Exhibit A

IN THE STATE OF SOUTH CAROLINA) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FOR THE 15TH JUDICIAL CIRCUIT CASE NO: 2019-CP-26-00946
LAUREN EGAN, and LAUREN K. EGAN 2017 IRREVOCABLE TRUST, Plaintiff(s), v. DOCKSTREET AT THE MARKET COMMON, INC.; DOCK STREET COMMUNITIES, INC.; DOCK STREET HOMES & COMMUNITIES, INC.; SANDS BUILDING GROUP, INC.; STERLING HOMES; REAL ESTATE MODO, INC.; OCEAN FRONT GURU REAL ESTATE SALES & DEVELOPMENT, INC.; and BRIAN PIERCY, Defendant(s).	**PLAINTIFF'S MOTION TO VACATE, ALTER, OR AMEND FORM 4 ORDER DATED APRIL 25, 2019.**

TO: THE HONORABLE COURT AND ALL COUNSEL OF RECORD

YOU WILL PLEASE TAKE NOTICE that the Plaintiff Lauren Egan, by and through undersigned counsel, will move the presiding judge of the Horry County Court of Common Pleas for an Order Vacating, Altering, or Amending its Form 4 Order dated April 25, 2019, pursuant to Rules 59(b) and 60(a) and (b), and other applicable law for the reasons set forth below.

COMES NOW the Plaintiff and does so move.

PROCEDURAL BACKGROUND

Defendants filed bare-bones Motions to Dismiss. They did not file any supporting memoranda as required. They did not file their affidavits with their motions as required. Instead, Defendants waited until they learned that Plaintiff's counsel had a Rule 601 conflict on the

original hearing date. Only then did they file affidavits – 43 hours before their motions were heard.

Defendants then appeared on the original hearing date, and despite the roster clearly stating that the hearings were not going forward, and despite the complete lack of notice to Plaintiff, Defendants argued their motions anyway. There is no evidence that Defendants attempted to contact Plaintiff's counsel when he did not appear. There is no evidence of which Plaintiff is aware that Defendants informed the Court of the reason for Plaintiff's counsel's non-appearance.

Instead, Defendants proceeded. They presented their untimely affidavits. They succeeded in converting their Motions to Dismiss into summary judgment motions. Without giving Plaintiff any opportunity to obtain or present any pertinent material in response, the Court granted summary judgment in favor of Defendants by Form 4 Order dated April 25, 2019 ("Form 4 Order").

The Form 4 Order came as a complete surprise to Plaintiff's counsel, as the Hearings should not have been held in the first place.

LEGAL ANALYSIS

1. The hearings on Defendants' motions to dismiss were held without proper notice to Plaintiff.

On April 22, 2019, Plaintiff advised the Court of a Rule 601 conflict that prevented the hearings on Defendants' Motions to Dismiss ("Hearings") going forward on the morning of April 25, 2019. **Exhibit A.** As a result, the Hearings were shown on the roster as not going forward on April 25, 2019, and Plaintiff's counsel removed them from his calendar.

Subsequently, the trial that created the Rule 601 conflict was continued. However, no notice was given to Plaintiff that the Hearings would go forward. Plaintiff's counsel did receive

notice vial email that a hearing ***in a different case*** was being placed back on the roster for the afternoon of the 24th (**Exhibit B**), and indeed the roster reflected that the other hearing was going forward. However, as of 3:04 p.m. the afternoon before the Hearings were held, the roster still showed that the Hearings in this case were ***not*** going forward. **Exhibit C**. The roster showed the same information when Plaintiff's counsel checked again on the morning of the 25th.

Based on notice and the change to the roster for the afternoon 4/24 hearing, and ***no notice*** and ***no change*** to the roster for the morning 4/25 Hearings, Plaintiff's Counsel reasonably concluded that the morning Hearings at issue had not been placed back on the roster to be heard on the 25th. Plaintiff's counsel checked the roster the afternoon of the 24th, and it was consistent with counsel's understanding — that the afternoon hearing would be held on the 24th, but the 4/25 morning Hearings would not. The same was true when counsel checked the roster again on the morning of the 25th.

As a result of the above, Plaintiff's counsel had no notice at all that the hearings were going to go forward on the morning of the 25th, let alone the required 10-day notice. The Form 4 Order was thus granted without due process (i.e. without notice and an opportunity to be heard). Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) ("The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review."). Accordingly, it should be vacated.

2. The Hearings were held in the absence of Plaintiff's counsel.

Opposing counsel was copied on the Rule 601 conflict email, and therefore knew that Plaintiff had advised the court of the Rule 601 conflict that prevented the Hearings going forward. **Exhibit A**. If opposing counsel had taken any steps to locate Plaintiff's counsel before

proceeding with the Hearings – by calling, emailing, texting, etc. – he would have found that Plaintiff's counsel was less than a mile from the courthouse all morning, preparing for his afternoon hearings.

