EXHIBIT C

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

C. Barry Dykes and Barbara Eisenhardt, individually and derivatively on behalf of the Wild Wing Plantation Property Owners' Association, Inc.,

Plaintiffs,

-vs-

Wild Wing Company, LLC, Sunstar, LLC, Ralph R. Teal, Jr., SLF IV/SBI Wild Wing, LLC, SLF IV/SBI JV, LLC, SLF IV/SBI Properties MM, LLC, SLF IV/SBI Development Holdings, LLC, Wild Wing Residential Development, LLC, Stratford Land Manager, L.P., d/b/a Stratford Land, Stratford Land Fund IV, L.P., SB Investments, LLC, Realstar Management, LLC, Graeme T. Black, H. Gilford Edwards, Founders Wild Wing, LLC, Founders Group International, LLC, Dan Liu, Xian "Nick" Dou, Rick Schultz, Rick Taylor and Thomas Plankers,

Defendants,

Wild Wing Plantation Owners' Association, Inc.

Nominal Defendant.

IN THE COURT OF COMMON PLEAS
THE FIFTEENTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2017-CP-26-04187

ORDER GRANTING INDIVIDUAL DEFENDANTS SCHULTZ, TAYLOR AND PLANKERS' MOTION FOR SUMMARY JUDGMENT

This matter came before the Court on May 4, 2021, concerning the Motion for Summary Judgment of Defendants Rick Schultz, Rick Taylor, and Thomas Plankers (hereinafter, collectively, the "Individual Defendants"), pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, on grounds that Plaintiffs C. Barry Dykes and Barbara Eisenhardt (hereinafter, "Plaintiffs") have failed to raise genuine issues of material fact in support of their claims. This

Order is entered as to these Individual Defendants. Orders as to the Remaining Defendants are incorporated herein by reference. This Order addresses the Individual Defendants only.

Following a hearing on the matter and review of the arguments and pleadings submitted by all parties, for the reasons detailed below, this Court GRANTS the Motion for Summary Judgment of the Individual Defendants and DISMISSES the lawsuit against them with prejudice.

PROCEDURAL HISTORY

Plaintiffs, as individual unit owners in a residential housing development in Horry County, brought this suit allegedly as a shareholder derivative action against various individual and corporate entities in connection with the development and administration of the development ("Wild Wing Planation") and its associated property owners association ("Wild Wing Plantation Property Owners Association" or "the Association"). Plaintiffs' claims against these Individual Defendants related to the Individual Defendants' status as members of the Association's Board of Trustees between 2015 and 2019 and included claims for breach of fiduciary duty, unjust enrichment, and a S.C. Unfair Trade Practices Act ("SCUTPA") claim. As originally pled, the Plaintiffs' breach of fiduciary duty claim centered on allegations that the Individual Defendants and others breached their duty to the Association's members by failing to observe generally accepted accounting principles ("GAAP") in conducting the affairs of the Association. Over the course of discovery and litigation, the parties narrowed and focused the GAAP issue to two primary issues. The first of these is what the parties came to refer to as "the Math" – that is, the Plaintiffs' contention that the Defendants failed to accurately calculate their funding obligation under the declarant's funding options in the yearly budget, by failing to include "bad debt"[1] as a

[1] In this matter, Plaintiffs define "bad debt" as the amount consisting of individual owners who have failed or elected not to pay their yearly assessments to the association.

component of the funding obligation. The second issue related to extensions of a declarant funding option ("the funding option") found within the original covenants which allowed the declarant, for a specified time, to choose between paying an assessment based on the number of individual lots owned by the declarant, or funding any shortfall between the association's actual operating expenditures and the assessments made against the individual lot owners in that year. Plaintiffs asserted that the two amendments of the funding option were "for the sole benefit of the Declarants and at the sole expense of the POA." Plaintiffs claim that the Individual Defendants' calculation of the Math and their extension of the funding option have resulted in the various declarants paying less to the Association than they otherwise would have, and that this constitutes a violation of GAAP and amounts to a breach of the Individual Defendants' fiduciary duty to the Association. The Court finds that at this point in the litigation the Plaintiffs have abandoned or dismissed their unjust enrichment and SCUTPA claims against these Individual Defendants, or otherwise conceded that these claims would fail of a necessary element should Plaintiffs not prevail on their fiduciary duty claims. Accordingly, the Court finds that a decision in favor of the Individual Defendants on the Math and the funding option are dispositive as to all claims against the Individual Defendants.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear that the moving party is entitled to a judgment as a matter of law. S.C.R. Civ. P. 56(c). Although the court must view the facts and inferences therefrom in the light most favorable to the non-moving party, the non-movant may not rest on mere allegations or denials of his pleading. Instead, the non-movant must set forth or point to specific facts showing that there is a genuine

issue of material fact. *Hancock v. Mid-South Management Co.*, 381 S.C. 326, 330-331, 381 S.E.2d 801, 803 (2009).

