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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas, Ninth Judicial Circuit
Hon. Bentley D. Price, Circuit Court Judge

Appellate Case No. 2020-001030

Maybank 2754, LLC, ...Appellant,

v.

Eugene Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo
Living Trust Dated December 11, 1997; 1776, LLC; Beach Fenwick, LLC;
The Beach Company; Seamon, Whiteside & Associates, Inc.; Penny
Creek Associates, LLC; John Doe and Mary Roe Respondents.

RECORD ON APPEAL
VOLUME II

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INDEX

VOLUME I

Orders

Order of Hon. Judge Mikell R. Scarborough dated June 21, 2017 and filed on June 23, 2017	1
Order of Hon. Judge Bentley D. Price – June 30, 2020	176
Order of Hon. Judge Bentley D. Price – July 13, 2020	179
Order of Hon. Mikell R. Scarborough – August 18, 2020	185
Order of Hon. Judge Bentley D. Price – October 7, 2020	188
Order of Hon. Judge Bentley D. Price – October 8, 2020	191
Order of Hon. Judge Bentley D. Price – October 12, 2020	194
Order of Hon. Judge Bentley D. Price – November 6, 2020	211
Order of Hon. Judge Bruce Williams – November 12, 2020	214

Pleadings

Complaint with Exhibits in <i>Zurlo v. Penny Creek Associates, LLC, et. al.</i> , case no. 2013-CP-10-7280 - December 16, 2013	216
Complaint in Wells Fargo Bank, N.A. v. Penny Creek Associates, LLC, et al., case no. 2014-CP-10-04946 - August 14, 2014	303
Plaintiff's Summons, Complaint, and Verification with Exhibit - Resolution of the Sole Shareholder of Penny Creek Associates, LLC – January 13, 2020	475

VOLUME II

Answer of Beach Co. – Feb. 17, 2020	491
Amended Answer of Beach Co. – March 16, 2020	505
Complaint in Maybank 2754, LLC v. Buist, Byars & Taylor, LLC, et al., case no. 2020-CP-10-02180 with Exhibits - Resolution of the Sole Shareholder of Penny Creek Associates, LLC & Affidavit of Lisa Brown - May 14, 2020	520

Motions

Beach Companies Motions to Dismiss – February 17, 2020	532
Beach Companies Motion to Refer to the Master-in-Equity – February 17, 2020	534
Seamon, Whiteside Associates, Inc.’s Motion to Dismiss Civil Conspiracy and Initial Memorandum in Support – February 20, 2020	581
1776, LLC’s Motion to Dismiss – February 21, 2020	592
1776’s Motion for Order of Reference to Master-in-Equity – February 21, 2020	594
Zurlo Defendants’ Motion to Refer to the Master-in-Equity – March 10, 2020	595
Maybank’s Motion for Temporary Injunction – March 11, 2020	614
Plaintiff’s Response in Opposition to the Defendants’ Motions to Dismiss for Failure to State a Cause of Action – April 6, 2020	616
Plaintiff’s Amended Objection and Response in Opposition to the Defendants’ Motions for Order of Reference to the Master-in-Equity – April 9, 2020	671
Plaintiff’s Second Amended Objection and Response in Opposition to the Defendants’ Motions for Order of Reference to the Master-in-Equity – May 15, 2020	674
1776, LLC’s Memorandum of Law in Support of Motion to Dismiss, Motion to Refer to Master, and Motion for Protection from Discovery, or in the Alternative, and Extension - June 10, 2020	677
Plaintiff’s Notice of Filing Authority In Support of Its Objection to the Defendants’, Motions for Order of Reference to the Master-In-Equity – June 12, 2020	680
1776, LLC’s Reply to Plaintiff’s Opposition to Motion to Dismiss and Motion to Refer to Master dated June 15, 2020	688
Plaintiff’s Motion for Reconsideration of the Court’s Order Entered on June 30, 2020 and Request for Expedited Ruling – July 1, 2020	690
Defendants’ Joint Response to the Plaintiff’s Motion for Reconsideration – July 8, 2020	704
Plaintiff’s Objection to Status Conference before the Master-in-Equity Because of the Pending Appeal – August 10, 2020	706
Zurlo Defendants’ Motion and Memorandum in Support of Summary Judgment with Exhibits – August 14, 2020	740

VOLUME III

Beach Companies Motion for Summary Judgment – August 19, 2020, ...	923
Plaintiff’s Request for Judicial Notice of Recorded Documents and City of Charleston Ordinances – August 24, 2020.....	926
Plaintiff’s Motion to Amend Complaint – August 24, 2020	1147
Seamon, Whiteside & Associates’ Supplement to Motion to Dismiss and/or Motion for Summary Judgment – August 26, 2020.....	1347
1776, LLC’s Motion for Summary Judgment – September 3, 2020	1349
Plaintiff’s Motion to Compel Defendant 1776, LLC’s Answers to Interrogatories and Requests for Production dated September 3, 2020	1350
Plaintiff’s Request for Judicial Notice of Recorded Document and Document Filed with the South Carolina Secretary of State – September 14, 2020	1376
Zurlo Defendants’ Supplemental Memorandum in Support of Motion for Summary Judgment – September 14, 2020	1381

VOLUME IV

Respondents’ Joint Motion to Dismiss Appeal and for Costs and Memorandum in Support Thereof – September 15, 2020.....	1423
Maybank’s Response in Opposition to the Defendants’ Motion for Summary Judgment – September 17, 2020	1432
Beach Companies Memorandum of Law in Support of Motion for Summary Judgment – September 18, 2020	1442
1776, LLC’s Memorandum in Support of Summary Judgment – September 21, 2020	1485
Return of Appellant to Respondents’ Motion to Dismiss Appeal and for Costs and Memorandum in Support Thereof – September 21, 2020	1490
Maybank’s Motion to Alter or Amend Order Entered on October 7, 2020, Order Entered on October 8, 2020, and Order Granting All Defendants Summary Judgment, Motion to Amend and/or Vacate Findings of Fact, Request for Ruling on Issues Raised, and Request for Expedited Ruling – October 16, 2020	1493
Response of Zurlo to Maybank’s October 16, 2020 Motion to Amend or Alter Judgment – October 29, 2020.....	1559

1776, LLC’s Memorandum in Opposition to Plaintiff’s Motion for Reconsideration - November 2, 2020	1565
The Beach Company and Beach Fenwick, LLC’s Memorandum in Opposition to Plaintiff’s Motion to Alter or Amend – November 2, 2020	1567
Seamon, Whiteside & Associates, Inc.’s Response to Plaintiff’s Motion to Amend or Alter Judgement – November 2, 2020	1572
Plaintiff’s Opposition to Beach Entities’ Motion for Sanctions and Exhibits – November 17, 2020.....	1573

Transcripts

Transcript of June 16, 2020 hearing – Hon. Judge Bentley D. Price.....	1584
Transcript of June 25, 2020 hearing – Hon. Judge Bentley D. Price.....	1612
Michael Laplante - Direct Examination by Mr. Tarokh	1626
Transcript of August 17, 2020 hearing – Hon. Mikell R. Scarborough.....	1672
Transcript of August 24, 2020 hearing – Hon. Judge Bentley D. Price (The date on the transcript is August 24, 2020, but this is a result of a clerical error by the court reporter. The hearing was, in fact, held on September 24, 2020).....	1692
Transcript of November 5, 2020 hearing – Hon. Judge Bentley D. Price	1755

Exhibits

Transcript of June 16, 2020 hearing – Exhibits	1780
Defendant’s Ex 1 - South Carolina Articles of Organization	1782
Defendant’s Ex 2 - Development Guidelines	1785
Defendant’s Ex 3 - Order and Judgement of Foreclosure & Sale.....	1790
Transcript of June 25, 2020 hearing – Exhibits	1806
Plaintiff’s Ex 1 - Resolution	1806
Plaintiff’s Ex 2 - Contract for Assignment of Interests	1808
Plaintiff’s Ex 3 - Email from The Beach Company.....	1822
Plaintiff’s Ex 4 - Complaint.....	1825

VOLUME V

Other Documents

Articles of Organization of Penny Creek Associates, LLC – January 15, 1999.....	1840
Mortgage recorded in the Register of Deeds in Charleston County on August 8, 2000, in Book P-352 at Page 613.....	1843
Third Amended and Restated Operating Agreement of Penny Creek Associates, LLC – October 15, 2005.....	1858
Mortgage recorded in the Register of Deeds in Charleston County on April 7, 2006, in Book G-579, at Page 249.....	1897
Plaintiff’s Responses to Defendant’s Requests for Admission – March 10, 2020	1910
Plaintiff’s First Set of Requests for Admissions to the Defendant Seamon, Whiteside & Associates – April 24, 2020	1912
Plaintiff’s Response to Defendants’ Second Request for Admissions – June 12, 2020	1930
Maybank First Notice of Appeal – July 15, 2020	1931
Affidavit of Michel F. Laplante – September 17, 2020	1943
Maybank Second Notice of Appeal – November 9, 2020	1990
Certificate of Counsel	2020

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

MAYBANK 2754, LLC,

PLAINTIFF,

V.

EUGENE J. ZURLO, Individually and as
Co-Trustee of the Eugene J. Zurlo Living
Trust Dated December 11, 1997, LLC;
BEACH FENWICK, LLC; THE BEACH
COMPANY; SEAMON, WHITESIDE &
ASSOCIATES, INC.; PENNY CREEK
ASSOCIATES, LLC; JOHN DOE AND
MARY ROE,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL

CASE NO.: 2020-CP-10-00209

**ANSWER ON BEHALF OF THE BEACH
COMPANY
AND BEACH FENWICK, LLC**

**REQUEST FOR EXPEDITED HEARING
ON DELCARATORY JUDGMENT**

COMES NOW, Defendants, Beach Fenwick, LLC ("Beach Fenwick") and The Beach Co., incorrectly identified herein as The Beach Company ("Beach Co.") (collectively, the "Beach Entities), subject to their Motion to Dismiss and subject to their Motion for Order of Reference, responding to the Complaint herein, who would show unto this Honorable Court as follows:

1. Each and every allegation of the Complaint not hereinafter admitted, denied or otherwise modified, shall be deemed denied and strict proof thereof demanded.
2. The Beach Entities admit, upon information and belief, the allegations of Paragraphs 1, 2 and 3 of the Complaint.
3. The Beach Entities admit so much of Paragraph 4 as alleges or may be construed to allege that Beach Fenwick, LLC is a limited liability company organized and existing pursuant to the laws of the State of South Carolina, and transacted business in Charleston County, South Carolina at all relevant times. The Beach Entities also admit

so much of Paragraph 4 as alleges or may be construed to allege that Beach Fenwick is affiliated with Beach Co. The Beach Entities deny any remaining allegations of Paragraph 4 and demand strict proof thereof.

4. The Beach Entities admit the allegations of Paragraph 5 of the Complaint.

5. The Beach Entities admit, upon information and belief, the allegations of Paragraph 6 of the Complaint.

6. The Beach Entities admit, upon information and belief, so much of Paragraph 7 as alleges or may be construed to allege that Penny Creek Associates, LLC ("Penny Creek") was, at all relevant times, a limited liability company organized and existing pursuant to the laws of the State of South Carolina and transacted business in Charleston County, South Carolina. The Beach Entities deny the remaining allegations of Paragraph 7, upon information and belief.

7. In Response to Paragraph 8, the Beach Entities are without sufficient information or knowledge to admit or deny the identities of John Doe and/or Mary Roe. Further responding, the Beach Entities deny there was, at any time, any conspiracy between or among any Defendants, including, without limitation, those designated as John Doe and Mary Roe, and further deny Plaintiff had or has any easement rights in or to the property, as it is designated below.

8. Paragraph 9 sets forth a legal conclusion to which the Beach Entities are not obligated to respond. Subject thereto, the Beach Entities affirmatively assert, upon information and belief, that the Master-in-Equity for Charleston County previously exercised jurisdiction over the property in question, and retained such jurisdiction, therefore, this matter should be properly referred to the Master-in-Equity.

9. Paragraph 10 sets forth a legal conclusion to which the Beach Entities are not obligated to respond.

10. The Beach Entities admit so much of Paragraph 11 as alleges or may be construed to allege that the property (the "Property") in which Plaintiff claims an unsupported interest is that described therein.

11. The Beach Entities admit, upon information and belief, so much of Paragraph 12 as alleges or may be construed to allege that Maybank 2754, LLC ("Plaintiff" or "Maybank") owns a lot adjacent to the Property, upon which there is a building. The Beach Entities lack sufficient information or knowledge to admit or deny the remaining allegations of Paragraph 12, therefore, deny same and demand strict proof thereof.

12. The Beach Entities lack sufficient information or knowledge to admit or deny the allegations of Paragraph 13, therefore, deny same and demand strict proof thereof.

13. Responding to Paragraph 14, the Beach Entities admit so much thereof as alleges or may be construed to allege there is a copy of a document attached to Plaintiff's Complaint as an exhibit that purports to be a Resolution of the Sole Shareholder of Penny Creek Associates, L.L.C ("Resolution"). The Beach Entities deny any remaining allegations of Paragraph 14 and demand strict proof thereof.

14. The Beach Entities are without sufficient information or knowledge to admit or deny the intent, validity or authenticity of the Resolution, therefore deny its intent, validity and authenticity but crave reference to the Resolution for the content thereof, denying any remaining allegations of Paragraph 15.

15. Responding to Paragraph 16, the Beach Entities crave reference to the Resolution for the content thereof, while denying, upon information and belief, the intent, validity or authenticity of the referenced document.

16. The Beach Entities admit the allegations of Paragraph 17.

17. The Beach Entities admit the allegations of Paragraph 18.

18. The Beach Entities are without sufficient information or knowledge to admit or deny the allegations of Paragraph 19, therefore, deny same and demand strict proof thereof.

19. Responding to Paragraph 20, the Beach Entities deny so much thereof as alleges or may be construed to allege there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the property of Beach Fenwick and demand strict proof thereof.

20. The Beach Entities are without sufficient information or knowledge to admit or deny the allegations of Paragraph 21, therefore, deny same and demand strict proof thereof.

21. Responding to Paragraph 22, the Beach Entities admit only so much thereof as alleges or may be construed to allege that on or about December 16, 2013, Eugene J. Zurlo as Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997 ("Zurlo") initiated an action against Penny Creek Associates, LLC ("Penny Creek") and others, which action is filed with the Charleston County Clerk of Court as Case No.: 2013-CP-10-7280. The Beach Entities deny any remaining allegations of Paragraph 22 and demand strict proof thereof.

22. The Beach Entities admit only so much of Paragraph 23 as alleges or may be construed to allege that on or about August 14, 2014, Wells Fargo Bank, N.A. initiated an action against Penny Creek and others, including Michel F. LaPlante, a/k/a Michel Laplante, a/k/a Mitch Laplante, who represents he is the Manager of Plaintiff herein, and that the subject of said action, designated as Case No. 2014-CP-10-4946 was, in part, the Property. The Beach Entities deny any remaining allegations of Paragraph 23 and demand strict proof thereof.

23. The Beach Entities admit, upon information and belief, the allegations of Paragraph 24 of the Complaint.

24. The Beach Entities admit, upon information and belief, the allegations of Paragraph 25 of the Complaint.

25. The Beach Entities admit, upon information and belief, the allegations of Paragraph 26 of the Complaint.

26. The Beach Entities admit, upon information and belief, the allegations of Paragraphs 27 and 28 of the Complaint.

27. The Beach Entities admit, upon information and belief, the allegations of Paragraphs 29 and 30 of the Complaint.

28. The Beach Entities are without sufficient information or knowledge to admit or deny the allegations of Paragraph 31 of the Complaint, therefore, deny same and demand strict proof thereof.

29. Responding to Paragraph 32, the Beach Entities admit, upon information and belief, so much thereof as alleges or may be construed to allege that Seamon, Whiteside & Associates, Inc. ("Seamon Whiteside"), performed certain work involving a

planned unit development relative to the Property, but is without sufficient information or knowledge to admit or deny any remaining allegations of Paragraph 32 and demand strict proof thereof.

30. The Beach Entities deny so much of Paragraph 33 as alleges or may be construed to allege that there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property, and thus deny Seamon Whiteside could have had any actual notice thereof. The Beach Entities are without sufficient information or knowledge to admit or deny any remaining allegations of Paragraph 33 and demand strict proof thereof.

31. The Beach Entities admit so much of Paragraph 34 as alleges or may be construed to allege that Beach Co. acted, from time to time, as a broker relative to the Property, and deny any remaining allegations of Paragraph 34 and demand strict proof thereof.

32. Responding to Paragraph 35, the Beach Entities deny so much thereof as alleges or may be construed to allege that there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property and thus also deny Beach Co. could have had any actual notice thereof. The Beach Entities deny any remaining allegations of Paragraph 35 and demand strict proof thereof.

33. The Beach Entities crave reference to any development agreement entered into by and between 1776, LLC ("1776") and the City of Charleston and deny any allegations of Paragraph 36 which are or may be inconsistent therewith.

34. The Beach Entities admit the allegations of Paragraph 37.

35. The Beach Entities admit only so much of Paragraph 38 as alleges or may be construed to allege that Beach Fenwick is the owner of the Property, and that it is and was affiliated with Beach Co. The Beach Entities deny that there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property and thus deny any individual or entity could have actual knowledge thereof. The Beach Entities also deny any remaining allegations of Paragraph 38 and demand strict proof thereof.

36. Responding to Paragraph 39, the Beach Entities crave reference to the Partial Assignment and Assumption of Rights and Obligations Under Development Agreement recorded in the office of the Register of Deeds for Charleston County at Book 0846, Page 269, and deny any remaining allegations of Paragraph 39 that are or may be inconsistent therewith.

37. The Beach Entities admit the allegations of Paragraph 40; there is no valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property, thus there are no specific provisions or reservations therefor.

38. Responding to Paragraph 41 of the Complaint, the Beach Entities deny that there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property, thus Zurlo had no actual notice thereof. The Beach Entities deny any remaining allegations of Paragraph 41 and demand strict proof thereof.

39. Responding to Paragraph 42 of the Complaint, the Beach Entities deny that there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property, thus neither Zurlo nor any other individual or entity could have actual

knowledge thereof. The Beach Entities deny any remaining allegations of Paragraph 42 and demand strict proof thereof.

40. Responding to Paragraph 43 of the Complaint, the Beach Entities deny that there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property, thus no Defendants could have actual notice thereof. The Beach Entities deny any remaining allegations of Paragraph 43 and demand strict proof thereof.

41. The Beach Entities deny that there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property, thus no Defendants could have any actual knowledge thereof. Further responding to Paragraph 44, the Beach Entities admit there is no reference to any easement in or upon the Property, as alleged by Plaintiff, as none exists. The Beach Entities deny any remaining allegations of Paragraph 44 and demand strict proof thereof.

42. The Beach Entities deny that there exists any valid, legitimate or enforceable easement, in or upon the Property, as alleged by Plaintiff, thus there is no provision or reservation therefor. The Beach Entities deny any remaining allegations of Paragraph 45 and demand strict proof thereof.

COUNT I

43. The Beach Entities reallege and reaver the foregoing as fully as if repeated verbatim

44. The Beach Entities admit so much of Paragraph 47 as alleges or may be construed to allege that Plaintiff deems its action to be one for declaratory judgment.

45. The Beach Entities deny so much of Paragraph 48 as alleges or may be construed to allege that Plaintiff has any right, title or interest in the Property that gives

rise to any justiciable controversy, and deny any remaining allegations of Paragraph 48 and demand strict proof thereof.

46. The Beach Entities deny so much of Paragraph 49 as alleges or may be construed to allege that there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property. Further responding, with the exception of the allegations of the Complaint, which the Beach Entities deem to be unsupported, the Beach Entities are without sufficient information or knowledge to admit or deny what Plaintiff seeks.

47. With the exception of the filing of the Complaint by Tarokh Law, PLLC, on behalf of Plaintiff, to which the Beach Entities crave reference, the Beach Entities are without sufficient information or knowledge to admit or deny the allegations of Paragraph 50.

COUNT II

48. The Beach Entities reallege and reaver the foregoing as fully as if repeated verbatim.

49. The Beach Entities admit so much of Paragraph 53 as alleges or may be construed to allege that Plaintiff deems its action to be one for declaratory judgment.

50. The Beach Entities deny so much of Paragraph 54 as alleges or may be construed to allege that there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property, that gives rise to any justiciable controversy.

51. The Beach Entities deny the allegations of Paragraph 55 of the Complaint and demand strict proof thereof.

52. Responding to Paragraph 56 the Beach Entities deny there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property and thus there is no reservation or provision therefor. The Beach Entities deny any remaining allegations of Paragraph 56 and demand strict proof thereof.

53. Responding to Paragraph 57, the Beach Entities deny there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property, thus deny there is any restrictive covenant created thereby. The Beach Entities deny any remaining allegations of Paragraph 57 and demand strict proof thereof.

54. With the exception of the filing of the Complaint by Tarokh Law, PLLC, on behalf of Plaintiff, to which the Beach Entities crave reference, the Beach Entities are without sufficient information or knowledge to admit or deny the allegations of Paragraph 58.

COUNT III

55. The Beach Entities reallege and reaver the foregoing as fully as if repeated verbatim.

56. In response to Paragraph 60, The Beach Entities are without sufficient information or knowledge to admit or deny what action is being sought by Plaintiff, but deny Plaintiff has or can suffer any damages related to the Property.

57. The Beach Entities admit so much of Paragraph 61 as alleges or may be construed to allege that 1776 acquired title to the Property. The Beach Entities deny so much of Paragraph 61 as alleges or may be construed to allege there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property, thus, there could be no concealment thereof, nor any scheme to deprive Plaintiff of a right or

interest it never had. The Beach Entities deny any remaining allegations of Paragraph 61 and demand strict proof thereof.

58. The Beach Entities deny so much of Paragraph 62 as alleges or may be construed to allege that Plaintiff is entitled to any damages as a result of any acts of the Beach Entities.

59. The Beach Entities deny so much of Paragraph 63 as alleges or may be construed to allege there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property, thus, Plaintiff could not suffer any damages, special or otherwise, relative thereto.

60. The Beach Entities deny so much of Paragraph 64 as alleges or may be construed to allege there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property, thus, Plaintiff could not suffer any damages, punitive or otherwise, relative thereto.

61. With the exception of the filing of the Complaint by Tarokh Law, PLLC, on behalf of Plaintiff, to which the Beach Entities crave reference, the Beach Entities are without sufficient information or knowledge to admit or deny the allegations of the second Paragraph 64.

COUNT IV

62. The Beach Entities reallege and reaver the foregoing as fully as if repeated verbatim.

63. The Beach Entities are without sufficient information or knowledge to admit or deny what Plaintiff pursues in its action, therefore, deny the allegations of Paragraph

66 and further deny Plaintiff has any right to any temporary injunction as to the Beach Entities.

64. The Beach Entities deny the allegations of Paragraph 67 and demand strict proof thereof.

65. Plaintiff has no valid, legitimate or enforceable easement, as it alleges, in or upon the Property, thus, Plaintiff can suffer no harm, irreparable or otherwise, relative thereto. Further responding, the Beach Entities deny any remaining allegations of Paragraph 68 of the Complaint and demand strict proof thereof.

66. Responding to Paragraph 69, the Beach Entities affirmatively assert Plaintiff has no rights related to the Property, therefore, has no rights to protect as related to the Property.

67. The Beach Entities deny the allegations of Paragraph 70 of the Complaint and demand strict proof thereof.

68. Responding to Paragraph 71, the Beach Entities affirmatively assert Plaintiff has no interest in the Property, therefore, is not entitled to any remedy as related to the Property, whether at law or otherwise.

69. With the exception of the filing of the Complaint by Tarokh Law, PLLC, on behalf of Plaintiff, to which the Beach Entities crave reference, the Beach Entities are without sufficient information or knowledge to admit or deny the allegations of Paragraph 72.

**FURTHER ANSWERING THE COMPLAINT
AND AS A FIRST AFFIRMATIVE DEFENSE THERETO**

70. The Beach Entities reallege and reaver the foregoing as fully as if repeated verbatim.

71. Plaintiff's claims are barred by the doctrine of collateral estoppel.

FURTHER ANSWERING THE COMPLAINT
AND AS A SECOND AFFIRMATIVE DEFENSE THERETO

72. The Beach Entities reallege and reaver the foregoing as fully as if restated verbatim.

73. Plaintiff's claims are barred pursuant to the South Carolina Statute of Frauds.

FURTHER ANSWERING THE COMPLAINT
AND AS A THIRD AFFIRMATIVE DEFENSE THERETO

74. The Beach Entities reallege and reaver the foregoing as fully as if restated verbatim.

75. Plaintiff's claims are barred pursuant to S.C. Code §30-7-10.

FURTHER ANSWERING THE COMPLAINT
AND AS A FOURTH AFFIRMATIVE DEFENSE THERETO

76. The Beach Entities reallege and reaver the foregoing as fully as if restated verbatim.

77. Plaintiff's claims are barred by the doctrine of waiver.

FURTHER ANSWERING THE COMPLAINT
AND AS A FIFTH AFFIRMATIVE DEFENSE THERETO

78. The Beach Entities reallege and reaver the foregoing as fully as if restated verbatim.

79. Plaintiff's claims are barred by the doctrine of unclean hands.

FURTHER ANSWERING THE COMPLAINT
AND AS A SIXTH AFFIRMATIVE DEFENSE THERETO

80. The Beach Entities reallege and reaver the foregoing as fully as if repeated verbatim.

81. Plaintiff's claims are barred by the doctrine of estoppel by silence.

FURTHER ANSWERING THE COMPLAINT
AND AS A SEVENTH AFFIRMATIVE DEFENSE THERETO

82. The Beach Entities reallege and reaver the foregoing as fully as if repeated verbatim.

83. Beach Fenwick is and was a bona fide purchaser, barring any claim by Plaintiff.

FURTHER ANSWERING THE COMPLAINT
AND AS AN EIGHT AFFIRMATIVE DEFENSE THERETO

84. The Beach Entities reallege and reaver the foregoing as fully as if repeated verbatim.

85. Plaintiff's claims are barred by the doctrine of laches.

WHEREFORE, having fully responded to the Complaint herein, Beach Fenwick, LLC and The Beach Co. pray that such action be dismissed, with prejudice, awarding costs to each, and for such other and further relief as this Court may deem just and proper.

/s/ Cheryl D. Shoun

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February 17, 2020

Charleston, SC

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

MAYBANK 2754, LLC,

PLAINTIFF,

V.

EUGENE J. ZURLO, Individually and as
Co-Trustee of the Eugene J. Zurlo Living
Trust Dated December 11, 1997, LLC;
BEACH FENWICK, LLC; THE BEACH
COMPANY; SEAMON, WHITESIDE &
ASSOCIATES, INC.; PENNY CREEK
ASSOCIATES, LLC; JOHN DOE AND
MARY ROE,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL

CASE NO.: 2020-CP-10-00209

**AMENDED ANSWER ON BEHALF OF
THE BEACH COMPANY
AND BEACH FENWICK, LLC**

**REQUEST FOR EXPEDITED HEARING
ON DELCARATORY JUDGMENT**

COMES NOW, Defendants, Beach Fenwick, LLC ("Beach Fenwick") and The Beach Co. incorrectly identified herein as The Beach Company ("Beach Co.") (collectively, the "Beach Entities), subject to their Motion to Dismiss and subject to their Motion for Order of Reference, responding to the Complaint herein, who would show unto this Honorable Court as follows:

1. Each and every allegation of the Complaint not hereinafter admitted, denied or otherwise modified, shall be deemed denied and strict proof thereof demanded.
2. The Beach Entities admit, upon information and belief, the allegations of Paragraphs 1, 2 and 3 of the Complaint.
3. The Beach Entities admit so much of Paragraph 4 as alleges or may be construed to allege that Beach Fenwick, LLC is a limited liability company organized and existing pursuant to the laws of the State of South Carolina, and transacted business in Charleston County, South Carolina at all relevant times. The Beach Entities also admit

so much of Paragraph 4 as alleges or may be construed to allege that Beach Fenwick is affiliated with Beach Co. The Beach Entities deny any remaining allegations of Paragraph 4 and demand strict proof thereof.

4. The Beach Entities admit the allegations of Paragraph 5 of the Complaint.

5. The Beach Entities admit, upon information and belief, the allegations of Paragraph 6 of the Complaint.

6. The Beach Entities admit, upon information and belief, so much of Paragraph 7 as alleges or may be construed to allege that Penny Creek Associates, LLC ("Penny Creek") was, at all relevant times, a limited liability company organized and existing pursuant to the laws of the State of South Carolina and transacted business in Charleston County, South Carolina. The Beach Entities deny the remaining allegations of Paragraph 7, upon information and belief.

7. The Beach Entities are without sufficient information or knowledge to admit or deny the identities of John Doe and/or Mary Roe. Further responding, the Beach Entities deny there was, at any time, any conspiracy between or among any Defendants, including, without limitation, those designated as John Doe and Mary Roe, and further deny Plaintiff had or has any easement rights in or to the property, as it is designated below.

8. Paragraph 9 sets forth a legal conclusion to which the Beach Entities are not obligated to respond. Subject thereto, the Beach Entities affirmatively assert, upon information and belief, that the Master-in-Equity for Charleston County previously exercised jurisdiction over the property in question, and retained such jurisdiction, therefore, this matter should be properly referred to the Master-in-Equity.

9. Paragraph 10 sets forth a legal conclusion to which the Beach Entities are not obligated to respond.

10. The Beach Entities admit so much of Paragraph 11 as alleges or may be construed to allege that the property (the "Property") in which Plaintiff claims an unsupported interest is that described therein.

11. The Beach Entities admit, upon information and belief, so much of Paragraph 12 as alleges or may be construed to allege that Maybank 2754, LLC ("Plaintiff" or "Maybank") owns a lot adjacent to the Property, upon which there is a building. The Beach Entities lack sufficient information or knowledge to admit or deny the remaining allegations of Paragraph 12, therefore, deny same and demand strict proof thereof.

12. The Beach Entities lack sufficient information or knowledge to admit or deny the allegations of Paragraph 13, therefore, deny same and demand strict proof thereof.

13. Responding to Paragraph 14, the Beach Entities admit so much thereof as alleges or may be construed to allege there is a copy of a document attached to Plaintiff's Complaint as an exhibit that purports to be a Resolution of the Sole Shareholder of Penny Creek Associates, L.L.C ("Resolution"). The Beach Entities deny any remaining allegations of Paragraph 14 and demand strict proof thereof.

14. The Beach Entities are without sufficient information or knowledge to admit or deny the intent, validity or authenticity of the Resolution, therefore deny its intent, validity and authenticity but crave reference to the Resolution for the content thereof, denying any remaining allegations of Paragraph 15.

15. Responding to Paragraph 16, the Beach Entities crave reference to the Resolution for the content thereof, while denying, upon information and belief, the intent, validity or authenticity of the referenced document.

16. The Beach Entities admit the allegations of Paragraph 17.

17. The Beach Entities admit the allegations of Paragraph 18.

18. The Beach Entities are without sufficient information or knowledge to admit or deny the allegations of Paragraph 19, therefore, deny same and demand strict proof thereof.

19. Responding to Paragraph 20, the Beach Entities deny so much thereof as alleges or may be construed to allege there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the property of Beach Fenwick and demand strict proof thereof.

20. The Beach Entities are without sufficient information or knowledge to admit or deny the allegations of Paragraph 21, therefore, deny same and demand strict proof thereof.

21. Responding to Paragraph 22, the Beach Entities admit only so much thereof as alleges or may be construed to allege that on or about December 16, 2013, Eugene J. Zurlo as Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997 ("Zurlo") initiated an action against Penny Creek Associates, LLC ("Penny Creek") and others, which action is filed with the Charleston County Clerk of Court as Case No.: 2013-CP-10-7280. The Beach Entities deny any remaining allegations of Paragraph 22 and demand strict proof thereof.

22. The Beach Entities admit only so much of Paragraph 23 as alleges or may be construed to allege that on or about August 14, 2014, Wells Fargo Bank, N.A. initiated an action against Penny Creek and others, including Michel F. LaPlante, a/k/a Michel Laplante, a/k/a Mitch Laplante, who represents he is the Manager of Plaintiff herein, and that the subject of said action, designated as Case No. 2014-CP-10-4946 was, in part, the Property. The Beach Entities deny any remaining allegations of Paragraph 23 and demand strict proof thereof.

23. The Beach Entities admit, upon information and belief, the allegations of Paragraph 24 of the Complaint.

24. The Beach Entities admit, upon information and belief, the allegations of Paragraph 25 of the Complaint.

25. The Beach Entities admit, upon information and belief, the allegations of Paragraph 26 of the Complaint.

26. The Beach Entities admit, upon information and belief, the allegations of Paragraphs 27 and 28 of the Complaint.

27. The Beach Entities admit, upon information and belief, the allegations of Paragraphs 29 and 30 of the Complaint.

28. The Beach Entities are without sufficient information or knowledge to admit or deny the allegations of Paragraph 31 of the Complaint, therefore, deny same and demand strict proof thereof.

29. Responding to Paragraph 32, the Beach Entities admit, upon information and belief, so much thereof as alleges or may be construed to allege that Seamon, Whiteside & Associates, Inc. ("Seamon Whiteside"), performed certain work involving a

planned unit development relative to the Property, but is without sufficient information or knowledge to admit or deny any remaining allegations of Paragraph 32 and demand strict proof thereof.

30. The Beach Entities deny so much of Paragraph 33 as alleges or may be construed to allege that there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property, and thus deny Seamon Whiteside could have had any actual notice thereof. The Beach Entities are without sufficient information or knowledge to admit or deny any remaining allegations of Paragraph 33 and demand strict proof thereof.

31. The Beach Entities admit so much of Paragraph 34 as alleges or may be construed to allege that Beach Co. acted, from time to time, as a broker relative to the Property, and deny any remaining allegations of Paragraph 34 and demand strict proof thereof.

32. Responding to Paragraph 35, the Beach Entities deny so much thereof as alleges or may be construed to allege that there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property and thus also deny Beach Co. could have had any actual notice thereof. The Beach Entities deny any remaining allegations of Paragraph 35 and demand strict proof thereof.

33. The Beach Entities crave reference to any development agreement entered into by and between 1776, LLC ("1776") and the City of Charleston and deny any allegations of Paragraph 36 which are or may be inconsistent therewith.

34. The Beach Entities admit the allegations of Paragraph 37.

35. The Beach Entities admit only so much of Paragraph 38 as alleges or may be construed to allege that Beach Fenwick is the owner of the Property, and that it is and was affiliated with Beach Co. The Beach Entities deny that there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property and thus deny any individual or entity could have actual knowledge thereof. The Beach Entities also deny any remaining allegations of Paragraph 38 and demand strict proof thereof.

36. Responding to Paragraph 39, the Beach Entities crave reference to the Partial Assignment and Assumption of Rights and Obligations Under Development Agreement recorded in the office of the Register of Deeds for Charleston County at Book 0846, Page 269, and deny any remaining allegations of Paragraph 39 that are or may be inconsistent therewith.

37. The Beach Entities admit the allegations of Paragraph 40; there is no valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property, thus there are no specific provisions or reservations therefor.

38. Responding to Paragraph 41 of the Complaint, the Beach Entities deny that there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property, thus Zurlo had no actual notice thereof. The Beach Entities deny any remaining allegations of Paragraph 41 and demand strict proof thereof.

39. Responding to Paragraph 42 of the Complaint, the Beach Entities deny that there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property, thus neither Zurlo nor any other individual or entity could have actual

knowledge thereof. The Beach Entities deny any remaining allegations of Paragraph 42 and demand strict proof thereof.

40. Responding to Paragraph 43 of the Complaint, the Beach Entities deny that there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property, thus no Defendants could have actual notice thereof. The Beach Entities deny any remaining allegations of Paragraph 43 and demand strict proof thereof.

41. The Beach Entities deny that there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property, thus no Defendants could have any actual knowledge thereof. Further responding to Paragraph 44, the Beach Entities admit there is no reference to any easement in or upon the Property, as alleged by Plaintiff, as none exists. The Beach Entities deny any remaining allegations of Paragraph 44 and demand strict proof thereof.

42. The Beach Entities deny that there exists any valid, legitimate or enforceable easement, in or upon the Property, as alleged by Plaintiff, thus there is no provision or reservation therefor. The Beach Entities deny any remaining allegations of Paragraph 45 and demand strict proof thereof.

COUNT I

43. The Beach Entities reallege and reaver the foregoing as fully as if repeated verbatim

44. The Beach Entities admit so much of Paragraph 47 as alleges or may be construed to allege that Plaintiff deems its action to be one for declaratory judgment.

45. The Beach Entities deny so much of Paragraph 48 as alleges or may be construed to allege that Plaintiff has any right, title or interest in the Property that gives

rise to any justiciable controversy, and deny any remaining allegations of Paragraph 48 and demand strict proof thereof.

46. The Beach Entities deny so much of Paragraph 49 as alleges or may be construed to allege that there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property. Further responding, with the exception of the allegations of the Complaint, which the Beach Entities deem to be unsupported, the Beach Entities are without sufficient information or knowledge to admit or deny what Plaintiff seeks.

47. With the exception of the filing of the Complaint by Tarokh Law, PLLC, on behalf of Plaintiff, to which the Beach Entities crave reference, the Beach Entities are without sufficient information or knowledge to admit or deny the allegations of Paragraph 50.

COUNT II

48. The Beach Entities reallege and reaver the foregoing as fully as if repeated verbatim.

49. The Beach Entities admit so much of Paragraph 53 as alleges or may be construed to allege that Plaintiff deems its action to be one for declaratory judgment.

50. The Beach Entities deny so much of Paragraph 54 as alleges or may be construed to allege that there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property, that gives rise to any justiciable controversy.

51. The Beach Entities deny the allegations of Paragraph 55 of the Complaint and demand strict proof thereof.

52. Responding to Paragraph 56 the Beach Entities deny there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property and thus there is no reservation or provision therefor. The Beach Entities deny any remaining allegations of Paragraph 56 and demand strict proof thereof.

53. Responding to Paragraph 57, the Beach Entities deny there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property, thus deny there is any restrictive covenant created thereby. The Beach Entities deny any remaining allegations of Paragraph 57 and demand strict proof thereof.

54. With the exception of the filing of the Complaint by Tarokh Law, PLLC, on behalf of Plaintiff, to which the Beach Entities crave reference, the Beach Entities are without sufficient information or knowledge to admit or deny the allegations of Paragraph 58.

COUNT III

55. The Beach Entities reallege and reaver the foregoing as fully as if repeated verbatim.

56. In response to Paragraph 60, The Beach Entities are without sufficient information or knowledge to admit or deny what action is being sought by Plaintiff, but deny Plaintiff has or can suffer any damages related to the Property.

57. The Beach Entities admit so much of Paragraph 61 as alleges or may be construed to allege that 1776 acquired title to the Property. The Beach Entities deny so much of Paragraph 61 as alleges or may be construed to allege there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property, thus, there could be no concealment thereof, nor any scheme to deprive Plaintiff of a right or

interest it never had. The Beach Entities deny any remaining allegations of Paragraph 61 and demand strict proof thereof.

58. The Beach Entities deny so much of Paragraph 62 as alleges or may be construed to allege that Plaintiff is entitled to any damages as a result of any acts of the Beach Entities.

59. The Beach Entities deny so much of Paragraph 63 as alleges or may be construed to allege there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property, thus, Plaintiff could not suffer any damages, special or otherwise, relative thereto.

60. The Beach Entities deny so much of Paragraph 64 as alleges or may be construed to allege there exists any valid, legitimate or enforceable easement, as alleged by Plaintiff, in or upon the Property, thus, Plaintiff could not suffer any damages, punitive or otherwise, relative thereto.

61. With the exception of the filing of the Complaint by Tarokh Law, PLLC, on behalf of Plaintiff, to which the Beach Entities crave reference, the Beach Entities are without sufficient information or knowledge to admit or deny the allegations of the second Paragraph 64.

COUNT IV

62. The Beach Entities reallege and reaver the foregoing as fully as if repeated verbatim.

63. The Beach Entities are without sufficient information or knowledge to admit or deny what Plaintiff pursues in its action, therefore, deny the allegations of Paragraph

66 and further deny Plaintiff has any right to any temporary injunction as to the Beach Entities.

64. The Beach Entities deny the allegations of Paragraph 67 and demand strict proof thereof.

65. Plaintiff has no valid, legitimate or enforceable easement, as it alleges, in or upon the Property, thus, Plaintiff can suffer no harm, irreparable or otherwise, relative thereto. Further responding, the Beach Entities deny any remaining allegations of Paragraph 68 of the Complaint and demand strict proof thereof.

66. Responding to Paragraph 69, the Beach Entities affirmatively assert Plaintiff has no rights related to the Property, therefore, has no rights to protect as related to the Property.

67. The Beach Entities deny the allegations of Paragraph 70 of the Complaint and demand strict proof thereof.

68. Responding to Paragraph 71, the Beach Entities affirmatively assert Plaintiff has no interest in the Property, therefore, is not entitled to any remedy as related to the Property, whether at law or otherwise.

69. With the exception of the filing of the Complaint by Tarokh Law, PLLC, on behalf of Plaintiff, to which the Beach Entities crave reference, the Beach Entities are without sufficient information or knowledge to admit or deny the allegations of Paragraph 72.

**FURTHER ANSWERING THE COMPLAINT
AND AS A FIRST AFFIRMATIVE DEFENSE THERETO**

70. The Beach Entities reallege and reaver the foregoing as fully as if repeated verbatim.

71. Plaintiff's claims are barred by the doctrine of collateral estoppel.

FURTHER ANSWERING THE COMPLAINT
AND AS A SECOND AFFIRMATIVE DEFENSE THERETO

72. The Beach Entities reallege and reaver the foregoing as fully as if restated verbatim.

73. Plaintiff's claims are barred pursuant to the South Carolina Statute of Frauds.

FURTHER ANSWERING THE COMPLAINT
AND AS A THIRD AFFIRMATIVE DEFENSE THERETO

74. The Beach Entities reallege and reaver the foregoing as fully as if restated verbatim.

75. Plaintiff's claims are barred pursuant to S.C. Code §30-7-10.

FURTHER ANSWERING THE COMPLAINT
AND AS A FOURTH AFFIRMATIVE DEFENSE THERETO

76. The Beach Entities reallege and reaver the foregoing as fully as if restated verbatim.

77. Plaintiff's claims are barred by the doctrine of waiver.

FURTHER ANSWERING THE COMPLAINT
AND AS A FIFTH AFFIRMATIVE DEFENSE THERETO

78. The Beach Entities reallege and reaver the foregoing as fully as if restated verbatim.

79. Plaintiff's claims are barred by the doctrine of unclean hands.

FURTHER ANSWERING THE COMPLAINT
AND AS A SIXTH AFFIRMATIVE DEFENSE THERETO

80. The Beach Entities reallege and reaver the foregoing as fully as if repeated verbatim.

81. Plaintiff's claims are barred by the doctrine of estoppel by silence.

FURTHER ANSWERING THE COMPLAINT
AND AS A SEVENTH AFFIRMATIVE DEFENSE THERETO

82. The Beach Entities reallege and reaver the foregoing as fully as if repeated verbatim.

83. Beach Fenwick is and was a bona fide purchaser, barring any claim by Plaintiff.

FURTHER ANSWERING THE COMPLAINT
AND AS AN EIGHT AFFIRMATIVE DEFENSE THERETO

84. The Beach Entities reallege and reaver the foregoing as fully as if repeated verbatim.

85. Plaintiff's claims are barred by the doctrine of laches.

FURTHER ANSWERING THE COMPLAINT
AND AS A NINTH AFFIRMATIVE DEFENSE THERTO
(Punitive Damages)

86. The Beach Entities reallege and reaver the foregoing as fully as if repeated verbatim

87. Any award of punitive damages herein (entitlement to which is denied), IS subject to the Fifth, Sixth and/or Fourteenth Amendments to the Constitution of the United States, and Article 1, Section 3 of the Constitution of the State of South Carolina.

FURTHER ANSWERING THE COMPLAINT
AND AN A TENTH DEFENSE THERTO
(Punitive Damages – S.C. Code Ann. § 15-32-500, et. seq.)

88. Defendants reallege and reaver the foregoing as fully as if restated verbatim.

89. Any award of punitive damages herein (entitlement to which is denied), is subject to S.C. Code Ann. § 15-32-530, *et. seq.*

WHEREFORE, having fully responded to the Complaint herein, Beach Fenwick, LLC and The Beach Co. pray that such action be dismissed, with prejudice, awarding costs to each, and for such other and further relief as this Court may deem just and proper.

/s/ Cheryl D. Shoun

Cheryl D. Shoun – S.C. Bar ID No. 5092

CShoun@nexsenpruet.com

Alexandra Austin – S.C. Bar ID No. 12496

AAustin@nexsenpruet.com

NEXSEN PRUET, LLC

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Charleston, SC 29402

Telephone: 843.577.9440

March 16, 2020

Charleston, SC

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE #: _____

MAYBANK 2754, LLC,

SUMMONS

Plaintiff,

(Jury Trial Requested)

v.

BUIST, BYARS & TAYLOR, LLC; CUSTIS
M. BYARS;

Defendants,

_____/

TO: BUIST, BYARS & TAYLOR, LLC; CUSTIS M. BYARS

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the Complaint upon the subscribers, at their office, TAROKH LAW, PLLC, PO Box 10827, Tampa, FL 33679, within thirty (30) days, after service hereof, exclusive of the day of such service; and if you fail to answer the Complaint in the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

TAROKH LAW, PLLC
PO BOX 10827
TAMPA, FL 33679
813-922-5510
jason@tarokhlaw.com

/s/ Jason M. Tarokh
JASON M. TAROKH
SOUTH CAROLINA BAR # 72837

May 14, 2020

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE #: _____

MAYBANK 2754, LLC,

Plaintiff,

(Jury Trial Requested)

v.

BUIST, BYARS & TAYLOR, LLC; CUSTIS
M. BYARS;

Defendants,

_____ /

COMPLAINT

COMES NOW THE PLAINTIFF, MAYBANK 2754, LLC, and sues the Defendants, BUIST, BYARS & TAYLOR, LLC; CUSTIS M. BYARS; and alleges as follows:

General Allegations

1. Plaintiff, MAYBANK 2754, LLC (herein “Maybank”), is a limited liability company organized and existing under the laws of the State of South Carolina, and transacted business in Charleston County, South Carolina at all relevant times.

2. Defendant, BUIST, BYARS & TAYLOR, LLC (herein “BBT”), is a limited liability company organized and existing under the laws of the State of South Carolina and provided legal services as a law firm to Maybank, its client, in Charleston County, South Carolina at all relevant times.

3. Defendant, CUSTIS M. BYARS (herein “Byars”), is a resident of Charleston County, South Carolina, and a partner or principal of BBT. Byars provided legal services to Maybank, his client, as a licensed South Carolina attorney and as a partner or principal of BBT at all relevant times.

4. This Court has jurisdiction over the parties and the subject of this lawsuit.
5. Venue is appropriate in Charleston County, South Carolina.
6. The real estate that is the subject of this case (herein "Property") is described as

follows:

ALL that certain piece, parcel or tract of land situate, lying and being in the City of Charleston County, South Carolina, containing 19.322 acres, more or less, and being shown as "**TRACT B-2-2 TMS 346-00-00-076 OWNER: 1776 LLC PREVIOUS ACREAGE 998,976 SF 22.933 AC NEW ACREAGE 841,688 SF 19.322 AC**" on a plat entitled "A PLAT OF A PORTION OF TMS #346-00-00-004, and -076 OWNED BY 1776, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA FOR THE NORTHERN PITCHFORK ROAD" dated January 22, 2019, last revised December 4, 2019, prepared by Philip R. Bryan, Jr. S.C.P.L.S. No. 28597 of Southeastern Land Surveying LLC and recorded on December 4, 2019, in Plat Book L19, Page 0515, in the ROD Office for Charleston County, South Carolina. Said parcel having such size, shape, buttings and boundings as will more fully appear by reference to said plat.

BEING A PORTION of the property conveyed to Grantor by deed of Mikell R. Scarborough as Master-in-Equity dated August 29, 2017 and recorded August 29, 2017 at Book 0662, Page 915 in the ROD Office for Charleston County, South Carolina.

This being the same property conveyed to Beach Fenwick, LLC, by deed of 1776, LLC, recorded on December 12, 2019, in Book 0846, Page 268 in the ROD Office for Charleston County, South Carolina

TMS# 346-00-00-076.

7. Maybank owns a lot adjacent to the Property. The lot has a building situated thereon with office spaces for lease. During all material times, office space on the lot has been leased and is currently leased.

8. Penny Creek Associates, LLC, is a limited liability corporation organized and existing under the laws of the State of South Carolina ("herein "Penny Creek"), and transacted business in Charleston County, South Carolina at all relevant times.

9. Until on or about October 7, 2013, Penny Creek solely owned Maybank and was the sole member of Maybank.

10. On or about October 4, 2013, BBT and/or Byars provided legal services and drafted documents for the transfer of Penny Creek's membership interest in Maybank as attorney for Maybank. One of those documents was a certain Resolution of the Sole Shareholder of Penny Creek Associates, LLC (herein "Resolution"). A true and correct copy of the Resolution is attached hereto and incorporated herein as an exhibit.

11. Pursuant to the Resolution, Penny Creek approved the transfer of its membership interest in Maybank to individuals set forth therein (herein "Laplane Family"), and also agreed to grant to them, and their assigns, a thirty (30) foot private right of way access easement for pedestrian and vehicular ingress, egress and access to, from and over the Property, the location and condition of which to be mutually agreed upon at the completion of that certain roadway known as Pitchfork Road.

12. Pursuant to the Resolution, upon completion Pitchfork Road, an easement agreement to memorialize the thirty (30) foot private right of way easement would follow.

13. At the time of the Resolution, members of the Laplane Family owned real estate, or had an interest in residential real estate, that was also adjacent to the Property.

14. BBT and Byars prepared documents and did the closing for the transfer of Maybank from Penny Creek to the Laplane Family.

15. Pitchfork Road has not been completed.

16. The Resolution was not recorded.

17. Maybank was assigned rights to the thirty (30) foot private right of way easement.

18. The Property is in the process of being developed. However, upon information and belief, the development plans for the Property do not have any specific provisions or reservations for the thirty (30) foot private right of way easement upon the completion of Pitchfork Road, a

consequence of which is Charleston County Court of Common Pleas Case # 2020-CP-10-00209, wherein Maybank is seeking a declaratory judgment for the existence of the thirty (30) foot private right of way easement, or alternatively, a declaratory judgment for the existence of a restrictive covenant, civil conspiracy and temporary injunction against the current owner of the Property and others.

19. The affidavit of Plaintiff's expert witness, Lisa Brown, Esq., is filed contemporaneously with this complaint and is incorporated by reference herein.

COUNT I
(Legal Malpractice)

20. At all times material hereto, BBT and Byars were under a professional obligation and fiduciary duty to Maybank to provide Maybank legal services, which includes the supervision of staff, paralegals and associate attorneys of BBT in the provision of legal services to Maybank, in conformity to the generally recognized and accepted practices of the legal profession in South Carolina and to exercise reasonable and ordinary care and diligence in the provision of those legal services as normally exercised by lawyers in similar circumstances.

21. BBT and Byars breached their professional obligation and fiduciary duty to Maybank to provide legal services, which includes the supervision of staff, paralegals and associate attorneys of BBT in the provision of legal services to Maybank, in conformity to the generally recognized and accepted practices of the legal profession in South Carolina and to exercise reasonable and ordinary care and diligence in the provision of those legal services as normally exercised by lawyers in similar circumstances by failing to record the Resolution, or failing to prepare and record a document, in the office of the Register of Deeds (formerly, Register of Mesne Conveyance) of Charleston County, South Carolina so as to provide constructive knowledge to the public of the existence of the thirty (30) foot private right of way easement.

22. BBT and Byars were careless and negligent failing to record the Resolution, or failing to prepare and record a document, in the office of the Register of Deeds (formerly, Register of Mesne Conveyance) of Charleston County, South Carolina so as to provide constructive knowledge to the public of the existence of the thirty (30) foot private right of way easement.

23. As a direct and proximate result of the Defendants' breach of the above-described duty owed to Maybank, Maybank has suffered, and continues to suffer, damages.

24. Additionally, Maybank has suffered special damages in that its adjacent lot has lost the value of a (30) foot private right of way easement across the Property.

25. Plaintiff has retained TAROKH LAW, PLLC, to initiate and maintain this action and is obligated to pay it a reasonable fee for its services in bringing this action.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment for damages against the Defendants, including special damages, plus interest and including an award of attorney's fees and Defendants if an attorney's fees award is available under the law, court costs, and such further relief as this Court deems just and proper.

COUNT II
(Breach of Fiduciary Duty)

26. Plaintiff re-alleges the Paragraphs above as though fully set forth herein verbatim.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment for damages against the Defendants, including special damages, plus interest and including an award of attorney's fees and Defendants, if an attorney's fees award is available under the law, court costs, and such further relief as this Court deems just and proper.

REQUEST FOR JURY TRIAL

27. The Plaintiff requests a trial by jury on all issues so triable.

Respectfully submitted,

TAROKH LAW, PLLC
PO BOX 10827
TAMPA, FL 33679

813-922-5510
jason@tarokhlaw.com

/s/ Jason M. Tarokh
JASON M. TAROKH
SOUTH CAROLINA BAR # 72837

May 14, 2020

**RESOLUTION OF THE SOLE SHAREHOLDER
OF PENNY CREEK ASSOCIATES, L.L.C.**

At a meeting of the Members of Penny Creek Associates, L.L.C. (the "Company") held at the Company's offices in Charleston, South Carolina, the Members of the Company hereby adopt the following resolutions:

WHEREAS, the Company is the sole member of Maybank 2754, LLC, a South Carolina limited liability company (the "Maybank 2754, LLC"); and

WHEREAS, pursuant to the terms and conditions of that certain Contract for Assignment of Interest, dated October 9, 2013, by and between the Company, Inc. (as Seller thereunder) and John H. Laplante, Michiel F. Laplante, Peter F. Laplante, Marianne Laplante-Scarlati, or their assigns (as Purchasers thereunder) (the "Agreement"), the Seller desire to sell, assign, transfer and convey certain Membership Interest in the Company to those certain Purchasers mentioned above and according to the provisions of the Agreement; and

WHEREAS, pursuant to the Agreement, the Company hereby certifies that the Company has complied with all provisions of the Company operating documents, with respect to the aforementioned sale, assignment and/or transfer of the Company Membership Interest in the Maybank 2754, LLC to the Purchaser, in consideration of Four Hundred Thousand and no/100 Dollars (\$400,000.00) and that the Members of the Company consent to the same; and

WHEREAS, as a condition of closing, the Company has agreed to grant, transfer, sell and convey to Purchasers, their successors and assigns, an access easement for pedestrian and vehicular ingress, egress and access to, from and over that portion of the lands of Seller known as "Residual Tract B-2-2" as shown on that plat by Richard D. Lacy, entitled "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895 ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES)," having been recorded in Plat Book EH, page 817 in the Charleston County RMC Office on March 25, 2005 ("30' Private R/W"), the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road ("Pitch Fork Road"). Upon the completion of Pitch Fork Road, the Parties hereto shall execute and record an Easement Agreement to memorialize the 30' Private R/W.

NOW THEREFORE IT IS RESOLVED, that the Company approves the Agreement; the sale, assignment, transfer and conveyance of Membership Interest in the Company thereunder; and any and all other documents necessary to facilitate the Company's execution of the Agreement and its compliance with the transactions contemplated thereunder.

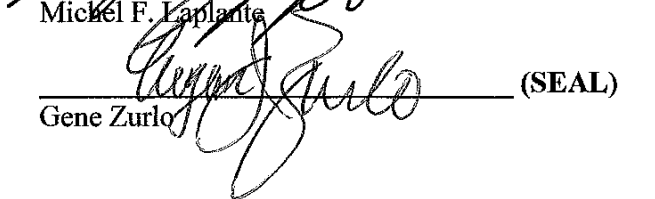
BE IT FURTHER RESOLVED, that upon the completion of Pitch Fork Road, the Company shall grant to Purchasers, their successors and assigns, an access easement for pedestrian and vehicular ingress, egress and access to, from and over that portion of the lands of the Company known as "Residual Tract B-2-2" as shown on that plat by Richard D. Lacy, entitled "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895 ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES)," having been recorded in Plat Book EH, page 817 in the Charleston County RMC Office on March 25, 2005 ("30' Private R/W"), the location and condition of which shall be mutually agreed upon at a future date.

BE IT FURTHER RESOLVED, that Michel F. Laplante in his capacity as Manager of the Company is hereby authorized to execute and deliver on behalf of the Company any and all agreements, assignments, satisfactions, releases, discharges, papers, documents, lending and collateral documents, offers, applications, leases, affidavits, certificates, certifications, verifications, non-disturbance agreements, guaranties, bonds, notes, subordination agreements, security agreements, resolutions, settlement statements, and any and all other contracts, papers or documents required in the course of the execution of the Agreement and the assignment and transfer of Membership Interest in the Company.

The undersigned Members of the Company do hereby certify that as of this 4TH day of October, 2013 the above to be a true and correct transcript of the Resolutions passed by the Company at the time and place above stated.

MEMBERS:

 (SEAL)
Michel F. Laplante

 (SEAL)
Gene Zurlo

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

MAYBANK 2754, LLC,

CASE #:

Plaintiff,

vs.

AFFIDAVIT OF LISA BROWN

BUIST, BYARS & TAYLOR, LLC;
CUSTIS M. BYARS,

Defendants.

I, Lisa Hostetler Brown, having been first duly sworn, deposes and states that:

1. I am the managing attorney of the law firm of LawyerLisa, LLC.
2. I am licensed to practice law in South Carolina and North Carolina and I have been practicing continuously in the area of South Carolina real estate law since 2007.
3. I have handled thousands of real estate closings including residential and commercial transactions.
4. I am a co-presenter of the South Carolina Bar Real Estate Essentials CLE, a Real Estate Transactions II guest lecturer at USC School of Law, and co-author of the upcoming Real Estate Bar Book for South Carolina Attorneys.
5. I have reviewed the pertinent documentation related to the October 2013 transfer of Maybank 2754, LLC by Penny Creek Associates, L.L.C. (hereafter "Seller") to John H. Laplante, Michel F. Laplante, Peter F. Laplante, Marianne Laplante-Scarlata (hereafter "Purchaser").
6. I have reviewed the terms of the agreement whereby Seller agreed to grant to Purchaser a thirty (30') foot access easement across Seller's tract known as B-2-2 to the future roadway known as Pitch Fork Road.
7. It is my professional and expert opinion that the Defendant breached the applicable standard of care owed to a client and committed professional negligence in violating that standard of care as set forth below:
 - a. The Contract For Assignment of Interest (hereinafter "Agreement"), which upon information and belief was prepared by the Defendant for the benefit of Plaintiff,

Handwritten initials: JTB

sets forth the terms upon which Seller would convey it's 100% interest in Maybank 2754, LLC to Purchaser

- i. The Agreement states that the Conveyance Documents will be the legal, valid and binding obligations of Seller and enforceable against Seller. (Section 3.1 of Agreement).
 - ii. The Agreement states that the Seller shall execute the Conveyance Documents in form and substance customary and usual for their intended purpose and reasonably satisfactory to Purchasers and its counsel. (Section 4.4 of Agreement).
 - iii. The Agreement states that Seller shall grant an easement across its Tract B-2-2 to Pitch Fork Road. The Agreement fails to state the beginning point of the easement, but upon information and belief, the parties intended the beginning point to be Tract B-3 which was and is owned by Maybank 2754, LLC. Upon completion of Pitch Fork Road, the parties intended to define the exact location and execute and record an Easement Agreement indicating the specifics of the right of way. (Section 4.5 of Agreement).
 - b. The Assignment of Membership Interest and Written Consent in Lieu of a Special Meeting of the Sole Member of Maybank 2754, LLC (hereinafter "Assignment"), which upon information and belief was prepared by the Defendant for the benefit of Plaintiff, transfers the Seller's membership interest in Maybank 2754, LLC to Purchaser
 - i. The Assignment states that "as a condition of closing", Seller agrees to grant the above described 30' access easement (Section 6 of Assignment).
 - c. Based upon my review of the documentation, the Defendant never prepared the agreed upon access easement in recordable format and no agreement was ever recorded in the Charleston County Register of Deeds Office.
 - d. Even though Pitch Fork Road was not yet complete, the agreement should have been recorded at the time of closing to put all future buyers and lenders on notice that Tract B-2-2 is subject to an easement.
 - e. An attorney exercising proper judgment and oversight would have prepared documentation of the agreement between the parties and recorded it with the Charleston County Register of Deeds Office to protect the Plaintiff's interest.
8. My professional opinion is based on my actual experience, general research, and review of the pertinent documentation related to this matter. I hold this opinion to a reasonable degree of legal certainty with the results being more probable than not.
 9. I have been retained as an expert witness by the Plaintiff and give my opinion in that capacity. This opinion is based on the allegations of the Complaint, which I assume to be true because of the supporting documentation I have reviewed. My opinions are subject to expansion and modification as further evidence or issues develop.
 10. This affidavit is given in compliance with South Carolina Code of Laws § 15-36-100, which does not require me to state all negligent acts, omissions, or wrongdoing by Defendant.

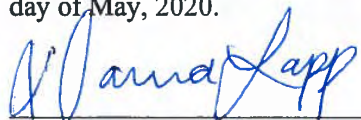
FURTHER, AFFIANT SAYETH NOT.

LAWYERLISA, LLC



Lisa Hostetler Brown

SWORN to and subscribed before me on this 13th
day of May, 2020.



Notary Public for South Carolina

My Commission Expires: 2/7/2028

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

MAYBANK 2754, LLC

Plaintiff,

vs.

EUGENE J. ZURLO, Individually and as
Co-Trustee of the Eugene J. Zurlo Living
Trust Dated December 11, 1997; 1776,
LLC; BEACH FENWICK, LLC; THE
BEACH COMPANY; SEAMON,
WHITESIDE & ASSOCIATES, INC.;
PENNY CREEK ASSOCIATES, LLC;
JOHN DOE AND MARY ROE

Defendants.

IN THE CIRCUIT COURT

Case No. 2020-CP-10-00209

**MOTION TO DISMISS ON BEHALF OF
DEFENDANTS BEACH FENWICK,
LLC AND THE BEACH COMPANY**

TO: Jason M. Tarokh, Esquire, Counsel for Plaintiff

PLEASE TAKE NOTICE that Defendants, Beach Fenwick, LLC and The Beach Co., herein incorrectly designated The Beach Company, (collectively, the "Beach Entities") by and through their undersigned counsel, will move before this Court for an Order, pursuant to Rule 12(b)(6), South Carolina Rules of Civil Procedure, dismissing Plaintiff's claims for failure to state facts sufficient to constitute the causes of action included in Plaintiff's Complaint.

Specifically, Plaintiff fails to plead the necessary elements to constitute a valid interest in land, and, in fact, by its pleading, establishes there are insufficient facts to establish a valid interest in property, thereby defeating its causes of action for declaratory judgement as to an easement or restrictive covenant, its cause of action for civil conspiracy and its cause of action seeking temporary injunction.

Further, Plaintiff fails to plead other essential elements necessary to constitute a cause of action for the imposition of a restrictive covenant, as Plaintiff asserts no contractual agreement between Plaintiff and the Beach Entities. Plaintiff likewise fails to plead the essential elements to constitute a cause of action for conspiracy, *to wit*: the alleged actions of two or more persons for the purpose of injuring Plaintiff, as well as any facts in furtherance of a conspiracy.

Respectfully submitted,

/s/ Cheryl D. Shoun

Cheryl D. Shoun, SC Bar #5092
Alexandra H. Austin, SC Bar #12496
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
(T) 843.577.9440
(F) 843.720.1777
cshoun@nexsenpruet.com
aaustin@nexsenpruet.com

February 17, 2020

Charleston, SC

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

MAYBANK 2754, LLC,

PLAINTIFF,

V.

EUGENE J. ZURLO, Individually and as
Co-Trustee of the Eugene J. Zurlo Living
Trust Dated December 11, 1997, LLC;
BEACH FENWICK, LLC; THE BEACH
COMPANY; SEAMON, WHITESIDE &
ASSOCIATES, INC.; PENNY CREEK
ASSOCIATES, LLC; JOHN DOE AND
MARY ROE,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL

CASE NO.: 2020-CP-10-00209

**MOTION FOR ORDER
OF
REFERENCE TO MASTER-IN-EQUITY**

YOU WILL PLEASE TAKE NOTICE THAT Defendants, Beach Fenwick, LLC and The Beach Co, incorrectly identified herein as The Beach Company, by and through their undersigned attorneys, will move, ten days following the date of this Motion, or at the Court's convenience, before a presiding judge of the Court of Common Pleas for the Ninth Judicial Circuit for an Order referring the above referenced matter to the Master-in-Equity for the County of Charleston, with the power to enter final judgment in all causes of action referred, pursuant to Rule 53 of the South Carolina Rules of Civil Procedure. This Motion is based upon the Complaint filed herein, the Order of the Honorable Mikell R. Scarborough, including Paragraph 10, Page 15 thereof, said Order having been entered on June 23, 2017 in Case No. 2014-CP-10-04946, a copy of which is attached hereto, the Rules of this Court, and the applicable law.

And Beach Fenwick, LLC and The Beach Co, so move.

Respectfully submitted,

/s/ Cheryl D. Shoun

Cheryl D. Shoun, SC Bar #5092
Alexandra H. Austin, SC Bar #102646
NEXSEN PRUET, LLC
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aaustin@nexsenpruet.com

February 17, 2020

Charleston, SC

Master Order of Sale, dated June 23, 2017

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE CIRCUIT COURT

Case No. 2014-CP-10-04946

Wells Fargo Bank, N.A., as Successor by
Merger to Wachovia Bank, National
Association, as Successor by Merger to First
Union National Bank,

Plaintiff,

vs.

**MASTER-IN-EQUITY'S ORDER AND
JUDGMENT OF FORECLOSURE AND
SALE**

**(Deficiency Not Waived;
not HAMP eligible)**

Penny Creek Associates, L.L.C. a/k/a Penny
Creek Associates, LLC; Michel F. LaPlante
a/k/a Michel Laplante a/k/a Mitch Laplante;
Charlotte R. Zurlo; Eugene J. Zurlo; Charlotte
R. Zurlo and Eugene J. Zurlo, as Co-Trustees
of The Nicklaus Lane Realty Trust No. 1 under
Declaration of Trust dated May 22, 1998, and
The Zurlo Investment Trust No. 1 pursuant to
trust agreement dated August 10, 1998;
Fenwick Hall Plantation Property Owners
Assn., Inc. a/k/a Fenwick Hall Plantation
Property Owners' Association, Inc.; Preserve
at Fenwick Hall Property Owners Association,
Inc. a/k/a The Preserve at Fenwick Hall
Property Owners' Association, Inc.; and The
Grove At Fenwick Plantation Condominium
Association, Inc.,

Defendants.

Michel Laplante,

Third-Party Plaintiff,

vs.

The Eugene J. Zurlo Living Trust, Dated
December 11, 1997,

Third-Party Defendant.

FILED
2017 JUN 23 PM 2:52
JULIE J. ARMSTRONG
CLERK OF COURT

Pursuant to Rules 53 and 71, SCRCF, the above-entitled matter was referred to the undersigned to make appropriate findings of fact and conclusions of law with authority to enter a final judgment in the cause.

Pursuant to the said reference, a hearing was held on June 19, 2017, and attended by the following persons:

Robert C. Byrd – Attorney for the Plaintiff
 Thomas B. Pritchard – Attorney for Defendant Penny Creek Associates, LLC
 J. Rutledge Young, Jr. – Attorney for Defendants Charlotte R. Zurlo and Eugene J. Zurlo, individually and as Co-Trustees of The Nicklaus Lane Realty Trust No. 1 under Declaration of Trust dated May 22, 1998, and The Zurlo Investment Trust No 1 pursuant to trust agreement dated August 10, 1998 (severed from the foreclosure claim)
 Defendant Michel F. Laplante (severed from the foreclosure claim)
 Brian Hellman – Attorney for Intervenor 1776, LLC
 J. Christopher Lanning – Manager of Penny Creek Associates, LLC

Based on the evidence presented at the hearing, I hereby find, conclude and order as follows:

FINDINGS OF FACT

1. The Lis Pendens, Summons, Complaint and Notice of Intent to Refer were filed August 14, 2014.
2. Service was made upon the defendants in this action, as is shown by the proofs of service filed herein.
3. Defendant Michel F. LaPlante a/k/a Michel Laplante a/k/a Mitch Laplante (“LaPlante”) filed a Motion for Injunction on August 29, 2014.
4. Defendant LaPlante filed a Motion for Temporary Restraining Order on September 9, 2014, and the Order denying said motion was entered on September 19, 2014.



5. Defendants Fenwick Hall Plantation Property Owners Assn., Inc. a/k/a Fenwick Hall Plantation Property Owners' Association, Inc.; Preserve at Fenwick Hall Property Owners Association, Inc. a/k/a The Preserve at Fenwick Hall Property Owners' Association, Inc.; and The Grove At Fenwick Plantation Condominium Association, Inc. (collectively, the "POA Defendants") filed an Answer and Counterclaim on September 29, 2014.

6. Defendants Charlotte R. Zurlo and Eugene J. Zurlo filed a Memorandum in Opposition to defendant LaPlante's Motion for Injunction on September 29, 2014.

7. Defendants Charlotte R. Zurlo, Eugene J. Zurlo, and Charlotte R. Zurlo and Eugene J. Zurlo, as Co-Trustees of The Nicklaus Lane Realty Trust No. 1 under Declaration of Trust dated May 22, 1998, and The Zurlo Investment Trust No. 1 pursuant to trust agreement dated August 10, 1998 (collectively, the "Zurlo Defendants"), filed an Answer and Cross Claim on October 16, 2014.

8. Defendant LaPlante filed an Answer, Cross Claims, and Third-Party Claims on October 27, 2014.

9. Defendant Penny Creek Associates, L.L.C. a/k/a Penny Creek Associates, LLC ("Penny Creek") and The Grove at Fenwick Plantation, LLC filed an Answer on November 6, 2014.

10. Defendant LaPlante filed a Reply to the Zurlo Defendants' Cross-Claims on November 10, 2014.

11. Third-party defendant Paul Zurlo filed a Motion to Dismiss defendant LaPlante's Third-Party Complaint on November 25, 2014.

12. Third-party defendant Eugene J. Zurlo Living Trust filed an Answer to defendant LaPlante's Third-Party Complaint on November 26, 2014.

13. The Plaintiff's Reply to the POA Defendants' Answer and Counterclaim was filed on December 4, 2014.

14. Defendant LaPlante filed Memoranda on January 15, 2015, in opposition to the Plaintiff's Motion to Strike Jury Demand and to Refer and in opposition to third-party defendant Paul Zurlo's Motion to Dismiss.

15. The Plaintiff filed a Memorandum of Law in support of its Motion to Refer on January 16, 2015.

16. Third-party defendant Paul Zurlo filed an Answer to Third-Party Complaint on January 30, 2015.

17. The Order granting Plaintiff's Motion to Refer was entered on March 5, 2015.

18. Defendant LaPlante filed a Motion on March 23, 2015, seeking to alter or amend the Order granting the Plaintiff's Motion to Refer.

19. The Zurlo Defendants filed an Amended Answer and Cross Claim on April 15, 2015.

20. Defendant LaPlante filed a Reply to the Cross-Claims of the Zurlo Defendants on April 27, 2015.

21. The Order denying defendant LaPlante's Motion to Alter or Amend the Order granting Plaintiff's Motion to Refer was entered on June 3, 2015.

22. Defendant LaPlante filed a Notice of Appeal on July 6, 2015, appealing the Order granting Plaintiff's Motion to Refer.

23. The Stipulation dismissing the third-party complaint against Paul Zurlo with prejudice was filed on July 17, 2015.



24. The Plaintiff filed a Motion to Dismiss defendant LaPlante's appeal in the Court of Appeals on August 4, 2015.

25. The Order granting the Plaintiff's Motion to Dismiss Appeal was entered by the Court of Appeals on October 20, 2015.

26. The Plaintiff's Motion for Partial Summary Judgment and Supporting Affidavit were filed on February 2, 2016.

27. The Stipulation was filed on May 26, 2016, dismissing the claims relating to The Grove at Fenwick Plantation loan and dismissing defendant The Grove at Fenwick Plantation, LLC as a party defendant.

28. The case originally asserted four (4) causes of action, two of which related to a loan by the Plaintiff to The Grove at Fenwick Plantation, LLC (the "Fenwick Loan"). During the course of the action, the Fenwick Loan was paid off and the parties stipulated to the dismissal of the two claims relating to that loan. Only the claims relating to loan to defendant Penny Creek remain.

29. The Consent Order Striking Case from Trial Docket Pursuant to Rule 40(j), SCRCPP was filed on September 30, 2016.

30. The Notice to Restore Case to Active Trial Docket was filed on April 12, 2017.

31. The Order Restoring Case to Active Trial Docket was entered on April 12, 2017.

32. The Stipulation to Entry of Order and Judgment of Foreclosure and Sale was filed on April 13, 2017; and

33. The Plaintiff's Motion to Sever and for Entry of Stipulated Final Order and Judgment of Foreclosure and Sale was filed on May 25, 2017, which this Court granted on June 19, 2017.

34. The Motion to Intervene was filed by 1776, LLC on June 19, 2017.
35. This Court granted the Plaintiff's Motion to Sever on June 19, 2007.
36. The Court also grants 1776, LLC's Motion to Intervene, as set forth more fully hereinafter.
37. All parties were notified of the date, time and place of the hearing in this matter.

The \$5,300,000.00 Loan

38. Defendant Penny Creek, for consideration, made, executed and delivered that certain Promissory Note dated August 7, 2000 ("Original Note 1"), payable to the order of First Union National Bank ("First Union"), in the original principal sum of \$5,300,000.00, together with interest as provided therein.

39. To secure payment of the indebtedness evidenced by Original Note 1, in accordance with the terms and conditions thereof, defendant Penny Creek, for consideration, made, executed and delivered to First Union a certain Mortgage and Absolute Assignment of Leases dated August 7, 2000 ("Mortgage 1"), covering certain real property located in Charleston County, South Carolina and described more fully therein. Mortgage 1 was recorded in the RMC Office for Charleston County on August 8, 2000, in Book P-352 at Page 613. Other terms and conditions are stated in the said Mortgage 1, which is of record herein.

40. Wells Fargo Bank, N.A. is the successor by merger to Wachovia Bank, National Association who is the successor by merger to First Union and is the sole owner and holder of Original Note 1, Mortgage 1, and all other related loan documents.

41. Certain terms of the Original Note 1 were amended, modified and/or renewed by, among other things, that certain renewal Promissory Note dated April 28, 2008, in the original



principal sum of \$3,142,781.92 ("Renewal Note 1"). (Original Note 1 and Renewal Note 1 are hereinafter referred to, collectively, as "Note 1.")

The \$2,200,000.00 Loan

42. Defendant Penny Creek, for consideration, made, executed and delivered that certain Promissory Note dated April 5, 2006 ("Original Note 2"), payable to the order of the Plaintiff, then known as Wachovia Bank, National Association, in the original principal sum of \$2,200,000.00, together with interest as provided therein. Other terms and conditions are stated in the said Original Note 2, which is of record herein.

43. To secure payment of the indebtedness evidenced by Original Note 2, in accordance with the terms and conditions thereof, defendant Penny Creek, for consideration, made, executed and delivered to the Plaintiff a certain Mortgage and Assignment of Rents dated April 5, 2006 ("Mortgage 2"), covering certain real property located in Charleston County, South Carolina and described more fully therein. Mortgage 2 was recorded in the RMC Office for Charleston County on April 7, 2006, in Book G-579 at Page 249. Other terms and conditions are stated in the said Mortgage 2, which is of record herein. (Mortgage 1 and Mortgage 2 are hereinafter referred to, collectively, as the "Mortgages.")

44. Certain terms of Original Note 2 were thereafter amended, modified and/or renewed by: (i) that certain renewal Promissory Note dated July 5, 2007, in the original principal sum of \$4,450,000.00; and (ii) that certain Modification Number One to Promissory Note dated April 28, 2008 (collectively, "Renewal Note 2"). Other terms and conditions are stated in the said Renewal Note 2, which is of record herein. (Original Note 2 and Renewal Note 2 are hereinafter referred to, collectively, as "Note 2.")



45. Thereafter, Mortgage 2 was amended and/or modified by that certain Modification of Mortgage and Notice of Future Advance dated July 5, 2007, and recorded in the RMC Office for Charleston County on July 27, 2007, in Book V-633 at Page 342. Other terms and conditions are stated in the said Modification of Mortgage and Notice of Future Advance, which is of record herein.

2009 Modification and Consolidation

46. Thereafter, certain terms of Note 1 and Note 2 were amended, modified and/or renewed by, among other things, that certain renewal Promissory Note dated July 28, 2009, in the original principal sum of \$7,592,781.92, which, among other things, consolidated Note 1 and Note 2 (collectively, the "Note"). Other terms and conditions are stated in the said Note, which is of record herein.

47. In order to induce the Plaintiff to modify or extend the aforesaid loan as evidenced by the Note, and to further secure the same, defendants LaPlante and the Zurlo Defendants, for consideration, executed separate, written Unconditional Guaranties dated July 28, 2009 (collectively, the "Guaranties"), whereby the said defendants absolutely, unconditionally and irrevocably guaranteed to the Plaintiff the full and prompt payment of the obligations of defendant Penny Creek to the Plaintiff under the Note, as consolidated. Other terms and conditions are stated in the said Guaranties, which are of record herein.

2012 and 2013 Modifications

48. Thereafter, certain terms of the Note were amended, modified and/or renewed by: (i) that certain First Modification to Promissory Note dated August 14, 2012; and (ii) that certain Second Modification to Promissory Note dated May 23, 2013 (collectively, the "Note



Modifications"). Other terms and conditions are stated in the said Note Modifications, which are of record herein.

49. In connection with the aforesaid modifications, Mortgage 1 and Mortgage 2 were amended and/or modified by that certain Modification of Mortgages dated October 1, 2012 (the "Mortgage Modification"), and recorded in the RMC Office for Charleston County on October 15, 2012, in Book 0284 at Page 614. Other terms and conditions are stated in the said Mortgage Modification, which is of record herein.

50. Under the express terms of the aforesaid Mortgage Modification, Mortgage 1 and Mortgage 2 (collectively, the "Mortgages") secure the Note in its entirety.

51. Certain portions of the subject mortgaged properties were thereafter released from the lien of the Mortgages, as amended and/or modified, which remains in full force and effect as to the remaining property described in the said Mortgages (the "Property").

**Loan Defaults, Forbearance Agreement and Stipulation
to Entry of Order and Judgment of Foreclosure and Sale**

52. The obligations under the terms and conditions of the Note are in default for, among other reasons, failing to repay the indebtedness in accordance with the terms thereof, including without limitation failing to repay the loan in full at maturity on April 18, 2014. The defendants have been duly notified, in writing, of the outstanding defaults.

53. In May 2016, the Plaintiff and defendants Penny Creek, LaPlante and the Zurlo Defendants entered into that certain Forbearance Agreement dated as of May 4, 2016 (the "Forbearance Agreement"), wherein the said defendants agreed and acknowledged, among other things, that the subject loan is in default and further agreed to execute the Stipulation to Entry of Order and Judgment of Foreclosure and Sale attached as Exhibit A to the Forbearance Agreement. Other terms and condition are stated in the said Forbearance Agreement, which is of record herein.

54. Pursuant to and in reliance upon the Forbearance Agreement and Stipulation, the case was removed from the active calendar pursuant to Rule 40(j), with leave to restore, by Consent Order entered on September 30, 2016.

55. The forbearance period set forth in the Forbearance Agreement expired on March 31, 2017, and the case was restored to active calendar on April 12, 2017.

56. The Plaintiff is entitled to proceed with foreclosure of its Mortgages, as amended and/or modified.

57. The Plaintiff's Mortgages constitute valid first priority liens on the Property.

58. Subsequent to the commencement of this action, the Eugene J. Zurlo Living Trust Dated December 11, 1997 (the "1997 Zurlo Trust") recorded a Second Mortgage on the subject Property in the Office of the RMC for Charleston County on May 25, 2016, in Book 0556 at Page 242 (the "Second Mortgage").

59. The Second Mortgage arose out of that certain Settlement Agreement between the 1997 Zurlo Trust and defendant Penny Creek Associates, LLC, the terms of which Settlement Agreement were entered on the record before The Honorable Markley Dennis, Jr. on February 29, 2016, in Case No. 2013-CP-10-07280. A copy of the transcript from the February 29, 2016 hearing before Judge Dennis in Case No. 2013-CP-10-07280, together with a copy of the Second Mortgage and the promissory note it secures, were presented to this Court and have been made a part of the record herein.

60. In accordance with the terms of the Settlement Agreement, the 1997 Zurlo Trust and its successor and assigns are only entitled to recover the principal sum of \$3,250,000.00, without any interest.

61. The Second Mortgage was assigned from the 1997 Zurlo Trust to 1776, LLC

pursuant to that certain Assignment of Note and Mortgage recorded in the Office of the RMC for Charleston County on April 7, 2017, in Book 629 at Page 45, a copy of which was presented to this Court and has been made a part of the record herein.

62. The parties to the foreclosure hereby consent to the joinder of 1776, LLC as a party defendant on the following express terms and conditions, which are hereby adopted and ordered by this Court:

a. That 1776, LLC expressly acknowledges and stipulates that the lien of its Second Mortgage is junior and subordinate to the lien of the Plaintiff's Mortgages;

b. That 1776, LLC further acknowledges and stipulates that it is bound by the terms of the Stipulation to Entry of Order and Judgment of Foreclosure and Sale filed on April 13, 2017; and

c. That all parties to the foreclosure, including 1776, LLC, consent to the immediate disposition of the foreclosure proceeding, expressly waiving the time limitations contained in Rule 40(b), SCRPC.

63. In the Plaintiff's loan documents, defendant Penny Creek agreed to pay all reasonable costs and expenses of collection including, but not limited to, reasonable attorneys' fees. I find and conclude that the sum of Thirty-Two Thousand Three Hundred Five and No/100 Dollars (\$32,305.00) is a reasonable amount to award as Plaintiff's unreimbursed attorneys' fees for services performed and anticipated to be performed until final adjudication of the within action, and that the sum of Two Thousand Six Hundred Sixty-Eight and 50/100 Dollars (\$2,668.50) is a reasonable amount to award as legal costs. In reaching this conclusion, I have carefully considered the nature, extent and difficulty of the legal services provided by Plaintiff's counsel in this commercial foreclosure action, the time and labor necessarily devoted by Plaintiff's

counsel to the case, the professional standing of Plaintiff's counsel and his firm, the fees customarily charged in Charleston County for similar legal services, and the beneficial results obtained by Plaintiff's counsel in this matter.

