STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

JON H. ATTRIDGE and JANET L ATTRIDGE, ROBERT W. BANKOV, VIRGINIA J. BANKOV, TOM BOLTON, GUY I. COLLIER, NANCY L. COLLIER, RICHARD JAY COLEMAN, MARLENE COLEMAN, RUSSELL G. DIMKE, SANDRA A. DIMKE, JAMES G. GOODWIN JR, CAROL A. GOODWIN, GEORGE J. LOVETT, WILNA W. LOVETT, PETER MARZLUFF, DEBORAH C. MARZLUFF, GARY OKEY, NANCY OKEY, MICHAEL PELLECCIHA, JANICE S. PELLECHIA, FRANK H. ROBERTS SR., RICHARD SWILPA, MICHELE GALLANT, PHYLLIS A. KAUPP-SEAS, ROBERT P. BRENDZA, and ROBIN E. BRENDZA individually and in their derivative capacity on behalf of BULL POINT PLANTATION PROPERTY OWNERS ASSOCIATION,

Plaintiffs/Counterclaim Defendants,

vs

THE BOARD OF DIRECTORS OF BULL POINT PLANTATION PROPERTY OWNERS ASSOCIATION, INC.; BULL POINT SC, LLC; WILLIAM E. GAVTGAN; MICHAEL CAREY; CHRISTOPHER J. QUICK; JAMES RIORDAN, DB ASTER, LLC, and GSI, LLC,

Defendants/Counterclaimants,

and

BULL POINT PLANTATION PROPERTY OWNERS ASSOCIATION, INC., BULL

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT
Civil Action No. 2018-CP-07-2345

RECEIVED
Nov 18 2020
SC Court of Appeals

DEFENDANTS' MOTION FOR RELIEF FROM ORDER (FILED NOVEMBER 18,2019) PURSUANT TO RULE 60 (b) SCRCP

PONT SC, LLC, GSI, LLC and WILLIAM E. GAVIGAN,

Third-Party Plaintiffs,

vs

STEVE ANDREWS, HARRIET BOSIACK, JOSEPH P. D'AMBROSIO, MARY D'AMBROSIO, JAMES HAYES, RON LAMBE, LAMAR NIX, MICHAEL POWERS, DAVE PRZBY, ROBERT WOLFSON, HUSPAH PROPERTIES, LLC, RIVERS REACH AT POCOTALIGO, LLC, RIVERS REACH REALTY, LLC AND JOHN DOES 1-10,

Third-Party Defendants.

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I. INTRODUCTION

This Motion is being filed in the Court of Common Pleas as well as the South Carolina Court of Appeals in an effort to assure that jurisdictional issues are resolved by filing in both Courts.

Defendants move pursuant to Rule 60 to be relieved from the Court's Order dated November 18, 2019, on the basis that the Order erred as a matter of law and fact and that each prong of Rule 60, subparagraph (b), is satisfied.

In 1995, Bull Point, LLC, the developer of Bull Point Plantation, acquired the first portion of a 694-acre tract that would be known as Bull Point Plantation. Later that year, Bull Point, LLC recorded restrictive covenants that encumbered Bull Point which reserved to the developer (the "Declarant") certain rights (the "Declarant's Rights") and which formed an unincorporated nonprofit association defined in the covenants. That Association was and is Bull Point Plantation Owners Association, Inc.

In 2012, Bull Point, LLC lost most of its real property interests (but not the entire interest) in a foreclosure action. In July 2012, a federal court transferred the property to DB Aster, LLC, an assignee of the party that prevailed in the foreclosure action, and in December 2012, Bull Point, LLC assigned the Declarant's Rights to DB Aster, LLC.

For five years DB Aster was little more than a caretaker Declarant. It was not actively involved in the oversight of Bull Point, it did not commence any litigation, and it did not record any amendments to the covenants. It did, however, act as the Declarant in that it appointed officers and directors as it was empowered to do under the Declaration and it executed certain Declarant documents, such as Waivers of Rights to Repurchase. During its tenure as the developer of Bull

Point and the Declarant, its status and authority was widely and publicly recognized by the owners at Bull Point; its status was never challenged, informally or in litigation.

On August 18, 2017, DB Aster, LLC sold all its interests to GSI, LLC for $1,200,000.00, including its real property interests and the Declarant's Rights. As the Declarant, GSI recorded an amendment to the covenants (*i.e.*, the Seventeenth Amendment) and appointed defendants Carey, Gavigan, and Quick to the Board of Directors to the Association. Subsequently, on August 21, 2017, GSI, LLC assigned its interests to defendant Bull Point SC, LLC.