FINDING OF FACTS

In the light most favorable to the non-movant, this Court finds the record in this case to show as follows:

The Wild Wing Plantation is a residential development located in Horry County between Conway and Myrtle Beach. The POA was formed on June 14, 2006 as a non-profit corporation. The initial declarant, Wild Wing Company, LLC ("WWC" or "Developer One") was organized on or about December 7, 2005. On or about September 26, 2006, Developer One filed the Declaration of Protective Covenants, Restrictions, Easements, Charges and Liens for Wild Wing Plantation (the "Wild Wing Covenants"). The Wild Wing Covenants identify the developer as "Declarant", provide that the Association was to be governed by a Board of Directors, and vested a number of rights and obligations in the Declarant. These included the right of the Declarant to name all members of the Association's Board during the period of the Declarant's control. On December 22, 2010, Developer One assigned its declarant rights to SLF IV/SBI Wild Wing Company, LLC ("Developer Two"). Developer Two remained the Declarant until November 9, 2011. On that date, Developer Two assigned its declarant rights to Wild Wing Residential Development, LLC ("Developer Three"). Developer Three served as Declarant from November 9, 2011 until April 13, 2015, when the declarant rights were assigned to Founders Wild Wing, LLC ("Developer Four"), which remains the Declarant to date.

Contemporaneously with its assumption of the Declarant rights for the Wild Wing Plantation, Developer Four purchased a number of golf courses in the Grand Strand area. Individual Defendants Rick Taylor, Rick Shultz, and Tom Plankers were all working as golf course

managers at one or more of the courses purchased by Developer Four and became employees of Developer Four pursuant to those purchases. On or about May 2015 Developer Four notified the Individual Defendants that they would henceforth serve as its representatives on the Board of Directors of the Wild Wing HOA. Defendants Plankers and Taylor remained on the board until sometime in 2017, when they both left the employment of Developer Four. Defendant Schultz continues to be on the board at the time of the issuance of this Order.

The Association's right to levy assessments on property owners within the development are set forth in the Wild Wing Covenants. The Association has the power to collect both annual assessments and special assessments. The covenants also allow the Declarant the funding option referenced earlier – in lieu of paying a per-lot assessment on all lots owned by the Declarant, the Declarant may pay a single annual assessment of "a sum equal to the actual amount of actual operating expenditures incurred by the Association for that portion of the calendar year less an amount equal to the total assessments made by the Association against owners of lots other than those owned by the Declarant." Stated as simply as possible, this language meant that the Declarant's minimum obligation was to annually fund any shortfall between the Association's actual operating expenditures and the assessments made against all other owners during that year.

Each fiscal year, the Association's Finance Committee, with the assistance of the property management company hired by the Association, created an annual budget. This annual budget projected both annual expenses and annual revenues for the Association, as well as a projected shortfall – the estimated deficit that would likely be owed by the Declarant at the end of the year pursuant to the language of the covenants. During that fiscal year the Declarant would then make installment payments on the projected shortfall.

Each year, the Association hired an accounting firm to audit the Association's financial statements. The accounting firm also prepared a "Developer Assessment" worksheet. The worksheet used the information gained from the audit to identify (a) the difference between the actual amount of actual operating expenditures, less the amount equal to the total assessments made (the "shortfall"); or (b) an amount equal to the per-unit assessment for all lots owned by the Declarant within Wild Wing Plantation. Pursuant to the Declaration, the Declarant was allowed to select its preferred funding mechanism and then make the appropriate payment to the Association.

The annual budgets, including the calculation of the declarant's contribution, were prepared by the property manager and then submitted to the Association's Finance Committee.[2] The budget sent forward by the Finance Committee was then reviewed and approved by the Board. The Board also reviewed the reports of the accounting professionals engaged to perform the yearly audits of these budgets.

