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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Charles B. Simmons, Jr., Master in Equity

Civil Action No. 2017-CP-23-06301
Appellate Case No. 2018-001209

Raymond Wedlake, individually and derivatively, on behalf of all Members of the Woodington Homowners' Association, Inc., ...Appellant,

v.

Benjamin Acord, William Craigo, Denis Esteve, and Brian James in their capacity as the current Board of Directors of the Woodington Homeowners' Association, Inc., and Association Management Group SC, Inc.,..... Respondents.

BRIEF OF APPELLANT

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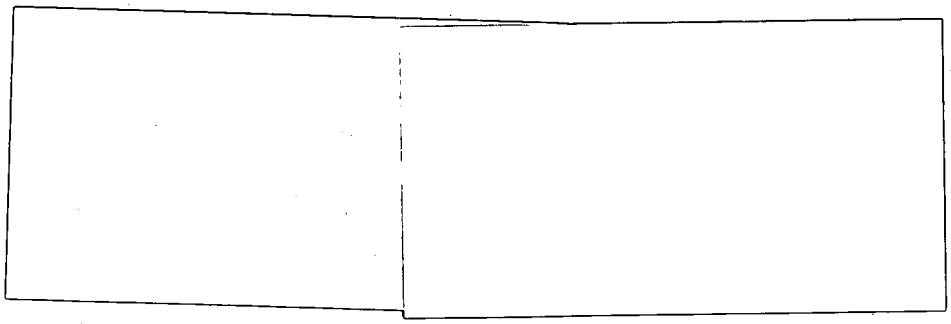


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STATEMENT OF THE ISSUES

I. **Did the Master in Equity err in his determination that Appellant had not met the requirements to sustain a derivative action under Rule 23(b) by applying the wrong standard of a "majority" for the requirements for "fairly and adequately" and "similarly situated?**

II. **Did the Master in Equity err in refusing to permit Appellant to admit into the record the basis of the parties' six stipulated issues before the Master in Equity, following Appellant's request to do so during the trial, resulting in the Master in Equity ordering involuntary nonsuit?**

III. **Did the Master in Equity err in refusing to take judicial notice of the By-Laws, pursuant to Rule 201 SCRE(d) and (f) at the close of the trial, and at the request of counsel for Appellant, which counsel for Appellant offered to the Court and which were "Exhibit A" as referred to in Appellant's Verified Complaint?**

IV. **Did the Master in Equity err in dismissing Appellant's individual action, without specifying the basis, where Appellant's testimony and the record provided a clear evidentiary basis for particularized injury and damages?**

V. **Did the Master in Equity err in granting a motion of involuntary nonsuit against Appellant following counsel for Respondent's motion for a directed verdict, when there was evidence on the record for Appellant's claims of violation of the By-Laws?**

VI. **Did the Master in Equity err in determining that the action for Declaratory relief was improper?**

VII. **Did the Master in Equity err in concluding that "Stipulated Issues 1(b), 1(d), 1(e), and 1(f) were moot, advisory in nature, or otherwise fail to present actual "justiciable controversies" therefore declining to issue the requested declarations?**

STATEMENT OF THE CASE

Appellant Ray Wedlake appeals from the Order of Nonsuit. Appellant brought this action derivatively on behalf of the Woodington Homeowner Association (WHOA) seeking a Declaratory Judgment regarding interpretation of six stipulated By-Laws of WHOA, and a related action filed individually by Appellant for specific and particularized injury Appellant sustained as a Member of WHOA. It arises in the context of disputed By-Laws provisions and Respondents' refusal to appoint Appellant to sit on the Board of Directors where the By-Laws provide the Board must fill a vacancy and one existed, thus denying Appellant the ability to fight for his constituency and for their platform of transparency and proper Board Governance. On May 29, 2018, the Honorable Charles B. Simmons, Jr., Master in Equity, granted an involuntary nonsuit, on the derivative action and dismissed Appellant's individual action.

Such appeal is based upon application of the wrong standard in determining standing in derivative Rule 23(b) cases, the refusal of the Master in Equity to permit entry of the key By-Laws documents which were at the core of the action, or to take judicial notice thereof following the request of counsel for Appellant, as well as improper dismissal of Appellant's individual action where there was a clear showing of particularized injury.

STATEMENT OF FACTS

As set forth in Appellant's e-filed verified Complaint, and Exhibits and Affidavits made a part thereof, along with the Pre-Trial brief requested by the Master in Equity, Appellant is a long-time member in good standing of the WHOA and a long-time resident of the community. He is a former two-term member of its Board of Directors, where he served as Secretary and co-authored By-Laws Revisions. Appellant has a distinct Board Governance platform, which includes enhanced transparency, open Board meetings, agendas provided to Members in advance of meetings, and proposed changes to the By-Laws such as the adoption of a provision for Alternative Dispute Resolution.

Disputes over interpretation of the existing By-Laws arose in 2016, arising in part from the then Board exceeding the term-limit of five-years specified in the By-Laws and in the SC Nonprofit Corporation Act. On multiple occasions, commencing in 2016, Appellant sought resolution of the disputes related to the By-Laws. Such efforts included several notices to the Board specifying the issues, followed by proposed mediation for which Appellant offered to pay. Proper interpretation of another key By-Laws issue which gave rise to Appellant's individual action, was the Respondent's refusal to fill an open vacancy on the Board as required by the By-Laws, which provide that the Board "shall" fill any vacancies if a Member in good standing is willing to serve. As a member in good standing willing to serve and in the hopes of obtaining a platform to represent his minority constituency, Appellant offered to serve on the Board. Respondents rejected Appellant's offer to serve and did not fill such vacancy, as requested in early May 2017 (such vacancy was not filled until mid-January 2018), thus disenfranchising Appellant and those who support his platform.

After not receiving a response, Appellant next turned to the Office of the Attorney

General seeking an advisory opinion regarding the proper interpretation of the By-Laws. When the Office of the Attorney General declined and recommended to Appellant he seek judicial relief, Appellant once again sought dispute resolution with the Board, failing which Appellant provided Respondents with an advance courtesy copy of the proposed Complaint for Declaratory Relief, seeking one last time, dispute resolution with a stated deadline. Receiving no response by the deadline, Appellant filed a Verified Complaint in the Circuit Court, Greenville County (2017-CP-23-06301 in October 2017, R. pp. 18 - 98), individually as well as derivatively on behalf of WHOA, against the members of the Board in such capacities, as well as against the Association Management Group (AMG). The action against AMG was subsequently dismissed by agreement of all parties and the Court. Appellant's Complaint was supported by Affidavits as well as numerous exhibits, including a full, complete copy of the By-Laws.

