EXHIBIT D



| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF HORRY<br><br>C. Barry Dykes and Barbara Eisenhardt, individually and derivatively on behalf of the Wild Wing Plantation Property Owners' Association, Inc.,<br><br>Plaintiffs,<br><br>vs.<br><br>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 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,<br><br>Defendants.<br><br>Wild Wing Plantation Owners' Association, Inc.,<br><br>Nominal Defendant. | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT<br><br>CASE NO.: 2017-CP-26-04187<br><br><br><br>**ORDER GRANTING DEFENDANTS TEAL, BLACK & EDWARDS'S MOTION FOR SUMMARY JUDGMENT** |

This matter came before the Court on May 4, 2021. Among other motions for summary judgment, the Court considered Defendants Ralph R. Teal, Jr., Graeme T. Black, and H. Gilford Edwards' ("these Defendants") Motion for Summary Judgment, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. All parties were represented by counsel at the hearing and presented oral argument. Based on the extensive briefing, oral arguments, and review of the pleadings and documents submitted by all parties, for the reasons detailed below, this Court

GRANTS these Defendants' Motion for Summary Judgment and DISMISSES the lawsuit against them with prejudice.[1]

## PROCEDURAL HISTORY

This lawsuit involves a dispute between property owners within Wild Wing Plantation, various Declarant entities associated with the development of Wild Wing Plantation, and current and former directors on the Wild Wing Plantation Owners' Association, Inc. ("the Association"), Board of Directors ("the Board"). Plaintiffs Barry Dykes ("Dykes") and Barbara Eisenhardt ("Eisenhardt") (hereinafter referenced individually or collectively as "Plaintiffs") are members of the Association, and brought this action as a shareholder derivative lawsuit.

Wild Wing Plantation is a residential development in Horry County near the border of Conway and Myrtle Beach, South Carolina. Several entities have served as the developer, maintaining Declarant's rights within Wild Wing Plantation pursuant to the Declaration of Protective Covenants, Restrictions, Easements, Charges and Liens for Wild Wing Plantation ("the Wild Wing Covenants") and other governing documents (collectively "the Governing Documents"). The Association was formed on June 14, 2006 as a non-profit corporation. Pursuant to these Covenants, the Association was to be governed by a Board of Directors. The initial Declarant was Wild Wing Company, LLC ("WWC"). WWC was the Declarant from September 2006 and throughout the unstable economic climate and real-estate downturn that began shortly thereafter and lasted for a few years.

On December 22, 2010, WWC assigned its Declarant rights to SLF IV/SBI Wild Wing Company, LLC ("SLF"), and SLF held Declarant's rights until November 9, 2011 when it assigned them to Wild Wing Residential Development, LLC ("WWRD"). WWRD was the Declarant from

[1] In separate Orders following the May 4, 2021 hearing, this Court granted summary judgment for all Defendants. This Order addresses only Defendants Teal, Black, and Edwards but incorporates the Court's findings in the other Orders by reference.

November 9, 2011 until April 13, 2015. On April 13, 2015, WWRD assigned Declarant rights to Founders Wild Wing, LLC, and this entity remains the Declarant to date. Defendants Ralph R. Teal, Jr., Graeme T. Black and H. Gilford Edwards were members of the Association's Board of Directors at various times until Declarant rights were assigned to Founders Wild Wing, LLC in April 2015.

Plaintiffs' pled against these Defendants causes of action for breach of fiduciary duty, unjust enrichment, and veil piercing/alter ego /amalgamation, and violation of the S.C. Unfair Trade Practices Act ("SCUTPA"). Plaintiffs' breach of fiduciary duty claim centered on allegations that these Defendants and others breached their duty to the Association's members as to two issues. The first is that the Declarant's funding obligation in the Covenants was incorrectly calculated because it failed to include "bad debt" as an expense in calculating the "shortfall" owed annually by the Declarant. The second issue is the Association's approval of the 2011 Amendment to the Declaration of Protective Covenants, Restrictions, Easements, Charges, and Liens for Wild Wing Plantation ("2011 Amendment"), which, among other things, extended the Declarant's rights as to voting and its right to pay the Association the shortfall or assessments on a per lot basis. Plaintiffs asserted the amendment of the Covenants were "for the sole benefit of the Declarants and at the sole expense of the POA." Plaintiffs claim that these Defendants' calculation of the shortfall and extension of the funding option resulted in the various declarants paying less to the Association than they should have, and that this constitutes 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, veil piercing/alter ego/amalgamation, and SCUTPA claims against these Defendants, or otherwise conceded that these claims would fail of a necessary element should Plaintiffs not prevail on their fiduciary duty claims.