Plaintiff's counsel could easily have appeared had anyone advised him that (despite what the roster said) the Hearings were going to be held. However, opposing counsel did not take any steps that we are aware of to contact or alert Plaintiff's counsel that he intended to proceed with the Hearings. It is unclear whether opposing counsel informed the Court of Plaintiff's counsel's anticipated absence, or the reason for it. Nonetheless, the matter was heard when the roster said it was not going to be, and without Plaintiff's counsel being present. The Form 4 Order was thus granted without due process, and it should be vacated. See McIntyre v. Sec. Comm'r of S.C., 425 S.C. 439, 452, 823 S.E.2d 193, 200 (Ct. App. 2018) (reversing an order obtained by denial of due process).

3. The Hearings were held in non-compliance with the Supreme Court's Order dated September 10, 2015.

The Supreme Court's Civil Motions Pilot Program order dated September 10, 2015 required Defendants to submit "a supporting memorandum of law" contemporaneously with their motions, and ***prior*** to any hearing on the matter.[1] **Exhibit D (highlighting added).** Defense counsel is presumed to be aware of the governing orders, rules, etc. in the counties where they practice. However, contrary to the Supreme Court's Order, Defendants did not submit a memorandum of law with their motions, nor did they submit one prior to the Hearings. As a

[1] The sole exception for instances where "a full explanation of the motion is contained within the motion and a memorandum would serve no useful purpose" is facially inapplicable here.

result, the Hearings were held, and a Form 4 order issued, all contrary to the mandatory procedure required by the Supreme Court's September 10, 2015 Order.

Non-compliance with the Supreme Court's Order is not in the nature of an affirmative defense, which may only apply when asserted. Rather, each of us is required to comply with the Supreme Court's valid orders, even when no one reminds us. In return, each of us is entitled to presume that ***others*** will comply with the Supreme Court's valid orders – even when no one is looking. Non-compliance with the Supreme Court's Order alone is sufficient to require this Court to vacate the Form 4 Order. See e.g. Matter of Krawcheck, 417 S.C. 470, 473, 790 S.E.2d 781, 782 (2016) (not proper "to willfully violate a valid order of the Supreme Court.").

4. Defendants' affidavit in support of their motions was untimely in multiple respects.

The Form 4 Order's apparent reliance on Defendant's affidavit is improper, as the affidavit was untimely. The affidavit was filed at 2:17 p.m. on April 23, 2019, less than 48 hours before the Hearings. This is improper under Rule 6(d), Rule 56, and the Supreme Court's September 10, 2015 Order. Rule 6(d), SCRCP, ("When a motion is to be supported by affidavit, the affidavit shall be served with the motion"); Supreme Court Order dated September 10, 2015 ("Affidavits and other materials supportive of the motion shall be filed and served with the motion."); Rule 56(c) (not even the non-moving party may file affidavits later "than two days before the hearing.").

Use of the term "shall" indicates that contemporaneous filing of affidavits is not optional. Nonetheless, instead of filing their affidavit with the motions as required, Defendants waited over a month, and filed the affidavit just 43 hours before the Hearings, and (perhaps not coincidentally) the day ***after*** Defendants learned that Plaintiff's counsel would not be present on

the morning of the 25th. The grossly untimely "ambush affidavit"[2] cannot form the basis of a valid order.

5. Defendants' motions to dismiss were converted to motions for summary judgment without proper notice to Plaintiff and without any opportunity for Plaintiff to present pertinent materials.

Rule 12(b) provides that when a 12(b) motion is converted to a summary judgment motion, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Rule 12(b), SCRCP. Plaintiff was not provided with any opportunity to present any material, let alone a ***reasonable*** opportunity to present ***all*** material.

This is not only because the hearings were held in Plaintiff's counsel's absence. Even if Plaintiff's counsel had been present, he would not have been able to obtain affidavits, depositions, answers to interrogatories, or admissions on file during the hearings. It was not proper for Defendants to wait until almost the eve of the Hearings, file an improper ambush affidavit, and then deny Plaintiff any opportunity to submit any pertinent material in response (especially when they knew or should have not that Plaintiff's counsel would not be there). Accordingly, the Court should not have converted the Rule 12(b) motions into summary judgment motions without any notice to Plaintiff that it was doing so, and without providing Plaintiff any opportunity to present all pertinent material.