ADMINISTRATIVE HISTORY

On October 5, 2017, Appellant filed a verified Complaint with affidavits and 26 Exhibits (C/A No: 2017-CP-23-06301). On November 6, 2017, Respondents moved to Dismiss under Rule 12(b)(6), SCRCP, or for a more definite statement. Appellant filed a Brief in Opposition on December 1, 2017. Shortly thereafter Appellant offered to Mediate. On December 14, 2017, the parties attempted mediation for approximately three hours, and Respondent called an impasse. On January 3, 2018, the Circuit Court, Judge Stillwell, heard arguments. At the close of the hearing, Judge Stilwell recommended that parties seek to resolve the matter.

On January 23, 2018, the Court filed its Order denying Respondent's Motions "in all respects" (Order- Judge Stilwell, R. p. 5).

The parties agreed to transfer the case to the Master in Equity. The parties also agreed to submit six stipulated issues in dispute related to the By-Laws. Appellant sought Declaratory Judgment.

The Master in Equity, the Honorable Judge Simmons, received Pre-trial Briefs incorporating the Verified Complaint which specifically incorporated the Exhibits and Affidavits, identifying the disputed By-Laws, and the standard for analysis of standing in bringing a derivative action under Rule 23(b)(1).

The Court held a one-day trial on April 20, 2018. The Master in Equity stated that he had received the issues stipulated by the parties relative to the By-Laws and declined Appellant's request to make an opening statement, stating that the case had been "pre-tried" and that he was fully familiar with it.

The Master in Equity determined that Appellant lacked standing under Rule 23(b)(1) determining that he did not meet the requirement of "fairly and adequately" representing the

members of the WHOA finding that he did not represent a "majority" of the homeowners, and also ordered nonsuit because the By-Laws were not being formally admitted into the trial record. The Master in Equity rejected counsel for Appellant's request to admit them prior to the close of the trial and his separate request that the court take judicial notice of them, since they were "Exhibit A" specifically referred to in the Complaint and a marked Exhibit for both Appellant (P-4) and Respondent (D-24). The Master in Equity dismissed Appellant's individual action without comment or explanation. The Master in Equity also granted involuntary nonsuit on the derivative action. Appellant Wedlake appeals both rulings.

STANDARD OF REVIEW – FINDING OF INVOLUNTARY NONSUIT

This is an appeal from a determination of involuntary nonsuit. The Court "must review the evidence and all inferences in the light most favorable to the unmoving party." (*W.R. Livingston v. Noland Corporation, et al*, 9293 S.C. 521, 362 S.E.2d 16 (SC Sup. Ct. 1987). "In deciding a motion for involuntary nonsuit, the trial court must consider the evidence and all reasonable inferences that can be drawn therefrom in the light most favorable to the party opposing the Motion and to grant the Motion if there is no evidence to support an alleged cause of action." *Carver v. Medical Society*, 286 SC 347 (1985).

ARGUMENT

I. The Master in Equity erred ruling that Appellant could not bring a derivative action under Rule 23(b) without the support of a majority of the homeowners.

The issues arising under Rule 23, SCRCP, are both questions of law and of fact. Here the issue is the proper judicial standard to use for interpretation of a statute, specifically the meaning of "fairly and adequately" set forth in Rule 23, SCRCP., in meeting the requirement of standing and is thus a question of law. As such, the standard would be a *de novo* review by this Court.

It is established that the standard of review of appellate court of issues of law is that "[a]n appellate court may decide questions of law with no particular deference to the trial court." (*Dreher v. Dreher,* 370 S.C. 75, 79, 634 S.E.2d 646, 648 (2006). More fundamentally, this the determination of involuntary nonsuit by necessity involved the interpretation of a statute, SCRCP Rule 23(b)(3).

Rule 23(b)(1), SCRCP, addresses the procedural requirements for individuals seeking to file a derivative action. It states that in a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or

association.

a) In ruling that Appellant failed to represent the Majority, the Master in Equity used the wrong standard in determining that Appellant failed to "fairly and adequately" represent "similarly situated" members of the homeowner association.

Although the Court never clarified the basis under Rule 23(b) for determining Appellant lacked standing, the basis appears to be the failure of the Appellant to show that he was a proper representative of the members of WHOA since he did not represent the "majority" of the homeowners. As set forth in the Complaint and Exhibits and in counsel for Appellant's Memorandum in Opposition to attorney for Respondent's Motion to Dismiss, all specifically referred to in Counsel for Appellant's Pre-Trial Brief requested by and provided to the Master in Equity, along with Appellant's testimony at trial while Appellant acknowledged he did not represent a majority, he did have a constituency favoring his Board Governance platform, as evidenced by his receiving more that 10% of ballots cast for election of Directors (see infra).

Appellant respectfully suggests that the Master in Equity erred in his interpretation of the law regarding the proper standard to determine adequate representation, and the specific test of "fairly and adequately represent." The law is clear, and counsel for Respondent is in error, when he states: "and the question is whether he [Appellant] fairly and adequately represents the interests of the community ...", for all members of the Association (Transcript, April 20, 2018, R. p. 287, line 25 and p. 288, line 1). Similarly, in concluding that Appellant lacked standing to bring an action derivatively, the Master in Equity based such determination on the fact that "the evidence indicates that the Plaintiff lacks the support of the majority of the members." (Order, R. p. 12, emphasis added). The position of the Master in Equity was that since Appellant did not represent the "majority" of homeowners he did not "fairly and adequately" represent "similarly situated" homeowners (Order, R. p. 12). Such a standard of "majority" is an improper

interpretation of what is required for to "fairly and adequately" represent the "similarly situated" group, here the homeowners. If the criteria were a "majority" then every case brought derivatively involving a minority shareholder(s)/member(s) would never have standing. Indeed, at the core of the derivative suit is oppression of the minority by the majority.