DECLARANT'S ANNUAL FINANCIAL CONTRIBUTION TO THE ASSOCIATION

The Association's right to levy assessments on property owners within the development is set forth in the Wild Wing Covenants. The Association has the power to collect both annual assessments and special assessments. The Wild Wing 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 the Declarant would likely owe by the end of the year pursuant to the language of the covenants. During that fiscal year the Declarant would make installment payments on the projected shortfall to the Association.

At the end of each fiscal year, the Association hired an accounting firm to audit the Association's financial statements. In conjunction with the audit, the accounting firm also prepared a "Developer Assessment" worksheet. This worksheet applied certain relevant figures from the audited annual financial statements to the Declarant funding options as set forth in the Declaration. This yielded two options: (1) the Declarant could fund the shortfall (i.e., the difference between the actual amount of actual operating expenditures incurred by the Association … less an amount equal to the total assessments made); or (2) the Declarant could pay an

assessment for all lots it owned within Wild Wing Plantation. As permitted by the Covenants, the Declarant then selected its funding mechanism, and, when required, paid the identified amount to the Association.

Ultimately, the Board– and these Defendants – only reviewed and approved annual budgets as prepared by the Finance Committee and property management companies. These Defendants were not involved in auditing the annual financial statements or determining the Declarant's shortfall contribution amount as presented in the "Developer Assessment" worksheet. Instead, the Board relied upon the Finance Committee, property management company, and accounting professionals to prepare budgets, track the Association's finances, perform annual audits, and determine the appropriate Declarant "shortfall" contribution.

2011 AMENDMENT TO DECLARATION OF PROTECTIVE COVENANTS, RESTRICTIONS, EASEMENTS, CHARGES, AND LIENS FOR WILD WING PLANTATION

In November 2011, the Association's Board of Directors, including these Defendants serving as Board members, called a special meeting for the purpose of voting to amend the Covenants, which among other things would extend the Declarant funding option from December 31, 2010 until December 31, 2016. In light of the challenges presented by the real estate downturn, the Association voted overwhelmingly in favor of the amendment, after appropriate notice and a meeting of the owners to discuss the amendment.

## SUMMARY JUDGMENT STANDARD

Summary judgment is proper when 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. Rule 56(c), SCRCP. 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 the mere allegations or denials of its pleading. Instead, the non-movant must set forth or point to specific facts showing that there is a genuine issue of material fact. *Sapp v. Ford Motor Co.*, 386 S.C. 143, 687 S.E.2d 47 (2009). *Hancock v.*

*Mid-South Management Co.*, 381 S.C. 326, 330-331, 381 S.E.2d 801, 803 (2009); *Dickert v. Metro. Life Ins. Co.*, 306 S.C. 311, 313, 411 S.E.2d 672, 673 (Ct. App. 1991); *McNair v. Rainsford*, 330 S.C. 332, 341, 499 S.E.2d. 488, 493 (Ct. App. 1998). "When ruling on a motion for summary judgment, the trial judge must consider all of the documents and evidence within the records, including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits." *Higgins v Med. Univ.*, 326 S.C. 592, 599, 486 S.E.2d 269, 272 (Ct. App. 1997). In determining whether any triable issue of fact exists so as to preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, S.E.2d 117 (1998); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). "If evidence favoring the non-moving party is merely colorable . . . or is not significantly probative . . . summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 59, 518 S.E.2d 301, 305 (Ct. App. 1999).

