

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2018-CP-400-6344

Appellate Case # 2019-001488

MB Hutson/ MB Hudson

Appellant.

v.

Penn America Insurance Company,
Global Indemnity Group, Inc.,
Timothy J. Newton, Esq. and
J.R. Murphy, Esq., John Doe #1 and
John Doe #

Respondents.

RECORD ON APPEAL (*p 1 to 493*)

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(Originally submitted by a Respondent, (at their request and with Appellant's permission per Rule 212), which was inadvertently left out of the record):

**Exhibit 2 to
Affidavit of Timothy
Newton :**

**"Clarendon County Public
Index," filed June 25, 2019
(5 pp.)**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
MB Hutson/MB Hudson,	)	Civil Action No. 2018-CP-40-06344
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER GRANTING
	)	DEFENDANTS PENN AMERICA
	)	INSURANCE COMPANY AND
Penn America Insurance Company, Global	)	GLOBAL INDEMNITY GROUP, INC.'S
Indemnity Group, Inc., Timothy J. Newton,	)	MOTION FOR SUMMARY JUDGMENT
Esquire, J.R. Murphy, Esq., John Doe #1,	)	
and John Doe #2,	)	
	)	
Defendants.	)	

This matter came before the Court upon Defendants Penn America Insurance Company and Global Indemnity Group, Inc.'s Motion for Summary Judgment, as well as the dispositive motions filed by the other co-defendants. A hearing on the motions was held on June 26, 2019, before the Honorable Michael G. Nettles. MB Hutson, Timothy Newton, Esquire, and J.R. Murphy, Esquire all appeared *pro se*. Penn America Insurance Company and Global Indemnity Group, Inc. (collectively "PAIC") were represented by Christian Stegmaier. Having considered all of the parties' memoranda and exhibits, the filed affidavits, the arguments heard at the hearing on June 26, 2019, the applicable law, and the parties' proposed orders, this Court grants Defendants PAIC's Motion for Summary Judgment. The Court presents its findings and conclusions below.

PROCEDURAL BACKGROUND

Plaintiff Hutson filed the original Complaint in this action on December 5, 2018, and filed his Amended Complaint, with accompanying Exhibits 1.1 – 13.0, on December 28, 2018. Co-Defendants J.R. Murphy and Timothy Newton filed a joint Motion to Dismiss on February 12, 2019. Newton later filed an Amended Motion to Dismiss, or in the Alternative for Summary

Judgment, on June 5, 2019. Newton subsequently filed a Memorandum in Support of his motion, with accompanying Exhibits A – AA, on May 30, 2019; a Reply Memorandum, with accompanying Exhibits BB – CC, on June 13, 2019; a Response to Plaintiff’s Supplemental Memorandum and an Affidavit from Newton on June 24, 2019; and an Amended Response to Plaintiff’s Supplemental Memorandum and Exhibits 1 – 3 to Newton’s Affidavit on June 25, 2019.

PAIC filed its timely Answer on February 14, 2019. PAIC filed its Motion for Summary Judgment on June 14, 2019, and filed its Memorandum in Support of its motion, with accompanying Exhibits A – B, on June 25, 2019.

In response to the dispositive motions, Hutson filed a Memorandum to Defendant’s Response on May 7, 2019,¹ and a Supplemental Memorandum and Affidavit of Huston, with attachments, on June 19, 2019.

A hearing was held on June 26, 2019, at which time the Court heard arguments on the motions from the parties. This Order addresses only the Motion for Summary Judgment brought by PAIC.

STANDARD OF REVIEW

Summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the court must view both the evidence and all reasonable inferences able to be drawn from the evidence in the light most favorable to the non-moving party. Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000). Nonetheless, a court “cannot ignore facts unfavorable to [the

¹ Plaintiff’s May 7, 2019 filing references accompanying Exhibits 14.0 – 30.0, but these exhibits were not included with the filing submitted to the Richland County Circuit Court.

non-moving] party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts.” Bloom v. Ravoira, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000). Accordingly, the court must search the proof to ascertain whether it discloses a real issue, rather than a formal, perfunctory or shadowy one. Saluda Motor Lines v. Crouch, 300 S.C. 43, 46, 386 S.E. 2d 290, 292 (Ct. App. 1989).

The plain language of Rule 56(c), SCRCPP, mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to the party’s case and on which that party will bear the burden of proof at trial. Bray v. Marathon Corp., 347 S.C. 189, 553 S.E.2d 477 (Ct. App. 2001). With respect to an issue on which the non-moving party has the burden of proof, the moving party may point out to the trial court that there is an absence of evidence to support the non-moving party’s case. Hedgepath v. AT&T, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001). The non-moving party must then “do more than simply show that there is some metaphysical doubt as to the materials facts[,]” but “must come forward with specific facts showing that there is a genuine issue for trial.” Id. A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment. Shupe v. Settle, 315 S.C. 510, 516–17, 445 S.E.2d 651, 655 (Ct. App. 1994). “[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” Moore v. Barony House Restaurant, LLC, 382 S.C. 35, 40, 674 S.E.2d 500, 503 (Ct. App. 2009).

RELEVANT FACTS

Stated succinctly, Hutson’s Amended Complaint raises claims in contract and tort against his former insurer and their coverage counsel related to the defense under right of reservation rendered to him in two prior lawsuits—a federal class action case in which Hutson was sued under

a third party claim for equitable indemnity and a related state defamation action—as well as a declaratory judgment action regarding PAIC’s coverage obligations in those two lawsuits. PAIC’s named insured was BWR, Inc. d/b/a Big Water Resort, and Hutson was an officer of the company. Construing his Complaint liberally, Hutson asserts, or attempts to assert, causes of action against PAIC for breach of contract, bad faith, fraud, misrepresentation, negligence, tortious interference with attorney-client relationship, and legal malpractice. Hutson seeks \$4.5 million in damages.

Original Land Deal and Hutson’s Ejectment

To provide context to the instant litigation, a brief factual background is necessary.² Hutson entered into a land deal with TLC Holdings, LLC and its members (collectively “TLC”) in late 2010. Under the terms of the Lease Purchase Agreement, TLC agreed to sell the land upon which the Big Water Resort campground was located to Hutson. As part of that same transaction, Hutson entered into a Membership Interest Purchase Agreement, by which he became the sole member in Big Water Resort, LLC, which operated the campground. Big Water Resort, LLC had previously sold retail memberships in the Big Water Resort campground to the campground members. Hutson was represented by attorney Andrew Tucker in these transactions.

In December 2011, TLC filed an ejectment action against Hutson alleging he defaulted on the terms of the Lease Purchase Agreement. Hutson filed counterclaims against TLC in the Ejectment Action. The parties agreed to settle the Ejectment Action, and the Settlement

² A more detailed recitation of the factual background has been set forth in several prior judicial orders. See Report and Recommendation of Mag. J., Big Water Resort, LLC, et al. v. TLC Holdings, LLC, et al., 2016 WL 7435620 at *1-*4 (D.S.C. Apr. 5, 2016), recommendation adopted, 2016 WL 2935891 at *1-*4 (D.S.C. May 20, 2016); Order Granting Pl’s. Mot. for Summ. J. as to Def’s. Countercls., TLC Holdings, LLC, et al. vs. M.B. Hutson a/k/a M.B. Hudson, Civ. Action No. 2015-CP-14-00615, pp. 1-5 (Clarendon Ct. Comm. Pl. filed Mar. 2, 2017).

Agreement was adopted into a Consent Order filed April 13, 2012. Hutson was represented by attorney Paul Weissenstein in the Ejectment Action.³

Hutson subsequently defaulted upon his obligations under the 2012 Settlement Agreement and Consent Order. TLC sought to evict Hutson from the Big Water Resort property. Following a hearing, the Honorable George James entered an order on March 21, 2014, which enforced the terms of the Consent Order and Settlement Agreement, by operation of which the Lease Purchase Agreement was terminated and Hutson was required to vacate the property. Hutson was represented by attorney H. Freeman Belser in the eviction proceedings.

Prior Lawsuits

In the midst of TLC's efforts to evict Hutson from the Big Water Resort property, Hutson allegedly sent the campground members a postcard dated December 18, 2013, asserting that both he and they were victims of a scam perpetrated by TLC.

On April 22, 2014, a group of Big Water Resort campground members filed a class action against TLC in federal court ("the Class Action litigation"). TLC asserted third-party claims for equitable indemnification against Hutson, and Hutson filed counterclaims against TLC.

On December 7, 2015, TLC filed a separate action against Hutson in state court for defamation ("the Defamation Action"). TLC's claims related to certain statements in the postcard

³ On September 4, 2018, Hutson filed a legal malpractice action against Paul Weissenstein. On February 25, 2019, the Honorable Kristi Curtis granted summary judgment in favor of Weissenstein. In addition to being filed after the statute of limitations, Judge Curtis found that Hutson knew about the lifetime memberships and their potential impact on the title of the subject property during the purchase process. To extent an error was made in failing to identify the title defect, Weissenstein could not be held responsible because he did not represent Hutson at that time. Moreover, there was ample evidence that Hutson was aware of the lifetime memberships, such that his counterclaim against TLC for fraud would have necessarily failed. Accordingly, she found no cognizable malpractice claim against Weissenstein for failing to pursue a counter-claim against TLC and advising Hutson to enter into the Settlement Agreement. Hutson v. Weissenstein, Case No. 2018-CP-43-1583 (Sumter Cnty. Comm. Pleas).

and certain statements Hutson made to the attorney who represented the campground members in the Class Action litigation. Hutson again asserted counterclaims against TLC in the Defamation Action.

In 2016, the Class Action litigation and the Defamation Action were tendered to PAIC. PAIC retained Murphy & Grantland as its coverage counsel and Newton filed a declaratory judgment action seeking a judicial ruling as to PAIC's coverage for TLC's claims asserted against Hutson in the Class Action and the Defamation Action. On September 16, 2016, Hutson executed a Settlement Agreement and Release in the declaratory judgment action, in exchange for monetary consideration, whereby he released Penn-America, its agents, and its affiliates, from liability for certain claims.

Meanwhile, PAIC agreed to defend Hutson in both actions under reservation of rights, but PAIC declined to provide counsel to Hutson for purposes of prosecuting his counterclaims. PAIC originally retained Laura Paton and Mike Etheredge of Carlock Copeland to represent Hutson in both matters, but Frank Gordon of Millberg Gordon was later substituted as counsel for Hutson.

Huston continued to pursue his counterclaims in both actions *pro se*. However, on May 20, 2016, the federal court granted TLC's motion for summary judgment as to Hutson's counterclaims in the Class Action litigation.⁴ On March 2, 2017, the state court similarly granted TLC's motion for summary judgment as to Hutson's counterclaims in the Defamation Action.

⁴ On April 5, 2016, Magistrate Judge Mary Gordon Baker issued her Report and Recommendation in the Class Action litigation, part of which recommended granting TLC's motion for summary judgment on Hutson's counterclaims. Report & Recommendation, Apr. 5, 2016, 2:2014-cv-01583. In his May 20, 2016, Order adopting the findings of the Report and Recommendation, Federal District Judge David C. Norton found that all of the evidence of fraud Hutson submitted related to the original purchase transaction, and that Hutson submitted no evidence of fraud in the inducement as to the Settlement Agreement. Consequently, Judge Norton ruled that Hutson's counterclaims against TLC in the Class Action litigation were barred by res judicata. Order Adopting R&R, May 20, 2016, 2:2014-cv-01583.

In early 2018, Penn-America settled TLC's claims against Hutson in the Class Action. This settlement protected Hutson from personal liability for both TLC's third-party claims against Hutson in the lawsuit and from the sanctions previously awarded against him.⁵ TLC's equitable indemnification claims against Hutson were dismissed on April 11, 2018.

While the settlement of TLC's claims against Hutson in the Class Action were being finalized, the Defamation Action was tried to a jury. The jury returned a verdict against Hutson in the amount of \$3,500,000.00. Following denial of the posttrial motions, the defense attorney retained by Penn-America filed a Notice of Appeal and filed the Initial Brief of Appellant. See TLC Holdings, LLC, et al. v. M.B. Hutson, Appellate Case No. 2018-000936. While the appeal was pending, Penn-America mediated the case with TLC and ultimately paid its policy limit to settle the Defamation Action in late 2018. TLC accepted the settlement in satisfaction of the judgment against Hutson in the Defamation Action. Newton informed Hutson that TLC's claims against him were settled on December 4, 2018. The next day, Hutson filed the instant lawsuit.

The Instant Lawsuit

Generally speaking, Hutson continues to assert that TLC and its attorneys committed "extrinsic fraud" upon the courts in the 2012 settlement, which he alleges carried over into and tainted all of the subsequent litigation. Hutson makes various claims related to what he avers was PAIC's obligation to expose and address the "extrinsic fraud."

⁵ Though the federal court declined to impose the requested sanctions in its order granting summary of judgment in favor of TLC on the counterclaims brought by Huston, a subsequent motion for sanctions led an award of \$14,908.50 against Huston. Judge Norton found: "Hutson appears to have continued his pattern of frivolous filings and conduct designed to harass or burden third-party plaintiffs, and there is no indication that he intends to cease." Judge Norton further found that "Hutson has established a pattern of making misrepresentations to the court, of making unsupported allegations of unethical and criminal conduct by the third-party plaintiffs, and of using the judicial process as a mechanism of harassment. His meritless filings have wasted untold hours of the court's time." Order Granting Sanctions, Oct. 6, 2017, 2:14-cv-01583.

At the June 24, 2019 hearing, Hutson made no objection to the Court hearing PAIC's timely filed motion for summary judgment. PAIC craved reference to the detailed memorandum that it filed with this Court but orally articulated the eight separate bases for granting its motion. Attached to its memorandum, PAIC provided a copy of the commercial general liability policy pursuant to which PAIC defended Hutson and an affidavit of Thomas L. Harper, Jr. with accompanying exhibits, including excerpts of Hutson's prior Rule 2004 Examination. PAIC requests an order granting summary judgment in its favor because: (a) Plaintiff executed a valid Release in favor of Penn-America and its affiliates, which precludes the instant claims; and (b) there exists no genuine issues of material fact and PAIC is entitled to judgment as a matter of law as to all causes of action articulated in Plaintiff's Amended Complaint.

Hutson also craved reference to the voluminous filings he has made with the Court. Hutson began his presentation by stating that he is a victim and citing the "scintilla of evidence" standard. Hutson admitted that the terms of the agreements related to Big Water Resort and the Lease Purchase Agreement sent up "red flags" and seemed "suspicious" to him, but contended that his attorney(s) at the time reviewed the title and advised him that things looked "okay." Hutson contended that attorneys from Turner Padgett prepared documents that they knew were based upon "extrinsic fraud." Hutson contends that this "extrinsic fraud" supersedes the settlement agreement he entered in 2012. When asked to narrow his focus to the allegations in the instant action, Huston claimed that J.R. Murphy "breached his duty to represent me." While Hutson agreed that Laura Paton in Charleston was the attorney actually retained to represent him, he stated that Tim Newton was his "contact person" at PAIC. Huston then repeated the allegations contained his pleadings regarding Newton's correspondence with Hutson, which Hutson perceived to validate his theory of "extrinsic fraud" and to later be inconsistent. Hutson then said: "Newton knew he didn't

represent me.” He averred that the “common interest” between Hutson and PAIC in Newton’s letter referred to the upcoming mediation to reduce the \$3.5 million judgment. Hutson contends that “by settling with knowledge of extrinsic fraud, they (presumably referring to the defendants) are co-conspirators in the fraud.” Hutson did not articulate any fraud or other basis to set aside the Release that he executed on September 16, 2016.

The court is cognizant that, ordinarily, a court will not consider statements of fact presented only in an attorney’s argument in determining whether a genuine issue of material fact exists sufficient to preclude summary judgment. West v. Gladney, 341 S.C. 127, 135, 533 S.E.2d 334, 338 (Ct. App. 2000). However, Hutson filed an affidavit with the Court on June 19, 2019. Though directly contradicted by the written correspondence from Newton, Hutson states that Newton verbally acknowledged to him in August 2018 that he was aware of the extrinsic fraud by TLC Holdings and their attorneys. Hutson contends that Newton initially refused to aid him in his efforts to expose the “extrinsic fraud” but later decided to assist Hutson, reviewing his drafted pleadings and providing him with a 16-point letter of legal advice. He avers that Newton had a duty to bring the “extrinsic fraud” to the attention of the state court, which would have prevented the \$3.5 million judgment. Notably, Hutson’s affidavit admits that Frank Gordon and Laura Paton were the attorneys who actually represented Hutson in the Class Action litigation and the Defamation Action. He further admits that Paton’s filing with the court “listed approximately ten direct concealments and lack of disclosures” that had been committed, apparently referring to the Answer to Amended Complaint and Pro Se Counter-Claims Back filed in the Defamation Action on December 16, 2016.

LAW/ANALYSIS

I. Summary judgment is proper because Plaintiff's claims are barred pursuant to the Settlement and Release Agreement he executed on September 16, 2016, releasing any present or future claims against Penn-America.

On September 16, 2016, Hutson executed a Settlement Agreement and Release in the declaratory judgment action, whereby he released Penn-America, its agents, and its affiliates, from liability for exactly the kinds of claims he raises in the instant action. The Release explicitly provides:

Hutson, for and in consideration of the sum of Nine Thousand Five Hundred and 00/100 (\$9,500.00) Dollars, receipt of which is hereby acknowledged, does hereby release and forever discharge Penn-America, its agents, servants, employees, affiliates, successors and assigns, and any and all other persons, firms or corporations from any and all actions, causes of action, demands and/or claims of any nature whatsoever which the undersigned may have against Penn-America relating to:

- a. Penn-America's coverage for the Underlying Lawsuits; and
- b. Penn-America's coverage for the Property Loss claim;

together with any claims relating to Penn-America's investigation and/or claim handling, including any causes of action for breach of contract, bad faith, improper claims practices, or any other cause of action which could be asserted, arising from the above-reference matters (hereinafter "Released Claims"). The consideration expressed herein constitutes payment in full to Hutson for all policy proceeds, damages, losses and/or injuries to persons or property or both, whether known or unknown, developed or undeveloped, which have resulted or may result from the incident aforesaid, whether the claims could have been asserted against Penn-America by way of counterclaim in the Declaratory Judgment Action or by separate lawsuit.

"Litigants are free to devise a settlement agreement in any manner that does not contravene public policy or the law." Ecclesiastes Prod. Ministries v. Outparcel Assocs., 374 S.C. 483, 493, 649 S.E.2d 494, 499 (Ct. App.2007). General contract principles apply to the construction of a settlement agreement because a settlement agreement is a contract. Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 672 S.E.2d 799 (Ct.App. 2009). When an agreement is plain and

unambiguous, the court does not have the authority to modify its terms. Patricia Grand Hotel, LLC v. MacGuire Enters., 372 S.C. 634, 643 S.E.2d 692 (Ct.App.2007). The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully. Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994); Jordan v. Security Group, Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993).

Huston has not articulated any policy or law prohibiting the September 16, 2016, agreement, or denied that he received the consideration specified therein. The plain language of the Release specified that the Released included "any claims relating to Penn-America's investigation and/or claim handling, including any causes of action for breach of contract, bad faith, improper claims practices, or any other cause of action which could be asserted, arising from the above-reference matters." Those matters included both of the underlying lawsuits, i.e. the Class Action litigation and the Defamation Action. Global Indemnity Group, Inc. is the parent company of Penn-America Insurance Company, and is thus encompassed within the Release's specification that it applies to Penn-America's "affiliates" and "any and all other persons, firms or corporations." Thus, all of the claims made in Hutson's Amended Complaint are barred under the Release. Accordingly, PAIC's motion for summary judgment as to all claims against them must be granted.

II. Summary judgment is proper because Plaintiff's claim for breach of contract must fail because there is no evidence that PAIC failed to comply with its contractual duty to defend Plaintiff in both underlying actions.

Even if it were not barred by the Release referenced *supra*, Hutson's claim for breach of contract fails as a matter of law. To establish a claim for breach of contract, a plaintiff must establish (1) the existence of a contract, (2) its breach, and (3) the damages caused by such breach. Branche Builders, Inc. v. Coggins, 686 S.E.2d 200, 202 (S.C. Ct. App. 2009). Section 1.a

of the applicable commercial general liability policy between Penn-America and BWR, Inc. provides:

We [the insurer] will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result.

Hutson cannot point to any evidence that this provision was either breached or that he has suffered any damages from an alleged breach.

PAIC did defend him, under a reservation of rights, with respect to the claims against him both in the Class Action litigation and the Defamation Action. See Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., 433 F.3d 365, 372-73 (4th Cir. 2005) (finding insured “adhered to settled principles under South Carolina law regarding their right and duty to defend by providing counsel ... to represent the defendants for all claims filed against them, despite the reservation of rights”); Allstate Ins. Co. v. Wilson, 259 S.C. 586, 193 S.E.2d 527, 530 (1972) (holding that insurance company, operating under a reservation of rights, “had the right and the duty to control the defense until such time as it was determined that it had no liability insurance coverage”). Both the federal third party claim and defamation case were ultimately settled without any personal liability to Hutson.

Hutson’s contention that PAIC owed a duty to prosecute his affirmative counter-claims, which he pursued *pro se* and lost, is without merit. While the South Carolina courts have not specifically ruled on whether an insurer’s duty to defend includes an obligation to prosecute an insured’s affirmative counter-claims, other jurisdictions have found no such obligation arises under the ordinary insurance contract. See, e.g., Mount Vernon Fire Ins. Co. v. Visionaid, Inc., 76 N.E.3d 204, 209-10 (Mass. 2017) (holding insurer has no duty to prosecute an affirmative claim

against the plaintiff in the underlying suit unless explicitly provided for in the policy); Morgan, Lewis & Bockius LLP v. Hanover Ins. Co., 929 F.Supp. 764, 771 (D.N.J. 1996) (same); Shoshone First Bank v. Pacific Employers Ins. Co., 2 P.3d 510, 516 (Wyo. 2000) (same); Aldous v. Darwin Nat'l Assur. Co., 851 F.3d 473, 483 (5th Cir. 2017) (same). Even those jurisdictions which more broadly interpret the insured's duty do so only under narrow circumstances. See, e.g., Safeguard Scientifics, Inc. v. Liberty Mut. Ins. Co., 766 F.Supp. 324, 333-334 (E.D. Pa. 1991) (duty to defend requires insurer to bring any counterclaim that is factually "inextricably intertwined" with underlying claim).

Our Supreme Court has held that "[a]n insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law." Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 663 S.E.2d 484, 487 (2008). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." Beaufort Cty. Sch. Dist. v. United Nat'l Ins. Co., 392 S.C. 506, 709 S.E.2d 85, 90 (S.C.Ct.App.2011) (citing Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 579 S.E.2d 132, 134 (2003)). "If the contract's language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect." Id. (citing Schulmeyer, 579 S.E.2d at 134). "However, an insurance contract which is 'in any respect ambiguous or capable of two meanings must be construed in favor of the insured.'" Id. (quoting Reynolds v. Wabash Life Ins. Co., 251 S.C. 165, 161 S.E.2d 168, 169 (1968)).

The plain meaning of "defend" is "to work to defeat a claim that could create liability against the individual being defended." Mount Vernon, 76 N.E.3d at 208-09. To impose a broader duty where none was explicitly included "is far beyond interpreting the language of the contract."

Id. at 210. Here, there is no provision in the policy requiring PAIC to pursue counter-claims, much less ancillary or collateral litigation, on behalf of its insured. Hutson has not provided any authority for his contention that PAIC or his retained counsel had a duty to re-open the 2011 case and attempt to set aside the 2012 Consent Order and Settlement Agreement entered therein. PAIC adhered to its duty to defend, which did not include prosecuting Hutson's counter-claims and which did not include pursuing a separate course of litigation to set aside a 2012 Settlement Agreement and Consent Order. Moreover, Hutson cannot show that he was damaged by any alleged breach where the Class Action litigation and Defamation litigation were both settled without any personal liability as to Hutson. Accordingly, PAIC's motion for summary judgment as to the breach of contract claim against them must be granted.

III. Summary judgment is proper because Plaintiff's claim for bad faith must fail because there is no evidence that PAIC failed to act reasonably.

Even if it were not barred by the Release referenced *supra*, Hutson's claim for bad faith fails as a matter of law. The South Carolina courts recognize an insured's ability to sue its insurer both in contract and for bad faith in tort. Tadlock Painting Co. v. Maryland Cas. Co., 322 S.C. 498, 502-03, 473 S.E.2d 52, 54 (1996). There is an implied "duty of good faith and fair dealing in the performance of *all* obligations undertaken by the insurer for the insured." Id. at 501, 473 S.E.2d at 53-54 (emphasis in original). Our Supreme Court specifically recognizes the existence of a cause of action for breach of the implied covenant of good faith and fair dealing by an insured against his or her insurer for consequential damages allegedly suffered because of the insurer's bad faith handling of third party claims. Id. at 504, 473 S.E.2d at 55. Breach of an express contractual provision is not a prerequisite to bringing a bad faith action. Id.

"[T]he covenant of good faith and fair dealing extends not just to the payment of a legitimate claim, but also to the manner in which it is processed." Mixson, Inc. v. American

Loyalty Ins. Co., 562 S.E.2d at 662. Under South Carolina law, an insurer acts in bad faith when there is no reasonable basis to support the insurer's decision. Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 466 S.E.2d 727 (1996). "If there is a reasonable ground for contesting a claim, there is no bad faith." Crossley v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 360, 415 S.E.2d 393, 397 (1992).

"South Carolina courts have found that where a policy provides an insurer with the right and duty to defend, the insurer has 'the right and the duty to control the defense until such time as it is determined that it has no liability insurance coverage.'" Founders Ins. Co. v. Richard Ruth's Bar & Grill LLC, 2016 WL 3219538, at *9 (D.S.C. June 8, 2016) (quoting Allstate Ins. Co. v. Wilson, 193 S.E.2d 527, 530 (S.C. 1972)). "If courts allowed insureds to create a genuine issue of material fact on a bad faith processing claim by engaging in a 'nit-picky' analysis of each action the insurance adjustor took or did not take in handling claims, every bad faith action would survive a motion for summary judgment." Id. There must still be an evaluation of the reasonableness of the insurer's conduct...." Id.

Here, PAIC did not refuse to defend Hutson; rather, PAIC provided a defense under a reservation of rights and ultimately settled both of the suits without any personal liability to Hutson. Hutson complains PAIC acted unreasonably in failing to "expose extrinsic fraud on the courts" and in failing to represent him in his counter-claims against TLC and its members. Hutson raised this alleged fraud to several courts, including as part of his *pro se* counterclaims in both the federal Class Action litigation and the Defamation Action. Each court has found that Hutson's claims of fraud relate to the underlying land transaction and were validly waived in the 2012 Settlement Agreement and Consent Order between Huston and TLC and its members. See Judge James' Order, Mar. 21, 2014, Civ. Action No. 2011-CP-14-00602; Judge Norton's Order, May 20,

2016, Civ. Action No. 2:2014-cv-01583; Judge Baker's Report & Recommendation, April 5, 2016, Civ. Action No. 2:2014-cv-01583; Judge Cothran's Order, Mar. 2, 2017, Civ. Action No. 2015-CP-14-00615. Thus, Hutson's bald and speculative averment that the outcome of his counter-claims would have been different had PAIC provided legal representation to prosecute them is insufficient to survive this motion for summary judgment.

Hutson points to no legal authority for the proposition that PAIC would have any duty to go even further to pursue collateral litigation to set aside the 2012 Settlement Agreement. Further, any such action would have likely been fruitless. See Robinson v. Estate of Harris, 388 S.C. 630, 641, 698 S.E.2d 222, 228 (2010) ("If a judgment procured by extrinsic fraud could have been avoided if the challenging party exercised due diligence, a court generally will not grant relief from the judgment."); id. ("The doctrine of laches is applicable in determining whether an action is time-barred even if extrinsic fraud is established.").

To the extent Hutson complains about the settlement reached, there was no contractual requirement for the insured's consent to settle. Rather, the policy provides: "We [the insurer] may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result." PAIC had a duty to settle the claims if settlement was "the reasonable thing to do." Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n, 347 S.C. 642, 649, 557 S.E.2d 670, 674 (2001). Hutson has not pointed to any evidence that PAIC did not act reasonably. Additionally, where – as here – an insurance contract provides that the insurer may, as it deems appropriate, settle any claim or action brought against its insured, a cause of action alleging breach of the insurer's good faith will not lie where the insurer has settled such a claim within the monetary limits of the policy. See, e.g., Marginian v. Allstate Ins. Co., 481 N.E.2d 600 (Ohio 1985); Casualty Ins. Co. v. Town & Country Pre-School Nursery, Inc., 498 N.E.2d 1177 (Ill. App. Ct. 1986); Feliberty v.

Damon, 129 A.D.2d 207 ((N.Y. App. Div. 1987); Shuster v. South Broward District Physicians' Professional Liability Insurance Trust, 570 So.2d 1362, 1366 (Fla. 4th DCA 1990).

To the extent that Hutson alleges that the declaratory judgment action regarding coverage was brought in bad faith, Hutson has failed to articulate how or why that filing was unreasonable. PAIC, through its counsel, requested declarations that Hutson was not an insured with respect to the personal misconduct alleged against him in the federal class action or in the state defamation action, that the coverage provided for in the insurance policy did not extend to the types of claims asserted in those actions, and that PAIC had no duty to defend or indemnify Hutson in either action. The arguments in the declaratory judgment action were based upon the plain language of the policy. Moreover, PAIC ultimately resolved the underlying cases by settlement and dismissed the declaratory judgment action and satisfied the judgments.

In sum, there is no evidence that PAIC, either directly or vicariously, acted in bad faith. Accordingly, PAIC's motion for summary judgment as to the bad faith claim against them must be granted.

IV. Summary judgment is proper because Plaintiff's claim for fraud must fail because there is no evidence (a) that PAIC or its agents made any material or false representation to Hutson, (b) that Hutson relied on such representation, or (c) that Hutson was consequently and proximately injured.

Even if it were not barred by the Release referenced *supra*, Hutson's claim for fraud fails as a matter of law. In order to prevail on a claim of fraud, the plaintiff must prove: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. Ardis v. Cox, 314 S.C. 512, 515, 431 S.E.2d

267, 269 (Ct.App.1993). “A complaint is fatally defective if it fails to allege all nine elements of fraud.” Id.

Hutson’s claims of fraud center on Newton’s e-mail to him regarding the possible argument of the existence of extrinsic fraud on the court. Hutson contends that Newton wanted Hutson to file an action to set aside the 2012 Settlement Agreement and Consent Order, as it would have benefited and provided leverage in PAIC’s defense of the other cases. Hutson never claims that anything written in the letter to him by Newton was false; rather, he later argues that the contents of the e-mail were all true in paragraphs 37-49 of his Amended Complaint. Further, in paragraph 35 of his Amended Complaint, Hutson admits that he never filed any such action to set aside the Agreement and Order. Thus, regardless of its truth or falsity, Hutson failed to allege any reliance upon the representation. Lastly, and perhaps most importantly, Hutson has not been injured. The claims against Hutson, and the federal sanctions awarded against him, were settled without any personal liability to Hutson. Accordingly, PAIC’s motion for summary judgment as to the fraud claim against them must be granted.

V. Summary judgment is proper because Plaintiff’s claim for misrepresentation must fail because there is no evidence (a) that PAIC or its agents made any false representation to Hutson, (b) that PAIC or its agents failed to exercise due care; (c) that Hutson relied on such representation, or (d) that Hutson proximately suffered a pecuniary loss.

Even if it were not barred by the Release referenced *supra*, Hutson’s claim for misrepresentation fails as a matter of law. In order to prevail on a claim for negligent misrepresentation, the plaintiff must prove (1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his

reliance on the representation. Brown v. Stewart, 348 S.C. 33, 42, 557 S.E.2d 676, 680–81 (Ct. App. 2001). Thus, a key difference between fraud and negligent misrepresentation is that fraud requires the conveyance of a known falsity, while negligent misrepresentation is predicated upon transmission of a negligently made false statement. Id.

Like his claims of fraud, Hutson's claims of misrepresentation center on Newton's e-mail to him regarding the possible argument of the existence of extrinsic fraud on the court. Hutson contends that Newton wanted Hutson to file an action to set aside the 2012 Settlement Agreement and Consent Order, as it would have benefited and provided leverage in PAIC's defense of the other cases. Hutson never claims that anything written in the letter to him by Newton was false; rather, he later argues that the contents of the e-mail were all true in paragraphs 37-49 of his Amended Complaint. Further, in paragraph 35 of his Amended Complaint, Hutson admits that he never filed any such action to set aside the Agreement and Order. Thus, regardless of its truth or falsity, Hutson failed to allege any reliance upon the representation. Lastly, and perhaps most importantly, Hutson has not suffered any pecuniary loss. The claims against Hutson, and the federal sanctions awarded against him, were settled without any personal liability to Hutson. Accordingly, PAIC's motion for summary judgment as to the misrepresentation claim against them must be granted.

VI. Summary judgment is proper because Plaintiff's claim for negligence must fail because there is no evidence that PAIC breached any duty to its insured or caused any harm to its insured.

Even if it were not barred by the Release referenced *supra*, Hutson's claim for negligence fails as a matter of law. To establish a cause of action for negligence a plaintiff must show the concurrence of three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by negligent act or omission; and (3) damage proximately resulting from the breach of duty. Trotter v. State Farm Mut. Auto. Ins. Co., 297 S.C. 465, 474, 377 S.E.2d 343,

348 (Ct. App. 1988). The absence of any one of these elements renders the cause of action insufficient. *Id.* An insurer can be found negligent in its handling of a claim or suit even in absence of fraud or bad faith. See Tyger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286, 170 S.E. 346, 348 (1933).

As discussed more fully *supra*, Hutson believes that PAIC should have gone above and beyond its contractual duty to defend by either providing representation for his counter-claims against TLC or by instituting a separate action to set aside the 2012 Consent Order and Settlement Agreement. PAIC's failure to exceed its duty to Hutson is not evidence of its failure to meet its duty to Hutson. Hutson cannot establish that there was any duty for PAIC to act in the manner he suggests was required, much less that there was a breach of the actual duty owed to him. Moreover, Hutson's claims of damages are baseless and speculative. Accordingly, PAIC's motion for summary judgment as to the negligence claim against them must be granted.

VII. Summary judgment is proper because Plaintiff's claim for tortious interference with the attorney-client relationship must fail because there is no evidence that PAIC acted wrongfully, that there was any breach of the attorney-client relationship, or that PAIC was unjustified in its control and settlement of the underlying litigation.

Even if it were not barred by the Release referenced *supra*, Hutson's claim for tortious interference fails as a matter of law. South Carolina recognizes a cause of action for wrongful interference with an attorney-client relationship. DeBerry v. McCain, 275 S.C. 569, 574, 274 S.E.2d 293, 296 (1981) (citing Keels v. Powell, 207 S.C. 97, 34 S.E.2d 482 (1945)). [I]nterference by a third party with contractual relationships, without justification, is a violation of a primary legal right. Keels, 207 S.C. at 100, 34 S.E.2d at 484. It is "an actionable injury to cause another to violate his contract with a third person, without a legal justification, or, as otherwise stated, where the breach is induced or caused maliciously, 'malice' having the meaning in this connection

of the intentional doing of a wrongful act without justification or excuse.” Id. at 101, 34 S.E.2d at 484. “[T]he interference must have been willful and unjustified.” Id. The Keels Court cited 7 C.J.S., Attorney and Client, § 53, p. 836, which provides: “Third persons unlawfully interfering with the relationship of an attorney and his client... are liable to the attorney for the damages caused thereby.” Id. The DeBerry Court clarified the elements of interference with contractual relations, which include: “(1) the contract; (2) the wrongdoer’s knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) damages resulting therefrom.” 275 S.C. at 574, 274 S.E.2d at 296.

South Carolina has not specifically recognized the applicability of a tortious interference cause action in the context of an insurer’s purported interference with an insured’s relationship with the retained defense counsel. However, South Carolina recognizes that “[w]hen an insurer hires an attorney to represent its insured, an attorney-client relationship arises between the attorney and the insured—his client.” Sentry Select Ins. Co. v. Maybank Law Firm, LLC, 426 S.C. 154, 157, 826 S.E.2d 270, 271 (2019). “Pursuant to that relationship, the attorney owes the client—not the insurer—a fiduciary duty.” Id. “However, an insurance company that hires an attorney to represent its insured is in a unique position in relation to the resulting attorney-client relationship.” Id. at 157, 826 S.E.2d at 272.

An insurer’s contractual “right to control the litigation carries with it certain duties, including the duty not to prejudice the insured’s rights by failing to request special interrogatories or a special verdict in order to clarify coverage of damages.” Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 341, 803 S.E.2d 288, 299 (2017) (internal quotations omitted); Id. (“[B]y virtue of its duty to defend, an insurer gains the advantage of exclusive control over the litigation....”). Moreover, “a liability insurer owes its insured a duty to settle a personal injury

claim covered by the policy, if settlement is the reasonable thing to do.” Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass’n, 347 S.C. 642, 649, 557 S.E.2d 670, 674 (2001). The duty of good faith requires the insurer to act reasonably in protecting the insured from liability in excess of the policy limits. Tyger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286, 170 S.E. 346, 348 (1933). Thus, PAIC’s control over the litigation was justified by the terms of the insurance policy providing its duty to defend.

PAIC’s actions in determining the scope of the representation, i.e. that it would defend the cases against Hutson under reservation but would not prosecute his counterclaims, and decision to settle the claims, do not constitute tortious interference with Hutson’s attorney-client relationship with retained counsel Frank Gordon. As discussed *supra*, Huston pursued his counterclaims and lost. Further, the settlement agreements were not entered until after the disposition of the counterclaims in the federal case and until after the disposition of the counterclaims and loss at trial in the state defamation case. There is no evidence that PAIC acted without justification or with malice. To rule otherwise, and allow an insurer to pursue such a claim against its insured anytime that it gives instructions to retained counsel in contravention to the instructions of the insured, would strip the insurer of its right to exclusively control the litigation. Moreover, Hutson cannot prove any damages from any alleged interference, as the claims against Huston were resolved without any personal liability to him. Hutson’s allegations otherwise are baseless and speculative. Accordingly, PAIC’s motion for summary judgment as to the negligence claim against them must be granted.

VIII. Summary judgment is proper because Plaintiff's claim for legal malpractice must fail because (a) Plaintiff failed to accompany his pleadings with the statutorily required affidavit regarding malpractice; (b) PAIC is not vicariously liable for any malpractice of counsel it retains to defend its insured or of coverage counsel; and (c) even if vicarious liability applied to coverage counsel, Plaintiff lacked the necessary attorney-client relationship with coverage counsel to sustain a claim of legal malpractice.

Even if it were not barred by the Release referenced *supra*, Hutson's claim for legal malpractice fails as a matter of law. In order to prevail in a cause of action for legal malpractice, a plaintiff must prove: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the client's damages by the breach. Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "In South Carolina, attorneys are required to render services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession." Holy Loch Distribs., Inc. v. Hitchcock, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000).

PAIC is not vicariously liable for any malpractice of counsel it retains to defend its insured. Mike Etheredge, Laura Paton or Frank Gordon. Vicarious liability does not fall on the carrier by virtue of their having retained them as attorneys to defend their insured. See Feliberty v. Damon, 129 A.D.2d 207, 210-11 (N.Y. App. Div. 1987) (holding "[i]f the acts are performed solely by the attorney (in his capacity as an attorney) and are directly related to the representation of the insured in litigation, the attorney's negligence will not be imputed to the insurance carrier."). Even if vicarious liability did apply, Hutson has not pointed to any evidence that any of the attorneys who actually represented him breached any duty to him or any damage to Hutson therefrom. Hutson's bald allegations that these attorneys should have prosecuted his counterclaims, and that had they done so, he would have prevailed, is without merit.

To the extent that Hutson asserts a legal malpractice action against Tim Newton or other attorneys at Murphy & Grantland, PAIC is not vicariously liable for the actions of its coverage

counsel. Generally, an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client.” Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Sols., 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010). Further, an attorney owes no duty to a non-client unless he “breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client.” Id. (quoting Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995)). In his professional capacity the attorney is not liable, except to his client and those in privity with his client, for injury allegedly arising out of the performance of his professional activities. Gaar v. N. Myrtle Beach Realty Co., 287 S.C. 525, 529, 339 S.E.2d 887, 889 (Ct. App. 1986).

Despite Hutson’s efforts to muddy the waters, neither Tim Newton nor any other attorney at Murphy & Grantland ever provided direct representation to Hutson. Hutson admitted as much at the hearing on this motion and in his filed affidavit. Tim Newton and the attorneys at Murphy & Grantland represented PAIC. Newton reminded Hutson of that fact in his August 13, 2018 e-mail to Hutson, writing: “I need to remind you that I don’t represent you and I can’t represent you because I represent Penn-America.” Newton again stated at the end of the same e-mail: “I highly recommend that you get a lawyer involved, even if it’s a pro bono lawyer.” Thus, no attorney-client relationship existed to support a legal malpractice claim against Newton or Murphy. With no attorney-client relationship between Hutson and any Murphy & Grantland attorney, Hutson cannot sustain a legal malpractice action against them, much less against their client, PAIC. See Fabian v. Lindsay, 410 S.C. 475, 483, 765 S.E.2d 132, 136 (2014) (“Privity for legal malpractice has traditionally been established by the existence of an attorney-client relationship.”); Williams

v. Burns, 463 F. Supp. 1278, 1285 (D. Colo. 1979) (“Clients are not insurers of actions taken by attorneys, despite the fact that such actions are taken on the clients behalf.”).

Accordingly, PAIC’s motion for summary judgment as to the legal malpractice claim(s) against them must be granted.

CONCLUSION

Plaintiff’s claims against PAIC are barred by the Release that Plaintiff executed on September 16, 2016. Notwithstanding the bar to Plaintiff’s claims, Plaintiff’s claims that PAIC, either directly or vicariously, breached its contract, acted in bad faith or negligently, engaged in fraud or misrepresentation, tortuously interfered with his attorney-client relationship, or committed legal malpractice, each must fail as a matter of law. Accordingly, the Court concludes that PAIC is entitled to a grant of summary judgment, which thereby dismisses Plaintiff’s claims against them.

IT IS ORDERED Defendants Penn America Insurance Company and Global Indemnity Group, Inc.’s Motion for Summary Judgment is hereby granted.

AND IT IS SO ORDERED.

THE HONORABLE MICHAEL G. NETTLES
Presiding Judge of the Fifth Judicial Circuit

_____, South Carolina
July _____, 2019



Richland Common Pleas

Case Caption: MB Hutson , plaintiff, et al vs Penn America Insurance Company ,
defendant, et al

Case Number: 2018CP4006344

Type: Order/Summary Judgment

So Ordered

s/ The Honorable Michael G. Nettles #2140

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

CIVIL ACTION NO: 2018-CP-40-06344

MB Hutson/MB Hudson,

Plaintiff,

vs.

Penn America Insurance Company, Global
Indemnity Group, Inc., Timothy J. Newton,
Esq., J.R. Murphy, Esq., John Doe #1, John
Doe #2,

Defendants.

**ORDER GRANTING
DEFENDANTS NEWTON AND MURPHY'S
DISPOSITIVE MOTIONS**

This matter is before me upon motions to dismiss by Defendants J.R. Murphy and Timothy J. Newton. Newton, joined by Murphy, also moved for summary judgment pursuant to Rule 12(b) and 56(b) of the South Carolina Rules of Civil Procedure. Defendants Penn-America Insurance Company and Global Indemnity Group, Inc. (hereinafter collectively "PAIC") also filed a motion for summary judgment. This matter was heard on June 26, 2019. The Plaintiff and Defendants Murphy and Newton appeared *pro se*. Christian Stegmaier represented PAIC.

This matter presents the question of whether a putative insured has a cause of action against coverage counsel representing a liability insurer. Under the circumstances of this case, I find that Plaintiff has failed to state a cognizable claim.

Plaintiff argues that questions of fact exist that prevent disposition of his claims at this stage of the case. However, the nature of Plaintiff's claim raises several threshold legal questions that must be addressed before proceeding to the merits. As noted above, a question of law exists as to whether Plaintiff has standing to assert this claim. A second question of law is whether Hutson has pled a recognized cause of action against Murphy and Newton. Yet another legal question is presented as to the effect of the release. Hutson's claim fails as a matter of law.

PLAINTIFF'S ALLEGATIONS

Plaintiff M.B. Hutson filed this action on December 5, 2018 and amended his complaint on December 28, 2018. Hutson also filed a supplemental memorandum, an affidavit, and exhibits. Construed broadly, Hutson alleges Newton knew that a fraud upon the court was committed in a prior action and failed to report the fraud or to otherwise take action to vindicate Hutson's rights. Hutson's allegations concern a campground known as Big Water Resort in Clarendon County.

Specifically, Hutson alleges that he entered into a Lease Purchase Agreement with certain non-parties to this action, TLC Holdings, LLC and its principals (hereinafter collectively "TLC"), to lease and ultimately purchase certain property located at 5215 Dingle Pond Road in Summerton (hereinafter "the Property"). Hutson alleges that when this transaction was negotiated, he notified TLC that he intended to purchase and develop lakefront condominiums on the Property.

Hutson alleges that TLC told him during these negotiations that TLC owned the Property and that a campground business located on the Property was owned by a separate entity, Big Water Resort, LLC. As alleged, TLC told Hutson that in order to purchase the Property, he would have to purchase Big Water Resort, LLC as well.

Hutson further alleges that TLC failed to disclose key facts to him during these negotiations. Specifically, TLC allegedly represented that water and sewer capacity were available for a development when in fact they were not, and misrepresented the financial condition of Big Water Resort, LLC. TLC also allegedly failed to disclose certain debts owed by Big Water Resort, LLC, including a debt owed to Black River Electric.

Hutson's key allegation is that TLC failed to disclose to Hutson that Big Water Resort, LLC had entered into Retail Membership Agreements (hereinafter "Campground Memberships" that granted the members of the campground the right to use the campground facilities for up to

two lifetimes. Hutson alleges that when he performed a title search, he did not find the Campground Memberships because they were not recorded.

Hutson alleges that these hidden defects rendered title to the Property unmarketable. As a result, the Property was undevelopable and the Property and Big Water Resort, LLC were worthless.

Exhibits establish that Hutson entered into the Lease Purchase Agreement with TLC in December of 2010. Hutson also entered into a Membership Interest Purchase Agreement at the same time. Through this agreement, Hutson became the sole principal in Big Water Resort, LLC.

Hutson alleges that the Defendants in this action knew that TLC's attorneys had committed "Extrinsic Fraud on the Courts" in a Settlement Agreement and Consent Order. This fraud was allegedly "carried over" into a defamation action filed by TLC against Hutson.

In support of this allegation, Hutson quotes an e-mail from Defendant Newton. Hutson alleges that Newton gave him "legal advice" in the e-mail. Hutson does not allege that he acted upon the purported legal advice. Instead, Hutson alleges that the e-mail establishes Newton's knowledge of the fraud perpetrated on him by TLC. Hutson claims that Newton's failure to act on the knowledge of this alleged fraud damaged Hutson by causing Hutson to be unsuccessful in his litigation against TLC.

Broadly construed in favor of Hutson, the e-mail indicates that Newton was aware of evidence corroborating Hutson's claims that he was defrauded. These include evidence from prior cases that:

- TLC knew Hutson wanted to develop waterfront property;
- the Campground Memberships (as well as an alleged lease between TLC Holdings, LLC and Big Water Resort, LLC) were not recorded;

- the Lease Purchase Agreement, the Membership Interest Purchase Agreement, and the Campground Memberships do not specify which portions of the Property were part of the campground;
- one campground member testified she thought all of the Property was campground property;
- the campground members were not parties to the Settlement Agreement;
- the Settlement Agreement had provisions for an acreage release in conjunction with which Hutson agreed to submit a plat to TLC for its approval for a subdivision development on the Property; and
- exhibits to a separate bankruptcy action appeared to indicate that the subdivision TLC approved was on the campground site.

This e-mail is dated August 13, 2018. In the e-mail, Newton stated that “If you were ordered to develop property that was subject to lifetime use rights, that probably should have been brought to the court’s attention.” Newton told Hutson that Newton did not represent Hutson, and that if Hutson wanted to pursue litigation against TLC, he should hire an attorney.

Hutson asserted several purported causes of action in his Amended Complaint. However, the gist of Hutson’s claim appears to be that Newton’s admitted knowledge of the above facts, coupled with certain statements about the law regarding these facts that Hutson calls “legal advice,” created a duty on the part of the Defendants to report fraud and/or to prosecute or pay for the prosecution of Hutson’s claims against TLC. Hutson made no allegations specific to Murphy.

Newton’s e-mail does not state that TLC committed fraud upon the court. However, in response to Newton’s briefing, Hutson submitted an affidavit averring that Newton told him verbally on several occasions that Newton knew that Hutson had been defrauded.

NEWTON’S CONTENTIONS

Newton denied Hutson’s allegations. In response, Newton pointed to a letter Hutson attached to his Amended Complaint. That letter recounts that the e-mail Hutson quoted in his Amended Complaint was part of ongoing settlement negotiations.

As set forth in the letter, Hutson had threatened to sue Defendant Penn-America Insurance Company for failure to procure a *supersedeas* bond while an appeal was pending from a judgment rendered against Hutson for \$3,500,000. During the course of those negotiations, Hutson offered to refrain from filing suit if Penn-America would join Hutson in a lawsuit against TLC. The e-mail Hutson quoted was in response to several e-mails from Hutson under the subject heading, “Setting Aside the Judgment,” in which Hutson represented to Newton that Hutson was not aware at the time he purchased the property that all of the Property he purchased was subject to the lifetime Campground Memberships.

Newton submitted the entire series of e-mails in support of his motion. Hutson did not object to these documents or dispute their authenticity at the hearing. In response, Hutson submitted additional materials, but those materials did not contradict Newton’s account in either the letter attached to Hutson’s Amended Complaint or the series of e-mails Newton submitted.

Newton submitted court records demonstrating that Defendants Newton was not involved in any of the above-referenced cases. Newton’s sole involvement in litigation with Hutson was that he represented Penn-America for purposes of a declaratory judgment action filed in federal court in June of 2016. Penn-America was notified of claims against Hutson in February of 2016 and it began defending Hutson in two lawsuits under a liability policy Penn-America issued to one of Hutson’s companies, BWR, Inc.

PRIOR RELATED LITIGATION

Hutson’s Amended Complaint alleges fraud that occurred in prior litigation. Newton submitted several judicial orders that bear upon Hutson’s claims in this action. Because Hutson’s allegations concern events that occurred in prior cases, a summary of the prior litigation and the judicial orders is necessary in order to evaluate Hutson’s claims in this action.

The Ejectment Action

In late 2011, TLC filed an action for ejectment and breach of lease in the Court of Common Pleas for Clarendon County. TLC Holdings, LLC v. M.B. Hudson a/k/a M.B. Hutson, Civil Action No. 2011-CP-14-00602 (the Ejectment Action”). The Settlement Agreement and Consent Order that Hutson attached to his pleading and alleged are fraudulent were filed in the Ejectment Action. Court records reflect that Newton was not involved in the Ejectment Action. Hutson was represented by separate counsel throughout the course of the Ejectment Action.

In the Ejectment Action, TLC alleged that Hutson breached the Lease Purchase Agreement and failed to make lease payments. Hutson answered and asserted counterclaims against TLC. Among the issues Hutson raised in his counterclaim were the alleged undisclosed sewer moratorium and outstanding debt owed to Black River Electric Cooperative.

The Settlement Agreement, which was filed on April 13, 2012, imposes certain duties on Hutson, including the duty to make lease payments. Hutson was permitted to stay on the Property and the Lease Purchase Agreement remained in force. One of the terms of the Settlement Agreement was that Hutson agreed to submit a Qualified Plat for TLC’s approval for a subdivision project on the Property. Court records from the Ejectment Action appear to confirm that the agreed-upon location of the proposed subdivision would be on the campground property. The Settlement Agreement specifically provided that if Hutson breached the terms of the Agreement, the Lease Purchase Agreement would be automatically terminated upon the filing of TLC’s affidavit of default. In that event Hutson would be required to immediately vacate the property. Additionally, Hutson would be deemed to have released TLC from any conduct involving Big Water Resort through the date of Hutson’s breach. The Settlement Agreement was incorporated into a Consent Order that was also filed on April 13, 2012.

None of the Defendants in this action were involved in negotiating the Settlement Agreement and Consent Order. Hutson was represented in that transaction by Paul Weissenstein.

TLC subsequently filed an Affidavit of Default in December of 2013. Hutson sought a temporary restraining order and moved to set aside the affidavit of default. On the date set for the hearing, Hutson filed bankruptcy. The bankruptcy court lifted the stay for a determination whether Hutson had an equitable interest in the Property.

In an Order filed March 21, 2014, Judge (now Justice) George C. James, Jr. ruled that Hutson breached the Settlement Agreement. He found that Hutson's breach was not caused by TLC's actions. Judge James ruled that by the terms of the Settlement Agreement, Hutson's breach terminated the Lease Purchase Agreement and required Hutson to immediately vacate the Property. Hutson was represented by counsel (E. Freeman Belser) at this hearing.

Hutson's postcard

Shortly after Hutson was notified of TLC's Affidavit of Default, Hutson sent a postcard (hereinafter "the Postcard") to all the campground members. In the Postcard, Hutson stated that both he and they were victims of a scam perpetrated by TLC. This led to two additional lawsuits.

The Class Action

The campground members filed a putative class action against TLC in federal court in April of 2014. Reed v. Big Water Resort, LLC, Civil Action No. 2:14-cv-1583-DCN-MGB (hereinafter "the Class Action"). The campground members settled their claims with TLC in February 2016. However, TLC asserted third-party claims against Hutson. Hutson also asserted counterclaims against TLC. TLC raised the automatic release provision in the 2012 Settlement Agreement as a defense to Hutson's counterclaims. Cross-motions for summary judgment were referred to Magistrate Judge Mary Gordon Baker for a hearing.

Magistrate Judge Baker's recitation of Hutson's counterclaims indicates that many of allegations Hutson raised in the Class Action are substantially the same allegations that Hutson raised in the Ejectment Action. In particular, Hutson alleged that TLC failed to disclose the financial location of Big Water Resort, LLC, the sewer moratorium, and the debt owed to Black River Electric when Hutson purchased the Property. Reed v. Big Water Resort, LLC, 2016 WL 7435620 at *4 (D.S.C. signed Apr. 5, 2016). Hutson also alleged that TLC failed to disclose the Campground Memberships with their lifetime use rights to Hutson when he purchased the property. Id.

Baker found that the release in the 2012 Settlement Agreement barred all of Hutson's counterclaims except for his defamation claim. Baker specifically found that the Settlement Agreement could not be set aside due to fraud. Id. at *12. After a thorough review of the evidence Hutson presented, Baker concluded that "All of Hutson's claims pertaining to fraud relate to the *original* transaction, *not the Release*." Id. at *14 (emphasis in original).

Baker specifically found that Hutson was aware of the Campground Memberships when he purchased the Property. Id. at *13 n.5. She cited correspondence dated November 2012 between Hutson, his realtor, TLC's realtor, and an attorney, regarding the effect of the lifetime memberships on the marketability of the title to the property. Id. This took place before Hutson signed the Lease Purchase Agreement and the Membership Interest Purchase Agreement.

At the time Magistrate Judge Baker heard the motions, Hutson was *pro se* as to his counterclaims. Hutson had an attorney prior to March 26, 2015, but that attorney (Matthew D.Hamrick) had been relieved as counsel. Hutson was *pro se* as to his counterclaims through the remainder of the Class Action. Counsel retained by Defendant Penn-America to defend Hutson (Laura Paton) had only appeared in the case a month earlier, and Paton only represented Hutson with respect to his defense. Id. at *8.

On May 20, 2016, District Judge David C. Norton granted TLC's motion for summary judgment as to Hutson's counterclaims. Judge Norton ruled that Hutson's counterclaims were barred by *res judicata*. Reed v. Big Water Resort, LLC, 2016 WL 2935891, *5-*8 (D.S.C. signed May 20, 2016). Judge Norton adopted Magistrate Judge Baker's factual findings as to Hutson's claims of alleged fraud. Id. at *7. He also found that all of Hutson's allegations of fraud related to the original transaction and not the procurement of the release. Id. at *7-*8.

The Defamation Action

In 2015, TLC filed suit against Hutson for defamation. TLC alleged that the defamatory statements he made in the Postcard he mailed to the campground members instigated the Class Action against TLC. TLC Holdings, LLC v. M.B. Hutson a/k/a M.B. Hudson, Civil Action No. 2015-CP-14-00615. Hutson also asserted counterclaims against TLC in the Defamation Action.

On March 17, 2017, Judge R. Ferrell Cothran, Jr. granted TLC's motion for summary judgment as to TLC's counterclaims. After reviewing the three above-referenced orders, Judge Cothran concluded that Hutson's counterclaims were barred by *res judicata*. Judge Cothran ruled that Hutson "never alleges that [TLC] perpetrated any sort of fraud or otherwise committed wrongful conduct, in relation to the parties' execution of the Settlement Agreement. . . . In other words, the fraud that Hutson here complains of is fraud related to the *original transaction*, not the *release*." Penn-America originally retained Laura Paton to defend Hutson in the Defamation. In February 2017, Frank J. Gordon was substituted as counsel for Hutson.

The Sanctions Order

In 2017, Hutson, acting *pro se*, filed a motion for reconsideration of the order granting summary judgment to TLC as to his counterclaims in the federal Class Action. Judge Norton denied Hutson's motion and also granted TLC's motion for sanctions. Judge Norton found that "Hutson appears to have continued his pattern of frivolous filings and conduct designed to harass

or burden [TLC], and there is no indication that he intends to cease.” Judge Norton noted that Hutson “again makes reference to the alleged fraud by [TLC] in obtaining the settlement agreement and the order signed by Judge James in the prior state court litigation. Hutson has made these allegations throughout the course of this litigation. He has never, however, specified what the fraud is or submitted evidence of it.” Judge Norton concluded that:

Hutson has established a pattern of making misrepresentations to the court, of making unsupported allegations of unethical and criminal conduct by [TLC], and of using the judicial process as a mechanism of harassment. His meritless filings have wasted untold hours of the court’s time. He lacks any evidence to support his counterclaims and other allegations against [TLC]. Indeed, Hutson routinely fails to provide factual or legal support for anything he files with the court. Accordingly, the court finds that sanctions are appropriate

Reed v. Big Water Resort, LLC, 2017 WL 4480195 at *2-*3 (D.S.C. filed Oct. 6, 2017).

Court records reflect that Penn-America settled TLC’s claims against Hutson in early 2018. As part of that settlement, TLC released its claim for sanctions against Hutson.

The trial and appeal in the Defamation Action

In early 2018, TLC’s case against Hutson in the Defamation Action proceeded to trial. The jury returned a verdict against Hutson in the amount of \$3,500,000. Counsel defending Hutson (Frank Gordon) filed an appeal from that judgment.

The e-mail Hutson attached to his pleading was sent during the pendency of this appeal. The record reflects that the Defamation Action settled for \$1,875,000. The judgment was marked satisfied on December 20, 2018. After receiving notice of the settlement, Hutson filed this lawsuit.

The Coverage Action

One other prior lawsuit is pertinent to this case. Penn-America filed a declaratory judgment action in federal court on June 14, 2016. Penn-America Ins. Co. v. BWR, Inc., et al., Civil Action No. 2:16-01943-DCN (D.S.C.). Hutson was named as a defendant in the Declaratory Judgment Action. Defendants Murphy and Newton signed the Complaint. In the Declaratory Judgment

Action, Penn-America contested its coverage for Hutson as to TLC's claims against him in the Class Action and the Defamation Action. Among other things, Penn-America contended that Hutson was not an insured for purposes of his actions forming the basis for TLC's claims against him. Penn-America also contended that the claims were excluded because Hutson knowingly violated TLC's rights and/or knowingly published false information.

Hutson alleged that the Defamation Action was filed secretly. However, court records reflect that Hutson was personally served with the pleadings in the Defamation Action. Hutson was dismissed as a party from the Coverage Action after stipulating to be bound by the results.

The Release

In conjunction with Hutson's dismissal from the Coverage Action, Hutson entered into a settlement agreement with Penn-America. Another first-party claim on the policy by Hutson was also included in this settlement. As part of the settlement agreement, Hutson agreed to release Penn-America and its agents from any further claims related to the Coverage Action. Hutson alleged that Murphy and Newton acted as agents for Penn-America in his Amended Complaint.

STANDARD

Generally, a motion to dismiss pursuant to Rule 12(b)(6), SCRCPP is based solely upon the allegations in the Complaint. Exhibits attached to a pleading are incorporated into the pleading as a part thereof for all purposes. Rule 10(c), SCRCPP. This Court may dismiss a suit when the defendant demonstrates that the plaintiff has failed to state facts sufficient to constitute a cause of action. Hambrick v. GMAC Mortg. Corp., 370 S.C. 118, 121, 634 S.E.2d 5, 7 (Ct. App. 2006). However, the Rules provide that a motion to dismiss may be converted into a motion for summary judgment when matters outside the pleadings are presented to the Court. Rule 12(c); SCRCPP; Brown v. Leverette, 291 S.C. 364, 366-67, 353 S.E.2d 697, 698-99 (1987).

In this case, I find it appropriate to consider matters outside the pleadings. The Amended Complaint bases its claims in part on matters that occurred in prior proceedings. The documents filed in those proceedings are public record. Some excerpts from depositions and trial testimony have been provided. These documents were offered merely for the purpose of establishing Hutson's knowledge of certain events and determinations in prior litigation. The defendants have submitted a settlement agreement between Hutson and Penn-America that pertains to this litigation. Finally, Newton submitted correspondence between Hutson and Newton providing context to the e-mail Hutson quoted in his Amended Complaint. These were e-mails Hutson had in his possession when he filed this action. Hutson had the opportunity to produce documentation to refute Newton's account, and indeed he produced other e-mails in response. Accordingly, these documents will be considered and the appropriate standard is that found in Rule 56, SCRCp.

"Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 323-24, 566 S.E.2d 536, 540 (2002). "In determining whether a genuine question of fact exists, the court must view the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving party." Id.

A party opposing summary judgment may not rest upon the mere allegations or denials of his pleadings. SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990). Rule 56(e) requires a party opposing summary judgment "to come forward with affidavits or other supporting documents demonstrating the existence of a genuine issue for trial." Doe v. Batson, 345 S.C. 316, 320-21, 548 S.E.2d 854, 856 (2001). Although only a scintilla of evidence is required, a party must present some evidence to avoid summary judgment. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 694 S.E.2d 1 (2010). Moreover, a party may not avoid summary judgment by asserting that a jury may disbelieve uncontradicted evidence. Id. at 549, 694 S.E.2d at 6.

CONCLUSIONS OF LAW

Hutson's allegations, broadly construed in his favor, assert that Newton represented him. However, court records conclusively demonstrate that Newton did not appear as counsel for any party in the Ejectment Action, the Class Action, and the Defamation Action. Murphy and Newton appeared as coverage counsel for Penn-America in the Coverage Action only. I find it appropriate to take judicial notice of these facts because they are contained in the public record.

Therefore, despite Hutson's allegations to the contrary, Hutson's claim against Newton and Murphy relates to Newton's actions as counsel for Penn-America, an adverse party in the Coverage Action,. The first question is whether Hutson has standing to sue counsel for an adverse party. The second issue is whether Newton's e-mail created a cause of action.

I. Standing

In South Carolina, attorneys are generally immune from liability to third parties arising from their actions as counsel for their clients. Gaar v. North Myrtle Beach Realty Co., Inc., 287 S.C. 525, 528, 339 S.E.2d 857, 889 (Ct. App. 1986). Attorneys are generally not liable to a party opponent for conduct in the course of litigation. Ronald E. Mallen & James A. Roberts, The Liability of a Litigation Attorney to a Party Opponent, 14 Willamette L. J. 387 (1978). Statements made in the course of litigation are absolutely privileged. Oesterle v. Wallace, 272 Mich. App. 260, 264, 725 N.W.3d 470, 474 (Mich. Ct. App. 2006). Every state that has considered the issue has held that the absolute judicial privilege from suit applies to statements made by attorneys during settlement negotiations. Id. at 266, 725 N.W.2d at 475-76.

The only exception to the rule that attorneys are immune from liability to third parties while representing party opponents is when misrepresentation or fraud is committed by the attorney. 7A C.J.S. Attorney & Client § 228 (June 2019 Update). There is no South Carolina case on point. 1 S.C. Jur. Attorney and Client § 22 (May 2019 Update). However, fraud generally requires proof

of nine distinct elements. *Id.* (citing M.B. Kahn Constr. Co. v. S.C. Nat'l Bank, 275 S.C. 381, 271 S.E.2d 414 (1980)).

Hutson does not allege that Newton or Murphy defrauded him. In fact, Hutson does not allege any conduct at all on the part of Murphy. Hutson's allegation is that Newton knew that TLC defrauded him and failed to take action. Moreover, as discussed below, it appears that Hutson cannot prove Newton or Murphy knew he was defrauded.

Hutson alleged that the purpose of Newton's e-mail was to provide leverage in settlement negotiations with TLC. A letter from Penn-America that Hutson attached to his pleading further explains that the e-mail served the dual purpose of providing leverage against TLC and also attempting to resolve Hutson's threatened lawsuit against Penn-America for failing to provide a *supersedeas* bond during the pendency of the appeal of the judgment in the Defamation Action.

I find that Newton's e-mail was part of ongoing settlement negotiations. The communication was made by Newton, acting as counsel for Hutson's opponent in the Coverage Action, Penn-America. Therefore, Hutson lacks standing to sue Newton or Murphy because they were acting as counsel for a party opponent in ongoing settlement negotiations.

II. Duty created by gratuitous undertaking

Hutson also alleges that Newton's e-mail constituted legal advice. Generally, an adverse party cannot demonstrate justifiable reliance in support of the creation of an implied duty of care. 1 S.C. Jur. Attorney and Client § 21 (May 2019 Update). Hutson, as an adverse party who was actively threatening litigation against Newton's client, cannot demonstrate he justifiably relied on any purported legal advice from Newton. Moreover, the e-mail upon which Hutson relies expressly states that the information therein was not provided based upon an attorney-client relationship, but rather upon a common interest.

As Hutson acknowledged at the hearing, Newton's e-mail states that Newton's comments to Hutson were based upon common interest. Hutson expressly alleges that had the alleged fraud been opposed, the \$3,500,000 judgment in the Defamation Action could have been set aside.

Liability insurers have an interest in the results of lawsuits they are defending because they are contractually obligated to indemnify the insured for covered damages. For this reason, the Supreme Court has recently held that liability insurers may sue attorneys they retain to defend their insureds for malpractice. Sentry Select Ins. Co. v. Maybank Law Firm, LLC, 826 S.E.2d 270 (2019). (allowing claim by insurer based upon defense counsel's failure to timely respond to requests for admission). Hutson alleges he was Penn-America's insured. This allegation demonstrates that Hutson had a common interest with Murphy and Newton's client, Penn-America. The common interest, as reflected in Hutson's allegations and supporting exhibits, was in reducing the value of the judgment against Hutson by potentially setting aside the judgment or using the threat of such litigation as leverage against TLC.

E-mails Newton provided demonstrate that Hutson was threatening lawsuits against both TLC and Penn-America at the time Newton's e-mail was sent. Hutson requested that Penn-America join him in litigation to set aside TLC's judgment against Hutson.

Hutson alleges that by providing information to him about a potential claim for fraud, Newton provided legal advice. However, Hutson fails to consider the nature of his claim against Penn-America.

Hutson alleged that his counterclaims against TLC were intertwined with Penn-America's defense of TLC's claims against Hutson. In order to investigate Hutson's assertion that the \$3,500,000 judgment could be set aside due to fraud, Penn-America necessarily had to investigate the merits of Hutson's claim against TLC. This investigation could not be conducted by the attorneys Penn-America retained to defend Hutson for several reasons. First, Hutson was *pro se*

as to his counterclaims against TLC. Second, Hutson was threatening litigation against Penn-America. Third, Hutson's claim concerned Penn-America's duty to defend and indemnify Hutson, not strategy for Hutson's defense.

Once Penn-America completed its investigation and declined Hutson's request to join in an action against TLC, Penn-America had no further interest in the information. The party with an interest in the information was Hutson because it was material to Hutson's allegations against TLC. By providing this information to Hutson, Penn-America satisfied any special duty owed to Hutson, as putative insured, to protect his counterclaims. Penn-America also furthered its common interest with Hutson in possibly reducing the value of TLC's judgment against Hutson.

For the above reasons, Hutson fails to establish that Newton gratuitously undertook Hutson's representation. Newton's e-mail expressly states that Newton did not represent Hutson. Hutson does not allege that Newton or Murphy defrauded Hutson. Moreover, the contents of Newton's e-mail do not demonstrate an undertaking to represent Hutson, but rather actions to further Penn-America's common interest in reducing the value of TLC's judgment against Hutson.

III. Professional malpractice liability

In order to bring a claim for professional malpractice, Hutson must establish an attorney-client relationship. Fabian v. Lindsay, 410 S.C. 475, 483, 765 S.E.2d 132, 136 (2014). Contractual privity is necessary to establish standing. Id. at 482, 765 S.E.2d at 136. The remaining elements of a legal malpractice action are a breach of duty by the attorney and proximately caused damages. Fabian, 410 S.C. at 483, 765 S.E.2d at 136. Hutson's claim fails for several reasons.

A. Duty

Hutson does not allege the existence of a contract creating an attorney-client relationship between himself and Newton. In fact, in the e-mail Hutson relies upon, Newton expressly stated several times that he does not represent Hutson and that Newton represented Hutson's opponent,

Penn-America. Hutson cannot demonstrate the existence of an attorney-client relationship to support a claim for professional malpractice against Newton.

Additionally, even if an attorney-client relationship could be proven, Hutson has failed to support his claim with the affidavit of an expert. Section 15-36-100(B) of the South Carolina Code requires a party bringing a professional malpractice action to “file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.” This statute applies to claims against attorneys. S.C. Code Ann. § 15-36-100(G)(2). Hutson did not attach an expert affidavit to his Complaint in this action. Therefore, Hutson has failed to state a claim for professional malpractice.

B. Breach of duty

Even if Hutson’s allegations demonstrate the existence of a legal duty, Hutson fails to show a breach of that duty under the circumstances of this case.

Hutson does not allege that Newton or Murphy defrauded Hutson, but rather that they failed to take action to counteract known fraud perpetrated by TLC. Hutson does not appear to allege that Newton or Murphy ever represented TLC, and court records confirm that they only represented Penn-America in the Coverage action.

Hutson argues that the Rules of Professional Responsibility require an opposing attorney to report fraud. None of the rules Hutson cited stand for this proposition.

Rule 1.7 of the South Carolina Rules of Professional Responsibility governs attorney-client relationships. Specifically, it prohibits lawyers from representing clients when there is a conflict of interest. Because Murphy and Newton did not represent Hutson, this Rule does not apply.

Rule 1.2 prohibits a lawyer from engaging or assisting a client in committing a crime or a fraud. Hutson does not allege that Murphy or Newton represented TLC, who allegedly defrauded

Hutson. Therefore, this rule does not apply to them in this case. Importantly, this Rule does not impose any duties upon an attorney based upon mere knowledge of a fraud perpetrated upon an opposing litigant. The rule applies to fraud perpetrated by an attorney's client (*i.e.*, Penn-America). Hutson does not allege that Penn-America committed any fraud.

Rule 3.3 prohibits a lawyer from knowingly offering evidence the lawyer knows is false. Again, Hutson's allegation is not that Newton offered false evidence, but rather that TLC defrauded the court. Neither Murphy nor Newton ever represented TLC. Therefore, this Rule does not apply to them in this case.

Rule 4.1 prohibits a lawyer from knowingly making a false statement to others. It also requires lawyers to disclose material facts when disclosure is necessary to prevent a client from committing a fraud. Murphy and Newton did not represent TLC, who allegedly defrauded Hutson. They represented Penn-America, an adverse party to both TLC and Hutson. Nothing in this Rule imposes a duty on a lawyer who represents an adverse party to file an action to set aside the result of a prior action, regardless of whether there are allegations of fraud.

Rule 8.4(e) prohibits lawyers from engaging in conduct that is prejudicial to the administration of justice. Newton did not represent either TLC or Hutson. This Rule does not require a lawyer representing a third party to intervene in a dispute merely because one of the adverse parties claims they are being defrauded.

Hutson provides no other basis for a breach of duty. Liability insurance policies do not require insurers to prosecute claims their insureds may have against third parties. Moreover, it appears that information material to Hutson's potential claims against TLC was disclosed to him.

C. Proximate cause

Even if a duty was breached, Hutson fails to allege any basis for proximate cause in this case. A review of Hutson's damages claims indicates that Hutson essentially claims that the results

of the Ejectment Action, the Class Action, and the Defamation Action would have been different had the Defendants in this suit acted on Hutson's behalf to counteract the fraud. Court records reflect that Newton and Murphy were not involved in those actions. By the time Newton's e-mail was sent, the Ejectment action was concluded, the Class Action had been settled, and a judgment had been entered against Hutson in the Defamation Action. Hutson provides no authority for the proposition that a lawyer representing an adverse party must attempt to re-open judgments in prior actions merely because of an awareness that those judgments may have been tainted by fraud.

Furthermore, the evidence does not support Hutson's allegation that Newton or Murphy knew Hutson was defrauded. Before any of the defendants in this action were involved in the Big Water Resort litigation, Judge James found that Hutson breached the Settlement Agreement and the Consent Order in the Ejectment Action. The subsequent rulings adverse to Hutson were all based upon *res judicata*. Therefore, Hutson could not prevail in any claim against TLC unless the ruling in the Ejectment Action could be set aside on some basis.

Before any of the Defendants in this action became involved, Hutson raised the issue of setting aside the Settlement Agreement and Consent Order based upon fraud. Hutson presented his arguments to Magistrate Judge Baker in the Class Action. Baker expressly found that Hutson failed to demonstrate fraud inducing him to enter into the Settlement Agreement. Reed v. Big Water Resort, LLC, 2016 WL 7435620 at *14. Judge Norton adopted this finding. Reed v. Big Water Resort, LLC, 2016 WL 2935891 at *7-*8. Judge Cothran's Order in the Defamation Action was in accord with Magistrate Judge Baker's findings. Moreover, Judge Norton sanctioned Hutson for continuing to assert the same argument after it had been ruled upon.

The only theory upon which Hutson had any hope of prevailing was to demonstrate evidence that TLC fraudulently induced Hutson to enter into the Settlement Agreement. Correspondence filed with the briefing indicates that Hutson asked Penn-America to join him in

litigation to set aside the Order in the Ejectment Action based upon newly discovered evidence that TLC failed to disclose to Hutson that all of the Property was subject to the lifetime Campground Memberships. Because there was no record delineating which property could be developed and which could not, Hutson could potentially argue he was fraudulently induced to enter into the Settlement Agreement. Newton's e-mail discussed this possibility.

However, the evidence cited in Newton's e-mail falls well short of establishing a claim for fraud. The Supreme Court has summarized what is necessary for proving fraud as follows:

In order to recover in an action for fraud and deceit, based upon misrepresentation, the following elements must be shown by clear, cogent and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; (9) the hearer's consequent and proximate injury. Failure to prove any one of the foregoing elements is fatal to recovery.

M.B. Kahn Constr. Co., Inc., 275 S.C. at 384, 271 S.E.2d at 415.

Fraud upon the court is an equitable doctrine. Chewning v. Ford Motor Co., 354 S.C. 72, 82, 579 S.E.2d 605, 610 (2003); Bryan v. Bryan, 220 S.C. 164, 167, 66 S.E.2d 609, 610 (1951) ("There is no doubt that a court of equity has inherent power to grant relief from a judgment on the ground of fraud."). Equitable relief is not available to a party who has unclean hands. Straight v. Goss, 383 S.C. 180, 206-07, 678 S.E.2d 443, 457-58 (Ct. App. 2009).

In order to prevail in an action to set aside a prior judgment based upon fraud, one of the elements Hutson would have to prove is that he was not aware at the time he entered into the Settlement Agreement that all of the Property was subject to the Campground Memberships. This element, which involves Hutson's subjective knowledge as to facts pertaining to prior transactions and legal actions, cannot be satisfied by any information in the possession of Newton or any of the Defendants in this case.

Although the issue was not specifically addressed in the judicial orders, court filings from the Class Action (a case in which Hutson was a party but in which Newton and Murphy were not involved) indicate that TLC argued in support of its motion for summary judgment against Hutson's counterclaims that all of the Property was not subject to the Campground Memberships. TLC's motion was granted. Therefore, Hutson appears to be collaterally estopped to argue that all of the Property was subject to the Campground Memberships. Moreover, a deposition transcript from the Class Action indicates that Hutson had the opportunity to personally cross-examine the realtor who represented TLC when Hutson purchased the Property, and she testified that some of the Property could have been developed.

Furthermore, Hutson has demonstrated a pattern of misrepresenting facts to the court regarding the alleged fraud. Hutson alleged in this action, as he did in the Ejectment Action, the Class Action, and the Defamation Action, that he was not aware of the Campground Memberships before he purchased the Property. Magistrate Judge Baker specifically found that Hutson was aware of the Campground Memberships before he purchased the Property. Reed v. Big Water Resort, LLC, 2016 WL 7435620 at *13 n.5. This finding was based upon communications between Hutson, the realtors, and an attorney in November 2010. Thus, Hutson's allegation in this action that he was not aware of the Campground Memberships before he purchased the Property is materially false. At a minimum, Hutson fails to show how any knowledge or actions on the part of Newton or any of the Defendants in this action could change the results of the prior litigation in light of this fact.

As discussed above, the genesis of this lawsuit—Hutson's representation to Newton that the entire Property (which included several parcels) was undevelopable and that TLC withheld this information from Hutson when he entered into the Settlement Agreement—appears to have been made without any good faith belief in its accuracy. Hutson made this same representation to this

Court in this action and to courts in other actions he has filed. (See Hutson Supp. Mem. filed June 19, 2019 at ¶ 9.C. on p. 11.) Newton argued at the hearing that his comments in the e-mail were conditional: “If you were ordered to develop property that was subject to lifetime use rights, that probably should have been brought to the court’s attention.” Newton’s letter dated November 8, 2018, which was attached to Hutson’s pleadings, and the e-mails Newton submitted were consistent with this understanding. Hutson was on notice, prior to the time he made any of these representations, through the court rulings against him on his counterclaims and Stroman’s deposition testimony in the Class Action, that his assertion that none of the Property could be developed was baseless. Hutson was in a position to know which property could be developed, whereas Newton and Murphy were not. Yet Hutson herein seeks to invoke the authority of this Court against them based upon Newton’s reaction to this false information Hutson knowingly provided to Newton.

Hutson’s own court filings demonstrate that he had duties to the campground members in his capacity as principal in Big Water Resort, LLC, the entity that sold and held the Campground Memberships. Hutson thus had a duty to investigate which property could be developed and which could not at the time he entered into the Settlement Agreement because he was principal in Big Water Resort, LLC.

Hutson’s allegations in this action are inconsistent with an affidavit he filed in the Ejectment Action. In that affidavit, Hutson referred to his duty to the campground members in his capacity as principal in Big Water Resort, LLC as a “major obstacle.” Hutson testified that the Campground Memberships impaired his ability to develop and sell the property. Hutson testified he dealt with this by attempting to force the campground members to give up their lifetime memberships by (a) firing all the staff at Big Water Resort, and (b) raising costs to the campground members. These actions “outraged the members.” Thus, Hutson’s own testimony establishes that

he attempted to force the campground members out so he could build on the property, causing them to become outraged.

It is doubtful that Hutson could prevail on a claim of fraud upon the court because he appears to have unclean hands due to Hutson's breach of his duties to the campground members. Straight, 383 S.C. at 206-07, 678 S.E.2d at 457-58. At a minimum, this is sufficient to demonstrate that Newton and Murphy were not aware of provable fraud against Hutson.

This evidence, much of which is derived from court filings in prior related cases, and all of which was known to Hutson when he filed this action, demonstrates that Hutson cannot prove Newton knew he was defrauded by TLC. As a result, any breach of duty by Newton or Murphy could not have proximately caused the damages Hutson claims in this action. Moreover, this evidence reflects that Hutson's allegations in this action are consistent with his pattern of making materially false representations to courts, both in this case and throughout the course of his litigation involving Big Water Resort.

IV. Release

Finally, even if all of the above could be established, Hutson's claims are subject to dismissal because they are barred by a release. Hutson's settlement agreement with Penn-America releases his claims against not only Penn-America, but also Penn-America's agents.

A release is a contract by which a plaintiff relinquishes rights or claims against persons against whom those rights could have been enforced. Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 492, 649 S.E.2d 494, 198 (Ct. App. 2007). "A release is a contract and contract principles of law should be used to determine what the parties intended." Id. at 497, 649 S.E.2d at 501. "The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully." Id. at 500, 649 S.E.2d at 503.

Hutson made no attempt either in briefing or at the hearing to contest the authenticity or enforceability of the release. Hutson failed to provide any reason why it should not apply to his claims in this case. The release bars any further claims against Penn-America relating to its coverage and claim handling with respect to the Class Action and the Defamation Action. This was the subject matter of the Coverage Action, the only case in which Murphy and Newton was involved. Because Hutson alleged Murphy and Newton acted as Penn-America's agents, Hutson's claims against them in this action are barred by the release.

CONCLUSION

For the reasons set forth above, I find that Newton's Amended Motion to Dismiss, or in the Alternative for Summary Judgment and Murphy's Motion to Dismiss should be granted pursuant to Rules 12(b)(6) and 56 of the South Carolina Rules of Civil Procedure.

It is hereby

ORDERED, ADJUDGED and DECREED that judgment be entered for Defendants Murphy and Newton, that Hutson's claims against them in this action should be dismissed, and that Murphy and Newton and should be dismissed as a parties from this action.

IT IS SO ORDERED.

Columbia, South Carolina

Date: _____

The Honorable Michael G. Nettles
Presiding Judge of the Fifth Circuit Court



Richland Common Pleas

Case Caption: MB Hutson , plaintiff, et al vs Penn America Insurance Company ,
defendant, et al
Case Number: 2018CP4006344
Type: Order/Summary Judgment

So Ordered

s/ The Honorable Michael G. Nettles #2140

Electronically signed on 2019-07-17 14:32:00 page 25 of 25

STATE OF SOUTH CAROLINA

COUNTY OF

RichlandMB Hutson

Plaintiff(s)

vs.

Peoples America Insurance CompanyGlobal Indemnity GroupTimothy J. Newton Esq. Defendant(s)

Submitted By:

Address:

MB Hutson
P.O. Box 2755 Orangeburg SC
29115

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2018CP400 0344

SC Bar #:

Telephone #:

Fax #:

Other:

E-mail:

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing cases that are NOT E-Filed. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint. This form is NOT required to be filed in E-Filed Cases.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts

- ☐ Constructions (100)
☐ Debt Collection (110)
☐ General (130)
☒ Breach of Contract (140)
☐ Fraud/Bad Faith (150)
☐ Failure to Deliver/Warranty (160)
☐ Employment Discrim (170)
☐ Employment (180)
☐ Other (199)

Inmate Petitions

- ☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

Torts - Professional Malpractice

- ☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Previous Notice of Intent Case #
 20 -NI-
☐ Notice/ File Med Mal (230)
☐ Other (299)

Administrative Law/Relief

- ☐ Reinstate Drv. License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899)

Special/Complex /Other

- ☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699)
☐ Sexual Predator (510)
☐ Permanent Restraining Order (680)
☐ Interpleader (690)

- ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in an
 Out-of-County Action (660)
☐ Pre-Suit Discovery (670)

Torts - Personal Injury

- ☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Assault/Battery (370)
☐ Slander/Libel (380)
☐ Other (399)

Judgments/Settlements

- ☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured
 Settlement Payment Rights
 Application (760)
☐ Confession of Judgment (770)
☐ Petition for Workers
 Compensation Settlement
 Approval (780)
☐ Incapacitated Adult
 Settlement (790)
☐ Other (799)

Real Property

- ☐ Claim & Delivery (400)
☐ Easement (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

Appeals

- ☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Comm. (990)
☐ Employment Security Comm (991)
☐ Other (999)

Submitting Party Signature:

[Signature]

Date:

Dec-5, 2018

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

COUNTY OF RICHLAND

Plaintiff,

VS.

Penn America Insurance Company, Global
Indemnity Group, Inc., Timothy J. Newton,
Esq., John Doe #1, John Doe #2
Defendants

Civil Action No. 2018-CP-

SUMMONS

RICHLAND COUNTY
 FILED
 2018 DEC -5 PM 12:22
 JEANNETTE W. MCBRIDE
 C.C.P. & G.S.

TO THE DEFENDANTS NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action,
a copy of which is herewith served upon you, and to serve a copy of your Answer to the
Complaint upon its subscribers, at the address shown below, within thirty (30) days after the
service hereof, exclusive of the day of such service. If you fail to answer the Complaint within
the time aforesaid, judgment by default will be rendered against you for the relief demanded in
the Complaint.

Penn America Insurance Company
Three Bala Plaza East, Suite 300
Bala Cynwyd, Pennsylvania 19004
610-660-8877

Global Indemnity Group, Inc.
Three Bala Plaza, Suite 300
Bala Cynwyd, Pennsylvania 19004
610-664-1500

Timothy J. Newton, Esq
4406-B Forest Drive
Columbia, SC 29206
803-782-4100

M B Hutson
Post Office Box 2755
Orangeburg, SC 29116-2755
803-308-2714

IN THE COURT OF COMMON PLEAS

Civil Action No.

2018-CP-

COMPLAINT FOR BREACH OF CONTRACT, NEGLIGENCE AND FAILURE TO PERFORM DUTIES

VS.

**Penn America Insurance Company,
Global Indemnity Group, Inc., Timothy J.
Newton, Esq., John Doe #1, John Doe #2
Defendants**

2008 DEC -5 PM 12:28
RICHLAND COUNTY
FILED
JANETTE W. MCBRIDE
C.C.P. & G.S.
is in honor of

The Plaintiff, upon information and belief, would respectfully show unto this Honorable

JURISDICTION AND VENUE

1. Plaintiff M. B. Hutson is a resident of Orangeburg County, South Carolina.
2. Defendant, Penn America Insurance Company is located in Pennsylvania.
3. Defendant, Penn America Insurance Company, employed Timothy J. Newton, Esq. of Murphy & Grantland, P.A., of Columbia, S.C. as their corporate counsel regarding the subject of this complaint.
4. T. Newton, Esq. attended court mediation on behalf of this case that involved Plaintiff as a Defendant, in Charleston, S.C.
5. Venue is proper in this court pursuant to S. C. Code Ann. §15-7-30 (C) because Defendant's counsel's office is located in Richland County, S.C., and that the most substantial part of the alleged acts giving rise to this cause of action occurred there.
6. This Court has jurisdiction over the parties and the subject matter of this action.

HISTORY of BACKGROUND FACTS
Taken from Laura Paton's filing referenced at the end.
Numbers in parenthesis are Paton's.

7. (42) "on or about 2010 ... Hutson was introduced to TLC Holdings, LLC's owners Richard Clark and Steve Lovell (hereinafter collectively TLC parties) ... for the purpose of purchasing the land at 5215 Dingle Pond Road, Summerton, SC (hereinafter "the property")."

8. (43-45) "That Richard Clark, Steve Lovell, with James Thigpen, owned and operated TLC Holdings, LLC ... (and) BWR... and other corporate entities hereinafter referred to as "John Doe Corporations," which were created to perform single purpose functions in order to effectuate the sole will of Messrs. Clark and Lovell"

9. (46-56) "in or around December 2010, ..."

- (A) "Hutson met with the TLC parties and advised the TLC parties that he sought to purchase the lake-front property, and develop water-front condominiums on the land...TLC parties advised ...Hutson that the property was owned by TLC Holdings and the campground business was owned by Big Water Resort, LLC ("BWR") and in order to purchase the land, he would be required to purchase BWR as well..."
- (B) "TLC parties advised Mr. Hutson that there was water and sewer adjacent to the property for development but failed to disclose the moratorium of approximately 5 years preventing development of the property..."
- (C) "TLC parties advised Mr. Hutson that BWR had no known debt ... and ... concealed BWR's \$300,000.00 annual losses... (and) advised Mr. Hutson that BWR had no accounting records."

10. (57) "...prior to executing the Lease Purchase Agreement¹ and the Membership Interest Purchase Agreement² (hereinafter collectively "the Agreements") ... Mr. Hutson searched the property title record; no liens or encumbrances were found."

11. (68) "That the TLC parties knowingly and / or negligently failed to disclose and / or concealed information that the Retail Membership Term Agreements³ provided ...each holder:"

A) "a (the) right to use campground facilities, and services solely for members recreational and enjoyment, (emphasis supplied)," ⁴

B) "this right to use the facilities ranges from 5 years up to two lifetimes."⁵

12. (70-1) "...the TLC parties knowingly and / or negligently failed to record the timeshares encumbering the property as required by statute and, therefore, hid from disclosure the encumbrances upon the property prior to ... Mr. Hutson's execution of the Agreements... TLC parties had a statutory duty to record the encumbrances pursuant to Sections 27-30-10 through 27-32-250 of the 1976 Code are designated as Article 1 of Chapter 32, Title 27..."

13. (73-4) "... the TLC parties had a pecuniary interest in knowingly and / or negligently concealing the encumbrances on the property to induce Mr. Huston to enter into the Agreements to secure a maximum profit to the TLC parties and to disgorge a failing business⁶... failing to record the timeshares ... encumbering the property, they knowingly and / or negligently concealed such encumbrances ... and induced Mr. Hutson to enter into the Agreements."

14. (76-77) "... as a result of such fraudulent and / or negligent misrepresentations, Mr. Hutson has been damaged, and continues to be damaged, and has suffered pecuniary loss as a direct and proximate result of his reliance on the TLC parties representations ... as a direct and

¹ Lease Purchase Agreement: Exhibit 5.0

² Membership Purchase Agreement: Exhibit 6.0

³ Retail Membership Agreements: Exhibits 1.1-1.3

⁴ Retail Membership Agreement: line 2, and Item "1. Purpose," ll. 1-2)

⁵ Retail Membership Agreement: Item "6. Duration of the Membership."

⁶ Lovell Deposition, 2/16/11, page 113, ll. 3-18. Exhibit 2.0

proximate result of the TLC parties' actions, Mr. Hutson is entitled to actual, direct, consequential, incidental, special, and punitive damages as aforesaid all in an amount to be determined by the trier of fact and any attempts in a contractual agreement for the limitation or disclaimer of same or any other waiver or other limitation are null, void, unenforceable, and subject to rescission as a matter of law."

15. (78-82) "... prior to execution of the Agreements, the TLC parties..."

(A) "...advised Mr. Hutson that the value of BWR was \$500,000 and the value of the land at 5215 Dingle Pond Road, Summerton, SC was \$6 million."

(B) "...advised Mr. Hutson that BWR had an annual income of approximately \$200,000.00...did not advise Mr. Hutson that BWR was operating at a substantial loss upwards of \$300,000.00 per year, outstripping its income."

(C) "advised Mr. Hutson that BWR had no accounting records"... (yet) "TLC parties knew that the operating expenses of BWR exceeded its income."

16. (86-88, 90) "That Mr. Hutson had a right to rely, and did rely, on the various representation of the TLC parties" ... (yet) "the TLC parties intentionally, ... and / or negligently ... concealed the ... operating costs and expenses... the annual income ...and accounting records of BWR, to induce Mr. Hutson to purchase BWR and enter into the Agreements... (thereby) he has suffered irreparable harm including, but not limited to significant financial harm."

17. (99) "This constitutes a breach of the Agreements with Mr. Hutson and accompanying this breach was the fraudulent acts:" (caused by Extrinsic Fraud upon the Courts):

- a. Knowingly failing to disclose the outstanding debts of BWR, including, but not limited to, Black Water Electric;
- b. Advising Mr. Hutson that no financial records were kept as to BWR to conceal the losses / financial condition of the company;
- c. Failing to record encumbrances required by statute as outlined above;

- d. Advising Mr. Hutson that the Retail Memberships could be divested to allow for development of the lakefront land as discussed; and,
- e. Other such concealments misrepresentations as may be discovered.”

18. (102) “The TLC parties and the John Doe Corporations and each of them, though, their act and omissions including, but not limited to, the following particulars, conducted unfair and deceptive practices within the meaning of S.C. Code Section 29-5-140(a) and 27-31-430, S. C. Code of Laws as amended:

- a) in failing to disclose the Vacation Time Shares encumbering the property;
- b) In failing to record the memberships as required pursuant to Sections 27-32-10 through 27-32-250 of the 1976 Code are designated as Article 1 of Chapter 32, Title 27 and entitled ‘Vacation Time Sharing Plans’;
- c) In failing to pay and subsequently hiding the debt owed to Black River Electric;
- d) in failing to provide any additional consideration for subsequent attempts to modify their agreement;
- e) in failing to properly disclose the true conditions of the business and properties at issue in the Agreements and putting them into the stream of commerce;
- f) in making false representations as to the condition of the business and properties at issue in the Agreements an / or representations as to the condition of the business and properties at issue in the Agreements in reckless disregard as to the truth of the representations; and
- g) In failing to analyze and preserve reserves for maintenance and operation of the business and concealing same.”

19. (103) “The conduct of the TLC parties in their ownership and management of TLC Holdings, BWR, and the John Doe Corporations, as described above, was knowing and willful, and the TLC parties knew or should have known that such conduct was a violation of S.C. Code Section 39-5-20 and 27-31-430.”

20. (104) Mr. Hutson is a person within the meaning of S. C. Code Section 39-5-140(a) and has suffered actual, direct, and proximate damages as a direct and proximate result of unfair and deceptive acts of the TLC parties, in an amount to be determined by the trier of fact.

21. (118-119) “There would exist a broad element of injustice and fundamental unfairness if the acts of the TLC parties, including Messrs. Lovell, Clark and TLC Holdings LLC, and the John Doe Corporations, and each of them individually, were not regarded as the acts of one another. At the time BWR and the Lease-Purchase Agreement were offered and placed in the stream of commerce by the TLC parties and the John Doe Corporations, the faulty defects and deficiencies heretofore described were hidden and concealed through the acts and omissions of the TLC parties and the John Doe Corporations.”

22. (121) “These hidden defects, including, but not limited to un-marketable title and outstanding and oppressive debts...rendered the business and the Lease Purchase Agreement undevelopable and worthless.” (Emphasis mine.)

FOR A FIRST CAUSE OF ACTION

**Failure to Deliver When under a “DUTY” or in the Alternative, Breach of Contract in
Failure to Execute a Duty to Investigate and Defend on behalf of the Plaintiff)**

23. Defendants were well versed on the details of the case and cognizant that TLC Holdings, LLC’s attorneys had committed Extrinsic Fraud on the Courts in the Settlement Agreement and Consent Order, carrying that Extrinsic Fraud over into their Defamation Complaint, and trial. This was due to the fact that the Lease Purchase Agreement, upon which the Settlement Agreement and Consent Order were formed, was recognized and remained “worthless.” Penn America’s counsels put their thoughts to record, as follows: (Emphasis mine.)

24. "...I can see how you could argue that the Consent Order is invalid because it attempts to adjudicate the rights of parties⁷ not before it. If you were ordered to develop property that was subject to lifetime use rights, that probably should have been brought to the court's attention....It's hard to see why TLC and its lawyers should not have, in good faith, simply told you (and the court) that the Big Water Resort property was undevelopable because it was already obligated to double lifetime memberships as a private club....Since attorneys were involved, and it resulted in your inability to present your case in court,.....there might possibly be extrinsic fraud on the court to support setting aside the Consent Order. See *Chewning v. Ford Motor Company* 354 S.C. 72, 579 S.E. 2d 605 (2003)."

–**Timothy J. Newton, Esq. (8-13-18)**⁸

25. "...These hidden defects, including but not limited to, defective, un-marketable title and outstanding and oppressive debts, which unbeknownst to Mr. Hutson, rendered the business and the Lease-Purchase Agreement undevelopable and worthless"

–**L. Paton, Esq. (8-08-16)**

26. The attorneys for the TLC Parties, who drafted the fraudulent Lease Purchase Agreement and Settlement Agreement for TLC Parties, and also drafted the Consent Order for Judge George James, thereby executed Extrinsic Fraud on the Courts (State and Federal). This was planned and orchestrated for the targeted purpose of injury to the Plaintiff, now the Defendant's client and policy holder. Yet, the Defendants' trained attorneys, and in spite of their obligation as officers of the courts,

A) chose to neglect their fiduciary duty to legally expose this Extrinsic Fraud on the Courts, and

B) chose not to defend their client against the injustice created by the Extrinsic Fraud upon the Court.

27. The Extrinsic Fraud on the Court provided a great disadvantage to Defendant's insured, Plaintiff, and an unfair advantage to TLC Holdings, LLC. The Fraud upon the Court was perpetrated in behalf of TLC Holdings, LLC, by their attorneys, and was recognized by at least two

⁷ Owners of Retail Membership Agreements, holding a sole right to use all the land for their recreation and enjoyment. See footnotes 3 and 4 referring to Exhibits 1.1-1.3.

