THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

RECEIVED
JUN 13 2018
SC Court of Appeals

Case No. 2016-CP-26-00673
Case No. 2016-CP-26-00674
Case No. 2016-CP-26-00743
Case No. 2016-CP-26-00744
Appellate Case No. 2018-000041

Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated, Plaintiffs,

v.

Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill and John Doe past board of directors of Ocean Front Spa Horizontal Property Regime, Inc., Defendants,

And

Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated, Plaintiffs,

v.

The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., Defendants,

And

Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders, Plaintiffs,

v.

K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., Defendants,

And

Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc., Plaintiffs,

v.

Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board of directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Associaiton, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe, past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc., Defendants,

Of whom Mark Dos Santos is the Appellant,

And

Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of the Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc. are the Respondents.

RECORD ON APPEAL VOLUME II

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INDEX

Orders.....

Order Denying Plaintiffs' Motions to Reconsider entered by the trial court on December 5, 2017 in C.A. No. 2016-CP-26-00673.....5

Order Denying Plaintiffs' Motions to Reconsider entered by the trial court on December 7, 2017 in C.A. No. 2016-CP-26-00674.....23

Order Denying Plaintiffs' Motions to Reconsider entered by the trial court on December 7, 2017 in C.A. No. 2016-CP-26-00743.....41

Order Denying Plaintiffs' Motions to Reconsider entered by the trial court on December 7, 2017 in C.A. No. 2016-CP-26-00744.....59

Order Granting Defendants' Motion to Enforce Settlement Agreement entered by the trial court on September 21, 2017 in C.A. No. 2016-CP-26-00673.....77

Order Granting Defendants' Motion to Enforce Settlement Agreement entered by the trial court on September 21, 2017 in C.A. No. 2016-CP-26-00674.....83

Order Granting Defendants' Motion to Enforce Settlement Agreement entered by the trial court on September 21, 2017 in C.A. No. 2016-CP-26-00743.....89

Order Granting Defendants' Motion to Enforce Settlement Agreement entered by the trial court on September 29, 2017 in C.A. No. 2016-CP-26-00744.....95

Pleadings.....

Amended Summons and Amended Complaint filed on February 26, 2016 in C.A. No. 2016-26-00673.....101

Amended Summons and Amended Complaint filed on February 26, 2016 in C.A. No. 2016-26-00674.....122

Amended Summons and Amended Verified Shareholders' Derivative Complaint filed on February 29, 2016 in C.A. No. 2016-26-00743.....160

Amended Summons and Amended Verified Shareholders' Derivative Complaint filed on February 29, 2016 in C.A. No. 2016-26-00744.....281

Transcript of Hearing on Motion to Enforce Settlement dated August 22, 2017.....411

Defendants' Consolidated Motion for Preliminary Approval of Settlement Agreement filed July 3, 2017 in C.A. No. 2016-CP-26-00673 433

Defendants' Consolidated Motion for Preliminary Approval of Settlement Agreement filed July 3, 2017 in C.A. No. 2016-CP-26-00674 496

Defendants' Consolidated Motion for Preliminary Approval of Settlement Agreement filed July 3, 2017 in C.A. No. 2016-CP-26-00743 559

Defendants' Consolidated Motion for Preliminary Approval of Settlement Agreement filed June 30, 2017 in C.A. No. 2016-CP-26-00744 622

Plaintiffs' Memorandum of Law in Opposition of Defendants' Consolidated Motion to Enforce Settlement/Motion for Preliminary Approval of Settlement Agreement filed July 26, 2017 in C.A. No. 2016-CP-26-00673.....685

Plaintiffs' Memorandum of Law in Opposition of Defendants' Consolidated Motion to Enforce Settlement/Motion for Preliminary Approval of Settlement Agreement filed July 26, 2017 in C.A. No. 2016-CP-26-00674.....702

Plaintiffs' Memorandum of Law in Opposition of Defendants' Consolidated Motion to Enforce Settlement/Motion for Preliminary Approval of Settlement Agreement filed July 26, 2017 in C.A. No. 2016-CP-26-00743.....718

Plaintiffs' Memorandum of Law in Opposition of Defendants' Consolidated Motion to Enforce Settlement/Motion for Preliminary Approval of Settlement Agreement filed July 26, 2017 in C.A. No. 2016-CP-26-00744.....735

Reply in Support of Defendants' Consolidated Motion for Preliminary Approval of Settlement Agreement filed August 7, 2017 in C.A. No. 2016-CP-26-00673 752

Reply in Support of Defendants' Consolidated Motion for Preliminary Approval of Settlement Agreement filed August 7, 2017 in C.A. No. 2016-CP-26-00674 810

Reply in Support of Defendants' Consolidated Motion for Preliminary Approval of Settlement Agreement filed August 7, 2017 in C.A. No. 2016-CP-26-00743 868

Reply in Support of Defendants' Consolidated Motion for Preliminary Approval of Settlement Agreement filed August 7, 2017 in C.A. No. 2016-CP-26-00744 926

Plaintiffs' Amended/Supplemental Memorandum of Law in Opposition of Defendants' Consolidated Motion to Enforce Settlement/Motion for Preliminary Approval of Settlement Agreement filed August 15, 2017 in C.A. No. 2016-CP-26-00673 984

Plaintiffs' Amended/Supplemental Memorandum of Law in Opposition of Defendants' Consolidated Motion to Enforce Settlement/Motion for Preliminary Approval of

Settlement Agreement filed August 15, 2017 in C.A. No. 2016-CP-26-00674 1000

Plaintiffs' Amended/Supplemental Memorandum of Law in Opposition of Defendants' Consolidated Motion to Enforce Settlement/Motion for Preliminary Approval of Settlement Agreement filed August 15, 2017 in C.A. No. 2016-CP-26-00743 1016

Plaintiffs' Amended/Supplemental Memorandum of Law in Opposition of Defendants' Consolidated Motion to Enforce Settlement/Motion for Preliminary Approval of Settlement Agreement filed August 15, 2017 in C.A. No. 2016-CP-26-00744 1032

Plaintiffs' Motion to Reconsider the Order and Final Judgment filed September 29, 2017 in C.A. No. 2016-CP-26-00673.....1048

Plaintiffs' Motion to Reconsider the Order and Final Judgment filed September 29, 2017 in C.A. No. 2016-CP-26-00674.....1063

Plaintiffs' Motion to Reconsider the Order and Final Judgment filed September 29, 2017 in C.A. No. 2016-CP-26-00743.....1078

Plaintiffs' Motion to Reconsider the Order and Final Judgment filed September 29, 2017 in C.A. No. 2016-CP-26-00744.....1093

Plaintiffs' Amended Motion to Reconsider the Order and Final Judgment filed October 2, 2017 in C.A. No. 2016-CP-26-00673.....1109

Plaintiffs' Amended Motion to Reconsider the Order and Final Judgment filed October 2, 2017 in C.A. No. 2016-CP-26-00674.....1123

Plaintiffs' Amended Motion to Reconsider the Order and Final Judgment filed October 2, 2017 in C.A. No. 2016-CP-26-00743.....1137

Plaintiffs' Amended Motion to Reconsider the Order and Final Judgment filed October 2, 2017 in C.A. No. 2016-CP-26-00744.....1151

Defendants' Consolidated Response to Plaintiff's Motions to Reconsider the Order and Final Judgment filed October 12, 2017 in C.A. No. 2016-CP-26-00673.....1166

Defendants' Consolidated Response to Plaintiff's Motions to Reconsider the Order and Final Judgment filed October 12, 2017 in C.A. No. 2016-CP-26-00674.....1310

Defendants' Consolidated Response to Plaintiff's Motions to Reconsider the Order and Final Judgment filed October 12, 2017 in C.A. No. 2016-CP-26-00743.....1454

Defendants' Consolidated Response to Plaintiff's Motions to Reconsider the Order and Final Judgment filed October 12, 2017 in C.A. No. 2016-CP-26-00744.....1598

Certificate of Counsel 1742

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00673**
	)	
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Defendants.	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00674**
	)	
The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	
	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15th JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00743**
	)	
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00744**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)	
	)	
Defendants.	)	

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Request for Exclusion

I/, _____, hereby declare my decision to be excluded as a Class Member in the following action(s), so indicating by my initials:

_____ *Jim Perkins et al. v. Ocean Front Spa Horizontal Property Regime, Inc., et al.,* Civil Action No.: 2016-CP-26-00673 ("OFS Class Action")

_____ *Jim Perkins et al. v. The Myrtle Beach Resort Homeowners Association, Inc. et al.,* Civil Action No.: 2016-CP-26-00674 ("MBR Class Action")

_____ *Jim Perkins et al. v. K.A. Diehl and Associates, Inc., et al.,* Civil Action No. 2016-CP-26-00743 ("MBR Derivative Action")

_____ *Jim Perkins et al. v. Ocean Front Spa Horizontal Property Regime, Inc. et al.,* Civil Action No.: 2016-CP-26-00744 ("OFS Derivative Action")

_____
Full Name

_____ _____
Signature Date

Mailing Address: _____

Phone number(s): _____

Street Address (if different from above):
_____

30343714.1

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CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

EXHIBIT E

ORDER OF PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

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STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00673**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.	)	
	)	
Defendants.	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00674**
	)	
The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	
	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15th JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00743**
	)	
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00744**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jul 03 9:22 AM - HORRY - COMMON PLEAS - CASE#2016CP2600673

ORDER OF PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

THIS MATTER IS BEFORE THE COURT upon the Motion of the Defendants in each of the above-captioned cases (C.A. Nos. 2016-CP-26-00673, 2016-CP-26-00674, 2016-CP-26-00743, and 2016-CP-26-00744) (collectively, the "Actions"). Defendants move for approval of the Settlement of the Actions.

The Court has reviewed the Settlement Agreement (**Exhibit A** to Defendants' Motion) and Settlement Notice (**Exhibit D** to Defendants' Motion) (collectively "Settlement

Documents"), has held a hearing on the Motion, and is familiar with the facts, legal issues and procedural history of the Actions.

The Court finds that the Settlement is the result of extensive negotiations following a lengthy period of contested litigation between the Parties. The Court further finds that the Settlement Agreement represents a fair and reasonable resolution of *bona fide* disputes between Plaintiffs and Defendants in the Actions. The Court further finds that the Settlement Agreement represents a fair and reasonable resolution of a *bona fide* dispute between persons on whose behalf the Actions have been brought ("absent class members") on the one hand, and Defendants on the other but that, as to such absent class members, the releases in the Settlement Agreement should be limited to "any and all claims which were actually asserted or might have been asserted by Plaintiffs in the Settled Actions." Based on these findings, and for good cause shown,

IT IS ORDERED that, pursuant to Rules 41(a)(1)(B) and Rule 23(c) of the South Carolina Rules of Civil Procedure, the Settlement Documents are hereby **APPROVED,** this ____ of _____, 2017.

_____

The Honorable _____

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00673**
	)	
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Defendants.	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00674**
	)	
The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	
	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15th JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00743**
	)	
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00744**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)	
	)	
Defendants.	)	

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CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

I. Introduction

Defendants in each of the above-captioned cases (C.A. Nos. 2016-CP-26-00673, 2016-CP-26-00674, 2016-CP-26-00743, and 2016-CP-26-00744) (collectively, the "Actions"), by and through their undersigned counsel and pursuant to Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), file this Consolidated Motion for Preliminary Approval of Settlement

Agreement regarding the Actions ("Motion to Approve"). For the reasons set forth herein, Defendants request that the Court issue an Order granting this Motion.

II. Mediation and Negotiation History

After extensive arms-length negotiations by parties and their counsel through mediation, all Plaintiffs and Defendants (collectively, the "Parties") in the Actions have reached a settlement that resolves all claims in dispute. The Parties' agreement is reflected in the Settlement Agreement. **(Exhibit A.)**

Representative members of the Plaintiff classes who serve on the Board of Directors for Defendant Ocean Front Spa Horizontal Property Regime, Inc. ("OFS") subsequently ratified the settlement and affirmed their understanding that the Actions have been resolved fully and finally through Mediation. These Plaintiffs (Nancy Moore, Steven Dame and Jim Perkins), joined by the two other OFS Board Members, did so by providing official written notification on May 4, 2017, to over a hundred seventy of the putative class members (their constituents, who are fellow members of the OFS community) that they had been able to successfully "resolve [the] five lawsuits." (Affidavit of Walter Jordan (Exhibit A), **Exhibit B.)** In addition, shortly after the mediation, these Plaintiffs posted notices in the OFS building informing all residents that "The recent state court litigation between various homeowners in the Ocean Front Spa and its management company and others has been resolved between the parties to their mutual satisfaction via alternative dispute resolution that occurred on May 1." **(Affidavit of Walter Jordan (Exhibits B and C) Exhibit B.)**

III. Plaintiffs Richardson and Santos Attempt to Renege

Notwithstanding the class representatives' ratification of the settlement and the fact that every representative class member signed the Settlement Agreement (either personally or

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

through counsel, with express permission), Plaintiffs' counsel has indicated that two Plaintiffs, Jeff Richardson ("Richardson") and Mark dos Santos ("Santos"), believe they are not bound by the Settlement Agreement. They take this position despite the fact that they both fully participated in the mediation negotiations that resulted in the Settlement Agreement.

It is anticipated that Plaintiffs Richardson and Santos will rely upon the fact that they were not physically present for the May 1, 2017, mediation as their basis to renege on the Settlement Agreement.[1] The mediation was set far in advance. Nevertheless, Plaintiff Richardson's attorney informed counsel for all the Parties on April 26, 2017, that Plaintiff Richardson would be unable to attend the mediation. On April 28, 2017, counsel for "Board Defendants"[2] asked, "Will you have settlement authority from Mr. Richardson?" to which counsel for Plaintiff Richardson responded, "I will. We are good to go." **(Exhibit C.)** On the day of the mediation, on information, Plaintiff Richardson participated in the mediation, having extensive discussions with his counsel throughout the day.

In the case of Santos, the Defendants had no forewarning that he would not be present. On the morning of May 1, 2017, counsel for Santos announced that he was not present. They assured the Defendants and their counsel that the case could be mediated in his absence. Santos actually participated in the mediation by phone, at one point offering his own rebuttal to remarks made by counsel for one of the Defendants.

In any event, the Settlement Agreement is signed by all Parties, either individually or, in the case of Plaintiffs Richardson and Santos, by their attorney to whom they had given authority.

---

[1] It is unknown whether the other Plaintiffs intend to renege on the Settlement Agreement and, if so, on what basis. Due to the refusal of Plaintiffs Richardson and Santos to follow through with the Settlement Agreement, counsel for all Plaintiffs has stated he will have to oppose any motion to enforce.

[2] The Myrtle Beach Resort Homeowners Association, Inc., Ocean Front Spa Horizontal Property Regime, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, Ralph Jump, and Ray Coghill.

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

All Parties invested substantial time and resources in conducting discovery to understand the cases, the issues, the risks and rewards. The Parties devoted more time preparing for the mediation. In the course of the lengthy mediation, the Parties expended substantial time and energy in exploring and, ultimately, reaching a negotiated settlement with the assistance of one of the preeminent and most well-respected mediators in our state. Notwithstanding their concurrence with a fully integrated Settlement Agreement, none of the Plaintiffs join in a Motion for Preliminary Approval. Accordingly, Defendants file this Motion jointly but without the consent of Plaintiffs.

IV. **Litigation Background**

Two separate class action lawsuits have been filed against certain Defendants in this Court: *Jim Perkins, et al. v. Ocean Front Spa Horizontal Property Regime, Inc.*, et al, C.A. No. 2016-CP-26-00673 ("OFS Class Action"); *Jim Perkins, et al. v. Myrtle Beach Resort Homeowners Association, Inc.*, C.A. No. 2016-CP-26-00674 ("MBR Class Action") (collectively, the "Class Actions"). Two separate derivative actions were filed against certain Defendants in this court; *Jim Perkins, et al. v. K.A. Diehl and Associates, Inc., et al.*, C.A. No. 2016-CP-26-00743 ("MBR Derivative Action"); and, *Jim Perkins, et al. v. Ocean Front Spa Horizontal Property Regime, Inc.*, C.A. No. 2016-CP-00744 ("OFS Derivative Action") (collectively, the "Derivative Actions").

In the OFS Class Action, Plaintiffs sought to certify a class consisting of "any and all persons and or entities owning a unit within the OFS HOA and thereby owning an undivided interest in the common elements, and business activity of the OFSHOA." ("OFS Class") OFS Class Action Amended Complaint ¶49. On behalf of the purported OFS Class, Plaintiffs allege in the OFS Class Action Amended Complaint that Defendants OFS, Bill Cameron, Walter

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past directors of OFS, breached their fiduciary duty to Plaintiffs and violated the standards set forth in the South Carolina Non-Profit Corporation Act, S.C. Code Ann. 33-31-830.

In the MBR Class Action, Plaintiffs sought to certify a class consisting of "any and all persons and or entities owning a unit within the MBRHOA and thereby owning an undivided interest in the common elements, and business activity of the MBRHOA." ("MBR Class") MBR Class Action Amended Complaint ¶49. On behalf of the purported MBR Class, Plaintiffs allege in the Amended MBR Class Action Complaint that Defendants The Myrtle Beach Resort Homeowners Association, Inc. ("MBR"), Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of MBR breached their fiduciary duty to Plaintiffs, acted negligently, and breached a covenant contained in the master deed and bylaws.

In the MBR Derivative Action, Plaintiffs have brought suit on behalf of a class of persons who own a unit in Myrtle Beach Resort, purportedly on behalf of nominal Defendant MBR, alleging that Defendants MBR and members of its Board of Directors (Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe Board Directors of MBR) breached their fiduciary duty to Plaintiffs, that Defendant FirstService Residential South Carolina, Inc., formerly known as K.A. Diehl & Associates, Inc. and incorrectly identified as K.A. Diehl and Associates, Inc. in the Derivative Actions ("K.A. Diehl"), acted negligently, that K.A. Diehl breached multiple contracts, and that K.A. Diehl breached multiple contracts accompanied with a fraudulent act.

In the OFS Derivative Action, Plaintiffs have brought suit on behalf of a class of persons who own a unit in Oceanfront Spa Horizontal Property Regime, purportedly on behalf of

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

nominal Defendant OFS, alleging that Defendants, OFS, members of the OFS Board of Directors (Walter Jordan, Ralph Jump, Ray Coghill, and John Doe Past Board Directors for OFS), MBR, and members of the MBR Board of Directors (Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, and John Doe Past Board Directors of MBR), breached their fiduciary duty to Plaintiffs, that K.A. Diehl breached multiple contracts, that K.A. Diehl breached multiple contracts accompanied with a fraudulent act, and that K.A. Diehl acted negligently.

Each of the Actions include allegations regarding issues related to the management of MBR and OFS, oversight of management, and other actions of the Boards of Directors of OFS and/or MBR, including the approval, implementation, and collection of a "gate pass fee," and an increase in the "gate pass fee."

Defendants do not admit any liability to Plaintiffs, or to anyone else because of, or growing out of, matters set forth in the Actions. Defendants deny all of the materials allegations asserted by Plaintiffs in each of the Actions. For purposes of this Motion alone, Defendants do not object to the definition of the purported MBR Class or the OFS Class (collectively, "Classes") in the Class Actions, do not object to Plaintiffs' purported representation of classes of owners in the Derivative Actions and do not object to Plaintiffs' prior actions therein on behalf of all the purported Class members in the Actions.

V. Settlement

The Parties, through their counsel, have engaged in lengthy and vigorous settlement negotiations. Specifically, on May 1, 2017, the Parties participated in a thorough mediation in which the Parties examined all issues raised in the Actions and the benefits and risks associated with litigation. At all times, the Parties' negotiations were adversarial, non-collusive, and at arms' length, reflecting the contentious and adversarial nature of the Actions. Ultimately, each

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

of the Parties recognized that further conduct of these Actions would likely be protracted and expensive, and that no Party has an assurance of a successful outcome. The Parties therefore concluded that it is desirable that the Actions be settled in the manner and upon the terms and conditions set forth in the Settlement Agreement. (*See* **Exhibit A**).

A. Release

Named Plaintiffs have agreed to release and forever discharge "Released Parties" from all "Claims," all as defined in the Settlement Agreement. (*See* **Exhibit A** at ¶¶ 4, 6). The release provisions of the Settlement Agreement agreed to by the Named Plaintiffs are as follows:

> In exchange for and in consideration of the promises set forth in this Agreement, and except for the rights to enforce the provisions of this Agreement, Plaintiffs, their heirs, executors, administrators, legal and personal representatives, successors and assigns, hereby covenant not to sue and fully release and forever discharge Defendants and their respective present and former parents, heirs, assigns, subsidiaries, affiliates, and related entities or corporations, and any of their past and present officers, directors, shareholders, employers, past and present employees, agents, partners, attorneys, heirs, successors, insurers and assigns (the "Released Parties"), from any and all claims, demands, actions, charges, complaints, suits, administrative proceedings, debts, promises, contracts, grievances, and causes of action (hereinafter collectively referred to as "Claims"), in law or in equity, whether known or unknown, which Plaintiffs and their heirs, executors, administrators, agents, distributees, beneficiaries, successors in interest and assignees may have by reason of any matter, cause or thing whatsoever from the beginning of the world to only the day of the date of Plaintiffs' execution of this Agreement, including, but not limited to, any and all claims which were actually asserted or might have been asserted by Plaintiffs in the Settled Actions. Plaintiffs agree never to file a lawsuit against Defendants based on any reason contained in this Agreement. The Release does not purport to release any claims that the law does not permit to be released.

Defendants are Released Parties within the meaning of the Settlement Agreement. (Id.)

These terms apply to the Plaintiffs in the Actions. If the Court approves the Settlement Agreement, the scope of the release as to absent class members would apply to only the claims which were actually asserted or might have been asserted on behalf of absent class members in the Actions.

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

B. Consideration for Release

In exchange for and in consideration of the promises set forth in the Settlement Agreement, Defendants promised to pay funds as follows:

1. Defendants will pay to Plaintiffs and Plaintiffs' attorney the sum of $15,000.00 to fund a binding arbitration of a declaratory judgment action to adjudicate whether the gate pass fee is proper.
2. Defendants will pay to The Board of Directors for the Myrtle Beach Resort Horizontal Property Regime and the Board of Directors for the Myrtle Beach Resort Five Seasons Centre Horizontal Property Regime the sum of $15,000.00 to fund the defense of a binding arbitration of a declaratory judgment action to adjudicate whether the gate pass fee is proper.
3. Defendants will pay to Plaintiffs' attorney the sum of $5,000.00 to be held in trust by his law firm to pay an arbitrator to resolve the arbitration set forth above.

(*See* **Exhibit A** at ¶ 1).

C. Attorneys' Fees

As part of the Settlement Agreement, Defendants also agreed to pay Plaintiffs' counsel attorneys' fees equal to $50,000.00, such amount not being subject to income or employment tax withholding, but to be reported on a Form 1099. (*See* **Exhibit A** at ¶ 1(d)). Defendants seek Court approval of this amount in addition to the Consideration for Release described above.

IV. Settlement Notice

Defendants have prepared a proposed Settlement Notice (**Exhibit D.**) Although Plaintiffs' counsel does not join this Motion, Plaintiffs' counsel has not indicated an objection to the terms of the Notice.

The Settlement Notice explains: (1) the terms of the Settlement Agreement; (2) how purported class members can opt-out or exclude themselves from the purported class; and (3) how to submit objections to the terms of the Settlement Agreement. The Defendants propose that the Settlement Notice be sent via email to members of the purported Classes, placed in a MBR and an OFS newsletter, discussed at special MBR and OFS Board meetings and subsequently included in the Board minutes, and posted on the MBR and OFS websites. These are the most practicable means of providing notice under the circumstances and comport with due process.

Significantly, Plaintiffs have already begun providing notice of the settlement to purported class members. On May 4, 2017, representative members of the Plaintiff classes who serve on the OFS Board of Directors provided written notice to their constituents (fellow OFS residents), in which the OFS Board Member Plaintiffs ratified the settlement and affirmed their understanding that the Actions have been resolved fully and finally through Mediation. **(Exhibit B.)** Plaintiffs provided this notice by (1) emailing a copy to what appears to most if not all OFS homeowners, and (2) posting the notice on all bulletin boards in the OFS building.

V. Argument

A. Defendants Ask the Court to Approve the Settlement Agreement

This Motion seeks preliminary approval of the Settlement Agreement, which would settle the four Actions which were filed pursuant to Rule 23 of the SCRCP. Pursuant to Rules 23(c) and 23 (b)(1) of the SCRCP, class and derivative actions may be settled only with court approval. In considering whether to approve a class action settlement, the South Carolina courts look to federal decisions interpreting Rule 23 of the Federal Rules of Civil Procedure, upon

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

which South Carolina's version of Rule 23 is patterned. *See Salmonsen v. CGD, Inc.*, 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008).

The decision to grant approval of a class action settlement involves the Court's consideration of several factors, including: (1) the amount offered in settlement; (2) the risks inherent in continued litigation; (3) the extent of discovery completed and the stage of the proceeding when the settlement was reached; (4) the risk, complexity, expense, and likely duration of the litigation absent settlement; (5) the experience and views of class counsel; and (6) the response of class members to the Settlement. *Brunson v. Louisiana-Pac. Corp.*, 818 F. Supp. 2d 922, 926 (D.S.C. 2011). Under these factors, preliminary approval is warranted.

There is no dispute as to the complexity of the Actions, the inherent risks of continued litigation of the Actions, and the expense the Parties would incur in event the litigation continued. A mere review of the Complaints in each Action will confirm these factors. Moreover, the Actions have been pending for over one year and, during litigation, the Parties have conducted substantial discovery and engaged in extensive motion practice. After adequate discovery, the Parties prepared for and engaged in a lengthy mediation in which all issues were thoroughly examined through experienced counsel and a capable mediator.

As evidenced by the Settlement Agreement, the Parties have concluded as follows: (1) further litigation would likely be protracted and expensive, and no party has assurance of a successful outcome; (2) it is in their mutual best interest to settle their disputes at this time; (3) the core remaining issue in the case is whether the gate pass fee currently charged by MBR is authorized under the governing MBR documents and applicable law; (4) a declaratory proceeding in binding arbitration is the most cost-effective and appropriate manner of bringing final resolution to the remaining issues raised in the Actions; (5) this objective can be reached by

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

certain Defendants' agreement to provide funding for the binding arbitration; and (6) the amount of the funding provided in the Settlement Agreement is adequate for purposes of the prosecution and defense of the arbitration.

Counsel representing the Parties have substantial familiarity with subject matters of the Actions and have experience in litigating such matters. The Parties' attorneys have actively negotiated the terms of the settlement on behalf of all known individuals and entities involved based on their extensive experience in this area, considering all of the risks inherent with litigation. At all times, the Parties' attorneys have represented their clients' best interests in reaching the settlement. The terms of the Settlement Agreement provide an appropriate and fair means of resolving the disputes in the Actions. *See id.* ("[A] presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.") (*quoting* Newberg & Conte, Newberg on Class Actions (3d ed. 1992) § 11.41.).

This motion has not been filed as a consent motion because of objections Plaintiffs Richardson and Santos have raised to the Settlement Agreement. Their objections are that they were not physically present at the mediation and did not actually sign the Settlement Agreement. The other Plaintiffs do not have these objections. Moreover, at least three of the Plaintiffs have subsequently ratified the Settlement Agreement. (**Exhibit B.**)

In any event, the objections of Plaintiffs Richardson and Santos are not proper. As indicated above, the Settlement Agreement was signed by their counsel with specific authority. It is not believed that they will now contend that their counsel did not have this authority.

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

The South Carolina "Court-Annexed Alternative Dispute Resolution Rules" promulgated by the South Carolina Supreme Court ("ADR Rules") require that the "following persons shall physically attend a mediation settlement conference unless otherwise agreed to by the mediator and all parties ...: ... All individual parties." ADR Rule 6 (b). "If any person ... subject to the ADR Rules violates any provision of the ADR Rules without good cause, the court may ... impose upon that party any lawful sanctions." ADR Rule 10 (b).

Prior to the mediation, Plaintiffs Richardson and Santos essentially requested to be relieved of their obligation to attend the mediation. As a courtesy, the mediator and counsel for the Defendants agreed to this arrangement upon assurance that Plaintiffs Richardson and Santos had given settlement authority to their counsel. Plaintiffs Richardson and Santos participated in the mediation remotely. Counsel for these Plaintiffs, with their authority and in a capacity as agent, signed the Settlement Agreement on their behalf. The ADR Rules do not contemplate that a party, physically absent by agreement, can be relieved from the effects of a settlement the party entered at mediation under these circumstances.

B. <u>Defendants Ask the Court to Approve the Proposed Settlement Notice</u>

Rule 23(d)(2), SCRCP, provides that the "court may at any time impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended," such as "notice . . . of a proposed settlement . . . including notice to the absent persons that they may come in and present claims and defenses if they so desire." In the case of a class action, it is generally accepted that Rule 23(d)(2), SCRCP, requires notice of the settlement to the purported class. The notice should inform purported class members of the nature of the litigation, the general terms of the settlement, the right of any purported class member to appear and be heard at the fairness hearing, and an opportunity to opt-out.

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

Here, the Settlement Notice **(Exhibit D)** meets all of these requirements. It identifies the Parties and describes the Actions in a straightforward matter; succinctly describes the essential terms of the Settlement Agreement; provides purported class members with information on how object to the terms of the Settlement Agreement or opt-out; and informs purported class member that if they do not opt out, they will be bound by the resulting judgment. In sum, the Settlement Notice provides the information necessary for purported class members and shareholders/members of MBR and OFS to make an informed decision regarding the Settlement Agreement.

Furthermore, sending the Settlement Notice via email to members of the purported Classes and to shareholders/members of MBR and OFS, placing the Settlement Notice in a MBR and an OFS newsletter, discussing the Settlement Notice at special MBR and OFS Board meetings and subsequently including the discussion in the board minutes, and posting the Settlement Notice on the MBR and the OFS websites are the most practicable means of providing notice under the circumstances and comports with due process. The Parties have access to each of these means of publication and ask this Court to find the proposed means of notice to Plaintiffs reasonable under the circumstances of the Actions. *See Salmonsen*, 377 S.C. at 458, 661 S.E.2d at 90 (Rule 23(d) provides a court discretion in determining how parties are notified of a proposed class settlement).

VI. Conclusion

For the reasons presented in this Motion, Defendants respectfully request that the Court enter an Order (1) preliminarily approving the attached Settlement Agreement; (2) approving the form and manner of the Settlement Notice; and (3) scheduling a Fairness Hearing to grant final

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

approval of the Parties' Settlement Agreement. A proposed order is attached hereto for the Court's consideration. **(Exhibit E)**

VII. Affirmation

The undersigned affirms that prior to filing the motion, they communicated, orally and in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion.

Respectfully submitted this 30th day of June, 2017.

	s/Phillip A. Kilgore Phillip A. Kilgore (S.C. Bar No. 3449) Lucas J. Asper (S.C. Bar No. 77902) 300 North Main Street, Suite 500 Greenville, South Carolina 29601 864.271.1300 (telephone) 864.235.4754 (facsimile) phillip.kilgore@ogletreedeakins.com lucas.asper@ogletreedeakins.com Attorneys for Defendants The Myrtle Beach Resort Homeowners Association, Inc., Ocean Front Spa Horizontal Property Regime, Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ralph Jump, Ray Coghill and Ken Perkins. Henrietta U. Golding, Esq. Henrietta U. Golding, Esq. Alicia E. Thompson, Esq. McNair Law Firm, P.A. Post Office Box 336 Myrtle Beach, SC 29578-0336 (843) 444-1107 (telephone) (843) 444-4729 (facsimile) Attorneys for Defendant FirstService Residential South Carolina, Inc., formerly known as K.A. Diehl & Associates, Inc.

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

EXHIBIT A

SETTLEMENT AGREEMENT

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

Settlement Agreement
Civil Action Nos.: 2016-CP-26-00673, -00674, -00743, -00744

The following is a Settlement Agreement ("Agreement") between Plaintiffs Jim Perkins, Colleen Franke a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dames, Errol Dos Santos, and Jeffrey Richardson ("Plaintiffs'") on the one hand and Defendants The Myrtle Beach Resort Homeowners Association, Inc., ("MBRHOA"), Ocean Front Spa Horizontal Property Regime, Inc. ("OFS"), Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Ken Perkins, Ray Coghill, Ralph Jump, and Wayne Urban ("Defendants") on the other (Plaintiffs and Defendants hereafter referred to as the "Parties") to settle Civil Action Nos.: 2016-CP-26-00673, -00674, -00743, -00744, currently pending on the South Carolina Circuit Court in Horry County ("Settled Actions").

1. For good and valuable consideration, upon full execution and effectuation of this Agreement, in full satisfaction of the Settled Actions, and any other claims or charges Plaintiffs have, claim to have, or may have, against Defendants, including, without limitation, any claim for attorneys' fees or costs, Defendants agree to pay the gross amount of $85,000.00 (the "Payment") in full satisfaction of any claims, charges or actions Plaintiffs have against Defendants.

a) Defendants will, thirty (30) business days hereafter, pay to Plaintiffs and Plaintiffs' attorney the total sum of Fifteen Thousand Dollars ($15,000.00) for the purposes of funding a binding arbitration of a declaratory judgment action to adjudicate whether the gate pass fee currently charged by MBRHOA is authorized under the governing MBRHOA documents and applicable law.
b) Defendants will, thirty (30) business days hereafter, pay to The Board of Directors for the Myrtle Beach Resort Horizontal Property Regime ("A Building Board") and the Board of Directors for the Myrtle Beach Resort Five Seasons Centre Horizontal Property Regime, ("Five Seasons Board") the total sum of Fifteen Thousand Dollars ($15,000.00) for the purposes of defending a binding arbitration of a declaratory judgment action filed by Plaintiffs for the purpose of adjudicating whether the gate pass fee currently charged is authorized under the governing MBRHOA documents and applicable law.
c) Arbitrator. Defendants will pay to Plaintiff's counsel the sum of $5,000.00 to be held in trust by his law firm to pay to an arbitrator to resolve the arbitration set forth in the previous two paragraphs. In the event this amount does not fund the arbitration in full, the balance, if any, shall be paid by the attorneys receiving the sums set out in the two previous paragraphs.
d) Defendants will, thirty (30) business days hereafter, pay "Brittain Law Firm" in the amount of Fifty Thousand Dollars and No Cents ($50,000.00), as payment for attorneys' fees and costs, such amount not being subject to income or employment tax withholding, but to be reported on a Form 1099

2. The Parties hereto recognize that the Defendants do not admit any liability to Plaintiffs, or to anyone else because of, or growing out of, matters set forth in Plaintiffs' Amended Complaints in the Settled Actions. The Parties have agreed to settle any and all claims

Plaintiffs have asserted or may have asserted against Defendants in order to avoid further cost and inconvenience in moving forward with a trial.

3. MBRHOA and OFS will use their best efforts to have their respective By-Laws amended to require at least three bids to be received prior to the awarding of any contract which will exceed $10,000.00 in value.

4. In exchange for and in consideration of the promises set forth in this Agreement, and except for the rights to enforce the provisions of this Agreement, Plaintiffs, their heirs, executors, administrators, legal and personal representatives, successors and assigns, hereby covenant not to sue and fully release and forever discharge Defendants and their respective present and former parents, heirs, assigns, subsidiaries, affiliates, and related entities or corporations, and any of their past and present officers, directors, shareholders, employers, past and present employees, agents, partners, attorneys, heirs, successors, insurers and assigns (the "Released Parties"), from any and all claims, demands, actions, charges, complaints, suits, administrative proceedings, debts, promises, contracts, grievances, and causes of action (hereinafter collectively referred to as "Claims"), in law or in equity, whether known or unknown, which Plaintiffs and their heirs, executors, administrators, agents, distributees, beneficiaries, successors in interest and assignees may have by reason of any matter, cause or thing whatsoever from the beginning of the world to only the day of the date of Plaintiffs' execution of this Agreement, including, but not limited to, any and all claims which were actually asserted or might have been asserted by Plaintiffs in the Settled Actions. Plaintiffs agree never to file a lawsuit against Defendants based on any reason contained in this Agreement. The Release does not purport to release any claims that the law does not permit to be released.

5. Within 15 days of receipt of the Payment, Plaintiffs' counsel shall file **a stipulation of dismissal with prejudice** in each of the Settled Actions.

6. Plaintiffs further acknowledge and agree that this Agreement extends to all claims of every kind and nature whatsoever, known or unknown, suspected or unsuspected, and Plaintiffs acknowledges they may hereafter discover facts in addition to or different from those which they know or believe to be true with respect to the subject matter of this Agreement, but it is their intention to hereby fully and finally settle and release all such matters as well and, in furtherance of that intention, the foregoing Release shall remain in effect as a full and complete release notwithstanding the discovery or existence of such additional or different facts.

7. Plaintiffs agree that they will not make any statements, oral or written, which they know or reasonably should know to be a disparaging or negative comment about Defendants or their officers, directors, employees and agents, or otherwise detrimental to the reputation or goodwill of Defendants, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required by law. Defendants agree that they will not make any statements, oral or written, which they know or reasonably should know to be a disparaging or negative comment about Plaintiffs or their officers, directors, employees and agents, or otherwise detrimental to the reputation or goodwill of Plaintiffs, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required by law.

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

8. It is understood and agreed that Defendants expressly rely upon the promises, representations, and warranties made by Plaintiffs in this Agreement; that any breach of such promises, representations, and warranties would constitute a material breach of this Agreement; and that in the event of any such breach, Defendants shall be entitled to any and all of the following relief: (a) the immediate repayment to Defendants of the full Settlement Amount hereunder (b) the indemnification and hold harmless protection set forth above; (c) specific enforcement of all promises and undertakings made by Plaintiffs hereunder; and (d) all other relief and damages available at law or in equity.

Agreed to this 1st Day of May, 2017.

Plaintiffs

Jim Perkins

Colleen Franke

Colleen Franke a/k/a Colleen Franke Perkins

Mark Dos Santos

By his Attorney

Nancy Moore

Nancy Moore

William Moore

William Moore

Steven Dame

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

Errol Dos Santos

Jeffrey Richardson

By his Attorney

Defendants

The Myrtle Beach Resort Homeowners Association, Inc., ("MBRHOA")

By its Attorney

Ocean Front Spa Horizontal Property Regime, Inc. ("OFS"),

By its Attorney

Phil Cox

Bill Cameron

By his Attorney

Stanley Jordan

By his Attorney

Walter Jordan

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

Ken Perkins

Ray Coghill

By his Attorney

Ralph Jump

Wayne Urban

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ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

EXHIBIT B

AFFIDAVIT OF WALTER JORDAN

ELECTRONICALLY FILED - 2017 Jun 30 4:24 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00673**
	)	
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jun 30 4:24 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00674**
	)	
The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	
	)	

ELECTRONICALLY FILED - 2017 Jun 30 4:24 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15th JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00743**
	)	
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jun 30 4:24 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00744**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jun 30 4:24 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

AFFIDAVIT OF WALTER JORDAN

COMES NOW, Walter Jordan, who, after being duly sworn, deposes and says:

1. My name is Walter Jordan. I am an adult, of sound mind, competent to testify to all matters in this Affidavit.

2. The information in this Affidavit is based on my personal knowledge and is true and accurate to the best of my knowledge and belief.

3. I live at 2311 Garrison Pl Road, Midlothian, VA 23112. I own units B216 and B219 at Ocean Front Spa ("OFS") at the Myrtle Beach Resort and reside there part of the year.

4. My email address is wjordan48@comcast.net.

5. On or about May 4, 2017, I received an email from email address MBRJimPerkins@aol.com. I am attaching a copy of the email to this affidavit as Exhibit A. The approximately 165 email addresses of the recipients of this email have been redacted for privacy reasons, but the original of the email will be made available to the court if needed.

6. I am attaching to this affidavit as Exhibit B a photograph I took of a notice posted on one of the bulletin boards in the OFS Building at the Myrtle Beach Resort. Identical notices were posted on all the bulletin boards in the OFS Building.

7. I personally observed the notices on all the bulletin boards beginning May 31, 2017, and the notice reflected in Exhibit B remained in place until June 20 or 21, 2017.

8. I believe these notices were first posted on or about May 5, 2017. The reason I believe this is because I received a text message from another OFS owner on that date with the attached photograph of a notice. Exhibit C. This notice is identical to the other notices I personally observed.

FURTHER AFFIANT SAYETH NOT.

[SIGNATURE PAGE FOLLOWS]

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I swear under oath that the foregoing Affidavit is true to the best of my knowledge and belief.

Walter Jordan — Date: 6-30-17

SWORN TO and subscribed before me
This 30th day of June, 2017.

Lori Beth Williams
Notary Public for Virginia
My Commission Expires: 10/31/18

LORI BETH WILLIAMS
NOTARY PUBLIC
REG # 7588036
MY COMMISSION EXPIRES 10/31/2018
COMMONWEALTH OF VIRGINIA

30245035.1

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EXHIBIT A
TO
AFFIDAVIT OF WALTER JORDAN

ELECTRONICALLY FILED - 2017 Jun 30 4:24 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

ELECTRONICALLY FILED - 2017 Jun 30 4:24 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

From: MBRJimPerkins@aol.com
Sent: Thursday, May 04, 2017 1:13 PM
To: REDACTED

To: REDACTED

Subject: RE: OFS (B-Building) Update

Myrtle Beach Resort Ocean Front Spa HPR

B Building Homeowners

May 4, 2017

Dear Homeowners:

Your Board Members desire transparency. As our term progresses, we believe that you will see a commitment to transparency. We also, like most, if not all of you, desired to put an end to much of the litigation. As you are aware, we resolved five lawsuits. Unfortunately, as a part of the resolution of the lawsuits, all parties agreed to keep certain terms quiet.

However, in keeping with the desire to be transparent, we are sharing with you that which we are permitted to. I am hopeful that this will address any concerns about the past, but more importantly clarify our path forward.

As a result of the settlement, FSR and the OFS Board have mutually decided to part ways. Of course, we were concerned about the welfare of the employees, and it is my understanding that FSR has graciously placed the 5 employees that served the OFS at other communities.

As a result of FSR and OFS parting ways, acquiring the services of a maintenance company was imperative. Fortunately, we were able to acquire three bids for the provision of maintenance, and your Board Members have hired Four Of A Kind maintenance company. They are already on site and are caring for the needs of our building.

The Board is considering an interim property management company to finish out the 2017 year. As with any transition, there will be some bumps. We ask that you be patient with us as we do our duty to get the interim management company in place for the remainder of this year. At the end of the year, we will be sending out RFP's for a property management company for a reasonable duration.

Thank you for your time and patience. Our goal is to make our Regime better in the future. If you have any questions, please contact us and we shall do our best to address your concerns.

On Behalf of Your Board of Directors,

Nancy Moore, President

Stanley Jordan, Vice President

Tracey Dorsey, Treasurer

Steve Dame, Secretary

Jim Perkins, Member at Large (MBR HOA Representative)

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EXHIBIT B
TO
AFFIDAVIT OF WALTER JORDAN

ELECTRONICALLY FILED - 2017 Jun 30 4:24 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

ELECTRONICALLY FILED - 2017 Jun 30 4:24 PM - HORRY - COMMON PLEAS - CASE#2016CP2000077

LAWSUIT UPDATE

The recent state court litigation between various homeowners in the Ocean Front Spa and its management company and others has been resolved between the parties to their mutual satisfaction via alternative dispute resolution that occurred on May 1. In the days and weeks ahead, the OFS Board will be announcing various changes involving, among other things, the management and maintenance of the building. Ocean Front Spa is a wonderful place to live for its residents and to visit for its guests. It's the ambition of the OFS Board to help make this wonderful community that much better as we go forward together into the future.

Negotiated by:

Nancy Moore, President

Steve Dame, Secretary

Jim Perkins, MBRHOA Representative

EXHIBIT C
TO
AFFIDAVIT OF WALTER JORDAN

ELECTRONICALLY FILED - 2017 Jun 30 4:24 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

ELECTRONICALLY FILED - 2017 Jun 30 4:24 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

LAWSUIT UPDATE

The recent state court litigation between various homeowners in the Ocean Front Spa and its management company and others has been resolved between the parties to their mutual satisfaction via alternative dispute resolution that occurred on May 1. In the days and weeks ahead, the OFS Board will be announcing various changes involving, among other things, the management and maintenance of the building. Ocean Front Spa is a wonderful place to live for its residents and to visit for its guests. It's the ambition of the OFS Board to help make this wonderful community that much better as we go forward together into the future.

Negotiated by:

Nancy Moore, President

Steve Dame, Secretary

Jim Perkins, MBRHOA Representative

POLICY
And

CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

EXHIBIT C

APRIL 28, 2017 EMAIL EXCHANGE

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

From: Preston Brittain <preston@brittainlawfirm.com>
Sent: Friday, April 28, 2017 9:58 PM
To: Kilgore, Phillip
Cc: Golding, Henrietta; Buffington, Bobby; Christian Stegmaier; Natalia V. Ertseva-Thomas; Tommy Brittain; msmith@thompsonlaw.com; TTurman@thompsonlaw.com; cnickels@clawsonandstaubes.com; Stephanie L. Mascella; Thompson, Alicia; Coggins, Robert E.; Asper, Lucas J.
Subject: Re: Civil Action No. 2015-CP-26-5573/Claim No. PHCO15080916718/C&L File No. 001832-00104 Diehl v. James Perkins, et al. (1832-104)

I will. We are good to go.

Sent from my iPhone

On Apr 28, 2017, at 2:27 PM, Kilgore, Phillip <Phillip.Kilgore@ogletree.com> wrote:

> Preston
>
> I will have settlement authority from all of my clients. Will you have settlement authority from Mr. Richardson?
>
> **Phillip A. Kilgore | Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**
> P.O. Box 2757 | Greenville, SC 29602 | Telephone: 864-271-1300 x240 | Fax: 864-235-4754 | Mobile: 864-982-2727
> phillip.kilgore@ogletreedeakins.com | www.ogletreedeakins.com

CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

EXHIBIT D

NOTICE OF PROPOSED SETTLEMENT

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00673**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Defendants.	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00674**
	)	
The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	
	)	

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15th JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)	
Plaintiffs,	)	
v.	)	**Civil Action No.: 2016-CP-26-00743**
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00744**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

NOTICE OF PROPOSED SETTLEMENT

This Notice May Affect Your Rights
Please read carefully!

TO:

ALL PERSONS WHO ARE OWNERS OF REAL PROPERTY LOCATED IN MYRTLE BEACH RESORT IN THE STATE OF SOUTH CAROLINA, COUNTY OF HORRY

1. WHY SHOULD I READ THIS NOTICE?

Several lawsuits which may affect your rights are pending in the South Carolina Court of Common Pleas, Fifteenth Judicial Circuit, County of Horry:

(1) *Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated v. Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.,* Civil Action No.: 2016-CP-26-00673 **("OFS Class Action");**

(2) *Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated v. The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,* Civil Action No.: 2016-CP-26-00674 **("MBR Class Action") (the "OFS Class Action" and the "MBR Class Action" are collectively referred to as the "Class Actions");**

(3) *Jim Perkins, Colleen Franke a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dames, Errol Dos Santos, and Jeffrey Richardson individually in their capacity as derivative shareholders v. K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,* Civil Action No. 2016-CP-26-00743 **("MBR Derivative Action")**; and

(4) *Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc., v. Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.* Civil Action No.: 2016-CP-26-00744 **("OFS Derivative Action") (the "MBR Derivative Action" and the "OFS Derivative Action" are collectively referred to as the "Derivative Actions")**

(The Class Actions and the Derivative Actions are collectively referred to as the "Actions.")

A proposed settlement has been reached in the Actions and has been conditionally approved by the Court. You have received this notice because you are thought to be someone who is a member of the Ocean Front Spa Horizontal Property Regime, Inc. ("OFS") and/or The Myrtle Beach Resort Homeowners Association, Inc. ("MBR"). If so, you are a potential member of the OFS Class and/or the MBR Class (defined below), and thus are among the class of those

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

potentially eligible to benefit from the settlement ("Settlement Class"). If so, you also are in one or both classes of persons on whose behalf the Derivative Actions have been brought.

You should read this Notice to determine whether your rights are affected, the steps necessary to pursue your rights as a member of a Settlement Class and as a member of OFS/MBR, or whether to opt out of a Settlement Class.

In the OFS Class Action and the MBR Class Action, one or more people, called "Named Plaintiffs" (Jim Perkins, Colleen Franke a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dames, Errol Dos Santos, and Jeffrey Richardson), have sued on behalf of themselves and all others similarly situated who are thought to have similar claims.

In the Derivative Actions, one or more people, called "Derivative Plaintiffs" (Jim Perkins, Colleen Franke a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dames, Errol Dos Santos, and Jeffrey Richardson), are suing derivatively on behalf of MBR, OFS, themselves, and classes of persons on whose behalf the Derivative Actions have been brought.

The Court may consider those who are similarly situated collectively as a Settlement Class or individually as Settlement Class Members. One Court resolves the issues for all Class Members, except for those who "opt-out" from the Settlement Class. "Opt-Out" means an affirmative choice to be excluded from the Settlement Class and is discussed further below.

2. THE ACTIONS

A. Overview of the Actions and Plaintiffs' Claims

Two separate class action lawsuits have been filed against certain Defendants in this Court: the OFS Class Action and the MBR Class Action. Two separate derivative actions were filed against certain Defendants in this court: the MBR Derivative Action and the OFS Derivative Action.

In the OFS Class Action, Named Plaintiffs sought to certify a class consisting of "any and all persons and or entities owning a unit within the OFS HOA and thereby owning an undivided interest in the common elements, and business activity of the OFSHOA" ("OFS Class"). On behalf of the purported OFS Class, Named Plaintiffs allege in the OFS Class Action Amended Complaint that Defendants OFS, Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past directors of OFS, breached their fiduciary duty to Plaintiffs and Class Members and violated the standards set forth in the South Carolina Non-Profit Corporation Act, S.C. Code Ann. 33-31-830.

In the MBR Class Action, Named Plaintiffs sought to certify a class consisting of "any and all persons and or entities owning a unit within the MBRHOA and thereby owning an undivided interest in the common elements, and business activity of the MBRHOA" ("MBR Class"). On behalf of the purported MBR Class, Named Plaintiffs allege in the Amended MBR Class Action Complaint that Defendants MBR, Phil Cox, Bill Cameron, Stanley Jordan, Walter

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of MBR breached their fiduciary duty to Plaintiffs and Class Members, acted negligently, and breached a covenant contained in the master deed and bylaws.

In the MBR Derivative Action, Derivative Plaintiffs have brought suit, purportedly on behalf of nominal Defendant MBR, alleging that Defendants MBR and board of directors Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe Board of Directors of MBR, breached their fiduciary duty to nominal Defendant MBR, that Defendant FirstService Residential South Carolina, Inc., formerly known as K.A. Diehl & Associates, Inc. and incorrectly identified as K.A. Diehl and Associates, Inc. in the Derivative Actions ("K.A. Diehl") acted negligently, that K.A. Diehl breached multiple contracts, and that K.A. Diehl breached multiple contracts accompanied with a fraudulent act.

In the OFS Derivative Action, Plaintiffs have brought suit, purportedly on behalf of nominal Defendant OFS, alleging that Defendants OFS and OFS Board of Directors Walter Jordan, Ralph Jump, Ray Coghill, John Doe Past Board of Directors for OFS, MBR, Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins and John Doe Board of Directors of MBR, breached their fiduciary duty to nominal Defendant OFS, that K.A. Diehl breached multiple contracts, that K.A. Diehl breached multiple contracts accompanied with a fraudulent act, and that K.A. Diehl acted negligently.

Each of the Actions include numerous allegations regarding issues related to management of MBR and OFS, oversight of the management, and other actions of the Boards of Directors of OFS and/or MBR, including the approval, implementation, and collection of a "gate pass fee," and an increase in the "gate pass fee."

Defendants in the Class Actions explicitly deny any liability to either the OFS Class or the MBR Class. Defendants in the Derivative Actions explicitly deny any liability to either OFS or MBR for the claims brought derivatively.

Counsel for the Parties have conducted thorough investigations into the facts of the Actions for their respective clients, including conducting thorough discovery and extensive review of relevant documents, information, and data. The Parties, recognizing the risks inherent in litigation, have agreed to settlement of the Actions on the terms summarized in Section 7 below and laid out more fully in the Settlement Agreement and Release between Named Plaintiffs and Defendants on file with the Court.

Defendants in the Actions are willing to settle the Actions to avoid further expense as well as to dispose of burdensome and protracted litigation. If members of the Settlement Class opt out, however, Defendants, at their option, may void this settlement.

3. CLASS DEFINITION

For purposes of this settlement alone, Defendants do not object to the definition of the purported MBR Class or the OFS Class, do not object to Plaintiffs' purported representation of classes of owners in the Derivative Actions, do not object to Plaintiffs' actions herein on behalf

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

of the Settlement Class or Settlement Class Members, and do not object to Plaintiffs' actions herein on behalf of nominal Defendants MBR and OFS in the Actions.

4. YOU ARE A MEMBER OF A CLASS

An agreement settling the Actions has been executed by Plaintiffs and Defendants. The terms of the proposed settlement (referred to in this Notice as "Proposed Settlement") are discussed in Section 7 below. As a potential member of the Settlement Class, you may participate in the hearing on the Proposed Settlement, and, if the Proposed Settlement is approved by the Court, you would receive the benefit of the Proposed Settlement.

However, as explained below, you may opt out of the Class Actions if you do not wish to participate in the hearing on the Proposed Settlement that is described below. If you opt out of the Class Actions, you may not benefit from the Proposed Settlement that is described below, but you may pursue any claims you may care to make by bringing a separate lawsuit on your own behalf, or you may do nothing if you so prefer. If you do not opt out of the Class Actions and the Proposed Settlement is approved, you will be bound by the terms of the Proposed Settlement.

5. NOTICE OF SETTLEMENT HEARING

You are hereby notified, pursuant to Rule 23(e) of the South Carolina Rules of Civil Procedure, that a hearing will be held on _____, 2017, at _____ _.m., before the Honorable Judge _____, in Courtroom No. _____ of the Horry County Courthouse, South Carolina, to determine whether the Proposed Settlement agreed to by the above-named parties is fair, reasonable, and adequate and whether it should be approved by the Court and judgment entered thereon. The hearing was scheduled by an Order of this Court dated _____, __, 2017.

The hearing may be adjourned by the Court from time to time by an announcement at the hearing, or at any adjournment thereof, without further notice.

6. YOUR RIGHTS MAY BE AFFECTED BY THE PROPOSED SETTLEMENT OF THIS ACTION

The giving of this Notice is not to be understood as expressing any opinion by the Court as to the merits of any of the claims or defenses asserted by any party herein and is for the sole purpose of informing all the members of the Settlement Class of the Proposed Settlement so that individual Settlement Class members may make whatever decisions they may deem appropriate for the protection of their interests.

7. PROPOSED SETTLEMENT

In summary, the Proposed Settlement will result in certain Defendants providing a sum of money to Plaintiffs and certain Regimes in MBR to fund an arbitration of a declaratory judgment action to adjudicate whether the gate pass fee currently charged by MBR is authorized under the governing MBR documents and applicable law. All Parties agree that the arbitration decision will be binding.

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

The Parties agreed that a declaratory proceeding in binding arbitration on the core remaining issue in the Actions (whether the gate pass fee currently charged by MBR is authorized under the governing MBR documents and applicable law) is the most cost-effective, fair, and appropriate manner of bringing final resolution to the remaining issues raised in the Actions. They believed that this objective could be reached by certain Defendants' agreement to fund the binding arbitration.

The Proposed Settlement was reached at mediation and all Parties were represented by experienced counsel. If the Proposed Settlement is approved by the Court, the Proposed Settlement will act as: 1) a complete release of all claims by Named Plaintiffs against all Defendants; and 2) a complete release of all claims against all Defendants which were actually asserted or might have been asserted on behalf of an absent class members in the MBR Class Action, the OFS Class Action, the MBR Derivative Action and the OFS Derivative Action. Thereafter, final judgments of dismissal will be entered, with prejudice, as to the Actions, and Plaintiffs and all Settlement Class Members will be conclusively bound by such dismissal.

8. ATTORNEYS FOR PLAINTIFFS AND DEFENDANTS

The attorneys for the named Plaintiffs and Settlement Class are A. Preston Brittain and Thomas C. Brittain of The Brittain Law Firm, P.A., whose telephone numbers and addresses appear below. Any questions regarding their representation of the interests of Named Plaintiffs, Derivative Plaintiffs, and those similarly situated must be directed to them.

A. Preston Brittain, Esq.
Thomas C. Brittain, Esq.
The Brittain Law Firm, P.A.
4614 Oleander Drive
Myrtle Beach, SC 29577
(843) 449-8562 (telephone)
(843) 497-6124 (facsimile)

Attorneys for Named Plaintiffs

The attorneys for Defendants Phillip A. Kilgore and Lucas J. Asper of Ogletree, Deakins, Nash, Smoak, & Stewart, P.C., and Henrietta U. Golding, Esq. and Alicia E. Thompson of McNair Law Firm, P.A., whose telephone numbers and addresses also appear below.

Phillip A. Kilgore, Esq.
Lucas J. Asper, Esq.
300 North Main Street, Suite 500
Greenville, South Carolina 29601
(864) 271-1300 (telephone)
(864) 235-4754 (facsimile)

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

Attorneys for Defendants The Myrtle Beach Resort Homeowners Association, Inc., Ocean Front Spa Horizontal Property Regime, Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ralph Jump, Ray Coghill, Ken Perkins, John Doe past Board of Directors of Ocean Front Spa Horizontal Property Regime, Inc., and John Doe past Board of Directors for the Myrtle Beach Resort Homeowners Association, Inc.

Henrietta U. Golding, Esq.
Alicia E. Thompson, Esq.
McNair Law Firm, P.A.
Post Office Box 336
Myrtle Beach, SC 29578-0336
(843) 444-1107
(843) 444-4729

Attorneys for Defendant K.A. Diehl

9. PROCEDURE FOR OPTING OUT OF THE SETTLEMENT CLASS OR FOR PRESENTING OBJECTIONS

Any member of the Settlement Class may appear and show cause, if he or she has any, why the Proposed Settlement should not be approved by the Court as fair, reasonable, and adequate, and why any of the Actions should not be dismissed on the merits, with prejudice. Any such member of the Settlement Class may also object to the allowance of the costs, expenses, and fees requested by Plaintiffs' counsel; provided that no such person shall be heard, and no papers or briefs shall be submitted by him or her to the Court, unless, on or before ten (10) days before the fairness hearing, he or she files a notice of intention to appear and a statement of the basis of his or her objections, together with a memorandum of authorities, with the Horry County Clerk of Court Melanie Huggins-Ward, 1301 Second Avenue, Conway, South Carolina 29526 and serves a copy on:

A. Preston Brittain, Esq. Thomas C. Brittain, Esq. The Brittain Law Firm, P.A. 4614 Oleander Drive Myrtle Beach, SC 29577 (843) 449-8562 (telephone) (843) 497-6124 (facsimile) Attorneys for Plaintiffs	Phillip A. Kilgore, Esq. Lucas J. Asper, Esq. 300 North Main Street, Suite 500 Greenville, South Carolina 29601 (864) 271-1300 (telephone) (864) 235-4754 (facsimile) Attorneys for Defendants The Myrtle Beach Resort Homeowners Association, Inc., Ocean Front Spa Horizontal Property Regime, Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ralph Jump, Ray Coghill, Ken Perkins, John Doe past Board of Directors of Ocean Front Spa Horizontal Property Regime, Inc., and John Doe past Board of Directors for the Myrtle Beach Resort

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

	Homeowners Association, Inc. Henrietta U. Golding, Esq. Alicia E. Thompson, Esq. McNair Law Firm, P.A. Post Office Box 336 Myrtle Beach, SC 29578-0336 (843) 444-1107 (telephone) (843) 444-4729 (facsimile) Attorney for Defendant FirstService Residential South Carolina, Inc., formerly known as K.A. Diehl & Associates, Inc.

If you are entitled to be a member of the Settlement Class and want to opt out or exclude yourself from the Actions, you need to sign the attached Request for Exclusion and return it to the above attorneys on or before _____, 2017. If you opt out of the Settlement Class, you will not be able to participate in the Actions related to the Settlement Class, should there be one or more.

10. EXAMINATION OF PLEADINGS AND PAPERS

The references in this Notice to the Settlement Agreement and Release between Plaintiffs and Defendants and other papers are only summaries of those documents. The pleadings in the Actions are on file with the Clerk of Court, at the address stated above, and are available for inspection there. Copies of documents related to the Actions not on file with the Clerk of Court will be available for inspection by any Settlement Class Member and his or her attorney at the offices of Class Counsel during mutually agreeable business hours.

11. OBTAINING ADDITIONAL INFORMATION

You may direct inquiries to Class Counsel at the address listed above. **DO NOT CONTACT THE COURT.**

This Notice provides only a summary of matters regarding the case. You may also seek independent legal counsel as to your rights at your own personal expense.

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

ATTACHMENT

REQUEST FOR EXCLUSION

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00673**
	)	
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00674**
	)	
The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	
	)	

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15th JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00743**
	)	
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00744**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

Request for Exclusion

I/, _____, hereby declare my decision to be excluded as a Class Member in the following action(s), so indicating by my initials:

_____ *Jim Perkins et al. v. Ocean Front Spa Horizontal Property Regime, Inc., et al.,* Civil Action No.: 2016-CP-26-00673 ("OFS Class Action")

_____ *Jim Perkins et al. v. The Myrtle Beach Resort Homeowners Association, Inc. et al.,* Civil Action No.: 2016-CP-26-00674 ("MBR Class Action")

_____ *Jim Perkins et al. v. K.A. Diehl and Associates, Inc., et al.,* Civil Action No. 2016-CP-26-00743 ("MBR Derivative Action")

_____ *Jim Perkins et al. v. Ocean Front Spa Horizontal Property Regime, Inc. et al.,* Civil Action No.: 2016-CP-26-00744 ("OFS Derivative Action")

_____
Full Name

_____ _____
Signature Date

Mailing Address: _____

Phone number(s): _____

Street Address (if different from above):
_____

30343714.1

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

EXHIBIT E

ORDER OF PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00673**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00674**
	)	
The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	
	)	

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15th JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00743**
	)	
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00744**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

ORDER OF PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

THIS MATTER IS BEFORE THE COURT upon the Motion of the Defendants in each of the above-captioned cases (C.A. Nos. 2016-CP-26-00673, 2016-CP-26-00674, 2016-CP-26-00743, and 2016-CP-26-00744) (collectively, the "Actions"). Defendants move for approval of the Settlement of the Actions.

The Court has reviewed the Settlement Agreement (**Exhibit A** to Defendants' Motion) and Settlement Notice (**Exhibit D** to Defendants' Motion) (collectively "Settlement

Documents"), has held a hearing on the Motion, and is familiar with the facts, legal issues and procedural history of the Actions.

The Court finds that the Settlement is the result of extensive negotiations following a lengthy period of contested litigation between the Parties. The Court further finds that the Settlement Agreement represents a fair and reasonable resolution of *bona fide* disputes between Plaintiffs and Defendants in the Actions. The Court further finds that the Settlement Agreement represents a fair and reasonable resolution of a *bona fide* dispute between persons on whose behalf the Actions have been brought ("absent class members") on the one hand, and Defendants on the other but that, as to such absent class members, the releases in the Settlement Agreement should be limited to "any and all claims which were actually asserted or might have been asserted by Plaintiffs in the Settled Actions." Based on these findings, and for good cause shown,

IT IS ORDERED that, pursuant to Rules 41(a)(1)(B) and Rule 23(c) of the South Carolina Rules of Civil Procedure, the Settlement Documents are hereby **APPROVED,** this ____ of _____, 2017.

_____

The Honorable _____

ELECTRONICALLY FILED - 2017 Jul 03 9:43 AM - HORRY - COMMON PLEAS - CASE#2016CP2600674

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00673**
	)	
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00674**
	)	
The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	
	)	

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15th JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00743**
	)	
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
Plaintiffs,	)	
v.	)	**Civil Action No.: 2016-CP-26-00744**
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)	
Defendants.	)	

CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

I. Introduction

Defendants in each of the above-captioned cases (C.A. Nos. 2016-CP-26-00673, 2016-CP-26-00674, 2016-CP-26-00743, and 2016-CP-26-00744) (collectively, the "Actions"), by and through their undersigned counsel and pursuant to Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), file this Consolidated Motion for Preliminary Approval of Settlement

Agreement regarding the Actions ("Motion to Approve"). For the reasons set forth herein, Defendants request that the Court issue an Order granting this Motion.

II. Mediation and Negotiation History

After extensive arms-length negotiations by parties and their counsel through mediation, all Plaintiffs and Defendants (collectively, the "Parties") in the Actions have reached a settlement that resolves all claims in dispute. The Parties' agreement is reflected in the Settlement Agreement. **(Exhibit A.)**

Representative members of the Plaintiff classes who serve on the Board of Directors for Defendant Ocean Front Spa Horizontal Property Regime, Inc. ("OFS") subsequently ratified the settlement and affirmed their understanding that the Actions have been resolved fully and finally through Mediation. These Plaintiffs (Nancy Moore, Steven Dame and Jim Perkins), joined by the two other OFS Board Members, did so by providing official written notification on May 4, 2017, to over a hundred seventy of the putative class members (their constituents, who are fellow members of the OFS community) that they had been able to successfully "resolve [the] five lawsuits." (Affidavit of Walter Jordan (Exhibit A), **Exhibit B.)** In addition, shortly after the mediation, these Plaintiffs posted notices in the OFS building informing all residents that "The recent state court litigation between various homeowners in the Ocean Front Spa and its management company and others has been resolved between the parties to their mutual satisfaction via alternative dispute resolution that occurred on May 1." **(Affidavit of Walter Jordan (Exhibits B and C) Exhibit B.)**

III. Plaintiffs Richardson and Santos Attempt to Renege

Notwithstanding the class representatives' ratification of the settlement and the fact that every representative class member signed the Settlement Agreement (either personally or

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

through counsel, with express permission), Plaintiffs' counsel has indicated that two Plaintiffs, Jeff Richardson ("Richardson") and Mark dos Santos ("Santos"), believe they are not bound by the Settlement Agreement. They take this position despite the fact that they both fully participated in the mediation negotiations that resulted in the Settlement Agreement.

It is anticipated that Plaintiffs Richardson and Santos will rely upon the fact that they were not physically present for the May 1, 2017, mediation as their basis to renege on the Settlement Agreement.[1] The mediation was set far in advance. Nevertheless, Plaintiff Richardson's attorney informed counsel for all the Parties on April 26, 2017, that Plaintiff Richardson would be unable to attend the mediation. On April 28, 2017, counsel for "Board Defendants"[2] asked, "Will you have settlement authority from Mr. Richardson?" to which counsel for Plaintiff Richardson responded, "I will. We are good to go." **(Exhibit C.)** On the day of the mediation, on information, Plaintiff Richardson participated in the mediation, having extensive discussions with his counsel throughout the day.