Four months after GSI acquired Bull Point, Old South Properties, Inc. commenced an action[1] against William E. Gavigan, GSI, LLC, Bull Point SC, LLC, and Bull Point Plantation Property Owners Association, Inc. As newly discovered evidence obtained *after* the Order reveals, this lawsuit was part of a scheme designed by Robert Wolfson (a former principal in both Bull Point, LLC and Old South Properties, Inc.) and other Plaintiffs to bog down defendant Gavigan with litigation so that he could not afford to operate as the developer of Bull Point. As is now known, this was but an opening salvo and the first of many actions commenced against Gavigan and entities owned or controlled by him.

Among other things, the Old South Properties Action challenged the validity of the Seventeenth Amendment. Plaintiff did not prevail and the statute of limitations to challenge the Seventeenth Amendment has now lapsed. The Old South Properties Action was followed with Gavigan acquiring ownership of Old South Properties, Inc. and Bull Point, LLC.

One year after GSI acquired Bull Point, a minority of owners commenced the within action individually and derivatively through Bull Point Plantation Property Owners Association (the "POA"). The derivative nature of this action was, at best, intellectually dishonest; at worst it was

[1] *Old South Properties, Inc. v. William E. Gavigan, et al*, Circuit Court Case No. 2018CP0700144.

falsely filed from the beginning. First and foremost, the POA's Articles of Incorporation provide that the nonprofit corporation does *not* have members. Second, in 2013, the POA filed Articles of Dissolution and more than five years have passed since its dissolution. Thus, as a matter of law, Plaintiffs could not bring this action derivatively through the POA.

The derivative nature of the action is further improper because the POA has always lacked standing. The restrictive covenants recorded by Bull Point, LLC in 1995 define and refer to an owner's association, which is Bull Point Plantation Owners Association, Inc. (the "Association"). The Association is separate from the POA. Further, the covenants do *not* define or reference the POA in any respect. Thus, the POA never derived any rights from the covenants and there is no basis for the action to be derivative.

The Order further errs as a matter of law and fact because the Order implicates rights of the Declarant and the Association under the covenants. Further, the Order negatively implicates the *property rights* of Bull Point, LLC. Crucially, neither Bull Point, LLC (the "Declarant") nor Bull Point Plantation Owners Association, Inc. (the "Association") are parties to this action. Thus, the Declarant and the Association were denied due process. Consequently, the Order is <u>void</u> as a matter of law.

The Order is further wrong as a matter of law because it sought to affect the governance of Bull Point. If by its terms the Order is limited to the POA, then it has no relevance to Bull Point. If the spirt of the Order, defective as it may be, was to pertain to the owner's association, then that owner's association must be named. It was not. Also, to the extent that it holds that a Board is removed, the action must name as a defendant the entity from which the Board is removed. The complaint does not name as a party and does not include in its prayer a viable entity as a defendant. Specifically, it omits the Association and although referenced in the complaint, Bull Point

Plantation Property Owners Association, Inc. ("POA-INC") is not named as a defendant and was *never* served with the summons and complaint.

The Order errs factually because it improperly amalgamates different entities. Bull Point Plantation Owners Association, Inc., Bull Point Plantation Property Owners Association, and Bull Point Plantation Property Owners Association, Inc. are *separate* nonprofit corporations and there is no legal basis to rule that they are one. Each was formed for a different purpose – one, the owner's association under the Declaration, another, the Developers Holding Company, and the other, an entity used (and abused) by Plaintiffs to manage Bull Point during its transition – and the architect of these entities never intended for these entities to overlap.

The Order no longer has justification to have prospective application because newly discovered evidence shows that Plaintiffs have long known of the correct name of the Association, sought unsuccessfully to change the Declaration so that the name of the owner's association in the Declaration comported with the name under which Plaintiffs have wrongly carried on. In fact, although Plaintiffs have argued herein that the Declarant's Rights cannot be acquired, the newly discovered evidence shows that Plaintiffs sought to use contingency funds from the Association to acquire the Declarant's Rights.

Finally, the putatively verified complaint appears not to have been verified. While an amended complaint was filed with verifications attached, in a subsequent federal action the attorney for Plaintiffs herein attached to a motion to dismiss an exhibit which claimed to be the verified amended complaint to the within action. That pleading, however, differs materially from the pleading on file herein. Therefore, Plaintiffs' counsel either misrepresented the complaint to the federal courts or misrepresented the complaint to this court. In either case, Rule 23 appears not to have been satisfied.