⁸ Emailed letter to Hutson from Newton, Subject: Setting Aside the Judgment, p. 2, items 15-16, Exhibit 4.2.

of the attorneys hired by Penn American Insurance Company: Penn America nor it's attorneys dared to take a public or legal stand against the Extrinsic Fraud upon the Court, allowing TLC's attorneys to continue to dominate the courts with their Extrinsic Fraud, while Penn America's client was losing all the court hearings due to that crippling disadvantage. Thus, TLC's attorneys held a great advantage by concealing, once again, the material facts of the fraudulent contracts, agreements, and orders they had put into place. Plaintiff had no chance to win as the Plaintiff had no knowledge of the contents of the concealed material facts and TLC's attorneys knew that. This Extrinsic Fraud blind-folded the Plaintiff during depositions, while testifying in court and provided a great disadvantage to Plaintiff in presenting his full case before the court in all matters.

FOR A SECOND CAUSE OF ACTION

**Failure to Deliver When under a "DUTY" or in the Alternative, Breach of Contract in
Failure to Execute a Duty to Investigate and Defend on behalf of the Plaintiff)**

28. Defendants filed for dismissal of all responsibility in filing for a Declaratory Judgment and a Summary Judgment in Federal Court (6/14/16 and 11/08/18, respectively). In Defendant's counsel's letter of 11/08/18, to Plaintiff, Tim Newton states:

*"Penn America has filed a declaratory judgment action regarding whether it owes a duty to defend and/or indemnify you ... Penn-America continues to reserve its right to deny coverage should the court find that coverage does not exist...including the right to withdraw its defense."*⁹

29. Defendants asked the Judge to fully dismiss coverage that would leave their insured, Plaintiff, stranded financially while also noticing TLC Holdings, LLC's attorneys that they would pay their policy limit¹⁰ of one million dollars (\$1,000,000.00) toward the \$3.5M

⁹ T. J. Newton, Esq. letter to Hutson dated November 8, 2018, p.4, ¶ 6. Exhibit 7.0

¹⁰ T. J. Newton, Esq. e-mail to Hutson dated November 19, 2018. Exhibit 8.0

judgment in favor of TLC Holdings LLC. The Defendants filed for Summary Judgment to exclude themselves from their fiduciary duty and responsibility to investigate and defend their client, the Plaintiff. No judgment would have been obtained had TLC Holdings, LLC's lawyers been honest with the court and disclosed to the Honorable Courts that they were broadcasting extrinsic fraud upon the courts and fraud upon Mr. Hutson, the Plaintiff, by failing to properly disclose the concealed facts about the entire purchase and sale which was all fabricated with fraud and fully disclosed by L. Paton, Esq. as "worthless."

30. Defendants sat back quietly taking the position that when Plaintiff lost and with judgments against himself, Defendants' plan was simply to wiggle out of paying such judgments via a Summary Judgment request or perhaps mediating and only having to pay a small judgment if possible instead of cutting off the fraudulent snakes head allowing respect and honor to the machinery of the courts as well as protecting their insured.

31. Defendants attempted to wiggle out of the responsibility of paying any of the judgments when the Plaintiff lost is evidenced by the Defendants filing in Federal Court for a Summary Judgment asking the Court to protect them from being held responsible for any financial responsibility placed against Plaintiff, including the \$3.5M judgment. Nevertheless, had Defendants cured the extrinsic fraud issue, plaintiff would have prevailed in all courts.

32. Defendants actions were clearly to avoid their duty to investigate and defend their client, Plaintiff, against the embedded Fraud Upon the Court, citing, "we lawyers just don't do each other that way" – T. Newton, Esq. (verbally).

Therefore, Plaintiff asks for not less than \$4.5M in damages.

Therefore, the Plaintiff PRAYS as follows:

1. Send this case to jury trial.
2. Allow this case to be speedy.
3. Allow for damages and punitive damages due to Defendant's intent.
4. Hold both Tim Newton and Penn America responsible for all damages, losses, financial
losses, mental and physical suffering by Defendant.
5. Allow any and all disputed issues to be judged by a jury.
6. Give special consideration to Plaintiff as Pro Se.
7. Allow for two John Does.

Respectfully submitted on this 5th day of December, 2018.



MB Hutson

P.O. Box 2755
Orangeburg, South Carolina 29116
803 308 2714

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

MB Hutson/MB Hudson,

Plaintiff,

vs.

Penn America Insurance Company, Global
Indemnity Group, Inc., Timothy J. Newton,
Esq., J. R. Murphy, Esq., John Doe #1, John
Doe #2

Defendants

IN THE COURT OF COMMON PLEAS

Civil Action # 2018 CP 400 6344

SUMMONS

RICHLAND COUNTY
FILED
2018 DEC 28 PM 4:11
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

TO THE DEFENDANTS NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action,
a copy of which is herewith served upon you, and to serve a copy of your Answer to the
Complaint upon its subscribers, at the address shown below, within thirty (30) days after the
service hereof, exclusive of the day of such service. If you fail to answer the Complaint within
the time aforesaid, judgment by default will be rendered against you for the relief demanded in
the Complaint.

Penn America Insurance Company
Three Bala Plaza East, Suite 300
Bala Cynwyd, Pennsylvania 19004
610-660-8877

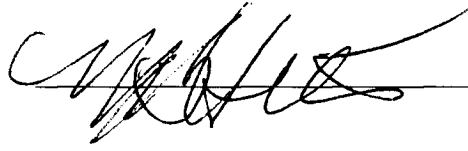
Global Indemnity Group, Inc.
Three Bala Plaza, Suite 300
Bala Cynwyd, Pennsylvania 19004
610-664-1500

Timothy J. Newton, Esq.
4406-B Forest Drive
Columbia, SC 29206
803-782-4100

J. R. Murphy, Esq.
4406-B Forest Drive
Columbia, SC 29206
803-782-4100

(Signature Page Follows)

By:

A handwritten signature in black ink, appearing to read 'M B Hutson', is written over a horizontal line.

M B Hutson, PRO SE

Post Office Box 2755

Orangeburg, SC 29116-2755

Telephone: (803) 308-2714

E-mail: hutson4444@gmail.com

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

MB Hutson/MB Hudson,

Plaintiff

vs.

Penn America Insurance Company,
Global Indemnity Group, Inc.,
Timothy J. Newton, Esq.,
J. R. Murphy, Esq., John Doe #1, John
Doe #2.

Defendants

IN THE COURT OF COMMON PLEAS

Civil Action No. 2018 - CP - 400-6344

**AMMENDED COMPLAINT
FOR BREACH OF CONTRACT,
NEGLIGENCE AND FAILURE TO
PERFORM DUTIES**

RICHLAND COUNTY
FILED
2018 DEC 28 PM 4:12
JEANETTE W. MCBRIDE
C.C.P. & G.S.

The Plaintiff, upon information and belief, would respectfully show unto this Honorable

Court as follows:

JURISDICTION AND VENUE

1. Plaintiff M. B. Hutson is a resident of Orangeburg County, South Carolina.
2. Defendant, Penn America Insurance Company is located in Pennsylvania.
3. Defendant, Penn America Insurance Company, employed J. R. Murphy, Esq. and Timothy J. Newton, Esq. of Murphy & Grantland, P.A., of Columbia, S.C. as their corporate counsel regarding the subject of this complaint.
4. T. Newton, Esq. attended court mediation on behalf of this case that involved Plaintiff as a Defendant, in Charleston, S.C.
5. Venue is proper in this court pursuant to S. C. Code Ann. §15-7-30 (C) because Defendant's counsel's office is located in Richland County, S.C., and that the most substantial part of the alleged acts giving rise to this cause of action occurred there.
6. This Court has jurisdiction over the parties and the subject matter of this action.

HISTORY of BACKGROUND FACTS

Taken from Laura Paton's filing¹

Numbers in parenthesis are Paton's.

7. (42) "on or about 2010 ... Hutson was introduced to TLC Holdings, LLC's owners Richard Clark and Steve Lovell (hereinafter collectively TLC parties) ... for the purpose of purchasing the land at 5215 Dingle Pond Road, Summerton, SC (hereinafter "the property")."

8. (43-45) "That Richard Clark, Steve Lovell, with James Thigpen, owned and operated TLC Holdings, LLC ... (and) BWR... and other corporate entities hereinafter referred to as "John Doe Corporations," which were created to perform single purpose functions in order to effectuate the sole will of Messrs. Clark and Lovell"

9. (46-56) "in or around December 2010, ..."

- (A) "Hutson met with the TLC parties and advised the TLC parties that he sought to purchase the lake-front property, and develop water-front condominiums on the land...TLC parties advised ...Hutson that the property was owned by TLC Holdings and the campground business was owned by Big Water Resort, LLC ("BWR") and in order to purchase the land, he would be required to purchase BWR as well..."
- (B) "TLC parties advised Mr. Hutson that there was water and sewer adjacent to the property for development but failed to disclose the moratorium of approximately 5 years preventing development of the property..."
- (C) "TLC parties advised Mr. Hutson that BWR had no known debt ... and ... concealed BWR's \$300,000.00 annual losses... (and) advised Mr. Hutson that BWR had no accounting records."

¹ Exhibit 3.0: "Amended Answer to Complaint and Counter-Claims Back" filed by Laura Paton, Esq.

10. (57) "...prior to executing the Lease Purchase Agreement² and the Membership Interest Purchase Agreement³ (hereinafter collectively "the Agreements") ... Mr. Hutson searched the property title record; no liens or encumbrances were found."

11. (68) "That the TLC parties knowingly and / or negligently failed to disclose and / or concealed information that the Retail Membership Term Agreements⁴ provided ... each holder:"

A) "a (the) right to use campground facilities, and services solely for members recreational and enjoyment, (emphasis supplied)," ⁵

B) "this right to use the facilities ranges from 5 years up to two lifetimes."⁶

12. (70-1) "...the TLC parties knowingly and / or negligently failed to record the timeshares encumbering the property as required by statute and, therefore, hid from disclosure the encumbrances upon the property prior to ... Mr. Hutson's execution of the Agreements... TLC parties had a statutory duty to record the encumbrances pursuant to Sections 27-30-10 through 27-32-250 of the 1976 Code are designated as Article 1 of Chapter 32, Title 27..."

13. (73-4) "... the TLC parties had a pecuniary interest in knowingly and / or negligently concealing the encumbrances on the property to induce Mr. Huston to enter into the Agreements to secure a maximum profit to the TLC parties and to disgorge a failing business⁷... failing to record the timeshares ... encumbering the property, they knowingly and / or negligently concealed such encumbrances ... and induced Mr. Hutson to enter into the Agreements."

14. (76-77) "... as a result of such fraudulent and / or negligent misrepresentations, Mr. Hutson has been damaged, and continues to be damaged, and has suffered pecuniary loss as a

² Lease Purchase Agreement: Exhibit 5.0

³ Membership Purchase Agreement: Exhibit 6.0

⁴ Retail Membership Agreements: Exhibits 1.1-1.3

⁵ Retail Membership Agreement: page one, line 2, and Item "1. Purpose," ll. 1-2)

⁶ Retail Membership Agreement: page one, Item "6. Duration of the Membership."

⁷ Lovell Deposition, 2/16/11, page 113, ll. 3-18. Exhibit 2.0

direct and proximate result of his reliance on the TLC parties representations ... as a direct and proximate result of the TLC parties' actions, Mr. Hutson is entitled to actual, direct, consequential, incidental, special, and punitive damages as aforesaid all in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of same or any other waiver or other limitation are null, void, unenforceable, and subject to rescission as a matter of law."

15. (78-82) "... prior to execution of the Agreements, the TLC parties..."

(A) "...advised Mr. Hutson that the value of BWR was \$500,000 and the value of the land at 5215 Dingle Pond Road, Summerton, SC was \$6 million."

(B) "...advised Mr. Hutson that BWR had an annual income of approximately \$200,000.00...did not advise Mr. Hutson that BWR was operating at a substantial loss upwards of \$300,000.00 per year, outstripping its income."

(C) "advised Mr. Hutson that BWR had no accounting records"... (yet) "TLC parties knew that the operating expenses of BWR exceeded its income."⁸

16. (86-88, 90) "That Mr. Hutson had a right to rely, and did rely, on the various representation of the TLC parties" ... (yet) "the TLC parties intentionally, ... and / or negligently ... concealed the ... operating costs and expenses... the annual income ...and accounting records of BWR, to induce Mr. Hutson to purchase BWR and enter into the Agreements... (thereby) he has suffered irreparable harm including, but not limited to significant financial harm."

17. (99) "This constitutes a breach of the Agreements with Mr. Hutson and accompanying this breach were the fraudulent acts:" (caused by Extrinsic Fraud upon the Courts):

a. Knowingly failing to disclose the outstanding debts of BWR, including, but not limited to, Black Water Electric;

⁸ Lovell testimony under deposition in 2011. Exhibit 2.0

- b. Advising Mr. Hutson that no financial records were kept as to BWR to conceal the losses / financial condition of the company;
- c. Failing to record encumbrances required by statute as outlined above;
- d. Advising Mr. Hutson that the Retail Memberships could be divested to allow for development of the lakefront land as discussed; and,
- e. Other such concealments misrepresentations as may be discovered.”

18. (102) “The TLC parties and the John Doe Corporations and each of them, though, their act and omissions including, but not limited to, the following particulars, conducted unfair and deceptive practices within the meaning of S.C. Code Section 29-5-140(a) and 27-31-430, S. C. Code of Laws as amended:

- a) in failing to disclose the Vacation Time Shares encumbering the property;
- b) In failing to record the memberships as required pursuant to Sections 27-32-10 through 27-32-250 of the 1976 Code are designated as Article 1 of Chapter 32, Title 27 and entitled ‘Vacation Time Sharing Plans’;
- c) In failing to pay and subsequently hiding the debt owed to Black River Electric;
- d) in failing to provide any additional consideration for subsequent attempts to modify their agreement;
- e) in failing to properly disclose the true conditions of the business and properties at issue in the Agreements and putting them into the stream of commerce;
- f) in making false representations as to the condition of the business and properties at issue in the Agreements and / or representations as to the condition of the business and properties at issue in the Agreements in reckless disregard as to the truth of the representations; and
- g) In failing to analyze and preserve reserves for maintenance and operation of the business and concealing same.”

19. (103) “The conduct of the TLC parties in their ownership and management of TLC Holdings, BWR, and the John Doe Corporations, as described above, was knowing and

willful, and the TLC parties knew or should have known that such conduct was a violation of S.C. Code Section 39-5-20 and 27-31-430.”

20. (104) Mr. Hutson is a person within the meaning of S. C. Code Section 39-5-140(a) and has suffered actual, direct, and proximate damages as a direct and proximate result of unfair and deceptive acts of the TLC parties, in an amount to be determined by the trier of fact.

21. (118-119) “There would exist a broad element of injustice and fundamental unfairness if the acts of the TLC parties, including Messrs. Lovell, Clark and TLC Holdings LLC, and the John Doe Corporations, and each of them individually, were not regarded as the acts of one another. At the time BWR and the Lease-Purchase Agreement were offered and placed in the stream of commerce by the TLC parties and the John Doe Corporations, the faulty defects and deficiencies heretofore described were hidden and concealed through the acts and omissions of the TLC parties and the John Doe Corporations.”

22. (121) “These hidden defects, including, but not limited to un-marketable title and outstanding and oppressive debts...rendered the business and the Lease Purchase Agreement undevelopable and worthless.” (Emphasis mine.)

FOR A FIRST CAUSE OF ACTION

Failure to Deliver When under a “DUTY” or in the Alternative, Breach of Contract in Failure to Execute a Duty to Investigate and Defend on behalf of the Plaintiff)

23. Defendants were well versed on the details of the case and cognizant that TLC Holdings, LLC’s attorneys had committed Extrinsic Fraud on the Courts in the Settlement Agreement⁹ and Consent Order¹⁰, carrying that Extrinsic Fraud over into their Defamation

⁹ Exhibit 9.0: Settlement Agreement with approved map for development area, April 13, 2012.

¹⁰ Exhibit 10.0: Consent Order, April 13, 2012, Judge George James, S.C. State Court.

Complaint filed by TLC parties in S.C. State Court¹¹, and the trial. This was due to the fact that the Lease Purchase Agreement¹², upon which the Settlement Agreement and Consent Order were formed, was recognized and remained “worthless” (See ¶ 25. below.) **Plaintiff, Hutson, had asked Defendant, Tim Newton, to give him some legal information and advice.** Defendant, Penn America’s counsels, put their thoughts to record, as follows: (Emphases mine.)

24. *‘Mr. Hutson, I need to remind you that I don’t represent you and I cant represent you because I represent Penn America. To the extent there is a common interest, I note the following: ... I can see how you could argue that the Consent Order is invalid because it attempts to adjudicate the rights of parties¹³ not before it. If you were ordered to develop property that was subject to lifetime use rights, that probably should have been brought to the court’s attention....It’s hard to see why TLC and its lawyers should not have, in good faith, simply told you (and the court) that the Big Water Resort property was undevelopable because it was already obligated to double lifetime memberships as a private club....Since attorneys were involved, and it resulted in your inability to present your case in court,.....there might possibly be extrinsic fraud on the court to support setting aside the Consent Order. See Chewning v. Ford Motor Company 354 S.C. 72, 579 S.E. 2d 605 (2003).’*

“However, that tis something you would have to follow up with on your own. I can’t undertake that. Possibly Frank could file a motion if Penn-America approves it, but he and I both have agreed to put everything on hold until the mediation. I highly recommend that you get a lawyer involved, even if it’s a pro bono lawyer. If you need the documents supporting the above, let me know. Tim”
–Timothy J. Newton, Esq. (8-13-18)¹⁴

25. *“...These hidden defects, including but not limited to, defective, un-marketable title and outstanding and oppressive debts, which unbeknownst to Mr. Hutson, rendered the business and the Lease-Purchase Agreement undevelopable and worthless”*

–L. Paton, Esq. (8-08-16)¹⁵

¹¹ Exhibit 13.0 – Complaint 2015-CP-14-615, filed 12/7/15.

¹² Lease Purchase Agreement (2010); Exhibit 5.0.

¹³ Owners of Retail Membership Agreements, holding a sole right to use all the land for their recreation and enjoyment. See footnotes 3 and 4 referring to Exhibits 1.1-1.3.

¹⁴ Emailed letter to Hutson from Newton, Subject: Setting Aside the Judgment, including items 15-16, Exhibit 4.2.

¹⁵ Exhibit 3.0 “Amended Answer to Complaint and Counter-Claims Back” filed August 8, 2016 by Laura Paton, Esq., page 24, ¶ 121.

26. The attorneys for the TLC Parties, who drafted the fraudulent Lease Purchase Agreement and Settlement Agreement for TLC Parties, and also drafted the Consent Order for Judge George James, thereby executed Extrinsic Fraud on the Courts (State and Federal). This was planned and orchestrated for the targeted purpose of injury to the Plaintiff, now the Defendant's client and policy holder. Yet, the Defendants' trained attorneys, and in spite of their obligation as officers of the courts,

- a) chose to neglect their fiduciary duty to legally expose this Extrinsic Fraud on the Courts, and
- b) chose not to defend their client against the injustice created by the Extrinsic Fraud upon the Court.

27. The Extrinsic Fraud on the Court provided a great disadvantage to Defendant's insured, Plaintiff, and an unfair advantage to TLC Holdings, LLC. The Fraud upon the Court was perpetrated in behalf of TLC Holdings, LLC, by their attorneys, and was recognized by at least two of the attorneys hired by Penn American Insurance Company: Penn America nor its attorneys dared to take a public or legal stand against the Extrinsic Fraud upon the Court, allowing TLC's attorneys to continue to dominate the courts with their Extrinsic Fraud, while Penn America's client was losing all the court hearings due to that crippling disadvantage. Thus, TLC's attorneys held a great advantage by concealing, once again, the material facts of the fraudulent contracts, agreements, and orders they had put into place creating Extrinsic Fraud upon the Court noted by Tim Newton, Esq., as follows:

*"I can see how you could argue that the Consent Order is invalid because it attempts to adjudicate the rights of parties not before it. If you were ordered to develop property that was subject to lifetime use rights, that probably should have been brought to the court's attention."*¹⁶

¹⁶ EXHIBIT 4.2: Email from Tim Newton, Esq. to Plaintiff 8/13/2018, Item # 15.

28. Plaintiff had no chance to win as the Plaintiff had no knowledge of the contents of the concealed material facts and TLC's attorneys knew that. This Extrinsic Fraud blind-folded the Plaintiff during depositions, while testifying in court and provided a great disadvantage to Plaintiff in presenting his full case before the court in all matters.

FOR A SECOND CAUSE OF ACTION

(Failure to Deliver When under a "DUTY" or in the Alternative, Breach of Contract in Failure to Execute a Duty to Investigate and Defend on behalf of the Plaintiff)

29. Defendants filed for dismissal of all responsibility in filing for a Declaratory Judgment¹⁷ and a Summary Judgment¹⁸ in Federal Court (6/14/16 and 11/08/18, respectively). In Defendant's counsel's letter of 11/08/18, to Plaintiff, Tim Newton, Esq. states:

*"Penn America has filed a declaratory judgment action regarding whether it owes a duty to defend and/or indemnify you ... Penn-America continues to reserve its right to deny coverage should the court find that coverage does not exist...including the right to withdraw its defense."*¹⁹

30. Defendants asked the Judge to fully dismiss coverage that would leave their insured, Plaintiff, stranded financially while also noticing TLC Holdings, LLC's attorneys that they would pay their policy limit²⁰ of one million dollars (\$1,000,000.00) toward the \$3.5M judgment in favor of TLC Holdings LLC. The Defendants filed for Summary Judgment²¹ on November 8, 2018, in an attempt to exclude themselves from their fiduciary duty and responsibility to investigate and defend their client, the Plaintiff. No judgment would have been

¹⁷ EXHIBIT 11.0--Complaint (Declaratory Judgment) filed by J. R. Murphy, Esq., Attorney for Penn-America. p.14;

¹⁸ EXHIBIT 12.0 – Motion for Summary Judgment filed by Timothy J. Newton, Esq., Attorney for Penn-America. p. 7.

¹⁹ T. J. Newton, Esq. letter to Hutson dated November 8, 2018, p.4, ¶ 6. Exhibit 7.0

²⁰ T. J. Newton, Esq. e-mail to Hutson dated November 19, 2018. Exhibit 8.0

²¹ EXHIBIT 12.0

obtained had TLC Holdings, LLC's lawyers been honest with the court and disclosed to the Honorable Courts that they were broadcasting Extrinsic Fraud upon the Courts and fraud upon Mr. Hutson, the Plaintiff, by failing to properly disclose the concealed facts about the entire purchase and sale which was all fabricated with fraud and fully disclosed by L. Paton, Esq., who stated the Lease Purchase Agreement was "worthless."²²

31. The Defendants' attempt to wiggle out of the responsibility of paying *any* of the judgments is evidenced when they filed for a Summary Judgment²³ in Federal Court. Defendants were asking the Court to protect them from being held liable for any financial responsibility placed against Plaintiff, including the \$3.5M judgment. Nevertheless, had Defendants cured the Extrinsic Fraud issue, Plaintiff would have prevailed in all courts.

32. Defendants actions were clearly to avoid their duty to investigate and defend their client, Plaintiff, against the embedded Extrinsic Fraud Upon the Court, citing, "we lawyers just don't do each other that way" – T. Newton, Esq. (verbally).

FOR A THIRD CAUSE OF ACTION
Fraud /Bad Faith

33. Penn America and their umbrella partner, Torus, including counselor(s) for the same, conducted the following act: Prepared a letter for the Plaintiff consisting of 16 legal paragraphs. The letter (Exhibit 4.1-4.3) dated August 13, 2018, was prepared by the carriers' counsel at Murphy & Grantland, P.A. This sixteen point document was prepared and emailed on August 13, 2018, to Plaintiff by Murphy & Grantland's Tim Newton, Esq.

²² EXHIBIT 3.0, page 24, par. 121.

²³ Exhibit 12.0 – Summary Judgment filing by Defendants. November 8, 2018.

34. That letter's purpose and intent was for Plaintiff to be able to use the information to aid the Plaintiff's lawsuit that he was preparing at that same time against Turner Padget's lawyers for their Extrinsic Fraud Upon the Court. The purpose was to intimidate Turner Padget into accepting less monies to settle the \$3.5M judgment against the Plaintiff, which was being negotiated by Murphy and Grantland and the two insurance companies.

35. By strengthening Plaintiff's case against Tuner Padget, it was hoped that the information in that August 13 letter would save the carriers money while at the same time weakening Turner Padget's position. On several occasions, Tim Newton, Esq. strongly suggested (verbally) that Plaintiff hurry and get his complaint against Turner Padget filed and served prior to the mediation. Plaintiff did not.

36. It should be noted, that Hutson, Plaintiff, had *nothing* to do with the mediation. Plaintiff was not invited to attend, nor was he involved in *any* Settlement Negotiations. The mediation meeting was exclusively between: 1) the mediator, 2) counsel from Murphy & Grantland, 3) TLC Holdings, LLC's owners with their counselors from Turner Padget, and 4) Penn America and Torus representatives.

FOR A FOURTH CAUSE OF ACTION
General Misrepresentation

37. Tim Newton, Esq., in his August 13, 2018 letter to Plaintiff, wrote:

"It's hard to see why TLC and its lawyers should not have, in good faith, simply told you (and the court) that the Big Water Resort property was undevelopable because it was already obligated to double lifetime memberships as a private club. It appears that could easily have averted the entire fiasco. Since attorneys were involved, and it resulted in your inability to present your case in court, and possibly led to the sanctions order and judgment against you, there might possibly be

extrinsic fraud on the court to support setting aside the Consent Order. See Chewning v. Ford Motor Co. 354 S.C. 72, 579 S.E. 2d 605 (2003)."

38. In a subsequent letter (November 8, 2018²⁴), Tim Newton wrote:

"At no point has Penn-America or its counsel ever acknowledged the existence of Fraud Upon the Court."

39. "It's hard to see why" What does this mean? If something is hard to see logically the thing that is not hard to see is just the opposite. What Newton is saying is that it would be difficult for TLC and its lawyers not to have a duty to disclose the fact that the Big Water Resort property was undevelopable.

40. Newton then states a legal remedy that would reverse the harmful effects of TLC and their lawyers' failure to disclose that fact to Plaintiff. Newton states a fact, "Since attorneys were involved." Newton then states another fact, "it (the failure to disclose when a duty to disclose was present) resulted in your inability to present your case in court."

41. Newton then uses those two facts to draw a conclusion regarding a "possible" third fact, it (the failure to disclose when a duty was present) leading to the sanctions order and judgment against you (Plaintiff). This possible third fact demonstrates the damage caused to the Plaintiff out of the failure of TLC and its lawyers to disclose when a duty to disclose those facts existed.

42. Further, Newton then sets forth a legal basis for righting the wrong Newton has described. Newton wrote, "there might possibly be '**extrinsic fraud on the court**' to support setting aside the Consent Order. Newton, so that there would be no confusion about what he was

²⁴ Exhibit 7.0

referring to then cites the following case, See *Chewning v. Ford Motor Co.* 354 S.C. 72, 579 S.E. 2d 605 (2003)".

43. Using only the information provided by Newton to the Plaintiff, what conclusion may be drawn? Newton gave the Plaintiff the framework for a complaint and/or motion to bring against TLC and its lawyers. Newton provided case law to support Newton's legal theory. Newton is an attorney licensed to practice law in the state of South Carolina. Since Newton is a licensed attorney he is governed by certain ethics and rules.

44. Considering those rules, it would not be logical or ethical for Newton to propose/outline/provide a framework for/ or suggest a legal theory that was not supported by the facts and the law of the particular situation. So, one reasonable conclusion that can be drawn from the letter and its contents is that Newton believed that the facts and law would support a legal action as Newton had set forth. Newton himself used the terms **"extrinsic fraud on the court."** This was a term first used in communication between Plaintiff and Newton and/or Penn.

45. Concerning the use of the phrase "might possibly", what might one reasonably conclude, that Newton as an attorney would not give a guarantee of a result but would use softer language to avoid such an implication.

46. The second letter demonstrates what Newton/Defendant was up to. In the second letter Newton makes a universal statement, "At no point". When we see such a universal statement it must be viewed with skepticism. What was Newton trying to exclude? That Penn-America or its counsel had "ever" (universal language again) "acknowledged" the existence of Fraud Upon the Court.

47. That is a difficult position for Newton and Penn-America to sustain. Newton was Penn-America's counsel. Newton had the actual and apparent authority to act for Penn-America. Newton laid out the facts and legal basis for Plaintiff to support a claim for extrinsic fraud upon the court. Newton himself used those very terms, and cited case law to back it up. It logically must have been Newton's legal opinion that "Extrinsic Fraud Upon the Court" existed or it would have been illogical and unethical for Newton to provide that legal theory for the Plaintiff. Newton must have anticipated that the Plaintiff would act on Newton's suggestion. Newton could not do through the Plaintiff what he could not do himself, to do so or suggest it would at the least be unethical and negligent and much worse if Newton intentionally took such an action.

48. Newton's attempt to distance himself and Penn-America from the very terms and legal action he himself proposed demonstrate his and Penn-America's delayed realization of the implication of just what Newton revealed to Plaintiff. The fact that such a delayed rejection of Newton's own theory makes any such attempt futile. The attempted rejection simply shines the spotlight on the excellent quality and reality of the absolute defense and counter argument to the unlawful action that the Plaintiff was exposed to by TLC and its lawyers and exposes Newton and Penn-America to liability for their failure to act upon Newton's correct legal theory. The attempted rejection actually confirms the very thing they attempt to deny.

49. Plaintiff hereby alleges that Penn America and Torus Insurance Companies' counselors were fully aware of the Extrinsic Fraud upon the Court, and intentionally misrepresented in their communications to their client, the Plaintiff.

FOR A FIFTH CAUSE OF ACTION
Ethical violations of attorneys

50. Plaintiff herein realleges all paragraphs of the complaint as if full set forth herein.

51. Defendants have tortuously interfered with Plaintiff attorney client relationship with the attorney they have hired for Plaintiff.

52. The Preamble of the Rules of Professional Conduct for Attorneys state the following: [2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer **zealously asserts the client's position** under the rules of the adversary system.

53. Defendants have caused the attorneys they hired and controlled to violate this rule.

54. Defendants have also caused the attorneys they hired and controlled to violate preamble rule [4] "In all professional functions a lawyer should be competent, prompt and diligent." The defendants have limited the attorneys' ability to be competent, prompt and diligent by restricting actions of those attorneys, by not allowing them to expose the fraud upon the court that they were fully aware of, and by further restricting the attorneys' ability to present all valid defenses and claims of the plaintiff.

55. These actions have caused irreparable harm to the plaintiff, herein as previously stated, which are incorporated herein by reference.

56. Yes, the scope of representation may be limited, but it cannot be limited to the extent it would create an ethical violation. Any attempt to do so is void. Any contract that would so require is also void. There is an ongoing requirement that any licensed attorney in South Carolina has to expose a fraud on the court once it is known.

DAMAGES TO PLAINTIFF CAUSED BY DEFENDANTS
(Neglect/ Failure to Defend/Improper Defense of Plaintiff)

57. Damages caused directly and proximately by Defendants' neglect, and failure to defend/improper defense of Plaintiff, both intentional and negligent performed by Defendants and the inaction by Penn-America and Newton, Murphy and Grantland, P.A. and any other John Does as may be revealed in discovery, against extrinsic fraud upon the courts and fraud upon Plaintiff, which caused the following damages:

- a) TLC's attorneys were using extrinsic fraud in causing Plaintiff to have a great disadvantage in presenting Plaintiff's counterclaims, consequently Plaintiff had no chance to win any hearings, suffered great disadvantages having his depositions taken by TLC's lawyers for the attorneys held and concealed material facts, that had Plaintiff been aware of, would have allowed Plaintiff to win all hearings and trials.
- b) Plaintiff would have won counterclaims consequently damages in favor of the Plaintiff would have been in the millions based on the intentional fraud and extrinsic fraud upon the courts and fraud against the plaintiff perpetrated by TLC and their attorneys.
- c) A claim of wrongful eviction was lost due to Plaintiff's intentional disadvantage caused by TLC's attorney's extrinsic Fraud Upon the Court and fraud upon the Plaintiff.
- d) Plaintiff's written and sworn appraisal by Bon Gardner, of Plaintiff's equitable Interest, appraised at \$700,000.00 to \$1.4M lost by losing all counterclaims due to TLC Holdings, LLC's attorneys extrinsic Fraud Upon the Court and fraud upon the Plaintiff.
- e) All hearings, deposition and trials could have been dismissed had TLC Holdings, LLC's attorneys not perpetrated the extrinsic fraud upon the courts and fraud against the Plaintiff simply by disclosing the facts that the property could not be developed, and that big water resort had no legal method to permit the use of land due to the lack of contractual agreement between TLC Holdings, LLC and Big Water Resort, LLC.

f) Plaintiff could have recovered his moneys spent to operate the Big Water Resort and all payments to TLC Holdings, LLC amounting more than \$800,000.00 thousand dollars.

g) Plaintiff loss of over five years of work without any profit other than loses and lack of ability to go seek other jobs due to TLC's attorneys extrinsic fraud upon the courts and fraud upon the plaintiff totaling more than \$300,000.00 dollars.

h) A worth to be determined by a jury regarding Plaintiff's inability to mediate claims against TLC Holdings, LLC and loss due to TLC' Holdings, LLC's attorneys' intentional extrinsic fraud that could and would have been avoided had Penn America defended Plaintiff by requiring TLC's attorneys to disclose all of which they were concealing intentional.

i) Plaintiff, being fined by way of sanctions by the federal judge of \$14,900.00, causing much mental suffering for fear of going to jail. A jury would have to decide the value of a situation like this caused by all Defendants.

58. Defendants Penn-America and Newton caused and contributed to all the damages set forth in paragraph 50 "a" through "i" above and those damages and loses are herein restated as if fully set forth herein, and are incorporated herein.

59. Plaintiff alleges additional damage claims will be revealed through discovery and claims the right to claim recovery of all those damages once all of them are revealed.

60. Therefore, Plaintiff asks for not less than \$4.5M in damages.

Therefore, the Plaintiff PRAYS as follows:

1. Send this case to jury trial.
2. Allow this case to be speedy.
3. Allow for damages and punitive damages due to Defendant's intent.

4. Hold Penn America, Tim Newton, Esq. and associated attorneys at Grantland, responsible for all damages, losses, financial losses, and mental and physical suffering by Defendant.
5. Allow any and all disputed issues to be judged by a jury.
6. Give special consideration to Plaintiff as Pro Se.
7. Allow for two John Does.

Respectfully submitted on this 28th day of December, 2018.

A handwritten signature in black ink, appearing to read 'MB Hutson', with a stylized, cursive flourish at the end.

MB Hutson, PRO SE
P.O. Box 2755
Orangeburg, South Carolina 29116-2755
(803) 308-2714

1.1-1.3	Retail Membership Agreements (3 samples), 2008
2.0	Lovell Deposition re: losses; <i>February 16, 2011</i>
3.0	Amended Answer to complaint & Counter-Claims, Laura Paton, Esq., <i>August 8, 2016</i>
4.1-4.3	Tim J. Newton, Esq., <i>Letter via e-mail</i> , <i>August 13, 2018</i>
5.0	Lease Purchase Agreement with property description 2010
6.0	Membership Interest Purchase Agreement, 2010
7.0	Tim J. Newton, Esq., <i>Letter of</i> <i>November 8, 2018</i>
8.0	E-mail to Hutson, Timothy J. Newton, Esq. (#9807) <i>November 19, 2018</i>
9.0	Settlement Agreement, with map, 9 pp., <i>April 13, 2012</i>
10.0	Consent Order, 8 pp., <i>April 13, 2012</i>
11.0	Complaint (Declaratory Judgment), 19 pp. by J. R. Murphy, Esq. (#3119) <i>June 14, 2016</i>
12.0	Memorandum... Summary Judgment, by T.J. Newton, Esq. (#9807) November 8, 2018
13.0	Defamation Suit December 7, 2015

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

M. B. HUTSON, PRO SE

Plaintiff(s)

2018 - CP - 400 - 6344

vs.

Penn America Ins. Co., Global Indemnity Group, Inc.,

Timothy J. Newton, Esq., J. R. Murphy, Esq.,

John Doe #1, John Doe #2.

Defendant(s)

(Please Print)

Submitted By: M. B. Hutson, PRO SE

Address: Post Office Box 2755

Orangeburg, SC 29116-2755

SC Bar #: NONE: PRO SE

Telephone #: (803) 308 - 2714

Fax #: NONE

Other: NONE

E-mail: hutson4444@gmail.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

Contracts

- ☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☒ Breach of Contract (140)
☐ Other (199)

Torts - Professional Malpractice

- ☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Other (299)

Torts - Personal Injury

- ☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☒ Other (399)

Real Property

- ☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

Intentional Damages

Inmate Petitions

- ☐ PCR (500)
☐ Sexual Predator (510)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

Judgments/Settlements

- ☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Other (799)

Administrative Law/Relief

- ☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture (840)
☐ Other (899)

Appeals

- ☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999)

Special/Complex /Other

- ☐ Environmental (600) ☐ Pharmaceuticals (630)
☐ Automobile Arb. (610) ☐ Unfair Trade Practices (640)
☐ Medical (620) ☐ Other (699)

Submitting Party Signature: 

Date: December 28, 2018

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

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13.0	Defamation Suit December 7, 2015	225

**EXHIBIT
1.1-1.3**

MEMBERSHIPS
(samples)

Big Water Resort, LLC
5215 Dingle Pond Rd.
Summerton, SC 29148

Retail Membership Term Agreement

By this agreement, Big Water Resort (BWR), A South Carolina, LLC, sells and the undersigned purchaser(s) ("Member") purchases a membership which gives the Member the right to use all present and future BWR facilities and services subject to membership terms provided herein.

NATURE OF MEMBERSHIP

1. Purpose. This membership grants a right to use BWR facilities and services solely for Member's recreation and enjoyment. This membership is neither sold nor purchased as a financial investment. Member acquires no legal or beneficial interest in BWR or its assets and no right or interest in property, contract rights or business of BWR. Member is not entitled to any share of income, gain or distribution of or by BWR. Nor does Member acquire any voting rights in BWR pertaining to its business or any right to participate in BWR's management.
2. Campsite Availability. BWR will use its best efforts to provide Member with a place to camp.
3. Use Privileges. Member may use all of BWR's present recreation facilities on a day use basis; and on an overnight camping and cabin basis. See current Reservation & Usage System Guidelines. Member usage is subject to space availability on a first come first served basis among all Members. There are no pre-assignment of or exclusive rights to specific campsites or cabins. To properly manage services, reservations are required for overnight camping & cabin stays.
4. Family and Guest Use privileges. Membership permits full recreational use by Member's unmarried dependant children under twenty-one (21) years of age, and may from time to time be extended to other family members and guests (s) at the discretion of BWR. Children under the age of 16 must be accompanied by an adult member. Children between the ages of 16-21 are limited to two (2) guests.
5. Other Use privileges. BWR will make available to Member the use of the reciprocal usage programs. These privileges are provided through BWR's licensing agreement. Eligibility for continued and/or renewed membership is subject to BWR's maintaining its licensing agreement. BWR agrees to use its best efforts to maintain its license agreements and affiliations with such reciprocal use programs as may be accepted by BWR and a majority of members. Member is required to pay all fees; and to use these subject to separate rules established by them and participating resorts. BWR may enter into other reciprocal use programs. There is no assurance this agreement or others will remain in effect.
6. Duration of the Membership. This membership is for 1 years, starting on 5/1/08 and ending on LIFETIME (SEE ADDENDUM PROVISIONS)
7. Transferability of the Membership. This membership may be transferred 0 times at the cost of \$500 a transfer and at a sales price determined by the current owner. In order for a membership to be transferred it must first be paid for in full to BWR and all dues must be current and the transferee is approved by BWR. When transferred only the remaining years left may be transferred. Example- If you have a 25 year membership and have used 5 years of it, then only the remaining 20 years may be transferred.
8. Ownership Limitations. Member may own only one active membership. This membership may not be assigned, rented, loaned or otherwise alienated, temporarily or permanently, in any manner other than as provided in Section 7 above. Violations of these prohibitions will constitute grounds for termination of membership.

ASSURANCE OF CONTINUED MEMBERSHIP QUALITY

9. Rules Supporting Member Satisfaction. Membership use privileges are subject to Member's observance of rules established by BWR to insure the enjoyment of all Members in their use of BWR facilities which rules are hereby incorporated as a part of this agreement. BWR may adopt, amend or repeal such rules provided that BWR deems necessary for the overall betterment of the Resort. The rules hereby incorporated are set forth in the membership Rules & Regulations.
10. BWR Management Commitment to Member. BWR will provide all management of BWR facilities. BWR, therefore, retains all management responsibility and authority to carry out this management role. This shall include but not be limited to: the administration of the membership rights provided through this agreement, the maintenance of BWR facilities in a manner that allows members the reasonable use and enjoyment of their membership; the payment of all property taxes, insurance, utilities and other ordinary and necessary expenses of BWR facility operations, BWR shall also continue to provide the Member's use of the campsites for Member's own recreation vehicle, the utility services provided to those campsites, the Members use of dump stations, recreation center buildings and swimming pools or swimming beaches and areas as may be provided.

CHARGES FOR MEMBERSHIP AND CONTRACTUAL STANDARDS

11. Initial Fee, Annual Dues and Assessments. The purchase price for this membership shall be the initiation fee, including finance charges if applicable, specified in paragraph 19 of this agreement. In consideration for paying dues, Member shall be entitled to use all facilities maintained for the benefit of BWR Members. At the signing of this agreement, member shall pay in advance INITIAL dues in the amount of \$370.00 and thereafter Members shall pay dues in advance, annually () or quarterly (), in the amount of \$370.00 beginning on 24. QTR. 08. Unless otherwise authorized in writing by the BWR General Manager, the annual rate of dues can be increased each year by no more than the percentage increase in the national consumer price index for all urban consumers, as reported by the US Dept. of Labor, Bureau of Labor Statistics, for the calendar year one year prior to the year for which the increase is being made, along with a pro rata share of pass through charges mandated by governmental authorities. If any dues payment is not made in full within 20 days of its due date, the member agrees to pay BWR a delinquency charge in the amount of 5% per month of the delinquent payment or \$5.00 whichever is greater. The purchaser is also responsible for any tax that might be assessed on this membership by a civil taxing authority.

* CALC. RATED
6.34 ARE

12. Use Charges. The Member agrees to pay for the following items if and when they are used by the member; rental housing; recreation vehicle storage and incidental recreation equipment usages. Published lists of the current use charges are available upon request. These use charges maybe changed at the sole discretion of BWR.
13. Rules For All Payments, Credit Reports. Member is obligated to make all payments described in this agreement as and when due, including payment of the purchase price, dues, the finance charge, if applicable, and any other charges to BWR or its assigns. No renewal, extension, or assignment by BWR of this membership agreement or any transfer of membership by Member shall release Member from any obligation of this agreement and the Member Rules, except as may be provided in writing by BWR to Member. Delinquent accounts will be reported to the appropriate credit service agency.
14. Default. Time is of the essence of this agreement and any of the following events will be "an event of default" by Member; a) Member's failure to make any payment under this agreement when due, including but not limited to the payment of initiation fees and dues or; b) any false representation made by Member in this agreement or in Member's credit application; c) a material breach by Member of any provision of this agreement or the member rules set forth in the Member Handbook.
15. Remedies. Should any "event of default" occur, BWR may immediately suspend Member's rights to use BWR resort facilities. In addition, upon the occurrence of any "event of default", BWR may, upon 30 days written notice to Member, a) declare the entire unpaid principle balance of the initiation fees, together with the finance charge and dues accrued to the date of default, immediately due and payable, with interest on the unpaid principle balance accruing from the date BWR declares the balance due at maximum contract rate allowed by law, until fully paid; and/or b) terminate this agreement and the membership. If BWR terminates this agreement and the membership because of Member's default, which BWR may but is not required to do, BWR shall have all remedies provided by law and BWR will keep all the money member has paid BWR up to the time of the default as liquidated damages and not as a penalty. Member agrees that this action as to liquidate damages is a reasonable endeavor to estimate a paid compensation for the losses which might result from Member's default. Member may not terminate this agreement or the membership if member defaults. The note holder may also be entitled any collection agency fees, late charges, interest or additional costs, fees or expenses which note holder may reasonably incur. If legal action is commenced to enforce or declare the meaning of any provision of this agreement, the prevailing party will be awarded its reasonable attorney's fees and costs, including fees and costs incurred in arbitration, trial and appellate courts, or any other adjudicatory forum.
16. BWR reserves the right to refuse membership to registered convicted felons.
17. Warranty Limitations. There are no warranties which extend beyond the description on the face hereof including, without limitation, implied warranties of merchantability of fitness for a particular purpose.

THE ABOVE MEMBERSHIP PURCHASE PRICE IS BASED ON BWR FACILITIES AS THEY PRESENTLY EXIST, AND IN NO WAY REFLECTS ADDITIONAL VALUE FOR ANY AMENITIES PLANNED IN THE FUTURE. BWR CANNOT GUARANTEE THE NATURE, QUALITY AND AVAILABILITY OF ANY INDIVIDUAL NON-BWR CAMPGROUNDS PARTICIPATING IN THE RECIPROCAL USE SYSTEMS.

18. Liability Limitations. BWR's liability for damages for breach of any warranty, or for any injury or damage to person or property shall not exceed the amounts Member has paid BWR under this agreement, except that this limitation of liability will not apply to personal injury to Member or Member's guests caused by BWR's negligence. Member agrees to indemnify BWR and hold BWR harmless against all claims, liability, loss and expense (including reasonable attorney's fees) incurred by reason of injury or damage to person or property, or both, of Member and Member's guests arising from such person's use of BWR facilities or surrounding area, except that this indemnity will not apply to personal injury caused by BWR's negligence. No action may be brought by either Member or BWR more than one year after the cause of action has occurred, except that an action for non-payment may be brought within the applicable statutes of limitation.
19. Effect of this Agreement. THIS AGREEMENT CONTAINS THE ENTIRE AGREEMENT BETWEEN BWR AND MEMBER AND IS A BINDING CONTRACT. Any provision of this agreement and such other provisions will remain in full force and effect. Venue is proper in any county in which this agreement is signed.

*ADDENDUM: LIFETIME premium membership upon
ADDITIONAL \$1405 w/in 2 yrs. - fees increase
held in check by Federal Gov't (PI - OUTDOOR
CAMPING \$0 (TOTAL LIFETIME JOINING FEE \$7900⁰⁰)
(ALL APPROVED BY MEMBER)

WHEREAS: The parties have executed this membership agreement on the date and year hereby written.

Deb Bailey
 Authorized Agent for Big Water Resort, LLC

5/31/08
 Date of Acceptance

[Signature] 5/31/08
 Membership Signature Date

Sticker Baldwin-Tact 5/31/08
 Membership Signature Date

*IF \$1405 NOT PAID w/in 2 yrs from DATE SIGNED
 MEMBERSHIP REVERTS TO 10 YEAR MEMBERSHIP w/OPTION
 TO INCREASE # OF MEMBERSHIP YEARS THROUGH RESORTAL UPGRADE
 OR PURCHASE (\$1000 FOR 5 more years, \$1500 FOR 10 more years)
 90

Big Water Resort, LLC
5215 Dingle Pond Rd.
Summerton, SC 29148

Retail Membership Term Agreement

By this agreement, Big Water Resort (BWR), A South Carolina, LLC, sells and the undersigned purchaser(s) ("Member") purchases a membership which gives the Member the right to use all present and future BWR facilities and services subject to membership terms provided herein.

NATURE OF MEMBERSHIP

1. Purpose. This membership grants a right to use BWR facilities and services solely for Member's recreation and enjoyment. This membership is neither sold nor purchased as a financial investment. Member acquires no legal or beneficial interest in BWR or its assets and no right or interest in property, contract rights or business of BWR. Member is not entitled to any share of income, gain or distribution of or by BWR. Nor does Member acquire any voting rights in BWR pertaining to its business or any right to participate in BWR's management.
 2. Campsite Availability. BWR will use its best efforts to provide Member with a place to camp.
 3. Use Privileges. Member may use all of BWR's present recreation facilities on a day use basis; and on an overnight camping and cabin basis. See current Reservation & Usage System Guidelines. Member usage is subject to space availability on a first come first served basis among all Members. There are no pre-assignment of or exclusive rights to specific campsites or cabins. To properly manage services, reservations are required for overnight camping & cabin stays.
 4. Family and Guest Use privileges. Membership permits full recreational use by Member's unmarried dependant children under twenty-one (21) years of age, and may from time to time be extended to other family members and guests (s) at the discretion of BWR. Children under the age of 16 must be accompanied by an adult member. Children between the ages of 16-21 are limited to two (2) guests.
 5. Other Use privileges. BWR will make available to Member the use of the reciprocal usage programs. These privileges are provided through BWR's licensing agreement. Eligibility for continued and/or renewed membership is subject to BWR's maintaining its licensing agreement. BWR agrees to use its best efforts to maintain its license agreements and affiliations with such reciprocal use programs as may be accepted by BWR and a majority of members. Member is required to pay all fees; and to use these subject to separate rules established by them and participating resorts. BWR may enter into other reciprocal use programs. There is no assurance this agreement or others will remain in effect.
 6. Duration of the Membership. This membership is for 10 years, starting on 7-7-08 and ending on 7-6-18.
 7. Transferability of the Membership. This membership may be transferred _____ times at the cost of \$500 a transfer and at a sales price determined by the current owner. In order for a membership to be transferred it must first be paid for in full to BWR and all dues must be current and the transferee is approved by BWR. When transferred only the remaining years left may be transferred. Example- If you have a 25 year membership and have used 5 years of it, then only the remaining 20 years may be transferred.
 8. Ownership Limitations. Member may own only one active membership. This membership may not be assigned, rented, loaned or otherwise alienated, temporarily or permanently, in any manner other than as provided in Section 7 above. Violations of these prohibitions will constitute grounds for termination of membership.
- ASSURANCE OF CONTINUED MEMBERSHIP QUALITY**
9. Rules Supporting Member Satisfaction. Membership use privileges are subject to Member's observance of rules established by BWR to insure the enjoyment of all Members in their use of BWR facilities which rules are hereby incorporated as a part of this agreement. BWR may adopt, amend or repeal such rules provided that BWR deems necessary for the overall betterment of the Resort. The rules hereby incorporated are set forth in the membership Rules & Regulations.
 10. BWR Management Commitment to Member. BWR will provide all management of BWR facilities. BWR, therefore, retains all management responsibility and authority to carry out this management role. This shall include but not be limited to: the administration of the membership rights provided through this agreement, the maintenance of BWR facilities in a manner that allows members the reasonable use and enjoyment of their membership; the payment of all property taxes, insurance, utilities and other ordinary and necessary expenses of BWR facility operations, BWR shall also continue to provide the Member's use of the campsites for Member's own recreation vehicle, the utility services provided to those campsites, the Members use of dump stations, recreation center buildings and swimming pools or swimming beaches and areas as may be provided.
- CHARGES FOR MEMBERSHIP AND CONTRACTUAL STANDARDS**
11. Initial Fee, Annual Dues and Assessments. The purchase price for this membership shall be the initiation fee, including finance charges if applicable, specified in paragraph 19 of this agreement. In consideration for paying dues, Member shall be entitled to use all facilities maintained for the benefit of BWR Members. At the signing of this agreement, member shall pay in advance _____ dues in the amount of _____ and thereafter Members shall pay dues in advance, annually ~~or~~ or quarterly (), in the amount of \$700 beginning on 1-1-09. Unless otherwise authorized in writing by the BWR General Manager, the annual rate of dues can be increased each year by no more than the percentage increase in the national consumer price index for all urban consumers, as reported by the US Dept. of Labor, Bureau of Labor Statistics, for the calendar year one year prior to the year for which the increase is being made, along with a pro rata share of pass through charges mandated by governmental authorities. If any dues payment is not made in full within 20 days of its due date, the member agrees to pay BWR a delinquency charge in the amount of 5% per month of the delinquent payment or \$5.00 whichever is greater. The purchaser is also responsible for any tax that might be assessed on this membership by a civil taxing authority.

12. Use Charges. The Member agrees to pay for the following items if and when they are used by the member; rental housing; recreation vehicle storage and incidental recreation equipment usages. Published lists of the current use charges are available upon request. These use charges maybe changed at the sole discretion of BWR.
13. Rules For All Payments, Credit Reports. Member is obligated to make all payments described in this agreement as and when due, including payment of the purchase price, dues, the finance charge, if applicable, and any other charges to BWR or its assigns. No renewal, extension, or assignment by BWR of this membership agreement or any transfer of membership by Member shall release Member from any obligation of this agreement and the Member Rules, except as may be provided in writing by BWR to Member. Delinquent accounts will be reported to the appropriate credit service agency.
14. Default. Time is of the essence of this agreement and any of the following events will be "an event of default" by Member; a) Member's failure to make any payment under this agreement when due, including but not limited to the payment of initiation fees and dues or; b) any false representation made by Member in this agreement or in Member's credit application; c) a material breach by Member of any provision of this agreement or the member rules set forth in the Member Handbook.
15. Remedies. Should any "event of default" occur, BWR may immediately suspend Member's rights to use BWR resort facilities. In addition, upon the occurrence of any "event of default", BWR may, upon 30 days written notice to Member, a) declare the entire unpaid principle balance of the initiation fees, together with the finance charge and dues accrued to the date of default, immediately due and payable, with interest on the unpaid principle balance accruing from the date BWR declares the balance due at maximum contract rate allowed by law, until fully paid; and/or b) terminate this agreement and the membership. If BWR terminates this agreement and the membership because of Member's default, which BWR may but is not required to do, BWR shall have all remedies provided by law and BWR will keep all the money member has paid BWR up to the time of the default as liquidated damages and not as a penalty. Member agrees that this action as to liquidate damages is a reasonable endeavor to estimate a paid compensation for the losses which might result from Member's default. Member may not terminate this agreement or the membership if member defaults. The note holder may also be entitled any collection agency fees, late charges, interest or additional costs, fees or expenses which note holder may reasonably incur. If legal action is commenced to enforce or declare the meaning of any provision of this agreement, the prevailing party will be awarded its reasonable attorney's fees and costs, including fees and costs incurred in arbitration, trial and appellate courts, or any other adjudicatory forum.
16. BWR reserves the right to refuse membership to registered convicted felons.
17. Warranty Limitations. There are no warranties which extend beyond the description on the face hereof including, without limitation, implied warranties of merchantability of fitness for a particular purpose.

THE ABOVE MEMBERSHIP PURCHASE PRICE IS BASED ON BWR FACILITIES AS THEY PRESENTLY EXIST, AND IN NO WAY REFLECTS ADDITIONAL VALUE FOR ANY AMENTIES PLANNED IN THE FUTURE. BWR CANNOT GUARANTEE THE NATURE, QUALITY AND AVAILABILITY OF ANY INDIVIDUAL NON-BWR CAMPGROUNDS PARTICIPATING IN THE RECIPROCAL USE SYSTEMS.

18. Liability Limitations. BWR's liability for damages for breach of any warranty, or for any injury or damage to person or property shall not exceed the amounts Member has paid BWR under this agreement, except that this limitation of liability will not apply to personal injury to Member or Member's guests caused by BWR's negligence. Member agrees to indemnify BWR and hold BWR harmless against all claims, liability, loss and expense (including reasonable attorney's fees) incurred by reason of injury or damage to person or property, or both, of Member and Member's guests arising from such person's use of BWR facilities or surrounding area, except that this indemnity will not apply to personal injury caused by BWR's negligence. No action may be brought by either Member or BWR more than one year after the cause of action has occurred, except that an action for non-payment may be brought within the applicable statutes of limitation.
19. Effect of this Agreement. THIS AGREEMENT CONTAINS THE ENTIRE AGREEMENT BETWEEN BWR AND MEMBER AND IS A BINDING CONTRACT. Any provision of this agreement and such other provisions will remain in full force and effect. Venue is proper in any county in which this agreement is signed.

ADDENDUM: 10 yr. membership non transferable - upgradeable during first 2 years at '08 prices. Upgradeable AFTER 2 years At the then current prices.

WHEREAS: The parties have executed this membership agreement on the date and year hereby written.

De B. Bellay
Authorized Agent for Big Water Resort, LLC

7-7-08
Date of Acceptance

Vicki Luna
Membership Signature 7-7-08 Date

Donna Luna
Membership Signature 7/7/08 Date

Big Water Resort, LLC
5215 Dingle Pond Rd.
Summerton, SC 29148
Retail Membership Agreement

1044

By this agreement, Big Water Resort (BWR), A South Carolina, LLC, sells and the undersigned purchaser(s) ("Member") purchases a membership which gives the Member the right to use all present and future BWR campground facilities and services subject to membership terms provided herein.

NATURE OF MEMBERSHIP

1. Purpose. This membership grants a right to use campground facilities and services solely for Member's recreation and enjoyment. This membership is neither sold nor purchased as a financial investment. Member acquires no legal or beneficial interest in BWR or its assets and no right or interest in property, contract rights or business of BWR. Member is not entitled to any share of income, gain or distribution of or by BWR. Nor does Member acquire any voting rights in BWR pertaining to its business or any right to participate in BWR's management.
2. Campsite Availability. BWR will use its best efforts to provide Member with a place to camp.
3. Use Privileges. Member may use all of BWR's present and future campground recreation facilities on a day use basis; and on an overnight camping basis for up to seven (7) consecutive nights. There is a seven (7) day waiting period before Member can resume camping overnight camping following any overnight stay. According to the rules and regulations of Big Water Resort a member is also allowed two - fourteen (14) consecutive night visits as well as three - twenty one (21) consecutive night visits during our off peak season - non holiday. Member usage is subject to space availability on a first come first served basis among all Members. There are no pre-assignment of or exclusive rights to specific campsites. To properly manage services, reservations are required for overnight camping. Cabin stay limit is two night to seven nights with a 14 day absence between each stay in the cabins.
4. Family and Guest Use privileges. Membership permits full recreational use by Member's unmarried dependant children under twenty-one (21) years of age, and may from time to time be extended to other family members and guests (s) at the discretion of BWR. Children under the age of 16 must be accompanied by an adult member. Children between the ages of 16-21 are limited to two (2) guests.
5. Other Use privileges. BWR will make available to Member the use of the reciprocal usage programs. These privileges are provided through BWR's licensing agreement. Eligibility for continued and/or renewed membership is subject to BWR's maintaining its licensing agreement. BWR agrees to use its best efforts to maintain its license agreements and affiliations with such reciprocal use programs as may be accepted by BWR and a majority of members. Member is required to pay all feed; and to use these subject to separate rules established by them and participating resorts. BWR may enter into other reciprocal use programs. There is no assurance this agreement or others will remain in effect.
6. Duration of the Membership. The membership is for _____ years, starting on 7/01/08 and ending on DEMISE OF BOTH MEMBERS (OR)
7. Transferability of the Membership. This membership may be transferred _____ times at the cost of \$500 a transfer and at a sales price determined by the current owner. In order for a membership to be transferred it must first be paid for in full to BWR and all dues must be current and the transferee is approved by BWR. When transferred only the remaining years left may be transferred. Example- If you have a 25 year membership and have used 5 years of it, then only the remaining 20 years may be transferred.
8. Ownership Limitations. Member may own only one active membership. This membership may not be assigned, rented, loaned or otherwise alienated, temporarily or permanently, in any manner other than as provided in Section 7 above. Violations of these prohibitions will constitute grounds for termination of membership.

ASSURANCE OF CONTINUED MEMBERSHIP QUALITY

9. Rules Supporting Member Satisfaction. Membership use privileges are subject to Member's observance of rules established by BWR to insure the enjoyment of all Members in their use of BWR campground facilities which rules are hereby incorporated as a part of this agreement. BWR may adopt, amend or repeal such rules provided that BWR deems necessary for the overall betterment of the Resort. The rules hereby incorporated are set forth in The Member Handbook. Member acknowledges he has received a copy of the Member Handbook.
10. BWR Management Commitment to Member. BWR will provide all management of BWR campground facilities. BWR, therefore, retains all management responsibility and authority to carry out this management role. This shall include but not be limited to: the administration of the membership rights provided through this agreement, the maintenance of BWR campground facilities in a manner that allows members the reasonable use and enjoyment of their membership; the payment of all property taxes, insurance, utilities and other ordinary and necessary expenses of BWR campground facility operations. BWR shall also continue to provide the Member's use of the campsites for Member's own recreation vehicle, the utility services provided to those campsites, the Members use of dump stations, recreation center buildings and swimming pools or swimming beaches and areas as may be provided.

CHARGES FOR MEMBERSHIP AND CONTRACTUAL STANDARDS

11. Initial Fee, Annual Dues and Assessments. The purchase price for this membership shall be the initiation fee, including finance charges if applicable, specified in paragraph 19 of this agreement. In consideration for paying dues, Member shall be entitled to use all facilities maintained for the benefit of BWR Members. At the signing of this agreement, member shall pay in advance N/A dues in the amount of 9,370.00 and thereafter Members shall pay dues in advance, annually () or quarterly (), in the amount of 9,370.00 beginning on 7th QTR 2008. Unless otherwise authorized in writing by the BWR General Manager, the annual rate of dues can be increased each year by no more than the percentage increase in the national consumer price index for all urban consumers, as reported by the US Dept. of Labor, Bureau of Labor Statistics, for the calendar year one year prior to the year for which the increase is being made, along with a pro rata share of pass through charges mandated by governmental authorities. If any dues payment is not made in full within 20 days of its due date, the member agrees to pay BWR a delinquency charge in the amount of 5% per month of the delinquent payment or \$5.00 whichever is greater. The purchaser is also responsible for any tax that might be assessed on this membership by a civil taxing authority.

12. Use Charges. The Member agrees to pay for the following items if and when they are used by the member; rental housing; recreation vehicle storage; usage of ~~campsites~~ ^(Outdoor Camping, etc); and incidental recreation equipment usages. Published lists of the current use charges are available upon request. These use charges may be changed at the sole discretion of BWR.
13. Rules For All Payments, Credit Reports. Member is obligated to make all payments described in this agreement as and when due, including payment of the purchase price, dues, the finance charge, if applicable, and any other charges to BWR or its assigns. No renewal, extension, or assignment by BWR of this membership agreement or any transfer of membership by Member shall release Member from any obligation of this agreement and the Member Rules, except as may be provided in writing by BWR to Member. Delinquent accounts will be reported to the appropriate credit service agency.
14. Default. Time is of the essence of this agreement and any of the following events will be "an event of default" by Member; a) Member's failure to make any payment under this agreement when due, including but not limited to the payment of initiation fees and dues or; b) any false representation made by Member in this agreement or in Member's credit application; c) a material breach by Member of any provision of this agreement or the member rules set forth in the Member Handbook.
15. Remedies. Should any "event of default" occur, BWR may immediately suspend Member's rights to use BWR resort facilities. In addition, upon the occurrence of any "event of default", BWR may, upon 30 days written notice to Member, a) declare the entire unpaid principle balance of the initiation fees, together with the finance charge and dues accrued to the date of default, immediately due and payable, with interest on the unpaid principle balance accruing from the date BWR declares the balance due at maximum contract rate allowed by law, until fully paid; and/or b) terminate this agreement and the membership. If BWR terminates this agreement and the membership because of Member's default, which BWR may but is not required to do, BWR shall have all remedies provided by law and BWR will keep all the money member has paid BWR up to the time of the default as liquidated damages and not as a penalty. Member agrees that this action as to liquidate damages is a reasonable endeavor to estimate a paid compensation for the losses which might result from Member's default. Member may not terminate this agreement or the membership if member defaults. The note holder may also be entitled any collection agency fees, late charges, interest or additional costs, fees or expenses which note holder may reasonably incur. If legal action is commenced to enforce or declare the meaning of any provision of this agreement, the prevailing party will be awarded its reasonable attorney's fees and costs, including fees and costs incurred in arbitration, trial and appellate courts, or any other adjudicatory forum.
16. BWR reserves the right to refuse membership to registered convicted felons.
17. Warranty Limitations. There are no warranties which extend beyond the description on the face hereof including, without limitation, implied warranties of merchantability of fitness for a particular purpose.

THE ABOVE MEMBERSHIP PURCHASE PRICE IS BASED ON BWR CAMPGROUND FACILITIES AS THEY PRESENTLY EXIST, AND IN NO WAY REFLECTS ADDITIONAL VALUE FOR ANY AMENITIES PLANNED IN THE FUTURE. BWR CANNOT GUARANTEE THE NATURE, QUALITY AND AVAILABILITY OF ANY INDIVIDUAL NON-BWR CAMPGROUNDS PARTICIPATING IN THE RECIPROCAL USE SYSTEMS.

18. Liability Limitations. BWR's liability for damages for breach of any warranty, or for any injury or damage to person or property shall not exceed the amounts Member has paid BWR under this agreement, except that this limitation of liability will not apply to personal injury to Member or Member's guests caused by BWR's negligence. Member agrees to indemnify BWR and hold BWR harmless against all claims, liability, loss and expense (including reasonable attorney's fees) incurred by reason of injury or damage to person or property, or both, of Member and Member's guests arising from such person's use of BWR campground facilities or surrounding area, except that this indemnity will not apply to personal injury caused by BWR's negligence. No action may be brought by either Member or BWR more than one year after the cause of action has occurred, except that an action for non-payment may be brought within the applicable statutes of limitation.
19. Effect of this Agreement. THIS AGREEMENT CONTAINS THE ENTIRE AGREEMENT BETWEEN BWR AND MEMBER AND IS A BINDING CONTRACT. Any provision of this agreement and such other provisions will remain in full force and effect. Venue is proper in any county in which this agreement is signed.

ADDENDUM: 1 Life Time Membership - option to hold
2nd Lifetime for additional \$2000 w/in 2 years and
w/ 1 Referral to BWR w/in 1 year - Does apply
\$370.00 / P2I - GRANT BARRERAS AGAINST Future Growth Fees

WHEREAS:

The parties have executed this membership agreement on the date and year hereby written.

Sandra Mowen
Membership Signature

2-11-08
Date of Acceptance

Sammy B. Bailey
Membership Signature

Sam B. Bailey
Authorized Agent for Big Water Resort, LLC

**EXHIBIT
2.0**

1 Q Was there any sort of due diligence process
2 done by anyone?
3 A We were told by our real estate agent that
4 Mr. Hudson had been working with another agent out
5 there who I know. I should say I know of. And that
6 that agent had had him checked out and he was for
7 real. Richard and I met with Mr. Hudson. He came
8 across as very, very knowledgeable. Very
9 knowledgeable not only about the property but about
10 real estate development and financing and so on. And
11 we were motivated, in large part because I told you
12 we were losing 200, \$250,000 a year, plus, I
13 personally am involved with numerous businesses that
14 I just don't have time to handle. And we were -- we
15 were very willing to work with good terms in order to
16 have someone else take control and manage the
17 property and suffer those losses or turn it around
18 and make those profits.
19 Q I didn't ask you this earlier, Mr. Lovell.
20 Where do you currently reside?
21 A I have a home in Chicago. Well, Burr Ridge,
22 Illinois, and I have a condo in Florida. I split my
23 time.
24 Q Do you consider yourself a citizen of any
25 one of those states?

1 A Florida.
2 Q Florida. All right.
3 A I have a home in Williamsburg, Virginia, to,
4 in case you're in the market.
5 MR. PADGET: I believe that's all I've
6 got for you, Mr. Lovell. Thank you for your
7 time today.
8 THE WITNESS: You bet.
9 EXAMINATION BY MR. WOODWARD:
10 Q One more question. Did I hear you correctly
11 that you and Mr. Clark offered one bank or the other
12 a million dollars to be done with this?
13 A We did.
14 Q At one point?
15 A We did.
16 Q Tell me about that.
17 A This was after the discovery of this debt
18 that we didn't know we had, and we got our attorneys
19 involved.
20 Q These guys here?
21 A These guys here. And it was somewhere
22 around, I don't know, August or September of 2008.
23 Is that when this began?
24 Q They can't answer you.
25 A Well, I'm sorry.

1 Q Do the best you can.
2 A I think it was around I think it was August
3 or so of 2008. Mr. Glasner, I think, had gotten
4 involved on the bank's end. And it could have been
5 maybe somewhere -- it was in the last part of 2008.
6 I can't remember if it was before or after the actual
7 foreclosure action was filed, but I think it was
8 before. So it would have put it in that time frame,
9 September or so. And we offered -- the bank came
10 back and said, look, we got this \$200,000 note
11 satisfied, so we recognize that you don't really owe
12 that.
13 Q Who is talking here now?
14 A Glasner. And this is hearsay. You can get
15 these guys to confirm it.
16 Q We have to put Tom on the stand.
17 A It wasn't really Tom. We told Morris to see
18 if they'll take the million dollars that we
19 authorized originally, and he said no.
20 Q Who said no?
21 A Glasner.
22 Q And this was in the latter half of 2008?
23 A This was at the very beginning of all this
24 foreclosure activity. It was, I think, prior to the
25 filing.

1 Q Prior to the actual foreclosure being --
2 A Prior to the actual foreclosure filing if my
3 memory is right.
4 Q Any writings communicating this offer or was
5 it all telephonic or do you know?
6 A You would have to ask Morris. Our
7 instructions to Morris were verbal.
8 Q To offer a million?
9 A Right.
10 MR. WOODWARD: Thank you.
11 MR. HARPER: I'm done.
12 (The deposition concluded at 2:32 p.m.)
13
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25

Laura Patton

EXHIBIT 3.0

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CLARENDON	)	CASE NO.: 2015-CP-14-0615
	)	
TLC HOLDINGS, LLC, RICHARD CLARK,	)	
AND JIMMY S. LOVELL.	)	
	)	
Plaintiffs,	)	AMENDED ANSWER TO COMPLAINT
	)	AND COUNTER-CLAIMS BACK
vs.	)	(JURY TRIAL REQUESTED)
	)	
M.B. HUTSON A/K/A M.B HUDSON.	)	
	)	
Defendant	)	
	)	
vs.	)	
	)	
JOHN DOE CORPORATIONS	)	
	)	

COMES NOW, Defendant M.B. Hutson a/k/a M.B. Hudson, (hereinafter "Defendant") by and through its undersigned attorneys, and hereby answers Plaintiffs TLC Holdings, LLC, Richard Clark, and Jimmy S. Lovell (hereinafter collectively "Plaintiffs TLC")'s Complaint and shows the Court as follows. Any allegation not expressly admitted herein is denied.

1. Responding to Paragraphs 1 through 3 of the Plaintiffs' Complaint, the allegations contained therein are, upon information and belief, admitted.

2. Responding to Paragraph 4 of Plaintiffs', Defendant admits so much as alleges he is temporarily residing in Orangeburg County, South Carolina, however, still retains resident contacts in Tennessee.

3. Responding to Paragraph 5 of Plaintiffs' Complaint, the allegations therein are denied as stated.

4. Responding to Paragraph 6 of Plaintiffs' Complaint, the allegations contains legal conclusions to which this Defendant is not required to admit or deny.

FACTUAL ALLEGATIONS

5. Responding to Paragraphs 7 and 8 of Plaintiffs' Complaint, those allegations are, upon information and belief, admitted.

6. Responding to Paragraph 9 of Plaintiffs' Complaint, Defendant admits so much as alleges that Defendant entered into a lease-purchase agreement and promissory note with certain of the Plaintiffs. As for the terms and dates of the lease-purchase agreement and promissory note, Defendant craves references to the documents themselves. Further responding, Defendant denies that the parties had a meeting of the minds as to the underlying agreement (s) and reserves the right to contest the validity of any agreement(s). To the extent Paragraph 9 alleges any wrongdoing on the part of the Defendant, those allegations are expressly denied.

7. Responding to Paragraph 10 of Plaintiffs' Complaint, Defendant admits so much as reiterates language in the lease-purchase agreement, to which Defendant craves reference. Further responding, Defendant denies that the parties had a meeting of the minds as to the underlying agreement (s) and reserves the right to contest the validity of any agreement(s). To the extent Paragraph 10 alleges any negligence or wrongdoing of the Defendant, those allegations are expressly denied.

8. Responding to Paragraph 11 of Plaintiffs', the allegations contained therein are, upon information and belief, admitted.

9. Responding to Paragraph 12 of Plaintiffs' Complaint, Defendant craves reference to the pleadings and documents filed in the referenced action. To the extent Paragraph 12 or the pleadings themselves express or allege any negligence or wrongdoing of the Defendant, those allegations are expressly denied.

10. Responding to Paragraph 13 of Plaintiffs' Complaint, Defendant craves reference to the terms of the pleadings and documents referenced therein. Further responding, Defendant denies any duty other than those imposed by law, statute, or binding contract. To the extent Paragraph 13 alleges any negligence or wrongdoing of the Defendant, those allegations are expressly denied.

11. Responding to Paragraphs 14 and 15, Defendant admits so much as alleges counsel for Clark, Lovell and TLC Holdings made communications regarding their position(s) as to the lease purchase agreement and pleadings. Further responding, to the extent that Paragraphs 14 and 15 expresses or imply any wrongdoing on the part of Defendant those allegations are denied as stated.

12. Responding to Paragraph 16 of Plaintiffs' Complaint, Defendant admits so much as alleges on or about December 18, 2013 postcards were sent, craves reference to the postcards, the terms of which speak for themselves, and denies any allegation inconsistent therewith. To the extent Paragraph 16 alleges or implies any wrongdoing on behalf of Defendant, those allegations are expressly denied.

13. Responding to Paragraph 17 of Plaintiffs' Complaint, Defendant admits so much as references the Court's Order, the terms of which speak for themselves. Further responding,

Defendant denies that the parties had a meeting of the minds as to the underlying agreement (s) and reserves the right to contest the validity of any agreement(s). Further responding, Defendant admits so much as he has vacated the property. To the extent Paragraph 17 alleges any wrongdoing on behalf of Defendant, those allegations are denied.

14. Responding to Paragraph 18 of Plaintiffs' Complaint, Defendant admits so much as references the pleadings referenced therein the terms of which speak for themselves. To the extent Paragraph 18 or the pleadings themselves allege any wrongdoing on behalf of Defendant, those allegations are expressly denied.

FOR A FIRST CAUSE OF ACTION
(Libel)

15. Paragraph 19 of Plaintiffs' Complaint is a reincorporation paragraph to which the Defendant is not required to respond other than to reiterate its defenses enumerated herein.

16. Responding to Paragraph 20 of Plaintiffs' Complaint, those allegations are denied

17. Responding to Paragraph 21 of Plaintiffs' Complaint, Defendant admits so much as alleges the postcard was sent to certain members of the Big Water Resort. The remaining allegations are denied as stated.

18. Responding to Paragraph 22 of Plaintiffs' Complaint, those allegations are denied as stated.

19. Responding to Paragraph 23 of Plaintiffs' Complaint, those allegations are denied.

20. Responding to Paragraph 24 of Plaintiffs' Complaint, those allegations are denied as stated.

21. Defendant denies the "Wherefore" clause, including all subparts, constituting the remainder of the Complaint.

22. Each and every allegation not expressly admitted in this Answer is denied.

FURTHERING RESPONDING AS AN AFFIRMATIVE DEFENSE
(Statute of Limitations)

23. Plaintiffs may have failed to commence this action within the time required by the applicable statute of limitations, and the failure to timely commence this action constitutes a bar and complete defense to these claims.

FURTHERING RESPONDING AS AN AFFIRMATIVE DEFENSE
(Privilege/Truth)

24. Plaintiffs' defamation cause of action is barred as Defendant's allegedly defamatory statement was absolutely or, in the alternative, qualifiedly privileged. Further, Defendant's allegedly defamatory statement was true.

FURTHERING RESPONDING AS AN AFFIRMATIVE DEFENSE
(Failure to State a Claim)

25. Plaintiffs' claims are barred by SCRCP 12(b)(6) because the Complaint fails to state facts sufficient to constitute a cause of action.

FURTHERING RESPONDING AS AN AFFIRMATIVE DEFENSE
(Lack of Standing)

26. Some or all of the Plaintiffs lack standing to assert a cause of action against the Defendant and, therefore, such Plaintiffs and claims should be dismissed.

FURTHERING RESPONDING AS AN AFFIRMATIVE DEFENSE
(Good Faith)

27. Defendant acted reasonably and in good faith in its action with regard to the circumstances described in the Complaint and its interactions with the members and Plaintiffs.

FURTHERING RESPONDING AS AN AFFIRMATIVE DEFENSE
(Negligence, Unclean Hands, Waiver, Acquiescence and Estoppel)

28. Plaintiffs' claims are barred or reduced by Plaintiffs' own negligence, unclean hands, waiver, acquiescence, and/or estoppel.

FURTHERING RESPONDING AS AN AFFIRMATIVE DEFENSE
(Punitive Damages Unconstitutional)

29. That the Complaint, to the extent it seeks punitive or exemplary damages, violates the right of the Defendant for procedural due process under the Fourteenth Amendment of the United States Constitution and the Constitution of the State of South Carolina, and therefore fails to state a cause of action upon which either exemplary or punitive damages can be awarded.

FURTHERING RESPONDING AS AN AFFIRMATIVE DEFENSE
(Unclean Hands)

30. That to the extent that the Plaintiffs were negligent, grossly negligent, willful, wanton and reckless, resulting in the damages allegedly sustained by the Plaintiffs, the Plaintiffs come to the Court with unclean hands and such inequitable conduct on the part of the Plaintiffs constitutes a bar and complete defense to any claim for equitable relief in the form of indemnity.

FURTHER RESPONDING AND AS AN AFFIRMATIVE DEFENSE
(Intervening Cause)

31. That whatever injury, damage, and/or loss alleged to have been suffered by the Plaintiffs were a proximate result of the intervening acts or superseding negligence of

individuals, parties, entities or organizations over whom Defendant had no control or responsibility, and for whose actions Defendants are not liable.

FURTHER RESPONDING AND AS AN AFFIRMATIVE DEFENSE
(Fraud, Duress, Unconsciounability)

32. To the extent that Plaintiffs now attempt to bring claims against Defendant Hutson, those claims may be voided by fraud, duress, and / or unconscionability.

FURTHER RESPONDING AND AS AN AFFIRMATIVE DEFENSE
(Equitable Estoppel)

33. To the extent that Plaintiffs now attempt to bring claims against Defendant Hutson for their own actions, they are equitably estopped from proceeding against Defendant Hutson.

FURTHER RESPONDING AND AS AN AFFIRMATIVE DEFENSE
(Accord and Satisfaction)

34. Defendant Hutson may have entered into a Settlement Agreement as to claims regarding the subject property which may amount to accord and satisfaction as to Plaintiffs TLC's claims. Defendant Hutson reserves the right to contest the validity of any such document.

FURTHER RESPONDING AND AS AN AFFIRMATIVE DEFENSE
(Statute of Repose)

35. Plaintiffs' claims against Defendant Hutson are or may be barred in whole or in part by the applicable statute of repose.

FURTHER RESPONDING AND AS AN AFFIRMATIVE DEFENSE
(Fraud)

36. Plaintiffs' claims are barred by the affirmative defense of fraud.

FURTHER RESPONDING AND AS AN AFFIRMATIVE DEFENSE
(Fraud in the Inducement)

37. Plaintiffs' claims are barred by fraud in the inducement.

FURTHER RESPONDING AND AS AN AFFIRMATIVE DEFENSE
(12(b)(6))

38. Plaintiffs' claims are barred by SCRCF 12(b)(6) because the Complaint fails to state facts sufficient to constitute a cause of action.

FURTHER RESPONDING AS AN AFFIRMATIVE DEFENSE
(Reservation)

39. Defendant reserves any additional further defenses as may be revealed by additional information during the course of discovery and investigation, and as is consistent with Federal Rules of Civil Procedure, to the extent applicable to the action, and other applicable laws and regulations.

Wherefore, having fully responded to the Complaint, Defendant demands that the Plaintiffs' claims against it be dismissed and that the Court award it costs and fees incurred in defending this matter. Defendant demands a Jury Trial.

SIGNATURE PAGE TO FOLLOW

Respectfully submitted.

CARLOCK COPELAND & STAIR, LLP

By: Laura Paris Paton

Laura Paris Paton

S.C. Bar No.: 74125

R. Michael Ethridge

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Counsel for the DEFENSE ONLY of Defendant M.B. Hutson a/k/a M.B. Hudson

prepared by Laura Paton August 8, 2016

**FURTHER RESPONDING AND AS COUNTER-CLAIMS AGAINST
TLC HOLDINGS, LLC, RICHARD CLARK, JIMMY S. LOVELL, AND JOHN DOE
CORPORATIONS**

40. Defendant Hutson reasserts and realleges its Answers and Defenses as if restated herein verbatim.

41. That the Court has jurisdiction over the parties and subject matter hereto as the allegations in the present Complaint and the Counter-Claims arise out of transactions regarding land and businesses located in Clarendon County, South Carolina.

42. That on or about 2010, Defendant Hutson was introduced to TLC Holdings, LLC's owners Richard Clark and Steve Lovell (hereinafter collectively TLC parties) by real

estate agent Susan Stroman for the purpose of purchasing the land at 5215 Dingle Pond Road, Summerton, SC (hereinafter "the property").

43. That Richard Clark, Steve Lovell, with James Thigpen, owned and operated TLC Holdings, LLC.

44. That Richard Clark and Steve Lovell, with James Thigpen, owned and operated BWR.

45. That Richard Clark and Steve Lovell controlled, owned and operated other corporate entities, hereinafter referred to as "John Doe Corporations", which were created to perform single purpose functions in order to effectuate the sole will of Messrs. Clark and Lovell.

46. That in or around December 2010, Defendant Hutson met with the TLC parties and advised the TLC parties that he sought to purchase the lake-front land at 5215 Dingle Pond Road, Summerton, SC, close the campground currently operating at the property, and develop water-front condominiums on the land.

47. That during the December 2010 meeting the TLC parties advised Defendant Hutson that the property was owned by TLC Holdings and the campground business was owned by Big Water Resort, LLC ("BWR").

48. That during the December 2010 meeting the TLC parties advised Mr. Hutson that in order to purchase the land, he would be required to purchase BWR as well.

49. That during the December 2010 meeting the TLC parties advised Mr. Hutson that there was water and sewer adjacent to the property for development but failed to disclose the moratorium of approximately 5 years preventing development of the property.

50. That during the December 2010 meeting the TLC parties advised Mr. Hutson that BWR had no known debt.

51. That during or after the December 2010 meeting the TLC parties advised Mr. Hutson that BWR had an annual income of approximately \$200,000.00.

52. That during and after the December 2010 meeting, the TLC parties concealed BWR's \$300,000 annual losses.

53. That during the December 2010 meeting the TLC parties advised Mr. Hutson that BWR had no accounting records.

54. That during the December 2010 meeting the TLC parties advised Mr. Hutson that the value of BWR was \$500,000 and the value of the land at 5215 Dingle Pond Road, Summerton, SC was \$6 million.

55. That TLC parties and Mr. Hutson negotiated for Mr. Hutson to lease the land with the option to purchase in 12 months for \$6 million or 24 months for \$7 million.

56. That during the December 2010 meeting the TLC parties and Mr. Hutson discussed the length of the Lease Purchase Agreement so that Mr. Hutson would have sufficient time to secure the necessary permits to develop the property.

57. That prior to executing the Lease Purchase Agreement and the Membership Interest Purchase Agreement (hereinafter collectively "the Agreements" attached as Exhibits A and B), Mr. Hutson searched the property title record; no liens or encumbrances were found.

58. That prior to purchase by Mr. Hutson, the TLC parties negotiated with Black River Electric for underground power.

59. That prior to purchase by Mr. Hutson, the TLC parties received, but refused to pay, for the cost of installation of the underground power.

60. That prior to purchase by Mr. Hutson, the TLC parties did not disclose the outstanding bill for installation of underground power encumbering the land and BWR.

61. That subsequent to the December 2010 meeting, the TLC parties and Mr. Hutson executed the Membership Interest Purchase Agreement for BWR and a Lease Purchase Agreement for the property at 5215 Dingle Pond Road, Summerton, SC (hereinafter collectively "the Agreements").

62. That the Membership Interest Purchase Agreement includes a representation by the TLC parties, "(T)here are no actions, suits, or proceedings either at law or equity ... or to the knowledge of the Sellers threatened."

63. That the Membership Interest Purchase Agreement includes a representation by the TLC parties that, "Seller represents, warrants and covenants to Purchaser as follows: "(the business is) In compliance with all laws regulations and orders applicable to its business."

64. That the Membership Interest Purchase Agreement includes a representation by the TLC parties representing that they had "good and marketable title to all of its properties and assets."

65. That the Lease Purchase Agreement includes representations by the TLC parties ensuring that they have good and marketable title to the land at 5215 Dingle Pond Road, Summerton, SC.

FOR A FIRST CAUSE OF ACTION

(Fraud or, in the Alternative, Negligent Misrepresentation – Failure to Disclose Encumbrances on the Property as to the TLC Parties)

66. That prior to execution of the Agreements, the TLC parties knew that there were approximately 700 "Retail Membership Agreements" encumbering the property.

67. That prior to the execution of the Agreements, the TLC parties knew or should have known that the Retail Membership Agreements are timeshares subject pursuant to South Carolina code and subject to the recording requirements of Sections 27-32-10 through 27-32-250 of the 1976 Code are designated as Article 1 of Chapter 32, Title 27, and entitled 'Vacation Time Sharing Plans'."

68. That the TLC parties knowingly and / or negligently failed to disclose and / or concealed information that the Retail Membership Agreements provided that each holder: 1) a right to use campground facilities, and services solely for members recreational and enjoyment. (emphasis supplied), 2) this right to use the facilities ranges from 5 years up to two life times.

69. That the TLC parties advised Mr. Hutson that the Retail Membership Agreements could be terminated / divested such that he could proceed with development of the property.

70. That the TLC parties knowingly and / or negligently failed to record the timeshares encumbering the property as required by statute and, therefore, hid from disclosure the encumbrances upon the property prior to Defendant Hutson's execution of the Agreements.

71. That the TLC parties had a statutory duty to record the encumbrances pursuant to Sections 27-32-10 through 27-32-250 of the 1976 Code are designated as Article 1 of Chapter 32, Title 27, and entitled 'Vacation Time Sharing Plans'."

72. That Mr. Hutson and his attorney performed title searches with the Clarendon County Register of Deeds prior to purchase and no encumbrances as to the time shares were found.

73. That the TLC parties had a pecuniary interest in knowingly and / or negligently concealing the encumbrances on the property to induce Mr. Hutson to enter into the Agreements to secure a maximum profit to the TLC parties and to disgorge a failing business.

74. That as a result of the TLC parties actively, intentionally, knowingly, willfully, wantonly, recklessly, and / or negligently failing to record the timeshares encumbering the property, they knowingly and / or negligently concealed such encumbrances which require disclosure by statute and induced Mr. Hutson to enter into the Agreements.

75. That in relying on the fraudulent representations and / or negligent misrepresentations, Mr. Hutson did materially change his position entering into the Agreements without knowledge of the timeshares believing, as was represented by the TLC parties, that the property was unencumbered.

76. That, as a result of such fraudulent and / or negligent misrepresentations, Mr. Hutson has been damaged, and continues to be damaged, and has suffered pecuniary loss as a direct and proximate result of his reliance on the TLC parties representations.

77. Therefore, as a direct and proximate result of the TLC parties' actions, Mr. Hutson is entitled to actual, direct, consequential, incidental, special, and punitive damages as aforesaid, all in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of same or any other waiver or other limitation are null, void, unenforceable, and subject to rescission as a matter of law.

FOR A SECOND CAUSE OF ACTION
(Fraud, or in the Alternative, Negligent Misrepresentation – Material
Misrepresentation as to Financial Position as to the TLC Parties)

78. That prior to execution of the Agreements, the TLC parties advised Mr. Hutson that the value of BWR was \$500,000 and the value of the land at 5215 Dingle Pond Road, Summerton, SC was \$6 million.

79. That prior to execution of the Agreements, the TLC parties advised Mr. Hutson that BWR had an annual income of approximately \$200,000.00.

80. That prior to execution of the Agreements, the TLC parties did not advise Mr. Hutson that BWR was operating at a substantial loss upwards of \$300,000 per year, outstripping its income.

81. That prior to execution of the Agreements, the TLC parties advised Mr. Hutson that BWR had no accounting records.

82. That prior to execution of the Agreements, the TLC parties knew that the operating expenses of BWR exceeded its income.

83. That prior to execution of the Agreements by Mr. Hutson, the TLC parties negotiated with Black River Electric for underground power.

84. That prior to execution of the Agreements by Mr. Hutson, the TLC parties received, but refused to pay, for the cost of installation of the underground power.

85. That prior to execution of the Agreements by Mr. Hutson, the TLC parties did not disclose the outstanding bill for installation of underground power encumbering the land and BWR.

86. That Mr. Hutson had a right to rely, and did rely, on the various representations of the TLC parties' as to the condition of their business and its encumbrances, including, but not limited to, those representations expressly outlined in the Agreements signed by the TLC parties.

87. That the TLC parties actively, intentionally, willfully, wantonly, recklessly, and / or negligently misrepresented and / or concealed the financial condition, including, but not limited to, the operating costs and expenses of BWR, to induce Mr. Hutson to purchase BWR and enter into the Agreements.

88. That the TLC parties actively, intentionally, willfully, wantonly, recklessly, and / or negligently misrepresented and / or concealed the financial condition, including, but not limited to, the annual income of BWR and accounting records of BWR, to induce Mr. Hutson to purchase BWR and enter into the Agreements.

89. That the TLC parties actively, intentionally, willfully, wantonly, recklessly, and / or negligently misrepresented and / or concealed the financial condition, including, but not limited to, the debt owed to Black River Electric, to induce Mr. Hutson to purchase BWR and enter into the Agreements.

90. That as a result of the TLC parties' intentional, active, willful, wonton, and / or reckless and / or negligent misrepresentations and / or concealments, inducing Mr. Hutson to enter into the Agreements, he has suffered irreparable harm including, but not limited to, significant financial harm.

91. Therefore, as a direct and proximate result of the TLC parties' actions, Mr. Hutson is entitled to actual, direct, consequential, incidental, special, and punitive damages as aforesaid, all in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of same or any other waiver or other limitation are null, void, unenforceable, and subject to rescission as a matter of law.

FOR A THIRD CAUSE OF ACTION
(Defamation / Libel Per Se as to the TLC parties)

92. That on or about April 3, 2014, the TLC parties wrote to the members of the Big Water Resort Campground the letter at Exhibit C.

93. That in their correspondence, the TLC parties included untrue statements impugning Mr. Hutson's performance as one-time owner of Big Water Resort.

94. That the TLC parties' correspondence was made with actual and / or implied malice and intended to degrade and reduce the character and / or reputation of Mr. Hutson to others.

95. That as a direct and proximate result of the TLC parties' actions, including, but not limited to, the malicious publication of libelous materials to the members of the Big Water Resort. Mr. Hutson is entitled to actual, direct, consequential, incidental, special, and punitive damages as aforesaid, all in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of same or any other waiver or other limitation are null, void, unenforceable, and subject to rescission as a matter of law.

AS A FOURTH CAUSE OF ACTION AGAINST THE TLC PARTIES
**(Breach of Contract Accompanied by a Fraudulent Act, or, in the alternative,
Breach of Contract)**

96. That the TLC entities and Defendant Hutson entered into the Agreements as outlined above.

97. That the Agreements contained certain provisions as outlined above including, but not limited to:

- a. Warranties as to good and marketable title to all its properties and assets;
- b. Seller represents, warrants and covenants to Purchaser as follows: . . . further, there are no actions, suits, or proceedings, either at law or equity . . . or to the knowledge of Sellers, threatened;
- c. Seller represents, warrants and covenants to Purchaser as follows: (e.) In compliance with all laws, regulation and orders applicable to its business"

98. That in breach of the afore mentioned Agreements, the TLC entities:

- a. Did not have marketable title and, in fact, such title was encumbered by timeshares;
- b. That a substantial outstanding debt was owed Black Water Electric which could lead to litigation;
- c. That the TLC entities failed to record timeshares as required by statute; and
- d. Other such breaches as may be determined.

99. This constitutes a breach of the Agreements with Mr. Hutson and accompanying this breach was the fraudulent acts:

- a. Knowingly failing to disclose the outstanding debts of BWR, including, but not limited to, Black Water Electric;
- b. Advising Mr. Hutson that no financial records were kept as to BWR to conceal the losses / financial condition of the company;
- c. Failing to record encumbrances required by statute as outlined above;
- d. Advising Mr. Hutson that the Retail Memberships could be divested to allow for development of the lakefront land as discussed; and,
- e. Other such concealments / misrepresentations as may be discovered.

100. The TLC entities either knew or should have known of said defects, all of which proximately caused the damage hereinabove and hereinafter described and entitles Mr. Hutson to punitive damages.

AS A FIFTH CAUSE OF ACTION AGAINST THE TLC PARTIES
(Violation of the South Carolina Unfair Trade Practices Act S.C. Code § 39-5-10, et seq.)

101. The TLC parties and the John Doe Corporations' creation of BWR and the subsequent offering and sale of BWR and the lease-purchase of the property, along with other representations to the holders of the Retail Membership Agreements in BWR, potential purchasers of BWR pre-dating Mr. Hutson's purchase, and the public at large, constituted the conduct of trade and commerce within the meaning of S.C. Code Section 39-5-20(a).

102. The TLC parties and the John Doe Corporations, and each of them, through their acts and omissions including, but not limited to, the following particulars, conducted unfair and deceptive practices within the meaning of S.C. Code Section 39-5-140(a) and 27-31-430, S.C. Code of Laws as amended:

- a) in failing to disclose the Vacation Time Shares encumbering the property;
- b) In failing to record the memberships as required pursuant to Sections 27-32-10 through 27-32-250 of the 1976 Code are designated as Article 1 of Chapter 32, Title 27, and entitled 'Vacation Time Sharing Plans';
- c) In failing to pay and subsequently hiding the debt owed to Black River Electric;
- d) in failing to provide any additional consideration for subsequent attempts to modify their agreement;
- e) in failing to properly disclose the true conditions of the business and properties at issue in the Agreements and putting them into the stream of commerce;
- f) in making false representations as to the condition of the business and properties at issue in the Agreements and/or representations as to the condition of the business and properties at issue in the Agreements in reckless disregard as to the truth of the representations; and
- g) In failing to analyze and preserve reserves for maintenance and operation of the business and concealing same.

103. The conduct of The TLC parties in their ownership and management of TLC Holdings, BWR, and the John Doe Corporations, as described above, was knowing and willful, and the TLC parties knew or should have known that such conduct was a violation of S.C. Code Section 39-5-20 and 27-31-430.

104. Mr. Hutson is a person within the meaning of S.C. Code Section 39-5-140(a) and has suffered actual, direct, and proximate damages as a direct and proximate result of unfair and deceptive acts of the TLC parties, in an amount to be determined by the trier of fact.

105. The aforesaid acts of the TLC parties impact the public interest in that they constituted unfair and deceptive acts and have the potential for repetition and, in fact, occurred at the execution of the Agreements and may continue to occur as the TLC entities engage in other enterprises related to the Retail Memberships and BWR and, as such, are acts which can, have and will affect the public at large by repetition.

106. These unfair and deceptive acts are acts which will affect members of the public, beyond the parties to the above-described transactions, in the form of other consumers who may be injured by purchasing new memberships or other such timeshare that the TLC parties and the John Doe Corporations offer on the land which, upon information and belief, those entities, and / or the amalgamated John Doe Corporations own and operate whereby placing members of the public in danger of harm.

107. Mr. Hutson is entitled to be compensated pursuant to S.C. Code Section 39-5-140(a) for the above-described actual, incidental, consequential, and special damages, as well as costs, interest, and attorney's fees, and to recover three (3) times these damages by reason of the knowing and willful nature of the unfair and deceptive acts by Defendants and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A SIXTH CAUSE OF ACTION

(Amalgamation, Alter Ego Liability and Piercing the Corporate Veil as to the TLC Parties and the John Doe Corporations)

108. The TLC parties, by and through various instrumentalities and alter-egos and other companies to be named at a later date were the original developers and / or operators of BWR.

109. That the TLC parties, with their John Doe Corporations, combined and joined together through various instrumentalities, alter egos, and amalgamated entities, to facilitate to process of developing BWR, encumbering BWR with various debts, and concealing such debts from Mr. Hutson.

110. The TLC parties created and controlled numerous and various entities (hereinafter the John Doe Corporations) to be expressly named at a later date, for the sole purpose of the activities solely relating to development and sale of memberships related to BWR.

111. The TLC parties and the John Doe Corporations created and controlled these sham entities for the sole purpose of enabling it to transact a portion of its business under an alternate corporate guise and to avoid claims such as those set forth herein. These entities, and each of them, were merely a facade for the operations of Messrs. Lovell and Clark to achieve their financial goals and to perpetrate the activities more particularly described herein.

