THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
IN THE COURT OF COMMON PLEAS
THE HONORABLE BENJAMIN H. CULBERTSON
CIRCUIT COURT JUDGE

Case No. 2018-CP-22-00199
Appellate Case No. 2019-000885

RECEIVED
NOV 22 2019
SC Court of Appeals

The Gulfstream Café, Inc., Appellant,

v.

Palmetto Industrial Development, LLC, Respondent.

RECORD ON APPEAL

Robert P. Wood (SC Bar No. 6206)
Joshua R. Hinson (SC Bar No. 102270)
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
IN THE COURT OF COMMON PLEAS
THE HONORABLE BENJAMIN H. CULBERTSON
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Case No. 2018-CP-22-00199
Appellate Case No. 2019-000885

The Gulfstream Café, Inc., Appellant,

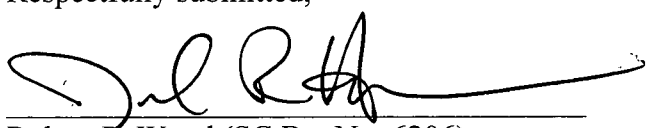
v.

Palmetto Industrial Development, LLC, Respondent.

CERTIFICATE OF COUNSEL

I hereby certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,



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November 22, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
IN THE COURT OF COMMON PLEAS
THE HONORABLE BENJAMIN H. CULBERTSON
CIRCUIT COURT JUDGE

Case No. 2018-CP-22-00199
Appellate Case No. 2019-000885

The Gulfstream Café, Inc., Appellant,

v.

Palmetto Industrial Development, LLC, Respondent.

PROOF OF SERVICE

I hereby certify I have served the Record on Appeal on November 22, 2019, by depositing a copy in the U.S. Mail, postage prepaid, addressed to the following party of record:

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Myrtle Beach, SC 29578

Grayson Lambert, Esq.
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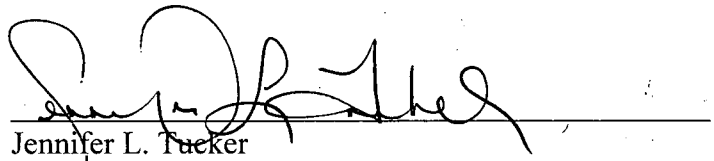

Jennifer L. Tucker
Paralegal
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INDEX RECORD ON APPEAL

1. Form 4 Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendant's Motion for Summary Judgment filed on April 29, 2019 6

2. Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment filed on May 6, 2019 9

3. Form 4 Order Denying Defendant's Motion to Dismiss filed on July 19, 2018 11

4. Order Denying Defendant's Motion to Dismiss filed on July 27, 2018 14

5. Notice of Appeal filed on May 24, 2019 18

6. Summons filed on February 23, 2018 26

7. Complaint with Exhibits filed on February 23, 2018 27

8. Acceptance of Service filed on March 1, 2018 85

9. Defendant's Motion to Dismiss the Complaint Pursuant to Rules 12(b)(6) and 12(b)(8) filed on March 29, 2018 86

10. The Gulfstream Café, Inc.'s Response in Opposition to Plaintiff's Motion to Dismiss Complaint with Exhibits filed on April 30, 2018 88

11. Defendant's Answer filed on August 7, 2018 109

12. Plaintiff's Notice of Motion and Motion for Summary Judgment with Exhibits filed on February 19, 2019 112

13. Defendant's Motion to Amend Answer filed on March 6, 2019 254

14. Defendant's Motion for Summary Judgment filed on March 19, 2019 262

15. Plaintiff's Response in Opposition to Defendant's Motion to Amend Answer filed on April 8, 2019 263

16. Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment with Exhibits filed on April 18, 2019 265

17. Plaintiff's Objections to Defendant's Proposed Order Granting Defendant's Motion for Summary Judgment filed on May 2, 2019 280

18. Defendant's Memorandum of Law in Support of its Motion to Dismiss the Complaint with Exhibits filed on March 29, 2018 283

19. Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion for Summary Judgment filed March 19, 2019 328

20. Hearing Transcript dated April 26, 2019.....338

21. Defendant's Proposed Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment 364

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Georgetown
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP2200199

The Gulfstream Cafe Inc
PLAINTIFF(S)

Palmetto Industrial Development Llc
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

Motion For Summary Judgment By Attorney Redman is Denied.
Motion To Alter and/or Amend Answer By Attorney Golding is Withdrawn.
Motion For Summary Judgment By Attorney Golding is Granted.

Attorney Henrietta U. Golding is to prepare a formal order.

ORDER INFORMATION

This order ☑ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/26/2019.

Adam D Nugent for The Gulfstream Cafe Inc
Simon H Bloom for The Gulfstream Cafe Inc
Andrea Joy Pearson for The Gulfstream Cafe Inc

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

ELECTRONICALLY FILED - 2019 Apr 29 10:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Court Reporter:

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

ELECTRONICALLY FILED - 2019 Apr 29 10:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2019 Apr 29 10:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Georgetown Common Pleas

Case Caption: The Gulfstream Cafe Inc VS Palmetto Industrial Development Llc

Case Number: 2018CP2200199

Type: Order/Electronic Form 4

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2019-04-26 16:00:13 page 3 of 3

STATE OF SOUTH CAROLINA	) **THE COURT OF COMMON PLEAS**
	)
COUNTY OF GEORGETOWN	) **CASE NO.: 2018-CP-22-00199**

The Gulfstream Café, Inc.,

Plaintiff,

v.

Palmetto Industrial Development, LLC,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The issue before the Court involves the interpretation of a warranty provision in easements granted to The Gulfstream Café, Inc. ("Gulfstream") to a parking lot at the Marlin Quay Marina. Gulfstream contends the warranty provision obligates Palmetto Industrial Development, LLC ("Palmetto") to warrant and defend the Easement against claims, including those made by Palmetto. Palmetto disputes Gulfstream's interpretation of the warranty provision. Both Gulfstream and Palmetto moved for summary judgment on this issue.

Having reviewed the pleadings, motions, memoranda of law, and exhibits and further, having considered the Parties' oral arguments, the Court **GRANTS** Palmetto's motion for summary judgment and **DENIES** Gulfstream's motion for summary judgment. Specifically, the Court finds that the South Carolina Supreme Court's opinion in *Black v. Patel*, 357 S.C. 466, 594 S.E.2d 162 (2004), governs this case. Under the *Black* decision, Palmetto is not required to warrant and defend the easement from the claims made in the prior litigation between Gulfstream and Palmetto.

Therefore, the Court **GRANTS** Palmetto's motion for summary judgment and **DENIES** Gulfstream's motion for summary judgment.

IT IS SO ORDERED.

[Electronic signature of the Honorable Benjamin H. Culbertson to follow.]

ELECTRONICALLY FILED - 2019 May 06 2:57 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2019 May 06 2:57 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Georgetown Common Pleas

Case Caption: The Gulfstream Cafe Inc VS Palmetto Industrial Development Llc

Case Number: 2018CP2200199

Type: Order/Summary Judgment

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2019-05-06 13:54:36 page 2 of 2

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2018CP2200199

The Gulfstream Cafe Inc		Palmetto Industrial Development Llc	
PLAINTIFF(S)		DEFENDANT(S)	
Submitted by: Clerk of Court		Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

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

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

ORDER INFORMATION

Motion To Dismiss Pursuant To 12 (b) In Lieu of Answer By Attorney Golding is denied on 12(b)(6) and 12(b)(8) grounds.

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

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

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	2129 Judge Code	7/19/2018 Date

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 2/17)

ELECTRONICALLY FILED - 2018 Jul 20 1:48 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

For Clerk of Court Office Use Only

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

George W. Redman III PO Box 357 Myrtle Beach, SC 29578
Simon H Bloom 977 Ponce De Leon Ave Ne Atlanta, GA 30306
Adam D Nugent 977 Ponce De Leon Ave Ne Atlanta, GA 30306
Andrea Joy Pearson 977 Ponce De Leon Ave Ne Atlanta, GA 30306

Henrietta U. Golding Mcnair Law Firm PO Box 336 Myrtle Beach, SC 29578

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter: Dixie C. Eubank

Alma Y. White - Clerk of Court

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

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

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

This Motion is denied on 12(b)(6) grounds because Plaintiff's Complaint states a claim. This Motion is denied on 12(b)(8) grounds because the Defense failed to attach or incorporate the Complaint of the 2016-CP-22-00961 action or a transcript of the trial proceedings for the Court to compare to the Complaint in this cause of action. Attorney Bloom to prepare a proposed Order for the Court's review within 7 days of today's date, July 19, 2018.

ELECTRONICALLY FILED - 2018 Jul 20 1:48 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Georgetown Common Pleas

Case Caption: The Gulfstream Cafe Inc VS Palmetto Industrial Development Llc

Case Number: 2018CP2200199

Type: Order/Form 4

So Ordered

s/ Steven H. John, Resident Circuit Judge, #129

Electronically signed on 2018-07-20 13:21:38 page 3 of 3

ELECTRONICALLY FILED - 2018 Jul 20 1:48 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2018 Jul 27 12:01 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF GEORGETOWN	)	
	)	CIVIL ACTION NO. 2018-CP-22-00199
The Gulfstream Café, Inc.,	)	
	)	
Plaintiff,	)	
	)	**ORDER DENYING DEFENDANTS' MOTION TO DISMISS**
vs.	)	
	)	
Palmetto Industrial Development, LLC,	)	
	)	
Defendant.	)	

This matter is before the Court on Defendant Palmetto Industrial Development, LLC's Motion to Dismiss the Complaint, which is made pursuant to South Carolina Rules of Civil Procedure 12(b)(6) and 12(b)(8). Having considered the pleadings, the submissions of the parties, and arguments of counsel, the Court hereby enters the following order.

A. Motion to Dismiss Pursuant to Rule 12(b)(6).

Defendant has moved to dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6). Rule 12(b)(6) allows dismissal of a plaintiff's complaint only where that complaint fails to state facts sufficient to constitute a cause of action. See Gentry v. Yonce, 337 S.C. 1, 2, 533 S.E.2d 137, 139 (1999). In resolving such a motion, the Court must base its ruling solely on the allegations set forth in the complaint and must take those allegations as true, with every doubt resolved in favor of the plaintiff. Id.; Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999) (citing Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995)). Dismissal is not appropriate if the complaint states any valid claim for relief, even if that claim for relief is not the claim that is so stated in the complaint. See Baird, 333 S.C. at 527, 511 S.E.2d at 73. If the facts as alleged in the complaint give the plaintiff

the ability to recover on any theory, then a Rule 12(b)(6) motion must be denied. Id.; Stiles, 318 S.C. at 300, 457 S.E.2d at 607.

Upon review of the summons and complaint, the Court determines that they clearly state a proper cause of action. Accordingly, Defendant's Motion to Dismiss pursuant to Rule 12(b)(6) is **DENIED**.

B. Motion to Dismiss Pursuant to Rule 12(b)(8).

Defendant has also moved to dismiss Plaintiff's Complaint pursuant to Rule 12(b)(8). Rule 12(b)(8) allows dismissal where another action is pending between the same parties for the same claim. Crick Cove Ventures, LLC v. Gilland, 390 S.C. 312, 322, 701 S.E.2d 39, 44 (Ct. App. 2010). The Court must determine that the claims are precisely or substantially the same in both proceedings before it can grant a motion under this rule. Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 106, 674 S.E.2d 524, 532 (Ct. App. 2009). In order for the Court to evaluate a motion under Rule 12(b)(8), the moving party must present the Court with information sufficient to determine whether the present action involves the same parties and same claims for relief that were raised or could have been raised in another action. Specifically, the moving party must include the complaints filed in both actions, as the well as the record and transcript of the trial in the prior proceeding.

After examining the materials submitted by Defendant in connection with its Motion to Dismiss pursuant to Rule 12(b)(8), the Court finds that Defendant has failed to provide the Court with the necessary and proper information to support Defendant's motion. While Defendant contends that case number 2016-CP-22-961 involves the same parties and claims as the present action, Defendant has failed to provide the Court with the complaints filed in either action or any other materials that would allow the Court to

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evaluate whether Rule 12(b)(8) applies. Accordingly, Defendant's Motion to Dismiss pursuant to Rule 12(b)(8) is **DENIED**.

SO ORDERED this ___ day of July, 2018.

Steven H. John
Resident Circuit Judge
Fifteenth Judicial Circuit

At Chambers, SC

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Georgetown Common Pleas

Case Caption: The Gulfstream Cafe Inc VS Palmetto Industrial Development Llc

Case Number: 2018CP2200199

Type: Order/Other

So Ordered

s/ Steven H. John, Resident Circuit Judge, #129

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
IN THE COURT OF COMMON PLEAS
THE HONORABLE BENJAMIN H. CULBERTSON
CIRCUIT COURT JUDGE

CASE NO. 2018-CP-22-00199

The Gulfstream Café, Inc., Appellant,

v.

Palmetto Industrial Development, LLC,
Respondent.

NOTICE OF APPEAL

The Gulfstream Café, Inc., appeals the orders of the Honorable Benjamin J. Culbertson issued on April 29, 2019 and May 6, 2019. Appellant received written notice of entry of these orders on April 29, 2019 and May 6, 2019, respectively.

May 24, 2019

(signature on next page)

ELECTRONICALLY FILED - 2019 May 24 4:24 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

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Counsel for Appellant The Gulfstream Café, Inc.

Other Counsel of Record:

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hgolding@burr.com

Counsel for Respondent Palmetto Industrial Development, LLC

ELECTRONICALLY FILED - 2019 May 24 4:24 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
IN THE COURT OF COMMON PLEAS
THE HONORABLE BENJAMIN H. CULBERTSON
CIRCUIT COURT JUDGE

CASE NO. 2018-CP-22-00199

The Gulfstream Café, Inc., Appellant,

v.

Palmetto Industrial Development, LLC,
Respondent.

PROOF OF SERVICE

I certify that I have served Palmetto Industrial Development, LLC with a copy of the Notice of by depositing a copy of it in the United States Mail, postage prepaid, on May 24, 2019, addressed to its attorney of record, Henrietta Golding, Esq, P.O. Box 336, Myrtle Beach, South Carolina 29578.

May 24, 2019

Sarah Prince

Paralegal to Robert P. Wood

ELECTRONICALLY FILED - 2019 May 24 4:24 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Georgetown
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP2200199

The Gulfstream Cafe Inc
PLAINTIFF(S)

Palmetto Industrial Development Llc
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY.**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

Motion For Summary Judgment By Attorney Redman is Denied.
Motion To Alter and/or Amend Answer By Attorney Golding is Withdrawn.
Motion For Summary Judgment By Attorney Golding is Granted.

Attorney Henrietta U. Golding is to prepare a formal order.

ORDER INFORMATION

This order ☑ ends ☐ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/26/2019.

Adam D Nugent for The Gulfstream Cafe Inc
Simon H Bloom for The Gulfstream Cafe Inc
Andrea Joy Pearson for The Gulfstream Cafe Inc

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

ELECTRONICALLY FILED - 2019 May 24 4:24 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2019 Apr 29 10:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Court Reporter:

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

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ELECTRONICALLY FILED - 2019 Apr 29 10:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Georgetown Common Pleas

Case Caption: The Gulfstream Cafe Inc VS Palmetto Industrial Development Llc

Case Number: 2018CP2200199

Type: Order/Electronic Form 4

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2019-04-26 16:00:13 page 3 of 3.

ELECTRONICALLY FILED - 2019 May 24 4:24 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2019 May 06 2:57 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA	**) THE COURT OF COMMON PLEAS**
	)
COUNTY OF GEORGETOWN	**) CASE NO.: 2018-CP-22-00199**

The Gulfstream Café, Inc.,

Plaintiff,

v.

Palmetto Industrial Development, LLC,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The issue before the Court involves the interpretation of a warranty provision in easements granted to The Gulfstream Café, Inc. ("Gulfstream") to a parking lot at the Marlin Quay Marina. Gulfstream contends the warranty provision obligates Palmetto Industrial Development, LLC ("Palmetto") to warrant and defend the Easement against claims, including those made by Palmetto. Palmetto disputes Gulfstream's interpretation of the warranty provision. Both Gulfstream and Palmetto moved for summary judgment on this issue.

Having reviewed the pleadings, motions, memoranda of law, and exhibits and further, having considered the Parties' oral arguments, the Court **GRANTS** Palmetto's motion for summary judgment and **DENIES** Gulfstream's motion for summary judgment. Specifically, the Court finds that the South Carolina Supreme Court's opinion in *Black v. Patel*, 357 S.C. 466, 594 S.E.2d 162 (2004), governs this case. Under the *Black* decision, Palmetto is not required to warrant and defend the easement from the claims made in the prior litigation between Gulfstream and Palmetto.

Therefore, the Court **GRANTS** Palmetto's motion for summary judgment and **DENIES** Gulfstream's motion for summary judgment.

IT IS SO ORDERED.

[Electronic signature of the Honorable Benjamin H. Culbertson to follow.]

ELECTRONICALLY FILED - 2019 May 24 4:24 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2019 May 06 2:57 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Georgetown Common Pleas

Case Caption: The Gulfstream Cafe Inc VS Palmetto Industrial Development Llc

Case Number: 2018CP2200199

Type: Order/Summary Judgment

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2019-05-06 13:54:36 page 2 of 2

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF GEORGETOWN	)	Civil Action No.: 2018-CP-22- _____
	)	
The Gulfstream Café, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**SUMMONS**
	)	
Palmetto Industrial Development, LLC,	)	
	)	
Defendant.	)	
	)	

TO: THE ABOVE-NAMED DEFENDANT

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscribers at their office at 1000 29th Avenue North, Myrtle Beach, South Carolina 29577, and to file your answer with the Clerk of Court for Horry County, all within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default for the relief demanded in the Complaint and a judgment will be rendered against you

BELLAMY, RUTENBERG, COPELAND, EPPS, GRAVELY & BOWERS, P.A.
Post Office Box 357
Myrtle Beach, SC 29578-0357
(843) 448-2400
Attorneys for Plaintiff

/s/ George W. Redman, III
S.C. Bar 72365

Myrtle Beach, South Carolina
February 23, 2018.

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF GEORGETOWN	)	Civil Action No.: 2018-CP-22- _____
	)	
The Gulfstream Café, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**COMPLAINT**
	)	
Palmetto Industrial Development, LLC,	)	
	)	
Defendant.	)	
	)	

Plaintiff The Gulfstream Café, Inc. (hereinafter "Gulfstream"), files this Complaint against Palmetto Industrial Development, LLC, and respectfully shows and alleges unto this Honorable Court as follows:

JURISDICTION

1. Gulfstream is a corporation existing, organized, and doing business in Georgetown County, within the State of South Carolina.
2. Palmetto Industrial Development, LLC ("Palmetto"), is a South Carolina entity which owns and operates property situated in Georgetown County, South Carolina.
3. This Action involves Palmetto's breach of an easement agreement, namely the express warranty provision contained therein, as well as the damages which continue to be inflicted upon Gulfstream.
4. Based on the foregoing, and as is more specifically set forth herein, this Honorable Court is the appropriate venue and has jurisdiction over the Parties and the Subject Matter of this Action.

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

FACTUAL ALLEGATIONS

I. Gulfstream Acquired An Easement Granting It Unfettered Access to the Parking Lot Adjacent to The Gulfstream Café Restaurant

5. Since 1986, Gulfstream has owned and operated a well-known fine dining establishment known as The Gulfstream Café, with a physical address of 1536 S. Waccamaw Drive, Murrells Inlet, South Carolina 29576.

6. The real property adjoining The Gulfstream Café is part of a development commonly referred to as The Marlin Quay Marina development, with improvements and amenities including condominiums, a marina, boat slips, as well as a parking lot.

7. The Marlin Quay Marina development did include a "Marina Club & Snack Bar" ("Snack Bar") which generally supported marina related activities, however, Palmetto demolished the Snack Bar in November of 2016.

8. Located between the former Snack Bar and The Gulfstream Café is a parking lot (the "Parking Lot"), with multiple driveways onto Waccamaw Drive, and is depicted as Lots 3, 4, and 5 of Tract 3 on that certain Plat entitled Survey of Marlin Quay Marina Horizontal Property Regime, Garden City Point, prepared by Surtech, Inc. dated May 21, 1985, revised November 27, 1985, and recorded in the office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 214. (attached hereto and incorporated herein verbatim as Exhibit A).

9. The Marlin Quay Marina development, including the Parking Lot, was initially owned and developed by The Marlin Quay Corporation, a South Carolina corporation.

10. On February 25, 1986, The Marlin Quay Marina Corporation expressly granted three (3) non-exclusive appurtenant easements to utilize the Parking Lot to Gulfstream, its Successors and Assigns, each of which was publicly recorded in Georgetown County

Deed Book 234 at Pages 790, 797, and 803. (attached hereto and incorporated herein verbatim as Exhibit B).

11. All of the Gulfstream easements expressly incorporate the plat recorded in Plat Book 6 at Page 214.

12. The easement recorded at Deed Book 234, page 797 excepts only two areas from Gulfstream's easement rights, shown as the area occupied by the Snack Bar and the area identified as the Sign Easement, both as shown on Plat Book 6 at Page 214.

13. In 1990, the Marlin Quay Marina Corporation again expressly granted and conveyed a perpetual non-exclusive easement for the use of the Parking Lot to Gulfstream, its successors and assigns, as set forth in that certain Agreement of Easement and Consent to and Joinder of Mortgagee to Granting of Easement (the "1990 Easement")[1] publicly filed with Georgetown County in Deed Book 382, Pages 217 to 226 (attached hereto and incorporated herein verbatim as Exhibit C).

14. The 1990 Easement expressly provides that The Gulfstream Café perpetually and currently enjoys the following rights:

> ...non-exclusive perpetual easement from Marlin Quay Marina Corporation to The Gulfstream Café, Inc. for the purpose of ingress and egress and vehicular parking on, over and across that certain real property of Marlin Quay Marina Corporation, which is more fully described herein below, by owners, agents, employees, servants, visitors, guests and invitees of The Gulfstream Café, Inc.
>
> . . . .
>
> Marlin Quay Marina Corporation, ... (the "Grantor"), has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto The Gulfstream Café, Inc., its successors and assigns (the "Grantee") a non-exclusive perpetual easement appurtenant to the premises of the Grantee hereinafter described for the full and free right of ingress and egress on, over and across the following described property of the Grantor, together with the rights of vehicular parking on and vehicular and pedestrian access to, all in accordance with all

[1] The easements are referred to collectively herein as the "Gulfstream Easement."

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

governmental rules, regulations, ordinances or laws, the premises of the Grantor hereinafter described, and also for the purpose of maintenance, repair, alteration and/or improvements to the Grantee's hereinafter described property. It is anticipated by the parties that while they will each have joint and non-exclusive use **at all times** of the area covered by this easement that the Grantor will utilize the premises primarily during the daytime regular business hours of Grantor and the Grantee will utilize the premises primarily in the evening regular business hours of Grantee. (*emphasis added*).

15. The Gulfstream Easement includes a warranty provision as follows:

The said Marlin Quay Marina Corporation does hereby bind itself and its Successors and Assigns, to warrant and forever defend, all and singular, the said easement unto the said Gulfstream Cafe, Inc. its Successors and Assigns, against itself and its Successors and Assigns and all others whomever lawfully claiming, or to claim the same or any part thereof.

16. The 1990 Easement reiterates Gulfstream's perpetual easement rights, described as follows:

A non-exclusive right of ingress, egress and vehicular parking over, across and on all those certain pieces, parcels or tracts of land situate, lying and being in the Garden City area of the County of Georgetown, State aforesaid, and being more particularly shown as Lots 3, 4, and 5 of Tract 3 on that certain Plat entitled Survey of Marlin Quay Marina Horizontal Property Regime, Garden City Point, prepared by Surtech, Inc. dated May 21, 1985, revised November 27, 1985, and recorded in the office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 214, said plat being expressly incorporated herein by reference.

A copy of the Plat referenced above, with markups depicting the approximate location of The Gulfstream Café and the Parking Lot, is attached hereto and incorporated herein verbatim as Exhibit D, (hereinafter the "Parking Lot Plat").

17. In 2014, Palmetto purchased the Marlin Quay Marina subject to Gulfstream's perpetual easement rights to utilize the Parking Lot, inclusive of all areas specifically depicted in the Parking Lot Plat, and subject to the warranty provision requiring Palmetto to defend Gulfstream against any claims on Gulfstream's easement rights.

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

II. Palmetto and Others Intentionally and Repeatedly Interfered with Gulfstream's Easement Rights in Breach of the Gulfstream Easement's Warranty Provision

18. On or around the first week of November 2016, Palmetto and Palmetto's owner, Mark Lawhon ("Lawhon"), began a construction project that obstructed access to the Parking Lot with signage, fences and barricades.

19. Palmetto and/or Lawhon placed large construction materials on the Parking Lot.

20. Unbeknownst to Gulfstream, Palmetto and Lawhon applied for and obtained a building permit from Georgetown County with the intent to construct improvements on the property that would permanently interfere with Gulfstream's rights to use the Parking Lot. Palmetto and Lawhon did not notify Gulfstream that the construction activities would block the Parking Lot.

21. Palmetto and Lawhon did not provide Gulfstream with any written construction plans prior to the initiation of Palmetto's construction activities.

22. Palmetto and Lawhon did not inform anyone from Gulfstream that Palmetto planned to build a building directly on top of the Parking Lot, resulting in permanent interference with Gulfstream's Easement.

23. Palmetto's and Lawhon's blocking of the Parking Lot prevented the owners, employees, guests, invitees, and vendors of Gulfstream from accessing the Parking Lot just prior to the Thanksgiving holiday.

24. In addition to blocking the Parking Lot through its construction activities, Palmetto, along with Lawhon and others, interfered with Gulfstream's Easement by:

    a. After having installed a construction fence blocking the Parking Lot, Lawhon placed his vehicle in the Parking Lot so as to further obstruct food service vendors' access to Gulfstream's delivery dock;

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

b. Erecting a tent over a portion of the Parking Lot on more than one occasion, blocking approximately fifteen (15) parking spots each time;

c. Closing off nearly half of the Parking Lot to vehicular traffic for the purpose of securing space for vendors, equipment and crowds associated with special events;

d. Lawhon and Chris Lawhon aggressively confronted two Gulfstream employees, Ms. Linda Barnaba and Mr. Jef Kirk, in the Parking Lot by throwing a hammer and screaming profanity at them;

e. Calling the Georgetown County Sheriff's Department on Gulfstream's employees and vendors (including painters and window washers) accusing them of trespassing on the Parking Lot and threatening legal action;

f. Blocking Parking Lot spaces with cones on multiple occasions;

g. Writing a letter to Gulfstream purporting to prohibit Gulfstream's use of portions of the area within the Gulfstream Easement;

h. Continuing to covertly seek governmental approvals of its plan to block off and build upon the Parking Lot;

i. Developing additional and differing plans for construction that would alter and overburden the Gulfstream Easement;

j. Seeking governmental approval of plans which place additional burdens upon the Gulfstream Easement; and,

k. Seeking governmental approval plans which amount to an unconstitutional governmental taking or inverse condemnation of Gulfstream's easement rights by Georgetown County for a private purpose, or for a public purpose without the payment of just compensation.

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25. On or around the beginning of March of 2017, Palmetto and Lawhon again took action to develop and begin construction activities which would block, alter, overburden, and interfere with the Gulfstream Easement.

26. On or about September 15, 2017, without notice, knowledge, or the consent of Gulfstream, Palmetto and Lawhon applied for and obtained a second building permit from Georgetown County in order to construct a new building directly over and on top of the Gulfstream Easement.

27. As a result of Palmetto's and Lawhon's numerous and repeated attempts to implement construction activities without notice, knowledge, or the consent of Gulfstream, Gulfstream has been forced to incur costs and expenses to defend its rights, as well as permanent and severe damage to the good will of The Gulfstream Café, Inc.

28. Gulfstream filed a related action seeking a temporary injunction, among other relief, pertaining to the interference caused by Palmetto's proposed building and related conduct. The Court entered a temporary injunction which restrained and enjoined Palmetto and Lawhon from interfering with Plaintiff's perpetual easement rights to use the Parking Lot.

29. In the related action, the Court found the Defendants in criminal contempt for willful violation of the Injunction due to the conduct of holding a fishing tournament in May, 2017 in the Parking Lot and for calling law enforcement to evict Gulfstream's window washers on two separate occasions. The Court imposed sanctions for evicting the window washers, sentencing Lawhon to 30 days in jail or payment of a $3,000.00 fine.

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

FOR A FIRST CAUSE OF ACTION
(*Declaratory Judgment-Duty to Defend against Palmetto*)

30. Each and every allegation as set forth in this Complaint, specifically including but not limited to each and every factual assertion set forth above, is realleged and incorporated into this cause of action as if it were repeated verbatim herein.

31. The Gulfstream Easement contains promises that run with the land, particularly the duties of Palmetto to "warrant and forever defend . . . the said premises unto the said The Gulfstream Café, Inc., its Successors and Assigns, against itself and its Successors and Assigns . . . to claim the same or any part thereof."

32. Palmetto and others, through numerous actions including encroaching on the Gulfstream Easement, have claimed an exclusive right to parts of the Gulfstream Easement directly in contravention of the express language of the Gulfstream Easement.

33. By letter, a copy of which is attached as Exhibit E, Gulfstream tendered the defense of its easement rights to Palmetto.

34. The demand letter reminded Palmetto of its express and unambiguous duty under the Gulfstream Easement to defend Gulfstream in this or any similar matter concerning Gulfstream's rights under the Gulfstream Easement.

35. Palmetto responded by letter and refused to defend Gulfstream, contending "Gulfstream has no legal basis for any indemnification claim." (attached hereto and incorporated herein verbatim as Exhibit F).

36. Palmetto has repudiated its duty to warrant and defend Gulfstream's rights under the Gulfstream Easement.

37. Gulfstream has been damaged by and will continue to be damaged by Palmetto's failure to warrant and forever defend Gulfstream's rights under the Gulfstream Easement,

including but not limited to causing the continuing accrual of attorneys' and other fees and costs of asserting its rights under the Gulfstream Easement.

38. Gulfstream is entitled to a declaratory judgment recognizing Gulfstream's express rights under the Gulfstream Easement, and other ancillary relief, including but not limited to the award of attorneys' fees and costs for the prosecution of this action as well as those attorneys' fees and costs incurred in other actions and venues to defend its rights as necessitated by and due to Palmetto's breaches thereof, in an amount to be proven at trial.

FOR A SECOND CAUSE OF ACTION
(Breach of Warranty against Palmetto)

39. Each and every allegation as set forth in this Complaint, specifically including but not limited to each and every factual assertion set forth above, is realleged and incorporated into this cause of action as if it were repeated verbatim herein.

40. Palmetto, under the Gulfstream Easement, has an express, unambiguous duty to warrant the premises from any incursion into Gulfstream's easement rights, including from Palmetto's own actions.

41. Gulfstream demanded that Palmetto defend the Gulfstream Easement in accordance with its unambiguous terms.

42. Palmetto responded by letter and refused to comply with its obligation to defend the Gulfstream Easement. (*See* Exhibit F).

43. Palmetto has breached its duty to so warrant the premises covered by the Gulfstream Easement, including but not limited to the intentional and reckless entry upon and complete obstruction of Gulfstream's property rights by Palmetto and others.

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44. Palmetto and others continue to unreasonably interfere with Gulfstream's use and enjoyment of its rights in the Parking Lot.

45. Palmetto's breach has caused Gulfstream damages in an amount to be determined at trial.

46. Gulfstream is entitled to judgment against Palmetto for breach of warranty for all actual, special, and consequential damages available at law.

WHEREFORE, Gulfstream, having complained of Palmetto, hereby prays for the following relief:

a. An Order of this Honorable Court granting the relief under the Causes of Action set forth above as to Gulfstream's actual, incidental and consequential damages, all costs and fees, including but not limited attorneys' fees, expenses, and prejudgment interest;

b. An Order from this Honorable Court declaring Gulfstream's express rights under the Gulfstream Easement, and other ancillary relief, including but not limited to the award of attorneys' fees and costs for the prosecution of this action as well as those attorneys' fees and costs incurred in other actions and venues to defend its rights as necessitated by and due to Palmetto's breaches thereof, in an amount to be proven at trial;

c. An Order from this Honorable Court acknowledging Palmetto's duty to defend and/or indemnify against Palmetto's own claims against the Gulfstream Easement, and for the award of actual, consequential and special damages, and for attorneys' fees and costs of defending Gulfstream's rights against Palmetto in this action; and

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

d. Any and all other relief which is deemed just and proper by this Honorable Court and the trier of fact.

Respectfully submitted,

BELLAMY, RUTENBERG, COPELAND, EPPS, GRAVELY & BOWERS, P.A.
Post Office Box 357
Myrtle Beach, SC 29578-0357
(843) 448-2400
Attorneys for Plaintiff

/s/ George W. Redman, III
George W. Redman, III
SC Bar No. 72365

Myrtle Beach, South Carolina

February 23, 2018

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Exhibit A

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

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I HEREBY CERTIFY THAT THE MEASUREMENTS AS SHOWN ABOVE ARE CORRECT AND TRUE AND ON VISIBLE ENCROACHMENTS ON THE PROPERTY SHOWN.

Stephen R. Wolfe
STEPHEN R. WOLFE R.L.S. NO. 9842

FILED
BETTY L. WILLIAMS
CCCP&G.S.

DEC 10 9 27 AM '85

GEORGETOWN COUNTY, S.C.

BOOK 6 PAGE 214

Geraldine M. Wheeler
Deputy CCCP

VICINITY MAP
SCALE 1" = 2 MI.

MURRELLS INLET CREEK

DOCK "A"

DOCK "B"

DOCK "C"

DOCK "D"

TRACT 4

WATER

GEORGETOWN CO. WATER & SEWER DISTRICT

BASIN TERRACE

BASIN DRIVE 40' R/W

TRACT 1

TRACT 1 = 4045 S.F.
TRACT 2 (LEASED AREA) = 1769 S.F.
TRACT 3 (LOT 3, 4, & A PORTION OF 5) = 25739 S.F.

DOCK "A"

DOCK SURFACE	2192 S.F. ±
WATER SURFACE	5455 S.F. ±
TOTAL AREA	7647 S.F. ±

DOCK SURFACE (DOCK B)	3140 S.F. ±
DOCK SURFACE (DOCK C)	6319 S.F. ±
HIGH GROUND	1165 S.F. ±
WATER SURFACE	96128 S.F. ±
TRACT 4 TOTAL AREA	106752 S.F. ± (2.451 AC. ±)

LOT 5

LOT 4

LOT 3

LOT 2

TRACT 2

TRACT 3

TRACTOR OFFICE TRAILER

COASTAL COUNCIL LINE AS FLAGGED BY MR. KEN HANCE OF S.C. COASTAL COUNCIL, MYRTLE BEACH, S.C. ON FEB. 23, 1990.

PROPOSED "POINT OF COMMENCEMENT"

SOUTH WACCAMAW DRIVE

REFERENCE MAPS:
1) "COMPILED PLAT OF 4.05 ACRES OF A PORTION OF THE WATERWAY SECTION, SOUTH POINT LOTS FOR JOHNNY STEVENS" BY CHILES LAND SURVEYING CO DATED MARCH 19, 1982.
2) DEED BK. 212, PG. 1449 (PLAT)

NOTES:
1) DATE OF FIELD SURVEY: FEB. 19, 1985
2) TAX MAP NO. 4-1-120-03
3) THIS LOT IS LOCATED IN FLOOD ZONE A-16 AS SHOWN ON PANEL NO 450093 0110 C DATED MARCH 1, 1984 - NATIONAL FLOOD INSURANCE PROGRAM FLOOD INSURANCE RATE MAP.
4) ALL BEARINGS ARE BASED ON THE SOUTH CAROLINA PLANE COORDINATE SYSTEM (NORTH ZONE). ALL DISTANCES SHOWN ARE HORIZONTAL DISTANCES NOT RAID DISTANCES.

S.C. COASTAL COUNCIL LINE

LINE	BEARING	DISTANCE
1	N 21-48-03 E	13.98
2	N 04-33-03 E	57.75
3	N 28-47-12 E	21.99
4	N 19-11-03 E	16.39
5	N 08-21-48 W	13.42
6	N 00-35-14 W	21.69
7	N 04-42-48 W	17.69
8	N 17-31-16 W	17.59
9	N 19-03-04 W	24.07
10	N 19-34-54 W	23.98
11	N 11-09-17 W	24.12
12	N 11-47-05 W	21.10
13	N 06-40-17 W	10.13
14	N 36-19-00 W	5.51
15	N 11-07-06 E	7.43
16	N 24-08-03 E	7.13
17	N 04-01-41 E	4.04
18	S 75-33-08 E	5.05
19	N 11-25-39 E	8.19
20	N 23-09-13 W	7.65

LEGEND
I.P.O. IRON PIPE OLD
I.P.N. IRON PIPE NEW
A STABILIZING PILINGS
(32) MARINA SLIP NUMBER

SURVEY OF
MARLIN QUAY MARINA
HORIZONTAL PROPERTY REGIME
GARDEN CITY POINT
GEORGETOWN CO. SOUTH CAROLINA
SCALE 1"=40 FEET MAY 31, 1990
40 20 0 40 80
SURVEYED AND MAPPED BY
SUR-TECH, INCORPORATED
MURRELLS INLET, GEORGETOWN COUNTY
SOUTH CAROLINA 29576
843-651-9003

01/17/89 MINOR SHEETS C,D,E,F
DATE REVISION

Exhibit B

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ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200200

FILED
BETTY L. WILLIAMS
C.C.P.&G.S.
APR 2 2 57 PM '86
GEORGETOWN COUNTY, S.C.
BOOK ____ PAGE ____

STATE OF SOUTH CAROLINA)
) AGREEMENT FOR EASEMENT
COUNTY OF GEORGETOWN)

KNOW ALL MEN BY THESE PRESENTS, that Marlin Quay Marina Corporation, a corporation duly organized pursuant to the laws of the State of South Carolina, for and in consideration of the sum of FIVE ($5.00) DOLLARS and the covenants and conditions expressed herein, paid by The Gulfstream Cafe', Inc., the legal sufficiency and receipt of which is hereby acknowledged, has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto The Gulfstream Cafe', Inc., its Successors and Assigns a non-exclusive easement appurtenant to the premises of the Grantee hereinafter described for the full and free right of ingress and egress over and across the following described property of the Grantor, together with the rights of vehicular and pedestrian access and also for the purpose of maintenance, repair, alteration and/or improvements to the Grantee's hereinafter described property. It is anticipated by the parties that while they will each have joint and non-exclusive use of the area covered by this easement that the Grantor will primarily utilize the premises during the daytime and the Grantee will primarily use these premises in the evening. The property of the Grantor subject to this non-exclusive easement is more fully described as follows:

> ALL those certain piece, parcel or lot of land situate, lying and being in the Garden City area of the County of Georgetown, State aforesaid, and being more particularly shown as Lot 5 of Tract 3 on that certain plat entitled "Survey Of Marlin Quay Marina Horizontal Property Regime, Garden City Point", prepared by Sur-Tech, Inc., dated May 21, 1985, revised November 27, 1985, and recorded in the office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 214, said plat being expressly incorporated herein by reference.
>
> The grantor having acquired the aforedescribed property by virtue of that certain deed from Marlin Quay Company, a S.C. General Partnership dated July 1, 1983, and recorded on September 1, 1983, in the Office of the Clerk of Court for Georgetown County in Deed Book 211 at Page 1141.

The property of the Grantee to which this easement is appurtenant is more fully described as follows:

(See attached Exhibit B)

IT IS EXPRESSLY UNDERSTOOD AND AGREED by Marlin Quay Marina Corporation and the The Gulfstream Cafe', Inc., that as part of the consideration for this conveyance, both parties shall be equally responsible for the maintenance and upkeep of the aforementioned easement area and shall equally share the costs associated with its proper maintenance and upkeep to insure that it is satisfactory for the uses and purposes intended herein.

IT IS FURTHER UNDERSTOOD AND ACKNOWLEDGED by the parties hereto that attached hereto as Exhibit "A" and incorporated herein is a Consent And Joinder of Mortgagee To Granting Of Easement from First Union National Bank which has a mortgage recorded in the Office of the Clerk of Court for Georgetown County in Mortgage Book 225 at Page 209 covering certain real property of the Grantor herein, a portion of which will be utilized for the easement.

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned unto the said The Gulfstream Cafe', Inc., its Successors and Assigns forever.

AND the said Marlin Quay Marina Corporation does hereby bind itself and its Successors and Assigns, to warrant and forever defend, all and singular, the said premises unto the said The Gulfstream Cafe', Inc., its Successors and Assigns, against itself and its Successors and Assigns and all others whomsoever lawfully claiming, or to claim the same or any part thereof.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this 25th day of February, in the year of our Lord One Thousand Nine Hundred and Eighty-six and in the Two Hundred and Tenth Year of the Sovereignty and Independence of the United States of America.

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

IN THE PRESENCE OF:

MARLIN QUAY MARINA CORPORATION

By _____
Grover C. Cauthen, Pres.

Attest _____
Jack L. Moore, Asst. Sec.

THE GULFSTREAM CAFE', INC.

By _____
Edward C. Cribb, Jr., Pres.

Attest _____
Grover C. Cauthen, Sec.

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

PERSONALLY appeared before me Alec Elmore and made oath that (s)he saw the within named MARLIN QUAY MARINA CORPORATION, a S.C. Corporation, by its duly authorized President, Grover C. Cauthen and its duly authorized Assistant Secretary, Jack L. Moore, sign, seal and attest, and as their official act and deed, deliver the within written instrument and that (s)he with Hal M. Strange witnessed the execution thereof.

_____

SWORN to before me this 25th day of February, 1986

_____ (SEAL)
Notary Public for South Carolina
My Commission expires: 10/10/87

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

PERSONALLY appeared before me Alec Elmore and made oath that (s)he saw the within named THE GULFSTREAM CAFE', INC., a S.C. Corporation, by its duly authorized President, Edward C. Cribb, Jr., and its duly authorized Secretary, Grover C. Cauthen, sign, seal and attest, and as their official act and deed, deliver the within written instrument and that (s)he with Hal M. Strange witnessed the execution thereof.

_____

SWORN to before me this 25th day of February, 1986

_____ (SEAL)
Notary Public for South Carolina
My Commission expires: 10/10/87

EXHIBIT "A"

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

CONSENT AND JOINDER OF MORTGAGEE
TO
GRANTING OF EASEMENT

WHEREAS, Marlin Quay Marina Corporation did on the 4th day of December, 1985, execute and deliver a note in the amount of Six Hundred Thousand and No/100 ($600,000.00) Dollars to First Union National Bank and secured the same by a mortgage and security agreement, said mortgage being recorded in the Office of the Clerk of Court for Georgetown County in Mortgage Book 225 at Page 209; and

WHEREAS, the said Marlin Quay Marina Corporation has executed on February 25, 1986, an Easement in favor of The Gulfstream Cafe', Inc., said Easement being located on a portion of the property described in the aforesaid mortgage, said Easement being more fully described as follows:

> A non-exclusive right of ingress and egress over and across all that certain piece, parcel or tract of land situate, lying and being in the Garden City area of the County of Georgetown, State aforesaid, and being more particularly shown as Lot 5 of Tract 3 on that certain plat entitled "Survey Of Marlin Quay Marina Horizontal Property Regime, Garden City Point", prepared by Sur-Tech, Inc., dated May 21, 1985, revised November 27, 1985, and recorded in the office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 214, said plat being expressly incorporated herein by reference.

WHEREAS, said Easement with this Consent and Joinder attached thereto will be recorded simultaneously in the Office of the Clerk of Court for Georgetown County, South Carolina.

NOW, THEREFORE, for and in consideration of the sum of One ($1.00) Dollar, the receipt and sufficiency of which is hereby acknowledged, First Union National Bank does hereby consent and join in the aforesaid Easement from Marlin Quay Marina Corporation to The Gulfstream Cafe', Inc., and all of the covenants, conditions and provisions contained therein for the sole purpose of consenting to the creation by Marlin Quay Marina Corporation of an easement upon a portion of the property upon which First Union National Bank has a lien and subordinates its aforesaid Mortgage to the easement; provided that First Union National Bank makes no representations or warranties as to the validity of the documents creating the easement; said mortgage however, in all other respects to remain in full force and virtue.

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

IN WITNESS WHEREOF the parties have caused this instrument to be executed this 19th day of February, A.D., 1986.

IN THE PRESENCE OF:

Amanda Burton

Amanda Burton

James A. McCartney

James A. McCartney

FIRST UNION NATIONAL BANK

By Catherine R. Williamson

Catherine R. Williamson, Vice President

Attest Dennis Harvey

Dennis Harvey, Assistant Secretary

STATE OF NORTH CAROLINA)
)
COUNTY OF WAKE)

PERSONALLY appeared before me Amanda Burton who, on oath, says that (s)he saw the within named FIRST UNION NATIONAL BANK by Catherine R. Williamson and Dennis Harvey its duly authorized officer(s) sign, seal and as its act and deed, deliver the within written instrument and that (s)he with James A. McCartney witnessed the execution thereof.

James A. McCartney

SWORN to before me this 19th day of February, 1986

L. Lee Betts (SEAL)

Notary Public for North Carolina

My Commission expires: 8-19-89

NOTARY PUBLIC WAKE COUNTY N.C.

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

EXHIBIT "B"

All those certain pieces, parcels, areas or tracts of land identified as "Marsh Area, Tract A and Tract B" on that certain "Survey For Marlin Quay Company Garden City Point" dated August 27, 1985, revised January 24, 1986 surveyed and mapped by Sur-Tech, Incorporated and recorded in the Office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 438.

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200196

BOOK 234 PAGE 790 7.00 NCKS

FILED
BETTY L. WILLIAMS
CCCP&G.S.

APR 2 2 57 PM '86

GEORGETOWN COUNTY, S.C.

BOOK 234 PAGE 790

Deedie M. Wheeler
Deputy clerk

Marlin Quay Marina Corp.

to

Gulfstream Cafe Inc.

Agreement for easement across Lot 5 Tract 3 B.C. point Tracts A & B marsh area

Recorded this 4th day of April A.D. 19 86
In Book 2 Page 1443
Edna C. Turner, Deputy
Auditor, Georgetown Co., S. C.

COUNTY PARCEL # 41-129-2 thru 5

M80

ELECTRONICALLY FILED 2018 Feb 23 2:50 PM GEORGETOWN COMMON PLEAS CASE#2018CP2200199

FILED
BETTY L. WILLIAMS
CC&PR.C.S.
APR 2 2 57 PM '86
GEORGETOWN COUNTY, S.C.
BOOK ____ PAGE ____

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

AGREEMENT FOR EASEMENT

KNOW ALL MEN BY THESE PRESENTS, that Marlin Quay Marina Corporation, a corporation duly organized pursuant to the laws of the State of South Carolina, for and in consideration of the sum of FIVE ($5.00) DOLLARS and the covenants and conditions expressed herein, paid by The Gulfstream Cafe', Inc., the legal sufficiency and receipt of which is hereby acknowledged, has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto The Gulfstream Cafe', Inc., its Successors and Assigns a non-exclusive easement appurtenant to the premises of the Grantee hereinafter described for the full and free right of ingress and egress over and across the following described property of the Grantor, together with the rights of vehicular parking and vehicular and pedestrian access and also for the purpose of maintenance, repair, alteration and/or improvements to the Grantee's hereinafter described property. It is anticipated by the parties that while they will each have joint and non-exclusive use of the area covered by this easement that the Grantor will primarily utilize the premises during the daytime and the Grantee will primarily use these premises in the evening. The property of the Grantor subject to this non-exclusive easement is more fully described as follows:

> ALL those certain pieces, parcels or lots of land situate, lying and being in the Garden City area of the County of Georgetown, State aforesaid, and being more particularly shown as Lots 3 and 4 of Tract 3 on that certain plat entitled "Survey Of Marlin Quay Marina Horizontal Property Regime, Garden City Point", prepared by Sur-Tech, Inc., dated May 21, 1985, revised November 27, 1985, and recorded in the office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 214, said plat being expressly incorporated herein by reference.
>
> SAVING AND EXCEPTING THEREFROM that portion of Lot 3 of Tract 3 on said plat occupied by that portion of the building identified as "Marina Club & Snack Bar" which projects from Tract 2 into Tract 3 and also the area identified as Sign Easement on said plat.
>
> The grantor having acquired the aforedescribed property by virtue of that certain deed from Marlin Quay Company, a S.C. General Partnership dated July 1, 1983, and recorded on September 1, 1983, in the Office of the Clerk of Court for Georgetown County in Deed Book 211 at Page 1141.

The property of the Grantee to which this easement is appurtenant is more fully described as follows:

(See attached Exhibit A)

IT IS EXPRESSLY UNDERSTOOD AND AGREED by Marlin Quay Marina Corporation and the The Gulfstream Cafe', Inc., that as part of the consideration for this conveyance, both parties shall be equally responsible for the maintenance and upkeep of the aforementioned easement area and shall equally share the costs associated with its proper maintenance and upkeep to insure that it is satisfactory for the uses and purposes intended herein.

IT IS FURTHER UNDERSTOOD AND ACKNOWLEDGED by the parties that First Union National Bank has a mortgage recorded in the Office of the Clerk of Court for Georgetown County in Mortgage Book 225 at Page 209 covering certain real property of the Grantor herein, a portion of which will be utilized for the easement herein granted. First Union National Bank does not consent and join in the aforesaid easement from Marlin Quay Marina Corporation to The Gulfstream Cafe', Inc., upon that portion of the property upon which First Union National Bank has a lien and does not subordinate its aforesaid Mortgage to this easement. First Union National Bank makes no representations or warranties as to the validity of the documents creating the easement and all aspects of said Mortgage remain in full force and virtue. This easement shall be subordinate to the aforesaid Mortgage.

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned unto the said The Gulfstream Cafe', Inc., its Successors and Assigns forever.

AND the said Marlin Quay Marina Corporation does hereby bind itself and its Successors and Assigns, to warrant and forever defend, all and singular, the said premises unto the said The Gulfstream Cafe', Inc., its Successors and Assigns, against itself and its

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Successors and Assigns and all others whomsoever lawfully claiming, or to claim the same or any part thereof.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this 25th day of February, in the year of our Lord One Thousand Nine Hundred and Eighty-six and in the Two Hundred and Tenth Year of the Sovereignty and Independence of the United States of America.

IN THE PRESENCE OF:

Hal M Strange

Barbara P. Mahaffey

MARLIN QUAY MARINA CORPORATION

By _____
Grover C. Cauthen, Pres.

Attest _____
Jack L. Moore, Asst. Sec.

Hal M Strange

Barbara P. Mahaffey

THE GULFSTREAM CAFE', INC.

By _____
Edward C. Cribb, Jr., Pres.

Attest _____
Grover C. Cauthen, Sec.

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

PERSONALLY appeared before me Barbara P. Mahaffey and made oath that (s)he saw the within named MARLIN QUAY MARINA CORPORATION, a S.C. Corporation, by its duly authorized President, Grover C. Cauthen and its duly authorized Assistant Secretary, Jack L. Moore, sign, seal and attest, and as their official act and deed, deliver the within written instrument and that (s)he with Hal M. Strange witnessed the execution thereof.

Barbara P. Mahaffey

SWORN to before me this 25th day of February, 1986

Hal M Strange (SEAL)
Notary Public for South Carolina
My Commission expires: 10/10/87

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

PERSONALLY appeared before me Barbara P. Mahaffey and made oath that (s)he saw the within named THE GULFSTREAM CAFE', INC., a S.C. Corporation, by its duly authorized President, Edward C. Cribb, Jr., and its duly authorized Secretary, Grover C. Cauthen, sign, seal and attest, and as their official act and deed, deliver the within written instrument and that (s)he with Hal M. Strange witnessed the execution thereof.

Barbara P. Mahaffey

SWORN to before me this 25th day of February, 1986.

Hal M. Strange (SEAL)
Notary Public for South Carolina
My Commission expires: 10/10/87

FILED 2010 OCT 28 PM 3:36 GEORGETOWN COUNTY CLERK OF COURT CASE#2010CP2200199

EXHIBIT "A"

All those certain pieces, parcels, areas or tracts of land identified as "Marsh Area, Tract A and Tract B" on that certain "Survey For Marlin Quay Company Garden City Point" dated August 27, 1985, revised January 24, 1986 surveyed and mapped by Sur-Tech, Incorporated and recorded in the Office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 438.

ELECTRONICALLY FILED - 2018 Feb 23 2:30 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200180

BOOK 234 PAGE 802 6.00 2 Ncvs

FILED
BETTY L. WILLIAMS
CCCP&O.S.

APR 2 2 57 PM '86

GEORGETOWN COUNTY, S.C.

BOOK 234 PAGE 797

Donaldine M. Wheeler
Deputy CCCP

Marlin Quay Marina Corp.

+

Gulfstream Cafe' Inc.

easement agreement

Lots 3 + 4 Tract 3

Tracts A + B Marlin Quay

Recorded this 4th day of
April A.D. 19 86
in Book Z Page 1443
Auditor, Georgetown Co. S.C.

COUNTY PARCEL # 41-179-2 thru 5

1180

ELECTRONICALLY FILED, 2018 Feb 23 2:50 PM, GEORGETOWN COMMON PLEAS, CASE#2018CP2200199

FILED
BETTY L. WILLIAMS
OCCP.R.C.S.
APR 2 2 57 PM '86
GEORGETOWN COUNTY, S.C.
BOOK _____ PAGE _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

AGREEMENT FOR EASEMENT

KNOW ALL MEN BY THESE PRESENTS, that Marlin Quay Marina Corporation, a corporation duly organized pursuant to the laws of the State of South Carolina, for and in consideration of the sum of FIVE ($5.00) DOLLARS and the covenants and conditions expressed herein, paid by The Gulfstream Cafe', Inc., the legal sufficiency and receipt of which is hereby acknowledged, has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto The Gulfstream Cafe', Inc., its Successors and Assigns a non-exclusive easement appurtenant to the premises of the Grantee hereinafter described for the full and free right of ingress and egress over and across the following described property of the Grantor, together with the rights of vehicular parking and vehicular and pedestrian access and also for the purpose of maintenance, repair, alteration and/or improvements to the Grantee's hereinafter described property. It is anticipated by the parties that while they will each have joint and non-exclusive use of the area covered by this easement that the Grantor will primarily utilize the premises during the daytime and the Grantee will primarily use these premises in the evening. The property of the Grantor subject to this non-exclusive easement is more fully described as follows:

> ALL that certain piece, parcel or lot of land situate, lying and being in the Garden City area of the County of Georgetown, State aforesaid, and being more particularly shown as Lot 5 of Tract 3 on that certain plat entitled "Survey Of Marlin Quay Marina Horizontal Property Regime, Garden City Point", prepared by Sur-Tech, Inc., dated May 21, 1985, revised November 27, 1985, and recorded in the office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 214, said plat being expressly incorporated herein by reference.
>
> The grantor having acquired the aforedescribed property by virtue of that certain deed from Marlin Quay Company, a S.C. General Partnership dated July 1, 1983, and recorded on September 1, 1983, in the Office of the Clerk of Court for Georgetown County in Deed Book 211 at Page 1141.

The property of the Grantee to which this easement is appurtenant is more fully described as follows:

(See attached Exhibit A)

IT IS EXPRESSLY UNDERSTOOD AND AGREED by Marlin Quay Marina Corporation and the The Gulfstream Cafe', Inc., that as part of the consideration for this conveyance, both parties shall be equally responsible for the maintenance and upkeep of the aforementioned easement area and shall equally share the costs associated with its proper maintenance and upkeep to insure that it is satisfactory for the uses and purposes intended herein.

IT IS FURTHER UNDERSTOOD AND ACKNOWLEDGED by the parties that First Union National Bank has a mortgage recorded in the Office of the Clerk of Court for Georgetown County in Mortgage Book 225 at Page 209 covering certain real property of the Grantor herein, a portion of which will be utilized for the easement herein granted. First Union National Bank does not consent and join in the aforesaid easement from Marlin Quay Marina Corporation to The Gulfstream Cafe', Inc., upon that portion of the property upon which First Union National Bank has a lien and does not subordinate its aforesaid Mortgage to this easement. First Union National Bank makes no representations or warranties as to the validity of the documents creating the easement and all aspects of said Mortgage remain in full force and virtue. This easement shall be subordinate to the aforesaid Mortgage.

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned unto the said The Gulfstream Cafe', Inc., its Successors and Assigns forever.

AND the said Marlin Quay Marina Corporation does hereby bind itself and its Successors and Assigns, to warrant and forever defend, all and singular, the said premises unto the said The Gulfstream Cafe', Inc., its Successors and Assigns, against itself and its

Successors and Assigns and all others whomsoever lawfully claiming, or to claim the same or any part thereof.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this 25th day of February, in the year of our Lord One Thousand Nine Hundred and Eighty-six and in the Two Hundred and Tenth Year of the Sovereignty and Independence of the United States of America.

IN THE PRESENCE OF:

MARLIN QUAY MARINA CORPORATION

By _____
Grover C. Cauthen, Pres.

Attest _____
Jack L. Moore, Asst. Sec.

THE GULFSTREAM CAFE', INC.

By _____
Edward C. Cribb, Jr., Pres.

Attest _____
Grover C. Cauthen, Sec.

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

PERSONALLY appeared before me Alec Elmore and made oath that (s)he saw the within named MARLIN QUAY MARINA CORPORATION, a S.C. Corporation, by its duly authorized President, Grover C. Cauthen and its duly authorized Assistant Secretary, Jack L. Moore, sign, seal and attest, and as their official act and deed, deliver the within written instrument and that (s)he with Hal M. Strange witnessed the execution thereof.

SWORN to before me this 25th day of February, 1986

_____ (SEAL)
Notary Public for South Carolina
My Commission expires: 10/10/87

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

PERSONALLY appeared before me Alec Elmore and made oath that (s)he saw the within named THE GULFSTREAM CAFE', INC., a S.C. Corporation, by its duly authorized President, Edward C. Cribb, Jr., and its duly authorized Secretary, Grover C. Cauthen, sign, seal and attest, and as their official act and deed, deliver the within written instrument and that (s)he with Hal M. Strange witnessed the execution thereof.

SWORN to before me this 25th day of February, 1986

(SEAL)
Notary Public for South Carolina
My Commission expires: 10/10/87

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200210

EXHIBIT "A"

All those certain pieces, parcels, areas or tracts of land identified as "Marsh Area, Tract A and Tract B" on that certain "Survey For Marlin Quay Company Garden City Point" dated August 27, 1985, revised January 24, 1986 surveyed and mapped by Sur-Tech, Incorporated and recorded in the Office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 438.

ELECTRONICALLY FILED - 2018 Oct 29 2:38 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP 2280199

ELECTRONICALLY FILED - 2018 Feb 23 2:30 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2206193

6.00 NCKS

BOOK 234 PAGE 808

FILED
BETTY L. WILLIAMS
CCCP&C.S.

APR 2 2 57 PM '86

GEORGETOWN COUNTY, S.C.

