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 III

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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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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.	)	

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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.	)	

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")?

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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.

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

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

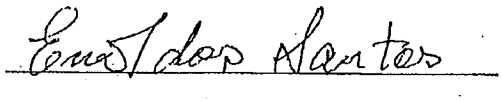
Nancy Moore

William Moore

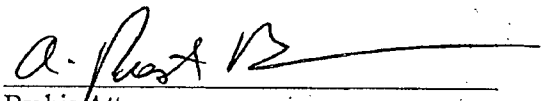
Steven Dame

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Errol Dos Santos



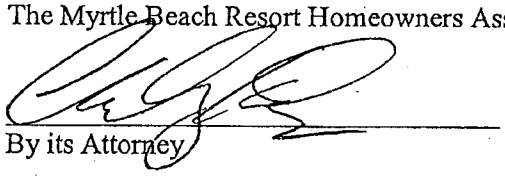
Jeffrey Richardson



By his Attorney

Defendants

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



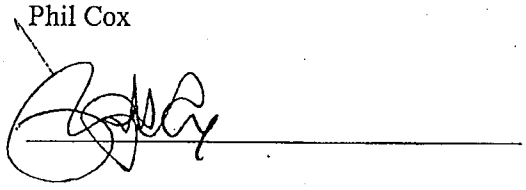
By its Attorney

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

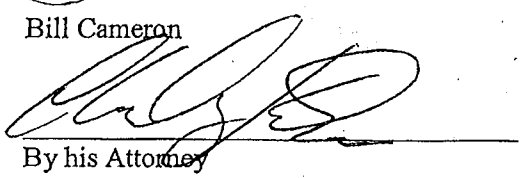


By its Attorney

Phil Cox

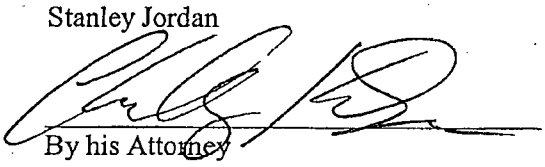


Bill Cameron



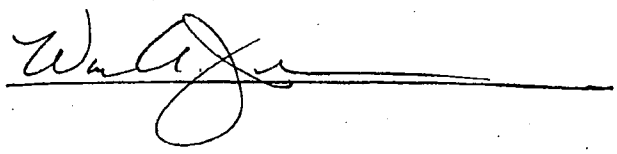
By his Attorney

Stanley Jordan



By his Attorney

Walter Jordan

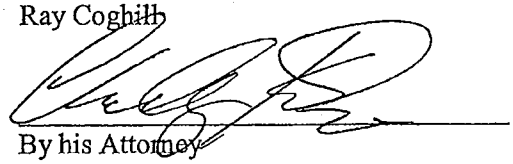


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Ken Perkins

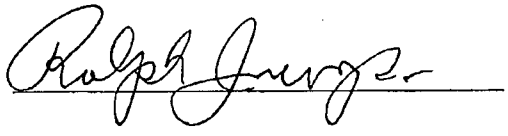


Ray Coghill

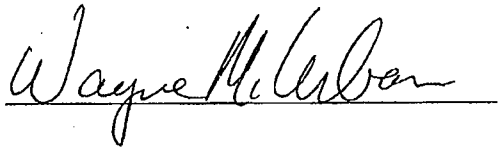


By his Attorney

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 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:

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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ELECTRONICALLY FILED - 2017 Aug 15 2:30 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' AMENDED/SUPPLEMENTAL 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 when an agreement was presented to

[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.

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Plaintiffs for signature and ultimately signed by the following Plaintiffs: Colleen Franke a/k/a Colleen Franke Perkins, Nancy Moore, William Moore, Steven Dame, Jim Perkins, and Errol dos Santos.[2] Plaintiffs Mark dos Santos and Jeffrey Richardson did not sign the agreement. Counsel for Plaintiff signed "for" Mark dos Santos and Jeffrey Richardson. Defendant Ray Coghill did not sign the agreement, but it was signed by his counsel "for" him. Defendant KA Diehl and Associates, Inc., nor its successor company, First Services Residential, signed the agreement. 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. SCRCP, Rule 43(k).

"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). "The intent of Rule 43(k) is to require all agreements regarding pending litigation to either be announced in open court or to be reduced to a consent order or written stipulation and entered." *Ashfort Corp. v. Palmetto*

[2] Jim Perkins signed the agreement under the space indicated for his spouse's signature.

Construction Group, Inc., 318 S.C. 492, 458 S.E.2d 533, 535 (1995) clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 n.2 (2006). (43(k)'s terms are mandatory).

ARGUMENT

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

In considering a motion to compel settlement the Court must look to the agreement and consider the agreement pursuant to Rule 43(k) and our appellate Courts' interpretation of Rule 43(k). In this case, the agreement was put into a writing. The writing/agreement was not reduced to the form of a consent order or made in open court nor entered into the record, and therefore, the first two preconditions of Rule 43(k) have not been met. As a result, the agreement is only enforceable under Rule 43(k) if it satisfies the third pre-condition which requires a writing signed by the parties and their counsel. The agreement was reduced to a "*writing*", but is not "*signed by the parties and counsel*". Specifically, the settlement agreement was not signed by four parties, Mark dos Santos, Jeffrey Richardson, Ray Coghill or KA Diehl. Further, the settlement agreement was not signed by counsel, Preston Brittain, Philip Kilgore, or Alicia Thompson. In looking to the agreement and the rule there is only one conclusion: 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).

a. Rule 43(k) applies to agreements between counsel and parties.

Rule 43(k) applies to all agreements affecting pending litigation. *Ashfort Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533, 535 (1995) clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 n.2 (2006). (43(k)'s terms are mandatory). In *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, one of the parties argued that Rule 43(k) did not apply because the agreement was between the parties and "merely confirmed by the party's counsel". The Court

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rejected this agreement expanding Rule 43(k) to all agreements affecting pending litigation. The Court's ruling in *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, defeats Defendants' argument that Rule 43(k) doesn't apply.

b. Farnsworth renders any question of counsel's authority to bind clients irrelevant.

Defendants' maintain that Plaintiffs' counsel's signature binds Santos and Richardson and that therefore it was signed by the parties. 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 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 because it had not been entered into the record nor made a part of the Courts record. The Court 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 because the remaining conditions of Rule 43(k) had not been met. Pursuant to *Farnsworth*, counsels' authority to sign on behalf of or "for" their clients is irrelevant. The Rule 43(k) analysis assumes that lawyers are acting on behalf of clients, but still permits clients certain rights to rescind prior to the execution of required 43(k) formalities. Even if the Court skirted around *Farnsworth*, and created law that counsels signature for their clients was satisfactory, it still could not avoid the truth that KA Diehl did not sign the agreement.

c. "Substantial compliance" is not enough.

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Defendants take the position that Rule 43(k) has been "substantially complied with" and therefore the Court should ignore the requirements of Rule 43(k). Defendants' position has been argued and rejected by our appellate courts. 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. *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[3]. 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." *Galloway v. Regis*, 325 S.C. 541 (1997).

Our Courts have strictly enforced Rule 43(k), and while difficult, 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

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

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intrusions of attorney-client privileged matters, and keeps our Courts from being bogged-down with disputes of this nature. To enforce the agreement without fulfillment of the statutory requirements and against the opposition by Plaintiffs would controvert clear South Carolina law and therefore the Court must deny Defendants' motion.

II. *Plaintiffs present the more compelling case law.*

Defendants argue the court should not consider South Carolina case law regarding Rule 43(k) if those cases were decided prior to the 2009 amendment to Rule 43(k) which added a provision that an agreement reduced to "writing" is binding if signed by "the parties and their counsel". The "Note to 2009 Amendment" reads: the amendment to Rule 43(k) provides a settlement agreement is also binding if the agreement is reduced to writing and signed by the parties and their counsel". The Note specifically refers to settlement agreements and specifically requires proper signatures of parties and counsel.

The cases cited by Plaintiff: *Ashfort, Young, Buckley, Galloway*, require strict adherence to Rule 43(k). Defendants rely upon *Byrd v. Livingston*, 398 S.C. 237, 240 727 S.E.2d 620, 621 (Ct. App. 2012) as a "post-2009" application of rule 43(k), which is weak given that Rule 43(k) was not implicated or discussed in any way shape or form in *Byrd*. More troubling for Defendants, they fail to provide any case supporting their position on Rule 43(k) and the cases which they have provided chiefly involve contracts/agreements which were properly executed, and therefore not subject to Rule 43(k). They also provide cases considering settlement agreements in a context different than a motion to compel settlement. The Defendants lament has been heard by our Courts and though sympathized with, not accepted.

III. ADR Rules have not been violated and favor 43(k) non-enforcement

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Plaintiffs have not violated the ADR Rules or to the extent such a violation has occurred it was by all parties – not solely plaintiffs. Rule 6 of ADR requires physical attendance of the parties and the party's counsel of record. Rule 6 permits parties to forego attendance if agreed to by the parties and the mediator. Prior to the start of the mediation, it was known to all parties that Mr. Santos and Mr. Richardson would not be physically present.[4] Mr. Santos participated in the opening session via telephone conference. Furthermore, authority of counsel is not addressed in Rule 6, and has no place in the Courts determination.

ADR Rule 6 does address agreements for Circuit Court. See ADR Rule 6(f). ADR Rule 6(f) states that upon reaching an agreement, the parties shall "before the adjournment of the mediation, reduce the agreement to writing and sign along with their attorneys." ADR Rule 6(f). It was impossible for Plaintiffs Santos and Richardson to abide by this rule as they were not present. KA Diehl, however, could have signed the agreement and failed to. Furthermore, the agreement has not been signed by any lawyer, despite that ADR Rule 6(f) (like Rule 43(k)) requires signature of counsel.[5]

Both Rule 43(k) and ADR Rule 6 envision that agreements affecting pending litigation will have certain protective measures to include the signatures of all parties and counsel. Had Plaintiffs' counsel been asked to sign the agreement would he have? What were the conversations between Plaintiffs' counsel and his client? What were the conversations between the mediator and Plaintiffs? What were the conversations between the mediator and Plaintiffs' counsel? These are questions that violate the attorney-client privilege and the confidentiality/neutrality of the mediator

[4] Exhibit B attached is an email between counsel and Plaintiffs. In an abundance of caution, due to the attorney client privileged information, this attachment is left blank; however, the undersigned counsel will have available copies of the email for review at the hearing, when all Counsel agree and stipulate that they do not waive any attorney client privilege.

[5] Don't miss the irony of the wording of the amendment to Rule 43(k) being exactly the same as the wording in the ADR Rules which were also apparently under some consideration and amended on April 29, 2009.

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(ADR Rule 8). These questions should be avoided and our courts have done well to avoid these questions by requiring strict adherence to Rule 43(k).

IV. *Defendants' "contract principals" analysis is premature*

The Defendants seek the Court to consider the agreement under standard contract principals. The Court cannot do so at this stage. There may very well be a time for this analysis, but it is not at the Rule 43(k) enforceability stage. The greater question of "an agreement" would put the Court into a tailspin having it consider matters of fact which cannot be fully explored at this stage in the proceeding. The "contract principals" analysis would require Plaintiffs to assert and the Court to determine potential defenses such as "meeting of the minds," "statute of frauds," "prior breach," etc. This approach is improper given the *Farnsworth* ruling where the Court made it clear that Rule 43(k) applies even to admitted agreements. The analysis begins and ends with Rule 43(k).

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

August 15, 2017
Myrtle Beach, South Carolina

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EXHIBIT A

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

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.

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

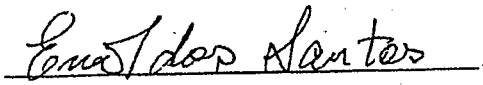
Nancy Moore

William Moore

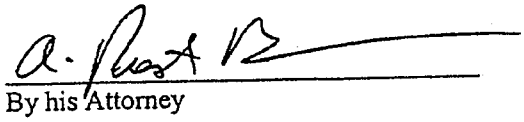
Steven Dame

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Errol Dos Santos



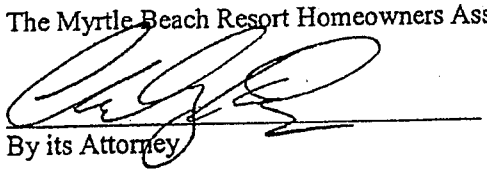
Jeffrey Richardson



By his Attorney

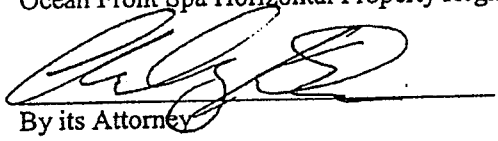
Defendants

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



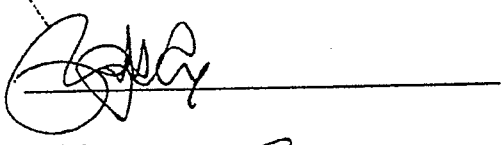
By its Attorney

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



By its Attorney

Phil Cox

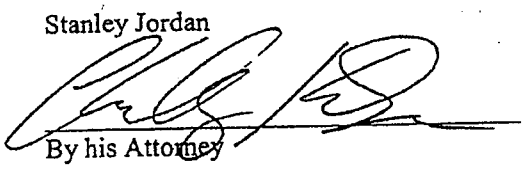


Bill Cameron



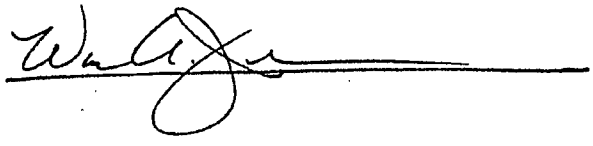
By his Attorney

Stanley Jordan



By his Attorney

Walter Jordan



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Ken Perkins

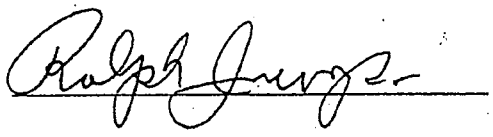


Ray Coghill

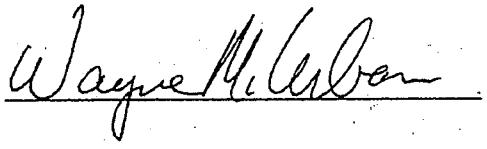


By his Attorney

Ralph Jump



Wayne Urban



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EXHIBIT B

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

EMAIL BETWEEN COUNSEL AND PLAINTIFFS

EMAIL TO BE PRODUCED

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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' AMENDED/SUPPLEMENTAL 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 when an agreement was presented to Plaintiffs for signature and ultimately signed by the following Plaintiffs: Colleen Franke a/k/a Colleen Franke Perkins, Nancy Moore, William Moore, Steven Dame, Jim Perkins, and Errol dos

[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.

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Santos.[2] Plaintiffs Mark dos Santos and Jeffrey Richardson did not sign the agreement. Counsel for Plaintiff signed "for" Mark dos Santos and Jeffrey Richardson. Defendant Ray Coghill did not sign the agreement, but it was signed by his counsel "for" him. Defendant KA Diehl and Associates, Inc., nor its successor company, First Services Residential, signed the agreement. 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. SCRCP, Rule 43(k).

"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). "The intent of Rule 43(k) is to require all agreements regarding pending litigation to either be announced in open court or to be reduced to a consent order or written stipulation and entered." *Ashfort Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533, 535 (1995) clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 n.2 (2006). (43(k)'s terms are mandatory).

[2] Jim Perkins signed the agreement under the space indicated for his spouse's signature.

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ARGUMENT

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

In considering a motion to compel settlement the Court must look to the agreement and consider the agreement pursuant to Rule 43(k) and our appellate Courts' interpretation of Rule 43(k). In this case, the agreement was put into a writing. The writing/agreement was not reduced to the form of a consent order or made in open court nor entered into the record, and therefore, the first two preconditions of Rule 43(k) have not been met. As a result, the agreement is only enforceable under Rule 43(k) if it satisfies the third pre-condition which requires a writing signed by the parties and their counsel. The agreement was reduced to a "*writing*", but is not "*signed by the parties and counsel*". Specifically, the settlement agreement was not signed by four parties, Mark dos Santos, Jeffrey Richardson, Ray Coghill or KA Diehl. Further, the settlement agreement was not signed by counsel, Preston Brittain, Philip Kilgore, or Alicia Thompson. In looking to the agreement and the rule there is only one conclusion: 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).

a. Rule 43(k) applies to agreements between counsel and parties.

Rule 43(k) applies to all agreements affecting pending litigation. *Ashfort Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533, 535 (1995) clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 n.2 (2006). (43(k)'s terms are mandatory). In *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, one of the parties argued that Rule 43(k) did not apply because the agreement was between the parties and "merely confirmed by the party's counsel". The Court rejected this agreement expanding Rule 43(k) to <u>all</u> agreements affecting pending litigation. The

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Court's ruling in *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, defeats Defendants' argument that Rule 43(k) doesn't apply.

b. Farnsworth renders any question of counsel's authority to bind clients irrelevant.

Defendants' maintain that Plaintiffs' counsel's signature binds Santos and Richardson and that therefore it was signed by the parties. 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 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 because it had not been entered into the record nor made a part of the Courts record. The Court 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 because the remaining conditions of Rule 43(k) had not been met. Pursuant to *Farnsworth*, counsels' authority to sign on behalf of or "for" their clients is irrelevant. The Rule 43(k) analysis assumes that lawyers are acting on behalf of clients, but still permits clients certain rights to rescind prior to the execution of required 43(k) formalities. Even if the Court skirted around *Farnsworth*, and created law that counsels signature for their clients was satisfactory, it still could not avoid the truth that KA Diehl did not sign the agreement.

c. "Substantial compliance" is not enough.

Defendants take the position that Rule 43(k) has been "substantially complied with" and therefore the Court should ignore the requirements of Rule 43(k). Defendants' position has been

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argued and rejected by our appellate courts. 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. *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[3]. 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." *Galloway v. Regis*, 325 S.C. 541 (1997).

Our Courts have strictly enforced Rule 43(k), and while difficult, 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 without fulfillment of the statutory

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

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requirements and against the opposition by Plaintiffs would controvert clear South Carolina law and therefore the Court must deny Defendants' motion.

II. *Plaintiffs present the more compelling case law.*

Defendants argue the court should not consider South Carolina case law regarding Rule 43(k) if those cases were decided prior to the 2009 amendment to Rule 43(k) which added a provision that an agreement reduced to "writing" is binding if signed by "the parties and their counsel". The "Note to 2009 Amendment" reads: the amendment to Rule 43(k) provides a settlement agreement is also binding if the agreement is reduced to writing and signed by the parties and their counsel". The Note specifically refers to settlement agreements and specifically requires proper signatures of parties and counsel.

The cases cited by Plaintiff: *Ashfort, Young, Buckley, Galloway*, require strict adherence to Rule 43(k). Defendants rely upon *Byrd v. Livingston*, 398 S.C. 237, 240 727 S.E.2d 620, 621 (Ct. App. 2012) as a "post-2009" application of rule 43(k), which is weak given that Rule 43(k) was not implicated or discussed in any way shape or form in *Byrd*. More troubling for Defendants, they fail to provide any case supporting their position on Rule 43(k) and the cases which they have provided chiefly involve contracts/agreements which were properly executed, and therefore not subject to Rule 43(k). They also provide cases considering settlement agreements in a context different than a motion to compel settlement. The Defendants lament has been heard by our Courts and though sympathized with, not accepted.

III. ADR Rules have not been violated and favor 43(k) non-enforcement

Plaintiffs have not violated the ADR Rules or to the extent such a violation has occurred it was by all parties – not solely plaintiffs. Rule 6 of ADR requires physical attendance of the parties and the party's counsel of record. Rule 6 permits parties to forego attendance if agreed to by the

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parties and the mediator. Prior to the start of the mediation, it was known to all parties that Mr. Santos and Mr. Richardson would not be physically present.[4] Mr. Santos participated in the opening session via telephone conference. Furthermore, authority of counsel is not addressed in Rule 6, and has no place in the Courts determination.

ADR Rule 6 does address agreements for Circuit Court. See ADR Rule 6(f). ADR Rule 6(f) states that upon reaching an agreement, the parties shall "before the adjournment of the mediation, reduce the agreement to writing and sign along with their attorneys." ADR Rule 6(f). It was impossible for Plaintiffs Santos and Richardson to abide by this rule as they were not present. KA Diehl, however, could have signed the agreement and failed to. Furthermore, the agreement has not been signed by any lawyer, despite that ADR Rule 6(f) (like Rule 43(k)) requires signature of counsel.[5]

Both Rule 43(k) and ADR Rule 6 envision that agreements affecting pending litigation will have certain protective measures to include the signatures of all parties and counsel. Had Plaintiffs' counsel been asked to sign the agreement would he have? What were the conversations between Plaintiffs' counsel and his client? What were the conversations between the mediator and Plaintiffs? What were the conversations between the mediator and Plaintiffs' counsel? These are questions that violate the attorney-client privilege and the confidentiality/neutrality of the mediator (ADR Rule 8). These questions should be avoided and our courts have done well to avoid these questions by requiring strict adherence to Rule 43(k).

IV. *Defendants' "contract principals" analysis is premature*

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[4] Exhibit B attached is an email between counsel and Plaintiffs. In an abundance of caution, due to the attorney client privileged information, this attachment is left blank; however, the undersigned counsel will have available copies of the email for review at the hearing, when all Counsel agree and stipulate that they do not waive any attorney client privilege.

[5] Don't miss the irony of the wording of the amendment to Rule 43(k) being exactly the same as the wording in the ADR Rules which were also apparently under some consideration and amended on April 29, 2009.

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The Defendants seek the Court to consider the agreement under standard contract principals. The Court cannot do so at this stage. There may very well be a time for this analysis, but it is not at the Rule 43(k) enforceability stage. The greater question of "an agreement" would put the Court into a tailspin having it consider matters of fact which cannot be fully explored at this stage in the proceeding. The "contract principals" analysis would require Plaintiffs to assert and the Court to determine potential defenses such as "meeting of the minds," "statute of frauds," "prior breach," etc. This approach is improper given the *Farnsworth* ruling where the Court made it clear that Rule 43(k) applies even to admitted agreements. The analysis begins and ends with Rule 43(k).

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

August 15, 2017
Myrtle Beach, South Carolina

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EXHIBIT A

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

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 a/k/a Colleen Franke Perkins

Mark Dos Santos

By his Attorney

Nancy Moore

William Moore

Steven Dame

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

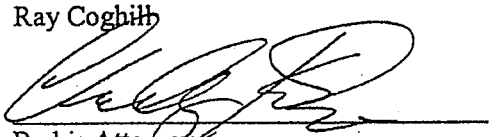
Walter Jordan

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Ken Perkins

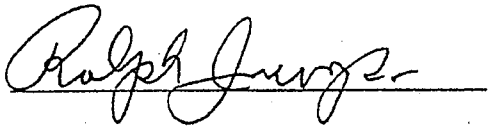


Ray Coghill



By his Attorney

Ralph Jump



Wayne Urban



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EMAIL BETWEEN COUNSEL AND PLAINTIFFS

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EMAIL TO BE PRODUCED

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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' AMENDED/SUPPLEMENTAL 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 when an agreement was presented to

[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.

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Plaintiffs for signature and ultimately signed by the following Plaintiffs: Colleen Franke a/k/a Colleen Franke Perkins, Nancy Moore, William Moore, Steven Dame, Jim Perkins, and Errol dos Santos.[2] Plaintiffs Mark dos Santos and Jeffrey Richardson did not sign the agreement. Counsel for Plaintiff signed "for" Mark dos Santos and Jeffrey Richardson. Defendant Ray Coghill did not sign the agreement, but it was signed by his counsel "for" him. Defendant KA Diehl and Associates, Inc., nor its successor company, First Services Residential, signed the agreement. 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. SCRCP, Rule 43(k).

"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). "The intent of Rule 43(k) is to require all agreements regarding pending litigation to either be announced in open court or to be

[2] Jim Perkins signed the agreement under the space indicated for his spouse's signature.

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reduced to a consent order or written stipulation and entered." *Ashfort Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533, 535 (1995) clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 n.2 (2006). (43(k)'s terms are mandatory).

ARGUMENT

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

In considering a motion to compel settlement the Court must look to the agreement and consider the agreement pursuant to Rule 43(k) and our appellate Courts' interpretation of Rule 43(k). In this case, the agreement was put into a writing. The writing/agreement was not reduced to the form of a consent order or made in open court nor entered into the record, and therefore, the first two preconditions of Rule 43(k) have not been met. As a result, the agreement is only enforceable under Rule 43(k) if it satisfies the third pre-condition which requires a writing signed by the parties and their counsel. The agreement was reduced to a "*writing*", but is not "*signed by the parties and counsel*". Specifically, the settlement agreement was not signed by four parties, Mark dos Santos, Jeffrey Richardson, Ray Coghill or KA Diehl. Further, the settlement agreement was not signed by counsel, Preston Brittain, Philip Kilgore, or Alicia Thompson. In looking to the agreement and the rule there is only one conclusion: 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).

a. Rule 43(k) applies to agreements between counsel and parties.

Rule 43(k) applies to all agreements affecting pending litigation. *Ashfort Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533, 535 (1995) clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 n.2 (2006). (43(k)'s terms are mandatory). In *Ashfort Corp. v.*

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Palmetto Constr. Group, Inc., one of the parties argued that Rule 43(k) did not apply because the agreement was between the parties and "merely confirmed by the party's counsel". The Court rejected this agreement expanding Rule 43(k) to all agreements affecting pending litigation. The Court's ruling in *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, defeats Defendants' argument that Rule 43(k) doesn't apply.

b. Farnsworth renders any question of counsel's authority to bind clients irrelevant.

Defendants' maintain that Plaintiffs' counsel's signature binds Santos and Richardson and that therefore it was signed by the parties. 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 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 because it had not been entered into the record nor made a part of the Courts record. The Court 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 because the remaining conditions of Rule 43(k) had not been met. Pursuant to *Farnsworth*, counsels' authority to sign on behalf of or "for" their clients is irrelevant. The Rule 43(k) analysis assumes that lawyers are acting on behalf of clients, but still permits clients certain rights to rescind prior to the execution of required 43(k) formalities. Even if the Court skirted around *Farnsworth*, and created law that counsels signature for their clients was satisfactory, it still could not avoid the truth that KA Diehl did not sign the agreement.

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c. "Substantial compliance" is not enough.

Defendants take the position that Rule 43(k) has been "substantially complied with" and therefore the Court should ignore the requirements of Rule 43(k). Defendants' position has been argued and rejected by our appellate courts. 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. *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[3]. 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." *Galloway v. Regis*, 325 S.C. 541 (1997).

Our Courts have strictly enforced Rule 43(k), and while difficult, its serves a very important purpose of keeping Courts out of disputes amongst counsel and parties as relates to

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

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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 without fulfillment of the statutory requirements and against the opposition by Plaintiffs would controvert clear South Carolina law and therefore the Court must deny Defendants' motion.

II. *Plaintiffs present the more compelling case law.*

Defendants argue the court should not consider South Carolina case law regarding Rule 43(k) if those cases were decided prior to the 2009 amendment to Rule 43(k) which added a provision that an agreement reduced to "writing" is binding if signed by "the parties and their counsel". The "Note to 2009 Amendment" reads: the amendment to Rule 43(k) provides a settlement agreement is also binding if the agreement is reduced to writing and signed by the parties and their counsel". The Note specifically refers to settlement agreements and specifically requires proper signatures of parties and counsel.

The cases cited by Plaintiff: *Ashfort, Young, Buckley, Galloway*, require strict adherence to Rule 43(k). Defendants rely upon *Byrd v. Livingston*, 398 S.C. 237, 240 727 S.E.2d 620, 621 (Ct. App. 2012) as a "post-2009" application of rule 43(k), which is weak given that Rule 43(k) was not implicated or discussed in any way shape or form in *Byrd*. More troubling for Defendants, they fail to provide any case supporting their position on Rule 43(k) and the cases which they have provided chiefly involve contracts/agreements which were properly executed, and therefore not subject to Rule 43(k). They also provide cases considering settlement agreements in a context different than a motion to compel settlement. The Defendants lament has been heard by our Courts and though sympathized with, not accepted.

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III. ADR Rules have not been violated and favor 43(k) non-enforcement

Plaintiffs have not violated the ADR Rules or to the extent such a violation has occurred it was by all parties – not solely plaintiffs. Rule 6 of ADR requires physical attendance of the parties and the party's counsel of record. Rule 6 permits parties to forego attendance if agreed to by the parties and the mediator. Prior to the start of the mediation, it was known to all parties that Mr. Santos and Mr. Richardson would not be physically present.[4] Mr. Santos participated in the opening session via telephone conference. Furthermore, authority of counsel is not addressed in Rule 6, and has no place in the Courts determination.

ADR Rule 6 does address agreements for Circuit Court. See ADR Rule 6(f). ADR Rule 6(f) states that upon reaching an agreement, the parties shall "before the adjournment of the mediation, reduce the agreement to writing and sign along with their attorneys." ADR Rule 6(f). It was impossible for Plaintiffs Santos and Richardson to abide by this rule as they were not present. KA Diehl, however, could have signed the agreement and failed to. Furthermore, the agreement has not been signed by any lawyer, despite that ADR Rule 6(f) (like Rule 43(k)) requires signature of counsel.[5]

Both Rule 43(k) and ADR Rule 6 envision that agreements affecting pending litigation will have certain protective measures to include the signatures of all parties and counsel. Had Plaintiffs' counsel been asked to sign the agreement would he have? What were the conversations between Plaintiffs' counsel and his client? What were the conversations between the mediator and

[4] Exhibit B attached is an email between counsel and Plaintiffs. In an abundance of caution, due to the attorney client privileged information, this attachment is left blank; however, the undersigned counsel will have available copies of the email for review at the hearing, when all Counsel agree and stipulate that they do not waive any attorney client privilege.

[5] Don't miss the irony of the wording of the amendment to Rule 43(k) being exactly the same as the wording in the ADR Rules which were also apparently under some consideration and amended on April 29, 2009.

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Plaintiffs? What were the conversations between the mediator and Plaintiffs' counsel? These are questions that violate the attorney-client privilege and the confidentiality/neutrality of the mediator (ADR Rule 8). These questions should be avoided and our courts have done well to avoid these questions by requiring strict adherence to Rule 43(k).

IV. *Defendants' "contract principals" analysis is premature*

The Defendants seek the Court to consider the agreement under standard contract principals. The Court cannot do so at this stage. There may very well be a time for this analysis, but it is not at the Rule 43(k) enforceability stage. The greater question of "an agreement" would put the Court into a tailspin having it consider matters of fact which cannot be fully explored at this stage in the proceeding. The "contract principals" analysis would require Plaintiffs to assert and the Court to determine potential defenses such as "meeting of the minds," "statute of frauds," "prior breach," etc. This approach is improper given the *Farnsworth* ruling where the Court made it clear that Rule 43(k) applies even to admitted agreements. The analysis begins and ends with Rule 43(k).

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

August 15, 2017
Myrtle Beach, South Carolina

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EXHIBIT A

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

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.

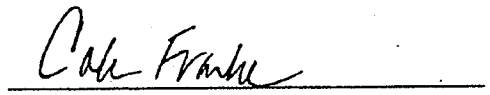
7. Plaintiffs agree that they will not make any statements, oral or written, which they know or reasonably should know to be a disparaging or negative comment about Defendants or their officers, directors, employees and agents, or otherwise detrimental to the reputation or goodwill of Defendants, and 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.

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.

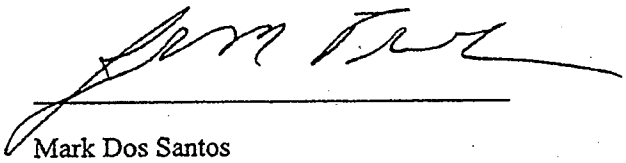
Agreed to this 1st Day of May, 2017.

Plaintiffs

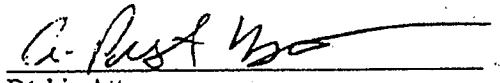
Jim Perkins



Colleen Franke a/k/a Colleen Franke Perkins

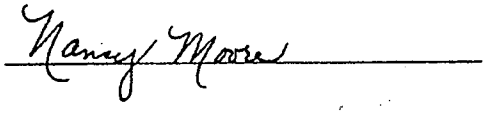


Mark Dos Santos

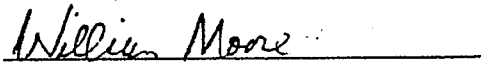


By his Attorney

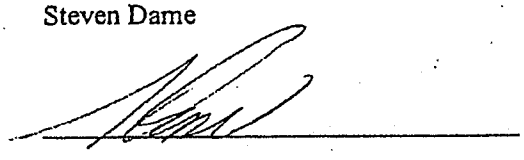
Nancy Moore



William Moore

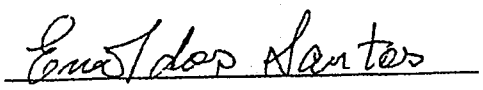


Steven Dame

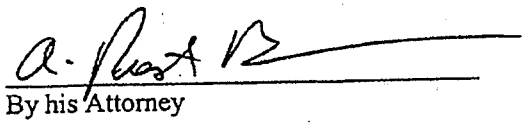


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Errol Dos Santos



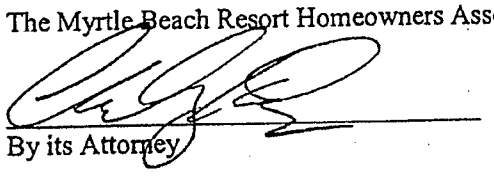
Jeffrey Richardson



By his Attorney

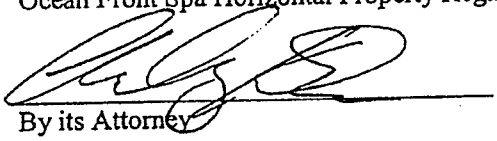
Defendants

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



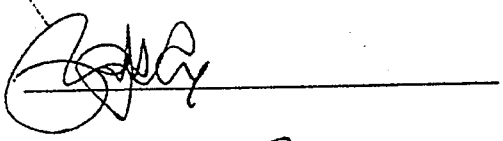
By its Attorney

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



By its Attorney

Phil Cox

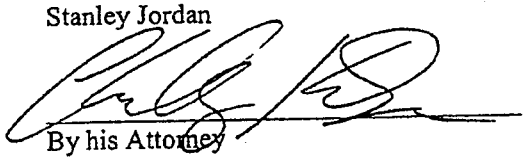


Bill Cameron



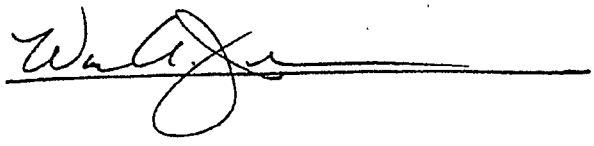
By his Attorney

Stanley Jordan



By his Attorney

Walter Jordan

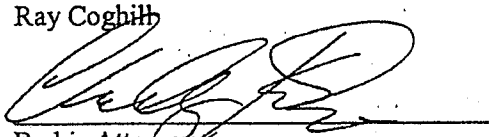


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Ken Perkins

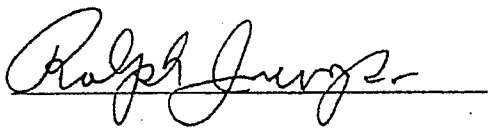


Ray Coghill

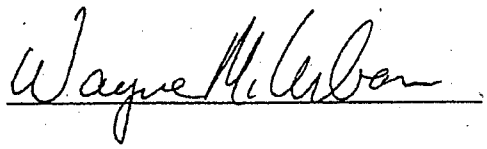


By his Attorney

Ralph Jump



Wayne Urban



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EXHIBIT B

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

EMAIL BETWEEN COUNSEL AND PLAINTIFFS

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EMAIL TO BE PRODUCED

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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' AMENDED/SUPPLEMENTAL 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

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adjusters.[1] Mediation concluded at roughly 11:45pm when an agreement was presented to Plaintiffs for signature and ultimately signed by the following Plaintiffs: Colleen Franke a/k/a Colleen Franke Perkins, Nancy Moore, William Moore, Steven Dame, Jim Perkins, and Errol dos Santos.[2] Plaintiffs Mark dos Santos and Jeffrey Richardson did not sign the agreement. Counsel for Plaintiff signed "for" Mark dos Santos and Jeffrey Richardson. Defendant Ray Coghill did not sign the agreement, but it was signed by his counsel "for" him. Defendant KA Diehl and Associates, Inc., nor its successor company, First Services Residential, signed the agreement. 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. SCRCP, Rule 43(k).

"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). "The intent of Rule 43(k) is to

[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.
[2] Jim Perkins signed the agreement under the space indicated for his spouse's signature.

require all agreements regarding pending litigation to either be announced in open court or to be reduced to a consent order or written stipulation and entered." *Ashfort Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533, 535 (1995) clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 n.2 (2006). (43(k)'s terms are mandatory).

ARGUMENT

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

In considering a motion to compel settlement the Court must look to the agreement and consider the agreement pursuant to Rule 43(k) and our appellate Courts' interpretation of Rule 43(k). In this case, the agreement was put into a writing. The writing/agreement was not reduced to the form of a consent order or made in open court nor entered into the record, and therefore, the first two preconditions of Rule 43(k) have not been met. As a result, the agreement is only enforceable under Rule 43(k) if it satisfies the third pre-condition which requires a writing signed by the parties and their counsel. The agreement was reduced to a "*writing*", but is not "*signed by the parties and counsel*". Specifically, the settlement agreement was not signed by four parties, Mark dos Santos, Jeffrey Richardson, Ray Coghill or KA Diehl. Further, the settlement agreement was not signed by counsel, Preston Brittain, Philip Kilgore, or Alicia Thompson. In looking to the agreement and the rule there is only one conclusion: 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).

a. Rule 43(k) applies to agreements between counsel and parties.

Rule 43(k) applies to all agreements affecting pending litigation. *Ashfort Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533, 535 (1995) clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 n.2 (2006). (43(k)'s terms are mandatory). In *Ashfort Corp. v.*

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Palmetto Constr. Group, Inc., one of the parties argued that Rule 43(k) did not apply because the agreement was between the parties and "merely confirmed by the party's counsel". The Court rejected this agreement expanding Rule 43(k) to all agreements affecting pending litigation. The Court's ruling in *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, defeats Defendants' argument that Rule 43(k) doesn't apply.

b. Farnsworth renders any question of counsel's authority to bind clients irrelevant.

Defendants' maintain that Plaintiffs' counsel's signature binds Santos and Richardson and that therefore it was signed by the parties. 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 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 because it had not been entered into the record nor made a part of the Courts record. The Court 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 because the remaining conditions of Rule 43(k) had not been met. Pursuant to *Farnsworth*, counsels' authority to sign on behalf of or "for" their clients is irrelevant. The Rule 43(k) analysis assumes that lawyers are acting on behalf of clients, but still permits clients certain rights to rescind prior to the execution of required 43(k) formalities. Even if the Court skirted around *Farnsworth*, and created law that counsels signature for their clients was satisfactory, it still could not avoid the truth that KA Diehl did not sign the agreement.

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c. *"Substantial compliance" is not enough.*

Defendants take the position that Rule 43(k) has been "substantially complied with" and therefore the Court should ignore the requirements of Rule 43(k). Defendants' position has been argued and rejected by our appellate courts. 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. *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[3]. 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." *Galloway v. Regis*, 325 S.C. 541 (1997).

Our Courts have strictly enforced Rule 43(k), and while difficult, its serves a very important purpose of keeping Courts out of disputes amongst counsel and parties as relates to

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

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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 without fulfillment of the statutory requirements and against the opposition by Plaintiffs would controvert clear South Carolina law and therefore the Court must deny Defendants' motion.

II. *Plaintiffs present the more compelling case law.*

Defendants argue the court should not consider South Carolina case law regarding Rule 43(k) if those cases were decided prior to the 2009 amendment to Rule 43(k) which added a provision that an agreement reduced to "writing" is binding if signed by "the parties and their counsel". The "Note to 2009 Amendment" reads: the amendment to Rule 43(k) provides a settlement agreement is also binding if the agreement is reduced to writing and signed by the parties and their counsel". The Note specifically refers to settlement agreements and specifically requires proper signatures of parties and counsel.

The cases cited by Plaintiff: *Ashfort, Young, Buckley, Galloway*, require strict adherence to Rule 43(k). Defendants rely upon *Byrd v. Livingston*, 398 S.C. 237, 240 727 S.E.2d 620, 621 (Ct. App. 2012) as a "post-2009" application of rule 43(k), which is weak given that Rule 43(k) was not implicated or discussed in any way shape or form in *Byrd*. More troubling for Defendants, they fail to provide any case supporting their position on Rule 43(k) and the cases which they have provided chiefly involve contracts/agreements which were properly executed, and therefore not subject to Rule 43(k). They also provide cases considering settlement agreements in a context different than a motion to compel settlement. The Defendants lament has been heard by our Courts and though sympathized with, not accepted.

III. ADR Rules have not been violated and favor 43(k) non-enforcement

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Plaintiffs have not violated the ADR Rules or to the extent such a violation has occurred it was by all parties – not solely plaintiffs. Rule 6 of ADR requires physical attendance of the parties and the party's counsel of record. Rule 6 permits parties to forego attendance if agreed to by the parties and the mediator. Prior to the start of the mediation, it was known to all parties that Mr. Santos and Mr. Richardson would not be physically present.[4] Mr. Santos participated in the opening session via telephone conference. Furthermore, authority of counsel is not addressed in Rule 6, and has no place in the Courts determination.

ADR Rule 6 does address agreements for Circuit Court. See ADR Rule 6(f). ADR Rule 6(f) states that upon reaching an agreement, the parties shall "before the adjournment of the mediation, reduce the agreement to writing and sign along with their attorneys." ADR Rule 6(f). It was impossible for Plaintiffs Santos and Richardson to abide by this rule as they were not present. KA Diehl, however, could have signed the agreement and failed to. Furthermore, the agreement has not been signed by any lawyer, despite that ADR Rule 6(f) (like Rule 43(k)) requires signature of counsel.[5]

Both Rule 43(k) and ADR Rule 6 envision that agreements affecting pending litigation will have certain protective measures to include the signatures of all parties and counsel. Had Plaintiffs' counsel been asked to sign the agreement would he have? What were the conversations between Plaintiffs' counsel and his client? What were the conversations between the mediator and Plaintiffs? What were the conversations between the mediator and Plaintiffs' counsel? These are questions that violate the attorney-client privilege and the confidentiality/neutrality of the mediator

[4] Exhibit B attached is an email between counsel and Plaintiffs. In an abundance of caution, due to the attorney client privileged information, this attachment is left blank; however, the undersigned counsel will have available copies of the email for review at the hearing, when all Counsel agree and stipulate that they do not waive any attorney client privilege.

[5] Don't miss the irony of the wording of the amendment to Rule 43(k) being exactly the same as the wording in the ADR Rules which were also apparently under some consideration and amended on April 29, 2009.

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(ADR Rule 8). These questions should be avoided and our courts have done well to avoid these questions by requiring strict adherence to Rule 43(k).

IV. *Defendants' "contract principals" analysis is premature*

The Defendants seek the Court to consider the agreement under standard contract principals. The Court cannot do so at this stage. There may very well be a time for this analysis, but it is not at the Rule 43(k) enforceability stage. The greater question of "an agreement" would put the Court into a tailspin having it consider matters of fact which cannot be fully explored at this stage in the proceeding. The "contract principals" analysis would require Plaintiffs to assert and the Court to determine potential defenses such as "meeting of the minds," "statute of frauds," "prior breach," etc. This approach is improper given the *Farnsworth* ruling where the Court made it clear that Rule 43(k) applies even to admitted agreements. The analysis begins and ends with Rule 43(k).

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

August 15, 2017
Myrtle Beach, South Carolina

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EXHIBIT A

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

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.

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.

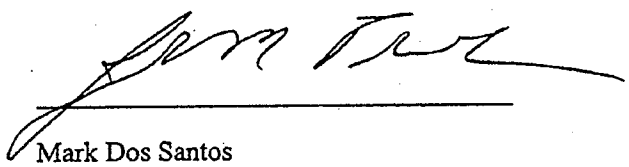
Agreed to this 1st Day of May, 2017.

Plaintiffs

Jim Perkins



Colleen Franke a/k/a Colleen Franke Perkins

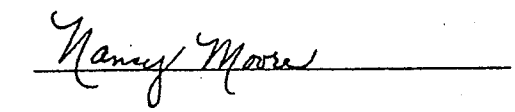


Mark Dos Santos

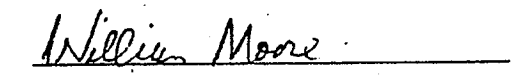


By his Attorney

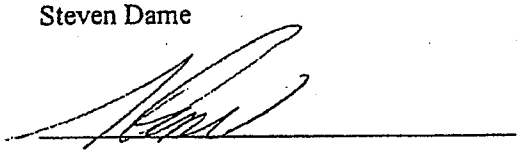
Nancy Moore



William Moore

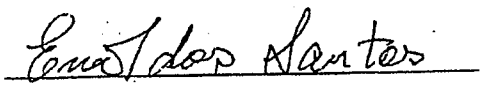


Steven Dame

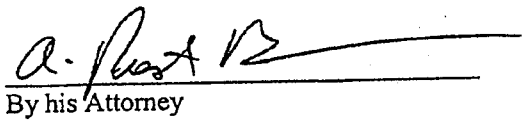


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Errol Dos Santos



Jeffrey Richardson



By his Attorney

Defendants

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



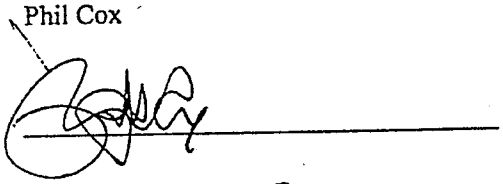
By its Attorney

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

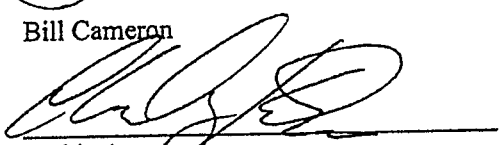


By its Attorney

Phil Cox

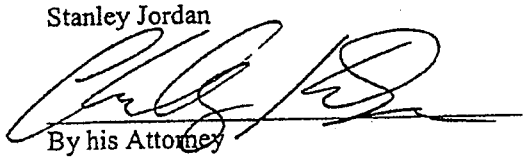


Bill Cameron



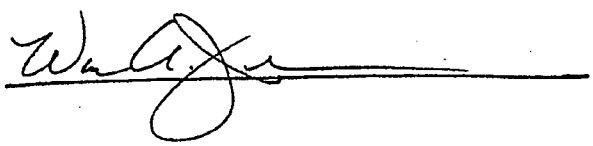
By his Attorney

Stanley Jordan



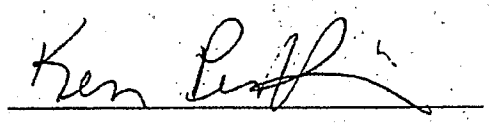
By his Attorney

Walter Jordan

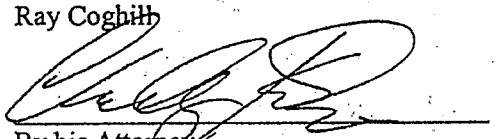


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Ken Perkins

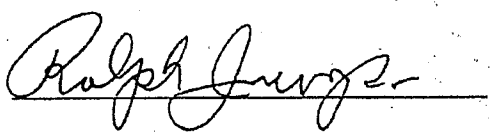


Ray Coghill

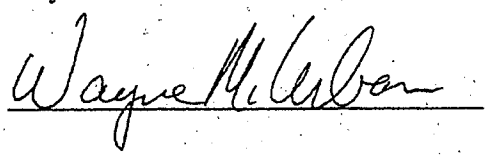


By his Attorney

Ralph Jump



Wayne Urban



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EXHIBIT B

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

EMAIL BETWEEN COUNSEL AND PLAINTIFFS

EMAIL TO BE PRODUCED

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ELECTRONICALLY FILED - 2017 Sep 29 5:12 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' MOTION TO RECONSIDER THE ORDER AND FINAL JUDGMENT**

TO: THIS HONORABLE COURT AND COUNSEL FOR THE NAMED DEFENDANTS:

Pursuant to Rule 59(e) and Rule 60(b)(2) of the South Carolina Rules of Civil Procedure, Plaintiffs 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, by and through their undersigned counsel, respectfully submit this Motion for Reconsideration of this Court's Order and Final Judgment entered on September 21, 2017, pursuant to the parties' proposed settlement agreement ("Proposed Settlement").

RULE/LAW

Reconsideration of the Order and Final Judgment should be granted for the following reasons, as further explained herein:

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I. *Court erred in ruling that Rule 43(k) doesn't apply to the settlement signed by some of the parties.*

The Court erred in ruling that Rule 43k doesn't apply to the partially executed settlement agreement. The Court reasoned that Rule 43(k) does not apply to the settlement agreement in issue because the purported settlement agreement is not "an agreement between counsel."

In *Ashfort* our Supreme Court considered a settlement agreement between an insurer and parties. The settlement agreement was not between counsel. Appellants argued Rule 43(k) did not apply to the agreement because it was not between counsel. The Court disagreed explaining that "[t]he intent of Rule 43(k) is to require all agreements regarding pending litigation to either be announced in open court or to be reduced to a consent order or written stipulation and entered." *Ashcroft Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533, 535 (1995) clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 n.2 (2006). (43(k)'s terms are mandatory). The Supreme Court also clarified that "in [their] opinion, Rule 43(k) is applicable to settlement agreements." *Ashcroft Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533, 535 (1995) clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 n.2 (2006). (43(k)'s terms are mandatory). According to our Supreme Court Rule 43(k) applies to settlement agreements including agreements that are not strictly between counsel.

Defendants have no precedent to support their position that *Ashcroft* or *Buckley* should be ignored. The Court apparently accepted Defendants' position that these cases are no longer authoritative because in those cases the Courts considered Rule 43(k) prior to the 2009 amendment to the rule. This argument is flawed. The 2009 Amendment to Rule 43(k) provides a third avenue for enforceability of agreements affecting pending litigation, *to wit*, a writing "signed by the parties and their counsel." SCRCP, Rule 43(k). In support of Plaintiffs' position, The Note to 2009

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Amendment states "a *settlement agreement* is also binding if the agreement is reduced to writing and signed by the parties and their counsel". SCRCP 43(k) Note to 2009 Amendment, (*emphasis added*). The Note to 2009 Amendment plainly states that the Rule applies to settlement agreements. Contrary to Defendants' position, this Amendment is in harmony with South Carolina case law (and ADR Rules). Rule 43(k) applies to the settlement agreement in issue because Rule 43(k) applies to all settlement agreements[1].

II. Court erred in its "alternative theory" of accepting Rule 43(k) and finding its conditions met.

The Court erred in determining that Rule 43(k), if applicable, was satisfied finding the settlement agreement was signed by the parties and their counsel. The settlement agreement itself is the only evidence the court needs to consider. KA Diehl is a party and did not sign the agreement. (The analysis could end there). Counsel for Plaintiffs signed the agreement "for Mark Santos and Jeff Richardson" but did not otherwise sign on their own behalf. (The analysis could end there). Counsel for Defendants signed the agreement "for Ray Coghill" but did not otherwise sign on their own behalf. (The analysis could end there). Counsel for KA Diehl did not sign the agreement. (The analysis could end there).

The Court provided no explanation as to how the signatures complied with Rule 43(k). Plaintiffs speculate that the Court must have concluded that counsel's signatures were somehow both "for" clients and for themselves, and that KA Diehl nor its attorney had to sign the agreement because KA Diehl is an agent of Defendant Ocean Front Spa and Myrtle Beach Resort Homeowners Association. Assuming this is the "explanation" for finding compliance, the Court has erred. Rule 43(k) requires the signature of the parties and their counsel and if lawyers could

[1] Rule 43(k) and the 2009 Amendment to Rule 43(k) are both in keeping with the South Carolina ADR Rule 6(f) which requires the signatures of the parties and their counsel.

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sign "for clients" then there would be no need for the rule. Likewise, counsel is required to sign on its own behalf. And KA Diehl is a party and should have signed the agreement (and its counsel should have too). The settlement agreement evidences that the parties and counsel failed to comply with Rule 43(k).

The most informative case related to signatures is *Farnsworth*. In *Farnsworth*, the lawyer had authority to sign/resolve litigation for a specific amount and did so, without his client's signature. She rescinded the agreement before Rule 43(k) became satisfied and the Court held that her recension of the agreement was proper. The conditions of Rule 43(k) must be strictly complied with before an agreement can affect pending litigation.[2]

III. The Court erred in ruling that this agreement releases KA Diehl and Associates, Inc.

KA Diehl & Associates, Inc., is a named defendant in two of the four actions brought by Plaintiffs. The purported settlement agreement lists the settling parties in the very first paragraph of the Settlement Agreement. It does not list KA Diehl. In fact, KA Diehl's name never appears in any part of the agreement. Therefore, there is a dispute as to whether there is any agreement between Plaintiffs and KA Diehl. The courts have repeatedly made clear that Rule 43(k)'s purpose is to alleviate Courts from having to determine whether an agreement between parties exists.

IV. The Court egregiously ruled that First Services Residential is released from liability.

The Court cannot add a party to the settlement agreement. The defendants have unilaterally decided to add a new party despite there being: no mention of this party in the settlement

[2] In unpublished opinion, filed September 27, 2017 the Court of Appeals noted "when dealing with settlement agreements, Rule 43(k), SCRCP's requirements must be strictly observed. *See* 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."; *see also Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637, 627 S.E.2d 724, 726 (2006) (stating Rule 43(k) applies to settlement agreements); *id.* at 637, 627 S.E.2d at 725 (stating Rule 43(k) is intended to prevent disputes concerning the existence and terms of agreements regarding pending litigation)." *In re Dockery*, Appellate Case No. 2015-000680, unpublished opinion no. 2017-UP-359 (September 27, 2017).

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agreement, no allegations against this party in the complaint, and no mention of "FRS" or "First Services Residential" in KA Diehl's answer. Plaintiffs did not amend the complaint to add allegations against First Services Residential and cannot be forced to retroactively release claims it may have against First Services Residential. First Services Residential was never in any way shape or form a party which Plaintiffs negotiated to release. They have not been involved in this action and should not benefit from this purported agreement.

V. New Evidence.

Plaintiffs maintain that this agreement is subject to Rule 43(k) and that applying Rule 43(k), the settlement agreement is unenforceable. Given that the Court has now determined that the agreement is enforceable, Plaintiffs offer new evidence for the Court to consider.[3] In general, the partially executed settlement agreement provides the following: mutual non-disparagement agreement, attorney fees to the Plaintiffs in exchange for a release of the Plaintiffs claims against the Defendants (with no mention of KA Diehl or First Services Residential), and a paid for future determination about the legality of a gate pass program.

Defendants violated the obtuse non-disparagement clause of the purported settlement agreement when Walter Jordan made a negative comment about Plaintiffs Nancy Moore and Jim Perkins.[4] The non-disparagement agreement states that "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 and goodwill of Plaintiffs, and shall refrain from suggesting

[3] In its amended memorandum to the Court, Plaintiffs anticipated that the Court could err and open up the analysis to contract principles, and further that if the Court did so, it would have to then consider matters such as "prior breach."
[4] Upon receiving a physical copy of the settlement agreement, Plaintiff Santos (and others who actually attended) did not recall its inclusion, and Santos vehemently opposed any language curtailing his right to free speech. Counsel is not, and will not, divulge any communications which occurred during the mediation (unless required to).

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to anyone else that such disparaging, negative or detrimental comment be made, unless required by law." Walter Jordan emailed the following statement: "Jim and Nancy will try and run him off like they did Bill if he doesn't buy into their program." (See Exhibit "B" email attached). Walter Jordan's email conveyed a negative impression of Plaintiffs Jim Perkins and Nancy Moore, and therefore constituted a material breach of the agreement. (See paragraph 8 of the purported settlement agreement, *to wit*, "that any breach of such promises, representations, and warranties would constitute a material breach of this Agreement.")

The Court should consider this new evidence and determine that the agreement is not binding because Defendants actions constitute a material breach of the agreement permitting Plaintiffs to no longer honor the agreement.

CONCLUSION

For all the reasons set forth hereinabove, this Court should accept the motion for reconsideration and grant it, in addition to any and all other measures of relief deemed proper and fit in the interest of justice.

RESPECTFULLY SUBMITTED:

THE BRITTAIN LAW FIRM

s/ A. Preston Brittain
A. Preston Brittain
SC BAR # 73707
4614 Oleander Drive
Myrtle Beach, South Carolina 29577
843-449-8562 (Telephone)
843-497-6124 (Facsimile)
Attorney for Plaintiffs

September 29, 2017
Myrtle Beach, South Carolina.

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THE BRITTAIN LAW FIRM, P.A.
ATTORNEYS AT LAW
4614 OLEANDER DRIVE
MYRTLE BEACH, SOUTH CAROLINA 29577

THOMAS C. BRITTAIN
MARY MADISON BRITTAIN LANGWAY
A. PRESTON BRITTAIN
T. CASE BRITTAIN, JR.

843-449-8562
843-497-6124
www.brittainlawfirm.com

October 2, 2017

Via First Class Mail

Horry County Clerk of Court

RE:
Civil Action No.: 2016-CP-26-00673

Dear Clerk:

Please see attached Exhibit A and Exhibit B which is be filed and attached to Plaintiffs' Motion to Reconsider which was filed September 29th, 2017 in this matter.

Sincerely yours,

THE BRITTAIN LAW FIRM, P.A.

s/A. Preston Brittain

A. Preston Brittain, Esquire

EXHIBIT A

PROPOSED 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.

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

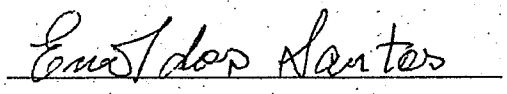
Nancy Moore

William Moore

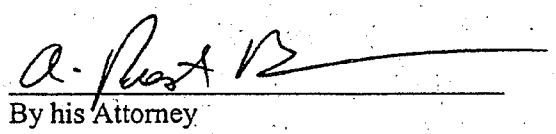
Steven Dame

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Errol Dos Santos



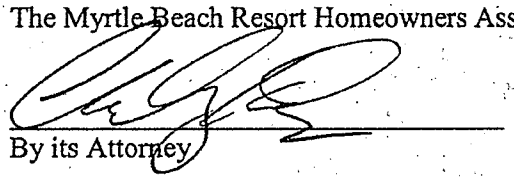
Jeffrey Richardson



By his Attorney

Defendants

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



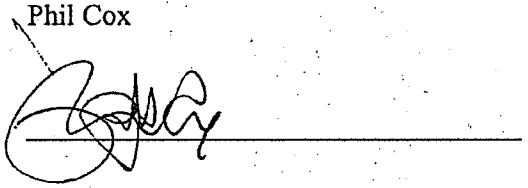
By its Attorney

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

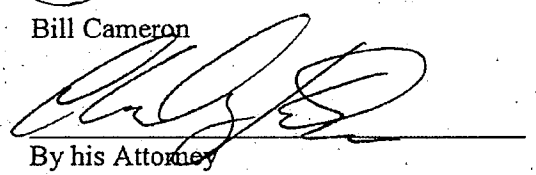


By its Attorney

Phil Cox

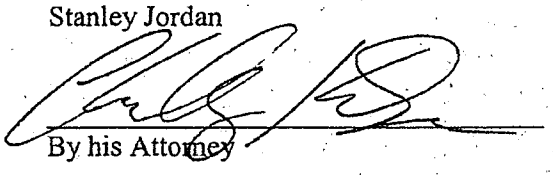


Bill Cameron



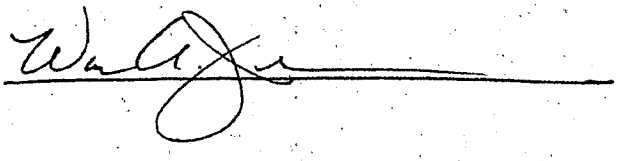
By his Attorney

Stanley Jordan



By his Attorney

Walter Jordan

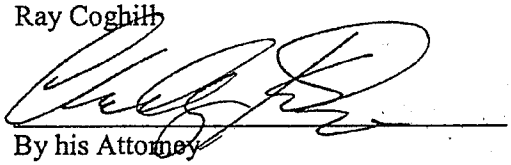


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Ken Perkins

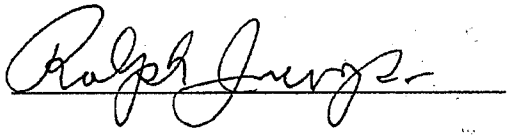


Ray Coghill

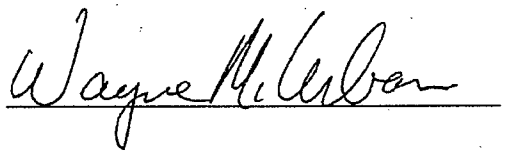


By his Attorney

Ralph Jump



Wayne Urban



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EXHIBIT B

EMAIL FROM WALTER JORDAN

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On Sun, Jul 16, 2017 at 5:22 PM, <MBRJimPerkins@aol.com> wrote:
Preston,
Please read below the email sent by Walter Jordan to Steve Dame / Nancy Moore.

Jim Perkins
OFS Board of Directors
Member at Large / MBR HOA Rep
702-755-2352

From: Walter.Jordan@RNDC-USA.COM
To: ssdameofs@yahoo.com, nancyl.moore@outlook.com
CC: mbrjimperkins@aol.com, tdorsey4151@gmail.com, sjordan90@cfl.rr.com, apedraza@wmdouglas.com
Sent: 7/16/2017 1:45:54 P.M. Pacific Daylight Time
Subj: RE: Re: Parking in the compact car spots

Jim and Nancy will try and run him off like they did Bill if he doesn't buy into their program.

Regards,
Walter Jordan
(804) 512-1420

Sent from my Verizon, Samsung Galaxy smartphone
"The information transmitted is intended only for the person or entity to which it is addressed and may contain proprietary, business-confidential and/or privileged material. If you are not the intended recipient of this message you are hereby notified that any use, review, retransmission, dissemination, distribution, reproduction or any action taken in reliance upon this message is prohibited. If you received this in error, please contact the sender and delete the material from any computer."

-----Original Message-----

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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' MOTION TO RECONSIDER THE FINAL ORDER AND JUDGMENT**

TO: THIS HONORABLE COURT AND COUNSEL FOR THE NAMED DEFENDANTS:

Pursuant to Rule 59(e) and Rule 60(b)(2) of the South Carolina Rules of Civil Procedure, Plaintiffs 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, by and through their undersigned counsel, respectfully submit this Motion for Reconsideration of this Court's Order and Final Judgment entered on September 21, 2017, pursuant to the parties' proposed settlement agreement ("Proposed Settlement").

RULE/LAW

Reconsideration of the Order and Final Judgment should be granted for the following reasons, as further explained herein:

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I. *Court erred in ruling that Rule 43(k) doesn't apply to the settlement signed by some of the parties.*

The Court erred in ruling that Rule 43k doesn't apply to the partially executed settlement agreement. The Court reasoned that Rule 43(k) does not apply to the settlement agreement in issue because the purported settlement agreement is not "an agreement between counsel."

In *Ashfort* our Supreme Court considered a settlement agreement between an insurer and parties. The settlement agreement was not between counsel. Appellants argued Rule 43(k) did not apply to the agreement because it was not between counsel. The Court disagreed explaining that "[t]he intent of Rule 43(k) is to require all agreements regarding pending litigation to either be announced in open court or to be reduced to a consent order or written stipulation and entered." *Ashcroft Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533, 535 (1995) clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 n.2 (2006). (43(k)'s terms are mandatory). The Supreme Court also clarified that "in [their] opinion, Rule 43(k) is applicable to settlement agreements." *Ashcroft Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533, 535 (1995) clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 n.2 (2006). (43(k)'s terms are mandatory). According to our Supreme Court Rule 43(k) applies to settlement agreements including agreements that are not strictly between counsel.

Defendants have no precedent to support their position that *Ashcroft* or *Buckley* should be ignored. The Court apparently accepted Defendants' position that these cases are no longer authoritative because in those cases the Courts considered Rule 43(k) prior to the 2009 amendment to the rule. This argument is flawed. The 2009 Amendment to Rule 43(k) provides a third avenue for enforceability of agreements affecting pending litigation, *to wit*, a writing "signed by the parties and their counsel." SCRCP, Rule 43(k). In support of Plaintiffs' position, The Note to 2009 Amendment states "a *settlement agreement* is also binding if the agreement is reduced to writing

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and signed by the parties and their counsel". SCRCP 43(k) Note to 2009 Amendment, (*emphasis added*). The Note to 2009 Amendment plainly states that the Rule applies to settlement agreements. Contrary to Defendants' position, this Amendment is in harmony with South Carolina case law (and ADR Rules). Rule 43(k) applies to the settlement agreement in issue because Rule 43(k) applies to all settlement agreements[1].

II. Court erred in its "alternative theory" of accepting Rule 43(k) and finding its conditions met.

The Court erred in determining that Rule 43(k), if applicable, was satisfied finding the settlement agreement was signed by the parties and their counsel. The settlement agreement itself is the only evidence the court needs to consider. KA Diehl is a party and did not sign the agreement. (The analysis could end there). Counsel for Plaintiffs signed the agreement "for Mark Santos and Jeff Richardson" but did not otherwise sign on their own behalf. (The analysis could end there). Counsel for Defendants signed the agreement "for Ray Coghill" but did not otherwise sign on their own behalf. (The analysis could end there). Counsel for KA Diehl did not sign the agreement. (The analysis could end there).

The Court provided no explanation as to how the signatures complied with Rule 43(k). Plaintiffs speculate that the Court must have concluded that counsel's signatures were somehow both "for" clients and for themselves, and that KA Diehl nor its attorney had to sign the agreement because KA Diehl is an agent of Defendant Ocean Front Spa and Myrtle Beach Resort Homeowners Association. Assuming this is the "explanation" for finding compliance, the Court has erred. Rule 43(k) requires the signature of the parties and their counsel and if lawyers could sign "for clients" then there would be no need for the rule. Likewise, counsel is required to sign

[1] Rule 43(k) and the 2009 Amendment to Rule 43(k) are both in keeping with the South Carolina ADR Rule 6(f) which requires the signatures of the parties and their counsel.

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on its own behalf. And KA Diehl is a party and should have signed the agreement (and its counsel should have too). The settlement agreement evidences that the parties and counsel failed to comply with Rule 43(k).

The most informative case related to signatures is *Farnsworth*. In *Farnsworth*, the lawyer had authority to sign/resolve litigation for a specific amount and did so, without his client's signature. She rescinded the agreement before Rule 43(k) became satisfied and the Court held that her recension of the agreement was proper. The conditions of Rule 43(k) must be strictly complied with before an agreement can affect pending litigation.[2]

III. The Court erred in ruling that this agreement releases KA Diehl and Associates, Inc.

KA Diehl & Associates, Inc., is a named defendant in two of the four actions brought by Plaintiffs. The purported settlement agreement lists the settling parties in the very first paragraph of the Settlement Agreement. It does not list KA Diehl. In fact, KA Diehl's name never appears in any part of the agreement. Therefore, there is a dispute as to whether there is any agreement between Plaintiffs and KA Diehl. The courts have repeatedly made clear that Rule 43(k)'s purpose is to alleviate Courts from having to determine whether an agreement between parties exists.

IV. The Court egregiously ruled that First Services Residential is released from liability.

The Court cannot add a party to the settlement agreement. The defendants have unilaterally decided to add a new party despite there being: no mention of this party in the settlement agreement, no allegations against this party in the complaint, and no mention of "FRS" or "First

[2] In unpublished opinion, filed September 27, 2017 the Court of Appeals noted "when dealing with settlement agreements, Rule 43(k), SCRCP's requirements must be strictly observed. *See* 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."; *see also Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637, 627 S.E.2d 724, 726 (2006) (stating Rule 43(k) applies to settlement agreements); *id.* at 637, 627 S.E.2d at 725 (stating Rule 43(k) is intended to prevent disputes concerning the existence and terms of agreements regarding pending litigation)." *In re Dockery*, Appellate Case No. 2015-000680, unpublished opinion no. 2017-UP-359 (September 27, 2017).

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Services Residential" in KA Diehl's answer. Plaintiffs did not amend the complaint to add allegations against First Services Residential and cannot be forced to retroactively release claims it may have against First Services Residential. First Services Residential was never in any way shape or form a party which Plaintiffs negotiated to release. They have not been involved in this action and should not benefit from this purported agreement.

V. New Evidence.

Plaintiffs maintain that this agreement is subject to Rule 43(k) and that applying Rule 43(k), the settlement agreement is unenforceable. Given that the Court has now determined that the agreement is enforceable, Plaintiffs offer new evidence for the Court to consider.[3] In general, the partially executed settlement agreement provides the following: mutual non-disparagement agreement, attorney fees to the Plaintiffs in exchange for a release of the Plaintiffs claims against the Defendants (with no mention of KA Diehl or First Services Residential), and a paid for future determination about the legality of a gate pass program.

Defendants violated the obtuse non-disparagement clause of the purported settlement agreement when Walter Jordan made a negative comment about Plaintiffs Nancy Moore and Jim Perkins.[4] The non-disparagement agreement states that "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 and goodwill of Plaintiffs, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required

[3] In its amended memorandum to the Court, Plaintiffs anticipated that the Court could err and open up the analysis to contract principles, and further that if the Court did so, it would have to then consider matters such as "prior breach."
[4] Upon receiving a physical copy of the settlement agreement, Plaintiff Santos (and others who actually attended) did not recall its inclusion, and Santos vehemently opposed any language curtailing his right to free speech. Counsel is not, and will not, divulge any communications which occurred during the mediation (unless required to).

by law." Walter Jordan emailed the following statement: "Jim and Nancy will try and run him off like they did Bill if he doesn't buy into their program." (See Exhibit "B" email attached). Walter Jordan's email conveyed a negative impression of Plaintiffs Jim Perkins and Nancy Moore, and therefore constituted a material breach of the agreement. (See paragraph 8 of the purported settlement agreement, *to wit*, "that any breach of such promises, representations, and warranties would constitute a material breach of this Agreement.")

The Court should consider this new evidence and determine that the agreement is not binding because Defendants actions constitute a material breach of the agreement permitting Plaintiffs to no longer honor the agreement.

CONCLUSION

For all the reasons set forth hereinabove, this Court should accept the motion for reconsideration and grant it, in addition to any and all other measures of relief deemed proper and fit in the interest of justice.

RESPECTFULLY SUBMITTED:

THE BRITTAIN LAW FIRM

s/ A. Preston Brittain

A. Preston Brittain
SC BAR # 73707
4614 Oleander Drive
Myrtle Beach, South Carolina 29577
843-449-8562 (Telephone)
843-497-6124 (Facsimile)
Attorney for Plaintiffs

September 29, 2017
Myrtle Beach, South Carolina.

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THE BRITTAIN LAW FIRM, P.A.
ATTORNEYS AT LAW
4614 OLEANDER DRIVE
MYRTLE BEACH, SOUTH CAROLINA 29577

THOMAS C. BRITTAIN
MARY MADISON BRITTAIN LANGWAY
A. PRESTON BRITTAIN
T. CASE BRITTAIN, JR.

843-449-8562
843-497-6124
www.brittainlawfirm.com

October 2, 2017

Via First Class Mail

Horry County Clerk of Court

RE:
Civil Action No.: 2016-CP-26-00674

Dear Clerk:

Please see attached Exhibit A and Exhibit B which is be filed and attached to Plaintiffs' Motion to Reconsider which was filed September 29th, 2017 in this matter.

Sincerely yours,

THE BRITTAIN LAW FIRM, P.A.

s/A. Preston Brittain

A. Preston Brittain, Esquire

EXHIBIT A

PROPOSED 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 a/k/a Colleen Franke Perkins

Mark Dos Santos

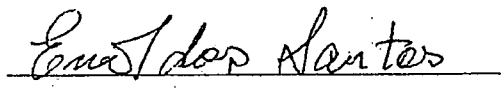
By his Attorney

Nancy Moore

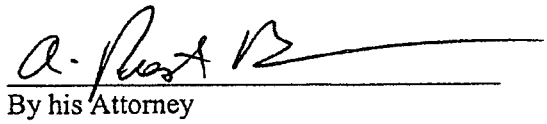
William Moore

Steven Dame

Errol Dos Santos



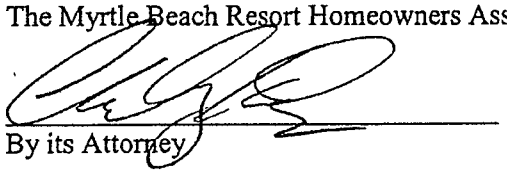
Jeffrey Richardson



By his Attorney

Defendants

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



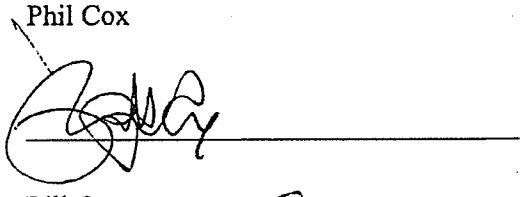
By its Attorney

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

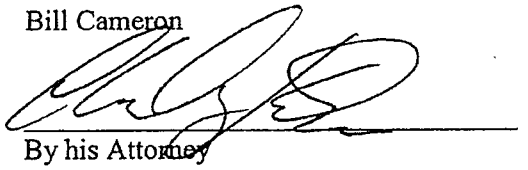


By its Attorney

Phil Cox

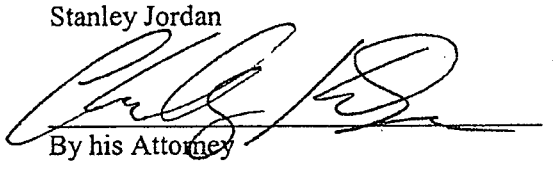


Bill Cameron



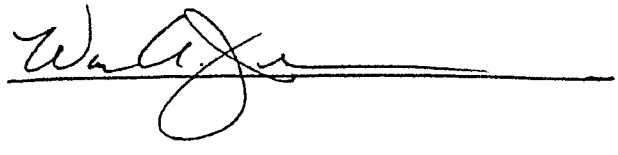
By his Attorney

Stanley Jordan



By his Attorney

Walter Jordan

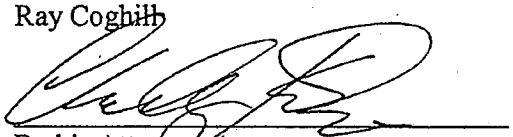


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Ken Perkins

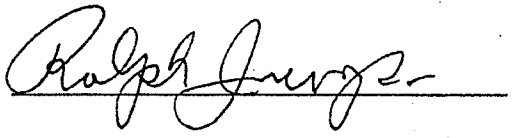


Ray Coghill

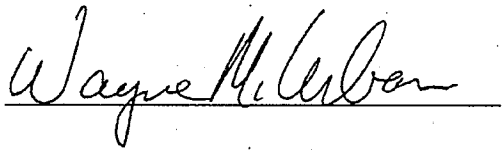


By his Attorney

Ralph Jump



Wayne Urban



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EXHIBIT B

EMAIL FROM WALTER JORDAN

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On Sun, Jul 16, 2017 at 5:22 PM, <MBRJimPerkins@aol.com> wrote:
Preston,
Please read below the email sent by Walter Jordan to Steve Dame / Nancy Moore.