In November 2011, the Association's Board of Directors (predecessor board to the board on which these Individual Defendants served) called a special meeting for the purpose of voting to amend the Covenants to extend the Declarant funding option from December 31, 2010 until December 31, 2016. Declarant and the individual Lot Owners, including Plaintiff Eisenhardt, voted unanimously in favor of the amendment. In November 2016, the Association's Board of Directors (on which these Individual Defendants served) called a special meeting for the purpose of voting to again amend the Covenants to extend the Declarant's funding option from December 31, 2016 until December 31, 2019, at which time the Declarant would be subject to assessments

[2] During the time frame that coincides with the board terms of Taylor, Schultz and Plankers, both Plaintiffs were members of the Finance Committee which was involved in the creation of these budgets and the accompanying calculation of the Declarant's contribution.

on the same basis as other lot owners. Once again, the amendment was passed, this time with a majority of Lot Owners and the Declarant voting in favor.

I. PLAINTIFF'S CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS ARE BARRED BY APPLICATION OF THE BUSINESS JUDGMENT RULE

In South Carolina, courts apply the business judgment rule to protect corporate directors. "Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts without corrupt motives and in good faith." *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 599, 538 S.E.2d 15, 25 (Ct. App. 2000). Our Court of Appeals has stated "the conduct of the directors should be judged by the 'business judgment rule' and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action." *Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) (citing 4 S.C. Juris. *Condominiums* § 42 (1991)). Further, "[t]he burden of proving good faith is not on the governing board; the burden of proving a lack of good faith is borne, rather, by those challenging the board's actions." *Dockside Ass'n, Inc. v. Detyens*, 294 S.C. 86, 87, 362 S.E.2d 874 (1987) (internal citation omitted).

In applying the business judgment rule, it must be determined if the acts complained of are *intra vires* acts or *ultra vires* acts. "A corporation may exercise only those powers granted to it by law, its charter or articles of incorporation, and any bylaws made pursuant thereto." *Seabrook Island Prop. Owners Ass'n v. Pelzer*, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct. App. 1987) (citing *Lovering v. Seabrook Island Prop. Owners Ass'n*, internal citations omitted). A corporation's actions taken within the scope of the powers granted it are considered *intra vires* acts, while "acts beyond the scope of its powers are *ultra vires* acts." *Id.* The business judgment rule applies to *intra vires* acts of the corporation, but not to *ultra vires* acts. *Id.*

The acts of the Individual Defendants singled out by Plaintiffs as the basis for their claims against the Individual Defendants are the calculation of the Declarant's contribution and the enactment of the covenant amendment which extended Declarant Four's option on how to fund any shortfall. (Transcript of Plaintiff Barry Dykes of June 25, 2020, pp.27-28, hereinafter, "Dykes Transcript"). Plaintiffs admit that the Covenants authorized the board to prepare and adopt annual budgets, to establish the means and methods to collect assessments, to make and amend rules and regulations, to employ professional management agents to assist them in carrying out their administration duties. Plaintiffs also acknowledge that the Covenant provides a mechanism for its own amendment. The record reflects that the procedures set forth in the Covenant to amend the document were followed on both extensions of the declarant's funding option. Accordingly, the Court finds that Plaintiffs concede that the acts of the Individual Defendants of which they complain are all *intra vires* acts:

> Q: You have named Tom Plankers, Rick Schultz, and Rick Taylor as defendants in this litigation. Do you contend that they acted, during the time they served as board members, they acted outside their authority?
> A: I contend that they violated their fiduciary duty to the membership.
> ***
> Q: I'm simply asking you to tell me is the thing they did wrong, can you point to a section of the covenants or the declarations and say, see, it says right here they should not do this and they did this?
> A: No, I can't point to a specific –
> Q: Okay.
> A: -- area that I recall right now.
>
> (Dykes Transcript, p.13, lines 6-13; p.15, lines 10-17).

Having ascertained that the acts complained of by Plaintiffs are *intra vires* acts, at the summary judgment stage it is the Plaintiffs' burden to make a showing that the business judgment rule should not apply because the judgment of the directors was the product of bad faith,

dishonesty, or incompetence. While suspicious of the motivations of the Individual Defendants, Plaintiffs have failed to make the required showing:

> Q: All right. Do you contend that my clients had any corrupt motives or acted in bad faith with regards to any actions they took as board members?
> A: I can't answer as to what their motivations are for their decisions.
> Q: Okay, so that's a no? Your answer to that question is no?
> A: No, it's not a no. It's a – it's a – you're asking me what their motivations are. I can't say what their motivations are. I can say that their actions were such that they were not in the best interest of the membership and the motivations for why they did that I can – I can guess but I don't know.
>
> (Dykes Transcript, p. 21, lines 5-19).
>
> Q: Do you have any evidence that their employer directed them to make particular decisions or take particular actions as board members?
> A: I don't have – I can't specifically say what the process was. I believe there was collaboration there.
> Q: And I understand. My question is do you have any evidence to support that belief?
> A: Not that I'm aware of.
> ***
> Q: Do you have any evidence that my clients would lose their jobs if they didn't take a particular action?
> A: I don't have specific evidence. I am aware that Rick Schultz tried to resign from the board at one point and was told he couldn't.
> Q: Well, that's not losing his job, that's keeping his job, right?
> A: Well, if he didn't – didn't do what they wanted, I assumed he'd lose – he would lose his job. But I don't – I don't have evidence of that.
> ***
> Q: Do you believe that my clients had any sort of financial incentive, other than maintaining their jobs, with regards to any of the decisions they made as board members?
> A: I don't know.
>
> (Dykes Transcript, p.25, lines 5-14; p.25, line 19-p.26, l.4; p.39, lines 16-20).

Under the summary judgment standard, the court must view the facts and inferences therefrom in the light most favorable to the non-moving party. Plaintiff Dykes has testified that he has formed an inference that the Individual Defendants acted with bad faith, based upon their actions. (Dykes Transcript, pp. 21-22; p.27, lines 18-22). However, the actions upon which Plaintiff's inferences are based are the aforementioned *intra vires* acts of the calculation of the

developer's contribution and the decision to extend the developer's funding option. Essentially, Plaintiff's testimony is that he infers bad will on the part of the Individual Defendants because he disagrees with their decisions: "I'm not disputing that as the board they have the right to make the decision, I am disputing that the decision was made in the best interests of the membership which is what their duty is." (Dykes Transcript, p. 19, lines 10-15). This is insufficient to meet the Plaintiffs' burden at this stage of the litigation. The business judgment rule acknowledges that reasonable minds can differ with regards to the best course of action for an organization, and exists to shield directors from litigation where in those circumstances, and this Court finds that Plaintiffs' claims against these Individual Defendants are barred pursuant to the application of that doctrine.

Additionally, S.C. Code Ann. § 33-31-830(b)(2) provides that a

> "director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence."

The evidence in the record in this matter indicates that the role of the Individual Defendants in determining the calculation of the developer's contribution was limited to reviewing and approving the figures that were provided to them by the joint work of the Association's finance committee, the property management company and the accountants retained for that purpose. Plaintiffs have conceded that the Individual Defendants' reliance on the finance committee, the property management company and the CPAs hired by the property management company was reasonable:

Q: Is it your understanding that somebody has to have an understanding of GAAP in order to serve on the development's finance committee?
A: No.
Q: What about on the HOA's board?

A: Not to my knowledge.
***
Q: So if you don't believe it's a requirement that you as a putative board member have to really understand GAAP, but you believe there is a requirement that they abide by the principles of GAAP, would it in your judgment be reasonable for a board member who didn't have your understanding of GAAP to approach other professionals for help in understanding that concept and how to apply it?
A: Yes, that would be reasonable.

(Dykes Transcript, p.46, lines 21-p.47, line 1; p.47, lines 12-21).

II. PLAINTIFF'S CLAIMS ARE BARRED BY THE SOUTH CAROLINA NONPROFIT CORPORATION ACT (S.C. CODE ANN. § 33-31-830).

As noted above, in conjunction with the Business Judgment Rule, the actions of the POA Board of Directors are also reviewed under S.C. Code Ann. § 33-31-830 of the Nonprofit Corporation Act. The applicability of S.C. Code Ann. § 33-31-830 is affirmed by the South Carolina Homeowners Association Act, which states "No provision of this article may be construed to be in conflict with the provisions of the South Carolina Nonprofit Corporation Act." S.C. Code Ann. § 27-30-170.

S.C. Code Ann. § 33-31-830 expressly insulates the POA Board of Directors when it relies on outside sources for guidance. Once the requirements of this section are met, review or second-guessing of the directors' decisions is precluded. In the present case, the undisputed evidence shows compliance with S.C. Code Ann. § 33-31-830.

By relying upon the POA property manager, the POA auditing accountant, and the POA Finance Committee, the Board of Directors discharged its duties in good faith and with the care of an ordinarily prudent person. Accordingly, this Court finds the actions taken by the POA Board in reliance upon the POA auditing accountant, the POA property manager, and the POA Finance Committee were in compliance with the Business Judgment Rule and S.C. Code Ann. § 33-31-830 and thus Summary Judgment is granted in favor of the Declarant Defendants.