BOOK 234 PAGE 803

Geraldine M. Wheeler
Deputy ccep

Marlin Quay Marina Corp.

to

Bulfstream Cafe' Inc

easement agreement

Lot 5 tract 3
Garden City Point

Tracts A + B
Marsh Area

Recorded this 4th day of
April A.D. 1986
in Book Z Page 1643
Glenn E. Truman, Deputy
Auditor, Georgetown Co., S.C.

COUNTY PARCEL # 41-129-2 thru 5
1150

Exhibit C

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

FILED
BETTY L. WILLIAMS
CCCP & GS
90 JUN -4 PM 12:04
BOOK ____ PAGE ____

STATE OF SOUTH CAROLINA) AGREEMENT OF EASEMENT AND
) CONSENT TO AND JOINDER OF MORTGAGEE
COUNTY OF GEORGETOWN) TO GRANTING OF EASEMENT

WHEREAS, Marlin Quay Marina Corporation did on the 4th day of December, 1985, execute and deliver a Note in the amount of Six Hundred Thousand and no/100 ($600,000.00) Dollars to First Union National Bank and secured the same by Mortgage and Security Agreement, said Mortgage being recorded in the Office of the Clerk of Court for Georgetown County in Real Estate Mortgage Book 225 at Page 209; and

WHEREAS, Marlin Quay Marina Corporation granted three (3) easements to The Gulfstream Cafe, Inc. which easements were recorded in the office of the Clerk of Court for Georgetown County in Deed Book 234 at Pages 790, 797 and 803; and

WHEREAS, the parties acknowledge that there may be discrepancies in the rights granted to The Gulfstream Cafe, Inc., and Marlin Quay Marina Corporation and The Gulfstream Cafe, Inc. therefore desire that Marlin Quay Marina Corporation grant a non-exclusive perpetual easement from Marlin Quay Marina Corporation to The Gulfstream Cafe, Inc. for the purposes of ingress and egress and vehicular parking on, over and across that certain real property of Marlin Quay Marina Corporation, which is more fully described herein below, by owners, agents, employees, servants, visitors, guests and invitees of The Gulfstream Cafe, Inc., and Marlin Quay Marina Corporation and The Gulfstream Cafe, Inc. further desire to clarify the intent of the parties in the granting of all of the easements described above, and First Union

National Bank desires to consent to and join in the granting of said easement hereinafter described;

NOW THEREFORE, for and in consideration of the sum of One and No/100 ($1.00) Dollar and the covenants and conditions expressed herein, the receipt and sufficiency of which is hereby acknowledged, Marlin Quay Marina Corporation, a corporation duly organized pursuant to the laws of the State of South Carolina (the "Grantor"), has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto The Gulfstream Cafe, Inc., its successors and assigns (the "Grantee") a non-exclusive perpetual easement appurtenant to the premises of the Grantee hereinafter described for the full and free right of ingress and egress on, over and across the following described property of the Grantor, together with the rights of vehicular parking on and vehicular and pedestrian access to, all in accordance with all governmental rules, regulations, ordinances or laws, the premises of the Grantor hereinafter described, and also for the purpose of maintenance, repair, alteration and/or improvements to the Grantee's hereinafter described property. It is anticipated by the parties that while they will each have joint and non-exclusive use at all times of the area covered by this easement that the Grantor will utilize the premises primarily during the daytime regular business hours of Grantor and the Grantee will utilize the premises primarily in the evening regular business hours of Grantee. The property of the

STATE OF SC COMMON PLEAS CASE#2018CP2200199

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Grantor subject to this non-exclusive perpetual easement is more fully described as follows:

A non-exclusive right of ingress, egress and vehicular parking over, across and on all those certain pieces, parcels or tracts of land situate, lying and being in the Garden City area of the County of Georgetown, State aforesaid, and being more particularly shown as Lots 3, 4, and 5 of Tract 3 on that certain Plat entitled Survey of Marlin Quay Marina Horizontal Property Regime, Garden City Point, prepared by Surtech, Inc. dated May 21, 1985, revised November 27, 1985, and recorded in the office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 214, said plat being expressly incorporated herein by reference.

The Grantor acquired the aforedescribed property by virtue of that certain Deed from Marlin Quay Company, a South Carolina General Partnership, dated July 1, 1983 and recorded on September 1, 1983 in the office of the Clerk of Court for Georgetown County in Deed Book 211 at Page 1141.

The property of the Grantee to which this easement is appurtenant is more fully described as follows:

All those certain pieces, parcels, areas or tracts of land identified as Marsh Area, Tract A and Tract B on that certain survey for Marlin Quay Company, Garden City Point dated August 27, 1985, revised January 24, 1986, surveyed and mapped by Surtech, Incorporated and recorded in the office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 438.

It is expressly understood and agreed by Marlin Quay Marina Corporation and the Gulfstream Cafe that as part of the consideration for this conveyance, both parties shall be equally responsible for the maintenance and upkeep of the aforementioned easement area and shall equally share the costs associated with its proper maintenance and upkeep to insure that it is satisfactory for the uses and purposed intended herein.

It is further understood and acknowledged by the parties hereto that the Grantor herein gave a Mortgage in favor of First Union National Bank, said Mortgage having been recorded in the Office of the Clerk of Court for Georgetown County in Mortgage Book 225 at Page 209, and covering certain real property of the Grantor herein, a portion of which real property is covered by the grant of the easement herein (the "Mortgage"). First Union National Bank consents to and joins in the aforesaid grant of easement from Marlin Quay Marina Corporation to The Gulfstream Cafe, Inc. upon and pertaining to that portion of the property covered by the aforedescribed Mortgage lien of First Union National Bank, and First Union National Bank specifically and expressly subordinates its aforesaid Mortgage lien to the easement granted herein; provided, however, that First Union National Bank makes no representations or warranties as to the validity of the documents creating the easement; and provided, further, that said Mortgage in all respects shall remain in full force and effect and be unaffected hereby except as set forth hereinabove;

Together with all and singular the rights, members, hereditaments and appurtenances to the above-described easement belonging, or in anywise incident or appertaining;

To have and to hold, all and singular, the above-described easement and to the said The Gulfstream Cafe, Inc., its successors and assigns forever;

FILED: 2018-12-03 2:30 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

And the said Marlin Quay Marina Corporation does hereby bind itself and its successors and assigns, to warrant and forever defend, all and singular, the said easement unto the said Gulfstream Cafe, its successors and assigns, against itself and its successors and assigns and all others whomever lawfully claiming, or to claim the same or any part thereof.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this 12th day of ~~August~~ April, in the year of our Lord One Thousand Nine Hundred and ~~Eighty-Five~~ Ninety and in the Two Hundred and Thirteenth Year of the Sovereignty and Independence of the United States of America.

IN THE PRESENCE OF:

MARLIN QUAY MARINA CORPORATION
a South Carolina Corporation
(Corporate Seal)

By: _____
Its: Pres

Nancy L. Rowe
(as to Marlin Quay Marina Corporation)

Attest: _____
Its: _____

WITNESSES:

The Gulfstream Cafe, Inc.
a South Carolina Corporation
(Corporate Seal)

By: _____
Edward C. Cribb, Jr.
President

Carolyn Jordan

Pamela A. Britton
(as to The Gulfstream Cafe, Inc.)

Attest: Jean C. Cribb
Its: Secretary

BOOK 382 PAGE 222

WITNESSES:

Marcia Combs

Angela Lee Huskey

(as to First Union National Bank)

FIRST UNION NATIONAL BANK

By: Deborah H. Miller

Its: Vice President

Attest: Joe Allen

Its: Assistant Secretary

COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA)
) PROBATE
COUNTY OF GEORGETOWN)

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named First Union National Bank , by and through its duly authorized officers, sign, seal and as its act and deed, deliver the within written Agreement of Easement and Consent To and Joinder of Mortgagee to Granting of Easement; and that deponent with the other witnesses whose name is subscribed above witnessed the execution thereof.

Marcia Corns

SWORN TO before me this
12th day of April, 1990 1990.

Silvia H. Alexander (L.S.)
Notary Public for South Carolina
North
My Commission Expires: 10-9-1990

STATE OF SOUTH CAROLINA)
HORRY) PROBATE
COUNTY OF ~~GEORGETOWN~~)

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named The Gulfstream Cafe, Inc., by and through its duly authorized officers, sign, seal and as its act and deed, deliver the within written Agreement of Easement and Consent To and Joinder of Mortgagee to Granting of Easement; and that deponent with the other witnesses whose name is subscribed above witnessed the execution thereof.

Pamela A. Britton

SWORN TO before me this
14th May, 1990
~~day of August 1990.~~

Cecilia Jordan (L.S.)
Notary Public for South Carolina

My Commission Expires: 4-25-96

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA)
) PROBATE
COUNTY OF GEORGETOWN)

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named Marlin Quay Marina Corporation, by and through its duly authorized officers, sign, seal and as its act and deed, deliver the within written Agreement of Easement and Consent To and Joinder of Mortgagee to Granting of Easement; and that deponent with the other witnesses whose name is subscribed above witnessed the execution thereof.

SWORN TO before me this
1st day of June, 1990.
Darcy L. Price (L.S.)
Notary Public for South Carolina
My Commission Expires: 6-9-98

FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

10.00 g.m

FILED
BETTY L. WILLIAMS
CCCP & GS

90 JUN -4 PM 12:00

REC'D
BOOK 382 PAGE 217
Edwards J. Prevatte
Deputy Cccp

Marlin Quay Marina Corp

to

Gulfstream Cafe Inc

Recorded this 6th day of June A.D. 1990

In Book ____ Page ____

Chris J. Abbott Deputy
Auditor, Georgetown Co., S. C.

COUNTY PARCEL # 41-129-5.3

MSO

BOOK 382 PAGE 226

70

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ARE NO VISIBLE ENCROACHMENTS OR PROJECTIONS OTHER THAN SHOWN.

Stephen R. Wolfe
STEPHEN R. WOLFE S.C.L.S. NO 5085

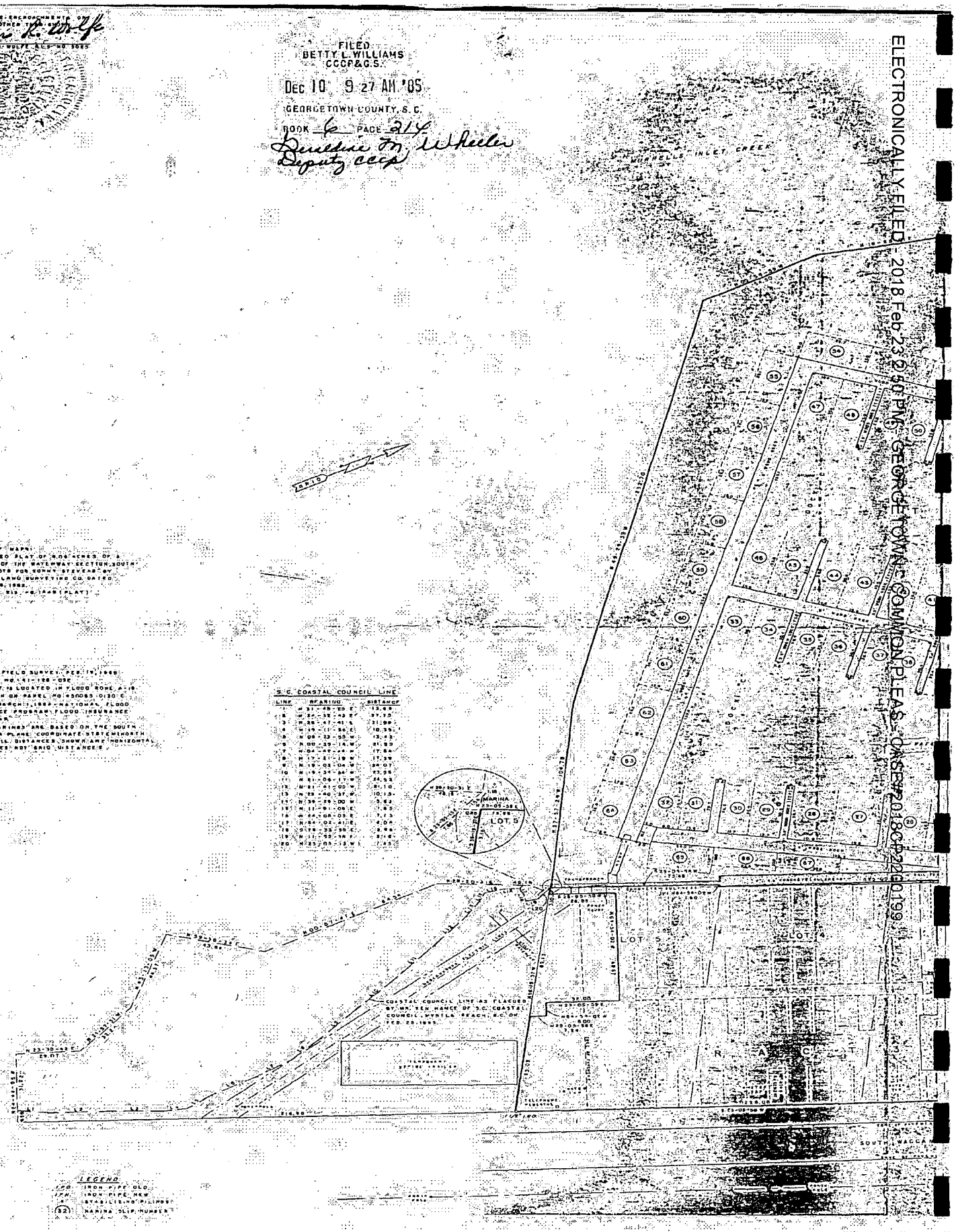
FILED
BETTY L. WILLIAMS
CCCP&G.S.

Dec 10 9 27 AM '85

GEORGETOWN COUNTY, S.C.

BOOK 6 PAGE 214

Deneshe F. Wheeler
Deputy CCCP



REFERENCE MAPS:
1) "COMPILED PLAT OF 9.06 ACRES OF A PORTION OF THE WATERWAY SECTION, SOUTH POINT LOTS FOR SONNY STEVENS" BY CULLER LAND SURVEYING CO. DATED MARCH 29, 1982.
2) DEED BK. 813, PG. 1449 (PLAT)

NOTES:
1) DATE OF FIELD SURVEY: FEB. 19, 1985
2) TAX MAP NO. 41-128-03C
3) THIS LOT IS LOCATED IN FLOOD ZONE A-19 AS SHOWN ON PANEL NO. 450083 0130 C DATED: MARCH 1, 1982 - NATIONAL FLOOD INSURANCE PROGRAM FLOOD INSURANCE RATE MAP.
4) ALL BEARINGS ARE BASED ON THE SOUTH CAROLINA PLANE COORDINATE SYSTEM NORTH ZONE. ALL DISTANCES SHOWN ARE HORIZONTAL DISTANCES NOT GRID DISTANCES.

S.C. COASTAL COUNCIL LINE

LINE	BEARING	DISTANCE
1	N 31-48-25 E	13.69
2	N 24-35-43 E	27.12
3	N 25-47-41 E	21.99
4	N 19-[illegible]-56 E	18.35
5	N 09-32-55 W	13.42
6	N 00-33-14 W	21.83
7	N 07-47-18 W	17.54
8	N 17-41-19 W	17.39
9	N 19-03-04 W	24.07
10	N 19-34-54 W	43.25
11	N 21-06-17 W	44.53
12	N 21-40-00 W	21.10
13	N 23-46-37 W	10.13
14	N 39-28-00 W	5.62
15	N 11-01-06 E	7.63
16	N 24-08-05 E	7.13
17	N 24-[illegible] E	6.05
18	N 19-33-30 E	8.96
19	N 11-53-38 E	8.46
20	N 43-03-14 W	13.13

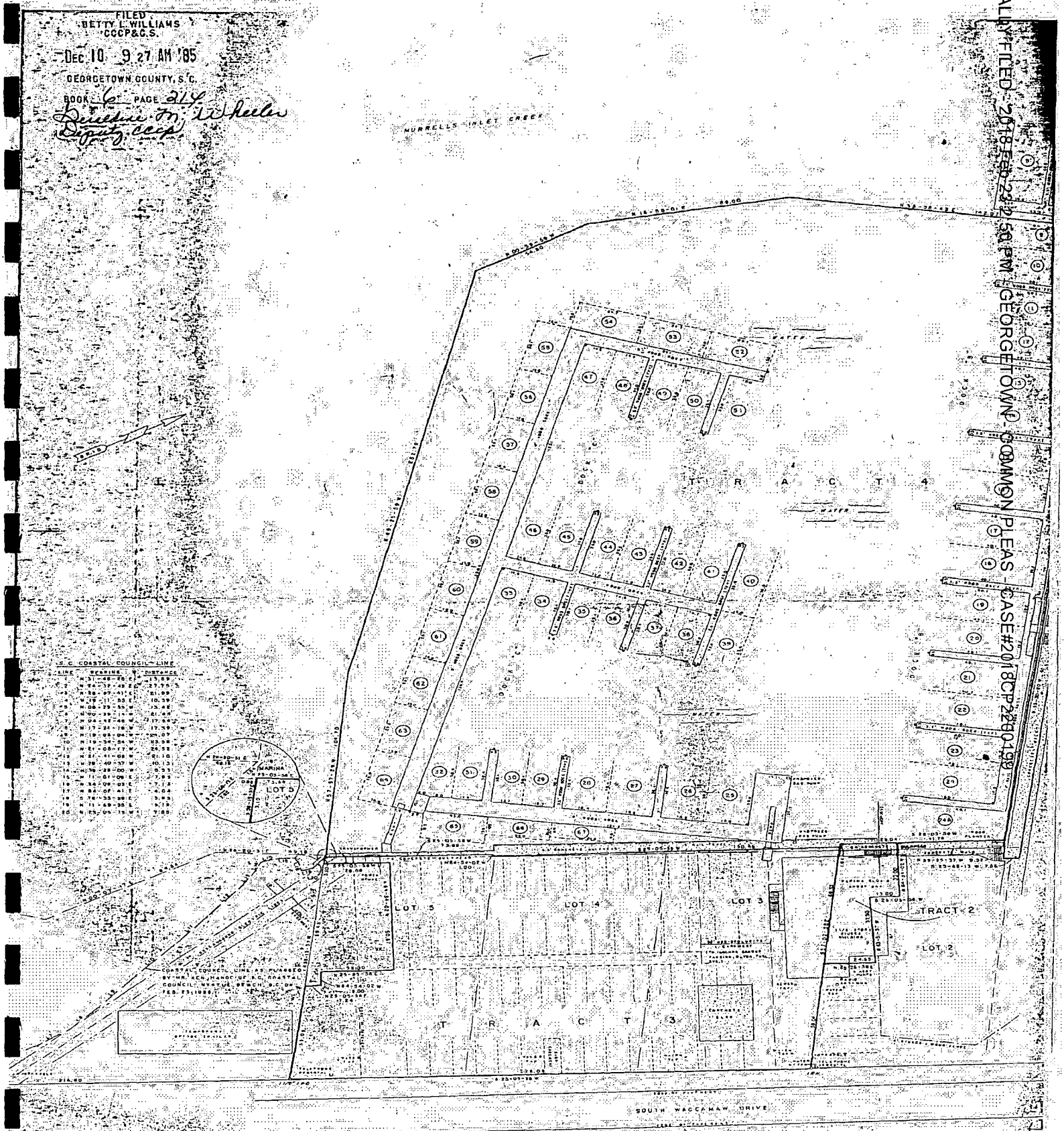
LEGEND

I.P.O.	IRON PIPE OLD
I.P.N.	IRON PIPE NEW
(52)	MARINA SLIP NUMBER

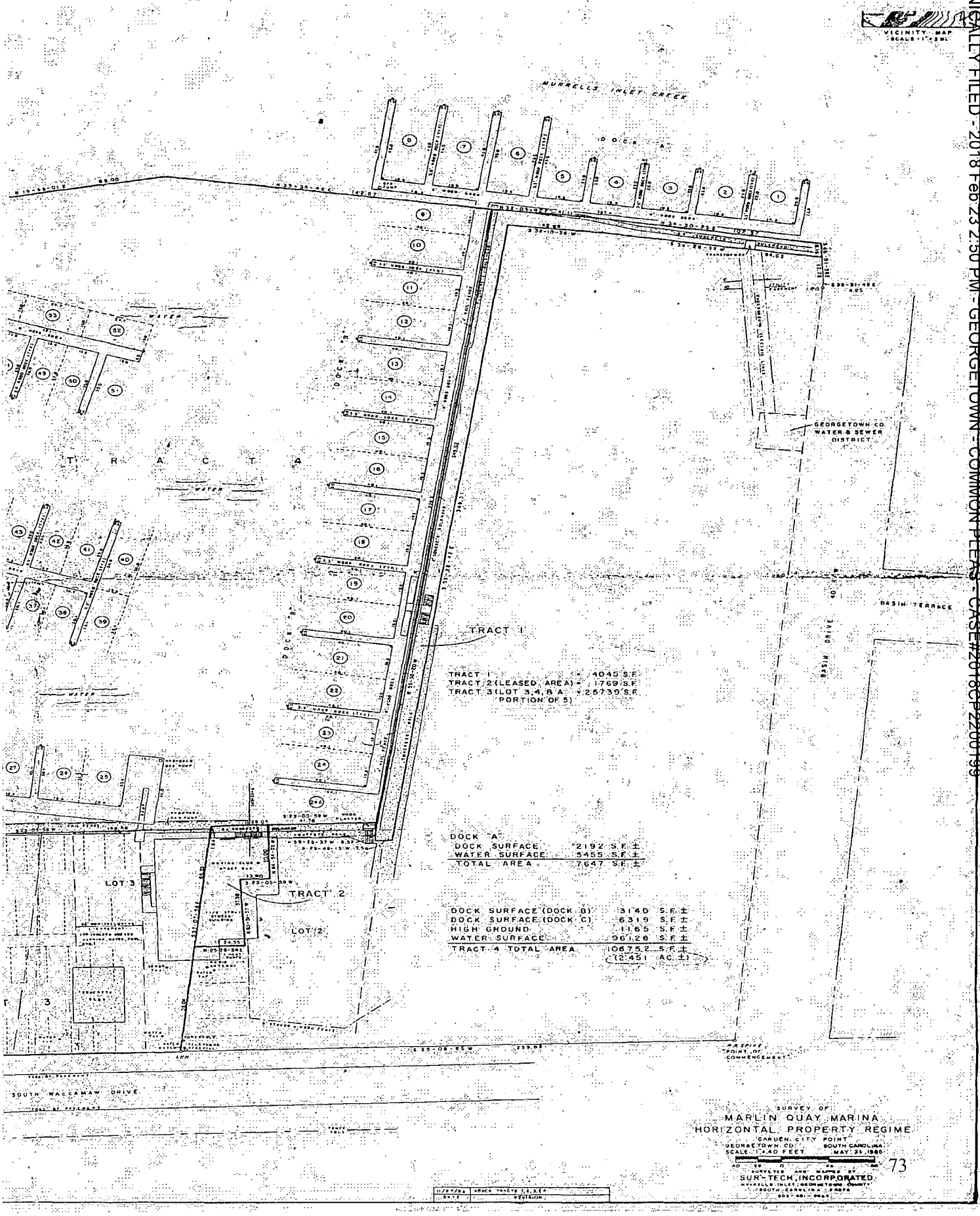
6|214

FILED
BETTY L. WILLIAMS
CCCP&C.S.
DEC 10 9 27 AM '85
GEORGETOWN COUNTY, S.C.
BOOK 6 PAGE 214
Deedie M. McKeller
Deputy, CCCP

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200198



6/214



ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

I HEREBY CERTIFY THAT THE MEASUREMENTS AS SHOWN HEREON ARE CORRECT AND THERE ARE NO VISIBLE ENCROACHMENTS OR PROJECTIONS OTHER THAN SHOWN.

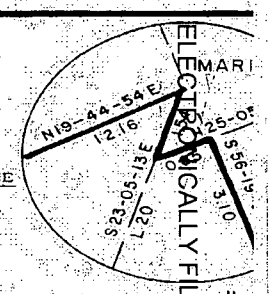
Stephen R. Wolfe

STEPHEN R. WOLFE R.L.S. NO. 9065

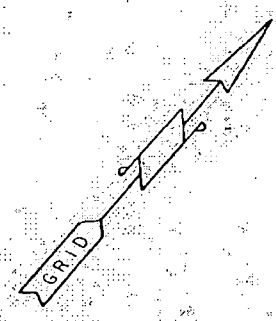
FILED
BETTY L. WILLIAMS
CCCP&C.S.
APR 2 2 59 PM '86
GEORGETOWN COUNTY, S.C.
BOOK 6 PAGE 438
Sandra M. Wheeler
Deputy

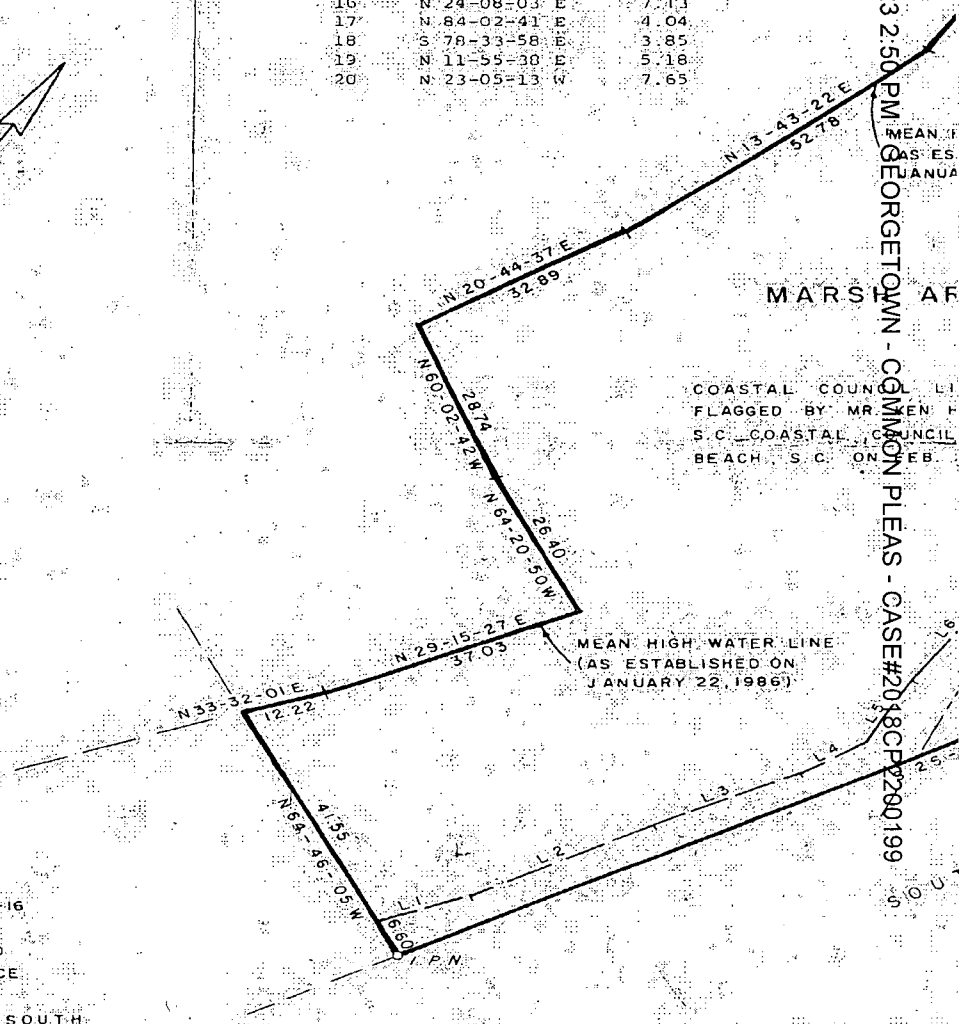
S. C. COASTAL COUNCIL LINE

LINE	BEARING	DISTANCE
1	N 31-46-25 E	13.69
2	N 24-32-43 E	27.75
3	N 26-47-41 E	21.99
4	N 19-11-53 E	10.39
5	N 08-23-55 W	13.42
6	N 00-39-14 W	21.89
7	N 04-42-46 W	17.64
8	N 17-21-19 W	17.39
9	N 19-03-04 W	24.07
10	N 19-34-54 W	23.58
11	N 21-06-17 W	24.52
12	N 21-41-05 W	21.10
13	N 28-40-37 W	10.13
14	N 36-28-00 W	5.53
15	N 11-01-06 E	7.65
16	N 24-08-03 E	7.13
17	N 84-02-41 E	4.04
18	S 78-33-58 E	3.85
19	N 11-55-30 E	5.18
20	N 23-05-13 W	7.65



INSET "A"
NOT TO SCAL





MARSH AR

COASTAL COUN LI
FLAGGED BY MR. EN H
S.C. COASTAL COUNCIL
BEACH, S.C. ON FEB.

NOTE THE ME
FROM N
THE M.
ON THE
MON. EL

LEGEND

I.P.O. IRON PIPE OLD
I.P.N. IRON PIPE NEW
S.F. SQUARE FEET

NOTES:
1) PARENT TAX MAP NO. 41-128-032
2) THIS LOT IS LOCATED IN FLOOD ZONE A-16 AS SHOWN ON PANEL NO. 450085 0120 C DATED MARCH 1, 1984 - NATIONAL FLOOD INSURANCE PROGRAM FLOOD INSURANCE RATE MAP.
3) ALL BEARINGS ARE BASED ON THE SOUTH CAROLINA PLANE COORDINATE SYSTEM (NORTH ZONE). ALL DISTANCES SHOWN ARE HORIZONTAL DISTANCES NOT GRID DISTANCES.

REFERENCE MAPS ENTITLED:
1) "SURVEY OF MARLIN QUAY MARINA HORIZONTAL PROPERTY REGIME" BY THIS OFFICE DATED MAY 21, 1985
2) "COMPILED MAP OF 6.06 ACRES OF WATERWAY SECTION SOUTH POINT LOTS FOR SONNY STEVENS" BY CULLER LAND SURVEYING CO. DATED MAR. 29, 1982

DATE	REVISION
1/24/86	ADDED MEAN HIGH WATER LINE
1/13/86	ADDED FOUNDATION OF RESTAURANT BUILDING

DRAWN BY DANNY LONG

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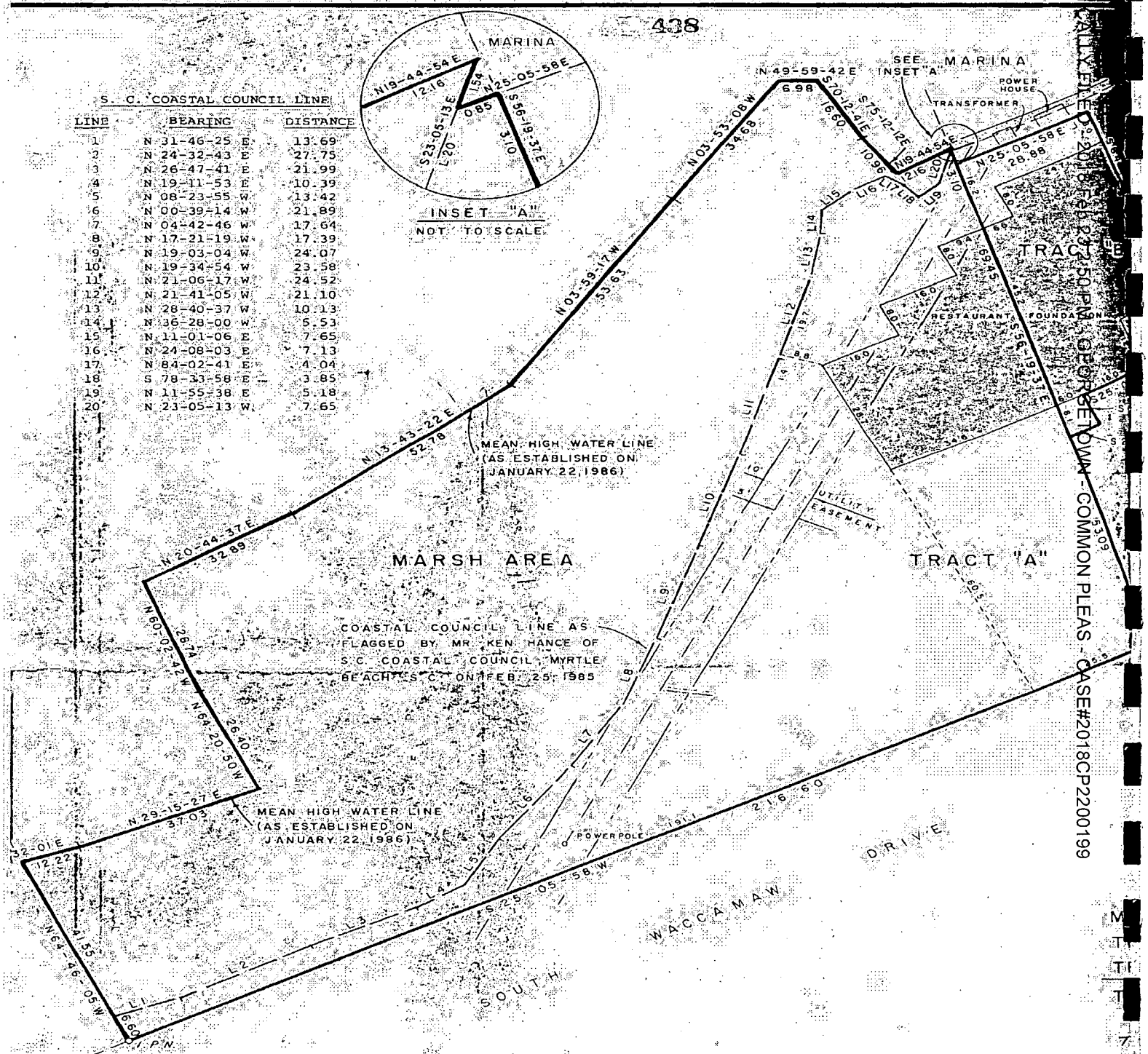

S. C. COASTAL COUNCIL LINE

LINE	BEARING	DISTANCE
1	N 31-46-25 E	13.69
2	N 24-32-43 E	27.75
3	N 26-47-41 E	21.99
4	N 19-11-53 E	10.39
5	N 08-23-55 W	13.42
6	N 00-39-14 W	21.89
7	N 04-42-46 W	17.64
8	N 17-21-19 W	17.39
9	N 19-03-04 W	24.07
10	N 19-34-54 W	23.58
11	N 21-06-17 W	24.52
12	N 21-41-05 W	21.10
13	N 28-40-37 W	10.13
14	N 36-28-00 W	5.53
15	N 11-01-06 E	7.65
16	N 24-08-03 E	7.13
17	N 84-02-41 E	4.04
18	S 78-33-58 E	3.85
19	N 11-55-38 E	5.18
20	N 23-05-13 W	7.65

NOTE: THE MEAN HIGH WATER (M.H.W.) LINE WAS ESTABLISHED FROM N.O.S. TIDAL BENCH MARK STAMPED "CA NO. 3 1975". THE M.H.W. LINE WAS LOCATED VERTICALLY AND HORIZONTALLY ON THE GROUND AT THE 2.56 M.S.L. ELEVATION. MON. ELEVATION 6.89' ABOVE MEAN HIGH WATER (M.H.W.) 9.45' ABOVE MEAN SEA LEVEL (M.S.L.)

86	ADDED MEAN HIGH WATER LINE
86	ADDED FOUNDATION OF RESTAURANT BUILDING
	REVISION

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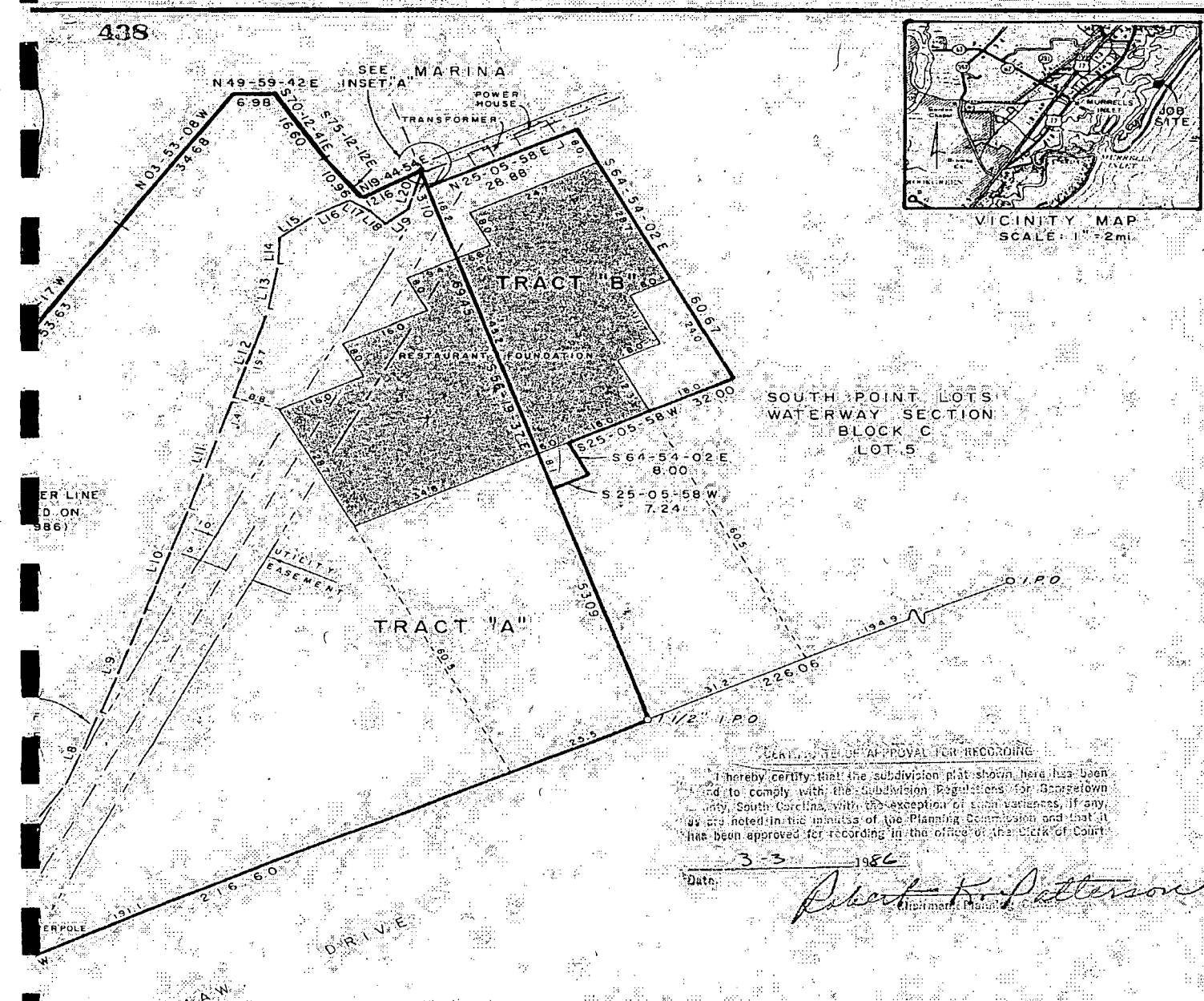

CERTIFICATE OF APPROVAL FOR RECORDING

I hereby certify that the subdivision plat shown here has been found to comply with the Subdivision Regulations for Georgetown County, South Carolina, with the exception of such variances, if any, as are noted in the minutes of the Planning Commission and that it has been approved for recording in the office of the Clerk of Court.

3-3 1986
Date

Robert K. Patterson
Chairman, Planning Commission

MARSH AREA	13281 S F ±
TRACT "A"	10002 S F ±
TRACT "B"	2083 S F ±
TOTAL AREA	25366 S F ±

TRACT "A" AND TRACT "B" WILL BE COMBINED INTO ONE LOT

H. WATER (M.H.W.) LINE WAS ESTABLISHED
L BENCH MARK STAMPED "CA NO 3 1975"
E WAS LOCATED VERTICALLY AND HORIZONTALLY
AT THE 2.56' M.S.L. ELEVATION
N 6.89' ABOVE MEAN HIGH WATER (M.H.W.)
9.45' ABOVE MEAN SEA LEVEL (M.S.L.)

SURVEY FOR
MARLIN QUAY COMPANY
GARDEN CITY POINT
GEORGETOWN CO. SOUTH CAROLINA
SCALE 1" = 20 FEET AUG 27, 1985

20 10 0 20 40

SURVEYED AND MAPPED BY
SUR-TECH, INCORPORATED
MURRELLS INLET, GEORGETOWN COUNTY
SOUTH CAROLINA 29576
803-651-8658

F.B. ST-150 MAP NO. 01-2-133

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Exhibit D

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FILED
BETTY L. WILLIAMS
CCCP&C.S.
DEC 10 9 27 AM '85
GEORGETOWN COUNTY, S.C.
BOOK 60 PAGE 214
Deputy CCCP

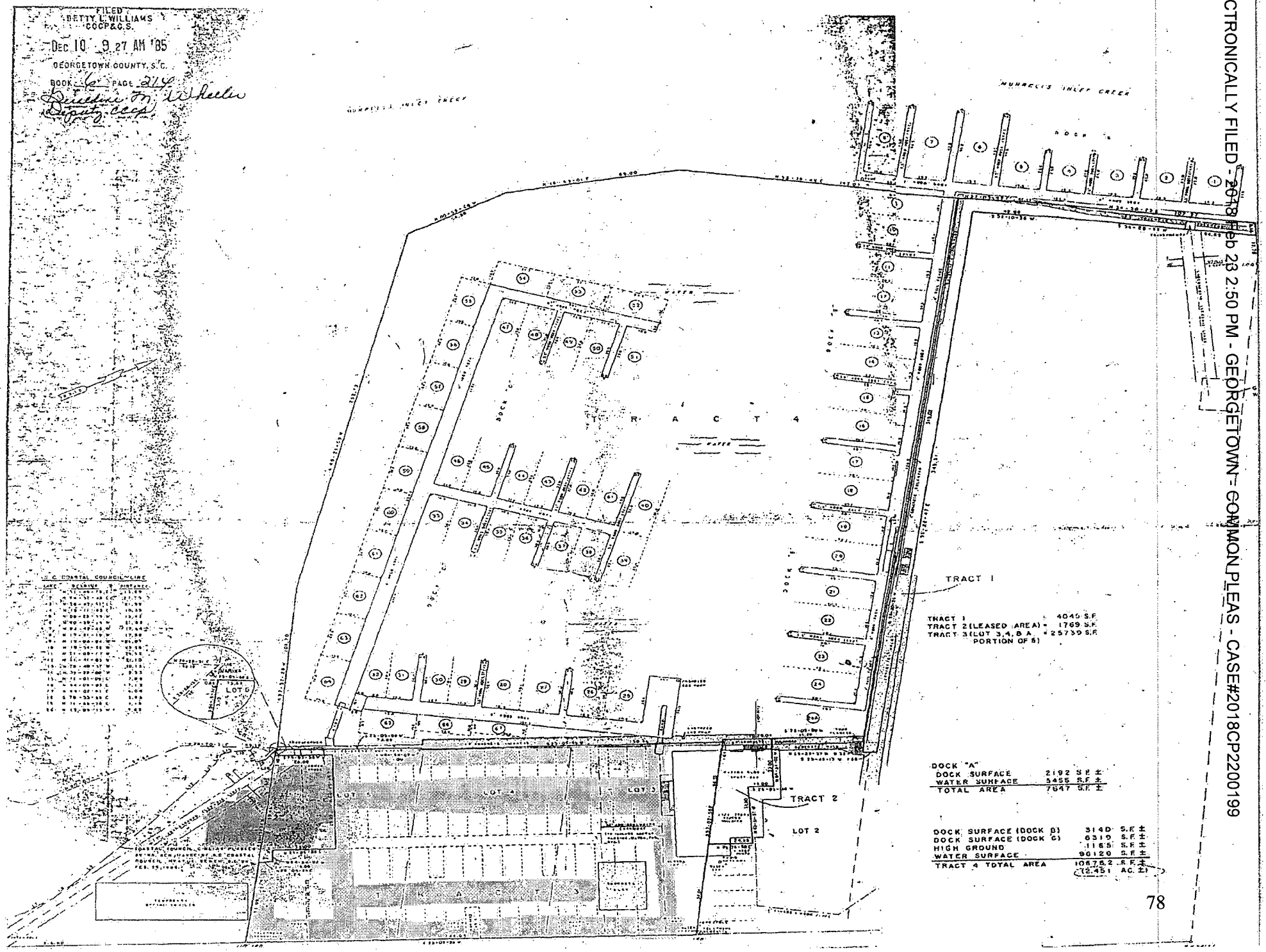

Exhibit E

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

HOWELL V. BELLAMY, JR.
EDWARD B. BOWERS, JR.*
BRADLEY D. KING
M. EDWIN HINDS, JR.
DAVID B. MILLER**
C. WINFIELD JOHNSON, III
DOUGLAS M. ZAYICEK
MARTIN C. DAWSEY*
ROBERT S. SHELTON**

* LLM TAXATION
** CERTIFIED MEDIATOR
*** LICENSED IN SC & NC

THE BELLAMY LAW FIRM

1000 29TH AVENUE NORTH • MYRTLE BEACH, SC 29577
MAILING ADDRESS: P.O. BOX 357 • MYRTLE BEACH, SC 29578
TELEPHONE (843) 448-2400 • FACSIMILE (843) 448-3022
WWW.BELLAMYLAW.COM

HOWELL V. BELLAMY, III
ASHLEY P. MORRISON
GEORGE W. REDMAN, III ** ***
BENJAMIN A. BAROODY ** ***
PHILLIP H. ALBERGOTTI* ***
HAYES K. STANTON ** ***
KARA J. KEITH
HOLLY M. LUSK

RETIRED:
CLAUDE M. EPPS, JR.
JOHN E. COPELAND
DAVID R. GRAVELY
JILL F. GRIFFITH
JOHN K. RUTENBERG (1939-2012)

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

December 5, 2017

Via U.S. Mail and Email
Henrietta U. Golding, Esq.
McNair Law Firm, PA
PO Box 336
Myrtle Beach, SC 29578

Re: **NOTICE AND DEMAND FOR DEFENSE AND INDEMNIFICATION**
The Gulfstream Café, Inc. v. Palmetto Development & J. Mark Lawhon, et al.
Civil Action No. 2016-CP-22-00961
The Gulfstream Café, Inc. v. Georgetown County Zoning Board of Appeals, & Palmetto Industrial Development, Inc.
Civil Action No. 2017-CP-22-00235
Marlin Quay Marina Bar & Grill, LLC v. Gulf Stream Café, Inc., et al.
Civil Action No. 2017-CP-22-00446,
Georgetown County Zoning Board of Appeals, Case No. APP # 10-17-19214

Dear Ms. Golding:

I write to demand that your client, Palmetto Industrial Development, Inc. ("Palmetto"), immediately honor its obligation to warrant and defend the Gulfstream Café, Inc.'s ("Gulfstream") easement rights within the Marlin Quay Marina Planned Development District.

In 1986 and 1990, the Marlin Quay Marina Corporation granted Gulfstream, "its successors and assigns forever," a total of four (4) permanent appurtenant easements (collectively referenced as the "Easements"). The Easements provide Gulfstream's owners, agents, employees, and invitees the perpetual, full, and free right to use the Parking Lot at all times for vehicular and pedestrian ingress, egress, and parking, as well as the right to maintain, repair, alter, and improve the restaurant. The Easements also include a detailed depiction of the Parking Lot configuration and limits to prevent continuous conflicting business uses.

Critically, the Marlin Quay Marina Corporation expressly agreed in the Easements that any successive owners of the Parking Lot would warrant and defend Gulfstream's perpetual rights in the subservient estate as burdens which run with the land:

> Marlin Quay Marina Corporation does hereby bind itself and its successors and assigns, to warrant and forever defend, all and singular, the said easement unto the said Gulfstream Café, its successors and assigns, against itself and its successors and assigns and all others whomever lawfully claiming, or to claim the same or any part thereof.

As described in more detail below, Palmetto is obligated to defend and indemnify Gulfstream on multiple grounds.

First, shortly after the purchase of the Property, Palmetto began developing plans for a new building within the Marlin Quay Marina. Palmetto proceeded to unilaterally block off the entire Parking Lot in November of 2016. In response, Gulfstream was forced to initiate litigation to gain access to and prevent interference with the Parking Lot prior to a busy Thanksgiving holiday. Since that time, the Honorable Judge Culbertson found Palmetto and Dr. Lawhon in Contempt for their interference with Gulfstream's Easement rights. Such interference is a direct breach of the warranty in each Easement. Because Gulfstream had to hire counsel to defend its Easement rights, your client is obligated to immediately tender payment for the defense of same.

Second, Palmetto submitted its redevelopment plans to Georgetown County for a building permit. These plans included a new and larger building with a restaurant larger than Gulfstream, and that the building would be placed directly on top of the Parking Lot. In response, Gulfstream was forced to petition the Zoning Board of Appeals for Georgetown County to defend its Easement rights. This matter remains pending before Judge Culbertson. Palmetto's submission of plans which would alter and build on top of the Easements is a direct breach of the warranty in each Easement, and as such, your client is obligated to immediately tender payment for the defense of Gulfstream's Easement rights.

Third, in May of 2017, the Marlin Quay Marina Bar & Grill, LLC (Marina Bar & Grill) filed its lawsuit against Gulfstream, essentially claiming the actions taken by Gulfstream to defend its Easement rights had caused damages. The claims presented by the Marina Bar & Grill are precisely the type which Palmetto warranted to defend when it purchased the Parking Lot property in August of 2014. As such, your client is obligated to immediately tender payment for the defense of Gulfstream's Easement rights. Because Gulfstream had to hire counsel to defend its Easement rights, your client is obligated to immediately tender payment for the defense of same.

Fourth, during the summer of 2017, Palmetto secretly commissioned new plans to build a different building upon the Parking Lot, and obtained a building permit from Georgetown County on or around September 15, 2017. The new plans also include a larger building with a restaurant larger than Gulfstream. The proposed building also would be placed directly on top of the north end of the Parking Lot. Once again, Gulfstream was forced to petition the Zoning Board of Appeals for Georgetown County to defend its Easement rights. Palmetto's second submission of plans under cover of darkness is a direct breach of the warranty in each Easement, and as such, your client is obligated to immediately tender payment for the defense of Gulfstream's Easement rights.

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Gulfstream has selected preferred Counsel for the defense of its rights under the Easement. Palmetto must now honor the above-referenced warranty and defense obligations without delay. We also ask that you provide confirmation that Gulfstream will be fully indemnified as to all future costs of the defenses set forth above, as well as the costs of any appeals. Your client's immediate attention to these matters is required. We thank you in advance for your cooperation so that additional and further legal action will not be required.

Sincerely,

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

George W. Redman, III

GWR:kel
cc: Client

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Exhibit F

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

McNAIR
ATTORNEYS

Henrietta U. Golding
hgolding@mcnair.net
T 843.444.1100

ELECTRONICALLY FILED - 2018 Feb 23 2:50 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

December 12, 2017

Via Email and U.S. Mail

George Redman, Esquire
Bellamy Law Firm
1000 29th Avenue North
Myrtle Beach, SC 29577

Re: The Gulfstream Cafe, Inc. v. J. Mark Lawhon and Palmetto Industrial Development, LLC
Civil Action No.: 2016-CP-22-00961

Dear George:

With regard to your letter dated December 5, 2017, it contains many inaccuracies. In addition, Gulfstream has no legal basis for any indemnification claim.

Sincerely,

McNAIR LAW FIRM, P.A.

Henrietta U. Golding
HUG/ck

cc: Client (*via email*)
Adam Nugent, Esquire (*via email*)
Simon Bloom, Esquire (*via email*)

McNAIR LAW FIRM, P.A.
Founders Centre
2411 Oak Street, Suite 206
Myrtle Beach, SC 29577

Mailing Address
Post Office Box 336
Myrtle Beach, SC 29578

mcnair.net

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF GEORGETOWN	)	Civil Action No.: 2018-CP-22- 00199
	)	
The Gulfstream Café, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**ACCEPTANCE OF SERVICE**
	)	
Palmetto Industrial Development, LLC,	)	
	)	
Defendant.	)	
	)	

The undersigned hereby accepts and acknowledges due personal service and receipt of a true copy of the Summons and Complaint on behalf of and as attorney of record for Defendant Palmetto Industrial Development, LLC, at her office with the correct mailing address and contact information as set forth below. Pursuant to the South Carolina Rules of Civil Procedure, all further notices and documents in this action to be served upon Defendant in this matter may be delivered to the undersigned using the mailing address and contact information below.

MCNAIR LAW FIRM, PA
Henrietta U. Golding, Esq.
PO Box 336
Myrtle Beach, South Carolina 29578
Email: *HGolding@mcnair.net*
Attorneys for Defendant

Henrietta U. Golding, Esquire

Date: 3/1/2018

Time: 11:01 Am

ELECTRONICALLY FILED - 2018 Mar 01 4:52 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	)))	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2018-CP-22-00199
The Gulfstream Café, Inc., Plaintiff, vs. Palmetto Industrial Development, LLC. Defendant.	))))))))))	**DEFENDANT'S MOTION TO DISMISS THE COMPLAINT PURSUANT TO RULES 12(b)(6) AND 12(b)(8)**

YOU WILL PLEASE TAKE NOTICE that Defendant, Palmetto Industrial Development, LLC ("Palmetto"), by and through its undersigned counsel, and pursuant to Rules 12(b)(6) and 12(b)(8) of the South Carolina Rules of Civil Procedure, files this Motion to Dismiss the Complaint.

This Motion is based upon the grounds that Plaintiff has failed to state facts sufficient to constitute a cause of action and that another action is pending between the same parties and therefore, should be dismissed. The above Motion is based on the Complaint, memoranda, and other documents that may be submitted prior to or at the time of the hearing of this matter and/or the case law and statutory law of the State of South Carolina.

Respectfully submitted,

McNair Law Firm, P.A.

s/Henrietta U. Golding
Henrietta U. Golding, SC Bar # 2173
McNair Law Firm, P.A.
2411 Oak Street, Suite 206
P.O. Box 336 (29578)
Myrtle Beach, South Carolina 29577
Tel: (843) 444-1107
Fax: (843) 443-9137

Email: hgolding@mcnair.net

Myrtle Beach, South Carolina

Dated: March 29, 2018

Attorneys for the Defendant Palmetto Industrial Development, LLC

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2018 Apr 30 11:46 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF GEORGETOWN	)	
	)	Civil Action File No. 2018-CP-22-00199
The Gulfstream Café, Inc.	)	
	)	
Plaintiff,	)	**THE GULFSTREAM CAFÉ, INC.'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS COMPLAINT**
	)	
v.	)	
	)	
Palmetto Industrial Development, LLC,	)	
	)	
Defendant.	)	
	)	

Plaintiff The Gulfstream Café, Inc. (hereinafter "Gulfstream"), submits the following brief in opposition to Defendant Palmetto Industrial Development, LLC's ("Palmetto") motion to dismiss.

I. INTRODUCTION

Palmetto raises a host of reasons why Gulfstream's complaint should be dismissed, all of which miss the mark. Palmetto's motion grasps at straws, relying on cases from far flung jurisdictions and other authority that is completely inapplicable to the circumstances of this action. By focusing on South Carolina authority and the case before it, the answers for why the Court should deny the motion are clear: (1) res judicata does not apply because there has been no final adjudication on the merits of Gulfstream's claims; (2) the claim splitting doctrine is inapplicable; (3) a duty to defend an easement does not require a challenge to title; and (4) Palmetto must defend Gulfstream because Palmetto's own wrongful conduct gives rise to the litigation triggering the duty to defend.

ELECTRONICALLY FILED - 2018 Apr 30 11:46 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

II. FACTUAL BACKGROUND

The Court is likely familiar with the facts underlying this suit, so Gulfstream hereby provides a brief recitation of only those facts that pertain to Palmetto's Motion. The Gulfstream Café has been in existence in the Marlin Quay area since 1986. (Compl. ¶ 5). Palmetto's predecessor in interest expressly granted Gulfstream three (3) non-exclusive appurtenant easements to utilize a parking lot adjacent to Gulfstream's property (the "Parking Lot") in 1986. (Id. ¶ 10). In 1990, the Palmetto's predecessor in interest again expressly granted and conveyed a perpetual non-exclusive easement for the use of the Parking Lot to Gulfstream (collectively with the 1986 easements, the "Gulfstream Easement"). (Id. ¶ 13). The Gulfstream Easement includes a warranty provision as follows:

> The said Marlin Quay Marina Corporation does hereby bind itself and its Successors and Assigns, to warrant and forever defend, all and singular, the said easement unto the said Gulfstream Cafe, Inc. its Successors and Assigns, against itself and its Successors and Assigns and all others whomever lawfully claiming, or to claim the same or any part thereof.

(Id. ¶ 13).

In November of 2016, Palmetto and its owner, Mark Lawhon, began a construction project with the objective of permanently interfering with Gulfstream's easement rights. (Id. ¶¶ 18-26). Palmetto and Lawhon also engaged in a campaign of repeated interference with the Gulfstream Easement and harassment of Gulfstream's employees and restaurant guests. (Id. ¶ 24). To stop Palmetto's interference, Gulfstream filed an action for temporary and permanent injunctive relief, among other damages (the "Injunction Suit"). (Id. ¶ 28).

Gulfstream then provided notice to Palmetto of its duty to defend Gulfstream and demanded that Palmetto indemnify it under the Gulfstream Easement. (Compl. Ex. E)

(Attached hereto as Exhibit A). Palmetto refused Gulfstream's demand. (Compl. Ex. F). Following Palmetto's refusal, Gulfstream promptly filed a motion for leave to amend its complaint in the Injunction Suit to add claims for declaratory judgment and breach of the warranty provision arising Palmetto's failure to defend Gulfstream. (Attached hereto as Exhibit B). The time for amendment without leave to amend had passed, however, and the Court exercised its discretion to deny the motion. (Attached hereto as Exhibit C). Shortly after that denial, on February 23, 2018, Gulfstream filed this action, asserting claims against Palmetto for declaratory judgment and breach of warranty, and seeking to enforce Palmetto's duty to defend Gulfstream under the Gulfstream Easement.

III. ARGUMENT AND CITATION OF AUTHORITIES

A. *Res Judicata Does Not Preclude Gulfstream from Bringing This Action*

Palmetto first erroneously argues that res judicata applies to bar Gulfstream from bringing this case because the Court denied Gulfstream's motion to amend in the Injunction Suit. To suggest that the denial of the motion for leave results in claim preclusion is absurd. In order for res judicata to apply, three elements must be met: "(1) *a final, valid judgment on the merits;* (2) identity of parties; and (3) the second action must involve matters properly included in the first suit." Plott v. Justin Enters., 374 S.C. 504, 511 (Ct. App. 2008) (emphasis added).

Palmetto's contention does not get past the first element of res judicata: a final judgment on the merits. As explained by the South Carolina Supreme Court, a judgment supporting the defense of res judicata must be final and on the merits. Logan v. Atlanta & C. Air Line R. Co., 82 S.C. 518, 518 (1909). Here, the Injunction Suit is still

ELECTRONICALLY FILED - 2018 Apr 30 11:46 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

pending, and the Court has not entered a final judgment on any of Gulfstream's claims. Therefore, res judicata simply does not apply.