The plain meaning of Rule 56(c), SCRCP, 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 that party's case. *Id*. In such a situation, the moving party is entitled to judgment as a matter of law because the non-moving party has failed to demonstrate a genuine issue of material fact as to a necessary part of that party's claim. *Id*. "When a motion for summary judgment is made and properly supported, an adverse party may not rest solely upon the allegation or denials in his pleadings, but must set forth specific facts showing that there is a genuine issue of fact for trial." *Jones v. Enterprise Leasing Company-Southeast*, 383 S.C. 259, 267, 678 S.E.2d 819, 823 (Ct. App. 2009).

## FINDINGS OF FACT

Plaintiffs brought this action alleging that Declarant Defendants have underpaid the POA. Plaintiffs' case relies entirely upon blending the actions of the POA as actions of the Declarants. There exists no evidence or law to support this theory. The actions complained of by the Plaintiffs were actions of the POA. There exists no rule of law that an appointing Declarant is somehow vicariously liable for the actions of it appointee.

In 2006, the POA was established as a Not-for-Profit Corporation to maintain and administer the Wild Wing community in accordance with the Declaration. The Declaration provides that the affairs of the POA shall be governed by a Board of Directors which was appointed by the Declarant. Once these directors are appointed to the POA Board, they assume a duty to the POA of a nonprofit entity as Board Members.

Duties of the Board of Directors in administering the POA include levying assessments against Lot Owners to defray the Common Expenses and to establish the means and methods of collecting such assessments. To assist in carrying out its duties, the Board of Directors hired a property manager, an auditing accountant, and formed a Finance Committee of Members all as permitted by the Declaration. Two of the Members of the Finance Committee were Plaintiffs Dykes and Eisenhardt.

The Declarants were also obligated to contribute monies to the POA. The Declaration provided the Declarant the option to pay assessments for each lot the Declarant owed or to pay the shortfall of "the actual amount of actual operating expenditures incurred" by the POA less "an amount equal to the total assessments made". This formula is common in many community governing documents. The Declarant Contribution has been calculated the same way since the inception of the POA.

In 2012, a Finance Committee made up of Lot Owners was established. Plaintiff Eisenhardt was one of the initial members. The Finance Committee was charged with reviewing all matters that may have a financial impact on the community and making recommendations to the Board of Directors. This specifically included review and presentation of the Declarant Contribution Calculation. Plaintiff Dykes purchased his lot in Wild Wing Plantation in 2013 and was appointed to the Finance Committee in mid-2014. Immediately following his appointment, Plaintiff Dykes met with the POA property manager and obtained copies of all POA financial information. On April 28, 2015, Plaintiff Dykes met with members of Waccamaw Management and the POA accountant, Jim Corbett, to review the draft of the 2014 Annual Audit. During this meeting, Plaintiff Dykes raised concerns about the Declarant Contribution Calculation. Plaintiff Dykes took issue with the CPA's calculation, specifically with the fact that bad debt was excluded from the "actual amount of actual operating expenditures incurred". Following deliberation and discussion, the Finance Committee commissioned Mr. Corbett to further review, investigate, and advise as to this decision. Mr. Corbett testified that he reviewed the Declaration and Generally Accepted Accounting Principles along with the other CPAs in his office. He also met with Jane Atkinson, the Chief Financial Officer of Waccamaw Management. Ms. Atkinson had never seen bad debt included as an "actual operating expenditure incurred" in her many years of Association accounting. Mr. Corbett took his conclusions back to the Finance Committee explaining that the Declarant cannot be held responsible for the unpaid assessments of members of the POA. Despite Plaintiff Dykes' objection, the Finance Committee and the Board of Directors relied on its accountant, and later the property manager, and continued to calculate Declarant dues as it had since 2007.

In 2011 and 2016, the Declaration was amended to extend the period of time for the payment option. The Amendments were passed by vote of the POA pursuant to and in strict

accordance with the procedures required by the Declaration. On November 9, 2011, the Board of Directors of the POA sent out official Notice to all Members of the POA, including Plaintiff Eisenhardt, giving notice that a Special Meeting of the Members had been called for November 21, 2011 to amend the Declaration. The Notice attached the proposed Amendment to the Declaration for each Member's review. Pursuant to the Notice, a special meeting was held and there was a vote of the membership. Plaintiff Eisenhardt was in personal attendance at the special meeting, and voted in favor of the Amendment. In fact, the membership voted unanimously in favor of the Amendment.