112. The subservient entities in fact manifested no separate interest of their own and that there was an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between The TLC parties and the John Doe Corporations and the sham corporations, shareholders, officers, agents, partners, employees, assets, and each of them.

113. The TLC parties created entities which were created to perform single purpose functions in order to effectuate the sole will of the TLC parties to perpetuate the acts described herein. Despite the creation of these sham entities and despite the sham entities appearing in name only on some contracts, letters, deeds, and/or other documents, the TLC parties and the John Doe Corporations actively and directly in the activities herein, and in fact put BWR in the stream of commerce.

114. The TLC parties and the John Doe Corporations created and controlled numerous and various John Doe Corporations / corporate entities for the sole purpose of the planning, development, design, construction, management, purchase, sale of memberships, and other activities solely relating to BWR as described more particularly herein.

115. The sham entities established by the TLC parties and / or the John Doe Corporations were and are characterized by one or more of the following: (1) being undercapitalized; (2) failing to observe corporate formalities; (3) failing to pay dividends; (4) Insolvency; (5) Lack(ed) proper records; (6) siphoning of funds by its members and/or affiliates; and (7) was used as a mere facade for the operation of the dominant shareholders, members, associates, and affiliates.

116. Upon information and belief, each shared the same mailing / emailing address, the TLC parties and the John Doe Corporations directly received payment and disbursed payment for obligations relating to the sham entities, the sham entities had no shareholders and/or officers of their own, no separation of accounting and bookkeeping functions, and/or the TLC parties and the John Doe Corporations directly contracted for the sham entities in the name of the TLC parties and the John Doe Corporations.

117. The TLC parties and the John Doe Corporations directed and oversaw the fraudulent / negligent actions described herein.

118. There would exist a broad element of injustice and fundamental unfairness if the acts of the TLC parties, including Messrs. Lovell, Clark, and TLC Holdings, LLC, and the John Doe Corporations, and each of them individually, were not regarded as the acts of one another.

119. At the time BWR and the Lease-Purchase Agreement were offered and placed into the stream of commerce by the TLC parties and the John Doe Corporations, the faulty defects and deficiencies heretofore described were hidden and concealed through the acts and omissions of the TLC parties and the John Doe Corporations.

120. That the TLC parties and the John Doe Corporations, knew or should have known of the existence of the said defects and deficiencies, which were unknown by and / or concealed from Mr. Hutson.

121. These hidden defects, including, but not limited to, defective, un-marketable title and outstanding and oppressive debts, which unbeknownst to Mr. Hutson, rendered the business and the Lease-Purchase Agreement undevelopable and worthless.

122. The resulting actual, incidental, consequential and special damages, and continue to do so through the date of this filing.

123. Mr. Hutson suffered damages and injuries when the TLC parties and the John Doe Corporations put BWR and the properties described in the Lease-Purchase Agreement into the stream of commerce and continue to be damaged and injured through the date of this filing.

124. As a direct and proximate result thereof, the TLC parties and the John Doe Corporations are liable to the Plaintiffs for actual, incidental, consequential, special and punitive damages, all in an amount to be determined by the trier of fact, and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

WHEREFORE, Defendant / Cross-Claimant Hutson respectfully request that this Honorable Court:

- a) Dismiss any and all claims filed by the TLC entities.
- b) Enter judgment in favor of the Defendant / Counter-Claimant Hutson and against all Plaintiffs jointly and severally, in an amount to be determined for actual, incidental, consequential, special, and punitive damages.

- c) Find that the TLC parties and their John Doe Corporations have engaged in unfair trade practices and knowingly did so thereby entitling Defendant / Counter-Claimant Hutson to treble damages.
- d) Award attorneys' fees and costs to the Defendant / Counter-Claimant Hutson; and
- e) Award such other and further relief as the Court may deem just and proper.

Respectfully submitted,

By: M.B. Hutson
M. B. Hutson, Pro Se as to Counter-Claims
803.308.2714

**EXHIBIT
4.0**

Fwd: Setting aside the Judgement

Mr. H <hmr226621@gmail.com>
Mon 8/13, 12:52 PM
ods06535cpc

Reply all

inbox

This item will expire in 24 days. To keep this item longer, apply a different label.

Label: 30 days Delete CPC mailbox (1 month) Expires: 9/12/2018 12:52 PM

Begin forwarded message:

From: "Tim J. Newton" <tnewton@murphygrantland.com>
Date: August 13, 2018 at 10:49:58 AM EDT
To: "Mr. H" <hmr226621@gmail.com>
Subject: RE: Setting aside the Judgement

Mr. Hutson,

I need to remind you that I don't represent you and I can't represent you because I represent Penn-America. To the extent there is a common interest, I note the following:

1. Renee Roark testified at trial in the defamation action that you contacted her in October 2010 looking for waterfront property to develop.
2. Susan Stroman admitted at trial sending you an e-mail dated November 11, 2010 in which she indicated the campground could possibly be moved or the members bought out. However, she denied having said that on behalf of TLC.
3. The alleged lease between Big Water Resort, LLC and TLC Holdings, LLC, if it existed, was never recorded, although it was for a term of more than a year.
4. The membership agreements between the campground members and Big Water Resort, LLC were never recorded. Possibly they should have been, since they granted campground members a rights to use Big Water Resort, LLC's facilities for life plus the lifetime of a survivor. See S.C. Code s 27-33-30 (requiring "any . . . agreement for the use . . . of real estate" to be recorded).
5. There is some case law indicating lifetime memberships are for the duration of the club member, and can only be terminated for cause. Paul Gabrillis, Inc. v. Dahl, 154 Or. App. 388, 961 P.2d 865 (Or. Ct. App. 1998); Martin v. Town & Country Dev., Inc., 230 Cal. App. 422, 41 Cal. Rptr. 47 (Cal. Ct. App. 1964).

...

7. The Lease-Purchase Agreement pertains to all of TLC's property at the Big Water Resort site.
8. The Membership Interest Purchase Agreement in Big Water Resort, LLC does not specify what property is subject to the campground membership agreements.
9. The Settlement Agreement dated March 30, 2012 is between TLC Holdings, LLC (and its principals) and Hutson only. TLC is represented as the landlord, and Hutson is represented as the tenant. Big Water Resort, LLC and the campground members are not parties.
10. The Settlement Agreement, in para. 5, obligates Hutson to submit a Qualified Plat for a proposed subdivision "as shown on Exhibit 'A' attached hereto." There are provisions for an acreage release, and it appears the payments owed to TLC may be paid from the proceeds of the subdivision and sale of parcels of the property.
11. The copy of this Settlement Agreement that was made an exhibit at Hutson's bankruptcy deposition had two hand drawings immediately after the last page, which reads "Exhibit A." These drawings depict the approximate location of the proposed development as being on the campground parcel.
12. Despite the language in the Lease-Purchase Agreement and the Settlement Agreement that the subdivision and sale pertained to unimproved portions of the property, the letter that TLC's attorney Tom Harper submitted to the Clarendon County Planning Commission with TLC's approval depicts a development on the campground property.
13. The Consent Order filed April 13, 2012 incorporates the Settlement Agreement but does not otherwise mention Big Water Resort, LLC or the campground members. It reads as if it pertains to a mere landlord-tenant dispute.
14. Bonnie Youmans testified at trial (by way of her deposition) that she thought all of TLC's property was part of the Big Water Resort campground and she would have considered it a violation of the campground memberships to have developed condominiums on the campground property. This testimony was unopposed.
15. I can see how you could argue that the Consent Order is invalid because it attempts to adjudicate the rights of parties not before it. If you were ordered to develop property that was subject to lifetime use rights, that probably should have been brought to the court's attention. Furthermore, I can see how you could argue you did not realize you were being obligated to violate the rights of the campground members by developing since TLC never specified exactly which property was subject to the campground memberships.
16. It's hard to see why TLC and its lawyers should not have, in good faith, simply told you (and the court) that the Big Water Resort property was undevelopable because it was already obligated to double lifetime memberships as a private club. It appears that could easily have averted the entire fiasco. Since attorneys were involved, and it resulted in your inability to present your case in court, and possibly led to the sanctions order and judgment against you, there might possibly be extrinsic fraud on the court to support setting aside the Consent Order. See *Chewning v. Ford Motor Co.*, 354 S.C. 72, 579 S.E.2d 605 (2003).

However, that is something you would have to follow up with on your own. I can't undertake that. Possibly Frank could file a motion if Penn-America approves it, but he and I both have agreed to put everything on hold until the mediation.

I highly recommend that you get a lawyer involved, even if it's a pro bono lawyer. If you need the documents supporting the above, let me know.

Tim N.



...

M & G

Murphy & Grantland, P.A.

Tim J. Newton, Esquire

tnewton@murphygrantland.com

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Columbia, South Carolina 29260

803-782-4100 ext. 1242

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From: Mr. H <hmr226621@gmail.com>

Sent: Saturday, August 11, 2018 9:04 PM

To: Tim J. Newton <tnewton@murphygrantland.com>

Subject: Setting aside the Judgement

EXHIBIT 5.0

LEASE PURCHASE AGREEMENT

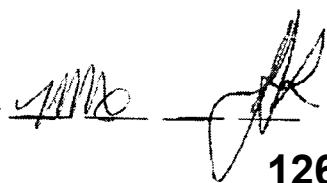
THIS LEASE PURCHASE AGREEMENT (this "Agreement") is made as of the ____ day of December, 2010 (the "Effective Date"), by and between TLC HOLDINGS, LLC, a South Carolina Limited Liability Company ("TLC" or "Landlord"), **RICHARD U. CLARK, JIMMY S. LOVELL and JAMES C. THIGPEN** (collectively, the "Members", and together with TLC, the "Seller"), and **M. B. HUDSON, AND/OR HIS HEIRS, SUCCESSORS AND PERMITTED ASSIGNEES** ("Purchaser").

WITNESSETH:

WHEREAS, Seller agrees to sell to Purchaser, and Purchaser agrees to purchase, (a) the following described premises in Clarendon County, South Carolina, herein sometimes called the "Premises" being more particularly described on the attached EXHIBIT "A" along with all furniture, fixtures, equipment, machinery, vehicles and other personal property that may be owned, leased, licensed or otherwise in the possession of TLC (collectively the "Property") and (b) all membership interests of the Members in TLC (hereinafter "Stock"); and

WHEREAS, from the Effective Date until such time that the sale of the Premises to Purchaser shall be consummated, Seller agrees to lease the Premises to Purchaser as provided below.

NOW, THEREFORE, for and in consideration of the premises and the covenants and agreements herein contained and for Ten Dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller and Purchaser hereby mutually covenant and agree as follows:

Handwritten initials and a signature, likely representing the parties to the agreement.

**SECTION 1
PURCHASE AGREEMENT**

1.1. Purchaser hereby agrees to purchase the Premises, Property and Stock from Seller and Seller hereby agrees to sell the Premises, Property and Stock to Purchaser as provided herein. Such purchase transaction shall close not later than December 30, 2012 (the "Closing"), provided, however, that Purchaser may accelerate the Closing by providing Seller written notice of Purchaser's intent to close the transaction no less than (a) ten (10) days from the date of the written request by Purchaser, if all mortgages upon the Premises have previously been satisfied; or (b) ninety (90) days from the date of the written request by Purchaser, if any such mortgage encumbers the Premises.

1.2. The parties ultimately intend for this transaction to be a sale of Stock of Seller, which has all right, title and interest in Premises and Property. In such event, the Premises and Property shall remain the property of TLC at Closing, and the Purchaser shall purchase and assume, and the Members shall sell and assign, the Stock in TLC to Purchaser at Closing. The purchase price for the Premises, Property and Stock (the "Purchase Price") shall be either the Incentive Purchase Price or the Standard Purchase Price, as defined herein. In the event Purchaser closes the purchase prior on or before September 1, 2011, the Purchase Price for the Premises, Property and Stock shall be an amount equal to Six Million and 00/100 Dollars (\$6,000,000.00) ("Incentive Purchase Price"). If the closing is after September 1, 2011, the Purchase Price for the Premises, Property and Stock shall be an amount equal to Seven and 00/100 Dollars (\$7,000,000.00) ("Standard Purchase Price").

*original
copy*

1.3. Purchaser shall have the exclusive right to close on any portion of the Premises, which is unimproved, in tracts of one (1) acre or more (each, a "Subparcel") at any time during the term of the Agreement for a Purchase Price of One Hundred Forty-Five Thousand and

00/100 Dollars (\$145,000.00) per acre. Such closing shall occur as soon as practical after written request is sent from Purchaser to Seller pursuant to Section 20, not to exceed ninety (90) days from the date of the written request except in the event the Seller has been unable to obtain a release on said Subparcel(s) from the Bank that currently holds a first position mortgage on the Premises within 90 days following receipt of Purchaser's written request (hereinafter the "Release Period"). If such event occurs prior to September 1, 2011, the right to purchase the Premises for the Incentive Purchase Price shall be extended for one (1) day for each day that Seller fails to obtain a release of the Premises after the expiration of the Release Period. Any such closing proceeds shall be applied to the Purchase Price for the entire Premises.

release

The parties acknowledge that the Purchaser intends to develop and construct condominiums or other residential dwelling structures on certain portions of the unimproved Premises. In the event Purchaser closes on any one or more unimproved Subparcel(s) as referenced in this Section 1.3, Purchaser shall pay thirty-five percent (35%) of the gross profits from the sale of any and all residential dwelling units to the Seller which shall be applied to reduce the Purchase Price for the entire Premises. As used herein, "gross profits" means the gross sales proceeds, reduced only by Purchaser's actual costs of construction of any improvements on such land. Purchaser shall be prohibited from selling such Subparcel(s), or portions thereof, except as part of the bona fide sale thereof at retail to an arm's length third party purchaser unaffiliated with Seller. If Purchaser fails to close on the entire property within the timeframes set forth in this Agreement, Seller shall have the option to repurchase any undeveloped parcel released under this Paragraph 1.3 for the price paid by Purchaser to Seller for such parcel, and an option to repurchase any improved parcel that has not been resold under the terms of this Paragraph 1.3 for the price paid by Purchaser for such parcel plus the actual costs of

the improvement(s) undertaken thereon by Purchaser. The provisions of this section shall survive the Closing (until such time as Seller has received the entire Purchase Price owing under this Agreement in cash) and any termination of this Agreement.

1.4. At Closing, the Purchase Price due hereunder, less adjustments and expenses provided herein, will be paid to Seller, either: (i) in cash, by cashier's check, or by wire transfer; or (ii) by Purchaser executing a Promissory Note payable to the Seller for an amount up to and including the full Purchase Price, to be financed for five (5) years at six percent (6.0%) interest per annum, based on a twenty (20) year amortization. Payments on said Promissory Note shall be made monthly to the Seller, with all amounts owing thereunder to be paid not later than the maturity date five (5) years following Closing. The Promissory Note shall be secured by a first position mortgage on the Premises conveyed at said Closing, and by a first-priority, perfected security interest in the Stock.

Big Water Company ownership

In the event the \$500,000.00 purchase price for The Big Water Resort, LLC, a South Carolina limited liability company, which has common members of the Seller herein, is financed by Promissory Note made from Purchaser to Members, the terms and conditions of which are more particularly set forth in the Membership Interest Purchase Agreement of even date herewith, then both Promissory Notes shall provide that a default under either one of the Promissory Notes will be deemed a default under the other Promissory Note, thereby permitting Seller to seek all rights and remedies available therein, including but not limited to foreclosure on the Premises and Stock.

1.5. At the Closing, in exchange for the Purchase Price, the Members shall convey to Purchaser or its designee, by assignment agreement, all of the Stock in TLC; provided that, at and as of Closing, TLC hold marketable title to the Premises, subject to (i) utility and drainage

casements of record, (ii) the rights of the public in any streets and highways, if any, adjoining the Land, (iii) zoning and building laws, ordinances, resolutions, and regulations, (iv) ad valorem real estate taxes and assessments for public improvements not due and payable as of the date of closing, and (v) any additional encumbrances subject to which Seller accepted title to the real property being conveyed. Purchaser shall, within ninety (90) days after the Effective Date, investigate Seller's title to the Premises and identify any exceptions to title which are not acceptable to Purchaser (any such exception being referred to herein as a "Title Exception"). Purchaser shall within ninety (90) days after the Effective Date provide Seller notice of any such Title Exception. If Purchaser does not notify Seller in writing of Title Exceptions within ninety (90) days after the Effective Date, then Purchaser shall be deemed to have accepted title to the Premises with all exceptions and conditions. If Purchaser timely notifies Seller of Title Exceptions (other than Title Exceptions that can be cured by the payment of money to satisfy any liens as of the Closing, which Title Exceptions shall be cured as of Closing), Seller may (but shall not be required to) cause all Title Exceptions to be deleted as exceptions from the title commitment, as the case may be, on or prior to thirty (30) days prior to Closing (the "Cure Deadline"). If Seller fails or refuses to cure any Title Exceptions prior to the Cure Deadline, then Purchaser may, as its sole and exclusive remedy for the existence of, or Seller's failure to cure, such Title Exceptions before the Cure Deadline, elect to terminate this Agreement, or waive its right to terminate this Agreement in writing and accept the title commitment with all uncured Title Exceptions. If Purchaser terminates this Agreement pursuant to this Section 1.5, then neither party shall have any further obligation under this Agreement, except for such obligations of the parties as are expressly stated to survive the termination of this Agreement.

Each party shall be responsible for and shall pay fifty percent (50%) of all other closing costs.

Each party shall be responsible for the fees of its respective counsel.

1.6. Seller shall use the closing proceeds to have any lien or encumbrance on the Premises and Stock released.

1.7. Upon the completion of the purchase transaction, but not prior thereto (whether or not any delay in the completion of or the failure to complete such purchase shall be the fault of Seller), this Agreement and all obligations hereunder (including, but not limited to, the obligations to pay Rent) shall terminate with respect to any portion of the Premises being purchased, provided that neither party shall be released with respect to obligations and liabilities of Purchaser and Seller, actual or contingent, under this Agreement which arose on or prior to the date of the closing of the purchase, or which expressly survive the termination of this Agreement.

1.8. This Purchase Agreement shall not be assigned or transferred by the Purchaser without the prior written consent of Seller, which shall not be unreasonably withheld.

*any
Default
→*

1.9. In the event of any default or breach of Purchaser's obligations under this Section 1, Seller shall be entitled to terminate this Agreement and retain all rent paid hereunder, and in addition, to specifically enforce Purchaser's obligations under Section 11.2 herein. In the event of any default or breach of Seller's obligations under this Section 1, Purchaser may, in the alternative, either terminate this Agreement or requiring specific performance on the part of Seller. Purchaser and Seller each hereby waive the right to money damages against the other party for matters arising out of this Agreement.

1.10. Purchaser hereby acknowledges that Seller has made no representations or warranties regarding the Premises. Purchaser has inspected the Premises to Purchaser's

complete and total satisfaction. Purchaser (i) is accepting the Premises for purposes of the lease as provided in provisions below; and (ii) at the time of Closing will be purchasing the Premises on an "AS IS" basis, that is, with all defects that may exist, if any, except as otherwise provided herein.

SECTION 2 TERM AND POSSESSION

2.1. Unless the Primary Term is extended upon the mutual agreement of the parties, the primary term of this Agreement (the "Primary Term") shall commence on January 1, 2011 and shall expire on the earlier of December 30, 2012 or the actual date of Closing.

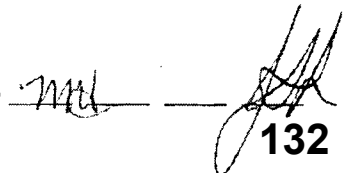
2.2. Possession of the Premises shall pass to Purchaser on January 1, 2011, provided that Purchaser has closed on its purchase of The Big Water Resort, LLC.

SECTION 3 PREMISES

TLC leases the Premises and Property to Purchaser, and Purchaser leases the Premises and Property from TLC, on the terms and conditions set forth in this Agreement.

SECTION 4 RENT

During the Primary Term of this Agreement, including any extensions thereof, Purchaser shall pay TLC as rent (the "Rent") for the Premises the sum of Ten Thousand and 00/100 Dollars (\$10,000.00) per month for the first seven (7) months of the Primary Term, and the sum of Eight Thousand and 00/100 Dollars (\$8,000.00) per month for the remaining months in the Primary Term. Rent shall be paid in advance on the first day of each month during the Primary Term, without demand or deduction, to TLC at its notice address for Richard U. Clark as set forth in Section 20, or at such other place as Seller may designate by written notice to Purchaser. The



first monthly rent payment is due on or before January 1, 2011, being the date that Purchaser receives possession.

SECTION 5 TAXES; PERMITTED CONTESTS

not provided

5.1. Purchaser shall pay all real estate taxes and assessments levied against the Premises which become due and payable during the Primary Term. However, any installments of taxes and assessments relating to the periods at the commencement of the Primary Term shall be prorated between Purchaser and TLC based on the number of days during the applicable taxing period each party shall occupy the Premises. Seller shall furnish to Purchaser copies of tax bills together with statements of the amount due from Purchaser. Purchaser shall pay those amounts within 30 days after receipt of Seller's statements. Purchaser shall provide Seller a copy of the receipt from the tax collector as proof of payment within the 30 days from the date of payment. Purchaser's obligations under this Section shall survive the expiration or termination of this Agreement.

contest taxes

5.2. Purchaser shall not be required, nor shall Seller have the right, to pay, discharge, or remove any taxes, charges, liens or encumbrances, or to comply with any legal requirements applicable to the Premises or the Land, as long as Purchaser contests the existence, amount, or validity of the matter in question by appropriate proceedings and Purchaser provides written notice to Seller of such contest proceeding. This right of Purchaser to withhold performances while proceedings are pending shall apply only if Purchaser's proceedings effectively prevent any lien, sale, forfeiture, or loss of the Premises or Land or Seller's rights under this Agreement. Nothing contained in this Section shall be deemed to relieve Purchaser from any obligation to pay the Rent. Purchaser shall pay to Seller at least one hundred (100%) of the contested amount

as reasonable security (the "Contest Security") as may be demanded by Seller to insure ultimate payment of the amounts and compliance with the legal requirements contested, and/or any potential sale or forfeiture of the Premises or any rent or other sum required to be paid by Purchaser under this Agreement. Seller may use the Contest Security to pay any amount reasonably necessary to release any lien or prevent any sale, forfeiture, or loss of the Premises. Any portion of the Contest Security not required for such purpose shall be returned to the Purchaser.

SECTION 6 UTILITIES

During the Primary Term, Purchaser shall obtain and pay for all sewer, water, electric, heat, trash removal, and other utility services furnished to or consumed on the Premises. Seller shall not be required to provide any utility service to Purchaser and shall not be responsible for any interruption in service.

SECTION 7 INSURANCE

7.1. Immediately upon commencement of the Primary Term, Purchaser shall procure and maintain, at Purchaser's sole expense (i) employer's liability and worker's compensation insurance as prescribed by applicable law; (ii) comprehensive general liability insurance (with products, completed operations, dramshop and independent contractors coverage) and comprehensive automobile liability insurance, all on an occurrence basis, with single-limit coverage for personal and bodily injury and property damage of at least Five Million Dollars (\$5,000,000) for each occurrence, and (iii) any other insurance as required from time to time by any franchisor. In connection with all significant construction at the Premises during the Primary Term, Purchaser shall cause the general contractor to maintain with an insurer approved by Seller and Purchaser comprehensive general liability insurance (with products, completed,

operations and independent contractors coverage) in at least the amount of Five Million Dollars (\$5,000,000) for each occurrence with Seller named as additional insured. Purchaser shall name Seller, franchisor and any mortgagee as additional insureds under these policies.

7.2. Purchaser shall keep the Buildings insured against loss by fire and all the risks and perils usually covered by an "all risk of physical loss" endorsement to a policy of fire insurance upon property comparable to the Premises, in an amount equal to not less than the greater of the replacement cost of the Buildings or the Purchase Price, and with Seller and any other holder of any mortgage on the Premises as additional insureds as their interests may appear.

7.3. The policies required by Sections 7.1 and 7.2 shall contain an agreement by the insurer that it will not cancel the policy except after ten (10) days prior written notice to Seller and Purchaser and that any loss otherwise payable under the policy shall be payable notwithstanding any act or negligence of Seller or Purchaser that might, absent such agreement, result in a forfeiture of all or a part of the insurance payment.

7.4. At the commencement of the term of this Agreement, Purchaser shall deliver to Seller certificates of the insurance required to be maintained under this Section. Purchaser shall also deliver to Seller at least ten (10) days prior to the expiration date of any such policy (or of any renewal policy), certificates for the renewal policy of this insurance.

SECTION 8 WAIVER OF LIABILITY AND SUBROGATION

Seller and Purchaser on behalf of themselves and all others claiming under them, including any insurer, waive all claims against each other, including all rights of subrogation, for loss or damage to their respective property (including, but not limited to, the Premises) arising from fire, smoke damage, windstorm, hail, vandalism, theft, malicious mischief, and any of the

other perils normally insured against in an "all risk of physical loss" insurance policy, regardless of whether insurance against those perils is in effect with respect to such party's property and regardless of the negligence of either party; provided, however, that this release shall be applicable and in force and effect only with respect to loss or damage fully covered by insurance and occurring during such time. As the Purchaser's insurance policy shall contain a clause or endorsement to the effect that any such release shall not adversely affect or impair said policies or prejudice the right of the Purchaser to recover thereunder. If either party so requests, the other party shall obtain from its insurer a written waiver of all rights of subrogation that it may have against the other party. If extra costs shall be charged therefor, each party shall advise the other thereof and of the amount of the extra cost, and the other party at its election, may pay the same, but shall not be obligated to do so.

SECTION 9 INDEMNIFICATION

Purchaser shall indemnify and hold Seller harmless against any and all claims, liabilities, damages, or losses resulting from injury or death of any person or damage to property occurring on or about the Premises or in any manner in conjunction with the use and occupancy of the Premises in whole or in part, unless the death, injury, or damage was sustained as a result of any tortuous or negligent act of Seller or Seller's agents.

SECTION 10 MAINTENANCE

Seller shall have no obligation for maintenance of the Premises whatsoever. During the Primary Term, Purchaser shall, at its sole expense, (a) maintain the Premises in good condition, including but not limited to all structural, electrical, plumbing, and HVAC, excepting only for reasonable wear and tear; (b) provide all necessary maintenance, repair, and replacements of, and keep in good operating condition, the water, gas, electrical, plumbing, heating, ventilating, air

conditioning, and all other mechanical and utility systems and facilities serving the Premises; (c) keep the sidewalks, parking areas, and drives on or about the Premises in a clean, sightly, and sanitary condition; (d) maintain and preserve the quantity and quality of the soft goods inventory (e.g., bedding and towels) and all furniture, fixtures, and equipment such as beds, televisions, clocks, lamps, desks, chairs, etc., except for reasonable wear and tear and loss due to the ordinary course of business (collectively, the soft goods and the furniture, fixtures, and equipment shall be referred to herein as the "Personal Property"); and (e) keep all grass mowed, shrubbery trimmed, and the yards free of excessive weed growth, so that the lawns and yards shall at all times be maintained in a neat and presentable condition. Until Purchaser has consummated the purchase of the Premises, Seller shall maintain ownership of the Personal Property, including any additions thereto made in the ordinary course of the operation of the Premises as a resort and campground due to wear and tear. Purchaser shall assume Seller's existing service and maintenance contracts related to the Premises (the "Service Contracts") including, without limitation, any property management system, the pest control agreement, the fire extinguisher service agreement, and any sprinkler system service contract. If Purchaser shall terminate any Service Contracts prior to the expiration of any such contract, Purchaser shall be solely responsible for any early termination expenses. Prior to such time that title to the Premises shall be conveyed to Purchaser, Purchaser shall notify Seller of any proposed changes it intends to make to the Service Contracts. Seller shall have the right, within its reasonable discretion, to approve or reject any proposed changes to the Service Contracts.

SECTION 11 ALTERATIONS

11.1. Purchaser shall have the right to make structural modifications, alterations and improvements listed on the attached EXHIBIT "B" without the Seller's prior written approval, in

Application for approval

[Signature]

 addition to paving, installation of sewer water lines, drilling of water wells, obtaining dock permits, obtaining architectural and engineering approval as necessary. Seller may, at Seller's sole discretion, require Purchaser to provide bonds to ensure the construction and completion of any Alterations prior to commencement by Purchaser.

paving
11.2. As part of such Alterations, Purchaser shall repave all private roads, parking lots and recreational vehicle ("RV") parking spaces on the Premises within seven (7) months following execution of this Agreement.

11.3. All modifications, alterations, and improvements shall be made in a good and workmanlike manner and shall not weaken the structure of the Buildings or materially lessen its value. All modifications, alterations, and improvements shall become the property of Seller at the expiration or earlier termination of this Agreement. Purchaser may, without Seller's consent, make nonstructural modifications, alterations, and improvements. Purchaser shall promptly pay its contractors and materialmen for all work done and performed by Purchaser, so as to prevent the assertion or imposition of liens upon or against the Premises.

11.4. Purchaser shall not remove any Personal Property from the Premises without replacing the removed Personal Property with new Personal Property of like quality. Purchaser may, without Seller's consent, install temporary partitions, shelves, bins, equipment, trade fixtures, and other personal property. Those items installed by Purchaser, other than replacement Personal Property as provided elsewhere herein, shall remain Purchaser's property and may be removed by Purchaser prior to the expiration or earlier termination of this Agreement.

11.5. Purchaser shall repair any damage to the Premises caused by that removal. Purchaser shall be solely responsible, at its own expense, for any and all improvements to the Premises required by any governmental or regulatory agency (collectively referred to as

"Required Improvements"). No amounts spent by Purchaser for the Required Improvements shall reduce or change the Purchase Price in any manner.

SECTION 12 DAMAGE AND DESTRUCTION

If, during the Primary Term, or any extension thereof, the Premises are damaged by fire or other casualty so as to be rendered untenable either in whole or in substantial part, Purchaser, within thirty (30) days of receipt of any insurance proceeds shall pay the Purchase Price to the Seller and Seller shall deliver a deed to the damaged Premises to Purchaser each as provided in Section 1 above.

SECTION 13 CONDEMNATION, LOSS OF ACCESS

If (i) all or part of the Premises shall be taken or condemned by a competent authority for a public or quasi-public use or purpose or if there is a negotiated purchase by such authority under threat of a taking (collectively, a "taking"), and if the loss of the part so taken substantially interferes with the use of the Premises by Purchaser, or (ii) due to any such taking, access to the Premises by motor vehicles as operated by Purchaser, its contractors, and its customers in the course of Purchaser's business as previously conducted is impaired or terminated, then Purchaser shall be entitled to all condemnation proceeds due to Seller as a result of such taking and Purchaser shall purchase the Premises from Seller as provided in Section 1 above.

SECTION 14 DEFAULT

14.1. If any of the following events ("defaults") shall occur: (i) Purchaser fails to pay the rent or any other sums payable by Purchaser under this Agreement (other than those obligations set forth in Section 1), and the failure continues for a period of fifteen (15) business days after the date due and payable; or (ii) Purchaser fails to perform any other obligations under

30
Days

this Agreement (other than those obligations set forth in Section 1) and the failure continues for thirty (30) days after written notice from Seller, or for an unreasonable period of time if thirty (30) days is not reasonably sufficient time to repair, remedy, or correct the obligation breached, and Purchaser commences cure within such thirty (30) day period and diligently pursues cure to completion, then Seller may re-enter the Premises, with or without terminating this Agreement; and if Seller so elects by giving written notice to Purchaser, Seller also may terminate this Agreement. If Seller at any time terminates this Agreement for any default other than those arising under Section 1, then, in addition to any other remedy it may have, it may recover from Purchaser all reasonable damages it may incur by reason of the default, including the cost of recovering the Premises, specific performance of Purchaser's obligation to purchase the Premises under Section 1, and the value at the time of termination of the excess, if any, of the amount of rent and charges reserved in this Agreement for the remainder of the term over the then reasonable rental value of the Premises for the remainder of the stated term, both figures being discounted to present value. Alternatively, Seller may elect to keep this Agreement in effect and recover monthly from Purchaser an amount equal to the rent and other charges due less the amount, if any, of any rentals which Seller may receive by reletting the Premises; however, nothing contained in this Section shall be deemed to impose upon Seller any duty to relet the Premises beyond the duties to mitigate, if any, imposed by law.

14.2. If Purchaser shall fail to make any payment within fifteen (15) business days after the date due, a late payment of five percent (5%) of the payment shall be due. If Purchaser shall fail to perform any act required to be made or performed under this Agreement, Seller, without waiving or releasing any obligation or default, may (but shall be under no obligation to), at any time, and upon reasonable notice to Purchaser, make the payment or perform the act for the

*Seller pays
and back
Purchaser*

account of and at the expense of Purchaser, and may enter upon the Premises for that purpose and take all actions as may be necessary to correct Purchaser's breach. No such entry shall be deemed an eviction of Purchaser. All sums so paid by Seller and all costs and expenses (including, but not limited to, reasonable attorneys' fees and expenses) so incurred, together with interest at the rate of ten percent (10%) per annum from the date of payment, shall constitute additional rent and shall be paid by Purchaser to Seller on demand.

14.3. In the event Purchaser is in default under the terms of this Agreement, other than the payment of Rent, then in any such event Seller may provide written notice of such default to Purchaser pursuant to this Section. Upon the expiration of thirty (30) days following the giving of such notice, if Purchaser (i) has failed to cure such default or (ii) in the case of a default (other than the payment of money) which by its nature cannot be completely cured within such thirty (30) day period, Purchaser does not within such period commence to cure the default, and diligently pursue and complete the cure in a reasonable period of time, then in either such event Seller may do all things necessary or desirable to remedy such default and perform the obligations of Purchaser which have not been fully or properly performed. Purchaser hereby irrevocably appoints Seller as his attorney-in-fact to enter upon the property and to complete the Building Improvements and the Purchaser Improvements and perform any other obligation of Purchaser that Purchaser has not fully and properly performed. Purchaser shall immediately upon demand reimburse for all costs and expenses incurred by Seller in connection with the foregoing plus interest to make such payment within thirty (30) days of written demand, and Seller may set off the amount of all costs and expenses incurred by Seller in connection with the foregoing, plus interest at the rate set forth in Section 14.2 against rent payment coming due under this Agreement.



14.4. The aforementioned 30-day period of time permitted for Seller to cure its default and the periods of time permitted for Purchaser to cure defaults hereunder shall be extended if the default cannot be cured within the time period allowed herein, so long as such party is diligently and continuously attempting to cure. The cure periods shall also be extended for any period of time during which the defaulting party is delayed in, or prevented from, curing due to fire or other casualty, or acts of God, strikes, lockouts, power shortages or outages, enactment, adoption, or promulgation of new laws, or the application or enforcement of laws. Notwithstanding the foregoing, there shall be no extended period in which to cure a monetary default.

SECTION 15 USE OF PREMISES

The Premises may be used, occupied, or sublet by Purchaser for the campground, hospitality, resort, retail fuel station and store business and any other uses as may be permitted by law, ordinance and/or zoning regulations and in the ordinary course of business without Seller's prior written consent, except that Purchaser shall not be entitled to request any change in permitted use or zoning laws affecting the Premises prior to Closing absent Seller's prior consent.

SECTION 16 COMPLIANCE WITH LAWS



During the Primary Term, Purchaser, at its expense, shall comply with all present and future laws and regulations applicable to its use and occupancy of the Premises. Purchaser agrees to hold Seller harmless from any cost, expense, or liability that may be imposed or assessed against Seller in connection with Purchaser's noncompliance with any such law, regulation, or requirements.

SECTION 17 REPAIRS

Purchaser shall be obligated to make, and Seller shall have no responsibility for, any structural repairs, modifications, or additions to the Premises, including, but not limited to, any repairs, modifications or additions to the Premises required pursuant to the Americans with Disabilities Act.

SECTION 18 ASSIGNMENT AND SUBLETTING

In accordance with the campground, hospitality and resort industry, Purchaser shall have the right to sublet all or any portion of the Premises in the normal course of business without the prior written consent of Seller. Notwithstanding the foregoing, Purchaser shall be able to assign this Agreement, whether in whole or in part, with the prior written consent of Seller, which shall not unreasonably be withheld. Any such assignment shall require the Assignee to assume and become bound to perform and observe all of the covenants and agreements of Purchaser under this Agreement. No such assignment shall relieve the assignor of its obligations hereunder..

TLC currently holds a lease from South Carolina Public Service Authority ("SCPSA"). Seller will use its reasonable best effort to obtain any and all approvals for the sublease thereof to Purchaser. Any and all payments to SCPSA under this lease shall be the sole responsibility of Purchaser. Any lease payments previously made to SCPSA by Seller shall be prorated as of January 1, 2011, and on that date, Purchaser shall reimburse Seller for the unexpired portion of the prepaid lease term.

**SECTION 19
SUBBORDINATION OF LEASE**

Seller hereby warrants and represents that the existing lease for the portion of the Premises containing the retail fuel station and store shall be subordinate to this Agreement. Seller hereby assigns to Purchaser any and all rents and income from the retail fuel station and store lease.

**SECTION 20
NOTICES**

All notices to be given to either party shall be deemed given if made in writing and deposited in the United States mail, postage prepaid, return receipt requested, and addressed to the parties at the following addresses:

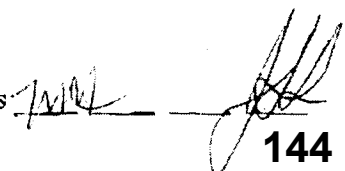
SELLER: TLC HOLDINGS, LLC
James C. Thigpen
P.O. Box 1257
7860 Wash Davis Road
Summerton, South Carolina 29148

Richard U. Clark
3124 Great Wood Way
Knoxville, Tennessee 37922

Jimmy S. (Steve) Lovell
20 Ambriance Drive
Burr Ridge, Illinois 60527

PURCHASER: M. B. HUDSON
c/o ANDREW F. TUCKER, ESQ.
385 2nd Avenue, Suite 1
Dayton, Tennessee 37321

Either party may change its notice address by giving notice of the change to the other.

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SECTION 21 MORTGAGES AND LIENS

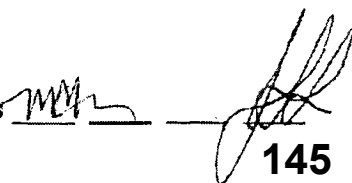
Seller currently has two (2) liens encumbering the Premises. It is clearly understood between the parties that Seller shall not allow any further or additional liens to be placed or encumber the Premises at any time during the Primary term or any extension thereof.

There are two pending actions relating to the campground property in the Court of Common Pleas for Clarendon County, South Carolina, one captioned *First Citizens Bank vs. Thigpen, et al.*, Case No. 08-CP-14-559, and the second captioned *Edwards vs. TLC Holdings, et al.*, Case No. 09-CP-14-58. Seller covenants, consents and agrees that these actions shall be dismissed or otherwise addressed on or before Closing on the entire Premises, so that said pending legal actions shall in no way encumber the Property or hinder said Closing. There is no other pending or threatened litigation, nor any legal or administrative action of any kind or character whatsoever, affecting the Property or any portion thereof.

Purchaser shall not permit any liens, whether consensual, judgment or statutory, to be placed on or encumber the Premises. Should any such lien be asserted or filed, Purchaser shall bond against or discharge the same within ten (10) days after written request by Seller. In the event Purchaser fails to remove said lien within said ten (10) days, Seller may, at its sole option, elect to satisfy and remove the lien by paying the full amount claimed or otherwise, without investigating the validity thereof. Seller's election to discharge liens as provided hereunder shall not be construed to be a waiver or cure of Purchaser's default hereunder

SECTION 22 SUCCESSORS AND ASSIGNS

Subject to the provisions of Section 14, this Agreement shall bind and inure to the benefit of the respective heirs, personal representatives, successors, and permitted assigns of Seller and Purchaser.

Handwritten signature and initials in black ink, located at the bottom right of the page.

**SECTION 23
PURCHASER'S PROPERTY**

All trade fixtures, furnishings, equipment, and other personal property placed or maintained on the Premises shall be at Purchaser's sole risk, and Seller shall not be liable for any loss or damage to such property from any cause whatsoever, and shall not provide any insurance on such property.

**SECTION 24
QUIET ENJOYMENT**

Seller covenants that, if Purchaser pays the rent and performs all of its obligations under this Agreement, Purchaser shall peaceably and quietly enjoy and possess the Premises throughout the term subject only to the conditions set forth in this Agreement.

**SECTION 25
SIGNS**

Any and all signs placed on the Premises by Purchaser shall be maintained in compliance with all applicable governmental laws and regulations.

**SECTION 26
NONWAIVER**

No waiver of any condition or covenant of this Agreement by either party shall be deemed to imply or constitute a further waiver of the same or any other condition or covenant, and nothing contained in this Agreement shall be construed to be a waiver on the part of Seller of any right or remedy in law or otherwise.

**SECTION 27
RIGHT OF ENTRY**

Upon reasonable notice to Purchaser, Seller shall have the right to enter the Premises during normal business hours to examine its condition; to make any repairs Seller deems

necessary for the safety, preservation, or improvement of the Premises. Each entry by Seller in accordance with this Section 27 shall be made in such a manner as will not unreasonably interfere with Purchaser's use of the Premises.

SECTION 28 ENVIRONMENTAL MATTERS

28.1. Seller represents and warrants to Purchaser that to the best of Seller's knowledge, as of the date hereof, no "Hazardous Substances" (as hereafter defined), or any other toxic material or medical waste are present on or in the Building or Land, other than fuel sold by the convenience store, or other amounts used in the ordinary course of the businesses operated upon the Premises (and, as to those, all are in material compliance with applicable law), and Seller shall indemnify Purchaser against any and all claims, demands, liabilities, losses and expenses, including consultant fees, court costs and reasonable attorneys' fees, arising out of any breach of the foregoing warranty.

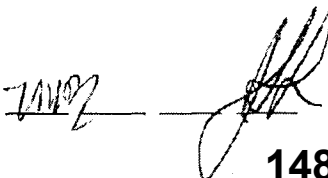
28.2. Except for Hazardous Substances or other toxic materials or medical waste brought, kept, or used in the Premises in commercial quantities similar to those quantities usually kept on similar premises by others in the same business, profession, or medical specialty, and which are used and kept in compliance with applicable public health, safety, and environmental laws, Purchaser shall not allow any Hazardous Substance or other toxic material or medical waste to be located in, on, or under the Premises or allow the Premises to be used for the manufacturing, handling, storage, distribution, or disposal of any Hazardous Substance or other toxic material.

28.3. Purchaser shall at all times and in all respects comply with all federal, state, or local laws, ordinances, regulations, and orders applicable to the Premises or the use thereof relating to industrial hygiene, the handling, storage and disposal of medical waste, environmental

protection, or the use, analysis, generation, manufacture, storage, disposal, or transportation of any Hazardous Substance, toxic material, or medical waste.

28.4. If Purchaser becomes aware of the presence of any Hazardous Substance in or on the Premises (except for those Hazardous Substances or other toxic material or medical waste brought, kept, or used in the Premises by Purchaser in commercial quantities similar to those quantities usually kept on similar premises by others in the same business, profession, or medical specialty and which are used and kept in compliance with applicable public health, safety, and environmental laws) or if Purchaser, or the Premises, becomes subject to any order of any federal, state, or local agency to repair, close, detoxify, decontaminate, or otherwise cleanup the Premises, Purchaser shall, at its own cost and expense, carry out and complete any repair, closure, detoxification, decontamination, or other cleanup of the Premises; provided that Purchaser shall not be responsible for any of the foregoing relating to any Hazardous Substance, or other toxic materials, or medical waste located on, in, or under the Premises on the date of this Agreement, all of which shall be the responsibility of Seller pursuant to Section 28.1. If Purchaser fails to implement and diligently pursue any such repair, closure, detoxification, decontamination, or other cleanup of the Premises, Seller shall have the right, but not the obligation, to carry out such action and to recover all of the costs and expenses from Purchaser.

28.5. "Hazardous Substances" as such term is used in this Agreement means any hazardous or toxic substance, material, or waste regulated or listed pursuant to any federal, state, or local environmental law, including without limitation, the Clean Air Act, the Clean Water Act, the Toxic Substances Control Act, the Comprehensive Environmental Response Compensation and Liability Act, the Resource Conservation and Recovery Act, the Federal Insecticide, Fungicide, Rodenticide Act, the Safe Drinking Water Act, and the Occupational Safety and

Handwritten initials "JW" and a signature.

Health Act, except for any reference to petroleum or petroleum products. The parties hereby acknowledge that the Premises has a retail gasoline and diesel service station located thereon, and any reference to Hazardous Substances specifically exclude petroleum or petroleum products.

SECTION 29 PARTIAL INVALIDITY

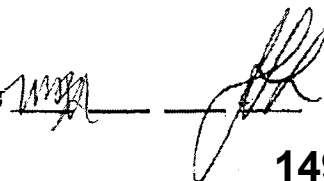
If any provision of this Agreement or its application to any person or circumstances shall to any extent be invalid or unenforceable, the remainder of this Agreement, or the application of that provision to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected, and each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

SECTION 30 MEMORANDUM OF LEASE

In addition to the execution of this Agreement, the parties shall execute a memorandum of this agreement in recordable form, which, in addition to the matters which may be required by applicable law, shall also include a description of the Premises leased hereunder, and those provisions (other than the amount of rent and the Purchase Price) requested by any party hereto.

SECTION 31 ENTIRE AGREEMENT

This Agreement contains the entire agreement between the parties and cannot be amended unless the amendment is in writing and executed by the party against whom the enforcement of the amendment is sought.

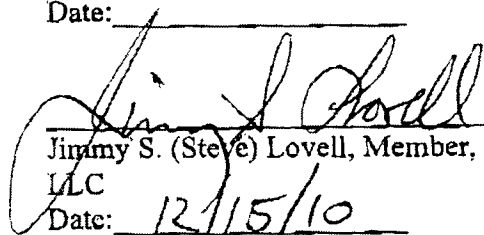
Handwritten initials and a signature, likely representing the parties to the agreement.

IN WITNESS WHEREOF, this Agreement has been executed as of the date and year
written herein below.

SELLER:
TLC Holdings, LLC

James C. Thigpen, Member, TLC Holdings, LLC
Date: _____

Richard U. Clark, Member, TLC Holdings, LLC
Date: _____


Jimmy S. (Steve) Lovell, Member, TLC Holdings,
LLC
Date: 12/15/10

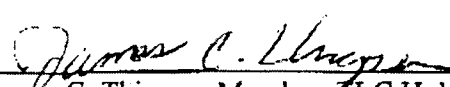
PURCHASER:


M. B. Hudson
Date: 12/16/10

[Signatures on Next Page]

IN WITNESS WHEREOF, this Agreement has been executed as of the date and year written herein below.

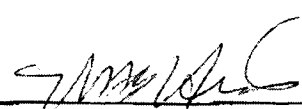
SELLER:
TLC Holdings, LLC


James C. Thigpen, Member, TLC Holdings, LLC
Date: 12/15/10

Richard U. Clark, Member, TLC Holdings, LLC
Date: _____

Jimmy S. (Steve) Lovell, Member, TLC Holdings, LLC
Date: _____

PURCHASER:

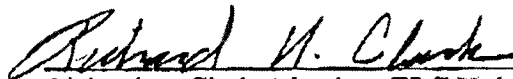

M. B. Hudson

Date: 12/15/10

IN WITNESS WHEREOF, this Agreement has been executed as of the date and year
written herein below.

SELLER:
TLC Holdings, LLC

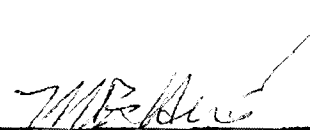
James C. Thigpen, Member, TLC Holdings, LLC
Date: _____



Richard U. Clark, Member, TLC Holdings, LLC
Date: 12/15/2010

Jimmy S. (Steve) Lovell, Member, TLC Holdings,
LLC
Date: _____

PURCHASER:



M. B. Hudson

Date: 12/15/2010

EXHIBIT A

A. CAMPGROUND KNOWN AS BIG WATER RESORT:

All that certain piece, parcel or tract of land lying, being and situate in School District No. 1 of Clarendon County, South Carolina, containing 30.44 acres according to plat hereinafter described and measuring and bounding as follows: beginning at an old iron found on the North bound exit ramp right of way from Interstate 95 at Exit 102, thence N 62 degrees 24'24" E for 3.66 feet along the right of way to a concrete monument, thence N 62 degrees 08'56" E for 120.09 feet along the right of way to an iron, thence N 70 degrees 36'47" E for 160.27 feet along the right of way to an iron, thence N 79 degrees 57'21" E for 93.40 feet along the right of way to a concrete monument, thence N 82 degrees 19'44" E for 190.85 feet along the right of way to a concrete monument, thence N 81 degrees 00'07" E for 82.23 feet along the right of way to an iron, thence N 74 degrees 05'12" E for 189.38 feet along the right of way to an iron, thence N 72 degrees 17'50" E for 38.91 feet along the right of way to an iron, thence S 56 degrees 09'56" E for 439.73 feet along the property line of lands being conveyed to Lee-Moore Oil Company, Inc. to an iron, thence S 56 degrees 09'26" E for 114.35 feet along the property line of land being conveyed to Lee-Moore Oil Company, Inc. to an iron, thence S 56 degrees 09'26" E for 253.97 feet along the property line of W. R. Williams to a concrete monument found on the 33 foot right of way of SC Highway S-14-390, thence S 33 degrees 10'53" W for 219.18 feet along the right of way to an iron, thence S 56 degrees 49'43" W for 1356.96 feet along the property line of Robert Malanuk to a concrete monument, thence N 25 degrees 40'07" W for 660.32 feet along the property line of the South Carolina Public Service Authority to an iron, thence N 25 degrees 42' W for 77.70 feet along the property line of the South Carolina Public Service Authority to a concrete monument, thence N 47 degrees 35' W for 248.5 feet along the property line of the South Carolina Public Service Authority to an iron, thence N 39 degrees 05'14" E for 394.98 feet along the right of way of Interstate 95 to the point of beginning. SUBJECT HOWEVER, to an easement to the Carolina Power and Light Company recorded in Deed Book A-26 at Page 165, also easement for absorption field recorded in Deed Book A-61 at Page 342, also sign lot and right of way recorded in Deed Book A-126 at page 478 and an easement from W. R. Williams, et al recorded in Deed Book A-109 at Page 551. SUBJECT to Black River Electric Coop. Power line easement as shown on plat described below. Subject to any visible and unrecorded easements and right of ways not revealed by current survey.

For a more particular description, reference may be had to a plat by H. F. Oliver, Surveyor, dated February 19, 1988, recorded in the Office of the RMC for Clarendon County in Plat Book 39 at page 123.



[Handwritten signature]

Lovell 00655

FOR DERIVATION, SEE BELOW.

Said tract being designated as Clarendon Tax Map No. 035-05-00-001-00.

TRACT II:

ALSO: All that piece, parcel, or tract of land lying, being and situate in School District No. 1 of Clarendon County, South Carolina, containing 3.21 acres on a plat hereinafter referred to, and bounding and measuring as follows: on the Northeast by SC Highway S-14-400 and measuring thereon 243.71 feet; on the Southeast by SC Highway S-14-390 and measuring thereon 618.30 feet; on the Southwest by lands of Lee Moore Oil Company, Inc. and measuring thereon 253.99 feet; on the Northwest by lands of Lee Moore Oil Company, Inc. and measuring thereon 755.15 feet.

For a more particular description of said tract reference may be had to a plat made by H. F. Oliver, Surveyor, dated March 15, 1988, recorded in the Office of the RMC for Clarendon County in Plat Book 44 at Page 36.

Said tract being designated as Clarendon Tax Map No. 035-06-02-007-00.
Said tracts having been conveyed to TLC Holdings, LLC by Deed of The Big Water Resort, LLC, dated 23 April, 2003, recorded on 9 May, 2003 in the Office of the RMC for Clarendon County in Deed Book A-497 at Page 00009.

TOGETHER WITH the Leasehold interest in that certain Lease between the Seller and the South Carolina Public Service Authority, pertaining to the waterfront property adjacent to the premises above described.

All buildings, fixtures, equipment used in the operation of the campground facility located on the above described premises.

SUBJECT HOWEVER to those certain Restrictive Covenants dated 3 November, 2003, recorded in the Office of the RMC for Clarendon County and any Amendments thereto and subject to certain Contracts between the Optionor and members of The Big Water Resort and others.

SUBJECT FURTHER, to all easements and rights of way of record.

B. CONVENIENCE STORE. That certain convenience store facility and the lands adjacent thereto known as "Big Water Country Store and Restaurant" described as follows:

All that piece, parcel or tract of land with buildings and improvements located thereon lying, being and situate Northwest of the Intersection of SC Highway S-14-390 and SC Highway S-14-400 in School District 1 of Clarendon County, South Carolina, containing 3.73 acres, being designated as Tract 2A on the plat

Sante Cooper

MBA

Lovell 00656

hereinafter referred to and bounding and measuring as follows: On the Northeast by Tract B on said plat and measuring thereon 439 feet; on the Southeast by the right of way of SC Highway S-14-400 and measuring thereon 318.4 feet; on the South by the intersection of SC Highway S-14-390 and SC Highway S-14-400, and measuring thereon 68.4 feet; On the Southwest by right-of-way of SC highway S-14-390, and measuring thereon 367.8 feet; on the Northwest by the arc of the curve of an intersection of an access strip and SC Highway S-14-390 and measuring thereon along said arc 50.58 feet and by said access strip and measuring thereon 338 feet.

For a more particular description of said tract, reference may be had to a plat made by H.F. Oliver, RLS, dated February 23, 1973, recorded in the Office of the Clerk of Court for Clarendon County in Plat Book 25 at Page 94, whereon said tract is designated as Tract 2A.

FOR DERIVATION, SEE BELOW.

Said premises being designated as Clarendon Tax Map Parcel N. 035-06-02-005-00.

ALSO:

All that certain piece, parcel, or tract of land, lying, being, and situate in School District No. 1 of the County of Clarendon, State of South Carolina, containing 2.50 acres and being designated as Tract B-1, according to plat hereinafter described and measuring and bounding, now or formerly, as follows: On the Northeast by lands of Ruby P. Levi, and measuring thereon 428.96 feet; On the Southeast by Tract B-2, and measuring thereon 304.55 feet; On the Southwest by lands of H.F. Swilley, a 50 foot access strip and lands of C&M Petroleum, and measuring thereon 281.99 feet; and on the Northwest by Highway Right-of-Way, and measuring thereon 340.64 feet.

For a more particular description, reference may be had to a plat by R.G. Mathis Land Surveying dated November 2, 1988, and recorded in the Office of the Clerk of Court of Clarendon County in Plat Book 42 at Page 86.

ALSO:

All of that certain piece, parcel, or strip of land, shown as an "Access Strip" on that certain plat prepared by H.F. Oliver, RLS, dated February 23, 1973, and recorded in the Office of the Clerk of Court in Plat Book 25 at Page 94, according to which plat, said property is bounded, now or formerly, and measures as follows: On the Northeast by Tract B on said Plat and measuring thereon a distance of 50 feet; On the Southeast by Tract 2-A and measuring thereon a distance of 338 feet; On the Southwest by the right-of-way of S.C. Highway S-14-390; and on the Northwest by Tract 1-A, and measuring thereon a distance of 338 feet.

7/20/88

SUBJECT, HOWEVER, to such easements of right-of-way for utilities and roadways as shall appear upon said plats.

FOR DERIVATION, SEE BELOW.

Above Tract B-1 and Access Strip being designated as Clarendon TMP#035-06-02-008-00.

ALSO:

All that piece, parcel, or tract of land together with any improvements located thereon, lying and being situate in Clarendon County, South Carolina, being designated as Tract B-2 on the plat hereinafter referred to, containing 2.5 acres and bounding, now or formerly, and measuring as follows: On the North by lands of Ruby P. Levi and measuring thereon 357.64 feet; On the East by the right-of-way of South Carolina Highway S-14-400, and measuring thereon 304.55 feet; On the South by lands of H.F. Swilley and measuring thereon 357.64 feet; On the West by Tract B-1 on said Plat, and measuring thereon 304.55 feet.

Above tracts having been conveyed to TLC Holdings, LLC by Deed of Santee Interstate Systems, Inc., Shawn M. Reardon and Cynthia C. Reardon by Deed dated 18 September, 2003, and recorded in the Office of the RMC for Clarendon County in Deed Book A-508, at Page 310.

Said lot begin designated as Clarendon County Tax Map Parcel No. 035-06-02-002-00.

Together with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise appertaining to the above tracts.

C. ROGER'S TRACT

All that certain piece, parcel or tract of land, lying, being and situate in the County of Clarendon, State of South Carolina, containing 57.81 acres, more or less, being described as follows: Beginning at an iron new ly placed on the 33 foot right-of-way of South Carolina Highway S-14-300, thence, North 30 degrees, 50 feet, 7 inches, East for 3346.76 feet along the 33 right-of-way of South Carolina Highway S-14-390 and South Carolina Highway S-14-400 to an old concrete monument. Thence, North 77 degrees, 20 feet, 33 inches, East for 71.68 feet along a site angle created by a 90 degrees Bend in South Carolina Highway S-14-400 to an old concrete monument. Thence, South 58 degrees, 20 feet, 23 inches, East for 1555.29 feet along the right-of-way of South Carolina Highway 400 to a new iron. Thence, South 71 degrees, 39 feet, 58 inches, West for 908.20 feet along the property line of the South Carolina Public Service Authority to an old concrete monument. Thence, South 49 degrees, 33 feet, 49 inches, West for 350.86 feet along the property line of the South Carolina Public Service Authority to an old concrete monument. Thence, South 45 degrees, 50 feet, 18 inches, West for 1076.74 feet

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along the property line of the South Carolina Public Service Authority to an old concrete monument. Thence, South 64 degrees, 37 feet, 33 inches, West for 634.11 feet along the property line of the South Carolina Public Service Authority to an old concrete monument. Thence, South 56 degrees, 47 feet, 48 inches, West for 524.93 feet along the property line of the South Carolina Public Service Authority to an old concrete monument. Thence, South 57 degrees, 28 feet, 19 inches, West for 350.08 feet along the property line of Robert Malenvik to the point of beginning.

For a more particular description of said tract, reference may be had to a plat made by H. F. Oliver, RLS, dated 17 March 1988, recorded in the Office of the Clerk of Court for Clarendon County in Plat Book 39 at Page 204.

Said premises having been conveyed to TLC Holdings, LLC by deed of Rodney L. Rogers dated May 19, 2008 and recorded May 21, 2008 in the Office of the Clerk of Court for Clarendon County in Deed Book A-699 at Page 275.

Said tract being designated as Clarendon County Tax Map Parcel Number 035-00-00-013-00.

met

**EXHIBIT B - A list of improvements that Purchaser wishes to make w/o additional approvals
from Seller.**

**EXHIBIT
6.0**

EXHIBIT 6.0

MEMBERSHIP INTEREST PURCHASE AGREEMENT

THIS MEMBERSHIP INTEREST PURCHASE AGREEMENT (the "Agreement") is made and entered into as of the ____ day of December 2010, by and among M. B. HUDSON (referred to herein as "Purchaser"), RICHARD U. CLARK, JIMMY S. LOVELL and JAMES C. THIGPEN (referred to herein collectively "Seller") and THE BIG WATER RESORT, LLC, a South Carolina limited liability company (referred to herein as "Company").

WITNESSETH:

WHEREAS, Seller is all the members of the Company with said membership interest subject to the terms and conditions of that certain Operating Agreement of The Big Water Resort, LLC dated December 1, 2002 and its Amendment dated June 3, 2008 ("Operating Agreement"). All capitalized terms not defined herein shall have those meanings set forth in the Operating Agreement; and

WHEREAS, Seller desires to sell all of their Membership Interest in the Company, which equals One Hundred Percent (100%) of the outstanding membership interests (referred to as the "Interest") to Purchaser, and Purchaser desires to purchase said Interest, being bound to the terms and conditions of the Operating Agreement.

NOW THEREFORE, in consideration of the foregoing, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties covenant, consent and agree as follows:

1. **Sale and Purchase.** Subject to the terms and conditions hereinafter set forth, Seller hereby sells, transfers, assigns and conveys the Interest to Purchaser, and Purchaser, in reliance on the representations made by Seller herein, accepts the sale, transfer, assignment and conveyance of the Interest from Seller in consideration for the



payment of the purchase Price (as defined below), subject to the terms and conditions set forth herein.

2. **Purchase Price.** The purchase price payable by Purchaser for the Interest is Five Hundred Thousand and 00/100 Dollars (\$500,000.00) ("Purchase Price") which shall be paid as follows at Closing:

(a) Ten and 00/100 Dollars (\$10.00) shall be paid by Purchaser to Seller;

(b) Purchaser shall execute a Promissory Note made payable to Seller for the balance of the Purchase Price, in form acceptable to Seller, which shall be due and payable upon the closing of the purchase of the membership interests in TLC Holdings, LLC, a South Carolina limited liability company also owned by Seller; and

(c) Purchaser shall assign, hypothecate and pledge the Interest to Seller as collateral for the Promissory Note, in form acceptable to Seller.

3. **Closing.** The closing of the sale and purchase shall take place on December 30, 2010 at the Law Office of Andrew F. Tucker, 385 2nd Avenue, Suite 1, Dayton, Tennessee or at such place as the parties may mutually agree.

4. **Actions at the Closing.**

(a) At the closing the Seller shall deliver to the Buyer the following:

(i) Membership Interest certificates for One Hundred percent (100%) of the Interest to be sold by Seller in the Company;

- (ii) A Certificate of Good Standing from the State of South Carolina;
 - (iii) A list of all debts and obligations of the Company and principal balance(s) of said debts and obligations as of the date of Closing, each of which are to be assumed by Purchaser at Closing, except only those loans made by Messrs. Clark and Lovell to the Company, which shall be repaid from the Purchase Price.
 - (iv) A list of all assets of the Company, including all cash on hand, all of which shall be assigned to Purchaser at Closing except for receivables/client reserve fund from Universal Guardian Acceptance (which Purchaser agrees shall remain the property of Seller, and any payments received by Purchaser after Closing shall promptly be remitted to Seller);
 - (v) A commitment letter to finance the balance of the Purchase Price at six percent (6%) per annum for up to five (5) years based upon a 240 month amortization schedule, with principal and interest payable monthly, upon Purchaser's closing on the purchase of the membership interests in TLC, LLC, a South Carolina limited liability company; and
- (b) At the closing the Buyer and Seller shall deliver to the Seller:
- (i) Ten and 00/100 Dollars (\$10.00) in Cash;
 - (ii) A Promissory Note in the amount of \$499,990.00 payable to Seller for the balance of the Purchase Price which shall be due and payable upon the Closing (as defined in the Lease Purchase Agreement of even date among Seller, Purchaser and TLC Holdings, LLC; and

(iii) An assignment, hypothecation and pledge agreement of the Interest as collateral for the Promissory Note.

5. **Representations and Warranties by Seller.** Seller represents, warrants and covenants to Purchaser as follows:

(a) **Capitalization and Interest.** The Interest represents 100% of Seller's capital and equity interest in the Company. There are no options, warrants or other rights to subscribe for or purchase any interest in the Company or securities convertible into or exchangeable for, or which otherwise confer on any holder any right to acquire, any interest in the Company, nor are the Company or Seller committed to issue any such option, warrant or other right.

(b) **Title.** Seller is the sole legal and equitable owner of the Interest, and Seller's absolute title thereto is not the subject of any claim or challenge threatened or asserted by any third party. Company has good and marketable title to all of its properties and assets. Further, there are no actions, suits or proceedings, either at law or in equity, or before any commission or administrative authority, or any kind now pending in any manner involving Company, or any of its property, or to the knowledge of Sellers, threatened.

(c) **No Liens or Restrictions.** The Interests are not subject to any security interest, lien, restriction on transfer, "buy sell" agreement, voting agreement, redemption agreement, option, or other agreements.

(d) **Consents.** No consents, authorizations or approvals of governmental authorities are necessary in order for Seller to perform its obligations pursuant to this Agreement.

(e) **Organization and Operation of Company.** The Company is a limited liability company duly organized, validly existing and in good standing under the laws of the State of South Carolina, has full corporate power to own its own property and carry on its business as and where it is now being conducted, in compliance with all laws, regulation and orders applicable to its business. The Operating Agreement of Company is in full force and effect and no amendments, modifications, changes or deletions have been made thereto. Further, Company does not control, directly or indirectly, any other corporation, association or business organization.

(f) **Taxes.** Company has filed with the appropriate governmental agencies all tax returns required to be filed by it prior to the date of this Agreement, and it has paid taxes due by it as reflected on said returns.

6. **Covenants of Seller.** Prior to or pending the closing, the Seller covenants that:

(a) Seller will cause Company to maintain itself at all times as a corporation duly organized, validly existing and in good standing under the laws of the State of South Carolina and to operate in a good and diligent manner and not engage in

any transaction or make any commitment or expenditure other than in the ordinary course of business, except such transactions, commitments and expenditures as shall be required or contemplated by this Agreement or which shall be presented to and approved by Purchaser (such approval not to be unreasonably withheld).

(b) Seller will cause Company to maintain in full force and effect all policies of insurance.

(c) Seller will cause Company to cooperate fully with Purchaser, his counsel, accountants and other representatives in connection with the closing and the consummation of the transaction herein contemplated, and make available to Purchaser, his counsel, accountants and other representatives all pertinent information with respect to the condition, business property, assets and liabilities of Company and afford Purchaser, his counsel, accountants or other representatives access during normal business hours to all the physical properties of the Company.

7. **Miscellaneous.**

(a) **Entire Agreement.** This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof, supersedes all prior understandings, commitments and agreements and may be amended only by a writing signed on behalf of each party. There are no agreements, promises, warranties, representations, inducements, covenants or undertakings other than those expressly set forth in this Agreement.

(b) **Notices.** Any notices or consents required or permitted by this Agreement shall be in writing and shall be deemed delivered if delivered in person or

if sent by certified mail, postage prepaid, return receipt requested, as following, unless such address is changed by written notice hereunder:

(i) If the Seller:

James C. Thigpen
P.O. Box 1257
7860 Wash Davis Road
Summerton, South Carolina 29148

Richard U. Clark
3124 Great Wood Way
Knoxville, Tennessee 37922

Jimmy S. (Steve) Lovell
20 Ambriance Drive
Burr Ridge, Illinois 60527

(ii) If to Purchaser:

M. B. HUDSON
c/o ANDREW F. TUCKER, ESQ.
385 2nd Avenue, Suite 1
Dayton, Tennessee 37321

(iii) If to Company:

THE BIG WATER RESORT, LLC
P.O. Box 1257
7860 Wash Davis Road
Summerton, South Carolina 29148

(c) **Assignment.** This Agreement and all of the provisions hereof shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, successors and permitted assigns, but neither this Agreement nor any of the rights, interest or obligations hereunder shall be assigned by either of the parties hereto without

the prior written consent of the other party, nor is this Agreement intended to confer upon any other person except the parties any rights or remedies hereunder.

(d) **Governing Law.** This Agreement shall be construed as to both validity and performance and enforced in accordance with and governed by the laws of the State of South Carolina.

(e) **Captions.** The section headings contained in this Agreement are solely for the purpose of reference, are not part of the agreement of the parties and shall not in any way affect the meaning or interpretation of this Agreement.

(f) **Further Action.** The parties shall execute and deliver all documents, provide all information and take or refrain from taking action as may be necessary or appropriate to achieve the purposes of this Agreement.

(g) **Expenses, Etc.** Except as otherwise provided in this Agreement, whether or not the transactions contemplated by this Agreement are consummated. Seller and Purchaser shall pay their own expenses and the fees and expenses of their counsel, financial advisors, accountants and other experts.

(h) **Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original as against any party whose signature appears thereon, and all of such counterparts shall together constitute one and

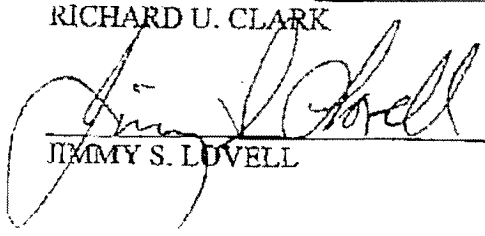
the same instrument. This Agreement shall become binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of all of the parties reflected hereon as the signatories. This Agreement may be executed and delivered by facsimile or other means of electronic communication; any original signatures that are initially delivered by electronic communication shall be physically delivered with reasonable promptness thereafter.

[Signatures on Next Page]

IN WITNESS WHEREOF, the parties have set their hands hereto on the date first above written.

SELLER:

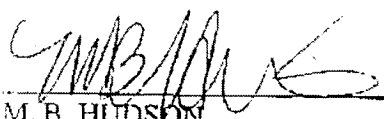
RICHARD U. CLARK



JIMMY S. LOVELL

JAMES C. THIGPEN

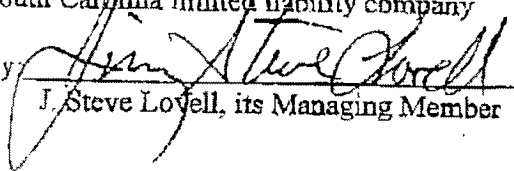
PURCHASER:



M. B. HUDSON

COMPANY:

THE BIG WATER RESORT, LLC, a
South Carolina limited liability company

By 

J. Steve Lovell, its Managing Member

10-12-16 14:47 FAX 0034852670 >> 4235700809 P 1/1

IN WITNESS WHEREOF, the parties have set their hands hereto on the date first above written.

SELLER:

RICHARD U. CLARK

JIMMY S. LOVELL



JAMES C. THIGPEN

PURCHASER:



M. B. HUDSON

COMPANY:

THE BIG WATER RESORT, L.L.C., a
South Carolina limited liability company

By: _____
J. Steve Lovell, its Managing Member

IN WITNESS WHEREOF, the parties have set their hands hereto on the date first above written.

SELLER:


RICHARD U. CLARK

JIMMY S. LOVELL

JAMES C. THIGPEN

PURCHASER:


M. B. HUDSON

COMPANY:

THE BIG WATER RESORT, LLC, a
South Carolina limited liability company

By: _____
I, Steve Lovell, its Managing Member

EXHIBIT
7.0



MURPHY & GRANTLAND, P.A.

EXHIBIT

Timothy J. Newton
Direct dial 803-454-1242
tnewton@murphygrantland.com

November 8, 2018

PERSONAL AND CONFIDENTIAL SETTLEMENT NEGOTIATIONS
VIA U.S. MAIL AND E-MAIL

Morris B. Hutson
1545 Bilmore St.
Orangeburg, SC 29115

Re: TLC Holdings, LLC, et al., v. Hutson
Civil Action No.: 2015-CP-14-00615
Claim No.: 15004802
Insured: BWR, Inc. d/b/a Big Water Resort
Our File No.: 1565-0050

Dear Mr. Hutson:

This letter follows your correspondence dated November 1 and 6, 2018, in which you demanded \$500,000 from Penn-America. From your correspondence, it appears your claim is based upon Penn-America's decision to proceed with participating in the scheduled mediation on November 2, 2018. Your correspondence also appears to argue that Penn-America has a duty to provide you with counsel to represent you in prosecuting certain claims you have alleged against TLC Holdings, LLC, its principals, and its lawyers.

As you may recall, in August 2018 you served notice to Penn-America that you would sue Penn-America if it did not immediately settle the above-referenced case (hereinafter "the Defamation action"), even though the mediation at that time was scheduled for September 12, 2018. As you know, the mediation had to be postponed due to a hurricane and was rescheduled for November 2, 2018. Your recent correspondence, sent the day before the mediation, makes the diametrically opposite claim that if Penn-America participates in the mediation, you will sue Penn-America.

The scheduled mediation was agreed upon by all parties and approved by the court in the declaratory judgment action addressing Penn-America's coverage (Penn-America Ins. Co. v. Big Water Resort, LLC, Civ. Action No. 2:16-cv-01943-DCN). Extensions were also obtained in the pending appeal of the judgment in the Defamation action in order to provide the opportunity for the parties to mediate.

Penn-America cannot unilaterally pull out of a scheduled mediation. In addition to the fact that only months ago, you were threatening to sue Penn-America for not settling the case, there are other interests that Penn-America must consider. The TLC parties are now judgment creditors, and in that capacity have a vested, direct claim on the policy. Lee v. Gulf Ins. Co., 248 S.C. 296, 298, 149 S.E.2d 639, 641 (1966) ("The law is well settled in this jurisdiction that an injured party who brings suit against a liability carrier in order to collect on a judgment previously acquired against an insured is possessed of all rights of the insured . . ."). Penn-America cannot ignore the TLC parties' claim

simply because you believe the claim should not be paid. In addition, the excess carrier, Starstone f/k/a Torus, has formally notified Penn-America that if Penn-America fails to settle the above-referenced case, Starstone may bring legal action against Penn-America.

Courts in South Carolina have held that liability insurers have a duty to settle cases if there is a reasonable opportunity for doing so. In most situations, insureds demand that their liability insurers settle cases to extinguish the legal claims against them. It is a relatively rare situation for a putative insured to demand that his or her liability carrier refuse to settle a case, especially after the injured claimants have obtained a judgment. Nevertheless, courts have held that in this situation, insurers may settle the claim over the insured's objections, even if the effect of the settlement is to extinguish a counterclaim for malicious prosecution. Hurvitz v. St. Paul Fire & Marine Ins. Co., 189 Cal. App. 4th 918, 930-31 (Cal. Ct. App. 2003); Caplan v. Fellheimer Eichen Braverman & Kaskey, 68 F.3d 828 (3rd Cir. 1995). The Hurvitz court reasoned as follows:

The decision to settle rather than continue litigation invariably involves a conflict between the desire to vindicate oneself and the desire to minimize the costs of litigation and avoid the risk of loss. . . . A party purchasing a liability insurance policy . . . agrees to accept the insurer's view concerning the point at which the benefits of settlement exceed the risk of continuing litigation. . . . The covenant of good faith and fair dealing requires the insurer to minimize the possibility of an award that exceeds the policy limits—it does not require the insurer to fight a legal action until the bitter end when the costs of defense exceed the benefit to be achieved.

109 Cal. App. 4th at 930-31.

The policy that Penn-America issued to your former company, BWR, Inc., provides that Penn-America "may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result." (Policy, Form CG 00 01 04 13, ¶ I.A.1.a.) The policy also requires you to assist and cooperate with Penn-America in investigating and settling any claim or suit. (Id. at ¶ IV.2.c.(3).) We are not aware of any provision in the insurance contract that gives you veto power over a settlement, particularly when acceding to your demand would embroil Penn-America in litigation with other parties as explained above.

As we understand it, your argument is that Penn-America has a duty to refuse to settle when it knows of extrinsic fraud affecting the judgment at issue. This argument is undermined by the fact that only a few months ago, you were threatening to sue Penn-America for not immediately settling the case. You admit that you did not know of any alleged fraud upon the court until recently.

At that time, you stated that you had counsel to represent you in a lawsuit against Penn-America for failure to procure a supersedeas bond to stop the TLC parties from executing on their judgment in the Defamation action while the appeal is pending. You also represented that you had an attorney who was willing to work with you in your efforts to obtain an order setting aside the order in TLC's eviction action against you (TLC Holdings, LLC v. Hutson, Civ. Action No. 2011-CP-14-00602, hereinafter "the Eviction action") based upon alleged fraud upon the court. You indicated that you believed the setting aside of that order would have the effect of not only allowing you to prosecute your counterclaims against the TLC parties, which have repeatedly been held to be barred by *res judicata*, but it might also somehow undermine the judgment in the Defamation action. You provided

a couple of outlines of your theory along with statutes and case law and asked whether any evidence produced at the trial of the Defamation action affected your proposed action against the TLC parties. You also indicated that if we provided whatever evidence was material to your proposed suit against the TLC parties, you would refrain from bringing action against Penn-America based upon failure to furnish a supersedeas bond while the appeal is pending.

At that time, we explained to you that Penn-America diligently sought to procure an appeal bond, but found that such a bond could not be obtained under the circumstances. Since an appeal bond could not be obtained, Penn-America agreed to mediate this case in exchange for a stay of execution until after the case could be mediated. The TLC parties subsequently agreed to postpone execution proceedings against you until after the resolution of the appeal, thus mooted the need for an appeal bond.

Penn-America has previously declined your demands for counsel to represent you in your affirmative claims against the TLC parties. We crave reference to our previous correspondence to you dated August 1, 2016 and incorporate the terms of that letter herein. Nothing in the policy requires a liability insurer to retain counsel or to pay litigation costs for claims the putative insured seeks to assert against other parties.

Nevertheless, in a good faith effort to resolve the claims you were asserting against Penn-America and to avoid any prejudice to whatever claims you may seek to assert against the TLC parties, you were provided with evidence that was presented at trial that may have bearing on your proposed claim against the TLC. We have repeatedly emphasized the neither Penn-America nor its counsel represents you. You were encouraged to investigate the matter further through your own counsel.

At no point has Penn-America or its counsel ever acknowledged the existence of fraud upon the court. Penn-America recognizes only that you have recently begun alleging that fraud upon the court was committed, particularly in the Eviction action that TLC Holdings, LLC brought against you. We have also recognized that certain evidence that was presented at the trial of the Defamation action, when coupled with the court filings in the prior Eviction action, raised concerns that you have a right to investigate, and possibly pursue, should you proceed with an action against the TLC parties. However, we are not aware of any judicial order finding that fraud upon the court was committed. Furthermore, we are not aware of any act of extrinsic fraud that was committed in the trial of the Defamation action. At most, you have alleged that certain arguments and evidentiary rulings in the Defamation action were made possible by the outcome of the Eviction action, in which you assert that extrinsic fraud was committed.

A court order is considered a final judgment even if an appeal is pending. Stoneledge at Lake Keowee Owners Ass'n, Inc. v. Cincinnati Ins. Co., 301 F. Supp. 3d 620, 627 (D.S.C. 2018). The judgment the TLC parties obtained in the Defamation action against you is a final judgment until such time as a court overturns it for some reason. At this point, we are not aware that legal action to set aside the Eviction action has yet been filed. Even if you prevail in that endeavor, you would still have to then take that order and move to set aside the judgment in the Defamation action.

The decision whether or not to pursue claims against TLC is up to you. Should you succeed in overturning the order(s) in the Eviction action, perhaps you could prove damages. However, we fail to see how that has any bearing on the Defamation action against you. It is true that you might possibly

be able to argue that result of the Defamation action was wrongly decided if the order(s) in the Eviction actions are eventually overturned. However, your counterclaims in the Defamation action have already been dismissed. Settlement with TLC would only resolve TLC's claims against you. You have not presented evidence of any harm you would suffer from the settlement of TLC's claims against you in the Defamation action other than the loss of your ability to achieve a complete vindication in your ongoing disputes with the TLC parties. This is precisely the type of injuries courts have held insufficient to outweigh a liability insurer's right and duty to settle, as explained above.

You also insinuated that Penn-America has a duty to prosecute your claims against the lawyers representing the TLC parties. There is absolutely no authority supporting any such duty. You have a right to pursue whatever legal recourse you have against any party you believe has wronged you. However, Penn-America has no standing to pursue such action.

You indicated that "you had no chance to win" due to the alleged extrinsic fraud. Again, this is merely your opinion. There is no evidence that anyone other than you has ever said this. You have repeatedly expressed your belief that the TLC parties' claims against you would be more defensible if counsel were provided to prosecute your counterclaims against the TLC parties. However, before the TLC parties brought their claims against you, a court order had already been entered in the Eviction proceeding that squarely held that you have released all claims against the TLC parties. It would have been futile to have attempted to prosecute claims against the TLC parties—in fact, you have been sanctioned for repeatedly attempting that very thing.

You recently hit upon the idea of attempting to have the order deeming you to have released the TLC parties set aside due to extrinsic fraud upon the court. If you believe that such fraud was committed, you have every right to pursue such a claim. However, that requires legal action that is far beyond the scope of any duty required by the policy. The question is not where in the policy Penn-America is restrained from taking such action, but rather where in the policy such a duty is imposed upon Penn-America.

Accordingly, Penn-America respectfully declines your settlement demand. After careful investigation, we find no legal or factual basis for it.

Furthermore, we warn you that your actions in interfering with our attempts to settle the claims against you are in breach of your duty to cooperate under the insurance contract. Breach of your duty to cooperate may result in your forfeiting any coverage available to you under the policy.

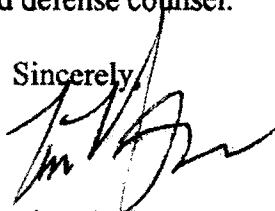
As you know, Penn America has filed a declaratory judgment action regarding whether it owes a duty to defend and/or indemnify you for the claims asserted in the Defamation action. As we have previously indicated, Penn-America agreed to defend you under a full reservation of rights and with the understanding that any indemnity settlements or payments will be applicable only for "personal injury" to which this insurance applies. Any uncovered damages, or any verdict or award in excess of your applicable policy limits for this loss will be your responsibility. Penn-America disputes your status as an insured under the policy. Penn-America continues to reserve its right to deny coverage should the court find that coverage does not exist.

Penn America specifically reserves all of its rights and remedies under the policy, and under the statutes, and common law, including the right to withdraw its defense. No action taken by Penn America

in this matter, including the assignment of defense counsel, should be construed as a waiver by or estoppel of these rights and remedies or any of the terms, conditions, exclusions, or limitations of the policy.

This decision was made based upon the information that Penn America currently possesses. If you believe that there is information that bears on this analysis that Penn America does not have, please provide that information as soon as possible and Penn America will give it all due consideration. We urge you to advise your staff not to discuss this matter with anyone other than a representative of Penn America and assigned defense counsel.

Sincerely,

A handwritten signature in black ink, appearing to read 'Timothy J. Newton', written over the word 'Sincerely,'.

Timothy J. Newton

TjN/

**EXHIBIT
8.0**

On Nov 19, 2018, at 1:50 PM, Tim J. Newton <tnewton@murphygrantland.com> wrote:

Mr. Hutson,

Penn-America agreed to pay its limits to TLC. I am no longer working on this case other than to finalize the settlement documents. What papers are you talking about?

Tim N.

<image003.png>

Murphy & Grantland, P.A.

Tim J. Newton, Esquire

tnewton@murphygrantland.com

Post Office Box 6648

Columbia, South Carolina 29260

803-782-4100 ext. 1242

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STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CLARENDON)

CASE NUMBER: 11-CP-14-602

TLC Holdings, LLC,)

Plaintiff,)

v.)

M.B. Hudson a/k/a M.B. Hutson,)

Defendant.)

SETTLEMENT AGREEMENT

M.B. Hudson a/k/a M.B. Hutson,)

Defendant and Third Party Plaintiff)

v.)

Richard U. Clark, Jimmy S. Lovell and
James C. Thigpen,)

Third Party Defendants)

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICEDATE 4/13/12Deborah B. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

Plaintiff, TLC Holdings, LLC, ("Plaintiff", "TLC" or "Landlord"), by and through its undersigned attorneys, and Defendant, M.B. Hudson a/k/a M.B. Hutson ("Defendant", "Hudson", or "Tenant"), by and through his undersigned attorney, hereby agree to a settlement of the above-captioned litigation on the following terms, effective as of March 30, 2012:

1. Reference is made to that certain Lease Purchase Agreement (the "Lease" or the "Agreement") dated December 15, 2010, by and among Landlord, Tenant, Richard U. Clark, Jimmy S. Lovell, and James C. Thigpen for property located in Clarendon County, South Carolina commonly known as the Big Water Resort (the "Premises" or the "Property"). Capitalized terms used in this Settlement Agreement without definition have the meaning given such terms in the Lease.

2. This Settlement Agreement shall be incorporated into a Consent Order (the "Consent Order") entered in the above-referenced case (the "Litigation"). Although Richard U. Clark, Jimmy S. Lovell and James C. Thigpen are parties to this Settlement Agreement by virtue of being parties to the Agreement, and are named as Third Party Defendants in the Litigation, they have not been served with pleadings in the Litigation and shall not be deemed to have appeared in the Litigation by their execution of this Settlement Agreement. This Settlement Agreement shall be binding upon all of the

undersigned parties even though Richard U. Clark, Jimmy S. Lovell and James C. Thigpen have not appeared in the Litigation and are not parties to the Consent Order.

3. Plaintiff and Defendant hereby agree that the arrearage due by Tenant under the Lease totals **\$199,969.19** as of March 31, 2012 (the "Arrearage"). The parties acknowledge the Arrearage includes late fees but not interest or Plaintiff's legal fees, which Plaintiff agrees not to include in the Arrearage.

4. Pursuant to the Consent Order, in the event that Mr. Hudson fails to comply with the terms of this Settlement Agreement, unless such failure is a direct and proximate result of TLC's failure to perform an action expressly required of it in this Settlement Agreement, time being of the essence, then the Plaintiff is entitled to the following immediate relief, without further order of the court or notice to Defendant or his attorney: (a) termination of the Agreement, (b) cancelation of the lis pendens filed by Hudson in this action, (c) immediate vacation of the Property by Mr. Hudson except for his personal residence, which shall be vacated within 15 days, enforceable by the Clarendon County sheriff; and (d) the provisions of Section 23 shall be effective. Prior to any such default by Hudson hereunder, the parties acknowledge that the Lease remains in full force and effect in accordance with its terms, as modified by this Settlement Agreement, and during the Primary Term (as may be extended as provided herein), Hudson shall have full possession of the Property in accordance with, and subject to, the terms of the Lease as modified by this Settlement Agreement.

5. Upon entry of the Consent Order, and the preparation of a proposed subdivision plat by Hudson of a portion of the Premises substantially as shown on **Exhibit "A"** attached hereto, Hudson shall present the proposed subdivision plat to TLC for approval, which shall not be unreasonably withheld. Within five (5) business days after receipt of the proposed Qualified Plat (as defined herein), TLC shall either approve the same or provide Hudson with specific comments thereto. A "Qualified Plat" is a proposed subdivision plat of a portion of the Premises substantially as shown on **Exhibit "A"** attached hereto, which is prepared by a registered South Carolina land surveyor, and which meets the minimum standards for the practice of land surveying under South Carolina law. The Approval Deadline (as defined below) shall be extended day-for-day for each day beyond such five (5) business day period until TLC provides Hudson with the foregoing approval or comments. Within five (5) business days following receipt of TLC's comments to a Qualified Plat, Hudson shall cause his surveyor to revise the Qualified Plat to address TLC's comments, and resubmit the revised Qualified Plat. If the revised Qualified Plat incorporates TLC's comments, then the Approval Deadline shall be extended day-for-day for each day after the revised Qualified Plat is presented to TLC until TLC either approves the same or provides additional comments thereto to Hudson, which shall be incorporated into the proposed subdivision plat; provided, however, that in no event shall the extension of the Approval Deadline pursuant to this sentence exceed thirty (30) days for any reason. Upon TLC's approval of a proposed subdivision plat, TLC would provide a letter to the Clarendon County Planning Commission, Attn: David Epperson, requesting that the Clarendon County Planning Commission approve the subdivision of the Premises into not less than two (2) adjacent and unimproved acres of the Property, and the further subdivision of such acres into

smaller individual lots, all of which must be contiguous. In addition, by April 3, 2012, TLC's attorney shall write the Clarendon County Planning Commission, Attn: David Epperson, and advise it that, while TLC is reserving its rights under this Settlement Agreement to approve any draft subdivision plat prior to its formal submission to the Planning Commission for consideration and approval – and advising the Planning Commission that no such subdivision plat should be considered by the Planning Commission unless accompanied by a letter from TLC or its counsel approving such proposed plat – TLC requests that Mr. Hudson and his professionals be permitted to consult with Clarendon County officials in conjunction with the preparation of a proposed subdivision for consideration by TLC (and, if approved by TLC, formal submission to the Planning Commission for consideration). Hudson may present alternative proposed subdivision plats to TLC for consideration. Mr. Hudson will pay for the survey(s) and all other expenses necessary to obtain all Approvals (as herein defined). Mr. Hudson will have until July 31, 2012 (as may be extended as provided herein, the "Approval Deadline") to obtain the Approvals (as defined herein). Mr. Hudson will have the right to extend the Approval Deadline for two (2) periods of thirty (30) days each (each, an "Approval Extension") if, prior to the then-applicable Approval Deadline, Mr. Hudson delivers to TLC written notice of his exercise of an Approval Extension, together with payment, by wire transfer, of \$8,000, none of which will be applied to the Purchase Price, but one one-half of which will be applied to the Arrearage, with the remainder not applicable to either the Purchase Price or the Arrearage but instead in consideration of the extension of the Approval Deadline.

6. Once the Clarendon County Planning Commission and any other governmental agency that is required to approve the development of the subdivision of the Property, including appraisals, and bonding of water and sewer installation, grants its approval of the subdivision plat in full and complete so that same can be recorded (the "Approvals"), then Mr. Hudson will have fifteen (15) days to close (the "Closing Deadline") upon his purchase of not less than two (2) acres of the Property pursuant to the approved subdivision plat (such closing being referred to herein as the "Initial Closing", with the portion of the Property being purchased by Hudson at the Initial Closing being referred to herein as the "Initial Closing Property").

7. The Purchase Price for the Initial Closing Property, which must be paid in cash, shall be **\$145,000.00 per acre**, which will be applied to the Purchase Price under the Agreement.

8. THE PARTIES ACKNOWLEDGE THAT THIS SETTLEMENT AGREEMENT IS NOT CONTINGENT UPON HUDSON'S RECEIPT OF THE APPROVALS.

9. At or before the Initial Closing, Mr. Hudson will provide to TLC a written statement from the realtor (Susan Stroman) that she is cancelling her commission contract with TLC and that, in lieu thereof, she will be paid by Mr. Hudson for her commissions for the sale(s) of portions of the Property pursuant to the Agreement as modified by this Settlement Agreement, both with respect to interim sales of acreage, such as the Initial Closing, and the ultimate purchase of the entire Property (the "Stroman Evidence"). In

other words, whatever commission Susan Stroman or her company would be entitled to under the Agreement shall be owing by Mr. Hudson, not TLC, and the Purchase Price to TLC is net of any such commissions (and the Purchase Price owing by Hudson shall be in addition to the commission owing to Stroman or her company). Absent the Stroman Evidence prior to the Initial Closing, TLC shall not be obligated to close, and Mr. Hudson shall be in default of this Settlement Agreement.

10. At the Initial Closing, in addition to the \$145,000 per acre release price which will apply to the Purchase Price, Mr. Hudson will pay to TLC, in cash, the following (together, the "Additional Initial Closing Payments"): (a) the sum of \$140,000.00, to be applied by TLC towards the Arrearage, unless the Initial Closing Property exceeds eight (8) acres, in which case the Arrearage shall be paid in full at the Initial Closing; and (b) the Arreared Additional Rent (as defined herein). The Additional Initial Closing Payments will not be applied to the Purchase Price, and are a material component of this Settlement Agreement, without which TLC shall not be obligated to close upon the sale of such acreage to Mr. Hudson, who would then be in default. However it is anticipated that the Additional Initial Closing Payments will be paid at the Initial Closing, and not prior thereto.

11. If prior to the Closing Deadline, Hudson has any unexercised Approval Extensions (i.e., if he obtained the Approvals prior to having to exercise both of the Approval Extensions), then he shall be permitted to exercise any remaining Approval Extension(s) to extend the Closing Deadline.

12. In addition to the two Approval Extensions described above, Mr. Hudson will have a third (3rd) thirty (30) day extension right, which may be used either to extend the Approval Deadline a third time, or to extend the Closing Deadline (the "Third Extension") if, prior to the then-applicable Approval Deadline (if Hudson elects to use the Third Extension to extend the Approval Deadline a third time), or prior to the Closing Deadline (if Hudson elects to use the Third Extension to extend the Closing Deadline), Mr. Hudson delivers to TLC written notice of his exercise of the Third Extension, together with payment, by wire transfer, of \$8,000, none of which will be applied to the Purchase Price or the Arrearage, and is solely an extension fee. For avoidance of doubt: one-half of the Approval Extension fees are applicable to the Arrearage, but none of the Third Extension fee is applicable to the Arrearage.

13. Beginning April 1, 2012, Hudson shall pay to TLC the Rent for the Premises of \$8,000 per month, in advance on or before the first day of each month during the Term, without notice, demand, deduction, or offset. Payment shall be made to TLC by wire transfer only, pursuant to wire instructions provided by TLC to Hudson. Notwithstanding the foregoing, the April, 2012 payment may be received by TLC not later than 5:00 p.m. on April 3, 2012. Rent for all future months shall be payable on or before the first of such month, even if the first day of a calendar month occurs on a weekend or day the banks are closed.

14. Beginning April 1, 2012, in addition to the monthly base rent of \$8,000, Mr. Hudson will also begin to accrue the obligation to pay, each month, the "Estimated

Additional Rent Payments", which means 1/12th of the yearly estimated amount of "Additional Rent" owing under the Lease (i.e., real estate taxes for the Property, annual insurance premiums, and the lease rent owing to the South Carolina Public Service Authority, which are the responsibility of Hudson under the Lease), in advance on or before the first day of each month during the Term, without notice, demand, deduction, or offset; provided, however, that the Estimated Additional Rent Payments shall be deferred for that period from April 1, 2012, until the Initial Closing. The amount of Estimated Additional Rent Payments owing for that period from April 1, 2012 until to the Initial Closing, and which is being deferred hereby, is referred to herein as the "Arreared Additional Rent". The Estimated Additional Rent Payments shall be based on the most recent invoices therefor (e.g., the 2011 taxes for the Property, the most recent insurance premiums, and the most recent SCPSA rent amount), but Hudson shall remain liable for the actual amount of such charges in the event the estimated Additional Rent is insufficient (and entitled to a refund in the event of overpayment). After the Initial Closing, the right to defer payment of the Estimated Additional Rent Payments shall lapse, and Hudson shall pay such amounts on or before the first day of each calendar month in addition to the Rent, all by wire transfer to TLC.

15. Having begun to receive the Additional Rent in advance (subject to the deferral thereof prior to the Initial Closing only), TLC shall be responsible for remitting payment of those items to the applicable party (e.g., the Clarendon County tax collector, the insurance company, and SCPSA), but Mr. Hudson would remain liable for them as provided in the Lease. Not less than 10 days before those payments are due, Mr. Hudson would remit the difference between those charges and the amount he had previously paid to TLC by way of the monthly Estimated Additional Rent Payments. (For example: the 2012 property taxes for the Property will be due in January, 2013, before Hudson has paid a full year's worth of Estimated Additional Rent Payments. Not later than January 5, 2013, Hudson shall pay to TLC the difference between the actual tax bill and the amount of Estimated Additional Rent Payments allocable to the property taxes, and then TLC would remit those funds to the Clarendon County tax collector.)

16. Mr. Hudson will pay all of the Arrearage not later than the earlier to occur of (a) December 31, 2012; and (b) the closing on the sale of a more than eight (8) acres of the Property pursuant to this Settlement Agreement and the Agreement, whether individually or when aggregated with land previously purchased hereunder. (In other words, at the time that Hudson buys, or causes to be bought, more than eight (8) acres of the Property, whether in a single closing or when combined with land previously purchased, all of the Arrearage must be repaid in addition to the \$145,000 per acre price.)

17. Not later than May 15, 2012, Mr. Hudson will pay to TLC by wire transfer all of the amounts received from Universal Financing since the Lease was executed, which amount totals approximately \$5,000.

18. In the event of any default by Hudson in the payment of amounts owing under this Settlement Agreement, he will be in default of this Settlement Agreement and the Agreement itself, with no grace period and no right to notice of default, and TLC shall be entitled to the relief set forth in Section 4 above.

19. Provided that Mr. Hudson has fully complied with the Settlement Agreement as of December 31, 2012, including repaying the Arrearage in full, and provided that he has paid the 2012 property taxes by that date (which would otherwise be due on January 15, 2013, pursuant to South Carolina law), then, as of December 31, 2012, (a) the Primary Term of the Lease shall be automatically extended until October 31, 2013 (with Hudson entitled to possession of the Premises during such extended Primary Term, upon the terms and conditions of this Settlement Agreement and the Lease as expressly modified hereby); (b) the Purchase Price for the Property will remain \$6,000,000 through October 31, 2013, provided that: (i) the unpaid amount is paid in cash; and (ii) Hudson has provided the Stroman Evidence as provided herein; and (c) the \$500,000.00 promissory note given by Hudson with respect to the purchase of the membership interests in The Big Water Resort, LLC, shall be automatically amended to extend the maturity date thereunder to October 31, 2013. The Agreement is hereby amended to delete any right of Hudson, or obligation of TLC, to permit Hudson to finance the purchase of the Property through the delivery of a promissory note to TLC (as described in Section 1.4(ii) of the Agreement), and the entire Purchase Price shall be paid in cash.

20. Mr. Hudson shall, at his expense, commence paving all private roads, parking lots and recreational vehicle ("RV") parking spaces on the Premises by February 28, 2013, and complete such work not later than May 31, 2013.

21. Not later than April 4, 2012, Mr. Hudson shall deliver to TLC a written statement, signed by him, that neither Mr. Hudson nor any of his companies have made any commitments to anyone on behalf of TLC and/or its members (i.e., Messrs. Clark, Lovell and Thigpen) with respect to the Property, and that any agreements made by Mr. Hudson or any of his companies with respect to the Property have been on behalf of The Big Water Resort, LLC, or another Hudson-company, but not TLC or its members.