The Court's denial of the motion to amend does not constitute an adjudication of the merits of Gulfstream's warranty claims. Palmetto's reliance on cases from foreign and federal jurisdictions ignores South Carolina precedent directly on point. In Plott v. Justin Enterprises, 374 S.C. 504 (Ct. App. 2008), the defendant argued that the plaintiff could not bring claims for interference with easement rights based on res judicata, because the court in the plaintiff's prior action for trespass denied a motion to amend to add the interference claims. The South Carolina Court of Appeals found res judicata did not preclude the second action, because "the trial court's refusal to allow Respondents to proceed on their claim for interference with their use of the right-of-way was not a ruling on the merits of that cause of action." Id. at 512 (citing 47 Am.Jur.2d Judgments § 495, at 56 (2006) ("[A] judgment is not res judicata as to any matters which a court expressly refused to determine.")).

Like in Plott, the Court's denial of Gulfstream's motion to amend did not make any determination of the merits of those prospective claims. The Court denied the motion in the exercise of its discretion because the time for amendment had passed. The Court did not in any way pass on the validity of the claims, and res judicata cannot prevent Gulfstream from bringing the claims in a separate action.

B. The Claim Splitting Doctrine Does Not Apply.

Palmetto next contends the Court should dismiss the claims based on the claim-splitting doctrine. Palmetto cites to federal case law in support of its position, but fails to point to any South Carolina cases adopting the claim-splitting rule. In the absence of South Carolina law on claim-splitting, the Court should reject Palmetto's argument.

ELECTRONICALLY FILED - 2018 Apr 30 11:46 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Assuming for the sake of argument only that the claim-splitting rule applies in South Carolina, Gulfstream's claims fall within one of the well-defined exceptions to the rule. The Restatement (Second) of Judgments § 26 provides that, in cases of a continuing or recurring wrong, a plaintiff may bring a second action against the defendant. See Restatement (Second) of Judgments § 26. In such a case, the plaintiff may sue for both past and prospective harm or may sue later for the damages incurred to the date of suit, and chooses the latter course. Id. Under this exception, "the courts, unaided by statute, may conclude that strong substantive policies favor such allowance with respect to cases involving anticipated continuing or recurrent wrongs." Id.

Palmetto's failure to defend Gulfstream is a continuing wrong that recurs every day that Palmetto refuses to fund the Injunction Suit. Absent Gulfstream's lawsuit, Palmetto will never provide a defense. The substantive policy set forth in the Restatement favors allowing Gulfstream's claims to be heard on the merits and provide relief for Palmetto's repeated and constant breach of its duty to defend the Gulfstream Easement.

C. Palmetto's Defense Obligation Has No Connection to Title.

Palmetto next argues that only claims challenging title trigger a duty to defend under a warranty, citing to Bennett v. Investors Title Insurance Company, 370 S.C. 561, 571-74 (Ct. App. 2006) and Black v. Patel, 357 S.C. 466, 468 (2004). Gulfstream's warranty, however, is fundamentally different from the warranties at issue in Bennett and Black. Bennett and Black involved the covenants contained in general warranty deeds, whereas Gulfstream's warranty relates to easement rights.

There is a critical distinction between a general warranty deed and Palmetto's promise to "warrant and forever defend, all and singular, the said *easement*[.]" As

ELECTRONICALLY FILED - 2018 Apr 30 11:46 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

acknowledged in Bennett, "[a]n easement is a right which one person has *to use the land of another for a specific purpose*.' . . . and *gives no title to the land* on which the servitude is imposed[.]" Bennett, 370 S.C. at 573 (emphasis added). An easement does not give title to the land, so it is nonsensical to say a dispute regarding title is required to trigger a duty to defend an easement. The primary interest given by an easement is the right to use the land for a specific purpose, and the claims in the Injunction Suit relate to interference with Gulfstream's right to use the Parking Lot—the exact rights granted by the Gulfstream Easement. Palmetto's argument regarding claims to title should therefore be rejected.

D. The Court Should Require Palmetto to Defend Because its Own Wrongful Conduct is the Basis for the Injunction Suit.

Palmetto finally contends that it only has a duty to defend successful claims, and the validity of Palmetto's claims in the Injunction Suit are yet to be determined. Palmetto cites Black for its position that attorneys' fees are only allowed if a claim to title is successful. Palmetto's position is totally incorrect.

Palmetto claims there is a rule limiting defense obligations to successful claims, but Palmetto conveniently ignores the language in Black that expressly recognizes a clear exception to the rule. Specifically, the Court in Black explained that when the grantor's own wrongful act gives rise to the litigation, then the grantor's obligation to defend is not limited to successful claims. Black, 357 S.C. at 472 n.4. In such a situation, the grantor's defense rights are triggered irrespective of whether the claims asserted were successful. Id.

The exception identified in Black makes logical sense, particularly in the context of the present case, which involves a dispute between the grantor and grantee.

ELECTRONICALLY FILED - 2018 Apr 30 11:46 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Palmetto, as grantor, has engaged in conduct that blatantly interferes with Gulfstream's easement rights, and Gulfstream has incurred significant legal fees attempting to defeat Palmetto's claim to the Gulfstream Easement. It does not matter whether Gulfstream prevails in the underlying lawsuit. Otherwise, Palmetto is permitted to undermine and challenge Gulfstream's easement, force Gulfstream to defend its rights, and then escape any obligation to shoulder the defense/warranty obligation that it contractually agreed to. This is a very different situation from that addressed in the Black case, which involved a claim asserted by a third party, to whom the grantor had no connection at all. Palmetto cannot avoid its obligation to defend Gulfstream when it is Palmetto's own conduct that gave rise to the underlying lawsuit.[1]

Moreover, the difference between the bundle of rights transferred in a warranty deed and an easement is instructive. A warranty deed, like that at issue in Black, represents a transfer of title where the grantor has no future rights or relationship with the grantee. Under an easement, the grantor and grantee typically maintain an ongoing relationship, which is exactly the case between Palmetto and Gulfstream. It would be completely inequitable to allow the Palmetto to abuse this relationship while sidestepping its obligation to pay attorneys' fees.

[1] Even if the Court accepted Palmetto's argument on this issue, Gulfstream's declaratory judgment claim should not be dismissed. There is a live controversy between the parties regarding the duty to defend, and the Court is empowered to determine that Palmetto must defend Gulfstream if Palmetto's claims against the Gulfstream Easement are successful.

ELECTRONICALLY FILED - 2018 Apr 30 11:46 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

E. Gulfstream Gave Palmetto Sufficient Notice of its Claims.

In addition to its unpersuasive challenges to the present lawsuit, Palmetto makes a blanket assertion that Gulfstream did not provide a proper notice of the claims. Importantly, Palmetto does not contend that Gulfstream should have given the notice within any particular timeframe or in any particular form. It is undisputed that Gulfstream gave Palmetto notice of the claims. (Compl. Ex. E)(Attached hereto as Exhibit A). Thus, the Court should reject Palmetto's baseless argument that Gulfstream did not provide proper notice. See Greer v. McFadden, 295 S.C. 14, 19 (Ct. App. 1998) ("It is admitted that Greer gave McFadden notice of the prior suit and demanded that he come in and defend.").

IV. CONCLUSION

For the reasons set forth above, Gulfstream respectfully requests the Court deny Palmetto's motion to dismiss.

Respectfully submitted,

BELLAMY, RUTENBERG, COPELAND, EPPS, GRAVELY & BOWERS, P.A.
Post Office Box 357
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(843) 448-2400
Attorneys for Plaintiff

/s/ George W. Redman, III
George W. Redman, III
SC Bar No. 72365

Myrtle Beach, South Carolina

April 30, 2018

ELECTRONICALLY FILED - 2018 Apr 30 11:46 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

EXHIBIT A

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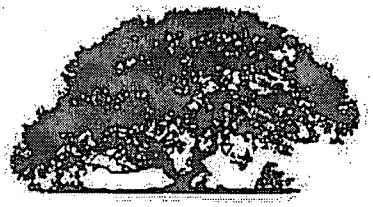

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December 5, 2017

Via U.S. Mail and Email
Henrietta U. Golding, Esq.
McNair Law Firm, PA
PO Box 336
Myrtle Beach, SC 29578

Re: **NOTICE AND DEMAND FOR DEFENSE AND INDEMNIFICATION**
The Gulfstream Café, Inc. v. Palmetto Development & J. Mark Lawhon, et al.
Civil Action No. 2016-CP-22-00961
The Gulfstream Café, Inc. v. Georgetown County Zoning Board of Appeals, & Palmetto Industrial Development, Inc.
Civil Action No. 2017-CP-22-00235
Marlin Quay Marina Bar & Grill, LLC v. Gulf Stream Café, Inc., et al.
Civil Action No. 2017-CP-22-00446,
Georgetown County Zoning Board of Appeals, Case No. APP # 10-17-19214

Dear Ms. Golding:

I write to demand that your client, Palmetto Industrial Development, Inc. ("Palmetto"), immediately honor its obligation to warrant and defend the Gulfstream Café, Inc.'s ("Gulfstream") easement rights within the Marlin Quay Marina Planned Development District.

In 1986 and 1990, the Marlin Quay Marina Corporation granted Gulfstream, "its successors and assigns forever," a total of four (4) permanent appurtenant easements (collectively referenced as the "Easements"). The Easements provide Gulfstream's owners, agents, employees, and invitees the perpetual, full, and free right to use the Parking Lot at all times for vehicular and pedestrian ingress, egress, and parking, as well as the right to maintain, repair, alter, and improve the restaurant. The Easements also include a detailed depiction of the Parking Lot configuration and limits to prevent continuous conflicting business uses.

Critically, the Marlin Quay Marina Corporation expressly agreed in the Easements that any successive owners of the Parking Lot would warrant and defend Gulfstream's perpetual rights in the subservient estate as burdens which run with the land:

> Marlin Quay Marina Corporation does hereby bind itself and its successors and assigns, to warrant and forever defend, all and singular, the said easement unto the said Gulfstream Café, its successors and assigns, against itself and its successors and assigns and all others whomever lawfully claiming, or to claim the same or any part thereof.

As described in more detail below, Palmetto is obligated to defend and indemnify Gulfstream on multiple grounds.

First, shortly after the purchase of the Property, Palmetto began developing plans for a new building within the Marlin Quay Marina. Palmetto proceeded to unilaterally block off the entire Parking Lot in November of 2016. In response, Gulfstream was forced to initiate litigation to gain access to and prevent interference with the Parking Lot prior to a busy Thanksgiving holiday. Since that time, the Honorable Judge Culbertson found Palmetto and Dr. Lawhon in Contempt for their interference with Gulfstream's Easement rights. Such interference is a direct breach of the warranty in each Easement. Because Gulfstream had to hire counsel to defend its Easement rights, your client is obligated to immediately tender payment for the defense of same.

Second, Palmetto submitted its redevelopment plans to Georgetown County for a building permit. These plans included a new and larger building with a restaurant larger than Gulfstream, and that the building would be placed directly on top of the Parking Lot. In response, Gulfstream was forced to petition the Zoning Board of Appeals for Georgetown County to defend its Easement rights. This matter remains pending before Judge Culbertson. Palmetto's submission of plans which would alter and build on top of the Easements is a direct breach of the warranty in each Easement, and as such, your client is obligated to immediately tender payment for the defense of Gulfstream's Easement rights.

Third, in May of 2017, the Marlin Quay Marina Bar & Grill, LLC (Marina Bar & Grill) filed its lawsuit against Gulfstream, essentially claiming the actions taken by Gulfstream to defend its Easement rights had caused damages. The claims presented by the Marina Bar & Grill are precisely the type which Palmetto warranted to defend when it purchased the Parking Lot property in August of 2014. As such, your client is obligated to immediately tender payment for the defense of Gulfstream's Easement rights. Because Gulfstream had to hire counsel to defend its Easement rights, your client is obligated to immediately tender payment for the defense of same.

Fourth, during the summer of 2017, Palmetto secretly commissioned new plans to build a different building upon the Parking Lot, and obtained a building permit from Georgetown County on or around September 15, 2017. The new plans also include a larger building with a restaurant larger than Gulfstream. The proposed building also would be placed directly on top of the north end of the Parking Lot. Once again, Gulfstream was forced to petition the Zoning Board of Appeals for Georgetown County to defend its Easement rights. Palmetto's second submission of plans under cover of darkness is a direct breach of the warranty in each Easement, and as such, your client is obligated to immediately tender payment for the defense of Gulfstream's Easement rights.

ELECTRONICALLY FILED - 2018 Apr 30 11:46 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Gulfstream has selected preferred Counsel for the defense of its rights under the Easement. Palmetto must now honor the above-referenced warranty and defense obligations without delay. We also ask that you provide confirmation that Gulfstream will be fully indemnified as to all future costs of the defenses set forth above, as well as the costs of any appeals. Your client's immediate attention to these matters is required. We thank you in advance for your cooperation so that additional and further legal action will not be required.

Sincerely,

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

George W. Redman, III

GWR:kel
cc: Client

{00400293.DOCX / }

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EXHIBIT B

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ELECTRONICALLY FILED - 2018 Apr 30 11:46 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2017 Dec 29 1:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF GEORGETOWN	)	Civil Action No. 2016-CP-22-00961
The Gulfstream Café, Inc.,	)	
Plaintiff,	)	
v.	)	**PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT**
J. Mark Lawhon, Individually, Palmetto Industrial Development, LLC, and Marlin Quay Marina Bar & Grill, LLC,	)	
Defendants.	)	

Plaintiff, The Gulfstream Café, Inc., by and through its undersigned attorneys, hereby moves pursuant to Rule 15 of the South Carolina Rules of Civil Procedure for an Order amending its Complaint in the above-captioned case to add additional claims.

Rule 15(a) of the South Carolina Rules of Civil Procedure, states that "a party may amend his pleading... by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15 SCRCP, which governs amendment of pleadings, strongly favors amendments and the court is encouraged to freely grant leave to amend. *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005). It is well established that a motion to amend a pleading is addressed to the sound discretion of the trial judge. *Duncan v. CRS Sirrine Eng 'rs*, 337 S.C. 537, 524 S.E.2d 115

(Ct. App. 1999); See *Berry v. McLeod*, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997) (Courts have wide latitude in amending pleadings). Prejudice exists only where there is a

"lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." *City of North Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 232-33, 599 S.E.2d 462, 465 (Ct. App. 2004).

First, Plaintiff's proposed Amended Complaint is proper because discovery is ongoing in this case. Both parties have requests for production of documents outstanding. Additionally, multiple depositions set to take place in February 2018. Discovery into the claims included in Plaintiff's Amended Complaint can be conducted simultaneously with the outstanding discovery, such that the Amended Complaint will not result in a delay of the case.

Second, Defendants will not be prejudiced by Plaintiff's Amended Complaint. This amendment adds additional causes of action that Defendants likely have been aware of since the filing of the Complaint but are proposed to be added in an abundance of caution in light of recent events described in the proposed Amended Complaint. Defendants have been aware of Plaintiff's claims for interference with its property rights granted by certain Easements since before the original Complaint was filed. Additionally, the Easements in question expressly state warranties and a duty to defend Plaintiff against encroachment, and Defendants have undoubtedly been aware of these obligations since the purchase of the property in 2014. Plaintiff's claims relating to Defendants' duty to warrant and defend the easement are now ripe because Defendants have denied Plaintiff's request for Defendant to warrant and defend the Easement. Plaintiff asserts an additional claim of equitable indemnity as to the fees and costs of this action based on the continuing bad faith

ELECTRONICALLY FILED - 2018 Apr 30 11:46 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2017 Dec 29 1:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

behavior of Palmetto, and this claim is an equitable alternative remedy to the proposed duty to defend claim. Defendants knew or should have known about these causes of action.

Further, Rule 15 allows for such claims to be brought. The proposed additional facts and claims do not present issues that are new or novel to this action as all of the claims arise out of the same facts, circumstances, transactions, and/or occurrences that gave rise to the original action. Defendants have had ample notice of the issues underlying these claims and had sufficient opportunity to refute them. In addition, Defendants' actions since the commencement of this litigation have given rise to Plaintiff's belief that these additional proposed claims have even greater merit. Rule 15(d) states that the court may permit a party to "... serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of

the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a cause of action or defense." In this case, Defendants' actions throughout this litigation provide additional evidence and cause for bringing the proposed claims.

Plaintiff's proposed amendments are necessary for the just and equitable pursuit of and trial of this action. Allowing Plaintiff leave to make these amendments is in accord with both the letter and spirit of Rule 15 SCRCP, and will cause no prejudice to the Defendants in this case.

The undersigned counsel for Plaintiff, pursuant to Rule 11, South Carolina Rules of Civil Procedure, hereby certifies that he has communicated with opposing counsel and has

ELECTRONICALLY FILED - 2018 Apr 30 11:46 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2017 Dec 29 1:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

attempted in good faith to resolve the matter contained in this motion, but no consent was provided.

Respectfully submitted,

BELLAMY, RUTENBERG, COPELAND, EPPS, GRAVELY & BOWERS, P.A.
Post Office Box 357
Myrtle Beach, SC 29578-0357
(843) 448-2400
Attorneys for Plaintiff

/s/ George W. Redman, III, Esq.
George W. Redman, III
SC Bar No. 72365

BLOOM SUGARMAN, LLP
977 Ponce de Leon Avenue, NE
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(404) 577-7710
Attorneys for Plaintiff
Pro Hac Vice, March 8, 2017

/s/ Simon H. Bloom, Esq., GA Bar #064298
Simon H. Bloom

Myrtle Beach, South Carolina

December 29, 2017

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EXHIBIT C

ELECTRONICALLY FILED - 2018 Apr 30 11:46 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2018 Apr 30 11:46 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2018 Feb 08 9:30 AM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	
Gulfstream Café, Inc.,	)	Case No.: 2016-CP-22-00961
Plaintiff,	)	
vs.	)	
J. Mark Lawhon, individually, and Palmetto Industrial Development, LLC	)	ORDER
Defendants.	)	

This matter comes before me on February 1, 2018, upon Plaintiff Gulfstream Café, Inc.'s Motion for Protection from Discovery, Defendant J. Mark Lawhon's Motion for Protection from Discovery, Plaintiff Gulfstream Café, Inc.'s Motion to Amend, Defendant J. Mark Lawhon's Motion to Produce Legal Services Agreements and Billings, and Defendant J. Mark Lawhon's Motion to Compel. At the hearing, Plaintiff Gulfstream Café, Inc. (hereafter "Plaintiff") was represented by Simon Bloom, Esquire, and others. J. Mark Lawhon, individually, and Palmetto Industrial Development, LLC (hereafter "Defendants") were represented by Henrietta Golding, Esquire, and others.

After careful consideration of these matters, the Court finds and concludes the following:

1. Plaintiff's Motion for Protection from Discovery is denied. Plaintiff is to produce to Defendants the 15 page document without redactions and notebook used by Plaintiff's designee, Mr. Greenbaum, during his deposition.
2. Defendant's Motion for Protection from Discovery is denied.
3. Plaintiff's Motion to Amend is denied.

4. Defendant's Motion to Produce Legal Services Agreements and Billings is granted and was consented to by the parties during the hearing. Same is to be provided with redactions for those portions protected by attorney-client privilege.
5. Defendant's Motion to Compel is denied.

Furthermore, a scheduling order will be prepared and electronically filed by Mr. Bloom to reflect the following dates:

1. Depositions of Experts by April 30, 2018.
2. Discovery will be completed by May 15, 2018.
3. All dispositive motions will be filed by May 15, 2018.
4. This case is set as the #2 date certain trial the week of June 4, 2018.

IT IS SO ORDERED.

The Honorable William H. Seals, Jr.
15th Judicial Circuit

February ___, 2018.
Georgetown, South Carolina.

ELECTRONICALLY FILED - 2018 Apr 30 11:46 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
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ELECTRONICALLY FILED - 2018 Apr 30 11:46 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2018 Feb 08 9:30 AM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

Georgetown Common Pleas

Case Caption: Gulfstream Cafe Inc VS J Mark Lawhon , defendant, et al

Case Number: 2016CP2200961

Type: Order/Other

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

Electronically signed on 2018-02-08 09:18:13 page 3 of 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO.: 2018-CP-22-00199
The Gulfstream Café, Inc.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**DEFENDANT'S ANSWER**
	)	
Palmetto Industrial Development, LLC.	)	
	)	
Defendant.	)	

The Defendant Palmetto Industrial Development, LLC answering the Complaint would respectfully show and allege onto this Honorable Court as follows:

FIRST DEFENSE

1. Each and every allegation not hereinafter admitted, modified or qualified is denied and strict proof demanded thereof.

2. The allegations of Paragraphs 1 and 2 are admitted.

3. The allegations of Paragraphs 3, 4, 5, 6, 7, 8, and 9 are denied and strict proof demanded thereof.

4. In answering Paragraphs 10 and 11, the allegations in Paragraphs 10 and 11 are admitted except the easements referenced therein are not "Gulfstream Easements" but rather joint non-exclusive easements with the Defendant.

5. The allegations of Paragraph 13 are admitted except that the non-exclusive easement is a joint nonexclusive easement, not only to Gulfstream but also to this Defendant.

6. In answering Paragraphs 12, 14, 15, and 16, the applicable easements speak for themselves and therefore reference is craved to said easements.

ELECTRONICALLY FILED - 2018 Aug 07 4:00 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

7. The remaining allegations, and claims, in the Complaint are denied and strict proof demanded thereof.

SECOND DEFENSE

8. The allegations of the First Defense are incorporated herein and made a part and parcel of the Second Defense.

9. The Defendant asserts waiver, estoppel and laches as affirmative defenses which bar any relief to the Plaintiff.

THIRD DEFENSE

10. The allegations of the First and Second Defense are incorporated herein and made a part and parcel of the Third Defense.

11. The Defendant asserts the applicable statute of limitations as a complete defense.

FOURTH DEFENSE

12. The allegations of the First, Second and Third Defense are incorporated herein and made a part and parcel of the Fourth Defense.

13. The Defendant asserts unclean hands on the part of the Plaintiff as a complete defense.

FIFTH DEFENSE

14. The allegations of the First, Second, Third, and Fourth Defense are incorporated herein and made a part and parcel of the Fifth Defense.

15. Any and all claims asserted by the Plaintiff should have been timely asserted in the Plaintiff's Civil Action No.: 2016-CP-22-00961. The Plaintiff, having failed to timely assert any similar claim as alleged in this action in the aforesaid 2016 civil action, is barred in asserting such claims.

ELECTRONICALLY FILED - 2018 Aug 07 4:00 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

SIXTH DEFENSE

16. The allegations of the First, Second, Third, Fourth and Fifth Defense are incorporated herein and made a part and parcel of the Sixth Defense.

17. The Defendant asserts res judicata, collateral estoppel, and issue preclusion as complete defenses.

SEVENTH DEFENSE

18. The allegations of the First, Second, Third, Fourth, Fifth and Sixth Defense are incorporated herein and made a part and parcel of the Seventh Defense.

19. The Plaintiff failed to timely notify the Defendant of any alleged duty to defend and indemnify, and as a result of such failure, the Plaintiff's claims are barred.

WHEREFORE, having answered the Complaint, the Defendant prays that the same be dismissed, for the costs of this action, and for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

McNair Law Firm, P.A.

s/Henrietta U. Golding
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Attorneys for the Defendant Palmetto Industrial Development, LLC

Myrtle Beach, South Carolina

August 7, 2018

1851013v1

ELECTRONICALLY FILED - 2018 Aug 07 4:00 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA **COUNTY OF GEORGETOWN** The Gulfstream Café, Inc., Plaintiff, v. Palmetto Industrial Development LLC, Defendant.	))))))))))))))	**IN THE COURT OF COMMON PLEAS** **COUNTY OF GEORGETOWN** Civil Action No. 2018-CP-22-00199 **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

PLEASE TAKE NOTICE that Plaintiff The Gulfstream Café, Inc. ("Gulfstream"), by and through its undersigned attorneys and pursuant to South Carolina Civil Procedure Rule 56, hereby moves this Court for summary judgment in its favor against Defendant Palmetto Industrial Development, LLC ("Defendant") with respect to its claims for declaratory relief and breach of warranty.

I. Introduction

This case is ideally suited for early disposition on summary judgment. The central legal issue is the interpretation of a warranty provision in an easement agreement between the parties, and matters of contract interpretation are the province of the Court. This warranty provision is critically important because it unconditionally requires Defendant to pay attorney's fees and defense costs associated with defending attacks against Gulfstream's easement. It says that the grantor binds itself and its successors and assigns to warrant and forever defend the easement unto Gulfstream Cafe, its successors and assigns, against itself and its successors and assigns and all others whomever lawfully claiming, or to claim the same or any part thereof. Once the Court properly construes the warranty provision, both of Gulfstream's claims are easily resolved, because the

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

undisputed facts show that: (1) the warranty provisions require that Defendant warrant and defend Gulfstream through payment of attorney's fees and costs; and (2) Defendant refused to honor that obligation. Accordingly, Gulfstream is entitled to summary judgment on both claims it has asserted.

II. Factual Background

A. Gulfstream Has an Express Easement for the Full and Free Use of the Parking Lot Adjacent to The Gulfstream Café, and Defendant Agreed to Warrant and Defend the Easement.

Since 1986, Gulfstream has owned and operated the "Gulfstream Café," located in the Marlin Quay Marina. (November 13, 2018 Affidavit of Edward Cribb, Jr. ("Cribb Aff.") at ¶ 1.)[1] At the time Gulfstream opened the restaurant, the Marlin Quay Marina Company owned the adjacent lot, which included a small building, the "Marina Club & Snack Bar" (the "Snack Bar"), and a parking lot (the "Parking Lot"). (Id. at ¶ 4.)

The Marlin Quay Marina Company expressly granted Gulfstream a perpetual, appurtenant easement to utilize the Parking Lot, and the easement was publicly recorded in the Georgetown County Deed Book 234 at Pages 790, 797, and 803 (the "1986 Easement".)[2] Specifically, the 1986 Easement grants Gulfstream, including its successors and assigns:

> a non-exclusive easement appurtenant to the premises of the Grantee hereinafter described for the full and free right of ingress and egress over and across the following described property of the Grantor, together with the rights of vehicular and pedestrian access and also for the purpose of maintenance, repair, alteration and/or improvements to the Grantee's hereinafter described property.

---

[1] A true and correct copy of the Cribb Affidavit is attached hereto as Exhibit 1.

[2] A true and correct copy of the Agreement for Easement at Book 234 Page 790 is attached hereto as Exhibit 2; a true and correct copy of the Agreement for Easement at Book 234 Page 797 is attached hereto as Exhibit 3; a true and correct copy of the Agreement for Easement at Book 234 Page 803 is attached hereto as Exhibit 4.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

(Exhibits 2, 3, & 4)(emphasis added.) Except for the portion of the property that is occupied by the Snack Bar and an unrelated sign easement, the 1986 Easement by its terms encumbers all of Lots 3, 4, and 5 of Tract 3, as shown on the Survey of Marlin Quay Marina Horizontal Property Regime, Garden City Point (the "Plat"). (Id.)[3]

The 1986 Easement expressly contemplates that "Grantor will primarily utilize the premises during the daytime and the Grantee will primarily use these premises in the evening." (Exhibits 2, 3, & 4.) The 1986 Easement also includes a warranty provision requiring that Grantor warrant and forever defend Gulfstream. (Id.) Gulfstream needed the above-referenced easement rights to the Parking Lot in order to run the restaurant. (Cribb Aff. ¶ 7.) The easement was necessary to provide adequate parking for the Gulfstream Café. (Id.)

In 1990, the Marlin Quay Marina Corporation again expressly granted a perpetual easement for the use of the Parking Lot to Gulfstream, its successors and assigns, as set forth in that certain Agreement of Easement and Consent to and Joinder of Mortgagee to Granting of Easement (the "1990 Easement") (collectively with the 1986 Easement, the "Gulfstream Easement" or the "Easement") publicly filed with Georgetown County in Deed Book 382, Pages 217 to 226 (attached hereto and incorporated herein verbatim as Exhibit 6.)

The 1990 Easement includes a substantially similar warranty provision to the 1986 Easement, requiring that Defendant warrant and defend Gulfstream. This warranty provision states:

> And the said Marlin Quay Marina Corporation does hereby bind itself and its successors and assigns, to warrant and forever defend, all and singular,

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[3] The Easement expressly incorporates the Plat by reference. A true and correct copy of the Plat at Book 6 Page 214 is attached hereto as Exhibit 5.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

> the said easement unto the said Gulfstream Cafe, its successors and assigns, against itself and its successors and assigns and all others whomever lawfully claiming, or to claim the same or any part thereof.

(Id.)

Mr. Edward Cribb, the then President of Gulfstream who signed both Gulfstream Easements, understood the warranty provisions to mean that Grantor would pay for Gulfstream's defense, including attorneys' fees and costs, if the use of the Parking Lot and/or Gulfstream's easement rights were challenged. (Cribb Aff. ¶ 10.) Gulfstream would not have signed the Easements if they did not include the warranty provisions. (Id. at ¶ 9.) During the negotiation of the Easements, it was clear the Grantor had the same understanding as Mr. Cribb. (Id. at ¶ 11.)

In 1996, Mr. Cribb sold Gulfstream, along with its easement rights. (Id. at ¶ 18.) In 2014, Defendant purchased the Marlin Quay Marina Property subject to the Gulfstream Easement, including the provisions requiring Defendant to warrant and forever defend the Gulfstream Easement. (Warranty Deed.)[4]

B. Defendant Has Made Numerous Claims Against the Easement.

In November 2016, Defendant demolished the Snack Bar in order to build a new building. (Excerpts of Transcript of Record Testimony of James Mark Lawhon ("Lawhon Trans."), June 7, 2018 at 44:20-45:3.)[5] Since that time, Defendant has made multiple claims against the easement:

- Defendant placed construction containers in parking spaces during its demolition of the Snack Bar (Id. at 46:3-47:19.)

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[4] A true and correct copy of the warranty deed conveying the Marlin Quay Marina to Defendant is attached hereto as Exhibit 7.

[5] A true and correct copy of excerpts of the transcript of Lawhon's testimony are attached hereto as Exhibit 8.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

- Defendant erected a construction fence around the Parking Lot (Id. at 50:7-52:18.)
- A U.S. Foods delivery driver told J. Mark Lawhon ("Lawhon"), owner of Defendant, that Lawhon was blocking the driver's ability to deliver food to Gulfstream (Id. at 166:4-171:20.)
- Lawhon's son also called the sheriff on two separate occasions on workers performing work on the Gulfstream Café, once on window washers and once on painters. The Court held Defendant in criminal contempt for calling the police (Id. at 154:15-162:15.)

Defendant also attempted to permanently claim portions of the Easement by locating part of the new building directly on the Easement. Defendant tried to build a large, L-shaped building that would run all the way to Waccamaw Drive and cover the parking lot before connecting to the Gulfstream Café by a boardwalk. (Lawhon Trans. at 37:16-21, 41:23-42:19, 43:6-17.) Defendant later changed the plans for its building (hereinafter "Building 2.0"). (Id. at 79:13-80:6.) Defendant then tried to build Building 2.0 on property also subject to the Gulfstream Easement. (Transcript of Record Testimony of Robert L. Castles, Jr. ("Castles Trans."), June 6, 2018 at 13:6-9.)[6] Every square foot of building that is built on the easement area necessarily eliminates easement rights.

Defendant also attempted to substantially increase the parking burden placed on the Easement. For instance, Defendant planned to serve a full-scale dinner at night at the new restaurant. (Lawhon Trans. at 140:25-141:2.) And Mr. Lawhon wanted the new

[6] A true and correct copy of the Castles Transcript is attached hereto as Exhibit 9.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

restaurant to include nightlife as well. (Id. at 142:15-19.) The plans for Building 2.0 had an occupancy limit of 359 people, and Building 2.0 would include 8500 square feet, compared to 4500 square feet for the original Snack Bar. (Id. at 142:10-14, 143:3-12.)

On November 16, 2016, Gulfstream filed suit to stop Defendant's encroachment on the easement area. (Court of Common Pleas, Fifteenth Judicial Circuit, County of Georgetown, South Carolina, Civil Action No. 2016-CP-22-00961, against Defendant and Lawhon (the "Injunction Lawsuit")). (Complaint, Civil Action No. 2016-CP-22-00961.)[7] Gulfstream brought claims against Defendant for: (1) intentional interference with easement rights, (2) trespass and nuisance, and (3) forcible entry and detainer. Defendant answered and brought its own counterclaims against Gulfstream for: (1) forcible entry and detainer, (2) trespass, (3) declaratory judgment, (4) promissory estoppel, and (5) breach of easement. (Defendants' Amended Answer and Counterclaims.)[8] Gulfstream sought injunctive relief prohibiting Defendant from engaging in future interference and damages for Defendant's past instances of interference.

In June 2018, Gulfstream's case against Defendant in the Injunction Lawsuit went to trial. After a week-long trial, the jury returned a verdict for Gulfstream. On the issue of Defendant's past interference with the Gulfstream Easement, the jury found that "[w]e, the jury, by unanimous decision find for the Plaintiff on its claim of interference with its easement." (Verdict Form.)[9] The jury awarded Gulfstream $1,000 in damages. (Id.)

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[7] A true and correct copy of the Complaint is attached hereto as Exhibit 10.
[8] A true and correct copy of Defendants' Amended Answer and Counterclaims is attached hereto as Exhibit 11.
[9] A true and correct copy of the Verdict Form is attached hereto as Exhibit 12.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

After the jury's verdict, Gulfstream moved for a permanent injunction that would: (1) prohibit Defendant from interfering with the Easement, (2) prohibit Defendant from building outside the footprint of the Snack Bar, and (3) prohibit Defendant from operating a full service restaurant at night. The Court partially granted Gulfstream's request, entering a permanent injunction against Defendant. (Form 4 Order, June 12, 2018.)[10] Gulfstream subsequently requested clarification of the Court's order, and the Court issued an amended permanent injunction that prohibited Defendant from denying Gulfstream the rights contained in the Easement and from constructing a building outside the boundaries of the demolished snack bar. (Order Granting Plaintiff's Motion to Alter or Amend Judgment, July 27, 2018.)[11]

C. Gulfstream Tendered the Defense of the Injunction Lawsuit to Defendant, and Defendant Refused to Warrant and Defend Gulfstream.

In December 2017, Gulfstream tendered a "Notice and Demand for Defense and Indemnification" to Defendant, demanding Defendant fulfill its warranty and defense obligations with respect to the lawsuit by paying for the costs, including attorney's fees, of defending against the claims to the Easement. (Correspondence from Mr. George Redman to Ms. Henrietta Golding, December 5, 2017.)[12] In a two-sentence response, Defendant refused to warrant and defend Gulfstream. (Correspondence from Ms. Henrietta Golding to Mr. George Redman, December 12, 2017.)[13]

III. Argument and Authority

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[10] A true and correct copy of the Form 4 Order is attached hereto as Exhibit 13.
[11] A true and correct copy of the July 27, 2018 order is attached hereto as Exhibit 14.
[12] A true and correct copy of Gulfstream's demand is attached hereto as Exhibit 15.
[13] A true and correct copy of Defendant's denial of Gulfstream's demand in attached hereto as Exhibit 16.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

A. Legal Standard

"Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Rule 56, SCRCP; South Carolina Prop. & Cas. Guar. Ass'n. v. Yensen, 345 S.C. 512, 528, 518 (Ct.App.2001). "When ruling on a motion for summary judgment, the trial judge must consider all of the documents and evidence within the record, including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits." Anthony v. Padmar, Inc., 307 S.C. 503 (Ct. App. 1992); Gilmore v. Ivey, 290 S.C. 53 (Ct. App. 1986).

Once the moving party establishes the absence of any evidentiary support for the opponent's case, "the opponent cannot simply rest on mere allegations or denials contained in the pleadings." Bradley v. Doe, 374 S.C. 622, 625, (Ct. App. 2007). Instead, the opponent must present "specific facts" that demonstrate a genuine issue for trial:

> [T]he rule authorizing summary judgment would serve no useful purpose if frivolous proofs were held to create a triable issue. The question on a motion for summary judgment is whether there is anything of substance to be tried. Therefore, it is incumbent upon the court to search the proof to ascertain whether it discloses a real issue, rather than a formal, perfunctory, or shadowy one. The fact that there is a factual dispute is not enough to preclude a summary judgment. The issue must be one which the defendant is entitled to litigate.

Saluda Motor Lines, Inc. v. Crouch, 300 S.C. 43, 46 (Ct. App. 1989) (quoting 73 Am. Jur. (2d) Summary Judgment §27). "Factual statements of the attorneys, whether made during argument or in written briefs or memoranda, ordinarily may not be considered by the court in determining whether a genuine issue of material fact exists." Gilmore, 290 S.C. 53.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

B. Gulfstream is Entitled to Summary Judgment on its Declaratory Judgment Claim.

Gulfstream seeks a declaration that Defendant warrant and defend Gulfstream for claims against the Easement by paying the attorney's fees and costs incurred by Gulfstream in defending against those claims. The plain language of the provision states:

> And the said Marlin Quay Marina Corporation does hereby bind itself and its successors and assigns, ***to warrant and forever defend***, all and singular, ***the said easement unto the said Gulfstream Cafe***, its successors and assigns, ***against itself*** and its successors and assigns and all others whomever lawfully claiming, or to claim the same or any part thereof.

(1990 Easement) (emphasis added).

In interpreting this provision, it is important to recall that an easement is a right to use the land of another for a specific purpose. Kelly v. Snyder, 370 S.C. 561, 572 (Ct. App. 2006). Any denial of the agreed-upon rights represents a claim against the easement. Here, the Easement granted Gulfstream the full and free right to access the parking lot for, among other things, ingress, egress, and vehicular parking. Interference with the Easement by any party prevents Gulfstream from using the land for the specific purpose that was granted to Gulfstream in the Easement, and such interference constitutes a claim against the Easement. The language of the warranty provision plainly indicates that Defendant is bound to warrant and forever defend the Easement unto Gulfstream against all claims, even claims made by Defendant.

The intent of the parties confirms this interpretation of the warranty provision. Gulfstream considered the warranty provision a key component of the Easement and would not have signed the Easement if it had not included the warranty. (Cribb Aff. ¶¶ 9, 15.) Mr. Edward Cribb, the then President of Gulfstream who signed the Gulfstream Easement, understood the warranty provision to mean that Grantor would pay for

Gulfstream's defense, including costs and attorneys' fees, if the use of the Parking Lot and/or Gulfstream's easement rights were challenged. (Id. at ¶¶ 10, 16.) During the negotiations of the Easement, it was clear the Grantor had the same understanding of the warranty provision as Mr. Cribb. (Id. at ¶¶ 11, 17.)

Based on the above common-sense interpretation, the Easement obligates Defendant to warrant and defend the easement from any and all claims made to the easement, including claims asserted by Defendant. This obligation necessarily includes the payment of attorney's fees and costs incurred by Gulfstream in defending against said claims. Gulfstream bargained for this protection and would not have signed the Easement had such warranty language been absent. The Court should grant Gulfstream summary judgment on its declaratory judgment claim.

C. Defendants Breached its Obligation to Warrant and Defend Gulfstream.

Once the Court construes the Easement to require Defendant to warrant and defend Gulfstream, it becomes clear that Gulfstream is entitled to summary judgment on its breach claim. The undisputed facts show that, in the face of claims made by Defendant to the Easement, Gulfstream tendered the defense of the Injunction Lawsuit to Defendant, and Defendant refused to honor its contractual obligations. These elements of Gulfstream's breach of contract claim are supported by the undisputed evidence in the record.

Gulfstream's Complaint in this action points to Defendant's past and future interference as constituting claims subject to the warranty obligations in the Gulfstream Easement. (Complaint ¶ 18-28.) The undisputed evidence shows that Defendant engaged in interference by obstructing the Easement through its placement of construction containers on the Parking Lot and a construction fence around the Parking Lot. (Lawhon

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Trans. at 46:3-47:19, 50:7-52:18.) Defendants also interfered by impeding access of Gulfstream's vendors on multiple occasions. (Id. at 166:4-171:20, 154:15-162:15.) In addition, Defendant attempted to construct a massive building on property subject to the Easement and outside of the footprint of the Snack Bar. (Castles Trans. at 13:6-9-14:3.) Lawhon also testified about Defendant's plans to construct Building 2.0 on the Gulfstream Easement and the building permits and regulatory approvals received by Defendant. (Lawhon Trans. at 79-83.) Defendant's testimony and the jury verdict in the Injunction Lawsuit conclusively establish that Defendant interfered with the easement, and Defendant cannot escape those findings by attempting to re-litigate them in this case.

In addition, the jury expressly found that Defendant interfered with the Gulfstream Easement. (Verdict Form) ("We, the jury, by unanimous decision find for the Plaintiff on its claim of interference with its easement.") The jury's finding of interference was necessary to support its judgment for Gulfstream on Gulfstream's interference claim and to support the damages award of $1,000. Like the jury, the Court found against Defendant, entering a permanent injunction prohibiting Defendant from interfering with Gulfstream's enjoyment of the rights granted in the Easement and preventing Defendant from constructing a building outside the footprint of the demolished Snack Bar. (Order Granting Plaintiff's Motion to Alter or Amend Judgment, July 27, 2018.) Defendant cannot contest the factual basis for Gulfstream's claims in this action, because those issues have already been decided.

Moreover, it is undisputed that Gulfstream tendered its demand for Defendant to warrant and defend Gulfstream by paying for the attorney's fees and costs incurred by Gulfstream in opposing Defendant's past and future interference. (Exhibit 15). Defendant unequivocally refused Gulfstream's demand. (Exhibit 16). Accordingly, the

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

undisputed facts show that Defendant did not warrant and defend Gulfstream for claims it made against the Easement, and summary judgment is proper as to Gulfstream's claim for breach of warranty.

IV. Conclusion

For the reasons stated herein, Plaintiff Gulfstream respectfully requests that the Court grant its Motion for Summary Judgment.

Respectfully submitted,

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Myrtle Beach, South Carolina

February 19, 2019.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF GEORGETOWN	)	Civil Action No. 2018-CP-22-00199
	)	
The Gulfstream Café, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**AFFIDAVIT OF EDWARD CRIBB, JR.**
	)	
Palmetto Industrial Development LLC,	)	
	)	
Defendant.	)	
	)	

Personally appeared before me, Edward Cribb, Jr., who, upon being duly sworn, deposes and states as follows:

1. My name is Edward Cribb, Jr., and I have personal knowledge of all matters set forth herein this Affidavit.
2. In 1986, I was the President of The Gulfstream Café, Inc. ("Gulfstream").
3. Gulfstream purchased the "Gulfstream Café" in 1986, located in the Marlin Quay Marina.
4. When Gulfstream purchased the restaurant, the Marlin Quay Marina Company owned the adjacent lot, which included a small building, the "Marina Club & Snack Bar" (the "Snack Bar"), and a parking lot (the "Parking Lot").
5. The Marlin Quay Marina Company expressly granted Gulfstream a non-exclusive, perpetual, appurtenant easement to utilize the Parking Lot (the "1986 Easement").
6. I signed the 1986 Easement in my capacity as President of Gulfstream.
7. Gulfstream needed the easement rights to the Parking Lot in order to run the restaurant. The easement was essential and necessary to provide adequate parking for the Gulfstream Café.

8. In addition to the easement rights provided, the 1986 Easement included a warranty provision, requiring that Grantor warrant and forever defend Gulfstream.

9. As President of Gulfstream, I would not have signed the 1986 Easement without the warranty provision.

10. Grantor and I intended the warranty provision to mean that Grantor would pay for Gulfstream's attorney's fees and costs incurred in defending or bringing litigation to protect Gulfstream's use of the Parking Lot or its easement rights if those rights were challenged by anyone, including the Grantor itself.

11. During the negotiation and execution of the 1986 Easement, it was clear that Grantor understood this warranty provision to mean the same exact thing as I did.

12. In 1990, the Marlin Quay Marina Corporation again expressly granted and conveyed a perpetual non-exclusive easement for the use of the Parking Lot to Gulfstream, its successors and assigns, as set forth in that certain Agreement of Easement and Consent to and Joinder of Mortgagee to Granting of Easement (the "1990 Easement").

13. I signed the 1990 Easement in my capacity as President of Gulfstream.

14. The 1990 Easement also included a warranty provision:

> And the said Marlin Quay Marina Corporation does hereby bind itself and its successors and assigns, to warrant and forever defend, all and singular, the said easement unto the said Gulfstream Cafe, its successors and assigns, against itself and its successors and assigns and all others whomever lawfully claiming, or to claim the same or any part thereof.

15. As President of Gulfstream, I would not have signed the 1990 Easement without the warranty provision.

16. Like the warranty provision in the 1986 Easement, Grantor and I intended the warranty provision in the 1990 Easement to mean that Grantor would pay for Gulfstream's

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

attorney's fees and costs incurred in defending or bringing litigation to protect Gulfstream's use of the Parking Lot or its easement rights if those rights were challenged by anyone, including the Grantor itself.

17. During the negotiation and execution of the 1990 Easement, it was clear that Grantor understood this warranty provision to mean the same exact thing as I did.

18. In 1996, I sold Gulfstream to the Greenbaum family. The sale of Gulfstream included the easement rights.

FURTHER AFFIANT SAYETH NOT.

EDWARD CRIBB

SWORN TO AND SUBSCRIBED before me
this 13th day of November, 2018.

Nicole M Richardson
Notary Public
My commission expires: 8/25/24

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

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FILED
BETTY L. WILLIAMS
CC&P.O.S.
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GEORGETOWN COUNTY, S.C.
BOOK ____ PAGE ____

STATE OF SOUTH CAROLINA)
) AGREEMENT FOR EASEMENT
COUNTY OF GEORGETOWN)

KNOW ALL MEN BY THESE PRESENTS, that Marlin Quay Marina Corporation, a corporation duly organized pursuant to the laws of the State of South Carolina, for and in consideration of the sum of FIVE ($5.00) DOLLARS and the covenants and conditions expressed herein, paid by The Gulfstream Cafe', Inc., the legal sufficiency and receipt of which is hereby acknowledged, has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto The Gulfstream Cafe', Inc., its Successors and Assigns a non-exclusive easement appurtenant to the premises of the Grantee hereinafter described for the full and free right of ingress and egress over and across the following described property of the Grantor, together with the rights of vehicular and pedestrian access and also for the purpose of maintenance, repair, alteration and/or improvements to the Grantee's hereinafter described property. It is anticipated by the parties that while they will each have joint and non-exclusive use of the area covered by this easement that the Grantor will primarily utilize the premises during the daytime and the Grantee will primarily use these premises in the evening. The property of the Grantor subject to this non-exclusive easement is more fully described as follows:

> ALL those certain piece, parcel or lot of land situate, lying and being in the Garden City area of the County of Georgetown, State aforesaid, and being more particularly shown as Lot 5 of Tract 3 on that certain plat entitled "Survey Of Marlin Quay Marina Horizontal Property Regime, Garden City Point", prepared by Sur-Tech, Inc., dated May 21, 1985, revised November 27, 1985, and recorded in the office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 214, said plat being expressly incorporated herein by reference.
>
> The grantor having acquired the aforedescribed property by virtue of that certain deed from Marlin Quay Company, a S.C. General Partnership dated July 1, 1983, and recorded on September 1, 1983, in the Office of the Clerk of Court for Georgetown County in Deed Book 211 at Page 1141.

The property of the Grantee to which this easement is appurtenant is more fully described as follows:

(See attached Exhibit B)

IT IS EXPRESSLY UNDERSTOOD AND AGREED by Marlin Quay Marina Corporation and the The Gulfstream Cafe', Inc., that as part of the consideration for this conveyance, both parties shall be equally responsible for the maintenance and upkeep of the aforementioned easement area and shall equally share the costs associated with its proper maintenance and upkeep to insure that it is satisfactory for the uses and purposes intended herein.

IT IS FURTHER UNDERSTOOD AND ACKNOWLEDGED by the parties hereto that attached hereto as Exhibit "A" and incorporated herein is a Consent And Joinder of Mortgagee To Granting Of Easement from First Union National Bank which has a mortgage recorded in the Office of the Clerk of Court for Georgetown County in Mortgage Book 225 at Page 209 covering certain real property of the Grantor herein, a portion of which will be utilized for the easement.

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned unto the said The Gulfstream Cafe', Inc., its Successors and Assigns forever.

AND the said Marlin Quay Marina Corporation does hereby bind itself and its Successors and Assigns, to warrant and forever defend, all and singular, the said premises unto the said The Gulfstream Cafe', Inc., its Successors and Assigns, against itself and its Successors and Assigns and all others whomsoever lawfully claiming, or to claim the same or any part thereof.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this 25th day of February, in the year of our Lord One Thousand Nine Hundred and Eighty-six and in the Two Hundred and Tenth Year of the Sovereignty and Independence of the United States of America.

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IN THE PRESENCE OF:

MARLIN QUAY MARINA CORPORATION

By _____
Grover C. Cauthen, Pres.

Attest _____
Jack L. Moore, Asst. Sec.

THE GULFSTREAM CAFE', INC.

By _____
Edward C. Cribb, Jr., Pres.

Attest _____
Grover C. Cauthen, Sec.

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

PERSONALLY appeared before me Alec Elmore and made oath that (s)he saw the within named MARLIN QUAY MARINA CORPORATION, a S.C. Corporation, by its duly authorized President, Grover C. Cauthen and its duly authorized Assistant Secretary, Jack L. Moore, sign, seal and attest, and as their official act and deed, deliver the within written instrument and that (s)he with Hal M. Strange witnessed the execution thereof.

SWORN to before me this 25th day of February, 1986

(SEAL)
Notary Public for South Carolina
My Commission expires: 10/10/87

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

PERSONALLY appeared before me Alec Elmore and made oath that (s)he saw the within named THE GULFSTREAM CAFE', INC., a S.C. Corporation, by its duly authorized President, Edward C. Cribb, Jr., and its duly authorized Secretary, Grover C. Cauthen, sign, seal and attest, and as their official act and deed, deliver the within written instrument and that (s)he with Hal M. Strange witnessed the execution thereof.

SWORN to before me this 25th day of February, 1986

(SEAL)
Notary Public for South Carolina
My Commission expires: 10/10/87

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EXHIBIT "A"

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

CONSENT AND JOINDER OF MORTGAGEE
TO
GRANTING OF EASEMENT

WHEREAS, Marlin Quay Marina Corporation did on the 4th day of December, 1985, execute and deliver a note in the amount of Six Hundred Thousand and No/100 ($600,000.00) Dollars to First Union National Bank and secured the same by a mortgage and security agreement, said mortgage being recorded in the Office of the Clerk of Court for Georgetown County in Mortgage Book 225 at Page 209; and

WHEREAS, the said Marlin Quay Marina Corporation has executed on February 25, 1986, an Easement in favor of The Gulfstream Cafe', Inc., said Easement being located on a portion of the property described in the aforesaid mortgage, said Easement being more fully described as follows:

> A non-exclusive right of ingress and egress over and across all that certain piece, parcel or tract of land situate, lying and being in the Garden City area of the County of Georgetown, State aforesaid, and being more particularly shown as Lot 5 of Tract 3 on that certain plat entitled "Survey Of Marlin Quay Marina Horizontal Property Regime, Garden City Point", prepared by Sur-Tech, Inc., dated May 21, 1985, revised November 27, 1985, and recorded in the office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 214, said plat being expressly incorporated herein by reference.

WHEREAS, said Easement with this Consent and Joinder attached thereto will be recorded simultaneously in the Office of the Clerk of Court for Georgetown County, South Carolina.

NOW, THEREFORE, for and in consideration of the sum of One ($1.00) Dollar, the receipt and sufficiency of which is hereby acknowledged, First Union National Bank does hereby consent and join in the aforesaid Easement from Marlin Quay Marina Corporation to The Gulfstream Cafe', Inc., and all of the covenants, conditions and provisions contained therein for the sole purpose of consenting to the creation by Marlin Quay Marina Corporation of an easement upon a portion of the property upon which First Union National Bank has a lien and subordinates its aforesaid Mortgage to the easement; provided that First Union National Bank makes no representations or warranties as to the validity of the documents creating the easement; said mortgage however, in all other respects to remain in full force and virtue.

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IN WITNESS WHEREOF the parties have caused this instrument to be executed this 19th day of February, A.D., 1986.

IN THE PRESENCE OF:

Amanda Burton

Amanda Burton

James A. McCartney

James A. McCartney

FIRST UNION NATIONAL BANK

By Catherine R. Williamson

Catherine R. Williamson, Vice President

Attest Dennis Harvey

Dennis Harvey, Assistant Secretary

STATE OF NORTH CAROLINA)
)
COUNTY OF WAKE)

PERSONALLY appeared before me Amanda Burton who, on oath, says that (s)he saw the within named FIRST UNION NATIONAL BANK by Catherine R. Williamson and Dennis Harvey _____ its duly authorized officer(s) sign, seal and as its act and deed, deliver the within written instrument and that (s)he with James A. McCartney witnessed the execution thereof.

James A. McCartney

James A. McCartney

SWORN to before me this 19th day of February, 1986

L. Lee Betts (SEAL)

Notary Public for North Carolina

My Commission expires: 8-19-89

NOTARY PUBLIC WAKE COUNTY N.C.

EXHIBIT "B"

All those certain pieces, parcels, areas or tracts of land identified as "Marsh Area, Tract A and Tract B" on that certain "Survey For Marlin Quay Company Garden City Point" dated August 27, 1985, revised January 24, 1986 surveyed and mapped by Sur-Tech, Incorporated and recorded in the Office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 438.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

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BOOK 234 PAGE 795 7.00 NCKS

FILED
BETTY L. WILLIAMS
CCCP&C.S.

APR 2 2 57 PM '86

GEORGETOWN COUNTY, S.C.

BOOK 234 PAGE 790

Deedie M. Wheeler
Deputy clerk

Marlin Quay Marina Corp.

to

Gulfstream Cafe' Inc.

Agreement for easement across lot 5 tract 3 N.C. point tracts A & B marsh area

Recorded this 1st day of April A.D. 19 86
In Book 2 Page 1443
~~Edna C. Turner, Deputy~~
Auditor, Georgetown Co., S. C.

COUNTY PARCEL # 41-129-2 thru 5

M80

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FILED
BETTY L. WILLIAMS
CCCP&G.S.
APR 2 2 57 PM '86
GEORGETOWN COUNTY, S.C.
BOOK ____ PAGE ____

STATE OF SOUTH CAROLINA)
) AGREEMENT FOR EASEMENT
COUNTY OF GEORGETOWN)

KNOW ALL MEN BY THESE PRESENTS, that Marlin Quay Marina Corporation, a corporation duly organized pursuant to the laws of the State of South Carolina, for and in consideration of the sum of FIVE ($5.00) DOLLARS and the covenants and conditions expressed herein, paid by The Gulfstream Cafe', Inc., the legal sufficiency and receipt of which is hereby acknowledged, has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto The Gulfstream Cafe', Inc., its Successors and Assigns a non-exclusive easement appurtenant to the premises of the Grantee hereinafter described for the full and free right of ingress and egress over and across the following described property of the Grantor, together with the rights of vehicular parking and vehicular and pedestrian access and also for the purpose of maintenance, repair, alteration and/or improvements to the Grantee's hereinafter described property. It is anticipated by the parties that while they will each have joint and non-exclusive use of the area covered by this easement that the Grantor will primarily utilize the premises during the daytime and the Grantee will primarily use these premises in the evening. The property of the Grantor subject to this non-exclusive easement is more fully described as follows:

> ALL those certain pieces, parcels or lots of land situate, lying and being in the Garden City area of the County of Georgetown, State aforesaid, and being more particularly shown as Lots 3 and 4 of Tract 3 on that certain plat entitled "Survey Of Marlin Quay Marina Horizontal Property Regime, Garden City Point", prepared by Sur-Tech, Inc., dated May 21, 1985, revised November 27, 1985, and recorded in the office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 214, said plat being expressly incorporated herein by reference.
>
> SAVING AND EXCEPTING THEREFROM that portion of Lot 3 of Tract 3 on said plat occupied by that portion of the building identified as "Marina Club & Snack Bar" which projects from Tract 2 into Tract 3 and also the area identified as Sign Easement on said plat.
>
> The grantor having acquired the aforedescribed property by virtue of that certain deed from Marlin Quay Company, a S.C. General Partnership dated July 1, 1983, and recorded on September 1, 1983, in the Office of the Clerk of Court for Georgetown County in Deed Book 211 at Page 1141.

The property of the Grantee to which this easement is appurtenant is more fully described as follows:

(See attached Exhibit A)

IT IS EXPRESSLY UNDERSTOOD AND AGREED by Marlin Quay Marina Corporation and the The Gulfstream Cafe', Inc., that as part of the consideration for this conveyance, both parties shall be equally responsible for the maintenance and upkeep of the aforementioned easement area and shall equally share the costs associated with its proper maintenance and upkeep to insure that it is satisfactory for the uses and purposes intended herein.

IT IS FURTHER UNDERSTOOD AND ACKNOWLEDGED by the parties that First Union National Bank has a mortgage recorded in the Office of the Clerk of Court for Georgetown County in Mortgage Book 225 at Page 209 covering certain real property of the Grantor herein, a portion of which will be utilized for the easement herein granted. First Union National Bank does not consent and join in the aforesaid easement from Marlin Quay Marina Corporation to The Gulfstream Cafe', Inc., upon that portion of the property upon which First Union National Bank has a lien and does not subordinate its aforesaid Mortgage to this easement. First Union National Bank makes no representations or warranties as to the validity of the documents creating the easement and all aspects of said Mortgage remain in full force and virtue. This easement shall be subordinate to the aforesaid Mortgage.

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned unto the said The Gulfstream Cafe', Inc., its Successors and Assigns forever.

AND the said Marlin Quay Marina Corporation does hereby bind itself and its Successors and Assigns, to warrant and forever defend, all and singular, the said premises unto the said The Gulfstream Cafe', Inc., its Successors and Assigns, against itself and its

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Successors and Assigns and all others whomsoever lawfully claiming, or to claim the same or any part thereof.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this 25th day of February, in the year of our Lord One Thousand Nine Hundred and Eighty-six and in the Two Hundred and Tenth Year of the Sovereignty and Independence of the United States of America.

IN THE PRESENCE OF:

Hal M Strange

Barbara P. Mahaffey

Hal M Strange

Barbara P. Mahaffey

MARLIN QUAY MARINA CORPORATION

By _____
Grover C. Cauthen, Pres.

Attest _____
Jack L. Moore, Asst. Sec.

THE GULFSTREAM CAFE', INC.

By _____
Edward C. Cribb, Jr., Pres.

Attest _____
Grover C. Cauthen, Sec.

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

PERSONALLY appeared before me Barbara P. Mahaffey and made oath that (s)he saw the within named MARLIN QUAY MARINA CORPORATION, a S.C. Corporation, by its duly authorized President, Grover C. Cauthen and its duly authorized Assistant Secretary, Jack L. Moore, sign, seal and attest, and as their official act and deed, deliver the within written instrument and that (s)he with Hal M. Strange witnessed the execution thereof.