For all the foregoing reasons, discussed more fully below, Defendants respectfully request that this Court vacate its Order.

II. STANDARD

SCRCP, Rule 60 provides:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) . . . or it is no longer equitable that the judgment should have prospective application."

(SCRCP, Rule 60.)

III. THE COURT SHOULD GRANT THE MOTION

A. The Court Order Was Limited to "Bull Point Plantation Property Owners Association".

Relief should be granted to all Defendants because the Order involved an entity that is a dissolved corporation not referenced in any documents germane to Bull Point Plantation. On November 18, 2019, the Court issued its Order relating to cross-motions for partial summary judgment filed by Plaintiffs and Defendants. Germane hereto, the Court granted Plaintiffs' fifth cause of action for declaratory judgment that defendant Bull Point SC, LLC was not the Declarant. Paragraph 5 of the Order provided:

> "Plaintiffs' request for Declaratory Judgment in its [fifth] cause of action is granted. Defendant Bull Point SC, LLC is not and never was the Declarant and, therefore, all actions it took as purported Declarant, including appointing the POA's directors and amending the Declarations, are void."

(Order, ¶ 5.)

The term "POA" was defined on page 2 of the Order in the opening paragraph as follows:

> "Plaintiffs commenced this suit individually and in their derivative capacity as property owners and members of the Bull Point Plantation Property Owners' Association (the "Association" or the "POA"), for injunctive relief and for a declaratory judgment as to the rights of the Association and its members under the Declaration of Covenants, Conditions and Restrictions for Bull Point Plantation (the "Declaration").[2]

(Order, p 2.)

Crucially, the Order does *not* state that any relief is granted for any other entity, including, but not limited to, Bull Point, LLC, Bull Point Plantation Owners Association, Inc., or Bull Point Plantation, LLC, each of which is a necessary party as discussed below, or Bull Point Plantation Property Owners Association, Inc., which although referenced in the complaint is not and never has been a party.

The limitation of the Order to Bull Point Plantation Property Owners Association (The POA) is material for two reasons: First, by its charter, the POA does *not* have any members. (Gavigan Aff., ¶11, Ex. 4.) Thus, regardless of what the Complaint and the Order state, it is impossible for the action to be derivative.

Second, the POA is a dissolved corporation. On March 20, 2013, the POA filed Articles of Dissolution. (*Id.*, ¶10, Ex. 4.) Pursuant to S.C. Code § 33-14-105, "a dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs." Thus, as a matter of law, all that the POA was authorized to do was wind up its affairs (and after five years, it could not carry on any business). (*Id.*)

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[2] Plaintiffs have used the terms "POA" and the "Association" in this litigation to refer variously to both Bull Point Plantation Property Owners Association and Bull Point Plantation Property Owners Association, Inc. This was intentional and a *ruse* by Plaintiffs to confuse the Court as to which entity is which and to have it seem as if they are one and the same, which they are not.

The Declaration defines the "Association" as Bull Point Plantation Owners Association, Inc. The Declaration does *not* define "POA" and NO charter document of Bull Point Plantation uses that term. Accordingly, so as not to fall into the quagmire that Plaintiffs have created, this motion uses the Declaration's definition of the "Association" to mean Bull Point Plantation Owners Association, Inc.), and the Order's definition of the "POA" to refer to Bull Point Plantation Property Owners Association. Further, the term "POA-INC " is used to refer to Bull Point Plantation Property Owners Association, Inc.

In later filings, Plaintiffs have sought to argue that Bull Point Plantation Property Owners Association (the POA) is the same as Bull Point Plantation Property Owners Association, Inc. (the POA-INC). The Order does *not* so provide. Further, as discussed below, there is no basis to so conclude.

B. Pursuant to Rule 60(b)(4), the Motion Should Be Granted as the Order is Void.

Rule 60(b)(4) allows relief from an order to be granted on the grounds that the order is void. A void order is one rendered in the absence of proper due process or jurisdiction. *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 561 S.E.2d 659 (Ct. App. 2002).

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652 (1950). Such notice must give the parties a reasonable time to make their appearance and "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.*

Here, there was a manifest absence of proper due process because the complaint failed to include several necessary parties, without which there cannot be any finality regarding Bull Point Plantation or any relevance or materiality regarding the Order.