III. PLAINTIFF'S CLAIMS ARE BARRED DUE TO PLAINTIFF'S FAILURE TO FILE THIS LAWSUIT WITHIN THE APPLICABLE STATUTE OF LIMITATIONS.

Plaintiffs' claims related to the Math in 2012 are also barred by the statute of limitations. A two-year statute of limitations and three-year statute of repose applies to the claims brought by Plaintiffs against these Defendants, pursuant to S.C. Code Ann. § 33-31-830 (f) which states,

> An action against a director asserting the director's failure to act in compliance with this section and consequent liability must be commenced before the sooner of (i) three years after the failure complained of or (ii) two years after the harm complained of is, or reasonably should have been, discovered.

Actions initiated under § 15-3-530 must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action. *Walbeck v. I'On Co., LLC*, 426 S.C. 494, 519, 827 S.E.2d 348, 361 (Ct. App. 2018).

South Carolina follows the "discovery rule," which requires that an action "must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." S.C. Code Ann. § 15-3-535; *See e.g., Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994); *see also Republic Contracting Corp. v. S.C. Dep't of Highways and Public Transp.*, 332 S.C. 197, 207, 503 S.E.2d 761, 766 (Ct. App. 1998). The language in S.C. Code Ann. § 33-31-830 (f) is substantially the same as S.C. Code Ann. § 15-3-535, and the discovery rule also applies. The relevant inquiry is not what Plaintiffs subjectively knew at specific points in time, but rather, at what point Plaintiffs objectively had "enough information such that [they] should have acted promptly to determine whether a cause of action might exist against [Defendants] for the injuries claimed in this case." *Ashley River Indus., Inc. v. Mobil Oil Corp.*, 135 F. Supp. 2d 733, 742 (D.S.C. 2000), *aff'd* 245 F.3d 849 (4th Cir. 2001); *see also Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 333, 534 S.E.2d 672, 678 (2000).

Plaintiffs' claims regarding the Amendments are likewise barred by the two year statute of limitations in S.C. Code Ann. § 33-31-830(f). Plaintiffs amended their Complaint on June 10, 2019 to add their claims on Amendments that were passed in 2011 and 2016. Plaintiffs filed this action in 2017 exclusive of any claims or allegations concerning the Amendments. Plaintiffs amended their Complaint on June 10, 2019 to add their claims on the 2011 and 2016 Amendments.

In 2016, both Plaintiff Dykes and Plaintiff Eisenhardt received Notice of the Special Meeting to vote on the proposed Amendment and cast their votes against the Amendment. At that time, Plaintiffs had knowledge of the harm complained of. Again, Plaintiffs failed to file until 2019. Therefore, this Court finds that Plaintiffs' allegations related to the Math are barred by the statute of limitations under S.C. Code Ann. § 33-31-830(f) and S.C. Code Ann. § 15-3-530.

IV. PLAINTIFF CLAIMS ARE BARRED PURSUANT TO THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT.

> Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, *but not in a representative capacity*, to recover actual damages.
>
> S.C. Code Ann. § 39-5-140(a) (Emphasis added).

"An unfair trade practices claim may not be brought in a representative capacity." *Wogan v. Kunze*, 366 S.C. 583, 609, 623 S.E.2d 107, 121 (Ct. App. 2005).

This Court finds that the POA cannot satisfy the requirements to have standing on its own or for associational standing on behalf of its members. The POA itself does not possess standing because it has not suffered an injury-in-fact. The POA also fails to satisfy associational standing because the POA members have not suffered an injury-in-fact necessary to establish standing in their own right and the damage claims are not common to the entire membership, nor shared equally. Plaintiffs presume to bring this lawsuit as representatives of the POA. Plaintiffs' Amended

Complaint alleges a Cause of Action under the Unfair Trade Practices Act in a representative capacity. South Carolina law makes clear that Plaintiffs may not bring an action for unfair trade practices in a representative capacity.

CONCLUSION

For the reasons stated in this Order, following a hearing and review of the arguments and briefs submitted by all parties, this Court **GRANTS** the Motion for Summary Judgment of Individual Defendants and DISMISSES the claims of the Plaintiffs with prejudice.

IT IS SO ORDERED.

The Honorable R. Markley Dennis, Jr.
Judge of the South Carolina Business Court

Horry Common Pleas

Case Caption: C Barry Dykes , plaintiff, et al VS Wild Wing Company LLC , defendant, et al

Case Number: 2017CP2604187

Type: Order/Summary Judgment

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