In the case of Santos, the Defendants had no forewarning that he would not be present. On the morning of May 1, 2017, counsel for Santos announced that he was not present. They assured the Defendants and their counsel that the case could be mediated in his absence. Santos actually participated in the mediation by phone, at one point offering his own rebuttal to remarks made by counsel for one of the Defendants.

In any event, the Settlement Agreement is signed by all Parties, either individually or, in the case of Plaintiffs Richardson and Santos, by their attorney to whom they had given authority.

---

[1] It is unknown whether the other Plaintiffs intend to renege on the Settlement Agreement and, if so, on what basis. Due to the refusal of Plaintiffs Richardson and Santos to follow through with the Settlement Agreement, counsel for all Plaintiffs has stated he will have to oppose any motion to enforce.

[2] The Myrtle Beach Resort Homeowners Association, Inc., Ocean Front Spa Horizontal Property Regime, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, Ralph Jump, and Ray Coghill.

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

All Parties invested substantial time and resources in conducting discovery to understand the cases, the issues, the risks and rewards. The Parties devoted more time preparing for the mediation. In the course of the lengthy mediation, the Parties expended substantial time and energy in exploring and, ultimately, reaching a negotiated settlement with the assistance of one of the preeminent and most well-respected mediators in our state. Notwithstanding their concurrence with a fully integrated Settlement Agreement, none of the Plaintiffs join in a Motion for Preliminary Approval. Accordingly, Defendants file this Motion jointly but without the consent of Plaintiffs.

IV. **Litigation Background**

Two separate class action lawsuits have been filed against certain Defendants in this Court: *Jim Perkins, et al. v. Ocean Front Spa Horizontal Property Regime, Inc.*, et al, C.A. No. 2016-CP-26-00673 ("OFS Class Action"); *Jim Perkins, et al. v. Myrtle Beach Resort Homeowners Association, Inc.*, C.A. No. 2016-CP-26-00674 ("MBR Class Action") (collectively, the "Class Actions"). Two separate derivative actions were filed against certain Defendants in this court; *Jim Perkins, et al. v. K.A. Diehl and Associates, Inc., et al.*, C.A. No. 2016-CP-26-00743 ("MBR Derivative Action"); and, *Jim Perkins, et al. v. Ocean Front Spa Horizontal Property Regime, Inc.*, C.A. No. 2016-CP-00744 ("OFS Derivative Action") (collectively, the "Derivative Actions").

In the OFS Class Action, Plaintiffs sought to certify a class consisting of "any and all persons and or entities owning a unit within the OFS HOA and thereby owning an undivided interest in the common elements, and business activity of the OFSHOA." ("OFS Class") OFS Class Action Amended Complaint ¶49. On behalf of the purported OFS Class, Plaintiffs allege in the OFS Class Action Amended Complaint that Defendants OFS, Bill Cameron, Walter

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past directors of OFS, breached their fiduciary duty to Plaintiffs and violated the standards set forth in the South Carolina Non-Profit Corporation Act, S.C. Code Ann. 33-31-830.

In the MBR Class Action, Plaintiffs sought to certify a class consisting of "any and all persons and or entities owning a unit within the MBRHOA and thereby owning an undivided interest in the common elements, and business activity of the MBRHOA." ("MBR Class") MBR Class Action Amended Complaint ¶49. On behalf of the purported MBR Class, Plaintiffs allege in the Amended MBR Class Action Complaint that Defendants The Myrtle Beach Resort Homeowners Association, Inc. ("MBR"), Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of MBR breached their fiduciary duty to Plaintiffs, acted negligently, and breached a covenant contained in the master deed and bylaws.

In the MBR Derivative Action, Plaintiffs have brought suit on behalf of a class of persons who own a unit in Myrtle Beach Resort, purportedly on behalf of nominal Defendant MBR, alleging that Defendants MBR and members of its Board of Directors (Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe Board Directors of MBR) breached their fiduciary duty to Plaintiffs, that Defendant FirstService Residential South Carolina, Inc., formerly known as K.A. Diehl & Associates, Inc. and incorrectly identified as K.A. Diehl and Associates, Inc. in the Derivative Actions ("K.A. Diehl"), acted negligently, that K.A. Diehl breached multiple contracts, and that K.A. Diehl breached multiple contracts accompanied with a fraudulent act.

In the OFS Derivative Action, Plaintiffs have brought suit on behalf of a class of persons who own a unit in Oceanfront Spa Horizontal Property Regime, purportedly on behalf of

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

nominal Defendant OFS, alleging that Defendants, OFS, members of the OFS Board of Directors (Walter Jordan, Ralph Jump, Ray Coghill, and John Doe Past Board Directors for OFS), MBR, and members of the MBR Board of Directors (Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, and John Doe Past Board Directors of MBR), breached their fiduciary duty to Plaintiffs, that K.A. Diehl breached multiple contracts, that K.A. Diehl breached multiple contracts accompanied with a fraudulent act, and that K.A. Diehl acted negligently.

Each of the Actions include allegations regarding issues related to the management of MBR and OFS, oversight of management, and other actions of the Boards of Directors of OFS and/or MBR, including the approval, implementation, and collection of a "gate pass fee," and an increase in the "gate pass fee."

Defendants do not admit any liability to Plaintiffs, or to anyone else because of, or growing out of, matters set forth in the Actions. Defendants deny all of the materials allegations asserted by Plaintiffs in each of the Actions. For purposes of this Motion alone, Defendants do not object to the definition of the purported MBR Class or the OFS Class (collectively, "Classes") in the Class Actions, do not object to Plaintiffs' purported representation of classes of owners in the Derivative Actions and do not object to Plaintiffs' prior actions therein on behalf of all the purported Class members in the Actions.

V. Settlement

The Parties, through their counsel, have engaged in lengthy and vigorous settlement negotiations. Specifically, on May 1, 2017, the Parties participated in a thorough mediation in which the Parties examined all issues raised in the Actions and the benefits and risks associated with litigation. At all times, the Parties' negotiations were adversarial, non-collusive, and at arms' length, reflecting the contentious and adversarial nature of the Actions. Ultimately, each

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

of the Parties recognized that further conduct of these Actions would likely be protracted and expensive, and that no Party has an assurance of a successful outcome. The Parties therefore concluded that it is desirable that the Actions be settled in the manner and upon the terms and conditions set forth in the Settlement Agreement. (*See* **Exhibit A**).

A. Release

Named Plaintiffs have agreed to release and forever discharge "Released Parties" from all "Claims," all as defined in the Settlement Agreement. (*See* **Exhibit A** at ¶¶ 4, 6). The release provisions of the Settlement Agreement agreed to by the Named Plaintiffs are as follows:

> In exchange for and in consideration of the promises set forth in this Agreement, and except for the rights to enforce the provisions of this Agreement, Plaintiffs, their heirs, executors, administrators, legal and personal representatives, successors and assigns, hereby covenant not to sue and fully release and forever discharge Defendants and their respective present and former parents, heirs, assigns, subsidiaries, affiliates, and related entities or corporations, and any of their past and present officers, directors, shareholders, employers, past and present employees, agents, partners, attorneys, heirs, successors, insurers and assigns (the "Released Parties"), from any and all claims, demands, actions, charges, complaints, suits, administrative proceedings, debts, promises, contracts, grievances, and causes of action (hereinafter collectively referred to as "Claims"), in law or in equity, whether known or unknown, which Plaintiffs and their heirs, executors, administrators, agents, distributees, beneficiaries, successors in interest and assignees may have by reason of any matter, cause or thing whatsoever from the beginning of the world to only the day of the date of Plaintiffs' execution of this Agreement, including, but not limited to, any and all claims which were actually asserted or might have been asserted by Plaintiffs in the Settled Actions. Plaintiffs agree never to file a lawsuit against Defendants based on any reason contained in this Agreement. The Release does not purport to release any claims that the law does not permit to be released.

Defendants are Released Parties within the meaning of the Settlement Agreement. (Id.)

These terms apply to the Plaintiffs in the Actions. If the Court approves the Settlement Agreement, the scope of the release as to absent class members would apply to only the claims which were actually asserted or might have been asserted on behalf of absent class members in the Actions.

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

B. Consideration for Release

In exchange for and in consideration of the promises set forth in the Settlement Agreement, Defendants promised to pay funds as follows:

1. Defendants will pay to Plaintiffs and Plaintiffs' attorney the sum of $15,000.00 to fund a binding arbitration of a declaratory judgment action to adjudicate whether the gate pass fee is proper.
2. Defendants will pay to The Board of Directors for the Myrtle Beach Resort Horizontal Property Regime and the Board of Directors for the Myrtle Beach Resort Five Seasons Centre Horizontal Property Regime the sum of $15,000.00 to fund the defense of a binding arbitration of a declaratory judgment action to adjudicate whether the gate pass fee is proper.
3. Defendants will pay to Plaintiffs' attorney the sum of $5,000.00 to be held in trust by his law firm to pay an arbitrator to resolve the arbitration set forth above.

(*See* **Exhibit A** at ¶ 1).

C. Attorneys' Fees

As part of the Settlement Agreement, Defendants also agreed to pay Plaintiffs' counsel attorneys' fees equal to $50,000.00, such amount not being subject to income or employment tax withholding, but to be reported on a Form 1099. (*See* **Exhibit A** at ¶ 1(d)). Defendants seek Court approval of this amount in addition to the Consideration for Release described above.

IV. Settlement Notice

Defendants have prepared a proposed Settlement Notice (**Exhibit D.**) Although Plaintiffs' counsel does not join this Motion, Plaintiffs' counsel has not indicated an objection to the terms of the Notice.

The Settlement Notice explains: (1) the terms of the Settlement Agreement; (2) how purported class members can opt-out or exclude themselves from the purported class; and (3) how to submit objections to the terms of the Settlement Agreement. The Defendants propose that the Settlement Notice be sent via email to members of the purported Classes, placed in a MBR and an OFS newsletter, discussed at special MBR and OFS Board meetings and subsequently included in the Board minutes, and posted on the MBR and OFS websites. These are the most practicable means of providing notice under the circumstances and comport with due process.

Significantly, Plaintiffs have already begun providing notice of the settlement to purported class members. On May 4, 2017, representative members of the Plaintiff classes who serve on the OFS Board of Directors provided written notice to their constituents (fellow OFS residents), in which the OFS Board Member Plaintiffs ratified the settlement and affirmed their understanding that the Actions have been resolved fully and finally through Mediation. (**Exhibit B.**) Plaintiffs provided this notice by (1) emailing a copy to what appears to most if not all OFS homeowners, and (2) posting the notice on all bulletin boards in the OFS building.

V. Argument

A. Defendants Ask the Court to Approve the Settlement Agreement

This Motion seeks preliminary approval of the Settlement Agreement, which would settle the four Actions which were filed pursuant to Rule 23 of the SCRCP. Pursuant to Rules 23(c) and 23 (b)(1) of the SCRCP, class and derivative actions may be settled only with court approval. In considering whether to approve a class action settlement, the South Carolina courts look to federal decisions interpreting Rule 23 of the Federal Rules of Civil Procedure, upon

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

which South Carolina's version of Rule 23 is patterned. *See Salmonsen v. CGD, Inc.*, 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008).

The decision to grant approval of a class action settlement involves the Court's consideration of several factors, including: (1) the amount offered in settlement; (2) the risks inherent in continued litigation; (3) the extent of discovery completed and the stage of the proceeding when the settlement was reached; (4) the risk, complexity, expense, and likely duration of the litigation absent settlement; (5) the experience and views of class counsel; and (6) the response of class members to the Settlement. *Brunson v. Louisiana-Pac. Corp.*, 818 F. Supp. 2d 922, 926 (D.S.C. 2011). Under these factors, preliminary approval is warranted.

There is no dispute as to the complexity of the Actions, the inherent risks of continued litigation of the Actions, and the expense the Parties would incur in event the litigation continued. A mere review of the Complaints in each Action will confirm these factors. Moreover, the Actions have been pending for over one year and, during litigation, the Parties have conducted substantial discovery and engaged in extensive motion practice. After adequate discovery, the Parties prepared for and engaged in a lengthy mediation in which all issues were thoroughly examined through experienced counsel and a capable mediator.

As evidenced by the Settlement Agreement, the Parties have concluded as follows: (1) further litigation would likely be protracted and expensive, and no party has assurance of a successful outcome; (2) it is in their mutual best interest to settle their disputes at this time; (3) the core remaining issue in the case is whether the gate pass fee currently charged by MBR is authorized under the governing MBR documents and applicable law; (4) a declaratory proceeding in binding arbitration is the most cost-effective and appropriate manner of bringing final resolution to the remaining issues raised in the Actions; (5) this objective can be reached by

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

certain Defendants' agreement to provide funding for the binding arbitration; and (6) the amount of the funding provided in the Settlement Agreement is adequate for purposes of the prosecution and defense of the arbitration.

Counsel representing the Parties have substantial familiarity with subject matters of the Actions and have experience in litigating such matters. The Parties' attorneys have actively negotiated the terms of the settlement on behalf of all known individuals and entities involved based on their extensive experience in this area, considering all of the risks inherent with litigation. At all times, the Parties' attorneys have represented their clients' best interests in reaching the settlement. The terms of the Settlement Agreement provide an appropriate and fair means of resolving the disputes in the Actions. *See id.* ("[A] presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.") (*quoting* Newberg & Conte, Newberg on Class Actions (3d ed. 1992) § 11.41.).

This motion has not been filed as a consent motion because of objections Plaintiffs Richardson and Santos have raised to the Settlement Agreement. Their objections are that they were not physically present at the mediation and did not actually sign the Settlement Agreement. The other Plaintiffs do not have these objections. Moreover, at least three of the Plaintiffs have subsequently ratified the Settlement Agreement. **(Exhibit B.)**

In any event, the objections of Plaintiffs Richardson and Santos are not proper. As indicated above, the Settlement Agreement was signed by their counsel with specific authority. It is not believed that they will now contend that their counsel did not have this authority.

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

The South Carolina "Court-Annexed Alternative Dispute Resolution Rules" promulgated by the South Carolina Supreme Court ("ADR Rules") require that the "following persons shall physically attend a mediation settlement conference unless otherwise agreed to by the mediator and all parties ...: ... All individual parties." ADR Rule 6 (b). "If any person ... subject to the ADR Rules violates any provision of the ADR Rules without good cause, the court may ... impose upon that party any lawful sanctions." ADR Rule 10 (b).

Prior to the mediation, Plaintiffs Richardson and Santos essentially requested to be relieved of their obligation to attend the mediation. As a courtesy, the mediator and counsel for the Defendants agreed to this arrangement upon assurance that Plaintiffs Richardson and Santos had given settlement authority to their counsel. Plaintiffs Richardson and Santos participated in the mediation remotely. Counsel for these Plaintiffs, with their authority and in a capacity as agent, signed the Settlement Agreement on their behalf. The ADR Rules do not contemplate that a party, physically absent by agreement, can be relieved from the effects of a settlement the party entered at mediation under these circumstances.

B. <u>Defendants Ask the Court to Approve the Proposed Settlement Notice</u>

Rule 23(d)(2), SCRCP, provides that the "court may at any time impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended," such as "notice . . . of a proposed settlement . . . including notice to the absent persons that they may come in and present claims and defenses if they so desire." In the case of a class action, it is generally accepted that Rule 23(d)(2), SCRCP, requires notice of the settlement to the purported class. The notice should inform purported class members of the nature of the litigation, the general terms of the settlement, the right of any purported class member to appear and be heard at the fairness hearing, and an opportunity to opt-out.

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

Here, the Settlement Notice (**Exhibit D**) meets all of these requirements. It identifies the Parties and describes the Actions in a straightforward matter; succinctly describes the essential terms of the Settlement Agreement; provides purported class members with information on how object to the terms of the Settlement Agreement or opt-out; and informs purported class member that if they do not opt out, they will be bound by the resulting judgment. In sum, the Settlement Notice provides the information necessary for purported class members and shareholders/members of MBR and OFS to make an informed decision regarding the Settlement Agreement.

Furthermore, sending the Settlement Notice via email to members of the purported Classes and to shareholders/members of MBR and OFS, placing the Settlement Notice in a MBR and an OFS newsletter, discussing the Settlement Notice at special MBR and OFS Board meetings and subsequently including the discussion in the board minutes, and posting the Settlement Notice on the MBR and the OFS websites are the most practicable means of providing notice under the circumstances and comports with due process. The Parties have access to each of these means of publication and ask this Court to find the proposed means of notice to Plaintiffs reasonable under the circumstances of the Actions. *See Salmonsen*, 377 S.C. at 458, 661 S.E.2d at 90 (Rule 23(d) provides a court discretion in determining how parties are notified of a proposed class settlement).

VI. Conclusion

For the reasons presented in this Motion, Defendants respectfully request that the Court enter an Order (1) preliminarily approving the attached Settlement Agreement; (2) approving the form and manner of the Settlement Notice; and (3) scheduling a Fairness Hearing to grant final

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

approval of the Parties' Settlement Agreement. A proposed order is attached hereto for the Court's consideration. **(Exhibit E)**

VII. Affirmation

The undersigned affirms that prior to filing the motion, they communicated, orally and in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion.

Respectfully submitted this 30th day of June, 2017.

	s/Phillip A. Kilgore Phillip A. Kilgore (S.C. Bar No. 3449) Lucas J. Asper (S.C. Bar No. 77902) 300 North Main Street, Suite 500 Greenville, South Carolina 29601 864.271.1300 (telephone) 864.235.4754 (facsimile) phillip.kilgore@ogletreedeakins.com lucas.asper@ogletreedeakins.com Attorneys for Defendants The Myrtle Beach Resort Homeowners Association, Inc., Ocean Front Spa Horizontal Property Regime, Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ralph Jump, Ray Coghill and Ken Perkins. Henrietta U. Golding, Esq. Henrietta U. Golding, Esq. Alicia E. Thompson, Esq. McNair Law Firm, P.A. Post Office Box 336 Myrtle Beach, SC 29578-0336 (843) 444-1107 (telephone) (843) 444-4729 (facsimile) Attorneys for Defendant FirstService Residential South Carolina, Inc., formerly known as K.A. Diehl & Associates, Inc.

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

EXHIBIT A

SETTLEMENT AGREEMENT

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

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Settlement Agreement
Civil Action Nos.: 2016-CP-26-00673, -00674, -00743, -00744

The following is a Settlement Agreement ("Agreement") between Plaintiffs Jim Perkins, Colleen Franke a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dames, Errol Dos Santos, and Jeffrey Richardson ("Plaintiffs'") on the one hand and Defendants The Myrtle Beach Resort Homeowners Association, Inc., ("MBRHOA"), Ocean Front Spa Horizontal Property Regime, Inc. ("OFS"), Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Ken Perkins, Ray Coghill, Ralph Jump, and Wayne Urban ("Defendants") on the other (Plaintiffs and Defendants hereafter referred to as the "Parties") to settle Civil Action Nos.: 2016-CP-26-00673, -00674, -00743, -00744, currently pending on the South Carolina Circuit Court in Horry County ("Settled Actions").

1. For good and valuable consideration, upon full execution and effectuation of this Agreement, in full satisfaction of the Settled Actions, and any other claims or charges Plaintiffs have, claim to have, or may have, against Defendants, including, without limitation, any claim for attorneys' fees or costs, Defendants agree to pay the gross amount of $85,000.00 (the "Payment") in full satisfaction of any claims, charges or actions Plaintiffs have against Defendants.

a) Defendants will, thirty (30) business days hereafter, pay to Plaintiffs and Plaintiffs' attorney the total sum of Fifteen Thousand Dollars ($15,000.00) for the purposes of funding a binding arbitration of a declaratory judgment action to adjudicate whether the gate pass fee currently charged by MBRHOA is authorized under the governing MBRHOA documents and applicable law.
b) Defendants will, thirty (30) business days hereafter, pay to The Board of Directors for the Myrtle Beach Resort Horizontal Property Regime ("A Building Board") and the Board of Directors for the Myrtle Beach Resort Five Seasons Centre Horizontal Property Regime, ("Five Seasons Board") the total sum of Fifteen Thousand Dollars ($15,000.00) for the purposes of defending a binding arbitration of a declaratory judgment action filed by Plaintiffs for the purpose of adjudicating whether the gate pass fee currently charged is authorized under the governing MBRHOA documents and applicable law.
c) Arbitrator. Defendants will pay to Plaintiff's counsel the sum of $5,000.00 to be held in trust by his law firm to pay to an arbitrator to resolve the arbitration set forth in the previous two paragraphs. In the event this amount does not fund the arbitration in full, the balance, if any, shall be paid by the attorneys receiving the sums set out in the two previous paragraphs.
d) Defendants will, thirty (30) business days hereafter, pay "Brittain Law Firm" in the amount of Fifty Thousand Dollars and No Cents ($50,000.00), as payment for attorneys' fees and costs, such amount not being subject to income or employment tax withholding, but to be reported on a Form 1099

2. The Parties hereto recognize that the Defendants do not admit any liability to Plaintiffs, or to anyone else because of, or growing out of, matters set forth in Plaintiffs' Amended Complaints in the Settled Actions. The Parties have agreed to settle any and all claims

Plaintiffs have asserted or may have asserted against Defendants in order to avoid further cost and inconvenience in moving forward with a trial.

3. MBRHOA and OFS will use their best efforts to have their respective By-Laws amended to require at least three bids to be received prior to the awarding of any contract which will exceed $10,000.00 in value.

4. In exchange for and in consideration of the promises set forth in this Agreement, and except for the rights to enforce the provisions of this Agreement, Plaintiffs, their heirs, executors, administrators, legal and personal representatives, successors and assigns, hereby covenant not to sue and fully release and forever discharge Defendants and their respective present and former parents, heirs, assigns, subsidiaries, affiliates, and related entities or corporations, and any of their past and present officers, directors, shareholders, employers, past and present employees, agents, partners, attorneys, heirs, successors, insurers and assigns (the "Released Parties"), from any and all claims, demands, actions, charges, complaints, suits, administrative proceedings, debts, promises, contracts, grievances, and causes of action (hereinafter collectively referred to as "Claims"), in law or in equity, whether known or unknown, which Plaintiffs and their heirs, executors, administrators, agents, distributees, beneficiaries, successors in interest and assignees may have by reason of any matter, cause or thing whatsoever from the beginning of the world to only the day of the date of Plaintiffs' execution of this Agreement, including, but not limited to, any and all claims which were actually asserted or might have been asserted by Plaintiffs in the Settled Actions. Plaintiffs agree never to file a lawsuit against Defendants based on any reason contained in this Agreement. The Release does not purport to release any claims that the law does not permit to be released.

5. Within 15 days of receipt of the Payment, Plaintiffs' counsel shall file **a stipulation of dismissal with prejudice** in each of the Settled Actions.

6. Plaintiffs further acknowledge and agree that this Agreement extends to all claims of every kind and nature whatsoever, known or unknown, suspected or unsuspected, and Plaintiffs acknowledges they may hereafter discover facts in addition to or different from those which they know or believe to be true with respect to the subject matter of this Agreement, but it is their intention to hereby fully and finally settle and release all such matters as well and, in furtherance of that intention, the foregoing Release shall remain in effect as a full and complete release notwithstanding the discovery or existence of such additional or different facts.

7. Plaintiffs agree that they will not make any statements, oral or written, which they know or reasonably should know to be a disparaging or negative comment about Defendants or their officers, directors, employees and agents, or otherwise detrimental to the reputation or goodwill of Defendants, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required by law. Defendants agree that they will not make any statements, oral or written, which they know or reasonably should know to be a disparaging or negative comment about Plaintiffs or their officers, directors, employees and agents, or otherwise detrimental to the reputation or goodwill of Plaintiffs, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required by law.

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8. It is understood and agreed that Defendants expressly rely upon the promises, representations, and warranties made by Plaintiffs in this Agreement; that any breach of such promises, representations, and warranties would constitute a material breach of this Agreement; and that in the event of any such breach, Defendants shall be entitled to any and all of the following relief: (a) the immediate repayment to Defendants of the full Settlement Amount hereunder (b) the indemnification and hold harmless protection set forth above; (c) specific enforcement of all promises and undertakings made by Plaintiffs hereunder; and (d) all other relief and damages available at law or in equity.

Agreed to this 1st Day of May, 2017.

Plaintiffs

Jim Perkins

Colleen Franke a/k/a Colleen Franke Perkins

Mark Dos Santos

By his Attorney

Nancy Moore

William Moore

Steven Dame

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

Errol Dos Santos

Jeffrey Richardson

By his Attorney

Defendants

The Myrtle Beach Resort Homeowners Association, Inc., ("MBRHOA")

By its Attorney

Ocean Front Spa Horizontal Property Regime, Inc. ("OFS"),

By its Attorney

Phil Cox

Bill Cameron

By his Attorney

Stanley Jordan

By his Attorney

Walter Jordan

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

Ken Perkins

Ray Coghill

By his Attorney

Ralph Jump

Wayne Urban

29682229.1

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CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

EXHIBIT B

AFFIDAVIT OF WALTER JORDAN

ELECTRONICALLY FILED - 2017 Jun 30 4:17 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00673**
	)	
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Defendants.	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00674**
	)	
The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	
	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15th JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00743**
	)	
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jun 30 4:17 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

ELECTRONICALLY FILED - 2017 Jun 30 4:17 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00744**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)	
	)	
Defendants.	)	

AFFIDAVIT OF WALTER JORDAN

COMES NOW, Walter Jordan, who, after being duly sworn, deposes and says:

1. My name is Walter Jordan. I am an adult, of sound mind, competent to testify to all matters in this Affidavit.

2. The information in this Affidavit is based on my personal knowledge and is true and accurate to the best of my knowledge and belief.

3. I live at 2311 Garrison Pl Road, Midlothian, VA 23112. I own units B216 and B219 at Ocean Front Spa ("OFS") at the Myrtle Beach Resort and reside there part of the year.

4. My email address is wjordan48@comcast.net.

5. On or about May 4, 2017, I received an email from email address MBRJimPerkins@aol.com. I am attaching a copy of the email to this affidavit as Exhibit A. The approximately 165 email addresses of the recipients of this email have been redacted for privacy reasons, but the original of the email will be made available to the court if needed.

6. I am attaching to this affidavit as Exhibit B a photograph I took of a notice posted on one of the bulletin boards in the OFS Building at the Myrtle Beach Resort. Identical notices were posted on all the bulletin boards in the OFS Building.

7. I personally observed the notices on all the bulletin boards beginning May 31, 2017, and the notice reflected in Exhibit B remained in place until June 20 or 21, 2017.

8. I believe these notices were first posted on or about May 5, 2017. The reason I believe this is because I received a text message from another OFS owner on that date with the attached photograph of a notice. Exhibit C. This notice is identical to the other notices I personally observed.

FURTHER AFFIANT SAYETH NOT.

[SIGNATURE PAGE FOLLOWS]

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I swear under oath that the foregoing Affidavit is true to the best of my knowledge and belief.

Walter Jordan — Date: 6-30-17

SWORN TO and subscribed before me
This 30th day of June, 2017.

Lori Beth Williams
Notary Public for Virginia
My Commission Expires: 10/31/18

LORI BETH WILLIAMS
NOTARY PUBLIC
REG # 7588036
MY COMMISSION EXPIRES 10/31/2018
COMMONWEALTH OF VIRGINIA

30245035.1

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EXHIBIT A
TO
AFFIDAVIT OF WALTER JORDAN

ELECTRONICALLY FILED - 2017 Jun 30 4:17 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

ELECTRONICALLY FILED - 2017 Jun 30 4:17 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

From: MBRJimPerkins@aol.com
Sent: Thursday, May 04, 2017 1:13 PM
To: REDACTED

To: REDACTED

Subject: RE: OFS (B-Building) Update

Myrtle Beach Resort Ocean Front Spa HPR

B Building Homeowners

May 4, 2017

Dear Homeowners:

Your Board Members desire transparency. As our term progresses, we believe that you will see a commitment to transparency. We also, like most, if not all of you, desired to put an end to much of the litigation. As you are aware, we resolved five lawsuits. Unfortunately, as a part of the resolution of the lawsuits, all parties agreed to keep certain terms quiet.

However, in keeping with the desire to be transparent, we are sharing with you that which we are permitted to. I am hopeful that this will address any concerns about the past, but more importantly clarify our path forward.

As a result of the settlement, FSR and the OFS Board have mutually decided to part ways. Of course, we were concerned about the welfare of the employees, and it is my understanding that FSR has graciously placed the 5 employees that served the OFS at other communities.

As a result of FSR and OFS parting ways, acquiring the services of a maintenance company was imperative. Fortunately, we were able to acquire three bids for the provision of maintenance, and your Board Members have hired Four Of A Kind maintenance company. They are already on site and are caring for the needs of our building.

The Board is considering an interim property management company to finish out the 2017 year. As with any transition, there will be some bumps. We ask that you be patient with us as we do our duty to get the interim management company in place for the remainder of this year. At the end of the year, we will be sending out RFP's for a property management company for a reasonable duration.

Thank you for your time and patience. Our goal is to make our Regime better in the future. If you have any questions, please contact us and we shall do our best to address your concerns.

On Behalf of Your Board of Directors,

Nancy Moore, President

Stanley Jordan, Vice President

Tracey Dorsey, Treasurer

Steve Dame, Secretary

Jim Perkins, Member at Large (MBR HOA Representative)

ELECTRONICALLY FILED - 2017 Jun 30 4:17 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

EXHIBIT B
TO
AFFIDAVIT OF WALTER JORDAN

ELECTRONICALLY FILED - 2017 Jun 30 4:17 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

ELECTRONICALLY FILED - 2017 Jun 30 4:17 PM - HORRY - COMMON PLEAS - CASE#2016CP2606745

LAWSUIT UPDATE

The recent state court litigation between various homeowners in the Ocean Front Spa and its management company and others has been resolved between the parties to their mutual satisfaction via alternative dispute resolution that occurred on May 1. In the days and weeks ahead, the OFS Board will be announcing various changes involving, among other things, the management and maintenance of the building. Ocean Front Spa is a wonderful place to live for its residents and to visit for its guests. It's the ambition of the OFS Board to help make this wonderful community that much better as we go forward together into the future.

Negotiated by:

Nancy Moore, President

Steve Dame, Secretary

Jim Perkins, MBRHOA Representative

EXHIBIT C
TO
AFFIDAVIT OF WALTER JORDAN

ELECTRONICALLY FILED - 2017 Jun 30 4:17 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

ELECTRONICALLY FILED - 2017 Jun 30 4:17 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

LAWSUIT UPDATE

The recent state court litigation between various homeowners in the Ocean Front Spa and its management company and others has been resolved between the parties to their mutual satisfaction via alternative dispute resolution that occurred on May 1. In the days and weeks ahead, the OFS Board will be announcing various changes involving, among other things, the management and maintenance of the building. Ocean Front Spa is a wonderful place to live for its residents and to visit for its guests. It's the ambition of the OFS Board to help make this wonderful community that much better as we go forward together into the future.

Negotiated by:
Nancy Moore, President
Steve Dame, Secretary
Jim Perkins, MBRHOA Representative

CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

EXHIBIT C

APRIL 28, 2017 EMAIL EXCHANGE

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

From: Preston Brittain <preston@brittainlawfirm.com>
Sent: Friday, April 28, 2017 9:58 PM
To: Kilgore, Phillip
Cc: Golding, Henrietta; Buffington, Bobby; Christian Stegmaier; Natalia V. Ertseva-Thomas; Tommy Brittain; msmith@thompsonlaw.com; TTurman@thompsonlaw.com; cnickels@clawsonandstaubes.com; Stephanie L. Mascella; Thompson, Alicia; Coggins, Robert E.; Asper, Lucas J.
Subject: Re: Civil Action No. 2015-CP-26-5573/Claim No. PHCO15080916718/C&L File No. 001832-00104 Diehl v. James Perkins, et al. (1832-104)

I will. We are good to go.

Sent from my iPhone

On Apr 28, 2017, at 2:27 PM, Kilgore, Phillip <Phillip.Kilgore@ogletree.com> wrote:

> Preston
>
> I will have settlement authority from all of my clients. Will you have settlement authority from Mr. Richardson?
>
> **Phillip A. Kilgore | Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**
> P.O. Box 2757 | Greenville, SC 29602 | Telephone: 864-271-1300 x240 | Fax: 864-235-4754 | Mobile: 864-982-2727
> phillip.kilgore@ogletreedeakins.com | www.ogletreedeakins.com

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CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

EXHIBIT D

NOTICE OF PROPOSED SETTLEMENT

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00673**
	)	
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Defendants.	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00674**
	)	
The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	
	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15th JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00743**
	)	
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00744**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

NOTICE OF PROPOSED SETTLEMENT

This Notice May Affect Your Rights
Please read carefully!

TO:

ALL PERSONS WHO ARE OWNERS OF REAL PROPERTY LOCATED IN MYRTLE BEACH RESORT IN THE STATE OF SOUTH CAROLINA, COUNTY OF HORRY

1. WHY SHOULD I READ THIS NOTICE?

Several lawsuits which may affect your rights are pending in the South Carolina Court of Common Pleas, Fifteenth Judicial Circuit, County of Horry:

(1) *Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated v. Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.,* Civil Action No.: 2016-CP-26-00673 **("OFS Class Action");**

(2) *Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated v. The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,* Civil Action No.: 2016-CP-26-00674 **("MBR Class Action") (the "OFS Class Action" and the "MBR Class Action" are collectively referred to as the "Class Actions");**

(3) *Jim Perkins, Colleen Franke a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dames, Errol Dos Santos, and Jeffrey Richardson individually in their capacity as derivative shareholders v. K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,* Civil Action No. 2016-CP-26-00743 **("MBR Derivative Action");** and

(4) *Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc., v. Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.* Civil Action No.: 2016-CP-26-00744 **("OFS Derivative Action") (the "MBR Derivative Action" and the "OFS Derivative Action" are collectively referred to as the "Derivative Actions")**

(The Class Actions and the Derivative Actions are collectively referred to as the "Actions.")

A proposed settlement has been reached in the Actions and has been conditionally approved by the Court. You have received this notice because you are thought to be someone who is a member of the Ocean Front Spa Horizontal Property Regime, Inc. ("OFS") and/or The Myrtle Beach Resort Homeowners Association, Inc. ("MBR"). If so, you are a potential member of the OFS Class and/or the MBR Class (defined below), and thus are among the class of those

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

potentially eligible to benefit from the settlement ("Settlement Class"). If so, you also are in one or both classes of persons on whose behalf the Derivative Actions have been brought.

You should read this Notice to determine whether your rights are affected, the steps necessary to pursue your rights as a member of a Settlement Class and as a member of OFS/MBR, or whether to opt out of a Settlement Class.

In the OFS Class Action and the MBR Class Action, one or more people, called "Named Plaintiffs" (Jim Perkins, Colleen Franke a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dames, Errol Dos Santos, and Jeffrey Richardson), have sued on behalf of themselves and all others similarly situated who are thought to have similar claims.

In the Derivative Actions, one or more people, called "Derivative Plaintiffs" (Jim Perkins, Colleen Franke a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dames, Errol Dos Santos, and Jeffrey Richardson), are suing derivatively on behalf of MBR, OFS, themselves, and classes of persons on whose behalf the Derivative Actions have been brought.

The Court may consider those who are similarly situated collectively as a Settlement Class or individually as Settlement Class Members. One Court resolves the issues for all Class Members, except for those who "opt-out" from the Settlement Class. "Opt-Out" means an affirmative choice to be excluded from the Settlement Class and is discussed further below.

2. THE ACTIONS

A. Overview of the Actions and Plaintiffs' Claims

Two separate class action lawsuits have been filed against certain Defendants in this Court: the OFS Class Action and the MBR Class Action. Two separate derivative actions were filed against certain Defendants in this court: the MBR Derivative Action and the OFS Derivative Action.

In the OFS Class Action, Named Plaintiffs sought to certify a class consisting of "any and all persons and or entities owning a unit within the OFS HOA and thereby owning an undivided interest in the common elements, and business activity of the OFSHOA" ("OFS Class"). On behalf of the purported OFS Class, Named Plaintiffs allege in the OFS Class Action Amended Complaint that Defendants OFS, Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past directors of OFS, breached their fiduciary duty to Plaintiffs and Class Members and violated the standards set forth in the South Carolina Non-Profit Corporation Act, S.C. Code Ann. 33-31-830.

In the MBR Class Action, Named Plaintiffs sought to certify a class consisting of "any and all persons and or entities owning a unit within the MBRHOA and thereby owning an undivided interest in the common elements, and business activity of the MBRHOA" ("MBR Class"). On behalf of the purported MBR Class, Named Plaintiffs allege in the Amended MBR Class Action Complaint that Defendants MBR, Phil Cox, Bill Cameron, Stanley Jordan, Walter

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of MBR breached their fiduciary duty to Plaintiffs and Class Members, acted negligently, and breached a covenant contained in the master deed and bylaws.

In the MBR Derivative Action, Derivative Plaintiffs have brought suit, purportedly on behalf of nominal Defendant MBR, alleging that Defendants MBR and board of directors Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe Board of Directors of MBR, breached their fiduciary duty to nominal Defendant MBR, that Defendant FirstService Residential South Carolina, Inc., formerly known as K.A. Diehl & Associates, Inc. and incorrectly identified as K.A. Diehl and Associates, Inc. in the Derivative Actions ("K.A. Diehl") acted negligently, that K.A. Diehl breached multiple contracts, and that K.A. Diehl breached multiple contracts accompanied with a fraudulent act.

In the OFS Derivative Action, Plaintiffs have brought suit, purportedly on behalf of nominal Defendant OFS, alleging that Defendants OFS and OFS Board of Directors Walter Jordan, Ralph Jump, Ray Coghill, John Doe Past Board of Directors for OFS, MBR, Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins and John Doe Board of Directors of MBR, breached their fiduciary duty to nominal Defendant OFS, that K.A. Diehl breached multiple contracts, that K.A. Diehl breached multiple contracts accompanied with a fraudulent act, and that K.A. Diehl acted negligently.

Each of the Actions include numerous allegations regarding issues related to management of MBR and OFS, oversight of the management, and other actions of the Boards of Directors of OFS and/or MBR, including the approval, implementation, and collection of a "gate pass fee," and an increase in the "gate pass fee."

Defendants in the Class Actions explicitly deny any liability to either the OFS Class or the MBR Class. Defendants in the Derivative Actions explicitly deny any liability to either OFS or MBR for the claims brought derivatively.

Counsel for the Parties have conducted thorough investigations into the facts of the Actions for their respective clients, including conducting thorough discovery and extensive review of relevant documents, information, and data. The Parties, recognizing the risks inherent in litigation, have agreed to settlement of the Actions on the terms summarized in Section 7 below and laid out more fully in the Settlement Agreement and Release between Named Plaintiffs and Defendants on file with the Court.

Defendants in the Actions are willing to settle the Actions to avoid further expense as well as to dispose of burdensome and protracted litigation. If members of the Settlement Class opt out, however, Defendants, at their option, may void this settlement.

3. CLASS DEFINITION

For purposes of this settlement alone, Defendants do not object to the definition of the purported MBR Class or the OFS Class, do not object to Plaintiffs' purported representation of classes of owners in the Derivative Actions, do not object to Plaintiffs' actions herein on behalf

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

of the Settlement Class or Settlement Class Members, and do not object to Plaintiffs' actions herein on behalf of nominal Defendants MBR and OFS in the Actions.

4. YOU ARE A MEMBER OF A CLASS

An agreement settling the Actions has been executed by Plaintiffs and Defendants. The terms of the proposed settlement (referred to in this Notice as "Proposed Settlement") are discussed in Section 7 below. As a potential member of the Settlement Class, you may participate in the hearing on the Proposed Settlement, and, if the Proposed Settlement is approved by the Court, you would receive the benefit of the Proposed Settlement.

However, as explained below, you may opt out of the Class Actions if you do not wish to participate in the hearing on the Proposed Settlement that is described below. If you opt out of the Class Actions, you may not benefit from the Proposed Settlement that is described below, but you may pursue any claims you may care to make by bringing a separate lawsuit on your own behalf, or you may do nothing if you so prefer. If you do not opt out of the Class Actions and the Proposed Settlement is approved, you will be bound by the terms of the Proposed Settlement.

5. NOTICE OF SETTLEMENT HEARING

You are hereby notified, pursuant to Rule 23(e) of the South Carolina Rules of Civil Procedure, that a hearing will be held on _____, 2017, at _____ _.m., before the Honorable Judge _____, in Courtroom No. _____ of the Horry County Courthouse, South Carolina, to determine whether the Proposed Settlement agreed to by the above-named parties is fair, reasonable, and adequate and whether it should be approved by the Court and judgment entered thereon. The hearing was scheduled by an Order of this Court dated _____, __, 2017.

The hearing may be adjourned by the Court from time to time by an announcement at the hearing, or at any adjournment thereof, without further notice.

6. YOUR RIGHTS MAY BE AFFECTED BY THE PROPOSED SETTLEMENT OF THIS ACTION

The giving of this Notice is not to be understood as expressing any opinion by the Court as to the merits of any of the claims or defenses asserted by any party herein and is for the sole purpose of informing all the members of the Settlement Class of the Proposed Settlement so that individual Settlement Class members may make whatever decisions they may deem appropriate for the protection of their interests.

7. PROPOSED SETTLEMENT

In summary, the Proposed Settlement will result in certain Defendants providing a sum of money to Plaintiffs and certain Regimes in MBR to fund an arbitration of a declaratory judgment action to adjudicate whether the gate pass fee currently charged by MBR is authorized under the governing MBR documents and applicable law. All Parties agree that the arbitration decision will be binding.

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

The Parties agreed that a declaratory proceeding in binding arbitration on the core remaining issue in the Actions (whether the gate pass fee currently charged by MBR is authorized under the governing MBR documents and applicable law) is the most cost-effective, fair, and appropriate manner of bringing final resolution to the remaining issues raised in the Actions. They believed that this objective could be reached by certain Defendants' agreement to fund the binding arbitration.

The Proposed Settlement was reached at mediation and all Parties were represented by experienced counsel. If the Proposed Settlement is approved by the Court, the Proposed Settlement will act as: 1) a complete release of all claims by Named Plaintiffs against all Defendants; and 2) a complete release of all claims against all Defendants which were actually asserted or might have been asserted on behalf of an absent class members in the MBR Class Action, the OFS Class Action, the MBR Derivative Action and the OFS Derivative Action. Thereafter, final judgments of dismissal will be entered, with prejudice, as to the Actions, and Plaintiffs and all Settlement Class Members will be conclusively bound by such dismissal.

8. ATTORNEYS FOR PLAINTIFFS AND DEFENDANTS

The attorneys for the named Plaintiffs and Settlement Class are A. Preston Brittain and Thomas C. Brittain of The Brittain Law Firm, P.A., whose telephone numbers and addresses appear below. Any questions regarding their representation of the interests of Named Plaintiffs, Derivative Plaintiffs, and those similarly situated must be directed to them.

A. Preston Brittain, Esq.
Thomas C. Brittain, Esq.
The Brittain Law Firm, P.A.
4614 Oleander Drive
Myrtle Beach, SC 29577
(843) 449-8562 (telephone)
(843) 497-6124 (facsimile)

Attorneys for Named Plaintiffs

The attorneys for Defendants Phillip A. Kilgore and Lucas J. Asper of Ogletree, Deakins, Nash, Smoak, & Stewart, P.C., and Henrietta U. Golding, Esq. and Alicia E. Thompson of McNair Law Firm, P.A., whose telephone numbers and addresses also appear below.

Phillip A. Kilgore, Esq.
Lucas J. Asper, Esq.
300 North Main Street, Suite 500
Greenville, South Carolina 29601
(864) 271-1300 (telephone)
(864) 235-4754 (facsimile)

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

Attorneys for Defendants The Myrtle Beach Resort Homeowners Association, Inc., Ocean Front Spa Horizontal Property Regime, Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ralph Jump, Ray Coghill, Ken Perkins, John Doe past Board of Directors of Ocean Front Spa Horizontal Property Regime, Inc., and John Doe past Board of Directors for the Myrtle Beach Resort Homeowners Association, Inc.

Henrietta U. Golding, Esq.
Alicia E. Thompson, Esq.
McNair Law Firm, P.A.
Post Office Box 336
Myrtle Beach, SC 29578-0336
(843) 444-1107
(843) 444-4729

Attorneys for Defendant K.A. Diehl

9. PROCEDURE FOR OPTING OUT OF THE SETTLEMENT CLASS OR FOR PRESENTING OBJECTIONS

Any member of the Settlement Class may appear and show cause, if he or she has any, why the Proposed Settlement should not be approved by the Court as fair, reasonable, and adequate, and why any of the Actions should not be dismissed on the merits, with prejudice. Any such member of the Settlement Class may also object to the allowance of the costs, expenses, and fees requested by Plaintiffs' counsel; provided that no such person shall be heard, and no papers or briefs shall be submitted by him or her to the Court, unless, on or before ten (10) days before the fairness hearing, he or she files a notice of intention to appear and a statement of the basis of his or her objections, together with a memorandum of authorities, with the Horry County Clerk of Court Melanie Huggins-Ward, 1301 Second Avenue, Conway, South Carolina 29526 and serves a copy on:

A. Preston Brittain, Esq. Thomas C. Brittain, Esq. The Brittain Law Firm, P.A. 4614 Oleander Drive Myrtle Beach, SC 29577 (843) 449-8562 (telephone) (843) 497-6124 (facsimile) Attorneys for Plaintiffs	Phillip A. Kilgore, Esq. Lucas J. Asper, Esq. 300 North Main Street, Suite 500 Greenville, South Carolina 29601 (864) 271-1300 (telephone) (864) 235-4754 (facsimile) Attorneys for Defendants The Myrtle Beach Resort Homeowners Association, Inc., Ocean Front Spa Horizontal Property Regime, Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ralph Jump, Ray Coghill, Ken Perkins, John Doe past Board of Directors of Ocean Front Spa Horizontal Property Regime, Inc., and John Doe past Board of Directors for the Myrtle Beach Resort

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

	Homeowners Association, Inc. Henrietta U. Golding, Esq. Alicia E. Thompson, Esq. McNair Law Firm, P.A. Post Office Box 336 Myrtle Beach, SC 29578-0336 (843) 444-1107 (telephone) (843) 444-4729 (facsimile) Attorney for Defendant FirstService Residential South Carolina, Inc., formerly known as K.A. Diehl & Associates, Inc.

If you are entitled to be a member of the Settlement Class and want to opt out or exclude yourself from the Actions, you need to sign the attached Request for Exclusion and return it to the above attorneys on or before _____, 2017. If you opt out of the Settlement Class, you will not be able to participate in the Actions related to the Settlement Class, should there be one or more.

10. EXAMINATION OF PLEADINGS AND PAPERS

The references in this Notice to the Settlement Agreement and Release between Plaintiffs and Defendants and other papers are only summaries of those documents. The pleadings in the Actions are on file with the Clerk of Court, at the address stated above, and are available for inspection there. Copies of documents related to the Actions not on file with the Clerk of Court will be available for inspection by any Settlement Class Member and his or her attorney at the offices of Class Counsel during mutually agreeable business hours.

11. OBTAINING ADDITIONAL INFORMATION

You may direct inquiries to Class Counsel at the address listed above. **DO NOT CONTACT THE COURT.**

This Notice provides only a summary of matters regarding the case. You may also seek independent legal counsel as to your rights at your own personal expense.

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

ATTACHMENT

REQUEST FOR EXCLUSION

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00673**
	)	
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00674**
	)	
The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	
	)	

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15th JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00743**
	)	
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00744**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

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Request for Exclusion

I/, _____, hereby declare my decision to be excluded as a Class Member in the following action(s), so indicating by my initials:

_____ *Jim Perkins et al. v. Ocean Front Spa Horizontal Property Regime, Inc., et al.,* Civil Action No.: 2016-CP-26-00673 ("OFS Class Action")

_____ *Jim Perkins et al. v. The Myrtle Beach Resort Homeowners Association, Inc. et al.,* Civil Action No.: 2016-CP-26-00674 ("MBR Class Action")

_____ *Jim Perkins et al. v. K.A. Diehl and Associates, Inc., et al.,* Civil Action No. 2016-CP-26-00743 ("MBR Derivative Action")

_____ *Jim Perkins et al. v. Ocean Front Spa Horizontal Property Regime, Inc. et al.,* Civil Action No.: 2016-CP-26-00744 ("OFS Derivative Action")

_____
Full Name

_____ _____
Signature Date

Mailing Address: _____

Phone number(s): _____

Street Address (if different from above):
_____

30343714.1

CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

EXHIBIT E

ORDER OF PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

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STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00673**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.	)	
	)	
Defendants.	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00674**
	)	
The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	
	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15th JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00743**
	)	
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00744**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

ORDER OF PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

THIS MATTER IS BEFORE THE COURT upon the Motion of the Defendants in each of the above-captioned cases (C.A. Nos. 2016-CP-26-00673, 2016-CP-26-00674, 2016-CP-26-00743, and 2016-CP-26-00744) (collectively, the "Actions"). Defendants move for approval of the Settlement of the Actions.

The Court has reviewed the Settlement Agreement (**Exhibit A** to Defendants' Motion) and Settlement Notice (**Exhibit D** to Defendants' Motion) (collectively "Settlement

Documents"), has held a hearing on the Motion, and is familiar with the facts, legal issues and procedural history of the Actions.

The Court finds that the Settlement is the result of extensive negotiations following a lengthy period of contested litigation between the Parties. The Court further finds that the Settlement Agreement represents a fair and reasonable resolution of *bona fide* disputes between Plaintiffs and Defendants in the Actions. The Court further finds that the Settlement Agreement represents a fair and reasonable resolution of a *bona fide* dispute between persons on whose behalf the Actions have been brought ("absent class members") on the one hand, and Defendants on the other but that, as to such absent class members, the releases in the Settlement Agreement should be limited to "any and all claims which were actually asserted or might have been asserted by Plaintiffs in the Settled Actions." Based on these findings, and for good cause shown,

IT IS ORDERED that, pursuant to Rules 41(a)(1)(B) and Rule 23(c) of the South Carolina Rules of Civil Procedure, the Settlement Documents are hereby **APPROVED,** this ____ of _____, 2017.

_____

The Honorable _____

ELECTRONICALLY FILED - 2017 Jul 03 9:50 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00673**
	)	
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Defendants.	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00674**
	)	
The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	
	)	

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15th JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00743**
	)	
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00744**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

I. Introduction

Defendants in each of the above-captioned cases (C.A. Nos. 2016-CP-26-00673, 2016-CP-26-00674, 2016-CP-26-00743, and 2016-CP-26-00744) (collectively, the "Actions"), by and through their undersigned counsel and pursuant to Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), file this Consolidated Motion for Preliminary Approval of Settlement

Agreement regarding the Actions ("Motion to Approve"). For the reasons set forth herein, Defendants request that the Court issue an Order granting this Motion.

II. Mediation and Negotiation History

After extensive arms-length negotiations by parties and their counsel through mediation, all Plaintiffs and Defendants (collectively, the "Parties") in the Actions have reached a settlement that resolves all claims in dispute. The Parties' agreement is reflected in the Settlement Agreement. **(Exhibit A.)**

Representative members of the Plaintiff classes who serve on the Board of Directors for Defendant Ocean Front Spa Horizontal Property Regime, Inc. ("OFS") subsequently ratified the settlement and affirmed their understanding that the Actions have been resolved fully and finally through Mediation. These Plaintiffs (Nancy Moore, Steven Dame and Jim Perkins), joined by the two other OFS Board Members, did so by providing official written notification on May 4, 2017, to over a hundred seventy of the putative class members (their constituents, who are fellow members of the OFS community) that they had been able to successfully "resolve [the] five lawsuits." (Affidavit of Walter Jordan (Exhibit A), **Exhibit B.**) In addition, shortly after the mediation, these Plaintiffs posted notices in the OFS building informing all residents that "The recent state court litigation between various homeowners in the Ocean Front Spa and its management company and others has been resolved between the parties to their mutual satisfaction via alternative dispute resolution that occurred on May 1." **(Affidavit of Walter Jordan (Exhibits B and C) Exhibit B.)**

III. Plaintiffs Richardson and Santos Attempt to Renege

Notwithstanding the class representatives' ratification of the settlement and the fact that every representative class member signed the Settlement Agreement (either personally or

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

through counsel, with express permission), Plaintiffs' counsel has indicated that two Plaintiffs, Jeff Richardson ("Richardson") and Mark dos Santos ("Santos"), believe they are not bound by the Settlement Agreement. They take this position despite the fact that they both fully participated in the mediation negotiations that resulted in the Settlement Agreement.

It is anticipated that Plaintiffs Richardson and Santos will rely upon the fact that they were not physically present for the May 1, 2017, mediation as their basis to renege on the Settlement Agreement.[1] The mediation was set far in advance. Nevertheless, Plaintiff Richardson's attorney informed counsel for all the Parties on April 26, 2017, that Plaintiff Richardson would be unable to attend the mediation. On April 28, 2017, counsel for "Board Defendants"[2] asked, "Will you have settlement authority from Mr. Richardson?" to which counsel for Plaintiff Richardson responded, "I will. We are good to go." (**Exhibit C.**) On the day of the mediation, on information, Plaintiff Richardson participated in the mediation, having extensive discussions with his counsel throughout the day.

In the case of Santos, the Defendants had no forewarning that he would not be present. On the morning of May 1, 2017, counsel for Santos announced that he was not present. They assured the Defendants and their counsel that the case could be mediated in his absence. Santos actually participated in the mediation by phone, at one point offering his own rebuttal to remarks made by counsel for one of the Defendants.

In any event, the Settlement Agreement is signed by all Parties, either individually or, in the case of Plaintiffs Richardson and Santos, by their attorney to whom they had given authority.

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[1] It is unknown whether the other Plaintiffs intend to renege on the Settlement Agreement and, if so, on what basis. Due to the refusal of Plaintiffs Richardson and Santos to follow through with the Settlement Agreement, counsel for all Plaintiffs has stated he will have to oppose any motion to enforce.

[2] The Myrtle Beach Resort Homeowners Association, Inc., Ocean Front Spa Horizontal Property Regime, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, Ralph Jump, and Ray Coghill.

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

All Parties invested substantial time and resources in conducting discovery to understand the cases, the issues, the risks and rewards. The Parties devoted more time preparing for the mediation. In the course of the lengthy mediation, the Parties expended substantial time and energy in exploring and, ultimately, reaching a negotiated settlement with the assistance of one of the preeminent and most well-respected mediators in our state. Notwithstanding their concurrence with a fully integrated Settlement Agreement, none of the Plaintiffs join in a Motion for Preliminary Approval. Accordingly, Defendants file this Motion jointly but without the consent of Plaintiffs.

IV. **Litigation Background**

Two separate class action lawsuits have been filed against certain Defendants in this Court: *Jim Perkins, et al. v. Ocean Front Spa Horizontal Property Regime, Inc.*, et al, C.A. No. 2016-CP-26-00673 ("OFS Class Action"); *Jim Perkins, et al. v. Myrtle Beach Resort Homeowners Association, Inc.*, C.A. No. 2016-CP-26-00674 ("MBR Class Action") (collectively, the "Class Actions"). Two separate derivative actions were filed against certain Defendants in this court; *Jim Perkins, et al. v. K.A. Diehl and Associates, Inc., et al.*, C.A. No. 2016-CP-26-00743 ("MBR Derivative Action"); and, *Jim Perkins, et al. v. Ocean Front Spa Horizontal Property Regime, Inc.*, C.A. No. 2016-CP-00744 ("OFS Derivative Action") (collectively, the "Derivative Actions").

In the OFS Class Action, Plaintiffs sought to certify a class consisting of "any and all persons and or entities owning a unit within the OFS HOA and thereby owning an undivided interest in the common elements, and business activity of the OFSHOA." ("OFS Class") OFS Class Action Amended Complaint ¶49. On behalf of the purported OFS Class, Plaintiffs allege in the OFS Class Action Amended Complaint that Defendants OFS, Bill Cameron, Walter

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past directors of OFS, breached their fiduciary duty to Plaintiffs and violated the standards set forth in the South Carolina Non-Profit Corporation Act, S.C. Code Ann. 33-31-830.

In the MBR Class Action, Plaintiffs sought to certify a class consisting of "any and all persons and or entities owning a unit within the MBRHOA and thereby owning an undivided interest in the common elements, and business activity of the MBRHOA." ("MBR Class") MBR Class Action Amended Complaint ¶49. On behalf of the purported MBR Class, Plaintiffs allege in the Amended MBR Class Action Complaint that Defendants The Myrtle Beach Resort Homeowners Association, Inc. ("MBR"), Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of MBR breached their fiduciary duty to Plaintiffs, acted negligently, and breached a covenant contained in the master deed and bylaws.

In the MBR Derivative Action, Plaintiffs have brought suit on behalf of a class of persons who own a unit in Myrtle Beach Resort, purportedly on behalf of nominal Defendant MBR, alleging that Defendants MBR and members of its Board of Directors (Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe Board Directors of MBR) breached their fiduciary duty to Plaintiffs, that Defendant FirstService Residential South Carolina, Inc., formerly known as K.A. Diehl & Associates, Inc. and incorrectly identified as K.A. Diehl and Associates, Inc. in the Derivative Actions ("K.A. Diehl"), acted negligently, that K.A. Diehl breached multiple contracts, and that K.A. Diehl breached multiple contracts accompanied with a fraudulent act.

In the OFS Derivative Action, Plaintiffs have brought suit on behalf of a class of persons who own a unit in Oceanfront Spa Horizontal Property Regime, purportedly on behalf of

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

nominal Defendant OFS, alleging that Defendants, OFS, members of the OFS Board of Directors (Walter Jordan, Ralph Jump, Ray Coghill, and John Doe Past Board Directors for OFS), MBR, and members of the MBR Board of Directors (Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, and John Doe Past Board Directors of MBR), breached their fiduciary duty to Plaintiffs, that K.A. Diehl breached multiple contracts, that K.A. Diehl breached multiple contracts accompanied with a fraudulent act, and that K.A. Diehl acted negligently.

Each of the Actions include allegations regarding issues related to the management of MBR and OFS, oversight of management, and other actions of the Boards of Directors of OFS and/or MBR, including the approval, implementation, and collection of a "gate pass fee," and an increase in the "gate pass fee."

Defendants do not admit any liability to Plaintiffs, or to anyone else because of, or growing out of, matters set forth in the Actions. Defendants deny all of the materials allegations asserted by Plaintiffs in each of the Actions. For purposes of this Motion alone, Defendants do not object to the definition of the purported MBR Class or the OFS Class (collectively, "Classes") in the Class Actions, do not object to Plaintiffs' purported representation of classes of owners in the Derivative Actions and do not object to Plaintiffs' prior actions therein on behalf of all the purported Class members in the Actions.

V. Settlement

The Parties, through their counsel, have engaged in lengthy and vigorous settlement negotiations. Specifically, on May 1, 2017, the Parties participated in a thorough mediation in which the Parties examined all issues raised in the Actions and the benefits and risks associated with litigation. At all times, the Parties' negotiations were adversarial, non-collusive, and at arms' length, reflecting the contentious and adversarial nature of the Actions. Ultimately, each

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

of the Parties recognized that further conduct of these Actions would likely be protracted and expensive, and that no Party has an assurance of a successful outcome. The Parties therefore concluded that it is desirable that the Actions be settled in the manner and upon the terms and conditions set forth in the Settlement Agreement. (*See* **Exhibit A**).

A. Release

Named Plaintiffs have agreed to release and forever discharge "Released Parties" from all "Claims," all as defined in the Settlement Agreement. (*See* **Exhibit A** at ¶¶ 4, 6). The release provisions of the Settlement Agreement agreed to by the Named Plaintiffs are as follows:

> In exchange for and in consideration of the promises set forth in this Agreement, and except for the rights to enforce the provisions of this Agreement, Plaintiffs, their heirs, executors, administrators, legal and personal representatives, successors and assigns, hereby covenant not to sue and fully release and forever discharge Defendants and their respective present and former parents, heirs, assigns, subsidiaries, affiliates, and related entities or corporations, and any of their past and present officers, directors, shareholders, employers, past and present employees, agents, partners, attorneys, heirs, successors, insurers and assigns (the "Released Parties"), from any and all claims, demands, actions, charges, complaints, suits, administrative proceedings, debts, promises, contracts, grievances, and causes of action (hereinafter collectively referred to as "Claims"), in law or in equity, whether known or unknown, which Plaintiffs and their heirs, executors, administrators, agents, distributees, beneficiaries, successors in interest and assignees may have by reason of any matter, cause or thing whatsoever from the beginning of the world to only the day of the date of Plaintiffs' execution of this Agreement, including, but not limited to, any and all claims which were actually asserted or might have been asserted by Plaintiffs in the Settled Actions. Plaintiffs agree never to file a lawsuit against Defendants based on any reason contained in this Agreement. The Release does not purport to release any claims that the law does not permit to be released.

Defendants are Released Parties within the meaning of the Settlement Agreement. (Id.)

These terms apply to the Plaintiffs in the Actions. If the Court approves the Settlement Agreement, the scope of the release as to absent class members would apply to only the claims which were actually asserted or might have been asserted on behalf of absent class members in the Actions.

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

B. Consideration for Release

In exchange for and in consideration of the promises set forth in the Settlement Agreement, Defendants promised to pay funds as follows:

1. Defendants will pay to Plaintiffs and Plaintiffs' attorney the sum of $15,000.00 to fund a binding arbitration of a declaratory judgment action to adjudicate whether the gate pass fee is proper.
2. Defendants will pay to The Board of Directors for the Myrtle Beach Resort Horizontal Property Regime and the Board of Directors for the Myrtle Beach Resort Five Seasons Centre Horizontal Property Regime the sum of $15,000.00 to fund the defense of a binding arbitration of a declaratory judgment action to adjudicate whether the gate pass fee is proper.
3. Defendants will pay to Plaintiffs' attorney the sum of $5,000.00 to be held in trust by his law firm to pay an arbitrator to resolve the arbitration set forth above.

(*See* **Exhibit A** at ¶ 1).

C. Attorneys' Fees

As part of the Settlement Agreement, Defendants also agreed to pay Plaintiffs' counsel attorneys' fees equal to $50,000.00, such amount not being subject to income or employment tax withholding, but to be reported on a Form 1099. (*See* **Exhibit A** at ¶ 1(d)). Defendants seek Court approval of this amount in addition to the Consideration for Release described above.

IV. Settlement Notice

Defendants have prepared a proposed Settlement Notice (**Exhibit D.**) Although Plaintiffs' counsel does not join this Motion, Plaintiffs' counsel has not indicated an objection to the terms of the Notice.

The Settlement Notice explains: (1) the terms of the Settlement Agreement; (2) how purported class members can opt-out or exclude themselves from the purported class; and (3) how to submit objections to the terms of the Settlement Agreement. The Defendants propose that the Settlement Notice be sent via email to members of the purported Classes, placed in a MBR and an OFS newsletter, discussed at special MBR and OFS Board meetings and subsequently included in the Board minutes, and posted on the MBR and OFS websites. These are the most practicable means of providing notice under the circumstances and comport with due process.

Significantly, Plaintiffs have already begun providing notice of the settlement to purported class members. On May 4, 2017, representative members of the Plaintiff classes who serve on the OFS Board of Directors provided written notice to their constituents (fellow OFS residents), in which the OFS Board Member Plaintiffs ratified the settlement and affirmed their understanding that the Actions have been resolved fully and finally through Mediation. (**Exhibit B.**) Plaintiffs provided this notice by (1) emailing a copy to what appears to most if not all OFS homeowners, and (2) posting the notice on all bulletin boards in the OFS building.

V. Argument

A. Defendants Ask the Court to Approve the Settlement Agreement

This Motion seeks preliminary approval of the Settlement Agreement, which would settle the four Actions which were filed pursuant to Rule 23 of the SCRCP. Pursuant to Rules 23(c) and 23 (b)(1) of the SCRCP, class and derivative actions may be settled only with court approval. In considering whether to approve a class action settlement, the South Carolina courts look to federal decisions interpreting Rule 23 of the Federal Rules of Civil Procedure, upon

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

which South Carolina's version of Rule 23 is patterned. *See Salmonsen v. CGD, Inc.*, 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008).

The decision to grant approval of a class action settlement involves the Court's consideration of several factors, including: (1) the amount offered in settlement; (2) the risks inherent in continued litigation; (3) the extent of discovery completed and the stage of the proceeding when the settlement was reached; (4) the risk, complexity, expense, and likely duration of the litigation absent settlement; (5) the experience and views of class counsel; and (6) the response of class members to the Settlement. *Brunson v. Louisiana-Pac. Corp.*, 818 F. Supp. 2d 922, 926 (D.S.C. 2011). Under these factors, preliminary approval is warranted.

There is no dispute as to the complexity of the Actions, the inherent risks of continued litigation of the Actions, and the expense the Parties would incur in event the litigation continued. A mere review of the Complaints in each Action will confirm these factors. Moreover, the Actions have been pending for over one year and, during litigation, the Parties have conducted substantial discovery and engaged in extensive motion practice. After adequate discovery, the Parties prepared for and engaged in a lengthy mediation in which all issues were thoroughly examined through experienced counsel and a capable mediator.

As evidenced by the Settlement Agreement, the Parties have concluded as follows: (1) further litigation would likely be protracted and expensive, and no party has assurance of a successful outcome; (2) it is in their mutual best interest to settle their disputes at this time; (3) the core remaining issue in the case is whether the gate pass fee currently charged by MBR is authorized under the governing MBR documents and applicable law; (4) a declaratory proceeding in binding arbitration is the most cost-effective and appropriate manner of bringing final resolution to the remaining issues raised in the Actions; (5) this objective can be reached by

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

certain Defendants' agreement to provide funding for the binding arbitration; and (6) the amount of the funding provided in the Settlement Agreement is adequate for purposes of the prosecution and defense of the arbitration.

Counsel representing the Parties have substantial familiarity with subject matters of the Actions and have experience in litigating such matters. The Parties' attorneys have actively negotiated the terms of the settlement on behalf of all known individuals and entities involved based on their extensive experience in this area, considering all of the risks inherent with litigation. At all times, the Parties' attorneys have represented their clients' best interests in reaching the settlement. The terms of the Settlement Agreement provide an appropriate and fair means of resolving the disputes in the Actions. *See id.* ("[A] presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.") (*quoting* Newberg & Conte, Newberg on Class Actions (3d ed. 1992) § 11.41.).

This motion has not been filed as a consent motion because of objections Plaintiffs Richardson and Santos have raised to the Settlement Agreement. Their objections are that they were not physically present at the mediation and did not actually sign the Settlement Agreement. The other Plaintiffs do not have these objections. Moreover, at least three of the Plaintiffs have subsequently ratified the Settlement Agreement. **(Exhibit B.)**

In any event, the objections of Plaintiffs Richardson and Santos are not proper. As indicated above, the Settlement Agreement was signed by their counsel with specific authority. It is not believed that they will now contend that their counsel did not have this authority.