1. The failure to include Bull Point, LLC as a party resulted in improper due process.

The Order is void because the Order and the Complaint failed to name Bull Point, LLC, the entity that is the *developer* of Bull Point Plantation, the Declarant under the covenants, and which was stripped of property rights.[3]

In January 1995, Bull Point, LLC acquired the first 160 acres out of the total 694 acres that is Bull Point Plantation. Subsequently, on September 26, 1995, Bull Point, LLC recorded the restrictive covenants to this property, entitled the "Declaration of Covenants, Conditions and Restrictions for Bull Point Plantation" Declaration"). (Gavigan Aff., ¶2, Ex.1.) The Declaration has been amended approximately 25 times, including two restatements, the Third Amendment recorded in 1996 and the Ninth Amendment recorded in 2000. (Gavigan Aff., ¶4 [the "Ninth Amendment"].)

While the original Declaration, Third Amendment, and Ninth Amendment have minor differences in the language, all define the "Declarant" as "Bull Point, LLC." (*Id.*, § 1.01(j).) Subsequently, the Declaration reserves to the Declarant certain rights and responsibilities, one of which is the right to appoint and remove officers and directors to the owner's association. (*Id.*, § 12.01.) Therefore, any order implicating this enumerated right would require this party to be before the Court. That, however, was not the case. Rather, the original complaint failed to name Bull Point, LLC as a party, even though all Plaintiffs and their counsel knew of Bull Point, LLC and its significance to this action. They again failed to name it as a party six months later in their Verified Amended Complaint.

Plaintiffs likely will argue that they included Bull Point SC, LLC as a defendant and that Defendants have contended that Bull Point SC, LLC is the Declarant and, therefore, that there was

[3] The Defendants make this argument in the alternative. Defendants continue to assert both in this case and in their appeal, that Bull Point SC LLC properly obtained the Declarant rights and should have remained the Declarant of the development.

no need to name Bull Point, LLC as a party. Plaintiffs are correct that Defendants asserted that Bull Point SC, LLC was the Declarant, but that is a moot point. The Fifth Cause of Action sought a ruling that Bull Point SC, LLC was not the Declarant and the Order granted judgment as to this cause of action. Thus, the law of the case is that Bull Point SC, LLC is not the Declarant. Insofar as the Declaration provides that only the Declarant may terminate the Declarant Rights (by the recording of an amendment), it follows that some party must be the Declarant. Accordingly, it was incumbent upon Plaintiffs to bring into this action *all* parties that potentially could be the Declarant. Plaintiffs failed to do so, with the result that the issue of who is the Declarant and/or who owns the Declarant's Rights under the Declaration remains at issue.[4]

As important, the Order denied Bull Point, LLC's *property rights*. More specifically, the Order provided:

> "7. . . . Defendants are enjoined from occupying the offices in the POA *clubhouse*, and they must vacate the clubhouse offices within 24 hours of the entry of this Order; . . ."
>
> "8. . . . Defendants shall turn over <u>possession</u> of: (a) the *clubhouse*. . ."

(Order, ¶¶ 7, 8.) (Emphasis added.)

The POA is *not* the owner of the clubhouse and it is *not* found anywhere in the chain of title to the clubhouse. (Gavigan Aff., ¶16.) Rather, the current title to the property where the clubhouse is situated is in the name of Bull Point, LLC. Thus, an order that deprived Bull Point, LLC of its property rights in any manner necessarily had to include Bull Point, LLC to insure its due process rights.

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[4] The issue of who is the Declarant (as well as the issue of who is the "Association") was the subject of that federal action entitled *Gary D. Grant v. Bull Point Plantation Property Owners Association, Inc., et al.*, United States District Court Case No. Case No. 9:20-CV-01582-RMG-MGB. Moving Party is informed that this action has been dismissed; Moving Party is not aware of the status of the appeal from the dismissal.

Plaintiffs will argue that Bull Point, LLC is not the proper owner to the clubhouse and, therefore, it was not denied its property rights. Plaintiffs' argument fails because it is undisputed that on the date of the Order, the clubhouse was owned by Bull Point, LLC. Moving parties acknowledge that during the pendency of this action another action was commenced implicating ownership of the clubhouse (the "Clubhouse Action"); however, no determinations regarding the merits of the Clubhouse Action have been made. Therefore, as a matter of law Bull Point, LLC remains the owner. Accordingly, any action implicating Bull Point, LLC's property rights necessarily needed to include Bull Point, LLC in the proceeding. The Order did not.