b) The Applicable Law in South Carolina - South Carolina courts have ruled that the test is not the relative number being represented. As set forth in *Brad Walbeck v. The I'On Company,* (Op. No. 5588 (S.C. Ct. App. filed Aug. 8, 2018)(Shearouse Adv. Sh. No. 32 at 125))(remanded on other grounds), in South Carolina the test is whether or not the shareholders or, as here, the members, are represented by qualified counsel and are similarly situated to the other HOA member" (See, e.g., *Runion v. U.S. Shelter*, 98 F.R.D. 313, 317 (D.S.C. 1983) interpreting the fourth class action requirement under Rule 23(a), FRCP, and holding, "In determining whether [the plaintiff] would be an adequate class representative, this court should look at two criteria—(1) the representative must have common interests with the unnamed members of the class; and (2) it must appear that the representative will vigorously prosecute the interests of the class through qualified counsel."); *Jordon v. Bowman Apple Prod. Co.*, 728 F. Supp. 409, 412 (W.D. Va. 1990) (emphasis added). The court in *Walbeck* went on to underscore that "Rule 23.1 places no minimum numerical limits on the number of shareholders who must be 'similarly situated.' In appropriate circumstances a single shareholder may be situated in a unique position and thus constitute a legitimate 'class of one.'" (citation omitted) (quoting *Halsted Video, Inc. v. Guttillo*, 115 F.R.D. 177, 180 (N.D. Ill. 1987); Halsted, 115 F.R.D. at 180 ("Rule 23.1[, FRCP] does not require a derivative action plaintiff to represent the interests of shareholders with whom he is not similarly situated."). The court reversed on a finding that there were a few others that supported Appellant. In the instant case, Appellant received over 10

percent of votes cast (Exhibit D-5, R. pp. 389 - 391) in the 2017 Annual Meeting to elect Directors. The proper test is set forth in numerous-precedent cases in South Carolina. See also: *Jennings v. Kay Jennings Family Limited Partnership*, 275 Va. 594, 659 S.E.2d 283 (2008) setting forth a multitude of factors, such as economic antagonism, a hidden agenda on the part of Plaintiff, unfamiliarity by the party bringing the derivative action with the litigation, the relative position of the Plaintiff's individual interests versus that of the class.

It is clear from the record that Appellant has and will continue to vigorously represent his constituency. Moreover, as noted infra, counsel for Appellant, although suffering from back pain during the Trial (Transcript, April 20, 2018, R. pp. 229 - 327), has over 40 years of active practice, much of it representing homeowner associations, is a former Editor of the law review, and has proven his willingness and ability to advocate for the Appellant and those he represents, the WHOA. While there is always a certain amount of antagonism between the party bringing the derivative action and the party against whom it is brought, the overriding reason for such action by Appellant was to improve Board Governance and in the best interests of the association, as set forth in Appellant's testimony (infra), and as supported by Affidavits, and Exhibits to the Verified Complaint.

c) Other Jurisdictions – In addition to the failure of the Court to follow the established South Carolina law, we would note that another established body of law has adopted the "proper purpose test" for determining if a party "fairly and adequately" represents a class is that established in the *Catano* decision, as counsel for Appellant argued in such documents. (*Cattano v Bragg*, 727 S.E.2d 625 (Sup. Ct. Virginia 2012). In the 2008 case of *Cattano v. Bragg*, the Virginia Supreme Court recognized the right of an individual shareholder to file a derivative suit (along with an individual suit), finding the shareholder could fairly and adequately represent the

interest of the corporation; despite apparent animosity in that case since such animosity is typical in derivative actions {*Cattano v. Bragg*, 727 S.E. 2d 625, 283 V. 638 (Sup. Ct. Va. 2012)}. In so finding, after citing numerous cases in support of a single shareholder having standing to sue derivatively in support, the Court adopted the factors used in *Jennings v. Kay Jennings Family Limited Partnership*, 275 Va. 594 (2008), taking aim in particular at the reason for the derivative suit (return of funds), which, as here was for protection of Members, which the court found was very appropriate. (Id). It focused its attention "on whether the totality of the circumstances suggest that the plaintiff will vigorously pursue the suit and that the remedy sought is in the interests of the corporation." (*Cattano* at 627).

In *Cattano*, a Supreme Court determined that the proper test for determining whether a party bringing an action derivatively "fairly and adequately" represented those "similarly situated" (the language in SC Rule 23(b)(3)) was whether the "purpose" for bringing such derivative action was proper, i.e., that it would, if achieved, bring benefit to those being represented derivatively. Indeed, in the Catano case, the Appellant class action representative was one individual, as is the case here.

Appellant submits that pursuing a minority platform of improved board governance, with increased transparency, is a proper purpose.

Numerous jurisdictions have also determined that a derivative action may be brought by a solitary individual, i.e., that a "class" in a derivative action may consist of only one person. See, e.g., *Larson v. Dumke*, 900 F.2d 1363, 1368-69 (9th Cir. 1990), *Jordon v. Bowman Apple Products Co., Inc.* 728 f. Supp 409, 412-13 (W.D.Va 1990), *Halsted Video, Inc.. v. Gutillo*, 115 F.R.D. 177, 179-80 (N.D. Ill. 1987) (finding a "legitimate class of one.", where there was no indication, as here, that the plaintiff had improper motivation. Indeed, Appellant derivative

action was for a Declaratory Judgment on disputed By-Laws issues, to have the court determine their meaning, and not for breach of fiduciary duty nor for damages. Nor does the fact that Appellant brought an action individually lead to a conclusion that Appellant's individual interests were inimical to those of the homeowner members. (See, *Eye Site, Inc. v. Blackburn*, 796 W.W.2d 160, 161-63 (Tex. 1990). His individual action was to assure the By-Laws requiring the Board to fill a Board vacancy was enforced to assure homeowners with a will to serve were offed an opportunity to do so.

d) Appellant Met all the Criteria in SCRCP Rule 23 to bring suit derivatively. The record, starting with the verified Complaint and accompanying Affidavits and Exhibits, as well as the Pre-Trial Memorandum provided to the Master in Equity, show the Appellant met all of the criteria for bringing an action derivatively, including being a member at the time, notice with specificity, efforts to mediate, an attempt to get resolution through the SC Attorney general and verified complaint.

e) Analysis of SCRCP Rule 23 - Rule 23, SCRCP is modeled after Rule 23, Fed.R.Civ.P., and therefore the Federal Standard that cases arising under such should be given "liberal rather than a restrictive interpretation" has been applied (See, *Eisen v. Carlisle & Jacquelin*, 391, F.2d 555, 563 (2d Cir. 1968). Rule 23 supersedes and supplants prior case law. The cases that have denied a Plaintiff derivative status appear, primarily, to be based on a failure to make a demand initially (*Carolina First Corporation, et. al., v. Whittle, Jr., et. al.,* 343 S.C. 176, 539 S.E. 402 (SC Ct. App., Oct. 30, 2000); *Allen Patterson, et. al, v. Herb Witter, et. al.*, 418 S.C. 66, 791 S.E. 2d 294 (S.C. Ct. App., Oct. 27, 2016).