64. The amount due and owing on the loan evidenced by the Note, as of June 19, 2017, including attorneys' fees and costs of collection, is as follows:

(1)	Principal due	\$5,775,289.35
(2)	Interest on principal only 02/28/17 – 03/29/17 @ 5.75% (30 days @ \$922.44205 per day)	\$ 27,673.26*
(3)	Interest on principal only 03/30/17 – 03/31/17 @ 6.00% (2 days @ \$962.54823 per day)	\$ 1,925.09*
(4)	Interest on principal only 04/01/17 – 04/29/17 @ 8.00% (29 days @ \$1,283.39763 per day)	\$ 37,218.53**
(5)	Interest on principal only 04/30/17 – 05/29/17 @ 8.00% (30 days @ \$1,283.39763 per day)	\$ 38,501.93**
(6)	Interest on principal only 05/30/17 – 06/19/17 @ 8.00% (21 days @ \$1,283.39763 per day)	\$ 26,951.35**
(7)	Legal Fees	\$ 32,305.00
(8)	Legal Costs	\$ <u>2,668.50</u>
	Total Debt Secured by Mortgages:	\$5,942,533.01

* Interest accruing at forbearance period rate of Prime plus 2.00%. It is a variable rate that has been and is subject to change.

** Interest accruing at default rate of Prime + 1% + 3.00%. It is a variable rate that has been and is subject to change.

Interest for the period from June 19, 2017, through the date of this judgment at the rate of 8.00% per annum shall be added to the above stated Total Debt Secured by Mortgages to comprise the amount of the judgment debt entered herein, and interest after the date of judgment at the same rate shall be added to such judgment debt to comprise the amount of the debt through the date to which such interest is computed.

65. Inasmuch as the Plaintiff has not waived deficiency, the bidding will remain open for thirty (30) days after the sale, unless waived by the Plaintiff, in writing, prior to the sale.

CONCLUSIONS OF LAW

1. The Plaintiff should have judgment of foreclosure of its Mortgages, as amended and/or modified.
2. The subject Property should be ordered sold at public auction after due advertisement.
3. The Plaintiff has not waived its right to seek a personal judgment for any deficiency remaining after the sale, but expressly reserves the right to waive deficiency, in writing, prior to the sale.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That there is due to the Plaintiff on the loan secured by the Mortgages, as amended and/or modified, set forth in the Complaint the sum of **Five Million Nine Hundred Forty-Two Thousand Five Hundred Thirty-Three and 01/100 Dollars (\$5,942,533.01)** representing the "Total Debt Secured By Mortgages" due the Plaintiff as set out in paragraph 64 hereinabove, together with interest after the aforesaid date at the rate of 8.00% per annum and thereafter, in the event of a deficiency judgment, at the legal rate of interest for judgments.
2. That the party or parties liable for the aforesaid debt, shall, on or before the date of sale of the Property hereinafter described, pay to the Plaintiff or its attorneys the amount of the debt owed as aforesaid, together with the costs and disbursements of this action.
3. That on default of payment at or before the time herein indicated, the Property be sold by the undersigned Master-in-Equity or his designee, at public auction, at the Charleston County Courthouse, in the City of Charleston, County and State aforesaid; on some convenient Sales Day hereafter as set by the Court, on the following terms, that is to say:



a. FOR CASH: The Master-in-Equity will require a deposit of five (5%) percent on the amount of the bid, in cash or its equivalence, same to be applied on the purchase price only upon compliance with the bid, but in case of non-compliance within thirty (30) days same to be forfeited and applied to the costs and Plaintiff's debt.

b. The sale shall be subject to taxes, assessments, existing easements, and easements and restrictions of record.

c. Purchaser to pay for deed stamps and cost of recording the deed.

d. That if the Plaintiff is the successful bidder at said sale for a sum not exceeding the amount of costs, expenses and the indebtedness of the Plaintiff in full, the Plaintiff may pay to the Master-in-Equity only the amount of the costs and expenses, crediting the balance of the bid on its indebtedness.

e. That if defendant 1776, LLC is the successful bidder at said sale for a sum not exceeding the amount of costs, expenses, the indebtedness of the Plaintiff in full, and the indebtedness owed on the Second Mortgage, the Plaintiff may pay to the Master-in-Equity only the amount of the costs, expenses, and the full amount of the Plaintiff's indebtedness, crediting the balance of the bid against its own indebtedness.

4. Inasmuch as the Plaintiff has not waived deficiency, the bidding will remain open for thirty (30) days after the sale, unless waived by the Plaintiff, in writing, prior to the sale.

5. That the Master-in-Equity will, by advertisement according to law, give notice of the time and place of such sale, and the terms thereof; and will execute to the purchaser or purchasers a deed to the Property sold. The Plaintiff or any other party to this action may become a purchaser at such sale, and if, upon such sale being made, the purchaser or purchasers should fail to comply with the terms thereof within thirty (30) days after date of sale, then the Master-in-

Equity may advertise the said Property for sale on the next or some other subsequent Sales Day, as set by the Court, at the risk of the former highest bidder, and so from time to time thereafter until a full compliance shall be secured.

6. That the Master-in-Equity shall apply the proceeds of the sale of the Property as follows:

FIRST: To payment of the amount of costs and expenses of this action;

NEXT: To the payment to Plaintiff or its attorney of the amount of debt owed to Plaintiff and interest, so much thereof as the purchase money will pay on the same; and

NEXT: Any surplus should be held pending further Order of this Court.

7. That the defendants named herein and all persons whosoever claiming under the defendants be forever barred and foreclosed of all right, title, interest and equity of redemption in the subject Property, or any part thereof.

8. That the deed(s) of conveyance made pursuant to said sale shall contain the names of only the Plaintiff, the defendant who was the titleholder of the Property at the time of the filing of the Lis Pendens, and the grantee; and the RMC is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deeds.

9. A description of the Property encumbered by the Mortgages and herein ordered to be sold is attached hereto as Exhibit "A" and Exhibit "A-1".

10. That the undersigned Master-in-Equity will retain jurisdiction to do all necessary acts incident to this foreclosure and to hear any post-judgment matters, including, but not limited to, the issuance of a Writ of Assistance.



AND IT IS SO ORDERED.

June 21, 2017

Charleston, South Carolina

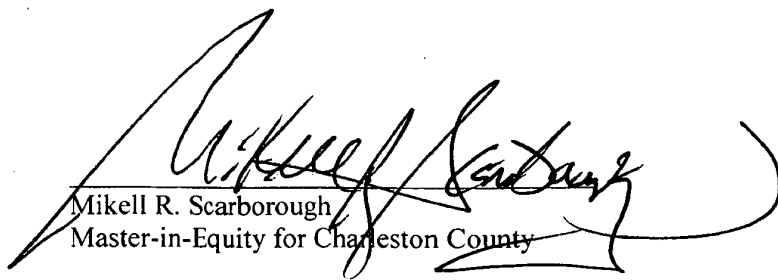

Mikell R. Scarborough
Master-in-Equity for Charleston County

EXHIBIT A-1**Tract B-2:**

ALL that piece, parcel or tract of land, together with the improvements thereon, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as "Tract 'B-2' 42.7 Acres," on a plat entitled, "SUBDIVISION OF PROPERTY IN THE NAME OF F-H-P REALTY LOCATED ON JOHNS ISLAND, CHARLESTON COUNTY, S.C.," by Forrest G. Calvert, RLS, dated September 17, 1979, and recorded in the RMC Office for Charleston County, South Carolina (hereinafter the "RMC Office") in Plat Book AO at Page 74, said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully be shown.

And Tract A:

ALL that piece, parcel or tract of land, together with the improvements thereon, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as "FHP Realty Tract 'A' 5.503 Acres" on a plat entitled, "PLAT SHOWING THE ABANDONMENT OF PROPERTY LINES FOR TMS NO. 346-00-00-12 AND TMS NO. 346-00-00-011, AND THE SUBSEQUENT SUBDIVISION OF TMS NO. 346-00-00-007 INTO TRACT 'A' CONTAINING 5.503 ACRES AND TRACT 'B' CONTAINING 7.497 ACRES OWNED BY FHP REALTY LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Hoffman Lester Associates, Inc., dated September 24, 1997, and recorded January 20, 1998, in the aforesaid RMC Office in Plat Book EC at Page 263.

The aforesaid Tract B-2 and Tract A are also more particularly shown on that certain plat entitled, "PLAT SHOWING PROPERTY LINE BETWEEN TMS NO. 346-00-00-004, TRACT B-2 (CONTAINING 42.49 ACRES) AND TMS NO. 346-00-00-007, RESIDUAL TRACT B (CONTAINING 5.50 ACRES) TO FORM TRACT B-2' (CONTAINING 47.99 ACRES), OWNED BY FHP REALTY LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by Hoffman Lester and Associates, Inc., dated April 7, 2000, and recorded as Exhibit "___" [sic: "C"] to that certain deed of conveyance from FHP Realty Company, a Partnership, to Penny Creek Associates, L.L.C., and also about to be recorded in the RMC Office for Charleston County, S.C.

Note: The above-referenced deed from FHP Realty Company, a Partnership, to Penny Creek Associates, L.L.C. is dated August 7, 2000, and recorded in the RMC Office for Charleston County on August 8, 2000, in Book O-352 at Page 691.

TOGETHER WITH a twenty-foot (20') non-exclusive easement in common with Helena Igoe Blanchard, her heirs and assigns, and others entitled thereto, in favor of "Tract B" above-described, for ingress and egress over, upon and across that certain twenty-foot (20') easement extending from Maybank Highway on the south to "Tract A" on the north, as said Tract A is shown on that certain plat recorded in Plat Book AK at Page 76 in the RMC Office, which easement is granted in that certain deed of conveyance from Helena Igoe Blanchard to FHP Realty Company, a Partnership, dated April 27, 1978, and recorded in Book P-115 at Page 273, in the RMC Office.

LESS AND EXCEPTING: ALL that certain streets, roads, drives and cul-de-sacs situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina and being shown and designated as "FENWICK HALL ALLEÉ R/W VARIES" on a plat entitled, "PLAT DEDICATING FENWICK HALL ALLEÉ, VARIABLE RIGHT-OF-WAY (TMS NO 346-00-00-078 TRACT C) TO THE USE OF THE PUBLIC CONTAINING 0.71 ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by Hoffman Lester Associates, Inc., dated August 27, 2001, and recorded November 1, 2001, in the RMC Office for Charleston County, South Carolina in Plat Book EF at Page 157. Said streets, roads, drives and cul-de-sacs butting and bounding, measuring and containing, and having such courses and distances as shown are shown on said plat, it being the intent of this legal description to convey the entire right-of-way. Reference being had to the aforesaid plat for a more full and complete description, being all of the said dimensions, a little more or a little less. Together with an exclusive easement for drainage and maintenance purposes over all drainage easement shown on the said plat.

LESS AND EXCEPTING: ALL that certain streets, roads, drives and cul-de-sacs situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina and being shown and designated as "EXTENSION OF FENWICK HALL ALLEÉ" on a plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 (TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE AN EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895 ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES PREPARED FOR PENNY CREEK ASSOCIATES, LLC AND FENWICK TARRAGON APARTMENTS, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by HLA, Inc., dated December 6, 2004, and recorded March 25, 2005, in the RMC Office for Charleston County, South Carolina in Plat Book EH at Page 817. Said streets, roads, drives and cul-de-sacs butting and bounding, measuring and containing, and having such courses and distances as shown are shown on said plat, it being the intent of this legal description to convey the entire right-of-way. Reference being had to the aforesaid

plat for a more full and complete description, being all of the said dimensions, a little more or a little less. Together with an exclusive easement for drainage and maintenance purposes over all drainage easement shown on the said plat.

LESS AND EXCEPTING: ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, measuring and containing 12.250 acres as more fully shown and designated as "PROPOSED TRACT B-2-3" on that plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT B-2-1 TMS NO. 346-00-00-004 CONTAINING 24.895 ACRES INTO TRACT B-2-3 (12.250 ACRES) AND RESIDUAL TRACT B-2-1 (12.645 ACRES) PROPERTY OF PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by HLA INC., dated December 10, 2004, and recorded in Plat Book EH at Page 903, in the RMC Office for Charleston County, South Carolina, said parcel having such location, buttings, boundings, courses and distances as by references to said plat more fully appear.

THE ABOVE REFERENCED PROPERTY IS ALSO KNOWN AS

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as **Tract B-2-1**, said to contain 11.645 total acres, as shown on a plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT B-2-1 TMS NO. 346-00-00-004 CONTAINING 24.895 ACRES INTO TRACT B-2-3 (12.250 ACRES) AND RESIDUAL TRACT B-2-1 (12.645 ACRES) PROPERTY OF PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by HLA INC., dated December 10, 2004, and recorded in Plat Book EH at Page 903, in the R.M.C. Office for Charleston County (herein after "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

BEING a portion of the same property conveyed to Penny Creek Associates, LLC by deed of FHP Realty Company, a Partnership, dated August 7, 2000, and recorded August 8, 2000, in the RMC Office for Charleston County, South Carolina in Book O-352 at Page 691.

TMS#: 346-00-00-004

AND

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as **Tract B-2-2**, said to contain 22.91 acres total, more or less, as shown on a plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT B-2-1 TMS NO. 346-00-00-004 CONTAINING 24.895 ACRES INTO TRACT B-2-3 (12.250 ACRES) AND RESIDUAL TRACT B-2-1 (12.645 ACRES) PROPERTY OF PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by HLA INC., dated December 10, 2004, and recorded in Plat Book EH at Page 903, in the R.M.C. Office for Charleston County (herein after "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

BEING a portion of the same property conveyed to Penny Creek Associates, LLC by deed of FHP Realty Company, a Partnership, dated August 7, 2000, and recorded August 8, 2000, in the RMC Office for Charleston County, South Carolina in Book O-352 at Page 691.

TMS#: 346-00-00-076

ALSOTract C:

ALL that certain piece, parcel or lot of land, situate, lying and being in the City of Charleston, County of Charleston, South Carolina, and being shown and delineated as TRACT "C," 59.280 acres of highland and 95.063 acres of marshland, on a plat by Forrest G. Calvert, dated November, 1977, entitled in part "PLAT SHOWING SUBDIVISION OF FENWICK HALL PLANTATION, 237.176 AC. HIGHLAND 148.058 AC. MARSH LOCATED ON JOHNS ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA. PROPERTY OF MRS. HELENA IGOE BLANCHARD," and recorded in Plat Book AK at Page 76, in the RMC Office for Charleston County, South Carolina (the "RMC Office"), and having such location, size, shape, buttings, boundings, and dimensions as will appear by reference to said plat which is incorporated herein by reference, be all the dimensions and measurements shown thereon a little more or less.

SAVING AND EXCEPTING that certain piece, parcel or lot of land, situate, lying and being in Charleston County, South Carolina, described as 0.97 acres of land as conveyed to the South Carolina Department of Transportation in that certain deed of conveyance from Fenwick Acres dated April 16, 1998, and recorded July 28, 1998, in Book R-307 at Page 246, in the RMC Office.

The aforesaid property and said 0.97 acre parcel are more particularly shown on that certain plat prepared by Southeastern Surveying, Inc. entitled, "A BOUNDARY SURVEY OF TRACT 'C' CONTAINING 153.53 ACRES, OWNED BY FENWICK ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," dated March 23, 1999, and recorded in the RMC Office in Plat Book ED at Page 70.

LESS AND EXCEPTING: ALL that certain piece, parcel or tract of land, situate, lying and being in the City of Charleston, Charleston County, South Carolina, containing 15.63 acres, more or less, shown and designated as "TRACT C-1" on that certain plat entitled, "PLAT SHOWING THE ADJUSTMENT OF THE PROPERTY LINE BETWEEN TMS 346-00-00-078 (TRACT C, R/W), TMS 346-00-00-076 (TRACT B-2-2) & TMS 346-00-00-002 (TRACT C), TO FORM RESIDUAL TRACT C 137.1 ± ACRES, RESIDUAL TRACT B-2-2 22.91 ACRES AND TRACT C, R/W 0.71 ACRES TO BE DEDICATED AS A PUBLIC RIGHT OF WAY AND SHOWING TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.63 ACRES PREPARED FOR PENNY CREEK ASSOCIATES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by Hoffman Lester & Associates, Inc., dated June 11, 2001, and recorded August 29, 2001, in the Charleston County RMC Office in Plat Book EF at Page 23 (the "Plat"), said property having such location, size, shape, dimensions, courses, distances, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that certain streets, roads, drives and cul-de-sacs situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina and being shown and designated as "FENWICK HALL ALLEÉ R/W VARIES" on a plat entitled, "PLAT DEDICATING FENWICK HALL ALLEÉ, VARIABLE RIGHT-OF-WAY (TMS NO 346-00-00-078 TRACT C) TO THE USE OF THE PUBLIC CONTAINING 0.71 ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by Hoffman Lester Associates, Inc., dated August 27, 2001, and recorded November 1, 2001, in the RMC Office for Charleston County, South Carolina in Plat Book EF at Page 157. Said streets, roads, drives and cul-de-sacs butting and bounding, measuring and containing, and having such courses and distances as shown are shown on said plat, it being the intent of this legal description to convey the entire right-of-way. Reference being had to the aforesaid plat for a more full and complete description, being all of the said dimensions, a little more or a little less. Together with an exclusive easement for drainage and maintenance purposes over all drainage easement shown on the said plat.

LESS AND EXCEPTING: ALL that certain streets, roads, drives and cul-de-sacs situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina and being shown and designated as "EXTENSION OF FENWICK HALL ALLEÉ" on a plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 (TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-

004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE AN EXTENSION OF FENWICK HALL ALLEE (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895 ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES PREPARED FOR PENNY CREEK ASSOCIATES, LLC AND FENWICK TARRAGON APARTMENTS, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by HLA, Inc., dated December 6, 2004, and recorded March 25, 2005, in the RMC Office for Charleston County, South Carolina in Plat Book EH at Page 817. Said streets, roads, drives and cul-de-sacs butting and bounding, measuring and containing, and having such courses and distances as shown are shown on said plat, it being the intent of this legal description to convey the entire right-of-way. Reference being had to the aforesaid plat for a more full and complete description, being all of the said dimensions, a little more or a little less. Together with an exclusive easement for drainage and maintenance purposes over all drainage easement shown on the said plat.

LESS AND EXCEPTING: ALL that certain piece, parcel or lot of land, situate, lying and being in the City of Charleston, Charleston County, South Carolina, and described as "LOT 1" on a plat prepared by GPA Professional Land Surveyors entitled, "SUBDIVISION PLAT SHOWING THE SUBDIVISION OF TMS# 346-00-00-002 TO CREATE NEW LOTS 1, 2, 3, and RESIDUAL, THE PRESERVE AT FENWICK PLANTATION OWNED BY PENNY CREEK ASSOCIATES, LLC," dated April 12, 2005, and recorded April 26, 2005, in Plat Book EH at Page 884 in the RMC Office for Charleston County, South Carolina.

LESS AND EXCEPTING: ALL that parcel, piece or lot of land, situate, lying and being located on Johns Island, Charleston County, South Carolina, shown as "LOT 15 7,871 SF 0.181 AC" on a plat entitled, "A FINAL SUBDIVISION PLAT OF A PORTION OF THE PRESERVE AT FENWICK PLANTATION LOTS 19 THRU 25, LOTS 31 THRU 35 AND PUBLIC RIGHT-OF-WAY BEING A PORTION OF LOT 1, OWNED BY EPIC DEVELOPMENT GROUP, LLC AND LOT 15, HELD IN TRUST AND TO BE CONVEYED TO EPIC DEVELOPMENT GROUP, LLC, BEING A PORTION OF LOT 3 AND EASEMENTS LOCATED ON LOT 2, OWNED BY PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated January 25, 2006, last revised April 13, 2006, and recorded May 5, 2006, in Plat Book EJ at Pages 722-727, in the RMC Office for Charleston County. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those pieces, parcels or lots of land located in the City of Charleston, Charleston County, South Carolina and shown and designated as "P.O.A. OPEN SPACE 9,701 SF 0.223 AC," "P.O.A. OPEN SPACE 23,630 SF

0.543 AC” and “P.O.A. OPEN SPACE 26,343 SF 0.605 AC” on a plat entitled, “A FINAL SUBDIVISION PLAT OF A PORTION OF THE PRESERVE AT FENWICK PLANTATION LOTS 19 THRU 25, LOTS 31 THRU 35 AND PUBLIC RIGHT-OF-WAY BEING A PORTION OF LOT 1, OWNED BY EPIC DEVELOPMENT GROUP, LLC AND LOT 15, HELD IN TRUST AND TO BE CONVEYED TO EPIC DEVELOPMENT GROUP, LLC, BEING A PORTION OF LOT 3 AND EASEMENTS LOCATED ON LOT 2, OWNED BY PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA,” by Southeastern Surveying of Charleston, Inc., dated January 25, 2006, last revised April 13, 2006, and recorded May 5, 2006, in Plat Book EJ at Pages 722-727, in the RMC Office for Charleston County. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that parcel, piece or lot of land, situate, lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown as “LOT A-1” on a plat entitled, “A SUBDIVISION PLAT OF LOT 3 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT A-1 LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA,” prepared by Southeastern Surveying of Charleston, Inc., dated May 10, 2006, and recorded June 15, 2006, in Plat Book DF at Page 133, in the RMC Office for Charleston County. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that parcel, piece or lot of land, situate, lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as “LOT 40 12,690 SF 0.291 AC #1648” on a plat entitled, “A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC THE PRESERVE AT FENWICK PLANTATION TO CREATE LOT 40, CONTAINING 0.291 ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA,” by Southeastern Surveying of Charleston, Inc., dated June 25, 2008, and recorded March 4, 2009, in Plat Book L09 at Page 0097, in the RMC Office for Charleston County, South Carolina. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those certain pieces, parcels or lots of land, situate lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as “LOT 52” and “LOT 53” on that certain plat entitled, “A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT 52, LOT 53 AND ZURLO WAY RIGHT-OF-WAY, THE PRESERVE AT FENWICK PLANTATION LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA,” by SWA Surveying LLC, dated June 9, 2013, and recorded July 2, 2013, in Plat Book L13 at Page 0238, in the RMC Office for Charleston County. Said lots having such

size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that certain piece, parcel or lot of land, situate lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as LOT 13 on that certain plat entitled, "A SUBDIVISION PLAT OF RESIDUAL LOT 3 OWNED BY PENNY CREEK ASSOCIATES, LLC THE PRESERVE AT FENWICK PLANTATION TO CREATE A NEW LOT 13, CONTAINING 0.187 ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated June 25, 2008, revised June 3, 2010, and recorded June 9, 2010, in the RMC Office for Charleston County, South Carolina in Plat Book L10 at Page 0154. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those certain pieces, parcels or lots of land, situate lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as LOT 58 and LOT 59 on that certain plat entitled, "A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT 58, #1612 ZURLO WAY AND LOT 59, #1608 ZURLO WAY, THE PRESERVE AT FENWICK PLANTATION LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by SWA Surveying LLC, dated March 7, 2014, and recorded March 20, 2014, in the RMC Office for Charleston County, South Carolina in Plat Book L14 at Page 0094. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

DERIVATION: BEING a portion of the same property conveyed to Penny Creek Associates, L.L.C. by (i) deed of Fenwick Acres, a Partnership, dated March 25, 1999, and recorded March 25, 1999, in the RMC Office for Charleston County, South Carolina in Book D-323 at Page 311; and (ii) deed of Julius H. Weil, Jr. dated March 25, 1999, and recorded March 25, 1999, in the said RMC Office in Book D-323 at Page 439.

<u>Property</u>	<u>TMS#</u>
Residual Tract C (55.19 acres)	346-00-00-002
Lot 2 Residual (14.46 acres)	346-00-00-258
Lot 3 Residual (9.76 acres)	346-00-00-259
Zurlo Way (Private R/W)	346-00-00-781

EXHIBIT "A-2"

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as Tract B-2-1, said to contain 11.645 total acres, as shown on a plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT B-2-1 TMS NO. 346-00-00-004 CONTAINING 24.895 ACRES INTO TRACT B-2-3 (12.250 ACRES) AND RESIDUAL TRACT B-2-1 (12.645 ACRES) PROPERTY OF PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by HLA INC., dated December 10, 2004, and recorded in Plat Book EH at Page 903, in the R.M.C. Office for Charleston County (herein after "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

BEING a portion of the same property conveyed to Penny Creek Associates, LLC by deed of FHP Realty Company, a Partnership, dated August 7, 2000, and recorded August 8, 2000, in the RMC Office for Charleston County, South Carolina in Book O-352 at Page 691.

TMS#: 346-00-00-004

ALSO

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as Tract B-2-2, said to contain 22.91 acres total, more or less, as shown on a plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT B-2-1 TMS NO. 346-00-00-004 CONTAINING 24.895 ACRES INTO TRACT B-2-3 (12.250 ACRES) AND RESIDUAL TRACT B-2-1 (12.645 ACRES) PROPERTY OF PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by HLA INC., dated December 10, 2004, and recorded in Plat Book EH at Page 903, in the R.M.C. Office for Charleston County (herein after "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

BEING a portion of the same property conveyed to Penny Creek Associates, LLC by deed of FHP Realty Company, a Partnership, dated August 7, 2000, and recorded August 8, 2000, in the RMC Office for Charleston County, South Carolina in Book O-352 at Page 691.

TMS#: 346-00-00-076

ALSO

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, State of South Carolina, shown and designated as Lot 2, said to contain 16.41 total acres, more or less, as shown on a plat entitled, "SHOWING THE SUBDIVISION OF TMS# 346-00-00-002 TO CREATE NEW LOTS 1, 2, 3, AND RESIDUAL THE PRESERVE AT FENWICK PLANTATION TO BE OWNED BY EPIC DEVELOPMENT, LLC THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by GPA Professional Land Surveyors, dated May 15, 2005, and recorded in Plat Book EJ at Page 107, in the R.M.C. Office for Charleston County, South Carolina (hereinafter "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

LESS AND EXCEPTING: ALL that parcel, piece or lot of land, situate, lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as "LOT 40 12,690 SF 0.291 AC #1648" on a plat entitled, "A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC THE PRESERVE AT FENWICK PLANTATION TO CREATE LOT 40, CONTAINING 0.291 ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated June 25, 2008, and recorded March 4, 2009, in Plat Book L09 at Page 0097, in the RMC Office for Charleston County, South Carolina. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those certain pieces, parcels or lots of land, situate lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as "LOT 52" and "LOT 53" on that certain plat entitled, "A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT 52, LOT 53 AND ZURLO WAY RIGHT-OF-WAY, THE PRESERVE AT FENWICK PLANTATION LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by SWA Surveying LLC, dated June 9, 2013, and recorded July 2, 2013, in Plat Book L13 at Page 0238, in the RMC Office for Charleston County. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those certain pieces, parcels or lots of land, situate lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as LOT 58 and LOT 59 on that certain plat entitled, "A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT 58, #1612 ZURLO WAY AND LOT 59, #1608 ZURLO WAY, THE PRESERVE AT FENWICK PLANTATION LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by SWA Surveying LLC, dated March 7, 2014, and

recorded March 20, 2014, in the RMC Office for Charleston County, South Carolina in Plat Book L14 at Page 0094. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

BEING a portion of the same property conveyed to Penny Creek Associates, L.L.C. by (i) deed of Fenwick Acres, a Partnership, dated March 25, 1999, and recorded March 25, 1999, in the RMC Office for Charleston County, South Carolina in Book D-323 at Page 311; and (ii) deed of Julius H. Weil, Jr. dated March 25, 1999, and recorded March 25, 1999, in the said RMC Office in Book D-323 at Page 439.

<u>Property</u>	<u>TMS#</u>
Lot 2 Residual (14.46 acres)	346-00-00-258
Zurlo Way (Private R/W)	346-00-00-781

ALSO

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, State of South Carolina, shown and designated as Lot 3, said to contain 11.96 total acres, more or less, as shown on a plat entitled, "SHOWING THE SUBDIVISION OF TMS# 346-00-00-002 TO CREATE NEW LOTS 1, 2, 3, AND RESIDUAL THE PRESERVE AT FENWICK PLANTATION TO BE OWNED BY EPIC DEVELOPMENT, LLC THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by GPA Professional Land Surveyors, dated May 15, 2005, and recorded in Plat Book EJ at Page 107, in the R.M.C. Office for Charleston County, South Carolina (hereinafter "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

LESS AND EXCEPTING: ALL that parcel, piece or lot of land, situate, lying and being located on Johns Island, Charleston County, South Carolina, shown as "LOT 15 7,871 SF 0.181 AC" on a plat entitled, "A FINAL SUBDIVISION PLAT OF A PORTION OF THE PRESERVE AT FENWICK PLANTATION LOTS 19 THRU 25, LOTS 31 THRU 35 AND PUBLIC RIGHT-OF-WAY BEING A PORTION OF LOT 1, OWNED BY EPIC DEVELOPMENT GROUP, LLC AND LOT 15, HELD IN TRUST AND TO BE CONVEYED TO EPIC DEVELOPMENT GROUP, LLC, BEING A PORTION OF LOT 3 AND EASEMENTS LOCATED ON LOT 2, OWNED BY PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated January 25, 2006, last revised April 13, 2006, and recorded May 5, 2006, in Plat Book EJ at Pages 722-727, in the RMC Office for Charleston County. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those pieces, parcels or lots of land located in the City of Charleston, Charleston County, South Carolina and shown and designated as "P.O.A. OPEN SPACE 9,701 SF 0.223 AC," "P.O.A. OPEN SPACE 23,630 SF 0.543 AC" and "P.O.A. OPEN SPACE 26,343 SF 0.605 AC" on a plat entitled, "A FINAL SUBDIVISION PLAT OF A PORTION OF THE PRESERVE AT FENWICK PLANTATION LOTS 19 THRU 25, LOTS 31 THRU 35 AND PUBLIC RIGHT-OF-WAY BEING A PORTION OF LOT 1, OWNED BY EPIC DEVELOPMENT GROUP, LLC AND LOT 15, HELD IN TRUST AND TO BE CONVEYED TO EPIC DEVELOPMENT GROUP, LLC, BEING A PORTION OF LOT 3 AND EASEMENTS LOCATED ON LOT 2, OWNED BY PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated January 25, 2006, last revised April 13, 2006, and recorded May 5, 2006, in Plat Book EJ at Pages 722-727, in the RMC Office for Charleston County. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that parcel, piece or lot of land, situate, lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown as "LOT A-1" on a plat entitled, "A SUBDIVISION PLAT OF LOT 3 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT A-1 LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by Southeastern Surveying of Charleston, Inc., dated May 10, 2006, and recorded June 15, 2006, in Plat Book DF at Page 133, in the RMC Office for Charleston County. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that certain piece, parcel or lot of land, situate lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as LOT 13 on that certain plat entitled, "A SUBDIVISION PLAT OF RESIDUAL LOT 3 OWNED BY PENNY CREEK ASSOCIATES, LLC THE PRESERVE AT FENWICK PLANTATION TO CREATE A NEW LOT 13, CONTAINING 0.187 ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated June 25, 2008, revised June 3, 2010, and recorded June 9, 2010, in the RMC Office for Charleston County, South Carolina in Plat Book L10 at Page 0154. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

BEING a portion of the same property conveyed to Penny Creek Associates, L.L.C. by (i) deed of Fenwick Acres, a Partnership, dated March 25, 1999, and recorded March 25, 1999, in the RMC Office for Charleston County, South Carolina in Book D-323 at Page 311; and (ii) deed of Julius H. Weil, Jr. dated March 25, 1999, and recorded March 25, 1999, in the said RMC Office in Book D-323 at Page 439.

Property

TMS#

Lot 3 Residual (9.76 acres)

346-00-00-259

2014-CP-10-4946

NOTICE OF SALE

BY VIRTUE of the Order heretofore granted in the case of Wells Fargo Bank, N.A., as Successor by Merger to Wachovia Bank, National Association, as Successor by Merger to First Union National Bank, against Penny Creek Associates, L.L.C. a/k/a Penny Creek Associates, LLC; Michel F. LaPlante a/k/a Michel Laplante a/k/a Mitch Laplante; Charlotte R. Zurlo; Eugene J. Zurlo; Charlotte R. Zurlo and Eugene J. Zurlo, as Co-Trustees of The Nicklaus Lane Realty Trust No. 1 under Declaration of Trust dated May 22, 1998, and The Zurlo Investment Trust No. 1 pursuant to trust agreement dated August 10, 1998; Fenwick Hall Plantation Property Owners Assn., Inc. a/k/a Fenwick Hall Plantation Property Owners' Association, Inc.; Preserve at Fenwick Hall Property Owners Association, Inc. a/k/a The Preserve at Fenwick Hall Property Owners' Association, Inc.; and The Grove at Fenwick Plantation Condominium Association, Inc., Case No. 2014-CP-10-04946, the undersigned as Master-in-Equity, or his designee, will offer for sale at public auction at the Charleston County Judicial Center, 100 Broad Street, Charleston, South Carolina, on **August 1, 2017, at 11:00 a.m.**, the following-described property:

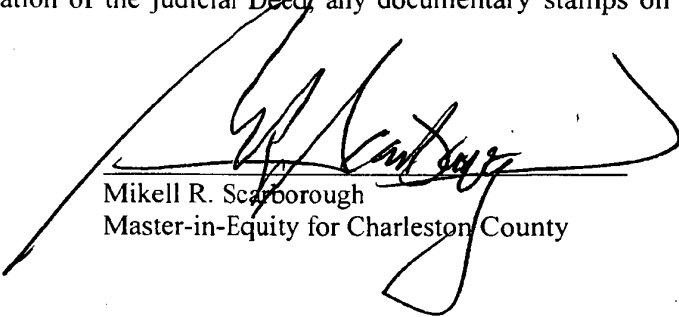
SEE ATTACHED EXHIBITS "A-1" AND "A-2".

SUBJECT TO CHARLESTON COUNTY TAXES AND ASSESSMENTS.

TERMS OF SALE: The successful bidder, other than the Plaintiff, will deposit with the Court, at the conclusion of the bidding, five (5%) percent of the bid, in cash or its equivalent, as evidence of good faith, same to be applied to the purchase price only in case of compliance with the bid, but to be forfeited and applied first to costs and then to Plaintiff's debt in the case of non-compliance. Should the last and highest bidder fail or refuse to make the required deposit at the time of the bid or to comply with the other terms of the bid within thirty (30) days, then the Master-in-Equity or his designee may resell the property on the same terms and conditions on some subsequent date to be determined by the Court, at the risk of the said highest bidder.

As the right to seek a deficiency judgment has been demanded, the bidding will remain open for thirty (30) days after the sale, unless waived by the Plaintiff, in writing, prior to the sale.

Purchaser to pay for preparation of the judicial Deed, any documentary stamps on the Deed and recording of the Deed.



Mikell R. Scarborough
Master-in-Equity for Charleston County

June 21, 2017

Charleston, South Carolina

Robert C. Byrd
Parker Poe Adams & Bernstein LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
(843) 727-2650

Attorneys for the Plaintiff

EXHIBIT A-1**Tract B-2:**

ALL that piece, parcel or tract of land, together with the improvements thereon, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as "Tract 'B-2' 42.7 Acres," on a plat entitled, "SUBDIVISION OF PROPERTY IN THE NAME OF F-H-P REALTY LOCATED ON JOHNS ISLAND, CHARLESTON COUNTY, S.C.," by Forrest G. Calvert, RLS, dated September 17, 1979, and recorded in the RMC Office for Charleston County, South Carolina (hereinafter the "RMC Office") in Plat Book AO at Page 74, said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully be shown.

And Tract A:

ALL that piece, parcel or tract of land, together with the improvements thereon, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as "FHP Realty Tract 'A' 5.503 Acres" on a plat entitled, "PLAT SHOWING THE ABANDONMENT OF PROPERTY LINES FOR TMS NO. 346-00-00-12 AND TMS NO. 346-00-00-011, AND THE SUBSEQUENT SUBDIVISION OF TMS NO. 346-00-00-007 INTO TRACT 'A' CONTAINING 5.503 ACRES AND TRACT 'B' CONTAINING 7.497 ACRES OWNED BY FHP REALTY LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Hoffman Lester Associates, Inc., dated September 24, 1997, and recorded January 20, 1998, in the aforesaid RMC Office in Plat Book EC at Page 263.

The aforesaid Tract B-2 and Tract A are also more particularly shown on that certain plat entitled, "PLAT SHOWING PROPERTY LINE BETWEEN TMS NO. 346-00-00-004, TRACT B-2 (CONTAINING 42.49 ACRES) AND TMS NO. 346-00-00-007, RESIDUAL TRACT B (CONTAINING 5.50 ACRES) TO FORM TRACT B-2 (CONTAINING 47.99 ACRES), OWNED BY FHP REALTY LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by Hoffman Lester and Associates, Inc., dated April 7, 2000, and recorded as Exhibit "___" [sic: "C"] to that certain deed of conveyance from FHP Realty Company, a Partnership, to Penny Creek Associates, L.L.C., and also about to be recorded in the RMC Office for Charleston County, S.C.

Note: The above-referenced deed from FHP Realty Company, a Partnership, to Penny Creek Associates, L.L.C. is dated August 7, 2000, and recorded in the RMC Office for Charleston County on August 8, 2000, in Book O-352 at Page 691.

TOGETHER WITH a twenty-foot (20') non-exclusive easement in common with Helena Igoe Blanchard, her heirs and assigns, and others entitled thereto, in favor of "Tract B" above-described, for ingress and egress over, upon and across that certain twenty-foot (20') easement extending from Maybank Highway on the south to "Tract A" on the north, as said Tract A is shown on that certain plat recorded in Plat Book AK at Page 76 in the RMC Office, which easement is granted in that certain deed of conveyance from Helena Igoe Blanchard to FHP Realty Company, a Partnership, dated April 27, 1978, and recorded in Book P-115 at Page 273, in the RMC Office.

LESS AND EXCEPTING: ALL that certain streets, roads, drives and cul-de-sacs situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina and being shown and designated as "FENWICK HALL ALLEÉ R/W VARIES" on a plat entitled, "PLAT DEDICATING FENWICK HALL ALLEÉ, VARIABLE RIGHT-OF-WAY (TMS NO 346-00-00-078 TRACT C) TO THE USE OF THE PUBLIC CONTAINING 0.71 ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by Hoffman Lester Associates, Inc., dated August 27, 2001, and recorded November 1, 2001, in the RMC Office for Charleston County, South Carolina in Plat Book EF at Page 157. Said streets, roads, drives and cul-de-sacs butting and bounding, measuring and containing, and having such courses and distances as shown are shown on said plat, it being the intent of this legal description to convey the entire right-of-way. Reference being had to the aforesaid plat for a more full and complete description, being all of the said dimensions, a little more or a little less. Together with an exclusive easement for drainage and maintenance purposes over all drainage easement shown on the said plat.

LESS AND EXCEPTING: ALL that certain streets, roads, drives and cul-de-sacs situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina and being shown and designated as "EXTENSION OF FENWICK HALL ALLEÉ" on a plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 (TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE AN EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895 ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES PREPARED FOR PENNY CREEK ASSOCIATES, LLC AND FENWICK TARRAGON APARTMENTS, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by HLA, Inc., dated December 6, 2004, and recorded March 25, 2005, in the RMC Office for Charleston County, South Carolina in Plat Book EH at Page 817. Said streets, roads, drives and cul-de-sacs butting and bounding, measuring and containing, and having such courses and distances as shown are shown on said plat, it being the intent of this legal description to convey the entire right-of-way. Reference being had to the aforesaid plat for a more full and complete description, being all of the said

dimensions, a little more or a little less. Together with an exclusive easement for drainage and maintenance purposes over all drainage easement shown on the said plat.

LESS AND EXCEPTING: ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, measuring and containing 12.250 acres as more fully shown and designated as "PROPOSED TRACT B-2-3" on that plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT B-2-1 TMS NO. 346-00-00-004 CONTAINING 24.895 ACRES INTO TRACT B-2-3 (12.250 ACRES) AND RESIDUAL TRACT B-2-1 (12.645 ACRES) PROPERTY OF PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by HLA INC., dated December 10, 2004, and recorded in Plat Book EH at Page 903, in the RMC Office for Charleston County, South Carolina, said parcel having such location, buttings, boundings, courses and distances as by references to said plat more fully appear.

THE ABOVE REFERENCED PROPERTY IS ALSO KNOWN AS

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as **Tract B-2-1**, said to contain 11.645 total acres, as shown on a plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT B-2-1 TMS NO. 346-00-00-004 CONTAINING 24.895 ACRES INTO TRACT B-2-3 (12.250 ACRES) AND RESIDUAL TRACT B-2-1 (12.645 ACRES) PROPERTY OF PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by HLA INC., dated December 10, 2004, and recorded in Plat Book EH at Page 903, in the R.M.C. Office for Charleston County (herein after "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

BEING a portion of the same property conveyed to Penny Creek Associates, LLC by deed of FHP Realty Company, a Partnership, dated August 7, 2000, and recorded August 8, 2000, in the RMC Office for Charleston County, South Carolina in Book O-352 at Page 691.

TMS#: 346-00-00-004

AND

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as **Tract B-2-2**, said to contain 22.91 acres total, more or less, as shown on a plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT B-2-1 TMS NO. 346-00-00-004 CONTAINING 24.895 ACRES INTO TRACT B-2-3 (12.250 ACRES) AND RESIDUAL TRACT B-2-1 (12.645 ACRES) PROPERTY OF PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by HLA INC., dated December 10, 2004, and recorded in Plat Book EH at Page 903, in the R.M.C. Office for Charleston County (herein after "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

BEING a portion of the same property conveyed to Penny Creek Associates, LLC by deed of FHP Realty Company, a Partnership, dated August 7, 2000, and recorded August 8, 2000, in the RMC Office for Charleston County, South Carolina in Book O-352 at Page 691.

TMS#: 346-00-00-076

ALSOTract C:

ALL that certain piece, parcel or lot of land, situate, lying and being in the City of Charleston, County of Charleston, South Carolina, and being shown and delineated as TRACT "C," 59.280 acres of highland and 95.063 acres of marshland, on a plat by Forrest G. Calvert, dated November, 1977, entitled in part "PLAT SHOWING SUBDIVISION OF FENWICK HALL PLANTATION, 237.176 AC. HIGHLAND 148.058 AC. MARSH LOCATED ON JOHNS ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA. PROPERTY OF MRS. HELENA IGOE BLANCHARD," and recorded in Plat Book AK at Page 76, in the RMC Office for Charleston County, South Carolina (the "RMC Office"), and having such location, size, shape, buttings, boundings, and dimensions as will appear by reference to said plat which is incorporated herein by reference, be all the dimensions and measurements shown thereon a little more or less.

SAVING AND EXCEPTING that certain piece, parcel or lot of land, situate, lying and being in Charleston County, South Carolina, described as 0.97 acres of land as conveyed to the South Carolina Department of Transportation in that certain deed of conveyance from Fenwick Acres dated April 16, 1998, and recorded July 28, 1998, in Book R-307 at Page 246, in the RMC Office.

The aforesaid property and said 0.97 acre parcel are more particularly shown on that certain plat prepared by Southeastern Surveying, Inc. entitled, "A BOUNDARY SURVEY OF TRACT 'C' CONTAINING 153.53 ACRES, OWNED BY FENWICK ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," dated March 23, 1999, and recorded in the RMC Office in Plat Book ED at Page 70.

LESS AND EXCEPTING: ALL that certain piece, parcel or tract of land, situate, lying and being in the City of Charleston, Charleston County, South Carolina, containing 15.63 acres, more or less, shown and designated as "TRACT C-1" on that certain plat entitled, "PLAT SHOWING THE ADJUSTMENT OF THE PROPERTY LINE BETWEEN TMS 346-00-00-078 (TRACT C, R/W), TMS 346-00-00-076 (TRACT B-2-2) & TMS 346-00-00-002 (TRACT C), TO FORM RESIDUAL TRACT C 137.1 ± ACRES, RESIDUAL TRACT B-2-2 22.91 ACRES AND TRACT C, R/W 0.71 ACRES TO DEDICATED AS A PUBLIC RIGHT OF WAY AND SHOWING TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.63 ACRES PREPARED FOR PENNY CREEK ASSOCIATES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by Hoffman Lester & Associates, Inc., dated June 11, 2001, and recorded August 29, 2001, in the Charleston County RMC Office in Plat Book EF at Page 23 (the "Plat"), said property having such location, size, shape, dimensions, courses, distances, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that certain streets, roads, drives and cul-de-sacs situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina and being shown and designated as "FENWICK HALL ALLEÉ R/W VARIES" on a plat entitled, "PLAT DEDICATING FENWICK HALL ALLEÉ, VARIABLE RIGHT-OF-WAY (TMS NO 346-00-00-078 TRACT C) TO THE USE OF THE PUBLIC CONTAINING 0.71 ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by Hoffman Lester Associates, Inc., dated August 27, 2001, and recorded November 1, 2001, in the RMC Office for Charleston County, South Carolina in Plat Book EF at Page 157. Said streets, roads, drives and cul-de-sacs butting and bounding, measuring and containing, and having such courses and distances as shown are shown on said plat, it being the intent of this legal description to convey the entire right-of-way. Reference being had to the aforesaid plat for a more full and complete description, being all of the said dimensions, a little more or a little less. Together with an exclusive easement for drainage and maintenance purposes over all drainage easement shown on the said plat.

LESS AND EXCEPTING: ALL that certain streets, roads, drives and cul-de-sacs situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina and being shown and designated as "EXTENSION OF FENWICK HALL ALLEÉ" on a plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 (TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE AN

EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895 ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES PREPARED FOR PENNY CREEK ASSOCIATES, LLC AND FENWICK TARRAGON APARTMENTS, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by HLA, Inc., dated December 6, 2004, and recorded March 25, 2005, in the RMC Office for Charleston County, South Carolina in Plat Book EH at Page 817. Said streets, roads, drives and cul-de-sacs butting and bounding, measuring and containing, and having such courses and distances as shown are shown on said plat, it being the intent of this legal description to convey the entire right-of-way. Reference being had to the aforesaid plat for a more full and complete description, being all of the said dimensions, a little more or a little less. Together with an exclusive easement for drainage and maintenance purposes over all drainage easement shown on the said plat.

LESS AND EXCEPTING: ALL that certain piece, parcel or lot of land, situate, lying and being in the City of Charleston, Charleston County, South Carolina, and described as "LOT 1" on a plat prepared by GPA Professional Land Surveyors entitled, "SUBDIVISION PLAT SHOWING THE SUBDIVISION OF TMS# 346-00-00-002 TO CREATE NEW LOTS 1, 2, 3, and RESIDUAL, THE PRESERVE AT FENWICK PLANTATION OWNED BY PENNY CREEK ASSOCIATES, LLC," dated April 12, 2005, and recorded April 26, 2005, in Plat Book EH at Page 884 in the RMC Office for Charleston County, South Carolina.

LESS AND EXCEPTING: ALL that parcel, piece or lot of land, situate, lying and being located on Johns Island, Charleston County, South Carolina, shown as "LOT 15 7,871 SF 0.181 AC" on a plat entitled, "A FINAL SUBDIVISION PLAT OF A PORTION OF THE PRESERVE AT FENWICK PLANTATION LOTS 19 THRU 25, LOTS 31 THRU 35 AND PUBLIC RIGHT-OF-WAY BEING A PORTION OF LOT 1, OWNED BY EPIC DEVELOPMENT GROUP, LLC AND LOT 15, HELD IN TRUST AND TO BE CONVEYED TO EPIC DEVELOPMENT GROUP, LLC, BEING A PORTION OF LOT 3 AND EASEMENTS LOCATED ON LOT 2, OWNED BY PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated January 25, 2006, last revised April 13, 2006, and recorded May 5, 2006, in Plat Book EJ at Pages 722-727, in the RMC Office for Charleston County. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those pieces, parcels or lots of land located in the City of Charleston, Charleston County, South Carolina and shown and designated as "P.O.A. OPEN SPACE 9,701 SF 0.223 AC," "P.O.A. OPEN SPACE 23,630 SF 0.543 AC" and "P.O.A. OPEN SPACE 26,343 SF 0.605 AC" on a plat entitled, "A FINAL SUBDIVISION PLAT OF A PORTION OF THE

PRESERVE AT FENWICK PLANTATION LOTS 19 THRU 25, LOTS 31 THRU 35 AND PUBLIC RIGHT-OF-WAY BEING A PORTION OF LOT 1, OWNED BY EPIC DEVELOPMENT GROUP, LLC AND LOT 15, HELD IN TRUST AND TO BE CONVEYED TO EPIC DEVELOPMENT GROUP, LLC, BEING A PORTION OF LOT 3 AND EASEMENTS LOCATED ON LOT 2, OWNED BY PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated January 25, 2006, last revised April 13, 2006, and recorded May 5, 2006, in Plat Book EJ at Pages 722-727, in the RMC Office for Charleston County. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that parcel, piece or lot of land, situate, lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown as "LOT A-1" on a plat entitled, "A SUBDIVISION PLAT OF LOT 3 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT A-1 LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by Southeastern Surveying of Charleston, Inc., dated May 10, 2006, and recorded June 15, 2006, in Plat Book DF at Page 133, in the RMC Office for Charleston County. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that parcel, piece or lot of land, situate, lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as "LOT 40 12,690 SF 0.291 AC #1648" on a plat entitled, "A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC THE PRESERVE AT FENWICK PLANTATION TO CREATE LOT 40, CONTAINING 0.291 ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated June 25, 2008, and recorded March 4, 2009, in Plat Book L09 at Page 0097, in the RMC Office for Charleston County, South Carolina. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those certain pieces, parcels or lots of land, situate lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as "LOT 52" and "LOT 53" on that certain plat entitled, "A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT 52, LOT 53 AND ZURLO WAY RIGHT-OF-WAY, THE PRESERVE AT FENWICK PLANTATION LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by SWA Surveying LLC, dated June 9, 2013, and recorded July 2, 2013, in Plat Book L13 at Page 0238, in the RMC Office for Charleston County. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that certain piece, parcel or lot of land, situate lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as LOT 13 on that certain plat entitled, "A SUBDIVISION PLAT OF RESIDUAL LOT 3 OWNED BY PENNY CREEK ASSOCIATES, LLC THE PRESERVE AT FENWICK PLANTATION TO CREATE A NEW LOT 13, CONTAINING 0.187 ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated June 25, 2008, revised June 3, 2010, and recorded June 9, 2010, in the RMC Office for Charleston County, South Carolina in Plat Book L10 at Page 0154. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those certain pieces, parcels or lots of land, situate lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as LOT 58 and LOT 59 on that certain plat entitled, "A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT 58, #1612 ZURLO WAY AND LOT 59, #1608 ZURLO WAY, THE PRESERVE AT FENWICK PLANTATION LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by SWA Surveying LLC, dated March 7, 2014, and recorded March 20, 2014, in the RMC Office for Charleston County, South Carolina in Plat Book L14 at Page 0094. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

DERIVATION: BEING a portion of the same property conveyed to Penny Creek Associates, L.L.C. by (i) deed of Fenwick Acres, a Partnership, dated March 25, 1999, and recorded March 25, 1999, in the RMC Office for Charleston County, South Carolina in Book D-323 at Page 311; and (ii) deed of Julius H. Weil, Jr. dated March 25, 1999, and recorded March 25, 1999, in the said RMC Office in Book D-323 at Page 439.

<u>Property</u>	<u>TMS#</u>
Residual Tract C (55.19 acres)	346-00-00-002
Lot 2 Residual(14.46 acres)	346-00-00-258
Lot 3 Residual(9.76 acres)	346-00-00-259
Zurlo Way (Private R/W)	346-00-00-781

EXHIBIT "A-2"

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as Tract B-2-1, said to contain 11.645 total acres, as shown on a plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT B-2-1 TMS NO. 346-00-00-004 CONTAINING 24.895 ACRES INTO TRACT B-2-3 (12.250 ACRES) AND RESIDUAL TRACT B-2-1 (12.645 ACRES) PROPERTY OF PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by HLA INC., dated December 10, 2004, and recorded in Plat Book EH at Page 903, in the R.M.C. Office for Charleston County (herein after "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

BEING a portion of the same property conveyed to Penny Creek Associates, LLC by deed of FHP Realty Company, a Partnership, dated August 7, 2000, and recorded August 8, 2000, in the RMC Office for Charleston County, South Carolina in Book O-352 at Page 691.

TMS#: 346-00-00-004

ALSO

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as Tract B-2-2, said to contain 22.91 acres total, more or less, as shown on a plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT B-2-1 TMS NO. 346-00-00-004 CONTAINING 24.895 ACRES INTO TRACT B-2-3 (12.250 ACRES) AND RESIDUAL TRACT B-2-1 (12.645 ACRES) PROPERTY OF PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by HLA INC., dated December 10, 2004, and recorded in Plat Book EH at Page 903, in the R.M.C. Office for Charleston County (herein after "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

BEING a portion of the same property conveyed to Penny Creek Associates, LLC by deed of FHP Realty Company, a Partnership, dated August 7, 2000, and recorded August 8, 2000, in the RMC Office for Charleston County, South Carolina in Book O-352 at Page 691.

TMS#: 346-00-00-076

ALSO

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, State of South Carolina, shown and designated as Lot 2, said to contain 16.41 total acres, more or less, as shown on a plat entitled, "SHOWING THE SUBDIVISION OF TMS# 346-00-00-002 TO CREATE NEW LOTS 1, 2, 3, AND RESIDUAL THE PRESERVE AT FENWICK PLANTATION TO BE OWNED BY EPIC DEVELOPMENT, LLC THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by GPA Professional Land Surveyors, dated May 15, 2005, and recorded in Plat Book EJ at Page 107, in the R.M.C. Office for Charleston County, South Carolina (hereinafter "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

LESS AND EXCEPTING: ALL that parcel, piece or lot of land, situate, lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as "LOT 40 12,690 SF 0.291 AC #1648" on a plat entitled, "A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC THE PRESERVE AT FENWICK PLANTATION TO CREATE LOT 40, CONTAINING 0.291 ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated June 25, 2008, and recorded March 4, 2009, in Plat Book L09 at Page 0097, in the RMC Office for Charleston County, South Carolina. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those certain pieces, parcels or lots of land, situate lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as "LOT 52" and "LOT 53" on that certain plat entitled, "A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT 52, LOT 53 AND ZURLO WAY RIGHT-OF-WAY, THE PRESERVE AT FENWICK PLANTATION LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by SWA Surveying LLC, dated June 9, 2013, and recorded July 2, 2013, in Plat Book L13 at Page 0238, in the RMC Office for Charleston County. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those certain pieces, parcels or lots of land, situate lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as LOT 58 and LOT 59 on that certain plat entitled, "A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT 58, #1612 ZURLO WAY AND LOT 59, #1608 ZURLO WAY, THE PRESERVE AT FENWICK PLANTATION LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by SWA Surveying LLC, dated March 7, 2014, and recorded March 20, 2014, in the RMC Office for Charleston County, South

Carolina in Plat Book L14 at Page 0094. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

BEING a portion of the same property conveyed to Penny Creek Associates, L.L.C. by (i) deed of Fenwick Acres, a Partnership, dated March 25, 1999, and recorded March 25, 1999, in the RMC Office for Charleston County, South Carolina in Book D-323 at Page 311; and (ii) deed of Julius H. Weil, Jr. dated March 25, 1999, and recorded March 25, 1999, in the said RMC Office in Book D-323 at Page 439.

<u>Property</u>	<u>TMS#</u>
Lot 2 Residual (14.46 acres)	346-00-00-258
Zurlo Way (Private R/W)	346-00-00-781

ALSO

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, State of South Carolina, shown and designated as Lot 3, said to contain 11.96 total acres, more or less, as shown on a plat entitled, "SHOWING THE SUBDIVISION OF TMS# 346-00-00-002 TO CREATE NEW LOTS 1, 2, 3, AND RESIDUAL THE PRESERVE AT FENWICK PLANTATION TO BE OWNED BY EPIC DEVELOPMENT, LLC THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by GPA Professional Land Surveyors, dated May 15, 2005, and recorded in Plat Book EJ at Page 107, in the R.M.C. Office for Charleston County, South Carolina (hereinafter "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

LESS AND EXCEPTING: ALL that parcel, piece or lot of land, situate, lying and being located on Johns Island, Charleston County, South Carolina, shown as "LOT 15 7,871 SF 0.181 AC" on a plat entitled, "A FINAL SUBDIVISION PLAT OF A PORTION OF THE PRESERVE AT FENWICK PLANTATION LOTS 19 THRU 25, LOTS 31 THRU 35 AND PUBLIC RIGHT-OF-WAY BEING A PORTION OF LOT 1, OWNED BY EPIC DEVELOPMENT GROUP, LLC AND LOT 15, HELD IN TRUST AND TO BE CONVEYED TO EPIC DEVELOPMENT GROUP, LLC, BEING A PORTION OF LOT 3 AND EASEMENTS LOCATED ON LOT 2, OWNED BY PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated January 25, 2006, last revised April 13, 2006, and recorded May 5, 2006, in Plat Book EJ at Pages 722-727, in the RMC Office for Charleston County. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those pieces, parcels or lots of land located in the City of Charleston, Charleston County, South Carolina and shown and designated as "P.O.A. OPEN SPACE 9,701 SF 0.223 AC," "P.O.A. OPEN SPACE 23,630 SF 0.543 AC" and "P.O.A. OPEN SPACE 26,343 SF 0.605 AC" on a plat entitled, "A FINAL SUBDIVISION PLAT OF A PORTION OF THE PRESERVE AT FENWICK PLANTATION LOTS 19 THRU 25, LOTS 31 THRU 35 AND PUBLIC RIGHT-OF-WAY BEING A PORTION OF LOT 1, OWNED BY EPIC DEVELOPMENT GROUP, LLC AND LOT 15, HELD IN TRUST AND TO BE CONVEYED TO EPIC DEVELOPMENT GROUP, LLC, BEING A PORTION OF LOT 3 AND EASEMENTS LOCATED ON LOT 2, OWNED BY PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated January 25, 2006, last revised April 13, 2006, and recorded May 5, 2006, in Plat Book EJ at Pages 722-727, in the RMC Office for Charleston County. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that parcel, piece or lot of land, situate, lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown as "LOT A-1" on a plat entitled, "A SUBDIVISION PLAT OF LOT 3 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT A-1 LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by Southeastern Surveying of Charleston, Inc., dated May 10, 2006, and recorded June 15, 2006, in Plat Book DF at Page 133, in the RMC Office for Charleston County. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that certain piece, parcel or lot of land, situate lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as LOT 13 on that certain plat entitled, "A SUBDIVISION PLAT OF RESIDUAL LOT 3 OWNED BY PENNY CREEK ASSOCIATES, LLC THE PRESERVE AT FENWICK PLANTATION TO CREATE A NEW LOT 13, CONTAINING 0.187 ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated June 25, 2008, revised June 3, 2010, and recorded June 9, 2010, in the RMC Office for Charleston County, South Carolina in Plat Book L10 at Page 0154. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

BEING a portion of the same property conveyed to Penny Creek Associates, L.L.C. by (i) deed of Fenwick Acres, a Partnership, dated March 25, 1999, and recorded March 25, 1999, in the RMC Office for Charleston County, South Carolina in Book D-323 at Page 311; and (ii) deed of Julius H. Weil, Jr. dated March 25, 1999, and recorded March 25, 1999, in the said RMC Office in Book D-323 at Page 439.

Property

TMS#

Lot 3 Residual (9.76 acres)

346-00-00-259

THE STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	) NINTH JUDICIAL CIRCUIT
	)
MAYBANK 2754, LLC,	) CASE NO.: 2020-CP-10-00209
	)
Plaintiff,	)
	)
vs.	) DEFENDANT SEAMON, WHITESIDE &
	) ASSOCIATES, INC.’S MOTION TO DISMISS
EUGENE J. ZURLO, INDIVIDUALLY AND	) PLAINTIFF’S COMPLAINT AND INITIAL
AS CO-TRUSTEE OF THE EUGENE J.	) MEMORANDUM IN SUPPORT
ZURLO LIVING TRUST DATED	)
DECEMBER 11, 1997, 1776, LLC, BEACH	)
FENWICK, LLC, THE BEACH COMPANY,	)
SEAMON, WHITESIDE & ASSOCIATES,	)
INC., PENNY CREEK ASSOCIATES, LLC,	)
JOHN DOE AND MARY ROE,	)
	)
Defendants.	)

Defendant Seamon, Whiteside & Associates, Inc. (“Seamon Whiteside”), by and through the undersigned counsel, and pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, hereby moves the Court for an Order dismissing Plaintiff Maybank 2754, LLC’s (“Maybank’s”) *Verified Complaint* against Seamon Whiteside for failure to state facts sufficient to constitute/support the causes of action therein. Maybank has not stated facts in its *Verified Complaint* sufficient to maintain its only cause of action against Seamon Whiteside—civil conspiracy, as contained within Count III of Maybank’s *Verified Complaint*. Thus, a dismissal of the civil conspiracy cause of action (which is warranted, as set forth below) will be a dismissal of the entirety of this litigation against Seamon Whiteside. In addition to the law and arguments contained herein, Seamon Whiteside hereby incorporates into this Motion any additional authority, arguments, and precedent cited by any of the Co-Defendants in their Motions to Dismiss the *Verified Complaint*, including but not limited to those grounds expressed by Defendants Beach Fenwick, LLC and The Beach Company in their Motion to Dismiss filed on February 17, 2020, and reserves the right to further assert that additional grounds and arguments apply to Seamon Whiteside for dismissal of this lawsuit.

MAYBANK'S COMPLAINT

On January 13, 2020, Maybank filed a *Verified Complaint* alleging, among other causes of action, that Defendants conspired to conceal a 30 foot private right of way easement when obtaining development approval from the City of Charleston for a property ("Servient Property") adjacent to Maybank's property ("Dominant Property"). Maybank alleges the Dominant Property is located in Charleston County, South Carolina adjacent to the Servient Property owned by Defendant Beach Fenwick, LLC. Maybank claims it secured a 30 foot private right of way easement to permit "pedestrian and vehicular ingress, ingress, and access to, from and over the [Servient] Property" from a prior owner of the property, Defendant Penny Creek Associates, LLC ("Penny Creek"). *Verified Complaint*, at ¶ 15. Penny Creek owned Maybank up until or about October 4, 2013. *Verified Complaint*, at ¶ 13. Penny Creek, of which Defendant Zurlo is an alleged member, transferred Maybank to the Laplante Family and also allegedly, by purported resolution, agreed to grant them and their assigns the easement in question. *Verified Complaint*, at ¶ 15.

The easement was allegedly contingent upon the access road, Pitchfork Road's, completion, which has not occurred; and, the recording of the easement, which has not occurred. *Verified Complaint*, at ¶¶ 16-18. At the conclusion of a seemingly disjointed and contentious derivative and judicial dissolution action leading to foreclosure proceedings of the Servient Property, Defendant 1776, LLC purchased the property at the foreclosure sale and received title through a master's deed. *Verified Complaint*, at ¶¶ 21-30.

During the pendency of the derivative and judicial dissolution action, Maybank alleges that "Seamon Whiteside was hired by Penny Creek to prepare planned unit development guidelines for the Property that were submitted to the City of Charleston for approval." *Verified Complaint*, at ¶ 32. Maybank claims, without any evidence in support, that Seamon Whiteside secured actual knowledge of the easement as a direct result of its involvement with the development process and in working with Penny Creek. *Verified Complaint*, at ¶ 33. Per Maybank's contentions, the development plans prepared by Seamon Whiteside do not have any specific provisions or reservations for the easement once the access road, Pitchfork Road, is completed. *Verified Complaint*, at ¶ 40. Maybank claims that each of the Defendants had actual knowledge of the

easement, but conspired to surreptitiously to conceal the easement by “intentionally and wrongfully omitting references thereof in the various recorded documents, and also in their submissions and representations to the City of Charleston to obtain development approval of the [Servient] Property, and/or assisting in these nefarious efforts, as part of a deceitful scheme to have the [Servient] Property developed without affording any provisions or reservation for the thirty (30) foot private right of way easement.” *Verified Complaint*, at ¶ 44. Maybank alleges that “[u]pon information and belief, as intended by Zurlo and/or all of the Defendants, the [Servient] Property now appears primed for development without any provision or reservation made for the Plaintiff’s thirty (30) foot private right of way easement across the [Servient] Property.” *Verified Complaint*, at ¶ 45.

The first two counts within Maybank’s *Verified Complaint* seek a declaratory judgment under South Carolina Code § 15-53-10, *et. seq.* finding that Maybank has an easement in its favor across the Servient Property and/or that the easement constitutes a restricted covenant that runs with the land. *Verified Complaint*, at ¶¶ 46-50 (Count I); 51-58 (Count II). Maybank brings its civil conspiracy claim in Count III of the *Verified Complaint*, alleging that the Defendants had actual knowledge of the easement and through the direction, guidance, and/or persuasion of Zurlo, the Defendants surreptitiously concealed the easement by “intentionally and wrongfully omitting any references” of the easement in the submissions made to the City of Charleston to secure development approval and/or nefariously through a “deceitful scheme” have the Property developed without affording any provisions or reservations in favor of the easement. *Verified Complaint*, at ¶¶ 59-64. Through the civil conspiracy cause of action, Maybank seeks damages for alleged lost value of the easement. *Verified Complaint*, at ¶¶ 63-64.

Finally, Count IV of Maybank’s *Verified Complaint* seeks a temporary injunction against Defendants Zurlo, 1776, and Beach Fenwick (notably, not Seamon Whiteside) to enjoin them from developing the property until after a trial on the merits of the above claims. *Verified Complaint*, at ¶¶ 65-72. As will be demonstrated below, Maybank fails to sufficiently plead facts within its

Verified Complaint to support its civil conspiracy cause of action against Seamon Whiteside, and therefore the case should be dismissed as to Seamon Whiteside.

LAW AND ARGUMENT

Maybank's claim for civil conspiracy against Seamon Whiteside fails as a matter of law because it fails to plead the essential elements to constitute a claim for conspiracy under SC law. First, Maybank does not allege that any relationship existed between Seamon Whiteside and Maybank to support a finding that Seamon Whiteside acted with specific intent to harm. Second, Maybank does not allege that Seamon Whiteside entered into any agreement with another party to purposely harm Maybank. Third, Maybank does not allege or plead sufficient facts to support the claim under Rule 8, SCRCP or otherwise per SC law. Fourth, Maybank does not allege any additional overt act in furtherance of the alleged conspiracy. Therefore, Maybank's civil conspiracy claim against Seamon Whiteside should be dismissed pursuant to Rule 12(b)(6), SCRCP.

"Under Rule 12(b)(6), a defendant may move to dismiss a complaint due to its 'failure to state facts sufficient to constitute a cause of action.'" *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 753 S.E.2d 846, 850 (S.C. 2014). "In considering a motion to dismiss under Rule 12(b)(6), a court must base its ruling solely on the allegations set forth in the complaint." *Id.* at 850; *Doe v. Marion*, 645 S.E.2d 245, 247 (S.C. 2007). "If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, dismissal under Rule 12(b)(6) is improper." *Carnival Corp.*, 753 S.E.2d at 850; *Doe*, 645 S.E.2d at 247.

I. Maybank failed to plead or demonstrate the requisite relationship existed between Maybank and Seamon Whiteside to sustain its civil conspiracy cause of action.

"A civil conspiracy is a combination of two or more persons joining *for the purpose of* injuring and causing special damage to the plaintiff." *McMillan v. Oconee Mem'l Hosp., Inc.*, 626 S.E.2d 884, 886 (S.C. 2006) (emphasis added); *see also Todd v. S.C. Farm Bureau Mut. Ins. Co.*,

292, 278 S.E.2d 607, 611 (S.C. 1981) (“Conspiracy is the conspiring or combining together to do an unlawful act to the detriment of another or the doing of a lawful act in an unlawful way to the detriment of another.”); *Vaught v. Waites*, 208, 387 S.E.2d 91, 95 (S.C. Ct. App. 1989) (“Civil conspiracy consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage.”).

The focus of the inquiry is thus on the purpose of the agreement: “the essential consideration is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the *primary purpose* or object of the combination is to injure the plaintiff.” *Lee v. Chesterfield Gen. Hosp., Inc.*, 344 S.E.2d 379, 383 (S.C. Ct. App. 1986) (emphasis added). Some evidence that the alleged conspirators “acted with malice towards” the plaintiff is required. *Waldrep Bros. Beauty Supply, Inc. v. Wynn Beauty Supply Co., Inc.*, 992 F.2d 59, 63 (4th Cir. 1993) (applying South Carolina law).

Importantly, when “alleged conspirators acted out of a general desire to make a profit rather than to harm the plaintiff, a claim for civil conspiracy cannot lie.” *Sizemore v. Ga-Pac. Corp.*, Civ. A. No. 6:94-2894, 1996 WL 498410 (D.S.C. 11/8/96); *Bivens v. Watkins*, 437 S.E.2d 132, 136 (S.C. Ct. App. 1993); *see also Stiles v. Onorato*, 457 S.E.2d 601, 603 (S.C. 1995) (Third party complaint alleging civil conspiracy was dismissed for failure to state a claim since the complaint failed to allege in what manner defendant attorney acted outside his role as plaintiff’s attorney and did not allege breach of any independent duty owed to the third party; only reasonable inference was that at all times defendant attorney was acting in his capacity as an attorney). “Thus, a claim for civil conspiracy requires at least some degree of relationship between the plaintiff and the alleged conspirators.” *Sizemore*, 1996 WL 498410, at *13.

In *Sizemore*, the plaintiff alleged that defendant HPVA, a non-profit trade association supporting manufacturers of hardwood plywood and veneer products, engaged in a civil conspiracy with defendant Georgia-Pacific and other manufacturers to conceal the flammability properties of

hardwood plywood paneling from disclosure to federal and state agencies, building code officials, consumer groups, and the general public. *Id.* Specifically, the plaintiff asserted that HPVA's research and advocacy activity on behalf of the industry, including Georgia-Pacific, was evidence of the conspiracy. *Id.* The *Sizemore* court held that the alleged acts by HPVA complained of did not satisfy, as a matter of law, the requirements of a South Carolina civil conspiracy claim. *Id.* There was no evidence in the record which suggested that there was any type of relationship between plaintiffs and HPVA, "let alone the type of relationship that could give rise to a claim that HPVA conspired with the specific intent to harm the plaintiffs." *Id.*; *Swartzbauer v. Lead Indus. Ass'n, Inc.*, 794 F. Supp. 142, 145 (E.D. Pa. 1992) ("court dismissed a civil conspiracy claim against an industry trade association because plaintiffs did not allege 'that the object of defendants' alleged agreement was to injure plaintiffs.'") The mere allegation made by plaintiff was "that HPVA was aware that its actions were injuring 'members of the [p]laintiffs' class, the users and consumers of plywood wall paneling products. This generalized statement is an insufficient factual predicate upon which to rest a finding that HPVA acted with the specific intent to harm the plaintiffs." *Id.*

Here, there is no relationship alleged between Maybank and Seamon Whiteside to support a claim for civil conspiracy. Taking the allegations of the *Verified Complaint* as true, Seamon Whiteside was engaged by Penny Creek to prepare planned unit development guidelines for the Servient Property sometime after the derivative and judicial dissolution action was commenced on December 16, 2013. *Verified Complaint*, at ¶¶ 22 & 32. At that time, Penny Creek had already allegedly transferred its membership interest in Maybank to the Laplante family by Resolution dated October 4, 2013. As such, there would have been no relationship—contractual or otherwise—between Maybank and Seamon Whiteside. Thus, no special relationship existed between Maybank and Seamon Whiteside to give rise to a claim that Seamon Whiteside conspired with the *specific intent or purpose* to harm Maybank. Seamon Whiteside was simply engaged by another Defendant, Penny Creek, to prepare documents on behalf of Penny Creek as a standard business transaction for

profit. Because the requisite relationship does not exist—nor has it been alleged to exist—between Maybank and Seamon Whiteside, the cause of action for civil conspiracy against Seamon Whiteside must be dismissed.

II. Maybank’s civil conspiracy claim against Seamon Whiteside fails as a matter of law because Maybank failed to comply with the pleading standards of Rule 8, SCRCP.

“The Rules ‘govern the procedure in all South Carolina courts in all suits of a civil nature whether cognizable as cases at law or in equity.’ *Justice v. Perry*, 496 S.E.2d 871, 872 (S.C. Ct. App. 1998); SCRCP, Rule 1. “The Rules clearly set forth the required contents of pleadings. Pleadings shall contain (1) a short and plain statement of the grounds including facts and statutes upon which the court’s jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled.” *Justice*, 496 S.E.2d at 872; SCRCP, Rule 8(a). “All pleadings shall be so construed as to do substantial justice to all parties.” *Id.*; SCRCP, Rule 8(f). “Therefore, in deciding whether a dismissal under Rule 12(b)(6), SCRCP, is proper, the adequacy of a plaintiff’s complaint must be determined through application of the pleading rules of Rule 8, SCRCP.” *Id.*

“In this state Rule 8, SCRCP, mandates that a pleading contain ‘ultimate facts’ rather than ‘evidentiary facts’ to state a cause of action.” *Watts v. Metro Sec. Agency*, 550 S.E.2d 869, 871 (S.C. Ct. App. 2001); *Jeffords v. Lesesne*, 541 S.E.2d 847 (S.C. Ct. App. 2000). “Ultimate facts fall somewhere between the verbosity of ‘evidentiary facts’ and the sparsity of ‘legal conclusions.’” *Watts*, 550 S.E.2d at 871; *Jeffords*, 541 S.E.2d at 847.

While “Rule 12(b)(6) SCRCP, ‘retains the Code Pleading standard . . . rather than the more lenient notice pleading standard found in the federal rules,’” the pertinent language of Rule 8, SCRCP is substantially similar to Rule 8, Federal Rules of Civil Procedure, and, thus, related federal case law provides guidance here. *See Gaskins v. S. Farm Bureau Cas. Ins. Co.*, 541 S.E.2d

269, 271 (S.C. Ct. App. 2000); Harry M. Lightsey, Jr. & James F. Flanagan, *S.C. Civ. Proc.* 93 (2nd Ed. 1996); *see* S.C. Rules of Civ. Proc., Rule 8(a), Fed. Rules of Civ. Pro., Rule 8(a). “In construing the South Carolina Rules of Civil Procedure, . . . [South Carolina] courts look for guidance to cases interpreting the federal rules.” *Maybank v. BB&T Corp.*, 787 S.E.2d 498, 510 (S.C. 2016); *Gardner v. Newsome Chevrolet-Buick, Inc.*, 404 S.E.2d 200, 201 (S.C. 1991). “The United States Supreme Court has made clear that, under Rule 8 of the Federal Rules of Civil Procedure, the complaint must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face.” *James v. Richland Cty Recreation Comm’n*, 2016 WL 6892806, at *2 (D.S.C. 11/1/16), *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “Expounding on its decision in *Twombly*, the United States Supreme Court stated in *Iqbal*:

The pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation. A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’ Nor does a complaint suffice if it tenders ‘naked assertions’ devoid of ‘further factual enhancement.’

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

James, 2016 WL 6892806 at *2-3; *Iqbal*, 556 U.S. at 677-78 (quoting *Twombly*, 550 U.S. at 555, 556, 557, 570).

Here, it is not enough for Maybank to simply lump Seamon Whiteside in its general allegation that all of the Defendants “at the direction, guidance, and/or persuasion of Zurlo” concealed the easement by omitting references to the easement when seeking approval for the

development of the Servient Property. *See Verified Complaint*, ¶ 61. Maybank was required to include allegations of specific facts in its Complaint to allow the Court to draw the reasonable inference of liability, and Maybank failed to do so in its claim for civil conspiracy. Further, along those same lines, the Complaint is devoid of any allegation that an agreement was entered into by Seamon Whiteside with the other alleged conspirators to conspire against Maybank for the specific purpose of harming Maybank. Those key omissions are fatal to Plaintiff's claim for civil conspiracy, such that Maybank's general allegations of conspiracy are just a "naked assertions" devoid of "factual enhancement" that are far from being "plausible on their face."

Without sufficient factual content to support, or allegations to establish, any specific agreement by Seamon Whiteside to conspire with the other Defendants to purposefully harm Maybank, it is impossible for this Court to test whether the claim has facial plausibility. Accordingly, Maybank's claim for civil conspiracy against Seamon Whiteside should be dismissed for failing to state facts sufficient to constitute a cause of action as required under Rule 8, SCRPC's pleading standard and otherwise per SC law.

III. Maybank has failed to properly plead any additional overt act to support its civil conspiracy claim, so the claim fails as a matter of law.

"A claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint. . . . Moreover, because the quiddity of a civil conspiracy claim is the special damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action." *Hackworth v. Greywood at Hammett, LLC*, 682 S.E.2d 871, 874 (S.C. Ct. App. 2009) (internal citations omitted). "As a unique feature of the tort of civil conspiracy, 'an action for civil conspiracy will not lie if a plaintiff has obtained relief through other avenues.'" *Roddey v. Nations Waste, Inc.*, 2005 WL 7084315, at *5 (S.C. Ct. App. July 28, 2005; *Kuznik v. Bees Ferry Assocs.*, 538 S.E.3d 15, 31 (S.C. Ct. App. 2000), *cert. dismissed* (Jan. 1, 2004). This case law is consistent with the premise of Rule 8(e)(2), which

provides a party the ability “to set forth two or more statements of a cause of action or defense *alternatively or hypothetically* [not cumulatively]... regardless of consistency and whether based on legal or on equitable grounds or on both.” *Roddey*, 2005 WL 7084315, at *5; SCRCF Rule 8(e)(2).

Here, Maybank has failed to allege any particular additional overt act in furtherance of the alleged conspiracy beyond what was alleged throughout the remainder of its pleading and other causes of action. The allegations of conspiracy are not plead “in the alternative,” and are essentially the same allegations contained elsewhere within Maybank’s Complaint—that is, the Defendants allegedly knew of the alleged easement but failed to include it in their submissions, and thus Maybank is now deprived of its easement. Because Maybank has failed to plead any additional overt act to support its civil conspiracy claim, the claim must be dismissed.

CONCLUSION

Seamon Whiteside respectfully moves this Honorable Court to enter an Order dismissing Maybank’s *Verified Complaint* against Seamon Whiteside with prejudice pursuant to SCRCF 12(b)(6), as Maybank’s claims fail as a matter of law as pled. Maybank’s civil conspiracy cause of action appears to be the only claim seeking relief against Seamon Whiteside. That claim fails as explained herein, which necessitates dismissal of the entire lawsuit as to Seamon Whiteside. Seamon Whiteside reserves the right to supplement the arguments and authority herein via supplemental memoranda and oral argument, and craves reference to other applicable grounds for dismissal as expressed by Co-Defendants.

(SIGNATURE ON FOLLOWING PAGE)

Respectfully submitted,

COPELAND, STAIR, KINGMA & LOVELL, LLP

By: s/ J. Patrick Norris
KENT T. STAIR
State Bar No.: 14029

J. PATRICK NORRIS
State Bar No.: 78270

JORDAN N. TEICH
State Bar No.: 77206

**Counsel for Defendant Seamon, Whiteside &
Associates, Inc.**

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	
MAYBANK 2754, LLC,	)	CASE NO.: 2020-CP-10-00209
	)	
Plaintiff(s)	)	
	)	
v.	)	MOTION TO DISMISS OF
	)	DEFENDANT 1776, LLC
EUGENE J. ZURLO, Individually and as	)	
Co-Trustee of the Eugene J. Zurlo Living	)	
Trust Dated December 11, 1997; ET AL.,	)	
	)	
Defendants.	)	
	)	

TO: Jason M. Tarokh, Esquire, Counsel for Plaintiff

PLEASE TAKE NOTICE that Defendant, 1776, LLC, by and through its undersigned counsel, will move before this Court for an Order, pursuant to Rule 12(b)(6), South Carolina Rules of Civil Procedure, dismissing Plaintiff's claims for failure to state facts sufficient to constitute the causes of action included in Plaintiff's Complaint.

Specifically, Plaintiff fails to plead the necessary elements to constitute a valid interest in real property, and, in fact, by its pleading, establishes there are insufficient facts to establish a valid interest in real property, thereby defeating its causes of action for declaratory judgement as to an easement or any other interest in real property and its cause of action for civil conspiracy.

Further, Plaintiff fails to plead other essential elements necessary to constitute a cause of action for the imposition of a restrictive covenant, as Plaintiff asserts no contractual agreement between Plaintiff and Defendant 1776, LLC. Plaintiff likewise fails to plead the essential elements to constitute a cause of action for conspiracy, to wit: the alleged actions of two or more persons for the purpose of injuring Plaintiff, as well as any facts in furtherance of a conspiracy.

And 1776, LLC, so moves.

Respectfully submitted,

/s/ Jason S. Smith

Brian A. Hellman (72399)

Jason S. Smith (80700)

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Attorneys for Defendant 1776, LLC

Charleston, South Carolina
February 21, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	
MAYBANK 2754, LLC,	)	CASE NO.: 2020-CP-10-00209
	)	
Plaintiff(s)	)	
	)	
v.	)	MOTION FOR ORDER OF
	)	REFERENCE TO MASTER-IN-EQUITY
EUGENE J. ZURLO, Individually and as	)	
Co-Trustee of the Eugene J. Zurlo Living	)	
Trust Dated December 11, 1997; ET AL.,	)	
	)	
Defendants.	)	

YOU WILL PLEASE TAKE NOTICE THAT Defendant, 1776, LLC, by and its undersigned attorneys, will move, ten days following the date of this Motion, or at the Court's convenience, before a presiding judge of the Court of Common Pleas for the Ninth Judicial Circuit for an Order referring the above referenced matter to the Master-in-Equity for the County of Charleston, with the power to enter final judgment in all causes of action referred, pursuant to Rule 53 of the South Carolina Rules of Civil Procedure. This Motion is based upon the Complaint filed herein, the Order of the Honorable Mikell R. Scarborough, including Paragraph 10, Page 15 thereof, said Order having been entered on June 23, 2017, in Case No. 2014-CP-10-04946, the Rules of this Court, and the applicable law.

And 1776, LLC, so moves.

Respectfully submitted,

/s/ Jason S. Smith
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 Jason S. Smith (80700)
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Attorneys for Defendant 1776, LLC

Charleston, South Carolina
 February 21, 2020

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

EUGENE J. ZURLO, Individually and as
Co-Trustee of the Eugene J. Zurlo Living
Trust Dated December 11, 1997; 1776, LLC;
BEACH FENWICK, LLC; THE BEACH
COMPANY; SEAMON, WHITESIDE &
ASSOCIATES, INC.; PENNY CREEK
ASSOCIATES, LLC; JOHN DOE AND
MARY ROE,

Defendants.