22. Provided he is in compliance with this Settlement Agreement, Hudson would continue to have the right to purchase unimproved acreage upon the Property in excess of the Initial Closing Property at the same \$145,000 per acre price as set forth above, up until December 31, 2012 (and, if he complies with the Settlement Agreement, including repaying all of the Arrearage by that date, such deadline would be extended until October 31, 2013 as provided above), but any additional acreage would have to be adjacent to the acreage already purchased unless at or before the closing upon the purchase of such additional, non-contiguous acreage, Hudson repays the Arrearage in full in addition to the \$145,000 per acre price.

23. As a material consideration of this Settlement Agreement, in the event of the termination of the Agreement pursuant to Section 4 above as a result of Hudson breach hereof, then automatically and without further action of the parties, as of the date of such termination (the "Termination Date"), Hudson shall be deemed to have released, forever discharged and promised never to sue TLC, Richard U. Clark, Jimmy S. Lovell, and James C. Thigpen, and their respective agents, attorneys, insurance companies, parent companies, subsidiaries, affiliates, predecessors, successors, or assigns (together, the "TLC Parties"), from any and all injuries, personal or property, known or unknown,

causes of action, demands, warranty claims, damages, suits at law or in equity, of whatsoever kind and nature, or because of any matter or thing done, omitted or suffered to be done, by the TLC Parties, prior to and including the Termination Date, on account of all injuries and damages, including attorneys' fees and litigation expenses, arising from the Lease or the relationship between Hudson, on the one hand, and TLC, Richard U. Clark, Jimmy S. Lovell, and James C. Thigpen, on the other hand, and any causes of action, known or unknown, relating to the Lease, including any and all claims alleged, or which could have been alleged, in the Litigation.

24. As a material consideration of this Settlement Agreement, in the event of the termination of the Agreement pursuant to Section 4 above as a result of Hudson breach hereof, and provided that Hudson has timely vacated the Property in accordance with this Settlement Agreement and surrendered the same to Landlord in the same condition as is required under the terms of the Lease upon a termination or expiration of the Primary Term thereof, then automatically and without further action of the parties, as of the Termination Date, the TLC Parties shall be deemed to have released, forever discharged and promised never to sue Hudson and his agents, attorneys, insurance companies, parent companies, subsidiaries, affiliates, predecessors, successors, or assigns (together, the "Hudson Parties"), from any and all injuries, personal or property, known or unknown, causes of action, demands, warranty claims, damages, suits at law or in equity, of whatsoever kind and nature, or because of any matter or thing done, omitted or suffered to be done, by the Hudson Parties, prior to and including the Termination Date, on account of all injuries and damages, including attorneys' fees and litigation expenses, arising from the Lease or the relationship between Hudson, on the one hand, and TLC, Richard U. Clark, Jimmy S. Lovell, and James C. Thigpen, on the other hand, and any causes of action, known or unknown, relating to the Lease, including any and all claims alleged, or which could have been alleged, in the Litigation.

25. The foregoing terms and conditions are to be strictly enforced, and time is of the essence with regard to each and every term of this Settlement Agreement.

26. The parties further covenant and agree that this written instrument expresses the entire agreement between the said parties, and there is no other agreement oral or otherwise varying or modifying the terms of this Settlement Agreement. This Settlement Agreement will inure to the benefit of and bind the respective heirs, personal representatives, successors, and permitted assigns of the parties to it. If any clause or provision of this Settlement Agreement is determined to be illegal, invalid, or unenforceable under any present or future law by the final judgment of a court of competent jurisdiction, the remainder of this Settlement Agreement will not be affected thereby. It is the intention of the parties that if any such provision is held to be illegal, invalid, or unenforceable, there will be added in lieu thereof a provision as similar in terms to that provision as is possible and be legal, valid, and enforceable.

27. Each and every term, covenant and condition of the Lease is incorporated herein such that the Lease and this Settlement Agreement shall be read and construed as one instrument. The Lease, as hereby amended, remains in full force and effect, and except as expressly stated herein, all terms and conditions of the Lease remain

unchanged. If there is a conflict between this Settlement Agreement and the Lease, then the provisions of this Settlement Agreement shall control.

28. This Settlement Agreement may be executed in counterpart, each of which shall be deemed an original but all of which shall constitute one document. This Settlement Agreement shall not constitute evidence of a settlement between the parties until such time as a counterpart of this document has been executed by each party hereto.

29. This Settlement Agreement and all matters relating thereto shall be governed by and construed and interpreted in accordance with the laws of the State of South Carolina.

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EXHIBIT
10.0

EXHIBIT

10.0

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

COUNTY OF CLARENDON)

CASE NUMBER: 11-CP-14-602)

TLC Holdings, LLC,)

Plaintiff,)

v.)

M.B. Hudson a/k/a M.B. Hutson,)

CONSENT ORDER)

Defendant.)

M.B. Hudson a/k/a M.B. Hutson,)

Defendant and Third Party Plaintiff,)

v.)

Richard U. Clark, Jimmy S. Lovell and)
James C. Thigpen,)

Third Party Defendants.)

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE
DATE 4/13/12Beverly S. Lobato
CLERK OF COURT
CLARENDON COUNTY, SC

THIS MATTER comes before me pursuant to (a) a Motion for Order Requiring Tenant to Pay All Rent Due, or, in the Alternative, for Appointment of Receiver filed in the above-captioned action by Plaintiff, TLC Holdings, LLC ("Plaintiff", "TLC" or "Landlord"), against Defendant, M.B. Hudson a/k/a M.B. Hutson ("Defendant", "Hudson", or "Tenant"); and (b) a Motion to Dismiss filed by Defendant in this action.

BACKGROUND AND PROCEDURAL HISTORY

This action concerns a Lease Purchase Agreement dated December 15, 2010 (the "Lease" or the "Agreement"), by and among Plaintiff, as landlord, Hudson, as tenant, and Richard U. Clark, Jimmy S. Lovell, and James C. Thigpen (the "Third Party Defendants"), for property located in Clarendon County, South Carolina, more fully

described in the Lease and commonly known as the Big Water Resort (the "Premises" or the "Property"). Plaintiff has filed this ejectment action against Defendant with respect to the Agreement. Defendant has also recorded a Lis Pendens in this action against the Premises and the Plaintiff and Third Party Defendants (the "Lis Pendens"). In his Answer and Counterclaim and Affirmative Defense and Motion to Dismiss and Third Party Complaint filed in this action, Hudson has asserted counterclaims against Plaintiff, as well as other claims against the Third Party Defendants. However, the Third Party Defendants have not been served with pleadings filed in this action, and none of the Third Party Defendants have made an appearance in this action.

It appears that the parties have agreed to a settlement of the pending motions, and all other matters at issue with respect to the Agreement, or which could have been asserted in this litigation, on those terms set forth in that certain Settlement Agreement dated as of March 30, 2012, a copy of which is attached hereto as Exhibit "A" and its terms incorporated herein by this reference (the "Settlement Agreement").

ORDER

NOW, THEREFORE, upon Motion of the Plaintiff, and with the consent of the Defendant, as the only parties having appeared in this action, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. The Settlement Agreement is hereby approved by this Court and incorporated into this Consent Order by this reference;
2. In the event that Hudson fails to comply with the terms of the Settlement Agreement, unless such failure is a direct and proximate result of TLC's failure to perform an action expressly required of it in the Settlement Agreement, time being of the

Bj/2

essence, then the Plaintiff is entitled to file an Affidavit of Default in this action, without notice to Defendant or his counsel of record, and, effectively immediately upon the filing of such Affidavit of Default, Plaintiff is hereby awarded the following immediate relief, without the need for further Order of this Court:

- a) The Agreement shall be deemed automatically terminated and of no further force or effect;
- b) The Lis Pendens shall be deemed automatically cancelled, terminated of record, and of no further force or effect;
- c) Mr. Hudson shall be required immediately to vacate the Property, except only with respect to his personal residence located thereon, as to which he shall be obligated to vacate the same within fifteen (15) days following receipt of a copy of the Affidavit of Default, or the posting of a copy of the Affidavit of Default upon such residence, whichever first occurs (the "Vacation Deadline").

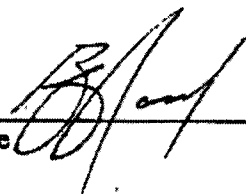
3. In the event that Hudson fails to vacate the Premises by the Vacation Deadline, then the Sheriff of Clarendon County is hereby directed to immediately evict Hudson therefrom, remove any personal property then and there remaining on the Premises, and put the Landlord in peaceful possession of the Premises. Landlord is hereby authorized to change the locks of the Premises effective 11:59 p.m. on the Vacation Deadline.

4. Prior to any such default by Hudson under the Settlement Agreement and the Lease as modified by the Settlement Agreement, the Lease remains in full force and effect in accordance with its terms, as modified by this Settlement Agreement, and during

B/13

the Primary Term (as defined in the Lease, and as may be extended as provided in the Settlement Agreement), Hudson shall have full possession of the Property in accordance with, and subject to, the terms of the Lease as modified by the Settlement Agreement.

SO ORDERED.

Judge 

Manning, South Carolina
April 12, 2012

[Signatures Continue on Following Page]

B/4

STATE OF SOUTH CAROLINA, COUNTY OF CLARENDON
IN THE COURT OF COMMON PLEAS
CASE NO. 11-CP-14-602
TLC HOLDINGS, LLC, VS. M.B. HUDSON A/K/A M.B. HUTSON

CONSENT ORDER

WE MOVE:

WOMBLE, CARLYLE, SANDRIDGE
& RICE, LLP

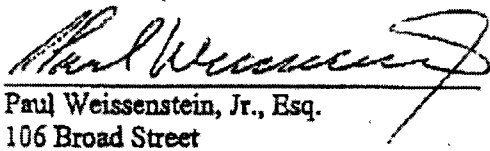

Thomas L. Harper, Jr., Esq.
5 Exchange Street
Post Office Box 999
Charleston, SC 29402
(843) 722-3400

*Attorneys for Plaintiff
TLC Holdings, LLC*

Charleston, South Carolina
April 3, 2012

WE CONSENT:

WEISSENSTEIN LAW FIRM, LLC


Paul Weissenstein, Jr., Esq.
106 Broad Street
Post Office Box 2446
Sumter, SC 29151
(803) 418-5700

*Attorneys for Defendant and Third Party
Plaintiff M.B. Hudson a/k/a M.B. Hutson*

Sumter, South Carolina
April 3, 2012

[Signatures Continue on Following Page]

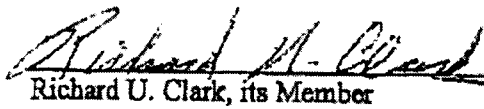


STATE OF SOUTH CAROLINA, COUNTY OF CLARENDON
IN THE COURT OF COMMON PLEAS
CASE NO. 11-CP-14-602
TLC HOLDINGS, LLC, VS. M.B. HUDSON A/K/A M.B. HUTSON

CONSENT ORDER

WE AGREE:

TLC HOLDINGS, LLC


Richard U. Clark, its Member

April 3, 2012

Plaintiff and Third Party Defendant

[Signatures Continue on Following Page]



STATE OF SOUTH CAROLINA, COUNTY OF CLARENDON
IN THE COURT OF COMMON PLEAS
CASE NO. 11-CP-14-602
TLC HOLDINGS, LLC, VS. M.B. HUDSON A/K/A M.B. HUTSON

CONSENT ORDER

I AGREE:


M.B. Hudson a/k/a M.B. Hutson

April 3, 2012

Defendant and Third Party Plaintiff

WCSR 720581941

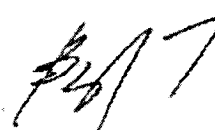


EXHIBIT "A"

(Copy of Settlement Agreement)

SEE ATTACHED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

CASE NUMBER: 2:16-cv-01943-DCN

Penn-America Insurance Company.

Plaintiff.

v.

BWR, Inc., on its own behalf and d/b/a Big
Water Resort, M.B. Hutson a/k/a M.B.
Hudson;

Big Water Resort, LLC, TLC Holdings, LLC,
Richard Clark, Jimmy S. Lovell a/k/a Jimmy
"Steve" Lovell, James Thigpen, Ocoee, LLC;

William Reed, Donna Reed, Bonnie Youmans,
Jane Yates, and Phillip Caulder, all
individually and for the benefit and on behalf
of all others similarly situated.

Defendants.

COMPLAINT
(Declaratory Judgment)
(Non-Jury)

The Plaintiff seeks declaratory relief to determine the rights of the parties. Plaintiff, Penn-America Insurance Company ("Penn-America"), complaining of the Defendants above-captioned, would respectfully allege and show as follows:

BACKGROUND

This action seeks declarations as to liability coverage for two underlying lawsuits. These lawsuits, in turn, relate to a series of other lawsuits in federal and state courts in the protracted litigation surrounding the Big Water Resort campground near Summerton, South Carolina.

JURISDICTION and PARTIES

1. Penn-America is a corporation organized and existing under the laws of the State of Pennsylvania with its principal place of business in Pennsylvania; Penn-America is authorized to transact business and write insurance policies in the State of South Carolina.

2. Upon information and belief, Defendant BWR, Inc. is or was a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in South Carolina.

3. Upon information and belief, Defendant M.B. Hutson a/k/a M.B. Hudson (hereinafter "HUTSON") is a citizen and resident of Orangeburg County, South Carolina

4. Upon information and belief, Defendant Big Water Resort, LLC is a limited liability company organized and existing under the laws of the State of South Carolina with its principal place of business in South Carolina.

5. Upon information and belief, Defendant TLC Holdings, LLC is a limited liability company organized and existing under the laws of the State of South Carolina with its principal place of business in South Carolina.

6. Upon information and belief, Defendant Richard Clark is a citizen and resident of Tennessee.

7. Upon information and belief, Defendant Jimmy S. Lovell a/k/a Jimmy "Steve" Lovell is a citizen and resident of Florida.

8. Upon information and belief, Defendant James Thigpen is a citizen and resident of the State of South Carolina.

9. Upon information and belief, Defendant Ocoee, LLC is a limited liability company organized and existing under the laws of the State of South Carolina with its principal place of business in South Carolina.

10. Upon information and belief, Defendant William Reed is a citizen and resident of Charleston County, South Carolina.

11. Upon information and belief, Defendant Donna Reed is a citizen and resident of Charleston County, South Carolina.

12. Upon information and belief, Defendant Bonnie Youmans is a citizen and resident of Colleton County, South Carolina.

13. Upon information and belief, Defendant Jane Yates is a citizen and resident of Florence County, South Carolina.

14. Upon information and belief, Defendant Phillip Caulder is a citizen and resident of Beaufort County, South Carolina.

15. This action is brought under the provisions of the Federal Declaratory Judgment Act, 28 U.S.C. § 2201 et seq. and Rule 57, Fed. R. Civ. P.; there is a real and justiciable controversy between the parties, and by these proceedings Penn-America asks this Court to inquire into and declare the rights and obligations of the parties hereto arising out of the facts set forth below.

16. The amount in controversy exceeds Seventy Five Thousand and No/100 (\$75,000.00) Dollars, exclusive of interests and costs, and there is complete diversity of citizenship; therefore, this Court has jurisdiction to hear this matter under 28 U.S.C. § 1332(a)(1).

THE POLICY

17. Penn-America issued commercial general liability (CGL) policy number PAC7045167 to "BWR, Inc. d/b/a Big Water Resort" as the named insured. The policy was in effect from October 16, 2013 through October 16, 2014. Penn-America craves reference to the policy for all of the terms, conditions, and provisions therein and incorporates them by reference herein. A copy of this policy (hereinafter "the Policy") is attached as Exhibit A.

18. On the declarations page for the Policy indicates that the named insured's form of business is "corporation."

19. On the first page of Form CG 0001 04 13 of the policy, entitled "Commercial General Liability Coverage Form," the policy specifies that the terms "you" and "your" in the policy mean "the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under the policy."

20. Under Section II – Who Is An Insured, paragraph 3, on page 10 of this coverage form, organizations newly acquired or formed by the named insured may qualify as a Named Insured under certain circumstances.

21. On the first page of Form CG 0001 04 13, the policy defines "insured" as "any person or organization qualifying as such under Section II – Who Is An Insured."

22. "BWR, Inc. d/b/a Big Water Resorts." as the named insured, qualifies as an insured under Paragraph II.1d. of Form CG 0001 04 13.

23. The Policy specifies that "executive officers" and directors of the named insured are insureds, but only with respect to their duties as officers and directors. The Policy defines "executive officers" as "person(s) holding any of the officer positions created by your charter, constitution, bylaws or any other similar governing document." The Policy further specifies that stockholders of the named insured are insureds, but only with respect to their liability as stockholders.

24. Paragraph II.2.a. of Form CG 0001 04 13 specifies that employees of the named insured are insureds, "but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business."

25. The final paragraph of Section II – Who Is An Insured in this Form provides as follows:

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

26. For those defined as insureds, the Policy provides liability coverage for certain risks under the insuring agreements, and excludes certain risks through policy exclusions.

27. The Insuring Agreement for Coverage A on page 1 of Form CG 0001 04 13 extends liability coverage to insureds for claims for damages because of “bodily injury” or “property damage” to which the Policy applies. The Policy defines “bodily injury” as “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.” “Property damage” is defined to include physical injury to tangible property and loss of use.

28. The Policy only covers “bodily injury” and “property damage” caused by an “occurrence,” which is defined as an accident. The “bodily injury” and “property damage” must have occurred during the policy period.

29. Coverage B of the Policy extends liability coverage to insureds for claims for “personal and advertising injury” to which the Policy applies. The Policy applies only to “personal and advertising injury” caused by an offense arising out of the named insured’s business. “Personal and advertising injury” is defined to include only certain offenses, including V.14.d, “Oral or written publication, in any manner, of material that slanders or libels a person”

30. Coverage B of the Policy contains Exclusion 2.a. Knowing Violation Of Rights Of Another, which excludes coverage for “Personal and advertising injury” caused by or at the

direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury."

31. Coverage B of the Policy contains Exclusion 2.b. Material Published With Knowledge Of Falsity, which excludes coverage for "Personal and advertising injury" arising out of oral or written publication, in any manner, of material, if done by or at the direction of the insured with knowledge of its falsity.

32. Coverage B of the Policy contains Exclusion 2.f. Breach Of Contract, which excludes coverage for "Personal and advertising injury" arising out of a breach of contract"

THE UNDERLYING REED CLASS ACTION

33. Upon information and belief, Defendants WILLIAM REED, DONNA REED, BONNIE YOUMANS, JANE YATES, AND PHILLIP CAULDER filed a class action in the United States District Court for the District of South Carolina, Charleston Division styled as follows: Reed v. Big Water Resort, LLC, et al., Civil Action number 2:14-1583-DCN-MGB ("the Underlying Reed Class Action"). A copy of the First Amended Complaint in the Underlying Reed Class Action is attached as Exhibit B. All of the allegations in the First Amended Complaint in the Underlying Reed Class Action are incorporated herein by reference.

34. The defendants in the Reed Class Action include Defendants BIG WATER RESORT, LLC; TLC HOLDINGS, LLC; RICHARD CLARK; JAMES THIGPEN; JIMMY "STEVE" LOVELL; and OCOEE, LLC.

35. The plaintiffs in the Underlying Reed Class Action alleged that BIG WATER RESORT, LLC, CLARK, THIGPEN, LOVELL, and TLC HOLDINGS, LLC (hereinafter collectively "the Joint Venture parties") entered into a joint venture for the common purpose of selling memberships in Big Water Resort.

36. As alleged, BIG WATER RESORTS, LLC was the marketing arm of this venture; defendant TLC HOLDINGS, LLC owned the land; and defendants CLARK, THIGPEN, and LOVELL provided the funding for the joint venture.

37. The plaintiffs in the Underlying Reed Class Action further alleged they purchased memberships in Big Water Resort for \$8,400 per membership for what was held out to be a lifetime membership in an exclusive private club.

38. As alleged, BIG WATER RESORT, LLC breached its contract with the plaintiffs in the Underlying Reed Class Action by converting the Big Water Resort from a private club to a public facility, thus rendering the class plaintiffs' memberships nearly valueless, and/or by ceasing operations.

39. The plaintiffs in the Underlying Reed Class Action alleged that the Joint Venture parties are all liable for BIG WATER RESORT, LLC's breach of contract because they all entered into a joint venture and/or amalgamation of interests.

40. Defendants CLARK, THIGPEN, and LOVELL are allegedly owners of TLC HOLDINGS, LLC and owners, managers, and/or members of BIG WATER RESORT, LLC.

41. The plaintiffs in the Underlying Reed Class Action also alleged that the Joint Venture parties breached their fiduciary duties by transferring BIG WATER RESORT, LLC to HUTSON when they knew or should have known the entity was insolvent and HUTSON did not have the wherewithal to continue operations.

42. Defendants TLC HOLDINGS, LLC, CLARK, THIGPEN, LOVELL, and OCOEE, LLC in the Underlying Reed Class Action filed an Answer and Third-Party Complaint against HUTSON asserting a single cause of action for equitable indemnity.

43. The basis for the equitable indemnity cause of action is that from December 2010 until April 2014, HUTSON was solely responsible for the operation of the Big Water Resorts campground. As alleged, HUTSON vacated the Big Water Resorts property in April 2014, and TLC HOLDINGS, LLC, CLARK, THIHPEN, and LOVELL were able to resume control and operation of the campground at that time.

44. On or about February 1, 2016, the plaintiffs in the Underlying Reed Class Action settled with the direct defendants. In its Order preliminarily approving the settlement, the Court found that: (a) BIG WATER RESORT, LLC was responsible for the daily operations and marketing of the Big Water Resort club; (b) CLARK, THIHPEN, and LOVELL are the sole members of TLC HOLDINGS, LLC and BIG WATER RESORTS, LLC; and (c) TLC HOLDINGS, LLC owns the property upon which the Big Water Resort is situated.

45. On May 20, 2016, the court granted the defendant / third-party plaintiffs' motion for summary judgment as to HUTSON'S counterclaims against them. However, the court denied the defendant / third party plaintiffs' motion for summary judgment on their equitable indemnity cause of action against HUTSON, thus allowing this claim to go forward.

THE UNDERLYING LIBEL ACTION

46. On December 27, 2015, TLC HOLDINGS, INC., CLARK, and LOVELL filed an action in state court asserting a single cause of action for libel. This action was styled as TLC Holdings, LLC, et al. v. M.B. Hutson a/k/a M.B. Hudson, Civil Action No. 2015-CP-14-00615 (hereinafter "the Underlying Libel Action"). A copy of the Complaint in this action is attached as Exhibit C.

47. The Complaint in the Underlying Libel Action alleges that on December 18, 2013 HUTSON made certain defamatory statements regarding TLC HOLDINGS, LLC and its

principals. In a postcard he distributed to all current and former members of Big Water Resort, HUTSON allegedly stated he was "scammed" by TLC HOLDINGS, LLC and its principals in that TLC HOLDINGS, LLC sold memberships in the Big Water Resort club without any intention of following through on its end of the bargain. HUTSON allegedly further stated in the postcard that he intended to file a class action lawsuit against TLC HOLDINGS, LLC demanding a refund of his membership dues, and encouraged the recipients of the postcards to join him in the lawsuit.

48. The Complaint in the Underlying Libel Action further alleges that in April 2014, a class action was filed against TLC HOLDINGS, LLC, its principals, and BIG WATER RESORT, LLC alleging that they breached the membership contracts, defrauded the campground members, and siphoned funds from the resort.

49. Upon information and belief, the class action alleged in the Underlying Libel Action refers to the above-referenced Underlying Reed Class Action.

50. The prayer in the Underlying Libel Action is for actual and punitive damages, as well as attorney's fees, costs, and pre-judgment interest.

51. The Underlying Libel Action was removed to federal court under Case number 2:16-cv-00003-DCN-MGB. On March 3, 2016, the case was remanded back to state court where it is currently pending.

OTHER RELATED LITIGATION AND TIMELINE

52. In both the Underlying Libel Action and the Underlying Reed Class Action, TLC HOLDINGS, LLC, CLARK, THIGPEN, LOVELL, and OCOEE, LLC alleged that they sold their membership interests in BIG WATER RESORTS, LLC to HUTSON in December 2010, making HUTSON the sole member of BIG WATER RESORTS, LLC. The sale price was

financed by a promissory note executed by HUTSON in favor of CLARK, LOVELL, and THIGPEN. A copy of the Membership Interest Purchase Agreement is attached as Exhibit D.

53. Also in December 2010, TLC HOLDINGS, LLC, CLARK, LOVELL, and THIGPEN (hereinafter "the TLC parties") entered into a Lease-Purchase Agreement with HUTSON in which the TLC parties agreed to sell certain property, including the land upon which Big Water Resorts was located, to HUTSON. The Lease-Purchase Agreement was also financed by a promissory note. The Lease-Purchase Agreement provided that a breach of either promissory note would be deemed a breach of the other, thereby permitting the TLC parties to seek recovery under both promissory notes. A copy of the Lease-Purchase Agreement is attached as Exhibit E.

54. As alleged, HUTSON defaulted on the promissory note(s) and the Lease-Purchase agreement.

55. In December 2011, TLC HOLDINGS, LLC filed an action in state court against HUTSON for breach of the Lease-Purchase Agreement seeking damages and ejectment. Upon information and belief, this action was styled as TLC Holdings, LLC v. M.B. Hudson, Civil Action number 2011-CP-14-00602.

56. The parties to the TLC Holdings, LLC v Hudson action entered into a Settlement Agreement which was approved by the court in April 2012. A copy of the Settlement Agreement is attached as Exhibit F.

57. The Settlement Agreement contains the following relevant provisions:

4. Pursuant to the Consent Order, in the event that Mr. Hudson fails to comply with the terms of this Settlement Agreement, unless such failure is a direct and proximate result of TLC's failure to perform an action expressly required of it in this Settlement Agreement, time being of the essence, then the Plaintiff is entitled to the following immediate relief, without further order of the court or notice to Defendant or his attorney: (a)

termination of the [Lease-Purchase] Agreement. . . . immediate vacation of the Property by Mr. Hudson except for his personal residence, which shall be vacated within 15 days, enforceable by the Clarendon County sheriff Prior to any such default by Hudson hereunder, the parties acknowledge that the Lease[-Purchase Agreement] remains in full force and effect

* * *

18. In the event of any default by Hudson in the payment of amounts owing under this Settlement Agreement, he will be in default of this Settlement Agreement and the [Lease-Purchase] Agreement itself, with no grace period and no right to notice of default, and TLC shall be entitled to the relief set forth in Section 4 above.

58. The court approval of the Settlement Agreement was by Consent Order dated filed April 13, 2012. A copy of the Consent Order is attached as Exhibit G.

59. The Consent Order contains the following relevant provisions:

NOW, THEREFORE, upon Motion of the Plaintiff, and with the consent of the Defendant, as the only parties having appeared in this action, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. The Settlement Agreement is hereby approved by this Court and incorporated into this Consent Order by this reference:

2. In the event that Hudson fails to comply with the terms of the Settlement Agreement, unless such failure is a direct and proximate result of TLC's failure to perform an action expressly required of it in the Settlement Agreement, time being of the essence, then the Plaintiff is entitled to file an Affidavit of Default in this action, without notice to Defendant or his counsel of record, and effectively immediately upon the filing of such Affidavit of Default, Plaintiff is hereby awarded the following immediate relief, without the need for further Order of this Court:

a) The [Lease-Purchase] Agreement shall be deemed automatically terminated and of no further force or effect:

* * *

c) Mr. Hudson shall be required immediately to vacate the Property, except only with respect to his personal residence located thereon, as to which he shall be obligated to vacate the same within fifteen (15) days following receipt of a copy of the Affidavit of Default

60. HUTSON defaulted under the terms of the Settlement Agreement and Consent Order. As of December 11, 2013, the TLC parties notified HUTSON that they were exercising their right to terminate the Lease Agreement and filed an Affidavit of Default. Copies of the termination letter and Affidavit are attached as Exhibits H and I.

61. On December 30, 2013 HUTSON filed a motion to set aside the Affidavit of Default and a motion for a temporary restraining order (TRO) alleging that the TLC parties failed to perform an action expressly required of them in the Settlement Agreement.

62. The court granted HUTSON's motion for a TRO on December 30, 2013. The order enjoined the TLC parties from pursuing further remedies under the Affidavit of Default.

63. On January 8, 2014, HUTSON filed a Chapter 11 petition in Bankruptcy Court. Upon information and belief, this action was styled as In re: Morris Beach Hutson a/k/a M.B. Hudson, Case No. 14-00165-jw.

64. The TLC parties argued that the Bankruptcy Court's automatic stay was inapplicable to the Big Water Resorts property because HUTSON's interest in the property terminated with the filing of their Affidavit of Default, and therefore the Big Water Resort property was not included in HUTSON's bankruptcy estate.

65. On February 21, 2014, the Bankruptcy Court issued an order granting limited relief from the automatic stay so the state court could determine what interest HUTSON had in the Big Water Resorts property as of the date he filed for bankruptcy.

66. The state court heard HUTSON's motions and made the following relevant findings and/or rulings:

- (a) The Court refused to rule on HUTSON's argument that he had an equitable interest in the Big Water Resorts property for purposes of his bankruptcy estate because he did not make that argument in his motions pending before the state court:

- (b) HUTSON defaulted under the terms of the Consent Order and the Settlement Agreement, and these defaults were not the direct and proximate result of TLC HOLDINGS, LLC's failure to perform an action expressly required of it under the Settlement Agreement;
- (c) Pursuant to the terms of the Settlement Agreement and Consent Order, the Lease Agreement was automatically terminated as of December 11, 2013, and HUTSON's rights of possession of the Big Water Resorts property terminated no later than December 18, 2013, when HUTSON acknowledged receipt of the Affidavit of Default.
- (d) HUTSON was ordered to immediately vacate the Big Water Resorts premises according to the terms of the Settlement Agreement and Consent Order.

A copy of the Order dated March 20, 2014 is attached as Exhibit J.

- 67. HUTSON vacated the Big Water Resorts property on March 26, 2014.
- 68. HUTSON subsequently withdrew his claim that he had an equitable interest in the Big Water Resorts property and the Bankruptcy action was dismissed on April 8, 2014. Copies of the Bankruptcy Court's Supplemental Order dated April 2, 2014 and its Order dismissing the case are attached as Exhibits K and L.

69. Upon information and belief, BWR, INC. was incorporated on February 28, 2011 and administratively dissolved on September 20, 2013.

70. HUTSON sought liability coverage under the Policy for the claims against him in the Underlying Reed Class Action and the Underlying Libel Action.

71. Penn-America is defending HUTSON in the Underlying Reed Class Action and the Underlying Libel Action under reservation of rights.

FOR A FIRST DECLARATION

72. The Plaintiff repeats, re-alleges, and incorporates paragraphs 1 through 71 as if fully set forth herein verbatim.

73. The named insured under the Policy is "BWR, Inc. d/b/a Big Water Resorts," a

corporation.

74. No other entity qualifies as a named insured under the Policy.

75. HUTSON is an insured only with respect to his duties on behalf of BWR, Inc. as an officer, director, or employee and/or his liability as a stockholder or member of BWR, Inc.

76. The Policy expressly provides that joint ventures and limited liability companies not listed on the Declarations of the Policy are not insureds.

77. The corporate defendants in the Underlying Reed Class Action lawsuit are BIG WATER RESORT, LLC; TLC HOLDINGS, LLC; and OCOEE, LLC. None of these entities are insureds under the Policy Penn-America issued to BWR, Inc.

78. Therefore, HUTSON is not an insured with respect to his actions on behalf of BIG WATER RESORT, LLC; TLC HOLDINGS, LLC; or OCOEE, LLC.

79. The third-party claim against HUTSON in the Underlying Reed Class Action is based upon his actions as purchaser under the Lease-Purchase Agreement. HUTSON entered into this Agreement in his individual capacity. HUTSON also purchased BIG WATER RESORT, LLC, which operated the campground, in his individual capacity.

80. BWR, INC. is not mentioned anywhere in the pleadings in the Underlying Reed Class Action, and HUTSON is not alleged to be liable as a stockholder of BWR, INC. or to have performed any act on behalf of BWR, INC. for which liability is asserted against him in the Underlying Reed Class Action.

81. Therefore, Penn-America is entitled to a declaration that HUTSON is not an insured with respect to the conduct alleged against him in the Underlying Reed Class Action.

FOR A SECOND DECLARATION

82. The Plaintiff repeats, re-alleges, and incorporates paragraphs 1 through 81 as if

fully set forth herein verbatim.

83. HUTSON is named as a defendant in his individual capacity in the Underlying Libel Action.

84. BWR, INC. is not named as a defendant or mentioned in the pleadings in the Underlying Libel Action, and HUTSON is not alleged to be liable as a stockholder of BWR, INC. or to have performed any act on behalf of BWR, INC. for which liability is asserted against him in the Underlying Libel Action.

85. The defamatory statement allegedly made by HUTSON in the Underlying Libel Action relates to HUTSON's interests as an investor, and was not made within the course and scope of his duties as a director, officer, or employee of BWR, INC.

86. Pursuant to the Settlement Agreement and the Consent Order in the TLC Holdings, LLC v Hudson action, HUTSON's interest in the Big Water Resort campground automatically terminated prior to the date of the alleged defamatory statement in the Underlying Libel Action.

87. BWR, INC. as an incorporated entity did not exist as of the date the defamatory statement was allegedly made in the Underlying Libel Action.

88. Therefore, Penn-America is entitled to a declaration that HUTSON is not an insured with respect to the conduct alleged against him in the Underlying Libel Action.

FOR A THIRD DECLARATION

89. The Plaintiff repeats, re-alleges, and incorporates paragraphs 1 through 88 as if fully set forth herein verbatim.

90. Coverage A of the Policy only covers claims for "bodily injury" or "property damage" caused by an "occurrence," as these terms are defined.

91. The plaintiffs in the Underlying Reed Class Action did not allege physical injury to tangible property or loss of use of tangible property caused by an accident. Their claims are for economic loss they suffered because of the business practices of the defendants in that action.

92. The third-party claim against HUTSON for equitable indemnification does not seek recovery for "bodily injury" or "property damage" caused by an "occurrence." The defendants / third-party plaintiffs seek indemnification from HUTSON for damages awarded against them based upon the claims by the plaintiffs in the Underlying Reed Class Action.

93. Therefore, Penn-America is entitled to a declaration that Coverage A of the Policy does not provide coverage for the claims asserted in the Underlying Reed Class Action even if HUTSON is found to be an insured for purposes of the claims asserted against him in that lawsuit.

FOR A FOURTH DECLARATION

94. The Plaintiff repeats, re-alleges, and incorporates paragraphs 1 through 93 as if fully set forth herein verbatim.

95. Coverage B of the Policy only covers claims for "personal and advertising injury" as defined. The Policy defines "personal and advertising injury" to include only specified offenses.

96. The third-party claim against HUTSON for equitable indemnification in the Underlying Reed Class Action is not included among the specified offenses in the definition of "personal and advertising injury."

97. Therefore, the Plaintiff is entitled to a declaration that Coverage B of the Policy does not provide coverage for the claims against HUTSON in the Underlying Reed Class Action, and therefore, coverage does not exist under the Policy for any of the claims asserted against him

in the Underlying Reed Class Action.

FOR A FIFTH DECLARATION

98. The Plaintiff repeats, re-alleges, and incorporates paragraphs 1 through 97 as if fully set forth herein verbatim.

99. The plaintiffs in the Underlying Libel Action did not allege "bodily injury" or "property damage" caused by an "occurrence."

100. Penn-America is entitled to a declaration that coverage does not exist under Coverage A of the Policy for the claims asserted against HUTSON in the Underlying Libel Action even if he is found to be an insured for purposes of the claims asserted against him in that lawsuit.

FOR A SIXTH DECLARATION

101. The Plaintiff repeats, re-alleges, and incorporates paragraphs 1 through 100 as if fully set forth herein verbatim.

102. Coverage B of the Policy excludes coverage for "personal and advertising injury" "caused by or at the direction of the insured with knowledge that the act would violate the rights of others and inflict personal and advertising injury."

103. Penn-America is entitled to a declaration that to the extent the claims against HUTSON in the Underlying Libel Action are for knowing violation of the plaintiffs' rights, coverage does not exist for these claims, even if HUTSON is found to be an insured for purposes of the claims asserted against him in that lawsuit.

FOR A SEVENTH DECLARATION

104. The Plaintiff repeats, re-alleges, and incorporates paragraphs 1 through 103 as if fully set forth herein verbatim.

105. Coverage B of the Policy excludes coverage for “personal and advertising injury” arising out of oral or written publication, in any manner, of material, if done by . . . the insured with knowledge of its falsity.”

106. Penn-America is entitled to a declaration that to the extent the claims against HUTSON in the Underlying Libel Action are for material published with knowledge of falsity, coverage does not exist for these claims, even if HUTSON is found to be an insured for purposes of the claims asserted against him in that lawsuit.

FOR AN EIGHTH DECLARATION

107. The Plaintiff repeats, re-alleges, and incorporates paragraphs 1 through 106 as if fully set forth herein verbatim.

108. Coverage B of the Policy excludes coverage for “personal and advertising injury” arising out of a breach of contract.

109. Penn-America is entitled to a declaration that to the extent the claims against HUTSON in the Underlying Libel Action are found to arise out of the alleged breach of contract, coverage does not exist for these claims, even if HUTSON is found to be an insured for purposes of the claims asserted against him in that lawsuit.

FOR A NINTH DECLARATION

110. Plaintiff repeats, re-alleges, and incorporates the preceding paragraphs as if fully set forth herein verbatim.

111. Plaintiff is entitled to a declaration that it has no duty to defend or indemnify HUTSON in either the Underlying Reed Class Action or the Underlying Libel Action because coverage does not exist under the Policy for these claims.

WHEREFORE, Plaintiff requests that this honorable Court inquire into these matters and

declare that the Penn-America policies do not provide coverage for the damages alleged to have been caused by the acts of HUTSON, and that therefore, Plaintiff does not owe HUTSON a defense or indemnification in the Underlying Reed Class Action or the Underlying Libel Action for the claims asserted him, together with its costs and disbursements incurred and such other and further relief as the Court may deem just and proper.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

s/J.R. Murphy

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Timothy J. Newton, Esquire (Fed. I.D. #9807)
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Attorneys for Plaintiff Penn-America Insurance
Company

Columbia, South Carolina
June 14, 2016

EXHIBIT
12.0

120

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION
CASE NUMBER: 2:16-cv-01943-DCN

Penn-America Insurance Company,

Plaintiff,

v.

Big Water Resort, LLC, TLC Holdings, LLC,
Richard Clark, Jimmy S. Lovell a/k/a Jimmy
"Steve" Lovell, James Thigpen, Ocoee, LLC;

Defendants.

**PLAINTIFF'S MEMORANDUM
IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT**

Plaintiff Penn-America Insurance Company (Penn-America) submits the following Memorandum in support of its Motion for Summary Judgment. Penn-America's Motion should be granted because the claims in the underlying case were based upon intentional misconduct, which is excluded. Penn-America reserves its right to assert additional grounds for summary judgment via separate motions.

BACKGROUND

This action seeks declarations by the court as to coverage under a policy (hereinafter "the Policy") that Penn-America issued to "BWR, Inc. d/b/a Big Water Resort." (Exh. A: Certified Policy.) The Policy, which was effective from October 16, 2013 through April 7, 2014, contains Commercial General Liability (CGL) coverage.

Coverage was sought under the Policy for two separate lawsuits, one in federal court and the other in state court. (See Second Amended Complaint, ¶¶ 27, 41, ECF Entry #29.) The federal court action has been settled. Only the claim arising from the state court action remains at issue.

The individual defendant that seeks coverage under the Policy is M.B. Hutson. The original Complaint in this action named Hutson as a defendant due to his interest as the putative insured. Hutson and BWR, Inc. were dismissed from this action after they stipulated to be bound by the judgment. (Order of Dismissal, ECF Entry #17.)

Defendants TLC Holdings, LLC; Richard Clark; and Jimmy S. Lovell (hereinafter collectively "the TLC Parties") are the plaintiffs in the underlying state court action. (See Exh. B: Amended Complaint, TLC Holdings, LLC, et al. v. Hutson, Civ. Action No. 2015-CP-14-00615 (hereinafter "the Underlying Defamation Action").) The interests of the remaining defendants, Big Water Resort, LLC; James Thigpen; and Ococo, LLC were mooted when the underlying federal court action was settled.

The Underlying Defamation Action arose out of a business dispute between the TLC Parties and Hutson. The conflict between the TLC Parties and Hutson erupted into litigation over control over a campground known as Big Water Resort. In the course of that litigation, Hutson made certain statements that led to a class action filed by the campground members against the TLC Parties, who filed third-party claims against Hutson for indemnification.¹ That action has been fully settled. The TLC Parties brought a separate action against Hutson for defamation in state court—the Underlying Defamation Action

At trial in the Underlying Defamation Action, the TLC Parties argued that Hutson embarked upon a malicious campaign to destroy the reputations of the TLC Parties. (Exh. C: Tr. of Record of trial of the Underlying Defamation Action, pp. 41.) Hutson sent out a postcard (hereinafter "the Postcard") containing defamatory statements. (*Id.* at p. 51.) Hutson also prepared a memorandum entitled "Class Action" (hereinafter "the Memo") accusing the TLC Parties of

¹ William Reed, et al. v. Big Water Resort, LLC, et al., Civ. Action No. 2:14-cv-01583-DCN.

wrongdoing which he used to threaten the TLC Parties and provided to lawyers for use against the TLC Parties. (Id. at pp. 51-52.) Thirdly, Hutson provided information to lawyers for the campground members that the TLC Parties argued was defamatory. (Id. at pp. 53.) The TLC Parties argued that these defamatory statements were incorporated into a lawsuit by the campground members (the Reed action), but the most damaging allegations were withdrawn after the financial records of the TLC Parties were produced. (Id. at 53-54.)

The Underlying Defamation Action was tried to a verdict in January 2018. Judgment was entered against Hutson in the amount of \$3,500,000.

STANDARD FOR MOTION FOR SUMMARY JUDGMENT

Rule 56(a) of the Federal Rules of Civil Procedure provides that a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” A “genuine dispute” exists only when a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To demonstrate a genuine dispute, a party opposing summary judgment must set forth specific facts from the evidentiary record. Id. at 250. A genuine dispute is not created by mere allegations or characterizations that are blatantly contradicted by the record. Scott v. Harris, 550 U.S. 372, 380 (2007). The purpose of Rule 56 is to force the non-moving party to come forward with specific evidence before litigation is prolonged. Lujan v. Nat’l Wildlife Federation, 497 U.S. 871, 888-89 (1990). The evidence is viewed in the light most favorable to the non-moving party, but only if a genuine dispute is reflected in the evidence. Ricci v. DeStefano, 557 U.S. 557, 586 (2009). Material facts are those that are relevant and might affect the outcome of the lawsuit. Anderson, 477 U.S. at 248.

ARGUMENT

The issue of whether Hutson was an insured for purposes of this claim is disputed. However, assuming *arguendo* that Hutson was an insured, coverage for this claim is excluded.

Exclusion I.B.2.a. excludes coverage for “[p]ersonal and advertising injury” caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict “personal and advertising injury.” (Exh. A: Policy, Form CG 0001 04 13.) This language excludes coverage for intentional conduct. Custom Hardware Eng’g & Consulting, Inc. v. Assurance Co. of America, 295 S.W.3d 557, 562 (Mo. Ct. App. 2009). The exclusion applies if the insured knew the act would violate another’s rights and would inflict injury. Burlington Ins. Co. v. Eden Cryogenics LLC, 126 Supp. 3d 947, 958 (S.D. Ohio 2015). South Carolina courts construe intentional act exclusions to apply if the perpetrator intended both the act and the result. Miller v. Fid.-Phoenix Ins. Co., 268 S.C. 72, 75, 231 S.E.2d 701, 702 (1977); Vermont Mut. Ins. Co. v. Singleton By & Through Singleton, 316 S.C. 5, 9–10, 446 S.E.2d 417, 420–21 (1994).

The trial court in the Underlying Defamation Action found that Hutson’s defamatory statements were intended to cause injury. In denying Hutson’s post-trial motions, the trial court specifically found that “the communications are more accurately categorized as champertous, maintenance or barratry” (Exh. D: Order, pp. 4-5.)

Barratry is a crime in South Carolina. S.C. Code Ann. § 16-17-10. “‘Civil barratry’ is the solicitation of employment to prosecute or defend a claim with the intent to obtain a personal benefit. It exists when a party brings a frivolous or malicious claim and connotes an improper motive or a legal position so wholly without merit as to be ridiculous.” 14 C.J.S. Champerty and Maintenance § 3 (Mar. 2018 Update). “Barratry . . . is the offense of frequently exciting and stirring up quarrels and suits between other individuals.” Osprey, Inc. v. Cabana Ltd. P’ship, 340

S.C. 367, 373, 532 S.E.2d 269, 273 (2000). “‘Maintenance’ means the act of one improperly, and for purposes of stirring up litigation and strife, encouraging others to bring actions . . . which they have no right to make . . .” 14 C.J.S. Champerty and Maintenance § 2 (Mar. 2018 Update).

Barratry and maintenance are intentional torts. Liability for these types of offenses can only be based upon intentional misconduct. The trial court’s finding that Hutson’s conduct constituted barratry and/or maintenance is tantamount to a finding of intent to injure. Barratry cannot be proven unless the defendant solicited a suit that he knew was groundless. State v. Chitty, 17 S.C.L. (1 Bail.) 379, 389 (1830). Maintenance requires intent to stir up litigation and strife. 14 C.J.S. Champerty and Maintenance § 2. Champerty does not appear to be at issue since there is no evidence that Hutson purchased an interest in the campground class members’ lawsuit against the TLC Parties. See Osprey, 340 S.C. at 373, 532 S.E.2d at 273.

Furthermore, the TLC Parties’ case was presented to the jury under a theory that Hutson intended to injure them. The TLC Parties opened and closed their case by representing to the jury that their case against Hutson was about a “malicious campaign” to destroy their reputations. (Exh. C: Tr. p. 41, 717, 725.) The TLC Parties argued that Hutson’s strategy was to fight the eviction by turning the campground members against them. (Id. at p. 51.)

Testimony was presented that the Postcard threatened a class action lawsuit. (Id. at p. 226-27.) The Memo was used to threaten the TLC Parties. (Id. at 227.) The final testimony the jury heard before closing arguments was the reading of this Court’s Order granting the TLC Parties’ Motion for Sanctions in the Reed action. (Exh. C: Tr. at pp. 697-98.) The jury heard that Hutson “has established a pattern of making misrepresentations to the Court, of making unsupported allegations of unethical and criminal conduct by [the TLC Parties], and of using the judicial process as a mechanism of harassment.” (Id. at p. 698.)

The TLC Parties argued to the court in the Underlying Defamation Action that Hutson was not entitled to a qualified privilege because he “drummed up the class action for malicious reasons.” (Exh. C: Tr. at p. 594.) Counsel for the TLC Parties argued Hutson was not a legitimate participant in the judicial process, but rather a mere “officious interloper” who interfered with the relationship between Big Water Resort, LLC and the campground members. (Id. at pp. 593-94.) His conduct was compared to one who stands on the courthouse steps and publicly broadcasts false information. (Id. at p. 595.) Hutson’s use of the Memo is called extortion. (Id. at p. 596.) After the defense rested, the TLC Parties argued they proved actual malice. (Id. at p. 702.)

In their closing statements, the TLC Parties argued to the jury the following:

What this case is about is exactly what I said it was about at the beginning. It’s about a malicious campaign by M.B. Hutson to destroy these excellent reputations [of Richard Clark, Steve Lovell, and their company TLC Holdings].

(Exh. C: Tr. p. 717, 725.) Counsel concluded by arguing: “This case is about malicious falsehoods. We have come to you to right that wrong” (Id. at p. 769.)

The trial judge charged the jury that actual malice means the defendant “was actuated by ill will in what he did, with a design to causelessly and wantonly injure the plaintiff” or published the statements “with such recklessness as to show a conscious disregard of the plaintiff’s rights.” (Exh. C: Tr. (Day 5) at p. 14.) Actual malice cannot exist if the defendant “had a good-faith belief that the statement was true.” (Id.)

The TLC Parties presented their case to the trial court and the jury upon a theory that Hutson acted maliciously with intent to injure them. The jury returned a verdict for the plaintiff. The TLC Parties were wholly successful at trial in proving that M.B. Hutson knowingly violated their rights. Accordingly, coverage is excluded.

CONCLUSION

Penn-America respectfully requests that this Court grant its motion for summary judgment. Coverage is excluded by the Knowing Violation Of Rights Of Another exclusion because the case was presented to the jury on the theory that Hutson acted with malicious intent to harm and trial court found that Hutson's conduct amounted to barratry and/or maintenance, which are both intentional torts requiring proof of intentional harm. For this reason, Penn-America's Motion should be granted.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

s/Timothy J. Newton

J. R. Murphy, Esquire (Fed. I.D. #3119)

Timothy J. Newton, Esquire (Fed. I.D. #9807)

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Attorneys for Penn-America Ins. Co.

Columbia, South Carolina
November 8, 2018

EXHIBIT
13.0

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CLARENDON) Civil Action No. 2015-CP-14- 615

TLC Holdings, LLC, Richard Clark, and
Jimmy S. Lovell,

Plaintiffs,

vs.

M. B. Hutson a/k/a M. B. Hudson,

Defendant.

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE
DATE 12/7/15 COMPLAINT
(JURY TRIAL DEMANDED)
Beulah G. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

BEULAH G. ROBERTS
CLERK OF COURT
CLARENDON COUNTY, SC
20 DEC 7 P 12:11

The Plaintiffs, upon information and belief, would respectfully show unto this Honorable

Court as follows:

JURISDICTION AND VENUE

1. Plaintiff TLC Holdings, LLC is a limited liability company organized and existing pursuant to the laws of the State of South Carolina.
2. Plaintiff Richard Clark is a resident of the state of Tennessee.
3. Plaintiff Jimmy "Steve" Lovell is a resident of the state of Florida.
4. Defendant M. B. Hutson a/k/a M. B. Hudson is a resident of Orangeburg County, South Carolina.
5. Venue is proper in this Court pursuant to S.C. Code Ann. § 15-7-30(C) because Defendant resided in Clarendon County at the time the cause of action arose, and the most substantial part of the alleged act giving rise to the cause of action occurred in Clarendon County.
6. This Court has jurisdiction over the parties and the subject matter of this action.

FACTUAL ALLEGATIONS

7. Plaintiffs Clark and Lovell are two of the three former members of Big Water Resort, LLC. James Thigpen is the third former member. Big Water Resort, LLC operated the Big Water Resort campground on the shores of Lake Marion. Big Water Resort, LLC began selling memberships in the campground in 2003 and eventually sold over 1,000 memberships.

8. Plaintiff TLC Holdings, LLC owns the land on which the Big Water Resort campground is located. Plaintiffs Clark and Lovell, along with James Thigpen, are the three members of TLC Holdings, LLC.

9. In December 2010, Plaintiffs Clark and Lovell, along with James Thigpen, sold their membership interests in Big Water Resort, LLC to Defendant Hutson, making Hutson the sole member of that LLC. Clark, Lovell, and Thigpen financed Hutson's purchase of the LLC under a promissory note payable to the three of them by Hutson.

10. Also in December 2010, Plaintiffs TLC Holdings, LLC, Clark, and Lovell, along with Thigpen, entered into a lease-purchase agreement with Defendant Hutson, under which TLC Holdings LLC, Clark, Lovell, and Thigpen agreed to sell certain property to Hutson. This property included the land on which the Big Water Resort campground was located.

11. Subsequent to these transactions, Defendant Hutson operated the Big Water Resort campground until early 2014.

12. In December 2011, Plaintiff TLC Holdings, LLC instituted an action in Clarendon County Court of Common Pleas against Defendant Hutson for breach of the lease-purchase agreement, seeking damages and ejectment.

13. In March 2012, the parties to the lease-purchase agreement entered into a Settlement Agreement. The terms of the Settlement Agreement imposed many duties on

Defendant Hutson, including the duty to make certain improvements to the campground property and the duty to make certain payments to Plaintiff TLC Holdings, LLC. The Settlement Agreement was approved by, and incorporated into, a consent order signed by the Honorable George C. James, Jr. in April 2012.

14. In February 2013, counsel for Plaintiffs Clark, Lovell, and TLC Holdings, LLC notified Defendant Hutson that he was in default of the lease-purchase agreement and Settlement Agreement.

15. Counsel for Plaintiffs Clark, Lovell, and TLC Holdings, LLC sent Hutson another default letter on December 10, 2013, notifying him that he had failed to cure the defaults outlined in the February 2013 default letter and that they would proceed with filing an affidavit of default.

16. In a postcard dated December 18, 2013 and addressed to current and former members of the Big Water Resort campground, Defendant Hutson stated the following:

I purchased the Big Water Resort business in 2010. I have since come to realize that members were scammed by paying thousands of dollars to Big Water Resort when formerly owned by TLC, Holdings [sic]. Those monies totaled about 5 million dollars paid by members when they signed their individual contracts to TLC, Holdings [sic] owned Big Water Resort. There was no feasible way that Big Water Resort could furnish the contractual benefits and the spirit as outlined in the contract, nor did TLC, Holdings [sic] have any desire to fulfill their end of the contract in actuality, nor in spirit.

I, and others, will seek to demand a refund from TLC Holdings, by way of a class action lawsuit, charging TLC, Holdings [sic] with fraud and possible racketeering for the five million plus triple damages. Any existing or former member wanting to join this lawsuit may do so by contacting me at Big Water Resort as soon as possible or dialing [redacted]. I, too, have been scammed by TLC, Holdings [sic] as a member and purchaser of Big Water Resort. I will be able to put any member in touch with the attorney. The suit will be filed in the next ten days. Anyone who joins stands a good chance of recovering their money. I know that hundreds of members are convinced they were scammed. It appears that hundreds will join this effort. I am told that the statute runs from time of discovery of the scam. Let's join together now and get our money back.

17. In March 2014, the Honorable George C. James, Jr. issued an order ruling that the Settlement Agreement and consent order should be enforced. Specifically, he ordered that the lease-purchase agreement was terminated and that Defendant Hutson was required to vacate the property. Hutson vacated the property later that month.

18. In April 2014, a group of campground members brought a putative class action in federal court against Plaintiff TLC Holdings, LLC; Plaintiff Clark; Plaintiff Lovell; James Thigpen; and Big Water Resort, LLC ("class action defendants"). The campground members alleged that, among other things, the class action defendants breached the members' membership contracts; that Clark and Lovell defrauded the campground members; and that Clark and Lovell siphoned funds from the resort.

FOR A FIRST CAUSE OF ACTION
(LIBEL)

19. The foregoing allegations are incorporated by reference as if fully repeated verbatim herein.

20. Defendant Hutson made false and defamatory statements about Plaintiffs in the December 2013 postcard.

21. Defendant Hutson distributed this postcard to hundreds of campground members and was the party at fault for the publication of the false and defamatory statements, which publication was not privileged.

22. The false statements made by Defendant Hutson about Plaintiffs in the postcard were defamatory in that they tended to degrade and disgrace Plaintiffs, reduce the reputation and character of Plaintiffs in the estimation of their friends, acquaintances, business associates, and/or the public, and accuse Plaintiffs of impropriety and criminal activity.

23. In publishing the statements, Defendant Hutson acted with recklessness and/or wantonness toward Plaintiffs' rights.

24. The false and defamatory statements made by Defendant Hutson about Plaintiffs have caused Plaintiffs to suffer damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs are entitled to and pray for the following relief:

- a) Entry of judgment in favor of Plaintiffs on all causes of action against Defendant;
- b) An award to Plaintiffs of actual damages from Defendant in an amount to be determined at trial;
- c) An award to Plaintiffs of punitive damages from Defendant in an amount to be determined at trial;
- d) An award to Plaintiffs of costs, pre-judgment interest, and fees from Defendant;
- e) A jury trial on all issues so triable; and
- f) For such other relief as this Honorable Court may deem just and proper.

{Signature Page Follows}

TURNER PADGET GRAHAM & LANEY P.A.

By:



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ATTORNEYS FOR PLAINTIFFS

December 7, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

CIVIL ACTION NO: 2018-CP-40-06344

MB Hutson/MB Hudson,

Plaintiff,

v.

MOTION TO DISMISS

Penn America Insurance Company, Global
 Indemnity Group, Inc., Timothy N. Newton,
 Esquire, JR Murphy, Esquire, John Doe #1 and
 John Doe #2,

Defendants.

**TO: MB HUTSON/MB HUDSON, PLAINTIFF PRO SE AND TO THE PLAINTIFF
 ABOVE NAMED:**

YOU WILL PLEASE TAKE NOTICE that the Defendants, Timothy N. Newton,
 Esquire, pro se and JR Murphy, Esquire, pro se, will move before the Presiding Judge of the
 Richland County Court of Common Pleas at the Richland County Courthouse at 10:00 a.m. on
 the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard for an
 Order dismissing the Plaintiff's Complaint against them pursuant to South Carolina Rules of
 Civil Procedure 12(b)(6) on the grounds that the Plaintiff's Complaint fails to state facts
 sufficient to constitute a cause of action against these Defendants. The basis for this motion will
 be more clearly set out in a memorandum of law to be filed.

s/Timothy J. Newton

Timothy J. Newton, Esquire, pro se
 (SC Bar #71640)
 Murphy & Grantland, PA
 P.O. Box 6648
 Columbia, SC 29260

s/J.R. Murphy

J.R. Murphy, Esquire, pro se
 (SC Bar #7941)
 Murphy & Grantland, PA
 P.O. Box 6648
 Columbia, SC 29260

Columbia, South Carolina

February 12, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
MB Hutson/MB Hudson,	)	Civil Action No.: 2018-CP-40-06344
	)	
Plaintiff,	)	DEFENDANTS
	)	PENN AMERICA
vs.	)	INSURANCE COMPANY AND
	)	GLOBAL INDEMNITY GROUP, INC.'S
Penn America Insurance Company, Global	)	ANSWER TO
Indemnity Group, Inc., Timothy J. Newton,	)	PLAINTIFF'S AMENDED COMPLAINT
Esq., J.R. Murphy, Esq., John Doe #1, and	)	
John Doe #2,	)	(Jury Trial Demanded)
	)	
Defendants.	)	

TO: MB HUTSON, PRO SE PLAINTIFF:

Defendant Penn America Insurance Company, the proper party in interest, on behalf of itself and Defendant Global Indemnity Group, Inc. (collectively "PAIC"), reserving the right to file a motion pursuant to Rule 12 of the South Carolina Rules of Civil Procedure, or any other dispositive motion, responds to the Amended Complaint of Plaintiff MB Hutson/MB Hudson ("Plaintiff") by denying each and every allegation not herein admitted, by demanding strict proof thereof, and further responds as follow:

FOR A FIRST DEFENSE AND BY WAY OF ANSWER

1. Each and every allegation not herein admitted is hereby denied and strict proof thereof demanded.
2. PAIC lacks sufficient knowledge and information to form a belief as to the truth of the allegations of Paragraph 1 regarding Plaintiff's county of residence; therefore, PAIC denies the same and demands strict proof thereof. PAIC admits, upon information and belief, Plaintiff is a citizen of South Carolina.

3. In responding to the allegations of Paragraph 2, PAIC avers that Penn America Insurance Company is a corporation organized and existing pursuant to the laws of the State of Pennsylvania with its principal place of business being Pennsylvania.
4. In responding to the allegations of Paragraph 3, PAIC retained Timothy J. Newton, Esquire (“Newton”) and J.R. Murphy, Esquire (“Murphy”) of Murphy & Grantland, P.A. as coverage counsel to file a declaratory judgment action related to an underlying lawsuit against Plaintiff. PAIC denies any remaining allegations of Paragraph 3 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demand strict proof thereof.
5. Upon information and belief, PAIC admits the allegations of Paragraph 4 which state Newton attended mediation on behalf of PAIC.
6. The allegations of Paragraph 5 contain conclusions of law to which no response is required. Alternatively, to the extent a response is required, PAIC does not contest that venue is proper in Richland County. However, PAIC denies any allegations of Paragraph 5 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.
7. The allegations of Paragraph 6 contain conclusions of law to which no response is required. Alternatively, to the extent a response is required, PAIC does not contest that this Court has personal and subject matter jurisdiction. However, PAIC denies any allegations of Paragraph 6 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.
8. In responding to the allegations of Paragraph 7 through 22, PAIC craves reference to the Counterclaims filed by Plaintiff against TLC Holdings, LLC, Richard Clark, Jimmy S.

Lovell, and John Doe Corporations on or about March 29, 2016, Case No. 2015-CP-14-00615, incorporates the same by reference, and denies any allegations of Paragraphs 7 through 22 inconsistent therewith. PAIC further denies any allegations of Paragraphs 7 through 22 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.

9. PAIC denies the allegations of Paragraphs 23 through 25 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.
10. PAIC denies the allegations of Paragraph 26, including all subparts, that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.
11. PAIC denies the allegations of Paragraph 27 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.
12. PAIC denies the allegations of Paragraph 28 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.
13. In responding to the allegations of Paragraph 29, PAIC craves reference to the filings in the declaratory judgment action, incorporate the same by reference, and denies any allegations of Paragraph 29 inconsistent therewith. PAIC further denies any allegations of Paragraph 29 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.

14. PAIC denies the allegations of Paragraph 30 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.
15. PAIC denies the allegations of Paragraph 31 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.
16. PAIC denies the allegations of Paragraph 32 and demands strict proof thereof.
17. PAIC denies the allegations of Paragraph 33 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.
18. PAIC denies the allegations of Paragraph 34 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.
19. PAIC denies the allegations of Paragraph 35 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.
20. PAIC denies the allegations of Paragraph 36 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.
21. PAIC denies the allegations of Paragraph 37 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.

22. PAIC denies the allegations of Paragraph 38 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.
23. PAIC denies the allegations of Paragraph 39 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.
24. PAIC denies the allegations of Paragraph 40 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.
25. PAIC denies the allegations of Paragraph 41 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.
26. PAIC denies the allegations of Paragraph 42 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.
27. PAIC denies the allegations of Paragraph 43 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.
28. PAIC denies the allegations of Paragraph 44 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.

29. PAIC denies the allegations of Paragraph 45 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.
30. PAIC denies the allegations of Paragraph 46 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.
31. PAIC denies the allegations of Paragraph 47 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.
32. PAIC denies the allegations of Paragraph 48 and demands strict proof thereof.
33. PAIC denies the allegations of Paragraph 49 and demands strict proof thereof.
34. In responding to the allegations of Paragraph 50, PAIC reasserts the above-numbered paragraphs and incorporates the same as if stated herein verbatim.
35. PAIC denies the allegations of Paragraph 51 and demands strict proof thereof.
36. PAIC denies the allegations of Paragraph 52 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.
37. PAIC denies the allegations of Paragraph 53 and demands strict proof thereof.
38. PAIC denies the allegations of Paragraph 54 and demands strict proof thereof.
39. PAIC denies the allegations of Paragraph 55 and demands strict proof thereof.
40. PAIC denies the allegations of Paragraph 56 that assert or could be construed as asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.

41. PAIC denies the allegations of Paragraph 57, including all subparts, and demands strict proof thereof.
42. PAIC denies the allegations of Paragraph 58 and demands strict proof thereof.
43. PAIC denies the allegations of Paragraph 59 and demands strict proof thereof.
44. PAIC denies Plaintiff is entitled to the relief sought in Paragraph 60 and demands strict proof thereof.
45. PAIC denies Plaintiff is entitled the relief sought in his Prayer for Relief Paragraph, including all subparts, and demands strict proof thereof. PAIC further denies any allegations of Plaintiff's Prayer for Relief Paragraph, including all subparts, that assert or could be construed asserting allegations of negligence or other wrongdoing on the part of PAIC and demands strict proof thereof.

FOR A SECOND DEFENSE

46. The Complaint fails to set forth sufficient facts to constitute a cause of action and, therefore, should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

47. PAIC aver they have performed all of their contractual and/or other duties and obligations and, therefore, are not in breach of any alleged contract.

FOR A FOURTH DEFENSE

48. Any injuries or damages sustained by Plaintiffs were due to and caused and occasioned by Plaintiffs' own action or conduct, or negligence, gross negligence, recklessness, willfulness and wantonness which was the direct and proximate cause of Plaintiffs' alleged injuries or damages, if any, and without which the same would not have occurred and, therefore, due

to Plaintiff's sole negligence, gross negligence, recklessness, willfulness and wantonness, Plaintiff's claims are barred.

FOR A FIFTH DEFENSE

49. Even if PAIC were negligent in any respect, which is expressly denied, and such conduct operated as a proximate cause of Plaintiffs' injuries or damages, if any, which is expressly denied, PAIC allege the Plaintiff's negligent, grossly negligent, reckless, willful and wanton conduct contributed more than fifty percent (50%) to the cause of the accident, and therefore, Plaintiff's claims are barred.

FOR A SIXTH DEFENSE

50. Even if PAIC were negligent in any respect, which is expressly denied, and even if such conduct on the part of PAIC operated as a greater than fifty percent (50%) cause of Plaintiff's injuries, if any, which is also denied, PAIC are entitled to a determination as to the percentage which Plaintiff's negligent, grossly negligent, reckless, willful and wanton conduct contributed to Plaintiff's accident and resulting injuries, if any, and to a reduction of any amount awarded to the Plaintiff by an amount equal to the percentage of the Plaintiff's own negligence.

FOR A SEVENTH DEFENSE

51. Any injuries sustained by the Plaintiffs may be due to and caused by the sole negligence of third persons over which PAIC had no control; therefore, PAIC should not be liable to the Plaintiffs in any sum whatsoever.

FOR AN EIGHTH DEFENSE

52. Any injuries or damages sustained by the Plaintiff were due to and caused by the intervening and superseding acts of negligence, carelessness, recklessness, and gross

negligence on the part of third persons as a proximate cause of injuries as alleged, if any; therefore, PAIC should not be liable to the Plaintiffs in any sum whatsoever.

FOR A NINTH DEFENSE

53. PAIC would show that even if PAIC were negligent, as alleged in the Complaint, which is specifically denied, PAIC's negligence is not the direct or proximate cause of any damages alleged by Plaintiffs; therefore, PAIC are not liable to Plaintiffs for any sum whatsoever.

FOR A TENTH DEFENSE

54. Plaintiff's claims are barred to the extent Plaintiff failed to mitigate his damages as required by law.

FOR AN ELEVENTH DEFENSE

55. Plaintiff's claims may be barred by the doctrines of waiver, estoppel, laches, and/or unclean hands.

FOR A TWELFTH DEFENSE

56. Plaintiff's claims are barred because there was an objective, reasonable good-faith basis for any and all actions taken by PAIC.

FOR A THIRTEENTH DEFENSE

57. Plaintiff's claims may be barred, in whole or in part, by the terms, conditions, exclusions and limitations contained in the policy.

FOR A FOURTEENTH DEFENSE

58. Plaintiff's claims may be barred by the lack of privity of contract between Plaintiff and PAIC.

FOR A FIFTEENTH DEFENSE

59. Plaintiff's claims may be barred by Plaintiff's violation of the conditions and terms of the policy.

FOR A SIXTEENTH DEFENSE

60. Any recovery by Plaintiff must be reduced or offset by amounts Plaintiff has received or will receive from others for the same claims in this lawsuit.

FOR A SEVENTEENTH DEFENSE

61. To the extent Plaintiff may be seeking punitive damages, punitive damages, as currently awarded in South Carolina, are violative of the United States Constitution and South Carolina Constitution, as well as the holding of State Farm Mutual Automobile Insurance Company v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), and the cases upon which it is based.

FOR AN EIGHTEENTH DEFENSE

62. Pursuant to Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S.Ct. 1678 (2001), if punitive damages are recoverable, which is denied, the amount of punitive damages "[are] not really a fact tried by the jury" therefore Plaintiff's request for punitive damages "to be determined by the jury" violates the United States Constitution.

FOR A NINETEENTH DEFENSE

63. The U.S. Constitution's Due Process Clause "forbids a State to use punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly [do not] represent," Phillip Morris USA v. Williams, 549 U.S. 346, 353 (2007), and, therefore, to the extent that Plaintiff seeks an award of punitive damages for potential or speculative harm to non-parties to the present action, such prayer for relief is

unconstitutional and must be struck from the pleadings and is otherwise inadmissible at trial.

FOR A TWENTIETH DEFENSE

64. Notwithstanding PAIC's prior defenses incorporating Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) and State Farm Mutual Automobile Insurance Company v. Campbell, 538 U.S. 408 (2003), and the cases upon which they are based, in the event the trial court permits the jury to return a punitive damages award in the instant case, such damages are to be limited to an amount that is no greater than the jury's award of actual damages, as explicated within Exxon Shipping Company v. Baker, 554 U.S. 471 (2008).

FOR A TWENTY-FIRST DEFENSE

65. PAIC plead any and all applicable protections afforded to them under the South Carolina Fairness in Civil Justice Act of 2011, codified at South Carolina Code Annotated Sections 15-32-510 to 15-32-540, as a defense to Plaintiff's claims or request for an award of punitive damages.

FOR A TWENTY-SECOND DEFENSE

66. PAIC incorporates any defenses asserted by other Defendants that may be applicable to PAIC and consistent with this response and defenses asserted in this Answer.

FOR A TWENTY-THIRD DEFENSE

67. PAIC specifically reserve the right to amend their answer and to raise any additional and/or affirmative defenses as may be available to them or revealed to them during the course of the investigation and/or discovery in this case.

WHEREFORE, having fully responded to Plaintiff's Complaint, Defendants Penn America Insurance Company and Global Indemnity Group, Inc. respectfully request:

- a. Plaintiff takes nothing by this action from these Defendants;
- b. A judgment of dismissal be entered in favor of these Defendants;
- c. These Defendants be awarded the cost of the suit incurred; and
- d. These Defendants be awarded such other and further relief as this Court deems proper.

Respectfully submitted,
COLLINS & LACY, P.C.

By: s/Christian Stegmaier
CHRISTIAN STEGMAIER
SC Bar No. 68648
cstegmaier@collinsandlacy.com
KELSEY J. BRUDVIG
SC Bar No. 101680
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1330 Lady Street, Sixth Floor (29201)
Post Office Box 12487
Columbia, SC 29211
(803) 256-2660 (voice)
(803) 771-4484 (fax)

ATTORNEYS FOR DEFENDANTS PENN
AMERICA INSURANCE COMPANY
AND GLOBAL INDEMNITY GROUP,
INC.

**DEFENDANTS PENN AMERICA
INSURANCE COMPANY AND
GLOBAL INDEMNITY GROUP, INC.'S
ANSWER TO PLAINTIFF'S
COMPLAINT**

Jury Trial Requested

Columbia, South Carolina
February 14, 2019

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

MB Hutson/MB Hudson,

Plaintiff

vs.

Penn America Insurance Company, Global
Indemnity Group, Inc., Timothy J.
Newton, Esq., J.R. Murphy, Esq., John
Doe #1 and John Doe #2,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2018-CP-400-6344

**PLAINTIFF'S MEMORANDUM
TO DEFENDANT'S RESPONSE**

RICHLAND COUNTY
FILED
2019 MAY -7 AM 11:15
JEANETTE W. MCBRIDE
C.C.P., G.S., & F.C.

Comes now the Plaintiff stating the following:

1. Defendants J.R. Murphy and Tim Newton attorneys for Murphy & Grantland represented Penn America and Global Indemnity "the insurer" and Plaintiff was the insured. Plaintiff relied and trusted Defendants of Murphy & Grantland, P.A. and made and received over an estimated 120 phone calls to Murphy & Grantland, trying to help and assist in any way possible. During conversations between Newton and Plaintiff, Defendant Tim Newton repeatedly stated that any actions that he took required approval from Penn America Insurance Company. Newton would say, "I will run it up the chain of command and see what they say".

2. Defendants Penn America Insurance Company and Global Indemnity authorized Defendants at Murphy & Grantland, P.A. to file a federal suit to terminate Plaintiff's coverage (Exhibits 11.0 and 12.0)¹. Also, the 11.08.18 action against this Plaintiff, *was not legally served on this Plaintiff nor was any written notice of such a filing given to this Plaintiff, even though* Plaintiff was the insured. Newton and Murphy/Defendants, were obligated by RULE

¹ 2:16-cv-01943-DCN (6.14.16 and 11.08.18)



SCANNED

1.7 to represent the *insured* which they were engaged by the insurer to defend at that time. In

Formal Op. #01-420, the ABA's Ethics Committee states:

*"In representing an insured, a lawyer MUST NOT permit compliance with "guidelines" or other insurer directives relating to the lawyer's services to impair materially the lawyer's independent professional judgment. There may be rare instances when the lawyer reasonably believes a limitation imposed by the insurer's directives is materially compromising the lawyer's ability to provide competent representation to both the insured and insurer. In such cases, IF the lawyer is UNABLE TO PERSUADE THE INSURER to withdraw the limitation, the resulting conflict between the insurer's directives and the insured's interests REQUIRES THE LAWYER TO PROTECT THE IMMEDIATE INTERESTS OF THE INSURED while preparing TO WITHDRAW from representing BOTH the insured and the insurer."*² (Emphases mine.)

Thereby, attorneys Newton and Murphy/Defendants failed to meet their duty to defend the insured, as follows: Newton & Murphy

- a) secretly filed against the insured (whom they were primarily engaged and duty bound to defend), and
- b) Although required by law, did NOT notice or inform the insured of that action taken on behalf of the insurer against the insured.

3. In an attempt to help Plaintiff, Tim Newton, Esq., of Murphy and Grantland, P.A., prepared a sixteen (16) point document of legal advice and emailed the same to Plaintiff on August 13, 2018.³ Notably, Newton stated that he had originally asked Frank Gordon, Esq., (who was engaged by Newton at Murphy and Grantland for the purpose of defending this Plaintiff /Hutson in a State Court action) "to copy the (16) point legal document on his letterhead" to send it to Plaintiff to distant himself from the "(16) point legal document prepared by Newton.

Newton later informed this Plaintiff that he was "unable to coordinate that with (Frank Gordon,

² Annotated South Carolina Rules of Professional Conduct 2016 Ed., Wilcox and Crystal, 2016. Pub: SC Bar, pp.121-122.

³ Exhibits 4.1 - 4.3.

Esq.). Consequently, Newton resorted to emailing it directly to Hutson, this Plaintiff.⁴ The advice within those 16 points was to assist and encourage Plaintiff to immediately file a lawsuit against TLC Holdings, LLC and their attorneys for (extrinsic fraud upon the court and the insured/Hutson) the discussed and targeted purpose of intimidation and influencing TLC Holdings, LLC and their attorneys to accept less monies at the pending mediation than the \$3.5M regarding the outstanding judgment. This is “subversive extortion with the intentional purpose to intimidate”, and “undue or unlawful use of authority to influence.” Murphy and Newton of Murphy and Grantland, P.A. violated the SC Rules of Professional Conduct, RULE 1.2 “Scope of Representation,” RULE 8.4-a “Misconduct,” RULE 4.1, “Truthfulness in statements to Others,” Rule 8.4-d “Dishonesty, Fraud, Deceit and Misrepresentation,” RULE 8.4 e “Misconduct Legal Advice,” RULE 3.3-b “Duty to Reveal Criminal or Fraudulent Conduct to the Tribunal,” RULE 3.3-a-3, page 406 “Mandatory Duty to Report Serious Misconduct by TLC Holdings and their attorneys.” Instead, Defendants could have, and should have, acted *legally, as follows*:

- a) given proper notice to the court about the concealed material facts by TLC Holdings, LLC and their attorneys which led to the fraud and the \$3.5M judgment against this Plaintiff, and
- b) filing a suit against TLC Holdings, LLC for Extrinsic Fraud upon the Court and the insured Plaintiff/Hutson and subsequent damages to their insured, the Plaintiff in this action saving themselves from the \$3.5M judgment, and their client (the Plaintiff/insured in this action) from the residual impact of that on the record.

During one particular conversation that Plaintiff was having with Newton, Plaintiff inquired, “Why wouldn’t Penn America defend me as the insured regarding the Extrinsic Fraud?” Newton responded by saying that Penn American just “did not want to take on that obligation.” That

⁴ Exhibits 4.1 – 4.3.

further substantiates that Newton was fully aware of the Extrinsic Fraud and that he had, in fact, “ran it up the chain” thus creating a breach of duty to defend doomed insured.

4. These statements verify that both insurance companies and Newton of Murphy and Grantland, P.A. were fully aware of the circumstances and are also liable for attempting the subversive extortion with the intentional purpose to intimidate the results of an ongoing mediation to their benefit since Defendants Newton J. R. Murphy were the servants of the Master being Penn America. The only thing that prevented the subversive extortion to intimidate being carried out is the fact that Plaintiff would not cooperate and held off on filing a suit for Extrinsic Fraud against TLC Holdings, LLC and their attorneys. Discovery will uncover a pattern of “I will run it up the chain of command and see what they say.” All Defendants have practiced bad faith and dishonesty towards the Plaintiff. All actions taken by Defendants Murphy and Grantland, P. A.’s attorneys were funded and endorsed by Defendants Penn America Insurance Company and Global Indemnity.

5. According to the Law and State Bar rules, individually and corporately, as Officers of the Court, each Defendant (including both insurance companies) had a duty to report the Extrinsic Fraud to the Court or the Attorney Generals office. (RULE 3.3 a-3) ”Mandatory Duty to Report.”⁵ Defendants individually, corporately and intentionally failed to do so. Defendants *could have and SHOULD have* reported the Extrinsic Fraud and concealment - undisclosed material facts that led to the current case perpetrated by TLC Holdings, LLC and their attorneys. Proper action on the part of these Defendants would have required the attorneys of TLC Holdings, LLC to disclose all concealed evidence that they had which favored their client, TLC Holdings LLC. This evidence included an undisclosed and unrecorded title defect which was cloaking/masking a non-existent, long-term ‘contractual/lease’ for the use of the land by the business operating thereon,

⁵ SC Rules of Professional Conduct. 2016 ed. page 406.

which had sold hundreds of one to two lifetime agreements for a “right to use” the property for over seventy years and thereby made the Settlement Agreement and Consent Order which required Plaintiff to develop those previously encumbered and now undevelopable 108 acres *fraudulent*.

Other concealed material facts that were never disclosed to the Buyer, nor to the courts were:

- A. Sellers lacked a contractual agreement providing Big Water Resort (BWR) the use of the land and properties needed to honor some 740 presold family memberships (known as Retail Membership Agreements, hereinafter referred to as RMAs),
- B. Sellers concealed that BWR was losing a continued 250 – 300 thousands dollars each year, which, when applied to the seventy years of obligation that BWR had to service those RMAs, hid and masked that BWR had a 20M dollar obligation.
- C. Sellers had failed to escrow ANY of the funds from the sale of the RMAs to fund BWR’s obligation to the RMA families. *Zero dollars* had been placed in escrow to protect interests of the RMAs.
- D. Sellers fraudulently provided a financial statements indicating BWR was worth 1.7M dollars, never disclosing the true facts.

BWR was merely an empty shell with no assets. These material facts had been hidden from the Courts and Honorable Judges. The Option to Purchase and the RMAs were crafted by TLC’s attorneys to deceive, defraud, and trap the Plaintiff into obligations which were legally impossible for Plaintiff to accomplish. All the attorneys, including Penn America, Global Indemnities, Murphy & Grantland, J.R. Murphy, and Tim Newton were fully aware of the Extrinsic Fraud Upon the Courts.

6. Defendants' firm (Murphy and Grantland, P.A.), Penn America Insurance Company, and Global Indemnity were all given several notices⁶ both in writing (at various times prior to the \$3.5M judgment settlement) and verbally by Plaintiff stating that TLC Holdings, LLC's attorneys were committing Fraud upon the Court. Defendant Tim Newton, Esq. acknowledged that he was aware of the same:

... Since attorneys were involved, and it resulted n your inability to present your case in court, and possibly led to the sanctions order and judgment against you, there might possibly be extrinsic fraud on the court to support setting aside the Consent Order. (See Chewning v. Ford Motor Company 354 S.C. 72; 579 S.E. 2d 605 (2003). –Tim Newton, Esq.⁷

Although this Plaintiff repeatedly urged Defendants to intervene, report and stop the fraud from continuing (instead of paying the perpetrators a settlement), *none* of these Defendants took *any* action to defend Plaintiff against that fraud. Defendants were fully aware of the “Extrinsic Fraud upon the Court” and fraud upon Plaintiff. Their lack of executing their fiduciary duties, thereby caused Plaintiff to suffer a great disadvantage and continue to suffer on-going damages in all court related hearings, records and filings. The current court records still reflect that the wrongful judgment negatively impacts current and future business endeavors. These court records showing Plaintiff “lost” cases validates that Plaintiff is already suffering business issues for the Plaintiff.

7. Defendant, Tim Newton, acknowledged to Plaintiff that taking actions to report the Extrinsic Fraud could cause TLC's attorneys to go to jail. He stated his concerns about that likely outcome. One must suspect that Newton and Murphy, in “carrying the issue ‘up the chain’” had discussed the full issues with the Defendants Penn America Insurance Company and Global Indemnity, advised them of their primary obligation to defend the insured and met with blatant

⁶ Example: Exhibit 14.0 (Email from Hutson to Tim Newton of Murphy Grantland, P.A., and Kim Jackson of Torus Insurance Company, Nov. 15, 2018.)

⁷ Exhibit 4.2, Item 16. ll. 4-7.

opposition from the insurance companies who Newton reported to Plaintiff that they (insurance) just wanted the case “off their books.” Murphy and Grantland’s attorneys then had to follow that directive in compliance with RULE 1.2. HOWEVER, these attorneys must have intentionally overlooked Rule 1.2 (d) wherein it clearly states that:

“A lawyer shall not counsel a client to engage, or assist a client” (Penn America/Global) “in conduct that a lawyer knows is criminal or fraudulent.”

These blatant and intentional acts by Penn America Insurance Company, Global Indemnity, and their attorneys at Murphy & Grantland, P.A. (Murphy and Newton) were made with the full knowledge to harm/damage this Plaintiff, the insured. Defendant’s insurance policy reads that the insurance company has the right to settle a claim without the consent of the insured. However, the policy does NOT read that Penn America Insurance Company and Global Indemnity have the right to settle should such settlement bring damages to their insured. Also, attorneys cannot hide from their fiduciary duty to report Extrinsic Fraud to the Courts and other Legal “Watchdog” Entities behind Rule 1.2’s guidelines to “abide by the client’s decision after consultation.” Plaintiff pleaded with Defendants not to settle with TLC Holdings, LLC and their attorneys due to the Extrinsic Fraud because any settlement of payment to TLC Holdings, LLC and their attorneys would consequently also be fraudulent and wrongful. Those monies were negotiated to some \$1.8M, and should be returned by way of disgorgement. Defendants should be required to report the Extrinsic Fraud to the court and subsequently sue TLC Holdings, LLC and their attorneys for Extrinsic Fraud requiring any settlement monies to be placed in escrow pending Plaintiff’s suits against all defendants.

8. Laura Paton, Esq. and Frank Gordon, Esq. also had, as Officers of the Court, an obligation, by law, to report the Fraud upon the Court/Extrinsic Fraud upon the Court caused by TLC Holdings, LLC and its attorneys. However, they were both hired and directed by the named Defendants and they, as well, failed in their fiduciary duties to report⁸ it as Officers of the Court.

9. Exposing the Fraud upon the Court would have prevented court losses as well as prevented the \$3.5M judgment on record against the Plaintiff. Plaintiff had begged for help regarding the Extrinsic Fraud, but defendants denied to act upon it.

10. Defendants were a part of a Settlement with TLC Holdings, LLC and their attorneys while, as heretofore laid out, possessed full knowledge that TLC and their attorneys had committed Extrinsic Fraud. Therefore, Penn America Insurance Company, Global Indemnity, and Newton and Murphy of Murphy & Grantland, P.A. / Defendants were *all conspirators to the Settlement Agreement* while that very settlement *was and is* causing damages to the Plaintiff. This also meets the criteria for insurance fraud.

11. Plaintiff, the victim of that conspiracy (see paragraph #10, above) was willing to talk, discuss and offer to help the Defendants on the details of the case. However, a conflict developed due to this Plaintiff's insistence on being defended against the Fraud upon the Court being committed by TLC Holdings, LLC and their attorneys. Defendant Tim Newton, as well as Penn America, both understood and verbally acknowledged the awareness of Fraud upon the Court having left Plaintiff at a greater disadvantage. Nevertheless, the Defendants (Penn America Insurance Company, Global Indemnity, and their affiliates convinced the lawyers they hired (J.R. Murphy and Tim Newton of Murphy and Grantland, P.A.) to not represent and/or defend the Plaintiff from that Fraud upon the Court/Extrinsic Fraud upon the Court. This was only possible

⁸ S.C. Rules of Professional Conduct, 2016 Ed., p. 406, "Mandatory Duty to Report Serious Misconduct."

because those attorneys at Murphy and Grantland, P.A. chose NOT to follow the Rules to report the Extrinsic Fraud nor to recuse themselves from the case for ethics reasons. Once again, (servants and master were in harmony with each other). Therefore, the attorneys hired by Murphy and Grantland, P.A. (Laura Paton, Esq. and Frank Gordon, Esq). would not mention the subject in their defenses of the Plaintiff, Hutson, even though they, too, recognized that the Plaintiff could not win without forcing TLC Holdings, LLC's attorneys to disclose their concealment of material facts in their initial suit against this Plaintiff where the Fraud upon the Court was initiated.

13. Plaintiff *appeared to be* unsupportive in dealing with the Defendants solely due to the facts that:

- a) the Fraud upon the Court was clearly visible,
- b) the Defendants were fully aware of it and yet
- c) the Defendants *refused to execute their duty and report it to the court.* In fact, Defendants refused to do anything about it other than settling the case with full knowledge that they had been defrauded as well as the Plaintiff.

Once Defendants realized that the Plaintiff was not going to file a suit for extrinsic fraud using the provided, written, legal advice "dated August 13, 2018" from Tim Newton, Esq. of Murphy and Grantland, P.A., and Defendants realized that Plaintiff was going to file a motion to be heard in Federal Court regarding their Summary Judgment to dismiss insurance coverage to the Plaintiff, Defendants quickly settled with TLC Holdings, LLC and their attorneys, fully understanding that such settlement would harm Plaintiff and was fraudulent.

14. Defendant Tim Newton twice stated to Plaintiff, "I'm praying for you." Later, Plaintiff realized the obvious reasons for that prayer was, in part, to console Newton's own guilt for not exposing the Extrinsic Fraud to the Court to protect the Plaintiff-insured. Defendant Newton fully understood: a) that Plaintiff was being taken advantage of by way of Extrinsic

Fraud, and b) that Plaintiff would have no 'out' and would never attain justice that would restore or protect him. Plaintiff still suffers from having the \$3.5M judgment on his record, spending over 8,000 hours trying to defend against TLC's attorneys, appearing in front of three Federal Judges and two State Judges all in vain due to the extrinsic fraud, and other damages to be disclosed upon discovery.

15. Plaintiff recognized that all the Defendants could not be trusted. They plotted behind Plaintiff's back to protect the fraud committed by fellow attorneys. Defendants, Attorney Tim Newton and Attorney J.R. Murphy in cooperation with the legal departments at Penn America Insurance Company and Global Indemnity, *intentionally* allowed the Extrinsic Fraud to continue by TLC Holdings, LLC's attorneys causing Plaintiff to have an extreme dis-advantage, dooming this Plaintiff in court, resulting in a \$3.5M judgment while TLC Holdings, LLC received great and unscrupulous advantages in court. The Extrinsic Fraud's harmful effects are not only to this Plaintiff, but also to the entire judicial system and is thereby a threat to the American way of life. Furthermore, ignoring and covering up this and ANY Extrinsic Fraud is a violation to the South Carolina Rules of Professional Conduct and every officer of the court is obligated by professional code to report it:

*"As a self-regulating profession, lawyers are expected to report serious misconduct by other lawyers to appropriate disciplinary authorities. See Rule 8.3 (b) and cmt. 1. The duty to report the misconduct of others extends even to misconduct by another lawyer in the same firm."*⁹

Plaintiff brings these violations to the attention of the Honorable Judge for the Honorable Judge himself, is an attorney by profession, and carries the same obligations to report or be in code violation. Please find eight (8) Exhibits (# 14.0 through #22.0) hereto, attached and indexed, of

⁹ Annotated South Carolina Rules of Professional Conduct-2016 Edition, Wilcox and Crystal. South Carolina Bar. RULE 8.3; p. 406. ¶ 2, "Mandatory Duty to Report Serious Misconduct" ll. 1-4.

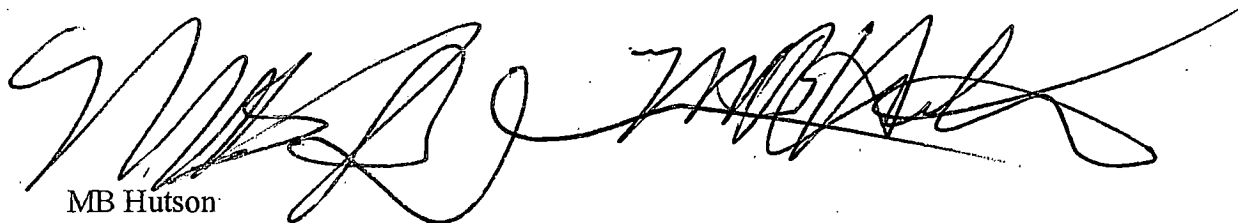
important confirming correspondence between Plaintiff, Penn America, Tim Newton, Esq. of Murphy and Grantland.

16. DEFINITION OF EXTRINSIC FRAUD: The United States Court of Appeals for the Sixth Circuit has delineated five elements of conduct that constitute Extrinsic Fraud Upon The Court:

- i. "On the part of an officer of the court,"
- ii. "That is directed to the 'judicial machinery' itself,"
- iii. "That is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth;"
- iv. "That is a positive averment or is concealment when one is under a duty to disclose;" and
- v. "That deceives the court."¹⁰

Therefore, Plaintiff had no other choice but to file this suit and beg this court for justice by sending this case to a jury of his peers.

Respectfully Submitted on this 6th day of May, 2019.

A large, stylized handwritten signature in black ink, appearing to be 'MB Hutson', written over a horizontal line.

MB Hutson

P.O. Box 2755
Orangeburg, South Carolina 29116-2755
Telephone: (803) 308-2714

Service on next page.

¹⁰ Demjanjuk v. Petrovsky, 10 F.3d 338, 348 (6th Cir. 1993).

EXHIBIT
14.0

complaint
for E. J. Newton



Got my complaint ready

H Hutson <hutson4444@gmail.com>

Sun, Oct 28, 2018 at 12:18 PM

To: "Tim J. Newton" <tnewton@murphygrantland.com>

Hello Tim. Please call me first thing in the morning and please don't forget for I need a couple laws cited to my complaint I will email a copy of the complaint to you in a couple hours from now don't forget to call me in the morning

EXHIBIT
15.0

EXHIBIT 15.0



Fraud upon the Court 2018.pdf

H Hutson <hutson4444@gmail.com>

Tue, Oct 30, 2018 at 8:47 AM

To: "Tim J. Newton" <tnewton@murphygrantland.com>

Good morning Tim. I sent you last night final copy of the complaint.

attached to this message I'm sending you an additional copy I would appreciate you letting me know what you think. I think it's got a lot of bite to it personally

----- Forwarded message -----

From: **Hutson** <hutson4444@gmail.com>

Date: Mon, Oct 29, 2018, 10:23 PM

Subject: Fraud upon the Court 2018.pdf

To: <desab@desaballard.com>, Hutson 4072 C <hutson4444@gmail.com>



Fraud upon the Court 2018.pdf

233K

Oct. 28, 2018 3:05 P.M. To Tim Newton
PAPER FOR YOUR COMMENTS

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

MB Hutson/MB Hudson,
Plaintiff

vs.

Turner Padget Graham & Laney P.A., John
Wilkerson, Wayne Byrd, Carlyle Cromer,
William Johnson and
Womble Carlyle Sandridge & Rice, Thomas
Harper, Charles Summerall, IV and
William Johnson ,
Defendants

IN THE COURT OF COMMON PLEAS

Civil Action No

EXHIBIT 15.0
ATTACHMENT

MOTION TO SET ASIDE TWO JUDGEMENTS:

1. CASE # 2011 - CP - 14 - 00602
JUDGEMENT, TLC Holdings, LLC,
Plaintiff and MB Hutson, Defendant, &
2. CASE # 2015 - CP - 14 - 00615
JUDGEMENT, TLC Holdings, LLC,
Plaintiff and MB Hutson, Defendant,,

AND

COMPLAINT FOR EXTRINSIC
FRAUD ON THE COURT (Hereby filed
by MB Hutson against Defendants, on
left)

first draft

**I. Motion for Relief from Judgment CASE # 2011 - CP - 14 - 00602
Pursuant to South Carolina Rules of Civil Procedure 60(b-4)**

Pursuant to SC Rules of Civil Procedure 60(b-4), Petitioner MB Hutson moves the Court for its Order granting him relief from Court's Judgment (Consent Order) based upon a Settlement Agreement. In particular, the Court ordered that Movant perform certain actions under a contract that was the basis of the consent order and settlement agreement that at the time the order was entered into were legally impossible for the Movant to perform.

This motion is supported by the record herein, and by the memorandum of pro se Movant, immediately following.

**II. Motion for Relief from Judgment CASE # 2015 - CP - 14 - 00615 pursuant to
this independent action as referenced as follows in Rule 60 of the South Carolina
Rules of Civil Procedure Rule 60(b-4):**

"This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court."

This motion and independent action is supported by the record herein, and by the memorandum of Pro Se Movant, immediately following.

III. DEFINITION OF EXTRINSIC FRAUD UPON THE COURT

The United States Court of Appeals for the Sixth Circuit has delineated five elements of conduct that constitute extrinsic fraud upon the court:

1. "On the part of an officer of the court;"
2. "That is directed to the 'judicial machinery' itself;"
3. "That is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth;"
4. "That is a positive averment or is concealment when one is under a duty to disclose;" and
5. "That deceives the court." ¹

IV. VENUE

WHEREAS MB Hutson/Hudson, hereby referred to as Plaintiff, resides in Orangeburg, South Carolina and Defendants, hereby referred to as Defendants:

- A. Turner Padget Graham & Laney P.A. (firm), John Wilkerson, Wayne Byrd, Carlyle Cromer, William Johnson, and William Johnson of Manning, SC, and
- B. Womble, Carlyle Cromer & Rice (firm), Thomas Harper, Charles Summerall IV,
- C. TLC Holdings, LLC, Steve Lovell and Richard Clark.

Defendant Firms and Attorneys listed under "A" and "B" (above) have real estate and businesses within South Carolina. These Officers of the Court have offices in Charleston, Manning, Myrtle Beach or nearby areas thereof, in eastern South Carolina.

¹ —Demjanjuk v. Petrovsky, 10 F.3d 338, 348 (6th Cir. 1993).

Richard Clark and Steve Lovell, owners of TLC Holdings, LLC, who live outside of South Carolina, conduct business within the State of South Carolina but are not Officers of the Court/attorneys. Hereinafter referred to as Seller.

V. HISTORY

A. Background information directly leading to this case:

1. One hundred eight acres, located on the north side of Lake Marion in South Carolina, was purchased in the early 2000's and developed into a campground with approximately six cabins on a beach strip, and over one hundred campsites with water and electrical connections by Defendants, TLC Holdings, LLC.
2. Slightly over twelve hundred (1,200+) family memberships with annual dues requirements were sold to families as Retail Membership Agreements. These "right to use" memberships, at varying prices, were for various number of years up to one and two "lifetimes". (Exhibits # 1.1 – 1.3).
3. Around 2007-2008, memberships decreased due to forfeiture and non-payment of dues, leaving the owners in a crisis. The business was "losing \$200,000 - \$250,000 a year plus".²
4. Owners called a meeting for January 16, 2009. All three members were present³ at the campground in Summerton, SC. The January 16, 2009, meeting minutes⁴ detailed the owners' deep dilemma, deliberations and decisions:
 - a. "Serious negative cash flows...Capital Calls on the members,"⁵
 - b. "Company could not generate cash to continue the operations"⁶
 - c. "Complete shutdown of operations...Immediate shutdown, Cons: Backlash from those who owned memberships..."⁷
 - d. Sell "Big Water LLC/Lease TLC assets to Buyer. Eliminate responsibility of operations quickly...Reduce expenses...Receive lease income..."⁸

² Lovell (owner/ Managing Member) deposition of 2/16/2011, p. 113, line 12. Exhibit # 3.0

³ Members Meeting Minutes, Exhibit #2.1, par. 1.

⁴ Members Meeting Minutes, Exhibit # 2.1 - 2.3

⁵ Ibid, Exhibit #2.1, par. 2, ll.5-6.

⁶ Ibid, par. 3, ll.2-3.