In the case at bar, Appellant made demand explicitly and repeatedly, without response in most cases (See, Verified Complaint and Affidavit, R. pp 18 - 98 and R. pp. 433 - 444) or by

Defendants refusing to follow-up on demands. For example, when Appellant advised Defendant, Mr. Acord, the President of the Board, that the By-Laws require a vacancy to be filled, he took no action, such as seeking candidates from the members or offering the position to Appellant who was eligible and willing to serve at the time (Verified Complaint - Affidavit, R. pp 18 - 98 and R. pp. 439, 463); and, in a similar instance, when Appellant noted that the By-Laws do not permit a member of the Board to fill two officer positions, and that the By-Laws prevailed over the Nonprofit Corporation Act (NPCA), explicitly as stated per the statute, Mr. Acord simply said the NPCA did not require more than three Directors, without addressing the issue (Affidavit, R. p. 439). When asked to confirm that the five-year term per the By-Laws and NPCA controlled and that the Board would not seek to extend beyond five years as the prior Board had done, there was no response (See, Complaint, R. pp 18 - 98).

f) Adequately Represent - In terms of "adequately represent", counsel for Appellant has over 40 years of active legal practice and has advised several homeowner associations and served on several Homeowner Association Boards as well. Currently he is a solo practitioner, assisting small companies and individuals. Appellant, Mr. Wedlake, has shown he has the determination, and the personal interest necessary to carry and maintain such action for the benefit of the WHOA. In addition, Appellant's interests, which are to promote the best interests of the WHOA, are aligned with those of all the Members. While there have been disputes that have arisen between Respondents and Appellant over Board Governance and By-Laws issues, Appellant holds no animus toward them (Complaint - Affidavit, R. pp 18 - 98 and R. pp. 461, 463). In addition, Appellant is intimately familiar with the litigation, and with the issues, is a real party in interest, and is fully committed to pursuing his platform of open governance to in the best interests of the WHOA (Complaint - Affidavit, R. pp 18 - 98 and R. pp. 461, 463).

g) Fairly and Adequately Represent Rule 23(b)(1): Regarding "fairly represent," prior to the past two boards, Appellant was an active, elected member of two Board of the WHOA, and also was an active member of such Boards' By-Laws Committee. (Complaint - Affidavit, R. pp 18 - 98 and R. p. 462). The Members of such Boards were dedicated to transparency, to open, noticed meetings, to published and posted minutes and, to abidance with the provisions of the By-Laws (and to proposing By-Laws changes to Members where appropriate) (Complaint - Affidavit, R. pp 18 - 98 and R. p. 462). Thus, there is a group, like Appellant, that believes that the By-Laws are governing documents which the Board must follow (Complaint - Affidavit, R. pp 18 - 98 and R. p. 462), absent preemption by statute.

Thus, the issue is not whether all or even a majority of the members may not wish to pursue interpretation and enforcement of the By-Laws (assuming they are aware), but whether Plaintiff can fairly represent those that do. He received several votes, indeed over 10% of the votes cast (Exhibit D-5, Transcript, April 20, 2018, R. pp. 389 - 391) at the last Annual Meeting election of Directors, on his platform of reform (Verified Complaint - Affidavit, R. pp 18 - 98 and R. p. 461), testimony at trial: "I [Appellant] did receive votes. ..." (Transcript, April 20, 2018, R. p. 241, line 25).

h) Basis and Reason for Bringing Declaratory Judgment Action - After all the efforts at dialogue, at mediation, and even petitioning the office of the AG for an advisory opinion, the filing of the action seeking Declaratory relief was a last resort (as we understand it should be) – and was done for the benefit of the members of the WHOA, to get clarity for current and more importantly at this point, for future Boards; to enforce the By-Laws which protect the homeowners, rather than have them enforced, if at all, in an ad hoc manner; and it is brought for protection of all (Verified Complaint, R. pp. 18-98 and Trial Testimony – Appellant, Transcript,

April 20, 2018 R. p. 286, lines 24-25 and R. p.287, line 1): "... issues being brought in the best interest of all the members of the Association, regardless of whether every member may agree with them."; (R. p. 287, lines 4-6): "… particularly when the Board violates the Bylaws to spend many thousands of dollars that they are not authorized to do, as stated in the Bylaws.".

i) Good Faith – Appellant's efforts, and clear evidence of our good faith include:

(i) Appellant offered Mediation three times – proposing to use Upstate Mediation Center, per Complaint Exhibits O, P, and Q, and were refused or no response resulted in all three instances (Verified Complaint with Appellant's Affidavit, R. pp 18 - 98 and R. pp. 438, 446, 447, 452, 461, 462).

(ii) Appellant's demands were basically requests for agreement on points, such as confirmation that all agreed that the By-Laws was a controlling document unless superseded by statute and the need for By-Laws Amendments, and that due to disputes judicial interpretation of the By-Laws was required, such as the need to appoint a Director if a vacancy is open;

(iii) Such requests only took the tone of demands when there was either no response or refusal to act in conformity with the By-Laws, as with the former Secretary of the Board (Verified Complaint -Appellant's Affidavit, R. pp 18 - 98 and R. p. 462),

(iv) Appellant provided a copy of the draft Complaint and notice of pending filing and asked again for mediation (response was that they would just forward it to their insurance carrier when received and we advised them that they may not be covered since our case is a Declaratory Judgment Action (Verified Complaint - Affidavit, R. pp 18 - 98 and R p. 463 and Exhibit 20 to Affidavit of 2018, R. pp. 529 - 530);

(v) Provided Board Governance materials on open meetings, the need for transparency, minutes; written by Board Governance experts;

(vi) No "Impasse" – An offer was made to keep mediation going and advised that we would pay costs for both sides (Complaint - Affidavit, R. pp 18 - 98 and R. p. 461);

(vii) The Board was asked in writing to join in this action on more than one occasion, as it is not adversarial but simply declaratory and for benefit of the WHOA (Verified Complaint - Affidavit, R. pp 18 - 98 and R. p. 461);

(viii) No request for legal fees was made unless covered by insurance (Verified Complaint, R. p. 33 and Order of Judgment, R. p. 9); and,

(ix) Also as noted, guidance was ultimately sought from the SC Office of the Attorney General, hoping to resolve the matter, short of judicial action (Verified Complaint - Affidavit, R. pp 18 - 98 and R. pp. 447, 462).

j) The Record Supports Appellant Bringing an Action Under Rule 23(b)(1). It is clear from the Complaint and the Exhibits attached thereto, as well as the Transcript, that although a minority, a group of homeowners did support Appellant as also evidence by the fact he received more than ten percent of votes (Exhibit D-5, R pp. 389 - 391) cast for election of Directors at the 2017 Board Meeting. Moreover, Counsel for Respondent's argument that Appellant lacked "standing" since he did not fairly and adequately represent the Member of WHOA is not supported by the record as no evidence was brought at Trial to substantiate any presumed claim that Plaintiff did/does not represent interests of Members, and no defense witnesses were presented to so state.

k) Testimony of Appellant – "Others Similarly Situated". Rule 23(b)(1) specifies that to bring a derivative action on behalf of members the representative must fairly and adequately represent "members similarly situated in enforcing the right of the… association". In addition, Appellant testified at trial as to voting records clearly evidencing that he was not alone

in his quest for a different governance policy by the Board, and that there were others, therefore, that were "similarly situated"