Plaintiff Dykes purchased his property in Wild Wing Plantation in 2013, after the 2011 Amendment had been filed of public record. Mr. Dykes' deed and title insurance policy, which he received in his closing documents, specifically provided that the property was subject to the Declaration and all amendments thereto.

In 2016, both Plaintiff Dykes and Plaintiff Eisenhardt received Notice of the Special Meeting to vote on the proposed Amendment. The Notice included the proposed Amendment and a letter explaining the proposed Amendment. On November 4, 2016, both Plaintiff Dykes and Plaintiff Eisenhardt voted against the Amendment. However, once again, the Amendment passed with the required two-thirds majority vote of the membership, including a majority of the Lot Owner Members voting in favor of the Amendment.

This Court finds that Plaintiffs' claims against the Declarant Defendants as to the Math fail because of the protection of the Business Judgment Rule, S.C. Code Ann. § 33-31-830 and the Statute of Limitations. Additionally, this Court finds that Plaintiffs claims against the Declarant Defendants as to the Amendments fail due to the validity of the Amendments under South Carolina law and the Statute of Limitations. For these and other reasons as further set forth below, Summary

Judgment is **GRANTED** for the Declarant Defendants and Plaintiffs' case is **DISMISSED WITH PREJUDICE**.

## I. PLAINTIFF'S CLAIMS ARE BARRED BY THE BUSINESS JUDGMENT RULE.

A corporation can only "exercise the powers granted to it by law, its charter or articles of incorporation, and any bylaws made pursuant thereto." *Lovering v. Seabrook Island Prop. Owners Ass'n*, 289 S.C. 77, 82, 344 S.E.2d 862, 865 (Ct. App. 1986). When a corporation acts within its scope of authority, such conduct is considered *intra vires.* "Acts beyond the scope of a corporation's powers as defined by law or its charter are *ultra vires.*" *Id.* In South Carolina, the business judgment rule operates to preclude judicial review of *intra vires* actions taken by a corporate governing board absent a showing of a lack of good faith, fraud, self-dealing or unconscionable conduct. *Dockside Ass'n, Inc. v. Detyens*, 294 S.C. 86, 87, 362 S.E.2d 874, 874 (1987) (internal citation omitted).

> In a dispute between the directors of a homeowners association and aggrieved homeowners, 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).

"The 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.*, 294 S.C. at 87, 362 S.E.2d at 874; *see also Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 415 S.C. 256, 781 S.E.2d 903 (2016). "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).

S.C. Code Ann. § 33-31-830(a):

> A director shall discharge his duties as a director, including his duties as a member of a committee in good faith; with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and in a manner the director reasonably believes to be in the best interests of the corporation.

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

> "in discharging his or her duties, 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*."

Finally, S.C. Code Ann. § 33-31-830(d) states, "A director is not liable to the corporation, a member, or any other person for any action taken or not taken as a director, if the director acted in compliance with this section."

The acts of these Defendants identified by Plaintiffs as the basis for their claims against them are the calculation of the Declarant's contribution and the enactment of the 2011 covenant amendment. The Court finds the Wild Wing 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, and to employ certified public accountants. The Court also finds the Wild Wing Covenants provides a mechanism for its own amendment. The record reflects, and the Court finds, that the Board followed the procedures set forth in the Wild Wing Covenants to amend

the covenants and appropriately relied on professionals in determining the Developer shortfall. Accordingly, the Court finds that the acts of these Defendants were all *intra vires* acts.

Having ascertained that the acts complained of by Plaintiffs are *intra vires* acts, the Plaintiffs have the burden to show that the business judgment rule should not apply because the judgment of the directors was the product of bad faith, dishonesty, or incompetence. Plaintiffs have failed to make the required showing. Plaintiffs infer bad will on the part of these Defendants because they disagree with these Defendants' and the Association's decision to amend the Covenants, and in their acceptance of the Association's accountant's annual calculation of the Declarant contribution. 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 it exists to shield directors from litigation in those circumstances. The role of these 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. The Court finds that these Defendants' reliance on the finance committee, the property management company and the CPAs hired by the property management company was reasonable and appropriate under South Carolina law. Therefore, this Court finds that Plaintiffs' claims against these Defendants are barred pursuant to the application of the business judgment rule.