Jim Perkins
OFS Board of Directors
Member at Large / MBR HOA Rep
702-755-2352

From: Walter.Jordan@RNDC-USA.COM
To: ssdameofs@yahoo.com, nancyl.moore@outlook.com
CC: mbrjimperkins@aol.com, tdorsey4151@gmail.com, sjordan90@cfl.rr.com, apedraza@wmdouglas.com
Sent: 7/16/2017 1:45:54 P.M. Pacific Daylight Time
Subj: RE: Re: Parking in the compact car spots

Jim and Nancy will try and run him off like they did Bill if he doesn't buy into their program.

Regards,
Walter Jordan
(804) 512-1420

Sent from my Verizon, Samsung Galaxy smartphone
"The information transmitted is intended only for the person or entity to which it is addressed and may contain proprietary, business-confidential and/or privileged material. If you are not the intended recipient of this message you are hereby notified that any use, review, retransmission, dissemination, distribution, reproduction or any action taken in reliance upon this message is prohibited. If you received this in error, please contact the sender and delete the material from any computer."

-----Original Message-----

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ELECTRONICALLY FILED - 2017 Sep 29 5:07 PM - HORRY - COMMON PLEAS - CASE#2016CP2600743

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' MOTION TO RECONSIDER THE ORDER AND FINAL JUDGMENT**

TO: THIS HONORABLE COURT AND COUNSEL FOR THE NAMED DEFENDANTS:

Pursuant to Rule 59(e) and Rule 60(b)(2) of the South Carolina Rules of Civil Procedure, Plaintiffs 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, by and through their undersigned counsel, respectfully submit this Motion for Reconsideration of this Court's Order and Final Judgment entered on September 21, 2017, pursuant to the parties' proposed settlement agreement ("Proposed Settlement").

RULE/LAW

Reconsideration of the Order and Final Judgment should be granted for the following reasons, as further explained herein:

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I. *Court erred in ruling that Rule 43(k) doesn't apply to the settlement signed by some of the parties.*

The Court erred in ruling that Rule 43k doesn't apply to the partially executed settlement agreement. The Court reasoned that Rule 43(k) does not apply to the settlement agreement in issue because the purported settlement agreement is not "an agreement between counsel."

In *Ashfort* our Supreme Court considered a settlement agreement between an insurer and parties. The settlement agreement was not between counsel. Appellants argued Rule 43(k) did not apply to the agreement because it was not between counsel. The Court disagreed explaining that "[t]he intent of Rule 43(k) is to require all agreements regarding pending litigation to either be announced in open court or to be reduced to a consent order or written stipulation and entered." *Ashcroft Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533, 535 (1995) clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 n.2 (2006). (43(k)'s terms are mandatory). The Supreme Court also clarified that "in [their] opinion, Rule 43(k) is applicable to settlement agreements." *Ashcroft Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533, 535 (1995) clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 n.2 (2006). (43(k)'s terms are mandatory). According to our Supreme Court Rule 43(k) applies to settlement agreements including agreements that are not strictly between counsel.

Defendants have no precedent to support their position that *Ashcroft* or *Buckley* should be ignored. The Court apparently accepted Defendants' position that these cases are no longer authoritative because in those cases the Courts considered Rule 43(k) prior to the 2009 amendment to the rule. This argument is flawed. The 2009 Amendment to Rule 43(k) provides a third avenue for enforceability of agreements affecting pending litigation, *to wit*, a writing "signed by the parties and their counsel." SCRCP, Rule 43(k). In support of Plaintiffs' position, The Note to 2009

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Amendment states "a *settlement agreement* is also binding if the agreement is reduced to writing and signed by the parties and their counsel". SCRCP 43(k) Note to 2009 Amendment, (*emphasis added*). The Note to 2009 Amendment plainly states that the Rule applies to settlement agreements. Contrary to Defendants' position, this Amendment is in harmony with South Carolina case law (and ADR Rules). Rule 43(k) applies to the settlement agreement in issue because Rule 43(k) applies to all settlement agreements[1].

II. Court erred in its "alternative theory" of accepting Rule 43(k) and finding its conditions met.

The Court erred in determining that Rule 43(k), if applicable, was satisfied finding the settlement agreement was signed by the parties and their counsel. The settlement agreement itself is the only evidence the court needs to consider. KA Diehl is a party and did not sign the agreement. (The analysis could end there). Counsel for Plaintiffs signed the agreement "for Mark Santos and Jeff Richardson" but did not otherwise sign on their own behalf. (The analysis could end there). Counsel for Defendants signed the agreement "for Ray Coghill" but did not otherwise sign on their own behalf. (The analysis could end there). Counsel for KA Diehl did not sign the agreement. (The analysis could end there).

The Court provided no explanation as to how the signatures complied with Rule 43(k). Plaintiffs speculate that the Court must have concluded that counsel's signatures were somehow both "for" clients and for themselves, and that KA Diehl nor its attorney had to sign the agreement because KA Diehl is an agent of Defendant Ocean Front Spa and Myrtle Beach Resort Homeowners Association. Assuming this is the "explanation" for finding compliance, the Court has erred. Rule 43(k) requires the signature of the parties and their counsel and if lawyers could

[1] Rule 43(k) and the 2009 Amendment to Rule 43(k) are both in keeping with the South Carolina ADR Rule 6(f) which requires the signatures of the parties and their counsel.

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sign "for clients" then there would be no need for the rule. Likewise, counsel is required to sign on its own behalf. And KA Diehl is a party and should have signed the agreement (and its counsel should have too). The settlement agreement evidences that the parties and counsel failed to comply with Rule 43(k).

The most informative case related to signatures is *Farnsworth*. In *Farnsworth*, the lawyer had authority to sign/resolve litigation for a specific amount and did so, without his client's signature. She rescinded the agreement before Rule 43(k) became satisfied and the Court held that her recension of the agreement was proper. The conditions of Rule 43(k) must be strictly complied with before an agreement can affect pending litigation.[2]

III. The Court erred in ruling that this agreement releases KA Diehl and Associates, Inc.

KA Diehl & Associates, Inc., is a named defendant in two of the four actions brought by Plaintiffs. The purported settlement agreement lists the settling parties in the very first paragraph of the Settlement Agreement. It does not list KA Diehl. In fact, KA Diehl's name never appears in any part of the agreement. Therefore, there is a dispute as to whether there is any agreement between Plaintiffs and KA Diehl. The courts have repeatedly made clear that Rule 43(k)'s purpose is to alleviate Courts from having to determine whether an agreement between parties exists.

IV. The Court egregiously ruled that First Services Residential is released from liability.

The Court cannot add a party to the settlement agreement. The defendants have unilaterally decided to add a new party despite there being: no mention of this party in the settlement

[2] In unpublished opinion, filed September 27, 2017 the Court of Appeals noted "when dealing with settlement agreements, Rule 43(k), SCRCP's requirements must be strictly observed. *See* 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."; *see also Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637, 627 S.E.2d 724, 726 (2006) (stating Rule 43(k) applies to settlement agreements); *id.* at 637, 627 S.E.2d at 725 (stating Rule 43(k) is intended to prevent disputes concerning the existence and terms of agreements regarding pending litigation)." *In re Dockery*, Appellate Case No. 2015-000680, unpublished opinion no. 2017-UP-359 (September 27, 2017).

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agreement, no allegations against this party in the complaint, and no mention of "FRS" or "First Services Residential" in KA Diehl's answer. Plaintiffs did not amend the complaint to add allegations against First Services Residential and cannot be forced to retroactively release claims it may have against First Services Residential. First Services Residential was never in any way shape or form a party which Plaintiffs negotiated to release. They have not been involved in this action and should not benefit from this purported agreement.

V. New Evidence.

Plaintiffs maintain that this agreement is subject to Rule 43(k) and that applying Rule 43(k), the settlement agreement is unenforceable. Given that the Court has now determined that the agreement is enforceable, Plaintiffs offer new evidence for the Court to consider.[3] In general, the partially executed settlement agreement provides the following: mutual non-disparagement agreement, attorney fees to the Plaintiffs in exchange for a release of the Plaintiffs claims against the Defendants (with no mention of KA Diehl or First Services Residential), and a paid for future determination about the legality of a gate pass program.

Defendants violated the obtuse non-disparagement clause of the purported settlement agreement when Walter Jordan made a negative comment about Plaintiffs Nancy Moore and Jim Perkins.[4] The non-disparagement agreement states that "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 and goodwill of Plaintiffs, and shall refrain from suggesting

[3] In its amended memorandum to the Court, Plaintiffs anticipated that the Court could err and open up the analysis to contract principles, and further that if the Court did so, it would have to then consider matters such as "prior breach."
[4] Upon receiving a physical copy of the settlement agreement, Plaintiff Santos (and others who actually attended) did not recall its inclusion, and Santos vehemently opposed any language curtailing his right to free speech. Counsel is not, and will not, divulge any communications which occurred during the mediation (unless required to).

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to anyone else that such disparaging, negative or detrimental comment be made, unless required by law." Walter Jordan emailed the following statement: "Jim and Nancy will try and run him off like they did Bill if he doesn't buy into their program." (See Exhibit "B" email attached). Walter Jordan's email conveyed a negative impression of Plaintiffs Jim Perkins and Nancy Moore, and therefore constituted a material breach of the agreement. (See paragraph 8 of the purported settlement agreement, *to wit*, "that any breach of such promises, representations, and warranties would constitute a material breach of this Agreement.")

The Court should consider this new evidence and determine that the agreement is not binding because Defendants actions constitute a material breach of the agreement permitting Plaintiffs to no longer honor the agreement.

CONCLUSION

For all the reasons set forth hereinabove, this Court should accept the motion for reconsideration and grant it, in addition to any and all other measures of relief deemed proper and fit in the interest of justice.

RESPECTFULLY SUBMITTED:

THE BRITTAIN LAW FIRM

s/ A. Preston Brittain
A. Preston Brittain
SC BAR # 73707
4614 Oleander Drive
Myrtle Beach, South Carolina 29577
843-449-8562 (Telephone)
843-497-6124 (Facsimile)
Attorney for Plaintiffs

September 29, 2017
Myrtle Beach, South Carolina.

ELECTRONICALLY FILED - 2017 Oct 02 10:17 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

THE BRITTAIN LAW FIRM, P.A.
ATTORNEYS AT LAW
4614 OLEANDER DRIVE
MYRTLE BEACH, SOUTH CAROLINA 29577

THOMAS C. BRITTAIN
MARY MADISON BRITTAIN LANGWAY
A. PRESTON BRITTAIN
T. CASE BRITTAIN, JR.

843-449-8562
843-497-6124
www.brittainlawfirm.com

October 2, 2017

Via First Class Mail

Horry County Clerk of Court

RE:
Civil Action No.: 2016-CP-26-00743

Dear Clerk:

Please see attached Exhibit A and Exhibit B which is be filed and attached to Plaintiffs' Motion to Reconsider which was filed September 29th, 2017 in this matter.

Sincerely yours,

THE BRITTAIN LAW FIRM, P.A.

s/A. Preston Brittain

A. Preston Brittain, Esquire

EXHIBIT A

PROPOSED SETTLEMENT AGREEMENT

ELECTRONICALLY FILED - 2017 Oct 02 10:17 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

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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

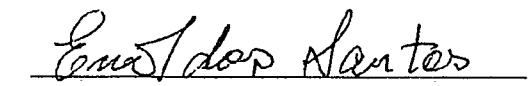
By his Attorney

Nancy Moore

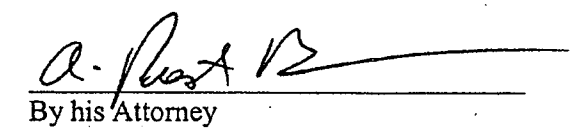
William Moore

Steven Dame

Errol Dos Santos



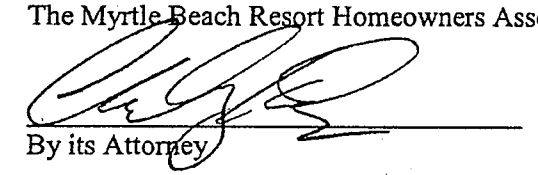
Jeffrey Richardson



By his Attorney

Defendants

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



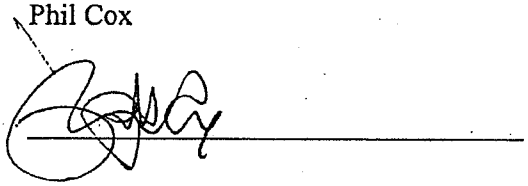
By its Attorney

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

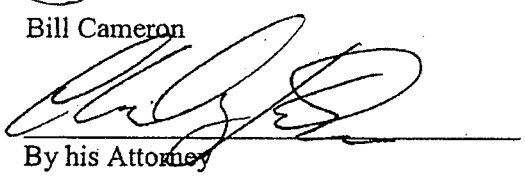


By its Attorney

Phil Cox

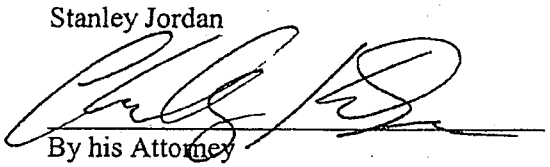


Bill Cameron



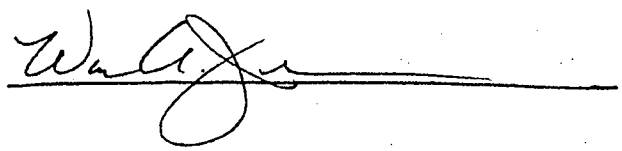
By his Attorney

Stanley Jordan



By his Attorney

Walter Jordan

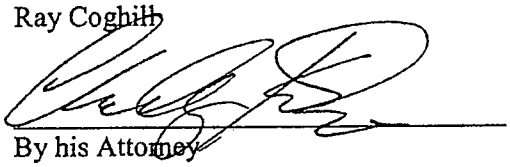


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Ken Perkins

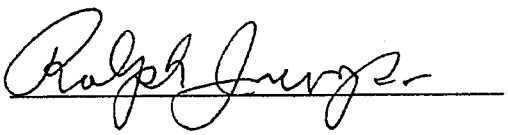


Ray Coghill



By his Attorney

Ralph Jump



Wayne Urban



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EXHIBIT B

EMAIL FROM WALTER JORDAN

ELECTRONICALLY FILED - 2017 Oct 02 10:17 AM - HORRY - COMMON PLEAS - CASE#2016CP2600743

On Sun, Jul 16, 2017 at 5:22 PM, <MBRJimPerkins@aol.com> wrote:
Preston,
Please read below the email sent by Walter Jordan to Steve Dame / Nancy Moore.

Jim Perkins
OFS Board of Directors
Member at Large / MBR HOA Rep
702-755-2352

From: Walter.Jordan@RNDC-USA.COM
To: ssdameofs@yahoo.com, nancyl.moore@outlook.com
CC: mbrjimperkins@aol.com, tdorsey4151@gmail.com, sjordan90@cfl.rr.com, apedraza@wmdouglas.com
Sent: 7/16/2017 1:45:54 P.M: Pacific Daylight Time
Subj: RE: Re: Parking in the compact car spots

Jim and Nancy will try and run him off like they did Bill if he doesn't buy into their program.

Regards,
Walter Jordan
(804) 512-1420

Sent from my Verizon, Samsung Galaxy smartphone
"The information transmitted is intended only for the person or entity to which it is addressed and may contain proprietary, business-confidential and/or privileged material. If you are not the intended recipient of this message you are hereby notified that any use, review, retransmission, dissemination, distribution, reproduction or any action taken in reliance upon this message is prohibited. If you received this in error, please contact the sender and delete the material from any computer."

-----Original Message-----

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ELECTRONICALLY FILED - 2017 Sep 29 5:09 PM - HORRY - COMMON PLEAS - CASE#2016CP2600744

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' MOTION TO RECONSIDER THE ORDER AND FINAL JUDGMENT**

TO: THIS HONORABLE COURT AND COUNSEL FOR THE NAMED DEFENDANTS:

Pursuant to Rule 59(e) and Rule 60(b)(2) of the South Carolina Rules of Civil Procedure, Plaintiffs 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, by and through their undersigned counsel, respectfully submit this Motion for Reconsideration of this Court's Order and Final Judgment entered on September 21, 2017, pursuant to the parties' proposed settlement agreement ("Proposed Settlement").

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RULE/LAW

Reconsideration of the Order and Final Judgment should be granted for the following reasons, as further explained herein:

I. *Court erred in ruling that Rule 43(k) doesn't apply to the settlement signed by some of the parties.*

The Court erred in ruling that Rule 43k doesn't apply to the partially executed settlement agreement. The Court reasoned that Rule 43(k) does not apply to the settlement agreement in issue because the purported settlement agreement is not "an agreement between counsel."

In *Ashfort* our Supreme Court considered a settlement agreement between an insurer and parties. The settlement agreement was not between counsel. Appellants argued Rule 43(k) did not apply to the agreement because it was not between counsel. The Court disagreed explaining that "[t]he intent of Rule 43(k) is to require all agreements regarding pending litigation to either be announced in open court or to be reduced to a consent order or written stipulation and entered." *Ashcroft Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533, 535 (1995) clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 n.2 (2006). (43(k)'s terms are mandatory). The Supreme Court also clarified that "in [their] opinion, Rule 43(k) is applicable to settlement agreements." *Ashcroft Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533, 535 (1995) clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 n.2 (2006). (43(k)'s terms are mandatory). According to our Supreme Court Rule 43(k) applies to settlement agreements including agreements that are not strictly between counsel.

Defendants have no precedent to support their position that *Ashcroft* or *Buckley* should be ignored. The Court apparently accepted Defendants' position that these cases are no longer authoritative because in those cases the Courts considered Rule 43(k) prior to the 2009 amendment

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to the rule. This argument is flawed. The 2009 Amendment to Rule 43(k) provides a third avenue for enforceability of agreements affecting pending litigation, *to wit*, a writing "signed by the parties and their counsel." SCRCP, Rule 43(k). In support of Plaintiffs' position, The Note to 2009 Amendment states "a *settlement agreement* is also binding if the agreement is reduced to writing and signed by the parties and their counsel". SCRCP 43(k) Note to 2009 Amendment, (*emphasis added*). The Note to 2009 Amendment plainly states that the Rule applies to settlement agreements. Contrary to Defendants' position, this Amendment is in harmony with South Carolina case law (and ADR Rules). Rule 43(k) applies to the settlement agreement in issue because Rule 43(k) applies to all settlement agreements[1].

II. Court erred in its "alternative theory" of accepting Rule 43(k) and finding its conditions met.

The Court erred in determining that Rule 43(k), if applicable, was satisfied finding the settlement agreement was signed by the parties and their counsel. The settlement agreement itself is the only evidence the court needs to consider. KA Diehl is a party and did not sign the agreement. (The analysis could end there). Counsel for Plaintiffs signed the agreement "for Mark Santos and Jeff Richardson" but did not otherwise sign on their own behalf. (The analysis could end there). Counsel for Defendants signed the agreement "for Ray Coghill" but did not otherwise sign on their own behalf. (The analysis could end there). Counsel for KA Diehl did not sign the agreement. (The analysis could end there).

The Court provided no explanation as to how the signatures complied with Rule 43(k). Plaintiffs speculate that the Court must have concluded that counsel's signatures were somehow

[1] Rule 43(k) and the 2009 Amendment to Rule 43(k) are both in keeping with the South Carolina ADR Rule 6(f) which requires the signatures of the parties and their counsel.

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both "for" clients and for themselves, and that KA Diehl nor its attorney had to sign the agreement because KA Diehl is an agent of Defendant Ocean Front Spa and Myrtle Beach Resort Homeowners Association. Assuming this is the "explanation" for finding compliance, the Court has erred. Rule 43(k) requires the signature of the parties and their counsel and if lawyers could sign "for clients" then there would be no need for the rule. Likewise, counsel is required to sign on its own behalf. And KA Diehl is a party and should have signed the agreement (and its counsel should have too). The settlement agreement evidences that the parties and counsel failed to comply with Rule 43(k).

The most informative case related to signatures is *Farnsworth*. In *Farnsworth*, the lawyer had authority to sign/resolve litigation for a specific amount and did so, without his client's signature. She rescinded the agreement before Rule 43(k) became satisfied and the Court held that her recension of the agreement was proper. The conditions of Rule 43(k) must be strictly complied with before an agreement can affect pending litigation.[2]

III. The Court erred in ruling that this agreement releases KA Diehl and Associates, Inc.

KA Diehl & Associates, Inc., is a named defendant in two of the four actions brought by Plaintiffs. The purported settlement agreement lists the settling parties in the very first paragraph of the Settlement Agreement. It does not list KA Diehl. In fact, KA Diehl's name never appears in any part of the agreement. Therefore, there is a dispute as to whether there is any agreement

[2] In unpublished opinion, filed September 27, 2017 the Court of Appeals noted "when dealing with settlement agreements, Rule 43(k), SCRCP's requirements must be strictly observed. *See* 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."; *see also Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637, 627 S.E.2d 724, 726 (2006) (stating Rule 43(k) applies to settlement agreements); *id.* at 637, 627 S.E.2d at 725 (stating Rule 43(k) is intended to prevent disputes concerning the existence and terms of agreements regarding pending litigation)." *In re Dockery*, Appellate Case No. 2015-000680, unpublished opinion no. 2017-UP-359 (September 27, 2017).

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between Plaintiffs and KA Diehl. The courts have repeatedly made clear that Rule 43(k)'s purpose is to alleviate Courts from having to determine whether an agreement between parties exists.

IV. The Court egregiously ruled that First Services Residential is released from liability.

The Court cannot add a party to the settlement agreement. The defendants have unilaterally decided to add a new party despite there being: no mention of this party in the settlement agreement, no allegations against this party in the complaint, and no mention of "FRS" or "First Services Residential" in KA Diehl's answer. Plaintiffs did not amend the complaint to add allegations against First Services Residential and cannot be forced to retroactively release claims it may have against First Services Residential. First Services Residential was never in any way shape or form a party which Plaintiffs negotiated to release. They have not been involved in this action and should not benefit from this purported agreement.

V. New Evidence.

Plaintiffs maintain that this agreement is subject to Rule 43(k) and that applying Rule 43(k), the settlement agreement is unenforceable. Given that the Court has now determined that the agreement is enforceable, Plaintiffs offer new evidence for the Court to consider.[3] In general, the partially executed settlement agreement provides the following: mutual non-disparagement agreement, attorney fees to the Plaintiffs in exchange for a release of the Plaintiffs claims against the Defendants (with no mention of KA Diehl or First Services Residential), and a paid for future determination about the legality of a gate pass program.

Defendants violated the obtuse non-disparagement clause of the purported settlement agreement when Walter Jordan made a negative comment about Plaintiffs Nancy Moore and Jim

[3] In its amended memorandum to the Court, Plaintiffs anticipated that the Court could err and open up the analysis to contract principles, and further that if the Court did so, it would have to then consider matters such as "prior breach."

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Perkins.[4] The non-disparagement agreement states that "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 and goodwill of Plaintiffs, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required by law." Walter Jordan emailed the following statement: "Jim and Nancy will try and run him off like they did Bill if he doesn't buy into their program." (See Exhibit "B" email attached). Walter Jordan's email conveyed a negative impression of Plaintiffs Jim Perkins and Nancy Moore, and therefore constituted a material breach of the agreement. (See paragraph 8 of the purported settlement agreement, *to wit*, "that any breach of such promises, representations, and warranties would constitute a material breach of this Agreement.")

The Court should consider this new evidence and determine that the agreement is not binding because Defendants actions constitute a material breach of the agreement permitting Plaintiffs to no longer honor the agreement.

CONCLUSION

For all the reasons set forth hereinabove, this Court should accept the motion for reconsideration and grant it, in addition to any and all other measures of relief deemed proper and fit in the interest of justice.

[4] Upon receiving a physical copy of the settlement agreement, Plaintiff Santos (and others who actually attended) did not recall its inclusion, and Santos vehemently opposed any language curtailing his right to free speech. Counsel is not, and will not, divulge any communications which occurred during the mediation (unless required to).

RESPECTFULLY SUBMITTED:

THE BRITTAIN LAW FIRM

s/ A. Preston Brittain
A. Preston Brittain
SC BAR # 73707
4614 Oleander Drive
Myrtle Beach, South Carolina 29577
843-449-8562 (Telephone)
843-497-6124 (Facsimile)
Attorney for Plaintiffs

September 29, 2017
Myrtle Beach, South Carolina.

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THE BRITTAIN LAW FIRM, P.A.
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4614 OLEANDER DRIVE
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THOMAS C. BRITTAIN
MARY MADISON BRITTAIN LANGWAY
A. PRESTON BRITTAIN
T. CASE BRITTAIN, JR.

843-449-8562
843-497-6124
www.brittainlawfirm.com

October 2, 2017

Via First Class Mail

Horry County Clerk of Court

RE:
Civil Action No.: 2016-CP-26-00744

Dear Clerk:

Please see attached Exhibit A and Exhibit B which is be filed and attached to Plaintiffs' Motion to Reconsider which was filed September 29th, 2017 in this matter.

Sincerely yours,

THE BRITTAIN LAW FIRM, P.A.

s/A. Preston Brittain

A. Preston Brittain, Esquire

EXHIBIT A

PROPOSED SETTLEMENT AGREEMENT

ELECTRONICALLY FILED - 2017 Oct 02 10:18 AM - HORRY - COMMON PLEAS - CASE#2016CP2600744

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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.

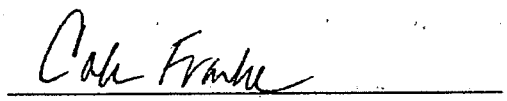
7. Plaintiffs agree that they will not make any statements, oral or written, which they know or reasonably should know to be a disparaging or negative comment about Defendants or their officers, directors, employees and agents, or otherwise detrimental to the reputation or goodwill of Defendants, and 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.

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.

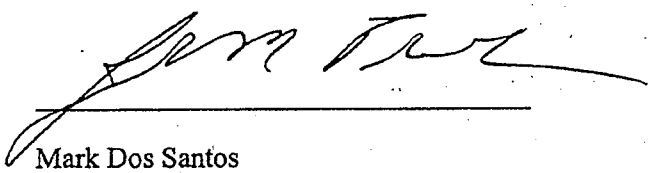
Agreed to this 1st Day of May, 2017.

Plaintiffs

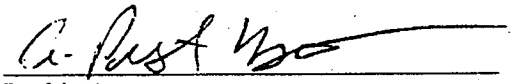
Jim Perkins



Colleen Franke a/k/a Colleen Franke Perkins

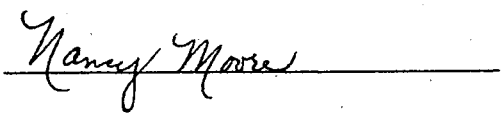


Mark Dos Santos

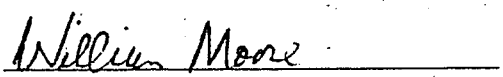


By his Attorney

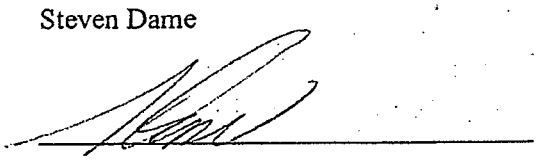
Nancy Moore



William Moore

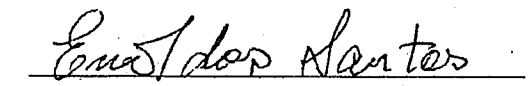


Steven Dame



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Errol Dos Santos



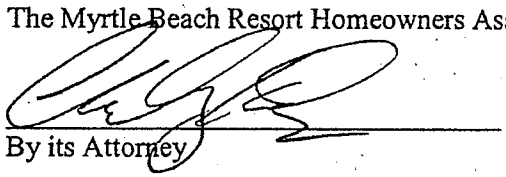
Jeffrey Richardson



By his Attorney

Defendants

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



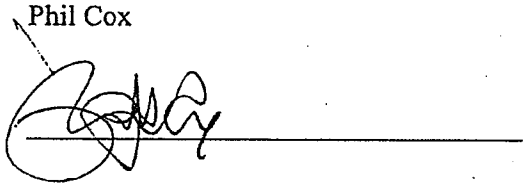
By its Attorney

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

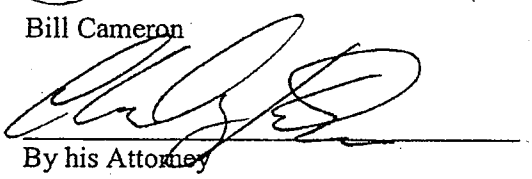


By its Attorney

Phil Cox

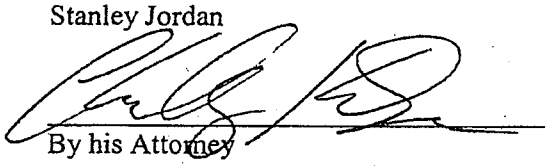


Bill Cameron



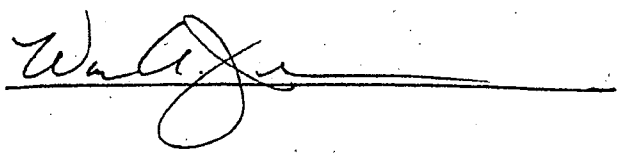
By his Attorney

Stanley Jordan



By his Attorney

Walter Jordan

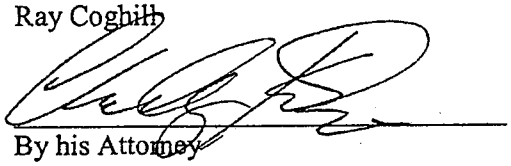


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Ken Perkins

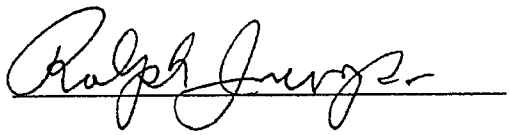


Ray Coghill



By his Attorney

Ralph Jump



Wayne Urban



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EXHIBIT B

EMAIL FROM WALTER JORDAN

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On Sun, Jul 16, 2017 at 5:22 PM, <MBRJimPerkins@aol.com> wrote:
Preston,
Please read below the email sent by Walter Jordan to Steve Dame / Nancy Moore.

Jim Perkins
OFS Board of Directors
Member at Large / MBR HOA Rep
702-755-2352

From: Walter.Jordan@RNDC-USA.COM
To: ssdameofs@yahoo.com, nancyl.moore@outlook.com
CC: mbrjimperkins@aol.com, tdorsey4151@gmail.com, sjordan90@cfl.rr.com, apedraza@wmdouglas.com
Sent: 7/16/2017 1:45:54 P.M. Pacific Daylight Time
Subj: RE: Re: Parking in the compact car spots

Jim and Nancy will try and run him off like they did Bill if he doesn't buy into their program.

Regards,
Walter Jordan
(804) 512-1420

Sent from my Verizon, Samsung Galaxy smartphone
"The information transmitted is intended only for the person or entity to which it is addressed and may contain proprietary, business-confidential and/or privileged material. If you are not the intended recipient of this message you are hereby notified that any use, review, retransmission, dissemination, distribution, reproduction or any action taken in reliance upon this message is prohibited. If you received this in error, please contact the sender and delete the material from any computer."

-----Original Message-----

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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-26-00673**
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' AMENDED MOTION TO RECONSIDER THE ORDER AND FINAL JUDGMENT**

TO: THIS HONORABLE COURT AND COUNSEL FOR THE NAMED DEFENDANTS:

Pursuant to Rule 59(e) and Rule 60(b)(2) of the South Carolina Rules of Civil Procedure, Plaintiffs 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, by and through their undersigned counsel, respectfully submit this Motion for Reconsideration of this Court's Order and Final Judgment entered on September 21, 2017, pursuant to the parties' proposed settlement agreement ("Proposed Settlement").

RULE/LAW

Reconsideration of the Order and Final Judgment should be granted for the following reasons, as further explained herein:

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I. *Court erred in ruling that Rule 43(k) doesn't apply to the settlement signed by some of the parties.*

The Court erred in ruling that Rule 43k doesn't apply to the partially executed settlement agreement. The Court reasoned that Rule 43(k) does not apply to the settlement agreement in issue because the purported settlement agreement is not "an agreement between counsel."

In *Ashfort* our Supreme Court considered a settlement agreement between an insurer and parties. The settlement agreement was not between counsel. Appellants argued Rule 43(k) did not apply to the agreement because it was not between counsel. The Court disagreed explaining that "[t]he intent of Rule 43(k) is to require all agreements regarding pending litigation to either be announced in open court or to be reduced to a consent order or written stipulation and entered." *Ashcroft Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533, 535 (1995) clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 n.2 (2006). (43(k)'s terms are mandatory). The Supreme Court also clarified that "in [their] opinion, Rule 43(k) is applicable to settlement agreements." *Ashcroft Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533, 535 (1995) clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 n.2 (2006). (43(k)'s terms are mandatory). According to our Supreme Court Rule 43(k) applies to settlement agreements including agreements that are not strictly between counsel.

Defendants have no precedent to support their position that *Ashcroft* or *Buckley* should be ignored. The Court apparently accepted Defendants' position that these cases are no longer authoritative because in those cases the Courts considered Rule 43(k) prior to the 2009 amendment to the rule. This argument is flawed. The 2009 Amendment to Rule 43(k) provides a third avenue for enforceability of agreements affecting pending litigation, *to wit*, a writing "signed by the parties and their counsel." SCRCP, Rule 43(k). In support of Plaintiffs' position, The Note to 2009

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Amendment states "a *settlement agreement* is also binding if the agreement is reduced to writing and signed by the parties and their counsel". SCRCP 43(k) Note to 2009 Amendment, (*emphasis added*). The Note to 2009 Amendment plainly states that the Rule applies to settlement agreements. Contrary to Defendants' position, this Amendment is in harmony with South Carolina case law (and ADR Rules). Rule 43(k) applies to the settlement agreement in issue because Rule 43(k) applies to all settlement agreements[1].

II. Court erred in its "alternative theory" of accepting Rule 43(k) and finding its conditions met.

The Court erred in determining that Rule 43(k), if applicable, was satisfied finding the settlement agreement was signed by the parties and their counsel. The settlement agreement itself is the only evidence the court needs to consider. KA Diehl is a party and did not sign the agreement. (The analysis could end there). Counsel for Plaintiffs signed the agreement "for Mark Santos and Jeff Richardson" but did not otherwise sign on their own behalf. (The analysis could end there). Counsel for Defendants signed the agreement "for Ray Coghill" but did not otherwise sign on their own behalf. (The analysis could end there). Counsel for KA Diehl did not sign the agreement. (The analysis could end there). (See attached Exhibit "A" Proposed Settlement Agreement).

The Court provided no explanation as to how the signatures complied with Rule 43(k). Plaintiffs speculate that the Court must have concluded that counsel's signatures were somehow both "for" clients and for themselves, and that KA Diehl nor its attorney had to sign the agreement because KA Diehl is an agent of Defendant Ocean Front Spa and Myrtle Beach Resort Homeowners Association. Assuming this is the "explanation" for finding compliance, the Court

[1] Rule 43(k) and the 2009 Amendment to Rule 43(k) are both in keeping with the South Carolina ADR Rule 6(f) which requires the signatures of the parties and their counsel.

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has erred. Rule 43(k) requires the signature of the parties and their counsel and if lawyers could sign "for clients" then there would be no need for the rule. Likewise, counsel is required to sign on its own behalf. And KA Diehl is a party and should have signed the agreement (and its counsel should have too). The settlement agreement evidences that the parties and counsel failed to comply with Rule 43(k).

The most informative case related to signatures is *Farnsworth*. In *Farnsworth*, the lawyer had authority to sign/resolve litigation for a specific amount and did so, without his client's signature. She rescinded the agreement before Rule 43(k) became satisfied and the Court held that her recension of the agreement was proper. The conditions of Rule 43(k) must be strictly complied with before an agreement can affect pending litigation.[2]

III. The Court erred in ruling that this agreement releases KA Diehl and Associates, Inc.

KA Diehl & Associates, Inc., is a named defendant in two of the four actions brought by Plaintiffs. The purported settlement agreement lists the settling parties in the very first paragraph of the Settlement Agreement. It does not list KA Diehl. In fact, KA Diehl's name never appears in any part of the agreement. Therefore, there is a dispute as to whether there is any agreement between Plaintiffs and KA Diehl. The courts have repeatedly made clear that Rule 43(k)'s purpose is to alleviate Courts from having to determine whether an agreement between parties exists.

IV. The Court egregiously ruled that First Services Residential is released from liability.

[2] In unpublished opinion, filed September 27, 2017 the Court of Appeals noted "when dealing with settlement agreements, Rule 43(k), SCRCP's requirements must be strictly observed. *See* 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."; *see also Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637, 627 S.E.2d 724, 726 (2006) (stating Rule 43(k) applies to settlement agreements); *id.* at 637, 627 S.E.2d at 725 (stating Rule 43(k) is intended to prevent disputes concerning the existence and terms of agreements regarding pending litigation)." *In re Dockery*, Appellate Case No. 2015-000680, unpublished opinion no. 2017-UP-359 (September 27, 2017).

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The Court cannot add a party to the settlement agreement. The defendants have unilaterally decided to add a new party despite there being: no mention of this party in the settlement agreement, no allegations against this party in the complaint, and no mention of "FRS" or "First Services Residential" in KA Diehl's answer. Plaintiffs did not amend the complaint to add allegations against First Services Residential and cannot be forced to retroactively release claims it may have against First Services Residential. First Services Residential was never in any way shape or form a party which Plaintiffs negotiated to release. They have not been involved in this action and should not benefit from this purported agreement.

V. New Evidence.

Plaintiffs maintain that this agreement is subject to Rule 43(k) and that applying Rule 43(k), the settlement agreement is unenforceable. Given that the Court has now determined that the agreement is enforceable, Plaintiffs offer new evidence for the Court to consider.[3] In general, the partially executed settlement agreement provides the following: mutual non-disparagement agreement, attorney fees to the Plaintiffs in exchange for a release of the Plaintiffs claims against the Defendants (with no mention of KA Diehl or First Services Residential), and a paid for future determination about the legality of a gate pass program.

Defendants violated the obtuse non-disparagement clause of the purported settlement agreement when Walter Jordan made a negative comment about Plaintiffs Nancy Moore and Jim Perkins.[4] The non-disparagement agreement states that "Defendants agree that they will not make any statements, oral or written, which they know or reasonably should know to be a disparaging

[3] In its amended memorandum to the Court, Plaintiffs anticipated that the Court could err and open up the analysis to contract principles, and further that if the Court did so, it would have to then consider matters such as "prior breach."
[4] Upon receiving a physical copy of the settlement agreement, Plaintiff Santos (and others who actually attended) did not recall its inclusion, and Santos vehemently opposed any language curtailing his right to free speech. Counsel is not, and will not, divulge any communications which occurred during the mediation (unless required to).

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or negative comment about Plaintiffs or their officers, directors, employees and agents, or otherwise detrimental to the reputation and goodwill of Plaintiffs, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required by law." Walter Jordan emailed the following statement: "Jim and Nancy will try and run him off like they did Bill if he doesn't buy into their program." (See Exhibit "B" email attached). Walter Jordan's email conveyed a negative impression of Plaintiffs Jim Perkins and Nancy Moore, and therefore constituted a material breach of the agreement. (See paragraph 8 of the purported settlement agreement, *to wit*, "that any breach of such promises, representations, and warranties would constitute a material breach of this Agreement.")

The Court should consider this new evidence and determine that the agreement is not binding because Defendants actions constitute a material breach of the agreement permitting Plaintiffs to no longer honor the agreement.

CONCLUSION

For all the reasons set forth hereinabove, this Court should accept the motion for reconsideration and grant it, in addition to any and all other measures of relief deemed proper and fit in the interest of justice. Plaintiffs hereby request a hearing.

RESPECTFULLY SUBMITTED:

THE BRITTAIN LAW FIRM

s/ A. Preston Brittain
A. Preston Brittain
SC BAR # 73707
4614 Oleander Drive
Myrtle Beach, South Carolina 29577
843-449-8562 (Telephone)
843-497-6124 (Facsimile)
Attorney for Plaintiffs

October 2, 2017
Myrtle Beach, South Carolina.

EXHIBIT A

PROPOSED 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 a/k/a Colleen Franke Perkins

Mark Dos Santos

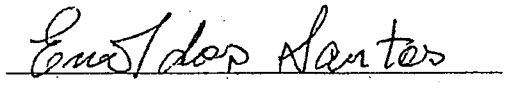
By his Attorney

Nancy Moore

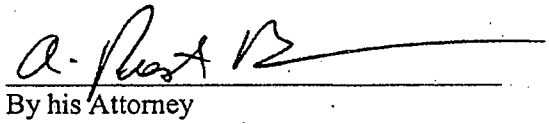
William Moore

Steven Dame

Errol Dos Santos



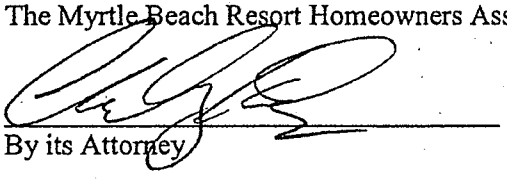
Jeffrey Richardson



By his Attorney

Defendants

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



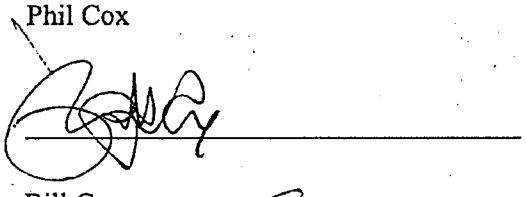
By its Attorney

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

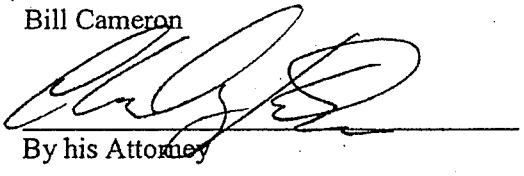


By its Attorney

Phil Cox

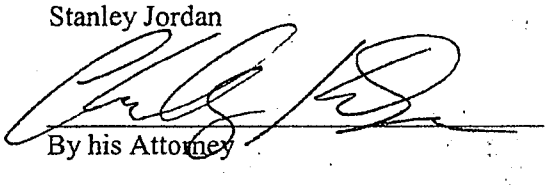


Bill Cameron



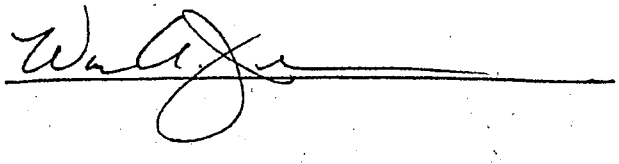
By his Attorney

Stanley Jordan



By his Attorney

Walter Jordan

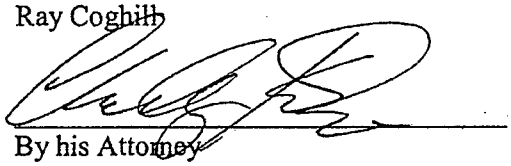


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Ken Perkins

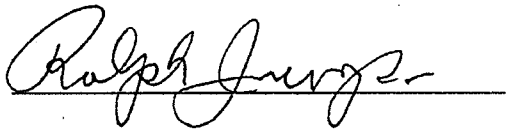


Ray Coghill

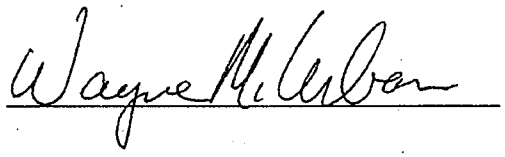


By his Attorney

Ralph Jump



Wayne Urban



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EXHIBIT B

EMAIL FROM WALTER JORDAN

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On Sun, Jul 16, 2017 at 5:22 PM, <MBRJimPerkins@aol.com> wrote:
Preston,
Please read below the email sent by Walter Jordan to Steve Dame / Nancy Moore.

Jim Perkins
OFS Board of Directors
Member at Large / MBR HOA Rep
702-755-2352

From: Walter.Jordan@RNDC-USA.COM
To: ssdameofs@yahoo.com, nancyl.moore@outlook.com
CC: mbrjimperkins@aol.com, tdorsey4151@gmail.com, sjordan90@cfl.rr.com, apedraza@wmdouglas.com
Sent: 7/16/2017 1:45:54 P.M. Pacific Daylight Time
Subj: RE: Re: Parking in the compact car spots

Jim and Nancy will try and run him off like they did Bill if he doesn't buy into their program.

Regards,
Walter Jordan
(804) 512-1420

Sent from my Verizon, Samsung Galaxy smartphone
"The information transmitted is intended only for the person or entity to which it is addressed and may contain proprietary, business-confidential and/or privileged material. If you are not the intended recipient of this message you are hereby notified that any use, review, retransmission, dissemination, distribution, reproduction or any action taken in reliance upon this message is prohibited. If you received this in error, please contact the sender and delete the material from any computer."

-----Original Message-----

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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' AMENDED MOTION TO RECONSIDER THE FINAL ORDER AND JUDGMENT**

TO: THIS HONORABLE COURT AND COUNSEL FOR THE NAMED DEFENDANTS:

Pursuant to Rule 59(e) and Rule 60(b)(2) of the South Carolina Rules of Civil Procedure, Plaintiffs 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, by and through their undersigned counsel, respectfully submit this Motion for Reconsideration of this Court's Order and Final Judgment entered on September 21, 2017, pursuant to the parties' proposed settlement agreement ("Proposed Settlement").

RULE/LAW

Reconsideration of the Order and Final Judgment should be granted for the following reasons, as further explained herein:

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I. *Court erred in ruling that Rule 43(k) doesn't apply to the settlement signed by some of the parties.*

The Court erred in ruling that Rule 43k doesn't apply to the partially executed settlement agreement. The Court reasoned that Rule 43(k) does not apply to the settlement agreement in issue because the purported settlement agreement is not "an agreement between counsel."

In *Ashfort* our Supreme Court considered a settlement agreement between an insurer and parties. The settlement agreement was not between counsel. Appellants argued Rule 43(k) did not apply to the agreement because it was not between counsel. The Court disagreed explaining that "[t]he intent of Rule 43(k) is to require all agreements regarding pending litigation to either be announced in open court or to be reduced to a consent order or written stipulation and entered." *Ashcroft Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533, 535 (1995) clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 n.2 (2006). (43(k)'s terms are mandatory). The Supreme Court also clarified that "in [their] opinion, Rule 43(k) is applicable to settlement agreements." *Ashcroft Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533, 535 (1995) clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 n.2 (2006). (43(k)'s terms are mandatory). According to our Supreme Court Rule 43(k) applies to settlement agreements including agreements that are not strictly between counsel.

Defendants have no precedent to support their position that *Ashcroft* or *Buckley* should be ignored. The Court apparently accepted Defendants' position that these cases are no longer authoritative because in those cases the Courts considered Rule 43(k) prior to the 2009 amendment to the rule. This argument is flawed. The 2009 Amendment to Rule 43(k) provides a third avenue for enforceability of agreements affecting pending litigation, *to wit*, a writing "signed by the parties and their counsel." SCRCP, Rule 43(k). In support of Plaintiffs' position, The Note to 2009 Amendment states "a *settlement agreement* is also binding if the agreement is reduced to writing

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and signed by the parties and their counsel". SCRCP 43(k) Note to 2009 Amendment, (*emphasis added*). The Note to 2009 Amendment plainly states that the Rule applies to settlement agreements. Contrary to Defendants' position, this Amendment is in harmony with South Carolina case law (and ADR Rules). Rule 43(k) applies to the settlement agreement in issue because Rule 43(k) applies to all settlement agreements[1].

II. Court erred in its "alternative theory" of accepting Rule 43(k) and finding its conditions met.

The Court erred in determining that Rule 43(k), if applicable, was satisfied finding the settlement agreement was signed by the parties and their counsel. The settlement agreement itself is the only evidence the court needs to consider. KA Diehl is a party and did not sign the agreement. (The analysis could end there). Counsel for Plaintiffs signed the agreement "for Mark Santos and Jeff Richardson" but did not otherwise sign on their own behalf. (The analysis could end there). Counsel for Defendants signed the agreement "for Ray Coghill" but did not otherwise sign on their own behalf. (The analysis could end there). Counsel for KA Diehl did not sign the agreement. (The analysis could end there). (See attached Exhibit "A" Proposed Settlement Agreement).

The Court provided no explanation as to how the signatures complied with Rule 43(k). Plaintiffs speculate that the Court must have concluded that counsel's signatures were somehow both "for" clients and for themselves, and that KA Diehl nor its attorney had to sign the agreement because KA Diehl is an agent of Defendant Ocean Front Spa and Myrtle Beach Resort Homeowners Association. Assuming this is the "explanation" for finding compliance, the Court has erred. Rule 43(k) requires the signature of the parties and their counsel and if lawyers could

[1] Rule 43(k) and the 2009 Amendment to Rule 43(k) are both in keeping with the South Carolina ADR Rule 6(f) which requires the signatures of the parties and their counsel.

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sign "for clients" then there would be no need for the rule. Likewise, counsel is required to sign on its own behalf. And KA Diehl is a party and should have signed the agreement (and its counsel should have too). The settlement agreement evidences that the parties and counsel failed to comply with Rule 43(k).

The most informative case related to signatures is *Farnsworth*. In *Farnsworth*, the lawyer had authority to sign/resolve litigation for a specific amount and did so, without his client's signature. She rescinded the agreement before Rule 43(k) became satisfied and the Court held that her recension of the agreement was proper. The conditions of Rule 43(k) must be strictly complied with before an agreement can affect pending litigation.[2]

III. The Court erred in ruling that this agreement releases KA Diehl and Associates, Inc.

KA Diehl & Associates, Inc., is a named defendant in two of the four actions brought by Plaintiffs. The purported settlement agreement lists the settling parties in the very first paragraph of the Settlement Agreement. It does not list KA Diehl. In fact, KA Diehl's name never appears in any part of the agreement. Therefore, there is a dispute as to whether there is any agreement between Plaintiffs and KA Diehl. The courts have repeatedly made clear that Rule 43(k)'s purpose is to alleviate Courts from having to determine whether an agreement between parties exists.

IV. The Court egregiously ruled that First Services Residential is released from liability.

The Court cannot add a party to the settlement agreement. The defendants have unilaterally decided to add a new party despite there being: no mention of this party in the settlement

[2] In unpublished opinion, filed September 27, 2017 the Court of Appeals noted "when dealing with settlement agreements, Rule 43(k), SCRCP's requirements must be strictly observed. *See* 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."; *see also Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637, 627 S.E.2d 724, 726 (2006) (stating Rule 43(k) applies to settlement agreements); *id.* at 637, 627 S.E.2d at 725 (stating Rule 43(k) is intended to prevent disputes concerning the existence and terms of agreements regarding pending litigation)." *In re Dockery*, Appellate Case No. 2015-000680, unpublished opinion no. 2017-UP-359 (September 27, 2017).

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agreement, no allegations against this party in the complaint, and no mention of "FRS" or "First Services Residential" in KA Diehl's answer. Plaintiffs did not amend the complaint to add allegations against First Services Residential and cannot be forced to retroactively release claims it may have against First Services Residential. First Services Residential was never in any way shape or form a party which Plaintiffs negotiated to release. They have not been involved in this action and should not benefit from this purported agreement.

V. New Evidence.

Plaintiffs maintain that this agreement is subject to Rule 43(k) and that applying Rule 43(k), the settlement agreement is unenforceable. Given that the Court has now determined that the agreement is enforceable, Plaintiffs offer new evidence for the Court to consider.[3] In general, the partially executed settlement agreement provides the following: mutual non-disparagement agreement, attorney fees to the Plaintiffs in exchange for a release of the Plaintiffs claims against the Defendants (with no mention of KA Diehl or First Services Residential), and a paid for future determination about the legality of a gate pass program.

Defendants violated the obtuse non-disparagement clause of the purported settlement agreement when Walter Jordan made a negative comment about Plaintiffs Nancy Moore and Jim Perkins.[4] The non-disparagement agreement states that "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 and goodwill of Plaintiffs, and shall refrain from suggesting

[3] In its amended memorandum to the Court, Plaintiffs anticipated that the Court could err and open up the analysis to contract principles, and further that if the Court did so, it would have to then consider matters such as "prior breach."
[4] Upon receiving a physical copy of the settlement agreement, Plaintiff Santos (and others who actually attended) did not recall its inclusion; and Santos vehemently opposed any language curtailing his right to free speech. Counsel is not, and will not, divulge any communications which occurred during the mediation (unless required to).

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to anyone else that such disparaging, negative or detrimental comment be made, unless required by law." Walter Jordan emailed the following statement: "Jim and Nancy will try and run him off like they did Bill if he doesn't buy into their program." (See Exhibit "B" email attached). Walter Jordan's email conveyed a negative impression of Plaintiffs Jim Perkins and Nancy Moore, and therefore constituted a material breach of the agreement. (See paragraph 8 of the purported settlement agreement, *to wit*, "that any breach of such promises, representations, and warranties would constitute a material breach of this Agreement.")

The Court should consider this new evidence and determine that the agreement is not binding because Defendants actions constitute a material breach of the agreement permitting Plaintiffs to no longer honor the agreement.

CONCLUSION

For all the reasons set forth hereinabove, this Court should accept the motion for reconsideration and grant it, in addition to any and all other measures of relief deemed proper and fit in the interest of justice. Plaintiffs hereby request a hearing.

RESPECTFULLY SUBMITTED:

THE BRITTAIN LAW FIRM

s/ A. Preston Brittain
A. Preston Brittain
SC BAR # 73707
4614 Oleander Drive
Myrtle Beach, South Carolina 29577
843-449-8562 (Telephone)
843-497-6124 (Facsimile)
Attorney for Plaintiffs

October 2, 2017
Myrtle Beach, South Carolina.

EXHIBIT A

PROPOSED SETTLEMENT AGREEMENT

ELECTRONICALLY FILED - 2017 Oct 02 4:25 PM - HORRY - COMMON PLEAS - CASE#2016CP260674

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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 a/k/a Colleen Franke Perkins

Mark Dos Santos

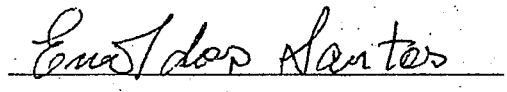
By his Attorney

Nancy Moore

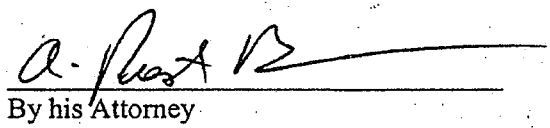
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Steven Dame

Errol Dos Santos



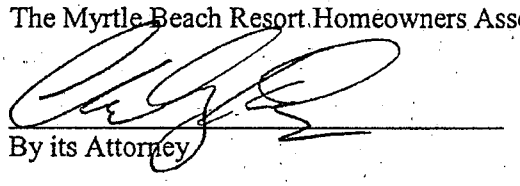
Jeffrey Richardson



By his Attorney

Defendants

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



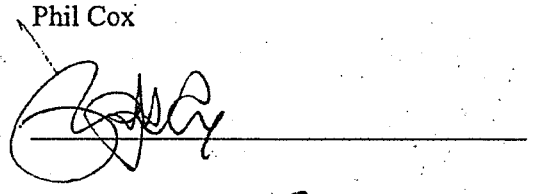
By its Attorney

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

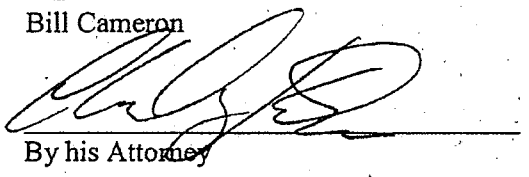


By its Attorney

Phil Cox

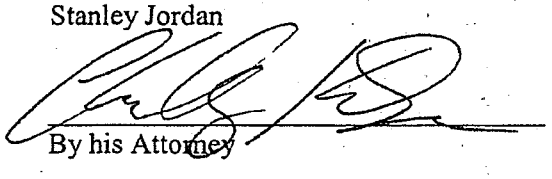


Bill Cameron



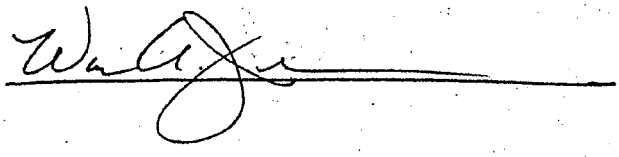
By his Attorney

Stanley Jordan



By his Attorney

Walter Jordan



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Ken Perkins

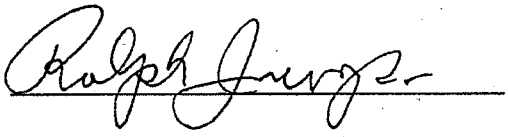


Ray Coghill

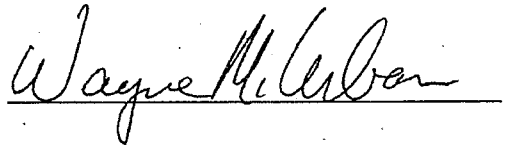


By his Attorney

Ralph Jump



Wayne Urban



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EXHIBIT B

EMAIL FROM WALTER JORDAN

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On Sun, Jul 16, 2017 at 5:22 PM, <MBRJimPerkins@aol.com> wrote:
Preston,
Please read below the email sent by Walter Jordan to Steve Dame / Nancy Moore.

Jim Perkins
OFS Board of Directors
Member at Large / MBR HOA Rep
702-755-2352

From: Walter.Jordan@RNDC-USA.COM
To: ssdameofs@yahoo.com, nancyl.moore@outlook.com
CC: mbrjimperkins@aol.com, tdorsey4151@gmail.com, sjordan90@cfl.rr.com, apedraza@wmdouglas.com
Sent: 7/16/2017 1:45:54 P.M. Pacific Daylight Time
Subj: RE: Re: Parking in the compact car spots

Jim and Nancy will try and run him off like they did Bill if he doesn't buy into their program.

Regards,
Walter Jordan
(804) 512-1420

Sent from my Verizon, Samsung Galaxy smartphone
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-----Original Message-----

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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' AMENDED MOTION TO RECONSIDER THE ORDER AND FINAL JUDGMENT**

TO: THIS HONORABLE COURT AND COUNSEL FOR THE NAMED DEFENDANTS:

Pursuant to Rule 59(e) and Rule 60(b)(2) of the South Carolina Rules of Civil Procedure, Plaintiffs 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, by and through their undersigned counsel, respectfully submit this Motion for Reconsideration of this Court's Order and Final Judgment entered on September 21, 2017, pursuant to the parties' proposed settlement agreement ("Proposed Settlement").

RULE/LAW

Reconsideration of the Order and Final Judgment should be granted for the following reasons, as further explained herein:

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I. *Court erred in ruling that Rule 43(k) doesn't apply to the settlement signed by some of the parties.*

The Court erred in ruling that Rule 43k doesn't apply to the partially executed settlement agreement. The Court reasoned that Rule 43(k) does not apply to the settlement agreement in issue because the purported settlement agreement is not "an agreement between counsel."

In *Ashfort* our Supreme Court considered a settlement agreement between an insurer and parties. The settlement agreement was not between counsel. Appellants argued Rule 43(k) did not apply to the agreement because it was not between counsel. The Court disagreed explaining that "[t]he intent of Rule 43(k) is to require all agreements regarding pending litigation to either be announced in open court or to be reduced to a consent order or written stipulation and entered." *Ashcroft Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533, 535 (1995) clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 n.2 (2006). (43(k)'s terms are mandatory). The Supreme Court also clarified that "in [their] opinion, Rule 43(k) is applicable to settlement agreements." *Ashcroft Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533, 535 (1995) clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 n.2 (2006). (43(k)'s terms are mandatory). According to our Supreme Court Rule 43(k) applies to settlement agreements including agreements that are not strictly between counsel.

Defendants have no precedent to support their position that *Ashcroft* or *Buckley* should be ignored. The Court apparently accepted Defendants' position that these cases are no longer authoritative because in those cases the Courts considered Rule 43(k) prior to the 2009 amendment to the rule. This argument is flawed. The 2009 Amendment to Rule 43(k) provides a third avenue for enforceability of agreements affecting pending litigation, *to wit*, a writing "signed by the parties and their counsel." SCRCP, Rule 43(k). In support of Plaintiffs' position, The Note to 2009

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Amendment states "a *settlement agreement* is also binding if the agreement is reduced to writing and signed by the parties and their counsel". SCRCP 43(k) Note to 2009 Amendment, (*emphasis added*). The Note to 2009 Amendment plainly states that the Rule applies to settlement agreements. Contrary to Defendants' position, this Amendment is in harmony with South Carolina case law (and ADR Rules). Rule 43(k) applies to the settlement agreement in issue because Rule 43(k) applies to all settlement agreements[1].

II. Court erred in its "alternative theory" of accepting Rule 43(k) and finding its conditions met.

The Court erred in determining that Rule 43(k), if applicable, was satisfied finding the settlement agreement was signed by the parties and their counsel. The settlement agreement itself is the only evidence the court needs to consider. KA Diehl is a party and did not sign the agreement. (The analysis could end there). Counsel for Plaintiffs signed the agreement "for Mark Santos and Jeff Richardson" but did not otherwise sign on their own behalf. (The analysis could end there). Counsel for Defendants signed the agreement "for Ray Coghill" but did not otherwise sign on their own behalf. (The analysis could end there). Counsel for KA Diehl did not sign the agreement. (The analysis could end there). (See attached Exhibit "A" Proposed Settlement Agreement).

The Court provided no explanation as to how the signatures complied with Rule 43(k). Plaintiffs speculate that the Court must have concluded that counsel's signatures were somehow both "for" clients and for themselves, and that KA Diehl nor its attorney had to sign the agreement because KA Diehl is an agent of Defendant Ocean Front Spa and Myrtle Beach Resort Homeowners Association. Assuming this is the "explanation" for finding compliance, the Court

[1] Rule 43(k) and the 2009 Amendment to Rule 43(k) are both in keeping with the South Carolina ADR Rule 6(f) which requires the signatures of the parties and their counsel.

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has erred. Rule 43(k) requires the signature of the parties and their counsel and if lawyers could sign "for clients" then there would be no need for the rule. Likewise, counsel is required to sign on its own behalf. And KA Diehl is a party and should have signed the agreement (and its counsel should have too). The settlement agreement evidences that the parties and counsel failed to comply with Rule 43(k).

The most informative case related to signatures is *Farnsworth*. In *Farnsworth*, the lawyer had authority to sign/resolve litigation for a specific amount and did so, without his client's signature. She rescinded the agreement before Rule 43(k) became satisfied and the Court held that her recension of the agreement was proper. The conditions of Rule 43(k) must be strictly complied with before an agreement can affect pending litigation.[2]

III. The Court erred in ruling that this agreement releases KA Diehl and Associates, Inc.

KA Diehl & Associates, Inc., is a named defendant in two of the four actions brought by Plaintiffs. The purported settlement agreement lists the settling parties in the very first paragraph of the Settlement Agreement. It does not list KA Diehl. In fact, KA Diehl's name never appears in any part of the agreement. Therefore, there is a dispute as to whether there is any agreement between Plaintiffs and KA Diehl. The courts have repeatedly made clear that Rule 43(k)'s purpose is to alleviate Courts from having to determine whether an agreement between parties exists.

IV. The Court egregiously ruled that First Services Residential is released from liability.

[2] In unpublished opinion, filed September 27, 2017 the Court of Appeals noted "when dealing with settlement agreements, Rule 43(k), SCRCP's requirements must be strictly observed. *See* 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."; *see also Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637, 627 S.E.2d 724, 726 (2006) (stating Rule 43(k) applies to settlement agreements); *id.* at 637, 627 S.E.2d at 725 (stating Rule 43(k) is intended to prevent disputes concerning the existence and terms of agreements regarding pending litigation)." *In re Dockery*, Appellate Case No. 2015-000680, unpublished opinion no. 2017-UP-359 (September 27, 2017).

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The Court cannot add a party to the settlement agreement. The defendants have unilaterally decided to add a new party despite there being: no mention of this party in the settlement agreement, no allegations against this party in the complaint, and no mention of "FRS" or "First Services Residential" in KA Diehl's answer. Plaintiffs did not amend the complaint to add allegations against First Services Residential and cannot be forced to retroactively release claims it may have against First Services Residential. First Services Residential was never in any way shape or form a party which Plaintiffs negotiated to release. They have not been involved in this action and should not benefit from this purported agreement.

V. New Evidence.

Plaintiffs maintain that this agreement is subject to Rule 43(k) and that applying Rule 43(k), the settlement agreement is unenforceable. Given that the Court has now determined that the agreement is enforceable, Plaintiffs offer new evidence for the Court to consider.[3] In general, the partially executed settlement agreement provides the following: mutual non-disparagement agreement, attorney fees to the Plaintiffs in exchange for a release of the Plaintiffs claims against the Defendants (with no mention of KA Diehl or First Services Residential), and a paid for future determination about the legality of a gate pass program.

Defendants violated the obtuse non-disparagement clause of the purported settlement agreement when Walter Jordan made a negative comment about Plaintiffs Nancy Moore and Jim Perkins.[4] The non-disparagement agreement states that "Defendants agree that they will not make any statements, oral or written, which they know or reasonably should know to be a disparaging

[3] In its amended memorandum to the Court, Plaintiffs anticipated that the Court could err and open up the analysis to contract principles, and further that if the Court did so, it would have to then consider matters such as "prior breach."
[4] Upon receiving a physical copy of the settlement agreement, Plaintiff Santos (and others who actually attended) did not recall its inclusion, and Santos vehemently opposed any language curtailing his right to free speech. Counsel is not, and will not, divulge any communications which occurred during the mediation (unless required to).

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or negative comment about Plaintiffs or their officers, directors, employees and agents, or otherwise detrimental to the reputation and goodwill of Plaintiffs, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required by law." Walter Jordan emailed the following statement: "Jim and Nancy will try and run him off like they did Bill if he doesn't buy into their program." (See Exhibit "B" email attached). Walter Jordan's email conveyed a negative impression of Plaintiffs Jim Perkins and Nancy Moore, and therefore constituted a material breach of the agreement. (See paragraph 8 of the purported settlement agreement, *to wit*, "that any breach of such promises, representations, and warranties would constitute a material breach of this Agreement.")

The Court should consider this new evidence and determine that the agreement is not binding because Defendants actions constitute a material breach of the agreement permitting Plaintiffs to no longer honor the agreement.

CONCLUSION

For all the reasons set forth hereinabove, this Court should accept the motion for reconsideration and grant it, in addition to any and all other measures of relief deemed proper and fit in the interest of justice. Plaintiffs hereby request a hearing.

RESPECTFULLY SUBMITTED:

THE BRITTAIN LAW FIRM

s/ A. Preston Brittain
A. Preston Brittain
SC BAR # 73707
4614 Oleander Drive
Myrtle Beach, South Carolina 29577
843-449-8562 (Telephone)
843-497-6124 (Facsimile)
Attorney for Plaintiffs

October 2, 2017
Myrtle Beach, South Carolina.

EXHIBIT A

PROPOSED SETTLEMENT AGREEMENT

ELECTRONICALLY FILED - 2017 Oct 02 4:31 PM - 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

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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

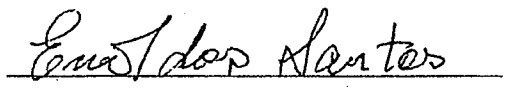
By his Attorney

Nancy Moore

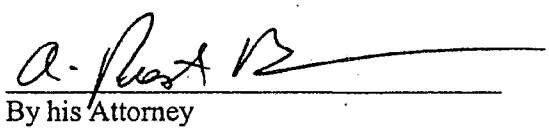
William Moore

Steven Dame

Errol Dos Santos



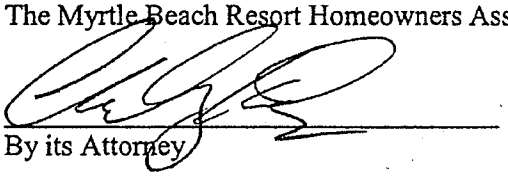
Jeffrey Richardson



By his Attorney

Defendants

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



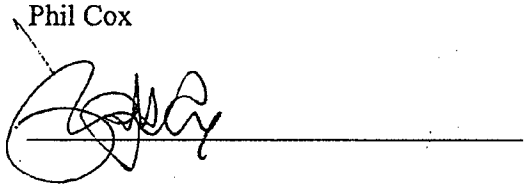
By its Attorney

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

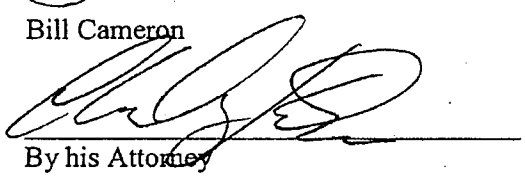


By its Attorney

Phil Cox

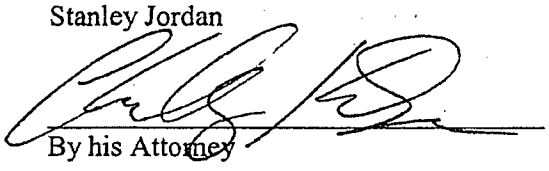


Bill Cameron



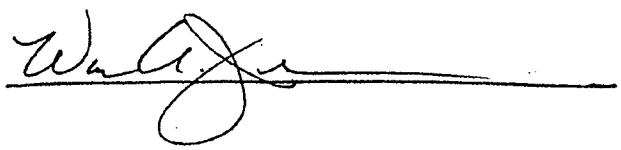
By his Attorney

Stanley Jordan



By his Attorney

Walter Jordan



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Ken Perkins

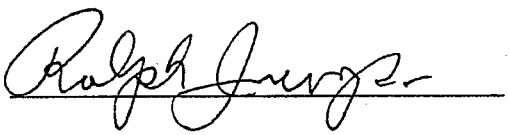


Ray Coghill



By his Attorney

Ralph Jump



Wayne Urban



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EXHIBIT B

EMAIL FROM WALTER JORDAN

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Member at Large / MBR HOA Rep
702-755-2352

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To: ssdameofs@yahoo.com, nancyl.moore@outlook.com
CC: mbrjimperkins@aol.com, tdorsey4151@gmail.com, sjordan90@cfl.rr.com, apedraza@wmdouglas.com
Sent: 7/16/2017 1:45:54 P.M. Pacific Daylight Time
Subj: RE: Re: Parking in the compact car spots

Jim and Nancy will try and run him off like they did Bill if he doesn't buy into their program.

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Sent from my Verizon, Samsung Galaxy smartphone
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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' AMENDED MOTION TO RECONSIDER THE ORDER AND FINAL JUDGMENT**

TO: THIS HONORABLE COURT AND COUNSEL FOR THE NAMED DEFENDANTS:

Pursuant to Rule 59(e) and Rule 60(b)(2) of the South Carolina Rules of Civil Procedure, Plaintiffs 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, by and through their undersigned counsel, respectfully submit this Motion for Reconsideration of this Court's Order and Final Judgment entered on September 21, 2017, pursuant to the parties' proposed settlement agreement ("Proposed Settlement").

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RULE/LAW

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In *Ashfort* our Supreme Court considered a settlement agreement between an insurer and parties. The settlement agreement was not between counsel. Appellants argued Rule 43(k) did not apply to the agreement because it was not between counsel. The Court disagreed explaining that "[t]he intent of Rule 43(k) is to require all agreements regarding pending litigation to either be announced in open court or to be reduced to a consent order or written stipulation and entered." *Ashcroft Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533, 535 (1995) clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 n.2 (2006). (43(k)'s terms are mandatory). The Supreme Court also clarified that "in [their] opinion, Rule 43(k) is applicable to settlement agreements." *Ashcroft Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533, 535 (1995) clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 n.2 (2006). (43(k)'s terms are mandatory). According to our Supreme Court Rule 43(k) applies to settlement agreements including agreements that are not strictly between counsel.

Defendants have no precedent to support their position that *Ashcroft* or *Buckley* should be ignored. The Court apparently accepted Defendants' position that these cases are no longer authoritative because in those cases the Courts considered Rule 43(k) prior to the 2009 amendment

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to the rule. This argument is flawed. The 2009 Amendment to Rule 43(k) provides a third avenue for enforceability of agreements affecting pending litigation, *to wit*, a writing "signed by the parties and their counsel." SCRCP, Rule 43(k). In support of Plaintiffs' position, The Note to 2009 Amendment states "a *settlement agreement* is also binding if the agreement is reduced to writing and signed by the parties and their counsel". SCRCP 43(k) Note to 2009 Amendment, (*emphasis added*). The Note to 2009 Amendment plainly states that the Rule applies to settlement agreements. Contrary to Defendants' position, this Amendment is in harmony with South Carolina case law (and ADR Rules). Rule 43(k) applies to the settlement agreement in issue because Rule 43(k) applies to all settlement agreements[1].