DEFENDANTS EUGENE J. ZURLO,
Individually and as Co-Trustee of the Eugene
J. Zurlo Living Trust Dated December 11,
1997 NOTICE OF MOTION AND MOTION
SEEKING REFERRAL TO MASTER IN
EQUITY

TO: JASON M. TAROKH, ESQ., COUNSEL FOR PLAINTIFF:

PLEASE TAKE NOTICE that Eugene J. Zurlo individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997 (“Zurlo Parties”), by and through counsel, will move before the Court of Common Pleas of Charleston County, at and upon such date, time, and place, as may be convenient to and designated by the Court, for an Order entering and granting remedies as follows:

1. For an Order of Referral to the Master-In-Equity for the County of Charleston pursuant to Rule 53(b) of all of the causes of action raised in the instant action, to hear all matters raised by the pleadings relating to the above-captioned case, with plenary authority to make appropriate findings of fact and conclusions of law pursuant to scope and standards of review applicable to and as if heard and decided by this Court sitting without a jury, and to enter final judgement thereon.

2. This Motion is based upon the Complaint filed herein, the Order of the Honorable Mikell R. Scarborough signed on June 21, 2017 in Civil Case No. 2014-CP-10-04946 (attached hereto as **Exhibit A**), Rules of this Court, and the applicable law.

3. The Zurlo Parties join in and incorporate by reference the Motions for Order of Reference to Master- in - Equity filed by Beach Fenwick, LLC and The Beach Co. on February 17, 2020, and by 1776, LLC on February 21, 2020.

4. Zurlo also seeks such additional Relief as may be warranted and proper.

Respectfully submitted this 10th day of March 2020 at Charleston, South Carolina.

/s J. Rutledge Young, Jr.

J. Rutledge Young, Jr. (SC Bar No. 5737)

Blake McKie (SC Bar No. 80198)

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*Attorneys for Defendant Eugene J. Zurlo, Individually
and as Co-Trustee of the Eugene J. Zurlo Living Trust
Dated December 11, 1997*

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Wells Fargo Bank, N.A., as Successor by
Merger to Wachovia Bank, National
Association, as Successor by Merger to First
Union National Bank,

Plaintiff,

vs.

Penny Creek Associates, L.L.C. a/k/a Penny
Creek Associates, LLC; Michel F. LaPlante
a/k/a Michel Laplante a/k/a Mitch Laplante;
Charlotte R. Zurlo; Eugene J. Zurlo; Charlotte
R. Zurlo and Eugene J. Zurlo, as Co-Trustees
of The Nicklaus Lane Realty Trust No. 1 under
Declaration of Trust dated May 22, 1998, and
The Zurlo Investment Trust No. 1 pursuant to
trust agreement dated August 10, 1998;
Fenwick Hall Plantation Property Owners
Assn., Inc. a/k/a Fenwick Hall Plantation
Property Owners' Association, Inc.; Preserve
at Fenwick Hall Property Owners Association,
Inc. a/k/a The Preserve at Fenwick Hall
Property Owners' Association, Inc.; and The
Grove At Fenwick Plantation Condominium
Association, Inc.,

Defendants.

Michel Laplante,

Third-Party Plaintiff,

vs.

The Eugene J. Zurlo Living Trust, Dated
December 11, 1997,

Third-Party Defendant.

IN THE CIRCUIT COURT

Case No. 2014-CP-10-04946

**MASTER-IN-EQUITY'S ORDER AND
JUDGMENT OF FORECLOSURE AND
SALE**

**(Deficiency Not Waived;
not HAMP eligible)**

FILED
2017 JUN 23 PM 2:52
JULIE J. ARMSTRONG
CLERK OF COURT



Pursuant to Rules 53 and 71, SCRCF, the above-entitled matter was referred to the undersigned to make appropriate findings of fact and conclusions of law with authority to enter a final judgment in the cause.

Pursuant to the said reference, a hearing was held on June 19, 2017, and attended by the following persons:

Robert C. Byrd – Attorney for the Plaintiff
 Thomas B. Pritchard – Attorney for Defendant Penny Creek Associates, LLC
 J. Rutledge Young, Jr. – Attorney for Defendants Charlotte R. Zurlo and Eugene J. Zurlo, individually and as Co-Trustees of The Nicklaus Lane Realty Trust No. 1 under Declaration of Trust dated May 22, 1998, and The Zurlo Investment Trust No 1 pursuant to trust agreement dated August 10, 1998 (severed from the foreclosure claim)
 Defendant Michel F. Laplante (severed from the foreclosure claim)
 Brian Hellman – Attorney for Intervenor 1776, LLC
 J. Christopher Lanning – Manager of Penny Creek Associates, LLC

Based on the evidence presented at the hearing, I hereby find, conclude and order as follows:

FINDINGS OF FACT

1. The Lis Pendens, Summons, Complaint and Notice of Intent to Refer were filed August 14, 2014.
2. Service was made upon the defendants in this action, as is shown by the proofs of service filed herein.
3. Defendant Michel F. LaPlante a/k/a Michel Laplante a/k/a Mitch Laplante (“LaPlante”) filed a Motion for Injunction on August 29, 2014.
4. Defendant LaPlante filed a Motion for Temporary Restraining Order on September 9, 2014, and the Order denying said motion was entered on September 19, 2014.



5. Defendants Fenwick Hall Plantation Property Owners Assn., Inc. a/k/a Fenwick Hall Plantation Property Owners' Association, Inc.; Preserve at Fenwick Hall Property Owners Association, Inc. a/k/a The Preserve at Fenwick Hall Property Owners' Association, Inc.; and The Grove At Fenwick Plantation Condominium Association, Inc. (collectively, the "POA Defendants") filed an Answer and Counterclaim on September 29, 2014.

6. Defendants Charlotte R. Zurlo and Eugene J. Zurlo filed a Memorandum in Opposition to defendant LaPlante's Motion for Injunction on September 29, 2014.

7. Defendants Charlotte R. Zurlo, Eugene J. Zurlo, and Charlotte R. Zurlo and Eugene J. Zurlo, as Co-Trustees of The Nicklaus Lane Realty Trust No. 1 under Declaration of Trust dated May 22, 1998, and The Zurlo Investment Trust No. 1 pursuant to trust agreement dated August 10, 1998 (collectively, the "Zurlo Defendants"), filed an Answer and Cross Claim on October 16, 2014.

8. Defendant LaPlante filed an Answer, Cross Claims, and Third-Party Claims on October 27, 2014.

9. Defendant Penny Creek Associates, L.L.C. a/k/a Penny Creek Associates, LLC ("Penny Creek") and The Grove at Fenwick Plantation, LLC filed an Answer on November 6, 2014.

10. Defendant LaPlante filed a Reply to the Zurlo Defendants' Cross-Claims on November 10, 2014.

11. Third-party defendant Paul Zurlo filed a Motion to Dismiss defendant LaPlante's Third-Party Complaint on November 25, 2014.

12. Third-party defendant Eugene J. Zurlo Living Trust filed an Answer to defendant LaPlante's Third-Party Complaint on November 26, 2014.

13. The Plaintiff's Reply to the POA Defendants' Answer and Counterclaim was filed on December 4, 2014.

14. Defendant LaPlante filed Memoranda on January 15, 2015, in opposition to the Plaintiff's Motion to Strike Jury Demand and to Refer and in opposition to third-party defendant Paul Zurlo's Motion to Dismiss.

15. The Plaintiff filed a Memorandum of Law in support of its Motion to Refer on January 16, 2015.

16. Third-party defendant Paul Zurlo filed an Answer to Third-Party Complaint on January 30, 2015.

17. The Order granting Plaintiff's Motion to Refer was entered on March 5, 2015.

18. Defendant LaPlante filed a Motion on March 23, 2015, seeking to alter or amend the Order granting the Plaintiff's Motion to Refer.

19. The Zurlo Defendants filed an Amended Answer and Cross Claim on April 15, 2015.

20. Defendant LaPlante filed a Reply to the Cross-Claims of the Zurlo Defendants on April 27, 2015.

21. The Order denying defendant LaPlante's Motion to Alter or Amend the Order granting Plaintiff's Motion to Refer was entered on June 3, 2015.

22. Defendant LaPlante filed a Notice of Appeal on July 6, 2015, appealing the Order granting Plaintiff's Motion to Refer.

23. The Stipulation dismissing the third-party complaint against Paul Zurlo with prejudice was filed on July 17, 2015.



24. The Plaintiff filed a Motion to Dismiss defendant LaPlante's appeal in the Court of Appeals on August 4, 2015.

25. The Order granting the Plaintiff's Motion to Dismiss Appeal was entered by the Court of Appeals on October 20, 2015.

26. The Plaintiff's Motion for Partial Summary Judgment and Supporting Affidavit were filed on February 2, 2016.

27. The Stipulation was filed on May 26, 2016, dismissing the claims relating to The Grove at Fenwick Plantation loan and dismissing defendant The Grove at Fenwick Plantation, LLC as a party defendant.

28. The case originally asserted four (4) causes of action, two of which related to a loan by the Plaintiff to The Grove at Fenwick Plantation, LLC (the "Fenwick Loan"). During the course of the action, the Fenwick Loan was paid off and the parties stipulated to the dismissal of the two claims relating to that loan. Only the claims relating to loan to defendant Penny Creek remain.

29. The Consent Order Striking Case from Trial Docket Pursuant to Rule 40(j), SCRCPP was filed on September 30, 2016.

30. The Notice to Restore Case to Active Trial Docket was filed on April 12, 2017.

31. The Order Restoring Case to Active Trial Docket was entered on April 12, 2017.

32. The Stipulation to Entry of Order and Judgment of Foreclosure and Sale was filed on April 13, 2017; and

33. The Plaintiff's Motion to Sever and for Entry of Stipulated Final Order and Judgment of Foreclosure and Sale was filed on May 25, 2017, which this Court granted on June 19, 2017.

34. The Motion to Intervene was filed by 1776, LLC on June 19, 2017.
35. This Court granted the Plaintiff's Motion to Sever on June 19, 2007.
36. The Court also grants 1776, LLC's Motion to Intervene, as set forth more fully hereinafter.
37. All parties were notified of the date, time and place of the hearing in this matter.

The \$5,300,000.00 Loan

38. Defendant Penny Creek, for consideration, made, executed and delivered that certain Promissory Note dated August 7, 2000 ("Original Note 1"), payable to the order of First Union National Bank ("First Union"), in the original principal sum of \$5,300,000.00, together with interest as provided therein.

39. To secure payment of the indebtedness evidenced by Original Note 1, in accordance with the terms and conditions thereof, defendant Penny Creek, for consideration, made, executed and delivered to First Union a certain Mortgage and Absolute Assignment of Leases dated August 7, 2000 ("Mortgage 1"), covering certain real property located in Charleston County, South Carolina and described more fully therein. Mortgage 1 was recorded in the RMC Office for Charleston County on August 8, 2000, in Book P-352 at Page 613. Other terms and conditions are stated in the said Mortgage 1, which is of record herein.

40. Wells Fargo Bank, N.A. is the successor by merger to Wachovia Bank, National Association who is the successor by merger to First Union and is the sole owner and holder of Original Note 1, Mortgage 1, and all other related loan documents.

41. Certain terms of the Original Note 1 were amended, modified and/or renewed by, among other things, that certain renewal Promissory Note dated April 28, 2008, in the original



principal sum of \$3,142,781.92 ("Renewal Note 1"). (Original Note 1 and Renewal Note 1 are hereinafter referred to, collectively, as "Note 1.")

The \$2,200,000.00 Loan

42. Defendant Penny Creek, for consideration, made, executed and delivered that certain Promissory Note dated April 5, 2006 ("Original Note 2"), payable to the order of the Plaintiff, then known as Wachovia Bank, National Association, in the original principal sum of \$2,200,000.00, together with interest as provided therein. Other terms and conditions are stated in the said Original Note 2, which is of record herein.

43. To secure payment of the indebtedness evidenced by Original Note 2, in accordance with the terms and conditions thereof, defendant Penny Creek, for consideration, made, executed and delivered to the Plaintiff a certain Mortgage and Assignment of Rents dated April 5, 2006 ("Mortgage 2"), covering certain real property located in Charleston County, South Carolina and described more fully therein. Mortgage 2 was recorded in the RMC Office for Charleston County on April 7, 2006, in Book G-579 at Page 249. Other terms and conditions are stated in the said Mortgage 2, which is of record herein. (Mortgage 1 and Mortgage 2 are hereinafter referred to, collectively, as the "Mortgages.")

44. Certain terms of Original Note 2 were thereafter amended, modified and/or renewed by: (i) that certain renewal Promissory Note dated July 5, 2007, in the original principal sum of \$4,450,000.00; and (ii) that certain Modification Number One to Promissory Note dated April 28, 2008 (collectively, "Renewal Note 2"). Other terms and conditions are stated in the said Renewal Note 2, which is of record herein. (Original Note 2 and Renewal Note 2 are hereinafter referred to, collectively, as "Note 2.")

45. Thereafter, Mortgage 2 was amended and/or modified by that certain Modification of Mortgage and Notice of Future Advance dated July 5, 2007, and recorded in the RMC Office for Charleston County on July 27, 2007, in Book V-633 at Page 342. Other terms and conditions are stated in the said Modification of Mortgage and Notice of Future Advance, which is of record herein.

2009 Modification and Consolidation

46. Thereafter, certain terms of Note 1 and Note 2 were amended, modified and/or renewed by, among other things, that certain renewal Promissory Note dated July 28, 2009, in the original principal sum of \$7,592,781.92, which, among other things, consolidated Note 1 and Note 2 (collectively, the "Note"). Other terms and conditions are stated in the said Note, which is of record herein.

47. In order to induce the Plaintiff to modify or extend the aforesaid loan as evidenced by the Note, and to further secure the same, defendants LaPlante and the Zurlo Defendants, for consideration, executed separate, written Unconditional Guaranties dated July 28, 2009 (collectively, the "Guaranties"), whereby the said defendants absolutely, unconditionally and irrevocably guaranteed to the Plaintiff the full and prompt payment of the obligations of defendant Penny Creek to the Plaintiff under the Note, as consolidated. Other terms and conditions are stated in the said Guaranties, which are of record herein.

2012 and 2013 Modifications

48. Thereafter, certain terms of the Note were amended, modified and/or renewed by: (i) that certain First Modification to Promissory Note dated August 14, 2012; and (ii) that certain Second Modification to Promissory Note dated May 23, 2013 (collectively, the "Note



Modifications"). Other terms and conditions are stated in the said Note Modifications, which are of record herein.

49. In connection with the aforesaid modifications, Mortgage 1 and Mortgage 2 were amended and/or modified by that certain Modification of Mortgages dated October 1, 2012 (the "Mortgage Modification"), and recorded in the RMC Office for Charleston County on October 15, 2012, in Book 0284 at Page 614. Other terms and conditions are stated in the said Mortgage Modification, which is of record herein.

50. Under the express terms of the aforesaid Mortgage Modification, Mortgage 1 and Mortgage 2 (collectively, the "Mortgages") secure the Note in its entirety.

51. Certain portions of the subject mortgaged properties were thereafter released from the lien of the Mortgages, as amended and/or modified, which remains in full force and effect as to the remaining property described in the said Mortgages (the "Property").

**Loan Defaults, Forbearance Agreement and Stipulation
to Entry of Order and Judgment of Foreclosure and Sale**

52. The obligations under the terms and conditions of the Note are in default for, among other reasons, failing to repay the indebtedness in accordance with the terms thereof, including without limitation failing to repay the loan in full at maturity on April 18, 2014. The defendants have been duly notified, in writing, of the outstanding defaults.

53. In May 2016, the Plaintiff and defendants Penny Creek, LaPlante and the Zurlo Defendants entered into that certain Forbearance Agreement dated as of May 4, 2016 (the "Forbearance Agreement"), wherein the said defendants agreed and acknowledged, among other things, that the subject loan is in default and further agreed to execute the Stipulation to Entry of Order and Judgment of Foreclosure and Sale attached as Exhibit A to the Forbearance Agreement. Other terms and condition are stated in the said Forbearance Agreement, which is of record herein.

54. Pursuant to and in reliance upon the Forbearance Agreement and Stipulation, the case was removed from the active calendar pursuant to Rule 40(j), with leave to restore, by Consent Order entered on September 30, 2016.

55. The forbearance period set forth in the Forbearance Agreement expired on March 31, 2017, and the case was restored to active calendar on April 12, 2017.

56. The Plaintiff is entitled to proceed with foreclosure of its Mortgages, as amended and/or modified.

57. The Plaintiff's Mortgages constitute valid first priority liens on the Property.

58. Subsequent to the commencement of this action, the Eugene J. Zurlo Living Trust Dated December 11, 1997 (the "1997 Zurlo Trust") recorded a Second Mortgage on the subject Property in the Office of the RMC for Charleston County on May 25, 2016, in Book 0556 at Page 242 (the "Second Mortgage").

59. The Second Mortgage arose out of that certain Settlement Agreement between the 1997 Zurlo Trust and defendant Penny Creek Associates, LLC, the terms of which Settlement Agreement were entered on the record before The Honorable Markley Dennis, Jr. on February 29, 2016, in Case No. 2013-CP-10-07280. A copy of the transcript from the February 29, 2016 hearing before Judge Dennis in Case No. 2013-CP-10-07280, together with a copy of the Second Mortgage and the promissory note it secures, were presented to this Court and have been made a part of the record herein.

60. In accordance with the terms of the Settlement Agreement, the 1997 Zurlo Trust and its successor and assigns are only entitled to recover the principal sum of \$3,250,000.00, without any interest.

61. The Second Mortgage was assigned from the 1997 Zurlo Trust to 1776, LLC

pursuant to that certain Assignment of Note and Mortgage recorded in the Office of the RMC for Charleston County on April 7, 2017, in Book 629 at Page 45, a copy of which was presented to this Court and has been made a part of the record herein.

62. The parties to the foreclosure hereby consent to the joinder of 1776, LLC as a party defendant on the following express terms and conditions, which are hereby adopted and ordered by this Court:

a. That 1776, LLC expressly acknowledges and stipulates that the lien of its Second Mortgage is junior and subordinate to the lien of the Plaintiff's Mortgages;

b. That 1776, LLC further acknowledges and stipulates that it is bound by the terms of the Stipulation to Entry of Order and Judgment of Foreclosure and Sale filed on April 13, 2017; and

c. That all parties to the foreclosure, including 1776, LLC, consent to the immediate disposition of the foreclosure proceeding, expressly waiving the time limitations contained in Rule 40(b), SCRPC.

63. In the Plaintiff's loan documents, defendant Penny Creek agreed to pay all reasonable costs and expenses of collection including, but not limited to, reasonable attorneys' fees. I find and conclude that the sum of Thirty-Two Thousand Three Hundred Five and No/100 Dollars (\$32,305.00) is a reasonable amount to award as Plaintiff's unreimbursed attorneys' fees for services performed and anticipated to be performed until final adjudication of the within action, and that the sum of Two Thousand Six Hundred Sixty-Eight and 50/100 Dollars (\$2,668.50) is a reasonable amount to award as legal costs. In reaching this conclusion, I have carefully considered the nature, extent and difficulty of the legal services provided by Plaintiff's counsel in this commercial foreclosure action, the time and labor necessarily devoted by Plaintiff's

counsel to the case, the professional standing of Plaintiff's counsel and his firm, the fees customarily charged in Charleston County for similar legal services, and the beneficial results obtained by Plaintiff's counsel in this matter.

64. The amount due and owing on the loan evidenced by the Note, as of June 19, 2017, including attorneys' fees and costs of collection, is as follows:

(1)	Principal due	\$5,775,289.35
(2)	Interest on principal only 02/28/17 – 03/29/17 @ 5.75% (30 days @ \$922.44205 per day)	\$ 27,673.26*
(3)	Interest on principal only 03/30/17 – 03/31/17 @ 6.00% (2 days @ \$962.54823 per day)	\$ 1,925.09*
(4)	Interest on principal only 04/01/17 – 04/29/17 @ 8.00% (29 days @ \$1,283.39763 per day)	\$ 37,218.53**
(5)	Interest on principal only 04/30/17 – 05/29/17 @ 8.00% (30 days @ \$1,283.39763 per day)	\$ 38,501.93**
(6)	Interest on principal only 05/30/17 – 06/19/17 @ 8.00% (21 days @ \$1,283.39763 per day)	\$ 26,951.35**
(7)	Legal Fees	\$ 32,305.00
(8)	Legal Costs	\$ <u>2,668.50</u>
	Total Debt Secured by Mortgages:	\$5,942,533.01

* Interest accruing at forbearance period rate of Prime plus 2.00%. It is a variable rate that has been and is subject to change.

** Interest accruing at default rate of Prime + 1% + 3.00%. It is a variable rate that has been and is subject to change.

Interest for the period from June 19, 2017, through the date of this judgment at the rate of 8.00% per annum shall be added to the above stated Total Debt Secured by Mortgages to comprise the amount of the judgment debt entered herein, and interest after the date of judgment at the same rate shall be added to such judgment debt to comprise the amount of the debt through the date to which such interest is computed.

65. Inasmuch as the Plaintiff has not waived deficiency, the bidding will remain open for thirty (30) days after the sale, unless waived by the Plaintiff, in writing, prior to the sale.

CONCLUSIONS OF LAW

1. The Plaintiff should have judgment of foreclosure of its Mortgages, as amended and/or modified.

2. The subject Property should be ordered sold at public auction after due advertisement.

3. The Plaintiff has not waived its right to seek a personal judgment for any deficiency remaining after the sale, but expressly reserves the right to waive deficiency, in writing, prior to the sale.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That there is due to the Plaintiff on the loan secured by the Mortgages, as amended and/or modified, set forth in the Complaint the sum of **Five Million Nine Hundred Forty-Two Thousand Five Hundred Thirty-Three and 01/100 Dollars (\$5,942,533.01)** representing the "Total Debt Secured By Mortgages" due the Plaintiff as set out in paragraph 64 hereinabove, together with interest after the aforesaid date at the rate of 8.00% per annum and thereafter, in the event of a deficiency judgment, at the legal rate of interest for judgments.

2. That the party or parties liable for the aforesaid debt, shall, on or before the date of sale of the Property hereinafter described, pay to the Plaintiff or its attorneys the amount of the debt owed as aforesaid, together with the costs and disbursements of this action.

3. That on default of payment at or before the time herein indicated, the Property be sold by the undersigned Master-in-Equity or his designee, at public auction, at the Charleston County Courthouse, in the City of Charleston, County and State aforesaid; on some convenient Sales Day hereafter as set by the Court, on the following terms, that is to say:



a. FOR CASH: The Master-in-Equity will require a deposit of five (5%) percent on the amount of the bid, in cash or its equivalence, same to be applied on the purchase price only upon compliance with the bid, but in case of non-compliance within thirty (30) days same to be forfeited and applied to the costs and Plaintiff's debt.

b. The sale shall be subject to taxes, assessments, existing easements, and easements and restrictions of record.

c. Purchaser to pay for deed stamps and cost of recording the deed.

d. That if the Plaintiff is the successful bidder at said sale for a sum not exceeding the amount of costs, expenses and the indebtedness of the Plaintiff in full, the Plaintiff may pay to the Master-in-Equity only the amount of the costs and expenses, crediting the balance of the bid on its indebtedness.

e. That if defendant 1776, LLC is the successful bidder at said sale for a sum not exceeding the amount of costs, expenses, the indebtedness of the Plaintiff in full, and the indebtedness owed on the Second Mortgage, the Plaintiff may pay to the Master-in-Equity only the amount of the costs, expenses, and the full amount of the Plaintiff's indebtedness, crediting the balance of the bid against its own indebtedness.

4. Inasmuch as the Plaintiff has not waived deficiency, the bidding will remain open for thirty (30) days after the sale, unless waived by the Plaintiff, in writing, prior to the sale.

5. That the Master-in-Equity will, by advertisement according to law, give notice of the time and place of such sale, and the terms thereof; and will execute to the purchaser or purchasers a deed to the Property sold. The Plaintiff or any other party to this action may become a purchaser at such sale, and if, upon such sale being made, the purchaser or purchasers should fail to comply with the terms thereof within thirty (30) days after date of sale, then the Master-in-

Equity may advertise the said Property for sale on the next or some other subsequent Sales Day, as set by the Court, at the risk of the former highest bidder, and so from time to time thereafter until a full compliance shall be secured.

6. That the Master-in-Equity shall apply the proceeds of the sale of the Property as follows:

FIRST: To payment of the amount of costs and expenses of this action;

NEXT: To the payment to Plaintiff or its attorney of the amount of debt owed to Plaintiff and interest, so much thereof as the purchase money will pay on the same; and

NEXT: Any surplus should be held pending further Order of this Court.

7. That the defendants named herein and all persons whosoever claiming under the defendants be forever barred and foreclosed of all right, title, interest and equity of redemption in the subject Property, or any part thereof.

8. That the deed(s) of conveyance made pursuant to said sale shall contain the names of only the Plaintiff, the defendant who was the titleholder of the Property at the time of the filing of the Lis Pendens, and the grantee; and the RMC is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deeds.

9. A description of the Property encumbered by the Mortgages and herein ordered to be sold is attached hereto as Exhibit "A" and Exhibit "A-1".

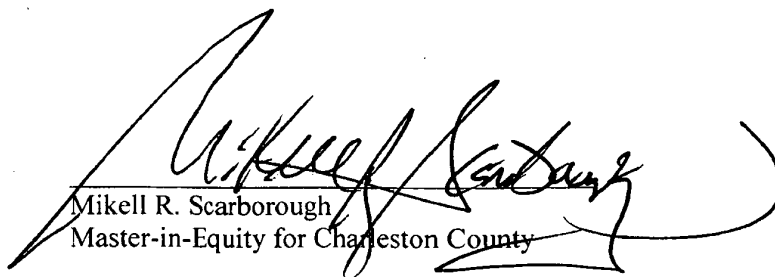
10. That the undersigned Master-in-Equity will retain jurisdiction to do all necessary acts incident to this foreclosure and to hear any post-judgment matters, including, but not limited to, the issuance of a Writ of Assistance.



AND IT IS SO ORDERED.

June 21, 2017

Charleston, South Carolina


Mikell R. Scarborough
Master-in-Equity for Charleston County

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE #: 2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

EUGENE J. ZURLO, Individually and as Co-Trustee
of the Eugene J. Zurlo Living Trust Dated December
11, 1997; 1776, LLC; BEACH FENWICK, LLC;
THE BEACH COMPANY; SEAMON, WHITESIDE
& ASSOCIATES, INC.; PENNY CREEK ASSOCIATES,
LLC; JOHN DOE AND MARY ROE

Defendants,

/

PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION

Plaintiff, MAYBANK 2754, LLC, by and through the undersigned attorney, hereby moves for a temporary injunction pursuant to Rule 65, South Carolina Rules of Civil Procedure, and in support states as follows:

1. Plaintiff incorporates by reference all allegations set forth in its Verified Complaint.
2. Plaintiff is entitled to a temporary injunction against the Defendant, BEACH FENWICK, LLC, the owner of the subject property, to enjoin it from developing the property until after a trial on the merits and a judgment rendered so that the status quo can be maintained pending this litigation.
3. Plaintiff will suffer irreparable harm if an injunction is not granted because Plaintiff can presently proceed with developing the subject property in total disregard to, and without any provision or reservation for, Plaintiff's right to a thirty (30) private right of way easement upon the completion of Pitchfork Road. Thus, an injunction is reasonably necessary to protect the rights of the Plaintiff pending this litigation.
4. Plaintiff has a likelihood of success on the merits.
5. There is no adequate remedy of law.

WHEREFORE, Plaintiff requests that the Court enter a temporary injunction enjoining

Defendant, BEACH FENWICK, LLC, to enjoin it from developing the subject property until after a trial on the merits and a judgment rendered so that the status quo can be maintained pending this litigation, and for such further relief as this Court deems proper and just.

Pursuant to Rule 11, the undersigned counsel has communicated with opposing counsel and has attempted in good faith to resolve the matter contained in the motion.

TAROKH LAW, PLLC
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jason@tarokhlaw.com

s/ Jason M. Tarokh
JASON M. TAROKH
S. CAROLINA BAR # 72837

March 11, 2020

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE #: 2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

EUGENE J. ZURLO, Individually and as Co-Trustee
of the Eugene J. Zurlo Living Trust Dated December
11, 1997; 1776, LLC; BEACH FENWICK, LLC;
THE BEACH COMPANY; SEAMON, WHITESIDE
& ASSOCIATES, INC.; PENNY CREEK ASSOCIATES,
LLC; JOHN DOE AND MARY ROE

Defendants,

**PLAINTIFF'S RESPONSE IN OPPOSITION TO THE DEFENDANTS' MOTIONS TO
DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION**

Plaintiff, MAYBANK 2754, LLC, by and through its undersigned attorney, hereby responds in opposition to each of the Defendants', BEACH FENWICK, LLC; THE BEACH COMPANY (THE BEACH CO.); 1776, LLC; and SEAMON, WHITESIDE & ASSOCIATES, INC.; (herein "Defendants"), respective motions to dismiss for failure to state a cause of action, and in support thereof states as follows:

1. Rule 8(f) of the South Carolina Rules of Civil Procedure states, "All pleadings shall be so construed as to do substantial justice to the parties."
2. Count I of the Complaint seeks a declaratory judgment pursuant to South Carolina Code §15-53-10, et. seq., declaring that the Plaintiff has an easement over the subject property, the location and condition of which is to be mutually agreed upon at the completion of Pitch Fork Road.
3. "An easement is the right of one person to use the land of another for a specific purpose." *Smith v. Commissioners of Public Works of the City of Charleston*, 441 S.E.2d 331, 335 (S.C. Ct. App. 1994).
4. Count I of the instant action is similar to the situation in *Smith*, a declaratory

judgment action involving the interpretation of a 1955 written agreement in which the South Carolina Court of Appeals ruled created both an easement and restrictive covenant. *Id.*

5. In *Smith*, the plaintiffs sought a declaration of easement rights under a written agreement to cross the defendant's land to access a canal. The Court of Appeals in *Smith* found that whether a grant in a written instrument creates an easement, and the type of easement created, are to be determined by ascertaining intention of the parties as gathered from language of the instrument, and that the grant should be construed so as to carry out that intention.

6. The South Carolina Court of Appeals in *Smith* stated:

Although we find the agreement was ambiguous, we nonetheless hold the evidence supports the master's conclusion that Article II of the 1955 agreement **creates an easement**. We also conclude that Article III was intended to be a restrictive covenant... **We hold the language of the agreement** is evidence supporting the master's conclusion that the agreement establishes an easement appurtenant between dominant ("future owners of Dean Hall Plantation") and servient (CPW) estates. The intent of the parties seems clear given the "future owners" language of Article II and the binding successors language of Article XI. The "impending condemnation" circumstances of the agreement and a 1955 letter from Kittredge's lawyer to Bushy Park's corporate secretary support the conclusion that Kittredge wanted to retain the right to cross CPW's land to enjoy the water and his other land. It is also clear that he intended by the language employed to attach the attribute of assignability (alienability) to the easement. *Sandy Island Corp. v. Ragsdale, supra*; 25 Am.Jur.2d Easements and License § 13 (1966) (easements in gross are not favored by the courts, and an easement will never be presumed as personal when it may fairly be construed as appurtenant to some other estate).

There is clearly no merit to CPW's contention that much significance should be placed on the failure of the Smiths to mention the agreement in the deed from Kittredge's Trustees to the Smiths. **The absence of any mention of the easement agreement in the deed is not relevant.**

Id. at 335-6. (emphasis added).

7. After the Court of Appeals in *Smith* found that the agreement established an easement, the court held that the easement was to be located in a location as is reasonably necessary for the full enjoyment of the plaintiffs' property. The Court of Appeals stated, "The subject **unlocated easement** must be interpreted, however, in light of good faith, reasonableness **and what was necessarily the intent of the parties** to the 1955 agreement." *Id.* at 336. (emphasis added).

8. Accordingly, the Court of Appeals in *Smith* remanded the case for a determination of the number of access points and routes to include their width. *Id.* at 337.

9. Clearly, Plaintiff sufficiently pleads an easement interest on the subject property despite the fact that the Resolution, an instrument that granted the subject easement, is unrecorded, and despite the fact the location and condition of the easement has not yet been determined.

10. An easement by grant is not required to be recorded to be valid, and recording is not necessary if the buyer has actual notice. *See, Frierson v. Watson*, 636 S.C. 60, 68 (Ct. App. 2006). "A purchaser of land with actual, constructive, or implied notice that the property is burdened with an easement ordinarily takes the estate subject to the easement. *Loftis v. South Carolina Elec. and Gas Co.*, 361 S.C. 434, 441 (Ct. App. 2004).

11. The Complaint alleges that all Defendants had actual knowledge of the subject easement and that Zurlo and/or all the Defendants were part of a deceitful scheme to develop the subject property without affording any provisions or reservations for the easement.

12. Additionally, Count II of the Complaint, plead in the alternative to Count I, seeks a declaratory judgment pursuant to South Carolina Code §15-53-10, et. seq., that a restrictive covenant exists over the subject property by virtue of the Resolution.

13. Moreover, Count II of the instant action is also similar to the situation in *West v. Newberry Electric Cooperative*, 357 S.C. 537 (S.C. Ct. App. 2004). In *West*, the Court of Appeals found that a 1955 written easement agreement was a restrictive covenant despite the fact that the agreement was unrecorded. In so finding, the Court of Appeals stated:

The very language of the 1955 easement reveals it to be a restrictive covenant that runs with the land. In the agreement, NEC promises to relocate the power line should the property ever "be developed." That agreement applies to the land. While the agreement does not specify whether this promise was to be honored only with respect to the Matthews, **it does envision the future of the land** and thus applies to the Wests. *See Marathon*, 325 S.C. at 604, 483 S.E.2d at 765 (explaining that a "restrictive covenant runs with the land, and is thus enforceable by a successor-in-interest, if the covenanting parties intended that the covenant run with the land, and the covenant touches and concerns the land") (citation omitted).

Moreover, the restrictive covenants in the 1955 easement touch and concern the subject property. The Matthews insisted upon several conditions in order to

maintain the safety and value of the property. The subject of the covenants is a power line connected to and crossing over the land. Adherence to the covenants by NEC directly affects the nature and value of the easement to both NEC and the Wests. The covenants in the easement also restrict the manner in which NEC can use the easement. **The exact location of the easement on the property is not described in the easement, but its possible relocation is contemplated.** The covenants were obviously intended to touch and concern the subject property.

Id. at 542-3.

14. Furthermore, the Complaint sufficiently states a cause of action for civil conspiracy. Plaintiff has alleged conduct that goes well beyond legitimate business competition. Plaintiff's alleges specific planning for the intended harm to occur, to wit: the development of the property without any reservation of provision for the Plaintiff's easement despite all Defendants having actual knowledge of the easement. The alleged injury was alleged to have been specifically planned by Zurlo and/or all the Defendants. Thus, the Court should find that the Plaintiff has satisfied this pleading requirement. *See*, Order p. 26 – 9, *Labelle v. Brown & Williamson Tobacco Corporation*, C.A. No. 2:98-3235-23 (Dist. S.C. 1999).

15. Plaintiff's claim for a temporary injunction is sufficiently plead. To establish a cause of action for injunction, the plaintiff must show: (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law. *Levin v. Spartanburg Regional Services District, Inc.*, 367 S.C. 458, 464 (Ct. App. 2005) ("The sole purpose of an injunction is to preserve the status quo to avoid potential irreparable injury to the aggrieved party pending litigation.")

16. Additionally, pursuant to Rule 12(b) of the South Carolina Rules of Civil Procedure, a motion making a 12(b)(6) motion (or any of the other enumerated defenses) shall be made before pleading. However, the all Defendants filed answers to the Plaintiff's Complaint. Therefore, the Defendants' motions are procedurally improper and also have been waived. Thus, Defendants' motions to dismiss for failure to state a cause of action should be summarily denied.

17. Copies of the cases and opinion referenced in this reply are attached hereto as exhibits.

WHEREFORE, Plaintiff requests that the Court enter an order denying the Defendants' motions to dismiss for failure to state a cause of action and granting such further relief as this Court deems just and proper.

Respectfully submitted,

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s/ Jason M. Tarokh
JASON M. TAROKH
S. CAROLINA BAR # 72837

April 6, 2020

441 S.E.2d 331 (1994)

Harold E. Smith, Carl F. Smith and Jerry R. Smith, Respondents,

v.

COMMISSIONERS OF PUBLIC WORKS OF the CITY OF CHARLESTON, a Corporate Body
Politie, and Jay H. McDowell and Bankers Trust Company, as Trustees under the Will of
Benjamin R. Kittredge, of whom
Commissioners of Public Works of the City of Charleston, a Corporate Body Politie is the
Appellant.

No. 2134.

Court of Appeals of South Carolina.

Heard December 9, 1993.

Decided February 7, 1994.

333 *333 Lucas C. Padgett, Jr., Donald M. Williams and Karen C. Jackson all of McNair & Sanford, Charleston, for appellant.

Capers G. Barr, III of Barr, Barr & McIntosh and Grover C. Seaton, III of Walter Bilbro & Associates, Charleston, for respondents.

CURETON, Judge:

This is a declaratory judgment action involving the interpretation of a written agreement. In the action, respondents, Harold E. Smith, Carl F. Smith and Jerry R. Smith (Smiths), ask the court to declare that they have an easement to cross the land of appellant, Commissioners of Public Works of the City of Charleston (CPW). The master granted the relief sought by the Smiths and CPW appeals. We affirm as modified and remand.

The Smiths and CPW are adjacent land owners in Berkeley County. They are subsequent grantees of Benjamin R. Kittredge who originally received the easement in question from Bushy Park Authority, CPW's predecessor in title. The easement agreement arose out of an impending condemnation action. In 1955, Bushy Park Authority needed to acquire land belonging to Kittredge to construct a canal leading from the Cooper River to the Back River. To avert condemnation, Kittredge and Bushy Park entered into an agreement whereby Kittredge deeded 427 acres to Bushy Park. Simultaneous with the conveyance, Kittredge and Bushy Park entered into the agreement at issue.

Article II of the agreement contains the provision in dispute:

Kittredge and all future owners of Dean Hall Plantation and Cypress Gardens shall have the right, and the same is hereby granted to them, of ingress, egress and regress to the banks of and across the canal about to be constructed, leading from the Cooper River to Back River, at any point contiguous to the lands being conveyed by Kittredge to the Authority.

Article III of the agreement requires CPW to limit the use of the canal as follows:

The Authority shall at all times prohibit shooting, hunting, fishing, or trafficking (sic), by use of outboard motors, or otherwise, in the said canal south of the viaduct [bridge] over same, ... which ... would be detrimental to the desired central quiet atmosphere of Cypress Gardens....

334 *334 The bridge (viaduct) mentioned in Article III is about 250 yards north of the Smiths' property but is not adjacent (contiguous) to their land. A highway leads from the Smiths' land to the bridge. The access the Smiths seek to the canal over CPW's land is south of the bridge.

Prior to his death, Kittredge deeded approximately 500 acres to his trustees to be disposed of upon his death pursuant to his will. This acreage was the remaining part of what was known as "Dean Hall Plantation." After Kittredge's death, the trustees sold approximately 71.45 acres from this tract to the Smiths.

The Smiths brought this action seeking a declaration of easement rights under Article II of the agreement. CPW answered, contending the Smiths were not entitled to an easement across its property under the agreement because the purpose of the 1955 agreement, which was to afford Kittredge and his successors access to the canal, had been satisfied with the construction of a bridge over the canal in 1956, and the subsequent construction of a boat landing dock nearby.^[1] Thus, any easement rights granted under the 1955 agreement, they argue, terminated with the construction of the bridge and dock.^[2]

The parties consented to an order of reference for final judgment with direct appeal to the Supreme Court, and conceded to the master that the matter at issue was fundamentally one of document interpretation. The master found: (1) the parties' agreement contemplated construction of the bridge; (2) the agreement was "clear and unambiguous" and granted the Smiths, as successors to Kittredge, the right to cross CPW's land "at any point" contiguous to the lands conveyed; (3) the agreement "clearly contemplat[ed]" that Kittredge's successors would "frequently cross" CPW lands and that they could do so "at any place" along the canal strip; and (4) the Smiths clearly are within the class of "future owners of Dean Hall Plantation" and, therefore, had easement rights over CPW's land.

Accordingly, subject to possible wetlands questions not at issue on appeal, the master ordered CPW to afford the Smiths rights of access over and across CPW's land "for the purpose of ingress, egress and regress to the banks of and across the Canal, held and owned by Defendant CPW, at such places as the Plaintiffs [Smiths] deem reasonable and necessary for the enjoyment of their property." Implicit in this holding is that "at any point" means several points rather than one point.

CPW first argues that the case before us sounds in equity because its main purpose is to determine the extent of the grant of an easement and, thus, we may take our view of the preponderance of the evidence. On the other hand, the Smiths argue this case involves the determination of the existence of an easement which is a question of fact in a law case. While we agree with the Smiths that the pleadings and evidence in this case present the primary issue of whether or not the agreement creates an easement in favor of the Smiths, they also present the question of the extent or scope of the easement. "[T]he determination of the *existence* of an easement is a question of fact in a law action" and subject to an any evidence standard of review when tried by a judge without a jury. Jowers v. Hornsby, 292 S.C. 549, 551, 357 S.E.2d 710, 711 (1987). However, the determination of the extent of a grant of an easement is an action in equity. Moore v. Reynolds, 285 S.C. 574, 577, 330 S.E.2d 542, 544 (Ct.App.1985). Thus, we may take our view of the evidence on the latter issue. Townes Assoc., Ltd. v. City Council of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976); see also *335 Floyd v. Floyd, 306 S.C. 376, 412 S.E.2d 397 (1991) (for treatment of cases containing both legal and equitable issues).

CPW next argues the master erred in finding the agreement was clear and unambiguous. We agree. An ambiguous agreement is one capable of being understood in more ways than one, an agreement obscure in meaning, through indefiniteness of expression, or containing words having a double meaning. Carolina Ceramics, Inc. v. Carolina Pipeline Co., 251 S.C. 151, 155-56, 161 S.E.2d 179, 181 (1968); Proffitt v. Sitton, 244 S.C. 206, 136 S.E.2d 257 (1964). We agree with CPW that the "future owners of Dean Hall Plantation" and "any point" language in the agreement are clearly ambiguous when considered in the context of the agreement. We conclude, however, such a ruling does not require a blanket reversal of the master on other issues raised in this appeal.

The parties appear to disagree as to whether the language of Article II creates an easement or a restrictive covenant. An easement is the right of one person to use the land of another for a specific purpose. Steele v. Williams, 204 S.C. 124, 28 S.E.2d 644 (1944). An easement is characterized as either appurtenant, in gross, or in gross for commercial purposes. 12 S.C.Juris. *Easements* § 3. A restrictive covenant, of the nature involved here, is contractual in nature and restricts in some particular the free use of land by its owner. See cases collected under West's S.C. Digest, *Covenants*, Vol. 7. Restrictive covenants are commonly created by a declaration of restrictive covenants, which is executed and recorded in the same manner as a deed. 17 S.C. Juris. *Covenants* § 8.

Whether a grant in a written instrument creates an easement and the type of easement created are to be determined by ascertaining the intention of the parties as gathered from the language of the instrument; the grant should be construed so as to carry out that intention. Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 143 S.E.2d 803 (1965); 23 Am.Jur.2d *Easements and Licenses* § 23 (1966) (if the language is uncertain or ambiguous in any respect, all surrounding circumstances, including the construction which the parties have placed on the language, may be inquired into and taken into consideration by the court). Without objection, both parties introduced evidence concerning the meaning of the language of the agreement and the circumstances surrounding the execution of the agreement. Although we find the agreement ambiguous, we nonetheless hold the evidence supports the master's conclusion that Article II of the 1955 agreement creates an easement. We also conclude that Article III was intended to be a restrictive covenant.

CPW next argues the master incorrectly ruled the Smiths were "future [owner(s)] of Dean Hall Plantation [or] Cypress Gardens." It claims the master's construction overlooks the intended distinction drawn by Kittredge and Bushy Park between "owners of Dean Hall Plantation or Cypress Gardens and all the [other] parcels of land conveyed by Kittredge to the Authority which includes successors of both Kittredge and Bushy Park." This claim has no merit. The Smiths' land was a part of the Dean Hall Plantation at the time the agreement was entered into.^[3] Any subsequent change in or renaming of a portion of the land upon a subdivision of the Dean Hall Plantation does not have the effect of voiding the easement. See Steele v. Williams, 204 S.C. 124, 28 S.E.2d 644 (1944) (an appurtenant easement right adheres to the dominant estate and every subdivision thereof).

336 CPW also complains of the failure of the master to denominate the instant easement as one in gross.^[4] The subject easement *336 was created by an express grant. The general rule is that the character of an express easement is determined by the nature of the right and the intention of the parties creating it. 25 Am.Jur.2d *Easements and Licenses* § 13 (1966). Nevertheless, the rule in South Carolina appears to be that an easement must be necessary to the enjoyment of the dominant estate to be appurtenant. 12 S.C.Juris. *Easements* § 3.

We hold the language of the agreement is evidence supporting the master's conclusion that the agreement establishes an easement appurtenant between dominant ("future owners of Dean Hall Plantation") and servient (CPW) estates. The intent of the parties seems clear given the "future owners" language of Article II and the binding successors language of Article XI.^[5] The "impending condemnation" circumstances of the agreement and a 1955 letter from Kittredge's lawyer to Bushy Park's corporate secretary support the conclusion that Kittredge wanted to retain the right to cross CPW's land to enjoy the water and his other land. It is also clear that he intended by the language employed to attach the attribute of assignability (alienability) to the easement. Sandy Island Corp. v. Ragsdale, *supra*; 25 Am.Jur.2d *Easements and License* § 13 (1966) (easements in gross are not favored by the courts, and an easement will never be presumed as personal when it may fairly be construed as appurtenant to some other estate).

There is clearly no merit to CPW's contention that much significance should be placed on the failure of the Smiths to mention the agreement in the deed from Kittredge's Trustees to the Smiths. The absence of any mention of the easement agreement in the deed is not relevant. The 1955 agreement clearly contemplates granting the easement to "future owners" and binds CPW as a successor to Bushy Park Authority. The easement runs with the land of the dominant (Smiths') estate although the "conveyance of the dominant estate does not expressly mention it." Carolina Land Co., Inc. v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1975). Moreover, the deed in question states following the property description that there is also granted "all and singular, the rights, members, hereditament and appurtenances to the said premises belonging, or in anywise incident or appertaining." Such language evidences the intent of the grantors "to grant [to the Smiths] all rights essential to the enjoyment of the premises conveyed." Brasington v. Williams, 143 S.C. 223, 141 S.E. 375 (1927).

The principal issue on appeal is whether the language in the agreement relating to "any point" means more than one point. We agree with the master that the term "any point" may mean more than one point. As pointed out in Pursley v. Inman, 215 S.C. 243, 248, 54 S.E.2d 800, 802 (1949):

the word "any" is a word of comprehensive meaning and is frequently used in the sense of "all or every", but like all other general words, its meaning is frequently restrained and limited by the subject which it

qualifies. [citing Tuten v. Bowden, 173 S.C. 256, 175 S.E. 510 (1934)].

The subject unlocated easement must be interpreted, however, in light of good faith, reasonableness and what was necessarily the intent of the parties to the 1955 agreement. Hill v. Carolina Power & Light Co., 204 S.C. 83, 28 S.E.2d 545 (1944) (an easement in general terms is limited to a use which is reasonably necessary and convenient and as little burdensome to the servient estate as possible for the use contemplated). In determining the extent of the easement (number of access points or routes), consideration must be given to what is essentially necessary to the enjoyment of the Smiths' property. Sandy Island Corp. v. Ragsdale, *supra*; Carolina Land Company v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1975); Jacobs v. Service Merchandise Co., 297 S.C. 123, 375 S.E.2d 1 (Ct.App.1988); 12 S.C.Juris. *Easements* § 20.

- 337 *337 In view of the subdivision of Dean Hall Plantation, we hold it is not reasonable to interpret the agreement to say that Kittredge and Bushy Park intended that each owner of any portion of the Plantation, no matter how small his portion, would have his own private unlimited access to the canal as long as his land was contiguous to CPW's land. Cf. Patterson v. Duke Power Co., 256 S.C. 479, 183 S.E.2d 122 (1971) (where deed grants right of way but does not fix its width, the matter of width is considered in light of what is "convenient and necessary to accomplish purpose for which way was created..."); see also 25 Am.Jur.2d *Easements and Licenses* § 64 *et seq.*

We, therefore, hold the Smiths are only entitled to such access across CPW's property as is reasonably necessary to a full enjoyment of their property. Here, however, the master did not consider whether or not it was necessary that the Smiths have multiple access to the canal across the land of CPW to fully enjoy their property. Additionally, although, we have found no South Carolina case that specifically says so, the general law is the owner of the servient estate has the right, in the first instant, to designate the location of an undesignated easement. Abdalla v. State Highway Comm'n, 261 N.C. 114, 134 S.E.2d 81 (1964); 25 Am.Jur.2d *Easements and Licenses* § 66 (1966); see Marlow v. Marlow, 284 S.C. 155, 325 S.E.2d 703 (Ct.App.1985); Annot., 24 A.L.R. 4th 1053 (1983). We, therefore, remand to the master for resolution the number of access points the Smiths are entitled to, and to establish the access point or points (routes), to include their width. See 25 Am.Jur.2d *Easements and Licenses* § 68 (1966). By way of direction to the trial court, we in no way hold that the Smiths are entitled to multiple access points across CPW's land if one point is reasonably sufficient to enable them to fully enjoy their property.

The decision of the master is affirmed as modified. All other issues raised by CPW and not discussed herein are found to be manifestly without merit and we affirm the master pursuant to Rule 220(b)(2), SCACR; S.C.Code Ann. § 14-8-250 (Supp.1993) and Voelker v. Hillcock, 288 S.C. 622, 344 S.E.2d 177 (Ct.App.1986).

AFFIRMED AS MODIFIED AND RMANDED.

HOWELL, C.J., concurs in part, and dissents in part, GOOLSBY, J., concurs.

HOWELL, Chief Judge (concurring in part, dissenting in part):

I concur in the majority's characterization of Article II, finding the language creates an easement. I disagree, however, with the finding that the easement is unlocated and undelineated necessitating a further determination by the master as to the number of access points to and across the canal. It is my opinion that the master sufficiently sets forth the scope of the easement and further findings are unnecessary.

Article II creating the easement grants "all future owners of Dean Hall Plantations and Cypress Gardens ... the right ... of ingress, egress and regress to the banks of and across the canal about to be constructed... at any point[.]" (Emphasis added). The majority holds the language "at any point" creates an ambiguity capable of more than one understanding and, therefore, requires the master to make additional findings as to whether the Smiths, by agreement, are granted multiple access points to the canal and across the lands of CPW. I disagree.

The cardinal rule of construction is to ascertain the intention of the parties. Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 143 S.E.2d 803 (1965). The easement, therefore, should be construed so as to carry out the intention of the parties.

338

Article II creates in all future owners of Dean Hall Plantation an easement that would afford them full enjoyment of the canal and banks contiguous to their property. Reviewing the agreement in its entirety, the intention of the parties appears to be the creation of unrestricted and unencumbered use in a manner consistent with unrestricted and unencumbered ownership of the fee on both sides of the waterway. It is my opinion that the words "to the banks of and across" intended to grant full enjoyment restricted only by Article III which prohibits activity "338 that would disturb the quiet enjoyment of the banks and waterway, *i.e.*, the use of outboard motors or shooting.

I would, therefore,

AFFIRM AS MODIFIED.

[1] The Smiths testified they use the boat ramp frequently for access to the canal.

[2] When an easement is implied by necessity, courts in other jurisdictions have held that the easement ceases at the time the necessity no longer exists. We have been unable to locate a South Carolina case that holds such. 12 S.C. Juris. *Easements* § 31. Here, however, the instant easement is expressly created by grant and the rules relating to implied easements of necessity do not apply. It is also worth noting that the agreement itself contemplated the construction of the bridge. Moreover, none of the bases for termination of an appurtenant easement appear to apply in this case. *See* 12 S.C. Juris. *Easements* §§ 29-34.

[3] The deed from Kittredge's Trustees to the Smiths recites the sixth paragraph of Kittredge's will which states the subject property is part of a 500 acre tract, "the remaining part of what was known as Dean Hall Plantation."

[4] An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer. *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E.2d 803 (1965). In contrast, an appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. *Id.* at 806. It also passes with the dominant estate upon conveyance. *Carolina Land Co., Inc. v. Bland*, *infra*.

[5] This Article provides that the terms of the agreement are binding upon the parties, their successors and assigns.

371 S.C. 60 (2006)
636 S.E.2d 872

Ed FRIERSON, IV, Virginia S. Frierson, and Allie S. Frierson, Respondents,
v.
David L. WATSON, Patricia R. Watson, and Carolina First Bank, Defendants, of whom David L. Watson is the Appellant.

No. 4167.

Court of Appeals of South Carolina.

Submitted October 1, 2006.

Decided October 23, 2006.

62 *62 C. Nicholas Lavery, Christopher G. Olson and Ronnie L. Smith, all of Clemson, for Appellant.

James C. Alexander, of Pickens, for Respondents.

63 *63 GOOLSBY, J.

Ed Frierson, IV, Virginia Frierson, and Allie S. Frierson (collectively, the "Friersons") brought this declaratory judgment action against David L. Watson and others to establish an easement for the use of a hallway between two adjoining buildings. The circuit court granted summary judgment to the Friersons, finding they had established an easement for the hallway. Watson appeals. We affirm.^[1]

FACTS

The Friersons^[2] have a two-story building at the corner of East Main Street and Pendleton Street in Easley, South Carolina. The building shares a common wall with an adjacent two-story building owned by Watson and his wife.^[3] An outdoor stairway located on Watson's property provides access to the second floor of both buildings. This dispute arose when Watson began to construct apartments on the second floor of his building and proposed to close off a connecting hallway at the top of the stairs. The Friersons assert they have an easement to use the outdoor stairway as well as the hallway to access the second floor of their building.^[4] They allege Watson's construction violates their easement because it would deny them access to the second floor. Watson does not dispute an easement exists for the stairway, but maintains there is no easement for the hallway and the Friersons would not be denied access to the upper floor of their building because there is a stairway inside the Frierson building.

64 *64 A review of the real estate records shows the Friersons' predecessors-in-interest, E.C., E.O., and D.M. Frierson, purchased the building in 1929 from the "Estate of R.F. Smith, Inc." The 1929 deed, dated January 14 and recorded on January 23, expressly conveyed "an easement in a certain four foot stair-way in the back of the building, with right of ingress and egress on said stairway to the second story of said building."

On January 21, 1929, two days before the deed was recorded, the parties to the sale executed a "Memorandum of Agreement" concerning an easement for the use of the hallway. Although the agreement was signed, it was never recorded. The agreement stated in relevant part:

[T]he party of the first part [Estate of R.F. Smith, Inc.] has sold to the parties of the second part [E.C., E.O. and D.M. Frierson], a certain brick building at the corner of Main and Pendleton Streets, the second story of which is not partitioned, but one-half belongs to each of the parties hereto. There are offices constructed over the building of the parties of the second part covering practically the width of their

building. As a part of the consideration of the sale of this property, the party of the first part grants to the parties of the second part, the right to use the hall-way on the second floor as long as the said room remains unpartitioned [sic] by brick and continuous through to the roof.

The Friersons currently use the first floor of their building to operate a drug store. Over the years, the family used the second floor for a variety of purposes. At one point, it was a Masonic lodge. Later, the family rented the second story to doctors, dentists, and others as office space and visitors used the hallway to access those offices. The second floor eventually became unusable and the family utilized it for storage and for private office space. The Frierson building passed through the estate of E.O. Frierson, one of the original parties named in the deed, to Virginia Frierson's husband, E.C. Frierson, III, and then through the husband's estate to Virginia.

65 In 2002, Watson and his wife purchased the two-story building adjacent to the Friersons' building from Goodwill Industries of Upper South Carolina, Inc. The deed, recorded *65 June 6, 2002, noted an easement as follows: "This conveyance is made subject to an easement granted E.C. Frierson, et al. to use the stairway along this common line as ingress and egress to the second story of the Frierson building (See Deed Book 3-V at Page 229)." The 2002 deed also referenced "a plat prepared by J.C. Smith & Associates, Surveyors, for Goodwill Industries of Upper South Carolina, Inc. dated April 23, 2002..." The plat showed access to the second floor via an external door, a twenty-eight foot stairway, and a forty-foot portion of an upstairs hallway.

Watson's closing attorney wrote a title opinion on June 3, 2002, prior to the closing, noting Goodwill was the owner of the property subject to easements for use of the exterior door, stairway, and hallway:

Goodwill Industries of Upper South Carolina, Inc. is the fee simple owner of said property subject, however, to the following exceptions ... Easement as to Tract No. 2., granted to E.C. Frierson, E.O. Frierson and D.M. Frierson, their heirs and assigns ... and such easements or rights-of-way to the exterior door, stairwell and hallway as [shown] on a plat dated April 23, 2002, by Smith Surveyors, Inc. for Goodwill Industries of Upper South Carolina, Inc.

Following the purchase, Watson began constructing apartments on the second floor of their building. He planned to place one of those apartments where the hallway was located. The Friersons brought this declaratory judgment action to establish an easement to the hallway. They also sought an injunction to stop Watson's construction and additionally asserted claims for trespass and breach of contract. The Friersons claimed Watson's construction violated their easement by eliminating the hallway, which denied them access to the second floor of their building.

66 During his deposition for discovery, Watson testified that he saw the survey containing the hallway easement either at closing or up to one week prior to closing, but he did not realize until after closing that the survey was actually part of the deed. Watson further testified that he received (1) either a copy of the 1929 deed or a document including the same language as the deed that granted an easement for the stairway and (2) a copy of the subsequent Memorandum of *66 Agreement from 1929 that granted an easement for the hallway. Also prior to the closing, Watson and a previous owner of the building had a conversation about an ongoing dispute with the Friersons about the hallway; during this conversation the previous owner informed Watson that the Friersons were claiming a right to use the hallway. Watson acknowledged, that an easement to only the top of the stairway served no purpose for the Friersons without some way to access their second floor from it.

The Friersons moved for summary judgment. After a hearing, the circuit court determined the Friersons had established an easement for use of the hallway by grant and by prescription and granted the Friersons' motion. Watson appeals.

STANDARD OF REVIEW

Under the South Carolina Rules of Civil Procedure, the trial court may determine summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party." Sumner v. Carpenter, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997).

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002); see also Baird v. Charleston County, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) ("Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.").

LAW/ANALYSIS

67 On appeal, Watson contends the circuit court erred in granting summary judgment to the Friersons and determining they had established an easement by grant to use the hallway. *67 Specifically, Watson asserts the 1929 deed granting an easement for use of the stairway does not refer to the hallway and the Memorandum of Agreement granting the hallway easement was not recorded.

"An easement is a right which one person has to use the land of another for a specific purpose." Steele v. Williams, 204 S.C. 124, 132, 28 S.E.2d 644, 647 (1944). This right of way over land may arise in three ways: (1) from necessity, (2) by grant, and (3) by prescription. Id. at 132, 28 S.E.2d at 647-48; see also Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 419, 143 S.E.2d 803, 806 (1965) ("One of the ways of creating an easement is by an express written grant.").

"A reservation of an easement in a deed by which lands are conveyed is equivalent, for the purpose of the creation of the easement, to an express grant of the easement by the grantee of the lands." Sandy Island Corp., 246 S.C. at 419, 143 S.E.2d at 806.

"A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments." Binkley v. Rabon Creek Watershed Conservation Dist., 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct.App.2001) (quoting 28A C.J.S. *Easements* § 57 (1996)). Both deeds and easements are valid to subsequent purchasers without notice when they are recorded. S.C.Code Ann. § 30-7-10 (Supp. 2005). The purpose of the recording statute is to protect a subsequent buyer without notice. Burnett v. Holliday Bros., 279 S.C. 222, 225, 305 S.E.2d 238, 240 (1983). Additionally, one who already has notice of the existence of any instrument will be bound by such notice whether the instrument is recorded or not. First Presbyterian Church v. York Depository, 203 S.C. 410, 416, 27 S.E.2d 573, 576 (1943).

68 Notice of a deed is notice of its entire contents and whatever matters one would have learned upon the inquiry that the instrument made it one's duty to pursue. Binkley, 348 S.C. at 71, 558 S.E.2d at 909. Further, "where a deed describes land as is shown as a certain plat, such becomes a part of the deed." Carolina Land Co. v. Bland, 265 S.C. 98, 105, 217 S.E.2d 16, 19 (1975). The law imputes to a purchaser of real property notice of the recitals contained in the written *68 instruments forming the purchaser's chain of title and charges him with the duty of making such reasonable inquiry and investigation as is suggested by the recitals and references therein contained. McDonald v. Welborn, 220 S.C. 10, 16, 66 S.E.2d 327, 330 (1951); LoPresti v. Burry, 364 S.C. 271, 276, 612 S.E.2d 730, 732-33 (Ct.App.2005); see also S. Ry., Carolina Div. v. Howell, 79 S.C. 281, 286, 60 S.E. 677, 679 (1908) (finding the equivalence of notice in circumstances where one has knowledge of such facts as were sufficient to put one on inquiry, which if pursued with due diligence, would have led to the knowledge of one's rights).

An easement by grant is not required to be recorded to be valid. Although notice is assumed when a document conveying an interest in real property is recorded, recording is not necessary if the buyer has actual notice. In this case, Watson testified regarding the numerous ways in which he knew about the hallway easement—his deed contained a survey noting the hallway easement and the previous owner had informed him of an ongoing dispute over the hallway. Further, Watson testified that he received a document that granted the easement to the stairway and that he knew an easement only to the stairway itself provided the Friersons with no way of accessing their second story from the stairway. Additionally, Watson's attorney prepared a title opinion which included the hallway easement and, most

importantly, Watson actually received a copy of the unrecorded document granting the hallway easement. Watson, moreover, testified at his deposition that he has been involved in purchasing and developing real estate for at least ten years. As the circuit court noted in its order, "Watson is a sophisticated businessman experienced in real estate." The unrecorded document clearly granted an easement to the hallway and Watson had the document prior to closing. We therefore hold the circuit court properly granted summary judgment to the Friersons on the basis they had established an easement by grant.^[5] Accordingly, the order of the circuit court is

AFFIRMED.

BEATTY and WILLIAMS, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

[2] Virginia Frierson held title to the property when this litigation began. Virginia Frierson subsequently died and her sons, Ed Frierson, IV and Allie S. Frierson, as the personal representatives of her estate, were substituted for her in this action.

[3] Watson and his wife, Patricia, are the title holders to the property; however, the Notice of Appeal names Watson as the appealing party.

[4] According to the Friersons' Amended Complaint, the easement they seek is for the use of "28 feet up the stairway and 40 feet down the hallway."

[5] Because we affirm the circuit court's award of summary judgment to the Friersons on the basis they established their right to an easement by grant, we need not address their entitlement to summary judgment on the additional basis that they had established the existence of an easement by prescription. See Matthews v. Dennis, 365 S.C. 245, 248 n. 2, 616 S.E.2d 437, 439 n. 2 (Ct.App.2005) (noting where the court affirmed the existence of an easement by prescription, it was unnecessary to address whether there was also an easement by necessity); see also Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal); Weeks v. McMillan, 291 S.C. 287, 292, 353 S.E.2d 289, 292 (Ct.App.1987) ("Where a decision is based on alternative grounds, either of which independent of the other is sufficient to support it, the decision will not be reversed even if one of the grounds is erroneous.").

361 S.C. 434 (2004)
604 S.E.2d 714

James M. LOFTIS and Roxana T. Loftis, Appellants,
v.
SOUTH CAROLINA ELECTRIC AND GAS COMPANY, Respondent.

No. 3874.

Court of Appeals of South Carolina.

Submitted September 14, 2004.

Decided October 11, 2004.

436 *436 Kenneth C. Krawcheck, of Charleston, for Appellant.

John M. Mahon, Jr. and Beaumont Barre Covert, both of Columbia; Wade H. Logan, III, Elizabeth Scott Moise and M. Scott Taylor, all of Charleston, for Respondent.

WILLIAMS, J.:

In this action filed by a property owner seeking an injunction preventing SCE&G from maintaining power lines on his property and damages resulting from past maintenance, the owner challenges the master's grant of summary judgment. The master based his ruling on, among other things, SCE&G's establishment of a prescriptive easement to maintain the power lines. We affirm.

FACTS

On September 4, 1998, James and Roxana Loftis ("Appellants") purchased a parcel of land located on Bryan Road in Hollywood, South Carolina. On two occasions prior to purchasing the property, Mr. Loftis conducted a walking inspection of the land. Two power lines extended across the property, one dedicated to the previous owner's residence and a second line that provided electrical service to all the residents of Bryan road.

437 While inspecting the property at the request of Mr. Loftis for the purpose of initiating basic electrical service, SCE&G *437 determined that safety concerns mandated routine trimming around all the power lines on the property. Thus, on three occasions, SCE&G's independent contractors entered the property to clear vegetation. On two occasions, Appellants' father, who was staying on the property, halted the trimming.

Believing SCE&G's trimming activities damaged their property, Appellants brought suit, asserting claims of conversion, negligence, and trespass. Appellants asked the court for money damages, an order requiring SCE&G to remove the existing power lines, and an injunction preventing SCE&G from entering the property in the future.

On October 4, 2002, SCE&G filed and served a motion for summary judgment on all causes of action. On the day scheduled for trial, the master agreed to hear arguments on SCE&G's summary judgment motion prior to the start of trial. Indicating he felt "hamstrung," Appellants' trial attorney explained he was surprised a hearing was being held on the motion. The master postponed the trial, allowing Appellants "ten days to submit a Brief with any supporting affidavits, or evidence that you want." After reviewing supplemental material from both parties, the master granted summary judgment on the trespass and conversion causes of action based on multiple grounds. This appeal follows.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003); George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court under Rule 56(c), SCRPC. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 108, 584 S.E.2d 375, 377 (2003). In determining whether any triable issue of fact *438 exists, the evidence and all factual inferences drawn from it must be viewed in a light most favorable to the nonmoving party. Sauner v. Public Serv. Auth., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). Hendricks v. Clemson Univ., 353 S.C. 449, 455-56, 578 S.E.2d 711, 714 (2003).

LAW / ANALYSIS

Appellants first argue the trial court erred in hearing SCE&G's motion for summary judgment on the day trial was scheduled to begin. In support of their position they cite Rule 6(d), SCRPC, which reads, "a written motion ... and notice of the hearing thereof, shall be served not later than ten days before the time specified for the hearing."

We conclude there was no reversible error in the procedure followed by the trial court. SCE&G's motion was filed and served twenty-seven days before the hearing. In response to objections to the timing of the motion hearing, the trial court granted Appellants ten additional days to submit a brief and opposing affidavits and did not rule on the motion until full consideration of these materials was given. Accordingly, we find Appellants have not been prejudiced. See Dedes v. Strickland, 307 S.C. 152, 155, 414 S.E.2d 132, 134 (1992) (holding that failure to give written notice of a motion hearing is reversible error when it "wrongfully denie[s] the opportunity to submit affidavits, documents or testimony opposing... the motion" and thereby causes prejudice to the opposing party). Having addressed Appellants' procedural exception, we move now to the merits of the master's findings.

The master concluded, as one of several grounds for finding a valid easement on Appellants' property, that SCE&G successfully established an easement by prescription. We affirm the master's decision on this ground.^[1]

*439 In order to establish an easement by prescription a party must show: (1) the continued and uninterrupted use or enjoyment of a right for a full period of twenty years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under claim of right. Horry County v. Laychur, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993); Babb v. Harrison, 220 S.C. 20, 24-25, 66 S.E.2d 457, 458 (1951); Hartley v. John Wesley United Methodist Church of Johns Island, 355 S.C. 145, 150, 584 S.E.2d 386, 388 (Ct.App.2003). Having reviewed the elements which define a prescriptive easement, we now review the evidence on the matter, being mindful to give Appellants "the benefit of all favorable inferences that might reasonably be drawn therefrom." Estes v. Roper Temporary Services, 304 S.C. 120, 121, 403 S.E.2d 157, 158 (Ct.App.1991).

We find ample undisputed evidence in the record to support the master's finding of a prescriptive easement. An agent of SCE & G testified that he inspected several telephone poles supporting the electrical lines crossing Appellants' property and found a "birthmark" on one pole reading 1972 and another reading 1954.^[2] The son of Appellants' property's prior owner, who is also a current neighbor of Appellants, testified that the property in question has received electrical service through the power lines since at least 1949. A life-time neighbor and family friend to the property's prior owners testified that the power lines at issue have been on the property since the 1930's, and electrical service provided every decade since. Because one of the two power lines in question is a "primary distribution line" that supplies power to the rest of Bryan Road, the few intermittent periods where Appellants' property did not receive electrical service do not cause the prescriptive easement to fail for lack of "continual" or "uninterrupted" use. Even when Appellants' property was without electrical service, the power lines were still being maintained and used by SCE&G. The evidence clearly supports the master's conclusion that SCE&G used the property to supply power to the residents of Bryan Road for the required twenty-year period.

440 '440 The brunt of Appellants' argument, however, lies in the third requirement for establishing an easement by prescription. Appellants incorrectly assert that a prescriptive easement cannot be established in this case because "[o]bviously, use is not adverse where the [d]efendant had a mistaken belief it had the right to be on the property." Appellants ignore that a prescriptive easement can also be established under a "claim of right," or, in other words, under the very mistaken belief Appellants admit drove SCE&G's actions. Our courts have held that a party may earn a prescriptive easement under a claim of right if "he demonstrate[s] a substantial belief that he had the right to use" the property in a manner consistent with the alleged easement. Hartley, 355 S.C. at 151, 584 S.E.2d at 389; see also Revis v. Barrett, 321 S.C. 206, 209, 467 S.E.2d 460, 462 (1996) (holding a party's belief about her right to use a road flowed from a claim of right); Morrow v. Dyches, 328 S.C. 522, 528, 492 S.E.2d 420, 424 (Ct.App.1997) (noting a party's belief that he had a right-of-way may be sufficient for a prescriptive easement pursuant to a claim of right).

In the case before us, SCE&G has used and maintained the power lines in question since the 1930's pursuant to their belief they had a valid right-of-way to use the property in this manner. Evidence supporting this belief, or claim of right, was presented to the master in the form of testimony regarding SCE&G's search for documents, believed to exist but missing, proving a filed right-of-way on the property. Furthermore, SCE&G presented as evidence several versions of their general service terms and conditions, which have stated the following since 1962:

"The Customer, in requesting or accepting service, thereby grants the Company without charge necessary rights-of-way and trimming and clearing privileges for its facilities along, across, and under property controlled by the Customer ... to the extent that such rights-of-way and trimmings are required or necessary to enable Company to supply service to the Customer... [and] to serve other Customers."

441 Since the prior owners of Appellants' property requested and received decades of electrical service, this evidence clearly *441 supports the master's finding that SCE&G had a substantial belief it had a right to use the property in the manner it did based upon the totality of the circumstances. Pursuant to this Court's standard of review, we therefore uphold the master's establishment of an easement by prescription in favor of SCE&G.

Finally, we address Appellants' contention that since they never requested electrical service from SCE&G,^[3] they are not bound by SCE&G's easement on the property, no matter what theory supports the easement's establishment. A purchaser of land with actual, constructive, or implied notice that the property is burdened with an easement ordinarily takes the estate subject to the easement. 25 Am. Jur. 2d *Easements and Licenses* § 106 at 677 (1996). In order to charge the purchaser of a servient estate with notice of an unrecorded easement, the marks of the servitude must be open and visible. 25 Am. Jur. 2d *Easements and Licenses* § 107 at 678 (1996). Here, the marks of the easement (the poles and power lines) were open and visible. Furthermore, Appellants admit to making inspections of the property and to actual knowledge of the power lines prior to the property's purchase. We therefore conclude that Appellants purchased the property subject to SCE&G's prescriptive easement.

For the foregoing reasons, the master-in-equity's decision is

AFFIRMED.

GOOLSBY and ANDERSON, JJ., concur.

[1] In light of our disposition of the case on the issue of prescriptive easement, it is not necessary to address Appellants' remaining issues. See Rule 220(c), SCACR; Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (appellate courts need not address remaining issues when the disposition of a prior issue is dispositive).

[2] A "birthmark" is a physical marking SCE&G places on its telephone poles which reflect the year in which they were erected.

[3] Although Appellants did not officially request electrical service prior to the trimming that gave rise to this action, they have since requested and received such service.

357 S.C. 537 (2004)
593 S.E.2d 500

Billye L. WEST, Misty M. West, Brandy B. West, Billye L. West, II, Tiffany T. West and Sabin S. West and The Heritage of Newberry, Inc., Respondents,

v.

NEWBERRY ELECTRIC COOPERATIVE, Inc., and Daniel P. Murphy, Appellants.

No. 3737.

Court of Appeals of South Carolina.

Heard October 8, 2003.

Decided February 2, 2004.

Rehearing Denied March 18, 2004.

539 *539 Thomas H. Pope, III, of Newberry, for Appellants.

James L. Bruner, of Columbia, for Respondents.

BEATTY, J.:

Newberry Electric Cooperative (NEC) appeals from the trial court's finding that Billye West, his children, and their family corporation (collectively, the Wests) were entitled to declaratory relief and ordering NEC to relocate a power line on the Wests' property. We affirm.

540 *540 **FACTS**

W.E. and Edith Matthews owned a 98-acre tract of land in Newberry County. In June 1955, they entered into a written agreement with NEC concerning the construction, operation, and maintenance of a power line on their property. The easement contained several restrictive covenants, including, NEC would not place more than four poles on the property, each pole were to be at least 45 feet tall, and the wires at least 35 feet from the ground "at the lowest point of sag." The easement also stated

should the premises over which these lines pass be developed by cutting into streets or lots or otherwise, then and in that event, with a reasonable time after notice and upon same conditions, [NEC] does hereby agree to remove its lines along a location along said street or streets or elsewhere to be designated by [the Matthews] but at no time shall [NEC] be deprived of the privilege of crossing said property at the general proximity of the same location and in case said line is moved, [NEC] shall have a right to use approved methods of construction in re-locating said line.

(emphasis added).

The easement concludes with a habendum clause which states "TO HAVE AND TO HOLD the privileges herein granted unto [NEC], its successors and assigns forever." The document was never recorded, but rather was maintained on file at NEC. In 1989, NEC placed additional poles on the property, in essence violating the covenant, but the Matthews did not complain.

The Wests purchased the property from the Matthews estate in 1996. While unaware of the unrecorded 1955 easement, the Wests were aware of the NEC power line on the property. Indeed, Billy West spoke with Larry Longshore, the CEO of NEC, before acquiring the property. West wanted to know whether the line could be relocated. West testified Longshore assured him the line would be moved. Longshore admitted to only speaking with West about a possible

541 relocation and maintained that he made no firm commitment to moving the line. However, both an NEC employee and a consulting engineer testified that Longshore *541 indicated a desire to move the line and asked that plans be drawn up for relocation.

In 1999, the Wests decided to develop the property for commercial use, prompting the need for water and sewer service. The City of Newberry (the City) could provide these utilities, but only if the Wests agreed to (1) annex the property into the City limits and (2) receive electric service from the City instead of NEC. The Wests agreed and the City annexed the property in January 2000. After the annexation, the Wests asked NEC to relocate the line, and NEC refused. The Wests then learned about the 1955 easement. They reiterated their request to move the line—this time arguing that NEC had violated the covenants of the 1955 easement. NEC again refused to relocate the line.

The Wests filed a complaint seeking the relocation of the power line, claiming trespass and promissory estoppel. They also sought a declaration that the 1955 easement was a real covenant that touched and concerned the subject property. The trial court found for the Wests on all three issues and ordered NEC to move the line.

ISSUES

- I. Did the trial court err in concluding that the 1955 easement on the property was a real covenant?
- II. Did the trial court err in finding that the Wests had not waived their rights to complain to NEC under the 1955 easement?
- III. Did the trial court err in finding that the Wests had met their burden of proving promissory estoppel?
- IV. Did the trial court err in finding that NEC had trespassed upon the property?

STANDARD OF REVIEW

542 "A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge *542 without a jury." *Slear v. Hanna*, 329 S.C. 407, 410, 496 S.E.2d 633, 635 (1998). The doctrine of promissory estoppel is equitable in nature. See 28 Am.Jur.2d *Estoppel and Waiver* §§ 1, 55 (2000). "When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." *Kiriakides v. Atlas Food Systems & Services, Inc.*, 338 S.C. 572, 580, 527 S.E.2d 371, 375 (Ct.App.2000) (citation omitted). In an action at equity, this court can find facts in accordance with its view of the preponderance of the evidence. *Doe v. Clark*, 318 S.C. 274, 276, 457 S.E.2d 336, 337 (1995).

LAW/ANALYSIS

I. 1955 Easement

NEC argues the trial judge erred in finding the 1955 easement was a real covenant that ran with the land. We disagree.

"A restrictive covenant runs with the land, and is thus enforceable by a successor-in-interest, if the covenanting parties intended that the covenant run with the land, and the covenant touches and concerns the land." *Marathon Fin. Co. v. HHC Liquidation Corp.*, 325 S.C. 589, 604, 483 S.E.2d 757, 765 (Ct.App.1997) (citations omitted). "[A] party seeking to enforce a covenant must show the covenant applies to the property either by its express language or by a plain and unmistakable implication." *Charping v. J.P. Scurry & Co., Inc.*, 296 S.C. 312, 314, 372 S.E.2d 120, 121 (Ct.App.1988) (citations omitted).

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The very language of the 1955 easement reveals it to be a restrictive covenant that runs with the land. In the agreement, NEC promises to relocate the power line should the property ever "be developed." That agreement applies to the land. While the agreement does not specify whether this promise was to be honored only with respect to the Matthews, it does envision the future of the land and thus applies to the Wests. See Marathon, 325 S.C. at 604, 483 S.E.2d at 765 (explaining that a "restrictive covenant runs with the land, and is thus enforceable by a successor-in-interest, if the covenanting parties intended that the covenant run with the land, and *543 the covenant touches and concerns the land") (citation omitted).

Moreover, the restrictive covenants in the 1955 easement touch and concern the subject property. The Matthews insisted upon several conditions in order to maintain the safety and value of the property. The subject of the covenants is a power line connected to and crossing over the land. Adherence to the covenants by NEC directly affects the nature and value of the easement to both NEC and the Wests. The covenants in the easement also restrict the manner in which NEC can use the easement. The exact location of the easement on the property is not described in the easement, but its possible relocation is contemplated. The covenants were obviously intended to touch and concern the subject property. See *id.* While the language of the easement does not expressly state the covenants were intended to touch and concern the subject property, that is clearly implied. See Charging, 296 S.C. at 314, 372 S.E.2d at 121.

Accordingly, the trial judge did not err in holding the 1955 easement was a real covenant that ran with the land.

II. Waiver

NEC argues the trial judge erred in failing to apply the doctrine of waiver. Specifically, NEC argues that, as neither the Matthews nor the Wests ever enforced several covenants in the 1955 easement, the right to file a complaint to NEC under the easement was waived.

This issue was neither addressed by the trial judge in the final order nor mentioned in the subsequent Rule 59(e), SCACR, motion. As such, it is not preserved for review by this court. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); see also Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (finding issue was not preserved where the trial judge did not explicitly rule on the appellant's argument and the appellant did not raise the issue in a Rule 59(e), SCRCP, motion to alter or amend the judgment).

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*544 III. Promissory Estoppel

Since we have found that the 1955 easement is valid as to the Wests, we need not address the issue of promissory estoppel.

IV. Trespass

NEC argues the trial judge erred in finding NEC had committed a trespass upon the property.

"Trespass is any intentional invasion of the plaintiff's interest in the exclusive possession of his property." Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 357, 559 S.E.2d 327, 337 (Ct.App.2001) (citing Silvester v. Spring Valley Country Club, 344 S.C. 280, 286, 543 S.E.2d 563, 566 (Ct.App.2001)); see also Ravan v. Greenville County, 315 S.C. 447, 463, 434 S.E.2d 296, 306 (Ct.App.1993) ("a trespass is any interference with one's right to the exclusive peaceable possession of his property.").

In the final order, the trial judge found, "the facts demonstrate that the NEC has violated the covenants in several ways, has technically forfeited its rights by reason of its violation and has committed trespass on the Property." This is the only mention of trespass in the final order. Assuming, without deciding, that the trial judge erred in finding NEC guilty of

trespass without conducting a more thorough analysis, we conclude this was harmless error. The record supports both the trial judge's substantive findings and his ultimate conclusion that NEC violated the terms of the 1955 easement. See, e.g., Brown v. Allstate Ins. Co., 344 S.C. 21, 25, 542 S.E.2d 723, 725 (2001) (reinstating a trial court's decision though the trial court had erred since the error was harmless); 5 Am.Jur.2d *Appellate Review* § 711 (1995) ("Harmless error provisions are designed to eliminate reversals on purely formal and technical grounds, and to assure that substantial justice has been done.").

Based on the foregoing, the trial court's order is

AFFIRMED.

GOOLSBY and HUFF, JJ., concur.

FILED

MAR 10 1999

**LARRY W. PRUFER, CLERK
CHARLESTON, SC**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

Donald A. LaBelle, as Personal Estate
of the Representative of Christine Lezzo
LaBelle, Deceased,

C.A. No. 2:98-3235-23

Plaintiff,

v.

Brown & Williamson Tobacco
Corporation, as successor by merger to
The American Tobacco Company;
Fortune Brands, Inc, formerly known as
American Brands, Inc.; Brown &
Williamson Tobacco Corporation; British
American Tobacco (Investments) Limited,
formerly known as British-American
Tobacco Company Limited; B.A.T.
Industries, PLC; Batus Holdings, Inc.;
Philip Morris Incorporated (Philip Morris
U.S.A.); Philip Morris Companies, Inc.;
R.J. Reynolds Tobacco Company; RJR
Nabisco, Inc.; Liggett & Myers, Inc.;
The Brooke Group Limited; Liggett
Group, Inc.; Lorillard, Inc.; Lorillard
Tobacco Company; Loews Corporation;
The Council for Tobacco Research --
U.S.A., Inc., as successor in interest to the
Tobacco Industry Research Committee;
and The Tobacco Institute, Inc.

ORDER

Defendants.

I. INTRODUCTION

Plaintiff Donald LaBelle has brought this suit on behalf of the heirs at law of his
deceased wife, Christine Lezzo LaBelle, alleging the following eight causes of action:

- (1) Strict Products Liability

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- (2) Fraud/Constructive Fraud
- (3) Breach of Express Warranties
- (4) Breach of Implied Warranty
- (5) Consumer Protection¹
- (6) Negligence/Gross Negligence
- (7) Civil Violation of the Federal Racketeer Influenced and Corrupt Organizations Act (RICO)
- (8) Civil Conspiracy

Within each cause of action, plaintiff has articulated both a survival action and a wrongful death claim.