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

The South Carolina "Court-Annexed Alternative Dispute Resolution Rules" promulgated by the South Carolina Supreme Court ("ADR Rules") require that the "following persons shall physically attend a mediation settlement conference unless otherwise agreed to by the mediator and all parties ...: ... All individual parties." ADR Rule 6 (b). "If any person ... subject to the ADR Rules violates any provision of the ADR Rules without good cause, the court may ... impose upon that party any lawful sanctions." ADR Rule 10 (b).

Prior to the mediation, Plaintiffs Richardson and Santos essentially requested to be relieved of their obligation to attend the mediation. As a courtesy, the mediator and counsel for the Defendants agreed to this arrangement upon assurance that Plaintiffs Richardson and Santos had given settlement authority to their counsel. Plaintiffs Richardson and Santos participated in the mediation remotely. Counsel for these Plaintiffs, with their authority and in a capacity as agent, signed the Settlement Agreement on their behalf. The ADR Rules do not contemplate that a party, physically absent by agreement, can be relieved from the effects of a settlement the party entered at mediation under these circumstances.

B. <u>Defendants Ask the Court to Approve the Proposed Settlement Notice</u>

Rule 23(d)(2), SCRCP, provides that the "court may at any time impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended," such as "notice . . . of a proposed settlement . . . including notice to the absent persons that they may come in and present claims and defenses if they so desire." In the case of a class action, it is generally accepted that Rule 23(d)(2), SCRCP, requires notice of the settlement to the purported class. The notice should inform purported class members of the nature of the litigation, the general terms of the settlement, the right of any purported class member to appear and be heard at the fairness hearing, and an opportunity to opt-out.

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

Here, the Settlement Notice (**Exhibit D**) meets all of these requirements. It identifies the Parties and describes the Actions in a straightforward matter; succinctly describes the essential terms of the Settlement Agreement; provides purported class members with information on how object to the terms of the Settlement Agreement or opt-out; and informs purported class member that if they do not opt out, they will be bound by the resulting judgment. In sum, the Settlement Notice provides the information necessary for purported class members and shareholders/members of MBR and OFS to make an informed decision regarding the Settlement Agreement.

Furthermore, sending the Settlement Notice via email to members of the purported Classes and to shareholders/members of MBR and OFS, placing the Settlement Notice in a MBR and an OFS newsletter, discussing the Settlement Notice at special MBR and OFS Board meetings and subsequently including the discussion in the board minutes, and posting the Settlement Notice on the MBR and the OFS websites are the most practicable means of providing notice under the circumstances and comports with due process. The Parties have access to each of these means of publication and ask this Court to find the proposed means of notice to Plaintiffs reasonable under the circumstances of the Actions. *See Salmonsen*, 377 S.C. at 458, 661 S.E.2d at 90 (Rule 23(d) provides a court discretion in determining how parties are notified of a proposed class settlement).

VI. Conclusion

For the reasons presented in this Motion, Defendants respectfully request that the Court enter an Order (1) preliminarily approving the attached Settlement Agreement; (2) approving the form and manner of the Settlement Notice; and (3) scheduling a Fairness Hearing to grant final

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

approval of the Parties' Settlement Agreement. A proposed order is attached hereto for the Court's consideration. **(Exhibit E)**

VII. Affirmation

The undersigned affirms that prior to filing the motion, they communicated, orally and in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion.

Respectfully submitted this 30th day of June, 2017.

	s/Phillip A. Kilgore Phillip A. Kilgore (S.C. Bar No. 3449) Lucas J. Asper (S.C. Bar No. 77902) 300 North Main Street, Suite 500 Greenville, South Carolina 29601 864.271.1300 (telephone) 864.235.4754 (facsimile) phillip.kilgore@ogletreedeakins.com lucas.asper@ogletreedeakins.com Attorneys for Defendants The Myrtle Beach Resort Homeowners Association, Inc., Ocean Front Spa Horizontal Property Regime, Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ralph Jump, Ray Coghill and Ken Perkins. Henrietta U. Golding, Esq. Henrietta U. Golding, Esq. Alicia E. Thompson, Esq. McNair Law Firm, P.A. Post Office Box 336 Myrtle Beach, SC 29578-0336 (843) 444-1107 (telephone) (843) 444-4729 (facsimile) Attorneys for Defendant FirstService Residential South Carolina, Inc., formerly known as K.A. Diehl & Associates, Inc.

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

EXHIBIT A

SETTLEMENT AGREEMENT

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

Settlement Agreement
Civil Action Nos.: 2016-CP-26-00673, -00674, -00743, -00744

The following is a Settlement Agreement ("Agreement") between Plaintiffs Jim Perkins, Colleen Franke a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dames, Errol Dos Santos, and Jeffrey Richardson ("Plaintiffs'") on the one hand and Defendants The Myrtle Beach Resort Homeowners Association, Inc., ("MBRHOA"), Ocean Front Spa Horizontal Property Regime, Inc. ("OFS"), Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Ken Perkins, Ray Coghill, Ralph Jump, and Wayne Urban ("Defendants") on the other (Plaintiffs and Defendants hereafter referred to as the "Parties") to settle Civil Action Nos.: 2016-CP-26-00673, -00674, -00743, -00744, currently pending on the South Carolina Circuit Court in Horry County ("Settled Actions").

1. For good and valuable consideration, upon full execution and effectuation of this Agreement, in full satisfaction of the Settled Actions, and any other claims or charges Plaintiffs have, claim to have, or may have, against Defendants, including, without limitation, any claim for attorneys' fees or costs, Defendants agree to pay the gross amount of $85,000.00 (the "Payment") in full satisfaction of any claims, charges or actions Plaintiffs have against Defendants.

a) Defendants will, thirty (30) business days hereafter, pay to Plaintiffs and Plaintiffs' attorney the total sum of Fifteen Thousand Dollars ($15,000.00) for the purposes of funding a binding arbitration of a declaratory judgment action to adjudicate whether the gate pass fee currently charged by MBRHOA is authorized under the governing MBRHOA documents and applicable law.
b) Defendants will, thirty (30) business days hereafter, pay to The Board of Directors for the Myrtle Beach Resort Horizontal Property Regime ("A Building Board") and the Board of Directors for the Myrtle Beach Resort Five Seasons Centre Horizontal Property Regime, ("Five Seasons Board") the total sum of Fifteen Thousand Dollars ($15,000.00) for the purposes of defending a binding arbitration of a declaratory judgment action filed by Plaintiffs for the purpose of adjudicating whether the gate pass fee currently charged is authorized under the governing MBRHOA documents and applicable law.
c) Arbitrator. Defendants will pay to Plaintiff's counsel the sum of $5,000.00 to be held in trust by his law firm to pay to an arbitrator to resolve the arbitration set forth in the previous two paragraphs. In the event this amount does not fund the arbitration in full, the balance, if any, shall be paid by the attorneys receiving the sums set out in the two previous paragraphs.
d) Defendants will, thirty (30) business days hereafter, pay "Brittain Law Firm" in the amount of Fifty Thousand Dollars and No Cents ($50,000.00), as payment for attorneys' fees and costs, such amount not being subject to income or employment tax withholding, but to be reported on a Form 1099

2. The Parties hereto recognize that the Defendants do not admit any liability to Plaintiffs, or to anyone else because of, or growing out of, matters set forth in Plaintiffs' Amended Complaints in the Settled Actions. The Parties have agreed to settle any and all claims

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

Plaintiffs have asserted or may have asserted against Defendants in order to avoid further cost and inconvenience in moving forward with a trial.

3. MBRHOA and OFS will use their best efforts to have their respective By-Laws amended to require at least three bids to be received prior to the awarding of any contract which will exceed $10,000.00 in value.

4. In exchange for and in consideration of the promises set forth in this Agreement, and except for the rights to enforce the provisions of this Agreement, Plaintiffs, their heirs, executors, administrators, legal and personal representatives, successors and assigns, hereby covenant not to sue and fully release and forever discharge Defendants and their respective present and former parents, heirs, assigns, subsidiaries, affiliates, and related entities or corporations, and any of their past and present officers, directors, shareholders, employers, past and present employees, agents, partners, attorneys, heirs, successors, insurers and assigns (the "Released Parties"), from any and all claims, demands, actions, charges, complaints, suits, administrative proceedings, debts, promises, contracts, grievances, and causes of action (hereinafter collectively referred to as "Claims"), in law or in equity, whether known or unknown, which Plaintiffs and their heirs, executors, administrators, agents, distributees, beneficiaries, successors in interest and assignees may have by reason of any matter, cause or thing whatsoever from the beginning of the world to only the day of the date of Plaintiffs' execution of this Agreement, including, but not limited to, any and all claims which were actually asserted or might have been asserted by Plaintiffs in the Settled Actions. Plaintiffs agree never to file a lawsuit against Defendants based on any reason contained in this Agreement. The Release does not purport to release any claims that the law does not permit to be released.

5. Within 15 days of receipt of the Payment, Plaintiffs' counsel shall file **a stipulation of dismissal with prejudice** in each of the Settled Actions.

6. Plaintiffs further acknowledge and agree that this Agreement extends to all claims of every kind and nature whatsoever, known or unknown, suspected or unsuspected, and Plaintiffs acknowledges they may hereafter discover facts in addition to or different from those which they know or believe to be true with respect to the subject matter of this Agreement, but it is their intention to hereby fully and finally settle and release all such matters as well and, in furtherance of that intention, the foregoing Release shall remain in effect as a full and complete release notwithstanding the discovery or existence of such additional or different facts.

7. Plaintiffs agree that they will not make any statements, oral or written, which they know or reasonably should know to be a disparaging or negative comment about Defendants or their officers, directors, employees and agents, or otherwise detrimental to the reputation or goodwill of Defendants, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required by law. Defendants agree that they will not make any statements, oral or written, which they know or reasonably should know to be a disparaging or negative comment about Plaintiffs or their officers, directors, employees and agents, or otherwise detrimental to the reputation or goodwill of Plaintiffs, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required by law.

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8. It is understood and agreed that Defendants expressly rely upon the promises, representations, and warranties made by Plaintiffs in this Agreement; that any breach of such promises, representations, and warranties would constitute a material breach of this Agreement; and that in the event of any such breach, Defendants shall be entitled to any and all of the following relief: (a) the immediate repayment to Defendants of the full Settlement Amount hereunder (b) the indemnification and hold harmless protection set forth above; (c) specific enforcement of all promises and undertakings made by Plaintiffs hereunder; and (d) all other relief and damages available at law or in equity.

Agreed to this 1st Day of May, 2017.

Plaintiffs

Jim Perkins

Colleen Franke

Colleen Franke a/k/a Colleen Franke Perkins

Mark Dos Santos

By his Attorney

Nancy Moore

Nancy Moore

William Moore

William Moore

Steven Dame

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

Errol Dos Santos

Jeffrey Richardson

By his Attorney

Defendants

The Myrtle Beach Resort Homeowners Association, Inc., ("MBRHOA")

By its Attorney

Ocean Front Spa Horizontal Property Regime, Inc. ("OFS"),

By its Attorney

Phil Cox

Bill Cameron

By his Attorney

Stanley Jordan

By his Attorney

Walter Jordan

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

Ken Perkins

Ray Coghill

By his Attorney

Ralph Jump

Wayne Urban

29682229.1

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CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

EXHIBIT B

AFFIDAVIT OF WALTER JORDAN

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00673**
	)	
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00674**
	)	
The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	
	)	

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15th JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00743**
	)	
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00744**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)	
	)	
Defendants.	)	

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AFFIDAVIT OF WALTER JORDAN

COMES NOW, Walter Jordan, who, after being duly sworn, deposes and says:

1. My name is Walter Jordan. I am an adult, of sound mind, competent to testify to all matters in this Affidavit.

2. The information in this Affidavit is based on my personal knowledge and is true and accurate to the best of my knowledge and belief.

3. I live at 2311 Garrison Pl Road, Midlothian, VA 23112. I own units B216 and B219 at Ocean Front Spa ("OFS") at the Myrtle Beach Resort and reside there part of the year.

4. My email address is wjordan48@comcast.net.

5. On or about May 4, 2017, I received an email from email address MBRJimPerkins@aol.com. I am attaching a copy of the email to this affidavit as Exhibit A. The approximately 165 email addresses of the recipients of this email have been redacted for privacy reasons, but the original of the email will be made available to the court if needed.

6. I am attaching to this affidavit as Exhibit B a photograph I took of a notice posted on one of the bulletin boards in the OFS Building at the Myrtle Beach Resort. Identical notices were posted on all the bulletin boards in the OFS Building.

7. I personally observed the notices on all the bulletin boards beginning May 31, 2017, and the notice reflected in Exhibit B remained in place until June 20 or 21, 2017.

8. I believe these notices were first posted on or about May 5, 2017. The reason I believe this is because I received a text message from another OFS owner on that date with the attached photograph of a notice. Exhibit C. This notice is identical to the other notices I personally observed.

FURTHER AFFIANT SAYETH NOT.

[SIGNATURE PAGE FOLLOWS]

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I swear under oath that the foregoing Affidavit is true to the best of my knowledge and belief.

Walter Jordan 6-30-17
Walter Jordan Date

SWORN TO and subscribed before me
This 30th day of June, 2017.

Lori Beth Williams
Notary Public for Virginia
My Commission Expires: 10/31/18

LORI BETH WILLIAMS
NOTARY PUBLIC
REG # 7588036
MY COMMISSION EXPIRES 10/31/2018
COMMONWEALTH OF VIRGINIA

30245035.1

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EXHIBIT A
TO
AFFIDAVIT OF WALTER JORDAN

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

From: MBRJimPerkins@aol.com
Sent: Thursday, May 04, 2017 1:13 PM
To: REDACTED

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To: REDACTED

Subject: RE: OFS (B-Building) Update

Myrtle Beach Resort Ocean Front Spa HPR

B Building Homeowners

May 4, 2017

Dear Homeowners:

Your Board Members desire transparency. As our term progresses, we believe that you will see a commitment to transparency. We also, like most, if not all of you, desired to put an end to much of the litigation. As you are aware, we resolved five lawsuits. Unfortunately, as a part of the resolution of the lawsuits, all parties agreed to keep certain terms quiet.

However, in keeping with the desire to be transparent, we are sharing with you that which we are permitted to. I am hopeful that this will address any concerns about the past, but more importantly clarify our path forward.

As a result of the settlement, FSR and the OFS Board have mutually decided to part ways. Of course, we were concerned about the welfare of the employees, and it is my understanding that FSR has graciously placed the 5 employees that served the OFS at other communities.

As a result of FSR and OFS parting ways, acquiring the services of a maintenance company was imperative. Fortunately, we were able to acquire three bids for the provision of maintenance, and your Board Members have hired Four Of A Kind maintenance company. They are already on site and are caring for the needs of our building.

The Board is considering an interim property management company to finish out the 2017 year. As with any transition, there will be some bumps. We ask that you be patient with us as we do our duty to get the interim management company in place for the remainder of this year. At the end of the year, we will be sending out RFP's for a property management company for a reasonable duration.

Thank you for your time and patience. Our goal is to make our Regime better in the future. If you have any questions, please contact us and we shall do our best to address your concerns.

On Behalf of Your Board of Directors,

Nancy Moore, President

Stanley Jordan, Vice President

Tracey Dorsey, Treasurer

Steve Dame, Secretary

Jim Perkins, Member at Large (MBR HOA Representative)

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

EXHIBIT B
TO
AFFIDAVIT OF WALTER JORDAN

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

LAWSUIT UPDATE

The recent state court litigation between various homeowners in the Ocean Front Spa and its management company and others has been resolved between the parties to their mutual satisfaction via alternative dispute resolution that occurred on May 1. In the days and weeks ahead, the OFS Board will be announcing various changes involving, among other things, the management and maintenance of the building. Ocean Front Spa is a wonderful place to live for its residents and to visit for its guests. It's the ambition of the OFS Board to help make this wonderful community that much better as we go forward together into the future.

Negotiated by:

Nancy Moore, President

Steve Dame, Secretary

Jim Perkins, MBRHOA Representative

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

EXHIBIT C
TO
AFFIDAVIT OF WALTER JORDAN

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

LAWSUIT UPDATE

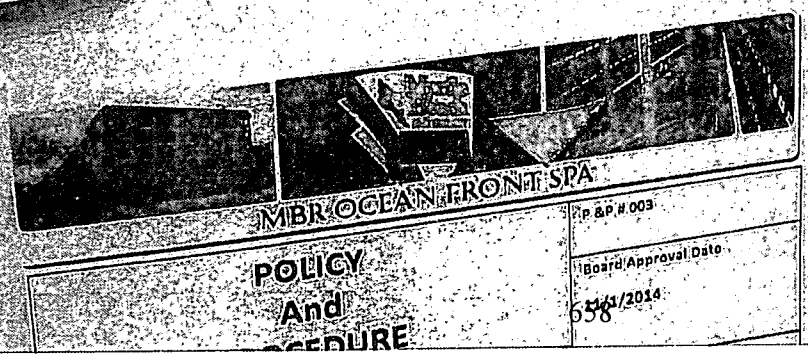
The recent state court litigation between various homeowners in the Ocean Front Spa and its management company and others has been resolved between the parties to their mutual satisfaction via alternative dispute resolution that occurred on May 1. In the days and weeks ahead, the OFS Board will be announcing various changes involving, among other things, the management and maintenance of the building. Ocean Front Spa is a wonderful place to live for its residents and to visit for its guests. It's the ambition of the OFS Board to help make this wonderful community that much better as we go forward together into the future.

Negotiated by:

Nancy Moore, President

Steve Dame, Secretary

Jim Perkins, MBRHOA Representative



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CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

EXHIBIT C

APRIL 28, 2017 EMAIL EXCHANGE

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

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From: Preston Brittain <preston@brittainlawfirm.com>
Sent: Friday, April 28, 2017 9:58 PM
To: Kilgore, Phillip
Cc: Golding, Henrietta; Buffington, Bobby; Christian Stegmaier; Natalia V. Ertseva-Thomas; Tommy Brittain; msmith@thompsonlaw.com; TTurman@thompsonlaw.com; cnickels@clawsonandstaubes.com; Stephanie L. Mascella; Thompson, Alicia; Coggins, Robert E.; Asper, Lucas J.
Subject: Re: Civil Action No. 2015-CP-26-5573/Claim No. PHCO15080916718/C&L File No. 001832-00104 Diehl v. James Perkins, et al. (1832-104)

I will. We are good to go.

Sent from my iPhone

On Apr 28, 2017, at 2:27 PM, Kilgore, Phillip <Phillip.Kilgore@ogletree.com> wrote:

> Preston
>
> I will have settlement authority from all of my clients. Will you have settlement authority from Mr. Richardson?
>
> **Phillip A. Kilgore | Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**
> P.O. Box 2757 | Greenville, SC 29602 | Telephone: 864-271-1300 x240 | Fax: 864-235-4754 | Mobile: 864-982-2727
> phillip.kilgore@ogletreedeakins.com | www.ogletreedeakins.com

CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

EXHIBIT D

NOTICE OF PROPOSED SETTLEMENT

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00673**
	)	
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Defendants.	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00674**
	)	
The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	
	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15th JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00743**
	)	
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00744**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

NOTICE OF PROPOSED SETTLEMENT

This Notice May Affect Your Rights
Please read carefully!

TO:

ALL PERSONS WHO ARE OWNERS OF REAL PROPERTY LOCATED IN MYRTLE BEACH RESORT IN THE STATE OF SOUTH CAROLINA, COUNTY OF HORRY

1. WHY SHOULD I READ THIS NOTICE?

Several lawsuits which may affect your rights are pending in the South Carolina Court of Common Pleas, Fifteenth Judicial Circuit, County of Horry:

(1) *Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated v. Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.,* Civil Action No.: 2016-CP-26-00673 **("OFS Class Action");**

(2) *Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated v. The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,* Civil Action No.: 2016-CP-26-00674 **("MBR Class Action") (the "OFS Class Action" and the "MBR Class Action" are collectively referred to as the "Class Actions");**

(3) *Jim Perkins, Colleen Franke a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dames, Errol Dos Santos, and Jeffrey Richardson individually in their capacity as derivative shareholders v. K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,* Civil Action No. 2016-CP-26-00743 **("MBR Derivative Action")**; and

(4) *Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc., v. Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.* Civil Action No.: 2016-CP-26-00744 **("OFS Derivative Action") (the "MBR Derivative Action" and the "OFS Derivative Action" are collectively referred to as the "Derivative Actions")**

(The Class Actions and the Derivative Actions are collectively referred to as the "Actions.")

A proposed settlement has been reached in the Actions and has been conditionally approved by the Court. You have received this notice because you are thought to be someone who is a member of the Ocean Front Spa Horizontal Property Regime, Inc. ("OFS") and/or The Myrtle Beach Resort Homeowners Association, Inc. ("MBR"). If so, you are a potential member of the OFS Class and/or the MBR Class (defined below), and thus are among the class of those

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

potentially eligible to benefit from the settlement ("Settlement Class"). If so, you also are in one or both classes of persons on whose behalf the Derivative Actions have been brought.

You should read this Notice to determine whether your rights are affected, the steps necessary to pursue your rights as a member of a Settlement Class and as a member of OFS/MBR, or whether to opt out of a Settlement Class.

In the OFS Class Action and the MBR Class Action, one or more people, called "Named Plaintiffs" (Jim Perkins, Colleen Franke a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dames, Errol Dos Santos, and Jeffrey Richardson), have sued on behalf of themselves and all others similarly situated who are thought to have similar claims.

In the Derivative Actions, one or more people, called "Derivative Plaintiffs" (Jim Perkins, Colleen Franke a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dames, Errol Dos Santos, and Jeffrey Richardson), are suing derivatively on behalf of MBR, OFS, themselves, and classes of persons on whose behalf the Derivative Actions have been brought.

The Court may consider those who are similarly situated collectively as a Settlement Class or individually as Settlement Class Members. One Court resolves the issues for all Class Members, except for those who "opt-out" from the Settlement Class. "Opt-Out" means an affirmative choice to be excluded from the Settlement Class and is discussed further below.

2. THE ACTIONS

A. Overview of the Actions and Plaintiffs' Claims

Two separate class action lawsuits have been filed against certain Defendants in this Court: the OFS Class Action and the MBR Class Action. Two separate derivative actions were filed against certain Defendants in this court: the MBR Derivative Action and the OFS Derivative Action.

In the OFS Class Action, Named Plaintiffs sought to certify a class consisting of "any and all persons and or entities owning a unit within the OFS HOA and thereby owning an undivided interest in the common elements, and business activity of the OFSHOA" ("OFS Class"). On behalf of the purported OFS Class, Named Plaintiffs allege in the OFS Class Action Amended Complaint that Defendants OFS, Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past directors of OFS, breached their fiduciary duty to Plaintiffs and Class Members and violated the standards set forth in the South Carolina Non-Profit Corporation Act, S.C. Code Ann. 33-31-830.

In the MBR Class Action, Named Plaintiffs sought to certify a class consisting of "any and all persons and or entities owning a unit within the MBRHOA and thereby owning an undivided interest in the common elements, and business activity of the MBRHOA" ("MBR Class"). On behalf of the purported MBR Class, Named Plaintiffs allege in the Amended MBR Class Action Complaint that Defendants MBR, Phil Cox, Bill Cameron, Stanley Jordan, Walter

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of MBR breached their fiduciary duty to Plaintiffs and Class Members, acted negligently, and breached a covenant contained in the master deed and bylaws.

In the MBR Derivative Action, Derivative Plaintiffs have brought suit, purportedly on behalf of nominal Defendant MBR, alleging that Defendants MBR and board of directors Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe Board of Directors of MBR, breached their fiduciary duty to nominal Defendant MBR, that Defendant FirstService Residential South Carolina, Inc., formerly known as K.A. Diehl & Associates, Inc. and incorrectly identified as K.A. Diehl and Associates, Inc. in the Derivative Actions ("K.A. Diehl") acted negligently, that K.A. Diehl breached multiple contracts, and that K.A. Diehl breached multiple contracts accompanied with a fraudulent act.

In the OFS Derivative Action, Plaintiffs have brought suit, purportedly on behalf of nominal Defendant OFS, alleging that Defendants OFS and OFS Board of Directors Walter Jordan, Ralph Jump, Ray Coghill, John Doe Past Board of Directors for OFS, MBR, Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins and John Doe Board of Directors of MBR, breached their fiduciary duty to nominal Defendant OFS, that K.A. Diehl breached multiple contracts, that K.A. Diehl breached multiple contracts accompanied with a fraudulent act, and that K.A. Diehl acted negligently.

Each of the Actions include numerous allegations regarding issues related to management of MBR and OFS, oversight of the management, and other actions of the Boards of Directors of OFS and/or MBR, including the approval, implementation, and collection of a "gate pass fee," and an increase in the "gate pass fee."

Defendants in the Class Actions explicitly deny any liability to either the OFS Class or the MBR Class. Defendants in the Derivative Actions explicitly deny any liability to either OFS or MBR for the claims brought derivatively.

Counsel for the Parties have conducted thorough investigations into the facts of the Actions for their respective clients, including conducting thorough discovery and extensive review of relevant documents, information, and data. The Parties, recognizing the risks inherent in litigation, have agreed to settlement of the Actions on the terms summarized in Section 7 below and laid out more fully in the Settlement Agreement and Release between Named Plaintiffs and Defendants on file with the Court.

Defendants in the Actions are willing to settle the Actions to avoid further expense as well as to dispose of burdensome and protracted litigation. If members of the Settlement Class opt out, however, Defendants, at their option, may void this settlement.

3. CLASS DEFINITION

For purposes of this settlement alone, Defendants do not object to the definition of the purported MBR Class or the OFS Class, do not object to Plaintiffs' purported representation of classes of owners in the Derivative Actions, do not object to Plaintiffs' actions herein on behalf

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

of the Settlement Class or Settlement Class Members, and do not object to Plaintiffs' actions herein on behalf of nominal Defendants MBR and OFS in the Actions.

4. YOU ARE A MEMBER OF A CLASS

An agreement settling the Actions has been executed by Plaintiffs and Defendants. The terms of the proposed settlement (referred to in this Notice as "Proposed Settlement") are discussed in Section 7 below. As a potential member of the Settlement Class, you may participate in the hearing on the Proposed Settlement, and, if the Proposed Settlement is approved by the Court, you would receive the benefit of the Proposed Settlement.

However, as explained below, you may opt out of the Class Actions if you do not wish to participate in the hearing on the Proposed Settlement that is described below. If you opt out of the Class Actions, you may not benefit from the Proposed Settlement that is described below, but you may pursue any claims you may care to make by bringing a separate lawsuit on your own behalf, or you may do nothing if you so prefer. If you do not opt out of the Class Actions and the Proposed Settlement is approved, you will be bound by the terms of the Proposed Settlement.

5. NOTICE OF SETTLEMENT HEARING

You are hereby notified, pursuant to Rule 23(e) of the South Carolina Rules of Civil Procedure, that a hearing will be held on _____, 2017, at _____ _.m., before the Honorable Judge _____, in Courtroom No. _____ of the Horry County Courthouse, South Carolina, to determine whether the Proposed Settlement agreed to by the above-named parties is fair, reasonable, and adequate and whether it should be approved by the Court and judgment entered thereon. The hearing was scheduled by an Order of this Court dated _____, __, 2017.

The hearing may be adjourned by the Court from time to time by an announcement at the hearing, or at any adjournment thereof, without further notice.

6. YOUR RIGHTS MAY BE AFFECTED BY THE PROPOSED SETTLEMENT OF THIS ACTION

The giving of this Notice is not to be understood as expressing any opinion by the Court as to the merits of any of the claims or defenses asserted by any party herein and is for the sole purpose of informing all the members of the Settlement Class of the Proposed Settlement so that individual Settlement Class members may make whatever decisions they may deem appropriate for the protection of their interests.

7. PROPOSED SETTLEMENT

In summary, the Proposed Settlement will result in certain Defendants providing a sum of money to Plaintiffs and certain Regimes in MBR to fund an arbitration of a declaratory judgment action to adjudicate whether the gate pass fee currently charged by MBR is authorized under the governing MBR documents and applicable law. All Parties agree that the arbitration decision will be binding.

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

The Parties agreed that a declaratory proceeding in binding arbitration on the core remaining issue in the Actions (whether the gate pass fee currently charged by MBR is authorized under the governing MBR documents and applicable law) is the most cost-effective, fair, and appropriate manner of bringing final resolution to the remaining issues raised in the Actions. They believed that this objective could be reached by certain Defendants' agreement to fund the binding arbitration.

The Proposed Settlement was reached at mediation and all Parties were represented by experienced counsel. If the Proposed Settlement is approved by the Court, the Proposed Settlement will act as: 1) a complete release of all claims by Named Plaintiffs against all Defendants; and 2) a complete release of all claims against all Defendants which were actually asserted or might have been asserted on behalf of an absent class members in the MBR Class Action, the OFS Class Action, the MBR Derivative Action and the OFS Derivative Action. Thereafter, final judgments of dismissal will be entered, with prejudice, as to the Actions, and Plaintiffs and all Settlement Class Members will be conclusively bound by such dismissal.

8. ATTORNEYS FOR PLAINTIFFS AND DEFENDANTS

The attorneys for the named Plaintiffs and Settlement Class are A. Preston Brittain and Thomas C. Brittain of The Brittain Law Firm, P.A., whose telephone numbers and addresses appear below. Any questions regarding their representation of the interests of Named Plaintiffs, Derivative Plaintiffs, and those similarly situated must be directed to them.

A. Preston Brittain, Esq.
Thomas C. Brittain, Esq.
The Brittain Law Firm, P.A.
4614 Oleander Drive
Myrtle Beach, SC 29577
(843) 449-8562 (telephone)
(843) 497-6124 (facsimile)

Attorneys for Named Plaintiffs

The attorneys for Defendants Phillip A. Kilgore and Lucas J. Asper of Ogletree, Deakins, Nash, Smoak, & Stewart, P.C., and Henrietta U. Golding, Esq. and Alicia E. Thompson of McNair Law Firm, P.A., whose telephone numbers and addresses also appear below.

Phillip A. Kilgore, Esq.
Lucas J. Asper, Esq.
300 North Main Street, Suite 500
Greenville, South Carolina 29601
(864) 271-1300 (telephone)
(864) 235-4754 (facsimile)

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

Attorneys for Defendants The Myrtle Beach Resort Homeowners Association, Inc., Ocean Front Spa Horizontal Property Regime, Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ralph Jump, Ray Coghill, Ken Perkins, John Doe past Board of Directors of Ocean Front Spa Horizontal Property Regime, Inc., and John Doe past Board of Directors for the Myrtle Beach Resort Homeowners Association, Inc.

Henrietta U. Golding, Esq.
Alicia E. Thompson, Esq.
McNair Law Firm, P.A.
Post Office Box 336
Myrtle Beach, SC 29578-0336
(843) 444-1107
(843) 444-4729

Attorneys for Defendant K.A. Diehl

9. PROCEDURE FOR OPTING OUT OF THE SETTLEMENT CLASS OR FOR PRESENTING OBJECTIONS

Any member of the Settlement Class may appear and show cause, if he or she has any, why the Proposed Settlement should not be approved by the Court as fair, reasonable, and adequate, and why any of the Actions should not be dismissed on the merits, with prejudice. Any such member of the Settlement Class may also object to the allowance of the costs, expenses, and fees requested by Plaintiffs' counsel; provided that no such person shall be heard, and no papers or briefs shall be submitted by him or her to the Court, unless, on or before ten (10) days before the fairness hearing, he or she files a notice of intention to appear and a statement of the basis of his or her objections, together with a memorandum of authorities, with the Horry County Clerk of Court Melanie Huggins-Ward, 1301 Second Avenue, Conway, South Carolina 29526 and serves a copy on:

A. Preston Brittain, Esq. Thomas C. Brittain, Esq. The Brittain Law Firm, P.A. 4614 Oleander Drive Myrtle Beach, SC 29577 (843) 449-8562 (telephone) (843) 497-6124 (facsimile) Attorneys for Plaintiffs	Phillip A. Kilgore, Esq. Lucas J. Asper, Esq. 300 North Main Street, Suite 500 Greenville, South Carolina 29601 (864) 271-1300 (telephone) (864) 235-4754 (facsimile) Attorneys for Defendants The Myrtle Beach Resort Homeowners Association, Inc., Ocean Front Spa Horizontal Property Regime, Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ralph Jump, Ray Coghill, Ken Perkins, John Doe past Board of Directors of Ocean Front Spa Horizontal Property Regime, Inc., and John Doe past Board of Directors for the Myrtle Beach Resort

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

	Homeowners Association, Inc. Henrietta U. Golding, Esq. Alicia E. Thompson, Esq. McNair Law Firm, P.A. Post Office Box 336 Myrtle Beach, SC 29578-0336 (843) 444-1107 (telephone) (843) 444-4729 (facsimile) Attorney for Defendant FirstService Residential South Carolina, Inc., formerly known as K.A. Diehl & Associates, Inc.

If you are entitled to be a member of the Settlement Class and want to opt out or exclude yourself from the Actions, you need to sign the attached Request for Exclusion and return it to the above attorneys on or before _____, 2017. If you opt out of the Settlement Class, you will not be able to participate in the Actions related to the Settlement Class, should there be one or more.

10. EXAMINATION OF PLEADINGS AND PAPERS

The references in this Notice to the Settlement Agreement and Release between Plaintiffs and Defendants and other papers are only summaries of those documents. The pleadings in the Actions are on file with the Clerk of Court, at the address stated above, and are available for inspection there. Copies of documents related to the Actions not on file with the Clerk of Court will be available for inspection by any Settlement Class Member and his or her attorney at the offices of Class Counsel during mutually agreeable business hours.

11. OBTAINING ADDITIONAL INFORMATION

You may direct inquiries to Class Counsel at the address listed above. **DO NOT CONTACT THE COURT.**

This Notice provides only a summary of matters regarding the case. You may also seek independent legal counsel as to your rights at your own personal expense.

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

ATTACHMENT

REQUEST FOR EXCLUSION

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00673**
	)	
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00674**
	)	
The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	
	)	

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15th JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00743**
	)	
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00744**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

Request for Exclusion

I/, _____, hereby declare my decision to be excluded as a Class Member in the following action(s), so indicating by my initials:

_____ *Jim Perkins et al. v. Ocean Front Spa Horizontal Property Regime, Inc., et al.*, Civil Action No.: 2016-CP-26-00673 ("OFS Class Action")

_____ *Jim Perkins et al. v. The Myrtle Beach Resort Homeowners Association, Inc. et al.*, Civil Action No.: 2016-CP-26-00674 ("MBR Class Action")

_____ *Jim Perkins et al. v. K.A. Diehl and Associates, Inc., et al.*, Civil Action No. 2016-CP-26-00743 ("MBR Derivative Action")

_____ *Jim Perkins et al. v. Ocean Front Spa Horizontal Property Regime, Inc. et al.*, Civil Action No.: 2016-CP-26-00744 ("OFS Derivative Action")

_____
Full Name

_____ _____
Signature Date

Mailing Address: _____

Phone number(s): _____

Street Address (if different from above):
_____

30343714.1

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CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

EXHIBIT E

ORDER OF PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00673**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00674**
	)	
The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	
	)	

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15th JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00743**
	)	
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00744**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

ORDER OF PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

THIS MATTER IS BEFORE THE COURT upon the Motion of the Defendants in each of the above-captioned cases (C.A. Nos. 2016-CP-26-00673, 2016-CP-26-00674, 2016-CP-26-00743, and 2016-CP-26-00744) (collectively, the "Actions"). Defendants move for approval of the Settlement of the Actions.

The Court has reviewed the Settlement Agreement (**Exhibit A** to Defendants' Motion) and Settlement Notice (**Exhibit D** to Defendants' Motion) (collectively "Settlement

Documents"), has held a hearing on the Motion, and is familiar with the facts, legal issues and procedural history of the Actions.

The Court finds that the Settlement is the result of extensive negotiations following a lengthy period of contested litigation between the Parties. The Court further finds that the Settlement Agreement represents a fair and reasonable resolution of *bona fide* disputes between Plaintiffs and Defendants in the Actions. The Court further finds that the Settlement Agreement represents a fair and reasonable resolution of a *bona fide* dispute between persons on whose behalf the Actions have been brought ("absent class members") on the one hand, and Defendants on the other but that, as to such absent class members, the releases in the Settlement Agreement should be limited to "any and all claims which were actually asserted or might have been asserted by Plaintiffs in the Settled Actions." Based on these findings, and for good cause shown,

IT IS ORDERED that, pursuant to Rules 41(a)(1)(B) and Rule 23(c) of the South Carolina Rules of Civil Procedure, the Settlement Documents are hereby **APPROVED,** this ____ of _____, 2017.

_____

The Honorable _____

ELECTRONICALLY FILED - 2017 Jun 30 4:29 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

ELECTRONICALLY FILED - 2017 Jul 26 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

STATE OF SOUTH CAROLINA **COUNTY OF HORRY**	)	**IN THE COURT OF COMMON PLEAS** **15TH JUDICIAL CIRCUIT** **Civil Action No.: 2016-CP-26-00673**
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated, Plaintiffs, vs. Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION OF DEFENDANTS' COSOLIDATED MOTION TO ENFORCE SETTLEMENT / MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

TO: THE HONORABLE COURT, THE ABOVE-NAMED DEFENDANTS and THEIR ATTORNEYS PHILLIP A. KILGORE, ESQ. and LUCAS J. ASPER, ESQ.:

FACTS

The above referenced parties agreed to mediate five cases in one day. The mediation was set to occur, and did occur on, May 1, 2017, despite the known absence of several parties and adjusters.[1] Mediation concluded at roughly 11:45pm with an agreement, which was reduced to a

[1] Defendants claim they were unaware that Plaintiff Santos would be participating by phone, but when the parties were introduced, defendants did not raise any objection or indicate any surprise by the absence of Santos. Further, Santos made remarks during the opening session.

writing and signed by the following Plaintiffs: Collen Franke a/k/a Colleen Franke Perkins, Nancy Moore, William Moore, Steven Dame, and Errol dos Santos. Plaintiffs Mark dos Santos, Jeffrey Richardson and Jim Perkins did not sign the agreement. Counsel for Plaintiff signed on behalf of Mark dos Santos and Jeffrey Richardson. Defendant Ray Coghill did not sign the agreement, but it was signed by his counsel on his behalf. Defendant KA Diehl and Associates, Inc., nor its successor company, First Services Residential, signed the agreement. Mark dos Santos and Jeffery Richardson did not receive a copy of the agreement until after the mediation. Plaintiffs' Santos and Richardson, upon reading the agreement for themselves, asked counsel to seek clarification of certain provisions. Thereafter, Defendants filed a motion to enforce the agreement, which Plaintiffs now oppose.

RULE/LAW

Pursuant to South Carolina Rules of Civil Procedure, Rule 43(k) SCRCP, no agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel.

"In interpreting the meaning of the SCRCP, the Court applies the same rules of construction used to interpret statutes." *Farnsworth v. Davis Heating and Air Conditioning Inc.*, 367 SC 634 (2006). Rule 43(k) of the South Carolina Rules of Civil Procedure is "intended to prevent disputes as to the existence and terms of agreements regarding pending litigation." *Ashfort Corp. v. Palmetto Construction Group Inc.*, 318 SC 492, 493-94 (1995).

ELECTRONICALLY FILED - 2017 Jul 26 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

In *Farnsworth v. Davis Heating and Air Conditioning Inc.*, 367 SC 634 (2006), the plaintiff expressly authorized her counsel to offer and accept $22,000.00 to settle her case against the defendant. Plaintiff's counsel sent a signed letter offering settlement of $22,000.00. Defendant's counsel signed the letter accepting the offer to settle plaintiff's claim for $22,000.00. Plaintiff rescinded the agreement and defendant moved to enforce the settlement. The Court found Rule 43(k) permitted plaintiff to rescind the settlement agreement again establishing that Rule 43(k) applies to settlement agreements (first established in *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492). The Court also made clear that plaintiffs admission that she *had* agreed to accept $22,000.00 and that her attorney *had* her authority to enter into the agreement did not bind her until one of three conditions precedent were met: (1) the agreement was reduced to the form of a consent order, (2) or written stipulation signed by counsel and entered in the record, or (3) reduced to writing and signed by the parties and their counsel.

Pursuant to Rule 8 of the South Carolina ADR Mediation Rules, "Communications during a mediation settlement conference shall be confidential. The parties, their attorneys and any other person present shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any oral or written communications having occurred in a mediation proceeding..."

ARGUMENT

I. *The Court should not enforce the proposed Settlement Agreement because Rule 43(k) has not been satisfied.*

Defendants seek to enforce a settlement agreement which clearly fails to comply with the strict 43(k) requirements. The agreement was reduced to a "*writing*", but is not "*signed by the parties and counsel*". The settlement agreement was not signed by five parties, Mark dos Santos,

ELECTRONICALLY FILED - 2017 Jul 26 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

Jeffrey Richardson, Jim Perkins, Ray Coghill or KA Diehl. The settlement agreement also was not signed by counsel, Preston Brittain, Philip Kilgore, or Alicia Thompson. The settlement agreement was not executed in a manner which our Courts recognize as binding because it lacked the signatures of "parties" and "counsel". (See Exhibit "A" Settlement Agreement).

Defendants' counter-position is that counsel had or should have had authority to sign on behalf of his clients. Defendant's position regarding authority of counsel is a red-herring and is directly controverted by the ruling in *Farnsworth*. Moreover, even if the Court accepted counsel's signature on behalf of Santos, Richardson, and Coghill, the agreement still would not comply with Rule 43(k) because it lacks the signatures of two other parties: Defendant KA Diehl and Plaintiff Jim Perkins.

Pursuant to Rule 43(k) settlement agreements are not binding unless parties <u>and counsel</u> sign the agreement. Counsel Preston Brittain and counsel Philip Kilgore signed the agreement on behalf of certain absent parties, but did not otherwise sign the agreement. Counsel for KA Diehl did not sign the agreement on behalf of their client or otherwise. Therefore, the settlement agreement is not a binding resolution of the case.

Defendants will take the position that Rule 43(k) has been "substantially complied with" or that this agreement is "not an agreement between counsel." Arguments such as these have been considered in the past and our appellate courts have rejected them. In *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, the Court considered the same arguments and held: "to take such a narrow reading of Rule 43(k) would defeat its purpose of preventing disputes such as this one...[W]e find defendants assertion that there has been substantial compliance to be without merit." *Ashfort*, 318 S.C. at 495, 458 S.E.2d at 535. The "substantial compliance" position was likewise rejected in

ELECTRONICALLY FILED - 2017 Jul 26 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

Young v. Cooler, where the court stated, "even if the Youngs intended to be bound and attempted to announce to the court that a settlement had been reached, the requirements of 43(k) were not met." *Young v. Cooler*, 347 S.C. 362, 366, 555 S.E.2d 410, 412 (Ct. App. 2001). Further, in *Buckley v. Shealy*, the Supreme Court upheld the appellate courts' decision that a mediation agreement was not binding despite having been honored by the parties for six years. In *Buckley v. Shealy*, 370 S.C. 317, 322, 635 S.E.2d 76, 78 (2006). In *Galloway v. Regis Corp.*, a matter was settled at mediation without a formally executed settlement agreement and a form order dismissing the case as settled was entered into the record[2]. The trial court enforced the agreement, but the S.C. Court of Appeals reversed the decision because the requirements of Rule 43(k) were not satisfied. The Court lamented that "while we recognize the apparent unfairness that our ruling works upon Galloway, our conclusion is compelled by the Supreme Court's rulings."

Our Courts have strictly enforced Rule 43(k), and while quirky, its serves a very important purpose of keeping Courts out of disputes amongst counsel and parties as relates to purported agreements. Rule 43(k) protects attorneys and clients from unwanted dialogues and intrusions of attorney-client privileged matters, and keeps our Courts from being bogged-down with disputes of this nature. To enforce the agreement against the opposition by Plaintiffs would controvert clear South Carolina law and therefore the Court must deny Defendants' motion.

CONCLUSION

The Court should not enforce the purported settlement agreement because the agreement is not compliant with Rule 43(k) of the Rules of Civil Procedure.

[2] Plaintiff attaches the article, "A Handshake is Not Enough", South Carolina Lawyer, July 2012.

ELECTRONICALLY FILED - 2017 Jul 26 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

THE BRITTAIN LAW FIRM, P.A.

s / A. Preston Brittain
A. Preston Brittain, Esquire (SC Bar # 73707)
Thomas C. Brittain, Esquire (SC Bar # 00893)
4614 Oleander Drive
Myrtle Beach, SC 29577
Phone: (843) 449-8562
Fax: (843) 497-6124
ATTORNEYS FOR PLAINTIFF

July 26, 2017
Myrtle Beach, South Carolina

ELECTRONICALLY FILED - 2017 Jul 26 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

EXHIBIT A

Plaintiffs' Memorandum in Opposition to Defendants' Motion to Enforce Settlement

SETTLEMENT AGREEMENT

ELECTRONICALLY FILED - 2017 Jul 26 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

ELECTRONICALLY FILED - 2017 Jul 26 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

Settlement Agreement
Civil Action Nos.: 2016-CP-26-00673, -00674, -00743, -00744

The following is a Settlement Agreement ("Agreement") between Plaintiffs Jim Perkins, Colleen Franke a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dames, Errol Dos Santos, and Jeffrey Richardson ("Plaintiffs'") on the one hand and Defendants The Myrtle Beach Resort Homeowners Association, Inc., ("MBRHOA"), Ocean Front Spa Horizontal Property Regime, Inc. ("OFS"), Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Ken Perkins, Ray Coghill, Ralph Jump, and Wayne Urban ("Defendants") on the other (Plaintiffs and Defendants hereafter referred to as the "Parties") to settle Civil Action Nos.: 2016-CP-26-00673, -00674, -00743, -00744, currently pending on the South Carolina Circuit Court in Horry County ("Settled Actions").

1. For good and valuable consideration, upon full execution and effectuation of this Agreement, in full satisfaction of the Settled Actions, and any other claims or charges Plaintiffs have, claim to have, or may have, against Defendants, including, without limitation, any claim for attorneys' fees or costs, Defendants agree to pay the gross amount of $85,000.00 (the "Payment") in full satisfaction of any claims, charges or actions Plaintiffs have against Defendants.

a) Defendants will, thirty (30) business days hereafter, pay to Plaintiffs and Plaintiffs' attorney the total sum of Fifteen Thousand Dollars ($15,000.00) for the purposes of funding a binding arbitration of a declaratory judgment action to adjudicate whether the gate pass fee currently charged by MBRHOA is authorized under the governing MBRHOA documents and applicable law.
b) Defendants will, thirty (30) business days hereafter, pay to The Board of Directors for the Myrtle Beach Resort Horizontal Property Regime ("A Building Board") and the Board of Directors for the Myrtle Beach Resort Five Seasons Centre Horizontal Property Regime, ("Five Seasons Board") the total sum of Fifteen Thousand Dollars ($15,000.00) for the purposes of defending a binding arbitration of a declaratory judgment action filed by Plaintiffs for the purpose of adjudicating whether the gate pass fee currently charged is authorized under the governing MBRHOA documents and applicable law.
c) Arbitrator. Defendants will pay to Plaintiff's counsel the sum of $5,000.00 to be held in trust by his law firm to pay to an arbitrator to resolve the arbitration set forth in the previous two paragraphs. In the event this amount does not fund the arbitration in full, the balance, if any, shall be paid by the attorneys receiving the sums set out in the two previous paragraphs.
d) Defendants will, thirty (30) business days hereafter, pay "Brittain Law Firm" in the amount of Fifty Thousand Dollars and No Cents ($50,000.00), as payment for attorneys' fees and costs, such amount not being subject to income or employment tax withholding, but to be reported on a Form 1099

2. The Parties hereto recognize that the Defendants do not admit any liability to Plaintiffs, or to anyone else because of, or growing out of, matters set forth in Plaintiffs' Amended Complaints in the Settled Actions. The Parties have agreed to settle any and all claims

Plaintiffs have asserted or may have asserted against Defendants in order to avoid further cost and inconvenience in moving forward with a trial.

3. MBRHOA and OFS will use their best efforts to have their respective By-Laws amended to require at least three bids to be received prior to the awarding of any contract which will exceed $10,000.00 in value.

4. In exchange for and in consideration of the promises set forth in this Agreement, and except for the rights to enforce the provisions of this Agreement, Plaintiffs, their heirs, executors, administrators, legal and personal representatives, successors and assigns, hereby covenant not to sue and fully release and forever discharge Defendants and their respective present and former parents, heirs, assigns, subsidiaries, affiliates, and related entities or corporations, and any of their past and present officers, directors, shareholders, employers, past and present employees, agents, partners, attorneys, heirs, successors, insurers and assigns (the "Released Parties"), from any and all claims, demands, actions, charges, complaints, suits, administrative proceedings, debts, promises, contracts, grievances, and causes of action (hereinafter collectively referred to as "Claims"), in law or in equity, whether known or unknown, which Plaintiffs and their heirs, executors, administrators, agents, distributees, beneficiaries, successors in interest and assignees may have by reason of any matter, cause or thing whatsoever from the beginning of the world to only the day of the date of Plaintiffs' execution of this Agreement, including, but not limited to, any and all claims which were actually asserted or might have been asserted by Plaintiffs in the Settled Actions. Plaintiffs agree never to file a lawsuit against Defendants based on any reason contained in this Agreement. The Release does not purport to release any claims that the law does not permit to be released.

5. Within 15 days of receipt of the Payment, Plaintiffs' counsel shall file a **stipulation of dismissal with prejudice** in each of the Settled Actions.

6. Plaintiffs further acknowledge and agree that this Agreement extends to all claims of every kind and nature whatsoever, known or unknown, suspected or unsuspected, and Plaintiffs acknowledges they may hereafter discover facts in addition to or different from those which they know or believe to be true with respect to the subject matter of this Agreement, but it is their intention to hereby fully and finally settle and release all such matters as well and, in furtherance of that intention, the foregoing Release shall remain in effect as a full and complete release notwithstanding the discovery or existence of such additional or different facts.

7. Plaintiffs agree that they will not make any statements, oral or written, which they know or reasonably should know to be a disparaging or negative comment about Defendants or their officers, directors, employees and agents, or otherwise detrimental to the reputation or goodwill of Defendants, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required by law. Defendants agree that they will not make any statements, oral or written, which they know or reasonably should know to be a disparaging or negative comment about Plaintiffs or their officers, directors, employees and agents, or otherwise detrimental to the reputation or goodwill of Plaintiffs, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required by law.

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8. It is understood and agreed that Defendants expressly rely upon the promises, representations, and warranties made by Plaintiffs in this Agreement; that any breach of such promises, representations, and warranties would constitute a material breach of this Agreement; and that in the event of any such breach, Defendants shall be entitled to any and all of the following relief: (a) the immediate repayment to Defendants of the full Settlement Amount hereunder (b) the indemnification and hold harmless protection set forth above; (c) specific enforcement of all promises and undertakings made by Plaintiffs hereunder; and (d) all other relief and damages available at law or in equity.

Agreed to this 1st Day of May, 2017.

Plaintiffs

Jim Perkins

Colleen Franke

Colleen Franke a/k/a Colleen Franke Perkins

Mark Dos Santos

By his Attorney

Nancy Moore

Nancy Moore

William Moore

William Moore

Steven Dame

ELECTRONICALLY FILED - 2017 Jul 26 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

Errol Dos Santos

Jeffrey Richardson

By his Attorney

Defendants

The Myrtle Beach Resort Homeowners Association, Inc., ("MBRHOA")

By its Attorney

Ocean Front Spa Horizontal Property Regime, Inc. ("OFS"),

By its Attorney

Phil Cox

Bill Cameron

By his Attorney

Stanley Jordan

By his Attorney

Walter Jordan

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Ken Perkins

Ray Coghill

By his Attorney

Ralph Jump

Wayne Urban

29682229.1

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EXHIBIT B

Plaintiffs' Memorandum in Opposition to Defendants' Motion to Enforce Settlement

ARTICLE: "A HANDSHAKE IS NOT ENOUGH", SOUTH CAROLINA LAWYER, 2012.

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A Handshake Is Not Enough

Angus Lawton And Erica McElreath

Settlement Agreements Under Rule 43(k)

You have finally done it. After months of negotiating, you hang up the phone knowing that the big case you have been working on is finally settled. Opposing counsel has a great reputation, and you know you can trust his word. Even so, you immediately draft a letter memorializing the terms of your agreement and send it to opposing counsel. You are a little nervous about his client backing out, so you ask him to have his client sign it. He does, and sends it back to you. You think the deal is done.

Fast-forward several months, and the opposing party is running into obstacles trying to comply with the terms of the settlement. You ask opposing counsel to close the deal, and you get nothing but excuses. After several more months, you hear from opposing counsel that the deal is off. You plan to move to enforce the settlement agreement. Is the agreement enforceable?

The rule

This situation is specifically addressed in Rule 43(k) of the South Carolina Rules of Civil Procedure.

The rule provides:

No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.

In the scenario described above, there is (a) no consent order regarding the alleged settlement; (b) no written stipulation signed by counsel and entered in the record regarding any settlement; (c) no hearing in open court where a settlement was noted upon the record; and (d) no writing signed by the parties and their counsel. Stated simply, there is no binding settlement agreement under South Carolina law, and a motion to enforce the settlement should fail.

History of the rule

Rule 43(k) is based on former Circuit Court Rule 14. Like its predecessor, the rule is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation and to relieve the court of the necessity of determining such disputes, which "are often more perplexing than the case itself." Ashfort Corp. v. Palmetto Const. Group, Inc., 318 S.C. 492, 493-94, 458 S.E.2d 533, 534 (1995). The S.C. Supreme Court has gone so far as to say that "[t]he time of the court should not be taken up in controversial matters of this character." Id.

Compliance with Rule 43(k) became easier with the S.C. Supreme Court's most recent amendment, effective on April 29, 2009. The amendment provides that agreements of counsel can be binding if they are "reduced to writing and signed by the parties and their counsel." The amendment eliminates the need for the agreement to be an official part of the record. With this addition to the rule, an enforceable agreement can be signed by all parties and counsel at the conclusion of a successful mediation.

Since the rule was amended, there have been no appellate court decisions interpreting the phrase "reduced to writing and signed by the parties and their counsel." However, based on the appellate courts' strict compliance with the rule since its inception, it seems likely that the courts will continue to require strict compliance before determining that a settlement agreement is enforceable.

Reasons for the rule

Although Rule 43(k) seems harsh, there are legitimate reasons for such a rule, and the courts are justified in demanding strict compliance. As indicated in the case law, disputes about settlement agreements often are very complicated. The only real witnesses in such disputes often are the attorneys. The courts are hesitant to make attorneys witnesses in cases that they have been handling.

Furthermore, in disputes involving alleged settlement agreements, there will often be issues concerning the attorney client privilege and what information was transmitted to the clients by the attorneys. If a client testifies that his attorney told him that the case was settled, then the attorney client privilege is probably waived. This will open the door to unnecessary and unpleasant discovery.

There is also an issue regarding Rule 408 of the South Carolina Rules of Evidence. This rule, titled "Compromise and Offers to Compromise" generally provides that settlement offers are not admissible to prove liability for a claim or its amount. Rule 408 will come into play if there is a trial on an issue regarding a settlement agreement, and it will likely prevent the introduction of any evidence regarding settlement offers.

Rule 43(k) in civil litigation

Attorneys in South Carolina settle cases every day without satisfying Rule 43(k). In fact, it is probably a rule ignored more than any other rule of civil procedure. Many attorneys go through their entire careers without having an issue with the enforcement of a settlement agreement. At least in civil litigation, there are usually no problems consummating settlements based on a phone call, a letter or a handshake.

Rule 43(k) comes into play in cases where there are difficult clients, or where there are volatile relationships between the parties or attorneys. It can be an issue when a settlement involves more than the simple payment of money in exchange for a release.

Especially when dealing with complex issues or relationships, it is important to comply with Rule 43(k) before assuming that an agreement can be enforced.

Attorneys can get into trouble by telling clients that their case has been settled prematurely. If there is no enforceable settlement agreement, then the client should be informed that the deal is tentative. Strict compliance with the rule is the only way for an attorney to know that a deal can be enforced.

Rule 43(k) must also be considered when a case settles at trial. At this point, with the excitement of resolving the case and the rush to put it on the record, key terms are often omitted from the record. If it is not in the record, it is not a part of the agreement, and the deal will not be enforced by the court.

Rule 43(k) in family court

After heated discovery, a husband and wife sit down with their attorneys and a mediator and attempt to finally settle their divorce case. This process takes all day, during which the parties and their attorneys spend hours pouring over every detail. After analyzing the case from every angle, the parties emerge with a mediation agreement, setting out all the details of the parties' final settlement agreement. The agreement is signed by the parties and their attorneys in order to satisfy the requirements of Rule 43(k).

Husband goes home and speaks with his newly-divorced neighbor, who tells husband that he agreed to pay far too much alimony. If he takes the case to trial, the judge will surely cut that amount in half. After this advice, husband calls his attorney to tell her that the deal is off. Wife moves to enforce the agreement. Is it enforceable?

According to the South Carolina Rules of Family Court, Rule 43(k) applies to domestic relations actions. See S.C. R. Family Ct. 2(a). In family court, as with civil litigation, the parties are free to reach an agreement concerning their disputes. In civil cases, an agreement that complies with Rule 43(k) should be enforceable; however, in family court there is an additional hurdle to overcome. All agreements concerning alimony, child support or property issues must be presented to the family court for approval.

Moseley v. Mosier, 279 S.C. 348, 353, 306 S.E.2d 624, 627 (1983). When approving a settlement agreement, the family court must determine: (1) if assent to the agreement is voluntarily given; and (2) if the agreement is fair under all relevant circumstances. Funderburk v. Funderburk, 286 S.C. 129, 131, 332 S.E.2d 205, 206 (1985). If the court finds the agreement was entered into freely and voluntarily, and concludes that the agreement was fair, the agreement should be approved, provided it also comports with Rule 43(k).

In family court matters, the court's discretion in approving agreements seems to undermine the force of the rule. Though it appears to pack less punch in family court, lawyers are well-advised to craft settlement agreements that comply with Rule 43(k). In at least one instance, the S.C. Supreme Court has declined to enforce a family court agreement that did not comport with the rule. (See the discussion on Buckley v. Shealy, infra.)

Case law

ELECTRONICALLY FILED - 2017 Jul 26 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

The cases interpreting Rule 43(k) have required strict compliance with the requirements of the rule. In some instances, the rule seems harsh. For example, the case Farnsworth v. Davis involved an action for breach of contract and negligence. During the course of discovery, Plaintiff's counsel wrote a letter to defense counsel indicating that Plaintiff would settle the case for $22,000. Plaintiff had specifically authorized his attorney to write the letter.

Thereafter, the defense attorney accepted the offer. He signed the settlement letter and returned it to Plaintiff's counsel. Unfortunately, the Plaintiff then changed her mind and rescinded the agreement. Defense counsel then filed a motion to compel the settlement. The circuit court ordered the Plaintiff to comply with the settlement agreement, finding that the requirements of Rule 43(k) had been satisfied. The matter then went up on appeal.

After hearing the case, the S.C. Court of Appeals held that the agreement could not be enforced, as the requirements of Rule 43(k) were not satisfied. Farnsworth v. Davis, 367 S.C. 634, 637-38, 627 S. E.2d 724, 726 (2006). It did not matter that the parties admitted that there was a duly executed written agreement. It did not matter that the Plaintiff had authorized his attorney to write the letter. The specific requirements of Rule 43(k) were not satisfied, and the case was remanded to the circuit court for trial.

In Galloway v. Regis Corp., Galloway sued Regis Corp. alleging she fell in Regis' retail establishment. The case settled after mediation, but no formal settlement agreement was signed. The parties subsequently informed the clerk of court that the case had been resolved, and a form order dismissing the case as settled was entered in the record. Subsequent disputes arose concerning the terms of the settlement agreement, and Galloway filed a motion seeking to compel Regis to comply with the settlement agreement. The trial court enforced the alleged settlement, but the S.C. Court of Appeals reversed the decision because the requirements of Rule 43(k) were not satisfied: "While we recognize the apparent unfairness that our ruling works upon Galloway, our conclusion is compelled by the Supreme Court's rulings ... We hope our decision here underscores the importance of putting a settlement agreement on the record or immediately reducing the agreement to writing, and including in the writing all material terms and conditions of the agreement. Only then will an attorney be certain that his client's interests are fully protected." Galloway v. Regis Corp., 325 S.C. 541, 546, 481 S.E.2d 714, 716 (Ct. App. 1997).

"Substantial compliance" with the rule has been rejected in three cases. In a domestic case involving a divorce, the parties settled a portion of their dispute during mediation and put the settlement agreement in writing. The husband paid the wife for six years pursuant to the agreement. Thereafter, disputes arose regarding the terms of the agreement, and the agreement could not be located. The trial court declined to enforce the settlement agreement, and the Supreme Court affirmed in an opinion written by Chief Justice Toal. The Court ruled that Rule 43(k) prohibited the enforcement of the agreement, Despite the fact that money had actually changed hands between the parties for six years. Buckley v. Shealy, 370 S.C. 317, 322, 635 S.E.2d 76, 78 (2006).

Young v. Cooler was a case involving an automobile accident. The liability portion of the claim was going to trial, but the UIM carrier agreed to settle the case. The attorney for the UIM carrier wrote a letter stating that $15,000 would be paid "regardless of the outcome of your settlement negotiations or trial" and further stated that he would order the drafts and prepare a release. The attorney later learned that he was mistaken about the liability coverage limits and withdrew the $15,000 offer. After the trial, the insured made a motion to the trial judge to enforce the alleged settlement with the UIM carrier. The judge granted the motion. The S.C. Court of Appeals reversed, concluding that the letter was not enough to satisfy the requirement of Rule 43(k). The court stated, "even if the Youngs intended to be bound and attempted to announce to the court that a settlement had been reached, the requirements of 43(k) were not met." Young v. Cooler, 347 S.C. 362, 366, 555 S. E.2d 410, 412 (Ct. App. 2001).

What happens if the clients, unbeknownst to the lawyers, negotiate a settlement concerning pending litigation? As the title of the rule states, Rule 43(k) applies to "Agreements of Counsel." If the attorneys did not negotiate the agreement, then arguably the rule does not apply. However, in Ashfort, the S.C. Supreme Court rejected a similar argument. In that case, an attorney hired by an insurance carrier attempted to settle a case, and the lawsuit was dismissed. Later, a dispute arose about the terms of the settlement. One of the parties argued that Rule 43(k) did not apply because the agreement was between the parties and "merely confirmed by the parties' counsel." The S.C. Supreme Court rejected this argument. "To take such a narrow reading of Rule 43(k) would defeat its purpose of preventing disputes such as this one ... [W]e find appellants' assertion that there has been substantial compliance with Rule 43(k) to be without merit." Ashfort, 318 S.C. at 495, 458 S.E.2d at 535.

Conclusion

Attorneys should be aware of the exact requirements of Rule 43(k). The rule is simple but specific. Following the rule may require a few extra steps beyond a handshake or phone call, but those extra steps are well worth it when a settlement agreement is questioned. Attorneys can avoid problems by strict compliance with the rule or by understanding that no agreement can be enforced unless the exact requirements of the rule have been satisfied.

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Angus Lawton and Erica McElreath practice with Lawton Law Firm, LLC in Mt. Pleasant. Special thanks to Rob Newton (Dooley Law Firm, PA) and David Shea (Law Offices of Shea and Barron) for their insight and research concerning Rule 43(k) in the context of family law.

VIEW ALL ARTICLES

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STATE OF SOUTH CAROLINA **COUNTY OF HORRY**	)	**IN THE COURT OF COMMON PLEAS** **15TH JUDICIAL CIRCUIT**
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all others similarly situated, Plaintiffs, vs. The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., Defendants.	)	**Civil Action No.: 2016-CP-26-00674**

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION OF DEFENDANTS' COSOLIDATED MOTION TO ENFORCE SETTLEMENT / MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

TO: THE HONORABLE COURT, THE ABOVE-NAMED DEFENDANTS and THEIR ATTORNEYS PHILLIP A. KILGORE, ESQ. and LUCAS J. ASPER, ESQ.:

FACTS

The above referenced parties agreed to mediate five cases in one day. The mediation was set to occur, and did occur on, May 1, 2017, despite the known absence of several parties and adjusters.[1] Mediation concluded at roughly 11:45pm with an agreement, which was reduced to a writing and signed by the following Plaintiffs: Collen Franke a/k/a Colleen Franke Perkins, Nancy Moore, William Moore, Steven Dame, and Errol dos Santos. Plaintiffs Mark dos Santos, Jeffrey Richardson and Jim Perkins did not sign the agreement. Counsel for Plaintiff signed on behalf of

[1] Defendants claim they were unaware that Plaintiff Santos would be participating by phone, but when the parties were introduced, defendants did not raise any objection or indicate any surprise by the absence of Santos. Further, Santos made remarks during the opening session.

Mark dos Santos and Jeffrey Richardson. Defendant Ray Coghill did not sign the agreement, but it was signed by his counsel on his behalf. Defendant KA Diehl and Associates, Inc., nor its successor company, First Services Residential, signed the agreement. Mark dos Santos and Jeffery Richardson did not receive a copy of the agreement until after the mediation. Plaintiffs' Santos and Richardson, upon reading the agreement for themselves, asked counsel to seek clarification of certain provisions. Thereafter, Defendants filed a motion to enforce the agreement, which Plaintiffs now oppose.

RULE/LAW

Pursuant to South Carolina Rules of Civil Procedure, Rule 43(k) SCRCP, no agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel.

"In interpreting the meaning of the SCRCP, the Court applies the same rules of construction used to interpret statutes." *Farnsworth v. Davis Heating and Air Conditioning Inc.*, 367 SC 634 (2006). Rule 43(k) of the South Carolina Rules of Civil Procedure is "intended to prevent disputes as to the existence and terms of agreements regarding pending litigation." *Ashfort Corp. v. Palmetto Construction Group Inc.*, 318 SC 492, 493-94 (1995).

In *Farnsworth v. Davis Heating and Air Conditioning Inc.*, 367 SC 634 (2006), the plaintiff expressly authorized her counsel to offer and accept $22,000.00 to settle her case against the defendant. Plaintiff's counsel sent a signed letter offering settlement of $22,000.00. Defendant's counsel signed the letter accepting the offer to settle plaintiff's claim for $22,000.00. Plaintiff rescinded the agreement and defendant moved to enforce the settlement. The Court found Rule

ELECTRONICALLY FILED - 2017 Jul 26 4:06 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

43(k) permitted plaintiff to rescind the settlement agreement again establishing that Rule 43(k) applies to settlement agreements (first established in *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492). The Court also made clear that plaintiffs admission that she *had* agreed to accept $22,000.00 and that her attorney *had* her authority to enter into the agreement did not bind her until one of three conditions precedent were met: (1) the agreement was reduced to the form of a consent order, (2) or written stipulation signed by counsel and entered in the record, or (3) reduced to writing and signed by the parties and their counsel.