The following is found on page 56 of the Transcript, April 20, 2018, commencing with a question from counsel for Respondent (R. p. 284):

> 11 Q. "... you purport to represent the interest of the community; is
> 12 that fair? You're the good guy for the community, acting for
> 13 their interests; right? That's how do you do it?
> 14 A. In various letters I've sent, I have suggested that is true
> 15 for various items that are being brought in the best interest of
> 16 the association and for -- to provide benefit for the homeowners.
> 17 Q. And you're trying to represent their interests in this
> 18 case; right?
> 19 A. I think it is clear that not any member represents every
> 20 member in an association. But that does not preclude the fact
> 21 that every member has good ideas for improvement.

and Transcript, April 20, 2018, p.59 (R. p. 287):

> 7 Q. I just want to make sure, your position is, it's in the
> 8 best interest of the community to pursue a lawsuit on their
> 9 behalf that they don't support. Is that what your saying?
> 10 A. That EVERY MEMBER MAY NOT SUPPORT, BUT I SUPPORT, AND
> 11 perhaps up to twenty-some other members also support ..." [CAPS added].

plus p.13, line 25 (R. p. 241, line 25): "A. I [Appellant] did receive votes ..." . All showing the record is not (R. p. 324, line 23): "... devoid of any evidence..." as stated by the Master in Equity. Support for Appellant's position is shown in Respondent's Exhibit D-5 (R pp. 389 - 391): "Raymond Wedlake voting ballots".

Thus, it is clear that while Appellant did not purport to represent all the Members of the homeowner association, the record shows that Appellant clearly will fairly and adequately represent, and that there was a constituency, although a minority, that he does represent: "others similarly situated" who support his Platform

In view of the application, by the Master in Equity, of the wrong standard in determining

Appellant's standing under Rule 23(b)(1), this Courts should as a matter of law, vacate the judgment of involuntary nonsuit.

II. The Master in Equity erred in refusing to permit Appellant to admit the By-Laws into the record on the basis of the parties six stipulated issues, following Appellant's request to do so during the trial, resulting in the Master in Equity ordering involuntary nonsuit.

The core issues of this action for declaratory judgment action were reflected in six stipulated issues submitted to the Master in Equity, all disputes over five By-Laws provisions, as noted by the Master in Equity during the Trial. At the outset of the Trial, in rejecting Counsel for Appellant's request to make an opening statement, the Judge stated that he had reviewed everything, and that the trial had been "pre-tried." (Transcript, April 20, 2018, R. p. 233, lines 22-25): "**No, sir, I don't need one. You can call your first witness. We've pre-tried the case. I've looked over everything. And if I don't understand it by now, we've got worse problems than that.**" (emphasis added). The only possible basis for such statements was the prior record from Judge Stilwell's Court from which the case was transferred, which included the Complaint, and Exhibits including the By-Laws, along with Affidavits in Support, along with the Pre-Trial Memorandum prepared at the request of the Master in Equity, which, in the case of Appellant's Pre-Trial Memorandum, incorporates prior record, in its entirety, specifically. (Appellants' Pre-trial Brief, R. pp. 474 - 481).

The Master in Equity refused to permit entry by Appellant of such By-Laws on the technical ground that Appellant had rested his case before seeking to do so. In the absence of the By-Laws, the Judge ruled he could not interpret them, so he declared nonsuit.

It is the overriding policy of the judiciary in South Carolina to assure that cases are tried on their merits and not dismissed on technicalities. This is equally true where, as here, the appeal is from a finding of nonsuit. As stated by the Supreme Court of South Carolina in *Sandel v.*

Cousins, 266 S.C. 19, 221 S.E.2d 111 (1975), a case where the court found it "impossible to determine .. the points of law or fact" (Id.), yet still reversed. In finding for the Appellant, the Court reiterated the fundamental principal that "a meritorious case is not disposed of on technical grounds." (Id.) Yet, the Master denied entry by Appellant's attorney of Exhibits, while the trial was still in process and no prejudice by Respondent was argued, or apparent. Following a brief recess called by the Judge, at which time the Court suggested the parties could stipulate to the entry of all exhibits, and upon objection by counsel for Respondent and over the request of Counsel for Appellant to enter such Exhibits, the Master in Equity improperly sustained the objection of Respondent's counsel, denying entry of such Exhibits. (Transcript, April 20, 2018, R. p. 270):

MR. GIBSON: Well, if Mr. Grote would permit, I'd ask him to stipulate that they would all be in evidence.
MR. GROTE: I haven't really had an opportunity to review those. I think it's his obligation to admit his exhibits. At this point, Your Honor, ---
THE COURT: If you're objecting, then the only two documents that are in are Plaintiff's 5 and Plaintiff's 10.
MR. GIBSON: Your Honor, if I could ---
THE COURT: I'm sorry. I need you to be standing up when you're addressing the Court under the Rules of Civil Procedure.
MR. GIBSON: Yes, Your Honor. I apologize, Your Honor. Would this be an appropriate time to try to submit them in chronological order?
MR. GROTE: I think he's rested his questions at this point.
THE COURT: In light of Mr. Grote's objection, I have no option but to sustain the objection.

Counsel for Respondent's objection was based upon his not "really [having] had an opportunity to review them" is spurious. Counsel for Respondent had in hand all Appellant counsel's Exhibits prior to commencement of trial and throughout the lengthy period of presentation by counsel for Appellant's presentation of his case. Indeed, Respondent counsel

was well aware that the By-Laws which were on file as "Exhibit A" to Appellant's Verified Complaint, and he, in fact, had labeled them as "Exhibit D-24", which he apparently decided not to enter in the hope of arguing that Appellant never entered the By-Laws. In addition, the Master in Equity could have simply permitted time for Counsel for Respondent to review the ten Exhibits not in evidence, or simply the By-Laws which Appellant Counsel had provided.

Such refusal to allow admittance of the By-Laws under such circumstances denied Appellant his day in court on the merits. It is an improper and a clear violation of the previously articulated fundamental policy of the courts in South Carolina to assure that wherever possible there is a full trial and judgment on the merits. It is in this context that we should consider the Master in Equity making much of the failure of Appellant's counsel to admit into evidence the By-Laws in rendering his finding of involuntary nonsuit. It was so basic – the failure of the Master in Equity to simply allow Appellant to enter the By-Laws during the course of the trial, a key document the Judge would later in his Order state was absent from the record, and therefore involuntary nonsuit should be granted, is a clear abuse of discretion.