⁷ Ibid, Item 1.a. ll.4 & 6.

⁸ Ibid, Exhibit #2.2, item 3, ll. 1,3,4,5.

- e. "Explore selling to local or state government"⁹ "Explore tax benefits if assets were given away"¹⁰
- f. "Action should be taken immediately to exercise option 3 maintaining a buy-back option should a buyer be found."¹¹
- B. Buyer/Plaintiff contacted a realtor in the fall of 2010 and visited the campground property on Thanksgiving Day, 2010. In December of 2010, Plaintiff met with Sellers and expressed his interest to purchase and develop that property on Lake Marion. Defendant/Seller agreed and shortly thereafter produced (via their attorney Thomas Harper of Womble, Carlyle, Sandridge & Rice of Charleston, SC) the Lease Purchase Agreement¹² for the land. The Seller/Defendant also required Buyer/Plaintiff to simultaneously purchase and close on the campground business that operated thereon known as Big Water Resort (Membership Interest Purchase Agreement¹³).
- C. Unknown to Plaintiff was that a title defect existed on the property due to hundreds of 70 year¹⁴ "right to use" Retail Membership Agreements¹⁵, which had been sold by Seller/TLC Holdings, LLC, Richard Clark and Steve Lowell, and Big Water Resort. This was the very property Plaintiff was buying. Defendants were aware that the property had defective title and was undevelopable, yet maintained their silence and withheld this information, from the Buyer/Plaintiff, and even in the courts, failing to provide full disclosure when they were under a Duty to Disclose¹⁶.
- D. Plaintiff was, therefore, unaware that the seven hundred forty Retail Membership Agreements constituted a title defect on the entire property that would keep him from

⁹ Ibid, Exhibit #2.3, item 5.

¹⁰ Ibid, item 6.

¹¹ Ibid, Par.1, ll.3-4.

¹² Lease Purchase Agreement, Exhibit 3.0

¹³ Membership Interest Purchase Agreement, Exhibit 4.0

¹⁴ "The membership is for ____ years, starting on 2/09/08 and ending on the demise of both members," (with option:) "Lifetime membership open to add 2nd lifetime for additional \$2,000.00..." --Retail Membership Agreement, Item #6 "Duration" and Item #7 "Transferability" (page one) and ADDENDUM on page two.

¹⁵ "...membership which gives the Member the right to use all present and future BWR campground facilities...right to use campground facilities and services solely for Member's recreation and enjoyment..."-- Retail Membership Agreement, Introduction through Purpose line one. Exhibit 1.1-1.3

¹⁶

developing the property as planned and outlined in the Lease Purchase Agreement¹⁷ which the Defendants, attorneys for the Seller, composed for the purpose of defrauding the Plaintiff/Buyer and later, the Court. Defendants' misrepresentations leading Plaintiff/Buyer to believe areas of development were possible was supported by the following:

1. published maps¹⁸ (full color) that named various large areas for "Future Development" in the undeveloped areas of the campground, and
2. by a sketch map in the Settlement Agreement (Exhibit 6.0, page 9) whereon Sellers/Defendants show Seller approved areas for the proposed housing development which overlaid existing campsites.

E. Due to intentional misrepresentations (as outlined in "D" above), concealments and non-disclosures made by the Defendants, attorneys for the Sellers, the development project was doomed from the start and grossly misled the Plaintiff. Those non-disclosures to the Court and Plaintiff set up Defendant's tactical advantage to coax the Plaintiff, Buyer, into a default on the land contract ***that would place Plaintiff/Buyer, into a defenseless default and wrongful eviction.

VI: COUNTS OF FRAUD UPON THE COURT

The United States Court of Appeals for the Sixth Circuit has delineated five elements of conduct¹⁹ that constitute Extrinsic Fraud Upon the Court:

A. "On the part of an officer of the court;"

Defendants are duly sworn Officers of the Court and full time attorneys, which were employed by TLC Holdings, LLC, or their attorneys to construct and/or to defend fraudulent contracts in SC State Court proceedings for their client/Seller, and Plaintiff/Buyer. Contracts were a scheme to offer an option to purchase and develop 108 acres for \$6M dollars providing that Buyer/Plaintiff, would buy and close on the Big Water Resort (campground business) simultaneously. Both contracts were fraudulent in nature and deliberately structured to cause

¹⁷ "...parties acknowledge that purchaser intends to develop and construct...residential dwelling structures...shall pay thirty-five percent 35% of the gross profits....to the Seller..." Lease Purchase Agreement, Page 3, P2, ll. 1-5.

¹⁸ Published maps (full color), Exhibit "11.0"

¹⁹ Demjanjuk v. Petrovsky, 10 F.3d 338, 348 (6th Cir. 1993).

damage to Buyer/Plaintiff without Plaintiff's knowledge and grossly benefit the Seller. Those contracts framed the Plaintiff into: assuming a non-disclosed \$20M liability to provide camping facilities for over 70+ years to 740 owners of Retail Membership Agreements by the Officers of the Court who were representing TLC Holdings, LLC and its owners.

B. "That is directed to the 'judicial machinery' itself;"

1. Once litigation started in 2011, the Defendants/attorneys structured fraudulent contracts failing to disclose to the Honorable Judge and Court their concealment of the material facts that ALL the land in the contract had defective title that could not be corrected due to the multiplied hundreds of Retail Membership Agreements for the use of ALL that land for multiplied decades. This concealment of critical material facts, as follows:

(a.) placed the Defendants/Sellers in a great *advantage* legally, and

(b.) placed the Plaintiff/Buyer in a *disadvantageous* position.

Therefore, Plaintiff/Buyer was NOT heard or properly equipped to present a defense in Court. All Defendant's contracts, including the Settlement Agreement and Consent Order were drafted by Thomas Harper of Womble Carlyle Sandridge & Rice, Defendants²⁰, was executed by the Honorable Judge without that Judge ever realizing nor being told about those critical material facts being harbored and hidden by the Defendant/Attorneys. The Honorable Judge was unaware that he and his court had been victims of Fraud upon the Court by the Defendants. The Plaintiff was ordered to develop property, *all of which* was subject to lifetime use rights, which should have been brought to the Court's Attention, but was concealed by the Officers of the Court. The Defendants/Attorneys placed Extrinsic Fraud upon the Court *intentionally*.

2. Plaintiff did not know about the fraud and neither did his attorney, also an Officer of the Court. The Defendants' finessing of the original Lease Purchase Agreement²¹ and Membership Interest Purchase Agreement²², without disclosing that the Retail Membership Agreements²³, encumbered ALL of the land for Retail Membership Agreement holders was too sophisticated for almost all persons to recognize. When paired with the Settlement Agreement²⁴ and Consent

²⁰ Richard Clark deposition on 3-18-2015, p.87, lines 9-13.

²¹ Lease Purchase Agreement-Exhibit 5.0

²² Membership Interest Purchase Agreement-Exhibit 4.0

²³ Retail Membership Agreements-Exhibits 1.1-1.3

²⁴ Settlement Agreement – Exhibit 6.0

Order²⁵, the concealment of the material fact that ALL the land was non-developable due to a clouded title was simply not decipherable by persons other than the Sellers and their attorneys. When the Judge, also unaware, signed the Consent Order, the deception then became hidden under *Res Judicata*. The Extrinsic Fraud Upon the Court is now obvious and clear.

C. "That is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth;"

1. All attorney/defendants acted deliberately to defraud while they fully understood the false representations, and were willfully blind to the truth in their attempts to adjudicate the rights of those parties not before the Court (namely the owners of the Retail Membership Agreements with decades of "rights to use" the property contracted by the Lease Purchase Agreement to Plaintiff to be developed and sold to individual families for residences).

Furthermore, the Defendants acted recklessly with total disregard for that truth by intentionally concealing those real material facts thereby committing Extrinsic Fraud upon the Court. Their deliberate actions were for self-gain and to create a broad advantage for Defendant's clients while simultaneously creating a great disadvantage to Plaintiff by concealing those material facts:

- a. Retail Membership Agreements clouded the title making development and subdivision of lots impossible legally, and
- b. Retail Membership Agreements clouding of the title made the Lease Purchase Agreement and the Settlement Agreement BOTH null, void and fraudulent, and
- c. Defendants actions blocked the representation of the families holding valid "right to use" agreements (Retail Membership Agreements).

2. The Defendant lawyers' actions were intentional and Extrinsically Fraudulent upon the Court, willfully blind to the truth, and were in reckless disregard for the truth for their own personal financial gain and to tilt the judicial scales completely in favor of their clients/Sellers.

3. Marketable title means the property can be conveyed without the reasonable probability of litigation by third parties. If and when third parties have special property interests that would

²⁵ Consent Order – Exhibit 7.0

enable them to sue for the enforcement and preservation of their use of the property, that clouds the title. In fact, the Retail Membership Agreement owners *did* sue in Federal Court with a class action suit a few years later to enforce their right to use all the property, and won²⁶.

D. "That is a positive averment or is concealment when one is under a duty to disclose;"

1. Defendants/attorneys/Officers of the Court have a Duty to Disclose material facts. Also, Sellers of real property have a Duty to Disclose. However, the Defendants withheld and deliberately concealed the material facts using the judicial machinery of the court to trap and destroy the Plaintiff from being heard. The Court Order, which required actions prohibited by the title cloud due to hundreds of Retail Membership Agreements also created *res judicata* for the perpetrators, Defendants, to hide their fraud behind. Full disclosure could have easily averted this entire fiasco and gross damages to the Buyer/Plaintiff. The attorneys Wayne Byrd, John Wilkerson, Carlyle Cromer, Thomas Harper, and other attorney Defendants representing TLC Holdings, LLC, (Richard Clark, Steven Lovell) intentionally plotted this fraud upon the State Court and the Federal Court, State and Federal Judges and a SC State Jury. These provable actions to defraud and place Extrinsic Fraud upon the Court have consequences from various agencies including the Courts themselves, and should include the voiding of the State Court's two fraudulent Judgments, as well as rule for the Plaintiff for the enormous damages.

2. The Affidavit of Mark Hardee, Expert Witness reads, "...there was ample evidence that TLC Holdings, LLC had made numerous misrepresentations and concealed relevant and material statements of fact regarding the usefulness and ability to develop the property"²⁷.

3. These negligent actions perpetrated by the Defendant/Officers of the Court/attorneys for TLC Holdings, LLC along with their self-serving financial motives caused the Defendant/Attorneys to turn away their eyes from their Duty to Disclose facts to the Courts and spawned the negligence of their professional ethics resulting in their placing Extrinsic

²⁶ Federal Court Class Action Lawsuit: 2:14-CV-01583-DCN-WWD

²⁷ Affidavit of Mark Hardee, Attorney at Law -Exhibit # 8.0

Fraud Upon the Courts. These actions served themselves as they gained hundreds of thousands of dollars paid to them by their client(s).

E. "That deceives the court." ²⁸

1. Defendants/attorneys plotted to gain full advantage by *intentionally deceiving the Court*, via withholding material facts from the Honorable Court, as follows:

- a) Intentionally concealing material facts that prevented the SC Court and Judge to demand to hear from those owners of the Retail Membership Agreements that held rights to use the land for multiple decades, and
- b) Intentionally making contractual demands for development that could NEVER be met and ordering a wrongful eviction thereby (due to those hundreds of Retail Membership Agreements which granted those agreement holders use of *all the property*²⁹), and whose rights were confirmed in a 2014 Class Action Federal Lawsuit.

COUNT ONE: Waltzing the Judge into signing a Consent Order that supported the fraudulent Settlement Agreement.

COUNT TWO: Swaying the jury into awarding a \$3.5M judgment while blinding them to the underlying facts, which they had fraudulently masked with the *res judicata* in COUNT ONE, above.

COUNT THREE: Using the fraudulent Consent Order from COUNT ONE to wrongfully evict the Plaintiff with no recourse.

COUNT FOUR: Relying on the fraudulent *res judicata* that the Defendants created in SC State Court and to seek further sanctions on Plaintiff, Defendants sued Buyer/Plaintiff in Federal Court intentionally to access Plaintiff's insurance coverage monies, making him a Third Party Defendant in the Class Action Federal Court. As Defendants planned, their fraud remained hidden behind that SC Court *res judicata*, thereby Defendant/attorneys nullified Plaintiff's efforts to be heard and his damages to be met.

²⁸ —Demjanjuk v. Petrovsky, 10 F.3d 338, 348 (6th Cir. 1993).

²⁹ Class Action Lawsuit: 2:14-CV-01583-DCN-WWD

VII. SUMMARY

A. Plaintiff was ordered under the Lease Purchase Agreement and the Settlement Agreement to develop property, ALL OF WHICH was discovered to be subject to lifetime use rights³⁰, which should have been brought to the attention of the SC Court and Buyer/Plaintiff, but was intentionally concealed by the Officers of the Court placing Extrinsic Fraud upon the Court. It is the Plaintiff's position that the Consent Order is therefore invalid because it attempts to adjudicate the rights of parties not before the Court, namely the Retail Membership Agreement owners.

B. The Plaintiff, nor the Plaintiff's attorney, realized that the Plaintiff was being obligated to violate the rights of the Big Water Resort campground members (owners of the Retail Membership Agreements) by developing since TLC never specified exactly which property was subject to the Campground Memberships, nor were those long term leases/agreements recorded at the courthouse in Clarendon County as required by SC Law³¹.

C. It's hard to imagine why TLC Holdings, LLC and it's lawyers should not have advised the Court and Judge that the Big Water Resort Property was undevelopable because it was already obligated to double lifetime memberships as a private club prior to Plaintiff's arrival in December 2010. TLC's attorneys were fully aware that neither Plaintiff's attorney nor Plaintiff recognized that undisclosed issue making it impossible to ever develop anything that was to be sold to the public.

D. That full disclosure could have easily averted the entire fiasco which caused much financial, mental stress, years of trying to defend Plaintiff and his reputation. Wayne Byrd, John Wilkerson, Carlyle Cromer and Thomas Harper for TLC Holdings, LLC, (included Richard Clark, Steven Lovell) intentionally plotted this Extrinsic Fraud upon the State Court

³⁰ 2:14-CV-01583-DCN-WWD (Federal Court Case)

³¹ SC Law Section 27-33-30: "Recordation of Leases" In order to give notice to third persons, any lease OR AGREEMENT(emphasis mine) for the use or occupancy of real estate shall be recorded in the same manner as a deed of real estate. Title 27, Ch. 33.
<http://www.scstatehouse.gov/code/t27c033.php>

and the Federal Court including Federal and State Judges and a State Jury. These provable actions to defraud and place Extrinsic Fraud upon the Court have consequences from various agencies including the Courts themselves as well as Plaintiff for the enormous damages to the Plaintiff.

E. Since Officers of the Courts (TLC Holdings' attorneys) created the Extrinsic Fraud upon the Court that resulted in Plaintiff's inability to present a defense including incurring possible sanctions, orders, evictions and judgments against himself, Extrinsic Fraud on the Court should apply to support the immediate setting aside of the Settlement Agreement and Consent Order. See *Chewning v. Ford Motor Co. m*, 354 s.c. 72, 579 s.e. 2d 605 (2003).

F. Marketable title means the property can be conveyed without the reasonable probability of litigation by third parties. It clouds the title if third parties have special property interests that would enable them to sue for the enforcement and preservation of their use of the property. In fact, the campground members *did sue* to enforce their right to use the property, substantiating that, in fact, the Defendants/Sellers *DID NOT have marketable title* as purported by the Attorney Thomas Harper/author of the Lease Purchase Agreement and Membership Interest Purchase Agreement: "Company has good and marketable title to all of its properties and assets"³² and "Purchaser, in reliance on the representations made by Seller herein, accepts the sale,..."³³,

G. Extrinsic Fraud Upon the Court is against all the integrity that the S.C. Bar stands for. These *multiple* violations clearly defy and diminish the integrity of Officers of the Court and degrade the Honorable Court and Honorable Judges. These are gross offenses that cause the SC Court and Judges to be vulnerable and at the same time distrusting of the Officers in their Courts, the attorneys, who in many cases make much more money if they win, regardless of the methods.

³² page 4, 5-(b), ll.3-4. Exhibit 4.0

³³ Page 1, #1, line 3. Exhibit 4.0

THEREFORE, Based on FOUR COUNTS of Extrinsic Fraud Upon the Court committed by the defendants/officers of the Court/attorneys, and that

- A. there is NO STATUTE of limitations when a party seeks to grant relief from a judgment on the grounds of extrinsic fraud upon the court. Rule 60(b-3&4) SCRCF;
as the extrinsic fraud by the attorneys made the judgment void, and
- B. because extrinsic fraud “induces a person not to present a case or deprives a person of the opportunity to be heard, as was in the case in Federal Court where Plaintiff was sued as third party Defendant. Relief is granted for extrinsic fraud...because the fraud prevented a party from fully exhibiting and trying his case...there has never been a real contest before the court on the subject matter of the action³⁴

THEREFORE, in order to secure equitable relief on the basis of fraud, the fraud, being extrinsic³⁵ Plaintiff asks the Court to set aside two (2) Judgments:

- 1) Case Number 2011- CP-14-00602, and
- 2) Case Number 2015-CP-14-00615.

**COMPLAINT AGAINST SAME DEFENDANTS (mentioned again below)
FOR DAMAGES TO THE PLAINTIFF, MB HUTSON
RESULTING FROM THEIR EXTRINSIC FRAUD UPON THE COURT**

v.

**TURNER PADGET GRAHAM & LANEY P.A., JOHN WILKERSON, WAYNE BYRD,
CARLYLE CROMER, WILLIAM JOHNSON**

AND

**WOMBLE CARLYLE SANDRIDGE & RICE, THOMAS HARPER, CHARLES
SUMMERALL, IV, and WILLIAM JOHNSON**

WHEREAS, MB HUTSON, Plaintiff, has alleged and charged the Defendants, indicated above, with committing Extrinsic Fraud Upon The Court. Their actions have inflicted the Plaintiff with

³⁴ Hilton Head Ctr v. South Carolina Pub. Serv. Comm’n, supra 294 S.C. 9,11, 362 S.E.2d 176,177 (1987).

³⁵ Bryan v. Bryan 220 S.C. 164, 66 S.E. 2d 609 (1951).

gross damages, including, but not limited to, serious and irreversible health and financial damages. Therefore, Plaintiff asks for an award from the Honorable Court and Jury for his suffering over seven (7) years of not less than **\$300,000,000.00 (Three Hundred Million Dollars)**.

THEREFORE, Plaintiff prays for the following:

1. The Honorable Court set-aside the two Fraudulent Judgments (2011-CP-14-00602 and 2015-CP-14-00615) based upon Extrinsic Fraud upon The Court and Rule 60-b-4.
2. The Honorable Court allows the over-all case for damages to be presented to a Jury where providence by Jury can deliberate a decision for Plaintiff.
3. Plaintiff asks for a speedy trial.
4. Plaintiff asks for full restitution and punitive damages and such other relief that the court deems appropriate.
5. Plaintiff may amend said Motion and Complaint within 30 days from date of filing.
6. Plaintiff asks for an immediate "stay" preventing any or all Defendants from executing any type of legal proceedings or harassments directly or indirectly against Plaintiff regarding the two fraudulent judgments requested to be set aside.

Respectfully Submitted on this __th day of _____, 2018

MB Hutson

P.O. Box 2755
Orangeburg, South Carolina 29116
803 308 2714

cc: Tim Newton, Counsel for Penn America Insurance and Torus Insurance Company

A copy has been placed in the US Postal Service on the _____, to:

EXHIBIT
16.0



Tim Presiding
Chewning vs. Ford Motor

EXHIBIT 16.0 p.1

FW: Chewning v. Ford Motor Co.

Tim J. Newton <tnewton@murphygrantland.com>
To: Hutson <hutson4444@gmail.com>

Mon, Oct 22, 2018 at 2:31 PM

Mr. Hutson,

I believe this is the case you were asking about. See pp. 609-610.

Tim N.



Murphy & Grantland, P.A.

Tim J. Newton, Esquire

tnewton@murphygrantland.com

Post Office Box 6648

Columbia, South Carolina 29260

803-782-4100 ext. 1242

803-454-1242 dd

803-782-4140 fax

www.murphygrantland.com

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EXHIBIT 16.0

P. 2

From: Westlaw@westlaw.com <Westlaw@westlaw.com>
Sent: Monday, October 22, 2018 2:30 PM
To: Tim J. Newton <tnewton@murphygrantland.com>
Subject: Chewning v. Ford Motor Co.

Tim Newton sent you content from Westlaw.
Please see the attached file.

Item: Chewning v. Ford Motor Co.
Citation: 354 S.C. 72
Sent On: Monday, October 22, 2018
Sent By: Tim Newton
Client ID: 5010-0050

Note:

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 **Chewning v Ford Motor Co.pdf**
191K

H Hutson <hutson4444@gmail.com>
To: "Tim J. Newton" <tnewton@murphygrantland.com>

Mon, Oct 22, 2018 at 7:02 PM

Tim it's Monday night please call me first thing in the morning have an idea
[Quoted text hidden]



image002.png
3K

EXHIBIT
17.0

Asking
for
settlement

From: **Hutson** <hutson4444@gmail.com>

Date: Tue, Oct 30, 2018 at 7:00 PM

Subject: Mediation set for October 2, 2018

To: <tnewton@murphygrantland.com>, <dfournier@global-indemnity.com>, Hutson 4072
C <hutson4444@gmail.com>

Dear Penn America:

Simply wishing to remind your Company that the \$3.5M dollar judgement given by the Jury trial has been recorded against me. However, I can prove and am in the process of filing a lawsuit to set aside the \$3.5M dollar judgement and the consent order judgement rendered in 2012.

Both of these judgements are tainted with extrinsic fraud upon the Court and I am certain if you wait by postponing the mediation I will prevail. As you can appreciate, your settling this judgement will blatantly express Penn America's acceptance that the \$3.5M judgement is legitimate and without extrinsic fraud upon the Court.

After much legal consideration and thought, I feel it would be better if no settlement would occur and then you would support my complaint which will be filed in the SC court system in the next few days. Your settlement would weaken my complaint.

Respectfully,

MB Hutson

From: **Tim J. Newton** <tnewton@murphygrantland.com>

Date: Wed, Oct 31, 2018 at 3:16 PM

Subject: RE: Do the right thing

To: Hutson <hutson4444@gmail.com>

OK, I'm looking into it. I'll let you know as soon as I can

Murphy & Grantland, P.A.

Tim J. Newton, Esquire

tnewton@murphygrantland.com

Post Office Box 6648

Columbia, South Carolina 29260

803-782-4100 ext. 1242

803-454-1242 dd

803-782-4140 fax

www.murphygrantland.com

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EXHIBIT
18.0

*complaining about
poor results of attorney*

EXHIBIT 18.0
p. 1 of 2



Notice to Penn America, Laur/Carlock and Copeland

hutson4444@gmail.com <hutson4444@gmail.com>

Sat, Jan 21, 2017 at 3:02 PM

To: tnewton@murphygrantland.com, methridge@carlockcopeland.com, Laur Paton <lpaton@carlockcopeland.com>, "hutson4444@gmail.com" <hutson4444@gmail.com>

Hutson
803.308.2714

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18K

January 21, 2017

Attention Tim Newton, attorney for Penn America

Dear Tim,

I have considered my position with regard to Penn America obtaining new counsel to defend the two claims filed by TLC Holdings. My review of the situation is as follows:

Since Penn America retained counsel to represent me, TLC Holdings, Inc. has won every motion and hearing that has been heard in court. During that time TLC Holdings, Inc. has amended their complaint and doubled the amount of damages they are claiming against me. As we discussed. The counsel that you retained to defend my claim, Carlock and Copeland, noticed the Plaintiffs TLC Holdings, Inc. et al. to take depositions. Carlock and Copeland knew that I had many questions that had to be asked on behalf of my counterclaims and that absent of evidence would be placed in peril of losing a summary judgment motion that was pending as well as hurting me in Federal Court.

Carlock and Copeland assured me in writing that I would be allowed to ask all my questions. That did not happen and as a result I lost the summary judgment motion on my counterclaim. I have been irreparably damaged by the actions of Carlock and Copeland. Carlock and Copeland substantiated that my losses were around nine million dollars (\$9,000,000.00).

I am now afraid to allow replacement counsel. Until the damage I have been subjected to has been addressed, either by obtaining the evidence I need to pursue the counterclaim recovered and having the summary judgment set aside or satisfactory payment made for the damages I have sustained have been paid, I must respectfully decline replacement counsel and participation in defending these claims. I am in a much worse situation now than I was absent counsel. I am now in a position that I cannot fix for myself.

I would anticipate TLC Holdings, Inc. attorney getting much more aggressive following their success than they were before. I feel compelled to serve TLC Holdings, Inc. and their attorneys a copy of this letter.

Let this letter serve as notice that I hold Penn America responsible for the failure of the attorneys they retained in this matter and the damages that they caused by their neglect. Let this letter also serve as notice that I cannot assist in this defense any further due to my worsening position with each action taken by counsel you have retained. I fear further assistance may put me in even more peril unless the grave deposition/evidence issue is resolved in my behalf.

With kindest personal regards,

MB Hutson Pro Se
803 308 2714

EXHIBIT 18.0
P. 2 of 2
did not know
about extrinsic
fraud at this
time

EXHIBIT
19.0

M Gmail

*Tim Penn America
murphy & grantland
Don't settle*Exhibit 19.0

TLC Holdings, LLC VS. MB Hutson

Hutson <hutson4444@gmail.com>

Mon, Jan 1, 2018 at 2:50 PM

To: tnewton@murphygrantland.com, dfournier@global-indemnity.com, mdigiovanni@global-indemnity.com, fgordon@mgsattorneys.com, "hutson4444@gmail.com" <hutson4444@gmail.com>

Dear Tim and all others who represent Penn American,

I wish to thank you all for making the payment to Turner Padgett for the sanctions of just less than \$15,000.00.

> With those sanctions, TLC and Turner Padgett had placed a calculated noose around my neck and my future. Removing the sanctions clearly reflects that Penn America believes in and supports my defense against TLC, who intentionally framed and defrauded me for their own financial release from their \$18 million dollar obligation over the next "two (2) lifetimes" —about 70 years—to approximately 740 family memberships.

However, I still have great concern. Specifically, should Penn America entertain any type of Settlement with TLC Holdings, LLC, that it would cripple my ability—likely even eliminate the possibility—that I could ever receive financial restitution for the lost income, lost years of time, mental stress that nearly drove me to suicide, humiliation, and crippling of my ability to seek other interim income, etc. which resulted from the two cases filed against me by TLC to cover up their covert actions. I often wonder what lack of conscience can humans like TLC's owners (and apparently their attorneys) possess to deliberately preplan, conspire, and intentionally entrap an innocent, hard-working man. It boggles my mind to think they were merely looking to make a profit for themselves irregardless of the costs to others—myself, and to a lesser degree the hundreds of family members.

Once again, I ask that Penn America NOT PAY TLC Holdings, LLC even a penny for any type of Settlement without my explicit written permission. <

Attorney Frank Gordon is confident that we can win any such pending lawsuit filed by TLC. That win or dismissal of the suits filed by TLC will open the only door I have to recover some of my damages. Thank you in advance for your comprehensive understanding and total commitment to my restitution.

Respectfully,

MB Hutson
803.308.2714

EXHIBIT
20.0



Tim + Billy Lyles Penn Amer...
do not settle due to E-train...

EXHIBIT 20
p. 1 of 3

NOTICE

Hut Hutson <hutson4444@icloud.com>

Tue, Oct 23, 2018 at 2:54 PM

To: bill@billyleslaw.com, tnewton@murphygrantland.com, "John S. Wilkerson" <JWilkerson@turnerpadget.com>, betty.temple@wbd-us.com, Hutson 4072 C <hutson4444@gmail.com>



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October 23, 2018. **Notice to all Parties**

Good afternoon Bill Lyles and Tim Newton:

The United States Court of Appeals for the Sixth Circuit has set forth five elements of fraud upon the court which consist of conduct:

“1. On the part of an officer of the court; 2. That is directed to the ‘judicial machinery’ itself; 3. That is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth; 4. That is a positive averment or is concealment when one is under a duty to disclose; 5. That deceives the court.”

—Demjanjuk v. Petrovsky, 10 F.3d 338, 348 (6th Cir. 1993).

Please Note that the following contributes to my case being currently prepared to have the 2012 Settlement Agreement and Consent Order “Set Aside” due to Fraud Upon the Court.

Womble Carlyle Sandridge & Rice (WCS&R) and Turner Padget Graham & Laney (TPG&L) are engaged in fraud and extrinsic fraud upon the Court beginning in 2011 and continuing to the present time. Such extrinsic fraud upon the Courts has no statute limitation.

WCS&R’s Thomas Harper authored fraudulent contracts, which structured and concealed the fraud by his clients, TLC Holdings, LLC, both in December, 2010 (Lease Purchase Agreement and Membership Interest Purchase Agreement) and wrote the Settlement Agreement and Consent Order for the Honorable Judge George James in 2012. All were extrinsic fraud upon the Court and against me, as the Purchaser.

TPG&L’s Wayne Byrd openly defended WCS&R’s documents, along with other attorneys from his firm, including the fraud therein, which continues today.

I am putting you on NOTICE that should you ^{not} participate in negotiations to settle with Penn America Insurance Company and attorneys/Officers of the Court including TLC Holdings, LLC, Turner Padget Graham & Laney P.A. or Womble Carlyle Sandridge &

Rice while the existing extrinsic fraud continues, I will hold you and your firms responsible for participating in fraudulent moneys, and sue accordingly. I will file this 20 days to set aside the fraudulent judgment based on the Extrinsic Fraud upon the Court. <

The Judgement and money settlement is tainted due to the fraud which makes Penn American Insurance Company's money not useable. I strongly advise that neither you nor your firms be part of negotiating and assisting either side for any settlement agreement for I plan to file to set aside the fraudulent 2012 Settlement Agreement and Consent Order prior to your meeting planned for November 2, 2018.

I am also putting Tim Newton of Penn America Insurance on notice not to negotiate any moneys for settlement with Womble Carlyle Sandridge & Rice, Turner Padgett Graham & Laney, or TLC Holdings, LLC until after my set aside complaint has concluded.

Should Penn America engage with mediation with any parties on this matter, I will hold them responsible, suing them for their actions, as the extrinsic fraud continues to exist. I would appreciate a response from both Bill Lyles and Tim Newton to the same.

Respectfully,

MB Hutson

803 308 2714
1545 Biltmore Street
Orangeburg, South Carolin
29115

Cc: John Wilkerson and Betty Temple:

EXHIBIT
21.0

WARR v. settle with TLC & ATTORNEYS
11/1/2018, 5:57 PM



Exhibit 21.0
p 102pp

Answer to your question:

Hutson <hutson4444@gmail.com>

Thu, Nov 1, 2018 at 8:25 AM

To: tnewton@murphygrantland.com, dfournier@global-indemnity.com

Good morning Tim.

As you are aware, I have prepared an extrinsic fraud upon the Court complaint to be filed in the next couple of business days. I can prove that all attorneys representing TLC Holdings, LLC developed an illegal, charted road by way of using extrinsic fraud upon the Court to defend their clients.

Definition of extrinsic Fraud Upon the Court:

*81 Extrinsic fraud is "fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted in court cases for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action".

Hilton Head Ctr. Of South Carolina v. Public Service. Comm'n, 294 S.C. 9, 11, 362 S.E.2d 176 (1987).

In order to secure equitable relief on the basis of Fraud Upon the Court, the fraud must be extrinsic. Bryan v. Bryan, 220 S.C. 164, 66 S.E. 2d 609 (1951).

On January 22 through 26, 2018, the Jury trial occurred and the result was a \$3.5M judgement.

The United States Court of Appeals for the Sixth Circuit has delineated five elements of conduct that constitute extrinsic fraud upon the court:

1. "On the part of an officer of the court;"
2. "That is directed to the 'judicial machinery' itself;"
3. "That is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth;"
4. "That is a positive averment or is concealment when one is under a duty to disclose;" and
5. "That deceives the court."

IV. VENUE

TLC attorneys had a duty not to conceal and withhold material facts. Their action in the court, by not disclosing those material facts gave their client, TLC, a greater advantage to be heard in Court and after hiding their impropriety, a great disadvantage for me, denying my ability for my position to be heard in court. By withholding several critical material facts, and securing a Res Judicata to prevent me from defending myself after I realized what they had done, prevented me from ever (to date) being heard in Court. Those withheld facts included:

1. Due to the family memberships, the **entire** TLC property could never be developed. (Proven in court when the class action was won by those family members.)
2. There was no contractual agreement allowing Big Water Resort to occupy the TLC's property for 70 years in order to honor the membership agreements.
3. There was a hidden \$20M dollar obligation placed upon me without my knowledge due to the fact that Big Water Resort was losing \$300,000.00 dollars each year and that's why they required me to purchase the business and close simultaneously when executing the Lease Purchase Agreement. TLC never intended to sell me the property, because they knew they could not (See Jan 16,2009 owners' meeting minutes collected in depositions, due to the 70 year obligations to the 740 family memberships.

Back to your question from yesterday. Had the attorneys (prior to starting the Jury trial) came forth and advised the Court what they were concealing (when, in fact, they had a duty to disclose the hidden facts that they were aware of to deceive me from the beginning) the Honorable Judge would have dismissed the case and the Jury.

With that being said, the entire trial was laced with Fraud upon the Court. That issue makes the entire trial (including the \$3.5M judgement) fraudulent. With your experience and great legal minds, you, and Penn America must know this. Should you appear to mediate tomorrow, it would make a clear statement to the courts and officers thereof, that Penn America and their attorney(s) do not recognize any wrong doings and so doing, would support the Plaintiffs and their attorneys implying that it is your belief and position that extrinsic fraud never happened.

This action would clearly show that Penn America is conspiring with the committed extrinsic fraud. Therefore, I would have no choice but to name Penn America as a defendant in the lawsuit that is ready to be filed for these actions would damage my case, trying desperately to right a wrong, as it proceeds though Court.

Penn America will have betrayed their client/customer deliberately with full knowledge of the same and I will be damaged.

Respectfully,

MB Hutson
803 308 2714

EXHIBIT
22.0

500 G Demand

EXHIBIT 22.0
Email w/ attachment

p. 1 of 2



Demand for Claim

H Hutson <hutson4444@gmail.com>

Mon, Apr 29, 2019 at 3:12 PM

To: OFFICE MAX OB <ODS06535CPC@officedepot.com>

----- Forwarded message -----

From: **Hutson** <hutson4444@gmail.com>

Date: Thu, Nov 1, 2018 at 11:59 AM

Subject: Demand for Claim

To: <tnewton@murphygrantland.com>, <dfournier@global-indemnity.com>, **Hutson 4072 C**
<hutson4444@gmail.com>



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19K

November 1, 2018

REF: TLC Holdings LLC vs. MB Hutson

Dear Penn America;

Under and within your policy it does state that you have a right to settle an outstanding claim without the consent of the insured. You had stated through your attorney that their might not be coverage for the \$3.5M. If there is not good coverage, then Penn America should not be a part to mediation. Since there is coverage, I am hereby filing a claim as outlined below.

However, it does not read that the insurance companies have a right to settle a claim when both companies have been put on notice that extrinsic fraud exist against the Courts, carriers, and myself as your customer and client. More important is the fact that Penn America is grossly aware of the same.

Settling by paying this fraudulent judgement is wrongful and reflects disloyalty to the insured while injuring your insured. I plan to file a claim against Penn America and the umbrella company for it seems the carriers are far more concerned in getting an outstanding off their books than justice.

What you are doing is simply throwing the fraudulent rabbit in the brier bush by settling this claim. It appears that this is a matter also for the Insurance Commission to closely examine.

Prior to my filing a complaint, please accept this letter as my claim and demand for \$500,000.00 dollars based on your actions and violations. I would expect a response **very shortly as to my claim.** If you are willing to pay for a judgement acquired through fraud, then please don't think twice about accepting my real and honest claim demand for my claim is reasonable and just.

Respectfully,

MB Hutson

EXHIBIT
23.0

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March 26, 2014

- Insurer Should Have Considered Extrinsic Facts When Determining Whether a Potential for Coverage Existed, Ninth Circuit Concludes
- Court Finds Coverage for Suit Over Termination of Breast Cancer Vaccine Program; Settlement Does Not Represent "Disgorgement"
- Tenth Circuit: Even If Insured Waited Too Long In Giving Notice, Insurer Suffered No Prejudice
- Insured Not Required to Exhaust All Remedies Against Perpetrators of Fraud, Court Rules

Insurer Should Have Considered Extrinsic Facts When Determining Whether A Potential for Coverage Existed, Ninth Circuit Concludes

Why it matters

In a fascinating – albeit unpublished – decision from the Ninth U.S. Circuit Court of Appeals, two judges on the appellate panel reversed summary judgment for an insurer that had failed to consider facts extrinsic to the underlying complaint when denying coverage to the policyholder. According to the majority, a police report and witness statements provided by

the insured offered an alternative theory of the plaintiff's case that moved it from the application of a policy exclusion. Because the extrinsic facts available to the insurer indicated the potential for coverage, that was sufficient to trigger the duty to defend, the court held.

Detailed Discussion

Rudy Martinez, a patron at the Crazy Horse Restaurant and Nightclub, filed suit after he was allegedly injured by the bar's security guards.

In addition to the complaint, Crazy Horse sent insurer Burlington Insurance Co. a copy of the police report, which contained multiple witness statements from the night in question. Some of the witnesses told police that Martinez was injured not by the security guards but when he tried to sit down on a stool and lost his footing, hitting his head on the wall.

According to Burlington, the allegations in Martinez's complaint against the security guards brought it within a policy exclusion for injuries "[a]rising out of assault or battery, or out of any act or omission in connection with the prevention or suppression of an assault or battery."

Burlington denied defense coverage and a federal district court granted the insurer summary judgment on the ground that it had no duty to defend or indemnify.

On appeal, the Ninth Circuit reversed, relying upon the police report and attached witness statements that "also contained facts indicating that Martinez's injuries might have been caused by events that would not fall within the assault-or-battery exclusion. Those extrinsic facts, which Burlington was obligated to consider in making its coverage decision, triggered a duty to defend because they reveal[ed] a possibility that the claim may be covered by the policy."

If the witnesses were correct that Martinez fell from a stool, that version of events would not fall within the exclusion, the court said. "Thus, the extrinsic facts available to Burlington indicated the *potential* for coverage, which is all that was necessary to trigger its duty to defend," the panel wrote.

The court acknowledged that extrinsic facts cannot trigger the defense duty when they relate only to claims that have not been pleaded in the third-party claimant's complaint.

"But here the extrinsic facts at issue do relate to a claim pleaded in Martinez's complaint – namely, his negligence claim," the court said. "Although as originally pleaded Martinez's negligence claim was predicated on the theory that he had been assaulted, the extrinsic facts available to Burlington revealed the possibility that Martinez could amend his negligence claim to allege theories of liability that would fall outside the assault-or-battery exclusion. Under well-settled California law, that possibility was enough to trigger Burlington's duty to defend."

To read the decision in *The Burlington Insurance Co. v. CHWC*, [click here](#).

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Court Finds Coverage for Suit Over Termination of Breast Cancer Vaccine Program; Settlement Does Not Represent "Disgorgement"

Why it matters

Did the decision to terminate a breast cancer vaccine program constitute a wrongful administrative act or involve medical or professional services? When falling on the side of a medical and professional service, a recent holding from the Illinois Court of Appeals meant coverage from one insurer for the insured medical educational institution and the application of an exclusion from a second. The court additionally held that the primary insurer waived its right to argue that it did not consent to an underlying settlement when it failed to timely object to the deal, despite knowledge of the settlement negotiations.

Detailed Discussion

The dispute began with a decision by nonprofit educational institution Rosalind Franklin University of Medicine to stop an experimental breast cancer vaccine program. Former patients sued. Despite the findings by Rosalind's institutional review board that the program lacked scientific validity and demonstrable efficacy, the patients argued the program's halt put their lives at risk.

After a preliminary hearing fared poorly for Rosalind, the school pursued a settlement with the former patients. The parties reached a deal where the university paid \$2.5 million into a trust for the patients to resume the study with an additional \$1 million to be paid if the plaintiffs were successfully able to get it started again, and \$500,000 "to compensate the plaintiffs for pain and suffering."

2-20 p. 177

Rosalind sought coverage from two insurers: Lexington, which had provided primary and excess healthcare liability policies to the university, and Landmark, under a directors and officers liability policy.

Lexington paid for counsel, albeit with a reservation of its rights, and refused to contribute to the settlement. The deal represented a disgorgement of funds and not "damages" or a "loss" under the policies, Lexington argued. It also took the position that the underlying suit was not medical in nature and therefore was not within the ambit of Lexington's policies; the former patients were really challenging an administrative decision to halt the program, the insurer said.

Landmark, which the parties agreed could only be on the hook for indemnification, also declined to chip in for the settlement. Landmark took an opposite stance as to the medical nature of the underlying complaint, arguing that the allegations involved a failure to render medical services and therefore fell under a medical malpractice exclusion in its policy.

Rosalind sued. In a somewhat mixed ruling for the insured, the Illinois Court of Appeals affirmed that the complaint fell under the professional services acts coverage of Lexington's policy and that Lexington failed to timely object to the settlement. However, the court also determined that Landmark's policy exclusion for medical malpractice precluded indemnification under the D&O policy.

The panel first rejected both insurers' contention that the settlement constituted disgorgement. The vaccine program was funded by a donation from a deceased doctor and earmarked for cancer research generally, the court said, not the specific research program at issue. The remaining funds are still being held for that purpose, the court added, as Rosalind paid the former patients from general operating funds.

"[T]he underlying complaint also sought damages for breach of duties, fraud, and misrepresentation, which cannot be framed as disgorgement or a turnover of fund. The settlement agreement disposed of all of the underlying plaintiffs' claims, including the nondisgorgement claim. Therefore, it is apparent that the settlement did not represent a disgorgement," the panel wrote.

Did the former plaintiffs allege acts of a medical nature? Yes, the panel concluded, bringing the suit within the covered acts of professional services under the Lexington policy.

p. 5/9

The preliminary statement of the complaint "alleges that Rosalind violated a cardinal principle of the medical profession" and "failed to 'comport with their professional responsibilities as articulated in the Code of Medical Ethics' by discontinuing care," the court noted. The genesis of the former patients' claims was the decision to shut down the vaccine program based on a lack of demonstrable efficacy of treatment, among other reasons.

Such decision-making constitutes "medical functions that require judgment aimed at protecting patients," the panel explained. "Thus, Rosalind's exercise of judgment in this regard constitutes professional service."

While the court's rejection of Lexington's wrongful administrative acts argument meant one victory for the insured, it also brought the complaint under the medical malpractice exclusion in Landmark's policy, negating indemnification under that policy for Rosalind.

Finally, the panel held that Lexington waived an argument that it failed to consent to the underlying settlement and therefore should not have to pay for it. Lexington was notified of the deal and its terms, the court said, and after it learned that settlement negotiations were ongoing, "had multiple opportunities to raise the issue of consent to settle or a voluntary payment defense, but it declined to do so until after Rosalind had executed the final settlement agreement."

The insurer even sent a reservation of rights letter during the settlement negotiations and never referenced the pending deal. "Under such circumstances, we agree with the trial court that it would be inequitable to allow Lexington to raise the voluntary payment defense now," the court concluded.

To read the order in *Rosalind Franklin University of Medicine and Science v. Lexington Ins. Co.*, [click here](#).

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Tenth Circuit: Even If Insured Waited Too Long In Giving Notice, Insurer Suffered No Prejudice

Why it matters

Even though an underground salt mine waited too long to notify its insurer about water intrusion and resulting damage, the Tenth Circuit Court of Appeals said that coverage might still be available. Such a delay would only relieve the insurer of coverage if substantial prejudice occurred as a result, the federal appellate panel ruled. However, Lexington

Insurance Company was unable to document how it would have handled the investigation or remediation process any differently or altered its underwriting process if the salt mine had given timely notice. The court reversed summary judgment in Lexington's favor and remanded the case for a coverage determination. P. 6/9

Detailed Discussion

In January 2008, employees at an underground salt mine in Kansas noticed an inflow of water. Fearing dissolution of the salt or structural issues, Lyons Salt Company tried to figure out the source of the problem and determine a solution.

In April 2010, Lyons attributed the water flow to an improperly sealed oil well and characterized the mine's future as "dire." Lyons then notified insurer Lexington Insurance Company in July 2010 of the water problems.

Lexington discovered that in the preceding two years, Lyons had already spent more than \$2.5 million to try to find and fix the problem; the total proof of loss was for \$7.5 million, which included remediation measures taken by Lyons prior to notifying Lexington of the water intrusion.

Arguing that Lyons had sat on its claim, Lexington declined to pay. A federal district court granted summary judgment in the insurer's favor when the salt mine sought a declaratory judgment to recognize coverage for the damage and related expenses.

But even assuming that the policyholder waited too long, Lexington failed to establish substantial prejudice, the Tenth Circuit concluded, reversing the lower court.

Under Kansas law, an insurer can show prejudice by presenting evidence that its ability to investigate a claim has been lost, by demonstrating that "it would have handled some aspect of the investigation, discovery or defense differently and that with this change, [the insurer] likely could have either defeated the underlying claims or settled the underlying claims for a lower sum than what the insureds settled."

Lexington proffered three areas of prejudice: it lost the opportunity to independently investigate the water inflow; it lost the opportunity to provide input on how to resolve the water inflow problem; and it suffered underwriting prejudice.

The federal appellate panel should have shown all three arguments. The insurer conducted its own independent investigation after it learned of the water problems, the court noted, and a contention that witnesses' memories are "not as fresh" did not explain how the investigation had (possibly) been impeded.

At a deposition, Lexington's own corporate representative responded to the question of whether the insurer's investigation was hampered with "How could I know?" This rhetorical question summarized the insurer's position, the court said.

As for prejudice in the remediation of the water problems, Lexington failed to "present evidence on how [its] input would have affected the remedial efforts," the panel wrote. And the insurer provided no evidence that it would have done anything differently – like cancellation, non-renewal, or amendment of Lyons' policies – had the salt mine provided timely notice of the inflow.

To read the decision in *B.S.C. Holding, Inc. v. Lexington Ins. Co.*, [click here](#).

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Insured Not Required to Exhaust All Remedies Against Perpetrators of Fraud, Court Rules

Why it matters

Which party—the insured or the insurer—bears the loss caused by the inevitable delays that occur when a potentially liable third party does not accept responsibility for a loss suffered by the insured and covered by its policy, as well as the costs and risks of pursuing such claims? According to a new opinion from the Texas Court of Appeals, the policy puts the burden on the insurer. Lloyd's of London declined to pay for a \$16 million theft, arguing that the insured was required to exhaust all possible remedies against the thief before turning to its policy. But combined with a two-year limit for insureds to bring suit when a claim has been denied, the court said the insured should be paid now with the insurer bearing the loss until the third parties (possibly) pay up.

Detailed Discussion

Cardtronics owns and operates ATMs. Pursuant to a series of contracts, Cardtronics leased money from Bank of America, which was transported by Mount Vernon Money Center, an armored car company.

Mount Vernon's president had other ideas, however, and stole millions of dollars from Cardtronics and other clients. When the theft – estimated to be around \$50 million, \$16 million of which came from Cardtronics – was discovered in 2010, Cardtronics notified its insurer, Lloyd's of London.

Seeking recovery of its \$16 million, Cardtronics requested payment from Lloyd's. The policy required that the insurer accept or reject the claim within 15 days or extend the deadline for additional time to reach a decision. Lloyd's repeatedly extended the deadline without rejecting Cardtronics' claim for more than one year before finally refusing to pay.

Although the policy provided coverage for contingent cash in transit as well as losses resulting from theft, the insurer pointed to a provision regarding armored motor vehicle companies. Subparagraph E.4.A. provided that Lloyd's would only pay for the amount of loss of contingent cash in transit that Cardtronics "cannot recover" under its agreement with an armored motor vehicle company or under any insurance carried either by that company or on behalf of its customers.

To comply with a two-year deadline in the policy, Cardtronics filed suit against Lloyd's in Texas state court. The insured argued that it could not recover from Mount Vernon (which had filed for bankruptcy) or its insurers before the deadline lapsed, and so it was impossible for Cardtronics to exhaust its remedies.

Lloyd's response: The applicable policy provision was contingent in nature and therefore it was not contractually responsible to pay anything until all possible remedies had been exhausted. The appellate court disagreed.

Although the insurer argued that "the Cardtronics policy is explicitly 'contingent' on an inability to recover from other sources," the court said that "the policy does not contain such an express requirement."

"Further, all insurance is contingent, explicitly or implicitly, on the insured's experience of an actual loss that cannot be recovered immediately. If Cardtronics had recovered the stolen money and incurred no other losses before filing a proof of claim, then Cardtronics would not be entitled to a recovery from [Lloyd's]," the court wrote. "But those are not the facts before us, and there is nothing in the policy language that requires Cardtronics to exhaust every possibility of recovery to establish that it 'cannot recover' under its contract with Mount Vernon or through any insurance policies purchased by Mount Vernon."

In fact, the policy only required Cardtronics to bring one lawsuit – a case against the insurer within two years of discovery of the loss. Lloyd’s argument that policy coverage was not triggered until the amount of loss was conclusively determined was unreasonable, the panel wrote.

“[B]ecause the policy is silent as to a deadline for when Cardtronics must demonstrate what it ‘cannot recover’ before payment from [Lloyd’s] is triggered, the ‘conclusive determination’ language urged by [Lloyd’s] interpretation is unduly restrictive and too stringent a test,” the court said.

Cardtronics clearly suffered a compensable loss, the panel said, and the policy required the insured to pursue its claim even with uncertainty regarding its amount. The insured could not harmonize the exhaustion requirement with the two-year deadline for filing suit, the court determined, adding that Lloyd’s retained its subrogation rights and could pursue any claims upon Cardtronics’ later receipt of funds from third parties.

“[W]e hold that ‘cannot recover’ applies at the time of the proof of loss, which gives meaning to all provisions of the policy and therefore is not unreasonable,” the panel said. “Contracts should be interpreted to avoid rendering a provision meaningless, such as the deadlines imposed by the policy. It is therefore reasonable to interpret subparagraph E.4.A’s ‘cannot recover’ to mean ‘cannot recover at the time the insured submits its proof of loss within 120 days of when the insured learns of the loss.’”

To read the decision in *Certain Underwriters at Lloyd’s of London v. Cardtronics*, [click here](#).

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EXHIBIT
24.0

South Carolina Federal District Court: Insurer May Act in Bad Faith by Considering Extrinsic Evidence to Deny Duty to Defend

On February 6, 2017, the United States District Court, District of South Carolina, found a genuine dispute of material fact existed as to whether a Roofing Limitation Endorsement in a liability policy barred the insurer's duty to defend. *Williford Roofing, Inc. v. Endurance Am. Specialty Ins. Co.*, 2017 WL 479507, at *3-4 (D.S.C. Feb. 6, 2017). Moreover, while an insurer's defense obligations are "not strictly controlled by the complaint" under South Carolina law, evaluating the complaint is the insurer's "first step." *Id.* at *4. Here, the district court found the insurer skipped the first step and instead looked first to extrinsic evidence to "deny coverage altogether." *Id.* As such, the court concluded the trier of fact could find the insurer acted in bad faith, and denied the insurer's motion for summary judgment on the bad faith claims.



In the underlying lawsuit, the insured, Williford Roofing, Inc., initially sued a homeowner to recover monies owed for roofing work. The homeowner counterclaimed, alleging rainwater entered the home after Williford removed shingles and left the home exposed to heavy rain. To recover any damages owed to the homeowner, Williford added its subcontractors to the lawsuit, which eventually settled.

Williford previously notified its insurer, Endurance American Specialty Insurance Company, and requested coverage under its liability policy. After Endurance denied coverage, Williford filed suit in state court, and

Endurance removed the suit to federal court. Williford asserted claims for breach of contract and bad faith, citing Endurance's failure to defend or indemnify. Endurance moved for summary judgment on all claims.

In considering Endurance's motion, the district court began with the Roofing Limitation Endorsement, which provided:

It is hereby agreed that we do not cover claims, loss, costs or expense due to "property damage" arising out of wind, hail, snow, rain, ice or any combination of these unless a suitable waterproof temporary covering, able to withstand the normal elements and large enough to cover the area being worked on, has been properly secured in place. This cover is to be put into place any time the contractor leaves the job site. This limitation applies to any sub-contracted work performed on behalf of the insured, including any sub-contractors of sub-contractors.

Williford, 2017 WL 479507, at *2 (emphasis added). Applying the key language underlined above, the court found the affidavits and deposition testimony demonstrated a factual dispute as to whether any covering had been secured on the roof. Because the policy did not define the term "suitable," and there was no "judicially determined definition of the term," the district court found a fact issue existed as to whether the endorsement applied. *Id.*

Significantly, Endurance, in denying coverage, had relied on a letter from the homeowner alleging Williford failed to "adequately" cover portions of the roof during heavy rains. A Williford representative, however, informed Endurance the roof was "dried in" on the night of the heavy rain. Moreover, the allegations in the counter-claim specifically stated Williford failed to notice or stop the rainwater from entering the house "through their roof covering." Resolving the factual dispute in the insured's favor, the court found the roof was covered at the time of the rain for purposes of Endurance's motion for summary judgment. Regarding the term "suitable," the district court explained Endurance's definition—i.e., any roof covering

that allows water to penetrate is not "suitable"—would render coverage under the policy illusory.

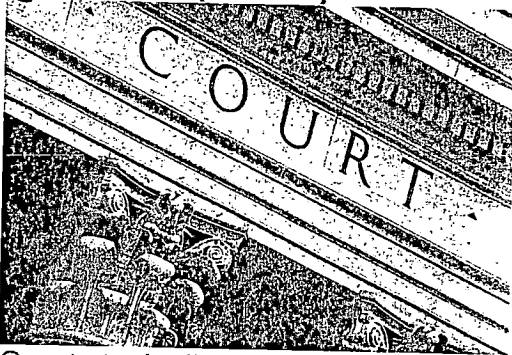
Next, the district court considered Williford's bad faith claims, noting an insurer owes a duty of good faith to satisfy its duties to both defend and indemnify within policy limits. Viewing the facts most favorably to Williford, the court concluded a reasonable jury could find Endurance both breached the policy and acted in bad faith by refusing to defend Williford. In South Carolina, the duty to defend is based on the allegations and the policy terms. The insurer must defend if the allegations create even a possibility of coverage. The duty to defend, however, is not strictly controlled by the complaint, and extrinsic facts known by the insurer may be considered. See *USAA Prop. & Cas. Ins. Co. v. Clegg*, 661 S.E.2d 791, 798 (S.C. 2008). Still, evaluating the allegations of the complaint is the first step that must be taken in making the duty to defend determination. *Id.* at 797. Because, according to the district court, Endurance skipped this first step and looked only to the homeowner's letter to deny coverage altogether, Williford's bad faith claims survived summary judgment.

Williford is an interesting decision and offers a warning to insurers, as the insured's bad faith claims survived summary judgment based on the district court's conclusion the insurer did not correctly apply the law in assessing whether it had a duty to defend its insured. The court put great significance on the insurer's reliance on the homeowner's letter in denying coverage. There is at least the suggestion that had the insurer more specifically detailed, in writing, that it was looking first to the allegations of the complaint and only after that assessment to extrinsic evidence, the district court might have viewed the bad faith claims differently.

About The Author

EXHIBIT
25.0

The Duty To Defend: The Four(ish) Corners Rule



Courts typically determine an insurer's duty to defend its insured under a liability policy in one of two ways.

R. Steven Rawls
Liability Insurance
November 2009

In some jurisdictions, an insurer's duty to defend depends solely on a comparison of the allegations of the complaint to the policy language. See, e.g., *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 13 (Tex. 2007). An insurer has a duty to defend if the face of the complaint alleges something covered and does not allege an exclusion to coverage. Extrinsic facts not alleged in the complaint do not affect the insurer's duty to defend in these jurisdictions. See *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888, 896–7 (Pa. 2006). Courts refer to this approach as the four-corners, or sometimes the eight-corners, rule.¹ *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 307 (Tex. 2006).

Other jurisdictions do not rely solely on a comparison of the allegations of the complaint to the policy language. These jurisdictions also require that, where the complaint does not trigger the duty to defend, an insurer must conduct a reasonable investigation of the surrounding facts to determine whether it has an obligation to defend. If the insurer determines that facts exist that would trigger the duty to defend despite the absence of such allegations in the complaint, the insurer has a duty to defend. See e.g., *Mortgage Exp., Inc. v. Tudor Ins. Co.*, 771 N.W.2d 137, 147 (Neb. 2009) ("In determining its duty to defend, an insurer must not only look to the petition or complaint filed against its insured, but must also investigate and ascertain the relevant facts from all available sources.").

However, even in a four-corners jurisdiction, the actual facts (as opposed to the alleged facts) may still play an important role in determining an insurer's defense obligation, particularly when the insurer knows about such facts.

The Four-Corners Rule

Under the four-corners rule, an insurer has a duty to defend its insured complaint states a claim that is potentially covered by the policy. *National Union Fire Ins. Co. v. Lenox Liquors, Inc.*, 358 So. 2d 533 (Fla. 1978). The court may not read facts into the pleadings, look outside the pleadings, or imagine factual scenarios that might trigger coverage. *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Merchs. Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997). The insurer's duty to indemnify, however, is governed by the actual facts establishing the insured's liability in the underlying litigation. *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 821 (Tex. 1997).

Ambiguous Complaints Are Generally Construed in Favor of a Defense

In four-corners jurisdictions, "the allegations of the complaint are controlling and, if ambiguous, must be construed most favorably to the insured to establish the duty to defend." *Baron Oil Co. v. Nationwide Mut. Fire Ins. Co.*, 470 So. 2d 810 (Fla. App. 1985); accord *Merchs. Fast Motor Lines, Inc., supra*, at 141 (resolving all doubts regarding the duty to defend in favor of the insured). Thus, if the complaint is ambiguous, the insurer generally has an obligation to defend and may be able to institute a declaratory judgment action to determine the actual facts. See *Baron Oil, supra*. However, in some states: if it is not clear from the face of the complaint that the policy provides coverage, but coverage could exist, the insurer must investigate and give the insured the benefit of the doubt that the insurer has a duty to defend. *Campbell v. Ticor Title Ins. Co.*, 209 P.3d 859, 861 (Wash. 2009).

The Devil You Know: Unpled Facts

Two kinds of facts may impact an insurer's obligation to defend in four-corners jurisdictions: (1) unpled but known facts that would negate coverage and (2) unpled but known facts that would trigger the insurer's duty to defend. [I]f the allegations in the complaint conflict with facts known to or readily ascertainable by the insurer, or if the allegations are ambiguous or inadequate, facts outside the complaint may be considered. *Woo v. Fireman's Fund Ins. Co.*, 164 P.3d 454, 459 (Wash. 2007). The insurer may not rely on facts extrinsic to the complaint to deny the duty to defend, and may do so only to trigger the duty.

Facts That Negate Coverage

Despite *Woo's* pronouncement that facts extrinsic to the complaint in a four-corners jurisdiction can never permit an insurer to deny the duty to defend, courts widely accept some situations as exceptions to the four-corners rule. One such exception is "the creation of the basic insurer-insured relationship" in the

complaint. In *Nateman v. Hartford Cas. Ins. Co.*, 544 So. 2d 1026, 1027 (Fla. Dist. Ct. App. 1989), the underlying defamation complaint against Dr. Nateman alleged that he was acting in his capacity as an employee of the hospital when he made allegedly libelous statements. Dr. Nateman sought a defense from Hartford, the hospital's insurer, as an additional insured because the Hartford policy made employees additional insureds.

The court relied on Dr. Nateman's actual status as an independent contractor in holding that Hartford had no duty to defend merely because the plaintiff alleged that the defendant was an insured or alleged facts which, if true, would make the defendant an insured. The *Nateman* court explained that:

The insurer is not obligated to provide a defense for a stranger ... it would be imprudent and illogical to confer such a duty upon an insurer as to a party who is not an insured ... and the ensuing duty to defend cannot be left to the imagination of the drafter of a complaint.

Id. (citing *Navajo Freight Lines, Inc. v. Liberty Mut. Ins. Co.*, 471 P.2d 309, 315-6 (Ariz. 1970)). "[A]s to *who* is an insured, the facts as they actually exist must be determinative." *Id.* (emphasis in original).

When an insured admits facts to the insurer which negate coverage and a claimant subsequently files a complaint against the insured that does not allege these facts, the insurer may have no duty to defend. In *Nationwide Mut. Fire Ins. Co. v. Keen*, 658 So. 2d 1101 (Fla. Dist. Ct. App. 1995), before suit was filed, the insured admitted to the insurer that he operated a boat with an engine that generated 40 horsepower and thus excluded under the policy (the policy excluded coverage for boats with certain horsepower engines). The complaint made no mention of the horsepower of the engine but the fact of the actual horsepower previously admitted by the insured clearly placed the boat outside the coverage afforded by the policy. Accordingly, the insurer had no duty to defend. *Accord Burns v. Underwriters Adjusting Co.*, 765 P.2d 712 (Mont. 1988) (insurer had no duty to defend insured against complaint alleging negligence where insured admitted to intentionally striking claimant in interview with insurer). When:

uncontroverted evidence places the claim outside of coverage, and the claimant makes no attempt to plead the fact creating coverage or suggest the existence of evidence establishing coverage, ... the insurer is relieved of defending. *Keen* at 1103.

Facts That Trigger the Duty To Defend

While many situations exist in which an insurer might know of actual unpleaded facts that would, if pleaded, trigger the duty to defend, an issue has arisen causing trouble for insurers recently where a complaint against a general contractor is silent about the use of subcontractors against whom a plaintiff either cannot or does not allege liability. The following cases illustrate this situation. In *Revelation Ind. Inc. v. St. Paul Fire & Marine Ins.*, 206 P.3d 919 (Mont. 2009),

Revelation entered into a contract with Phillips Environmental Products, Inc., to design and develop a disposable sanitary bag for use with Phillips's portable environmental toilets. Revelation subcontracted with Manchester Packaging to produce the bags in accordance with Phillips's specifications. The bags provided by Manchester did not contain cornstarch as required by Phillips and, not knowing of the nonconformity, Revelation provided the bags to Phillips. Phillips promptly claimed the bags failed to meet its specifications and terminated its relationship with Revelation.

Revelation attempted to meet with Phillips to salvage the relationship, to no avail. Eventually Phillips claimed to have suffered significant damages and Revelation notified St. Paul of the claim by telephone. St. Paul memorialized the conversation in a letter reciting the facts described above. Phillips subsequently demanded compensation from Revelation, and Revelation forwarded the demand letter to St. Paul. The demand letter did not mention Manchester. St. Paul denied Revelation's request for a defense and indemnity to Phillips's claim. Phillips subsequently sued Revelation in a complaint, which again failed to mention Manchester, and St. Paul declined coverage. Revelation defended itself and filed a third-party complaint against Manchester.

Revelation also sued St. Paul, claiming it breached the insurance contract, and St. Paul counterclaimed for a declaratory judgment that it was not obligated to defend Revelation. Ruling on each party's motion for summary judgment, the lower court concluded that the policy "provided coverage for a defective product manufactured by a subcontractor" but the complaint, by omitting any reference to Manchester, did not trigger St. Paul's duty to defend or indemnify Revelation. The Supreme Court of Montana reviewed Montana caselaw addressing situations in which courts "looked beyond the allegations [of the complaint] to the facts known by the insurer or to the actual acts giving rise to the underlying claims" to determine the insurer had no duty to defend, the Supreme Court of Montana concluded that:

this same analysis should be utilized when the complaint does not present a claim which on its face is covered by the policy, but the insurer nonetheless has information that could give rise to a duty to defend and indemnify.

Revelation at

925□6.

The Supreme Court of Montana clarified that looking beyond the allegations of the complaint to the actual facts where the allegations in the complaint: were either incomplete or inaccurate ... does not require an insurer to seek out such information—as we have previously held, insurers that look at facts beyond the allegations in the complaint do so at their own risk as they will be required to defend and/or indemnify based on the information discovered. *Id.* (citation omitted).

The court found that St. Paul had knowledge of the true, undisputed facts giving

rise to coverage when the complaint was filed, could not ignore those facts, and thus, had a duty to defend. The Supreme Court of Montana did not address whether St. Paul acted in bad faith by disclaiming its defense obligation and it does not appear the issue was raised in that suit.

In a similar case in Connecticut where the insurer withdrew a defense provided for many years after the operative pleading was amended, the insured sued alleging its insurer acted in bad faith in withdrawing its defense. Despite noting that "the exclusive pleading rule has never been used in Connecticut to defeat an insurer's duty to defend," the court further explained that "[a]n insurer's reasonable interpretation of unsettled law does not amount to bad faith." *Fortin v. Hartford Underwriters Ins. Co.*, 2009 WL 659210, 10 (Conn. Super. 2009) (citation omitted).

However, in a case with facts analogous to *Revelation*, the Northern District of Illinois found that the insurer acted in bad faith in refusing to defend its insured where the insurer had undisputed knowledge "of true but unpled facts" which triggered the insurer's duty to defend. *Edward Gray Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 1997 WL 102542, 5 (N.D. Ill. 1997) (citation omitted). In that case, Edward Gray contracted to perform work at an electrical utility plant in Indiana. Edward Gray subcontracted with Correct Construction Company to perform piping and plumbing work at the site. Under the subcontract, Correct was required to provide insurance coverage for its work both during its operations and after its operations were completed. Edward Gray was named as an additional insured under the general liability insurance policies issued to Correct by National Union.

Subsequent to the completion of Correct's work, the utility plant suffered a collapse of soil above two underground intake and discharge circulating water pipes. The utility's insurers paid the \$47 million in repair costs and subsequently sued various contractors who performed work at the site, including Edward Gray. Edward Gray sought a defense from National Union and National Union refused. Edward Gray defended itself, won summary judgment, and then filed this declaratory judgment action seeking a determination that National Union breached the insurance contract and Edward Gray was entitled to attorney's fees and costs.

As an additional insured under Correct's policy, "the underlying complaint must have alleged that property damage occurred as a result of work which was performed by or for Correct" to trigger National Union's obligation to defend Edward Gray. The court found the underlying complaint to be "completely devoid" of any information relating to Correct and, in fact, "there is no mention of Correct or any other subcontractors in the complaint." *Id.* Accordingly, the complaint did not trigger National Union's duty to defend Edward Gray.

However, after several exchanges of correspondence in which Edward Gray

requested a defense and National Union declined to provide it, Edward Gray tendered two binders of information to National Union and met with National Union representatives to discuss the possibility of a defense. The court reviewed the materials provided and determined that "it should have become apparent to National" that "a possibility of coverage existed." Further, National Union's "own notes on this case reflect the fact that the possibility of coverage existed." *Id.* at 6. Thus, because "all questions of coverage must be resolved in favor of the insured," the court found National Union's knowledge of the possibility that its duty to defend was triggered "did in fact trigger National's duty" and its refusal to defend was in error.

Important to the court's determination that National Union's "denial was vexatious and unreasonable" and therefore in bad faith, were the following facts: National Union repeatedly denied the insured's requests for a defense instead of defending under a reservation of rights or seeking a declaratory judgment and National Union did not seek the opinion of an insurance coverage attorney, despite Edward Gray's requests, instead responding that it did not need one. The court found that the record supported "the fact that National did not attempt to resolve the question of coverage but merely kept denying that coverage existed" which is not proper practice in Illinois and "such denials were unreasonable under the circumstances." *Id.*

Conclusion

Although four-corners jurisdictions do not require an investigation into the facts to determine an insurer's duty to defend, courts in those jurisdictions generally liberally construe the allegations of the complaint and resolve any doubt in favor of a defense for the insured. In this context, extrinsic facts known by the insurer can create a defense obligation even where the complaint is silent as to those facts.

As the Supreme Court of Montana explained,
An insurer cannot ignore knowledge of facts that may give rise to coverage under the policy simply because the complaint—which is, after all, drafted by a claimant over whose draftsmanship the insured has no control—does not allege these facts of which the insurer has knowledge. Under such circumstances, the insurer must defend. It may commence a defense under a reservation of rights while conducting an investigation, and it may commence a declaratory action ... It may not, however, ignore information in its possession that may give rise to coverage simply because the complaint fails to recite it, and thereupon refuse to defend. *Revelation* at 928.

While facts extrinsic to the allegations of the complaint clearly negating coverage can allow the insurer to deny coverage, particularly where the insured acknowledges such facts, an insurer's failure to defend based on known unpleaded facts that potentially trigger coverage under the policy can lead to

extracontractual exposure for the insurer.

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¹This is also known as the "four corners" rule, "complaint allegation" rule, "comparison test," and "exclusive pleading" rule. See *Pompa v. American Family Mut. Ins. Co.*, 520 F.3d 1139, 1145 (10th Cir. 2008) and *Fortin v. Hartford Underwriters Ins. Co.*, 2009 WL 659210 (Conn. Super. Ct. 2009).

EXHIBIT
26.0

Courts typically determine an insurer's duty to defend its insured under a liability policy in one of two ways.

R. Steven Rawls

Liability Insurance

November 2009

In some jurisdictions, an insurer's duty to defend depends solely on a comparison of the allegations of the complaint to the policy language. See, e.g., *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 13 (Tex. 2007). An insurer has a duty to defend if the face of the complaint alleges something covered and does not allege an exclusion to coverage. Extrinsic facts not alleged in the complaint do not affect the insurer's duty to defend in these jurisdictions. See *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888, 896–7 (Pa. 2006). Courts refer to this approach as the four-corners, or sometimes the eight-corners, rule. *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 307 (Tex. 2006).

Other jurisdictions do not rely solely on a comparison of the allegations of the complaint to the policy language. These jurisdictions also require that, where the complaint does not trigger the duty to defend, an insurer must conduct a reasonable investigation of the surrounding facts to determine whether it has an obligation to defend. If the insurer determines that facts exist that would trigger the duty to defend despite the absence of such allegations in the complaint, the insurer has a duty to defend. See e.g., *Mortgage Exp., Inc. v. Tudor Ins. Co.*, 771 N.W.2d 137, 147 (Neb. 2009) ("In determining its duty to defend, an insurer must not only look to the petition or complaint filed against its insured, but must also investigate and ascertain the relevant facts from all available sources.").

EXHIBIT
27.0

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EXHIBIT 27.0
4pp p. 1/4

Insurance against being wrongly sued: The duty to defend even when extrinsic facts suggest no coverage: Impact | Understanding and Managing Business Risk

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Insurance against being wrongly sued: The duty to defend even when extrinsic facts suggest no coverage: Impact | Understanding and Managing Business Risk

Insurance against being wrongly sued: The duty to defend even when extrinsic facts suggest no coverage

By [business-risk-management-blog/author/David-Goodman]David Goodman, [business-risk-management-blog/author/Thadford-Felton]Thadford Felton on July 8, 2015 at 6:00 PM

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A recent Illinois appellate court decision illustrates that a policyholder can compel its insurance carrier to provide it with a defense even when it is clear from extrinsic facts that the insurer will not ultimately have an obligation to indemnify the policyholder against a judgment.

pay the defense costs even though it will not have to fund a judgment is not an empty victory. As illustrated by the recent appellate decision in Illinois Tool Works, Inc. v. Travelers Casualty and Surety, the policyholder may need to push the insurer to focus on the facts as pled and not the facts as "known" to force its insurance carrier to defend the claim. Policyholders themselves should not focus on the facts as known but on potential liability, assuming the claimant could actually prove the claims — regardless of how factually baseless they may be — in assessing whether it has coverage for defense costs.

The appellate court's take

In Illinois Tool Works, the policyholder purchased insurance policies that included a defense obligation from the defendant carriers from 1971 through 1987. It is undisputed that Illinois Tool Works was not supplying and distributing products in the welding product market until 1993, when it entered that market by acquiring another company. Illinois Tool Works did not actually engage in the welding product market during the time encompassed by the insurance policies it purchased from the defendant insurers.

Regardless of when Illinois Tool Works entered the welding product market, it found itself named as a defendant in multiple toxic tort personal injury lawsuits filed around the country by people who claimed to have been injured through the use of welding products they allege it sold. The plaintiffs complained in generic terms that they were injured by products sold or distributed by Illinois Tool Works over a period of time that encompassed the years 1971 through 1987. Illinois Tool Works was sued directly for its conduct and indirectly as a successor to the company it acquired. The complaints were vague as to when the exposure occurred but suggested it included the period from 1971 through 1987.

Attempting to avoid their duty to defend Illinois Tool Works, the insurance carriers relied on extrinsic facts nowhere to be found in the complaints against Illinois Tool Works. The insurers denied coverage on the basis that Illinois Tool Works did not in fact distribute the products at issue during the period their policies covered. But an "insurer's knowledge that extrinsic facts not pled in the complaint will ultimately defeat any coverage obligation does not negate its duty to defend in the first place if the complaint, on its face, presents a claim potentially within the insurance policy's coverage," the court stated. Finding the insurers were obligated to fund the policyholder's defense, the court recognized that "the Insurers agreed to provide a defense for cases based on groundless

The insurers also asserted that to the extent the claims against Illinois Tool Works were a successor to the entity it acquired, there was no coverage. The appellate court found that to the extent the claims were *solely* as successor to the entity it acquired, there was no coverage.

Addressing inherent conflicts

Among the takeaways from this case, insurers often point to extrinsic matters or seek information about extrinsic matters in order to "evaluate" their defense obligations. Insurance carriers use this "investigation" to search for excuses to avoid their duty to defend even though that duty arises from the claims pled. Sometimes, such as when a policyholder was not even engaged in the conduct alleged during the periods covered by the insurance policies, the carrier's position may not, at first blush, seem so unreasonable. And many times, policyholders accept the insurance carrier's determination that there is no coverage based on the extrinsic facts, if the policyholder does not contest the facts the insurer cites.

The insurer's duty is determined by the claims alleged. After all, a policyholder does not buy insurance just against meritorious claims but also to defend against meritless claims. As illustrated by *Illinois Tool Works*, the insurance carrier's coverage obligation includes a defense against claims for conduct alleged to have occurred at a time when the manufacturer had not even begun to manufacture the products at issue. An insurer's refusal to defend is only justified when "it is clear from the face of the underlying complaint that the allegations fail to state facts which bring the cause within *or potentially within* coverage," the appellate court stated. This principle should help to guide how a policyholder defends itself. Vague, poorly pled claims may provide a policyholder with a greater opportunity to find insurance coverage. Thus, while there may be a kneejerk response to seek clarification through a motion to dismiss, the policyholder may be better served by avoiding that reaction.

This case also illustrates the conflict inherent when the complaint presents a claim that is potentially within coverage but where the facts will ultimately show the claim is outside coverage. In such circumstances, the policyholder should insist on receiving a defense by attorneys it hires – at the insurer's expense – and not accept a defense from counsel appointed by the insurer. Frequently in these circumstances, the insurance carrier will

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numbing language of the insurance explaining all of the reasons that coverage is likely to ultimately be excluded — but then providing defense counsel.

Will defense counsel engaged by the carrier be as likely to defend the case in a way to preserve the insurer's duty to fund the defense? It's a reasonable question that should cause the policyholder to engage counsel. And in light of the conflict presented between the insurer and policyholder, the insurer will be required to pay for the defense until such time, if ever, as there are no claims potentially within the coverage of the insurance policy.

Tags: [business-risk-management-blog/tag/insurance-coverage]insurance coverage

EXHIBIT
28.0

9pp p. 1/9

The Attorney's Duty to the Court Against Concealment, Nondisclosure and Suppression of Information as Coextensive with the Duty Not To Allow Fraud To Be Committed upon the Court

The extent to which it is regarded as counsel's duty to advise the court as to matters relevant to the proper decision of the case of which opposing counsel is ignorant or which he has overlooked turns on the degree to which the old idea that litigation is a game between the lawyers has been supplanted by the more modern view that the lawyer is a minister of justice.

H. Drinker, *Legal Ethics* 76 (1953).

A case dealing with the failure of an attorney to advise the court of a matter which was relevant to a proper decision is *Sullins v. State Bar*.¹ A testatrix had disinherited her daughter and left her whole estate to her nephew. The daughter began an action to contest the will. Sullins, who had been the attorney for the conservator of the testatrix before her death, represented the executor of the will.² In this capacity, Sullins wrote to the nephew telling him of his position as sole beneficiary and that the daughter was contesting the will. The nephew immediately replied in a notarized letter, expressing his desire not to receive anything under the will and that the property should be the daughter's without her having to contest the will. Sullins did not acknowledge this letter nor did he disclose its receipt or the information contained therein to the daughter or to the court, which had before it the probate of the estate and the will contest. Three years later, still without having disclosed the letter, Sullins obtained from the court a 50% contingency fee, replacing a 33 1/3% agreement that had been in effect. In the petition for the new agreement, Sullins stated that the 33 1/3% fee was not adequate "because the civil action had been and would continue to be

1. 15 Cal. 3d 609, 542 P.2d 631, 125 Cal. Rptr. 471 (1975), *cert. denied*, 425 U.S. 937 (1976).

2. As attorney for conservator, Sullins had handled an action to set aside a conveyance by the testatrix of real estate, making up the bulk of the estate, to the disinherited daughter and herself as joint tenants because of lack of delivery. A default judgment against the daughter was obtained, but she secured permission to file an answer.

fiercely contested.”³ The daughter’s attorney requested that the nephew come to California for the taking of depositions before trial. At these depositions, the nephew revealed the correspondence between himself and Sullins. As a result of this information, the daughter obtained the removal of the administrator and Sullins from the handling of the estate. The court found that fraud upon the court and the estate had been committed when the petition for the increased fee was presented for the court’s approval while the letter from the nephew was kept secret. An administrative committee of the State Bar found that Sullins had not carried out the oath and duties required of an attorney, citing several sections of the Business and Professions Code.⁴ The disciplinary board decided to reprove Sullins publicly rather than suspend him for ninety days as had been suggested by the administrative committee. The reasons Sullins gave to justify his actions were, *inter alia*, that the daughter’s attorney had also concealed the letter, that the nephew’s letter violated a no-contest clause of the will, or in the alternative, that the nephew’s interest could not be assigned, and that as attorney for the estate he owed a duty to its creditors. The court held that whether the other attorney failed to disclose the contents of the letter had no bearing on the issue of whether Sullins should be disciplined. The contention that the letter violated the no-contest clause or that the nephew could not assign his interest would be helpful, the court held, only if Sullins had in good faith believed these were reasons not to disclose the information contained in the letter. There was no evidence that he really believed these were valid reasons for his failure to disclose. According to the court, the duty to the creditors of the estate was no defense because sections 6068 and 6128 of the Business and Professions Code absolutely prohibit an attorney from misleading or deceiving the court and Sullins admitted the concealment.⁵ Public reproof was found to have been the appropriate discipline.⁶

3. 542 P.2d at 634, 125 Cal. Rptr. at 474.

4. In CAL. [BUS. & PROF.] CODE § 6103 (West 1974), a violation of the oath or duties of an attorney is a cause for discipline. Section 6128 makes it a misdemeanor for an attorney to be a party to any deceit or collusion intended to deceive either the court or any other party. Section 6106 makes discipline proper for acting in a dishonest manner or with moral turpitude.

5. *Id.* Section 6068 makes it the duty of an attorney “never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.”

6. The court did not decide whether the court was misled for the attorney’s

Failures to disclose numerous things to the court have been held to have been professional misconduct, including association of a juror with the attorney,⁷ property in a bankruptcy proceeding,⁸ facts relevant to possible unreliability of a witness,⁹ prior adjudication,¹⁰ settlement of a case,¹¹ perjury of a witness,¹² and adverse case law.¹³ The ABA Code of Professional Responsibility (hereinafter referred to as ABA Code) places upon an attorney a duty not to withhold from the court information he has an obligation to disclose.¹⁴ There are, however, no clear guidelines for telling an attorney exactly what his duty entails.

Samuel Williston, while defending on a contract, was faced with the problem of whether or not to disclose a letter to the court. At Williston's counsel table there was an assembly of correspondence between the parties to the suit. The judge found for the defendant, stating as one of his reasons, a fact which was shown by one of the letters to be in error. Williston, though feeling uncomfortable, kept quiet. He concluded that it would have been a violation of his duty to his client if he had disclosed the unfavorable evidence. Williston stated that a lawyer, after deciding to represent a client, does not have to and should not inform the court of information which would be harmful to the cause of his client.¹⁵ It is generally believed that Williston's action in this situation was proper.¹⁶

It is an overstatement to say that an attorney never has to

own gain because the misleading of the court was itself sufficient reason for the discipline.

7. *Mississippi Power Co. v. Stribling*, 191 Miss. 832, 3 So. 2d 807 (1941).

8. *In re Glover*, 176 Minn. 519, 223 N.W. 921 (1929).

9. *In re Tepper*, 170 App. Div. 889, 154 N.Y.S. 412 (1915). See generally Note, *The Attorney's Duties of Disclosure*, 31 ST. JOHN'S L. REV. 283 (1957).

10. *People ex rel. Healy v. Case*, 241 Ill. 279, 89 N.E. 638 (1909).

11. *State ex rel. Dill v. Martin*, 45 Wash. 76, 87 P. 1054 (1906).

12. *In re King*, 7 Utah 2d 258, 322 P.2d 1095 (1958).

13. *In re Greenberg*, 15 N.J. 132, 104 A.2d 46 (1954).

14. ABA CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as ABA CODE], Ethical Consideration [hereinafter cited as EC] 7-27 reads in pertinent part as follows: "Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce." ABA CODE, Disciplinary Rule [hereinafter cited as DR] 7-102(A)(3) states that while representing a client, a lawyer shall not "conceal or knowingly fail to disclose that which he is required by law to reveal."

15. See S. WILLISTON, *LIFE AND LAW* 271-72 (1940).

16. Countryman, *The Scope of the Lawyer's Professional Responsibility*, 26 OHIO ST. L.J. 66, 69 (1965).

reveal information which would be harmful or even fatal to a cause he is trying. Although not very helpful, the general rule could be said to be that an attorney, as an officer of the court, has a duty to inform the court of anything which it is entitled to be informed of.¹⁷ It has been held that "the true position of an attorney before the court is that of an aide and assistant."¹⁸ Yet, the Committee on Professional Ethics of the Bar of New York City has decided that an attorney would have committed no wrong in allowing a court to grant a default judgment on all the issues in a new trial even though the attorney knew that the new trial had been limited in scope by the judge who ordered it.¹⁹ But the attorney in *People ex rel. Healy v. Hooper*²⁰ was said to have deceived the court and was disbarred for, *inter alia*, representing that his client was entitled to a default judgment when he was aware, and the court was not, that a motion to quash the service had been filed by the other party. One way of distinguishing the situation encountered by the Ethics Committee and the *Healy* case would be to say that the attorney's client in the ethics opinion was entitled to a default judgment, even though it should have been limited, while the party in *Healy*, because of the motion to quash made by the other party, was not entitled to a default judgment and still the attorney asked for one. Still, it seems that only a matter of degree separates the two failures to disclose.

An attorney does not owe a lesser duty to the court in a criminal case than he does in a civil case.²¹ In the second inquiry of Opinion No. 287 of the ABA Committee on Professional Ethics, there is a situation somewhat analogous to Williston's problem even though it deals with a criminal proceeding.²² An attorney heard the judge give his convicted client probation due to the fact that the client had no criminal record. The custodian of criminal records had misin-

17. *De Blanc v. De Blanc*, 18 So. 2d 619 (La. 1944).

18. *Alabama Great S.R.R. v. Swain*, 248 Ala. 533, 535, 28 So. 2d 714, 716 (1947).

19. THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SELECTED OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS, No. 52 (1926-27).

20. 218 Ill. 313, 75 N.E. 896 (1905).

21. *In re Palmieri*, 176 App. Div. 58, 162 N.Y.S. 799 (1916), *rev'd on other grounds*, 221 N.Y. 611, 117 N.E. 1078 (1917). See generally NEW YORK COUNTY CRIMINAL COURTS BAR ASSOCIATION CODE OF ETHICS AND PRINCIPLES FOR THE PROSECUTION AND DEFENSE OF CRIMINAL CASES, published in 14 ROCKY MTN. L. REV. 203 (1953).

22. ABA COMMITTEE ON PROFESSIONAL ETHICS, OPINIONS [hereinafter cited as ABA OPINIONS] No. 287 (1953).

formed the judge and the attorney knew that his client actually did have a criminal record. The issue was whether it would be a breach of the attorney's duty to the court if he remained silent. The Committee decided that if there was not a confidentiality problem, then the determination would depend on the resolution of the conflict between what is required of an attorney by two canons of the now replaced ABA Canons of Professional Ethics. Canon 22 required that an attorney act with candor and fairness toward the court, while Canon 6 required representation of the client with undivided fidelity and with no divulging of his secrets. As stated by the Committee: "If, under all the circumstances, the lawyer believes that the court relies on him as corroborating the correctness [of the information] . . . the lawyer's duty of candor and fairness to the court requires him, in our opinion, to advise the court not to rely on counsel's personal knowledge as to the facts of the client's record."²³ Here is support for the idea that any duty an attorney has as a minister of justice to inform the court as to matters which might be harmful to the client's cause stems only from the obligation not to allow fraud or misrepresentation to be practiced on the court.²⁴ The New York County Lawyers Association Committee on Professional Ethics has held that it would not be improper for an attorney to fail to reveal that he knew of an eye-witness to an accident when the case was dismissed for lack of evidence.²⁵ This opinion has been questioned.²⁶ If the attorney had obtained the dismissal upon his implied representation that he did not know of a witness, he would probably have breached his duty to inform the court.²⁷ If nothing was done to conceal the witness, there would probably be no misrepresentation since judges do not rely on an attorney to produce the other side's evidence.²⁸

23. *Id.* at 615.

24. *Cf.* ABA CODE, EC 8-5 reads: "Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers." DR 1-102(A)(4) says that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, nor be guilty of wilful misconduct."

25. THE NEW YORK COUNTY LAWYERS' ASSOCIATION, SELECTED OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS, No. 309 (1933). *See* Cohen, *The Fundamentals of Legal Ethics in Alabama*, 36 ALA. LAW. 160, 202 (1975).

26. *See* H. DRINKER, LEGAL ETHICS 77 n.42 (1953).

27. *Cf.* ABA OPINIONS, No. 287 (1953).

28. *See* Cheatham, *The Lawyer's Role and Surroundings*, 25 ROCKY MTN. L. REV. 405 (1953).

A prosecutor in a criminal case has a strong obligation to disclose information even if it is harmful to the prosecution efforts.²⁹ An attorney does not have the same obligation to produce evidence unfavorable to his side, in either a criminal or civil case, but he may not conceal or suppress evidence necessary for a just determination of a cause.³⁰ This does not mean that a just determination was not reached in the case where Williston did not inform the court of the information contained in the letter he possessed, because a just determination is made when both parties perform their duties and the court performs its duty.³¹ Williston performed his duty by being loyal to the client's case and yet, suppressing or concealing no evidence which he should have revealed. While in most cases an attorney does not have the duty to introduce evidence harmful to his client, he may not take steps to prevent the court from having the truth presented to it.³² The attorney in *In re Williams*³³ was found to have breached his professional responsibility by advising the destruction of a decedent's written instructions as to the disposition of property with knowledge that they would be needed at trial. In *Bar Association v. Greenwood*,³⁴ an attorney was disbarred for not

The most distinctive element in the lawyer's work is the method used for the determination of controversies not otherwise resolved. A trial is not a dispassionate and cooperative effort by all the parties to arrive at justice. It is the adversary system, the competitive system in the administration of law. In a court there is a judge, who is to pass on the questions, and there are lawyers on each side. Under the American system, the judge is relatively passive, listening, moderating, and passing on what is offered to him. But neither the judge nor any other representative of the public is active in developing the facts. The lawyers are the ones who develop and present the case. They do so, each for his own side and not for both sides. If one lawyer is poor or lazy, his side suffers accordingly. If the other side is unscrupulous, his side may benefit unduly.

Id. at 409.

29. *Turner v. Ward*, 321 F.2d 918 (10th Cir. 1963); ABA CODE, EC 7-13. See generally Comment, *Actions Against Prosecutors Who Suppress or Falsify Evidence*, 47 TEX. L. REV. 642 (1969).

30. See Annot., 40 A.L.R.3d 169 (1971); Annot., 1917B L.R.A. 384.

31. See generally CURTIS, *IT'S YOUR LAW* (1954). See also Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 12 (1951), where the following language appears: "The administration of justice is no more designed to elicit the truth than the scientific approach is designed to extract justice from the atom."

32. See ABA OPINIONS No. 131 (1935).

33. 221 Minn. 554, 23 N.W.2d 4 (1946).

34. 168 Mass. 169, 46 N.E. 568 (1897).

turning over to the court a copy of an agreement in his possession even though he was aware that the judge was seeking to have the agreement shown. Problems of not being candid with the court are also present where an attorney begins an action with knowledge of facts that would make the allegations made in the complaint untrue. Such conduct has been held improper.³⁵ These cases seem to fall within the ambits of ABA Code, Disciplinary Rule 1-102(A)(4) and Ethical Consideration 8-5 which deal in part with fraud.³⁶

The wrongdoing in suppression of evidence does not come until there is an intent to keep relevant evidence from being available for trial.³⁷ Keeping evidence from availability for the court's use could be considered a fraud on the court in that there may be an implied representation by the attorney, due to the provisions of the ABA Code, that he has not suppressed or concealed evidence wrongfully.³⁸ If evidence has been wrongfully kept from the court, then the court makes its decision based on a misrepresentation. In *In re Marron*,³⁹ the concealment of immaterial evidence was found to be unprofessional conduct, but the evidence was already in the hands of the court when it was concealed.⁴⁰ Rather than being a fraud on the court which would have caused an unjust outcome, there was, in effect, a theft from the court.⁴¹

The court in *Sullins v. State Bar* specifically stated that by not disclosing information to the court, Sullins had perpetrated a fraud on the court when he sought approval of an increased fee. The provisions of the Business and Professions Code clearly prohibited his actions.⁴² His failure to disclose coupled with his petition for increased fees would also seem to be prohibited by the ABA Code

35. *E.g.*, *McMahon v. State Bar*, 39 Cal. 2d 367, 246 P.2d 1931 (1952).

36. *See In re Star*, 538 S.W.2d 334 (Mo. 1976); note 24 *supra*.

37. *See In re Luce*, 83 Cal. 303, 23 P. 350 (1890); *In re Chadsey*, 141 App. Div. 458, 126 N.Y.S. 456 (1910), *aff'd*, 201 N.Y. 572, 95 N.E. 1124 (1911). In the latter case, the attorney sought to obtain letters written by his client which might have shown immorality. The court held that if there was no purpose to prevent evidence that might be relevant to possible litigation from being available on trial, then there was no wrongdoing.

38. *Cf.* ABA OPINIONS, No. 287.

39. 22 N.M. 252, 160 P. 391 (1916).

40. *See generally* Annot., 151 A.L.R. 750 (1944).

41. The concealed evidence was actually still in the clerk's office, but the attorney had hidden it beneath a blotter. This would seem to be just as much a theft as if the attorney had removed the evidence from the clerk's office.

42. *See* notes 4 and 5 *supra*.

provisions on fraud⁴³ and nondisclosure.⁴⁴

It seems that when concealment, nondisclosure, and suppression of information from the court have been found to be unprofessional conduct by an attorney, there has usually also been a fraud on the court. Certainly there can be a fraud perpetrated on a court in many ways besides concealment, nondisclosure, and suppression of information, but it is difficult to see how any of these three actions by an attorney could be found to be unprofessional conduct without at least an attempted fraud upon the court being committed. The trouble comes in deciding when there is a fraud upon the court. Whether fraud has been committed will depend on whether the attorney had a duty to the court greater than the duty to the client with respect to disclosure of information in that particular case.⁴⁵ It should not be forgotten that judges are lawyers too and that they do not expect attorneys to give away their cases. What a judge expects of an attorney will be determinative of whether the attorney is considered to have struck the balance correctly.⁴⁶

As stated by William Howard Taft:

[I]f [the legal profession] serves its high purpose, if it vindicates its existence, [it] requires from those who have assumed its obligation a double allegiance, a duty toward one's client and a duty toward the court which, reconciled as they can be and are in fact reconciled in practice, make for justice It is the

43. See note 24 *supra*.

44. See note 14 *supra*.

45. See Gold, *Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer*, 14 CLEV.-MAR. L. REV. 65, 76 (1965). A fact situation was presented in which an attorney and judge were talking about what should be done with the defendant. Neither the defendant nor a jury was present. At question was the duty of candor to the court required by Canon 22 as opposed to the duty of loyalty to the client. The author stated:

In the above situation for reasons of expediency the lawyer usually leans on his duty of candor to the court rather than on his duty of undivided loyalty to the client. Canon 22 prevails over all others not because it offers the highest moral solution, but because it is practical. The lawyer knows that he will appear before the judge or his associates many times. The discovery of an error which could have been prevented by candid counsel can injure the reputation of the less than candid one among the judiciary. This pragmatic control factor can operate not only when the court directly asks a question but at any time that the lawyer knows something that a sentencing judge should know. *Id.*

46. See Cheatham, *supra* note 28.

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compliance with these limitations [imposed upon advocacy by the standards of the profession] that is the true reconciliation of the primary duty of fidelity to the client, with the constant and ever-present duty that the lawyer has as a part of the administration of justice owing to the minister of justice in the person of the judge.⁴⁷

Keneth B. Taylor, Jr.

47. *Id.*, quoting W. TAFT, ETHICS OF LAW (Hubbard Lectures 1914).

EXHIBIT
29.0

Ray v. Ray

Annotate this Case

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Don Allyn Ray, Appellant,

v.

Melinda Hodges Ray, Respondent.

Appeal From Richland County
Kellum W. Allen, Family Court Judge

Opinion No. 26343
Heard January 30, 2007 – Filed June 25, 2007

REVERSED AND REMANDED

Jean Perrin Derrick, of Lexington, for Appellant.

W. Joseph Isaacs, of Isaacs & Alley, of Columbia, for Respondent.

JUSTICE BURNETT: Don Allyn Ray (Appellant) brought this action to set aside the judgment of the family court pursuant to Rule 60(b), SCRCP. The family court granted Melinda Hodges Ray's (Respondent) motion to dismiss pursuant to Rule 12(b)(6), SCRCP. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

Appellant and Respondent were divorced in 2000. In 2001, the family court issued a decree approving the settlement reached by Appellant and Respondent concerning the equitable division of their marital estate. In 2005, Appellant initiated the instant action, alleging an action for fraud upon the court and an independent action in equity arising from Respondent's deliberate concealment of \$130,000 until after the marital property had been divided.

Prior to the divorce, Respondent entered an agreement to sell a pharmacy she owned jointly with her husband. At the same time, Respondent entered into a separate agreement not to compete with CVS, the purchaser of the pharmacy, for which she received \$130,000 in consideration. Respondent made arrangements with CVS to receive payment after the divorce was finalized. Further, she deliberately concealed the aforementioned agreement in response to discovery requests and during depositions.

The family court addressed the issue of whether Appellant's allegation against Respondent rose to the level of extrinsic fraud or were simply intrinsic fraud. Respondent argued that her acts constituted only intrinsic fraud, res judicata applied, Appellant failed to exercise due diligence in discovering the fraud, and the complaint failed to state facts sufficient to constitute a cause of action. Thereafter, Respondent filed a motion to dismiss pursuant to Rule 12(b)(6), SCRCP.

The family court, citing *Chewning v. Ford Motor Company*, 354 S.C. 72, 579 S.E.2d 605 (2003), held Appellant's allegations did not rise to the level of extrinsic fraud because there were no allegations of "extraordinary, collateral matters which would justify the relitigation of issues concluded by judicial decree years ago." The family court granted Respondent's motion to dismiss. This appeal followed.

ISSUE

Does deliberate concealment of a marital asset constitute extrinsic fraud when the concealment is part of a deliberate scheme to defraud, involving an unknown third party not subject to discovery?

STANDARD OF REVIEW

In appeals from the family court, this Court has the authority to find facts in accordance with its view of the preponderance of the evidence. *E.D.M. v. T.A.M.*, 307 S.C. 471, 473, 415 S.E.2d 812, 814 (1992). However, this broad scope of review does not require this Court to disregard the findings of the family court who saw and heard the parties, and is in a better position to evaluate their credibility. *Stevenson v. Stevenson*, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981); *Cherry v. Thomasson*, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981).

LAW/ANALYSIS

Appellant argues Respondent's deliberate concealment of \$130,000 in proceeds generated from the sale of the couple's pharmacy constitutes extrinsic fraud based on this Court's opinion in *Chewning v. Ford Motor Company*, 354 S.C. 72, 579 S.E.2d 605. Appellant argues the family court erred in limiting extrinsic fraud, as defined in *Chewning*, to misconduct perpetrated by attorneys. We agree.

In *Chewning*, we noted:

Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated will constitute fraud on the court. Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court.