Pursuant to Rule 8 of the South Carolina ADR Mediation Rules, "Communications during a mediation settlement conference shall be confidential. The parties, their attorneys and any other person present shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any oral or written communications having occurred in a mediation proceeding..."

ARGUMENT

I. *The Court should not enforce the proposed Settlement Agreement because Rule 43(k) has not been satisfied.*

Defendants seek to enforce a settlement agreement which clearly fails to comply with the strict 43(k) requirements. The agreement was reduced to a "*writing*", but is not "*signed by the parties and counsel*". The settlement agreement was not signed by five parties, Mark dos Santos, Jeffrey Richardson, Jim Perkins, Ray Coghill or KA Diehl. The settlement agreement also was not signed by counsel, Preston Brittain, Philip Kilgore, or Alicia Thompson. The settlement agreement was not executed in a manner which our Courts recognize as binding because it lacked the signatures of "parties" and "counsel". (See Exhibit "A" Settlement Agreement).

Defendants' counter-position is that counsel had or should have had authority to sign on behalf of his clients. Defendant's position regarding authority of counsel is a red-herring and is

ELECTRONICALLY FILED - 2017 Jul 26 4:06 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

directly controverted by the ruling in *Farnsworth*. Moreover, even if the Court accepted counsel's signature on behalf of Santos, Richardson, and Coghill, the agreement still would not comply with Rule 43(k) because it lacks the signatures of two other parties: Defendant KA Diehl and Plaintiff Jim Perkins.

Pursuant to Rule 43(k) settlement agreements are not binding unless parties and counsel sign the agreement. Counsel Preston Brittain and counsel Philip Kilgore signed the agreement on behalf of certain absent parties, but did not otherwise sign the agreement. Counsel for KA Diehl did not sign the agreement on behalf of their client or otherwise. Therefore, the settlement agreement is not a binding resolution of the case.

Defendants will take the position that Rule 43(k) has been "substantially complied with" or that this agreement is "not an agreement between counsel." Arguments such as these have been considered in the past and our appellate courts have rejected them. In *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, the Court considered the same arguments and held: "to take such a narrow reading of Rule 43(k) would defeat its purpose of preventing disputes such as this one...[W]e find defendants assertion that there has been substantial compliance to be without merit." *Ashfort*, 318 S.C. at 495, 458 S.E.2d at 535. The "substantial compliance" position was likewise rejected in *Young v. Cooler*, where the court stated, "even if the Youngs intended to be bound and attempted to announce to the court that a settlement had been reached, the requirements of 43(k) were not met." *Young v. Cooler*, 347 S.C. 362, 366, 555 S.E.2d 410, 412 (Ct. App. 2001). Further, in *Buckley v. Shealy*, the Supreme Court upheld the appellate courts' decision that a mediation agreement was not binding despite having been honored by the parties for six years. In *Buckley v. Shealy*, 370 S.C. 317, 322, 635 S.E.2d 76, 78 (2006). In *Galloway v. Regis Corp.*, a matter was settled at mediation without a formally executed settlement agreement and a form order dismissing

ELECTRONICALLY FILED - 2017 Jul 26 4:06 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

the case as settled was entered into the record[2]. The trial court enforced the agreement, but the S.C. Court of Appeals reversed the decision because the requirements of Rule 43(k) were not satisfied. The Court lamented that "while we recognize the apparent unfairness that our ruling works upon Galloway, our conclusion is compelled by the Supreme Court's rulings."

Our Courts have strictly enforced Rule 43(k), and while quirky, its serves a very important purpose of keeping Courts out of disputes amongst counsel and parties as relates to purported agreements. Rule 43(k) protects attorneys and clients from unwanted dialogues and intrusions of attorney-client privileged matters, and keeps our Courts from being bogged-down with disputes of this nature. To enforce the agreement against the opposition by Plaintiffs would controvert clear South Carolina law and therefore the Court must deny Defendants' motion.

CONCLUSION

The Court should not enforce the purported settlement agreement because the agreement is not compliant with Rule 43(k) of the Rules of Civil Procedure.

THE BRITTAIN LAW FIRM, P.A.

s / A. Preston Brittain
A. Preston Brittain, Esquire (SC Bar # 73707)
Thomas C. Brittain, Esquire (SC Bar # 00893)
4614 Oleander Drive
Myrtle Beach, SC 29577
Phone: (843) 449-8562
Fax: (843) 497-6124
ATTORNEYS FOR PLAINTIFF

July 26, 2017
Myrtle Beach, South Carolina

[2] Plaintiff attaches the article, "A Handshake is Not Enough", South Carolina Lawyer, July 2012.

ELECTRONICALLY FILED - 2017 Jul 26 4:06 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

EXHIBIT A

Plaintiffs' Memorandum in Opposition to Defendants' Motion to Enforce Settlement

SETTLEMENT AGREEMENT

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Settlement Agreement
Civil Action Nos.: 2016-CP-26-00673, -00674, -00743, -00744

The following is a Settlement Agreement ("Agreement") between Plaintiffs Jim Perkins, Colleen Franke a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dames, Errol Dos Santos, and Jeffrey Richardson ("Plaintiffs'") on the one hand and Defendants The Myrtle Beach Resort Homeowners Association, Inc., ("MBRHOA"), Ocean Front Spa Horizontal Property Regime, Inc. ("OFS"), Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Ken Perkins, Ray Coghill, Ralph Jump, and Wayne Urban ("Defendants") on the other (Plaintiffs and Defendants hereafter referred to as the "Parties") to settle Civil Action Nos.: 2016-CP-26-00673, -00674, -00743, -00744, currently pending on the South Carolina Circuit Court in Horry County ("Settled Actions").

1. For good and valuable consideration, upon full execution and effectuation of this Agreement, in full satisfaction of the Settled Actions, and any other claims or charges Plaintiffs have, claim to have, or may have, against Defendants, including, without limitation, any claim for attorneys' fees or costs, Defendants agree to pay the gross amount of $85,000.00 (the "Payment") in full satisfaction of any claims, charges or actions Plaintiffs have against Defendants.

a) Defendants will, thirty (30) business days hereafter, pay to Plaintiffs and Plaintiffs' attorney the total sum of Fifteen Thousand Dollars ($15,000.00) for the purposes of funding a binding arbitration of a declaratory judgment action to adjudicate whether the gate pass fee currently charged by MBRHOA is authorized under the governing MBRHOA documents and applicable law.
b) Defendants will, thirty (30) business days hereafter, pay to The Board of Directors for the Myrtle Beach Resort Horizontal Property Regime ("A Building Board") and the Board of Directors for the Myrtle Beach Resort Five Seasons Centre Horizontal Property Regime, ("Five Seasons Board") the total sum of Fifteen Thousand Dollars ($15,000.00) for the purposes of defending a binding arbitration of a declaratory judgment action filed by Plaintiffs for the purpose of adjudicating whether the gate pass fee currently charged is authorized under the governing MBRHOA documents and applicable law.
c) Arbitrator. Defendants will pay to Plaintiff's counsel the sum of $5,000.00 to be held in trust by his law firm to pay to an arbitrator to resolve the arbitration set forth in the previous two paragraphs. In the event this amount does not fund the arbitration in full, the balance, if any, shall be paid by the attorneys receiving the sums set out in the two previous paragraphs.
d) Defendants will, thirty (30) business days hereafter, pay "Brittain Law Firm" in the amount of Fifty Thousand Dollars and No Cents ($50,000.00), as payment for attorneys' fees and costs, such amount not being subject to income or employment tax withholding, but to be reported on a Form 1099

2. The Parties hereto recognize that the Defendants do not admit any liability to Plaintiffs, or to anyone else because of, or growing out of, matters set forth in Plaintiffs' Amended Complaints in the Settled Actions. The Parties have agreed to settle any and all claims

Plaintiffs have asserted or may have asserted against Defendants in order to avoid further cost and inconvenience in moving forward with a trial.

3. MBRHOA and OFS will use their best efforts to have their respective By-Laws amended to require at least three bids to be received prior to the awarding of any contract which will exceed $10,000.00 in value.

4. In exchange for and in consideration of the promises set forth in this Agreement, and except for the rights to enforce the provisions of this Agreement, Plaintiffs, their heirs, executors, administrators, legal and personal representatives, successors and assigns, hereby covenant not to sue and fully release and forever discharge Defendants and their respective present and former parents, heirs, assigns, subsidiaries, affiliates, and related entities or corporations, and any of their past and present officers, directors, shareholders, employers, past and present employees, agents, partners, attorneys, heirs, successors, insurers and assigns (the "Released Parties"), from any and all claims, demands, actions, charges, complaints, suits, administrative proceedings, debts, promises, contracts, grievances, and causes of action (hereinafter collectively referred to as "Claims"), in law or in equity, whether known or unknown, which Plaintiffs and their heirs, executors, administrators, agents, distributees, beneficiaries, successors in interest and assignees may have by reason of any matter, cause or thing whatsoever from the beginning of the world to only the day of the date of Plaintiffs' execution of this Agreement, including, but not limited to, any and all claims which were actually asserted or might have been asserted by Plaintiffs in the Settled Actions. Plaintiffs agree never to file a lawsuit against Defendants based on any reason contained in this Agreement. The Release does not purport to release any claims that the law does not permit to be released.

5. Within 15 days of receipt of the Payment, Plaintiffs' counsel shall file a **stipulation of dismissal with prejudice** in each of the Settled Actions.

6. Plaintiffs further acknowledge and agree that this Agreement extends to all claims of every kind and nature whatsoever, known or unknown, suspected or unsuspected, and Plaintiffs acknowledges they may hereafter discover facts in addition to or different from those which they know or believe to be true with respect to the subject matter of this Agreement, but it is their intention to hereby fully and finally settle and release all such matters as well and, in furtherance of that intention, the foregoing Release shall remain in effect as a full and complete release notwithstanding the discovery or existence of such additional or different facts.

7. Plaintiffs agree that they will not make any statements, oral or written, which they know or reasonably should know to be a disparaging or negative comment about Defendants or their officers, directors, employees and agents, or otherwise detrimental to the reputation or goodwill of Defendants, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required by law. Defendants agree that they will not make any statements, oral or written, which they know or reasonably should know to be a disparaging or negative comment about Plaintiffs or their officers, directors, employees and agents, or otherwise detrimental to the reputation or goodwill of Plaintiffs, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required by law.

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8. It is understood and agreed that Defendants expressly rely upon the promises, representations, and warranties made by Plaintiffs in this Agreement; that any breach of such promises, representations, and warranties would constitute a material breach of this Agreement; and that in the event of any such breach, Defendants shall be entitled to any and all of the following relief: (a) the immediate repayment to Defendants of the full Settlement Amount hereunder (b) the indemnification and hold harmless protection set forth above; (c) specific enforcement of all promises and undertakings made by Plaintiffs hereunder; and (d) all other relief and damages available at law or in equity.

Agreed to this 1st Day of May, 2017.

Plaintiffs

Jim Perkins

Colleen Franke a/k/a Colleen Franke Perkins

Mark Dos Santos

By his Attorney

Nancy Moore

William Moore

Steven Dame

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Errol Dos Santos

Jeffrey Richardson

By his Attorney

Defendants

The Myrtle Beach Resort Homeowners Association, Inc., ("MBRHOA")

By its Attorney

Ocean Front Spa Horizontal Property Regime, Inc. ("OFS"),

By its Attorney

Phil Cox

Bill Cameron

By his Attorney

Stanley Jordan

By his Attorney

Walter Jordan

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Ken Perkins

Ray Coghill

By his Attorney

Ralph Jump

Wayne Urban

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EXHIBIT B

Plaintiffs' Memorandum in Opposition to Defendants' Motion to Enforce Settlement

ARTICLE: "A HANDSHAKE IS NOT ENOUGH", SOUTH CAROLINA LAWYER, 2012.

Change Language: Choose

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A Handshake Is Not Enough

Angus Lawton And Erica McElreath

Settlement Agreements Under Rule 43(k)

You have finally done it. After months of negotiating, you hang up the phone knowing that the big case you have been working on is finally settled. Opposing counsel has a great reputation, and you know you can trust his word. Even so, you immediately draft a letter memorializing the terms of your agreement and send it to opposing counsel. You are a little nervous about his client backing out, so you ask him to have his client sign it. He does, and sends it back to you. You think the deal is done.

Fast-forward several months, and the opposing party is running into obstacles trying to comply with the terms of the settlement. You ask opposing counsel to close the deal, and you get nothing but excuses. After several more months, you hear from opposing counsel that the deal is off. You plan to move to enforce the settlement agreement. Is the agreement enforceable?

The rule

This situation is specifically addressed in Rule 43(k) of the South Carolina Rules of Civil Procedure.

The rule provides:

No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.

In the scenario described above, there is (a) no consent order regarding the alleged settlement; (b) no written stipulation signed by counsel and entered in the record regarding any settlement; (c) no hearing in open court where a settlement was noted upon the record; and (d) no writing signed by the parties and their counsel. Stated simply, there is no binding settlement agreement under South Carolina law, and a motion to enforce the settlement should fail.

History of the rule

Rule 43(k) is based on former Circuit Court Rule 14. Like its predecessor, the rule is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation and to relieve the court of the necessity of determining such disputes, which "are often more perplexing than the case itself." Ashfort Corp. v. Palmetto Const. Group, Inc., 318 S.C. 492, 493-94, 458 S.E.2d 533, 534 (1995). The S.C. Supreme Court has gone so far as to say that "[t]he time of the court should not be taken up in controversial matters of this character." Id.

Compliance with Rule 43(k) became easier with the S.C. Supreme Court's most recent amendment, effective on April 29, 2009. The amendment provides that agreements of counsel can be binding if they are "reduced to writing and signed by the parties and their counsel." The amendment eliminates the need for the agreement to be an official part of the record. With this addition to the rule, an enforceable agreement can be signed by all parties and counsel at the conclusion of a successful mediation.

Since the rule was amended, there have been no appellate court decisions interpreting the phrase "reduced to writing and signed by the parties and their counsel." However, based on the appellate courts' strict compliance with the rule since its inception, it seems likely that the courts will continue to require strict compliance before determining that a settlement agreement is enforceable.

Reasons for the rule

Although Rule 43(k) seems harsh, there are legitimate reasons for such a rule, and the courts are justified in demanding strict compliance. As indicated in the case law, disputes about settlement agreements often are very complicated. The only real witnesses in such disputes often are the attorneys. The courts are hesitant to make attorneys witnesses in cases that they have been handling.

Furthermore, in disputes involving alleged settlement agreements, there will often be issues concerning the attorney client privilege and what information was transmitted to the clients by the attorneys. If a client testifies that his attorney told him that the case was settled, then the attorney client privilege is probably waived. This will open the door to unnecessary and unpleasant discovery.

There is also an issue regarding Rule 408 of the South Carolina Rules of Evidence. This rule, titled "Compromise and Offers to Compromise" generally provides that settlement offers are not admissible to prove liability for a claim or its amount. Rule 408 will come into play if there is a trial on an issue regarding a settlement agreement, and it will likely prevent the introduction of any evidence regarding settlement offers.

Rule 43(k) in civil litigation

Attorneys in South Carolina settle cases every day without satisfying Rule 43(k). In fact, it is probably a rule ignored more than any other rule of civil procedure. Many attorneys go through their entire careers without having an issue with the enforcement of a settlement agreement. At least in civil litigation, there are usually no problems consummating settlements based on a phone call, a letter or a handshake.

Rule 43(k) comes into play in cases where there are difficult clients, or where there are volatile relationships between the parties or attorneys. It can be an issue when a settlement involves more than the simple payment of money in exchange for a release.

Especially when dealing with complex issues or relationships, it is important to comply with Rule 43(k) before assuming that an agreement can be enforced.

Attorneys can get into trouble by telling clients that their case has been settled prematurely. If there is no enforceable settlement agreement, then the client should be informed that the deal is tentative. Strict compliance with the rule is the only way for an attorney to know that a deal can be enforced.

Rule 43(k) must also be considered when a case settles at trial. At this point, with the excitement of resolving the case and the rush to put it on the record, key terms are often omitted from the record. If it is not in the record, it is not a part of the agreement, and the deal will not be enforced by the court.

Rule 43(k) in family court

After heated discovery, a husband and wife sit down with their attorneys and a mediator and attempt to finally settle their divorce case. This process takes all day, during which the parties and their attorneys spend hours pouring over every detail. After analyzing the case from every angle, the parties emerge with a mediation agreement, setting out all the details of the parties' final settlement agreement. The agreement is signed by the parties and their attorneys in order to satisfy the requirements of Rule 43(k).

Husband goes home and speaks with his newly-divorced neighbor, who tells husband that he agreed to pay far too much alimony. If he takes the case to trial, the judge will surely cut that amount in half. After this advice, husband calls his attorney to tell her that the deal is off. Wife moves to enforce the agreement. Is it enforceable?

According to the South Carolina Rules of Family Court, Rule 43(k) applies to domestic relations actions. See S.C. R. Family Ct. 2(a). In family court, as with civil litigation, the parties are free to reach an agreement concerning their disputes. In civil cases, an agreement that complies with Rule 43(k) should be enforceable; however, in family court there is an additional hurdle to overcome. All agreements concerning alimony, child support or property issues must be presented to the family court for approval.

Moseley v. Mosier, 279 S.C. 348, 353, 306 S.E.2d 624, 627 (1983). When approving a settlement agreement, the family court must determine: (1) if assent to the agreement is voluntarily given; and (2) if the agreement is fair under all relevant circumstances. Funderburk v. Funderburk, 286 S.C. 129, 131, 332 S.E.2d 205, 206 (1985). If the court finds the agreement was entered into freely and voluntarily, and concludes that the agreement was fair, the agreement should be approved, provided it also comports with Rule 43(k).

In family court matters, the court's discretion in approving agreements seems to undermine the force of the rule. Though it appears to pack less punch in family court, lawyers are well-advised to craft settlement agreements that comply with Rule 43(k). In at least one instance, the S.C. Supreme Court has declined to enforce a family court agreement that did not comport with the rule. (See the discussion on Buckley v. Shealy, infra.)

Case law

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The cases interpreting Rule 43(k) have required strict compliance with the requirements of the rule. In some instances, the rule seems harsh. For example, the case Farnsworth v. Davis involved an action for breach of contract and negligence. During the course of discovery, Plaintiff's counsel wrote a letter to defense counsel indicating that Plaintiff would settle the case for $22,000. Plaintiff had specifically authorized his attorney to write the letter.

Thereafter, the defense attorney accepted the offer. He signed the settlement letter and returned it to Plaintiff's counsel. Unfortunately, the Plaintiff then changed her mind and rescinded the agreement. Defense counsel then filed a motion to compel the settlement. The circuit court ordered the Plaintiff to comply with the settlement agreement, finding that the requirements of Rule 43(k) had been satisfied. The matter then went up on appeal.

After hearing the case, the S.C. Court of Appeals held that the agreement could not be enforced, as the requirements of Rule 43(k) were not satisfied. Farnsworth v. Davis, 367 S.C. 634, 637-38, 627 S. E.2d 724, 726 (2006). It did not matter that the parties admitted that there was a duly executed written agreement. It did not matter that the Plaintiff had authorized his attorney to write the letter. The specific requirements of Rule 43(k) were not satisfied, and the case was remanded to the circuit court for trial.

In Galloway v. Regis Corp., Galloway sued Regis Corp. alleging she fell in Regis' retail establishment. The case settled after mediation, but no formal settlement agreement was signed. The parties subsequently informed the clerk of court that the case had been resolved, and a form order dismissing the case as settled was entered in the record. Subsequent disputes arose concerning the terms of the settlement agreement, and Galloway filed a motion seeking to compel Regis to comply with the settlement agreement. The trial court enforced the alleged settlement, but the S.C. Court of Appeals reversed the decision because the requirements of Rule 43(k) were not satisfied. "While we recognize the apparent unfairness that our ruling works upon Galloway, our conclusion is compelled by the Supreme Court's rulings ... We hope our decision here underscores the importance of putting a settlement agreement on the record or immediately reducing the agreement to writing, and including in the writing all material terms and conditions of the agreement. Only then will an attorney be certain that his client's interests are fully protected." Galloway v. Regis Corp., 325 S.C. 541, 546, 481 S.E.2d 714, 716 (Ct. App. 1997).

"Substantial compliance" with the rule has been rejected in three cases. In a domestic case involving a divorce, the parties settled a portion of their dispute during mediation and put the settlement agreement in writing. The husband paid the wife for six years pursuant to the agreement. Thereafter, disputes arose regarding the terms of the agreement, and the agreement could not be located. The trial court declined to enforce the settlement agreement, and the Supreme Court affirmed in an opinion written by Chief Justice Toal. The Court ruled that Rule 43(k) prohibited the enforcement of the agreement, Despite the fact that money had actually changed hands between the parties for six years. Buckley v. Shealy, 370 S.C. 317, 322, 635 S.E.2d 76, 78 (2006).

Young v. Cooler was a case involving an automobile accident. The liability portion of the claim was going to trial, but the UIM carrier agreed to settle the case. The attorney for the UIM carrier wrote a letter stating that $15,000 would be paid "regardless of the outcome of your settlement negotiations or trial" and further stated that he would order the drafts and prepare a release. The attorney later learned that he was mistaken about the liability coverage limits and withdrew the $15,000 offer. After the trial, the insured made a motion to the trial judge to enforce the alleged settlement with the UIM carrier. The judge granted the motion. The S.C. Court of Appeals reversed, concluding that the letter was not enough to satisfy the requirement of Rule 43(k). The court stated, "even if the Youngs intended to be bound and attempted to announce to the court that a settlement had been reached, the requirements of 43(k) were not met." Young v. Cooler, 347 S.C. 362, 366, 555 S. E.2d 410, 412 (Ct. App. 2001).

What happens if the clients, unbeknownst to the lawyers, negotiate a settlement concerning pending litigation? As the title of the rule states, Rule 43(k) applies to "Agreements of Counsel." If the attorneys did not negotiate the agreement, then arguably the rule does not apply. However, in Ashfort, the S.C. Supreme Court rejected a similar argument. In that case, an attorney hired by an insurance carrier attempted to settle a case, and the lawsuit was dismissed. Later, a dispute arose about the terms of the settlement. One of the parties argued that Rule 43(k) did not apply because the agreement was between the parties and "merely confirmed by the parties' counsel." The S.C. Supreme Court rejected this argument. "To take such a narrow reading of Rule 43(k) would defeat its purpose of preventing disputes such as this one ... [W]e find appellants' assertion that there has been substantial compliance with Rule 43(k) to be without merit." Ashfort, 318 S.C. at 495, 458 S.E.2d at 535.

Conclusion

Attorneys should be aware of the exact requirements of Rule 43(k). The rule is simple but specific. Following the rule may require a few extra steps beyond a handshake or phone call, but those extra steps are well worth it when a settlement agreement is questioned. Attorneys can avoid problems by strict compliance with the rule or by understanding that no agreement can be enforced unless the exact requirements of the rule have been satisfied.

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Angus Lawton and Erica McElreath practice with Lawton Law Firm, LLC in Mt. Pleasant. Special thanks to Rob Newton (Dooley Law Firm, PA) and David Shea (Law Offices of Shea and Barron) for their insight and research concerning Rule 43(k) in the context of family law.

VIEW ALL ARTICLES

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STATE OF SOUTH CAROLINA **COUNTY OF HORRY**	)))	**IN THE COURT OF COMMON PLEAS** **15TH JUDICIAL CIRCUIT** **Civil Action No.: 2016-CP-26-00743**
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all others similarly situated, Plaintiffs, vs. K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION OF DEFENDANTS' COSOLIDATED MOTION TO ENFORCE SETTLEMENT / MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

TO: THE HONORABLE COURT, THE ABOVE-NAMED DEFENDANTS and THEIR ATTORNEYS PHILLIP A. KILGORE, ESQ. and LUCAS J. ASPER, ESQ.:

FACTS

The above referenced parties agreed to mediate five cases in one day. The mediation was set to occur, and did occur on, May 1, 2017, despite the known absence of several parties and adjusters.[1] Mediation concluded at roughly 11:45pm with an agreement, which was reduced to a

[1] Defendants claim they were unaware that Plaintiff Santos would be participating by phone, but when the parties were introduced, defendants did not raise any objection or indicate any surprise by the absence of Santos. Further, Santos made remarks during the opening session.

writing and signed by the following Plaintiffs: Collen Franke a/k/a Colleen Franke Perkins, Nancy Moore, William Moore, Steven Dame, and Errol dos Santos. Plaintiffs Mark dos Santos, Jeffrey Richardson and Jim Perkins did not sign the agreement. Counsel for Plaintiff signed on behalf of Mark dos Santos and Jeffrey Richardson. Defendant Ray Coghill did not sign the agreement, but it was signed by his counsel on his behalf. Defendant KA Diehl and Associates, Inc., nor its successor company, First Services Residential, signed the agreement. Mark dos Santos and Jeffery Richardson did not receive a copy of the agreement until after the mediation. Plaintiffs' Santos and Richardson, upon reading the agreement for themselves, asked counsel to seek clarification of certain provisions. Thereafter, Defendants filed a motion to enforce the agreement, which Plaintiffs now oppose.

RULE/LAW

Pursuant to South Carolina Rules of Civil Procedure, Rule 43(k) SCRCP, no agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel.

"In interpreting the meaning of the SCRCP, the Court applies the same rules of construction used to interpret statutes." *Farnsworth v. Davis Heating and Air Conditioning Inc.*, 367 SC 634 (2006). Rule 43(k) of the South Carolina Rules of Civil Procedure is "intended to prevent disputes as to the existence and terms of agreements regarding pending litigation." *Ashfort Corp. v. Palmetto Construction Group Inc.*, 318 SC 492, 493-94 (1995).

ELECTRONICALLY FILED - 2017 Jul 26 4:08 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

In *Farnsworth v. Davis Heating and Air Conditioning Inc.*, 367 SC 634 (2006), the plaintiff expressly authorized her counsel to offer and accept $22,000.00 to settle her case against the defendant. Plaintiff's counsel sent a signed letter offering settlement of $22,000.00. Defendant's counsel signed the letter accepting the offer to settle plaintiff's claim for $22,000.00. Plaintiff rescinded the agreement and defendant moved to enforce the settlement. The Court found Rule 43(k) permitted plaintiff to rescind the settlement agreement again establishing that Rule 43(k) applies to settlement agreements (first established in *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492). The Court also made clear that plaintiffs admission that she *had* agreed to accept $22,000.00 and that her attorney *had* her authority to enter into the agreement did not bind her until one of three conditions precedent were met: (1) the agreement was reduced to the form of a consent order, (2) or written stipulation signed by counsel and entered in the record, or (3) reduced to writing and signed by the parties and their counsel.

Pursuant to Rule 8 of the South Carolina ADR Mediation Rules, "Communications during a mediation settlement conference shall be confidential. The parties, their attorneys and any other person present shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any oral or written communications having occurred in a mediation proceeding..."

ARGUMENT

I. *The Court should not enforce the proposed Settlement Agreement because Rule 43(k) has not been satisfied.*

Defendants seek to enforce a settlement agreement which clearly fails to comply with the strict 43(k) requirements. The agreement was reduced to a "*writing*", but is not "*signed by the parties and counsel*". The settlement agreement was not signed by five parties, Mark dos Santos,

ELECTRONICALLY FILED - 2017 Jul 26 4:08 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

Jeffrey Richardson, Jim Perkins, Ray Coghill or KA Diehl. The settlement agreement also was not signed by counsel, Preston Brittain, Philip Kilgore, or Alicia Thompson. The settlement agreement was not executed in a manner which our Courts recognize as binding because it lacked the signatures of "parties" and "counsel". (See Exhibit "A" Settlement Agreement).

Defendants' counter-position is that counsel had or should have had authority to sign on behalf of his clients. Defendant's position regarding authority of counsel is a red-herring and is directly controverted by the ruling in *Farnsworth*. Moreover, even if the Court accepted counsel's signature on behalf of Santos, Richardson, and Coghill, the agreement still would not comply with Rule 43(k) because it lacks the signatures of two other parties: Defendant KA Diehl and Plaintiff Jim Perkins.

Pursuant to Rule 43(k) settlement agreements are not binding unless parties <u>and counsel</u> sign the agreement. Counsel Preston Brittain and counsel Philip Kilgore signed the agreement on behalf of certain absent parties, but did not otherwise sign the agreement. Counsel for KA Diehl did not sign the agreement on behalf of their client or otherwise. Therefore, the settlement agreement is not a binding resolution of the case.

Defendants will take the position that Rule 43(k) has been "substantially complied with" or that this agreement is "not an agreement between counsel." Arguments such as these have been considered in the past and our appellate courts have rejected them. In *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, the Court considered the same arguments and held: "to take such a narrow reading of Rule 43(k) would defeat its purpose of preventing disputes such as this one...[W]e find defendants assertion that there has been substantial compliance to be without merit." *Ashfort*, 318 S.C. at 495, 458 S.E.2d at 535. The "substantial compliance" position was likewise rejected in

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Young v. Cooler, where the court stated, "even if the Youngs intended to be bound and attempted to announce to the court that a settlement had been reached, the requirements of 43(k) were not met." *Young v. Cooler*, 347 S.C. 362, 366, 555 S.E.2d 410, 412 (Ct. App. 2001). Further, in *Buckley v. Shealy*, the Supreme Court upheld the appellate courts' decision that a mediation agreement was not binding despite having been honored by the parties for six years. In *Buckley v. Shealy*, 370 S.C. 317, 322, 635 S.E.2d 76, 78 (2006). In *Galloway v. Regis Corp.*, a matter was settled at mediation without a formally executed settlement agreement and a form order dismissing the case as settled was entered into the record[2]. The trial court enforced the agreement, but the S.C. Court of Appeals reversed the decision because the requirements of Rule 43(k) were not satisfied. The Court lamented that "while we recognize the apparent unfairness that our ruling works upon Galloway, our conclusion is compelled by the Supreme Court's rulings."

Our Courts have strictly enforced Rule 43(k), and while quirky, its serves a very important purpose of keeping Courts out of disputes amongst counsel and parties as relates to purported agreements. Rule 43(k) protects attorneys and clients from unwanted dialogues and intrusions of attorney-client privileged matters, and keeps our Courts from being bogged-down with disputes of this nature. To enforce the agreement against the opposition by Plaintiffs would controvert clear South Carolina law and therefore the Court must deny Defendants' motion.

CONCLUSION

The Court should not enforce the purported settlement agreement because the agreement is not compliant with Rule 43(k) of the Rules of Civil Procedure.

[2] Plaintiff attaches the article, "A Handshake is Not Enough", South Carolina Lawyer, July 2012.

ELECTRONICALLY FILED - 2017 Jul 26 4:08 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

ELECTRONICALLY FILED - 2017 Jul 26 4:08 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

THE BRITTAIN LAW FIRM, P.A.

s / A. Preston Brittain
A. Preston Brittain, Esquire (SC Bar # 73707)
Thomas C. Brittain, Esquire (SC Bar # 00893)
4614 Oleander Drive
Myrtle Beach, SC 29577
Phone: (843) 449-8562
Fax: (843) 497-6124
ATTORNEYS FOR PLAINTIFF

July 26, 2017
Myrtle Beach, South Carolina

EXHIBIT A

Plaintiffs' Memorandum in Opposition to Defendants' Motion to Enforce Settlement

SETTLEMENT AGREEMENT

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Settlement Agreement
Civil Action Nos.: 2016-CP-26-00673, -00674, -00743, -00744

The following is a Settlement Agreement ("Agreement") between Plaintiffs Jim Perkins, Colleen Franke a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dames, Errol Dos Santos, and Jeffrey Richardson ("Plaintiffs'") on the one hand and Defendants The Myrtle Beach Resort Homeowners Association, Inc., ("MBRHOA"), Ocean Front Spa Horizontal Property Regime, Inc. ("OFS"), Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Ken Perkins, Ray Coghill, Ralph Jump, and Wayne Urban ("Defendants") on the other (Plaintiffs and Defendants hereafter referred to as the "Parties") to settle Civil Action Nos.: 2016-CP-26-00673, -00674, -00743, -00744, currently pending on the South Carolina Circuit Court in Horry County ("Settled Actions").

1. For good and valuable consideration, upon full execution and effectuation of this Agreement, in full satisfaction of the Settled Actions, and any other claims or charges Plaintiffs have, claim to have, or may have, against Defendants, including, without limitation, any claim for attorneys' fees or costs, Defendants agree to pay the gross amount of $85,000.00 (the "Payment") in full satisfaction of any claims, charges or actions Plaintiffs have against Defendants.

a) Defendants will, thirty (30) business days hereafter, pay to Plaintiffs and Plaintiffs' attorney the total sum of Fifteen Thousand Dollars ($15,000.00) for the purposes of funding a binding arbitration of a declaratory judgment action to adjudicate whether the gate pass fee currently charged by MBRHOA is authorized under the governing MBRHOA documents and applicable law.
b) Defendants will, thirty (30) business days hereafter, pay to The Board of Directors for the Myrtle Beach Resort Horizontal Property Regime ("A Building Board") and the Board of Directors for the Myrtle Beach Resort Five Seasons Centre Horizontal Property Regime, ("Five Seasons Board") the total sum of Fifteen Thousand Dollars ($15,000.00) for the purposes of defending a binding arbitration of a declaratory judgment action filed by Plaintiffs for the purpose of adjudicating whether the gate pass fee currently charged is authorized under the governing MBRHOA documents and applicable law.
c) Arbitrator. Defendants will pay to Plaintiff's counsel the sum of $5,000.00 to be held in trust by his law firm to pay to an arbitrator to resolve the arbitration set forth in the previous two paragraphs. In the event this amount does not fund the arbitration in full, the balance, if any, shall be paid by the attorneys receiving the sums set out in the two previous paragraphs.
d) Defendants will, thirty (30) business days hereafter, pay "Brittain Law Firm" in the amount of Fifty Thousand Dollars and No Cents ($50,000.00), as payment for attorneys' fees and costs, such amount not being subject to income or employment tax withholding, but to be reported on a Form 1099.

2. The Parties hereto recognize that the Defendants do not admit any liability to Plaintiffs, or to anyone else because of, or growing out of, matters set forth in Plaintiffs' Amended Complaints in the Settled Actions. The Parties have agreed to settle any and all claims

Plaintiffs have asserted or may have asserted against Defendants in order to avoid further cost and inconvenience in moving forward with a trial.

3. MBRHOA and OFS will use their best efforts to have their respective By-Laws amended to require at least three bids to be received prior to the awarding of any contract which will exceed $10,000.00 in value.

4. In exchange for and in consideration of the promises set forth in this Agreement, and except for the rights to enforce the provisions of this Agreement, Plaintiffs, their heirs, executors, administrators, legal and personal representatives, successors and assigns, hereby covenant not to sue and fully release and forever discharge Defendants and their respective present and former parents, heirs, assigns, subsidiaries, affiliates, and related entities or corporations, and any of their past and present officers, directors, shareholders, employers, past and present employees, agents, partners, attorneys, heirs, successors, insurers and assigns (the "Released Parties"), from any and all claims, demands, actions, charges, complaints, suits, administrative proceedings, debts, promises, contracts, grievances, and causes of action (hereinafter collectively referred to as "Claims"), in law or in equity, whether known or unknown, which Plaintiffs and their heirs, executors, administrators, agents, distributees, beneficiaries, successors in interest and assignees may have by reason of any matter, cause or thing whatsoever from the beginning of the world to only the day of the date of Plaintiffs' execution of this Agreement, including, but not limited to, any and all claims which were actually asserted or might have been asserted by Plaintiffs in the Settled Actions. Plaintiffs agree never to file a lawsuit against Defendants based on any reason contained in this Agreement. The Release does not purport to release any claims that the law does not permit to be released.

5. Within 15 days of receipt of the Payment, Plaintiffs' counsel shall file a **stipulation of dismissal with prejudice** in each of the Settled Actions.

6. Plaintiffs further acknowledge and agree that this Agreement extends to all claims of every kind and nature whatsoever, known or unknown, suspected or unsuspected, and Plaintiffs acknowledges they may hereafter discover facts in addition to or different from those which they know or believe to be true with respect to the subject matter of this Agreement, but it is their intention to hereby fully and finally settle and release all such matters as well and, in furtherance of that intention, the foregoing Release shall remain in effect as a full and complete release notwithstanding the discovery or existence of such additional or different facts.

7. Plaintiffs agree that they will not make any statements, oral or written, which they know or reasonably should know to be a disparaging or negative comment about Defendants or their officers, directors, employees and agents, or otherwise detrimental to the reputation or goodwill of Defendants, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required by law. Defendants agree that they will not make any statements, oral or written, which they know or reasonably should know to be a disparaging or negative comment about Plaintiffs or their officers, directors, employees and agents, or otherwise detrimental to the reputation or goodwill of Plaintiffs, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required by law.

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8. It is understood and agreed that Defendants expressly rely upon the promises, representations, and warranties made by Plaintiffs in this Agreement; that any breach of such promises, representations, and warranties would constitute a material breach of this Agreement; and that in the event of any such breach, Defendants shall be entitled to any and all of the following relief: (a) the immediate repayment to Defendants of the full Settlement Amount hereunder (b) the indemnification and hold harmless protection set forth above; (c) specific enforcement of all promises and undertakings made by Plaintiffs hereunder; and (d) all other relief and damages available at law or in equity.

Agreed to this 1st Day of May, 2017.

Plaintiffs

Jim Perkins

Colleen Franke

Colleen Franke a/k/a Colleen Franke Perkins

Mark Dos Santos

By his Attorney

Nancy Moore

Nancy Moore

William Moore

William Moore

Steven Dame

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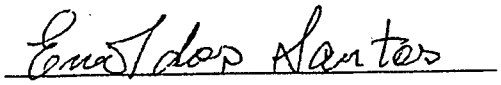
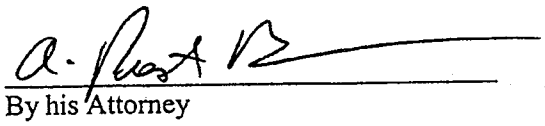
Errol Dos Santos



Jeffrey Richardson



By his Attorney

Defendants

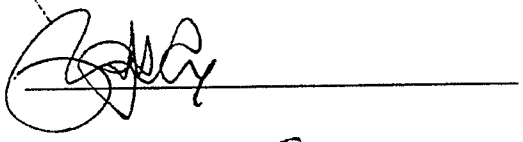
The Myrtle Beach Resort Homeowners Association, Inc., ("MBRHOA")

By its Attorney

Ocean Front Spa Horizontal Property Regime, Inc. ("OFS"),

By its Attorney

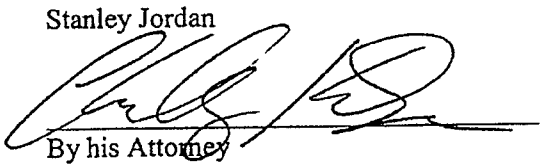
Phil Cox



Bill Cameron

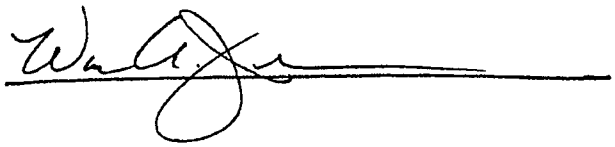
By his Attorney

Stanley Jordan



By his Attorney

Walter Jordan



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Ken Perkins

Ray Coghill

By his Attorney

Ralph Jump

Wayne Urban

29682229.1

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EXHIBIT B

Plaintiffs' Memorandum in Opposition to Defendants' Motion to Enforce Settlement

ARTICLE: "A HANDSHAKE IS NOT ENOUGH", SOUTH CAROLINA LAWYER, 2012.

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Change Language: Choose

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A Handshake Is Not Enough

Angus Lawton And Erica McElreath

Settlement Agreements Under Rule 43(k)

You have finally done it. After months of negotiating, you hang up the phone knowing that the big case you have been working on is finally settled. Opposing counsel has a great reputation, and you know you can trust his word. Even so, you immediately draft a letter memorializing the terms of your agreement and send it to opposing counsel. You are a little nervous about his client backing out, so you ask him to have his client sign it. He does, and sends it back to you. You think the deal is done.

Fast-forward several months, and the opposing party is running into obstacles trying to comply with the terms of the settlement. You ask opposing counsel to close the deal, and you get nothing but excuses. After several more months, you hear from opposing counsel that the deal is off. You plan to move to enforce the settlement agreement. Is the agreement enforceable?

The rule

This situation is specifically addressed in Rule 43(k) of the South Carolina Rules of Civil Procedure.

The rule provides:

No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.

In the scenario described above, there is (a) no consent order regarding the alleged settlement; (b) no written stipulation signed by counsel and entered in the record regarding any settlement; (c) no hearing in open court where a settlement was noted upon the record; and (d) no writing signed by the parties and their counsel. Stated simply, there is no binding settlement agreement under South Carolina law, and a motion to enforce the settlement should fail.

History of the rule

Rule 43(k) is based on former Circuit Court Rule 14. Like its predecessor, the rule is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation and to relieve the court of the necessity of determining such disputes, which "are often more perplexing than the case itself." Ashfort Corp. v. Palmetto Const. Group, Inc., 318 S.C. 492, 493-94, 458 S.E.2d 533, 534 (1995). The S.C. Supreme Court has gone so far as to say that "[t]he time of the court should not be taken up in controversial matters of this character." Id.

Compliance with Rule 43(k) became easier with the S.C. Supreme Court's most recent amendment, effective on April 29, 2009. The amendment provides that agreements of counsel can be binding if they are "reduced to writing and signed by the parties and their counsel." The amendment eliminates the need for the agreement to be an official part of the record. With this addition to the rule, an enforceable agreement can be signed by all parties and counsel at the conclusion of a successful mediation.

Since the rule was amended, there have been no appellate court decisions interpreting the phrase "reduced to writing and signed by the parties and their counsel." However, based on the appellate courts' strict compliance with the rule since its inception, it seems likely that the courts will continue to require strict compliance before determining that a settlement agreement is enforceable.

Reasons for the rule

Although Rule 43(k) seems harsh, there are legitimate reasons for such a rule, and the courts are justified in demanding strict compliance. As indicated in the case law, disputes about settlement agreements often are very complicated. The only real witnesses in such disputes often are the attorneys. The courts are hesitant to make attorneys witnesses in cases that they have been handling.

Furthermore, in disputes involving alleged settlement agreements, there will often be issues concerning the attorney client privilege and what information was transmitted to the clients by the attorneys. If a client testifies that his attorney told him that the case was settled, then the attorney client privilege is probably waived. This will open the door to unnecessary and unpleasant discovery.

There is also an issue regarding Rule 408 of the South Carolina Rules of Evidence. This rule, titled "Compromise and Offers to Compromise" generally provides that settlement offers are not admissible to prove liability for a claim or its amount. Rule 408 will come into play if there is a trial on an issue regarding a settlement agreement, and it will likely prevent the introduction of any evidence regarding settlement offers.

Rule 43(k) in civil litigation

Attorneys in South Carolina settle cases every day without satisfying Rule 43(k). In fact, it is probably a rule ignored more than any other rule of civil procedure. Many attorneys go through their entire careers without having an issue with the enforcement of a settlement agreement. At least in civil litigation, there are usually no problems consummating settlements based on a phone call, a letter or a handshake.

Rule 43(k) comes into play in cases where there are difficult clients, or where there are volatile relationships between the parties or attorneys. It can be an issue when a settlement involves more than the simple payment of money in exchange for a release.

Especially when dealing with complex issues or relationships, it is important to comply with Rule 43(k) before assuming that an agreement can be enforced.

Attorneys can get into trouble by telling clients that their case has been settled prematurely. If there is no enforceable settlement agreement, then the client should be informed that the deal is tentative. Strict compliance with the rule is the only way for an attorney to know that a deal can be enforced.

Rule 43(k) must also be considered when a case settles at trial. At this point, with the excitement of resolving the case and the rush to put it on the record, key terms are often omitted from the record. If it is not in the record, it is not a part of the agreement, and the deal will not be enforced by the court.

Rule 43(k) in family court

After heated discovery, a husband and wife sit down with their attorneys and a mediator and attempt to finally settle their divorce case. This process takes all day, during which the parties and their attorneys spend hours pouring over every detail. After analyzing the case from every angle, the parties emerge with a mediation agreement, setting out all the details of the parties' final settlement agreement. The agreement is signed by the parties and their attorneys in order to satisfy the requirements of Rule 43(k).

Husband goes home and speaks with his newly-divorced neighbor, who tells husband that he agreed to pay far too much alimony. If he takes the case to trial, the judge will surely cut that amount in half. After this advice, husband calls his attorney to tell her that the deal is off. Wife moves to enforce the agreement. Is it enforceable?

According to the South Carolina Rules of Family Court, Rule 43(k) applies to domestic relations actions. See S.C. R. Family Ct. 2(a). In family court, as with civil litigation, the parties are free to reach an agreement concerning their disputes. In civil cases, an agreement that complies with Rule 43(k) should be enforceable; however, in family court there is an additional hurdle to overcome. All agreements concerning alimony, child support or property issues must be presented to the family court for approval.

Moseley v. Mosier, 279 S.C. 348, 353, 306 S.E.2d 624, 627 (1983). When approving a settlement agreement, the family court must determine: (1) if assent to the agreement is voluntarily given; and (2) if the agreement is fair under all relevant circumstances. Funderburk v. Funderburk, 286 S.C. 129, 131, 332 S.E.2d 205, 206 (1985). If the court finds the agreement was entered into freely and voluntarily, and concludes that the agreement was fair, the agreement should be approved, provided it also comports with Rule 43(k).

In family court matters, the court's discretion in approving agreements seems to undermine the force of the rule. Though it appears to pack less punch in family court, lawyers are well-advised to craft settlement agreements that comply with Rule 43(k). In at least one instance, the S.C. Supreme Court has declined to enforce a family court agreement that did not comport with the rule. (See the discussion on Buckley v. Shealy, infra.)

Case law

ELECTRONICALLY FILED - 2017 Jul 26 4:08 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

The cases interpreting Rule 43(k) have required strict compliance with the requirements of the rule. In some instances, the rule seems harsh. For example, the case Farnsworth v. Davis involved an action for breach of contract and negligence. During the course of discovery, Plaintiff's counsel wrote a letter to defense counsel indicating that Plaintiff would settle the case for $22,000. Plaintiff had specifically authorized his attorney to write the letter.

Thereafter, the defense attorney accepted the offer. He signed the settlement letter and returned it to Plaintiff's counsel. Unfortunately, the Plaintiff then changed her mind and rescinded the agreement. Defense counsel then filed a motion to compel the settlement. The circuit court ordered the Plaintiff to comply with the settlement agreement, finding that the requirements of Rule 43(k) had been satisfied. The matter then went up on appeal.

After hearing the case, the S.C. Court of Appeals held that the agreement could not be enforced, as the requirements of Rule 43(k) were not satisfied. Farnsworth v. Davis, 367 S.C. 634, 637-38, 627 S. E.2d 724, 726 (2006). It did not matter that the parties admitted that there was a duly executed written agreement. It did not matter that the Plaintiff had authorized his attorney to write the letter. The specific requirements of Rule 43(k) were not satisfied, and the case was remanded to the circuit court for trial.

In Galloway v. Regis Corp., Galloway sued Regis Corp. alleging she fell in Regis' retail establishment. The case settled after mediation, but no formal settlement agreement was signed. The parties subsequently informed the clerk of court that the case had been resolved, and a form order dismissing the case as settled was entered in the record. Subsequent disputes arose concerning the terms of the settlement agreement, and Galloway filed a motion seeking to compel Regis to comply with the settlement agreement. The trial court enforced the alleged settlement, but the S.C. Court of Appeals reversed the decision because the requirements of Rule 43(k) were not satisfied. "While we recognize the apparent unfairness that our ruling works upon Galloway, our conclusion is compelled by the Supreme Court's rulings ... We hope our decision here underscores the importance of putting a settlement agreement on the record or immediately reducing the agreement to writing, and including in the writing all material terms and conditions of the agreement. Only then will an attorney be certain that his client's interests are fully protected." Galloway v. Regis Corp., 325 S.C. 541, 546, 481 S.E.2d 714, 716 (Ct. App. 1997).

"Substantial compliance" with the rule has been rejected in three cases. In a domestic case involving a divorce, the parties settled a portion of their dispute during mediation and put the settlement agreement in writing. The husband paid the wife for six years pursuant to the agreement. Thereafter, disputes arose regarding the terms of the agreement, and the agreement could not be located. The trial court declined to enforce the settlement agreement, and the Supreme Court affirmed in an opinion written by Chief Justice Toal. The Court ruled that Rule 43(k) prohibited the enforcement of the agreement, Despite the fact that money had actually changed hands between the parties for six years. Buckley v. Shealy, 370 S.C. 317, 322, 635 S.E.2d 76, 78 (2006).

Young v. Cooler was a case involving an automobile accident. The liability portion of the claim was going to trial, but the UIM carrier agreed to settle the case. The attorney for the UIM carrier wrote a letter stating that $15,000 would be paid "regardless of the outcome of your settlement negotiations or trial" and further stated that he would order the drafts and prepare a release. The attorney later learned that he was mistaken about the liability coverage limits and withdrew the $15,000 offer. After the trial, the insured made a motion to the trial judge to enforce the alleged settlement with the UIM carrier. The judge granted the motion. The S.C. Court of Appeals reversed, concluding that the letter was not enough to satisfy the requirement of Rule 43(k). The court stated, "even if the Youngs intended to be bound and attempted to announce to the court that a settlement had been reached, the requirements of 43(k) were not met." Young v. Cooler, 347 S.C. 362, 366, 555 S. E.2d 410, 412 (Ct. App. 2001).

What happens if the clients, unbeknownst to the lawyers, negotiate a settlement concerning pending litigation? As the title of the rule states, Rule 43(k) applies to "Agreements of Counsel." If the attorneys did not negotiate the agreement, then arguably the rule does not apply. However, in Ashfort, the S.C. Supreme Court rejected a similar argument. In that case, an attorney hired by an insurance carrier attempted to settle a case, and the lawsuit was dismissed. Later, a dispute arose about the terms of the settlement. One of the parties argued that Rule 43(k) did not apply because the agreement was between the parties and "merely confirmed by the parties' counsel." The S.C. Supreme Court rejected this argument. "To take such a narrow reading of Rule 43(k) would defeat its purpose of preventing disputes such as this one ... [W]e find appellants' assertion that there has been substantial compliance with Rule 43(k) to be without merit." Ashfort, 318 S.C. at 495, 458 S.E.2d at 535.

Conclusion

Attorneys should be aware of the exact requirements of Rule 43(k). The rule is simple but specific. Following the rule may require a few extra steps beyond a handshake or phone call, but those extra steps are well worth it when a settlement agreement is questioned. Attorneys can avoid problems by strict compliance with the rule or by understanding that no agreement can be enforced unless the exact requirements of the rule have been satisfied.

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Angus Lawton and Erica McElreath practice with Lawton Law Firm, LLC in Mt. Pleasant. Special thanks to Rob Newton (Dooley Law Firm, PA) and David Shea (Law Offices of Shea and Barron) for their insight and research concerning Rule 43(k) in the context of family law.

VIEW ALL ARTICLES

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STATE OF SOUTH CAROLINA **COUNTY OF HORRY**	)))	**IN THE COURT OF COMMON PLEAS** **15TH JUDICIAL CIRCUIT** **Civil Action No.: 2016-CP-26-00744**
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc. Plaintiffs, vs. Ocean Front Spa Horizontal Property Regime Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc., Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION OF DEFENDANTS' COSOLIDATED MOTION TO ENFORCE SETTLEMENT / MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

TO: THE HONORABLE COURT, THE ABOVE-NAMED DEFENDANTS and THEIR ATTORNEYS PHILLIP A. KILGORE, ESQ. and LUCAS J. ASPER, ESQ.:

FACTS

The above referenced parties agreed to mediate five cases in one day. The mediation was set to occur, and did occur on, May 1, 2017, despite the known absence of several parties and

adjusters.[1] Mediation concluded at roughly 11:45pm with an agreement, which was reduced to a writing and signed by the following Plaintiffs: Collen Franke a/k/a Colleen Franke Perkins, Nancy Moore, William Moore, Steven Dame, and Errol dos Santos. Plaintiffs Mark dos Santos, Jeffrey Richardson and Jim Perkins did not sign the agreement. Counsel for Plaintiff signed on behalf of Mark dos Santos and Jeffrey Richardson. Defendant Ray Coghill did not sign the agreement, but it was signed by his counsel on his behalf. Defendant KA Diehl and Associates, Inc., nor its successor company, First Services Residential, signed the agreement. Mark dos Santos and Jeffery Richardson did not receive a copy of the agreement until after the mediation. Plaintiffs' Santos and Richardson, upon reading the agreement for themselves, asked counsel to seek clarification of certain provisions. Thereafter, Defendants filed a motion to enforce the agreement, which Plaintiffs now oppose.

RULE/LAW

Pursuant to South Carolina Rules of Civil Procedure, Rule 43(k) SCRCP, no agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel.

"In interpreting the meaning of the SCRCP, the Court applies the same rules of construction used to interpret statutes." *Farnsworth v. Davis Heating and Air Conditioning Inc.*, 367 SC 634 (2006). Rule 43(k) of the South Carolina Rules of Civil Procedure is "intended to prevent disputes

[1] Defendants claim they were unaware that Plaintiff Santos would be participating by phone, but when the parties were introduced, defendants did not raise any objection or indicate any surprise by the absence of Santos. Further, Santos made remarks during the opening session.

ELECTRONICALLY FILED - 2017 Jul 26 4:11 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

as to the existence and terms of agreements regarding pending litigation." *Ashfort Corp. v. Palmetto Construction Group Inc.*, 318 SC 492, 493-94 (1995).

In *Farnsworth v. Davis Heating and Air Conditioning Inc.*, 367 SC 634 (2006), the plaintiff expressly authorized her counsel to offer and accept $22,000.00 to settle her case against the defendant. Plaintiff's counsel sent a signed letter offering settlement of $22,000.00. Defendant's counsel signed the letter accepting the offer to settle plaintiff's claim for $22,000.00. Plaintiff rescinded the agreement and defendant moved to enforce the settlement. The Court found Rule 43(k) permitted plaintiff to rescind the settlement agreement again establishing that Rule 43(k) applies to settlement agreements (first established in *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492). The Court also made clear that plaintiffs admission that she *had* agreed to accept $22,000.00 and that her attorney *had* her authority to enter into the agreement did not bind her until one of three conditions precedent were met: (1) the agreement was reduced to the form of a consent order, (2) or written stipulation signed by counsel and entered in the record, or (3) reduced to writing and signed by the parties and their counsel.

Pursuant to Rule 8 of the South Carolina ADR Mediation Rules, "Communications during a mediation settlement conference shall be confidential. The parties, their attorneys and any other person present shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any oral or written communications having occurred in a mediation proceeding…"

ARGUMENT

I. *The Court should not enforce the proposed Settlement Agreement because Rule 43(k) has not been satisfied.*

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Defendants seek to enforce a settlement agreement which clearly fails to comply with the strict 43(k) requirements. The agreement was reduced to a "*writing*", but is not "*signed by the parties and counsel*". The settlement agreement was not signed by five parties, Mark dos Santos, Jeffrey Richardson, Jim Perkins, Ray Coghill or KA Diehl. The settlement agreement also was not signed by counsel, Preston Brittain, Philip Kilgore, or Alicia Thompson. The settlement agreement was not executed in a manner which our Courts recognize as binding because it lacked the signatures of "parties" and "counsel". (See Exhibit "A" Settlement Agreement).

Defendants' counter-position is that counsel had or should have had authority to sign on behalf of his clients. Defendant's position regarding authority of counsel is a red-herring and is directly controverted by the ruling in *Farnsworth*. Moreover, even if the Court accepted counsel's signature on behalf of Santos, Richardson, and Coghill, the agreement still would not comply with Rule 43(k) because it lacks the signatures of two other parties: Defendant KA Diehl and Plaintiff Jim Perkins.

Pursuant to Rule 43(k) settlement agreements are not binding unless parties <u>and counsel</u> sign the agreement. Counsel Preston Brittain and counsel Philip Kilgore signed the agreement on behalf of certain absent parties, but did not otherwise sign the agreement. Counsel for KA Diehl did not sign the agreement on behalf of their client or otherwise. Therefore, the settlement agreement is not a binding resolution of the case.

Defendants will take the position that Rule 43(k) has been "substantially complied with" or that this agreement is "not an agreement between counsel." Arguments such as these have been considered in the past and our appellate courts have rejected them. In *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, the Court considered the same arguments and held: "to take such a narrow

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reading of Rule 43(k) would defeat its purpose of preventing disputes such as this one...[W]e find defendants assertion that there has been substantial compliance to be without merit." *Ashfort*, 318 S.C. at 495, 458 S.E.2d at 535. The "substantial compliance" position was likewise rejected in *Young v. Cooler*, where the court stated, "even if the Youngs intended to be bound and attempted to announce to the court that a settlement had been reached, the requirements of 43(k) were not met." *Young v. Cooler*, 347 S.C. 362, 366, 555 S.E.2d 410, 412 (Ct. App. 2001). Further, in *Buckley v. Shealy*, the Supreme Court upheld the appellate courts' decision that a mediation agreement was not binding despite having been honored by the parties for six years. In *Buckley v. Shealy*, 370 S.C. 317, 322, 635 S.E.2d 76, 78 (2006). In *Galloway v. Regis Corp.*, a matter was settled at mediation without a formally executed settlement agreement and a form order dismissing the case as settled was entered into the record[2]. The trial court enforced the agreement, but the S.C. Court of Appeals reversed the decision because the requirements of Rule 43(k) were not satisfied. The Court lamented that "while we recognize the apparent unfairness that our ruling works upon Galloway, our conclusion is compelled by the Supreme Court's rulings."

Our Courts have strictly enforced Rule 43(k), and while quirky, its serves a very important purpose of keeping Courts out of disputes amongst counsel and parties as relates to purported agreements. Rule 43(k) protects attorneys and clients from unwanted dialogues and intrusions of attorney-client privileged matters, and keeps our Courts from being bogged-down with disputes of this nature. To enforce the agreement against the opposition by Plaintiffs would controvert clear South Carolina law and therefore the Court must deny Defendants' motion.

[2] Plaintiff attaches the article, "A Handshake is Not Enough", South Carolina Lawyer, July 2012.

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CONCLUSION

The Court should not enforce the purported settlement agreement because the agreement is not compliant with Rule 43(k) of the Rules of Civil Procedure.

THE BRITTAIN LAW FIRM, P.A.

s / A. Preston Brittain
A. Preston Brittain, Esquire (SC Bar # 73707)
Thomas C. Brittain, Esquire (SC Bar # 00893)
4614 Oleander Drive
Myrtle Beach, SC 29577
Phone: (843) 449-8562
Fax: (843) 497-6124
ATTORNEYS FOR PLAINTIFF

July 26, 2017
Myrtle Beach, South Carolina

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EXHIBIT A

Plaintiffs' Memorandum in Opposition to Defendants' Motion to Enforce Settlement

SETTLEMENT AGREEMENT

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Settlement Agreement
Civil Action Nos.: 2016-CP-26-00673, -00674, -00743, -00744

The following is a Settlement Agreement ("Agreement") between Plaintiffs Jim Perkins, Colleen Franke a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dames, Errol Dos Santos, and Jeffrey Richardson ("Plaintiffs'") on the one hand and Defendants The Myrtle Beach Resort Homeowners Association, Inc., ("MBRHOA"), Ocean Front Spa Horizontal Property Regime, Inc. ("OFS"), Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Ken Perkins, Ray Coghill, Ralph Jump, and Wayne Urban ("Defendants") on the other (Plaintiffs and Defendants hereafter referred to as the "Parties") to settle Civil Action Nos.: 2016-CP-26-00673, -00674, -00743, -00744, currently pending on the South Carolina Circuit Court in Horry County ("Settled Actions").

1. For good and valuable consideration, upon full execution and effectuation of this Agreement, in full satisfaction of the Settled Actions, and any other claims or charges Plaintiffs have, claim to have, or may have, against Defendants, including, without limitation, any claim for attorneys' fees or costs, Defendants agree to pay the gross amount of $85,000.00 (the "Payment") in full satisfaction of any claims, charges or actions Plaintiffs have against Defendants.

a) Defendants will, thirty (30) business days hereafter, pay to Plaintiffs and Plaintiffs' attorney the total sum of Fifteen Thousand Dollars ($15,000.00) for the purposes of funding a binding arbitration of a declaratory judgment action to adjudicate whether the gate pass fee currently charged by MBRHOA is authorized under the governing MBRHOA documents and applicable law.
b) Defendants will, thirty (30) business days hereafter, pay to The Board of Directors for the Myrtle Beach Resort Horizontal Property Regime ("A Building Board") and the Board of Directors for the Myrtle Beach Resort Five Seasons Centre Horizontal Property Regime, ("Five Seasons Board") the total sum of Fifteen Thousand Dollars ($15,000.00) for the purposes of defending a binding arbitration of a declaratory judgment action filed by Plaintiffs for the purpose of adjudicating whether the gate pass fee currently charged is authorized under the governing MBRHOA documents and applicable law.
c) Arbitrator. Defendants will pay to Plaintiff's counsel the sum of $5,000.00 to be held in trust by his law firm to pay to an arbitrator to resolve the arbitration set forth in the previous two paragraphs. In the event this amount does not fund the arbitration in full, the balance, if any, shall be paid by the attorneys receiving the sums set out in the two previous paragraphs.
d) Defendants will, thirty (30) business days hereafter, pay "Brittain Law Firm" in the amount of Fifty Thousand Dollars and No Cents ($50,000.00), as payment for attorneys' fees and costs, such amount not being subject to income or employment tax withholding, but to be reported on a Form 1099

2. The Parties hereto recognize that the Defendants do not admit any liability to Plaintiffs, or to anyone else because of, or growing out of, matters set forth in Plaintiffs' Amended Complaints in the Settled Actions. The Parties have agreed to settle any and all claims

Plaintiffs have asserted or may have asserted against Defendants in order to avoid further cost and inconvenience in moving forward with a trial.

3. MBRHOA and OFS will use their best efforts to have their respective By-Laws amended to require at least three bids to be received prior to the awarding of any contract which will exceed $10,000.00 in value.

4. In exchange for and in consideration of the promises set forth in this Agreement, and except for the rights to enforce the provisions of this Agreement, Plaintiffs, their heirs, executors, administrators, legal and personal representatives, successors and assigns, hereby covenant not to sue and fully release and forever discharge Defendants and their respective present and former parents, heirs, assigns, subsidiaries, affiliates, and related entities or corporations, and any of their past and present officers, directors, shareholders, employers, past and present employees, agents, partners, attorneys, heirs, successors, insurers and assigns (the "Released Parties"), from any and all claims, demands, actions, charges, complaints, suits, administrative proceedings, debts, promises, contracts, grievances, and causes of action (hereinafter collectively referred to as "Claims"), in law or in equity, whether known or unknown, which Plaintiffs and their heirs, executors, administrators, agents, distributees, beneficiaries, successors in interest and assignees may have by reason of any matter, cause or thing whatsoever from the beginning of the world to only the day of the date of Plaintiffs' execution of this Agreement, including, but not limited to, any and all claims which were actually asserted or might have been asserted by Plaintiffs in the Settled Actions. Plaintiffs agree never to file a lawsuit against Defendants based on any reason contained in this Agreement. The Release does not purport to release any claims that the law does not permit to be released.

5. Within 15 days of receipt of the Payment, Plaintiffs' counsel shall file a **stipulation of dismissal with prejudice** in each of the Settled Actions.

6. Plaintiffs further acknowledge and agree that this Agreement extends to all claims of every kind and nature whatsoever, known or unknown, suspected or unsuspected, and Plaintiffs acknowledges they may hereafter discover facts in addition to or different from those which they know or believe to be true with respect to the subject matter of this Agreement, but it is their intention to hereby fully and finally settle and release all such matters as well and, in furtherance of that intention, the foregoing Release shall remain in effect as a full and complete release notwithstanding the discovery or existence of such additional or different facts.

7. Plaintiffs agree that they will not make any statements, oral or written, which they know or reasonably should know to be a disparaging or negative comment about Defendants or their officers, directors, employees and agents, or otherwise detrimental to the reputation or goodwill of Defendants, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required by law. Defendants agree that they will not make any statements, oral or written, which they know or reasonably should know to be a disparaging or negative comment about Plaintiffs or their officers, directors, employees and agents, or otherwise detrimental to the reputation or goodwill of Plaintiffs, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required by law.

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8. It is understood and agreed that Defendants expressly rely upon the promises, representations, and warranties made by Plaintiffs in this Agreement; that any breach of such promises, representations, and warranties would constitute a material breach of this Agreement; and that in the event of any such breach, Defendants shall be entitled to any and all of the following relief: (a) the immediate repayment to Defendants of the full Settlement Amount hereunder (b) the indemnification and hold harmless protection set forth above; (c) specific enforcement of all promises and undertakings made by Plaintiffs hereunder; and (d) all other relief and damages available at law or in equity.

Agreed to this 1st Day of May, 2017.

Plaintiffs

Jim Perkins

Colleen Franke

Colleen Franke a/k/a Colleen Franke Perkins

Mark Dos Santos

By his Attorney

Nancy Moore

Nancy Moore

William Moore

William Moore

Steven Dame

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Errol Dos Santos

Jeffrey Richardson

By his Attorney

Defendants

The Myrtle Beach Resort Homeowners Association, Inc., ("MBRHOA")

By its Attorney

Ocean Front Spa Horizontal Property Regime, Inc. ("OFS"),

By its Attorney

Phil Cox

Bill Cameron

By his Attorney

Stanley Jordan

By his Attorney

Walter Jordan

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Ken Perkins

Ray Coghill

By his Attorney

Ralph Jump

Wayne Urban

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EXHIBIT B

Plaintiffs' Memorandum in Opposition to Defendants' Motion to Enforce Settlement

ARTICLE: "A HANDSHAKE IS NOT ENOUGH", SOUTH CAROLINA LAWYER, 2012.

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Change Language: Choose

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A Handshake Is Not Enough

Angus Lawton And Erica McElreath

Settlement Agreements Under Rule 43(k)

You have finally done it. After months of negotiating, you hang up the phone knowing that the big case you have been working on is finally settled. Opposing counsel has a great reputation, and you know you can trust his word. Even so, you immediately draft a letter memorializing the terms of your agreement and send it to opposing counsel. You are a little nervous about his client backing out, so you ask him to have his client sign it. He does, and sends it back to you. You think the deal is done.