II. Court erred in its "alternative theory" of accepting Rule 43(k) and finding its conditions met.

The Court erred in determining that Rule 43(k), if applicable, was satisfied finding the settlement agreement was signed by the parties and their counsel. The settlement agreement itself is the only evidence the court needs to consider. KA Diehl is a party and did not sign the agreement. (The analysis could end there). Counsel for Plaintiffs signed the agreement "for Mark Santos and Jeff Richardson" but did not otherwise sign on their own behalf. (The analysis could end there). Counsel for Defendants signed the agreement "for Ray Coghill" but did not otherwise sign on their own behalf. (The analysis could end there). Counsel for KA Diehl did not sign the agreement. (The analysis could end there). (See attached Exhibit "A" Proposed Settlement Agreement).

[1] Rule 43(k) and the 2009 Amendment to Rule 43(k) are both in keeping with the South Carolina ADR Rule 6(f) which requires the signatures of the parties and their counsel.

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The Court provided no explanation as to how the signatures complied with Rule 43(k). Plaintiffs speculate that the Court must have concluded that counsel's signatures were somehow both "for" clients and for themselves, and that KA Diehl nor its attorney had to sign the agreement because KA Diehl is an agent of Defendant Ocean Front Spa and Myrtle Beach Resort Homeowners Association. Assuming this is the "explanation" for finding compliance, the Court has erred. Rule 43(k) requires the signature of the parties and their counsel and if lawyers could sign "for clients" then there would be no need for the rule. Likewise, counsel is required to sign on its own behalf. And KA Diehl is a party and should have signed the agreement (and its counsel should have too). The settlement agreement evidences that the parties and counsel failed to comply with Rule 43(k).

The most informative case related to signatures is *Farnsworth*. In *Farnsworth*, the lawyer had authority to sign/resolve litigation for a specific amount and did so, without his client's signature. She rescinded the agreement before Rule 43(k) became satisfied and the Court held that her recension of the agreement was proper. The conditions of Rule 43(k) must be strictly complied with before an agreement can affect pending litigation.[2]

III. The Court erred in ruling that this agreement releases KA Diehl and Associates, Inc.

KA Diehl & Associates, Inc., is a named defendant in two of the four actions brought by Plaintiffs. The purported settlement agreement lists the settling parties in the very first paragraph

[2] In unpublished opinion, filed September 27, 2017 the Court of Appeals noted "when dealing with settlement agreements, Rule 43(k), SCRCP's requirements must be strictly observed. *See* 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."; *see also Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637, 627 S.E.2d 724, 726 (2006) (stating Rule 43(k) applies to settlement agreements); *id.* at 637, 627 S.E.2d at 725 (stating Rule 43(k) is intended to prevent disputes concerning the existence and terms of agreements regarding pending litigation)." *In re Dockery*, Appellate Case No. 2015-000680, unpublished opinion no. 2017-UP-359 (September 27, 2017).

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of the Settlement Agreement. It does not list KA Diehl. In fact, KA Diehl's name never appears in any part of the agreement. Therefore, there is a dispute as to whether there is any agreement between Plaintiffs and KA Diehl. The courts have repeatedly made clear that Rule 43(k)'s purpose is to alleviate Courts from having to determine whether an agreement between parties exists.

IV. The Court egregiously ruled that First Services Residential is released from liability.

The Court cannot add a party to the settlement agreement. The defendants have unilaterally decided to add a new party despite there being: no mention of this party in the settlement agreement, no allegations against this party in the complaint, and no mention of "FRS" or "First Services Residential" in KA Diehl's answer. Plaintiffs did not amend the complaint to add allegations against First Services Residential and cannot be forced to retroactively release claims it may have against First Services Residential. First Services Residential was never in any way shape or form a party which Plaintiffs negotiated to release. They have not been involved in this action and should not benefit from this purported agreement.

V. New Evidence.

Plaintiffs maintain that this agreement is subject to Rule 43(k) and that applying Rule 43(k), the settlement agreement is unenforceable. Given that the Court has now determined that the agreement is enforceable, Plaintiffs offer new evidence for the Court to consider.[3] In general, the partially executed settlement agreement provides the following: mutual non-disparagement agreement, attorney fees to the Plaintiffs in exchange for a release of the Plaintiffs claims against the Defendants (with no mention of KA Diehl or First Services Residential), and a paid for future determination about the legality of a gate pass program.

[3] In its amended memorandum to the Court, Plaintiffs anticipated that the Court could err and open up the analysis to contract principles, and further that if the Court did so, it would have to then consider matters such as "prior breach."

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Defendants violated the obtuse non-disparagement clause of the purported settlement agreement when Walter Jordan made a negative comment about Plaintiffs Nancy Moore and Jim Perkins.[4] The non-disparagement agreement states that "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 and goodwill of Plaintiffs, and shall refrain from suggesting to anyone else that such disparaging, negative or detrimental comment be made, unless required by law." Walter Jordan emailed the following statement: "Jim and Nancy will try and run him off like they did Bill if he doesn't buy into their program." (See Exhibit "B" email attached). Walter Jordan's email conveyed a negative impression of Plaintiffs Jim Perkins and Nancy Moore, and therefore constituted a material breach of the agreement. (See paragraph 8 of the purported settlement agreement, *to wit*, "that any breach of such promises, representations, and warranties would constitute a material breach of this Agreement.")

The Court should consider this new evidence and determine that the agreement is not binding because Defendants actions constitute a material breach of the agreement permitting Plaintiffs to no longer honor the agreement.

CONCLUSION

For all the reasons set forth hereinabove, this Court should accept the motion for reconsideration and grant it, in addition to any and all other measures of relief deemed proper and fit in the interest of justice. Plaintiffs hereby request a hearing.

[4] Upon receiving a physical copy of the settlement agreement, Plaintiff Santos (and others who actually attended) did not recall its inclusion, and Santos vehemently opposed any language curtailing his right to free speech. Counsel is not, and will not, divulge any communications which occurred during the mediation (unless required to).

RESPECTFULLY SUBMITTED:

THE BRITTAIN LAW FIRM

s/ A. Preston Brittain

A. Preston Brittain
SC BAR # 73707
4614 Oleander Drive
Myrtle Beach, South Carolina 29577
843-449-8562 (Telephone)
843-497-6124 (Facsimile)
Attorney for Plaintiffs

October 2, 2017
Myrtle Beach, South Carolina.

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EXHIBIT A

PROPOSED 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 a/k/a Colleen Franke Perkins

Mark Dos Santos

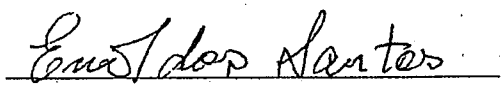
By his Attorney

Nancy Moore

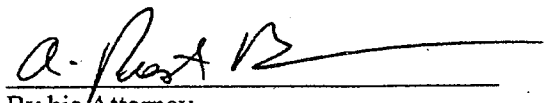
William Moore

Steven Dame

Errol Dos Santos



Jeffrey Richardson



By his Attorney

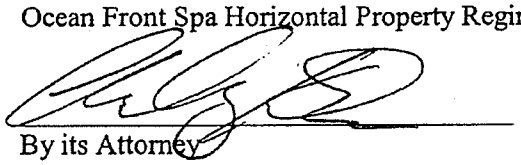
Defendants

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



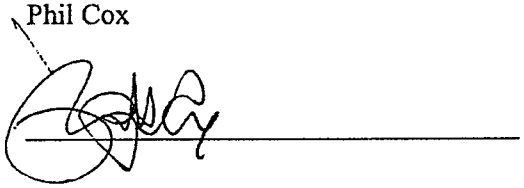
By its Attorney

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

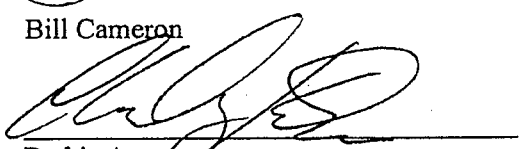


By its Attorney

Phil Cox

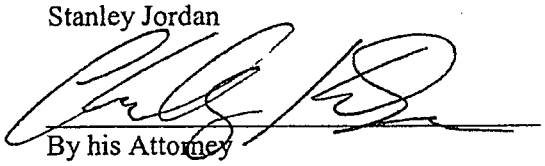


Bill Cameron



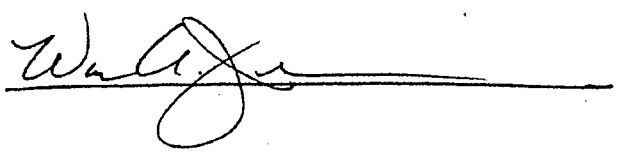
By his Attorney

Stanley Jordan



By his Attorney

Walter Jordan

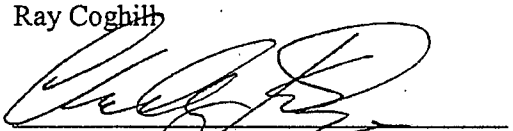


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Ken Perkins

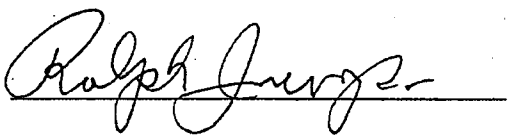


Ray Coghill



By his Attorney

Ralph Jump



Wayne Urban



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EXHIBIT B

EMAIL FROM WALTER JORDAN

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On Sun, Jul 16, 2017 at 5:22 PM, <MBRJimPerkins@aol.com> wrote:
Preston,
Please read below the email sent by Walter Jordan to Steve Dame / Nancy Moore.

Jim Perkins
OFS Board of Directors
Member at Large / MBR HOA Rep
702-755-2352

From: Walter.Jordan@RNDC-USA.COM
To: ssdameofs@yahoo.com, nancyl.moore@outlook.com
CC: mbrjimperkins@aol.com, tdorsey4151@gmail.com, sjordan90@cfl.rr.com, apedraza@wmdouglas.com
Sent: 7/16/2017 1:45:54 P.M. Pacific Daylight Time
Subj: RE: Re: Parking in the compact car spots

Jim and Nancy will try and run him off like they did Bill if he doesn't buy into their program.

Regards,
Walter Jordan
(804) 512-1420

Sent from my Verizon, Samsung Galaxy smartphone
"The information transmitted is intended only for the person or entity to which it is addressed and may contain proprietary, business-confidential and/or privileged material. If you are not the intended recipient of this message you are hereby notified that any use, review, retransmission, dissemination, distribution, reproduction or any action taken in reliance upon this message is prohibited. If you received this in error, please contact the sender and delete the material from any computer."

-----Original Message-----

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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.	)	

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 Oct 12 4:45 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.	)	

ELECTRONICALLY FILED - 2017 Oct 12 4:45 PM - HORRY - COMMON PLEAS - CASE#2016CP2600673

ELECTRONICALLY FILED - 2017 Oct 12 4:45 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, 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.	)	

DEFENDANTS' CONSOLIDATED RESPONSE TO PLAINTIFF'S MOTIONS TO RECONSIDER THE ORDER AND FINAL JUDGMENT

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") submit this Consolidated Response to Plaintiffs' Motions to Reconsider the Order and Final Judgment in the Actions ("Motions to Reconsider").

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In its Orders entered September 21 and 29, 2017, the Court properly enforced the settlement agreement in the Actions ("Agreement"),[1] finding:

(1) The Agreement was the result of extensive negotiations following a lengthy period of contested litigation between the parties;

(2) All parties and their counsel attended and participated in the mediation conference resulting in the Agreement (in person or via telephone), which concluded with all parties signing the Agreement (personally or through their designated agents);

(3) As the Agreement was not an "agreement between counsel," SCRCP Rule 43(k) is inapplicable; and

(4) Even if SCRCP Rule 43(k) did apply, the Agreement complies with the Rule; all identified parties to the Agreement signed the document (personally or through their designated agents), as did their attorneys.

Plaintiffs' Motions to Reconsider do nothing to change the above conclusions. Instead, they (1) regurgitate arguments already made and previously rejected by the Court, (2) ask the Court to adopt a strained and absurd construction of Rule 43(k), and (3) confusingly, request that the Court reject the Agreement by enforcing an isolated provision in the Agreement that an individual Defendant allegedly breached. Plaintiffs' Motions should be denied.

A. Plaintiffs' contention that the Agreement did not satisfy Rule 43(k) directly contradicts well-established principles of statutory interpretation.

As indicated in the July 3, 2017, Consolidated Motion For Preliminary Approval of Settlement Agreement ("Motion to Approve Settlement") and in the discussion below, Defendants contend, and the Court agreed, that a plain reading of Rule 43(k) shows that it does

[1] The Agreement is in the record as Exhibit A to Defendants' July 3, 2017, motion to approve the Agreement, and as Exhibit A to Plaintiffs' present motion.

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not apply since the Agreement is not an "agreement between counsel." Even if Rule 43(k) does apply, the Agreement would comply with the Rule.

Plaintiffs have never attempted to contradict the following facts, all of which are undisputed and mandate enforcement of the Agreement:

- On May 1, 2017, all parties and their counsel attended and participated in (either in person or via telephone) the Court-mandated mediation conference in the Actions, which was facilitated by Mediator Karl A. Folkens, Esq.—one of the most experienced and well-respected mediators in South Carolina.[2]
- At the same mediation, the parties and their counsel participated in (either in person or via telephone) the Court-mandated mediation conference in companion action entitled " K.A. Diehl and Associates, Inc. v. James Perkins, Colleen Frank, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame and Errol Dos Santos", Civil Action No. 2015-CP-26-5573, wherein the Plaintiffs (less Jeff Richardson) asserted counterclaims based on the same factual grounds as the Actions ("2015 Action"). (Attachment A, Amended Answer and Counterclaims in 2015 Action).
- The mediation was intended to be a global settlement conference of all claims asserted in the Actions as well as the 2015 Action.
- In accordance with Rule 6(b), SCADR, at the commencement of the mediation conference, Mediator Folkens confirmed that (a) all parties agreed for Plaintiffs

[2] 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.

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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.

- Plaintiffs Santos and Richardson actively participated in the mediation conference via telephone.
- 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 and the 2015 Action.
- In accordance with Rule 6(f), SCADR, Mediator Folkens ensured that the parties reduced their settlement to writing in agreements that accurately captured the terms of the negotiated resolution and that all parties signed—the Agreement and/or the Settlement Agreement in the 2015 Action.[3]
- Due to Plaintiffs Santos and Richardson not being physically present, Plaintiffs' counsel executed the Agreement on their behalf as their duly-authorized agent, with the 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 operative provisions of the Agreement and the Settlement Agreement in the 2015 Action to them over the telephone.
- Plaintiffs' counsel presented the Agreement and the Settlement Agreement in the 2015 Action to Mediator Folkens and Defendants' counsel, signed by or on behalf of all of the named Plaintiffs.

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[3] The Reply of the Defendants to the Motion to Enforce the Settlement incorporates the Settlement Agreement in the 2015 Action by reference. (Attachment B, 2015 Action Settlement Agreement).

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- Based on the parties' negotiated settlement, memorialized in the Agreement, Mediator Folkens filed an Amended Proof of ADR form in each of the Actions and in the 2015 Action, 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."
- After the mediation, three of the named Plaintiffs (Nancy Moore, Steven Dame and Jim Perkins) expressly ratified the Agreement by (1) official written notification to all members of the OFS community that they successfully "resolve[d the] five lawsuits"; and (2) notices posted in the OFS building informing all residents that "[t]he 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."[4]
- The Plaintiffs have performed, in part, under the Settlement Agreement in the 2015 Action by drafting and delivering a release to K.A. Diehl and Associates, Inc. As contemplated by the terms of the Settlement Agreement in the 2015 Action, the attorneys for Mark Dos Santos, Jim Perkins, Steven Dame and Nancy Moore also delivered settlement funds to counsel for K.A. Diehl and Associates, Inc.
- K.A. Diehl and Associates, Inc., has also performed its obligations under the Settlement Agreement in the 2015 Action.

[4] Copies of these notices are included in the record with the Affidavit of Walter Jordan, which is Exhibit B to the Motion to Approve Settlement.

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These undisputed facts leave no doubt that the Agreement fully satisfied Rule 43(k).

Rule 43(k) contemplates several ways in which an agreement covered by the Rule becomes binding. One way is where the agreement is "reduced to writing and signed by the parties and their counsel." That has clearly occurred here, mandating enforcement of the Agreement:

(1) The parties' negotiated resolution was "reduced to writing" in the form of the Agreement;

(2) Each of the named Plaintiffs and each of the Defendants signed the Agreement and/or the Settlement Agreement in the 2015 Action, either personally or through the actions of their duly-authorized agents; and

(3) The Agreement shows that "A. Preston Brittain"—counsel for Plaintiffs—signed the Agreement twice (once in an agency capacity for Plaintiff Santos, and once in an agency capacity for Plaintiff Richardson), and that "Phillip A. Kilgore"—counsel for all Defendants who were party to the Agreement—signed the Agreement five times (in an agency capacity for two corporate Defendants and the three individual Defendants who were present via telephone).

Plaintiffs acknowledge the truth of each of these three facts, leaving no room to argue that Rule 43(k) was not satisfied.

1. Counsel for all named parties to the Agreement signed the Agreement.

In attempt to evade the Agreement, Plaintiffs ask the Court to adopt a tortured and absurd interpretation of Rule 43(k). Plaintiffs' first absurd construction of the Rule is that the signatures of Plaintiffs' counsel and Defendants' counsel on the Agreement should be disregarded because they did not sign in their individual capacity. Nothing in the Rule has such a capacity requirement.

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The purpose of Rule 43(k) is to promote certainty with respect to the terms of agreements between counsel and to remove the Court from such disputes. *See Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637, 627 S.E.2d 724, 725 (2006). Rule 43(k) was amended in 2009, adding another way in which to accomplish this purpose—by allowing the enforcement of an "agreement between counsel" (1) that is in writing, (2) to which the parties acknowledge their assent by signing the document, and (3) of which the attorneys confirm their review and approval by signing the document.

The obvious purpose of the attorney signature on this form of a Rule 43(k) "agreement between counsel" is to ensure that the document accurately conveys the terms of the deal the parties have reached. It is certainly not to signal counsel's agreement to be bound individually, as the attorney essentially never has affirmative obligations or rights under the agreement.

Here, counsel of Plaintiffs and counsel for Defendants signed the Agreement as agents of their clients. In other words, it is beyond dispute that the parties' attorneys did indeed sign the Agreement. Applying the most fundamental statutory interpretation principles, this fact plainly satisfies Rule 43(k), which merely requires that the document be "signed by . . . counsel." *See State v. Muldrow*, 348 S.C. 264, 268, 559 S.E.2d 847, 849 (2002) ("[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."). The Rule requires counsel to sign the agreement, and they did.

Moreover, by signing the Agreement as agents/attorneys for their principals/clients, both counsel clearly indicated that they fulfilled their duties to their clients, having reviewed the Agreement and confirmed that it accurately sets forth the relevant terms of settlement.

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Moreover, their signatures constitute representations that their clients gave them express permission to sign in their stead.

Neither attorney would have signed the Agreement as the agent of his client unless these facts were true.[5] Plaintiffs' contention that the Agreement is non-binding because the attorneys did not sign in their individual capacity must be rejected accordingly.

2. Plaintiffs Santos and Richardson signed the Agreement for purposes of Rule 43(k) by directing their agent/counsel to sign on their behalf.

Plaintiffs further hope to evade the Agreement with a second absurd argument.[6] They contend that a party does not actually sign an agreement for purposes of Rule 43(k), even when the party expressly directed his/her/its agent/attorney to sign the agreement on his/her/its behalf and the attorney does so in a manner making clear that the attorney is signing in the place of the party.[7] This argument defies age-old agency principles and must be rejected.

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[5] Frankly, Defendants are confused by Plaintiffs' assertion that Rule 43(k) was not satisfied by their attorney's signature. Only two scenarios can explain Plaintiffs' counsel's signature: either (1) he had express authority to sign the Agreement as agent for Plaintiffs Santos and Richardson, and by doing so satisfied the requirements of Rule 43(k); or (2) he did not have authority to sign the Agreement as agent for Plaintiffs Santos and Richardson, and he did so on his own initiative.

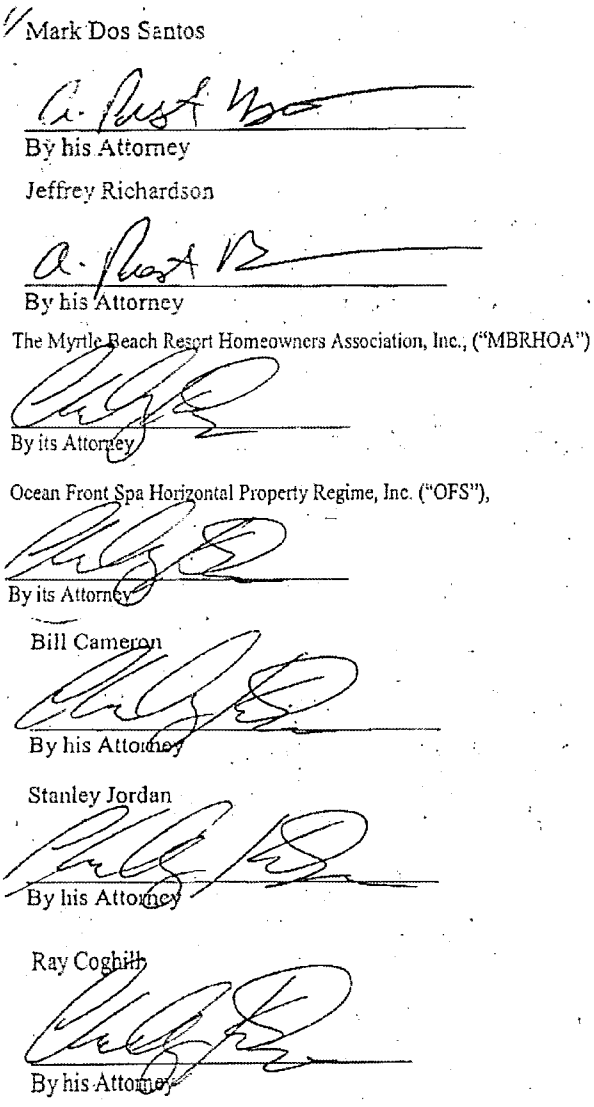
Plaintiffs have never argued the second alternative to be true (and Defendants have no reason to believe Plaintiffs' counsel would engage in such actions). As a result, there can be only one possible conclusion; even if Rule 43(k) applies to the Agreement, the Agreement is binding because it complied fully with Rule.

[6] Note that Plaintiffs do not contend that the Settlement Agreement in 2015 Action is unenforceable due to any similar hyper technical argument. Plaintiffs conceded, through counsel, that the 2015 Action Settlement Agreement is enforceable, even though it was signed by counsel on behalf of Mark Dos Santos, who attended the mediation via phone.

[7] Plaintiffs raised this argument in opposition to the Motion to Approve Settlement but Plaintiffs' Motions to Reconsider appear to abandon this argument. They focus instead on the isolated issue addressed in Section A.1 above—their contention that Plaintiffs' counsel and Defendants' counsel did not "sign" the agreement for purposes of Rule 43(k). Defendants include Section A.2 in the event Plaintiffs later say they did not abandon their argument addressed therein.

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Below are the actual signatures from the Agreement with which Plaintiffs apparently take issue:



All of these signature blocks make clear that the parties/principals have signed the Agreement, and that the attorneys are merely putting pen to paper as the agents of the principals.

An agent with express authority to contract is clearly able to bind the principal by signing on the principal's behalf. *S.C. Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 183, 348 S.E.2d 617, 624 (Ct. App. 1986) ("An agent contracting with the authority of his principal binds him to

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the same extent as if the principal personally made the contract. The principal's liability to the third party is contractual and direct." (emphasis added)). Thus, through the actions of their agents/attorneys, all of the principals/parties effectively signed the Agreement.

To accept Plaintiffs' argument, corporate defendants (which always sign through their agents) and other parties who are forced to sign agreements through their agents (due to incapacity, absence, or otherwise) would apparently never be able to enter into a binding agreement under Rule 43(k). This is clearly not what the Legislature intended, and the absurd result Plaintiffs seek must be avoided. *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) ("If possible, the Court will construe a statute so as to escape the absurdity and carry the intention into effect." (citing Kiriakides v. United Artist Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994))).

3. The execution of the Settlement Agreement in the 2015 Action satisfies the requirements of Rule 43(k).

Plaintiffs' third argument is that they are not bound by the terms of the Agreement, because K.A. Diehl and Associates, Inc. and its counsel did not sign the Settlement Agreement. However, in the Settlement Agreement signed by all parties in the 2015 Action, the Plaintiffs agreed to "authorize their respective attorneys to execute a dismissal with prejudice" and to enter "a more comprehensive release releasing" K.A. Diehl and Associates, Inc., and its "employees, agents, directors, members, officers, attorneys, insurers and related parties" from "all claims and damages". The clear intent of the Agreement and the Settlement Agreement in the 2015 Action was to dismiss with prejudice and to resolve all claims between the parties in the various cases mediated by in the global settlement conference on May 1, 2017. K.A. Diehl and Associates, Inc.'s execution of the Settlement Agreement in the 2015 Action comports with the requirements of Rule 43(k).

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Moreover, Plaintiffs' argument that they are not bound by the Agreement because the lack of signatures of another party is disingenuous when the party at issue has clearly expressed its intent to be bound by and subject to the terms of the Agreement. By joining in the Motion to Enforce Settlement and opposing the Motions for Reconsideration, K.A. Diehl and Associates, Inc. has expressed its unequivocal intent to be bound by and subject to the terms of the Agreement.

B. The plain language of Rule 43(k)—as emphasized by the Supreme Court—makes clear that the Rule is inapplicable to the Agreement.

Despite the fact that the Agreement complies with Rule 43(k), the plain language of the Rule 43(k) makes clear that the Court was correct in ruling that it is inapplicable to the Agreement. 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*, 367 S.C. at 638, 627 S.E.2d at 726 (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." *Muldrow*, 348 S.C. at 268, 559 S.E.2d at 849. Applying this basic rule of statutory interpretation plainly demonstrates Rule 43(k)'s inapplicability to the Agreement.

The Agreement was not an "agreement between counsel." It is an agreement between the parties. A Rule 43(k) "agreement between counsel" contemplates an agreement negotiated by

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attorneys, as to which the attorneys must later take overt action, identified in the Rule, before it becomes enforceable. One of these actions can be where the "agreement between counsel" is later "reduced to writing and signed by the parties and their counsel." SCRCP Rule 43(k). 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 obvious purpose of the Rule is to protect parties in connection with agreements negotiated and entered into by their attorneys. The Rule is not designed to replace the basic law of contract pertaining to agreements into which the parties themselves enter.

A recent Court of Appeals opinion 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). Likewise, the Supreme Court, in *Farnsworth*—a case on which Plaintiffs rely—recognized the importance of 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 *Farnsworth* Court went a step further in its holding, noting that "Rule 43(k) plainly applies to all settlement agreements signed by counsel." *Id.* at 638, 627 S.E.2d at 726 (emphasis added). If the Court interpreted Rule 43(k) as applying to all settlement agreements, including those entered into by parties themselves, the Court's use of the wording "signed by counsel" would have been entirely superfluous. A fair reading of this language is that the Court intended to distinguish between "all settlement agreements," and "all settlement agreements signed by counsel." By including this qualifying language, the Court demonstrated that not all settlement

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agreements are covered by Rule 43(k), only those that are "agreement[s] between counsel" as the plain language of the Rule makes clear.

The history of Rule 43(k) further demonstrates its inapplicability to the Agreement. The predecessor to Rule 43(k), Circuit Court Rule 14, provided as follows: "No agreement or consent between parties, or their attorneys, in respect to the proceedings in a cause, shall be binding, unless . . . ." *Farnsworth,* 367 S.C. at 638 n.3, 627 S.E.2d at 726 n.3 (emphasis added). The *Farnsworth* Court compared Circuit Court Rule 14 to SCRCP 43(k) to point out that language included in the old rule but omitted in the new rule rendered the agreement at issue unenforceable. *Id.* ("Under [the old] rule, Davis and Farnsworth's agreement would be enforceable simply because it is in writing. Unlike Rule 43(k), Circuit Court Rule 14 did not contain the additional requirement that written agreements be entered into the record.").

Likewise, new SCRCP Rule 43(k) omits other language present in old Circuit Court Rule 14, an omission which is relevant in this dispute. SCRCP Rule 43(k) makes no reference to "agreement[s] or consent[s] between parties" and retains only the reference to "agreement[s] between counsel." It is fair to conclude that this omission was intentional, has meaning, and cannot be overlooked.

The Legislature clearly intended for old Circuit Court Rule 14 to apply to all litigation agreements, whether between the parties or their attorneys. In devising the new Rule, Rule 43(k), the Legislature must have contemplated the possibility of including agreements between parties, but elected to omit any reference to such agreements. Such omission in the revised Rule on the same subject demonstrates the Legislature's clear intent to limit the requirements of the Rule to only agreements "between counsel."

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To hold otherwise would require the Court to assume that the Legislature committed an oversight, simply forgot to retain the reference to agreements between parties when drafting Rule 43(k), and has allowed the error to remain in place for decades. There is no basis for such assumptions, and the Court must give meaning to the Legislature's intentional omission of "agreements between parties" from Rule 43(k).

Plaintiffs also rely on *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533 (1995), in an attempt to overcome a clear and straightforward interpretation of Rule 43(k). *Ashfort* appears easily distinguishable, as that case involved (1) the attorneys vaguely "advis[ing] the circuit court that the case had been settled" without providing any details as to the terms, and (2) some undescribed, purported agreement between a party and the other party's insurer. *Id.* at 493, 495, 458 S.E.2d at 534-35. There was no evidence the purported agreement was in writing or between the parties, and the lower court concluded "there had been no 'meeting of the minds' regarding the terms of the settlement." *Id.* at 493, 458 S.E.2d at 534. Based on this record, the Court was left with nothing more than representations by counsel that a purported agreement had been reached, facts that fell woefully short of the requirements of the then-current version of Rule 43(k) to either "reduce[the agreement] to the form of a consent order or written stipulation signed by counsel and entered in the record, or [make it] in open court and note[it] upon the record." *Id.*

The sparse facts in *Ashfort* bear no similarity to the present facts, where (1) all of the parties (with the assistance of counsel) actively participated in, negotiated, and reached terms on a settlement during a full-day mediation conference, (2) the parties reduced those terms to writing in the Agreement and the Settlement Agreement in the 2015 Action that all parties signed

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before leaving the mediation, and (3) a seasoned and well-respected mediator filed a notice with the Court confirming each of the above two facts.

The Agreement in this case was not an "agreement between counsel," as contemplated in Rule 43(k). The Agreement and the Settlement Agreement in the 2015 Action were negotiated, memorialized, and executed by all of the parties, after a full day of mediation in which all actively participated.[8] The Court properly held that Rule 43(k) is inapplicable. Plaintiffs' motions should be denied accordingly.

C. Plaintiffs have effectively conceded the enforceability of the Agreement through their alleged "new evidence" argument, which requires the Agreement to be enforceable.

Plaintiffs present so-called "new evidence," which they argue demonstrates that one of the individual Defendants breached the Agreement. They say that an email sent by Defendant Walter Jordan violated the Agreement's non-disparagement clause.[9] This new argument, which was not raised before the Order was entered, fails for several reasons.

First, by asking the court to enforce a certain provision of the Agreement in their favor, Plaintiffs have effectively conceded the enforceability of the entire Agreement. For Defendant Walter Jordan to be in breach of the Agreement's non-disparagement clause as alleged in Plaintiffs' "new evidence" argument, there must first be a valid and enforceable non-disparagement clause. Thus, Plaintiffs ironically rely on the binding and enforceable nature of the Agreement as a means of repudiating the Agreement.

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[8] If the Court finds that Rule 43(k) does not apply, ample case law exists that a fully executed agreement between all parties to the litigation is not a prerequisite to enforcing a settlement.

[9] The email is found at Exhibit B to Plaintiffs' Motions to Reconsider.

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Placing aside Plaintiffs' tacit admission, their "new evidence" argument is irrelevant to their Motions and the enforcement of the Agreement. If Plaintiffs believe that there has been a breach of the Agreement, they are free to pursue their rights under the Agreement accordingly, at a different time and in a different forum. The alleged breach—which is extremely tenuous, at best[10]—has no bearing on whether the Agreement is binding and enforceable. That is the only issue before the Court. Plaintiffs' "new evidence" argument should be disregarded entirely.

Finally, the email does not constitute "new evidence" under Rule 60(b)(2); therefore, the issue is barred under Rule 59(e) as a new argument, not previously raised. Evidence is "newly discovered" if it was not known to the party or in his possession at the time of hearing. *See Lanier v. Lanier*, 364 S.C. 211, 218, 612 S.E.2d 456, 459 (Ct. App. 2005). The Plaintiffs received the email in July 2016, several weeks before the hearing; thus, the email is not new evidence under Rule 60(b)(2) and is not a preserved issue under Rule 59(e). *See Fields v. Reg'l Med. Ctr.*, 363 S.C. 19, 27, 609 S.E.2d 506, 510 (2005).

D. <u>Plaintiffs' contentions regarding the application of the Agreement to K.A. Diehl is premature, as the Order does not in any way mention K.A. Diehl or its successor in interest</u>.

Plaintiffs argue that the Court erred (1) "in ruling that this agreement releases KA Diehl and Associates, Inc.", and (2) in ruling that "First Services Residential is released from liability." Plaintiffs are placing the cart well ahead of the horse, as the Order of which they are seeking

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[10] The essence of the Jordan email is a statement that two of the Plaintiff OFS board members may "run off" a third Plaintiff OFS board member "if he doesn't buy into their program." Defendants fail to understand how this is even remotely disparaging. Moreover, the email was sent to only the five OFS board members (including the three Plaintiff OFS board members at issue) and the OFS property manager, which is the agent OFS. As a former Board Member and owner of property in OFS, surely such an email, directed to such a narrow group of people, would be subject to a privilege. Nevertheless, Plaintiffs are free to pursue this frivolous claim for breach of the Agreement if they wish. They cannot, however, raise it now as a defense to the enforceability of the Agreement.

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reconsideration makes no mention whatsoever of First Services Residential, nor does it specifically address the release of K.A. Diehl and Associates, Inc. The Order simply finds that the Agreement is enforceable. Thus, Plaintiffs' arguments with respect to the Plaintiffs' release of claims against K.A. Diehl and Associates, Inc. and First Services Residential are clearly premature and not yet ripe for adjudication.

E. Conclusion

Plaintiffs' motions do not question the accuracy of the Agreement's terms, as they cannot. Nor have Plaintiffs challenged the fact that all parties to the Agreement and their respective counsel signed the Agreement at the conclusion of mediation (either personally or through their duly-authorized agents). Instead, Plaintiffs rely on hyper-technical and absurd interpretations of Rule 43(k) that the Legislature never could have intended and the Courts have never adopted to overcome an obviously binding settlement. The Court should reject those interpretations of Rule 43(k) and deny Plaintiffs' motions, affirming the Orders enforcing the Agreement.

Respectfully submitted this 12th day of October, 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. s/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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February 2, 2016

Via Hand Delivery

Ms. Melanie Huggins-Ward, Clerk of Court
Horry County Courthouse
P.O. Box 677
Conway, South Carolina 29526

RE: K.A. Diehl and Associates, Inc. vs. James Perkins, Colleen Franke, aka Colleen Franke Perkins, Mark Dos Santos, Errol Dos Santos, Nancy Moore, William Moore, and Steven Dame
Civil Action No.: 2015-CP-26-05573

Dear Ms. Huggins-Ward:

Enclosed herewith please find one original and one copy of **Defendants' Answer to Plaintiff's Complaint and Counterclaims,** which I submit to you this date for filing in the above-referenced action.

By way of this letter, I hereby serve a copy of the same to Alicia Thompson, Esq., of McNair Law Firm, PA, attorney for Plaintiff. Thank you for your kind assistance in this matter.

With warm regards, I am
Yours truly,

THE BRITTAIN LAW FIRM, P.A.

A. Preston Brittain, Esquire

Enclosures

CC: (via email and first class mail)
Alicia Thompson, Esq.
(via electronic mail delivery)
Mr. Christopher W. Nickels, Esq.
Mr. Christian Stegmaier, Esq.
Mr. Robert W. Buffington, Esq.

EXHIBIT
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ORIGINAL

STATE OF SOUTH CAROLINA **COUNTY OF HORRY**	**IN THE COURT OF COMMON PLEAS** **15TH JUDICIAL CIRCUIT** **Civil Action No.: 2015-CP-26-05573**
K.A. DIEHL and ASSOCIATES, INC., Plaintiff, vs. James Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, Defendants.	**DEFENDANTS' ANSWER TO PLAINTIFF'S COMPLAINT AND COUNTERCLAIMS**

NOW COMES COUNSEL THOMAS C. BRITTAIN, PRESTON BRITTAIN, CHRISTIAN STEGMAIER, ROBERT BUFFINGTON, and CHRISTOPHER NICKELS on behalf of the Defendants James Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, (hereinafter referred to as "Defendant or Defendants" collectively), answering Plaintiffs' Complaint and responding with defenses to the same and bringing Counterclaims.

GENERAL DENIAL

Defendants deny each and every allegation contained in the complaint set forth by Plaintiffs and demand strict proof thereof. Any such paragraphs or allegations not specifically admitted in this answer are hereby denied.

1. Defendants admit the allegations contained in paragraphs 1 - 8 of Plaintiff's complaint.
2. As to paragraph 9 of Plaintiff's complaint, Defendants deny defamatory statements and unlawful conduct and demand strict proof thereof. Defendants admit K.A. Diehl's action

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relates to its management of the MBR Association and OFS Association in Horry County, South Carolina.

3. Defendants admit the allegations contained in paragraphs 10.
4. Defendants admit the allegations contained in paragraph 11, specifically that there are there are four regimes.
5. Defendants admit the allegations contained in paragraph 12.
6. Defendants deny that the allegations in paragraph 13 that relate to the scope of the Master Board's governance. Specifically, Defendants admit that the Master Board governs the common areas, but denies any additional government of the property and such other allegations contained in paragraph 13 relating to the same. Defendant admits the remaining allegations contained in paragraph 13 not related to the Master Board's authority.
7. Defendants admit to the allegations contained in paragraphs 14 and 15.
8. Defendants have insufficient knowledge to either admit or deny the allegations as set forth in paragraph 16 of Plaintiff's complaint.
9. Defendants admit the allegations contained in paragraph 17 of Plaintiff's complaint.
10. Defendants admit the allegations contained in paragraph 18, but deny the nomenclature of "MBR Association Board of Directors" and admit to Perkins' service on the "Master Board Association."
11. Defendants admit the allegations of paragraph 19-21, but deny the nomenclature of "MBR Association Board of Directors."
12. Defendants deny the allegations set forth in paragraph 22 of Plaintiff's complaint and demand strict proof thereof.

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13. Defendants deny the allegations set forth in paragraph 23 of Plaintiff's complaint and demand strict proof thereof.

14. Defendants deny the allegations set forth in paragraph 24 of Plaintiff's complaint and demand strict proof thereof.

15. Defendants deny the allegations set forth in paragraph 25 of Plaintiff's complain and demand strict proof thereof.

16. Defendants deny the allegations set forth in paragraph 26 of Plaintiff's complaint and demand strict proof thereof.

17. Defendants deny the allegations set forth in paragraph 27 of Plaintiff's complaint and demand strict proof thereof.

18. Defendants admit the allegations contained in paragraph 28 of Plaintiff's complaint.

19. Defendants admit the allegations contained in paragraph 29 of Plaintiff's complaint.

20. Defendants deny the allegations set forth in paragraph 30 of Plaintiff's complaint and demand strict proof thereof.

21. Defendants deny in part and admit in part the allegations set forth in paragraph 31 of Plaintiff's complaint. Defendants admit that the "petition" was available on "www.change.org" and a private facebook page but deny the remaining allegations contained in paragraph 31 of Plaintiff's complaint and demand strict proof thereof.

22. Defendants deny in part and admit in part the allegations contained in paragraph 32 of Plaintiffs' complaint. Defendants admit that the words contained in sub-section A-J were used; but denies that they were "statements or false allegations."

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23. Defendants admit in part and deny part the allegations contained in paragraph 33 of Plaintiff's complaint. Defendants deny that the accusations set forth in the aforesaid Petition were false.

24. Defendants lack sufficient knowledge to admit or deny the allegations contained in paragraph 34 Plaintiff's complaint.

25. Defendants deny in part and admit in part the allegations contained in paragraph 35 of Plaintiffs' complaint. Defendants admit the allegations contained in 32(c) includes Glen "Rusty" Magill, but denies the remaining allegations and demand strict proof thereof.

26. Defendants deny in part and admit in part the allegations contained in paragraph 36 of Plaintiffs' complaint. Defendants admit the election issues were related to the OFS election, but deny the remaining allegations and demand strict proof thereof.

27. Defendants deny the allegations set forth in paragraph 37 of Plaintiff's complaint and demand strict proof thereof.

28. Defendants admit the allegations contained in paragraphs 38 of Plaintiff's complaint.

29. Defendants deny in part and admit in part the allegations contained in paragraph 39 of Plaintiffs' complaint. Defendants admit familial relation, but deny the remaining allegations and demand strict proof thereof.

30. Defendants deny in part and admit in part the allegations contained in paragraph 40 of Plaintiffs' complaint. Defendants admit they participated in a limited Facebook group page to discuss concerns and share information, but deny that said purpose was "in order to circulate the above referenced defamatory statements about K.A. Diehl, the MBR Association, the OFS Association, and its vendors" and further deny any remaining allegations and demand strict proof thereof.

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31. Defendants admit in part and deny in part the allegations contained in paragraph 41 of Plaintiff's complaint. Specifically, Defendants admit that Dame sent an email containing the contents of the petition which contained the concerns of the homeowners and that Perkins, Franke, and William and Nancy Moore were copied to the same. Defendants deny any receipt of response from Walter Jordan.
32. Defendants admit the allegations contained in paragraphs 42 of Plaintiff's complaint.
33. Defendants deny the allegations set forth in paragraph 43 of Plaintiff's complaint and demand strict proof thereof.
34. Defendants admit the allegations set forth in paragraph 44 of Plaintiff's complaint.
35. Defendants deny in part and admit in part the allegations contained in paragraph 45 of Plaintiffs' complaint. Defendants admits knowledge of Allegiant Agreement but deny "bad faith" further deny any remaining allegations and demand strict proof thereof.
36. Defendants admit the allegations set forth in paragraph 46 of Plaintiff's complaint.
37. Defendants deny the allegations set forth in paragraph 47 of Plaintiff's complaint and demand strict proof thereof.
38. Defendants deny the allegations set forth in paragraph 48 of Plaintiff's complaint and demand strict proof thereof.
39. Defendants admit in part and deny in part the allegations set forth in paragraph 49 of Plaintiff's complaint. Defendants deny allegations pertaining to "implying" and "improperly" but admit the remaining allegations including the contents of the email.
40. Defendants deny the allegations set forth in paragraph 50 of Plaintiff's complaint and demand strict proof thereof.

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41. Defendants deny the allegations set forth in paragraph 51 of Plaintiff's complaint and demand strict proof thereof.

42. Defendants deny the allegations set forth in paragraph 52 of Plaintiff's complaint and demand strict proof thereof. Further that such allegations seek conclusions of law.

43. Defendants admit in part and deny in part the allegations contained in paragraph 53 of the Plaintiff's complaint. Specifically, defendants deny that any communications were "statements," but admit issues were raised in the form of seeking answers to the Master Board, certain "members," and to their counsel. Defendants deny the remaining allegations set forth in paragraph 53 of Plaintiff's complaint and demand strict proof thereof.

44. Defendants deny the allegations set forth in paragraph 54 of Plaintiff's complaint and demand strict proof thereof.

45. Defendants deny the allegations set forth in paragraph 55 of Plaintiff's complaint and demand strict proof thereof.

46. Defendants deny the allegations set forth in paragraph 56 of Plaintiff's complaint and demand strict proof thereof.

47. Defendants deny the allegations set forth in paragraph 57 of Plaintiff's complaint and demand strict proof thereof.

48. Defendants deny the allegations set forth in paragraph 58 of Plaintiff's complaint and demand strict proof thereof.

49. Defendants deny the allegations set forth in paragraph 59 of Plaintiff's complaint and demand strict proof thereof.

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50. Defendants deny the allegations set forth in paragraph 60 of Plaintiff's complaint and demand strict proof thereof.

51. Defendants deny the allegations set forth in paragraph 61 of Plaintiff's complaint and demand strict proof thereof.

52. Defendants deny the allegations set forth in paragraph 62 of Plaintiff's complaint and demand strict proof thereof.

53. As to paragraph 63, Defendants hereby incorporate each and every allegation and denial contained within the proceeding paragraphs as if set forth herein verbatim.

54. Defendants admit the allegations set forth in paragraph 64 of Plaintiff's complaint.

55. Defendants deny in part and admit in part the allegations contained in paragraph 65 of Plaintiffs' complaint. Defendants admit they "published" "through their attorney" questions and raised concerns to MBR Association and the Board, but deny publishing "false statements" or "attacking" the reputation of K.A. Diehl and demand strict proof thereof. Further Defendants deny any other allegations contained in paragraph 65 and demand strict proof thereof.

56. Defendants deny in part and admit in part the allegations contained in paragraph 66 of Plaintiffs' complaint. Defendants deny such other boards are "subordinate" and admit all other allegations contained herein.

57. Defendants deny the allegations set forth in paragraph 67 of Plaintiff's complaint and demand strict proof thereof.

58. Defendants deny the allegations set forth in paragraph 68 of Plaintiff's complaint and demand strict proof thereof.

59. Defendants deny the allegations set forth in paragraph 69 of Plaintiff's complaint and demand strict proof thereof.

60. Defendants deny the allegations set forth in paragraph 70 of Plaintiff's complaint and demand strict proof thereof.

61. As to paragraph 71, Defendants hereby incorporate each and every allegation and denial contained within the proceeding paragraphs as if set forth herein verbatim.

62. Defendants deny the allegations set forth in paragraph 72 of Plaintiff's complaint and demand strict proof thereof.

63. Defendants deny the allegations set forth in paragraph 73 of Plaintiff's complaint and demand strict proof thereof.

64. Defendants deny the allegations set forth in paragraph 74 of Plaintiff's complaint and demand strict proof thereof.

65. Defendants deny the allegations set forth in paragraph 75 of Plaintiff's complaint and demand strict proof thereof.

66. Defendants deny the allegations set forth in paragraph 76 of Plaintiff's complaint and demand strict proof thereof.

67. As to paragraph 77, Defendants hereby incorporate each and every allegation and denial contained within the proceeding paragraphs as if set forth herein verbatim.

68. Defendants deny the allegations set forth in paragraph 78 of Plaintiff's complaint and demand strict proof thereof.

69. Defendants deny the allegations set forth in paragraph 79 of Plaintiff's complaint and demand strict proof thereof.

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70. Defendants deny the allegations set forth in paragraph 80 of Plaintiff's complaint and demand strict proof thereof.

71. Defendants deny the allegations set forth in paragraph 81 of Plaintiff's complaint and demand strict proof thereof.

72. As to paragraph 82, Defendants hereby incorporate each and every allegation and denial contained within the proceeding paragraphs as if set forth herein verbatim.

73. Defendants deny the allegations set forth in paragraph 83 of Plaintiff's complaint and demand strict proof thereof.

74. Defendants deny the allegations set forth in paragraph 84 of Plaintiff's complaint and demand strict proof thereof.

75. Defendants deny the allegations set forth in paragraph 85 of Plaintiff's complaint and demand strict proof thereof.

76. Defendants deny the allegations set forth in paragraph 86 of Plaintiff's complaint and demand strict proof thereof.

77. Defendants deny the allegations set forth in paragraph 87 of Plaintiff's complaint and demand strict proof thereof.

78. The Defendants deny the relief requested in the prayer for relief and any other such allegations contained therein and demand strict proof thereof.

FOR A FIRST DEFENSE
(TRUTH)

79. Defendants hereby incorporate each and every allegation, and denial, contained within the proceeding paragraphs as if set forth herein verbatim.

80. Defendants assert the defense of truth.

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81. Defendants assert that to the extent such iterations are proved by Plaintiff to meet the criteria of "published statements," that such statements are true, including, but not limited to: 1) failure to invoice Allegiant for utilities amounting to $60,000.00; 2) negligent hiring of Glen "Rusty" Magill; 3) failure to procure multiple insurance broker bids, 4) a familial relationship between K.A. Diehl's former CEO and the then broker of ADP Barlow.

82. Further, that Plaintiff knew the truth of the purported statements at the time Plaintiff filed said action.

FOR A SECOND DEFENSE
(QUALIFIED PRIVELEGE / GOOD FAITH)

83. Defendants hereby incorporate each and every allegation and denial contained within the proceeding paragraphs as if set forth herein verbatim.

84. Defendants assert the defense of good faith or privilege.

85. Defendants "alleged statements" were communications made in good faith regarding subject matter which Defendants have an interest in.

86. Defendants further allege such mitigating circumstances: Plaintiff's contract with MBRHOA remains unaffected; no harm to Plaintiff; prior negative reputations/comments about K.A. Diehl are obtainable online (**http://reviews.birdeye.com/diehl-k-a-associates-826602368**) (printed out and attached as "Attachment A") online activities are private or intended for private use; K.A. Diehl made no effort to remove any postings; and the filing of suit by K.A. Diehl is for the ulterior purpose of intimidating individuals and preventing dissemination of truth.

FOR A THIRD DEFENSE
(FAILURE TO MITIGATE)

87. Defendants hereby incorporate each and every allegation, and denial, contained within the proceeding paragraphs as if set forth herein verbatim.

88. Defendants assert Plaintiff failed to mitigate damages.

FOR A FOURTH DEFENSE
(FAILURE TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION)

89. Defendants hereby incorporate each and every allegation, and denial, contained within the proceeding paragraphs as if set forth herein verbatim.

90. Defendants assert Plaintiff failed to state sufficient facts to constitute a cause of action pursuant to Rule 12(b) of the South Carolina Rules of Civil Procedure.

FOR A FIFTH DEFENSE
(CONTRACTING PARTY/AGENT)

91. Defendants hereby incorporate each and every allegation, and denial, contained within the Answer as if set forth herein verbatim.

92. Defendants assert that they are, in their capacity as homeowners, the contracting party of the agreements between KA Diehl and OFS, and between KA Diehl and the Master Board.

93. Defendants assert that as contract parties they cannot be sued for interfering with their own current or prospective contract.

94. Defendants reserve the right to amend and add defenses.

I.
COUNTERCLAIMS
FACTUAL ALLEGATIONS

95. Defendants hereby incorporate each and every allegation, and denial, contained within the proceeding paragraphs as if set forth herein verbatim.

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96. Defendants Nancy and William Moore own Units 403, 106, and 511 at Ocean Front Spa and are, pursuant to the Master Deed and/or ByLaws, members of the Myrtle Beach Resort Ocean Front Spa Horizontal Property Regime, Inc., which is charged with management of the Regime, and further by virtue of the Master Deed and/or ByLaws, members of The Myrtle Beach Resort Homeowners' Association, Inc., which is charged with maintenance of common areas for the purpose of providing utilities, cable, refuse collection, and other such common needs as set forth in Master Deed.

97. Defendants Jim Perkins and Colleen Franke own Units 109, 201, 251, 301, 304, 305, 421 and 546 at Ocean Front Spa and are, pursuant to the Master Deed and/or ByLaws, members of the Myrtle Beach Resort Ocean Front Spa Horizontal Property Regime, Inc., which is charged with management of the Regime, and further by virtue of the Master Deed and/or ByLaws, members of The Myrtle Beach Resort Homeowners' Association, Inc., which is charged with maintenance of common areas for the purpose of providing utilities, cable, refuse collection, and other such common needs as set forth in Master Deed.

98. Defendant Steven Dame owns Units 328 and 330 at Ocean Front Spa and is, pursuant to the Master Deed and/or ByLaws, a member of the Myrtle Beach Resort Ocean Front Spa Horizontal Property Regime, Inc., which is charged with management of the Regime, and further by virtue of the Master Deed and/or ByLaws, members of The Myrtle Beach Resort Homeowners' Association, Inc., which is charged with maintenance of common areas for the purpose of providing utilities, cable, refuse collection, and other such common needs as set forth in Master Deed.

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99. Defendant Mark Dos Santos owns Unit #101 at Ocean Front Spa and is, pursuant to the Master Deed and/or ByLaws, a member of the Myrtle Beach Resort Ocean Front Spa Horizontal Property Regime, Inc., which is charged with management of the Regime, and further by virtue of the Master Deed and/or ByLaws, members of The Myrtle Beach Resort Homeowners' Association, Inc., which is charged with maintenance of common areas for the purpose of providing utilities, cable, refuse collection, and other such common needs as set forth in Master Deed.

100. Defendant Errol Dos Santos owns Unit 322 at Ocean Front Spa and is, pursuant to the Master Deed and/or ByLaws, a member of the Myrtle Beach Resort Ocean Front Spa Horizontal Property Regime, Inc., which is charged with management of the Regime, and further by virtue of the Master Deed and/or ByLaws, members of The Myrtle Beach Resort Homeowners' Association, Inc., which is charged with maintenance of common areas for the purpose of providing utilities, cable, refuse collection, and other such common needs as set forth in Master Deed.

101. That upon information and belief Plaintiff K.A. Diehl entered into an agreement with the Myrtle Beach Resort Homeowners' Associations, Inc., (hereinafter referred to as "MBRHOA", "Master Board" or "Master Association"), to serve as the resort property manager.

102. That upon information and belief, K.A. Diehl initially, in 2007, managed Renaissance Tower, Ocean Front Spa, Five Seasons, and Myrtle Beach Resort HPR, and the Myrtle Beach Resort HOA which encompassed all regimes and the Master Board.

103. That upon information and belief the management agreement between K.A. Diehl and MBRHOA was modified in December of 2012.

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104. Upon information and belief, the December 2012 agreement included modifications one of which was a two year term with an auto-renewal.

105. That, upon information and belief, the management agreement was modified in 2014.

106. That, upon information and belief, pursuant to the 2014 management agreement, K.A. Diehl is required to: manage accounts; manage contracts with vendors; procure competitive bids using multiple brokers for insurance; procure competitive bids for security and manage common areas; receive, review and approve invoices; and advise the Board on administrative tasks such as elections.

107. That the individual homeowners pay assessments that fund the MBRHOA for the purpose of providing services for the common elements. That the MBRHOA is tasked with procuring insurance, maintaining common areas, providing cable, etc. as is more fully set forth in the Master Deed.

108. That the homeowners, including the defendants that have been subjected to plaintiff's SLAPP suit, pay assessments through their regimes to the MBRHOA which provides funds to acquire the services of K.A. Diehl.

109. That the agreements between the MBRHOA and K.A. Diehl are for the benefit of the homeowners.

110. That, upon information and belief, K.A. Diehl continues to manage OFS, subject to the 2014 management contract.

111. That, upon information and belief, pursuant to said agreement, K.A. Diehl is required to: prepare an annual budget; administer insurance and other contracts; manage accounts, and such other tasks as enumerated in the agreement.

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112. That, upon information and belief, the individual homeowners pay assessments that fund the OFS HOA for the purpose of providing services for the common elements. That the OFS Board is tasked with procuring insurance, maintaining common areas, providing cable, etc. as is more fully set forth in the Association Master Deed and Bylaws.

113. That upon information and belief, K.A. Diehl owes a duty of care to the individual homeowners.

114. That, upon information and belief, the homeowners, including the defendants that have been subjected to plaintiff's SLAPP suit, pay assessments through their regimes to the OFS which provides funds to acquire the services of K.A. Diehl.

115. That, upon information and belief, the agreements between the OFS and K.A. Diehl are for the benefit of the homeowners.

CONFLICT ALLEGATIONS

116. That in April of 2014 defendant Jim Perkins was elected to serve on the MBRHOA.

117. That Jim Perkins and Nancy Moore serve as Directors on the OFS Board.

118. That during Perkins term of service on the MBRHOA, he learned of information which led him to believe that there was a business relationship between board member Phil Cox and the largest vendor – Allegiant Food and Beverage, LLC (hereinafter "Allegiant" or "Allegiant Food and Beverage") / Myrtle Beach Resort Vacations (hereinafter "MBRV").

119. That upon information and belief, certain OFS / MBRHOA members maintain business relationships with MBRV.

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120. That upon information and belief, several MBRHOA board members revised the Allegiant Food and Beverage vendor agreement in October of 2013, signing said agreement before a vote by the MBRHOA board of directors.

121. That upon information and belief, the agreement granted to Allegiant Food and Beverage to maintain the commercial lease for a period of six years before the Board would even consider other vendor bids. Further, that during the final year of the agreement, when bids are permitted, Allegiant Food and Beverage gets a right of first refusal.

122. That the conflict of interest subject matter was eventually raised at a board meeting and discussed with counsel, Sam Stathos, who identified a conflict and opined that directors with such conflict, including Phil Cox should refrain from voting on Allegiant and MBRV matters (Attachment "B" Attorney Stathos Letter).

123. That despite Attorney Stathos' opinion letter, Phil Cox refused to abstain from voting on MBRV related matters.

124. Upon information and belief, the following OFS and Master Board directors have or had during their term of service a contractual relationship with MBRV:

a. Master Board: Phil Cox, and Stanley Jordan;

b. OFS Board: Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill.

INVOICE ALLEGATIONS

125. That in May of 2014, Jim Perkins, in his capacity as a director sought out the agreements between Allegiant Food and Beverage and the MBRHOA, and so obtained a copy of the same. (Attachment "C" Allegiant Food and Beverage Agreement).

126. That the agreement clearly required vendor Allegiant Food and Beverage to pay for utilities.

127. That defendant Jim Perkins discovered that K.A. Diehl had failed to invoice Allegiant Food and Beverage utilities.

128. That the failure to invoice Allegiant Food and Beverage utilities was an egregious error that would have cost the homeowners approximately $60,000.00, if Jim Perkins had not discovered the same and required action for repayment of the full amount.

129. That upon information and belief, Allegiant Food and Beverage, through owner Bobby Jones, began reimbursing the utilities immediately after Perkins's discovery, but had only paid approximately $30,000.00 of the approximately $60,000.00 owed to MBRHOA. (See Attachment "D").

130. That the MBRHOA board directors discussed KA Diehl and the Master Boards' failure to invoice Allegiant and during the meeting directors Phil Cox and Wayne Urban initially voted to forgive the debt rather than seek to recoup the lost funds.

131. That ultimately the MBRHOA voted to pursue the funds, such that an agreement with Allegiant was reached. That Allegiant is scheduled to repay the remaining funds over a period of years, and that such reimbursement is presumably ongoing.

132. That neither KA Diehl or MBRHOA disclosed this failure to invoice to the homeowners at large until the individual defendants shared their concerns.

133. That upon information and belief, K.A. Diehl attempted to address the matter by blaming the mistake on unclear language from the previous commercial lease agreement.

134. That, upon information and belief, the November 2009 Commercial Lease Agreement between MBRHOA and Allegiant Food and Beverage is clear. That, upon

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information and belief, it contains a section "3. Utilities" that states "Tenant [Allegiant] shall arrange and pay for the use of utilities...including, but not limited to, water, electricity, gas, sewer and telephone." (Attachment "E" November 2009 Commercial Lease Agreement).

135. That upon information and belief, KA Diehl failed to invoice MBRV for its portion of the improper gate passes. That the improper gate passes created a $280,000.00 tax upon the homeowners per year for the last two years.

136. That upon information and belief, despite admitting this error, K.A. Diehl sued the individual defendants who brought this truth to light.

DISCLOSURE ALLEGATIONS

137. That several homeowners began asking questions about KA Diehl's management of the property and about MBRHOA's failure to investigate concerning information.

138. That defendant, Mark Dos Santos, was among those who began to seek information from both the MBRHOA and from K.A. Diehl. That defendant, Mark Dos Santos, specifically requested the contracts between the MBRHOA and its numerous vendors.

139. That defendant, Mark Dos Santos, sent numerous emails to the plaintiff inquiring about important matters.

140. That upon information and belief, the defendant, Mark Dos Santos, and others, received negative responses to include: threats of suit, and vendors' rights pamphlets.

141. That upon information and belief, at the April 2015 OFS annual meeting, a non-defendant homeowner, Alan Bolton, requested that the OFS Board permit a financial audit.

142. That upon information and belief, the OFS Board agreed that they would vote to support such an audit, but failed to do so.

143. That upon information and belief, defendant William Moore requested in writing a financial audit.

144. That the individual Defendants, through counsel, requested a financial audit of the records of the corporation.

145. That Defendants, through counsel, sent letters to the MBRHOA and to OFS board seeking investigation and action.

146. That upon information and belief, directors from the MBRHOA and OFS provided these letters to KA Diehl rather than providing the financial audit.

147. That shortly thereafter, KA Diehl brought suit against the individual homeowner defendants.

INSURANCE ALLEGATIONS

148. That upon information and belief, since 2008 K.A. Diehl has been obligated to procure insurance for the MBRHOA and all four regimes.

149. That upon information and belief, K.A. Diehl failed to procure competitive insurance broker bids relying instead solely upon ADP Barlow Insurance Co.

150. That upon information and belief, former CEO of K.A. Diehl, Rob Barlow, was at the time married to the owner of ADP Barlow Insurance, Robin Barlow.

151. That upon and belief, the failure to procure competitive bids cost the homeowners substantial money, and thus, the individual defendants ascertainable sums of money annually.

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152. That upon information and belief the relationship between K.A. Diehl and ADP Barlow Insurance was eventually disclosed to OFS and the Master Board, but not to the homeowners at large.

153. Upon information and belief, when the property management contracts were reconfigured in December of 2012, K.A. Diehl's disclosure of the relationship did not obviate its contractual and ethical obligation to procure competitive bids and comparable brokerage fees.

154. Upon information and belief, the OFS master deed and bylaws requires the board to seek three year bids, not annual bids. That K.A. Diehl and OFS acquired annual bids.

155. That upon information and belief, K.A. Diehl's failure to utilize multiple brokers to procure competitive bids subjected homeowners to higher premiums and broker fees and charges.

COMMISSIONS / RENTALS ALLEGATIONS

156. That defendant Nancy Moore, serving as Treasurer of the Ocean Front Spa, learned information that led her to believe that certain sales commissions were not being properly accounted for or paid.

157. That K.A. Diehl was responsible to insure that the sales commissions were properly accounted for and paid.

158. That upon information and belief, MBRV is required to pay to MBRHOA 2% rental commissions or a base rate in the event 2% of the rental commissions does not exceed the base rate.

159. That upon information and belief, MBRHOA has the right to request rental commission income from MBRV, but that it has failed obtain the same.

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160. That upon information and belief, K.A. Diehl has not requested the rental commission income from MBRV on behalf of MBRHOA.

161. That upon information and belief, the financial statements prepared by KA Diehl reflect 2% rental income paid monthly by MBRV.

162. That upon information and belief, MBRV does not actually pay 2% rental income, but instead pays the base rate.

163. That upon information and belief, 2% of MBRV's rental commissions would exceed the base rate. That regardless of whether the rental commissions actually exceed the same, K.A. Diehl and MBRHOA were negligent in not pursuing information regarding the same.

SECURITY SERVICES

164. That upon information and belief, K.A. Diehl provides security services through Watchmen Services.

165. That upon information and belief, in December of 2009, K.A. Diehl retained itself to provide certain security services at the resort.

166. That upon information and belief, the signatures of the security services agreement contain only K.A. Diehl employees and agents. (Attachment "F" Security Services Agreement 2009)

167. That upon information and belief, pursuant to the agreement, K.A. Diehl is required to provide qualified employees to secure the resort and operate the front gate, which includes collecting parking fees.

168. That upon information and belief, there is an inherent conflict of interest with K.A. Diehl's management of the property and provision of security services.

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169. That upon information and belief, the compensation schedule permits K.A. Diehl's Chief of Security to effectually determine whether MBRHOA or K.A. Diehl is responsible for Watchmen Security employee overtime.

170. That upon information and belief, in 2013 security services cost over $400,000.00.

171. That upon information and belief, in 2013 the MBRHOA paid for over 700 hours of employee overtime. (Attachment "G" Watchmen Services Payment Information 2013).

172. That upon information and belief, KA Diehl maintains an unreliable system for logging employee hours.

173. That upon information and belief, KA Diehl maintains an unreliable system for collection of parking fees.

174. That upon information and belief K.A. Diehl has hired employees that are not qualified.

175. That upon information and belief, the Master Board has permitted K.A. Diehl to maintain involvement in the security service bidding process or permitted K.A. Diehl to view competitors' bids.

176. That upon information and belief, K.A. Diehl has usurped this opportunity to insure that Watchmen Services obtains the contract.

NEGLIGENT HIRING ALLEGATIONS

177. That K.A. Diehl hired Rusty Magill to serve as manager for OFS HOA.

178. That upon information and belief, North Carolina Bankruptcy Court thoroughly examined Rusty Magill's management of a beach condominium rental business. In so

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doing, the Court found, among other unfortunate findings, that Magill had "grossly mismanaged" the business. (Attachment "H", US Bankruptcy Court Order, Eastern District of North Carolina).

179. That several of the individual defendants, having learned of this information, questioned K.A. Diehl about whether the Rusty Magill whom KA Diehl had hired was in fact the same Rusty Magill whom had been discussed in bankruptcy Order.

180. That several of the individual defendants learned from Rusty Magill that K.A. Diehl had advertised and procured Rusty Magill through a Craigs List posting.

181. That several of the individual defendants questioned KA Diehl's hiring process.

182. That upon information and belief, KA Diehl initially ignored the inquiries, and has never adequately addressed the decision to hire Rusty Magill.

183. That upon information and belief, KA Diehl has failed to hire qualified security personnel.

184. That upon information and belief, K.A. Diehl employed Joseph M. Depace whom had previously pled guilty to receiving stolen property, a 3rd degree crime. (Attachment "I").

185. That upon information and belief, Joseph M. Depace was recently arrested for impersonating law enforcement. (Attachment "J").

186. That several defendants, in good faith, have sought information and explanations from K.A. Diehl and the MBRHOA about the above matters.

187. That the defendants continued to ask questions, hired counsel, created a private Facebook page, and blog to begin a dialogue with other homeowners who were concerned about the allegations above and other such allegations.

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188. That upon information and belief, K.A. Diehl, in an effort to quiet the defendants, and to prevent dissemination and further discovery of the truth sued the defendants for defamation, civil conspiracy, tortious interference with contractual relationships and interference with prospective contractual relationships.

189. That upon information and belief, K.A. Diehl in filing said suit abused the process of the South Carolina courts.

190. That upon information and belief, K.A. Diehl's failure to obtain competitive bids for the purpose of usurping the business opportunity for a sister company or company owned by a spouse, was a deceptive practice that affects the individual defendants and the public, at large, and thus violated the South Carolina Unfair Trade Practices Act.

FOR A FIRST COUNTERCLAIM/CAUSE OF ACTION
(ABUSE OF PROCESS AGAINST PLAINTIFF KA DIEHL BY INDIVIDUAL DEFENDANTS)

191. Defendants hereby incorporate each and every allegation, and denial, contained within the proceeding paragraphs as if set forth herein verbatim.

192. That the defendants made good faith efforts to inquire about perceived failures and misconduct regarding the operation of Myrtle Beach Resorts. In so doing, the defendants raised the concerns contained in paragraphs 115 - 188 to OFS and MBRHOA property management company, K.A. Diehl.

193. That Plaintiff failed to respond appropriately to Defendants' inquiries, and threatened to sue one or more of the Defendants. That such threat to use the system was for the purpose of intimidating the Defendants in an effort to prevent them from disseminating the truth.

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194. That upon information and belief, K.A. Diehl became aware of the defendants' intention to file a derivative action on behalf of MBRHOA against K.A. Diehl. That K.A. Diehl then filed suit seeking to intimidate defendants and cause them to hire counsel for the purpose of attempting to make said derivative suit financially impracticable for defendants.

195. Further, K.A. Diehl filed this suit for the purpose of intimidating all other homeowners and to prevent such other homeowners from participating in defendants future action against it, and to prevent them from engaging in conversation about the failures or misconduct of K.A. Diehl and the Master Board.

196. That upon information and belief, both K.A. Diehl and MBRHOA posted the lawsuit to make an example of the individual defendants and further intimidate any other homeowners that would question K.A. Diehl's practices.

197. That recently a homeowner having been apprised of one of the myriad of issues regarding operation and management of MBRHOA replied to defendant Mark Dos Santos, "be careful, we are not allowed to question anything, you might get sued!!!!!!!!!!" (Please see Attachment "K").

198. That in January of 2016, the defendants began to engage with the homeowners again via email despite the intimidation by K.A. Diehl, and that around the same time, it became known to K.A. Diehl that the claims against the defendants were covered by insurance – such that it was no longer a financial strain upon them.

199. That shortly after witnessing defendants' communications with homeowners and that all defendants had insurance coverage, K.A. Diehl, having learned that is ulterior motives were no longer being served, sought to negotiate a resolution.

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200. That after the filing of the action against defendants K.A. Diehl evidenced the misuse of the process when one of its employees acknowledged to defendant Mark Dos Santos that there was really only one statement that was even potentially actionable. Specifically, that the according to K.A. Diehl's own employee, the only inaccurate or potentially defamatory remark was that "Rusty Magill filed bankruptcy."

201. That K.A. Diehl's suit against the individual defendants is for an ulterior purpose.

202. That K.A. Diehl's suit against the individual defendants sought to financially harm defendants, intimidate defendants, intimidate others, and thereby prevent disclosure of facts to the other homeowners.

203. That K.A. Diehl's Complaint alleges that defendants' allegation that K.A. Diehl failed to invoice Allegiant Food and Beverage was untrue and defamatory. That K.A. Diehl alleges so in bad faith, knowing that it failed to invoice Allegiant Food and Beverage for utilities.

204. That the truth of this fact is beyond contest.

205. That K.A. Diehl's complaint against the individual defendants is replete with fabrications and trumped up causes of action.

206. That K.A. Diehl has not suffered any harm or damage as result of the individuals conduct, but that even if such had occurred, it would not substantiate an action against these individual homeowners.

207. That K.A. Diehl filed suit not to pursue damages but to quiet the individual defendants to prevent their speech regarding matters of great importance to the homeowners.

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208. That as a result of Plaintiff K.A. Diehl's conduct, defendants have suffered actual damages including frustration, emotional distress, embarrassment, loss of time, and attorney fees.

209. That the defendants are entitled to receive actual and punitive damages resulting from plaintiff's abuse of process.

FOR A SECOND COUNTERCLAIM/CAUSE OF ACTION
(VIOLATION OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT INDIVIDUAL DEFENDANTS VS K.A. DIEHL)

210. Defendants hereby incorporate each and every allegation, and denial, contained within the proceeding paragraphs as if set forth herein verbatim.

211. That, upon information and belief, K.A. Diehl's performance of its contract with the MBRHOA is for the benefit of the individual homeowners at the resort.

212. That, upon information and belief, each of the individual defendants, sued by K.A. Diehl, owns at least one unit at MBR, and that at least one such unit is contained within OFS.

213. That upon information and belief, K.A. Diehl's former CEO, Robert Barlow, is married to Robin Barlow. That Robin Barlow owned ADP Barlow Insurance at the time it brokered insurance for MBRHOA and the all Myrtle Beach Resort property regimes.

214. That upon information and belief, the two companies have shared office space or operated out of the same building, and have shared a web presence (insert website).

215. That pursuant to its agreement with MBRHOA, K.A. Diehl was to procure competitive insurance bids for the common areas of the resort.

216. That pursuant to its agreement with OFS, K.A. Diehl was to procure competitive insurance bids for the OFS HOA.

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217. That upon information and belief, K.A. Diehl knew there were better rates but failed to procure the same.

218. Upon information and belief, Renaissance Tower used CWS Insurance to procure insurance and procured the same for tens of thousands of dollars less.

219. That K.A. Diehl knew this and failed to offer the same to Five Seasons and Myrtle Beach Resort Horizontal Property Regimes.

220. That upon information and belief, as a result of the familial relationship, K.A. Diehl consistently used one broker – ADP Barlow Insurance.

221. Upon information and belief, as a result of the failure to procure bids from other brokers, MBRHOA paid higher premiums for a period of years and higher brokerage fees.

222. That upon information and belief, such was a material breach of the agreement.

223. Upon information and belief, this same practice was utilized for the independent regimes until the Renaissance Tower discovered that the premiums were not competitive, and changed insurance brokers.

224. Upon information and belief, the Renaissance Tower, through broker CWS Insurance obtained comparative insurance for lower cost and brokerage rates than the other regimes that acquired insurance through ADP Barlow.

225. That K.A. Diehl, upon information and belief, did not disclose this relationship to the homeowners.

226. That upon information and belief, the OFS Board and MBRHOA directors failed to disclose this relationship to the homeowners.

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227. That upon information and belief, K.A. Diehl manages over 120 properties throughout the country including 40 in the State of South Carolina.

228. That upon information and belief, K.A. Diehl's conduct relating to procuring competitive insurance bids affects the public interest.

229. That upon information and belief, K.A. Diehl's conduct relating to procuring competitive insurance bids is capable of repetition and upon information and belief would have been repeated in 2014 if not for Nancy Moore and Jim Perkins.

230. That K.A. Diehl's conduct relating to procuring competitive insurance bids proximately harmed the individual defendants by inflating the amount of homeowner dues each owed.

231. That K.A. Diehl's conduct relating to procuring competitive insurance bids proximately caused harm to the individual defendants as members of the MBRHOA and OFS HOA in that each individual homeowner paid dues for the purpose of contracting with K.A. Diehl for its services, including this particular service.

232. That the individual unit owners possess 15 units between them and therefore paid a finite amount of dues collectively for a period of approximately 7 years.

233. That upon information and belief, and as shall be further substantiated during the course of discovery, a portion of said funds was utilized to pay for the procurement of insurance and for the services of K.A. Diehl.

234. That upon information and belief, the violation of the South Carolina Unfair Trade Practices Act was a willful and knowing violation such that defendants are entitled to treble damages.

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235. That the defendants are entitled to receive actual damages, including special and consequential damages, and treble damages and such other damages permissible under the statute.