III. The Master in Equity erred in refusing to take judicial notice of the By-Laws pursuant to SCRE 201 (b) (d) and (f), at the close of the trial, and at Appellant's request, when Appellant offered them to the Court and when they were an Exhibit to Appellant's Verified Complaint, and referred to.

a) Denial of Appellant's Request for Judicial Notice - The Master in Equity denied Appellant's request to take judicial notice of Exhibits cited by the Verified Complaint, (which included the By-Laws) and Affidavits filed, along with counsel for Appellant's Memorandum in Opposition to Respondent's Motion to Dismiss, all entered into the record prior to transfer to the Master in Equity. Similarly, the Master in Equity failed to consider the Pre-Trial Brief providing the stipulated issues and providing specifics as to the By-Laws and also as to the law to establish standing for bringing a derivative action under Rule 23(b)(3). Indeed, the

Court received the six stipulated issues which were e-filed and laid out the issues presented by the By-Laws in dispute, along with the By-Laws themselves.

The Master in Equity referred to the Pre-Trial Memorandum in terms of the six stipulated issues during the course of the Trial (Transcript, April 20, 2018, R. p. 247, lines 8-10): "... relevant to the six stipulated issues that both counsel have told me are before the Court?" Moreover, in response to Appellant's request to make an opening statement, the Master in Equity said (R. p. 233, lines 22-25): "No, sir, I don't need one. … We've pre-tried the case. I've looked over everything. And if I don't understand it by now, we've got worse problems than that." Yet despite the fact that prior to trial he had looked over everything and had "pre-tried the case" he ordered involuntary nonsuit on the grounds that the By-Laws were not specifically entered into the Record at trial, when the Master in Equity had them as "Exhibit A" to the e-filed Verified Complaint, and regarding which Appellant asked the Judge to take judicial notice thereof, prior to the Judge ruling on the case (Transcript, April 20, 2018, R. p. 324, lines 12-17): "Certainly the key provisions of the Bylaws were discussed in the pretrial brief. … Exhibit … e-filed officially, and they were cross-referenced as a result in all the written material. … that it's part of the record."

b) Judicial notice of adjudicative facts - South Carolina Rule 201, SCRE governs:

(a) Scope of Rule. This rule governs only **judicial notice** of **adjudicative facts**.

(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When Discretionary. A court may take **judicial notice**, whether requested or not.

(d) When Mandatory. A court shall take **judicial notice** if requested by a party and supplied with the necessary information.

(e) Opportunity to Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking **judicial notice** and the tenor of the matter noticed. In the absence of prior notification, the request may be made after **judicial notice** has been taken.

(f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing Jury. The court shall instruct the jury to accept as conclusive any fact judicially noticed.

An appellate court may take into consideration not only judicial notice of its own records, and proceedings for all proper purposes {*Freeman v. McBee*, 280 S.C. 490, 313 S.E. 2d 325 (Ct. App. 1984)}., but also, importantly, it may "take judicial notice of what was stated in [a] prior Opinion in [a] prior action of the same case." Id.

Judicial records are in particular proper vehicles for judicial notice. Key to this appeal, the 4th Circuit Court of Appeals, has noted that "the most frequent use of judicial notice of ascertainable facts is in noticing the content of court records." *(Colonial Penn Ins. Co. v. Coil,* 887 F.2d 1236, 1239 (4th Cir. 1989)(emphasis added), (quoting 21 Charles A. Wright Kenneth W. Graham Jr. *Federal Practice & Procedure Section* 5106, at 505 (1977). Crucially, "[a] Court may take judicial notice of an adjudicative facts at any stage of the proceeding. (Rule 201(f) SCRE).

c) Mandatory Judicial Notice – Rule 201(d) SCRE - Rule 201(c) SCRE mandates that "[a] court shall take judicial notice if requested by a party and supplied with the necessary information" The record is clear, as more support by the Transcript detailed infra, that counsel for Appellant made a clear request for the judge to recognize the Verified Complaint,

which specifically incorporated the Exhibits including the By-Laws. In addition, as previously noted, the Pre-Trial Brief he requested and which Appellant provided specifically incorporated such documents, and both Appellant Counsel (P-4) and Respondent counsel (D-24) had marked as Exhibits the By-Laws, and counsel for Appellant had offered them during the course of the Trial.

d) Judicial Recognition *Sua Sponte* - Even assuming that the pleading from the case, and Exhibits and Affidavits were not part of the record of the court (not the case here we assert), the law is clear that where one does not request the Appellate Court to take judicial notice (not the case here), the appellate court can take judicial notice of something that was not before the trial court if it is indisputable." *Wise v. Wise* (S.C. Ct. App. Opinion No. 4879 (August 24, 2011). Indeed, the court in *Wise* took cognizance of the filing of the Complaint and facts established therein in taking judicial notice of information contained in such Complaint. That is precisely the case here, where, as stated by Appellant counsel to the Master in Equity, the By-Laws, which he concluded were not part of the record and regarding which Appellant sought a declaratory judgment, were the cornerstone of the Complaint and included as "Exhibit A" to such Complaint, all as underscored by counsel for Appellant before the court, in response to the Court's inquiry as to why the court should not grant involuntary nonsuit. The United States Supreme Court weighed in on the issue of entry of Exhibits to Complaints not on the record in *Tallabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007). It reversed the Court of Appeals refusal to admit Exhibits to the Complaint not on the record and sustained a motion to dismiss, explaining that in analyzing a 12(b)(6) motion to dismiss, the court **must** consider **"documents incorporated into the complaint by reference, and matters which the court may take judicial notice."** (Id. At 730) (emphasis added).

e) Specific Precedent for Entry of Pleadings - Certain categories, such as pleadings, records and judgments in other court cases have routinely been the subject of judicial notice (see, e.g. *Green v. Warden U.S. Penitentiary*, 699 F.2d 364, 369 (7th Cir. 1983). In the instant case it was pleadings arising from the same case that were sought to be judicially recognized. Pursuant to S.C.R.E. 201, the court clearly should have taken judicial notice as a document that was not subject to reasonable dispute and was subject to accurate and ready determination. In this case, Appellant had "Exhibit P-4" of the By-Laws in hand to provide the Master in Equity, the Complaint had an attached set of By-Laws as the Court was advised, the Master in Equity had attested to having "pre-tried the case" and being fully familiar with it. Counsel for Respondent was holding a copy in his hand which he had marked as "Exhibit D-24" but not entered.

It is clear from the Transcript that Counsel for Appellant pleaded with the Master in Equity to admit that which he offered to the Judge; and also that at the close of the Trial (Transcript, April 20, 2018, R. p. 324, lines 12-17): "Certainly the key provisions of the Bylaws were discussed in the pretrial brief. But more importantly they are Exhibit 3 [A] to the Complaint and they are filed officially, e-filed officially, and they were cross-referenced as a result in all the written material. That would be my response, Your Honor, that it's part of the record.", in response to the Master in Equity stating that he had concluded that an involuntary nonsuit was appropriate due to the absence of the By-Laws being formally entered into the record before counsel for Appellant rested. Counsel for Appellant asked the Judge to take judicial notice thereof, noting that they were attached to the Complaint which were e-filed.