Fast-forward several months, and the opposing party is running into obstacles trying to comply with the terms of the settlement. You ask opposing counsel to close the deal, and you get nothing but excuses. After several more months, you hear from opposing counsel that the deal is off. You plan to move to enforce the settlement agreement. Is the agreement enforceable?

The rule

This situation is specifically addressed in Rule 43(k) of the South Carolina Rules of Civil Procedure.

The rule provides:

No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.

In the scenario described above, there is (a) no consent order regarding the alleged settlement; (b) no written stipulation signed by counsel and entered in the record regarding any settlement; (c) no hearing in open court where a settlement was noted upon the record; and (d) no writing signed by the parties and their counsel. Stated simply, there is no binding settlement agreement under South Carolina law, and a motion to enforce the settlement should fail.

History of the rule

Rule 43(k) is based on former Circuit Court Rule 14. Like its predecessor, the rule is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation and to relieve the court of the necessity of determining such disputes, which "are often more perplexing than the case itself." Ashfort Corp. v. Palmetto Const. Group, Inc., 318 S.C. 492, 493-94, 458 S.E.2d 533, 534 (1995). The S.C. Supreme Court has gone so far as to say that "[t]he time of the court should not be taken up in controversial matters of this character." Id.

Compliance with Rule 43(k) became easier with the S.C. Supreme Court's most recent amendment, effective on April 29, 2009. The amendment provides that agreements of counsel can be binding if they are "reduced to writing and signed by the parties and their counsel." The amendment eliminates the need for the agreement to be an official part of the record. With this addition to the rule, an enforceable agreement can be signed by all parties and counsel at the conclusion of a successful mediation.

Since the rule was amended, there have been no appellate court decisions interpreting the phrase "reduced to writing and signed by the parties and their counsel." However, based on the appellate courts' strict compliance with the rule since its inception, it seems likely that the courts will continue to require strict compliance before determining that a settlement agreement is enforceable.

Reasons for the rule

Although Rule 43(k) seems harsh, there are legitimate reasons for such a rule, and the courts are justified in demanding strict compliance. As indicated in the case law, disputes about settlement agreements often are very complicated. The only real witnesses in such disputes often are the attorneys. The courts are hesitant to make attorneys witnesses in cases that they have been handling.

Furthermore, in disputes involving alleged settlement agreements, there will often be issues concerning the attorney client privilege and what information was transmitted to the clients by the attorneys. If a client testifies that his attorney told him that the case was settled, then the attorney client privilege is probably waived. This will open the door to unnecessary and unpleasant discovery.

There is also an issue regarding Rule 408 of the South Carolina Rules of Evidence. This rule, titled "Compromise and Offers to Compromise" generally provides that settlement offers are not admissible to prove liability for a claim or its amount. Rule 408 will come into play if there is a trial on an issue regarding a settlement agreement, and it will likely prevent the introduction of any evidence regarding settlement offers.

Rule 43(k) in civil litigation

Attorneys in South Carolina settle cases every day without satisfying Rule 43(k). In fact, it is probably a rule ignored more than any other rule of civil procedure. Many attorneys go through their entire careers without having an issue with the enforcement of a settlement agreement. At least in civil litigation, there are usually no problems consummating settlements based on a phone call, a letter or a handshake.

Rule 43(k) comes into play in cases where there are difficult clients, or where there are volatile relationships between the parties or attorneys. It can be an issue when a settlement involves more than the simple payment of money in exchange for a release.

Especially when dealing with complex issues or relationships, it is important to comply with Rule 43(k) before assuming that an agreement can be enforced.

Attorneys can get into trouble by telling clients that their case has been settled prematurely. If there is no enforceable settlement agreement, then the client should be informed that the deal is tentative. Strict compliance with the rule is the only way for an attorney to know that a deal can be enforced.

Rule 43(k) must also be considered when a case settles at trial. At this point, with the excitement of resolving the case and the rush to put it on the record, key terms are often omitted from the record. If it is not in the record, it is not a part of the agreement, and the deal will not be enforced by the court.

Rule 43(k) in family court

After heated discovery, a husband and wife sit down with their attorneys and a mediator and attempt to finally settle their divorce case. This process takes all day, during which the parties and their attorneys spend hours pouring over every detail. After analyzing the case from every angle, the parties emerge with a mediation agreement, setting out all the details of the parties' final settlement agreement. The agreement is signed by the parties and their attorneys in order to satisfy the requirements of Rule 43(k).

Husband goes home and speaks with his newly-divorced neighbor, who tells husband that he agreed to pay far too much alimony. If he takes the case to trial, the judge will surely cut that amount in half. After this advice, husband calls his attorney to tell her that the deal is off. Wife moves to enforce the agreement. Is it enforceable?

According to the South Carolina Rules of Family Court, Rule 43(k) applies to domestic relations actions. See S.C. R. Family Ct. 2(a). In family court, as with civil litigation, the parties are free to reach an agreement concerning their disputes. In civil cases, an agreement that complies with Rule 43(k) should be enforceable; however, in family court there is an additional hurdle to overcome. All agreements concerning alimony, child support or property issues must be presented to the family court for approval.

Moseley v. Mosier, 279 S.C. 348, 353, 306 S.E.2d 624, 627 (1983). When approving a settlement agreement, the family court must determine: (1) if assent to the agreement is voluntarily given; and (2) if the agreement is fair under all relevant circumstances.. Funderburk v. Funderburk, 286 S.C. 129, 131, 332 S.E.2d 205, 206 (1985). If the court finds the agreement was entered into freely and voluntarily, and concludes that the agreement was fair, the agreement should be approved, provided it also comports with Rule 43(k).

In family court matters, the court's discretion in approving agreements seems to undermine the force of the rule. Though it appears to pack less punch in family court, lawyers are well-advised to craft settlement agreements that comply with Rule 43(k). In at least one instance, the S.C. Supreme Court has declined to enforce a family court agreement that did not comport with the rule. (See the discussion on Buckley v. Shealy, infra.)

Case law

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The cases interpreting Rule 43(k) have required strict compliance with the requirements of the rule. In some instances, the rule seems harsh. For example, the case Farnsworth v. Davis involved an action for breach of contract and negligence. During the course of discovery, Plaintiff's counsel wrote a letter to defense counsel indicating that Plaintiff would settle the case for $22,000. Plaintiff had specifically authorized his attorney to write the letter.

Thereafter, the defense attorney accepted the offer. He signed the settlement letter and returned it to Plaintiff's counsel. Unfortunately, the Plaintiff then changed her mind and rescinded the agreement. Defense counsel then filed a motion to compel the settlement. The circuit court ordered the Plaintiff to comply with the settlement agreement, finding that the requirements of Rule 43(k) had been satisfied. The matter then went up on appeal.

After hearing the case, the S.C. Court of Appeals held that the agreement could not be enforced, as the requirements of Rule 43(k) were not satisfied. Farnsworth v. Davis, 367 S.C. 634, 637-38, 627 S. E.2d 724, 726 (2006). It did not matter that the parties admitted that there was a duly executed written agreement. It did not matter that the Plaintiff had authorized his attorney to write the letter. The specific requirements of Rule 43(k) were not satisfied, and the case was remanded to the circuit court for trial.

In Galloway v. Regis Corp., Galloway sued Regis Corp. alleging she fell in Regis' retail establishment. The case settled after mediation, but no formal settlement agreement was signed. The parties subsequently informed the clerk of court that the case had been resolved, and a form order dismissing the case as settled was entered in the record. Subsequent disputes arose concerning the terms of the settlement agreement, and Galloway filed a motion seeking to compel Regis to comply with the settlement agreement. The trial court enforced the alleged settlement, but the S.C. Court of Appeals reversed the decision because the requirements of Rule 43(k) were not satisfied. "While we recognize the apparent unfairness that our ruling works upon Galloway, our conclusion is compelled by the Supreme Court's rulings ... We hope our decision here underscores the importance of putting a settlement agreement on the record or immediately reducing the agreement to writing, and including in the writing all material terms and conditions of the agreement. Only then will an attorney be certain that his client's interests are fully protected." Galloway v. Regis Corp., 325 S.C. 541, 546, 481 S.E.2d 714, 716 (Ct. App. 1997).

"Substantial compliance" with the rule has been rejected in three cases. In a domestic case involving a divorce, the parties settled a portion of their dispute during mediation and put the settlement agreement in writing. The husband paid the wife for six years pursuant to the agreement. Thereafter, disputes arose regarding the terms of the agreement, and the agreement could not be located. The trial court declined to enforce the settlement agreement, and the Supreme Court affirmed in an opinion written by Chief Justice Toal. The Court ruled that Rule 43(k) prohibited the enforcement of the agreement, Despite the fact that money had actually changed hands between the parties for six years. Buckley v. Shealy, 370 S.C. 317, 322, 635 S.E.2d 76, 78 (2006).

Young v. Cooler was a case involving an automobile accident. The liability portion of the claim was going to trial, but the UIM carrier agreed to settle the case. The attorney for the UIM carrier wrote a letter stating that $15,000 would be paid "regardless of the outcome of your settlement negotiations or trial" and further stated that he would order the drafts and prepare a release. The attorney later learned that he was mistaken about the liability coverage limits and withdrew the $15,000 offer. After the trial, the insured made a motion to the trial judge to enforce the alleged settlement with the UIM carrier. The judge granted the motion. The S.C. Court of Appeals reversed, concluding that the letter was not enough to satisfy the requirement of Rule 43(k). The court stated, "even if the Youngs intended to be bound and attempted to announce to the court that a settlement had been reached, the requirements of 43(k) were not met." Young v. Cooler, 347 S.C. 362, 366, 555 S. E.2d 410, 412 (Ct. App. 2001).

What happens if the clients, unbeknownst to the lawyers, negotiate a settlement concerning pending litigation? As the title of the rule states, Rule 43(k) applies to "Agreements of Counsel." If the attorneys did not negotiate the agreement, then arguably the rule does not apply. However, in Ashfort, the S.C. Supreme Court rejected a similar argument. In that case, an attorney hired by an insurance carrier attempted to settle a case, and the lawsuit was dismissed. Later, a dispute arose about the terms of the settlement. One of the parties argued that Rule 43(k) did not apply because the agreement was between the parties and "merely confirmed by the parties' counsel." The S.C. Supreme Court rejected this argument. "To take such a narrow reading of Rule 43(k) would defeat its purpose of preventing disputes such as this one ... [W]e find appellants' assertion that there has been substantial compliance with Rule 43(k) to be without merit." Ashfort, 318 S.C. at 495, 458 S.E.2d at 535.

Conclusion

Attorneys should be aware of the exact requirements of Rule 43(k). The rule is simple but specific. Following the rule may require a few extra steps beyond a handshake or phone call, but those extra steps are well worth it when a settlement agreement is questioned. Attorneys can avoid problems by strict compliance with the rule or by understanding that no agreement can be enforced unless the exact requirements of the rule have been satisfied.

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Angus Lawton and Erica McElreath practice with Lawton Law Firm, LLC in Mt. Pleasant. Special thanks to Rob Newton (Dooley Law Firm, PA) and David Shea (Law Offices of Shea and Barron) for their insight and research concerning Rule 43(k) in the context of family law.

VIEW ALL ARTICLES

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00673**
	)	
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Defendants.	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00674**
	)	
The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	
	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15th JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00743**
	)	
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00744**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)	
	)	
Defendants.	)	

REPLY IN SUPPORT OF DEFENDANTS' CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

Defendants in each of the above-captioned cases (C.A. Nos. 2016-CP-26-00673, 2016-CP-26-00674, 2016-CP-26-00743, and 2016-CP-26-00744) (collectively, the "Actions"), by and through their undersigned counsel and pursuant to Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), file this Reply in Support of their Consolidated Motion for Preliminary Approval of Settlement Agreement regarding the Actions ("Motion to Approve").

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I. FACTUAL BACKGROUND

Plaintiffs' Memorandum of Law In Opposition to Defendants' Consolidated Motion for Preliminary Approval of Settlement Agreement ("Opposition") either concedes, must concede, or does not contest the following, all of which are undisputed facts:

- On February 10, 2017, the parties notified their choice of mediator that they agreed to schedule a mediation to take place on May 1, 2017. Exhibit A.
- The mediator selected was Karl A. Folkens, Esq., one of the most experienced and well-respected mediators in South Carolina.
- On March 26, 2017, Mediator Folkens confirmed the mediation was to take place on May 1, 2017. (Exhibit B.)
- On April 26, 2017, Plaintiff's counsel informed counsel for the Defendants that Plaintiff Richardson would be unable to attend the mediation in person, and on April 28, 2017, confirmed to counsel for the Defendants that he would "have settlement authority from Mr. Richardson . . . ." (Motion to Approve, Exhibit C.)
- On May 1, 2017, Plaintiffs and their counsel were physically present with the exception of Plaintiff Richardson and Plaintiff Mark dos Santos.
- Santos's absence was not anticipated. Before the mediation commenced, the parties agreed the mediation could proceed in Santos's absence, conditioned on his counsel having his settlement authority.
- All parties and their counsel attended the May 1 mediation conference, either in person or via telephone, and participated in the mediation.[1]

[1] Of the eight (8) named plaintiffs in the Actions, six (6) were physically present at the mediation, and two (2)—Mark Dos Santos and Jeffrey Richardson—were present via telephone.

- In accordance with Rule 6(b) of the South Carolina Court Annexed Alternative Dispute Resolution ("ADR") Rules, at the commencement of the mediation conference Mediator Folkens confirmed that (a) all parties agreed for Plaintiffs Santos and Richardson to attend via telephone, and (b) counsel for Plaintiffs had full settlement authority for and on behalf of Plaintiffs Santos and Richardson.
- Both Plaintiffs Santos and Richardson actively participated in the mediation conference via telephone—during joint sessions with all parties and closed sessions with only Plaintiffs.
- After a full-day mediation, involving extensive arms-length negotiations between the parties and their counsel, the parties reached a resolution of all claims in the Actions.
- In accordance with ADR Rule 6(f), Mediator Folkens ensured that the parties reduced their agreement to writing in an agreement that accurately captured the terms of the negotiated resolution and that all parties signed ("Settlement Agreement"). (Motion to Approve, Exhibit A.)[2]

[2] K.A. Diehl and Associates, Inc. ("K.A. Diehl")—Defendant in Civil Action Nos. 2016-CP-26-00743 and 2016-CP-26-00744 and an agent for of Ocean Front Spa Horizontal Property Regime, Inc. ("OFS") and The Myrtle Beach Resort Homeowners Association, Inc. ("MBR")—is a released party as defined in the Settlement Agreement. Moreover, although K.A. Diehl did not sign the agreement, its terms contemplated that the claims in the above Actions would be fully dismissed with prejudice after the settlement payments were received. At the same mediation, K. A. Diehl and the Plaintiffs also reached a settlement as to all claims in K.A. Diehl's action against the Plaintiffs (less Plaintiff Richardson), Civil Action No. 2015-CP-26-05573. The Plaintiffs attended the mediation in person and by telephone and signed that settlement agreement in the same manner as the Settlement Agreement in the Actions. Nevertheless, Plaintiffs intend to honor the agreement in Civil Action No. 2015-CP-26-05573 but dishonor the Settlement Agreement in the Actions.

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- Due to Plaintiffs Santos and Richardson not being physically present, Plaintiffs' counsel executed the Settlement Agreement on their behalf as their duly-authorized agent, with the Settlement Agreement making clear that both Santos and Richardson were thereby signing through the actions of their counsel-agent.
- Before signing on behalf of Plaintiffs Santos and Richardson, Plaintiffs' counsel orally read the operative provisions of the Settlement Agreement to them over the telephone.
- Plaintiffs' counsel presented Mediator Folkens and Defendants' counsel the Settlement Agreement, signed by or for all of the named Plaintiffs.
- Based on the parties' negotiated settlement, memorialized in the Settlement Agreement, Mediator Folkens filed an Amended Proof of ADR form in each of the Actions, making clear that all parties were present and that each of the Actions were "[f]ully settled by Consent Judgment or a Voluntary Dismissal to be filed by the parties." (Exhibit C.)

Based on these undisputed facts, the Motion to Approve must be granted.

Rather than acknowledge the effect of these undisputed facts, and completely ignoring well-settled contract principles, Plaintiffs rely exclusively on a tortured reading of SCRCP Rule 43(k) to evade the final and binding Settlement Agreement. Plaintiffs' opposition is misplaced and disingenuous. First, SCRCP Rule 43(k) deals only with "agreements *between counsel* affecting the proceedings," and has no application whatsoever to the facts at hand. (Emphasis added.) Second, Plaintiffs' arguments are at odds with well-established contract principles. Third, Plaintiffs' position ignores the provisions of the South Carolina ADR Rules.

The Motion to Approve should be granted accordingly.

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II. ARGUMENT

A. Rule 43(k) Applies only to Agreements Between Counsel.

1. *The Plain Language of Rule 43(k) Demonstrates its Inapplicability in this Case.*

The plain language of SCRCP Rule 43(k) makes clear that it is inapplicable to the Settlement Agreement and the resolution between the parties in the Actions. The rule provides as follows:

> **(k) Agreements of Counsel.** No agreement *between counsel* affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.

SCRCP Rule 43(k) (emphasis added). "'In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes.'" *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 638, 627 S.E.2d 724, 726 (2006) (quoting *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003)). "[T]he words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *State v. Muldrow*, 348 S.C. 264, 268, 559 S.E.2d 847, 849 (2002). Applying this basic rule of statutory interpretation plainly demonstrates SCRCP Rule 43(k)'s inapplicability to the Settlement Agreement.

Stated simply, the Settlement Agreement was not an "agreement between counsel." It is an agreement of the parties. A SCRCP Rule 43(k) "agreement between counsel" contemplates an agreement negotiated by attorneys alone, to the exclusion of their clients, about which the attorneys must later take some overt action, identified in the Rule, before it becomes enforceable. One of these actions is where the "agreement between counsel" is later "reduced to writing and

signed by the parties and their counsel." SCRCP Rule 43(k).[3] This means that lawyers must memorialize their agreements with other counsel, consult with their clients about the terms, and ensure that their clients sign the agreement.

The Court of Appeals recently recognized as much. According to SCRCP Rule 43(k), "*lawyers* have been required . . . to reduce *their* agreements to a written document." *Inglese v. Beal*, 403 S.C. 290, 742 S.E.2d 687, 694 (Ct. App. 2013) (Pieper, J., concurring in part and dissenting in part) (emphasis added). Even the Supreme Court, in *Farnsworth*—the case on which Plaintiffs primarily rely[4]—recognized the importance of those two words in the introductory clause, emphasizing "between counsel" when quoting the rule. *See Farnsworth*, 367 S.C. at 637, 627 S.E.2d at 725 (quoting SCRCP Rule 43(k)).

The Settlement Agreement in this case was not an "agreement between counsel," as contemplated in SCRCP Rule 43(k). The Settlement Agreement was negotiated, memorialized, and executed by all of the parties after a full day of mediation in which all actively participated.

This conclusion was affirmed shortly after the mediation, when several named Plaintiffs expressly ratified the settlement and affirmed their understanding that the Actions had been resolved fully and finally through mediation. These Plaintiffs notified all OFS building residents that "The recent state court litigation between various homeowners in the Ocean Front Spa and

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[3] The clause regarding signed "agreements between counsel" being enforceable was added by 2009 Amendment to the Civil Rules.

[4] *Farnsworth* dealt with a former version of SCRCP Rule 43(k) that did not include the 2009 amendment.

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

its management company and others has been resolved *between the parties* to their mutual satisfaction via alternative dispute resolution that occurred on May 1." (Emphasis added).[5]

This conclusion was further established by the filing of the Amended Proof of ADR, signed by Mediator Folkens, who affirmed that as a result of the mediation, the cases were fully settled, with all parties present. Mediator Folkens would not have done so had a settlement not been reached, as he had affirmative duty to declare an impasse if settlement was not reached and report the results of the mediation to the court. ADR Rule 7(e)-(f). The result reported was that the cases were "fully settled" with all parties present.

The plain language of SCRCP Rule 43(k) thus mandates an interpretation that it is inapplicable to the circumstances here, requiring the granting of the Motion to Approve.

2. *Plaintiff's Interpretation of Rule 43(k) would Lead to Absurd Results.*

Plaintiffs' interpretation would require the court to disregard the title of SCRCP Rule 43(k) ("Agreements of Counsel") and key limiting language in the body of the rule ("No *agreement between counsel* affecting the proceedings in an action shall be binding . . ."), and read certain provisions of Rule 43(k) in isolation. Plaintiffs would then need the court to ignore the agreement they reached pursuant to ADR Rule 6(b), with all others present before the mediation commenced—an agreement that allowed the mediation to proceed in the physical absence of Santos and Richardson on the condition that their counsel had settlement authority for them. They further ask the court to ignore the fact that Santos and Richardson participated extensively in the mediation, authorized their attorney to settle the case, and authorized him to sign the Settlement Agreement on their behalf.

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[5] *See* Exhibit B to Motion to Approve (Affidavit of Walter Jordan and Exhibits B and C thereto).

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

This is the tortured pathway to the result Plaintiffs desire, an absurd result that the General Assembly simply could not have intended. "[R]egardless of how plain the ordinary meaning of the words in a statute, courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the General Assembly." *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) (citing *Kiriakides v. United Artist Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994); *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 351, 549 S.E.2d 243, 249 (2001)). "If possible, the Court will construe a statute so as to escape the absurdity and carry the intention into effect." *Id.* (citing *Kiriakides*, 312 S.C. at 275, 440 S.E.2d at 366).

Plaintiffs' argument rests exclusively on Santos' and Richardson's physical absence from the mediation and the fact that they did not personally and physically "sign" the Settlement Agreement.[6] They then rely on the following selected language from the rule: "No agreement affecting the proceedings shall be binding . . . unless . . . reduced to writing and signed by the parties and their counsel." SCRCP Rule 43(k). They argue that these facts and this language are conclusive and render the Settlement Agreement unenforceable. They ask the court to pretend that the body of this rule is not limited, by its terms, to only that subset of agreements which are "between counsel."

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[6] For the first time nearly three months following mediation, Plaintiffs also inexplicably assert that Plaintiff Jim Perkins did not sign the Settlement Agreement. Aside from the fact that the Settlement Agreement bears a signature of a name which appears to be that of Plaintiff Jim Perkins, it is beyond dispute that he was present for the duration of the mediation. If Plaintiff Jim Perkins persists in asserting that he did not sign the Settlement Agreement, perhaps the court might be interested in asking him to take the stand and explain under oath whether he was present when the mediator presented the Settlement Agreement to the Plaintiffs and their counsel, to identify the person who signed his name to the Settlement Agreement, to state whether he authorized such person to sign on his behalf and to explain why he and his colleagues on the OFS Board announced to all the OFS that the parties had the settled the litigation. Until such time, Defendants need not further waste the Court's time on this issue.

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

SCRCP Rule 43(k) applies only to an "agreement between counsel," and not to agreements the parties themselves are actively involved in negotiating and reaching. The introductory language of SCRCP Rule 43(k) ("Agreements of Counsel") gives further direction, confirming the purpose of the rule, and cannot be disregarded. Ignoring a key modifying provision of the rule would lead to and absurd interpretation. Doing so while ignoring key facts would lead to an absurd result.

Plaintiffs' selective interpretation violates yet another rule of statutory interpretation. When "construing a statute to escape the absurdity and carry the intention into effect, . . . the Court should not concentrate on isolated phrases within the statute, but rather, read the statute as a whole and in a manner consonant and in harmony with its purpose." *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. at 355, 782 S.E.2d at 592 (citing *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011); *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006)).

The purpose of SCRCP Rule 43(k) is obvious—to prevent attorneys from attempting to bind clients to alleged agreements that attorneys make in "back room/closed door" sessions in which their clients are not involved in the negotiations. That purpose has no bearing here, where all of the parties attended and actively participated in the mediation conference at which the Settlement Agreement was negotiated and executed.

Plaintiffs' desired interpretation would render meaningless the title and introductory/limiting language of SCRCP Rule 43(k), an obviously improper result. *See, e.g.*, *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 574 S.E.2d 196 (2002) ("In construing statutory language, the statute must be *read as a whole* and sections which are part of the same general statutory law *must be construed together* and each one given effect. The Court must

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

presume the *legislature did not intend a futile act*, but rather intended its statutes to accomplish something." (emphasis added) (citing *TNS Mills, Inc. v. S.C. Dep't of Revenue,* 331 S.C. 611, 503 S.E.2d 471 (1998))).

As important, Plaintiffs' interpretation would effectively overturn and nullify the long history of precedent making clear that settlement agreements are contracts that are subject to enforcement like any other contracts, *see, e.g.*, *Nichols Holding, LLC v. Divine Capital Grp., LLC*, 416 S.C. 327, 335, 785 S.E.2d 613, 617 (Ct. App. 2016) ("In South Carolina jurisprudence, settlement agreements are viewed as contracts." (citing *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009))). Therefore, Plaintiffs' opposition should be rejected accordingly, and the Motion to Approve granted.

3. *Pre-2009 Case Law is Inapplicable to the Current Version of 43(k)*

In support of the absurd and improper results Plaintiffs seek, they cite to cases from 2006 and earlier that did not even interpret the language in SCRCP Rule 43(k) on which they rely. Prior to 2009, SCRCP Rule 43(k) required one of three conditions for an "agreement between counsel" to be binding. The agreement had to be:

1. "reduced to the form of a consent order . . . signed by counsel and entered in the record,"
2. "reduced to the form of a . . . written stipulation signed by counsel and entered in the record," or
3. "made in open court and noted upon the record."

Farnsworth v. Davis Heating & Air Conditioning, Inc., 367 S.C. 634, 637, 627 S.E.2d 724, 725 (2006) (citing the previous version of the Rule). In 2009, however, the rule was amended to add a fourth avenue for enforcement of agreements between counsel. An agreement between counsel could now also be binding if the agreement is "reduced to writing and signed by the parties and their counsel." SCRCP Rule 43(k). The cases relied upon by Plaintiffs are clearly inapplicable to

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

this Motion as the courts in those cases were confined to the requirements of the pre-2009 version of the rule.

4. *Even if the Court finds Rule 43(k) Applies, the Settlement Agreement Complied with the Post-2009 Provisions*

Regardless, here, the parties and their counsel signed the Settlement Agreement and it should be enforced. Each of the parties signed, either themselves or by their attorneys. Likewise, counsel for Plaintiffs and counsel for Board Defendants signed the agreement on behalf of parties who were physically absent.

Plaintiffs first argue that the Settlement Agreement is unenforceable because the attorneys did not sign the agreement in their capacities as legal counsel. They do not, however, cite any legal authority for this baseless proposition (because there is none). Moreover, it is highly doubtful that the General Assembly intended for a party to rescind an agreement simply because his or her attorney did not sign the agreement separate and apart from the party.

Plaintiffs' hyper-technical argument flies in the face of one of the main purposes SCRCP Rule 43(k), which is to take courts out of disputes arising from agreements between counsel. *Ashfort Corp v. Palmetto Constr. Group, Inc.* 318 S.C. 492, 495, 458 S.E. 2d. 533, 535 (S.Ct. 1995). ("[T]he purpose of rules such as Rule 43(k) is: to prevent disputes as to the existence and terms of agreements and to relieve the court of the necessity of determining such disputes. . . ." (citing 83 C.J.S. Stipulations § 4 (1953)). Plaintiffs' tortured approach would actually force courts to get involved in matters such as this that <u>have already been resolved</u> between the parties and their counsel, with the assistance of an eminent mediator.

Plaintiffs' second hyper-technical argument is that a signature by an attorney with authority from and on behalf of a client must be disregarded under SCRCP Rule 43(k). This argument wholly disregards well-established precedent recognizing that an attorney acts as an

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

agent for his or her client. Our Supreme Court recognizes the attorney-client relationship is that of an agent and principal: "Acts of an attorney are directly attributable to and binding upon the client. Absent fraud or mistake, where attorneys of record for a party agree to settle a case, the party cannot later repudiate the agreement." *Arnold v. Yarborough*, 281 S.C. 570, 572, 316 S.E.2d 416, 417 (Ct. App. 1984) (*citing Clark v. Clark*, 271 S.C. 21, 244 S.E.2d 743 (1978); *Poore v. Poore*, 105 S.C. 206, 89 S.E. 569 (1916)).

The fact that Santos and Richardson were not present and relied on their attorney to read the Settlement Agreement to them and sign on their behalf does not excuse them from the Agreement. *See Kirkland v. Moseley*, 109 S.C. 477, 96 S.E. 608 (1917) (a party cannot set aside a settlement agreement signed pursuant to attorney's erroneous advice); *Ex Parte Jones*, 47 S.C. 393, 25 S.E. 285 (1896). Moreover,

> When a litigant voluntarily accepts an offer of settlement, either directly or indirectly through the duly authorized actions of his attorney, the integrity of the settlement cannot be attacked on the basis of inadequate representation by the litigant's attorney. In such cases, any remaining dispute is purely between the party and his attorney.

Shelton v. Bressant, 312 S.C. 183, 185, 439 S.E.2d 833, 834 (1993) (*quoting Petty v. The Timken Corp.*, 849 F.2d 130 at 133 (4th Cir. 1988)). The fact that they now may not like the terms of the Agreement is beside the point. "Having second thoughts about the results of a settlement agreement does not justify setting aside an otherwise valid agreement." *Crawford v. Nat'l Honorary Beta Club*, No. 7:14-CV-02970-GRA, 2015 WL 12806590, at *2 (D.S.C. Oct. 8, 2015) (*quoting Young v. F.D.I.C*, 103 F.3d 1180, 1195 (4th Cir. 1997)).

Plaintiffs' third hyper-technical argument is that K.A. Diehl is not a party to the Settlement Agreement, and the Plaintiffs did not agree to dismiss their claims against this Defendant with prejudice. In the Settlement Agreement, Plaintiffs covenanted to fully release

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

and forever discharge (and not to sue) the Defendants and their past and present "agents" from "any and all claims, demands, actions, charges, complaints, suits, administrative proceedings, debts, promises, contracts, grievances, and causes of action," whether known or unknown, through the date of the Settlement Agreement. (Motion to Approve, Exhibit A at ¶ 4.) K.A. Diehl, as the Defendants OFS and MBR's property manager and agent, was clearly a released party pursuant to this language. Moreover, the Plaintiffs agreed, without any conditions or limitations, to "file a stipulation of dismissal with prejudice in each of the Settled Actions" within 15 days of receipt of payment of the settlement funds. (*Id.* at ¶ 5.)

"When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense." *C.A.N. Enterprises, Inc. v. S.C. Health & Human Servs. Fin. Com.*, 296 S.C. 373, 377, 373 S.E.2d 584 (1998) (*citing Warner v. Weader*, 280 S.C. 81, 83, 311 S.E. (2d) 78, 79 (1983)). The clear, explicit, and unambiguous terms of the Settlement Agreement releases K.A. Diehl of all claims, and further, requires the Plaintiffs to dismiss their claims asserted in the Actions against all defendants, including K.A. Diehl, upon payment received.

"Common sense and good faith, the leading touchstones of construction of the provisions of a contract", dictate that the parties intended the dismissal with prejudice to be as to all claims asserted in the cases. *C.A.N. Enterprises, Inc.*, 296 S.C. at 377 (citing *Farr v. Duke Power Co.*, 265 S.C. 356, 360, 218 S.E.2d 431, 434 (1975)). To read the Settlement Agreement in any other manner would lead to the "unusual and extraordinary" conclusion that Defendants OFS and MBR would agree to the Plaintiffs releasing them without releasing the claims pending against their agent, exposing Defendants OFS and MBR to arguments that they should indemnify their agent. *Id.* Instead, the Court must employ the "reasonable, fair, and just" construction of the

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

Settlement Agreement that all parties intended the "dismissal with prejudice" language to apply to all claims pending in the case, including the claims against K.A. Diehl.

As discussed above, Plaintiffs' Memorandum relies on pre-2009 cases, which are inapplicable to the 2009 amendment to SCRCP Rule 43(k). The Court should find post-2009 cases more instructive. For example, in *Byrd v. Livingston*, the three parties to litigation attended mediation, which resulted in all three parties signing an agreement in principle. 398 S.C. 237, 240, 727 S.E.2d 620, 621 (Ct. App. 2012). The agreement in principle contemplated a more formal and detailed settlement agreement would supplant the agreement in principle. *Id.* However, the second settlement agreement was never signed. *Id.* The defendants filed a motion to enforce the agreement in principle. *Id.* The trial court found the agreement in principle enforceable against the plaintiff and the court of appeals affirmed. *Id.* Importantly, the court analyzed whether the agreement was enforceable by applying contractual principles, making no mention of Rule 43(k). *Id.* at 243.

B. <u>Plaintiffs' Argument Ignores Well-Settled Contract Principles</u>

To hold that SCRCP Rule 43(k) prevents the enforcement of the Settlement Agreement would be inconsistent with the general contractual nature of settlements. *See Nichols Holding*, 416 S.C. at 335, 785 S.E.2d at 617 ("In South Carolina jurisprudence, settlement agreements are viewed as contracts." (*citing Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009))). Parties such as Defendants that proceed with the costs, time, and effort associated with entering into a good faith mediation or settlement discussion must be allowed to settle their differences without the fear that the other party could simply later walk away because of a case of "cold feet" or "buyer's remorse." Ruling in Plaintiffs' favor would undermine the

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

negotiation process and the sanctity of contracts, leading to an absurd result not contemplated by the legislature or the courts.

Judicial economy demands that a party be held to the terms of an agreement, unless the agreement is substantially unfair or there has been a material misrepresentation. *White v. Hewitt*, 86 S. C. 576, 68 S. E. 820 (1910). A ruling for Plaintiffs would lead to an unintended outcome, bogging-down the court system with unnecessary further litigation revolving around a party's abuse of SCRCP Rule 43(k) to rescind a valid settlement agreement after the fact. The Plaintiffs' advocated result would thwart the finality provided by settlement agreements, prolonging the litigation beyond what the parties intended.

SCRCP Rule 43(k)'s purpose is to keep courts *out* of disputes between *counsel* in the *trial* context, not to immerse courts in matters stemming from valid settlement agreements negotiated by, and ultimately reached between, the parties to a lawsuit. To rule in Plaintiffs favor would severely undermine the mediation process and actually inhibit parties from engaging in good faith settlement negotiations.

C. <u>Plaintiffs' Argument Runs Afoul of the ADR Rules</u>

The ADR Rules are not mere suggestions. They are rules duly promulgated by the South Carolina Supreme Court mandating the process of mediation in the state. The Rules require physical attendance of the individual parties at a mediation. ADR Rule 6(b). The rules contemplate that individuals may avoid physical attendance only if "agreed to by the mediator and all parties." *Id.* The rules do not place limits on such agreements, so parties are free to condition them on the absent party providing settlement authority to an agent.

The Rules further give the mediator authority over the proceedings, including the authority to declare an impasse. ADR Rules 7(a), 7(e). The Rules require that "[u]pon reaching

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

an agreement, the parties shall, before the adjournment of the mediation reduce the agreement to writing . . . ." ADR Rule 6(f). The mediator shall file with the clerk of court a "Proof of ADR on a form approved by the Supreme Court." ADR Rule 7(f). Such form requires the mediator to state whether parties were present and the outcome (whether the mediation resulted in full settlement, impasse, or otherwise).

In this case, the parties and mediator reached an agreement on the conditions of the absence of Plaintiffs Santos and Richardson from the mediation, as allowed by ADR Rule 6(d). The parties complied with the mediation process and Mediator Folkens has affirmed the successful outcome of the mediation. ADR Rule 7. In contending the Settlement Agreement is unenforceable, Plaintiffs make a mockery of the mediation process.

The ADR Rules contemplate the consequences to a party who violates the provisions of the rules. ADR Rule 10(b). If Plaintiffs persist in their position, it would appear their acts of evasion constitute a violation of the ADR rules. In such case, the ADR Rules permit the Chief Judge for Administrative Purposes to inquire regarding such possible violations. ADR Rule 8(b)(2).

Accordingly, pursuant to ADR Rule 8(b), Defendants ask the Court to direct a written inquiry from the Chief Judge for Administrative Purposes to the mediator in the case, Karl A. Folkens, Esq. of Florence, South Carolina, as suggested in Exhibit D hereto and incorporated by reference herein. If the Court deems appropriate, Defendants also ask the Court to conduct such other inquiries to the attorneys and other participants in the mediation to ascertain whether Plaintiffs' position constitutes a violation of the ADR Rules. Finally, Defendants ask the Court to permit further submissions regarding appropriate sanctions under ADR Rule 10(b).

D. <u>Conclusion</u>

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

For the reasons presented in this Reply and the underlying Motion to Approve, Defendants respectfully request that the Court enter an Order (1) preliminarily approving the attached Settlement Agreement; (2) approving the form and manner of the Settlement Notice; and (3) scheduling a Fairness Hearing to grant final approval of the Parties' Settlement Agreement.

Respectfully submitted this 7th day of August, 2017.

	s/Phillip A. Kilgore Phillip A. Kilgore (S.C. Bar No. 3449) Lucas J. Asper (S.C. Bar No. 77902) 300 North Main Street, Suite 500 Greenville, South Carolina 29601 864.271.1300 (telephone) 864.235.4754 (facsimile) phillip.kilgore@ogletreedeakins.com lucas.asper@ogletreedeakins.com Attorneys for Defendants The Myrtle Beach Resort Homeowners Association, Inc., Ocean Front Spa Horizontal Property Regime, Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ralph Jump, Ray Coghill and Ken Perkins. Henrietta U. Golding, Esq. Henrietta U. Golding, Esq. Alicia E. Thompson, Esq. McNair Law Firm, P.A. Post Office Box 336 Myrtle Beach, SC 29578-0336 (843) 444-1107 (telephone) (843) 444-4729 (facsimile) Attorneys for Defendant FirstService Residential South Carolina, Inc., formerly known as K.A. Diehl & Associates, Inc.

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EXHIBIT A
TO
REPLY IN SUPPORT OF DEFENDANTS' CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

02/10/2017 EMAIL FROM THOMPSON TO MEDIATOR

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From: Thompson, Alicia <AThompson@mcnair.net>
Sent: Friday, February 10, 2017 1:02 PM
To: Nell Folkens
Cc: Roberts, Kathy; Golding, Henrietta; Lax, Andrew; Chris Nickels; Preston Brittain; Bobby Buffington; Kilgore, Phillip; msmith@thompsonlaw.com; Brady, Donna; Roberts, Kathy; Golding, Henrietta; Miranda Byrnside; Falls, Charlene; Tenna Turman; Coggins, Robert E.; Christian Stegmaier
Subject: RE: FW: KADiehl

Hi Nell:

Please allow this email to confirm the mediation below on May 1, 2017 at 9:30 am at McNair's Myrtle Beach office. Can you please send out the confirmation letters? I have also copied all counsel so that they are aware that the date has been reserved.

Kathy Roberts, my assistant, will send you the pleadings in the 5 cases sometime within the next two weeks. My maternity leave begins sometime soon, so please contact her and Henri Golding for any further scheduling/administrative inquiries.

kroberts@mcnair.net
hgolding@mcnair.net

Thanks for your assistance.

Alicia

MCNAIR
ATTORNEYS

Alicia E. Thompson
Shareholder
athompson@mcnair.net | 843 443 3058 Direct

McNair Law Firm, P.A.
Myrtle Beach Office Founders Centre, 2411 Oak Street | Suite 206 | Myrtle Beach, SC 29577
843 444 1107 Main | 843 946 5969 Fax
Mailing Post Office Box 336 | Myrtle Beach, SC 29578
VCard | Bio URL | Website

From: Nell Folkens [mailto:nell@folkenslaw.com]
Sent: Tuesday, February 07, 2017 11:50 AM
To: Thompson, Alicia <AThompson@mcnair.net>
Subject: Re: FW: KADiehl

GREAT!

Nell

Nell G. Folkens
Firm Manager/Paralegal
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P. O. Box 6139
Florence, SC 29502-6139
(843) 665-0100
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On Tue, Feb 7, 2017 at 11:33 AM, Thompson, Alicia <AThompson@mcnair.net> wrote:

Thanks, Nell. I am waiting for all attorneys to confirm the date, but most have said that they are available. I will send you the time and location soon.

Alicia

Alicia E. Thompson
Shareholder
athompson@mcnair.net | 843 443 3058 Direct

McNair Law Firm, P.A.
Myrtle Beach Office Founders Centre, 2411 Oak Street | Suite 206 | Myrtle Beach, SC 29577
843 444 1107 Main | 843 946 5969 Fax
Mailing Post Office Box 336 | Myrtle Beach, SC 29578
VCard | Bio URL | Website

From: Nell Folkens [mailto:nell@folkenslaw.com]
Sent: Monday, February 06, 2017 6:03 PM
To: Thompson, Alicia <AThompson@mcnair.net>
Cc: karl@folkenslaw.com; Brady, Donna <DBrady@mcnair.net>; Roberts, Kathy <KRoberts@mcnair.net>; Golding, Henrietta <HGolding@mcnair.net>
Subject: Re: FW: KADiehl

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

Alicia:

Thank you for your online request. Karl has no conflict. We have your hold in place for this date and time. I have received the full caption, docket number, list of attorneys. Just let me know location. I will then send out confirmation letters.

Also, if there are any special requests or concerns which I should bring to Karl's attention, please let us know.

We look forward to working with you.

Nell

Nell G. Folkens

Firm Manager/Paralegal

601 West Evans Street

P. O. Box 6139

Florence, SC 29502-6139

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On Mon, Feb 6, 2017 at 5:18 PM, Thompson, Alicia <AThompson@mcnair.net> wrote:

Karl:

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Henri Golding and I represent KA Diehl in three actions, captions attached for your convenience. The firms for the parties are reflected on the certificates of service behind each of the captions. The parties have agreed to consolidate these three cases, along with two class actions brought by the plaintiffs in the derivative actions against the associations and directors, for mediation purposes (a total of five cases), and we hope to mediate in April or May with you as the mediator.

I see that you are open on May 1, 2017. Can you hold that date for us and run a conflicts check?

I am also happy to send the full pleadings if you need them to run the check, but they are voluminous.

Thanks,

Alicia Thompson

MCNAIR
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EXHIBIT B
TO
REPLY IN SUPPORT OF DEFENDANTS' CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

03/26/2017 EMAIL FROM MEDIATOR TO COUNSEL

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From: Karl Folkens <karl@folkenslaw.com>
Sent: Sunday, March 26, 2017 1:21 PM
To: Bobby Buffington; Christian Stegmaier; Henrietta Golding (HGolding@mcnair.net); Mike Smith; Kilgore, Phillip; Preston Brittain; cwn@cslaw.com; mhall@collinsandlacy.com; tommyb@brittainlawfirm.com
Cc: Alicia Thompson; Kathy Roberts
Subject: Mediation: K. A. Diehl and Associates, Inc. v. James Perkins, et al. - MA17-126
Attachments: Mediation Agreement and FAQ - 2016.pdf; Mediation Outline for Karl Folkens.doc

Dear Attorneys:

This letter will confirm that a mediation conference has been scheduled in the above-referenced case for **May 1, 2017**, beginning at **9:30 a.m.** at **McNair Law Firm, P.A., 2411 Oak Street, Suite 206, Myrtle Beach, SC.**

You will receive a separate "calendar invite" e-mail confirming this date and time.

Attached is a proposed agreement to mediate which I will present for signing at the mediation conference. I also attach FAQ—Frequently Asked Questions. Please feel free to distribute these to your client.

My fee for mediation is $400.00 per hour which will be evenly divided by the parties, unless otherwise agreed upon ahead of time.

Please send me copies of the Complaint, Answer, any Counterclaim and any additional information you would like for me to review. Also, please let opposing counsel and me know who will be present with you at the mediation.

I strongly urge you to have all persons necessary to effect a full and complete settlement attend the mediation session. For the purposes of an insurance company, I take the term "full authority" to mean a person with full policy limits authority or the authority up to the Plaintiff's last written demand, whichever is less.

Consistent with both state and federal rules governing the mediation process, a chief administrative judge has ruled that the term "full authority" is the

> . . . ability, power, and freedom to make all decisions, including the ultimate decision to accept or reject a settlement proposal ***without having to make a phone call or get approval from someone who is not present at the conference***. When a proposal is made during the course of the mediation process, and the person present must get permission from someone not participating in the conference in order to respond to the proposal, then "full authority" is lacking. [Emphasis added.]

For the purposes of an individual, non-corporate party, I take the term "full authority" to mean the personal attendance of anyone in addition to the named party who would be necessary to consult in order to make a final decision, such as a spouse or other significant person.

If this will not occur, please let opposing counsel and me know immediately so that we may address this issue. As you know, the likelihood of success increases exponentially if everyone with full settlement authority participates in the mediation session. Also, the applicable ADR rules require such persons to personally attend the mediation.

Thank you for the opportunity to serve as mediator, and please do not hesitate to contact us if you have any questions about this mediation. For questions about scheduling, please contact my mediation coordinator, Nell Folkens, whose e-mail address is also set forth above.

Finally, we now offer a convenient on-line calendar-availability system on our website. To schedule your next ADR event, please consider using this calendar at www.folkenslaw.com/mediation.html.

Yours very truly,

Karl

Karl A. Folkens
karl@folkenslaw.com
www.folkenslaw.com
843.665.0100

Confidential: The information contained in this message may be privileged and confidential and protected from disclosure. If the recipient of this message is not the intended person, or an employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify the sender immediately by reply email and delete all copies from your computer.

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AGREEMENT TO MEDIATE

The undersigned parties and their attorneys hereby agree that the above matter shall be submitted to mediation pursuant to the applicable rules, guidelines, and Order of the Court having jurisdiction over this matter. They acknowledge that they have reviewed Mr. Folkens' *Frequently Asked Questions*, and further agree that:

1. All statements made during the course of mediation are confidential and privileged, are made without prejudice to any party's legal position, and are non-discoverable and inadmissible for any purpose in any legal proceeding.

2. The confidential and privileged character of any information is not altered by disclosure to the mediator. Disclosure of any records, reports, or other documents received or prepared by the mediator cannot be compelled. The mediator shall not be compelled to disclose or to testify in any proceeding about (i) any records, reports, or other documents received or prepared by the mediator or (ii) information disclosed or representations made in the course of the mediation or otherwise communicated to the mediator in confidence.

3. Evidence of anything said or any admission made in the course of mediation is not admissible in evidence, and disclosure of any such evidence shall not be compelled in any civil action in which, pursuant to law, testimony can be compelled to be given.

4. Unless a document provides otherwise, no document prepared for the purpose of, or in the course of, or pursuant to, the mediation, or copy thereof, is admissible in evidence, and disclosure of any such document shall not be compelled in any civil action in which pursuant to law, testimony can be compelled to be given.

5. Nothing in this Agreement to Mediate shall limit the admissibility of any particular evidence if all persons who conducted or otherwise participated in the mediation consent to its disclosure.

6. The parties understand that the mediator does not represent any party, and does not provide legal or financial advice. Parties not represented by counsel are urged to seek legal advice from an attorney and to obtain financial advice as needed from qualified professionals. The parties agree that the mediator shall have no liability for any act or omission in connection with the mediation.

7. Each party and the respective attorney is jointly and severally responsible for that party's proportionate share of the costs of mediation.

Dated and signed before commencement of the mediation by each of the persons whose signatures appear below.

_____	_____
Plaintiff	Defendant or Representative
_____	_____
Attorney for Plaintiff	Attorney for Defendant
_____	_____
_____	_____

(If there are more parties or attorneys participating in the mediation than provided for in the space above, they may sign below or on an additional page which shall be attached to this agreement.)

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

FREQUENTLY ASKED QUESTIONS

Karl A. Folkens, Mediator

- *What can I expect at the mediation?*

  - Usually, the mediation process begins with a "general session" during which all sides are given an opportunity to fully present their views of the case. After everyone has had an opportunity to be heard, the decision is then made as to how best to proceed depending upon the issues to be resolved. Sometimes the group continues meeting as a whole. At other times, "break-out" sessions are held in private with one or more sides.

  - Communications during a mediation settlement conference are privileged and confidential. To that end, the Rules require that the parties and any other person present shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any oral or written communications having occurred in a mediation proceeding, including, but not limited to:

    - (1) Views expressed or suggestions made by another party or any other person present with respect to a possible settlement of the dispute;

    - (2) Admissions made in the course of the mediation proceeding by another party or any other person present;

    - (3) Proposals made or views expressed by the mediator;

    - (4) The fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator; or

    - (5) All records, reports or other documents created solely for use in the mediation.

  - This rule does not prohibit:

    - (1) Disclosures as may be stipulated by all parties;

    - (2) A report to or an inquiry from the Chief Judge for Administrative Purposes regarding a possible violation of these rules;

    - (3) The mediator or participants from responding to an appropriate request for information duly made by persons authorized by the court to monitor or evaluate the ADR program;

    - (4) Threats of harm or attempts to inflict physical harm made during the mediation sessions; and

- (5) Any disclosures required by law or a professional code of ethics.

- If during a break-out session you share confidential information with me that you do not want me to share with the other side, please tell me it is confidential, and I will honor and protect that confidence.

- If a settlement is reached, usually the basic terms of the settlement are reduced to writing at the conclusion of the mediation and signed by the parties. This settlement, once signed by the parties and attorneys, will no longer be subject to the confidentiality provisions of the mediation and will be binding under Rule 43(k), SCRCP, unless specifically set forth in the written settlement agreement.

- Mediation is different from other forms of conflict resolution, such as arbitration or early neutral evaluation. One key difference is that any agreement must be reached by mutual consent of the parties. The mediation conference is not a trial; the mediator is not a judge, jury or arbitrator; and the parties retain the right to trial if they do not reach a settlement.

- Conduct and statements made during mediation are inadmissible as evidence in any arbitral, judicial or other proceeding, except as set forth above.

- *What can I do to prepare for the mediation?*

  - Mediation sessions can be emotional, fatiguing or frustrating as we go about trying to resolve the case. Be prepared: Get a good night's sleep. Eat breakfast. Keep outside irritations to a minimum. Turn off your cell phone and pager while we're working.

  - A lawyer hoping to receive a monetary settlement should bring the firm's federal identification number and correct legal name to the mediation. I will provide a blank W-9 form for you which may expedite the issuance of settlement funds.

  - You should talk with everyone coming with you ahead of the mediation about what you hope to accomplish in the mediation and what will be discussed in the opening session. Discuss what information should be obtained prior to the mediation to ensure a meaningful mediation occurs. Agree to keep an open mind throughout the mediation.

  - We have an outside smoking area on the east side of our building. Please dispose of cigarette butts in the wall-mounted receptacle.

- *What set-up do you have at your law firm for making presentations?*

  - Our main conference room has 60" and 46" flat panel televisions. We removed our SmartBoard from the main conference room, as we are encouraging the use of monitors rather than projectors for presentations.

  - Bring your PowerPoint or Keynote presentation on a flash drive, and I will transfer it onto my Apple MacBook Air to play wirelessly through AirPlay). Or, you can e-mail the presentation to me, or send a Dropbox link. If you prefer to use your

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own computer and do not have an HDMI port on it, let me know so I can have the right adapter ready for you. If you want to present on an iPad or MacBook, we're fully AirPlay capable.

- We are also equipped for wireless presentations using your iPad. TrialPad, the new app for courtroom and mediation document presentations, is ideal for making wireless presentations through AirPlay and Apple TV. I will give you a short demonstration if you're not familiar with this arrangement.

- *What should be provided to you prior to the mediation?*

  - Please send me copies of the pleadings, including the Complaint, Answer, and any Counterclaims. Also, the attorneys are sent a sample outline for providing me with basic information about the case. You may send any additional information you believe would assist me in understanding the case and your position, such as a confidential mediation statements in your own format with exhibits, summary judgment motions and memoranda, and the like. I am sending you a mediation information outline which you may or may not want to use. It is in Word® format if you would like to simply type in your responses and forward it to me. Or, you could incorporate the information into your own report format.

  - If you send me additional information, decide whether to share that information with the other side. I usually recommend that you copy the other side with such information since, after all, the goal is to convince the other side to settle the case rather than to convince me of anything! However, I realize that there may be times you want to share confidential information with me before the mediation in which case please note on your communication with me that it is confidential and not shared with the other side.

  - Let opposing counsel and me know who will be present with you at the mediation. If it is someone other than a party, please provide the person's title or relationship to the party.

  - Let my mediation coordinators know if a pre-mediation conference call would be beneficial. Telephone conferences, either alone with me or with others, can be scheduled at a mutually convenient time.

- *Who should attend the mediation?*

  - EVERYONE necessary for your side to effect a full and complete settlement should attend the mediation session. This should include everyone with "full authority" to settle the case.

    - For the purposes of an insurance company, I take the term "full authority" to mean a person with full policy limits authority or the authority up to the Plaintiff's last written demand, whichever is less, without being required to consult someone not in attendance.

    - For the purposes of an individual party not relying solely upon the payment by an insurance company to resolve the case, I take the term

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

"full authority" to mean the personal attendance of anyone in addition to the named party who would be necessary to consult in order to make a final decision, such as a spouse, business partner, or other significant person.

- Consistent with both state and federal rules governing the mediation process, a chief administrative judge has ruled that the term "full authority" is the

  > . . . ability, power, and freedom to make all decisions, including the ultimate decision to accept or reject a settlement proposal without having to make a phone call or get approval from someone who is not present at the conference. When a proposal is made during the course of the mediation process, and the person present must get permission from someone not participating in the conference in order to respond to the proposal, then "full authority" is lacking.

- If this will not occur, please let opposing counsel and me know immediately so that we may address this issue.

o The likelihood of success increases exponentially if everyone with full settlement authority participates in the mediation session. ***I cannot stress enough the importance to have everyone with full authority personally attend the mediation.***

- In many cases, the failure for someone with such authority to personally attend may be a violation of the court rules or a judge's standing Order applicable to your case.

- More importantly, I become much less effective in assisting you in settling your case if everyone is not personally in attendance. In such cases, the mediation simply becomes a journey in finding out what limited authority exists rather than exploring all possible avenues to get the case settled.

- *What is the cost of mediation?*

o I currently charge $400.00 per hour. This includes time reviewing submissions by the parties, conducting the mediation, following up with the attorneys, and preparing any reports which need to be filed with the court.

o If the mediation is scheduled outside of the Florence area, I charge $220.00 per hour travel time and mileage at the IRS mileage reimbursement rate.

o To expedite delivery of the bill, Nell e-mails the bill shortly after the session concludes to the primary attorney representing each side. By e-mailing the bill, an attorney can more easily forward the bill to the person responsible for payment. If you want someone other than the attorney, or in addition to the attorney, initially receiving the bill, let us know at the outset.

o NOTE: ***The bill you receive will be your net share of the entire mediation***

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

cost. The rate has already been divided in accordance with the following section. Please send back one copy of the bill e-mailed to you to ensure that you receive proper credit for your payment.

- If you would prefer a hard-copy of the bill mailed to you, let us know at the conclusion of the mediation session.

- *How is the cost of mediation divided?*
  - Unless otherwise agreed to by the parties, the cost is divided equally among the parties to the action. In some cases, certain groupings of parties represented by the same attorney will be treated as one for mediation cost purposes. If you anticipate any issues concerning the division of the mediation costs, *please* bring them to my attention as soon as you become aware of them.
  - Most courts and judges consider mediation costs to be similar to deposition costs and treat non-payment of such costs in a similar manner.

- *Do you charge a cancellation fee?*
  - Although many mediators charge cancellation fees, I currently do not, but I do charge for review and preparation time prior to notice of cancellation. I realize that cases often settle on the eve of mediation, and I encourage such discussions. I also realize that litigators are often called to a court which has priority to mediation and the mediation will need to be rescheduled. I do not penalize the parties for such cancellations; however, I ask that you let me know as soon as possible if there is a good likelihood the mediation session will be cancelled or postponed.
  - Likewise, as a mediator who is also an active litigator, I may be called to court which may necessitate rescheduling the mediation. This rarely occurs, especially in light of Rule 601, SCACR.

- *Ok, so what is Rule 601, SCACR, and how does it affect the mediation?*
  - RULE 601 deals with conflicts in hearing dates when an attorney is called to appear simultaneously in two or more "tribunals." Recognizing the importance of mediation and other forms of alternative dispute resolution, the South Carolina Supreme Court includes mediation in the list of tribunals.
    - The Rule also provides: "When a party or his counsel is in the process of a hearing or trial before a tribunal, he may not be required to appear in another tribunal having greater priority unless the tribunal with less priority grants a recess or continuance for that purpose."
  - Attorneys should work closely with judges and mediators to avoid scheduling conflicts. Simply because a matter may get scheduled later in the day after a mediation has been scheduled is not grounds to immediately seek a rescheduling of the mediation. Of course, the circumstances of each conflict should be examined and everyone involved should work cooperatively and timely to deal with such conflicts.

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

- If you anticipate a court-related scheduling conflict which may interfere with an already scheduled mediation, I can contact judges, clerks of court or the federal ADR Program Director on your behalf to assist with resolving such conflicts.

- *Where can I get directions to your office?*

  - Go to our firm's website at www.folkenslaw.com and click on the "Directions" tab for specific information and an interactive map. Our office is in downtown Florence, one block west of the McMillan Federal Building, at 601 West Evans Street.

  - Many popular GPS units, including Garmins, for some strange reason don't recognize West Evans Street as a main thoroughfare, which it is. Once you're on West Evans St., resist directions to turn off of West Evans!

- *What is your "meal" policy?*

  - I have found it best, except in rare circumstances, to work non-stop during the mediation session. If lunch (or dinner) will need to be served, we order from a local restaurant and the food is delivered to us.

  - If you have any special dietary needs, please let me know them beforehand, and every effort will be made to accommodate special requests.

  - The cost of the meal is added to the total mediation cost. If this is not acceptable to you, please let me know ahead of time so alternative arrangements can be made.

  - Refreshments, including soft drinks, juices, and bottled water, are available during the mediation. Wireless Internet access is available, and long distance calls may be made anywhere in the United States without charge. Please ask the staff if you have any special requests.

- *Are you willing to travel?*

  - Yes. I routinely travel outside of the Florence area to conduct alternative dispute resolution events. If parties, claims representatives and/or attorneys live primarily outside of the Florence area, it may be more cost effective to pay my reduced travel hourly rate and mileage for me to travel to you rather than having everyone travel to Florence. Explore this possibility with the other side if there might be cost savings to you.

- *When is the "best" time to conduct a mediation?*

  - Timing is everything in mediation! Some matters are best resolved through a mediation conducted early in the process, even before a lawsuit is filed. Others require a certain amount of discovery to be in a position to negotiate a final resolution. I urge you in all of your cases to discuss mediation and other forms of alternative dispute resolution as early as possible with the other side and agree upon when the ADR event will occur. In some cases, having an early ADR event

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

to agree upon what discovery will be undertaken before a full-blown session is held is beneficial.

- *What rules apply to mediation?*
  - The current South Carolina Circuit Court Alternative Dispute Resolution Rules can be found at www.sccourts.org/courtReg/
- *I am an attorney and not admitted in South Carolina. What special rules apply to me?*
  - The South Carolina Supreme Court recently adopted new rules affecting appearances by non-South Carolina lawyers in arbitration, mediation or other alternative dispute resolution proceedings in South Carolina. If you fall into this category, you *must* read Rule 404 of the South Carolina Appellate Court Rules. Rules 404(g) – (i) specifically state:

    (g) **Non-South Carolina Lawyers Appearing in an Arbitration, Mediation or Other Alternative Dispute Resolution Proceeding in South Carolina.** Pursuant to Rule 5.5(c)(3) of the Rules of Professional Conduct, Rule 407, SCACR, a lawyer admitted to practice law in another jurisdiction may perform legal services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's pre-existing representation of a client in a jurisdiction in which the lawyer is admitted to practice.

    (h) **Limitations on Provision of Legal Services Pursuant to Rule 5.5(c)(3).** A lawyer who is not admitted to practice in South Carolina who seeks to provide legal services pursuant to Rule 5.5(c)(3) in more than three matters in a calendar year shall be presumed to be providing legal services on a regular, not temporary, basis.

    (i) **Fee; Record of Provision of Legal Services Pursuant to Rule 5.5(c)(3)**. For each matter in which a lawyer seeks to provide legal services pursuant to Rule 5.5(c)(3), the lawyer shall file a verified statement with the South Carolina Supreme Court Office of Bar Admissions stating that the lawyer has not filed more than three statements pursuant to this rule in a 365-day period. The statement shall be accompanied by a $250 fee and shall be served on opposing counsel, if known. If opposing counsel is not known at the time the verified statement is filed, the statement shall be filed on opposing counsel within ten days of learning the identity of opposing counsel.

  - The Rules and required forms can be found at www.sccourts.org/courtReg/index.cfm

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

- If you fall into this category I will assume that you have fully complied with the Rules, submitted the required form and fee to the South Carolina Supreme Court's Office of Bar Admissions, and received permission to appear by the time of the mediation.

- *How can I make scheduling my next ADR event with you easier?*

  - I have been inducted into the National Academy of Distinguished neutrals. The Academy offers a convenient online calendar-availability system which is linked on our website. To schedule your next ADR event, please consider using this system at www.folkenslaw.com/mediation.html. Once you enter your information one time, your contact information will be automatically filled-in on your next visit to the site.

  - Many attorneys get the other side on the phone and jointly review the available slots on the online calendar, avoiding having to go back and forth in selecting a particular date.

- *I'm coming from out-of-town and plan to stay the evening before. What is the best, most convenient lodging to your office?*

  - We recommend the new Hotel Florence which is just a few blocks east of our office on the same street at 126 West Evans Street. This boutique hotel with competitive rates is made up of three of Florence's historical buildings downtown that have been renovated to create one space. The original building was built in 1891 and has been fully remodeled. Click here for more information: www.hotelflorencesc.com/

  - For special rates given to our clients and mediation participants, go to this link: www.ascendcollection.com/ires/en-US/html/ArrivalInfo?hotel=SC477&srp=LFOLKE&pu=no

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

MEDIATION OUTLINE FOR KARL FOLKENS

1. What is the case about?

2. What are the contested issues?

3. What is the present posture of the case?

4. What have been the settlement efforts to date?

5. What are your case strengths and weaknesses?

6. Who will be attending with you?

7. Does anyone attending with you need any special accommodations?

8. Are there any sensitive issues or other concerns?

9. If you want your share of the mediation bill emailed to someone else, such as paralegal, bookkeeper or claims representative, what is the person's name and email address?

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

EXHIBIT C
TO
REPLY IN SUPPORT OF DEFENDANTS' CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

AMENDED PROOF OF MEDIATION

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

CIRCUIT COUR

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

K. A. DIEHL AND ASSOCIATES, INC. V. JAMES PERKINS, ET AL.
Docket No. 2015-CP-26-05573

JAMES PERKINS, ET AL. V. K.A. DIEHL AND ASSOCIATES, ET AL.
Docket No. 2016-CP-26-00744

JIM PERKINS, COLLEEN FRANKE, ET AL. V. OCEAN FRONT SPA HORIZONTAL PROPERTY REGIME, INC., ET AL.
Docket No. 2016-CP-26-00673

JIM PERKINS, COLEEN FRANKE, ET AL. V. THE MYRTLE BEACH RESORT HOMEOWNERS ASSOCIATION, INC., ET AL.
Docket No. 2016-CP-26-00674

JIM PERKINS, COLEEN FRANKE, ET AL. V. K. A. DIEHL AND ASSOCIATES, INC., ET AL.
Docket No. 2016-26-00743

AMENDED PROOF OF ADR

1. Alternative Dispute Resolution (ADR) was conducted in the form of: **Mediation**.

2, The neutral was: **Karl A. Folkens.**

3. The ADR was conducted on **May 1, 2017**.

4. As a result of ADR, these cases should be considered (please check one):
   __X__ Fully Settled by Consent Judgment or a Voluntary Dismissal to be filed by the parties.
   _____ Partially Settled, with agreement of the parties on the following issues:
   _____ At an impasse.
   _____ In need of further ADR. I ____ am / ____ am not willing to mediate this case further.
   I recommend that ADR resume as of:
   _____ Continued to (Date):

5. Plaintiffs __X__ were/ _____ was not present.
   Defendants __X__ were/ _____ were *not present individually (through representatives).*

6. Other participants were:

   __X__ Lawyers for parties: *Henrietta U. Golding, Esq., Alicia E. Thompson, Esq., A. Preston Brittain, Esq., Christopher W. Nickels, Esq., Christian Stegmaier, Esq., Robert W. Buffington, Esq., Phillip A. Kilgore, Esq. & G. Michael Smith, Esq.*

   __X__ Representatives for insurance carrier: *Hugh Spears, Chubb; Eva Jane Ammons, Nationwide; Lori Barns, Philadelphia Insurance Company*
   _____ Guardian ad Litem:
   _____ Experts:
   _____ Others:

7. Choice of the mediator was by:
   __X__ Stipulation
   _____ Court Order

8. The total number of hours spent in ADR was: ***16.5** hours, plus travel.*

9. Further comments of the neutral: *None.*

May 1, 2017

S/ Karl A. Folkens

KARL A. FOLKENS, Mediator
P. O. Box 6139, Florence, SC 29502-6139
(843) 665-0100; FAX (843) 665-0500

MA17-126

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

EXHIBIT D
TO
REPLY IN SUPPORT OF DEFENDANTS' CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

REQUESTED WRITTEN INQUIRIES

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

EXHIBIT D

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00673**
	)	
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00674**
	)	
The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	
	)	

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15th JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00743**
	)	
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
Plaintiffs,	)	
v.	)	**Civil Action No.: 2016-CP-26-00744**
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Aug 07 3:55 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

REQUESTED WRITTEN INQUIRIES

Pursuant to Rule 8(b)(2) of the Court-Annexed Alternative Dispute Resolution (ADR) Rules, Defendants respectfully request the following inquiries to be made by the Chief Judge for Administrative Purposes to Mediator Karl A. Folkens, Esq:

1. On May 1, 2017, did you serve as the mediator in a consolidated mediation of five (5) litigation matters, including the four (4) matters captioned above ("Actions")?

2. Of the eight (8) named plaintiffs in the Actions, were six (6) physically present at the mediation, and were two (2)—Mark Dos Santos and Jeffrey Richardson—present via telephone?

3. In accordance with Rule 6(b) of the SC ADR Rules, at the commencement of the mediation conference, did you and all parties agree for Mr. Santos and Mr. Richardson to be physically absent but to participate via telephone?

4. If so, did counsel for plaintiffs have Mr. Santos and Mr. Richardson's authority to speak and act on their behalf in their physical absence?

5. Did plaintiffs' counsel specifically indicate that he had full settlement authority for and on behalf of Mr. Santos and Mr. Richardson?

6. Did Mr. Santos and Mr. Richardson actively participate in the mediation conference via telephone?

7. After a full-day mediation involving extensive arms-length negotiations between the parties and their counsel, did the parties reach a resolution of all claims in the Actions?