In summary, the Order implicated the rights of Bull Point, LLC without proper due process. Accordingly, the Order is void.

2. <u>The failure to include Bull Point Plantation Owners Association, Inc. as a party resulted in improper due process</u>.

The Order dealt with the owner's association, but the entity defined in the Declaration as the owner's association was not named as a party. Therefore, there was improper due process afforded to the owner's association.

The Order provides in relevant part:

> ". . . Defendants are enjoined from serving on the [owner's association] Board of Directors (unless elected by the POA members); Defendants are enjoined from taking any actions in further governance of the [owner's association], including scheduling of an Annual Meeting or issuance of a Proposed Budget for 2020; Defendants are enjoined from occupying the offices in the [owner's association] clubhouse, and they must vacate the clubhouse offices within 24 hours of the entry of this Order; Defendants are enjoined from exercising any control over the [owner's association] funds."

(Order, ¶ 4.)

The Declaration, the Third Amendment, and the Ninth Amendment all define an owner's association in *identical* terms as follows:

> "'Association' shall mean and refer to *Bull Point Plantation Owners Association, Inc.*, a South Carolina nonprofit corporation."

(Declaration, §1.01(e).)[5] (Emphasis added.)

Following its definition, the Declaration gives to the Association certain rights and duties. (Declaration, §§1.01-13.13.) Importantly, while the Declaration provides for successors and assigns to the Declarant, the Declaration does ***not*** provide for either successors or assigns to the owners' association. (*Id*.) Accordingly, any action that implicates the rights and duties of the Association necessarily needs to name the Association as a party.

Neither the Complaint nor the Verified Amended Complaint named the Association, and it was not afforded any due process during the pendency of the action up to the Order. Therefore, the Order is void.

3. The failure to include Bull Point Plantation, LLC as a party resulted in improper due process.

The Order dealt with the management of the community, yet the Order and the Complaint failed to include the management company as a party to the within action. Therefore, the Order is void.

Article VIII of the Declaration pertains to Administration of Bull Point Plantation. Section 8.04 provides:

> "8.04 Management Agreement. Bull Point Plantation, LLC or an affiliate ***shall*** be employed as the *manager* of the Association and the Development . . . Every grantee of any interest in the Development by acceptance of a deed or other conveyance of such interest, shall be deemed to ratify such management agreement."

[5] Unless otherwise noted, this pleading uses the term "Declaration" in a universal sense to refer to the Declaration, as amended, which amendments thereto include, but are not limited to the Ninth Amendment. In those instances where specificity of the covenants is required, this pleading will expressly refer to the Original Declaration, the Third Amendment, or the Ninth Amendment.

(Declaration, § 8.04.) (Emphasis added.)

The express language of Section 8.04 mandates that Bull Point Plantation, LLC shall be employed as the manager of the Association. In this capacity, Bull Point Plantation, LLC was charged with duties which the Order addressed, including "to provide for administrative control over necessary POA functions." (Order, ¶ 6.) Accordingly, any action that implicates the rights and duties of the administration or management of Bull Point Plantation necessarily needed to name Bull Point Plantation, LLC as a party.

Neither the Complaint nor the Verified Amended Complaint named Bull Point Plantation, LLC as a party. Therefore, the Order lacked due process and is void.

C. Pursuant to Rule 60(b)(1), the Motion Should Be Granted as the Order was Based on Mistake.

This Motion should be granted because the Order was based on *mistake* in the arguments of Plaintiffs and the analysis of the Court.

1. The Order wrongly defines the "Declaration".

The Order was incorrect as a matter of law because it defined the "Declaration" to mean the "Declaration of Covenants, Conditions and Restrictions for Bull Point Plantation". Within this document, the term "Declaration" is defined to mean this very document *and* all amendments thereto. (*See* Declaration, § 1.01(k).) This is significant because approximately 17 amendments followed the Ninth Amendment referenced in the Order, and these amendments affect the determination of who is the Declarant. For example, the Seventeenth Amendment recorded on August 21, 2017 defines the Declarant as GSI, LLC. This entity subsequently assigned the Declarant Rights to Bull Point SC, LLC.

2. Limitation of the Order to the "POA" makes it irrelevant to Bull Point Plantation.

The Order was limited in scope as it defined "POA" to mean "Bull Point Plantation Property Owners Association." (Order, p. 2.) Subsequently, the Order purported to grant to the POA, its members, and its Board of Directors certain relief. (*Id.*, ¶ 4, 6.) This limitation is fatal to its intended application to Bull Point Plantation.