On December 18, 1998, this court entered a consent order in which the parties agreed to dismiss many of the defendants from the case without prejudice. The only defendants that remain in the case at this time are Philip Morris, Inc. (Philip Morris U.S.A.), Liggett & Meyers, Inc., the Brooke Group Limited, and Liggett Group, Inc. On December 14, 1998, Philip Morris, Inc. filed a motion to dismiss the action (and accompanying memorandum) pursuant to Rules 12(b)(6) and 9(b) of the federal Rules of Civil Procedure. On January 27, 1999, Liggett & Meyers, Inc, the Brooke Group Limited, and Liggett Group, Inc. ("the Liggett defendants") filed a similar motion, in which they announced their intention to join in all of the arguments advanced in Philip Morris' motion. Additionally, plaintiff has

¹ Plaintiff claims that Pennsylvania law governs the causes of action alleged in this suit, since Mrs. LaBelle was a resident of Pennsylvania at the time of her death -- therefore, he has stated his consumer protection claim under the Pennsylvania Unfair Trade Practices and Consumer Protection Law.

voluntarily dismissed the third and seventh causes of action in his complaint. Therefore, this order will deal only with defendants' motions as they pertain to the remaining six causes of action.

II. STANDARD FOR MOTION TO DISMISS

Rule 12(b)(6) of the Federal Rules of Civil Procedure states that a claim can be dismissed for "failure to state a claim upon which relief can be granted." Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint need only set forth a "short and plain statement of the claim showing that the pleader is entitled to relief." "Vague and conclusory" allegations are insufficient to satisfy the notice pleading requirements of Rule 8(a)(2). Simpson v. Welch, 900 F.2d 33, 35 (4th Cir. 1990).

"When passing on a motion to dismiss . . . for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Johnson v. Mueller, 415 F.2d 354, 355 (4th Cir. 1969). Furthermore, "a motion to dismiss for failure to state a claim for relief should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim." Id.; see also Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Labram v. Havel, 43 F.3d 918, 920 (4th Cir. 1996). For the purposes of a motion to dismiss, the factual allegations of the complaint are taken as true. Johnson v. Mueller, 415 F.2d at 355.

III. ANALYSIS

Defendants' motion to dismiss argues two general theories. First, it argues that all of plaintiffs' claims are pre-empted by the 1965 Federal Cigarette Advertising and Labeling

3
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Act (as amended by the 1969 Public Health Cigarette Smoking Act), 15 U.S.C. §§ 1331-1341. Second, it argues that even if not pre-empted, many of plaintiffs' claims must be dismissed because the allegations contained in the complaint fail to satisfy the elements of the various claims asserted, and thus fail to state a claim upon which relief may be granted. The court will address each of these theories in turn.

A. The Pre-emption Issue

In 1965, Congress enacted the Federal Cigarette Advertising and Labeling Act ("the Labeling Act") for the purpose of providing a comprehensive federal scheme for regulating, among other things, the types of warning labels that must be placed on cigarette packages and advertisements. Congress then amended certain provisions of the Labeling Act in 1969 with the Public Health Cigarette Smoking Act ("the Smoking Act"). Section 4 of the Labeling Act made it unlawful to sell cigarettes unless the package bore a conspicuous label warning the buyer of potential health hazards. 15 U.S.C. § 1333(a). Congress also articulated a pre-emption provision in § 5 of the Act, which reads as follows (in its amended form):

- (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
- (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334. Defendants have argued that this provision -- specifically, § 5(b) of the

4
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Labeling Act -- pre-empts plaintiffs' post-1969 claims.²

The United States Supreme Court addressed the pre-emptive effect of § 5(b) in the case of Cippolone v. Liggett Group, Inc., 505 U.S. 504 (1992). In that case (upon which defendants base much of their pre-emption argument), the Supreme Court held that, prior to being amended in 1969, § 5 of the Labeling Act superseded only positive enactments by state or federal legislatures or agencies that would require particular warnings on cigarette labels or advertisements. Id. at 518-20. However, the 1969 Cigarette Smoking Act amended (and broadened) § 5(b) of the Labeling Act, and resulted in a statute that pre-empts certain state-law damages actions against cigarette manufacturers.³ Id. at 520-24. The Court described the central inquiry as follows:

[W]e ask whether the legal duty that is the predicate of the common-law damages action constitutes a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion," giving that clause a fair but narrow reading.

Id. at 524. It then concluded generally that the statute pre-empted the plaintiff's state-law damages actions which were predicated on a "failure to warn" theory and on the theory that the defendants committed fraudulent misrepresentation by creating advertisements which "neutralized" the effect of the federally-mandated warning labels. Id. at 524-25, 527-28. However, it did not pre-empt the plaintiff's claims for breach of express warranty, or any fraudulent misrepresentation claims that were based on allegations of false representations

² Apparently, defendants concede that plaintiffs' pre-1969 claims are not pre-empted, although they argue that many of them should fail for other reasons.

³ Section 5 has not been amended since the 1969 Cigarette Smoking Act, so it reads today exactly the same as it has read since the passage of that act.

5
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or concealment of material facts. *Id.* at 525-29. Similarly, the Court held that the plaintiff's claim of conspiracy to misrepresent or conceal material facts was not pre-empted. *Id.* at 530.

The main thrust of defendants' argument in this case is that no matter what plaintiffs call them, all of their claims are, in effect, "failure to warn" claims -- that is, they are claims based on allegations that defendants could have and should have done more to alert plaintiff to the dangers of smoking. In essence, then, the court's task is one of "claim construction" -- that is, plaintiffs' claims must be evaluated to determine if they fit one or more of the types of claims that are pre-empted by the Labeling Act.

As a general rule, a suit against a cigarette manufacturer may not be based on claims which allege that warnings used in cigarette advertising, promotion, or packaging are inadequate, and which argue that the manufacturer could have or should have done more to warn of the dangers of smoking. However, a suit may be based on claims that the manufacturer affirmatively engaged in deceit by concealing material facts that it had a duty to disclose through some means other than advertising or promotion, or affirmatively misrepresenting material facts regarding the dangers of smoking in any medium, including advertising and promotion. See *Cippolone*, 505 U.S. at 527-29. In addition, a suit may be based on a "contractual commitment voluntarily undertaken" (i.e., a breach of express warranty), or allegations involving actions other than advertising or promotion -- that is, "claims that rely solely on . . . testing or research practices." *Id.* at 524-25. Many of the circuit and district court cases cited in the memoranda of both parties appear to follow a similar framework. See *Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 171 (5th Cir. 1996) (Claims for failure to warn and fraudulent concealment of information pre-empted;

6
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claim for fraudulent misrepresentation not pre-empted, but failed for other reasons); Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 235 (6th Cir. 1988) (Failure to warn claim pre-empted; products liability claim not pre-empted); Lacey v. Lorillard Tobacco Co., Inc., 956 F. Supp. 956, 961-63 (N.D. Ala. 1997) (Claims for failure to disclose ingredients of cigarettes and for fraudulent concealment/suppression of information were pre-empted, as was claim for injunction requiring defendants to disclose information regarding such ingredients to consumers; but noting in dicta that "[A]ctions based on intentionally false misstatements of fact do not appear to be pre-empted . . ."); Sonnenreich v. Philip Morris, Inc., 929 F. Supp. 416, 418-19, (S.D. Fla. 1996) (Claim of "negligent failure to warn" which alleged that defendants could have used "non-promotional communications" to inform public of dangers of cigarette smoking was pre-empted); Griesenbeck v. American Tobacco Co., 897 F. Supp 815, 822-24 (D.N.J. 1995) (Products liability action based on allegations that defendant should have warned plaintiff, through some sort of "mass notification," of dangers associated with cigarettes is pre-empted)⁴; Burton v. R.J. Reynolds Tobacco Co., 884 F. Supp. 1515, 1521 (D. Kan. 1995) (Failure to warn claim pre-empted; fraudulent misrepresentation and concealment claims, conspiracy claim, and claim based on the Kansas

⁴ Griesenbeck dealt not with a smoking-related illness, but with a fire which had been started by a lit cigarette that had been left burning on a couch, and which resulted in the deaths of several of the plaintiff's family members. The plaintiff argued that the Labeling Act pre-empted only those claims which alleged that cigarette manufacturers should have warned of the risks of smoking-related illnesses, but the court did not accept the plaintiff's distinction. Instead, the court determined that the risk of self-immolation from a cigarette was every bit as much of a "health risk" as the risk of getting cancer from smoking -- thus, the Labeling Act pre-empted any action based on a cigarette manufacturer's failure to warn of cigarettes' fire risks just the same as it would pre-empt an action based on its failure to warn of the risk of smoking-related illnesses. Griesenbeck, 897 F. Supp. at 823.

Consumer Protection Act were not pre-empted); Castano v. American Tobacco Co., 870 F. Supp. 1425, 1432-34 (E.D. La. 1994) (Claims for fraud, deceit, negligent misrepresentation, intentional infliction of emotional distress, violation of Consumer Protection Statute, breach of express and implied warranties, negligence, and strict liability were not pre-empted).

Before turning to plaintiffs' claims, one final point should be made regarding the types of claims that typically are pre-empted. As noted supra, courts generally agree that claims based on a "failure to warn" theory are pre-empted, while claims based on some sort of affirmative or fraudulent misrepresentation of material fact are not pre-empted. The gray area in between these types of claims includes claims of "fraudulent concealment or suppression" of material facts -- that is, claims which allege that cigarette manufacturers engaged in fraud and deceit by failing to disclose information relating to the addictive qualities of and the true nature and degree of the health risks associated with cigarettes. Some courts have held that these claims are pre-empted, see Allgood; Lacey, supra, while others have not, see Burton; Castano, supra. On this issue, this court agrees with the rationale articulated by those courts which have held that such claims are pre-empted. These claims are, in essence, claims that tobacco manufacturers should have disclosed additional information about smoking and health, but did not. As such, they are analogous to claims that the warnings placed on tobacco products and advertisements by tobacco companies are inadequate or insufficient, in light of the health risks about which the tobacco companies knew, but did not reveal. As noted in Cippolone, these types of claims are essentially failure-to-warn claims and are pre-empted, because the duty imposed by such claims would amount to a "requirement or prohibition based on smoking and health . . . imposed under

8
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State law with respect to . . . advertising or promotion.”⁵

With this analytical framework in mind, the court turns to plaintiffs’ individual claims.

Count I: Strict Liability

From the face of the complaint, plaintiffs’ strict liability claim appears to be predicated on two general sets of allegations: (1) defendants’ products were defective and unreasonably dangerous because of the manner in which they were designed and manufactured, see Complaint, ¶¶ 42-43; and (2) defendants’ products were defective and unreasonably dangerous because of the manner in which they were packaged and labeled, and because defendants’ advertising and marketing methods lacked adequate warnings as to the dangers of cigarette smoking, id. at ¶¶ 44(a) & (b), 45-46, 48.⁶ The first set of allegations relates to defendants’ research, testing, and manufacturing processes – under Cippolone, that

⁵ It should be noted, however, that if the “duty to disclose” is not imposed by state law, but was, for example, voluntarily undertaken by defendants, then an action based on such “failure to disclose” or “fraudulent concealment” would not be pre-empted. Also, if the “duty to disclose” is imposed by state law, but not “related to advertising and promotion,” then the claim would not be pre-empted. The Cippolone Court gave as an example of such an instance a situation in which a state law would require disclosure of information related to smoking and health to a state agency. Cippolone, 504 U.S. at 528.

⁶ Plaintiff also alleges, as part of his “strict liability” claim, that defendants’ products were not reasonably safe for their intended uses because of advertising and marketing methods which “depicted cigarettes and cigarette smoking to be a safe and healthy practice,” and which contained information that was “inaccurate, misleading and/or false.” Complaint, ¶ 44(c) & (d). Regardless of the fact that plaintiff labels it as a “strict liability” claim, the former of these two allegations is an example of the type of “neutralization” claim that Cippolone held to be pre-empted. Cippolone, 504 U.S. at 527-28. The latter of these two allegations appears to the court to be more appropriately characterized as an allegation of fraud, and will be addressed as such infra.

set of allegations is not pre-empted. See Cippolone, 505 U.S. at 524-25 ("The Act does not . . . pre-empt petitioner's claims that rely solely on respondents' testing or research practices or other actions unrelated to advertising or promotion.").

The second set of allegations, however, is more problematic. These allegations appear to fly in the face of Cippolone and the Labeling Act -- that is, they appear to be little more than claims that defendants should have disclosed information in their possession regarding the health effects of smoking, but did not. Moreover, these allegations speak not so much to "advertising and promotion" as they do to the labeling and packaging of defendants' products. That is, the allegations are predicated largely on the theory that the products are unreasonably dangerous because the warnings on cigarette labels and packages are inadequate. As such, these claims would have the effect of requiring defendants to include additional cautionary statements on cigarette labels and packages, a requirement that is flatly prohibited by § 5 of the Labeling Act.⁷ Therefore, the court concludes that these

⁷ Plaintiff offers a somewhat creative argument on the issue of whether his "package-based" claims are pre-empted. Essentially, plaintiff argues that, following Cippolone's interpretation of § 5(a) of the Labeling Act (which deals with the required warnings on cigarette packages), a plaintiff is not pre-empted from bringing a state tort action for money damages with regard to cigarette packaging and labeling. According to plaintiff's argument, the Cippolone court held that the 1965 version of § 5(a) pre-empted only affirmative legislative acts by state legislatures or agencies which would require additional warning labels on cigarette packages, and does not pre-empt state tort actions based on inadequate warnings. Since § 5(a) was not amended by the 1969 Amendments to § 5, plaintiff argues, it naturally follows that the pre-emptive scope of § 5(a) remains limited.

Plaintiff's argument appears to be drawn from a 1997 law review article. See Michael D. Green, Cippolone Revisited: A Not So Little Secret About the Scope of Cigarette Preemption, 82 Iowa L. Rev. 1257 (1997). However, even the author of that article acknowledged that the almost universal weight of authority understands Cippolone and the Labeling Act to pre-empt "failure to warn" claims based on cigarette packaging and labeling. Id. at 1264-65. Indeed, the author could not cite to a single case which concurred with his

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allegations are pre-empted.

In sum, to the extent that plaintiff alleges that defendants' cigarettes were unreasonably dangerous because of a defective design and manufacturing, his claim survives pre-emption. Such a claim is related to defendants' testing, research, and manufacturing practices only, and falls under an exception articulated in Cippolone. Castano, 870 F. Supp. at 1434. However, plaintiff's claim is pre-empted to the extent that it is based on allegations regarding the manner in which defendants' products were (or "should have been") packaged and labeled.

Count II: Fraud/Constructive Fraud

As stated supra, claims for fraud are not pre-empted to the extent that they rely on allegations of affirmative misrepresentations or misstatements of material fact, regardless of whether those representations or statements appeared in materials that could be deemed to be sources of "advertising and promotion." However, such claims are pre-empted to the extent that they rest on allegations of concealment or failure to disclose information relating to the health effects of smoking. The court recognizes, however, that some courts that have considered the latter issue would disagree. See Burton, Castano, supra.

In this case, the vast bulk of plaintiff's allegations of fraud concerns a number of "false, misleading, and deceptive statements" allegedly made by defendants. Complaint, ¶¶

arguments, though he acknowledged several which had reached the opposite conclusion. See, e.g., Lacey, 956 F. Supp. at 964 ("It is precisely this type of claim -- that the warnings on cigarette packages and advertising are inadequate -- that is pre-empted by the Labeling Act.") (emphasis added). Although the court is intrigued by this argument, it is not the place of this district court to rule against such an overwhelming weight of precedential authority.

60-66. There are no specific allegations of "fraudulent concealment" of information by defendants, except to the extent that plaintiff's fraud claim incorporates the general allegations of concealment of information relating to smoking and health by defendants that are stated elsewhere in the complaint. Therefore, plaintiff's claim is only pre-empted to the extent that it relies on those other general allegations of concealment of information relating to smoking and health. The remainder of plaintiff's fraud claim, including all of the specific allegations enumerated in that cause of action, are not pre-empted.

Count IV: Breach of Implied Warranties

In plaintiff's complaint, this claim does not make any specific references to information that defendants should have disclosed, but instead concealed, or to any warnings that they should have made with respect to their products. Indeed, none of the cases cited by the parties have held that a claim for breach of implied warranties is pre-empted per se by the Labeling Act. Defendants cite to two cases in their brief which they claim support a conclusion that plaintiff's implied warranty claim is pre-empted -- however, a closer examination of those cases reveals that the issue is not so simple. Defendants first cite Allgood as a case in which a claim for breach of implied warranty was pre-empted -- however, Allgood did nothing of the kind. The warranty claims at issue in Allgood were dismissed for the following separate reasons: (1) two of the defendants, The Tobacco Institute, Inc. and the Council for Tobacco Research -- U.S.A., Inc. had never manufactured or sold cigarettes, and (2) the warranty claims against the two other defendants -- R.J. Reynolds Tobacco Company and the American Tobacco Company -- were barred by the statute of limitations. Id. at 170-71.

The second case cited by defendants is a New York state case, Geiger v. American Tobacco Co., 674 N.Y.S.2d 775 (N.Y. App. Div. 1998). However, that case stated only that implied warranty claims are pre-empted to the extent that they are based on a failure to warn. Id. at *9. Therefore, plaintiffs' claim for breach of implied warranty would not be pre-empted to the extent that it is based on something other than the failure to disclose information related to health and smoking on the part of defendants. Whether plaintiff's claim is, in fact, based on something other than a failure to warn is somewhat unclear from the complaint itself -- however, it appears that plaintiff's allegations of breach of warranty revolve, to at least some degree, around the idea that the cigarettes are "defective" and "not fit for the ordinary purposes for which they are used" because defendants withheld information about them from the public, and inadequately labeled and packaged them. To the extent that plaintiffs' breach of warranty claims are based on such allegations, they are pre-empted.

It should be noted, however, that plaintiff has also cited to an unpublished case from a lower New York state court which notes that, as a general matter, a claim for breach of the implied warranty of merchantability is based on the "general warranty that a product is fit for use, and thus is independent of 'advertising and promotion.'" Appavoo v. Philip Morris, Inc., 1998 WL 440036, *3 (N.Y. Sup. Ct. 1998). See also Castano, 870 F. Supp. at 1434 (Duty imposed under the implied warranty of merchantability is not based on "advertising and promotion"). Castano is particularly instructive, in that the implied warranty claim analyzed therein was based not on the defendants' alleged failure to warn of the hazards of cigarette smoking, but on their alleged manipulation of nicotine levels in cigarettes to make

a more addictive product. Id. Thus, Castano held that the claim would not impose a duty related to "advertising and promotion," at least as far as the claim was based on the nature and characteristics of the product itself, not on the public statements and warnings about the product (or lack thereof) made by the defendants. Put differently, the claim was based on the defendants' "manufacture and sale of cigarettes, which contain nicotine, regardless of whether defendants advertise or promote them," and thus was not pre-empted. Id. In this case, plaintiff's complaint contains similar allegations that defendants manipulated the level of nicotine in their cigarettes to produce a more addictive product. Insofar as plaintiffs' breach of warranty claim relies on these allegations, it is not pre-empted.

Count V: Consumer Protection

At the outset, it should be noted that there exists a question as to whether plaintiff's claims are governed by South Carolina or Pennsylvania law. Plaintiff maintains that the case is governed by Pennsylvania law, and has stated his "consumer protection" claim under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTCPL"), Pa. Stat. Ann. tit. 73, § 201-1 et seq. However, if the case is determined to be controlled by South Carolina law, then plaintiff's consumer protection claim would be brought under the South Carolina Unfair Trade Practices Act ("UTPA"), S.C. Code Ann. § 39-5-10 et seq. (Law. Co-op 1985 & Supp. 1998). For the sake of the pre-emption analysis, however, the choice of law question need not be resolved at this time.

Defendants argue that plaintiff's consumer protection claim is pre-empted because it relies, to at least some extent, on allegations that defendants concealed and failed to disclose information regarding the true nature of the health risks associated with smoking.

Admittedly, some of the "unfair and deceptive" acts alleged by plaintiffs appear to embrace "failing to warn the American public . . . of the health risks of smoking" and "the destruction or concealment of scientific test results which were adverse to their own interests in selling cigarettes." Complaint, ¶ 92(d) & (f). However, these allegations alone do not warrant pre-emption of plaintiff's consumer protection claim.

As the Cippolone Court noted, a claim that incidentally deals with advertising, promotion, and the dissemination of information can survive pre-emption if the duty imposed is not one "based on smoking and health," but on some other obligation. Cippolone, 505 U.S. at 528. In this case, it appears that there is another such obligation -- the duty to refrain from engaging in deceptive or unfair trade or business practices. Whether the actions alleged actually constitute unfair or deceptive trade practices is a separate inquiry, and one that will be dealt with infra. For the purposes of the pre-emption inquiry, however, this court concurs with those courts which have addressed the issue and concluded that actions brought under state consumer protection or unfair trade practice laws do not arise from a duty based on smoking and health, and thus are not pre-empted. Burton, 884 F. Supp. at 1521; Castano, 870 F. Supp. at 1433.

Count VI: Negligence/Gross Negligence

From the face of the complaint, it appears that plaintiffs' negligence claim is predicated on two general sets of allegations: (1) that defendants were negligent in designing, testing, and performing research on cigarettes and in marketing a product with dangerous and addictive qualities; (2) that defendants affirmatively misrepresented the health risks associated with smoking to the American public, and specifically to Mrs. LaBelle; and (3)

that defendants were negligent in failing to provide complete and accurate research and testing information to plaintiffs and the public, and in failing to provide sufficient warnings on cigarette packages. Under Cippolone, the first set of allegations is not pre-empted. See Cippolone, 505 U.S. at 524-25 ("The Act does not . . . pre-empt petitioner's claims that rely solely on respondents' testing or research practices or other actions unrelated to advertising or promotion."). Nor is the second set of allegations pre-empted, as it is analogous (and perhaps somewhat redundant) to plaintiff's fraud claim.⁸

The third set of allegations, however, is more problematic. These allegations appear to fly in the face of Cippolone and the Labeling Act -- that is, they appear to be little more than allegations that defendants were obligated to disclose information in their possession and to provide additional warnings regarding the health effects of smoking, and they failed to do so. Indeed, this would appear to be the exact type of "negligent failure to warn" claim that Cippolone and its progeny have consistently held to be pre-empted.

Plaintiffs attempt to circumvent this problem by claiming that the "duty to disclose" the information in question, while imposed by state law and based on smoking and health,

⁸ Indeed, to the extent plaintiff's claim depends on allegations that defendants intentionally misrepresented the health effects of smoking, it is more appropriately analyzed as a claim for fraud. However, to the extent plaintiff is alleging negligent misrepresentations on the part of defendants, those allegations may be characterized as part of plaintiff's negligence claim. Defendants may attempt to argue that such claims of "negligent misrepresentation" constitute a type of "failure to warn" claim that is pre-empted by Cippolone. However, a claim of negligent misrepresentation is conceptually different from a "failure to warn" claim. A plaintiff alleging negligent misrepresentation is not claiming that a defendant failed to speak when he had a duty to do so -- he is claiming that the defendant, regardless of whether he had a duty to speak at all, had a duty to speak truthfully and non-negligently once he elected to speak.

is not related to "advertising and promotion." That is, plaintiffs appear to argue that defendants could have and should have used other "non-promotional" means to disclose the information that it possessed regarding the health effects and addictive nature of cigarette smoking. However, most courts that have considered such claims have rejected the distinction that plaintiffs are attempting to draw, and have held that any claim which would require the public release or disclosure of information by tobacco companies, in any medium, is "related to advertising and promotion." See Lacey, 956 F. Supp. at 963-64; Sonnenreich, 929 F. Supp. at 418-19; Griesenbeck, 897 F. Supp. at 823.⁹ As such, they are pre-empted.

⁹ Plaintiffs strenuously argue that the Griesenbeck court misread Cippolone in concluding that any and all forms of "mass communication" between cigarette manufacturers and their customers constitutes "advertising and promotion." In support of this assertion, they cite three cases: Philip Morris, Inc., et al. v. Harshbarger, et al., 122 F.3d 58 (1st Cir. 1997); Penn Advertising of Baltimore v. Mayor and City Council of Baltimore, 63 F.3d 1318 (4th Cir. 1995); and Shaw v. Brown and Williamson Tobacco Corp., 973 F. Supp. 539 (D. Md. 1997). None of these cases are directly on point, however. Harshbarger involved a pre-emption challenge to a Massachusetts statute which required cigarette manufacturers to disclose information about their products to a state agency; Penn Advertising involved a pre-emption challenge to a city ordinance prohibiting cigarette advertisements on billboards within certain designated zones; and Shaw was a second-hand smoke case in which the plaintiff was a non-smoker. While Shaw opined that the relevant language from Griesenbeck was merely dicta and not binding, a close reading of Griesenbeck reveals that it was not dicta, but one of several alternate holdings. Moreover, a fair reading of Penn Advertising reveals that the court's decision rested on the fact that the ordinance was not directly "based on smoking and health," not on any interpretation of the phrase "advertising and promotion." Penn Advertising, 63 F.3d at 1324.

The only one of these cases which speaks directly to the meaning of the phrase "advertising and promotion" is Harshbarger. However, that court specifically noted that the issue of whether any direct communication between cigarette manufacturers and consumers or the public constituted "advertising and promotion" was not before it, because the statute at issue in that case did not require direct disclosure to the public, but to a state agency. Harshbarger, 122 F.3d at 75-77. It further noted that the "skepticism" with which it viewed the broad constructions given to that phrase by Lacey, Sonnenreich, and Griesenbeck was merely dicta. Id.

Count VIII: Civil Conspiracy

This claim is dependent on the previous counts. Essentially, plaintiff has alleged that in addition to engaging individually in all of the acts of which they complained, defendants conspired together to commit those acts. To the extent that plaintiff's individual claims against defendants can survive pre-emption, his conspiracy claim also survives pre-emption.

Plaintiff's Wrongful Death Claims

As with the conspiracy claim, defendants argue that plaintiff's wrongful death claims are dependent on the same sets of facts as the underlying statutory and tort claims, and therefore cannot survive pre-emption. However, as discussed supra, several of plaintiff's underlying claims will survive pre-emption in whole or in part -- to the extent that those claims are viable under a survival theory, plaintiff's wrongful death claims also survive.

B. The Substantive Elements of Plaintiff's Claims

In addition to their pre-emption arguments, defendants also argue that even if plaintiffs' claims are not pre-empted, they fail because the allegations in the complaint are insufficient, as a matter of law, to satisfy the elements of the individual claims. Again, the court will address plaintiffs' claims in turn. Before it does, however, there is a "choice of law" issue that must be addressed. While defendants maintain that South Carolina law governs the claims at issue, plaintiff's complaint alleges that the deceased was a citizen and resident of Pennsylvania up until the time of her death. In determining which state's law to apply to a case before it, a federal court sitting in diversity applies the "choice of law" rules

18
PMD

of the forum state, so long as doing so would not violate due process.¹⁰ Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941); Thornton v. Cessna Aircraft Co., 886 F.2d 85, 87 (4th Cir. 1989). South Carolina follows the traditional rule of lex loci delicti – that is, the substantive law of the state in which the injury occurred governs the action. Id.; Dawkins v. State, 412 S.E.2d 407, 408 (S.C. 1991).

Based solely on plaintiff's allegations, it would appear that the substantive law of Pennsylvania controls this case. However, at this early stage, such a determination is likely premature -- therefore, the court will analyze plaintiff's claims under both South Carolina and Pennsylvania law, where necessary. If the differences between the two states' laws would appear to affect the dismissal decision one way or the other on any particular claims, then the motion to dismiss will be left unresolved with respect to those claims until such time as the choice of law issue can be resolved.

Count I: Strict Liability

Defendants only argue that plaintiffs cannot state a claim of strict liability based on goods that were placed into the stream of commerce prior to July 9, 1974, even if the injury allegedly caused by those goods occurs thereafter. This argument is based on South Carolina law, which did not recognize a strict liability action for products placed into the stream of commerce prior to that date. Schall v. Sturm, Ruger Co., Inc., 300 S.E.2d 735 (S.C. 1983). However, defendants also concede that Pennsylvania adopted § 402A of the Restatement

¹⁰ When originally filed, plaintiff's complaint contained a cause of action under federal law (specifically, RICO) – however, that claim has been voluntarily dismissed, and only plaintiff's state law claims remain. Thus, this court's jurisdiction over the case is supported only by the diversity of the parties.

(Second) of Torts, which deals with strict products liability, in 1966. Webb v. Zern, 220 A.2d 853, 854 (Pa. 1966). Since it appears that plaintiff's strict liability claim would be dismissed in part under South Carolina law, but not under Pennsylvania law (as the doctrine of strict products liability would have been in force in Pennsylvania for the entire time that the deceased was a smoker), the court will reserve ruling on this issue until the choice of law issue can be resolved.

Count II: Fraud/Constructive Fraud

Defendants argue that plaintiff has failed to plead his fraud claim with the level of specificity required by Rule 9(b) of the Federal Rules of Civil Procedure. Specifically, defendants claim that plaintiff has not provided sufficiently detailed allegations describing the content of the alleged "misrepresentations," who said them, and when they were said -- as such, defendants argue, plaintiff's allegations are inadequate to state a claim for fraud. See Spear v. Ernst & Young, No. 3:94-1150-17, 1994 WL 585815, *3 (D.S.C. 1994). Defendants also cite certain cases for the proposition that when a plaintiff is alleging a fraud committed by multiple defendants, he may not lump all of the defendants together under a blanket set of allegations, and must specify which defendants were involved in which activities. Maryland Staffing Services, Inc. v. Manpower, Inc., 936 F. Supp. 1494 (E.D. Wis. 1996); Center Cadillac, Inc. v. Bank Leumi Trust Co. of New York, 808 F. Supp. 213 (S.D.N.Y. 1992), aff'd, 99 F.3d 401 (2nd Cir. 1993).

In this case, it appears that plaintiff has described in some detail the content of numerous allegedly fraudulent statements, and has identified the remaining defendants as the speakers of those statements. See Complaint, ¶ 60. In addition, plaintiff also has referred

22
PMD

specifically to several allegedly false statements made by defendants' CEOs before Congress in the early 1990s. *Id.* at ¶ 27. Lastly, in other parts of the complaint, plaintiff refers more generally to other "false, misleading and deceptive" statements, representations, and practices on issues such as youth targeting, smoking and health, and cigarette research. *Id.* at ¶¶ 26, 28-30, 33-36. To be sure, all of these allegations could be more specific. However, courts have noted that when the alleged misrepresentations are numerous and occur over a long period of time, they may be alleged with "somewhat less specificity" than is normally required under Rule 9(b). *Wilson v. Brown & Williamson Tobacco Corp.*, 968 F. Supp. 296, 300 n.4 (S.D.W.Va. 1997) (citing 2 *Moore's Federal Practice* § 9.03(1)(b) nn. 14 & 15). Bearing in mind these considerations, then, the court will refrain from dismissing these allegations of fraud at this time. The court invites plaintiff to move to amend his complaint as he may deem appropriate, so as to state his claims of fraud with more particularity, and also invites the parties to revisit this issue at the summary judgment stage.

Count IV: Implied Warranty

At the outset, it appears that plaintiff is only attempting to state a claim for breach of the implied warranty of merchantability, and not one for breach of the implied warranty of fitness for a particular purpose. The allegations in the complaint appear only to invoke the former warranty – indeed, to the extent that plaintiff may be trying to allege a breach of the implied warranty of fitness for a particular purpose, he has not alleged that Mrs. LaBelle had a particular purpose (other than the regular intended use of the product) in mind for the cigarettes that she purchased and used, or that defendants had any way of knowing that she might have had such a purpose in mind. Thus, plaintiff's implied warranty claim will be

21
PMD

treated as one for breach of the implied warranty of merchantability.

Also, it should be noted that, while there are certain minor differences in the implied warranty statutes of South Carolina and Pennsylvania, those differences appear to be of little significance to the issues currently before the court. Indeed, the similarities between the two provisions are far more striking than the differences. The South Carolina implied warranty statute, S.C. Code Ann. § 36-2-314(2) (Law. Co-op. 1977), reads as follows:

Goods to be merchantable must be at least such as

- (a) pass without objection in the trade under the contract description; and
- (b) in the case of fungible goods, are of fair average quality within the description; and
- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged, and labeled as the agreement may require.

The analogous Pennsylvania statute, 13 Pa. Cons. Stat. Ann. § 2314(b), reads as follows:

Goods to be merchantable must be at least such as:

- (1) pass without objection in the trade under the contract description;
- (2) in the case of fungible goods, are of fair average quality within the description;
- (3) are fit for the ordinary purposes for which such goods are used;
- (4) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved;
- (5) are adequately contained, packaged, and labeled as the agreement may require; and

22
PMD

(6) conform to the promises or affirmations of fact made on the container or label if any.

Plaintiff's allegations regarding this claim are somewhat unclear -- they do not explicitly say how defendants breached the implied warranty, only that they breached it. However, it appears that plaintiff's claim is based on two general sets of allegations: (1) that defendants withheld or concealed information about their products (thereby rendering their labels and packaging inadequate and the product "unmerchantable"); and (2) that the products are, by nature, so dangerous as to be "unmerchantable," largely because defendants manipulated the levels of nicotine in their cigarettes to make a more addictive product. As discussed supra, plaintiff's claim is pre-empted with respect to the first set of allegations, but not with respect to the second set. The question, then, is whether the second set states a cognizable claim for breach of the implied warranty of merchantability.

The thrust of defendants' argument is that plaintiffs' claim must fail because they have not alleged any specific defect in the product, and because the mere fact that the product is dangerous, in and of itself, is insufficient to give rise to such an action. In support of their argument, they rely largely on Judge Simpson's dissenting opinion in Green v. American Tobacco Co., 391 F.2d 97 (5th Cir. 1968). That opinion was explicitly adopted by the Fifth Circuit in its en banc reversal of the panel opinion. Green v. American Tobacco Co., 409 F.2d 1166 (5th Cir. 1969).

The Green opinions revolved around the issue of whether a cigarette manufacturer could be held strictly liable under an implied warranty theory without proof of a specific defect in the product. Judge Simpson's dissent essentially opined that, under the Florida law

23
PMD

of implied warranties, liability may not be imposed unless there has been an "actual adulteration" of the product which made it unfit for general use. Green, 391 F.2d at 110-11 (Simpson, J., dissenting). That is, the facts that cigarette smoking may be harmful and that smoking caused the plaintiff's cancer were, in and of themselves, insufficient to impose liability -- the plaintiff had to show that it was not the product, but some particular "adulteration" or defect within the product that caused his damages in order to recover for a breach of warranty.

Judge Simpson's opinion went on to conclude that, since plaintiff could not prove that the cigarettes that he smoked were any different from or of an inferior quality than most, if not all, other cigarettes on the market, he could not show the "defect" necessary to prove a breach of warranty.¹¹ Id. This opinion appears to be premised on the assumption that cigarettes, as a generic product, are per se "merchantable" and "fit for their ordinary use," despite the harmful health effects associated with them. The notion that cigarettes must possess some "unique" harmful characteristic that is not possessed by all other cigarettes on the market in order to be "unmerchantable" has been echoed by a federal district court in New York. See Semowich v. R.J. Reynolds Tobacco Co., No. 86-CU-118, 1998 WL

¹¹ He did, however, qualify his remarks by noting that "[i]nability to prove a specific defect would not preclude liability if there was proof the product was unreasonably dangerous without a defect." Id. at 110. The only way the court can reconcile this remark with the other statements in his opinion is to assume that he meant that the inability to prove a specific defect would not preclude liability under theories other than implied warranty (such as strict liability) if it could be proven that the product was unreasonably dangerous without a defect. Otherwise, the statement plainly conflicts with his assertion that "the Florida position on implied warranty is clearly one in which there has to first be an actual adulteration in the product before there can be liability from harm resulting from its use." Id. at 111.

123930, *3 (N.D.N.Y. 1988). See also Altronics of Bethlehem, Inc. v. Repco, Inc., 957 F.2d 1102, 1105 (3rd Cir. 1992) (Under Pennsylvania law, plaintiff must prove a defect or specific "malfunction" that occurred in the course of ordinary use of the product to show breach of the implied warranty of merchantability). That court noted that such a claim may be treated more properly under a strict products liability theory. Id.

Plaintiff in this case has not alleged any unique "defects" in the cigarettes smoked by Mrs. LaBelle -- indeed, the complaint appears to allege that she smoked not just one brand of cigarettes, but a variety of cigarettes produced by more than one manufacturer. Thus, no matter how it is viewed, plaintiff's claim depends on allegations that the cigarettes smoked by Mrs. LaBelle are dangerous and unfit for consumption as a general universe of products. The nature of a claim for breach of implied warranty focuses not on the issue of whether a particular type of product is inherently dangerous, but whether the specific product deviates so far in quality from a typical example of such a product that it cannot be said to constitute a "fair average" representation of that type of product, or to be "fit for the ordinary purposes" of such a product. Thus, plaintiffs' implied warranty claim is more appropriately analyzed in the context of a claim for strict products liability, which focuses on the "dangerousness" of the product per se, not on its relative quality, as compared to other products within the same universe. Plaintiffs' claim for breach of implied warranty therefore will be dismissed.

Count V: Consumer Protection

Defendants challenge plaintiff's consumer protection claim on pre-emption grounds only. As analyzed supra, plaintiff's consumer protection claim is not pre-empted -- thus, regardless of whether Pennsylvania or South Carolina law controls the case, it will not be

25
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dismissed.

Count VI: Negligence/Gross Negligence

As with plaintiff's consumer protection claim, defendants challenge plaintiff's negligence claim on pre-emption grounds only. Therefore, to the extent it is not pre-empted, plaintiff's negligence claim will not be dismissed.

Count VIII: Civil Conspiracy

In both South Carolina and Pennsylvania, a claim of civil conspiracy requires the plaintiff to show that two or more persons or entities combined to commit an unlawful act, and that they did so with "malice" or for the purpose of injuring the plaintiff. Corrigan v. Methodist Hospital, 853 F. Supp. 832, 836-37 (E.D. Pa. 1994); Skipworth v. Lead Industries Ass'n, Inc., 690 A.2d 169, 174 (Pa. 1977); Future Group II v. NationsBank, 478 S.E.2d 45, 50-51 (S.C. 1996); Hammond v. Butler, Means, Evins & Brown, 388 S.E.2d 796, 798 (S.C. 1990).¹² Defendants first argue that plaintiff's claim must fail because he has not pled that they acted with specific intent to injure (or "malice" towards) Mrs. LaBelle.

With respect to the second element, plaintiff has alleged that defendants acted in concert with respect to several of the acts alleged, thereby intentionally injuring Mrs. LaBelle in order to increase their profits. Complaint, ¶¶ 24-25, 29-31, 33-34, 122. Defendants,

¹² In South Carolina, a plaintiff alleging civil conspiracy must also prove that the conspiracy caused him special damages. Future Group II, 478 S.E.2d at 50; Todd v. S.C. Farm Bureau Mut. Ins. Co., 278 S.E.2d 607 (S.C. 1981). This requirement will be addressed infra.

In Pennsylvania, a plaintiff must also show an overt act in furtherance of the "common purpose or design," and some "identifiable damages," even if only nominal. Corrigan, 853 F. Supp. at 836-37; Pelagatti v. Cohen, 536 A.2d 1337, 1346 (Pa. Super. Ct. 1987).

26
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however, make essentially two arguments. First, they argue that because they had no idea who Mrs. LaBelle was or that she even existed, plaintiff cannot claim that they conspired to injure her. There is some case law to support this argument, at least in South Carolina. For instance, in Future Group II, the court noted that the plaintiff could not state a claim for conspiracy when one of the alleged conspirators had no idea of the plaintiff's existence, or of the fact that its actions might injure the plaintiff. 478 S.E.2d at 51. Thus, it could not be argued that the defendant conspired for the purpose of injuring the plaintiff.

Future Group II is at least somewhat distinguishable on its facts, however. The situation presented in that case involved two debts -- an \$80,000 debt owed by an insurance agency to a business partnership, and an \$800,000 debt owed by one of the agency's directors to a bank. The partnership alleged that the bank conspired to injure the partnership by obtaining the agency's corporate guarantee of the director's debt to the bank. Since the bank had no idea of the partnership's existence or of the debtor-creditor relationship between it and the agency, it could hardly be argued that the bank entered into a conspiracy with the intent of injuring the partnership. Whatever harm that occurred to the partnership was totally incidental and unforeseeable. In this case, however, the allegations describe a situation in which the harm resulting from defendants' actions was much less "incidental" or "unforeseeable." Indeed, the only part of the alleged harm that was unforeseeable was the exact identity of the people to whom it would come. So, while instructive, Future Group II is not quite entirely on point with the present situation.

A potentially more important question is the degree to which it must be alleged that defendants' specific purpose was that of causing injury to someone else. Certain cases in

both Pennsylvania and South Carolina seem to indicate that in at least some circumstances, if the injury is a by-product of some other motivation (such as the desire to make money), then there can be no claim for conspiracy. See Waldrep Bros. Beauty Supply, Inc. v. Wynn Beauty Supply Co., Inc., 992 F.2d 59, 63 (4th Cir. 1993); LaMotte v. Punch Line of Columbia, Inc., 370 S.E.2d 711, 713 (S.C. 1988) (conspiracy must be motivated by the desire to "ruin or damage the business of another"). See also Corrigan, 853 F. Supp. at 837 (Requisite "malice" cannot be inferred from the mere fact that defendants stood to gain financially from their allegedly harmful and illegal actions). In this case, plaintiff has alleged that defendants intentionally injured Mrs. LaBelle not out of any particular spite or malice towards her per se, but primarily out of a desire to increase their profits. See Complaint, ¶¶ 24, 28-30, 33-34. The question, then is whether it is sufficient to allege that the intentional injury was not the ultimate object of the conspiracy, but a means to achieving that ultimate object. This appears to be something of a gray area in the law of civil conspiracy -- however, it is noteworthy that in cases such as Waldrep, courts appear to have based their conclusions on the idea that the "harm" which befalls a plaintiff is "incidental" (and therefore not actionable) if it occurs as a result of "legitimate business competition." Waldrep, 992 F.2d at 63. In this case, however, plaintiff has alleged conduct that goes well beyond "legitimate business competition," and which includes specific planning for at least some of the alleged types of harm (e.g., addiction) to occur -- thus, the harm legitimately can be characterized as much less "incidental." Since the alleged injury in this case was foreseen (and to at least some extent, specifically planned), even though it may not have been the ultimate object of the alleged conspiracy, the court concludes that plaintiffs have satisfied this pleading

requirement.

It is at this point that the court reaches an apparent divergence of some sort between Pennsylvania and South Carolina law. Under South Carolina law, a conspiracy claim requires a third element – the plaintiff must plead and prove special damages. Essentially, this means that the complaint must describe damages that occurred as a result of the conspiracy itself, in addition to any damages alleged as a result of any other claims. That is, the damages allegedly resulting from the conspiracy must not overlap with or be subsumed by the damages resulting from the other claims. Sheek v. Lee, 345 S.E.2d 496, 497 (S.C. 1986); Todd v. S.C. Farm Bureau Mut. Ins. Co., 278 S.E.2d 607 (S.C. 1981). By contrast, however, it is unclear whether Pennsylvania law contains a similar requirement, or if it does, whether it is as rigorously interpreted. See, e.g., Smith v. Wagner, 588 A.2d 1308, 1312 (Pa. Super. Ct. 1991) (Where plaintiff pleaded damages that customarily result from publication of defamatory falsehoods, such averments were sufficient to plead a cause of action for civil conspiracy). As the choice of law question remains unresolved for the time being, the court will reserve a ruling on this matter until such time as that question is resolved and the issue can be briefed more fully by the parties.

Plaintiff's Wrongful Death Claims

Again, defendants have argued that since plaintiff's wrongful death claims are predicated on the same facts and theories as his survival actions, they should be dismissed as well. To the extent the court has concluded supra that plaintiff's survival actions should be dismissed, his wrongful death claims will be dismissed as well.

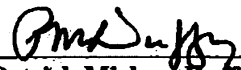
IV. CONCLUSION

It is therefore,

ORDERED, that defendants' motion to dismiss is **GRANTED IN PART AND DENIED IN PART**. The motion is granted in the following respects:

- (1) Count I (Strict Products Liability) is **DISMISSED IN PART**, but only to the extent that it is based on allegations that defendants' products were defective and unreasonably dangerous because of packaging and labeling;
- (2) Count II (Fraud/Constructive Fraud) is **DISMISSED IN PART**, but only to the extent that it relies on allegations of concealment of information related to smoking and health by defendants;
- (3) Count IV (Implied Warranty) is **DISMISSED**;
- (4) Count VI (Negligence/Gross Negligence) is **DISMISSED IN PART**, to the extent that it is based on allegations that defendants failed to provide information relating to smoking and health to the public and provided insufficient warning labels on cigarette packages;
- (5) Count VIII (Civil Conspiracy) is **DISMISSED**.

AND IT IS SO ORDERED.



Patrick Michael Duffy
United States District Judge

Charleston, South Carolina
March 18th, 1999

30

367 S.C. 458 (2005)
626 S.E.2d 38

Beth Ellen LEVINE, M.D., Respondent,
v.
SPARTANBURG REGIONAL SERVICES DISTRICT, INC. and Foothills Anesthesia Consultants,
P.C., Appellants.

No. 4065.

Court of Appeals of South Carolina.

Heard November 10, 2005.

Decided December 19, 2005.

Rehearing Denied February 16, 2006.

461 *461 H. Spencer King, T. Alexander Evins and Perry Boulter, all of Spartanburg, for Appellants.

A. Camden Lewis, of Columbia and Michael Eugene Spears, of Spartanburg, for Respondent.

HEARN, C.J.:

This is an appeal from an order of the trial court enjoining Spartanburg Regional Services District, Inc. (the Hospital) and Foothills Anesthesia Consultants, P.C. (Foothills) from terminating the privileges of anesthesiologist Beth Ellen Levine until the merits of her case can be adjudicated. We affirm.

FACTS

Beth Ellen Levine is a licensed physician and board-certified anesthesiologist. Her competency as a physician is not, and has never been, an issue in this case.

462 On May 1, 2000, the Hospital and Foothills entered into a three-year "Anesthesiology Agreement" (2000 Agreement). Under the 2000 Agreement, Foothills agreed to provide the Hospital with anesthesia services performed by licensed and qualified anesthesiologists. Four months later, Foothills and *462 Levine entered into a "Medical Service Agreement" (Service Agreement). Under the Service Agreement, Levine agreed to perform anesthesia services for Foothills at the Hospital. The Service Agreement included a three-year term limit as well as an automatic renewal provision.

The renewal provision stated:

At the end of the initial term, this Agreement shall automatically renew for a period of three (3) years unless any party gives written notice to the other party at least ninety (90) days before the end of the renewal term of its intent not to renew the Agreement. [Foothills] agrees that it shall give [Levine] a notice of non-renewal only if the grounds for its decision not to renew this or subsequent Agreements would be grounds for terminating this or subsequent Agreements. If such notice of non-renewal is given and [Levine] elects to exercise the rights available under Section 7(h) of the Agreement prior to the expiration of this or subsequent agreements, the Agreement shall remain in full force and effect at least until the respective rights and obligations of the parties concerning the renewal of the Agreement are determined by final order of the arbitrator.

The 2000 Agreement, by its own terms, ended in May 2003, but the Hospital and Foothills extended it through June. On July 21, 2003, the President of Foothills told Levine the 2000 Agreement had expired. Despite the end of the arrangement between the Hospital and Foothills, Levine continued to perform anesthesia services at the Hospital.

On November 19, 2003, the Hospital Board of Directors (the Board) amended the bylaws to enable the Hospital to enter into an exclusive contract for core anesthesia services. The Board also amended a provision of the bylaws related to the termination of privileges at the Hospital. The amended provision of the bylaws stated:

463 Where a physician previously has been granted . . . privileges in a Restricted Member Service,^[1] and was not, or is no longer, a Contract Physician,^[2] the President shall so notify *463 the Board. The Board shall propose the termination of the affected physician's privileges. . . . The affected physician shall have the procedural rights set forth in the Medical Staff Bylaws related to revocation of privileges . . . but the only issues for determination in any such proceedings shall be:

(1) Whether the privileges in question are, in fact, privileges reserved for Restricted Member Services; and

(2) Whether the applicant presently is, in fact, a Contract Physician. . . .

(footnotes added). On January 30, 2004, the Hospital and Foothills entered into another three-year agreement (2004 Agreement).

A month later, on February 24, 2004, general counsel for the Hospital notified Levine that if Foothills did not employ her she would lose her privileges at the Hospital. On March 1, 2004, the President of the Hospital informed Levine of the Board's decision to terminate her privileges. He informed Levine that she was entitled to procedural rights under the bylaws, "but the only issues for determination in such proceedings" would be whether Levine was employed by Foothills.

On March 3, 2004, Levine filed the present action against the Hospital and Foothills for breach of contract, interference with a contractual relationship, violation of due process, and civil conspiracy. Levine also sought a temporary restraining order to prevent the Hospital from terminating her privileges. After a hearing, the trial court granted a temporary injunction against the Hospital and Foothills. Both entities appeal.

STANDARD OF REVIEW

The grant or denial of an injunction by the trial court will not be reversed absent an abuse of discretion. *Gilley v. Gilley*, 327 S.C. 8, 11-12, 488 S.E.2d 310, 312 (1997); *MailSource, L.L.C. v. M.A. Bailey & Assocs.*, 356 S.C. 363, 367, 588 S.E.2d 635, 637-38 (Ct.App.2003). An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law. *Ledford v. Pa. Life Ins. Co.*, 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976); *County of Richland v. Simpkins*, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct.App.2002).

464 *464 LAW/ANALYSIS

The Hospital and Foothills argue the trial court erred when it enjoined the Hospital from revoking Levine's privileges. We disagree.

"An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). To obtain an injunction, the plaintiff must allege facts sufficient to constitute a cause of action for injunction and demonstrate the injunction is reasonably necessary to protect the legal rights pending in the litigation. *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct.App.2002). To establish a cause of action for injunction, the plaintiff must show "(1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Scratch Golf*, 361 S.C. at 121, 603 S.E.2d at 908.

A. Irreparable Harm

The Hospital and Foothills argue Levine has not suffered irreparable harm entitling her to injunctive relief because the harm she alleges can be remedied by monetary damages alone. We disagree.

The sole purpose of an injunction is to preserve the status quo to avoid potential irreparable injury to the aggrieved party pending litigation. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001); MailSource, L.L.C. v. M.A. Bailey & Assocs., 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct.App.2003). Before granting an injunction, the trial court should balance the equities: the court should look at the particular facts of each case and the equities of each party and determine which side, if any, is more entitled to equitable relief. MailSource, 356 S.C. at 368, 588 S.E.2d at 638. Whether "a wrong is irreparable, in the sense that equity may intervene, and whether there is an adequate remedy at law, are questions that are not decided by narrow and artificial rules." Kirk v. Clark, 191 S.C. 205, 211, 4 S.E.2d 13, 16 (1939).

465 *465 The trial court found that Levine, as a physician with a private practice, would suffer irreparable harm if an injunction was not granted. The record supports this conclusion. Levine has built a patient referral base through her work at the Hospital. This referral base would erode and potentially disappear if Levine lost her privileges at the Hospital while the merits of her underlying action against the Hospital and Foothills are adjudicated. Levine would also lose competency in anesthesiology if she were unable to ply her trade as the lawsuit progressed. Such inactivity could lead to the loss of her professional practice and career, which can be an irreparable harm.^[3] Therefore, we find the trial court did not abuse its discretion in deciding Levine would suffer irreparable harm without injunctive relief.

B. Success on the Merits

The Hospital and Foothills next argue Levine cannot succeed on the merits because the 2004 Agreement is an enforceable exclusive contract and the Service Agreement ended, without renewal, when the 2000 Agreement expired. We disagree.

1. Validity of the 2004 Agreement

466 When seeking a preliminary injunction, the plaintiff need not prove an absolute legal right; the plaintiff need only present "a fair question to raise as to the existence of such a right." Williams v. Jones, 92 S.C. 342, 347, 75 S.E. 705, 710 (1912). The determination of whether an injunction is granted should not be based on the merits of the underlying case except insofar as the merits may assist the trial court in *466 determining whether a prima facie showing has been made. MailSource, 356 S.C. at 368, 588 S.E.2d at 638 (citing Transcon. Gas Pipe Line Corp. v. Porter, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969)). "Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits." Helsel v. City of North Myrtle Beach, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992).

The trial court concluded Levine made a prima facie showing she was entitled to protection under the Hospital bylaws. Once this conclusion was made, the court was not required to determine whether the 2004 Agreement was valid. Accordingly, the trial court did not abuse its discretion in deciding Levine would likely succeed on the merits of the underlying action.

2. Automatic Renewal Provision of the Service Agreement

The trial court also concluded Levine made a prima facie showing she was entitled to protection under the Service Agreement. The record supports this conclusion as well. Under the Service Agreement, Foothills was required to give Levine notice of its intent not to renew the Service Agreement ninety days before the termination of the Service

Agreement. The July 21, 2003 letter from the President of Foothills to Levine does not appear to satisfy this requirement because it was sent within ninety days of the termination of the Service Agreement. Thus, the Service Agreement may have automatically renewed until September 1, 2006. Thus, we find the trial court did not abuse its discretion in determining Levine made a prima facie showing of success on the merits under the Service Agreement.

C. Inadequate Remedy at Law

Finally, the Hospital and Foothills argue Levine has an adequate remedy at law because she can recover money damages for her injuries. We disagree.

467 The purpose of an injunction is the preservation of the status quo. MailSource, 356 S.C. at 368, 588 S.E.2d at 638. "A temporary injunction is used to preserve the subject *467 of controversy in the condition which it is at the time of the [o]rder until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation." *Id.* As explained above, the trial court decided monetary damages alone would not remedy the harm Levine would sustain if her privileges at the Hospital were terminated. If Levine lost her privileges, her professional practice and, by extension, her career may very well be lost long before her claims against the Hospital and Foothills were finally adjudicated. This point is perhaps best buttressed by a provision of the 2004 Agreement between the Hospital and Foothills that states when privileges are terminated damages will "be difficult, if not impossible, to ascertain, and it is therefore agreed that [the Hospital] and Foothills shall have the right to an injunction or other equitable relief. . . ." Thus, we find the trial court did not abuse its discretion when it concluded the loss of a professional practice and a career could not be adequately remedied through money damages alone.

CONCLUSION

For the forgoing reasons, the order of the trial court is AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

[1] "Restricted Member Service" includes anesthesiology.

[2] A "Contract Physician" is a "physician who is employed by a physician group who is party to an exclusive contract."

[3] Other appellate courts have upheld injunctive relief to prevent the loss of a business or business goodwill. District of Columbia v. E. Trans-Waste of Md., Inc., 758 A.2d 1, 15 (D.C.2000) ("While economic loss does not, in and of itself, constitute irreparable harm, such harm will be found if economic loss threatens the very existence of [plaintiffs] business."); Campbell Inns, Inc. v. Banholzer, Turnure & Co., 148 Vt. 1, 527 A.2d 1142, 1146 (1987) ("The potential loss of a business satisfies the irreparable harm requirement for the issuance of an injunction."); IAC, Ltd. v. Bell Helicopter Textron, Inc., 160 S.W.3d 191, 200 (Tex.App. 2005) ("Loss of business goodwill or loss that is not easily calculated in pecuniary terms is sufficient to show irreparable injury for purposes of obtaining a temporary injunction.").

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE #: 2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

EUGENE J. ZURLO, Individually and as Co-Trustee
of the Eugene J. Zurlo Living Trust Dated December
11, 1997; 1776, LLC; BEACH FENWICK, LLC;
THE BEACH COMPANY; SEAMON, WHITESIDE
& ASSOCIATES, INC.; PENNY CREEK ASSOCIATES,
LLC; JOHN DOE AND MARY ROE

Defendants,

/

**PLAINTIFF'S AMENDED OBJECTION AND RESPONSE IN OPPOSITION TO THE
DEFENDANTS', MOTIONS FOR ORDER OF REFERENCE TO THE MASTER-IN-
EQUITY**

Plaintiff, MAYBANK 2754, LLC, by and through its undersigned attorney, hereby objects and responds in opposition to each of the Defendants', BEACH FENWICK, LLC; THE BEACH COMPANY (THE BEACH CO.); 1776, LLC; and EUGENE J. ZURLO, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997 (herein "Defendants"), respective motions for order of reference to the Master-in-Equity, and in support thereof states as follows:

1. An order of reference to the Master-In-Equity at this stage in this case is premature, improper and would violate Plaintiff's due process rights.
2. The Complaint requests a jury trial on all issues so triable.
3. Count I of the Complaint seeks a declaratory judgment pursuant to South Carolina Code §15-53-10, et. seq., declaring that the Plaintiff has an easement over the subject property, the location and condition of which is to be mutually agreed upon at the completion of Pitch Fork Road.
4. Count II of the Complaint, plead in the alternative to Count I, seeks a declaratory

judgment pursuant to South Carolina Code §15-53-10, et. seq., that a restrictive covenant exists over the subject property by virtue of the Resolution.

5. Count III of the Complaint seeks damages for civil conspiracy. An action for civil conspiracy is an action at law.

6. Establishing the existence of an easement is a question of fact in a law action. The decision of the trier of fact as to whether or not an easement exists is an action at law. *See, Jowers v. Hornsby*, 292 S.C. 549, 552 (Ct. App. 1987).

7. However, the determination of the scope of an easement is a question in equity. *See, Hardy v. Aiken*, 369 S.C. 160, 165 (S.C. 2006).

8. Therefore, before this case may be properly referred to the Master-in-Equity to determine the scope of an easement, a Circuit Court Judge should first determine whether an easement exists.

9. Furthermore, reliance on the Master-in-Equity's Order and Judgment of Foreclosure and Sale entered in Charleston County Court of Common Pleas Case # 2014-CP-10-04946 is misplaced because the Plaintiff was neither named as a party nor served with process in that case.

10. Thus, the Master-in-Equity never had personal jurisdiction over the Plaintiff in the foreclosure case, and as a result, its rights and interests in the subject property were never extinguished or impacted by the foreclosure judgment. Therefore, the reservation of jurisdiction of the foreclosure case by the Master-in-Equity only affects those whom were named as parties and also properly served with process. To conclude otherwise would obviously violate the Plaintiff's due process rights.

11. A judgment is void if a court acts without personal jurisdiction. *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). A court generally obtains personal jurisdiction by the service of a summons. *Ex parte S.C. Dep't of Revenue*, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct.App.2002) (citing *State v. Sanders*, 118 S.C. 498, 502, 110 S.E. 808, 810 (1920). ("The purpose of the summons is to acquire jurisdiction of the person of the defendant.. . .")).

12. Accordingly, the foreclosure judgment is void against the Plaintiff, and therefore cannot properly serve as the basis to refer this case to the Master-in-Equity.

WHEREFORE, Plaintiff requests that the Court enter an order denying the Defendants' motions for order of reference to the Master-in-Equity and granting such further relief as this Court deems just and proper.

Respectfully submitted,

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s/ Jason M. Tarokh
JASON M. TAROKH
S. CAROLINA BAR # 72837

April 9, 2020

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE #: 2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

EUGENE J. ZURLO, Individually and as Co-Trustee
of the Eugene J. Zurlo Living Trust Dated December
11, 1997; 1776, LLC; BEACH FENWICK, LLC;
THE BEACH COMPANY; SEAMON, WHITESIDE
& ASSOCIATES, INC.; PENNY CREEK ASSOCIATES,
LLC; JOHN DOE AND MARY ROE

Defendants,

/

**PLAINTIFF'S SECOND AMENDED OBJECTION AND RESPONSE IN OPPOSITION
TO THE DEFENDANTS', MOTIONS FOR ORDER OF REFERENCE TO THE
MASTER-IN-EQUITY**

Plaintiff, MAYBANK 2754, LLC, by and through its undersigned attorney, hereby objects and responds in opposition to each of the Defendants', BEACH FENWICK, LLC; THE BEACH COMPANY (THE BEACH CO.); 1776, LLC; and EUGENE J. ZURLO, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997 (herein "Defendants"), respective motions for order of reference to the Master-in-Equity, and in support thereof states as follows:

1. An order of reference to the Master-In-Equity at this stage in this case is premature, improper and would violate Plaintiff's due process rights.
2. The Complaint requests a jury trial on all issues so triable.
3. Count I of the Complaint seeks a declaratory judgment pursuant to South Carolina Code §15-53-10, et. seq., declaring that the Plaintiff has an easement over the subject property, the location and condition of which is to be mutually agreed upon at the completion of Pitch Fork Road.
4. Count II of the Complaint, plead in the alternative to Count I, seeks a declaratory

judgment pursuant to South Carolina Code §15-53-10, et. seq., that a restrictive covenant exists over the subject property by virtue of the Resolution.

5. Count III of the Complaint seeks damages for civil conspiracy. An action for civil conspiracy is an action at law.

6. Establishing the existence of an easement is a question of fact in a law action. The decision of the trier of fact as to whether or not an easement exists is an action at law. *See, Jowers v. Hornsby*, 292 S.C. 549, 552 (Ct. App. 1987).

7. However, the determination of the scope of an easement is a question in equity. *See, Hardy v. Aiken*, 369 S.C. 160, 165 (S.C. 2006).

8. Therefore, before this case may be properly referred to the Master-in-Equity to determine the scope of an easement, a jury should first determine whether an easement exists. *See*, South Carolina Code §15-53-90; Rule 57 of South Carolina Rules of Civil Procedure.

9. Furthermore, reliance on the Master-in-Equity's Order and Judgment of Foreclosure and Sale entered in Charleston County Court of Common Pleas Case # 2014-CP-10-04946 is misplaced because the Plaintiff was neither named as a party nor served with process in that case.

10. Thus, the Master-in-Equity never had personal jurisdiction over the Plaintiff in the foreclosure case, and as a result, its rights and interests in the subject property were never extinguished or impacted by the foreclosure judgment. Therefore, the reservation of jurisdiction of the foreclosure case by the Master-in-Equity only affects those whom were named as parties and also properly served with process. To conclude otherwise would obviously violate the Plaintiff's due process rights.

11. A judgment is void if a court acts without personal jurisdiction. *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). A court generally obtains personal jurisdiction by the service of a summons. *Ex parte S.C. Dep't of Revenue*, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct.App.2002) (citing *State v. Sanders*, 118 S.C. 498, 502, 110 S.E. 808, 810 (1920). ("The purpose of the summons is to acquire jurisdiction of the person of the defendant.. . .")).

12. Accordingly, the foreclosure judgment is void against the Plaintiff, and therefore cannot properly serve as the basis to refer this case to the Master-in-Equity.

WHEREFORE, Plaintiff requests that the Court enter an order denying the Defendants' motions for order of reference to the Master-in-Equity and granting such further relief as this Court deems just and proper.

Respectfully submitted,

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May 15, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	
MAYBANK 2754, LLC,	)	CASE NO.: 2020-CP-10-00209
	)	
Plaintiff(s)	)	
	)	
v.	)	DEFENDANT 1776, LLC'S
	)	MEMORANDUM OF LAW
EUGENE J. ZURLO, Individually and as	)	IN SUPPORT OF (1) MOTION
Co-Trustee of the Eugene J. Zurlo Living	)	TO DISMISS, (2) MOTION TO
Trust Dated December 11, 1997; ET AL.,	)	REFER TO MASTER, AND (3)
	)	MOTION FOR PROTECTION
Defendants.	)	FROM DISCOVERY, OR
	)	IN THE ALTERNATIVE,
	)	AN EXTENSION

Defendant 1776, LLC's ("1776") involvement in this matter is limited to purchasing and later conveying certain real property adjacent to Plaintiff Maybank 2754, LLC's ("Maybank") real property in a 2017 foreclosure proceeding before the Honorable Mikell F. Scarborough, Master in Equity, Charleston County. Case No. 2014-CP-10-4946.

Judge Scarborough's order of foreclosure resolved all issues relating to 1776's property, including the existence of any easements affecting the property; and further, Judge Scarborough expressly retained jurisdiction over any related matters. *Id.* (Order dated June 21, 2017).

Maybank's managing member and verifier of its Complaint, Michel F. Laplante ("Laplante"), was a party to that foreclosure action; he appeared and spoke at the foreclosure hearings before Judge Scarborough; and he was the manager of the entity, Penny Creek Associates, LLC, that he now claims failed to grant the alleged easement at issue, so he was at fault for any such failure. Laplante's knowledge and notice of the same is imputed to his limited liability company, Maybank, and therefore bars its claims. S.C. Code Ann. § 33-44-102 (Supp. 2012). *See Carolina Park Assocs., LLC v. Marino*, 400 S.C. 1, 732 S.E.2d 876 (2012) (dismissing complaint filed after foreclosure order).

Nevertheless, Laplante caused Maybank to file this frivolous and improper action against 1776 and numerous other parties. He also caused Maybank to file a separate malpractice action blaming its own attorney for the same injuries alleged here. Case No. 2020-CP-1002180.

1776 has filed three motions in this action that are currently pending before the Court.

First, 1776 moved to refer this matter to Judge Scarborough in view of the foreclosure order retaining jurisdiction over property matters related to the foreclosure, such as the claims made by the plaintiff. The other defendants have filed similar motions and supporting memoranda, which 1776 joins and incorporates by reference as if repeated herein.

Second, 1776 moved to dismiss the Complaint for failure to state a cause of action. Again, the other defendants have filed similar motions and supporting memoranda, which 1776 joins and incorporates by reference as if repeated herein. In addition to Maybank's failure to allege facts supporting the existence of the alleged easement or civil conspiracy under South Carolina law, 1776 emphasizes that its involvement in this matter is limited to the foreclosure action; that it had nothing to do with the failure to grant the alleged easement at issue, for which Laplante himself is at fault; and that Maybank has sued its own attorney for that alleged injury.

Third, 1776 moved for a protective order or extension after being served with extensive discovery at the outset of the pandemic COVID-19. As more particularly detailed in the motion, 1776's two ultimate principals are in their late-70s and early-80s and both have serious underlying health conditions making them among the most vulnerable to COVID-19 and at highest risk for hospitalization and mortality. Maybank refused to accommodate them with a reasonable extension to its discovery, necessitating 1776's motion.

WHEREFORE, respectfully, the Court should grant 1776's motions by referring this action to Judge Scarborough or otherwise dismissing the Complaint and issuing a protective order or extension regarding Maybank's discovery requests to 1776.

/s/ Jason S. Smith
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Attorneys for Defendant 1776, LLC

Charleston, South Carolina
June 10, 2020

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE #: 2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

EUGENE J. ZURLO, Individually and as Co-Trustee
of the Eugene J. Zurlo Living Trust Dated December
11, 1997; 1776, LLC; BEACH FENWICK, LLC;
THE BEACH COMPANY; SEAMON, WHITESIDE
& ASSOCIATES, INC.; PENNY CREEK ASSOCIATES,
LLC; JOHN DOE AND MARY ROE

Defendants,

/

**PLAINTIFF'S NOTICE OF FILING AUTHORITY IN SUPPORT OF ITS OBJECTION
TO THE DEFENDANTS', MOTIONS FOR ORDER OF REFERENCE TO THE
MASTER-IN-EQUITY**

Plaintiff, MAYBANK 2754, LLC, by and through its undersigned attorney, hereby gives notice of filing authority in support of its objection to the Defendants' motions for order of reference to the Master-in-Equity. Copies of the South Carolina Supreme Court decisions in *First-Citizens Bank and Trust Company of South Carolina v. Hucks*, 305 S.C. 296, 408 S.E.2d 222 (1991), *Jowers v. Hornsby*, 292 S.C. 549, 357 S.E.2d 710 (1987), and *Hardy v. Aiken*, 369 S.C. 160, 631 S.E.2d 539 (2006), are attached hereto.

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s/ Jason M. Tarokh
JASON M. TAROKH
S. CAROLINA BAR # 72837

June 12, 2020

305 S.C. 296 (1991)
408 S.E.2d 222

**FIRST-CITIZENS BANK AND TRUST COMPANY OF SOUTH CAROLINA, as Trustee under the
Will of W. Jennings Hucks, deceased, Plaintiff**

v.

**Rudene HUCKS, Jenny Hucks Thompson, Ted J. Hucks, Dennis Hucks and First-Citizens Bank
and Trust Company of South Carolina as Executor under the Will of W. Jennings Hucks,
deceased, Of Whom First-Citizens Bank and Trust Company of South Carolina, as Trustee
under the Will of W. Jennings Hucks, deceased, and as Executor under the Will of W. Jennings
Hucks, deceased, Rudene Hucks and Jenny Hucks Thompson are Respondents and Ted J.
Hucks and Dennis Hucks are Appellants. Appeal of Ted J. HUCKS and Dennis Hucks.**

23436

Supreme Court of South Carolina.

Submitted December 14, 1990.

Decided July 22, 1991.

297 *297 *Clifford H. Tall, of Leiter & Tall, Myrtle Beach, for appellants.*

Steven M. Anastasion, of Callison, Tighe, Robinson & Anastasion, Columbia, for respondent First-Citizens Bank and Trust Co. of South Carolina.

John P. Henry, of Thompson, Henry, Gwin, Brittain & Stevens, P.A., Conway, for respondent Rudene Hucks.

Submitted Dec. 14, 1990.

Decided July 22, 1991.

FINNEY, Justice:

Appellants Ted J. Hucks and Dennis Hucks appeal from a circuit court order referring to the master-in-equity for final adjudication by jury trial their counterclaim which involves legal issues. We reverse and remand.

This action commenced when Respondent First-Citizens Bank and Trust Company of South Carolina (First-Citizens) initiated suit for Declaratory Judgment against appellants. The appellants filed counterclaims alleging breach of contract and breach of fiduciary duties and requested a jury trial on all legal issues. The circuit court referred all issues to the master with the direction that the claims for equitable relief be tried by the master and the claims which are legal in nature be tried by jury. The order provided further that any appeal from the final judgment of the court or verdict of the jury shall be directly to the South Carolina Supreme Court. First-Citizens consented to the order of reference.

The sole issue on appeal is whether the circuit court erred in referring to a master-in-equity legal issues for trial by jury. First-Citizens' complaint seeks equitable relief. Appellants' counterclaim involves legal claims and seeks monetary damages. Appellants contend the master lacks jurisdiction to conduct jury trials. We agree.

298 *298 A party does not waive its rights to a jury trial on a counterclaim asserted in an equity action if the counterclaim is legal and compulsory in nature. *North Carolina Federal S & L v. DAV Corp.*, 298 S.C. 514, 381 S.E. (2d) 903 (1989). "If the complaint is equitable and the counterclaim legal and compulsory, the defendant has the right to a jury trial on the counterclaim." *Johnson v. South Carolina Nat. Bank*, 292 S.C. 51, 52, 354 S.E. (2d) 895, 896 (1987). This Court set forth in *Johnson* the procedure to be followed in suits such as the case at bar.

... [W]here a complaint is equitable and the counterclaim is legal and compulsory, the trial judge has two options. He may either order separate trials pursuant to Rule 42(b) or may order the claims tried in a single proceeding. In making this determination, caution should be taken to assure that, under the circumstances of the case, a joint trial will not deprive a party of his right to a full jury trial of legal issues.

Johnson, 354 S.E. (2d) at 897.

It is undisputed that appellants' counterclaim is legal in nature. Thus, the crucial question is whether the counterclaim is compulsory or permissive. By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim. SCRCP Rule 13(a). In North Carolina Federal S & L v. DAV Corp., *supra*, this Court held that the test for determining if counterclaims are permissive or compulsory is whether there is a logical relationship between the claim and the counterclaim.

In the instant case, the trustee's equity action seeks a declaration of rights arising in the administration of a trust. The legal counterclaim alleges that the trustee has breached its contractual agreement and fiduciary duty. We find that there is a logical relationship between the counterclaim and the claim. Hence the counterclaim is compulsory, and appellants are entitled to a jury trial on their counterclaim.

299 The master is without jurisdiction to conduct jury trials. Thus, the legal issues in this case should not have been referred to the master for final adjudication. *299 Where the issues are complicated, a case may be referred to a master for the limited purpose of making factual findings to be received by the circuit court as evidence only. See First Palmetto State Bank and Trust Co. v. Boyles, 394 S.E. (2d) 313 (S.C. Sup. Ct. 1990). For the foregoing reasons, this case is reversed and remanded.

Reversed and remanded.

GREGORY, C.J., and HARWELL, CHANDLER and TOAL, JJ., concur.

292 S.C. 549 (1987)
357 S.E.2d 710

Bobby JOWERS, Appellant
v.
Richard I. HORNSBY, Respondent.

22735

Supreme Court of South Carolina.

Heard April 8, 1987.
Decided June 8, 1987.

Jonathan R. Hendrix, of Hendrix & Steigner, Lexington, for appellant.

Timothy G. Driggers, of Driggers, Williams, Carlton & Barry, Lexington, for respondent.

550 *550 Heard April 8, 1987.

Decided June 8, 1987.

HARWELL, Justice:

Appellant contends that the trial court erred in concluding that appellant failed to establish an easement by necessity across respondent's land. We disagree with appellant and affirm the order of the trial court.

In 1983, appellant bought a piece of real estate in the town of Swansea. Since 1976, respondent had owned a piece of real estate which is located between appellant's land and a thoroughfare called Spring Street. There is a dirt roadway which runs from Spring Street, across respondent's land, and toward appellant's lot. There was a dispute about whether or not this road extends all the way to appellant's lot. Respondent contends that this roadway, which he chained off shortly after he purchased the lot, is his private driveway. Appellant instituted this action to attempt to establish a right to use this roadway since appellant's property does not adjoin Spring Street. Appellant further sought to enjoin respondent from obstructing appellant's use of this roadway.

The circuit court found that appellant failed to establish the existence of a public road, the acquisition of an easement by prescription, or the existence of an implied easement by necessity. On appeal, appellant argues only that he should have been granted an implied easement by necessity.

There are three elements of an implied easement by necessity. Brasington v. Williams, 143 S.C. 223, 141 S.E. 375 (1927); Graham v. Causey, 284 S.C. 339, 326 S.E. (2d) 412 (Ct. App. 1985). The attorneys stipulated that two of these three elements, unity of title and severance of this title, were present in this case. The only issue in this appeal is whether or not appellant proved the element of necessity. In South Carolina, the degree of necessity which is required is "reasonable necessity." The party claiming an easement must prove more than convenience, but he need not show that the easements is absolutely essential. Graham v. Causey, *supra*. The necessity must be actual, real, and reasonable as distinguished from convenient, but need not be absolute and irresistible. Steele v. Williams, 204 S.C. 124, *551 28 S.E. (2d) 644 (1944); Merrimon v. McCain, 201 S.C. 76, 21 S.E. (2d) 404 (1942); Lawton v. Rivers, 13 S.C.L. (2 McCord) 445 (1823). See also Annot., 10 A.L.R. 4th 447 (1981).

The trial court found that appellant had an alternate means of access to his property through an alleyway which is shown on the county tax map and referred to in the deed by which appellant acquired his property. While the trial court noted that the alleyway is covered by underbrush and growth, it found that the mere inconvenience of clearing this alleyway is not a sufficient burden, on the appellant to satisfy the reasonable necessity requirement.

Before we review the trial court's finding, we must determine our scope of review in this matter. It is necessary for us to ascertain whether the action below was legal or equitable in nature. There appears to be some inconsistency in our case law regarding this determination. While few cases have addressed the issue directly, conflicting implications arise from various cases. Some cases support the view that an action to establish an easement can be either legal or equitable depending on the relief sought as interpreted by the court from the "main purpose" of the complaint. Gore v. Skipper, 255 S.C. 18, 176 S.E. (2d) 569 (1970); Smith v. Haymond, 135 W. Va. 638, 64 S.E. (2d) 105 (1951). See also Collins Music Company, Inc. v. Lightsey, 285 S.C. 108, 328 S.E. (2d) 477 (1985).

A line of cases issued by the Court of Appeals treats the question of an existence of an easement as an equitable action. Graham v. Causey, 284 S.C. 339, 326 S.E. (2d) 412, (Ct. App. 1985); Marlow v. Marlow, 284 S.C. 155, 325 S.E. (2d) 703 (Ct. App. 1984); Brown v. Gaskins, 284 S.C. 30, 324 S.E. (2d) 639 (Ct. App. 1984). Many prior cases issued by this Court treat the existence of an easement as a question of law. Merrimon v. McCain, 201 S.C. 76, 21 S.E. (2d) 404 (1942); Crosland v. Rogers, 32 S.C. 130, 10 S.E. 874 (1890); Polson v. Ingram, 22 S.C. 541 (1885); Lawton v. Rivers, 13 S.C.L. (2 McCord) 445 (1823).

552 We hold that the determination of the existence of an easement is a question of fact in a law action. The decision of the trier of fact as to whether or not an easement exists will be reviewed by this Court as an action at law. In the case at bar, the judge determined that an *552 easement by necessity had not been proven. In an action at law tried without a jury, the judge's finding of fact will not be disturbed unless there is no evidence to support the judge's finding. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E. (2d) 773 (1976). As noted in the trial court's order, the evidence reveals the existence of an alleyway which can serve as an alternate means of ingress and egress to appellant's property. This alleyway is described in appellant's deed and shown on the county tax map. There is testimony in the record that appellant has used this alleyway to walk to and from his property and to bring his boat to the pond which adjoins his property. We cannot say that there is no evidence to support the judge's finding. The trial court's order is

Affirmed.

NESS, C.J., and FINNEY, J., concur.

GREGORY, J., and BRUCE LITTLEJOHN, Acting Associate Justice, concur in a separate opinion.

GREGORY, Justice, concurring in result:

I disagree with the majority's holding that this case is reviewable as an action at law. As stated in the majority opinion, an action to establish an easement may be either legal or equitable depending upon the relief sought in the complaint. See Gore v. Skipper, *supra*. The cases cited to support the majority's holding involve questions of title. As noted in the majority opinion, title is not at issue in this case. Here the complaint sought to enjoin the impediment to appellant's use of an asserted easement by necessity. In my view, this is clearly an equitable action. Under our scope of review in an equity action, I reach the same result as the majority.

LITTLEJOHN, Acting J., concurs.

369 S.C. 160 (2006)
631 S.E.2d 539

Dale A. HARDY, Lawrence J. Kukulski, Patricia A. Kukulski, and Grace G. Stegall, Respondents,
v.
Millicent O. AIKEN, William R. Aiken, Virginia N. Baillie, Mary R. Ballenger, Richard C. Ballenger,
Deane Fant Camak, Joseph Boyd Camak, Nancy L. Hearn, Rozlyn S. Hood, William C. Hood,
Yvonne R. Jeffcoat, Rajeev Malik, Mary Alice N. Terry, and Ellen L. Ware, Defendants,
Of whom Yvonne R. Jeffcoat is the, Appellant.

No. 26130.

Supreme Court of South Carolina.

Heard February 14, 2006.

Decided June 12, 2006.

162 *162 James B. Richardson, Jr., of Richardson & Birdsong, of Columbia; and Samuel F. Albergotti, of Jones, Spitz, Moorhead, Baird & Albergotti, P.A., of Anderson, for Appellant.

Harold P. Threlkeld, of Anderson, for Respondents.

Acting Justice HAYES:

The special referee found the duration of the restrictive covenants on the parties' property could not be extended by amendment and expired January 14, 2005. This case was certified for review pursuant to Rule 204(b), SCACR, and we now affirm.

FACTUAL/PROCEDURAL BACKGROUND

In 1971, J. Donald King, Sr. subdivided a tract of land adjacent to Highway 81 into ten separate parcels—referred to as Lots 1-8 and Tracts A and B. On September 13, 1979, restrictive covenants applying to Lots 1-7 and Tracts A and B were recorded.^[1] On January 14, 1980, these restrictive covenants were re-recorded.

163 *163 Among other things, the restrictive covenants prohibited the commercial use of the land. The restrictive covenants were to "run with the land and [] be binding on all parties and all persons claiming under them for a period of 25 years from the date these Covenants are recorded." Thus, the restrictive covenants were to expire January 14, 2005.

One provision in the covenants provided for amendments to the restrictive covenants as follows:

Change of Restrictions. Any change or amendment of these restrictions shall be made only by an instrument in writing signed by a majority of the heads of household owning lots in said subdivision.

In 1987, King subdivided Tract A into lots A-F and designated them as the Marcdon Place subdivision. On May 20, 1987, a separate set of restrictive covenants was filed for Marcdon Place. Among other things, these restrictive covenants prohibited the commercial use of the land until May 20, 2012.

In the 1970s, Highway 81 was a two-lane road. Later, it was enlarged to four lanes to connect downtown Anderson to I-85. In recent years, there has been significant commercial development along Highway 81.

Part of Lot 1 and Lots 5 and 7 have houses on them, and Lots 2, 3, 4, and 6 remain undeveloped.^[2] Five of the Marcdon Place lots have houses on them. At the hearing, the current homes were described as high end homes with an

average value of \$500,000. The respondents, the seven owners of lots 1-6,^[3] have proposed developing their property for commercial use. The defendants, the eight owners of lots A-F in Marcdon Place (previously Tract A), Tract B, and Lot 7, oppose any commercial development.^[4]

On December 20, 2002, the respondents filed a document purporting to cancel the restrictive covenants. The document recited the amendment provision and stated the majority of the heads of household wanted to cancel the restrictive covenants. *164 Four months later, on April 25, 2003, the defendants filed a document amending the restrictive covenants by extending the covenants' expiration date to September 13, 2029.^[5]

The respondents sought a declaratory judgment stating the restrictive covenants expired September 13, 2004, and thus are now unenforceable.^[6] Defendant/Appellant Yvonne Jeffcoat filed a cross-claim and a counterclaim requesting a declaratory judgment stating the amendment extended the restrictive covenants until September 13, 2029.

The special referee found the amendment provision in the restrictive covenants ambiguous. He specifically held the amendment provision in the covenants did not expressly allow the amendment of the duration of the covenants. Strictly construing the amendment provision, the special referee held the restrictive covenants expired January 14, 2005, and could not be extended by agreement of less than 100% of the owners. Jeffcoat appeals.

ISSUE

Did the special referee err in finding the restrictive covenants could not be amended?

LAW/ANALYSIS

Standard of Review

The appellant contends the standard of review is de novo. The respondents, however, argue the standard of review is "any evidence." We find the proper standard of review is de novo.

Both sides agree "[a] suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland County*, 303 S.C. *165 354, 356, 400 S.E.2d 781, 782 (1991). The respondents contend this action's underlying issue is an action to construe a contract. However, the appellant argues the underlying issue is one to enforce restrictive covenants which is in equity.

"The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury." *Slear v. Hanna*, 329 S.C. 407, 410, 496 S.E.2d 633, 635 (1998). However, the determination of the scope of the easement is a question in equity. *Tupper v. Dorchester County*, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997). While this action potentially may require the Court to construe a contract, the underlying action is a declaratory action to declare whether the restrictive covenants are enforceable after January 14, 2005. Accordingly, we hold the proper scope of review is de novo.

Discussion

The special referee held the general amendment provision is ambiguous as to whether it includes the power to amend the duration of the restrictive covenants. He then strictly construed the amendment provision in favor of free use of the property and held the duration could not be extended. The appellant contends the special referee erred in finding the provision ambiguous and in holding it includes the amending of the duration of the restrictive covenants. We disagree.