FOR A THIRD COUNTERCLAIM

(Civil Conspiracy against K.A. Diehl)

236. That the defendants hereby incorporate the preceding allegations, and denials, as if set forth herein verbatim.

237. That upon information and belief, K.A. Diehl has conspired with several board of directors serving on MBRHOA and several board of directors serving on OFSHOA for the purpose of harming defendants.

238. That upon information and belief, K.A. Diehl and a majority of directors of MBRHOA and a majority of directors of OFSHOA are so intertwined that K.A. Diehl controls them both.

239. That upon information and belief, at a board meeting, several OFS directors inquired about suing defendant Mark Dos Santos for harassment. Further upon information, counsel advised the board that they could not sue a homeowner for simply asking questions. Upon information and belief, such board members were not happy with counsel's advice.

240. Upon information and belief, shortly thereafter K.A. Diehl brought suit against defendants for matters arising out of the inquiries by Mark Dos Santos.

241. That upon information and belief, K.A. Diehl, several of MBRHOA / OFSHOA directors and agents have conspired to prevent the defendants from gaining records of the OFS HOA and MBRHOA, including financial records.

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242. Further, they have acted in concert to prevent the disclosure of records, relationships amongst board members and vendors, accounts and accounting information, failures to seek competitive bids, and such other information as discovery may reveal.

243. That the relationship between K.A. Diehl and the MBRHOA / OFS is improperly mutually beneficial in that, these boards continue to grant to K.A. Diehl business contracts without legitimate consideration of other management companies, including security services (where K.A. Diehl entered into a contract signing both for it and the board), in exchange for protection of the board members' misconduct.

244. That upon information and belief, defendants Jim Perkins and Nancy Moore discovered that K.A. Diehl was providing kickbacks to certain board members to include the provision of free storage space.

245. That upon information and belief, the storage space issue was litigated with respect to the "A" building, and deemed improper, but that the practice continued with some of the other boards' directors.

246. That prior to the filing of the suit, K.A. Diehl interfered with OFS elections, and effectively the MBRHOA board.

247. That as result of this relationship, the boards and K.A. Diehl, concerned of the disclosure of truth conspired to injure and harm defendants by filing this suit, and depriving defendants of information.

248. Further that after filing the lawsuit, K.A. Diehl and the master board have continually deprived OFS treasurer Nancy Moore of the ability to perform her duty as duly elected treasurer. That the deprivation of this right includes preventing Moore from possessing relevant financial information.

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249. That they have done the same to Jim Perkins, OFS board member.

250. That as result of the combination of K.A. Diehl and the OFS and MBR board directors, the defendants have suffered special damages to include attorney fees, costs, and such other damages as jury may determine.

FOR A FOURTH COUNTERCLAIM

(Breach of Fiduciary Duty)

251. That Defendants incorporate each and every allegation contained in this Answer, and denials, as if set forth herein verbatim.

252. That upon information and belief, K.A. Diehl owes to each individual homeowner, including Defendants, a duty of care. That this duty of care is of a fiduciary nature.

253. That the conduct and omissions as alleged in the preceding paragraphs including: insurance procurement, security procurement, hiring of staff, abuse of process, conspiratorial conduct, and such other failures as more specifically set forth above, breach said duty, and are the direct and proximate cause of damages to the defendants.

254. That defendants are entitled to recover such damages against K.A. Diehl in an amount to include actual and punitive damages.

FOR A FIFTH COUNTERCLAIM

(NEGLIGENCE)

255. That Defendants incorporate each and every allegation contained in this Answer, and denials, as if set forth herein verbatim.

256. That upon information and belief, K.A. Diehl owes to each individual homeowner, including Defendants, a duty of care.

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257. That the conduct and omissions as alleged in the preceding paragraphs including: insurance procurement, security procurement, hiring of staff, abuse of process, conspiratorial conduct, and such other failures as more specifically set forth above, breach said duty owed to the Defendants and are the direct and proximate cause of damage to the defendants.

258. That the conduct, as more fully set forth above, was wanton and reckless.

259. That defendants are entitled to recover such damages against K.A. Diehl in an amount to include actual and punitive damages.

FOR A SIXTH COUNTERCLAIM

(FRAUD)

260. That defendants hereby incorporate each and every allegation contained in the Answer, including denials, as if set forth herein verbatim.

261. That K.A. Diehl is responsible to the homeowners by and through K.A. Diehl's interaction with MBRHOA. Further, that K.A. Diehl is responsible to the homeowners, and these individual defendants, by and through its interaction with OFS.

262. That K.A. Diehl is required to perform its obligations and duties in good faith, and to promote the best interest of the homeowners.

263. That K.A. Diehl has exploited its relationship with MBRHOA and OFS and has harmed the defendants.

264. That K.A. Diehl represented itself as a reputable company that would deal fairly and procure competitive bids and provide proper staff.

265. That K.A. Diehl's representations were false.

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266. That K.A. Diehl's representations were material, and that K.A. Diehl and its agents knew of the falsity of such statements or recklessly disregarded its truth. That K.A. Diehl had knowledge of facts and a duty to reveal said facts to the defendants.

267. That to the extent K.A. Diehl informed OFS or MBRHOA that it had a relationship with ADP Barlow, K.A. Diehl did not divulge that utilizing ADP Barlow would cost individual homeowners money.

268. That K.A. Diehl may be liable to these individual defendants because it had knowledge that the hearer of the statement would rely upon its statements and impact the homeowners, including defendants.

269. That K.A. Diehl intended that the hearer of the statements act upon said statements to include: not procuring competitive insurance bids; not procuring competitive management bids; and not procuring competitive security bids.

270. That the hearers of said statements have relied upon said statements as evidenced by: having purchased insurance with ADP Barlow; maintaining management agreements with K.A. Diehl; and hiring Watchmen Services (K.A. Diehl affiliate) to provide security services.

271. That upon information and belief, MBRHOA and OFS, and the defendants were ignorant of the truth of the falsity of the statements, and had right to rely upon said statements, and did, in fact, rely upon such statements.

272. That the defendants have been consequently and proximately injured by way of higher regime fees.

PRAYER FOR RELIEF

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WHEREFORE, Defendants Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, hereby pray unto this honorable court for the following relief: (1) dismissal of KA Diehl's claims against them; (2) for an award of actual, punitive, and special damages against KA Diehl together with attorney fees and costs; and (3) for such other and further relief as justice may require.

RESPECTFULLY SUBMITTED BY:

THE BRITTAIN LAW FIRM, P.A.

A. Preston Brittain

A. Preston Brittain, Esq.
SC Bar #73707
Thomas C. Brittain, Esq.
SC Bar # 00893
4614 Oleander Drive
Myrtle Beach, SC 29577
843-449-8562 (O)
843-449-6148 (F)

On behalf of Defendants James Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos

JANUARY 29, 2016
Myrtle Beach, SC

RESPECTFULLY SUBMITTED,

CLAWSON & STAUBES, LLC

By: Christ W. Nickels by A. Preston Brittain
Christopher W. Nickels, Esq. per authority
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
Phone: 843 577 2026
CNICKELS@clawsonandstaubes.com
ATTORNEY FOR MARK DOS SANTOS

RESPECTFULLY SUBMITTED,

COLLINS & LACY, P.C.

By: Christian Stegmaier by A. Preston Bolt w/ authority
CHRISTIAN STEGMAIER
cstegmaier@collinsandlacy.com
AMY L. NEUSCHAFER
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11945 Grandhaven Drive, Suite D
Murrells Inlet, South Carolina 29576
(843) 353-2350 (voice)
(843) 652-0301 (facsimile)

ATTORNEYS FOR DEFENDANTS
JAMES PERKINS AND NANCY MOORE

RESPECTFULLY SUBMITTED,

HAYNESWORTH, SINKLER, BOYD, P.A.

By: Robert W. Buffington by A. Preston Bolt w/ authority
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ATTORNEY FOR WILLIAM MOORE

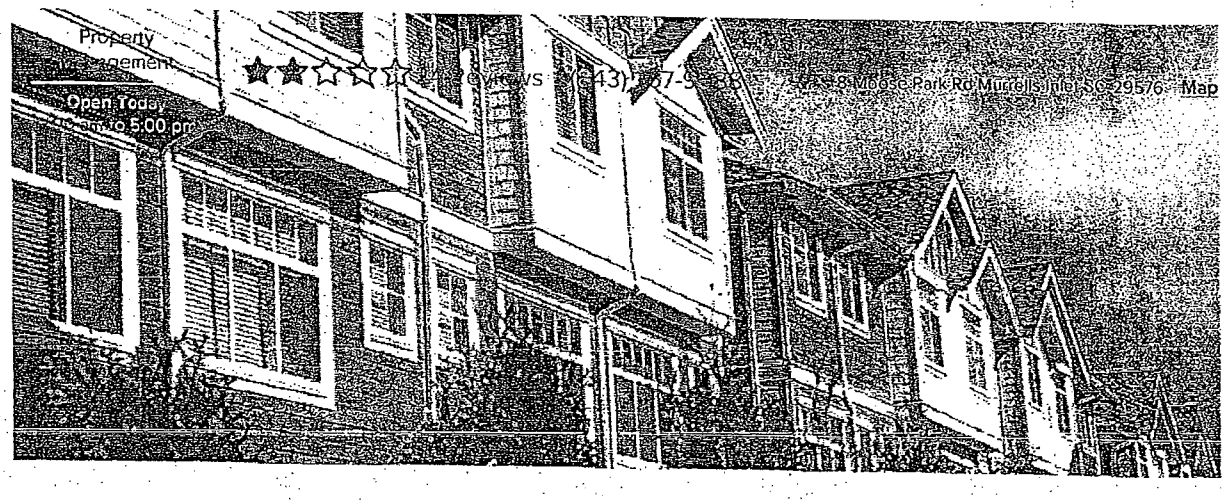
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ATTACHMENT "A"

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Diehl K A & Associates Reviews



FEEDBACK

ABOUT US

MAP

APPOINTMENT

BUSINESS OWNER?
FIX YOUR REPUTATION

JANIS H.
★☆☆☆☆

Recommended | All
Sep 17, 2015

I work for an HOA and we give our owners the benefit of the doubt and only send homeowners that are seriously delinquent to collections. KA Diehl wants to foreclose your home if you owe $300.00. Take away your home over HOA dues. I understand I need to pay because that is how they pay the bills, however, I doubt the company will go broke and need to kick myself and my family out of our home over that amount. They are the worse company I have ever had the unfortunate pleasure to deal with and will put my name on the list of board members so that I can fight for my community to get a new HOA provider.

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JENNIFER M.

★☆☆☆☆

Sep 14, 2015

Do not move into a KA Diehl managed property! Especially one in New Jersey. The "Community Manager" sharon strange in the Mt. Laurel, NJ office is an incompetent crook that should have her license expunged. She lies, cheats and does whatever necessary
in order to get your money, all the while property values are decreasing exponentially because she is sitting around doing nothing to improve the community. Those who do not have the
financial and cognitive capability to own their own home should not be managing yours, investigate before you buy in a KA Diehl mismanaged property.



FRED S.

★☆☆☆☆

Jul 08, 2015

These people are condescending idiots, that also have no idea what they are doing. The only thing they understand is being threatened with a court action. They hire substandard sub contractors to do the work in my community and raise the condo fees as often as they can. My community manager never responds when anything needs to be done, and when this manager does he sent Cement company to fix a roof who did not even do the job. But KA Diehl keeps this bad manager in place. This manager never checks on any contractor after work has been done and if any homeowners complained they put you on a blacklist. This manager never believes the homeowner he believes the substandard contractor instead. This is bad business.



JOE H.

★☆☆☆☆

Jul 02, 2015

This company is terrible the property manager is worse than that. They spend you're money on do overs, time and time again,and never get it right the first time. I wish there was a way to get out of this terrible contract we have with them!



CMC

★☆☆☆☆

May 05, 2015

This company is a nightmare and it starts at the top with their CEO Jack Boselli. It took us 16 months to get a simple front step renovation done. We were FORCED to change the color of our existing deck to white in spite of none of the other 89 units being white. The day it was finished, we were told by an elected board member that it was wrong and had to be torn down. Turns out there was another development with the same name as ours in a different state. The very ignorant KA employee was reading the wrong guidelines.

It took us 16 months to finally have the issue resolved and not until we retained a lawyer. Jack ended up having a "buddy" demolish and rebuild the deck as a favor with what he called 'Superior craftsmanship and materials". Within 3 weeks, 3 pieces of the "superior" deck already broke and Jack refused to do anything about it. He said

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it was our fault. To top it off, he actually called ME a jerk. For $177 a month in dues, the CEO's buddy shouldn't be building decks as a favor.

Do not employ this company. They will waste your monthly dues and they do not care because there is no accountability.



BARBIE D.
Myrtle Beach, SC
★☆☆☆☆

May 01, 2015

Ive never had a problem my whole life until i moved to mb. This company is unprofessional and h o r i b le...before you buy a home adk who runs poa first...



BARBIE D.
Myrtle Beach, SC
★☆☆☆☆

May 01, 2015

Ive never had a problem my whole life until i moved to mb. This company is unprofessional and h o r i b le...before you buy a home adk who runs poa first...



ANONYMOUS
★★★★★

Jun 26, 2014

Im very pleased so far with the services performed by KA Diehl at the Wynbrooke condos, Murrells Inlet, SC. Their employees are out there in 90 degree plus and 80% humidity to insure that the residents/ owners can enjoy a well kept community and pool. That the roads and parking areas are clean, and that the greenery is trimmed and mulched. Thank your gardeners KA Diehl. Love their enthusiasm and sacrifices.



JSLISS
★☆☆☆☆

Aug 14, 2013

If you want your neighborhood to deteriorate quickly, hire KA Diehl. The management ignores complaints and has poorly trained personnel who argue with property owners. KA Diehl personnel will also say anything to get you off the phone. A tree in a common area by my property was hit by lightening and is about to fall down. KA Diehl has ignored my request to have it taken down. The majority of homeowners in Springmill Plantation are dissatisfied because of the poor relations with this company. Can't wait to fire them when we take over from the POA.



MATTYWALKER
★☆☆☆☆

Mar 23, 2013

This is a TERRIBLE management company. Bad customer service. Can't keep records straight. Do not respond to HOA membership notes or requests. BAD, BAD, BAD. Save your money!

TURION80

Mar 13, 2013

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★☆☆☆☆

Unfortunately KA Diehl is the managing company if my neighborhood. I forgot to pay a months assessment and was charged a late fee



TURION80 Mar 13, 2013

★☆☆☆☆

Unfortunately KA Diehl is the managing company if my neighborhood. I forgot to pay a months assessment and was charged a late fee



GUEST92931 Jul 05, 2012

★☆☆☆☆

Absolutley terrible management company. They lie and have particularly dishonest business practices. The agents that work there should have their licenses removed. Once they get their hands on your checkbook watchout. Get rid of them.



HOMEOWNER Feb 19, 2012

★☆☆☆☆

Absolutley terrible management company. They lie and have particularly dishonest business practices. The agents that work there should have their licenses removed. They lied about everything they can. Once they have their hands on your checkbook look out. Get rid of them



OCEAN CREEK HOMEOWNER Sep 22, 2011

★☆☆☆☆

Our HoA is "managed" by KA Diehl and is about to be let go thank god! They are nothing but a bunch of crooks and liars and do not keep their word...at all. Ocean Creek will be better off without this company so beware of they come knocking.



OURHOAISBIAS Jun 27, 2009

★☆☆☆☆

Having an issue with your HOA or property management company?Support Senate Bill S30 write or email Senators - S30 Subcommittee Members: Senators Robert Ford, Gerald Malloy, Shane Martin, Shane Massey, Michael Mulvaney and President South Carolina Senate Honorable Glenn F. McConnellThis bill has been adjusted to cost a homeowner $1.00 per year. Well worth the price. Why? No one has jurisdiction over your HOA. HOA's can do what they want without any oversight, even if its illegal. If this bill is passed, a homeowner can have an issue mediated by the SC Board of Consumer affairs. Your HOA will then have someone to answer to. The SC CAI has been sending opposition letters to these Senators regarding Bill S30. You can find more information and see the oppostion letters at :SC CIA Websitehttp://www.cai-

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sc.net/doc/toc.asp?assn_id=320&doc_cat_id=3500S30 opposition
letter:http://www.cai-sc.net/doc/AdobeViewer.asp?
doc_filename=/hoa/assn320/document



OURHOAISBIAS Jun 26, 2009

★☆☆☆☆

Not an honest company to deal with. Neither is our HOA Board. what can you do? Write or email your senator and ask them to pass the :S.C. Homeowners' Association ActThis would only cost each homeowner between $1-$10 dollars a year. Then any complaint regarding your board or property management company would be mediated by Consumer Affairs. Right now, no one has authority over your HOA & maangement company which allows them to do whatever they want ,when they want to even if its illegal.



MITZI YASKO THACKSTON Sep 10, 2008

★★★★★

I recent wrote a blog about Diehl K A & Associates regarding the cracked foundation in myy home. I spoke directlt with Linda Mcmanus and my foundation was repaired with days. The board president, Bob Johnston was refusing to allow my foundation to be repaired. IF THIS MAN MOVES INTO YOUR NEIGHBORHOOD BEWARE. Linda Mcmanus is currently cleaning up our neighborhood and I can not stay enough about her. IF YOU ARE HAVING TROUBLE WITH YOUR HOA, call and write the management company. It works. Most of the time the problem is with your board and not with the management company. However, from personal experience, once the company was contacted she did address our issues with the board. Bob Johnson, president of our HOA, is a nighmare to work with and he doesn't follow rules. I can not thank the management company for steping in and helping our family. Please remenber to call and write the management company .



ANONYMOUS Aug 04, 2008

★★★☆☆

In all my years of doing business and dealing with management companies I have never in all my life dealt with a company such as this horrible outfit. The staff at the main office sucks, can't get anyone to answer the phone, no one calls back, owner is out all the time, seems to be missing from action. The VP is an idiot. I for one am voting to get rid of this outfit when our contract comes due in December 2008. As for our HOA manager.....she should be place in an insane asylum. We had a excellent manager, never to be seen again.



A. MAD SERVICE May 07, 2008

★☆☆☆☆

I own a company that was providing an HOA a service. Things were fine till they took over. We stopped getting paid. Upon further investigation, I found that they have a habit of doing that. What happens is, they take over the property and force all the

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other services out by not paying them. They tell the HOA that they do not know they service is getting worse, while all this the service company is working for free, if at all. Once the original service is out, they put in their people, which they end up getting money from. Not a good way to run a business, the people that get hurt are the service companies (because they do not get paid) and the home owners (they end up getting bad service either from the original service company because of non payment or the new company because most of them are in-experienced. . Note to HOA's YOU ARE BETTER OFF DOING IT YOURSELF...DO NOT HIRE THIS COMPANY!!!



MITZI — May 04, 2008

★★★☆☆

Diehl K A & Associates have been a nightmare to work with. We bought a townhouse, and we have a crack in the foundation. We have been writing letters since 2006 and they have not sent anyone over to assess the damage. Instead, they divert their attention and hire attorneys to police our association fees. They truly create expenses for others instead of handling the bigger problems that exist. To date I would like to report the ctack in the foundation has become longer and wider. Perhaps we will eventually get their attention whenever our townhouse caves inward and the neighbors are living on top of us.We own another condo and they do not manage that property and it runs smoothly. I will never buy another home tha they manage. Their turnover employee rate is extremely high.



PAT FRANCIS — Apr 05, 2008

★☆☆☆☆

I agree with the other lady. We bought a condo in a Centex property managed by KA Diehl and we had an excellent manager at the beginning but they changed us in January and now we never get an answer from anyone when we email or call. Even the people in the office have a different tone to their voice when they hear the name of our property. We have 2 maintenance men who try their best to keep the place up but the college students who reside here are destroying our investments and KA Diehl refuses to follow up on any complaints. I will never buy in another complex where they are the managers.



WANDA MANNING — Feb 06, 2008

★★★★★

Management company well versed in all aspects of property management. Excellent staff. Follows up and implements Board actions.Worked with several property management cos. in the Myrtle Beach area and this company is far superior to all others.



JENNIFER MCCANN — Dec 31, 2007

★☆☆☆☆

just bought a home where ka diehl are the management. upped our monthly dues $20.00 to 65.00 and we get absolutley nothing for it. When i call to speak to

someone there is no one there and you never get a call back. Do not move in if they are your management company

Diehl K A & Associates

powered by BirdEye

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ATTACHMENT "B"

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www.patrickandstathos.com

SAM G. STATHOS

DANIEL L. PATRICK
OF COUNSEL

Writer's e-mail: sgs@patrickandstathos.com

June 4, 2014

Darla Donovan, CMCA, AMS
Senior Community Manager
K.A. Diehl, AAMC
11822 Hwy 17 Bypass South
Murrells Inlet, SC 29576

Re: Myrtle Beach Resort Homeowners' Association, Inc. ("Master Association")

Dear Darla:

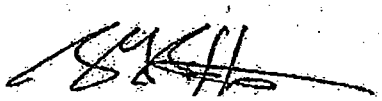
I am writing pursuant to your request that our firm address an issue on behalf of the Master Association regarding conflict of interest. Specifically, the issue is whether a conflict of interest exists for a director that sits on the board of the Master Association who is in a contractual relationship with a Master Association approved food and beverage and rental contractor, such as Allegiant Food & Beverage, LLC ("Food & Beverage") and Allegiant Property Management, LLC ("Property Management"), and must vote on issues that affect the subject contractors.

The governing document for the Master Association is the Declaration of Covenants, Conditions and Restrictions filed April 25, 1991 ("Declaration"). The Declaration does not provide express guidance as to conflict of interest issues, however, as a non-profit corporation the Master Association is subject to the applicable statute. Therefore, pursuant to the South Carolina Nonprofit Corporation Act, specifically S.C. Code § 33-31-831, a conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. If a director of the Master Association has a direct interest in either Food & Beverage or Property Management, then there is a conflict of interest. A direct interest may be deemed to be a contractual relationship with the companies before the Master Association that can result in the director receiving something of value. An indirect interest is one where a director has a material interest in the other entity or is a general partner in that entity, or a director, officer or trustee of the entity that is a party to the transaction.

In my opinion, if either Food and Beverage or Property Management matters are before the Master Association and a director has a contractual relationship with either company, then that director has a conflict of interest on such matters. In that event, the director's interest must be disclosed so that the remaining directors can address the matter at hand pursuant to the statute. In conclusion, a conflict of interest does not itself prevent the Master Association from addressing a matter since the statute provides a mechanism for a board to function and to authorize and approve decisions when a conflict of interest is presented.

If you require any further clarification on this matter please let me know.

Sincerely,



Sam G. Stathos

SGS/

cc: Myrtle Beach Resort Homeowners' Association, Inc.

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ATTACHMENT "C"

CONTRACT ALLEGIANT

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

AGREEMENT

THIS AGREEMENT, made and entered into as of the 12th day of November, 2009, by and between THE MYRTLE BEACH RESORT HOMEOWNERS" ASSOCIATION, INC., a South Carolina corporation (hereinafter the "Association") and ALLEGIANT PROPERTY MANAGEMENT, LLC, a North Carolina limited liability company (hereinafter referred to as "Allegiant")doing business as Myrtle Beach Resort Vacations.

WITNESSETH

WHEREAS, the Association has determined it to be in the best interest of the homeowners at The Myrtle Beach Resort to enter into an Agreement that results in one rental agent whereby the Association will receive a royalty on all rental and sales activity conducted at the Resort and whereby Association will obtain ownership of Commercial Unit D within the Five Seasons Centre Council of Co-owners, and

WHEREAS, Allegiant has made certain promises and has committed to certain undertakings, as more particularly set out herein, as an inducement to the Association to enter into this Agreement, and,

WHEREAS, The Association and Allegiant respectively desire to enter into this Agreement which will be effective January 1, 2010,

NOW THEREFORE in consideration of Five Dollars ($5.00), and the mutual covenants given herein, the receipt and sufficiency of such consideration being hereby acknowledged, the parties agree to as follows:

SECTION A: Rental Management Agreement

1. Association agrees to facilitate solicitation by Allegiant of the homeowners at the Myrtle Beach Resort to enter into Rental Management Agreements ("RMAs") with Allegiant, provided Allegiant 's form of RMA is reasonable in light of the then current industry standards and the management fee expressed as a % of the Rental Revenue has been approved by the Association. Any changes to the types or amounts of Additional Charges from Exhibit "A" shall be approved by the Association prior to implementation.
2. The term "Gross Rental Revenue" is defined as the total of Rent, Departure Cleaning, Linen Service, Processing Fees, and Resort Fees.
3. The initial term of this Agreement shall be effective as of January 1, 2010 and shall continue in effect through December 31, 2014. The Association shall have the option to buyout the remainder of this

1

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Agreement from Allegiant for a sum of $150,000 and the terms stated in the Contract of Sale executed with Allegiant for Commercial Unit D in the Five Seasons Centre as well as the terms in paragraph 3 of this Agreement related to the Assignment of Rental Management Agreements, providing Association has given notice to Allegiant of its intent to exercise its buyout option, which must be exercised on or before August 31, 2012. In the event Association does not exercise its buyout, provided that Allegiant has complied with the terms of the lease, and provided that neither party has advised the other by August 31, 2014 that they do not wish to extend or renegotiate this Agreement, the term of this lease shall extend an additional five (5) years commencing January 1, 2015 and ending December 31, 2019. Subsequent terms of this agreement shall be in automatic renewals in five (5) year increments provided neither party has advised the other by August 31st of the final year of a term that they wish to terminate or renegotiate the Agreement. At any time prior to August 31st of the final year of any term of this Agreement the Association shall have the right to test the market place to determine the potential value of the Agreement at that time. However Allegiant shall have a right of first refusal for the Agreement unless Association has notified Allegiant by August 31st of that year that they wish to terminate the agreement. Upon termination of this Agreement, all incidental contracts, "800" telephone numbers, use of internet websites using the name Myrtle Beach Resort, except for the website using Myrtle-Beach-Resort, if and only if this Agreement is terminated prior to December 31, 2019, use of Association logos, related services including rental histories of Association RMA's, and licenses incidental to the rental program at the Myrtle Beach Resort shall be assigned by Allegiant to the Association or its designee. The disposition of the Rental Management Agreements (RMA's) shall be in accordance with paragraph 4. SECTION A of this Agreement. All other internet assets, as listed in Exhibit "B", brought to this Agreement from Allegiant shall return to Allegiant at any termination of this agreement.

4. Effective with the execution of this agreement and the payment of the monies due upon execution of this contract, the Association shall transfer, set over, and assign to Allegiant all existing RMA's (approximately 216) owned by the Association for administration by Allegiant. These RMA's, between the incumbent agent Myrtle Beach Vacation Rentals and Myrtle Beach Resort owners, are to be assigned to the Association or its agent effective January 1, 2010 in accordance with their present Agreement. This assignment shall include all rental reservations booked or in the process of being booked, for the calendar years of 2010 and beyond. Allegiant brings their own RMA's (Approximately 160) with them into this Agreement. If Allegient is successful in increasing the total number of RMA's managed under this Agreement, the additional RMA's shall be assigned between the Association and Allegiant in proportion to the number actually brought into the Agreement on January 1, 2010. If the number decreases from the total number of RMA's as of January 1, 2010, any decrease shall be considered to have come from the number brought to the Agreement by Allegiant. Should this decrease occur, any

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additions of RMA's from that point shall be considered as Allegiant RMA's until such time as the original total has once again been met. At the end of the second term on December 31, 2019 all RMA's shall be considered to be Association RMA's at that time and thereafter. If there is a termination of the contract prior to December 31, 2019, the RMA's shall be separated according to the apportionment of the RMA's, as described above, at the time of the termination.

5. Association shall turn over to Allegiant the existing "800" telephone lines serving the Myrtle Beach Resort and responsibility for payment of these services effective 1/1/2010. Association shall grant to Allegiant an exclusive license to use any of its registered logos for the duration of the contract.

6. In consideration of the assignments and licenses above, Allegiant shall agree and pay to the Association in good and sufficient funds as follows:

   A. Upon the execution of the contract, a credit of Seventy-two Thousand Five Hundred Dollars ($72,500.00) shall be applied toward the Association's purchase of Commercial Unit D of the Five Seasons Centre from Allegiant. Allegiant also agrees to fund the cost of a new sign (design provided by Tyson Signs in 2008 and approved by the Association at its Annual Meeting in April 2008) to be placed at the entrance of the Myrtle Beach Resort by May 31, 2009.
   B. On the anniversary date of this contract in 2011, the sum of Seventy Four Thousand Six Hundred Seventy-five dollars ($74,675.00) in cash.
   C. By January 10, 2011 a sum equal to 2% of Gross Rental Revenues from January 1, 2010 through December 31, 2010 that are in excess of $3,625,000.
   D. On the anniversary date of this agreement in 2012, the sum of Seventy Six Thousand Nine Hundred Fifteen Dollars and Twenty-five cents ($76,915.25).
   E. By January 10, 2012 a sum equal to 2% of Gross Rental Revenues from January 1, 2011 through December 31, 2011 that are in excess of $3,733,750.00

   F. By January 10, 2013 a sum equal to 2% of Gross Rental Revenues from January 1, 2012 through December 31, 2012 that are in excess of $3,845,762.50

7. If the Association has not exercised its buyout option, Commencing February 10, 2013 and continuing on the 10th day of each succeeding month through the duration of this Agreement and any extension of this Agreement, Allegiant shall pay Association an amount equaling Two Percent (2%) percent of Gross Rental Revenues received for the preceding month. However, in no event shall the annual payment for

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2013 be less than Seventy-nine Thousand Two Hundred and Twenty-two Dollars and Seventy-one Cents ($79,222.71) "the minimum annual payment". In each successive year the minimum annual payment shall increase by 3.0 %. In any year the 2% of Gross Rental Revenue does not equal the minimum annual amount, then Allegiant will pay such deficit so that each annual payment shall equal "the minimum annual payment" as provided for herein and such deficit shall be paid by Allegiant to the Association no later than January 10 for the immediately preceding payment year.

8. Allegiant agrees to pay Association a ten (10%) percent late fee for payments received ten (10) or more days after their due date. This shall apply to any payments due under this Agreement.

9. In the event, during the term of this Agreement, there is a decrease in gross annual rental revenue when compared to previous "Agreement year", and where such decrease is caused by a qualifying force majeure (including fire, flood, weather related evacuation, war, riot, or insurrection) "the minimum annual payment" requirement provided for herein, shall be reduced for the Agreement year of such qualifying force majeure event as hereinafter provided for that year. A "qualifying force majeure event" shall occur when greater than fifteen (15%) percent of the rental units under contract with Allegiant are uninhabitable as a result of such a force majeure during the period from May 15 through September 15 ("prime season") of any given Agreement year. In the event of such a force majeure event, the minimum annual payment shall be reduced by a fraction of the minimum annual payment, which said fraction shall be determined as follows:

   A. The numerator shall be the total number of unit days that such qualifying units are uninhabitable, and the denominator shall be the total unit days under contract with Allegiant for the applicable "prime season". It is understood and agreed that such adjustment and minimum annual payment shall only apply if the percentage rent provided for herein is less than the minimum annual payment as adjusted herein and only to the extent that there is a decrease in gross annual rental revenue when compared to the previous year.

10. Commencing February 10, 2010 Allegiant shall also furnish the Association with a written statement, certified by Allegiant to be correct, showing the amount of gross rental revenue from the beginning of the current year to the end of the previous calendar month or any portion thereof.

Allegiant agrees to make such portions of their books and records available to the Association, or its designated representative, as may be necessary or desired (at the sole discretion of the Association) in respect to the percentage leases as set out herein. This will include, without limitation, accommodation tax records. If

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Allegiant shall not make payment of any money due hereunder or otherwise perform any of the terms hereof, and Allegiant fails to make such payment or remediate such performance within ten (10) days from mailing from the mailing of a written notice from the Association)or within a reasonable period of time if such cure cannot reasonably be implemented within a ten (10) day period), or if Allegiant shall be adjudicated bankrupt or make assignment for the benefit of creditors or if the assets of Allegiant shall be sold under execution or other legal process, such event shall constitute an event of default under this Section A. Upon occurrence of an uncured fault, the Association may, at its option, terminate this agreement and/or sue Allegiant for damages. If either party shall default under the terms of this Section A, such defaulting party agrees to pay all reasonable attorney fees and costs incurred by the non-defaulting party and enforcing the obligations of the defaulting party under this Section A: Rental Management Agreement.

SECTION B: Lease of Rental Management And Resale Space

The Association will lease to the Allegiant the rental management, sales, and Homeowners' Association space now utilized in the office building at 5905 Highway 17 South, Horry County. This space is estimated at 3,400 square feet.

1. The term of this leasehold shall be Five (5) years commencing January 1, 2010 and terminating at midnight on December 31, 2014. Allegiant shall have the option to extend this leasehold an additional five (5) years terminating December 31, 2019 s provided Allegiant notify Association of its intent to exercise such option by August 31, 2014. In the event Association exercises it buyout option with Allegiant related to rental management services, it shall also constitute notice to Allegiant that this leasehold shall also terminate as of December 31, 2012. Subsequent terms of this agreement shall be in automatic renewals in five (5) year increments provided neither party has advised the other by August 31st of the final year of a term that they wish to terminate or renegotiate the Agreement.
2. The rental fee for this space shall be Fifty One Thousand Dollars ($51,000.00) annually paid in monthly installments due in advance on the 1st of each month. This rental fee shall be increased by three percent (3.0 %) at the beginning of each subsequent calendar year under this Agreement.
3. Allegiant agrees to pay Association a ten (10%) percent late fee for payments received ten (10) or more days after their due date. This shall apply to any payments due under this Agreement.
4. Allegiant shall arrange and pay for the use of utilities furnished to the leased premises during the term of this Lease Agreement, including but not limited to, water, electricity, gas, sewer, and telephone. Allegiant agrees to pay one-third of the monthly maintenance fees for the Resort telephone system ($216.67). Allegiant agrees to manage and pay for the VCTV system that inserts a video stream for viewing on Channel 3, the Myrtle Beach Resort Channel of the TimeWarner cable system.

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5. Maintenance of the interior leased space including all plumbing, heating, electrical and air conditioning shall be the responsibility of Allegiant. Maintenance and the maintenance of the exterior shall be the responsibility of the Association. Allegiant shall, at its own expense, keep and maintain the premises in good order and repair during the term of this Lease Agreement, and shall surrender same to the Association at the expiration or earlier termination of this Lease Agreement in as good condition as when received, normal wear and tear excepted.
6. All repairs, replacements, and renewals shall be at least equal in quality, materials, and workmanship to that which originally existed on the leased property. Allegiant shall indemnify the Association against all costs, expenses, liabilities, losses, damages, suits, claims, and demands, including reasonable attorney's fees, because of the failure of Allegiant to comply with the foregoing. Allegiant shall not, in any event, cause or permit any waste, damage, or injury to the leased property.
7. The Association shall be under no liability for damages to Allegiant due to the discontinuance of heat, air conditioning, electricity, water, or of any other service provided by or through the Association, or of any other services provided by or through the Association, or for loss of profit whether caused by the foregoing, rain, water, force majeure, or otherwise.
8. The Association reserves the right to enter on the premises at reasonable times to inspect same.
9. Allegiant agrees to pay reasonable cost of garbage collection and disposal as provided by the Association. Provided, however, Allegiant is solely responsible for collecting and transporting garbage from office area to the dumpster to be provided by the Association, the location of which is to be designated by the Association.
10. All ad valorem taxes, assessments, liens or charges on the land or improvements now located thereon, and all obligations secured by mortgage or other liens that may be against or levied upon the demised premises shall be properly paid by the Association when due. All taxes on the personal property owned or leased by Allegiant, as well as all business licenses required for the operation of its business, shall be paid by Allegiant.

11. During the entire term of the lease agreement, Allegiant shall, at the expense of Allegiant, secure and maintain such personal property insurance as it may determine upon all personal property owned or leased by Allegiant and located upon the leased premises, at the expense of Allegiant. Allegiant shall, at the expense of Allegiant, secure and maintain during the entire term of this Lease, general liability insurance policy (or policies) upon the leased premises in an amount that totals no less than Two Million and 00/100 Dollars ($2,000,000.00) for each occurrence and a Five Million and 00/100 Dollars Umbrella policy. Said general liability insurance policy (or policies) shall be procured with an insurance company licensed to do business in the State of South Carolina and shall be procured by Allegiant in

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such manner as to include the Association and all individual horizontal property regimes as additional insured. Allegiant shall promptly furnish copies of said policies of insurance to the Association and shall direct and instruct the insuring company to mail duplicate notices of premiums due from time to time to said policies of insurance to the Association at the address designated by the Association.

12. Allegiant, at its sole expense, shall comply with all laws, orders, and regulations of federal, state and municipal authorities, and with any direction of any public officer, pursuant to the law, which impose any duty upon the Association or Allegiant with respect to the leased property. Allegiant, at its sole expense, shall obtain all licenses or permits which may be required by the conduct of its business within the terms of this Lease Agreement, or for the making of repairs, alterations, improvements, or additions, if permitted by the Association. Allegiant shall comply with the requirements of all polices of public liability, fire, and all other types of insurance at any time in force with respect to the buildings and other improvements on the leased property.

13. Allegiant shall, on the last day of the last term, or upon the sooner termination of the term, peaceably and quietly surrender the leased property to the Association, in as good condition and repair as at the commencement of the term, including replacements, additions, or improvements constructed, erected, added, or placed thereon by Allegiant with the Association's consent, with the natural wear and tear thereof excepted.

14. If the premises are wholly or partially destroyed by fire or other casualty, through no fault of Allegiant, rental shall abate in proportion to the loss of use. The Association shall, to the extent of available insurance proceeds, promptly restore the structure to substantially the same condition as existed before damage or destruction, whereupon full rental shall resume.

15. If the whole of the demised premises, or such portion thereof as will make the leased property unsuitable for the purposes herein listed, is condemned for any public use or purpose by any legally constituted authority, then in either of such events, this Lease shall cease from the time when possession is taken by such public authority, and rental shall be accounted for between the Association and Allegiant as of the date of the surrender of possession. Such termination shall be without prejudice to the rights of either the Association or Allegiant to recover compensation from the condemning authority for any loss or damage caused by such condemnation. Neither the Association nor Allegiant shall have any rights in or to any award made to the other by the condemning authority.

16. If Allegiant shall be in default in the payment of any rent due hereunder or in the performance of any conditions hereof, and shall it fail to correct and rectify any such default within ten (10) days from the mailing of a written notice thereof from the Association, or if Allegiant shall be adjudicated bankrupt or make any assignment for the benefit of creditors, or; if the interest of Allegiant therein shall be sold

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under execution or other legal process, the Association may enter into said premises and repossess the same as if this Lease had not been made and shall thereupon have the right to cure this Lease, without prejudice, however, to the right of entry to the Association to recover all rent due to the time of such entry. If Allegiant shall fail to fulfill any agreement stated in this Lease, or fail to pay any portion of the rent, or vacate the leased premises prior to the expiration of the lease term, the Association may terminate this lease, and all rents due and which would become due during the remainder of the lease term, shall immediately become due and payable, provided, however, Allegiant shall have a ten (10) day right to cure any such default. If either party should default under the terms of this agreement, such defaulting party agrees to pay all reasonable attorney's fees and court costs incurred by the non-defaulting party in enforcing the obligations of the defaulting party under this Lease Agreement

17. The Association shall be responsible for real property taxes and general fire and extended casualty insurance on the building. Allegiant shall be responsible for all personal property, business licenses, income or other taxes, that relate to the conduct of its business on the demised premises. Allegiant shall also be responsible for insuring its personal property. Each party shall maintain adequate liability insurance, worker's compensation insurance and other insurance, in reasonable and adequate amounts, and either party may require the other party to produce evidence of coverage upon reasonable request.
18. No permanent improvements, alterations, or additions to the premises shall be made by Allegiant without the express written consent of the Association. All improvements and additions made and permanently attached to the premises, including without limitation, any partitions, carpets, lighting fixtures, doors, hardware, shelves, counters, cabinets, and all other permanent improvements and fixtures, shall remain with the premises, and shall be surrendered to the Association at the expiration or earlier termination of this Lease Agreement.

SECTION C: Linen Storage, Maid Service, Commercial Laundry Area Rental

1. The Association controls and hereby leases to Allegiant certain linen storage and maid service areas shown on Exhibit "B" as well as a commercial laundry at The Myrtle Beach Resort Ocean Front Spa for the sum of One Thousand Fifty Dollars ($1,050.00) per month, payable monthly in advance with the first payment being due on or before January 1, 2010. (Allocated as follows: $675.00 for commercial laundry and $375.00 for 8 linen storage and maid service areas, 5 in the Renaissance Tower, 2 in the Ocean Front Spa and 1 in the Horizontal Property Regime). This amount shall have an annual three percent (3.0 %) increase on January 1st of every year for the duration of this Agreement and any extensions. If at any time during a term of this agreement a Regime increases the rental rates of its storage areas to the Association, Allegiant the payment under this section shall immediately be amended

to include that increase in rental rates.

2. The term of this leasehold shall be Five (5) years commencing January 1, 2010, and terminating at midnight on December 31, 2014. Allegiant shall have the option to extend this leasehold an additional five (5) years terminating December 31, 2019 provided Allegiant notify Association of its Intent to exercise such option by August 31, 2014. In the event Association exercises it buyout option with Allegiant related to rental management services it shall also constitute notice to Allegiant that this leasehold shall also terminate as of December 31, 2012. Subsequent terms of this agreement shall be in automatic renewals in five (5) year increments provided neither party has advised the other by August 31st of the final year of a term that they wish to terminate or renegotiate the Agreement.

SECTION D: Miscellaneous

1. The leases herein shall be subject and subordinate at all times to the lien of existing mortgages and of mortgages which hereafter may be made a lien of the leased property by Association. Although no instrument or act on the part of Allegiant shall be necessary to effectuate such subordination, Allegiant will, nevertheless, execute and deliver such further instruments subordination this lien to the lien of any mortgages as may be desired by the mortgagee.
2. Allegiant covenants not to compete (outside the scope of this Agreement) in any way, shape or form in respect to rentals at the Myrtle Beach Resort during the term of this Lease Agreement, and for a period of one and one half (11/2) years beyond such term, unless this agreement is terminated by the Association prior to December 31, 2019.
3. Allegiant agrees to have each of its employees who handle money in any respect covered by employee dishonesty coverage in an amount no less than One Hundred Thousand and 00/100 Dollars ($100,000.00). Further, any employee of Allegiant who is a signatory on any of Allegiant's bank accounts shall be bonded in an amount no less than One Million and 00/100 Dollars ($1,000,000.00).
4. Employees, guests and invitees of Allegiant shall abide by all parking regulations and traffic rules established by the Association.
5. Allegiant shall undertake no on-site advertising with respect to its use of the office space without the prior written consent of the Association, which consent shall not be unreasonably withheld.
6. Allegiant shall split with the Association, on a 50/50 basis, the cost of the American Hospitality Association's summer program to provide children's activities at the Resort and the cost to provide the Saturday evening reception on the Annual Homeowners' Meetings weekend each year.
7. In the event the Association must proceed with legal action against the current vendor, Myrtle Beach Vacation Rentals (MBVR), in order to enforce the non-compete clause in the existing Agreement

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between Association and MBVR, Allegiant agrees to indemnify the Association for all expenses Associated with that action.

8. In the event the Association must proceed with legal action against MBVR in order to enforce the assignment of the current RMA's to the Association or its Agent, Allegiant agrees to reimburse Association for 50% of the legal fees required for that legal action.

IN WITNESS WHEREOF, the Association and Allegiant subscribed their names and affixed their seals the day and year first above written.

WITNESSES:

ASSOCIATION:

MYRTLE BEACH RESORT HOMEOWNERS' ASSOCIATION, INC.

By: _____
Stanley Jordan, President

ALLEGIANT PROPERTY MANAGEMENT, LLC

By: _____
Robert Jones, Managing Member

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Exhibit "A"

Additional Charges

Departure Cleaning: Units will be cleaned by our Housekeeping Department after departure. Departure cleaning charges are as follows:
1 Bedroom Units - $50
2 Bedroom Units - $60
3 Bedroom Units - $70

Linen Service: Condos are provided with linen and towels, etc. for $50 per stay (3 BRs are $70).

Processing Fee: $30.00

Damage Waiver: $6 per Day
Click here for Details

Destination Fee: $1/Night

Resort Fee: 4% of Rent Only

Optional Features/Charges
Daily Maid Service is available for $19.95/night.
Travel Insurance (Click here for details)

Myrtle Beach Resort Home Page

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Exhibit "B"

ASSETS BELONGING TO ALLEGIANT

Toll-Free Numbers

800-845-0629
888-627-3767
866-484-5175
866-863-0762
888-826-4018
888-826-3981

Domains

charmingcancun.com
discovermyrtlebeachrestaurants.com
exploremiamibeach.com
funbeachvacations.com
hawaiianstays.com
mb4fun.com
mbforfun.com
mbfourfun.com
mbr4fun.com
mbresortcondos.com
mbresortvacations.com
mbrho.com
mbseniors.com
myrtlebeachattractionsonline.com
myrtlebeachbikeweeklive.com
myrtlebeachentertainmentlive.com
myrtlebeachgolfinsider.com
myrtlebeachhotdeals.com
myrtlebeach-living.com
myrtlebeachrealestatenow.com
myrtle-beach-resort.com
myrtlebeachresortcondos.com
myrtlebeachresorthomeowners.com
myrtlebeachresortrentals.com
myrtlebeachresortsales.com
myrtlebeachresortvacations.mobi
myrtlebeachresortvacationservices.com
myrtlebeachvacationcondos.com
playmb.com
resortmb.com
resortvacationservices.com
virginiabeachescapes.com

1callmaint.com - Expires on 10-Sep-2010
onecallmaint.com - Expires on 10-Sep-2010

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ATTACHMENT "D"

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K.A. DIEHL

Myrtle Beach Resort Homeowners Assoc., Inc.
Operating Income Statement
08/31/2014

c/o K.A. Diehl
P.O. Box 15159, 5905 S. Kings
Myrtle Beach SC 29587

K.A. Diehl
Community Management
Specialists

	Description	Current Period Actual	Current Period Budget	Variance	Year To Date Actual	Year To Date Budget	Variance	Yearly Budget
	INCOME							
4001	Regular Assessments	$ 96,030.80	$ 96,035	$ (4.20)	$ 768,246.40	$ 768,280	$ (33.60)	$ 1,152,423
4002	Reserve Funding	(12,137.00)	(12,137)	0.00	(97,096.00)	(97,096)	0.00	(145,644)
4040	Sales Commissions	612.31	417	195.31	5,900.93	3,336	2,564.93	5,000
4041	Rental/Lease Income	0.00	83	(83.00)	214.75	664	(449.25)	1,000
4042	MBRV Sales Office Rent	4,783.41	4,784	(0.59)	38,267.25	38,272	(4.75)	57,410
4043	MBRV 2% Rental Commission	13,621.72	14,688	(1,066.28)	65,132.70	62,016	3,116.70	81,600
4044	MBRV Food & Beverage Lease	11,880.36	11,880	0.36	95,042.88	95,040	2.88	106,923
4052	Vending Income	0.00	83	(83.00)	956.64	664	292.64	1,000
4058	Gate Income	14,532.50	9,992	4,540.50	98,295.00	79,936	18,359.00	119,906
4060	Storage Rm Lease Income	881.79	1,181	(299.21)	8,104.29	9,448	(1,343.71)	14,177
4064	Utility Reimbursement	0.00	0	0.00	3,650.00	0	3,650.00	0
4083	Water and Sewer Reimbursement	7,523.47	0	7,523.47	7,523.47	0	7,523.47	0
4120	Interest Income-Operating	0.00	0	0.00	1.78	0	1.78	0
4149	Common Element Inc	14,532.50	9,992	4,540.50	98,295.00	79,936	18,359.00	119,906
	Total Income	$ 152,261.86	$ 136,998	$ 15,263.86	$ 1,092,535.09	$ 1,040,496	$ 52,039.09	$ 1,513,701
	EXPENSES							
	General & Administrative							
5000	General & Administrative	$ 0.00	$ 1,025	$ 1,025.00	$ 563.97	$ 8,200	$ 7,636.03	$ 12,300
5001	Office Supplies & Expenses	104.28	417	312.72	2,461.89	3,336	874.11	5,000
5002	Printing Expense	1,116.74	833	(283.74)	11,652.33	6,664	(4,988.33)	10,000
5003	Postage	53.05	267	213.95	2,208.72	2,136	(72.72)	3,200
5009	Board Meeting Expense	0.00	678	678.00	3,887.56	5,424	1,536.44	8,133
5015	Legal Services	0.00	83	83.00	1,900.00	664	(1,236.00)	1,000
5017	Management Services	8,025.00	8,145	120.00	64,200.00	65,160	960.00	97,734
5020	Consulting Services Other	1,050.00	1,050	0.00	8,400.00	8,400	0.00	12,595
5021	Audit/Tax Preparation Services	0.00	0	0.00	2,850.00	2,850	0.00	2,850
5023	Insurance Expense	3,664.63	4,177	512.37	29,884.85	33,416	3,531.15	50,119
5034	Licenses & Permits	0.00	0	0.00	425.00	1,500	1,075.00	1,500
5039	Property Taxes	0.00	0	0.00	457.47	0	(457.47)	50,500
5049	Operating Contingency	0.00	417	417.00	0.00	3,336	3,336.00	5,000
	General & Administrative Total	$ 14,013.70	$ 17,092	$ 3,078.30	$ 128,891.79	$ 141,086	$ 12,194.21	$ 259,931
	Repairs & Maintenance							
6000	General Maintenance	$ 674.16	$ 2,917	$ 2,242.84	$ 19,758.25	$ 23,336	$ 3,577.75	$ 35,000
6004	Lazy River Staff	6,208.59	2,359	(3,849.59)	26,727.03	18,872	(7,855.03)	28,305
6006	Mileage Reimbursement	0.00	17	17.00	268.80	136	(132.80)	200
6021	Golf Cart Expense	1,119.43	875	(244.43)	7,069.51	7,000	(69.51)	10,500
6030	Fire Alarm & Sprinkler Maint	163.49	203	39.51	1,361.88	1,624	262.12	2,433
6031	HVAC System Maint	41.42	250	208.58	1,650.19	2,000	349.81	3,000
6034	TV Repair & Replacement	0.00	21	21.00	0.00	168	168.00	250
6036	Interior Pest Control	212.75	233	20.25	1,664.80	1,864	199.20	2,800
6038	Termite Treatment	310.00	41	(269.00)	585.00	328	(257.00)	490
6039	Nuisance Control	2,491.67	192	(2,299.67)	3,833.36	1,536	(2,297.36)	2,300
6041	Janitorial Supplies	879.29	542	(337.29)	4,148.95	4,336	187.05	6,500
6080	Grounds Staff	2,083.53	4,690	2,606.47	27,539.55	37,520	9,980.45	56,280
6099	Golf Cart Repair MBR	150.95	83	(67.95)	597.44	664	66.56	1,000
6151	Contract Landscape Maintenance	1,875.00	1,875	0.00	15,000.00	15,000	0.00	22,500
6152	Landscape Maint	1,166.81	1,679	512.19	22,431.56	13,432	(8,999.56)	20,145
6159	Lake Maintenance	420.00	458	38.00	3,929.57	3,664	(265.57)	5,500
6185	Pool/Spa Supplies	2,384.99	2,250	(134.99)	16,505.28	18,000	1,494.72	27,000
6186	Pool/Spa Maintenance	284.99	1,250	965.01	8,061.10	10,000	1,938.90	15,000
6241	Watchmen Services	41,101.09	39,867	(1,234.09)	315,195.70	318,936	3,740.30	478,400
6243	Watchman Uniforms	0.00	125	125.00	1,121.88	1,000	(121.88)	1,500
6244	Watchman Supplies	1,431.29	1,042	(389.29)	6,901.43	8,336	1,434.57	12,500
	Repairs & Maintenance Total	$ 62,999.45	$ 60,969	$ (2,030.45)	$ 484,351.28	$ 487,752	$ 3,400.72	$ 731,603

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K.A. DIEHL

0137 Myrtle Beach Resort Homeowners Assoc., Inc.
Operating Income Statement
09/30/2014

c/o K.A. Diehl
P.O. Box 15159, 5905 S. Kings
Myrtle Beach SC 29587

K.A. Diehl
Community Management
Specialists

	Description	Current Period Actual	Current Period Budget	Variance	Year To Date Actual	Year To Date Budget	Variance	Yearly Budget
	INCOME							
4001	Regular Assessments	$ 96,030.80	$ 96,035	$ (4.20)	$ 864,277.20	$ 864,315	$ (37.80)	$ 1,152,423
4002	Reserve Funding	(12,137.00)	(12,137)	0.00	(109,233.00)	(109,233)	0.00	(145,644)
4040	Sales Commissions	471.00	417	54.00	6,371.93	3,753	2,618.93	5,000
4041	Rental/Lease Income	(214.75)	83	(297.75)	0.00	747	(747.00)	1,000
4042	MBRV Sales Office Rent	4,783.41	4,784	(0.59)	43,050.66	43,056	(5.34)	57,410
4043	MBRV 2% Rental Commission	7,002.15	13,056	(6,053.85)	72,134.85	75,072	(2,937.15)	81,600
4044	MBRV Food & Beverage Lease	11,880.36	11,883	(2.64)	106,923.24	106,923	0.24	106,923
4052	Vending Income	214.75	83	131.75	1,171.39	747	424.39	1,000
4058	Gate Income	20,607.50	9,992	10,615.50	118,902.50	89,928	28,974.50	119,906
4060	Storage Rm Lease Income	881.79	1,181	(299.21)	8,986.08	10,629	(1,642.92)	14,177
4064	Utility Reimbursement	4,115.37	0	4,115.37	7,765.37	0	7,765.37	0
4083	Water and Sewer Reimbursement	4,382.77	0	4,382.77	11,906.24	0	11,906.24	0
4120	Interest Income-Operating	0.00	0	0.00	1.78	0	1.78	0
4149	Common Element Inc	20,607.50	9,992	10,615.50	118,902.50	89,928	28,974.50	119,906
	Total Income	$ 158,625.65	$ 135,369	$ 23,256.65	$ 1,251,160.74	$ 1,175,865	$ 75,295.74	$ 1,513,701
	EXPENSES							
	General & Administrative							
5000	General & Administrative	$ 0.00	$ 1,025	$ 1,025.00	$ 563.97	$ 9,225	$ 8,661.03	$ 12,300
5001	Office Supplies & Expenses	247.19	417	169.81	2,709.08	3,753	1,043.92	5,000
5002	Printing Expense	1,232.54	833	(399.54)	12,884.87	7,497	(5,387.87)	10,000
5003	Postage	160.31	267	106.69	2,369.03	2,403	33.97	3,200
5009	Board Meeting Expense	581.05	678	96.95	4,468.61	6,102	1,633.39	8,133
5015	Legal Services	0.00	83	83.00	1,900.00	747	(1,153.00)	1,000
5017	Management Services	8,025.00	8,145	120.00	72,225.00	73,305	1,080.00	97,734
5020	Consulting Services Other	1,050.00	1,050	0.00	9,450.00	9,450	0.00	12,595
5021	Audit/Tax Preparation Services	0.00	0	0.00	2,850.00	2,850	0.00	2,850
5023	Insurance Expense	3,664.63	4,177	512.37	33,549.48	37,593	4,043.52	50,119
5034	Licenses & Permits	13.01	0	(13.01)	438.01	1,500	1,061.99	1,500
5039	Property Taxes	(2,472.01)	0	2,472.01	(2,014.54)	0	2,014.54	50,500
5049	Operating Contingency	0.00	417	417.00	0.00	3,753	3,753.00	5,000
	General & Administrative Total	$ 12,501.72	$ 17,092	$ 4,590.28	$ 141,393.51	$ 158,178	$ 16,784.49	$ 259,931
	Repairs & Maintenance							
6000	General Maintenance	$ 1,952.76	$ 2,917	$ 964.24	$ 21,711.01	$ 26,253	$ 4,541.99	$ 35,000
6004	Lazy River Staff	3,139.51	2,359	(780.51)	29,866.54	21,231	(8,635.54)	28,305
6006	Mileage Reimbursement	0.00	17	17.00	268.80	153	(115.80)	200
6021	Golf Cart Expense	1,119.43	875	(244.43)	8,188.94	7,875	(313.94)	10,500
6030	Fire Alarm & Sprinkler Maint	163.50	203	39.50	1,525.38	1,827	301.62	2,433
6031	HVAC System Maint	(780.41)	250	1,030.41	869.78	2,250	1,380.22	3,000
6034	TV Repair & Replacement	0.00	21	21.00	0.00	189	189.00	250
6036	Interior Pest Control	212.75	233	20.25	1,877.55	2,097	219.45	2,800
6038	Termite Treatment	0.00	41	41.00	585.00	369	(216.00)	490
6039	Nuisance Control	(2,108.33)	192	2,300.33	1,725.03	1,728	2.97	2,300
6041	Janitorial Supplies	518.96	542	23.04	4,667.91	4,878	210.09	6,500
6080	Grounds Staff	3,856.07	4,690	833.93	31,395.62	42,210	10,814.38	56,280
6099	Golf Cart Repair MBR	1,958.39	83	(1,875.39)	2,555.83	747	(1,808.83)	1,000
6151	Contract Landscape Maintenance	1,875.00	1,875	0.00	16,875.00	16,875	0.00	22,500
6152	Landscape Maint	406.59	1,679	1,272.41	22,838.15	15,111	(7,727.15)	20,145
6159	Lake Maintenance	556.85	458	(98.85)	4,486.42	4,122	(364.42)	5,500
6185	Pool/Spa Supplies	2,059.04	2,250	190.96	18,564.32	20,250	1,685.68	27,000
6186	Pool/Spa Maintenance	1,781.64	1,250	(531.64)	9,842.74	11,250	1,407.26	15,000
6241	Watchmen Services	40,061.93	39,867	(194.93)	355,257.63	358,803	3,545.37	478,400
6243	Watchman Uniforms	0.00	125	125.00	1,121.88	1,125	3.12	1,500
6244	Watchman Supplies	173.11	1,042	868.89	7,074.54	9,378	2,303.46	12,500
	Repairs & Maintenance Total	$ 56,946.79	$ 60,969	$ 4,022.21	$ 541,298.07	$ 548,721	$ 7,422.93	$ 731,603

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K.A. DIEHL

0152 Myrtle Beach Resort Homeowners Assoc, Inc
Operating Income Statement
10/31/2014

11/17/2014 11:14 AM Page: 1

c/o K.A. Diehl
P.O. Box 15159, 5905 S. Kings
Myrtle Beach SC 29587

K.A. Diehl
Community Management
Specialists

	Description	Current Period Actual	Current Period Budget	Current Period Variance	Year-To-Date Actual	Year-To-Date Budget	Year-To-Date Variance	Yearly Budget
	INCOME							
4001	Regular Assessments	$ 96,030.80	$ 96,035	$ (4.20)	$ 960,308.00	$ 960,350	$ (42.00)	$ 1,152,423
4002	Reserve Funding	(12,137.00)	(12,137)	0.00	(121,370.00)	(121,370)	0.00	(145,644)
4040	Sales Commissions	978.98	417	561.98	7,350.91	4,170	3,180.91	5,000
4041	Rental/Lease Income	0.00	83	(83.00)	0.00	830	(830.00)	1,000
4042	MBRV Sales Office Rent	4,783.41	4,784	(0.59)	47,834.07	47,840	(5.93)	57,410
4043	MBRV 2% Rental Commission	3,361.37	3,264	97.37	75,496.22	78,336	(2,839.78)	81,600
4044	MBRV Food & Beverage Lease	0.00	0	0.00	106,923.24	106,923	0.24	106,923
4052	Vending Income	0.00	83	(83.00)	1,171.39	830	341.39	1,000
4058	Gate Income	14,190.00	9,992	4,198.00	133,092.50	99,920	33,172.50	119,906
4060	Storage Rm Lease Income	131.79	1,181	(1,049.21)	9,117.87	11,810	(2,692.13)	14,177
4064	Utility Reimbursement	0.00	0	0.00	7,765.37	0	7,765.37	0
4083	Water and Sewer Reimbursement	3,430.35	0	3,430.35	15,336.59	0	15,336.59	0
4120	Interest Income-Operating	0.00	0	0.00	1.78	0	1.78	0
4149	Common Element Inc	14,190.00	9,992	4,198.00	133,092.50	99,920	33,172.50	119,906
4199	Miscellaneous Income	5.43	0	5.43	5.43	0	5.43	0
	Total Income	$ 124,965.13	$ 113,694	$ 11,271.13	$ 1,376,125.87	$ 1,289,559	$ 86,566.87	$ 1,513,701
	EXPENSES							
	General & Administrative							
5000	General & Administrative	$ 0.00	$ 1,025	$ 1,025.00	$ 563.97	$ 10,250	$ 9,686.03	$ 12,300
5001	Office Supplies & Expenses	282.44	417	134.56	2,991.52	4,170	1,178.48	5,000
5002	Printing Expense	627.69	833	205.31	13,512.56	8,330	(5,182.56)	10,000
5003	Postage	58.90	267	208.10	2,427.93	2,670	242.07	3,200
5009	Board Meeting Expense	280.06	678	397.94	4,748.67	6,780	2,031.33	8,133
5015	Legal Services	0.00	83	83.00	1,900.00	830	(1,070.00)	1,000
5017	Management Services	8,025.00	8,145	120.00	80,250.00	81,450	1,200.00	97,734
5020	Consulting Services Other	1,050.00	1,050	0.00	10,500.00	10,500	0.00	12,595
5021	Audit/Tax Preparation Services	0.00	0	0.00	2,850.00	2,850	0.00	2,850
5023	Insurance Expense	3,664.63	4,177	512.37	37,214.11	41,770	4,555.89	50,119
5034	Licenses & Permits	0.00	0	0.00	438.01	1,500	1,061.99	1,500
5039	Property Taxes	0.00	0	0.00	(2,014.54)	0	2,014.54	50,500
5049	Operating Contingency	0.00	417	417.00	0.00	4,170	4,170.00	5,000
	General & Administrative Total	$ 13,988.72	$ 17,092	$ 3,103.28	$ 155,382.23	$ 175,270	$ 19,887.77	$ 259,931
	Repairs & Maintenance							
6000	General Maintenance	$ 3,572.52	$ 2,917	$ (655.52)	$ 25,283.53	$ 29,170	$ 3,886.47	$ 35,000
6004	Lazy River Staff	684.50	2,359	1,674.50	30,551.04	23,590	(6,961.04)	28,305
6006	Mileage Reimbursement	0.00	17	17.00	268.80	170	(98.80)	200
6021	Golf Cart Expense	1,119.43	875	(244.43)	9,308.37	8,750	(558.37)	10,500
6030	Fire Alarm & Sprinkler Maint	593.50	203	(390.50)	2,118.88	2,030	(88.88)	2,433
6031	HVAC System Maint	41.42	250	208.58	911.20	2,500	1,588.80	3,000
6034	TV Repair & Replacement	0.00	21	21.00	0.00	210	210.00	250
6036	Interior Pest Control	212.75	233	20.25	2,090.30	2,330	239.70	2,800
6038	Termite Treatment	0.00	41	41.00	585.00	410	(175.00)	490
6039	Nuisance Control	191.67	192	0.33	1,916.70	1,920	3.30	2,300
6041	Janitorial Supplies	365.17	542	176.83	5,033.08	5,420	386.92	6,500
6080	Grounds Staff	4,407.81	4,690	282.19	35,803.43	46,900	11,096.57	56,280
6099	Golf Cart Repair MBR	853.29	83	(770.29)	3,409.12	830	(2,579.12)	1,000
6151	Contract Landscape Maintenance	1,875.00	1,875	0.00	18,750.00	18,750	0.00	22,500
6152	Landscape Maint	360.57	1,679	1,318.43	23,198.72	16,790	(6,408.72)	20,145
6159	Lake Maintenance	420.00	458	38.00	4,906.42	4,580	(326.42)	5,500
6185	Pool/Spa Supplies	1,392.85	2,250	857.15	19,957.17	22,500	2,542.83	27,000
6186	Pool/Spa Maintenance	224.70	1,250	1,025.30	10,067.44	12,500	2,432.56	15,000
6241	Watchman Services	36,706.62	39,867	3,160.38	391,964.25	398,670	6,705.75	478,400
6243	Watchman Uniforms	0.00	125	125.00	1,121.88	1,250	128.12	1,500
6244	Watchman Supplies	547.30	1,042	494.70	7,621.84	10,420	2,798.16	12,500
	Repairs & Maintenance Total	$ 53,569.10	$ 60,969	$ 7,399.90	$ 594,867.17	$ 609,690	$ 14,822.83	$ 731,603

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K.A. DIEHL

093 Myrtle Beach Resort Homeowners Assoc, Inc
Operating Income Statement
11/30/2014

12/10/2014 5:38 PM Page: 1

c/o K.A. Diehl
P.O. Box 15159, 5905 S. Kings
Myrtle Beach SC 29587

K.A. Diehl
Community Management
Specialists

	Description	Current Period Actual	Budget	Variance	Year-To-Date Actual	Budget	Variance	Year Budget
	INCOME							
4001	Regular Assessments	$ 96,030.80	$ 96,035	$ (4.20)	$ 1,056,338.80	$ 1,056,385	$ (46.20)	$ 1,152,423
4002	Reserve Funding	(12,137.00)	(12,137)	0.00	(133,507.00)	(133,507)	0.00	(145,644)
4040	Sales Commissions	189.00	417	(228.00)	7,539.91	4,587	2,952.91	5,000
4041	Rental/Lease Income	0.00	83	(83.00)	0.00	913	(913.00)	1,000
4042	MBRV Sales Office Rent	4,783.41	4,784	(0.59)	52,617.48	52,624	(6.52)	57,410
4043	MBRV 2% Rental Commission	1,819.56	1,632	187.56	77,315.78	79,968	(2,652.22)	81,600
4044	MBRV Food & Beverage Lease	0.00	0	0.00	106,923.24	106,923	0.24	106,923
4052	Vending Income	0.00	83	(83.00)	1,171.39	913	258.39	1,000
4058	Gate Income	6,377.50	9,992	(3,614.50)	139,470.00	109,912	29,558.00	119,906
4060	Storage Rm Lease Income	806.79	1,181	(374.21)	9,924.66	12,991	(3,066.34)	14,177
4063	Trash Removal Reimbursement	3,376.00	0	3,376.00	3,376.00	0	3,376.00	0
4064	Utility Reimbursement	6,161.92	0	6,161.92	13,927.29	0	13,927.29	0
4083	Water and Sewer Reimbursement	763.00	0	763.00	16,099.59	0	16,099.59	0
4120	Interest Income-Operating	0.00	0	0.00	1.78	0	1.78	0
4149	Common Element Inc	6,377.50	9,992	(3,614.50)	139,470.00	109,912	29,558.00	119,906
4199	Miscellaneous Income	0.00	0	0.00	5.43	0	5.43	0
	Total Income	$ 114,548.48	$ 112,062	$ 2,486.48	$ 1,490,674.35	$ 1,401,621	$ 89,053.35	$ 1,513,701
	EXPENSES							
	General & Administrative							
5000	General & Administrative	$ 31.85	$ 1,025	$ 993.15	$ 595.82	$ 11,275	$ 10,679.18	$ 12,300
5001	Office Supplies & Expenses	110.14	417	306.86	3,101.66	4,587	1,485.34	5,000
5002	Printing Expense	1,039.56	833	(206.56)	14,552.12	9,163	(5,389.12)	10,000
5003	Postage	24.00	267	243.00	2,451.93	2,937	485.07	3,200
5009	Board Meeting Expense	489.97	678	188.03	5,238.64	7,458	2,219.36	8,133
5015	Legal Services	0.00	83	83.00	1,900.00	913	(987.00)	1,000
5017	Management Services	8,025.00	8,145	120.00	88,275.00	89,595	1,320.00	97,734
5020	Consulting Services Other	1,050.00	1,050	0.00	11,550.00	11,550	0.00	12,595
5021	Audit/Tax Preparation Services	0.00	0	0.00	2,850.00	2,850	0.00	2,850
5023	Insurance Expense	3,864.63	4,177	512.37	40,878.74	45,947	5,068.26	50,119
5034	Licenses & Permits	0.00	0	0.00	438.01	1,500	1,061.99	1,500
5039	Property Taxes	0.00	0	0.00	(2,014.54)	0	2,014.54	50,500
5049	Operating Contingency	0.00	417	417.00	0.00	4,587	4,587.00	5,000
	General & Administrative Total	$ 14,435.15	$ 17,092	$ 2,656.85	$ 169,817.38	$ 192,362	$ 22,544.62	$ 259,931
	Repairs & Maintenance							
6000	General Maintenance	$ 1,216.89	$ 2,917	$ 1,700.11	$ 26,500.42	$ 32,087	$ 5,586.58	$ 35,000
6004	Lazy River Staff	684.50	2,359	1,674.50	31,235.54	25,949	(5,286.54)	28,305
6006	Mileage Reimbursement	0.00	17	17.00	268.80	187	(81.80)	200
6021	Golf Cart Expense	1,119.43	875	(244.43)	10,427.80	9,625	(802.80)	10,500
6030	Fire Alarm & Sprinkler Maint	163.50	203	39.50	2,282.38	2,233	(49.38)	2,433
6031	HVAC System Maint	41.42	250	208.58	952.62	2,750	1,797.38	3,000
6034	TV Repair & Replacement	0.00	21	21.00	0.00	231	231.00	250
6036	Interior Pest Control	212.75	233	20.25	2,303.05	2,563	259.95	2,800
6038	Termite Treatment	0.00	41	41.00	585.00	451	(134.00)	490
6039	Nuisance Control	191.67	192	0.33	2,108.37	2,112	3.63	2,300
6041	Janitorial Supplies	171.37	542	370.63	5,204.45	5,962	757.55	6,500
6080	Grounds Staff	7,523.34	4,690	(2,833.34)	43,328.77	51,590	8,263.23	56,280
6089	Golf Cart Repair MBR	386.99	83	(303.99)	3,796.11	913	(2,883.11)	1,000
6151	Contract Landscape Maintenance	1,875.00	1,875	0.00	20,625.00	20,625	0.00	22,500
6152	Landscape Maint	2,219.00	1,679	(540.00)	25,417.72	18,469	(6,948.72)	20,145
6159	Lake Maintenance	420.00	458	38.00	5,326.42	5,038	(288.42)	5,500
6185	Pool/Spa Supplies	90.95	2,250	2,159.05	20,048.12	24,750	4,701.88	27,000
6186	Pool/Spa Maintenance	1,015.56	1,250	234.44	11,083.00	13,750	2,667.00	15,000
6241	Watchmen Services	36,856.55	39,867	3,010.45	428,820.80	438,537	9,716.20	478,400
6243	Watchman Uniforms	0.00	125	125.00	1,121.88	1,375	253.12	1,500
6244	Watchman Supplies	159.62	1,042	882.38	7,781.46	11,462	3,680.54	12,500
	Repairs & Maintenance Total	$ 54,348.54	$ 60,969	$ 6,620.46	$ 649,215.71	$ 670,659	$ 21,443.29	$ 731,603

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K.A. DIEHL

0137 Myrtle Beach Resort Homeowners Assoc. Inc
Operating Income Statement
12/31/2014

01/16/2015 5:00 PM Page: 1

c/o K.A. Diehl
P.O. Box 15159, 5905 S. Kings
Myrtle Beach SC 29587

K.A. Diehl
Community Management
Specialists

	Description	Current Period Actual	Current Period Budget	Current Period Variance	Year To Date Actual	Year To Date Budget	Year To Date Variance	Yearly Budget
	INCOME							
4001	Regular Assessments	$ 96,030.80	$ 96,038	$ (7.20)	$ 1,152,369.60	$ 1,152,423	$ (53.40)	$ 1,152,423
4002	Reserve Funding	(12,137.00)	(12,137)	0.00	(145,644.00)	(145,644)	0.00	(145,644)
4040	Sales Commissions	531.00	413	118.00	8,070.91	5,000	3,070.91	5,000
4041	Rental/Lease Income	0.00	87	(87.00)	0.00	1,000	(1,000.00)	1,000
4042	MBRV Sales Office Rent	4,783.41	4,786	(2.59)	57,400.89	57,410	(9.11)	57,410
4043	MBRV 2% Rental Commission	4,082.55	1,632	2,450.55	81,398.33	81,600	(201.67)	81,600
4044	MBRV Food & Beverage Lease	0.00	0	0.00	106,923.24	106,923	0.24	106,923
4052	Vending Income	0.00	87	(87.00)	1,171.39	1,000	171.39	1,000
4058	Gate Income	3,102.50	9,994	(6,891.50)	142,572.50	119,906	22,666.50	119,906
4060	Storage Rm Lease Income	806.79	1,186	(379.21)	10,731.45	14,177	(3,445.55)	14,177
4063	Trash Removal Reimbursement	1,541.00	0	1,541.00	4,917.00	0	4,917.00	0
4064	Utility Reimbursement	0.00	0	0.00	13,927.29	0	13,927.29	0
4083	Water and Sewer Reimbursement	909.00	0	909.00	17,008.59	0	17,008.59	0
4120	Interest Income-Operating	0.00	0	0.00	1.78	0	1.78	0
4149	Common Element Inc	3,102.50	9,994	(6,891.50)	142,572.50	119,906	22,666.50	119,906
4199	Miscellaneous Income	0.00	0	0.00	5.43	0	5.43	0
	Total Income	$ 102,752.55	$ 112,080	$ (9,327.45)	$ 1,593,426.90	$ 1,513,701	$ 79,725.90	$ 1,513,701
	EXPENSES							
	General & Administrative							
5000	General & Administrative	$ 200.00	$ 1,025	$ 825.00	$ 795.82	$ 12,300	$ 11,504.18	$ 12,300
5001	Office Supplies & Expenses	670.76	413	(257.76)	3,772.42	5,000	1,227.58	5,000
5002	Printing Expense	1,121.42	837	(284.42)	15,673.54	10,000	(5,673.54)	10,000
5003	Postage	573.80	263	(310.80)	3,025.73	3,200	174.27	3,200
5009	Board Meeting Expense	50.00	675	625.00	5,288.64	8,133	2,844.36	8,133
5015	Legal Services	0.00	87	87.00	1,900.00	1,000	(900.00)	1,000
5017	Management Services	8,025.00	8,139	114.00	96,300.00	97,734	1,434.00	97,734
5020	Consulting Services Other	1,050.00	1,045	(5.00)	12,600.00	12,595	(5.00)	12,595
5021	Audit/Tax Preparation Services	0.00	0	0.00	2,850.00	2,850	0.00	2,850
5023	Insurance Expense	3,664.63	4,172	507.37	44,543.37	50,119	5,575.63	50,119
5034	Licenses & Permits	0.00	0	0.00	438.01	1,500	1,061.99	1,500
5037	Income Taxes	14,000.00	0	(14,000.00)	14,000.00	0	(14,000.00)	0
5038	State Income Tax	3,000.00	0	(3,000.00)	3,000.00	0	(3,000.00)	0
5039	Property Taxes	54,211.34	50,500	(3,711.34)	52,196.80	50,500	(1,696.80)	50,500
5049	Operating Contingency	0.00	413	413.00	0.00	5,000	5,000.00	5,000
	General & Administrative Total	$ 86,566.95	$ 67,569	$ (18,997.95)	$ 256,384.33	$ 259,931	$ 3,546.67	$ 259,931
	Repairs & Maintenance							
6000	General Maintenance	$ 10,152.60	$ 2,913	$ (7,239.60)	$ 36,653.02	$ 35,000	$ (1,653.02)	$ 35,000
6004	Lazy River Staff	497.00	2,356	1,859.00	31,732.54	28,305	(3,427.54)	28,305
6006	Mileage Reimbursement	0.00	13	13.00	268.80	200	(68.80)	200
6021	Golf Cart Expense	1,119.43	875	(244.43)	11,547.23	10,500	(1,047.23)	10,500
6030	Fire Alarm & Sprinkler Maint	163.50	200	36.50	2,445.88	2,433	(12.88)	2,433
6031	HVAC System Maint	538.42	250	(288.42)	1,491.04	3,000	1,508.96	3,000
6034	TV Repair & Replacement	0.00	19	19.00	0.00	250	250.00	250
6036	Interior Pest Control	212.75	237	24.25	2,515.80	2,800	284.20	2,800
6038	Termite Treatment	0.00	39	39.00	585.00	490	(95.00)	490
6039	Nuisance Control	191.67	188	(3.67)	2,300.04	2,300	(0.04)	2,300
6041	Janitorial Supplies	213.99	538	324.01	5,418.44	6,500	1,081.56	6,500
6080	Grounds Staff	11,724.90	4,690	(7,034.90)	55,051.67	56,280	1,228.33	56,280
6099	Golf Cart Repair MBR	186.51	87	(99.51)	3,982.62	1,000	(2,982.62)	1,000
6151	Contract Landscape Maintenance	1,875.00	1,875	0.00	22,500.00	22,500	0.00	22,500
6152	Landscape Maint	302.40	1,676	1,373.60	25,720.12	20,145	(5,575.12)	20,145
6159	Lake Maintenance	420.00	462	42.00	5,746.42	5,500	(246.42)	5,500
6185	Pool/Spa Supplies	487.84	2,250	1,762.16	20,535.96	27,000	6,464.04	27,000
6186	Pool/Spa Maintenance	909.50	1,250	340.50	11,992.50	15,000	3,007.50	15,000
6241	Watchmen Services	48,804.74	39,863	(8,941.74)	477,625.54	478,400	774.46	478,400
6243	Watchman Uniforms	0.00	125	125.00	1,121.88	1,500	378.12	1,500
6244	Watchman Supplies	352.50	1,038	685.50	8,133.96	12,500	4,366.04	12,500
	Repairs & Maintenance Total	$ 78,152.75	$ 60,944	$ (17,208.75)	$ 727,368.46	$ 731,603	$ 4,234.54	$ 731,603

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ATTACHMENT "E"

STATE OF SOUTH CAROLINA)

) COMMERCIAL LEASE AGREEMENT

COUNTY OF HORRY)

THIS AGREEMENT, made and entered into as of the 11th day of November, 2009, by and between THE MYRTLE BEACH RESORT HOMEOWNERS' ASSOCIATION, INC., a South Carolina corporation (hereinafter the "Association") and ALLEGIANT FOOD & BEVERAGE , LLC, a North Carolina limited liability company (hereinafter referred to as "Tenant").