Importantly, no part of the Order pertains to (1) Bull Point, LLC, (2) Bull Point Plantation Owners Association, Inc., (3) Bull Point Plantation Property Owners Association, Inc., or (4) Bull Point Plantation, LLC, each of which is separate legal entity. As such, the Order is ineffective as to the governance of Bull Point Plantation.

3. The "POA" defined in the Order does not have members.

The Order is based on mistake because it presumes that Plaintiffs have rights as members in the POA, including to bring an action derivatively, because the POA does *not* have members. On January 2, 2007, Bull Point Plantation Property Owners Association was incorporated as a South Carolina nonprofit corporation. Its Articles of Incorporation provide: "The corporation will *not* have members." (Gavigan Aff., ¶ 11, Ex. 4.) (Emphasis added.) Thus, the individual Plaintiffs are not members of the POA and could not bring the action derivatively through it.

4. The "POA" defined in the Order is a dissolved corporation.

The Order is based on mistake because the POA is a dissolved corporation. On March 20, 2013, the POA filed Articles of Dissolution. (Gavigan Aff., ¶ 10.) Accordingly, all that the POA was authorized to do was wind up and dissolve; it could not carry on ordinary business. (S.C. Code § 33-14-105.)

5. The "POA" defined in the Order is not referenced in Bull Point Plantation's covenants.

The Order is based on mistake because it presumed that the POA was the owner's association referenced in Bull Point's restrictive covenants.

Bull Point Plantation is subject to restrictive covenants referred to herein as the "Declaration" (to include and as amended by the Ninth Amendment). The Declaration defines an owner's association and imbues that owner's association with rights and duties. As defined in the Declaration, that owner's association is "Bull Point Plantation Owners Association, Inc." (the "Association"). (Declaration, §1.01(e).)

Importantly, Bull Point Plantation Property Owners Association (the "POA") and Bull Point Plantation Owners Association, Inc. (the "Association") are separate entities. (Gavigan Aff., ¶¶8-10, Exs. 2-4.) Thus, the Order that references the POA and that does not reference the Association *cannot* implicate any actions taken by or in connection with the Association.

D. Pursuant to Rule 60(b)(2), the Motion Should Be Granted Based on Newly Discovered Evidence.

This Motion should be granted because of newly discovered evidence obtained by Defendants which shows Plaintiffs' fraud and misrepresentation and the impracticality of having the POA associated with Bull Point Plantation in any capacity.

1. Defendants obtained newly discovery evidence from the Attorney representing the Association.

Defendants are in receipt of newly discovered evidence from Barry Johnson, Esq., of Johnson & Davis, P.A., that factors in to how all evidence in front of this court should be evaluated.

In the litigation that led to GSI, LLC's acquisition of Bull Point Plantation, *GSI, LLC v. DB Aster, LLC, et al.*, United States District Court Case No. 9:16-cv-02552-RMG (the "GSI Action"), Mr. Johnson filed an affidavit in which he stated that he had been retained by the "Bull Point Operations Committee." (Gavigan Aff., ¶ 21, Ex. 8.) That affidavit was not truthful. It had far reaching implications, as Defendants and their attorneys *relied* on false information.

For more than two years, from September 2017 through December 31, 2019, Defendants sought to obtain Mr. Johnson's files. Ultimately, *after* the Order, the court denied a motion to quash the right to have Mr. Johnson's file. When the Defendant were finally able to review approximately 1,800 pages relating to Bull Point Plantation (the "Johnson File") it was revealed for the first time that Mr. Johnson had been retained by the Association and *not* the POA or the POA-INC. (Gavigan Aff., ¶ 24a, Ex. 10.) That same discovery also revealed that in connection with the GSI Action, the Association had retained the firm of Nexsen Pruet and *not* the POA or the POA-INC. (Gavigan Aff., ¶ 24b, Ex. 11.)

The Johnson File begs several questions regarding Plaintiffs' sincerity and intent. Well before this action was commenced, Plaintiffs and other owners were carrying on through the unincorporated nonprofit association as the Declaration intended, yet Plaintiffs have been making the argument that the POA (and more recently, the POA-INC) is the owner's association enumerated in the Declaration. Their argument is nothing more than a misguided effort to foist a fraud upon the court, which they have been actively doing for more than two years. The truth is that there is no justification for Plaintiffs to have carried on through one entity then and to argue now that a different entity is the Association.