Barbara P. Mahaffey

SWORN to before me this 25th day of February, 1986

Hal M Strange (SEAL)
Notary Public for South Carolina
My Commission expires: 10/10/87

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

PERSONALLY appeared before me Barbara P. Mahaffey and made oath that (s)he saw the within named THE GULFSTREAM CAFE', INC., a S.C. Corporation, by its duly authorized President, Edward C. Cribb, Jr., and its duly authorized Secretary, Grover C. Cauthen, sign, seal and attest, and as their official act and deed, deliver the within written instrument and that (s)he with Hal M. Strange witnessed the execution thereof.

Barbara P. Mahaffey

SWORN to before me this 25th day of February, 1986.

Hal M. Strange (SEAL)
Notary Public for South Carolina
My Commission expires: 10/10/87

2019-02-18 Motion for Summary Judgment Exhibit 3

1 Q For Steak-Out?
2 A Yes.
3 Q Excellent. And but you're not going to run this
4 restaurant; are you, the project that we're talking about?
5 A If I have to cook I can cook.
6 MR. BLOOM: That's, Your Honor, that's not my question.
7 THE COURT: All right.
8 A Yes.
9 THE COURT: Listen, listen to the question --
10 A Oh, I'm sorry.
11 THE COURT: -- and then you can fill in. Go ahead.
12 A Yes, if I have to. Anything that's needed I can do,
13 including karaoke.
14 Q I appreciate that. You, you have got your son lined up
15 -- this is his -- going to be his employment to run this
16 project for you and then to run this restaurant; correct?
17 A Yes.
18 Q And he has what experience in running a 85 or 8600 square
19 foot restaurant?
20 A He has worked at restaurants in college. He's worked for
21 me in Steak-Out. He's a very smart boy.
22 Q I don't doubt that, sir, and he's been watching Bar
23 Rescue as well; right?
24 A So do I. It's entertaining.
25 Q And do you plan to serve a full-scale dinner at night in

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

1 A I think they came to everyone. Yes.
2 Q Okay. Jef Kirk and Linda Barnaba?
3 A I'm pretty sure.
4 Q Okay.
5 A Yes. I'm pretty -- either one of them or both of them.
6 Q Okay. Do you recall the final, the third, the third
7 reading before Georgetown Council?
8 A I do.
9 Q Okay. And was there a vote taken?
10 A Yes.
11 Q And what was the vote for approval of a major amendment?
12 A I think unanimous.
13 Q Okay. And after you obtained the ordinance, which we've
14 already shown, did you then get a building permit?
15 A I did.
16 Q Okay. Let me give you what's marked as Defendants' 35.
17 Can you identify Defendants' Exhibit 35?
18 A Yes, ma'am. It appears to be a building permit dated 4-
19 20-18 for my building.
20 Q Okay. And is that a true and accurate copy of the
21 building permit that was issued by the Georgetown County to
22 Palmetto Industrial for construction of the building which are
23 set forth in version 2 plans?
24 A Yes.
25 Q Okay.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

1 also?
2 A I think so.
3 Q Okay. Now, as a result of that lawsuit and stopping
4 everything again, did you make a decision to change how you
5 would get approval for your building, version 2?
6 A Yes.
7 Q And what, what was that decision?
8 A What changed my mind about doing it the way I'm doing it
9 was Mr. Redman did that on the podium at the zoning board and
10 said, "We need a public hearing," and when I talked to Dan, I
11 said, "You know, they can just keep appealing, appealing,
12 appealing, appealing, appealing and my son won't have a job.
13 How can I stop all this nonsense because obviously they don't
14 want anything back there." He said, "Well, you have to go
15 through a major, a major change." Well, I've already went
16 through two minor changes and got approval. So I said, "Fine.
17 If that's what everybody wants in this case, go to the major
18 change."
19 Q And in fact did that procedure go through?
20 A Yes.
21 Q Okay. Do you recall going to the three hearings, I mean,
22 three sessions before the council meeting?
23 A Six, but yeah, the last three, yes.
24 Q Sorry. Six. Did anyone on behalf of Gulfstream Café
25 attend those public hearings?

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

1 A Yes. He was there.
2 Q Okay. Did Jef Kirk or Linda Barnaba make any statements
3 at that hearing on behalf of Gulfstream Café, Inc.?
4 A Yes.
5 Q Okay. Do you recall how Jef Kirk introduced himself to
6 this appeals board?
7 A Yes. He said, "I'm Jef Kirk. I'm the operating manager
8 of the Gulfstream Café."
9 Q Okay. And do you recall how Linda Barnaba introduced
10 herself to the panel?
11 A I believe she said, "I'm Linda Barnaba the director of"
12 whatever she's director of for Gulfstream Café.
13 Q Okay. Did either of them at any time say, "Wait, we're
14 not an agent of Gulfstream Café"?
15 A No.
16 Q Okay. Then was the minor amendment for the version 2 of
17 plans was that approved?
18 A Yeah.
19 Q Was that appeal denied?
20 A The appeal was denied. We, we won.
21 Q And as a result of the appeal being denied, were you sued
22 again?
23 A Yes. Well, somehow. I don't know -- understand the
24 legal thing, but I was -- yeah. Yeah. I was stopped again.
25 Q Okay. And did -- was Georgetown sued in that lawsuit

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

1 side where the old store was and just start over, and just,
2 you know, they didn't want me doing that they should have just
3 told me and I, I would have done this to start off with.
4 Q And in fact, were the new plans implemented and prepared
5 by Steve Goggans?
6 A Yes.
7 Q Okay. And with respect to the new plans, I'll call them
8 version 2, those, those plans, were they then went through the
9 permitting process?
10 A Yes.
11 Q Okay. And the first time was as a they call it a minor
12 amendment?
13 A Yes, ma'am.
14 Q Okay. And when you obtained the approval of a minor
15 amendment, did -- was there a petition or an appeal of that?
16 A Yes.
17 Q Okay. And then with respect to that appeal by
18 Gulfstream, was there a hearing?
19 A A zoning board of appeals hearing.
20 Q Okay.
21 A The second one.
22 Q Okay. Now, who would -- did anyone attend for Gulfstream
23 Café to that zoning board?
24 A Jef Kirk, Linda Barnaba.
25 Q Okay. Did -- and their attorney, George Redman?

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

1 that discussion about hammers?
2 A No. Because it didn't happen.
3 Q Okay. Okay. What was the time period when they went
4 into the building and when she came back out?
5 A Twenty, it was 20 minutes maybe. I -- it, it was, it was
6 short, I mean. Let me see, they walked back up into -- they
7 walked back up the steps to go in. They were standing there
8 at the, at the, at the, you know, at the trashcans. They
9 didn't walk around the trashcans. They walked back up the
10 step. So then she come back out the front way and that's when
11 I saw her walking down the front of the -- in front of
12 Gulfstream to me.
13 Q Okay. Now, as a result of this lawsuit did you or in
14 finding out that Gulfstream was not happy with your plans, did
15 you then change anything in your plans?
16 A I did.
17 Q What did you change?
18 A Well, I talked to Dan Stacy and I talked to my architect,
19 I said --
20 Q Don't, don't say anything --
21 A Oh, okay.
22 Q -- that you talked -- what you said to them.
23 A Okay.
24 Q Just say what did you change and how did you change it?
25 A I decided to take the entire building back over to the

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

1 underneath that building.
2 Q Okay. Now, on this day did -- was there any
3 conversations of how long the fence would be up or anything of
4 that nature, this temporary fence?
5 A Well, sure. Yeah. We, we talked about -- well, two
6 things we talked about as far as temporary goes. He knew on
7 that day, again, you know, once we get everything out of the
8 way with the building and, and make sure everything's secure,
9 we, we were going to haul these things off, the containers
10 off, of course, and this fence we both knew that it was going
11 to be temporary. I mean, he, he said, "Look, is it going to
12 be down by Thanksgiving?" I said, "Absolutely it'll be down
13 by Thanksgiving." You know, we just needed to make sure we
14 direct traffic. We were worried about somebody pulling in
15 through the Gulfstream and driving on through here and a track
16 hoe or something hit them. So Jef was like, "We don't need
17 any lawsuits." "I mean, I agree with you." So we put the
18 fence up.
19 Q Okay. Did you have any more communication with Mr. Kirk
20 on November 4, 5, 6? Do you recall?
21 A I, I don't recall.
22 Q Okay. Do you recall when your next communication was
23 with Mr. Kirk?
24 A He called me I want to say on the, on the 11th, I guess.
25 I think it was the 11th of November and, you know, we said

1 A November 4th me, Chris, Jef and actually Mike Everhart was
2 there also, met on the site. It was during the day like, you
3 know, sun was up. I don't know if it was a morning. It was
4 probably in the morning, and we got out there, walked in the
5 parking lot, and I asked him, "Do you have, you know, what do
6 you think? You know, we need to kind of corral this area. I
7 don't want a piece of rock or something flying, hitting
8 somebody." We were both worried about safety, and we walked
9 through and we decided where we were going to put the fence.
10 He said his only concern was he, he wanted to be able to drive
11 a golf cart or a car underneath the Gulfstream Café, and we
12 put the fence up right where he said he'd need it, and we
13 measured to make sure a car or golf cart could go underneath
14 there.
15 Q Okay. Plaintiff's Exhibit Seven, can we take a look at
16 that, please? Plaintiff's Exhibit Seven, does that show any
17 part of the fence?
18 A Yes, ma'am. You can see the chicken wire on the wood
19 posts there from Waccamaw coming down toward the bulkhead.
20 Q Okay. Now, is that a complete photograph of the fence?
21 A No, ma'am.
22 Q Okay. Was the fence a straight fence or was there any
23 curvature or slant to it?
24 A No. It -- we, we, we had to curve it. I mean, it was --
25 Jef wanted to make sure a golf cart or car could get

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

1 know -- for the seawall, do you know how long -- do you know
2 when they first came there?
3 A Had to be, had to be either on or before November 1st, I
4 guess. I --
5 Q Okay. Now, let's go through November, November 2016.
6 A Yes, ma'am.
7 Q The first of November, 2016, can you sort of take us
8 through your communications and contacts with Jef Kirk with
9 respect to the parking lot?
10 A Well, I know on November 3rd I called Jef and I said,
11 "Look, you know, everything is coming to a, you know, to a
12 head here. We got to, you know, make some decisions," and I
13 said, "Are you going to be there tomorrow," which would be
14 November 4th. I said, "You need to tell us where you want us
15 to put this fence or, you know, help us place this fence."
16 Q Okay. And was that the, the sum and substance of your
17 conversation with him on November 3rd?
18 A Placement of the -- he, he had to be there, he had to be
19 there to tell us where to put this fence or help us, you know,
20 direct where we were going to put this fence.
21 Q Okay. And then tell us what happened November 4th. Is
22 that a Friday?
23 A Yes, ma'am.
24 Q Okay. Tell us what you recall about the placement of the
25 fence on Friday, November 4th?

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

1 empty lot further down the road.
2 Q At that time did you -- in November of 2016, did you have
3 available an empty lot to locate the containers?
4 A Yes.
5 Q Okay. And when you say as soon as we can get a transport
6 company, what does that mean?
7 A Well, you've got to have a special truck. They have to
8 come out and hook up and pull that thing on and, and, you
9 know, take it away. You can't just call a wrecker, you know,
10 or, or a flatbed.
11 Q Okay. You stated just now that the spaces you occupied
12 were designated by Mr. Kirk?
13 A Yes. There was discussion of where to put the
14 containers, and Jef agreed it would be okay to put them there.
15 Q Okay. And did you put the containers in the exact
16 location where Jef Kirk designated?
17 A Yes. I mean, we talked about it. I mean, it was, it was
18 a discussion. Didn't hide anything. We talked about it. We
19 talked about everything.
20 Q Okay. Now, I'm going to switch again to another topic.
21 A Okay.
22 Q I'm, I'm sorry, the seawall construction.
23 A Yes, ma'am.
24 Q Or the seawall work that had to be done. With respect to
25 the seawall work, who was the contractor for the marina

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

1 in freezer being beside and adjacent to your building?
2 A Never.
3 Q And after the -- during these two-week period of time do
4 you recall any communications with Jef Kirk, the two weeks
5 that the -- that your building was being emptied?
6 A He -- while it was being emptied, we -- I think he and
7 Chris -- well, for me -- with me I called him on the 3rd.
8 Q That's November 3rd?
9 A Yes, ma'am. November 3rd.
10 Q Okay. What I was getting at, Mr. Lawhon, was with
11 respect to the location of the containers once they were
12 filled up, where were those containers put?
13 A They were placed along Waccamaw Drive.
14 Q Okay. And were they placed on any parking spaces?
15 A Yes. Right where Jef told us to put them.
16 Q Okay. When did Jef tell you to put the containers on the
17 parking spaces?
18 A That information was given about two weeks, a week and a
19 half, two weeks before we started tearing the building because
20 we had to take the stuff out the building.
21 Q Okay. And what did you tell him about how long the
22 containers would be located at -- on the parking spaces by
23 Waccamaw Road?
24 A Just as soon as we could get them loaded and we could get
25 the transporters back we were going to take them down to an

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

1 commence?
2 A Demolition started, if I remember correctly now, November
3 4th, 5th, somewhere in there.
4 Q Now, before the building was demolished did the, did the
5 building have to be emptied out of furniture, equipment and
6 everything else?
7 A Of course. We had T-shirts to take out. We had
8 equipment. We had all kind of stuff had to come out of that
9 building.
10 Q When did that start, to clean out the building?
11 A A couple of weeks before we started tearing the building
12 down.
13 Q Okay. And those couple of weeks were in October?
14 A Yes, ma'am.
15 Q Okay. And everything that was in the building, where did
16 that go, well, most everything, let me say that?
17 A In containers that we had.
18 Q Okay. And those containers, were those containers
19 located on or near the, the building?
20 A Yes, ma'am.
21 Q Okay. And where were those containers located?
22 A From the building to the road is where we had our
23 containers and freezer.
24 Q Okay. Now, prior to November 1, 2016, did Gulfstream at
25 any time ever object to the containers and the, and the walk-

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

1 approximately where I thought the building was going to go. I
2 don't, I don't, I don't think so. I mean, I told him
3 everything that, you know, we -- where this wall was going to
4 go, where the T-shirts going to go, all that stuff inside the
5 building we didn't really talk about that, but we, we talked
6 about the boardwalk, and we talked about the building going
7 down to the bulkhead and we talked about the building being
8 raised. We talked about re-paving the parking lot. We
9 talked about rebuilding the cement. We just talked about a
10 lot of things. It was no secret to him what we were going to
11 do.
12 Q I think Mr. Kirk testified that, that the, the
13 information with respect to the building or the knowledge of
14 the building, the employees and the community, the local
15 community, that was a topic in the local community in 2015;
16 was it not?
17 A Everybody knew.
18 Q Okay.
19 A Everybody.
20 Q Okay. When, in fact, did you make a decision to demolish
21 the building, the Marlin Quay building?
22 A After Steve Goggans was -- after really Steve Goggans was
23 employed. He made a recommendation that the building was just
24 too, too far gone.
25 Q With respect to when did -- what -- when did demolition

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

1 A November the --
2 Q The 17th of 2016?
3 A Yes, ma'am.
4 Q What exhibit number, is that Plaintiff's Exhibit Number --
5 MR. BLOOM: Four.
6 Q -- Number Four. I just want to pull that up on the screen
7 so the jury can see that. Well, the highlighted area doesn't
8 show the L-shaped, but was that your concept as far as the
9 location of part of the proposed building?
10 A Yes, ma'am. It went down the bulkhead the --
11 Q Okay.
12 A -- where the water is.
13 Q Okay. And what -- how was there going to be a connection
14 with Gulfstream?
15 A It would connect kind of right where you see the gangplank
16 there at, at the -- where the old building was on the
17 corner.
18 Q Okay. Once you, you had the concepts and the ideas and
19 the renditions that you were working on with Mr. Goggans, did
20 you ever have any issue with confidentiality of the actual
21 building plan?
22 A When I had what -- say that again. I'm sorry.
23 Q I'm talking about your discussions with, with regard to
24 confidentiality with the actual building plan?
25 A Well, I mean, I told Jef what we were doing, showed him

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

1 L-shaped building?
2 A Yes, ma'am. If you -- okay. Where the bulkhead is,
3 where the water of the marina is, we were going to go down
4 that south to north. When we got near the condos property we
5 were going to go out to the road so it made an L shape like --
6 well, I can't -- it's an L shape. It's, it's an L. Your
7 other question? I'm sorry.
8 Q With respect to that L shape, did part of it -- was part
9 of that plan also to be close to the Gulfstream Café?
10 A Yes. That's the reason Jef and I talked about connecting
11 the, you know, putting the boardwalk out so people could walk
12 in front of the two buildings. It was our plan to do like a
13 MarshWalk, I mean, because they're doing good over there and
14 so we, we said, okay. Where the buildings are situated I kind
15 of showed him in the parking lot where I thought I was going
16 to try to do with it. I didn't really know exactly where it
17 was going to go. I knew it would be close to Gulfstream so we
18 could put that boardwalk between them, and he thought it was a
19 great idea.
20 Q Okay. And over how many months or over what time period
21 did you discuss with Jef Kirk the L-shaped concept and idea or
22 plan?
23 A We started talking about this early 2015, and I didn't
24 stop speaking to Jef until I was served with a lawsuit.
25 Q Okay. And when was that?

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

1 MR. BLOOM: That is another instance of hearsay. I'm
2 sorry to, to rise again, Judge, but she's now asked for
3 communications from Linda Barnaba and George Ogorek, which are
4 additional instances of hearsay, cannot talk about what they
5 said in this courtroom, especially George Ogorek, who is not a
6 witness in this case.
7 THE COURT: All right. You may not set forth anything
8 that Mr. Ogorek said.
9 A Yes, sir.
10 THE COURT: All right. Now, as to Ms. Barnaba, what's
11 your argument, Ms. Golding?
12 MS. GOLDING: She's -- she signed the complaint in this
13 lawsuits as a director of operations. She signed -- which was
14 obviously filed of public record, director of operations for
15 Gulfstream Café, Inc. She, she -- the Plaintiff, she also
16 signed two affidavits in that same capacity for Gulfstream
17 Café, Inc., and of course --
18 THE COURT: All right. Based on that I'm going to allow
19 the questions as to Mr. Kirk and Ms. Barnaba. You may
20 proceed.
21 MS. GOLDING: Thank you, Your Honor.
22 BY MS. GOLDING:
23 Q Now going back to the construction plans, the proposal,
24 the plans that you had with respect to the L-shape, can you
25 just identify again to the jury where you had planned the, the

1 A He told me he did not.
2 Q Okay. Now, who did you then hire?
3 A I hired Steve Goggans.
4 Q Okay. And when did you hire Steve Goggans?
5 A I'm not exactly sure when I, when I hired him. It was
6 after Mr. Victoria told me that he, he couldn't --
7 MR. BLOOM: Your Honor, objection. Hearsay again.
8 THE COURT: All right. Don't, don't relay what Mr.
9 Victoria said, please.
10 Q But did you know Steve Goggans when you hired him?
11 A No.
12 Q Okay. At that point in time when Mr. Goggans was hired
13 what information did you have as to any positions he occupied
14 in Georgetown County?
15 A I just knew he was an architect.
16 Q Okay. After you hired Mr. Goggans and he started drawing
17 plans for you, did you have any discussions with Jef Kirk
18 about your ideas and your plans?
19 A Yes. In all those many conversations I had with Jef Kirk
20 the concept that I envisioned was having an L-shaped building
21 that ran along the bulkhead and out to Waccamaw, and in
22 initial conversations, once I retained an architect, I knew I
23 had to go up because of FEMA, that we couldn't put it back on
24 the ground, which, you know, it's just the rules, and I, I
25 would -- we would talk about stuff like that, and one of the

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF GEORGETOWN) 2016-CP-22-00961

The Gulfstream Café, Inc.,	)	
	)	
Plaintiff,	)	Transcript of Record
	)	
vs.	)	Testimony of
	)	
J. Mark Lawhon, Individually, and	)	James Mark Lawhon
Palmetto Industrial Development,	)	
LLC,	)	June 7, 2018
Defendants.	)	

B E F O R E:

Honorable Steven H. John
Georgetown County Courthouse
Georgetown, South Carolina

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

Simon H. Bloom, Esquire
Adam D. Nugent, Esquire
George W. Redman, III, Esquire
Attorneys for Plaintiff

Henrietta U. Golding, Esquire
John Connell, Jr., Esquire
Attorneys for Defendants

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

GEORGETOWN COUNTY PARCEL

Instrument	Book	Page
201400007290	2421	273

#41-0129-002-00-00
41-0128-032-61-00
41-0128-032-61-55
41-0128-032-61-56
41-0128-032-61-57
41-0128-032-61-58
41-0128-032-61-59 envelope
41-0128-032-61-60 142205 McClain
41-0128-032-61-61
41-0128-032-61-62
41-0128-032-61-63
41-0128-032-61-64
41-0128-032-61-65
41-0128-032-61-66
41-0128-032-61-67
SPE

201400007290
Filed for Record in
GEORGETOWN SC
WANDA PREVATTE, REGISTER OF DEEDS
08-21-2014 At 01:42:27 pm.

DEED	13.00
STATE TAX	2080.00
COUNTY TAX	880.00

Book 2421 Page 267 - 273

Wanda J. Prevatte

RECORDED THIS DATE

BRIAN D. SHULT

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA)
) **AFFIDAVIT**
COUNTY OF GEORGETOWN)

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this affidavit and I understand such information.

2. The property being transferred is **Marlin Quay Marina, Garden City, SC** , bearing various **Georgetown** County Tax Map Numbers 41-0129-002-00-00, 41-0128-032-61-00, 41-0128-032-61-55, 41-0128-032-61-56, 41-0128-032-61-57, 41-0128-032-61-58, 41-0128-032-61-59, 41-0128-032-61-60, 41-0128-032-61-61, 41-0128-032-61-62, 41-0128-032-61-63, 41-0128-032-61-65, 41-0128-032-61-66, & 41-0128-032-61-67, was transferred by **Reel Crazy Charters, Inc.** to **Palmetto Industrial Development, LLC** on **August** 20 **, 2014**.

3. Check on of the following. The deed is:

   a. X subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth $800,000.00.
   b. _____ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
   c. _____ exempt from the deed recording fee because (See Information section of affidavit): _____. (If exempt, please skip items 4-7, and go to item 8 of this affidavit.)

If exempt under exemption #14 as described in the information section of this affidavit, did the agent and principal relationship exist at the time of the original sale and was the purpose of this relationship to purchase the realty? Check Yes ___or No ___.

4. Check on of the following if either item 3(a) or item 3(b) above has been checked (See Information section of this affidavit):
   a. X The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of $800,000.00.
   b. _____ The fee is computed on the fair market value of the realty which is $_____.
   c. _____ The fee is computed on the fair market value of the realty as established for property tax purposes which is $_____.

5. Check Yes _____ or No X ___ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "Yes," the amount of the outstanding balance of this lien or encumbrance is: _____

6. The deed recording fee is computed as follows:
   a. Place the amount listed in item 4 above here: 800,000.00
   b. Place the amount listed in item 5 above here: 0 (If no amount is listed, place zero here.)
   c. Subtract Line 6(b) from Line 6(a) and place result here: 800,000.00

7. The deed recording fee is based on the amount listed on Line 6(c) above and the deed recording fee due is: $2,960.00.

8. As required by Code § 12-24-70, I state that I am a responsible person who was connected with the transaction as: Grantor

I further understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

Reel Crazy Charters, Inc.

By: Charles W. Stone
Its: President

SWORN to before me this
20th day of August, 2014.

Notary Public for South Carolina
My Commission Expires: 3/19/19

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

EXHIBIT "B"

PERMITTED EXCEPTIONS TO DEED

1. Governmental rights of police power or eminent domain unless notice of the exercise of such rights appears in the public records as of the date hereof; and the consequences of any such law, ordinance or governmental regulation including, but not limited to, building and zoning ordinances.

2. Visible and apparent easements and all underground easements, the existence of which may arise by unrecorded grant or by use.

3. Any and all recorded leases, if any, and rights of parties therein.

4. Taxes and assessments for the year of closing and subsequent years.

5. All valid and enforceable covenants, liens, encumbrances, defects, easements and other matters as shown in the public record.

6. Title to that portion of the property lying below the mean high water mark of Murrells Inlet Creek.

7. The rights of control lying in the South Carolina Coastal Council as provided in Title 48, Chapter 39 (Coastal Tidelands and Wetlands Act) of the South Carolina Code of Laws, 1976, as amended.

8. Interests created by, or limitations on use imposed by, the Federal Coastal Zone Management Act or other Federal law or South Carolina Code of Laws, 1976, as amended, Chapter 39, Title 48, amended, or any regulations promulgated pursuant to State or Federal laws.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

(2) on that certain *"Survey of Marlin Quay Marina Horizontal Property Regime, Garden City Point, Georgetown County, South Carolina"* dated May 21, 1985, revised November 27, 1985, surveyed and mapped by Sur-Tech, Incorporated, and recorded in the Office of the Clerk of Court for Georgetown County in Plat Book 6, at Page 214. Said leasehold interest being set forth in that certain *Agreement Of Lease*, dated October 1, 1994, between Council of Co-Owners Marlin Quay Horizontal Property Regime, as Landlord, and Marlin Point Corporation, as Tenant.

ALSO

All those improvements affixed to, constructed on and forming a part of the Property extending from or in the above-described Tract Three (3) and Tract Four (4), EXCLUDING, HOWEVER, ANY INTEREST OR OWNERSHIP IN PROPERTY WHICH WAS HERETOFORE INCLUDED AS COMMON PROPERTY OF THE MARLIN QUAY MARINA HORIZONTAL PROPERTY REGIME IN THE MASTER DEED THEREOF, DATED DECEMBER 9, 1985, OR ANY INTEREST OR OWNERSHIP IN LAND WHICH EXTENDS BEYOND THE MEAN HIGHWATER MARK OF MURRELLS INLET CREEK, OR THE MARINA BASIN AREA, TO WHICH TITLE IS, OR MAY BE, VESTED BY LAW IN THE STATE OF SOUTH CAROLINA AND OVER THE NAVIGABLE PORTION OF WHICH THE UNITED STATES GOVERNMENT RETAINS JURISDICTION, and consisting of buildings, gasoline and fuel pumping facilities presently located within Tracts Three and Four, together with all pipes, lines, storage facilities or other equipment associated with said pumping facilities, together with an easement to such lines, equipment or facilities to allow for the maintenance, repair or replacement thereof, along with the exclusive right, with all appropriate easements, to construct, own, maintain and operate such additional gasoline and/or fuel pumping facilities upon the Property as Grantee may deem appropriate, including, but not limited to, the location of additional gasoline and/or fuel pumping facilities, with all lines, storage facilities, and equipment associated therewith, upon the dock areas. The real property being more particularly shown and described on that certain *"Survey of Marlin Quay Marina Horizontal Property Regime, Garden City Point, Georgetown County, South Carolina"* dated May 21, 1985, revised November 27, 1985, surveyed and mapped by Sur-Tech, Incorporated, and recorded in the Office of the Clerk of Court for Georgetown County in Plat Book 6, at Page 214.

ALSO

Any and all rights, if any, as Sponsor and/or Declarant of the Marlin Quay Marina Horizontal Property Regime as the result of being the successor in interest to the assets of, but not the liabilities of, Marlin Quay Marina Corporation through that certain foreclosure action between *First Union National Bank of South Carolina*, as Plaintiff, and *Marlin Quay Marina Corporation, et al.*, as Defendants, in Judgment Roll No. 91-CP-22-755, Georgetown County records.

All of this being a portion of the identical property conveyed to Reel Crazy Charters, Inc. by deed of Marlin Point Corporation dated December 6, 1996 and recorded December 12, 1996 in Deed Book 737 at Page 199 in the Office of the Register of Deeds for Georgetown County, South Carolina.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

EXHIBIT "A"

PROPERTY DESCRIPTION

ALL AND SINGULAR, all that certain piece, parcel, lot or tract situate, lying and being in Georgetown County, South Carolina, more particularly identified as **TRACT THREE (3)** on that certain *"Survey of Marlin Quay Marina Horizontal Property Regime, Garden City Point, Georgetown County, South Carolina"* dated May 21, 1985, revised November 27, 1985, surveyed and mapped by Sur-Tech, Incorporated, and recorded in the Office of the Clerk of Court for Georgetown County in Plat Book 6, at Page 214, which map is incorporated herein as a part of this description.

ALSO

BOAT SLIP NOS. 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66 and 67 of MARLIN QUAY MARINA HORIZONTAL PROPERTY REGIME (the *"Condominium"*) established pursuant to the South Carolina Horizontal Property Act, Sections 27-31-10, et seq., *South Carolina Code of Laws (Supp. 1984)*, and submitted by Master Deed dated December 9, 1985, and recorded December 10, 1985, in the Office of the Clerk of Court for Georgetown County, South Carolina, in Deed Book 231, at Page 890.

SUBJECT to all of the provisions of said Master Deed, the provisions of the South Carolina Horizontal Property Act and to all other covenants, conditions, easements, restrictions and reservations of record.

TOGETHER with all the appurtenances thereto according to said Master Deed; and **SUBJECT** to all the provisions of the By-Laws of MARLIN QUAY MARINA OWNERS' ASSOCIATION, and to the rights-of-way of record, including, but not limited to, those set out in the Master Deed and the Exhibits thereto.

ALSO

A non-exclusive easement eight (8') feet wide extending across the northwestern portions of **Tract Two (2) and Lot Two (2)** from **Tract Three (3) to Tract One (1)** as is more particularly shown and designated as a shaded area on that certain *"Survey of Marlin Quay Marina Horizontal Property Regime, Garden City Point, Georgetown County, South Carolina"* dated May 21, 1985, revised November 27, 1985, surveyed and mapped by Sur-Tech, Incorporated, and recorded in the Office of the Clerk of Court for Georgetown County in Plat Book 6, at Page 214, for the maintenance, renovation, repair and restoration of the bulkhead and for ingress and egress to adjoining properties. This easement shall be appurtenant to and run with the title to **Lot Three (3) of Tract Three (3)** described above.

ALSO

The following leasehold interest, to wit: All that certain piece, parcel or lot of land situate, lying and being in Georgetown County, South Carolina, designated as **Lot Two (2) and Tract Two**

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AND Grantor does hereby bind itself and its successors and assigns, to warrant and forever defend all and singular the said premises unto the said PALMETTO INDUSTRIAL DEVELOPMENT, LLC, a South Carolina limited liability company, its successors and assigns, forever, in fee simple, against the Grantor's successors and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

WITNESS the execution hereof by Grantor this 20th day of August, 2014.

Signed, Sealed and Delivered
in the Presence of

Witness

Notary

REEL CRAZY CHARTERS, INC.

(SEAL)

By: Charles W. Stone
Its: President

STATE OF SOUTH CAROLINA)
) **PROBATE**
COUNTY OF GEORGETOWN)

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

Witness

SWORN to before me this
20th day of August, 2014.

Notary Public for South Carolina
My Commission Expires: 3/19/19

(SEAL)

Instrument Book Page
201400007290 2421 267

201400007290
Filed for Record in
GEORGETOWN SC
WANDA PREVATTE, REGISTER OF DEEDS
08-21-2014 At 01:42:27 pm.
DEED 13.00
STATE TAX 2080.00
COUNTY TAX 880.00
Book 2421 Page 267 - 273

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Prepared By and Return to:
Rice, MacDonald & Hicks, P.A.
1107 48th Avenue North, Suite 210
Myrtle Beach, SC 29577
File No.: DCH41348

various parcels + Boat slip + easement

(Please do not write above this line – Reserved for Register of Deeds Office)

NO TITLE EXAMINATION PERFORMED BY PREPARER OF THIS INSTRUMENT

STATE OF SOUTH CAROLINA)
) **WARRANTY DEED**
COUNTY OF GEORGETOWN)

KNOW ALL MEN BY THESE PRESENTS, that REEL CRAZY CHARTERS, INC., a South Carolina corporation, in the State aforesaid, for and in consideration of the sum of Eight Hundred Thousand and No/100 ($800,000.00) Dollars, unto it paid by PALMETTO INDUSTRIAL DEVELOPMENT, LLC, a South Carolina limited liability company, in the State aforesaid, the receipt whereof is hereby acknowledged, has granted, bargained, sold and released and by these presents does grant, bargain, sell, and release unto the said PALMETTO INDUSTRIAL DEVELOPMENT, LLC, a South Carolina limited liability company, its successors and assigns, forever, in fee simple, the following described property, to wit:

See attached Exhibit "A" for legal description

This conveyance is made and accepted subject to all matters (the "Permitted Exceptions") set forth in Exhibit "B", attached hereto and incorporated herein by reference.

Grantee(s) Address: 611 West Palmetto Street, Florence, SC 29501

THIS CONVEYANCE IS MADE SUBJECT TO easements and restrictions of record and otherwise affecting the property.

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said PALMETTO INDUSTRIAL DEVELOPMENT, LLC, a South Carolina limited liability company, its successors and assigns, forever, in fee simple.

GEORGETOWN COUNTY PARCEL
see back pg
SPE

10.00 g x m

FILED
BETTY L. WILLIAMS
CCCP & GS

90 JUN -4 PM 12:00

RECORDED
BOOK 382 PAGE 217
Edwards J. Prevatte
Deputy Comp

Marlin Quay Marina Corp

to

Gulfstream Cafe Inc

Recorded this 6th day of June A.D. 1990
In Book ____ Page ____
Doris J. Ulmer Deputy
Auditor, Georgetown Co., S. C.

COUNTY PARCEL # 41-129-5-3
MSO

BOOK 382 PAGE 226

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA)
) PROBATE
COUNTY OF GEORGETOWN)

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named Marlin Quay Marina Corporation, by and through its duly authorized officers, sign, seal and as its act and deed, deliver the within written Agreement of Easement and Consent To and Joinder of Mortgagee to Granting of Easement; and that deponent with the other witnesses whose name is subscribed above witnessed the execution thereof.

SWORN TO before me this
1st day of June, 1990.

Darcy L. Howe (L.S.)
Notary Public for South Carolina
My Commission Expires: 6-9-98

STATE OF SOUTH CAROLINA)
HORRY) PROBATE
COUNTY OF ~~GEORGETOWN~~)

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named The Gulfstream Cafe, Inc., by and through its duly authorized officers, sign, seal and as its act and deed, deliver the within written Agreement of Easement and Consent To and Joinder of Mortgagee to Granting of Easement; and that deponent with the other witnesses whose name is subscribed above witnessed the execution thereof.

Pamela A Brisson

SWORN TO before me this
14th day of May, 1990
~~August, 1989~~

Dorothy Jordan (L.S.)
Notary Public for South Carolina

My Commission Expires: 4-25-96

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA)
) PROBATE
COUNTY OF GEORGETOWN)

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named First Union National Bank , by and through its duly authorized officers, sign, seal and as its act and deed, deliver the within written Agreement of Easement and Consent To and Joinder of Mortgagee to Granting of Easement; and that deponent with the other witnesses whose name is subscribed above witnessed the execution thereof.

Marcia Corbin

SWORN TO before me this
12th day of April, 1990.

Silvia H. Alexander (L.S.)
Notary Public for South Carolina
My Commission Expires: 10-9-1990

WITNESSES:

Marcia Conn

Angela Ann Huskey

(as to First Union National Bank)

FIRST UNION NATIONAL BANK

By: Deborah M. Miller

Its: Vice President

Attest: Lee Allen

Its: Assistant Secretary

COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

And the said Marlin Quay Marina Corporation does hereby bind itself and its successors and assigns, to warrant and forever defend, all and singular, the said easement unto the said Gulfstream Cafe, its successors and assigns, against itself and its successors and assigns and all others whomever lawfully claiming, or to claim the same or any part thereof.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this 12th day of ~~August~~ April, in the year of our Lord One Thousand Nine Hundred and ~~Eighty-Nine~~ Ninety and in the Two Hundred and Thirteenth Year of the Sovereignty and Independence of the United States of America.

IN THE PRESENCE OF:

MARLIN QUAY MARINA CORPORATION
a South Carolina Corporation
(Corporate Seal)

By: [signature]
Its: Pres.

Nancy L. Rowe
(as to Marlin Quay Marina Corporation)

Attest: [signature]
Its:

WITNESSES:

The Gulfstream Cafe, Inc.
a South Carolina Corporation
(Corporate Seal)

By: [signature]
Edward C. Gibb, Jr.
President

Pamela A. Britton
(as to The Gulfstream Cafe, Inc.)

Attest: Jean C. Gibb
Its: Secretary

It is further understood and acknowledged by the parties hereto that the Grantor herein gave a Mortgage in favor of First Union National Bank, said Mortgage having been recorded in the Office of the Clerk of Court for Georgetown County in Mortgage Book 225 at Page 209, and covering certain real property of the Grantor herein, a portion of which real property is covered by the grant of the easement herein (the "Mortgage"). First Union National Bank consents to and joins in the aforesaid grant of easement from Marlin Quay Marina Corporation to The Gulfstream Cafe, Inc. upon and pertaining to that portion of the property covered by the aforedescribed Mortgage lien of First Union National Bank, and First Union National Bank specifically and expressly subordinates its aforesaid Mortgage lien to the easement granted herein; provided, however, that First Union National Bank makes no representations or warranties as to the validity of the documents creating the easement; and provided, further, that said Mortgage in all respects shall remain in full force and effect and be unaffected hereby except as set forth hereinabove;

Together with all and singular the rights, members, hereditaments and appurtenances to the above-described easement belonging, or in anywise incident or appertaining;

To have and to hold, all and singular, the above-described easement and to the said The Gulfstream Cafe, Inc., its successors and assigns forever;

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ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Grantor subject to this non-exclusive perpetual easement is more fully described as follows:

> A non-exclusive right of ingress, egress and vehicular parking over, across and on all those certain pieces, parcels or tracts of land situate, lying and being in the Garden City area of the County of Georgetown, State aforesaid, and being more particularly shown as Lots 3, 4, and 5 of Tract 3 on that certain Plat entitled Survey of Marlin Quay Marina Horizontal Property Regime, Garden City Point, prepared by Surtech, Inc. dated May 21, 1985, revised November 27, 1985, and recorded in the office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 214, said plat being expressly incorporated herein by reference.
>
> The Grantor acquired the aforedescribed property by virtue of that certain Deed from Marlin Quay Company, a South Carolina General Partnership, dated July 1, 1983 and recorded on September 1, 1983 in the office of the Clerk of Court for Georgetown County in Deed Book 211 at Page 1141.

The property of the Grantee to which this easement is appurtenant is more fully described as follows:

> All those certain pieces, parcels, areas or tracts of land identified as Marsh Area, Tract A and Tract B on that certain survey for Marlin Quay Company, Garden City Point dated August 27, 1985, revised January 24, 1986, surveyed and mapped by Surtech, Incorporated and recorded in the office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 438.

It is expressly understood and agreed by Marlin Quay Marina Corporation and the Gulfstream Cafe that as part of the consideration for this conveyance, both parties shall be equally responsible for the maintenance and upkeep of the aforementioned easement area and shall equally share the costs associated with its proper maintenance and upkeep to insure that it is satisfactory for the uses and purposed intended herein.

National Bank desires to consent to and join in the granting of said easement hereinafter described;

NOW THEREFORE, for and in consideration of the sum of One and No/100 ($1.00) Dollar and the covenants and conditions expressed herein, the receipt and sufficiency of which is hereby acknowledged, Marlin Quay Marina Corporation, a corporation duly organized pursuant to the laws of the State of South Carolina (the "Grantor"), has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto The Gulfstream Cafe, Inc., its successors and assigns (the "Grantee") a non-exclusive perpetual easement appurtenant to the premises of the Grantee hereinafter described for the full and free right of ingress and egress on, over and across the following described property of the Grantor, together with the rights of vehicular parking on and vehicular and pedestrian access to, all in accordance with all governmental rules, regulations, ordinances or laws, the premises of the Grantor hereinafter described, and also for the purpose of maintenance, repair, alteration and/or improvements to the Grantee's hereinafter described property. It is anticipated by the parties that while they will each have joint and non-exclusive use at all times of the area covered by this easement that the Grantor will utilize the premises primarily during the daytime regular business hours of Grantor and the Grantee will utilize the premises primarily in the evening regular business hours of Grantee. The property of the

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON IN THE COMMON PLEAS CASE#2018CP2200199

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STATE OF SOUTH CAROLINA)
) AGREEMENT OF EASEMENT AND CONSENT TO AND JOINDER OF MORTGAGEE TO GRANTING OF EASEMENT
COUNTY OF GEORGETOWN)

WHEREAS, Marlin Quay Marina Corporation did on the 4th day of December, 1985, execute and deliver a Note in the amount of Six Hundred Thousand and no/100 ($600,000.00) Dollars to First Union National Bank and secured the same by Mortgage and Security Agreement, said Mortgage being recorded in the Office of the Clerk of Court for Georgetown County in Real Estate Mortgage Book 225 at Page 209; and

WHEREAS, Marlin Quay Marina Corporation granted three (3) easements to The Gulfstream Cafe, Inc. which easements were recorded in the office of the Clerk of Court for Georgetown County in Deed Book 234 at Pages 790, 797 and 803; and

WHEREAS, the parties acknowledge that there may be discrepancies in the rights granted to The Gulfstream Cafe, Inc., and Marlin Quay Marina Corporation and The Gulfstream Cafe, Inc. therefore desire that Marlin Quay Marina Corporation grant a non-exclusive perpetual easement from Marlin Quay Marina Corporation to The Gulfstream Cafe, Inc. for the purposes of ingress and egress and vehicular parking on, over and across that certain real property of Marlin Quay Marina Corporation, which is more fully described herein below, by owners, agents, employees, servants, visitors, guests and invitees of The Gulfstream Cafe, Inc., and Marlin Quay Marina Corporation and The Gulfstream Cafe, Inc. further desire to clarify the intent of the parties in the granting of all of the easements described above, and First Union

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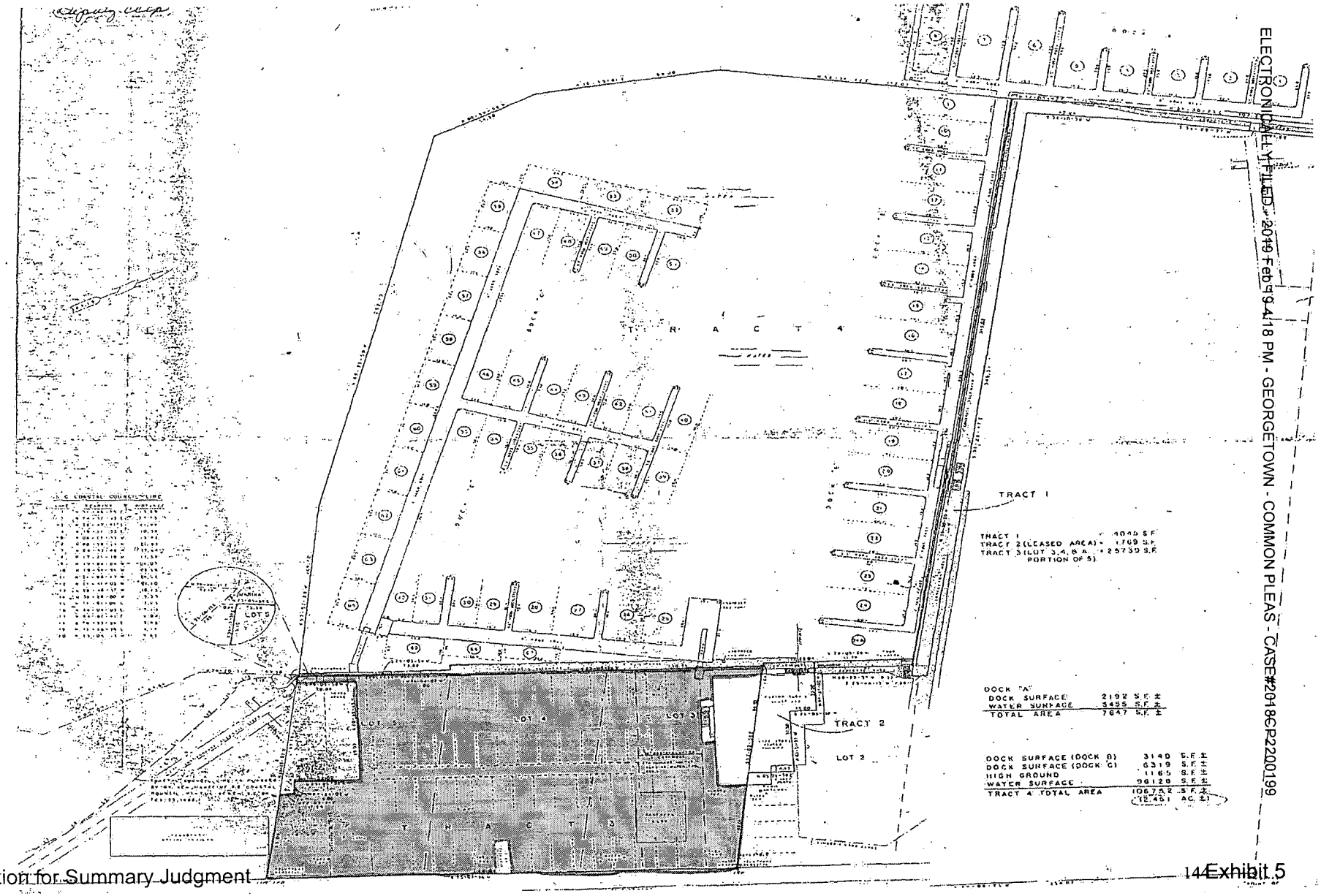

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

PERSONALLY appeared before me Alec Elmore and made oath that (s)he saw the within named THE GULFSTREAM CAFE', INC., a S.C. Corporation, by its duly authorized President, Edward C. Cribb, Jr., and its duly authorized Secretary, Grover C. Cauthen, sign, seal and attest, and as their official act and deed, deliver the within written instrument and that (s)he with Hal M. Strange witnessed the execution thereof.

SWORN to before me this 25th day of February, 1986

(SEAL)
Notary Public for South Carolina
My Commission expires: 10/10/87

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Successors and Assigns and all others whomsoever lawfully claiming, or to claim the same or any part thereof.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this 25th day of February, in the year of our Lord One Thousand Nine Hundred and Eighty-six and in the Two Hundred and Tenth Year of the Sovereignty and Independence of the United States of America.

IN THE PRESENCE OF:

MARLIN QUAY MARINA CORPORATION

By _____
Grover C. Cauthen, Pres.

Attest _____
Jack L. Moore, Asst. Sec.

THE GULFSTREAM CAFE', INC.

By _____
Edward C. Cribb, Jr., Pres.

Attest _____
Grover C. Cauthen, Sec.

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

PERSONALLY appeared before me Alec Elmore and made oath that (s)he saw the within named MARLIN QUAY MARINA CORPORATION, a S.C. Corporation, by its duly authorized President, Grover C. Cauthen and its duly authorized Assistant Secretary, Jack L. Moore, sign, seal and attest, and as their official act and deed, deliver the within written instrument and that (s)he with Hal M. Strange witnessed the execution thereof.

SWORN to before me this 25th day of February, 1986

_____ (SEAL)
Notary Public for South Carolina
My Commission expires: 10/10/87

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The property of the Grantee to which this easement is appurtenant is more fully described as follows:

(See attached Exhibit A)

IT IS EXPRESSLY UNDERSTOOD AND AGREED by Marlin Quay Marina Corporation and the The Gulfstream Cafe', Inc., that as part of the consideration for this conveyance, both parties shall be equally responsible for the maintenance and upkeep of the aforementioned easement area and shall equally share the costs associated with its proper maintenance and upkeep to insure that it is satisfactory for the uses and purposes intended herein.

IT IS FURTHER UNDERSTOOD AND ACKNOWLEDGED by the parties that First Union National Bank has a mortgage recorded in the Office of the Clerk of Court for Georgetown County in Mortgage Book 225 at Page 209 covering certain real property of the Grantor herein, a portion of which will be utilized for the easement herein granted. First Union National Bank does not consent and join in the aforesaid easement from Marlin Quay Marina Corporation to The Gulfstream Cafe', Inc., upon that portion of the property upon which First Union National Bank has a lien and does not subordinate its aforesaid Mortgage to this easement. First Union National Bank makes no representations or warranties as to the validity of the documents creating the easement and all aspects of said Mortgage remain in full force and virtue. This easement shall be subordinate to the aforesaid Mortgage.

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned unto the said The Gulfstream Cafe', Inc., its Successors and Assigns forever.

AND the said Marlin Quay Marina Corporation does hereby bind itself and its Successors and Assigns, to warrant and forever defend, all and singular, the said premises unto the said The Gulfstream Cafe', Inc., its Successors and Assigns, against itself and its

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GEORGETOWN COUNTY, S.C.
BOOK ____ PAGE ____

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

AGREEMENT FOR EASEMENT

KNOW ALL MEN BY THESE PRESENTS, that Marlin Quay Marina Corporation, a corporation duly organized pursuant to the laws of the State of South Carolina, for and in consideration of the sum of FIVE ($5.00) DOLLARS and the covenants and conditions expressed herein, paid by The Gulfstream Cafe', Inc., the legal sufficiency and receipt of which is hereby acknowledged, has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto The Gulfstream Cafe', Inc., its Successors and Assigns a non-exclusive easement appurtenant to the premises of the Grantee hereinafter described for the full and free right of ingress and egress over and across the following described property of the Grantor, together with the rights of vehicular parking and vehicular and pedestrian access and also for the purpose of maintenance, repair, alteration and/or improvements to the Grantee's hereinafter described property. It is anticipated by the parties that while they will each have joint and non-exclusive use of the area covered by this easement that the Grantor will primarily utilize the premises during the daytime and the Grantee will primarily use these premises in the evening. The property of the Grantor subject to this non-exclusive easement is more fully described as follows:

> ALL that certain piece, parcel or lot of land situate, lying and being in the Garden City area of the County of Georgetown, State aforesaid, and being more particularly shown as Lot 5 of Tract 3 on that certain plat entitled "Survey Of Marlin Quay Marina Horizontal Property Regime, Garden City Point", prepared by Sur-Tech, Inc., dated May 21, 1985, revised November 27, 1985, and recorded in the office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 214, said plat being expressly incorporated herein by reference.
>
> The grantor having acquired the aforedescribed property by virtue of that certain deed from Marlin Quay Company, a S.C. General Partnership dated July 1, 1983, and recorded on September 1, 1983, in the Office of the Clerk of Court for Georgetown County in Deed Book 211 at Page 1141.

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BOOK 234 PAGE 802 NCVS

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CCCP&O.S.

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GEORGETOWN COUNTY, S.C.

BOOK 234 PAGE 797.

Geraldine M. Wheeler
Deputy CCCP

Marlin Quay Marina Corp.

+

Gulfstream Cafe' Inc.

easement agreement

Lots 3 + 4 Tract 3

Tracts A + B Marsh Area

Recorded this 4th day of
April A.D. 19 86
in Book 12 Page 1443
Edna E. Turner Deputy
Auditor, Georgetown Co., S.C.

COUNTY PARCEL # 41-179-2 HM-5

1180

EXHIBIT "A"

All those certain pieces, parcels, areas or tracts of land identified as "Marsh Area, Tract A and Tract B" on that certain "Survey For Marlin Quay Company Garden City Point" dated August 27, 1985, revised January 24, 1986 surveyed and mapped by Sur-Tech, Incorporated and recorded in the Office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 438.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

1 this new restaurant?
2 A Yes. We -- and may I, I'm just going to say a little --
3 explain that a little bit. We're going to do exactly what we
4 did before we tore the building down.
5 MR. BLOOM: And Judge, this is exactly what I'm talking
6 about.
7 THE COURT: Well, I appreciate that. I am -- I'm going
8 to allow him -- that was not an expansive answer. I'm
9 allowing that response, also. Thank you.
10 BY MR. BLOOM:
11 Q Okay. Let's talk about that. You're going to have a new
12 kitchen in this new restaurant; aren't you?
13 A Yes.
14 Q It's going to be much better than that old kitchen; isn't
15 it?
16 A Be laid out differently. Yes.
17 Q Are you going to drag the old fryer from the old building
18 into the new building for your fryer?
19 A Yes. There's nothing wrong with it.
20 Q Okay. And are you going to buy any new equipment or
21 you're just going to drag all that old stuff into the new
22 restaurant?
23 A I'm going to buy some new equipment.
24 Q Okay. Are you going to grab that little coffee pot that,
25 that much was made of and bring that into the new restaurant?

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1 A It will likely, yes, be in my office.
2 Q Okay. And we can agree I, I hope that the capacity of
3 the kitchen in the new restaurant is going to be greater than
4 the capacity of the kitchen in the old restaurant?
5 A The capacity you mean by what, sir.
6 Q The ability to turn out more meals.
7 A No.
8 Q We don't agree on that?
9 A No, sir.
10 Q Okay. And you, you, you do agree, though, that the, that
11 the, the plans for the new building have a capacity or, sorry,
12 an occupancy limit of 359 people. You agree with that; don't
13 you?
14 A Yes, sir. That's what's on the plans.
15 Q And you, in fact, have plans to not only make this a
16 restaurant but you want to have some nightlife at this
17 restaurant; right?
18 A Yes. It's the -- but it's the same thing we had before
19 in the old restaurant.
20 Q It's just going to be an 8500 square-foot building
21 instead of a 4500 square foot building; right?
22 A No.
23 Q Okay. The building permit for this project says 8500
24 total square feet on it; doesn't it?
25 A It says total square feet. Uh-huh. Yes.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

1 Q 8500 square feet?
2 A Yes, sir.
3 Q And you're not going to tell this jury that the old
4 building was 8500 square feet; are you?
5 A No, sir.
6 Q Okay. You actually heard your own expert, Mr. Wooten,
7 tell this jury that the old building was about 4500 square
8 feet; didn't you?
9 A Yes, sir.
10 Q So the new building is going to be roughly twice the size
11 of the old building; isn't it?
12 A Yes, sir. The structure will be twice the size.
13 Q The available usable space where people can stand, walk
14 is going to be roughly twice of the old building; isn't it?
15 A No, sir.
16 Q Okay.
17 A There won't be any -- let me, let me explain. There
18 won't be any people in the storeroom except my employees who
19 were in the storeroom before we tore the building down.
20 Q Okay. There's going to be 3000 square feet extra balcony
21 and rooftop deck space in the new building; isn't there?
22 A I don't know.
23 Q You don't know?
24 A If you can show it to me I'll --
25 Q I don't know is a fine answer. Your goal, in fact, with

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1 A That's correct.
2 Q And you don't know whether Mr. Goggans had any
3 communications directly with the other councilmen before the
4 vote; do you?
5 A I don't know.
6 Q Okay. He sees them regularly; doesn't he?
7 A I don't know.
8 MS. GOLDING: Your Honor, I'm going to make an objection.
9 I think that the witness has already --
10 THE COURT: That's -- it, it -- he said no, and this is
11 beyond the scope of his, his knowledge. So let's move along.
12 Q You --
13 MR. BLOOM: I'm sorry, Judge.
14 BY MR. BLOOM:
15 Q You testified earlier on direct that you -- about these
16 phone calls to the sheriff, one for window washer and one for
17 the painter, and I just wanted to try and understand that. Do
18 you have the direct cell phone number to the County Sheriff
19 Deputy Sergeant Weaver?
20 A I don't.
21 Q He's not in your phone somewhere?
22 A No, sir.
23 Q How do you communicate with him directly?
24 A When I see him.
25 Q But you don't have any contact information for him?