CONCLUSION

In the interest of justice, because of deprivation of due process, because of mistake, inadvertence, surprise, and/or excusable neglect, to avoid willfully violating a valid order of the Supreme Court, and for such other reasons as may be described in supplemental memoranda or

[2] Ambush by affidavit "demeans our adversarial system." *South Carolina Lawyer* November-December 2000 - Michael F. Gillen Civility Among Lawyers.

during a hearing on the matter, Plaintiff respectfully requests that this Court VACATE its Form 4 Order dated April 25, 2019, and set Defendants' Motions to Dismiss to be heard on the next available motions roster.

Respectfully Submitted,

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REPLY TO ANN STREET OFFICE

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*OF COUNSEL

January 21, 2020

Sent Via Regular U.S. Mail

The Honorable Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: *Lauren Egan v. Dock Street at the Market Common, et al.*
Appellate Case No. 2019-000918

Dear Ms. Kitchings,

Enclosed for filing, please find the referenced exhibit in Appellants' Reply to Return to Motion for Leave. Should you have any questions, please do not hesitate to contact our office.

Sincerely,

Ivey B. Franklin, Esq.

Enclosure as stated.

Cc: Joseph D. Thompson, III (By U.A. Mail and E-Mail)
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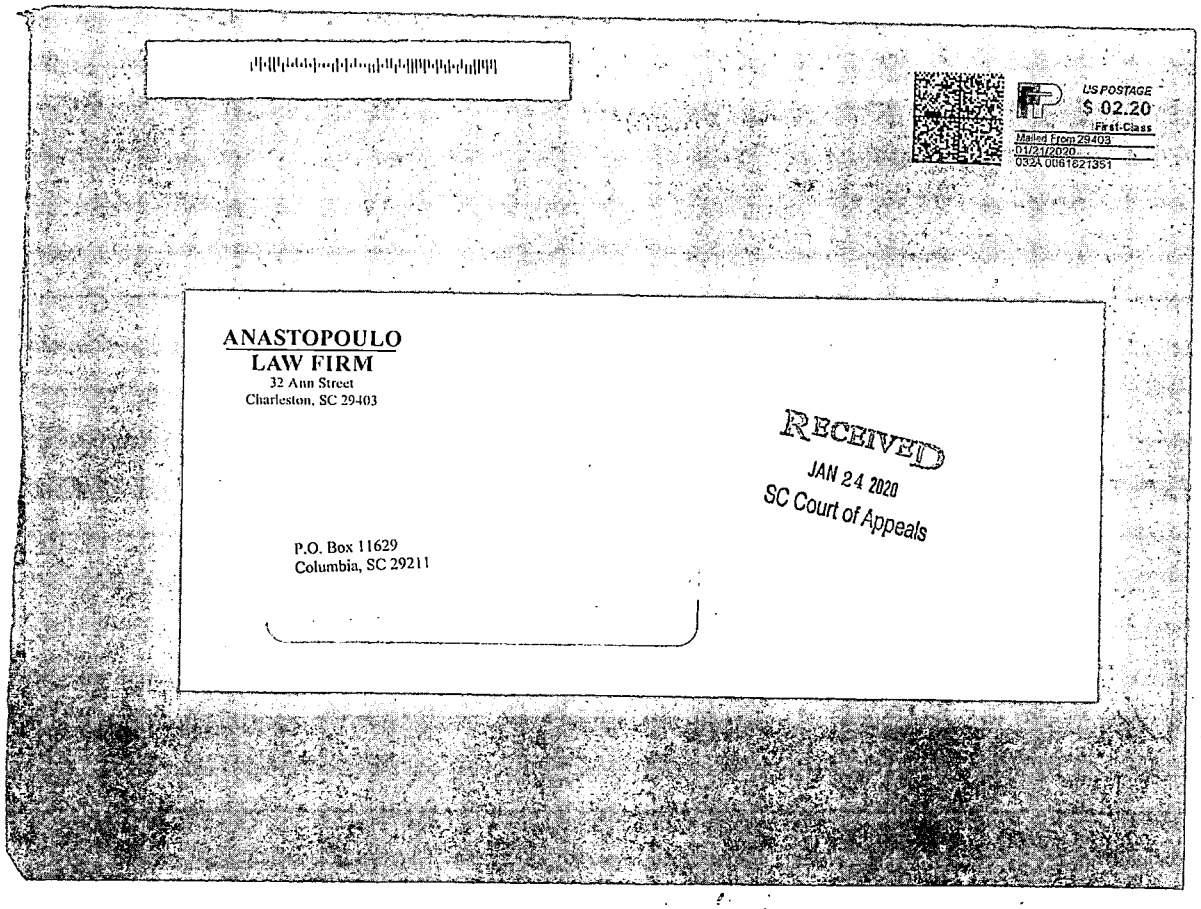

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