WITNESSETH

WHEREAS, the Association owns certain commercial property at The Myrtle Beach Resort, as is more particularly set out below; and

WHEREAS, the Association further has the authority to lease other commercial areas owned or controlled by other Homeowners' Associations at The Myrtle Beach Resort, as more particularly set out below; and

WHEREAS, the Association has determined it to be in the best interest of the homeowners at The Myrtle Beach Resort to enter into an Agreement providing for a consolidated operation of the food and beverage and other commercial activities, including gift shop and convenience store, all as is more particularly set out below; and

WHEREAS, Tenant has made certain promises and has committed to certain undertakings, as more particularly set out herein, as an inducement to the Association to enter into this Agreement.

NOW THEREFORE, in consideration of Five Dollars ($5.00), and the mutual covenants given herein, the receipt and sufficiency of such consideration being hereby acknowledged, the parties agree to as follows:

I. COMMERCIAL AREAS OWNED BY THE ASSOCIATION HEREWITH LEASED TO TENANT

The Association owns the following commercial property and agrees to lease these properties to the tenant for operation:

A. Cabana Bar and lot consisting of approximately .303 acres(Also known as Cabana Lot, 5905 S. Kings Hwy., Myrtle Beach, SC 20575. The Tenant may use and occupy the leased property for entertainment

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or food service or any other lawful purpose approved in writing by the Association. Tenant agrees that bands/entertainment will be geared to a family-type audience. Tenant also agrees and warrants that there will be no loud or disturbing noise on the premises. Tenant warrants that there will be no cover charge or admission fees levied by Tenant, except as approved by Association.

B. Ocean front portion of the first floor of The Renaissance Tower of The Myrtle Beach Resort being a portion of commercial Unit A and consisting of approximately 1,600 square feet (Deli area, also known as Unit A, 5905 S. Kings Hwy., Myrtle Beach, SC 20575). The Tenant may use and occupy the leased property for the operation of a delicatessen or similar food service operation, or such other lawful purpose approved in writing by the Association.

C. Ocean front portion of the first floor of The Renaissance Tower of The Myrtle Beach Resort being a portion of commercial Unit A and consisting of approximately 700 square feet (formerly "Gift Shop" area). The Tenant may use and occupy the leased property for the operation of a delicatessen or similar food service operation, or such other lawful purpose approved in writing by the Association

D. Commercial Unit D, of the Renaissance Tower of the Myrtle Beach Resort, commonly known as the "General Store". The Tenant may use and occupy the leased property for a General Store or for such other lawful purpose approved in writing by the Association.

E. Commercial Unit B, of the Ocean Front Spa of the Myrtle Beach Resort, commonly referred to as the "Snack Bar". Tenant may use and occupy the leased property for a snack bar or any lawful purpose approved in writing by the Association.

F. "Snack Bar" located at Myrtle Beach Resort Horizontal Property Regime and owned by that Association. Tenant may use and occupy the leased property for a snack bar or any lawful purpose approved in writing by the Association.

G. Snack Bar located in the Lazy River/Water park area of the Horizontal Property. Tenant may use and occupy the leased property for a snack bar or any lawful purpose approved in writing by the Association.

In addition to the above, the Tenant agrees to abide by all reasonable rules and regulations of the

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Association as well as the rules and regulations of the Alcoholic Beverage Control Commission, the individual horizontal property regimes upon which such leased property is located, and any other governing authority. Tenant, and its employees, guests and invitees, shall adhere to all parking regulations and traffic rules established by the Association or the individual horizontal property regimes.

Tenant agrees and warrants that it will undertake no advertising in respect to its use of premises, unless consented to in advance by Association.

It is anticipated that the leased space and the extent of operations of the Tenant may be modified from time to time by mutual written consent of the Association and Tenant. The parties agree to negotiate and act in good faith with one another in an attempt to provide a consolidated operation of food, beverage and other commercial activities, including gift shop and convenience store operations, all in a manner that will be in the best interest of the homeowners at The Myrtle Beach Resort.

II. HOURS OF OPERATION.

It is the intent of all parties that the food, beverage and retail operations at Myrtle Beach Resort be profitable for the Tenant and provides a quality experience for the owners and guests. Therefore, it is agreed that the Tenant will provide adequate food, beverage and retail service on a year round basis as is more specifically set forth below. Any operations after 11:00 P.M. shall be permitted only with the advance written consent of the Association.

Tenant will meet with management, or other Association designated contacts, on a regular basis to review operating schedules and events, and will, to the extent possible, operate in coordination with other resort operations. Any changes to operating hours must be approved in writing by Association.

LOCATION:	Off Season* Hours	In Season* Hours
Cabana Bar	closed	11AM until 11PM
Deli	7AM until 7PM	7AM until 11PM

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Convenience Store	7AM until 7PM	11AM until 11PM
"A" Building Pool Shack	closed	11AM until 5PM
Oceanfront Spa Snack Bar	9AM until 2PM January through March	closed
Water Park Snack Bar	11AM until 5PM only during times Water Park is open	10AM until 7PM

* "In Season" is defined as the period of time from Memorial Day weekend through Labor Day Weekend; plus "Bike Weeks" (Myrtle Beach Harley Davidson Spring and Fall rallies and Atlantic Beach Bike fest; dates for these may vary from year to year) and Spring Break Weeks. "Off Season" means and includes all times not designated as "In Season."

III. TERM.

The term for this Lease shall be for a period of five (5) years commencing January 1, 2010 and ending December 31, 2014. Provided that Tenant has complied with the terms of the lease, this lease shall automatically extend for additional five (5) year periods unless either party notifies the other of a desire to terminate or re-negotiate the contract by August 31st of the last year of any term. The Association shall maintain the right to test the market place via negotiations with other parties at any time during the final year of each term; however Tenant shall have the right of first refusal to match any Agreement the Association may obtain with other parties. The Association shall have the option to buy out the remainder of this Agreement from Tenant as of December 31, 2012 for the amount of Two Hundred Thousand Dollars ($200,000.00) upon providing notice to tenant on or before August 31, 2012.

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2015 2014 2011 - 97,850
2012 100,785.50
2015 110,130 2013 103,809.07

IV. RENT.

A. Tenant shall pay the Association a fixed annual rent of Ninety-Five Thousand Dollars ($95,000.00) for 2010 with an annual Three percent (3.0%) increase on January 1st of every year for the duration of this Agreement.

B. The annual rent shall be payable in advance in nine (9) equal monthly installments with the first 2015
installment due on January 1 of each year and with subsequent monthly installments due on the first 24,119.11
day of each succeeding month until the annual rent is paid in full.

C. In addition to the fixed rent set out above, the Tenant shall pay to the Association any increase in insurance premiums incurred by the Association as a result of the operations of the Tenant from any portion of this property.

Tenant shall pay ten percent (10%) late charge on any payment not received by the Association within ten (10) days of the date, which it is otherwise due.

If Tenant is in default of its obligation to pay rent, the Association shall have a lien upon all personal property, equipment, and trade fixtures located upon the leased premises. If the Association asserts such a lien and/or levies for distress, the Tenant agrees not to remove or permit the removal of such property until all defaults have been cured.

V. MAINTENANCE OF PREMISES

Tenant shall, at its own expense, keep and maintain the premises and all equipment now or hereafter located on or affixed to the premises, including without limitation permanent equipment and fixtures, in good order and repair during the term of this Lease Agreement and shall surrender same to the Association at the expiration or earlier termination of this Lease Agreement in as good condition as they were when received (or subsequently improved or altered), normal wear and tear excepted.

All repairs, replacements and renewals shall be at least equal in quality of materials and workmanship to that which originally existed on the leased property. The Association shall in no event be required to

make any repair, alteration, or improvement to the leased property except as specifically provided for herein. The Tenant shall indemnify the Association against all costs, expenses, liabilities, losses, damages, suits, fines, penalties, claims, and demands, including reasonable attorney's fees, because of Tenant's failure to comply with the foregoing.

Any improvements, alterations and additions to the premises by the Tenant shall be made only at Tenant's expense, in good and workmanlike manner and in accordance with plans and specifications, which have been previously approved in writing by the Association. Association reserves the right to approve any contractor, which approval shall not be unreasonably withheld, and to require adequate lien waivers, evidence of financial responsibility, permits, licenses, and insurance to be provided by the contractor.

All improvements and additions made by the Tenant and permanently attached to the premises, including without limitation all venting partitions, carpets, lighting fixtures, doors, hardware, shelves, cabinets, counters, ceiling and all other permanent improvements and fixtures, including trade fixtures of any kind, shall remain with the premises and shall be surrendered to the Association at the expiration or earlier termination of this Lease Agreement.

The parties agree that any and all items on the premises at the time of the commencement of this lease Agreement and attached to the premises by any means are fixtures that shall remain with the premises and be rendered to the Association at the termination of this lease Agreement, including without limitation the following: Two wall air conditioning units located in the Cabana Bar; a three-compartment sink and a hand sink located in the Cabana Bar; the hood, exhaust, and fire suppression system located in the Cabana and any and all cabinetry, shelving, counters, and sinks located anywhere upon any of the leased premises.

Tenant shall not, in any event, cause or permit any waste, damage or injury to the leased property.

Association shall be under no liability for damages to the Tenant due to the discontinuance of heat, air conditioning, electricity, water, or of any other service provided by Association or for loss or damage to property of Tenant caused by rain, water, or otherwise. Provided, however, if the loss is insured, the Association will use reasonable efforts to recover any appropriate loss for Tenant, but is under no liability to do so.

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The Tenant agrees and acknowledges that it has been afforded ample time to inspect the premises and further agrees to accept the premises "as is."

VI. SIGNAGE

EXTERIOR SIGNS.

At its sole expense, Tenant shall install a Sign, displaying the Tenant's business trade name, on the storefront of the leased premises. If the Association requests the Tenant shall also install at its sole expense an under canopy sign displaying the Tenant's business trade name. All signs erected by Tenant must comply with the Association's sign criteria and with all applicable laws, rules, and ordinances passed by any governmental Agency. Tenant shall not erect any signs whose design and appearance have not first been approved in writing by the Association. Tenant shall at its sole expense obtain any permits or licenses required by any governmental authorities for any signs erected by the Tenant. Tenant agrees to indemnify the Association and hold it harmless from any claims, costs, or damages arising in any way from the erection, maintenance, existence, or removal of any signage. Upon vacating the leased premises, the Tenant shall at its sole expense remove any signs erected by Tenant and to promptly repair any damage caused by the removal.

Tenant agrees not to erect any other sign, decal, awning, advertisement, antenna, satellite dish, or other structure or object on the exterior of the leased premises without first obtaining the written approval of the Association.

INTERIOR SIGNS AND DISPLAYS AND WINDOW DISPLAYS

All interior signs and displays and window displays shall be tasteful, prepared in a professional manner, and in keeping with the character and standards of the Myrtle Beach Resort as determined by the Association in its sole discretion. No hand lettered signs or displays shall be permitted. The Tenant agrees to remove any nonconforming sign or display, as determined by the Association, upon request by the Association.

VII. OTHER PROVISIONS

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1. **ENTRY ON PREMISES BY ASSOCIATION.** Association reserves the right to enter on the premises at any reasonable time to inspect the premises.

2. **BUSINESS RECORDS.** The Tenant agrees to make all sales and financial records pertaining to all its operations on the premises available on an annual basis by the 31st day of January following the preceding year by forwarding copies to the association's managing agent.

3. **UTILITIES.** The Tenant shall arrange and pay for the use of utilities furnished to the demised premises during the term of this Lease, including, but not limited to, water, electricity, gas, sewer and telephone.

Tenant agrees to pay reasonable pro-rata cost of garbage collection and disposal as provided by Association. Provided, however, Tenant is solely responsible for collecting and transporting garbage to a dumpster to be provided by Association, the location of which is to be designated by Association.

4. **TAXES AND ASSESSMENTS.** All ad valorem taxes, assessments, liens or charges on the land or improvements now located thereon, and all obligations secured by millage or other liens that may be against or levied upon the demised premises shall be properly paid by Association when due. All taxes on property owned by Tenant, as well as all business licenses required by Tenant for the operation of its business, shall be paid by Tenant.

5. **INSURANCE.** During the entire term of this Lease, the Tenant shall, at the Tenant's sole expense, secure and maintain such personal property insurance as it may determine upon all personal property owned by Tenant and located upon the leased premises, at the expense of Tenant. The Tenant shall, at the expense of the Tenant, secure and maintain during the entire term of its Lease, public liability insurance upon, and in respect to, the leased premises in an amount of no less than Two Million ($2,000,000.00) Dollars for each occurrence and an Umbrella Policy of no less than Five Million ($5,000,000.00) Dollars, and said public liability insurance shall be procured with an insurance company licensed to do business in the State of South Carolina and shall be procured by the Tenant in such manner as to include The Myrtle Beach Resort Homeowners' Association and all individual horizontal property regimes as additional insured's. Tenant shall promptly furnish copies of said policies of insurance to Association and shall direct and instruct the insuring company to mail

duplicate notices of premiums due from time to time under said policies of insurance to the Association at the address designated by the Association.

6. NO SET-OFF OR ABATEMENTS OF RENT. The Tenant shall not be entitled under any circumstances to withhold rent payments or to set off rent payments for any reason whatsoever. The Tenant further agrees that it shall not be entitled to any abatement of rent unless the Myrtle Beach Resort is closed for more than ten (10) consecutive days during the period beginning with the Memorial Day weekend and ending with the Labor Day weekend.

In the event, during the term of this Agreement the Myrtle Beach Resort is closed for more than ten (10) consecutive days during the period beginning with the Memorial Day weekend and ending with Labor Day weekend, the annual rental payment shall be reduced as hereinafter provided. The minimum annual payment shall be reduced by the number of days the Myrtle Beach Resort is closed divided by the number of days between Memorial Day and Labor Day.

7. COMPLIANCE WITH APPLICABLE LAWS. The Tenant, at its sole expense, shall comply with all laws, orders, and regulations of federal, state, and municipal authorities, and with any direction of any public officer, pursuant to the law, which impose any duty upon the Association or the Tenant with respect to the leased property. The Tenant, at its sole expense, shall obtain all licenses or permits which may be required by the conduct of its business within the terms of this Lease, or for the making of repairs, alterations, improvements, or additions, if permitted by Association. The Tenant shall comply with the requirements of all policies of public liability, fire, and all other types of insurance at any time in force with respect to the buildings and other improvements on the leased property.

8. TENANT TO MAKE GOLF PACKAGES AND OTHER PROMOTIONAL OFFERS AVAILABLE TO ALL UNIT OWNERS AND GUESTS AT THE MYRTLE BEACH RESORT. The Tenant agrees to extend any services, sales, and promotional offers made by the Tenant while on the Premises to all guests and owners at the Myrtle Beach Resort on equal terms; this Section includes without limitation any offers for golf packages and other off premises activities offered by the Tenant.

9. TENANT TO PROVIDE SECURITY. The Tenant shall provide, at its sole expense, adequate security for all activities conducted by the Tenant on the leased premises.

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10. SURRENDER OF PREMISES AND OPTION TO PURCHASE PERSONALTY. The Tenant shall on the last day of the term, or upon the sooner termination of the term, peaceably and quietly surrender the leased property to the Association, in as good condition and repair as at the commencement of the term, including replacements, or additions, or improvements constructed, erected, added, or placed thereon by the Tenant with Association's consent, with the natural wear and tear thereof excepted.

The Tenant hereby grants to the Association an option to purchase at the termination of this lease, any movable trade fixtures, furniture, equipment, and personal property of every nature and kind owned by the Tenant and utilized in the operation of the business transacted on the property. The option price shall be the cost of the item or items less cumulative book depreciation at the time this option is exercisable. Association shall have thirty (30) days within which to decide whether it wishes to exercise its option to purchase said personal property at the expiration of this Lease.

If the Tenant fails to remove any personal property, equipment, or movable trade fixtures from the premises within ten days of being notified by the Association that it does not intend to exercise its option, then the Association may in its discretion do one of the following: 1) The Association may deem the property to have been abandoned by the Tenant, and the Association shall have right to dispose of the property as it sees fit; or 2) the Association may have the property removed and may recover from the Tenant the costs of removing the property.

11. DESTRUCTION OF PREMISES. If at any time during the term of this Lease, the leased premises should be damaged by fire or other major casualty, not the fault of Tenant, and if the cost of repairing the damage does not exceed twenty-five percent (25%) of the value of the premises herein leased, then the Association shall as soon as practicable repair the damage caused by said fire or other casualty. If, however, the damage should exceed twenty-five percent (25%) of the value of the premises herein leased, then Association shall have the option of either restoring said premises as set out above or terminating this Lease as of the date of said fire or other casualty. In no event shall the Tenant be entitled to an abatement of rent unless the Myrtle Beach Resort is closed for more than ten consecutive days during the period beginning with the Memorial Day weekend and ending with the Labor Day Weekend.

If, during the period beginning with the Memorial Day weekend and ending with the Labor Day

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weekend the leased premises shall be rendered uninhabitable for more than ten consecutive days by damage which is not the fault of Tenant, the rent shall be abated from the eleventh day following the date of the event rendering the premises uninhabitable to the date of completion of the restoration of the premises. Such abatement shall be proportionate to the loss of occupancy sustained in respect to the revenue generated by that portion of the leased premises. If the damage is so extensive as to an amount practically to the total destruction of the entire leased premises, either Tenant or Association shall have the right to cancel this Lease by giving written notice and rental shall be apportioned to the date of the damage.

12. DEFAULT. If Tenant shall default in the terms of this Agreement, Tenant agrees to pay all reasonable attorney's fees and costs incurred by the Association in enforcing the obligations of the Tenant under this Agreement.

13. DECLARATION OF GOVERNING LAW. This Lease shall be governed by, construed, and enforced in accordance with the laws of the State of South Carolina

14. SUBORDINATION TO EXISTING AND FUTURE MORTGAGES. This Lease shall be subject and subordinate at all times to the lien of existing mortgages and of mortgages which hereafter may be made a lien of the leased property. Although no instrument or act on the part of the Tenant shall be necessary to effectuate such subordination, the Tenant will, nevertheless, execute and deliver such further instruments subordinating this lien to the lien of any mortgages as may be desired by the mortgagee. The Tenant hereby appoints the Association, its attorney-in-fact, irrevocably to execute and deliver any such instrument for the Tenant.

15. WAIVER. Failure of either party to insist upon strict performance of any covenant or condition of this Lease in anyone or more instances shall not be constituted as a waiver for the future of any such covenant or condition, but the same shall be and remain in full force and effect.

16. BINDING EFFECT. The covenants, terms, conditions, provisions, and undertakings in this Lease, or in any renewals thereof, shall extend to and be binding upon the heirs, executors, administrators, successors, and assigns of the respective parties hereto, as if they were in every case named and expressed, and shall be considered as covenants running with the land; and, wherever reference is made to either of the parties hereto, it shall be held to include and apply also to the heirs,

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executors, administrators, successors, and assigns of such party, as if in each and every case so expressed.

17. ENTIRE AGREEMENT, MODIFICATION, SEVERABILITY. This Lease contains the entire agreement between the parties and shall not be modified in any manner except by an instrument in writing executed by the parties. If any term or provision of this Lease or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Lease, or the application of such term or provision to persons or circumstances other than those to which it is held invalid or unenforceable, shall not be affected thereby and each term and provision of this Lease shall be valid and shall be enforced to the fullest extent permitted by law.

18. INDEMNIFICATION AND HOLD HARMLESS AGREEMENT. Tenant agrees to indemnify and save Association harmless except in the event of gross negligence on the part of Association, its employees, or agents, against any and all claims, demands, damages, costs and expenses, including reasonable attorney's fees for the defense thereof, arising in any way from the leasing of the aforesaid premises to the Tenant or from the conduct or management of any business operated by the Tenant in or on the Demised Premises or from any breach or default on the part of the Tenant in the performance of any covenant or agreement on the part of the Tenant to be performed pursuant to the terms of this Lease Agreement, including any work done in respect to improvements to be performed by Tenant, or from any act of negligence of Tenant, Tenant's agent, contractors, sub-contractors, servants, employees, sublease, concessionaires, or licensees in or about the Demised Premises. In case of any action or proceeding brought against the Association by reason of any such claim, upon notice from Association, Tenant covenants to defend such action or proceeding by counsel reasonably satisfactory to Association.

All property kept, stored, or maintained in the Demised Premises shall be so kept, stored or maintained at the sole risk of Tenant.

Tenant agrees to pay and discharge any mechanic's, material men's or other liens against the Demised Premises or Association's interest therein claimed in respect to any labor, services, materials, supplies or equipment furnished or alleged to have been furnished to or upon the request of Tenant, provided that Tenant may contest such lien claim upon promptly securing the discharge of the leased premises from the lien by the filing of a written undertaking as provided by statute, or upon furnishing to

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Association such indemnification as the Association may reasonably require for the final payment and discharge of the lien, together with the costs and expenses of defending the same. If the Tenant fails to secure the discharge of the leased premises from any such lien within ten days of the filing of the lien, or fails to furnish the Association within ten days of demand by the Association with such indemnification as the Association may require for the final payment and discharge of the lien, then Association may release the lien by any means allowed by law, and the Tenant shall reimburse the Association for all costs and expenses incurred by the Association in procuring the release of the lien, including attorney's fees, plus interest at the rate of prime plus four per cent on any sum paid by the Association.

Nothing contained in the Lease Agreement shall be so construed as to in any way as to subject Association's interest in the Demised Premises to any such lien.

Association shall not be liable to Tenant, and Tenant hereby agrees to hold Association harmless, for any damage occasioned by plumbing, electrical, gas, water, steam or other utility pipes, systems, and facilities or by the bursting, stopping, leaking or running of any tank, closet, waste, or other pipes in or about which they are a part, nor, from any damage occasioned by water being upon or coming through the roof, vent, windows, doors, or otherwise.

19. ASSIGNMENT. Tenant may not assign this Lease or sublease any portion of this property without the express written consent of the Association, which may be withheld for any reason.

(This Section Left Blank Intentionally)

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IN WITNESS WHEREOF, the Association and Tenant subscribed their names and affixed their seals the day and year first above written.

WITNESSES:

Carla L. Donovan

Dione M. Kuyanga

ASSOCIATION:

MYRTLE BEACH RESORT HOMEOWNERS' ASSOCIATION, INC.

By: [signature]

Mel Renkey, Sr. Community Manager

? - KA Beh / signed on behalf of HOA *

ALLEGIANT FOOD & BEVERAGE, LLC

Carla L. Donovan

Dione M. Kuyanga

By: [signature]

Robert Jones, Managing Member

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STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

ADDENDUM TO COMMERCIAL LEASE AGREEMENT

THIS ADDENDUM TO AGREEMENT, made and entered into as of the 21st day of October, 2013, (hereinafter referred to as "Addendum"), by and between THE MYRTLE BEACH RESORT HOMEOWNERS' ASSOCIATION, INC., a South Carolina corporation, (hereinafter referred to as "Association") and ALLEGIANT FOOD & BEVERAGE, LLC., a North Carolina Limited Liability Company, (hereinafter referred to as "Tenant").

WITNESSETH:

WHEREAS, the Association and the Tenant have heretofore entered into a Commercial Lease Agreement dated November 11, 2009, (hereinafter referred to as "Agreement") for the leasing of certain commercial property located at the Myrtle Beach Resort providing for a consolidated operation of the food and beverage and other commercial activities, including gift shop and convenience as more particularly set forth in the Agreement that is incorporated herein by reference; and

WHEREAS, the undersigned parties to the Commercial Lease Agreement have amicably agreed to amend the aforesaid Agreement and to further memorialize the same by entering into this Addendum;

NOW, THEREFORE, in consideration of Five Dollars ($5.00) and the mutual covenants given herein, the receipt and sufficiency of such consideration being hereby acknowledged, the parties agree to the Addendum of the the aforesaid Agreement as follows:

1. II. HOURS OF OPERATION

LOCATION:	Off Season Hours	In Season Hours
Cabana Bar (The Quarterdeck)	11AM until 10PM or later based upon occupancy *	11AM until 12AM
Deli (The Galley)	8AM until 3PM *	8AM until 11PM
Convenience Store	9AM until 11PM	
"A" Building Pool Shack	10AM until 7PM *	
Water Park Snack Bar	10AM until 5PM *	

*Weather permitting

In Season shall continue to be defined as set forth in the Agreement that being the period of time from Memorial Day weekend through Labor Day Weekend; plus "Bike Weeks" (Myrtle Beach Harley Davidson Spring and Fall rallies and Atlantic Beach Bike Fest, dates for these may vary from year to year); Spring Break weeks and Holidays.

Off Season shall also be defined as set forth in the Agreement that means and includes all times not designated as "In Season".

2. The Tenant shall consider lowering the off season menu to accommodate winter residents.

3. The noise level at the Cabana Bar (The Quarterdeck) shall be monitored two times per night by security and security shall keep a written log as to such monitoring which shall take place when there is music being played by a band or otherwise.

4. The Tenant hereby agrees that it shall pay the sum of $39,835.00 that shall be allocated as follows:

A. The Tenant shall remodel the space the Cabana Bar (The Quarterdeck) and the Tenant shall further be responsible for the cost of the remodel in the sum of $15,790.00. The Tenant agrees that such remodel will be completed between October and December, 2013.

B. The Tenant agrees to bear the entire cost and host the annual homeowner's dinner for the annual meeting in April of each year as previously provided, so long as the Tenant remains under contract with the Association. The costs of the annual dinner is estimated at approximately $3,000.00 per year for a 6 year period with an approximate total of $18,000.00 in costs.

C. The Tenant shall replace all of the carpeting inside the Rental Office Building located outside of the Security Gate, with the Tenant bearing 100% of the cost that shall be completed within the calendar year of 2014 at an estimated cost of $6,045.00.

5. The Association shall absorb the cost of replacing the existing flooring in the kitchen, bar and storage areas of the Cabana Bar (The Quarterdeck) at an estimated cost of $15,872.00.

6. The Association hereby agrees to waive its right contained in the current Agreement which allows the Association by August 31, 2014 to seek alternative proposals that the Tenant would then have to match.

7. The expiration date of the Agreement shall be December 31, 2019. The Association shall maintain the right to test the market place via negotiations with other parties at any time during the final year of the Agreement which is 2019, however, the Tenant shall have the right of first refusal to match any Agreement the Association may obtain from other parties.

8. All other terms and conditions set forth in the original Commercial Lease Agreement dated November 11, 2009, shall be in full force and effect until the termination date of December 31, 2019, including the 3% increase in

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annual rent per year on January 1st of every year for the duration of the Agreement. Furthermore, the Tenant agrees to make available all sales and financial records pertaining to all its operations on the premises on an annual basis by the 31st day of March following the preceding year by forwarding copies to the Association's Managing Agent.

- are this in the previous contract?

IN WITNESS WHEREOF, the Association and Allegiant subscribed their names and affixed their seals the day and year first above written.

WITNESSES:

ASSOCIATION:

MYRTLE BEACH RESORT

HOMEOWNERS' ASSOCIATION, INC.

By: _____

Stanley Jordan, President

ATTEST:

Phil Cox, Secretary

ALLEGIANT FOOD & BEVERAGE, LLC

By: _____

Robert Jones, Managing Manager

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ATTACHMENT "F"

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KA. DIEHL & ASSOCIATES, INC
SECURITY SERVICES CONTRACT

THIS AGREEMENT, made as of this 7th day of December, 2009, by and between the **MYTRLE BEACH RESORT HOMEOWNERS' ASSOCIATION**, a Not for Profit Corporation of the State of South Carolina, (hereinafter "ASSOCIATION") and **K.A. DIEHL & ASSOCIATES, INC** a South Carolina Corporation, mailing address at 11740 Highway 17 Bypass South, Murrells Inlet, SC 29576, (hereinafter referred to as "KAD").

WITNESSETH: In consideration of the agreements herein contained, to be performed by the parties hereto, and of the payments hereinafter agreed to be made, it is mutually agreed as follows:

1. KAD will perform all work in connection with the security services at the Myrtle Beach Resort on behalf of ASSOCIATION located in Myrtle Beach, South Carolina (the "Property") under the terms as stated in this contract document.

2. KAD will furnish qualified, uniformed personnel, equipment, labor, insurance, and other accessories and services necessary to perform said officers services in accordance with pricing in "contract document". Badges shall clearly state either the word "Security" or the officers rank across the center bar. Hats shall prominently display the words Security Officer across the front and all jackets shall prominently display the words Security Officer across the shoulders. All officers shall have successfully passed a background check conducted by SLED, and all officers shall have been properly trained, certified and will be properly supervised. KAD shall provide substitute officers to cover for planned or unplanned absences.

3. All equipment, mutually agreed upon by KAD and ASSOCIATION, paid for by KAD will be the property of KAD and, upon termination or expiration of contract, will remain the property of KAD, and similarly for equipment paid for by ASSOCIATION.

4. ASSOCIATION will furnish (or reimburse KAD for) all consumable accessories and supplies, as may be necessary for regular use and non-transferable to other properties, such as access passes, daily logs, phone lists, markers, stickers, etc.

5. KAD agrees to perform all services related to security, as mutually agreed by KAD and ASSOCIATION, based upon the General Scope of Services, attached hereto as part of Exhibit A, and as further described in Supplemental Guidelines to be prepared separately based upon Association guidelines for access, parking, etc.

6. Pricing for services is outlined in the Cost Proposal, attached hereto as part of Exhibit A. It is hereby acknowledged by KAD that KAD will supply at no additional cost all uniforms, licenses, vacation, and bonuses to key personnel.

7. KAD shall pay all wages and applicable employment taxes and maintain Workers' Compensation Insurance for all of its employees. Pay periods shall run from the 1st to the 15th and from the 16th to last day of each month. Paydays shall be on the 5th and 20th of each Month. If the 5th or 20th is a Saturday, the payday shall be the preceding Friday and if the 5th or 20th fall on a Sunday, the payday shall fall on the following Monday.

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8. The term "contract documents" means and will consist of this document, including Exhibit A, correspondence if any, and SLED License and Insurance Certificate.

The "contract documents" enumerated above are hereby made part of this contract and are physically attached hereto and by execution of this Contract the ASSOCIATION and KAD acknowledge that they have examined and are familiar with the contents of the said "contract documents".

9. ASSOCIATION agrees to pay KAD in current funds for the performance of the Contract, subject to additions and deductions contained in the "contract documents" in such amounts as required by the "contract documents". Billing will correspond with KAD payroll periods.

10. Payment shall be made within 10 days of the invoice date. A service charge of 1-1/2% per month (18% per annum), shall be applied to invoices not paid within thirty days of the invoice date.

11. This contract shall commence at 10:30 pm on December 31, 2009 and continue through and including December 31, 2011. Thereafter, this contract will renew for successive 2-year terms, with the inclusion of an increase as decided annually by the Myrtle Beach Resort HOA Board of Directors to compensate for personnel pay increases. Either party may give notice of their intent not to renew 90 days prior to the end of any contract term.

12. KAD and ASSOCIATION hereby agree that the level of services, including hours to be provided by KAD, are as set forth in General Scope of Services. Based on holidays, bike weeks and other additional shift requirements within the Property these hours could increase as determined by and based upon the needs of ASSOCIATION.

13. In the event of sole negligence on the part of KAD its employees, agents or sub-contractors, KAD shall be liable for any damage caused by KAD to any property of ASSOCIATION or that of any occupant, agent, or invitee of ASSOCIATION and shall promptly repair any such damage.

14. Notwithstanding that joint or concurrent liability may be imposed upon ASSOCIATION by statue, ordinance, rule, regulation, order or court decision, KAD shall, notwithstanding any insurance furnished pursuant hereto or otherwise, indemnify, protect, defend and hold harmless ASSOCIATION from and against any and all liability, fines, suits, claims, obligations, damages, losses, penalties, demand, actions and judgments, and costs and reasonable expenses of any kind or nature (including reasonable attorney's fees), by anyone whomsoever, due to or arising out of:

a. any work or thing done in, on or about the Property or any part thereof by KAD or anyone claiming through or under KAD or the respective employees, agents, licensees, servants or subtenants of KAD or any such person;

b. any air, land, water or other pollution caused by KAD;

c. any negligence or wrongful act or omission on the part of KAD or any person claiming through or under KAD or the respective employees, agents, licensees, invitees, or servants of KAD or any such person;

d. any accident or injury to any person (including death) or damage to property (including loss of property) occurring in or on the Property or any part thereof, except for accidents or injury to any person or damage to property caused by any negligence or wrongful act or omission on the part of ASSOCIATION;

E.L.G.
Initial KAD

Initial ASSOC

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e. any failure on the part of KAD to perform or comply with any of the covenants, agreements, terms, provisions, conditions or limitations contained in this Contract on its part to be performed or complied with; and

15. Cancellation:

a. **ASSOCIATION** and **KAD** reserve the right to cancel this Agreement, with or without cause, upon thirty (30) days' written notice to the other party. Notice for **KAD** under this Agreement shall be sent, via certified mail, to K. A. Diehl & Associates, Inc., 11740 Highway 17 Bypass, Murrells Inlet, SC 29576. Notice for MBR HOA shall be sent certified mail to MBRHOA 5905 S. King's Hwy, Myrtle Beach, SC 29575. The date the notice is postmarked shall serve as the beginning of the thirty (30) day notice period.
b. Upon termination of this Agreement, **KAD** shall promptly account for and deliver to **ASSOCIATION**, or such person or entity designated, materials, supplies, equipment, keys, and records (including electronic media) pertaining to this Agreement.

(This space left blank intentionally)

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IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed by their proper corporate offices and their proper corporate seals to be affixed hereto the day and year as indicated in the acknowledgements attached hereto and made a part hereto.

WITNESS: **MYRTLE BEACH RESORT HOMEOWNERS' ASSOCIATION**

By: _____ By: _____
Mel Renkey-Sr Community Manager

WITNESS: **K.A. DIEHL & ASSOCIATES**

By: _____ By: _____
Eric Ault, Director of Property Services

E.C.G. Initial KAD

Initial ASSOC

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Exhibit A

General Scope of Services

KAD will provide personnel for the purpose of:

Manning the front gate house; Monitoring and controlling vehicle access to the property; Distributing temporary access passes in accordance with Association guidelines; Patrolling designated areas within the Property; Distributing miscellaneous items to homeowners and Management as may be required by Management or requested by Association; Receiving, processing, responding to complaints and emergency calls as necessary; additional services, specific to the Property, as mutually agreed by KAD and Association.

Specific guidelines and procedures for performing all services will be established and documented in a cooperative effort between both KAD and ASSOCIATION. KAD shall obtain whatever SLED and Horry County certifications are necessary for the officers at the Myrtle Beach Resort to continue to be able to write tickets and make arrests in the same manner as done currently.

Employees are the contracted employees of KAD. The addition or termination of security employees at the Myrtle Beach Resort, with the exception of the Chief of Security, currently Mr. Woody Perry, must be made with the recommendation of the Chief of Security . . . and the approval of the Community Manager of the MBR HOA, currently Mel Renkey. Any changes to the Chief of Security's position or pay shall be recommended by the Community Manager and approved by the MBRHOA Board of Directors. In the event of a termination or expiration of this contract the MBR HOA maintains a right of first refusal for all KAD personnel assigned to Myrtle Beach Resort. This refusal includes the right for the MBRHOA to hire another contractor to provide these services and the right to transfer the employees assigned byKAD from the employment of KAD to employment by the new contractor effective on the termination or expiration or this contract.

The Chief of Security will normally have the final say on all operating issues except those that require the expenditure of funds, in which case the approval of the Community Manager is required. If the KAD administrator and the Chief of Security disagree on any operating issues, they will jointly present their case to the Community Manager who will consult with the Board of Directors, if deemed necessary, and make a decision. If the Community manager has not consulted with the Board and either party disagrees with the decision of the Community Manager, they shall notify the Community Manager of their desire for the Board to be consulted and the Community Manager shall involve the Board in a final decision on the matter.

KAD guarantees that sufficient work force will be available to MBR HOA during Bike Weeks and if not, KAD will reimburse MBR HOA for any additional expenses required to provide adequate force in the event KAD should fail to do so.

All officers assigned to Patrol duties will be trained in the use of handcuffs, chemical sprays, and baton.

All officers assigned to Gate duties will be trained in the use of chemical sprays.

All officers assigned to the property will be trained in, and authorized by SLED to, execute arrest powers and write citations on the property.

The costs associated with all certification training for SLED and for use of weapons and chemicals shall be borne by KAD. On site training required for familiarizing an employee with the premises and procedure unique to Myrtle Beach Resort shal be borne by the Association.

KAD shall provide officers for Patrol Shifts who are fully capable, both in training and physical abilities, of apprehending individuals who are violating the law and who choose not to cooperate with security officers.

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If the Chief of Security has provided KAD with at least five days notice of the need for additional Personnel and KAD has failed to provide an officer fitting the description in the previous paragraph, KAD shall bear the costs of all overtime required to fill the personnel needs as requested by the Chief of Security. Any disputes as to the question of "fully capable" shall be adjudicated through the appeal process outlined above with respect to operating issues. In the event of sickness or injury of an officer, the five days notice required shall not apply and KAD will be required to furnish personnel or pay the additional premium time required to backfill for the officer.

KAD employees providing the services herein described will be assigned without regard to race, color, creed, sex, national origin, handicap conditions, and/or covered veteran status for which employees are protected in their terms and conditions of employment by Federal, State, Or Municipal law, or Executive Orders and Regulations governing the conduct of contractors with Federal, State, or Municipal Governments.

Cost Proposal

The total compensation to which KAD shall be entitled during the term of the agreement shall consist of fees for man hours to cover shifts established by ASSOCIATION in conjunction with our management team. Such compensation represents the overhead expenses of theKAD and fees for Uniforms, Supplies and Licensing Fees are included in our Price. KAD hourly compensation also includes vacation, some overtime, as described above, and bonuses paid to the full time staff.

Any site-based staff required by ASSOCIATION will be provided to ASSOCIATION. K.A. DIEHL will be responsible for advertising, pre-employment testing, background checks, benefits administration, and payroll administration for this staff as well as Wage and Hour reporting, EEOC claims administration and SLED training. For this service we will charge a man hour rate as follows:

Supervisor (Chief) Rate:	$28.00
Assistant Supervisor (Lt) Rate:	$15.50
Sgt Rate	$15.00
Officer III Rate	$14.50
Officer II Rate	$14.00
Officer I Rate	$13.50
Staff Rate	$13.00

These rates are subject to change annually based on the actual hourly rate paid to each staff member or with the addition of new staff members

KAD will make available to all full-time staff, health benefits as part of KAD's group policy. It is understood that ASSOCIATION will be responsible for 70% of the cost of these benefits to each employee assigned to the Property, while the individual will be responsible for the remaining 30%.

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K.A. DIEHL WATCHMEN SERVICES

(As presented to the Board; September 2009)

It is our goal to provide *"security services"* and our mission shall be:

To be the premier Community Association security services company in all aspects, especially in maintaining common properties, providing a secure environment, preserving a quality natural setting, meeting members' needs for community services, maintaining and enhancing property values, and fostering a spirit of community for all members.

In our attempt to develop and institutionalize a better customer service model, Department heads have worked on putting together a Service Commitment statement, which serves as a mission for our whole security organization and Core Values and Service Basics that reflect that commitment. After several meetings and many hours, we have arrived at the commitment, values, and basics that we feel separates us from a mediocre organization and makes us superior . What we have developed is exemplified by K.A. Diehl employees every day. We do feel that constant reinforcement of our commitment, values, and service basics will only improve our already superior performance.

Therefore, the following procedure will be followed:

- Supervisors will be responsible to review with their personnel the Service commitment, Core Value Service, Basic and Specials note as designated by the Director of Security and the Association Personnel Manual.

Our Core Values:

- We are empowered to ensure complete member satisfaction.
- Our Service Commitment is embraced and executed by each employee.
- We will demonstrate genuine respect for one another—ladies and gentlemen serving ladies and gentlemen.
- Communication at all levels is how we succeed.
- We anticipate members' needs to create a seamless and personalized experience.
- Protection of our natural environment and the Association's assets is the responsibility of every employee.
- Each employee is an ambassador of K. A. Diehl and the Association.
- All employees use the proper greetings, verbiage and phone etiquette at all times.
- We maintain a professional appearance through proper and appropriate grooming standards and standard uniforms.
- A clean, uncluttered, well-organized and efficient workplace is the responsibility of every employee.

Our Service Basics:

Empowerment

- Understand the difference between what is right and what is wrong.....

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Service

- Anticipate the customers' needs.
- Follow through on the service details like making eye contact, approaching the customer as he/she approaches you, providing a map or an escort.
- Keep your heart in your work. Develop a personal commitment to excellence.

Differences

- Value individualism, creativity and specialization since these make the whole better.
- Accept and respect differences.

Communication Skills

- Demonstrate genuine caring and service for others
- Be approachable and friendly.
- Seek first to understand, then to be understood. Listen carefully. Speak slowly. Ask questions.
- Keep the communication loop flowing.
- We are all one service team..

The Property

- Understand your connectedness to the Association. The resort, regimes, guests, town and wildlife are all an integral part, just like you.
- Actively represent the Association. Promote goodwill.
- Seek the best interests of the Association.
- Be a good steward of the Association's assets and a benefit to the Properties habitat.

Etiquette

- Use pleasantries like "please", "thank you", "my pleasure", and "you're welcome".
- Use the member's name. Introduce yourself.
- Answer the phone..., Respond "on their dime."

Personal

- Come to work with a well-groomed, neat appearance, appropriate & complete uniform.
- Respect each other. If you see a mess clean it up. If you get it out, put it back. If you turn it on, turn it off. Pick up litter. This goes for personal work areas the corporate work areas and the entire property.

K.A. DIEHL WATCHMEN SERVICES

BASIC FUNCTIONS-SECURITY

The basic functions of the K.A. Diehl security services include;

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Controlling access to the property by assuring all persons passing through the gates have a reason to pass and have authorization as promulgated by the Vehicle Access policy set by the Board of Directors.

- Patrol all properties and enforce the Covenants, and Rules and Regulations. The method of gaining compliance with these guidelines is through engineering, education, and punitive enforcement as necessary.
- Providing quality of life customer service type services to members. Such services include checking vacant properties, changing member's tires, providing medical assists, and responding to all service requests within the realm of responsibility of Watchmen.
- Inspecting the entire property and member's properties for safety exposures.
- Providing officers for special events and activities.

ACCESS CONTROL

A primary function of K.A. Diehl security services is access control or allowing authorized individuals on the property and keeping unauthorized people out. Typical actions regarding this control include:

- Ensuring that all members, contractors, employees, and renters have and display the proper access credentials.
- Identifying all visitors and assuring that they have the necessary passes.
- Ensuring that pass access restrictions are understood and when necessary enforced.
- Monitor Parking Passes to Ensure they are Appropriately Displayed at all Time and Issue Warnings and/or Violations as outlined in Association Operation Manual.

PATROL

Patrol officers observe a wide variety of persons and locations; they report a large amount of information to K.A. DIEHL administration. This information, when properly reviewed and analyzed, provides an invaluable insight into the operation of the Association's security program. Hazards are reported and deficiencies in the asset protection guidelines are highlighted so that changes in procedures can be made. Our patrols are almost exclusively motorized-with time out of patrol vehicles to check parking lots for passes, to answer calls, to enforce parking rules, to provide officers at special events, and to give particular attention to problem or directed patrol areas.

The entire property should be patrolled at least twice per shift and all aspects of the environment should be carefully observed. When anything out of the ordinary occurs, the Officers should evaluate the situation and take necessary steps as outlined by Myrtle Beach Resort policy and procedure manual.

The common items an officer on patrol should look for include:

- Doors, windows, or other openings that are not secure;
- Suspicious persons, vehicles, or circumstances (improper access);
- Disorder or unusual activity-disorderly youths, noise, vehicular annoyances; and
- Hazardous conditions-such as water or other fluid leaks, fire hazards, and malfunctioning equipment.

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ESCORTS

In our effort to provide premier customer service it oftentimes becomes necessary to provide escorts for property owner guests, contractors, people with disabilities, and/or children. The actual reasons for such escort duty is myriad, but, any reasonable request is honored, whenever possible.

INSPECTIONS AND SPECIAL ASSIGNMENTS

Inspection activities include commercial and employee pass verification, property owner and renter guest pass verification, checking for hazards, and other safety reviews.

Officers also serve as messengers, communications coordinators, and at times as necessary as chauffeurs.

SECURITY ORGANIZATION

One of the basic tasks of an officer is to determine how many posts are required to provide the service expected and to protect the assets of the organization.

An officer's post is defined as any location or combination of activities for which a trained human being is necessary. This definition includes three key concepts:

- A location or combination of activities.
- Necessary human being. (*see description below*)
- Training and competence to accomplish the required activities.

LOCATION OR COMBINATION OF ACTIVITIES

The stationary or "fixed post" and the roving patrol represent the location or combination of activities in the first concept of estimating personnel requirements.

NECESSARY HUMAN BEING

The following activities, characteristics, and capabilities may be regarded as attributes requiring a human being:

- Ability to discriminate among events, persons, circumstances or physical objects based on complex and varying criteria;
- Ability to conduct rational dialogue with other persons face to face or on the phone and discern necessary action based on that communication;
- Ability to exercise judgment to determine a logical course of mental or physical activity in response to circumstances that may vary randomly.

Duties outlined in our Basic Function require all the above criteria defining the need for a human being on post.

TRAINING AND COMPETENCY

To assure that officers have the knowledge necessary to perform their basic functions much time is expended on training functions.

Training Modules
(Typical examples)

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Subject	Orientation	Quarterly	Monthly	Weekly	Daily	Yearly
Phone Etiquette	XXX		XXX			
Decal/Pass System	XXX	XXX				
Computer Usage	XXX		XXX			
Customer Service	XXX			XXX		
Service Basics	XXX				XXX	
Covenants	XXX	XXX				
Gate House Operations	XXX	XXX				
Bomb Threats	XXX	XXX				
Verbal communications	XXX			XXX		
Report Writing	XXX	XXX				
Patrol Function	XXX	XXX				
Ticket writing	XXX					
Anger Management	XXX					
Harassment/Discrimination	XXX					XXX
Performance Management Plan	XXX	XXX				XXX
Employee Handbook	XXX					
Sled Certification	XXX					
Safety Issues-General	XXX*					
Safety Issues-Heat Stress	XXX*					XXX
Safety Issues-Driving	XXX*					XXX
Safety Issues-CPR/AED	XXX*					XXX
Safety Issues-Electrical	XXX*					XXX
Safety Issues-Fire	XXX*					XXX
Safety Issues-Housekeeping	XXX*					XXX
Safety Issues-Slips, Trips, Falls	XXX*					XXX
Safety Issues-Workplace Violence	XXX*					XXX
Safety Issues-Managing Stress	XXX*					XXX
Safety Issues-Your Heart Matters	XXX*					XXX
Safety Issues-Ergonomics	XXX*					XXX
Safety Issues-Back Injuries	XXX*					XXX

*Briefly mentioned at orientation but a major OJT component.

KAD is committed to ongoing review and refinement of our training criteria for all staff. The curriculum and specific training methods and material is updated on a regular basis, with the specific intent of exceeding that required by SLED.

E.C.A.
Initial KAD

Initial ASSOC

https://mail.google.com/_/scs/mail-static/_/js/k=gmail.main.en.WMsW1NJLURo.O/m=m_i,t/am=PMoANvPoYQY/rs=ACQPhvcYQQPhvcYQQPhvcYQQPhvcYQQPhvcYQQ/d=1/ed=1/ct=zgms/rt=j/sv=1/ex=xpm/km=AOr4Ys4ZAAAA.js

ATTACHMENT "G"

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Nancy:

Below is Jack's calculations on the hours for Watchmen's Services. The total amount spent for Watchmen's Services is on the December 31, 2013 financials on the Master website. If you want each month broken down you will find it on the Operating Income Statement under GL#6241 on the Master website.

Darla Donovan, CMCA, AMS

Senior Community Manager

K.A. Diehl, AAMC

An Accredited Association Management Company

(Direct Dial: (843) 828-1300

(Direct Fax: (843) 357-4153

(Corporate fax line (843) 828-8021

*Email: Darla.Donovan@KADiehl.com

ÿ www.KADiehl.com

P Please consider the environment before printing this email.

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www.kadiehl.com

From: Jack Boselli

Sent: Wednesday, February 19, 2014 11:19 AM

To: Darla Donovan

Cc: Julie Watson; Eric Ault; Vicki Gallagher

Subject: Watchmen Hours

Importance: High

Darla,

It is my understanding that the MBR Master Board has approved the distribution of the # of watchmen hours for 2013. Please see the following information:

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Regular Hours	25,665.00
Overtime Hours	730.50
Holiday	1,036.00
Sick/Personal	296.00
Vacation	1,024.00
Bonus	558.00
Total	29,309.50

Thanks and have a great day!

Jack Boselli

Chief Executive Officer

ATTACHMENT "H"

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SO ORDERED.

SIGNED this 11 day of December,2013.

Stephani W. Humrickhouse
Stephani W. Humrickhouse
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
GREENVILLE DIVISION

IN RE:

CROC, LLC,

DEBTOR

CASE NO.

13-05146-8-SWH

ORDER ALLOWING MOTION TO CONVERT OR DISMISS

This matter came before the court on motion of the bankruptcy administrator to convert or dismiss this chapter 11 case for cause pursuant to 11 U.S.C. § 1112(b)(4). Memoranda supportive of the bankruptcy administrator's motion were filed by creditors SRS, North Carolina Property, LLC ("SRS") and Stephen R. Smith ("Smith"), Donald Wray ("Wray"), and EOS Properties, LLC ("EOS"). The debtor objects to the motion. Hearings on the motion took place on October 17 and November 7, 2013, in Raleigh, North Carolina, after which the court afforded the parties an additional opportunity to file supplemental memoranda. The matter is now ripe for disposition, and for the reasons that follow, the court will convert the case for cause pursuant to § 1112(b)(4).

BACKGROUND

The debtor is a beach condominium unit rental business with two employees; the debtor's owner-operator, Glenn Magill ("Magill"), and his son, who lived in one of the condo units (through October 2013) as the on-site manager. The debtor owns a total of twelve condominium units within

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the Bodie Island Resort, located in Nags Head, North Carolina. Though the usage allocations change from time-to-time, at present, eight of the condos are designated as long-term rentals and four are used for short-term vacation rental. The debtor filed a petition for relief under chapter 11 of the Bankruptcy Code on August 15, 2013.

On August 29 and September 12, 2013, Magill testified for the debtor at an emergency hearing for the use of cash collateral. In response to and consequence of Magill's testimony, the Bankruptcy Administrator ("BA") moved to dismiss or convert the debtor's case for cause under multiple provisions of § 1112(b)(4): specifically, the BA urges conversion or dismissal on four separate grounds; the likelihood of substantial and continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; gross mismanagement of the estate; the debtor's failure to maintain appropriate insurance; and the debtor's post-petition payments for debts or services rendered pre-petition. SRS, Smith, Wray and EOS filed memoranda supporting the BA's motion to convert or dismiss. Creditor EOS also filed a memorandum outlining the specific bases upon which it contends the debtor's case should be converted to Chapter 7.

In addition, the memoranda filed by the BA and other creditors assert their collective belief that the debtor's plan is not feasible. The debtor filed a plan on November 13, 2013, which attempted to address its creditors' efforts to preclude cramdown, but developments since that filing

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indicate that the debtor is unlikely to succeed with its effort[1] to include an impaired accepting class. In light of the court's determination that cause exists to convert the case, the court need not address the feasibility of the debtor's plan.

I. Grounds to Convert or Dismiss Pursuant to 11 U.S.C. § 1112(b)(4)

A. Diminution of Estate and Absence of Likelihood of Rehabilitation

Among the statutory grounds providing cause for conversion or dismissal is the "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation." 11 U.S.C. § 1112(b)(4)(A). The BA contends that dismissal on this ground is warranted by at least three factual bases: First, the testimony of Jack Lightbody, a real estate witness, that "the property is in a diminished state and in need of immediate attention, metal is rusting, stucco has water damage, only one pool is in operation, buildings need new paint, a crack in the pool needs to be sealed, the entrance sign needs to be replaced, property is in general disrepair and overall not aesthetically pleasing." BA's Mem. in Support of Mot. to Dismiss or Convert ("BA's Mem.") at ¶ 1(a). Next, the BA argues that the debtor "does not generate enough income to satisfy debts and pay for expenses including homeowner's dues and assessments associated with the property." Id. Finally, the BA notes that the debtor, as the owner of 12 units, has "failed to pay the homeowner's association for past dues and/or assessments, which has resulted in the property falling into disrepair and caused a hardship on the homeowner's association." Id. At the hearing on November 4, 2013, Mike Milam, chairman of the finance committee of the Bodie Island

[1] At one point, the debtor thought that secured creditor Donald Wray might vote in favor of the debtor's plan, but Wray is in support of dismissal or conversion. The debtor then represented that creditor Jon T. Gonzales would be the sole impaired class voting in favor of the debtor's plan, but the Gonzales claim is now assigned to creditor EOS.

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Homeowners Association ("HOA"), testified that the debtor had not made payment to the HOA since June 2012, for 2012 dues. Milam estimated the debtor's dues shortfall to be approximately $40,000, which he characterized as a hardship that impacts the HOA's ability to provide maintenance services.

In response, the debtor did not address testimony regarding the physical condition of the property in any detail, except to state that there is "no evidence that the property is declining in value" and that "the property is being properly maintained." Debtor's Resp. to BA's Mot. at 6-7. The debtor notes of its relationship with the HOA that "the Debtor and the HOA are in conflict with each other," which the debtor attributes in part to the HOA's lack of cooperation in producing evidence of insurance (discussed below). There are, however, other areas of conflict as well, as illustrated by the debtor's objection to the HOA's claim of $75,855.20, and its assertion that it holds an offsetting claim of $174,554.53, as well as certain statutes of limitation defenses which will, the debtor states, warrant disallowance in full of the HOA claim.

Beyond those points, the testimonial evidence and filings are (comparatively) sparse with regard to whether there is a literal, physical component to any loss to or diminution of the estate. The court recognizes that the BA's concerns under § 1112(b)(4)(A) go beyond the physical condition of the property, but the court believes those concerns fit more comfortably into the context of gross mismanagement, discussed below. Accordingly, based on the limited testimony of the HOA representative and the debtor's skimpy response, the court concludes only that the property of the estate is in less than optimal condition. The court does not at this time believe that failures of maintenance and upkeep rise to the level of "substantial or continuing loss or diminution."

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B. Gross Mismanagement of the Estate

The court shall convert or dismiss a case if the court finds "gross mismanagement of the estate." 11 U.S.C. § 1112(b)(4)(B). The BA asserts that the debtor's varying testimony over three hearings (on the motion to dismiss and the motion to use cash collateral) establishes his general lack of familiarity with, and understanding of,[2] the debtor's income and expenses. In addition, by the BA's calculations, information provided by Magill with respect to the nature of the leases[3] (month-to-month, long or short term, etc.) results in monthly collections of $5,900 in long-term rent money. In contrast, the BA says, the projections advanced by the debtor at the hearing predict collections of $8,400 per month at full capacity. BA's Mem. at ¶ 1(b).

The debtor responded with two memoranda, the affidavit of Magill, and a collection of documents in support of the affidavit, including utility bills and portions of the HOA's insurance policy. The court thoroughly reviewed all of the testimony and documentation offered in opposition to the motion. The court concludes that these sources, taken together, establish the debtor's managerial shortcomings to be so extensive and pervasive that conversion or dismissal is necessary based on § 1112(b)(4)(B) alone.

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[2] Magill's testimony with respect to the number of units that were short-term as opposed to long-term rentals differed from one hearing to the next, and that factual discrepancy was among several factors initially cited by the BA as catalysts for her concerns about mismanagement of the estate. Magill subsequently explained in his memorandum that at the time of the first hearing, there were five vacation and six long-term rentals; during the short period of time between that hearing and the next, he re-designated a vacation rental as long-term, such that there was no inconsistency, but rather a change. The court accepts this explanation as plausible.

[3] The BA clarifies further that the debtor did not provide to the BA the lease agreement for Unit 301, that the lease agreement for Unit 310 was set to expire on 11/30/13, and that there is no current lease agreement that the BA knows of for Unit 102, which was occupied by Magill's son.

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The debtor's own testimony reflects a wholly inappropriate fluidity between the debtor and Bodie Island LLC, which is another entity held solely by Magill. The details are unclear, but it is evident that the Bodie Island entity is used (at least in part, and at least sometimes) to receive the debtor's rents and deposits, and then pay those receivables out to Magill (and, perhaps, others). See Magill Aff. ¶ 5; see also Magill Aff. Ex. F p. 3 (indicating the debtor's cash on hand, with a portion attributable to "BI"); Ex. F p. 4 (entitled "Exhibit B" and allocating the debtor's vacation rental income to both the debtor and to Bodie Island LLC). Compounding the obvious problems inherent in this sort of arrangement is the fact that "most" of the debtor's long term tenants (it is unclear how many) do not have checking accounts, according to Magill. These tenants pay monthly rent, in amounts ranging from $1,000 to $1,200, in cash. Given these longstanding financial ambiguities, there are so very few solid, verifiable benchmarks – financial, operational, or otherwise – to go by that even the task of establishing where to *start* in pinpointing the exact nature of the debtor's business difficulties is, in itself, difficult. The court does not believe the debtor intended for its business practices to be virtually indecipherable, but suspects that to Magill's way of thinking, the debtor's current system "works" if one is fully immersed in its quirks and vagaries. This approach, however, clearly did *not* work prior to bankruptcy, and cannot be maintained going forward.

On this same note, a review of the utility bills appended to Magill's affidavit shows that out of bills for seven of the twelve units, four bills (for units 101, 102, 303, and 304) identify the customer as Croc LLC; three others (units 103, 301, and 305) list the customer as Glenn E. Magill, Jr. Magill Aff. ¶ 7, Ex. I. Did the debtor pay utility bills that were not even its own debts to pay, and were instead the debts of Magill? So it appears, although again, the debtor's lack of bookkeeping and accounting standards raises doubts. What is abundantly clear is that the debtor

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does not grasp the significance of Croc, LLC operating as a distinct business entity, and an entity in bankruptcy, at that.[4]

These utility bills were included by the debtor in response to the BA's contention that the debtor "made post-petition payments for debts and/or services rendered pre-petition." Magill explained that the bills were due on September 30, 2013, and that he paid them because he "believed that I needed to pay those bills to keep the electricity running for the condominium units and that those expenses were ordinary and necessary business expenses." Magill Aff. ¶ 7. Every utility bill includes a past due amount and an indication that a percentage of the past due amount was paid during the preceding month.[5] Aside from the clear indication that the bills were paid for pre-petition debt and/or services, these bills reflect the debtor's month-to-month struggle simply to maintain electrical service to the units.

These difficulties notwithstanding, Magill's affidavit and the debtor's forecasts together paint an optimistic picture of the debtor's expected income and expenses going forward. These projections, however, have no stated and assessable bases. The debtor states that it will raise all rents in 2014, yet articulated no rationale for expecting success in doing so. The debtor's "2014

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[4] The debtor filed a motion on September 4, 2013, for authorization to refund certain deposits received by it for vacations that were subsequently cancelled, but as creditor EOS and the BA then noted in objections filed on September 23, 2013, it appears that those monies – as well as others – were in fact received by Bodie Island LLC. See Magill Aff. Ex. F p. 4 (entitled Exhibit B and listing vacation rental income, allocated to both the debtor and to Bodie Island LLC, and deducting McFadden deposit of $670.50 from Bodie Island).

[5] Except for Unit 301, as to which no previous (September 5) payment was made. The bill for Unit 301 differs from the others in that it includes no usage history prior to September, though it does include a previous amount due of $102.55, plus a "deposit installment" of $75 and usage charges for September, totaling $348.51. The amount was billed to Magill, not to Croc, LLC. Unit 301 is the unit for which Magill accepted a discounted rate of $800 per month because "the air conditioning did not work."

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Projected Condo expenses" omits reference to its legal fees, tax obligations other than occupancy taxes, management fees, and credit card fees. It also stipulates that long-term tenants pay their own electric bills even though the bills appended to the affidavit included at least one bill for a unit designated by the debtor as long-term.[6]

Going forward, the debtor estimated housekeeping fees for four vacation units at $180 a month, or $2,160 a year. Magill Aff. Ex. H. However, the debtor's profit and loss statement for the two weeks of August 16-31, 2013 reflects a housekeeping cost of $540. Magill Aff. Ex. F p. 12. Another accounting of receipts and expenses, this for the period of August 28 to September 12, 2013, lists housekeeping costs ($60 per clean) at $1,080. Magill Aff. Ex. A. The accounting for the following two-week period, September 15 to 30, 2013, sets out two weeks' worth of housekeeping expenses at $840. Magill Aff. Ex. B. And, the accounting for the four week period after that, October 1 to 31, 2013, sets out four weeks' worth of housekeeping expenses at $1,200. Magill Aff. Ex. C. So, on the one hand, the debtor's operating budgets for a total of eight weeks reflect actual costs of $3,120 for housekeeping, or a total of $3,680 for ten weeks if the slightly overlapping period of August 16-31 is included. Then, on the other hand, there is the debtor's forecast of $180 per month in housekeeping fees for 2014. The numbers cannot be reconciled or explained, even though these are the accountings prepared for use in this bankruptcy case, where accuracy and verifiability are paramount.[7]

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[6] The debtor paid utility bills on September 8 for units including Unit 301, a long-term unit. The debtor's payment for two other long-term units may reflect their former status as a short-term rental (Unit 101) and as Magill's son's unit (Unit 102).

[7] The court understands and has considered the seasonal nature of the debtor's business which impacts the consistency of the need for housekeeping. Notwithstanding that, the debtor has not offered a verifiable basis for its projections.

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The court is not unsympathetic to the difficulties of operating a residential rental business. Magill's efforts to keep many balls in the air and his evident flexibility and creativity in attempting to achieve the highest and best use of the properties (long-term, short-term, payment options, etc.) are useful, laudable traits. However, they do not carry the day in the face of creditors' legitimate competing interests, and against the overwhelming and compelling evidence that the business of the debtor is grossly mismanaged. The debtor's method of doing business over the past years renders it utterly unable to provide for its creditors and the court a clear, understandable, and transparent accounting of its use of cash and receipts, and for its outlays for expenditures. The court will convert this case to a case under Chapter 7 based upon the debtor's gross mismanagement of the estate within the meaning of § 1112(b)(4)(B), which will afford a trustee the opportunity to unravel and make sense of the debtor's finances.

C. Failure to Maintain Appropriate Insurance

Cause to dismiss or convert exists upon a debtor's "failure to maintain appropriate insurance that poses a risk to the estate or to the public." 11 U.S.C. § 1112(b)(4)(C). The BA contends, and the debtor does not contest, that the only insurance policy currently in effect on the properties is held by Bodie Island Resorts, which is the homeowners' association ("HOA"). The BA maintains that there is no general liability policy in the name of the debtor. The chairman of the HOA's finance committee, Mark Milam, testified that the insurance policy maintained by the resort covers only the common areas of the complex and outside structures. Further, he testified that "most if not all current homeowners maintain separate general liability policies." BA's Mem. at ¶ 1(c).

The debtor acknowledges in response that he has "had some challenges in producing the Declarations for the insurance policies," but states that insurance has been in place since the filing

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of the petition. According to the debtor, the policies "are in the name of the HOA." Debtor's Response at 3. In his affidavit, Magill responds to the BA's contention that the debtor has no general liability insurance on the property by stating that "[i]n reference to insurance, attached as EXHIBIT D are documents evidencing casualty and liability insurance." Magill Aff. at ¶ 9. The documents included in Exhibit D are portions of policies maintained by the HOA.

It appears that there is no general liability policy on the property, that there is no insurance policy in the name of the debtor, and that the debtor is unaware of these facts and the significance of them. Magill appears to believe that the HOA's insurance policy is to the debtor's benefit, which is all the more incongruous given the debtor's ongoing dispute with the HOA and failure to pay the dues owing to it. The court concludes that the debtor's property lacks appropriate insurance and, on that ground alone, sufficient cause exists to convert or dismiss.

D. Failure to Satisfy Reporting Requirements

Finally, the BA argues that cause to convert or dismiss exists under 11 U.S.C. § 1112(b)(4)(F), which provides that 'cause' includes a debtor's "unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter." Specifically, the BA cites the debtor's testimony of October 17, 2013, that there are three professionals "currently working on the debtor's behalf," including special counsel for the debtor, a real estate agent, and an accountant. BA's Mem. at ¶ 1(d). However, the BA notes, that the debtor did not file an application seeking to employ special counsel until October 25, 2013; further, the BA notes, as of November 11, 2013 (the date on which the BA filed the supplement to the motion to convert or dismiss), neither the real estate agent nor the accountant had been

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employed, despite the BA's request at the September 11, 2013 hearing for the use of cash collateral. Finally, the BA states that the debtor failed to file federal income tax returns for 2011 or 2012.

In response, the debtor states in his affidavit, with respect to records, that "I am properly maintaining books and records for the Debtor." Magill Aff. ¶ 11. The debtor filed a motion to employ Hersey C. Quinn as accountant on October 21, 2013, which was allowed without objection on November 18, 2013. At the hearing on October 17, 2013, the debtor testified that Mr. Quinn was "working on" the 2012 taxes and acknowledged that the 2011 taxes also had not been filed. The debtor applied to employ Phillip H. Hayes as special counsel on October 25, 2013, after testifying at the hearing on October 17, 2013, that Mr. Hayes already was acting as its attorney, was working on a lawsuit against creditors EOS, SRS and Smith, and was owed $5,000. The debtor applied on November 12, 2013 to employ Geraldine J. Holcomb of Coldwell Banker Seaside Realty, after testifying at the hearing on October 17 that Ms. Holcomb was the debtor's realtor. As for unfiled taxes, Magill testified that the debtor did not list the IRS as a creditor, does not owe any federal taxes, and is not in default. The recently filed plan and disclosure statement do include IRS and NC Department of Revenue tax claims as part of an unimpaired Class 3, but indicates that these entities do not have claims.

In light of all the above, the court concludes that the debtor's approach to filing requirements, whether imposed as part of bankruptcy procedure or federal tax law, is consistent with other managerial practices in that the debtor either does not understand or lacks the proper regard for requirements that actually apply to it. In the court's view, the odds of the debtor's tax obligations to the federal and state governments simply zeroing out are, in all probability, zero. Thus it remains uncertain whether the debtor will have additional claims to contend with or should

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instead expect a refund of tax overpayment. These reporting failures add to the court's certainty that conversion of the case is appropriate.

II. Conversion on Grounds of Lack of Feasibility or Confirmability

In light of the court's conclusion that the BA and secured creditors have established ample bases for conversion or dismissal, and that conversion is in the best interest of creditors, there is no reason to discuss additional and alternative grounds for conversion.

CONCLUSION

The BA has established ample cause to dismiss or convert within the meaning of 11 U.S.C. § 1112(b)(4)(B), and also, separately and independently, under 11 U.S.C. § 1112(b)(4)(C). The court's consideration of factors set out in §§ 1112(b)(4)(A) and (F) also support conversion or dismissal, though they would not independently require either action. This case cannot proceed under the ill-fitting auspices of a Chapter 11 plan, and the interests of the creditors and the estate are best served by conversion of the case to a liquidation under Chapter 7 so that the financial affairs of the debtor can be properly sorted.

For the foregoing reasons, the debtor's Chapter 11 case is hereby **CONVERTED** to a case under Chapter 7.

SO ORDERED.

END OF DOCUMENT

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ATTACHMENT "I"

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PRESS RELEASE

October 12, 2007

Sussex County Prosecutor David J. Weaver announced the sentencing of Joseph M. Depace, who appeared before the Honorable Thomas J. Critchley, Jr., JSC at the Sussex County Courthouse in Newton on October 12, 2007.

Depace, age 43, of Hamburg, NJ was sentenced to two years probation. He was ordered to serve 20 days in the Sheriff's Labor Assistance Program (the plea agreement called for 364 days in the Keogh-Dwyer Correctional Facility) and perform 100 hours of community service. He must pay restitution in the amount of $3,285.00. He must pay total fines and penalties of $155.00 and submit a DNA sample at his expense.

He pled guilty on August 9, 2007 to receiving stolen property, a 3rd degree crime.

Between September 1, 2006 and December 9, 2006 in Hardyston Township, the defendant took several portable radios belonging to the Hardyston First Aid Squad. On or about September 19, 2006 in Vernon Township, he burglarized two condominiums and took LCD television sets. He also took a communication radio from Mountain Creek Park

Depace was represented by Evan Nappen, Esq. and the State was represented by Assistant Prosecutor Robert L. Klingenburg.

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ATTACHMENT "J"

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HORRY COUNTY
SHERIFF'S OFFICE

Horry County
Committed to Excellence

MAIN OFFICE DETENTION NEWS & EVENTS

Currently: Detention » Daily Bookings and Releases

Last Name:
Depace

Booking Date:

Release Date:

Search Reset Form

Disclaimer:

This website contains information obtained on individuals who were booked at the J. Reuben Long Detention Center or by the City of North Myrtle Beach, Horry County cannot validate the accuracy of the information and is not responsible for any inaccuracies that may be posted.