Thus, it is also clear that the Master in Equity, in failing to comply with S.C.R.E. Rule 201, erred, and that this basis alone mandates a reversal and remand for a new trial.

IV. The Master in Equity erred in dismissing Appellant's individual action, without specifying the basis therefore, where Appellant's testimony provided an evidentiary basis

for particularized injury and damages.

The Appellant's fight for proper Board Governance is at the heart of both his derivative and individual actions. The latter, his individual action arises in the context of his seeking a position as a member of the Board of Directors to be in a position to represent a minority of Members supporting his platform of transparency, with open meetings announced by proper advance notice with agendas, adherence to the By-Laws and an amendment to the By-Laws providing for Alternative Dispute Resolution.

The Master in Equity erred in dismissing Appellant's individual action, without specifying the basis therefore, where Appellant's testimony provided substantial evidentiary support for Appellant's individual action, coupled with proof of injury and damages. The Transcript shows that in order to suppress Appellant's platform, he was not appointed to fill a vacancy on the Board despite his meeting the requirements and the absence of any other volunteers to fill such vacancy. He was thus disenfranchised, suffering particularized injury, a keystone element. Appellant's testimony underscores such particularized injury.

In response to inquiry from Appellant's counsel about another By-Laws provision concerning the requirement for the Board to fill vacancies, Appellant also underscored that a dispute existed as to interpretation.

Counsel for Appellant: "What other stipulated issues are you familiar with and what are the[ir] importance… [f]or example, …the issue with regard to filling vacancies" (Transcript, April 20, 2018, R. p. 244, lines 10-13).

Appellant: "The By-Laws state plainly the Board shall fill a vacancy." (Transcript, April 20, 2018, R. p. 244, line 15).

Counsel for Appellant: "Did a vacancy arise?" (Transcript, April 20, 2018, R. p. 244, line

17).

Appellant: "...I believe it was early in May of 2017, the then presiding Board secretary decided to resign, opening up such vacancy. I petitioned the Board at that time that I was willing and eligible to fill the vacancy, and they did not fill the vacancy until January of 2018...." (Transcript, April 20, 2018, R. p. 244, lines 18-22).

In response to an objection concerning questioning of Appellant concerning governance issues, such as the failure of the Respondents to send out Minutes to Members, counsel for Appellant stated in support of such line of questioning: "If I may, Your Honor?... We're looking at a two-term Board member with a specific agenda, platform, which differs markedly from the current and prior Boards, inasmuch as this is an issue of transparency and Board governance. What we have here is an individual that sought to present his platform of openness and transparency, which is markedly different, a minority view currently and basically got disenfranchised when not being permitted to do so. And that's the individual action on his part. Not derivative, but both derivatively and individually. Thus, the reason I'm raising this issue, Your Honor." (Transcript, April 20, 2018, R. p. 246, lines 22-25 and R. p. 247, lines 2-7).

In addition, the Master in Equity following the close of arguments stated on the record that (R. p. 324, lines 24-25 and R. p. 325, line 1): "He clearly has rights individually as a member of the Woodington Homeowners Association". Yet the Master in Equity went on to deny Appellant of such rights, by dismissing his individual action.

As stated in the Brief Memorandum in Response to Defendants' Motion in Support of Motion to Dismiss (inter alia), the law is clear, a homeowner who suffers an injury that is "separate and distinct from that of the [homeowner association] ... may bring an individual action. *Brown v. Steward*, 557 N.E.2d 676, 684 (S.C. Ct. App. 2001).

Thus, it is clear that the Master in Equity improperly dismissed, without comment or explanation, Appellant's individual action for which there was particularized injury shown (inability to promote his platform of good governance).

V. The Master in Equity erred in granting a motion of involuntary nonsuit against Appellant following counsel for Respondent's motion for a directed verdict, when there was evidence on the record for Appellant's claims of violation of the By-Laws.

Involuntary Nonsuit was Improper - The lower court failed to fulfill the requirements of ordering involuntary nonsuit under SCRCP Rule 52, which requires that "[i]n an action tried on the facts without a jury or with an advisory jury, the court must find the facts specifically and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court." It is respectfully asserted that the Order of Judgment for Defendants was not only improperly couched but also failed to enumerate the facts specifically or "state its conclusions of law separately." (See, Order of Judge Simmons, R. pp. 13 - 14). This is particularly apparent with respect to Appellant's individual action, for which it remains unclear as to the basis for dismissal of such action.

The Master in Equity did not address or apply the proper standard in declaring a nonsuit. The proper standard is that articulated in by this Court and the Supreme Court of South Carolina: "The effect of a motion for nonsuit admits the truth of the evidence of the party against whom the challenge is made and all inferences reasonably drawn therefrom and requires that the evidence must be interpreted most strongly against the challenger and in the list most favorable to the opposing party. *Fielding Home for Funerals v. Public Savings Life Ins. Co.*, 271 S.C. 117, 245 S.E. (2d) 238 (1978). See also, *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 548 S.E.2d 223 reiterating that South Carolina has a policy "favoring the disposition of issues on

their merits rather than on technicalities." (Id. 511, 226).

Involuntary nonsuit exists where there is no evidence, yet in this case there was substantial evidence regarding the violation by the Board Defendants of the By-Laws giving rise to the six stipulated By-Laws provisions for which Appellant sought a Declaratory Judgment. Such evidence not only arises from the Complaint and the Exhibits and Affidavits a part thereof, but also from the testimony of Appellant both at the Hearing on Respondent's Motion to Dismiss and also in Appellant's testimony at trial before Judge Simmons.

Such testimony before the Master in Equity makes clear that there was an evidentiary basis for the Declaratory Judgment, specifically as follows.

The Transcript is replete with testimony concerning disputed By-Laws provisions. For example, in responding to a series of questions from his counsel, Appellant stated concerning the stipulated issues and pointed to several By-Laws issues in dispute, including the By-Laws provision requiring the Board to ballot issues faced by the Community:

Counsel for Appellant: "You were involved in the drafting of the By-Laws ..." (Transcript, April 20, 2018, R. p. 243, line 16).

Appellant: "I was the main proponent, as an author of the By-Laws..." (R. p. 243, line 18), "...to bring the ballot provision into the By-Laws." (R. p. 243, line 20).

Counsel for Appellant: "Okay, so it's your thinking, then, that that valid provision was violated when they [the Board] didn't sent out ballots…?" (R. p. 244, lines 5-6).

Appellant: "Per the strict language of the By-Laws that the Board shall send a ballot, that's correct." (R. p. 244, lines 8-9).