8. In accordance with Rule 6(f) of the SC ADR Rules, did you ensure that the parties reduced their agreement to writing in an agreement that accurately captured the terms of the negotiated resolution and that all parties signed, either themselves or by their agent?

9. Is Attachment A to these Inquiries an accurate copy of the settlement agreement?

10. Due to Mr. Santos and Mr. Richardson not being physically present, did plaintiffs' counsel execute the agreement on their behalf as their duly-authorized agent, with the agreement making clear that both Mr. Santos and Mr. Richardson were thereby signing the agreement through the actions of their counsel-agent?

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11. Did plaintiffs' counsel tell you that he orally read the operative provisions of the agreement to Mr. Santos and Mr. Richardson over the telephone?

12. Did you present an unsigned copy of the settlement agreement to plaintiffs' counsel and plaintiffs who were present?

13. Did plaintiffs' counsel present you with the signed copy of the agreement indicating that all named plaintiffs had either personally signed or had directed counsel to sign on their behalf?

14. Did you then present the agreement signed by or for plaintiffs to the Board Defendants (i.e., all but K.A. Diehl and Associates, Inc.) and their counsel for them to sign the agreement?

15. Did counsel for the Board Defendants present to you the signed copy of the agreement indicating that all named Board Defendants had either personally signed or had directed counsel to sign on their behalf?

16. Did you inform K.A. Diehl and Associates, Inc. and its counsel that all claims in the Actions were settled?

17. Based on the parties' negotiated settlement that was memorialized in the signed agreement, did you file Amended Proof of ADR forms in each of the Actions pursuant to ADR Rule 7(f)?

18. Did the Amended Proof of ADR (Attachment B) indicate as follows?

a. The parties stipulated to your service as mediator in the Actions.

b. Plaintiffs and defendants were present at the May 1, 2017 mediation.

c. All attorneys in the Actions were present at the May, 1, 2017 mediation, including three (3) separate attorneys for Mr. Santos.

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d. All Actions were "[f]ully settled by Consent Judgment or a Voluntary Dismissal to be filed by the parties."

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Attachment A

Settlement Agreement

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Settlement Agreement
Civil Action Nos.: 2016-CP-26-00673, -00674, -00743, -00744

The following is a Settlement Agreement ("Agreement") between Plaintiffs Jim Perkins, Colleen Franke a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dames, Errol Dos Santos, and Jeffrey Richardson ("Plaintiffs'") on the one hand and Defendants The Myrtle Beach Resort Homeowners Association, Inc., ("MBRHOA"), Ocean Front Spa Horizontal Property Regime, Inc. ("OFS"), Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Ken Perkins, Ray Coghill, Ralph Jump, and Wayne Urban ("Defendants") on the other (Plaintiffs and Defendants hereafter referred to as the "Parties") to settle Civil Action Nos.: 2016-CP-26-00673, -00674, -00743, -00744, currently pending on the South Carolina Circuit Court in Horry County ("Settled Actions").

1. For good and valuable consideration, upon full execution and effectuation of this Agreement, in full satisfaction of the Settled Actions, and any other claims or charges Plaintiffs have, claim to have, or may have, against Defendants, including, without limitation, any claim for attorneys' fees or costs, Defendants agree to pay the gross amount of $85,000.00 (the "Payment") in full satisfaction of any claims, charges or actions Plaintiffs have against Defendants.

a) Defendants will, thirty (30) business days hereafter, pay to Plaintiffs and Plaintiffs' attorney the total sum of Fifteen Thousand Dollars ($15,000.00) for the purposes of funding a binding arbitration of a declaratory judgment action to adjudicate whether the gate pass fee currently charged by MBRHOA is authorized under the governing MBRHOA documents and applicable law.

b) Defendants will, thirty (30) business days hereafter, pay to The Board of Directors for the Myrtle Beach Resort Horizontal Property Regime ("A Building Board") and the Board of Directors for the Myrtle Beach Resort Five Seasons Centre Horizontal Property Regime, ("Five Seasons Board") the total sum of Fifteen Thousand Dollars ($15,000.00) for the purposes of defending a binding arbitration of a declaratory judgment action filed by Plaintiffs for the purpose of adjudicating whether the gate pass fee currently charged is authorized under the governing MBRHOA documents and applicable law.

c) Arbitrator. Defendants will pay to Plaintiff's counsel the sum of $5,000.00 to be held in trust by his law firm to pay to an arbitrator to resolve the arbitration set forth in the previous two paragraphs. In the event this amount does not fund the arbitration in full, the balance, if any, shall be paid by the attorneys receiving the sums set out in the two previous paragraphs.

d) Defendants will, thirty (30) business days hereafter, pay "Brittain Law Firm" in the amount of Fifty Thousand Dollars and No Cents ($50,000.00), as payment for attorneys' fees and costs, such amount not being subject to income or employment tax withholding, but to be reported on a Form 1099

2. The Parties hereto recognize that the Defendants do not admit any liability to Plaintiffs, or to anyone else because of, or growing out of, matters set forth in Plaintiffs' Amended Complaints in the Settled Actions. The Parties have agreed to settle any and all claims

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Plaintiffs have asserted or may have asserted against Defendants in order to avoid further cost and inconvenience in moving forward with a trial.

3. MBRHOA and OFS will use their best efforts to have their respective By-Laws amended to require at least three bids to be received prior to the awarding of any contract which will exceed $10,000.00 in value.

4. In exchange for and in consideration of the promises set forth in this Agreement, and except for the rights to enforce the provisions of this Agreement, Plaintiffs, their heirs, executors, administrators, legal and personal representatives, successors and assigns, hereby covenant not to sue and fully release and forever discharge Defendants and their respective present and former parents, heirs, assigns, subsidiaries, affiliates, and related entities or corporations, and any of their past and present officers, directors, shareholders, employers, past and present employees, agents, partners, attorneys, heirs, successors, insurers and assigns (the "Released Parties"), from any and all claims, demands, actions, charges, complaints, suits, administrative proceedings, debts, promises, contracts, grievances, and causes of action (hereinafter collectively referred to as "Claims"), in law or in equity, whether known or unknown, which Plaintiffs and their heirs, executors, administrators, agents, distributees, beneficiaries, successors in interest and assignees may have by reason of any matter, cause or thing whatsoever from the beginning of the world to only the day of the date of Plaintiffs' execution of this Agreement, including, but not limited to, any and all claims which were actually asserted or might have been asserted by Plaintiffs in the Settled Actions. Plaintiffs agree never to file a lawsuit against Defendants based on any reason contained in this Agreement. The Release does not purport to release any claims that the law does not permit to be released.

5. Within 15 days of receipt of the Payment, Plaintiffs' counsel shall file **a stipulation of dismissal with prejudice** in each of the Settled Actions.

6. Plaintiffs further acknowledge and agree that this Agreement extends to all claims of every kind and nature whatsoever, known or unknown, suspected or unsuspected, and Plaintiffs acknowledges they may hereafter discover facts in addition to or different from those which they know or believe to be true with respect to the subject matter of this Agreement, but it is their intention to hereby fully and finally settle and release all such matters as well and, in furtherance of that intention, the foregoing Release shall remain in effect as a full and complete release notwithstanding the discovery or existence of such additional or different facts.

7. Plaintiffs agree that they will not make any statements, oral or written, which they know or reasonably should know to be a disparaging or negative comment about Defendants or their officers, directors, employees and agents, or otherwise detrimental to the reputation or goodwill of Defendants, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required by law. Defendants agree that they will not make any statements, oral or written, which they know or reasonably should know to be a disparaging or negative comment about Plaintiffs or their officers, directors, employees and agents, or otherwise detrimental to the reputation or goodwill of Plaintiffs, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required by law.

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8. It is understood and agreed that Defendants expressly rely upon the promises, representations, and warranties made by Plaintiffs in this Agreement; that any breach of such promises, representations, and warranties would constitute a material breach of this Agreement; and that in the event of any such breach, Defendants shall be entitled to any and all of the following relief: (a) the immediate repayment to Defendants of the full Settlement Amount hereunder (b) the indemnification and hold harmless protection set forth above; (c) specific enforcement of all promises and undertakings made by Plaintiffs hereunder; and (d) all other relief and damages available at law or in equity.

Agreed to this 1st Day of May, 2017.

Plaintiffs

Jim Perkins

Colleen Franke

Colleen Franke a/k/a Colleen Franke Perkins

Mark Dos Santos

By his Attorney

Nancy Moore

Nancy Moore

William Moore

William Moore

Steven Dame

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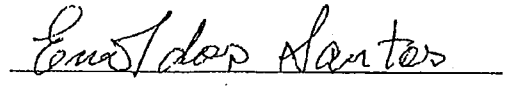
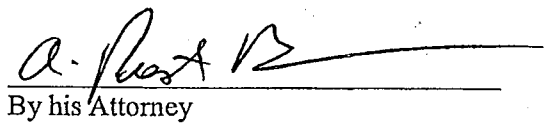
Errol Dos Santos



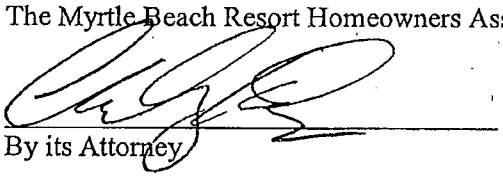
Jeffrey Richardson



By his Attorney

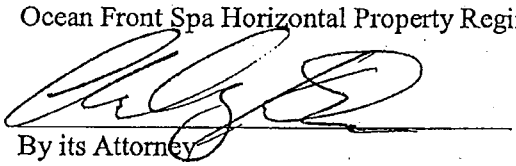
Defendants

The Myrtle Beach Resort Homeowners Association, Inc., ("MBRHOA")



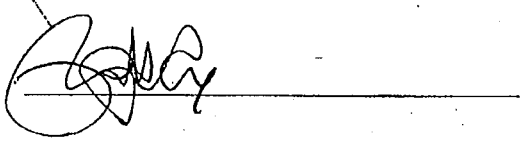
By its Attorney

Ocean Front Spa Horizontal Property Regime, Inc. ("OFS"),

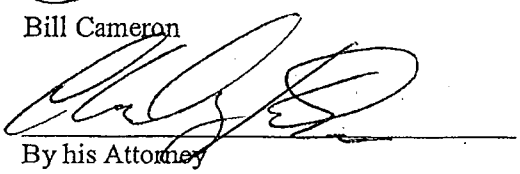


By its Attorney

Phil Cox

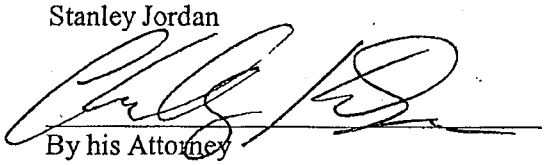


Bill Cameron



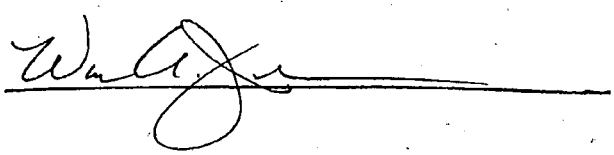
By his Attorney

Stanley Jordan



By his Attorney

Walter Jordan



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Ken Perkins

Ray Coghill

By his Attorney

Ralph Jump

Wayne Urban

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Attachment B

Amended Proof of ADR

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

CIRCUIT COURT

K. A. DIEHL AND ASSOCIATES, INC. V. JAMES PERKINS, ET AL.
Docket No. 2015-CP-26-05573

JAMES PERKINS, ET AL. V. K.A. DIEHL AND ASSOCIATES, ET AL.
Docket No. 2016-CP-26-00744

JIM PERKINS, COLLEEN FRANKE, ET AL. V. OCEAN FRONT SPA HORIZONTAL PROPERTY REGIME, INC., ET AL.
Docket No. 2016-CP-26-00673

JIM PERKINS, COLEEN FRANKE, ET AL. V. THE MYRTLE BEACH RESORT HOMEOWNERS ASSOCIATION, INC., ET AL.
Docket No. 2016-CP-26-00674

JIM PERKINS, COLEEN FRANKE, ET AL. V. K. A. DIEHL AND ASSOCIATES, INC., ET AL.
Docket No. 2016-26-00743

AMENDED PROOF OF ADR

1. Alternative Dispute Resolution (ADR) was conducted in the form of: **Mediation**.

2. The neutral was: **Karl A. Folkens.**

3. The ADR was conducted on **May 1, 2017.**

4. As a result of ADR, these cases should be considered (please check one):
   __X__ Fully Settled by Consent Judgment or a Voluntary Dismissal to be filed by the parties.
   _____ Partially Settled, with agreement of the parties on the following issues:
   _____ At an impasse.
   _____ In need of further ADR. I ____ am / ____ am not willing to mediate this case further.
   I recommend that ADR resume as of:
   _____ Continued to (Date):

5. Plaintiffs __X__ were/ _____ was not present.
   Defendants __X__ were/ _____ were *not present individually (through representatives).*

6. Other participants were:

   __X__ Lawyers for parties: *Henrietta U. Golding, Esq., Alicia E. Thompson, Esq., A. Preston Brittain, Esq., Christopher W. Nickels, Esq., Christian Stegmaler, Esq., Robert W. Buffington, Esq., Phillip A. Kilgore, Esq. & G. Michael Smith, Esq.*

   __X__ Representatives for insurance carrier: *Hugh Spears, Chubb; Eva Jane Ammons, Nationwide; Lori Barns, Philadelphia Insurance Company*
   _____ Guardian ad Litem:
   _____ Experts:
   _____ Others:

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7. Choice of the mediator was by:
   __X__ Stipulation
   _____ Court Order

8. The total number of hours spent in ADR was: ***16.5** hours, plus travel.*

9. Further comments of the neutral: *None.*

May 1, 2017

S/ Karl A. Folkens

KARL A. FOLKENS, Mediator
P. O. Box 6139, Florence, SC 29502-6139
(843) 665-0100; FAX (843) 665-0500

MA17-126

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00673**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Defendants.	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00674**
	)	
The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	
	)	

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15th JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00743**
	)	
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00744**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)	
	)	
Defendants.	)	

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REPLY IN SUPPORT OF DEFENDANTS' CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

Defendants in each of the above-captioned cases (C.A. Nos. 2016-CP-26-00673, 2016-CP-26-00674, 2016-CP-26-00743, and 2016-CP-26-00744) (collectively, the "Actions"), by and through their undersigned counsel and pursuant to Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), file this Reply in Support of their Consolidated Motion for Preliminary Approval of Settlement Agreement regarding the Actions ("Motion to Approve").

I. FACTUAL BACKGROUND

Plaintiffs' Memorandum of Law In Opposition to Defendants' Consolidated Motion for Preliminary Approval of Settlement Agreement ("Opposition") either concedes, must concede, or does not contest the following, all of which are undisputed facts:

- On February 10, 2017, the parties notified their choice of mediator that they agreed to schedule a mediation to take place on May 1, 2017. Exhibit A.
- The mediator selected was Karl A. Folkens, Esq., one of the most experienced and well-respected mediators in South Carolina.
- On March 26, 2017, Mediator Folkens confirmed the mediation was to take place on May 1, 2017. (Exhibit B.)
- On April 26, 2017, Plaintiff's counsel informed counsel for the Defendants that Plaintiff Richardson would be unable to attend the mediation in person, and on April 28, 2017, confirmed to counsel for the Defendants that he would "have settlement authority from Mr. Richardson . . . ." (Motion to Approve, Exhibit C.)
- On May 1, 2017, Plaintiffs and their counsel were physically present with the exception of Plaintiff Richardson and Plaintiff Mark dos Santos.
- Santos's absence was not anticipated. Before the mediation commenced, the parties agreed the mediation could proceed in Santos's absence, conditioned on his counsel having his settlement authority.
- All parties and their counsel attended the May 1 mediation conference, either in person or via telephone, and participated in the mediation.[1]

[1] Of the eight (8) named plaintiffs in the Actions, six (6) were physically present at the mediation, and two (2)—Mark Dos Santos and Jeffrey Richardson—were present via telephone.

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

- In accordance with Rule 6(b) of the South Carolina Court Annexed Alternative Dispute Resolution ("ADR") Rules, at the commencement of the mediation conference Mediator Folkens confirmed that (a) all parties agreed for Plaintiffs Santos and Richardson to attend via telephone, and (b) counsel for Plaintiffs had full settlement authority for and on behalf of Plaintiffs Santos and Richardson.
- Both Plaintiffs Santos and Richardson actively participated in the mediation conference via telephone—during joint sessions with all parties and closed sessions with only Plaintiffs.
- After a full-day mediation, involving extensive arms-length negotiations between the parties and their counsel, the parties reached a resolution of all claims in the Actions.
- In accordance with ADR Rule 6(f), Mediator Folkens ensured that the parties reduced their agreement to writing in an agreement that accurately captured the terms of the negotiated resolution and that all parties signed ("Settlement Agreement"). (Motion to Approve, Exhibit A.)[2]

[2] K.A. Diehl and Associates, Inc. ("K.A. Diehl")—Defendant in Civil Action Nos. 2016-CP-26-00743 and 2016-CP-26-00744 and an agent for of Ocean Front Spa Horizontal Property Regime, Inc. ("OFS") and The Myrtle Beach Resort Homeowners Association, Inc. ("MBR")—is a released party as defined in the Settlement Agreement. Moreover, although K.A. Diehl did not sign the agreement, its terms contemplated that the claims in the above Actions would be fully dismissed with prejudice after the settlement payments were received. At the same mediation, K. A. Diehl and the Plaintiffs also reached a settlement as to all claims in K.A. Diehl's action against the Plaintiffs (less Plaintiff Richardson), Civil Action No. 2015-CP-26-05573. The Plaintiffs attended the mediation in person and by telephone and signed that settlement agreement in the same manner as the Settlement Agreement in the Actions. Nevertheless, Plaintiffs intend to honor the agreement in Civil Action No. 2015-CP-26-05573 but dishonor the Settlement Agreement in the Actions.

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

- Due to Plaintiffs Santos and Richardson not being physically present, Plaintiffs' counsel executed the Settlement Agreement on their behalf as their duly-authorized agent, with the Settlement Agreement making clear that both Santos and Richardson were thereby signing through the actions of their counsel-agent.
- Before signing on behalf of Plaintiffs Santos and Richardson, Plaintiffs' counsel orally read the operative provisions of the Settlement Agreement to them over the telephone.
- Plaintiffs' counsel presented Mediator Folkens and Defendants' counsel the Settlement Agreement, signed by or for all of the named Plaintiffs.
- Based on the parties' negotiated settlement, memorialized in the Settlement Agreement, Mediator Folkens filed an Amended Proof of ADR form in each of the Actions, making clear that all parties were present and that each of the Actions were "[f]ully settled by Consent Judgment or a Voluntary Dismissal to be filed by the parties." (Exhibit C.)

Based on these undisputed facts, the Motion to Approve must be granted.

Rather than acknowledge the effect of these undisputed facts, and completely ignoring well-settled contract principles, Plaintiffs rely exclusively on a tortured reading of SCRCP Rule 43(k) to evade the final and binding Settlement Agreement. Plaintiffs' opposition is misplaced and disingenuous. First, SCRCP Rule 43(k) deals only with "agreements *between counsel* affecting the proceedings," and has no application whatsoever to the facts at hand. (Emphasis added.) Second, Plaintiffs' arguments are at odds with well-established contract principles. Third, Plaintiffs' position ignores the provisions of the South Carolina ADR Rules.

The Motion to Approve should be granted accordingly.

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

II. ARGUMENT

A. Rule 43(k) Applies only to Agreements Between Counsel.

1. *The Plain Language of Rule 43(k) Demonstrates its Inapplicability in this Case.*

The plain language of SCRCP Rule 43(k) makes clear that it is inapplicable to the Settlement Agreement and the resolution between the parties in the Actions. The rule provides as follows:

> **(k) Agreements of Counsel.** No agreement *between counsel* affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.

SCRCP Rule 43(k) (emphasis added). "'In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes.'" *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 638, 627 S.E.2d 724, 726 (2006) (quoting *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003)). "[T]he words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *State v. Muldrow*, 348 S.C. 264, 268, 559 S.E.2d 847, 849 (2002). Applying this basic rule of statutory interpretation plainly demonstrates SCRCP Rule 43(k)'s inapplicability to the Settlement Agreement.

Stated simply, the Settlement Agreement was not an "agreement between counsel." It is an agreement of the parties. A SCRCP Rule 43(k) "agreement between counsel" contemplates an agreement negotiated by attorneys alone, to the exclusion of their clients, about which the attorneys must later take some overt action, identified in the Rule, before it becomes enforceable. One of these actions is where the "agreement between counsel" is later "reduced to writing and

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

signed by the parties and their counsel." SCRCP Rule 43(k).[3] This means that lawyers must memorialize their agreements with other counsel, consult with their clients about the terms, and ensure that their clients sign the agreement.

The Court of Appeals recently recognized as much. According to SCRCP Rule 43(k), "*lawyers* have been required . . . to reduce *their* agreements to a written document." *Inglese v. Beal*, 403 S.C. 290, 742 S.E.2d 687, 694 (Ct. App. 2013) (Pieper, J., concurring in part and dissenting in part) (emphasis added). Even the Supreme Court, in *Farnsworth*—the case on which Plaintiffs primarily rely[4]—recognized the importance of those two words in the introductory clause, emphasizing "between counsel" when quoting the rule. *See Farnsworth*, 367 S.C. at 637, 627 S.E.2d at 725 (quoting SCRCP Rule 43(k)).

The Settlement Agreement in this case was not an "agreement between counsel," as contemplated in SCRCP Rule 43(k). The Settlement Agreement was negotiated, memorialized, and executed by all of the parties after a full day of mediation in which all actively participated.

This conclusion was affirmed shortly after the mediation, when several named Plaintiffs expressly ratified the settlement and affirmed their understanding that the Actions had been resolved fully and finally through mediation. These Plaintiffs notified all OFS building residents that "The recent state court litigation between various homeowners in the Ocean Front Spa and

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[3] The clause regarding signed "agreements between counsel" being enforceable was added by 2009 Amendment to the Civil Rules.

[4] *Farnsworth* dealt with a former version of SCRCP Rule 43(k) that did not include the 2009 amendment.

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

its management company and others has been resolved *between the parties* to their mutual satisfaction via alternative dispute resolution that occurred on May 1." (Emphasis added).[5]

This conclusion was further established by the filing of the Amended Proof of ADR, signed by Mediator Folkens, who affirmed that as a result of the mediation, the cases were fully settled, with all parties present. Mediator Folkens would not have done so had a settlement not been reached, as he had affirmative duty to declare an impasse if settlement was not reached and report the results of the mediation to the court. ADR Rule 7(e)-(f). The result reported was that the cases were "fully settled" with all parties present.

The plain language of SCRCP Rule 43(k) thus mandates an interpretation that it is inapplicable to the circumstances here, requiring the granting of the Motion to Approve.

2. *Plaintiff's Interpretation of Rule 43(k) would Lead to Absurd Results.*

Plaintiffs' interpretation would require the court to disregard the title of SCRCP Rule 43(k) ("Agreements of Counsel") and key limiting language in the body of the rule ("No *agreement between counsel* affecting the proceedings in an action shall be binding . . ."), and read certain provisions of Rule 43(k) in isolation. Plaintiffs would then need the court to ignore the agreement they reached pursuant to ADR Rule 6(b), with all others present before the mediation commenced—an agreement that allowed the mediation to proceed in the physical absence of Santos and Richardson on the condition that their counsel had settlement authority for them. They further ask the court to ignore the fact that Santos and Richardson participated extensively in the mediation, authorized their attorney to settle the case, and authorized him to sign the Settlement Agreement on their behalf.

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[5] *See* Exhibit B to Motion to Approve (Affidavit of Walter Jordan and Exhibits B and C thereto).

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

This is the tortured pathway to the result Plaintiffs desire, an absurd result that the General Assembly simply could not have intended. "[R]egardless of how plain the ordinary meaning of the words in a statute, courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the General Assembly." *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) (citing *Kiriakides v. United Artist Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994); *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 351, 549 S.E.2d 243, 249 (2001)). "If possible, the Court will construe a statute so as to escape the absurdity and carry the intention into effect." *Id.* (citing *Kiriakides*, 312 S.C. at 275, 440 S.E.2d at 366).

Plaintiffs' argument rests exclusively on Santos' and Richardson's physical absence from the mediation and the fact that they did not personally and physically "sign" the Settlement Agreement.[6] They then rely on the following selected language from the rule: "No agreement affecting the proceedings shall be binding . . . unless . . . reduced to writing and signed by the parties and their counsel." SCRCP Rule 43(k). They argue that these facts and this language are conclusive and render the Settlement Agreement unenforceable. They ask the court to pretend that the body of this rule is not limited, by its terms, to only that subset of agreements which are "between counsel."

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[6] For the first time nearly three months following mediation, Plaintiffs also inexplicably assert that Plaintiff Jim Perkins did not sign the Settlement Agreement. Aside from the fact that the Settlement Agreement bears a signature of a name which appears to be that of Plaintiff Jim Perkins, it is beyond dispute that he was present for the duration of the mediation. If Plaintiff Jim Perkins persists in asserting that he did not sign the Settlement Agreement, perhaps the court might be interested in asking him to take the stand and explain under oath whether he was present when the mediator presented the Settlement Agreement to the Plaintiffs and their counsel, to identify the person who signed his name to the Settlement Agreement, to state whether he authorized such person to sign on his behalf and to explain why he and his colleagues on the OFS Board announced to all the OFS that the parties had the settled the litigation. Until such time, Defendants need not further waste the Court's time on this issue.

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

SCRCP Rule 43(k) applies only to an "agreement between counsel," and not to agreements the parties themselves are actively involved in negotiating and reaching. The introductory language of SCRCP Rule 43(k) ("Agreements of Counsel") gives further direction, confirming the purpose of the rule, and cannot be disregarded. Ignoring a key modifying provision of the rule would lead to and absurd interpretation. Doing so while ignoring key facts would lead to an absurd result.

Plaintiffs' selective interpretation violates yet another rule of statutory interpretation. When "construing a statute to escape the absurdity and carry the intention into effect, . . . the Court should not concentrate on isolated phrases within the statute, but rather, read the statute as a whole and in a manner consonant and in harmony with its purpose." *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. at 355, 782 S.E.2d at 592 (citing *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011); *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006)).

The purpose of SCRCP Rule 43(k) is obvious—to prevent attorneys from attempting to bind clients to alleged agreements that attorneys make in "back room/closed door" sessions in which their clients are not involved in the negotiations. That purpose has no bearing here, where all of the parties attended and actively participated in the mediation conference at which the Settlement Agreement was negotiated and executed.

Plaintiffs' desired interpretation would render meaningless the title and introductory/limiting language of SCRCP Rule 43(k), an obviously improper result. *See, e.g.*, *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 574 S.E.2d 196 (2002) ("In construing statutory language, the statute must be *read as a whole* and sections which are part of the same general statutory law *must be construed together* and each one given effect. The Court must

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

presume the *legislature did not intend a futile act*, but rather intended its statutes to accomplish something." (emphasis added) (citing *TNS Mills, Inc. v. S.C. Dep't of Revenue,* 331 S.C. 611, 503 S.E.2d 471 (1998))).

As important, Plaintiffs' interpretation would effectively overturn and nullify the long history of precedent making clear that settlement agreements are contracts that are subject to enforcement like any other contracts, *see, e.g., Nichols Holding, LLC v. Divine Capital Grp., LLC*, 416 S.C. 327, 335, 785 S.E.2d 613, 617 (Ct. App. 2016) ("In South Carolina jurisprudence, settlement agreements are viewed as contracts." (citing *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009))). Therefore, Plaintiffs' opposition should be rejected accordingly, and the Motion to Approve granted.

3. *Pre-2009 Case Law is Inapplicable to the Current Version of 43(k)*

In support of the absurd and improper results Plaintiffs seek, they cite to cases from 2006 and earlier that did not even interpret the language in SCRCP Rule 43(k) on which they rely. Prior to 2009, SCRCP Rule 43(k) required one of three conditions for an "agreement between counsel" to be binding. The agreement had to be:

1. "reduced to the form of a consent order . . . signed by counsel and entered in the record,"
2. "reduced to the form of a . . . written stipulation signed by counsel and entered in the record," or
3. "made in open court and noted upon the record."

Farnsworth v. Davis Heating & Air Conditioning, Inc., 367 S.C. 634, 637, 627 S.E.2d 724, 725 (2006) (citing the previous version of the Rule). In 2009, however, the rule was amended to add a fourth avenue for enforcement of agreements between counsel. An agreement between counsel could now also be binding if the agreement is "reduced to writing and signed by the parties and their counsel." SCRCP Rule 43(k). The cases relied upon by Plaintiffs are clearly inapplicable to

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

this Motion as the courts in those cases were confined to the requirements of the pre-2009 version of the rule.

4. *Even if the Court finds Rule 43(k) Applies, the Settlement Agreement Complied with the Post-2009 Provisions*

Regardless, here, the parties and their counsel signed the Settlement Agreement and it should be enforced. Each of the parties signed, either themselves or by their attorneys. Likewise, counsel for Plaintiffs and counsel for Board Defendants signed the agreement on behalf of parties who were physically absent.

Plaintiffs first argue that the Settlement Agreement is unenforceable because the attorneys did not sign the agreement in their capacities as legal counsel. They do not, however, cite any legal authority for this baseless proposition (because there is none). Moreover, it is highly doubtful that the General Assembly intended for a party to rescind an agreement simply because his or her attorney did not sign the agreement separate and apart from the party.

Plaintiffs' hyper-technical argument flies in the face of one of the main purposes SCRCP Rule 43(k), which is to take courts out of disputes arising from agreements between counsel. *Ashfort Corp v. Palmetto Constr. Group, Inc.* 318 S.C. 492, 495, 458 S.E. 2d. 533, 535 (S.Ct. 1995). ("[T]he purpose of rules such as Rule 43(k) is: to prevent disputes as to the existence and terms of agreements and to relieve the court of the necessity of determining such disputes. . . ." (citing 83 C.J.S. Stipulations § 4 (1953)). Plaintiffs' tortured approach would actually force courts to get involved in matters such as this that <u>have already been resolved</u> between the parties and their counsel, with the assistance of an eminent mediator.

Plaintiffs' second hyper-technical argument is that a signature by an attorney with authority from and on behalf of a client must be disregarded under SCRCP Rule 43(k). This argument wholly disregards well-established precedent recognizing that an attorney acts as an

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

agent for his or her client. Our Supreme Court recognizes the attorney-client relationship is that of an agent and principal: "Acts of an attorney are directly attributable to and binding upon the client. Absent fraud or mistake, where attorneys of record for a party agree to settle a case, the party cannot later repudiate the agreement." *Arnold v. Yarborough*, 281 S.C. 570, 572, 316 S.E.2d 416, 417 (Ct. App. 1984) (*citing Clark v. Clark*, 271 S.C. 21, 244 S.E.2d 743 (1978); *Poore v. Poore*, 105 S.C. 206, 89 S.E. 569 (1916)).

The fact that Santos and Richardson were not present and relied on their attorney to read the Settlement Agreement to them and sign on their behalf does not excuse them from the Agreement. *See Kirkland v. Moseley*, 109 S.C. 477, 96 S.E. 608 (1917) (a party cannot set aside a settlement agreement signed pursuant to attorney's erroneous advice); *Ex Parte Jones*, 47 S.C. 393, 25 S.E. 285 (1896). Moreover,

> When a litigant voluntarily accepts an offer of settlement, either directly or indirectly through the duly authorized actions of his attorney, the integrity of the settlement cannot be attacked on the basis of inadequate representation by the litigant's attorney. In such cases, any remaining dispute is purely between the party and his attorney.

Shelton v. Bressant, 312 S.C. 183, 185, 439 S.E.2d 833, 834 (1993) (*quoting Petty v. The Timken Corp.*, 849 F.2d 130 at 133 (4th Cir. 1988)). The fact that they now may not like the terms of the Agreement is beside the point. "Having second thoughts about the results of a settlement agreement does not justify setting aside an otherwise valid agreement." *Crawford v. Nat'l Honorary Beta Club*, No. 7:14-CV-02970-GRA, 2015 WL 12806590, at *2 (D.S.C. Oct. 8, 2015) (*quoting Young v. F.D.I.C*, 103 F.3d 1180, 1195 (4th Cir. 1997)).

Plaintiffs' third hyper-technical argument is that K.A. Diehl is not a party to the Settlement Agreement, and the Plaintiffs did not agree to dismiss their claims against this Defendant with prejudice. In the Settlement Agreement, Plaintiffs covenanted to fully release

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

and forever discharge (and not to sue) the Defendants and their past and present "agents" from "any and all claims, demands, actions, charges, complaints, suits, administrative proceedings, debts, promises, contracts, grievances, and causes of action," whether known or unknown, through the date of the Settlement Agreement. (Motion to Approve, Exhibit A at ¶ 4.) K.A. Diehl, as the Defendants OFS and MBR's property manager and agent, was clearly a released party pursuant to this language. Moreover, the Plaintiffs agreed, without any conditions or limitations, to "file a stipulation of dismissal with prejudice in each of the Settled Actions" within 15 days of receipt of payment of the settlement funds. (*Id.* at ¶ 5.)

"When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense." *C.A.N. Enterprises, Inc. v. S.C. Health & Human Servs. Fin. Com.*, 296 S.C. 373, 377, 373 S.E.2d 584 (1998) (*citing Warner v. Weader*, 280 S.C. 81, 83, 311 S.E. (2d) 78, 79 (1983)). The clear, explicit, and unambiguous terms of the Settlement Agreement releases K.A. Diehl of all claims, and further, requires the Plaintiffs to dismiss their claims asserted in the Actions against all defendants, including K.A. Diehl, upon payment received.

"Common sense and good faith, the leading touchstones of construction of the provisions of a contract", dictate that the parties intended the dismissal with prejudice to be as to all claims asserted in the cases. *C.A.N. Enterprises, Inc.*, 296 S.C. at 377 (citing *Farr v. Duke Power Co.*, 265 S.C. 356, 360, 218 S.E.2d 431, 434 (1975)). To read the Settlement Agreement in any other manner would lead to the "unusual and extraordinary" conclusion that Defendants OFS and MBR would agree to the Plaintiffs releasing them without releasing the claims pending against their agent, exposing Defendants OFS and MBR to arguments that they should indemnify their agent. *Id.* Instead, the Court must employ the "reasonable, fair, and just" construction of the

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Settlement Agreement that all parties intended the "dismissal with prejudice" language to apply to all claims pending in the case, including the claims against K.A. Diehl.

As discussed above, Plaintiffs' Memorandum relies on pre-2009 cases, which are inapplicable to the 2009 amendment to SCRCP Rule 43(k). The Court should find post-2009 cases more instructive. For example, in *Byrd v. Livingston*, the three parties to litigation attended mediation, which resulted in all three parties signing an agreement in principle. 398 S.C. 237, 240, 727 S.E.2d 620, 621 (Ct. App. 2012). The agreement in principle contemplated a more formal and detailed settlement agreement would supplant the agreement in principle. *Id.* However, the second settlement agreement was never signed. *Id.* The defendants filed a motion to enforce the agreement in principle. *Id.* The trial court found the agreement in principle enforceable against the plaintiff and the court of appeals affirmed. *Id.* Importantly, the court analyzed whether the agreement was enforceable by applying contractual principles, making no mention of Rule 43(k). *Id.* at 243.

B. <u>Plaintiffs' Argument Ignores Well-Settled Contract Principles</u>

To hold that SCRCP Rule 43(k) prevents the enforcement of the Settlement Agreement would be inconsistent with the general contractual nature of settlements. *See Nichols Holding*, 416 S.C. at 335, 785 S.E.2d at 617 ("In South Carolina jurisprudence, settlement agreements are viewed as contracts." (*citing Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009))). Parties such as Defendants that proceed with the costs, time, and effort associated with entering into a good faith mediation or settlement discussion must be allowed to settle their differences without the fear that the other party could simply later walk away because of a case of "cold feet" or "buyer's remorse." Ruling in Plaintiffs' favor would undermine the

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

negotiation process and the sanctity of contracts, leading to an absurd result not contemplated by the legislature or the courts.

Judicial economy demands that a party be held to the terms of an agreement, unless the agreement is substantially unfair or there has been a material misrepresentation. *White v. Hewitt*, 86 S. C. 576, 68 S. E. 820 (1910). A ruling for Plaintiffs would lead to an unintended outcome, bogging-down the court system with unnecessary further litigation revolving around a party's abuse of SCRCP Rule 43(k) to rescind a valid settlement agreement after the fact. The Plaintiffs' advocated result would thwart the finality provided by settlement agreements, prolonging the litigation beyond what the parties intended.

SCRCP Rule 43(k)'s purpose is to keep courts *out* of disputes between *counsel* in the *trial* context, not to immerse courts in matters stemming from valid settlement agreements negotiated by, and ultimately reached between, the parties to a lawsuit. To rule in Plaintiffs favor would severely undermine the mediation process and actually inhibit parties from engaging in good faith settlement negotiations.

C. <u>Plaintiffs' Argument Runs Afoul of the ADR Rules</u>

The ADR Rules are not mere suggestions. They are rules duly promulgated by the South Carolina Supreme Court mandating the process of mediation in the state. The Rules require physical attendance of the individual parties at a mediation. ADR Rule 6(b). The rules contemplate that individuals may avoid physical attendance only if "agreed to by the mediator and all parties." *Id.* The rules do not place limits on such agreements, so parties are free to condition them on the absent party providing settlement authority to an agent.

The Rules further give the mediator authority over the proceedings, including the authority to declare an impasse. ADR Rules 7(a), 7(e). The Rules require that "[u]pon reaching

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

an agreement, the parties shall, before the adjournment of the mediation reduce the agreement to writing . . . ." ADR Rule 6(f). The mediator shall file with the clerk of court a "Proof of ADR on a form approved by the Supreme Court." ADR Rule 7(f). Such form requires the mediator to state whether parties were present and the outcome (whether the mediation resulted in full settlement, impasse, or otherwise).

In this case, the parties and mediator reached an agreement on the conditions of the absence of Plaintiffs Santos and Richardson from the mediation, as allowed by ADR Rule 6(d). The parties complied with the mediation process and Mediator Folkens has affirmed the successful outcome of the mediation. ADR Rule 7. In contending the Settlement Agreement is unenforceable, Plaintiffs make a mockery of the mediation process.

The ADR Rules contemplate the consequences to a party who violates the provisions of the rules. ADR Rule 10(b). If Plaintiffs persist in their position, it would appear their acts of evasion constitute a violation of the ADR rules. In such case, the ADR Rules permit the Chief Judge for Administrative Purposes to inquire regarding such possible violations. ADR Rule 8(b)(2).

Accordingly, pursuant to ADR Rule 8(b), Defendants ask the Court to direct a written inquiry from the Chief Judge for Administrative Purposes to the mediator in the case, Karl A. Folkens, Esq. of Florence, South Carolina, as suggested in Exhibit D hereto and incorporated by reference herein. If the Court deems appropriate, Defendants also ask the Court to conduct such other inquiries to the attorneys and other participants in the mediation to ascertain whether Plaintiffs' position constitutes a violation of the ADR Rules. Finally, Defendants ask the Court to permit further submissions regarding appropriate sanctions under ADR Rule 10(b).

D. <u>Conclusion</u>

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

For the reasons presented in this Reply and the underlying Motion to Approve, Defendants respectfully request that the Court enter an Order (1) preliminarily approving the attached Settlement Agreement; (2) approving the form and manner of the Settlement Notice; and (3) scheduling a Fairness Hearing to grant final approval of the Parties' Settlement Agreement.

Respectfully submitted this 7th day of August, 2017.

s/Phillip A. Kilgore
Phillip A. Kilgore (S.C. Bar No. 3449)
Lucas J. Asper (S.C. Bar No. 77902)

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30786195.3

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EXHIBIT A
TO
REPLY IN SUPPORT OF DEFENDANTS' CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

02/10/2017 EMAIL FROM THOMPSON TO MEDIATOR

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From: Thompson, Alicia <AThompson@mcnair.net>
Sent: Friday, February 10, 2017 1:02 PM
To: Nell Folkens
Cc: Roberts, Kathy; Golding, Henrietta; Lax, Andrew; Chris Nickels; Preston Brittain; Bobby Buffington; Kilgore, Phillip; msmith@thompsonlaw.com; Brady, Donna; Roberts, Kathy; Golding, Henrietta; Miranda Byrnside; Falls, Charlene; Tenna Turman; Coggins, Robert E.; Christian Stegmaier
Subject: RE: FW: KADiehl

Hi Nell:

Please allow this email to confirm the mediation below on May 1, 2017 at 9:30 am at McNair's Myrtle Beach office. Can you please send out the confirmation letters? I have also copied all counsel so that they are aware that the date has been reserved.

Kathy Roberts, my assistant, will send you the pleadings in the 5 cases sometime within the next two weeks. My maternity leave begins sometime soon, so please contact her and Henri Golding for any further scheduling/administrative inquiries.

kroberts@mcnair.net
hgolding@mcnair.net

Thanks for your assistance.

Alicia

MCNAIR
ATTORNEYS

Alicia E. Thompson
Shareholder
athompson@mcnair.net | 843 443 3058 Direct

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Mailing Post Office Box 336 | Myrtle Beach, SC 29578
VCard | Bio URL | Website

From: Nell Folkens [mailto:nell@folkenslaw.com]
Sent: Tuesday, February 07, 2017 11:50 AM
To: Thompson, Alicia <AThompson@mcnair.net>
Subject: Re: FW: KADiehl

GREAT!

Nell

Nell G. Folkens
Firm Manager/Paralegal
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Florence, SC 29502-6139
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On Tue, Feb 7, 2017 at 11:33 AM, Thompson, Alicia <AThompson@mcnair.net> wrote:

Thanks, Nell. I am waiting for all attorneys to confirm the date, but most have said that they are available. I will send you the time and location soon.

Alicia

Alicia E. Thompson
Shareholder
athompson@mcnair.net | 843 443 3058 Direct

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Myrtle Beach Office Founders Centre, 2411 Oak Street | Suite 206 | Myrtle Beach, SC 29577
843 444 1107 Main | 843 946 5969 Fax
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From: Nell Folkens [mailto:nell@folkenslaw.com]
Sent: Monday, February 06, 2017 6:03 PM
To: Thompson, Alicia <AThompson@mcnair.net>
Cc: karl@folkenslaw.com; Brady, Donna <DBrady@mcnair.net>; Roberts, Kathy <KRoberts@mcnair.net>; Golding, Henrietta <HGolding@mcnair.net>
Subject: Re: FW: KADiehl

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

Alicia:

Thank you for your online request. Karl has no conflict. We have your hold in place for this date and time. I have received the full caption, docket number, list of attorneys. Just let me know location. I will then send out confirmation letters.

Also, if there are any special requests or concerns which I should bring to Karl's attention, please let us know.

We look forward to working with you.

Nell

Nell G. Folkens

Firm Manager/Paralegal

601 West Evans Street

P. O. Box 6139

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On Mon, Feb 6, 2017 at 5:18 PM, Thompson, Alicia <AThompson@mcnair.net> wrote:

Karl:

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Henri Golding and I represent KA Diehl in three actions, captions attached for your convenience. The firms for the parties are reflected on the certificates of service behind each of the captions. The parties have agreed to consolidate these three cases, along with two class actions brought by the plaintiffs in the derivative actions against the associations and directors, for mediation purposes (a total of five cases), and we hope to mediate in April or May with you as the mediator.

I see that you are open on May 1, 2017. Can you hold that date for us and run a conflicts check?

I am also happy to send the full pleadings if you need them to run the check, but they are voluminous.

Thanks,

Alicia Thompson

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Mailing Post Office Box 336 | Myrtle Beach, SC 29578
VCard | Bio URL | Website

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EXHIBIT B
TO
REPLY IN SUPPORT OF DEFENDANTS' CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

03/26/2017 EMAIL FROM MEDIATOR TO COUNSEL

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

From: Karl Folkens <karl@folkenslaw.com>
Sent: Sunday, March 26, 2017 1:21 PM
To: Bobby Buffington; Christian Stegmaier; Henrietta Golding (HGolding@mcnair.net); Mike Smith; Kilgore, Phillip; Preston Brittain; cwn@cslaw.com; mhall@collinsandlacy.com; tommyb@brittainlawfirm.com
Cc: Alicia Thompson; Kathy Roberts
Subject: Mediation: K. A. Diehl and Associates, Inc. v. James Perkins, et al. - MA17-126
Attachments: Mediation Agreement and FAQ - 2016.pdf; Mediation Outline for Karl Folkens.doc

Dear Attorneys:

This letter will confirm that a mediation conference has been scheduled in the above-referenced case for **May 1, 2017**, beginning at **9:30 a.m.** at **McNair Law Firm, P.A., 2411 Oak Street, Suite 206, Myrtle Beach, SC.**

You will receive a separate "calendar invite" e-mail confirming this date and time.

Attached is a proposed agreement to mediate which I will present for signing at the mediation conference. I also attach FAQ—Frequently Asked Questions. Please feel free to distribute these to your client.

My fee for mediation is $400.00 per hour which will be evenly divided by the parties, unless otherwise agreed upon ahead of time.

Please send me copies of the Complaint, Answer, any Counterclaim and any additional information you would like for me to review. Also, please let opposing counsel and me know who will be present with you at the mediation.

I strongly urge you to have all persons necessary to effect a full and complete settlement attend the mediation session. For the purposes of an insurance company, I take the term "full authority" to mean a person with full policy limits authority or the authority up to the Plaintiff's last written demand, whichever is less.

Consistent with both state and federal rules governing the mediation process, a chief administrative judge has ruled that the term "full authority" is the

> . . . ability, power, and freedom to make all decisions, including the ultimate decision to accept or reject a settlement proposal ***without having to make a phone call or get approval from someone who is not present at the conference***. When a proposal is made during the course of the mediation process, and the person present must get permission from someone not participating in the conference in order to respond to the proposal, then "full authority" is lacking. [Emphasis added.]

For the purposes of an individual, non-corporate party, I take the term "full authority" to mean the personal attendance of anyone in addition to the named party who would be necessary to consult in order to make a final decision, such as a spouse or other significant person.

If this will not occur, please let opposing counsel and me know immediately so that we may address this issue. As you know, the likelihood of success increases exponentially if everyone with full settlement authority participates in the mediation session. Also, the applicable ADR rules require such persons to personally attend the mediation.

Thank you for the opportunity to serve as mediator, and please do not hesitate to contact us if you have any questions about this mediation. For questions about scheduling, please contact my mediation coordinator, Nell Folkens, whose e-mail address is also set forth above.

Finally, we now offer a convenient on-line calendar-availability system on our website. To schedule your next ADR event, please consider using this calendar at www.folkenslaw.com/mediation.html.

Yours very truly,

Karl

Karl A. Folkens
karl@folkenslaw.com
www.folkenslaw.com
843.665.0100

Confidential: The information contained in this message may be privileged and confidential and protected from disclosure. If the recipient of this message is not the intended person, or an employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify the sender immediately by reply email and delete all copies from your computer.

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AGREEMENT TO MEDIATE

The undersigned parties and their attorneys hereby agree that the above matter shall be submitted to mediation pursuant to the applicable rules, guidelines, and Order of the Court having jurisdiction over this matter. They acknowledge that they have reviewed Mr. Folkens' *Frequently Asked Questions*, and further agree that:

1. All statements made during the course of mediation are confidential and privileged, are made without prejudice to any party's legal position, and are non-discoverable and inadmissible for any purpose in any legal proceeding.

2. The confidential and privileged character of any information is not altered by disclosure to the mediator. Disclosure of any records, reports, or other documents received or prepared by the mediator cannot be compelled. The mediator shall not be compelled to disclose or to testify in any proceeding about (i) any records, reports, or other documents received or prepared by the mediator or (ii) information disclosed or representations made in the course of the mediation or otherwise communicated to the mediator in confidence.

3. Evidence of anything said or any admission made in the course of mediation is not admissible in evidence, and disclosure of any such evidence shall not be compelled in any civil action in which, pursuant to law, testimony can be compelled to be given.

4. Unless a document provides otherwise, no document prepared for the purpose of, or in the course of, or pursuant to, the mediation, or copy thereof, is admissible in evidence, and disclosure of any such document shall not be compelled in any civil action in which pursuant to law, testimony can be compelled to be given.

5. Nothing in this Agreement to Mediate shall limit the admissibility of any particular evidence if all persons who conducted or otherwise participated in the mediation consent to its disclosure.

6. The parties understand that the mediator does not represent any party, and does not provide legal or financial advice. Parties not represented by counsel are urged to seek legal advice from an attorney and to obtain financial advice as needed from qualified professionals. The parties agree that the mediator shall have no liability for any act or omission in connection with the mediation.

7. Each party and the respective attorney is jointly and severally responsible for that party's proportionate share of the costs of mediation.

Dated and signed before commencement of the mediation by each of the persons whose signatures appear below.

_____	_____
Plaintiff	Defendant or Representative
_____	_____
Attorney for Plaintiff	Attorney for Defendant
_____	_____
_____	_____

(If there are more parties or attorneys participating in the mediation than provided for in the space above, they may sign below or on an additional page which shall be attached to this agreement.)

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FREQUENTLY ASKED QUESTIONS

Karl A. Folkens, Mediator

- *What can I expect at the mediation?*

  - Usually, the mediation process begins with a "general session" during which all sides are given an opportunity to fully present their views of the case. After everyone has had an opportunity to be heard, the decision is then made as to how best to proceed depending upon the issues to be resolved. Sometimes the group continues meeting as a whole. At other times, "break-out" sessions are held in private with one or more sides.

  - Communications during a mediation settlement conference are privileged and confidential. To that end, the Rules require that the parties and any other person present shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any oral or written communications having occurred in a mediation proceeding, including, but not limited to:

    - (1) Views expressed or suggestions made by another party or any other person present with respect to a possible settlement of the dispute;

    - (2) Admissions made in the course of the mediation proceeding by another party or any other person present;

    - (3) Proposals made or views expressed by the mediator;

    - (4) The fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator; or

    - (5) All records, reports or other documents created solely for use in the mediation.

  - This rule does not prohibit:

    - (1) Disclosures as may be stipulated by all parties;

    - (2) A report to or an inquiry from the Chief Judge for Administrative Purposes regarding a possible violation of these rules;

    - (3) The mediator or participants from responding to an appropriate request for information duly made by persons authorized by the court to monitor or evaluate the ADR program;

    - (4) Threats of harm or attempts to inflict physical harm made during the mediation sessions; and

- (5) Any disclosures required by law or a professional code of ethics.

- If during a break-out session you share confidential information with me that you do not want me to share with the other side, please tell me it is confidential, and I will honor and protect that confidence.

- If a settlement is reached, usually the basic terms of the settlement are reduced to writing at the conclusion of the mediation and signed by the parties. This settlement, once signed by the parties and attorneys, will no longer be subject to the confidentiality provisions of the mediation and will be binding under Rule 43(k), SCRCP, unless specifically set forth in the written settlement agreement.

- Mediation is different from other forms of conflict resolution, such as arbitration or early neutral evaluation. One key difference is that any agreement must be reached by mutual consent of the parties. The mediation conference is not a trial; the mediator is not a judge, jury or arbitrator; and the parties retain the right to trial if they do not reach a settlement.

- Conduct and statements made during mediation are inadmissible as evidence in any arbitral, judicial or other proceeding, except as set forth above.

- *What can I do to prepare for the mediation?*

  - Mediation sessions can be emotional, fatiguing or frustrating as we go about trying to resolve the case. Be prepared: Get a good night's sleep. Eat breakfast. Keep outside irritations to a minimum. Turn off your cell phone and pager while we're working.

  - A lawyer hoping to receive a monetary settlement should bring the firm's federal identification number and correct legal name to the mediation. I will provide a blank W-9 form for you which may expedite the issuance of settlement funds.

  - You should talk with everyone coming with you ahead of the mediation about what you hope to accomplish in the mediation and what will be discussed in the opening session. Discuss what information should be obtained prior to the mediation to ensure a meaningful mediation occurs. Agree to keep an open mind throughout the mediation.

  - We have an outside smoking area on the east side of our building. Please dispose of cigarette butts in the wall-mounted receptacle.

- *What set-up do you have at your law firm for making presentations?*

  - Our main conference room has 60" and 46" flat panel televisions. We removed our SmartBoard from the main conference room, as we are encouraging the use of monitors rather than projectors for presentations.

  - Bring your PowerPoint or Keynote presentation on a flash drive, and I will transfer it onto my Apple MacBook Air to play wirelessly through AirPlay). Or, you can e-mail the presentation to me, or send a Dropbox link. If you prefer to use your

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own computer and do not have an HDMI port on it, let me know so I can have the right adapter ready for you. If you want to present on an iPad or MacBook, we're fully AirPlay capable.

- We are also equipped for wireless presentations using your iPad. TrialPad, the new app for courtroom and mediation document presentations, is ideal for making wireless presentations through AirPlay and Apple TV. I will give you a short demonstration if you're not familiar with this arrangement.

- *What should be provided to you prior to the mediation?*

  - Please send me copies of the pleadings, including the Complaint, Answer, and any Counterclaims. Also, the attorneys are sent a sample outline for providing me with basic information about the case. You may send any additional information you believe would assist me in understanding the case and your position, such as a confidential mediation statements in your own format with exhibits, summary judgment motions and memoranda, and the like. I am sending you a mediation information outline which you may or may not want to use. It is in Word® format if you would like to simply type in your responses and forward it to me. Or, you could incorporate the information into your own report format.

  - If you send me additional information, decide whether to share that information with the other side. I usually recommend that you copy the other side with such information since, after all, the goal is to convince the other side to settle the case rather than to convince me of anything! However, I realize that there may be times you want to share confidential information with me before the mediation in which case please note on your communication with me that it is confidential and not shared with the other side.

  - Let opposing counsel and me know who will be present with you at the mediation. If it is someone other than a party, please provide the person's title or relationship to the party.

  - Let my mediation coordinators know if a pre-mediation conference call would be beneficial. Telephone conferences, either alone with me or with others, can be scheduled at a mutually convenient time.

- *Who should attend the mediation?*

  - EVERYONE necessary for your side to effect a full and complete settlement should attend the mediation session. This should include everyone with "full authority" to settle the case.

    - For the purposes of an insurance company, I take the term "full authority" to mean a person with full policy limits authority or the authority up to the Plaintiff's last written demand, whichever is less, without being required to consult someone not in attendance.

    - For the purposes of an individual party not relying solely upon the payment by an insurance company to resolve the case, I take the term

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

"full authority" to mean the personal attendance of anyone in addition to the named party who would be necessary to consult in order to make a final decision, such as a spouse, business partner, or other significant person.

- Consistent with both state and federal rules governing the mediation process, a chief administrative judge has ruled that the term "full authority" is the

  > . . . ability, power, and freedom to make all decisions, including the ultimate decision to accept or reject a settlement proposal without having to make a phone call or get approval from someone who is not present at the conference. When a proposal is made during the course of the mediation process, and the person present must get permission from someone not participating in the conference in order to respond to the proposal, then "full authority" is lacking.

- If this will not occur, please let opposing counsel and me know immediately so that we may address this issue.

o The likelihood of success increases exponentially if everyone with full settlement authority participates in the mediation session. ***I cannot stress enough the importance to have everyone with full authority personally attend the mediation.***

- In many cases, the failure for someone with such authority to personally attend may be a violation of the court rules or a judge's standing Order applicable to your case.

- More importantly, I become much less effective in assisting you in settling your case if everyone is not personally in attendance. In such cases, the mediation simply becomes a journey in finding out what limited authority exists rather than exploring all possible avenues to get the case settled.

• *What is the cost of mediation*?

o I currently charge $400.00 per hour. This includes time reviewing submissions by the parties, conducting the mediation, following up with the attorneys, and preparing any reports which need to be filed with the court.

o If the mediation is scheduled outside of the Florence area, I charge $220.00 per hour travel time and mileage at the IRS mileage reimbursement rate.

o To expedite delivery of the bill, Nell e-mails the bill shortly after the session concludes to the primary attorney representing each side. By e-mailing the bill, an attorney can more easily forward the bill to the person responsible for payment. If you want someone other than the attorney, or in addition to the attorney, initially receiving the bill, let us know at the outset.

o NOTE: ***The bill you receive will be your net share of the entire mediation***

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

cost. The rate has already been divided in accordance with the following section. Please send back one copy of the bill e-mailed to you to ensure that you receive proper credit for your payment.

- If you would prefer a hard-copy of the bill mailed to you, let us know at the conclusion of the mediation session.

- *How is the cost of mediation divided?*
  - Unless otherwise agreed to by the parties, the cost is divided equally among the parties to the action. In some cases, certain groupings of parties represented by the same attorney will be treated as one for mediation cost purposes. If you anticipate any issues concerning the division of the mediation costs, *please* bring them to my attention as soon as you become aware of them.
  - Most courts and judges consider mediation costs to be similar to deposition costs and treat non-payment of such costs in a similar manner.

- *Do you charge a cancellation fee?*
  - Although many mediators charge cancellation fees, I currently do not, but I do charge for review and preparation time prior to notice of cancellation. I realize that cases often settle on the eve of mediation, and I encourage such discussions. I also realize that litigators are often called to a court which has priority to mediation and the mediation will need to be rescheduled. I do not penalize the parties for such cancellations; however, I ask that you let me know as soon as possible if there is a good likelihood the mediation session will be cancelled or postponed.
  - Likewise, as a mediator who is also an active litigator, I may be called to court which may necessitate rescheduling the mediation. This rarely occurs, especially in light of Rule 601, SCACR.

- *Ok, so what is Rule 601, SCACR, and how does it affect the mediation?*
  - RULE 601 deals with conflicts in hearing dates when an attorney is called to appear simultaneously in two or more "tribunals." Recognizing the importance of mediation and other forms of alternative dispute resolution, the South Carolina Supreme Court includes mediation in the list of tribunals.
    - The Rule also provides: "When a party or his counsel is in the process of a hearing or trial before a tribunal, he may not be required to appear in another tribunal having greater priority unless the tribunal with less priority grants a recess or continuance for that purpose."
  - Attorneys should work closely with judges and mediators to avoid scheduling conflicts. Simply because a matter may get scheduled later in the day after a mediation has been scheduled is not grounds to immediately seek a rescheduling of the mediation. Of course, the circumstances of each conflict should be examined and everyone involved should work cooperatively and timely to deal with such conflicts.

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- If you anticipate a court-related scheduling conflict which may interfere with an already scheduled mediation, I can contact judges, clerks of court or the federal ADR Program Director on your behalf to assist with resolving such conflicts.

- *Where can I get directions to your office?*

  - Go to our firm's website at www.folkenslaw.com and click on the "Directions" tab for specific information and an interactive map. Our office is in downtown Florence, one block west of the McMillan Federal Building, at 601 West Evans Street.

  - Many popular GPS units, including Garmins, for some strange reason don't recognize West Evans Street as a main thoroughfare, which it is. Once you're on West Evans St., resist directions to turn off of West Evans!

- *What is your "meal" policy?*

  - I have found it best, except in rare circumstances, to work non-stop during the mediation session. If lunch (or dinner) will need to be served, we order from a local restaurant and the food is delivered to us.

  - If you have any special dietary needs, please let me know them beforehand, and every effort will be made to accommodate special requests.

  - The cost of the meal is added to the total mediation cost. If this is not acceptable to you, please let me know ahead of time so alternative arrangements can be made.

  - Refreshments, including soft drinks, juices, and bottled water, are available during the mediation. Wireless Internet access is available, and long distance calls may be made anywhere in the United States without charge. Please ask the staff if you have any special requests.

- *Are you willing to travel?*

  - Yes. I routinely travel outside of the Florence area to conduct alternative dispute resolution events. If parties, claims representatives and/or attorneys live primarily outside of the Florence area, it may be more cost effective to pay my reduced travel hourly rate and mileage for me to travel to you rather than having everyone travel to Florence. Explore this possibility with the other side if there might be cost savings to you.

- *When is the "best" time to conduct a mediation?*

  - Timing is everything in mediation! Some matters are best resolved through a mediation conducted early in the process, even before a lawsuit is filed. Others require a certain amount of discovery to be in a position to negotiate a final resolution. I urge you in all of your cases to discuss mediation and other forms of alternative dispute resolution as early as possible with the other side and agree upon when the ADR event will occur. In some cases, having an early ADR event

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

to agree upon what discovery will be undertaken before a full-blown session is held is beneficial.

- *What rules apply to mediation?*
  - The current South Carolina Circuit Court Alternative Dispute Resolution Rules can be found at www.sccourts.org/courtReg/
- *I am an attorney and not admitted in South Carolina. What special rules apply to me?*
  - The South Carolina Supreme Court recently adopted new rules affecting appearances by non-South Carolina lawyers in arbitration, mediation or other alternative dispute resolution proceedings in South Carolina. If you fall into this category, you *must* read Rule 404 of the South Carolina Appellate Court Rules. Rules 404(g) – (i) specifically state:

    (g) **Non-South Carolina Lawyers Appearing in an Arbitration, Mediation or Other Alternative Dispute Resolution Proceeding in South Carolina.** Pursuant to Rule 5.5(c)(3) of the Rules of Professional Conduct, Rule 407, SCACR, a lawyer admitted to practice law in another jurisdiction may perform legal services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's pre-existing representation of a client in a jurisdiction in which the lawyer is admitted to practice.

    (h) **Limitations on Provision of Legal Services Pursuant to Rule 5.5(c)(3).** A lawyer who is not admitted to practice in South Carolina who seeks to provide legal services pursuant to Rule 5.5(c)(3) in more than three matters in a calendar year shall be presumed to be providing legal services on a regular, not temporary, basis.

    (i) **Fee; Record of Provision of Legal Services Pursuant to Rule 5.5(c)(3)**. For each matter in which a lawyer seeks to provide legal services pursuant to Rule 5.5(c)(3), the lawyer shall file a verified statement with the South Carolina Supreme Court Office of Bar Admissions stating that the lawyer has not filed more than three statements pursuant to this rule in a 365-day period. The statement shall be accompanied by a $250 fee and shall be served on opposing counsel, if known. If opposing counsel is not known at the time the verified statement is filed, the statement shall be filed on opposing counsel within ten days of learning the identity of opposing counsel.

  - The Rules and required forms can be found at www.sccourts.org/courtReg/index.cfm

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

- If you fall into this category I will assume that you have fully complied with the Rules, submitted the required form and fee to the South Carolina Supreme Court's Office of Bar Admissions, and received permission to appear by the time of the mediation.

- *How can I make scheduling my next ADR event with you easier?*
  - I have been inducted into the National Academy of Distinguished neutrals. The Academy offers a convenient online calendar-availability system which is linked on our website. To schedule your next ADR event, please consider using this system at www.folkenslaw.com/mediation.html. Once you enter your information one time, your contact information will be automatically filled-in on your next visit to the site.
  - Many attorneys get the other side on the phone and jointly review the available slots on the online calendar, avoiding having to go back and forth in selecting a particular date.

- *I'm coming from out-of-town and plan to stay the evening before. What is the best, most convenient lodging to your office?*
  - We recommend the new Hotel Florence which is just a few blocks east of our office on the same street at 126 West Evans Street. This boutique hotel with competitive rates is made up of three of Florence's historical buildings downtown that have been renovated to create one space. The original building was built in 1891 and has been fully remodeled. Click here for more information: www.hotelflorencesc.com/
  - For special rates given to our clients and mediation participants, go to this link: www.ascendcollection.com/ires/en-US/html/ArrivalInfo?hotel=SC477&srp=LFOLKE&pu=no

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MEDIATION OUTLINE FOR KARL FOLKENS

1. What is the case about?

2. What are the contested issues?

3. What is the present posture of the case?

4. What have been the settlement efforts to date?

5. What are your case strengths and weaknesses?

6. Who will be attending with you?

7. Does anyone attending with you need any special accommodations?

8. Are there any sensitive issues or other concerns?

9. If you want your share of the mediation bill emailed to someone else, such as paralegal, bookkeeper or claims representative, what is the person's name and email address?

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

EXHIBIT C
TO
REPLY IN SUPPORT OF DEFENDANTS' CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

AMENDED PROOF OF MEDIATION

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

CIRCUIT COUR

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K. A. DIEHL AND ASSOCIATES, INC. V. JAMES PERKINS, ET AL.
Docket No. 2015-CP-26-05573

JAMES PERKINS, ET AL. V. K.A. DIEHL AND ASSOCIATES, ET AL.
Docket No. 2016-CP-26-00744

JIM PERKINS, COLLEEN FRANKE, ET AL. V. OCEAN FRONT SPA HORIZONTAL PROPERTY REGIME, INC., ET AL.
Docket No. 2016-CP-26-00673

JIM PERKINS, COLEEN FRANKE, ET AL. V. THE MYRTLE BEACH RESORT HOMEOWNERS ASSOCIATION, INC., ET AL.
Docket No. 2016-CP-26-00674

JIM PERKINS, COLEEN FRANKE, ET AL. V. K. A. DIEHL AND ASSOCIATES, INC., ET AL.
Docket No. 2016-26-00743

AMENDED PROOF OF ADR

1. Alternative Dispute Resolution (ADR) was conducted in the form of: **Mediation**.

2. The neutral was: **Karl A. Folkens.**

3. The ADR was conducted on **May 1, 2017**.

4. As a result of ADR, these cases should be considered (please check one):
   __X__ Fully Settled by Consent Judgment or a Voluntary Dismissal to be filed by the parties.
   _____ Partially Settled, with agreement of the parties on the following issues:
   _____ At an impasse.
   _____ In need of further ADR. I ____ am / ____ am not willing to mediate this case further.
   I recommend that ADR resume as of:
   _____ Continued to (Date):

5. Plaintiffs __X__ were/ _____ was not present.
   Defendants __X__ were/ _____ were *not present individually (through representatives).*

6. Other participants were:

   __X__ Lawyers for parties: *Henrietta U. Golding, Esq., Alicia E. Thompson, Esq., A. Preston Brittain, Esq., Christopher W. Nickels, Esq., Christian Stegmaier, Esq., Robert W. Buffington, Esq., Phillip A. Kilgore, Esq. & G. Michael Smith, Esq.*

   __X__ Representatives for insurance carrier: *Hugh Spears, Chubb; Eva Jane Ammons, Nationwide; Lori Barns, Philadelphia Insurance Company*
   _____ Guardian ad Litem:
   _____ Experts:
   _____ Others:

7. Choice of the mediator was by:
   __X__ Stipulation
   _____ Court Order

8. The total number of hours spent in ADR was: ***16.5** hours, plus travel.*

9. Further comments of the neutral: *None.*

May 1, 2017

S/ Karl A. Folkens

KARL A. FOLKENS, Mediator
P. O. Box 6139, Florence, SC 29502-6139
(843) 665-0100; FAX (843) 665-0500

MA17-126

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

EXHIBIT D
TO
REPLY IN SUPPORT OF DEFENDANTS' CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

REQUESTED WRITTEN INQUIRIES

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

EXHIBIT D

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00673**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Aug 07 3:59 PM - HORRY - COMMON PLEAS - CASE#2016CP2600674

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00674**
	)	
The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	
	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15th JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00743**
	)	
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00744**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)	
	)	
Defendants.	)	

REQUESTED WRITTEN INQUIRIES

Pursuant to Rule 8(b)(2) of the Court-Annexed Alternative Dispute Resolution (ADR) Rules, Defendants respectfully request the following inquiries to be made by the Chief Judge for Administrative Purposes to Mediator Karl A. Folkens, Esq:

1. On May 1, 2017, did you serve as the mediator in a consolidated mediation of five (5) litigation matters, including the four (4) matters captioned above ("Actions")?