Id. at 78, 579 S.E.2d at 608 (citing *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978)). Extrinsic fraud "induces a person not to present a case or deprives a person of the opportunity to be heard." *Id.* at 81, 579 S.E.2d at 610 (citing *Hilton Head Ctr. of South Carolina v. Public Serv. Comm'n*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). On the other hand, intrinsic fraud "is fraud which was presented and considered in the trial" and which "misleads a court in determining issues and induces the court to find for the party

perpetrating the fraud." Id. (citing *Aggy v. Pruitt*, 339 S.C. 425, 529 S.E.2d 1714 (2000); *Hilton Head Ctr.*, 294 S.C. at 9, 302 S.E.2d at 176)).

EX. 29

The essential distinction between intrinsic and extrinsic fraud is the ability to discover the fraud.[1] Equitable relief from a judgment "is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." Id.; see also *Bryan v. Bryan*, 220 S.C. 164, 167-68, 66 S.E.2d 609, 610 (1951) ("[N]ot every fraud is sufficient to move a court of equity to grant relief from a judgment. Generally speaking, in order to secure equitable relief, it must appear that the fraud was extrinsic or collateral to the question examined and determined in the action in which the judgment was rendered: intrinsic fraud is not sufficient for equitable relief."); *Bowman v. Bowman*, 357 S.C. 146, 152, 591 S.E.2d 654, 657 (Ct. App. 2004) ("South Carolina's strong policy towards finality of judgments trumps a party's ability to set aside a judgment where, as here, the party could have discovered the evidence prior to trial."); *Mr. G. v. Mrs. G.*, 320 S.C. 305, 308, 465 S.E.2d 101, 103 (Ct. App. 1995) ("Relief is granted for extrinsic but not intrinsic fraud on the theory that the latter deceptions should be discovered during the litigation itself, and to permit such relief undermines the stability of all judgments.").[2] Extrinsic fraud, as opposed to intrinsic fraud, is often difficult, if not impossible to discover during the litigation. For example, concealing assets through an unknown third-party not subject to discovery is extrinsic fraud in that it constitutes conduct or activities outside of the court proceedings which deprive the other party of the opportunity to fully exhibit and try his case. 24 Am. Jur. 2d Divorce and Separation § 435 (1998); *Chewning*, 354 S.C. at 81, 579 S.E.2d at 610.

In *Chewning*, we held "the subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud." Id. at 82, 579 S.E.2d at 610. However, our holding in *Chewning* does not limit the finding of extrinsic fraud to misconduct of an attorney or an officer of the court. As we noted in *Evans*, fraud upon the court has been defined as "that species of fraud which does, or attempts to, subvert the integrity of the Court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Evans v. Gunter*, 294 S.C. 525, 529, 366 S.E.2d 44, 46 (1988) (quoting H. Lightsey, J. Flanagan, *South Carolina Civil Procedure*, 408 (2nd ed. 1985)) (emphasis added).

In *Evans*, the former husband brought an action for relief from judgment under Rule 60(b), SCRPC, when he discovered his former wife had induced him to sign an affidavit waiving his right to plead or appear for the divorce action when he was extremely intoxicated. We noted that while the former wife's perjury would fall in the intrinsic fraud category, "her actions in inducing Evans to sign such a waiver form, denying him his opportunity to be heard were such as could be considered extrinsic fraud under Rule 60(b)." Id. at 529, 366 S.E.2d at 47. The fraud in *Evans* was not solely perjury or concealing documents, acts which alone would constitute intrinsic fraud. *Evans* involved an act of intrinsic fraud accompanied by an intentional act or scheme to defraud or mislead the court, making the fraud rise to the level of extrinsic fraud.

In the instant case, Respondent misrepresented the existence of the marital assets when ordered by the court to produce an accounting. This was intrinsic fraud. See *Chewning*, 354 S.C. at 81, 579 S.E.2d at 610 ("the failure to disclose to an adversary or court matters which would defeat one's own claim is intrinsic fraud") (quoting *Hilton Head Ctr.*, 294 S.C. at

11, 362 S.E.2d at 177). However, in this case, as in *Evans*, there was no showing that one has acted with an intent to deceive or defraud the court." *Chewning*, 307 S.C. at 78, 579 S.E.2d at 608 ("it [is] essential that there be a showing of conscious wrongdoing – what can properly be characterized as a deliberate scheme to defraud – before relief from a final judgment is appropriate."). In delaying the payment by CVS until after the divorce, Respondent engaged in "a deliberately planned and carefully executed scheme to defraud." *Id.* at 79, 579 S.E.2d at 609 (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250 (1944)). We hold an act of perjury or concealment of a document coupled with an intentional scheme to defraud the court justifies the setting aside of a judgment pursuant to Rule 60(b) due to extrinsic fraud. See, e.g., *Rozier*, 573 F.2d at 1338 ("In order to set aside a judgment or order because of fraud upon the court under Rule 60(b) . . . it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision.") (internal citations omitted); *Rathmell v. Morrison*, 732 S.W.2d 6 (Tex. App. 1987) (holding a wrongful act coupled with misrepresentation of the value of companies in a property settlement agreement amounts to more than intrinsic fraud when former wife was prevented from having a fair opportunity to present evidence concerning the value of the companies); cf. *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 590 S.E.2d 502 (Ct. App. 2003) (holding there was no extrinsic fraud absent a finding of a fraudulent intent).

CONCLUSION

Respondent's actions rose to the level of extrinsic fraud when she engaged in a fraudulent scheme to hide assets from the court and, in doing so, utilized an unknown third party, CVS, not subject to discovery during the litigation. Accordingly, we reverse the family court's dismissal of this action and remand for further proceedings consistent with this opinion.

REVERSED.

TOAL, C.J., and MOORE, J., concur. PLEICONES, J., dissenting in a separate opinion in which WALLER, J., concurs.

JUSTICE PLEICONES: I respectfully dissent. In my opinion, appellant's complaint alleges a classic instance of intrinsic fraud which the family court properly dismissed. I would affirm.

A party may bring a suit in equity to set aside a judgment at law allegedly procured by fraud as appellant has, or may move to set the judgment aside under Rule 60(b), SCRCP. While there are certain procedural differences depending on the form of the action, the legal principles are identical: relief is available where the earlier judgment was procured by extrinsic fraud, but a judgment obtained through the use of intrinsic fraud is not subject to collateral attack. The majority and I agree on this point, as we do on the basic definition of intrinsic fraud: a fraud that goes to the merits of the earlier action, that is, to an issue of which the party had both notice and an opportunity to litigate in that prior suit. E.g., *Mr. G. v. Mrs. G.*, 320 S.C. 305, 465 S.E.2d 101 (Ct. App. 1995).

Appellant alleges that respondent deliberately concealed a marital asset as part of a scheme to defraud appellant of his rightful share of the equitable division of marital property in the parties' divorce action. Appellant was undeniably aware that the identity and valuation of assets was at issue in that suit, and had the opportunity to litigate equitable distribution. Accordingly, appellant's present complaint alleges only intrinsic fraud. The

policy reason underlying the bar intrinsic fraud claims is predicated on the theory that an issue which has been tried and passed upon in the original action should not be retried in an action for equitable relief against the judgment, and that otherwise litigation would be interminable....” Bryan v. Bryan, 220 S.C. 164, 168, 66 S.E.2d 609, 610 (1951) (internal citation omitted). The need for finality of judgments, as well as the potential for endless relitigation, is especially strong in family court matters.

EX. 29.0

In Bryan, the Court was asked the then-novel question whether perjury or false swearing could form the basis for an action to set aside a judgment. The Court acknowledged the validity of criticisms leveled at the intrinsic/extrinsic fraud distinction, but ultimately adopted that rule. In deciding to adopt this rule, the Court recognized that “the classic example of intrinsic as contrasted with extrinsic fraud is the commission of perjury by a witness. While perjury is a fraud upon the court [it is insufficient for attacking a judgment] because the materiality of the testimony and the opportunity to attack it, was open at the trial.” Bryan at 268, 66 S.E.2d at 611 (internal citation omitted); but see Chewning v. Ford Motor Co., 354 S.C. 72, 579 S.E.2d 605, fn.2 (2003)(stating that perjury or false swearing is not a fraud upon the court).

The Bryan Court did, however, leave open the possibility that exceptional circumstances involving intrinsic fraud may justify equitable relief. To date, the only time an exception has been made is in Chewning, where the Court held the subornation of perjury by an attorney, or the intentional concealment of documents by an attorney, is a sufficient fraud upon the court to allow a collateral attack on a judgment. In Chewning we were careful to reiterate that perjury by a party or witness, such as the failure of a party to disclose to its adversary or to the court matter which would defeat that party’s claim, or a party’s failure to disclose requested documents, is intrinsic fraud which cannot support a collateral attack on the judgment. Chewning at 82-83, 579 S.E.2d at 610-611; see also Raby Constr., LLP v. Orr, 358 S.C. 10, 594 S.E.2d 478 (2004).

The fraud alleged by appellant here is classic intrinsic fraud. The majority’s reliance on a federal case decided under Rule 60(b), FRCP,[3] and a Texas decision[4] is misplaced. In the federal case, the defendant’s attorneys were responsible for the concealment of a document,[5] a Chewning situation. In the Texas case, the court concluded that the husband’s threats to the wife which caused her to forego an appraisal was “not only some evidence of extrinsic fraud, but ... evidence ... sufficient to support a jury finding thereon.”[6] Here, the alleged concealment of an asset by a party, even one which should have been disclosed pursuant to court ordered discovery, is not extrinsic fraud. Chewning at 82, 579 S.E.2d at 610-611.

The majority’s attempt to limit its new rule to situations where a party’s perjury or concealment is intended to defraud the court does nothing more than restate the current definition of intrinsic fraud. As the Bryan Court recognized, all perjury and all document concealment by a party is an attempt to defraud the court. Furthermore, a person does not commit perjury unless the false testimony is given “willfully.” S.C. Code Ann. § 16-9-10 (2003). If we are to overrule Bryan and eliminate the distinction between intrinsic and extrinsic fraud, then we should acknowledge that we are doing so, not couch it as a “new” definition of extrinsic fraud. In my opinion, however, the strong policy reasons favoring the finality of judgments, especially in family court, militate strongly in favor of retaining the extrinsic/intrinsic fraud distinction. Finally, the majority holds that “an act of perjury or concealment of a document coupled with an intentional scheme to defraud the court

justifies the setting aside of a judgment pursuant to Rule 60(b) due to "intrinsic fraud." I simply note that the present case was brought as an independent action, not as a motion under Rule 60(b), SCRCP.

EX. 29.1

For the reasons given above, I would affirm the trial court's dismissal of this suit.

WALLER, J., concurs.

[1] See generally *In re Marriage of Melton*, 33 Cal. Rptr. 2d 761 (Cal. Ct. App. 1994) (no extrinsic fraud found where husband misrepresented value of pension benefits with the assistance of the benefit plan administrator where the plan was a party to the action and wife's counsel could have discovered the concealed information through discovery); *Bankston v. Bankston*, 251 S.W.2d 768 (Tex. Civ. App. 1952) (holding wife could not have judgment set aside on ground of fraudulent representations made to her concerning the market value of assets when wife was represented by able counsel and charged with the duty to make a full and careful investigation, yet neglected to exercise ordinary prudence and fully avail herself of the discovery process).

[2] Furthermore, we take this opportunity to remind the Bar that parties must avail themselves of the discovery process and be attentive to the warning signs of fraud.

It is the policy of the courts not only to discourage fraud, but also to discourage negligence and inattention to one's own interests. Courts do not sit for the purpose of relieving parties who refuse to exercise reasonable diligence or discretion to protect their own interests. A party must avail himself of the knowledge or means of knowledge open to him. The court will not protect the person who, with full opportunity to do so, will not protect himself.

King v. Oxford, 282 S.C. 307, 312, 318 S.E.2d 125, 128 (Ct. App. 1984) (internal citations omitted).

[3] *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978).

[4] *Rahmell v. Morrison*, 732 S.W.2d 5 (Tex. App. 1987).

[5] A month after stating in its written response to plaintiff's interrogatory that it could locate "no such report," "an in-house attorney for [defendant] involved in this case discovered [the report] but failed to disclose it or to amend its inaccurate response to [the] interrogatory...." *Rozier* at 1341-1342.

[6] *Rahmell* at 14.

EXHIBIT
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11/6/19

Hutson vs. Penn America, 3 John Does

Hutson <hutson4444@gmail.com>

Tue, Nov 6, 2018 at 2:49 PM

To: dfournier@global-indemnity.com, tnewton@murphygrantland.com, Insurance Glenn Paul <gpaul@global-indemnity.com>, Hutson 4072 C <hutson4444@gmail.com>

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28K

November 6, 2018

Global Indemnity Group, Inc/Penn America
Policy number PAC 7045167
Attention: Doreen Fournier

Dear Ms. Fournier:

I am so disappointed with your companies and staff. I am preparing a lawsuit against your companies to be filed as soon as possible. Some of the allegations or counts are as follows:

1. Your attorneys mediated with the Plaintiff's attorneys to settle a \$3.5M judgement when they were *fully aware* that the judgement was wrongful due to Extrinsic Fraud upon the Court committed deliberately by Plaintiff's lawyers against your insured (2011 through 2018), yet you nor your representatives/counselors took any action to defend nor prosecute the Plaintiff's (TLC Holdings, LLC's) lawyers in order to protect Penn America and your client "the insured." This lack of action shows no real concern for yourself nor for your client, "the insured."
2. Your company was negligent by failing to take the necessary action against TLC's attorney's placing such extrinsic fraud upon the Court and against your insured client for it was known by Penn America's own council of which I sent his own letter to you. Penn America's attorney has an obligation to keep their client informed.

Tim Newton, Attorney for Penn America, was aware of the Plaintiff's "Extrinsic Fraud Upon the Court" to the extent that he wrote and emailed the same to me/ your insured on August 13, 2018:

"It's hard to see why TLC and its lawyers should not have, in good faith, simply told you (and the court) that the Big Water Resort property was undevelopable because it was already obligated to double lifetime memberships as a private club. It appears that could easily have averted the entire fiasco. Since attorneys were involved, and it resulted in your inability to present your case in court, and possibly led to the sanctions order and judgment against you, there might possibly be extrinsic fraud on the court to support setting aside

the Consent Order. See *Chewning v. Ford Motor Co.*, 354 S.C. 72, 579 S.E. 2d 605 (2003)".

3. Penn America's counsel was totally aware of this situation and both law firms which Penn America hired were aware of the same. The firm in Charleston had a conflict of interest due to the fact that their main office was under the same roof as Plaintiff's attorneys. Penn America's attorneys, Laura Paton and Chip Emge, in Charleston, SC, would not take a case involving legal malpractice, nor attempt to prosecute that fraud because, as they stated, they did not handle any malpractice cases, thus making myself and your company exposed.

The second lawyer you hired, Frank Gordon, would not be a part of prosecuting Plaintiff's lawyers for Extrinsic Fraud upon the Court. Your own counsel, Tim Newton, stated in a conversation with me by phone while discussing the Extrinsic Fraud, "I could not be a part of prosecuting lawyers causing them to perhaps be put in jail."

4. Penn America had an obligation to defend and prosecute the Extrinsic Fraud since their client's defense team, whom Penn America hired, could never win due to the Extrinsic Fraud. Penn America and their counsel were completely aware of this crime, yet failed to protect itself and its client, myself.

When civil or criminal conduct is responsible for generating the \$3.5M judgement via Extrinsic Fraud against Penn America and the insured, and Penn America was knowledgeable and aware of the "extrinsic fraud" as shown by Penn America's own counsel in writing, then your policy of not providing two-way counsel for yourself and the insured constitutes *negligence* as Penn America *did know* and was *fully aware* of the Extrinsic Fraud. *Negligence* is deemed to be the proximate cause of an injury when, without such negligence, the injury would not have occurred or could have been avoided.

Why bother to defend the insured if Penn America and its counsel were aware that the insured has no chance to win due to extrinsic fraud? Penn America intentionally closed their eyes to the facts.

Still, you continue through mediation to pay Plaintiffs for their criminal behavior with no regard for your insured. Does Penn America not have any integrity, nor a concern about liability?

I hold Penn America responsible. I was never advised that defeat was acceptable and eminent. Why did Penn America employ attorneys to represent the insured with full knowledge that the insured would be defeated due to the Extrinsic Fraud upon the SC State and the Federal Courts?

5. By Penn America's lack of concern and intentionally turning their eyes in another direction, plainly places the blame for my loses, suffering, pain and punitive damages. It's like your counsel, Tim Newton, stated "It appears that could easily have averted the entire fiasco." Newton was speaking about Plaintiff's attorneys' conduct of not having disclosed the material facts that led to the Extrinsic Fraud . Penn America had an obligation, in fact, a duty, to act because they knew the facts. This is dereliction of duty by Penn America and it's staff.

Please show me in your policy manual where Penn America is refrained from prosecuting Extrinsic Fraud Upon the Court?

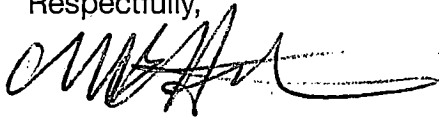
6. Penn America's failing to provide a bond to protect me, the insured.
7. Penn America's failing to prosecute the appeal when "extrinsic fraud" was the method of accomplishing all Plaintiffs' wins including the \$3.5M judgement.
8. Penn America and its counsel have committed wrongful conduct towards it's customer and insured. Your staff and company could have and should have intercepted and disabled legally the Extrinsic Fraud Upon the Court since your own counsel was fully aware.
9. I have additional claims and actions that I plan to take in my complaint.

I am working and preparing a complaint to right the wrong your company and employees have committed upon me. In addition, I strongly suggest that you discontinue your effort in settling any fraudulent judgement or claim. Do the right thing for a change. Don't take quick, irresponsible actions just to clear your books.

I look forward in taking this entire issue before a jury. I believe that a jury will award much greater than the claim that I am demanding for an out of court settlement.

Please be reminded that I have not misrepresented *any* facts.

Respectfully,

A handwritten signature in black ink, appearing to be 'MB Hutson', written over a horizontal line.

MB Hutson

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

CIVIL ACTION NO: 2018-CP-40-06344

MB Hutson/MB Hudson,

Plaintiff,

vs.

Penn America Insurance Company, Global
Indemnity Group, Inc., Timothy J. Newton,
Esq., J.R. Murphy, Esq., John Doe #1, John
Doe #2,

Defendants.

**MEMORANDUM IN SUPPORT OF
DEFENDANT TIMOTHY J. NEWTON'S
MOTION TO DISMISS OR
MOTION FOR SUMMARY JUDGMENT**

Defendant Timothy J. Newton submits the following Memorandum in support of his Motion to Dismiss or for Summary Judgment as to all claims brought by Plaintiff. For the reasons set forth herein, Newton respectfully requests that his Motion be granted.

FACTUAL BACKGROUND

This action is the latest in a series of legal actions involving Big Water Resort and M.B. Hutson. The background facts have been set forth in several judicial orders. See Report and Recommendation of Mag. J., Big Water Resort, LLC, et al. v. TLC Holdings, LLC, C/A: 2:14-1583-DCN-MGB, 2016 WL 7435620 at *1-*4 (D.S.C. Apr. 5, 2016) (hereinafter “R&R”), recommendation adopted, 2016 WL 2935891 at *1-*4 (D.S.C. May 20, 2016) (hereinafter “Norton Order”); Order Granting Pl’s. Mot. for Summ. J. as to Def’s. Countercls., TLC Holdings, LLC, et al. vs. M.B. Hutson a/k/a M.B. Hudson, Civ. Action No. 2015-CP-14-00615, pp. 1-5 (Clarendon Ct. Comm. Pl. filed Mar. 2, 2017) (hereinafter “Cochran Order”). Copies of the R&R, the Norton Order, and the Cochran Order are attached as Exhibits A, B, and C, respectively.

The following summary of the factual background provides the context surrounding Hutson’s allegations. These facts are readily ascertainable from filed pleadings and orders that are

part of the public record. Hutson is aware of all of this because he was a party to all of the litigation discussed below.

Hutson's purchase transaction with TLC

Plaintiff Hutson entered into a Lease Purchase Agreement with TLC Holdings, LLC and its principals (hereinafter collectively "TLC") in late 2010. Under the Lease Purchase Agreement, TLC agreed to sell the land upon which the Big Water Resort campground was located to Hutson. (See Hutson Exhibit 5.0);¹ Exh. C: Cothran Order, p. 2.) As part of that same transaction, Hutson became the sole shareholder in Big Water Resort, LLC, which operated the campground. (*Id.* at 1-2; see also Hutson Exh. 6.0.) Big Water Resort, LLC had previously sold memberships in the Big Water Resort campground to the campground members. (See Hutson Exh. 1.0.)

Hutson was represented by an attorney by the name of Andrew Tucker for purposes of his purchase of Big Water Resort. (Exh. A: R&R at p. *13 n.5.) None of the defendants in this action had any involvement in that transaction whatsoever.

The Ejectment Action: TLC suit to eject Hutson

In December 2011, TLC filed an ejectment action against Hutson alleging he defaulted on the terms of the Lease Purchase Agreement. (Exh. C: Cothran Order, p. 2; Exh. D: Compl., TLC Holdings, LLC vs. M.B. Hudson a/k/a M.B. Hutson, Case No. 2011-CP-14-00602 (Clarendon Ct. Comm. Pl.) (hereinafter "the Ejectment Action").) Hutson filed counterclaims against TLC in the Ejectment Action. (Exh. E: Answer and Countercl.) Nevertheless, Hutson agreed to settle the Ejectment Action, and the Settlement Agreement was adopted into a Consent Order. (See Hutson Exhs. 9.0 and 10.0; Exh. C: Cochran Order at pp. 2-3.)

¹ Hutson's Amended Complaint references a list of exhibits. The exhibit documents were filed on Jan. 3, 2019, but they appear to be attachments. The exhibits to the Amended Complaint are hereinafter referred to as "Hutson Exh."

Hutson was represented by Attorney Paul Weissenstein in the Ejectment Action. (See Hutson Exh. 10.0.) None of the defendants in this action had any involvement in the Ejectment Action. Hutson has filed an attorney malpractice action against Paul Weissenstein. (Exh. F: Amended Compl., Hutson v. Weissenstein, Case No. 2018-CP-43-1583 (Sumter Ct. Comm. Pleas).)

Hutson subsequently defaulted upon his obligations under the Settlement Agreement and Consent Order in the Ejectment Action. (Exh. C: Cothran Order, p. 3.) TLC sought to evict Hutson from the Big Water Resort property, and this matter was ultimately heard and ruled upon by Judge George C. James, Jr. (Id. at 3-4.) Judge James ruled that the Lease Purchase Agreement was terminated and ordered Hutson to vacate the property. (Id.; Exh. G: Order (hereinafter “James Order”).)

None of the defendants in this action were involved in the hearing before Judge James. Hutson was represented at the hearing by H. Freeman Belser. (Exh. G: James Order at p. 2.)

Hutson’s defamatory postcard

In the midst of TLC’s efforts to evict Hutson from the Big Water Resort property, Hutson made certain statements that TLC alleged were defamatory. (Exh. C: Cothran Order at p. 4.) Hutson allegedly sent the campground members a postcard asserting that both he and they were victims of a scam perpetrated by TLC (hereinafter “the Postcard”). (Id.)

The Class Action: the campground members sue TLC

After the Postcard was sent out, a group of Big Water Resort campground members brought a class action against TLC in federal court. (Id.) That action, captioned as Big Water Resort, LLC, et al. v. TLC Holdings, LLC, C/A: 2:14-1583-DCN-MGB, is hereinafter referred to as “the Class Action.” TLC asserted third-party claims for equitable indemnification against Hutson in the Class

Action. (Exh. C: Norton Order at *2.) Hutson filed counterclaims against TLC in the Class Action. (Id. at *2.)

The Defamation Action: TLC sues Hutson

TLC filed a separate action against Hutson in state court for defamation. (See Hutson Exh. 13.0.) That action, captioned as TLC Holdings, LLC, et al. v. M.B. Hutson a/k/a M.B. Hudson, Civ. Action No. 2015-CP-14-00615 (Clarendon Ct. Comm. Pleas), is hereinafter referred to as “the Defamation Action.” In the Defamation Action, TLC alleged that Hutson instigated the Class Action against TLC through the Postcard and certain statements Hutson made to the attorney who represented the campground members in the Class Action. (Hutson Exh. 13.0, ¶¶ 16-18.) Hutson also asserted counterclaims against TLC in the Defamation Action. (See Exh. H: Am. Answer and Countercls.)

The Coverage Action: Penn-America requests a declaratory judgment

Defendant Newton’s involvement in this ongoing litigation began in early 2016 when Penn-America retained Murphy & Grantland, P.A. as its coverage counsel after the claims against Hutson in the Class Action and the Defamation Action were tendered to Penn-America. Penn-America agreed to defend Hutson in both actions under reservation of rights. (See Hutson Exh. 11.0 at ¶ 71.) Penn-America declined to provide counsel for Hutson for purposes of prosecuting his counterclaims. Penn-America filed a declaratory judgment action (hereinafter “the Coverage Action”) seeking a judicial ruling as to its coverage for TLC’s claims asserted against Hutson in the Class Action and the Defamation Action. (See Compl., Exh. 11.0.)

Hutson’s threats of litigation against Penn-America

Hutson first began threatening lawsuits against Penn-America almost as soon as he learned of Penn-America’s involvement. Hutson and Penn-America entered into a Settlement Agreement and Release of Certain Claims on September 16, 2016. (Exh. I: Settlement Agreement.) In this

settlement, which was supported by consideration, Hutson agreed to release all claims relating to coverage and claim handling arising from the Class Action and the Defamation Action. (Id.) The Settlement Agreement protects not only Penn-America, but also its “agents.” (Id. at p. 2.) Hutson alleged in the Complaint in this action that Newton acted as Penn-America’s counsel, and that he had agency authority to act on behalf of Penn-America. (Am. Compl., ¶¶ 3.47.)

Hutson also stipulated to be bound by the result of the declaratory judgment action in exchange for a dismissal with prejudice from the Coverage Action. (Exh. J.: Order of Dismissal and Mot. to Dismiss.) Accordingly, Hutson was dismissed as a party from the Coverage Action on September 30, 2016. (Id.)

Nevertheless, Hutson continued to make threats of litigation against Penn-America. Hutson continued to demand that Penn-America pay for counsel to represent him for purposes of prosecuting his counterclaims against TLC in the Class Action and the Defamation Action.

By the time Penn-America retained Murphy & Grantland, P.A. as coverage counsel, the Class Action had already been in litigation for approximately two (2) years. For some period prior to February 2016, Hutson was represented in the Class Action by Matthew D. Hamrick in the Class Action. None of the defendants in this action had any involvement in either the Class Action or the Defamation Action until early 2016.

Magistrate Judge Baker’s R&R in the Class Action

On April 5, 2016, Magistrate Judge Mary Gordon Baker issued her Report and Recommendation in the Class Action. (Exh. A: R&R.) One of the issues Magistrate Judge Baker addressed in her Report and Recommendation was TLC’s motion for summary judgment as to Hutson’s counterclaims against TLC. Magistrate Judge Baker specifically found that the Settlement Agreement (see Hutson Exh. 9.0) could not be set aside due to fraud. (Exh. A: R&R at *12.) This ruling was predicated upon a finding that all of the alleged fraud related to the original

purchase transaction, not the release in the Settlement Agreement. (Id. at *14.) The Settlement Agreement (see Hutson Exh. 9.0 at ¶ 23) contained a conditional release providing that if Hutson defaulted on the terms of the Settlement Agreement, he would be deemed to have released TLC from any claims by Hutson against them for their conduct involving Big Water Resort prior to December 11, 2013. (Exh. A: R&R at *12.) Based upon Judge James' ruling that Hutson had breached the Settlement Agreement, Magistrate Judge Baker found that Hutson's counterclaims against TLC were barred by the release. (Id.)

Hutson alleged in his Amended Complaint in this action, as he has previously alleged on countless occasions, that he entered into the Lease Purchase Agreement with TLC with intent to develop and sell condominiums on the property, and that he was not aware of the long-term campground memberships on the property. (Compare Am. Compl. ¶¶ 9-12 with Exh. A: R&R at *3.) Importantly, Magistrate Judge Baker found that Hutson could not prove fraud because there was evidence that he knew about the campground memberships before he purchased Big Water Resort. (Exh. A: R&R at *13 n.5.) Magistrate Judge Baker cited to an e-mail from Hutson's realtor dated November 11, 2010 in which Hutson inquired about the effect of the campground membership agreements upon his ability to develop the property. (Id.) Thus, before Penn-America had completed its investigation of its liability coverage for TLC's claims against Hutson, a federal magistrate judge had already recommended dismissal of Hutson's counterclaims against TLC based upon a finding that Hutson could not prove fraud because he knew about the long-term campground memberships before he purchased the Big Water Resort property.

Judge Norton's Order adopting the R&R in the Class Action

Federal District Judge David C. Norton adopted the findings of the Report and Recommendation. (Exh. B: Norton Order at *9.) Judge Norton conducted his own review and found that all of the evidence of fraud Hutson submitted related to the original purchase

transaction, and that Hutson submitted no evidence of fraud in the inducement as to the Settlement Agreement. (*Id.* at *6-*7.) Consequently, Judge Norton ruled that Hutson's counterclaims against TLC in the Class Action were barred by *res judicata*. (*Id.* at *7-*8.)

Judge Cothran's Order in the Defamation Action

Despite this turn of events, Hutson continued to prosecute his counterclaims against TLC in the Defamation Action. On March 2, 2017, Judge Cothran issued an Order granting TLC's motion for summary judgment as to Hutson's counterclaims. (Exh. C: Cothran Order.) Judge Cothran ruled that Hutson's counterclaims, which were based upon the same allegations of fraud as those made in the Class Action, were barred by *res judicata* due to Judge James' Order, Magistrate Judge Baker's Report and Recommendation, and Judge Norton's Order. (Exh. C: Cothran Order at pp. 9-11.) Specifically, Judge Cothran found that Hutson's allegations of fraud only related to the original purchase transaction, not fraud inducing him to enter into the Settlement Agreement. (*Id.* at pp. 11-12.)

Judge Norton's Sanctions Order in the Class Action

Even this did not discourage Hutson from attempting to continue litigating his claims of fraud against TLC. On April 21, 2017, Hutson filed a motion to reconsider Judge Norton's order dismissing his counterclaims in the Class Action. (Exh. K: Order (hereinafter "Sanctions Order").) Judge Norton not only denied Hutson's motion for reconsideration, he also granted TLC's motion for sanctions against Hutson. (Exh. K: Order at p. 8.) Judge Norton specifically found that "Hutson appears to have continued his pattern of frivolous filings and conduct designed to harass or burden third-party plaintiffs, and there is no indication that he intends to cease." (*Id.* at 5.) Judge Norton further found that "Hutson has established a pattern of making misrepresentations to the court, of making unsupported allegations of unethical and criminal conduct by the third-

party plaintiffs, and of using the judicial process as a mechanism of harassment. His meritless filings have wasted untold hours of the court's time.” (Id. at 6.)

Settlement of the Class Action

In early 2018, Penn-America settled TLC's claims against Hutson in the Class Action. This settlement protected Hutson from not only TLC's third-party claims against Hutson in the lawsuit, it also protected Hutson from the sanctions award against him. TLC's claims against Hutson were dismissed on April 11, 2018. (Exh. L: Stipulation of Dismissal.)

Resolution of the Defamation Action

While the settlement of TLC's claims against Hutson in the Class Action were being finalized, the Defamation Action was tried to a jury. The jury returned a verdict against Hutson in the amount of \$3,500,000. (Exh. M: Verdict Form.) Hutson's post-trial motions were denied by Order filed April 19, 2018. Defense counsel retained by Penn-America filed a Notice of Appeal on Hutson's behalf. (Exh. N: Notice of Appeal.) Nevertheless, TLC sought to execute on the judgment against Hutson during the pendency of the appeal. (Exh. O: Pl's. Mem. in Opp'n to Def's. Mot. for Stay of Execution of J.)

Penn-America attempted to obtain a supersedeas bond to stay execution while the appeal was pending. However, a bond could not be secured. As the letter Hutson filed recounts (Hutson Exh. 7.0, p. 3), Penn-America informed Hutson it would continue defending him against the execution proceedings while the appeal was pending. Hutson responded by threatening to sue Penn-America for bad faith. (See Hutson Exh. 7.0 at p. 2.) Hutson's allegations in this lawsuit relate to the attempts to resolve this dispute. This will be discussed in further detail below.

Penn-America paid its policy limit to settle the Defamation Action in late 2018. TLC accepted the settlement in satisfaction of the judgment against Hutson in the Defamation Action. (Exh. P: Satisfaction of Judgment.) Newton informed Hutson that TLC's claims against him were settled on December 4, 2018. The next day, Hutson filed this lawsuit.

Hutson's legal malpractice action against Weissenstein

Hutson also filed several other lawsuits around the same time. On September 4, 2018, Hutson filed a legal malpractice action against Paul Weissenstein, who represented Hutson with respect to the settlement of the Ejectment Action. (Exh. F: Amended Complaint; see also Hutson Exh. 9.0 and 10.0.) On February 25, 2019, Judge Kristi Curtis granted Weissenstein's motion for summary judgment. (Exh. Q: Order (hereinafter "Curtis Order").) Judge Curtis found that Hutson knew about the lifetime memberships before he purchased Big Water Resort. (Id. at p. 9.) Hutson has filed an appeal from this Order.

Hutson's legal malpractice action against Burn

On November 8, 2018, Hutson filed a legal malpractice action against Stephen "Chip" Burn, another attorney who represented Hutson in the Eviction Action. (Exh. R: Complaint, Hutson v. Burn, et al., Civ. Action No. 2018-CP-32-03879.) Hutson alleged in that lawsuit that Burn reviewed the documentation and advised Hutson that he did not have sufficient evidence to prevail in the counterclaim he had asserted in the Ejectment Action. (Id. at ¶¶ D. through H.) This lawsuit has been dismissed. (Exh. S: Order filed Apr. 10, 2019.)

Other lawsuits demonstrating Hutson's modus operandi

Hutson also recently filed a lawsuit alleging fraud in another real estate transaction. (Exh. T: Complaint, Hutson v. Atlantic Coast Props., et al., Civ. Action No. 2018-CP-40-06156.) Judge Robert E. Hood dismissed that action upon a finding that the suit was filed in breach of a release.

(Exh. U: Order.) This demonstrates a continuing pattern on the part of Hutson of breaching settlement agreements.

Hutson's claims in this action

Hutson alleged in his Amended Complaint that Penn-America employed Newton as its corporate counsel. However, exhibits Hutson attached to his pleading demonstrate that Newton is employed by Murphy & Grantland, P.A., the firm Penn-America retained to represent it in the Coverage Action against Hutson. (Hutson Exhs. 4.0, 7.0, 11.0, and 12.0.)

Hutson's allegations concern his claims against TLC relating to Big Water Resort. In fact, Hutson quoted from a draft of an Answer and Counterclaim that was filed in the Defamation Action. (Am. Compl., ¶¶ 7-22 and Exh. 3.0.) These allegations generally concern Hutson's claim that TLC concealed title defects when it sold Big Water Resort to Hutson. Specifically, Hutson claims he did not know about the lifetime memberships held by the campground members when he purchased Big Water Resort. (Am. Compl., ¶ 11.)

Hutson also alleged that he sought Newton's advice and that Newton knew TLC had committed "Extrinsic Fraud on the Courts." These are sham allegations.

Documents Hutson attached to his pleading establish the nature of the interaction. Hutson did not come to Newton as a potential client seeking legal advice. The communications Hutson refers to were part of ongoing settlement negotiations between Hutson, Penn-America, and TLC.

In a letter dated November 8, 2018, Newton recounted that Hutson stated that he had counsel to represent him in a lawsuit against Penn-America for failure to procure a supersedeas bond. (Hutson Exh. 7.0 at p. 2.) Hutson also indicated he had an attorney who was willing to assist him in his efforts to obtain an order setting aside the orders in the Eviction Action based upon fraud upon the court. (Id.) Hutson provided outlines of his claim and stated that he would

refrain from suing Penn-America if Penn-America would provide whatever evidence it had that might assist Hutson in his proposed lawsuit against TLC. (Id. at pp. 2-3.)

Hutson omitted his communications to Newton and Penn-America when he filed this lawsuit—communications which materially undercut his allegations in this action. Since Hutson’s communications to Newton and Penn-America are known to Hutson, he would not benefit from conducting discovery in this matter. Furthermore, because Hutson is alleging a fraud upon the court was committed, his lawsuit should not be permitted to proceed based upon an illusion Hutson has attempted to create by Hutson’s own lack of candor to the Court.

On August 11, 2018, Hutson sent Newton an e-mail with the subject line “Setting Aside the Judgment.” (Exh. V: Hutson e-mails.) The e-mail that Hutson attached to his pleading is responsive to this e-mail. (See Hutson Exh. 4.0.) Attached to Hutson’s e-mail was a nine-page outline. In paragraph 8 of his outline, Hutson set forth his position that the Settlement Agreement and Consent Order (see Hutson Exhs. 9.0 and 10.0) should be set aside based upon fraud upon the court. (Exh. V: Hutson e-mails.)

Hutson did not stop there. Between August 7 and 13, 2018, Hutson peppered Newton with phone calls and e-mails regarding his proposed action. Hutson showed up unsolicited at the law offices of Murphy & Grantland, P.A. under the guise of dropping off an exhibit and instead spent over an hour attempting to convince Newton that Penn-America should join in his proposed lawsuit against TLC.

On August 11, 2018, Hutson sent Newton another e-mail that explains his intentions. Hutson’s e-mail states: “We can checkmate the crooks and ride the [\$3,500,000 judgment] by getting the Fraudulent Judgment set aside.” (Exh. V: Hutson e-mails.) Hutson continued: “I beg you to move quickly and let’s get a game plan to move forward. Merely filing to set aside will cause TLC to fall to their feet.” (Id.)

Later that day, Hutson sent Newton yet another e-mail. In this e-mail, Hutson requested that a suit to set aside the judgment be filed and that TLC be served without any prior notice. (Exh. V: Hutson e-mails.)

The next day, Hutson sent Newton another outline of his proposed lawsuit. In paragraph H., Hutson again asserted that the lawyers who drafted the Settlement Agreement and Consent Order committed fraud upon the court. (Exh. V: Hutson e-mails.)

On August 13, 2018, at 5:27 a.m., Hutson e-mailed Newton asking about fraud upon the court. (Exh. V: Hutson e-mails.) Hutson e-mailed Newton again at 10:04 a.m. pleading for Penn-America to file an action to set aside the judgment. (Id.)

Newton's e-mail followed the above e-mails from Hutson. In Newton's e-mail, he explained that he did not represent Hutson. (Hutson Exh. 4.0.) The non-privileged information Newton provided was based upon the common interest in possibly getting TLC's judgment against Hutson set aside, and for the purpose of settling Hutson's claims against Penn-America relating to the supersedeas bond. (Id.)

Shortly thereafter, Hutson e-mailed Newton again. In this e-mail, Hutson asked whether filing an action to set aside the judgment would strengthen Penn-America's position. (Exh. V: Hutson e-mails.) Newton's responsive e-mail corroborates that the communications were in the context of attempts to settle TLC's claims against Hutson and Hutson's claims against Penn-America. (Exh. V: Hutson e-mails.)

On August 14, 2018, Hutson sent an e-mail to Newton as counsel for Penn-America and counsel for the excess carrier entitled "Notice." In this e-mail, Hutson claims he has been damaged by the failure to procure a supersedeas bond and threatens to file suit against them. (Exh. V: Hutson e-mails.)

The next day, Hutson again e-mailed Newton. He said: “Please let me know as soon as possible regarding the offer I made the other day to you.” This demonstrates that the communications were made in the context of settlement negotiations. Newton’s responsive e-mail indicated that Hutson’s offer was rejected. (Exh. V: Hutson e-mails.)

These communications, which Hutson withheld when he filed this lawsuit, corroborate the account provided in Newton’s letter that Hutson attached to his pleading. (Hutson Exh. 7.0.) The e-mail Hutson attached to his Complaint was part of ongoing settlement negotiations between Hutson and Penn-America. Some of Hutson’s own allegations are consistent with this understanding. (See Am. Compl., ¶ 34.) Hutson and Penn-America were adverse parties with respect to Hutson’s claims against Penn-America regarding the supersedeas bond. However, they had a common interest with respect to TLC’s claims against Hutson.

Many of Hutson’s allegations are demonstrably false. Hutson alleged that Newton and Penn-America were “cognizant that TLC Holdings, LLC’s attorneys has committed Extrinsic Fraud on the Courts.” (Am. Compl., ¶ 23.) In fact, courts have repeatedly rejected Hutson’s claims against TLC based upon fraud. (Exh. A: R&R at *13 n.5.; Exh. B: Norton Order at *9; Exh. C: Cothran Order at pp. 9-12; Exh. Q: Curtis Order.) Hutson has even been sanctioned by a federal court judge for continuing to assert the same claim without any supporting evidence. (Exh. K: Sanctions Order.)

Additionally, Hutson insinuated that Newton developed the theory of extrinsic fraud in response to Hutson’s request for legal advice. In fact, it was Hutson who proposed this course of action. (Exh. V: Hutson e-mails.) Furthermore, Hutson’s *pro se* court filings in the Class Action demonstrate that, as early as 2016, Hutson was well aware of what extrinsic fraud upon the court is and that it could be used to set aside a judgment. (Exh. W: Hutson Mem. filed March 14, 2016; Exh. X: Hutson Resp. filed Sept. 25, 2017; Exh. Y: Hutson Mem. filed June 30, 2017.)

Hutson continues to file litigation claiming he was defrauded in the Big Water Resort transaction in the face of an oft-filed e-mail demonstrating he was aware of the campground memberships before he purchased the campground. (Exh. Z: E-mail; see also Exh. A: R&R at *13 n.5; Exh. Q: Curtis Order at p. 2.) He has been sanctioned by a federal judge for repetitive frivolous court filings—sanctions that Penn-America paid as part of settlement that Newton negotiated. (Exh. K: Sanctions Order.) For the reasons that follow, Hutson’s claims against Newton should be dismissed with prejudice.

STANDARD FOR MOTION TO DISMISS
AND
REQUEST THAT THIS MOTION TO DISMISS BE TREATED
AS A MOTION FOR SUMMARY JUDGMENT

Generally, a motion to dismiss pursuant to Rule 12(b)(6), SCRCP is based solely upon the allegations in the Complaint. Exhibits attached to a pleading are incorporated into the pleading as a part thereof for all purposes. Rule 10(c), SCRCP. This Court may dismiss a suit when the defendant demonstrates that the plaintiff has failed to state facts sufficient to constitute a cause of action. Hambrick v. GMAC Mortg. Corp., 370 S.C. 118, 121, 634 S.E.2d 5, 7 (Ct. App. 2006). However, the Rules provide that a motion to dismiss may be converted into a motion for summary judgment when matters outside the pleadings are presented to the Court. Rule 12(c), SCRCP.

Rule 11(a), SCRCP deems a party filing a pleading to have certified that the allegations pled have good ground to support them to the best of the party’s knowledge. Violation of Rule 11 warrants striking of the pleading and imposition of sanctions. Id. Courts may strike sham allegations that are known to be false or lack good ground to support them. Halpern v. Barran, 272 A.2d 118 (Del. Ch. 1970), U.S. v. Maguire Indus., 99 F. Supp. 329, 330 (S.D.N.Y. 1951).

Materials outside the pleadings have been submitted in support of this motion. All of the documents Newton has submitted are either judicial rulings, documents filed in the Big Water Resort litigation of which Hutson is aware, or correspondence between Hutson and Penn-America (through Newton as its counsel) that Hutson has in his possession, and which Hutson has withheld in order to falsely portray material facts. These documents demonstrate that Hutson cannot set forth facts that would state a claim under the standard required by Rule 11 and 12, SCRCF. Additionally, Hutson's lawsuit attempts, based upon Hutson's misrepresentation of material facts, to impose a legal duty that is completely unsupported by legal authority and that goes far beyond the scope of any duty imposed by the insurance contract. In order to avoid protracted discovery due to a frivolous claim, Newton hereby requests that this Court either dismiss this suit pursuant to Rule 12(b)(6) or consider matter outside the pleadings and treat this motion as a motion for summary judgment pursuant to Rule 56. See Johnson v. Dailey, 318 S.C. 318, 321, 457 S.E.2d 613, 615 (1995).

STANDARD FOR MOTION FOR SUMMARY JUDGMENT

"Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 323-24, 566 S.E.2d 536, 540 (2002). "In determining whether a genuine question of fact exists, the court must view the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving party." Id.

A party opposing summary judgment may not rest upon the mere allegations or denials of his pleadings. SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990). Rule 56(e) requires a party opposing summary judgment "to come forward with affidavits or other supporting documents demonstrating the existence of a genuine issue for trial." Doe v. Batson, 345 S.C. 316, 320-21, 548 S.E.2d 854, 856 (2001). Although only a scintilla of evidence is required,

a party must present some evidence to avoid summary judgment. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 694 S.E.2d 1 (2010). Moreover, a party may not avoid summary judgment by asserting that a jury may disbelieve uncontradicted evidence. Id. at 549, 694 S.E.2d at 6.

ARGUMENT

Before proceeding with legal arguments, it is worthwhile to consider the equities of Hutson's claim. Hutson has repeatedly sued TLC, who Hutson alleges perpetrated the fraud against him, TLC—and lost. (Exh. G: James Order; Exh. A: R&R; Exh. B: Norton Order; Exh. C: Cothran Order.) Hutson has sued the lawyers who represented him in his litigation against TLC for malpractice—and lost. (Exh. Q: Curtis Order; Exh. S: Order.) Hutson has now resorted to suing his liability insurer—the one that defended him throughout the course of the Class Action and the Defamation Action and paid its limits to settle not only TLC's claims against him, but also the sanctions Hutson incurred as a result of his own misconduct—as well as its coverage counsel, Defendants Murphy and Newton.

Hutson claims that Penn-America and its coverage counsel knew Hutson had been defrauded and stood on the sidelines. In the first place, it is not the purpose of liability coverage to prosecute an insured's affirmative claims against third parties. Furthermore, Hutson's claims of fraud have been debunked repeatedly. Judge James ruled that Hutson breached the Settlement Agreement with TLC. (Exh. G: James Order.) Magistrate Judge Baker ruled that the automatic release in the Settlement Agreement was enforceable because Hutson could not prove fraud. (Exh. A: R&R at *11 to *15.) Judge Norton agreed with Magistrate Judge Baker and found that Hutson's claims against TLC were barred by *res judicata*. (Exh. B: Norton Order at pp. *6-*9.) Judge Cothran also found that Hutson could not prove fraud and that his claims against TLC were barred by *res judicata*. (Exh. C: Cothran Order.) Hutson has even been sanctioned by a federal judge for continuing to assert the same meritless claims against TLC. (Exh. K: Sanctions Order.)

Any credibility to Hutson's claim he was defrauded evaporates when one considers that Hutson knew about the campground memberships before he purchased Big Water Resort. (Exh. B: Norton Order at p. *7; Exh. A: R&R at *13 n.5; Exh. Q: Curtis Order at p. 2; Exh. Z: E-mail.) During the settlement discussions Hutson references, Hutson had represented to Newton that he had only recently learned that all of the Big Water Resort property was subject to the campground membership agreements. However, it appears that even if this were true, Hutson had a duty to investigate and ascertain which property could be developed and sold. Documents attached to Hutson's pleading demonstrate that Hutson assumed a duty to the campground members when he became principal of Big Water Resort, LLC. (See Hutson Exh. 1.1 through 1.3 and 6.0.) The Settlement Agreement empowered Hutson to subdivide and sell a portion of the property upon which the campground was located. (See Hutson Exh. 9.0, ¶ 5. and Exh. A.) This demonstrates that Hutson knowingly entered into a settlement with TLC—with court approval—that gave Hutson the ability to deprive the campground members of property in which they held lifetime memberships, and the only damage Hutson suffered as a result of TLC's alleged fraud was that he was prevented from breaching his fiduciary duty to the campground members. Even if TLC is guilty of committing fraud upon the court in entering into the Settlement Agreement, Hutson is just as guilty because he knew about the campground members' lifetime memberships in the property.

Turning to the legal issues, Hutson has not alleged facts that would support a cognizable claim against Newton. If his claim is construed as a claim for legal malpractice, Hutson has failed to provide an affidavit as required by law. If Hutson's claim is not a legal malpractice claim, Hutson lacks standing and his claim is barred by the litigation privilege. Therefore, Hutson's claims against Newton should be dismissed.

I. If Hutson's claim is for legal malpractice, he failed to attach an expert affidavit.

Section 15-36-100(B) of the South Carolina Code requires a party bringing a professional malpractice action to “file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.” This statute applies to claims against attorneys. S.C. Code Ann. § 15-36-100(G)(2). Hutson did not attach an expert affidavit to his Complaint in this action. Therefore, to the extent his claim is for professional malpractice, his claim must be dismissed. (See Exh. S: Order.)

II. Hutson lacks standing and his claims against Newton are barred by the litigation privilege.

Hutson seems to allege that Newton's knowledge of certain facts could impose a duty upon Newton to act on Hutson's behalf. However, Newton represented Penn-America, an adverse party in the Big Water Resort coverage action. (See Hutson Exhs. 4.0, 7.0, 11.0, and 12.0.) Therefore, Newton could not represent Hutson, and he informed Hutson of this fact in the e-mail upon which Hutson relies in this case. (Hutson Exh. 4.0.)

Hutson had—and, indeed, still has—every right to file legal action to set aside the Settlement Agreement and the Consent Order in the Ejectment action if he has a cognizable claim, and to retain an attorney to represent him in that endeavor if he can find one to do so. However, even if Newton were to file legal action seeking to set aside the Consent Order in the Ejectment Action, Newton would have to act on behalf of Penn-America, not Hutson.

South Carolina law generally limits attorney liability to parties with whom the attorney has an attorney-client relationship. RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012). Courts in this state have recently adopted two exceptions to this rule. First, a third-party beneficiary of an existing will or estate planning document may bring a claim

against a lawyer whose drafting error defeats or diminishes the client's intent. Fabian v. Lindsay, 410 S.C. 475, 492, 765 S.E.2d 132, 141 (2014). Second, a liability insurer may sue the attorney it retained to defend an insured. Sentry Select Ins. Co. v. Maybank Law Firm, LLC, 826 S.E.2d 270 (2019). Neither of these exceptions apply.

Penn-America did not retain Murphy & Grantland, P.A. to defend Hutson. Penn-America initially retained Mike Ethridge and Laura Paton for this purpose. At Hutson's request, Ethridge and Paton withdrew as counsel and Penn-America subsequently retained Frank J. Gordon of the firm Millberg Gordon Stewart PLLC to defend Hutson. (See Exh. AA: Consent Order.) Hutson was not a third-party beneficiary to the attorney-client relationship between Penn-America and Murphy & Grantland, P.A. Instead, Murphy & Grantland, P.A. represented Penn-America as an adverse party in the Coverage Action. (See Hutson Exhs. 11.0 and 12.0.) Therefore, neither of the exceptions apply to establish Hutson's standing to sue Murphy and Newton.

Attorneys are generally not liable to a party opponent for conduct in the course of litigation. Ronald E. Mallen & James A. Roberts, The Liability of a Litigation Attorney to a Party Opponent, 14 Willamette L. J. 387 (1978). Statements made in the course of litigation are absolutely privileged. Oesterle v. Wallace, 272 Mich. App. 260, 264, 725 N.W.3d 470, 474 (Mich. Ct. App. 2006). Every state that has considered the issue has held that the absolute judicial privilege from suit applies to statements made by attorneys during settlement negotiations. Id. at 266, 725 N.W.2d at 475-76.

As set forth above in the factual background section, the e-mail Hutson attached to his Complaint in this action was a statement made in the course of litigation, and particularly, a statement made in the course of settlement negotiations. (See Exh. V: Hutson e-mails; Hutson Exh. 8.0.) Thus, Hutson's claims against Newton are barred by the judicial privilege and should be dismissed.

III. This lawsuit should be dismissed because Hutson cannot establish the existence of a legal duty.

Hutson alleges that a liability insurer had a duty to affirmatively file litigation seeking to set aside a ruling in a prior case merely because the result in the prior action might affect the result in the suit the insurer is defending. Counsel is unaware of any legal authority for this proposition.

In the first place, insurers generally do not have a duty to prosecute affirmative counterclaims on behalf of their insureds. Mt. Vernon Fire Ins. Co. v. Visionaid, Inc., 477 Mass. 343, 76 N.E.3d 204 (2017); Duke Univ. v. St. Paul Mercury Ins. Co., 95 N.C. App. 663, 680, 384 S.E.2d 36, 46; 1 A.D. Windt, Ins. Claims and Disputes: Representation of Insureds & Insurers § 4:41 (6th ed. Mar. 2018 update). South Carolina courts have never held that a liability insurer's duty to defend includes a duty to prosecute affirmative claims by the insured or to pay litigation costs for such a claim.

But even if this Court were to find that Penn-America owed a duty to prosecute Hutson's counterclaims against TLC in the Class Action and the Defamation Action, such a duty would not apply in this case. The duty Hutson alleges in this case involves filing legal action to set aside a judgment in a prior action in which Penn-America had no involvement. The Settlement Agreement and Consent Order were entered into in the Ejectment action. (See Hutson Exhs. 9.0 and 10.0.) Imposing a duty upon an insurer in this situation would vastly increase the amount of litigation before the courts because it would require insurers to not only defend claims against their insureds, but also to file separate actions seeking to set aside prior judicial orders that merely affect the case the insurer is defending based upon principles of *res judicata* or collateral estoppel.

Long before Penn-America became involved in the Big Water Resort litigation, Judge James had already ruled that Hutson was deemed to have released all claims against TLC by breaching the Consent Order. (Exh. G: James Order.) While Penn-America was still investigating

its coverage for TLC's claims against Hutson, Magistrate Judge Baker recommended that Hutson's counterclaims—which were based upon substantially similar allegations to those made in the Ejectment Action—should be dismissed based upon *res judicata*. (Exh. A: R&R.)

A ruling in favor of Hutson in this action would create a duty on the part of a liability insurer and its coverage counsel to set aside several prior judicial orders. Filing such an action could subject Penn-America and any attorney retained to prosecute such an action to sanctions for frivolous proceedings. Accordingly, Hutson cannot demonstrate the existence of a legal duty on the part of Penn-America or Newton, as its coverage counsel, to file legal action seeking to set aside the Settlement Agreement and the Consent Order in the Ejectment Action.

IV. Hutson has previously released Penn-America and its agent, Newton, from liability arising from the Big Water Resort litigation.

In addition, Hutson's claims against Newton are subject to a prior release from liability. Due to Hutson's litigious course of conduct in the Big Water Resort matter, Penn-America asked Hutson for a complete release when it settled his claim for loss of use benefits under the policy. (See Exh. I: Settlement Agreement.) The Settlement Agreement specifies the policy at issue. (See Hutson Exh. 11.0, ¶ 17.) It recites Hutson's potential liability in the Class Action and the Defamation Action. It references the pending Coverage Action. It further recites that Hutson had indicated he intended to file counterclaims in the Coverage Action for bad faith claim investigation and handling against Penn-America. (Exh. I: Settlement Agreement at p. 2.) The Settlement Agreement recites that Hutson and Penn-America sought to settle all claims that were raised or that could have been raised in the Coverage Action. (*Id.*) Hutson agreed, based upon the consideration paid, to release Penn-America from all claims relating to its coverage for the him in the Class Action and the Defamation Action. (*Id.* at p. 3.) Therefore, Hutson's claims against Penn-America in this action are barred by the release in the Settlement Agreement.

Not only did Hutson agree to resolve his claims against Penn-America in the Settlement Agreement, he also agreed to release any claims against Penn-America's agents. (Exh. I: Settlement Agreement at p. 2.) Hutson's claims against Newton are based upon Newton's agency relationship with Penn-America as Penn-America's coverage counsel. (Am. Compl., ¶¶ 3, 47.) Therefore, Hutson's claims against Newton are also barred by the release in the Settlement Agreement.

Hutson has demonstrated a proclivity for breaching settlement agreements. He breached the Settlement Agreement in the Ejectment Action. (Exh. G: James Order.) He breached that same Settlement Agreement each time he sued TLC. (Exh. C: Cothran Order.) He breached his agreement with Atlantic Coast Properties. (Exh. U: Order.) Hutson should not be allowed to breach his Settlement Agreement with Penn-America by continuing to prosecute this action.

CONCLUSION

For the reasons set forth above, Hutson's claims against Defendant Newton should be dismissed, and Newton should be dismissed as a party from this action.²

Respectfully submitted,

s/Timothy J. Newton

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Columbia, South Carolina
May 30, 2019

² The Court docket indicates Hutson filed a "Memorandum to Defendants Response" on May 7, 2019. Newton has not yet received a copy of this filing. Newton reserves his right to supplement this Memorandum after he receives a copy of that filing.

Exhibit A

2016 WL 7435620

Only the Westlaw citation is currently available.
United States District Court, D.
South Carolina, Charleston Division.

William REED, Donna Reed, Bonnie
Youmans, Jane Yates, Phillip Caulder, all
individually and for the benefit and on behalf
of all others similarly situated, Plaintiffs,

v.

BIG WATER RESORT, LLC; TLC Holdings,
LLC; Richard Clark; James Thigpen; Jimmy
"Steve" Lovell; and Ocoee, LLC, Defendants.

TLC Holdings, LLC; Richard Clark;
James Thigpen; Jimmy "Steve" Lovell;
and Ocoee, LLC, Third-Party Plaintiffs,

v.

M.B. Hutson a/k/a M.B.
Hudson, Third-Party Defendant.

C/A: 2:14-1583-DCN-MGB

|

Signed 04/05/2016

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REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

MARY GORDON BAKER, UNITED STATES
MAGISTRATE JUDGE

*1 This matter is before the Court upon various motions:
(a) a Motion for Sanctions filed by Big Water Resort
LLC, Richard Clark, Jimmy Lovell, Ocoee LLC, TLC
Holdings LLC, James Thigpen (Dkt. No. 179); (b) a
Motion for Summary Judgment filed by Richard Clark,
Jimmy Lovell, Ocoee LLC, TLC Holdings LLC, James
Thigpen (Dkt. No. 183); and (c) a Motion for Summary
Judgment filed by M.B. Hutson a/k/a M.B. Hudson (Dkt.
No. 228). Pursuant to the provisions of Title 28, United
States Code, Section 636(b)(1) and Local Rule 73.02(B)
(2)(c), D.S.C., all pretrial matters in cases involving *pro*
se litigants are referred to a United States Magistrate for
consideration. A hearing was held before the undersigned
on March 16, 2016 at 10:00 a.m. (See Dkt. No. 257; Dkt.
No. 267.) For the reasons set forth herein, the undersigned
recommends denying Third-Party Plaintiffs' Motion for
Sanctions (Dkt. No. 179), granting Third-Party Plaintiffs'
Motion for Summary Judgment (Dkt. No. 183); and
denying Hutson's Motion for Summary Judgment (Dkt.
No. 228).

FACTUAL BACKGROUND

Plaintiffs are all purchasers of memberships in the club
known as "Big Water Resort." (See generally Am.
Compl.) The crux of the dispute between Plaintiffs and
Defendants centers upon whether Plaintiffs' memberships
in the Big Water Resort, LLC entitled Plaintiffs to the
use of a private, members-only resort, or whether that
resort could be opened to the public. Plaintiffs contend
that they purchased memberships in a private, members-
only resort. (See generally Am. Compl.) Defendants, on
the other hand, contend that the membership agreements
"do not promise exclusivity[.] and any evidence to the
contrary is inadmissible under the parol evidence rule
and under the terms of the merger clause contained in
the agreement." (Dkt. No. 88 at 13.) This portion of
the dispute has been settled, and on February 1, 2016,
Judge Norton entered an Order granting the Motion for
Preliminary Approval of the Settlement. (See Dkt. No.

248; *see also* Dkt. No. 242.) Ancillary disputes are before the Court today.

Defendants/Third-Party Plaintiffs¹ filed a Third-Party Complaint against Third-Party Defendant M.B. Hutson a/k/a M.B. Hudson (hereinafter “Hutson”). Third-Party Plaintiffs allege that their third-party complaint “arises from ... Hutson’s failure to operate the Big Water Resort campground in a manner beneficial to the members.” (Dkt. No. 72 ¶ 133.) Third-Party Plaintiffs allege that in December of 2010, they sold their membership interests in Big Water Resort, LLC to Hutson, “making Hutson the sole member of that LLC.” (*Id.* ¶ 134.) According to Third-Party Plaintiffs, the sale price was \$500,000, “of which \$499,990 was payable under a promissory note executed by Hutson in favor of” Third-Party Plaintiffs Clark, Lovell, and Thigpen. (*Id.*) Third-Party Plaintiffs further allege that in December of 2010, they “entered into a lease-purchase agreement with ... Hutson,” under which Third-Party Plaintiffs “agreed to sell certain property to Hutson,” including the land on which the Big Water Resort campground was located. (*Id.* ¶ 135.) Third-Party Plaintiffs allege that Hutson “defaulted on both the promissory note and the lease-purchase agreement.” (*Id.* ¶ 136.)

*2 Third-Party Plaintiffs allege that in December of 2011, they instituted an action against Hutson in state court “for breach of the lease-purchase agreement, seeking damages and ejectment.” (*Id.* ¶ 137.) Third-Party Plaintiffs further allege as follows:

In March 2012, the parties to the lease—purchase agreement entered into a Settlement Agreement. The terms of the Settlement Agreement imposed many duties on Third-Party Defendant Hutson, including the duty to make certain improvements to the campground property and the duty to make certain payments to Third-Party Plaintiff TLC Holdings, LLC. The Settlement Agreement was approved by a consent order in April 2012.

(*Id.* ¶ 138.) Third-Party Plaintiffs allege that Hutson defaulted under the March 2012 Settlement Agreement and was notified of such default in February of 2013 but did not cure the defaults. (*Id.* ¶¶ 139-40.) Third-Party Plaintiffs assert that they filed an affidavit of default in December of 2013, and in response, Hutson filed a “motion to set aside the affidavit of default and a motion for a temporary restraining order.” (*Id.* ¶ 141.) Third-Party Plaintiffs further allege, *inter alia*,

144. In an Order dated March 20, 2013, Judge James declined to set aside the affidavit of default or issue a preliminary injunction and ruled that the March 2012 Settlement Agreement and April 2012 Consent Order should be enforced. Specifically, he ordered that the lease—purchase agreement was terminated and that Third-Party Defendant Hutson was required to vacate the property.

145. Third-Party Defendant Hutson vacated the property in April 2014, at which time Third-Party Plaintiffs Clark, Lovell, and Thigpen were able to resume control and operation of the Big Water Resort campground.

(*Id.* ¶¶ 144-45.)

Third-Party Plaintiffs allege a cause of action for equitable indemnity against Hutson. (*Id.* ¶¶ 146-150.) Third-Party Plaintiffs allege that Hutson has “exposed Third-Party Plaintiffs to potential liability” by “his alleged wrongful acts” and that they “have incurred, and may continue to incur, expenses necessary to protect their interest in defending the claims brought by the members of the Big Water Resort campground.” (*Id.* ¶¶ 147, 150.) Third-Party Plaintiffs allege that Hutson “is solely responsible for the acts that have allegedly harmed the members that compose the class in the underlying action” and that they “have no fault and did not join in Third-Party Defendant Hutson’s allegedly wrongful acts.” (*Id.* ¶ 149.) According to Third-Party Plaintiffs, the relationship between them and Hutson “is such that an obligation in equity exists on Third-Party Defendant Hutson to indemnify Third-Party Plaintiffs.” (*Id.* ¶ 148.)

Hutson answered the third-party complaint and filed a counterclaim against Third-Party Plaintiffs. (*See* Dkt. No. 75.) Hutson alleges that in December of 2010, he “became aware of the Big Water Resort through a conversation

with a realtor ..., who stated that the resort was for sale as a campground and for other uses.” (Dkt. No. 75 ¶ 51.) Hutson alleges that after various discussions with the realtor and Third-Party Plaintiffs, he met with Clark and Lovell in Chattanooga. (*Id.* ¶¶ 52-54.) According to Hutson, Clark and Lovell told Hutson, *inter alia*, that if Hutson purchased three tracts of land, he “would also be required to purchase the rights to approximately 700 existing club memberships.” (*Id.* ¶ 54.) Hutson alleges that when he asked Clark and Lovell how much profit or loss the campground was experiencing, “[t]heir response was that it was not making a profit yet but had much potential.” (*Id.* ¶ 55.) Hutson further alleges,

*3 At or about the end of December, 2010 the Third-Party Defendant agreed to purchase the rights to the club memberships and the option to purchase all the tracts of real property and Third-Party Defendant moved onto the property. Prior to these transactions Third-Party Defendant told the Third-Party Plaintiffs that he intended to develop the property for sale to the public and the Third-Party Plaintiffs understood this and never indicated to Third-Party Defendant that he would be prohibited from doing so by virtue of any of the terms of the club membership agreements or otherwise.

(*Id.* ¶ 56.)

Hutson alleges that when he moved onto the property, he discovered there was only approximately \$5,000 in the club’s checking account, and that over the next few weeks, he determined “that there was not likely enough income to properly operate and maintain the campground.” (*Id.* ¶ 57.) Hutson asserts he “had no choice but to dismiss” most of the campground’s employees and cut back on various other expenses “because of lack of money and income from the campground resort operation.” (*Id.* ¶ 58.) Approximately two months after moving onto the property “and discovering the ...

situation,” Hutson “realized at that time that the resort was a seasonal business,” something Third-Party Plaintiffs “never disclosed” to Hutson. (*Id.* ¶ 61.) Hutson alleges he told Clark that “there was no business from the club members and that the resort was essentially dead.” (*Id.* ¶ 61.) Hutson states that Clark suggested raising club members’ fees, which Hutson did. (*Id.* ¶¶ 62-66.) Hutson further alleges that Clark told Hutson that Third-Party Plaintiffs “did not want to be responsible for the obligations to the class members, and that perhaps if [Hutson] raised the membership fees drastically then members would be encouraged to drop their memberships.” (*Id.* ¶ 64.) Hutson alleges that Clark also told him “that if the members dropped their memberships it would provide an opportunity for [Hutson] to seek business from the general public as opposed to only the club members and that it would lessen the potential of a class-action lawsuit against TLC Holdings, LLC and its owners.” (*Id.* ¶ 65.) According to Hutson, when he raised fees, “members began to drop their memberships and threatened to file a class-action lawsuit, stating that they thought they had been scammed and that their memberships had become worthless.” (*Id.* ¶ 66.)

Hutson alleges that prior to his involvement in the Big Water Resort, Third-Party Plaintiffs “were allowing members of the public to rent campsites, despite [the fact] that the club membership agreements arguably created a private club resort exclusive to the club’s members.” (*Id.* ¶ 70.) Hutson further alleges, *inter alia*,

71. Eventually, by the end of 2013, Third-Party Defendant realized that TLC Holdings, LLC and its owners intended to use him as a scapegoat. Once the Third-Party Plaintiffs collected millions of dollars from the lifetime club members the Third-Party Plaintiffs immediately began to quietly market the property for sale through realtor Susan Stroman. Susan Stroman has subsequently told Third-Party Defendant that she was instructed by the Third-Party Plaintiffs not to list the property for sale, but to instead ... quietly and privately help them find a buyer.

72. Unbeknownst to Third-Party Defendant, the Third-Party Plaintiffs placed him in an impossible situation which prevented him from successfully purchasing the land and developing a subdivision in the middle of the campsites, despite that Third-Party Plaintiffs were fully aware, prior to entering into the ... transactions with Third-Party Defendant, that this was Third-Party

Defendant's plan and reason for entering into the transactions with Third-Party Plaintiffs.

*4 73. Third-Party Plaintiffs intentionally misled and failed to disclose vital information to Third-Party Defendant, including but not limited to the facts that Third-Party Plaintiffs had previously promised the benefits of club membership including the exclusive right to enjoy the club land and property to club members for two lifetimes into the future, that Big Water Resort was losing approximately \$250,000 per year and had insufficient reserves or income for proper maintenance of the resort club, that the local authorities had imposed a sewer moratorium on the subject tracts of land, and that the Big Water Resort was subject to exorbitant charges by the Black River Electric utility company.

74. Third-Party Plaintiffs acknowledged to Third-Party Defendant, after they had entered into the transactions with Third-Party Defendant for the purchase of the rights to the club memberships and the lease-purchase agreement for the land, and after entering into the ... settlement agreement with Third-Party Defendant, that Third-Party Plaintiffs' real reason for entering into these transactions with Third-Party Defendant was [to] distance themselves from the club members and avoid a potential class-action lawsuit against Third-Party Plaintiffs.

(Dkt. No. 75 at ¶¶ 71-74.)

Hutson alleges that "[b]ecause of the wrongful acts and omissions" of Third-Party Plaintiffs, he "became financially destitute and was forced to file for Chapter 11 bankruptcy." (*Id.* ¶ 76.) Hutson asserts he "became in a state of duress and suffered mental anguish because of this situation." (*Id.*) Hutson alleges that Third-Party Plaintiffs "have falsely told third-parties, verbally and in writing, that the failure of Third-Party Defendant's ability to successfully operate and maintain the Big Water Resort was Third-Party Defendant's fault, defaming him and damaging his reputation." (*Id.* ¶ 77.) Hutson contends that Third-Party Plaintiffs "were fully aware that Big Water Resort, LLC was totally insolvent and financially vulnerable prior to contracting" with him. (*Id.* ¶ 78.) Hutson lists the following causes of action against Third-Party Plaintiffs: breach of contract; breach of contract accompanied by fraud; fraud and fraud in the inducement; negligent misrepresentation; constructive fraud; breach of

the covenant of good faith and fair dealing; negligence; recklessness, wilfulness and wantonness; and defamation. (Dkt. No. 75 at 15-18 of 19.)

DISCUSSION

As noted above, three motions are pending before the Court: (a) Third-Party Plaintiffs' Motion for Sanctions (Dkt. No. 179); (b) Third-Party Plaintiffs' Motion for Summary Judgment (Dkt. No. 183); and (c) Third-Party Defendant's Motion for Summary Judgment (Dkt. No. 228). The undersigned addresses the motions in turn.

A. Motion for Sanctions (Dkt. No. 179)

In the Motion for Sanctions, Third-Party Plaintiffs seek sanctions against Hutson. (*See generally* Dkt. No. 179-1.) Third-Party Plaintiffs state, *inter alia*,

Throughout the course of this litigation, Third-Party Defendant Hutson has engaged in a pattern of behavior designed to harass and unduly burden Third-Party Plaintiffs and which has made a mockery of the judicial system. He has also attempted to extort a settlement from Third-Party Plaintiffs on numerous occasions by threatening them with criminal prosecution. This behavior has manifested itself primarily through Third-Party Defendant's filings with this Court and his communications with counsel for Third-Party Plaintiffs.

(Dkt. No. 179-1 at 2 of 15.) Third-Party Plaintiffs list a litany of actions taken by Hutson that they contend warrant sanctions. (*See* Dkt. No. 179-1 at 3-15 of 15; *see also* Dkt. No. 179-2; Dkt. No. 179-3; Dkt. No. 179-5; Dkt. No. 179-6; Dkt. No. 179-7; Dkt. No. 179-8; Dkt. No. 179-9; Dkt. No. 179-10; Dkt. No. 179-11; Dkt. No. 179-12; Dkt. No. 179-13; Dkt. No. 179-14; Dkt. No. 179-15; Dkt. No. 179-16; Dkt. No. 179-17; Dkt. No. 179-18; Dkt. No. 179-19; Dkt. No. 179-20; Dkt. No. 179-21; Dkt. No.

179-23; Dkt. No. 179-27; Dkt. No. 179-28; Dkt. No. 179-29; Dkt. No. 179-30.)

***5 Rule 11(b) of the Federal Rules of Civil Procedure** provides as follows:

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

FED. R. CIV. P. 11(b).

Third-Party Plaintiffs present evidence of the following in support of their motion for sanctions:

- In an email dated March 25, 2015 to Attorneys Byrd and Wilkerson, Hutson stated that it was his "civic duty to report and provide evidence to the claims department" of Auto Owners Insurance, letting the insurance company know "that TLC's members are up to more no good." (Dkt. No. 179-2.) Hutson asserted TLC is "[t]rying to defraud more victims." (*Id.*) He "[r]espectfully" inquired, "How can someone file an insurance claim for something they plotted and planned and finally got caught?" (*Id.*)
- Hutson has frequently filed motions in this case with "no supporting exhibits" and no "supporting factual information or legal authority." (See Dkt. No. 179-1

at 2.) Third-Party Plaintiffs point to his May 5, 2015 motion asking the court to "set aside" his deposition in his bankruptcy case. (See Dkt. No. 112.)

- On June 29, 2015, Hutson filed a Motion "to be Allowed to Use Tape Recordings Found During Jury Trial." (Dkt. No. 138.)² Third-Party Plaintiffs assert this motion was "an attempt ... to circumvent this Court's Order compelling him to respond to Third-Party Plaintiffs' first set of requests for production by May 24, which he did not comply with." (Dkt. No. 179-1 at 4.) During his 2014 deposition, Hutson stated that he had not recorded anybody in the room (which included Clark); in this motion, however, he asserts he was able to find a 2011 recording he made of Clark. (See Dkt. No. 138; Dkt. No. 179-5 at 10, 13 of 14.)
- On July 5, 2015, Hutson sent an email to Mr. Wilkerson stating that if they were not able to settle, Hutson "plan[s] to quickly move in some new directions to get justice and restitution regarding [his] case that will soon go in another direction plus the civil with [sic] also remain." (Dkt. No. 179-6.) Third-Party Plaintiffs assert this is a "thinly-veiled threat at instituting criminal prosecution of Third-Party Plaintiffs." (Dkt. No. 179-1 at 5.)

***6** • On July 11, 2015, Hutson emailed a copy of a draft complaint against Turner Padgett Graham & Laney to Attorneys Byrd, Wilkerson, and Cromer. (Dkt. No. 179-7; Dkt. No. 179-8.) The email itself was blank other than the subject line of "Revised Federal Complaint, final draft." (Dkt. No. 179-7.) In the draft complaint, Hutson complained about his treatment when deposed by Attorney Byrd at Turner Padgett's office. (Dkt. No. 179-8.) Hutson also accused Turner Padgett of, *inter alia*, "unprofessional behavior" and violating the "SC Bar Association's Code of Conduct." (Dkt. No. 179-8 at 2 of 2.)

- One day later, on July 12, 2015, Hutson emailed Attorneys Byrd, Wilkerson, and Cromer with an updated draft of the complaint against Turner Padgett. (Dkt. No. 179-9; Dkt. No. 10.) In the email, Hutson told Wilkerson that the draft complaint "will be filed this coming Wed. and also an additional motion request[ing] that your law firm be barred from representing the Class Action/TLC Holdings/ Third Party Defendant MB Hutson based on multiple conflicts of interest." (Dkt. No. 179-9.) Hutson also told

Wilkerson that he "believe[s] that [Wilkerson's] clients will soon need criminal attorneys." (*Id.*) In the updated draft, Hutson continued to accuse Turner Padgett attorneys of "ethics and civil rights violations." (Dkt. No. 179-10 at 3 of 4.) The draft complaint had a "cc" line to the "State Bar Association of South Carolina," though it is unclear whether the draft complaint was in fact forwarded to the Bar. (*Id.* at 4 of 4.)

- One day later, on July 13, 2015, Hutson emailed Wilkerson and told Wilkerson that he was prepared to pay the filing fee and file the complaint against Turner Padgett. (Dkt. No. 179-11.) Hutson stated, *inter alia*, "I have prepared the necessary paper work for the South Carolina State Bar and will attach all necessary exhibits and other documents including depositions regarding your firm's involvement.... I honestly can't see how the State Bar Association will allow or support your firm being involved under these clear circumstances." (Dkt. No. 179-11.)
- On July 29, 2015, Hutson emailed Wilkerson, Byrd, and Cromer; the subject line was "Motion to consider criminal first." (Dkt. No. 179-14.) Hutson attached a draft motion entitled "Motion Asking the Honorable Court to Prioritize the Issue of Criminal Felony Theft Over the Civil Issues Involving Certification." (Dkt. No. 179-15.) It does not appear this motion was ever filed with the court.
- On or about July 29, 2015, Hutson filed a motion entitled "Third-Party Defendant's Motion Citing Reasons for the Piercing of Any Veil that Owners of TLC Holdings, LLC Do and Could Hide Behind, and a Formal Plea for the Immediate Investigation of Criminal Wrongs by TLC Holdings, LLC., et al. to Be Made by This Honorable Court to the Appropriate Investigative Departments of the United States." (Dkt. No. 160.)³ This motion was withdrawn on or about December 3, 2015. (Dkt. No. 213.)
- On July 30, 2015, Hutson emailed Byrd, Wilkerson, Cromer, Padgett, Thomas, and Perry. (Dkt. No. 179-18.) The email was blank other than the subject line, which stated "Wayne Byrd Conspiracy." (*Id.*) A draft motion was attached; that draft motion was entitled, "Third-Party Defendant's Motion Regarding Third Parties Defense Attorney Wayne Byrd Showing a Conspiring Rol[e] to Protect Their Clients Felony Theft By Deception." (Dkt. No. 179-19.) Hutson filed this

motion on or about August 3, 2015, and withdrew it on or about December 3, 2015. (Dkt. No. 162; Dkt. No. 213.)

- On or about July 31, 2015, Hutson filed a document entitled "Third-Party Defendant Shows To Honorable Court How TLC Committed Felony Theft by Deception According to Federal Law." (Dkt. No. 161.) In that filing, Hutson "prays" that the Court "immediately turn this entire scheme into a First Class WHITE COLLAR FELONY CRIME case, having all three TLC owners arrested and charged with FELONY THEFT BY DECEPTION and prosecuted,..." (Dkt. No. 161 at 2 of 2.)
- On July 31, 2015, Hutson emailed Byrd, Wilkerson, Cromer, Padgett, Thomas, and Perry. (Dkt. No. 179-20.) The email is blank other than the subject line, which states, "WAYNE Byrd." (*Id.*) The document he attached to that email was entitled "The Supreme Court of South Carolina Office of Disciplinary Counsel Has Opened Investigation into TLC Holdings, LLC's Defense Team & CEO, Wayne Byrd Regarding this Case, Thus Third Party Defendant Asks that the Turner Padgett Defense Team for TLC Holdings, LLC Be Barred Based on Various, Potentially Serious, Conflicts." (Dkt. No. 179-21.) Hutson filed that document on or about August 7, 2015. (Dkt. No. 168.) Hutson asserted therein that Byrd is "in such blatant disregard of ethical and professional behavior that he is now under investigation by the Supreme Court of South Carolina's Disciplinary Counsel pertaining to this case." (Dkt. No. 168.)
- In an email dated August 4, 2015 to Byrd, Wilkerson, Padgett, Thomas, Harper, and Perry, Hutson stated that he planned to file suit in the South Carolina Court of Common Pleas "regarding case number 11cp-14602," asking that the "case number and rulings be dropped, reversed or over-turned on the grounds of fraud, theft, deception, and entrapment." (Dkt. No. 179-23.)
- On September 1, 2015, Hutson emailed Byrd, Wilkerson, Cromer, Thomas, and Padgett; the email was blank except for the subject line of "Amended [sic] filing 9/1/15." (Dkt. No. 179-27.) Hutson attached a draft motion to his email; the draft motion was entitled "Motion Citing Felony Theft by Deception Committed by TLC Holdings, LLC Owners." (Dkt. No. 179-28.) Hutson therein asserted that the Third-Party Plaintiffs

violated South Carolina Code Section 16-13-260. (Dkt. No. 179-28.) Hutson filed this motion on or about September 9, 2015 and withdrew it on December 3, 2015. (Dkt. No. 186; Dkt. No. 213.)

• On September 2, 2015, Hutson emailed Byrd, Wilkerson, Cromer, Padget, and Thomas. (Dkt. No. 179-29.) The email was blank except for the subject line, which stated "ORIGINAL Federal Header TLC." (Dkt. No. 179-29.) Hutson attached a draft motion entitled "Third-Party Defendant's Motion Outlining Reasons for All Pending Motions to Be Heard in Court Before the Honorable Judge Baker." (Dkt. No. 179-30.) Although Hutson did not name this individual by name, presumably he was describing Byrd when Hutson said, "Third Party Plaintiff's Counsel (CEO) is shrewd, conniving, involved, [and] entwined with his clients in fraudulent and dishonest actions...." (Dkt. No. 179-30.) Hutson filed this document on September 9, 2015. (Dkt. No. 185.)

*8 The instant Motion for Sanctions was filed on September 3, 2015. (See Dkt. No. 179.) As noted above, Rule 11 "specifies that attorneys and *pro se* plaintiffs must sign pleadings, motions or other papers filed with the court" and that such a signature "constitutes a certification that (1) the paper is not being presented for any 'improper purpose,' (2) legal contentions therein are 'warranted,' (3) allegations have evidentiary support, and (4) denials of allegations are warranted on the evidence." *Johnson v. Lyddane*, 368 F. Supp. 2d 529, 532 (E.D. Va. 2005). "The purpose of Rule 11 is to deter conduct that frustrates the just, speedy, and inexpensive determination of civil actions." *Laremont-Lopez v. Se. Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1078 (E.D. Va. 1997). Although *pro se* pleadings are held to less stringent standards than formal pleadings drafted by lawyers, see *Haines v. Kerner*, 404 U.S. 519 (1972), Rule 11 sanctions can still be appropriate against an individual despite his or her *pro se* status. See *Harmon v. O'Keefe*, 149 F.R.D. 114, 116 (E.D. Va. 1993).

In the case *sub judice*, Hutson has accused Turner Padget's attorneys of a variety of nefarious actions, though it does appear Hutson ultimately withdrew the motions accusing Turner Padget of criminal activities. (See Dkt. No. 209; Dkt. No. 213.) Despite being previously told that motions pertaining to trial (such as to exclude evidence) are premature, Hutson continued to file such motions. (See, e.g. Dkt. No. 145; Dkt. No. 260.) In addition, he re-

filed the motion pertaining to his deposition that Judge Marchant previously denied. (See Dkt. No. 255; see also Dkt. No. 121.)

Given Hutson's *pro se* status, the fact that he withdrew many objectionable filings prior to Third-Party Plaintiffs' filing the Motion for Sanctions, the fact that Hutson had not been previously warned that he was in violation of Rule 11, and the fact that Hutson will no longer be proceeding *pro se* if the District Judge adopts the undersigned's recommendation as to Third-Party Plaintiffs' Motion for Summary Judgment (Dkt. No. 183),⁴ the undersigned recommends denying Third-Party Plaintiffs' Motion for Sanctions (Dkt. No. 179). See *Pizzuto v. Smith*, Civ. A. No. 5:12-CV-149, 2014 WL 1648269, at *15 (N.D. W. Va. Apr. 23, 2014), adopted at 2014 WL 2155039 (N.D.W. Va. May 22, 2014) ("Courts that have imposed sanctions against *pro se* parties frequently attach importance to the fact that the party had already been placed on notice that she was close to violating Rule 11."); see also *Sharp v. Town of Kitty Hawk, N.C.*, Civ. A. No. 2:11-cv-13-BR, 2011 WL 5520432, at *2 (E.D.N.C. Nov. 14, 2011) ("While plaintiff's complaint in this action was largely factually and legally duplicative of the one she filed in her earlier action here, such repetition does not rise to a level violative of 'an objective standard of reasonableness' worthy of Rule 11 sanctions. Nor is it indicative of the bad faith and vexatious behavior necessary to invoke the court's inherent power to sanction.").

B. Motion for Summary Judgment (Dkt. No. 183)

Third-Party Plaintiffs seek summary judgment as to all of Hutson's counterclaims against them. Third-Party Plaintiffs contend they are entitled to summary judgment "on Hutson's Counterclaims because the Counterclaims are barred by the doctrine of *res judicata*." (Dkt. No. 183-1 at 7.) Specifically, Third-Party Plaintiffs assert Hutson's claims against them "are barred by *res judicata* due to the Settlement Agreement which was incorporated into Judge James' 2012 Consent Order." (Dkt. No. 183-1 at 9.) As explained below, many of the claims Hutson raises in the case *sub judice* are the identical claims he raised in the state court case of *TLC Holdings, LLC v. M.B. Hudson aka M.B. Hutson*, Civ. A. No. 2011-CP-14-602 (hereinafter the "State Court Case"); the parties to that action settled it and entered into a release. For the reasons set forth below, the undersigned recommends concluding

Hutson's claims for breach of contract; breach of contract accompanied by fraud; fraud and fraud in the inducement; negligent misrepresentation; constructive fraud; breach of the covenant of good faith and fair dealing; and negligence, recklessness, wilfulness and wantonness are barred by the release he executed in settling the state court action. The undersigned further recommends concluding that Hutson's claim for defamation fails as a matter of law. Accordingly, Third-Party Plaintiffs' Motion for Summary Judgment (Dkt. No. 183) should be granted.

*9 Before turning to the legal analysis, the undersigned will review the allegations, the settlement, and the Orders issued in the State Court Case.

1. The Allegations in the State Court Case (2011-CP-14-602)

The case *sub judice* is not the first civil action between the parties; TLC filed suit against Hutson in the State Court Case. The 2012 Consent Order to which Third-Party Plaintiffs refer was issued in the State Court Case. Most of the allegations Hutson makes against Third-Party Plaintiffs in the case *sub judice* are the same allegations he made against them in the State Court Case.

In the State Court Case, Hutson filed a counterclaim against TLC Holdings, LLC and a Third-Party Complaint against Clark, Lovell, and Thigpen. (See Dkt. No. 183-5.) Hutson raised the Third-Party Plaintiffs' knowledge (and failure to disclose)—and Hutson's lack of knowledge—that the South Carolina Public Health and Environmental Control “had imposed a moratorium on the property that prevented the property from tying into public water and sewer services.” (Dkt. No. 183-5 at ¶¶ 42-44; ¶ 58.) Hutson also raised therein Third-Party Plaintiffs' knowledge that Hutson intended to develop condominiums and other residential structures and failure to disclose that “there was no sewer capacity at that time.” (*Id.* ¶¶ 47-48.) He also alleged as follows:

49. Pursuant to the contract, Hutson caused a title examination to be made of the premises and found that [TLC Holdings, LLC] was involved in litigation affecting the premises. The Sellers in the contract disclosed the existence of that litigation, but set forth a Covenant, Consent and Agreement that included language that said “Seller covenants, consents and agrees that these actions shall be dismissed or otherwise addressed on or before closing of the entire premises, so

that said pending legal action shall in no way encumber the property or hinder such closing.” To date, those actions are still pending and Hutson has been unable to proceed to purchase the property.

(*Id.* ¶ 49.) He also alleged that Third-Party Plaintiffs interfered with his development of the property; specifically, Hutson alleges therein that Third-Party Plaintiffs notified Clarendon County Council of the pending litigation in order to “delay and hinder ... [Hutson] from further performance pursuant to the Lease Purchase Agreement.” (*Id.* ¶ 85.) He also alleged that Third-Party Plaintiffs “deliberately and maliciously [took] steps to try to cause [him] to fail at this project in order for them to recover same with the value of the project enhanced through [his] efforts.” (*Id.* ¶ 89.) Hutson further asserted therein that he should be given an equitable interest in the property for his improvements. (See *id.* ¶¶ 55-56.)

2. The Orders in the State Court Case

The Settlement Agreement to which Third-Party Plaintiffs point was signed by Hutson on March 30, 2012. (See Dkt. No. 183-6 at 10 of 10.) The Settlement Agreement purports to be between Hutson and TLC Holdings, LLC. (See Dkt. No. 183-6 at 1 of 10.) However, it also provides as follows:

2. This Settlement Agreement shall be incorporated into a Consent Order (the “Consent Order”) entered in the above-referenced case (the “Litigation”). Although Richard U. Clark, Jimmy S. Lovell and James C. Thigpen are parties to this Settlement Agreement by virtue of being parties to the [Lease Purchase] Agreement, and are named as Third Party Defendants in the Litigation, they have not been served with the pleadings in the Litigation and shall not be deemed to have appeared in the Litigation by their execution of this Settlement Agreement. This Settlement Agreement shall be binding upon all of the undersigned parties even though Richard U.

Clark, Jimmy S. Lovell and James C. Thigpen have not appeared in the Litigation and are not parties to the Consent Order.

Section 23, the "Release," provides as follows:

*10 (Dkt. No. 183-6 at 1-2 of 10.) The Settlement Agreement further provides, *inter alia*,

4. Pursuant to the Consent Order, in the event that Mr. Hutson fails to comply with the terms of the Settlement Agreement, unless such failure is a direct and proximate result of TLC's failure to perform an action expressly required of it in this Settlement Agreement, time being of the essence, then the Plaintiff is entitled to the following immediate relief, without further notice of the court or notice to Defendant or his attorney: (a) termination of the [Lease Purchase] Agreement, (b) cancelation [sic] of the lis pendens filed by Hudson in this action, (c) immediate vacation of the Property by Mr. Hudson except for his personal residence, which shall be vacated within 15 days, enforceable by the Charendon County Sheriff; and (d) the provisions of Section 23 shall be effective. Prior to any such default by Hudson hereunder, the parties acknowledge that the Lease remains in full force and effect in accordance with its terms, as modified by this Settlement Agreement, and during the Primary Term (as may be extended as provided herein), Hutson shall have full possession of the Property in accordance with, and subject to, the terms of the Lease as modified by this Settlement Agreement.

23. As a material consideration of this Settlement Agreement, in the event of the termination of the [Lease Purchase] Agreement pursuant to Section 4 above as a result of Hudson[s] breach hereof, then automatically and without further action of the parties, as of the date of such termination (the "Termination Date"), Hudson shall be deemed to have released, forever discharged and promised never to sue TLC, Richard U. Clark, Jimmy S. Lovell, and James C. Thigpen, and their respective agents, attorneys, insurance companies, parent companies, subsidiaries, affiliates, predecessors, successors, or assigns (together, the "TLC Parties"), from any and all injuries, personal or property, known or unknown, causes of action, demands, warranty claims, damages, suits at law or in equity, of whatsoever kind and nature, or because of any matter or thing done, omitted or suffered to be done, by the TLC Parties, prior to and including the Termination Date, on account of all injuries and damages, including attorneys' fees and litigation expenses, arising from the Lease or the relationship between Hudson, on the one hand, and TLC, Richard U. Clark, Jimmy S. Lovell, and James C. Thigpen, on the other hand, and any causes of action, known or unknown, relating to the Lease, including any and all claims alleged, or which could have been alleged, in the Litigation.

(Dkt. No. 183-6 at 6-7 of 10.)

(Dkt. No. 183-6 at 2 of 10.)

On April 12, 2012, Judge James issued a Consent Order that approved the Settlement Agreement and incorporated the Settlement Agreement into the Consent Order by reference. (See generally Dkt. No. 183-7; see also Dkt. No. 183-7 at 2 of 7.) In an Order dated March 20, 2014, Judge James addressed various motions in the State Court Case, including Hutson's Motion to Set Aside Affidavit of Default and Motion for Temporary Restraining Order. (See generally Dkt. No. 183-8; see also Dkt. No. 183-8 at 3 of 12.) Judge James found that Hutson had breached several provisions of the Settlement Agreement, including, *inter alia*, failing to pay the arrearage prior to December 31, 2012. (Dkt. No. 183-8 at 6 of 12.) Judge James' Order further stated,

*11 10. Pursuant to the express terms of the Consent Order, effective upon the filing of the Affidavit of Default in this action on December 11, 2013, Plaintiff was entitled to have the following immediate relief, without further order of the Court or notice to Defendant or his counsel of record: (a) termination of the Lease Purchase Agreement, (b) cancellation of the Lis Pendens [filed by Defendant in this case], (c) immediate vacation of the Property by Defendant except for his personal residence thereon, which shall be vacated within fifteen (15) days; and (d) the provisions of Section 23 shall be effective." Consent Order at ¶ 2.

11. Therefore, the Lease Purchase Agreement was terminated, according to its terms as modified by the Settlement Agreement and Consent Order, as of December 11, 2013 (the "Termination Date"), and Hutson was required to vacate the Property immediately, except only for his personal residence thereon, which he was required to vacate within fifteen (15) days (i.e., December 26, 2013).

(Dkt. No. 183-8 at 11 of 12.) That order further provides,

[I]t is hereby:

...

FURTHER ORDERED, that the Settlement Agreement and Consent Order are to be enforced according to their terms.

FURTHER ORDERED, that, in conjunction with enforcing the Consent Order according to its terms, pursuant to Paragraph 2 of the Consent Order, upon the filing of the Affidavit of Default on December 11, 2013,

Plaintiff was and is entitled to, and is hereby awarded, the following immediate relief, without the need for further Order of this Court:

(a) The Lease Purchase Agreement was deemed automatically terminated and of no further force or effect; [and]

(b) The lis pendens filed by Defendant against the Property was deemed automatically cancelled, terminated of record, and of no further force or effect....

...

FURTHER ORDERED, that pursuant to the Consent Order, Defendant is deemed to have granted the TLC Release to the TLC parties, as set forth more fully in Section 23 of the Settlement Agreement.

(Dkt. No. 183-8 at 11-12 of 12.)

3. Release

Hutson's claims for breach of contract; breach of contract accompanied by fraud; fraud and fraud in the inducement; negligent misrepresentation; constructive fraud; breach of the covenant of good faith and fair dealing; and negligence, recklessness, wilfulness and wantonness are barred by the release he entered in settling the State Court Case. As in *Bowers v. Department of Transportation*, 360 S.C. 149, 600 S.E.2d 543 (Ct. App. 2004), the Settlement Agreement in the case *sub judice* is a contract. *Bowers*, 360 S.C. at 153, 600 S.E.2d at 545; see also *Hyman v. Ford Motor Co.*, 142 F. Supp. 2d 735 (D.S.C. 2001). In *Bowers*, the South Carolina Court of Appeals upheld dismissal of two suits against the Department of Transportation, concluding that the releases executed by two drivers in an accident released the Department of Transportation. The court noted that the release was a contract and that since the release "unambiguously sets forth the contracting parties' intent, [the court is] bound by that clearly expressed intent without resort to extrinsic evidence." *Bowers*, 360 S.C. at 153, 600 S.E.2d at 545. The court further stated,

The terms of the Release do not evince an intent to limit its scope to any specifically identified parties. Rather, the Release is general and all encompassing in its scope. It clearly states that the Appellants released the tortfeasor "and all other persons, firms or corporations liable, or who might be claimed to be liable." This

language is a clear, explicit, and unequivocal indication of the parties' intent that *all* claims arising from the accident—now and in the future—are barred under the terms of the Release. Had Appellants intended a contrary result and desired to limit the operation of the Release to named persons only, the terms of the Release could have been easily tailored to that end. We are constrained by the plain, unambiguous language of the Release to find that Appellants' claims against SCDOT fall within the terms of the Release.

*12 *Id.* at 154, 600 S.E.2d at 545-46.

Turning to the case *sub judice*, the Release—paragraph 23 of the Settlement Agreement—unequivocally provides that if the Lease Purchase Agreement is terminated as a result of Hutson's breach, Hutson "shall be deemed to have released, forever discharged and promised never to sue" Third-Party Plaintiffs for "any and all injuries, personal or property, known or unknown, causes of action, demands, warranty claims, damages, suits at law or in equity, of whatsoever kind and nature, or because of any matter or thing done, omitted or suffered to be done" by Third-Party Plaintiffs, "prior to and including" December 11, 2013. (Dkt. No. 183-6 at 6-7 of 10; *see also* Dkt. No. 183-8 at 11 of 12.) This Release is cut and dry—Hutson has clearly released Third-Party Plaintiffs from liability for actions they took (or actions they failed to take) prior to December 11, 2013.

A contract can be set aside for fraud, *see First Equity Inv. Corp. v. United Serv. Corp. of Anderson*, 299 S.C. 491, 497, 386 S.E.2d 245, 249 (1989) ("As a general rule, a defrauded party to a contract has a choice of remedies; he may rescind the contract and recover what he has paid, or he may affirm the contract and recover damages."), and Hutson asserts he has been defrauded. However, having reviewed all of Hutson's allegations and assertions, the undersigned concludes—for the reasons set forth below—that this Settlement Agreement and Release *cannot* be set aside due to fraud.

In arguing that the Settlement Agreement and Release should be set aside due to fraud, Hutson refers to the January 2009 meeting minutes as well as the "2015 depositions." (Dkt. No. 192; *see also* Dkt. No. 200-1 at 9-11 of 28.) Hutson asserts the minutes of the January 2009 meeting reveal the "severe options" TLC was "consider[ing] to rid themselves of the BWR campground and its members." (Dkt. No. 200 at 3 of 7.) Although

Hutson refers to "2015 depositions," the only deposition transcript he attached to his filings opposing the Motion for Summary Judgment were transcripts from Lovell's deposition taken on February 16, 2011. (*See* Dkt. No. 200-1 at 15-16, 21 of 28.)