A restrictive covenant is ambiguous when its terms are reasonably susceptible of more than one interpretation. *South Carolina Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (2001). On one hand, the

amendment provision states "any change or amendment" can be made. (Emphasis added). On the other hand, the restrictive covenants clearly state they expire in twenty-five years and there is no express provision allowing for an amendment to extend the duration of the restrictive covenants. We find the amendment provision ambiguous as to whether "any change or amendment" includes an extension of the duration of the restrictive covenants.^[7]

The appellant then contends if the provision is deemed ambiguous, it should be interpreted to allow an amendment of the duration of the restrictive covenants. We disagree.

"[A] restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." See *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980). The Court is to construe any ambiguity in favor of limited duration and against restricting property. Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free use of the property, although the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants. *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). Restrictive covenants are contractual in nature. *Hoffman v. Cohen*, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974). The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution. *Taylor*, 332 S.C. at 4, 498 S.E.2d at 864.

Here, the restrictive covenants had a clear expiration date, and there was no express provision for their extension. Further, strictly construing the general amendment provision and resolving any doubts in favor of the free use of the property, we hold the amendment provision does not allow extending the duration of the restrictive covenants. Accordingly, the purported amendment is invalid and the restrictive covenants expired January 14, 2005.

***167 CONCLUSION**

For the foregoing reasons, we affirm the special referee's order.

TOAL, C.J., MOORE, BURNETT, and PLEICONES, JJ., concur.

[1] For some undisclosed reason, Lot 8 was not subjected to these restrictive covenants.

[2] Lot 1 was subdivided into two lots in 1986.

[3] There were seven owners because Lot 1 was subdivided into two lots.

[4] We note not all of the defendants are participating in this appeal.

[5] Of the defendants, only Yvonne Jeffcoat appeals.

[6] Plaintiffs Lawrence and Patricia Kukulski originally were the only plaintiffs. The special referee realigned the parties. Afterwards, in addition to the Kukulskis, the plaintiffs included Dale Hardy and Grace Stegall. The defendants were Millicent and William Aiken, Virginia Baillie, Mary and Richard Ballenger, Nancy Hearn, Rozlyn and William Hood, Yvonne Jeffcoat, Deanne and Joseph Camak, Rajeev Malik, Mary Alice Terry, and Ellen Ware.

[7] We note that amendment provisions similar to the one here have been interpreted differently in different jurisdictions. See, e.g., *Allen v. Sea Gate Ass'n*, 119 N.C.App. 761, 460 S.E.2d 197 (1995) (holding the duration of restrictive covenants cannot be extended, unless the restrictive covenants clearly authorize it); and *Venetian Isles Homeowners Ass'n, Inc., v. Albrecht*, 823 So.2d 813 (Fla. Dist. Ct. App. 2002) (holding the general power to modify restrictive covenants includes the power to extend the duration).

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	
MAYBANK 2754, LLC,	)	CASE NO.: 2020-CP-10-00209
	)	
Plaintiff(s)	)	
	)	
v.	)	1776, LLC'S REPLY
	)	TO MAYBANK 2754, LLC'S
EUGENE J. ZURLO, Individually and as	)	RESPONSE TO (1) MOTION
Co-Trustee of the Eugene J. Zurlo Living	)	TO DISMISS, (2) MOTION TO
Trust Dated December 11, 1997; ET AL.,	)	REFER TO MASTER
	)	
Defendants.	)	
	)	

The positions taken by Plaintiff Maybank 2754, LLC in its briefs in this matter fundamentally contravene the integrity and efficacy of South Carolina's judicial foreclosure system. Defendant 1776, LLC directs the Court to *Ex Parte Johnson*, 640 S.E.2d 887 (Ct. App. 2006) for an instructive discussion of these controlling legal principles. That case explains the "long-established policy in South Carolina that '[t]he courts should be particularly jealous of the integrity of judicial sales.'" *Id.*, 640 S.E.2d at 890 (quoting *In re Wilson*, 141 S.C. 60, 63, 139 S.E. 171, 172 (1927)). And it explains that to "rewrite the terms of sale *after the sale* would be patently inequitable" to benefit one who "who remained silent" during the foreclosure proceeding. *Johnson*, 640 S.E.2d at 889 (emphasis in the original).

Here, during a prior foreclosure proceeding, Plaintiff Maybank 2754, LLC's managing member and verifier of its Complaint, Michel F. Laplante, remained silent about the alleged easement interest that it now claims (and which is the basis of its wild conspiracy theory against numerous innocent parties who have been named in this action). This Court, respectfully, must protect the integrity of that foreclosure proceeding and refer this matter to Judge Scarborough, who

expressly retained jurisdiction over such matters in his order of foreclosure; or otherwise, this Court should dismiss Plaintiff's frivolous Complaint outright.

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Charleston, South Carolina
June 15, 2020

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE #: 2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

EUGENE J. ZURLO, Individually and as Co-Trustee
of the Eugene J. Zurlo Living Trust Dated December
11, 1997; 1776, LLC; BEACH FENWICK, LLC;
THE BEACH COMPANY; SEAMON, WHITESIDE
& ASSOCIATES, INC.; PENNY CREEK ASSOCIATES,
LLC; JOHN DOE AND MARY ROE

Defendants,

/

**PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER
ENTERED ON JUNE 30, 2020 AND REQUEST FOR EXPEDITED RULING**

Plaintiff, MAYBANK 2754, LLC, by and through its undersigned attorney, hereby respectfully moves the Court to reconsider and alter or amend its Form 4 Order entered on June 30, 2020 (herein "Order") pursuant to Rule 59(e), SCRPC, and requests an expedited ruling thereon, and in support thereof states as follows:

1. After two separate hearings, on June 30, 2020, the Court entered the Order and stated,

Plaintiff Maybank 2754 LLC's [sic] Motion/Temporary Injunction is Denied.
Defendant Beech [sic] Company's Motion to Dismiss and Refer to the Master,
Along with all outstanding motions to refer to the master, are granted.

A true and correct copy of the Order is attached hereto and incorporated herein as
"Exhibit A".

2. The Order is contrary to well-established law relative to granting the Motion to Dismiss on Behalf of Defendants Beach Fenwick, LLC and The Beach Company (herein "Motion to Dismiss") and their Motion for Order of Reference to Master-in-Equity, and all other

Defendants' motions for an order of reference¹ (herein "Motions for Order of Reference"), and thus should be altered or amended as set forth below. A true and correct copy of the Motion to Dismiss is attached hereto and incorporated herein as "Exhibit B".

I. **Motion to Dismiss**

3. The Motion seeks a dismissal based upon Rule 12(b)(6), SCRCP, for failure to state facts sufficient to constitute the causes of action included in the Plaintiff's complaint.

4. However, the Order does not state that Plaintiff may amend its complaint, which is error. Presumably, the Court granted the Motion because it found that the complaint failed to state sufficient facts to constitute a cause of action. However, the Order does not specifically state what causes of action were insufficiently pled.

5. Because the Order states that it does not end the case, it appears the Court may be providing an opportunity for the Plaintiff to amend its complaint, but it is unclear because Rule 15 (a) states that a party may amend its pleading only by leave of court (or written consent of the adverse party). Additionally, at the beginning of the June 25, 2020 hearing, the Plaintiff specifically sought leave to amend its complaint via an ore tenus motion, but the Court denied it. Therefore, it is unclear whether the Order is providing the Plaintiff an opportunity to file an amended complaint.

6. The Order does not specifically state what causes of action were insufficiently plead and should specifically give the Plaintiff an opportunity to amend the complaint. *See Foman v. Davis*, 371 U.S. 178, 179, 182, 83 S. Ct. 227, 228, 230, 9 L. Ed. 2d 222, 224, 226 (1962) (where a complaint is dismissed "for failure to state a claim upon which relief might be granted," leave

¹ The following Defendants filed motions for order of reference: Beach Fenwick, LLC; The Beach Company (Beach Co.); 1776, LLC; and Eugene J. Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997. All Defendants apparently joined in the filed motions for an order of reference at the June 25, 2020 hearing.

to amend the complaint "should, as the rules require, be 'freely given'" (quoting Rule 15(a), Fed. R. Civ. P.)); *Dockside Ass'n, Inc. v. Detyens, Simmons & Carlisle*, 297 S.C. 91, 95, 374 S.E.2d 907, 909 (Ct. App. 1988) (holding "Dockside should have been given leave to amend its complaint" before it was finally dismissed pursuant to Rule 12(b), SCRCF (citing *Foman*, 371 U.S. at 182, 83 S. Ct. at 230, 9 L. Ed. 2d at 226)). Rule 15(a) "strongly favors amendments and the court is encouraged to freely grant leave to amend." *Patton v. Miller*, 420 S.C. 471, 489-90, 804 S.E.2d 252, 261 (2017) (quoting *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 717 (Ct. App. 2005)).

7. Thus, the Order should be altered or amended to specifically state what causes of action are insufficiently plead and also to specifically allow the Plaintiff an opportunity to file an amended complaint.

II. Motions for Order of Reference

8. The Complaint requests a jury trial on all issues so triable.

9. The Order violates Plaintiff's right to a jury trial, which is error.

10. Count I of the Complaint seeks a declaratory judgment pursuant to South Carolina Code §15-53-10, et. seq., declaring that the Plaintiff has an easement over the subject property.

11. Count II of the Complaint, plead in the alternative to Count I, seeks a declaratory judgment pursuant to South Carolina Code §15-53-10, et. seq., that a restrictive covenant exists over the subject property by virtue of the Resolution.

12. Count III of the Complaint seeks damages for civil conspiracy. An action for civil conspiracy is an action at law.

13. Establishing the existence of an easement is a question of fact in a law action. The decision of the trier of fact as to whether or not an easement exists is an action at law. *See*,

Jowers v. Hornsby, 292 S.C. 549, 552 (Ct. App. 1987).

14. However, the determination of the scope of an easement is a question in equity. *See, Hardy v. Aiken*, 369 S.C. 160, 165 (S.C. 2006).

15. Thus, before this case may be properly referred to the Master-in-Equity to determine the scope of an easement, a jury should first determine whether an easement exists. *See, South Carolina Code §15-53-90; Rule 57 of South Carolina Rules of Civil Procedure.*

16. The Master-in-Equity is without jurisdiction to conduct jury trials. *See, First-Citizens Bank and Trust Company of South Carolina v. Hucks*, 305 S.C. 296, 298-299 (1991).

17. Therefore, it is error for the Court to refer this case in its entirety to the Master-in-Equity.

18. Furthermore, the Court's presumed reliance on the Master-in-Equity's Order and Judgment of Foreclosure and Sale entered in Charleston County Court of Common Pleas Case # 2014-CP-10-04946 (herein "Foreclosure Judgment") to refer this case to the Master-in-Equity is misplaced because the Plaintiff was neither named as a party nor served with process in that case.

19. Thus, the Master-in-Equity never had personal jurisdiction over the Plaintiff in the foreclosure case, and as a result, its rights and interests in the subject property were never extinguished or impacted by the foreclosure judgment. Therefore, the reservation of jurisdiction of the foreclosure case by the Master-in-Equity only affects those whom were named as parties and also properly served with process. To conclude otherwise would obviously violate the Plaintiff's due process rights.

20. Moreover, to the extent the Court relies upon Michel F. Laplante (herein "Laplante") being originally named and served in the above-referenced foreclosure case (2014-CP-10-04946)

as the basis upon which to bind the Plaintiff to the Foreclosure Judgment, the Foreclosure Judgment itself states that he was “severed from the foreclosure claim”. (p. 2). Also, see Order Granting Plaintiff’s Motion to Sever where Laplante was severed from the foreclosure case and the court stated in relevant part, “The individual guarantors are not necessary parties to the foreclosure portion of the case and are, therefore, severed as parties from the foreclosure proceedings as well. The foreclosure shall proceed as against defendant Penny Creek Associates, LLC and the defendant property owners associations”. A true and correct copy of the Order Granting Plaintiff’s Motion to Sever is attached hereto and incorporated herein as “Exhibit C”. However, even assuming *arguendo* that Laplante was not severed (he was severed), the unsupported (both in fact and law) imputed knowledge theory of the Defendants under S.C. Code § 33-44-120 does not operate to override basic due process and fundamental personal jurisdiction requirements of the Plaintiff first having to be named as a party then being served with process in the foreclosure case to properly be bound by the Foreclosure Judgment.

21. Additionally, the Foreclosure Judgment itself states that the property is sold subject to “existing easements”. (p. 14).

22. Furthermore, Plaintiff’s Exhibits # 1, # 2 and # 3 were admitted into evidence at the June 25, 2020 hearing and clearly demonstrate the existence of the easement and that Laplante was the manager of Penny Creek Associates, LLC, not manager of the Plaintiff, at the time of their execution. True and correct copies of the said exhibits are attached hereto and incorporated herein as exhibits.

23. A judgment is void if a court acts without personal jurisdiction. *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). A court generally obtains personal jurisdiction by the service of a summons. *Ex parte S.C. Dep’t of Revenue*, 350

S.C. 404, 407, 566 S.E.2d 196, 198 (Ct.App.2002) (citing *State v. Sanders*, 118 S.C. 498, 502, 110 S.E. 808, 810 (1920). ("The purpose of the summons is to acquire jurisdiction of the person of the defendant.. . ."))).

24. Accordingly, the foreclosure judgment is void against the Plaintiff, and therefore cannot properly serve as the basis to refer this case to the Master-in-Equity.

25. Therefore, the Order should be altered or amended to deny the Motions for Order of Reference so that Plaintiff can have a jury trial.

Conclusion

26. For the foregoing reasons the Order should be altered or amended to specifically state what causes of action are insufficiently plead and also to specifically allow the Plaintiff an opportunity to file an amended complaint. In addition, the Order should be altered or amended to deny the Motions for Order of Reference so that the Plaintiff can have a jury trial.

WHEREFORE, Plaintiff requests that the Court enter an order altering or amending the Order to specifically state what causes of action are insufficiently plead and also to specifically allow the Plaintiff to file an amended complaint, and in addition, denying the Motions for Order of Reference so that the Plaintiff can have a jury trial, and granting such further relief as this Court deems just and proper.

Respectfully submitted,

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s/ Jason M. Tarokh
JASON M. TAROKH
S. CAROLINA BAR # 72837

July 1, 2020

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP1000209

Maybank 2754 Llc
PLAINTIFF(S)

Eugene J Zurlo et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Plaintiff Maybank 2754 LIC's Motion/Temporary Injunction is Denied. Defendant Beech Company's Motion to Dismiss and Refer to the Master, Along with all outstanding motions to the refer to the master, are granted.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 06/29/2020 .

Mary Roe
John Doe

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Charleston Common Pleas

Case Caption: Maybank 2754 Llc VS Eugene J Zurlo , defendant, et al

Case Number: 2020CP1000209

Type: Order/Electronic Form 4

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

Electronically signed on 2020-06-29 10:03:37 page 3 of 3

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE CIRCUIT COURT

MAYBANK 2754, LLC
Plaintiff,

Case No. 2020-CP-10-00209

vs.

**MOTION TO DISMISS ON BEHALF OF
DEFENDANTS BEACH FENWICK,
LLC AND THE BEACH COMPANY**

EUGENE J. ZURLO, Individually and as
Co-Trustee of the Eugene J. Zurlo Living
Trust Dated December 11, 1997; 1776,
LLC; BEACH FENWICK, LLC; THE
BEACH COMPANY; SEAMON,
WHITESIDE & ASSOCIATES, INC.;
PENNY CREEK ASSOCIATES, LLC;
JOHN DOE AND MARY ROE

Defendants.

TO: Jason M. Tarokh, Esquire, Counsel for Plaintiff

PLEASE TAKE NOTICE that Defendants, Beach Fenwick, LLC and The Beach Co., herein incorrectly designated The Beach Company, (collectively, the “Beach Entities”) by and through their undersigned counsel, will move before this Court for an Order, pursuant to Rule 12(b)(6), South Carolina Rules of Civil Procedure, dismissing Plaintiff’s claims for failure to state facts sufficient to constitute the causes of action included in Plaintiff’s Complaint.

Specifically, Plaintiff fails to plead the necessary elements to constitute a valid interest in land, and, in fact, by its pleading, establishes there are insufficient facts to establish a valid interest in property, thereby defeating its causes of action for declaratory judgement as to an easement or restrictive covenant, its cause of action for civil conspiracy and its cause of action seeking temporary injunction.

Further, Plaintiff fails to plead other essential elements necessary to constitute a cause of action for the imposition of a restrictive covenant, as Plaintiff asserts no contractual agreement between Plaintiff and the Beach Entities. Plaintiff likewise fails to plead the essential elements to constitute a cause of action for conspiracy, *to wit*: the alleged actions of two or more persons for the purpose of injuring Plaintiff, as well as any facts in furtherance of a conspiracy.

Respectfully submitted,

/s/ Cheryl D. Shoun

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Alexandra H. Austin, SC Bar #12496
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February 17, 2020

Charleston, SC

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE CIRCUIT COURT

Case No. 2014-CP-10-4946

**ORDER GRANTING PLAINTIFF'S
MOTION TO SEVER**

Wells Fargo Bank, N.A., Successor by Merger
to Wachovia Bank, National Association, as
Successor by Merger to First Union National
Bank,

Plaintiff,

vs.

Penny Creek Associates, L.L.C. a/k/a Penny
Creek Associates, LLC; Michel F. LaPlante
a/k/a Michel Laplante a/k/a Mitch Laplante;
Charlotte R. Zurlo; Eugene J. Zurlo; Charlotte
R. Zurlo and Eugene J. Zurlo, as Co-Trustees
of The Nicklaus Lane Realty Trust No. 1 under
Declaration of Trust dated May 22, 1998, and
The Zurlo Investment Trust No. 1 pursuant to
trust agreement dated August 10, 1998;
Fenwick Hall Plantation Property Owners
Assn., Inc. a/k/a Fenwick Hall Plantation
Property Owners' Association, Inc.; Preserve
at Fenwick Hall Property Owners Association,
Inc. a/k/a The Preserve at Fenwick Hall
Property Owners' Association, Inc.; and The
Grove At Fenwick Plantation Condominium
Association, Inc.,

Defendants.

Michel Laplante,

Third-Party Plaintiff,

vs.

The Eugene J. Zurlo Living Trust, Dated
December 11, 1997,

Third-Party Defendant.

FILED
2017 JUN 21 AM 9:14
JULIE J. ARMSTRONG
CLERK OF COURT

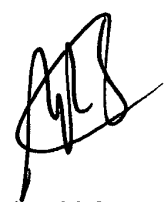


This matter comes before the Court for hearing on the Plaintiff's Motion to Sever and for Entry of Stipulated Final Order and Judgment of Foreclosure and Sale. All parties were duly notified of the time and place of the hearing.

This is a mortgage foreclosure regarding certain properties described more fully in the pleadings heretofore filed in the case, as amended, which are incorporated herein by reference. Wells Fargo has moved to sever from the guaranty claims set forth in the "Third Cause of Action (Guaranty of the Penny Creek Note" from the "First Cause of Action (Foreclosure of the Penny Creek Mortgage)"¹

Pursuant to Rule 42(b), SCRCP, this Court may sever claims that are distinct where doing so would be "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." Here, there is a great likelihood that the foreclosure sale proceeds may be sufficient to pay the Plaintiff's loan in full, in which case there would be no deficiency to pursue against the guarantors and the deficiency claims would be moot. Because all parties have already stipulated to the entry of a final Order and Judgment of Foreclosure and Sale, there is no prejudice to any party result from the requested severance. The individual guarantors are not necessary parties to the foreclosure portion of the case and are, therefore, severed as parties from the foreclosure proceedings as well. The foreclosure shall proceed as against defendant Penny Creek Associates, LLC and the defendant property owners associations.

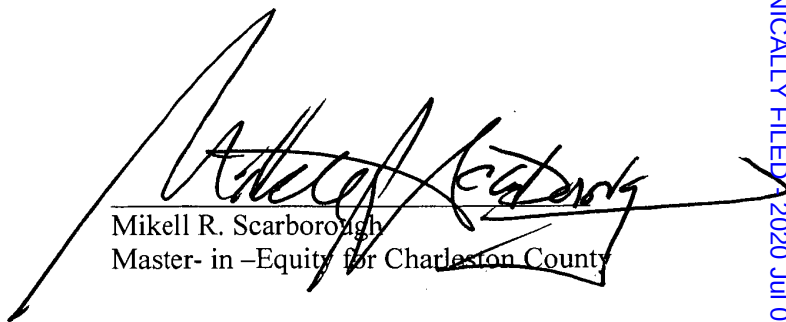
NOW, THEREFORE, IT IS HEREBY ORDERED that the Plaintiff's Motion to Sever be, and the same hereby is, granted.²



¹ The Second and Fourth Causes of Action relating to a separate loan to The Grove at Fenwick Plantation, LLC were previously dismissed by Stipulation of the parties filed on May 26, 2016.

² The Plaintiff's Motion for Entry of Stipulated Final Order and Judgment of Foreclosure and Sale will be addressed in a separate order.

AND IT IS SO ORDERED.



Mikell R. Scarborough
Master- in -Equity for Charleston County

June 19, 2017

Charleston, South Carolina

ELECTRONICALLY FILED 2020 Jul 01 7:32 AM - CHARLESTON - COMMON PLEAS - CASE#2020CP1000209

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

EUGENE J. ZURLO, Individually and as
Co-Trustee of the Eugene J. Zurlo Living
Trust Dated December 11, 1997; 1776, LLC;
BEACH FENWICK, LLC; THE BEACH
COMPANY; SEAMON, WHITESIDE &
ASSOCIATES, INC.; PENNY CREEK
ASSOCIATES, LLC; JOHN DOE AND
MARY ROE,

Defendants.

**ALL DEFENDANTS' JOINT RESPONSE TO
PLAINTIFF'S MOTION FOR
RECONSIDERATION**

TO: JASON M. TAROKH, ESQ., COUNSEL FOR PLAINTIFF MAYBANK 2754, LLC:

Eugene J. Zurlo, individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997 ("Zurlo Parties"), by and through counsel, responds to Plaintiff Maybank 2754 LLC's ("Plaintiff") Motion for Reconsideration, with all Defendants joining, and in support thereof, avers the following:

1. All the Defendants submit that the Court's decision to refer this matter to the Master-in-Equity for all pretrial issues was within the Court's authority and discretion and appropriate to most efficiently adjudicate this dispute. See South Carolina Rules of Civil Procedure: Rule 53(b) and Rule 53(c), SCRPC.
2. Judge Scarborough is familiar with the real estate at issue and the related foreclosure action, and he is well equipped to handle any pretrial issues raised by any of the parties, including but not limited to the issues the Plaintiff raises in its reconsideration motion. As to the pre-trial matters referred to the Master-in-Equity, those are referred with finality, with any appeal therefrom directly to the South Carolina Court of Appeals or the South Carolina Supreme Court. See South Carolina Rules of Civil Procedure: Rule 53(e), SCRPC.

3. Rather than file additional Memoranda and Briefs *ad nauseum*, the Defendants collectively rely on their prior filings and attach a Proposed Order to this RESPONSE for the Court's consideration.
4. A Word version of the Proposed Order is being provided to the Court in the event the Court would like to modify the Order.

Respectfully Submitted:

s/ Brian A. Hellman

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Attorneys for Defendant Eugene J. Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997

July 8, 2020
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE #: 2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

EUGENE J. ZURLO, Individually and as Co-Trustee
of the Eugene J. Zurlo Living Trust Dated December
11, 1997; 1776, LLC; BEACH FENWICK, LLC;
THE BEACH COMPANY; SEAMON, WHITESIDE
& ASSOCIATES, INC.; PENNY CREEK ASSOCIATES,
LLC; JOHN DOE AND MARY ROE

Defendants,

PLAINTIFF'S OBJECTION TO STATUS CONFERENCE BEFORE THE MASTER-IN-EQUITY BECAUSE OF THE PENDING APPEAL

Plaintiff, MAYBANK 2754, LLC, by and through its undersigned attorney, hereby respectfully objects to any status conference being held before the Master-in-Equity (herein "MIE") because of the pending appeal, and in support thereof states as follows:

1. The Complaint requests a jury trial on all issues so triable.
2. Over the objection of the Plaintiff, the Court referred the entire case to the MIE.
3. Consequently, on July 15, 2020, the Plaintiff timely filed and served its Notice of Appeal of the Court's reference of this entire case to the MIE. A true and correct copy of the Notice of Appeal is attached hereto and incorporated herein as "Exhibit A".
4. The appeal was accepted by the Court of Appeals, was assigned appellate case number 2020-001030 and is currently pending.
5. Despite the pending appeal, on July 24, 2020, counsel for Defendants, Beach Fenwick, LLC, and The Beach Company, sent the MIE correspondence seeking a status conference. A true and correct copy of the correspondence is attached hereto and incorporated herein as "Exhibit B".
6. In response, on July 27, 2020, Plaintiff's counsel sent correspondence to the MIE's

law clerk and therein objected to the request for the status conference. A true and correct copy of the correspondence is attached hereto and incorporated herein as “Exhibit C”.

7. As an apparent result, on July 27, 2020, the MIE’s law clerk stated in pertinent part, “Due to the Order of Reference being appealed, this court will not have jurisdiction over the above referenced matter.” A true and correct copy of the correspondence is attached hereto and incorporated herein as “Exhibit D”.

8. However, on August 5, 2020, counsel for Defendants, Beach Fenwick, LLC, and The Beach Company, again sent correspondence to the MIE requesting a status conference. Curiously, the correspondence mentioned that “Mitch Laplante” had previously filed an appeal on the same grounds in a different case. However, Mitch Laplante is not a party to this lawsuit and the appeal referenced in the correspondence was years ago. A true and correct copy of the correspondence is attached hereto and incorporated herein as “Exhibit E”.

9. In response, on August 5, 2020, Plaintiff’s counsel sent correspondence to the MIE’s law clerk again objecting to a status conference. A true and correct copy of the correspondence is attached hereto and incorporated herein as “Exhibit F”.

10. Despite Plaintiff’s previous objections and the MIE’s law clerk’s prior conclusion that the MIE is without jurisdiction, as of the date of this objection, August 6, 2020, the MIE has decided to proceed with a status conference with the proposed date August 17, 2020. It is error for the MIE to proceed and conduct a status conference due to the pending appeal. A true and correct copy of correspondence from the MIE’s scheduling clerk is attached hereto and incorporated herein as “Exhibit G”.

11. Plaintiff respectfully objects to the MIE holding a status conference in this case.

12. The reference of this case to the MIE is currently pending appellate review.

13. The MIE does not have jurisdiction to rule on any matters due to the pending appeal as the appeal will determine whether the MIE can hear the case at all. All matters in this case are affected by the appeal. *See*, Rules 205 and 241(a), SCRAP.

14. The Court of Appeals currently has jurisdiction of this case, not the MIE.

15. Participation in a proceeding before the MIE has been held as waiver to the objection of the MIE’s authority. *See, Karl Sitte Plumbing Co., Inc., v. Darby Development Company of Columbia, Inc.*, 295 S.C. 70, 367 S.E.2d 162 (1988). It is this scenario that Plaintiff must avoid to preserve and protect its right to a jury trial in this case.

WHEREFORE, Plaintiff respectfully objects to any status conference being held before the MIE.

Respectfully submitted,

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s/ Jason M. Tarokh
JASON M. TAROKH
S. CAROLINA BAR # 72837

August 6, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Charleston County
Court of Common Pleas, Ninth Judicial Circuit
Hon. Bentley D. Price, Circuit Court Judge

2020-CP-10-00209

Eugene J. Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997; 1776, LLC; Beach Fenwick, LLC; The Beach Company; Seamon, Whiteside & Associates, Inc.; Penny Creek Associates, LLC; John Doe and Mary Roe;.....Respondents,

v.

Maybank 2754, LLC,.....Appellant.

NOTICE OF APPEAL

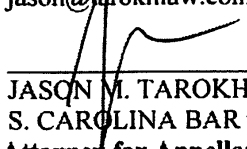
Maybank 2754, LLC, appeals the Form 4 Order, signed by the Honorable Bentley D. Price on June 29, 2020 and filed on June 30, 2020, in the above titled matter. The Appellant received written notice of the entry of the Form 4 Order in this matter on June 30, 2020. A copy of the Form 4 Order is attached hereto as required by Rule 203(d)(1)(B)(ii), SCACR. Maybank 2754, LLC, also appeals the Order, signed by the Honorable Bentley D. Price on July 13, 2020 and filed on July 13, 2020, in the above titled matter. The Appellant received written notice of the entry of the Order in this matter on July 13, 2020. A copy of the Order is attached hereto as required by Rule 203(d)(1)(B)(ii), SCACR. Both of the attached orders, which refer the entire case to the master, are immediately appealable because they affect the mode of trial, a substantial right. *See, Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985).

Respectfully submitted,

TAROKH LAW, PLLC
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TAMPA, FL 33679

“EXHIBIT A”

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jason@tarokhlaw.com


JASON M. TAROKH
S. CAROLINA BAR # 72837
Attorney for Appellant, Maybank 2754, LLC

July 15, 2020

Tampa, Florida

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Attorney for Penny Creek Associates, LLC

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP1000209

Maybank 2754 Llc
PLAINTIFF(S)

Eugene J Zurlo et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Plaintiff Maybank 2754 LIC's Motion/Temporary Injunction is Denied. Defendant Beech Company's Motion to Dismiss and Refer to the Master, Along with all outstanding motions to the refer to the master, are granted.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 06/29/2020 .

Mary Roe
John Doe

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

ELECTRONICALLY FILED - 2020 Jun 30 3:09 PM - CHARLESTON - COMMON PLEAS - CASE#2020CP1000209

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Charleston Common Pleas

Case Caption: Maybank 2754 Llc VS Eugene J Zurlo , defendant, et al

Case Number: 2020CP1000209

Type: Order/Electronic Form 4

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

Electronically signed on 2020-06-29 10:03:37 page 3 of 3

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

MAYBANK 2754, LLC,
Plaintiff,

Case No. 2020-CP-10-00209

vs.

[PROPOSED] ORDER

EUGENE J. ZURLO, Individually and as
Co-Trustee of the Eugene J. Zurlo Living
Trust Dated December 11, 1997; 1776,
LLC; BEACH FENWICK, LLC; THE BEACH
COMPANY; SEAMON, WHITESIDE &
ASSOCIATES, INC.; PENNY CREEK
ASSOCIATES, LLC; JOHN DOE AND
MARY ROE,
Defendant.

BRIEF PROCEDURAL HISTORY

This matter came before the Court on June 16 and June 25, 2020 pursuant to certain motions filed by Defendants and a Motion filed on behalf of Plaintiff in this action, including:

- 1) February 17, 2020 – Defendants Beach Fenwick, LLC and The Beach Co.'s ("Beach Entities") Motion to Dismiss;
- 2) February 17, 2020 – Beach Entities' Motion to Refer to the Master-In-Equity;
- 3) February 20, 2020 – Defendant Seamon Whiteside Associates, Inc.'s ("Seamon Whiteside") Motion to Dismiss Civil Conspiracy;
- 4) February 21, 2020 – Defendant 1776, LLC's ("1776") Motion to Dismiss;
- 5) February 21, 2020 – 1776's Motion to Refer to the Master-In-Equity;

6) March 10, 2020 – Defendants Eugene J. Zurlo, individually and as co-trustee of Eugene J. Zurlo Living Trust's ("Zurlo Parties") Motion to Refer to the Master-In-Equity;

7) March 11, 2020 – Plaintiff Maybank 2754's ("Maybank") Motion for Temporary Injunction.

Counsel for all parties appeared, via video conference application "Zoom," and the Court heard oral argument on behalf of all parties.

On June 30, 2020, this Court issued its Form 4 Order, with the following Statement of Judgment:

Plaintiff Maybank 2754 LLC's Motion/Temporary Injunction is denied. Defendant Beech Company's Motion to Dismiss and Refer to the Master, along with all outstanding motions to refer to the master, are granted.

The Plaintiff filed a Rule 59 Motion to Reconsider on July 1. That Motion is denied for the reasons set forth below.

PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION

Plaintiff's Motion for Temporary Injunction, filed March 11, 2020, seeks to enjoin Beach Fenwick from developing the Subject Property until after a trial on the merits and a judgment is rendered in this matter. In consideration of Plaintiff's Motion, the Court considered the Beach Entities' Memorandum of Law in Opposition to Plaintiff's Motion for Temporary Injunction, filed on June 15, 2020, Plaintiff's Notice of Filing Order Exhibits in Support of Its Motion for Temporary Injunction, filed June 23, 2020, the testimony of Michel F. Laplante, on behalf of Plaintiff, and the oral argument of Plaintiff's counsel, and applicable South Carolina authority, based upon which this Court makes the following findings, and denies Plaintiff's Motion for Temporary Injunction.

A court may issue a temporary injunction “only if necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law.” *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586–87, 694 S.E.2d 15, 17 (2010). “An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff.” *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). Generally, for a preliminary injunction to be granted, the plaintiff must establish that: (1) he would suffer irreparable harm if the injunction is not granted; (2) he will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law. *Id.*

In consideration of the briefing filed with this Court on behalf of Plaintiff and on behalf of the Beach Entities relative to Plaintiff’s Motion for Temporary Injunction, oral argument of counsel, testimony presented on behalf of Plaintiff, as well as the law of the State of South Carolina, this Court finds and so rules that Plaintiff has failed to demonstrate that it will suffer irreparable harm in the absence of the injunction sought. Plaintiff has failed to establish it will suffer irreparable harm if the injunction is not granted. Further, Plaintiff has failed to establish it will likely succeed on the merits of this litigation and likewise failed to establish it has no adequate remedy at law. Additionally, Plaintiff seeks damages in a Conspiracy Cause of Action in its Complaint, so Plaintiff has a remedy at law.

**DEFENDANTS’ MOTIONS FOR ORDER OF REFERENCE
TO THE MASTER-IN-EQUITY**

All Defendants, except Seamon, Whiteside & Associates, Inc., filed motions for an order of reference of this litigation to the Master-In-Equity, as set forth above. Plaintiff filed its Objection and Response in Opposition to the Defendants' Motions for Order of Reference to the Master-In-Equity on April 6, 2020, following which Plaintiff filed its Amended Objection and Response in Opposition to the Defendants' Motions for Order of Reference to the Master-In-Equity on April 9, 2020. Subsequently, the Zurlo Parties filed their Reply to Plaintiff's Amended Objection and Response in Opposition to Motion for Order of Reference to the Master-In-Equity on April 22, 2020, following which Plaintiff filed its Second Amended Objection and Response in Opposition to the Defendants' Motions for Order of Reference to the Master-In-Equity on May 15, 2020. The Zurlo Parties filed their Brief in Support of Motion to Refer to Master on June 11, 2020. The Beach Entities filed their Memorandum of Law in Support of Their Motion for Order of Reference to Master-In-Equity on June 19, 2020.

The Court heard oral argument on Defendants' Motions to Refer to the Master-In-Equity on June 16, with additional argument on June 25, 2020. Based upon the parties' submissions to this Court, as well as oral argument of counsel and the testimony of Mitch Laplante, on behalf of Plaintiff, this Court finds as follows:

The Master-In-Equity may hear any matter referred to him or her by the Circuit Court. See S.C. Code Ann. § 14-11-10 et seq. and Rule 53 of the South Carolina Rules of Civil Procedure. "Pursuant to Rule 53, SCRCP, a master has no power or authority except that which is given to him by the order of reference." *Bunkum v. Manor Props.*, 321 S.C. 95, 98, 467 S.E.2d 758, 760 (Ct. App. 1996). "When a case is referred to a master, Rule 53(c) gives the master the power to conduct hearings in the same manner

as the circuit court, unless the order of reference specifies or limits his powers." *Smith Cos. of Greenville, Inc. v. Hayes*, 311 S.C. 358, 360, 428 S.E.2d 900, 902 (Ct. App. 1993). "To rewrite the terms of sale after the sale would be patently inequitable." *Ex parte Johnson*, 371 S.C. 614, 618, 640 S.E.2d 887, 889 (Ct. App. 2006). "[I]t is the long established policy in South Carolina that '[t]he courts should be particularly jealous of the integrity of judicial sales.'" *Id.* (citing *In re Wilson*, 141 S.C. 60, 63, 139 S.E. 171, 172 (1927)).

THE BEACH ENTITIES' MOTIONS TO DISMISS

The portion of the Court's Order of June 30, 2020, indicating the Beach Entities' Motion to Dismiss is granted is a scrivener's error; that Motion was not argued, it was reserved for referral to the Master-in-Equity and not considered by this Court, so that Motion will be transferred to the Master-In-Equity.

CONCLUSION AND ORDER

The Plaintiff's Motion for a Temporary Restraining Order is Denied, the Plaintiff's Motion to Reconsider is denied, and the entire case and all the pending Motions are referred to the Master-in-Equity, pursuant to and consistent with South Carolina Rules of Civil Procedure, Rule 53. All pre-trial matters, including the parties' motions, shall be and are hereby referred to the Master-In-Equity, with finality, with appeal directly to the South Carolina Court of Appeals or the South Carolina Supreme Court.

AND IT IS SO ORDERED.

Bentley Price
Presiding Judge-Ninth Judicial Circuit

Charleston, S.C.

July _____, 2020



Charleston Common Pleas

Case Caption: Maybank 2754 Llc VS Eugene J Zurlo , defendant, et al

Case Number: 2020CP1000209

Type: Order/Other

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

Electronically signed on 2020-07-13 11:52:27 page 6 of 6

Cheryl D. Shoun
Special Counsel
Admitted in SC

July 24, 2020

The Honorable Mikell R. Scarborough
100 Broad Street, Ste. 266
Charleston, S.C. 29401-2243

Re: Maybank 2754, LLC v Eugene J. Zurlo, individually and Co-Trustee of
Eugene J. Zurlo, 1776, LLC, Beach Fenwick, LLC, The Beach
Company, Seamon Whiteside & Associates, Inc., Penny Creek
Associates, LLC, John Doe and Mary Roe
Case No.: 2020-CP-10-00209

Dear Judge Scarborough:

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

As the Court may be aware, the referenced matter has been referred to the Master-in-Equity. Please accept this letter as a request on behalf of my clients, Beach Fenwick, LLC and The Beach Company [sic], as well as all remaining Defendants, for a status conference before Your Honor.

By way of a brief history, this matter was referred to Your Honor by a Form 4 Order executed by The Honorable Bentley D. Price on June 29, 2020 and entered June 30, 2020. A copy of the Form 4 Order is enclosed. Plaintiff moved for reconsideration of that ruling. On July 13, 2020, Judge Price executed and entered an Order denying Plaintiff's Motion to Reconsider, and expanded upon the previous Form 4 Order. Plaintiff served its Notice to Appeal on July 15, 2020.

In order to provide further background to the Court, I have set forth below all parties and their counsel.

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PO Box 486
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F 843.414.8238
E CShoun@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

"EXHIBIT B"

Page 2

Maybank 2754, LLC
Law, PLLC

Jason M. Tarokh, Tarokh

Eugene J. Zurlo, Individually,
and as Co-Trustee of the Eugene
J. Zurlo Living Trust Dated
December 11, 1997

J. Rutledge Young, Jr.
Blake McKie
Duffy & Young

1776, LLC

Brian A. Hellman
Jason S. Smith
Hellman, Yates & Tisdale, PA

Beach Fenwick, LLC
The Beach Company[sic]

Cheryl D. Shoun
Alexandra H. Austin
Nexsen Pruet, LLC

Seamon, Whitesides
& Associates, Inc.

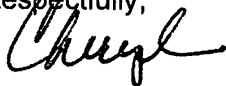
J. Patrick Norris
Kent T. Stair
Jordan N. Teich
Copeland, Stair, Kingma &
Lovell, LLP

Penny Creek Associates, LLC

Thomas B. Pritchard
Parker Nelson & Associates

Again, Defendants will greatly appreciate the benefit of a status conference with the Court, thus allowing the Court and all parties to examine the status of the case and determine a path for moving forward.

Respectfully,



Cheryl D. Shoun
CDS/rp
Enclosure

Page 3

CC: J. Patrick Norris, Esquire
Kent T. Stair, Esquire
Jordan N. Teich, Esquire
Jason S. Smith, Esquire
Brian A. Hellman, Esquire
J. Rutledge Young, Jr., Esquire
Christopher Lanning, Esquire
Jason M. Tarokh, Esquire

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

MAYBANK 2754, LLC,
Plaintiff,

Case No. 2020-CP-10-00209

vs.

[PROPOSED] ORDER

EUGENE J. ZURLO, Individually and as
Co-Trustee of the Eugene J. Zurlo Living
Trust Dated December 11, 1997; 1776,
LLC; BEACH FENWICK, LLC; THE BEACH
COMPANY; SEAMON, WHITESIDE &
ASSOCIATES, INC.; PENNY CREEK
ASSOCIATES, LLC; JOHN DOE AND
MARY ROE,
Defendant.

BRIEF PROCEDURAL HISTORY

This matter came before the Court on June 16 and June 25, 2020 pursuant to certain motions filed by Defendants and a Motion filed on behalf of Plaintiff in this action, including:

- 1) February 17, 2020 – Defendants Beach Fenwick, LLC and The Beach Co.'s ("Beach Entities") Motion to Dismiss;
- 2) February 17, 2020 – Beach Entities' Motion to Refer to the Master-In-Equity;
- 3) February 20, 2020 – Defendant Seamon Whiteside Associates, Inc.'s ("Seamon Whiteside") Motion to Dismiss Civil Conspiracy;
- 4) February 21, 2020 – Defendant 1776, LLC's ("1776") Motion to Dismiss;
- 5) February 21, 2020 – 1776's Motion to Refer to the Master-In-Equity;

- 6) March 10, 2020 – Defendants Eugene J. Zurlo, individually and as co-trustee of Eugene J. Zurlo Living Trust's ("Zurlo Parties") Motion to Refer to the Master-In-Equity;
- 7) March 11, 2020 – Plaintiff Maybank 2754's ("Maybank") Motion for Temporary Injunction.

Counsel for all parties appeared, via video conference application "Zoom," and the Court heard oral argument on behalf of all parties.

On June 30, 2020, this Court issued its Form 4 Order, with the following Statement of Judgment:

Plaintiff Maybank 2754 LLC's Motion/Temporary Injunction is denied. Defendant Beech Company's Motion to Dismiss and Refer to the Master, along with all outstanding motions to refer to the master, are granted.

The Plaintiff filed a Rule 59 Motion to Reconsider on July 1. That Motion is denied for the reasons set forth below.

PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION

Plaintiff's Motion for Temporary Injunction, filed March 11, 2020, seeks to enjoin Beach Fenwick from developing the Subject Property until after a trial on the merits and a judgment is rendered in this matter. In consideration of Plaintiff's Motion, the Court considered the Beach Entities' Memorandum of Law in Opposition to Plaintiff's Motion for Temporary Injunction, filed on June 15, 2020, Plaintiff's Notice of Filing Order Exhibits in Support of Its Motion for Temporary Injunction, filed June 23, 2020, the testimony of Michel F. Laplante, on behalf of Plaintiff, and the oral argument of Plaintiff's counsel, and applicable South Carolina authority, based upon which this Court makes the following findings, and denies Plaintiff's Motion for Temporary Injunction.

A court may issue a temporary injunction “only if necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law.” *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586–87, 694 S.E.2d 15, 17 (2010). “An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff.” *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). Generally, for a preliminary injunction to be granted, the plaintiff must establish that: (1) he would suffer irreparable harm if the injunction is not granted; (2) he will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law. *Id.*

In consideration of the briefing filed with this Court on behalf of Plaintiff and on behalf of the Beach Entities relative to Plaintiff’s Motion for Temporary Injunction, oral argument of counsel, testimony presented on behalf of Plaintiff, as well as the law of the State of South Carolina, this Court finds and so rules that Plaintiff has failed to demonstrate that it will suffer irreparable harm in the absence of the injunction sought. Plaintiff has failed to establish it will suffer irreparable harm if the injunction is not granted. Further, Plaintiff has failed to establish it will likely succeed on the merits of this litigation and likewise failed to establish it has no adequate remedy at law. Additionally, Plaintiff seeks damages in a Conspiracy Cause of Action in its Complaint, so Plaintiff has a remedy at law.

**DEFENDANTS’ MOTIONS FOR ORDER OF REFERENCE
TO THE MASTER-IN-EQUITY**

All Defendants, except Seamon, Whiteside & Associates, Inc., filed motions for an order of reference of this litigation to the Master-In-Equity, as set forth above. Plaintiff filed its Objection and Response in Opposition to the Defendants' Motions for Order of Reference to the Master-In-Equity on April 6, 2020, following which Plaintiff filed its Amended Objection and Response in Opposition to the Defendants' Motions for Order of Reference to the Master-In-Equity on April 9, 2020. Subsequently, the Zurlo Parties filed their Reply to Plaintiff's Amended Objection and Response in Opposition to Motion for Order of Reference to the Master-In-Equity on April 22, 2020, following which Plaintiff filed its Second Amended Objection and Response in Opposition to the Defendants' Motions for Order of Reference to the Master-In-Equity on May 15, 2020. The Zurlo Parties filed their Brief in Support of Motion to Refer to Master on June 11, 2020. The Beach Entities filed their Memorandum of Law in Support of Their Motion for Order of Reference to Master-In-Equity on June 19, 2020.

The Court heard oral argument on Defendants' Motions to Refer to the Master-In-Equity on June 16, with additional argument on June 25, 2020. Based upon the parties' submissions to this Court, as well as oral argument of counsel and the testimony of Mitch Laplante, on behalf of Plaintiff, this Court finds as follows:

The Master-In-Equity may hear any matter referred to him or her by the Circuit Court. See S.C. Code Ann. § 14-11-10 et seq. and Rule 53 of the South Carolina Rules of Civil Procedure. "Pursuant to Rule 53, SCRPC, a master has no power or authority except that which is given to him by the order of reference." *Bunkum v. Manor Props.*, 321 S.C. 95, 98, 467 S.E.2d 758, 760 (Ct. App. 1996). "When a case is referred to a master, Rule 53(c) gives the master the power to conduct hearings in the same manner

as the circuit court, unless the order of reference specifies or limits his powers." *Smith Cos. of Greenville, Inc. v. Hayes*, 311 S.C. 358, 360, 428 S.E.2d 900, 902 (Ct. App. 1993). "To rewrite the terms of sale after the sale would be patently inequitable." *Ex parte Johnson*, 371 S.C. 614, 618, 640 S.E.2d 887, 889 (Ct. App. 2006). "[I]t is the long established policy in South Carolina that '[t]he courts should be particularly jealous of the integrity of judicial sales.'" *Id.* (citing *In re Wilson*, 141 S.C. 60, 63, 139 S.E. 171, 172 (1927)).

THE BEACH ENTITIES' MOTIONS TO DISMISS

The portion of the Court's Order of June 30, 2020, indicating the Beach Entities' Motion to Dismiss is granted is a scrivener's error; that Motion was not argued, it was reserved for referral to the Master-in-Equity and not considered by this Court, so that Motion will be transferred to the Master-In-Equity.

CONCLUSION AND ORDER

The Plaintiff's Motion for a Temporary Restraining Order is Denied, the Plaintiff's Motion to Reconsider is denied, and the entire case and all the pending Motions are referred to the Master-in-Equity, pursuant to and consistent with South Carolina Rules of Civil Procedure, Rule 53. All pre-trial matters, including the parties' motions, shall be and are hereby referred to the Master-In-Equity, with finality, with appeal directly to the South Carolina Court of Appeals or the South Carolina Supreme Court.

AND IT IS SO ORDERED.

Charleston, S.C.

July _____, 2020

Bentley Price
Presiding Judge-Ninth Judicial Circuit

Subject: Re: Maybank 2754, LLC v Eugene J. Zurlo et al Case No.: 2020-CP-10-00209 [IWOV-NPCHAR1.FID1148795]
Date: Monday, July 27, 2020 at 2:37:03 PM Eastern Daylight Time
From: Jason Tarokh
To: Katelyn J. Brunson, Parish, Ruthie R.
CC: 'Rutledge Young Jr.', 'Teich, Jordan N.', 'Brian Hellman', 'Jason Smith', 'pnorris@cskl.law', 'kstair@cskl.law', 'Chris Lanning (clanning@brush-lanning.com)'
Attachments: image001.png, image002.png, image003.jpg, Notice.of.Appeal.etc.Maybank.2754.LLC.Easement.pdf

Good afternoon, Ms. Brunson.

I represent the Plaintiff in the above-referenced case. I filed an appeal relative to the orders of reference. Please see attached. Given the current procedural posture of this case, I don't believe it is proper to have the Master-in-Equity conduct a status conference when Plaintiff is seeking appellate review of the issue of this case being referred to the Master-in-Equity and therefore would respectfully object to a status conference. Thank you.

With kind regards,

Jason

Jason M. Tarokh | Attorney
PO Box 10827 | Tampa, Florida 33679
T: 813-922-5510 | E: jason@tarokhlaw.com
www.tarokhlaw.com



Florida | South Carolina

THIS IS A COMMUNICATION FROM A DEBT COLLECTOR. THIS IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE. IF YOU ARE CURRENTLY IN BANKRUPTCY OR HAVE RECEIVED A DISCHARGE IN BANKRUPTCY, THIS COMMUNICATION IS NOT AN ATTEMPT TO COLLECT A DEBT BUT IS PROVIDED FOR INFORMATIONAL PURPOSES ONLY.

This email, and any attachments thereto, is intended only for use by the addressee(s) named herein and may contain legally privileged and/or confidential information. If you are not the intended recipient of this e-mail, you are hereby notified that any dissemination, distribution or copying of this e-mail, and any attachments thereto, is strictly prohibited. If you have received this e-mail in error, please immediately notify me at 813-922-5510 and permanently delete the original and any copy of any e-mail and any printout thereof. Thank you.

“EXHIBIT C”

Subject: RE: Maybank 2754, LLC v Eugene J. Zurlo et al Case No.: 2020-CP-10-00209 [IWOV-NPCHAR1.FID1148795]
Date: Monday, July 27, 2020 at 3:57:18 PM Eastern Daylight Time
From: Katelyn J. Brunson
To: Rutledge Young Jr., Jason Tarokh, Parish, Ruthie R.
CC: 'Teich, Jordan N.', 'Brian Hellman', 'Jason Smith', 'pnorris@cskl.law', 'kstair@cskl.law', 'Chris Lanning (clanning@brush-lanning.com)', Martha S. Dennis
Attachments: image001.png, image002.png, image003.jpg

Good Afternoon,

I hope you are all well. Thank you for the information regarding the Notice of Appeal. Due to the Order of Reference being appealed, this court will not have jurisdiction over the above referenced matter.

Please do not hesitate to reach out with any questions, comments, or concerns.

Many Thanks,

Katelyn "Katie" Brunson, Esq.
Charleston County Master in Equity
Judicial Law Clerk
100 Broad Street, Suite 266
Charleston, SC 29401
Ph: (843)958-5075
KBrunson@charlestoncounty.org

"EXHIBIT D"

Cheryl D. Shoun
Special Counsel
Admitted in SC

August 5, 2020

Via Email and Regular Mail

The Honorable Mikell R. Scarborough
100 Broad Street, Ste. 266
Charleston, S.C. 29401-2243

Re: Maybank 2754, LLC v Eugene J. Zurlo, individually and Co-Trustee of
Eugene J. Zurlo, 1776, LLC, Beach Fenwick, LLC, The Beach
Company, Seamon Whiteside & Associates, Inc., Penny Creek
Associates, LLC, John Doe and Mary Roe
Case No.: 2020-CP-10-00209

Dear Judge Scarborough:

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

I am writing to the Court in follow up to my letter of July 26, 2020 as well as the email communication exchanged between Ms. Brunson and various counsel in the referenced action.

As the Court will recall, my initial letter requested a status conference. In response, Mr. Tarokh, on behalf of Plaintiff, advised Ms. Brunson he does not believe it is proper to have Your Honor conduct a status conference when Plaintiff is seeking appellate review of the referral of the case to Your Honor. Rutledge Young on behalf of the Zurlo Defendants responded that Appellate Court Rule 241 allows the lower court to retain jurisdiction over matters not affected by the appeal. Ms. Brunson then cancelled the status conference. The Defendants respectfully renew the request for a status conference.

The Order entered by Judge Price on July 13, 2020, specifically concludes "All pre-trial matters, including the parties' motions, shall be and are hereby referred to the Master-In-Equity, with finality, with appeal directly to the South Carolina Court of Appeals or the South Carolina Supreme Court." Moreover, SCACR 205 states, in pertinent part, "Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal."

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PO Box 486
Charleston, SC 29402
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T 843.720.1762
F 843.414.8238
E CShoun@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

"EXHIBIT E"

August 5, 2020
Page 2

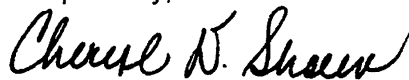
It is undisputed that a number of motions remain outstanding that are not subject to appeal and are within Your Honor's jurisdiction to consider at this time. "When a case is referred to a master, Rule 53(c) gives the master the power to conduct hearing in the same manner as the circuit court, unless the order of reference specifies or limits his powers." See *Smith Cos. of Greenville, Inc. v. Hayes*, 311 S.C. 358, 428 S.E.2d 900 (Ct. App.).

In addition, Chief Justice Beatty issued a Memorandum dated July 30, 2020, a copy of which is attached, which addresses court operations between August 3, 2020 and September 18, 2020. That Memorandum provides, in pertinent part, that status conferences shall be held in all cases on the trial docket, and disposition should be made of pre-trial motions.

Finally, Mitch Laplante previously filed an appeal from an Order of Reference to the Master-in-Equity based upon the same grounds; mode of trial. That appeal was dismissed by the Court of Appeals. A copy of that Order is also attached.

For the reasons stated herein, and others, Defendants wish to have the opportunity to address outstanding matters with this Court. This will allow all parties to fully set forth their positions. If, after hearing from the parties, the Court concludes it lacks jurisdiction, the parties may proceed accordingly.

Respectfully,



Cheryl D. Shoun
CDS/rp

cc: All Counsel of Record via email



The Supreme Court of South Carolina

DONALD W. BEATTY
CHIEF JUSTICE

POST OFFICE BOX 3543
SPARTANBURG, SOUTH CAROLINA 29304-3543

MEMORANDUM

To: Circuit Court Judges
Family Court Judges
Clerks of Court

From: Chief Justice Beatty

Subject: Court Operations during the Seven-Week Period August 3 –
September 18, 2020

Date: July 30, 2020

I continue to thank judges, clerks of court, and court staff for their diligence and their efforts to ensure that the South Carolina Judicial Branch remains open for business. The unprecedented COVID-19 pandemic has required changes to ordinary court operations and you have readily adapted to these difficult circumstances. Since the beginning of this pandemic, Circuit and Family Court judges have held more than 6,800 hearings via WebEx. Numerous other hearings have additionally been held in person, via Zoom, teleconference, and other platforms.

As we continue to prepare for the anticipated resumption of normal court activity, the Chief Judges for Administrative Purposes in each circuit for Common Pleas, General Sessions and Family Court should continue to work with the Clerks of Court to create a comprehensive plan to schedule and dispose of all status conferences, pre-trial hearings, and pre-trial motions during this time. Additionally, judges shall continue to hear any non-jury matter currently pending. All local administrative orders must be approved by the Chief Justice and filed with Court Administration prior to implementation. **Every judge not previously scheduled for vacation or official leave should operate on a normal schedule and keep regular office hours.**

All status conferences, pre-trial matters and scheduled hearings may be conducted using remote communication technology to avoid the need for a physical appearance

of all or some of the parties, counsel or witnesses. Consent of the parties or counsel is not required. Video conferencing should be the primary means of holding hearings. In-person hearings should occur only when remote hearings are not feasible. I encourage you to use WebEx, the conferencing platform supported by the Judicial Branch. Videoconferencing should be hosted by the judge and not by a party to the case. In cases where members of the press request to observe a remote hearing that ordinarily would be open to the public, an invitation to the videoconference should be provided to them. If an in-person hearing is conducted, only attorneys, the parties, necessary witnesses, and a limited number of members of the press will be allowed to appear. Hearings must be adequately staggered to minimize the number of people appearing at the same time.

Judges will continue handling as much of the regular dockets within their circuit as is practical.

In doing so, judges shall adhere to the guidance set forth in the order of the Supreme Court regarding Operation of the Trial Courts During the Coronavirus Emergency (As Amended April 22, 2020).

Please take note of the following:

1. Clerks of Court, in consultation with the Chief Judges for Administrative Purposes, shall prepare dockets for the ensuing seven terms of court. Full dockets are required for Common Pleas, General Sessions, and Family Court. Should your scheduled term of court break down or collapse for one or more days of the week, please notify Tiffany Raines at Court Administration as soon as possible.
2. Status conferences shall be held in all cases on the trial docket, criminal and civil, and pre-trial motions should be disposed of.
3. Limited judicial travel for court assignments will now be permitted. However, travel will be allowed outside of a judge's home circuit only when the travel can be accomplished by commuting daily. Judges should carefully review their schedules for the remainder of 2020 and determine whether or not their current assignments will allow them to commute on a daily basis. If a judge has assignments which would require them to remain overnight, please notify Tiffany Raines at Court Administration as soon as possible. Unless a judge will be staying with family, Court Administration will make adjustments to the statewide calendar to allow for a daily commute. However, chief judges

for administrative purposes may continue to handle cases within the circuit for which they are assigned as administrative judge.

4. Notwithstanding any prior guidance, continuances on pre-trial matters are discouraged during this seven-week period and should be granted only in exceptional circumstances with good cause shown. Continuances should not be granted based solely on a general reluctance by a party, attorney, or witness to attend court, so long as proper safeguards and protocols are being observed.
5. Chief administrative judges should work with the Attorney General's office to schedule PCR hearings as may be feasible.
6. Any matter heard in person must be conducted in a reasonably safe manner. Reasonably safe manner assumes adherence to CDC social distancing recommendations, wearing of personal protective equipment when appropriate, availability of adequate sanitizing supplies, and staggering of hearings. Multiple in-person hearings or appearances shall not be scheduled to take place at the same time.
7. Pilot criminal jury trials are scheduled to take place the week of August 3rd in Laurens County and August 10th in Horry County. Any judge interested in holding a criminal jury trial should contact Leslie Taaffe at Court Administration and provide her with a detailed safety plan as well as the proposed dates, presiding judge, and the nature of the case. These proposals will be approved or denied on a case-by-case basis. Civil jury trials remain suspended.

Clerks of Court should include on their websites, if available, a regular docket or roster of all matters scheduled to be heard and the chief judges should assist them in doing so. If the courthouse is closed to the public, the docket or roster should additionally be posted on the courthouse door. Information posted about the docket or roster should include contact information for members of the public seeking to view the hearing. If a courthouse must close during normal operating hours for any reason, the Clerk of Court's office should inform Court Administration.

Please let me know if you have any questions or concerns.

The South Carolina Court of Appeals

Wells Fargo Bank, N.A., as Successor by Merger to
Wachovia Bank, National Association, as Successor by
Merger to First Union National Bank, Respondent,

v.

Penny Creek Associates, L.L.C. a/k/a Penny Creek
Associates, LLC; The Grove at Fenwick Plantation,
LLC; Charlotte R. Zurlo; The Grove at Fenwick
Plantation, LLC; Michel F. LaPlante a/k/a Michel
Laplante a/k/a Mitch Laplante; Charlotte R. Zurlo;
Eugene J. Zurlo; Charlotte R. Zurlo and Eugene J. Zurlo,
as Co-Trustees of The Nicklaus Lane Realty Trust No. 1
under Declaration of Trust dated May 22, 1998; Fenwick
Hall Plantation Property Owners Assn., Inc. a/k/a
Fenwick Hall Plantation Property Owners' Association,
Inc.; Preserve at Fenwick Hall Property Owners'
Association, Inc.; and The Grove at Fenwick Plantation
Condominium Association, Inc., Defendants,

Of Whom Penny Creek Associates, L.L.C. a/k/a Penny
Creek Associates, LLC; The Grove at Fenwick
Plantation, LLC; Charlotte R. Zurlo; The Grove at
Fenwick Plantation, LLC; Charlotte R. Zurlo; Eugene J.
Zurlo; Charlotte R. Zurlo and Eugene J. Zurlo, as Co-
Trustees of The Nicklaus Lane Realty Trust No. 1 under
Declaration of Trust dated May 22, 1998; Fenwick Hall
Plantation Property Owners Assn., Inc. a/k/a Fenwick
Hall Plantation Property Owners' Association, Inc.;
Preserve at Fenwick Hall Property Owners' Association,
Inc.; and The Grove at Fenwick Plantation Condominium
Association, Inc., are the Respondents.

Michel F. LaPlante a/k/a Michel Laplante a/k/a Mitch
Laplante, Appellant,

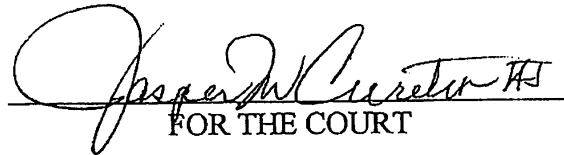
v.

The Eugene J. Zurlo Living Trust, Dated December 11,
1997 and Paul Zurlo, Respondents.

Appellate Case No. 2015-001461

ORDER

Respondents' motion to dismiss is granted. The remittitur will be sent as provided
by Rule 221(b) of the South Carolina Appellate Court Rules.


FOR THE COURT

Columbia, South Carolina

cc: John Page Seibels, Jr., Esquire
Jason Scott Luck, Esquire
Robert C. Byrd, Esquire
Alyson Smith Podris, Esquire
Robert Bratton Varnado, Esquire
Thomas Bacot Pritchard, Esquire
J. Rutledge Young, Jr., Esquire
John A. Massalon, Esquire
Amber B. Carter, Esquire



Subject: Re: Maybank 2754, LLC v Eugene J. Zurlo, et al Case No.: 2020-CP-10-00209 [IWOV-NPCHAR1.FID1148795]
Date: Wednesday, August 5, 2020 at 2:24:01 PM Eastern Daylight Time
From: Jason Tarokh
To: Parish, Ruthie R., 'kbrunson@charlestoncounty.org', 'Rutledge Young Jr.', 'Teich, Jordan N.', 'Brian Hellman', 'Jason Smith', 'pnorris@cskl.law', 'kstair@cskl.law', 'kstair@cskl.law', 'master@charlestoncounty.org', 'tpritchard@pnalaw.net', Shoun, Cheryl D.
Attachments: image001.png, image002.png, image003.jpg, Notice.of.Appeal.etc.Maybank.2754.LLC.Easement[3].pdf

Good afternoon, Ms. Brunson.

I represent the Plaintiff in the above-referenced matter. The Defendants' second request for a status conference from Master-in-Equity is improper. I respectfully reiterate my prior objection as stated in my 7.27.20 e-mail as to this issue and agree with your conclusion that the Master-in-Equity does not have jurisdiction because this case is pending appellate review.

Despite my client's jury trial request, the entire case was referred to the Master-in-Equity. Subsequently, a notice of appeal was filed. Please see attached notice of appeal documents. The appeal remains pending and all matters in this case are affected by the appeal. Therefore, the Court of Appeals has exclusive jurisdiction over this case.

It is improper and also unreasonable to conduct a status conference in this court when the issue of the propriety of the referral to this court, despite my client's jury trial demand, is currently pending appellate review. The Master-in-Equity does not conduct jury trials and does not have jurisdiction to do so. It is also not efficient to have this court incur its time, especially in these circumstances, to hear matters in this case when there is a possibility of a reversal of the order of reference. For all these reasons, the Plaintiff respectfully objects to the Defendants' second request for a status conference.

In addition, the reference in Ms. Shoun's 8.5.20 correspondence as to Mitch Laplante previously filing an appeal in a separate case years ago is completely irrelevant because he is not party in this case. Thank you.

With kind regards,

Jason

Jason M. Tarokh | Attorney
 PO Box 10827 | Tampa, Florida 33679
 T: 813-922-5510 | E: jason@tarokhlaw.com
 www.tarokhlaw.com



Florida | South Carolina

THIS IS A COMMUNICATION FROM A DEBT COLLECTOR. THIS IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE. IF YOU ARE CURRENTLY IN BANKRUPTCY OR HAVE RECEIVED A DISCHARGE

“EXHIBIT F”

Subject: RE: Maybank 2754, LLC v Eugene J. Zurlo, et al Case No.: 2020-CP-10-00209 [IWOV-NPCHAR1.FID1148795]
Date: Thursday, August 6, 2020 at 2:56:41 PM Eastern Daylight Time
From: Martha S. Dennis
To: Rutledge Young Jr., Jason Tarokh
CC: Katelyn J. Brunson, Parish, Ruthie R., Teich, Jordan N., Brian Hellman, Jason Smith, pnorris@csl.law, kstair@csl.law, Mikell Scarborough, tpritchard@pnalaw.net, Shoun, Cheryl D.

Good Afternoon,

The status will be before Judge Scarborough. Would all parties be available August 17th at 10:00?

Best,

Martha "Marti" Dennis, Esq.
Roster and Scheduling Clerk
Master In Equity
100 Broad Street
Suite 266
Charleston, SC 29401
MDennis@charlestoncounty.org
843-958-5053 direct
843-958-5077 fax

"EXHIBIT G"

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

EUGENE J. ZURLO, Individually and as
Co-Trustee of the Eugene J. Zurlo Living
Trust Dated December 11, 1997; 1776, LLC;
BEACH FENWICK, LLC; THE BEACH
COMPANY; SEAMON, WHITESIDE &
ASSOCIATES, INC.; PENNY CREEK
ASSOCIATES, LLC; JOHN DOE AND
MARY ROE,

Defendants.

DEFENDANT EUGENE J. ZURLO,
Individually and as Co-Trustee of the Eugene
J. Zurlo Living Trust Dated December 11,
1997's MOTION AND MEMORANDUM IN
SUPPORT OF SUMMARY JUDGMENT

TO: JASON M. TAROKH, ESQ., COUNSEL FOR PLAINTIFF MAYBANK 2754, LLC:

Eugene J. Zurlo, individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997 ("Zurlo Parties"), by and through counsel, will move before the presiding judge of the Court of Common Pleas for the Ninth Judicial Circuit at the Charleston County Courthouse, at such time as the Court may appoint, for an Order, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, granting summary judgment in its favor as to Plaintiff's Complaint, and submit this Memorandum in support of the same.

BACKGROUND

In 1999, Mitch Laplante ("Laplante") and the Eugene J. Zurlo Living Trust Dated December 11, 1997 ("Zurlo Trust"), created Penny Creek Associates, LLC ("PCA") to purchase and develop approximately 60 acres of property along Maybank Highway on Johns Island, South

Carolina. Laplante was a 50% voting member, he and his family were 50% members of PCA, and the Zurlo Trust was the other 50% member.

In December of 2013, Zurlo initiated an action, individually and derivatively on behalf of PCA against Laplante and others seeking several remedies, to include an accounting, appointment of a new manager, and judicial dissolution of PCA. That matter was ultimately resolved, with the terms of the settlement placed on the record on February 29, 2016. PCA was to wind up its business, sell its real estate, and ultimately terminate its LLC status.

In 2014, Wells Fargo commenced a foreclosure action against PCA and its members. (See, Case No.: 2014-CP-10-04946, filed with the Charleston County Clerk of Court.) Based upon various allegations and matters set forth in that action, which was referred to the Master-in-Equity for disposition, the Master-in-Equity issued its Order and Judgment of Foreclosure and Sale. **Exhibit A.** The Foreclosure Order notes that “all persons whosoever claiming under the defendants be forever barred and foreclosed of all right, title, interest, and equity of redemption in the Subject Property” and specifically retained jurisdiction “to do all necessary acts incident to this foreclosure and to hear any post-judgment matters.” Pursuant to this Order, certain properties of PCA were sold in August 2017 to 1776, LLC. In December of 2019, Beach Fenwick, LLC purchased a certain 22-acre tract of the referenced property from 1776, LLC. Laplante, individually was a named party to the foreclosure action, and at the relevant time, was the managing partner of PCA. Laplante’s knowledge and conduct is, therefore, imputed to Maybank. See *In re Infinity Bus. Grp., Inc.*, 497 B.R. 794, 813 (Bankr. D.S.C. 2013); S.C. Code § 33-44-120.

Maybank 2754 is a limited liability company organized pursuant to the laws of the State of South Carolina. Laplante is its managing member. Maybank relies upon a document

entitled Resolution of the Sole Shareholder of Penny Creek Associates, LLC, dated October 7, 2013, for its claim of a future easement across the former PCA property purchased by Beach Fenwick, LLC from 1776, LLC (“Subject Property”). The referenced resolution provides, inter alia:

...the Company [PCA] has agreed to grant transfer, sell and convey to Purchasers [Laplante, John H. Laplante, Peter F. Laplante, Marianne Laplante-Scarlata], their successors and assigns, an access easement for pedestrian and vehicular ingress, egress and access to, from and over that portion of the lands of Seller [PCA] known as “Residual Tract B-2-2”...¹the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road (“Pitch Fork Road”). Upon the completion of Pitch Fork Road, the Parties hereto shall execute and record an Easement Agreement to memorialize the 30’ Private R/W. (“Future Easement”)

Plaintiff avers in its Complaint that Pitch Fork Road has not been completed and admits the “Future Easement” was never recorded. It is the claim of that future easement, and matters attendant thereto, that give rise to this action.

SUMMARY JUDGMENT STANDARD

Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law.”² With respect to an issue upon which the non-moving party bears the burden of proof, the moving party may discharge his initial responsibility by pointing out to the Court the absence of evidence to support the non-moving party’s case.³ After the moving party has met his initial burden, Rule 56(e) requires the opposing party to “do more than simply show

¹ Residual Tract B-2-2 represents the Subject Property.

² Rule 56, *SCRPC*.

³ Baughman v. American Tel & Tel. Co., 306 S.C. 101, 115,410 S.E.2d 537, 545 (1991).

that there is some metaphysical doubt as to the material facts.”⁴ In response to a properly supported motion for summary judgment, the opposing party “must come forward with specific facts showing there is a genuine issue of material fact.”⁵ In 2015, a unanimous South Carolina Supreme Court explained (in an opinion reversing the appellate court’s reversal of summary judgment and reinstating the trial court’s summary judgment ruling):

“In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party.” *Quail Hill, L.L.C. v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (emphasis added) (quoting *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006)). Even though courts are required to view the facts in the light most favorable to the nonmoving party, to survive a motion for summary judgment, “it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.” *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013) (citing *Evans v. Stewart*, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct.App.2006)).⁶

“Although summary judgment is a drastic remedy which should be cautiously invoked, where a verdict is not reasonably possible under the facts presented, summary judgment is proper.”⁷

ZURLO PARTIES’ MOTION FOR SUMMARY JUDGMENT

The Zurlo Parties are entitled to summary judgment on all the Plaintiff’s claims against them as there is no genuine issue as to the material facts and the Zurlo parties are entitled to summary judgment as a matter of law. The grounds for this Court to do so are as follows:

1. The Plaintiff has admitted under oath and in its Complaint that no easement was ever recorded. (See Plaintiff’s Verified Complaint, Paragraph 18; and Zurlo Parties’

⁴ Id.

⁵ Id.; see also Rule 56(e), *SCRCP*.

⁶ *Grimsley v. S.C. Law Enft Div.*, 415 S.C. 33, 40, 780 S.E.2d 897, 900 (2015).

⁷ *Evans v. Stewart*, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct. App. 2006) (citing *Bloom v. Ravoir*, 339 S.C. 417, 425, 529 S.E.2d 710, 714 (2000)).

Requests to Admit and Plaintiff's Responses to Requests to Admit, attached hereto as **Exhibit B**). Not only was an easement never recorded, no written easement was ever prepared, yet another admission under oath by the Plaintiff. These two admissions plus a lawsuit by Maybank 2754 against its former law firm for malpractice in failing to perfect the easement (2020-CP-10-02180) defeat all the Plaintiff's claims as a matter of law.

2. In identifying and locating property conveyed in a deed or easement, “[w]hile a property description need not be perfect, it must allow one examining it to identify the property conveyed; otherwise, the conveyance is void.” *Hoyler v. State*, 428 S.C. 279, 295, 833 S.E.2d 845, 853 (Ct. App. 2019). In resorting to extrinsic evidence when necessary to clarify a property description, “if it is impossible to locate a key identifier referenced in the deed, the grant is void.” *Id.* at 296, 833 S.E.2d at 854 (citing *Blake v. Doherty*, 18 U.S. 359, 362-63(1820)). The description of an easement in a recorded document is sufficient when it contains language that acts as a guide to the location of the easement on the land such that the easement is ‘capable of being rendered to a certainty [by reference] to something extrinsic ... to which it refer[s].’” *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 72, 558 S.E.2d 902, 909 (Ct. App. 2001). Here, neither the 2013 Assignment, nor the Penny Creek Resolution sufficiently identify or describe the alleged 30 foot right of way easement over the Subject Property. The sole identifier referenced by the documents, on which the location of the alleged easement depends is Pitch Fork Road. As Plaintiff admits in its Complaint, Paragraph 17, “Pitchfork Road has not been completed.” Therefore—while the 2013 Assignment and the Penny Creek Resolution merely constitute an agreement to agree at a

later date between Penny Creek and the Laplantes, “[T]he Company has agreed to grant...to Purchasers...an access easement for pedestrian and vehicular ingress, egress, and access...the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road (“Pitch Fork Road”). Upon the completion of Pitch Fork Road, the Parties hereto shall execute and record an Easement Agreement to memorialize the 30’ private R/W.” Such a grant would be void as a matter of law, due to the impossibility of locating a road which had not been constructed at the time, and which has still not been constructed. Accordingly, even if the Penny Creek Resolution or any similar document had been recorded, which never occurred, Plaintiff still would not have an easement across the Subject Property. At all times relevant to this action, Plaintiff may have had, at best, a contractual right to be granted a 30 foot right of way easement by Penny Creek, which right was contingent upon the completion of Pitch Fork Road. For the foregoing reasons, Plaintiff has never possessed a property interest, including any alleged easement, in the Subject Parcel.

3. As stated previously in the background summary of this case, Wells Fargo commenced a foreclosure action in 2014 against PCA and its members. (See, Case No.: 2014-CP-10-04946, filed with the Charleston County Clerk of Court). The Master-in-Equity’s Order dated June 23, 2017 in that matter foreclosed and barred any and all future claims related to the property or any interest in the property in question. Laplante was a named Defendant in the foreclosure action; was Manager of PCA; was a member of the Plaintiff Maybank 2754, LLC (his son John was manager of Maybank 2754, LLC at the time of foreclosure and was actually served with the foreclosure Complaint on August 20, 2014 as manager of the foreclosure Defendant The Preserve at

Fenwick Hall POA); was represented by counsel; and was present at the June 19, 2017 Hearing when testimony and exhibits concerning the foreclosure sale were put on the record. Plaintiff Maybank 2754, LLC was not a party to the foreclosure action because it did not possess a real property interest in the subject property. The clerk's file in Case No. 2014-CP-10-04946 demonstrates that Mitch Laplante actively participated in that proceeding, making no mention in any of his pleadings or at the Foreclosure Hearing of any Maybank 2754, LLC right to a future easement. As a matter of fact, he understood perfectly that any interest he or PCA had were being foreclosed by Wells Fargo: "I am a big guy. I have accepted that," acknowledging that PCA was going to lose all its property and any unrecorded interest in that property at foreclosure. (See Hearing Transcript, June 19, 2017, pages 25-28, attached hereto as **Exhibit C**). Additionally, there was no exception for a springing or future easement in the June 21, 2017 Order that was executed by Judge Scarborough – and there was not a springing or future easement noted on any plat.

The June 21, 2017, Order of Foreclosure specifically retains jurisdiction for the Master-in-Equity to "do all necessary acts incident to this foreclosure and to hear any post-judgment matters...." That Order is now the law of the case since it involves the same parties and the same property. By bringing this action, Maybank 2754 seeks to have a circuit court judge collaterally attack the Master's earlier Order. It is a cardinal rule in South Carolina that one Circuit Court should not overrule another, especially when the other circuit court judge has retained jurisdiction. See *Bakala v. Bakala*, 352 S.C. 612, 576 S.E.2d 156 (2003) (holding that a family court judge could not overrule the prior unappealed order of another family court judge because it had become law of the

case); *In re Morrison*, 321 S.C. 370 n. 2, 468 S.E.2d 651 n. 2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); *Cooper Tire & Rubber Co. v. Perry et al.*, 261 S.C. 538, 201 S.E.2d 245 (1973) (holding that where a ruling on a demurrer to complaint is not appealed from, it becomes the law of the case); *Watkins v. Hodge*, 232 S.C. 245, 247–48, 101 S.E.2d 657, 658 (1958) (refusing to consider jurisdictional matter of underlying case where issue had been ruled upon and not challenged on appeal). *Judy v. Martin*, 381 S.C. 455, 458–59, 674 S.E.2d 151, 153 (2009).

4. South Carolina Code of Laws § 33-44-102 binds the Plaintiff to any knowledge acquired by Laplante, the manager of PCA and member of the Plaintiff, to whom PCA allegedly contracted to give the “Future Easement.” See *Carolina Park Assocs., LLC v Marino*, 400 S.C.1, 732 S.E.2d 876 (2012) (dismissing Complaint after foreclosure). Laplante’s son, John, was formerly the manager of the Plaintiff until his death, at which time Laplante became the manager. Laplante verified the Complaint in this action as Manager of Plaintiff. As noted previously, both Mitch and John Laplante were aware of everything related to this property, most notably the 2014 foreclosure action that barred the very claims the Plaintiff is now bringing in this suit. Laplante had notice and therefore that notice is imputed on the Plaintiff. Of note, the statute states:

An entity knows, has notice, or receives a notification of a fact for purposes of a particular transaction when the individual conducting the transaction for the entity knows, has notice, or receives a notification of the fact, or in any event when the fact would have been brought to the individual's attention had the entity exercised reasonable diligence.

5. Even if the alleged “Future Easement” were to exist, Maybank 2754 is not a real party in interest. The so-called “Future Easement” would have been assigned to the

Laplante family members in 2005. (See October 7, 2015 Resolution and Assignment, attached hereto as **Exhibit D**). Thus, even if the easement were to be deemed valid, which it is not, the assignment renders the Plaintiff's claims null and void as it was not the assignee and thus is not the real party in interest.

6. The Resolution referenced by the Plaintiff in its Complaint was not properly executed by the Zurlo Trust in accordance with the Third Amended and restated Operating Agreement of PCA attached to **Exhibit B** (See Classes and Voting Sections of the Third Amended and Restated OA and Resolution attached hereto as **Exhibit E** and **Exhibit F** respectively). Mitch Laplante knew that in accordance with Section 3.19 of the PCA Third Amended and Restated Operating Agreement, for the Resolution to be effective, it had to be signed by Eugene and Charlotte Zurlo as Co-Trustees of the 1997 Zurlo Living Trust after a Special Meeting was held. Absent a Special Meeting, the Class A members and Manager were required to adopt by unanimous Written Consent the future easement Resolution and sign a SIGNED WRITTEN CONSENT IN LIEU OF A SPECIAL MEETING, which did not occur here. (See, Laplante Written Resignation as Manager of Penny Creek Associates, LLC attached hereto as **Exhibit G** and compare this to the Resolution in **Exhibit D**). Thus, the Resolution is *ultravires*, null and void.

For the foregoing reasons, the Zurlo Parties are entitled to summary judgment as a matter of law on all of the Plaintiff's claims.

CONCLUSION

The Zurlo Parties' respectfully move this Honorable Court to enter an Order granting this Motion for Summary Judgment pursuant to 56 of the South Carolina Rules of Civil Procedure. The Zurlo Parties' reserve the right to supplement this motion with additional memoranda, affidavits, oral arguments or other evidence that may become available.

Respectfully Submitted,

s/ J. Rutledge Young, Jr.

J. Rutledge Young, Jr. (SC Bar No. 5737)

Blake McKie (SC Bar No. 80198)

DUFFY & YOUNG, LLC

96 Broad Street

Charleston, South Carolina 29401

(843) 720-2044 (phone)

(843) 720-2047 (fax)

jry@duffyandyoung.com

bmckie@duffyandyoung.com

*Attorneys for Defendant Eugene J. Zurlo,
Individually and as Co-Trustee of the Eugene J.
Zurlo Living Trust Dated December 11, 1997*

August 14, 2020
Charleston South Carolina

EXHIBIT B

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

EUGENE J. ZURLO, Individually and as
Co-Trustee of the Eugene J. Zurlo Living
Trust Dated December 11, 1997; 1776, LLC;
BEACH FENWICK, LLC; THE BEACH
COMPANY; SEAMON, WHITESIDE &
ASSOCIATES, INC.; PENNY CREEK
ASSOCIATES, LLC; JOHN DOE AND
MARY ROE,

Defendants.

DEFENDANT EUGENE J. ZURLO as Co-
Trustee of the Eugene J. Zurlo Living Trust
Dated December 11, 1997's FIRST SET OF
REQUESTS FOR ADMISSIONS TO
PLAINTIFF

TO: JASON M. TAROKH, ESQ., COUNSEL FOR PLAINTIFF:

COMES NOW Eugene J. Zurlo as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997 ("Zurlo"), by and through counsel, and requests that Maybank 2754, LLC ("Plaintiff") admit the truth of the matters set forth below in writing within thirty (30) days after service of these Requests, pursuant to Rule 36 of the South Carolina Rules of Civil Procedure.

REQUESTS FOR ADMISSION

Admit:

1. Admit that the document attached hereto as Exhibit A is a true and accurate copy of the Articles of Organization of Penny Creek Associates, LLC filed January 18, 1999.
2. Admit that the document attached hereto as Exhibit B is a true and accurate copy of the Third Amended and Restated Operating Agreement of Penny Creek Associates, LLC dated October 15, 2005.

3. Admit that pursuant to Exhibit B, Section 3.9, Eugene J and Charlotte R. Zurlo, as Co-Trustees of the Eugene J. Zurlo Living Trust Dated December 11, 1997 were 50% Class A members of Penny Creek Associates, LLC.

4. Admit that pursuant to Exhibit B, Section 3.9, Michel LaPlante a/k/a Mitch LaPlante was the other 50% Class A member of Penny Creek Associates, LLC.

5. Admit that pursuant to Exhibit B, Michel LaPlante was the managing member of Penny Creek Associates, LLC until he was removed and replaced by Chris Lanning on May 3, 2016 pursuant to the ORDER of the Hon. R. Markley Dennis Jr attached as Exhibit C.

6. Admit that Exhibit D, is a true and accurate copy of the WRITTEN CONSENT IN LIEU OF SPECIAL MEETING OF THE CLASS A MEMBERS AND MANGER OF PENNY CREEK ASOCIATES, LLC in which Michel LaPlante resigned as the managing member of Penny Creek Associates, LLC and was replaced by Chris Lanning.

7. Admit that the document attached hereto as Exhibit E is a true and accurate copy of the RESOLUTION OF THE SOLE SHAREHOLDER OF PENNY CREEK ASSOCIATES, LLC dated October 4, 2013 in which the alleged agreement to create a Springing Easement which is the subject of Plaintiff's lawsuit was allegedly transferred from PCA, LLC to Maybank 2754, LLC.

8. Admit that the document attached hereto as Exhibit E is not signed by Eugene J and Charlotte R. Zurlo as Co-Trustees of the Eugene J Zurlo Living Trust of December 11.1997 (Class A member of PCA along with Mitch LaPlante).