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1 A I don't have his number. No, sir.
2 Q Any other contact information?
3 A I can call the sheriff's department.
4 Q Okay. And so your testimony is that you did not
5 communicate directly with that sergeant to come out to deal
6 with either the window washers or the painter?
7 A I didn't call him. No.
8 Q Okay. But he, in fact, was the, was the sergeant, the
9 sheriff that came out on one of those two occasions; wasn't
10 he?
11 A Yes. He was on duty.
12 Q And you were the one that called the sheriff's department
13 on that occasion; weren't you?
14 A No.
15 Q You called the other occasion?
16 A No.
17 Q You -- your testimony is that you didn't call the
18 sheriff's department on either occasion to complain about
19 either window washers or the painter?
20 A No, sir.
21 Q Okay. No, that's not your testimony or no that --
22 A I did not call a sheriff on the painters or the window
23 washers.
24 Q And I'm trying to understand this because your testimony
25 on direct was that the youngin' just doesn't -- didn't know

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

1 what to do and he called the sheriff, you were talking about
2 your son; remember that?
3 A That's right.
4 Q And so he called the sheriff, the sheriff comes out, puts
5 the window washer or the painter on a criminal trespass list,
6 you find out about it and so surely after that you said,
7 "Chris, you don't need to do that. That's not necessary. Let
8 me know the next time it happens." Did you do that?
9 A No.
10 Q Okay. You didn't do that because when it happened again
11 he called the sheriff again; didn't he?
12 A I didn't know about the first -- I didn't know about the
13 -- when -- in depositions I thought you guys were talking
14 about the window washers. I didn't even know about the
15 painters.
16 Q So he didn't report to you, "Hey, Dad, I called the
17 sheriff and had to call the sheriff on the those Gulfstream
18 painters"?
19 A Oh, yes. Yeah. Yeah. Yeah. He told me he called them
20 but I wasn't there.
21 Q Okay.
22 MR. BLOOM: Your Honor, this is the problem.
23 THE COURT: That's all right. That's all right. Just
24 continue on.
25 BY MR. BLOOM:

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1 Q So the question, let me try and do it again. The
2 question is, the question is do you recall which occurred
3 first, the call to the sheriff for the window washer or the
4 call to the sheriff for the painter?
5 A In, in talking this stuff through, the painters were
6 first, I think, and then the window washer.
7 Q Okay. And let's just assume that's right. I don't --
8 I'm not saying one way or the other.
9 A Okay.
10 Q The painter first, then window washer. Your son calls
11 the sheriff to complain about the painters painting the
12 Gulfstream Restaurant; correct?
13 A Yes, sir.
14 Q And is it your testimony that he did so while you were at
15 Home Depot and you weren't getting good phone reception, and
16 therefore, he couldn't contact you?
17 A No.
18 Q Okay. So you didn't know about the painter call at all?
19 A Until the next day.
20 Q Okay. So the next day you knew it?
21 A Yes, sir.
22 Q Fair, fair enough. So day one he calls the sheriff on
23 the painter, these poor painters. He calls the sheriff on
24 them. You find out about it the next day and then weeks later
25 he calls the sheriff again on the window washers;

1 doesn't he?
2 A Yes.
3 Q The youngin' just didn't know what to do, he just had to
4 call the sheriff on them?
5 A I didn't know it was going to happen again.
6 Q Well, does that sound consistent with your personal
7 mantra that you testified earlier about trying to avoid
8 conflict?
9 A I don't like conflict.
10 MR. BLOOM: That's not my question, Your Honor.
11 THE COURT: I believe it's responsive to the question.
12 MR. BLOOM: Thank you, Your Honor.
13 BY MR. BLOOM:
14 Q These guys are just out there washing the windows, doing
15 their job, trying to make a living and someone on your behalf
16 calls the sheriff on them. Is that avoiding conflict?
17 A Yes. And I'll tell you why. If they were -- when I got
18 there I saw their equipment. They had a very -- he was
19 driving a car. These are window washers driving a small
20 little tiny compact car, and he had some rickety ladder he was
21 on, and I know for a fact behind the Gulfstream where that
22 seawall is there's a big sinkhole there, kind of a dip. It's
23 unstable ground, and beyond that, if you fall off of that
24 bulkhead, I don't know if you've ever jumped into a bed of
25 oyster beds, but it will cut you from stem to stern. Then I

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1 saw another lawsuit coming at me for somebody getting hurt on
2 my property. That's the God's honest truth.
3 Q So you condone the fact that your son called the sheriff
4 not twice -- not once, but twice on these folks just trying to
5 do their job; right?
6 A Yes, but I think if he's unsure and he's in fear that
7 someone's going to get hurt and he doesn't want to confront
8 somebody, what you do is you call somebody with authority over
9 you, which is, which is the police.
10 Q Better than throwing a hammer at them; isn't it?
11 A Yeah. He didn't throw a hammer though.
12 Q We'll get to that.
13 A I can't wait.
14 Q We came to the court -- to this courthouse. We came to
15 this very room because of the calls to the sheriff for the
16 window washer and the painter; didn't we?
17 A Yes.
18 Q And we argued to the Judge, I sat over there, and Ms.
19 Golding sat over here, that by making those calls you were
20 interfering with our easement. Do you remember all that? You
21 were here.
22 A I don't know the legal part of what it was ruled. I
23 don't know.
24 Q We had a hearing in this room; didn't we?
25 A Yes.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

1 Q Had a Judge, not this Judge but another Judge. It was
2 here.
3 A Yes.
4 Q And the Judge entered an order and that order found that
5 you interfered with the easement --
6 MS. GOLDING: Your Honor.
7 Q -- by making the calls to the sheriff's office.
8 MS. GOLDING: Your Honor, Your Honor.
9 THE COURT: All right.
10 MS. GOLDING: May I approach the bench? I object.
11 That's not a correct --
12 THE COURT: All right. What -- addressed this issue
13 before. What we need to do is use exactly the form order
14 issued by Judge Culbertson. We'll use the language set forth
15 in the form order by Judge Culbertson.
16 MR. BLOOM: Plaintiff's 55.
17 MS. GOLDING: Your Honor, may I approach the bench?
18 THE COURT: Yes, ma'am.
19 MS. GOLDING: Okay.
20 (Whereupon, a bench conference is held in the presence
21 but out of the hearing of the jury.)
22 THE COURT: You all take that off the screen, please.
23 (Whereupon, a bench conference is held in the presence
24 but out of the hearing of the jury.)
25 THE COURT: And what you want to use I don't suppose we

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ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

1 can do that selectively as far as putting it on a screen. How
2 about print the document.
3 MR. BLOOM: Here it is.
4 THE COURT: All right. Okay. Good. Now, okay.
5 (Whereupon, a bench conference is held in the presence
6 but out of the hearing of the jury.)
7 THE COURT: Let's -- do you have that one, 55, marked?
8 Okay. So let's mark that there then. All right. 55 is in
9 evidence.
10 MR. BLOOM: May I approach the witness?
11 THE COURT: Yes, sir. And it's in evidence over the
12 objection of the Defendant.
13 (Plaintiff's Exhibit Number 55 [Order] admitted into
14 evidence and appropriately marked.)
15 BY MR. BLOOM:
16 Q Okay. We left off talking about you coming here and the
17 Judge entering an order finding that you interfered with the
18 easement and found that you were in criminal contempt; isn't
19 that all true?
20 A Yes.
21 Q Is the easement up at this point -- I'm sorry, the
22 easement. Is the contempt order up at this point, and on the
23 second page of the contempt order it says, [as read],
24 "Plaintiff's Motion For Contempt is partially granted. The
25 Defendant is held in criminal contempt for willful violation

1 of the prior court order by interfering with the Plaintiff's
2 easement, by interfering with the Plaintiff's easement during
3 the fishing tournament held in May 2017, and for calling law
4 enforcement to evict the Plaintiff's window washer on two
5 separate occasions. The Defendant is not held in contempt for
6 placing three orange cones in the parking area. However, for
7 contempt in evicting the Plaintiff's window washer on two
8 separate occasions, the Defendant J. Mark Lawhon", that's you;
9 correct?
10 A Yes.
11 Q [As read] "is sentenced as follows, as follows: 30 days
12 in jail or 30" -- I'm sorry, "$3000.00 fine"; right?
13 A Yes.
14 Q Instead of serving the time you paid the fine; right?
15 A Yes.
16 Q Now, the jury's heard a lot of testimony about fences and
17 containers. So let's -- I'm going to try and go through it as
18 quickly as I can, but we, we agree --
19 THE COURT: We're done with that.
20 Q --- that there was at some point --
21 THE COURT: Go ahead.
22 Q -- we agree that at some point there was a construction
23 fence up in the parking lot at Marlin Quay; correct?
24 A Yes.
25 Q And there's debate about how -- what percentage of the

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

1 Kirk where someone said it was going to get ugly, you went to
2 the parking lot at Marlin Quay; didn't you?
3 A I don't know when I went to the parking lot.
4 Q That same day, that same day after that call, you went to
5 the parking lot and blocked this delivery truck from making
6 its delivery; didn't you?
7 A No.
8 Q Is it your testimony that you didn't go to the parking
9 lot or that you didn't block the truck?
10 A I didn't block the truck.
11 Q Your opinion is you didn't block the truck?
12 A I didn't block the truck.
13 Q Is that your opinion?
14 A I didn't block the truck.
15 Q Okay. He had a different opinion; didn't he?
16 A I don't know.
17 Q He, the driver. He asked you to move your truck; didn't
18 he?
19 A Yes.
20 Q So he obviously thought it was in his way; didn't he?
21 A Yes.
22 Q Okay. Well, we can agree to that. He told you that it
23 was blocking his ability to deliver food to Gulfstream; didn't
24 he?
25 A Yes.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

1 Q And you told him you weren't blocking anything, kind of
2 like you just said now, and that you'll move it when you feel
3 like it; didn't you?
4 A No.
5 Q What did you say?
6 A I said I'll be over there when I'm done over here.
7 Q When I'm done over here. Got you. And if we could pull
8 up -- well, you know where the parking lot is. Let's go to
9 Exhibit 20. There's the delivery truck we're talking about;
10 isn't it, sir?
11 A Yes.
12 Q And at the, at the middle of the page at the top of the
13 delivery truck is your fence; correct?
14 A Yes.
15 Q And beyond that fence are the containers; correct?
16 A Yes.
17 Q And is that man standing at the back of the delivery
18 truck, the man that you confronted about being in his way or
19 not in his way?
20 A Yes.
21 MS. GOLDING: Object to the form of the question. Mr.
22 Lawhon did not confront.
23 THE COURT: I'm, I'm going to allow the question. The
24 witness can agree or disagree with it.
25 Q And that man was just driving his US Food delivery truck

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

1 trying to drop off and make a delivery at Gulfstream Café;
2 right?
3 A I don't know. I'm assuming so. Yes.
4 Q He doesn't have anything to do with Gulfstream Café; does
5 he?
6 A I don't think so.
7 Q His last name is not Greenbaum; is it?
8 A No.
9 Q He's just there trying to do his job, kind of like the
10 window washers and the painters; right?
11 A He's there doing his job. Yes.
12 Q Yeah. Third page shows a picture of your, of your truck;
13 doesn't it?
14 A Yes.
15 Q The fourth page shows another picture of your truck
16 where's some -- there's like some broken gravel or stones
17 underneath it; do you see that?
18 A Yes.
19 Q And do you see the truck, the truck in question in the
20 left corner?
21 A Yes.
22 Q And then in the final page is the statement from this
23 driver who doesn't have a dog in this fight at all; does he?
24 A No.
25 Q He says, "I asked -- I said" -- he says, let's see, [as

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

1 read], "I, Adrian Felder, pull up to Gulfstream Café for a
2 delivery when a white guy pull up in a truck and block my
3 entrance for Gulfstream." So at least he thought you were
4 blocking him; right?
5 A That's what he said.
6 Q [As read], "I ask him was he planning on moving his truck
7 there because he was blocking, blocking dock. His answer was
8 yes and that he were not going to move his truck and for me to
9 tell another guy to call him if I have a problem." That's
10 what he says; isn't it?
11 A That's what he said.
12 Q No reason in the world for him to make up a story; is
13 there?
14 A No.
15 Q Now, can you pull up that really good aerial of the
16 parking lot?
17 MR. BLOOM: Your Honor --
18 Q Okay. Right in the middle of that picture, right where
19 that dot is --
20 A Uh-huh.
21 Q -- that's what everyone keeps talking about as this
22 informal entrance; correct?
23 A Yes, sir.
24 Q And that is a parking spot that doesn't have a blocker,
25 Linda called it a bumper; right?

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

1 A Yes. But that's I think maybe three parking spots, three
2 or four.
3 Q All without bumpers?
4 A There's a -- there's no bumpers but there's grass in
5 front of them and a, and a sidewalk.
6 Q Right. And you knew the delivery trucks used that area
7 to try and get out or get in to make deliveries at Gulfstream;
8 right?
9 A Yes.
10 Q Okay. So you knew that this truck wanted to use that
11 area when you parked your car in it; didn't you?
12 A No.
13 Q Despite talking with him, you still didn't know that?
14 A I told him -- I knew it and I told him I would come back
15 and move the truck when I -- my car when I was finished.
16 Q Did you tell him that was going to be 30 seconds, 30
17 minutes or three hours or just didn't tell him?
18 A He didn't ask me.
19 Q Okay. Well, he's got to go make other deliveries;
20 doesn't he?
21 A I'm assuming so.
22 Q Okay. You don't like conflict or confrontation though;
23 do you?
24 A I don't.
25 Q That whole parking lot, are you still on the parking lot,

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1 you, you could have pulled your car in by your building;
2 couldn't you, on that day?
3 A I don't know what was going on that day. I could have
4 gone in there I'm assuming, yes.
5 Q You could have parked right next to your own building,
6 but you chose to park right where you knew delivery trucks
7 come and go instead; didn't you?
8 A I don't know why I parked there. It could have been the
9 truck that was tearing down the building that needed to get
10 out of the parking lot.
11 Q You don't know that.
12 MS. GOLDING: I'm sorry.
13 Q Do you, do you regret --
14 MS. GOLDING: Your Honor, there was a --
15 THE COURT: All right. That, that wasn't a question.
16 Q You don't know that; do you?
17 A No.
18 Q Do you regret making this guy's life a little bit more
19 miserable that day?
20 A I didn't make his life miserable.
21 Q Let's talk about the hammer throw. Right after this
22 lawsuit was filed, you were in the parking lot with your son
23 taking down the fence; correct?
24 A Yes.
25 Q And that would have been November 17, November 18, 2016;

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF GEORGETOWN) 2016-CP-22-00961

The Gulfstream Café, Inc.,	)	
	)	
Plaintiff,	)	Transcript of Record
	)	
vs.	)	Testimony of
	)	
J. Mark Lawhon, Individually, and Palmetto Industrial Development, LLC,	)	Robert L. Castles, Jr.
	)	
Defendants.	)	

B E F O R E:

Honorable Steven H. John
Georgetown County Courthouse
Georgetown, South Carolina

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

Simon H. Bloom, Esquire
Adam D. Nugent, Esquire
George W. Redman, III, Esquire
Attorneys for Plaintiff

Henrietta U. Golding, Esquire
John Connell, Jr., Esquire
Attorneys for Defendants

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

1 THE COURT: All right. I'll leave that to cross-
2 examination. I'm going to allow 15 into evidence over the
3 objection of Defense. You may proceed.
4 All right. Go ahead, sir.
5 BY MR. NUGENT:
6 Q Mr. Castles, is it your opinion that the proposed
7 building will have the same footprint as the demolished marina
8 store and snack bar?
9 A No. The proposed building actually is located
10 differently on the property. It extends closer to the marina
11 and actually extends over the marina property line, which is
12 not appropriate in surveying. I'm not saying whether it
13 legally can be done or not but surveying-wise you can't extend
14 buildings over the property line, just like you can't extend
15 your house over its property line when you build it. So the
16 building extends over the property line in that direction. In
17 the direction toward the Gulfstream Café it extends
18 approximately 10 feet into the property, which then would
19 encroach on the easement of Lot Three by approximately 10 feet
20 and that would be the Gulfstream easement for parking, and
21 then the building basically extends all the way down to the
22 looks like the right-of-way line of Waccamaw Drive.
23 Q And just to confirm, your testimony is that this proposed
24 building will, in fact, be constructed on property that is
25 subject to the Gulfstream parking lot easement; is that

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

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1 correct?
2 A Part of it will be on the Gulfstream parking lot
3 easement. Yes, sir.
4 Q And you testified a minute ago that you reviewed the
5 building plans which are in front of you as Exhibit Number 12.
6 Do any of those plans show the footprint of the proposed
7 building and the footprint of the demolished building, and
8 I'll direct your attention to page six which is document C101
9 of those building plans?
10 A Yeah. NC101 it shows both the existing building
11 footprint and then the new building footprint overlaid on top
12 of it.
13 Q I'm going to hand you what we'll mark as Plaintiff's
14 Exhibit 53.
15 MS. GOLDING: I have no copy of 53.
16 MR. BLOOM: What page?
17 MR. NUGENT: Page six.
18 MS. GOLDING: But I have -- you have not provided -- Your
19 Honor, I have not been provided a copy of Exhibit 53.
20 THE COURT: All right. How about cover with the witness
21 if that's part of the previous exhibit or a new. All right.
22 Whatever -- what this is, okay, first.
23 MR. NUGENT: Okay.
24 MS. GOLDING: Your Honor, may I see -- just I, I have no
25 idea what it is.

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF GEORGETOWN	)	Civil Action No. 2016-CP-22-009161
The Gulfstream Café, Inc.,	)	
Plaintiff,	)	
v.	)	**VERIFIED COMPLAINT**
J. Mark Lawhon, Individually, and Palmetto Industrial Development, LLC,	)	
Defendants.	)	

FILED
GEORGETOWN COUNTY, S.C.
2016 NOV 16 PM 4:28
ALMA Y. WHITE
CLERK OF COURT

Plaintiff The Gulfstream Café, Inc. (hereinafter "Plaintiff"), complaining of J. Mark Lawhon, Individually, and Palmetto Industrial Development, LLC, (hereafter sometimes referred to collectively as "Defendants"), would respectfully show and allege unto this Honorable Court as follows:

JURISDICTION

1. Plaintiff is a corporation existing, organized, and doing business in Georgetown County, within the State of South Carolina.

2. Upon information, knowledge and belief, Defendant J. Mark Lawhon (Lawhon), is an individual who owns and controls property and various ongoing business interests within Georgetown County, South Carolina, and as such, has acted in his individual capacity, and on behalf of those entities of which he controls, has taken and authorized intentional, malicious, and reckless tortious acts as set forth herein.

3. Upon information and belief, Palmetto Industrial Development, LLC ("Palmetto"), is a South Carolina entity which owns and operates property situate in Georgetown County, South Carolina.

4. This Action involves Defendants' intentional, malicious, and reckless trespass and forcible entry and detainer unto and over Plaintiff's interest in certain real property, as well as the damages which continue to be inflicted upon Plaintiff.

5. Based upon the foregoing, and as is more specifically set forth herein, this Honorable Court is the appropriate venue and has jurisdiction over the Parties to and the Subject Matter of this Action.

6. Plaintiff will suffer immediate and irreparable injury, loss, and damage if Defendants' actions as set forth herein are not immediately enjoined.

FACTUAL ALLEGATIONS

7. Plaintiff owns and operates a well-known and firmly-established fine dining establishment known as The Gulfstream Café, Inc., with a physical address of 1536 S. Waccamaw Drive, Murrells Inlet, South Carolina 29576.

8. The real property adjoining the restaurant is part of a development commonly referred to as the Marlin Quay Marina, with improvements and amenities including condominiums, a marina, boat slips, as well as a number of parking lots.

9. The Marlin Quay Marina development did include a "Marina Club & Snack Bar" which generally supported marina related activities, however, said Snack Bar was recently demolished.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

10. The real property between the Snack Bar and the Gulfstream Café is comprised of a parking lot (the "Parking Lot") with multiple accesses onto Waccamaw Drive, and is particularly shown as Lots 3, 4, and 5 of Tract 3 on that certain Plat entitled Survey of Marlin Quay Marina Horizontal Property Regime, Garden City Point, prepared by Surtech, Inc. dated May 21, 1985, revised November 27, 2985, and recorded in the office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 214. (*See* Exhibit B)

11. The Marlin Quay Marina property, including the Parking Lot, was previously owned by The Marlin Quay Company, a South Carolina General Partnership.

12. On or around July 1, 1983, The Marlin Quay Company sold the Marlin Quay Marina property, including the Parking Lot, to the Marlin Quay Marina Corporation, by way of that certain Deed recorded on September 1, 1983, in Georgetown County Deed Book 211 at Page 1141.

13. On February 25, 1986, The Marlin Quay Marina Company conveyed to The Gulfstream Café, Inc., a 25,366 square foot portion of the Marlin Quay Marina property, specifically identified as "Marsh Area, Tract A and Tract B" on that certain plat publicly recorded with Georgetown County at Plat Book 6, Page 438.

14. On February 25, 1986, The Marlin Quay Marina Company also expressly granted three (3) non-exclusive appurtenant easements to utilize the Parking Lot to The Gulfstream Café, Inc., its Successors and Assigns, each of which was publicly recorded in Georgetown County Deed Book 234 at Pages 790, 797, and 803.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

15. In 1990, the Marlin Quay Marina Corporation again expressly granted and conveyed a perpetual non-exclusive easement for the use of the Parking Lot to The Gulfstream Café, it successors and assigns, as set forth in that certain Agreement of Easement and Consent to and Joinder of Mortgagee to Granting of Easement ("Easement") publicly filed with the Georgetown County in Deed Book 382, Pages 217 to 226 (attached hereto and incorporated herein verbatim as Exhibit A).

16. The Easement expressly provides that The Gulfstream Café perpetually and currently enjoys the following rights:

> ...non-exclusive perpetual easement from Marlin Quay Marina Corporation to The Gulfstream Café, Inc. for the purpose of ingress and egress and vehicular parking on, over and across that certain real property of Marlin Quay Marina Corporation, which is more fully described herein below, by owners, agents, employees, servants, visitors, guests and invitees of The Gulfstream Café, Inc.
>
> ...
>
> Marlin Quay Marina Corporation, ... (the "Grantor"), has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto The Gulfstream Café, Inc., its successors and assigns (the "Grantee") a non-exclusive perpetual easement appurtenant to the premises of the Grantee hereinafter described for the full and free right of ingress and egress on, over and across the following described property of the Grantor, together with the rights of vehicular parking on and vehicular and pedestrian access to, all in accordance with all governmental rules, regulations, ordinances or laws, the premises of the Grantor hereinafter described, and also for the purpose of maintenance, repair, alteration and/or improvements to the Grantee's hereinafter described property. It is anticipated by the parties that while they will each have joint and non-exclusive use **at all times** of the area covered by this easement that the Grantor will utilize the premises primarily during the daytime regular business hours of Grantor and the Grantee will utilize the premises primarily in the evening regular business hours of Grantee. (*emphasis added*).

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

17. The Easement provides that the Parking Lot subject to Plaintiff's perpetual easement rights is specifically described as follows:

> A non-exclusive right of ingress, egress and vehicular parking over, across and on all those certain pieces, parcels or tracts of land situate, lying and being in the Garden City area of the County of Georgetown, State aforesaid, and being more particularly shown as Lots 3, 4, and 5 of Tract 3 on that certain Plat entitled Survey of Marlin Quay Marina Horizontal Property Regime, Garden City Point, prepared by Surtech, Inc. dated May 21, 1985, revised November 27, 1985, and recorded in the office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 214, said plat being expressly incorporated herein by reference.

A copy of the Plat referenced above, with markups depicting the approximate location of The Gulfstream Café and the Parking Lot, is attached hereto and incorporated herein verbatim as Exhibit B, (hereinafter the "Parking Lot Plat").

18. On or around September 11, 1992, the Marlin Quay Marina Corporation, by and through the Master in Equity, conveyed the Marlin Quay property, including the Parking Lot, to Marlin Point Corporation, as evidenced by that certain Deed publicly filed with the Georgetown County in Deed Book 486, Page 181.

19. On or around December 12, 1996, the Marlin Point Corporation conveyed the Marlin Quay property, inclusive of the Parking Lot, to Reel Crazy Charters, Inc., as evidenced by that certain Deed publicly filed with Georgetown County in Deed Book 737, page 199.

20. On or around the 20th of August, 2014, Defendant Palmetto Industrial Development, LLC, purchased the Marlin Quay Marina property, inclusive of the

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Parking Lot, from Reel Crazy Charters, Inc., as evidenced by that certain Deed publicly filed with the Georgetown County in Deed Book 2421, Page 267.

21. Defendant purchased the Marlin Quay Marina subject to The Gulfstream Café's perpetual easement rights to utilize the Parking Lot to the full extent set forth in the Easement, inclusive of all areas specifically depicted in the Parking Lot Plat.

22. On or about February 7, 2007, the Marlin Quay Marina Owners' Association initiated construction activity to make improvements upon and within the Marlin Quay Marina which included dredging of the marina.

23. The 2007 construction activities required exclusive use of the Parking Lot.

24. In recognition of Plaintiff's non-exclusive perpetual easement right to use the Parking Lot, the Marlin Quay Marina Owners' Association and The Gulfstream Café, Inc. entered into a written agreement acknowledging Plaintiff's Easement rights and that the obstruction of Plaintiff's rights would need to be mitigated by locating additional parking, as well as some measure of payment for damages that would inevitably be caused by and through inadequate or inconvenient parking.

25. On or around the second week of November 2016, Defendants have again initiated a construction project involving the Marlin Quay Marina, and have completely obstructed access to the Parking Lot by The Gulfstream Café, Inc.

26. Defendants have put up signage, fences, and barricades to block Plaintiff's access to the Parking Lot. (See Exhibit C, Photographs of Defendants' Actions).

27. Defendants have placed large construction materials upon the Parking Lot.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

28. Upon information and belief, Defendants have begun a construction project where the Plans call for improvements which will permanently interfere with Plaintiff's rights to use the Parking Lot.

29. Defendant J. Mark Lawhon, individually, and on behalf of other entities he owns and or controls, has taken additional action to prevent invitees and vendors of The Gulfstream Café, Inc. from accessing the restaurant via the parking lot by parking his car in one access to the Parking Lot.

30. At no time prior to the initiation of the construction activities was anyone from The Gulfstream Café, Inc. notified that constructions activities were about to take place.

31. As a result of the Defendants completely blocking the parking lot, the owners, employees, guests, invitees, and vendors are unable to access The Gulfstream Café, Inc.

32. As a result of Defendants' construction activities, Plaintiff will incur immediate irreparable damages to its ongoing operations, as well as permanent and severe damage to the good will of The Gulfstream Café, Inc.

FOR A FIRST CAUSE OF ACTION
(Intentional Interference with Easement Rights)

33. Each and every allegation set forth in this Complaint, specifically including but not limited to each and every factual assertion set forth above, is realleged and incorporated into this cause of action as if it was repeated verbatim herein.

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34. Defendants have breached and violated their obligations set forth within the above publicly recorded perpetual Easement, as is more specifically set forth above, and as may be further discovered during the pendency of this Action.

35. Plaintiff is entitled to judgment against the Defendants for breach of agreement for all actual, special, and consequential damages available at law.

FOR A SECOND CAUSE OF ACTION
(Trespass and Nuisance)

36. Each and every allegation set forth in this Complaint, specifically including but not limited to each and every factual assertion set forth above, is realleged and incorporated into this cause of action as if it was repeated verbatim herein.

37. Plaintiff has a valid and legal right to use of and possession of the Parking Lot to the fullest extent set forth in the Easement, and to the full boundaries as depicted in the Parking Lot Plat.

38. Defendants and others have intentionally obstructed Plaintiff's right to access and utilize the Parking Lot, and said entry and obstruction is without Plaintiff's permission and was intentional and in reckless disregard of Plaintiff's rights.

39. As set forth above, Defendants' intentional and reckless entry upon and complete obstruction of Plaintiff's property rights has and will cause significant damage to Plaintiff.

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40. Defendants' intentional and reckless entry upon and complete obstruction of Plaintiff's property rights has and will continually and unreasonably interfere with Plaintiff's use and enjoyment of its rights in the Parking Lot.

41. Plaintiff prays for and is entitled to all actual, consequential, and incidental damages incurred as a result of Defendants' wrongful, reckless and intentional conduct as set forth above, as well as punitive damages, attorney fees and costs.

42. Plaintiff prays for immediate, temporary, and permanent injunctive relief to prevent Defendants from obstruction of Plaintiff's rights.

FOR A THIRD CAUSE OF ACTION

(*S.C. Code §15-67-410 et seq., Forcible Entry and Detainer and Waste*)

43. Each and every allegation set forth in this Complaint, specifically including but not limited to each and every factual assertion set forth above, is realleged and incorporated into this cause of action as if it were repeated verbatim herein.

44. South Carolina Code §15-67-410 expressly provides:

> If any person be put out or disseized of any lands or tenements in forcible manner or put out peaceably and be afterwards holden out with strong hand, or after such entry, any feoffment or discontinuance in any wise thereof be made to defraud and take away the right of the possessor, the party grieved in this behalf shall have an action against such disseizor.

45. As set forth above, Defendants have actually and forcibly disseized Plaintiff of access to the Parking Lot, to which it has a perpetual lawful right of quiet and peaceable use and enjoyment.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

46. As set forth above, Plaintiff has suffered damages as a result of Defendants' actions, and pursuant to South Carolina Code Section 15-67-410 *et seq.*, Plaintiff is entitled to an award of treble damages, and to be put in possession of the Parking Lot immediately.

47. Plaintiff hereby sues Defendants pursuant to South Carolina Code Section 15-67-410, for the immediate and peaceable return of the Parking Lot.

48. Plaintiff has sued Defendants for the immediate return of possession of the parking lot, and Plaintiff hereby further sues Defendants for the fair-market rental value of Plaintiff's interest in the Parking Lot for every day Defendants obstruct the Property.

49. As set forth herein, Plaintiff hereby prays for an Order from this Court instructing Defendants to immediately deposit with the Clerk of Court, and on a monthly basis thereafter for the pendency of this Action, the entire fair-market rental value of the Parking Lot.

50. Plaintiff is entitled to and prays for an Order from this Court expressly charging Defendants with all costs incurred related to necessary removal of any debris or alleged improvements, including costs, expenses, fines, damages, and service fees as may be required to retake the Parking Lot.

51. Plaintiff has suffered and believes it is entitled to an award of and for actual, incidental, consequential, and treble damages inflicted as a proximate result of Defendants' actions.

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52. Pursuant to South Carolina Code Section 15-67-410 *et seq.*, Plaintiff is entitled to an award of treble damages, to be put in possession of the Parking Lot.

WHEREFORE, Plaintiff, having complained of Defendants, hereby pray for the following relief:

a. An Order of this Honorable Court granting the relief under the Causes of Action set forth above as to Plaintiff's actual, incidental and consequential damages, fair market rental value, all costs and fees, including but not limited to punitive or treble damages and prejudgment interest;

b. Plaintiff prays for immediate, temporary, and permanent injunctive relief to prevent Defendants from obstruction of Plaintiff's rights.

c. Any and all other relief which is deemed just and proper by this Honorable Court and the trier of fact.

Respectfully submitted,

BELLAMY, RUTENBERG, COPELAND, EPPS, GRAVELY & BOWERS, P.A.
Post Office Box 357
Myrtle Beach, SC 29578-0357
(843) 448-2400
Attorneys for Plaintiff

George W. Redman, III

Myrtle Beach, South Carolina

November 16, 2016.

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2016-CP-22-00101

STATE OF SOUTH CAROLINA)
) **VERIFICATION**
COUNTY OF GEORGETOWN)

PERSONALLY appeared before me, Linda Barnaba, as Director of Operations for Plaintiff, The Gulf Stream Café, Inc., in the foregoing action who, being duly sworn says:

(a) That this Deponent has read the allegations contained in the attached pleadings consisting of twelve (12) pages, including this statement;

(b) That the attached pleading was prepared by this Deponent's attorney based upon information this Deponent has personally furnished to said attorney;

(c) That the allegations contained in the attached pleading are true and correct, and are based upon the personal knowledge of this Deponent, except for those allegations which are based upon this Deponent's information and belief and, as to those, this Deponent verily believes the same to be true; and,

(d) That this Deponent has authorized said attorney to file the attached pleading, to present the same to the Court and secure any necessary Orders based thereon, and to secure service upon the adverse party of the attached pleading and necessary process based thereon.

Linda Barnaba, Director of Operations
The Gulfstream Café, Inc.

FILED
GEORGETOWN COUNTY, S.C.
2016 NOV 16 PM 4:28
MARY WHITE
CLERK OF COURT

STATE OF SOUTH CAROLINA)
) **ACKNOWLEDGMENT**
COUNTY OF GEORGETOWN)

I, George Redman, a notary public duly commissioned, qualified and acting within and for said County and State, do hereby certify that Linda Barnaba personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this the 16th day of November 2016.

(L.S.)
Notary Public for South Carolina

My Commission Expires: Jan. 13, 2025

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

2016-CP-22-00961

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

EXHIBIT A

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FILED
BETTY L. WILLIAMS
CCCP & GS
90 JUN -4 PM 12:04
BOOK ____ PAGE ____

STATE OF SOUTH CAROLINA) AGREEMENT OF EASEMENT AND
) CONSENT TO AND JOINDER OF MORTGAGEE
COUNTY OF GEORGETOWN) TO GRANTING OF EASEMENT

WHEREAS, Marlin Quay Marina Corporation did on the 4th day of December, 1985, execute and deliver a Note in the amount of Six Hundred Thousand and no/100 ($600,000.00) Dollars to First Union National Bank and secured the same by Mortgage and Security Agreement, said Mortgage being recorded in the Office of the Clerk of Court for Georgetown County in Real Estate Mortgage Book 225 at Page 209; and

WHEREAS, Marlin Quay Marina Corporation granted three (3) easements to The Gulfstream Cafe, Inc. which easements were recorded in the office of the Clerk of Court for Georgetown County in Deed Book 234 at Pages 790, 797 and 803; and

WHEREAS, the parties acknowledge that there may be discrepancies in the rights granted to The Gulfstream Cafe, Inc., and Marlin Quay Marina Corporation and The Gulfstream Cafe, Inc. therefore desire that Marlin Quay Marina Corporation grant a non-exclusive perpetual easement from Marlin Quay Marina Corporation to The Gulfstream Cafe, Inc. for the purposes of ingress and egress and vehicular parking on, over and across that certain real property of Marlin Quay Marina Corporation, which is more fully described herein below, by owners, agents, employees, servants, visitors, guests and invitees of The Gulfstream Cafe, Inc., and Marlin Quay Marina Corporation and The Gulfstream Cafe, Inc. further desire to clarify the intent of the parties in the granting of all of the easements described above, and First Union

National Bank desires to consent to and join in the granting of said easement hereinafter described;

NOW THEREFORE, for and in consideration of the sum of One and No/100 ($1.00) Dollar and the covenants and conditions expressed herein, the receipt and sufficiency of which is hereby acknowledged, Marlin Quay Marina Corporation, a corporation duly organized pursuant to the laws of the State of South Carolina (the "Grantor"), has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto The Gulfstream Cafe, Inc., its successors and assigns (the "Grantee") a non-exclusive perpetual easement appurtenant to the premises of the Grantee hereinafter described for the full and free right of ingress and egress on, over and across the following described property of the Grantor, together with the rights of vehicular parking on and vehicular and pedestrian access to, all in accordance with all governmental rules, regulations, ordinances or laws, the premises of the Grantor hereinafter described, and also for the purpose of maintenance, repair, alteration and/or improvements to the Grantee's hereinafter described property. It is anticipated by the parties that while they will each have joint and non-exclusive use at all times of the area covered by this easement that the Grantor will utilize the premises primarily during the daytime regular business hours of Grantor and the Grantee will utilize the premises primarily in the evening regular business hours of Grantee. The property of the

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Grantor subject to this non-exclusive perpetual easement is more fully described as follows:

> A non-exclusive right of ingress, egress and vehicular parking over, across and on all those certain pieces, parcels or tracts of land situate, lying and being in the Garden City area of the County of Georgetown, State aforesaid, and being more particularly shown as Lots 3, 4, and 5 of Tract 3 on that certain Plat entitled Survey of Marlin Quay Marina Horizontal Property Regime, Garden City Point, prepared by Surtech, Inc. dated May 21, 1985, revised November 27, 1985, and recorded in the office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 214, said plat being expressly incorporated herein by reference.
>
> The Grantor acquired the aforedescribed property by virtue of that certain Deed from Marlin Quay Company, a South Carolina General Partnership, dated July 1, 1983 and recorded on September 1, 1983 in the office of the Clerk of Court for Georgetown County in Deed Book 211 at Page 1141.

The property of the Grantee to which this easement is appurtenant is more fully described as follows:

> All those certain pieces, parcels, areas or tracts of land identified as Marsh Area, Tract A and Tract B on that certain survey for Marlin Quay Company, Garden City Point dated August 27, 1985, revised January 24, 1986, surveyed and mapped by Surtech, Incorporated and recorded in the office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 438.

It is expressly understood and agreed by Marlin Quay Marina Corporation and the Gulfstream Cafe that as part of the consideration for this conveyance, both parties shall be equally responsible for the maintenance and upkeep of the aforementioned easement area and shall equally share the costs associated with its proper maintenance and upkeep to insure that it is satisfactory for the uses and purposes intended herein.

It is further understood and acknowledged by the parties hereto that the Grantor herein gave a Mortgage in favor of First Union National Bank, said Mortgage having been recorded in the Office of the Clerk of Court for Georgetown County in Mortgage Book 225 at Page 209, and covering certain real property of the Grantor herein, a portion of which real property is covered by the grant of the easement herein (the "Mortgage"). First Union National Bank consents to and joins in the aforesaid grant of easement from Marlin Quay Marina Corporation to The Gulfstream Cafe, Inc. upon and pertaining to that portion of the property covered by the aforedescribed Mortgage lien of First Union National Bank, and First Union National Bank specifically and expressly subordinates its aforesaid Mortgage lien to the easement granted herein; provided, however, that First Union National Bank makes no representations or warranties as to the validity of the documents creating the easement; and provided, further, that said Mortgage in all respects shall remain in full force and effect and be unaffected hereby except as set forth hereinabove;

Together with all and singular the rights, members, hereditaments and appurtenances to the above-described easement belonging, or in anywise incident or appertaining.

To have and to hold, all and singular, the above-described easement and to the said The Gulfstream Cafe, Inc., its successors and assigns forever;

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And the said Marlin Quay Marina Corporation does hereby bind itself and its successors and assigns, to warrant and forever defend, all and singular, the said easement unto the said Gulfstream Cafe, its successors and assigns, against itself and its successors and assigns and all others whomever lawfully claiming, or to claim the same or any part thereof.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this 12th day of ~~August~~ April, in the year of our Lord One Thousand Nine Hundred and ~~Eighty-Nine~~ Ninety and in the Two Hundred and Thirteenth Year of the Sovereignty and Independence of the United States of America.

IN THE PRESENCE OF:

Nancy L. Rowe
(as to Marlin Quay Marina Corporation)

MARLIN QUAY MARINA CORPORATION
a South Carolina Corporation
(Corporate Seal)

By: [signature]
Its: Pres

Attest: [signature]
Its:

WITNESSES:

Annette Jordan

Pamela A. Britton
(as to The Gulfstream Cafe, Inc.)

The Gulfstream Cafe, Inc.
a South Carolina Corporation
(Corporate Seal)

By: [signature]
Edward C. Tribb, Jr.
President

Attest: Jean C. Tribb
Its: Secretary

BOOK 382 PAGE 222

WITNESSES:

Marcia Combs

Angela Ann Hurley

(as to First Union National Bank)

FIRST UNION NATIONAL BANK

By: Deborah H. Walker

Its: Vice President

Attest: [illegible]

Its: Assistant Secretary

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STATE OF SOUTH CAROLINA)
) PROBATE
COUNTY OF GEORGETOWN)

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named First Union National Bank , by and through its duly authorized officers, sign, seal and as its act and deed, deliver the within written Agreement of Easement and Consent To and Joinder of Mortgagee to Granting of Easement; and that deponent with the other witnesses whose name is subscribed above witnessed the execution thereof.

Marcia Corns

SWORN TO before me this
12th day of April 1990

Sylvia H. Alexander (L.S.)
Notary Public for South Carolina
North
My Commission Expires: 10-9-1990

STATE OF SOUTH CAROLINA)
HORRY) PROBATE
COUNTY OF ~~GEORGETOWN~~)

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named The Gulfstream Cafe, Inc., by and through its duly authorized officers, sign, seal and as its act and deed, deliver the within written Agreement of Easement and Consent To and Joinder of Mortgagee to Granting of Easement; and that deponent with the other witnesses whose name is subscribed above witnessed the execution thereof.

Pamela A. Britton

SWORN TO before me this
14th day of May, 1990
~~August xx 1989~~

Carolyn Jordan (L.S.)
Notary Public for South Carolina

My Commission Expires: 4-25-96

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STATE OF SOUTH CAROLINA)
) PROBATE
COUNTY OF GEORGETOWN)

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named Marlin Quay Marina Corporation, by and through its duly authorized officers, sign, seal and as its act and deed, deliver the within written Agreement of Easement and Consent To and Joinder of Mortgagee to Granting of Easement; and that deponent with the other witnesses whose name is subscribed above witnessed the execution thereof.

SWORN TO before me this
11 day of June, 1990.
Darcy L. Rowe (L.S.)
Notary Public for South Carolina
My Commission Expires: 6-9-98

10.00 gtm

FILED
BETTY L. WILLIAMS
CCCP & GS

90 JUN -4 PM 12:00

GEO. CO.
BOOK 382 PAGE 217
Edwards J. Prevatte
Deputy CCCP

Marlin Quay Marina Corp

to

Gulfstream Cafe Inc

Recorded this 6th day of June A.D. 1990
In Book ____ Page ____
Loris J. Ubelis Deputy
Auditor, Georgetown Co., S.C.

COUNTY PARCEL # 41-129-5-3
MSO

BOOK 382 PAGE 226

2018-CP-22-00961

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EXHIBIT B

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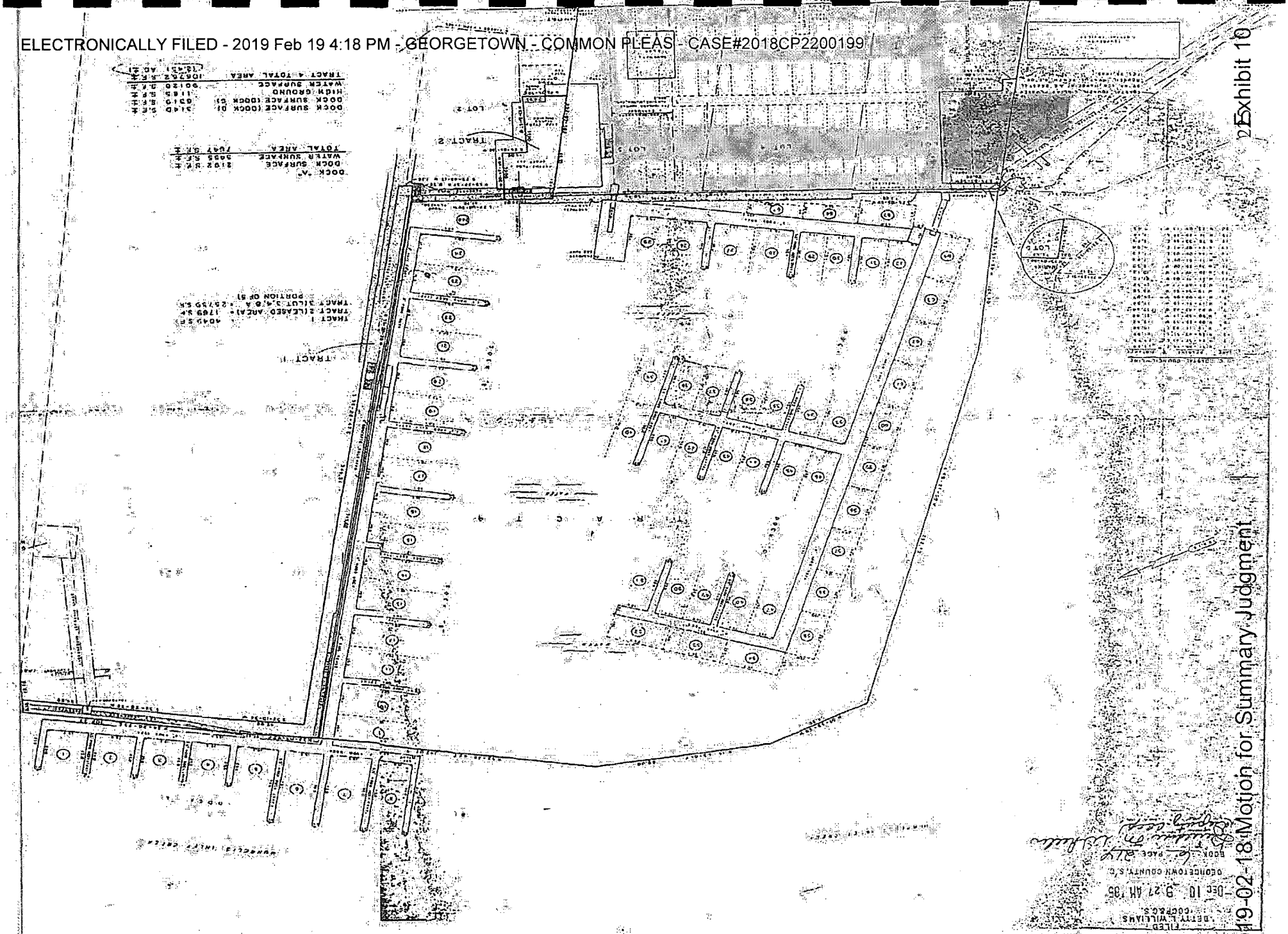

Exhibit 10

2019-02-18 Motion for Summary Judgment

2016-CP-22-009161

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EXHIBIT C

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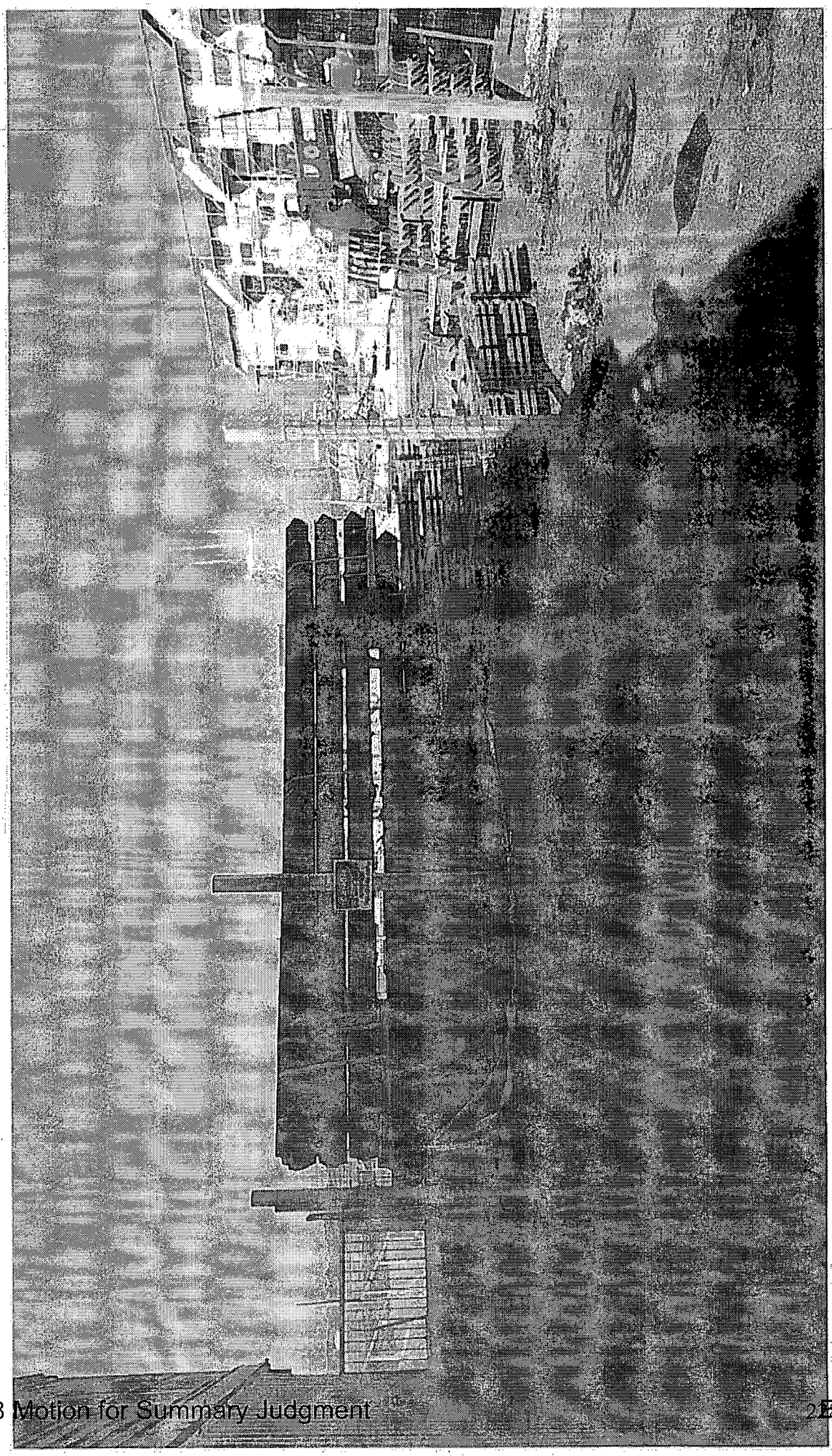

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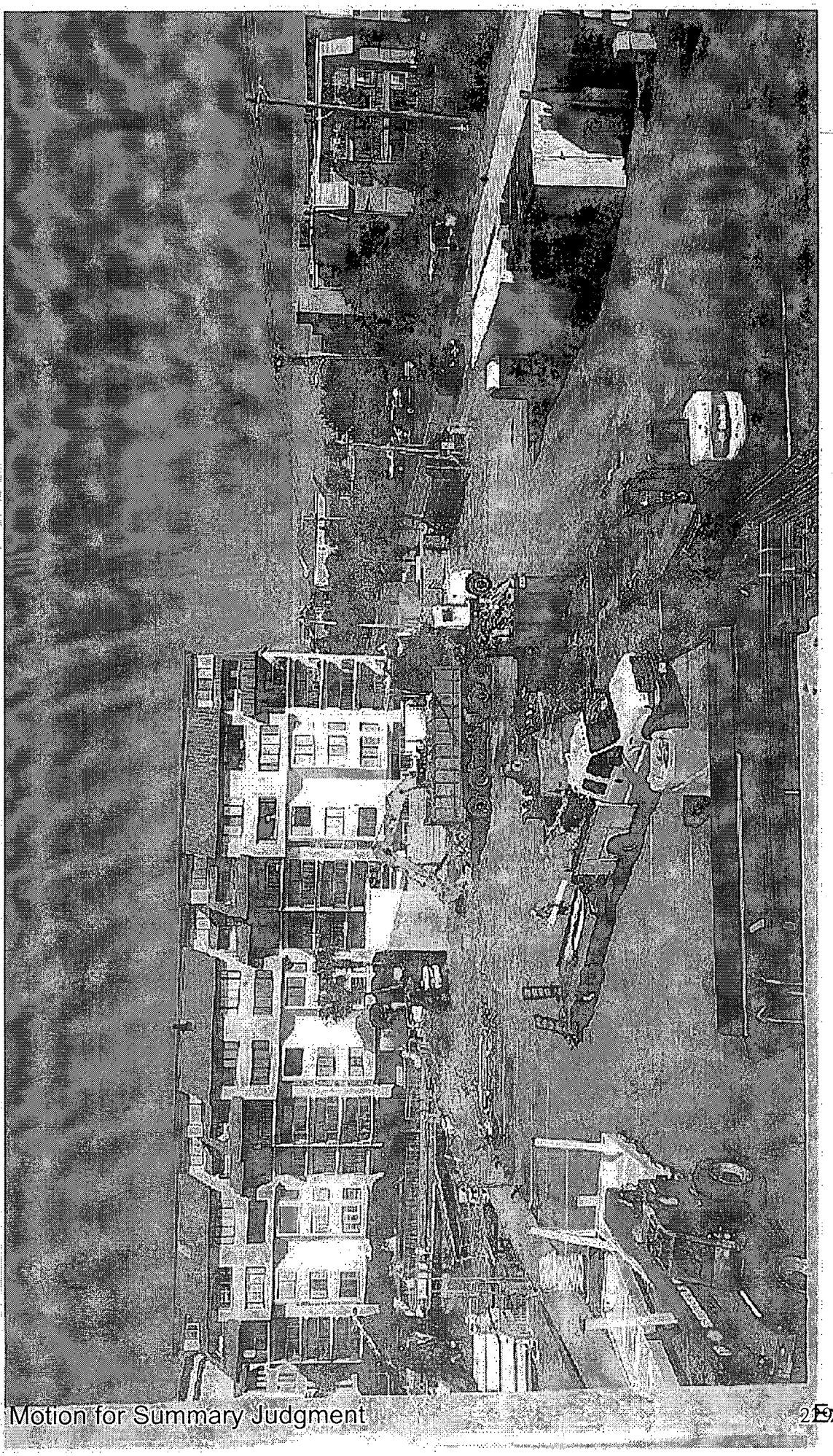

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2016-CP-22-00961
The Gulfstream Café, Inc.,	)	
Plaintiff,	)	
vs.	)	**DEFENDANTS' AMENDED ANSWER AND COUNTERCLAIMS (JURY TRIAL)**
J. Mark Lawhon, Individually, and Palmetto Industrial Development, LLC,	)	
Defendants.	)	

The Defendants J. Mark Lawhon and Palmetto Industrial Development, LLC (hereinafter "Defendants"), answering the Complaint, would respectfully show and allege unto this Honorable Court as follows:

FIRST DEFENSE

1. Each and every allegation not hereinafter admitted, modified, or qualified is denied.

2. The allegations of Paragraph 1 are admitted.

3. The allegations of Paragraph 2 are denied.

4. The allegations of Paragraph 3 are admitted.

5. The allegations of Paragraphs 4, 5 and 6 are denied.

6. In answering Paragraph 7, it is admitted that Plaintiff owns and operates a restaurant known as the Gulfstream Café at 1536 S. Waccamaw Drive in Murrells Inlet, South Carolina. The remaining allegations are denied.

7. In answering Paragraph 8, it is admitted that condominiums, boat slips, a fuel dock, parking lots, and other improvements are located on multiple parcels of real property in the vicinity of 1536 S. Waccamaw Drive in Murrells Inlet, South Carolina, and that one or more of

such parcels and the improvements thereon are commonly referred to collectively as "Marlin Quay Marina." The remaining allegations are denied.

8. In answering Paragraph 9, it is admitted that Marlin Quay Marina Bar & Grill, LLC operated a restaurant in a building located at Marlin Quay Marina and that said restaurant was demolished in November 2016. The remaining allegations are denied.

9. In answering Paragraph 10, it is admitted that a parcel of real property owned by Defendant Palmetto Industrial Development, LLC ("Palmetto") is contiguous with property owned by Plaintiff ("Plaintiff's Property") and said property appears as Lots 3, 4, and 5 on the Plat recorded in Plat Book 6 at 214 in the office of the Clerk of Court for Georgetown County. It is further admitted that the property owned by Palmetto ("Palmetto's Property") is currently used, in part, for vehicular parking. The remaining allegations are denied.

10. The allegations in Paragraphs 11 thru 20 are based upon matters of public record and so long as such allegations are consistent with the publically recorded documents referenced therein, the allegations are admitted.

11. In answering Paragraph 21, the terms and conditions of any easements granted to the Plaintiff are set forth in said easements and are governed by applicable South Carolina law.

12. In answering Paragraph 22, it is admitted that dredging of the Marlin Quay Marina basin occurred during 2007. Defendants lack sufficient knowledge or information to form a belief as to the truth of the remaining allegations therein and therefore deny the same.

13. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraphs 23 and 24 and therefore deny the same.

14. In answering Paragraph 25, it is admitted that Defendant Palmetto engaged in demolition activities on its Property in November 2016. The remaining allegations are denied.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

15. In answering Paragraph 26, it is admitted that Defendant Palmetto installed temporary safety-related signage, fencing, and warning devices on portions of its Property before and during demolition activities in November 2016. The remaining allegations are denied.

16. The allegations of Paragraphs 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36 are denied.

17. In answering Paragraph 37, it is admitted that Plaintiff has only those rights to the Parking Lot which are set forth in the document recorded in Georgetown County Deed Book 382 at Pages 217 through 226 and which bears the caption "Agreement of Easement and Consent to and Joinder of Mortgagee to Granting of Easement." The remaining allegations are denied.

18. The allegations of Paragraphs 38, 39, 40, 41, 42, and 43 are denied.

19. In answering Paragraph 44, it is admitted that S.C. Code Ann. § 15-67-410 contains the quoted language. The remaining allegations are denied.

20. The allegations of Paragraphs 45, 46, 47, 48, 49, 50, 51, and 52 are denied.

SECOND DEFENSE
(Unclean Hands)

21. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

22. Between May 2015, and October 31, 2016, Palmetto informed Plaintiff of Palmetto's plans for demolition and construction through numerous conversations with Plaintiff's agents.

23. Between May 2015, and October 31, 2016, Plaintiff, through its agents, contributed input and suggestions which Palmetto incorporated into its plans for demolition and construction.

24. Between May 2015 and November 15, 2016, Plaintiff, approved of, endorsed, and encouraged Palmetto to perform the demolition and construction.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

25. On November 15, 2016, Plaintiff, through its Director of Operations Linda Barnaba, in reference to the demolition and construction, told Palmetto the following:

- "you're making a lot of improvements, you know, to the marina which, you know, we are super-excited about.";
- "I'm so glad that you called, Mr. Lawhon, because we, you know, the timing is not bad for us. You know, the last time I guess it was Mr. Stone, they did the dredging. It was unfortunate for us. It was just bad timing because it was the middle of the summer which was during our peak season. So right now it's not, you know, it's not the worst time in the world for us.";
- "It's just the two holidays that, you know, that we're concerned about. And that's really we're looking at about like a three-week period of time. So I mean if – you picked a good time, you know, to do this, and I'm sure that you were really considerate, you know, making that decision."
- "I'm the best neighbor in the world."
- "there's really enough pie to go around, absolutely enough, you know.";
- ". . . it sounds to me like, you know, it's going to be a great partnership. I mean it's -- I really appreciate you calling me back, and I appreciate the fact that we're willing to sit down and, you know, take a look at this. And I'm super-excited."

26. Plaintiff's claims are barred in whole or in part by Plaintiff's Unclean Hands.

THIRD DEFENSE
(Waiver, Estoppel, Laches)

27. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

28. Palmetto, and its predecessors in title, have properly used, regularly and frequently, for the past twenty to thirty years without objection or interference, Palmetto's Property including the Parking Lot for non-parking activities including but not limited to construction, fishing tournaments, and charity events.

29. Upon information and belief, Plaintiff has repeatedly, over many years, used the Parking Lot for non-parking purposes during the past twenty to thirty years.

30. Plaintiff's claims are barred in whole or in part by the doctrines of Waiver, Estoppel, and Laches.

FOURTH DEFENSE
(Consent)

31. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

32. Plaintiff's claims are barred in whole or in part because Plaintiff consented to Palmetto's actions including but not limited to Palmetto's use of the Parking Lot for construction activities and the erection of a building above portions of the Parking Lot.

FIFTH DEFENSE
(Failure to State a Claim, Rule 12(b)(6), SCRCP, as to Plaintiff's First Cause of Action for Intentional Interference with Easement Rights, and Second Cause of Action for Trespass and Nuisance)

33. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

34. As "Intentional Interference with Easement Rights" is not a separate cause of action in South Carolina, Plaintiff's First Cause of Action fails to state a claim.

35. Plaintiff alleges in Paragraph 20 of the Complaint that Defendant Palmetto owns the real property on which Plaintiff alleges Defendant trespassed.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

36. As one cannot trespass on one's own property, Plaintiff's Second Cause of Action fails to state a claim for Trespass.

37. Plaintiff's claims for Trespass and Intentional Interference with Easement Rights fail to state the elements needed for such claims.

SIXTH DEFENSE AND FIRST COUNTERCLAIM
(Forcible Entry and Detainer)

38. The above allegations and defenses are incorporated herein by reference and made a part and parcel hereof.

39. Palmetto possess Palmetto's Property in fee simple.

40. Defendant Palmetto made demand on Plaintiff to remove the sign, grease trap, backflow preventer, trash dumpster, water hookup and portions of a storage building currently situated on Defendant Palmetto's property but Plaintiff refused and continues to occupy said Defendant's property.

41. Plaintiff holds Palmetto out of Palmetto's Property with strong hand.

42. By its conduct described above, Plaintiff disseized Palmetto of Palmetto's Property.

43. Plaintiff's conduct violates S.C. Code Ann. § 15-67-410 et seq.

44. As a result of Plaintiff's wrongful conduct, Palmetto suffered and continues to suffer harm.

45. Palmetto is entitled to compensatory, incidental, consequential, special, and punitive damages.

46. Palmetto is entitled to treble damages as provided by S.C. Code Ann. § 15-67-420.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

47. Palmetto is entitled to an Order of the Court requiring the Plaintiff to remove from the Defendant Palmetto's property the Plaintiff's sign, grease trap, backflow preventer, trash dumpster, water hookup and that portion of the storage building on said Defendant's property.

SEVENTH DEFENSE AND SECOND COUNTERCLAIM
(Trespass)

48. The above allegations, defenses, and counterclaims are incorporated herein by reference and made a part and parcel hereof.

49. Palmetto is in legal possession of its Property.

50. Due to Plaintiff's failure to remove its personal property from Defendant Palmetto's property, the Plaintiff's storage building, advertising sign, grease trap, backflow preventer, trash dumpster and water hookup constitute a continuing trespass.

51. As a result of Plaintiff's wrongful conduct, Palmetto suffered, and continues to suffer, harm including physical harm to Palmetto's Property and to Palmetto's personal property situated thereon.

52. Palmetto is entitled to compensatory, incidental, consequential, special, and punitive damages.

53. In addition, Palmetto is entitled to Mandatory Injunction ordering Plaintiff to remove all the aforesaid from Defendant's property, as well as a Permanent Injunction enjoining Plaintiff from erecting structures on Palmetto's Property in the future.

EIGHTH DEFENSE AND THIRD COUNTERCLAIM
(Declaratory Judgment, S.C. Code Ann. § 15-53-10 et seq.;
Permanent Mandatory Injunction)

54. The above allegations, defenses and counterclaims are incorporated herein by reference and made a part and parcel hereof.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

55. The document recorded in Georgetown County Deed Book 382 at Pages 217 through 226 bearing the caption "Agreement of Easement and Consent to and Joinder of Mortgagee to Granting of Easement," ("Grant of Easement") clearly and unambiguously limits Plaintiff's right to use the Parking Lot to the specific purposes of ingress, egress, vehicular parking, maintenance, and repair.