In his Supplemental Response in Opposition, Hutson contends that TLC knew—as of April 2003—that sewer service was needed to support further development at the Big Water Resort and that such service was not available until the water treatment plant in Manning was enlarged. (Dkt. No. 200 at 1 of 7.) Hutson states, "TLC Holdings, LLC and its owners were fully aware of this serious long term problem as it prevented ANY developer from getting any of the necessary local governmental approvals to develop at that location." (*Id.* at 2 of 7.) According to Hutson, TLC's owners "knew that water and sewer as an essential component for the Buyer signing," and they also knew that "water and sewer WAS NOT AVAILABLE." (Dkt. No. 200 at 4 of 7.)

To support his claim for "FELONY THEFT BY DECEPTION," Hutson asserts that although TLC "was not EVER with clear title to close, they continued to collect hundreds of thousands of dollars from [Hutson] for a 'right to purchase.'" (Dkt. No. 200 at 5 of 7.) He states, "Is it not theft by deception to then add mandatory cash requirements totaling hundreds of thousands of dollars for the 'Right to Purchase'—even if they could be credited toward closing—since the Seller had NO INTENTION to close?" (Dkt. No. 200 at 2 of 7.) Hutson points to TLC's admission that "they had financially subsidized" the Big Water Resort "just to keep the gates open." (Dkt. No. 200 at 2 of 7.)

*13 Hutson asserts that TLC knew—as outlined in its January 2009 minutes—that the membership agreements "creat[ed] un-marketable title for home loans." (Dkt. No. 202 at 1 of 2; *see also* Dkt. No. 202-1.)⁵ According to Hutson, TLC found several buyers "who wanted to buy and develop the property into a condo subdivision," but these developers "found that TLC Holdings, LLC could not get marketable title." (Dkt. No. 200 at 2-3 of 7.) Hutson notes that Community Resource Bank had a "very large lien on all of the property for approximately two years," and each time Hutson asked Clark "if the title was now clear in order for Third Party Defendant to start making plans to acquire purchase contracts from potential Buyers to move toward closing," "[n]ever once did the

Seller or any of its agents inform the Buyer[] that clear title had been resolved.” (Dkt. No. 200 at 4 of 7.) Hutson contends he was required to close within 24 months, but he was “trapped and unable to close” because of the liens on the property. (*Id.*)

***14** Hutson asserts Third-Party Plaintiffs “intentionally held back and misrepresented critical information (ex.: sewer ...) and the sixty year obligation to family members for an exclusive right to use all property covered by the contract and improvements thereon.” (Dkt. No. 200 at 5 of 7.) Hutson contends he had seven months under the contract to “repave all private roads, parking lots and recreational vehicle (RV) parking spaces on the Premises,” but it was impossible to do so within seven months because “the municipalities would not approve any permanent asphalt roads” unless he was able to address the sewer issues. (Dkt. No. 200 at 5 of 7.)

According to Hutson, Third-Party Plaintiffs never had any plan to “actually sell” the property but that instead their “plan was to stage it so they could re-call the property.” (Dkt. No. 200 at 6 of 7.) He asserts that Third-Party Plaintiffs knew—“as far back as January 16, 2009”—that they could not sell real estate that was leased for an extended period of time. (Dkt. No. 200 at 6 of 7.) Hutson claims “theft” in that he “was not offered nor given” an “equitable interest” for accomplishments during [his] tenure on-site, which was appraised at over one million dollars ... WITHOUT the impact of the restaurant.” (Dkt. No. 200 at 6 of 7.)

As to contractual interference, Hutson asserts that attorney Thomas Harper, who was representing TLC, “contractually interfered, on behalf of TLC Holdings, LLC ... by contacting government approval agencies to slow down [Hutson’s] progress in acquiring approvals for the development project,” negatively impacting his “ability to close within the contract’s 24 months.” (Dkt. No. 200 at 6 of 7.)

Hutson asks this Court to “set aside paragraph 23 [of the Settlement Agreement] for it was designed to be a fraudulent buffer providing protection to TLC Holdings, LLC and it’s [sic] owners to carry out the criminal acts.” (Dkt. No. 192 at 3 of 4.)

Hutson’s claims for breach of contract; breach of contract accompanied by fraud; fraud and fraud in the inducement;

negligent misrepresentation; constructive fraud; breach of the covenant of good faith and fair dealing; and negligence, recklessness, wilfulness and wantonness all arise out of the Lease Purchase Agreement and Hutson’s dealings with TLC, Thigpen, Lovell, and Clark in purchasing the Big Water Resort. The Release plainly releases all claims against Third-Party Plaintiffs for claims that arose on December 11, 2013 or before. (See Dkt. No. 183-8 at 11 of 12.)

Hutson has not alleged fraud that took place after December 11, 2013, and there is accordingly no basis to set aside the Release.⁶ Most of the circumstances to which he now points (with the exception of his claim for defamation, discussed below) were raised in his counterclaim and third-party claim in the state court action, so he clearly had notice of these circumstances at the time he entered into the Settlement Agreement and Release. All of Hutson’s claims pertaining to fraud relate to the *original* transaction, *not the Release*. In other words, Hutson cannot set aside the Release because he has not made any showing that fraud induced him to enter into the Release. See *House v. Aiken Cnty. Nat’l Bank*, 956 F. Supp. 1284, 1291-92 (D.S.C. 1996) (granting motion to dismiss—treated as motion for summary judgment—without prejudice where “[t]he only issue before this Court is whether the release signed as a result of that previous settlement is invalid because of fraud, misrepresentation or like circumstances. Plaintiffs have failed to provide any evidence, other than their own conclusory allegations, that they were induced to enter into this release because of fraud or misrepresentation.”); see also *Hopkins v. Fidelity Ins. Co.*, 240 S.C. 230, 125 S.E.2d 468 (1962).

***15** Moreover, to establish fraud, Hutson would have to prove the following elements:

- (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer’s ignorance of its falsity; (7) the hearer’s reliance on its truth; (8) the hearer’s right to rely thereon;

and (9) the hearer's consequent and proximate injury.

Armstrong v. Collins, 366 S.C. 204, 218-19, 621 S.E.2d 368, 375 (Ct. App. 2005) (quoting *Regions Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 444-45 (Ct. App. 2003)). Although Hutson frequently contends he was defrauded, he has not clearly alleged the elements of fraud. For example, it is not clear upon what representation or representations he asserts he relied, nor is it clear such representation was false or that he had the right to rely on such representation(s).⁷

Although Hutson repeatedly asserts fraud, none of his assertions of fraud pertain to the Release. He is therefore is not entitled to set aside the Release. *See House*, 956 F. Supp. at 1291-92; *see also Hopkins*, 240 S.C. 230, 125 S.E.2d 468. Third-Party Plaintiffs are entitled to summary judgment on the following claims Hutson makes against them: breach of contract; breach of contract accompanied by fraud; fraud and fraud in the inducement; negligent misrepresentation; constructive fraud; breach of the covenant of good faith and fair dealing; and negligence, recklessness, wilfulness and wantonness.

4. Defamation

Hutson's claim for defamation requires a slightly different analysis, as the events giving rise to this claim occurred after execution of the Settlement Agreement and Release. At the hearing, Mr. Hutson clarified that the only basis for his defamation claim is the April 3, 2014 letter from TLC to "Members of the Big Water Resort Campground." (*See* Dkt. No. 77-17.) That letter provides, in relevant part,

Over the course of the past three (3) years, Mr. Hutson breached his obligations under the [Lease Purchase] Agreement in numerous respects. Those breaches began just months after he took over the property. For example, he failed to pay rents he owed to TLC Holdings, LLC, and taxes owing to Clarendon County that were his responsibility under the Agreement. He failed to pave or repave the roads as required by the Agreement, which would have been a benefit to everyone at the campground. At times, he failed to carry insurance that was necessary to protect the property and the club [that] operated on it. TLC Holdings, LLC has been forced to make tax payments and

insurance payments to protect the property that were Mr. Hutson's responsibility under the Agreement.

Beginning in 2011, TLC Holdings has endeavored to enforce the obligations of Mr. Hutson with regard to the campground. As a result of Mr. Hutson's breaches, TLC Holdings, LLC sued him in state court back in 2011. Mr. Hutson has vigorously resisted TLC Holdings' efforts to enforce his obligations. After protracted litigation in the state court, when TLC Holdings was finally on the verge of success in evicting Mr. Hutson from the property, Mr. Hutson then filed for bankruptcy on January 8th of this year, delaying for a few more months TLC Holdings' recovery of the property. For all these months that Mr. Hutson has resisted TLC Holdings' efforts to recover the property, he has continued the breaches of the Agreement that have hurt TLC Holdings, LLC, and the club members who have used the property.

*16 ...

As a result of TLC Holdings' successes in the state court and bankruptcy court, TLC Holdings, LLC is now finally in control of the campground property for the first time since December, 2010. Much has changed over those three years, and it appears that much work is needed....

Unfortunately, because the records recovered by TLC Holdings, LLC from Mr. Hutson are incomplete in some respects, we ask that you provide to us your understanding of your current status with regard to your membership agreement with Big Water Resort....

...
We understand that this protracted litigation may have confused or frustrated you. It certainly has us ...

(Dkt. No. 77-17.)

The undersigned recommends granting summary judgment as to Hutson's claim for defamation. "The tort of defamation allows a plaintiff to recover for injury to her reputation as the result of the defendant's communication to others of a false message about the plaintiff." *Holtzschneider v. Thomson Newspapers, Inc.*, 332 S.C. 502, 508, 506 S.E.2d 497, 501 (1998); *see also Parrish v. Allison*, 376 S.C. 308, 321, 656 S.E.2d 382, 389 (Ct. App. 2007) ("A communication is defamatory if it tends

to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating with him.” (citing *Holtzschetter*, 332 S.C. at 530, 506 S.E.2d at 513 (Toal, J., concurring)). As stated in *Parrish*,

To recover for defamation, the plaintiff must establish by a preponderance of the evidence, that there was (1) a false and defamatory statement by the defendant concerning the plaintiff; (2) an unprivileged communication; (3) fault on the defendant's part in publishing the statement; and (4) either actionability of the statement irrespective of special harm or the existence of special harm to the plaintiff caused by the publication.

Parrish, 376 S.C. at 320, 656 S.E.2d at 388 (citations omitted).

Hutson complained at the hearing that TLC stated he filed for bankruptcy but did not explain why he filed for bankruptcy. Because Hutson *did* file for bankruptcy, however, TLC's statement is true, and Hutson cannot prevail on a claim of defamation for such a statement. See *Fountain v. First Reliance Bank*, 398 S.C. 434, 442-44, 730 S.E.2d 305, 309-10 (2012). The same can be said of the other statements contained in the April 3, 2014 letter. The letter indicated that Mr. Hutson “failed to pay rents he owed to TLC Holdings, LLC and taxes owing to Clarendon County.” (Dkt. No. 77-17.) The Settlement Agreement in the State Court Action—which Mr. Hutson signed—indicated that Hutson was in arrearage to TLC in the amount of \$199,969.19. (See Dkt. No. 183-6 at 2 of 10.) Mr. Hutson stated in his deposition that he “didn't have enough money to pay the taxes on the property like [he] was supposed to.” (Hutson Dep. at 199; Dkt. No. 135.) As to the statement that Hutson failed to carry insurance, there is undisputed evidence in the record that Hutson did not always carry insurance. (See Clark Dep. at 21-22; Dkt. No. 134.) Similarly, as to the statement in the letter that Hutson failed to pave the roads, Hutson admitted that he did not pave the roads. (Hutson Dep. at 80, 82; Dkt. No. 135.) In the letter of April 3, 2014,

TLC states that Hutson “has continued the breaches of the [Lease Purchase] Agreement. (Dkt. No. 77-17.) Of course, that is exactly what Judge James found in the State Court Action in his Order dated March 20, 2014. (See Dkt. No. 183-8; Dkt. No. 183-8 at 6 of 12.) Because the undisputed evidence reveals that the statements of which Hutson complains were, in fact, true, Third-Party Plaintiffs are entitled to summary judgment as to Hutson's claim against them for defamation.

C. Motion for Summary Judgment (Dkt. No. 228)

*17 Hutson seeks summary judgment as to Third-Party Plaintiffs' claim against him for equitable indemnity. (See Dkt. No. 228.)⁸ As stated in *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999),

For a party to recover under a theory of equitable indemnification, three things must be proven: (1) the indemnitor was liable for causing the Plaintiff's damages; (2) the indemnitee was exonerated from any liability for those damages; and (3) the indemnitee suffered damages as a result of the Plaintiff's claims against it which were eventually proven to be the fault of the indemnitor.

Vermeer, 336 S.C. at 63, 518 S.E.2d at 307. Stated another way, in order for Third-Party Plaintiffs to recover pursuant to a theory of equitable indemnification, Third-Party Plaintiffs must prove that (1) Hutson “was liable for causing the Plaintiff's damages”; (2) Third-Party Plaintiffs were “exonerated from any liability for those damages”; and (3) Third-Party Plaintiffs suffered damages as a result of the Plaintiff's claims against [them] which were eventually proven to be the fault of” Hutson. See *Vermeer*, 336 S.C. at 63, 518 S.E.2d at 307.

In his written filings, Hutson asserts he is entitled to summary judgment on the claim for equitable indemnity because “Third Party Plaintiffs were sued by the Class due to broken promises and fraudulent behaviors by the Third Party Plaintiffs in the years prior to Third

Party Defendant's arrival." (Dkt. No. 251 at 16 of 20.) Hutson points to Judge Norton's Order of February 1, 2016 to support his position that Third Party Plaintiffs "convert[ed] the 'club' to a public club and allowed the public onto the property several years prior to 2011." (Dkt. No. 251 at 16 of 20.)

At the hearing, Hutson argued that he is entitled to summary judgment as to Third-Party Plaintiffs' claim for equitable indemnity because the Court can find as a matter of law that TLC is at fault for the circumstances "that we find ourselves here in today." Hutson asserted that TLC violated several South Carolina statutes by not recording the membership agreements or the "purported lease" between Big Water Resort and TLC—which he contends is negligence per se. Hutson argued that negligence per se is fault and that, as a matter of law, TLC is at fault and cannot prevail on its claim for equitable indemnity.

The undersigned recommends denying Hutson's Motion for Summary Judgment (Dkt. No. 228.) Hutson's arguments about Third-Party Plaintiffs' failure to record—while interesting—are red herrings. Even if TLC violated the South Carolina Code in failing to record the membership agreements and the lease between Big Water and TLC, this failure did not cause the Plaintiffs' damages. See *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Constr., LLC*, 413 S.C. 615, 619, 625-26, 776 S.E.2d 426, 428, 432 (Ct. App. 2015) (noting that the party seeking equitable indemnification (the general contractor Marick) "cannot recover for equitable indemnity" from Clear View (the subcontractor) "if [Marick] had any fault in causing Stoneledge's damages," where Stoneledge "brought this lawsuit seeking damages resulting from construction defects that allowed water into the townhomes" and "[t]wo of the construction defects alleged by Stoneledge related to the stonework performed by Clear View"). The crux of Plaintiffs' claim is that they were injured when the resort changed from a private resort to a public resort. Simply put, whether lease and the membership agreements were recorded had nothing to do with changing the resort from a private resort to a public resort. Whatever damages Hutson contends he suffered due to the failure to record, it is clear that the Plaintiffs suffered no damages.

*18 To the extent Hutson argues that Judge Norton's order of February 1, 2016 supports his position that it was Third-Party Plaintiffs who converted the club from

a private club to a public club, the undersigned finds no such support therein.⁹ The portion of the Order to which Hutson points provides,

The Defendants asserted numerous defenses arguing among other things that the conversion of the club to a public club was not a breach of contract and that the public was allowed onto the property several years prior to 2011 which would render all claims time barred by the statute of limitations.

(Dkt. No. 248 at 3 of 10.) The fact that Defendants pled the statute of limitations as a defense does not mean that they cannot also argue that Plaintiffs' damages were caused by a third party, as inconsistent defenses may be pleaded. See *FED. R. CIV. P. 8(d)(3)* ("A party may state as many separate claims or defenses as it has, regardless of consistency."); see also *Little v. Texaco, Inc.*, 456 F.2d 219, 220 (10th Cir. 1972) ("[A] defendant is at liberty to deny and at the same time advance an affirmative defense.").

Third-Party Plaintiffs contend that Hutson is the one who opened Big Water Resort up to the public, thereby causing Plaintiffs' damages, and Hutson contends Third-Party Plaintiffs opened Big Water Resort to the public, thereby causing Plaintiffs' damages. Who in fact opened the resort to the public—Third-Party Plaintiffs or Hutson—is a classic factual dispute;¹⁰ accordingly, Hutson's Motion for Summary Judgment as to the claim for equitable indemnity should be denied. See *Stoneledge*, 413 S.C. at 626, 776 S.E.2d at 432 ("Marick cannot recover for equitable indemnity if it had any fault in causing Stoneledge's damages. We have carefully examined the record in this case, and we cannot say as a matter of law Marick is at fault. Rather, we find the evidence is conflicting, and viewing the evidence in the light most favorable to Marick, the record contains evidence a factfinder could reasonably find supports the conclusion Marick was not at fault. Because of this conflicting evidence, the equitable indemnity cause of action must be remanded for a trial."). While Third-Party Plaintiffs "cannot recover for equitable indemnity if they had any fault in causing Plaintiffs' damages," because the evidence

of who is at fault is conflicting, Hutson's motion should be denied. *See id.* at 626, 776 S.E.2d at 432.

for Summary Judgment (Dkt. No. 183) be GRANTED, and that Third-Party Defendant's Motion for Summary Judgment (Dkt. No. 228) be DENIED.

IT IS SO RECOMMENDED.

CONCLUSION

*19 It is therefore RECOMMENDED, for the foregoing reasons, that Third-Party Plaintiffs' Motion for Sanctions (Dkt. No. 179) be DENIED. It is further RECOMMENDED that Third-Party Plaintiffs' Motion

All Citations

Not Reported in Fed. Supp., 2016 WL 7435620

Footnotes

1 Third-Party Plaintiffs are TLC Holdings, LLC; Richard Clark; James Thigpen; Jimmy "Steve" Lovell; and Ocoee, LLC (hereinafter "Third-Party Plaintiffs").

2 This motion was denied via text order on July 2, 2015. (Dkt. No. 145.)

3 To the extent Hutson attempts to have criminal charges brought against Thigpen, Lovell, and/or Clark, he cannot do so in the instant civil action. *See Sattler v. Johnson*, 857 F.2d 224, 227 (4th Cir. 1988) (rejecting argument that the plaintiff "had an enforceable right as a member of the public at large and as a victim to have the defendants criminally prosecuted," stating, "There is ... no such constitutional right...").

4 Hutson has counsel as to the claim against him for equitable indemnity. (See Dkt. No. 253.) Counsel does not represent Hutson as to Hutson's counterclaims against Third-Party Plaintiffs. (*Id.*)

5 Hutson knew about the membership agreements at the time he purchased the Big Water Resort. (See Dkt. No. 266-1 at 7 of 35; *see also* Dkt. No. 266-1 at 31-34 of 35.) Renee Roark was Hutson's realtor in connection with the purchase of Big Water Resort. (See Dkt. No. 266-1 at 4-7 of 15.) On November 11, 2010, Ms. Roark emailed Mr. Coffey of Coffey Chandler & Kent; that email stated, *inter alia*,

Attached is Susan's lifetime membership info. regarding Big Water camp ground. My buyer is concerned about the "life time" memberships and the impact they can have on the future development of the property. In other words, in your opinion, what is the easiest, legal way to terminate the lifetime memberships of Big Water? Will these memberships have an impact on obtaining clear title for the property?

(Dkt. No. 266-3 (emphasis added).) At the hearing, Mr. Hutson stated, "I knew that there were memberships, but I did not know, and was not ever told that the memberships created defective title." On the one hand, Hutson stated at the hearing that he knew there were memberships but "was told that they were annual," and on the other hand, he stated that he "asked Renee Roark if the ... lifetime memberships would affect the title." Hutson complained at the hearing that he never received an answer as to whether the lifetime memberships would have an impact on obtaining clear title. He also stated at the hearing that he bought Big Water Resort without looking at the books or business records. Furthermore, the Lease Purchase Agreement contained the following provision:

Purchaser shall, within ninety (90) days after the Effective Date, investigate Seller's title to the Premises and identify any exceptions to title which are not acceptable to Purchaser (any such exception being referred to herein as a "Title Exception"). Purchaser shall within ninety (90) days after the Effective Date provide Seller notice of any such Title Exception. If Purchaser does not notify Seller in writing of Title Exceptions within ninety (90) days after the Effective Date, then Purchaser shall be deemed to have accepted title to the Premises with all exceptions and conditions...

(Dkt. No. 266-6 at 5 of 34.) The "Effective Date" was in December of 2010. (See Dkt. No. 266-3 at 1, 25-27 of 34.) Hutson admitted at the hearing that he had access to the membership agreements within this ninety day period.

Hutson was also represented by an attorney—Andrew Tucker—in conjunction with his purchase of Big Water Resort. (See Dkt. No. 266-1 at 9-13 of 35.) At his deposition, Hutson stated that approximately four or five days after Christmas of 2010, he and Tucker "actually started reading some of the membership agreements." (Dkt. No. 266-1 at 15 of 35.) Hutson continued,

And lo and behold, I can't tell you why, [Tucker] never picked up on the fact that I was obligated, according to you, for 60 years, for each one of these people. Because if so, it would be—why—why bother to get a—a sales contract and charge me \$10–\$10,000 a month, when they know good and well that I can't develop, because I've got to keep this place as a whole for 60 years?

(Dkt. No. 266-1 at 15-16 of 35.) Hutson indicated that he and Tucker "sat at the table together and went over" the membership agreements before closing. (Dkt. No. 266-1 at 16 of 35.)

6 At the hearing, Hutson argued he was "misled" via "six direct fraudulent paths" and submitted a document laying out his arguments. (See Hutson Ex. 3.) The alleged misrepresentations which, according to Hutson, constitute fraud, are as follows:

(a) Big Water Resort has no known debt, when the campground was operating with an annual shortfall;

(b) The financial reports listed memberships as a "present net value" of over \$1.7 million, when they "were in fact a liability";

(c) "[T]here w[ere] no actions, suits, or proceedings, either at law or equity ... or to the knowledge of Sellers, threatened," where Third-Party Plaintiffs were aware of the threat of suit by the individuals who purchased membership agreements;

(d) "[The] Seller represents, warrants and covenants to Purchaser" that seller is "[i]n compliance with all laws, regulation and orders applicable to its business," where Third-Party Plaintiffs failed to record the membership agreements pursuant to [South Carolina Code § 27-33-30](#);

(e) Third-Party Plaintiffs had "[g]ood and marketable title" to all "properties and assets," where Big Water Resort "did not own any real estate"; and

(f) Third-Party Plaintiffs had "[g]ood and marketable title" where (1) the sellers "agreed to owner finance the purchase," as it "appeared from their willingness to owner finance that they were confident in the value of the property and the marketability of their title" and where (2) the sellers "agreed to be paid from the proceeds of the sale of condominiums and lots," as the sellers' "willingness to accept a percentage gave confidence that they had good and marketable title to the property."

(Hutson's Ex. 3.) All of these alleged "fraudulent paths" arise out of Hutson's purchase of the Big Water Resort; they do not pertain to the Release.

7 For example, Hutson indicates he asked Lovell and Clark—"right before [he] bought" Big Water—how much money the campground was making, and Hutson admits they said none. (See Dkt. No. 135 at 28, 83-84 of 328.) He complains, however, that TLC "didn't bother to tell [him] it was losing \$300,000 a year." (*Id.*)

8 From a reading of Hutson's motion, it is not entirely clear to the undersigned whether Hutson also seeks summary judgment as to his counterclaims against Third-Party Plaintiffs. (See Dkt. No. 228.) To the extent Hutson seeks summary judgment as to his counterclaims against Third-Party Plaintiffs, such a request should be denied because, as set forth above, Hutson's counterclaims against Third-Party Plaintiffs fail.

9 Hutson also asserts that Third-Party Plaintiffs "have agreed to pay damages/restitution to the Class Members because they are guilty of contract violations for the exclusivity of use to the Class Members." (Dkt. No. 251 at 17 of 20.) However, the Settlement Agreement contains no admission of liability. (See Dkt. No. 218-1.)

10 The record contains evidence that Big Water Resort was opened to the public before Hutson ever arrived. One of the named Plaintiffs in this case—Bonnie Youmans—testified at her deposition that in 2008 or 2009, she noticed that nonmembers were coming in off I-95 and staying for just one night; she indicated these people were not at the resort for a tour. (Youmans Dep. 14-15, 20; Dkt. No. 91-9.) Ms. Youmans testified that she, along with Linda Hudson and Frances McDonald, consulted an attorney in 2008 or 2009 about a possible class action. (Youmans Dep. 34-35; Dkt. No. 91-9.) Of course, the record also contains evidence that Hutson was the one who opened the resort to the public. On or about August 19, 2011, Hutson sent a letter to the "Members"; that letter stated, *inter alia* (verbatim),

Regarding the issue of taking in the public, please let us clear this up. The same as each member use to be (public prior to becoming a member) other outsiders who express an interest are being considered. The only difference is we allow perspective new members to visit our park under trial membership which allows us the opportunity to observe that potential member for longer yearly memberships. All new members will and do pay more money for each visit for campsites and cabin sites. Existing members will always pay far less. The new system will help with the financial growth of Big Water and provide opportunity for Big Water to offer more than ever, with your help and support....

(Dkt. No. 77-23 at 1-2 of 2.) Hutson testified during his deposition that Big Water began to "take every person that we could coming in from the public" about six months after his August 2011 letter (in other words, in early 2012). (Hutson Dep. at 320-21; Dkt. No. 126-1.) He also testified, however, that members complained to him about public access to the resort as early as five or six days after he arrived there. (Hutson Dep. 58-65, 88, 91; Dkt. No. 135.)

Exhibit B

2016 WL 2935891

Only the Westlaw citation is currently available.

United States District Court,
D. South Carolina, Charleston Division.

William Reed, Donna Reed, Bonnie
Youmans, Jane Yates, Phillip Caulder, all
individually and for the benefit and on behalf
of all others similarly situated, Plaintiffs,

v.

Big Water Resort, LLC; TLC Holdings, LLC;
Richard Clark; James Thigpen; Jimmy
"Steve" Lovell; and Ocoee, LLC, Defendants.
Big Water Resort, LLC; TLC Holdings, LLC;
Richard Clark; James Thigpen; Jimmy "Steve"
Lovell; Ocoee, LLC, Third-Party Plaintiffs,

v.

M.B. Hutson, a/k/a M.B.
Hudson, Third-Party Defendant.

No. 2:14-cv-01583-DCN

Signed 05/20/2016

ORDER

DAVID C. NORTON, UNITED STATES DISTRICT
JUDGE

*1 This matter is before the court on the following three motions: (1) a motion for sanctions filed by third-party plaintiffs Big Water Resort LLC, Richard Clark, Jimmy Lovell, James Thigpen, Ocoee LLC, and TLC Holdings LLC ("third-party plaintiffs") (ECF No. 179); (2) a motion for summary judgment filed by third-party plaintiffs (ECF No. 183); and (3) a motion for summary judgment filed by third-party defendant M.B. Hutson a/k/a M.B. Hudson ("Hutson") (ECF No. 228). Pursuant to the provisions of [Title 28 U.S.C. § 636\(b\)\(1\)](#) and Local Rule 73.02(B)(2)(e), the court referred all pretrial matters in this case, involving a *pro se* litigant, to United States Magistrate Judge Mary Gordon Baker. The magistrate judge conducted a hearing on the aforementioned motions on March 16, 2016 and submitted a report and recommendation ("R&R") to this court recommending that the court deny third-party plaintiffs' motion for sanctions, grant third-party

plaintiffs' motion for summary judgment, and deny Hutson's motion for summary judgment. For the reasons set forth below, the court adopts the R&R, denies third-party plaintiffs' motion for sanctions, grants third-party plaintiffs' motion for summary judgment, and denies Hutson's motion for summary judgment.

I. BACKGROUND

The plaintiffs are members of a putative class of over 1,000 individuals who purchased memberships in defendant Big Water Resort, LLC. Am. Compl. ¶¶ 40, 41. The Big Water Resort, LLC membership agreements ("membership agreements") grant plaintiffs "a right to use all...campground facilities and services" at Big Water Resort ("BWR"), a recreational campground and an accommodation located in Clarendon County, South Carolina and owned by TLC Holdings LLC. *Id.* ¶¶ 14, 79. Third-party plaintiffs Big Water Resort, LLC, TLC Holdings, LLC, Richard Clark ("Clark"), James Thigpen ("Thigpen"), and Jimmy "Steve" Lovell ("Lovell") allegedly had an interest in BWR in various capacities, fully set forth in the court's order on plaintiffs' motion to certify class. *Id.* ¶¶ 17, 19; see also ECF No. 193. Big Water Resort, LLC sold memberships from BWR's opening in 2003 until the it was transferred to third-party defendant Hutson in December 2010 through a lease-purchase agreement. Am. Compl. ¶¶ 70–72; Hutson Answer and Countercl. ¶ 5.

Plaintiffs make various allegations regarding this transfer. They allege that: (1) Big Water Resort, LLC was insolvent at the time of the transfer; (2) Hutson did not have the financial ability to continue its operations; and (3) there was no long term contract between defendant TLC Holdings, LLC—the owner of the property on which BWR is located—and Big Water Resort, LLC to ensure that members would have continued access to BWR. Am. Compl. ¶¶ 36, 38, 82. Following this transaction, the BWR became a public facility and Big Water Resort, LLC ceased operations. *Id.* ¶¶ 28, 82.

Plaintiffs, taking issue with this conversion, filed suit in this court on April 22, 2014. The disputes between plaintiffs and third-party defendants have been settled. The court entered an order granting preliminary approval of the class settlement. ECF No. 248. The final fairness hearing, during which the court considered whether to

finally approve the class action settlement, was held on May 16, 2016. The issues now before the court involve ancillary disputes between third-party plaintiffs and Hutson.

*2 In December 2011, TLC Holdings, LLC instituted an action against Hutson in the Court of Common Pleas for Clarendon County for “breach of the lease-purchase agreement, seeking damages and ejectment.” Third-Party Pls.’ Mot. Ex. 4. Hutson filed a third-party complaint against Clark, Lovell, and Thigpen. *Id.* at Ex. 5. The parties entered into a settlement agreement resolving the dispute on March 30, 2012. In this action, third-party plaintiffs allege that:

In March 2012, the parties to the lease-purchase agreement entered into a Settlement Agreement. The terms of the Settlement Agreement imposed many duties on [Hutson], including the duty to make certain improvements to the campground property and the duty to make certain payments to [TLC Holdings, LLC]. The Settlement Agreement was approved by consent order in April 2012.

Third-Party Defs.’ Answer ¶ 138; *see also* Ex. 6. Judge James approved the Settlement Agreement and incorporated it into a Consent Order in April 2012. Third-Party Pls.’ Mot. Ex. 7. Hutson defaulted on the March 2012 Settlement Agreement, and despite third-party plaintiffs notifying him of such default on numerous occasions, he did not cure the default. Third-Party Defs.’ Answer ¶¶ 139–40; *see also* Ex. 9. Third-party plaintiffs filed an affidavit of default in December 2013, and Hutson filed a “motion to set aside the affidavit of default and a motion for a temporary restraining order” in response. *Id.* ¶ 141; *see also* Third-Party Pls.’ Mot. Exs. 11–13. On March 23, 2013, Judge James declined to set aside the affidavit of default or issue a preliminary injunction and ruled that the March 2012 Settlement Agreement and April 2012 Consent Order should be enforced. *Id.* ¶ 144; *see also* Ex. 8. Judge James deemed the lease-purchase agreement terminated and ordered Hutson to vacate the property pursuant to the terms of the

settlement agreement. *Id.* In April 2014, Hutson vacated the property, at which time Clark, Lovell, and Thigpen resumed operation of BWR. *Id.* ¶ 145.

After plaintiffs filed suit in this court, third-party plaintiffs filed a third-party complaint against Hutson alleging that Hutson failed to operate BWR in a manner beneficial to the members. Defs.’ Answer, ECF No. 72, ¶ 133. Third-party plaintiffs allege that in December 2010, they sold their membership interests in Big Water Resort, LLC to Hutson pursuant to a lease-purchase agreement, making Hutson the sole member of the LLC. *Id.* ¶ 134. According to third-party plaintiffs’ complaint, the sale price was \$500,000.00, \$499,990.00 of which was payable under a promissory note executed by Hutson in favor of Clark, Lovell, and Thigpen. *Id.*; *see also* Defs.’ Mot. Summ. J., Ex. 2. They further allege that they “entered into a lease-purchase agreement with... Hutson,” under which third-party plaintiffs agreed to sell certain property to Hutson, including the land on which BWR was located. *Id.* ¶ 135; *see also* Ex. 3. Third-party plaintiffs contend that Hutson defaulted on both the promissory note and the lease-purchase agreement. *Id.* ¶ 136. Third-party plaintiffs bring a cause of action for equitable indemnity, alleging that Hutson’s actions during his control of the BWR exposed them to potential liability. *Id.* ¶¶ 146–50. Third-party plaintiffs further allege that they “have incurred, and may continue to incur, expenses necessary to protect their interest in defending the claims brought by the members of the [BWR] campground.” *Id.* ¶¶ 147, 150. According to the allegations in the complaint, “an obligation in equity exists on...Hutson to indemnify [third-party plaintiffs].” *Id.* ¶ 148.

*3 Hutson answered the third-party complaint and filed counterclaims against third-party plaintiffs. ECF No. 75. In his pleadings, Hutson explains how BWR came to be open to the public. He alleges that in early 2011, he contacted Clark “asking permission to convert the beautiful recreational building, known as the Clubhouse, into a public restaurant.” Hutson Answer ¶ 8. As a result of this conversion, members “would no longer have open, free access to that former recreational building as presented in their membership agreement. The restaurant was to be open to the public and all incoming business was required to pay for their meals.” *Id.*

Hutson alleges that after learning about the property from a real estate agent, he met with Clark and Lovell, who

told Hutson that if he purchased three tracts of land, he “would also be required to purchase the rights to approximately 700 existing club memberships.” *Id.* ¶¶ 51–54. Hutson alleges that when he asked Clark and Lovell how much the campground lost and profited, “[t]heir response was that it was not making a profit yet but had much potential.” *Id.* ¶ 55. Hutson further alleges that prior to purchasing the rights to club memberships and the option to purchase the real property, he told third-party plaintiffs that he intended to develop the property for sale to the public. *Id.* ¶ 56. Hutson alleges that third-party plaintiffs understood his desire to develop the property and never indicated that he would be prohibited from doing so by the terms of the membership agreements or otherwise. *Id.* Hutson alleges that after he moved onto the property, he discovered that there was only approximately \$5,000.00 in the club's existing checking account. *Id.* ¶ 57. According to Hutson, he soon realized that there was not enough income to properly operate and maintain the campground. *Id.* Hutson alleges that he had no choice but to let go approximately 90% of the employees, cut back on the telephone lines, change insurance companies, and use part-time employees. *Id.* ¶ 58. Clark suggested that Hutson raise the membership fees drastically, which would encourage members to drop their memberships and allow Hutson to seek business from the general public. *Id.* ¶¶ 60–65. Thereafter, Hutson raised member fees, and members began to drop their memberships and threatened to file a class-action lawsuit. *Id.* ¶ 66.

Hutson alleges that prior to his involvement with BWR, third-party plaintiffs allowed the public to access the campground. *Id.* ¶ 70. Hutson alleges that he eventually realized that third-party plaintiffs intended to use him as a scapegoat after collecting millions of dollars from lifetime club members. *Id.* ¶ 71. Hutson claims that third-party plaintiffs intentionally misled him and failed to disclose pertinent information, putting him in an impossible situation that prevented him from developing the property. *Id.* ¶ 72. Hutson alleges that third-party plaintiffs failed to disclose the exclusive nature of the memberships, BWR's yearly losses of \$250,000.00, the lack of sufficient reserves or income for proper maintenance of the resort club, the fact that local authorities imposed a sewer moratorium on the property, and the fact that BWR was subject to large charges by the utility company. *Id.* ¶ 73. Hutson claims that third-party plaintiffs' actions caused him to become financially destitute and forced him to file for bankruptcy. *Id.* ¶ 76.

Hutson also alleges that third-party plaintiffs defamed him and caused him duress and mental anguish. *Id.* ¶ 76–77. Hutson brings the following counterclaims: (1) breach of contract; (2) breach of contract accompanied by fraud; (3) fraud and fraud in the inducement; (4) negligent misrepresentation; (5) constructive fraud; (6) breach of the covenant of good faith and fair dealing; (7) negligence, recklessness, willfulness, and wantonness; and (8) defamation.

*4 On September 3, 2015, third-party plaintiffs filed a motion for sanctions against Hutson. On September 9, 2015, third-party plaintiffs filed a motion for summary judgment. Hutson filed a response in opposition to the motion for sanctions on September 11, 2015, and an amended response that same day. On September 14, 2015, Hutson filed another response in opposition to the motion for sanctions and a response in opposition to the motion for summary judgment. Hutson filed an additional response to both motions on September 29, 2015. Third-party plaintiffs replied on October 8, 2015, and Hutson filed a sur-reply on October 13, 2015. Hutson filed a motion for summary judgment on third-party plaintiffs' equitable indemnity claim on January 6, 2016. Third-party plaintiffs filed a response in opposition on January 25, 2016, and Hutson replied on February 5, 2016. Hutson filed a second reply on February 10, 2016. The magistrate judge held a hearing on all pending motions on March 16, 2015. On April 5, 2016, the magistrate judge issued an R&R, recommending that the court deny third-party plaintiffs' motion for sanctions, grant third-party plaintiffs' motion for summary judgment, and deny Hutson's motion for summary judgment. Hutson and his counsel—representing him on the equitable indemnity claim only—filed objections to the R&R. Third-party plaintiffs did not file objections to the R&R, but they filed a reply to Hutson's objections on May 9, 2016. The motions have been fully briefed and are ripe for the court's review.¹

II. STANDARD

This court is charged with conducting a *de novo* review of any portion of the magistrate judge's report to which specific, written objections are made, and may accept, reject, or modify, in whole or in part, the recommendations contained in that report. 28 U.S.C. § 636(b)(1). The magistrate judge's recommendation does

not carry presumptive weight, and it is the responsibility of this court to make a final determination. Mathews v. Weber, 423 U.S. 261, 270–71 (1976). A party's failure to object may be treated as agreement with the conclusions of the magistrate judge. See Thomas v. Arn, 474 U.S. 140, 150 (1985).

Summary judgment shall be granted “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). “By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Id. at 248. “[S]ummary judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Id.

“[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Id. at 249. When the party moving for summary judgment does not bear the ultimate burden of persuasion at trial, it may discharge its burden by demonstrating to the court that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The non-movant must then “make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” Id. at 322. The court should view the evidence in the light most favorable to the non-moving party and draw all inferences in its favor. Anderson, 477 U.S. at 255.

III. DISCUSSION

A. Third-Party Plaintiffs' Motion for Summary Judgment

Third-party plaintiffs argue that the court should grant their motion for summary judgment because Hutson's counterclaims are barred by the doctrine of res judicata

in light of the Settlement Agreement incorporated into Judge James's 2012 Consent Order in the state court action. Third-Party Pls.' Mot. 7. The R&R recommends that the court grant third-party plaintiffs' motion and hold that Hutson's claims for breach of contract, breach of contract accompanied by fraud, fraud and fraud in the inducement, negligent misrepresentation, constructive fraud, breach of the covenant of good faith and fair dealing, and negligence, recklessness, willfulness, and wantonness are barred by the release Hutson executed in settling the state court action. R&R 14–15. Hutson objects to the magistrate judge's recommendation, arguing that an exception to the doctrine of res judicata applies because the release was procured by fraud. Third-Party Def.'s Obj. 17–20.

*5 “+The doctrine of res adjudicata (or res judicata) in the strict sense of that time-honored Latin phrase had its origin in the principle that it is in the public interest that there should be an end of litigation and that no one should be twice sued for the same cause of action.’ +” S.C. Dep't of Soc. Servs. v. Basnight, 551 S.E.2d 274, 278 (S.C. Ct. App. 2001) (quoting First Nat'l Bank of Greenville v. U.S. Fid. & Guar. Co., 35 S.E.2d 47, 56 (S.C. 1945)). Res judicata, or claim preclusion, bars litigation of claims that were litigated or could have been litigated in an earlier suit. Nevada v. United States, 463 U.S. 110, 130 (1983); Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C., 362 S.E.2d 176, 177 (S.C. 1987). To determine the preclusive effect of a state court judgment, federal courts look to state law. Allen v. McCurry, 449 U.S. 90, 95–96 (1980); Laurel Sand & Gravel, Inc. v. Wilson, 519 F.3d 156, 161–62 (4th Cir. 2008). In South Carolina, res judicata requires proof of three elements: (1) “a final, valid judgment was entered on the merits of the first suit”; (2) “the parties to both suits are the same”; and (3) “the subsequent action involves matters properly included in the first action.” Judy v. Judy, 677 S.E.2d 213, 217 (S.C. Ct. App. 2009).

As stated above, in December 2011, third-party plaintiffs instituted an action against Hutson in the Court of Common Pleas for Clarendon County for “breach of the lease-purchase agreement, seeking damages and ejectment.” Third-Party Pls.' Mot. Ex. 4; TLC Holdings, LLC v. M.B. Hudson, a/k/a M.B. Hutson, Civ. A. 2011-co-14-602 (hereafter “state court case”). Hutson filed counterclaims against TLC Holdings, LLC and a third-party complaint against Clark, Lovell, and Thigpen. Third-Party Pls.' Mot. Ex. 5, Hutson Answer. Hutson

alleged that third-party plaintiffs “**knew** that defects existed in regard to the premises,” including that a moratorium was imposed on the property for sewer installation and of the large utility bills. *Id.* Ex. 5 at 7, 14. Hutson further alleged that third-party plaintiffs “made misrepresentations to [Hutson] or otherwise concealed relevant and material statements of facts regarding the condition, usefulness, and ability to develop the property.” *Id.* at 12. According to Hutson's third-party complaint, third-party plaintiffs interfered with his development of the property by notifying Clarendon County of the pending litigation in an attempt to hinder and delay Hutson's performance under the lease-purchase agreement. *Id.* ¶ 85. Hutson further alleged that he should be given an equitable interest in the property because of the improvements made thereon. *Id.*

On March 30, 2012, Hutson and TLC Holdings, LLC signed a settlement agreement (“Settlement Agreement”) resolving the dispute. Third-Party Pls.’ Mot. Ex. 6. Although the other third-party plaintiffs did not sign the Settlement Agreement, its provisions provide:

This Settlement Agreement shall be incorporated into a Consent Order (the “Consent Order”) entered in the above-referenced case (the “Litigation”). Although Richard U. Clark, Jimmy S. Lovell and James C. Thigpen are parties to this Settlement Agreement by virtue of being parties to the [Lease Purchase] Agreement, and are named as Third Party Defendants in the Litigation, they have not been served with the pleadings in the Litigation and shall not be deemed to have appeared in the Litigation by their execution of this Settlement Agreement. This Settlement Agreement shall be binding upon all of the undersigned parties even though Richard U. Clark, Jimmy S. Lovell and James C. Thigpen have not appeared in the Litigation and are not parties to the Consent Order.

Id. The Settlement Agreement further provides:

Pursuant to the Consent Order, in the event that Mr. Hudson fails to comply with the terms of the Settlement Agreement, unless such failure is a direct and proximate result of TLC's failure to perform an action expressly required of it in this Settlement Agreement, time being of the essence, then the Plaintiff is entitled to the following immediate relief, without further notice of the court or notice to Defendant or his attorney: (a) termination of the [Lease Purchase] Agreement, (b) cancelation [sic] of the lis pendens filed by Hudson in this action, (c) immediate vacation of the Property by Mr. Hudson except for his personal residence, which shall be vacated within 15 days, enforceable by the Clarendon County Sheriff; and (d) the provisions of Section 23 shall be effective. Prior to any such default by Hudson hereunder, the parties acknowledge that the Lease remains in full force and effect in accordance with its terms, as modified by this Settlement Agreement, and during the Primary Term (as may be extended as provided herein), Hutson shall have full possession of the Property in accordance with, and subject to, the terms of the Lease as modified by this Settlement Agreement.

*6 *Id.* at 2 (emphasis added).

Section 23 of the Settlement Agreement, titled “Release,” provides as follows:

As a material consideration of this Settlement Agreement, in the event

of the termination of the [Lease Purchase] Agreement pursuant to Section 4 above as a result of Hudson[s] breach hereof, then automatically and without further action of the parties, as of the date of such termination (the "Termination Date"), Hudson shall be deemed to have released, forever discharged and promised never to sue TLC, Richard U. Clark, Jimmy S. Lovell, and James C. Thigpen, and their respective agents, attorneys, insurance companies, parent companies, subsidiaries, affiliates, predecessors, successors, or assigns (together, the "TLC Parties"), from any and all injuries, personal or property, known or unknown, causes of action, demands, warranty claims, damages, suits at law or in equity, of whatsoever kind and nature, or because of any matter or thing done, omitted or suffered to be done, by the TLC Parties, prior to and including the Termination Date, on account of all injuries and damages, including attorneys' fees and litigation expenses, arising from the Lease or the relationship between Hudson, on the one hand, and TLC, Richard U. Clark, Jimmy S. Lovell, and James C. Thigpen, on the other hand, and any causes of action, known or unknown, relating to the Lease, including any and all claims alleged, or which could have been alleged, in the Litigation.

Id. at 6–7 (emphasis added).

Judge James entered a Consent Order on April 12, 2012 approving the Settlement Agreement and incorporating it into the Consent Order by reference. Third-Party Pls.' Mot. Ex. 7. By December 31, 2012, Hutson was in default of the provisions of the Settlement Agreement. *Id.* at Ex. 8, 4. After sending numerous default letters to Hutson,

TLC Holdings, LLC filed an affidavit of default, signed by Clark. *Id.* at Ex. 11. In response, Hutson filed a motion to set aside the affidavit of default and a motion for a restraining order against TLC Holdings, LLC. *Id.* at Exs. 12, 13. Judge James held a hearing on these motions on January 8, 2014.

On March 20, 2014, Judge James entered an order in which he found that Hutson had breached several provisions of the Settlement Agreement. *Id.* at Ex. 8, at 6. Judge James's order further stated that pursuant to the express terms of the Consent Order, Hutson defaulted as of the filing date of the affidavit of default on December 11, 2013, resulting in a termination of the lease-purchase agreement and his immediate vacation of the property, except his personal residence thereon, which he was required to vacate within fifteen days. *Id.* at 9. In light of Hutson's default and the terms of the Settlement Agreement, Judge James's order deemed Hutson to have granted "the TLC Release to the TLC Parties, as set forth more fully in Section 23 of the Settlement Agreement." *Id.* at 11–12.

Judge James's order is plainly a final judgment on the merits of the state court case. Further, it is clear that Hutson's counterclaims for breach of contract, breach of contract accompanied by fraud, fraud and fraud in the inducement, negligent misrepresentation, constructive fraud, breach of the covenant of good faith and fair dealing, and negligence, recklessness, willfulness, and wantonness fall within the broad, express language of the Settlement Agreement and its Release provision. The state court action involved the same parties currently before the court, although not named in the caption, and the Settlement Agreement was binding on all of the parties. Lastly, the state court action involves matters that are now before the court that were, or could have been, brought by Hutson.

*7 Hutson's objections, construed broadly, do not appear to object to the magistrate judge's finding that the Settlement Agreement and the Release, incorporated into the state court order, encompass his present counterclaims against third-party plaintiffs. Nor does Hutson object to the magistrate judge's finding that the principles of res judicata apply. Rather, Hutson argues that the Release is unenforceable. Specifically, Hutson argues that he could not have pursued a claim for fraud in the state court action because he did not have knowledge upon which to raise

the claim until after he signed the Settlement Agreement. Third-Party Def.'s Obj. 20–21. Hutson specifically points to Lovell's deposition and meeting minutes from a January 2009 meeting to support his claims that he did not have knowledge of the alleged fraudulent conduct. *Id.* Hutson additionally argues that the Release and Settlement Agreement should be set aside for public policy reasons. *Id.* at 21–30.

Although Hutson contends that the alleged fraud was ongoing, he does not point to any alleged fraudulent conduct that took place after December 11, 2013.² There is no dispute that Hutson **knew** about the “life time” membership agreements when he purchased BWR. See Third-Party Def.'s Obj. 20; see also Third-Party Pls.' Reply, Ex. 3 (email from Hutson's real estate agent expressing his concerns about the effect of the life time membership agreements).³ The Release clearly releases all claims against third-party plaintiffs that arose on or prior to December 11, 2013, the date on which third-party plaintiffs filed the Affidavit of Default.

Further, all of Hutson's claims of fraud relate to the original transaction and not the procurement of the Release. Hutson was represented by an attorney in the underlying state court action and was therefore presumably advised of the application and effect of the Release. See *House v. Aiken Cty. Nat. Bank*, 956 F. Supp. 1284, 1291 (D.S.C.) (“[T]hey have failed to produce an affidavit or statement from the attorney who represented them in the former litigation, any documents to show they were not fully informed or advised as to the content of the settlement of that previous litigation, or any other evidence sufficient to raise a genuine factual dispute as to this issue. Plaintiff's conclusory allegations, without more, are insufficient to provide evidence of fraud or to defeat a properly supported motion for summary judgment.”). Hutson has failed to provide any evidence whatsoever of fraud in the procurement of the Release. Therefore, there is no basis to set aside the Release. See *House*, 956 F. Supp. at 1292 (“Plaintiffs have failed to provide any evidence, other than their own conclusory allegations, that they were induced to enter into this release because of fraud or misrepresentation.”).

*8 Hutson also makes various public policy arguments for his assertion that the Release should be set aside, including that public policy disfavors releases procured by fraudulent conduct, there was a disparity in bargaining

power, and there was no meeting of the minds between the parties. Third-Party Def.'s Obj. 21–28. Again, all of Hutson's allegations of fraud relate to the original transaction and not the procurement of the Release. Further, as stated above, Hutson was represented by counsel in the state court action. The Settlement Agreement and Release were reviewed by an impartial judge and incorporated into his order. There is absolutely no indication that Hutson held an unfair bargaining position. Further, although Hutson continues to argue that he did not have sufficient knowledge to form a binding contract, all of the evidence on the record points to the contrary. Hutson made the same allegations of third-party plaintiffs' fraudulent misrepresentations in the state court action that were thereafter released by the Settlement Agreement. See Third-Party Pls.' Mot. Ex. 8 at 2. Therefore, Hutson's public policy arguments also fail.

Thus, the court grants third-party plaintiffs' motion for summary judgment as to Hutson's claims for breach of contract, breach of contract accompanied by fraud, fraud and fraud in the inducement, negligent misrepresentation, constructive fraud, breach of the covenant of good faith and fair dealing, and negligence, recklessness, willfulness, and wantonness.⁴

B. Third-Party Defendant's Motion for Summary Judgment

Hutson seeks summary judgment as to third-party plaintiffs' equitable indemnity claim. ECF No. 228. The magistrate judge recommends that the court deny Hutson's motion for summary judgment because the third-party plaintiffs' alleged failure to record the membership agreements did not cause the damage of which plaintiffs complain. R&R 30–35. Hutson objects to the magistrate judge's recommendation, arguing that the magistrate judge defines plaintiffs' damages too narrowly.⁵ Third-Party Def.'s Obj. 7.

“The law of equitable indemnification allows recovery of expenses when the act of the wrongdoer involves the innocent defendant in litigation or places him in such relation with others as makes it necessary to incur expenses to protect his interest.” *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 518 S.E.2d 301, 305 (S.C. Ct. App. 1999). Third-party plaintiffs must prove the following three things to recover against Hutson for equitable indemnification: (1) Hutson was liable for

causing plaintiffs' damages; (2) third-party plaintiffs were exonerated from any liability for those damages; and (3) third-party plaintiffs suffered damages as a result of the plaintiffs' claims against it which were eventually proven to be Hutson's fault. *Id.* at 307.

Hutson argues that third-party plaintiffs' "failure to record the membership agreements and the alleged lease between TLC and BWR is negligence *per se* which is fault and, as a matter of law, TLC cannot prevail on its claim for equitable indemnity." Third-Party Def.'s Obj. 6. Hutson argues that the plaintiffs' damages all arise out of third-party plaintiffs' failure to record the membership agreements. However, not all of plaintiffs' alleged damages relate to third-party plaintiffs' failure to record the membership agreements. Most notably, plaintiffs allege that the public was allowed to access BWR in violation of the membership agreements. There is evidence on the record the BWR was opened to the public prior to Hutson's involvement. See Youmans Dep. 14:11–15:11, ECF No. 91, Ex. 9. On the other hand, there is also evidence that Hutson opened the resort to the public. See Mot. to Certify Class, Ex. 23 Hutson letter to members; see also Hutson Dep. 320:18–32:25, ECF No. 126 ("QUESTION: And about six months later, sometime in 2012, because of the financial condition that – that you inherited this – this club in, you opened it up to the general public as an at-large; isn't that right? ANSWER: We always took the members. But we would take every person that we could coming in from the public. We didn't have no [sic] choice.").

*9 Third-party plaintiffs cannot recover for equitable indemnity if they had any fault in causing plaintiffs' damages. See *Walterboro Cmty. Hosp. v. Meacher*, 709 S.E.2d 71, 74 (S.C. Ct. App. 2011) ("The most important requirement for...equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault." (citation

omitted)); *Vermeer*, 518 S.E.2d at 307 ("[T]here can be no [equitable] indemnity among mere joint tortfeasors."). The court cannot say as a matter of law who is at fault, and there is evidence in the record—when viewed in the light most favorable to the third-party plaintiffs as the nonmoving parties—from which a jury could determine that Hutson caused the plaintiffs' damages. There is a genuine issue of material fact as to who opened BWR to the public, thereby causing plaintiffs' alleged damages. The court agrees with the magistrate judge that this dispute cannot be resolved at the summary judgment stage. Because there is conflicting evidence of who is at fault in causing plaintiffs' damage, Hutson's motion for summary judgment is denied. See *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC*, 776 S.E.2d 426, 432 (S.C. Ct. App. 2015) ("[W]e find the evidence is conflicting, and viewing the evidence in the light most favorable to [the nonmoving party], the record contains evidence a factfinder could reasonably find supports the conclusion [the nonmoving party] was not at fault. Because of this conflicting evidence, the equitable indemnity cause of action must be remanded for a trial.").

IV. CONCLUSION

For the foregoing reasons, the court **ADOPTS** the R&R, **DENIES** third-party plaintiffs' motion for sanctions, **GRANTS** third-party plaintiffs' motion for summary judgment, and **DENIES** third-party defendant's motion for summary judgment.

AND IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2016 WL 2935891

Footnotes

- 1 Hutson did not object to the magistrate judge's recommendation that the court grant third-party plaintiffs' motion as it pertains to the defamation claim. Further, third-party plaintiffs did not file objections. After reviewing the record *de novo*, the court adopts the R&R as it pertains to third-party plaintiffs' motion for sanctions and motion for summary judgment as to Hutson's defamation claim. Accordingly, the court denies the motion for sanctions and dismisses Hutson's defamation claim.
- 2 Section 23 of the Settlement Agreement provides that in the event of Hutson's default, as of the date of the termination of the lease-purchase agreement, "Hutson shall be deemed to have released, forever discharged, and promised never to sue" third-party plaintiffs. Third-Party Pls.' Mot. Ex. 6, at 7. Judge James's order provided that, effective upon the

filing of the Affidavit of Default on December 11, 2013, third-party plaintiffs remained entitled to the relief set forth in the Settlement Agreement. See Judge James's Order, Third-Party Pls.' Mot. Ex. 8, at 9; see also Consent Order, Ex. 7, at 2–3. The order also states that Hutson is deemed to have granted the Release as set forth in the Settlement Agreement. Id. at 10. Therefore, the court uses the date of the filing of the Affidavit of Default as the date of termination to trigger the Release provision.

- 3 The R&R extensively outlines Hutson's allegations as set forth in his many filings with this court. See R&R 22–25. The R&R also provides the lengthy basis of Hutson's knowledge of the underlying allegations of fraud prior to signing the Release, as set forth in his own filings and representations made to the court during various hearings. Id. The court has reviewed the magistrate judge's representations of the allegations and Hutson's respective knowledge thereof and finds no error. Because the R&R provides a comprehensive outline of Hutson's allegations and his knowledge of the alleged fraud, the court does not find it necessary to regurgitate that information in this order and will refer the parties to the R&R for further discussion thereof.
- 4 The magistrate judge did not find that the Settlement Agreement and Release applied to Hutson's defamation claim because his allegations of defamation occurred after December 11, 2013. R&R 27. However, the R&R recommends that the court grant third-party plaintiffs' motion for summary judgment as to Hutson's defamation claim because “the undisputed evidence reveals that the statements of which Hutson complains were, in fact, true....” R&R 30. In his objections, Hutson states that he “would not object to a dismissal without prejudice on the defamation claim as he will pursue it in state court.” Third-Party Def.'s Obj. 30. After reviewing the R&R de novo, the court agrees with the magistrate judge that third-party plaintiffs are entitled to summary judgment as to Hutson's defamation claim because the alleged defamatory statements are true. Therefore, the court also grants third-party plaintiffs' motion for summary judgment as to Hutson's defamation claim.
- 5 Hutson has an attorney who represents him only on the equitable indemnification claim. His attorney submitted objections on his behalf that relate only to the magistrate judge's recommendation as to the equitable indemnity claim. However, Hutson's objections to the magistrate judge's other recommendations were filed pro se.

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Exhibit C

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

IN THE COURT OF COMMON PLEAS
Civil Action No. 2015-CP-14-0615

TLC Holdings, LLC, Richard Clark, and
Jimmy S. Lovell,

Plaintiffs,

vs.

M. B. Hutson a/k/a M. B. Hudson,

Defendant.

**ORDER GRANTING
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AS TO
DEFENDANT'S COUNTERCLAIMS**

BEULAH
CLERK OF COURT
CLARENDON COUNTY, SC
2017 MAR 2 PM 059

This matter is before the Court upon the motion of Plaintiffs TLC Holdings, LLC, Richard Clark, and Jimmy S. Lovell for summary judgment as to Defendant M. B. Hutson a/k/a M. B. Hudson's counterclaims. For the reasons set forth below, the Court grants Plaintiffs' motion.

BACKGROUND

This case arises from events related to the Big Water Resort campground ("Big Water"), which is located on the shores of Lake Marion in Clarendon County, South Carolina. Big Water provides campsites, cabins, pools, clubhouse, beach access, boat launch/storage, etc. Big Water began operation in 2003 and memberships were sold from 2003 until sales activities ended in 2010.

Prior to December 31, 2010, the three members of Big Water Resort, LLC,¹ were Richard Clark, Steve Lovell, and James Thigpen. Thigpen served as managing member until June 2008, at which time Steve Lovell became the managing member. In December 2010, Plaintiffs Clark and Lovell, along with Thigpen, sold their membership interests in Big Water Resort, LLC to

¹ Big Water Resort, LLC was the entity that operated the campground.

Defendant M. B. Hutson a/k/a M. B. Hudson, making Hutson the sole member of that LLC. The sales price was \$500,000, of which \$499,990 was payable under a promissory note ("Note") executed by Hutson in favor of Clark, Lovell, and Thigpen. (Ex. A to Plaintiffs' Memorandum in Support of their Motion for Summary Judgment.) At the same time, TLC Holdings, LLC, Clark, Lovell, and Thigpen entered into a lease-purchase agreement ("Lease-Purchase Agreement") with Hutson, under which TLC Holdings, Clark, Lovell, and Thigpen agreed to sell certain property to Hutson. (Ex. B to Plaintiffs' Memorandum.) This property included the land on which the Big Water Resort campground was located. Hutson also executed a pledge agreement in favor of Clark, Lovell, and Thigpen as security for the transaction. (Ex. C to Plaintiffs' Memorandum, Pledge Agreement.) Hutson ultimately defaulted on both the Note and the Lease-Purchase Agreement.

In December 2011, TLC Holdings, LLC instituted an action in Clarendon County Court of Common Pleas against Hutson for breach of contract, seeking damages and ejectment. (Ex. D to Plaintiffs' Memorandum, State Court Summons and Complaint.) Hutson answered and asserted several counterclaims against TLC Holdings and also filed a third-party complaint against Clark, Lovell, and Thigpen. (Ex. E to Plaintiffs' Memorandum, Hutson Answer and Third-Party Complaint.) On March 30, 2012, the parties to the Lease-Purchase Agreement (TLC Holdings, LLC, Clark, Lovell, Thigpen, and Hutson) entered into a Settlement Agreement. (Ex. F to Plaintiffs' Memorandum, Settlement Agreement.) The terms of the Settlement Agreement imposed many duties on Hutson, including the duty to make certain improvements to the campground property and the duty to make certain payments to Plaintiff TLC Holdings, LLC. The Settlement Agreement provided, in part, that a breach by Hutson would terminate the Lease-Purchase Agreement, would require Hutson to vacate the property, and would operate as a

release by Hutson of any and all claims he had against Plaintiffs, whether or not alleged in that lawsuit. *Id.* Hutson was represented by counsel in connection with the negotiation of the settlement agreement. The Settlement Agreement was approved by, and incorporated into, a consent order signed by the Honorable George C. James, Jr. in April 2012 (Ex. G to Plaintiffs' Memorandum, Consent Order).²

By December 31, 2012, Hutson had breached the Settlement Agreement in numerous respects. (Ex. H to Plaintiffs' Memorandum, Judge James' Order, p. 4.) Counsel for Clark, Lovell, and TLC Holdings notified Hutson in February 2013 that he was in default of the Lease-Purchase Agreement and Settlement Agreement. (Ex. I to Plaintiffs' Memorandum, Feb. 2013 Default Letter.) Hutson did not cure the defaults. (Ex. H to Plaintiffs' Memorandum, p. 5.)

TLC Holdings, LLC sent Hutson another default letter in December 2013, notifying him that he had failed to cure the defaults outlined in the February 2013 default letter and that they would proceed with filing an affidavit of default. (Ex. J to Plaintiffs' Memorandum, Dec. 2013 Default Letter.) TLC Holdings subsequently filed the affidavit of default, which was signed by Clark. (Ex. K to Plaintiffs' Memorandum, Affidavit of Default.) In response, Hutson filed a motion in Clarendon County Court of Common Pleas to set aside the affidavit of default and a motion for a temporary restraining order against TLC Holdings, LLC. (Ex. L to Plaintiffs' Memorandum, Motion to Set Aside Affidavit; Ex. M to Plaintiffs' Memorandum, Motion for TRO.) The court granted the temporary restraining order, which prevented TLC Holdings from pursuing further proceedings arising from its issuance of an affidavit of default.

² Because Clark, Lovell, and Thigpen were not made parties to that action due to Hutson's failure to serve them in that action, the Consent Order was between only TLC Holdings, LLC and Hutson. (Ex. G to Plaintiffs' Memorandum, p. 2.) Clark, Lovell, and Thigpen were parties to the Settlement Agreement, however.

A hearing on these motions was held on January 8, 2014 before Judge James. During or immediately prior to this hearing, which Hutson did not attend, Hutson filed a Chapter 11 bankruptcy petition, which automatically stayed the state court proceedings. (Ex. H to Plaintiffs' Memorandum, p. 6.) In February 2014, the Bankruptcy Court granted relief to TLC Holdings, LLC from the automatic stay so that Judge James could determine whether Hutson had any interest in the property that is the subject of the Lease-Purchase Agreement, as of the date of filing the bankruptcy petition. (Ex. H to Plaintiffs' Memorandum, p. 6.)

After a hearing on March 6, 2014, regarding these issues, Judge James issued an order on March 20, 2014, in which he declined to set aside the affidavit of default or issue a preliminary injunction and ruled that the March 2012 Settlement Agreement and April 2012 Consent Order should be enforced. (Ex. H to Plaintiffs' Memorandum, pp. 8-9.) Specifically, he ordered that the Lease-Purchase Agreement was terminated and that Hutson was required to vacate the property. (Ex. H to Plaintiffs' Memorandum, pp. 9-10.) Hutson vacated the property in late March 2014.

In the midst of TLC Holdings' efforts to evict Hutson from the property, he made numerous statements about Plaintiffs, which statements Plaintiffs allege are defamatory, including mailing a postcard to hundreds of current and former campground members asserting that they, along with him, were victims of a scam perpetrated by Plaintiffs. These allegedly defamatory statements led to the initiation of the instant case.

Following Hutson's allegedly defamatory statements, a group of campground members filed a putative class action in federal court against TLC Holdings, Richard Clark, Jimmy Lovell, and other parties,³ alleging a variety of claims.⁴ Those defendants then filed a third-party

³ William Reed, et al. v. Big Water Resort, LLC, et al. (D.S.C. 2:14-cv-01583).

complaint against Hutson, alleging a claim for equitable indemnity. In response, Hutson asserted a variety of counterclaims, including breach of contract, fraud, misrepresentation, negligence, and defamation. See Ex. 1, Hutson Answer & Counterclaims, *Reed Case*. TLC, Clark, Lovell, and the other third-party plaintiffs moved for summary judgment as to Hutson's counterclaims on the basis that they were barred by the doctrine of *res judicata*. Magistrate Judge Mary Gordon Baker agreed, finding that Hutson had released his claims against the third-party plaintiffs and that Hutson's claims were precluded by Judge James' Order. (Ex. N to Plaintiffs' Memorandum, Judge Baker's Report and Recommendation.) District Judge David C. Norton then issued an Order adopting Judge Baker's R&R and granting third-party plaintiffs' motion. (Ex. O to Plaintiffs' Memorandum, Judge Norton's Order.)

Returning focus to the instant case, Hutson, acting pro se, asserted counterclaims against Plaintiffs. These counterclaims consist of the following:

- Fraud / Negligent Misrepresentation
- Defamation / Libel Per Se
- Breach of Contract / Breach of Contract Accompanied by a Fraudulent Act
- Violation of the South Carolina Unfair Trade Practices Act
- Amalgamation / Alter Ego / Piercing the Corporate Veil

Plaintiffs then filed the motion at hand, asking this Court to grant their motion for summary judgment on these claims.

LEGAL STANDARD

A trial court may properly grant summary judgment when "the pleadings, depositions,

⁴ TLC Holdings, Clark, Lovell, and the other defendants in that matter ultimately defeated the plaintiffs' attempts to certify a class and also succeeded in getting certain causes of action dismissed. The parties then reached a settlement agreement, which was approved by the district court.

answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the Court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Simmons v. Tuomey Regional Medical Center*, 341 S.C. 32, 533 S.E.2d 312 (2000).

Once the party moving for summary judgment meets its initial burden of showing a lack of genuine issue of material fact, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Bravis v. Dunbar*, 316 S.C. 263, 265, 449 S.E.2d 495, 496 (Ct. App. 1994). Rather, the nonmoving party must set forth or point to specific facts showing that there is a genuine issue for trial. *Id.*

DISCUSSION

The doctrine of *res judicata* “bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties.” *S.C. Pub. Interest Found. v. Greenville County*, 401 S.C. 377, 385, 737 S.E.2d 502, 506 (Ct. App. 2012) (citation and internal quotation marks omitted). “Res judicata may be applied if (1) the identities of the parties are the same as in the prior litigation, (2) the subject matter is the same as in the prior litigation, and (3) there was a prior adjudication of the issue by a court of competent jurisdiction.” *Catawba Indian Nation v. South Carolina*, 407 S.C. 526, 538, 756 S.E.2d 900, 907 (2014). “Under the doctrine of *res judicata*, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.” *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (citation and internal quotation marks omitted).

As stated above, in December 2011, Plaintiff TLC Holdings, LLC instituted an action against Hutson in this Court for breach of the Lease–Purchase Agreement and ejectment. Hutson counterclaimed and filed a third-party complaint against Plaintiffs Clark and Lovell. Hutson alleged that Plaintiffs “knew that defects existed in regard to the premises,” including that a moratorium was imposed on the property for sewer installation and that there were large utility bills outstanding. Ex. E to Plaintiffs’ Memorandum, Hutson Answer and Third-Party Complaint, pp. 7, 13, 14.) Defendant Hutson further alleged that Plaintiffs “made misrepresentations . . . or otherwise concealed relevant and material statements of facts regarding the condition, usefulness, and ability to develop the property.” *Id.* at 12. The parties in that case ultimately entered into the Settlement Agreement, discussed *supra*, which includes the following provisions:

This Settlement Agreement shall be incorporated into a Consent Order (the “Consent Order”) entered in the above-referenced case (the “Litigation”). Although Richard U. Clark, Jimmy S. Lovell and James C. Thigpen are parties to this Settlement Agreement by virtue of being parties to the [Lease–Purchase] Agreement, and are named as Third Party Defendants in the Litigation, they have not been served with pleadings in the Litigation and shall not be deemed to have appeared in the Litigation by their execution of this Settlement Agreement. This Settlement Agreement shall be binding upon all of the undersigned parties even though Richard U. Clark, Jimmy S. Lovell and James C. Thigpen have not appeared in the Litigation and are not parties to the Consent Order.

....

Pursuant to the Consent Order, in the event that Hudson fails to comply with the terms of this Settlement Agreement, unless such failure is a direct and proximate result of TLC’s failure to perform an action expressly required of it in this Settlement Agreement, time being of the essence, then the Plaintiff is entitled to the following immediate relief, without further order of the court or notice to Defendant or his attorney: “(a) termination of the [Lease–Purchase] Agreement, (b) cancelation of the lis pendens filed by Hudson in this action, (c) immediate vacation of the Property by Hudson except for his personal residence, which shall be vacated within 15 days, enforceable by the Clarendon County sheriff; and (d) the provisions of Section 23 shall be effective.”

....

[Section 23.] As a material consideration of this Settlement Agreement, in the event of the termination of the [Lease-Purchase Agreement] pursuant to Section 4 above as a result of Hudson breach hereof, then automatically and without further action of the parties, as of the date of such termination (the "Termination Date"), Hudson shall be deemed to have released, forever discharged and promised never to sue TLC, Richard U. Clark, Jimmy S. Lovell, and James C. Thigpen, and their respective agents, attorneys, insurance companies, parent companies, subsidiaries, affiliates, predecessors, successors, or assigns (together, the "TLC Parties"), from any and all injuries, personal or property, known or unknown, causes of action, demands, warranty claims, damages, suits at law or in equity, of whatsoever kind and nature, or because of any matter or thing done, omitted or suffered to be done, by the TLC Parties, prior to and including the Termination Date, on account of all injuries and damages, including attorneys' fees and litigation expenses, arising from the [Lease-Purchase Agreement] or the relationship between Hudson, on the one hand, and TLC, Richard U. Clark, Jimmy S. Lovell, and James C. Thigpen, on the other hand, and any causes of action, known or unknown, relating to the [Lease-Purchase Agreement], including any and all claims alleged, or which could have been alleged, in the Litigation.

(Ex. F to Plaintiffs' Memorandum, Settlement Agreement) (emphasis added). Judge James issued his consent order in April 2012 approving the Settlement Agreement and incorporating it by reference. (Ex. G to Plaintiffs' Memorandum, Consent Order.) Subsequently, in early 2014, Judge James found that Hudson was in breach of the Settlement Agreement. Judge James issued his second order in March 2014, which found as follows:

Pursuant to the express terms of the Consent Order, effective upon the filing of the Affidavit of Default in this action on December 11, 2013, Plaintiff was entitled to have the following immediate relief, without further order of the Court or notice to Defendant or his counsel of record: (a) termination of the [Lease-Purchase Agreement], (b) cancellation of the Lis Pendens [filed by Defendant in this case], (c) immediate vacation of the Property by Defendant except for his personal residence thereon, which shall be vacated with fifteen (15) days; and (d) the provisions of Section 23 shall be effective. Consent Order at ¶12.

Therefore, the Lease Purchase Agreement was terminated, according to its terms as modified by the Settlement Agreement and Consent Order, as of December 11, 2013 (the "Termination Date"), and Hudson was required to vacate the property immediately, except only for his personal residence thereon, which he was required to vacate within fifteen (15) days (i.e., December 26, 2013).

....

[I]t is hereby:

....

FURTHER ORDERED, that the Settlement Agreement and Consent Order are to be enforced according to their terms.

....

FURTHER ORDERED, that pursuant to the Consent Order, Defendant is deemed to have granted the TLC Release to the TLC parties, as set forth more fully in Section 23 of the Settlement Agreement.

(Ex. H to Plaintiffs' Memorandum, Judge James' March 2014 Order.)

The terms of the Settlement Agreement are clear and unambiguous: Hutson has released Plaintiffs from liability for any actions, whether known or unknown, that they took (or failed to take) prior to December 11, 2013. This fact was confirmed in the two orders of Judge James.

Furthermore, in the federal class action case, Hutson filed counterclaims against Plaintiffs, in which he alleged the same wrongs as in the state court case. *See* Ex. 1. Upon the motion of Plaintiffs, Magistrate Judge Baker issued a Report and Recommendation in which she recommended that summary judgment be granted as to Hutson's counterclaims, as he had previously released all of his claims against Plaintiffs by way of the Settlement Agreement. (Ex. N to Plaintiffs' Memorandum, Judge Baker's Report and Recommendation.) District Judge Norton then issued an Order adopting Judge Baker's R&R and finding that the Settlement Agreement was binding on all parties, that Hutson had previously released his claims against Plaintiffs, and that Judge James' order was a final judgment on the merits. (Ex. O to Plaintiffs' Memorandum, Judge Norton's Order.)

Judge James' order is plainly a final judgment on the merits of the prior state court case. In the case at bar, Hutson's counterclaims against Plaintiffs, and all of the allegations in his

pleading, relate to conduct by Plaintiffs that allegedly occurred in or around December 2010 and were all part of the same transaction or occurrence that was litigated in the prior state court case.⁵ His claims here, in other words, either were or could have been brought by Hutson in the prior state court case, and they fall within the broad, express language in the Settlement Agreement. The prior state court case involved the same parties currently before the Court and the Settlement Agreement was expressly binding on all parties. As Judge James, Judge Baker, and Judge Norton have found, Hutson has released Plaintiffs from any claims he had against them during this time period. The principles of *res judicata*—identity parties, identity of claims, and a final adjudication—are all present here.

Indeed, Hutson does not dispute that the Settlement Agreement, incorporated into Judge James' order, encompasses his claims in the instant case. Nor does Hutson dispute that the elements of *res judicata* are satisfied here. Rather, he asserts that the Settlement Agreement is unenforceable because of fraud. Hutson, however, has failed to demonstrate or even allege any fraud that would bar the application of the Settlement Agreement. A review of the allegations in Hutson's pleading shows that he never alleges that Plaintiffs perpetrated any sort of fraud, or otherwise committed wrongful conduct, in relation to the parties' execution of the Settlement

⁵ The sole exception is his counterclaim for defamation. In this claim, Hutson complains of a letter that TLC Holdings sent to the campground members on April 3, 2014, shortly after evicting Hutson from the campground. The letter discussed the facts that Hutson filed for bankruptcy and had failed to pay rents and taxes that he owed. Hutson, however, alleged this same claim in the federal court action. In recommending that summary judgment be granted on this claim in favor of Plaintiffs, Magistrate Judge Baker found in her R&R this claim fails because none of the statements in the letter were false. See Ex. N to Plaintiffs' Memorandum, pp. 27-30. Similarly, Judge Norton found that summary judgment was proper for this claim because the undisputed evidence shows that all the statements in the letter were true. See Ex. O to Plaintiffs' Memorandum, p. 17, footnote 4. Thus, in addition to summary judgment being proper on this claim because the statements were not defamatory, summary judgment is proper because Judge Norton's Order is a final order on this claim that precludes it from being raised in this action. Hutson neither moved for a reconsideration of Judge Norton's Order nor appealed it.

Agreement. Rather, the only fraud he pleads is fraud in connection with the parties' transactions related to the sale of the campground in December 2010. In other words, the fraud that Hutson here complains of is fraud related to the *original transaction*, not the *release*.

Any claim of fraud that Hutson had in connection with the December 2010 transactions is unquestionably barred. Defendant had the opportunity to litigate those claims in the prior state court litigation, and that case culminated in the March 2012 Settlement Agreement in which Hutson agreed to release all such claims. Hutson also agreed for the release to be incorporated into Judge James' consent order. He cannot now re-litigate those issues.

With regard to his counterclaims in the case at hand, Hutson contends that he needs time to perform additional discovery in this case, including the opportunity to depose Plaintiffs on matters related to his counterclaims. However, in light of the clear, express, and broad terms of the Settlement Agreement and the orders of Judge James, Hutson's counterclaims here are barred. No additional discovery, including depositions of Plaintiffs, would change that fact. Hutson was represented by counsel in the prior state court case and had a full opportunity to conduct discovery in that matter; that same counsel represented him in connection with the execution of the Settlement Agreement; and he further had the opportunity to conduct full discovery, and in fact took the depositions of Plaintiffs with regard to these very same issues, in the federal court case.⁶ Throughout that entire process, he has identified no allegedly fraudulent conduct by Plaintiffs except that which he has alleged in connection with the December 2010 transactions, which claims he voluntarily released in the Settlement Agreement. Hutson has identified no instance of fraud in connection with the execution of the Settlement Agreement,

⁶ In that case, Hutson took the deposition of TLC Holdings, LLC on May 20, 2015; the deposition of Richard Clark on September 26, 2014; and the deposition of Jimmy S. Lovell on September 25, 2014. *See Ex. 2*. He also participated in written discovery in that case and received service of all documents Plaintiffs produced in that matter.

either in his pleading or in his arguments in this Court; indeed, he has not even alleged such fraud.⁷ At the hearing on Plaintiffs' summary judgment motion in this Court on January 5, 2017, when asked by the Court what fraud he was complaining of, Hutson complained only about fraud in connection with his purchase of the campground. Additional discovery by Hutson on his counterclaims would be fruitless, and he has failed to show why the binding, preclusive effect of *res judicata* principles does not bar his claims here.

In sum, the elements of *res judicata* are satisfied, and they operate to bar Defendant Hutson's counterclaims. Hutson's counterclaims either were or could have been raised in the prior state court litigation, and he released all such claims by virtue of the Settlement Agreement. The Court finds that summary judgment is proper.

CONCLUSION

For the reasons discussed above, this Court GRANTS Plaintiffs' motion for summary judgment as to Defendant Hutson's counterclaims.

AND IT IS SO ORDERED.

By:


The Honorable R. Ferrell Cothran, Jr.
Presiding Judge, Third Judicial Circuit

March 2, 2017

Manning, S.C.

⁷ Even if Hutson had alleged such fraud, summary judgment would still be proper, as he has produced no evidence of such. See *House v. Aiken Cnty. Nat'l Bank*, 956 F. Supp. 1284, 1291-92 (D.S.C. 1996) (granting motion to dismiss (treated as motion for summary judgment) where "[t]he only issue before [the] Court is whether the release signed as a result of that previous settlement is invalid because of fraud, misrepresentation or like circumstances. Plaintiffs have failed to provide any evidence, other than their own conclusory allegations, that they were induced to enter into this release because of fraud or misrepresentation."); see also *Hopkins v. Fidelity Ins. Co.*, 240 S.C. 230, 125 S.E.2d 468 (1962).

Exhibit D

STATE OF SOUTH CAROLINA)

COUNTY OF CLARENDON)

TLC HOLDINGS, LLC,)

Plaintiff,)

vs.)

M.B. HUDSON A/K/A M.B. HUTSON,)

Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO.: 11-CP-14-602

SUMMONS

BEULAH G. ROBERTS
CLERK OF COURT
CLARENDON COUNTY, SC
2011 DEC 14 PM 1:56

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the Plaintiff, TLC Holdings, LLC ("Plaintiff"), or its attorneys, Womble, Carlyle, Sandridge & Rice, LLP, Attention: Thomas L. Harper, Jr., 5 Exchange Street, Charleston, South Carolina 29401, within thirty (30) days from the date of such service; and if you fail to answer the Complaint within the time aforesaid, Plaintiff will apply to the Court for judgment by default for the relief demanded in the Complaint.

WOMBLE, CARLYLE, SANDRIDGE &
RICE, LLP

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE

DATE 12/14/11

Beulah G. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

Thomas L. Harper, Jr. (SC Bar No.: 11553)
5 Exchange Street
P.O. Box 999
Charleston, SC 29402
Telephone (843) 722-3400
Facsimile (843) 723-7398

ATTORNEYS FOR PLAINTIFF

Charleston, South Carolina
December 13, 2011

WCSR 7062783v1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CLARENDON	)	CASE NO.: 11-CP-14-602
TLC HOLDINGS, LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	COMPLAINT
	)	(Breach of Lease)
M.B. HUDSON A/K/A M.B. HUTSON,	)	(Ejectment)
	)	(Non-Jury)
Defendant.	)	

CERTIFIED TRUE COPY
 ORIGINAL FILED IN THIS OFFICE
 DATE 12/14/11
Paula H. Roberts
 CLERK OF COURT
 CLARENDON COUNTY, SC

Plaintiff, TLC Holdings, LLC ("Plaintiff"), by and through its undersigned attorneys, complaining of the Defendant, M.B. Hudson, a/k/a M.B. Hutson ("Tenant"), alleges and says as follows:

1. Plaintiff is a limited liability company organized and existing under the laws of the State of South Carolina.
2. Upon information and belief, Tenant is an individual residing and doing business in the County of Clarendon, State of South Carolina.
3. This action concerns real property located in the County of Clarendon, State of South Carolina.

AS A FIRST CAUSE OF ACTION
(Breach of Lease)

4. Plaintiff realleges and reiterates each and every allegation set forth above as if set forth fully herein verbatim.
5. On or about December 16, 2010, Plaintiff and Tenant entered into a Lease Purchase Agreement for, among other things, the rental of real property located at 5215 Dingle Pond Road, Summerton, SC 29148, generally known as the "Big Water Resort"

(the "Leased Premises") (the "Lease" or the "Agreement"). A copy of the Lease is attached hereto as Exhibit "A" and incorporated herein by reference.

6. Pursuant to the Lease, and as set forth more fully in the Lease, Tenant agreed to pay (a) monthly rent to the Plaintiff; (b) annual rent to the South Carolina Public Service Authority with respect to a portion of the Premises; (b) the premiums owning upon various insurance policies required to be maintained by Defendant thereunder (the "Insurance Policies").

7. Despite complete performance by Plaintiff of its obligations under the Lease, Tenant has breached the Lease by failing to pay (a) monthly rent to the Plaintiff for the period beginning with the month of July, 2011, and continuing through date of this Complaint; (b) annual rent to the South Carolina Public Service Authority (which amounts Plaintiff was compelled to pay of Tenant's behalf and for which Plaintiff is entitled to reimbursement pursuant to the terms of the Lease); and (c) the premiums owning upon the Insurance Policies (which amounts Plaintiff was compelled to pay of Tenant's behalf and for which Plaintiff is entitled to reimbursement pursuant to the terms of the Lease).

8. The total amount due and owing by Tenant to the Plaintiff under the Lease as of November 22, 2011, equals Seventy-Eight Thousand One Hundred Eighty-Six and 44/100 (\$78,186.44) Dollars, plus default interest and late fees owing upon such amounts as set forth in the Lease.

9. The Lease provides that Plaintiff may recover from Tenant its reasonable attorneys' fees and costs of collection in enforcing its rights under the Lease. Plaintiff

has retained and employed the law firm of Womble, Carlyle, Sandridge & Rice, LLP for the purpose of instituting and prosecuting this action.

10. As a direct and proximate result of Tenant's breach of the Lease, Plaintiff has suffered damages in the above amounts, and is entitled to recover these amounts from Tenant, together with all rent owing for the remainder of the term of the Lease, and Plaintiff's reasonable attorneys' fees and costs of collection in this matter.

AS A SECOND CAUSE OF ACTION
(Ejectment)

11. Plaintiff realleges and reiterates each and every allegation set forth above as if set forth fully herein verbatim.

12. As outlined more fully above, Tenant has violated the terms and conditions of the Lease, and has breached the same, by its failure to pay the monthly rent and other amounts owing under the Lease when due.

13. Tenant has forfeited any and all right to possession of the Leased Premises by its failure to perform specific obligations under the Lease.

14. Pursuant to the Lease, upon the foregoing defaults by Tenant, Plaintiff is entitled to terminate the Lease.

15. By letter dated October 15, 2011, Landlord advised Tenant that it had terminated the Agreement as a result of Tenant's defaults.

16. As a result of the Termination of the Agreement, the term of the Lease has expired.

17. Plaintiff has elected to eject Tenant from the Leased Premises pursuant to Plaintiff's rights under South Carolina Code § 27-37-10, *et seq.*

WHEREFORE, Plaintiff prays that this Honorable Court issue its Order:

A. Granting Plaintiff judgment against Defendant Lesa Hall Patton and Robert T. Patton, jointly and severally, under the First Cause of Action in the amount of Seventy-Eight Thousand One Hundred Eighty-Six and 44/100 (\$78,186.44) Dollars as of November 22, 2011, plus default interest and late fees owing upon such amounts as set forth in the Lease, together with Plaintiff's reasonable attorneys' fees and costs of collection.

B. Issuing a written rule requiring the Tenant to vacate the Leased Premises occupied by them or to show cause why they should not be ejected before this Honorable Court within ten days after service of a copy of such rule upon Tenant; and

C. Granting Plaintiff such other and further relief as this Court may deem just and proper.

WOMBLE, CARLYLE, SANDRIDGE &
RICE, LLP



Thomas L. Harper, Jr. (SC Bar No.: 11553)
5 Exchange Street
P.O. Box 999
Charleston, SC 29402
Telephone (843) 722-3400
Facsimile (843) 723-7398

ATTORNEYS FOR PLAINTIFF

Charleston, South Carolina
December 13, 2011

Exhibit E

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CLARENDON	)	
TLC Holdings, LLC,	)	THIRD JUDICIAL CIRCUIT
	)	CASE NUMBER: 2011-CP-14-602
Plaintiff(s),	)	
	)	ANSWER
Vs.	)	AND
	)	COUNTERCLAIM
	)	AND
	)	AFFIRMATIVE DEFENSE
	)	AND
	)	MOTION TO DISMISS
M. B. Hudson aka M. B. Hutson,	)	AND
	)	THIRD PARTY COMPLAINT
Defendant and Third Party Plaintiff,	)	(Jury Trial Demanded)
	)	
Vs.	)	
	)	
Richard U. Clark, Jimmy S. Lovell and	)	
James C. Thigpen,	)	
	)	
<u>Third Party Defendants.</u>	)	

MOTION TO DISMISS

PLEASE take notice that at 10:00 AM on the tenth (10th) day after service hereof, or as soon as counsel may be heard, the Defendant will move to dismiss the Summons and Complaint of the Plaintiff herein pursuant to Rule 12(b)(4) and 12(b)(5), SCRCP as follows:

- a) The Plaintiff previously served a Rule to Show on the Defendant, without copy of any Petition, Application, or other pleading.
- b) Within ten (10) days of that service, on December 8, 2011, Defendant filed and served his Motion to Dismiss, which motion is still pending.
- c) Plaintiff has now filed and served a Summons and Verified Complaint, but without the Rule to Show Cause, and still without the Petition, Application, or other pleading that resulted in issuance of the Rule to Show Cause.

d) The Defendant is informed and believes that the Plaintiff has failed to properly serve the Defendant in this matter, and the Plaintiff's case should be dismissed.

Without waiving his rights under this motion, or the motion filed December 8, 2011, the Defendant, M. B. Hudson aka M. B. Hutson, does hereby answer the Complaint of the Plaintiff herein as follows:

FOR A FIRST DEFENSE

1. Each allegation of the Complaint is denied unless specifically admitted or explained.
2. The Defendant admits the allegations of Paragraph 1 of the Complaint on information and belief.
3. As to Paragraph 2, the Defendant admits that he resides and does business in Clarendon County, South Carolina but would show that he is a Purchaser pursuant to the Lease Purchase Agreement.
4. The Defendant admits the allegations of Paragraph 3.
5. The Defendant does not believe that Paragraph 4 requires an answer but if one is required then the Defendant denies same.
6. As to the allegations of Paragraph 5, Defendant admits that on about December 16, 2010, a Lease Purchase Agreement was entered into for property at 5215 Dingle Pond Road, Summerton, S.C., generally known as The Big Water Resort and would admit that the Lease Purchase Agreement is attached as Exhibit A to the Plaintiff's Complaint. However, the Defendant is throughout that document referred to as a Purchaser and not as a Tenant.
7. The Defendant admits so much of the allegations of Paragraph 6 as alleged that portions of the Lease Purchase Agreement call for the payment of monthly rent, payment of

annual rent to the South Carolina Public Service Authority, and insurance premiums, but denies any remaining allegations of said Paragraph 6.

8. The Defendant denies so much of the allegations of Paragraph 7 of the Complaint as alleges complete performance by the Plaintiff of its obligations, and also as alleges that there has been a breach of the terms of the Lease Purchase Agreement by the Defendant but would show that all the payments called for in the Lease Purchase Agreement have not been paid by the Defendant due to the lack of disclosures by the Plaintiff.

9. As to the allegations of Paragraph 8, the Defendant admits that there are amounts which the Lease Purchase Agreement called for Defendant to pay to Plaintiff which are unpaid to the Plaintiff but is uncertain as to any balance due and demands strict proof thereof.

10. As to the allegations of Paragraph 9, the Defendant admits that the Lease Purchase Agreement provided that the Purchaser would be responsible for costs and expenses (including, but not limited to, reasonable attorney's fees and expenses), but only if Plaintiff can prove that it is entitled to recover same as a result of any legal actions.

11. The Defendant denies the allegations of Paragraph 10 of the Complaint.

12. The Defendant is informed and believes that Paragraph 11 does not require a response but if a response is required, the Defendant denies same and demands strict proof thereof.

13. The Defendant denies the allegations of Paragraphs 12, 13, and 14 of the Complaint.

14. As to the allegations of Paragraph 15, the Defendant admits that the Plaintiff sent a letter dated October 15, 2011 but is informed and believes that the language of the letter should speak for itself. Further, the Defendant denies that the Lease Purchase Agreement

and/or South Carolina law will allow the Plaintiff to cancel on its own a contract under which a Defendant has made expenditures toward the purchase of a piece of real property.

15. The Defendant denies the allegations of Paragraphs 16 and 17 of the Complaint.

16. Throughout the Complaint, the Plaintiff has attempted to label the Defendant as a Tenant. The Lease Purchase Agreement entered into between the parties referred to the Defendant only as a Purchaser and that relationship was the intent of the parties. In preparing this responsive pleading, the Defendant assumes that any references by the Plaintiff to "tenant" is merely scrivener's error and is intended to refer to the Defendant, M.B. Hudson aka M.B. Hutson. The Defendant has responded to the Complaint as though the Plaintiff has so intended.

FOR A SECOND DEFENSE

17. Each matter set forth above is re-alleged as fully as if set forth herein.

18. As to the allegation that a landlord / tenant relationship existed between the Plaintiff and Defendant, the Defendant denies that allegation and would respectfully show the Court that the Defendant is in fact a Purchaser under the Lease Purchase Agreement, which was prepared by the Sellers, attached as Exhibit A of the Complaint and incorporated herein by reference. Throughout that document, Defendant is referred to only as a Purchaser, and not as a Lessee or tenant.

19. While the Defendant has not paid all of the rent payments that have become due, the Defendant denies that grounds for ejectment exist, and thus the relief sought by the Plaintiff should be denied.

20. The Plaintiff has requested the ejectment of the Defendant from the premises that is the subject of a lease purchase agreement.

21. For the Court to grant the Plaintiff the relief sought would cause the Plaintiff to receive an unjust enrichment.

22. Thus the relief sought by the Plaintiff should be denied.

FOR A THIRD DEFENSE

23. Each matter set forth above is re-alleged as fully as if set forth herein.

24. The Plaintiff has requested the ejectment of the Defendant from the premises that is the subject of a lease purchase agreement.

25. For the Court to grant the Plaintiff the relief sought would cause the Defendant to suffer irreparable harm.

26. Thus the relief sought by the Plaintiff should be denied.

FOR A FOURTH DEFENSE

27. Each matter set forth above is re-alleged as fully as if set forth herein.

28. The Plaintiff, Third Party Defendants and Defendant entered into a Lease Purchase Agreement by which Defendant would acquire from the Plaintiff and Third Party Defendants the property that is the subject of this action.

29. Pursuant to that Lease Purchase Agreement, Defendant has made large expenditures of sums to maintain and develop the property.

30. Defendant has an equity of redemption in the property and thus cannot be evicted from the property without protection of his equity of redemption and/or investments into the maintenance and development of the property.

31. Thus the relief sought by the Plaintiff should be denied.

FOR A THIRD PARTY COMPLAINT

32. Each matter set forth above is re-alleged as fully as set forth herein.

33. Defendant/Third Party Plaintiff, hereinafter referred to as Defendant, would show unto the Court as follows:

34. The Defendant is a citizen and resident of Clarendon County, South Carolina.

35. The Defendant is informed and believes that the Plaintiff is an LLC organized under the laws of the State of South Carolina.

36. The Third Party Defendants are owners or members of TLC Holdings, LLC and, with TLC Holdings, LLC, are Sellers of the premises described in the Complaint as shown and described in the Lease Purchase Agreement.

37. On information and belief, the Defendant Thigpen is a citizen and resident of Clarendon County, South Carolina, the Defendant Clark is a citizen and resident of Knoxville, Tennessee, and the Defendant Lovell is a citizen and resident of Burr Ridge, Illinois.

38. The Defendant is informed and believes that all three of the Third Party Defendants, as owners of the property that is the subject of this action, are subject to the jurisdiction of this Court.

39. On or about December 15, 2010, Plaintiff, TLC Holdings, LLC, and Third Party Defendants, Clark, Lovell, and Thigpen, individually and as members of TLC Holdings, LLC, entered into a Lease Purchase Agreement to sell to M. B. Hudson as Purchaser the property hereinafter described. The Lease Purchase Agreement is attached to the Complaint as Exhibit A, and is also attached hereto and made a part hereof as Exhibit A.

FOR A CLAIM, COUNTERCLAIM, AND FIFTH DEFENSE

40. Each matter set forth above is re-alleged as fully as if set forth herein.

41. The property that is the subject of this action was owned by one or more of the Sellers being, according to the Lease Purchase Agreement, the Plaintiff and Third Party Defendants since at least May 19, 2008. Defendant is informed and believes that Plaintiff and/or the Third Party Defendants may have had some interest in the property prior to that time. The Sellers did enter into the Lease Purchase Agreement with Hudson on or about the 15th day of December 2010 to sell to Hudson said property. Section 1 of the Lease Purchase

Agreement consisting of more than five (5) pages was titled a Purchase Agreement and dealt with the terms and conditions of the Purchase by Hudson of the premises from the Sellers and anticipated the construction of improvements on the property by the Purchaser.

42. However, Sellers knew that defects existed in regard to the premises in that the South Carolina Public Health and Environmental Control had imposed a moratorium on the property that prevented the property from tying into public water and sewer services.

43. In fact the Lease Purchase Agreement in Section 11.1 called for the installation of sewer and water lines and other improvements.

44. However, the Sellers did not disclose the existence of this moratorium to the Purchaser. However, the Sellers knew of the existence of this moratorium as shown by the letter of The Town of Summerton dated April 23, 2003, attached hereto as Exhibit B.

45. The Agreement provided in Paragraph 11.1 that Purchaser, without prior written approval of Sellers, could install new sewer and water lines, but Sellers knew or should have known at the time of the preparation of this contract that new sewer and water lines would have no purpose because the project was operating at capacity and, because of the moratorium placed on the property, that the capacity could not be presently increased. This problem was material and was not disclosed by the Sellers to Hudson.

46. The Sellers in the Agreement require the Defendant to repave the existing roads, but it would make no sense to pave such roads prior to the installation of underground utilities that would require the roads to be damaged or otherwise destroyed and requiring repair or repavement because of the anticipated installation of additional water and sewer lines. Further, Progress Energy has for many months, subsequent to entering into the Agreement by Hudson, driven large vehicles onto the property in order to work on transmission lines extending across Lake Marion. Such large vehicles would have caused damage to the roads. Hudson has been

asked by Progress Energy to delay resurfacing of the roads until it had finished its work. Hudson had provided this information to the Sellers.

47. The contract, prepared by the Sellers, provides in part that "the parties acknowledge that Purchaser plans to develop and construct condominiums or other residential dwelling structures on certain portions of the unimproved premises."

48. However, the Sellers did not make any disclosure to Purchaser that there was no sewer capacity at that time that the Agreement was being negotiated for any such further development on the property as then existed.

49. Pursuant to the contract, Hudson caused a title examination to be made of the premises and found that the Plaintiff was involved in litigation affecting the premises. The Sellers in the contract disclosed the existence of that litigation, but set forth a Covenant, Consent and Agreement that included language that said "Seller covenants, consents and agrees that these actions shall be dismissed or otherwise addressed on or before closing of the entire premises, so that said pending legal actions shall in no way encumber the property or hinder such closing." To date, those actions are still pending and Hudson has been unable to proceed to purchase the property.