9. Admit that the document attached hereto as Exhibit E was not made a part of a 10-day Notice of a Special Meeting of PCA, LLC.

10. Admit that the document attached hereto as Exhibit E was not the subject of a written Consent signed by all PCA members in lieu of Notice of a Special Meeting.

11. Admit that the document attached hereto as Exhibit E was never recorded in the RMC or RDC office for Charleston County.

12. Admit that the document attached as Exhibit F is the Buist, Byars & Taylor, LLC Statement of Settlement for the Purchasers of Maybank 2754, LLC dated October 7, 2013 .

13. Admit that there is no recorded deed wherein Maybank 2754 LLC bought the Maybank 2754 LLC property from Penny Creek Associates, LLC.

14. Admit that on October 15, 2015, Mitch LaPlante, Applicant, for Owners Penny Creek Associates, LLC, Fenwick Allee, LLC and 2754 Maybank, LLC submitted Development Guidelines and Land Use Plan for the Village at Fenwick Plantation PUD as part of the PUD conditional use Master Plan for the Village at Fenwick Plantation application submitted in accordance with the Zoning Ordinance of the City of Charleston, Article 2, Part 7 Sections 54-250, et seq.

15. Admit that the document attached hereto as Exhibit G is a true and accurate copy of the Transcript of the Foreclosure Hearing at which 1776, LLC indicated it was going to make a credit bid for all PCA's property, to include the property which is the subject matter of Plaintiff's lawsuit .

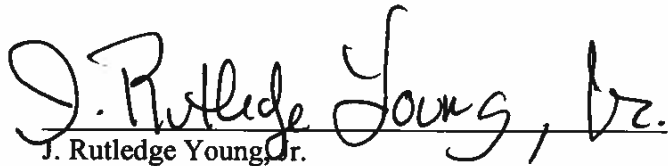
16. Admit that the document attached hereto as Exhibit H is a true and accurate copy of the Order of Foreclosure signed by the Hon Michael Scarborough on June 21, 2017.

17. Admit that Michael LaPlante was a Defendant in the foreclosure, action, in which Paragraph 3b of the ORDERED, ADJUDGED AND DECREED portion of the Order states that the sale is subject to taxes, assessments, existing easements and easements and restrictions of record.

18. Admit that Michael LaPlante was a Defendant in the foreclosure, action. Paragraph 7 of the ORDERED, ADJUDGED AND DECREED portion of the Order foreclosed and forever barred all right, title and interest of person claiming under the defendants in the property, and Paragraph 7 of the of the Order foreclosed and forever barred all right, title and interest of person claiming under the defendants in the property.

This th20 day of February 2020 at Charleston, South Carolina.

D.Y.
4



J. Rutledge Young, Jr.

Blake McKie

DUFFY & YOUNG, LLC

96 Broad Street

Charleston, South Carolina 29401

(843) 720-2044 (phone)

(843) 720-2047 (fax)

jry@duffyandyoung.com

bmckie@duffyandyoung.com

*Attorneys for Defendant Eugene J. Zurlo, Individually
and as Co-Trustee of the Eugene J. Zurlo Living Trust
Dated December 11, 1997*

EXHIBIT A

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE

Jan 17 2020
REFERENCE ID: 458737

Mark Hammond
SECRETARY OF STATE OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA
SECRETARY OF STATE
JIM MILES
ARTICLES OF ORGANIZATION
LIMITED LIABILITY COMPANY



The undersigned deliver the following articles of organization to form a South Carolina limited liability company pursuant to § 33-44-202 and § 33-44-203 of the 1976 South Carolina Code, as amended.

1. The name of the limited liability company which complies with § 33-44-105 of the South Carolina Code of 1976, as amended is Penny Creek Associates, L.L.C.
2. The office of the initial designated office of the limited liability company in South Carolina is:
4 Nicklaus Lane
Street address
Klawah Island, South Carolina 29455
City Zip Code
3. The initial agent for service of process of the limited liability company is
Michel LaPlante
Name
and the street address in South Carolina for this initial agent for service of process is:
4 Nicklaus Lane
Street address
Klawah Island, South Carolina 29455
City Zip Code
4. The name and address of each organizer is:
 - (a) Scott Y. Barnes
Name
171 Church Street
Street address
Charleston South Carolina 29401
City State Zip Code
 - (b) _____
Name

Street address

City State Zip Code
(Add additional lines if necessary)

99-002789CC

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE

5. Jan 17, 2020 Check this box only if the company is to be term company. If so, provide the
REFERENCE ID: ~~40000~~ specified:

Mark Hammond
January 1, 2020

6. [X] Check this box only if management of the limited liability company is vested in a manager or managers. If this company is to be managed by managers, specify the name and address of each initial manager:

(a) Michel LaPlante

Name

4 Nicklaus Lane

Street address

Klawah Island

South Carolina

29455

City

State

Zip Code

(b)

Name

Street address

City

State

Zip Code

(c)

Name

Street address

City

State

Zip Code

(d)

Name

Street address

City

State

Zip Code

(Add additional lines if necessary)

7. [] Check this box only if one or more of the members of the company are to be liable for its debts and obligations under Section 33-44-303(c). If one or more members are so liable, specify which members, and for which debts, obligations or liabilities such members are liable in their capacity as members.

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE

Jan 17 2020

REFERENCE ID: 438757

8. Unless a delayed effective date is specified, these articles will be effective when endorsed for filing by the Secretary of State. Specify any delayed effective date and time:

Mark Hammond

SECRETARY OF STATE OF SOUTH CAROLINA

9. Set forth any other provisions not inconsistent with law which the organizers determine to include, including any provisions that are required or are permitted to be set forth in the limited liability company operating agreement.
10. Signature of each organizer:

Signature of Organizer

J. G. Owens

Signature of Organizer

Date: January 15, 1999

FILING INSTRUCTIONS

1. File two copies of this form, the original and either a duplicate original or a conformed copy.
2. If space on this form is not sufficient, please attach additional sheets containing a reference to the appropriate paragraph in this form, or prepare this using a computer disk which will allow for expansion of the space on the form.
3. This form must be accompanied by the filing fee of \$110.00 payable to the Secretary of State.

Form Approved by South Carolina
Secretary of State Jim Miles, June 1996

EXHIBIT B

**THIRD AMENDED AND RESTATED
OPERATING AGREEMENT
OF
PENNY CREEK ASSOCIATES, L.L.C.**

TABLE OF CONTENTS

ARTICLE I	1
DEFINITIONS.....	1
ARTICLE II.....	5
ORGANIZATION.....	5
2.1 <i>FORMATION.....</i>	<i>5</i>
2.2 <i>NAME.....</i>	<i>5</i>
2.3 <i>DESIGNATED OFFICE.....</i>	<i>5</i>
2.4 <i>REGISTERED AGENT.....</i>	<i>5</i>
2.5 <i>PRINCIPAL OFFICE IN THE UNITED STATES OTHER OFFICES.....</i>	<i>5</i>
2.6 <i>PURPOSES.....</i>	<i>5</i>
2.7 <i>FOREIGN QUALIFICATION.....</i>	<i>5</i>
2.8 <i>TERM.....</i>	<i>6</i>
2.9 <i>MERGERS.....</i>	<i>6</i>
2.10 <i>NO STATE-LAW PARTNERSHIP.....</i>	<i>6</i>
ARTICLE III.....	6
MEMBERS.....	6
3.1 <i>ADMISSION OF MEMBERS.....</i>	<i>6</i>
3.2 <i>REPRESENTATIONS AND WARRANTIES.....</i>	<i>6</i>
3.3 <i>RESTRICTIONS ON THE DISPOSITION OF A MEMBERSHIP.....</i>	<i>7</i>
3.4 <i>ADDITIONAL MEMBERS.....</i>	<i>8</i>
3.5 <i>INTERESTS IN A MEMBER.....</i>	<i>9</i>
3.6 <i>INFORMATION.....</i>	<i>9</i>
3.7 <i>LIABILITIES TO THIRD PARTIES.....</i>	<i>10</i>
3.8 <i>WITHDRAWAL.....</i>	<i>10</i>
3.9 <i>CLASSES AND VOTING.....</i>	<i>10</i>
3.10 <i>PLACE AND MANNER OF MEETING.....</i>	<i>11</i>
3.11 <i>CONDUCT OF MEETINGS.....</i>	<i>11</i>
3.12 <i>ANNUAL MEETING.....</i>	<i>11</i>
3.13 <i>VOTING LISTS.....</i>	<i>11</i>
3.14 <i>SPECIAL MEETINGS.....</i>	<i>12</i>
3.15 <i>NOTICE.....</i>	<i>12</i>
3.16 <i>QUORUM OF MEMBERS.....</i>	<i>12</i>
3.17 <i>MAJORITY VOTE; WITHDRAWAL OF QUORUM.....</i>	<i>12</i>
3.18 <i>VOTING OF MEMBERSHIP.....</i>	<i>13</i>
3.19 <i>ACTION WITHOUT MEETING.....</i>	<i>13</i>
3.20 <i>ASSIGNMENT OF DISTRIBUTIONAL INTEREST.....</i>	<i>13</i>
3.21 <i>DISTRIBUTION IN KIND.....</i>	<i>14</i>
3.22 <i>RIGHT TO DISTRIBUTION.....</i>	<i>14</i>
3.23 <i>LIMITATION ON DISTRIBUTION.....</i>	<i>14</i>
3.24 <i>BUYOUT OF DISSOCIATING MEMBER.....</i>	<i>14</i>
3.25 <i>PERSONAL GUARANTIES.....</i>	<i>15</i>
3.26 <i>OTHER BUSINESS OR ACTIVITIES.....</i>	<i>15</i>

ARTICLE IV	15
CAPITAL CONTRIBUTIONS	15
4.1 <i>INITIAL CONTRIBUTIONS.....</i>	<i>15</i>
4.2 <i>SUBSEQUENT CONTRIBUTIONS.....</i>	<i>15</i>
4.3 <i>FAILURE TO CONTRIBUTE.....</i>	<i>15</i>
4.4 <i>RETURN OF CONTRIBUTIONS.....</i>	<i>17</i>
4.5 <i>ADVANCED BY MEMBERS.....</i>	<i>17</i>
4.6 <i>MAINTENANCE OF CAPITAL ACCOUNTS.....</i>	<i>17</i>
4.7 <i>DISTRIBUTION OF ASSETS.....</i>	<i>17</i>
4.8 <i>SALE OR EXCHANGE OF INTEREST.....</i>	<i>18</i>
4.9 <i>COMPLIANCE WITH SECTION 704(b) OF THE CODE.....</i>	<i>18</i>
ARTICLE V.....	18
ALLOCATIONS AND DISTRIBUTIONS	18
5.1 <i>ALLOCATIONS OF NET PROFITS AND NET LOSSES.....</i>	<i>18</i>
5.2 <i>COMPANY MINIMUM GAIN CHARGEBACK.....</i>	<i>19</i>
5.3 <i>MEMBER MINIMUM GAIN CHARGEBACK.....</i>	<i>19</i>
5.4 <i>QUALIFIED INCOME OFFSET.....</i>	<i>20</i>
5.5 <i>INTERIM DISTRIBUTIONS.....</i>	<i>20</i>
ARTICLE VI.....	20
MANAGERS.....	20
6.1 <i>MANAGEMENT BY MANAGERS.....</i>	<i>20</i>
6.2 <i>ACTIONS BY MANAGERS; COMMITTEES; DELEGATION OF AUTHORITY AND DUTIES.....</i>	<i>21</i>
6.3 <i>POWERS OF MANAGERS.....</i>	<i>22</i>
6.4 <i>NUMBER AND TERM OF OFFICE.....</i>	<i>22</i>
6.5 <i>REMOVAL.....</i>	<i>22</i>
6.6 <i>RESIGNATIONS.....</i>	<i>22</i>
6.7 <i>VACANCIES.....</i>	<i>23</i>
6.8 <i>PLACE AND MANNER OF MEETINGS.....</i>	<i>23</i>
6.9 <i>FIRST MEETINGS.....</i>	<i>23</i>
6.10 <i>REGULAR MEETING OF MANAGERS.....</i>	<i>23</i>
6.11 <i>SPECIAL MEETING OF MANAGERS.....</i>	<i>23</i>
6.12 <i>NOTICE OF MANAGER'S MEETINGS.....</i>	<i>23</i>
6.13 <i>ACTION WITHOUT MEETING.....</i>	<i>23</i>
6.14 <i>QUORUM; MAJORITY VOTE.....</i>	<i>24</i>
6.15 <i>APPROVAL OR RATIFICATION OF ACTS OR CONTRACTS BY MEMBERS.....</i>	<i>24</i>
6.16 <i>INTERESTED MANAGERS, OFFICERS AND MEMBERS.....</i>	<i>24</i>
6.17 <i>COMPENSATION.....</i>	<i>25</i>
ARTICLE VII	25
INDEMNIFICATION	25
7.1 <i>INDEMNIFICATION.....</i>	<i>25</i>
ARTICLE VIII.....	25
TAXES.....	25
8.1 <i>"TAX MATTERS PARTNER".....</i>	<i>25</i>

ARTICLE IX	25
NOTICE	25
9.1 <i>NOTICE</i>	25
ARTICLE X	26
DISSOLUTION, LIQUIDATION, AND TERMINATION	26
10.1 <i>DISSOLUTION</i>	26
10.2 <i>WINDING UP AND TERMINATION</i>	26
10.3 <i>DEFICIT CAPITAL ACCOUNTS</i>	28
10.4 <i>ARTICLES OF DISSOLUTION</i>	28
ARTICLE XI	28
GENERAL PROVISIONS	28
11.1 <i>BOOKS AND RECORDS</i>	28
11.2 <i>AMENDMENT OR MODIFICATION</i>	28
11.3 <i>CHECKS, NOTES, DRAFTS, ETC.</i>	28
11.4 <i>HEADINGS</i>	29
11.5 <i>CONSTRUCTION</i>	29
11.6 <i>ENTIRE AGREEMENT; SUPERSEDEDURE</i>	29
11.7 <i>EFFECT OF WAIVER OR CONSENT</i>	29
11.8 <i>BINDING EFFECT</i>	29
11.9 <i>GOVERNING LAW; SEVERABILITY</i>	30
11.10 <i>FURTHER ASSURANCES</i>	30
11.11 <i>NOTICE TO MEMBERS OF PROVISIONS OF THIS AGREEMENT</i>	30
11.12 <i>COUNTERPARTS</i>	30
11.13 <i>CONFLICTING PROVISIONS</i>	30

**THIRD AMENDED AND RESTATED
OPERATING AGREEMENT
OF
PENNY CREEK ASSOCIATES, L.L.C.**

This Third Amended and Restated Operating Agreement of PENNY CREEK ASSOCIATES, L.L.C. (the "Company") dated as of October 15, 2005 amends and restates the Operating Agreement of the Company dated as of June 1, 2005 which amended and restated the Operating Agreement of the Company dated July _____, 2001 which amended and restated the Operating Agreement of the Company dated March 23, 1999, and is (a) adopted by the Managers (as defined below) and (b) executed and agreed to, for good and valuable consideration, by the Members (as defined below).

**ARTICLE I
DEFINITIONS**

As used in this Operating Agreement, the following terms have the following meanings:

- A. "Act" means the Uniform Limited Liability Company Act of 1996 and any successor statute as amended from time to time.
- B. "Adjusted Invested Capital" means as of any time, all capital contributions of a Member, less all amounts previously distributed to that Member by the Company as a return of Adjusted Invested Capital, provided that Adjusted Invested Capital shall not be reduced below zero.
- C. "Articles" means the Articles of Organization filed with the Secretary of State of South Carolina by which PENNY CREEK ASSOCIATES, L.L.C. was organized as a South Carolina Limited Liability Company under and pursuant to the Act.
- D. "Bankrupt Member" means a Member who is the subject of an order for relief under Title 11 of the United States Code or a comparable order under a successor statute of general application or a comparable order under federal, state, or foreign law governing insolvency and has the same meaning as the term "Debtor in Bankruptcy" defined in § 33-44-101(4) of the Act.
- E. "Business Day" means any day other than a Saturday, a Sunday, or a holiday on which national banking associations in the State of South Carolina are closed.
- F. "Capital Contribution" means any contribution by a Member to the capital of the Company.
- G. "Cash Flow" means for any fiscal year, all cash receipts of the Company (other than capital contributions and proceeds from borrowing) plus excess reserves less all cash expenditures and such reasonable reserves as the Manager shall determine from time to time.

H. "Code" means the Internal Revenue Code of 1986 and any successor statute, as amended from time to time.

I. "Company" means PENNY CREEK ASSOCIATES, L.L.C., a South Carolina Limited Liability Company.

J. "Company Liability" means any enforceable debt or obligation for which the Company is liable or which is secured by any Company Property.

K. "Company Minimum Gain" means an amount determined by first computing for each Company Nonrecourse Liability any gain the Company would realize if it disposed of the Company Property subject to that liability for no consideration other than full satisfaction of the liability, and then aggregating the separately computed gains. The amount of Company Minimum Gain includes such minimum gain arising from a conversion, refinancing, or other change to a debt instrument, only to the extent a Member is allocated a share of that minimum gain. For any taxable year, the net increase or decrease in Company Minimum Gain is determined by comparing the Company Minimum Gain on the last day of the immediately preceding taxable year with the Minimum Gain on the last day of the current taxable year. Notwithstanding any provision to the contrary contained herein, Company Minimum Gain and increases and decreases in Company Minimum Gain are intended to be computed in accordance with § 704 of the Code and the Regulations issued thereunder, as the same may be issued and interpreted from time to time. A Member's share of Company Minimum Gain at the end of any taxable year equals; the sum of Nonrecourse Deductions allocated to that Member (and to that Member's predecessors in interest) up to that time and the distributions made to that Member (and to that Member's predecessors in interest) up to that time of proceeds of a nonrecourse liability allocable to an increase in Company Minimum Gain minus the sum of that Member's (and that Member's predecessors' in interest) aggregate share of the net decreases in Company Minimum Gain plus their aggregate share of decreases resulting from revaluations of Company Property subject to one or more Company Nonrecourse Liabilities.

L. "Company Nonrecourse Liability" means a Company Liability to the extent that no Member or related person bears the economic risk of loss (as defined in § 1.752-2 of the Regulations) with respect to the liability.

M. "Cumulative Preferred Return" means the cumulative non-compounded annual return equal to the product of a Member's Adjusted Invested Capital multiplied by 5% per annum.

N. "Default Interest Rate" means a rate per annum equal to the lesser of (a) five percent (5.0%) plus a varying rate per annum that is equal to the *Wall Street Journal* prime rate as quoted in the money rates section of the *Wall Street Journal* which is also the base rate on corporate loans at large United States money center commercial banks, from time to time as its prime commercial or similar reference interest rate, with adjustments in that varying rate to be made on the same date as any change in that rate, and (b) the maximum rate permitted by applicable law.

O. "Delinquent Member" means a Member who does not contribute by the time required all or any portion of a Capital Contribution that Member is required to make as provided in this Operating Agreement.

P. "Distributional Interest" means all of a Member's interest in distributions by the Company.

Q. "Dispose," "Disposing," or "Disposition" means a sale, assignment, transfer, exchange, mortgage, pledge, grant of a security interest, or other disposition or encumbrance (including, without limitation, by operation of law), or the acts thereof.

R. "General Interest Rate" means a rate per annum equal to the lesser of (a) the *Wall Street Journal* prime rate as quoted in the money rates section of the *Wall Street Journal* which is also the base rate on corporate loans at large United States Money center commercial banks, from time to time as its prime commercial or similar reference interest rate, with adjustments in that varying rate to be made on the same date as any change in that rate, and (b) the maximum rate permitted by applicable law.

S. "Lending Member" means those Members, whether one or more, who advance the portion of the Delinquent Member's Capital Contribution that is in default.

T. "Majority in Interest" means the majority vote of both these Class A Members owning a majority of the capital and those Class A Members owning a majority of the Net Profits and Net Losses of the Company.

U. "Manager or Managers" means Michel Laplante or any Person hereafter elected as a Manager of the Company as provided in this Operating Agreement, but does not include any Person who has ceased to be a Manager of the Company.

V. "Member" means any Person executing this Operating Agreement, or hereafter admitted to the Company as a Member as provided in this Operating Agreement, but does not include any Person who has ceased to be a Member in the Company. There shall be two classes of Members: Class "A" Members and Class "B" Members. Class "B" Members shall have all of the rights, powers, and duties of a Class "A" Member except that Class "B" Members shall have no right to vote on or consent (in writing or otherwise) to any matter except as provided in S.C. Code Ann. § 33-44-103(b). The provisions of this Agreement which require Member or Membership consent, written or otherwise, or a vote of the Members or Membership shall require only the consent or a vote of the Class "A" Members or Membership.

W. "Member Minimum Gain" means an amount determined by first computing for each Member Nonrecourse Liability any gain the Company would realize if it disposed of the Company property subject to that liability for no consideration other than full satisfaction of the liability, and then aggregating the separately computed gains. The amount of Member Minimum Gain includes such minimum gain arising from a conversion, refinancing, or other change to a debt instrument, only to the extent a Member is allocated a share of that minimum gain. For any taxable year, the net increase or decrease in Member Minimum Gain is determined by comparing the Member Minimum Gain on the last day of the immediately preceding taxable year with the Minimum Gain on the last day of the current taxable year. Notwithstanding any provision to the contrary contained herein, Member Minimum Gain and increases and decreases in Member Minimum Gain are intended to be computed in accordance with § 704 of the Code or the Regulations issued thereunder, as the same may be issued and interpreted from time to time.

X. "Member Nonrecourse Liability" means any Company Liability to the extent of liability is nonrecourse under state law, and on which a Member or related person bears the economic risk of loss under § 1.752-2 of the Regulations because, for example, the Member or related person is the creditor or a guarantor.

Y. "Membership" means any Member's interest in the Company, including, without limitation, rights to distributions (liquidating or otherwise), allocations, information, and in the case of Class A Members to consent or approve.

Z. "Net Losses" means the losses and deductions of the Company determined in accordance with accounting principles consistently applied from year to year employed under the method of accounting adopted by the Company and as reported separately or in the aggregate, as appropriate, on the tax return of the Company filed for federal income tax purposes.

AA. "Net Profits" means the income and gains of the Company determined in accordance with accounting principles consistently applied from year to year employed under the method of accounting adopted by the Company and as reported separately or in the aggregate as appropriate on the tax return of the Company filed for federal income tax purposes.

BB. "Nonrecourse Liabilities" means Company Nonrecourse Liabilities and Member Nonrecourse Liabilities.

CC. "Offsettable Decrease" means any allocation that unexpectedly causes or increases a deficit in the Member's Capital Account as of the end of the taxable year to which the allocation relates attributable to depletion allowances under § 1.704-1(b)(2)(iv)(k) of the Regulations, allocations of loss and deductions under §§ 704(e)(2) or 706 of the Code or under § 1.751-1 of the Regulations, or distributions that, as of the end of the year are reasonably expected to be made to the extent they exceed the offsetting increases to such Member's Capital Account that reasonably are expected to occur during or (prior to) the taxable years in which such distributions are expected to be made (other than increases pursuant to a Minimum Gain Chargeback).

DD. "Operating Agreement" has the meaning given that term in the introductory paragraph.

EE. "Person" includes an individual, partnership, limited partnership, limited liability company, foreign limited liability company, trust, estate, corporation, custodian, trustee, executor, administrator, nominee or entity in a representative capacity.

FF. "Proceeding" means any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative, arbitative or investigative.

GG. "Property" means the property described in Exhibit B attached hereto.

HH. "Required Interest" means one hundred percent (100 %) of the Class A Members.

Other terms defined herein have the meanings so given them.

ARTICLE II ORGANIZATION

2.1 FORMATION.

The Company has been organized as a South Carolina Limited Liability Company by the filing of Articles pursuant to the Act and the issuance of a certificate of organization for the Company by the Secretary of State of South Carolina.

2.2 NAME.

The name of the Company is PENNY CREEK ASSOCIATES, L.L.C. and all Company business must be conducted in that name or such other names that comply with applicable law as the Manager may select from time to time.

2.3 DESIGNATED OFFICE.

The registered office of the Company required by the Act to be maintained in the State of South Carolina shall be the office of the initial registered agent named in the Articles or such other office (which need not be a place of business of the Company) as the Manager, or Members if there is no Manager, may designate from time to time in the manner provided by law.

2.4 REGISTERED AGENT.

The registered agent of the Company in the State of South Carolina shall be the initial registered agent named in the Articles or such other Person or Persons as the Manager, or Members if there is no Manager, may designate from time to time in the manner provided by law.

2.5 PRINCIPAL OFFICE IN THE UNITED STATES OTHER OFFICES.

The principal office of the Company in the United States shall be at such place as the Manager, or Members if there is no Manager or the management of the Company is reserved to the Members, may designate from time to time, which need not be in the State of South Carolina. The Company may have such other offices as the Manager, or Members if there is no Manager, may designate from time to time.

2.6 PURPOSES.

The purposes of the Company are initially to acquire and hold the Property for a long term capital appreciation. In managing the Property as an investment the Company may hold, lease, sell, rent, develop, operate, transfer, exchange, or otherwise dispose of all or a portion of the Property, and to engage in any and all lawful business activities related or incidental thereto.

2.7 FOREIGN QUALIFICATION.

Prior to the Company's conducting business in any jurisdiction other than South Carolina, the Managers shall cause the Company to comply, to the extent procedures are available and those matters are reasonably within the control of the Manager or Members, with all requirements necessary to qualify the Company as a foreign limited liability company in that jurisdiction. At the request of the Manager or

Members, each Member shall execute, acknowledge, swear to, and deliver all certificates and other instruments conforming with this Operating Agreement that are necessary or appropriate to qualify, continue, and terminate the Company as a foreign limited liability company in all such jurisdictions in which the Company may conduct business.

2.8 TERM.

The Company commenced on the date the Articles were filed with the Secretary of State of South Carolina for the Company and shall continue in existence for the period fixed in the Articles for the duration of the Company, or such earlier time as this Operating Agreement may specify.

2.9 MERGERS.

The Company may merge with another business entity subject to the requirements of Sections 33-44-904 through 33-44-907 of the Act.

2.10 NO STATE-LAW PARTNERSHIP.

The Members intend that the Company not be a partnership (including, without limitation, a limited partnership) or joint venture, and that no Member or Manager be a partner or joint venturer of any other Member of Manager, for any purposes other than federal and state tax purposes, and this Operating Agreement may not be construed to suggest otherwise.

ARTICLE III MEMBERS

3.1 ADMISSION OF MEMBERS.

A. After the formation of this Company, a person becomes a new Member:

(1) in the case of a person acquiring a Membership directly from this Company, on compliance with the provisions of Section 3.2 and 3.4 of this Agreement governing admission of new Members or, if this Operating Agreement contains no relevant admission provisions, on the written consent of a Required Interest; and

(2) in the case of an assignee of a Membership on compliance with the provisions of Section 3.2 and 3.3 of this Agreement.

B. Any person may be a Member unless the person lacks capacity.

3.2 REPRESENTATIONS AND WARRANTIES.

Each Member hereby represents and warrants to the Company and each other Member that (a) if that Member is a corporation, it is duly organized, validly existing and in good standing under the law of the state of its incorporation and is duly qualified and in good standing as a foreign corporation in the jurisdiction of its principal place of business (if not incorporated therein); (b) if that Member is a limited liability company, it is duly organized, validly existing, and (if applicable) in good standing under the law of the state of its organization and is duly qualified and (if applicable) in good standing as a foreign

limited liability company in the jurisdiction of its principal place of business (if not organized therein); (c) if that Member is a partnership, trust, or other entity, it is duly formed, validly existing, and (if applicable) in good standing under the law of the state of its formation, and if required by law is duly qualified to do business and (if applicable) in good standing in the jurisdiction of its principal place of business (if not formed therein), and the representations and warranties in clause (a), (b), or (c), as applicable, are true and correct with respect to each partner (other than limited partners), trustee, or other Member thereof, (d) that Member has full corporate, limited liability company, partnership, trust, or other applicable power and authority to execute and agree to this Operating Agreement and to perform obligations hereunder and all necessary actions by the board of directors, shareholders, manager, members, partners, trustees, beneficiaries, or other Persons necessary for the due authorization, execution, delivery, and performance of this Operating Agreement by that Member have been duly taken; (e) that Member has duly executed and delivered this Operating Agreement; and (f) that Member's authorization, execution, delivery, and performance of this Operating Agreement do not conflict with any other agreement or arrangement to which that Member is a party or by which it is bound.

3.3 RESTRICTIONS ON THE DISPOSITION OF A MEMBERSHIP.

A. Membership and transferability of Memberships in the Company are substantially restricted. An unauthorized transfer of a Membership could create a substantial hardship to the Company, jeopardize its capital base, and adversely affect its tax structure. These restrictions upon ownership and transfer are not intended as a penalty, but as a method to protect and preserve existing relationships based upon trust and the Company's capital and its financial ability to continue. A Disposition of a Membership in the Company may be effective only with the consent of a Required Interest.

An assignee who becomes a Member has, to the extent assigned, the rights and powers and is subject to the restrictions and liabilities of a Member under this Operating Agreement and the Act. Unless otherwise provided by this Operating Agreement, an assignee who becomes a Member also is liable for the obligations of the assignor to make contributions but is not obligated for liabilities unknown to the assignee at the time the assignee became a Member and which could not be ascertained from this Operating Agreement. Whether or not an assignee of a Membership becomes a Member, the assignor is not released from the assignor's liability to this Company.

B. Subject to the provisions of the following section, (i) a Person to whom a Membership in the Company is transferred has the right to be admitted to the Company as a Member with the interest in Net Profits, Net Losses, and capital so transferred to such Person, if (A) the Member making such transfer grants the transferee the right to be so admitted, and (B) such transfer is consented to in accordance with this section.

C. The Company may not recognize for any purpose any purported Disposition of a Membership unless and until the other applicable provisions of this section have been satisfied and the Manager has received, on behalf of the Company, a document (i) executed by both the Member effecting the Disposition (or if the transfer is on account of the death, incapacity, or liquidation of the transferor, his representative) and the Person to which the Membership is Disposed, (ii) including the notice address of any Person to be admitted to the Company as a Member and its agreement to be bound by this Operating Agreement in respect of the Membership being obtained, (iii) setting forth the Person's interest in Net Profits, Net Losses and capital after the Disposition of the Member affecting the

Disposition and the Person to which the Membership is Disposed (which together must total the Person's interest in Net Profits, Net Losses and capital of the Member affecting the Disposition before the Disposition), and (iv) containing a representation and warranty that the Disposition was made in accordance with all applicable laws and regulations (including securities laws) and, if the Person to which the Membership is Disposed is to be admitted to the Company, its representation and warranty that the representations and warranties in this Operation Agreement are true and correct with respect to that Person.

D. For the right of a Member to Dispose of a Membership or of any Person to be admitted to the Company in connection therewith to exist or be exercised, (i) either (A) the Membership subject to the Disposition or admission must be registered under the Securities Act of 1933, as amended, and any applicable state securities laws or (B) the Company must receive a favorable opinion of the Company's legal counselor or other legal counsel acceptable to the Manager to the effect that the Disposition or admission is exempt from registration under those laws and (ii) the Company must receive a favorable opinion of the Company's legal counsel or of other legal counsel acceptable to the Manager to the effect that the Disposition or admission, when added to the total of all other sales, assignments, or other Dispositions within the preceding 12 months, would not result in the Company's being considered to have terminated within the meaning of the Code. The Manager, however, may waive the requirements of this sub-part of this section.

E. The Member effecting a Disposition and any Person admitted to the Company in connection therewith shall pay, or reimburse the Company for, all costs incurred by the Company in connection with the Disposition or admission (including, without limitation, the legal fees incurred in connection with the legal opinions referred above) on or before the tenth day after the receipt by that Person of the Company's invoice for the amount due. If payment is not made by the date due, the Person owing that amount shall pay interest on the unpaid amount from the date due until paid at a rate per annum equal to the Default Interest Rate.

F. Each Member shall be entitled, without the consent of the Manager or other Members, to Dispose of all or less than all of his or its Distributional Interest to a family member or family trust of such Member, or a beneficiary of such Member, provided that, contemporaneously with the Disposition, the affiliate, family member or family trust to whom such Distributional Interest is Disposed shall execute an agreement pursuant to which such affiliate, family member or family trust agrees to be bound by the provisions of this Agreement; provided, further, that following any such Disposition, the assigning Member shall continue to be bound to perform and discharge such member's obligations and liabilities under this Agreement or any other agreement with a third party, such as loan guaranties, as long as any affiliate, family member or family trust of such assigning Member owns a Distributional Interest. For purposes of this Section 3.3, if part or all of a Membership is held by more than one affiliate, family member or family trust of such Member ("Permitted Transferee"), the Permitted Transferees shall appoint one person as sole representative with full power and authority to bind them to act on their behalf with respect to all matters in connection with the Company and this Agreement and shall send notice of such appointment to the Manager.

3.4 ADDITIONAL MEMBERS.

Additional Persons may be admitted to the Company as Members and Memberships may be created and issued to those Persons and to existing Members with the consent of all of the Members. The terms of admission or issuance must specify the percentage of Net Profit, Net Loss, allocable to

such person and the Capital Contribution applicable thereto and may provide for the creation of different classes or groups of Members and having different rights, powers, and duties. The Manager shall reflect the creation of any new class or group in an amendment to this Operating Agreement indicating the different rights, powers, and duties, and such an amendment need be executed only by the Manager. Any such admission also must comply with the requirements described elsewhere in this Operating Agreement and is effective only after the new Member has executed and delivered to the Manager or a Required Interest, as appropriate, a document including the new Member's notice address, its agreement to be bound by this Operating Agreement, and its representation and warranty that the representation and warranties required of new Members are true and correct with respect to the new Member. The provisions of this section shall not apply to Dispositions of a Membership.

Notwithstanding the foregoing, the Members of the Company shall have a preemptive right to acquire additional, newly created Memberships of the Company, or securities of the Company convertible into or carrying a right to subscribe to or acquire Memberships, except to the extent limited or denied by this Operating Agreement or the Articles.

3.5 INTERESTS IN A MEMBER.

A Member that is not a natural person may not cause or permit an interest, direct or indirect, in itself to be Disposed of such that after the Disposition, (a) the Company would be considered to have terminated within the meaning of section 708 of the Code or (b) without the consent of a Required Interest that Member shall cease to be controlled by substantially the same Persons who control it as of the date of its admission to the Company. On any breach of the provisions of clause (b) of the immediately preceding sentence, the Company shall have the option to buy, and on exercise of that option the breaching Member shall sell, the breaching Member's Membership. The date of payment and the fair market value of the Membership shall be determined by the Company.

3.6 INFORMATION.

A. The Manager shall prepare and present to the Members, annually, a progress report which will include a financial statement for the month, and year to date, a comparison of the benchmarks established by the Manager with the actual performance to date, a cash flow analysis and a comparison of the monthly and project to date sales goals with actual sales.

B. In addition to the other rights specifically set forth in this Operating Agreement, each Member is entitled to all information to which that Member is entitled to have access pursuant to Section 33-44-408 of the Act under the circumstances and subject to the conditions therein stated.

C. The Members and Manager acknowledge that from time to time, they may receive information from or regarding the Company in the nature of trade secrets or that otherwise is confidential, the release of which may be damaging to the Company or Persons with which it does business. Each Member and Manager shall hold in strict confidence any information it receives regarding the Company that is identified as being confidential (and if that information is provided in writing, that is so marked) and may not disclose it to any Person other than another Member or the Managers, except for disclosures (i) compelled by law (but the Manager must notify the Members promptly of any request for that information, before disclosing it, if practicable), (ii) to advisers or representatives of the Member or Persons to which that Member's Membership may be Disposed as permitted by this Operating Agreement, but only if the recipients have agreed to be bound by the

provisions of this section or (iii) of information that Member also has received from a source independent of the Company that the Member reasonably believes obtained that information without breach of any obligation of confidentiality. The Members acknowledge that breach of the provisions of this section may cause irreparable injury to the Company for which monetary damages are inadequate, difficult to compute, or both. Accordingly, the Members agree that the provisions of this section may be enforced by specific performance.

3.7 LIABILITIES TO THIRD PARTIES.

Except as otherwise expressly agreed in writing, no Member or Manager shall be liable for the debts, obligations or liabilities of the Company, including under a judgment decree or order of a court.

3.8 WITHDRAWAL.

A. At any time prior to the death of a Class A Member, a Class A Member may notify the remaining Member of the first Class A Member's desire to withdraw. The notice shall contain the buyout price, terms of payment, and such other commercially reasonable terms as the first Class A Member shall desire ("First Notice"). Upon receipt of the First Notice, the remaining Class A Member shall have sixty (60) days to notify the first Class A Member ("Second Notice") either: (i) that the remaining Class A Member desires to purchase the Membership owned by the first Class A Member for the price and upon such terms established by the first Class A Member; or (ii) that the remaining Class A Member desires to sell its Membership for such price (as adjusted by the Company C.P.A. to reflect capital account differences and percentage interests in Net Profits and Net Losses) and upon such terms. The decision of the remaining Class A Member, set out in the Second Notice, shall be binding upon all Class A Members.

B. In the event that the remaining Class A Member does not deliver the Second Notice to the first Class A Member within said 60 days, the first Class A Member may, within 30 days thereafter, notify the remaining Class A Member ("Third Notice") either (i) that the first Class A Member desires to purchase the Membership owned by the remaining Class A Member for such adjusted price and upon such terms; or (ii) that the first Class A Member desires to sell his Class A Membership for such price and upon such terms to the remaining Class A Member. The decision of the first Class A Member set out in the Third Notice, delivered in accordance with the requirements for notice set out in this Agreement, shall be binding upon the first Class A Member and the remaining Class A Members.

C. If neither the first nor the remaining Class A Member has so notified the other Member(s) of an election to buy, sell, or liquidate within the periods set forth herein, the rights created by the First Notice shall lapse. This procedure can be initiated, however, by any Class A Member again at any time.

D. No Class B Member may withdraw from the Company prior to the date specified in the Articles of Organization for dissolution and any such attempted withdrawal shall be wrongful.

3.9 CLASSES AND VOTING.

Unless otherwise provided by this Operating Agreement, there shall be two classes of Members. The Class "A" Members shall be Eugene Z. Zurlo and Charlotte R. Zurlo, Co-Trustees of the Eugene Z. Zurlo Living Trust dated December 11, 1997 and Michel Laplante. The Class "B" Members shall be

Kenneth E. Fowler, Trustee of the Patricia C. Laplante Trust dated September 1, 2000, Kenneth E. Fowler, Trustee of the John H. Laplante Trust dated September 1, 2000, Kenneth E. Fowler, Trustee of the Marianne E. Laplante Trust dated September 1, 2000, and Kenneth E. Fowler, Trustee of the Peter F. Laplante Trust dated September 1, 2000.

The Class A Members, at a duly authorized annual or special meeting, may elect to establish different classes or group of Members. The following provisions shall apply to each class or group:

A. The rights, powers, or duties of a class or group may be senior to those of one or more existing classes or groups of Members.

B. Prompt notice of the taking of an action under this Operating Agreement that require less than unanimous written consent of the Members and that may be taken without a meeting shall be given to the Members who have not consented in writing to the taking of the action.

C. For the purposes of this section, the taking of an action includes amending this Operating Agreement or creating, under provisions of this Operating Agreement, a class of Membership that was not previously outstanding.

3.10 PLACE AND MANNER OF MEETING.

All meetings of the Members shall be held at such time and place, within or without the State of South Carolina, as shall be stated in the notice of the meeting or in a duly executed waiver of notice thereof. Members may participate in such meetings by means of conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting as provided herein shall constitute presence in person at such meeting, except where a person participates in the meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened.

3.11 CONDUCT OF MEETINGS.

All meetings of the Members shall be presided over by the chairman of the meeting, who shall be a Manager (or representative thereof). The chairman of any meeting of Members shall determine the order of business and the procedure at the meeting, including such regulation of the manner of voting and the conduct of discussion as seem to him in order.

3.12 ANNUAL MEETING.

The annual meeting of the Members for the transaction of all other business which may come before the meeting shall be held on the last week in April in each year (if not a legal holiday and, if a legal holiday, then on the next business day following) at the hour specified in the notice of the meeting. If the annual meeting is not held on the date above specified, the Manager shall cause a special meeting of the Members in lieu thereof to be held as soon thereafter as convenient, and any business transacted or election held at the meeting shall be as valid as if held at the annual meeting. Failure to hold the annual meeting at the designated time shall not work a dissolution of the Company.

3.13 VOTING LISTS.

The Manager, officer, or agent having charge of the records reflecting the Membership of each Member of each class, if more than one class, shall make, at least ten (10) days before each meeting of Members, a complete list of the Members, entitled to vote at such meeting or any adjournment thereof, arranged in alphabetical order with the address of and percentage of Membership of each Member of each class, if more than one class, which list, for a period of ten (10) days prior to such meeting, shall be kept on file at the registered office of the Company and shall be subject to inspection by any Member at any time during usual business hours. Such list shall also be produced and kept open at the time and place of the meeting and shall be subject to the inspection of any Member during the whole time of the meeting. The original records reflecting the Membership of each Member of each class, if more than one class, shall be prima-facie evidence as to who are the Members entitled to examine such list or records or to vote at any meeting of Members.

Failure to comply with the requirements of this Article shall not affect the validity of any action taken at such meeting.

3.14 SPECIAL MEETINGS.

Special meetings of the Members may be called at any time by a Class A Member. Special meetings of Members may also be called by the Manager. Such request shall state the purpose or purposes of such meeting and the matters proposed to be acted on thereat.

3.15 NOTICE.

Written or printed notice stating the place, day and hour of the meeting and, in case of a special meeting, the purpose or purposes for which the meeting is called, shall be delivered not less than ten nor more than sixty days before the date of the meeting either personally or by mail, or at the direction of the officer or person calling the meeting, to each Member entitled to vote at the meeting, provided that such notice may be waived as provided in this Operation Agreement. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail addressed to the Member at his address as it appears on the records of the Company, with postage thereon prepaid. Any notice required to be given to any Member hereunder or under the Articles of Organization need not be given to the Member if (A) notice of two consecutive annual meetings of the Company and all notices of meetings held during the period between those annual meetings, if any, or (B) all (but in no event less than two) payments (if sent by first class mail) of distributions during a twelve-month period have been mailed to that person, addressed at his address as shown on the records of the Company, and have been returned undeliverable. Any action or meeting taken or held without notice to such person shall have the same force and effect as if the notice had been duly given.

3.16 QUORUM OF MEMBERS.

Unless otherwise provided in the Articles, one hundred (100%) percent of the Class A Members entitled to vote, represented in person or proxy, shall constitute a quorum at a meeting of Members.

3.17 MAJORITY VOTE; WITHDRAWAL OF QUORUM.

With respect to any matter when a quorum is present at any meeting, the vote of the holders of a Required Interest, present in person or represented by proxy, having voting power with respect to that matter, shall decide such matter brought before such meeting, unless the matter is one upon which, by

express provision of the Articles or this Operating Agreement, or by any express provision of the statutes which is applicable to such vote, a different vote is required, in which case the Operating Agreement shall govern and control the decision of such matter. The Members present at a duly organized meeting may continue to transact business until adjournment, notwithstanding the withdrawal of enough Memberships to leave less than a quorum.

3.18 VOTING OF MEMBERSHIP.

On each matter submitted to a vote of the Membership (as opposed to a vote of the Members) each outstanding Class A Membership shall be entitled to vote its percentage interest in the Company as follows:

Eugene J. Zurlo and Charlotte R. Zurlo, Co-Trustees of	
The Eugene J. Zurlo Living Trust dated December 11, 1997	50%
Michel Laplante	50%

Class A Memberships owned by another limited liability company or corporation, the majority of the Memberships or voting stock of which is owned or controlled by this Company, and Class A Memberships held by this Company in a fiduciary capacity shall not be voted, directly or indirectly, at any meeting, and shall not be counted in determining the total Class A Memberships at any given time.

A Class A Member may vote either in person or by proxy executed in writing by the Class A Member or by his duly authorized attorney in fact. No proxy shall be valid after eleven (11) months from the date of its execution unless otherwise provided in the proxy. Each proxy shall be revocable unless the proxy form conspicuously states that the proxy is irrevocable and the proxy is coupled with an interest.

3.19 ACTION WITHOUT MEETING.

Any action required by the Act to be taken at a meeting of the Members, or any action which may be taken at a meeting of the Members, may be taken without a meeting, without prior notice, and without a vote, if a consent or consents in writing, setting forth the action so taken, shall have been signed by the holder or holders of all the Class A Memberships, if more than one class, entitled to vote with respect to the action that is the subject matter of the consent, and such consent shall have the same force and effect as a unanimous vote of the Class A Members. Every written consent pursuant to this section shall be signed, dated and delivered in the manner required by, and shall become effective at the time and remain effective for the period specified by, the Act. A telegram, telex, cablegram, or similar transmission by a Class A Member, or a photographic, photostatic, facsimile, or similar reproduction of a writing signed by a Class A Member, shall be regarded as signed by the Class A Member for purposes of this section.

For purposes of this section, the taking of the action includes amending this Operating Agreement or creating, under provisions of this Operating Agreement, a class of Memberships that was not previously outstanding.

3.20 ASSIGNMENT OF DISTRIBUTIONAL INTEREST.

A. Unless otherwise provided by this Operating Agreement:

- (1) a Distributional Interest is assignable in whole or in part;
- (2) an assignment of a Distributional Interest does not entitle the assignee to become, or to exercise rights or powers of, a Member;
- (3) an assignment entitles the assignee to receive distributions, to which the assignor was entitled, to the extent those items are assigned and allocates to the assignee the assignors allocable share of Net Profit and Net Loss; and
- (4) until the assignee becomes a Member, the assignor Member continues to be a Member and to have the power to exercise any rights or powers of a Member.

3.21 DISTRIBUTION IN KIND.

Except as provided by the Articles or this Operating Agreement, a Member, regardless of the nature of the Member's contribution, may not demand a distribution from this Company in any form other than cash. A Member at his option may agree to receive a distribution in kind.

3.22 RIGHT TO DISTRIBUTION.

Subject to the Act, at the time that a Member becomes entitled to receive a distribution, with respect to a distribution, that Member has the status of and is entitled to all remedies available to a creditor of the Company.

3.23 LIMITATION ON DISTRIBUTION.

No distribution may be made if, after giving effect to the distribution:

- A. the Company would not be able to pay its debts as they become due in the ordinary course of business; or
- B. the Company's total assets would be less than the sum of its liabilities plus, the amount that would be needed, if the Company were to be dissolved, wound up, and terminated at the time of the distribution, to satisfy the preferential rights upon dissolution, winding up and termination of Members whose preferential rights are superior to their receiving the distribution. The Company may base a determination that a distribution is not prohibited upon the provisions of Section 33-44-406(b) and (c) of the Act.

3.24 BUYOUT OF DISSOCIATING MEMBER.

Except as otherwise provided in Section 3.8, if, following the death, retirement, resignation, expulsion, bankruptcy or dissolution of a Member or the occurrence of any event which terminates the continued Membership of a Member in the Company, the dissociating Member shall be entitled to receive any distribution which the dissociating Member was entitled to receive prior to the death, retirement, resignation, expulsion, bankruptcy or dissolution of a Member or the occurrence of any event which terminates the continued Membership of a Member in the Company. The Company shall have no obligation to purchase a dissociating Member's Membership until the date of the expiration of the

specified term of the Company that existed on the date of the dissociation. The date of payment and fair market value, if any, of the Dissociating Members Membership shall be determined by the Company. The death of a Member or the appointment of a guardian or general conservator shall not constitute an event of dissociation and the Member's Membership shall (i) in the case of death, pass to and may be voted by the Member's estate and subsequent beneficiary under the terms of the Member's will, or (ii) in the case of disability, be voted by such Member's guardian or general conservator.

3.25 PERSONAL GUARANTIES.

Eugene J. Zurlo, on behalf of The Eugene J. Zurlo Living Trust dated December 11, 1997, shall, if required by a financial institution extending credit to the Company or by any vendor to the Company, personally guaranty up to \$2,000,000 of the Company's obligation. Michel Laplante shall have no obligation to personally guarantee any obligation of the Company.

3.26 OTHER BUSINESS OR ACTIVITIES.

Nothing in this Operating Agreement shall be deemed to restrict in any way the freedom of any Member or Manager to conduct any other business or activity whatsoever, including, but not limited to, the acquisition, investment in, development, leasing, sale and exploitation of real property, without any accounting to the Company or any party hereto.

ARTICLE IV CAPITAL CONTRIBUTIONS

4.1 INITIAL CONTRIBUTIONS.

The Eugene J. Zurlo Living Trust dated December 11, 1997, shall make or has made the Capital Contribution described for it on Exhibit A and shall make such additional Capital Contributions as may be required from time to time. The value of the Capital Contributions shall be as set forth on Exhibit A. No interest shall accrue on any Capital Contribution and no Member shall have the right to withdraw or be repaid any Capital Contribution except as provided in this Operation Agreement.

4.2 SUBSEQUENT CONTRIBUTIONS.

Without creating any rights in favor of any third party, The Eugene J. Zurlo Living Trust dated December 11, 1997, shall make subsequent cumulative contributions to the Company, in cash, up to \$700,000. Michel Laplante and all the Class B Members shall not be required to make, at any time, a capital contribution to the Company.

4.3 FAILURE TO CONTRIBUTE.

A. If The Eugene J. Zurlo Living Trust dated December 11, 1997, does not contribute by the time required all or any portion of a Capital Contribution that Member is required to

make as provided in this Operating Agreement, the Company may exercise, on notice to that Member (the "Delinquent Member"), one or more of the following remedies:

(1) taking such action (including, without limitation, court proceedings) as the Manager may deem appropriate to obtain payment by the Delinquent Member of the portion of the Delinquent Member's Capital Contribution that is in default together with interest thereon at the Default Interest Rate from the date that the Capital Contribution was due until the date that it is made, all at the cost and expense of the Delinquent Member;

(2) permitting the other Members on a pro rata basis or in such other percentages as they may agree (the "Lending Member," whether one or more), to advance the portion of the Delinquent Member's Capital Contribution that is in default, with the following results:

(a) the sum advanced constitutes a loan from the Lending Member to the Delinquent Member and a Capital Contribution of that sum to the Company by the Delinquent Member pursuant to the applicable provisions of this Operating Agreement,

(b) the principal balance of the loan and all accrued unpaid interest thereon is due and payable in whole on the tenth day after written demand therefor by the Lending Member to the Delinquent Member,

(c) the amount loaned bears interest at the Default Interest Rate from the day that the advance is deemed made until the date that the loan, together with all interest accrued on it, is repaid to the Lending Member,

(d) all distributions from the Company that otherwise would be made to the Delinquent Member (whether before or after dissolution of the Company) instead shall be paid to the Lending Member until the loan and all interest accrued on it have been paid in full to the Lending Member (with payments being applied first to accrued and unpaid interest and then to principal),

(e) the payment of the loan and interest accrued on it is secured by a security interest in the Delinquent Member's Membership, as more fully set forth in this section, and

(f) the Lending Member has the right, in addition to the other rights and remedies granted to it pursuant to this Operating Agreement or available to it at law or in equity, to take any action (including without limitation, court proceedings) that the Lending Member may deem appropriate to obtain payment by the Delinquent Member of the loan and all accrued and unpaid interest on it, at the cost and expense of the Delinquent Member;

(3) exercising the rights of a secured party under the Uniform Commercial Code of the State of South Carolina, as more fully set forth in this Section; or

(4) exercising any other rights and remedies available at law or in equity.

B. Each Member grants to the Company, and to each Lending Member with respect to any loans made by the Lending Member to that Member as a Delinquent Member pursuant to this section, as security, equally and ratably, for the payment of all Capital Contributions that Member

has agreed to make and the payment of all loans and interest accrued on them made by Lending Members to that Member as a Delinquent Member pursuant to this section, a security interest in and a general lien on its Membership and the proceeds thereof, all under the Uniform Commercial Code of the State of South Carolina. On any default in the payment of a Capital Contribution or in the payment of such a loan or interest accrued on it, the Company or the Lending Member, as applicable, is entitled to all the rights and remedies of a secured party under the Uniform Commercial Code of the State of South Carolina with respect to the security interest granted in this section. Each Member shall execute and deliver to the Company and the other Members all financing statements and other instruments that the Manager or the Lending Member, as applicable, may request to effectuate and carry out the preceding provisions of this section. At the option of the Manager or a Required Interest, as appropriate, or a Lending Member, this Operating Agreement or a carbon, photographic, or other copy hereof may serve as a financing statement.

C. The trustee(s) of a trust shall be liable only to the extent of such trusts assets for any default in the payment of a Capital Contribution.

4.4 RETURN OF CONTRIBUTIONS.

A Member is not entitled to the return of any part of its Capital Contributions or to be paid interest in respect of either its capital account, or its Capital Contributions. An unrepaid Capital Contribution is not a liability of the Company or of any Member. A Member is not required to contribute or to lend any cash or property to the Company to enable the Company to return any Member's Capital Contributions.

4.5 ADVANCED BY MEMBERS.

If the Company does not have sufficient cash to pay its obligations, one or more Members with the consent of all other Members may advance all or part of the needed funds to or on behalf of the Company. An advance described in this section constitutes a loan from the Member to the Company, bears interest at the General Interest Rate from the date of the advance until the day of payment, and is not a Capital Contribution.

4.6 MAINTENANCE OF CAPITAL ACCOUNTS.

The Company shall establish and maintain Capital Accounts for each Member. Each Member's Capital Accounts shall be increased by (1) the amount of any money actually contributed by the Member to the capital of the Company, (2) the fair market value of any property contributed, as determined by the Company and the contributing Member at arm's length at the time of contribution (net of liabilities assumed by the Company or subject to which the Company takes such property, within the meaning of § 752 of the Code), and (3) the Member's share of Net Profits and of any separately allocated items of income or gain except adjustments required by the Code. Each Member's Capital Account shall be decreased by (1) the amount of Money actually distributed by the Company to the Member, (2) the fair market value of any property distributed to the Member, as determined by the Company and the Member at arm's length at the time of distribution (net of liabilities of the Company assumed by the Member or subject to which the Member takes such property within the meaning of § 752 of the Code), and (3) the Member's share of Net Losses and of any separately allocated items of deduction or loss.

4.7 DISTRIBUTION OF ASSETS.

If the Company at any time distributes any of its assets in-kind to any Member, the Capital Account of each Member shall be adjusted in accordance with Section 704(c) of the Code to account for that Member's allocable share of the Net Profits or Net Losses that would have been realized by the Company had it sold the assets that were distributed at their respective fair market value immediately prior to their distribution.

4.8 SALE OR EXCHANGE OF INTEREST.

In the event of a sale or exchange of some or all of the Member's Interest in the Company, the Capital Account of the transferring Member shall become the Capital Account of the assignee, to the extent it relates to the portion of the interest transferred.

4.9 COMPLIANCE WITH SECTION 704(b) OF THE CODE.

The provisions of this Article IV as they related to the maintenance of Capital Accounts are intended, and shall be construed, and, if necessary, modified to cause the allocations of profits, losses, income, gain and credit pursuant to Article V to have substantial economic effect under the Regulations promulgated under § 704(b) of the Code, in light of the distributions made pursuant to Articles V and XI and the Capital Contributions made pursuant to this Article IV. In cases where § 704(c) and § 1.704-3 of the Regulations apply to Company property, Members' Capital Accounts shall be adjusted in accordance with § 1.704-1(b)(2)(iv)(g) of the Regulations for allocations to them of income, gain, loss, and deduction (including depreciation), depletion, amortization, or other cost recovery) as computed for book purposes, with respect to property. Notwithstanding anything herein to the contrary, this Operation Agreement shall not be construed as creating a deficit restoration obligation.

ARTICLE V ALLOCATIONS AND DISTRIBUTIONS

5.1 ALLOCATIONS OF NET PROFITS AND NET LOSSES.

Except as may be required by § 704(c) of the Code, and Sections 5.2, 5.3, and 5.4 of this Article V, Net Profits, Net Losses, and other items of income, gain, loss, deduction and credit shall be allocated among the Members as follows:

Net Losses with respect to any fiscal year shall be allocated among the Members as follows:

A. First, to the Members in proportion to their respective positive capital account balances, until they have been reduced to zero.

B. The balance, if any, 50% to Eugene J. Zurlo and Charlotte R. Zurlo, Co-Trustees of the Eugene J. Zurlo Living Trust dated December 11, 1997, 25% to Michel Laplante, 10% to Kenneth E. Fowler, Trustee of the Patricia C. Laplante Trust dated September 1, 2000, 5% to Kenneth E. Fowler, Trustee of the John H. Laplante Trust, dated September 1, 2000, 5% to Kenneth E. Fowler, Trustee of the Marianne E. Laplante Trust dated September 1, 2000 and 5% to Kenneth E. Fowler, Trustee of the Peter F. Laplante Trust dated September 1, 2000.

Net Profits with respect to any fiscal year shall be allocated among the Members as follows:

A. First, to the Members until the cumulative Net Profits allocated pursuant to this Section are equal to the cumulative Net Losses allocated to the Members for all prior fiscal years.

B. Second, to Eugene J. Zurlo and Charlotte R. Zurlo, Co-Trustees of the Eugene J. Zurlo Living Trust dated December 11, 1997, an amount equal to his accrued Cumulative Preferred Return, reduced by prior allocations pursuant to this subsection B.

C. The balance, if any, 50% to Eugene J. Zurlo and Charlotte R. Zurlo, Co-Trustees of the Eugene J. Zurlo Living Trust dated December 11, 1997, and 25% to Michel Laplante, 10% to Kenneth E. Fowler, Trustee of the Patricia C. Laplante Trust dated September 1, 2000, 5% to Kenneth E. Fowler, Trustee of the John H. Laplante Trust, dated September 1, 2000, 5% to Kenneth E. Fowler, Trustee of the Marianne E. Laplante Trust dated September 1, 2000 and 5% to Kenneth E. Fowler, Trustee of the Peter F. Laplante Trust dated September 1, 2000.

The initial interest of Michel Laplante in Net Profits and Net Losses was an interest received in exchange for services to be rendered to or for the benefit of the Company (with such interest in Net Profits and Net Losses having no current predictable distributions).

5.2 COMPANY MINIMUM GAIN CHARGEBACK.

If there is a net decrease in Company Minimum Gain for a taxable year, each Member must be allocated items of income and gain for that taxable year equal to that Member's share of the net decrease in Company Minimum Gain. A Member's share of the net decrease in Company Minimum Gain is the amount of the total net decrease multiplied by the Member's percentage share of the Company Minimum Gain at the end of the immediately preceding taxable year. A Member's share of any decrease in Company Minimum Gain resulting from a revaluation of Company Property equals the increase in the Member's Capital Account attributable to the revaluation to the extent the reduction in minimum gain is caused by the revaluation. A Member is not subject to the Company Minimum Gain Chargeback Requirement to the extent the Member's share of the net decrease in Company Minimum Gain is caused by a guarantee, refinancing, or other change in the debt instrument causing it to become partially or wholly a Recourse Liability or a Member Nonrecourse Liability, and the Member bears the economic risk of loss (within the meaning of § 1.752-2 of the Regulations) for the newly guaranteed, refinanced, or otherwise changed liability.

5.3 MEMBER MINIMUM GAIN CHARGEBACK.

If during a taxable year there is a net decrease in Member Minimum Gain, any Member with a share of that Member Minimum Gain (as determined under § 1.704-2(i)(5) of the Regulations) as of the beginning of that taxable year must be allocated items of income and gain for that taxable year (and, if necessary, for succeeding taxable years) equal to that Member's share of the net decrease in the Company Minimum Gain. A Member's share of the net decrease in Member Minimum Gain is determined in a manner consistent with the provisions of § 1.704-2(g)(2) of the Regulations. A Member is not subject to this Member Minimum Gain Chargeback, however, to the extent the net decrease in Member Minimum Gain arises because the liability ceases to be Member Nonrecourse Liability due to a conversion, refinancing, or other change in the debt instrument that causes it to become partially or wholly a Company Nonrecourse Liability. The amount that would otherwise be subject to the Member

Minimum Gain Chargeback is added to the Member's share of Company Minimum Gain. In addition, rules consistent with those applicable to Company Minimum Gain shall be applied to determine the shares of Member Minimum Gain and Member Minimum Gain Chargeback to the extent provided under the Regulations issued pursuant to § 704(b) of the Code.

5.4 QUALIFIED INCOME OFFSET.

In the event any Member, in such capacity, unexpectedly received an Offsettable Decrease, such Member will be allocated items of income and gain (consisting of a pro rata portion of each item of partnership income and gain for such year) in an amount and manner sufficient to offset such Offsettable Decrease as quickly as possible.

5.5 INTERIM DISTRIBUTIONS.

Cash Flow shall be distributed among the Member with respect to each fiscal year of the Company as soon as practicable after the end of the year, in the following order of priority:

A. First, to Eugene J. Zurlo and Charlotte R. Zurlo, Co-Trustees of the Eugene J. Zurlo Living Trust dated December 11, 1997, to the extent of his Cumulative Preferred Return.

B. Second, to the Members in an amount, as determined by the Company's certified public accountant, sufficient to pay state and federal income taxes on Net Profits allocated to the Members pursuant to Section 5.1.

C. Third, to Eugene J. Zurlo and Charlotte R. Zurlo, Co-Trustees of the Eugene J. Zurlo Living Trust dated December 11, 1997, of the extent of his Adjusted Invested Capital.

D. The balance of any Cash Flow shall be distributed 50% to Eugene J. Zurlo and Charlotte R. Zurlo, Co-Trustees of the Eugene J. Zurlo Living Trust dated December 11, 1997, and 25% to Michel Laplante, 10% to Kenneth E. Fowler, Trustee of the Patricia C. Laplante Trust dated September 1, 2000, 5% to Kenneth E. Fowler, Trustee of the John H. Laplante Trust, dated September 1, 2000, 5% to Kenneth E. Fowler, Trustee of the Marianne E. Laplante Trust dated September 1, 2000, and 5% to Kenneth E. Fowler, Trustee of the Peter F. Laplante Trust dated September 1, 2000.

ARTICLE VI MANAGERS

6.1 MANAGEMENT BY MANAGERS.

A. Except for situations in which the approval of the Class A Members is required by this Operating Agreement or by nonwaivable provisions of applicable law or as otherwise provided in this Operating Agreement, and subject to the provisions of Section 6.2, (i) the powers of the Company shall be exercised by or under the authority of, and the business and affairs of the Company shall be managed under the direction of, the Manager; and (ii) the Manager may make all decisions and take all actions for the Company not otherwise provided for in this Operating Agreement, including without limitation, the following:

1. entering into, making, and performing contracts, agreements, leases, management contract and other undertakings binding the Company that may be necessary, appropriate, or advisable in furtherance of the purposes of the Company and making all decisions and waivers thereunder;
2. maintaining the assets of the Company in good order;
3. collecting sums due the Company;
4. to the extent that funds of the Company are available therefore, paying debts and obligations of the Company;
5. obtaining insurance for the Company.

B. The Manager may not make any decision or take any action for the Company without the prior written consent of the Class A Members on any of the following matters:

1. selling and marketing the Property in accordance with a business plan established by the Members;
2. Establishing a loan with a banking institution acceptable to the Members and draw upon such loan at any time and from time to time, borrowing money or otherwise committing the credit of the Company for Company activities and voluntary prepayments or extensions of debt;
3. opening and maintaining bank and investment accounts and arrangements;
4. acquiring, utilizing for Company purposes, and disposing of any asset of the Company; and
5. Selecting, removing, and changing the authority and responsibility of lawyers, accountants, and other advisers and consultants; and

6.2 ACTIONS BY MANAGERS; COMMITTEES; DELEGATION OF AUTHORITY AND DUTIES.

A. In Managing the business and affairs of the Company and exercising its powers, the Manager shall act (i) through meetings and written consents as may be provided or limited in other provisions of this Operating Agreement; and (ii) through committees pursuant to Section 6.2 B.

B. The Manager may, from time to time, designate one or more Persons to be officers of the Company who is not a Manager. No officer need be a resident of the State of South Carolina or a Member. Any officers so designated shall have such authority and perform such duties as the Manager may, from time to time, delegate to them. The Manager may assign titles to particular officers. Unless the Manager decides otherwise, if the title is one commonly used for officers of a business corporation, the assignment of such title shall constitute the delegation to such officer of the authority and duties that are normally associated with that office, subject to any specific delegation of authority and duties made to such officer by the Manager. Each officer shall hold office until his

successor shall be duly designated and shall qualify or until his death or until he shall resign or shall have been removed in the manner hereinafter provided. Any number of offices may be held by the same Person. The salaries or other compensation, if any, of the officers and agents of the Company shall be fixed from time to time by the Manager with the approval of all of the Members.

C. Any officer may resign as such at any time. Such resignation shall be made in writing and shall take effect at the time specified therein, or if no time be specified, at the time of its receipt by the Manager. The acceptance of a resignation shall not be necessary to make it effective, unless expressly so provided in the resignation. Any officer may be removed as such, either with or without cause, by the Manager whenever in its judgment the best interests of the Company will be served thereby; provided, however, that such removal shall be without prejudice to the contract rights, if any, of the Person so removed. Designation of an officer shall not of itself create contract rights. Any vacancy occurring in any office of the Company may be filled by the Manager.

D. Any Person dealing with the Company, other than a Member, may rely on the authority of any one Manager or officer in taking any action in the name of the Company without inquiry into the provisions of this Operating Agreement or compliance herewith, regardless of whether that action actually is taken in accordance with the provisions of this Operating Agreement.

6.3 POWERS OF MANAGERS.

The Manager is an agent of this Company for the purpose of its business or affairs and the act of a Manager, including, but not limited to, the execution in the name of the Company of any instrument for apparently carrying on in the usual way the Company business or businesses of the kind carried on by the Company, binds the Company, unless the Manager so acting have, in fact, no authority to act for this Company in the particular matter, and, except as provided in Section 33-44-301(c) of the Act, the person with whom the Manager is dealing has knowledge of the fact that the Manager has no such authority.

6.4 NUMBER AND TERM OF OFFICE.

The Manager of the Company shall be Michel Laplante. He shall serve as Manager of the Company until removal as provided in Section 6.5 of this Agreement or upon resignation as provided in Section 6.6 of this Agreement. Unless otherwise provided in the Articles, the Manager need not be a Member or resident of the State of South Carolina.

6.5 REMOVAL.

Any and all Managers may be removed, either for or without cause by vote of a Required Interest

6.6 RESIGNATIONS.

Any Manager may resign at any time. Such resignation shall be made in writing and shall take effect at the time specified therein, or, if no time be specified then at the time of its receipt by the other Managers, if any. The acceptance of a resignation shall not be necessary to make it effective, unless expressly so provided in the resignation.

6.7 VACANCIES.

Any vacancy occurring in the Manager may be filled by vote of a Required Interest. A Manager named to fill a vacancy shall be elected for the unexpired term of his predecessor in office. Any Manager position to be filled by reason of an increase in the number of Managers shall be filled by vote of a Required Interest.

6.8 PLACE AND MANNER OF MEETINGS.

Meeting of the Manager, regular or special, may be held either within or without the State of South Carolina. Manager may participate in such meetings by means of conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other and participation in a meeting as provided herein shall constitute presence in person at such meeting, except where a person participates in the meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened.

6.9 FIRST MEETINGS.

The first meeting of the newly elected Managers shall be held without further notice immediately following the annual meeting of Members, and at the same place, unless by unanimous consent of the Managers then elected and serving, such time or place shall be changed.

6.10 REGULAR MEETING OF MANAGERS.

A regular meeting of the Managers may be held at such time as shall be determined from time to time by resolution of the Managers.

6.11 SPECIAL MEETING OF MANAGERS.

A Manager may call a special meeting of the Managers at any time. Such special meeting shall be held at the time specified in the notice of meeting. Except as otherwise expressly provided by statute, or by the Articles, or by this Operating Agreement, neither the business to be transacted at, nor the purpose of, any special meeting need be specified in the notice or waiver of notice.

6.12 NOTICE OF MANAGER'S MEETINGS.

All meeting of the Managers (annual, regular or special) shall be held upon two (2) days written notice stating the date, place and hour of meeting delivered to each Manager either personally or by mail or at the direction of the President or the Secretary or the officer or person calling the meeting.

In any case where all of the Managers execute a waiver of notice of the time and place of the meeting, no notice thereof shall be required, and any such meeting (whether annual, regular or special) shall be held at the time and at the place (either within or without the state of South Carolina) specified in the waiver of notice. Attendance of Managers at any meeting shall constitute a waiver of notice of such meeting, except where the Managers attend a meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened.

6.13 ACTION WITHOUT MEETING.

Any action required by statute to be taken at a meeting of the Managers, or any action which may be taken at a meeting of the Managers, may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all the Managers. Such consent shall have the same force and effect as a unanimous vote at a meeting.

6.14 QUORUM; MAJORITY VOTE.

At all meetings of the Managers a majority of the number of Managers fixed by the Operating Agreement shall constitute a quorum for the transaction of business unless a greater number is required by law or by the Articles. The act of a majority of the Managers present at any meeting at which a quorum is present shall be the act of the Managers unless the act of a greater number is required by the statute, by the Articles or by this Operating Agreement. If a quorum shall not be present at any meeting of the Managers, the Managers present thereat may adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum is present.

6.15 APPROVAL OR RATIFICATION OF ACTS OR CONTRACTS BY MEMBERS.

The Managers in their discretion may submit any act or contract for approval or ratification at any annual meeting of the Members or at any special meeting of the Members called for the purpose of considering any such act or contract, and any act or contract that shall be approved or be ratified by a Required Interest shall be as valid and as binding upon the Company and upon all the Members as if it shall have been approved or ratified by every Class A Member of the Company.

6.16 INTERESTED MANAGERS, OFFICERS AND MEMBERS.

A. INTERESTED MANAGERS. No contract or transaction between this Company and one or more of its Managers or officers, or between this Company and any other limited liability company, corporation, partnership, association, or other organization in which one or more of its Managers or officers are managers or officers or have a financial interest, shall be void or voidable solely for this reason, solely, because the Manager or officer is present at or participates in the meeting of Managers or of a committee of Managers which authorizes the contract or transaction, or solely because such Manager's or Managers' votes are counted for such purpose, if:

(1) The material facts as to the relationship or interest and as to the contract or transaction are disclosed or are known to the Managers or the committee, and the Managers or committee in good faith authorizes the contract or transaction by the affirmative vote of a majority of the disinterested Managers, even though the disinterested Managers be less than a quorum; or

(2) The material facts as to the relationship or interest and as to the contract or transaction are disclosed or are known to the Members entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the Members; or

(3) The contract or transaction is fair as to this Company as of the time it is authorized, approved, or ratified by the Managers, a committee thereof, or the Members.

B. Common or interested Managers may be counted in determining the presence of a quorum at a meeting of the Managers or of a committee which authorizes the contract or transaction.

C. This provision shall not be construed to invalidate any contract or transaction which would be valid in the absence of this provision.

6.17 COMPENSATION.

The Managers with the express written consent of all Members may be paid their expenses and may be paid a fixed sum for attendance at each meeting of the Managers or a stated salary as Manager. No such payment shall preclude any Manager from serving the Company in any other capacity and receiving compensation therefor.

ARTICLE VII INDEMNIFICATION

7.1 INDEMNIFICATION.

The Company shall indemnify the Members, Managers, and agents for all costs, losses, liabilities, and damages paid or accrued by such Members, Managers or agents in connection with the business of the Company, to the fullest extent provided or allowed by the laws of the state; provided, however, the Company shall not indemnify a Member or Manager for any costs, losses, liabilities or damages paid or accrued by such Member or Manager as a result of any Member or Manager's violation of his duty of care or loyalty to the Company or another Member or willful dishonesty towards, fraud upon, or deliberate injury or attempted injury to the Company and/or a Member.

ARTICLE VIII TAXES

8.1 "TAX MATTERS PARTNER".

Michel Laplante is designated as the "tax matters partner" of the Company pursuant to § 6231(a)(7) of the Code.

ARTICLE IX NOTICE

9.1 NOTICE.

Any notice or communication required or permitted to be given by any provision of this Operating Agreement shall be in writing and shall be deemed to have been given and received by the Person to whom directed (a) when delivered personally to such Person or to a Member or Manager of the Company to which directed, or (b) when posted in the United States mails if sent by registered or

certified mail, postage and charges prepaid, addressed to the Person to which directed at the address of which such Person has notified the Company and all of the Members or Managers.

ARTICLE X DISSOLUTION, LIQUIDATION, AND TERMINATION

10.1 DISSOLUTION.

The Company shall dissolve and its affairs shall be wound up only upon the first to occur of the following:

- A. the written consent of 100% of the Class A Memberships;
- B. the expiration of the period fixed for the duration of the Company set forth in the Articles;
- C. upon an event that makes it unlawful for all or substantially all of the business of the Company to be continued, but any cure of illegality within ninety (90) days after notice to the Company of the event is effective retroactively to the date of the event;
- D. upon entry of a judicial decree that:
 - (1) the economic purpose of the Company is likely to be unreasonably frustrated;
 - (2) another Member has engaged in conduct relating to the Company's business that makes it not reasonably practicable to carry on the Company's business with that Member;
 - (3) it is not otherwise reasonably practicable to carry on the Company's business in conformity with the Articles of Organization and the Operating Agreement;
 - (4) the Company failed to purchase the Member's Distributional interest as required by § 33-44-701 of the Act; or
 - (5) the Manager or Members in control of the Company have acted, are acting, or will act in a manner that is illegal, oppressive, fraudulent, or unfairly prejudicial to a Member; and
- E. entry of a decree of judicial dissolution of the Company under Section 33-44-801 (b) of the Act or administrative dissolution as provided in Section 33-44-809 of the Act.

10.2 WINDING UP AND TERMINATION.

On dissolution of the Company as a result of an event described in Section 10.1 A. or the Manager shall act as liquidator. In all other cases, the Manager shall act as liquidators or may appoint one or more Members as liquidators. If there is no Manager, then a Required Interest of the Members will appoint one or more Members as Liquidator. The liquidator shall proceed diligently to wind up the

affairs of the Company and make final distributions as provided herein. The costs of liquidation shall be borne as a Company expense. Until final distribution, the liquidator shall continue to operate the Company properties with all of the power and authority of the Managers. The steps to be accomplished by the liquidator are as follows:

A. as promptly as possible after dissolution and again after final liquidation, the liquidator shall cause a proper accounting to be made by a recognized firm of certified public accountants of the Company's assets, liabilities, and operations through the last day of the calendar month in which the dissolution occurs or the final liquidation is completed as applicable.

B. the liquidator shall cause the notice described in Section 33-44-807 of the Act to be mailed to each known creditor of and claimant against the Company in the manner described in such Section 33-44-808 of the Act;

C. the liquidator shall pay, satisfy or discharge from Company funds all of the debts, liabilities and obligations of the Company (including, without limitation, all expenses incurred in liquidation and any advances described in Section 4.5) or otherwise make adequate provision for payment and discharge thereof (including, without limitation, the establishment of a cash escrow fund for contingent liabilities in such amount and for such term as the liquidator may reasonably determine); and

D. all remaining assets of the Company shall be distributed to Members as follows:

(1) the liquidator may sell any or all Company property, including to Members, and any resulting gain or loss from each sale shall be computed and allocated to the capital accounts of the Members;

(2) with respect to all Company property that has not been sold, the fair market value of that property shall be determined and the capital accounts of the Members shall be adjusted to reflect the manner in which the unrealized income, gain, loss, and deduction inherent in property that has not been reflected in the capital accounts previously would be allocated among the Members if there were a taxable disposition of that property for the fair market value of that property on the date of distribution; and

(3) Company property shall be distributed among the Members in accordance with the positive capital account balances of the Members, as determined after taking into account all capital account adjustments for the taxable year of the Company during which the liquidation of the Company occurs (other than those made by reason of this clause (3)); and those distributions shall be made, if possible, by the end of the taxable year of the Company during which the liquidation of the Company occurs.

All distributions in kind to the Members shall be made subject to the Liability of each distributee for costs, expenses, and liabilities theretofore incurred or for which the Company has committed and those costs, expenses, and liabilities shall be allocated to the distributee pursuant to this Section 10.2. To the extent that a Member returns funds to the Company, it has no claim against any other Member for those funds.

10.3 DEFICIT CAPITAL ACCOUNTS.

Notwithstanding anything to the contrary contained in this Operating Agreement, and notwithstanding any custom or rule of law to the contrary, to the extent that the deficit, if any, in the capital account of any Member results from or is attributable to deductions and losses of the Company (including non-cash items such as depreciation) or distributions of money pursuant to this Operating Agreement to all Members in proportion to their respective interests in the Company, upon dissolution of the Company such deficit shall not be an asset of the Company and such Members shall not be obligated to contribute such amount to the Company to bring the balance of such Member's capital account to zero.

10.4 ARTICLES OF DISSOLUTION.

After the dissolution of the limited liability company pursuant to Section 33-44-801 of the Act, the Manager or the authorized Member shall file Articles of Dissolution with the Secretary of State of South Carolina and take such other actions as may be necessary to terminate the Company. An "Authorized Member" will be a Member or Members appointed by the Manager.

ARTICLE XI GENERAL PROVISIONS

11.1 BOOKS AND RECORDS.

A. The Company shall maintain those books and records as it may deem necessary or desirable. All books and records shall be open to inspection of the Members from time to time. The Manager may examine all such books and records at all reasonable times. The Company shall keep and maintain such records as the Manager deems appropriate.

B. The Company shall maintain its records, if any, in written form or in another form capable of conversion into written form within a reasonable time.

C. The Company shall keep in its registered office in South Carolina and make available to Members on reasonable request the street address of its principal United States Office in which the records, if any, are maintained or will be available.

D. The Company shall keep its books on the cash method of accounting.

11.2 AMENDMENT OR MODIFICATION.

The Operating Agreement may be amended and modified from time to time only by a written instrument adopted and executed by all of the Class A Members. No Member or Manager shall have any vested rights in the Operating Agreement.

11.3 CHECKS, NOTES, DRAFTS, ETC.

The Company's checkbook shall be maintained by Eugene J. Zurlo. All checks, drafts, or other orders for payment of money, notes, or other evidences of indebtedness issued in the name of or payable

to the Company shall be signed or endorsed by Eugene J. Zurlo or by another designated person which may be appointed from time to time by the Members. The Company promptly makes available such funds as are required during the Project for payments to architects, engineers, attorneys, contractors, consultants, and others providing goods and services to the Project. The designated person may be the Manager, Member, or other person(s) as may from time to time be designed.

11.4 HEADINGS.

The headings used in this Operating Agreement have been inserted for convenience only and do not constitute matter to be construed in interpretation.

11.5 CONSTRUCTION.

Whenever the context so requires, the gender of all words used in this Operating Agreement includes the masculine, feminine, and neuter, and the singular shall include the plural, and conversely. All references to Articles and Sections refer to articles and sections of this Operating Agreement, and all references to Exhibits, if any, are to Exhibits attached hereto, if any, each of which is made a part hereof for all purposes. If any portion of this Operating Agreement shall be invalid or inoperative, then, so far as is reasonable and possible:

A. The remainder of this Operating Agreement shall be considered valid and operative; and

B. Effect shall be given to the intent manifested by the portion held invalid or inoperative.

11.6 ENTIRE AGREEMENT; SUPERSEDURE.

This Operating Agreement constitutes the entire agreement of the Members and their Affiliates relating to the Company and supersedes all prior contracts or agreements with respect to the Company, whether oral or written.

11.7 EFFECT OF WAIVER OR CONSENT.

A waiver or consent, express or implied, to or of any breach or default by any Person in the performance by that Person of its obligations with respect to the Company is not a consent or waiver to or of any other breach or default in the performance by that Person of the same or any other obligations of that Person with respect to the Company. Failure on the part of a Person to complain of any act of any Person or to declare any Person in default with respect to the Company, irrespective of how long that failure continues, does not constitute a waiver by that Person of its rights with respect to that default until the applicable statute-of-limitations period has run.

11.8 BINDING EFFECT.

Subject to the restrictions on Dispositions set forth in this Operating Agreement, this Operating Agreement is binding on and inures to the benefit of the Members and their respective heirs, legal representatives, successors, and assigns.

11.9 GOVERNING LAW; SEVERABILITY.

THIS OPERATING AGREEMENT IS GOVERNED BY AND SHALL BE CONSTRUED IN ACCORDANCE WITH THE LAW OF THE STATE OF SOUTH CAROLINA EXCLUDING ANY CONFLICT-OF-LAWS RULE OR PRINCIPLE THAT MIGHT REFER THE GOVERNANCE OR THE CONSTRUCTION OF THIS OPERATING AGREEMENT TO THE LAW OF ANOTHER JURISDICTION. In the event of a direct conflict between the provisions of this Operating Agreement and (a) a mandatory provision of the Articles, or (b) any mandatory provision of the Act, the applicable provision of the Operating Agreement shall control. If any provision of this Operating Agreement or the application thereof to any Person or circumstance is held invalid or unenforceable to any extent, the remainder of this Operating Agreement and the application of that provision to other Persons or circumstances is not affected thereby and that provision shall be enforced to the greatest extent permitted by law.

11.10 FURTHER ASSURANCES.

In connection with this Operating Agreement and the transactions contemplated hereby, each Member shall execute and deliver any additional documents and instruments and perform any additional acts that may be necessary or appropriate to effectuate and perform the provisions of this Operating Agreement and those transactions.

11.11 NOTICE TO MEMBERS OF PROVISIONS OF THIS AGREEMENT.

By executing this Operating Agreement, each Member acknowledges that it has actual notice of (a) all of the provisions of this Operating Agreement, including, without limitation, the restrictions on the transfer of Membership set forth in Article III, and (b) all of the provisions of the Articles. Each Member hereby agrees that this Operating Agreement constitute adequate notice of all such provisions, and each Member hereby waives any requirement that any further notice thereunder be given.

11.12 COUNTERPARTS.

This Operating Agreement may be executed in any number of counterparts with the same effect as if all signing parties had signed the same document. All counterparts shall be construed together and constitute the same instrument.

11.13 CONFLICTING PROVISIONS.

To the extent that one or more provisions of this Operating Agreement appear to be in conflict with one another, then the Manager shall have the right to choose which of the conflicting provisions are to be enforced. Wide latitude is given to the Manager, in interpreting the provision of this Operating Agreement to accomplish the purposes and objectives of the Company, and the Managers or a Required Interest, if there is no Manager, in interpreting the provisions of this Operating Agreement to accomplish the purposes and objectives of the Company and consistent with the interpretation given by the Manager.

The undersigned, being all the Members and Managers, hereby certify that the foregoing Third Amended and Restated Operating Agreement was unanimously adopted by the Manager, and the Members, effective as of the 15 day of October, 2005, TO WITNESS WHICH we have hereunto affixed our signatures.