The Johnson File further shows that Plaintiffs sought to become the Association. In or about 2017, Plaintiffs worked with Mr. Johnson to prepare an amendment to the Declaration (the

"Proposed 17th Amendment") to change the definition of the "Association" from Bull Point Plantation Owners Association, Inc. to Bull Point Plantation Property Owners Association, Inc. (Gavigan Aff., ¶24d, Ex. 12.) Plaintiffs wanted to bring about this change because in February of 2016, Plaintiff Russell Dimke *fraudulently* submitted Articles of Amendment to change the name of BPHOA/BPPOA[6] to "Bull Point Plantation Property Owners Association, Inc." This name change was fraudulent because it was not done in the manner required under the Articles of Incorporation. (Gavigan Aff., ¶24d, Ex. 12.) Consequently, the name change was *ultra vires*.

The name change was done because Plaintiffs had fraudulently recorded several documents in this entity's name and had filed several legal actions, including one that resulted in foreclosure of Lot 223. At the time the court issued its *Deed by Judicial Order* relating to Lot 223, no entity existed in the name of the Grantee and Dimke and Plaintiffs wanted the Proposed 17th Amendment recorded to cover their tracks. Wisely, DB Aster, LLC, the then Declarant, did *not* go forward with the recording of the Proposed 17th Amendment.

The Johnson File also shows that Plaintiffs sought to purchase the Declarant's Rights. Throughout this litigation, Plaintiffs have argued that GSI, LLC or Bull Point SC, LLC could not be the Declarant because the Declarant's Rights were not assignable. The Johnson File, however, shows that Plaintiffs have sought for several years to acquire the Declarant's Rights and the developer properties. (Gavigan Aff., ¶24h, Ex. 13.) Moreover, at least one such scheme sought to use contingency funds for this purpose. (*Id.*) Plaintiffs argued in this litigation that the contingency funds were sacrosanct, but the Johnson File shows that the contingency funds are sacrosanct in

[6] On September 26, 1995, Bull Point Homeowners Association, Inc. was formed as a South Carolina nonprofit corporation (BPHOA). On August 14, 2006, BPHOA changed its name to "Bull Point Property Owners Association, Inc." (BPPOA). On February 4, 2016, BPHOA/BPPOA changed its name to "Bull Point Plantation Property Owners Association, Inc."

this litigation even though Defendants sought to use these monies for the betterment of the community, but are not sacrosanct when Plaintiffs wanted a fund from which to purchase the Declarant's rights.

2. Defendants obtained newly discovered evidence that shows the Plaintiffs falsely claimed the amended complaint was verified.

The motion should be granted because the complaint was not properly verified. SCRCP, Rule 23 provides in relevant part:

> "(b)(1) Derivative Actions by Shareholders. In a derivative action brought by. . . members to enforce a right of a corporation or of an unincorporated association, . . . the complaint shall be *verified* and shall allege that the plaintiff was a . . . member at the time of the transaction of which he complains . . ."

(SCRCP, Rule 23.) (Emphasis added.)

On December 23, 2018, Plaintiffs commenced the within action by filing their purported verified complaint. Subsequently, on April 22, 2019, Plaintiffs moved to amend. The motion included a draft verified amended complaint; however, there were no verifications attached to the exhibit. Thereafter, on June 13, 2019, Plaintiffs lodged their "Verified Amended Complaint." This pleading was *not* the same document as that included in the motion.

Although the June 2019 pleading purports to be verified, it was not. *After* the order, Moving Parties learned that the version of the pleading submitted to the Plaintiffs for verification is different from the one submitted. More specifically, Joseph D'Ambrosio, Esq., is one of the attorneys representing Plaintiffs herein as well as a defendant in that federal action entitled *UPC vs D'Ambrosio*, United States District Court Case No.: 9:19-CV-00547-BHH (the "UPC Federal Action"). On October 22, 2109, D'Ambrosio filed a motion to dismiss in the UPC Action. The

exhibits to the motion included a copy of the actual verified amended complaint that the affidavits in the Attridge matter attested to (the "Attested VAC"). (Gavigan Aff., ¶27, Ex. 14.)

Not surprisingly, there are material differences in the June 2019 pleading and the Attested VAC, including the caption, parties, allegations, and relief sought.

E. Pursuant to Rule 60(b)(3), the Motion Be Granted Based on Plaintiffs' Fraud, Misrepresentation, or Other Misconduct.

Defendants should be relieved of the Order pursuant to Rule 60(b)(3) because of Plaintiffs' fraud, misrepresentation, and other misconduct.