50. The Agreement provides that Hudson could purchase the property on or before September 1, 2011 for the sum of Six Million and 00/100 (\$6,000,000.00) Dollars, but that after that date the price would increase to Seven Million and 00/100 (\$7,000,000.00) Dollars. Because Seller has not caused the two actions referred to in the Agreement to be dismissed or otherwise addressed, Purchaser is informed and believes that the deadline to purchase the property for Six Million and 00/100 (\$6,000,000.00) Dollars should be extended until those actions are resolved. Pursuant to the provision regarding the extension of time to close beyond September 1, 2011, if that provision is not granted, Hudson will suffer damage in the amount of

One Million and 00/100 (\$1,000,000.00) Dollars. Therefore the Complaint should be dismissed and the Agreement should be modified to extend the payment due date and the ultimate closing date.

FOR A SIXTH DEFENSE, COUNTERCLAIM AND THIRD PARTY CLAIM

51. Each matter set forth above is re-alleged as fully as if set forth herein.

52. The Lease Purchase Agreement was prepared by the Seller and was executed by the parties thereto. That Agreement anticipated the purchase of the property that is the subject of this action by Hudson. The sale of the property was for the benefit of both parties, and Purchaser is informed and believes that the Sellers consider this Agreement as imposing an obligation on the part of the Purchaser to complete the purchase of the property. Pursuant to and in reliance on that Agreement, Hudson has caused certain improvements to be made to the property and has incurred expense in making said improvements, including expense in hiring attorneys, architects, electricians and engineers in trying to develop and maintain the property pursuant to the Lease Purchase Agreement. Hudson has incurred expenses in excess of Thirty Eight Thousand and 00/100 (\$38,000.00) Dollars in hiring and retaining these professionals.

53. If Hudson is ejected from the property, he will have lost those funds and have been damaged by that loss. Hudson should be entitled to be reimbursed by the Plaintiff and /or Third Party Defendants in the amount in excess of Thirty Eight Thousand and 00/100 (\$38,000.00) Dollars.

FOR A SEVENTH DEFENSE, COUNTERCLAIM AND THIRD PARTY CLAIM

54. Each matter set forth above is realleged as fully as if set forth herein.

55. The Lease Purchase Agreement provided terms and conditions for the purchase of the premises by Hudson as Purchaser from the Plaintiff and Third Party Defendants as Sellers. Pursuant to that Lease Purchase Agreement, Hudson has taken possession of the

property and taken steps to develop the property pursuant to the Agreement and prior to closing on that Purchase Agreement. Hudson therefore asserts an ownership interest in the property and thus the issue of title to the real property shall come into question.

56. Thus the parties have proceeded as though this Lease Purchase Agreement is a Purchase Contract, and Hudson is entitled to an equity of redemption, and cannot be subject to eviction as though the Agreement was merely a lease.

FOR AN EIGHTH DEFENSE, COUNTERCLAIM AND THIRD PARTY CLAIM

57. Each matter as set forth above is re-alleged as fully as if set forth herein.

58. The Seller and the Purchaser entered into a Lease Purchase Agreement and anticipated the development of the property by the Purchaser. However, because the sewer and water capacity had previously been reached for the project, and because a moratorium existed that did not allow the property to tie onto public water and sewer service, the Purchaser was unable to develop the property as anticipated in the contract. A condition for lifting the moratorium would be to construct a pump station at an estimated cost of about Two Hundred Eighty Thousand and 00/100 (\$280,000.00) Dollars. Those matters were or should have been known to the Sellers at the time that the contract was negotiated, but not disclosed to the Purchaser. The value of the property to the Purchaser was based in a large part on the ability of the Purchaser to immediately begin development of the property.

59. Had the Seller disclosed these problems to the Purchaser, Purchaser would not have agreed to pay such large rent prices, nor would Purchaser have agreed to pay such a large sales price, nor would Purchaser have agreed to such early price increases and closing deadlines.

60. Purchaser has been damaged by the actions of the Seller in not disclosing these matters. As a result of the damage suffered by Purchaser, the amount of rental payment should

be adjusted downward, and the sales price should also be adjusted downward by amounts to be determined.

FOR A NINTH DEFENSE, COUNTERCLAIM AND THIRD PARTY CLAIM

61. Each matter set forth above is re-alleged as fully as if set forth herein.

62. In the negotiation of the Lease Purchase Agreement, the Sellers made certain representations to Hudson that improvements could be made to the property but failed to disclose either that the property was at maximum sewer capacity or that additional water and sewer from public utilities was presently unavailable. This made the representations by the Sellers regarding future development of the property false, and those representations were material. The Sellers knew of the false representations but intended that the Purchaser act upon the representations. Hudson had no knowledge of the falsity of the representations but relied on the truth of those representations and entered into the contract. Hudson had the right to rely on those representations and has suffered a consequent and proximate injury. As a result of the fraud and misrepresentations of the Sellers, the Defendant has suffered actual damages including but not limited to the following:

a. Rental payments paid to the Plaintiff by the Defendant in the amount of about Sixty Thousand and 00/100 (\$60,000.00) Dollars,

b. Additional development costs incurred to date, including hiring attorneys, architects and engineers in the amount of about Thirty Eight Thousand and 00/100 (\$38,000.00) Dollars, plus insurance premiums, employee salaries, and other payments.

c. Almost a year of Purchaser's own time spent on the project during which time Purchaser was unable to attempt to earn funds on any other project or from any other source.

d. In addition, Hudson should be entitled to recover punitive damages from the Sellers.

FOR A TENTH DEFENSE, COUNTERCLAIM AND THIRD PARTY CLAIM

63. Each matter set forth above is re-alleged as fully as if set forth herein.

64. The property that is the subject of this action is commonly known as the Big Water Resort. It is a resort property with about six hundred (600) members who are members of the general public, and who bring guests to the property. The development and use of the property affects the public interest. Hudson has been damaged by the acts or practices of the Sellers, and those acts or practices have affected the public interest in that the conduct by the Sellers are capable of repetition.

65. Hudson and the Sellers entered into a Lease Purchase Agreement and Hudson relied on representations made by the Sellers regarding the condition of the property at the time the agreement was negotiated and prior to and subsequent to its execution. Sellers made misrepresentations to the Purchaser or otherwise concealed relevant and material statements of facts regarding the condition, usefulness, and ability to develop the property. The concealment of those facts constitute unfair or deceptive acts or practices in the conduct of trade or commerce.

66. Hudson has suffered damages as set forth above, and is entitled to recover for those damages as well as recover treble damages and attorney's fees, and the case should be dismissed.

FOR AN ELEVENTH DEFENSE, COUNTERCLAIM AND THIRD PARTY CLAIM

67. Each matter set forth above is re-alleged as fully as if set forth herein.

68. Hudson and Plaintiff and third party Defendants entered into a Lease Purchase Agreement on December 15, 2010 as set forth above.

69. That Agreement required Hudson to pay utility bills on the property.

70. Prior to entering into the Agreement with Hudson, Sellers had undertaken the installation of underground electrical utilities with Black River Electric Cooperative. The Defendant is informed and believes that Black River had advised the Plaintiff and Third Party Defendants that there would be a substantial charge for installing underground utilities instead of above ground utilities, but the Defendant is informed that the Plaintiff and Third Party Defendants never paid for that installation.

71. Defendant is informed that the cost of that installation has been added to the monthly electric bill by Black River, and has resulted in the Defendant having to pay electrical utilities charges in excess of \$110,000.00 in less than one year since signing the Lease Purchase Agreement.

72. The Defendant is informed and believes that at least \$50,000.00 to \$60,000.00 of those utility payments were to pay for the underground utility installation that was the responsibility of the Plaintiff and Third Party Defendants. The Plaintiff and Third Party Defendants knew or should have known of that charge, and failed to disclose said charges to the Defendant prior to or at any time subsequent to the entry into the Lease Purchase Agreement.

73. That failure to disclose the liability of Sellers and their assigns (the Defendant), and the resulting charges billed to and paid by the Defendant in keeping utility power on at the premises was material and the failure to disclose those underground utility charges constituted a false representation to the Defendant that the electrical utilities would be for ordinary electrical power usage. Sellers knew of the false representations of their nondisclosure but intended that the Purchaser act upon the representations. Hudson had no knowledge of the falsity of the representations but relied on the truth of those representations and entered into the

Lease Purchase Agreement. Hudson had the right to rely on those representations and has suffered a consequent and proximate injury.

74. Defendant is informed and believes that the Plaintiff and/or Third Party Defendants contacted Black River and cancelled use of its tax identification number, without notice to Defendant, resulting in termination of electric utility service in late November 2011.

75. The Defendant then had to refund deposits and rental fees for customers who had made reservations.

76. As a result of the fraud and misrepresentations of the Sellers, the Defendant has suffered actual damages including but not limited to:

- a. Payment of excess utility bills in an amount estimated at this time at approximately \$60,000.00,
- b. Suffering from power outage at the property because of his inability to pay the excessive utility charges, which affected the membership of the resort and the general public,
- c. Loss of profits suffered by Defendant due to not having electrical service on the property due to the excessive utility charges.
- d. Loss of goodwill of customers as a result of the cancellation of utility services.
- e. Financial losses incurred by the Defendant in trying to raise funds in order to pay the utility charges,
- f. Attorney's fees and other expenses incurred in trying to ascertain the reason for the excess cost of the utility services and in trying to negotiate extensions to allow payment of the excess utility charges,
- g. Diversion of funds to pay excessive utility bills, the excess portions of which could have been used to pay any the contractual obligations alleged to be due to the Sellers pursuant to the Lease Purchase Agreement.

FOR A TWELTH DEFENSE, COUNTERCLAIM, AFFIRMATIVE DEFENSE AND THIRD PARTY CLAIM

77. Each matter set forth above is re-alleged as fully as if set forth herein.

78. The Plaintiff has alleged that the Defendant is past due to the Plaintiff the sum of Seventy Eight Thousand One Hundred Eighty Six and 44/100 (\$78,186.44) Dollars.

79. The Defendant has made payments in the form of excess utility payments, and development costs incurred due to the nondisclosure by Sellers of the matters set forth above.

80. Defendant is informed and believes that those payments constitute payment of any debt alleged by Plaintiff to be past due, and Defendant should be entitled to credit on his account with the Sellers.

FOR A THIRTEENTH DEFENSE, COUNTERCLAIM AND THIRD PARTY CLAIM

81. Each matter set forth above is re-alleged as fully as if set forth herein.

82. Pursuant to the Lease Purchase Agreement, Hudson had incurred large sums of money and time in preparing an application to Clarendon County Council in order to try to further develop the property as anticipated in that Lease Purchase Agreement.

83. The County Council meeting was held December 20, 2011, at which time Defendant anticipated receiving conceptual approval which would allow him to commence construction.

84. However, after executive session, approval was denied based on pending litigation involving the property.

85. Defendant is informed and believes that such notification of pending litigation involving the property was made by the Plaintiff or Third Party Defendant and was designed to delay and hinder the Defendant from further performance pursuant to the Lease Purchase Agreement.

86. As a result, the Defendant has suffered damages, including but not limited to all of the costs and expenses incurred in his efforts to perform under the Agreement, and expenses arising from the delay of such development.

FOR A FOURTEENTH DEFENSE, COUNTERCLAIM AND THIRD PARTY CLAIM

87. Each matter set forth above is re-alleged as fully as if set forth herein.

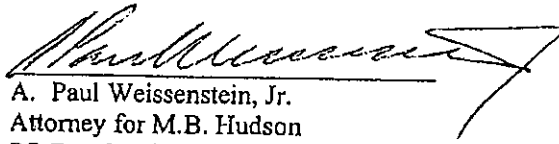
88. The Plaintiff, Defendant and Third Party Defendant entered into a Lease Purchase Agreement on about December 15, 2010, and pursuant to that Agreement, Defendant has performed by making payments and trying to proceed with the anticipated development of the property.

89. Defendant is informed and believes that the Plaintiff and Third Party Defendant have deliberately and maliciously taken steps to try to cause Defendant to fail at this project in order for them to try to recover same with the value of the project enhanced through Defendant's efforts.

90. These actions by the Plaintiff and Third Party Defendant show bad faith on their part.

91. Defendant has been damaged by the efforts of Plaintiff and Third Party Defendants and should be entitled to recover actual damages, punitive damages, and costs and expenses.

WHEREFORE having answered the Complaint in this matter, Hudson prays that the Court dismiss the Complaint and grant to the Defendant judgment against the Plaintiff and Third Party Defendants for actual damages for the amounts set forth herein, for treble damages, attorney's fees, and punitive damages, and grant to the Defendant such other and further relief as may be just and proper.



A. Paul Weissenstein, Jr.
Attorney for M.B. Hudson
PO Box 2446
Sumter, SC 29151
803-418-5700
pwlaw@ftc-i.net

Sumter, SC
December 29, 2011

STATE OF SOUTH CAROLINA)

COUNTY OF CLARENDON)

TLC Holdings, LLC,)

Plaintiff(s),)

Vs.)

M. B. Hudson aka M. B. Hutson,)

Defendant and Third Party Plaintiff,)

Vs.)

Richard U. Clark, Jimmy S. Lovell and)
James C. Thigpen,)

Third Party Defendants.)

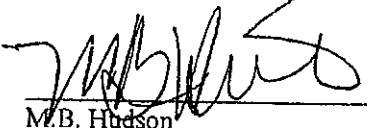
IN THE COURT OF COMMON PLEAS

THIRD JUDICIAL CIRCUIT
CASE NUMBER: 2011-CP-14-602

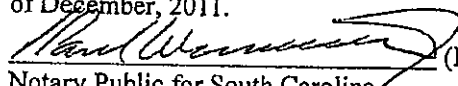
VERIFICATION

Personally appeared before me, M. B. Hudson who being sworn, deposes and says
as follows:

- 1) I am M.B. Hudson aka M.B. Hutson, the Defendant in this action.
- 2) I am personally familiar with the matters set forth in this Answer,
Counterclaim, and Third Party Complaint, and know that the facts stated therein are true
of my own knowledge except as to those matters stated on information and belief, and as
to those matters, I believe them to be true.


M.B. Hudson

SWORN to before me this 29 day
of December, 2011.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: August 31, 2011

Exhibit F

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER

RECORDED

Civil Action No. 2018-CP- 43-1583

MB Hutson/MB Hudson,

2018 OCT -3 A 10:23

Plaintiff,

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

vs.

SUMMONS

Paul Weissenstein (Attorney)/
Paul Weissenstein, John Doe #1,
John Doe #2.
Defendants.

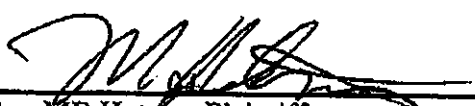
TO: The DEFENDANTS NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Complaint upon its subscribers, at the address shown below, within thirty (30) days after the service hereof, exclusive of the day of such service. If you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

Paul Weissenstein, Attorney
106 Broad Street
Sumter, South Carolina 29151

John Doe #1, Attorney
106 Broad Street
Sumter, South Carolina 29151

John Doe #2, Attorney
106 Broad Street
Sumter, South Carolina 29151

Oct 1, 2018

By: MB Hutson, Plaintiff
Post Office Box 2755
Orangeburg, SC 29116-2755
Telephone: 803.308.2714
Email: hutson4444@gmail.com

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON
PLEAS

COUNTY OF SUMTER

Civil Action No. 2018-CP-43-1583

MB Hutson/MB Hudson,

Plaintiff,

vs.

A. Paul Weissenstein (Attorney)/
A. Paul Weissenstein Firm, John Doe #1,
John Doe #2

Defendants.

RECORDED

2018 OCT -3 A 10:23

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.AMENDED COMPLAINT FOR
LEGAL MALPRACTICE

I. DEFINITIONS OF MALPRACTICE

- A. "malpractice *n.* negligence, misconduct, lack of ordinary skill, or a breach of duty in the performance of a professional service...resulting in injury or loss."

Merriam-Webster's Dictionary of Law, Springfield, Mass. 1996. p.301.

- B. "A plaintiff in a legal malpractice action must prove four elements: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client and (4) proximate causation of the client's damages by the breach".

The Law of Legal Malpractice in South Carolina. Gray, Jordan, Lindsay,
Stepp and Watson (Sowell Gray Robinson Stepp & Laffitte, LLC), South
Carolina Bar. Continuing Legal Education Division, 2017. p 3.

- C. "In Wildasin vs Mathis, 2016, Dist. Lexis 31672 M.D. Tenn. Mar. 11, 2016), a federal court was called to decide whether an association of lawyers could be held vicariously liable for the malpractice of a member. The court found it could."

"ASSOCIATION OF ATTORNEYS CAN BE FOUND VICARIOUSLY LIABLE FOR THE
MALPRACTICE OF MEMBERS EVEN IF NOT A FIRM" Posted May 18, 2016 by fglannoni.
Crystal Lawyers for Lawyers a cgcfirm.com

II. JURISDICTION AND VENUE

WHEREAS MB Hutson/Hudson, hereby referred to as Plaintiff, resides in Orangeburg South Carolina and Defendant, Paul Weissenstein, Attorney/Paul Weissenstein, herein Referred to as Defendant, who's Law Office is in Sumter, South Carolina and said Malpractice occurred in Sumter County at Defendant's law office, Court house, and the Planning Board Meetings in Manning, South Carolina.

III. HISTORY

- A. Plaintiff retained Defendant Paul Weissenstein / Attorney to represent him in litigation involving TLC Holdings, LLC and Big Water Resort on October 25, 2011 (Exhibit "A"). Plaintiff intended to purchase and develop property on Lake Marion through a Lease Purchase Agreement (Exhibit "B") that also included an on-going business (Exhibit "C").
- B. Unknown to Plaintiff was that a title defect existed on the property due to hundreds of one and two lifetime agreements for "rights use campground facilities and services solely for Member's..." which had been sold by TLC Holdings, LLC and Big Water Resort which equated to approximately 30 to 70 years. (Sample: "Retail Membership Agreement" Exhibit "D").
- C. Plaintiff was unaware that these agreements constituted a title defect on the property that would prevent him from developing the property as planned. The

project was doomed from the start due to those title defects (Retail Membership Agreements) and other misrepresentations made by TLC Holdings, LLC.

- D. In October 2011, TLC Holdings, LLC brought an eviction action against Plaintiff causing Plaintiff to retain Defendant Paul Weissenstein / Attorney on October 25, 2011, to defend him and prosecute valuable counterclaims against TLC Holdings, LLC. This Retainer Agreement (EXHIBIT "A") was activated with a "Confirmation of \$2,950 ...deposit." (See EXHIBIT "A", page four), prepared by Defendant Paul Weissenstein.

Verification of Malpractice element #1, the existence of an attorney-client relationship).

- E. Plaintiff was aware that Defendant had one or two additional attorneys working in the same office full time during the 2011-2012 contract period between Weissenstein and Plaintiff. During one or more visits to the Defendant's office, Plaintiff took the opportunity to speak/visit with at least one of the associate attorney(s).

"In Wildasin vs Mathis, 2016, Dist. Lexis 31672 M.D. Tenn. Mar. 11, 2016), a federal court was called to decide whether an association of lawyers could be held vicariously liable for the malpractice of a member. The court found it could." (See Definitions p. 1, I-C of this amended complaint.)

- F. Defendant Weissenstein counter-claimed TLC Holdings, LLC (Exhibit "G") using all evidence that he could establish, find or research based on the contracts that Plaintiff had executed with TLC Holdings, LLC. Plaintiff had provided Defendant

with all contracts (Lease Purchase Agreement (Exhibit "B" 33pp), Membership Interest Purchase Agreement (Exhibit "C" 12pp.), sample Retail Membership Agreements (Exhibit "D" pp.2), and plats (See Exhibit "E"), and other documents to the Defendant to review and study.

- G. Defendant had various meetings with Plaintiff for the purposes of reviewing all contracts and other related paper work including proposed subdivision plats since Plaintiff's only desire was to develop the property.
- H. Defendant, Weissenstein, filed a Counter Claim on behalf of Plaintiff on November 9, 2011. (Exhibit "G")
- I. After a short period of time, *Defendant Weissenstein advised Plaintiff that he did not have sufficient evidence to prevail in his counter claims based on all paper work that had been provided to him (by the Plaintiff) including his own research and suggested that Plaintiff consider an offered settlement agreement by TLC Holdings, LLC to prevent an eviction and loss of opportunity to develop the property into a subdivision.*
- J. Having been given no other choice Plaintiff took Defendant Weissenstein's advice and executed the Settlement Agreement and Consent Order that had been prepared by the TLC Holdings LLC's attorneys, which doomed the Plaintiff.

At that point, Defendant Weissenstein became more reliant upon TLC Holdings, LLC's attorneys.

IV. COUNT ONE OF MALPRACTICE: A BREACH OF DUTY BY ATTORNEY # 1

- A. Defendant Weissenstein failed to recognize the ample evidence that TLC Holdings, LLC had made numerous misrepresentations, concealing relevant and material statements of fact regarding the usefulness and ability to develop the property when factual evidence in the form of Retail Membership Agreements/Leases for multiplied decades of exclusive land use was right in front of him by way of document information which the Plaintiff had provided to Defendant / Attorney Weissenstein.

Verification of Malpractice element #2: a breach of duty by the attorney.

- B. Further evidence that Defendant Weissenstein did not recognize, nor advise Plaintiff of the title defect created by the Retail Membership Agreements is Defendant's participation in the Planning Commission of Clarendon County's process assisting Plaintiff in acquiring subdivision permission from Clarendon County's Planning Commission. (See Exhibit "J").

Verification of Malpractice element #2: a breach of duty by the attorney.

V. COUNT TWO OF MALPRACTICE: BREACH OF DUTY BY ATTORNEY #2

- A. Plaintiff was not properly advised of the application and effect of the release in the Settlement Agreement by Defendant / Attorney Weissenstein. This breach of fiduciary duty, was highlighted in Federal Court by Judge Norton's Order stating that Plaintiff's attorney should have advised him. (Exhibit # F-1 and F-2).
- B. However, Plaintiff's attorney did NOT advise him properly and, consequently, Plaintiff executed the Settlement Agreement (Exhibit "H") and Consent Order (Exhibit "I") which ended up defeating Plaintiff's efforts before they had barely had an opportunity to start, while simultaneously creating a *res judicata* for the perpetrators of both the fraudulent Lease Purchase Agreement and the Settlement Agreement preventing Plaintiff from ever having another opportunity to recoup from those damages as the latter covered the perpetrators with a *res judicata*. There was more than sufficient evidence to win the Defendant's counter claim on behalf of the Plaintiff had Defendant / Attorney Weissenstein recognized the title defect preventing Plaintiff from ever developing the property, marketing said property to the public and acquiring loans for the construction of new homes. (See Exhibit "L")

Verification of Malpractice element #2: a breach of duty by the attorney.

VI. COUNT THREE OF MALPRACTICE:**NEGLIGENCE**

- A. The Attorney/Defendant's negligence demonstrated in his falling to recognize the title defect issue, resulted in the Plaintiff losing the counter claim suit in SC State Court. (See Weissenstein's Counter Claim: Exhibit "F")

Elements of Malpractice #2: a breach of duty by the attorney.

- B. This gross negligence on the part of the Defendant prevented the Plaintiff from ever being able to negotiate or sue for his damages as it facilitated the ability of the perpetrators of the fraud in the Lease Purchase Agreement to hide under State Court res judicata in a Federal Court case which they initiated for the purpose of collecting monies from the Plaintiff's insurance company.

Elements of Malpractice (3) damage to the client and
(4) proximate causation of the client's damages by the breach".

VII. COUNT FOUR OF MALPRACTICE: DAMAGE TO THE CLIENT/PLAINTIFF

- A. Defendant / Attorney Paul Weissenstein fell below the standard of care expected of attorneys in similar situations at the time by failing to advise Plaintiff:

1. That the existence and effect of the long term (leases, contractual agreements, Family memberships) would prevent him from *ever* developing the property as the Plaintiff had intended, and
2. that THEREFORE, even his default of the Settlement Agreement was inevitable, and that

3. he would forever be barred from prosecuting and using as a defense the fraud perpetrated on him by TLC Holdings, LLC, in both the Lease Purchase Agreement and the Settlement Agreement due to the perpetrators' hiding behind *res judicata* rights embedded in the fraudulent Settlement Agreement and Consent Order.

Elements of Malpractice (3) damage to the client and
(4) proximate causation of the client's damages by the breach".

VIII. COUNT FIVE OF MALPRACTICE: PROXIMATE CAUSATION OF THE CLIENT'S DAMAGES BY THE BREACH.

- A. Defendant failed to protect Plaintiff from the fraud in the Lease Purchase Agreement by not recognizing that there was no contractual agreement between TLC Holdings, LLC allowing for Big Water Resort to operate an on-going business. (See Exhibit "K"). Consequently,
- B. Plaintiff owning Big Water Resort had no legal land on which to honor the hundreds of family memberships (for one and two life times) causing
- C. Plaintiff to be doomed and sued at a later date in Federal Court by TLC Holdings, LLC (Sellers/Landowners). (See suit on Plaintiff by TLC Holdings, LLC in Federal Court Exhibit "N").

Elements of Malpractice (3) damage to the client, and
(4) proximate causation of the client's damages by the breach".

IX. COUNT SIX OF MALPRACTICE: FRAUDULENT COVERUP BY DEFENDANT(s)

A. After the Settlement Agreement and Consent Order was executed by the Plaintiff, TLC Holdings, LLC filed suit in Federal Court against the Plaintiff / Hutson and The Honorable Judge Norton issued an Order (Exhibit on 5/20/16 against the Plaintiff reading:

1. "Hutson failed to produce an affidavit or statement from the attorney" (Weissenstein) "who represented him in the former litigation" (See Exhibit #F-2)

2. "Hutson was represented by an attorney in the underlying state court action" (Weissenstein) "and was therefore presumably advised of the application and effect of the Release" (See Exhibit # F-1 to F-2)

Verification of Malpractice element #2: a breach of duty by the attorney.

B. Plaintiff pleaded with Defendant / Attorney Weissenstein and to his insurance attorney to make an appearance or prepare an affidavit stating that neither he nor Plaintiff were aware of 1) the defective title; and 2) the fraud in the Settlement Agreement and Consent Order.

C. Defendant Weissenstein refused to help Plaintiff and hid behind his insurance attorney thus creating a fraudulent cover-up.

D. Defendant Weissenstein was fully aware that Plaintiff was losing his counter actions in Federal Court trying to defend himself (See Exhibit "M"—e-mails

from Hutson pleading for support and responses)

- E. Plaintiff lost his counter claims against TLC Holdings, LLC In Federal Court caused by Defendant Weissenstein's complete incompetence lacking the ability to advise, protect, inform, and understand the nuances and fraud in the Lease Purchase and Settlement Agreements between his client, Plaintiff, and TLC Holdings, LLC and by his refusal to appear in Federal Court while attempting to hide and cover up his gross negligence in these matters.

Elements of Malpractice (3) damage to the client, and
(4) proximate causation of the client's damages by the breach".

X: COUNT SEVEN OF MALPRACTICE: GROSS NEGLIGENCE DAMAGING PLAINTIFF

- A. Due to the complete and total disregard for Plaintiff's rights and protection, Defendant / Weissenstein's legal advice to execute the Settlement Agreement and the Consent Order required Plaintiff to make improvements to and develop TLC Holdings LLC's property and ultimately sell that same property to the public in small divided lots.
- B. The Honorable Judge George James was never informed that the property had a defective title and could never be developed for a public subdivision since no lending institution would participate while exception to good title existed. (exhibit "L")

- C. Consequently, due to Defendant/ Attorney Weissenstein's advice to Plaintiff to accept the Fraudulent Settlement Agreement (Exhibit "H") and Consent Order (Exhibit "I"), Plaintiff had no out other than ultimately defaulting and being wrongfully evicted losing all of his equitable interest (certified appraisal attached showing worth of Nine Hundred Thousand Dollars or more (\$900K+) (Exhibit "O" – 7 pp.) in said property, his ability to develop and sell lots and homes, and terminating the planned profits which would have exceeded Five Million dollars. (\$5M) plus lost monthly payments to TLC Holdings of. In addition, Weissenstein's malpractice caused Plaintiff constant fighting for over four and one half years (+4.5 yrs.) trying to defend himself all to no avail due to the *res judicata* from the Settlement Agreement that Defendant Weissenstein advised Plaintiff to sign.

Elements of Malpractice: element #2 : a breach of duty by the attorney.
 element #3: damage to the client and
 element #4: proximate causation of the client's damages by the breach".

XI: COUNT EIGHT OF MALPRACTICE: GROSS NEGLIGENCE

- A. Due to Defendant / Attorney's gross negligence and lack of prudent action, Plaintiff was wrongfully evicted on the 15th of April of 2014, for the Settlement Agreement and Consent Order clearly stated Plaintiff would be evicted if development, sales of lots and new homes, and full payment to TLC Holdings, LLC did not occur within specified time frames.
- B. Meeting the criteria was legally impossible under all circumstances due to defective title. The machinery of the Court was used to cause this Plaintiff

incredible suffering, wrongful eviction and lack of being properly heard and defended before the Court while Plaintiff's attorney (Weissenstein) seemed to know little about proper representation.

Elements of Malpractice: element #2 : a breach of duty by the attorney.
 element #3: damage to the client and
 element #4: proximate causation of the client's damages by the breach".

XII: COUNT NINE OF MALPRACTICE: GROSS NEGLIGENCE: FAILURE TO INTRODUCE S.C. LAW 27-33-30

A. IF Defendant Attorney/Paul Weissenstein had not committed malpractice on the Plaintiff and Defendant had

1. recognized the fraud being masked by the Sellers and
2. understood the contracts and
3. Counterclaimed , specifically that:
 - a) the property had defective title which the Sellers were masking,
 - b) by not recording long term lease(s) in the county courthouse as required by SC law 27-33-30, TLC Holdings, LLC was not only breaking the law, but setting up their opportunity to create the contractual fraud,

B. **THEN**, Defendant would have responsibly represented his client, the Plaintiff, with one of any defenses that were available. (Exhibit "Q")

But, this scenario was never recognized by Defendant, Weissenstein.

- C. **MISSING THIS**, the *fraudulent* Sellers were never put on their knees and the fraud was not halted. The outcome definitely would have been completely in the Plaintiff's favor. This was gross negligence by Defendant, Weissenstein.
- D. **THEREFORE**, Due to the Defendant's gross and all encompassing malpractice insisting that Plaintiff execute the Settlement Agreement and Consent Order prepared by TLC Holdings, LLC's attorneys, Plaintiff has suffered immensely: Plaintiff has been dragged into filing an injunction, filing Chapter 11, sued in Federal and State Court, been taken before three Federal Judges and two State Judges only to end up with a 3.5 million dollar judgment against himself, Plaintiff/Hutson.

Verification of Malpractice element #2: a breach of duty by the attorney.

#3: damage to the client and

#4: proximate causation of the client's damages by the breach.

XIII: COUNT TEN OF MALPRACTICE: NEGLIGENCE AND LACK OF CONCERN

- A. Defendant was handed a copy of a prior deposition taken by William Padgett, Attorney, who sued TLC Holdings, LLC a year before Plaintiff executed the Option to Purchase TLC Holdings LLC's property and the simultaneous purchase closing of the Big Water Resort back in January 2011. (Exhibit "T")
- B. In that deposition, TLC Holding, LLC's owner acknowledged that the Big Water Resort was losing over \$250,000 dollars each year. Plaintiff was ill

advised of this fact prior to purchasing the Big Water Resort. Defendant Weissenstein never recognized or connected that constant financial loss nor the fact that Big Water Resort owned no land nor had any legal right to operate a business where two life times of obligations existed. Another violation of SC # 27-33-30. (Exhibit "U")

- C. Also, Defendant, Weissenstein, never recognized that BWR had no contractual agreement to use TLC Holdings LLC's property, essentially making it impossible to assure its ability to operate and honor those 720 Family Memberships for 70 years. The existence of this defective title prevented Plaintiff from ever purchasing said TLC Holdings, LLC's property. Consequently, Plaintiff was sued by way of Class Action or default after Plaintiff was wrongfully evicted. (Exhibit "S")
- D. This entire Fiasco could have been prevented had Defendant Weissenstein not grossly over-looked and failed to recognize all the facts in the paperwork (i.e.: defective title and no land for the Big Water Resort Campground to legally use for the seventy years required to honor the Retail Family Membership Agreements, as well as other misleading "conditions" required by TLC Holdings, LLC in the Lease Purchase Option as well as the subsequent, but inclusive Settlement Agreement. This exceeds gross negligence.
- E. Defendant's malpractice has caused Plaintiff to be sued three times in Federal Court (Exhibit "S") and one time in State Court (Exhibit "R"). Plaintiff

has fought for years trying to defend himself while Defendant quietly continues to practice law without a care for what he created.

Verification of Malpractice element #2: a breach of duty by the attorney.

#3: damage to the client and

#4: proximate causation of the client's damages by the breach

XIV. COUNT ELEVEN OF MALPRACTICE: ALLOWING FRAUD UPON THE COURT

- A. Defendant Paul Weissenstein Attorney (being an Officer of the Court) accepted and took thousands of dollars in payment from the Plaintiff while not seriously spending the time to fully understand the documents and contracts that Plaintiff had laid in his hands.

- B. Defendant, Weissenstein, sat back and allowed Fraud Upon the Court to occur by allowing TLC Holdings LLC's attorneys to draw and prepare all papers including the Settlement Agreement *and Consent Order* (Exhibit "Q"). Defendant, having the license, ability and training to know that Plaintiff would be destroyed by the Settlement Agreement and Consent Order, withheld critical Material Evidence from being admitted on Plaintiff's behalf, thereby, as an officer of the court, Defendant Weissenstein committed Fraud upon the Court, while working in concert with the opposing party. (*Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985).

- C. Defendant refused to make an appearance in Federal Court to support Plaintiff's

Filing for new and additional information. He was totally self-serving due to his fear of being convicted of malpractice. *Consequently*, Plaintiff was sanctioned \$15,000.00 dollars (or go to jail) by the Federal Judge Norton due to Plaintiff's inability to produce new evidence. (Exhibit "M")

1. Defendant Weissenstein's new evidence being requested was simply informing the Federal Judge Norton that Plaintiff had not been advised to title defects and other concealments of which TLC Holdings LLC and their lawyers were aware of. (Exhibit "F") Weissenstein's refusal to appear in court or provide an affidavit shows: (1) the complete lack of professional ethics, (2) the complete lack of morales, and (3) shows professional egocentrism. Any officer of the court conducting him/herself as described should no longer be allowed to represent the public in the courtroom.

Defendant Weissenstein simply allowed Plaintiff to be innocently placed on the Alter of the Court and be sacrificed, knowing full well the fraudulent Settlement Agreement and Consent Order ordained plaintiff's legal demise by fraudulent TLC Holdings, LLC's attorneys who knew Plaintiff's wrongful eviction would become mandatory causing Plaintiff to be lost in every respect. The Defendant had to be aware that he had failed as the Plaintiff's attorney, but was too concerned for his personal future to alert or assist his client.

2. Even after the Federal Judge asked for proof that Plaintiff had not been made aware or advised by his attorney of the situation regarding the Settlement Agreement and Consent Order (Exhibit "F"), the Defendant still refused to appear to merely testify that he had not advised his client of the facts. Defendant Weissenstein refused to come to the aid of his former client (Plaintiff) *even though the Federal Judge had spelled out what he wanted to hear* to be convinced that Plaintiff was telling the truth, Defendant Weissenstein continued to hide and remain outside the Courtroom in Sumter, S.C. knowing Plaintiff was being slaughtered.

This was "intentional gross negligence" and a cruel lack of concern for another human being, a human being who had paid this Defendant thousands of dollars. It was a total lack of a sense duty to right the wrong he had created.

XV. COUNT TWELVE OF MALPRACTICE: ON-GOING DAMAGES FROM MALPRACTICE

- A. The damages outlined FAR exceeds 2.5 Million Dollars (\$2.5M) *subject to a full deposition and a competed audit* to also include:
 1. Equitable Interest Lost: \$700,000-\$1,4000,000) (*Exhibit "O"*) **BUT** *does not include the established new restaurant (increasing BWR income by \$5K per month) then only operating for 3 months when report was done.*

2. Payments made to TLC Holdings, LLC for Lease Option (\$162,500)
(Exhibit "P")

3. State Court has assigned a \$3.5 M (Three and one-half million dollar)
JUDGMENT against Plaintiff, who has been unable to properly defend
himself due to the *res judicata* allowed and advised by the malpractice
and incompetence of this Defendant, Paul Weissenstein.

4. Federal Court assigned a \$15,000.00 sanction

B. Plaintiff is now faced with attempting to file to set aside the fraudulent State
Court Judgment regarding the Settlement and Consent Order Agreements.

Elements of Malpractice (3) damage to the client and
(4) proximate causation of the client's damages by the breach".

THEREFORE Plaintiff prays for the following:

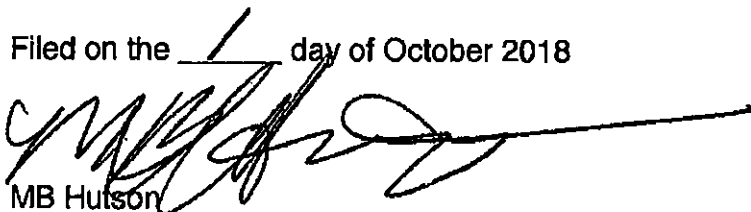
- A. This case be taken before a jury.
- B. Defendant be held totally liable for all damages incurred to Plaintiff.
- C. Permit all actions by the Honorable Court to make the Plaintiff whole.
- D. Plaintiff requests a speedy trial due to on-going damages and suffering.
- E. Plaintiff is Pro Se and diligently seeks complete justice.
- F. Defendant not be allowed to sell, transfer, assign, legally hide any of his assets

or any joint ownership of any kind including business, partnerships, stocks and/or bonds, weekly income (Including any agreed percentage of income caused by any attorney working in his office part time or full time) until this case has been presented to a jury.

- G. Plaintiff be given special consideration as Pro Se.
- H. Plaintiff be allowed to file online to send and receive all documents regarding this case due to hardship and driving distance.
- I. Plaintiff asks for Punitive damages due to gross negligence.
- J. Allow the Defendant to be responsible for all Plaintiff's costs for having to sue Defendant for restitution and damages.
- K. Allow Plaintiff to include in this complaint any associated attorneys due to association as additional defendants (John Doe) at the time this Malpractice occurred (2011-2012) based on "Wildasin vs Mathes 2016".

All document evidences are hereby attached to this Amended Complaint.

Filed on the 1 day of October 2018



MB Hutson
803 308 2714
1545 Biltmore Street
Orangeburg, South Carolina
29115

Exhibit G

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 11 CP- 14 - 602

TLC Holdings, LLCM. B. Hutson

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

The CourtAttorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant ☐

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

IT IS ORDERED AND ADJUDGED: ☒ See attached order (format order to follow) ☐ Statement of Judgment by the Court:CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE

DATE

3/21/14This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

ORDER INFORMATION

Bonnie H. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

Date

21433/20/14

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Thomas L. Harper, Jr.
R. Wayne Byrd, Esq.

ATTORNEY(S) FOR THE PLAINTIFF(S)

H. Freeman Belsa, Esq.

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

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

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

[illegible]

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CLARENDON)

CASE NUMBER: 11-CP-14-602

TLC Holdings, LLC,)

Plaintiff,)

v.)

M.B. Hudson a/k/a M.B. Hutson,)

Defendant.)

ORDER

M.B. Hudson a/k/a M.B. Hutson,)

Defendant and Third Party Plaintiff,)

v.)

Richard U. Clark, Jimmy S. Lovell and)
James C. Thigpen,)

Third Party Defendants.)

**CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE**DATE 3/21/14Bentley S. Roberts
CLERK OF COURT
CLARENDON COUNTY, SCBEULAH C. FORTIS
CLERK OF COURT
2014/03/21 AM 11:56

Before the Court is the Motion to Set Aside Affidavit of Default (the "Affidavit of Default Motion") and Motion for Temporary Restraining Order ("TRO Motion" and, together with the Affidavit of Default Motion, the "Motions") filed in the above-captioned action on December 30, 2013 by Defendant and Third Party Plaintiff, M.B. Hudson a/k/a M.B. Hutson ("Defendant", "Hutson" or the "Debtor"). On January 8, 2014 (the "Petition Date"), during this Court's previous hearing on the Motions, Defendant filed a bankruptcy petition under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. Section 101 *et seq.* (the "Bankruptcy Code"), which is pending in the United States Bankruptcy Court for the District of South Carolina (the "Bankruptcy Court"), Case Number 14-00165-jw (the "Bankruptcy Case"). By Order Granting Limited Relief from the Automatic Stay filed on February 21, 2014 (the "Stay Relief Order"), the Bankruptcy Court granted relief from the automatic bankruptcy stay to Plaintiff, TLC Holdings, LLC ("Plaintiff" or "TLC"), for the limited purpose of allowing this Court to determine "whether the Debtor had any property interest in the Property" as of the bankruptcy

¹ The term "Property", as used in the Stay Relief Order, means the property located generally at 5277 Dingle Pond Road, Summerton, Clarendon County, South Carolina, along Lake Marion, upon which the Defendant has been operating a business known as the "Big Water Resort". The Consent Order and Settlement Agreement, as defined below, use a similar definition for the term "Property", and this Court will adopt the same definition of that term for purposes of this Order.



petition date, January 8, 2014, and, if so, whether the Debtor presently has any remaining property interest in the Property". Stay Relief Order at 4.

This Court conducted a hearing on March 6, 2014 (the "March Hearing"), attended by Plaintiff and its attorneys, R. Wayne Byrd and Thomas L. Harper, Jr., and by Defendant and his attorney, H. Freeman Belser, to consider the Motions and the issues presented to this Court through the Stay Relief Order.

This Court has given careful consideration to the Stay Relief Order, and to the scope of the issues properly before this Court for ruling in light of the procedural posture of this case as of the Petition Date. As set forth more fully below, this Court has concluded that, pursuant to the Stay Relief Order, this Court is authorized by the Bankruptcy Court to decide the Motions that were pending in this action on the Petition Date. To the extent that the Stay Relief Order could be interpreted as requesting or directing that this Court decide issues or matters beyond the scope of the Motions, this Court has concluded that such issues are beyond what has been presented to this Court, and declines to do so. As to the Motions before the Court, for the reasons set forth below, the Court concludes that the Motions should be denied.

The court notes that after advising counsel of the ruling set forth herein, the court, by email, inquired of the parties as to their positions on the issue of whether the court had the authority to rule on the issues set forth in this order. The potential predicament is that the Bankruptcy Court issued the fourteen day stay so this court could rule on the issue of whether the Defendant had any interest in the Property; however, the court is not addressing that specific question in this order. The Defendant maintains that the granting of the stay was to address only that narrow issue and that since this court is not addressing that narrow issue, this court is precluded from addressing any other issues. The Plaintiff maintains the court has the authority to address the issues set forth in this order. The court concludes the stay does not prohibit it from issuing the ruling set forth herein.

FINDINGS OF FACT AND PROCEDURAL HISTORY

1. On December 14, 2011, Plaintiff filed its Summons and Complaint in this action (the "Complaint"), seeking to eject Defendant from the Property and recover money damages from Defendant for Defendant's alleged breach of a Lease Purchase Agreement related to the Property, which was dated on or about December 15, 2010, and entered among Plaintiff, Defendant and the Third Party Defendants named above (the "Lease Purchase Agreement").

2. By Answer and Counterclaim and Affirmative Defense and Motion to Dismiss and Third Party Complaint filed in this action on January 3, 2012 (the "Answer and Counterclaims"), Defendant, through counsel, asserted various affirmative defenses, counterclaims and third party complaints against Plaintiff and the members of Plaintiff relating to the Lease Purchase Agreement and the circumstances surrounding the parties' execution of the same and the Defendant's prospective lease and purchase of the Property from Plaintiff. In the Answer and Counterclaims, Defendant asserted, *inter alia*, that he had obtained an equitable interest in the Property and was entitled to a right of redemption therefor, and that Plaintiff had made various misrepresentations or material omissions regarding facts related to the Property, and had interfered with Defendant's development and/or operation of the Property.

3. Plaintiff and Defendant settled all claims brought in Plaintiff's Complaint and in Defendant's Answer and Counterclaims by virtue of a Settlement Agreement dated as of March 30, 2012, among Plaintiff, Defendant, and the Third Party Defendants (the "Settlement Agreement"). The parties sought this Court's approval of the Settlement Agreement, and its adoption as the Order of this Court, which was effected by virtue of a Consent Order entered in this action on April 13, 2012 (the "Consent Order"). The Consent Order expressly incorporates the Settlement Agreement by reference, and approves the terms thereof.

4. The Settlement Agreement, as approved by the Consent Order, amended the Lease Purchase Agreement in several respects, including the following:

a. It extended the term of the lease contained in the Lease Purchase Agreement, whereby Hutson was obligated to pay base rent each month to TLC, as well as the property taxes owing on the Property and the rent owing to the South Carolina Public Service Authority (the "Santee Cooper Rent").

b. It imposed an "Approval Deadline" by which Hutson must obtain the "Approvals", which was defined as all necessary governmental approvals for the development and subdivision of the Property, so that Hutson's subdivision plat of the Property could be recorded. The Approval Deadline was July 31, 2012, with three thirty (30) day extension rights which, if exercised, could extend the Approval Deadline to approximately November 1, 2012.

c. It required Hutson to close on the purchase of a portion of the Property within 15 days after he received his Approvals, which thus would have to occur prior to the end of November, 2012.

d. It contained a provision whereby Hutson acknowledged that he owed an "Arrearage" under the Lease Purchase Agreement of \$199,969.19 as of March 31, 2012, and it expressly obligated Hutson to repay the Arrearage not later than December 31, 2012. Settlement Agreement ¶ 4.

e. It obligated TLC to review any "Qualified Plat" provided to it by Hutson, and either approve or provide comments thereto. It defined a "Qualified Plat" as "a proposed subdivision plat of a portion of the [Property], which is prepared by a registered South Carolina land surveyor, and which meets the minimum standards for the practice of land surveying under South Carolina law". Settlement Agreement ¶ 5. If TLC approved a Qualified Plat presented to it, then it was obligated to write a letter to the Clarendon County Planning Commission (the "Planning Commission") requesting that the Planning Commission approve that Qualified Plat.

f. Except for a letter due from TLC to the Planning Commission by April 3, 2012, as to which there is no dispute that TLC delivered, TLC was not obligated to deliver other letters to the Planning Commission unless and until it was presented with a Qualified Plat.

g. It expressly and conspicuously provided, in all capital letters, that Hutson's obligations under the Settlement Agreement were not conditioned upon his receipt of the Approvals. Settlement Agreement ¶ 8.

5. In addition, Section 3 of the Settlement Agreement provides that in the event that Defendant fails to comply with the terms of the Settlement Agreement, "unless such failure is a direct and proximate result of TLC's failure to perform an action expressly required of it in this Settlement Agreement", then the Plaintiff was entitled to "the following immediate relief, without further order of the Court or notice to Defendant or his counsel of record: (a) termination of the [Lease Purchase] Agreement, (b) cancellation of the Lis Pendens [filed by Defendant in this case], (c) immediate vacation of the Property by Defendant except for his personal residence thereon, which shall be vacated within fifteen (15) days; and (d) the provisions of Section 23 shall be effective".

6. Section 23 of the Settlement Agreement contains an automatic release by Defendant, as of the date of termination of the Lease Purchase Agreement, whereby Defendant is deemed to have released, forever discharged and promised never to sue TLC, the Third Party Defendants, and parties related thereto (defined more fully therein as the "TLC Parties") from all claims, known or unknown, and arising at law or in equity, relating to the Lease Purchase Agreement or the relationship between the parties (herein, the "TLC Release").

7. By December 31, 2012, Defendant had breached several provisions of the Settlement Agreement, including:

- a. failing to obtain the Approvals by the Approval Deadline;
- b. failing to close upon the purchase of at least eight acres of the Property by the closing deadline imposed therein (which was approximately November 15, 2012); and
- c. failing to pay the Arrearage prior to December 31, 2012.

8. It is undisputed by the parties that each of the foregoing breaches remains uncured at present. Defendant acknowledges that he has not received his Approvals, nor purchased any portion of the Property, nor repaid the Arrearage.²

9. By letter from Plaintiff's counsel to Defendant dated February 7, 2013, Plaintiff notified Hutson that he was in default of the Settlement Agreement and Lease Purchase Agreement for, among other things, failing to pay the Arrearage, failing to pay rent owing thereunder, permitting a mechanics' lien to be filed against the Property by Blue Line Consulting, LLC, and failing to pay the 2012 property taxes for the Property prior to their delinquency on or before January 15, 2013.

² Plaintiff alleges that other defaults by Hutson exist under the Lease Purchase Agreement, including failing to pay the 2012 property taxes for the Property prior to their delinquency, failing to pay the Santee Cooper Rent arising after the date of the Settlement Agreement, permitting a mechanic's lien to be filed against the Property, failing to construct certain road improvements to the Property, and failing to comply with certain covenants governing insurance as required under the Settlement Agreement.

10. Defendant did not cure the defaults outlined in the February 7, 2013 letter.

11. By letter dated December 10, 2013, Hutson was advised by Plaintiff's counsel that Plaintiff had exercised its right under the Settlement Agreement to terminate the Lease Purchase Agreement (the "LPA Termination Letter").

12. On December 11, 2013, in accordance with the Consent Order, Plaintiff filed an Affidavit of Default in this action (the "Affidavit of Default"). Plaintiff enclosed a copy of the Affidavit of Default in the LPA Termination Letter.

13. On December 30, 2013, prior to being ejected from the Property, Hutson filed the Motions, along with a supporting affidavit by Hutson (the "Hutson Affidavit"). In the Motions, Hutson alleged that TLC failed to perform an action expressly required of it in the Settlement Agreement, and that it was that failure by TLC which caused Hutson to be unable to perform his obligations under the Settlement Agreement. Hutson Affidavit ¶ 4.a. Specifically, Hutson alleges the following:

a. that Plaintiff approved the proposed subdivision plat, but failed to provide a letter to the Planning Commission that requested that the Planning Commission approve the subdivision. See TRO Motion ¶ 7.a.

b. that Plaintiff made "verbal assurances" to Hutson that were incorrect, and/or that Plaintiff failed to make "important disclosures" to him regarding the Property. See TRO Motion ¶ 7.b.; Hutson Affidavit ¶ 4.b.

c. that Plaintiff failed to provide notice to Defendant regarding the filing of liens against the Property, or of Defendant's failure to pay property taxes with regard to the Property. TRO Motion ¶ 7.c.; Hutson Affidavit ¶ 4.c.

14. This Court issued a Temporary Restraining Order (the "TRO") on December 30, 2013, enjoining Plaintiff from pursuing further proceedings arising from its issuance of an Affidavit of Default. The TRO was to be in effect through January 9, 2014, pursuant to Rule 65, SCRCP.

15. The sole relief requested in the Motions was for this Court to set aside the Plaintiff's Affidavit of Default due to the alleged failure of the Plaintiff to perform actions required of it in the Settlement Agreement and Consent Order. The pertinent issues before this Court in the Motions were whether the Plaintiff had failed or refused to perform certain obligations owing by it under the Settlement Agreement and Consent Order, and whether any such failure had been the "direct and proximate" cause of the Defendant's failure to perform his obligations. ~~The Motions and the Hutson Affidavit did not assert any claim by Defendant to a right of redemption or other equitable interest in the Property.~~

16. The Court scheduled a hearing on the Motions for January 8, 2014 (the "January Hearing"). The sole purpose of the January Hearing was for this Court to determine whether the TRO should be extended. At no time prior to March 6, 2014 was this Court presented with the issue of whether the Defendant had an equitable interest in the Property that

survived the entry of the Settlement Agreement and Consent Order, and the filing of the Affidavit of Default.

17. During the course of the January Hearing, the Court was advised by the Defendant's attorney that the Defendant had just filed a Chapter 11 petition in the Bankruptcy Court. Therefore, this Court adjourned the hearing, as the Chapter 11 filing automatically stayed further proceedings.

18. On January 24, 2014, Plaintiff filed a Motion for Relief from Automatic Stay or, in the Alternative, for an Order Determining that the Automatic Stay is Inapplicable (the "Stay Relief Motion") in the Bankruptcy Court. It appears that, in the Stay Relief Motion, Plaintiff argued, *inter alia*, that the Property should not be considered property of the Debtor's bankruptcy estate because the Lease Purchase Agreement had been terminated prior to the Petition Date, thereby extinguishing any property interest the Defendant had in the Property. It also appears that Defendant argued in defense of the Stay Relief Motion that he had an equitable interest in the Property, which Plaintiff claimed was asserted previously in Defendant's Answer and Counterclaims, and resolved with finality by the Consent Order and Settlement Agreement.

19. On February 21, 2014, the Bankruptcy Court entered the Stay Relief Order in which it determined that the issue of whether the Defendant has any interest in the Property is a matter of state law, and that considerations of judicial economy, and this Court's familiarity with the dispute, supported its conclusion that this Court is the more appropriate forum to consider the arguments of the parties and to determine what interest, if any, the Defendant has in the Property. The Stay Relief Order granted relief from the automatic bankruptcy stay to Plaintiff for the limited purpose of allowing either Plaintiff or Defendant to seek a determination by this Court of "whether the Debtor had any property interest in the Property as of the bankruptcy petition date, January 8, 2014, and, if so, whether the Debtor presently has any remaining property interest in the Property". Stay Relief Order at 4.

20. On or about February 28, 2014, counsel for the Plaintiff contacted this Court for the purpose of scheduling a hearing. The March Hearing was held in Florence County on March 6, 2014.³ At the March Hearing, counsel for Defendant submitted a supporting memorandum of law in which Defendant argued that it was a "vendee in possession" of the Property as of the Petition Date, and that, accordingly, Defendant was entitled to claim an equitable interest, and right of redemption, in the Property.

CONCLUSIONS OF LAW

1. In the Stay Relief Order, the Bankruptcy Court determined that this Court was better situated to determine (a) whether the Debtor had any property interest in the Property as of the Petition Date, and (b) if so, whether he has any property interest in the Property at present. At the March Hearing, this Court repeatedly inquired of the parties whether they believed this Court had the authority, based on the matters pending before it, to issue a final decision on the

³ This Court notes that, with the consent of the parties, the March Hearing was conducted within fourteen days of the entry of the Stay Relief Order, and that this Order is being entered more than fourteen days following the entry of the Stay Relief Order. This Court makes no determination of whether any stay under Fed. R. Bankr. P. 4001(a)(3) has now expired, nor any determination of the legal effect of the existence or expiration thereof.

merits on these two issues. The parties, through their counsel, insist that this Court does. This Court concludes it does not. All that was presented to this Court prior to the Petition Date was the issue raised in the two Motions. While the issue of whether the Lease Purchase Agreement was properly terminated was before the Court on the Petition Date, the question of whether that termination, if it stands, thereby extinguished any property interest the Defendant had in the Property was not. Again, the issue presented by the Motions is whether the Defendant's failure to perform under the Settlement Agreement and Consent Order was directly and proximately caused by the Plaintiff's failure to perform, not whether the Defendant has retained some sort of equitable or legal interest in the Property by virtue of improvements or other value he has added to the Property. Any notation in the Defendant's Motions, or in the Plaintiff's Stay Relief Motion, that the movant was also seeking "such other and further relief as may be just and proper", does not expand the matters presented to this Court, or this Court's jurisdiction, into the one now urged by the parties.

2. As to the TRO Motion, the Court will now address the issue of whether the TRO should be extended. In so doing, the Court will address the relevant issues raised at the March Hearing as if they had been raised at the January Hearing, when the TRO was still in effect.⁴ The law is well-settled in South Carolina that an injunction is a drastic remedy and may only be granted when the party seeking the relief demonstrates (1) he will suffer irreparable harm if the injunction is not granted, (2) he will likely succeed on the merits of the litigation, and (3) there is an inadequate remedy at law. *See AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 674 S.E.2d 505 (Ct. App. 2009). The remedy of an injunction is drastic and should only be applied when legal rights are unlawfully invaded or legal duties are willfully or wantonly neglected. *LeFurgy v. Long Cove Club Owners Assoc., Inc.*, 313 S.C. 555, 443 S.E.2d 577 (Ct. App. 1994). The party seeking an injunction is not required to prove an absolute legal right, but must present a reasonable question as to the existence of such a right. The court may consider the merits of a case to the extent necessary to determine whether a temporary injunction is warranted. "Once a *prima facie* showing has been made entitling the [moving party] to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits." *AJG Holdings, LLC*, 382 S.C. at 50-51.

3. Having considered the arguments of Defendant and the evidence presented by the parties, this Court concludes that the Defendant has not demonstrated that his failure to perform his obligations under the Settlement Agreement is a direct and proximate result of Plaintiff's failure to perform an action expressly required of it under the Settlement Agreement. The evidence presented at the March Hearing was convincing that the Defendant breached several provisions of the Settlement Agreement approved by the Court, and made part of the Order of this Court in the Consent Order filed on April 13, 2012. For example, Defendant admits that he has not repaid the Arrearage, nor did he obtain the Approvals by the Approval Deadline, nor has he purchased any portion of the Property. Evidence of other defaults by Defendant was presented at the March Hearing, including his failure to pay rent and property

⁴ Pursuant to S.C.R.Civ.P. 65, the TRO was scheduled to expire ten days after its issuance, on January 9, 2014. *See* TRO. This Court knows of no authority, and none was presented by the parties, addressing whether the Chapter 11 automatic stay also stayed the expiration of the TRO, and, if so, whether the expiration of the fourteen day 4001(a)(3) Stay has now caused the TRO to expire.

taxes required under the Lease Purchase Agreement as modified by the Settlement Agreement, and permitting a mechanic's lien to be filed against the Property.

4. Defendant contends in the Hutson Affidavit that TLC approved a subdivision plat of the Property but failed to submit a requisite letter to the Planning Commission. See TRO Motion ¶ 7.a. The Settlement Agreement does require TLC to consider a proposed Qualified Plat submitted by Hutson and, if approved, submit a letter in support thereof to the Planning Commission. But in his sworn examination taken in the Bankruptcy Case pursuant to F. R. Bankr. P. 2004 (the "2004 Examination"), Hutson admitted that he had not provided a "Qualified Plat" to TLC for consideration prior to January, 2014, well past the Approval Deadline in November, 2012. 2004 Examination p. 460 lns.16-18.

5. With respect to Defendant's allegations in Paragraph 7.b. of the TRO Motion that Plaintiff made "verbal assurances" to Hutson that were incorrect, or that Plaintiff failed to make "important disclosures" to him, Hutson made those same allegations in his Answer and Counterclaims filed in this action on January 3, 2012, and those allegations were included in the settlement of this action pursuant to the Settlement Agreement, which was approved by the Consent Order. Hutson admitted in his 2004 Examination that these all arose prior to the Settlement Agreement. 2004 Examination p. 515, ln.4 – p. 516, ln. 21. Thus, those alleged misstatements or omissions, even if true, were known to Defendant prior to the entry of the Consent Order, and were the basis of the settlement of this action pursuant to the Settlement Agreement which was approved by the Consent Order.

6. With respect to Defendant's allegations in Paragraph 7.c. of the TRO Motion that no notice was provided by Plaintiff to Defendant regarding liens placed on the Property, or any nonpayment of real property taxes, those allegations are likewise unfounded. In the letter from Plaintiff's counsel to Defendant dated February 7, 2013, Plaintiff expressly advised Hutson that he was in default for, among other things, "permitting a lien to be filed against the Property by Blue Line Consulting, LLC" and "failing to pay the 2012 property taxes for the Property prior to their delinquency on or before January 15, 2013". While the mechanic's lien may have subsequently lapsed by statute, the 2012 property taxes were never paid by Defendant.

7. Accordingly, there has been no *prima facie* showing by the Defendant that the injunction should be extended. The allegations contained in the Hutson Affidavit are refuted by his own testimony in the 2004 Examination, and by the documentary evidence presented by Plaintiff. Defendant has failed to establish that he would be likely to succeed on the merits of his claim that his breaches of the Settlement Agreement were caused by the Plaintiff. The assertions set forth in the Hutson Affidavit must have a reasonable factual basis, and this Court concludes that they do not.

8. Because the Defendant has not established that he is likely to prevail on the merits of his claim, there is no need for this Court to examine whether the Defendant will suffer irreparable harm if the relief is not granted, nor whether the Defendant has an adequate remedy at law. This Court declines to extend the TRO or otherwise to grant an injunction in Defendant's favor against the enforcement of the Consent Order and Settlement Agreement according to their terms.

9. As to the Affidavit of Default Motion, because this Court concludes that Defendant defaulted under the terms of the Consent Order and Settlement Agreement, and that those defaults were not the "direct and proximate result of TLC's failure to perform an action expressly required of it" under the Settlement Agreement, the Defendant's Motion to Set Aside Affidavit of Default is likewise denied.

10. Pursuant to the express terms of the Consent Order, effective upon the filing of the Affidavit of Default in this action on December 11, 2013, Plaintiff was entitled to the following immediate relief, without further order of the Court or notice to Defendant or his counsel of record: (a) termination of the Lease Purchase Agreement, (b) cancellation of the Lis Pendens [filed by Defendant in this case], (c) immediate vacation of the Property by Defendant except for his personal residence thereon, which shall be vacated within fifteen (15) days; and (d) the provisions of Section 23 shall be effective". Consent Order at ¶ 2.

11. Therefore, the Lease Purchase Agreement was terminated, according to its terms as modified by the Settlement Agreement and Consent Order, as of December 11, 2013 (the "Termination Date"), and Hutson was required to vacate the Property immediately, except only for his personal residence thereon, which he was required to vacate within fifteen (15) days (i.e., December 26, 2013).

12. In the TRO Motion, Defendant acknowledges receiving a copy of the Affidavit of Default on December 18, 2013. TRO Motion ¶ 4. Even if this Court were inclined to commence the fifteen (15) day period for vacating his residence from the date Defendant says he received the Affidavit of Default on December 18, 2013, Defendant was still required to vacate that residence by January 2, 2014. Defendant's rights to possession of the remainder of the Property, other than his residence, expired no later than December 18, 2013, and his right to remain in his residence would have lapsed not later than January 2, 2014.

ORDER

NOW, THEREFORE, it is hereby:

ORDERED, that this Court declines to extend the TRO or otherwise grant an injunction against Plaintiff's enforcement of the Consent Order and Settlement Agreement.

FURTHER ORDERED, that the Motion to Set Aside Affidavit of Default is denied.

FURTHER ORDERED, that the Settlement Agreement and Consent Order are to be enforced according to their terms.

FURTHER ORDERED, that, in conjunction with enforcing the Consent Order according to its terms, pursuant to Paragraph 2 of the Consent Order, upon the filing of the Affidavit of Default on December 11, 2013, Plaintiff was and is entitled to, and is hereby awarded, the following immediate relief, without the need for further Order of this Court:

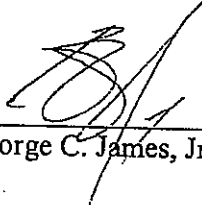
(a) The Lease Purchase Agreement was deemed automatically terminated and of no further force or effect;

(b) The lis pendens filed by Defendant against the Property was deemed automatically cancelled, terminated of record, and of no further force or effect; and

(c) Defendant was required immediately to vacate the Property, except only with respect to his personal residence located thereon, as to which he was obligated to vacate the same within fifteen (15) days following receipt of a copy of the Affidavit of Default, or the posting of a copy of the Affidavit of Default upon such residence, whichever first occurs.

FURTHER ORDERED, that pursuant to the Consent Order, Defendant is deemed to have granted the TLC Release to the TLC Parties, as set forth more fully in Section 23 of the Settlement Agreement.

IT IS SO ORDERED.


George C. James, Jr., Circuit Judge

March 20, 2014

Exhibit H

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CLARENDON	)	CASE NO.: 2015-CP-14-0615
	)	
TLC HOLDINGS, LLC, RICHARD CLARK,	)	
AND JIMMY S. LOVELL,	)	
	)	
Plaintiffs,	)	ANSWER TO AMENDED COMPLAINT
	)	AND PRO SE COUNTER-CLAIMS
vs.	)	BACK
	)	(JURY TRIAL REQUESTED)
M.B. HUTSON A/K/A M.B HUDSON,	)	
	)	
Defendant	)	
	)	
vs.	)	
	)	
JOHN DOE CORPORATIONS	)	
	)	

COMES NOW, Defendant M.B. Hutson a/k/a M.B. Hudson, (hereinafter "Defendant") by and through its undersigned attorneys, and hereby answers Plaintiffs TLC Holdings, LLC, Richard Clark, and Jimmy S. Lovell (hereinafter collectively "Plaintiffs TLC")'s Complaint and Defendant M.B. Hutson a/k/a M.B. Hudson, pro se, files these counter-claims back. Any allegation not expressly admitted herein is denied.

1. Responding to Paragraphs 1 through 3 of the Plaintiffs' Complaint, the allegations contained therein are, upon information and belief, admitted.

2. Responding to Paragraph 4 of Plaintiffs', Defendant admits so much as alleges he is temporarily residing in Orangeburg County, South Carolina, however, still retains resident contacts in Tennessee.

3. Responding to Paragraph 5 of Plaintiffs' Complaint, the allegations therein are denied as stated.

4. Responding to Paragraph 6 of Plaintiffs' Complaint, the allegations contains legal conclusions to which this Defendant is not required to admit or deny.

FACTUAL ALLEGATIONS

5. Responding to Paragraphs 7 and 8 of Plaintiffs' Complaint, those allegations are, upon information and belief, admitted.

6. Responding to Paragraph 9 of Plaintiffs' Complaint, Defendant admits so much as alleges that Defendant entered into a lease-purchase agreement and promissory note with certain of the Plaintiffs. As for the terms and dates of the lease-purchase agreement and promissory note, Defendant craves references to the documents themselves. Further responding, Defendant denies that the parties had a meeting of the minds as to the underlying agreement (s) and reserves the right to contest the validity of any agreement(s). To the extent Paragraph 9 alleges any wrongdoing on the part of the Defendant, those allegations are expressly denied.

7. Responding to Paragraph 10 of Plaintiffs' Complaint, Defendant admits so much as reiterates language in the lease-purchase agreement, to which Defendant craves reference. Further responding, Defendant denies that the parties had a meeting of the minds as to the underlying agreement (s) and reserves the right to contest the validity of any agreement(s). To the extent Paragraph 10 alleges any negligence or wrongdoing of the Defendant, those allegations are expressly denied.

8. Responding to Paragraph 11 of Plaintiffs', the allegations contained therein are, upon information and belief, admitted.

9. Responding to Paragraph 12, the allegations therein are, upon information and belief, denied as stated.

10. Responding to Paragraph 13, Defendant admits so much as alleges that subsequent to execution of the agreements referenced herein, he was engaged in the operation of the Big Water Resort Campground.

11. Responding to Paragraph 14 of Plaintiffs' Complaint, Defendant craves reference to the pleadings and documents filed in the referenced action. To the extent Paragraph 14 or the pleadings themselves express or allege any negligence or wrongdoing of the Defendant, those allegations are expressly denied.

12. Responding to Paragraph 15 of Plaintiffs' Complaint, Defendant craves reference to the terms of the pleadings and documents referenced therein. Further responding, Defendant denies any duty other than those imposed by law, statute, or binding contract. Further responding, Defendant denies any meeting of the mind as to the terms of the Settlement Agreement and reserves the right to contest such document. To the extent Paragraph 15 alleges any negligence or wrongdoing of the Defendant, those allegations are expressly denied.

13. Responding to Paragraphs 16 and 17, Defendant admits so much as alleges counsel for Clark, Lovell and TLC Holdings made communications regarding their position(s) as to the lease purchase agreement and pleadings. Further responding, to the extent that Paragraphs 16 or 17 express or imply any wrongdoing on the part of Defendant those allegations are denied as stated.

14. Responding to Paragraph 18 of Plaintiffs' Complaint, Defendant admits so much as alleges on or about December 18, 2013 postcards were sent, craves reference to the postcards, the terms of which speak for themselves, and denies any allegation inconsistent therewith. To the extent Paragraph 18 alleges or implies any wrongdoing on behalf of Defendant, those allegations are expressly denied.

15. Responding to Paragraph 19, Defendant admits so much as alleges he tried to avoid eviction from Big Water Resort Campground. To the extent Paragraph 19 alleges or implies any wrongdoing on behalf of Defendant, those allegations are expressly denied.

16. Responding to Paragraph 20, there is no exhibit attached and, therefore, Defendant is without sufficient information to respond to the allegations therein. To the extent Paragraph 20 alleges or implies any wrongdoing on behalf of Defendant, those allegations are denied.

17. Responding to Paragraph 21, admits so much as refers to pleadings filed with the Court, the contents and procedural posture of which speak for themselves. Further, there is no exhibit attached to these pleadings and, therefore, Defendant is without sufficient information to further respond to Paragraph 21. To the extent Paragraph 21 alleges or implies any wrongdoing on behalf of Defendant, those allegations are denied.

18. Responding to Paragraph 22, Defendant admits so much as references the Court's Order, the terms of which speak for themselves. Further responding, Defendant denies that the parties had a meeting of the minds as to the underlying agreement (s) and reserves the right to contest the validity of any agreement(s). Further responding, Defendant admits so much as he has vacated the property. To the extent Paragraph 22 alleges any wrongdoing on behalf of Defendant, those allegations are denied.

19. Responding to Paragraph 23 of Plaintiffs' Complaint, Defendant admits so much as references the pleadings referenced therein the terms of which speak for themselves. To the extent Paragraph 23 or the pleadings themselves allege any wrongdoing on behalf of Defendant, those allegations are expressly denied.

FOR A FIRST CAUSE OF ACTION
(Libel)

20. Paragraph 24 of Plaintiffs' Complaint is a reincorporation paragraph to which the Defendant is not required to respond other than to reiterate its defenses enumerated herein.

21. Responding to Paragraph 25, those allegations are denied

22. Responding to Paragraph 26, Defendant admits so much as alleges that in an effort to prepare a class action, he contacted potential class members and made other such preparations to engage in a suit which was ultimately filed by others in the Federal Court at 2:14-CV-01583-DCN.

23. Responding to Paragraph 27 of Plaintiffs' Complaint, those allegations are denied as stated.

24. Responding to Paragraph 28 of Plaintiffs' Complaint, those allegations are denied.

25. Responding to Paragraph 29 of Plaintiffs' Complaint, those allegations are denied as stated.

FOR A SECOND CAUSE OF ACTION
(Slander)

26. Paragraph 30 of Plaintiffs' Complaint is a reincorporation paragraph to which the Defendant is not required to respond other than to reiterate its defenses enumerated herein.

27. Responding to Paragraph 31, those allegations are denied as stated.

28. Responding to Paragraph 32, Defendant is without sufficient information to respond to the allegations contained in Paragraph 32 and, therefore, denies same. To the extent Paragraph 32 or the pleadings themselves allege any wrongdoing on behalf of Defendant, those allegations are expressly denied.

29. Responding to Paragraph 33, those allegations are denied as stated.
30. Responding to Paragraph 34, those allegations are denied.
31. Responding to Paragraph 35, those allegations are denied.
32. Defendant denies the “Wherefore” clause, including all subparts, constituting the remainder of the Complaint.
33. Each and every allegation not expressly admitted in this Answer is denied.

FURTHERING RESPONDING AS AN AFFIRMATIVE DEFENSE
(Privilege/Truth)

34. Plaintiffs’ defamation cause of action is barred as Defendant’s allegedly defamatory statement was absolutely or, in the alternative, qualifiedly privileged. Further, Defendant’s allegedly defamatory statement was true.

FURTHERING RESPONDING AS AN AFFIRMATIVE DEFENSE
(Statute of Limitations)

35. Plaintiffs may have failed to commence this action within the time required by the applicable statute of limitations, and the failure to timely commence this action constitutes a bar and complete defense to these claims.

FURTHERING RESPONDING AS AN AFFIRMATIVE DEFENSE
(Failure to State a Claim)

36. Plaintiffs’ claims are barred by SCRCP 12(b)(6) because the Complaint fails to state facts sufficient to constitute a cause of action.

FURTHERING RESPONDING AS AN AFFIRMATIVE DEFENSE
(Lack of Standing)

37. Some or all of the Plaintiffs may lack standing to assert a cause of action against the Defendant and, therefore, such Plaintiffs and claims should be dismissed.

FURTHERING RESPONDING AS AN AFFIRMATIVE DEFENSE
(Good Faith)

38. Defendant acted reasonably and in good faith in its action with regard to the circumstances described in the Complaint and its interactions with the members and Plaintiffs.

FURTHERING RESPONDING AS AN AFFIRMATIVE DEFENSE
(Negligence, Unclean Hands, Waiver, Acquiescence and Estoppel)

39. Plaintiffs' claims are barred or reduced by Plaintiffs' own negligence, unclean hands, waiver, acquiescence, and/or estoppel.

FURTHERING RESPONDING AS AN AFFIRMATIVE DEFENSE
(Punitive Damages Unconstitutional)

40. That the Complaint, to the extent it seeks punitive or exemplary damages, violates the right of the Defendant for procedural due process under the Fourteenth Amendment of the United States Constitution and the Constitution of the State of South Carolina, and therefore fails to state a cause of action upon which either exemplary or punitive damages can be awarded.

FURTHERING RESPONDING AS AN AFFIRMATIVE DEFENSE
(Unclean Hands)

41. That to the extent that the Plaintiffs were negligent, grossly negligent, willful, wanton and reckless, resulting in the damages allegedly sustained by the Plaintiffs, the Plaintiffs come to the Court with unclean hands and such inequitable conduct on the part of the Plaintiffs constitutes a bar and complete defense to any claim for equitable relief in the form of indemnity.

FURTHER RESPONDING AND AS AN AFFIRMATIVE DEFENSE
(Intervening Cause)

42. That whatever injury, damage, and/or loss alleged to have been suffered by the Plaintiffs were a proximate result of the intervening acts or superseding negligence of

individuals, parties, entities or organizations over whom Defendant had no control or responsibility, and for whose actions Defendants are not liable.

FURTHER RESPONDING AND AS AN AFFIRMATIVE DEFENSE
(Fraud, Duress, Unconscionability)

43. To the extent that Plaintiffs now attempt to bring claims against Defendant Hutson, those claims may be voided by fraud, duress, and / or unconscionability.

FURTHER RESPONDING AND AS AN AFFIRMATIVE DEFENSE
(Equitable Estoppel)

44. To the extent that Plaintiffs now attempt to bring claims against Defendant Hutson for their own actions, they are equitably estopped from proceeding against Defendant Hutson.

FURTHER RESPONDING AND AS AN AFFIRMATIVE DEFENSE
(Accord and Satisfaction)

45. Defendant Hutson may have entered into a Settlement Agreement as to claims regarding the subject property which may amount to accord and satisfaction as to Plaintiffs TLC's claims. Defendant Hutson reserves the right to contest the validity of any such document.

FURTHER RESPONDING AND AS AN AFFIRMATIVE DEFENSE
(Statute of Repose)

46. Plaintiffs' claims against Defendant Hutson are or may be barred in whole or in part by the applicable statute of repose.

FURTHER RESPONDING AND AS AN AFFIRMATIVE DEFENSE
(Fraud)

47. Plaintiffs' claims are barred by the affirmative defense of fraud.

FURTHER RESPONDING AND AS AN AFFIRMATIVE DEFENSE
(Fraud in the Inducement)

48. Plaintiffs' claims are barred by fraud in the inducement.

FURTHER RESPONDING AND AS AN AFFIRMATIVE DEFENSE
(12(b)(6))

49. Plaintiffs' claims are barred by SCRCP 12(b)(6) because the Complaint fails to state facts sufficient to constitute a cause of action.

FURTHER RESPONDING AS AN AFFIRMATIVE DEFENSE
(Reservation)

50. Defendant reserves any additional further defenses as may be revealed by additional information during the course of discovery and investigation, and as is consistent with Federal Rules of Civil Procedure, to the extent applicable to the action, and other applicable laws and regulations.

Wherefore, having fully responded to the Complaint, Defendant demands that the Plaintiffs' claims against it be dismissed and that the Court award it costs and fees incurred in defending this matter. Defendant demands a Jury Trial.

Respectfully submitted,

CARLOCK COPELAND & STAIR, LLP

By: *s/ Laura Paris Paton*

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Counsel for the DEFENSE ONLY of Defendant M.B. Hutson a/k/a M.B. Hudson

**FURTHER RESPONDING AND AS COUNTER-CLAIMS AGAINST
TLC HOLDINGS, LLC, RICHARD CLARK, JIMMY S. LOVELL, AND JOHN DOE
CORPORATIONS**

51. Defendant Hutson reasserts and realleges its Answers and Defenses as if restated herein verbatim.

52. That the Court has jurisdiction over the parties and subject matter hereto as the allegations in the present Complaint and the Counter-Claims arise out of transactions regarding land and businesses located in Clarendon County, South Carolina.

53. That on or about 2010, Defendant Hutson was introduced to TLC Holdings, LLC's owners Richard Clark and Steve Lovell (hereinafter collectively TLC parties) by real estate agent Susan Stroman for the purpose of purchasing the land at 5215 Dingle Pond Road, Summerton, SC (hereinafter "the property").

54. That Richard Clark, Steve Lovell, with James Thigpen, owned and operated TLC Holdings, LLC.

55. That Richard Clark and Steve Lovell, with James Thigpen, owned and operated BWR.

56. That Richard Clark and Steve Lovell controlled, owned and operated other corporate entities, hereinafter referred to as "John Doe Corporations", which were created to perform single purpose functions in order to effectuate the sole will of Messrs. Clark and Lovell.

57. That in or around December 2010, Defendant Hutson met with the TLC parties and advised the TLC parties that he sought to purchase the lake-front land at 5215 Dingle Pond Road, Summerton, SC, close the campground currently operating at the property, and develop water-front condominiums on the land.

58. That during the December 2010 meeting the TLC parties advised Defendant Hutson that the property was owned by TLC Holdings and the campground business was owned by Big Water Resort, LLC ("BWR").

59. That during the December 2010 meeting the TLC parties advised Mr. Hutson that in order to purchase the land, he would be required to purchase BWR as well.

60. That during the December 2010 meeting the TLC parties advised Mr. Hutson that there was water and sewer adjacent to the property for development but failed to disclose the moratorium of approximately 5 years preventing development of the property.

61. That during the December 2010 meeting the TLC parties advised Mr. Hutson that BWR had no known debt.

62. That during or after the December 2010 meeting the TLC parties advised Mr. Hutson that BWR had an annual income of approximately \$200,000.00.

63. That during and after the December 2010 meeting, the TLC parties concealed BWR's \$300,000 annual losses.

64. That during the December 2010 meeting the TLC parties advised Mr. Hutson that BWR had no accounting records.

65. That during the December 2010 meeting the TLC parties advised Mr. Hutson that the value of BWR was \$500,000 and the value of the land at 5215 Dingle Pond Road, Summerton, SC was \$6 million.

66. That TLC parties and Mr. Hutson negotiated for Mr. Hutson to lease the land with the option to purchase in 12 months for \$6 million or 24 months for \$7 million.

67. That during the December 2010 meeting the TLC parties and Mr. Hutson discussed the length of the Lease Purchase Agreement so that Mr. Hutson would have sufficient time to secure the necessary permits to develop the property.

68. That prior to executing the Lease Purchase Agreement and the Membership Interest Purchase Agreement (hereinafter collectively "the Agreements" attached as Exhibits A and B), Mr. Hutson searched the property title record; no liens or encumbrances were found.

69. That prior to purchase by Mr. Hutson, the TLC parties negotiated with Black River Electric for underground power.

70. That prior to purchase by Mr. Hutson, the TLC parties received, but refused to pay, for the cost of installation of the underground power.

71. That prior to purchase by Mr. Hutson, the TLC parties did not disclose the outstanding bill for installation of underground power encumbering the land and BWR.

72. That subsequent to the December 2010 meeting, the TLC parties and Mr. Hutson executed the Membership Interest Purchase Agreement for BWR and a Lease Purchase Agreement for the property at 5215 Dingle Pond Road, Summerton, SC (hereinafter collectively "the Agreements").

73. That the Membership Interest Purchase Agreement includes a representation by the TLC parties, "(T)here are no actions, suits, or proceedings either at law or equity ... or to the knowledge of the Sellers threatened."

74. That the Membership Interest Purchase Agreement includes a representation by the TLC parties that, "Seller represents, warrants and covenants to Purchaser as follows: "(the business is) In compliance with all laws regulations and orders applicable to its business."

75. That the Membership Interest Purchase Agreement includes a representation by the TLC parties representing that they had “good and marketable title to all of its properties and assets.”

76. That the Lease Purchase Agreement includes representations by the TLC parties ensuring that they have good and marketable title to the land at 5215 Dingle Pond Road, Summerton, SC.

FOR A FIRST CAUSE OF ACTION

(Fraud or, in the Alternative, Negligent Misrepresentation – Failure to Disclose Encumbrances on the Property as to the TLC Parties)

77. That prior to execution of the Agreements, the TLC parties knew that there were approximately 700 “Retail Membership Agreements” encumbering the property.

78. That prior to the execution of the Agreements, the TLC parties knew or should have known that the Retail Membership Agreements are timeshares subject pursuant to South Carolina code and subject to the recording requirements of Sections 27-32-10 through 27-32-250 of the 1976 Code are designated as Article 1 of Chapter 32, Title 27, and entitled 'Vacation Time Sharing Plans'."

79. That the TLC parties knowingly and / or negligently failed to disclose and / or concealed information that the Retail Membership Agreements provided that each holder: 1) a right to use campground facilities, and services solely for members recreational and enjoyment, (emphasis supplied), 2) this right to use the facilities ranges from 5 years up to two life times.

80. That the TLC parties advised Mr. Hutson that the Retail Membership Agreements could be terminated / divested such that he could proceed with development of the property.

81. That the TLC parties knowingly and / or negligently failed to record the timeshares encumbering the property as required by statute and, therefore, hid from disclosure the encumbrances upon the property prior to Defendant Hutson's execution of the Agreements.

82. That the TLC parties had a statutory duty to record the encumbrances pursuant to Sections 27-32-10 through 27-32-250 of the 1976 Code are designated as Article 1 of Chapter 32, Title 27, and entitled 'Vacation Time Sharing Plans'."

83. That Mr. Hutson and his attorney performed title searches with the Clarendon County Register of Deeds prior to purchase and no encumbrances as to the time shares were found.

84. Plaintiffs merely entered into a Lease Purchase Agreement (which had defective title) for the sole purpose of inducing Defendant to precede and purchase the ongoing Big Water Resort for the following reasons:

- a) To obligate Defendant to a hidden 18 million dollar obligation that he had no prior knowledge of to benefit the Plaintiffs;
- b) To relieve the Plaintiffs' from a 70 year (two life times) obligation for the, sole use right, of the TLC owned property which was not disclosed to Defendant;
- c) To relieve the Plaintiffs from continuing to lose \$300,000 per year placing that burden onto the Defendant by misrepresentation; and
- d) To prevent the Plaintiffs from having to file bankruptcy.

85. That as a result of the TLC parties actively, intentionally, knowingly, willfully, wantonly, recklessly, and / or negligently failing to record the timeshares encumbering the property, they knowingly and / or negligently concealed such encumbrances which require disclosure by statute and induced Mr. Hutson to enter into the Agreements.

86. That in relying on the fraudulent representations and / or negligent misrepresentations, Mr. Hutson did materially change his position entering into the Agreements without knowledge of the timeshares believing, as was represented by the TLC parties, that the property was unencumbered.

87. That, as a result of such fraudulent and / or negligent misrepresentations, Mr. Hutson has been damaged, and continues to be damaged, and has suffered pecuniary loss as a direct and proximate result of his reliance on the TLC parties representations.

88. Therefore, as a direct and proximate result of the TLC parties' actions, Mr. Hutson is entitled to actual, direct, consequential, incidental, special, and punitive damages as aforesaid, all in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of same or any other waiver or other limitation are null, void, unenforceable, and subject to rescission as a matter of law.

FOR A SECOND CAUSE OF ACTION
(Fraud, or in the Alternative, Negligent Misrepresentation – Material Misrepresentation as to Financial Position as to the TLC Parties)

89. That prior to execution of the Agreements, the TLC parties advised Mr. Hutson that the value of BWR was \$500,000 and the value of the land at 5215 Dingle Pond Road, Summerton, SC was \$6 million.

90. That prior to execution of the Agreements, the TLC parties advised Mr. Hutson that BWR had an annual income of approximately \$200,000.00.

91. That prior to execution of the Agreements, the TLC parties did not advise Mr. Hutson that BWR was operating at a substantial loss upwards of \$300,000 per year, outstripping its income.

92. That prior to execution of the Agreements, the TLC parties advised Mr. Hutson that BWR had no accounting records.

93. That prior to execution of the Agreements, the TLC parties knew that the operating expenses of BWR exceeded its income.

94. That prior to execution of the Agreements by Mr. Hutson, the TLC parties negotiated with Black River Electric for underground power.

95. That prior to execution of the Agreements by Mr. Hutson, the TLC parties received, but refused to pay, for the cost of installation of the underground power.

96. That prior to execution of the Agreements by Mr. Hutson, the TLC parties did not disclose the outstanding bill for installation of underground power encumbering the land and BWR.

97. That Mr. Hutson had a right to rely, and did rely, on the various representations of the TLC parties' as to the condition of their business and its encumbrances, including, but not limited to, those representations expressly outlined in the Agreements signed by the TLC parties.

98. That the TLC parties actively, intentionally, willfully, wantonly, recklessly, and / or negligently misrepresented and / or concealed the financial condition, including, but not limited to, the operating costs and expenses of BWR, to induce Mr. Hutson to purchase BWR and enter into the Agreements.

99. That the TLC parties actively, intentionally, willfully, wantonly, recklessly, and / or negligently misrepresented and / or concealed the financial condition, including, but not limited to, the annual income of BWR and accounting records of BWR, to induce Mr. Hutson to purchase BWR and enter into the Agreements.

100. That the TLC parties actively, intentionally, willfully, wantonly, recklessly, and / or negligently misrepresented and / or concealed the financial condition, including, but not limited to, the debt owed to Black River Electric, to induce Mr. Hutson to purchase BWR and enter into the Agreements.

101. That as a result of the TLC parties' intentional, active, willful, wonton, and / or reckless and / or negligent misrepresentations and / or concealments, inducing Mr. Hutson to enter into the Agreements, he has suffered irreparable harm including, but not limited to, significant financial harm.

102. Therefore, as a direct and proximate result of the TLC parties' actions, Mr. Hutson is entitled to actual, direct, consequential, incidental, special, and punitive damages as aforesaid, all in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of same or any other waiver or other limitation are null, void, unenforceable, and subject to rescission as a matter of law.

FOR A THIRD CAUSE OF ACTION
(Defamation / Libel Per Se as to the TLC parties)

103. That on or about April 3, 2014, the TLC parties wrote to the members of the Big Water Resort Campground the letter at Exhibit C.

104. That in their correspondence, the TLC parties included untrue statements impugning Mr. Hutson's performance as one-time owner of Big Water Resort.

105. That the TLC parties' correspondence was made with actual and / or implied malice and intended to degrade and reduce the character and / or reputation of Mr. Hutson to others.

106. That as a direct and proximate result of the TLC parties' actions, including, but not limited to, the malicious publication of libelous materials to the members of the Big Water Resort, Mr. Hutson is entitled to actual, direct, consequential, incidental, special, and punitive damages as aforesaid, all in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of same or any other waiver or other limitation are null, void, unenforceable, and subject to rescission as a matter of law.

AS A FOURTH CAUSE OF ACTION AGAINST THE TLC PARTIES
(Breach of Contract Accompanied by a Fraudulent Act, or, in the alternative, Breach of Contract)

107. That the TLC entities and Defendant Hutson entered into the Agreements as outlined above.

108. That the Agreements contained certain provisions as outlined above including, but not limited to:

- a) Warranties as to good and marketable title to all its properties and assets;
- b) Seller represents, warrants and covenants to Purchaser as follows: . . . further, there are no actions, suits, or proceedings, either at law or equity . . . or to the knowledge of Sellers, threatened;
- c) Seller represents, warrants and covenants to Purchaser as follows: (e.) In compliance with all laws, regulation and orders applicable to its business"

109. That in breach of the afore mentioned Agreements, the TLC entities:

- a) Did not have marketable title and, in fact, such title was encumbered by timeshares;
- b) That a substantial outstanding debt was owed Black Water Electric which could lead to litigation;
- c) That the TLC entities failed to record timeshares as required by statute; and
- d) Other such breaches as may be determined.

110. This constitutes a breach of the Agreements with Mr. Hutson and accompanying this breach was the fraudulent acts:

- a) Knowingly failing to disclose the outstanding debts of BWR, including, but not limited to, Black Water Electric;
- b) Advising Mr. Hutson that no financial records were kept as to BWR to conceal the losses / financial condition of the company;
- c) Failing to record encumbrances required by statute as outlined above;
- d) Advising Mr. Hutson that the Retail Memberships could be divested to allow for development of the lakefront land as discussed; and,
- e) Other such concealments / misrepresentations as may be discovered.

111. The TLC entities either knew or should have known of said defects, all of which proximately caused the damage hereinabove and hereinafter described and entitles Mr. Hutson to punitive damages.

AS A FIFTH CAUSE OF ACTION AGAINST THE TLC PARTIES
(Violation of the South Carolina Unfair Trade Practices Act S.C. Code § 39-5-10, et seq.)

112. The TLC parties and the John Doe Corporations' creation of BWR and the subsequent offering and sale of BWR and the lease-purchase of the property, along with other representations to the holders of the Retail Membership Agreements in BWR, potential purchasers of BWR pre-dating Mr. Hutson's purchase, and the public at large, constituted the conduct of trade and commerce within the meaning of S.C. Code Section 39-5-20(a).

113. The TLC parties and the John Doe Corporations, and each of them, through their acts and omissions including, but not limited to, the following particulars, conducted unfair and deceptive practices within the meaning of S.C. Code Section 39-5-140(a) and 27-31-430, S.C. Code of Laws as amended:

- a) in failing to disclose the Vacation Time Shares encumbering the property;

- b) In failing to record the memberships as required pursuant to Sections 27-32-10 through 27-32-250 of the 1976 Code are designated as Article 1 of Chapter 32, Title 27, and entitled 'Vacation Time Sharing Plans';
- c) In failing to pay and subsequently hiding the debt owed to Black River Electric;
- d) in failing to provide any additional consideration for subsequent attempts to modify their agreement;
- e) in failing to properly disclose the true conditions of the business and properties at issue in the Agreements and putting them into the stream of commerce;
- f) in making false representations as to the condition of the business and properties at issue in the Agreements and/or representations as to the condition of the business and properties at issue in the Agreements in reckless disregard as to the truth of the representations; and
- g) In failing to analyze and preserve reserves for maintenance and operation of the business and concealing same.

114. The conduct of The TLC parties in their ownership and management of TLC Holdings, BWR, and the John Doe Corporations, as described above, was knowing and willful, and the TLC parties knew or should have known that such conduct was a violation of S.C. Code Section 39-5-20 and 27-31-430.

115. Mr. Hutson is a person within the meaning of S.C. Code Section 39-5-140(a) and has suffered actual, direct, and proximate damages as a direct and proximate result of unfair and deceptive acts of the TLC parties, in an amount to be determined by the trier of fact.

116. The aforesaid acts of the TLC parties impact the public interest in that they constituted unfair and deceptive acts and have the potential for repetition and, in fact, occurred at the execution of the Agreements and may continue to occur as the TLC entities engage in other enterprises related to the Retail Memberships and BWR and, as such, are acts which can, have and will affect the public at large by repetition.

117. These unfair and deceptive acts are acts which will affect members of the public, beyond the parties to the above-described transactions, in the form of other consumers who may be injured by purchasing new memberships or other such timeshare that the TLC parties and the John Doe Corporations offer on the land which, upon information and belief, those entities, and / or the amalgamated John Doe Corporations own and operate whereby placing members of the public in danger of harm.

118. Mr. Hutson is entitled to be compensated pursuant to S.C. Code Section 39-5-140(a) for the above-described actual, incidental, consequential, and special damages, as well as costs, interest, and attorney's fees, and to recover three (3) times these damages by reason of the knowing and willful nature of the unfair and deceptive acts by Defendants and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A SIXTH CAUSE OF ACTION

(Amalgamation, Alter Ego Liability and Piercing the Corporate Veil as to the TLC Parties and the John Doe Corporations)

119. The TLC parties, by and through various instrumentalities and alter-egos and other companies to be named at a later date were the original developers and / or operators of BWR.

120. That the TLC parties, with their John Doe Corporations, combined and joined together through various instrumentalities, alter egos, and amalgamated entities, to facilitate to process of developing BWR, encumbering BWR with various debts, and concealing such debts from Mr. Hutson.

121. The TLC parties created and controlled numerous and various entities (hereinafter the John Doe Corporations) to be expressly named at a later date, for the sole purpose of the activities solely relating to development and sale of memberships related to BWR.

122. The TLC parties and the John Doe Corporations created and controlled these sham entities for the sole purpose of enabling it to transact a portion of its business under an alternate corporate guise and to avoid claims such as those set forth herein. These entities, and each of them, were merely a facade for the operations of Messrs. Lovell and Clark to achieve their financial goals and to perpetrate the activities more particularly described herein.

123. The subservient entities in fact manifested no separate interest of their own and that there was an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between The TLC parties and the John Doe Corporations and the sham corporations, shareholders, officers, agents, partners, employees, assets, and each of them.

124. The TLC parties created entities which were created to perform single purpose functions in order to effectuate the sole will of the TLC parties to perpetuate the acts described herein. Despite the creation of these sham entities and despite the sham entities appearing in name only on some contracts, letters, deeds, and/or other documents, the TLC parties and the John Doe Corporations actively and directly in the activities herein, and in fact put BWR in the stream of commerce.

125. The TLC parties and the John Doe Corporations created and controlled numerous and various John Doe Corporations / corporate entities for the sole purpose of the planning, development, design, construction, management, purchase, sale of memberships, and other activities solely relating to BWR as described more particularly herein.

126. The sham entities established by the TLC parties and / or the John Doe Corporations were and are characterized by one or more of the following: (1) being undercapitalized; (2) failing to observe corporate formalities; (3) failing to pay dividends; (4) Insolvency; (5) Lack(ed) proper records; (6) siphoning of funds by its members and/or affiliates; and (7) was used as a mere facade for the operation of the dominant shareholders, members, associates, and affiliates.

127. Upon information and belief, each shared the same mailing / emailing address, the TLC parties and the John Doe Corporations directly received payment and disbursed payment for obligations relating to the sham entities, the sham entities had no shareholders and/or officers of their own, no separation of accounting and bookkeeping functions, and/or the TLC parties and the John Doe Corporations directly contracted for the sham entities in the name of the TLC parties and the John Doe Corporations.

128. The TLC parties and the John Doe Corporations directed and oversaw the fraudulent / negligent actions described herein.

129. There would exist a broad element of injustice and fundamental unfairness if the acts of the TLC parties, including Messrs. Lovell, Clark, and TLC Holdings, LLC, and the John Doe Corporations, and each of them individually, were not regarded as the acts of one another.

130. At the time BWR and the Lease-Purchase Agreement were offered and placed into the stream of commerce by the TLC parties and the John Doe Corporations, the faulty defects and deficiencies heretofore described were hidden and concealed through the acts and omissions of the TLC parties and the John Doe Corporations.

131. That the TLC parties and the John Doe Corporations, knew or should have known of the existence of the said defects and deficiencies, which were unknown by and / or concealed from Mr. Hutson.

132. These hidden defects, including, but not limited to, defective, un-marketable title and outstanding and oppressive debts, which unbeknownst to Mr. Hutson, rendered the business and the Lease-Purchase Agreement undevelopable and worthless.

133. The resulting actual, incidental, consequential and special damages, and continues to do so through the date of this filing.

134. Mr. Hutson suffered damages and injuries when the TLC parties and the John Doe Corporations put BWR and the properties described in the Lease-Purchase Agreement into the stream of commerce and continue to be damaged and injured through the date of this filing.

135. As a direct and proximate result thereof, the TLC parties and the John Doe Corporations are liable to the Plaintiffs for actual, incidental, consequential, special and punitive damages, all in an amount to be determined by the trier of fact, and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

WHEREFORE, Defendant / Cross-Claimant Hutson respectfully request that this Honorable Court:

- a) Dismiss any and all claims filed by the TLC entities.
- b) Enter judgment in favor of the Defendant / Counter-Claimant Hutson and against all Plaintiffs jointly and severally, in an amount to be determined for actual, incidental, consequential, special, and punitive damages.
- c) Find that the TLC parties and their John Doe Corporations have engaged in unfair trade practices and knowingly did so thereby entitling Defendant / Counter-Claimant Hutson to treble damages.

- d) Award attorneys' fees and costs to the Defendant / Counter-Claimant Hutson; and
- e) Award such other and further relief as the Court may deem just and proper.

Respectfully submitted,

By: s/ M. B. Huston, pro se

M.B. Hutson, Pro Se as to Counter-Claims
803.308.2714