2. Of the eight (8) named plaintiffs in the Actions, were six (6) physically present at the mediation, and were two (2)—Mark Dos Santos and Jeffrey Richardson—present via telephone?

3. In accordance with Rule 6(b) of the SC ADR Rules, at the commencement of the mediation conference, did you and all parties agree for Mr. Santos and Mr. Richardson to be physically absent but to participate via telephone?

4. If so, did counsel for plaintiffs have Mr. Santos and Mr. Richardson's authority to speak and act on their behalf in their physical absence?

5. Did plaintiffs' counsel specifically indicate that he had full settlement authority for and on behalf of Mr. Santos and Mr. Richardson?

6. Did Mr. Santos and Mr. Richardson actively participate in the mediation conference via telephone?

7. After a full-day mediation involving extensive arms-length negotiations between the parties and their counsel, did the parties reach a resolution of all claims in the Actions?

8. In accordance with Rule 6(f) of the SC ADR Rules, did you ensure that the parties reduced their agreement to writing in an agreement that accurately captured the terms of the negotiated resolution and that all parties signed, either themselves or by their agent?

9. Is Attachment A to these Inquiries an accurate copy of the settlement agreement?

10. Due to Mr. Santos and Mr. Richardson not being physically present, did plaintiffs' counsel execute the agreement on their behalf as their duly-authorized agent, with the agreement making clear that both Mr. Santos and Mr. Richardson were thereby signing the agreement through the actions of their counsel-agent?

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11. Did plaintiffs' counsel tell you that he orally read the operative provisions of the agreement to Mr. Santos and Mr. Richardson over the telephone?

12. Did you present an unsigned copy of the settlement agreement to plaintiffs' counsel and plaintiffs who were present?

13. Did plaintiffs' counsel present you with the signed copy of the agreement indicating that all named plaintiffs had either personally signed or had directed counsel to sign on their behalf?

14. Did you then present the agreement signed by or for plaintiffs to the Board Defendants (i.e., all but K.A. Diehl and Associates, Inc.) and their counsel for them to sign the agreement?

15. Did counsel for the Board Defendants present to you the signed copy of the agreement indicating that all named Board Defendants had either personally signed or had directed counsel to sign on their behalf?

16. Did you inform K.A. Diehl and Associates, Inc. and its counsel that all claims in the Actions were settled?

17. Based on the parties' negotiated settlement that was memorialized in the signed agreement, did you file Amended Proof of ADR forms in each of the Actions pursuant to ADR Rule 7(f)?

18. Did the Amended Proof of ADR (Attachment B) indicate as follows?

a. The parties stipulated to your service as mediator in the Actions.

b. Plaintiffs and defendants were present at the May 1, 2017 mediation.

c. All attorneys in the Actions were present at the May, 1, 2017 mediation, including three (3) separate attorneys for Mr. Santos.

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d. All Actions were "[f]ully settled by Consent Judgment or a Voluntary Dismissal to be filed by the parties."

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Attachment A

Settlement Agreement

Settlement Agreement
Civil Action Nos.: 2016-CP-26-00673, -00674, -00743, -00744

The following is a Settlement Agreement ("Agreement") between Plaintiffs Jim Perkins, Colleen Franke a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dames, Errol Dos Santos, and Jeffrey Richardson ("Plaintiffs'") on the one hand and Defendants The Myrtle Beach Resort Homeowners Association, Inc., ("MBRHOA"), Ocean Front Spa Horizontal Property Regime, Inc. ("OFS"), Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Ken Perkins, Ray Coghill, Ralph Jump, and Wayne Urban ("Defendants") on the other (Plaintiffs and Defendants hereafter referred to as the "Parties") to settle Civil Action Nos.: 2016-CP-26-00673, -00674, -00743, -00744, currently pending on the South Carolina Circuit Court in Horry County ("Settled Actions").

1. For good and valuable consideration, upon full execution and effectuation of this Agreement, in full satisfaction of the Settled Actions, and any other claims or charges Plaintiffs have, claim to have, or may have, against Defendants, including, without limitation, any claim for attorneys' fees or costs, Defendants agree to pay the gross amount of $85,000.00 (the "Payment") in full satisfaction of any claims, charges or actions Plaintiffs have against Defendants.

a) Defendants will, thirty (30) business days hereafter, pay to Plaintiffs and Plaintiffs' attorney the total sum of Fifteen Thousand Dollars ($15,000.00) for the purposes of funding a binding arbitration of a declaratory judgment action to adjudicate whether the gate pass fee currently charged by MBRHOA is authorized under the governing MBRHOA documents and applicable law.

b) Defendants will, thirty (30) business days hereafter, pay to The Board of Directors for the Myrtle Beach Resort Horizontal Property Regime ("A Building Board") and the Board of Directors for the Myrtle Beach Resort Five Seasons Centre Horizontal Property Regime, ("Five Seasons Board") the total sum of Fifteen Thousand Dollars ($15,000.00) for the purposes of defending a binding arbitration of a declaratory judgment action filed by Plaintiffs for the purpose of adjudicating whether the gate pass fee currently charged is authorized under the governing MBRHOA documents and applicable law.

c) Arbitrator. Defendants will pay to Plaintiff's counsel the sum of $5,000.00 to be held in trust by his law firm to pay to an arbitrator to resolve the arbitration set forth in the previous two paragraphs. In the event this amount does not fund the arbitration in full, the balance, if any, shall be paid by the attorneys receiving the sums set out in the two previous paragraphs.

d) Defendants will, thirty (30) business days hereafter, pay "Brittain Law Firm" in the amount of Fifty Thousand Dollars and No Cents ($50,000.00), as payment for attorneys' fees and costs, such amount not being subject to income or employment tax withholding, but to be reported on a Form 1099

2. The Parties hereto recognize that the Defendants do not admit any liability to Plaintiffs, or to anyone else because of, or growing out of, matters set forth in Plaintiffs' Amended Complaints in the Settled Actions. The Parties have agreed to settle any and all claims

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Plaintiffs have asserted or may have asserted against Defendants in order to avoid further cost and inconvenience in moving forward with a trial.

3. MBRHOA and OFS will use their best efforts to have their respective By-Laws amended to require at least three bids to be received prior to the awarding of any contract which will exceed $10,000.00 in value.

4. In exchange for and in consideration of the promises set forth in this Agreement, and except for the rights to enforce the provisions of this Agreement, Plaintiffs, their heirs, executors, administrators, legal and personal representatives, successors and assigns, hereby covenant not to sue and fully release and forever discharge Defendants and their respective present and former parents, heirs, assigns, subsidiaries, affiliates, and related entities or corporations, and any of their past and present officers, directors, shareholders, employers, past and present employees, agents, partners, attorneys, heirs, successors, insurers and assigns (the "Released Parties"), from any and all claims, demands, actions, charges, complaints, suits, administrative proceedings, debts, promises, contracts, grievances, and causes of action (hereinafter collectively referred to as "Claims"), in law or in equity, whether known or unknown, which Plaintiffs and their heirs, executors, administrators, agents, distributees, beneficiaries, successors in interest and assignees may have by reason of any matter, cause or thing whatsoever from the beginning of the world to only the day of the date of Plaintiffs' execution of this Agreement, including, but not limited to, any and all claims which were actually asserted or might have been asserted by Plaintiffs in the Settled Actions. Plaintiffs agree never to file a lawsuit against Defendants based on any reason contained in this Agreement. The Release does not purport to release any claims that the law does not permit to be released.

5. Within 15 days of receipt of the Payment, Plaintiffs' counsel shall file **a stipulation of dismissal with prejudice** in each of the Settled Actions.

6. Plaintiffs further acknowledge and agree that this Agreement extends to all claims of every kind and nature whatsoever, known or unknown, suspected or unsuspected, and Plaintiffs acknowledges they may hereafter discover facts in addition to or different from those which they know or believe to be true with respect to the subject matter of this Agreement, but it is their intention to hereby fully and finally settle and release all such matters as well and, in furtherance of that intention, the foregoing Release shall remain in effect as a full and complete release notwithstanding the discovery or existence of such additional or different facts.

7. Plaintiffs agree that they will not make any statements, oral or written, which they know or reasonably should know to be a disparaging or negative comment about Defendants or their officers, directors, employees and agents, or otherwise detrimental to the reputation or goodwill of Defendants, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required by law. Defendants agree that they will not make any statements, oral or written, which they know or reasonably should know to be a disparaging or negative comment about Plaintiffs or their officers, directors, employees and agents, or otherwise detrimental to the reputation or goodwill of Plaintiffs, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required by law.

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8. It is understood and agreed that Defendants expressly rely upon the promises, representations, and warranties made by Plaintiffs in this Agreement; that any breach of such promises, representations, and warranties would constitute a material breach of this Agreement; and that in the event of any such breach, Defendants shall be entitled to any and all of the following relief: (a) the immediate repayment to Defendants of the full Settlement Amount hereunder (b) the indemnification and hold harmless protection set forth above; (c) specific enforcement of all promises and undertakings made by Plaintiffs hereunder; and (d) all other relief and damages available at law or in equity.

Agreed to this 1st Day of May, 2017.

Plaintiffs

Jim Perkins

Colleen Franke a/k/a Colleen Franke Perkins

Mark Dos Santos

By his Attorney

Nancy Moore

William Moore

Steven Dame

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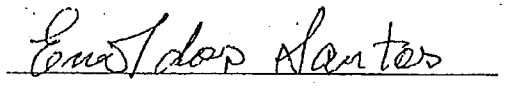
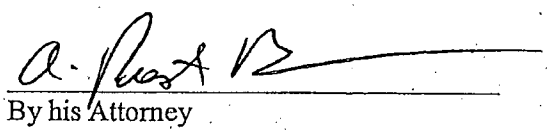
Errol Dos Santos



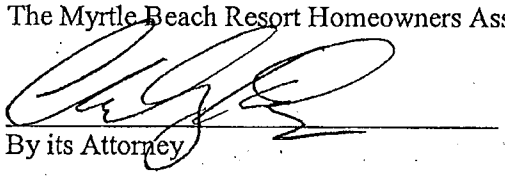
Jeffrey Richardson



By his Attorney

Defendants

The Myrtle Beach Resort Homeowners Association, Inc., ("MBRHOA")

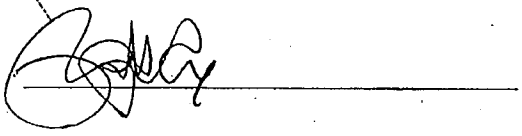


By its Attorney

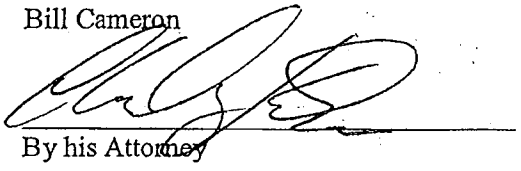
Ocean Front Spa Horizontal Property Regime, Inc. ("OFS"),

By its Attorney

Phil Cox

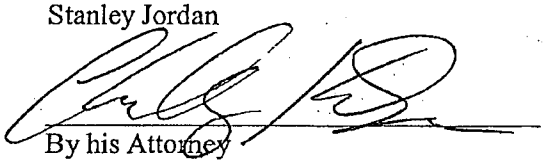


Bill Cameron



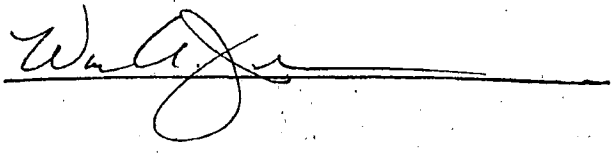
By his Attorney

Stanley Jordan



By his Attorney

Walter Jordan



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Ken Perkins

Ray Coghill

By his Attorney

Ralph Jump

Wayne Urban

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Attachment B

Amended Proof of ADR

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

CIRCUIT COURT

K. A. DIEHL AND ASSOCIATES, INC. V. JAMES PERKINS, ET AL.
Docket No. 2015-CP-26-05573

JAMES PERKINS, ET AL. V. K.A. DIEHL AND ASSOCIATES, ET AL.
Docket No. 2016-CP-26-00744

JIM PERKINS, COLLEEN FRANKE, ET AL. V. OCEAN FRONT SPA HORIZONTAL PROPERTY REGIME, INC., ET AL.
Docket No. 2016-CP-26-00673

JIM PERKINS, COLEEN FRANKE, ET AL. V. THE MYRTLE BEACH RESORT HOMEOWNERS ASSOCIATION, INC., ET AL.
Docket No. 2016-CP-26-00674

JIM PERKINS, COLEEN FRANKE, ET AL. V. K. A. DIEHL AND ASSOCIATES, INC., ET AL.
Docket No. 2016-26-00743

AMENDED PROOF OF ADR

1. Alternative Dispute Resolution (ADR) was conducted in the form of: **Mediation**.

2. The neutral was: **Karl A. Folkens.**

3. The ADR was conducted on **May 1, 2017**.

4. As a result of ADR, these cases should be considered (please check one):
   __X__ Fully Settled by Consent Judgment or a Voluntary Dismissal to be filed by the parties.
   _____ Partially Settled, with agreement of the parties on the following issues:
   _____ At an impasse.
   _____ In need of further ADR. I ____ am / ____ am not willing to mediate this case further.
   I recommend that ADR resume as of:
   _____ Continued to (Date):

5. Plaintiffs __X__ were/ _____ was not present.
   Defendants __X__ were/ _____ were *not present individually (through representatives).*

6. Other participants were:

   __X__ Lawyers for parties: *Henrietta U. Golding, Esq., Alicia E. Thompson, Esq., A. Preston Brittain, Esq., Christopher W. Nickels, Esq., Christian Stegmaier, Esq., Robert W. Buffington, Esq., Phillip A. Kilgore, Esq. & G. Michael Smith, Esq.*

   __X__ Representatives for insurance carrier: *Hugh Spears, Chubb; Eva Jane Ammons, Nationwide; Lori Barns, Philadelphia Insurance Company*
   _____ Guardian ad Litem:
   _____ Experts:
   _____ Others:

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7. Choice of the mediator was by:
   __X__ Stipulation
   _____ Court Order

8. The total number of hours spent in ADR was: ***16.5** hours, plus travel.*

9. Further comments of the neutral: *None.*

May 1, 2017

S/ Karl A. Folkens

KARL A. FOLKENS, Mediator
P. O. Box 6139, Florence, SC 29502-6139
(843) 665-0100; FAX (843) 665-0500

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00673**
	)	
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Defendants.	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00674**
	)	
The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	
	)	

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15th JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00743**
	)	
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
Plaintiffs,	)	
v.	)	**Civil Action No.: 2016-CP-26-00744**
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)	
Defendants.	)	

REPLY IN SUPPORT OF DEFENDANTS' CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

Defendants in each of the above-captioned cases (C.A. Nos. 2016-CP-26-00673, 2016-CP-26-00674, 2016-CP-26-00743, and 2016-CP-26-00744) (collectively, the "Actions"), by and through their undersigned counsel and pursuant to Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), file this Reply in Support of their Consolidated Motion for Preliminary Approval of Settlement Agreement regarding the Actions ("Motion to Approve").

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I. FACTUAL BACKGROUND

Plaintiffs' Memorandum of Law In Opposition to Defendants' Consolidated Motion for Preliminary Approval of Settlement Agreement ("Opposition") either concedes, must concede, or does not contest the following, all of which are undisputed facts:

- On February 10, 2017, the parties notified their choice of mediator that they agreed to schedule a mediation to take place on May 1, 2017. Exhibit A.
- The mediator selected was Karl A. Folkens, Esq., one of the most experienced and well-respected mediators in South Carolina.
- On March 26, 2017, Mediator Folkens confirmed the mediation was to take place on May 1, 2017. (Exhibit B.)
- On April 26, 2017, Plaintiff's counsel informed counsel for the Defendants that Plaintiff Richardson would be unable to attend the mediation in person, and on April 28, 2017, confirmed to counsel for the Defendants that he would "have settlement authority from Mr. Richardson . . . ." (Motion to Approve, Exhibit C.)
- On May 1, 2017, Plaintiffs and their counsel were physically present with the exception of Plaintiff Richardson and Plaintiff Mark dos Santos.
- Santos's absence was not anticipated. Before the mediation commenced, the parties agreed the mediation could proceed in Santos's absence, conditioned on his counsel having his settlement authority.
- All parties and their counsel attended the May 1 mediation conference, either in person or via telephone, and participated in the mediation.[1]

---

[1] Of the eight (8) named plaintiffs in the Actions, six (6) were physically present at the mediation, and two (2)—Mark Dos Santos and Jeffrey Richardson—were present via telephone.

- In accordance with Rule 6(b) of the South Carolina Court Annexed Alternative Dispute Resolution ("ADR") Rules, at the commencement of the mediation conference Mediator Folkens confirmed that (a) all parties agreed for Plaintiffs Santos and Richardson to attend via telephone, and (b) counsel for Plaintiffs had full settlement authority for and on behalf of Plaintiffs Santos and Richardson.
- Both Plaintiffs Santos and Richardson actively participated in the mediation conference via telephone—during joint sessions with all parties and closed sessions with only Plaintiffs.
- After a full-day mediation, involving extensive arms-length negotiations between the parties and their counsel, the parties reached a resolution of all claims in the Actions.
- In accordance with ADR Rule 6(f), Mediator Folkens ensured that the parties reduced their agreement to writing in an agreement that accurately captured the terms of the negotiated resolution and that all parties signed ("Settlement Agreement"). (Motion to Approve, Exhibit A.)[2]

[2] K.A. Diehl and Associates, Inc. ("K.A. Diehl")—Defendant in Civil Action Nos. 2016-CP-26-00743 and 2016-CP-26-00744 and an agent for of Ocean Front Spa Horizontal Property Regime, Inc. ("OFS") and The Myrtle Beach Resort Homeowners Association, Inc. ("MBR")—is a released party as defined in the Settlement Agreement. Moreover, although K.A. Diehl did not sign the agreement, its terms contemplated that the claims in the above Actions would be fully dismissed with prejudice after the settlement payments were received. At the same mediation, K. A. Diehl and the Plaintiffs also reached a settlement as to all claims in K.A. Diehl's action against the Plaintiffs (less Plaintiff Richardson), Civil Action No. 2015-CP-26-05573. The Plaintiffs attended the mediation in person and by telephone and signed that settlement agreement in the same manner as the Settlement Agreement in the Actions. Nevertheless, Plaintiffs intend to honor the agreement in Civil Action No. 2015-CP-26-05573 but dishonor the Settlement Agreement in the Actions.

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

- Due to Plaintiffs Santos and Richardson not being physically present, Plaintiffs' counsel executed the Settlement Agreement on their behalf as their duly-authorized agent, with the Settlement Agreement making clear that both Santos and Richardson were thereby signing through the actions of their counsel-agent.
- Before signing on behalf of Plaintiffs Santos and Richardson, Plaintiffs' counsel orally read the operative provisions of the Settlement Agreement to them over the telephone.
- Plaintiffs' counsel presented Mediator Folkens and Defendants' counsel the Settlement Agreement, signed by or for all of the named Plaintiffs.
- Based on the parties' negotiated settlement, memorialized in the Settlement Agreement, Mediator Folkens filed an Amended Proof of ADR form in each of the Actions, making clear that all parties were present and that each of the Actions were "[f]ully settled by Consent Judgment or a Voluntary Dismissal to be filed by the parties." (Exhibit C.)

Based on these undisputed facts, the Motion to Approve must be granted.

Rather than acknowledge the effect of these undisputed facts, and completely ignoring well-settled contract principles, Plaintiffs rely exclusively on a tortured reading of SCRCP Rule 43(k) to evade the final and binding Settlement Agreement. Plaintiffs' opposition is misplaced and disingenuous. First, SCRCP Rule 43(k) deals only with "agreements *between counsel* affecting the proceedings," and has no application whatsoever to the facts at hand. (Emphasis added.) Second, Plaintiffs' arguments are at odds with well-established contract principles. Third, Plaintiffs' position ignores the provisions of the South Carolina ADR Rules.

The Motion to Approve should be granted accordingly.

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

II. ARGUMENT

A. Rule 43(k) Applies only to Agreements Between Counsel.

1. *The Plain Language of Rule 43(k) Demonstrates its Inapplicability in this Case.*

The plain language of SCRCP Rule 43(k) makes clear that it is inapplicable to the Settlement Agreement and the resolution between the parties in the Actions. The rule provides as follows:

> **(k) Agreements of Counsel.** No agreement *between counsel* affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.

SCRCP Rule 43(k) (emphasis added). "'In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes.'" *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 638, 627 S.E.2d 724, 726 (2006) (quoting *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003)). "[T]he words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *State v. Muldrow*, 348 S.C. 264, 268, 559 S.E.2d 847, 849 (2002). Applying this basic rule of statutory interpretation plainly demonstrates SCRCP Rule 43(k)'s inapplicability to the Settlement Agreement.

Stated simply, the Settlement Agreement was not an "agreement between counsel." It is an agreement of the parties. A SCRCP Rule 43(k) "agreement between counsel" contemplates an agreement negotiated by attorneys alone, to the exclusion of their clients, about which the attorneys must later take some overt action, identified in the Rule, before it becomes enforceable. One of these actions is where the "agreement between counsel" is later "reduced to writing and

signed by the parties and their counsel." SCRCP Rule 43(k).[3] This means that lawyers must memorialize their agreements with other counsel, consult with their clients about the terms, and ensure that their clients sign the agreement.

The Court of Appeals recently recognized as much. According to SCRCP Rule 43(k), "*lawyers* have been required . . . to reduce *their* agreements to a written document." *Inglese v. Beal*, 403 S.C. 290, 742 S.E.2d 687, 694 (Ct. App. 2013) (Pieper, J., concurring in part and dissenting in part) (emphasis added). Even the Supreme Court, in *Farnsworth*—the case on which Plaintiffs primarily rely[4]—recognized the importance of those two words in the introductory clause, emphasizing "between counsel" when quoting the rule. *See Farnsworth*, 367 S.C. at 637, 627 S.E.2d at 725 (quoting SCRCP Rule 43(k)).

The Settlement Agreement in this case was not an "agreement between counsel," as contemplated in SCRCP Rule 43(k). The Settlement Agreement was negotiated, memorialized, and executed by all of the parties after a full day of mediation in which all actively participated.

This conclusion was affirmed shortly after the mediation, when several named Plaintiffs expressly ratified the settlement and affirmed their understanding that the Actions had been resolved fully and finally through mediation. These Plaintiffs notified all OFS building residents that "The recent state court litigation between various homeowners in the Ocean Front Spa and

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[3] The clause regarding signed "agreements between counsel" being enforceable was added by 2009 Amendment to the Civil Rules.

[4] *Farnsworth* dealt with a former version of SCRCP Rule 43(k) that did not include the 2009 amendment.

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

its management company and others has been resolved *between the parties* to their mutual satisfaction via alternative dispute resolution that occurred on May 1." (Emphasis added).[5]

This conclusion was further established by the filing of the Amended Proof of ADR, signed by Mediator Folkens, who affirmed that as a result of the mediation, the cases were fully settled, with all parties present. Mediator Folkens would not have done so had a settlement not been reached, as he had affirmative duty to declare an impasse if settlement was not reached and report the results of the mediation to the court. ADR Rule 7(e)-(f). The result reported was that the cases were "fully settled" with all parties present.

The plain language of SCRCP Rule 43(k) thus mandates an interpretation that it is inapplicable to the circumstances here, requiring the granting of the Motion to Approve.

2. *Plaintiff's Interpretation of Rule 43(k) would Lead to Absurd Results.*

Plaintiffs' interpretation would require the court to disregard the title of SCRCP Rule 43(k) ("Agreements of Counsel") and key limiting language in the body of the rule ("No *agreement between counsel* affecting the proceedings in an action shall be binding . . ."), and read certain provisions of Rule 43(k) in isolation. Plaintiffs would then need the court to ignore the agreement they reached pursuant to ADR Rule 6(b), with all others present before the mediation commenced—an agreement that allowed the mediation to proceed in the physical absence of Santos and Richardson on the condition that their counsel had settlement authority for them. They further ask the court to ignore the fact that Santos and Richardson participated extensively in the mediation, authorized their attorney to settle the case, and authorized him to sign the Settlement Agreement on their behalf.

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[5] *See* Exhibit B to Motion to Approve (Affidavit of Walter Jordan and Exhibits B and C thereto).

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

This is the tortured pathway to the result Plaintiffs desire, an absurd result that the General Assembly simply could not have intended. "[R]egardless of how plain the ordinary meaning of the words in a statute, courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the General Assembly." *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) (citing *Kiriakides v. United Artist Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994); *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 351, 549 S.E.2d 243, 249 (2001)). "If possible, the Court will construe a statute so as to escape the absurdity and carry the intention into effect." *Id.* (citing *Kiriakides*, 312 S.C. at 275, 440 S.E.2d at 366).

Plaintiffs' argument rests exclusively on Santos' and Richardson's physical absence from the mediation and the fact that they did not personally and physically "sign" the Settlement Agreement.[6] They then rely on the following selected language from the rule: "No agreement affecting the proceedings shall be binding . . . unless . . . reduced to writing and signed by the parties and their counsel." SCRCP Rule 43(k). They argue that these facts and this language are conclusive and render the Settlement Agreement unenforceable. They ask the court to pretend that the body of this rule is not limited, by its terms, to only that subset of agreements which are "between counsel."

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[6] For the first time nearly three months following mediation, Plaintiffs also inexplicably assert that Plaintiff Jim Perkins did not sign the Settlement Agreement. Aside from the fact that the Settlement Agreement bears a signature of a name which appears to be that of Plaintiff Jim Perkins, it is beyond dispute that he was present for the duration of the mediation. If Plaintiff Jim Perkins persists in asserting that he did not sign the Settlement Agreement, perhaps the court might be interested in asking him to take the stand and explain under oath whether he was present when the mediator presented the Settlement Agreement to the Plaintiffs and their counsel, to identify the person who signed his name to the Settlement Agreement, to state whether he authorized such person to sign on his behalf and to explain why he and his colleagues on the OFS Board announced to all the OFS that the parties had the settled the litigation. Until such time, Defendants need not further waste the Court's time on this issue.

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

SCRCP Rule 43(k) applies only to an "agreement between counsel," and not to agreements the parties themselves are actively involved in negotiating and reaching. The introductory language of SCRCP Rule 43(k) ("Agreements of Counsel") gives further direction, confirming the purpose of the rule, and cannot be disregarded. Ignoring a key modifying provision of the rule would lead to and absurd interpretation. Doing so while ignoring key facts would lead to an absurd result.

Plaintiffs' selective interpretation violates yet another rule of statutory interpretation. When "construing a statute to escape the absurdity and carry the intention into effect, . . . the Court should not concentrate on isolated phrases within the statute, but rather, read the statute as a whole and in a manner consonant and in harmony with its purpose." *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. at 355, 782 S.E.2d at 592 (citing *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011); *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006)).

The purpose of SCRCP Rule 43(k) is obvious—to prevent attorneys from attempting to bind clients to alleged agreements that attorneys make in "back room/closed door" sessions in which their clients are not involved in the negotiations. That purpose has no bearing here, where all of the parties attended and actively participated in the mediation conference at which the Settlement Agreement was negotiated and executed.

Plaintiffs' desired interpretation would render meaningless the title and introductory/limiting language of SCRCP Rule 43(k), an obviously improper result. *See, e.g.*, *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 574 S.E.2d 196 (2002) ("In construing statutory language, the statute must be *read as a whole* and sections which are part of the same general statutory law *must be construed together* and each one given effect. The Court must

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

presume the *legislature did not intend a futile act*, but rather intended its statutes to accomplish something." (emphasis added) (citing *TNS Mills, Inc. v. S.C. Dep't of Revenue,* 331 S.C. 611, 503 S.E.2d 471 (1998))).

As important, Plaintiffs' interpretation would effectively overturn and nullify the long history of precedent making clear that settlement agreements are contracts that are subject to enforcement like any other contracts, *see, e.g., Nichols Holding, LLC v. Divine Capital Grp., LLC*, 416 S.C. 327, 335, 785 S.E.2d 613, 617 (Ct. App. 2016) ("In South Carolina jurisprudence, settlement agreements are viewed as contracts." (citing *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009))). Therefore, Plaintiffs' opposition should be rejected accordingly, and the Motion to Approve granted.

3. *Pre-2009 Case Law is Inapplicable to the Current Version of 43(k)*

In support of the absurd and improper results Plaintiffs seek, they cite to cases from 2006 and earlier that did not even interpret the language in SCRCP Rule 43(k) on which they rely. Prior to 2009, SCRCP Rule 43(k) required one of three conditions for an "agreement between counsel" to be binding. The agreement had to be:

1. "reduced to the form of a consent order . . . signed by counsel and entered in the record,"
2. "reduced to the form of a . . . written stipulation signed by counsel and entered in the record," or
3. "made in open court and noted upon the record."

Farnsworth v. Davis Heating & Air Conditioning, Inc., 367 S.C. 634, 637, 627 S.E.2d 724, 725 (2006) (citing the previous version of the Rule). In 2009, however, the rule was amended to add a fourth avenue for enforcement of agreements between counsel. An agreement between counsel could now also be binding if the agreement is "reduced to writing and signed by the parties and their counsel." SCRCP Rule 43(k). The cases relied upon by Plaintiffs are clearly inapplicable to

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

this Motion as the courts in those cases were confined to the requirements of the pre-2009 version of the rule.

4. *Even if the Court finds Rule 43(k) Applies, the Settlement Agreement Complied with the Post-2009 Provisions*

Regardless, here, the parties and their counsel signed the Settlement Agreement and it should be enforced. Each of the parties signed, either themselves or by their attorneys. Likewise, counsel for Plaintiffs and counsel for Board Defendants signed the agreement on behalf of parties who were physically absent.

Plaintiffs first argue that the Settlement Agreement is unenforceable because the attorneys did not sign the agreement in their capacities as legal counsel. They do not, however, cite any legal authority for this baseless proposition (because there is none). Moreover, it is highly doubtful that the General Assembly intended for a party to rescind an agreement simply because his or her attorney did not sign the agreement separate and apart from the party.

Plaintiffs' hyper-technical argument flies in the face of one of the main purposes SCRCP Rule 43(k), which is to take courts out of disputes arising from agreements between counsel. *Ashfort Corp v. Palmetto Constr. Group, Inc.* 318 S.C. 492, 495, 458 S.E. 2d. 533, 535 (S.Ct. 1995). ("[T]he purpose of rules such as Rule 43(k) is: to prevent disputes as to the existence and terms of agreements and to relieve the court of the necessity of determining such disputes. . . ." (citing 83 C.J.S. Stipulations § 4 (1953)). Plaintiffs' tortured approach would actually force courts to get involved in matters such as this that <u>have already been resolved</u> between the parties and their counsel, with the assistance of an eminent mediator.

Plaintiffs' second hyper-technical argument is that a signature by an attorney with authority from and on behalf of a client must be disregarded under SCRCP Rule 43(k). This argument wholly disregards well-established precedent recognizing that an attorney acts as an

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

agent for his or her client. Our Supreme Court recognizes the attorney-client relationship is that of an agent and principal: "Acts of an attorney are directly attributable to and binding upon the client. Absent fraud or mistake, where attorneys of record for a party agree to settle a case, the party cannot later repudiate the agreement." *Arnold v. Yarborough*, 281 S.C. 570, 572, 316 S.E.2d 416, 417 (Ct. App. 1984) (*citing Clark v. Clark*, 271 S.C. 21, 244 S.E.2d 743 (1978); *Poore v. Poore*, 105 S.C. 206, 89 S.E. 569 (1916)).

The fact that Santos and Richardson were not present and relied on their attorney to read the Settlement Agreement to them and sign on their behalf does not excuse them from the Agreement. *See Kirkland v. Moseley*, 109 S.C. 477, 96 S.E. 608 (1917) (a party cannot set aside a settlement agreement signed pursuant to attorney's erroneous advice); *Ex Parte Jones*, 47 S.C. 393, 25 S.E. 285 (1896). Moreover,

> When a litigant voluntarily accepts an offer of settlement, either directly or indirectly through the duly authorized actions of his attorney, the integrity of the settlement cannot be attacked on the basis of inadequate representation by the litigant's attorney. In such cases, any remaining dispute is purely between the party and his attorney.

Shelton v. Bressant, 312 S.C. 183, 185, 439 S.E.2d 833, 834 (1993) (*quoting Petty v. The Timken Corp.*, 849 F.2d 130 at 133 (4th Cir. 1988)). The fact that they now may not like the terms of the Agreement is beside the point. "Having second thoughts about the results of a settlement agreement does not justify setting aside an otherwise valid agreement." *Crawford v. Nat'l Honorary Beta Club*, No. 7:14-CV-02970-GRA, 2015 WL 12806590, at *2 (D.S.C. Oct. 8, 2015) (*quoting Young v. F.D.I.C*, 103 F.3d 1180, 1195 (4th Cir. 1997)).

Plaintiffs' third hyper-technical argument is that K.A. Diehl is not a party to the Settlement Agreement, and the Plaintiffs did not agree to dismiss their claims against this Defendant with prejudice. In the Settlement Agreement, Plaintiffs covenanted to fully release

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

and forever discharge (and not to sue) the Defendants and their past and present "agents" from "any and all claims, demands, actions, charges, complaints, suits, administrative proceedings, debts, promises, contracts, grievances, and causes of action," whether known or unknown, through the date of the Settlement Agreement. (Motion to Approve, Exhibit A at ¶ 4.) K.A. Diehl, as the Defendants OFS and MBR's property manager and agent, was clearly a released party pursuant to this language. Moreover, the Plaintiffs agreed, without any conditions or limitations, to "file a stipulation of dismissal with prejudice in each of the Settled Actions" within 15 days of receipt of payment of the settlement funds. (*Id.* at ¶ 5.)

"When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense." *C.A.N. Enterprises, Inc. v. S.C. Health & Human Servs. Fin. Com.*, 296 S.C. 373, 377, 373 S.E.2d 584 (1998) (*citing Warner v. Weader*, 280 S.C. 81, 83, 311 S.E. (2d) 78, 79 (1983)). The clear, explicit, and unambiguous terms of the Settlement Agreement releases K.A. Diehl of all claims, and further, requires the Plaintiffs to dismiss their claims asserted in the Actions against all defendants, including K.A. Diehl, upon payment received.

"Common sense and good faith, the leading touchstones of construction of the provisions of a contract", dictate that the parties intended the dismissal with prejudice to be as to all claims asserted in the cases. *C.A.N. Enterprises, Inc.*, 296 S.C. at 377 (citing *Farr v. Duke Power Co.*, 265 S.C. 356, 360, 218 S.E.2d 431, 434 (1975)). To read the Settlement Agreement in any other manner would lead to the "unusual and extraordinary" conclusion that Defendants OFS and MBR would agree to the Plaintiffs releasing them without releasing the claims pending against their agent, exposing Defendants OFS and MBR to arguments that they should indemnify their agent. *Id.* Instead, the Court must employ the "reasonable, fair, and just" construction of the

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Settlement Agreement that all parties intended the "dismissal with prejudice" language to apply to all claims pending in the case, including the claims against K.A. Diehl.

As discussed above, Plaintiffs' Memorandum relies on pre-2009 cases, which are inapplicable to the 2009 amendment to SCRCP Rule 43(k). The Court should find post-2009 cases more instructive. For example, in *Byrd v. Livingston*, the three parties to litigation attended mediation, which resulted in all three parties signing an agreement in principle. 398 S.C. 237, 240, 727 S.E.2d 620, 621 (Ct. App. 2012). The agreement in principle contemplated a more formal and detailed settlement agreement would supplant the agreement in principle. *Id.* However, the second settlement agreement was never signed. *Id.* The defendants filed a motion to enforce the agreement in principle. *Id.* The trial court found the agreement in principle enforceable against the plaintiff and the court of appeals affirmed. *Id.* Importantly, the court analyzed whether the agreement was enforceable by applying contractual principles, making no mention of Rule 43(k). *Id.* at 243.

B. <u>Plaintiffs' Argument Ignores Well-Settled Contract Principles</u>

To hold that SCRCP Rule 43(k) prevents the enforcement of the Settlement Agreement would be inconsistent with the general contractual nature of settlements. *See Nichols Holding*, 416 S.C. at 335, 785 S.E.2d at 617 ("In South Carolina jurisprudence, settlement agreements are viewed as contracts." (*citing Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009))). Parties such as Defendants that proceed with the costs, time, and effort associated with entering into a good faith mediation or settlement discussion must be allowed to settle their differences without the fear that the other party could simply later walk away because of a case of "cold feet" or "buyer's remorse." Ruling in Plaintiffs' favor would undermine the

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

negotiation process and the sanctity of contracts, leading to an absurd result not contemplated by the legislature or the courts.

Judicial economy demands that a party be held to the terms of an agreement, unless the agreement is substantially unfair or there has been a material misrepresentation. *White v. Hewitt*, 86 S. C. 576, 68 S. E. 820 (1910). A ruling for Plaintiffs would lead to an unintended outcome, bogging-down the court system with unnecessary further litigation revolving around a party's abuse of SCRCP Rule 43(k) to rescind a valid settlement agreement after the fact. The Plaintiffs' advocated result would thwart the finality provided by settlement agreements, prolonging the litigation beyond what the parties intended.

SCRCP Rule 43(k)'s purpose is to keep courts *out* of disputes between *counsel* in the *trial* context, not to immerse courts in matters stemming from valid settlement agreements negotiated by, and ultimately reached between, the parties to a lawsuit. To rule in Plaintiffs favor would severely undermine the mediation process and actually inhibit parties from engaging in good faith settlement negotiations.

C. <u>Plaintiffs' Argument Runs Afoul of the ADR Rules</u>

The ADR Rules are not mere suggestions. They are rules duly promulgated by the South Carolina Supreme Court mandating the process of mediation in the state. The Rules require physical attendance of the individual parties at a mediation. ADR Rule 6(b). The rules contemplate that individuals may avoid physical attendance only if "agreed to by the mediator and all parties." *Id.* The rules do not place limits on such agreements, so parties are free to condition them on the absent party providing settlement authority to an agent.

The Rules further give the mediator authority over the proceedings, including the authority to declare an impasse. ADR Rules 7(a), 7(e). The Rules require that "[u]pon reaching

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

an agreement, the parties shall, before the adjournment of the mediation reduce the agreement to writing . . . ." ADR Rule 6(f). The mediator shall file with the clerk of court a "Proof of ADR on a form approved by the Supreme Court." ADR Rule 7(f). Such form requires the mediator to state whether parties were present and the outcome (whether the mediation resulted in full settlement, impasse, or otherwise).

In this case, the parties and mediator reached an agreement on the conditions of the absence of Plaintiffs Santos and Richardson from the mediation, as allowed by ADR Rule 6(d). The parties complied with the mediation process and Mediator Folkens has affirmed the successful outcome of the mediation. ADR Rule 7. In contending the Settlement Agreement is unenforceable, Plaintiffs make a mockery of the mediation process.

The ADR Rules contemplate the consequences to a party who violates the provisions of the rules. ADR Rule 10(b). If Plaintiffs persist in their position, it would appear their acts of evasion constitute a violation of the ADR rules. In such case, the ADR Rules permit the Chief Judge for Administrative Purposes to inquire regarding such possible violations. ADR Rule 8(b)(2).

Accordingly, pursuant to ADR Rule 8(b), Defendants ask the Court to direct a written inquiry from the Chief Judge for Administrative Purposes to the mediator in the case, Karl A. Folkens, Esq. of Florence, South Carolina, as suggested in Exhibit D hereto and incorporated by reference herein. If the Court deems appropriate, Defendants also ask the Court to conduct such other inquiries to the attorneys and other participants in the mediation to ascertain whether Plaintiffs' position constitutes a violation of the ADR Rules. Finally, Defendants ask the Court to permit further submissions regarding appropriate sanctions under ADR Rule 10(b).

D. <u>Conclusion</u>

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

For the reasons presented in this Reply and the underlying Motion to Approve, Defendants respectfully request that the Court enter an Order (1) preliminarily approving the attached Settlement Agreement; (2) approving the form and manner of the Settlement Notice; and (3) scheduling a Fairness Hearing to grant final approval of the Parties' Settlement Agreement.

Respectfully submitted this 7th day of August, 2017.

	s/Phillip A. Kilgore Phillip A. Kilgore (S.C. Bar No. 3449) Lucas J. Asper (S.C. Bar No. 77902) 300 North Main Street, Suite 500 Greenville, South Carolina 29601 864.271.1300 (telephone) 864.235.4754 (facsimile) phillip.kilgore@ogletreedeakins.com lucas.asper@ogletreedeakins.com Attorneys for Defendants The Myrtle Beach Resort Homeowners Association, Inc., Ocean Front Spa Horizontal Property Regime, Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ralph Jump, Ray Coghill and Ken Perkins. Henrietta U. Golding, Esq. Henrietta U. Golding, Esq. Alicia E. Thompson, Esq. McNair Law Firm, P.A. Post Office Box 336 Myrtle Beach, SC 29578-0336 (843) 444-1107 (telephone) (843) 444-4729 (facsimile) Attorneys for Defendant FirstService Residential South Carolina, Inc., formerly known as K.A. Diehl & Associates, Inc.

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EXHIBIT A
TO
REPLY IN SUPPORT OF DEFENDANTS' CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

02/10/2017 EMAIL FROM THOMPSON TO MEDIATOR

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From: Thompson, Alicia <AThompson@mcnair.net>
Sent: Friday, February 10, 2017 1:02 PM
To: Nell Folkens
Cc: Roberts, Kathy; Golding, Henrietta; Lax, Andrew; Chris Nickels; Preston Brittain; Bobby Buffington; Kilgore, Phillip; msmith@thompsonlaw.com; Brady, Donna; Roberts, Kathy; Golding, Henrietta; Miranda Byrnside; Falls, Charlene; Tenna Turman; Coggins, Robert E.; Christian Stegmaier
Subject: RE: FW: KADiehl

Hi Nell:

Please allow this email to confirm the mediation below on May 1, 2017 at 9:30 am at McNair's Myrtle Beach office. Can you please send out the confirmation letters? I have also copied all counsel so that they are aware that the date has been reserved.

Kathy Roberts, my assistant, will send you the pleadings in the 5 cases sometime within the next two weeks. My maternity leave begins sometime soon, so please contact her and Henri Golding for any further scheduling/administrative inquiries.

kroberts@mcnair.net
hgolding@mcnair.net

Thanks for your assistance.

Alicia

MCNAIR
ATTORNEYS

Alicia E. Thompson
Shareholder
athompson@mcnair.net | 843 443 3058 Direct

McNair Law Firm, P.A.
Myrtle Beach Office Founders Centre, 2411 Oak Street | Suite 206 | Myrtle Beach, SC 29577
843 444 1107 Main | 843 946 5969 Fax
Mailing Post Office Box 336 | Myrtle Beach, SC 29578
VCard | Bio URL | Website

From: Nell Folkens [mailto:nell@folkenslaw.com]
Sent: Tuesday, February 07, 2017 11:50 AM
To: Thompson, Alicia <AThompson@mcnair.net>
Subject: Re: FW: KADiehl

GREAT!

Nell

Nell G. Folkens
Firm Manager/Paralegal
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P. O. Box 6139
Florence, SC 29502-6139
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On Tue, Feb 7, 2017 at 11:33 AM, Thompson, Alicia <AThompson@mcnair.net> wrote:

Thanks, Nell. I am waiting for all attorneys to confirm the date, but most have said that they are available. I will send you the time and location soon.

Alicia

Alicia E. Thompson
Shareholder
athompson@mcnair.net | 843 443 3058 Direct

McNair Law Firm, P.A.
Myrtle Beach Office Founders Centre, 2411 Oak Street | Suite 206 | Myrtle Beach, SC 29577
843 444 1107 Main | 843 946 5969 Fax
Mailing Post Office Box 336 | Myrtle Beach, SC 29578
VCard | Bio URL | Website

From: Nell Folkens [mailto:nell@folkenslaw.com]
Sent: Monday, February 06, 2017 6:03 PM
To: Thompson, Alicia <AThompson@mcnair.net>
Cc: karl@folkenslaw.com; Brady, Donna <DBrady@mcnair.net>; Roberts, Kathy <KRoberts@mcnair.net>; Golding, Henrietta <HGolding@mcnair.net>
Subject: Re: FW: KADiehl

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Alicia:

Thank you for your online request. Karl has no conflict. We have your hold in place for this date and time. I have received the full caption, docket number, list of attorneys. Just let me know location. I will then send out confirmation letters.

Also, if there are any special requests or concerns which I should bring to Karl's attention, please let us know.

We look forward to working with you.

Nell

Nell G. Folkens

Firm Manager/Paralegal

601 West Evans Street

P. O. Box 6139

Florence, SC 29502-6139

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On Mon, Feb 6, 2017 at 5:18 PM, Thompson, Alicia <AThompson@mcnair.net> wrote:

Karl:

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Henri Golding and I represent KA Diehl in three actions, captions attached for your convenience. The firms for the parties are reflected on the certificates of service behind each of the captions. The parties have agreed to consolidate these three cases, along with two class actions brought by the plaintiffs in the derivative actions against the associations and directors, for mediation purposes (a total of five cases), and we hope to mediate in April or May with you as the mediator.

I see that you are open on May 1, 2017. Can you hold that date for us and run a conflicts check?

I am also happy to send the full pleadings if you need them to run the check, but they are voluminous.

Thanks,

Alicia Thompson

MCNAIR
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EXHIBIT B
TO
REPLY IN SUPPORT OF DEFENDANTS' CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

03/26/2017 EMAIL FROM MEDIATOR TO COUNSEL

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

From: Karl Folkens <karl@folkenslaw.com>
Sent: Sunday, March 26, 2017 1:21 PM
To: Bobby Buffington; Christian Stegmaier; Henrietta Golding (HGolding@mcnair.net); Mike Smith; Kilgore, Phillip; Preston Brittain; cwn@cslaw.com; mhall@collinsandlacy.com; tommyb@brittainlawfirm.com
Cc: Alicia Thompson; Kathy Roberts
Subject: Mediation: K. A. Diehl and Associates, Inc. v. James Perkins, et al. - MA17-126
Attachments: Mediation Agreement and FAQ - 2016.pdf; Mediation Outline for Karl Folkens.doc

Dear Attorneys:

This letter will confirm that a mediation conference has been scheduled in the above-referenced case for **May 1, 2017,** beginning at **9:30 a.m.** at **McNair Law Firm, P.A., 2411 Oak Street, Suite 206, Myrtle Beach, SC.**

You will receive a separate "calendar invite" e-mail confirming this date and time.

Attached is a proposed agreement to mediate which I will present for signing at the mediation conference. I also attach FAQ—Frequently Asked Questions. Please feel free to distribute these to your client.

My fee for mediation is $400.00 per hour which will be evenly divided by the parties, unless otherwise agreed upon ahead of time.

Please send me copies of the Complaint, Answer, any Counterclaim and any additional information you would like for me to review. Also, please let opposing counsel and me know who will be present with you at the mediation.

I strongly urge you to have all persons necessary to effect a full and complete settlement attend the mediation session. For the purposes of an insurance company, I take the term "full authority" to mean a person with full policy limits authority or the authority up to the Plaintiff's last written demand, whichever is less.

Consistent with both state and federal rules governing the mediation process, a chief administrative judge has ruled that the term "full authority" is the

> . . . ability, power, and freedom to make all decisions, including the ultimate decision to accept or reject a settlement proposal ***without having to make a phone call or get approval from someone who is not present at the conference***. When a proposal is made during the course of the mediation process, and the person present must get permission from someone not participating in the conference in order to respond to the proposal, then "full authority" is lacking. [Emphasis added.]

For the purposes of an individual, non-corporate party, I take the term "full authority" to mean the personal attendance of anyone in addition to the named party who would be necessary to consult in order to make a final decision, such as a spouse or other significant person.

If this will not occur, please let opposing counsel and me know immediately so that we may address this issue. As you know, the likelihood of success increases exponentially if everyone with full settlement authority participates in the mediation session. Also, the applicable ADR rules require such persons to personally attend the mediation.

Thank you for the opportunity to serve as mediator, and please do not hesitate to contact us if you have any questions about this mediation. For questions about scheduling, please contact my mediation coordinator, Nell Folkens, whose e-mail address is also set forth above.

Finally, we now offer a convenient on-line calendar-availability system on our website. To schedule your next ADR event, please consider using this calendar at www.folkenslaw.com/mediation.html.

Yours very truly,

Karl

Karl A. Folkens
karl@folkenslaw.com
www.folkenslaw.com
843.665.0100

Confidential: The information contained in this message may be privileged and confidential and protected from disclosure. If the recipient of this message is not the intended person, or an employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify the sender immediately by reply email and delete all copies from your computer.

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AGREEMENT TO MEDIATE

The undersigned parties and their attorneys hereby agree that the above matter shall be submitted to mediation pursuant to the applicable rules, guidelines, and Order of the Court having jurisdiction over this matter. They acknowledge that they have reviewed Mr. Folkens' *Frequently Asked Questions*, and further agree that:

1. All statements made during the course of mediation are confidential and privileged, are made without prejudice to any party's legal position, and are non-discoverable and inadmissible for any purpose in any legal proceeding.

2. The confidential and privileged character of any information is not altered by disclosure to the mediator. Disclosure of any records, reports, or other documents received or prepared by the mediator cannot be compelled. The mediator shall not be compelled to disclose or to testify in any proceeding about (i) any records, reports, or other documents received or prepared by the mediator or (ii) information disclosed or representations made in the course of the mediation or otherwise communicated to the mediator in confidence.

3. Evidence of anything said or any admission made in the course of mediation is not admissible in evidence, and disclosure of any such evidence shall not be compelled in any civil action in which, pursuant to law, testimony can be compelled to be given.

4. Unless a document provides otherwise, no document prepared for the purpose of, or in the course of, or pursuant to, the mediation, or copy thereof, is admissible in evidence, and disclosure of any such document shall not be compelled in any civil action in which pursuant to law, testimony can be compelled to be given.

5. Nothing in this Agreement to Mediate shall limit the admissibility of any particular evidence if all persons who conducted or otherwise participated in the mediation consent to its disclosure.

6. The parties understand that the mediator does not represent any party, and does not provide legal or financial advice. Parties not represented by counsel are urged to seek legal advice from an attorney and to obtain financial advice as needed from qualified professionals. The parties agree that the mediator shall have no liability for any act or omission in connection with the mediation.

7. Each party and the respective attorney is jointly and severally responsible for that party's proportionate share of the costs of mediation.

Dated and signed before commencement of the mediation by each of the persons whose signatures appear below.

_____	_____
Plaintiff	Defendant or Representative
_____	_____
Attorney for Plaintiff	Attorney for Defendant
_____	_____
_____	_____

(If there are more parties or attorneys participating in the mediation than provided for in the space above, they may sign below or on an additional page which shall be attached to this agreement.)

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

FREQUENTLY ASKED QUESTIONS

Karl A. Folkens, Mediator

- *What can I expect at the mediation?*
  - Usually, the mediation process begins with a "general session" during which all sides are given an opportunity to fully present their views of the case. After everyone has had an opportunity to be heard, the decision is then made as to how best to proceed depending upon the issues to be resolved. Sometimes the group continues meeting as a whole. At other times, "break-out" sessions are held in private with one or more sides.
  - Communications during a mediation settlement conference are privileged and confidential. To that end, the Rules require that the parties and any other person present shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any oral or written communications having occurred in a mediation proceeding, including, but not limited to:
    - (1) Views expressed or suggestions made by another party or any other person present with respect to a possible settlement of the dispute;
    - (2) Admissions made in the course of the mediation proceeding by another party or any other person present;
    - (3) Proposals made or views expressed by the mediator;
    - (4) The fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator; or
    - (5) All records, reports or other documents created solely for use in the mediation.
  - This rule does not prohibit:
    - (1) Disclosures as may be stipulated by all parties;
    - (2) A report to or an inquiry from the Chief Judge for Administrative Purposes regarding a possible violation of these rules;
    - (3) The mediator or participants from responding to an appropriate request for information duly made by persons authorized by the court to monitor or evaluate the ADR program;
    - (4) Threats of harm or attempts to inflict physical harm made during the mediation sessions; and

- (5) Any disclosures required by law or a professional code of ethics.

- If during a break-out session you share confidential information with me that you do not want me to share with the other side, please tell me it is confidential, and I will honor and protect that confidence.

- If a settlement is reached, usually the basic terms of the settlement are reduced to writing at the conclusion of the mediation and signed by the parties. This settlement, once signed by the parties and attorneys, will no longer be subject to the confidentiality provisions of the mediation and will be binding under Rule 43(k), SCRCP, unless specifically set forth in the written settlement agreement.

- Mediation is different from other forms of conflict resolution, such as arbitration or early neutral evaluation. One key difference is that any agreement must be reached by mutual consent of the parties. The mediation conference is not a trial; the mediator is not a judge, jury or arbitrator; and the parties retain the right to trial if they do not reach a settlement.

- Conduct and statements made during mediation are inadmissible as evidence in any arbitral, judicial or other proceeding, except as set forth above.

- *What can I do to prepare for the mediation?*

  - Mediation sessions can be emotional, fatiguing or frustrating as we go about trying to resolve the case. Be prepared: Get a good night's sleep. Eat breakfast. Keep outside irritations to a minimum. Turn off your cell phone and pager while we're working.

  - A lawyer hoping to receive a monetary settlement should bring the firm's federal identification number and correct legal name to the mediation. I will provide a blank W-9 form for you which may expedite the issuance of settlement funds.

  - You should talk with everyone coming with you ahead of the mediation about what you hope to accomplish in the mediation and what will be discussed in the opening session. Discuss what information should be obtained prior to the mediation to ensure a meaningful mediation occurs. Agree to keep an open mind throughout the mediation.

  - We have an outside smoking area on the east side of our building. Please dispose of cigarette butts in the wall-mounted receptacle.

- *What set-up do you have at your law firm for making presentations?*

  - Our main conference room has 60" and 46" flat panel televisions. We removed our SmartBoard from the main conference room, as we are encouraging the use of monitors rather than projectors for presentations.

  - Bring your PowerPoint or Keynote presentation on a flash drive, and I will transfer it onto my Apple MacBook Air to play wirelessly through AirPlay). Or, you can e-mail the presentation to me, or send a Dropbox link. If you prefer to use your

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

own computer and do not have an HDMI port on it, let me know so I can have the right adapter ready for you. If you want to present on an iPad or MacBook, we're fully AirPlay capable.

- We are also equipped for wireless presentations using your iPad. TrialPad, the new app for courtroom and mediation document presentations, is ideal for making wireless presentations through AirPlay and Apple TV. I will give you a short demonstration if you're not familiar with this arrangement.

- *What should be provided to you prior to the mediation?*

  - Please send me copies of the pleadings, including the Complaint, Answer, and any Counterclaims. Also, the attorneys are sent a sample outline for providing me with basic information about the case. You may send any additional information you believe would assist me in understanding the case and your position, such as a confidential mediation statements in your own format with exhibits, summary judgment motions and memoranda, and the like. I am sending you a mediation information outline which you may or may not want to use. It is in Word® format if you would like to simply type in your responses and forward it to me. Or, you could incorporate the information into your own report format.

  - If you send me additional information, decide whether to share that information with the other side. I usually recommend that you copy the other side with such information since, after all, the goal is to convince the other side to settle the case rather than to convince me of anything! However, I realize that there may be times you want to share confidential information with me before the mediation in which case please note on your communication with me that it is confidential and not shared with the other side.

  - Let opposing counsel and me know who will be present with you at the mediation. If it is someone other than a party, please provide the person's title or relationship to the party.

  - Let my mediation coordinators know if a pre-mediation conference call would be beneficial. Telephone conferences, either alone with me or with others, can be scheduled at a mutually convenient time.

- *Who should attend the mediation?*

  - EVERYONE necessary for your side to effect a full and complete settlement should attend the mediation session. This should include everyone with "full authority" to settle the case.

    - For the purposes of an insurance company, I take the term "full authority" to mean a person with full policy limits authority or the authority up to the Plaintiff's last written demand, whichever is less, without being required to consult someone not in attendance.

    - For the purposes of an individual party not relying solely upon the payment by an insurance company to resolve the case, I take the term

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

"full authority" to mean the personal attendance of anyone in addition to the named party who would be necessary to consult in order to make a final decision, such as a spouse, business partner, or other significant person.

- Consistent with both state and federal rules governing the mediation process, a chief administrative judge has ruled that the term "full authority" is the

> . . . ability, power, and freedom to make all decisions, including the ultimate decision to accept or reject a settlement proposal without having to make a phone call or get approval from someone who is not present at the conference. When a proposal is made during the course of the mediation process, and the person present must get permission from someone not participating in the conference in order to respond to the proposal, then "full authority" is lacking.

- If this will not occur, please let opposing counsel and me know immediately so that we may address this issue.

o The likelihood of success increases exponentially if everyone with full settlement authority participates in the mediation session. ***I cannot stress enough the importance to have everyone with full authority personally attend the mediation***.

- In many cases, the failure for someone with such authority to personally attend may be a violation of the court rules or a judge's standing Order applicable to your case.

- More importantly, I become much less effective in assisting you in settling your case if everyone is not personally in attendance. In such cases, the mediation simply becomes a journey in finding out what limited authority exists rather than exploring all possible avenues to get the case settled.

- *What is the cost of mediation*?

o I currently charge $400.00 per hour. This includes time reviewing submissions by the parties, conducting the mediation, following up with the attorneys, and preparing any reports which need to be filed with the court.

o If the mediation is scheduled outside of the Florence area, I charge $220.00 per hour travel time and mileage at the IRS mileage reimbursement rate.

o To expedite delivery of the bill, Nell e-mails the bill shortly after the session concludes to the primary attorney representing each side. By e-mailing the bill, an attorney can more easily forward the bill to the person responsible for payment. If you want someone other than the attorney, or in addition to the attorney, initially receiving the bill, let us know at the outset.

o NOTE: ***The bill you receive will be your net share of the entire mediation***

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

cost. The rate has already been divided in accordance with the following section. Please send back one copy of the bill e-mailed to you to ensure that you receive proper credit for your payment.

- If you would prefer a hard-copy of the bill mailed to you, let us know at the conclusion of the mediation session.

- *How is the cost of mediation divided?*

  - Unless otherwise agreed to by the parties, the cost is divided equally among the parties to the action. In some cases, certain groupings of parties represented by the same attorney will be treated as one for mediation cost purposes. If you anticipate any issues concerning the division of the mediation costs, *please* bring them to my attention as soon as you become aware of them.

  - Most courts and judges consider mediation costs to be similar to deposition costs and treat non-payment of such costs in a similar manner.

- *Do you charge a cancellation fee?*

  - Although many mediators charge cancellation fees, I currently do not, but I do charge for review and preparation time prior to notice of cancellation. I realize that cases often settle on the eve of mediation, and I encourage such discussions. I also realize that litigators are often called to a court which has priority to mediation and the mediation will need to be rescheduled. I do not penalize the parties for such cancellations; however, I ask that you let me know as soon as possible if there is a good likelihood the mediation session will be cancelled or postponed.

  - Likewise, as a mediator who is also an active litigator, I may be called to court which may necessitate rescheduling the mediation. This rarely occurs, especially in light of Rule 601, SCACR.

- *Ok, so what is Rule 601, SCACR, and how does it affect the mediation?*

  - RULE 601 deals with conflicts in hearing dates when an attorney is called to appear simultaneously in two or more "tribunals." Recognizing the importance of mediation and other forms of alternative dispute resolution, the South Carolina Supreme Court includes mediation in the list of tribunals.

    - The Rule also provides: "When a party or his counsel is in the process of a hearing or trial before a tribunal, he may not be required to appear in another tribunal having greater priority unless the tribunal with less priority grants a recess or continuance for that purpose."

  - Attorneys should work closely with judges and mediators to avoid scheduling conflicts. Simply because a matter may get scheduled later in the day after a mediation has been scheduled is not grounds to immediately seek a rescheduling of the mediation. Of course, the circumstances of each conflict should be examined and everyone involved should work cooperatively and timely to deal with such conflicts.

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

- If you anticipate a court-related scheduling conflict which may interfere with an already scheduled mediation, I can contact judges, clerks of court or the federal ADR Program Director on your behalf to assist with resolving such conflicts.

- *Where can I get directions to your office?*

  - Go to our firm's website at www.folkenslaw.com and click on the "Directions" tab for specific information and an interactive map. Our office is in downtown Florence, one block west of the McMillan Federal Building, at 601 West Evans Street.

  - Many popular GPS units, including Garmins, for some strange reason don't recognize West Evans Street as a main thoroughfare, which it is. Once you're on West Evans St., resist directions to turn off of West Evans!

- *What is your "meal" policy?*

  - I have found it best, except in rare circumstances, to work non-stop during the mediation session. If lunch (or dinner) will need to be served, we order from a local restaurant and the food is delivered to us.

  - If you have any special dietary needs, please let me know them beforehand, and every effort will be made to accommodate special requests.

  - The cost of the meal is added to the total mediation cost. If this is not acceptable to you, please let me know ahead of time so alternative arrangements can be made.

  - Refreshments, including soft drinks, juices, and bottled water, are available during the mediation. Wireless Internet access is available, and long distance calls may be made anywhere in the United States without charge. Please ask the staff if you have any special requests.

- *Are you willing to travel?*

  - Yes. I routinely travel outside of the Florence area to conduct alternative dispute resolution events. If parties, claims representatives and/or attorneys live primarily outside of the Florence area, it may be more cost effective to pay my reduced travel hourly rate and mileage for me to travel to you rather than having everyone travel to Florence. Explore this possibility with the other side if there might be cost savings to you.

- *When is the "best" time to conduct a mediation?*

  - Timing is everything in mediation! Some matters are best resolved through a mediation conducted early in the process, even before a lawsuit is filed. Others require a certain amount of discovery to be in a position to negotiate a final resolution. I urge you in all of your cases to discuss mediation and other forms of alternative dispute resolution as early as possible with the other side and agree upon when the ADR event will occur. In some cases, having an early ADR event

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

to agree upon what discovery will be undertaken before a full-blown session is held is beneficial.

- *What rules apply to mediation?*
  - The current South Carolina Circuit Court Alternative Dispute Resolution Rules can be found at www.sccourts.org/courtReg/
- *I am an attorney and not admitted in South Carolina. What special rules apply to me?*
  - The South Carolina Supreme Court recently adopted new rules affecting appearances by non-South Carolina lawyers in arbitration, mediation or other alternative dispute resolution proceedings in South Carolina. If you fall into this category, you *must* read Rule 404 of the South Carolina Appellate Court Rules. Rules 404(g) – (i) specifically state:

    (g) **Non-South Carolina Lawyers Appearing in an Arbitration, Mediation or Other Alternative Dispute Resolution Proceeding in South Carolina.** Pursuant to Rule 5.5(c)(3) of the Rules of Professional Conduct, Rule 407, SCACR, a lawyer admitted to practice law in another jurisdiction may perform legal services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's pre-existing representation of a client in a jurisdiction in which the lawyer is admitted to practice.

    (h) **Limitations on Provision of Legal Services Pursuant to Rule 5.5(c)(3).** A lawyer who is not admitted to practice in South Carolina who seeks to provide legal services pursuant to Rule 5.5(c)(3) in more than three matters in a calendar year shall be presumed to be providing legal services on a regular, not temporary, basis.

    (i) **Fee; Record of Provision of Legal Services Pursuant to Rule 5.5(c)(3).** For each matter in which a lawyer seeks to provide legal services pursuant to Rule 5.5(c)(3), the lawyer shall file a verified statement with the South Carolina Supreme Court Office of Bar Admissions stating that the lawyer has not filed more than three statements pursuant to this rule in a 365-day period. The statement shall be accompanied by a $250 fee and shall be served on opposing counsel, if known. If opposing counsel is not known at the time the verified statement is filed, the statement shall be filed on opposing counsel within ten days of learning the identity of opposing counsel.

  - The Rules and required forms can be found at www.sccourts.org/courtReg/index.cfm

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

- If you fall into this category I will assume that you have fully complied with the Rules, submitted the required form and fee to the South Carolina Supreme Court's Office of Bar Admissions, and received permission to appear by the time of the mediation.

- *How can I make scheduling my next ADR event with you easier?*

  - I have been inducted into the National Academy of Distinguished neutrals. The Academy offers a convenient online calendar-availability system which is linked on our website. To schedule your next ADR event, please consider using this system at www.folkenslaw.com/mediation.html. Once you enter your information one time, your contact information will be automatically filled-in on your next visit to the site.

  - Many attorneys get the other side on the phone and jointly review the available slots on the online calendar, avoiding having to go back and forth in selecting a particular date.