Plaintiffs have not complied with the Order because they are acting through an entity other than that the subject of the Order. The Order defines the "POA" as Bull Point Plantation Property Owners Association and provides relief solely to that entity. (Order, p. 2, and ¶¶ 1-6.) Plaintiffs have not taken any actions through the POA; rather, Plaintiffs purport to act by and through Bull Point Plantation Property Owners Association, Inc. (the "POA-INC"). If, as they have now argued in recent law and motions, that POA-INC was the intended entity all along, then that entity should have been named as a party and served with the summons and complaint, appeared in the action, and been subject to discovery, etc. The POA-Inc was not so served. Thus, it is misconduct for Plaintiffs to act through POA-INC.

Plaintiffs have not followed the Declaration. The Declaration provides in Section 13.13 that "Notices required hereunder shall be in writing and shall be delivered by hand or sent by United States mail, postage pre-paid." The putative Interim Board did not deliver notices by hand and did *not* send notices by United States mail; rather, they emailed notices. (Gavigan Aff., ¶24e.)

Plaintiffs denied Members the right to vote. The Fifteenth Amendment provides that Members must be in good standing in connection with voting for members of the Contingency

Fund Committee. (Gavigan Aff., ¶14, Ex. 5.) Neither the Original Declaration nor the Fifteenth Amendment or any other document precludes Members from voting on any other matters, regardless of whether they are in good standing, including for the election of persons to the Board of Directors. Notwithstanding the absence of such a restriction, the Interim Board barred one or more owners from voting, ostensibly because they had not paid their annual assessment. This denial of a fundamental right is not found in any covenant, amendment, by-law, or rule.

F. <u>"Bull Point Plantation Property Owners Association" is not a Misnomer for Any Other Entity and it is a Fraud to Claim Otherwise.</u>

Plaintiffs have sought to mislead the court in several respects, including by arguing that various similar sounding entities are misnomers of one another and by blithely defining these different entities as the "POA" or the "Association" in pleadings and law and motion. Plaintiffs' efforts were intentional and a fraud upon the court.

Plaintiffs apparently hope to bring about an "amalgamation" of the Association, the POA, and the POA-INC; however, there is no basis for this. In *Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 96, 344 S.E.2d 869, 874 (Ct. App. 1986). South Carolina first considered an amalgamation theory to find that corporate entities could be combined into a single entity if their interests, entities and activities are so interconnected, "as to blur the legal distinction between the corporations and their activities." Importantly, however, this amalgamation approach pertains only to instances of piercing the corporate veil. And later South Carolina cases have narrowed this amalgamation theory and place strict limits on its application. Whether broadly or narrowly applied, the theory is not applicable where an entity is referenced in restrictive covenants, that entity has never held itself out as anything other than the enumerated entity, and that entity has not acted with fraud.

Confusion regarding the identity of the entities is the fault (and *intent*) of Plaintiffs. Plaintiffs and counsel have stated that they use names in a "generic" sense. More specifically, as Plaintiffs recently stated in a federal action: "Plaintiffs intentionally plead their Amended Complaint with the *generic* name "Bull Point Property Owners Association (without the "Inc."). (Gavigan Aff., ¶19, Ex. 7.) (Emphasis added.) They later stated that "Plaintiffs opted to *generically plead* "Bull Point Property Owners' Association (without the "Inc.")." (*Id*.)

Claiming to plead "generically" is intentional obfuscation, especially after the Plaintiffs are well aware of the difficulties they have with this particular misstep in filing and serving lawsuits. All parties have had actual and constructive notice of the differently named entities within *one month* after this action commenced. More specifically, on January 15, 2019, Defendants filed their Answer and Counterclaims. In that pleading, Defendants alleged that Plaintiffs and certain Third-Party Defendants created a "Shadow POA" and incorporated it as "Bull Point Plantation Property Owners Association," - the entity through which Plaintiffs contend they brought the action derivatively - in an attempt to wrongly "control the community" and to try and "purchase the Declarant and developer rights to the community." (Counterclaim, pp. 3-4.) Thus, Plaintiffs can only feign ignorance that Bull Point Plantation Owners Association, Inc., Bull Point Plantation Property Owners Association, and Bull Point Plantation Property Owners Association, Inc. are *three* separate entities.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant the within Motion, declare the Order void and relieve all Defendants from the Order, dated November 18, 2019.

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