## 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.

> In discharging his duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:… public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence, [or] a committee of the board of which the director is not a member.
>
> S.C. Code Ann. § 33-31-830(b).

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. PLAINTIFFS' CLAIMS AGAINST THESE DEFENDANTS ARE BARRED BECAUSE PLAINTIFFS FAILED TO FILE THIS LAWSUIT WITHIN THE APPLICABLE 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." S.C. Code Ann. § 33-31-830 (f) reduces the three-year statute of limitations identified in S.C. Code Ann. § 15-3-530 (1) and (5) (providing for a three-year statute of limitations for actions arising "upon a contract, obligation, or liability, express or implied" and actions for "any injury. . . not arising on contract and not enumerated by law").

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 filed this case on June 30, 2017. It is clear that Plaintiffs had enough information prior to June 30, 2014 or June 30, 2015 such that they knew or should have known of the basis for their claims against these Defendants. Plaintiff Eisenhardt has been a property owner in Wild Wing Plantation since 2007, and she was one of the three founding members of the Association's finance committee in 2012. Plaintiff Dykes has been a homeowner since 2013 and was appointed to the Association's Finance Committee at the 2014 Annual Meeting.

All Association members, including the Plaintiffs, had access to the published audited financial statements each year, including the calculation of the declarant assessment exposure for those years. The audited financial statements for the year ending December 31, 2008 were published on July 6, 2009. The audited financial statements for the year ending December 31, 2009 were published on May 31, 2011. The audited financial statements for the years ending December 31, 2010 and December 31, 2011 were published on September 4, 2012. The audited financial statements for the years 2012 and 2013 were published on March 20, 2014. Each of these audited financial statements included a clear explanation of how the auditor calculated the declarant contribution. Plaintiffs knew or should have known how Declarant contributions were calculated well before June 30, 2014.

Furthermore, Plaintiff Eisenhardt was a homeowner at the time of the November 2011 vote to amend the Covenants. Ms. Eisenhardt received written notice of the proposed amendment from Wright Management on November 9, 2011. A vote was held on this amendment on November 21, 2011, and the minutes reflect that Ms. Eisenhardt was present at this vote. The votes were unanimous in favor of the amendment. Plaintiff Eisenhardt had sufficient information as early as November 2011 that she knew or should have known of the basis of the claims against these Defendants related to the 2011 vote to amend the Covenants. Despite knowing the purpose of the 2011 amendment and having an opportunity to vote on the adoption of the same, Plaintiff Eisenhardt waited until 2017, almost six years after the fact, to object. Plaintiff Dykes purchased his property within Wild Wing Plantation in 2013 with notice of the amendment. Property Owners are charged with constructive notice of instruments recorded in their chain of title. *S.C. DOT v. Horry County*, 391 S.C. 76, 84, 705 S.E.2d 21, (2011) (quoting *Binkley v. Rabon Creek Watershed Conservation Dist.*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001)). A party has constructive notice if the party knows of "facts and circumstances of an injury [that] would put a

person of common knowledge and experience on notice that some right… has been invaded or that some claim against another party might exist." *Barr v. City of Rock Hill*, 330 S.C. 640, 645, 500 S.E.2d 157, 160 (1998). Failure of the injured party to comprehend the full extent of damages is immaterial. *Id.* "The date on which discovery should have been made is an objective, not subjective, question." *Id.*

This Court finds that Plaintiffs' claims against these Defendants, individually and derivatively, are barred pursuant to the applicable statutes of limitation.

## IV. PLAINTIFF LACKS STANDING AND CLAIMS ARE BARRED PURSUANT TO THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT.

It is fundamental that before this Court can exercise jurisdiction over a case, the party bringing suit must have standing to do so. *See Anders v. S.C. Parole & Cmty. Corr. Bd.*, 279 S.C. 206, 211, 305 S.E.2d 229, 231 (1983). To possess standing, either the POA itself must have suffered a concrete, particularized injury or its members must have suffered such an injury and the other elements of associational standing must be satisfied. *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 753 S.E.2d 846 (2014).

> 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 these 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

R. Markley Dennis Jr., 2060

R. Markley Dennis Jr., 2060