- *I'm coming from out-of-town and plan to stay the evening before. What is the best, most convenient lodging to your office?*

  - We recommend the new Hotel Florence which is just a few blocks east of our office on the same street at 126 West Evans Street. This boutique hotel with competitive rates is made up of three of Florence's historical buildings downtown that have been renovated to create one space. The original building was built in 1891 and has been fully remodeled. Click here for more information: www.hotelflorencesc.com/

  - For special rates given to our clients and mediation participants, go to this link: www.ascendcollection.com/ires/en-US/html/ArrivalInfo?hotel=SC477&srp=LFOLKE&pu=no

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

MEDIATION OUTLINE FOR KARL FOLKENS

1. **What is the case about?**

2. **What are the contested issues?**

3. **What is the present posture of the case?**

4. **What have been the settlement efforts to date?**

5. **What are your case strengths and weaknesses?**

6. **Who will be attending with you?**

7. **Does anyone attending with you need any special accommodations?**

8. **Are there any sensitive issues or other concerns?**

9. **If you want your share of the mediation bill emailed to someone else, such as paralegal, bookkeeper or claims representative, what is the person's name and email address?**

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

EXHIBIT C
TO
REPLY IN SUPPORT OF DEFENDANTS' CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

AMENDED PROOF OF MEDIATION

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

CIRCUIT COURT

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

K. A. DIEHL AND ASSOCIATES, INC. V. JAMES PERKINS, ET AL.
Docket No. 2015-CP-26-05573

JAMES PERKINS, ET AL. V. K.A. DIEHL AND ASSOCIATES, ET AL.
Docket No. 2016-CP-26-00744

JIM PERKINS, COLLEEN FRANKE, ET AL. V. OCEAN FRONT SPA HORIZONTAL PROPERTY REGIME, INC., ET AL.
Docket No. 2016-CP-26-00673

JIM PERKINS, COLEEN FRANKE, ET AL. V. THE MYRTLE BEACH RESORT HOMEOWNERS ASSOCIATION, INC., ET AL.
Docket No. 2016-CP-26-00674

JIM PERKINS, COLEEN FRANKE, ET AL. V. K. A. DIEHL AND ASSOCIATES, INC., ET AL.
Docket No. 2016-26-00743

AMENDED PROOF OF ADR

1. Alternative Dispute Resolution (ADR) was conducted in the form of: **Mediation**.

2, The neutral was: **Karl A. Folkens.**

3. The ADR was conducted on **May 1, 2017**.

4. As a result of ADR, these cases should be considered (please check one):
   __X__ Fully Settled by Consent Judgment or a Voluntary Dismissal to be filed by the parties.
   _____ Partially Settled, with agreement of the parties on the following issues:
   _____ At an impasse.
   _____ In need of further ADR. I ____ am / ____ am not willing to mediate this case further.
   I recommend that ADR resume as of:
   _____ Continued to (Date):

5. Plaintiffs __X__ were/ _____ was not present.
   Defendants __X__ were/ _____ were *not present individually (through representatives).*

6. Other participants were:

   __X__ Lawyers for parties: *Henrietta U. Golding, Esq., Alicia E. Thompson, Esq., A. Preston Brittain, Esq., Christopher W. Nickels, Esq., Christian Stegmaier, Esq., Robert W. Buffington, Esq., Phillip A. Kilgore, Esq. & G. Michael Smith, Esq.*

   __X__ Representatives for insurance carrier: *Hugh Spears, Chubb; Eva Jane Ammons, Nationwide; Lori Barns, Philadelphia Insurance Company*
   _____ Guardian ad Litem:
   _____ Experts:
   _____ Others:

7. Choice of the mediator was by:
   __X__ Stipulation
   _____ Court Order

8. The total number of hours spent in ADR was: ***16.5** hours, plus travel.*

9. Further comments of the neutral: *None.*

May 1, 2017

S/ Karl A. Folkens

KARL A. FOLKENS, Mediator
P. O. Box 6139, Florence, SC 29502-6139
(843) 665-0100; FAX (843) 665-0500

MA17-126

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

EXHIBIT D
TO
REPLY IN SUPPORT OF DEFENDANTS' CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

REQUESTED WRITTEN INQUIRIES

EXHIBIT D

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00673**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00674**
	)	
The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	
	)	

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15th JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00743**
	)	
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
Plaintiffs,	)	
v.	)	**Civil Action No.: 2016-CP-26-00744**
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)	
Defendants.	)	

REQUESTED WRITTEN INQUIRIES

Pursuant to Rule 8(b)(2) of the Court-Annexed Alternative Dispute Resolution (ADR) Rules, Defendants respectfully request the following inquiries to be made by the Chief Judge for Administrative Purposes to Mediator Karl A. Folkens, Esq:

1. On May 1, 2017, did you serve as the mediator in a consolidated mediation of five (5) litigation matters, including the four (4) matters captioned above ("Actions")?

2. Of the eight (8) named plaintiffs in the Actions, were six (6) physically present at the mediation, and were two (2)—Mark Dos Santos and Jeffrey Richardson—present via telephone?

3. In accordance with Rule 6(b) of the SC ADR Rules, at the commencement of the mediation conference, did you and all parties agree for Mr. Santos and Mr. Richardson to be physically absent but to participate via telephone?

4. If so, did counsel for plaintiffs have Mr. Santos and Mr. Richardson's authority to speak and act on their behalf in their physical absence?

5. Did plaintiffs' counsel specifically indicate that he had full settlement authority for and on behalf of Mr. Santos and Mr. Richardson?

6. Did Mr. Santos and Mr. Richardson actively participate in the mediation conference via telephone?

7. After a full-day mediation involving extensive arms-length negotiations between the parties and their counsel, did the parties reach a resolution of all claims in the Actions?

8. In accordance with Rule 6(f) of the SC ADR Rules, did you ensure that the parties reduced their agreement to writing in an agreement that accurately captured the terms of the negotiated resolution and that all parties signed, either themselves or by their agent?

9. Is Attachment A to these Inquiries an accurate copy of the settlement agreement?

10. Due to Mr. Santos and Mr. Richardson not being physically present, did plaintiffs' counsel execute the agreement on their behalf as their duly-authorized agent, with the agreement making clear that both Mr. Santos and Mr. Richardson were thereby signing the agreement through the actions of their counsel-agent?

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

11. Did plaintiffs' counsel tell you that he orally read the operative provisions of the agreement to Mr. Santos and Mr. Richardson over the telephone?

12. Did you present an unsigned copy of the settlement agreement to plaintiffs' counsel and plaintiffs who were present?

13. Did plaintiffs' counsel present you with the signed copy of the agreement indicating that all named plaintiffs had either personally signed or had directed counsel to sign on their behalf?

14. Did you then present the agreement signed by or for plaintiffs to the Board Defendants (i.e., all but K.A. Diehl and Associates, Inc.) and their counsel for them to sign the agreement?

15. Did counsel for the Board Defendants present to you the signed copy of the agreement indicating that all named Board Defendants had either personally signed or had directed counsel to sign on their behalf?

16. Did you inform K.A. Diehl and Associates, Inc. and its counsel that all claims in the Actions were settled?

17. Based on the parties' negotiated settlement that was memorialized in the signed agreement, did you file Amended Proof of ADR forms in each of the Actions pursuant to ADR Rule 7(f)?

18. Did the Amended Proof of ADR (Attachment B) indicate as follows?

a. The parties stipulated to your service as mediator in the Actions.

b. Plaintiffs and defendants were present at the May 1, 2017 mediation.

c. All attorneys in the Actions were present at the May, 1, 2017 mediation, including three (3) separate attorneys for Mr. Santos.

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

d. All Actions were "[f]ully settled by Consent Judgment or a Voluntary Dismissal to be filed by the parties."

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ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

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Attachment A

Settlement Agreement

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

Settlement Agreement
Civil Action Nos.: 2016-CP-26-00673, -00674, -00743, -00744

The following is a Settlement Agreement ("Agreement") between Plaintiffs Jim Perkins, Colleen Franke a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dames, Errol Dos Santos, and Jeffrey Richardson ("Plaintiffs'") on the one hand and Defendants The Myrtle Beach Resort Homeowners Association, Inc., ("MBRHOA"), Ocean Front Spa Horizontal Property Regime, Inc. ("OFS"), Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Ken Perkins, Ray Coghill, Ralph Jump, and Wayne Urban ("Defendants") on the other (Plaintiffs and Defendants hereafter referred to as the "Parties") to settle Civil Action Nos.: 2016-CP-26-00673, -00674, -00743, -00744, currently pending on the South Carolina Circuit Court in Horry County ("Settled Actions").

1. For good and valuable consideration, upon full execution and effectuation of this Agreement, in full satisfaction of the Settled Actions, and any other claims or charges Plaintiffs have, claim to have, or may have, against Defendants, including, without limitation, any claim for attorneys' fees or costs, Defendants agree to pay the gross amount of $85,000.00 (the "Payment") in full satisfaction of any claims, charges or actions Plaintiffs have against Defendants.

a) Defendants will, thirty (30) business days hereafter, pay to Plaintiffs and Plaintiffs' attorney the total sum of Fifteen Thousand Dollars ($15,000.00) for the purposes of funding a binding arbitration of a declaratory judgment action to adjudicate whether the gate pass fee currently charged by MBRHOA is authorized under the governing MBRHOA documents and applicable law.

b) Defendants will, thirty (30) business days hereafter, pay to The Board of Directors for the Myrtle Beach Resort Horizontal Property Regime ("A Building Board") and the Board of Directors for the Myrtle Beach Resort Five Seasons Centre Horizontal Property Regime, ("Five Seasons Board") the total sum of Fifteen Thousand Dollars ($15,000.00) for the purposes of defending a binding arbitration of a declaratory judgment action filed by Plaintiffs for the purpose of adjudicating whether the gate pass fee currently charged is authorized under the governing MBRHOA documents and applicable law.

c) Arbitrator. Defendants will pay to Plaintiff's counsel the sum of $5,000.00 to be held in trust by his law firm to pay to an arbitrator to resolve the arbitration set forth in the previous two paragraphs. In the event this amount does not fund the arbitration in full, the balance, if any, shall be paid by the attorneys receiving the sums set out in the two previous paragraphs.

d) Defendants will, thirty (30) business days hereafter, pay "Brittain Law Firm" in the amount of Fifty Thousand Dollars and No Cents ($50,000.00), as payment for attorneys' fees and costs, such amount not being subject to income or employment tax withholding, but to be reported on a Form 1099

2. The Parties hereto recognize that the Defendants do not admit any liability to Plaintiffs, or to anyone else because of, or growing out of, matters set forth in Plaintiffs' Amended Complaints in the Settled Actions. The Parties have agreed to settle any and all claims

Plaintiffs have asserted or may have asserted against Defendants in order to avoid further cost and inconvenience in moving forward with a trial.

3. MBRHOA and OFS will use their best efforts to have their respective By-Laws amended to require at least three bids to be received prior to the awarding of any contract which will exceed $10,000.00 in value.

4. In exchange for and in consideration of the promises set forth in this Agreement, and except for the rights to enforce the provisions of this Agreement, Plaintiffs, their heirs, executors, administrators, legal and personal representatives, successors and assigns, hereby covenant not to sue and fully release and forever discharge Defendants and their respective present and former parents, heirs, assigns, subsidiaries, affiliates, and related entities or corporations, and any of their past and present officers, directors, shareholders, employers, past and present employees, agents, partners, attorneys, heirs, successors, insurers and assigns (the "Released Parties"), from any and all claims, demands, actions, charges, complaints, suits, administrative proceedings, debts, promises, contracts, grievances, and causes of action (hereinafter collectively referred to as "Claims"), in law or in equity, whether known or unknown, which Plaintiffs and their heirs, executors, administrators, agents, distributees, beneficiaries, successors in interest and assignees may have by reason of any matter, cause or thing whatsoever from the beginning of the world to only the day of the date of Plaintiffs' execution of this Agreement, including, but not limited to, any and all claims which were actually asserted or might have been asserted by Plaintiffs in the Settled Actions. Plaintiffs agree never to file a lawsuit against Defendants based on any reason contained in this Agreement. The Release does not purport to release any claims that the law does not permit to be released.

5. Within 15 days of receipt of the Payment, Plaintiffs' counsel shall file **a stipulation of dismissal with prejudice** in each of the Settled Actions.

6. Plaintiffs further acknowledge and agree that this Agreement extends to all claims of every kind and nature whatsoever, known or unknown, suspected or unsuspected, and Plaintiffs acknowledges they may hereafter discover facts in addition to or different from those which they know or believe to be true with respect to the subject matter of this Agreement, but it is their intention to hereby fully and finally settle and release all such matters as well and, in furtherance of that intention, the foregoing Release shall remain in effect as a full and complete release notwithstanding the discovery or existence of such additional or different facts.

7. Plaintiffs agree that they will not make any statements, oral or written, which they know or reasonably should know to be a disparaging or negative comment about Defendants or their officers, directors, employees and agents, or otherwise detrimental to the reputation or goodwill of Defendants, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required by law. Defendants agree that they will not make any statements, oral or written, which they know or reasonably should know to be a disparaging or negative comment about Plaintiffs or their officers, directors, employees and agents, or otherwise detrimental to the reputation or goodwill of Plaintiffs, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required by law.

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

8. It is understood and agreed that Defendants expressly rely upon the promises, representations, and warranties made by Plaintiffs in this Agreement; that any breach of such promises, representations, and warranties would constitute a material breach of this Agreement; and that in the event of any such breach, Defendants shall be entitled to any and all of the following relief: (a) the immediate repayment to Defendants of the full Settlement Amount hereunder (b) the indemnification and hold harmless protection set forth above; (c) specific enforcement of all promises and undertakings made by Plaintiffs hereunder; and (d) all other relief and damages available at law or in equity.

Agreed to this 1st Day of May, 2017.

Plaintiffs

Jim Perkins

Colleen Franke

Colleen Franke a/k/a Colleen Franke Perkins

Mark Dos Santos

By his Attorney

Nancy Moore

Nancy Moore

William Moore

William Moore

Steven Dame

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

Errol Dos Santos

Jeffrey Richardson

By his Attorney

Defendants

The Myrtle Beach Resort Homeowners Association, Inc., ("MBRHOA")

By its Attorney

Ocean Front Spa Horizontal Property Regime, Inc. ("OFS"),

By its Attorney

Phil Cox

Bill Cameron

By his Attorney

Stanley Jordan

By his Attorney

Walter Jordan

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

Ken Perkins

Ray Coghill

By his Attorney

Ralph Jump

Wayne Urban

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ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

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Attachment B

Amended Proof of ADR

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

CIRCUIT COURT

K. A. DIEHL AND ASSOCIATES, INC. V. JAMES PERKINS, ET AL.
Docket No. 2015-CP-26-05573

JAMES PERKINS, ET AL. V. K.A. DIEHL AND ASSOCIATES, ET AL.
Docket No. 2016-CP-26-00744

JIM PERKINS, COLLEEN FRANKE, ET AL. V. OCEAN FRONT SPA HORIZONTAL PROPERTY REGIME, INC., ET AL.
Docket No. 2016-CP-26-00673

JIM PERKINS, COLEEN FRANKE, ET AL. V. THE MYRTLE BEACH RESORT HOMEOWNERS ASSOCIATION, INC., ET AL.
Docket No. 2016-CP-26-00674

JIM PERKINS, COLEEN FRANKE, ET AL. V. K. A. DIEHL AND ASSOCIATES, INC., ET AL.
Docket No. 2016-26-00743

AMENDED PROOF OF ADR

1. Alternative Dispute Resolution (ADR) was conducted in the form of: **Mediation.**

2, The neutral was: **Karl A. Folkens.**

3. The ADR was conducted on **May 1, 2017.**

4. As a result of ADR, these cases should be considered (please check one):
   __X__ Fully Settled by Consent Judgment or a Voluntary Dismissal to be filed by the parties.
   _____ Partially Settled, with agreement of the parties on the following issues:
   _____ At an impasse.
   _____ In need of further ADR. I ____ am / ____ am not willing to mediate this case further.
   I recommend that ADR resume as of:
   _____ Continued to (Date):

5. Plaintiffs __X__ were/ _____ was not present.
   Defendants __X__ were/ _____ were *not present individually (through representatives).*

6. Other participants were:

   __X__ Lawyers for parties: *Henrietta U. Golding, Esq., Alicia E. Thompson, Esq., A. Preston Brittain, Esq., Christopher W. Nickels, Esq., Christian Stegmaier, Esq., Robert W. Buffington, Esq., Phillip A. Kilgore, Esq. & G. Michael Smith, Esq.*

   __X__ Representatives for insurance carrier: *Hugh Spears, Chubb; Eva Jane Ammons, Nationwide; Lori Barns, Philadelphia Insurance Company*
   _____ Guardian ad Litem:
   _____ Experts:
   _____ Others:

ELECTRONICALLY FILED - 2017 Aug 07 4:01 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

7. Choice of the mediator was by:
   __X__ Stipulation
   _____ Court Order

8. The total number of hours spent in ADR was: ***16.5** hours, plus travel.*

9. Further comments of the neutral: *None.*

May 1, 2017

S/ Karl A. Folkens

KARL A. FOLKENS, Mediator
P. O. Box 6139, Florence, SC 29502-6139
(843) 665-0100; FAX (843) 665-0500

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00673**
	)	
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00674**
	)	
The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	
	)	

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15th JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00743**
	)	
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 2016-CP-26-00744**
	)	
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)	
	)	
Defendants.	)	

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

REPLY IN SUPPORT OF DEFENDANTS' CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

Defendants in each of the above-captioned cases (C.A. Nos. 2016-CP-26-00673, 2016-CP-26-00674, 2016-CP-26-00743, and 2016-CP-26-00744) (collectively, the "Actions"), by and through their undersigned counsel and pursuant to Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), file this Reply in Support of their Consolidated Motion for Preliminary Approval of Settlement Agreement regarding the Actions ("Motion to Approve").

I. FACTUAL BACKGROUND

Plaintiffs' Memorandum of Law In Opposition to Defendants' Consolidated Motion for Preliminary Approval of Settlement Agreement ("Opposition") either concedes, must concede, or does not contest the following, all of which are undisputed facts:

- On February 10, 2017, the parties notified their choice of mediator that they agreed to schedule a mediation to take place on May 1, 2017. Exhibit A.
- The mediator selected was Karl A. Folkens, Esq., one of the most experienced and well-respected mediators in South Carolina.
- On March 26, 2017, Mediator Folkens confirmed the mediation was to take place on May 1, 2017. (Exhibit B.)
- On April 26, 2017, Plaintiff's counsel informed counsel for the Defendants that Plaintiff Richardson would be unable to attend the mediation in person, and on April 28, 2017, confirmed to counsel for the Defendants that he would "have settlement authority from Mr. Richardson . . . ." (Motion to Approve, Exhibit C.)
- On May 1, 2017, Plaintiffs and their counsel were physically present with the exception of Plaintiff Richardson and Plaintiff Mark dos Santos.
- Santos's absence was not anticipated. Before the mediation commenced, the parties agreed the mediation could proceed in Santos's absence, conditioned on his counsel having his settlement authority.
- All parties and their counsel attended the May 1 mediation conference, either in person or via telephone, and participated in the mediation.[1]

[1] Of the eight (8) named plaintiffs in the Actions, six (6) were physically present at the mediation, and two (2)—Mark Dos Santos and Jeffrey Richardson—were present via telephone.

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

- In accordance with Rule 6(b) of the South Carolina Court Annexed Alternative Dispute Resolution ("ADR") Rules, at the commencement of the mediation conference Mediator Folkens confirmed that (a) all parties agreed for Plaintiffs Santos and Richardson to attend via telephone, and (b) counsel for Plaintiffs had full settlement authority for and on behalf of Plaintiffs Santos and Richardson.
- Both Plaintiffs Santos and Richardson actively participated in the mediation conference via telephone—during joint sessions with all parties and closed sessions with only Plaintiffs.
- After a full-day mediation, involving extensive arms-length negotiations between the parties and their counsel, the parties reached a resolution of all claims in the Actions.
- In accordance with ADR Rule 6(f), Mediator Folkens ensured that the parties reduced their agreement to writing in an agreement that accurately captured the terms of the negotiated resolution and that all parties signed ("Settlement Agreement"). (Motion to Approve, Exhibit A.)[2]

[2] K.A. Diehl and Associates, Inc. ("K.A. Diehl")—Defendant in Civil Action Nos. 2016-CP-26-00743 and 2016-CP-26-00744 and an agent for of Ocean Front Spa Horizontal Property Regime, Inc. ("OFS") and The Myrtle Beach Resort Homeowners Association, Inc. ("MBR")—is a released party as defined in the Settlement Agreement. Moreover, although K.A. Diehl did not sign the agreement, its terms contemplated that the claims in the above Actions would be fully dismissed with prejudice after the settlement payments were received. At the same mediation, K. A. Diehl and the Plaintiffs also reached a settlement as to all claims in K.A. Diehl's action against the Plaintiffs (less Plaintiff Richardson), Civil Action No. 2015-CP-26-05573. The Plaintiffs attended the mediation in person and by telephone and signed that settlement agreement in the same manner as the Settlement Agreement in the Actions. Nevertheless, Plaintiffs intend to honor the agreement in Civil Action No. 2015-CP-26-05573 but dishonor the Settlement Agreement in the Actions.

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

- Due to Plaintiffs Santos and Richardson not being physically present, Plaintiffs' counsel executed the Settlement Agreement on their behalf as their duly-authorized agent, with the Settlement Agreement making clear that both Santos and Richardson were thereby signing through the actions of their counsel-agent.
- Before signing on behalf of Plaintiffs Santos and Richardson, Plaintiffs' counsel orally read the operative provisions of the Settlement Agreement to them over the telephone.
- Plaintiffs' counsel presented Mediator Folkens and Defendants' counsel the Settlement Agreement, signed by or for all of the named Plaintiffs.
- Based on the parties' negotiated settlement, memorialized in the Settlement Agreement, Mediator Folkens filed an Amended Proof of ADR form in each of the Actions, making clear that all parties were present and that each of the Actions were "[f]ully settled by Consent Judgment or a Voluntary Dismissal to be filed by the parties." (Exhibit C.)

Based on these undisputed facts, the Motion to Approve must be granted.

Rather than acknowledge the effect of these undisputed facts, and completely ignoring well-settled contract principles, Plaintiffs rely exclusively on a tortured reading of SCRCP Rule 43(k) to evade the final and binding Settlement Agreement. Plaintiffs' opposition is misplaced and disingenuous. First, SCRCP Rule 43(k) deals only with "agreements *between counsel* affecting the proceedings," and has no application whatsoever to the facts at hand. (Emphasis added.) Second, Plaintiffs' arguments are at odds with well-established contract principles. Third, Plaintiffs' position ignores the provisions of the South Carolina ADR Rules.

The Motion to Approve should be granted accordingly.

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

II. ARGUMENT

A. Rule 43(k) Applies only to Agreements Between Counsel.

1. *The Plain Language of Rule 43(k) Demonstrates its Inapplicability in this Case.*

The plain language of SCRCP Rule 43(k) makes clear that it is inapplicable to the Settlement Agreement and the resolution between the parties in the Actions. The rule provides as follows:

> **(k) Agreements of Counsel.** No agreement *between counsel* affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.

SCRCP Rule 43(k) (emphasis added). "'In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes.'" *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 638, 627 S.E.2d 724, 726 (2006) (quoting *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003)). "[T]he words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *State v. Muldrow*, 348 S.C. 264, 268, 559 S.E.2d 847, 849 (2002). Applying this basic rule of statutory interpretation plainly demonstrates SCRCP Rule 43(k)'s inapplicability to the Settlement Agreement.

Stated simply, the Settlement Agreement was not an "agreement between counsel." It is an agreement of the parties. A SCRCP Rule 43(k) "agreement between counsel" contemplates an agreement negotiated by attorneys alone, to the exclusion of their clients, about which the attorneys must later take some overt action, identified in the Rule, before it becomes enforceable. One of these actions is where the "agreement between counsel" is later "reduced to writing and

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

signed by the parties and their counsel." SCRCP Rule 43(k).[3] This means that lawyers must memorialize their agreements with other counsel, consult with their clients about the terms, and ensure that their clients sign the agreement.

The Court of Appeals recently recognized as much. According to SCRCP Rule 43(k), "*lawyers* have been required . . . to reduce *their* agreements to a written document." *Inglese v. Beal*, 403 S.C. 290, 742 S.E.2d 687, 694 (Ct. App. 2013) (Pieper, J., concurring in part and dissenting in part) (emphasis added). Even the Supreme Court, in *Farnsworth*—the case on which Plaintiffs primarily rely[4]—recognized the importance of those two words in the introductory clause, emphasizing "between counsel" when quoting the rule. *See Farnsworth*, 367 S.C. at 637, 627 S.E.2d at 725 (quoting SCRCP Rule 43(k)).

The Settlement Agreement in this case was not an "agreement between counsel," as contemplated in SCRCP Rule 43(k). The Settlement Agreement was negotiated, memorialized, and executed by all of the parties after a full day of mediation in which all actively participated.

This conclusion was affirmed shortly after the mediation, when several named Plaintiffs expressly ratified the settlement and affirmed their understanding that the Actions had been resolved fully and finally through mediation. These Plaintiffs notified all OFS building residents that "The recent state court litigation between various homeowners in the Ocean Front Spa and

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[3] The clause regarding signed "agreements between counsel" being enforceable was added by 2009 Amendment to the Civil Rules.

[4] *Farnsworth* dealt with a former version of SCRCP Rule 43(k) that did not include the 2009 amendment.

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

its management company and others has been resolved *between the parties* to their mutual satisfaction via alternative dispute resolution that occurred on May 1." (Emphasis added).[5]

This conclusion was further established by the filing of the Amended Proof of ADR, signed by Mediator Folkens, who affirmed that as a result of the mediation, the cases were fully settled, with all parties present. Mediator Folkens would not have done so had a settlement not been reached, as he had affirmative duty to declare an impasse if settlement was not reached and report the results of the mediation to the court. ADR Rule 7(e)-(f). The result reported was that the cases were "fully settled" with all parties present.

The plain language of SCRCP Rule 43(k) thus mandates an interpretation that it is inapplicable to the circumstances here, requiring the granting of the Motion to Approve.

2. *Plaintiff's Interpretation of Rule 43(k) would Lead to Absurd Results.*

Plaintiffs' interpretation would require the court to disregard the title of SCRCP Rule 43(k) ("Agreements of Counsel") and key limiting language in the body of the rule ("No *agreement between counsel* affecting the proceedings in an action shall be binding . . ."), and read certain provisions of Rule 43(k) in isolation. Plaintiffs would then need the court to ignore the agreement they reached pursuant to ADR Rule 6(b), with all others present before the mediation commenced—an agreement that allowed the mediation to proceed in the physical absence of Santos and Richardson on the condition that their counsel had settlement authority for them. They further ask the court to ignore the fact that Santos and Richardson participated extensively in the mediation, authorized their attorney to settle the case, and authorized him to sign the Settlement Agreement on their behalf.

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[5] *See* Exhibit B to Motion to Approve (Affidavit of Walter Jordan and Exhibits B and C thereto).

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

This is the tortured pathway to the result Plaintiffs desire, an absurd result that the General Assembly simply could not have intended. "[R]egardless of how plain the ordinary meaning of the words in a statute, courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the General Assembly." *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) (citing *Kiriakides v. United Artist Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994); *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 351, 549 S.E.2d 243, 249 (2001)). "If possible, the Court will construe a statute so as to escape the absurdity and carry the intention into effect." *Id.* (citing *Kiriakides*, 312 S.C. at 275, 440 S.E.2d at 366).

Plaintiffs' argument rests exclusively on Santos' and Richardson's physical absence from the mediation and the fact that they did not personally and physically "sign" the Settlement Agreement.[6] They then rely on the following selected language from the rule: "No agreement affecting the proceedings shall be binding . . . unless . . . reduced to writing and signed by the parties and their counsel." SCRCP Rule 43(k). They argue that these facts and this language are conclusive and render the Settlement Agreement unenforceable. They ask the court to pretend that the body of this rule is not limited, by its terms, to only that subset of agreements which are "between counsel."

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[6] For the first time nearly three months following mediation, Plaintiffs also inexplicably assert that Plaintiff Jim Perkins did not sign the Settlement Agreement. Aside from the fact that the Settlement Agreement bears a signature of a name which appears to be that of Plaintiff Jim Perkins, it is beyond dispute that he was present for the duration of the mediation. If Plaintiff Jim Perkins persists in asserting that he did not sign the Settlement Agreement, perhaps the court might be interested in asking him to take the stand and explain under oath whether he was present when the mediator presented the Settlement Agreement to the Plaintiffs and their counsel, to identify the person who signed his name to the Settlement Agreement, to state whether he authorized such person to sign on his behalf and to explain why he and his colleagues on the OFS Board announced to all the OFS that the parties had the settled the litigation. Until such time, Defendants need not further waste the Court's time on this issue.

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

SCRCP Rule 43(k) applies only to an "agreement between counsel," and not to agreements the parties themselves are actively involved in negotiating and reaching. The introductory language of SCRCP Rule 43(k) ("Agreements of Counsel") gives further direction, confirming the purpose of the rule, and cannot be disregarded. Ignoring a key modifying provision of the rule would lead to and absurd interpretation. Doing so while ignoring key facts would lead to an absurd result.

Plaintiffs' selective interpretation violates yet another rule of statutory interpretation. When "construing a statute to escape the absurdity and carry the intention into effect, . . . the Court should not concentrate on isolated phrases within the statute, but rather, read the statute as a whole and in a manner consonant and in harmony with its purpose." *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. at 355, 782 S.E.2d at 592 (citing *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011); *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006)).

The purpose of SCRCP Rule 43(k) is obvious—to prevent attorneys from attempting to bind clients to alleged agreements that attorneys make in "back room/closed door" sessions in which their clients are not involved in the negotiations. That purpose has no bearing here, where all of the parties attended and actively participated in the mediation conference at which the Settlement Agreement was negotiated and executed.

Plaintiffs' desired interpretation would render meaningless the title and introductory/limiting language of SCRCP Rule 43(k), an obviously improper result. *See, e.g.*, *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 574 S.E.2d 196 (2002) ("In construing statutory language, the statute must be *read as a whole* and sections which are part of the same general statutory law *must be construed together* and each one given effect. The Court must

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

presume the *legislature did not intend a futile act*, but rather intended its statutes to accomplish something." (emphasis added) (citing *TNS Mills, Inc. v. S.C. Dep't of Revenue,* 331 S.C. 611, 503 S.E.2d 471 (1998))).

As important, Plaintiffs' interpretation would effectively overturn and nullify the long history of precedent making clear that settlement agreements are contracts that are subject to enforcement like any other contracts, *see, e.g., Nichols Holding, LLC v. Divine Capital Grp., LLC*, 416 S.C. 327, 335, 785 S.E.2d 613, 617 (Ct. App. 2016) ("In South Carolina jurisprudence, settlement agreements are viewed as contracts." (citing *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009))). Therefore, Plaintiffs' opposition should be rejected accordingly, and the Motion to Approve granted.

3. *Pre-2009 Case Law is Inapplicable to the Current Version of 43(k)*

In support of the absurd and improper results Plaintiffs seek, they cite to cases from 2006 and earlier that did not even interpret the language in SCRCP Rule 43(k) on which they rely. Prior to 2009, SCRCP Rule 43(k) required one of three conditions for an "agreement between counsel" to be binding. The agreement had to be:

1. "reduced to the form of a consent order . . . signed by counsel and entered in the record,"
2. "reduced to the form of a . . . written stipulation signed by counsel and entered in the record," or
3. "made in open court and noted upon the record."

Farnsworth v. Davis Heating & Air Conditioning, Inc., 367 S.C. 634, 637, 627 S.E.2d 724, 725 (2006) (citing the previous version of the Rule). In 2009, however, the rule was amended to add a fourth avenue for enforcement of agreements between counsel. An agreement between counsel could now also be binding if the agreement is "reduced to writing and signed by the parties and their counsel." SCRCP Rule 43(k). The cases relied upon by Plaintiffs are clearly inapplicable to

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

this Motion as the courts in those cases were confined to the requirements of the pre-2009 version of the rule.

4. *Even if the Court finds Rule 43(k) Applies, the Settlement Agreement Complied with the Post-2009 Provisions*

Regardless, here, the parties and their counsel signed the Settlement Agreement and it should be enforced. Each of the parties signed, either themselves or by their attorneys. Likewise, counsel for Plaintiffs and counsel for Board Defendants signed the agreement on behalf of parties who were physically absent.

Plaintiffs first argue that the Settlement Agreement is unenforceable because the attorneys did not sign the agreement in their capacities as legal counsel. They do not, however, cite any legal authority for this baseless proposition (because there is none). Moreover, it is highly doubtful that the General Assembly intended for a party to rescind an agreement simply because his or her attorney did not sign the agreement separate and apart from the party.

Plaintiffs' hyper-technical argument flies in the face of one of the main purposes SCRCP Rule 43(k), which is to take courts out of disputes arising from agreements between counsel. *Ashfort Corp v. Palmetto Constr. Group, Inc.* 318 S.C. 492, 495, 458 S.E. 2d. 533, 535 (S.Ct. 1995). ("[T]he purpose of rules such as Rule 43(k) is: to prevent disputes as to the existence and terms of agreements and to relieve the court of the necessity of determining such disputes. . . ." (citing 83 C.J.S. Stipulations § 4 (1953)). Plaintiffs' tortured approach would actually force courts to get involved in matters such as this that <u>have already been resolved</u> between the parties and their counsel, with the assistance of an eminent mediator.

Plaintiffs' second hyper-technical argument is that a signature by an attorney with authority from and on behalf of a client must be disregarded under SCRCP Rule 43(k). This argument wholly disregards well-established precedent recognizing that an attorney acts as an

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

agent for his or her client. Our Supreme Court recognizes the attorney-client relationship is that of an agent and principal: "Acts of an attorney are directly attributable to and binding upon the client. Absent fraud or mistake, where attorneys of record for a party agree to settle a case, the party cannot later repudiate the agreement." *Arnold v. Yarborough*, 281 S.C. 570, 572, 316 S.E.2d 416, 417 (Ct. App. 1984) (*citing Clark v. Clark*, 271 S.C. 21, 244 S.E.2d 743 (1978); *Poore v. Poore*, 105 S.C. 206, 89 S.E. 569 (1916)).

The fact that Santos and Richardson were not present and relied on their attorney to read the Settlement Agreement to them and sign on their behalf does not excuse them from the Agreement. *See Kirkland v. Moseley*, 109 S.C. 477, 96 S.E. 608 (1917) (a party cannot set aside a settlement agreement signed pursuant to attorney's erroneous advice); *Ex Parte Jones*, 47 S.C. 393, 25 S.E. 285 (1896). Moreover,

> When a litigant voluntarily accepts an offer of settlement, either directly or indirectly through the duly authorized actions of his attorney, the integrity of the settlement cannot be attacked on the basis of inadequate representation by the litigant's attorney. In such cases, any remaining dispute is purely between the party and his attorney.

Shelton v. Bressant, 312 S.C. 183, 185, 439 S.E.2d 833, 834 (1993) (*quoting Petty v. The Timken Corp.*, 849 F.2d 130 at 133 (4th Cir. 1988)). The fact that they now may not like the terms of the Agreement is beside the point. "Having second thoughts about the results of a settlement agreement does not justify setting aside an otherwise valid agreement." *Crawford v. Nat'l Honorary Beta Club*, No. 7:14-CV-02970-GRA, 2015 WL 12806590, at *2 (D.S.C. Oct. 8, 2015) (*quoting Young v. F.D.I.C*, 103 F.3d 1180, 1195 (4th Cir. 1997)).

Plaintiffs' third hyper-technical argument is that K.A. Diehl is not a party to the Settlement Agreement, and the Plaintiffs did not agree to dismiss their claims against this Defendant with prejudice. In the Settlement Agreement, Plaintiffs covenanted to fully release

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

and forever discharge (and not to sue) the Defendants and their past and present "agents" from "any and all claims, demands, actions, charges, complaints, suits, administrative proceedings, debts, promises, contracts, grievances, and causes of action," whether known or unknown, through the date of the Settlement Agreement. (Motion to Approve, Exhibit A at ¶ 4.) K.A. Diehl, as the Defendants OFS and MBR's property manager and agent, was clearly a released party pursuant to this language. Moreover, the Plaintiffs agreed, without any conditions or limitations, to "file a stipulation of dismissal with prejudice in each of the Settled Actions" within 15 days of receipt of payment of the settlement funds. (*Id.* at ¶ 5.)

"When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense." *C.A.N. Enterprises, Inc. v. S.C. Health & Human Servs. Fin. Com.*, 296 S.C. 373, 377, 373 S.E.2d 584 (1998) (*citing Warner v. Weader*, 280 S.C. 81, 83, 311 S.E. (2d) 78, 79 (1983)). The clear, explicit, and unambiguous terms of the Settlement Agreement releases K.A. Diehl of all claims, and further, requires the Plaintiffs to dismiss their claims asserted in the Actions against all defendants, including K.A. Diehl, upon payment received.

"Common sense and good faith, the leading touchstones of construction of the provisions of a contract", dictate that the parties intended the dismissal with prejudice to be as to all claims asserted in the cases. *C.A.N. Enterprises, Inc.*, 296 S.C. at 377 (citing *Farr v. Duke Power Co.*, 265 S.C. 356, 360, 218 S.E.2d 431, 434 (1975)). To read the Settlement Agreement in any other manner would lead to the "unusual and extraordinary" conclusion that Defendants OFS and MBR would agree to the Plaintiffs releasing them without releasing the claims pending against their agent, exposing Defendants OFS and MBR to arguments that they should indemnify their agent. *Id.* Instead, the Court must employ the "reasonable, fair, and just" construction of the

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Settlement Agreement that all parties intended the "dismissal with prejudice" language to apply to all claims pending in the case, including the claims against K.A. Diehl.

As discussed above, Plaintiffs' Memorandum relies on pre-2009 cases, which are inapplicable to the 2009 amendment to SCRCP Rule 43(k). The Court should find post-2009 cases more instructive. For example, in *Byrd v. Livingston*, the three parties to litigation attended mediation, which resulted in all three parties signing an agreement in principle. 398 S.C. 237, 240, 727 S.E.2d 620, 621 (Ct. App. 2012). The agreement in principle contemplated a more formal and detailed settlement agreement would supplant the agreement in principle. *Id.* However, the second settlement agreement was never signed. *Id.* The defendants filed a motion to enforce the agreement in principle. *Id.* The trial court found the agreement in principle enforceable against the plaintiff and the court of appeals affirmed. *Id.* Importantly, the court analyzed whether the agreement was enforceable by applying contractual principles, making no mention of Rule 43(k). *Id.* at 243.

B. <u>Plaintiffs' Argument Ignores Well-Settled Contract Principles</u>

To hold that SCRCP Rule 43(k) prevents the enforcement of the Settlement Agreement would be inconsistent with the general contractual nature of settlements. *See Nichols Holding*, 416 S.C. at 335, 785 S.E.2d at 617 ("In South Carolina jurisprudence, settlement agreements are viewed as contracts." (*citing Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009))). Parties such as Defendants that proceed with the costs, time, and effort associated with entering into a good faith mediation or settlement discussion must be allowed to settle their differences without the fear that the other party could simply later walk away because of a case of "cold feet" or "buyer's remorse." Ruling in Plaintiffs' favor would undermine the

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negotiation process and the sanctity of contracts, leading to an absurd result not contemplated by the legislature or the courts.

Judicial economy demands that a party be held to the terms of an agreement, unless the agreement is substantially unfair or there has been a material misrepresentation. *White v. Hewitt*, 86 S. C. 576, 68 S. E. 820 (1910). A ruling for Plaintiffs would lead to an unintended outcome, bogging-down the court system with unnecessary further litigation revolving around a party's abuse of SCRCP Rule 43(k) to rescind a valid settlement agreement after the fact. The Plaintiffs' advocated result would thwart the finality provided by settlement agreements, prolonging the litigation beyond what the parties intended.

SCRCP Rule 43(k)'s purpose is to keep courts *out* of disputes between *counsel* in the *trial* context, not to immerse courts in matters stemming from valid settlement agreements negotiated by, and ultimately reached between, the parties to a lawsuit. To rule in Plaintiffs favor would severely undermine the mediation process and actually inhibit parties from engaging in good faith settlement negotiations.

C. Plaintiffs' Argument Runs Afoul of the ADR Rules

The ADR Rules are not mere suggestions. They are rules duly promulgated by the South Carolina Supreme Court mandating the process of mediation in the state. The Rules require physical attendance of the individual parties at a mediation. ADR Rule 6(b). The rules contemplate that individuals may avoid physical attendance only if "agreed to by the mediator and all parties." *Id.* The rules do not place limits on such agreements, so parties are free to condition them on the absent party providing settlement authority to an agent.

The Rules further give the mediator authority over the proceedings, including the authority to declare an impasse. ADR Rules 7(a), 7(e). The Rules require that "[u]pon reaching

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

an agreement, the parties shall, before the adjournment of the mediation reduce the agreement to writing . . . ." ADR Rule 6(f). The mediator shall file with the clerk of court a "Proof of ADR on a form approved by the Supreme Court." ADR Rule 7(f). Such form requires the mediator to state whether parties were present and the outcome (whether the mediation resulted in full settlement, impasse, or otherwise).

In this case, the parties and mediator reached an agreement on the conditions of the absence of Plaintiffs Santos and Richardson from the mediation, as allowed by ADR Rule 6(d). The parties complied with the mediation process and Mediator Folkens has affirmed the successful outcome of the mediation. ADR Rule 7. In contending the Settlement Agreement is unenforceable, Plaintiffs make a mockery of the mediation process.

The ADR Rules contemplate the consequences to a party who violates the provisions of the rules. ADR Rule 10(b). If Plaintiffs persist in their position, it would appear their acts of evasion constitute a violation of the ADR rules. In such case, the ADR Rules permit the Chief Judge for Administrative Purposes to inquire regarding such possible violations. ADR Rule 8(b)(2).

Accordingly, pursuant to ADR Rule 8(b), Defendants ask the Court to direct a written inquiry from the Chief Judge for Administrative Purposes to the mediator in the case, Karl A. Folkens, Esq. of Florence, South Carolina, as suggested in Exhibit D hereto and incorporated by reference herein. If the Court deems appropriate, Defendants also ask the Court to conduct such other inquiries to the attorneys and other participants in the mediation to ascertain whether Plaintiffs' position constitutes a violation of the ADR Rules. Finally, Defendants ask the Court to permit further submissions regarding appropriate sanctions under ADR Rule 10(b).

D. <u>Conclusion</u>

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

For the reasons presented in this Reply and the underlying Motion to Approve, Defendants respectfully request that the Court enter an Order (1) preliminarily approving the attached Settlement Agreement; (2) approving the form and manner of the Settlement Notice; and (3) scheduling a Fairness Hearing to grant final approval of the Parties' Settlement Agreement.

Respectfully submitted this 7th day of August, 2017.

	s/Phillip A. Kilgore Phillip A. Kilgore (S.C. Bar No. 3449) Lucas J. Asper (S.C. Bar No. 77902) 300 North Main Street, Suite 500 Greenville, South Carolina 29601 864.271.1300 (telephone) 864.235.4754 (facsimile) phillip.kilgore@ogletreedeakins.com lucas.asper@ogletreedeakins.com Attorneys for Defendants The Myrtle Beach Resort Homeowners Association, Inc., Ocean Front Spa Horizontal Property Regime, Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ralph Jump, Ray Coghill and Ken Perkins. Henrietta U. Golding, Esq. Henrietta U. Golding, Esq. Alicia E. Thompson, Esq. McNair Law Firm, P.A. Post Office Box 336 Myrtle Beach, SC 29578-0336 (843) 444-1107 (telephone) (843) 444-4729 (facsimile) Attorneys for Defendant FirstService Residential South Carolina, Inc., formerly known as K.A. Diehl & Associates, Inc.

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EXHIBIT A
TO
REPLY IN SUPPORT OF DEFENDANTS' CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

02/10/2017 EMAIL FROM THOMPSON TO MEDIATOR

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From: Thompson, Alicia <AThompson@mcnair.net>
Sent: Friday, February 10, 2017 1:02 PM
To: Nell Folkens
Cc: Roberts, Kathy; Golding, Henrietta; Lax, Andrew; Chris Nickels; Preston Brittain; Bobby Buffington; Kilgore, Phillip; msmith@thompsonlaw.com; Brady, Donna; Roberts, Kathy; Golding, Henrietta; Miranda Byrnside; Falls, Charlene; Tenna Turman; Coggins, Robert E.; Christian Stegmaier
Subject: RE: FW: KADiehl

Hi Nell:

Please allow this email to confirm the mediation below on May 1, 2017 at 9:30 am at McNair's Myrtle Beach office. Can you please send out the confirmation letters? I have also copied all counsel so that they are aware that the date has been reserved.

Kathy Roberts, my assistant, will send you the pleadings in the 5 cases sometime within the next two weeks. My maternity leave begins sometime soon, so please contact her and Henri Golding for any further scheduling/administrative inquiries.

kroberts@mcnair.net
hgolding@mcnair.net

Thanks for your assistance.

Alicia

MCNAIR ATTORNEYS

Alicia E. Thompson
Shareholder
athompson@mcnair.net | 843 443 3058 Direct

McNair Law Firm, P.A.
Myrtle Beach Office Founders Centre, 2411 Oak Street | Suite 206 | Myrtle Beach, SC 29577
843 444 1107 Main | 843 946 5969 Fax
Mailing Post Office Box 336 | Myrtle Beach, SC 29578
VCard | Bio URL | Website

From: Nell Folkens [mailto:nell@folkenslaw.com]
Sent: Tuesday, February 07, 2017 11:50 AM
To: Thompson, Alicia <AThompson@mcnair.net>
Subject: Re: FW: KADiehl

GREAT!

Nell

Nell G. Folkens
Firm Manager/Paralegal
601 West Evans Street
P. O. Box 6139
Florence, SC 29502-6139
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On Tue, Feb 7, 2017 at 11:33 AM, Thompson, Alicia <AThompson@mcnair.net> wrote:

Thanks, Nell. I am waiting for all attorneys to confirm the date, but most have said that they are available. I will send you the time and location soon.

Alicia

Alicia E. Thompson
Shareholder
athompson@mcnair.net | 843 443 3058 Direct

McNair Law Firm, P.A.
Myrtle Beach Office Founders Centre, 2411 Oak Street | Suite 206 | Myrtle Beach, SC 29577
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From: Nell Folkens [mailto:nell@folkenslaw.com]
Sent: Monday, February 06, 2017 6:03 PM
To: Thompson, Alicia <AThompson@mcnair.net>
Cc: karl@folkenslaw.com; Brady, Donna <DBrady@mcnair.net>; Roberts, Kathy <KRoberts@mcnair.net>; Golding, Henrietta <HGolding@mcnair.net>
Subject: Re: FW: KADiehl

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

Alicia:

Thank you for your online request. Karl has no conflict. We have your hold in place for this date and time. I have received the full caption, docket number, list of attorneys. Just let me know location. I will then send out confirmation letters.

Also, if there are any special requests or concerns which I should bring to Karl's attention, please let us know.

We look forward to working with you.

Nell

Nell G. Folkens

Firm Manager/Paralegal

601 West Evans Street

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On Mon, Feb 6, 2017 at 5:18 PM, Thompson, Alicia <AThompson@mcnair.net> wrote:

Karl:

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Henri Golding and I represent KA Diehl in three actions, captions attached for your convenience. The firms for the parties are reflected on the certificates of service behind each of the captions. The parties have agreed to consolidate these three cases, along with two class actions brought by the plaintiffs in the derivative actions against the associations and directors, for mediation purposes (a total of five cases), and we hope to mediate in April or May with you as the mediator.

I see that you are open on May 1, 2017. Can you hold that date for us and run a conflicts check?

I am also happy to send the full pleadings if you need them to run the check, but they are voluminous.

Thanks,

Alicia Thompson

MCNAIR
ATTORNEYS

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EXHIBIT B
TO
REPLY IN SUPPORT OF DEFENDANTS' CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

03/26/2017 EMAIL FROM MEDIATOR TO COUNSEL

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

From: Karl Folkens <karl@folkenslaw.com>
Sent: Sunday, March 26, 2017 1:21 PM
To: Bobby Buffington; Christian Stegmaier; Henrietta Golding (HGolding@mcnair.net); Mike Smith; Kilgore, Phillip; Preston Brittain; cwn@cslaw.com; mhall@collinsandlacy.com; tommyb@brittainlawfirm.com
Cc: Alicia Thompson; Kathy Roberts
Subject: Mediation: K. A. Diehl and Associates, Inc. v. James Perkins, et al. - MA17-126
Attachments: Mediation Agreement and FAQ - 2016.pdf; Mediation Outline for Karl Folkens.doc

Dear Attorneys:

This letter will confirm that a mediation conference has been scheduled in the above-referenced case for **May 1, 2017,** beginning at **9:30 a.m.** at **McNair Law Firm, P.A., 2411 Oak Street, Suite 206, Myrtle Beach, SC.**

You will receive a separate "calendar invite" e-mail confirming this date and time.

Attached is a proposed agreement to mediate which I will present for signing at the mediation conference. I also attach FAQ—Frequently Asked Questions. Please feel free to distribute these to your client.

My fee for mediation is $400.00 per hour which will be evenly divided by the parties, unless otherwise agreed upon ahead of time.

Please send me copies of the Complaint, Answer, any Counterclaim and any additional information you would like for me to review. Also, please let opposing counsel and me know who will be present with you at the mediation.

I strongly urge you to have all persons necessary to effect a full and complete settlement attend the mediation session. For the purposes of an insurance company, I take the term "full authority" to mean a person with full policy limits authority or the authority up to the Plaintiff's last written demand, whichever is less.

Consistent with both state and federal rules governing the mediation process, a chief administrative judge has ruled that the term "full authority" is the

> . . . ability, power, and freedom to make all decisions, including the ultimate decision to accept or reject a settlement proposal ***without having to make a phone call or get approval from someone who is not present at the conference***. When a proposal is made during the course of the mediation process, and the person present must get permission from someone not participating in the conference in order to respond to the proposal, then "full authority" is lacking. [Emphasis added.]

For the purposes of an individual, non-corporate party, I take the term "full authority" to mean the personal attendance of anyone in addition to the named party who would be necessary to consult in order to make a final decision, such as a spouse or other significant person.

If this will not occur, please let opposing counsel and me know immediately so that we may address this issue. As you know, the likelihood of success increases exponentially if everyone with full settlement authority participates in the mediation session. Also, the applicable ADR rules require such persons to personally attend the mediation.

Thank you for the opportunity to serve as mediator, and please do not hesitate to contact us if you have any questions about this mediation. For questions about scheduling, please contact my mediation coordinator, Nell Folkens, whose e-mail address is also set forth above.

Finally, we now offer a convenient on-line calendar-availability system on our website. To schedule your next ADR event, please consider using this calendar at www.folkenslaw.com/mediation.html.

Yours very truly,

Karl

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AGREEMENT TO MEDIATE

The undersigned parties and their attorneys hereby agree that the above matter shall be submitted to mediation pursuant to the applicable rules, guidelines, and Order of the Court having jurisdiction over this matter. They acknowledge that they have reviewed Mr. Folkens' *Frequently Asked Questions*, and further agree that:

1. All statements made during the course of mediation are confidential and privileged, are made without prejudice to any party's legal position, and are non-discoverable and inadmissible for any purpose in any legal proceeding.

2. The confidential and privileged character of any information is not altered by disclosure to the mediator. Disclosure of any records, reports, or other documents received or prepared by the mediator cannot be compelled. The mediator shall not be compelled to disclose or to testify in any proceeding about (i) any records, reports, or other documents received or prepared by the mediator or (ii) information disclosed or representations made in the course of the mediation or otherwise communicated to the mediator in confidence.

3. Evidence of anything said or any admission made in the course of mediation is not admissible in evidence, and disclosure of any such evidence shall not be compelled in any civil action in which, pursuant to law, testimony can be compelled to be given.

4. Unless a document provides otherwise, no document prepared for the purpose of, or in the course of, or pursuant to, the mediation, or copy thereof, is admissible in evidence, and disclosure of any such document shall not be compelled in any civil action in which pursuant to law, testimony can be compelled to be given.

5. Nothing in this Agreement to Mediate shall limit the admissibility of any particular evidence if all persons who conducted or otherwise participated in the mediation consent to its disclosure.

6. The parties understand that the mediator does not represent any party, and does not provide legal or financial advice. Parties not represented by counsel are urged to seek legal advice from an attorney and to obtain financial advice as needed from qualified professionals. The parties agree that the mediator shall have no liability for any act or omission in connection with the mediation.

7. Each party and the respective attorney is jointly and severally responsible for that party's proportionate share of the costs of mediation.

Dated and signed before commencement of the mediation by each of the persons whose signatures appear below.

_____	_____
Plaintiff	Defendant or Representative
_____	_____
Attorney for Plaintiff	Attorney for Defendant
_____	_____
_____	_____

(If there are more parties or attorneys participating in the mediation than provided for in the space above, they may sign below or on an additional page which shall be attached to this agreement.)

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

FREQUENTLY ASKED QUESTIONS

Karl A. Folkens, Mediator

- *What can I expect at the mediation?*

  - Usually, the mediation process begins with a "general session" during which all sides are given an opportunity to fully present their views of the case. After everyone has had an opportunity to be heard, the decision is then made as to how best to proceed depending upon the issues to be resolved. Sometimes the group continues meeting as a whole. At other times, "break-out" sessions are held in private with one or more sides.

  - Communications during a mediation settlement conference are privileged and confidential. To that end, the Rules require that the parties and any other person present shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any oral or written communications having occurred in a mediation proceeding, including, but not limited to:

    - (1) Views expressed or suggestions made by another party or any other person present with respect to a possible settlement of the dispute;

    - (2) Admissions made in the course of the mediation proceeding by another party or any other person present;

    - (3) Proposals made or views expressed by the mediator;

    - (4) The fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator; or

    - (5) All records, reports or other documents created solely for use in the mediation.

  - This rule does not prohibit:

    - (1) Disclosures as may be stipulated by all parties;

    - (2) A report to or an inquiry from the Chief Judge for Administrative Purposes regarding a possible violation of these rules;

    - (3) The mediator or participants from responding to an appropriate request for information duly made by persons authorized by the court to monitor or evaluate the ADR program;

    - (4) Threats of harm or attempts to inflict physical harm made during the mediation sessions; and

- (5) Any disclosures required by law or a professional code of ethics.

- If during a break-out session you share confidential information with me that you do not want me to share with the other side, please tell me it is confidential, and I will honor and protect that confidence.

- If a settlement is reached, usually the basic terms of the settlement are reduced to writing at the conclusion of the mediation and signed by the parties. This settlement, once signed by the parties and attorneys, will no longer be subject to the confidentiality provisions of the mediation and will be binding under Rule 43(k), SCRCP, unless specifically set forth in the written settlement agreement.

- Mediation is different from other forms of conflict resolution, such as arbitration or early neutral evaluation. One key difference is that any agreement must be reached by mutual consent of the parties. The mediation conference is not a trial; the mediator is not a judge, jury or arbitrator; and the parties retain the right to trial if they do not reach a settlement.

- Conduct and statements made during mediation are inadmissible as evidence in any arbitral, judicial or other proceeding, except as set forth above.

- *What can I do to prepare for the mediation?*

  - Mediation sessions can be emotional, fatiguing or frustrating as we go about trying to resolve the case. Be prepared: Get a good night's sleep. Eat breakfast. Keep outside irritations to a minimum. Turn off your cell phone and pager while we're working.

  - A lawyer hoping to receive a monetary settlement should bring the firm's federal identification number and correct legal name to the mediation. I will provide a blank W-9 form for you which may expedite the issuance of settlement funds.

  - You should talk with everyone coming with you ahead of the mediation about what you hope to accomplish in the mediation and what will be discussed in the opening session. Discuss what information should be obtained prior to the mediation to ensure a meaningful mediation occurs. Agree to keep an open mind throughout the mediation.

  - We have an outside smoking area on the east side of our building. Please dispose of cigarette butts in the wall-mounted receptacle.

- *What set-up do you have at your law firm for making presentations?*

  - Our main conference room has 60" and 46" flat panel televisions. We removed our SmartBoard from the main conference room, as we are encouraging the use of monitors rather than projectors for presentations.

  - Bring your PowerPoint or Keynote presentation on a flash drive, and I will transfer it onto my Apple MacBook Air to play wirelessly through AirPlay). Or, you can e-mail the presentation to me, or send a Dropbox link. If you prefer to use your

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

own computer and do not have an HDMI port on it, let me know so I can have the right adapter ready for you. If you want to present on an iPad or MacBook, we're fully AirPlay capable.

- We are also equipped for wireless presentations using your iPad. TrialPad, the new app for courtroom and mediation document presentations, is ideal for making wireless presentations through AirPlay and Apple TV. I will give you a short demonstration if you're not familiar with this arrangement.

- *What should be provided to you prior to the mediation?*

  - Please send me copies of the pleadings, including the Complaint, Answer, and any Counterclaims. Also, the attorneys are sent a sample outline for providing me with basic information about the case. You may send any additional information you believe would assist me in understanding the case and your position, such as a confidential mediation statements in your own format with exhibits, summary judgment motions and memoranda, and the like. I am sending you a mediation information outline which you may or may not want to use. It is in Word® format if you would like to simply type in your responses and forward it to me. Or, you could incorporate the information into your own report format.

  - If you send me additional information, decide whether to share that information with the other side. I usually recommend that you copy the other side with such information since, after all, the goal is to convince the other side to settle the case rather than to convince me of anything! However, I realize that there may be times you want to share confidential information with me before the mediation in which case please note on your communication with me that it is confidential and not shared with the other side.

  - Let opposing counsel and me know who will be present with you at the mediation. If it is someone other than a party, please provide the person's title or relationship to the party.

  - Let my mediation coordinators know if a pre-mediation conference call would be beneficial. Telephone conferences, either alone with me or with others, can be scheduled at a mutually convenient time.

- *Who should attend the mediation?*

  - EVERYONE necessary for your side to effect a full and complete settlement should attend the mediation session. This should include everyone with "full authority" to settle the case.

    - For the purposes of an insurance company, I take the term "full authority" to mean a person with full policy limits authority or the authority up to the Plaintiff's last written demand, whichever is less, without being required to consult someone not in attendance.

    - For the purposes of an individual party not relying solely upon the payment by an insurance company to resolve the case, I take the term

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

"full authority" to mean the personal attendance of anyone in addition to the named party who would be necessary to consult in order to make a final decision, such as a spouse, business partner, or other significant person.

- Consistent with both state and federal rules governing the mediation process, a chief administrative judge has ruled that the term "full authority" is the

  > . . . ability, power, and freedom to make all decisions, including the ultimate decision to accept or reject a settlement proposal without having to make a phone call or get approval from someone who is not present at the conference. When a proposal is made during the course of the mediation process, and the person present must get permission from someone not participating in the conference in order to respond to the proposal, then "full authority" is lacking.

- If this will not occur, please let opposing counsel and me know immediately so that we may address this issue.

o The likelihood of success increases exponentially if everyone with full settlement authority participates in the mediation session. ***I cannot stress enough the importance to have everyone with full authority personally attend the mediation***.

- In many cases, the failure for someone with such authority to personally attend may be a violation of the court rules or a judge's standing Order applicable to your case.

- More importantly, I become much less effective in assisting you in settling your case if everyone is not personally in attendance. In such cases, the mediation simply becomes a journey in finding out what limited authority exists rather than exploring all possible avenues to get the case settled.

• *What is the cost of mediation*?

o I currently charge $400.00 per hour. This includes time reviewing submissions by the parties, conducting the mediation, following up with the attorneys, and preparing any reports which need to be filed with the court.

o If the mediation is scheduled outside of the Florence area, I charge $220.00 per hour travel time and mileage at the IRS mileage reimbursement rate.

o To expedite delivery of the bill, Nell e-mails the bill shortly after the session concludes to the primary attorney representing each side. By e-mailing the bill, an attorney can more easily forward the bill to the person responsible for payment. If you want someone other than the attorney, or in addition to the attorney, initially receiving the bill, let us know at the outset.

o NOTE: ***The bill you receive will be your net share of the entire mediation***

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

cost. The rate has already been divided in accordance with the following section. Please send back one copy of the bill e-mailed to you to ensure that you receive proper credit for your payment.

- If you would prefer a hard-copy of the bill mailed to you, let us know at the conclusion of the mediation session.

- *How is the cost of mediation divided?*
  - Unless otherwise agreed to by the parties, the cost is divided equally among the parties to the action. In some cases, certain groupings of parties represented by the same attorney will be treated as one for mediation cost purposes. If you anticipate any issues concerning the division of the mediation costs, *please* bring them to my attention as soon as you become aware of them.
  - Most courts and judges consider mediation costs to be similar to deposition costs and treat non-payment of such costs in a similar manner.

- *Do you charge a cancellation fee?*
  - Although many mediators charge cancellation fees, I currently do not, but I do charge for review and preparation time prior to notice of cancellation. I realize that cases often settle on the eve of mediation, and I encourage such discussions. I also realize that litigators are often called to a court which has priority to mediation and the mediation will need to be rescheduled. I do not penalize the parties for such cancellations; however, I ask that you let me know as soon as possible if there is a good likelihood the mediation session will be cancelled or postponed.
  - Likewise, as a mediator who is also an active litigator, I may be called to court which may necessitate rescheduling the mediation. This rarely occurs, especially in light of Rule 601, SCACR.

- *Ok, so what is Rule 601, SCACR, and how does it affect the mediation?*
  - RULE 601 deals with conflicts in hearing dates when an attorney is called to appear simultaneously in two or more "tribunals." Recognizing the importance of mediation and other forms of alternative dispute resolution, the South Carolina Supreme Court includes mediation in the list of tribunals.
    - The Rule also provides: "When a party or his counsel is in the process of a hearing or trial before a tribunal, he may not be required to appear in another tribunal having greater priority unless the tribunal with less priority grants a recess or continuance for that purpose."
  - Attorneys should work closely with judges and mediators to avoid scheduling conflicts. Simply because a matter may get scheduled later in the day after a mediation has been scheduled is not grounds to immediately seek a rescheduling of the mediation. Of course, the circumstances of each conflict should be examined and everyone involved should work cooperatively and timely to deal with such conflicts.

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

- If you anticipate a court-related scheduling conflict which may interfere with an already scheduled mediation, I can contact judges, clerks of court or the federal ADR Program Director on your behalf to assist with resolving such conflicts.

- *Where can I get directions to your office?*
  - Go to our firm's website at www.folkenslaw.com and click on the "Directions" tab for specific information and an interactive map. Our office is in downtown Florence, one block west of the McMillan Federal Building, at 601 West Evans Street.
  - Many popular GPS units, including Garmins, for some strange reason don't recognize West Evans Street as a main thoroughfare, which it is. Once you're on West Evans St., resist directions to turn off of West Evans!

- *What is your "meal" policy?*
  - I have found it best, except in rare circumstances, to work non-stop during the mediation session. If lunch (or dinner) will need to be served, we order from a local restaurant and the food is delivered to us.
  - If you have any special dietary needs, please let me know them beforehand, and every effort will be made to accommodate special requests.
  - The cost of the meal is added to the total mediation cost. If this is not acceptable to you, please let me know ahead of time so alternative arrangements can be made.
  - Refreshments, including soft drinks, juices, and bottled water, are available during the mediation. Wireless Internet access is available, and long distance calls may be made anywhere in the United States without charge. Please ask the staff if you have any special requests.

- *Are you willing to travel?*
  - Yes. I routinely travel outside of the Florence area to conduct alternative dispute resolution events. If parties, claims representatives and/or attorneys live primarily outside of the Florence area, it may be more cost effective to pay my reduced travel hourly rate and mileage for me to travel to you rather than having everyone travel to Florence. Explore this possibility with the other side if there might be cost savings to you.

- *When is the "best" time to conduct a mediation?*
  - Timing is everything in mediation! Some matters are best resolved through a mediation conducted early in the process, even before a lawsuit is filed. Others require a certain amount of discovery to be in a position to negotiate a final resolution. I urge you in all of your cases to discuss mediation and other forms of alternative dispute resolution as early as possible with the other side and agree upon when the ADR event will occur. In some cases, having an early ADR event

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

to agree upon what discovery will be undertaken before a full-blown session is held is beneficial.

- *What rules apply to mediation?*
  - The current South Carolina Circuit Court Alternative Dispute Resolution Rules can be found at www.sccourts.org/courtReg/
- *I am an attorney and not admitted in South Carolina. What special rules apply to me?*
  - The South Carolina Supreme Court recently adopted new rules affecting appearances by non-South Carolina lawyers in arbitration, mediation or other alternative dispute resolution proceedings in South Carolina. If you fall into this category, you *must* read Rule 404 of the South Carolina Appellate Court Rules. Rules 404(g) – (i) specifically state:

    (g) **Non-South Carolina Lawyers Appearing in an Arbitration, Mediation or Other Alternative Dispute Resolution Proceeding in South Carolina.** Pursuant to Rule 5.5(c)(3) of the Rules of Professional Conduct, Rule 407, SCACR, a lawyer admitted to practice law in another jurisdiction may perform legal services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's pre-existing representation of a client in a jurisdiction in which the lawyer is admitted to practice.

    (h) **Limitations on Provision of Legal Services Pursuant to Rule 5.5(c)(3).** A lawyer who is not admitted to practice in South Carolina who seeks to provide legal services pursuant to Rule 5.5(c)(3) in more than three matters in a calendar year shall be presumed to be providing legal services on a regular, not temporary, basis.

    (i) **Fee; Record of Provision of Legal Services Pursuant to Rule 5.5(c)(3)**. For each matter in which a lawyer seeks to provide legal services pursuant to Rule 5.5(c)(3), the lawyer shall file a verified statement with the South Carolina Supreme Court Office of Bar Admissions stating that the lawyer has not filed more than three statements pursuant to this rule in a 365-day period. The statement shall be accompanied by a $250 fee and shall be served on opposing counsel, if known. If opposing counsel is not known at the time the verified statement is filed, the statement shall be filed on opposing counsel within ten days of learning the identity of opposing counsel.

  - The Rules and required forms can be found at www.sccourts.org/courtReg/index.cfm

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

- If you fall into this category I will assume that you have fully complied with the Rules, submitted the required form and fee to the South Carolina Supreme Court's Office of Bar Admissions, and received permission to appear by the time of the mediation.

- *How can I make scheduling my next ADR event with you easier?*

  - I have been inducted into the National Academy of Distinguished neutrals. The Academy offers a convenient online calendar-availability system which is linked on our website. To schedule your next ADR event, please consider using this system at www.folkenslaw.com/mediation.html. Once you enter your information one time, your contact information will be automatically filled-in on your next visit to the site.

  - Many attorneys get the other side on the phone and jointly review the available slots on the online calendar, avoiding having to go back and forth in selecting a particular date.

- *I'm coming from out-of-town and plan to stay the evening before. What is the best, most convenient lodging to your office?*

  - We recommend the new Hotel Florence which is just a few blocks east of our office on the same street at 126 West Evans Street. This boutique hotel with competitive rates is made up of three of Florence's historical buildings downtown that have been renovated to create one space. The original building was built in 1891 and has been fully remodeled. Click here for more information: www.hotelflorencesc.com/

  - For special rates given to our clients and mediation participants, go to this link: www.ascendcollection.com/ires/en-US/html/ArrivalInfo?hotel=SC477&srp=LFOLKE&pu=no

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

MEDIATION OUTLINE FOR KARL FOLKENS

1. What is the case about?

2. What are the contested issues?

3. What is the present posture of the case?

4. What have been the settlement efforts to date?

5. What are your case strengths and weaknesses?

6. Who will be attending with you?

7. Does anyone attending with you need any special accommodations?

8. Are there any sensitive issues or other concerns?

9. If you want your share of the mediation bill emailed to someone else, such as paralegal, bookkeeper or claims representative, what is the person's name and email address?

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

EXHIBIT C
TO
REPLY IN SUPPORT OF DEFENDANTS' CONSOLIDATED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

AMENDED PROOF OF MEDIATION

ELECTRONICALLY FILED - 2017 Aug 07 4:05 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744