56. The Grant of Easement clearly and unambiguously provides that Plaintiff's right to use the Parking Lot is non-exclusive.

57. The Grant of Easement does not contain any express limitations on Defendants' use of the Parking Lot.

58. The Grant of Easement does not convey to Plaintiff any rights to air, sunshine, view, or breezes nor any rights to erect and maintain structures thereon.

59. Defendant Palmetto is entitled to a Judgment declaring that the aforesaid easement granted to Plaintiff by the Grant of Easement ("Plaintiff's Easement") (1) does not extend vertically more than 13'6" from the surface of the ground, (2) does not inhibit or restrict in any way Defendants' right and ability to build a structure in the airspace above Plaintiff's Easement, (3) may be used by Plaintiff exclusively for the specific purposes of ingress, egress, vehicular parking, maintenance, and repair as set forth in the Grant of Easement, (4) does not entitle Plaintiff to a specific number of parking spaces, (5) entitles Plaintiff only to such parking as may be available, even if the amount of available parking is zero at any given time, and (6) does not entitle Plaintiff to maintain any structures or personal property thereon.

60. Defendant Palmetto is entitled to an Order of this Court vacating the Court's Order Granting Temporary Injunction and awarding Defendant damages resulting from Defendant having been wrongfully enjoined from November 17, 2016 through the present.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

61. The Grant of Easement clearly and unambiguously provides that "both parties shall be equally responsible for the maintenance and upkeep of the aforementioned easement area and shall equally share the costs associated with its proper maintenance and upkeep to insure that it is satisfactory for the uses and purposes intended herein."

62. Upon information and belief, during 2014, 2015, and 2016, Plaintiff has not timely paid its equal share of the costs as required by the Grant of Easement.

63. Defendant Palmetto is entitled to a Permanent Mandatory Injunction requiring Plaintiff to timely pay its equal share of the costs of maintaining Plaintiff's Easement as required by the Grant of Easement in the future.

64. Defendant Palmetto is entitled to a judgment against the Plaintiff for damages in the amount of Plaintiff's share of the costs of maintaining Plaintiff's Easement from August 20, 2014 through the present, together with legal interest thereon.

NINTH DEFENSE AND FOURTH COUNTERCLAIM
(Promissory Estoppel)

65. The above allegations, defenses and counterclaims are incorporated herein by reference and made a part and parcel hereof.

66. The Plaintiff, thru its agents, actively encouraged, represented, and promised the Defendant Palmetto that the improvements to the Defendant Palmetto's property were needed and welcomed. Further, that the time for the construction of the improvements to commence was appropriate and consistent with the Plaintiff's business.

67. In addition to the above representations and promises made by the Plaintiff, the Plaintiff, over the many years it has operated the Gulfstream Café, has, through its conduct, representations, and promises, permitted and utilized the use of the Parking Lot, or portions thereof, for activities unrelated to parking, ingress, and egress.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

68. The Defendant Palmetto relied on the representations, conduct and promises when it undertook the necessary acts needed for construction improvements, such as the hiring of an architect, preparation of drawings, demolition of the Restaurant and Marine Shop, as well as other related activities.

69. The Defendant's reliance on the representations, conduct and promises of the Plaintiff was reasonable, foreseeable and expected.

70. As a result of the Plaintiff's representations, conduct and promises, and the Defendant's reliance thereon, the Defendant Palmetto has been damaged in that the said Defendant expended thousands of dollars in preparing for construction and demolishing the Restaurant and Marina Shop.

71. As a result, the Defendant Palmetto is entitled to an award of actual, compensatory, and punitive damages, as well as legal interest on its actual and compensatory damages, against the Plaintiff.

TENTH DEFENSE AND FIFTH COUNTERCLAIM
(Breach of Easement)

72. The above allegations, defenses and counterclaims are incorporated herein by reference and made a part and parcel hereof.

73. The Plaintiff breached its obligations of good faith and dealing by attempting to usurp the Defendant Palmetto's rights to its property, by interfering with Palmetto's property rights, by abusing its rights under the Easements alleged in its Complaint, and by attempting to enlarge its easement rights to the detriment of the Defendant Palmetto.

74. As a result of Plaintiff's breach of the easement agreement, the Defendant Palmetto is entitled to the payment of the monthly rental value of Plaintiff's use of Defendant Palmetto's property for its use of said property which is beyond the uses permitted under the

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

easements, together with legal interest thereon, as well as an order of the Court directing the Plaintiff to completely remove any and all obstructions Plaintiff erected on Defendant Palmetto's property as well as fully restore those portion of Defendant's property used by the Plaintiff.

WHEREFORE, having fully answered the Complaint, Defendants pray for the following:

a. The Complaint be dismissed with prejudice;

b. An award against the Plaintiff to the Defendant Palmetto of actual, compensatory, consequential, punitive, and treble damages, together with legal interest thereon, resulting from Plaintiff's Forcible Entry and Detainer;

c. An award against the Plaintiff to the Defendant Palmetto for actual, compensatory, consequential, and punitive damages, together with legal interest thereon, to the Defendant Palmetto resulting from Plaintiff's promises;

d. An Order of the Court restoring Palmetto to possession of Palmetto's Property;

e. An award to Palmetto of compensatory, incidental, consequential, special, and punitive damages resulting from Plaintiff's Trespass;

f. A Mandatory Injunction ordering Plaintiff to remove all obstructions that the Plaintiff erected on Defendant Palmetto's Property, as well as a Permanent Injunction enjoining Plaintiff from erecting any structures on Palmetto's Property in the future;

g. A Judgment declaring that the easement granted to Plaintiff by the Grant of Easement ("Plaintiff's Easement") (1) does not extend vertically more than 13'6" from the surface of the ground, (2) does not inhibit or restrict in any way Defendant Palmetto's right and ability to build a structure in the airspace above Plaintiff's Easement, (3) can be used by Plaintiff exclusively for the specific purposes of ingress, egress, vehicular parking, maintenance, and

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

repair as set forth in the Grant of Easement, (4) does not entitle Plaintiff to a specific number of parking spaces, and (5) entitles Plaintiff only to such parking as may be available, even if the amount of available parking is zero at any given time;

h. An Order vacating the Court's Order Granting Temporary Injunction, and awarding Defendant Palmetto damages resulting from said Defendant being wrongfully enjoined from November 17, 2016 through the present;

i. A Permanent Mandatory Injunction requiring Plaintiff to timely pay its equal share of the costs of maintaining Plaintiff's Easement as required by the Grant of Easement in the future;

j. An award to the Defendant Palmetto for damages, together with legal interest, for Plaintiff's share of the costs of maintaining Plaintiff's Easement from August 20, 2014 through the present, and the monthly rental value, together with legal interest, for Plaintiff's sign, grease trap, backflow preventer, and water hookup which continues to occupy Defendant Palmetto's real property; and

k. For such other and further relief as this Court may deem just and proper.

McNAIR LAW FIRM, P.A.

s/Henrietta U. Golding
Henrietta U. Golding, SC Bar #2173
2411 N. Oak Street, Suite 206 (29577)
Post Office Box 336
Myrtle Beach, SC 29578-0336
Ph: 843.444.1107
Fax: 843.443-9137
Email: hgolding@mcnair.net
Attorneys for the Defendants

Myrtle Beach, South Carolina
October 2, 2017

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2018 Jun 12 10:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961
ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN The Gulfstream Café, Inc., Plaintiff, v. J. Mark Lawhon, Individually, and Palmetto Industrial Development, LLC, Defendants.	)))))))))))))	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT Civil Action No. 2016-CP-22-00961 **VERDICT FORM**

PLAINTIFF'S CLAIM

1. **Interference with Easement**

☒ We, the jury, by unanimous decision find for the Plaintiff on its claim of interference with its easement.

OR

☐ We, the jury, by unanimous decision find for the Defendants.

If you found for the Plaintiff, set forth the amount of damages, if any.

$ ~~0~~ $1,000.00 DAR

Please proceed to Question 2

ELECTRONICALLY FILED - 2018 Jun 12 10:50 AM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961
ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

DEFENDANTS' CLAIMS

2. Trespass as to Plaintiff's Trash Dumpster

☐ We, the jury, by unanimous decision find for the Defendants on their claim of trespass.

OR

☒ We, the jury, by unanimous decision find for the Plaintiff.

If you found for the Defendants, set forth the amount of damages, if any.

$ _____

Please proceed to Question 3

3. Breach of Easement as to Equally Sharing Costs of Proper Maintenance and Upkeep

☐ We, the jury, by unanimous decision find for the Defendants on their claim of Breach of Easement.

OR

☒ We, the jury, by unanimous decision find for the Plaintiff.

If you found for the Defendants, set forth the amount of damages, if any.

$ _____

Foreperson: _____

June 11, 2018
Georgetown, SC

WHEN YOU HAVE REACHED A VERDICT, KNOCK ON THE DOOR AND NOTIFY THE BAILIFF

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP2200961

Gulfstream Cafe Inc		J Mark Lawhon	Palmetto Industrial Development LLC
PLAINTIFF(S)		DEFENDANT(S)	
Submitted by: Clerk of Court		Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: See page 2 for Order Granting Permanent Injunction.

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Gulfstream Café	J. Mark Lawhon	$1000.00
Gulfstream Café	Palmetto Industrial Development LLC	$1000.00

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

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	2129 Judge Code	6/04/2018 Date

For Clerk of Court Office Use Only

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

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 2/17)

ELECTRONICALLY FILED - 2018 Jun 12 10:55 AM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961
ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

George W. Redman III PO Box 357 Myrtle Beach, SC 29578
Simon H Bloom Bloom Sugarman Llp 977 Ponce De Leon Ave., Ne Atlanta, GA 30306
Adam D Nugent 977 Pone De Leon Ave Ne Atlanta, GA 30306

ATTORNEY(S) FOR THE PLAINTIFF(S)

Henrietta U. Golding Mcnair Law Firm PO Box 336 Myrtle Beach, SC 29578
David J. Mills PO Box 1431 Charleston, SC 29402
Daniel J. MacDonald Parkway Office Plaza 1107 48Th Avenue North, Suite 210 Myrtle Beach, SC 29577

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter: Grace Hurley

Alma Y. White - Clerk of Court

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

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

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

Based on the case law of this state, the facts as presented at this trial, and the jury's verdict, a permanent restraining order is issued with the following terms. The Defendants are enjoined from preventing the Plaintiff from enjoying the right granted to it in the recorded nonexclusive joint easement. The Defendants are restrained and may not expand the outside boundaries of any new building beyond those previously used. The Court is specifically not talking about height, only the outside boundaries.

ELECTRONICALLY FILED - 2018 Jun 12 10:55 AM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961
ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2018 Jun 12 10:55 AM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961
ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Georgetown Common Pleas

Case Caption: Gulfstream Cafe Inc VS J Mark Lawhon , defendant, et al

Case Number: 2016CP2200961

Type: Order/Form 4

So Ordered

s/ Steven H. John, Resident Circuit Judge, #129

Electronically signed on 2018-06-11 17:11:03 page 3 of 3

ELECTRONICALLY FILED - 2018 Jul 27 12:07 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961
ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA **COUNTY OF GEORGETOWN** The Gulfstream Café, Inc., Plaintiff, vs. J. Mark Lawhon, Individually, and Palmetto Industrial Development, LLC, Defendants.	)	**IN THE COURT OF COMMON PLEAS** **FIFTEENTH JUDICIAL CIRCUIT** CIVIL ACTION NO. 2016-CP-22-00961 **ORDER GRANTING PLAINTIFF'S MOTION TO ALTER OR AMEND THE JUDGMENT**

This matter is before the Court on Plaintiff The Gulfstream Café, Inc.'s Motion to Alter or Amend the Judgment. On June 12, 2018, the Court entered a Permanent Injunction in the above case. On June 22, 2018, Plaintiff filed the instant Motion to Alter or Amend pursuant to South Carolina Rule of Civil Procedure 59(e). Based upon the filings in this matter, the arguments of counsel, and the entire record at trial, the Court enters the following order.

South Carolina Rule of Civil Procedure 59(e) permits a party to file a motion to alter or amend the judgment. The purpose of Rule 59(e) is to enable a party to request that the Court reconsider matters properly encompassed in a decision on the merits. Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). As with other motions under Rule 59, a motion to alter or amend is addressed to the sound discretion of the trial court. See Brinkley v. South Carolina Dept. of Corrections, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009)

Having reviewed Plaintiff's Motion to Alter or Amend, Defendants' response, the record in this case, and having considered the arguments of the parties, the Court finds

that the parties are unclear as to the order of the Court entered on June 12. As a result, the Court exercises its discretion to amend the Permanent Injunction. The following, amended Permanent Injunction is hereby entered.

Based on the case law of this state, the facts presented at this trial, and the jury's verdict, a permanent restraining order is issued with the following terms. The Defendants are enjoined from preventing the Plaintiff from enjoying the right granted to it in the recorded nonexclusive joint easement. The Defendants are restrained and may not expand the outside boundaries of any new building beyond those previously used. The outside boundaries specifically are the outside boundaries of the old building, which was depicted on the 1985 Plat recorded at Plat Book 6, Page 214 of the Georgetown County real property records and was demolished by Defendants in November 2016. The outside boundaries do not include any outbuildings, fixtures, concrete pads, dumpsters, or other accessories. As a result, any new building must be located on the same footprint as the old building. The Court is specifically not talking about height, only the outside boundaries.

SO ORDERED this __ day of July, 2018.

Steven H. John
Resident Circuit Judge
Fifteenth Judicial Circuit

At Chambers, SC

ELECTRONICALLY FILED - 2018 Jul 27 12:07 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961
ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2018 Jul 27 12:07 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961
ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Georgetown Common Pleas

Case Caption: Gulfstream Cafe Inc VS J Mark Lawhon , defendant, et al

Case Number: 2016CP2200961

Type: Order/Amend

So Ordered

s/ Steven H. John, Resident Circuit Judge, #129

Electronically signed on 2018-07-27 11:49:15 page 3 of 3

HOWELL V. BELLAMY, JR.
EDWARD B. BOWERS, JR.*
BRADLEY D. KING
M. EDWIN HINDS, JR.
DAVID B. MILLER**
C. WINFIELD JOHNSON, III
DOUGLAS M. ZAYICEK
MARTIN C. DAWSEY*
ROBERT S. SHELTON**

* LLM TAXATION
** CERTIFIED MEDIATOR
*** LICENSED IN SC & NC

THE BELLAMY LAW FIRM

1000 29TH AVENUE NORTH • MYRTLE BEACH, SC 29577
MAILING ADDRESS: P.O. BOX 357 • MYRTLE BEACH, SC 29578
TELEPHONE (843) 448-2400 • FACSIMILE (843) 448-3022
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HOWELL V. BELLAMY, III
ASHLEY P. MORRISON
GEORGE W. REDMAN, III ** ***
BENJAMIN A. BAROODY ** ***
PHILLIP H. ALBERGOTTI* ***
HAYES K. STANTON ** ***
KARA J. KEITH
HOLLY M. LUSK

RETIRED:
CLAUDE M. EPPS, JR.
JOHN E. COPELAND
DAVID R. GRAVELY
JILL F. GRIFFITH
JOHN K. RUTENBERG (1939-2012)

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

December 5, 2017

Via U.S. Mail and Email
Henrietta U. Golding, Esq.
McNair Law Firm, PA
PO Box 336
Myrtle Beach, SC 29578

Re: **NOTICE AND DEMAND FOR DEFENSE AND INDEMNIFICATION**
The Gulfstream Café, Inc. v. Palmetto Development & J. Mark Lawhon, et al.
Civil Action No. 2016-CP-22-00961
The Gulfstream Café, Inc. v. Georgetown County Zoning Board of Appeals, & Palmetto Industrial Development, Inc.
Civil Action No. 2017-CP-22-00235
Marlin Quay Marina Bar & Grill, LLC v. Gulf Stream Café, Inc., et al.
Civil Action No. 2017-CP-22-00446,
Georgetown County Zoning Board of Appeals, Case No. APP # 10-17-19214

Dear Ms. Golding:

I write to demand that your client, Palmetto Industrial Development, Inc. ("Palmetto"), immediately honor its obligation to warrant and defend the Gulfstream Café, Inc.'s ("Gulfstream") easement rights within the Marlin Quay Marina Planned Development District.

In 1986 and 1990, the Marlin Quay Marina Corporation granted Gulfstream, "its successors and assigns forever," a total of four (4) permanent appurtenant easements (collectively referenced as the "Easements"). The Easements provide Gulfstream's owners, agents, employees, and invitees the perpetual, full, and free right to use the Parking Lot at all times for vehicular and pedestrian ingress, egress, and parking, as well as the right to maintain, repair, alter, and improve the restaurant. The Easements also include a detailed depiction of the Parking Lot configuration and limits to prevent continuous conflicting business uses.

Critically, the Marlin Quay Marina Corporation expressly agreed in the Easements that any successive owners of the Parking Lot would warrant and defend Gulfstream's perpetual rights in the subservient estate as burdens which run with the land:

> Marlin Quay Marina Corporation does hereby bind itself and its successors and assigns, to warrant and forever defend, all and singular, the said easement unto the said Gulfstream Café, its successors and assigns, against itself and its successors and assigns and all others whomever lawfully claiming, or to claim the same or any part thereof.

As described in more detail below, Palmetto is obligated to defend and indemnify Gulfstream on multiple grounds.

First, shortly after the purchase of the Property, Palmetto began developing plans for a new building within the Marlin Quay Marina. Palmetto proceeded to unilaterally block off the entire Parking Lot in November of 2016. In response, Gulfstream was forced to initiate litigation to gain access to and prevent interference with the Parking Lot prior to a busy Thanksgiving holiday. Since that time, the Honorable Judge Culbertson found Palmetto and Dr. Lawhon in Contempt for their interference with Gulfstream's Easement rights. Such interference is a direct breach of the warranty in each Easement. Because Gulfstream had to hire counsel to defend its Easement rights, your client is obligated to immediately tender payment for the defense of same.

Second, Palmetto submitted its redevelopment plans to Georgetown County for a building permit. These plans included a new and larger building with a restaurant larger than Gulfstream, and that the building would be placed directly on top of the Parking Lot. In response, Gulfstream was forced to petition the Zoning Board of Appeals for Georgetown County to defend its Easement rights. This matter remains pending before Judge Culbertson. Palmetto's submission of plans which would alter and build on top of the Easements is a direct breach of the warranty in each Easement, and as such, your client is obligated to immediately tender payment for the defense of Gulfstream's Easement rights.

Third, in May of 2017, the Marlin Quay Marina Bar & Grill, LLC (Marina Bar & Grill) filed its lawsuit against Gulfstream, essentially claiming the actions taken by Gulfstream to defend its Easement rights had caused damages. The claims presented by the Marina Bar & Grill are precisely the type which Palmetto warranted to defend when it purchased the Parking Lot property in August of 2014. As such, your client is obligated to immediately tender payment for the defense of Gulfstream's Easement rights. Because Gulfstream had to hire counsel to defend its Easement rights, your client is obligated to immediately tender payment for the defense of same.

Fourth, during the summer of 2017, Palmetto secretly commissioned new plans to build a different building upon the Parking Lot, and obtained a building permit from Georgetown County on or around September 15, 2017. The new plans also include a larger building with a restaurant larger than Gulfstream. The proposed building also would be placed directly on top of the north end of the Parking Lot. Once again, Gulfstream was forced to petition the Zoning Board of Appeals for Georgetown County to defend its Easement rights. Palmetto's second submission of plans under cover of darkness is a direct breach of the warranty in each Easement, and as such, your client is obligated to immediately tender payment for the defense of Gulfstream's Easement rights.

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Gulfstream has selected preferred Counsel for the defense of its rights under the Easement. Palmetto must now honor the above-referenced warranty and defense obligations without delay. We also ask that you provide confirmation that Gulfstream will be fully indemnified as to all future costs of the defenses set forth above, as well as the costs of any appeals. Your client's immediate attention to these matters is required. We thank you in advance for your cooperation so that additional and further legal action will not be required.

Sincerely,

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

George W. Redman, III

GWR:kel
cc: Client

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

McNAIR
ATTORNEYS

Henrietta U. Golding
hgolding@mcnair.net
T 843.444.1102

ELECTRONICALLY FILED - 2019 Feb 19 4:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

December 12, 2017

Via Email and U.S. Mail

George Redman, Esquire
Bellamy Law Firm
1000 29th Avenue North
Myrtle Beach, SC 29577

Re: The Gulfstream Cafe, Inc. v. J. Mark Lawhon and Palmetto Industrial Development, LLC
Civil Action No.: 2016-CP-22-00961

Dear George:

With regard to your letter dated December 5, 2017, it contains many inaccuracies. In addition, Gulfstream has no legal basis for any indemnification claim.

Sincerely,

McNAIR LAW FIRM, P.A.

Henrietta U. Golding
HUG/ck

cc: Client (*via email*)
Adam Nugent, Esquire (*via email*)
Simon Bloom, Esquire (*via email*)

McNAIR LAW FIRM, P.A.
Founders Centre
2411 Oak Street, Suite 206
Myrtle Beach, SC 29577

Mailing Address
Post Office Box 336
Myrtle Beach, SC 29578

mcnair.net

ELECTRONICALLY FILED - 2019 Mar 06 5:25 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	)))	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2018-CP-22-00199
The Gulfstream Café, Inc., Plaintiff, vs. Palmetto Industrial Development, LLC. Defendant.	))))))))))	**DEFENDANT'S MOTION TO AMEND ANSWER**

Defendant Palmetto Industrial Development, LLC ("Defendant"), by and through its undersigned counsel, hereby moves pursuant to Rule 15 of the South Carolina Rules of Civil Procedure for an Order amending its Answer to the Complaint, in the above-captioned case, to add a counterclaim. The basis of this motion is in the interest of justice and that facts arose since the filing of this lawsuit which warrant the addition of a counterclaim to be asserted. Pursuant to Rule 15, South Carolina Rules of Civil Procedure, motions to amend are freely granted where, as here, justice so requires and it is not prejudicial to the other parties. Defendant's Amended Answer and Counterclaim to the Complaint is attached hereto as Exhibit A.

The undersigned counsel for the Defendant, pursuant to Rule 11, South Carolina Rules of Civil Procedure, hereby certifies that consultation would not be fruitful and therefore, serves no useful purpose.

Respectfully submitted,

BURR & FORMAN LLP

s/Henrietta U. Golding

Henrietta U. Golding, SC Bar # 2173
Burr & Forman LLP
2411 Oak Street, Suite 206
P.O. Box 336 (29578)

Myrtle Beach, South Carolina 29577
Tel: (843) 444-1107
Fax: (843) 443-9137
Email: hgolding@burr.com

Attorneys for the Defendant Palmetto Industrial Development, LLC

Myrtle Beach, South Carolina

March 6, 2019

ELECTRONICALLY FILED - 2019 Mar 06 5:25 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2019 Mar 06 5:25 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	)))	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2018-CP-22-00199
The Gulfstream Café, Inc., Plaintiff, vs. Palmetto Industrial Development, LLC. Defendant.	))))))))))	**DEFENDANT'S AMENDED ANSWER AND COUNTERCLAIM**

The Defendant Palmetto Industrial Development, LLC ("Palmetto") answering the Complaint would respectfully show and allege onto this Honorable Court as follows:

FIRST DEFENSE

1. Each and every allegation not hereinafter admitted, modified or qualified is denied and strict proof demanded thereof.

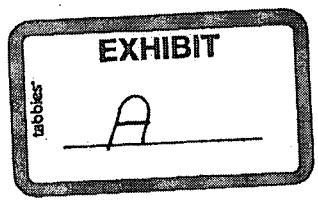
2. The allegations of Paragraphs 1 and 2 are admitted.

3. The allegations of Paragraphs 3, 4, 5, 6, 7, 8, and 9 are denied and strict proof demanded thereof.

4. In answering Paragraphs 10 and 11, the allegations in Paragraphs 10 and 11 are admitted except the easements referenced therein are not "Gulfstream Easements" but rather joint non-exclusive easements with the Defendant.

5. The allegations of Paragraph 13 are admitted except that the non-exclusive easement is a joint nonexclusive easement, not only to Gulfstream but also to this Defendant.

6. In answering Paragraphs 12, 14, 15, and 16, the applicable easements speak for themselves and therefore reference is craved to said easements.



7. The remaining allegations, and claims, in the Complaint are denied and strict proof demanded thereof.

SECOND DEFENSE

8. The allegations of the First Defense are incorporated herein and made a part and parcel of the Second Defense.

9. The Defendant asserts waiver, estoppel and laches as affirmative defenses which bar any relief to the Plaintiff.

THIRD DEFENSE

10. The allegations of the First and Second Defense are incorporated herein and made a part and parcel of the Third Defense.

11. The Defendant asserts the applicable statute of limitations as a complete defense.

FOURTH DEFENSE

12. The allegations of the First, Second and Third Defense are incorporated herein and made a part and parcel of the Fourth Defense.

13. The Defendant asserts unclean hands on the part of the Plaintiff as a complete defense.

FIFTH DEFENSE

14. The allegations of the First, Second, Third, and Fourth Defense are incorporated herein and made a part and parcel of the Fifth Defense.

15. Any and all claims asserted by the Plaintiff should have been timely asserted in the Plaintiff's Civil Action No.: 2016-CP-22-00961. The Plaintiff, having failed to timely assert any similar claim as alleged in this action in the aforesaid 2016 civil action, is barred in asserting such claims.

ELECTRONICALLY FILED - 2019 Mar 06 5:25 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

SIXTH DEFENSE

16. The allegations of the First, Second, Third, Fourth and Fifth Defense are incorporated herein and made a part and parcel of the Sixth Defense.

17. The Defendant asserts res judicata, collateral estoppel, and issue preclusion as complete defenses.

SEVENTH DEFENSE

18. The allegations of the First, Second, Third, Fourth, Fifth and Sixth Defense are incorporated herein and made a part and parcel of the Seventh Defense.

19. The Plaintiff failed to timely notify the Defendant of any alleged duty to defend and indemnify, and as a result of such failure, the Plaintiff's claims are barred.

EIGHTH DEFENSE AND FIRST COUNTERCLAIM

20. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, and Seventh Defense are incorporated herein and made a part and parcel of this Eighth Defense and First Counterclaim.

21. Since the commencement of this action, The Gulfstream Café, Inc.'s ("Gulfstream") has intentionally breached its easement agreement with Palmetto for its unlawful control and detention of a parking space situated over and across Palmetto's parking lot ("Parking Lot").

22. Palmetto's Parking Lot has been in existence since the early 1980's and is situated between the Marlin Quay Marina Bar and Grill ("Marlin Quay Marina") and Gulfstream's restaurant.

23. On February 25, 1986, the Marlin Quay Marina Corporation, Palmetto's predecessor, granted Gulfstream, its successors and assigns, three joint nonexclusive easements to

ELECTRONICALLY FILED - 2019 Mar 06 5:25 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

the Parking Lot for ingress, egress, vehicular parking, and to conduct maintenance, repair, alteration, and improvements to its property. The nonexclusive easements were recorded on April 2, 1986 in the office of the Clerk of Court for Georgetown County in Deed Book 234 at Pages 790, 797, and 803.

24. On June 4, 1990, the Marlin Quay Marina Corporation clarified the nonexclusive easements and granted Gulfstream the following joint nonexclusive easement ("Joint Nonexclusive Easement"):

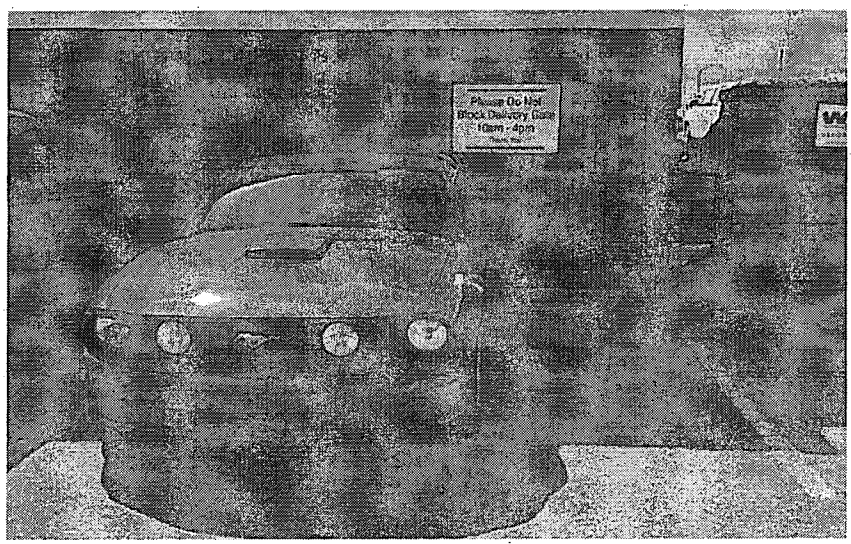
> "[A] non-exclusive perpetual easement appurtenant to the premises of the Grantee hereinafter described for the full and free right of ingress and egress on, over and across the following described property of the Grantor, together with the rights of vehicular parking on and vehicular and pedestrian access to, all in accordance with all governmental rules, regulations, ordinances or laws, the premises of the Grantor hereinafter described, and also for the purpose of maintenance, repair, alteration, and/or improvements to the Grantee's hereinafter described property. It is anticipated by the parties that while they will each have joint and non-exclusive use at all times of the area covered by this easement that the Grantor will utilize the premises primarily during the daytime regular business hours of Grantor and the Grantee will utilize the premises primarily in the evening regular business hours of Grantee. The property of the Grantor subject to this nonexclusive perpetual easement is more full described as follows:
>
> A nonexclusive right of ingress, egress and vehicular parking over, across and all of those certain pieces, parcels or tracts of land situate, lying and being in the Garden City area of the County of Georgetown, State aforesaid, and being more particularly shown as Lots 3, 4, and 5 of Marlin Quay Marina Horizontal Property Regime, Garden City Point, prepared by Surtech, Inc. dated May 21, 1985, revised November 27, 1985, and recorded in the office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 214, said plat being expressly incorporated herein by reference.
>
> The Grantor acquired the aforedescribed property by virtue of that certain Deed from Marlin Quay Company, a South Carolina General Partnership, dated July 1, 1983 and recorded on September 1, 1983 in the office of the Clerk of Court for Georgetown County in Deed Book 211 at Page 1141.
> The property of the Grantee to which this easement is appurtenant is more fully described as follows:
>
> All those certain pieces, parcels, areas of tracts of land identified as Marsh Area, Tract A and Tract B on that certain survey for Marlin Quay Company, Garden City

ELECTRONICALLY FILED - 2019 Mar 06 5:25 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Point dated August 27, 1985, revised January 24, 1986, surveyed and mapped by Surtech, Incorporated and recorded in the office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 438.

It is expressly understood and agreed by Marlin Quay Marina Corporation and the Gulfstream Café that as part of the consideration for this conveyance, both parties shall be equally responsible for the maintenance and upkeep of the aforementioned easement area and shall equally share the costs associated with its proper maintenance and upkeep to insure that it is satisfactory for the uses and purposed intended herein."

25. On or around July 18, 2018, Gulfstream hung a do not park sign ("Do Not Park Sign") on its building demanding that visitors, employees, and patrons not park in a parking space located within the Joint Nonexclusive Easement and on Palmetto's Parking Lot. Below, are pictures of the Do Not Park Sign and where it is located:



ELECTRONICALLY FILED - 2019 Mar 06 5:25 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

26. Pursuant to the Joint Nonexclusive Easement, Gulfstream's right to use Palmetto's Parking Lot is nonexclusive and it cannot prohibit or demand that a visitor, employee, or patron not park in a parking space on Palmetto's Parking Lot.

27. Through its unilateral taking of a parking space and demanding that visitors, employees, and patrons not park on Palmetto's Parking Lot, Gulfstream is in breach of its Joint Nonexclusive Easement.

28. As a result of Gulfstream's breach of the Joint Nonexclusive Easement, Palmetto is entitled to an order of the Court directing Gulfstream to remove the Do Not Park Sign hung on its building.

WHEREFORE, having answered the Complaint, the Defendant prays for the following:

a) Gulfstream's Complaint be dismissed with prejudice;

b) An Order of the Court directing Gulfstream to remove the Do Not Park Sign; and,

c) For such other and further relief as this Court may deem just and proper for the costs of this action, and for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

BURR & FORMAN LLP

_____

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March _____, 2019

Attorneys for the Defendant Palmetto Industrial Development, LLC

ELECTRONICALLY FILED - 2019 Mar 06 5:25 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA	) **THE COURT OF COMMON PLEAS**
	) **FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF GEORGETOWN	) **CASE NO.: 2018-CP-22-00199**
The Gulfstream Café, Inc., Plaintiff, v. Palmetto Industrial Development, LLC, Defendant.	**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Palmetto Industrial Development, LLC, pursuant to Rule 56, SCRCP, respectfully moves for summary judgment thereby resulting in a dismissal of the Complaint.

This dispute raises a legal question about the interpretation of warranty provisions in four easements held by The Gulfstream Café. The plain language of those provisions (which has already been interpreted by the South Carolina Supreme Court when used in another case, *see Black v. Patel*, 357 S.C. 466, 594 S.E.2d 162 (2004)) and common sense make clear that Palmetto Industrial is not required to indemnify The Gulfstream Café. Therefore, Palmetto Industrial is entitled to summary judgment.

A memorandum in support of this motion and in opposition to Gulfstream's motion for summary judgment is being filed with this motion.

Dated this 19th day of March, 2019.

Respectfully submitted,

BURR & FORMAN LLP

s/Henrietta U. Golding
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ELECTRONICALLY FILED - 2019 Mar 19 4:14 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2019 Apr 08 11:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**COUNTY OF GEORGETOWN**
COUNTY OF GEORGETOWN	)	Civil Action No. 2018-CP-22-00199
	)	
The Gulfstream Café, Inc.,	)	
	)	**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO AMEND ANSWER**
Plaintiff,	)	
	)	
v.	)	
	)	
Palmetto Industrial Development LLC,	)	
	)	
Defendant.	)	
	)	
	)	

Plaintiff The Gulfstream Café, Inc. ("Gulfstream") hereby responds to Defendant Palmetto Industrial Development, LLC's ("Palmetto") Motion to Amend Answer, filed on March 6, 2019. Palmetto's Motion seeks to amend its Answer to assert a counterclaim that has no connection to the instant lawsuit, and which arises from an incident occurring nearly nine months ago. Rule 15 of the South Carolina Rules of Civil Procedure provides that a motion to amend should not be granted where prejudice would result from the amendment. The prejudice that Rule 15 envisions is a lack of notice that a new issue is to be tried and a lack of opportunity to refute it. Tanner V. Florence County Treasurer, 336 S.C. 552, 558-59 (1999).

The present case deals with a single, discrete issue: whether the easement held by Gulfstream obligates Palmetto to warrant and defend against claims that Palmetto made to the easement. Both parties have moved for summary judgment on the only claims in the case, and the parties are in the process of scheduling mediation. Following mediation, the case will be ready for trial. Palmetto's proposed amendment relates to the placement of a sign by Gulfstream, which incident occurred in July 2018 and which has no connection at all to the warranty language contained in the easement. Palmetto's late addition of this unrelated claim represents an attempt

to delay resolution of the case, and this delay will prejudice Gulfstream, which seeks to have this matter resolved promptly.

Because the proposed counterclaim has no connection to the pending litigation, and because this case is nearly ready for trial, the Court should deny Palmetto's Motion to Amend.

Respectfully submitted,

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/s/ Simon H. Bloom
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Admitted Pro Hac Vice
Adam D. Nugent
GA Bar No. 381008
Admitted Pro Hac Vice

Myrtle Beach, South Carolina

April 8, 2019.

ELECTRONICALLY FILED - 2019 Apr 08 11:31 AM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2019 Apr 18 4:38 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA **COUNTY OF GEORGETOWN**	)	**IN THE COURT OF COMMON PLEAS** **COUNTY OF GEORGETOWN** Civil Action No. 2018-CP-22-00199
The Gulfstream Café, Inc., Plaintiff, v. Palmetto Industrial Development LLC, Defendant.	)	**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff The Gulfstream Café, Inc. ("Gulfstream") hereby responds to Defendant Palmetto Industrial Development, LLC's ("Defendant") Motion for Summary Judgment, filed on March 19, 2019.

INTRODUCTION

Defendant's Motion for Summary Judgment represents a desperate effort to avoid the impact of the plain language of the Easement Agreement. In that document, Defendant (through its predecessor) plainly agreed to defend Gulfstream from claims against its Easement, including those made by Defendant itself. Despite this obligation, Defendant embarked upon a campaign to destroy the easement rights held by Gulfstream. Defendant's claims trigger the warranty and defense obligation, and this Court should find as a matter of law that Defendant has breached the Easement Agreement.

FACTUAL BACKGROUND

Gulfstream's Notice of Motion and Motion for Summary Judgment (hereinafter the "Gulfstream Motion for Summary Judgment"), including exhibits in support, filed on February 19, 2019, includes the factual background relevant to determination of the pending Motions for Summary Judgment and is expressly incorporated herein by reference.

ARGUMENT AND CITATION OF AUTHORITY

I. Summary Judgment Standard.

"Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Rule 56, SCRCP; South Carolina Prop. & Cas. Guar. Ass'n. v. Yensen, 345 S.C. 512, 528, 518 (Ct.App.2001). "When ruling on a motion for summary judgment, the trial judge must consider all of the documents and evidence within the record, including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits." Anthony v. Padmar, Inc., 307 S.C. 503 (Ct. App. 1992); Gilmore v. Ivey, 290 S.C. 53 (Ct. App. 1986).

Once the moving party establishes the absence of any evidentiary support for the opponent's case, "the opponent cannot simply rest on mere allegations or denials contained in the pleadings." Bradley v. Doe, 374 S.C. 622, 625, (Ct. App. 2007). Instead, the opponent must present "specific facts" that demonstrate a genuine issue for trial:

> [T]he rule authorizing summary judgment would serve no useful purpose if frivolous proofs were held to create a triable issue. The question on a motion for summary judgment is whether there is anything of substance to be tried. Therefore, it is incumbent upon the court to search the proof to ascertain whether it discloses a real issue, rather than a formal, perfunctory, or shadowy one. The fact that there is a factual dispute is not enough to preclude a summary judgment. The issue must be one which the defendant is entitled to litigate.

Saluda Motor Lines, Inc. v. Crouch, 300 S.C. 43, 46 (Ct. App. 1989) (quoting 73 Am. Jur. (2d) Summary Judgment §27).

II. The Language of the Easement and the Intent of the Parties Demonstrate Defendant Must Warrant and Forever Defend Gulfstream.

The Court must first look to the language of the Easement and the intent of the parties to the Easement to determine the meaning of the warranty provision. The plain language of the provision states:

ELECTRONICALLY FILED - 2019 Apr 18 4:38 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

> Marlin Quay Marina Corporation does hereby bind itself and its successors and assigns, ***to warrant and forever defend***, all and singular, ***the said easement unto the said Gulfstream Cafe***, its successors and assigns, ***against itself*** and its successors and assigns and all others whomever lawfully claiming, or to claim the same or any part thereof.

(Gulfstream Motion for Summary Judgment, Exhibit 6, 1990 Easement) (emphasis added).

In interpreting this provision, the Court should consider the purpose of an easement, as opposed to a deed. An easement is a right to *use the land* of another for a specific purpose. Kelly v. Snyder, 370 S.C. 561, 572 (Ct. App. 2006). It necessarily follows that any denial of the agreed-upon rights represents a claim against the easement. Here, the Easement granted Gulfstream the full and free right to access the parking lot for, among other things, ingress, egress, and vehicular parking, particularly during Gulfstream's evening business hours. Defendant's interference with the Easement prevented Gulfstream from using the land for the specific purpose that was granted to Gulfstream, and such interference therefore constitutes a claim against the Easement. The language of the Easement plainly indicates that Defendant is bound to warrant and forever defend the Easement unto Gulfstream against all claims against the Easement, even those made by Defendant.

Because the language of the Easement is not ambiguous it is not necessary to consider the intent of the parties. But, if the Court looked to that intent, the evidence confirms Gulfstream's interpretation of the warranty provision. Gulfstream considered the warranty provision a key component of the Easement and would not have signed the Easement if it had not included the warranty. (Gulfstream Motion for Summary Judgment, Exhibit 1, Cribb Aff. ¶¶ 9, 15.) Mr. Edward Cribb, the then President of Gulfstream who signed the Gulfstream Easement, understood the warranty provision to

ELECTRONICALLY FILED - 2019 Apr 18 4:38 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

mean that Grantor would pay for Gulfstream's defense, including costs and attorneys' fees, if the use of the Parking Lot and/or Gulfstream's easement rights were challenged. (Id. at ¶¶ 10, 16.) Mr. Cribb's understanding of the warranty provision is probative of the intent of the parties in agreeing to the Easement. Moreover, during the negotiations of the Easement, it was clear the Grantor had the same understanding of the warranty provision as Mr. Cribb. (Id. at ¶¶ 11, 17.) Mr. Cribb was personally involved in the negotiations of the Easement, and he possesses knowledge regarding how both parties to those negotiations viewed the Easement rights. Defendant's argument that Mr. Cribb's affidavit is not based on personal knowledge is meritless.

III. The Court Should Require Defendant to Defend Gulfstream Because Defendant's Own Wrongful Conduct is the Basis for the Injunction Suit.

Defendant argues that it only has a duty to defend successful claims, and that Gulfstream's verdict in the Injunction Lawsuit is the "undoing of its claim here." Defendant relies solely on Black v. Patel, 357 S.C. 466 (2004) for its position that attorneys' fees are only allowed if a claim to title is successful. Defendant's position is totally incorrect.

Defendant claims there is a rule limiting defense obligations to successful claims, but Defendant conveniently ignores the language in Black that expressly recognizes a clear exception to the rule. Specifically, the Court in Black explained that when the grantor's own wrongful act gives rise to the litigation, then the grantor's obligation to defend is not limited to successful claims. Black, 357 S.C. at 472 n.4. In such a situation, the grantor's defense rights are triggered irrespective of whether the claims asserted were successful. Id.

ELECTRONICALLY FILED - 2019 Apr 18 4:38 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

The exception identified in Black demonstrates that common sense favors Gulfstream, not Defendant. Defendant, as grantor, has engaged in conduct that blatantly interferes with Gulfstream's easement rights, and Gulfstream has incurred significant legal fees attempting to defeat Defendant's claim to the Gulfstream Easement. It does not matter whether Gulfstream prevailed in the underlying lawsuit. Otherwise, Defendant is permitted to undermine and challenge the Easement, force Gulfstream to defend its rights, and then escape any obligation to shoulder the defense/warranty obligation that it contractually agreed to. This is factually distinguishable from the circumstances in the Black case, which involved a claim asserted by a third party, to whom the grantor had no connection at all. Defendant cannot avoid its obligation to defend Gulfstream when it is Defendant's own conduct that gave rise to the underlying lawsuit.

Contrary to Defendant's argument, the difference between the bundle of rights transferred in a warranty deed and an easement is critical. A warranty deed, like that at issue in Black, represents a transfer of title where the grantor has no future rights or relationship with the grantee. By contrast, under an Easement, the grantor and grantee typically maintain an ongoing relationship, which is exactly the case between Defendant and Gulfstream. It would be completely inequitable to allow the Defendant to abuse this relationship while sidestepping its obligation to pay attorneys' fees.

Finally, to the extent the Court finds that Defendant must warrant and defend successful claims, the reality is that Defendant successfully limited Gulfstream's easement rights in the Injunction Suit. Specifically, Gulfstream asked the Court to prohibit Defendant from operating a restaurant that serves dinner in the evening. (Attachment A, Plaintiff's Motion to Alter or Amend Judgment, In the Court of Common Pleas Fifteenth Judicial Circuit, Civil Action No. 2016-CP-22-00961). Gulfstream made this request

ELECTRONICALLY FILED - 2019 Apr 18 4:38 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

because the Easements expressly contemplate that Gulfstream's primary use of the parking lot would be during the evening. (Exhibits 2, 3, 4, & 6 to Gulfstream's Motion for Summary Judgment.) The Court denied this request and declined to enter injunctive relief requested by Gulfstream. (Id.); (Gulfstream Motion for Summary Judgment, Exhibit 14, July 27, 2018 Order). Accordingly, Defendant made a successful claim against the Easement with respect to its ability to operate a restaurant at night, and Defendants' operation of such a restaurant will greatly limit the scope of Gulfstream's Easement rights. Defendant must, at a minimum, warrant and defend Gulfstream for this claim.

IV. Defendant's Defense Obligation Has No Connection to Title.

Defendant also argues that only claims challenging title trigger a duty to defend under a warranty, again relying primarily on Black to support its position. Gulfstream's warranty, however, is fundamentally different from the warranties at issue in Black. Black involved the covenants contained in general warranty deeds, whereas Gulfstream's warranty relates to easement rights.

Again, the distinction between a general warranty deed and Defendant's promise to warrant and defend the Easement cannot be overlooked. "An easement is a right which one person has *to use the land of another for a specific purpose*.' . . . and *gives no title to the land* on which the servitude is imposed[.]" Douglas v. Med. Investors, Inc., 26 S.C. 440, 445 (1971) (emphasis added). An easement does not give title to the land, so it is nonsensical to say a dispute regarding title is required to trigger a duty to defend an easement. The interest given by an easement is the right to use the land for a specific purpose. Murrells Inlet Corp. v. Ward, 378 S.C. 225, 232 (Ct. App. 2008). The claims in the Injunction Lawsuit relate to interference with Gulfstream's right to use the Parking

ELECTRONICALLY FILED - 2019 Apr 18 4:38 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Lot—the exact rights granted by the Gulfstream Easement. Defendant's argument regarding claims to title should therefore be rejected.

V. Defendant's "Common Sense" Argument is Directly Contradictory to the Language in the Easement.

Finally, Defendant argues that courts have refused to interpret indemnification provisions to fund both sides of the litigation unless explicitly required by the provision. Defendant's argument ignores that the Easement *does* expressly impose an indemnification obligation directly on Defendant. The provision states that Defendant will "warrant and forever defend . . . the [] easement unto [] Gulfstream Café . . . against itself. . . ." (1990 Easement). This warranty language expressly applies even when Defendant itself makes the claim against the Easement. In short, Defendant *did* agree in the Easement to fund both sides of litigation between Defendant and Gulfstream.

The express terms of the Easement encompass both third-party claims (by strangers to the agreement) and first-party claims (by Defendant). The logical interpretation is that Defendant (through its predecessor in interest) agreed to fund the defense of claims it makes against the Easement. See In re Refco Sec. Litig., 890 F. Supp. 2d 332, 344 (S.D.N.Y. 2012) ("Indemnification provisions that specifically distinguish third-party claims from interparty claims indicate an intent to cover claims between the parties, as those distinctions would be surplusage if [the indemnification provision] did not refer also to claims between the parties themselves.") (internal quotation marks omitted) (alteration in original). Common sense dictates that Defendant's Motion for Summary Judgment should be denied.

CONCLUSION

For the reasons set forth above, the Court should grant Gulfstream's Motion for Summary Judgment and deny Defendant's Motion for Summary Judgment.

ELECTRONICALLY FILED - 2019 Apr 18 4:38 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Respectfully submitted,

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Admitted Pro Hac Vice

Myrtle Beach, South Carolina

April 18, 2019.

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Attachment A

ELECTRONICALLY FILED - 2019 Apr 18 4:38 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2018 Jun 22 7:41 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961
ELECTRONICALLY FILED - 2019 Apr 18 4:38 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA **COUNTY OF GEORGETOWN** The Gulfstream Café, Inc., Plaintiff, vs. J. Mark Lawhon, Individually, and Palmetto Industrial Development, LLC, Defendants.	**IN THE COURT OF COMMON PLEAS** **FIFTEENTH JUDICIAL CIRCUIT** **CIVIL ACTION NO. 2016-CP-22-00961** **PLAINTIFF'S MOTION TO ALTER OR AMEND THE JUDGMENT**

TO: HENRIETTA U. GOLDING, ESQ., AS COUNSEL FOR THE DEFENDANTS

Plaintiff The Gulfstream Café, Inc. (hereinafter "Gulfstream") hereby moves this Court pursuant to South Carolina Rule of Civil Procedure 59(e) to alter or amend the judgment entered on June 12, 2018.

1. At the conclusion of trial in the above case, and after receiving a jury verdict in its favor, Gulfstream presented a motion for permanent injunction. In that motion, Gulfstream asked the Court to permanently enjoin Defendants in three different respects:

(1) prohibit Defendants from interfering with Gulfstream's easement rights;

(2) prohibit Defendants from constructing a building outside the footprint of the demolished Marlin Quay Marina Store and Snack Bar as identified in the express 1986 Agreement for Easement recorded at Book 234, Page 797, and depicted in Plat Book 6, Page 214 of the Georgetown County real estate records; and

(3) prohibit Defendants from operating a restaurant that serves dinner in the evening.

ELECTRONICALLY FILED - 2018 Jun 22 7:41 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961
ELECTRONICALLY FILED - 2019 Apr 18 4:38 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

2. Following the arguments of counsel and consideration of the evidence in the record, the Court issued a ruling from the bench entering a permanent injunction against Defendants. The Court subsequently issued a Form 4 order regarding its decision.

3. The Court's order specifically states:

- The Defendants are enjoined from preventing the Plaintiff from enjoying the right granted to it in the recorded nonexclusive joint easement.
- The Defendants are restrained and may not expand the outside boundaries of any new building beyond those previously used.

4. The language of the Court's order, considered in the context of the evidence in the record and arguments of counsel, leads Gulfstream to conclude that the Court granted the injunction on grounds (1) and (2) requested by Gulfstream.

5. Gulfstream submits the instant motion to request confirmation that the Court's injunction covers grounds (1) and (2) requested by Gulfstream, and to request confirmation that Defendants may not construct a building outside the boundary of the demolished building shown in Plat Book 6, Page 214.[1]

6. Gulfstream requests confirmation from this Court because Defendants have taken the position that they intend to construct the building known as Version 2.0. Specifically, Defendants posted a picture of Version 2.0 on Facebook following entry of the permanent injunction, and Defendants stated in that Facebook post that the building would be open in June 2019.[2] As the Court may recall from the evidence presented at trial, the footprint

[1] Plat Book 6, Page 214 is Plaintiff's Exhibit 4 and is attached hereto as Exhibit A.
[2] A true and correct copy of Defendants' Facebook post is attached hereto as Exhibit B.

for Version 2.0 extends well outside the boundary of the demolished building in at least three different directions.[3]

7. Absent confirmation from the Court regarding this aspect of the injunction, it appears that Defendants will commence construction of Version 2.0, and that construction may result in additional litigation.

8. Accordingly, Gulfstream respectfully requests that the Court alter or amend the permanent injunction pursuant to Rule 59(e) to confirm that Defendants are restrained and may not expand the outside boundaries of any new building beyond the boundary of the demolished building shown in Plat Book 6, Page 214.

Respectfully submitted,

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/s/ Simon Bloom, Esq.
GA Bar # 064298

Myrtle Beach, South Carolina
June 22, 2018.

[3] Plaintiff's Exhibit 53 depicts the footprint of Version 2.0 and the footprint of the demolished building. That exhibit is attached hereto as Exhibit C.

ELECTRONICALLY FILED - 2018 Jun 22 7:41 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961
ELECTRONICALLY FILED - 2019 Apr 18 4:38 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2018 Jun 22 7:41 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200861
ELECTRONICALLY FILED - 2019 Apr 18 4:38 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200861

I HEREBY CERTIFY THAT THE MEASUREMENTS AS SHOWN ABOVE ARE CORRECT AND TRUE AND ON VISIBLE ENCROACHMENTS ARE THERE PRESENT EXCEPT AS SHOWN.

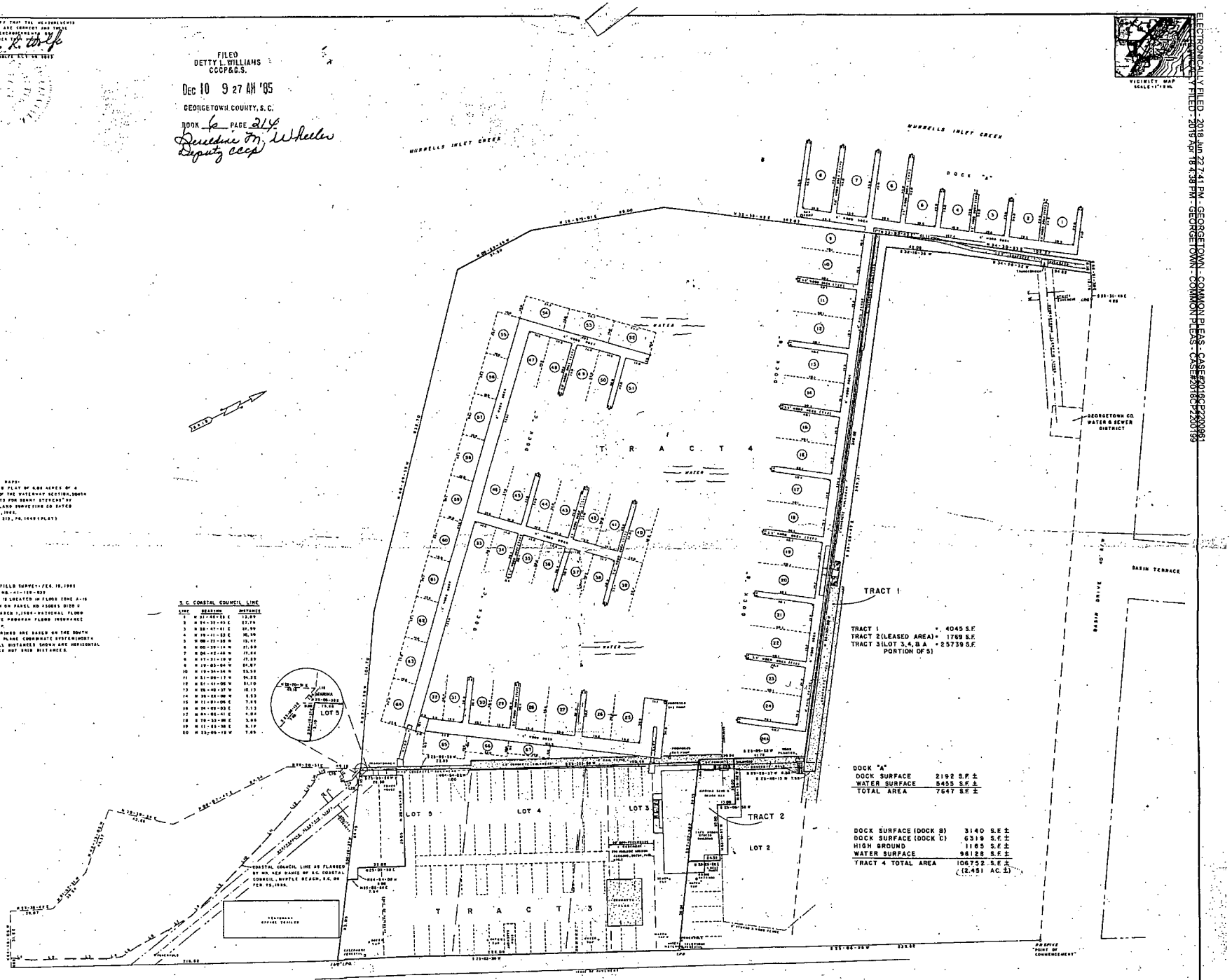
FILED
DETTY L. WILLIAMS
CCCP&C.S.

Dec 10 9 27 AM '85

GEORGETOWN COUNTY, S.C.

BOOK 6 PAGE 214

Benedine M. Wheeler
Deputy CCCP



TRACT 1 = 4045 S.F.
TRACT 2 (LEASED AREA) = 1769 S.F.
TRACT 3 (LOT 3, 4, & A PORTION OF 5) = 25739 S.F.

DOCK "A"

DOCK SURFACE	2192 S.F. ±
WATER SURFACE	5455 S.F. ±
TOTAL AREA	7647 S.F. ±

DOCK SURFACE (DOCK B)	3140 S.F. ±
DOCK SURFACE (DOCK C)	6319 S.F. ±
HIGH GROUND	1185 S.F. ±
WATER SURFACE	96128 S.F. ±
TRACT 4 TOTAL AREA	106752 S.F. ± (2.451 AC. ±)

SURVEY OF
MARLIN QUAY MARINA
HORIZONTAL PROPERTY REGIME
BARDEN CITY POINT
GEORGETOWN CO. SOUTH CAROLINA
SCALE 1" = 40 FEET MAY 31, 1984

SURVEYED AND MAPPED BY
SUR-TECH, INCORPORATED
MURRELLS INLET, HORRY/GEORGETOWN COUNTY
SOUTH CAROLINA 29576
843-651-6963

Exhibit A

AT&T 11:33 AM 40%

Marlin Quay Marina

Home About Photos Reviews Vide

Marlin Quay Marina

46 mins ·

We want to thank all of our family, customers and our captains based out of Marlin Quay for their support of our new facility. We would also like to extend our gratitude to our neighboring condo associations for their support. Without further ado we want to unveil our new building coming to completion next June of 2019.