Data last collected @ 9/16/2015 6:07 PM

Showing 1 results on your search for Last Name: Depace

Name	Ethnicity /Sex	DOB /Age	Booking Date	Release Date	Booking # /Arresting Agency
 DEPACE, JOSEPH MICHAEL MYRTLE BEACH, SC 29588	AMERICAN (US) MALE	06/16/1964 51 years old	9/16/2015 8:34 AM	Still Incarcerated	HC09161548729 SLED
- IMPERSONATING LAW ENFORCEMENT OFFICER / Pre-Trial / $1,500.00					

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From: rentals@myrtlebeachvrbo.net
To: markedossantos@gmail.com; cameronwdc@sc.rr.com; deerfoot35@aol.com; rvspc@yahoo.com; waynembhpr@yahoo.com; walter.lindajordan@comcast.net ; ralphjump@fuse.net;wajordan48@comcast.net
CC: golden@stny.rr.com; alanbolton@windstream.net; kwow2001@yahoo.com; fletch197735@gmail.com; billy_nancy@hotmail.com; baziz@mac.com; benetta2009@hotmail.com;ccameronphd@ ; ellenlewis39@yahoo.com; miciccarei@gmail.com; barbaradomagala@hotmail.com;kmarroon@hvc.rr.com; mdossan@yahoo.com; konicley@yahoo.com; kirkt@embarqmail.com; vrb0181@aol.c :glo1827@aol.com; inr702@aol.com; wilna.eury@att.net; oceanmtnrentals@att.net; MBRtower1816@aol.com; douglaszz@aol.com; stanjor@comcast.net; kdpd3330@aol.com;chief444@comca
Subject: RE: Gate Passes Fees and Security Fees
Date: Sun, 10 Jan 2016 05:02:50 -0700

Be careful we are not allowed to question anything, you might be sued!!!!!!!!!!!!!!!

-------- Original Message --------
Subject: Gate Passes Fees and Security Fees
From: Mark dos Santos <markedossantos@gmail.com>
Date: Sat, January 09, 2016 11:43 pm
To: Bill Cameron <cameronwdc@sc.rr.com>, Kay McGregor <deerfoot35@aol.com>, Phil Cox <rvspc@yahoo.com>, Wayne Urban <waynembhpr@yahoo.com>, "Walter & Linda Jordan" <walter.lindajordan@comcast.net>, Ralph Jump <ralphjump@fuse.net>, Walter Jordan <wajordan48@comcast.net>
Cc: "Alan & Madell Rohulich" <golden@stny.rr.com>, Alan Bolton <alanbolton@windstream.net>, Angela Wowk <kwow2001@yahoo.com>, Bill Fletcher <fletch197735@gmail.com>, Billy Moore <billy_nancy@hotmail.com>, Brian Webb <baziz@mac.com>, Calvert And Benetta Andrews <benetta2009@hotmail.com>, Cathy Cameron <ccameronphd@sc.rr.com>, Chris Kelly <kastco@aol.com>, Cindy Woolfert <woolfort3@hotmail.com>, Colleen Franke <cfrankelperkins@aol.com>, "David & Deborah Vera" <dvera1@msn.com>, Desiree Steffen <dsteffen002@cinci.rr.com>, Dwight Nicholas <dwight_nicholas@comcast.net>, Errol Dos Santos <erroldos@aol.com>, Gayle Scott <gscottphar@cox.net>, George Williams <geowill@coptonline.net>, Greg Agee <greg@colonialequip.com>, Hollie White <hawcrna@yahoo.com>, "James And Peggy O'Neill" <jimmyoneill@fuse.net>, "Jeff & Maria Fulcher" <jeff_94501@yahoo.com>, Jim Beuten <jrbeuten@verizon.net>, Jim Perkins <MBRJimPerkins@aol.com>, Joe And Barb Domagala <beach_rentals@yahoo.com>, Joey Hammet <sandyfeet@beachboyzrentals.com>, John and Ellen Lewis <ellenlewis39@yahoo.com>, John And Mary Joe Ciccarelli <miciccarei@gmail.com>, Joseph and Barbara Domagala <barbaradomagala@hotmail.com>, Karen Pastor <rentals@myrtlebeachvrbo.net>, Keith Marroon <kmarroon@hvc.rr.com>, Keri Dos Santos <mdossan@yahoo.com>, Kevin Nicely <konicley@yahoo.com>, Kirk Thomas <kirkt@embarqmail.com>, Lisa Rohrer <vrb0181@aol.com>, Marian And Dudley Dalton <dudleydalton@msn.com>, Mark dos Santos <markedossantos@outlook.com>, Marvin Zepf <marv7man@nycap.rr.com>, Mary Ann Newman <marfitns@yahoo.com>, Matthew Brandt <mebakh@comcast.net>, Michael And Lori Preisler <preisler@allstate.com>, Michele Boehm <myrtlebchcondo@aol.com>, Michelle Williams <michelew@coptonline.net>, Mike And Lillian Hall <mhall0791@charter.net>, "Monty & Phyllis Taylor" <gvmgoer26@carolina.rr.com>, "Mr. & Mrs. Bissette" <bissette@triad.rr.com>, "Mr. & Mrs. Robert Russell" <fran_195@comcast.net>, "Mr. & Mrs. Strother Adams" <adams27@hotmail.com>, "Mr. & Mrs. Ted Eighmie" <bestinvt1@usa.net>, "Mr. & Mrs. Tracey Meadows" <meadowscondo@suddenlink.net>, Nancy Moore <nancyl.moore@outlook.com>, Nanette Thomas <luvs2sing@embarqmail.com>, Neil And Sharon Jewell <jewelsatthebeach@yahoo.com>, Nicholas Ramos <s.somarrealty@verizon.net>, Norma Benz <mbrcondo@gmail.com>, Patricia Dixon <patnduck@vadtel.net>, Paul And Elaine Grochowsky <myrtlebeach329@gmail.com>, Phyllis Slaven <slavenpc@fuse.net>, Roy and Yasmine Cramer <ycramer23@gmail.com>, Sam And Joyce Fanning <sassygal51@frontier.com>, "Sandy & Kevin Segriff" <sanseg66@hotmail.com>, Sandy Shears <ggshrs@aol.com>, Sharon Crummett <bowlingblonde@aol.com>, Sharon Pulaski <sap286@aol.com>, Stanley Jordan <sjordan90@cfl.rr.com>, Steve And Andrea Dame <A_dame1@yahoo.com>, Steven Riggsbee <briggsbee1@gmail.com>, Sung Hong <hwahong50@gmail.com>, Terry White <twhitemyrbsc@gmail.com>, Thomas Davis <B406MBR@aol.com>, Tom And Kathy Sturges <b204condo@bex.net>, Tony And Sue Camaioni <barb1716@nc.rr.com>, Vince Robleto <myrtlebeachresorts@hotmail.com>, Wayne And Gloria Provost <glo1827@aol.com>, William And Lynette Reynolds <inr702@aol.com>, Wilna Eury <wilna.eury@att.net>, Sandy Welch <oceanmtnrentals@att.net>, "Richard & Wendy Burdett 1816 RT" <MBRtower1816@aol.com>, Douglas dos Santos <douglaszz@aol.com>, Stanley Jordan <stanjor@comcast.net>, Kelly dos Santos <kdpd3330@aol.com>, Ron Burner <chief444@comcast.net>, Jeff Richardson <jlr5456@yahoo.com>, Denny Sassa <densassa@yahoo.com>, Joseph Kantor <jmkantor@msn.com>, Mick Fahy <mcfahy@rochester.rr.com>, Marian Creamer West <mwestiskl@bellsouth.net>, Mara Richardson <mkr59@yahoo.com>, Mike <71spirdo@gmail.com>

Walter, Ralph, Bill,

I sent you a couple emails regarding the gate pass issue in December and you have not replied. I request your response immediately.

I am now also including Wayne Urban and Phil Cox on the Master Board.

Wayne, Phil, Walter, Ralph, Bill - please respond.

I am also now copying a number of homeowners as I believe they also need to know the answer to the following related issues:

1) Gate Passes Revenue Issue:

During the last HOA meeting, the issue of the gate passes was raised - as you know, **the HOA and management companies have collected >$1.3M in gate pass fees (approximate $1,333 per unit) from 2008 through September 2015 alone** (see attached MBR HOA Income Statements) - this does not include the gate pass fees collected from the homeowners prior to 2008 or since September as you still haven't posted the 2015 financials for October -December as they are late (this is another issue that needs to be address - financials not being posted in a timely manner). As you know, transacting of gate passes at the gate has been the cause of significant delays for ingress to the resort during peak seasons, and we are paying for the hours of Watchman Services Security guards who are standing around collected gate pass money. Per the MBR HOA "Gate Pass Resolution", the purpose of the gate passes is to "generate funds to offset annual costs for Security services and road and parking lot repairs" - 1) My understanding is that we already pay dues for this, 2) It appears we are paying these additional fees to pay for security hours, many of which are being spent collecting the fees, 3) Per the OFS (and other regime) Master Deed, occupants are already granted a right to parking, egress and ingress, so under what authority is the HOA demanding these additional money from the homeowner?

Per Article III, paragraph 5 of the Master Deed of the OFS (attached), the Declarant granted an easement (rights) for vehicular parking within the Regime together with an easement for ingress and egress for access to and from such parking, i.e., "Parking spaces shall not be reserved solely for the use of Occupants or any particular Apartment nor shall they be numbered. Further, Declarant hereby reserves unto itself (including the right to grant to others) **and grants to all Occupants and visitors of the Regime an easement for vehicular parking upon the parking spaces within the Regime, together with an easement for ingress and egress for access to and from such parking."**

How / under what authority is the HOA demanding money for gate passes when we already have a right to our parking, ingress and egress?

My understanding is that if occupants do not pay these fees, their vehicles will be ticketed and/or towed by KA Diehl / "Watchman Services" - is this correct? If so, it would appear we are being forced to pay the gate pass fees under threat of the material damage caused by having our car towed. Please explain how this policy is NOT in contravention / violation of our Master Deed. If you cannot provide valid explanation and justification, I request and demand that you reimburse the homeowners for all gate pass fees paid over the last 10 years, and cease collection of gate passes immediately.

2) Security Contract Issue:

During the last meeting, neither the board nor KA Diehl were able to produce the Security contract when asked, and when we pressed Jack Boselli, he said we no longer have the contract and that we are "on a month to month" - this seems very strange. Please explain what this means and confirm whether we have a contract, and if we don't, when and under what circumstances and for what reason was our security contract ever cancelled? As security is the single largest line expenditure of the MBR HOA (approximately $500K per year), I certainly hope we have a contract that was negotiated with a longer term than monthly.

Also, I do not recall our security services ever being put out to bid - has the board ever sought competitive bids for security, or has it only been sole-sourced to KA Diehl / Watchman Services? I would find it deeply troubling if the latter is the case.

Thank you.

-Mark
404-886-6263

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STATE OF SOUTH CAROLINA **COUNTY OF HORRY**	**IN THE COURT OF COMMON PLEAS** **15TH JUDICIAL CIRCUIT** **Civil Action No.: 2015-CP-26-05573**
K.A. DIEHL and ASSOCIATES, INC., Plaintiff, vs. James Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, Defendants.	**CERTIFICATE OF SERVICE**

Miranda E. Byrnside hereby certifies that she is an employee of The Brittain Law Firm, P.A., attorneys for Jim Perkins, Colleen Franke, Mark dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol dos Santos and that she caused to be served via electronic and via first class mail, this day, February 2, 2016, the documents listed below in the above entitled action to the parties set out below:

DOCUMENTS: **Defendants' Answer to Plaintiff's Complaint & Counterclaims**
Certificate of Service

PARTIES: Alicia E. Thompson, Esq.
McNair Law Firm, P.A.
Post Office Box 336
Myrtle Beach, SC 29578-0336
Attorney for K.A. Diehl and Associates, Inc.

Miranda E Byrnside

MIRANDA E. BYRNSIDE
Paralegal for A. Preston Brittain, Esq.
The Brittain Law Firm, PA
4614 Oleander Drive
Myrtle Beach, SC 20577
(O) 843.449.8562
(F) 843.497.6124
Miranda@brittainlawfirm.com

Commission Expires: May 9, 2023

February 2, 2016

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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

MEDIATED SETTLEMENT AGREEMENT

As a result of mediation, the parties have agreed as follows:

1. Defendants' insurers shall pay to Plaintiff the total sum of $100,000.00 as soon as practicable, but no later than 20 days.

2. Ocean Front Spa ("OFS") shall pay Plaintiff $5,000.00 for property management services through June 1, 2017 after which its property management services shall cease. OFS shall pay an additional $10,000.00 to Plaintiff by June 10, 2017.

3. The existing maintenance personnel will be paid by OFS through Plaintiff through May 5, 2017, after which the existing maintenance personnel will no longer provide services to OFS.

4. Plaintiff shall transfer financial records and other documentation and assets to OFS by June 1, 2017, as required by South Carolina law and generally accepted property management standards

5. The parties will execute a mutual release releasing the other and the other's employees, agents, directors, members, officers, attorneys, insurers and related parties (but specifically excluding Allegiant as a "related party") from all claims and damages

6. The parties acknowledge that a more comprehensive mutual release will be executed incorporating the terms of this Agreement. The parties intend for this Agreement to be enforceable by the Court, and if any material term is omitted, the Court shall determine what is reasonable rather than voiding this Agreement.

7. All parties authorize their respective attorneys to execute a dismissal with prejudice.

8. The parties shall equally divide the costs of the mediation seven ways.

President, K. Diehl & Associates, Inc.

Chris Nichols
For Mark Santos

for William Moore (Chuck)

C. Preston Betts
For All Defendants / 1/3 Party 7/8

for
Errol Dos Santos

1307

EXHIBIT
B

Nancy Moore

Chesta Skipmaier w/ permission

Callum Franke

William Moore

Jim Perkins

Fernando Santos

Jeff Richardson w/ permission

Mark Santos w/ permission

May 1, 2017

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.	)	

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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.	)	

DEFENDANTS' CONSOLIDATED RESPONSE TO PLAINTIFF'S MOTIONS TO RECONSIDER THE ORDER AND FINAL JUDGMENT

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") submit this Consolidated Response to Plaintiffs' Motions to Reconsider the Order and Final Judgment in the Actions ("Motions to Reconsider").

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In its Orders entered September 21 and 29, 2017, the Court properly enforced the settlement agreement in the Actions ("Agreement"),[1] finding:

(1) The Agreement was the result of extensive negotiations following a lengthy period of contested litigation between the parties;

(2) All parties and their counsel attended and participated in the mediation conference resulting in the Agreement (in person or via telephone), which concluded with all parties signing the Agreement (personally or through their designated agents);

(3) As the Agreement was not an "agreement between counsel," SCRCP Rule 43(k) is inapplicable; and

(4) Even if SCRCP Rule 43(k) did apply, the Agreement complies with the Rule; all identified parties to the Agreement signed the document (personally or through their designated agents), as did their attorneys.

Plaintiffs' Motions to Reconsider do nothing to change the above conclusions. Instead, they (1) regurgitate arguments already made and previously rejected by the Court, (2) ask the Court to adopt a strained and absurd construction of Rule 43(k), and (3) confusingly, request that the Court reject the Agreement by enforcing an isolated provision in the Agreement that an individual Defendant allegedly breached. Plaintiffs' Motions should be denied.

A. <u>Plaintiffs' contention that the Agreement did not satisfy Rule 43(k) directly contradicts well-established principles of statutory interpretation</u>.

As indicated in the July 3, 2017, Consolidated Motion For Preliminary Approval of Settlement Agreement ("Motion to Approve Settlement") and in the discussion below, Defendants contend, and the Court agreed, that a plain reading of Rule 43(k) shows that it does

[1] The Agreement is in the record as Exhibit A to Defendants' July 3, 2017, motion to approve the Agreement, and as Exhibit A to Plaintiffs' present motion.

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not apply since the Agreement is not an "agreement between counsel." Even if Rule 43(k) does apply, the Agreement would comply with the Rule.

Plaintiffs have never attempted to contradict the following facts, all of which are undisputed and mandate enforcement of the Agreement:

- On May 1, 2017, all parties and their counsel attended and participated in (either in person or via telephone) the Court-mandated mediation conference in the Actions, which was facilitated by Mediator Karl A. Folkens, Esq.—one of the most experienced and well-respected mediators in South Carolina.[2]
- At the same mediation, the parties and their counsel participated in (either in person or via telephone) the Court-mandated mediation conference in companion action entitled " K.A. Diehl and Associates, Inc. v. James Perkins, Colleen Frank, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame and Errol Dos Santos", Civil Action No. 2015-CP-26-5573, wherein the Plaintiffs (less Jeff Richardson) asserted counterclaims based on the same factual grounds as the Actions ("2015 Action"). (Attachment A, Amended Answer and Counterclaims in 2015 Action).
- The mediation was intended to be a global settlement conference of all claims asserted in the Actions as well as the 2015 Action.
- In accordance with Rule 6(b), SCADR, at the commencement of the mediation conference, Mediator Folkens confirmed that (a) all parties agreed for Plaintiffs

[2] 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.

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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.

- Plaintiffs Santos and Richardson actively participated in the mediation conference via telephone.
- 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 and the 2015 Action.
- In accordance with Rule 6(f), SCADR, Mediator Folkens ensured that the parties reduced their settlement to writing in agreements that accurately captured the terms of the negotiated resolution and that all parties signed—the Agreement and/or the Settlement Agreement in the 2015 Action.[3]
- Due to Plaintiffs Santos and Richardson not being physically present, Plaintiffs' counsel executed the Agreement on their behalf as their duly-authorized agent, with the 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 operative provisions of the Agreement and the Settlement Agreement in the 2015 Action to them over the telephone.
- Plaintiffs' counsel presented the Agreement and the Settlement Agreement in the 2015 Action to Mediator Folkens and Defendants' counsel, signed by or on behalf of all of the named Plaintiffs.

[3] The Reply of the Defendants to the Motion to Enforce the Settlement incorporates the Settlement Agreement in the 2015 Action by reference. (Attachment B, 2015 Action Settlement Agreement).

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- Based on the parties' negotiated settlement, memorialized in the Agreement, Mediator Folkens filed an Amended Proof of ADR form in each of the Actions and in the 2015 Action, 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."
- After the mediation, three of the named Plaintiffs (Nancy Moore, Steven Dame and Jim Perkins) expressly ratified the Agreement by (1) official written notification to all members of the OFS community that they successfully "resolve[d the] five lawsuits"; and (2) notices posted in the OFS building informing all residents that "[t]he 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."[4]
- The Plaintiffs have performed, in part, under the Settlement Agreement in the 2015 Action by drafting and delivering a release to K.A. Diehl and Associates, Inc. As contemplated by the terms of the Settlement Agreement in the 2015 Action, the attorneys for Mark Dos Santos, Jim Perkins, Steven Dame and Nancy Moore also delivered settlement funds to counsel for K.A. Diehl and Associates, Inc.
- K.A. Diehl and Associates, Inc., has also performed its obligations under the Settlement Agreement in the 2015 Action.

[4] Copies of these notices are included in the record with the Affidavit of Walter Jordan, which is Exhibit B to the Motion to Approve Settlement.

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These undisputed facts leave no doubt that the Agreement fully satisfied Rule 43(k).

Rule 43(k) contemplates several ways in which an agreement covered by the Rule becomes binding. One way is where the agreement is "reduced to writing and signed by the parties and their counsel." That has clearly occurred here, mandating enforcement of the Agreement:

(1) The parties' negotiated resolution was "reduced to writing" in the form of the Agreement;

(2) Each of the named Plaintiffs and each of the Defendants signed the Agreement and/or the Settlement Agreement in the 2015 Action, either personally or through the actions of their duly-authorized agents; and

(3) The Agreement shows that "A. Preston Brittain"—counsel for Plaintiffs—signed the Agreement twice (once in an agency capacity for Plaintiff Santos, and once in an agency capacity for Plaintiff Richardson), and that "Phillip A. Kilgore"—counsel for all Defendants who were party to the Agreement—signed the Agreement five times (in an agency capacity for two corporate Defendants and the three individual Defendants who were present via telephone).

Plaintiffs acknowledge the truth of each of these three facts, leaving no room to argue that Rule 43(k) was not satisfied.

1. Counsel for all named parties to the Agreement signed the Agreement.

In attempt to evade the Agreement, Plaintiffs ask the Court to adopt a tortured and absurd interpretation of Rule 43(k). Plaintiffs' first absurd construction of the Rule is that the signatures of Plaintiffs' counsel and Defendants' counsel on the Agreement should be disregarded because they did not sign in their individual capacity. Nothing in the Rule has such a capacity requirement.

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The purpose of Rule 43(k) is to promote certainty with respect to the terms of agreements between counsel and to remove the Court from such disputes. *See Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637, 627 S.E.2d 724, 725 (2006). Rule 43(k) was amended in 2009, adding another way in which to accomplish this purpose—by allowing the enforcement of an "agreement between counsel" (1) that is in writing, (2) to which the parties acknowledge their assent by signing the document, and (3) of which the attorneys confirm their review and approval by signing the document.

The obvious purpose of the attorney signature on this form of a Rule 43(k) "agreement between counsel" is to ensure that the document accurately conveys the terms of the deal the parties have reached. It is certainly not to signal counsel's agreement to be bound individually, as the attorney essentially never has affirmative obligations or rights under the agreement.

Here, counsel of Plaintiffs and counsel for Defendants signed the Agreement as agents of their clients. In other words, it is beyond dispute that the parties' attorneys did indeed sign the Agreement. Applying the most fundamental statutory interpretation principles, this fact plainly satisfies Rule 43(k), which merely requires that the document be "signed by . . . counsel." *See State v. Muldrow*, 348 S.C. 264, 268, 559 S.E.2d 847, 849 (2002) ("[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."). The Rule requires counsel to sign the agreement, and they did.

Moreover, by signing the Agreement as agents/attorneys for their principals/clients, both counsel clearly indicated that they fulfilled their duties to their clients, having reviewed the Agreement and confirmed that it accurately sets forth the relevant terms of settlement.

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Moreover, their signatures constitute representations that their clients gave them express permission to sign in their stead.

Neither attorney would have signed the Agreement as the agent of his client unless these facts were true.[5] Plaintiffs' contention that the Agreement is non-binding because the attorneys did not sign in their individual capacity must be rejected accordingly.

2. Plaintiffs Santos and Richardson signed the Agreement for purposes of Rule 43(k) by directing their agent/counsel to sign on their behalf.

Plaintiffs further hope to evade the Agreement with a second absurd argument.[6] They contend that a party does not actually sign an agreement for purposes of Rule 43(k), even when the party expressly directed his/her/its agent/attorney to sign the agreement on his/her/its behalf and the attorney does so in a manner making clear that the attorney is signing in the place of the party.[7] This argument defies age-old agency principles and must be rejected.

---

[5] Frankly, Defendants are confused by Plaintiffs' assertion that Rule 43(k) was not satisfied by their attorney's signature. Only two scenarios can explain Plaintiffs' counsel's signature: either (1) he had express authority to sign the Agreement as agent for Plaintiffs Santos and Richardson, and by doing so satisfied the requirements of Rule 43(k); or (2) he did not have authority to sign the Agreement as agent for Plaintiffs Santos and Richardson, and he did so on his own initiative.

Plaintiffs have never argued the second alternative to be true (and Defendants have no reason to believe Plaintiffs' counsel would engage in such actions). As a result, there can be only one possible conclusion; even if Rule 43(k) applies to the Agreement, the Agreement is binding because it complied fully with Rule.

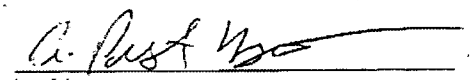
[6] Note that Plaintiffs do not contend that the Settlement Agreement in 2015 Action is unenforceable due to any similar hyper technical argument. Plaintiffs conceded, through counsel, that the 2015 Action Settlement Agreement is enforceable, even though it was signed by counsel on behalf of Mark Dos Santos, who attended the mediation via phone.

[7] Plaintiffs raised this argument in opposition to the Motion to Approve Settlement but Plaintiffs' Motions to Reconsider appear to abandon this argument. They focus instead on the isolated issue addressed in Section A.1 above—their contention that Plaintiffs' counsel and Defendants' counsel did not "sign" the agreement for purposes of Rule 43(k). Defendants include Section A.2 in the event Plaintiffs later say they did not abandon their argument addressed therein.

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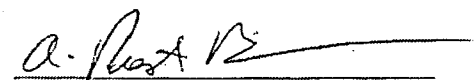
Below are the actual signatures from the Agreement with which Plaintiffs apparently take issue:

Mark Dos Santos



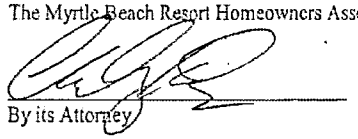
By his Attorney

Jeffrey Richardson



By his Attorney

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



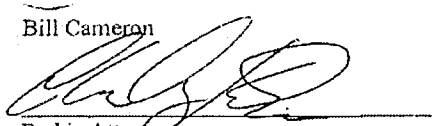
By its Attorney

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



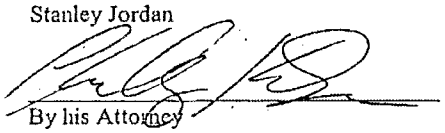
By its Attorney

Bill Cameron



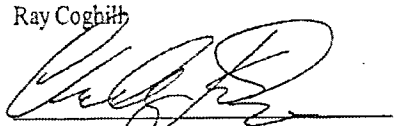
By his Attorney

Stanley Jordan



By his Attorney

Ray Coghill



By his Attorney

All of these signature blocks make clear that the parties/principals have signed the Agreement, and that the attorneys are merely putting pen to paper as the agents of the principals.

An agent with express authority to contract is clearly able to bind the principal by signing on the principal's behalf. *S.C. Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 183, 348 S.E.2d 617, 624 (Ct. App. 1986) ("An agent contracting with the authority of his principal binds him to

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the same extent as if the principal personally made the contract. The principal's liability to the third party is contractual and direct." (emphasis added)). Thus, through the actions of their agents/attorneys, all of the principals/parties effectively signed the Agreement.

To accept Plaintiffs' argument, corporate defendants (which always sign through their agents) and other parties who are forced to sign agreements through their agents (due to incapacity, absence, or otherwise) would apparently never be able to enter into a binding agreement under Rule 43(k). This is clearly not what the Legislature intended, and the absurd result Plaintiffs seek must be avoided. *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) ("If possible, the Court will construe a statute so as to escape the absurdity and carry the intention into effect." (citing Kiriakides v. United Artist Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994))).

3. The execution of the Settlement Agreement in the 2015 Action satisfies the requirements of Rule 43(k).

Plaintiffs' third argument is that they are not bound by the terms of the Agreement, because K.A. Diehl and Associates, Inc. and its counsel did not sign the Settlement Agreement. However, in the Settlement Agreement signed by all parties in the 2015 Action, the Plaintiffs agreed to "authorize their respective attorneys to execute a dismissal with prejudice" and to enter "a more comprehensive release releasing" K.A. Diehl and Associates, Inc., and its "employees, agents, directors, members, officers, attorneys, insurers and related parties" from "all claims and damages". The clear intent of the Agreement and the Settlement Agreement in the 2015 Action was to dismiss with prejudice and to resolve all claims between the parties in the various cases mediated by in the global settlement conference on May 1, 2017. K.A. Diehl and Associates, Inc.'s execution of the Settlement Agreement in the 2015 Action comports with the requirements of Rule 43(k).

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Moreover, Plaintiffs' argument that they are not bound by the Agreement because the lack of signatures of another party is disingenuous when the party at issue has clearly expressed its intent to be bound by and subject to the terms of the Agreement. By joining in the Motion to Enforce Settlement and opposing the Motions for Reconsideration, K.A. Diehl and Associates, Inc. has expressed its unequivocal intent to be bound by and subject to the terms of the Agreement.

B. The plain language of Rule 43(k)—as emphasized by the Supreme Court—makes clear that the Rule is inapplicable to the Agreement.

Despite the fact that the Agreement complies with Rule 43(k), the plain language of the Rule 43(k) makes clear that the Court was correct in ruling that it is inapplicable to the Agreement. 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*, 367 S.C. at 638, 627 S.E.2d at 726 (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." *Muldrow*, 348 S.C. at 268, 559 S.E.2d at 849. Applying this basic rule of statutory interpretation plainly demonstrates Rule 43(k)'s inapplicability to the Agreement.

The Agreement was not an "agreement between counsel." It is an agreement between the parties. A Rule 43(k) "agreement between counsel" contemplates an agreement negotiated by

attorneys, as to which the attorneys must later take overt action, identified in the Rule, before it becomes enforceable. One of these actions can be where the "agreement between counsel" is later "reduced to writing and signed by the parties and their counsel." SCRCP Rule 43(k). 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 obvious purpose of the Rule is to protect parties in connection with agreements negotiated and entered into by their attorneys. The Rule is not designed to replace the basic law of contract pertaining to agreements into which the parties themselves enter.

A recent Court of Appeals opinion 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). Likewise, the Supreme Court, in *Farnsworth*—a case on which Plaintiffs rely—recognized the importance of 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 *Farnsworth* Court went a step further in its holding, noting that "Rule 43(k) plainly applies to all settlement agreements signed by counsel." *Id.* at 638, 627 S.E.2d at 726 (emphasis added). If the Court interpreted Rule 43(k) as applying to all settlement agreements, including those entered into by parties themselves, the Court's use of the wording "signed by counsel" would have been entirely superfluous. A fair reading of this language is that the Court intended to distinguish between "all settlement agreements," and "all settlement agreements signed by counsel." By including this qualifying language, the Court demonstrated that not all settlement

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agreements are covered by Rule 43(k), only those that are "agreement[s] between counsel" as the plain language of the Rule makes clear.

The history of Rule 43(k) further demonstrates its inapplicability to the Agreement. The predecessor to Rule 43(k), Circuit Court Rule 14, provided as follows: "No agreement or consent between parties, or their attorneys, in respect to the proceedings in a cause, shall be binding, unless . . . ." *Farnsworth*, 367 S.C. at 638 n.3, 627 S.E.2d at 726 n.3 (emphasis added). The *Farnsworth* Court compared Circuit Court Rule 14 to SCRCP 43(k) to point out that language included in the old rule but omitted in the new rule rendered the agreement at issue unenforceable. *Id.* ("Under [the old] rule, Davis and Farnsworth's agreement would be enforceable simply because it is in writing. Unlike Rule 43(k), Circuit Court Rule 14 did not contain the additional requirement that written agreements be entered into the record.").

Likewise, new SCRCP Rule 43(k) omits other language present in old Circuit Court Rule 14, an omission which is relevant in this dispute. SCRCP Rule 43(k) makes no reference to "agreement[s] or consent[s] between parties" and retains only the reference to "agreement[s] between counsel." It is fair to conclude that this omission was intentional, has meaning, and cannot be overlooked.

The Legislature clearly intended for old Circuit Court Rule 14 to apply to all litigation agreements, whether between the parties or their attorneys. In devising the new Rule, Rule 43(k), the Legislature must have contemplated the possibility of including agreements between parties, but elected to omit any reference to such agreements. Such omission in the revised Rule on the same subject demonstrates the Legislature's clear intent to limit the requirements of the Rule to only agreements "between counsel."

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To hold otherwise would require the Court to assume that the Legislature committed an oversight, simply forgot to retain the reference to agreements between parties when drafting Rule 43(k), and has allowed the error to remain in place for decades. There is no basis for such assumptions, and the Court must give meaning to the Legislature's intentional omission of "agreements between parties" from Rule 43(k).

Plaintiffs also rely on *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533 (1995), in an attempt to overcome a clear and straightforward interpretation of Rule 43(k). *Ashfort* appears easily distinguishable, as that case involved (1) the attorneys vaguely "advis[ing] the circuit court that the case had been settled" without providing any details as to the terms, and (2) some undescribed, purported agreement between a party and the other party's insurer. *Id.* at 493, 495, 458 S.E.2d at 534-35. There was no evidence the purported agreement was in writing or between the parties, and the lower court concluded "there had been no 'meeting of the minds' regarding the terms of the settlement." *Id.* at 493, 458 S.E.2d at 534. Based on this record, the Court was left with nothing more than representations by counsel that a purported agreement had been reached, facts that fell woefully short of the requirements of the then-current version of Rule 43(k) to either "reduce[the agreement] to the form of a consent order or written stipulation signed by counsel and entered in the record, or [make it] in open court and note[it] upon the record." *Id.*

The sparse facts in *Ashfort* bear no similarity to the present facts, where (1) all of the parties (with the assistance of counsel) actively participated in, negotiated, and reached terms on a settlement during a full-day mediation conference, (2) the parties reduced those terms to writing in the Agreement and the Settlement Agreement in the 2015 Action that all parties signed

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before leaving the mediation, and (3) a seasoned and well-respected mediator filed a notice with the Court confirming each of the above two facts.

The Agreement in this case was not an "agreement between counsel," as contemplated in Rule 43(k). The Agreement and the Settlement Agreement in the 2015 Action were negotiated, memorialized, and executed by all of the parties, after a full day of mediation in which all actively participated.[8] The Court properly held that Rule 43(k) is inapplicable. Plaintiffs' motions should be denied accordingly.

C. Plaintiffs have effectively conceded the enforceability of the Agreement through their alleged "new evidence" argument, which requires the Agreement to be enforceable.

Plaintiffs present so-called "new evidence," which they argue demonstrates that one of the individual Defendants breached the Agreement. They say that an email sent by Defendant Walter Jordan violated the Agreement's non-disparagement clause.[9] This new argument, which was not raised before the Order was entered, fails for several reasons.

First, by asking the court to enforce a certain provision of the Agreement in their favor, Plaintiffs have effectively conceded the enforceability of the entire Agreement. For Defendant Walter Jordan to be in breach of the Agreement's non-disparagement clause as alleged in Plaintiffs' "new evidence" argument, there must first be a valid and enforceable non-disparagement clause. Thus, Plaintiffs ironically rely on the binding and enforceable nature of the Agreement as a means of repudiating the Agreement.

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[8] If the Court finds that Rule 43(k) does not apply, ample case law exists that a fully executed agreement between all parties to the litigation is not a prerequisite to enforcing a settlement.

[9] The email is found at Exhibit B to Plaintiffs' Motions to Reconsider.

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Placing aside Plaintiffs' tacit admission, their "new evidence" argument is irrelevant to their Motions and the enforcement of the Agreement. If Plaintiffs believe that there has been a breach of the Agreement, they are free to pursue their rights under the Agreement accordingly, at a different time and in a different forum. The alleged breach—which is extremely tenuous, at best[10]—has no bearing on whether the Agreement is binding and enforceable. That is the only issue before the Court. Plaintiffs' "new evidence" argument should be disregarded entirely.

Finally, the email does not constitute "new evidence" under Rule 60(b)(2); therefore, the issue is barred under Rule 59(e) as a new argument, not previously raised. Evidence is "newly discovered" if it was not known to the party or in his possession at the time of hearing. *See Lanier v. Lanier*, 364 S.C. 211, 218, 612 S.E.2d 456, 459 (Ct. App. 2005). The Plaintiffs received the email in July 2016, several weeks before the hearing; thus, the email is not new evidence under Rule 60(b)(2) and is not a preserved issue under Rule 59(e). *See Fields v. Reg'l Med. Ctr.*, 363 S.C. 19, 27, 609 S.E.2d 506, 510 (2005).

D. <u>Plaintiffs' contentions regarding the application of the Agreement to K.A. Diehl is premature, as the Order does not in any way mention K.A. Diehl or its successor in interest</u>.

Plaintiffs argue that the Court erred (1) "in ruling that this agreement releases KA Diehl and Associates, Inc.", and (2) in ruling that "First Services Residential is released from liability." Plaintiffs are placing the cart well ahead of the horse, as the Order of which they are seeking

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[10] The essence of the Jordan email is a statement that two of the Plaintiff OFS board members may "run off" a third Plaintiff OFS board member "if he doesn't buy into their program." Defendants fail to understand how this is even remotely disparaging. Moreover, the email was sent to only the five OFS board members (including the three Plaintiff OFS board members at issue) and the OFS property manager, which is the agent OFS. As a former Board Member and owner of property in OFS, surely such an email, directed to such a narrow group of people, would be subject to a privilege. Nevertheless, Plaintiffs are free to pursue this frivolous claim for breach of the Agreement if they wish. They cannot, however, raise it now as a defense to the enforceability of the Agreement.

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reconsideration makes no mention whatsoever of First Services Residential, nor does it specifically address the release of K.A. Diehl and Associates, Inc. The Order simply finds that the Agreement is enforceable. Thus, Plaintiffs' arguments with respect to the Plaintiffs' release of claims against K.A. Diehl and Associates, Inc. and First Services Residential are clearly premature and not yet ripe for adjudication.

E. Conclusion

Plaintiffs' motions do not question the accuracy of the Agreement's terms, as they cannot. Nor have Plaintiffs challenged the fact that all parties to the Agreement and their respective counsel signed the Agreement at the conclusion of mediation (either personally or through their duly-authorized agents). Instead, Plaintiffs rely on hyper-technical and absurd interpretations of Rule 43(k) that the Legislature never could have intended and the Courts have never adopted to overcome an obviously binding settlement. The Court should reject those interpretations of Rule 43(k) and deny Plaintiffs' motions, affirming the Orders enforcing the Agreement.

Respectfully submitted this 12th day of October, 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. s/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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February 2, 2016

Via Hand Delivery

Ms. Melanie Huggins-Ward, Clerk of Court
Horry County Courthouse
P.O. Box 677
Conway, South Carolina 29526

RE: K.A. Diehl and Associates, Inc. vs. James Perkins, Colleen Franke, aka Colleen Franke Perkins, Mark Dos Santos, Errol Dos Santos, Nancy Moore, William Moore, and Steven Dame
Civil Action No.: 2015-CP-26-05573

Dear Ms. Huggins-Ward:

Enclosed herewith please find one original and one copy of **Defendants' Answer to Plaintiff's Complaint and Counterclaims,** which I submit to you this date for filing in the above-referenced action.

By way of this letter, I hereby serve a copy of the same to Alicia Thompson, Esq., of McNair Law Firm, PA, attorney for Plaintiff. Thank you for your kind assistance in this matter.

With warm regards, I am
Yours truly,

THE BRITTAIN LAW FIRM, P.A.

A. Preston Brittain, Esquire

Enclosures

CC: (via email and first class mail)
Alicia Thompson, Esq.
(via electronic mail delivery)
Mr. Christopher W. Nickels, Esq.
Mr. Christian Stegmaier, Esq.
Mr. Robert W. Buffington, Esq.

EXHIBIT
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ORIGINAL

STATE OF SOUTH CAROLINA **COUNTY OF HORRY**	**IN THE COURT OF COMMON PLEAS** **15TH JUDICIAL CIRCUIT** **Civil Action No.: 2015-CP-26-05573**
K.A. DIEHL and ASSOCIATES, INC., Plaintiff, vs. James Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, Defendants.	**DEFENDANTS' ANSWER TO PLAINTIFF'S COMPLAINT AND COUNTERCLAIMS**

NOW COMES COUNSEL THOMAS C. BRITTAIN, PRESTON BRITTAIN, CHRISTIAN STEGMAIER, ROBERT BUFFINGTON, and CHRISTOPHER NICKELS on behalf of the Defendants James Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, (hereinafter referred to as "Defendant or Defendants" collectively), answering Plaintiffs' Complaint and responding with defenses to the same and bringing Counterclaims.

GENERAL DENIAL

Defendants deny each and every allegation contained in the complaint set forth by Plaintiffs and demand strict proof thereof. Any such paragraphs or allegations not specifically admitted in this answer are hereby denied.

1. Defendants admit the allegations contained in paragraphs 1 - 8 of Plaintiff's complaint.
2. As to paragraph 9 of Plaintiff's complaint, Defendants deny defamatory statements and unlawful conduct and demand strict proof thereof. Defendants admit K.A. Diehl's action

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relates to its management of the MBR Association and OFS Association in Horry County, South Carolina.

3. Defendants admit the allegations contained in paragraphs 10.
4. Defendants admit the allegations contained in paragraph 11, specifically that there are there are four regimes.
5. Defendants admit the allegations contained in paragraph 12.
6. Defendants deny that the allegations in paragraph 13 that relate to the scope of the Master Board's governance. Specifically, Defendants admit that the Master Board governs the common areas, but denies any additional government of the property and such other allegations contained in paragraph 13 relating to the same. Defendant admits the remaining allegations contained in paragraph 13 not related to the Master Board's authority.
7. Defendants admit to the allegations contained in paragraphs 14 and 15.
8. Defendants have insufficient knowledge to either admit or deny the allegations as set forth in paragraph 16 of Plaintiff's complaint.
9. Defendants admit the allegations contained in paragraph 17 of Plaintiff's complaint.
10. Defendants admit the allegations contained in paragraph 18, but deny the nomenclature of "MBR Association Board of Directors" and admit to Perkins' service on the "Master Board Association."
11. Defendants admit the allegations of paragraph 19-21, but deny the nomenclature of "MBR Association Board of Directors."
12. Defendants deny the allegations set forth in paragraph 22 of Plaintiff's complaint and demand strict proof thereof.

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13. Defendants deny the allegations set forth in paragraph 23 of Plaintiff's complaint and demand strict proof thereof.

14. Defendants deny the allegations set forth in paragraph 24 of Plaintiff's complaint and demand strict proof thereof.

15. Defendants deny the allegations set forth in paragraph 25 of Plaintiff's complain and demand strict proof thereof.

16. Defendants deny the allegations set forth in paragraph 26 of Plaintiff's complaint and demand strict proof thereof.

17. Defendants deny the allegations set forth in paragraph 27 of Plaintiff's complaint and demand strict proof thereof.

18. Defendants admit the allegations contained in paragraph 28 of Plaintiff's complaint.

19. Defendants admit the allegations contained in paragraph 29 of Plaintiff's complaint.

20. Defendants deny the allegations set forth in paragraph 30 of Plaintiff's complaint and demand strict proof thereof.

21. Defendants deny in part and admit in part the allegations set forth in paragraph 31 of Plaintiff's complaint. Defendants admit that the "petition" was available on "www.change.org" and a private facebook page but deny the remaining allegations contained in paragraph 31 of Plaintiff's complaint and demand strict proof thereof.

22. Defendants deny in part and admit in part the allegations contained in paragraph 32 of Plaintiffs' complaint. Defendants admit that the words contained in sub-section A-J were used; but denies that they were "statements or false allegations."

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23. Defendants admit in part and deny part the allegations contained in paragraph 33 of Plaintiff's complaint. Defendants deny that the accusations set forth in the aforesaid Petition were false.

24. Defendants lack sufficient knowledge to admit or deny the allegations contained in paragraph 34 Plaintiff's complaint.

25. Defendants deny in part and admit in part the allegations contained in paragraph 35 of Plaintiffs' complaint. Defendants admit the allegations contained in 32(c) includes Glen "Rusty" Magill, but denies the remaining allegations and demand strict proof thereof.

26. Defendants deny in part and admit in part the allegations contained in paragraph 36 of Plaintiffs' complaint. Defendants admit the election issues were related to the OFS election, but deny the remaining allegations and demand strict proof thereof.

27. Defendants deny the allegations set forth in paragraph 37 of Plaintiff's complaint and demand strict proof thereof.

28. Defendants admit the allegations contained in paragraphs 38 of Plaintiff's complaint.

29. Defendants deny in part and admit in part the allegations contained in paragraph 39 of Plaintiffs' complaint. Defendants admit familial relation, but deny the remaining allegations and demand strict proof thereof.

30. Defendants deny in part and admit in part the allegations contained in paragraph 40 of Plaintiffs' complaint. Defendants admit they participated in a limited Facebook group page to discuss concerns and share information, but deny that said purpose was "in order to circulate the above referenced defamatory statements about K.A. Diehl, the MBR Association, the OFS Association, and its vendors" and further deny any remaining allegations and demand strict proof thereof.

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31. Defendants admit in part and deny in part the allegations contained in paragraph 41 of Plaintiff's complaint. Specifically, Defendants admit that Dame sent an email containing the contents of the petition which contained the concerns of the homeowners and that Perkins, Franke, and William and Nancy Moore were copied to the same. Defendants deny any receipt of response from Walter Jordan.
32. Defendants admit the allegations contained in paragraphs 42 of Plaintiff's complaint.
33. Defendants deny the allegations set forth in paragraph 43 of Plaintiff's complaint and demand strict proof thereof.
34. Defendants admit the allegations set forth in paragraph 44 of Plaintiff's complaint.
35. Defendants deny in part and admit in part the allegations contained in paragraph 45 of Plaintiffs' complaint. Defendants admits knowledge of Allegiant Agreement but deny "bad faith" further deny any remaining allegations and demand strict proof thereof.
36. Defendants admit the allegations set forth in paragraph 46 of Plaintiff's complaint.
37. Defendants deny the allegations set forth in paragraph 47 of Plaintiff's complaint and demand strict proof thereof.
38. Defendants deny the allegations set forth in paragraph 48 of Plaintiff's complaint and demand strict proof thereof.
39. Defendants admit in part and deny in part the allegations set forth in paragraph 49 of Plaintiff's complaint. Defendants deny allegations pertaining to "implying" and "improperly" but admit the remaining allegations including the contents of the email.
40. Defendants deny the allegations set forth in paragraph 50 of Plaintiff's complaint and demand strict proof thereof.

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41. Defendants deny the allegations set forth in paragraph 51 of Plaintiff's complaint and demand strict proof thereof.

42. Defendants deny the allegations set forth in paragraph 52 of Plaintiff's complaint and demand strict proof thereof. Further that such allegations seek conclusions of law.

43. Defendants admit in part and deny in part the allegations contained in paragraph 53 of the Plaintiff's complaint. Specifically, defendants deny that any communications were "statements," but admit issues were raised in the form of seeking answers to the Master Board, certain "members," and to their counsel. Defendants deny the remaining allegations set forth in paragraph 53 of Plaintiff's complaint and demand strict proof thereof.

44. Defendants deny the allegations set forth in paragraph 54 of Plaintiff's complaint and demand strict proof thereof.

45. Defendants deny the allegations set forth in paragraph 55 of Plaintiff's complaint and demand strict proof thereof.

46. Defendants deny the allegations set forth in paragraph 56 of Plaintiff's complaint and demand strict proof thereof.

47. Defendants deny the allegations set forth in paragraph 57 of Plaintiff's complaint and demand strict proof thereof.

48. Defendants deny the allegations set forth in paragraph 58 of Plaintiff's complaint and demand strict proof thereof.

49. Defendants deny the allegations set forth in paragraph 59 of Plaintiff's complaint and demand strict proof thereof.

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50. Defendants deny the allegations set forth in paragraph 60 of Plaintiff's complaint and demand strict proof thereof.

51. Defendants deny the allegations set forth in paragraph 61 of Plaintiff's complaint and demand strict proof thereof.

52. Defendants deny the allegations set forth in paragraph 62 of Plaintiff's complaint and demand strict proof thereof.

53. As to paragraph 63, Defendants hereby incorporate each and every allegation and denial contained within the proceeding paragraphs as if set forth herein verbatim.

54. Defendants admit the allegations set forth in paragraph 64 of Plaintiff's complaint.

55. Defendants deny in part and admit in part the allegations contained in paragraph 65 of Plaintiffs' complaint. Defendants admit they "published" "through their attorney" questions and raised concerns to MBR Association and the Board, but deny publishing "false statements" or "attacking" the reputation of K.A. Diehl and demand strict proof thereof. Further Defendants deny any other allegations contained in paragraph 65 and demand strict proof thereof.

56. Defendants deny in part and admit in part the allegations contained in paragraph 66 of Plaintiffs' complaint. Defendants deny such other boards are "subordinate" and admit all other allegations contained herein.

57. Defendants deny the allegations set forth in paragraph 67 of Plaintiff's complaint and demand strict proof thereof.

58. Defendants deny the allegations set forth in paragraph 68 of Plaintiff's complaint and demand strict proof thereof.

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59. Defendants deny the allegations set forth in paragraph 69 of Plaintiff's complaint and demand strict proof thereof.

60. Defendants deny the allegations set forth in paragraph 70 of Plaintiff's complaint and demand strict proof thereof.

61. As to paragraph 71, Defendants hereby incorporate each and every allegation and denial contained within the proceeding paragraphs as if set forth herein verbatim.

62. Defendants deny the allegations set forth in paragraph 72 of Plaintiff's complaint and demand strict proof thereof.

63. Defendants deny the allegations set forth in paragraph 73 of Plaintiff's complaint and demand strict proof thereof.

64. Defendants deny the allegations set forth in paragraph 74 of Plaintiff's complaint and demand strict proof thereof.

65. Defendants deny the allegations set forth in paragraph 75 of Plaintiff's complaint and demand strict proof thereof.

66. Defendants deny the allegations set forth in paragraph 76 of Plaintiff's complaint and demand strict proof thereof.

67. As to paragraph 77, Defendants hereby incorporate each and every allegation and denial contained within the proceeding paragraphs as if set forth herein verbatim.

68. Defendants deny the allegations set forth in paragraph 78 of Plaintiff's complaint and demand strict proof thereof.

69. Defendants deny the allegations set forth in paragraph 79 of Plaintiff's complaint and demand strict proof thereof.

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70. Defendants deny the allegations set forth in paragraph 80 of Plaintiff's complaint and demand strict proof thereof.

71. Defendants deny the allegations set forth in paragraph 81 of Plaintiff's complaint and demand strict proof thereof.

72. As to paragraph 82, Defendants hereby incorporate each and every allegation and denial contained within the proceeding paragraphs as if set forth herein verbatim.

73. Defendants deny the allegations set forth in paragraph 83 of Plaintiff's complaint and demand strict proof thereof.

74. Defendants deny the allegations set forth in paragraph 84 of Plaintiff's complaint and demand strict proof thereof.

75. Defendants deny the allegations set forth in paragraph 85 of Plaintiff's complaint and demand strict proof thereof.

76. Defendants deny the allegations set forth in paragraph 86 of Plaintiff's complaint and demand strict proof thereof.

77. Defendants deny the allegations set forth in paragraph 87 of Plaintiff's complaint and demand strict proof thereof.

78. The Defendants deny the relief requested in the prayer for relief and any other such allegations contained therein and demand strict proof thereof.

FOR A FIRST DEFENSE
(TRUTH)

79. Defendants hereby incorporate each and every allegation, and denial, contained within the proceeding paragraphs as if set forth herein verbatim.

80. Defendants assert the defense of truth.

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81. Defendants assert that to the extent such iterations are proved by Plaintiff to meet the criteria of "published statements," that such statements are true, including, but not limited to: 1) failure to invoice Allegiant for utilities amounting to $60,000.00; 2) negligent hiring of Glen "Rusty" Magill; 3) failure to procure multiple insurance broker bids, 4) a familial relationship between K.A. Diehl's former CEO and the then broker of ADP Barlow.

82. Further, that Plaintiff knew the truth of the purported statements at the time Plaintiff filed said action.

FOR A SECOND DEFENSE
(QUALIFIED PRIVELEGE / GOOD FAITH)

83. Defendants hereby incorporate each and every allegation and denial contained within the proceeding paragraphs as if set forth herein verbatim.

84. Defendants assert the defense of good faith or privilege.

85. Defendants "alleged statements" were communications made in good faith regarding subject matter which Defendants have an interest in.

86. Defendants further allege such mitigating circumstances: Plaintiff's contract with MBRHOA remains unaffected; no harm to Plaintiff; prior negative reputations/comments about K.A. Diehl are obtainable online (**http://reviews.birdeye.com/diehl-k-a-associates-826602368**) (printed out and attached as "Attachment A") online activities are private or intended for private use; K.A. Diehl made no effort to remove any postings; and the filing of suit by K.A. Diehl is for the ulterior purpose of intimidating individuals and preventing dissemination of truth.

FOR A THIRD DEFENSE
(FAILURE TO MITIGATE)

87. Defendants hereby incorporate each and every allegation, and denial, contained within the proceeding paragraphs as if set forth herein verbatim.

88. Defendants assert Plaintiff failed to mitigate damages.

FOR A FOURTH DEFENSE
(FAILURE TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION)

89. Defendants hereby incorporate each and every allegation, and denial, contained within the proceeding paragraphs as if set forth herein verbatim.

90. Defendants assert Plaintiff failed to state sufficient facts to constitute a cause of action pursuant to Rule 12(b) of the South Carolina Rules of Civil Procedure.

FOR A FIFTH DEFENSE
(CONTRACTING PARTY/AGENT)

91. Defendants hereby incorporate each and every allegation, and denial, contained within the Answer as if set forth herein verbatim.

92. Defendants assert that they are, in their capacity as homeowners, the contracting party of the agreements between KA Diehl and OFS, and between KA Diehl and the Master Board.

93. Defendants assert that as contract parties they cannot be sued for interfering with their own current or prospective contract.

94. Defendants reserve the right to amend and add defenses.

I.
COUNTERCLAIMS
FACTUAL ALLEGATIONS

95. Defendants hereby incorporate each and every allegation, and denial, contained within the proceeding paragraphs as if set forth herein verbatim.

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96. Defendants Nancy and William Moore own Units 403, 106, and 511 at Ocean Front Spa and are, pursuant to the Master Deed and/or ByLaws, members of the Myrtle Beach Resort Ocean Front Spa Horizontal Property Regime, Inc., which is charged with management of the Regime, and further by virtue of the Master Deed and/or ByLaws, members of The Myrtle Beach Resort Homeowners' Association, Inc., which is charged with maintenance of common areas for the purpose of providing utilities, cable, refuse collection, and other such common needs as set forth in Master Deed.

97. Defendants Jim Perkins and Colleen Franke own Units 109, 201, 251, 301, 304, 305, 421 and 546 at Ocean Front Spa and are, pursuant to the Master Deed and/or ByLaws, members of the Myrtle Beach Resort Ocean Front Spa Horizontal Property Regime, Inc., which is charged with management of the Regime, and further by virtue of the Master Deed and/or ByLaws, members of The Myrtle Beach Resort Homeowners' Association, Inc., which is charged with maintenance of common areas for the purpose of providing utilities, cable, refuse collection, and other such common needs as set forth in Master Deed.

98. Defendant Steven Dame owns Units 328 and 330 at Ocean Front Spa and is, pursuant to the Master Deed and/or ByLaws, a member of the Myrtle Beach Resort Ocean Front Spa Horizontal Property Regime, Inc., which is charged with management of the Regime, and further by virtue of the Master Deed and/or ByLaws, members of The Myrtle Beach Resort Homeowners' Association, Inc., which is charged with maintenance of common areas for the purpose of providing utilities, cable, refuse collection, and other such common needs as set forth in Master Deed.

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99. Defendant Mark Dos Santos owns Unit #101 at Ocean Front Spa and is, pursuant to the Master Deed and/or ByLaws, a member of the Myrtle Beach Resort Ocean Front Spa Horizontal Property Regime, Inc., which is charged with management of the Regime, and further by virtue of the Master Deed and/or ByLaws, members of The Myrtle Beach Resort Homeowners' Association, Inc., which is charged with maintenance of common areas for the purpose of providing utilities, cable, refuse collection, and other such common needs as set forth in Master Deed.

100. Defendant Errol Dos Santos owns Unit 322 at Ocean Front Spa and is, pursuant to the Master Deed and/or ByLaws, a member of the Myrtle Beach Resort Ocean Front Spa Horizontal Property Regime, Inc., which is charged with management of the Regime, and further by virtue of the Master Deed and/or ByLaws, members of The Myrtle Beach Resort Homeowners' Association, Inc., which is charged with maintenance of common areas for the purpose of providing utilities, cable, refuse collection, and other such common needs as set forth in Master Deed.

101. That upon information and belief Plaintiff K.A. Diehl entered into an agreement with the Myrtle Beach Resort Homeowners' Associations, Inc., (hereinafter referred to as "MBRHOA", "Master Board" or "Master Association"), to serve as the resort property manager.

102. That upon information and belief, K.A. Diehl initially, in 2007, managed Renaissance Tower, Ocean Front Spa, Five Seasons, and Myrtle Beach Resort HPR, and the Myrtle Beach Resort HOA which encompassed all regimes and the Master Board.

103. That upon information and belief the management agreement between K.A. Diehl and MBRHOA was modified in December of 2012.

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104. Upon information and belief, the December 2012 agreement included modifications one of which was a two year term with an auto-renewal.

105. That, upon information and belief, the management agreement was modified in 2014.

106. That, upon information and belief, pursuant to the 2014 management agreement, K.A. Diehl is required to: manage accounts; manage contracts with vendors; procure competitive bids using multiple brokers for insurance; procure competitive bids for security and manage common areas; receive, review and approve invoices; and advise the Board on administrative tasks such as elections.

107. That the individual homeowners pay assessments that fund the MBRHOA for the purpose of providing services for the common elements. That the MBRHOA is tasked with procuring insurance, maintaining common areas, providing cable, etc. as is more fully set forth in the Master Deed.

108. That the homeowners, including the defendants that have been subjected to plaintiff's SLAPP suit, pay assessments through their regimes to the MBRHOA which provides funds to acquire the services of K.A. Diehl.

109. That the agreements between the MBRHOA and K.A. Diehl are for the benefit of the homeowners.

110. That, upon information and belief, K.A. Diehl continues to manage OFS, subject to the 2014 management contract.

111. That, upon information and belief, pursuant to said agreement, K.A. Diehl is required to: prepare an annual budget; administer insurance and other contracts; manage accounts, and such other tasks as enumerated in the agreement.

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112. That, upon information and belief, the individual homeowners pay assessments that fund the OFS HOA for the purpose of providing services for the common elements. That the OFS Board is tasked with procuring insurance, maintaining common areas, providing cable, etc. as is more fully set forth in the Association Master Deed and Bylaws.

113. That upon information and belief, K.A. Diehl owes a duty of care to the individual homeowners.

114. That, upon information and belief, the homeowners, including the defendants that have been subjected to plaintiff's SLAPP suit, pay assessments through their regimes to the OFS which provides funds to acquire the services of K.A. Diehl.

115. That, upon information and belief, the agreements between the OFS and K.A. Diehl are for the benefit of the homeowners.

CONFLICT ALLEGATIONS

116. That in April of 2014 defendant Jim Perkins was elected to serve on the MBRHOA.

117. That Jim Perkins and Nancy Moore serve as Directors on the OFS Board.

118. That during Perkins term of service on the MBRHOA, he learned of information which led him to believe that there was a business relationship between board member Phil Cox and the largest vendor – Allegiant Food and Beverage, LLC (hereinafter "Allegiant" or "Allegiant Food and Beverage") / Myrtle Beach Resort Vacations (hereinafter "MBRV").

119. That upon information and belief, certain OFS / MBRHOA members maintain business relationships with MBRV.

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120. That upon information and belief, several MBRHOA board members revised the Allegiant Food and Beverage vendor agreement in October of 2013, signing said agreement before a vote by the MBRHOA board of directors.

121. That upon information and belief, the agreement granted to Allegiant Food and Beverage to maintain the commercial lease for a period of six years before the Board would even consider other vendor bids. Further, that during the final year of the agreement, when bids are permitted, Allegiant Food and Beverage gets a right of first refusal.

122. That the conflict of interest subject matter was eventually raised at a board meeting and discussed with counsel, Sam Stathos, who identified a conflict and opined that directors with such conflict, including Phil Cox should refrain from voting on Allegiant and MBRV matters (Attachment "B" Attorney Stathos Letter).

123. That despite Attorney Stathos' opinion letter, Phil Cox refused to abstain from voting on MBRV related matters.

124. Upon information and belief, the following OFS and Master Board directors have or had during their term of service a contractual relationship with MBRV:

a. Master Board: Phil Cox, and Stanley Jordan;

b. OFS Board: Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill.

INVOICE ALLEGATIONS

125. That in May of 2014, Jim Perkins, in his capacity as a director sought out the agreements between Allegiant Food and Beverage and the MBRHOA, and so obtained a copy of the same. (Attachment "C" Allegiant Food and Beverage Agreement).

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126. That the agreement clearly required vendor Allegiant Food and Beverage to pay for utilities.

127. That defendant Jim Perkins discovered that K.A. Diehl had failed to invoice Allegiant Food and Beverage utilities.

128. That the failure to invoice Allegiant Food and Beverage utilities was an egregious error that would have cost the homeowners approximately $60,000.00, if Jim Perkins had not discovered the same and required action for repayment of the full amount.

129. That upon information and belief, Allegiant Food and Beverage, through owner Bobby Jones, began reimbursing the utilities immediately after Perkins's discovery, but had only paid approximately $30,000.00 of the approximately $60,000.00 owed to MBRHOA. (See Attachment "D").

130. That the MBRHOA board directors discussed KA Diehl and the Master Boards' failure to invoice Allegiant and during the meeting directors Phil Cox and Wayne Urban initially voted to forgive the debt rather than seek to recoup the lost funds.

131. That ultimately the MBRHOA voted to pursue the funds, such that an agreement with Allegiant was reached. That Allegiant is scheduled to repay the remaining funds over a period of years, and that such reimbursement is presumably ongoing.

132. That neither KA Diehl or MBRHOA disclosed this failure to invoice to the homeowners at large until the individual defendants shared their concerns.

133. That upon information and belief, K.A. Diehl attempted to address the matter by blaming the mistake on unclear language from the previous commercial lease agreement.

134. That, upon information and belief, the November 2009 Commercial Lease Agreement between MBRHOA and Allegiant Food and Beverage is clear. That, upon

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information and belief, it contains a section "3. Utilities" that states "Tenant [Allegiant] shall arrange and pay for the use of utilities...including, but not limited to, water, electricity, gas, sewer and telephone." (Attachment "E" November 2009 Commercial Lease Agreement).

135. That upon information and belief, KA Diehl failed to invoice MBRV for its portion of the improper gate passes. That the improper gate passes created a $280,000.00 tax upon the homeowners per year for the last two years.

136. That upon information and belief, despite admitting this error, K.A. Diehl sued the individual defendants who brought this truth to light.

DISCLOSURE ALLEGATIONS

137. That several homeowners began asking questions about KA Diehl's management of the property and about MBRHOA's failure to investigate concerning information.

138. That defendant, Mark Dos Santos, was among those who began to seek information from both the MBRHOA and from K.A. Diehl. That defendant, Mark Dos Santos, specifically requested the contracts between the MBRHOA and its numerous vendors.

139. That defendant, Mark Dos Santos, sent numerous emails to the plaintiff inquiring about important matters.

140. That upon information and belief, the defendant, Mark Dos Santos, and others, received negative responses to include: threats of suit, and vendors' rights pamphlets.

141. That upon information and belief, at the April 2015 OFS annual meeting, a non-defendant homeowner, Alan Bolton, requested that the OFS Board permit a financial audit.

142. That upon information and belief, the OFS Board agreed that they would vote to support such an audit, but failed to do so.

143. That upon information and belief, defendant William Moore requested in writing a financial audit.

144. That the individual Defendants, through counsel, requested a financial audit of the records of the corporation.

145. That Defendants, through counsel, sent letters to the MBRHOA and to OFS board seeking investigation and action.

146. That upon information and belief, directors from the MBRHOA and OFS provided these letters to KA Diehl rather than providing the financial audit.

147. That shortly thereafter, KA Diehl brought suit against the individual homeowner defendants.

INSURANCE ALLEGATIONS

148. That upon information and belief, since 2008 K.A. Diehl has been obligated to procure insurance for the MBRHOA and all four regimes.

149. That upon information and belief, K.A. Diehl failed to procure competitive insurance broker bids relying instead solely upon ADP Barlow Insurance Co.

150. That upon information and belief, former CEO of K.A. Diehl, Rob Barlow, was at the time married to the owner of ADP Barlow Insurance, Robin Barlow.

151. That upon and belief, the failure to procure competitive bids cost the homeowners substantial money, and thus, the individual defendants ascertainable sums of money annually.

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152. That upon information and belief the relationship between K.A. Diehl and ADP Barlow Insurance was eventually disclosed to OFS and the Master Board, but not to the homeowners at large.

153. Upon information and belief, when the property management contracts were reconfigured in December of 2012, K.A. Diehl's disclosure of the relationship did not obviate its contractual and ethical obligation to procure competitive bids and comparable brokerage fees.

154. Upon information and belief, the OFS master deed and bylaws requires the board to seek three year bids, not annual bids. That K.A. Diehl and OFS acquired annual bids.

155. That upon information and belief, K.A. Diehl's failure to utilize multiple brokers to procure competitive bids subjected homeowners to higher premiums and broker fees and charges.

COMMISSIONS / RENTALS ALLEGATIONS

156. That defendant Nancy Moore, serving as Treasurer of the Ocean Front Spa, learned information that led her to believe that certain sales commissions were not being properly accounted for or paid.

157. That K.A. Diehl was responsible to insure that the sales commissions were properly accounted for and paid.

158. That upon information and belief, MBRV is required to pay to MBRHOA 2% rental commissions or a base rate in the event 2% of the rental commissions does not exceed the base rate.

159. That upon information and belief, MBRHOA has the right to request rental commission income from MBRV, but that it has failed obtain the same.

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160. That upon information and belief, K.A. Diehl has not requested the rental commission income from MBRV on behalf of MBRHOA.

161. That upon information and belief, the financial statements prepared by KA Diehl reflect 2% rental income paid monthly by MBRV.

162. That upon information and belief, MBRV does not actually pay 2% rental income, but instead pays the base rate.

163. That upon information and belief, 2% of MBRV's rental commissions would exceed the base rate. That regardless of whether the rental commissions actually exceed the same, K.A. Diehl and MBRHOA were negligent in not pursuing information regarding the same.

SECURITY SERVICES

164. That upon information and belief, K.A. Diehl provides security services through Watchmen Services.

165. That upon information and belief, in December of 2009, K.A. Diehl retained itself to provide certain security services at the resort.

166. That upon information and belief, the signatures of the security services agreement contain only K.A. Diehl employees and agents. (Attachment "F" Security Services Agreement 2009)

167. That upon information and belief, pursuant to the agreement, K.A. Diehl is required to provide qualified employees to secure the resort and operate the front gate, which includes collecting parking fees.

168. That upon information and belief, there is an inherent conflict of interest with K.A. Diehl's management of the property and provision of security services.

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169. That upon information and belief, the compensation schedule permits K.A. Diehl's Chief of Security to effectually determine whether MBRHOA or K.A. Diehl is responsible for Watchmen Security employee overtime.

170. That upon information and belief, in 2013 security services cost over $400,000.00.

171. That upon information and belief, in 2013 the MBRHOA paid for over 700 hours of employee overtime. (Attachment "G" Watchmen Services Payment Information 2013).

172. That upon information and belief, KA Diehl maintains an unreliable system for logging employee hours.

173. That upon information and belief, KA Diehl maintains an unreliable system for collection of parking fees.

174. That upon information and belief K.A. Diehl has hired employees that are not qualified.

175. That upon information and belief, the Master Board has permitted K.A. Diehl to maintain involvement in the security service bidding process or permitted K.A. Diehl to view competitors' bids.

176. That upon information and belief, K.A. Diehl has usurped this opportunity to insure that Watchmen Services obtains the contract.

NEGLIGENT HIRING ALLEGATIONS

177. That K.A. Diehl hired Rusty Magill to serve as manager for OFS HOA.

178. That upon information and belief, North Carolina Bankruptcy Court thoroughly examined Rusty Magill's management of a beach condominium rental business. In so

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doing, the Court found, among other unfortunate findings, that Magill had "grossly mismanaged" the business. (Attachment "H", US Bankruptcy Court Order, Eastern District of North Carolina).

179. That several of the individual defendants, having learned of this information, questioned K.A. Diehl about whether the Rusty Magill whom KA Diehl had hired was in fact the same Rusty Magill whom had been discussed in bankruptcy Order.

180. That several of the individual defendants learned from Rusty Magill that K.A. Diehl had advertised and procured Rusty Magill through a Craigs List posting.

181. That several of the individual defendants questioned KA Diehl's hiring process.

182. That upon information and belief, KA Diehl initially ignored the inquiries, and has never adequately addressed the decision to hire Rusty Magill.

183. That upon information and belief, KA Diehl has failed to hire qualified security personnel.

184. That upon information and belief, K.A. Diehl employed Joseph M. Depace whom had previously pled guilty to receiving stolen property, a 3rd degree crime. (Attachment "I").

185. That upon information and belief, Joseph M. Depace was recently arrested for impersonating law enforcement. (Attachment "J").

186. That several defendants, in good faith, have sought information and explanations from K.A. Diehl and the MBRHOA about the above matters.

187. That the defendants continued to ask questions, hired counsel, created a private Facebook page, and blog to begin a dialogue with other homeowners who were concerned about the allegations above and other such allegations.

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188. That upon information and belief, K.A. Diehl, in an effort to quiet the defendants, and to prevent dissemination and further discovery of the truth sued the defendants for defamation, civil conspiracy, tortious interference with contractual relationships and interference with prospective contractual relationships.

189. That upon information and belief, K.A. Diehl in filing said suit abused the process of the South Carolina courts.

190. That upon information and belief, K.A. Diehl's failure to obtain competitive bids for the purpose of usurping the business opportunity for a sister company or company owned by a spouse, was a deceptive practice that affects the individual defendants and the public, at large, and thus violated the South Carolina Unfair Trade Practices Act.

FOR A FIRST COUNTERCLAIM/CAUSE OF ACTION
(ABUSE OF PROCESS AGAINST PLAINTIFF KA DIEHL BY INDIVIDUAL DEFENDANTS)

191. Defendants hereby incorporate each and every allegation, and denial, contained within the proceeding paragraphs as if set forth herein verbatim.

192. That the defendants made good faith efforts to inquire about perceived failures and misconduct regarding the operation of Myrtle Beach Resorts. In so doing, the defendants raised the concerns contained in paragraphs 115 - 188 to OFS and MBRHOA property management company, K.A. Diehl.

193. That Plaintiff failed to respond appropriately to Defendants' inquiries, and threatened to sue one or more of the Defendants. That such threat to use the system was for the purpose of intimidating the Defendants in an effort to prevent them from disseminating the truth.

194. That upon information and belief, K.A. Diehl became aware of the defendants' intention to file a derivative action on behalf of MBRHOA against K.A. Diehl. That K.A. Diehl then filed suit seeking to intimidate defendants and cause them to hire counsel for the purpose of attempting to make said derivative suit financially impracticable for defendants.

195. Further, K.A. Diehl filed this suit for the purpose of intimidating all other homeowners and to prevent such other homeowners from participating in defendants future action against it, and to prevent them from engaging in conversation about the failures or misconduct of K.A. Diehl and the Master Board.

196. That upon information and belief, both K.A. Diehl and MBRHOA posted the lawsuit to make an example of the individual defendants and further intimidate any other homeowners that would question K.A. Diehl's practices.

197. That recently a homeowner having been apprised of one of the myriad of issues regarding operation and management of MBRHOA replied to defendant Mark Dos Santos, "be careful, we are not allowed to question anything, you might get sued!!!!!!!!!!" (Please see Attachment "K").

198. That in January of 2016, the defendants began to engage with the homeowners again via email despite the intimidation by K.A. Diehl, and that around the same time, it became known to K.A. Diehl that the claims against the defendants were covered by insurance – such that it was no longer a financial strain upon them.

199. That shortly after witnessing defendants' communications with homeowners and that all defendants had insurance coverage, K.A. Diehl, having learned that is ulterior motives were no longer being served, sought to negotiate a resolution.

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200. That after the filing of the action against defendants K.A. Diehl evidenced the misuse of the process when one of its employees acknowledged to defendant Mark Dos Santos that there was really only one statement that was even potentially actionable. Specifically, that the according to K.A. Diehl's own employee, the only inaccurate or potentially defamatory remark was that "Rusty Magill filed bankruptcy."

201. That K.A. Diehl's suit against the individual defendants is for an ulterior purpose.

202. That K.A. Diehl's suit against the individual defendants sought to financially harm defendants, intimidate defendants, intimidate others, and thereby prevent disclosure of facts to the other homeowners.

203. That K.A. Diehl's Complaint alleges that defendants' allegation that K.A. Diehl failed to invoice Allegiant Food and Beverage was untrue and defamatory. That K.A. Diehl alleges so in bad faith, knowing that it failed to invoice Allegiant Food and Beverage for utilities.

204. That the truth of this fact is beyond contest.

205. That K.A. Diehl's complaint against the individual defendants is replete with fabrications and trumped up causes of action.

206. That K.A. Diehl has not suffered any harm or damage as result of the individuals conduct, but that even if such had occurred, it would not substantiate an action against these individual homeowners.

207. That K.A. Diehl filed suit not to pursue damages but to quiet the individual defendants to prevent their speech regarding matters of great importance to the homeowners.

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208. That as a result of Plaintiff K.A. Diehl's conduct, defendants have suffered actual damages including frustration, emotional distress, embarrassment, loss of time, and attorney fees.

209. That the defendants are entitled to receive actual and punitive damages resulting from plaintiff's abuse of process.

FOR A SECOND COUNTERCLAIM/CAUSE OF ACTION
(VIOLATION OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT INDIVIDUAL DEFENDANTS VS K.A. DIEHL)

210. Defendants hereby incorporate each and every allegation, and denial, contained within the proceeding paragraphs as if set forth herein verbatim.

211. That, upon information and belief, K.A. Diehl's performance of its contract with the MBRHOA is for the benefit of the individual homeowners at the resort.

212. That, upon information and belief, each of the individual defendants, sued by K.A. Diehl, owns at least one unit at MBR, and that at least one such unit is contained within OFS.

213. That upon information and belief, K.A. Diehl's former CEO, Robert Barlow, is married to Robin Barlow. That Robin Barlow owned ADP Barlow Insurance at the time it brokered insurance for MBRHOA and the all Myrtle Beach Resort property regimes.

214. That upon information and belief, the two companies have shared office space or operated out of the same building, and have shared a web presence (insert website).

215. That pursuant to its agreement with MBRHOA, K.A. Diehl was to procure competitive insurance bids for the common areas of the resort.

216. That pursuant to its agreement with OFS, K.A. Diehl was to procure competitive insurance bids for the OFS HOA.

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217. That upon information and belief, K.A. Diehl knew there were better rates but failed to procure the same.

218. Upon information and belief, Renaissance Tower used CWS Insurance to procure insurance and procured the same for tens of thousands of dollars less.

219. That K.A. Diehl knew this and failed to offer the same to Five Seasons and Myrtle Beach Resort Horizontal Property Regimes.

220. That upon information and belief, as a result of the familial relationship, K.A. Diehl consistently used one broker – ADP Barlow Insurance.

221. Upon information and belief, as a result of the failure to procure bids from other brokers, MBRHOA paid higher premiums for a period of years and higher brokerage fees.

222. That upon information and belief, such was a material breach of the agreement.

223. Upon information and belief, this same practice was utilized for the independent regimes until the Renaissance Tower discovered that the premiums were not competitive, and changed insurance brokers.