WITNESS:

Justin Feit
Justin Feit
Justin Feit

CLASS A MEMBERS

EUGENE J. ZURLO AND CHARLOTTE R. ZURLO,
TRUSTEES OF THE EUGENE J. ZURLO LIVING
TRUST DATED DECEMBER 11, 1997

By: Eugene J. Zurlo
Eugene J. Zurlo
Its: Co-Trustee

By: Charlotte R. Zurlo
Charlotte R. Zurlo
Its: Co-Trustee

Michel Laplante (SEAL)
Michel Laplante (Member)

CLASS B MEMBERS

Kenneth E. Fowler, Trustee of
The Patricia C. Laplante Trust
Dated September 1, 2000

By: Kenneth E. Fowler
Kenneth E. Fowler
Its: Trustee

Kenneth E. Fowler, Trustee of
The John H. Laplante Trust
Dated September 1, 2000

By: Kenneth E. Fowler
Kenneth E. Fowler
Its: Trustee

Kenneth E. Fowler, Trustee of
The Marianne E. Laplante Trust
Dated September 1, 2000

By: Kenneth E. Fowler
Kenneth E. Fowler
Its: Trustee

Justin Feit

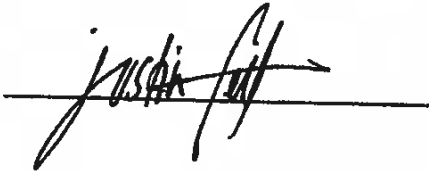
Justin Feit

Justin Feit



Kenneth E. Fowler, Trustee of
The Peter F. Laplante Trust
Dated September 1, 2000

By: 
Kenneth E. Fowler
Its: Trustee



MANAGER

Michel Laplante (SEAL)

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EXHIBIT "A"

<u>MEMBER</u>	<u>INITIAL CONTRIBUTION</u>	<u>FAIR MARKET VALUE</u>
Eugene J. Zurlo and Charlotte R. Zurlo Co- Trustees The Eugene J. Zurlo Living Trust dated December 11, 1997	Cash	\$400,000
Michel Laplante	None	- \$ 0 -

EXHIBIT "B"**[PROPERTY DESCRIPTION]****Tract B-2**

ALL that piece, parcel or tract of land, together with the improvements thereon, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as "Tract 'B-2' 42.7 Acres", on a plat entitled "SUBDIVISION OF PROPERTY IN THE NAME OF F-H-P REALTY LOCATED ON JOHNS ISLAND, CHARLESTON COUNTY, S.C.", by Forrest G. Calvert, RLS, dated September 27, 1979, and recorded in the RMC Office for Charleston County, South Carolina (hereinafter the "RMC Office") in Plat Book AO at page 74, said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully be shown. (TMS Number 346-00-00-004)

And Tract 'A':

ALL that piece, parcel or tract of land, together with the improvements thereon, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as "FHP Realty Tract 'A' 5.503 Acres" on a plat entitled "PLAT SHOWING THE ABANDONMENT OF PROPERTY LINES FOR TMS NO. 346-00-00-012 AND TMS NO. 346-00-00-011, AND THE SUBSEQUENT SUBDIVISION OF TMS NO. 346-00-00-007 INTO TRACT 'A' CONTAINING 5.503 ACRES AND TRACT 'B' CONTAINING 7.497 ACRES OWNED BY FHP REALTY LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA" by Hoffman Lester Associates, Inc., dated September 24, 1997, and recorded January 20, 1998, in the aforesaid RMC Office in Plat Book EC at page 263. (TMS Number 346-00-00-066)

The aforesaid Tract B-2 and Tract A are also more particularly shown on that certain plat entitled "PLAT SHOWING PROPERTY LINE BETWEEN TMS NO. 346-00-00-004, TRACT B-2 (CONTAINING 42.49 ACRES) AND TMS NO. 346-00-00-007, RESIDUAL TRACT B (CONTAINING 5.50 ACRES) TO FORM TRACT B-2 (CONTAINING 47.99 ACRES), OWNED BY FHP REALTY LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA", prepared by Hoffman Lester Associates, Inc., dated April 7, 2000, and recorded as Exhibit "___" to that certain deed of conveyance from FHP Realty Company, A Partnership, to Penny Creek Associates, L.L.C., and also about to be recorded in the RMC Office for Charleston County, S.C.

TOGETHER WITH a twenty-foot (20') non-exclusive easement in common with Helena Igoe Blanchard, her heirs and assigns, and others entitled thereto, in favor of "Tract B" above-described, for ingress and egress over, upon and across that certain twenty-foot (20') easement extending from Maybank Highway on the south to "Tract A" on the north, as said Tract A is shown on that certain plat recorded in Plat Book AK at page 76 in the RMC Office, which easement is granted in that certain deed of conveyance from Helena Igoe Blanchard to FHP Realty Company, A Partnership, dated April 27, 1978, and recorded in Book P115, page 273, in the RMC office.

ALSO:Parcel A, River Road:

ALL that piece, parcel or tract of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as "Parcel A 44,273 sq. ft. 10.11 acres" on that certain plat by Forsberg Engineering & Surveying, Inc., dated February 18, 1998, and recorded February 20, 1998, in Plat Book EC at page 328, in the RMC Office for Charleston County, S.C., said property having such location, size, shape, metes, courses, distances, buttings and boundings as will by reference to said plat more fully appear.

ALSO:Tract C:

ALL that certain piece, parcel or lot of land, situate, lying and being in City of Charleston, County of Charleston, South Carolina, and being shown and delineated as TRACT "C", 59.280 acres of highland and 95.063 acres of marshland, on a plat by Forrest G. Calvert, dated November, 1977, entitled in part "Plat Showing Subdivision of Fenwick Hall Plantation, 237.176 Ac. Highland 148.058 Ac. Marsh Located on Johns Island, Charleston County, South Carolina. Property of Mrs. Helena Igoe Blanchard", and recorded in Plat Book AK, at page 76, in the RMC Office for Charleston County, South Carolina (the "RMC Office"), and having such location, size, shape, buttings, boundings, and dimensions as will appear by reference to said plat which is incorporated herein by reference, be all the dimensions and measurements shown thereon a little more or less.

SAVING AND EXCEPTING that certain piece, parcel or lot of land, situate, lying and being in Charleston County, South Carolina, described as 0.97 acres of land as conveyed to the South Carolina Department of Transportation in that certain deed of conveyance from Fenwick Acres dated April 16, 1998, and recorded July 28, 1998, in Book R307, page 246, in the RMC Office.

The aforesaid property and said 0.97 acre parcel are more particularly shown on that certain plat prepared by Southeastern Surveying, Inc., entitled "A Boundary Survey of Tract "C" Containing 153.153 Acres, Owned by Fenwick Acres Located in the City of Charleston, Charleston County, South Carolina", dated March 23, 1999, and recorded in the RMC Office in Plat Book ED, at page 70.

EXHIBIT C

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2013-CP-10-7280

EUGENE J. ZURLO as Trustee of the
EUGENE J. ZURLO LIVING TRUST,
dated December 11, 1997, individually and
derivatively on behalf of PENNY CREEK
ASSOCIATES, LLC, and THE GROVE AT
FENWICK PLANTATION, LLC

Plaintiff,

v.

PENNY CREEK ASSOCIATES, LLC, THE
GROVE AT FENWICK PLANTATION,
LLC, and MICHEL LAPLANTE,

Defendants.

PENNY CREEK ASSOCIATES, LLC, THE
GROVE AT FENWICK PLANTATION,
LLC, and MICHEL LAPLANTE,
Individually and in his Capacity as Manager
of Penny Creek Associates, LLC and the
Grove at Fenwick Plantation, LLC,

Third-Party Plaintiffs,

v.

CHARLOTTE ZURLO, Individually and as
Co-Trustee of The Eugene J. Zurlo Living
Trust, Dated December 11, 1997, and
EUGENE J. ZURLO, Individually

Third-Party Defendants.

ORDER

FILED
2016 MAY 16 PM 2:36
JULIE J. ARISTON
CLERK OF COURT
BY _____

Handwritten signature

This matter is before the Court on the Plaintiff's Motion to Enforce the Settlement of this action entered on the Court's record in this case on February 29, 2016.

After considering the Motion, receiving Exhibits into evidence at today's hearing, and hearing arguments of counsel, it is **ORDERED** as follows:

1. Effective May 3, 2016, Michel Laplante has resigned as Manager of Penny Creek Associates, LLC, and Chris Lanning is appointed as the new Manager of Penny Creek Associates, LLC. (See Attached: Plaintiff's Exhibit 2.)

AND IT IS SO ORDERED.

May 16, 2016
Charleston, South Carolina

R. Markley Dennis, Jr.
The Honorable R. Markley Dennis, Jr.
Circuit Court Judge
Ninth Judicial Circuit

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., C.C. & F.C.
By *[Signature]*
DEPUTY CLERK

RMDS 2

Lanning Law Firm



May 3, 2016

Penny Creek Association
Attention: Mitch LaPlante

Re: Penny Creek Association, LLC Engagement Letter

Dear Mitch:

I want to take this opportunity to personally thank you for selecting me to be the Manager of Penny Creek Association, LLC and The Grove at Fenwick Plantation, LLC. My duties as Manager will be to strictly follow and comply with the terms of the Settlement Agreement you entered into pursuant to the lawsuit of *Eugene Zurlo, et al v. Penny Creek Association, LLC, et al*, Case Number 2013-CP-10-07280. In addition, my duties will be to strictly follow the Third Amended and Restated Operating Agreement of Penny Creek Association, LLC. All communication regarding Penny Creek Association, LLC must come directly from you only and not your attorneys or representatives. Any communication by any and all third parties and or attorneys or representative on your behalf will not be permitted. I feel that this will allow me to work in an efficient manner with all of you for the benefit of Penny Creek Association, LLC and Grove, LLC.

In addition, to my duties set forth in the Settlement Agreement and Operating Agreements, I am authorized in my discretion and subject to a budget limit of One Thousand and 00/100 (\$1,000.00) Dollars per consultant per month to utilize the services of:

(a) Carrio Lanning, CPA, on financial and accounting matters involving PCA and The Grove, at the rate of Two Hundred Twenty Five and 00/100 (\$225.00) Dollars per hour, and

(b) Stuart Coleman on development matters involving PCA and The Grove, at the rate of Two Hundred Fifty and 00/100 (\$250.00) Dollars per hour.

Manager shall not incur consultant expenses that exceed One Thousand and 00/100 (\$1,000.00) Dollars per consultant per month during the term of his service as Manager without the prior written approval of the Class A Members. Consultant costs shall be paid by PCA or The Grove as applicable.

My fee arrangement, as agreed, will be based on an hourly rate of \$250.00. I will bill for my services on a monthly basis, in addition to any disbursements due. Disbursements include the following but not limited to: photocopying, long distance charges, courier services, computer on-line services, travel, etc. Payment is due upon receipt of my invoice. Failure to make timely payments may, upon 30 days written notice, result in my withdrawal as Manager of Penny Creek Association, LLC.

J. Chris Lanning
2036 oWall Street, Suite F
Mt Pleasant, SC 29464

www.lanninglawfirm.com

Phone - (843) 284
Fax - (843) 881
chris@lanninglawfirm.com

0000

2016 10:17 FAX

Again, thank you for this opportunity to be of service. Please sign and return a copy of this letter to me. If you have any questions, please do not hesitate to contact me.

Sincerely,

LANNING LAW FIRM, LLC

J. Chris Lanning

ACKNOWLEDGED:

Penny Creek Association, LLC

By: M. H. LAURANTE

Its: M. H. LAURANTE

Date: 5/3/16

EXHIBIT D

**WRITTEN CONSENT IN LIEU OF A SPECIAL MEETING
OF THE CLASS A MEMBERS AND MANAGER
OF PENNY CREEK ASSOCIATES, L.L.C.**

Pursuant to Section 3.19 of PENNY CREEK ASSOCIATES, L.L.C. Third Amended and Restated Operating Agreement and that settlement agreement reached on February 29, 2016, the Class A Members and Manager of PENNY CREEK ASSOCIATES, L.L.C. (the "Company") adopted by unanimous Written Consent the following resolutions:

RESOLVED, that Michel F. Laplante's written resignation as Manager and Designated Agent of the Company is hereby accepted;

FURTHER RESOLVED, that pursuant to Section 6.7 of the Company's Operating Agreement, J. Chris Lanning, Esq. shall be the Company's Manager and Designated Agent;

FURTHER RESOLVED, that the Company's Articles of Organization and Third Amended and Restated Operating Agreement be amended to reflect the resignation of Michel F. Laplante as Manager and Designated Agent, and appointment of Mr. Lanning as the replacement Manager and Designated Agent;

FURTHER RESOLVED, that Mr. Lanning is instructed to sell the Company's assets and the assets of the Grove at Fenwick Plantation, LLC in accordance with resolutions previously executed by the Class A Members and all such contracts and letters of intent entered into by the Company and its Manager Michel Laplante as of April 21, 2016. Mr. Lanning shall have a deciding vote if necessary, and may not attempt to change or alter these contracts, agents, attorneys, accountants etc. without vote as required by the applicable company operating agreement. The expenses of Mr. Lanning are to be paid by the Company. Mr. Lanning shall regularly communicate with the Class A members solely and directly, and not through counsel, and provide ongoing updates to all members, who shall be copied on any and all emails or communications;

FURTHER RESOLVED, that the Class A Members shall agree to liquidate the Company, which shall then be dissolved and wound up pursuant to Section 10.1A of the Company's Third Amended and Restated Operating Agreement, once all Company property has been sold;

FURTHER RESOLVED, that Mr. Lanning shall be appointed to act as Liquidator of the Company once all Company Property has been sold;

FURTHER RESOLVED, that the Company discharge from Company funds all of the debts, liabilities and obligations of the Company in the ordinary course, pay all debts owed to lending institutions such as Wells Fargo or its successor, then repay \$3,250,000 in available funds to the Eugene J. Zurlo Living Trust, dated December 11, 1997, account to the Eugene J. Zurlo Living Trust, dated December 11, 1997 for its \$700,000 cash capital contribution in accord with the terms of the Third Amended Company Operating Agreement, and distribute the remaining funds, if any, to the Members, which distributions shall be made 50% to the Eugene J. Zurlo Living Trust, dated December 11, 1997 and 50% to the Laplante interests as directed by Michel Laplante or his designee.

The Class A Members by signing this Written Consent, waive notice of the time, place, and purpose of a meeting of the Class A Members and Manager, and agree to the transaction of the business of this

meeting by unanimous Written Consent of the Class A Members and Manager. This Consent may be executed in two or more counterparts and when executed by each Class A Member and Manager shall become effective.

APPROVED:

CLASS A MEMBERS:

The Eugene J. Zurlo Living Trust
Dated December 11, 1997

By: Eugene J. Zurlo
Eugene J. Zurlo
Its: Co-Trustee

Dated: 15 Apr 16, 2016

By: Charlotte R. Zurlo
Charlotte R. Zurlo
Its: Co-Trustee

Dated: April 26, 2016

By: Michel F. Laplante
Michel F. Laplante

Dated: 4/17, 2016

MANAGER:

By: Michel F. Laplante
Michel F. Laplante

Dated: 4/17, 2016

EXHIBIT E

**RESOLUTION OF THE SOLE SHAREHOLDER
OF PENNY CREEK ASSOCIATES, L.L.C.**

At a meeting of the Members of Penny Creek Associates, L.L.C. (the "Company") held at the Company's offices in Charleston, South Carolina, the Members of the Company hereby adopt the following resolutions:

WHEREAS, the Company is the sole member of Maybank 2754, LLC, a South Carolina limited liability company (the "Maybank 2754, LLC"); and

WHEREAS, pursuant to the terms and conditions of that certain Contract for Assignment of Interest, dated October 7, 2013, by and between the Company, Inc. (as Seller thereunder) and John H. Laplante, Michel F. Laplante, Peter F. Laplante, Marianne Laplante-Scarlata, or their assigns (as Purchasers thereunder) (the "Agreement"), the Seller desire to sell, assign, transfer and convey certain Membership Interest in the Company to those certain Purchasers mentioned above and according to the provisions of the Agreement; and

WHEREAS, pursuant to the Agreement, the Company hereby certifies that the Company has complied with all provisions of the Company operating documents, with respect to the aforementioned sale, assignment and/or transfer of the Company Membership Interest in the Maybank 2754, LLC to the Purchaser, in consideration of Four Hundred Thousand and no/100 Dollars (\$400,000.00) and that the Members of the Company consent to the same; and

WHEREAS, as a condition of closing, the Company has agreed to grant, transfer, sell and convey to Purchasers, their successors and assigns, an access easement for pedestrian and vehicular ingress, egress and access to, from and over that portion of the lands of Seller known as "Residual Tract B-2-2" as shown on that plat by Richard D. Lacy, entitled "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895 ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES)," having been recorded in Plat Book EH, page 817 in the Charleston County RMC Office on March 25, 2005 ("30' Private R/W"), the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road ("Pitch Fork Road"). Upon the completion of Pitch Fork Road, the Parties hereto shall execute and record an Easement Agreement to memorialize the 30' Private R/W.

NOW THEREFORE IT IS RESOLVED, that the Company approves the Agreement; the sale, assignment, transfer and conveyance of Membership Interest in the Company thereunder; and any and all other documents necessary to facilitate the Company's execution of the Agreement and its compliance with the transactions contemplated thereunder.

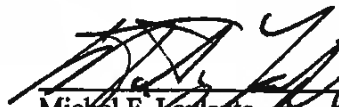
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BE IT FURTHER RESOLVED, that upon the completion of Pitch Fork Road, the Company shall grant to Purchasers, their successors and assigns, an access easement for pedestrian and vehicular ingress, egress and access to, from and over that portion of the lands of the Company known as "Residual Tract B-2-2" as shown on that plat by Richard D. Lacy, entitled "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895 ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES)," having been recorded in Plat Book EH, page 817 in the Charleston County RMC Office on March 25, 2005 ("30' Private R/W"), the location and condition of which shall be mutually agreed upon at a future date.

BE IT FURTHER RESOLVED, that Michel F. Laplante in his capacity as Manager of the Company is hereby authorized to execute and deliver on behalf of the Company any and all agreements, assignments, satisfactions, releases, discharges, papers, documents, lending and collateral documents, offers, applications, leases, affidavits, certificates, certifications, verifications, non-disturbance agreements, guaranties, bonds, notes, subordination agreements, security agreements, resolutions, settlement statements, and any and all other contracts, papers or documents required in the course of the execution of the Agreement and the assignment and transfer of Membership Interest in the Company.

The undersigned Members of the Company do hereby certify that as of this 4TH day of October, 2013 the above to be a true and correct transcript of the Resolutions passed by the Company at the time and place above stated.

MEMBERS:


Michel F. Laplante (SEAL)

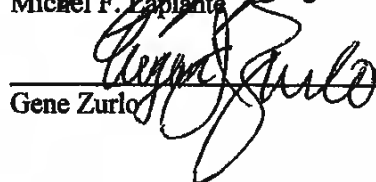

Gene Zurlo (SEAL)

EXHIBIT F

BUIST, BYARS & TAYLOR, LLC
STATEMENT OF SETTLEMENT FOR PURCHASERS

PROPERTY ADDRESS: 2754 Maybank Highway, Charleston, SC 29455

PURCHASER/BORROWER(S): Maybank 2754, LLC

SELLER(S):

SETTLEMENT DATE: October 7, 2013

DISBURSED: October 7, 2013

PRORATION DATE: October 7, 2013

LEGAL DESCRIPTION:

All that piece, parcel, lot or tract of land, together with the buildings and improvements thereon, situate, lying and being in the County of Charleston, State of South Carolina, and being shown as LOT "B-3" on a plat by Forrest G Calvert, entitled "Property in the name of F H P Realty about to be conveyed to David C Swann, DDS, located on Johns Island, Charleston County, South Carolina," having been recorded in Plat Book T at Page 139 in the RMC Office for Charleston County on the 1st day of February, 1981. Said property being approximately Eight Hundred and One (801') feet East of the intersection of River Road and Maybank Highway

SUBJECT TO a perpetual easement of ingress and egress over, under and across the front fifty (50') feet portion of the above described Lot B-3, the purpose of said ingress and egress being for the possible creation of a frontage or access road which the said F H P Realty Company, a Partnership, shall have no obligation to construct.

Butting and bounding on the South by Maybank Highway One Hundred Twenty (120') feet, on the West by Tract B-1 now or formerly of F H P Realty Two Hundred (200') FEET, on the North by a portion Tract B-1 One Hundred (120') feet, the East by Tract B-2 now or formerly of FHP Realty Two Hundred (200') feet. All of which will more fully and at large appear by reference to the aforementioned plat.

		DEBIT	CREDIT
Payoff first mortgage		\$ 330,074.42	
Tax / Commercial	to (344.00 / x days)	344.00	
County Taxes	to (5,916.17 / x days)	5,916.17	
Principal Amount of New Loan(s)			350,000.00
Commitment Fee	Southcoast Community Bank	3,500.00	
Underwriting Fee	Southcoast Community Bank	600.00	
Appraisal Fee	Southcoast Community Bank	2,000.00	
Flood Hazard Determination Fee	Southcoast Community Bank	13.00	
UCC Continuation/Set. Fee	SC Secretary of State	84.00	
UCC Satisfaction Fee	Charleston County RMC	8.00	
Mortgage/Assign of Rents Est.	Charleston County RMC	10.00	
Interest For 26 days @ \$ 48.611110/day	Southcoast Community Bank	1,216.28	
Hazard Insurance Premium 1.0 years	Paula Hampton State Farm	14,292.00	
Escrow Hazard Insurance 10,000 months @ \$ 367.67 per month		3,678.70	
Escrow Tax / Commercial 2,000 months @ \$ 26.67 per month		57.34	
Escrow County Taxes 2,000 months @ \$ 492.93 per month		985.85	
Escrow Aggregate Adjustment		-2,881.32	
Abstract or Title Search	Jackie Davis	104.00	
Title Exam	Buist, Byars & Taylor, LLC	35.00	
Title Insurance Binder	Clear Title Agency, LLC	100.00	
Document Preparation	Buist, Byars & Taylor, LLC	25.00	
Notary Fees	An Extra Pair of Hands, LLC	65.00	
Attorney's Fees	Buist, Byars & Taylor, LLC	2,000.00	
Title Insurance Premium	Clear Title Agency, LLC	1,028.00	
Recording Fees	Charleston County RMC Office	21.00	
Record Assign. of Leases/Rents	Charleston County RMC Office	11.00	
Record UCC	Charleston County RMC Office	10.00	
File UCC	SC Secretary of State	10.00	
Corporate Documents	SC Secretary of State	183.50	
Balance of Assignment of LLC	Penny Creek Associates, LLC	65,106.68	
Subtotals		414,080.33	350,000.00
Balance Due FROM Purchaser/Borrower			16,106.68
TOTALS		414,080.33	414,080.33

The above figures do not include sales or use taxes on personal property

APPROVED and ACCEPTED

PURCHASER(S) / BORROWER(S):

2754 Maybank, LLC

By: Michael E. Laplante, Its: Member

By: John H. Laplante, Its: Member & Manager

ESCROW AGENT:

[Signature]
 Buist, Byars & Taylor, LLC

(2013010136.PFD/2013010130/04)

**PLAINTIFF'S
EXHIBIT**

141

EXHIBIT G

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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

Wells Fargo Bank, N.A., as Successor
by Merger to Wachovia Bank, National
Association, as Successor by Merger
to First Union National Bank,
Plaintiff,
vs. CASE NO. 2014-CP-10-4946

Penny Creek Associates, LLC, a/k/a Penny
Creek Associates, LLC; Michel F. LaPlante
a/k/a Mitch LaPlante; Charlotte R. Zurlo;
Eugene J. Zurlo; Charlotte R. Zurlo and
Eugene J. Zurlo, as Co-Trustees of The Nicklaus
Lane Realty Trust No. 1 under Declaration of
Trust dated May 22, 1998, and The Zurlo Investment
Trust No. 1 pursuant to trust agreement dated
August 10, 1998; Fenwick Hall Plantation Property
Owners Assn, Inc. a/k/a Fenwick Hall Plantation
Property Owners' Association, Inc.; Preserve at
Fenwick Hall Property Owners Association, Inc.
a/k/a The Preserve at Fenwick Hall Property Owners'
Association, Inc.; and The Grove at Fenwick
Plantation Condominium Association, Inc.,
Defendants.

Michel LaPlante,
Third-Party Plaintiff,
vs.
The Eugene J. Zurlo Living Trust, Dated
December 11, 1997,
Third-Party Defendant.

COPY

Hearing before the Honorable Mikell R.
Scarborough, reported by Christine A. Smith, Court
Reporter and Notary Public, at 2:58 p.m. on
June 19, 2017 at 100 Broad Street, Charleston,
South Carolina.

Christine A. Smith, Court Reporter
Master-in-Equity
P.O. Box 30276
Charleston, South Carolina, 29417
(843) 958-5071
casmith@charlestoncounty.org

1 APPEARANCES OF COUNSEL:

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3 Parker Poe Adams & Bernstein, LLP
4 200 Meeting Street
5 Suite 301
6 Charleston, SC 29401
7 (843) 727-2650
8 Bobbybyrd@parkerpoe.com

9 J. Rutledge Young, Jr., Esq.
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11 96 Broad Street
12 Charleston, SC 29401
13 (843) 720-2044
14 Jry@duffyandyoung.com

15 Brian A. Hellman, Esq.
16 Hellman Yates & Tisdale
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18 Third Floor
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(843) 722-3300
Tpritchard@pritchardlawgroup.com

P R O C E E D I N G S

THE COURT: The next case up is the Wells Fargo Bank versus Penny Creek Associates case. It's 2014-CP-10-4946. I've been around Mr. Bobby Byrd long enough to know he's representing Wells Fargo.

Mr. Young, your client would be whom, sir?

MR. YOUNG: Your Honor, in this foreclosure case I represent -- and Duffy and Young represent -- Charlotte R. Zurlo, Eugene J. Zurlo, and then there are two trusts: The Nicholas Lane Realty Trust No. 1, May 22, 1998, and the Zurlo Investment Trust No. 1, August 10, 1998. I represent them in this foreclosure action.

THE COURT: Thank you, sir.

MR. YOUNG: And they're all guarantors.

THE COURT: Guarantors?

MR. YOUNG: Yes, sir.

THE COURT: On this side? Mr. Pritchard?

MR. PRITCHARD: Yes, sir. At this point, Your Honor, I represent Penny Creek Associates.

THE COURT: All right. Very good. Thomas Pritchard.

MR. HELLMAN: Your Honor, Brian Hellman. I represent 1776, LLC, which has an interest in a

1 property by way of a subordinate mortgage.

2 THE COURT: 1776?

3 MR. HELLMAN: Correct.

4 THE COURT: Very good. Thank you,
5 Mr. Hellman. All right.

6 MR. YOUNG: Your Honor, there are two other
7 Defendants. One is Mr. Michel Mitch LaPlante. He's
8 not represented, but he's here in the courtroom.

9 THE COURT: Okay.

10 MR. YOUNG: And two property owners'
11 associations are represented by Rob Varnado. I don't
12 know -- Mr. Byrd might be able to tell me whether
13 they play any real active role in this. I know he's
14 had some health issues recently.

15 THE COURT: Right. Yes. He actually showed
16 up in my courtroom the other day.

17 MR. PRITCHARD: I've seen him. He's doing
18 well.

19 THE COURT: Mr. LaPlante is currently
20 unrepresented? Is that correct, Mr. LaPlante?

21 MR. LAPLANTE: Yes, sir.

22 THE COURT: Okay. Very good. We had -- I'm
23 looking at some notes. It looks like we stabbed this
24 thing back in like March of '16 and you gave me a
25 heads up and then it bounced around for a while and

1 now it's back. I'm glad to hear from you, Mr. Byrd.

2 MR. BYRD: Thank you, Judge. Your Honor, this
3 is a case that was filed in 2014 on two separate but
4 related development projects. One was The Grove at
5 Fenwick Plantation, and the other is Penny Creek
6 Associates were the names on the entities.

7 They're both projects out on John's Island in
8 that Fenwick property there to the right when you
9 come over the Stono. The guarantors are the same for
10 both loans. We brought them together as one
11 foreclosure with several causes of action.

12 Unfortunately for the bank what happened early
13 on is that it got dragged into a longstanding dispute
14 between Mr. Young's clients, the Zurlos, and
15 Mr. LaPlante who was at that time represented by Jay
16 Seibels. They had a separate action pending in
17 Circuit Court, basically an old-fashioned business
18 divorce. He started asserting the same kinds of
19 claims in this case. I think they were blaming each
20 other for how they got into this mess with the bank.

21 Our understanding is that that case was
22 settled, and the separate action was settled. It
23 came up for trial. Judge Markley Dennis was the
24 presiding Judge for that term of Court, and the
25 parties settled their case, put their settlement on

1 the record is my understanding, and out of that we
2 were able to kind of move forward with doing what we
3 needed to do in this case once they were able to get
4 that resolved.

5 Part of their resolution of that separate
6 litigation was that the Zurlos got a second mortgage
7 on the property. There's only one property left.
8 It's the Penny Creek property. It's several tracts,
9 but it's just the Penny Creek loan. About a year
10 ago, the Fenwick Grove -- Fenwick Plantation loan got
11 paid in full, so we ended up releasing the
12 foreclosure claim as to that property and also the
13 guarantee claim related to that loan so it's
14 simplified now. We just have the Penny Creek loan
15 and the Penny Creek guarantees.

16 Last spring -- Your Honor had a great memory
17 because last spring after the Fenwick loan was paid
18 off, after the Zurlos and Mr. LaPlante were able to
19 settle their separate litigation, we entered into a
20 forbearance agreement of the remaining indebtedness
21 owed to the bank.

22 In the forbearance agreement, which Your Honor
23 has a copy of -- Ms. Beck requested a copy of that
24 and I provided that to her -- the parties agreed and
25 stipulated that the bank would be entitled to the

1 foreclosure, no defenses to the foreclosure, what was
2 due, what was stated to be due at the time, and that
3 was the debt, and the parties entered into a
4 stipulation at that time which we held. We held the
5 original of it. We did not file it immediately.

6 Part of this forbearance was that we would
7 take the case off the active roster under a 40(j),
8 which we did. The forbearance period expired on its
9 own terms at the end of March of this year. At that
10 time we moved to restore the case to the active
11 roster, and we filed the stipulation with the Clerk
12 of Court. So both of those have been done.

13 We're prepared to go forward with the
14 foreclosure. I don't believe there's any
15 disagreement about that fact. Everybody's stipulated
16 that the bank's entitled to this relief, and so we're
17 ready to go forward.

18 Mr. Young has asked me on numerous occasions
19 to release his clients, to dismiss the guarantee
20 claims. I didn't feel like I was in a position to
21 dismiss the guarantees because we haven't had the
22 sale yet. I think more likely than not I will end up
23 waiving deficiency, but unless and until that sale
24 takes place I can't dismiss the guarantors. So what
25 I told him I would be willing to do, though, is agree

1 to sever out the remaining guarantor claim and just
2 proceed just on the foreclosure, and obviously if
3 something happens then I'll go forward on a
4 guarantee.

5 I'm not anticipating anything's going to
6 happen. I think that both parties are ready to go
7 forward with the foreclosure and go ahead and get
8 this case over with.

9 So we would ask that it be scheduled for the
10 August sale. I've actually brought the documents
11 with me. We don't have to get into those now unless
12 you want to, Your Honor. I would ask that the Court
13 go ahead and grant the Motion to Sever. I have a
14 proposed order to that effect, and also part of my
15 motion is to enter an Order of Foreclosure and Sale
16 if we're ready to go forward on that today.

17 THE COURT: Do you have current debt figures
18 on that?

19 MR. BYRD: I do, Your Honor.

20 THE COURT: Roughly what are we talking about?

21 MR. BYRD: 5.9.

22 THE COURT: How many acres is this particular
23 tract? This would be the Penny Creek?

24 MR. YOUNG: It's about 40 plus at the current
25 time, which includes 34 platted but unsold lots in a

1 subdivision called, The Preserve.

2 THE COURT: The Preserve?

3 MR. YOUNG: Yes, sir.

4 THE COURT: All right.

5 MR. YOUNG: And while I'm standing, on behalf
6 of the Zurlos, I obviously have no objection to the
7 Motion to Sever because basically what it does is
8 relieve them, at least temporarily and hopefully
9 forever, of their guarantees of the debt.

10 THE COURT: Certainly if the debt is
11 sufficient to satisfy it there would be no need for
12 that. At this point in time you-all are not ready to
13 waive the deficiency is what I'm hearing, right?

14 MR. BYRD: Your Honor, we would do what we
15 normally do which is to reserve the right to waive it
16 but not waive it today for sure.

17 THE COURT: Okay.

18 MR. YOUNG: I might mention that Mr. Byrd has
19 got pretty good reason to do that. His last year
20 appraisal, about a year old, appraises the property
21 left at about \$9 million, and the debt, as he said,
22 is about 5.8 or 5.9. So there seems to be a little
23 bit of equity left over.

24 THE COURT: Okay. I guess we'll see. All
25 right. Mr. Hellman?

1 MR. HELLMAN: Thank you, Your Honor. Your
2 Honor, if I may, this is a motion that I filed a
3 little while ago, and I don't know if it made it into
4 the stack here. It's simply a Motion to Intervene in
5 this case as a subordinate mortgage holder.

6 As Mr. Byrd pointed out, this mortgage was
7 actually assigned to 1776, LLC from the Zurlo
8 December 11, 1997 Trust that received this mortgage
9 and the underlying promissory note from the
10 settlement that occurred prior. It was assigned to
11 my client, and from a timing standpoint the
12 foreclosure action, while it commenced after the
13 action between the members of Penny Creek, the motion
14 wasn't granted until after Mr. Byrd's lis pendens.

15 So we would seek that the Court recognize our
16 subordinate mortgage solely for the opportunity to
17 credit bid at the sale if it comes to that.

18 THE COURT: Your mortgage predates the action,
19 though, correct?

20 MR. HELLMAN: No. Our mortgage does not
21 predate the action. Our mortgage -- the action that
22 lead to our mortgage predates this action, but the
23 mortgage wasn't granted until after --

24 THE COURT: -- until after this case was
25 commenced?

1 MR. HELLMAN: -- after this case was
2 commenced.

3 THE COURT: All right. So you still have the
4 right to pursue that matter separately, but in this
5 instance you want to be in the case; is that what
6 you're seeking?

7 MR. HELLMAN: We would like to be in the case,
8 Your Honor. We would like for our debt to be
9 determined. It's actually pretty simple. There's no
10 interest and no attorney's fees the way the note's
11 written, so it's \$3 million and a quarter, so in the
12 event of the foreclosure sale if it becomes necessary
13 my client may wish to bid that or perhaps even credit
14 bid it.

15 THE COURT: 3.25?

16 MR. HELLMAN: Yes, Your Honor.

17 THE COURT: They're clearly behind the first
18 mortgage, right?

19 MR. HELLMAN: Yes, Your Honor.

20 THE COURT: Any other intervening liens that
21 you're aware of?

22 MR. HELLMAN: None that we're aware of.

23 THE COURT: Let me come back to you and let me
24 ask Mr. Pritchard. Mr. Pritchard?

25 MR. PRITCHARD: We don't have any objection to

1 MR. YOUNG: Actually, it's across River Road.

2 THE COURT: The across River Road is in the
3 interior tract.

4 MR. YOUNG: Yes, sir. That's 72 apartments
5 that were sold. It was sold -- it was such a nice
6 sum that it brought the Wells Fargo bank loan up to
7 date and paid off all the old mortgage on the second
8 PCA loan and got us the forbearance agreement that
9 Mr. Byrd mentioned.

10 THE COURT: I think that was what was going on
11 in March of '16, if I'm not mistaken?

12 MR. YOUNG: That's exactly what was happening,
13 yes, sir. So unless of course you have any
14 questions, thank you very much for letting me put all
15 that into the record.

16 THE COURT: Very good. Thank you, Mr. Young.

17 Let me just ask then, Mr. Lanning, anything
18 you want to add to that?

19 MR. LANNING: Nothing, Your Honor.

20 THE COURT: You were appointed sort of
21 pursuant to that agreement, I assume, and that's when
22 you took over?

23 MR. LANNING: That's correct, Your Honor.
24 Through that settlement agreement a new manager had
25 to be appointed, and Mr. LaPlante and Mr. Zurlo

1 agreed that I would be the manager, and then Judge
2 Dennis had appointed me as the manager. Then when
3 the mortgage was presented to me, I looked back at
4 the transcript which said that that mortgage had been
5 agreed upon by both parties. I went ahead and signed
6 it based on the fact that it was basically a court
7 order of that settlement agreement.

8 THE COURT: Part of that agreement?

9 MR. LANNING: That's correct.

10 THE COURT: So you executed that mortgage, and
11 at that time that was to the Zurlo Trust, and then
12 since that time were you put on notice that the Trust
13 had conveyed the mortgage to --

14 MR. LANNING: I received a letter, I think,
15 from Mr. Hellman's firm saying that they were putting
16 that in default.

17 THE COURT: Am I correct that it's a no
18 interest/no fees loan? It is -- what the face value
19 of the mortgage is is the face value of the debt; is
20 that right?

21 MR. LANNING: That is correct, Your Honor.

22 THE COURT: So it would properly be satisfied
23 out of the proceeds of any sale of the property?

24 MR. LANNING: That's correct.

25 THE COURT: That would be the case?

1 MR. LANNING: That's correct, Your Honor.

2 THE COURT: Very good. From that standpoint
3 no objection, and Mr. Hellman, you-all are certainly
4 agreeable to seeing that the sale goes through as
5 expeditiously as possible I imagine?

6 MR. HELLMAN: Yes, Your Honor.

7 THE COURT: Since you-all aren't even clicking
8 away at interest, are you?

9 MR. HELLMAN: We're not clicking away at
10 interest, and obviously the more their interest
11 clicks away the more it raises the bar.

12 THE COURT: I'm with you. I'm with you. So
13 with that understanding then Mr. --

14 MR. BYRD: Your Honor, again, I don't have a
15 problem with them going it. I just don't want it to
16 extend the foreclosure.

17 THE COURT: Delay your timeframe.

18 MR. BYRD: Unanticipated.

19 THE COURT: Very good. Okay. Mr. LaPlante,
20 you had a question about that?

21 MR. LaPLANTE: Is it possible to find out
22 who -- I know it's an LLC, but who -- is it a shell
23 from Mr. Zurlo? Who was in the LLC?

24 THE COURT: I don't know. I just know they're
25 the holder of the mortgage.

1 MR. LaPLANTE: Your Honor, I have a few other
2 points if you would let me ask the questions? I
3 don't deny that Mr. Zurlo is owed the three and a
4 quarter million dollars. I never have denied it over
5 the 16 years I've worked on the project. I've never
6 said -- when Mr. Young said that I would not sign for
7 it -- I never said such a thing.

8 I would not sign the document that was there
9 because Mr. Zurlo and Mr. Young have spent the last
10 four years of my life making it miserable and
11 misleading. I would have never agreed to a mortgage
12 that would have been assigned, for one. The concern
13 I had with the second mortgage was Mr. Zurlo had a
14 pattern of saying things and not following through.
15 He proved it correct when we had contracts. He would
16 not release the second mortgage or agree to the
17 second mortgage on the contracts we had therefore
18 gumming up the works.

19 His comment to me early on was that he was
20 going to force it into foreclosure, buy it, and
21 squeeze me out. That looks like what's happening.
22 I'm a big guy. I've accepted that.

23 The second mortgage being sold, I would have
24 never agreed to selling a second mortgage. If I'm
25 responsible for half the payments of the second

1 mortgage -- Mr. Lanning never reviewed it with me.
2 It was signed without my knowledge.

3 THE COURT: You didn't have to. You had lost
4 all control by then, Mr. LaPlante. After that
5 settlement agreement on February 29th it looks like
6 you gave up any sort of management control at that
7 time. Okay? That was part of you-all's agreement.

8 MR. LaPLANTE: But I had no right to see the
9 second mortgage or approve it?

10 THE COURT: No, sir. That was Mr. Lanning's
11 job.

12 MR. LaPLANTE: Poorly done.

13 THE COURT: Maybe so. That's what we call
14 settlement agreements. Do you want me to read to you
15 what Judge Dennis said? I agree with him
16 100 percent. Here's what Judge Dennis said on
17 February 29, 2016 when you-all put the agreement on
18 the record:

19 "Very well. Thank you, gentlemen. I thank
20 the parties as well.

21 "As a mentor more indirectly than directly,
22 since that I different forum, but Judge Blatt, who
23 everyone, both the attorneys here knows and respects,
24 has always said that that's not always the best thing
25 in the world, both sides are not exactly satisfied,

1 I'm sure, but that's what settlement entails, and I
2 commend you and I commend your lawyers for the
3 professionalism that they have demonstrated as I
4 stated to them.

5 "One of the things that I learned early on in
6 this job, I was privileged to be a lawyer in this
7 State for 21 years before I assumed this
8 responsibility, and one of the things that's a joy is
9 to have an opportunity to work with persons that I
10 respect so highly, and these certainly have held to
11 that standard, and I thank you them (sic) for that.
12 It's a privilege. Thank you. Good luck to all the
13 parties."

14 He said that in February of '16, and I'll say
15 it in June of '17. Anyway, it looks like we're
16 heading towards the end of this matter. I'm going to
17 approve the Motion to Sever. I'm going to allow the
18 Motion to Intervene. It's a permissive intervention,
19 so I'll grant both of those motions. It doesn't
20 sound like there's any objection.

21 Let's set the sale for August 3rd, I think it
22 is; is that right?

23 MR. BYRD: I think so, Your Honor.

24 THE COURT: Or August 1st. I think it's
25 August 1st, isn't it? We'll set the sale out to then

1 and we'll see what we can do, and if you-all decide
2 you're going to waive deficiency my rule is that I
3 need to know that at least a week ahead of time so
4 that the parties can -- if they're going to bid on it
5 they know what to bid. Okay?

6 MR. BYRD: Your Honor, I've got a proposed
7 order granting the Motion to Sever unless you want to
8 do a Form 4. It doesn't matter to me.

9 THE COURT: However you want to do it.

10 MR. BYRD: And I've got --

11 THE COURT: It looks like you've got multiple
12 books over there (indicating).

13 MR. BYRD: Well, I don't know how Your Honor
14 wants to handle this. I don't think there's any
15 question as to the calculation of the debt. I've got
16 an affidavit that brings it forward. We'll obviously
17 need to submit another order, a final order before it
18 goes to sale, but I would be happy to just go ahead
19 and put my affidavits into the record now.

20 THE COURT: Why don't you do that, set the
21 record straight. Thank you, sir.

22 MR. BYRD: Here's the original Affidavit of
23 Indebtedness and an additional Affidavit of Fees.
24 Some of my fees have been paid all along through
25 various sales, but we've got about 31 or 32,000

1 that's still unreimbursed to the bank. That's all
2 we're asking --

3 THE COURT: That's calculated in there?

4 MR. BYRD: It's calculated in there.

5 THE COURT: Very good. All right. So as to
6 the Motion to Sever, this will allow the foreclosure
7 to go forward, correct?

8 MR. BYRD: That's correct, Your Honor.

9 THE COURT: I'll execute that.

10 Mr. Hellman, on your Motion to Intervene, is
11 it sufficient to do a Form 4 on that one?

12 MR. HELLMAN: It is, Your Honor. Ultimately,
13 we just want a seat at the table at the foreclosure.

14 THE COURT: Sure. I'm with you. You-all hold
15 the second mortgage. That certainly entitles you to
16 sit there.

17 MR. HELLMAN: Thank you.

18 THE COURT: As to the debt then have you-all
19 had a chance to look at that?

20 MR. YOUNG: I took a look at the proposed
21 order Friday and again today, and it looked to me
22 like it had been calculated properly.

23 THE COURT: All right, sir. I'm just looking
24 at this affidavit. Were you-all getting monthly
25 interest payments; is that what I'm seeing?

1 MR. BYRD: No. The interest rate changed.
2 There were periodic payments from time to time from
3 the sale of certain properties. It was convoluted.
4 It took forever to figure out.

5 THE COURT: So the interest rate was
6 fluctuating?

7 MR. BYRD: Fluctuating throughout the four
8 years -- three years that this case has been pending.

9 THE COURT: The term and then as sales were
10 made you-all were applying it towards the debt?

11 MR. BYRD: Yes. And of course we had to apply
12 it -- figure out what was -- what the interest rate
13 was and whether the interest rate had changed during
14 that period.

15 THE COURT: It can be done.

16 MR. BYRD: It can be done, but it has to be
17 done by hand.

18 THE COURT: I'm with you. So when it comes
19 due the total due on the debt is just over
20 \$5.9 million? That's 5,775,000 in principal and
21 132,000 they accrued in unpaid interest; is that
22 right?

23 MR. BYRD: That's correct, Your Honor.

24 THE COURT: Very good. And the current
25 attorneys' fees figures are somewhere around 32,305;

1 is that what I'm seeing?

2 MR. BYRD: Yes, sir.

3 THE COURT: You want to submit an order to
4 that effect, or is that in here?

5 MR. BYRD: I have not submitted an order to
6 that effect. I can hand one up.

7 THE COURT: Any objection to those figures
8 from anybody? Okay. Very good. Do you want to turn
9 that in?

10 We'll set the sale -- I usually set the sales
11 some 45 to 60 days, so if you want to set the sale
12 for the 1st of August, is that what you're looking
13 at, and we'll bring this thing to a close? We'll do
14 that.

15 Mr. LaPlante, I sell on the first Tuesday of
16 each month. August is Tuesday August the 1st, so
17 we'll set it up for sale at that time. You should
18 get -- I would think you're going to get a buyer.
19 Apparently the second mortgage is looking to pay it
20 in, so yes, you-all would be entitled to a credit bid
21 on the amount of your debt. If somebody outbids you
22 more power to you.

23 MR> LaPLANTE: Thank you, Your Honor.

24 MR. BYRD: I'll submit an order -- it will be
25 tomorrow -- along with a Notice of Sale. We prepare

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the Notices of Sale in Charleston now, right?

THE COURT: Yes. Yes. Very good. All right,
gentlemen. Thank you-all for coming today. Good to
see you-all.

(The proceedings were concluded at 3:36 p.m.)

1 State of South Carolina)
2 County of Charleston) C E R T I F I C A T E
3

4 I, Christine A. Smith, Court Reporter and
5 Notary Public for the State of South Carolina at
6 Large, do hereby certify that the foregoing
7 transcript is a true, accurate, and complete record.

8 I further certify that I am neither related to
9 nor counsel for any party to the cause pending or
10 interested in the events thereof.

11 Witness my hand, I have hereunto affixed my
12 official seal this 21st day of June, 2017 at
13 Charleston, Charleston County, South Carolina.
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16

17 
18 Christine A. Smith
19 Notary Public
20 My Commission Expires
21 May 12, 2021
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I N D E X

Page

WITNESS/EXAMINATION

C E R T I F I C A T E

34

E X H I B I T S

Page

EXH. #1, Transcript of Record

16

EXH. #2, Order

18

EXH. #4, Promissory Note

19

EXH. #5, Second Mortgage

20

EXH. #6, Third Amended and Restated

21

Operating Agreement of Penny Creek

Associates, LLC

EXH. #1-A, Color Map

22

EXHIBIT H

**STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON**

Wells Fargo Bank, N.A., as Successor by
Merger to Wachovia Bank, National
Association, as Successor by Merger to First
Union National Bank,

Plaintiff,

vs.

Penny Creek Associates, L.L.C. a/k/a Penny
Creek Associates, LLC; Michel F. LaPlante
a/k/a Michel Laplante a/k/a Mitch Laplante;
Charlotte R. Zurlo; Eugene J. Zurlo; Charlotte
R. Zurlo and Eugene J. Zurlo, as Co-Trustees
of The Nicklaus Lane Realty Trust No. 1 under
Declaration of Trust dated May 22, 1998, and
The Zurlo Investment Trust No. 1 pursuant to
trust agreement dated August 10, 1998;
Fenwick Hall Plantation Property Owners
Assn., Inc. a/k/a Fenwick Hall Plantation
Property Owners' Association, Inc.; Preserve
at Fenwick Hall Property Owners Association,
Inc. a/k/a The Preserve at Fenwick Hall
Property Owners' Association, Inc.; and The
Grove At Fenwick Plantation Condominium
Association, Inc.,

Defendants.

Michel Laplante,

Third-Party Plaintiff,

vs.

The Eugene J. Zurlo Living Trust, Dated
December 11, 1997,

Third-Party Defendant.

IN THE CIRCUIT COURT

Case No. 2014-CP-10-04946

**MASTER-IN-EQUITY'S ORDER AND
JUDGMENT OF FORECLOSURE AND
SALE**

**(Deficiency Not Waived;
not HAMP eligible)**

FILED
2017 JUN 23 PM 2:52
JULIE J. ARMSTRONG
CLERK OF COURT

Pursuant to Rules 53 and 71, SCRCP, the above-entitled matter was referred to the undersigned to make appropriate findings of fact and conclusions of law with authority to enter a final judgment in the cause.

Pursuant to the said reference, a hearing was held on June 19, 2017, and attended by the following persons:

Robert C. Byrd – Attorney for the Plaintiff
Thomas B. Pritchard – Attorney for Defendant Penny Creek Associates, LLC
J. Rutledge Young, Jr. – Attorney for Defendants Charlotte R. Zurlo and Eugene J. Zurlo, individually and as Co-Trustees of The Nicklaus Lane Realty Trust No. 1 under Declaration of Trust dated May 22, 1998, and The Zurlo Investment Trust No 1 pursuant to trust agreement dated August 10, 1998 (severed from the foreclosure claim)
Defendant Michel F. Laplante (severed from the foreclosure claim)
Brian Hellman – Attorney for Intervenor 1776, LLC
J. Christopher Lanning – Manager of Penny Creek Associates, LLC

Based on the evidence presented at the hearing, I hereby find, conclude and order as follows:

FINDINGS OF FACT

1. The Lis Pendens, Summons, Complaint and Notice of Intent to Refer were filed August 14, 2014.
2. Service was made upon the defendants in this action, as is shown by the proofs of service filed herein.
3. Defendant Michel F. LaPlante a/k/a Michel Laplante a/k/a Mitch Laplante ("LaPlante") filed a Motion for Injunction on August 29, 2014.
4. Defendant LaPlante filed a Motion for Temporary Restraining Order on September 9, 2014, and the Order denying said motion was entered on September 19, 2014.



5. Defendants Fenwick Hall Plantation Property Owners Assn., Inc. a/k/a Fenwick Hall Plantation Property Owners' Association, Inc.; Preserve at Fenwick Hall Property Owners Association, Inc. a/k/a The Preserve at Fenwick Hall Property Owners' Association, Inc.; and The Grove At Fenwick Plantation Condominium Association, Inc. (collectively, the "POA Defendants") filed an Answer and Counterclaim on September 29, 2014.

6. Defendants Charlotte R. Zurlo and Eugene J. Zurlo filed a Memorandum in Opposition to defendant LaPlante's Motion for Injunction on September 29, 2014.

7. Defendants Charlotte R. Zurlo, Eugene J. Zurlo, and Charlotte R. Zurlo and Eugene J. Zurlo, as Co-Trustees of The Nicklaus Lane Realty Trust No. 1 under Declaration of Trust dated May 22, 1998, and The Zurlo Investment Trust No. 1 pursuant to trust agreement dated August 10, 1998 (collectively, the "Zurlo Defendants"), filed an Answer and Cross Claim on October 16, 2014.

8. Defendant LaPlante filed an Answer, Cross Claims, and Third-Party Claims on October 27, 2014.

9. Defendant Penny Creek Associates, L.L.C. a/k/a Penny Creek Associates, LLC ("Penny Creek") and The Grove at Fenwick Plantation, LLC filed an Answer on November 6, 2014.

10. Defendant LaPlante filed a Reply to the Zurlo Defendants' Cross-Claims on November 10, 2014.

11. Third-party defendant Paul Zurlo filed a Motion to Dismiss defendant LaPlante's Third-Party Complaint on November 25, 2014.

12. Third-party defendant Eugene J. Zurlo Living Trust filed an Answer to defendant LaPlante's Third-Party Complaint on November 26, 2014.

13. The Plaintiff's Reply to the POA Defendants' Answer and Counterclaim was filed on December 4, 2014.

14. Defendant LaPlante filed Memoranda on January 15, 2015, in opposition to the Plaintiff's Motion to Strike Jury Demand and to Refer and in opposition to third-party defendant Paul Zurlo's Motion to Dismiss.

15. The Plaintiff filed a Memorandum of Law in support of its Motion to Refer on January 16, 2015.

16. Third-party defendant Paul Zurlo filed an Answer to Third-Party Complaint on January 30, 2015.

17. The Order granting Plaintiff's Motion to Refer was entered on March 5, 2015.

18. Defendant LaPlante filed a Motion on March 23, 2015, seeking to alter or amend the Order granting the Plaintiff's Motion to Refer.

19. The Zurlo Defendants filed an Amended Answer and Cross Claim on April 15, 2015.

20. Defendant LaPlante filed a Reply to the Cross-Claims of the Zurlo Defendants on April 27, 2015.

21. The Order denying defendant LaPlante's Motion to Alter or Amend the Order granting Plaintiff's Motion to Refer was entered on June 3, 2015.

22. Defendant LaPlante filed a Notice of Appeal on July 6, 2015, appealing the Order granting Plaintiff's Motion to Refer.

23. The Stipulation dismissing the third-party complaint against Paul Zurlo with prejudice was filed on July 17, 2015.



24. The Plaintiff filed a Motion to Dismiss defendant LaPlante's appeal in the Court of Appeals on August 4, 2015.

25. The Order granting the Plaintiff's Motion to Dismiss Appeal was entered by the Court of Appeals on October 20, 2015.

26. The Plaintiff's Motion for Partial Summary Judgment and Supporting Affidavit were filed on February 2, 2016.

27. The Stipulation was filed on May 26, 2016, dismissing the claims relating to The Grove at Fenwick Plantation loan and dismissing defendant The Grove at Fenwick Plantation, LLC as a party defendant.

28. The case originally asserted four (4) causes of action, two of which related to a loan by the Plaintiff to The Grove at Fenwick Plantation, LLC (the "Fenwick Loan"). During the course of the action, the Fenwick Loan was paid off and the parties stipulated to the dismissal of the two claims relating to that loan. Only the claims relating to loan to defendant Penny Creek remain.

29. The Consent Order Striking Case from Trial Docket Pursuant to Rule 40(j), SCRCP was filed on September 30, 2016.

30. The Notice to Restore Case to Active Trial Docket was filed on April 12, 2017.

31. The Order Restoring Case to Active Trial Docket was entered on April 12, 2017.

32. The Stipulation to Entry of Order and Judgment of Foreclosure and Sale was filed on April 13, 2017; and

33. The Plaintiff's Motion to Sever and for Entry of Stipulated Final Order and Judgment of Foreclosure and Sale was filed on May 25, 2017, which this Court granted on June 19, 2017.

34. The Motion to Intervene was filed by 1776, LLC on June 19, 2017.
35. This Court granted the Plaintiff's Motion to Sever on June 19, 2007.
36. The Court also grants 1776, LLC's Motion to Intervene, as set forth more fully hereinafter.
37. All parties were notified of the date, time and place of the hearing in this matter.

The \$5,300,000.00 Loan

38. Defendant Penny Creek, for consideration, made, executed and delivered that certain Promissory Note dated August 7, 2000 ("Original Note 1"), payable to the order of First Union National Bank ("First Union"), in the original principal sum of \$5,300,000.00, together with interest as provided therein.

39. To secure payment of the indebtedness evidenced by Original Note 1, in accordance with the terms and conditions thereof, defendant Penny Creek, for consideration, made, executed and delivered to First Union a certain Mortgage and Absolute Assignment of Leases dated August 7, 2000 ("Mortgage 1"), covering certain real property located in Charleston County, South Carolina and described more fully therein. Mortgage 1 was recorded in the RMC Office for Charleston County on August 8, 2000, in Book P-352 at Page 613. Other terms and conditions are stated in the said Mortgage 1, which is of record herein.

40. Wells Fargo Bank, N.A. is the successor by merger to Wachovia Bank, National Association who is the successor by merger to First Union and is the sole owner and holder of Original Note 1, Mortgage 1, and all other related loan documents.

41. Certain terms of the Original Note 1 were amended, modified and/or renewed by, among other things, that certain renewal Promissory Note dated April 28, 2008, in the original



principal sum of \$3,142,781.92 ("Renewal Note 1"). (Original Note 1 and Renewal Note 1 are hereinafter referred to, collectively, as "Note 1.")

The \$2,200,000.00 Loan

42. Defendant Penny Creek, for consideration, made, executed and delivered that certain Promissory Note dated April 5, 2006 ("Original Note 2"), payable to the order of the Plaintiff, then known as Wachovia Bank, National Association, in the original principal sum of \$2,200,000.00, together with interest as provided therein. Other terms and conditions are stated in the said Original Note 2, which is of record herein.

43. To secure payment of the indebtedness evidenced by Original Note 2, in accordance with the terms and conditions thereof, defendant Penny Creek, for consideration, made, executed and delivered to the Plaintiff a certain Mortgage and Assignment of Rents dated April 5, 2006 ("Mortgage 2"), covering certain real property located in Charleston County, South Carolina and described more fully therein. Mortgage 2 was recorded in the RMC Office for Charleston County on April 7, 2006, in Book G-579 at Page 249. Other terms and conditions are stated in the said Mortgage 2, which is of record herein. (Mortgage 1 and Mortgage 2 are hereinafter referred to, collectively, as the "Mortgages.")

44. Certain terms of Original Note 2 were thereafter amended, modified and/or renewed by: (i) that certain renewal Promissory Note dated July 5, 2007, in the original principal sum of \$4,450,000.00; and (ii) that certain Modification Number One to Promissory Note dated April 28, 2008 (collectively, "Renewal Note 2"). Other terms and conditions are stated in the said Renewal Note 2, which is of record herein. (Original Note 2 and Renewal Note 2 are hereinafter referred to, collectively, as "Note 2.")



45. Thereafter, Mortgage 2 was amended and/or modified by that certain Modification of Mortgage and Notice of Future Advance dated July 5, 2007, and recorded in the RMC Office for Charleston County on July 27, 2007, in Book V-633 at Page 342. Other terms and conditions are stated in the said Modification of Mortgage and Notice of Future Advance, which is of record herein.

2009 Modification and Consolidation

46. Thereafter, certain terms of Note 1 and Note 2 were amended, modified and/or renewed by, among other things, that certain renewal Promissory Note dated July 28, 2009, in the original principal sum of \$7,592,781.92, which, among other things, consolidated Note 1 and Note 2 (collectively, the "Note"). Other terms and conditions are stated in the said Note, which is of record herein.

47. In order to induce the Plaintiff to modify or extend the aforesaid loan as evidenced by the Note, and to further secure the same, defendants LaPlante and the Zurlo Defendants, for consideration, executed separate, written Unconditional Guaranties dated July 28, 2009 (collectively, the "Guaranties"), whereby the said defendants absolutely, unconditionally and irrevocably guaranteed to the Plaintiff the full and prompt payment of the obligations of defendant Penny Creek to the Plaintiff under the Note, as consolidated. Other terms and conditions are stated in the said Guaranties, which are of record herein.

2012 and 2013 Modifications

48. Thereafter, certain terms of the Note were amended, modified and/or renewed by: (i) that certain First Modification to Promissory Note dated August 14, 2012; and (ii) that certain Second Modification to Promissory Note dated May 23, 2013 (collectively, the "Note



Modifications"). Other terms and conditions are stated in the said Note Modifications, which are of record herein.

49. In connection with the aforesaid modifications, Mortgage 1 and Mortgage 2 were amended and/or modified by that certain Modification of Mortgages dated October 1, 2012 (the "Mortgage Modification"), and recorded in the RMC Office for Charleston County on October 15, 2012, in Book 0284 at Page 614. Other terms and conditions are stated in the said Mortgage Modification, which is of record herein.

50. Under the express terms of the aforesaid Mortgage Modification, Mortgage 1 and Mortgage 2 (collectively, the "Mortgages") secure the Note in its entirety.

51. Certain portions of the subject mortgaged properties were thereafter released from the lien of the Mortgages, as amended and/or modified, which remains in full force and effect as to the remaining property described in the said Mortgages (the "Property").

**Loan Defaults, Forbearance Agreement and Stipulation
to Entry of Order and Judgment of Foreclosure and Sale**

52. The obligations under the terms and conditions of the Note are in default for, among other reasons, failing to repay the indebtedness in accordance with the terms thereof, including without limitation failing to repay the loan in full at maturity on April 18, 2014. The defendants have been duly notified, in writing, of the outstanding defaults.

53. In May 2016, the Plaintiff and defendants Penny Creek, LaPlante and the Zurlo Defendants entered into that certain Forbearance Agreement dated as of May 4, 2016 (the "Forbearance Agreement"), wherein the said defendants agreed and acknowledged, among other things, that the subject loan is in default and further agreed to execute the Stipulation to Entry of Order and Judgment of Foreclosure and Sale attached as Exhibit A to the Forbearance Agreement. Other terms and condition are stated in the said Forbearance Agreement, which is of record herein.

54. Pursuant to and in reliance upon the Forbearance Agreement and Stipulation, the case was removed from the active calendar pursuant to Rule 40(j), with leave to restore, by Consent Order entered on September 30, 2016.

55. The forbearance period set forth in the Forbearance Agreement expired on March 31, 2017, and the case was restored to active calendar on April 12, 2017.

56. The Plaintiff is entitled to proceed with foreclosure of its Mortgages, as amended and/or modified.

57. The Plaintiff's Mortgages constitute valid first priority liens on the Property.

58. Subsequent to the commencement of this action, the Eugene J. Zurlo Living Trust Dated December 11, 1997 (the "1997 Zurlo Trust") recorded a Second Mortgage on the subject Property in the Office of the RMC for Charleston County on May 25, 2016, in Book 0556 at Page 242 (the "Second Mortgage").

59. The Second Mortgage arose out of that certain Settlement Agreement between the 1997 Zurlo Trust and defendant Penny Creek Associates, LLC, the terms of which Settlement Agreement were entered on the record before The Honorable Markley Dennis, Jr. on February 29, 2016, in Case No. 2013-CP-10-07280. A copy of the transcript from the February 29, 2016 hearing before Judge Dennis in Case No. 2013-CP-10-07280, together with a copy of the Second Mortgage and the promissory note it secures, were presented to this Court and have been made a part of the record herein.

60. In accordance with the terms of the Settlement Agreement, the 1997 Zurlo Trust and its successor and assigns are only entitled to recover the principal sum of \$3,250,000.00, without any interest.

61. The Second Mortgage was assigned from the 1997 Zurlo Trust to 1776, LLC

pursuant to that certain Assignment of Note and Mortgage recorded in the Office of the RMC for Charleston County on April 7, 2017, in Book 629 at Page 45, a copy of which was presented to this Court and has been made a part of the record herein.

62. The parties to the foreclosure hereby consent to the joinder of 1776, LLC as a party defendant on the following express terms and conditions, which are hereby adopted and ordered by this Court:

a. That 1776, LLC expressly acknowledges and stipulates that the lien of its Second Mortgage is junior and subordinate to the lien of the Plaintiff's Mortgages;

b. That 1776, LLC further acknowledges and stipulates that it is bound by the terms of the Stipulation to Entry of Order and Judgment of Foreclosure and Sale filed on April 13, 2017; and

c. That all parties to the foreclosure, including 1776, LLC, consent to the immediate disposition of the foreclosure proceeding, expressly waiving the time limitations contained in Rule 40(b), SCRPC.

63. In the Plaintiff's loan documents, defendant Penny Creek agreed to pay all reasonable costs and expenses of collection including, but not limited to, reasonable attorneys' fees. I find and conclude that the sum of Thirty-Two Thousand Three Hundred Five and No/100 Dollars (\$32,305.00) is a reasonable amount to award as Plaintiff's unreimbursed attorneys' fees for services performed and anticipated to be performed until final adjudication of the within action, and that the sum of Two Thousand Six Hundred Sixty-Eight and 50/100 Dollars (\$2,668.50) is a reasonable amount to award as legal costs. In reaching this conclusion, I have carefully considered the nature, extent and difficulty of the legal services provided by Plaintiff's counsel in this commercial foreclosure action, the time and labor necessarily devoted by Plaintiff's

counsel to the case, the professional standing of Plaintiff's counsel and his firm, the fees customarily charged in Charleston County for similar legal services, and the beneficial results obtained by Plaintiff's counsel in this matter.

64. The amount due and owing on the loan evidenced by the Note, as of June 19, 2017, including attorneys' fees and costs of collection, is as follows:

(1)	Principal due	\$5,775,289.35
(2)	Interest on principal only 02/28/17 – 03/29/17 @ 5.75% (30 days @ \$922.44205 per day)	\$ 27,673.26*
(3)	Interest on principal only 03/30/17 – 03/31/17 @ 6.00% (2 days @ \$962.54823 per day)	\$ 1,925.09*
(4)	Interest on principal only 04/01/17 – 04/29/17 @ 8.00% (29 days @ \$1,283.39763 per day)	\$ 37,218.53**
(5)	Interest on principal only 04/30/17 – 05/29/17 @ 8.00% (30 days @ \$1,283.39763 per day)	\$ 38,501.93**
(6)	Interest on principal only 05/30/17 – 06/19/17 @ 8.00% (21 days @ \$1,283.39763 per day)	\$ 26,951.35**
(7)	Legal Fees	\$ 32,305.00
(8)	Legal Costs	\$ <u>2,668.50</u>
	Total Debt Secured by Mortgages:	\$5,942,533.01

* Interest accruing at forbearance period rate of Prime plus 2.00%. It is a variable rate that has been and is subject to change.

** Interest accruing at default rate of Prime + 1% + 3.00%. It is a variable rate that has been and is subject to change.

Interest for the period from June 19, 2017, through the date of this judgment at the rate of 8.00% per annum shall be added to the above stated Total Debt Secured by Mortgages to comprise the amount of the judgment debt entered herein, and interest after the date of judgment at the same rate shall be added to such judgment debt to comprise the amount of the debt through the date to which such interest is computed.

65. Inasmuch as the Plaintiff has not waived deficiency, the bidding will remain open for thirty (30) days after the sale, unless waived by the Plaintiff, in writing, prior to the sale.

CONCLUSIONS OF LAW

1. The Plaintiff should have judgment of foreclosure of its Mortgages, as amended and/or modified.
2. The subject Property should be ordered sold at public auction after due advertisement.
3. The Plaintiff has not waived its right to seek a personal judgment for any deficiency remaining after the sale, but expressly reserves the right to waive deficiency, in writing, prior to the sale.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That there is due to the Plaintiff on the loan secured by the Mortgages, as amended and/or modified, set forth in the Complaint the sum of **Five Million Nine Hundred Forty-Two Thousand Five Hundred Thirty-Three and 01/100 Dollars (\$5,942,533.01)** representing the "Total Debt Secured By Mortgages" due the Plaintiff as set out in paragraph 64 hereinabove, together with interest after the aforesaid date at the rate of 8.00% per annum and thereafter, in the event of a deficiency judgment, at the legal rate of interest for judgments.
2. That the party or parties liable for the aforesaid debt, shall, on or before the date of sale of the Property hereinafter described, pay to the Plaintiff or its attorneys the amount of the debt owed as aforesaid, together with the costs and disbursements of this action.
3. That on default of payment at or before the time herein indicated, the Property be sold by the undersigned Master-in-Equity or his designee, at public auction, at the Charleston County Courthouse, in the City of Charleston, County and State aforesaid; on some convenient Sales Day hereafter as set by the Court, on the following terms, that is to say:



a. **FOR CASH:** The Master-in-Equity will require a deposit of five (5%) percent on the amount of the bid, in cash or its equivalence, same to be applied on the purchase price only upon compliance with the bid, but in case of non-compliance within thirty (30) days same to be forfeited and applied to the costs and Plaintiff's debt.

b. The sale shall be subject to taxes, assessments, existing easements, and easements and restrictions of record.

c. Purchaser to pay for deed stamps and cost of recording the deed.

d. That if the Plaintiff is the successful bidder at said sale for a sum not exceeding the amount of costs, expenses and the indebtedness of the Plaintiff in full, the Plaintiff may pay to the Master-in-Equity only the amount of the costs and expenses, crediting the balance of the bid on its indebtedness.

e. That if defendant 1776, LLC is the successful bidder at said sale for a sum not exceeding the amount of costs, expenses, the indebtedness of the Plaintiff in full, and the indebtedness owed on the Second Mortgage, the Plaintiff may pay to the Master-in-Equity only the amount of the costs, expenses, and the full amount of the Plaintiff's indebtedness, crediting the balance of the bid against its own indebtedness.

4. Inasmuch as the Plaintiff has not waived deficiency, the bidding will remain open for thirty (30) days after the sale, unless waived by the Plaintiff, in writing, prior to the sale.

5. That the Master-in-Equity will, by advertisement according to law, give notice of the time and place of such sale, and the terms thereof; and will execute to the purchaser or purchasers a deed to the Property sold. The Plaintiff or any other party to this action may become a purchaser at such sale, and if, upon such sale being made, the purchaser or purchasers should fail to comply with the terms thereof within thirty (30) days after date of sale, then the Master-in-

Equity may advertise the said Property for sale on the next or some other subsequent Sales Day, as set by the Court, at the risk of the former highest bidder, and so from time to time thereafter until a full compliance shall be secured.

6. That the Master-in-Equity shall apply the proceeds of the sale of the Property as follows:

FIRST: To payment of the amount of costs and expenses of this action;

NEXT: To the payment to Plaintiff or its attorney of the amount of debt owed to Plaintiff and interest, so much thereof as the purchase money will pay on the same; and

NEXT: Any surplus should be held pending further Order of this Court.

7. That the defendants named herein and all persons whosoever claiming under the defendants be forever barred and foreclosed of all right, title, interest and equity of redemption in the subject Property, or any part thereof.

8. That the deed(s) of conveyance made pursuant to said sale shall contain the names of only the Plaintiff, the defendant who was the titleholder of the Property at the time of the filing of the Lis Pendens, and the grantee; and the RMC is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deeds.

9. A description of the Property encumbered by the Mortgages and herein ordered to be sold is attached hereto as Exhibit "A" and Exhibit "A-1".

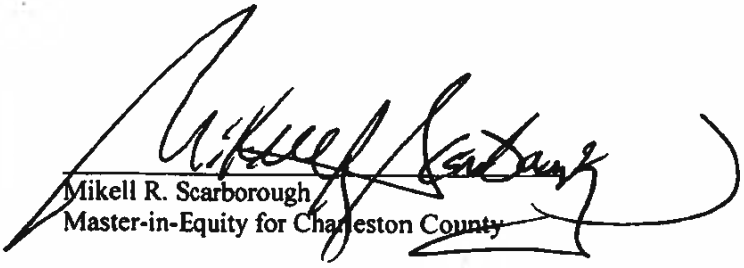
10. That the undersigned Master-in-Equity will retain jurisdiction to do all necessary acts incident to this foreclosure and to hear any post-judgment matters, including, but not limited to, the issuance of a Writ of Assistance.



AND IT IS SO ORDERED.

June 21, 2017

Charleston, South Carolina


Mikell R. Scarborough
Master-in-Equity for Charleston County

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

**EUGENE J. ZURLO, Individually and as
Co-Trustee of the Eugene J. Zurlo Living
Trust Dated December 11, 1997; 1776, LLC;
BEACH FENWICK, LLC; THE BEACH
COMPANY; SEAMON, WHITESIDE &
ASSOCIATES, INC.; PENNY CREEK
ASSOCIATES, LLC; JOHN DOE AND
MARY ROE,**

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **DEFENDANT EUGENE J. ZURLO as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997's FIRST SET OF REQUESTS FOR ADMISSIONS TO PLAINTIFF** has been served upon each of the parties to this action via electronic mail and/or by depositing same in the United States mail, postage prepaid, in an envelope(s) addressed as follows:

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LLC*

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Attorneys for Seamon Whiteside & Associates, Inc.

This 20th day of February 2020.


DUFFY & YOUNG, LLC

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE #: 2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

EUGENE J. ZURLO, Individually and as Co-Trustee
of the Eugene J. Zurlo Living Trust Dated December
11, 1997; 1776, LLC; BEACH FENWICK, LLC;
THE BEACH COMPANY; SEAMON, WHITESIDE
& ASSOCIATES, INC.; PENNY CREEK ASSOCIATES,
LLC; JOHN DOE AND MARY ROE

Defendants,

/

PLAINTIFF'S RESPONSES TO DEFENDANT'S REQUESTS FOR ADMISSION

Plaintiff, MAYBANK 2754, LLC, by and through its undersigned counsel, hereby
responses to Defendant's, EUGENE J. ZURLO, as Co-Trustee of the Eugene J. Zurlo Living
Trust Dated December 11, 1997, Requests for Admission dated February 20, 2020 as follows:

1. Admit.
2. Deny.
3. Admit.
4. Admit.
5. Admit that Michel Laplante was the managing member of Penny Creek Associates, LLC,
and that he resigned and was replaced with Chris Lanning on May 3, 2016 pursuant to the
Order of the Honorable R. Markley Dennis Jr. Deny remaining allegations.
6. Admit.
7. Admit that Exhibit E is a true and accurate copy of the RESOLUTION OF THE SOLE
SHAREHOLDER OF PENNY CREEK ASSOCIATES, LLC dated October 4, 2013.
Admit that Exhibit E created the easement that is the subject of Plaintiff's lawsuit. Deny
the easement is a "Springing Easement". Deny remaining allegations.

8. Deny. Pursuant to the legal and/or equitable doctrines of actual and/or apparent authority, agency, equitable estoppel and waiver, and any other applicable doctrines or principles, when Eugene J. Zurlo signed Exhibit E, the Co-Trustees also became bound to Exhibit E.
9. Deny.
10. Deny.
11. Admit that Exhibit E was not recorded in the RMC office for Charleston County.
Without knowledge as to whether Exhibit E was recorded in the “RDC” office for Charleston County, therefore deny.
12. Admit.
13. Admit that there is no recorded deed specifically from Penny Creek Associates, LLC, as grantor or transferor, to Maybank 2754, LLC, as grantee or transferee, for the real property that is the subject of this case. Deny remaining allegations.
14. Admit.
15. Admit
16. Admit.
17. Admit that paragraph 3b of the ORDERED, ADJUDGED AND DECREED portion of the Order states, “The sale shall be subject to taxes, assessments, existing easements, and easements and restrictions of record.” Deny that Michael Laplante was a defendant in the foreclosure action.
18. Deny all allegations.

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jason@tarokhlaw.com

s/ Jason M. Tarokh
JASON M. TAROKH
S. CAROLINA BAR # 72837

March 10, 2020

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE #: 2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

EUGENE J. ZURLO, Individually and as Co-Trustee
of the Eugene J. Zurlo Living Trust Dated December
11, 1997; 1776, LLC; BEACH FENWICK, LLC;
THE BEACH COMPANY; SEAMON, WHITESIDE
& ASSOCIATES, INC.; PENNY CREEK ASSOCIATES,
LLC; JOHN DOE AND MARY ROE

Defendants,

/

**PLAINTIFF' NOTICE OF SERVICE OF PLAINTIFF'S RESPONSES TO
DEFENDANT'S REQUESTS FOR ADMISSION**

Plaintiff, MAYBANK 2754, LLC, by and through their undersigned counsel, hereby
gives notice of serving Plaintiff's Responses to Defendant's, EUGENE J. ZURLO, as Co-
Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997, Requests for
Admission dated February 20, 2020, and this Notice by mailing copies thereof by regular mail
to the following person(s) on March 10, 2020:

Cheryl D. Shoun, Esq.
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s/ Jason M. Tarokh
JASON M. TAROKH
S. CAROLINA BAR # 72837

EXHIBIT C

1 MR. LANNING: That's correct, Your Honor.

2 THE COURT: Very good. From that standpoint
3 no objection, and Mr. Hellman, you-all are certainly
4 agreeable to seeing that the sale goes through as
5 expeditiously as possible I imagine?

6 MR. HELLMAN: Yes, Your Honor.

7 THE COURT: Since you-all aren't even clicking
8 away at interest, are you?

9 MR. HELLMAN: We're not clicking away at
10 interest, and obviously the more their interest
11 clicks away the more it raises the bar.

12 THE COURT: I'm with you. I'm with you. So
13 with that understanding then Mr. --

14 MR. BYRD: Your Honor, again, I don't have a
15 problem with them going it. I just don't want it to
16 extend the foreclosure.

17 THE COURT: Delay your timeframe.

18 MR. BYRD: Unanticipated.

19 THE COURT: Very good. Okay. Mr. LaPlante,
20 you had a question about that?

21 MR. LaPLANTE: Is it possible to find out
22 who -- I know it's an LLC, but who -- is it a shell
23 from Mr. Zurlo? Who was in the LLC?

24 THE COURT: I don't know. I just know they're
25 the holder of the mortgage.

1 MR. LaPLANTE: Your Honor, I have a few other
2 points if you would let me ask the questions? I
3 don't deny that Mr. Zurlo is owed the three and a
4 quarter million dollars. I never have denied it over
5 the 16 years I've worked on the project. I've never
6 said -- when Mr. Young said that I would not sign for
7 it -- I never said such a thing.

8 I would not sign the document that was there
9 because Mr. Zurlo and Mr. Young have spent the last
10 four years of my life making it miserable and
11 misleading. I would have never agreed to a mortgage
12 that would have been assigned, for one. The concern
13 I had with the second mortgage was Mr. Zurlo had a
14 pattern of saying things and not following through.
15 He proved it correct when we had contracts. He would
16 not release the second mortgage or agree to the
17 second mortgage on the contracts we had therefore
18 gumming up the works.

19 His comment to me early on was that he was
20 going to force it into foreclosure, buy it, and
21 squeeze me out. That looks like what's happening.
22 I'm a big guy. I've accepted that.

23 The second mortgage being sold, I would have
24 never agreed to selling a second mortgage. If I'm
25 responsible for half the payments of the second

1 mortgage -- Mr. Lanning never reviewed it with me.

2 It was signed without my knowledge.

3 THE COURT: You didn't have to. You had lost
4 all control by then, Mr. LaPlante. After that
5 settlement agreement on February 29th it looks like
6 you gave up any sort of management control at that
7 time. Okay? That was part of you-all's agreement.

8 MR. LaPLANTE: But I had no right to see the
9 second mortgage or approve it?

10 THE COURT: No, sir. That was Mr. Lanning's
11 job.

12 MR. LaPLANTE: Poorly done.

13 THE COURT: Maybe so. That's what we call
14 settlement agreements. Do you want me to read to you
15 what Judge Dennis said? I agree with him
16 100 percent. Here's what Judge Dennis said on
17 February 29, 2016 when you-all put the agreement on
18 the record:

19 "Very well. Thank you, gentlemen. I thank
20 the parties as well.

21 "As a mentor more indirectly than directly,
22 since that I different forum, but Judge Blatt, who
23 everyone, both the attorneys here knows and respects,
24 has always said that that's not always the best thing
25 in the world, both sides are not exactly satisfied,

1 I'm sure, but that's what settlement entails, and I
2 commend you and I commend your lawyers for the
3 professionalism that they have demonstrated as I
4 stated to them.

5 "One of the things that I learned early on in
6 this job, I was privileged to be a lawyer in this
7 State for 21 years before I assumed this
8 responsibility, and one of the things that's a joy is
9 to have an opportunity to work with persons that I
10 respect so highly, and these certainly have held to
11 that standard, and I thank you them (sic) for that.
12 It's a privilege. Thank you. Good luck to all the
13 parties."

14 He said that in February of '16, and I'll say
15 it in June of '17. Anyway, it looks like we're
16 heading towards the end of this matter. I'm going to
17 approve the Motion to Sever. I'm going to allow the
18 Motion to Intervene. It's a permissive intervention,
19 so I'll grant both of those motions. It doesn't
20 sound like there's any objection.

21 Let's set the sale for August 3rd, I think it
22 is; is that right?

23 MR. BYRD: I think so, Your Honor.

24 THE COURT: Or August 1st. I think it's
25 August 1st, isn't it? We'll set the sale out to then

EXHIBIT D

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE #: 2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

EUGENE J. ZURLO, Individually and as Co-Trustee
of the Eugene J. Zurlo Living Trust Dated December
11, 1997; 1776, LLC; BEACH FENWICK, LLC;
THE BEACH COMPANY; SEAMON, WHITESIDE
& ASSOCIATES, INC.; PENNY CREEK ASSOCIATES,
LLC; JOHN DOE AND MARY ROE

Defendants,

/

**PLAINTIFF'S NOTICE OF FILING ORDER EXHIBITS IN SUPPORT OF ITS
MOTION FOR TEMPORARY INJUNCTION**

Plaintiff, MAYBANK 2754, LLC, by and through its undersigned attorney, hereby
gives notice of filing exhibits in support of its motion for temporary injunction. True and correct
copies of the exhibits are attached hereto.

TAROKH LAW, PLLC
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jason@tarokhlaw.com

s/ Jason M. Tarokh
JASON M. TAROKH
S. CAROLINA BAR # 72837

June 23, 2020

EELECTRONICALLY FILED--2020 Aug 12 12:16 PM--CHAMPLAIN--CCO/M/M/KON/P/LEAS--CASE#2020CP10002299

WHEREAS, the Company is the sole member of Maybank 2754, LLC, a South Carolina limited liability company (the “Maybank 2754, LLC”); and

WHEREAS, pursuant to the Agreement, the Company hereby certifies that the Company has complied with all provisions of the Company operating documents, with respect to the aforementioned sale, assignment and/or transfer of the Company Membership Interest in the Maybank 2754, LLC to the Purchaser, in consideration of Four Hundred Thousand and no/100 Dollars (\$400,000.00) and that the Members of the Company consent to the same; and

NOW THEREFORE IT IS RESOLVED, that the Company approves the Agreement; the sale, assignment, transfer and conveyance of Membership Interest in the Company thereunder; and any and all other documents necessary to facilitate the Company's execution of the Agreement and its compliance with the transactions contemplated thereunder.

BE IT FURTHER RESOLVED, that upon the completion of Pitch Fork Road, the Company shall grant to Purchasers, their successors and assigns, an access easement for pedestrian and vehicular ingress, egress and access to, from and over that portion of the lands of the Company known as "Residual Tract B-2-2" as shown on that plat by Richard D. Lacy, entitled "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895 ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES)," having been recorded in Plat Book EH, page 817 in the Charleston County RMC Office on March 25, 2005 ("30' Private R/W"), the location and condition of which shall be mutually agreed upon at a future date.

BE IT FURTHER RESOLVED, that Michel F. Laplante in his capacity as Manager of the Company is hereby authorized to execute and deliver on behalf of the Company any and all agreements, assignments, satisfactions, releases, discharges, papers, documents, lending and collateral documents, offers, applications, leases, affidavits, certificates, certifications, verifications, non-disturbance agreements, guaranties, bonds, notes, subordination agreements, security agreements, resolutions, settlement statements, and any and all other contracts, papers or documents required in the course of the execution of the Agreement and the assignment and transfer of Membership Interest in the Company.