-Thanks to all

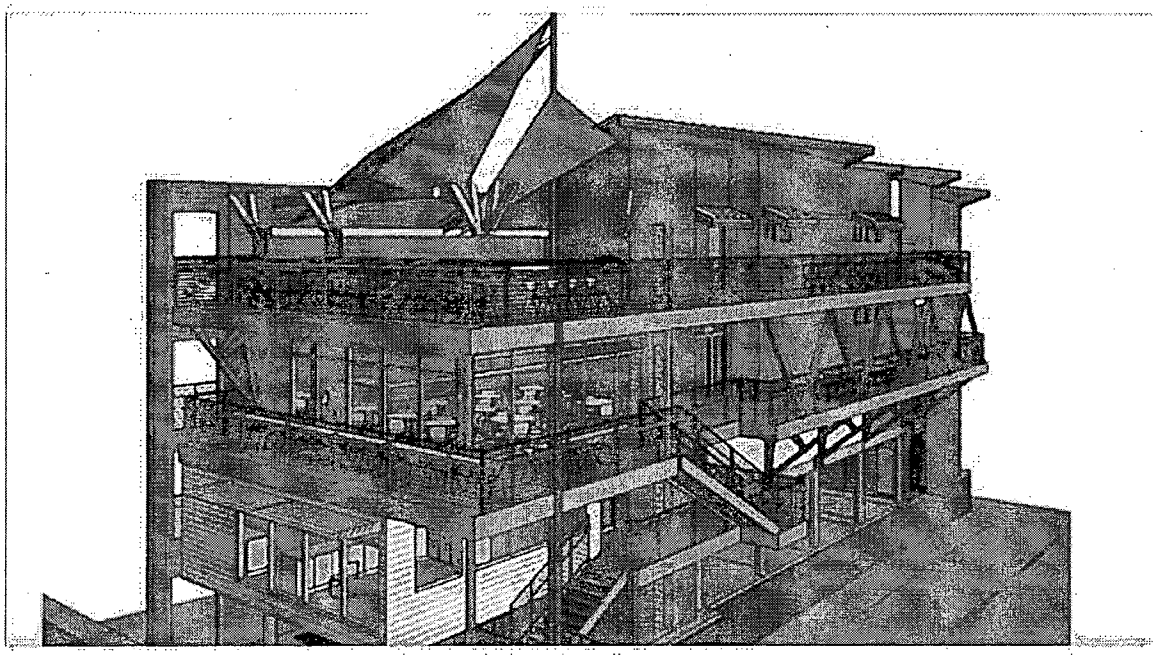


Exhibit B

ELECTRONICALLY FILED - 2018 Jun 22 7:41 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961
ELECTRONICALLY FILED - 2019 Apr 18 4:38 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

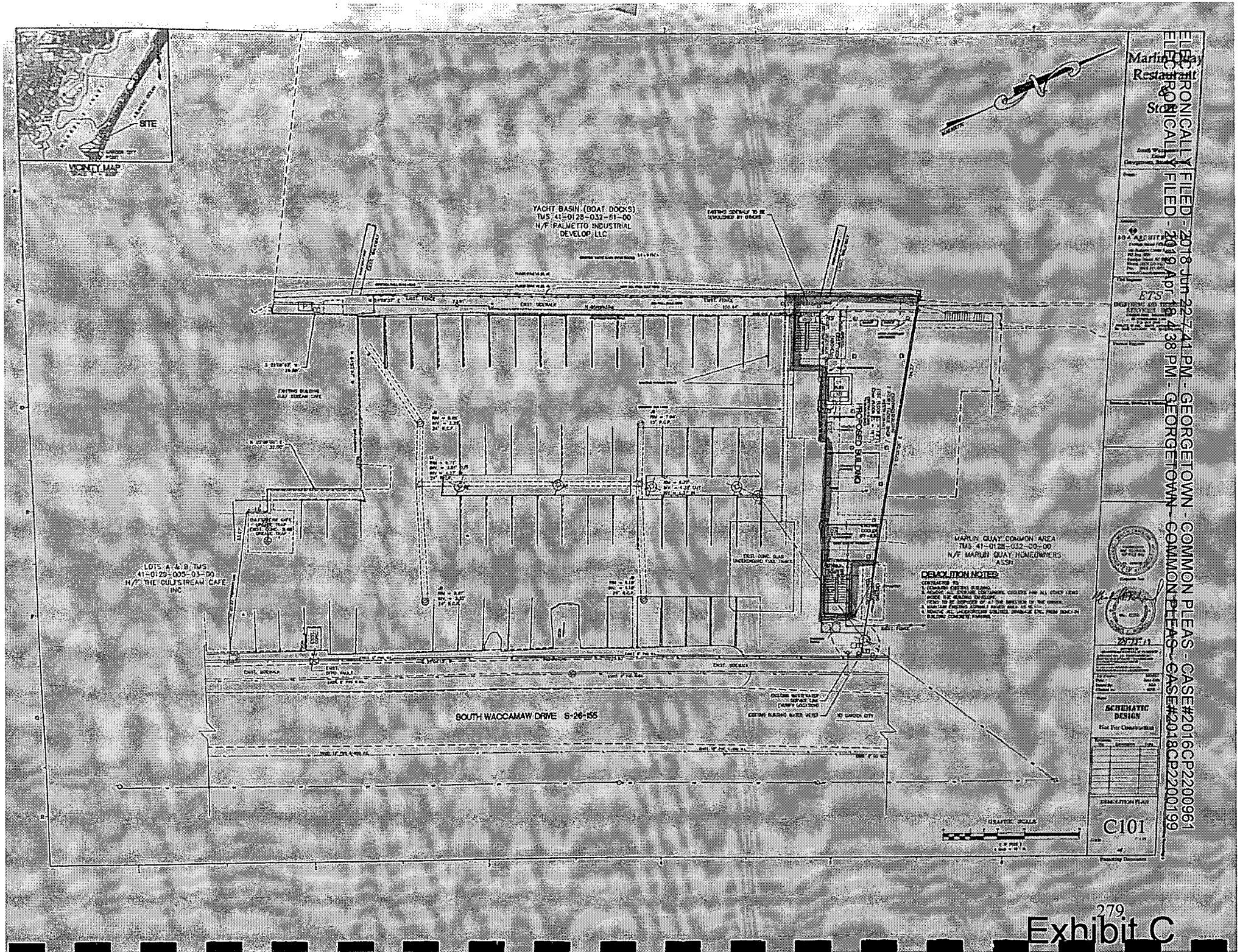

VICINITY MAP
SITE
YACHT BASIN (BOAT DOCKS)
TMS 41-0128-032-61-00
N/F PALMETTO INDUSTRIAL DEVELOP LLC
PROPOSED BUILDING
MARLIN QUAY COMMON AREA
TMS 41-0128-032-00-00
N/F MARLIN QUAY HOMEOWNERS ASSN
LOTS A & B TMS
41-0129-005-03-00
N/F THE GULFSTREAM CAFE INC
DEMOLITION NOTES
SOUTH WACCAMAW DRIVE S-26-155
GRAPHIC SCALE
SCHEMATIC DESIGN
Not For Construction
DEMOLITION PLAN
C101
Marlin Bay Restaurant & Bar
Georgetown, SC
ELECTRONICALLY FILED - 2018 Jun 22 7:41 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961
ELECTRONICALLY FILED - 2019 Apr 18 4:38 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Exhibit C

ELECTRONICALLY FILED - 2019 May 02 3:06 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA **COUNTY OF GEORGETOWN**	)	**IN THE COURT OF COMMON PLEAS** **COUNTY OF GEORGETOWN** Civil Action No. 2018-CP-22-00199
The Gulfstream Café, Inc., Plaintiff, v. Palmetto Industrial Development LLC, Defendant.	)	**PLAINTIFF'S OBJECTIONS TO DEFENDANT'S PROPOSED ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff The Gulfstream Café, Inc. ("Gulfstream") hereby submits its objections to Defendant Palmetto Industrial Development, LLC's ("Defendant") Proposed Order granting Defendant's Motion for Summary Judgment.

1. The Court based its ruling solely on the opinion in Black v. Patel, 357 S.C. 466 (2004). The Court did not rule that the warranty provision does not apply in an indemnitee/indemnitor suit, and accordingly the Court should not adopt Section II of the Proposed Order.

2. The Court did not rule that a compensable claim under the warranty provision must involve a finding that Gulfstream had no easement or that the easement granted was ineffective in some manner. Accordingly, the Court should strike the language contained in the first sentence at the top of Page 5 of the Proposed Order.

3. The Court did not rule on the admissibility of the affidavit of Edward Cribb, Jr. Accordingly, the Court should strike Footnote 3 on Page 6 of the Proposed Order.

4. Defendant's Proposed Order on Page 1 incorrectly refers to the business purchased by Defendant as a restaurant known as the "Marlin Quay Marina Store and Restaurant." There is no evidence in the record that the business was ever referred to by

that name. Instead, the affidavit of Ed Cribb, a signatory to the Easement, states that the business was the "Marina Club and Snack Bar." The Court should correct this language in the Proposed Order.

5. Defendant's Proposed Order on Page 2 states that the jury in the prior lawsuit sided with Gulfstream but omits any reference to the permanent injunction that Gulfstream requested. The Court should correct the Proposed Order to note that Gulfstream requested a permanent injunction and that the Court partially granted the requested injunction.

6. Defendant's Proposed Order on Page 5 mischaracterizes Gulfstream's Motion for Summary Judgment. In that Motion, Gulfstream did not "repeatedly note" that it prevailed in the earlier lawsuit against Palmetto. Instead, Gulfstream's Motion states that the jury in the prior lawsuit returned a verdict for Gulfstream and that the Court partially granted Gulfstream's request for a permanent injunction. The Court should correct this erroneous language in the Proposed Order.

7. Defendant's Proposed Order inaccurately states on Page 2 that the dispute in the previous lawsuit centered around the parking lot. In reality, the prior lawsuit focused on the scope of the easement granted to Gulfstream and the parties' rights under that easement. The Court should correct this inaccurate language in the Proposed Order.

ELECTRONICALLY FILED - 2019 May 02 3:06 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Respectfully submitted,

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May 2, 2019.

ELECTRONICALLY FILED - 2019 May 02 3:06 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	)))	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2018-CP-22-00199
The Gulfstream Café, Inc., Plaintiff, vs. Palmetto Industrial Development, LLC. Defendant.	))))))))))	**DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT**

The Defendant, Palmetto Industrial Development, LLC, (hereinafter, "Palmetto"), by and through its undersigned counsel, hereby respectfully submits this Memorandum of Law in Support of its Motion to Dismiss the Complaint.

STATEMENT OF THE CASE

In August 2014, Palmetto purchased the Marlin Quay Marina located at the Point in Garden City which included the Marina Store and Restaurant, a parking lot (the "Parking Lot"), and a number of boat slips. The Parking Lot has been in existence since the early 1980's and is situated between the Marlin Quay Marina and Plaintiff Gulfstream Café, Inc.'s ("Gulfstream") Restaurant. In 1986, Gulfstream was granted, by the then Marlin Quay Marina owner, a non-exclusive easement ("Gulfstream's Easement") to the Parking Lot for ingress, egress, vehicular parking, and to conduct maintenance, repair, alteration, and improvements to its property. (**Gulfstream's Complaint, CA No. 2018-CP-22-00199**). Gulfstream's Easement specifically states,

> [A] non-exclusive perpetual easement appurtenant to the premises of the Grantee hereinafter described for the full and free right of ingress and egress, on, over and across the following described property of the grantor, together with the rights of vehicular parking on and vehicular and pedestrian access to, all in accordance with all governmental rules, regulations, ordinances or laws, the premises of the Grantor hereinafter described, and also for the purpose of maintenance, repair, alteration

> and/or improvements to the Grantee hereinafter described property. It is anticipated by the parties that while they will each have joint and non-exclusive use at all times of the area covered by this easement that the Grantor will utilize the premises primarily during the daytime regular business hours of Grantor and the Grantee will utilize the premises primarily in the evening regular business hours of Grantee.

Gulfstream's easement also contains a general warranty provisions ("General Warranty Provision") as follows:

> And the said Marlin Quay Marina Corporation does hereby bind itself and its successors and assigns, to warrant and forever defend, all and singular, the said easement unto the said Gulfstream Café, Inc., its successors and assigns, against itself and its successors and assigns and all others whom lawfully claiming, or to claim the same or any part thereof.

On November 16, 2016, Gulfstream filed a Verified Complaint ("First Lawsuit") against J. Mark Lawhon, Individually, and Palmetto (collectively, in reference to the First Lawsuit, "Defendants"), Civil Action No. 2016-CP-22-00961. (**Gulfstream's Complaint, CA No. 2018-CP-22-00199**). As referenced in Gulfstream's prayer for relief and in Exhibit E of Gulfstream's Complaint CA No. 2018-CP-22-00199, Gulfstream's First Lawsuit alleged that Defendants intentionally, maliciously, and recklessly trespassed and forcibly entered and detained over Gulfstream's Easement. (**Gulfstream's Complaint, CA No. 2018-CP-22-00199**). Gulfstream alleged causes of action against Defendants for (1) Intentional Interference with Easement Rights, (2) Trespass and Nuisance, and (3) Forcible Entry and Detainer and Waste.

On December 5, 2017, over a year after filing the First Lawsuit, Gulfstream's counsel wrote a letter to Defendants' counsel demanding that Palmetto fully indemnify Gulfstream for all costs incurred for the defenses of the following four actions:

(1) CA No. 2016-CP-22-00961;
(2) CA No. 2017-CP-22-00235;
(3) CA No. 2017-CP-22-00446; and,
(4) Georgetown County Zoning Board of Appeals Case No. APP # 10-17-19214.

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

(**Gulfstream's Complaint, CA No. 2018-CP-22-00199**). In its letter, Gulfstream's counsel alleged that Palmetto should warrant and defend Gulfstream's Easement rights pursuant to the General Warranty Provision within Gulfstream's Easement. (**Gulfstream's Complaint, CA No. 2018-CP-22-00199**). On December 12, 2017, Defendant's counsel replied to Gulfstream's December 5, 2017 request for indemnification and stated, "[w]ith regard to your letter dated December 5, 2017, it contains many inaccuracies. In addition, Gulfstream has no legal basis for any indemnification claim." (**Gulfstream's Complaint, CA No. 2018-CP-22-00199**).

On December 29, 2017, Gulfstream filed its Motion for Leave to Amend its Complaint ("Motion to Amend its Complaint CA No. 2016-CP-22-00961") pursuant to Rule 15 of the South Carolina Rules of Civil Procedure seeking an Order to amend its November 16, 2016 First Lawsuit (**Exhibit A**, Gulfstream's Motion to Amend its Complaint). In Gulfstream's Motion to Amend its Complaint, Gulfstream attached a Proposed First Amended Complaint. (**Exhibit A**). The Proposed First Amended Complaint included, in relevant part, causes of action against Palmetto as it relates to the General Warranty Provision within Gulfstream's Easement. (**Exhibit A**). Specifically, Gulfstream alleged causes of action for: 1) Declaratory Judgment – Duty to Defend against Palmetto and 2) Breach of Warranty against Palmetto. (**Exhibit A**). Gulfstream contended that Palmetto's alleged interference with Gulfstream's Easement is in contravention to the General Warranty Provision and therefore, Gulfstream is entitled to a declaratory judgment determining that Palmetto shall indemnify Gulfstream under the General Warranty Provision and that Palmetto breached the General Warranty Provision. (**Exhibit A**). On February 1, 2018, Gulfstream's Motion to Amend its Complaint was heard and denied. (**Exhibit B**, Judge Seal's Form 4 and Written Order).

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

On February 23, 2018, Gulfstream filed Civil Action No. 2018-CP-22-00199 ("Second Lawsuit") against Palmetto. **(Gulfstream's Complaint, CA No. 2018-CP-22-00199)**. In the Second Lawsuit Complaint, Gulfstream alleges virtually identical factual allegations and causes of action against Palmetto as it sought to assert in the Proposed First Amended Complaint: 1) Declaratory Judgment – Duty to Defend against Palmetto and 2) Breach of Warrant against Palmetto. These exact claims were alleged in Gulfstream's Motion to Amend its Complaint in the First Lawsuit and arose from the same General Warranty Provision in Gulfstream's Easement. Gulfstream now attempts to bring this Second Lawsuit in order to circumvent the Court's ruling in the First Lawsuit denying its Motion to Amend its Complaint.

STANDARD OF REVIEW

A motion to dismiss pursuant to South Carolina Rules of Civil Procedure Rule 12(b)(6) should be granted if based on the face of the pleadings, and, in reading the pleading in the light most favorable to the nonmoving party, the pleading fails to state any valid claim. *See Gentry v. Yonce*, 337 S.C. 1, 2, 533 S.E.2d 137, 129 (1999). Under Rule 12(b)(6), a defendant may make a motion to dismiss based on the plaintiff's failure to state facts sufficient to constitute a cause of action. If a petition fails to state facts sufficient to constitute a cause of action, dismissal pursuant to SCRCP Rule 12(b)(6) is appropriate. See *Id.* When considering a 12(b)(6) motion, a court must base its ruling "solely upon allegations set forth on the face of the [pleading]." *Baird v. Charleston County,* 333 S.C. 519, 527, 511 S.E.2d 69 73 (1999) (citing *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995)). If no facts alleged or inferences therefrom entitle the nonmoving party to relief, the motion should be granted. *See Id.*

A motion to dismiss under South Carolina Rules of Civil Procedure Rule 12(b)(8) states that a matter may be dismissed wherein "another action is pending between the same parties for

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

the same claim." "To prevail on a motion to dismiss pursuant to South Carolina Rules of Civil Procedure Rule 12(b)(8), the movant must show that the actions in questions are between the same parties in their capacities." *Crick Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 322, 701 S.E.2d 39, 44 (Ct. App. 2010). Specifically, "[i]n South Carolina, dismissal under Rule 12(b)(8) may be proper when there is (1) another action pending, (2) between the same parties, and (3) for the same claim." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 106 , 674 S.E.2d 524, 531 (Ct. App. 2009).

ARGUMENT

I. THE COMPLAINT MUST BE DISMISSED AS GULFSTREAM ATTEMPTS TO CIRCUMVENT THE COURT'S DENIAL OF ITS MOTION TO AMEND AS THE NEW COMPLAINT IS VIRTUALLY IDENTICAL TO THE ONE UNSUCCESSFULLY SOUGHT TO BE ADDED ONTO THE FIRST LAWSUIT.

"The rule against claim splitting 'prohibits a plaintiff from prosecuting its case piecemeal and requires that all claims arising out of a single wrong be presented in one action.'" *Sensormatic Sec. Corp. v. Sensormatic Elecs. Corp.*, 273 Fed. App'x. 256, 265 (4th Cir. 2008). (quoting *Myers v. Colgate Palmolive Co.,* 102 F. Supp. 2d 1208, 1224 (D. Kan. 2000). "In a claim splitting case, the second suit will be barred if the claim involves the same parties and 'arises out of the same transaction or series of transactions as the first claim." *Id.* (quoting *Trustmark Insur. Co. v. ESULU, Inc.*, 299 F.3d 1265, 1269-70 (11th Cir. 2002).

> "Often, the rule against claim splitting applies to prevent a plaintiff from filing a new lawsuit after the court in an earlier action has denied the plaintiff's request for leave to amend to add the claims later asserted in the second lawsuit."

Id. See *Northern Assurance Co. of Am. V. Square D. Co.*, 201 F.3d 84, 87-88 (2d Cir. 2000) (citing string of cases dismissing claim in second suit that was duplicated of claim sought to be amended in first suit.)

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

United States v. McGann, 951 F. Supp. 372, 382 (E.D.NY. 1997) is directly on point to the case at hand and discusses the procedural implications of denying a plaintiff's motion to amend, only for the plaintiff to file a "new complaint presented in the guise of a new action which is virtually identical to the one unsuccessfully sought to be amended." *Id.* In reviewing the decision by plaintiff to file a new complaint in the guise a new action, the Court in *McGann* stated,

> "I characterized this earlier as attempting to accomplish indirectly what couldn't be accomplished directly and made reference to the jaundiced eye with which the law has almost always looked at such attempt. That such attempts have been looked at with askance by others is reflected in their decisions and provides an additional basis for granting this motion [to dismiss]."

Id. 382-383.

In a further comparative analysis of other jurisdictions, *McGann* then cited to *Sendi v. NCR Comten, Inc.*, 624 F. Supp. 1205 (E.D. Pa. 1986), "where a second complaint was filed which was identical to a complaint sought to be amended by a motion which was denied." *Id.* In *Sendi,* the court "granted the defendant's motion to dismiss the second complaint, relying in part upon the doctrine of *res judicata* as intended to prevent repetitive litigation and stating that, 'the fact that plaintiff was denied leave to amend does not give him the right to file a second lawsuit based on the same facts.'" *Id.* (quoting *Sendi*, 624 F. Supp. At 1207).

> "The court then quoted from *Walton v. Eaton Corp.*, 563 F.2d 66, 71 (3d Cir. 1977) which held that a district court 'must insure that the plaintiff does not use the incorrect procedure of filing duplicative complaints for the purpose of circumventing the rule pertaining to the amendment of complaints. *Fed. R. Civ. Proc.* 15.' And then added that the plaintiff's proper course was to appeal from the denial of his motion to amend citing as authority *Poe v. John Deere Co.*, 695 F.2d 1103, 1107 (8th Cir. 1982)."

Id.

Accordingly, the court in *McGann* held in granting defendant's motion to dismiss that, "it is well settled that denial of leave to amend constitutes res judicata on the merits of the claims

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

which were the subject of the proposed amended pleading." *Id.* (citing *King v. Hoover Group, Inc.*, 958 F.2d 219, 222-23 (8th Cir. 1992).

In the case at hand, Gulfstream attempts to circumvent the Court's decision in which it denied Gulfstream's Motion to Amend its Complaint in the First Lawsuit. As similarly discussed in each case cited above, Gulfstream improperly filed this Second Lawsuit with virtually identical factual allegations and causes of actions against Palmetto as it had previously tried to bring when it attempted to amend its First Lawsuit's Complaint. (**Gulfstream's Complaint, CA No. 2018-CP-22-00199** and **Exhibit B**). The fact that Gulfstream was denied to amend its First Lawsuit does not give it the right to file the Second Lawsuit based on the same facts. As held in *McGann*, "it is well settled that denial of leave to amend constitutes res judicata on the merits of the claims which were the subject of the proposed amended pleading." *Id.* Accordingly, as noted in *Sensormatic Sec. Corp*, 273 Fed. App'x. at 265, presuming that Gulfstream felt that this denial was in error, Gulfstream should have waited to appeal the decision until the First Lawsuit becomes final. Consequently, Gulfstream's Second Lawsuit should be dismissed.

II. THE COMPLAINT MUST BE DISMISSED AS GULFSTREAM'S CLAIMS FOR INDEMNIFICATION AND BREACH OF WARRANTY FAIL TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED IN THAT THERE IS NO ADVERSE CLAIM TO GULFSTREAM'S TITLE TO ITS EASEMENT

"An easement is a right to use the land of another for a specific purpose." *Rhett v. Gray*, 401 S.C. 478, 490, 736 S.E.2d 873, 879 (Ct. App. 2012). An easement may arise by grant, from necessity, by prescription, or by implication by prior use. *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 416, 633 S.E.2d 136, 139 (2006). In the case at hand, Gulfstream's easement arose by grant and "a grant of an easement is to be construed in accordance with the rules applied to deeds and other instruments." *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001). Accordingly, this Court shall apply the established rules of interpreting deeds with interpreting Gulfstream's easement,

> "In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well rule of law or public policy. In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law. The intention of the grantor must be found within the four corners of the deed."

Windham v. Riddle, 381 S.C. 192, 201, 672 S.E.2d 578, 582 (2009). Therefore, "[t]he construction of a clear and unambiguous deed is a question of law for the court. *Hammond v. Lindsay*, 277 S.C. 182, 184, 284 S.E.2d 581, 582 (1981); *Hunt v. Forestry Comm'n*, 358 S.C. 564, 568, 595 S.E.2d 846, 848 (Ct. App. 2004).

In *Bennett v. Inv'rs Title Ins. Co.*, 370 S.C. 561, 571-74, 635 S.E.2d 660, 665-67 (Ct. App. 2006), the Court of Appeals, in painstaking detail, explained each clause appearing in a typical deed in South Carolina. In performing this analysis, the Court of Appeals discussed the warranty section of a deed. *Id.* at 572-73, 635 S.E.2d at 666. The Court of Appeals explained that a general warranty deed in South Carolina embraces five (5) covenants. *Id.* at 573, 635 S.E.2d at 666 (quoting *Martin v. Floyd*, 282 S.C. 47, 51, 317 S.E.2d 133, 136 (Ct. App. 1984)). The Court stated as follows:

> A South Carolina general warranty deed embraces all of the following five covenants usually inserted in fee simple conveyances by English conveyors: (1) that the seller is seized in fee; (2) that he has a right to convey; (3) that the purchaser, his heirs and assigns, shall quietly enjoy the land; (4) that the land is free from all encumbrances; and (5) for further assurances.

Id.

"A grantor seeking to include all of the common law covenants of title may use the language in section 27-7-10 of the South Carolina Code to carry out this effect." *Bennett*, 370 S.C. at 573, 635 S.E.2d at 666. The South Carolina Code of Laws Section 27-7-10 sets forth the general warranty language, which reads as follows:

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

> And I do hereby bind myself, my heirs, executors, and administrators, to warrant and forever defend all and singular said premises unto said C D, his heirs and assigns, against myself and my heirs and against every person whomsoever lawfully claiming or to claim the same, or any part thereof.

In *Black v. Patel*, 357 S.C. 466, 468, 594 S.E.2d 162, 163 (2004), the Supreme Court examined the language of a general warranty deed. Citing the above quoted statutory language, the Supreme Court observed that the language in the general warranty deed in question "is based upon state statute." *Id.* at 471 n.3, 567 S.E.2d at 164 n.3 (citing S.C. Code Ann. § 27-7-10). The Court observed that the language in the general warranty deed before it "contains ... standard language." *Id.* at 468, 594 S.E.2d at 163. The general warranty deed in *Black* tracked the statutory framework in Section 27-7-10 of the South Carolina Code of Laws and provided as follows:

> And the Grantor does hereby bind himself and his Heirs, Executors and Administrators, to warrant and forever defend all and singular the said premises unto the said Grantee and the Grantee's Heirs and Assigns, against the Grantor and the Grantor's Heirs and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

Id.

Importantly, in *Black*, the Supreme Court identified the language that appeared before it as a "general warranty deed," and then, the Court further citied section 27-7-10 as the standard language for general warranty deeds. *Id.* "The general warranty deed specifically states that the duty to defend goes to defending ***only against those people "lawfully claiming" the land.***" *Black*, 357 S.C. at 472, 594 S.E.2d at 165 (emphasis added). Claim of ownership is defined as "(1) the possession of a piece of property with the intention of claiming it in hostility to the true owner; (2) a party's manifest intention to take over land, regardless of title or right." *Black's Law Dictionary*, 102 (2nd ed. 2002).

However, "a covenant of warranty simply does not protect against every unfounded adverse claim." *Id.* "A party is entitled to recover of the covenantor all reasonable costs attending a litigation ***of the question of title.***" 20 Am.Jur.2d Covenants § 139 (emphasis added). "The

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

nature and purpose of a covenant of general warranty is for the indemnity of the purchaser against the loss or injury the purchaser may sustain by a failure or defect in the vendor's title, and thus, a vendor has a duty to defend a title passed by a general warranty; however, the obligation of providing monetary indemnity applies only to loss sustained by a failure in the warrantor's title." 21 C.J.S. Covenants § 22.

Furthermore, in *Black*, the Supreme Court considered whether a failure to defend a general warranty deed could give rise to the recovery of attorney's fees. "The general rule for cases in this context is that only 'lawful'—that is, successful-claims asserted against title justify an award of attorneys' fees where the covenantor has failed to defend." *Black*, 357 S.C. at 471, 594 S.E.2d at 164; *see Outcalt*, 750 N.E.2d at 863 ("Because the *covenant of warranty does not protect against every adverse claim*, 'the covenantee is not entitled to demand of his covenantor expenses incurred in the defense of a suit *which sustains the conveyed title as valid*." (emphasis added)). In *Black*, the Court held that a claim for attorneys' fees would exist only if title is unsuccessfully defended. 357 S.C. at 466, 594 S.E.2d at 165.

Here, like in *Bennett* and in *Black*, the language in the General Warranty Provision of Gulfstream's Easement is the same as a general warranty deed. The language appears on a document filed with the Register of Deeds in Georgetown County, which grants an easement to Gulfstream. Like *Black* and *Bennett*, the language in the general warranty deed tracks the language found in state statute, S.C. Code Ann. § 27-7-10. The language in the General Warranty Provision provides:

> And the said Marlin Quay Marina Corporation does hereby bind itself and its successors and assigns, to warrant and forever defend, all and singular, the said easement unto the said Gulfstream Café, its successors and assigns, against itself and its successors and assigns and all others whomever lawfully claiming, or to claim the same or any part thereof.

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

The above quoted language in the General Warranty Provision has no bearing on the allegations asserted in the Second Lawsuit Complaint. The General Warranty Provision obligates the covenator, Marlin Quay Marina Corporation, as well as its successors and assigns, to defend only against "claims" challenging ownership of Gulfstream's Easement. *Black*, 357 S.C. at 472, 594 S.E.2d at 165. Gulfstream alleges that its right to use the easement has been interfered with, but such a claim does not implicate the General Warranty Provision as only a claim of ownership shall give rise to the General Warranty Provision. Gulfstream claims that "Palmetto has breached its duty to so warrant the premises covered by the easements, including but not limited to Palmetto's intentional reckless entry upon and complete obstruction of Gulfstream's property rights." (**Gulfstream's Complaint, CA No. 2018-CP-22-00199**). However, Gulfstream makes no allegation that Palmetto is attempting to make a claim of ownership by way of claiming Gulfstream's easement in hostility or by way of Palmetto taking Gulfstream's easement, regardless of title or right. In fact, Palmetto agrees that Gulfstream's Easement is valid and Palmetto is not attempting to claim ownership over Gulfstream's Easement. The General Warranty Provision "simply does not protect against every unfounded adverse claim." *Black*, 357 S.C. at 472, 594 S.E.2d at 165.

Furthermore, as established in *Black*, a general warranty deed can only give rise to a claim for attorneys' fees if title is unsuccessfully defended. *Black*, 357 S.C. at 466, 594 S.E.2d at 165. Again, no claims or questions to Gulfstream's title to its Easement have arisen in this case, and title is not an issue. Therefore, it is axiomatic that where Palmetto has alleged no adverse claim against Gulfstream's title to its Easement and makes no assertion that Gulfstream's title is invalid, there is no mechanism to demand that Palmetto indemnify Gulfstream for any costs or attorneys' fees or allow Gulfstream to recover for an alleged breach of the General Warranty Provision.

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Accordingly, Gulfstream's claims for declaratory judgment holding that Palmetto has a duty to defend and that Palmetto breached the General Warranty Provision should be dismissed for failure to state facts sufficient to constitute a cause of action.

III. ASSUMING *ARGUENDO* THAT GULFSTREAM'S CLAIMS ARE VALID, THE COMPLAINT STILL FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED AS GULFSTREAM FAILED TO PROVIDE SUFFICIENT NOTICE TO PALMETTO.

"The purpose of the notice is that the grantor of a general warranty deed shall understand that a suit is pending *asserting a superior title to the one he has warranted*, and by which it is or may be in peril, and to inform him that it is for the recovery of the property he sold and that he is thereby called on to *defend the title*." *Black*, 357 S.C. at 471, 594 S.E.2d at 164 (emphasis added) (citing *Greer v. McFadden*, 295 S.C. 14, 19, 336 S.E.2d, 263, 266 (Ct. App. 1988).

Here, Gulfstream's First Lawsuit was filed on November 16, 2016, alleging Defendants intentionally, maliciously, and reckless trespassed and forcibly entered and detained over Gulfstream's Easement. Gulfstream sat on its hands, for over a year after filing its First Lawsuit, and failed to provide any notice to Palmetto demanding indemnification. Then, on December 5, 2017, Gulfstream's counsel reaches out to Palmetto's counsel claiming that Gulfstream has a right to be indemnified. Even if Gulfstream's claim for indemnification is proper, which Palmetto denies it is, Gulfstream failed to provide proper notice to Palmetto.

CONCLUSION

For the foregoing reasons, Gulfstream's Second Lawsuit should be dismissed in its entirety.

Respectfully submitted,

McNair Law Firm, P.A.

s/Henrietta U. Golding
Henrietta U. Golding, SC Bar # 2173

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ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

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Dated: March 29, 2018

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

EXHIBIT A

(Plaintiff's Motion for Leave to Amend Complaint 2016-CP-22-00961)

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
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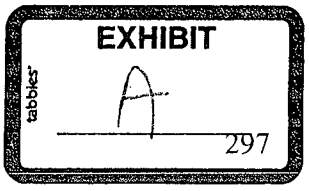
STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	Civil Action No. 2016-CP-22-00961
The Gulfstream Café, Inc.,	
Plaintiff,	
v.	**PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT**
J. Mark Lawhon, Individually, Palmetto Industrial Development, LLC, and Marlin Quay Marina Bar & Grill, LLC,	
Defendants.	

Plaintiff, The Gulfstream Café, Inc., by and through its undersigned attorneys, hereby moves pursuant to Rule 15 of the South Carolina Rules of Civil Procedure for an Order amending its Complaint in the above-captioned case to add additional claims.

Rule 15(a) of the South Carolina Rules of Civil Procedure, states that "a party may amend his pleading...by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15 SCRCP, which governs amendment of pleadings, strongly favors amendments and the court is encouraged to freely grant leave to amend. *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005). It is well established that a motion to amend a pleading is addressed to the sound discretion of the trial judge. *Duncan v. CRS Sirrine Eng 'rs*, 337 S.C. 537, 524 S.E.2d 115

(Ct. App. 1999); See *Berry v. McLeod*, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997) (Courts have wide latitude in amending pleadings). Prejudice exists only where there is a



ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2017 Dec 29 1:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

"lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." *City of North Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 232-33, 599 S.E.2d 462, 465 (Ct. App. 2004).

First, Plaintiff's proposed Amended Complaint is proper because discovery is ongoing in this case. Both parties have requests for production of documents outstanding. Additionally, multiple depositions set to take place in February 2018. Discovery into the claims included in Plaintiff's Amended Complaint can be conducted simultaneously with the outstanding discovery, such that the Amended Complaint will not result in a delay of the case.

Second, Defendants will not be prejudiced by Plaintiff's Amended Complaint. This amendment adds additional causes of action that Defendants likely have been aware of since the filing of the Complaint but are proposed to be added in an abundance of caution in light of recent events described in the proposed Amended Complaint. Defendants have been aware of Plaintiff's claims for interference with its property rights granted by certain Easements since before the original Complaint was filed. Additionally, the Easements in question expressly state warranties and a duty to defend Plaintiff against encroachment, and Defendants have undoubtedly been aware of these obligations since the purchase of the property in 2014. Plaintiff's claims relating to Defendants' duty to warrant and defend the easement are now ripe because Defendants have denied Plaintiff's request for Defendant to warrant and defend the Easement. Plaintiff asserts an additional claim of equitable indemnity as to the fees and costs of this action based on the continuing bad faith

behavior of Palmetto, and this claim is an equitable alternative remedy to the proposed duty to defend claim. Defendants knew or should have known about these causes of action.

Further, Rule 15 allows for such claims to be brought. The proposed additional facts and claims do not present issues that are new or novel to this action as all of the claims arise out of the same facts, circumstances, transactions, and/or occurrences that gave rise to the original action. Defendants have had ample notice of the issues underlying these claims and had sufficient opportunity to refute them. In addition, Defendants' actions since the commencement of this litigation have given rise to Plaintiff's belief that these additional proposed claims have even greater merit. Rule 15(d) states that the court may permit a party to "...serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of

the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a cause of action or defense." In this case, Defendants' actions throughout this litigation provide additional evidence and cause for bringing the proposed claims.

Plaintiff's proposed amendments are necessary for the just and equitable pursuit of and trial of this action. Allowing Plaintiff leave to make these amendments is in accord with both the letter and spirit of Rule 15 SCRCP, and will cause no prejudice to the Defendants in this case.

The undersigned counsel for Plaintiff, pursuant to Rule 11, South Carolina Rules of Civil Procedure, hereby certifies that he has communicated with opposing counsel and has

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2017 Dec 29 1:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

attempted in good faith to resolve the matter contained in this motion, but no consent was provided.

Respectfully submitted,

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Attorneys for Plaintiff
Pro Hac Vice, March 8, 2017

/s/ Simon H. Bloom, Esq., GA Bar #064298
Simon H. Bloom

Myrtle Beach, South Carolina

December 29, 2017

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2017 Dec 29 1:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2017 Dec 29 1:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF GEORGETOWN	)	Civil Action No. 2016-CP-22-00961
	)	
The Gulfstream Café, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**FIRST AMENDED COMPLAINT**
	)	
J. Mark Lawhon, Individually, Palmetto Industrial Development, LLC, and Marlin Quay Marina Bar & Grill, LLC,	)	
	)	
Defendants.	)	

Pursuant to Rule 15 of the South Carolina Rules of Civil Procedure, Plaintiff The Gulfstream Café, Inc. (hereinafter "Gulfstream"), hereby amends the Complaint against J. Mark Lawhon, Individually, and Palmetto Industrial Development, LLC (hereafter sometimes referred to collectively as "Defendants"), and respectfully shows and alleges unto this Honorable Court as follows:

JURISDICTION

1. Gulfstream is a corporation existing, organized, and doing business in Georgetown County, within the State of South Carolina.

2. Upon information, knowledge and belief, Defendant J. Mark Lawhon ("Lawhon"), is an individual who owns and controls property and various ongoing business interests within Georgetown County, South Carolina, and as such, has acted in his individual capacity, and on behalf of those entities of which he controls, has taken and authorized intentional, malicious, and reckless tortious acts as set forth herein.

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2017 Dec 29 1:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

3. Upon information and belief, Palmetto Industrial Development, LLC ("Palmetto"), is a South Carolina entity which owns and operates property situated in Georgetown County, South Carolina.

4. This Action involves Defendants' breach of an easement agreement, as well as their intentional, malicious, and reckless trespass over Gulfstream's interest in certain real property, as well as the damages which continue to be inflicted upon Gulfstream.

5. Based upon the foregoing, and as is more specifically set forth herein, this Honorable Court is the appropriate venue and has jurisdiction over the Parties to and the Subject Matter of this Action.

6. Gulfstream will suffer immediate and irreparable injury, loss, and damage if Defendants' actions as set forth herein are not immediately enjoined.

FACTUAL ALLEGATIONS

7. Gulfstream owns and operates a well-known and firmly-established fine dining establishment known as The Gulfstream Café, Inc., with a physical address of 1536 S. Waccamaw Drive, Murrells Inlet, South Carolina 29576.

8. The real property adjoining the restaurant is part of a development commonly referred to as the Marlin Quay Marina, with improvements and amenities including condominiums, a marina, boat slips, as well as a parking lot.

9. The Marlin Quay Marina development did include a "Marina Club & Snack Bar" ("Snack Bar") which generally supported marina related activities, however,

Defendants demolished said Snack Bar was recently demolished in November of 2016.

10. The real property between the Snack Bar and The Gulfstream Café is comprised of a parking lot (the "Parking Lot") with multiple accesses onto Waccamaw Drive, and is particularly depicted as Lots 3, 4, and 5 of Tract 3 on that certain Plat entitled Survey of Marlin Quay Marina Horizontal Property Regime, Garden City Point, prepared by Surtech, Inc. dated May 21, 1985, revised November 27, 1985, and recorded in the office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 214. (attached hereto and incorporated herein verbatim as Exhibit A).

11. The Marlin Quay Marina property, including the Parking Lot, was initially developed by The Marlin Quay Company, a South Carolina General Partnership.

12. On or around July 1, 1983, The Marlin Quay Company sold the Marlin Quay Marina property, including the Parking Lot, to the Marlin Quay Marina Corporation, by way of that certain Deed recorded on September 1, 1983, in Georgetown County Deed Book 211 at Page 1141.

13. On February 25, 1986, The Marlin Quay Marina Company conveyed to The Gulfstream Café, Inc., a 25,366 square foot portion of the Marlin Quay Marina property, specifically identified as "Marsh Area, Tract A and Tract B" on that certain plat publicly recorded with Georgetown County at Plat Book 6, Page 438. (attached hereto and incorporated herein verbatim as Exhibit B).

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2017 Dec 29 1:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2017 Dec 29 1:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

14. On February 25, 1986, The Marlin Quay Marina Company also expressly granted three (3) non-exclusive appurtenant easements to utilize the Parking Lot to The Gulfstream Café, Inc., its Successors and Assigns, each of which was publicly recorded in Georgetown County Deed Book 234 at Pages 790, 797, and 803. (attached hereto and incorporated herein verbatim as Exhibit C).

15. All of the Gulfstream easements expressly incorporate the plat recorded in Plat Book 6 at Page 214.

16. The easement recorded at Deed Book 234, page 797 sets forth the only two areas excepted from the Plaintiff's easement rights as the area occupied by the "Marina Club & Snack Bar" and also the area identified as Sign Easement, both as shown on Plat Book 6 at Page 214.

17. In 1990, the Marlin Quay Marina Corporation again expressly granted and conveyed a perpetual non-exclusive easement for the use of the Parking Lot to The Gulfstream Café, Inc., it successors and assigns, as set forth in that certain Agreement of Easement and Consent to and Joinder of Mortgagee to Granting of Easement (the "1990 Easement") publicly filed with Georgetown County in Deed Book 382, Pages 217 to 226 (attached hereto and incorporated herein verbatim as Exhibit D).

18. The 1990 Easement expressly provides that The Gulfstream Café perpetually and currently enjoys the following rights:

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2017 Dec 29 1:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

...non-exclusive perpetual easement from Marlin Quay Marina Corporation to The Gulfstream Café, Inc. for the purpose of ingress and egress and vehicular parking on, over and across that certain real property of Marlin Quay Marina Corporation, which is more fully described herein below, by owners, agents, employees, servants, visitors, guests and invitees of The Gulfstream Café, Inc.

. . . .

Marlin Quay Marina Corporation, ... (the "Grantor"), has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto The Gulfstream Café, Inc., its successors and assigns (the "Grantee") a non-exclusive perpetual easement appurtenant to the premises of the Grantee hereinafter described for the full and free right of ingress and egress on, over and across the following described property of the Grantor, together with the rights of vehicular parking on and vehicular and pedestrian access to, all in accordance with all governmental rules, regulations, ordinances or laws, the premises of the Grantor hereinafter described, and also for the purpose of maintenance, repair, alteration and/or improvements to the Grantee's hereinafter described property. It is anticipated by the parties that while they will each have joint and non-exclusive use **at all times** of the area covered by this easement that the Grantor will utilize the premises primarily during the daytime regular business hours of Grantor and the Grantee will utilize the premises primarily in the evening regular business hours of Grantee. (*emphasis added*).

19. All of the Gulfstream Easements includes a warranty provision as follows:

The said Marlin Quay Marina Corporation does hereby bind itself and its Successors and Assigns, to warrant and forever defend, all and singular, the said premises unto the said The Gulfstream Café, Inc., its Successors and Assigns, against itself and its Successors and Assigns and all others whomsoever lawfully claiming, or to claim the same or any part thereof.

20. The 1990 Easement provides that the Parking Lot subject to Gulfstream's perpetual easement rights is specifically described as follows:

A non-exclusive right of ingress, egress and vehicular parking over, across and on all those certain pieces, parcels or tracts of land situate, lying and being in the Garden City area of the County of Georgetown, State aforesaid, and being more particularly shown as Lots 3, 4, and 5 of Tract 3 on that certain Plat entitled Survey of Marlin Quay Marina Horizontal

Property Regime, Garden City Point, prepared by Surtech, Inc. dated May 21, 1985, revised November 27, 1985, and recorded in the office of the Clerk of Court for Georgetown County in Plat Book 6 at Page 214, said plat being expressly incorporated herein by reference.

A copy of the Plat referenced above, with markups depicting the approximate location of The Gulfstream Café and the Parking Lot, is attached hereto and incorporated herein verbatim as Exhibit E, (hereinafter the "Parking Lot Plat").

21. On or around September 11, 1992, the Marlin Quay Marina Corporation, by and through the Master in Equity, conveyed the Marlin Quay property, including the Parking Lot, to Marlin Point Corporation, as evidenced by that certain Deed publicly filed with Georgetown County in Deed Book 486, Page 181.

22. On or around December 12, 1996, the Marlin Point Corporation conveyed the Marlin Quay property, inclusive of the Parking Lot, to Reel Crazy Charters, Inc., as evidenced by that certain Deed publicly filed with Georgetown County in Deed Book 737, page 199.

23. On or around the 20th of August, 2014, Defendant Palmetto Industrial Development, LLC, purchased the Marlin Quay Marina property, inclusive of the Parking Lot, from Reel Crazy Charters, Inc., as evidenced by that certain Deed publicly filed with Georgetown County in Deed Book 2421, Page 267.

24. Defendant Palmetto purchased the Marlin Quay Marina subject to The Gulfstream Café's perpetual easement rights to utilize the Parking Lot to the full extent set forth in the Easement, inclusive of all areas specifically depicted in the Parking Lot Plat.

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2017 Dec 29 1:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2017 Dec 29 1:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

25. Defendant Palmetto purchased the Marlin Quay Marina subject to the warranty provision requiring Defendant Palmetto to defend The Gulfstream Café, Inc. from any claims on Gulfstream's easement rights.

26. On or around the second week of November 2016, Palmetto and Lawhon initiated a construction project involving the Marlin Quay Marina and completely obstructed access to the Parking Lot with signage, fences and barricades. Photographs depicting Gulfstream's restricted access to the Easement are attached hereto as Exhibit F.

27. Palmetto and/or Lawhon placed large construction materials upon the Parking Lot.

28. Unbeknownst to Gulfstream, Palmetto and Lawhon intended to begin a construction project where the Plans called for improvements which would permanently interfere with Gulfstream's rights to use the Parking Lot.

29. At no time prior to the initiation of the construction activities was anyone from Gulfstream notified that constructions activities would block the entire parking lot during construction, nor was anyone from Gulfstream notified that Defendants' new building was to be placed directly on top of and permanently alter the Parking Lot.

30. As a result of the Defendants completely blocking the Parking Lot, the owners, employees, guests, invitees, and vendors were unable to access Gulfstream just prior to the Thanksgiving holiday.

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2017 Dec 29 1:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

31. Since beginning construction activities that blocked the Parking Lot, Defendants have taken additional action to interfere with Gulfstream's easement rights including, but not limited to:

a. After having installed a construction fence blocking the Parking Lot, Lawhon placed his vehicle in the access to the Parking Lot so as to further obstruct food service vendors' access to Gulfstream's delivery dock;

b. Erecting a tent over a portion of the Parking Lot on more than one occasion, blocking approximately fifteen (15) parking spots each time;

c. Closing off nearly half of the Parking Lot to vehicular traffic for the purpose of securing space for vendors, equipment and crowds associated with special events;

d. Calling the Georgetown County Sheriff's Department on Gulfstream's employees and vendors (including painters and window washers) accusing them of trespassing on the Parking Lot and threatening legal action;

e. Blocking Parking Lot spaces with cones on multiple occasions;

f. Writing a letter to Gulfstream purporting to prohibit Gulfstream's use of a portions of the area within the Easement;

g. Continuing to seek governmental approvals of its plan to block off and build upon the Parking Lot ,

h. Developing additional and differing plans for construction that would alter and overburden the Gulfstream easements, and thereafter submitting said

plans to Georgetown County for the purpose of seeking authorization and approval of said plans as is set forth further below.

32. On or around the beginning of March of 2017, Palmetto and Lawhon again took action to develop and begin construction activities involving the Marlin Quay Marina which would block, alter, overburden, and interfere with Gulfstream's easements

33. Upon information and belief, without notice, knowledge, or the consent of Gulfstream, Palmetto and Lawhon applied for and obtained a building permit from Georgetown County on or about September 15, 2017, in order to construct a new building directly over and on top of Gulfstream's easement.

34. Once again Defendants failed to notify anyone associated with Gulfstream of Defendants' intention to begin construction or provide any information to Gulfstream regarding the nature and extent of the intended construction activities planned by Defendants.

35. As a result of Defendants' numerous and repeated attempts to implement construction activities without notice, knowledge, or the consent of Gulfstream, Gulfstream has been forced to incurr costs and expenses to defend its rights, as well as immediate irreparable damages to its current and ongoing operations, as well as permanent and severe damage to the good will of The Gulfstream Café, Inc.

36. Based on Defendants' construction plans, the construction of the new building on the Marlin Quay Property will encroach on, interfere with, and restrict

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2017 Dec 29 1:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

Gulfstream's easement rights, and will cause permanent and severe damages to The Gulfstream Café, Inc.'s operations and good will.

FOR A FIRST CAUSE OF ACTION
(*Breach of Easement Agreement, and Intentional Interference with Easement Rights*)

37. Each and every allegation set forth in this First Amended Complaint, specifically including but not limited to each and every factual assertion set forth above, is realleged and incorporated into this cause of action as if it was repeated verbatim herein.

38. Defendants have breached and violated their obligations set forth within the above publicly recorded perpetual Easement, as is more specifically set forth above, and as may be further discovered during the pendency of this Action.

39. Gulfstream is entitled to judgment against the Defendants for their breach of the easement agreements and for an Order awarding Plaintiff all of its actual, special, and consequential damages as is available at law.

40. Pursuant to the express terms of each of the easements, Gulfstream is entitled to an Order of this Court awarding Gulfstream all costs and expenses, including tis reasonable attorney fees, as same were incurred by Gulfstream in the defense of its easement rights.

FOR A SECOND CAUSE OF ACTION
(*Trespass and Nuisance*)

41. Each and every allegation set forth in this First Amended Complaint, specifically including but not limited to each and every factual assertion set forth above, is

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2017 Dec 29 1:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2017 Dec 29 1:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

realleged and incorporated into this cause of action as if it was repeated verbatim herein.

42. Gulfstream has a valid and legal right to the use of and possession of the Parking Lot to the fullest extent set forth in its easements, and to the full boundaries as depicted in the Parking Lot Plat.

43. Defendants have intentionally obstructed Gulfstream's right to access and utilize the Parking Lot, and said entry and obstruction is without Gulfstream's permission and was intentional and in reckless disregard of Gulfstream's rights.

44. As set forth above, Defendants' intentional and reckless entry upon and complete obstruction of Gulfstream's property rights has and will cause significant damage to Gulfstream.

45. Defendants' intentional and reckless entry upon and complete obstruction of Gulfstream's property rights has and will continually and unreasonably interfere with Gulfstream's use and enjoyment of its rights in the Parking Lot.

46. Gulfstream prays for and is entitled to all actual, consequential, and incidental damages incurred as a result of Defendants' wrongful, reckless and intentional conduct as set forth above, as well as punitive damages, attorney fees and costs.

47. Gulfstream prays for immediate, temporary, and permanent injunctive relief to prevent Defendants from obstruction of Plaintiff's rights.

FOR A THIRD CAUSE OF ACTION

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2017 Dec 29 1:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

(S.C. Code §15-67-410 et seq., Forcible Entry and Detainer and Waste)

48. Each and every allegation set forth in this First Amended Complaint, specifically including but not limited to each and every factual assertion set forth above, is realleged and incorporated into this cause of action as if it were repeated verbatim herein.

49. South Carolina Code §15-67-410 expressly provides:

> If any person be put out or disseized of any lands or tenements in forcible manner or put out peaceably and be afterwards holden out with strong hand, or after such entry, any feoffment or discontinuance in any wise thereof be made to defraud and take away the right of the possessor, the party grieved in this behalf shall have an action against such disseizor.

50. As set forth above, Defendants actually and forcibly disseized Gulfstream of access to the Parking Lot, to which it has a perpetual lawful right of quiet and peaceable use and enjoyment. Moreover, Palmetto and Lawhon's planned construction on, over, and adjacent to the Parking Lot will continue to actually and forcibly disseize Gulfstream of access to the Parking Lot as provided by the Easement.

51. As set forth above, Gulfstream has suffered damages as a result of Defendants' actions, and pursuant to South Carolina Code Section 15-67-410 *et seq.*, Gulfstream is entitled to an award of treble damages, and to be put in possession of the Parking Lot immediately and without interruption of its easement rights.

52. Gulfstream hereby sues Defendants pursuant to South Carolina Code Section 15-67-410, for the immediate and peaceable return of the Parking Lot.

53. Plaintiff sues Defendants for the immediate return of possession of the Parking Lot, and Gulfstream hereby further sues Defendants for the fair-market rental value of Gulfstream's interest in the Parking Lot for every day Defendants obstruct the Property.

54. As set forth herein, Gulfstream hereby prays for an Order from this Court instructing Defendants to immediately deposit with the Clerk of Court, and on a monthly basis thereafter for the pendency of this Action, the entire fair-market rental value of the Parking Lot.

55. Gulfstream is entitled to and prays for an Order from this Court expressly charging Defendants with all costs incurred related to necessary removal of any debris or alleged improvements, including costs, expenses, fines, damages, and service fees as may be required to retake the Parking Lot.

56. Gulfstream has suffered and believes it is entitled to an award of and for actual, incidental, consequential, and treble damages inflicted as a proximate result of Defendants' actions.

57. Pursuant to South Carolina Code Section 15-67-410 *et seq.*, Gulfstream is entitled to an award of treble damages, to be put in possession of the Parking Lot.

FOR A FOURTH CAUSE OF ACTION
(Declaratory Judgment-Interference with Easement and Permanent Mandatory Injunction against Defendants)

58. Each and every allegation as set forth in this First Amended Complaint, specifically including but not limited to each and every factual assertion set forth

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2017 Dec 29 1:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

above, is realleged and incorporated into this cause of action as if it were repeated verbatim herein.

59. The Easement sets forth certain property rights pertaining to Gulfstream.

60. Defendants, through their development activities, have taken actions to interfere with and encroach on Gulfstream's easement rights.

61. Gulfstream is entitled to a declaratory judgment that:

(1) The proposed building for which Palmetto obtained a building permit on September 15, 2017 constitutes an impermissible interference with and encroachment on Gulfstream's easement;

(2) Defendants are not permitted to build any structure outside the footprint of the building as stated in the "SAVING AND EXCEPTING" clause of the Agreement for Easement, found at Deed Book 234, page 797, and as specifically depicted on the plat recorded at Plat Book 6, page 214;

(3) Defendants are not permitted to engage in or expand their business or activities which would allow Defendants to interfere with or overburden Plaintiff's permanent easement right to use the Parking Lot primarily during evening business hours;

(4) Defendants are not permitted to reconfigure or resize the Parking Lot lanes or parking spaces from that which is depicted within the plat recorded at Plat Book 6, page 214; and,

(5) Defendants are not permitted to interfere with the improvements and fixtures in place and existing prior to Defendant's purchase of property

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2017 Dec 29 1:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

within the Marlin Quay Marina, including but not limited to approved signage, sewer systems, grease traps, backflow preventers, dumpsters, water hook ups, power house, and transformers.

62. Gulfstream is further entitled to a permanent mandatory injunction:

(1) Prohibiting Defendants from taking any action to construct the proposed building for which Palmetto obtained a building permit on September 15, 2017;

(2) Prohibiting Defendants constructing any structure outside the footprint of the building as stated in the "SAVING AND EXCEPTING" clause of the Agreement for Easement, found at Deed Book 234, page 797, and as specifically depicted on the plat recorded at Plat Book 6, page 214;

(3) Prohibiting Defendants from engaging in the expansion of their business or any other activities which would allow Defendants to interfere with or overburden Plaintiff's permanent easement right to use the Parking Lot primarily during evening business hours;

(4) Prohibiting Defendants from reconfiguring or resizing the Parking Lot lanes or parking spaces from that which is depicted within the plat recorded at Plat Book 6, page 214; and,

(5) Prohibiting Defendants from interfering with the improvements and fixtures in place and existing prior to Defendant's purchase of property within the Marlin Quay Marina, including but not limited to approved signage, sewer

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2017 Dec 29 1:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2017 Dec 29 1:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

systems, grease traps, backflow preventers, dumpsters, water hook ups, power house, and transformers.

FOR A FIFTH CAUSE OF ACTION
(Declaratory Judgment-Duty to Defend against Palmetto)

63. Each and every allegation as set forth in this First Amended Complaint, specifically including but not limited to each and every factual assertion set forth above, is realleged and incorporated into this cause of action as if it were repeated verbatim herein.

64. All of Gulfstream's easements contain promises that run with the land, particularly the duties of Palmetto to "warrant and forever defend . . . the said premises unto the said The Gulfstream Café, Inc., its Successors and Assigns, against itself and its Successors and Assigns . . . to claim the same or any part thereof."

65. Palmetto, by its several actions including encroaching on the easements, has claimed an exclusive right to parts of the easement directly in contravention of the express language of the Grantor.

66. By letter, a copy of which is attached as Exhibit G, Gulfstream notified Palmetto of its express and unambiguous duty under the easements to defend Gulfstream in this or any similar matter concerning Gulfstream's rights under the easements.

67. Palmetto has repudiated its duty to warrant and defend Gulfstream's rights under the easements.

68. Gulfstream has been damaged by and will continue to be damaged by Palmetto's failure to warrant and forever defend Gulfstream's rights under the easements,

including but not limited to causing the continuing accrual of attorneys' and other fees and costs of asserting its rights under the various easements.

69. Gulfstream is entitled to a declaratory judgment recognizing Gulfstream's express rights under the easements, and other ancillary relief, including but not limited to the award of attorneys' fees and costs for the prosecution of this action as well as those attorneys' fees and costs incurred in other actions and venues to defend its rights as necessitated by and due to Palmetto's breaches thereof, in an amount to be proven at trial.

FOR A SIXTH CAUSE OF ACTION
(Breach of Warranty against Palmetto)

70. Each and every allegation as set forth in this First Amended Complaint, specifically including but not limited to each and every factual assertion set forth above, is realleged and incorporated into this cause of action as if it were repeated verbatim herein.

71. Palmetto, under the easements, has an express, unambiguous duty to warrant the premises from any incursion into Gulfstream's easement rights, including from Palmetto's own actions.

72. Palmetto has breached its duty to so warrant the premises covered by the easements, including but not limited to Palmetto's intentional and reckless entry upon and complete obstruction of Gulfstream's property rights.

73. Palmetto continues to unreasonably interfere with Gulfstream's use and enjoyment of its rights in the Parking Lot.

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ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
ELECTRONICALLY FILED - 2017 Dec 29 1:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

74. Palmetto's breach has caused Gulfstream damages in an amount to be determined at trial.

75. Gulfstream is entitled to judgment against Palmetto for breach of warranty for all actual, special, and consequential damages available at law.

FOR A SEVENTH CAUSE OF ACTION
(Equitable Indemnity against Palmetto)

76. Each and every allegation as set forth in this First Amended Complaint, specifically including but not limited to each and every factual assertion set forth above, is realleged and incorporated into this cause of action as if it were repeated verbatim herein.

77. Palmetto's intentional acts constituting breaches of warranty constitutes a special relationship between the parties at equity.

78. Gulfstream's damages, fees, and other expenses caused by Palmetto's breach are not in any way the fault of Gulfstream.

79. Palmetto has an equitable duty to indemnify Gulfstream for the attorneys' fees and costs of defending itself against Palmetto's intentional conduct including the several breaches of warranty which caused Gulfstream's damages.

80. Gulfstream is entitled to judgment against Palmetto for equitable indemnity for the costs, attorneys' fees, and other expenses of pursuing this action in an amount to be determined at trial.

WHEREFORE, Gulfstream, having complained of Defendants, hereby prays for the following relief:

a. An Order of this Honorable Court granting the relief under the Causes of Action set forth above as to Gulfstream's actual, incidental and consequential damages, fair market rental value, all costs and fees, including but not limited to punitive or treble damages and prejudgment interest, as well as attorneys' fees and expenses;

b. An Order from this Honorable Court declaring that Defendants may not interfere with or encroach on Plaintiff's easement through construction of a building, alteration of the parking lot, expansion of Defendant's business, or relocation of fixtures and improvements in place prior to Defendants' purchase of the property;

c. An Order from this Honorable Court for immediate, temporary, and permanent injunctive relief to prevent Defendants from obstruction of Gulfstream's rights;

d. An Order from this Honorable Court acknowledging Defendant's duty to defend and/or indemnify against Palmetto's own claims against the Easement, and for the award of actual, consequential and special damages, and for attorneys' fees and costs of defending Gulfstream's rights against Palmetto in this action; and

e. Any and all other relief which is deemed just and proper by this Honorable Court and the trier of fact.