224. Upon information and belief, the Renaissance Tower, through broker CWS Insurance obtained comparative insurance for lower cost and brokerage rates than the other regimes that acquired insurance through ADP Barlow.

225. That K.A. Diehl, upon information and belief, did not disclose this relationship to the homeowners.

226. That upon information and belief, the OFS Board and MBRHOA directors failed to disclose this relationship to the homeowners.

227. That upon information and belief, K.A. Diehl manages over 120 properties throughout the country including 40 in the State of South Carolina.

228. That upon information and belief, K.A. Diehl's conduct relating to procuring competitive insurance bids affects the public interest.

229. That upon information and belief, K.A. Diehl's conduct relating to procuring competitive insurance bids is capable of repetition and upon information and belief would have been repeated in 2014 if not for Nancy Moore and Jim Perkins.

230. That K.A. Diehl's conduct relating to procuring competitive insurance bids proximately harmed the individual defendants by inflating the amount of homeowner dues each owed.

231. That K.A. Diehl's conduct relating to procuring competitive insurance bids proximately caused harm to the individual defendants as members of the MBRHOA and OFS HOA in that each individual homeowner paid dues for the purpose of contracting with K.A. Diehl for its services, including this particular service.

232. That the individual unit owners possess 15 units between them and therefore paid a finite amount of dues collectively for a period of approximately 7 years.

233. That upon information and belief, and as shall be further substantiated during the course of discovery, a portion of said funds was utilized to pay for the procurement of insurance and for the services of K.A. Diehl.

234. That upon information and belief, the violation of the South Carolina Unfair Trade Practices Act was a willful and knowing violation such that defendants are entitled to treble damages.

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235. That the defendants are entitled to receive actual damages, including special and consequential damages, and treble damages and such other damages permissible under the statute.

FOR A THIRD COUNTERCLAIM

(Civil Conspiracy against K.A. Diehl)

236. That the defendants hereby incorporate the preceding allegations, and denials, as if set forth herein verbatim.

237. That upon information and belief, K.A. Diehl has conspired with several board of directors serving on MBRHOA and several board of directors serving on OFSHOA for the purpose of harming defendants.

238. That upon information and belief, K.A. Diehl and a majority of directors of MBRHOA and a majority of directors of OFSHOA are so intertwined that K.A. Diehl controls them both.

239. That upon information and belief, at a board meeting, several OFS directors inquired about suing defendant Mark Dos Santos for harassment. Further upon information, counsel advised the board that they could not sue a homeowner for simply asking questions. Upon information and belief, such board members were not happy with counsel's advice.

240. Upon information and belief, shortly thereafter K.A. Diehl brought suit against defendants for matters arising out of the inquiries by Mark Dos Santos.

241. That upon information and belief, K.A. Diehl, several of MBRHOA / OFSHOA directors and agents have conspired to prevent the defendants from gaining records of the OFS HOA and MBRHOA, including financial records.

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242. Further, they have acted in concert to prevent the disclosure of records, relationships amongst board members and vendors, accounts and accounting information, failures to seek competitive bids, and such other information as discovery may reveal.

243. That the relationship between K.A. Diehl and the MBRHOA / OFS is improperly mutually beneficial in that, these boards continue to grant to K.A. Diehl business contracts without legitimate consideration of other management companies, including security services (where K.A. Diehl entered into a contract signing both for it and the board), in exchange for protection of the board members' misconduct.

244. That upon information and belief, defendants Jim Perkins and Nancy Moore discovered that K.A. Diehl was providing kickbacks to certain board members to include the provision of free storage space.

245. That upon information and belief, the storage space issue was litigated with respect to the "A" building, and deemed improper, but that the practice continued with some of the other boards' directors.

246. That prior to the filing of the suit, K.A. Diehl interfered with OFS elections, and effectively the MBRHOA board.

247. That as result of this relationship, the boards and K.A. Diehl, concerned of the disclosure of truth conspired to injure and harm defendants by filing this suit, and depriving defendants of information.

248. Further that after filing the lawsuit, K.A. Diehl and the master board have continually deprived OFS treasurer Nancy Moore of the ability to perform her duty as duly elected treasurer. That the deprivation of this right includes preventing Moore from possessing relevant financial information.

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249. That they have done the same to Jim Perkins, OFS board member.

250. That as result of the combination of K.A. Diehl and the OFS and MBR board directors, the defendants have suffered special damages to include attorney fees, costs, and such other damages as jury may determine.

FOR A FOURTH COUNTERCLAIM

(Breach of Fiduciary Duty)

251. That Defendants incorporate each and every allegation contained in this Answer, and denials, as if set forth herein verbatim.

252. That upon information and belief, K.A. Diehl owes to each individual homeowner, including Defendants, a duty of care. That this duty of care is of a fiduciary nature.

253. That the conduct and omissions as alleged in the preceding paragraphs including: insurance procurement, security procurement, hiring of staff, abuse of process, conspiratorial conduct, and such other failures as more specifically set forth above, breach said duty, and are the direct and proximate cause of damages to the defendants.

254. That defendants are entitled to recover such damages against K.A. Diehl in an amount to include actual and punitive damages.

FOR A FIFTH COUNTERCLAIM

(NEGLIGENCE)

255. That Defendants incorporate each and every allegation contained in this Answer, and denials, as if set forth herein verbatim.

256. That upon information and belief, K.A. Diehl owes to each individual homeowner, including Defendants, a duty of care.

257. That the conduct and omissions as alleged in the preceding paragraphs including: insurance procurement, security procurement, hiring of staff, abuse of process, conspiratorial conduct, and such other failures as more specifically set forth above, breach said duty owed to the Defendants and are the direct and proximate cause of damage to the defendants.

258. That the conduct, as more fully set forth above, was wanton and reckless.

259. That defendants are entitled to recover such damages against K.A. Diehl in an amount to include actual and punitive damages.

FOR A SIXTH COUNTERCLAIM

(FRAUD)

260. That defendants hereby incorporate each and every allegation contained in the Answer, including denials, as if set forth herein verbatim.

261. That K.A. Diehl is responsible to the homeowners by and through K.A. Diehl's interaction with MBRHOA. Further, that K.A. Diehl is responsible to the homeowners, and these individual defendants, by and through its interaction with OFS.

262. That K.A. Diehl is required to perform its obligations and duties in good faith, and to promote the best interest of the homeowners.

263. That K.A. Diehl has exploited its relationship with MBRHOA and OFS and has harmed the defendants.

264. That K.A. Diehl represented itself as a reputable company that would deal fairly and procure competitive bids and provide proper staff.

265. That K.A. Diehl's representations were false.

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266. That K.A. Diehl's representations were material, and that K.A. Diehl and its agents knew of the falsity of such statements or recklessly disregarded its truth. That K.A. Diehl had knowledge of facts and a duty to reveal said facts to the defendants.

267. That to the extent K.A. Diehl informed OFS or MBRHOA that it had a relationship with ADP Barlow, K.A. Diehl did not divulge that utilizing ADP Barlow would cost individual homeowners money.

268. That K.A. Diehl may be liable to these individual defendants because it had knowledge that the hearer of the statement would rely upon its statements and impact the homeowners, including defendants.

269. That K.A. Diehl intended that the hearer of the statements act upon said statements to include: not procuring competitive insurance bids; not procuring competitive management bids; and not procuring competitive security bids.

270. That the hearers of said statements have relied upon said statements as evidenced by: having purchased insurance with ADP Barlow; maintaining management agreements with K.A. Diehl; and hiring Watchmen Services (K.A. Diehl affiliate) to provide security services.

271. That upon information and belief, MBRHOA and OFS, and the defendants were ignorant of the truth of the falsity of the statements, and had right to rely upon said statements, and did, in fact, rely upon such statements.

272. That the defendants have been consequently and proximately injured by way of higher regime fees.

PRAYER FOR RELIEF

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WHEREFORE, Defendants Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, hereby pray unto this honorable court for the following relief: (1) dismissal of KA Diehl's claims against them; (2) for an award of actual, punitive, and special damages against KA Diehl together with attorney fees and costs; and (3) for such other and further relief as justice may require.

RESPECTFULLY SUBMITTED BY:

THE BRITTAIN LAW FIRM, P.A.

A. Preston Brittain

A. Preston Brittain, Esq.
SC Bar #73707
Thomas C. Brittain, Esq.
SC Bar # 00893
4614 Oleander Drive
Myrtle Beach, SC 29577
843-449-8562 (O)
843-449-6148 (F)

On behalf of Defendants James Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos

JANUARY 29, 2016
Myrtle Beach, SC

RESPECTFULLY SUBMITTED,

CLAWSON & STAUBES, LLC

By: Chris W. Nickels by A. Preston Brittain w/ authority

Christopher W. Nickels, Esq.
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
Phone: 843 577 2026
CNICKELS@clawsonandstaubes.com
ATTORNEY FOR MARK DOS SANTOS

RESPECTFULLY SUBMITTED,

COLLINS & LACY, P.C.

By: Christian Stegmaier by A. Preston Bolt w/ authority

CHRISTIAN STEGMAIER
cstegmaier@collinsandlacy.com
AMY L. NEUSCHAFER
aneuschafer@collinsandlacy.com
11945 Grandhaven Drive, Suite D
Murrells Inlet, South Carolina 29576
(843) 353-2350 (voice)
(843) 652-0301 (facsimile)

ATTORNEYS FOR DEFENDANTS
JAMES PERKINS AND NANCY MOORE

RESPECTFULLY SUBMITTED,

HAYNESWORTH, SINKLER, BOYD, P.A.

By: Robert W. Buffington by A. Preston Bolt w/ authority

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Myrtle Beach, SC 29577
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FAX 843.722.2266
ATTORNEY FOR WILLIAM MOORE

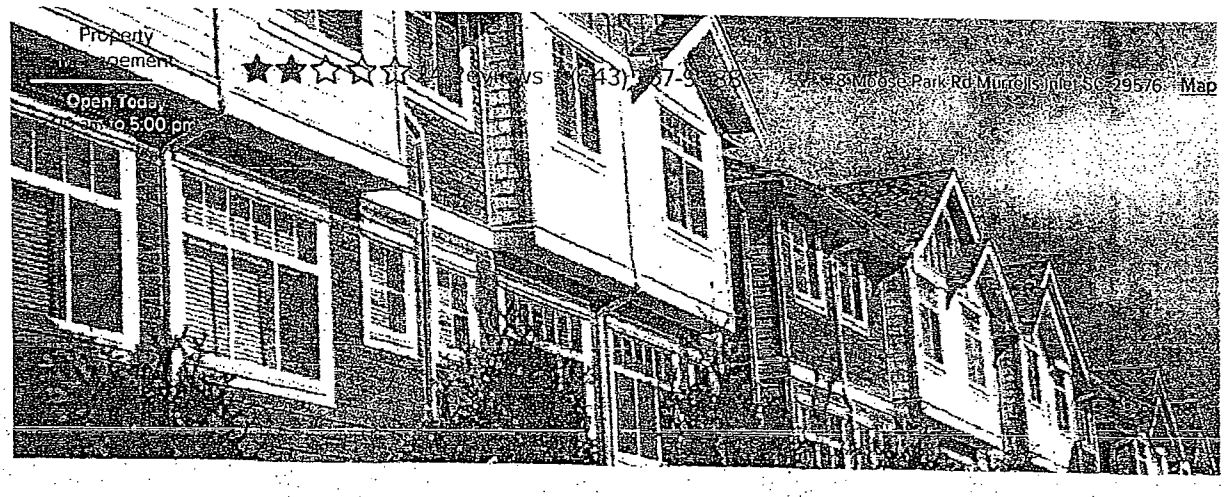
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ATTACHMENT "A"

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Diehl K A & Associates Reviews



FEEDBACK

ABOUT US

MAP

APPOINTMENT

BUSINESS OWNER?
FIX YOUR REPUTATION

JANIS H.
★☆☆☆☆

Recommended | All
Sep 17, 2015

I work for an HOA and we give our owners the benefit of the doubt and only send homeowners that are seriously delinquent to collections. KA Diehl wants to foreclose your home if you owe $300.00. Take away your home over HOA dues. I understand I need to pay because that is how they pay the bills, however, I doubt the company will go broke and need to kick myself and my family out of our home over that amount. They are the worse company I have ever had the unfortunate pleasure to deal with and will put my name on the list of board members so that I can fight for my community to get a new HOA provider.

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JENNIFER M.

★☆☆☆☆

Sep 14, 2015

Do not move into a KA Diehl managed property! Especially one in New Jersey. The "Community Manager" sharon strange in the Mt. Laurel, NJ office is an incompetent crook that should have her license expunged. She lies, cheats and does whatever necessary
in order to get your money, all the while property values are decreasing exponentially because she is sitting around doing nothing to improve the community. Those who do not have the
financial and cognitive capability to own their own home should not be managing yours, investigate before you buy in a KA Diehl mismanaged property.



FRED S.

★☆☆☆☆

Jul 08, 2015

These people are condescending idiots, that also have no idea what they are doing. The only thing they understand is being threatened with a court action. They hire substandard sub contractors to do the work in my community and raise the condo fees as often as they can. My community manager never responds when anything needs to be done, and when this manager does he sent Cement company to fix a roof who did not even do the job. But KA Diehl keeps this bad manager in place. This manager never checks on any contractor after work has been done and if any homeowners complained they put you on a blacklist. This manager never believes the homeowner he believes the substandard contractor instead. This is bad business.



JOE H.

★☆☆☆☆

Jul 02, 2015

This company is terrible the property manager is worse than that. They spend you're money on do overs, time and time again.,and never get it right the first time. I wish there was a way to get out of this terrible contract we have with them!



CMC

★☆☆☆☆

May 05, 2015

This company is a nightmare and it starts at the top with their CEO Jack Boselli. It took us 16 months to get a simple front step renovation done. We were FORCED to change the color of our existing deck to white in spite of none of the other 89 units being white. The day it was finished, we were told by an elected board member that it was wrong and had to be torn down. Turns out there was another development with the same name as ours in a different state. The very ignorant KA employee was reading the wrong guidelines.

It took us 16 months to finally have the issue resolved and not until we retained a lawyer. Jack ended up having a "buddy" demolish and rebuild the deck as a favor with what he called 'Superior craftsmanship and materials". Within 3 weeks, 3 pieces of the "superior" deck already broke and Jack refused to do anything about it. He said

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it was our fault. To top it off, he actually called ME a jerk. For $177 a month in dues, the CEO's buddy shouldn't be building decks as a favor.

Do not employ this company. They will waste your monthly dues and they do not care because there is no accountability.



BARBIE D.

Myrtle Beach, SC

★☆☆☆☆

May 01, 2015

Ive never had a problem my whole life until i moved to mb. This company is unprofessional and h o r i b le...before you buy a home adk who runs poa first...



BARBIE D.

Myrtle Beach, SC

★☆☆☆☆

May 01, 2015

Ive never had a problem my whole life until i moved to mb. This company is unprofessional and h o r i b le...before you buy a home adk who runs poa first...



ANONYMOUS

★★★★★

Jun 26, 2014

Im very pleased so far with the services performed by KA Diehl at the Wynbrooke condos, Murrells Inlet, SC. Their employees are out there in 90 degree plus and 80% humidity to insure that the residents/ owners can enjoy a well kept community and pool. That the roads and parking areas are clean, and that the greenery is trimmed and mulched. Thank your gardeners KA Diehl. Love their enthusiasm and sacrifices.



JSLISS

★☆☆☆☆

Aug 14, 2013

If you want your neighborhood to deteriorate quickly, hire KA Diehl. The management ignores complaints and has poorly trained personnel who argue with property owners. KA Diehl personnel will also say anything to get you off the phone. A tree in a common area by my property was hit by lightening and is about to fall down. KA Diehl has ignored my request to have it taken down. The majority of homeowners in Springmill Plantation are dissatisfied because of the poor relations with this company. Can't wait to fire them when we take over from the POA.



MATTYWALKER

★☆☆☆☆

Mar 23, 2013

This is a TERRIBLE management company. Bad customer service. Can't keep records straight. Do not respond to HOA membership notes or requests. BAD, BAD, BAD. Save your money!

TURION80

Mar 13, 2013

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★☆☆☆☆

Unfortunately KA Diehl is the managing company if my neighborhood. I forgot to pay a months assessment and was charged a late fee



TURION80 Mar 13, 2013

★☆☆☆☆

Unfortunately KA Diehl is the managing company if my neighborhood. I forgot to pay a months assessment and was charged a late fee



GUEST92931 Jul 05, 2012

★☆☆☆☆

Absolutley terrible management company. They lie and have particularly dishonest business practices. The agents that work there should have their licenses removed. Once they get their hands on your checkbook watchout. Get rid of them.



HOMEOWNER Feb 19, 2012

★☆☆☆☆

Absolutley terrible management company. They lie and have particularly dishonest business practices. The agents that work there should have their licenses removed. They lied about everything they can. Once they have their hands on your checkbook look out. Get rid of them



OCEAN CREEK HOMEOWNER Sep 22, 2011

★☆☆☆☆

Our HoA is "managed" by KA Diehl and is about to be let go thank god! They are nothing but a bunch of crooks and liars and do not keep their word....at all. Ocean Creek will be better off without this company so beware of they come knocking.



OURHOAISBIAS Jun 27, 2009

★☆☆☆☆

Having an issue with your HOA or property management company?Support Senate Bill S30 write or email Senators - S30 Subcommittee Members: Senators Robert Ford, Gerald Malloy, Shane Martin, Shane Massey, Michael Mulvaney and President South Carolina Senate Honorable Glenn F. McConnellThis bill has been adjusted to cost a homeowner $1.00 per year. Well worth the price. Why? No one has jurisdiction over your HOA. HOA's can do what they want without any oversight, even if its illegal. If this bill is passed, a homeowner can have an issue mediated by the SC Board of Consumer affairs. Your HOA will then have someone to answer to. The SC CAI has been sending opposition letters to these Senators regarding Bill S30. You can find more information and see the oppostion letters at :SC CIA Websitehttp://www.cai-

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sc.net/doc/toc.asp?assn_id=320&doc_cat_id=3500S30 opposition
letter:http://www.cai-sc.net/doc/AdobeViewer.asp?
doc_filename=/hoa/assn320/document



OURHOAISBIAS Jun 26, 2009

★☆☆☆☆

Not an honest company to deal with. Neither is our HOA Board. what can you do? Write or email your senator and ask them to pass the :S.C. Homeowners' Association ActThis would only cost each homeowner between $1-$10 dollars a year. Then any complaint regarding your board or property management company would be mediated by Consumer Affairs. Right now, no one has authority over your HOA & maangement company which allows them to do whatever they want ,when they want to even if its illegal.



MITZI YASKO THACKSTON Sep 10, 2008

★★★★★

I recent wrote a blog about Diehl K A & Associates regarding the cracked foundation in myy home. I spoke directlt with Linda Mcmanus and my foundation was repaired with days. The board president, Bob Johnston was refusing to allow my foundation to be repaired. IF THIS MAN MOVES INTO YOUR NEIGHBORHOOD BEWARE. Linda Mcmanus is currently cleaning up our neighborhood and I can not stay enough about her. IF YOU ARE HAVING TROUBLE WITH YOUR HOA, call and write the management company. It works. Most of the time the problem is with your board and not with the management company. However, from personal experience, once the company was contacted she did address our issues with the board. Bob Johnson, president of our HOA, is a nighmare to work with and he doesn't follow rules. I can not thank the management company for steping in and helping our family. Please remenber to call and write the management company .



ANONYMOUS Aug 04, 2008

★★★☆☆

In all my years of doing business and dealing with management companies I have never in all my life dealt with a company such as this horrible outfit. The staff at the main office sucks, can't get anyone to answer the phone, no one calls back, owner is out all the time, seems to be missing from action. The VP is an idiot. I for one am voting to get rid of this outfit when our contract comes due in December 2008. As for our HOA manager.....she should be place in an insane asylum. We had a excellent manager, never to be seen again.



A. MAD SERVICE May 07, 2008

★☆☆☆☆

I own a company that was providing an HOA a service. Things were fine till they took over. We stopped getting paid. Upon further investigation, I found that they have a habit of doing that. What happens is, they take over the property and force all the

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other services out by not paying them. They tell the HOA that they do not know they service is getting worse, while all this the service company is working for free, if at all. Once the original service is out, they put in their people, which they end up getting money from. Not a good way to run a business, the people that get hurt are the service companies (because they do not get paid) and the home owners (they end up getting bad service either from the original service company because of non payment or the new company because most of them are in-experienced. . Note to HOA's YOU ARE BETTER OFF DOING IT YOURSELF...DO NOT HIRE THIS COMPANY!!!



MITZI

May 04, 2008

★★★☆☆

Diehl K A & Associates have been a nightmare to work with. We bought a townhouse, and we have a crack in the foundation. We have been writing letters since 2006 and they have not sent anyone over to assess the damage. Instead, they divert their attention and hire attorneys to police our association fees. They truly create expenses for others instead of handling the bigger problems that exist. To date I would like to report the ctack in the foundation has become longer and wider. Perhaps we will eventually get their attention whenever our townhouse caves inward and the neighbors are living on top of us.We own another condo and they do not manage that property and it runs smoothly. I will never buy another home tha they manage. Their turnover employee rate is extremely high.



PAT FRANCIS

Apr 05, 2008

★☆☆☆☆

I agree with the other lady. We bought a condo in a Centex property managed by KA Diehl and we had an excellent manager at the beginning but they changed us in January and now we never get an answer from anyone when we email or call. Even the people in the office have a different tone to their voice when they hear the name of our property. We have 2 maintenance men who try their best to keep the place up but the college students who reside here are destroying our investments and KA Diehl refuses to follow up on any complaints. I will never buy in another complex where they are the managers.



WANDA MANNING

Feb 06, 2008

★★★★★

Management company well versed in all aspects of property management. Excellent staff. Follows up and implements Board actions.Worked with several property management cos. in the Myrtle Beach area and this company is far superior to all others.



JENNIFER MCCANN

Dec 31, 2007

★☆☆☆☆

just bought a home where ka diehl are the management. upped our monthly dues $20.00 to 65.00 and we get absolutley nothing for it. When i call to speak to

someone there is no one there and you never get a call back. Do not move in if they are your management company

Diehl K A & Associates

powered by BirdEye

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ATTACHMENT "B"

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www.patrickandstathos.com

SAM G. STATHOS

DANIEL L. PATRICK
OF COUNSEL

Writer's e-mail: sgs@patrickandstathos.com

June 4, 2014

Darla Donovan, CMCA, AMS
Senior Community Manager
K.A. Diehl, AAMC
11822 Hwy 17 Bypass South
Murrells Inlet, SC 29576

Re: Myrtle Beach Resort Homeowners' Association, Inc. ("Master Association")

Dear Darla:

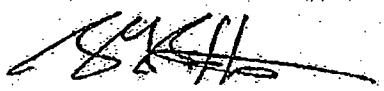
I am writing pursuant to your request that our firm address an issue on behalf of the Master Association regarding conflict of interest. Specifically, the issue is whether a conflict of interest exists for a director that sits on the board of the Master Association who is in a contractual relationship with a Master Association approved food and beverage and rental contractor, such as Allegiant Food & Beverage, LLC ("Food & Beverage") and Allegiant Property Management, LLC ("Property Management"), and must vote on issues that affect the subject contractors.

The governing document for the Master Association is the Declaration of Covenants, Conditions and Restrictions filed April 25, 1991 ("Declaration"). The Declaration does not provide express guidance as to conflict of interest issues, however, as a non-profit corporation the Master Association is subject to the applicable statute. Therefore, pursuant to the South Carolina Nonprofit Corporation Act, specifically S.C. Code § 33-31-831, a conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. If a director of the Master Association has a direct interest in either Food & Beverage or Property Management, then there is a conflict of interest. A direct interest may be deemed to be a contractual relationship with the companies before the Master Association that can result in the director receiving something of value. An indirect interest is one where a director has a material interest in the other entity or is a general partner in that entity, or a director, officer or trustee of the entity that is a party to the transaction.

In my opinion, if either Food and Beverage or Property Management matters are before the Master Association and a director has a contractual relationship with either company, then that director has a conflict of interest on such matters. In that event, the director's interest must be disclosed so that the remaining directors can address the matter at hand pursuant to the statute. In conclusion, a conflict of interest does not itself prevent the Master Association from addressing a matter since the statute provides a mechanism for a board to function and to authorize and approve decisions when a conflict of interest is presented.

If you require any further clarification on this matter please let me know.

Sincerely,



Sam G. Stathos

SGS/

cc: Myrtle Beach Resort Homeowners' Association, Inc.

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ATTACHMENT "C"

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CONTRACT ALLEGIANT

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

AGREEMENT

THIS AGREEMENT, made and entered into as of the 12th day of November, 2009, by and between THE MYRTLE BEACH RESORT HOMEOWNERS" ASSOCIATION, INC., a South Carolina corporation (hereinafter the "Association") and ALLEGIANT PROPERTY MANAGEMENT, LLC, a North Carolina limited liability company (hereinafter referred to as "Allegiant")doing business as Myrtle Beach Resort Vacations.

WITNESSETH

WHEREAS, the Association has determined it to be in the best interest of the homeowners at The Myrtle Beach Resort to enter into an Agreement that results in one rental agent whereby the Association will receive a royalty on all rental and sales activity conducted at the Resort and whereby Association will obtain ownership of Commercial Unit D within the Five Seasons Centre Council of Co-owners, and

WHEREAS, Allegiant has made certain promises and has committed to certain undertakings, as more particularly set out herein, as an inducement to the Association to enter into this Agreement, and,

WHEREAS, The Association and Allegiant respectively desire to enter into this Agreement which will be effective January 1, 2010,

NOW THEREFORE in consideration of Five Dollars ($5.00), and the mutual covenants given herein, the receipt and sufficiency of such consideration being hereby acknowledged, the parties agree to as follows:

SECTION A: Rental Management Agreement

1. Association agrees to facilitate solicitation by Allegiant of the homeowners at the Myrtle Beach Resort to enter into Rental Management Agreements ("RMAs") with Allegiant, provided Allegiant 's form of RMA is reasonable in light of the then current industry standards and the management fee expressed as a % of the Rental Revenue has been approved by the Association. Any changes to the types or amounts of Additional Charges from Exhibit "A" shall be approved by the Association prior to implementation.
2. The term "Gross Rental Revenue" is defined as the total of Rent, Departure Cleaning, Linen Service, Processing Fees, and Resort Fees.
3. The initial term of this Agreement shall be effective as of January 1, 2010 and shall continue in effect through December 31, 2014. The Association shall have the option to buyout the remainder of this

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Agreement from Allegiant for a sum of $150,000 and the terms stated in the Contract of Sale executed with Allegiant for Commercial Unit D in the Five Seasons Centre as well as the terms in paragraph 3 of this Agreement related to the Assignment of Rental Management Agreements, providing Association has given notice to Allegiant of its intent to exercise its buyout option, which must be exercised on or before August 31, 2012. In the event Association does not exercise its buyout, provided that Allegiant has complied with the terms of the lease, and provided that neither party has advised the other by August 31, 2014 that they do not wish to extend or renegotiate this Agreement, the term of this lease shall extend an additional five (5) years commencing January 1, 2015 and ending December 31, 2019. Subsequent terms of this agreement shall be in automatic renewals in five (5) year increments provided neither party has advised the other by August 31st of the final year of a term that they wish to terminate or renegotiate the Agreement. At any time prior to August 31st of the final year of any term of this Agreement the Association shall have the right to test the market place to determine the potential value of the Agreement at that time. However Allegiant shall have a right of first refusal for the Agreement unless Association has notified Allegiant by August 31st of that year that they wish to terminate the agreement. Upon termination of this Agreement, all incidental contracts, "800" telephone numbers, use of internet websites using the name Myrtle Beach Resort, except for the website using Myrtle-Beach-Resort, if and only if this Agreement is terminated prior to December 31, 2019, use of Association logos, related services including rental histories of Association RMA's, and licenses incidental to the rental program at the Myrtle Beach Resort shall be assigned by Allegiant to the Association or its designee. The disposition of the Rental Management Agreements (RMA's) shall be in accordance with paragraph 4. SECTION A of this Agreement. All other internet assets, as listed in Exhibit "B", brought to this Agreement from Allegiant shall return to Allegiant at any termination of this agreement.

4. Effective with the execution of this agreement and the payment of the monies due upon execution of this contract, the Association shall transfer, set over, and assign to Allegiant all existing RMA's (approximately 216) owned by the Association for administration by Allegiant. These RMA's, between the incumbent agent Myrtle Beach Vacation Rentals and Myrtle Beach Resort owners, are to be assigned to the Association or its agent effective January 1, 2010 in accordance with their present Agreement. This assignment shall include all rental reservations booked or in the process of being booked, for the calendar years of 2010 and beyond. Allegiant brings their own RMA's (Approximately 160) with them into this Agreement. If Allegiant is successful in increasing the total number of RMA's managed under this Agreement, the additional RMA's shall be assigned between the Association and Allegiant in proportion to the number actually brought into the Agreement on January 1, 2010. If the number decreases from the total number of RMA's as of January 1, 2010, any decrease shall be considered to have come from the number brought to the Agreement by Allegiant. Should this decrease occur, any

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additions of RMA's from that point shall be considered as Allegiant RMA's until such time as the original total has once again been met. At the end of the second term on December 31, 2019 all RMA's shall be considered to be Association RMA's at that time and thereafter. If there is a termination of the contract prior to December 31, 2019, the RMA's shall be separated according to the apportionment of the RMA's, as described above, at the time of the termination.

5. Association shall turn over to Allegiant the existing "800" telephone lines serving the Myrtle Beach Resort and responsibility for payment of these services effective 1/1/2010. Association shall grant to Allegiant an exclusive license to use any of its registered logos for the duration of the contract.

6. In consideration of the assignments and licenses above, Allegiant shall agree and pay to the Association in good and sufficient funds as follows:

   A. Upon the execution of the contract, a credit of Seventy-two Thousand Five Hundred Dollars ($72,500.00) shall be applied toward the Association's purchase of Commercial Unit D of the Five Seasons Centre from Allegiant. Allegiant also agrees to fund the cost of a new sign (design provided by Tyson Signs in 2008 and approved by the Association at its Annual Meeting in April 2008) to be placed at the entrance of the Myrtle Beach Resort by May 31, 2009.
   B. On the anniversary date of this contract in 2011, the sum of Seventy Four Thousand Six Hundred Seventy-five dollars ($74,675.00) in cash.
   C. By January 10, 2011 a sum equal to 2% of Gross Rental Revenues from January 1, 2010 through December 31, 2010 that are in excess of $3,625,000.
   D. On the anniversary date of this agreement in 2012, the sum of Seventy Six Thousand Nine Hundred Fifteen Dollars and Twenty-five cents ($76,915.25).
   E. By January 10, 2012 a sum equal to 2% of Gross Rental Revenues from January 1, 2011 through December 31, 2011 that are in excess of $3,733,750.00

   F. By January 10, 2013 a sum equal to 2% of Gross Rental Revenues from January 1, 2012 through December 31, 2012 that are in excess of $3,845,762.50

7. If the Association has not exercised its buyout option, Commencing February 10, 2013 and continuing on the 10th day of each succeeding month through the duration of this Agreement and any extension of this Agreement, Allegiant shall pay Association an amount equaling Two Percent (2%) percent of Gross Rental Revenues received for the preceding month. However, in no event shall the annual payment for

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2013 be less than Seventy-nine Thousand Two Hundred and Twenty-two Dollars and Seventy-one Cents ($79,222.71) "the minimum annual payment". In each successive year the minimum annual payment shall increase by 3.0 %. In any year the 2% of Gross Rental Revenue does not equal the minimum annual amount, then Allegiant will pay such deficit so that each annual payment shall equal "the minimum annual payment" as provided for herein and such deficit shall be paid by Allegiant to the Association no later than January 10 for the immediately preceding payment year.

8. Allegiant agrees to pay Association a ten (10%) percent late fee for payments received ten (10) or more days after their due date. This shall apply to any payments due under this Agreement.

9. In the event, during the term of this Agreement, there is a decrease in gross annual rental revenue when compared to previous "Agreement year", and where such decrease is caused by a qualifying force majeure (including fire, flood, weather related evacuation, war, riot, or insurrection) "the minimum annual payment" requirement provided for herein, shall be reduced for the Agreement year of such qualifying force majeure event as hereinafter provided for that year. A "qualifying force majeure event" shall occur when greater than fifteen (15%) percent of the rental units under contract with Allegiant are uninhabitable as a result of such a force majeure during the period from May 15 through September 15 ("prime season") of any given Agreement year. In the event of such a force majeure event, the minimum annual payment shall be reduced by a fraction of the minimum annual payment, which said fraction shall be determined as follows:

   A. The numerator shall be the total number of unit days that such qualifying units are uninhabitable, and the denominator shall be the total unit days under contract with Allegiant for the applicable "prime season". It is understood and agreed that such adjustment and minimum annual payment shall only apply if the percentage rent provided for herein is less than the minimum annual payment as adjusted herein and only to the extent that there is a decrease in gross annual rental revenue when compared to the previous year.

10. Commencing February 10, 2010 Allegiant shall also furnish the Association with a written statement, certified by Allegiant to be correct, showing the amount of gross rental revenue from the beginning of the current year to the end of the previous calendar month or any portion thereof.

Allegiant agrees to make such portions of their books and records available to the Association, or its designated representative, as may be necessary or desired (at the sole discretion of the Association) in respect to the percentage leases as set out herein. This will include, without limitation, accommodation tax records. If

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Allegiant shall not make payment of any money due hereunder or otherwise perform any of the terms hereof, and Allegiant fails to make such payment or remediate such performance within ten (10) days from mailing from the mailing of a written notice from the Association)or within a reasonable period of time if such cure cannot reasonably be implemented within a ten (10) day period), or if Allegiant shall be adjudicated bankrupt or make assignment for the benefit of creditors or if the assets of Allegiant shall be sold under execution or other legal process, such event shall constitute an event of default under this Section A. Upon occurrence of an uncured fault, the Association may, at its option, terminate this agreement and/or sue Allegiant for damages. If either party shall default under the terms of this Section A, such defaulting party agrees to pay all reasonable attorney fees and costs incurred by the non-defaulting party and enforcing the obligations of the defaulting party under this Section A: Rental Management Agreement.

SECTION B: Lease of Rental Management And Resale Space

The Association will lease to the Allegiant the rental management, sales, and Homeowners' Association space now utilized in the office building at 5905 Highway 17 South, Horry County. This space is estimated at 3,400 square feet.

1. The term of this leasehold shall be Five (5) years commencing January 1, 2010 and terminating at midnight on December 31, 2014. Allegiant shall have the option to extend this leasehold an additional five (5) years terminating December 31, 2019 s provided Allegiant notify Association of its intent to exercise such option by August 31, 2014. In the event Association exercises it buyout option with Allegiant related to rental management services, it shall also constitute notice to Allegiant that this leasehold shall also terminate as of December 31, 2012. Subsequent terms of this agreement shall be in automatic renewals in five (5) year increments provided neither party has advised the other by August 31st of the final year of a term that they wish to terminate or renegotiate the Agreement.
2. The rental fee for this space shall be Fifty One Thousand Dollars ($51,000.00) annually paid in monthly installments due in advance on the 1st of each month. This rental fee shall be increased by three percent (3.0 %) at the beginning of each subsequent calendar year under this Agreement.
3. Allegiant agrees to pay Association a ten (10%) percent late fee for payments received ten (10) or more days after their due date. This shall apply to any payments due under this Agreement.
4. Allegiant shall arrange and pay for the use of utilities furnished to the leased premises during the term of this Lease Agreement, including but not limited to, water, electricity, gas, sewer, and telephone. Allegiant agrees to pay one-third of the monthly maintenance fees for the Resort telephone system ($216.67). Allegiant agrees to manage and pay for the VCTV system that inserts a video stream for viewing on Channel 3, the Myrtle Beach Resort Channel of the TimeWarner cable system.

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5. Maintenance of the interior leased space including all plumbing, heating, electrical and air conditioning shall be the responsibility of Allegiant. Maintenance and the maintenance of the exterior shall be the responsibility of the Association. Allegiant shall, at its own expense, keep and maintain the premises in good order and repair during the term of this Lease Agreement, and shall surrender same to the Association at the expiration or earlier termination of this Lease Agreement in as good condition as when received, normal wear and tear excepted.
6. All repairs, replacements, and renewals shall be at least equal in quality, materials, and workmanship to that which originally existed on the leased property. Allegiant shall indemnify the Association against all costs, expenses, liabilities, losses, damages, suits, claims, and demands, including reasonable attorney's fees, because of the failure of Allegiant to comply with the foregoing. Allegiant shall not, in any event, cause or permit any waste, damage, or injury to the leased property.
7. The Association shall be under no liability for damages to Allegiant due to the discontinuance of heat, air conditioning, electricity, water, or of any other service provided by or through the Association, or of any other services provided by or through the Association, or for loss of profit whether caused by the foregoing, rain, water, force majeure, or otherwise.
8. The Association reserves the right to enter on the premises at reasonable times to inspect same.
9. Allegiant agrees to pay reasonable cost of garbage collection and disposal as provided by the Association. Provided, however, Allegiant is solely responsible for collecting and transporting garbage from office area to the dumpster to be provided by the Association, the location of which is to be designated by the Association.
10. All ad valorem taxes, assessments, liens or charges on the land or improvements now located thereon, and all obligations secured by mortgage or other liens that may be against or levied upon the demised premises shall be properly paid by the Association when due. All taxes on the personal property owned or leased by Allegiant, as well as all business licenses required for the operation of its business, shall be paid by Allegiant.

11. During the entire term of the lease agreement, Allegiant shall, at the expense of Allegiant, secure and maintain such personal property insurance as it may determine upon all personal property owned or leased by Allegiant and located upon the leased premises, at the expense of Allegiant. Allegiant shall, at the expense of Allegiant, secure and maintain during the entire term of this Lease, general liability insurance policy (or policies) upon the leased premises in an amount that totals no less than Two Million and 00/100 Dollars ($2,000,000.00) for each occurrence and a Five Million and 00/100 Dollars Umbrella policy. Said general liability insurance policy (or policies) shall be procured with an insurance company licensed to do business in the State of South Carolina and shall be procured by Allegiant in,

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such manner as to include the Association and all individual horizontal property regimes as additional insured. Allegiant shall promptly furnish copies of said policies of insurance to the Association and shall direct and instruct the insuring company to mail duplicate notices of premiums due from time to time to said policies of insurance to the Association at the address designated by the Association.

12. Allegiant, at its sole expense, shall comply with all laws, orders, and regulations of federal, state and municipal authorities, and with any direction of any public officer, pursuant to the law, which impose any duty upon the Association or Allegiant with respect to the leased property. Allegiant, at its sole expense, shall obtain all licenses or permits which may be required by the conduct of its business within the terms of this Lease Agreement, or for the making of repairs, alterations, improvements, or additions, if permitted by the Association. Allegiant shall comply with the requirements of all polices of public liability, fire, and all other types of insurance at any time in force with respect to the buildings and other improvements on the leased property.

13. Allegiant shall, on the last day of the last term, or upon the sooner termination of the term, peaceably and quietly surrender the leased property to the Association, in as good condition and repair as at the commencement of the term, including replacements, additions, or improvements constructed, erected, added, or placed thereon by Allegiant with the Association's consent, with the natural wear and tear thereof excepted.

14. If the premises are wholly or partially destroyed by fire or other casualty, through no fault of Allegiant, rental shall abate in proportion to the loss of use. The Association shall, to the extent of available insurance proceeds, promptly restore the structure to substantially the same condition as existed before damage or destruction, whereupon full rental shall resume.

15. If the whole of the demised premises, or such portion thereof as will make the leased property unsuitable for the purposes herein listed, is condemned for any public use or purpose by any legally constituted authority, then in either of such events, this Lease shall cease from the time when possession is taken by such public authority, and rental shall be accounted for between the Association and Allegiant as of the date of the surrender of possession. Such termination shall be without prejudice to the rights of either the Association or Allegiant to recover compensation from the condemning authority for any loss or damage caused by such condemnation. Neither the Association nor Allegiant shall have any rights in or to any award made to the other by the condemning authority.

16. If Allegiant shall be in default in the payment of any rent due hereunder or in the performance of any conditions hereof, and shall it fail to correct and rectify any such default within ten (10) days from the mailing of a written notice thereof from the Association, or if Allegiant shall be adjudicated bankrupt or make any assignment for the benefit of creditors, or; if the interest of Allegiant therein shall be sold

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under execution or other legal process, the Association may enter into said premises and repossess the same as if this Lease had not been made and shall thereupon have the right to cure this Lease, without prejudice, however, to the right of entry to the Association to recover all rent due to the time of such entry. If Allegiant shall fail to fulfill any agreement stated in this Lease, or fail to pay any portion of the rent, or vacate the leased premises prior to the expiration of the lease term, the Association may terminate this lease, and all rents due and which would become due during the remainder of the lease term, shall immediately become due and payable, provided, however, Allegiant shall have a ten (10) day right to cure any such default. If either party should default under the terms of this agreement, such defaulting party agrees to pay all reasonable attorney's fees and court costs incurred by the non-defaulting party in enforcing the obligations of the defaulting party under this Lease Agreement

17. The Association shall be responsible for real property taxes and general fire and extended casualty insurance on the building. Allegiant shall be responsible for all personal property, business licenses, income or other taxes, that relate to the conduct of its business on the demised premises. Allegiant shall also be responsible for insuring its personal property. Each party shall maintain adequate liability insurance, worker's compensation insurance and other insurance, in reasonable and adequate amounts, and either party may require the other party to produce evidence of coverage upon reasonable request.
18. No permanent improvements, alterations, or additions to the premises shall be made by Allegiant without the express written consent of the Association. All improvements and additions made and permanently attached to the premises, including without limitation, any partitions, carpets, lighting fixtures, doors, hardware, shelves, counters, cabinets, and all other permanent improvements and fixtures, shall remain with the premises, and shall be surrendered to the Association at the expiration or earlier termination of this Lease Agreement.

SECTION C: Linen Storage, Maid Service, Commercial Laundry Area Rental

1. The Association controls and hereby leases to Allegiant certain linen storage and maid service areas shown on Exhibit "B" as well as a commercial laundry at The Myrtle Beach Resort Ocean Front Spa for the sum of One Thousand Fifty Dollars ($1,050.00) per month, payable monthly in advance with the first payment being due on or before January 1, 2010. (Allocated as follows: $675.00 for commercial laundry and $375.00 for 8 linen storage and maid service areas, 5 in the Renaissance Tower, 2 in the Ocean Front Spa and 1 in the Horizontal Property Regime). This amount shall have an annual three percent (3.0 %) increase on January 1st of every year for the duration of this Agreement and any extensions. If at any time during a term of this agreement a Regime increases the rental rates of its storage areas to the Association, Allegiant the payment under this section shall immediately be amended

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to include that increase in rental rates.

2. The term of this leasehold shall be Five (5) years commencing January 1, 2010, and terminating at midnight on December 31, 2014. Allegiant shall have the option to extend this leasehold an additional five (5) years terminating December 31, 2019 provided Allegiant notify Association of its intent to exercise such option by August 31, 2014. In the event Association exercises it buyout option with Allegiant related to rental management services it shall also constitute notice to Allegiant that this leasehold shall also terminate as of December 31, 2012. Subsequent terms of this agreement shall be in automatic renewals in five (5) year increments provided neither party has advised the other by August 31st of the final year of a term that they wish to terminate or renegotiate the Agreement.

SECTION D: Miscellaneous

1. The leases herein shall be subject and subordinate at all times to the lien of existing mortgages and of mortgages which hereafter may be made a lien of the leased property by Association. Although no instrument or act on the part of Allegiant shall be necessary to effectuate such subordination, Allegiant will, nevertheless, execute and deliver such further instruments subordination this lien to the lien of any mortgages as may be desired by the mortgagee.
2. Allegiant covenants not to compete (outside the scope of this Agreement) in any way, shape or form in respect to rentals at the Myrtle Beach Resort during the term of this Lease Agreement, and for a period of one and one half (11/2) years beyond such term, unless this agreement is terminated by the Association prior to December 31, 2019.
3. Allegiant agrees to have each of its employees who handle money in any respect covered by employee dishonesty coverage in an amount no less than One Hundred Thousand and 00/100 Dollars ($100,000.00). Further, any employee of Allegiant who is a signatory on any of Allegiant's bank accounts shall be bonded in an amount no less than One Million and 00/100 Dollars ($1,000,000.00).
4. Employees, guests and invitees of Allegiant shall abide by all parking regulations and traffic rules established by the Association.
5. Allegiant shall undertake no on-site advertising with respect to its use of the office space without the prior written consent of the Association, which consent shall not be unreasonably withheld.
6. Allegiant shall split with the Association, on a 50/50 basis, the cost of the American Hospitality Association's summer program to provide children's activities at the Resort and the cost to provide the Saturday evening reception on the Annual Homeowners' Meetings weekend each year.
7. In the event the Association must proceed with legal action against the current vendor, Myrtle Beach Vacation Rentals (MBVR), in order to enforce the non-compete clause in the existing Agreement

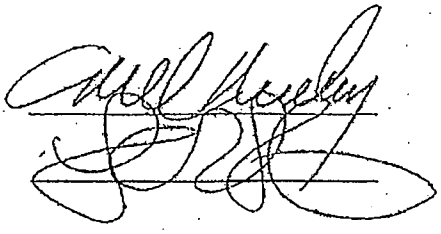
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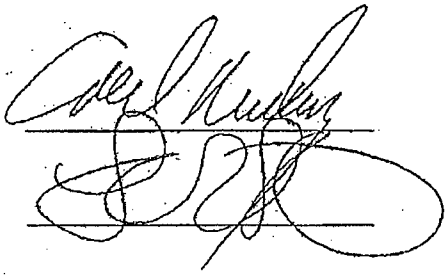
between Association and MBVR, Allegiant agrees to indemnify the Association for all expenses Associated with that action.

8. In the event the Association must proceed with legal action against MBVR in order to enforce the assignment of the current RMA's to the Association or its Agent, Allegiant agrees to reimburse Association for 50% of the legal fees required for that legal action.

IN WITNESS WHEREOF, the Association and Allegiant subscribed their names and affixed their seals the day and year first above written.

WITNESSES:





ASSOCIATION:

MYRTLE BEACH RESORT
HOMEOWNERS' ASSOCIATION, INC.

By: _____
Stanley Jordan, President

ALLEGIANT PROPERTY
MANAGEMENT, LLC

By: _____
Robert Jones, Managing Member

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Exhibit "A"

Additional Charges

Departure Cleaning: Units will be cleaned by our Housekeeping Department after departure. Departure cleaning charges are as follows:
1 Bedroom Units - $50
2 Bedroom Units - $60
3 Bedroom Units - $70

Linen Service: Condos are provided with linen and towels, etc. for $50 per stay (3 BRs are $70).

Processing Fee: $30.00

Damage Waiver: $6 per Day
Click here for Details

Destination Fee: $1/Night

Resort Fee: 4% of Rent Only

Optional Features/Charges
Daily Maid Service is available for $19.95/night.
Travel Insurance (Click here for details)

Myrtle Beach Resort Home Page

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Exhibit "B"

ASSETS BELONGING TO ALLEGIANT

Toll-Free Numbers

800-845-0629
888-627-3767
866-484-5175
866-863-0762
888-826-4018
888-826-3981

Domains

charmingcancun.com
discovermyrtlebeachrestaurants.com
exploremiamibeach.com
funbeachvacations.com
hawaiianstays.com
mb4fun.com
mbforfun.com
mbfourfun.com
mbr4fun.com
mbresortcondos.com
mbresortvacations.com
mbrho.com
mbseniors.com
myrtlebeachattractionsonline.com
myrtlebeachbikeweeklive.com
myrtlebeachentertainmentlive.com
myrtlebeachgolfinsider.com
myrtlebeachhotdeals.com
myrtlebeach-living.com
myrtlebeachrealestatenow.com
myrtle-beach-resort.com
myrtlebeachresortcondos.com
myrtlebeachresorthomeowners.com
myrtlebeachresortrentals.com
myrtlebeachresortsales.com
myrtlebeachresortvacations.mobi
myrtlebeachresortvacationservices.com
myrtlebeachvacationcondos.com
playmb.com
resortmb.com
resortvacationservices.com
virginiabeachescapes.com

1callmaint.com - Expires on 10-Sep-2010
onecallmaint.com - Expires on 10-Sep-2010

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ATTACHMENT "D"

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K.A. DIEHL

Myrtle Beach Resort Homeowners Assoc., Inc.
Operating Income Statement
08/31/2014

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c/o K.A. Diehl
P.O. Box 15159, 5905 S. Kings
Myrtle Beach SC 29587

K.A. Diehl
Community Management
Specialists

	Description	Current Period Actual	Current Period Budget	Variance	Year To Date Actual	Year To Date Budget	Variance	Yearly Budget
	INCOME							
4001	Regular Assessments	$ 96,030.80	$ 96,035	$ (4.20)	$ 768,246.40	$ 768,280	$ (33.60)	$ 1,152,423
4002	Reserve Funding	(12,137.00)	(12,137)	0.00	(97,096.00)	(97,096)	0.00	(145,644)
4040	Sales Commissions	612.31	417	195.31	5,900.93	3,336	2,564.93	5,000
4041	Rental/Lease Income	0.00	83	(83.00)	214.75	664	(449.25)	1,000
4042	MBRV Sales Office Rent	4,783.41	4,784	(0.59)	38,267.25	38,272	(4.75)	57,410
4043	MBRV 2% Rental Commission	13,621.72	14,688	(1,066.28)	65,132.70	62,016	3,116.70	81,600
4044	MBRV Food & Beverage Lease	11,880.36	11,880	0.36	95,042.88	95,040	2.88	106,923
4052	Vending Income	0.00	83	(83.00)	956.64	664	292.64	1,000
4058	Gate Income	14,532.50	9,992	4,540.50	98,295.00	79,936	18,359.00	119,906
4060	Storage Rm Lease Income	881.79	1,181	(299.21)	8,104.29	9,448	(1,343.71)	14,177
4064	Utility Reimbursement	0.00	0	0.00	3,650.00	0	3,650.00	0
4083	Water and Sewer Reimbursement	7,523.47	0	7,523.47	7,523.47	0	7,523.47	0
4120	Interest Income-Operating	0.00	0	0.00	1.78	0	1.78	0
4149	Common Element Inc	14,532.50	9,992	4,540.50	98,295.00	79,936	18,359.00	119,906
	Total Income	$ 152,261.86	$ 136,998	$ 15,263.86	$ 1,092,535.09	$ 1,040,496	$ 52,039.09	$ 1,513,701
	EXPENSES							
	General & Administrative							
5000	General & Administrative	$ 0.00	$ 1,025	$ 1,025.00	$ 563.97	$ 8,200	$ 7,636.03	$ 12,300
5001	Office Supplies & Expenses	104.28	417	312.72	2,461.89	3,336	874.11	5,000
5002	Printing Expense	1,116.74	833	(283.74)	11,652.33	6,664	(4,988.33)	10,000
5003	Postage	53.05	267	213.95	2,208.72	2,136	(72.72)	3,200
5009	Board Meeting Expense	0.00	678	678.00	3,887.56	5,424	1,536.44	8,133
5015	Legal Services	0.00	83	83.00	1,900.00	664	(1,236.00)	1,000
5017	Management Services	8,025.00	8,145	120.00	64,200.00	65,160	960.00	97,734
5020	Consulting Services Other	1,050.00	1,050	0.00	8,400.00	8,400	0.00	12,595
5021	Audit/Tax Preparation Services	0.00	0	0.00	2,850.00	2,850	0.00	2,850
5023	Insurance Expense	3,664.63	4,177	512.37	29,884.85	33,416	3,531.15	50,119
5034	Licenses & Permits	0.00	0	0.00	425.00	1,500	1,075.00	1,500
5039	Property Taxes	0.00	0	0.00	457.47	0	(457.47)	50,500
5049	Operating Contingency	0.00	417	417.00	0.00	3,336	3,336.00	5,000
	General & Administrative Total	$ 14,013.70	$ 17,092	$ 3,078.30	$ 128,891.79	$ 141,086	$ 12,194.21	$ 259,931
	Repairs & Maintenance							
6000	General Maintenance	$ 674.16	$ 2,917	$ 2,242.84	$ 19,758.25	$ 23,336	$ 3,577.75	$ 35,000
6004	Lazy River Staff	6,208.59	2,359	(3,849.59)	26,727.03	18,872	(7,855.03)	28,305
6006	Mileage Reimbursement	0.00	17	17.00	268.80	136	(132.80)	200
6021	Golf Cart Expense	1,119.43	875	(244.43)	7,069.51	7,000	(69.51)	10,500
6030	Fire Alarm & Sprinkler Maint	163.49	203	39.51	1,361.88	1,624	262.12	2,433
6031	HVAC System Maint	41.42	250	208.58	1,650.19	2,000	349.81	3,000
6034	TV Repair & Replacement	0.00	21	21.00	0.00	168	168.00	250
6036	Interior Pest Control	212.75	233	20.25	1,664.80	1,864	199.20	2,800
6038	Termite Treatment	310.00	41	(269.00)	585.00	328	(257.00)	490
6039	Nuisance Control	2,491.67	192	(2,299.67)	3,833.36	1,536	(2,297.36)	2,300
6041	Janitorial Supplies	879.29	542	(337.29)	4,148.95	4,336	187.05	6,500
6080	Grounds Staff	2,083.53	4,690	2,606.47	27,539.55	37,520	9,980.45	56,280
6099	Golf Cart Repair MBR	150.95	83	(67.95)	597.44	664	66.56	1,000
6151	Contract Landscape Maintenance	1,875.00	1,875	0.00	15,000.00	15,000	0.00	22,500
6152	Landscape Maint	1,166.81	1,679	512.19	22,431.56	13,432	(8,999.56)	20,145
6159	Lake Maintenance	420.00	458	38.00	3,929.57	3,664	(265.57)	5,500
6185	Pool/Spa Supplies	2,384.99	2,250	(134.99)	16,505.28	18,000	1,494.72	27,000
6186	Pool/Spa Maintenance	284.99	1,250	965.01	8,061.10	10,000	1,938.90	15,000
6241	Watchmen Services	41,101.09	39,867	(1,234.09)	315,195.70	318,936	3,740.30	478,400
6243	Watchman Uniforms	0.00	125	125.00	1,121.88	1,000	(121.88)	1,500
6244	Watchman Supplies	1,431.29	1,042	(389.29)	6,901.43	8,336	1,434.57	12,500
	Repairs & Maintenance Total	$ 62,999.45	$ 60,969	$ (2,030.45)	$ 484,351.28	$ 487,752	$ 3,400.72	$ 731,603

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K.A. DIEHL

0137 Myrtle Beach Resort Homeowners Assoc., Inc.
Operating Income Statement
09/30/2014

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c/o K.A. Diehl
P.O. Box 15159, 5905 S. Kings
Myrtle Beach SC 29587

K.A. Diehl
Community Management
Specialists

	Description	Current Period Actual	Current Period Budget	Variance	Year To Date Actual	Year To Date Budget	Variance	Yearly Budget
	INCOME							
4001	Regular Assessments	$ 96,030.80	$ 96,035	$ (4.20)	$ 864,277.20	$ 864,315	$ (37.80)	$ 1,152,423
4002	Reserve Funding	(12,137.00)	(12,137)	0.00	(109,233.00)	(109,233)	0.00	(145,644)
4040	Sales Commissions	471.00	417	54.00	6,371.93	3,753	2,618.93	5,000
4041	Rental/Lease Income	(214.75)	83	(297.75)	0.00	747	(747.00)	1,000
4042	MBRV Sales Office Rent	4,783.41	4,784	(0.59)	43,050.66	43,056	(5.34)	57,410
4043	MBRV 2% Rental Commission	7,002.15	13,056	(6,053.85)	72,134.85	75,072	(2,937.15)	81,600
4044	MBRV Food & Beverage Lease	11,880.36	11,883	(2.64)	106,923.24	106,923	0.24	106,923
4052	Vending Income	214.75	83	131.75	1,171.39	747	424.39	1,000
4058	Gate Income	20,607.50	9,992	10,615.50	118,902.50	89,928	28,974.50	119,906
4060	Storage Rm Lease Income	881.79	1,181	(299.21)	8,986.08	10,629	(1,642.92)	14,177
4064	Utility Reimbursement	4,115.37	0	4,115.37	7,765.37	0	7,765.37	0
4083	Water and Sewer Reimbursement	4,382.77	0	4,382.77	11,906.24	0	11,906.24	0
4120	Interest Income-Operating	0.00	0	0.00	1.78	0	1.78	0
4149	Common Element Inc	20,607.50	9,992	10,615.50	118,902.50	89,928	28,974.50	119,906
	Total Income	$ 158,625.65	$ 135,369	$ 23,256.65	$ 1,251,160.74	$ 1,175,865	$ 75,295.74	$ 1,513,701
	EXPENSES							
	General & Administrative							
5000	General & Administrative	$ 0.00	$ 1,025	$ 1,025.00	$ 563.97	$ 9,225	$ 8,661.03	$ 12,300
5001	Office Supplies & Expenses	247.19	417	169.81	2,709.08	3,753	1,043.92	5,000
5002	Printing Expense	1,232.54	833	(399.54)	12,884.87	7,497	(5,387.87)	10,000
5003	Postage	160.31	267	106.69	2,369.03	2,403	33.97	3,200
5009	Board Meeting Expense	581.05	678	96.95	4,468.61	6,102	1,633.39	8,133
5015	Legal Services	0.00	83	83.00	1,900.00	747	(1,153.00)	1,000
5017	Management Services	8,025.00	8,145	120.00	72,225.00	73,305	1,080.00	97,734
5020	Consulting Services Other	1,050.00	1,050	0.00	9,450.00	9,450	0.00	12,595
5021	Audit/Tax Preparation Services	0.00	0	0.00	2,850.00	2,850	0.00	2,850
5023	Insurance Expense	3,664.63	4,177	512.37	33,549.48	37,593	4,043.52	50,119
5034	Licenses & Permits	13.01	0	(13.01)	438.01	1,500	1,061.99	1,500
5039	Property Taxes	(2,472.01)	0	2,472.01	(2,014.54)	0	2,014.54	50,500
5049	Operating Contingency	0.00	417	417.00	0.00	3,753	3,753.00	5,000
	General & Administrative Total	$ 12,501.72	$ 17,092	$ 4,590.28	$ 141,393.51	$ 158,178	$ 16,784.49	$ 259,931
	Repairs & Maintenance							
6000	General Maintenance	$ 1,952.76	$ 2,917	$ 964.24	$ 21,711.01	$ 26,253	$ 4,541.99	$ 35,000
6004	Lazy River Staff	3,139.51	2,359	(780.51)	29,866.54	21,231	(8,635.54)	28,305
6006	Mileage Reimbursement	0.00	17	17.00	268.80	153	(115.80)	200
6021	Golf Cart Expense	1,119.43	875	(244.43)	8,188.94	7,875	(313.94)	10,500
6030	Fire Alarm & Sprinkler Maint	163.50	203	39.50	1,525.38	1,827	301.62	2,433
6031	HVAC System Maint	(780.41)	250	1,030.41	869.78	2,250	1,380.22	3,000
6034	TV Repair & Replacement	0.00	21	21.00	0.00	189	189.00	250
6036	Interior Pest Control	212.75	233	20.25	1,877.55	2,097	219.45	2,800
6038	Termite Treatment	0.00	41	41.00	585.00	369	(216.00)	490
6039	Nuisance Control	(2,108.33)	192	2,300.33	1,725.03	1,728	2.97	2,300
6041	Janitorial Supplies	518.96	542	23.04	4,667.91	4,878	210.09	6,500
6080	Grounds Staff	3,856.07	4,690	833.93	31,395.62	42,210	10,814.38	56,280
6099	Golf Cart Repair MBR	1,958.39	83	(1,875.39)	2,555.83	747	(1,808.83)	1,000
6151	Contract Landscape Maintenance	1,875.00	1,875	0.00	16,875.00	16,875	0.00	22,500
6152	Landscape Maint	406.59	1,679	1,272.41	22,838.15	15,111	(7,727.15)	20,145
6159	Lake Maintenance	556.85	458	(98.85)	4,486.42	4,122	(364.42)	5,500
6185	Pool/Spa Supplies	2,059.04	2,250	190.96	18,564.32	20,250	1,685.68	27,000
6186	Pool/Spa Maintenance	1,781.64	1,250	(531.64)	9,842.74	11,250	1,407.26	15,000
6241	Watchmen Services	40,061.93	39,867	(194.93)	355,257.63	358,803	3,545.37	478,400
6243	Watchman Uniforms	0.00	125	125.00	1,121.88	1,125	3.12	1,500
6244	Watchman Supplies	173.11	1,042	868.89	7,074.54	9,378	2,303.46	12,500
	Repairs & Maintenance Total	$ 56,946.79	$ 60,969	$ 4,022.21	$ 541,298.07	$ 548,721	$ 7,422.93	$ 731,603

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K.A. DIEHL

0157 Myrtle Beach Resort Homeowners Assoc, Inc
Operating Income Statement
10/31/2014

c/o K.A. Diehl
P.O. Box 15159, 5905 S. Kings
Myrtle Beach SC 29587

K.A. Diehl
Community Management
Specialists

	Description	Current Period Actual	Budget	Variance	Year-To-Date Actual	Budget	Variance	Yearly Budget
	INCOME							
4001	Regular Assessments	$ 96,030.80	$ 96,035	$ (4.20)	$ 960,308.00	$ 960,350	$ (42.00)	$ 1,152,423
4002	Reserve Funding	(12,137.00)	(12,137)	0.00	(121,370.00)	(121,370)	0.00	(145,644)
4040	Sales Commissions	978.98	417	561.98	7,350.91	4,170	3,180.91	5,000
4041	Rental/Lease Income	0.00	83	(83.00)	0.00	830	(830.00)	1,000
4042	MBRV Sales Office Rent	4,783.41	4,784	(0.59)	47,834.07	47,840	(5.93)	57,410
4043	MBRV 2% Rental Commission	3,361.37	3,264	97.37	75,498.22	78,336	(2,839.78)	81,600
4044	MBRV Food & Beverage Lease	0.00	0	0.00	106,923.24	106,923	0.24	106,923
4052	Vending Income	0.00	83	(83.00)	1,171.39	830	341.39	1,000
4058	Gate Income	14,190.00	9,992	4,198.00	133,092.50	99,920	33,172.50	119,906
4060	Storage Rm Lease Income	131.79	1,181	(1,049.21)	9,117.87	11,810	(2,692.13)	14,177
4064	Utility Reimbursement	0.00	0	0.00	7,765.37	0	7,765.37	0
4083	Water and Sewer Reimbursement	3,430.35	0	3,430.35	15,336.59	0	15,336.59	0
4120	Interest Income-Operating	0.00	0	0.00	1.78	0	1.78	0
4149	Common Element Inc	14,190.00	9,992	4,198.00	133,092.50	99,920	33,172.50	119,906
4199	Miscellaneous Income	5.43	0	5.43	5.43	0	5.43	0
	Total Income	$ 124,965.13	$ 113,694	$ 11,271.13	$ 1,376,125.87	$ 1,289,559	$ 86,566.87	$ 1,513,701
	EXPENSES							
	General & Administrative							
5000	General & Administrative	$ 0.00	$ 1,025	$ 1,025.00	$ 563.97	$ 10,250	$ 9,686.03	$ 12,300
5001	Office Supplies & Expenses	282.44	417	134.56	2,991.52	4,170	1,178.48	5,000
5002	Printing Expense	627.69	833	205.31	13,512.56	8,330	(5,182.56)	10,000
5003	Postage	58.90	267	208.10	2,427.93	2,670	242.07	3,200
5009	Board Meeting Expense	280.06	678	397.94	4,748.67	6,780	2,031.33	8,133
5015	Legal Services	0.00	83	83.00	1,900.00	830	(1,070.00)	1,000
5017	Management Services	8,025.00	8,145	120.00	80,250.00	81,450	1,200.00	97,734
5020	Consulting Services Other	1,050.00	1,050	0.00	10,500.00	10,500	0.00	12,595
5021	Audit/Tax Preparation Services	0.00	0	0.00	2,850.00	2,850	0.00	2,850
5023	Insurance Expense	3,664.83	4,177	512.37	37,214.11	41,770	4,555.89	50,119
5034	Licenses & Permits	0.00	0	0.00	438.01	1,500	1,061.99	1,500
5039	Property Taxes	0.00	0	0.00	(2,014.54)	0	2,014.54	50,500
5049	Operating Contingency	0.00	417	417.00	0.00	4,170	4,170.00	5,000
	General & Administrative Total	$ 13,988.72	$ 17,092	$ 3,103.28	$ 155,382.23	$ 175,270	$ 19,887.77	$ 259,931
	Repairs & Maintenance							
6000	General Maintenance	$ 3,572.52	$ 2,917	$ (655.52)	$ 25,283.53	$ 29,170	$ 3,886.47	$ 35,000
6004	Lazy River Staff	684.50	2,359	1,674.50	30,551.04	23,590	(6,961.04)	28,305
6006	Mileage Reimbursement	0.00	17	17.00	268.80	170	(98.80)	200
6021	Golf Cart Expense	1,119.43	875	(244.43)	9,308.37	8,750	(558.37)	10,500
6030	Fire Alarm & Sprinkler Maint	593.50	203	(390.50)	2,118.88	2,030	(88.88)	2,433
6031	HVAC System Maint	41.42	250	208.58	911.20	2,500	1,588.80	3,000
6034	TV Repair & Replacement	0.00	21	21.00	0.00	210	210.00	250
6036	Interior Pest Control	212.75	233	20.25	2,090.30	2,330	239.70	2,800
6038	Termite Treatment	0.00	41	41.00	585.00	410	(175.00)	490
6039	Nuisance Control	191.67	192	0.33	1,916.70	1,920	3.30	2,300
6041	Janitorial Supplies	365.17	542	176.83	5,033.08	5,420	386.92	6,500
6080	Grounds Staff	4,407.81	4,690	282.19	35,803.43	46,900	11,096.57	56,280
6099	Golf Cart Repair MBR	853.29	83	(770.29)	3,409.12	830	(2,579.12)	1,000
6151	Contract Landscape Maintenance	1,875.00	1,875	0.00	18,750.00	18,750	0.00	22,500
6152	Landscape Maint	360.57	1,679	1,318.43	23,198.72	16,790	(6,408.72)	20,145
6159	Lake Maintenance	420.00	458	38.00	4,906.42	4,580	(326.42)	5,500
6185	Pool/Spa Supplies	1,392.85	2,250	857.15	19,957.17	22,500	2,542.83	27,000
6186	Pool/Spa Maintenance	224.70	1,250	1,025.30	10,067.44	12,500	2,432.56	15,000
6241	Watchmen Services	36,706.62	39,867	3,160.38	391,964.25	398,670	6,705.75	478,400
6243	Watchman Uniforms	0.00	125	125.00	1,121.88	1,250	128.12	1,500
6244	Watchman Supplies	547.30	1,042	494.70	7,621.84	10,420	2,798.16	12,500
	Repairs & Maintenance Total	$ 53,569.10	$ 60,969	$ 7,399.90	$ 594,867.17	$ 609,690	$ 14,822.83	$ 731,603

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K.A. DIEHL

0157 Myrtle Beach Resort Homeowners Assoc, Inc
Operating Income Statement
11/30/2014

12/10/2014 5:38 PM Page: 1

c/o K.A. Diehl
P.O. Box 15159, 5905 S. Kings
Myrtle Beach SC 29587

K.A. Diehl
Community Management
Specialists

Inc	Description	Current Period Actual	Budget	Variance	Year To Date Actual	Budget	Variance	Yearly Budget
	INCOME							
4001	Regular Assessments	$ 96,030.80	$ 96,035	$ (4.20)	$ 1,056,338.80	$ 1,056,385	$ (46.20)	$ 1,152,423
4002	Reserve Funding	(12,137.00)	(12,137)	0.00	(133,507.00)	(133,507)	0.00	(145,644)
4040	Sales Commissions	189.00	417	(228.00)	7,539.91	4,587	2,952.91	5,000
4041	Rental/Lease Income	0.00	83	(83.00)	0.00	913	(913.00)	1,000
4042	MBRV Sales Office Rent	4,783.41	4,784	(0.59)	52,617.48	52,624	(6.52)	57,410
4043	MBRV 2% Rental Commission	1,819.56	1,632	187.56	77,315.78	79,968	(2,652.22)	81,600
4044	MBRV Food & Beverage Lease	0.00	0	0.00	106,923.24	106,923	0.24	106,923
4052	Vending Income	0.00	83	(83.00)	1,171.39	913	258.39	1,000
4058	Gate Income	6,377.50	9,992	(3,614.50)	139,470.00	109,912	29,558.00	119,906
4060	Storage Rm Lease Income	806.79	1,181	(374.21)	9,924.66	12,991	(3,066.34)	14,177
4063	Trash Removal Reimbursement	3,376.00	0	3,376.00	3,376.00	0	3,376.00	0
4064	Utility Reimbursement	6,161.92	0	6,161.92	13,927.29	0	13,927.29	0
4083	Water and Sewer Reimbursement	763.00	0	763.00	16,099.59	0	16,099.59	0
4120	Interest Income-Operating	0.00	0	0.00	1.78	0	1.78	0
4149	Common Element Inc	6,377.50	9,992	(3,614.50)	139,470.00	109,912	29,558.00	119,906
4199	Miscellaneous Income	0.00	0	0.00	5.43	0	5.43	0
	Total Income	$ 114,548.48	$ 112,062	$ 2,486.48	$ 1,490,674.35	$ 1,401,621	$ 89,053.35	$ 1,513,701
	EXPENSES							
	General & Administrative							
5000	General & Administrative	$ 31.85	$ 1,025	$ 993.15	$ 595.82	$ 11,275	$ 10,679.18	$ 12,300
5001	Office Supplies & Expenses	110.14	417	306.86	3,101.66	4,587	1,485.34	5,000
5002	Printing Expense	1,039.56	833	(206.56)	14,552.12	9,163	(5,389.12)	10,000
5003	Postage	24.00	267	243.00	2,451.93	2,937	485.07	3,200
5009	Board Meeting Expense	489.97	678	188.03	5,238.64	7,458	2,219.36	8,133
5015	Legal Services	0.00	83	83.00	1,900.00	913	(987.00)	1,000
5017	Management Services	8,025.00	8,145	120.00	88,275.00	89,595	1,320.00	97,734
5020	Consulting Services Other	1,050.00	1,050	0.00	11,550.00	11,550	0.00	12,595
5021	Audit/Tax Preparation Services	0.00	0	0.00	2,850.00	2,850	0.00	2,850
5023	Insurance Expense	3,864.63	4,177	512.37	40,878.74	45,947	5,068.26	50,119
5034	Licenses & Permits	0.00	0	0.00	438.01	1,500	1,061.99	1,500
5039	Property Taxes	0.00	0	0.00	(2,014.54)	0	2,014.54	50,500
5049	Operating Contingency	0.00	417	417.00	0.00	4,587	4,587.00	5,000
	General & Administrative Total	$ 14,435.15	$ 17,092	$ 2,656.85	$ 169,817.38	$ 192,362	$ 22,544.62	$ 259,931
	Repairs & Maintenance							
6000	General Maintenance	$ 1,216.89	$ 2,917	$ 1,700.11	$ 26,500.42	$ 32,087	$ 5,586.58	$ 35,000
6004	Lazy River Staff	684.50	2,359	1,674.50	31,235.54	25,949	(5,286.54)	28,305
6006	Mileage Reimbursement	0.00	17	17.00	268.80	187	(81.80)	200
6021	Golf Cart Expense	1,119.43	875	(244.43)	10,427.80	9,625	(802.80)	10,500
6030	Fire Alarm & Sprinkler Maint	163.50	203	39.50	2,282.38	2,233	(49.38)	2,433
6031	HVAC System Maint	41.42	250	208.58	952.62	2,750	1,797.38	3,000
6034	TV Repair & Replacement	0.00	21	21.00	0.00	231	231.00	250
6036	Interior Pest Control	212.75	233	20.25	2,303.05	2,563	259.95	2,800
6038	Termite Treatment	0.00	41	41.00	585.00	451	(134.00)	490
6039	Nuisance Control	191.67	192	0.33	2,108.37	2,112	3.63	2,300
6041	Janitorial Supplies	171.37	542	370.63	5,204.45	5,962	757.55	6,500
6080	Grounds Staff	7,523.34	4,690	(2,833.34)	43,326.77	51,590	8,263.23	56,280
6089	Golf Cart Repair MBR	386.99	83	(303.99)	3,796.11	913	(2,883.11)	1,000
6151	Contract Landscape Maintenance	1,875.00	1,875	0.00	20,625.00	20,625	0.00	22,500
6152	Landscape Maint	2,219.00	1,679	(540.00)	25,417.72	18,469	(6,948.72)	20,145
6159	Lake Maintenance	420.00	458	38.00	5,326.42	5,038	(288.42)	5,500
6185	Pool/Spa Supplies	90.95	2,250	2,159.05	20,048.12	24,750	4,701.88	27,000
6186	Pool/Spa Maintenance	1,015.56	1,250	234.44	11,083.00	13,750	2,667.00	15,000
6241	Watchmen Services	36,856.55	39,867	3,010.45	428,820.80	438,537	9,716.20	478,400
6243	Watchman Uniforms	0.00	125	125.00	1,121.88	1,375	253.12	1,500
6244	Watchman Supplies	159.62	1,042	882.38	7,781.46	11,462	3,680.54	12,500
	Repairs & Maintenance Total	$ 54,348.54	$ 60,969	$ 6,620.46	$ 649,215.71	$ 670,659	$ 21,443.29	$ 731,603

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K.A. DIEHL

0137 Myrtle Beach Resort Homeowners Assoc, Inc.
Operating Income Statement
12/31/2014

01/16/2015 5:00 PM Page: 1

c/o K.A. Diehl
P.O. Box 15159, 5905 S. Kings
Myrtle Beach SC 29587

K.A. Diehl
Community Management
Specialists

	Description	Current Period Actual	Current Period Budget	Current Period Variance	Year To Date Actual	Year To Date Budget	Year To Date Variance	Yearly Budget
	INCOME							
4001	Regular Assessments	$ 96,030.80	$ 96,038	$ (7.20)	$ 1,152,369.60	$ 1,152,423	$ (53.40)	$ 1,152,423
4002	Reserve Funding	(12,137.00)	(12,137)	0.00	(145,644.00)	(145,644)	0.00	(145,644)
4040	Sales Commissions	531.00	413	118.00	8,070.91	5,000	3,070.91	5,000
4041	Rental/Lease Income	0.00	87	(87.00)	0.00	1,000	(1,000.00)	1,000
4042	MBRV Sales Office Rent	4,783.41	4,786	(2.59)	57,400.89	57,410	(9.11)	57,410
4043	MBRV 2% Rental Commission	4,082.55	1,632	2,450.55	81,398.33	81,600	(201.67)	81,600
4044	MBRV Food & Beverage Lease	0.00	0	0.00	106,923.24	106,923	0.24	106,923
4052	Vending Income	0.00	87	(87.00)	1,171.39	1,000	171.39	1,000
4058	Gate Income	3,102.50	9,994	(6,891.50)	142,572.50	119,906	22,666.50	119,906
4060	Storage Rm Lease Income	806.79	1,186	(379.21)	10,731.45	14,177	(3,445.55)	14,177
4063	Trash Removal Reimbursement	1,541.00	0	1,541.00	4,917.00	0	4,917.00	0
4064	Utility Reimbursement	0.00	0	0.00	13,927.29	0	13,927.29	0
4083	Water and Sewer Reimbursement	909.00	0	909.00	17,008.59	0	17,008.59	0
4120	Interest Income-Operating	0.00	0	0.00	1.78	0	1.78	0
4149	Common Element Inc	3,102.50	9,994	(6,891.50)	142,572.50	119,906	22,666.50	119,906
4199	Miscellaneous Income	0.00	0	0.00	5.43	0	5.43	0
	Total Income	$ 102,752.55	$ 112,080	$ (9,327.45)	$ 1,593,426.90	$ 1,513,701	$ 79,725.90	$ 1,513,701
	EXPENSES							
	General & Administrative							
5000	General & Administrative	$ 200.00	$ 1,025	$ 825.00	$ 795.82	$ 12,300	$ 11,504.18	$ 12,300
5001	Office Supplies & Expenses	670.76	413	(257.76)	3,772.42	5,000	1,227.58	5,000
5002	Printing Expense	1,121.42	837	(284.42)	15,673.54	10,000	(5,673.54)	10,000
5003	Postage	573.80	263	(310.80)	3,025.73	3,200	174.27	3,200
5009	Board Meeting Expense	50.00	675	625.00	5,288.64	8,133	2,844.36	8,133
5015	Legal Services	0.00	87	87.00	1,900.00	1,000	(900.00)	1,000
5017	Management Services	8,025.00	8,139	114.00	96,300.00	97,734	1,434.00	97,734
5020	Consulting Services Other	1,050.00	1,045	(5.00)	12,600.00	12,595	(5.00)	12,595
5021	Audit/Tax Preparation Services	0.00	0	0.00	2,850.00	2,850	0.00	2,850
5023	Insurance Expense	3,664.63	4,172	507.37	44,543.37	50,119	5,575.63	50,119
5034	Licenses & Permits	0.00	0	0.00	438.01	1,500	1,061.99	1,500
5037	Income Taxes	14,000.00	0	(14,000.00)	14,000.00	0	(14,000.00)	0
5038	State Income Tax	3,000.00	0	(3,000.00)	3,000.00	0	(3,000.00)	0
5039	Property Taxes	54,211.34	50,500	(3,711.34)	52,196.80	50,500	(1,696.80)	50,500
5049	Operating Contingency	0.00	413	413.00	0.00	5,000	5,000.00	5,000
	General & Administrative Total	$ 86,566.95	$ 67,569	$ (18,997.95)	$ 256,384.33	$ 259,931	$ 3,546.67	$ 259,931
	Repairs & Maintenance							
6000	General Maintenance	$ 10,152.60	$ 2,913	$ (7,239.60)	$ 36,653.02	$ 35,000	$ (1,653.02)	$ 35,000
6004	Lazy River Staff	497.00	2,356	1,859.00	31,732.54	28,305	(3,427.54)	28,305
6006	Mileage Reimbursement	0.00	13	13.00	268.80	200	(68.80)	200
6021	Golf Cart Expense	1,119.43	875	(244.43)	11,547.23	10,500	(1,047.23)	10,500
6030	Fire Alarm & Sprinkler Maint	163.50	200	36.50	2,445.88	2,433	(12.88)	2,433
6031	HVAC System Maint	538.42	250	(288.42)	1,491.04	3,000	1,508.96	3,000
6034	TV Repair & Replacement	0.00	19	19.00	0.00	250	250.00	250
6036	Interior Pest Control	212.75	237	24.25	2,515.80	2,800	284.20	2,800
6038	Termite Treatment	0.00	39	39.00	585.00	490	(95.00)	490
6039	Nuisance Control	191.67	188	(3.67)	2,300.04	2,300	(0.04)	2,300
6041	Janitorial Supplies	213.99	538	324.01	5,418.44	6,500	1,081.56	6,500
6080	Grounds Staff	11,724.90	4,690	(7,034.90)	55,051.67	56,280	1,228.33	56,280
6099	Golf Cart Repair MBR	186.51	87	(99.51)	3,982.62	1,000	(2,982.62)	1,000
6151	Contract Landscape Maintenance	1,875.00	1,875	0.00	22,500.00	22,500	0.00	22,500
6152	Landscape Maint	302.40	1,676	1,373.60	25,720.12	20,145	(5,575.12)	20,145
6159	Lake Maintenance	420.00	462	42.00	5,746.42	5,500	(246.42)	5,500
6185	Pool/Spa Supplies	487.84	2,250	1,762.16	20,535.96	27,000	6,464.04	27,000
6186	Pool/Spa Maintenance	909.50	1,250	340.50	11,992.50	15,000	3,007.50	15,000
6241	Watchmen Services	48,804.74	39,863	(8,941.74)	477,625.54	478,400	774.46	478,400
6243	Watchman Uniforms	0.00	125	125.00	1,121.88	1,500	378.12	1,500
6244	Watchman Supplies	352.50	1,038	685.50	8,133.96	12,500	4,366.04	12,500
	Repairs & Maintenance Total	$ 78,152.75	$ 60,944	$ (17,208.75)	$ 727,368.46	$ 731,603	$ 4,234.54	$ 731,603

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ATTACHMENT "E"

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STATE OF SOUTH CAROLINA)

) COMMERCIAL LEASE AGREEMENT

COUNTY OF HORRY)

THIS AGREEMENT, made and entered into as of the 11th day of November, 2009, by and between THE MYRTLE BEACH RESORT HOMEOWNERS' ASSOCIATION, INC., a South Carolina corporation (hereinafter the "Association") and ALLEGIANT FOOD & BEVERAGE, LLC, a North Carolina limited liability company (hereinafter referred to as "Tenant").