MEMBERS:

CONTRACT FOR ASSIGNMENT OF INTEREST

THIS CONTRACT FOR ASSIGNMENT OF INTEREST (this "Agreement") is made and entered into this 1 day of October, 2013, by and between John H. Laplante, Michel F. Laplante, Peter F. Laplante, Marianne Laplante-Scarlata, or their assigns, (each a "Purchaser" and collectively the "Purchasers") and Penny Creek Associates, L.L.C., a South Carolina limited liability company (the "Seller").

WITNESSETH:

WHEREAS, the Seller is the sole member of Maybank 2754, LLC, a South Carolina limited liability company (the "Company"); and

WHEREAS, the Company is not governed by a written operating agreement;

WHEREAS, on the terms and subject to the conditions of this Agreement, Purchasers desire to purchase One Hundred and No/100 (100%) Percent of Seller's membership interest in the Company, and Seller desires to sell and assign such One Hundred and No/100 (100%) Percent of its membership interest in the Company to Purchasers (the "Assignment"); and

WHEREAS, Purchasers and Seller now desire to memorialize the terms and conditions and respective rights, duties and obligations of the Purchasers and Seller regarding the Assignment by the provisions hereof and executing this Agreement; and

WHEREAS, the Company is joining in this Agreement for the limited purpose of acknowledging its agreement to the Assignment.

NOW, THEREFORE, in consideration of the forgoing and the mutual promises and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by Purchasers and Seller, the undersigned, intending to be legally bound, hereby agree as follows:

ARTICLE I Assignment of Interest

Section 1.1. Assignment of Interest. On the terms and subject to the conditions set forth in this Agreement, Seller hereby agrees to sell, assign, transfer and deliver to Purchasers on the "Closing Date" (hereinafter defined), and Purchasers agree to purchase from Seller on the Closing Date, One Hundred and No/100 (100%) Percent of Seller's membership interest in the Company, including any and all associated financial and voting rights in the Company (such assets being hereinafter collectively referred to as the "Interest"). Said Interest being the entire outstanding membership interest of the Company.

Section 1.2. Assumption of Liabilities. It is hereby expressly understood and agreed that Purchasers do not assume or agree hereunder to pay, perform or discharge any debt, obligation or liability of Seller of any kind or nature whatsoever nor shall the Interest be subject to any such debt, obligation or liability.

Section 1.3. Purchase Price. On the terms and subject to the conditions set forth in this Agreement, Purchasers shall pay to Seller the purchase price of Four Hundred ~~Twenty Five~~ Thousand and No/100 (~~\$425,000.00~~) Dollars ("Purchase Price").

400,000.00

ARTICLE II Closing

Section 2.1. Closing. The closing (the "Closing") of the sale, transfer, assignment and delivery of the Interest, the delivery of the Conveyance Documents pursuant to Section 2.2 of this Agreement, the payment of the Purchase Price, and the delivery of any and all other instruments and certificates required hereunder shall take place on or before 4:00 PM ET, October 4, 2013, at the offices of Buist, Byars & Taylor, LLC, or at such other date or at such other time or place as the parties hereto shall agree to in writing (the date and time of the closing hereunder being referred to herein as the "Closing Date").

Section 2.2. Transfer of Interest. On the Closing Date, Seller shall execute and deliver to Purchasers all such instruments and documents (the "Conveyance Documents") (including, but not limited to the "Assignment of Interest" attached hereto as Exhibit "A,") as shall be requested by Purchasers to effectuate the sale, assignment, transfer and delivery of the Interest from Seller to Purchasers.

ARTICLE III Representations and Warranties

Seller and Purchasers hereby represent and warrant to each other as follows:

Section 3.1. Authorization, Etc. The execution and delivery of this Agreement, the Assignment of Interest and any Conveyance Documents by Seller and Purchasers and the due consummation of the transactions contemplated herein have been duly authorized by all necessary action on the part of Seller and Purchasers. This Agreement has been duly executed and delivered by Seller and Purchasers and constitutes the legal, valid and binding obligations of Seller and Purchasers, enforceable against Seller and Purchasers in accordance with its terms. When executed and delivered pursuant to this Agreement, the Conveyance Documents will be the legal, valid and binding obligations of Seller and Purchasers, enforceable against Seller and Purchasers in accordance with their terms.

Section 3.2. No Violation. Neither the execution and delivery of this Agreement nor the consummation by Seller or Purchasers of the transactions contemplated hereby will constitute a violation of: (a) any agreement(s) or commitment(s) to which they are a party or by which they are bound; (b) any judgment, decree, order, regulation or rule of any court or governmental authority; or (c) any statute or law.

Section 3.3. Consent to Transfer of Membership Interest. The Company has joined in this Agreement for the limited purpose of acknowledging its consent to the Assignment of Interest from Seller to Purchasers, and its agreement to accept the Purchasers as Members of the Company.

Section 3.4. No Other Consents. Except as set forth in Section 3.3 hereto, no consent, approval or authorization of any third party or any federal, state or local or other governmental regulatory agency or authority is required in connection with the execution, delivery and performance of Seller and Purchasers under this Agreement.

Section 3.5. Title to Assets; Encumbrances. Seller has good, valid and marketable title to the Interest, subject to no lien, security interest, encumbrance or other restriction and Seller hereby represents and warrants that the Company has good, valid and marketable title to the Property, subject only to the permitted exceptions" set forth in Exhibit "2" (the "Permitted Exceptions").

ARTICLE IV Conditions to Purchasers' Obligations

Each and every obligation of Purchasers under this Agreement to be performed at or before the Closing Date shall be subject to the fulfillment, at or before the Closing Date, of each of the following conditions:

Section 4.1. Representations and Warranties True; Obligations Performed. (i) The representations and warranties of Seller and Purchasers contained in this Agreement shall be true and correct in all material respects as of the Closing Date with the same force and effect as if made on and as of the Closing Date; (ii) Seller and Purchasers shall have performed and complied in all material respects with all agreements and covenants required by this Agreement to be performed by it prior to the Closing Date; and (iii) Seller shall have delivered the Interest to Purchasers at the Closing.

Section 4.2. No Material Adverse Change. There shall not have occurred any material adverse change since the date of this Agreement in the business, properties, results of operations or business or financial condition of the Company, or the Interest being conveyed by Seller.

Section 4.3. Litigation. No suit, investigation, action or other proceeding shall be threatened or pending against Seller or Company before any court or governmental agency that, in the opinion of counsel for Purchasers, could result in the restraint, prohibition or obtainment of damages or other relief against either Seller or Company in connection with this Agreement or the consummation of the transactions contemplated hereby.

Section 4.4. Conveyance Documents. Seller shall have executed and delivered the Conveyance Documents in form and substance customary and usual for their intended purpose and reasonably satisfactory to Purchasers and its counsel.

Section 4.5. 30' Access Easement. Seller shall grant, transfer, sell and convey to Purchaser, its successors and assigns, an access easement for pedestrian and vehicular ingress, egress and access to, from and over that portion of the lands of Seller known as "Residual Tract B-2-2" as shown on that plat by Richard D. Lacy, entitled "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895 ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES)," having been recorded in Plat Book EH, page 817 in the Charleston County RMC Office on March 25, 2005 ("30' Private R/W"), the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road ("Pitch Fork Road"). Upon the completion of Pitch Fork Road, the Parties hereto shall execute and record an Easement Agreement to memorialize the 30' Private R/W.

ARTICLE V Indemnification

Section 5.1. Indemnification. Seller and Purchasers each hereby indemnify and hold the other harmless and shall defend the other from any and all claims, demands, actions, causes of action, judgments, costs and expenses, including attorneys' fees and court costs arising out of the ownership of the Interest and the operation of the Company; prior to the Closing in the case of Seller's indemnification of Purchasers, and from and after the Closing in the case of the Purchasers' indemnification of Seller.

ARTICLE VI Miscellaneous

Section 6.1. Expenses. The Purchasers and Seller shall pay all expenses incurred in connection with the preparation and execution of the Agreement and in connection with the transactions contemplated hereby as purchasers and sellers customarily pay in Charleston County in similar transactions.

Section 6.2. Survival of Representations, Warranties and Covenants. Each of the representations, warranties, obligations, covenants and agreements of the undersigned included or provided for herein or in any schedule, certificate, or other document delivered pursuant to this Agreement shall survive the consummation of the transactions contemplated by this Agreement, notwithstanding any investigation heretofore or hereafter made by any of them or on behalf of any of them.

Section 6.3. Schedules and Exhibits. Any exhibits and schedules referred to herein and attached hereto are made a part of this Agreement.

Section 6.4. Assignment. This Agreement and all of the provisions hereof shall be binding upon, and inure to the benefit of Seller, Purchasers, and their respective successors, personal representatives, executors, heirs, beneficiaries, and permitted assigns. Purchasers, with the prior written consent of the Company, shall be permitted to assign his rights or delegate their duties pursuant to this Agreement, or any other right, obligation or duty contemplated by this Agreement, in whole or in part.

Section 6.6. Entire Agreement. This Agreement, including the other documents referred to herein which form a part hereof, constitutes the entire agreement and understanding of the parties hereto with respect to the subject matter hereof and supersedes all prior agreements and understandings between the parties with respect to such subject matter.

Section 6.7. Waiver; Amendment. No waiver in any instance by any party of any provision of this Agreement shall be deemed a waiver by such party of such provision in any other instance or a waiver of any other provision hereunder in any instance. This Agreement cannot be modified except in writing signed by the party to be charged.

Section 6.8. Counterparts This Agreement may be executed in more than one counterpart, each such counterpart shall be deemed an original, and all such counterparts shall constitute one and the same agreement. This Agreement shall be effective when executed by all parties, but all parties need not execute the original or the same counterpart.

[Signatures on following page]



COMPANY:
Maybank 2754, LLC



By: Penny Creek Associates, LLC
Its: Sole Member
By: Michel F. Laplante
Its: Manager
Date: 10/7, 2013

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EXHIBIT "A"

(Assignment of Membership Interest and Written Consent in Lieu of a Special Meeting of the
Sole Member of Maybank 2754, LLC)

**ASSIGNMENT OF MEMBERSHIP INTEREST AND
WRITTEN CONSENT IN LIEU OF A SPECIAL MEETING
OF THE SOLE MEMBER OF MAYBANK 2754, LLC**

DATE: October 4, 2013

PARTIES: Penny Creek Associates, L.L.C., a South Carolina limited liability company (the “Transferring Member”) and, John H. Laplante, Michel F. Laplante, Peter F. Laplante, Marianne Laplante-Scarlata, or their assigns or its assigns, (each a “Transferee” or collectively the “Transferees”).

RECITALS:

A. The Transferring Member is the sole member of Maybank 2754, LLC, a South Carolina limited liability company (the “Company”).

B. The Transferring Member has a 100.0% ownership interest in the Company, and is entitled to that percentage of the profits and interim distributions of the Company, and must bear that percentage of the Company’s losses.

AGREEMENTS:

1. **ASSIGNMENT.** By signing this assignment, the Transferring Member assigns and transfers all of its 100.0% interest in the Company to the Transferees, in equal shares. This assignment and transfer includes all of the right, title and interest of the Transferring Member in the profits, losses, and interim distribution of the Company.

2. **ACCEPTANCE.** By signing this assignment, the Transferees accept the assignment and transfer of the interest as a Member of the Company being transferred under this assignment.

3. **CONSIDERATION.** In consideration of the mutual promises and agreements contained in that certain Contract for Assignment of Interest, dated October 4, 2013, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged (“Consideration”), said Consideration to be paid in full and into escrow upon the execution of a certain Contract for Assignment of Interest, by and between the Transferring Member and Transferees, dated October 4, 2013.

4. **TRANSFERRING MEMBER’S REPRESENTATIONS AND WARRANTIES.** The Transferring Member represents and warrants to the Transferees that:

4.1. **Ownership of Interest and Right to Transfer.** The Transferring Member is the sole owner of the interest in the Company being transferred under this assignment, free and clear of any and all liens or encumbrances, and will defend the same against all claims and demands of all persons. The Transferring Member has a good right to transfer the interest as a member of the Company to each Transferee.

4.2. Status of Company. The Company is a limited liability company duly organized, validly existing, and in good standing under the laws of the State of South Carolina and has all powers required to own its assets and property and to carry on its business as now owned and conducted. The Company is not licensed or qualified as a foreign limited liability company in any other state, and the nature of its business does not make such license or qualification necessary.

4.3. Financial Statements. The financial records of the Company, to the extent available, have been furnished to the Transferees (collectively the "Financial Statements") and are in accordance with the books and records of the Company, are based upon regularly accepted accounting principles that have been consistently applied, are complete and correct, and fairly present the financial position and results of operation of the Company as of the dates and for the periods indicated.

4.4. Adverse Changes. There has been no material adverse change in the financial condition of the Company or in the condition of its assets from that reflected in the Financial Statements.

4.5. Liabilities. the Company does not have any material liabilities or obligations of any kind whether accrued, absolute, contingent, or otherwise, and whether or not such liabilities or obligations would have been required to be disclosed on a balance sheet prepared in accordance with generally accepted accounting principles.

4.6. Tax Returns. The Company has filed all tax returns and reports that it is required to file with the appropriate federal, state, and local government agencies. Such returns and reports are accurate and complete, and the Company has paid in full or has made adequate provision for payment of all taxes, interest, penalties, assessments, or deficiencies shown to be due on such returns or reports, claimed to be due by any taxing authority, or otherwise due and owing. The Company has made all withholdings of tax required to be made under all applicable federal, state, and local tax regulations. To the best of the knowledge of the Transferring Member, the provisions for applicable property taxes and/or any applicable payroll taxes payable reflected in the Financial Statements are adequate.

4.7. Assets. The Company has good and marketable title to all of its assets, including but not limited to that certain real property known as "Lot B-3" located in City of Johns Island, Charleston County, South Carolina and as more particularly described in Exhibit "1," attached hereto and incorporated herein by reference (the "Property"), free and clear of all claims and encumbrances, except any liens for taxes not yet due and payable or as disclosed in the financial statements.

4.8. Compliance with Law. To the best of the knowledge and belief of the Transferring Member, the Company is not in violation of any applicable law, ordinance, regulation, order, or requirement relating to its operations.

4.9. Actions and Suits. There are no actions, suits, or proceedings pending or threatened against or affecting the Company at law or in equity or before or by any federal, state, municipal, or other governmental or nongovernmental department, commission, board, bureau, agency, or instrumentality that can reasonably be expected to result in any adverse change in the business, properties, operations, prospects, or assets of the Company or in its condition, financial or otherwise.

4.10. Obligations and Contracts. The Company is not in default in the payment of any of its obligations and is not in breach of the performance of any contract to which it is a party.

4.11. Complete Disclosures. To the best of the knowledge and belief of the Transferring Member, neither this assignment nor any document that has been furnished by the Transferring Member to the Transferees in connection with this assignment contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements in this assignment or in such documents not misleading. There is no fact that materially adversely affects, or, to the best of the knowledge and belief of the Transferring Member, in the future may materially adversely affect, the business, operations, or condition (financial or otherwise) of the Company that has not been set forth in this assignment or in the Financial Statements.

5. TRANSFEREES' REPRESENTATIONS AND WARRANTIES. The Transferees represent and warrant to the Transferring Member, and to the Company, that:

5.1. Investment Intent. The Transferees are acquiring the interest as a member of the Company being transferred under this assignment for investment and not with a view to distribution.

5.2. Securities Law Registration. The Transferees understand that the interest as a member of the Company being transferred under this assignment has not been registered under the Securities and Exchange Act of 1933 or under applicable state securities statutes in reliance upon exemptions from registration. The Transferees also understand that the interest must be held indefinitely, unless it is later registered under the Securities and Exchange Act of 1933 and applicable state securities statutes unless exemptions from registration are otherwise available, and that the Company has no obligation to register the interest. The Transferees agree that the interest will not be offered, sold, transferred, pledged, or otherwise disposed of without registration under the Securities and Exchange Act of 1933 and applicable state securities laws or an opinion of counsel acceptable to the Company that such registration is not required.

6. **30' ACCESS EASEMENT.** As a condition of closing, Transferor agrees to grant, transfer, sell and convey to Transferee, its successors and assigns, an access easement for pedestrian and vehicular ingress, egress and access to, from and over that portion of the lands of Transferor known as "Residual Tract B-2-2" as shown on that plat by Richard D. Lacy, entitled "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895

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9. OWNERSHIP INTEREST. The Members of the Company, their initial capital contributions shall be deemed to have been made, and their voting percentage within the Company shall be as follows:

MEMBERS	VOTING PERCENTAGE
John H. Laplante	50.0%
Michel F. Laplante	25.0%
Peter F. Laplate	12.5%
Marianne Laplante-Scarlata	12.5%
TOTAL	100.0%

10.2. Notice. Any notice or other communication required or permitted to be given under this assignment must be in writing and must be mailed by certified mail, return receipt requested, postage prepaid, addressed to the parties at the addresses set forth herein. All notices and other communications will be deemed to be given at the expiration of three days after the

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10.5. Entire Agreement. This assignment constitutes the entire agreement between the parties pertaining to its subject matter, and it supersedes all prior and contemporaneous agreements, representations, and understandings of the parties. No supplement, modification, or amendment of this assignment will be binding unless executed in writing by all parties.

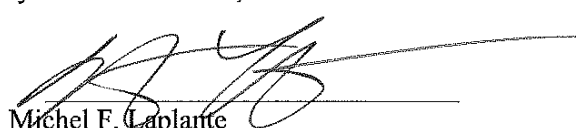
[Signatures on following page]

IT IS SO RESOLVED, APPROVED, AND AGREED THIS 4th DAY OF OCTOBER, 2013.

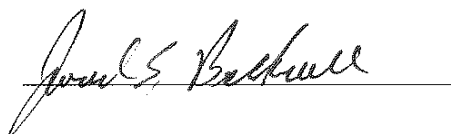
TRANSFERRING MEMBER:

Penny Creek Associates, L.L.C.

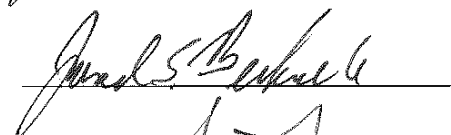


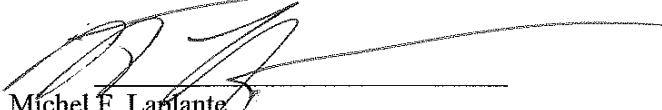

By: Michel F. Laplante
Its: Manager

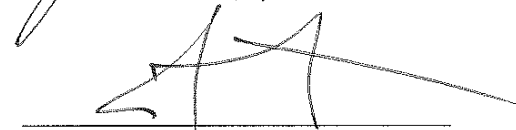
TRANSFERREE:




John H. Laplante




Michel F. Laplante




Peter F. Laplante



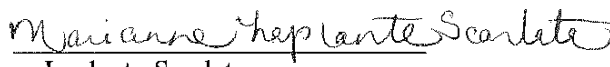

Marianne Laplante-Scarlata

EXHIBIT E

provisions of this section or (iii) of information that Member also has received from a source independent of the Company that the Member reasonably believes obtained that information without breach of any obligation of confidentiality. The Members acknowledge that breach of the provisions of this section may cause irreparable injury to the Company for which monetary damages are inadequate, difficult to compute, or both. Accordingly, the Members agree that the provisions of this section may be enforced by specific performance.

3.7 LIABILITIES TO THIRD PARTIES.

Except as otherwise expressly agreed in writing, no Member or Manager shall be liable for the debts, obligations or liabilities of the Company, including under a judgment decree or order of a court.

3.8 WITHDRAWAL.

A. At any time prior to the death of a Class A Member, a Class A Member may notify the remaining Member of the first Class A Member's desire to withdraw. The notice shall contain the buyout price, terms of payment, and such other commercially reasonable terms as the first Class A Member shall desire ("First Notice"). Upon receipt of the First Notice, the remaining Class A Member shall have sixty (60) days to notify the first Class A Member ("Second Notice") either: (i) that the remaining Class A Member desires to purchase the Membership owned by the first Class A Member for the price and upon such terms established by the first Class A Member; or (ii) that the remaining Class A Member desires to sell its Membership for such price (as adjusted by the Company C.P.A. to reflect capital account differences and percentage interests in Net Profits and Net Losses) and upon such terms. The decision of the remaining Class A Member, set out in the Second Notice, shall be binding upon all Class A Members.

B. In the event that the remaining Class A Member does not deliver the Second Notice to the first Class A Member within said 60 days, the first Class A Member may, within 30 days thereafter, notify the remaining Class A Member ("Third Notice") either (i) that the first Class A Member desires to purchase the Membership owned by the remaining Class A Member for such adjusted price and upon such terms; or (ii) that the first Class A Member desires to sell his Class A Membership for such price and upon such terms to the remaining Class A Member. The decision of the first Class A Member set out in the Third Notice, delivered in accordance with the requirements for notice set out in this Agreement, shall be binding upon the first Class A Member and the remaining Class A Members.

C. If neither the first nor the remaining Class A Member has so notified the other Member(s) of an election to buy, sell, or liquidate within the periods set forth herein, the rights created by the First Notice shall lapse. This procedure can be initiated, however, by any Class A Member again at any time.

D. No Class B Member may withdraw from the Company prior to the date specified in the Articles of Organization for dissolution and any such attempted withdrawal shall be wrongful.

3.9 CLASSES AND VOTING.

Unless otherwise provided by this Operating Agreement, there shall be two classes of Members. The Class "A" Members shall be Eugene Z. Zurlo and Charlotte R. Zurlo, Co-Trustees of the Eugene Z. Zurlo Living Trust dated December 11, 1997 and Michel Laplante. The Class "B" Members shall be

Kenneth E. Fowler, Trustee of the Patricia C. Laplante Trust dated September 1, 2000, Kenneth E. Fowler, Trustee of the John H. Laplante Trust dated September 1, 2000, Kenneth E. Fowler, Trustee of the Marianne E. Laplante Trust dated September 1, 2000, and Kenneth E. Fowler, Trustee of the Peter F. Laplante Trust dated September 1, 2000.

The Class A Members, at a duly authorized annual or special meeting, may elect to establish different classes or group of Members. The following provisions shall apply to each class or group:

A. The rights, powers, or duties of a class or group may be senior to those of one or more existing classes or groups of Members.

B. Prompt notice of the taking of an action under this Operating Agreement that require less than unanimous written consent of the Members and that may be taken without a meeting shall be given to the Members who have not consented in writing to the taking of the action.

C. For the purposes of this section, the taking of an action includes amending this Operating Agreement or creating, under provisions of this Operating Agreement, a class of Membership that was not previously outstanding.

3.10 PLACE AND MANNER OF MEETING.

All meetings of the Members shall be held at such time and place, within or without the State of South Carolina, as shall be stated in the notice of the meeting or in a duly executed waiver of notice thereof. Members may participate in such meetings by means of conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting as provided herein shall constitute presence in person at such meeting, except where a person participates in the meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened.

3.11 CONDUCT OF MEETINGS.

All meetings of the Members shall be presided over by the chairman of the meeting, who shall be a Manager (or representative thereof). The chairman of any meeting of Members shall determine the order of business and the procedure at the meeting, including such regulation of the manner of voting and the conduct of discussion as seem to him in order.

3.12 ANNUAL MEETING.

The annual meeting of the Members for the transaction of all other business which may come before the meeting shall be held on the last week in April in each year (if not a legal holiday and, if a legal holiday, then on the next business day following) at the hour specified in the notice of the meeting. If the annual meeting is not held on the date above specified, the Manager shall cause a special meeting of the Members in lieu thereof to be held as soon thereafter as convenient, and any business transacted or election held at the meeting shall be as valid as if held at the annual meeting. Failure to hold the annual meeting at the designated time shall not work a dissolution of the Company.

3.13 VOTING LISTS.

express provision of the Articles or this Operating Agreement, or by any express provision of the statutes which is applicable to such vote, a different vote is required, in which case the Operating Agreement shall govern and control the decision of such matter. The Members present at a duly organized meeting may continue to transact business until adjournment, notwithstanding the withdrawal of enough Memberships to leave less than a quorum.

3.18 VOTING OF MEMBERSHIP.

On each matter submitted to a vote of the Membership (as opposed to a vote of the Members) each outstanding Class A Membership shall be entitled to vote its percentage interest in the Company as follows:

Eugene J. Zurlo and Charlotte R. Zurlo, Co-Trustees of	
The Eugene J. Zurlo Living Trust dated December 11, 1997	50%
Michel Laplante	50%

Class A Memberships owned by another limited liability company or corporation, the majority of the Memberships or voting stock of which is owned or controlled by this Company, and Class A Memberships held by this Company in a fiduciary capacity shall not be voted, directly or indirectly, at any meeting, and shall not be counted in determining the total Class A Memberships at any given time.

A Class A Member may vote either in person or by proxy executed in writing by the Class A Member or by his duly authorized attorney in fact. No proxy shall be valid after eleven (11) months from the date of its execution unless otherwise provided in the proxy. Each proxy shall be revocable unless the proxy form conspicuously states that the proxy is irrevocable and the proxy is coupled with an interest.

3.19 ACTION WITHOUT MEETING.

Any action required by the Act to be taken at a meeting of the Members, or any action which may be taken at a meeting of the Members, may be taken without a meeting, without prior notice, and without a vote, if a consent or consents in writing, setting forth the action so taken, shall have been signed by the holder or holders of all the Class A Memberships, if more than one class, entitled to vote with respect to the action that is the subject matter of the consent, and such consent shall have the same force and effect as a unanimous vote of the Class A Members. Every written consent pursuant to this section shall be signed, dated and delivered in the manner required by, and shall become effective at the time and remain effective for the period specified by, the Act. A telegram, telex, cablegram, or similar transmission by a Class A Member, or a photographic, photostatic, facsimile, or similar reproduction of a writing signed by a Class A Member, shall be regarded as signed by the Class A Member for purposes of this section.

For purposes of this section, the taking of the action includes amending this Operating Agreement or creating, under provisions of this Operating Agreement, a class of Memberships that was not previously outstanding.

3.20 ASSIGNMENT OF DISTRIBUTIONAL INTEREST.

A. Unless otherwise provided by this Operating Agreement:

EXHIBIT F

**RESOLUTION OF THE SOLE SHAREHOLDER
OF PENNY CREEK ASSOCIATES, L.L.C.**

At a meeting of the Members of Penny Creek Associates, L.L.C. (the "Company") held at the Company's offices in Charleston, South Carolina, the Members of the Company hereby adopt the following resolutions:

WHEREAS, the Company is the sole member of Maybank 2754, LLC, a South Carolina limited liability company (the "Maybank 2754, LLC"); and

WHEREAS, pursuant to the terms and conditions of that certain Contract for Assignment of Interest, dated October 9, 2013, by and between the Company, Inc. (as Seller thereunder) and John H. Laplante, Michel F. Laplante, Peter F. Laplante, Marianne Laplante-Scarlatia, or their assigns (as Purchasers thereunder) (the "Agreement"), the Seller desire to sell, assign, transfer and convey certain Membership Interest in the Company to those certain Purchasers mentioned above and according to the provisions of the Agreement; and

WHEREAS, pursuant to the Agreement, the Company hereby certifies that the Company has complied with all provisions of the Company operating documents, with respect to the aforementioned sale, assignment and/or transfer of the Company Membership Interest in the Maybank 2754, LLC to the Purchaser, in consideration of Four Hundred Thousand and no/100 Dollars (\$400,000.00) and that the Members of the Company consent to the same; and

WHEREAS, as a condition of closing, the Company has agreed to grant, transfer, sell and convey to Purchasers, their successors and assigns, an access easement for pedestrian and vehicular ingress, egress and access to, from and over that portion of the lands of Seller known as "Residual Tract B-2-2" as shown on that plat by Richard D. Lacy, entitled "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895 ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES)," having been recorded in Plat Book EH, page 817 in the Charleston County RMC Office on March 25, 2005 ("30' Private R/W"), the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road ("Pitch Fork Road"). Upon the completion of Pitch Fork Road, the Parties hereto shall execute and record an Easement Agreement to memorialize the 30' Private R/W.

NOW THEREFORE IT IS RESOLVED, that the Company approves the Agreement; the sale, assignment, transfer and conveyance of Membership Interest in the Company thereunder; and any and all other documents necessary to facilitate the Company's execution of the Agreement and its compliance with the transactions contemplated thereunder.

BE IT FURTHER RESOLVED, that upon the completion of Pitch Fork Road, the Company shall grant to Purchasers, their successors and assigns, an access easement for pedestrian and vehicular ingress, egress and access to, from and over that portion of the lands of the Company known as "Residual Tract B-2-2" as shown on that plat by Richard D. Lacy, entitled "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895 ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES)," having been recorded in Plat Book EH, page 817 in the Charleston County RMC Office on March 25, 2005 ("30' Private R/W"), the location and condition of which shall be mutually agreed upon at a future date.

BE IT FURTHER RESOLVED, that Michel F. Laplante in his capacity as Manager of the Company is hereby authorized to execute and deliver on behalf of the Company any and all agreements, assignments, satisfactions, releases, discharges, papers, documents, lending and collateral documents, offers, applications, leases, affidavits, certificates, certifications, verifications, non-disturbance agreements, guaranties, bonds, notes, subordination agreements, security agreements, resolutions, settlement statements, and any and all other contracts, papers or documents required in the course of the execution of the Agreement and the assignment and transfer of Membership Interest in the Company.

The undersigned Members of the Company do hereby certify that as of this 4th day of October, 2013 the above to be a true and correct transcript of the Resolutions passed by the Company at the time and place above stated.

MEMBERS:

 (SEAL)
Michel F. Laplante

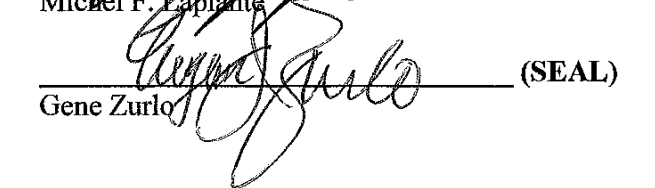
 (SEAL)
Gene Zurlo

EXHIBIT G

**WRITTEN CONSENT IN LIEU OF A SPECIAL MEETING
OF THE CLASS A MEMBERS AND MANAGER
OF PENNY CREEK ASSOCIATES, L.L.C.**

Pursuant to Section 3.19 of PENNY CREEK ASSOCIATES, L.L.C. Third Amended and Restated Operating Agreement and that settlement agreement reached on February 29, 2016, the Class A Members and Manager of PENNY CREEK ASSOCIATES, L.L.C. (the "Company") adopted by unanimous Written Consent the following resolutions:

RESOLVED, that Michel F. Laplante's written resignation as Manager and Designated Agent of the Company is hereby accepted;

FURTHER RESOLVED, that pursuant to Section 6.7 of the Company's Operating Agreement, J. Chris Lanning, Esq. shall be the Company's Manager and Designated Agent;

FURTHER RESOLVED, that the Company's Articles of Organization and Third Amended and Restated Operating Agreement be amended to reflect the resignation of Michel F. Laplante as Manager and Designated Agent, and appointment of Mr. Lanning as the replacement Manager and Designated Agent;

FURTHER RESOLVED, that Mr. Lanning is instructed to sell the Company's assets and the assets of the Grove at Fenwick Plantation, LLC in accordance with resolutions previously executed by the Class A Members and all such contracts and letters of intent entered into by the Company and its Manager Michel Laplante as of April 21, 2016. Mr. Lanning shall have a deciding vote if necessary, and may not attempt to change or alter these contracts, agents, attorneys, accountants etc. without vote as required by the applicable company operating agreement. The expenses of Mr. Lanning are to be paid by the Company. Mr. Lanning shall regularly communicate with the Class A members solely and directly, and not through counsel, and provide ongoing updates to all members, who shall be copied on any and all emails or communications;

FURTHER RESOLVED, that the Class A Members shall agree to liquidate the Company, which shall then be dissolved and wound up pursuant to Section 10.1A of the Company's Third Amended and Restated Operating Agreement, once all Company property has been sold;

FURTHER RESOLVED, that Mr. Lanning shall be appointed to act as Liquidator of the Company once all Company Property has been sold;

FURTHER RESOLVED, that the Company discharge from Company funds all of the debts, liabilities and obligations of the Company in the ordinary course, pay all debts owed to lending institutions such as Wells Fargo or its successor, then repay \$3,250,000 in available funds to the Eugene J. Zurlo Living Trust, dated December 11, 1997, account to the Eugene J. Zurlo Living Trust, dated December 11, 1997 for its \$700,000 cash capital contribution in accord with the terms of the Third Amended Company Operating Agreement, and distribute the remaining funds, if any, to the Members, which distributions shall be made 50% to the Eugene J. Zurlo Living Trust, dated December 11, 1997 and 50% to the Laplante interests as directed by Michel Laplante or his designee.

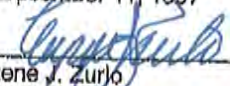
The Class A Members by signing this Written Consent, waive notice of the time, place, and purpose of a meeting of the Class A Members and Manager, and agree to the transaction of the business of this

meeting by unanimous Written Consent of the Class A Members and Manager. This Consent may be executed in two or more counterparts and when executed by each Class A Member and Manager shall become effective.

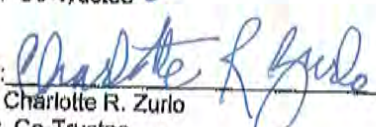
APPROVED:

CLASS A MEMBERS:

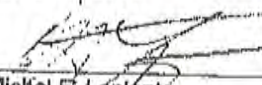
The Eugene J. Zurlo Living Trust
Dated December 11, 1997

By: 
Eugene J. Zurlo
Its: Co-Trustee

Dated: 25 Apr 16, 2016

By: 
Charlotte R. Zurlo
Its: Co-Trustee

Dated: April 26, 2016


Michel F. Laplante

Dated: 4/17, 2016

MANAGER:


Michel F. Laplante

Dated: 4/17, 2016

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE CIRCUIT COURT

Case No. 2014-CP-10-04946

Wells Fargo Bank, N.A., as Successor by
Merger to Wachovia Bank, National
Association, as Successor by Merger to First
Union National Bank,

Plaintiff,

vs.

MASTER-IN-EQUITY'S ORDER AND
JUDGMENT OF FORECLOSURE AND
SALE

(Deficiency Not Waived;
not HAMP eligible)

Penny Creek Associates, L.L.C. a/k/a Penny
Creek Associates, LLC; Michel F. LaPlante
a/k/a Michel Laplante a/k/a Mitch Laplante;
Charlotte R. Zurlo; Eugene J. Zurlo; Charlotte
R. Zurlo and Eugene J. Zurlo, as Co-Trustees
of The Nicklaus Lane Realty Trust No. 1 under
Declaration of Trust dated May 22, 1998, and
The Zurlo Investment Trust No. 1 pursuant to
trust agreement dated August 10, 1998;
Fenwick Hall Plantation Property Owners
Assn., Inc. a/k/a Fenwick Hall Plantation
Property Owners' Association, Inc.; Preserve
at Fenwick Hall Property Owners Association,
Inc. a/k/a The Preserve at Fenwick Hall
Property Owners' Association, Inc.; and The
Grove At Fenwick Plantation Condominium
Association, Inc.,

Defendants.

Michel Laplante,

Third-Party Plaintiff,

vs.

The Eugene J. Zurlo Living Trust, Dated
December 11, 1997,

Third-Party Defendant.

FILED
2017 JUN 23 PM 2:52
JULIE J. ARMSTRONG
CLERK OF COURT

Pursuant to Rules 53 and 71, SCRCP, the above-entitled matter was referred to the undersigned to make appropriate findings of fact and conclusions of law with authority to enter a final judgment in the cause.

Pursuant to the said reference, a hearing was held on June 19, 2017, and attended by the following persons:

Robert C. Byrd – Attorney for the Plaintiff
 Thomas B. Pritchard – Attorney for Defendant Penny Creek Associates, LLC
 J. Rutledge Young, Jr. – Attorney for Defendants Charlotte R. Zurlo and Eugene J. Zurlo, individually and as Co-Trustees of The Nicklaus Lane Realty Trust No. 1 under Declaration of Trust dated May 22, 1998, and The Zurlo Investment Trust No 1 pursuant to trust agreement dated August 10, 1998 (severed from the foreclosure claim)
 Defendant Michel F. Laplante (severed from the foreclosure claim)
 Brian Hellman – Attorney for Intervenor 1776, LLC
 J. Christopher Lanning – Manager of Penny Creek Associates, LLC

Based on the evidence presented at the hearing, I hereby find, conclude and order as follows:

FINDINGS OF FACT

1. The Lis Pendens, Summons, Complaint and Notice of Intent to Refer were filed August 14, 2014.
2. Service was made upon the defendants in this action, as is shown by the proofs of service filed herein.
3. Defendant Michel F. LaPlante a/k/a Michel Laplante a/k/a Mitch Laplante (“LaPlante”) filed a Motion for Injunction on August 29, 2014.
4. Defendant LaPlante filed a Motion for Temporary Restraining Order on September 9, 2014, and the Order denying said motion was entered on September 19, 2014.



5. Defendants Fenwick Hall Plantation Property Owners Assn., Inc. a/k/a Fenwick Hall Plantation Property Owners' Association, Inc.; Preserve at Fenwick Hall Property Owners Association, Inc. a/k/a The Preserve at Fenwick Hall Property Owners' Association, Inc.; and The Grove At Fenwick Plantation Condominium Association, Inc. (collectively, the "POA Defendants") filed an Answer and Counterclaim on September 29, 2014.

6. Defendants Charlotte R. Zurlo and Eugene J. Zurlo filed a Memorandum in Opposition to defendant LaPlante's Motion for Injunction on September 29, 2014.

7. Defendants Charlotte R. Zurlo, Eugene J. Zurlo, and Charlotte R. Zurlo and Eugene J. Zurlo, as Co-Trustees of The Nicklaus Lane Realty Trust No. 1 under Declaration of Trust dated May 22, 1998, and The Zurlo Investment Trust No. 1 pursuant to trust agreement dated August 10, 1998 (collectively, the "Zurlo Defendants"), filed an Answer and Cross Claim on October 16, 2014.

8. Defendant LaPlante filed an Answer, Cross Claims, and Third-Party Claims on October 27, 2014.

9. Defendant Penny Creek Associates, L.L.C. a/k/a Penny Creek Associates, LLC ("Penny Creek") and The Grove at Fenwick Plantation, LLC filed an Answer on November 6, 2014.

10. Defendant LaPlante filed a Reply to the Zurlo Defendants' Cross-Claims on November 10, 2014.

11. Third-party defendant Paul Zurlo filed a Motion to Dismiss defendant LaPlante's Third-Party Complaint on November 25, 2014.

12. Third-party defendant Eugene J. Zurlo Living Trust filed an Answer to defendant LaPlante's Third-Party Complaint on November 26, 2014.

13. The Plaintiff's Reply to the POA Defendants' Answer and Counterclaim was filed on December 4, 2014.

14. Defendant LaPlante filed Memoranda on January 15, 2015, in opposition to the Plaintiff's Motion to Strike Jury Demand and to Refer and in opposition to third-party defendant Paul Zurlo's Motion to Dismiss.

15. The Plaintiff filed a Memorandum of Law in support of its Motion to Refer on January 16, 2015.

16. Third-party defendant Paul Zurlo filed an Answer to Third-Party Complaint on January 30, 2015.

17. The Order granting Plaintiff's Motion to Refer was entered on March 5, 2015.

18. Defendant LaPlante filed a Motion on March 23, 2015, seeking to alter or amend the Order granting the Plaintiff's Motion to Refer.

19. The Zurlo Defendants filed an Amended Answer and Cross Claim on April 15, 2015.

20. Defendant LaPlante filed a Reply to the Cross-Claims of the Zurlo Defendants on April 27, 2015.

21. The Order denying defendant LaPlante's Motion to Alter or Amend the Order granting Plaintiff's Motion to Refer was entered on June 3, 2015.

22. Defendant LaPlante filed a Notice of Appeal on July 6, 2015, appealing the Order granting Plaintiff's Motion to Refer.

23. The Stipulation dismissing the third-party complaint against Paul Zurlo with prejudice was filed on July 17, 2015.



24. The Plaintiff filed a Motion to Dismiss defendant LaPlante's appeal in the Court of Appeals on August 4, 2015.

25. The Order granting the Plaintiff's Motion to Dismiss Appeal was entered by the Court of Appeals on October 20, 2015.

26. The Plaintiff's Motion for Partial Summary Judgment and Supporting Affidavit were filed on February 2, 2016.

27. The Stipulation was filed on May 26, 2016, dismissing the claims relating to The Grove at Fenwick Plantation loan and dismissing defendant The Grove at Fenwick Plantation, LLC as a party defendant.

28. The case originally asserted four (4) causes of action, two of which related to a loan by the Plaintiff to The Grove at Fenwick Plantation, LLC (the "Fenwick Loan"). During the course of the action, the Fenwick Loan was paid off and the parties stipulated to the dismissal of the two claims relating to that loan. Only the claims relating to loan to defendant Penny Creek remain.

29. The Consent Order Striking Case from Trial Docket Pursuant to Rule 40(j), SCRCPP was filed on September 30, 2016.

30. The Notice to Restore Case to Active Trial Docket was filed on April 12, 2017.

31. The Order Restoring Case to Active Trial Docket was entered on April 12, 2017.

32. The Stipulation to Entry of Order and Judgment of Foreclosure and Sale was filed on April 13, 2017; and

33. The Plaintiff's Motion to Sever and for Entry of Stipulated Final Order and Judgment of Foreclosure and Sale was filed on May 25, 2017, which this Court granted on June 19, 2017.

34. The Motion to Intervene was filed by 1776, LLC on June 19, 2017.
35. This Court granted the Plaintiff's Motion to Sever on June 19, 2007.
36. The Court also grants 1776, LLC's Motion to Intervene, as set forth more fully hereinafter.
37. All parties were notified of the date, time and place of the hearing in this matter.

The \$5,300,000.00 Loan

38. Defendant Penny Creek, for consideration, made, executed and delivered that certain Promissory Note dated August 7, 2000 ("Original Note 1"), payable to the order of First Union National Bank ("First Union"), in the original principal sum of \$5,300,000.00, together with interest as provided therein.

39. To secure payment of the indebtedness evidenced by Original Note 1, in accordance with the terms and conditions thereof, defendant Penny Creek, for consideration, made, executed and delivered to First Union a certain Mortgage and Absolute Assignment of Leases dated August 7, 2000 ("Mortgage 1"), covering certain real property located in Charleston County, South Carolina and described more fully therein. Mortgage 1 was recorded in the RMC Office for Charleston County on August 8, 2000, in Book P-352 at Page 613. Other terms and conditions are stated in the said Mortgage 1, which is of record herein.

40. Wells Fargo Bank, N.A. is the successor by merger to Wachovia Bank, National Association who is the successor by merger to First Union and is the sole owner and holder of Original Note 1, Mortgage 1, and all other related loan documents.

41. Certain terms of the Original Note 1 were amended, modified and/or renewed by, among other things, that certain renewal Promissory Note dated April 28, 2008, in the original



principal sum of \$3,142,781.92 ("Renewal Note 1"). (Original Note 1 and Renewal Note 1 are hereinafter referred to, collectively, as "Note 1.")

The \$2,200,000.00 Loan

42. Defendant Penny Creek, for consideration, made, executed and delivered that certain Promissory Note dated April 5, 2006 ("Original Note 2"), payable to the order of the Plaintiff, then known as Wachovia Bank, National Association, in the original principal sum of \$2,200,000.00, together with interest as provided therein. Other terms and conditions are stated in the said Original Note 2, which is of record herein.

43. To secure payment of the indebtedness evidenced by Original Note 2, in accordance with the terms and conditions thereof, defendant Penny Creek, for consideration, made, executed and delivered to the Plaintiff a certain Mortgage and Assignment of Rents dated April 5, 2006 ("Mortgage 2"), covering certain real property located in Charleston County, South Carolina and described more fully therein. Mortgage 2 was recorded in the RMC Office for Charleston County on April 7, 2006, in Book G-579 at Page 249. Other terms and conditions are stated in the said Mortgage 2, which is of record herein. (Mortgage 1 and Mortgage 2 are hereinafter referred to, collectively, as the "Mortgages.")

44. Certain terms of Original Note 2 were thereafter amended, modified and/or renewed by: (i) that certain renewal Promissory Note dated July 5, 2007, in the original principal sum of \$4,450,000.00; and (ii) that certain Modification Number One to Promissory Note dated April 28, 2008 (collectively, "Renewal Note 2"). Other terms and conditions are stated in the said Renewal Note 2, which is of record herein. (Original Note 2 and Renewal Note 2 are hereinafter referred to, collectively, as "Note 2.")



45. Thereafter, Mortgage 2 was amended and/or modified by that certain Modification of Mortgage and Notice of Future Advance dated July 5, 2007, and recorded in the RMC Office for Charleston County on July 27, 2007, in Book V-633 at Page 342. Other terms and conditions are stated in the said Modification of Mortgage and Notice of Future Advance, which is of record herein.

2009 Modification and Consolidation

46. Thereafter, certain terms of Note 1 and Note 2 were amended, modified and/or renewed by, among other things, that certain renewal Promissory Note dated July 28, 2009, in the original principal sum of \$7,592,781.92, which, among other things, consolidated Note 1 and Note 2 (collectively, the "Note"). Other terms and conditions are stated in the said Note, which is of record herein.

47. In order to induce the Plaintiff to modify or extend the aforesaid loan as evidenced by the Note, and to further secure the same, defendants LaPlante and the Zurlo Defendants, for consideration, executed separate, written Unconditional Guaranties dated July 28, 2009 (collectively, the "Guaranties"), whereby the said defendants absolutely, unconditionally and irrevocably guaranteed to the Plaintiff the full and prompt payment of the obligations of defendant Penny Creek to the Plaintiff under the Note, as consolidated. Other terms and conditions are stated in the said Guaranties, which are of record herein.

2012 and 2013 Modifications

48. Thereafter, certain terms of the Note were amended, modified and/or renewed by: (i) that certain First Modification to Promissory Note dated August 14, 2012; and (ii) that certain Second Modification to Promissory Note dated May 23, 2013 (collectively, the "Note



Modifications"). Other terms and conditions are stated in the said Note Modifications, which are of record herein.

49. In connection with the aforesaid modifications, Mortgage 1 and Mortgage 2 were amended and/or modified by that certain Modification of Mortgages dated October 1, 2012 (the "Mortgage Modification"), and recorded in the RMC Office for Charleston County on October 15, 2012, in Book 0284 at Page 614. Other terms and conditions are stated in the said Mortgage Modification, which is of record herein.

50. Under the express terms of the aforesaid Mortgage Modification, Mortgage 1 and Mortgage 2 (collectively, the "Mortgages") secure the Note in its entirety.

51. Certain portions of the subject mortgaged properties were thereafter released from the lien of the Mortgages, as amended and/or modified, which remains in full force and effect as to the remaining property described in the said Mortgages (the "Property").

**Loan Defaults, Forbearance Agreement and Stipulation
to Entry of Order and Judgment of Foreclosure and Sale**

52. The obligations under the terms and conditions of the Note are in default for, among other reasons, failing to repay the indebtedness in accordance with the terms thereof, including without limitation failing to repay the loan in full at maturity on April 18, 2014. The defendants have been duly notified, in writing, of the outstanding defaults.

53. In May 2016, the Plaintiff and defendants Penny Creek, LaPlante and the Zurlo Defendants entered into that certain Forbearance Agreement dated as of May 4, 2016 (the "Forbearance Agreement"), wherein the said defendants agreed and acknowledged, among other things, that the subject loan is in default and further agreed to execute the Stipulation to Entry of Order and Judgment of Foreclosure and Sale attached as Exhibit A to the Forbearance Agreement. Other terms and condition are stated in the said Forbearance Agreement, which is of record herein.

54. Pursuant to and in reliance upon the Forbearance Agreement and Stipulation, the case was removed from the active calendar pursuant to Rule 40(j), with leave to restore, by Consent Order entered on September 30, 2016.

55. The forbearance period set forth in the Forbearance Agreement expired on March 31, 2017, and the case was restored to active calendar on April 12, 2017.

56. The Plaintiff is entitled to proceed with foreclosure of its Mortgages, as amended and/or modified.

57. The Plaintiff's Mortgages constitute valid first priority liens on the Property.

58. Subsequent to the commencement of this action, the Eugene J. Zurlo Living Trust Dated December 11, 1997 (the "1997 Zurlo Trust") recorded a Second Mortgage on the subject Property in the Office of the RMC for Charleston County on May 25, 2016, in Book 0556 at Page 242 (the "Second Mortgage").

59. The Second Mortgage arose out of that certain Settlement Agreement between the 1997 Zurlo Trust and defendant Penny Creek Associates, LLC, the terms of which Settlement Agreement were entered on the record before The Honorable Markley Dennis, Jr. on February 29, 2016, in Case No. 2013-CP-10-07280. A copy of the transcript from the February 29, 2016 hearing before Judge Dennis in Case No. 2013-CP-10-07280, together with a copy of the Second Mortgage and the promissory note it secures, were presented to this Court and have been made a part of the record herein.

60. In accordance with the terms of the Settlement Agreement, the 1997 Zurlo Trust and its successor and assigns are only entitled to recover the principal sum of \$3,250,000.00, without any interest.

61. The Second Mortgage was assigned from the 1997 Zurlo Trust to 1776, LLC



pursuant to that certain Assignment of Note and Mortgage recorded in the Office of the RMC for Charleston County on April 7, 2017, in Book 629 at Page 45, a copy of which was presented to this Court and has been made a part of the record herein.

62. The parties to the foreclosure hereby consent to the joinder of 1776, LLC as a party defendant on the following express terms and conditions, which are hereby adopted and ordered by this Court:

a. That 1776, LLC expressly acknowledges and stipulates that the lien of its Second Mortgage is junior and subordinate to the lien of the Plaintiff's Mortgages;

b. That 1776, LLC further acknowledges and stipulates that it is bound by the terms of the Stipulation to Entry of Order and Judgment of Foreclosure and Sale filed on April 13, 2017; and

c. That all parties to the foreclosure, including 1776, LLC, consent to the immediate disposition of the foreclosure proceeding, expressly waiving the time limitations contained in Rule 40(b), SCRCP.

63. In the Plaintiff's loan documents, defendant Penny Creek agreed to pay all reasonable costs and expenses of collection including, but not limited to, reasonable attorneys' fees. I find and conclude that the sum of Thirty-Two Thousand Three Hundred Five and No/100 Dollars (\$32,305.00) is a reasonable amount to award as Plaintiff's unreimbursed attorneys' fees for services performed and anticipated to be performed until final adjudication of the within action, and that the sum of Two Thousand Six Hundred Sixty-Eight and 50/100 Dollars (\$2,668.50) is a reasonable amount to award as legal costs. In reaching this conclusion, I have carefully considered the nature, extent and difficulty of the legal services provided by Plaintiff's counsel in this commercial foreclosure action, the time and labor necessarily devoted by Plaintiff's

counsel to the case, the professional standing of Plaintiff's counsel and his firm, the fees customarily charged in Charleston County for similar legal services, and the beneficial results obtained by Plaintiff's counsel in this matter.

64. The amount due and owing on the loan evidenced by the Note, as of June 19, 2017, including attorneys' fees and costs of collection, is as follows:

(1)	Principal due	\$5,775,289.35
(2)	Interest on principal only 02/28/17 – 03/29/17 @ 5.75% (30 days @ \$922.44205 per day)	\$ 27,673.26*
(3)	Interest on principal only 03/30/17 – 03/31/17 @ 6.00% (2 days @ \$962.54823 per day)	\$ 1,925.09*
(4)	Interest on principal only 04/01/17 – 04/29/17 @ 8.00% (29 days @ \$1,283.39763 per day)	\$ 37,218.53**
(5)	Interest on principal only 04/30/17 – 05/29/17 @ 8.00% (30 days @ \$1,283.39763 per day)	\$ 38,501.93**
(6)	Interest on principal only 05/30/17 – 06/19/17 @ 8.00% (21 days @ \$1,283.39763 per day)	\$ 26,951.35**
(7)	Legal Fees	\$ 32,305.00
(8)	Legal Costs	\$ 2,668.50
	Total Debt Secured by Mortgages:	\$5,942,533.01

* Interest accruing at, forbearance period rate of Prime plus 2.00%. It is a variable rate that has been and is subject to change.

** Interest accruing at default rate of Prime + 1% + 3.00%. It is a variable rate that has been and is subject to change.

Interest for the period from June 19, 2017, through the date of this judgment at the rate of 8.00% per annum shall be added to the above stated Total Debt Secured by Mortgages to comprise the amount of the judgment debt entered herein, and interest after the date of judgment at the same rate shall be added to such judgment debt to comprise the amount of the debt through the date to which such interest is computed.

65. Inasmuch as the Plaintiff has not waived deficiency, the bidding will remain open for thirty (30) days after the sale, unless waived by the Plaintiff, in writing, prior to the sale.

CONCLUSIONS OF LAW

1. The Plaintiff should have judgment of foreclosure of its Mortgages, as amended and/or modified.

2. The subject Property should be ordered sold at public auction after due advertisement.

3. The Plaintiff has not waived its right to seek a personal judgment for any deficiency remaining after the sale, but expressly reserves the right to waive deficiency, in writing, prior to the sale.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That there is due to the Plaintiff on the loan secured by the Mortgages, as amended and/or modified, set forth in the Complaint the sum of **Five Million Nine Hundred Forty-Two Thousand Five Hundred Thirty-Three and 01/100 Dollars (\$5,942,533.01)** representing the "Total Debt Secured By Mortgages" due the Plaintiff as set out in paragraph 64 hereinabove, together with interest after the aforesaid date at the rate of 8.00% per annum and thereafter, in the event of a deficiency judgment, at the legal rate of interest for judgments.

2. That the party or parties liable for the aforesaid debt, shall, on or before the date of sale of the Property hereinafter described, pay to the Plaintiff or its attorneys the amount of the debt owed as aforesaid, together with the costs and disbursements of this action.

3. That on default of payment at or before the time herein indicated, the Property be sold by the undersigned Master-in-Equity or his designee, at public auction, at the Charleston County Courthouse, in the City of Charleston, County and State aforesaid; on some convenient Sales Day hereafter as set by the Court, on the following terms, that is to say:



a. FOR CASH: The Master-in-Equity will require a deposit of five (5%) percent on the amount of the bid, in cash or its equivalence, same to be applied on the purchase price only upon compliance with the bid, but in case of non-compliance within thirty (30) days same to be forfeited and applied to the costs and Plaintiff's debt.

b. The sale shall be subject to taxes, assessments, existing easements, and easements and restrictions of record.

c. Purchaser to pay for deed stamps and cost of recording the deed.

d. That if the Plaintiff is the successful bidder at said sale for a sum not exceeding the amount of costs, expenses and the indebtedness of the Plaintiff in full, the Plaintiff may pay to the Master-in-Equity only the amount of the costs and expenses, crediting the balance of the bid on its indebtedness.

e. That if defendant 1776, LLC is the successful bidder at said sale for a sum not exceeding the amount of costs, expenses, the indebtedness of the Plaintiff in full, and the indebtedness owed on the Second Mortgage, the Plaintiff may pay to the Master-in-Equity only the amount of the costs, expenses, and the full amount of the Plaintiff's indebtedness, crediting the balance of the bid against its own indebtedness.

4. Inasmuch as the Plaintiff has not waived deficiency, the bidding will remain open for thirty (30) days after the sale, unless waived by the Plaintiff, in writing, prior to the sale.

5. That the Master-in-Equity will, by advertisement according to law, give notice of the time and place of such sale, and the terms thereof; and will execute to the purchaser or purchasers a deed to the Property sold. The Plaintiff or any other party to this action may become a purchaser at such sale, and if, upon such sale being made, the purchaser or purchasers should fail to comply with the terms thereof within thirty (30) days after date of sale, then the Master-in-

Equity may advertise the said Property for sale on the next or some other subsequent Sales Day, as set by the Court, at the risk of the former highest bidder, and so from time to time thereafter until a full compliance shall be secured.

6. That the Master-in-Equity shall apply the proceeds of the sale of the Property as follows:

FIRST: To payment of the amount of costs and expenses of this action;

NEXT: To the payment to Plaintiff or its attorney of the amount of debt owed to Plaintiff and interest, so much thereof as the purchase money will pay on the same; and

NEXT: Any surplus should be held pending further Order of this Court.

7. That the defendants named herein and all persons whosoever claiming under the defendants be forever barred and foreclosed of all right, title, interest and equity of redemption in the subject Property, or any part thereof.

8. That the deed(s) of conveyance made pursuant to said sale shall contain the names of only the Plaintiff, the defendant who was the titleholder of the Property at the time of the filing of the Lis Pendens, and the grantee; and the RMC is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deeds.

9. A description of the Property encumbered by the Mortgages and herein ordered to be sold is attached hereto as Exhibit "A" and Exhibit "A-1".

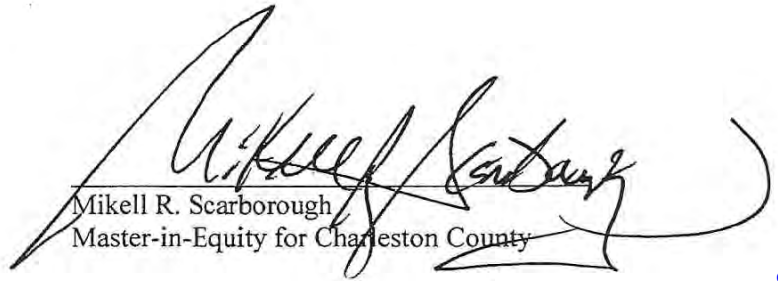
10. That the undersigned Master-in-Equity will retain jurisdiction to do all necessary acts incident to this foreclosure and to hear any post-judgment matters, including, but not limited to, the issuance of a Writ of Assistance.



AND IT IS SO ORDERED.

June 21, 2017

Charleston, South Carolina


Mikell R. Scarborough
Master-in-Equity for Charleston County

ELECTRONICALLY FILED - 2020 Aug 14 12:34 PM - CHARLESTON - COMMON PLEAS - CASE#2020CP1000209

EXHIBIT A-1**Tract B-2:**

ALL that piece, parcel or tract of land, together with the improvements thereon, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as "Tract 'B-2' 42.7 Acres," on a plat entitled, "SUBDIVISION OF PROPERTY IN THE NAME OF F-H-P REALTY LOCATED ON JOHNS ISLAND, CHARLESTON COUNTY, S.C.," by Forrest G. Calvert, RLS, dated September 17, 1979, and recorded in the RMC Office for Charleston County, South Carolina (hereinafter the "RMC Office") in Plat Book AO at Page 74, said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully be shown.

And Tract A:

ALL that piece, parcel or tract of land, together with the improvements thereon, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as "FHP Realty Tract 'A' 5.503 Acres" on a plat entitled, "PLAT SHOWING THE ABANDONMENT OF PROPERTY LINES FOR TMS NO. 346-00-00-12 AND TMS NO. 346-00-00-011, AND THE SUBSEQUENT SUBDIVISION OF TMS NO. 346-00-00-007 INTO TRACT 'A' CONTAINING 5.503 ACRES AND TRACT 'B' CONTAINING 7.497 ACRES OWNED BY FHP REALTY LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Hoffman Lester Associates, Inc., dated September 24, 1997, and recorded January 20, 1998, in the aforesaid RMC Office in Plat Book EC at Page 263.

The aforesaid Tract B-2 and Tract A are also more particularly shown on that certain plat entitled, "PLAT SHOWING PROPERTY LINE BETWEEN TMS NO. 346-00-00-004, TRACT B-2 (CONTAINING 42.49 ACRES) AND TMS NO. 346-00-00-007, RESIDUAL TRACT B (CONTAINING 5.50 ACRES) TO FORM TRACT B-2' (CONTAINING 47.99 ACRES), OWNED BY FHP REALTY LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by Hoffman Lester and Associates, Inc., dated April 7, 2000, and recorded as Exhibit "___" [sic: "C"] to that certain deed of conveyance from FHP Realty Company, a Partnership, to Penny Creek Associates, L.L.C., and also about to be recorded in the RMC Office for Charleston County, S.C.

Note: The above-referenced deed from FHP Realty Company, a Partnership, to Penny Creek Associates, L.L.C. is dated August 7, 2000, and recorded in the RMC Office for Charleston County on August 8, 2000, in Book O-352 at Page 691.

TOGETHER WITH a twenty-foot (20') non-exclusive easement in common with Helena Igoe Blanchard, her heirs and assigns, and others entitled thereto, in favor of "Tract B" above-described, for ingress and egress over, upon and across that certain twenty-foot (20') easement extending from Maybank Highway on the south to "Tract A" on the north, as said Tract A is shown on that certain plat recorded in Plat Book AK at Page 76 in the RMC Office, which easement is granted in that certain deed of conveyance from Helena Igoe Blanchard to FHP Realty Company, a Partnership, dated April 27, 1978, and recorded in Book P-115 at Page 273, in the RMC Office.

LESS AND EXCEPTING: ALL that certain streets, roads, drives and cul-de-sacs situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina and being shown and designated as "FENWICK HALL ALLEÉ R/W VARIES" on a plat entitled, "PLAT DEDICATING FENWICK HALL ALLEÉ, VARIABLE RIGHT-OF-WAY (TMS NO 346-00-00-078 TRACT C) TO THE USE OF THE PUBLIC CONTAINING 0.71 ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by Hoffman Lester Associates, Inc., dated August 27, 2001, and recorded November 1, 2001, in the RMC Office for Charleston County, South Carolina in Plat Book EF at Page 157. Said streets, roads, drives and cul-de-sacs butting and bounding, measuring and containing, and having such courses and distances as shown are shown on said plat, it being the intent of this legal description to convey the entire right-of-way. Reference being had to the aforesaid plat for a more full and complete description, being all of the said dimensions, a little more or a little less. Together with an exclusive easement for drainage and maintenance purposes over all drainage easement shown on the said plat.

LESS AND EXCEPTING: ALL that certain streets, roads, drives and cul-de-sacs situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina and being shown and designated as "EXTENSION OF FENWICK HALL ALLEÉ" on a plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 (TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE AN EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895 ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES PREPARED FOR PENNY CREEK ASSOCIATES, LLC AND FENWICK TARRAGON APARTMENTS, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by HLA, Inc., dated December 6, 2004, and recorded March 25, 2005, in the RMC Office for Charleston County, South Carolina in Plat Book EH at Page 817. Said streets, roads, drives and cul-de-sacs butting and bounding, measuring and containing, and having such courses and distances as shown are shown on said plat, it being the intent of this legal description to convey the entire right-of-way. Reference being had to the aforesaid

plat for a more full and complete description, being all of the said dimensions, a little more or a little less. Together with an exclusive easement for drainage and maintenance purposes over all drainage easement shown on the said plat.

LESS AND EXCEPTING: ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, measuring and containing 12.250 acres as more fully shown and designated as "PROPOSED TRACT B-2-3" on that plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT B-2-1 TMS NO. 346-00-00-004 CONTAINING 24.895 ACRES INTO TRACT B-2-3 (12.250 ACRES) AND RESIDUAL TRACT B-2-1 (12.645 ACRES) PROPERTY OF PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by HLA INC., dated December 10, 2004, and recorded in Plat Book EH at Page 903, in the RMC Office for Charleston County, South Carolina, said parcel having such location, buttings, boundings, courses and distances as by references to said plat more fully appear.

THE ABOVE REFERENCED PROPERTY IS ALSO KNOWN AS

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as **Tract B-2-1**, said to contain 11.645 total acres, as shown on a plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT B-2-1 TMS NO. 346-00-00-004 CONTAINING 24.895 ACRES INTO TRACT B-2-3 (12.250 ACRES) AND RESIDUAL TRACT B-2-1 (12.645 ACRES) PROPERTY OF PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by HLA INC., dated December 10, 2004, and recorded in Plat Book EH at Page 903, in the R.M.C. Office for Charleston County (herein after "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

BEING a portion of the same property conveyed to Penny Creek Associates, LLC by deed of FHP Realty Company, a Partnership, dated August 7, 2000, and recorded August 8, 2000, in the RMC Office for Charleston County, South Carolina in Book O-352 at Page 691.

TMS#: 346-00-00-004

AND

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as **Tract B-2-2**, said to contain 22.91 acres total, more or less, as shown on a plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT B-2-1 TMS NO. 346-00-00-004 CONTAINING 24.895 ACRES INTO TRACT B-2-3 (12.250 ACRES) AND RESIDUAL TRACT B-2-1 (12.645 ACRES) PROPERTY OF PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by HLA INC., dated December 10, 2004, and recorded in Plat Book EH at Page 903, in the R.M.C. Office for Charleston County (herein after "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

BEING a portion of the same property conveyed to Penny Creek Associates, LLC by deed of FHP Realty Company, a Partnership, dated August 7, 2000, and recorded August 8, 2000, in the RMC Office for Charleston County, South Carolina in Book O-352 at Page 691.

TMS#: 346-00-00-076

ALSOTract C:

ALL that certain piece, parcel or lot of land, situate, lying and being in the City of Charleston, County of Charleston, South Carolina, and being shown and delineated as TRACT "C," 59.280 acres of highland and 95.063 acres of marshland, on a plat by Forrest G. Calvert, dated November, 1977, entitled in part "PLAT SHOWING SUBDIVISION OF FENWICK HALL PLANTATION, 237.176 AC. HIGHLAND 148.058 AC. MARSH LOCATED ON JOHNS ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA. PROPERTY OF MRS. HELENA IGOE BLANCHARD," and recorded in Plat Book AK at Page 76, in the RMC Office for Charleston County, South Carolina (the "RMC Office"), and having such location, size, shape, buttings, boundings, and dimensions as will appear by reference to said plat which is incorporated herein by reference, be all the dimensions and measurements shown thereon a little more or less.

SAVING AND EXCEPTING that certain piece, parcel or lot of land, situate, lying and being in Charleston County, South Carolina, described as 0.97 acres of land as conveyed to the South Carolina Department of Transportation in that certain deed of conveyance from Fenwick Acres dated April 16, 1998, and recorded July 28, 1998, in Book R-307 at Page 246, in the RMC Office.

The aforesaid property and said 0.97 acre parcel are more particularly shown on that certain plat prepared by Southeastern Surveying, Inc. entitled, "A BOUNDARY SURVEY OF TRACT 'C' CONTAINING 153.53 ACRES, OWNED BY FENWICK ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," dated March 23, 1999, and recorded in the RMC Office in Plat Book ED at Page 70.

LESS AND EXCEPTING: ALL that certain piece, parcel or tract of land, situate, lying and being in the City of Charleston, Charleston County, South Carolina, containing 15.63 acres, more or less, shown and designated as "TRACT C-1" on that certain plat entitled, "PLAT SHOWING THE ADJUSTMENT OF THE PROPERTY LINE BETWEEN TMS 346-00-00-078 (TRACT C, R/W), TMS 346-00-00-076 (TRACT B-2-2) & TMS 346-00-00-002 (TRACT C), TO FORM RESIDUAL TRACT C 137.1 ± ACRES, RESIDUAL TRACT B-2-2 22.91 ACRES AND TRACT C, R/W 0.71 ACRES TO BE DEDICATED AS A PUBLIC RIGHT OF WAY AND SHOWING TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.63 ACRES PREPARED FOR PENNY CREEK ASSOCIATES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by Hoffman Lester & Associates, Inc., dated June 11, 2001, and recorded August 29, 2001, in the Charleston County RMC Office in Plat Book EF at Page 23 (the "Plat"), said property having such location, size, shape, dimensions, courses, distances, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that certain streets, roads, drives and cul-de-sacs situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina and being shown and designated as "FENWICK HALL ALLEÉ R/W VARIES" on a plat entitled, "PLAT DEDICATING FENWICK HALL ALLEÉ, VARIABLE RIGHT-OF-WAY (TMS NO 346-00-00-078 TRACT C) TO THE USE OF THE PUBLIC CONTAINING 0.71 ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by Hoffman Lester Associates, Inc., dated August 27, 2001, and recorded November 1, 2001, in the RMC Office for Charleston County, South Carolina in Plat Book EF at Page 157. Said streets, roads, drives and cul-de-sacs butting and bounding, measuring and containing, and having such courses and distances as shown are shown on said plat, it being the intent of this legal description to convey the entire right-of-way. Reference being had to the aforesaid plat for a more full and complete description, being all of the said dimensions, a little more or a little less. Together with an exclusive easement for drainage and maintenance purposes over all drainage easement shown on the said plat.

LESS AND EXCEPTING: ALL that certain streets, roads, drives and cul-de-sacs situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina and being shown and designated as "EXTENSION OF FENWICK HALL ALLEÉ" on a plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 (TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-

004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE AN EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895 ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES PREPARED FOR PENNY CREEK ASSOCIATES, LLC AND FENWICK TARRAGON APARTMENTS, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by HLA, Inc., dated December 6, 2004, and recorded March 25, 2005, in the RMC Office for Charleston County, South Carolina in Plat Book EH at Page 817. Said streets, roads, drives and cul-de-sacs butting and bounding, measuring and containing, and having such courses and distances as shown are shown on said plat, it being the intent of this legal description to convey the entire right-of-way. Reference being had to the aforesaid plat for a more full and complete description, being all of the said dimensions, a little more or a little less. Together with an exclusive easement for drainage and maintenance purposes over all drainage easement shown on the said plat.

LESS AND EXCEPTING: ALL that certain piece, parcel or lot of land, situate, lying and being in the City of Charleston, Charleston County, South Carolina, and described as "LOT 1" on a plat prepared by GPA Professional Land Surveyors entitled, "SUBDIVISION PLAT SHOWING THE SUBDIVISION OF TMS# 346-00-00-002 TO CREATE NEW LOTS 1, 2, 3, and RESIDUAL, THE PRESERVE AT FENWICK PLANTATION OWNED BY PENNY CREEK ASSOCIATES, LLC," dated April 12, 2005, and recorded April 26, 2005, in Plat Book EH at Page 884 in the RMC Office for Charleston County, South Carolina.

LESS AND EXCEPTING: ALL that parcel, piece or lot of land, situate, lying and being located on Johns Island, Charleston County, South Carolina, shown as "LOT 15 7,871 SF 0.181 AC" on a plat entitled, "A FINAL SUBDIVISION PLAT OF A PORTION OF THE PRESERVE AT FENWICK PLANTATION LOTS 19 THRU 25, LOTS 31 THRU 35 AND PUBLIC RIGHT-OF-WAY BEING A PORTION OF LOT 1, OWNED BY EPIC DEVELOPMENT GROUP, LLC AND LOT 15, HELD IN TRUST AND TO BE CONVEYED TO EPIC DEVELOPMENT GROUP, LLC, BEING A PORTION OF LOT 3 AND EASEMENTS LOCATED ON LOT 2, OWNED BY PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated January 25, 2006, last revised April 13, 2006, and recorded May 5, 2006, in Plat Book EJ at Pages 722-727, in the RMC Office for Charleston County. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those pieces, parcels or lots of land located in the City of Charleston, Charleston County, South Carolina and shown and designated as "P.O.A. OPEN SPACE 9,701 SF 0.223 AC," "P.O.A. OPEN SPACE 23,630 SF

0.543 AC" and "P.O.A. OPEN SPACE 26,343 SF 0.605 AC" on a plat entitled, "A FINAL SUBDIVISION PLAT OF A PORTION OF THE PRESERVE AT FENWICK PLANTATION LOTS 19 THRU 25, LOTS 31 THRU 35 AND PUBLIC RIGHT-OF-WAY BEING A PORTION OF LOT 1, OWNED BY EPIC DEVELOPMENT GROUP, LLC AND LOT 15, HELD IN TRUST AND TO BE CONVEYED TO EPIC DEVELOPMENT GROUP, LLC, BEING A PORTION OF LOT 3 AND EASEMENTS LOCATED ON LOT 2, OWNED BY PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated January 25, 2006, last revised April 13, 2006, and recorded May 5, 2006, in Plat Book EJ at Pages 722-727, in the RMC Office for Charleston County. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that parcel, piece or lot of land, situate, lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown as "LOT A-1" on a plat entitled, "A SUBDIVISION PLAT OF LOT 3 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT A-1 LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by Southeastern Surveying of Charleston, Inc., dated May 10, 2006, and recorded June 15, 2006, in Plat Book DF at Page 133, in the RMC Office for Charleston County. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that parcel, piece or lot of land, situate, lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as "LOT 40 12,690 SF 0.291 AC #1648" on a plat entitled, "A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC THE PRESERVE AT FENWICK PLANTATION TO CREATE LOT 40, CONTAINING 0.291 ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated June 25, 2008, and recorded March 4, 2009, in Plat Book L09 at Page 0097, in the RMC Office for Charleston County, South Carolina. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those certain pieces, parcels or lots of land, situate lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as "LOT 52" and "LOT 53" on that certain plat entitled, "A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT 52, LOT 53 AND ZURLO WAY RIGHT-OF-WAY, THE PRESERVE AT FENWICK PLANTATION LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by SWA Surveying LLC, dated June 9, 2013, and recorded July 2, 2013, in Plat Book L13 at Page 0238, in the RMC Office for Charleston County. Said lots having such

size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that certain piece, parcel or lot of land, situate lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as LOT 13 on that certain plat entitled, "A SUBDIVISION PLAT OF RESIDUAL LOT 3 OWNED BY PENNY CREEK ASSOCIATES, LLC THE PRESERVE AT FENWICK PLANTATION TO CREATE A NEW LOT 13, CONTAINING 0.187 ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated June 25, 2008, revised June 3, 2010, and recorded June 9, 2010, in the RMC Office for Charleston County, South Carolina in Plat Book L10 at Page 0154. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those certain pieces, parcels or lots of land, situate lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as LOT 58 and LOT 59 on that certain plat entitled, "A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT 58, #1612 ZURLO WAY AND LOT 59, #1608 ZURLO WAY, THE PRESERVE AT FENWICK PLANTATION LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by SWA Surveying LLC, dated March 7, 2014, and recorded March 20, 2014, in the RMC Office for Charleston County, South Carolina in Plat Book L14 at Page 0094. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

DERIVATION: BEING a portion of the same property conveyed to Penny Creek Associates, L.L.C. by (i) deed of Fenwick Acres, a Partnership, dated March 25, 1999, and recorded March 25, 1999, in the RMC Office for Charleston County, South Carolina in Book D-323 at Page 311; and (ii) deed of Julius H. Weil, Jr. dated March 25, 1999, and recorded March 25, 1999, in the said RMC Office in Book D-323 at Page 439.

<u>Property</u>	<u>TMS#</u>
Residual Tract C (55.19 acres)	346-00-00-002
Lot 2 Residual (14.46 acres)	346-00-00-258
Lot 3 Residual (9.76 acres)	346-00-00-259
Zurlo Way (Private R/W)	346-00-00-781

EXHIBIT "A-2"

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as Tract B-2-1, said to contain 11.645 total acres, as shown on a plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT B-2-1 TMS NO. 346-00-00-004 CONTAINING 24.895 ACRES INTO TRACT B-2-3 (12.250 ACRES) AND RESIDUAL TRACT B-2-1 (12.645 ACRES) PROPERTY OF PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by HLA INC., dated December 10, 2004, and recorded in Plat Book EH at Page 903, in the R.M.C. Office for Charleston County (herein after "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

BEING a portion of the same property conveyed to Penny Creek Associates, LLC by deed of FHP Realty Company, a Partnership, dated August 7, 2000, and recorded August 8, 2000, in the RMC Office for Charleston County, South Carolina in Book O-352 at Page 691.

TMS#: 346-00-00-004

ALSO

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as Tract B-2-2, said to contain 22.91 acres total, more or less, as shown on a plat entitled, "PLAT SHOWING THE SUBDIVISION OF TRACT B-2-1 TMS NO. 346-00-00-004 CONTAINING 24.895 ACRES INTO TRACT B-2-3 (12.250 ACRES) AND RESIDUAL TRACT B-2-1 (12.645 ACRES) PROPERTY OF PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by HLA INC., dated December 10, 2004, and recorded in Plat Book EH at Page 903, in the R.M.C. Office for Charleston County (herein after "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

BEING a portion of the same property conveyed to Penny Creek Associates, LLC by deed of FHP Realty Company, a Partnership, dated August 7, 2000, and recorded August 8, 2000, in the RMC Office for Charleston County, South Carolina in Book O-352 at Page 691.

TMS#: 346-00-00-076

ALSO

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, State of South Carolina, shown and designated as Lot 2, said to contain 16.41 total acres, more or less, as shown on a plat entitled, "SHOWING THE SUBDIVISION OF TMS# 346-00-00-002 TO CREATE NEW LOTS 1, 2, 3, AND RESIDUAL THE PRESERVE AT FENWICK PLANTATION TO BE OWNED BY EPIC DEVELOPMENT, LLC THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by GPA Professional Land Surveyors, dated May 15, 2005, and recorded in Plat Book EJ at Page 107, in the R.M.C. Office for Charleston County, South Carolina (hereinafter "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

LESS AND EXCEPTING: ALL that parcel, piece or lot of land, situate, lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as "LOT 40 12,690 SF 0.291 AC #1648" on a plat entitled, "A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC THE PRESERVE AT FENWICK PLANTATION TO CREATE LOT 40, CONTAINING 0.291 ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated June 25, 2008, and recorded March 4, 2009, in Plat Book L09 at Page 0097, in the RMC Office for Charleston County, South Carolina. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those certain pieces, parcels or lots of land, situate lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as "LOT 52" and "LOT 53" on that certain plat entitled, "A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT 52, LOT 53 AND ZURLO WAY RIGHT-OF-WAY, THE PRESERVE AT FENWICK PLANTATION LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by SWA Surveying LLC, dated June 9, 2013, and recorded July 2, 2013, in Plat Book L13 at Page 0238, in the RMC Office for Charleston County. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those certain pieces, parcels or lots of land, situate lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as LOT 58 and LOT 59 on that certain plat entitled, "A SUBDIVISION PLAT OF LOT 2 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT 58, #1612 ZURLO WAY AND LOT 59, #1608 ZURLO WAY, THE PRESERVE AT FENWICK PLANTATION LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by SWA Surveying LLC, dated March 7, 2014, and

recorded March 20, 2014, in the RMC Office for Charleston County, South Carolina in Plat Book L14 at Page 0094. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

BEING a portion of the same property conveyed to Penny Creek Associates, L.L.C. by (i) deed of Fenwick Acres, a Partnership, dated March 25, 1999, and recorded March 25, 1999, in the RMC Office for Charleston County, South Carolina in Book D-323 at Page 311; and (ii) deed of Julius H. Weil, Jr. dated March 25, 1999, and recorded March 25, 1999, in the said RMC Office in Book D-323 at Page 439.

<u>Property</u>	<u>TMS#</u>
Lot 2 Residual (14.46 acres)	346-00-00-258
Zurlo Way (Private R/W)	346-00-00-781

ALSO

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, State of South Carolina, shown and designated as Lot 3, said to contain 11.96 total acres, more or less, as shown on a plat entitled, "SHOWING THE SUBDIVISION OF TMS# 346-00-00-002 TO CREATE NEW LOTS 1, 2, 3, AND RESIDUAL THE PRESERVE AT FENWICK PLANTATION TO BE OWNED BY EPIC DEVELOPMENT, LLC THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA," prepared by GPA Professional Land Surveyors, dated May 15, 2005, and recorded in Plat Book EJ at Page 107, in the R.M.C. Office for Charleston County, South Carolina (hereinafter "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

LESS AND EXCEPTING: ALL that parcel, piece or lot of land, situate, lying and being located on Johns Island, Charleston County, South Carolina, shown as "LOT 15 7,871 SF 0.181 AC" on a plat entitled, "A FINAL SUBDIVISION PLAT OF A PORTION OF THE PRESERVE AT FENWICK PLANTATION LOTS 19 THRU 25, LOTS 31 THRU 35 AND PUBLIC RIGHT-OF-WAY BEING A PORTION OF LOT 1, OWNED BY EPIC DEVELOPMENT GROUP, LLC AND LOT 15, HELD IN TRUST AND TO BE CONVEYED TO EPIC DEVELOPMENT GROUP, LLC, BEING A PORTION OF LOT 3 AND EASEMENTS LOCATED ON LOT 2, OWNED BY PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated January 25, 2006, last revised April 13, 2006, and recorded May 5, 2006, in Plat Book EJ at Pages 722-727, in the RMC Office for Charleston County. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL those pieces, parcels or lots of land located in the City of Charleston, Charleston County, South Carolina and shown and designated as "P.O.A. OPEN SPACE 9,701 SF 0.223 AC," "P.O.A. OPEN SPACE 23,630 SF 0.543 AC" and "P.O.A. OPEN SPACE 26,343 SF 0.605 AC" on a plat entitled, "A FINAL SUBDIVISION PLAT OF A PORTION OF THE PRESERVE AT FENWICK PLANTATION LOTS 19 THRU 25, LOTS 31 THRU 35 AND PUBLIC RIGHT-OF-WAY BEING A PORTION OF LOT 1, OWNED BY EPIC DEVELOPMENT GROUP, LLC AND LOT 15, HELD IN TRUST AND TO BE CONVEYED TO EPIC DEVELOPMENT GROUP, LLC, BEING A PORTION OF LOT 3 AND EASEMENTS LOCATED ON LOT 2, OWNED BY PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated January 25, 2006, last revised April 13, 2006, and recorded May 5, 2006, in Plat Book EJ at Pages 722-727, in the RMC Office for Charleston County. Said lots having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that parcel, piece or lot of land, situate, lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown as "LOT A-1" on a plat entitled, "A SUBDIVISION PLAT OF LOT 3 OWNED BY PENNY CREEK ASSOCIATES, LLC TO CREATE LOT A-1 LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," prepared by Southeastern Surveying of Charleston, Inc., dated May 10, 2006, and recorded June 15, 2006, in Plat Book DF at Page 133, in the RMC Office for Charleston County. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

LESS AND EXCEPTING: ALL that certain piece, parcel or lot of land, situate lying and being on Johns Island, City of Charleston, Charleston County, South Carolina shown and designated as LOT 13 on that certain plat entitled, "A SUBDIVISION PLAT OF RESIDUAL LOT 3 OWNED BY PENNY CREEK ASSOCIATES, LLC THE PRESERVE AT FENWICK PLANTATION TO CREATE A NEW LOT 13, CONTAINING 0.187 ACRES LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA," by Southeastern Surveying of Charleston, Inc., dated June 25, 2008, revised June 3, 2010, and recorded June 9, 2010, in the RMC Office for Charleston County, South Carolina in Plat Book L10 at Page 0154. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

BEING a portion of the same property conveyed to Penny Creek Associates, L.L.C. by (i) deed of Fenwick Acres, a Partnership, dated March 25, 1999, and recorded March 25, 1999, in the RMC Office for Charleston County, South Carolina in Book D-323 at Page 311; and (ii) deed of Julius H. Weil, Jr. dated March 25, 1999, and recorded March 25, 1999, in the said RMC Office in Book D-323 at Page 439.

Property

TMS#

Lot 3 Residual (9.76 acres)

346-00-00-259