Respectfully submitted,

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BELLAMY, RUTENBERG, COPELAND, EPPS, GRAVELY & BOWERS, P.A.
Post Office Box 357
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(843) 448-2400
Attorneys for Plaintiff

/s/ George W. Redman, III
George W. Redman, III
SC Bar No. 72365

BLOOM SUGARMAN, LLP
977 Ponce de Leon Avenue, NE
Atlanta, Georgia 30306
(404) 577-7710
Attorneys for Plaintiff
Pro Hac Vice, March 8, 2017

/s/ Simon H. Bloom, Esq., GA Bar #064298

Myrtle Beach, South Carolina

December 29, 2017

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ELECTRONICALLY FILED - 2017 Dec 29 1:16 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

EXHIBIT B

(Order 2018-02-08
2016-CP-22-00961)

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ELECTRONICALLY FILED - 2018 Feb 08 8:40 AM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP2200961

Gulfstream Cafe Inc		J Mark Lawhon	Palmetto Industrial Development LLC
PLAINTIFF(S)		**DEFENDANT(S)**	
Submitted by: Clerk of Court		**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

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

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

ORDER INFORMATION

Motion/Admission Pro Hac Vice/Redman is granted.
Motion/Protection From Discovery/Redman is denied.
Motion/Protection From Discovery/Golding is denied.
Motion/Alter and/or Amend/Redman is denied.
Motion/Produce Legal Services Agreements & Billings/Golding is granted.
Motion/Compel/Golding is denied.

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

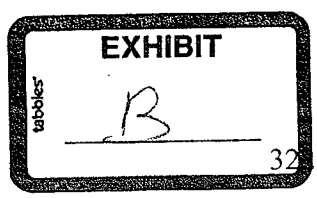
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

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

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

2157 2/01/2018

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 2/17)



Circuit Court Judge | Judge Code | Date

For Clerk of Court Office Use Only

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

George W. Redman III PO Box 357 Myrtle Beach, SC 29578
Simon H Bloom Bloom Sugarman Llp 977 Ponce De Leon Ave., Ne Atlanta, GA 30306
Ariel D Zion Bloom Sugarman LLP 977 Ponce De Leon Ave., Ne Atlanta, GA 30306

Henrietta U. Golding Mcnair Law Firm PO Box 336 Myrtle Beach, SC 29578
David J. Mills PO Box 1431 Charleston, SC 29402

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter: Natalie Dahl

Alma Y. White - Clerk of Court

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

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

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

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Georgetown Common Pleas

Case Caption: Gulfstream Cafe Inc VS J Mark Lawhon , defendant, et al

Case Number: 2016CP2200961

Type: Order/Form 4

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

Electronically signed on 2018-02-07 17:23:41 page 3 of 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	
Gulfstream Café, Inc.,	)	Case No.: 2016-CP-22-00961
Plaintiff,	)	
vs.	)	
J. Mark Lawhon, individually, and Palmetto Industrial Development, LLC	)	ORDER
Defendants.	)	

This matter comes before me on February 1, 2018, upon Plaintiff Gulfstream Café, Inc.'s Motion for Protection from Discovery, Defendant J. Mark Lawhon's Motion for Protection from Discovery, Plaintiff Gulfstream Café, Inc.'s Motion to Amend, Defendant J. Mark Lawhon's Motion to Produce Legal Services Agreements and Billings, and Defendant J. Mark Lawhon's Motion to Compel. At the hearing, Plaintiff Gulfstream Café, Inc. (hereafter "Plaintiff") was represented by Simon Bloom, Esquire, and others. J. Mark Lawhon, individually, and Palmetto Industrial Development, LLC (hereafter "Defendants") were represented by Henrietta Golding, Esquire, and others.

After careful consideration of these matters, the Court finds and concludes the following:

1. Plaintiff's Motion for Protection from Discovery is denied. Plaintiff is to produce to Defendants the 15 page document without redactions and notebook used by Plaintiff's designee, Mr. Greenbaum, during his deposition.
2. Defendant's Motion for Protection from Discovery is denied.
3. Plaintiff's Motion to Amend is denied.

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961
ELECTRONICALLY FILED - 2018 Feb 08 9:30 AM - GEORGETOWN - COMMON PLEAS - CASE#2016CP2200961

4. Defendant's Motion to Produce Legal Services Agreements and Billings is granted and was consented to by the parties during the hearing. Same is to be provided with redactions for those portions protected by attorney-client privilege.
5. Defendant's Motion to Compel is denied.

Furthermore, a scheduling order will be prepared and electronically filed by Mr. Bloom to reflect the following dates:

1. Depositions of Experts by April 30, 2018.
2. Discovery will be completed by May 15, 2018.
3. All dispositive motions will be filed by May 15, 2018.
4. This case is set as the #2 date certain trial the week of June 4, 2018.

IT IS SO ORDERED.

The Honorable William H. Seals, Jr.
15th Judicial Circuit

February ___, 2018.
Georgetown, South Carolina.

ELECTRONICALLY FILED - 2018 Mar 29 4:09 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199
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Georgetown Common Pleas

Case Caption: Gulfstream Cafe Inc VS J Mark Lawhon , defendant, et al

Case Number: 2016CP2200961

Type: Order/Other

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

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ELECTRONICALLY FILED - 2019 Mar 19 4:20 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

STATE OF SOUTH CAROLINA	**) THE COURT OF COMMON PLEAS**
	) FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	**) CASE NO.: 2018-CP-22-00199**
The Gulfstream Café, Inc., Plaintiff, v. Palmetto Industrial Development, LLC, Defendant.	**MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Palmetto Industrial Development, LLC respectfully submits this memorandum in opposition to The Gulfstream Café, Inc.'s motion for summary judgment and in support of its own motion for summary judgment.

Introduction

The Gulfstream Café (Gulfstream) is correct in only one part of its analysis of this case: The case is ideally suited for early disposition. Gulfstream is incorrect, however, in the disposition that should be reached. Palmetto Industrial—not Gulfstream—is entitled to summary judgment. A careful analysis of the warranty provisions in the easements makes clear that their plain language and common sense support Palmetto Industrial's position. Thus, Gulfstream's argument falls apart, and the easements actually do not require Palmetto Industrial to pay anything to Gulfstream here. Palmetto Industrial is therefore entitled to summary judgment on both of Gulfstream's claims.

Factual Background

For purposes of these cross-motions for summary judgment, few facts are relevant, as the language of the warranty provisions is central.

As a review of these relevant facts, the Marlin Quay Marina sits in Garden City, South Carolina. For many years, it has had two restaurants on it. One was the Marlin Quay Marina Store and Restaurant, which was owned by Marlin Quay Marina Corporation. In addition to that restaurant, Marlin Quay Marina Corporation also owned the parking lot at the marina.

The second restaurant is the Gulfstream Café. In 1986 and 1990, Marlin Quay Marina Corporation granted Gulfstream four nonexclusive easements appurtenant to use the parking lot.

Each easements also included an indemnification provision. All four easements use the same language:

> Marlin Quay Marina Corporation does hereby bind itself and its Successor and Assigns, to warrant and forever defend, all and singular, the said premises unto the said The Gulfstream Café, Inc., its Successor and Assigns, against itself and its Successors and Assigns and all other whomever lawfully claiming, or to claim the same or any part thereof.

Pl.'s Mot. for Summ. J. Ex. 2, p. 2; Ex. 3, pp. 2–3; Ex. 4, pp. 2–3; Ex. 6, p. 5.

Gulfstream filed its first lawsuit against Palmetto Industrial about these easements in November 2016. That complaint alleged claims for intentional interference with the easements, trespass and nuisance, and forcible entry. *See* Compl., *Gulfstream Café, Inc. v. Lawhon*, No. 2016-CP-22-00961 (S.C. Ct. Comm. Pls. Nov. 16, 2016). Palmetto Industrial denied those allegations, and it asserted counterclaims for forcible entry, trespass, declaratory relief, promissory estoppel, and breach of Gulfstream's rights under the easement. *See* Am. Answer and Countercls., *Gulfstream Café, Inc. v. Lawhon*, No. 2016-CP-22-00961 (S.C. Ct. Comm. Pls. Oct. 2, 2017). These counterclaims were not based on the validity of the easements, but rather on the allegation that the Gulfstream had exceeded them. The jury in that case ultimately sided with Gulfstream. *See* Verdict, *Gulfstream Café, Inc. v. Lawhon*, No. 2016-CP-22-00961 (S.C. Ct. Comm. Pls. June 12, 2018).

ELECTRONICALLY FILED - 2019 Mar 19 4:20 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

By letter dated December 5, 2017, Gulfstream sent Palmetto Industrial demanding that Palmetto Industrial pay its attorney's fees and other costs associated with its 2016 lawsuit. The letter cited four times when Gulfstream claims that it had been forced to defend its rights under the easement.

- First, it pointed to Palmetto Industrial's plan for a new building and the subsequent litigation.
- Second, it cited the redevelopment plans that Palmetto Industrial submitted to Georgetown County for a larger building.
- Third, it referred to the lawsuit filed by Marlin Quay Marina Bar & Grill, LLC in May 2017.
- Fourth, it noted Palmetto Industrial's obtaining a building permit for a larger building on the north end of the parking lot.

Pl.'s Mot. for Summ. J. Ex. 15.

A week later, Palmetto Industrial responded that it had no duty to indemnify Gulfstream. Pl.'s Mot. for Summ. J. Ex. 16.

Gulfstream ultimately sued Palmetto Industrial, in February 2018, in a two-count complaint. The first count was for a declaratory judgment that Palmetto Industrial has a duty to indemnify Gulfstream. The second was for breach of warranty regarding that duty. The Parties have now cross-moved for summary judgment.

Legal Standard

Summary judgment should be granted whenever "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

ELECTRONICALLY FILED - 2019 Mar 19 4:20 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Joseph v. S.C. Dep't of Labor, Licensing & Regulation, 417 S.C. 436, 448, 790 S.E.2d 763, 769 (2016) (citing Rule 56(c), SCRCP).

Argument

I. The Warranty Provisions Do Not Require Palmetto Industrial to Indemnify Gulfstream.

Just like the General Assembly's intent is the North Star of statutory interpretation, the grantor's intent, as derived from the document, guides the interpretation of easements. *Windham v. Riddle*, 381 S.C. 192, 201, 672 S.E.2d 578, 582 (2009) ("In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy." (internal quotation mark omitted)). Here, the plain language of the warranty provisions and common sense both point to the same conclusion: Palmetto Industrial has no obligation to indemnify Gulfstream in any disputes between these parties.

A. The Plain Language of the Warranty Provisions Shows that These Provisions Do Not Apply Here.

To determine a grantor's intent, "the deed must be construed as a whole and effect given to every part if it can be done consistently with the law." *Id.*, 672 S.E.2d at 583. A court must look to the "language of an easement" to determine what the grantor intended. *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 67, 558 S.E.2d 902, 906–07 (Ct. App. 2001). "Clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in [the] plain, ordinary, and popular sense." *Id.*, 558 S.E.2d at 907. Only when the language of an easement is "not clear, or is ambiguous or uncertain" may a court look outside the four corners of the document. *Hunt v. Forestry Comm'n*, 358 S.C. 564, 569, 595 S.E.2d 846, 848 (Ct. App. 2004).

ELECTRONICALLY FILED - 2019 Mar 19 4:20 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

Here, the language is clear in two respects, both of which defeat Gulfstream's indemnification claim. First, indemnification is only required for a *successful* claim against the easements. There was not such a claim, as Gulfstream prevailed in the first lawsuit. Second, indemnification is only required for a successful *claim* against the easement. In the 2016 lawsuit, no claim was made against the easement, but instead the Parties were fighting about whether the easements had been exceeded.

1. The Warranty Provision Applies Only to Successful Claims Against the Easements, and There Were No Successful Claims Against Gulfstream's Easements.

The South Carolina Supreme Court has spoken directly to this language. The indemnification provision here mirrors the language in S.C. Code § 27-7-10, which provides a form for conveying land in fee simple. In *Black v. Patel*, 357 S.C. 466, 594 S.E.2d 162 (2004), the grantor gave a general warranty deed with the same warranty language at issue here. The grantee was sued by a neighbor for nuisance and trespass, but the grantee successfully defeated those claims. Then, the grantee sought its attorney's fees from the grantor, based on the warranty provision. The trial court refused to award fees.

Our Supreme Court affirmed. It explained that the "general rule for cases in this context is that only 'lawful'—that is, successful—claims asserted against title justify an award of attorneys' fees where the covenantor has failed to defend." *Id.* at 471, 594 S.E.2d at 164; *see also id.* at 472, 594 S.E.2d at 165 ("We agree that in this context, the language that a claim to title must be 'lawful' in order to trigger the duty to defend indicates that the duty extends only to claims which are ultimately successful."). The court specifically rejected the argument that this

ELECTRONICALLY FILED - 2019 Mar 19 4:20 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

indemnification language "establishes a duty to defend *any* claim of paramount title." *Id.* at 472–73, 594 S.E.2d at 165.[1]

That *Black* involved a deed and this case involves an easement is irrelevant. Both types of documents involve an interest in land, and the documents in both cases used the same language. Therefore, the Supreme Court's interpretation of the warranty provision in *Black* controls here, so the warranty provisions in Gulfstream's easements apply only when there is a successful claim against the easements.

Gulfstream would be entitled to recover under the warranty provisions only if a court determined that it in fact did not have an easement and that the grant from Marlin Quay Marina Corporation was ineffective in some manner. That, of course, has not been the result of any of the four items cited in the December 5 letter, nor the result reached by the jury and Judge John in the first lawsuit. As Gulfstream repeatedly notes in its summary judgment motion, it prevailed in the earlier lawsuit against Palmetto Industrial, and none of the other three items in its letter involve a claim against the easement. In other words, Gulfstream still has the exact same easements now that it claimed to have had when those easements were granted in 1986 and 1990. At most, the first lawsuit concluded that Palmetto Industrial had interfered with Gulfstream's easements, not that Palmetto Industrial had made any successful claim against those easements.

Ultimately, for all of the trumpeting Gulfstream does in its summary judgment motion of its verdict from the 2016 lawsuit, that verdict is actually the undoing of its claim here. Because it obtained that favorable verdict, it has admitted (at least implicitly) that any claim against its easements was not successful. Therefore, its demand for indemnification fails.

---

[1] This case is binding precedent, which is enough to require it to be followed. Still, it is worth noting that this case is not an aberration in the law; rather, it is in accord with cases around the country. *See, e.g.*, *Outcalt v. Wardlaw*, 750 N.E.2d 859, 864 (Ind. Ct. App. 2001); *Nunes v. Meadowbrook Dev. Co.*, 24 A.3d 539, 543 (R.I. 2011); *Stumhoffer v. Perales*, 459 S.W.3d 158, 165–66. (Tex. App. 2015)

ELECTRONICALLY FILED - 2019 Mar 19 4:20 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

ELECTRONICALLY FILED - 2019 Mar 19 4:20 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

2. The Warranty Provision Only Applies to Claims Against Title, and There Were No Challenges to Gulfstream's Claim to the Easements in the First Lawsuit.

Gulfstream's indemnification claim fails for a second reason based on the plain language of the warranty provision: Nothing in the first lawsuit challenged Gulfstream's claim to having the easements. The dispute was over whether Palmetto had inhibited Gulfstream's use of the Parking Lot. Thus, Gulfstream's heavy reliance on its verdict in the first lawsuit does not support its claim for indemnification.

The warranty provisions impose "the duty to defend . . . *only against those people 'lawfully claiming' the land.*" *Id.* at 472, 594 S.E.2d at 165 (emphasis added). This "covenant of warranty simply does not protect against every unfounded adverse claim." *Id.* Rather, "[a] party is entitled to recover of the covenantor all reasonable costs attending a litigation *of the question of title*." 20 Am.Jur.2d Covenants § 139 (emphasis added). As another treatise explained:

> The nature and purpose of a covenant of general warranty is for the indemnity of the purchaser against the loss or injury the purchaser may sustain by a failure or defect in the vendor's title, and thus, a vendor has a duty to defend a title passed by a general warranty; however, the obligation of providing monetary indemnity applies only to loss sustained by a failure in the warrantor's title.

21 C.J.S. Covenants § 22.

The warranty provisions in the easements—which are the type of general warranty provision described above—are not triggered by the allegations or counterclaims asserted in the 2016 lawsuit. The warranty provisions obligate Palmetto Industrial, as the successor to Marlin Quay Marina Corporation, to defend only against any "claim" challenging the easement granted to Gulfstream Café. *Black*, 357 S.C. at 472, 594 S.E.2d at 165. In that 2016 lawsuit, Palmetto Industrial never made any claim challenging the grant by Marlin Quay Marina Corporation to Gulfstream Café. Indeed, as that case was pled and tried, the parties were arguing about whether

either party had violated the use of the easements—no one disputed that the easements existed or were valid.

Now in this lawsuit, Gulfstream asserted that the easements' warranty provisions are seemingly automatically triggered because it prevailed in the 2016 lawsuit. Interference with the easements, however, is not a claim against them. Or put another way, the interferences that were the premise of the verdict in that first lawsuit related to acts of use of the Parking lot, not acts that challenge the easement grant. At no time did Palmetto Industrial ever assert a claim that Gulfstream was not entitled to the easements in question. Therefore, no claim was made against the easements, so the warranty provisions are not applicable.

B. Common Sense Undermines The Gulfstream Café's Interpretation of the Warranty Provisions.

Gulfstream's interpretation of the warranty provisions is, upon reflection, remarkable. It contends that the grantor intended to indemnify Gulfstream in *any* lawsuit in which the premise of the lawsuit is that Palmetto or third parties use the Parking Lot property.

No reasonable person would likely agree to such a warranty provision. It would effectively prohibit a grantor from ever litigating any dispute over an easement, unless the grantor was willing to fund both sides of the litigation.

Given this common-sense conclusion that a grantor is unlikely to be willing to fund litigation against itself, courts have repeatedly recognized the wariness (if not strict refusal) of one party to agree to fund both sides of litigation. In cases involving indemnification provisions (even if not involving easements or deeds), courts have refused to interpret indemnification provisions to require a party to fund both sides unless the provision explicitly requires that. For example, the Southern District of New York has held that "courts have generally declined to infer indemnification obligations from an indemnitee/indemnitor suit if the contractual language does

ELECTRONICALLY FILED - 2019 Mar 19 4:20 PM - GEORGETOWN - COMMON PLEAS - CASE#2018CP2200199

not suggest that the contracting parties were specifically concerned with prospective litigation between themselves." *In re Refco Sec. Litig.*, 890 F. Supp. 2d 332, 341 (S.D.N.Y. 2012).

The warranty provisions here have no language that discusses indemnification in legal claims brought by Gulfstream against Palmetto. Rather, they are generally worded provisions to "warrant and forever defend" that cannot be interpreted as obligating Palmetto to prosecute claims, sue itself, obtain and pay legal counsel to sue itself, or pay attorney's fees whenever Gulfstream sues Palmetto.

II. The Cribb Affidavit Is Not Competent Evidence of the Grantor's Intent.

When moving for summary judgment, a party must rely on admissible evidence. *See* Rule 56(e), SCRCP. The cornerstone of Gulfstream's motion is the Cribb affidavit, but that affidavit is not a solid foundation, as it gives no support for Cribb's claim that he knew what the grantor intended the warranty provisions to mean.

The crux of Cribb's affidavit is in Paragraphs 10, 11, 16, and 17. In these paragraphs, Cribb discusses the easement agreements (with their identical warranty provisions). Cribb says that both the "Grantor and [Cribb] intended" that the warranty provisions require the grantor to pay The Gulfstream Café's attorney's fees "incurred in defending or bringing litigation" related to the easement, including litigation against "the Grantor itself." Cribb Aff. ¶¶ 10, 16. Cribb continues that "it was clear" from the "negotiation and execution" of these agreements that "the Grantor understood the warranty provision to mean the exact same thing as" he did. Cribb Aff. ¶¶ 11, 17.

A witness, of course, may testify only about matters of which he has personal knowledge. Rule 602, SCRE. Simply saying that someone has personal knowledge, however, is not enough.

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A party must offer evidence "sufficient to support a finding that the witness has personal knowledge of the matter." Rule 602, SCRE.

Cribb claims to have "personal knowledge of all matters" in his affidavit, including those assertions about the grantor's intent. Cribb Aff. ¶1. But Cribb cannot possibly know what someone else was thinking. Indeed, he does not quote anything the grantor said in 1986 or 1990. Nor did Cribb attach any document that supports his bald assertion about the grantor's intend.

Although a witness's own testimony can, in some instances, be sufficient to prove actual knowledge, *see* Rule 602, SCRE, it is not sufficient here. Cribb testifies about events that are more than thirty years old, and he offers nothing—no details, no corroboration—other than self-serving, generalized statements. Without anything more, the affidavit does not establish that Cribb has personal knowledge about the grantor's intent. And without the affidavit, Gulfstream's motion for summary judgment has no evidentiary support.

Conclusion

Palmetto Industrial's motion for summary judgment should be granted, and Gulfstream's motion for summary judgment should be denied.

Dated this 19th day of March, 2019.

Respectfully submitted,

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF GEORGETOWN) 2018-CP-22-199

The Gulfstream Café, Inc.,)
)
Plaintiff,)
)
Versus)
) April 26, 2019
Palmetto Industrial)
Development, LLC,)
)
Defendant.)
)

B E F O R E:

Honorable Benjamin H. Culbertson
Georgetown County Courthouse
Georgetown, South Carolina

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

Adam D. Nugent, Esquire
George W. Redman, III, Esquire
Attorneys for Plaintiff

Henrietta U. Golding, Esquire
Attorney for Defendant

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

1 (There were no exhibits marked during the hearing.)
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1 (On the record, April 26, 2019.)
2 THE COURT: All right. Next is 2018-CP-22-199, The
3 Gulfstream Café, Inc., versus Palmetto Industrial Development,
4 LLC. According to my roster the matter is before the Court on
5 a motion for summary judgment by the Plaintiff, a motion to
6 alter and/or amend the answer by the Defendant and a motion
7 for summary judgment by the Defendant. Please give the court
8 reporter your names and who you represent.
9 MR. NUGENT: Your Honor, Adam Nugent here on behalf of
10 The Gulfstream Café, Inc. I'm joined by my co-counsel, George
11 Redman.
12 THE COURT: All right.
13 MS. GOLDING: Good afternoon, Your Honor. Henrietta
14 Golding on behalf of the Defendant Palmetto Industrial.
15 THE COURT: All right. Are any of these motions
16 dispositive of other motions or how do -- what order do we
17 want to take them in?
18 MR. NUGENT: Your Honor, I think the summary judgment
19 motions probably can be argued at the same time. They are on
20 similar legal issues.
21 THE COURT: All right. Are either one of those
22 dispositive of the motion to alter or amend?
23 MS. GOLDING: No, sir, Your Honor.
24 THE COURT: Okay. All right. Then I guess since the
25 Plaintiff's motion was filed first, let me hear from the

1 Plaintiff.

2 MR. NUGENT: Thank you, Your Honor. May it please the
3 Court. Adam Nugent here on behalf of The Gulfstream Café,
4 Inc. I know it's Friday afternoon. Your Honor's been on the
5 bench all day. I'm going to try to keep this as brief as I
6 can. Your Honor I'm sure is aware my client has been before
7 this Court, before Your Honor and before other judges in the
8 circuit numerous times, and I assure you it's not because we
9 want to be here, but it's because we have to.

10 Gulfstream is a restaurant whose survival depends on
11 access to parking. It's located over in the Marlin Quay area,
12 and the only available parking for the restaurant is the
13 parking lot that is adjacent to its building, nowhere else to
14 park in the area, and Gulfstream cannot operate without full
15 access to that parking lot during the evening. For that
16 reason, when Gulfstream was first started back in 1980s, it
17 got a perpetual easement for ingress, egress and parking on
18 that adjacent property next to its building and, like I said,
19 that is essential to the restaurant's operation, essential to
20 its survival.

21 What's gone on over the past two and a half years has
22 been a campaign by Palmetto Industrial Development to
23 undermine those easement rights, to take those easement rights
24 away from Gulfstream, and in the face of that campaign,
25 Gulfstream's had no choice but to defend its easement rights.

1 I want to walk the Court through a little bit of
2 background about how we got here because I think it'll help.
3 THE COURT: I know this issue has already been litigated
4 once, and Judge John's already issued an order that specified
5 what the rights are.
6 MR. NUGENT: That's correct, Your Honor.
7 THE COURT: All right.
8 MR. NUGENT: I have a couple of pictures that might just
9 refresh the Court's recollection about --
10 THE COURT: I recall it vividly.
11 MR. NUGENT: Okay. Well, I'm happy to just remind the
12 Court that this issue was about the scope of the easement that
13 was held by Gulfstream in perpetuity granted by the
14 predecessor in interest to Palmetto Industrial Development,
15 and that easement provided for ingress, egress and parking and
16 it specified that Gulfstream would have primary use of the
17 parking lot during the evening hours. Of course, there was
18 interference, Your Honor --
19 THE COURT: It said -- the easement it said they have
20 primary use during the evening hours?
21 MR. NUGENT: Your Honor, it does, in fact, specify that
22 Gulfstream would have primary use during the evening hours.
23 That's correct.
24 THE COURT: That's in the recorded easement?
25 MR. NUGENT: It is, Your Honor, if you'd like I can --

1 THE COURT: Okay. No. That's fine. Go ahead.
2 MR. NUGENT: There were several different easements, but
3 they all have substantially similar language along that, along
4 those lines, and like I mentioned, access to parking,
5 especially in the evening. It's just critical to Gulfstream's
6 operation, and this all started, Palmetto tore down its
7 building, put up the construction fence, blocked off the
8 parking lot, started building a building directly on top of
9 the parking lot and that's what brought litigation to Your
10 Honor in the first instance back in 2016. Your Honor entered
11 a temporary injunction prohibiting interference with the
12 easement. Palmetto didn't comply. We came back on a motion
13 for contempt. The contemptual behavior -- contentious
14 behavior, excuse me, was the son of --
15 THE COURT: Yeah. But that's all over and done with.
16 Judge John's already ruled that case. It's over with. What
17 are you asking for in this lawsuit and what are you entitled
18 to summary judgment for in this lawsuit?
19 MR. NUGENT: This lawsuit, Your Honor, references and
20 deals with a specific warranty provision that is contained in
21 the easement agreements, and that warranty provision obligates
22 Palmetto to warrant and defend the easement from claims that
23 are made to the easement by Palmetto and by others, and under
24 principles of contractual interpretation, Gulfstream is
25 entitled to summary judgment on claims for declaratory

1 judgment, that Palmetto has an obligation to warrant and
2 defend the easement and on a claim for breach of contract for
3 Palmetto failing to warrant and defend the easement, and I'm
4 happy to walk through --
5 THE COURT: So Palmetto is obligated to warrant and
6 defend the easement on behalf of Gulfstream even though
7 Palmetto says they're not entitled to it in a, in a lawsuit
8 against Palmetto? In other words, Gulfstream is saying, "In a
9 lawsuit against Palmetto brought by us, Palmetto has to defend
10 us in the lawsuit that we brought against them."
11 MR. NUGENT: Yes, Your Honor. Palmetto is required to
12 defend the easement from any claim that's made against that
13 easement whether that, that claim is made by a third-party or
14 that claim is made by Palmetto itself, and the reason --
15 THE COURT: So, in effect, Palmetto can never prevail in
16 a lawsuit even if they are right if it is brought by
17 Gulfstream against Palmetto?
18 MR. NUGENT: Where Palmetto makes the claim to the
19 easement, and Your Honor, the, the important piece to recall
20 is the claim to the easement is the action by Palmetto seeking
21 to undermine Gulfstream's easement rights. Putting up the
22 fence, seeking to build the building directly on top of the
23 easement, taking away those parking spaces, all of those
24 actions that form the basis for the prior lawsuit are claims
25 by Palmetto against the easement. The easement's not a grant

1 of title. It's not a warranty deed. It's the grant by
2 Palmetto's predecessor, and to which Palmetto is bound, it's
3 the grant of a right to use the property for a specific
4 purpose.
5 THE COURT: It's like -- it's like a parking lot at a
6 mall. Every store is going to be competing for that parking
7 space. Christmastime, some stores are out because their
8 customers can't find a parking space. That's basically what
9 you have here.
10 MR. NUGENT: This is a situation, Your Honor, where the
11 mall owner says to a store, to let's say it's to Walmart says,
12 "You have a right to use the parking lot during these hours,"
13 and then the mall owner comes in, blocks off the parking lot,
14 starts building a new building on top of the parking lot,
15 takes away those spaces, takes away the rights that were
16 granted to Walmart in that hypothetical. That's the situation
17 we have here. It's not a third-party coming in and fighting
18 with Gulfstream about the scope of the easement or what rights
19 are granted. It is a campaign by the grantor itself to take
20 away those easement rights and that's what distinguishes it
21 from a situation where it was a third-party and Palmetto had
22 no impact or no role in creating the lawsuit. So the first
23 issue and this warranty language comes from warranty deeds.
24 It's familiar language, but it's been adapted in the context
25 of an easement, but it still expressly provides that Palmetto

1 as the successor in interest to Marlin Quay Corporation would
2 warrant and defend the easement from claims made against the
3 easement by Palmetto and by others, and so the first issue and
4 there's -- frankly, there's no dispute about several issues
5 here, and one is that this warranty does, in fact, impose an
6 obligation on Palmetto. That has not been disputed. There is
7 a warranty obligation here and that warranty obligation
8 extends to paying for the costs that Gulfstream has in
9 defending itself. That's not disputed by the parties.
10 THE COURT: Defending itself against a lawsuit that it
11 brought against Palmetto?
12 MR. NUGENT: I understand the scenario is unusual but
13 that's part of what --
14 THE COURT: Unusual, it just seems idiotic.
15 MR. NUGENT: Well --
16 THE COURT: It just says -- what you're saying is, "The
17 Defendant that I'm suing is obligated to pay my legal fees in
18 the lawsuit that they're defending against me."
19 MR. NUGENT: The Defendant, when this easement agreement
20 was struck, it was a bargain. It was the sale by Palmetto of
21 or not Palmetto, excuse me, the Marlin Quay Marina
22 Corporation, Palmetto's predecessor, it was the sale of access
23 to this parking lot to Gulfstream.
24 THE COURT: Have you got any legal appellate decision
25 that holds your --

1 MR. NUGENT: There is no case we have found in the
2 easement context, no case we found in the easement context
3 saying that -- dealing with this kind of warranty language,
4 but what I will say is the case that's actually relied on by
5 the Defendants, the Black case, it expressly carves out this
6 exception, this notion that where the grantor is the reason
7 for the claims, where it's the grantor's acts that cause the
8 grantee, here Gulfstream, to be in litigation, where it's the
9 grantor's acts, then that grantor is liable to defend and
10 warrant for claims regardless of whether they prevail or don't
11 prevail and --
12 THE COURT: Even though they are a party to the action,
13 an opposite party to the action against -- that Black case,
14 here you had two parties, a Plaintiff, a Defendant, the
15 Plaintiff is saying, "The Defendant, you warranted me, and so
16 therefore, you have to pay my legal fees and defend me in my
17 lawsuit against you."
18 MR. NUGENT: It's, it's a different situation. The Black
19 case actually dealt with a claim by a third-party.
20 THE COURT: Exactly and that's a big difference.
21 MR. NUGENT: But -- and that's a big difference, and the
22 reason for the difference is critical, Your Honor. What the
23 Black case said, what the court said is in that scenario it's
24 unfair to put this defense obligation on the grantor because
25 the grantor had nothing to do with the claims against the

1 property. The claims against the property were brought by a
2 third-party, no relationship, no connection, nothing to do
3 with the grantor, and so in that situation there was a
4 fairness issue. It was unfair to put that potential burden on
5 the grantor, but the footnote deals with our situation. Here
6 the only reason this lawsuit ever existed is because Palmetto
7 put up that fence and started building literally on top of
8 dozens of parking spaces that are so vital to my client's
9 operation. That is what started this lawsuit, and Palmetto at
10 all times has had control over the fact that claims were being
11 made to the easement, and those claims extend, I mean, it's
12 been going on for years, Your Honor, and Your Honor's familiar
13 with the procedural history that this is something that,
14 frankly, will never stop because Palmetto is determined to
15 take away those easement rights from Gulfstream. That's a far
16 cry from the third-party coming in and the grantor sort of
17 standing here saying, "I didn't cause you to get into this
18 trouble, and I gave you good title." That's not at all the
19 situation we have here. We have a grantor or a successor
20 here, Palmetto, who is actively seeking to take away those
21 easements rights. In that scenario, then the grantor,
22 Palmetto, can be on the hook for warranting and defending
23 irrespective of whether the claims are successful or not and
24 it, frankly, it's a bargain. It's there was a bargain between
25 the Marlin Quay Corporation and Gulfstream to give Gulfstream

1 access which was so vital to its operation but Marlin Quay
2 said, "I promise I will warrant and defend this from any
3 claims, even ones that I make," and in doing that it
4 affirmatively undertook this obligation. It said, "If I come
5 down the line years later and say forget this, I don't really
6 want to be part of this easement agreement anymore, I'm going
7 to try to take it over from you, I'm going to build on top
8 your easement, I'm going to try to take away your parking
9 spaces, I'm going to operate a restaurant at night, all of
10 those things," when that easement document was signed Marlin
11 Quay said, "I'll protect you if I do that," and I agree it's a
12 burden that's placed on Marlin Quay, but Palmetto is the
13 successor in interest. It affirmatively undertook that
14 obligation when it purchased the property subject to the
15 easement. It's not something that's inequitable. There's
16 nothing unfair about imposing this obligation on Palmetto.
17 It's simply what the parties agreed to back in 1986 and again
18 reaffirmed in 1990, and with the principles of contract
19 interpretation in mind, it's clear that it is a warranty
20 against claims and against claims by Palmetto. There's no
21 question that what Palmetto has done is a claim against the
22 easement. Physically restricting the easement, building on
23 top of the parking lot that is subject to the easement takes
24 away the essence of the rights that were granted when this
25 easement document was signed, no question about that, and as

1 to whether the claims can be by Palmetto, no question about
2 that. That's in the, the face of the document, and so then
3 the last issue is do the claims have to be successful, and
4 first off, they don't. There's nothing -- no case saying that
5 that applies in easement context and consider, Your Honor,
6 that an easement is different from a warranty deed. It is a
7 document in which the parties contemplated having an ongoing
8 relationship, unlike transferring ownership where following
9 the conveyance the grantor, grantee go their separate ways.
10 They're not continuing to have that relationship. An
11 easement's different, and so when that easement relationship
12 goes south there is a much better rationale for telling the
13 grantor, "Hey, you signed up for this. You gave them these
14 rights and you promised that you wouldn't try to take them
15 away," and it's that action that makes it not the least bit
16 inequitable, the least but unfair to impose the obligation on
17 Palmetto, and so, Your Honor, interpreting the document -- and
18 we've got an affidavit from the -- one of the signatories to
19 the easement agreement that confirms this, that confirms his
20 understanding of this warranty provision, and it was if there
21 was a challenge to Gulfstream's parking rights that the
22 grantor, then the Marlin Quay Corporation, would, in fact,
23 defend and reimburse Gulfstream for the costs.
24 THE COURT: And the affidavit says even if it was a
25 lawsuit by your client against Marlin Quay when Marlin Quay

1 was the owner then they would have voluntarily come in and
2 defended on behalf of your client in a lawsuit against them.
3 MR. NUGENT: What it says is when the rights under the
4 easement were challenged that's when the defense obligation
5 was triggered and that's exactly what happened here.
6 THE COURT: I understand.
7 MR. NUGENT: The Plaintiff and the Defendant aren't
8 relevant here because it's the actual claim, the actual
9 activity that was the subject of the first lawsuit that was
10 litigated for several years, that activity was a claim to the
11 easement rights. It was a fundamental attempt to strip away
12 the rights that were given to Gulfstream, and that's the most
13 fundamental piece of this entire agreement. It's what's vital
14 to Gulfstream's operation as a restaurant, and so whether
15 Gulfstream filed suit or Palmetto filed suit frankly doesn't
16 make a difference because it's what was going on. Your Honor
17 saw it in the first instance and have seen it during the
18 duration of this litigation. Those claims trigger the defense
19 obligation. There's nothing unfair or inequitable, no reason
20 not to impose on Palmetto the obligation that it affirmatively
21 undertook when it bought the property subject to the easement.
22 We ask for summary judgment on our declaratory judgment claim
23 and on our breach of contract claim with the only thing left
24 for determination by the jury being the issue of damages.
25 THE COURT: All right.

1 MR. NUGENT: Thank you, Your Honor.
2 THE COURT: All right. Ms. Golding.
3 MS. GOLDING: Thank you, Your Honor. I -- there was so
4 many misstatements of law and the facts, Your Honor, but I'd
5 like to start with the Black versus Patel case. May I
6 approach the bench --
7 THE COURT: All right.
8 MS. GOLDING: -- and provide you with the decision?
9 Thank you, Your Honor.
10 First of all, Your Honor, to clarify with respect to the
11 easement, the warranty provision that is, that is applicable
12 to this lawsuit is the exact same language in Black and Patel,
13 Your Honor, exactly the same warranty provision. The Black
14 versus Patel decision by the U.S. Supreme Court in 2004, Your
15 Honor, emphasized that the issue is was the claim against the
16 title successful because the language, Your Honor, in this
17 warranty specifically states that warrant and defend
18 Gulfstream Café its successors and assigns against itself, its
19 successors and assigns and all other who, whomever lawfully
20 claiming or to claim the same. It's lawfully claiming the
21 easement, Your Honor. Ironically in their motion for summary
22 judgment, Your Honor, they never once cited the Black versus
23 Patel case because that case is on point. It is the law in
24 South Carolina. The Black versus Patel case using the exact
25 same language as in this easement says that lawfully claiming

1 means that there must have been a successful claim against the
2 title in the Black versus Patel case. In this situation it
3 would be a successful claim against the easement.
4 Your Honor, today Gulfstream has the same easement that
5 it got in 1986. There has been no successful claim against
6 that easement. In the lawsuit, in the 2016 lawsuit, Your
7 Honor, when it was first brought by Gulfstream their claim was
8 for tortious interference with the easement, trespass and
9 nuisance and another esoteric claim about ejectment. They
10 didn't have a claim under warranty. It wasn't till 14 months
11 later on this same document they brought a lawsuit in that
12 they send a letter, "Oh, by the way, there's a warranty." If,
13 in fact, Gulfstream's lawsuit triggered the warranty
14 provision, Gulfstream would have asserted it and not waited 14
15 months, but even aside from that, as the Black versus Patel
16 case clearly states that the word lawful claim must be a
17 successful claim. Our answer and counterclaims in the 2016
18 lawsuit not one challenged Gulfstream's easement. We said,
19 "Gulfstream you exceeded your easement." We never challenged
20 the easement. We have always admitted their easement.
21 There are some basic legal provisions, while they're so
22 basic, but I'm going to repeat them, you know. There is that
23 you must construe the easement and the warranty provision as
24 it is written as a whole. The clear and unambiguous language
25 must be construed, and if the language is not clear, then you

1 go outside. Here the language is clear. Indemnification is
2 only triggered if there's a lawful claim. Black versus Patel
3 specifically stated that in order to be a lawful claim it must
4 be a successful claim. The, the 2016 finding, the jury found
5 for Gulfstream. So there was no successful claim against
6 Gulfstream's easement.
7 The covenant does not protect against every possible
8 manner or every possible adverse claim, and, in fact, in the
9 Black versus Patel case, the Supreme Court said it's not a
10 broad brush at all. It's only successful claims against what
11 you bargained to get. The interference claim that they had
12 was a tort claim. It wasn't a claim that said we didn't have
13 this easement. They said they had the easement. The jury
14 agreed.
15 In -- there is no case in South Carolina outside of Black
16 versus Patel. Why the Plaintiff disregards that clear
17 precedent is unbelievable. Then the Plaintiff says, "Well, if
18 you follow Black and Patel there's an exception," and Mr.
19 Nugent referred to the exception which is note four in the
20 case. Your Honor, he failed to state that the exception
21 specifically relates to litigations with third-party, and
22 that's what he did in his trial -- I mean, reply brief. He
23 refers to the exception, but he doesn't disclose it completely
24 to the Court.
25 He -- in their reply brief they said the big distinction

1 between Black and Patel and this is that Black versus Patel
2 related to title. This lawsuit relates to easement. That is
3 a distinction without a difference because both the deed and
4 the easement relate to ownership of property, and both use the
5 same exact language of the covenant, and that same exact
6 language was relied upon and interpreted by the South Carolina
7 Supreme Court.
8 This Court, Your Honor, was right to say -- to question
9 Mr. Nugent and say, "Are you saying the law in South Carolina
10 is I can sue you, you have to defend me, you also have to fund
11 my lawyer and you have to defend yourself." That's
12 ridiculous. In fact, there's law outside of this
13 jurisdiction, and I cite it in our brief, that said if that's
14 the intent of an indemnification provision, it must be clearly
15 noted if that is the intent, and Your Honor, there's
16 absolutely nothing in this warranty provision that clearly
17 notes that the predecessor in title had any obligation to
18 indemnify for any adverse claims whatsoever relating to the
19 easement. The covenant says successful claims. There was no
20 successful claim depriving Gulfstream of its easement. The
21 easement it had today is the same easement it had in 1986.
22 Thank you, Your Honor.
23 THE COURT: All right. Anything in reply?
24 MR. NUGENT: Yes, Your Honor. Ms. Golding said several
25 times that Gulfstream has today the same easement it had in

1 1986, and that's simply not true. The easements from 1986 and
2 again signed in 1990 expressly contemplated that Gulfstream
3 would have primary use of the parking lot during its evening
4 business hours. It's in both of the documents.
5 Following the trial, Gulfstream moved for a permanent
6 injunction, and it sought to protect two types of
7 interference. One was physical interference on the easement,
8 the placement of a building on the easement property, and the
9 second was what we called capacity interference and that was
10 allowing Palmetto to operate a full-service restaurant at
11 night that would take up an enormous number of parking spaces
12 that simply were not there in the evening because that's when
13 Gulfstream had its primary use under the easement agreement.
14 Judge John granted the permanent injunction only as to
15 physical interference. That's the only piece that was
16 enjoined, the physical location of the building outside the
17 boundaries delineated on the plat that's made part of the
18 easement. The request for an injunction against capacity
19 interference was not granted, and so following that ruling --
20 THE COURT: I mean does the easement deal with capacity?
21 MS. GOLDING: No.
22 MR. NUGENT: Your Honor --
23 THE COURT: It just gives the use of the property for
24 parking.
25 MR. NUGENT: The capacity word we use as a way to explain

1 this division between the Marlin Quay store being a daytime
2 business and Gulfstream being an evening business, and that's
3 in all, all four of the easements, the idea that Marlin Quay,
4 Palmetto's predecessor would use the easement during the
5 daytime hours and that Gulfstream would use it at night.
6 That's the only way to make this parking situation work.
7 There's just not enough parking, frankly, as it is, but
8 certainly not when you've got two full-service restaurants and
9 what we've got going on right now right this minute is that
10 Palmetto is building what would be a 10,000 square foot
11 restaurant with three different levels of deck seating, two
12 different bars, and the focus on the nightlife was in the
13 trial testimony of Dr. Mark Lawhon as something he wanted to
14 have a part of his new building. That type of interference is
15 absolutely contrary to what the easement provides, and so
16 right now Palmetto is out there building a gigantic building
17 that is intended to operate at night and to serve dinner at
18 night and will absolutely upset the balance that was set in
19 the easement. So Gulfstream doesn't have the same easement.
20 There was a successful claim, and this isn't about legal
21 claims and who was Plaintiff and who was Defendant.
22 THE COURT: Well, now, you're not -- no. You're just
23 trying to get them to quit -- you just don't want them to open
24 a restaurant that serves at night --
25 MR. NUGENT: Well --

1 THE COURT: -- because you anticipate that it will affect
2 the parking for your client.
3 MR. NUGENT: We're -- absolutely, Your Honor, we're
4 concerned about parking. That is a hundred percent what this
5 is about. We're not right now seeking to enjoin the opening
6 of that restaurant because the permanent injunction it only
7 covered that physical interference. So the injunction didn't
8 give us the right to stop them from interfering by operating a
9 restaurant at night, and as a result, there has been a
10 successful claim, and I, I can't emphasize enough that the
11 balance that's in those easement documents has been upset and
12 as a result of the lawsuit, and just because Gulfstream filed
13 first and tried to protect its easement, it doesn't matter.
14 At the end of the day the claim that has occurred is Palmetto
15 has taken away some of those rights, and so that piece means
16 that even if the successful claims doctrine were the law, and
17 Ms. Golding admits that that is, in her view, that should be
18 the law, that if there's a successful claim then Palmetto's on
19 the hook. We disagree. We think it's all claims, and I'm
20 happy to argue that further. I think the analysis in the
21 Black case about the fairness and the grantor being the source
22 of the claims is absolutely persuasive and dispositive of what
23 claims should be warranted and defended against, but Ms.
24 Golding's own standard is if there's a successful claim
25 Palmetto's on the hook, there's absolutely a successful claim

1 here, and Your Honor, the, the final piece that Ms. Golding
2 brought up was that if the parties intended for this kind of a
3 relationship to exist they should have made it clear, and we
4 think the language of the easement is plenty clear, but we've
5 also got an affidavit from one of the signatories to the
6 easement explaining his understanding and his intent, which
7 was that Gulfstream would be protected if its parking rights
8 were challenged, including by Palmetto's predecessor. If the
9 language of the warranty agreement is not or it's ambiguous,
10 it's not unambiguous the Court needs to look past that
11 language, the only evidence in the record of the parties'
12 intent is Mr. Cribb's affidavit. It stands uncontradicted,
13 and it shows exactly what we've been saying. Palmetto signed
14 up for this. When it bought this property subject to an
15 easement, it agreed to take on warranty and defense for claims
16 that were asserted against the easement, including by itself.
17 It's made those claims. It's cost Gulfstream an enormous
18 amount trying to protect its easement rights, and there is no
19 inequity, nothing unfair about holding Palmetto accountable
20 for what it signed up for. Once that warranty language is
21 properly construed, then liability is established on breach of
22 contract and declaratory judgment claims, we can move on to
23 the amount of damages. We can get this case resolved and move
24 on and hopefully wrap up the fight that's been going on.
25 Gulfstream can move on to try and operate its business and not

1 deal with the two and a half year campaign of Palmetto trying
2 to take away the rights that were granted 30 plus years ago.
3 Thank you, Your Honor.
4 THE COURT: All right. Ms. Golding, since you also have
5 a motion for summary judgment, I'll allow you one reply, too.
6 MS. GOLDING: Okay. Thank you, Your Honor. I did not
7 address during my argument the warranty provision, the --
8 excuse me, not warranty, it's a provision in the easement that
9 relates -- that Mr. Nugent's been stating that gives Palmetto
10 -- restricts Palmetto to only daytime. The provision in the
11 easement is stated it is anticipated by the parties that while
12 they will each have joint and non-exclusive use of the area
13 covered by the easement, the grantor will primarily utilize
14 the premises during the day and the grantee utilize the
15 premises in the evening. This was extensively litigated in
16 the trial, Your Honor. The -- Gulfstream put up extensive
17 evidence that this was intended, that it can only -- it had a
18 right to operate at night and we did not. The jury rejected
19 that. Judge John rejected that. That's clearly the -- we're
20 talking about a joint non-exclusive easement, Your Honor, and
21 Your Honor, the bottom line -- Mr. Cribb's affidavit says
22 nothing. It's not admissible. Clearly, he did not lay any
23 foundation. He did not set forth why he thinks he can read
24 into the minds of the grantor. I tried to contact Mr. Cribb.
25 I've sent several emails to Mr. Nugent, "I want his

1 deposition. I want his deposition." Mr. Nugent said, "I'll
2 contact him. We'll set it up." I finally had to get back
3 with Mr. Nugent and say, "I can't, you know, what's happening
4 here?" Mr. Nugent says, "We don't have an address. I just
5 have a telephone number." I can't find him. I've had a
6 process server go in Horry and Georgetown County trying to
7 find him. You know, this individual, they have an obligation.
8 His affidavit is inadmissible, and they're hiding him, but
9 that just goes to show the mindset of Gulfstream, and
10 Gulfstream's -- the position it's taken today is clearly
11 against South Carolina law. Black and Patel is on point, and
12 it knocks out completely what Gulfstream is saying is the
13 interpretation of that warranty provision. Following Black
14 and Patel, Your Honor, you should grant the Defendant's motion
15 for summary judgment. Thank you, Your Honor.
16 THE COURT: All right. All right. Ms. Golding, if I
17 could get you to prepare an order that grants the Defendant's
18 motion for summary judgment, denies the Plaintiff's motion for
19 summary judgment. I don't know that they're obligated to
20 defend as I read the warranty and as I read the Black case.
21 So if you'd prepare an order, Ms. Golding, to that effect.
22 What does that do to your motion to alter or amend?
23 Ms. GOLDING: I think I'm going to withdraw it at this
24 time, Your Honor.
25 THE COURT: Okay.

1 MS. GOLDING: Thank you, Your Honor.
2 THE COURT: So that -- does that conclude -- that
3 concludes the case because it was basically a declaratory
4 judgment on the warranty and indemnification; correct?
5 MR. NUGENT: Your Honor, it was both declaratory judgment
6 and breach of contract on that same provision.
7 THE COURT: Yeah. I got you. All right. All right. I
8 find there is no dispute. It's all interpreted by the
9 interpretation, and under this Black decision I think that the
10 Defendants are entitled to judgment as a matter of law.
11 MS. GOLDING: Thank you, Your Honor.
12 THE COURT: All right. Thank you.
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1 C E R T I F I C A T E

2

3 I, the undersigned, Grace L. Hurley, Official Court
4 Reporter for the State of South Carolina, do hereby certify
5 that the foregoing is a true, accurate and complete transcript
6 of the hearing held in the case of The Gulfstream Café, Inc.
7 versus Palmetto Industrial Development, LLC, held in the Court
8 of Common Pleas for Georgetown County, Georgetown County
9 Courthouse, Georgetown, South Carolina, on April 26, 2019.
10 I do hereby certify that I am neither of kin, counsel,
11 nor interest to any party hereto.
12
13
14
15 _____
16 Grace L. Hurley, CVR-CM-M
17 Official Reporter
18
19
20
21
22
23
24 June 24, 2019.
25

STATE OF SOUTH CAROLINA	) **THE COURT OF COMMON PLEAS**
	)
COUNTY OF GEORGETOWN	) **CASE NO.: 2018-CP-22-00199**

The Gulfstream Café, Inc.,

Plaintiff,

v.

Palmetto Industrial Development, LLC,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The issue before the Court involves the interpretation of a warranty provision in easements granted to The Gulfstream Café, Inc. ("Gulfstream") to a parking lot at the Marlin Quay Marina. Gulfstream contends the warranty provision entitles it to recover all of the attorney's fees and costs Gulfstream incurred in its first lawsuit against Palmetto Industrial Development, LLC ("Palmetto"). Palmetto disputes Gulfstream's interpretation of the warranty provision. Both Gulfstream and Palmetto moved for summary judgment on this issue. Having reviewed the pleadings, motions, memoranda of law, and exhibits and further, having considered the Parties' oral arguments, the Court **GRANTS** Palmetto's motion for summary judgment and **DENIES** Gulfstream's motion for summary judgment.[1]

Factual Background

The property known as Marlin Quay Marina sits in Garden City, South Carolina. For many years, two restaurants occupied the property. One is the Marlin Quay Marina Store and Restaurant, which was owned by Marlin Quay Marina Corporation, and the second is The Gulfstream Café.

[1] Palmetto has withdrawn its motion for leave to amend its answer and assert a counterclaim.

Marlin Quay Marina Corporation also owned the parking lot at the Marlin Quay Marina. In 1986 and 1990, Marlin Quay Marina Corporation granted Gulfstream four nonexclusive joint easements appurtenant to use the parking lot. Each easement included a warranty provision. All four easements used the same language:

> Marlin Quay Marina Corporation does hereby bind itself and its Successor and Assigns, to warrant and forever defend, all and singular, the said premises unto the said The Gulfstream Café, Inc., its Successor and Assigns, against itself and its Successors and Assigns and all other whomever lawfully claiming, or to claim the same or any part thereof.

Pl.'s Mot. for Summ. J. Ex. 2, p. 2; Ex. 3, pp. 2–3; Ex. 4, pp. 2–3; Ex. 6, p. 5.

In 2014, Palmetto purchased the Marlin Quay Marina property, inclusive of the parking lot and restaurant. In November 2016, Gulfstream filed its first lawsuit against Palmetto. The dispute in the first lawsuit centered around the parking lot. In the first lawsuit, Gulfstream asserted causes of action against Palmetto for intentional interference with the easements, trespass and nuisance, and forcible entry. *See* Compl., *Gulfstream Café, Inc. v. Lawhon*, No. 2016-CP-22-00961 (S.C. Ct. Comm. Pls. Nov. 16, 2016). Palmetto denied the allegations in the first lawsuit and asserted counterclaims against Gulfstream for forcible entry, trespass, declaratory relief, promissory estoppel, and breach of easement. *See* Am. Answer and Countercls., *Gulfstream Café, Inc. v. Lawhon*, No. 2016-CP-22-00961 (S.C. Ct. Comm. Pls. Oct. 2, 2017). Palmetto's counterclaims did not challenge the validity of the easements, but rather alleged that Gulfstream exceeded them. The jury in the first lawsuit sided with Gulfstream by rendering a $1,000.00 verdict in its favor on the interference claim. *See* Verdict, *Gulfstream Café, Inc. v. Lawhon*, No. 2016-CP-22-00961 (S.C. Ct. Comm. Pls. June 12, 2018).

By letter dated December 5, 2017, Gulfstream demanded that Palmetto pay the attorney's fees and costs associated with the first lawsuit. The letter cited four times when Gulfstream claims that it was forced to defend its rights under the easements.

- First, it pointed to Palmetto's plan for a new building and the subsequent litigation.
- Second, it cited the redevelopment plans that Palmetto submitted to Georgetown County for a larger building.
- Third, it referred to the lawsuit filed by Marlin Quay Marina Bar & Grill, LLC in May 2017.
- Fourth, it noted that Palmetto obtained a building permit for a larger building on the north end of the parking lot.

Palmetto rejected Gulfstream's demand. In February 2018, Gulfstream filed the second lawsuit against Palmetto, consisting of a two-count complaint. In the first count, Gulfstream sought a declaratory judgment, declaring that Palmetto has a duty to indemnify Gulfstream. The second count was for breach of warranty regarding that duty. Palmetto answered, denying any obligation to indemnify.

Legal Standard

Summary judgment should be granted whenever "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 448, 790 S.E.2d 763, 769 (2016) (citing Rule 56(c), SCRCP).

Legal Findings

I. Under *Black v. Patel*, Palmetto Is Entitled to Summary Judgment.

The South Carolina Supreme Court has spoken directly to the language of the warranty provisions in the easement agreements subject to this dispute. *See Black v. Patel*, 357 S.C. 466, 594 S.E.2d 162 (2004). In *Black*, the grantee was sued by a neighbor for nuisance and trespass, but the grantee successfully defeated those claims. Then, the grantee sought to recover its attorney's fees from the grantor, based on the warranty provision. The trial court refused to award fees.

Our Supreme Court affirmed. It explained that the "general rule for cases in this context is that only 'lawful'—that is, successful—claims asserted *against title* justify an award of attorneys' fees where the covenantor has failed to defend." *Id.* at 471, 594 S.E.2d at 164 (emphasis added); *see also id.* at 472, 594 S.E.2d at 165 ("We agree that in this context, the language that a claim to title must be 'lawful' in order to trigger the duty to defend indicates that the duty extends only to claims which are ultimately successful."). In other words, the warranty provision is triggered only when a third party has made a successful claim against the grantee's interest in the land. The court specifically rejected the argument that the indemnification language establishes a duty to defend *any* adverse claim. *Id.* at 472–73, 594 S.E.2d at 165. (Emphasis added)

The fact that *Black* involved a deed and this case involves an easement is irrelevant. Both types of documents involve an interest in land, and the warranty provision in both cases use the same exact language. Therefore, the Supreme Court's interpretation of the warranty provision in *Black* controls here; the warranty provisions in Gulfstream's easements apply only when there has been a successful claim against the easements.[2]

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[2] Gulfstream is incorrect that the exception from footnote 4 in *Black* applies. That exception comes into play only when "the wrongful act of the covenantor . . . causes the covenantee *to be in litigation with the third party*." *Id.* at 471 n.4, 594 S.E.2d at 165 n.4 (emphasis added). Gulfstream would have the Court ignore both the requirement of a successful claim and this plain language about third parties (as opposed to an indemnitee/indemintor suit, *see infra* Part II).

Gulfstream would be entitled to recover under the warranty provisions only if a court determined that it, in fact, did not have an easement or that the easement granted from Marlin Quay Marina Corporation was ineffective in some manner. That, of course, has not been the result of any of the four items cited in Gulfstream's December 5 letter, nor was it the result reached by the jury and Judge John in the first lawsuit. Indeed, as Gulfstream repeatedly notes in its summary judgment motion, it prevailed in the earlier lawsuit against Palmetto, and none of the other three items in its letter even involve a claim against the easement. In other words, Gulfstream still has the same easements now that it claimed to have when those easements were granted to it in 1986 and 1990. At most, the first lawsuit concluded that Palmetto had interfered with Gulfstream's easements, not that Palmetto had made any successful claim against those easements.

Therefore, Palmetto is entitled to summary judgment on both claims in the complaint in this second lawsuit.

II. The Warranty Provisions Do Not Explicitly Apply to an Indemnitee/Indemnitor Suit.

Palmetto is entitled to summary judgment for a second, independent reason: The warranty provision does not explicitly state that it applies to indemnitee/indemnitor suits.

When interpreting an easement, the intent of the grantor controls. *Windham v. Riddle*, 381 S.C. 192, 201, 672 S.E.2d 578, 582 (2009). Although South Carolina courts have not addressed the specific question of whether a general warranty provision applies to indemnitee/indemnitor suits, courts in other states have consistently held that they do not. *See, e.g.*, *In re Refco Sec. Litig.*, 890 F.Supp.2d 332, 341 (S.D.N.Y. 2012) ("[C]ourts have generally declined to infer indemnification obligations from an indemnitee/indemnitor suit if the contractual language does not suggest that the contracting parties were specifically concerned with prospective litigation between themselves.").

This rule is well reasoned. No reasonable person would likely agree to such a warranty provision. It would effectively prohibit a grantor from ever litigating any dispute over an easement, unless the grantor was willing to fund both sides of the litigation. Before a grantor is required to fund both sides of a lawsuit, it must have expressly agreed to do so.

Palmetto did not do so here. The warranty provisions in these easements have no language that discusses indemnification of any legal claims brought by Gulfstream against Palmetto. Rather, they are generally worded provisions to "warrant and forever defend" that cannot be interpreted as obligating Palmetto to pay attorney's fees whenever Gulfstream sues Palmetto.[3]

Conclusion

The Court **GRANTS** Palmetto's motion for summary judgment and **DENIES** Gulfstream's motion for summary judgment.

IT IS SO ORDERED.

[Electronic signature of the Honorable Benjamin H. Culbertson to follow.]

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[3] The affidavit of Edward Cribb, Jr. is not admissible evidence on the grantor's intent. *See* Rule 56(e), SCRCP. The affidavit includes only conclusory assertions about what the another person (the grantor) intended. Such a naked statement is not "sufficient to support a finding that the witness has personal knowledge of the matter." Rule 602, SCRE.