WITNESSETH

WHEREAS, the Association owns certain commercial property at The Myrtle Beach Resort, as is more particularly set out below; and

WHEREAS, the Association further has the authority to lease other commercial areas owned or controlled by other Homeowners' Associations at The Myrtle Beach Resort, as more particularly set out below; and

WHEREAS, the Association has determined it to be in the best interest of the homeowners at The Myrtle Beach Resort to enter into an Agreement providing for a consolidated operation of the food and beverage and other commercial activities, including gift shop and convenience store, all as is more particularly set out below; and

WHEREAS, Tenant has made certain promises and has committed to certain undertakings, as more particularly set out herein, as an inducement to the Association to enter into this Agreement.

NOW THEREFORE, in consideration of Five Dollars ($5.00), and the mutual covenants given herein, the receipt and sufficiency of such consideration being hereby acknowledged, the parties agree to as follows:

I. COMMERCIAL AREAS OWNED BY THE ASSOCIATION HEREWITH LEASED TO TENANT

The Association owns the following commercial property and agrees to lease these properties to the tenant for operation:

A. Cabana Bar and lot consisting of approximately .303 acres(Also known as Cabana Lot, 5905 S. Kings Hwy., Myrtle Beach, SC 20575. The Tenant may use and occupy the leased property for entertainment

or food service or any other lawful purpose approved in writing by the Association. Tenant agrees that bands/entertainment will be geared to a family-type audience. Tenant also agrees and Warrants that there will be no loud or disturbing noise on the premises. Tenant warrants that there will be no cover charge or admission fees levied by Tenant, except as approved by Association.

B. Ocean front portion of the first floor of The Renaissance Tower of The Myrtle Beach Resort being a portion of commercial Unit A and consisting of approximately 1,600 square feet (Deli area, also known as Unit A, 5905 S. Kings Hwy., Myrtle Beach, SC 20575). The Tenant may use and occupy the leased property for the operation of a delicatessen or similar food service operation, or such other lawful purpose approved in writing by the Association.

C. Ocean front portion of the first floor of The Renaissance Tower of The Myrtle Beach Resort being a portion of commercial Unit A and consisting of approximately 700 square feet (formerly "Gift Shop" area). The Tenant may use and occupy the leased property for the operation of a delicatessen or similar food service operation, or such other lawful purpose approved in writing by the Association

D. Commercial Unit D, of the Renaissance Tower of the Myrtle Beach Resort, commonly known as the "General Store". The Tenant may use and occupy the leased property for a General Store or for such other lawful purpose approved in writing by the Association.

E. Commercial Unit B, of the Ocean Front Spa of the Myrtle Beach Resort, commonly referred to as the "Snack Bar". Tenant may use and occupy the leased property for a snack bar or any lawful purpose approved in writing by the Association.

F. "Snack Bar" located at Myrtle Beach Resort Horizontal Property Regime and owned by that Association. Tenant may use and occupy the leased property for a snack bar or any lawful purpose approved in writing by the Association.

G. Snack Bar located in the Lazy River/Water park area of the Horizontal Property. Tenant may use and occupy the leased property for a snack bar or any lawful purpose approved in writing by the Association.

In addition to the above, the Tenant agrees to abide by all reasonable rules and regulations of the

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Association as well as the rules and regulations of the Alcoholic Beverage Control Commission, the individual horizontal property regimes upon which such leased property is located, and any other governing authority. Tenant, and its employees, guests and invitees, shall adhere to all parking regulations and traffic rules established by the Association or the individual horizontal property regimes.

Tenant agrees and warrants that it will undertake no advertising in respect to its use of premises, unless consented to in advance by Association.

It is anticipated that the leased space and the extent of operations of the Tenant may be modified from time to time by mutual written consent of the Association and Tenant. The parties agree to negotiate and act in good faith with one another in an attempt to provide a consolidated operation of food, beverage and other commercial activities, including gift shop and convenience store operations, all in a manner that will be in the best interest of the homeowners at The Myrtle Beach Resort.

II. HOURS OF OPERATION.

It is the intent of all parties that the food, beverage and retail operations at Myrtle Beach Resort be profitable for the Tenant and provides a quality experience for the owners and guests. Therefore, it is agreed that the Tenant will provide adequate food, beverage and retail service on a year round basis as is more specifically set forth below. Any operations after 11:00 P.M. shall be permitted only with the advance written consent of the Association.

Tenant will meet with management, or other Association designated contacts, on a regular basis to review operating schedules and events, and will, to the extent possible, operate in coordination with other resort operations. Any changes to operating hours must be approved in writing by Association.

LOCATION:	Off Season* Hours	In Season* Hours
Cabana Bar	closed	11AM until 11PM
Deli	7AM until 7PM	7AM until 11PM

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Convenience Store	7AM until 7PM	11AM until 11PM
"A" Building Pool Shack	closed	11AM until 5PM
Oceanfront Spa Snack Bar	9AM until 2PM January through March	closed
Water Park Snack Bar	11AM until 5PM only during times Water Park is open	10AM until 7PM

* "In Season" is defined as the period of time from Memorial Day weekend through Labor Day Weekend; plus "Bike Weeks" (Myrtle Beach Harley Davidson Spring and Fall rallies and Atlantic Beach Bike fest; dates for these may vary from year to year) and Spring Break Weeks. "Off Season" means and includes all times not designated as "In Season."

III. TERM.

The term for this Lease shall be for a period of five (5) years commencing January 1, 2010 and ending December 31, 2014. Provided that Tenant has complied with the terms of the lease, this lease shall automatically extend for additional five (5) year periods unless either party notifies the other of a desire to terminate or re-negotiate the contract by August 31st of the last year of any term. The Association shall maintain the right to test the market place via negotiations with other parties at any time during the final year of each term, however Tenant shall have the right of first refusal to match any Agreement the Association may obtain with other parties. The Association shall have the option to buy out the remainder of this Agreement from tenant as of December 31, 2012 for the amount of Two Hundred Thousand Dollars ($200,000.00) upon providing notice to tenant on or before August 31, 2012.

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2015 2014 2011 - 97,850
2015 2012 100,285.52
110,130 2013 103,809.07

IV. RENT.

A. Tenant shall pay the Association a fixed annual rent of Ninety-Five Thousand Dollars ($95,000.00) for 2010 with an annual Three percent (3.0%) increase on January 1st of every year for the duration of this Agreement.

B. The annual rent shall be payable in advance in nine (9) equal monthly installments with the first installment due on January 1 of each year and with subsequent monthly installments due on the first day of each succeeding month until the annual rent is paid in full. 2015 24,117.11/mo

C. In addition to the fixed rent set out above, the Tenant shall pay to the Association any increase in insurance premiums incurred by the Association as a result of the operations of the Tenant from any portion of this property.

Tenant shall pay ten percent (10%) late charge on any payment not received by the Association within ten (10) days of the date, which it is otherwise due.

If Tenant is in default of its obligation to pay rent, the Association shall have a lien upon all personal property, equipment, and trade fixtures located upon the leased premises. If the Association asserts such a lien and/or levies for distress, the Tenant agrees not to remove or permit the removal of such property until all defaults have been cured.

V. MAINTENANCE OF PREMISES

Tenant shall, at its own expense, keep and maintain the premises and all equipment now or hereafter located on or affixed to the premises, including without limitation permanent equipment and fixtures, in good order and repair during the term of this Lease Agreement and shall surrender same to the Association at the expiration or earlier termination of this Lease Agreement in as good condition as they were when received (or subsequently improved or altered), normal wear and tear excepted.

All repairs, replacements and renewals shall be at least equal in quality of materials and workmanship to that which originally existed on the leased property. The Association shall in no event be required to

make any repair, alteration, or improvement to the leased property except as specifically provided for herein. The Tenant shall indemnify the Association against all costs, expenses, liabilities, losses, damages, suits, fines, penalties, claims, and demands, including reasonable attorney's fees, because of Tenant's failure to comply with the foregoing.

Any improvements, alterations and additions to the premises by the Tenant shall be made only at Tenant's expense, in good and workmanlike manner and in accordance with plans and specifications, which have been previously approved in writing by the Association. Association reserves the right to approve any contractor, which approval shall not be unreasonably withheld, and to require adequate lien waivers, evidence of financial responsibility, permits, licenses, and insurance to be provided by the contractor.

All improvements and additions made by the Tenant and permanently attached to the premises, including without limitation all venting partitions, carpets, lighting fixtures, doors, hardware, shelves, cabinets, counters, ceiling and all other permanent improvements and fixtures, including trade fixtures of any kind, shall remain with the premises and shall be surrendered to the Association at the expiration or earlier termination of this Lease Agreement.

The parties agree that any and all items on the premises at the time of the commencement of this lease Agreement and attached to the premises by any means are fixtures that shall remain with the premises and be rendered to the Association at the termination of this lease Agreement, including without limitation the following: Two wall air conditioning units located in the Cabana Bar; a three-compartment sink and a hand sink located in the Cabana Bar; the hood, exhaust, and fire suppression system located in the Cabana and any and all cabinetry, shelving, counters, and sinks located anywhere upon any of the leased premises.

Tenant shall not, in any event, cause or permit any waste, damage or injury to the leased property.

Association shall be under no liability for damages to the Tenant due to the discontinuance of heat, air conditioning, electricity, water, or of any other service provided by Association or for loss or damage to property of Tenant caused by rain, water, or otherwise. Provided, however, if the loss is insured, the Association will use reasonable efforts to recover any appropriate loss for Tenant, but is under no liability to do so.

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The Tenant agrees and acknowledges that it has been afforded ample time to inspect the premises and further agrees to accept the premises "as is."

VI. SIGNAGE

EXTERIOR SIGNS.

At its sole expense, Tenant shall install a Sign, displaying the Tenant's business trade name, on the storefront of the leased premises. If the Association requests the Tenant shall also install at its sole expense an under canopy sign displaying the Tenant's business trade name. All signs erected by Tenant must comply with the Association's sign criteria and with all applicable laws, rules, and ordinances passed by any governmental Agency. Tenant shall not erect any signs whose design and appearance have not first been approved in writing by the Association. Tenant shall at its sole expense obtain any permits or licenses required by any governmental authorities for any signs erected by the Tenant. Tenant agrees to indemnify the Association and hold it harmless from any claims, costs, or damages arising in any way from the erection, maintenance, existence, or removal of any signage. Upon vacating the leased premises, the Tenant shall at its sole expense remove any signs erected by Tenant and to promptly repair any damage caused by the removal.

Tenant agrees not to erect any other sign, decal, awning, advertisement, antenna, satellite dish, or other structure or object on the exterior of the leased premises without first obtaining the written approval of the Association.

INTERIOR SIGNS AND DISPLAYS AND WINDOW DISPLAYS

All interior signs and displays and window displays shall be tasteful, prepared in a professional manner, and in keeping with the character and standards of the Myrtle Beach Resort as determined by the Association in its sole discretion. No hand lettered signs or displays shall be permitted. The Tenant agrees to remove any nonconforming sign or display, as determined by the Association, upon request by the Association.

VII. OTHER PROVISIONS

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1. **ENTRY ON PREMISES BY ASSOCIATION.** Association reserves the right to enter on the premises at any reasonable time to inspect the premises.

2. **BUSINESS RECORDS.** The Tenant agrees to make all sales and financial records pertaining to all its operations on the premises available on an annual basis by the 31st day of January following the preceding year by forwarding copies to the association's managing agent.

3. **UTILITIES.** The Tenant shall arrange and pay for the use of utilities furnished to the demised premises during the term of this Lease including, but not limited to, water, electricity, gas, sewer and telephone.

Tenant agrees to pay reasonable pro-rata cost of garbage collection and disposal as provided by Association. Provided, however, Tenant is solely responsible for collecting and transporting garbage to a dumpster to be provided by Association, the location of which is to be designated by Association.

4. **TAXES AND ASSESSMENTS.** All ad valorem taxes, assessments, liens or charges on the land or improvements now located thereon, and all obligations secured by millage or other liens that may be against or levied upon the demised premises shall be properly paid by Association when due. All taxes on property owned by Tenant, as well as all business licenses required by Tenant for the operation of its business, shall be paid by Tenant.

5. **INSURANCE.** During the entire term of this Lease, the Tenant shall, at the Tenant's sole expense, secure and maintain such personal property insurance as it may determine upon all personal property owned by Tenant and located upon the leased premises, at the expense of Tenant. The Tenant shall, at the expense of the Tenant, secure and maintain during the entire term of its Lease, public liability insurance upon, and in respect to, the leased premises in an amount of no less than Two Million ($2,000,000.00) Dollars for each occurrence and an Umbrella Policy of no less than Five Million ($5,000,000.00) Dollars, and said public liability insurance shall be procured with an insurance company licensed to do business in the State of South Carolina and shall be procured by the Tenant in such manner as to include The Myrtle Beach Resort Homeowners' Association and all individual horizontal property regimes as additional insured's. Tenant shall promptly furnish copies of said policies of insurance to Association and shall direct and instruct the insuring company to mail

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duplicate notices of premiums due from time to time under said policies of insurance to the Association at the address designated by the Association.

6. NO SET-OFF OR ABATEMENTS OF RENT. The Tenant shall not be entitled under any circumstances to withhold rent payments or to set off rent payments for any reason whatsoever. The Tenant further agrees that it shall not be entitled to any abatement of rent unless the Myrtle Beach Resort is closed for more than ten (10) consecutive days during the period beginning with the Memorial Day weekend and ending with the Labor Day weekend.

In the event, during the term of this Agreement the Myrtle Beach Resort is closed for more than ten (10) consecutive days during the period beginning with the Memorial Day weekend and ending with Labor Day weekend, the annual rental payment shall be reduced as hereinafter provided. The minimum annual payment shall be reduced by the number of days the Myrtle Beach Resort is closed divided by the number of days between Memorial Day and Labor Day.

7. COMPLIANCE WITH APPLICABLE LAWS. The Tenant, at its sole expense, shall comply with all laws, orders, and regulations of federal, state, and municipal authorities, and with any direction of any public officer, pursuant to the law, which impose any duty upon the Association or the Tenant with respect to the leased property. The Tenant, at its sole expense, shall obtain all licenses or permits which may be required by the conduct of its business within the terms of this Lease, or for the making of repairs, alterations, improvements, or additions, if permitted by Association. The Tenant shall comply with the requirements of all policies of public liability, fire, and all other types of insurance at any time in force with respect to the buildings and other improvements on the leased property.

8. TENANT TO MAKE GOLF PACKAGES AND OTHER PROMOTIONAL OFFERS AVAILABLE TO ALL UNIT OWNERS AND GUESTS AT THE MYRTLE BEACH RESORT. The Tenant agrees to extend any services, sales, and promotional offers made by the Tenant while on the Premises to all guests and owners at the Myrtle Beach Resort on equal terms; this Section includes without limitation any offers for golf packages and other off premises activities offered by the Tenant.

9. TENANT TO PROVIDE SECURITY. The Tenant shall provide, at its sole expense, adequate security for all activities conducted by the Tenant on the leased premises.

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10. SURRENDER OF PREMISES AND OPTION TO PURCHASE PERSONALTY. The Tenant shall on the last day of the term, or upon the sooner termination of the term, peaceably and quietly surrender the leased property to the Association, in as good condition and repair as at the commencement of the term, including replacements, or additions, or improvements constructed, erected, added, or placed thereon by the Tenant with Association's consent, with the natural wear and tear thereof excepted.

The Tenant hereby grants to the Association an option to purchase at the termination of this lease, any movable trade fixtures, furniture, equipment, and personal property of every nature and kind owned by the Tenant and utilized in the operation of the business transacted on the property. The option price shall be the cost of the item or items less cumulative book depreciation at the time this option is exercisable. Association shall have thirty (30) days within which to decide whether it wishes to exercise its option to purchase said personal property at the expiration of this Lease.

If the Tenant fails to remove any personal property, equipment, or movable trade fixtures from the premises within ten days of being notified by the Association that it does not intend to exercise its option, then the Association may in its discretion do one of the following: 1) The Association may deem the property to have been abandoned by the Tenant, and the Association shall have right to dispose of the property as it sees fit; or 2) the Association may have the property removed and may recover from the Tenant the costs of removing the property.

11. DESTRUCTION OF PREMISES. If at any time during the term of this Lease, the leased premises should be damaged by fire or other major casualty, not the fault of Tenant, and if the cost of repairing the damage does not exceed twenty-five percent (25%) of the value of the premises herein leased, then the Association shall as soon as practicable repair the damage caused by said fire or other casualty. If, however, the damage should exceed twenty-five percent (25%) of the value of the premises herein leased, then Association shall have the option of either restoring said premises as set out above or terminating this Lease as of the date of said fire or other casualty. In no event shall the Tenant be entitled to an abatement of rent unless the Myrtle Beach Resort is closed for more than ten consecutive days during the period beginning with the Memorial Day weekend and ending with the Labor Day Weekend.

If, during the period beginning with the Memorial Day weekend and ending with the Labor Day

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weekend the leased premises shall be rendered uninhabitable for more than ten consecutive days by damage which is not the fault of Tenant, the rent shall be abated from the eleventh day following the date of the event rendering the premises uninhabitable to the date of completion of the restoration of the premises. Such abatement shall be proportionate to the loss of occupancy sustained in respect to the revenue generated by that portion of the leased premises. If the damage is so extensive as to an amount practically to the total destruction of the entire leased premises, either Tenant or Association shall have the right to cancel this Lease by giving written notice and rental shall be apportioned to the date of the damage.

12. DEFAULT. If Tenant shall default in the terms of this Agreement, Tenant agrees to pay all reasonable attorney's fees and costs incurred by the Association in enforcing the obligations of the Tenant under this Agreement.

13. DECLARATION OF GOVERNING LAW. This Lease shall be governed by, construed, and enforced in accordance with the laws of the State of South Carolina

14. SUBORDINATION TO EXISTING AND FUTURE MORTGAGES. This Lease shall be subject and subordinate at all times to the lien of existing mortgages and of mortgages which hereafter may be made a lien of the leased property. Although no instrument or act on the part of the Tenant shall be necessary to effectuate such subordination, the Tenant will, nevertheless, execute and deliver such further instruments subordinating this lien to the lien of any mortgages as may be desired by the mortgagee. The Tenant hereby appoints the Association, its attorney-in-fact, irrevocably to execute and deliver any such instrument for the Tenant.

15. WAIVER. Failure of either party to insist upon strict performance of any covenant or condition of this Lease in anyone or more instances shall not be constituted as a waiver for the future of any such covenant or condition, but the same shall be and remain in full force and effect.

16. BINDING EFFECT. The covenants, terms, conditions, provisions, and undertakings in this Lease, or in any renewals thereof, shall extend to and be binding upon the heirs, executors, administrators, successors, and assigns of the respective parties hereto, as if they were in every case named and expressed, and shall be considered as covenants running with the land; and, wherever reference is made to either of the parties hereto, it shall be held to include and apply also to the heirs,

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executors, administrators, successors, and assigns of such party, as if in each and every case so expressed.

17. ENTIRE AGREEMENT, MODIFICATION, SEVERABILITY. This Lease contains the entire agreement between the parties and shall not be modified in any manner except by an instrument in writing executed by the parties. If any term or provision of this Lease or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Lease, or the application of such term or provision to persons or circumstances other than those to which it is held invalid or unenforceable, shall not be affected thereby and each term and provision of this Lease shall be valid and shall be enforced to the fullest extent permitted by law.

18. INDEMNIFICATION AND HOLD HARMLESS AGREEMENT. Tenant agrees to indemnify and save Association harmless except in the event of gross negligence on the part of Association, its employees, or agents, against any and all claims, demands, damages, costs and expenses, including reasonable attorney's fees for the defense thereof, arising in any way from the leasing of the aforesaid premises to the Tenant or from the conduct or management of any business operated by the Tenant in or on the Demised Premises or from any breach or default on the part of the Tenant in the performance of any covenant or agreement on the part of the Tenant to be performed pursuant to the terms of this Lease Agreement, including any work done in respect to improvements to be performed by Tenant, or from any act of negligence of Tenant, Tenant's agent, contractors, sub-contractors, servants, employees, sublease, concessionaires, or licensees in or about the Demised Premises. In case of any action or proceeding brought against the Association by reason of any such claim, upon notice from Association, Tenant covenants to defend such action or proceeding by counsel reasonably satisfactory to Association.

All property kept, stored, or maintained in the Demised Premises shall be so kept, stored or maintained at the sole risk of Tenant.

Tenant agrees to pay and discharge any mechanic's, material men's or other liens against the Demised Premises or Association's interest therein claimed in respect to any labor, services, materials, supplies or equipment furnished or alleged to have been furnished to or upon the request of Tenant, provided that Tenant may contest such lien claim upon promptly securing the discharge of the leased premises from the lien by the filing of a written undertaking as provided by statute, or upon furnishing to

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Association such indemnification as the Association may reasonably require for the final payment and discharge of the lien, together with the costs and expenses of defending the same. If the Tenant fails to secure the discharge of the leased premises from any such lien within ten days of the filing of the lien, or fails to furnish the Association within ten days of demand by the Association with such indemnification as the Association may require for the final payment and discharge of the lien, then Association may release the lien by any means allowed by law, and the Tenant shall reimburse the Association for all costs and expenses incurred by the Association in procuring the release of the lien, including attorney's fees, plus interest at the rate of prime plus four per cent on any sum paid by the Association.

Nothing contained in the Lease Agreement shall be so construed as to in any way as to subject Association's interest in the Demised Premises to any such lien.

Association shall not be liable to Tenant, and Tenant hereby agrees to hold Association harmless, for any damage occasioned by plumbing, electrical, gas, water, steam or other utility pipes, systems, and facilities or by the bursting, stopping, leaking or running of any tank, closet, waste, or other pipes in or about which they are a part, nor, from any damage occasioned by water being upon or coming through the roof, vent, windows, doors, or otherwise.

19. **ASSIGNMENT.** Tenant may not assign this Lease or sublease any portion of this property without the express written consent of the Association, which may be withheld for any reason.

(This Section Left Blank Intentionally)

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IN WITNESS WHEREOF, the Association and Tenant subscribed their names and affixed their seals the day and year first above written.

WITNESSES:

Darla L Donovan

Dixie M Kupsanyk

ASSOCIATION:

MYRTLE BEACH RESORT HOMEOWNERS' ASSOCIATION, INC.

By: M Renkey

Mel Renkey, Sr. Community Manager

P-KA Beck / signed on behalf of Holt

ALLEGIANT FOOD & BEVERAGE, LLC

Darla L Donovan

Dixie M Kupsanyk

By: Robert N. Jones

Robert Jones, Managing Member

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STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

ADDENDUM TO COMMERCIAL
LEASE AGREEMENT

THIS ADDENDUM TO AGREEMENT, made and entered into as of the 1st day of October, 2013, (hereinafter referred to as "Addendum"), by and between THE MYRTLE BEACH RESORT HOMEOWNERS' ASSOCIATION, INC., a South Carolina corporation, (hereinafter referred to as "Association") and ALLEGIANT FOOD & BEVERAGE, LLC., a North Carolina Limited Liability Company, (hereinafter referred to as "Tenant").

WITNESSETH:

WHEREAS, the Association and the Tenant have heretofore entered into a Commercial Lease Agreement dated November 11, 2009, (hereinafter referred to as "Agreement") for the leasing of certain commercial property located at the Myrtle Beach Resort providing for a consolidated operation of the food and beverage and other commercial activities, including gift shop and convenience as more particularly set forth in the Agreement that is incorporated herein by reference; and

WHEREAS, the undersigned parties to the Commercial Lease Agreement have amicably agreed to amend the aforesaid Agreement and to further memorialize the same by entering into this Addendum;

NOW, THEREFORE, in consideration of Five Dollars ($5.00) and the mutual covenants given herein, the receipt and sufficiency of such consideration being hereby acknowledged, the parties agree to the Addendum of the the aforesaid Agreement as follows:

I. II. HOURS OF OPERATION

LOCATION:	Off Season Hours	In Season Hours
Cabana Bar (The Quarterdeck)	11AM until 10PM or later based upon occupancy *	11AM until 12AM
Deli (The Galley)	8AM until 3PM *	8AM until 11PM
Convenience Store	9AM until 11PM	
"A" Building Pool Shack	10AM until 7PM *	
Water Park Snack Bar	10AM until 5PM *	

*Weather permitting

In Season shall continue to be defined as set forth in the Agreement that being the period of time from Memorial Day weekend through Labor Day Weekend; plus "Bike Weeks" (Myrtle Beach Harley Davidson Spring and Fall rallies and Atlantic Beach Bike Fest; dates for these may vary from year to year); Spring Break weeks and Holidays.

Off Season shall also be defined as set forth in the Agreement that means and includes all times not designated as "In Season".

2. The Tenant shall consider lowering the off season menu to accommodate winter residents.

3. The noise level at the Cabana Bar (The Quarterdeck) shall be monitored two times per night by security and security shall keep a written log as to such monitoring which shall take place when there is music being played by a band or otherwise.

4. The Tenant hereby agrees that it shall pay the sum of $39,835.00 that shall be allocated as follows:

A. The Tenant shall remodel the space the Cabana Bar (The Quarterdeck) and the Tenant shall further be responsible for the cost of the remodel in the sum of $15,790.00. The Tenant agrees that such remodel will be completed between October and December, 2013.

B. The Tenant agrees to bear the entire cost and host the annual homeowner's dinner for the annual meeting in April of each year as previously provided, so long as the Tenant remains under contract with the Association. The costs of the annual dinner is estimated at approximately $3,000.00 per year for a 6 year period with an approximate total of $18,000.00 in costs.

C. The Tenant shall replace all of the carpeting inside the Rental Office Building located outside of the Security Gate, with the Tenant bearing 100% of the cost that shall be completed within the calendar year of 2014 at an estimated cost of $6,045.00.

5. The Association shall absorb the cost of replacing the existing flooring in the kitchen, bar and storage areas of the Cabana Bar (The Quarterdeck) at an estimated cost of $15,872.00.

6. The Association hereby agrees to waive its right contained in the current Agreement which allows the Association by August 31, 2014 to seek alternative proposals that the Tenant would then have to match.

7. The expiration date of the Agreement shall be December 31, 2019. The Association shall maintain the right to test the market place via negotiations with other parties at any time during the final year of the Agreement which is 2019, however, the Tenant shall have the right of first refusal to match any Agreement the Association may obtain from other parties.

8. All other terms and conditions set forth in the original Commercial Lease Agreement dated November 11, 2009, shall be in full force and effect until the termination date of December 31, 2019, including the 3% increase in

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annual rent per year on January 1st of every year for the duration of the Agreement. Furthermore, the Tenant agrees to make available all sales and financial records pertaining to all its operations on the premises on an annual basis by the 31st day of March following the preceding year by forwarding copies to the Association's Managing Agent.

- was this in the previous contract?

IN WITNESS WHEREOF, the Association and Allegiant subscribed their names and affixed their seals the day and year first above written.

WITNESSES:

ASSOCIATION:

MYRTLE BEACH RESORT

HOMEOWNERS' ASSOCIATION, INC.

By: _____

Stanley Jordan, President

ATTEST:

Phil Cox, Secretary

ALLEGIANT FOOD & BEVERAGE, LLC

By: _____

Robert Jones, Managing Manager

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ATTACHMENT "F"

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KA. DIEHL & ASSOCIATES, INC
SECURITY SERVICES CONTRACT

THIS AGREEMENT, made as of this 7th day of December, 2009, by and between the **MYTRLE BEACH RESORT HOMEOWNERS' ASSOCIATION**, a Not for Profit Corporation of the State of South Carolina, (hereinafter "ASSOCIATION") and **K.A. DIEHL & ASSOCIATES, INC** a South Carolina Corporation, mailing address at 11740 Highway 17 Bypass South, Murrells Inlet, SC 29576, (hereinafter referred to as "KAD").

WITNESSETH: In consideration of the agreements herein contained, to be performed by the parties hereto, and of the payments hereinafter agreed to be made, it is mutually agreed as follows:

1. KAD will perform all work in connection with the security services at the Myrtle Beach Resort on behalf of ASSOCIATION located in Myrtle Beach, South Carolina (the "Property") under the terms as stated in this contract document.

2. KAD will furnish qualified, uniformed personnel, equipment, labor, insurance, and other accessories and services necessary to perform said officers services in accordance with pricing in "contract document". Badges shall clearly state either the word "Security" or the officers rank across the center bar. Hats shall prominently display the words Security Officer across the front and all jackets shall prominently display the words Security Officer across the shoulders. All officers shall have successfully passed a background check conducted by SLED, and all officers shall have been properly trained, certified and will be properly supervised. KAD shall provide substitute officers to cover for planned or unplanned absences.

3. All equipment, mutually agreed upon by KAD and ASSOCIATION, paid for by KAD will be the property of KAD and, upon termination or expiration of contract, will remain the property of KAD, and similarly for equipment paid for by ASSOCIATION.

4. ASSOCIATION will furnish (or reimburse KAD for) all consumable accessories and supplies, as may be necessary for regular use and non-transferable to other properties, such as access passes, daily logs, phone lists, markers, stickers, etc.

5. KAD agrees to perform all services related to security, as mutually agreed by KAD and ASSOCIATION, based upon the General Scope of Services, attached hereto as part of Exhibit A, and as further described in Supplemental Guidelines to be prepared separately based upon Association guidelines for access, parking, etc.

6. Pricing for services is outlined in the Cost Proposal, attached hereto as part of Exhibit A. It is hereby acknowledged by KAD that KAD will supply at no additional cost all uniforms, licenses, vacation, and bonuses to key personnel.

7. KAD shall pay all wages and applicable employment taxes and maintain Workers' Compensation Insurance for all of its employees. Pay periods shall run from the 1st to the 15th and from the 16th to last day of each month. Paydays shall be on the 5th and 20th of each Month. If the 5th or 20th is a Saturday, the payday shall be the preceding Friday and if the 5th or 20th fall on a Sunday, the payday shall fall on the following Monday.

https://mail.google.com/...

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8. The term "contract documents" means and will consist of this document, including Exhibit A, correspondence if any, and SLED License and Insurance Certificate.

The "contract documents" enumerated above are hereby made part of this contract and are physically attached hereto and by execution of this Contract the ASSOCIATION and KAD acknowledge that they have examined and are familiar with the contents of the said "contract documents".

9. ASSOCIATION agrees to pay KAD in current funds for the performance of the Contract, subject to additions and deductions contained in the "contract documents" in such amounts as required by the "contract documents". Billing will correspond with KAD payroll periods.

10. Payment shall be made within 10 days of the invoice date. A service charge of 1-1/2% per month (18% per annum), shall be applied to invoices not paid within thirty days of the invoice date.

11. This contract shall commence at 10:30 pm on December 31, 2009 and continue through and including December 31, 2011. Thereafter, this contract will renew for successive 2-year terms, with the inclusion of an increase as decided annually by the Myrtle Beach Resort HOA Board of Directors to compensate for personnel pay increases. Either party may give notice of their intent not to renew 90 days prior to the end of any contract term.

12. KAD and ASSOCIATION hereby agree that the level of services, including hours to be provided by KAD, are as set forth in General Scope of Services. Based on holidays, bike weeks and other additional shift requirements within the Property these hours could increase as determined by and based upon the needs of ASSOCIATION.

13. In the event of sole negligence on the part of KAD its employees, agents or sub-contractors, KAD shall be liable for any damage caused by KAD to any property of ASSOCIATION or that of any occupant, agent, or invitee of ASSOCIATION and shall promptly repair any such damage.

14. Notwithstanding that joint or concurrent liability may be imposed upon ASSOCIATION by statue, ordinance, rule, regulation, order or court decision, KAD shall, notwithstanding any insurance furnished pursuant hereto or otherwise, indemnify, protect, defend and hold harmless ASSOCIATION from and against any and all liability, fines, suits, claims, obligations, damages, losses, penalties, demand, actions and judgments, and costs and reasonable expenses of any kind or nature (including reasonable attorney's fees), by anyone whomsoever, due to or arising out of:

a. any work or thing done in, on or about the Property or any part thereof by KAD or anyone claiming through or under KAD or the respective employees, agents, licensees, servants or subtenants of KAD or any such person;

b. any air, land, water or other pollution caused by KAD;

c. any negligence or wrongful act or omission on the part of KAD or any person claiming through or under KAD or the respective employees, agents, licensees, invitees, or servants of KAD or any such person;

d. any accident or injury to any person (including death) or damage to property (including loss of property) occurring in or on the Property or any part thereof, except for accidents or injury to any person or damage to property caused by any negligence or wrongful act or omission on the part of ASSOCIATION;

Initial KAD

Initial ASSOC

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e. any failure on the part of KAD to perform or comply with any of the covenants, agreements, terms, provisions, conditions or limitations contained in this Contract on its part to be performed or complied with; and

15. Cancellation:

a. **ASSOCIATION** and **KAD** reserve the right to cancel this Agreement, with or without cause, upon thirty (30) days' written notice to the other party. Notice for **KAD** under this Agreement shall be sent, via certified mail, to K. A. Diehl & Associates, Inc., 11740 Highway 17 Bypass, Murrells Inlet, SC 29576. Notice for MBR HOA shall be sent certified mail to MBRHOA 5905 S. King's Hwy, Myrtle Beach, SC 29575. The date the notice is postmarked shall serve as the beginning of the thirty (30) day notice period.
b. Upon termination of this Agreement, **KAD** shall promptly account for and deliver to **ASSOCIATION**, or such person or entity designated, materials, supplies, equipment, keys, and records (including electronic media) pertaining to this Agreement.

(This space left blank intentionally)

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IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed by their proper corporate offices and their proper corporate seals to be affixed hereto the day and year as indicated in the acknowledgements attached hereto and made a part hereto.

WITNESS: **MYRTLE BEACH RESORT HOMEOWNERS' ASSOCIATION**

By: _____

By: _____
Mel Renkey-Sr Community Manager

WITNESS:

By: _____

K.A. DIEHL & ASSOCIATES

By: _____
Eric Ault, Director of Property Services

E.C.G.
Initial KAD

Initial ASSOC

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Exhibit A

General Scope of Services

KAD will provide personnel for the purpose of:

Manning the front gate house; Monitoring and controlling vehicle access to the property; Distributing temporary access passes in accordance with Association guidelines; Patrolling designated areas within the Property; Distributing miscellaneous items to homeowners and Management as may be required by Management or requested by Association; Receiving, processing, responding to complaints and emergency calls as necessary; additional services, specific to the Property, as mutually agreed by KAD and Association.

Specific guidelines and procedures for performing all services will be established and documented in a cooperative effort between both KAD and ASSOCIATION. KAD shall obtain whatever SLED and Horry County certifications are necessary for the officers at the Myrtle Beach Resort to continue to be able to write tickets and make arrests in the same manner as done currently.

Employees are the contracted employees of KAD. The addition or termination of security employees at the Myrtle Beach Resort, with the exception of the Chief of Security, currently Mr. Woody Perry, must be made with the recommendation of the Chief of Security . . . and the approval of the Community Manager of the MBR HOA, currently Mel Renkey. Any changes to the Chief of Security's position or pay shall be recommended by the Community Manager and approved by the MBRHOA Board of Directors. In the event of a termination or expiration of this contract the MBR HOA maintains a right of first refusal for all KAD personnel assigned to Myrtle Beach Resort. This refusal includes the right for the MBRHOA to hire another contractor to provide these services and the right to transfer the employees assigned byKAD from the employment of KAD to employment by the new contractor effective on the termination or expiration or this contract.

The Chief of Security will normally have the final say on all operating issues except those that require the expenditure of funds, in which case the approval of the Community Manager is required. If the KAD administrator and the Chief of Security disagree on any operating issues, they will jointly present their case to the Community Manager who will consult with the Board of Directors, if deemed necessary, and make a decision. If the Community manager has not consulted with the Board and either party disagrees with the decision of the Community Manager, they shall notify the Community Manager of their desire for the Board to be consulted and the Community Manager shall involve the Board in a final decision on the matter.

KAD guarantees that sufficient work force will be available to MBR HOA during Bike Weeks and if not, KAD will reimburse MBR HOA for any additional expenses required to provide adequate force in the event KAD should fail to do so.

All officers assigned to Patrol duties will be trained in the use of handcuffs, chemical sprays, and baton.

All officers assigned to Gate duties will be trained in the use of chemical sprays.

All officers assigned to the property will be trained in, and authorized by SLED to, execute arrest powers and write citations on the property.

The costs associated with all certification training for SLED and for use of weapons and chemicals shall be borne by KAD. On site training required for familiarizing an employee with the premises and procedure unique to Myrtle Beach Resort shal be borne by the Association.

KAD shall provide officers for Patrol Shifts who are fully capable, both in training and physical abilities, of apprehending individuals who are violating the law and who choose not to cooperate with security officers.

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If the Chief of Security has provided KAD with at least five days notice of the need for additional Personnel and KAD has failed to provide an officer fitting the description in the previous paragraph, KAD shall bear the costs of all overtime required to fill the personnel needs as requested by the Chief of Security. Any disputes as to the question of "fully capable" shall be adjudicated through the appeal process outlined above with respect to operating issues. In the event of sickness or injury of an officer, the five days notice required shall not apply and KAD will be required to furnish personnel or pay the additional premium time required to backfill for the officer.

KAD employees providing the services herein described will be assigned without regard to race, color, creed, sex, national origin, handicap conditions, and/or covered veteran status for which employees are protected in their terms and conditions of employment by Federal, State, Or Municipal law, or Executive Orders and Regulations governing the conduct of contractors with Federal, State, or Municipal Governments.

Cost Proposal

The total compensation to which KAD shall be entitled during the term of the agreement shall consist of fees for man hours to cover shifts established by ASSOCIATION in conjunction with our management team. Such compensation represents the overhead expenses of theKAD and fees for Uniforms, Supplies and Licensing Fees are included in our Price. KAD hourly compensation also includes vacation, some overtime, as described above, and bonuses paid to the full time staff.

Any site-based staff required by ASSOCIATION will be provided to ASSOCIATION. K.A. DIEHL will be responsible for advertising, pre-employment testing, background checks, benefits administration, and payroll administration for this staff as well as Wage and Hour reporting, EEOC claims administration and SLED training. For this service we will charge a man hour rate as follows:

Supervisor (Chief) Rate:	$28.00
Assistant Supervisor (Lt) Rate:	$15.50
Sgt Rate	$15.00
Officer III Rate	$14.50
Officer II Rate	$14.00
Officer I Rate	$13.50
Staff Rate	$13.00

These rates are subject to change annually based on the actual hourly rate paid to each staff member or with the addition of new staff members

KAD will make available to all full-time staff, health benefits as part of KAD's group policy. It is understood that ASSOCIATION will be responsible for 70% of the cost of these benefits to each employee assigned to the Property, while the individual will be responsible for the remaining 30%.

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K.A. DIEHL WATCHMEN SERVICES

(As presented to the Board; September 2009)

It is our goal to provide ***"security services"*** and our mission shall be:

To be the premier Community Association security services company in all aspects, especially in maintaining common properties, providing a secure environment, preserving a quality natural setting, meeting members' needs for community services, maintaining and enhancing property values, and fostering a spirit of community for all members.

In our attempt to develop and institutionalize a better customer service model, Department heads have worked on putting together a Service Commitment statement, which serves as a mission for our whole security organization and Core Values and Service Basics that reflect that commitment. After several meetings and many hours, we have arrived at the commitment, values, and basics that we feel separates us from a mediocre organization and makes us superior . What we have developed is exemplified by K.A. Diehl employees every day. We do feel that constant reinforcement of our commitment, values, and service basics will only improve our already superior performance.

Therefore, the following procedure will be followed:

- Supervisors will be responsible to review with their personnel the Service commitment, Core Value Service, Basic and Specials note as designated by the Director of Security and the Association Personnel Manual.

Our Core Values:

- We are empowered to ensure complete member satisfaction.
- Our Service Commitment is embraced and executed by each employee.
- We will demonstrate genuine respect for one another—ladies and gentlemen serving ladies and gentlemen.
- Communication at all levels is how we succeed.
- We anticipate members' needs to create a seamless and personalized experience.
- Protection of our natural environment and the Association's assets is the responsibility of every employee.
- Each employee is an ambassador of K. A. Diehl and the Association.
- All employees use the proper greetings, verbiage and phone etiquette at all times.
- We maintain a professional appearance through proper and appropriate grooming standards and standard uniforms.
- A clean, uncluttered, well-organized and efficient workplace is the responsibility of every employee.

Our Service Basics:

Empowerment

- Understand the difference between what is right and what is wrong....

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Service

- Anticipate the customers' needs.
- Follow through on the service details like making eye contact, approaching the customer as he/she approaches you, providing a map or an escort.
- Keep your heart in your work. Develop a personal commitment to excellence.

Differences

- Value individualism, creativity and specialization since these make the whole better.
- Accept and respect differences.

Communication Skills

- Demonstrate genuine caring and service for others
- Be approachable and friendly.
- Seek first to understand, then to be understood. Listen carefully. Speak slowly. Ask questions.
- Keep the communication loop flowing.
- We are all one service team..

The Property

- Understand your connectedness to the Association. The resort, regimes, guests, town and wildlife are all an integral part, just like you.
- Actively represent the Association. Promote goodwill.
- Seek the best interests of the Association.
- Be a good steward of the Association's assets and a benefit to the Properties habitat.

Etiquette

- Use pleasantries like "please", "thank you", "my pleasure", and "you're welcome".
- Use the member's name. Introduce yourself.
- Answer the phone..., Respond "on their dime."

Personal

- Come to work with a well-groomed, neat appearance, appropriate & complete uniform.
- Respect each other. If you see a mess clean it up. If you get it out, put it back. If you turn it on, turn it off. Pick up litter. This goes for personal work areas the corporate work areas and the entire property.

BASIC FUNCTIONS-SECURITY

The basic functions of the K.A. Diehl security services include;

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Controlling access to the property by assuring all persons passing through the gates have a reason to pass and have authorization as promulgated by the Vehicle Access policy set by the Board of Directors.

- Patrol all properties and enforce the Covenants, and Rules and Regulations. The method of gaining compliance with these guidelines is through engineering, education, and punitive enforcement as necessary.
- Providing quality of life customer service type services to members. Such services include checking vacant properties, changing member's tires, providing medical assists, and responding to all service requests within the realm of responsibility of Watchmen.
- Inspecting the entire property and member's properties for safety exposures.
- Providing officers for special events and activities.

ACCESS CONTROL

A primary function of K.A. Diehl security services is access control or allowing authorized individuals on the property and keeping unauthorized people out. Typical actions regarding this control include:

- Ensuring that all members, contractors, employees, and renters have and display the proper access credentials.
- Identifying all visitors and assuring that they have the necessary passes.
- Ensuring that pass access restrictions are understood and when necessary enforced.
- Monitor Parking Passes to Ensure they are Appropriately Displayed at all Time and Issue Warnings and/or Violations as outlined in Association Operation Manual.

PATROL

Patrol officers observe a wide variety of persons and locations; they report a large amount of information to K.A. DIEHL administration. This information, when properly reviewed and analyzed, provides an invaluable insight into the operation of the Association's security program. Hazards are reported and deficiencies in the asset protection guidelines are highlighted so that changes in procedures can be made. Our patrols are almost exclusively motorized-with time out of patrol vehicles to check parking lots for passes, to answer calls, to enforce parking rules, to provide officers at special events, and to give particular attention to problem or directed patrol areas.

The entire property should be patrolled at least twice per shift and all aspects of the environment should be carefully observed. When anything out of the ordinary occurs, the Officers should evaluate the situation and take necessary steps as outlined by Myrtle Beach Resort policy and procedure manual.

The common items an officer on patrol should look for include:

- Doors, windows, or other openings that are not secure;
- Suspicious persons, vehicles, or circumstances (improper access);
- Disorder or unusual activity-disorderly youths, noise, vehicular annoyances; and
- Hazardous conditions-such as water or other fluid leaks, fire hazards, and malfunctioning equipment.

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ESCORTS

In our effort to provide premier customer service it oftentimes becomes necessary to provide escorts for property owner guests, contractors, people with disabilities, and/or children. The actual reasons for such escort duty is myriad, but, any reasonable request is honored, whenever possible.

INSPECTIONS AND SPECIAL ASSIGNMENTS

Inspection activities include commercial and employee pass verification, property owner and renter guest pass verification, checking for hazards, and other safety reviews.

Officers also serve as messengers, communications coordinators, and at times as necessary as chauffeurs.

SECURITY ORGANIZATION

One of the basic tasks of an officer is to determine how many posts are required to provide the service expected and to protect the assets of the organization.

An officer's post is defined as any location or combination of activities for which a trained human being is necessary. This definition includes three key concepts:

- A location or combination of activities.
- Necessary human being. *(see description below)*
- Training and competence to accomplish the required activities.

LOCATION OR COMBINATION OF ACTIVITIES

The stationary or "fixed post" and the roving patrol represent the location or combination of activities in the first concept of estimating personnel requirements.

NECESSARY HUMAN BEING

The following activities, characteristics, and capabilities may be regarded as attributes requiring a human being:

- Ability to discriminate among events, persons, circumstances or physical objects based on complex and varying criteria;
- Ability to conduct rational dialogue with other persons face to face or on the phone and discern necessary action based on that communication;
- Ability to exercise judgment to determine a logical course of mental or physical activity in response to circumstances that may vary randomly.

Duties outlined in our Basic Function require all the above criteria defining the need for a human being on post.

TRAINING AND COMPETENCY

To assure that officers have the knowledge necessary to perform their basic functions much time is expended on training functions.

Training Modules
(Typical examples)

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Subject	Orientation	Quarterly	Monthly	Weekly	Daily	Yearly
Phone Etiquette	XXX		XXX			
Decal/Pass System	XXX	XXX				
Computer Usage	XXX		XXX			
Customer Service	XXX			XXX		
Service Basics	XXX				XXX	
Covenants	XXX	XXX				
Gate House Operations	XXX	XXX				
Bomb Threats	XXX	XXX				
Verbal communications	XXX			XXX		
Report Writing	XXX	XXX				
Patrol Function	XXX	XXX				
Ticket writing	XXX					
Anger Management	XXX					XXX
Harassment/Discrimination	XXX					XXX
Performance Management Plan	XXX	XXX				
Employee Handbook	XXX					
Sled Certification	XXX					
Safety Issues-General	XXX*					XXX
Safety Issues-Heat Stress	XXX*					XXX
Safety Issues-Driving	XXX*					XXX
Safety Issues-CPR/AED	XXX*					XXX
Safety Issues-Electrical	XXX*					XXX
Safety Issues-Fire	XXX*					XXX
Safety Issues-Housekeeping	XXX*					XXX
Safety Issues-Slips, Trips, Falls	XXX*					XXX
Safety Issues-Workplace Violence	XXX*					XXX
Safety Issues-Managing Stress	XXX*					XXX
Safety Issues-Your Heart Matters	XXX*					XXX
Safety Issues-Ergonomics	XXX*					XXX
Safety Issues-Back Injuries	XXX*					XXX

*Briefly mentioned at orientation but a major OJT component

KAD is committed to ongoing review and refinement of our training criteria for all staff. The curriculum and specific training methods and material is updated on a regular basis, with the specific intent of exceeding that required by SLED.

E.C.A.
Initial KAD

Initial ASSOC

https://mail.google.com/_/scs/mail-static/_/js/k=gmail.main.en.WMsW1N.U.HRe.O/m=m_i,t/am=PiMoANuRoYBQY92nrY9QCLhxxx...

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ATTACHMENT "G"

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Nancy:

Below is Jack's calculations on the hours for Watchmen's Services. The total amount spent for Watchmen's Services is on the December 31, 2013 financials on the Master website. If you want each month broken down you will find it on the Operating Income Statement under GL#6241 on the Master website.

Darla Donovan, CMCA, AMS

Senior Community Manager

K.A. Diehl, AAMC

An Accredited Association Management Company

(Direct Dial: (843) 828-1300

(Direct Fax: (843) 357-4153

(Corporate fax line (843) 828-8021

*Email: Darla.Donovan@KADiehl.com

ÿ www.KADiehl.com

P Please consider the environment before printing this email.

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www.kadiehl.com

From: Jack Boselli

Sent: Wednesday, February 19, 2014 11:19 AM

To: Darla Donovan

Cc: Julie Watson; Eric Ault; Vicki Gallagher

Subject: Watchmen Hours

Importance: High

Darla,

It is my understanding that the MBR Master Board has approved the distribution of the # of watchmen hours for 2013. Please see the following information:

Regular Hours	25,665.00
Overtime Hours	730.50
Holiday	1,036.00
Sick/Personal	296.00
Vacation	1,024.00
Bonus	558.00
Total	29,309.50

Thanks and have a great day!

Jack Boselli

Chief Executive Officer

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ATTACHMENT "H"

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SO ORDERED.

SIGNED this 11 day of December,2013.

Stephani W. Humrickhouse
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
GREENVILLE DIVISION

IN RE:

CROC, LLC,

DEBTOR

CASE NO.

13-05146-8-SWH

ORDER ALLOWING MOTION TO CONVERT OR DISMISS

This matter came before the court on motion of the bankruptcy administrator to convert or dismiss this chapter 11 case for cause pursuant to 11 U.S.C. § 1112(b)(4). Memoranda supportive of the bankruptcy administrator's motion were filed by creditors SRS, North Carolina Property, LLC ("SRS") and Stephen R. Smith ("Smith"), Donald Wray ("Wray"), and EOS Properties, LLC ("EOS"). The debtor objects to the motion. Hearings on the motion took place on October 17 and November 7, 2013, in Raleigh, North Carolina, after which the court afforded the parties an additional opportunity to file supplemental memoranda. The matter is now ripe for disposition, and for the reasons that follow, the court will convert the case for cause pursuant to § 1112(b)(4).

BACKGROUND

The debtor is a beach condominium unit rental business with two employees; the debtor's owner-operator, Glenn Magill ("Magill"), and his son, who lived in one of the condo units (through October 2013) as the on-site manager. The debtor owns a total of twelve condominium units within

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the Bodie Island Resort, located in Nags Head, North Carolina. Though the usage allocations change from time-to-time, at present, eight of the condos are designated as long-term rentals and four are used for short-term vacation rental. The debtor filed a petition for relief under chapter 11 of the Bankruptcy Code on August 15, 2013.

On August 29 and September 12, 2013, Magill testified for the debtor at an emergency hearing for the use of cash collateral. In response to and consequence of Magill's testimony, the Bankruptcy Administrator ("BA") moved to dismiss or convert the debtor's case for cause under multiple provisions of § 1112(b)(4): specifically, the BA urges conversion or dismissal on four separate grounds; the likelihood of substantial and continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; gross mismanagement of the estate; the debtor's failure to maintain appropriate insurance; and the debtor's post-petition payments for debts or services rendered pre-petition. SRS, Smith, Wray and EOS filed memoranda supporting the BA's motion to convert or dismiss. Creditor EOS also filed a memorandum outlining the specific bases upon which it contends the debtor's case should be converted to Chapter 7.

In addition, the memoranda filed by the BA and other creditors assert their collective belief that the debtor's plan is not feasible. The debtor filed a plan on November 13, 2013, which attempted to address its creditors' efforts to preclude cramdown, but developments since that filing

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indicate that the debtor is unlikely to succeed with its effort[1] to include an impaired accepting class. In light of the court's determination that cause exists to convert the case, the court need not address the feasibility of the debtor's plan.

I. Grounds to Convert or Dismiss Pursuant to 11 U.S.C. § 1112(b)(4)

A. Diminution of Estate and Absence of Likelihood of Rehabilitation

Among the statutory grounds providing cause for conversion or dismissal is the "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation." 11 U.S.C. § 1112(b)(4)(A). The BA contends that dismissal on this ground is warranted by at least three factual bases: First, the testimony of Jack Lightbody, a real estate witness, that "the property is in a diminished state and in need of immediate attention, metal is rusting, stucco has water damage, only one pool is in operation, buildings need new paint, a crack in the pool needs to be sealed, the entrance sign needs to be replaced, property is in general disrepair and overall not aesthetically pleasing." BA's Mem. in Support of Mot. to Dismiss or Convert ("BA's Mem.") at ¶ 1(a). Next, the BA argues that the debtor "does not generate enough income to satisfy debts and pay for expenses including homeowner's dues and assessments associated with the property." Id. Finally, the BA notes that the debtor, as the owner of 12 units, has "failed to pay the homeowner's association for past dues and/or assessments, which has resulted in the property falling into disrepair and caused a hardship on the homeowner's association." Id. At the hearing on November 4, 2013, Mike Milam, chairman of the finance committee of the Bodie Island

[1] At one point, the debtor thought that secured creditor Donald Wray might vote in favor of the debtor's plan, but Wray is in support of dismissal or conversion. The debtor then represented that creditor Jon T. Gonzales would be the sole impaired class voting in favor of the debtor's plan, but the Gonzales claim is now assigned to creditor EOS.

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Homeowners Association ("HOA"), testified that the debtor had not made payment to the HOA since June 2012, for 2012 dues. Milam estimated the debtor's dues shortfall to be approximately $40,000, which he characterized as a hardship that impacts the HOA's ability to provide maintenance services.

In response, the debtor did not address testimony regarding the physical condition of the property in any detail, except to state that there is "no evidence that the property is declining in value" and that "the property is being properly maintained." Debtor's Resp. to BA's Mot. at 6-7. The debtor notes of its relationship with the HOA that "the Debtor and the HOA are in conflict with each other," which the debtor attributes in part to the HOA's lack of cooperation in producing evidence of insurance (discussed below). There are, however, other areas of conflict as well, as illustrated by the debtor's objection to the HOA's claim of $75,855.20, and its assertion that it holds an offsetting claim of $174,554.53, as well as certain statutes of limitation defenses which will, the debtor states, warrant disallowance in full of the HOA claim.

Beyond those points, the testimonial evidence and filings are (comparatively) sparse with regard to whether there is a literal, physical component to any loss to or diminution of the estate. The court recognizes that the BA's concerns under § 1112(b)(4)(A) go beyond the physical condition of the property, but the court believes those concerns fit more comfortably into the context of gross mismanagement, discussed below. Accordingly, based on the limited testimony of the HOA representative and the debtor's skimpy response, the court concludes only that the property of the estate is in less than optimal condition. The court does not at this time believe that failures of maintenance and upkeep rise to the level of "substantial or continuing loss or diminution."

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B. Gross Mismanagement of the Estate

The court shall convert or dismiss a case if the court finds "gross mismanagement of the estate." 11 U.S.C. § 1112(b)(4)(B). The BA asserts that the debtor's varying testimony over three hearings (on the motion to dismiss and the motion to use cash collateral) establishes his general lack of familiarity with, and understanding of,[2] the debtor's income and expenses. In addition, by the BA's calculations, information provided by Magill with respect to the nature of the leases[3] (month-to-month, long or short term, etc.) results in monthly collections of $5,900 in long-term rent money. In contrast, the BA says, the projections advanced by the debtor at the hearing predict collections of $8,400 per month at full capacity. BA's Mem. at ¶ 1(b).

The debtor responded with two memoranda, the affidavit of Magill, and a collection of documents in support of the affidavit, including utility bills and portions of the HOA's insurance policy. The court thoroughly reviewed all of the testimony and documentation offered in opposition to the motion. The court concludes that these sources, taken together, establish the debtor's managerial shortcomings to be so extensive and pervasive that conversion or dismissal is necessary based on § 1112(b)(4)(B) alone.

---

[2] Magill's testimony with respect to the number of units that were short-term as opposed to long-term rentals differed from one hearing to the next, and that factual discrepancy was among several factors initially cited by the BA as catalysts for her concerns about mismanagement of the estate. Magill subsequently explained in his memorandum that at the time of the first hearing, there were five vacation and six long-term rentals; during the short period of time between that hearing and the next, he re-designated a vacation rental as long-term, such that there was no inconsistency, but rather a change. The court accepts this explanation as plausible.

[3] The BA clarifies further that the debtor did not provide to the BA the lease agreement for Unit 301, that the lease agreement for Unit 310 was set to expire on 11/30/13, and that there is no current lease agreement that the BA knows of for Unit 102, which was occupied by Magill's son.

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The debtor's own testimony reflects a wholly inappropriate fluidity between the debtor and Bodie Island LLC, which is another entity held solely by Magill. The details are unclear, but it is evident that the Bodie Island entity is used (at least in part, and at least sometimes) to receive the debtor's rents and deposits, and then pay those receivables out to Magill (and, perhaps, others). See Magill Aff. ¶ 5; see also Magill Aff. Ex. F p. 3 (indicating the debtor's cash on hand, with a portion attributable to "BI"); Ex. F p. 4 (entitled "Exhibit B" and allocating the debtor's vacation rental income to both the debtor and to Bodie Island LLC). Compounding the obvious problems inherent in this sort of arrangement is the fact that "most" of the debtor's long term tenants (it is unclear how many) do not have checking accounts, according to Magill. These tenants pay monthly rent, in amounts ranging from $1,000 to $1,200, in cash. Given these longstanding financial ambiguities, there are so very few solid, verifiable benchmarks – financial, operational, or otherwise – to go by that even the task of establishing where to *start* in pinpointing the exact nature of the debtor's business difficulties is, in itself, difficult. The court does not believe the debtor intended for its business practices to be virtually indecipherable, but suspects that to Magill's way of thinking, the debtor's current system "works" if one is fully immersed in its quirks and vagaries. This approach, however, clearly did *not* work prior to bankruptcy, and cannot be maintained going forward.

On this same note, a review of the utility bills appended to Magill's affidavit shows that out of bills for seven of the twelve units, four bills (for units 101, 102, 303, and 304) identify the customer as Croc LLC; three others (units 103, 301, and 305) list the customer as Glenn E. Magill, Jr. Magill Aff. ¶ 7, Ex. I. Did the debtor pay utility bills that were not even its own debts to pay, and were instead the debts of Magill? So it appears, although again, the debtor's lack of bookkeeping and accounting standards raises doubts. What is abundantly clear is that the debtor

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does not grasp the significance of Croc, LLC operating as a distinct business entity, and an entity in bankruptcy, at that.[4]

These utility bills were included by the debtor in response to the BA's contention that the debtor "made post-petition payments for debts and/or services rendered pre-petition." Magill explained that the bills were due on September 30, 2013, and that he paid them because he "believed that I needed to pay those bills to keep the electricity running for the condominium units and that those expenses were ordinary and necessary business expenses." Magill Aff. ¶ 7. Every utility bill includes a past due amount and an indication that a percentage of the past due amount was paid during the preceding month.[5] Aside from the clear indication that the bills were paid for pre-petition debt and/or services, these bills reflect the debtor's month-to-month struggle simply to maintain electrical service to the units.

These difficulties notwithstanding, Magill's affidavit and the debtor's forecasts together paint an optimistic picture of the debtor's expected income and expenses going forward. These projections, however, have no stated and assessable bases. The debtor states that it will raise all rents in 2014, yet articulated no rationale for expecting success in doing so. The debtor's "2014

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[4] The debtor filed a motion on September 4, 2013, for authorization to refund certain deposits received by it for vacations that were subsequently cancelled, but as creditor EOS and the BA then noted in objections filed on September 23, 2013, it appears that those monies – as well as others – were in fact received by Bodie Island LLC. See Magill Aff. Ex. F p. 4 (entitled Exhibit B and listing vacation rental income, allocated to both the debtor and to Bodie Island LLC, and deducting McFadden deposit of $670.50 from Bodie Island).

[5] Except for Unit 301, as to which no previous (September 5) payment was made. The bill for Unit 301 differs from the others in that it includes no usage history prior to September, though it does include a previous amount due of $102.55, plus a "deposit installment" of $75 and usage charges for September, totaling $348.51. The amount was billed to Magill, not to Croc, LLC. Unit 301 is the unit for which Magill accepted a discounted rate of $800 per month because "the air conditioning did not work."

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Projected Condo expenses" omits reference to its legal fees, tax obligations other than occupancy taxes, management fees, and credit card fees. It also stipulates that long-term tenants pay their own electric bills even though the bills appended to the affidavit included at least one bill for a unit designated by the debtor as long-term.[6]

Going forward, the debtor estimated housekeeping fees for four vacation units at $180 a month, or $2,160 a year. Magill Aff. Ex. H. However, the debtor's profit and loss statement for the two weeks of August 16-31, 2013 reflects a housekeeping cost of $540. Magill Aff. Ex. F p. 12. Another accounting of receipts and expenses, this for the period of August 28 to September 12, 2013, lists housekeeping costs ($60 per clean) at $1,080. Magill Aff. Ex. A. The accounting for the following two-week period, September 15 to 30, 2013, sets out two weeks' worth of housekeeping expenses at $840. Magill Aff. Ex. B. And, the accounting for the four week period after that, October 1 to 31, 2013, sets out four weeks' worth of housekeeping expenses at $1,200. Magill Aff. Ex. C. So, on the one hand, the debtor's operating budgets for a total of eight weeks reflect actual costs of $3,120 for housekeeping, or a total of $3,680 for ten weeks if the slightly overlapping period of August 16-31 is included. Then, on the other hand, there is the debtor's forecast of $180 per month in housekeeping fees for 2014. The numbers cannot be reconciled or explained, even though these are the accountings prepared for use in this bankruptcy case, where accuracy and verifiability are paramount.[7]

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[6] The debtor paid utility bills on September 8 for units including Unit 301, a long-term unit. The debtor's payment for two other long-term units may reflect their former status as a short-term rental (Unit 101) and as Magill's son's unit (Unit 102).

[7] The court understands and has considered the seasonal nature of the debtor's business which impacts the consistency of the need for housekeeping. Notwithstanding that, the debtor has not offered a verifiable basis for its projections.

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The court is not unsympathetic to the difficulties of operating a residential rental business. Magill's efforts to keep many balls in the air and his evident flexibility and creativity in attempting to achieve the highest and best use of the properties (long-term, short-term, payment options, etc.) are useful, laudable traits. However, they do not carry the day in the face of creditors' legitimate competing interests, and against the overwhelming and compelling evidence that the business of the debtor is grossly mismanaged. The debtor's method of doing business over the past years renders it utterly unable to provide for its creditors and the court a clear, understandable, and transparent accounting of its use of cash and receipts, and for its outlays for expenditures. The court will convert this case to a case under Chapter 7 based upon the debtor's gross mismanagement of the estate within the meaning of § 1112(b)(4)(B), which will afford a trustee the opportunity to unravel and make sense of the debtor's finances.

C. Failure to Maintain Appropriate Insurance

Cause to dismiss or convert exists upon a debtor's "failure to maintain appropriate insurance that poses a risk to the estate or to the public." 11 U.S.C. § 1112(b)(4)(C). The BA contends, and the debtor does not contest, that the only insurance policy currently in effect on the properties is held by Bodie Island Resorts, which is the homeowners' association ("HOA"). The BA maintains that there is no general liability policy in the name of the debtor. The chairman of the HOA's finance committee, Mark Milam, testified that the insurance policy maintained by the resort covers only the common areas of the complex and outside structures. Further, he testified that "most if not all current homeowners maintain separate general liability policies." BA's Mem. at ¶ 1(c).

The debtor acknowledges in response that he has "had some challenges in producing the Declarations for the insurance policies," but states that insurance has been in place since the filing

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of the petition. According to the debtor, the policies "are in the name of the HOA." Debtor's Response at 3. In his affidavit, Magill responds to the BA's contention that the debtor has no general liability insurance on the property by stating that "[i]n reference to insurance, attached as EXHIBIT D are documents evidencing casualty and liability insurance." Magill Aff. at ¶ 9. The documents included in Exhibit D are portions of policies maintained by the HOA.

It appears that there is no general liability policy on the property, that there is no insurance policy in the name of the debtor, and that the debtor is unaware of these facts and the significance of them. Magill appears to believe that the HOA's insurance policy is to the debtor's benefit, which is all the more incongruous given the debtor's ongoing dispute with the HOA and failure to pay the dues owing to it. The court concludes that the debtor's property lacks appropriate insurance and, on that ground alone, sufficient cause exists to convert or dismiss.

D. Failure to Satisfy Reporting Requirements

Finally, the BA argues that cause to convert or dismiss exists under 11 U.S.C. § 1112(b)(4)(F), which provides that 'cause' includes a debtor's "unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter." Specifically, the BA cites the debtor's testimony of October 17, 2013, that there are three professionals "currently working on the debtor's behalf," including special counsel for the debtor, a real estate agent, and an accountant. BA's Mem. at ¶ 1(d). However, the BA notes, that the debtor did not file an application seeking to employ special counsel until October 25, 2013; further, the BA notes, as of November 11, 2013 (the date on which the BA filed the supplement to the motion to convert or dismiss), neither the real estate agent nor the accountant had been

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employed, despite the BA's request at the September 11, 2013 hearing for the use of cash collateral. Finally, the BA states that the debtor failed to file federal income tax returns for 2011 or 2012.

In response, the debtor states in his affidavit, with respect to records, that "I am properly maintaining books and records for the Debtor." Magill Aff. ¶ 11. The debtor filed a motion to employ Hersey C. Quinn as accountant on October 21, 2013, which was allowed without objection on November 18, 2013. At the hearing on October 17, 2013, the debtor testified that Mr. Quinn was "working on" the 2012 taxes and acknowledged that the 2011 taxes also had not been filed. The debtor applied to employ Phillip H. Hayes as special counsel on October 25, 2013, after testifying at the hearing on October 17, 2013, that Mr. Hayes already was acting as its attorney, was working on a lawsuit against creditors EOS, SRS and Smith, and was owed $5,000. The debtor applied on November 12, 2013 to employ Geraldine J. Holcomb of Coldwell Banker Seaside Realty, after testifying at the hearing on October 17 that Ms. Holcomb was the debtor's realtor. As for unfiled taxes, Magill testified that the debtor did not list the IRS as a creditor, does not owe any federal taxes, and is not in default. The recently filed plan and disclosure statement do include IRS and NC Department of Revenue tax claims as part of an unimpaired Class 3, but indicates that these entities do not have claims.

In light of all the above, the court concludes that the debtor's approach to filing requirements, whether imposed as part of bankruptcy procedure or federal tax law, is consistent with other managerial practices in that the debtor either does not understand or lacks the proper regard for requirements that actually apply to it. In the court's view, the odds of the debtor's tax obligations to the federal and state governments simply zeroing out are, in all probability, zero. Thus it remains uncertain whether the debtor will have additional claims to contend with or should

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instead expect a refund of tax overpayment. These reporting failures add to the court's certainty that conversion of the case is appropriate.

II. Conversion on Grounds of Lack of Feasibility or Confirmability

In light of the court's conclusion that the BA and secured creditors have established ample bases for conversion or dismissal, and that conversion is in the best interest of creditors, there is no reason to discuss additional and alternative grounds for conversion.

CONCLUSION

The BA has established ample cause to dismiss or convert within the meaning of 11 U.S.C. § 1112(b)(4)(B), and also, separately and independently, under 11 U.S.C. § 1112(b)(4)(C). The court's consideration of factors set out in §§ 1112(b)(4)(A) and (F) also support conversion or dismissal, though they would not independently require either action. This case cannot proceed under the ill-fitting auspices of a Chapter 11 plan, and the interests of the creditors and the estate are best served by conversion of the case to a liquidation under Chapter 7 so that the financial affairs of the debtor can be properly sorted.

For the foregoing reasons, the debtor's Chapter 11 case is hereby **CONVERTED** to a case under Chapter 7.

SO ORDERED.

END OF DOCUMENT

ATTACHMENT "I"

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