VI. The Master in Equity erred in determining that the action for Declaratory Relief was improper.

As set forth in Appellant's Verified Complaint, interpretation of the disputed By-Laws in

this case is the very essence of why the legislature enacted Title 15, Chapter 53 Sections 20, *et. seq.*, which provides in pertinent part:

"Any person interested under a …written contract may have determined any question of construction or validity arising under the …contract…and obtain a declaration of rights, status or other legal relations thereunder."

Declaratory relief was sought since there are disputes that have not been able to be resolved surrounding interpretation of the By-Laws of WHOA, despite efforts to do so.

The Plaintiff, both individually, and as a member of the WHOA collectively, has tangible legal interests that have been abridged by the Defendants.

The actions and failure to act where a duty is imposed pursuant to the By-Laws is opposed to Plaintiffs' tangible legal interests.

The nature of the disputes is, in each case, distinct and subject to full resolution, by an immediate and definitive resolution by this Court of the parties' rights, thereby avoiding the necessity of litigation.

In his original Complaint, Appellant requested a Declaratory Judgment regarding issues that are at the very core of declaratory relief, for each of the following matters:

1). That Plaintiff is entitled to the Requested Information;

2). That Board Defendants do not have unilateral authority to increase the fees for AMG;

3). That previous years' Contracts with AMG are null and void since they were never properly authorized by Members;

4). That the purported "ratification" of all prior acts by the 2016 Board at the Annual Meeting of the WHOA on January 10, 2017 was improper and ineffective, and a breach of duty of good faith as implied in the By-Laws;

5). That the purported ratification of prior AMG Contracts at such Annual Meeting was improper and ineffective, and a breach of duty of good faith as implied in the ByLaws, and also based upon the facts such Contract was not provided to Members for review and the increase in fees to AMG not disclosed at the time of the increase;

6) That Respondents are incorrect in their interpretation of the By-Laws provision regarding filling a vacancy on the Board and must fill the vacancy if a Member is willing to serve.

As shown, these fit perfectly within the guidelines established by the law and the courts for seeking declaratory relief, and accordingly the Master in Equity erred in determining that the case was not proper for such relief.

VII. The Master in Equity erred in concluding that "Stipulated Issues 1(b), 1(d), 1(e), and 1(f) are moot, advisory in nature, or otherwise fail to present actual justiciable controversies" therefore declining to issue the requested declarations.

The issues of mootness, advisory in nature and otherwise not justiciable issues were argued before Judge Stilwell in Respondent's Motion to Dismiss and were rejected by Judge Stilwell as lacking merit. It is clear from the section above on Declaratory relief that the stipulated issues were very much in controversy, thus the very reason they were stipulated! While one of the six stipulated issues was dropped upon an agreement as to interpretation of the applicable By-Laws provision during trial, the other five remained in controversy. For example, the stipulated issue of whether the term limit of five years set forth in the By-Laws means five years or not was not resolved and remains an issue. That is frequently the reason for bringing a declaratory judgment, as here, i.e., for the Court to interpret and conclude as to the meaning of a document in dispute. In the event that the Master in Equity found the case was not justiciable due to Appellant lacking standing for his derivative action, that issue has been addressed, as has

the right of Appellant to bring his action individually.

The Complaint and attached Exhibits make clear that the Declaratory relief sought was over actual, ongoing disputes over specified By-Laws provisions either being violated or not enforced. Thus, they were clearly justiciable and clearly not moot. Indeed, Judge Stilwell made clear that failure to proceed with actively disputed and ongoing conflict over interpretation of the By-Laws would only mean an appeal and likely reversal (Judge Stilwell Transcript, January 3, 2018, R. p. 271, lines 5-14): "If [this court] were to summarily dismiss it, ... then surely you would be at the appellate courts. And then you'd probably be back down. Which means that I would just add to the angst. And I would add to the timely expense of this case. So, I think the courts are better served to have hearings on the merits. The [To] fully adjudicate the issues that come before the court."

CONCLUSION

Accordingly, based upon the issues raised and the arguments, including:

(i) the clear error of law of the Master in Equity in applying a wrong standard in concluding Appellant lacked standing to bring a derivative action under Rule 23(b)(3) (a question of law);

(ii) the wrongful refusal of the Master in Equity to permit Counsel for Appellant to enter Exhibits, including the By-Laws into evidence during the course of the Trial;

(iii) the wrongful refusal, under Rule 201, SCRE (b), (d) and (f), of the Master to take judicial notice of the Complaint and Exhibits thereto following Appellant's specific request to do so at the close of trial in response to the Master in Equity's inquiry of counsel for Appellant if he had anything further to add, coupled with a repeated offer to supply the Judge with a copy (which were in the record with the Verified Complaint),

(iv) the wrongful dismissal of Appellant's individual action, without comment or guidance, in the face of Appellant's clear evidence of specific individual injury to support his individual action,

along with the other arguments presented, it is respectfully requested that this Court address the five stipulated issues presented to the Master in Equity, and address the Appellant's individual action; or, in the alternative, reverse the finding of involuntary nonsuit regarding the action for Declaratory Judgment, as well as reverse the dismissal of Appellant's individual action, to permit the Appellant to seek a new trial on the merits.

Respectfully Submitted,

May 1st, 2019

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Charles B. Simmons, Jr., Master in Equity

Civil Action No. 2017-CP-23-06301
Appellate Case No. 2018-001209

RECEIVED
MAY 02 2019
SC Court of Appeals

Raymond Wedlake, individually and derivatively, on behalf of all Members of the Woodington Homowners' Association, Inc., ….....Appellant,

v.

Benjamin Acord, William Craigo, Denis Esteve, and Brian James in their capacity as the current Board of Directors of the Woodington Homeowners' Association, Inc., and Association Management Group SC, Inc.,..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

May 1ST, 2019

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HE STATE OF SOUTH CAROLINA
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APPEAL FROM GREENVILLE COUNTY
Charles B. Simmons, Jr., Master in Equity

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SC Court of Appeals

Civil Action No. 2017-CP-23-06301
Appellate Case No. 2018-001209

Raymond Wedlake, individually and derivatively, on behalf of all Members of the Woodington Homowners' Association, Inc., ...Appellant,

v.

Benjamin Acord, William Craigo, Denis Esteve, and Brian James in their capacity as the current Board of Directors of the Woodington Homeowners' Association, Inc., and Association Management Group SC, Inc.,..... Respondents.

PROOF OF SERVICE

I, Grant H. Gibson, Esq., certify that I have served, or caused to be served, the Final Brief of Appellant on counsel for the Respondents by depositing one bound copy of the same in the United States mail, postage prepaid, addressed as follows:

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This 1ST day of May 2019.

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