

# **EXHIBIT A**

STATE OF SOUTH CAROLINA  
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

Juontonio Pinckney, et al.,

Civil Action No. 2010-CP-46-02326

Plaintiffs,

v.

Epcon Communities, Inc.; Epcon  
Communities Franchising, Inc.; Brock L.  
Fankhauser; Fankhauser Property Group,  
Inc.; Stonecrest Villas of Tega Cay, LLC;  
and Stonecrest Villas of Tega Cay Home  
Owners Association, Inc.,

Defendants.

Fankhauser Prop. Group, Inc.,

Third-Party Plaintiff,

v.

Exterior Expressions of NC., Inc.; Al-  
Mega Construction, Inc.; Procar, Inc.; The  
Southeastern Group, Inc.; and Jose  
Simenez, Individually and d/b/a M&L  
Roofing Co., LLC and/or MB Roofing  
Company,

Third-Party Defendants,

Stonecrest Villas of Tega Cay Home  
Owners Association, Inc.,

Third-Party Plaintiff,

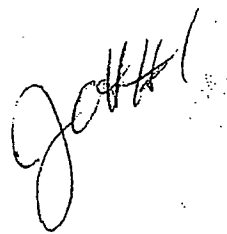
v.

Stonecrest Villas of Tega Cay, LLC

Third-Party Defendant,

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YORK COUNTY, SC

**ORDER GRANTING  
DEFENDANT STONECREST  
VILLAS OF TEGAY CAY  
CONDOMINIUM OWNERS  
ASSOCIATION, INC.'S MOTION  
FOR SUMMARY JUDGMENT  
AS TO PLAINTIFFS' CLAIMS**



Exterior Expressions of North Carolina,  
Inc.,

Fourth-Party Plaintiff,

v.

Marcos Gonzalez,

Fourth-Party Defendant.

This matter came before me for a hearing on a Motion for Summary Judgment as to Plaintiffs' Claims (the "Motion") filed by Defendant Stonecrest Villas of Tega Cay Condominium Owners Association, Inc. ("Stonecrest COA"). Appearing at the hearing were Curtis W. Dowling and Matthew G. Gerrald on behalf of Stonecrest COA and J. Cameron Halford on behalf of the Plaintiffs.

**PREAMBLE**

The undersigned issued an Order in this matter dated January 23, 2013. The Plaintiffs timely filed a Motion to Reconsider said Order, which was denied. The Plaintiffs timely filed a Notice of Intent to Appeal the initial and subsequent Order. The January 23, 2013 Order approved a settlement by and among Stonecrest COA and various Defendants and Third- and Fourth-Party Defendants.

At the time the Plaintiffs filed their Notice of Intent to Appeal, the undersigned had instructed counsel for Stonecrest COA to draw an Order granting the Motion, which was heard on March 19, 2013. The undersigned has elicited input from counsel for the Plaintiffs and counsel for Stonecrest COA as to the Court's jurisdiction to rule on the Motion in light of the Notice of Intent to Appeal. The undersigned has asked for counsel for Stonecrest COA to prepare a proposed Order granting the Motion. The proposed

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Order has been received but was not signed prior to the filing of the Plaintiffs' Notice of Intent to Appeal. Counsel for Stonecrest COA asserts the Court can enter an Order ruling on the Motion, while counsel for the Plaintiffs claims "the summary judgment issue is stayed by the Notice of Intent to Appeal."

There are two issues the Court must consider as to the issuance, at this time, of an Order addressing the Motion: Rule 205, SCACR, and the applicability of Rule 241, SCACR, Stay and Supersedeas in Civil Actions.

Rule 205 divests the Circuit Court of jurisdiction as to all matters "over the appeal," but not "matters not affected by the appeal" once a Notice of Intent to Appeal is filed. Rule 241 provides a stay as to matters on appeal but, as does Rule 205, excludes from the stay "matters not affected by the appeal." Stonecrest COA suggests that the case of Metts v. Mims, 384 S.C. 491, 682 S.E.2d 813 (2009), supports its position that the stay provided for in Rule 241 does not apply in the instant case. I find Metts of no help as it deals with a purely collateral matter, the appeal of an order of contempt, rather than an appeal of an order addressing a substantive issue.

The business judgment rule is implicated by the matter on appeal and in the instant order. However, I find the issue addressed in the instant Order is not a matter which will be affected by the matter on appeal.

As noted elsewhere in the Order, the Plaintiffs primarily seek personal monetary relief, not recovery on behalf of the owners of all of the Stonecrest Villas condominiums. The Plaintiffs do not seek recovery of funds to affect repairs to the common elements. The issue on appeal is settlement of claims for damages to the common elements. The

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order on appeal specifically provides that the Plaintiffs' claims for their "direct damage to themselves or their individual units" are unaffected by said Order.

While the business judgment rule is implicated in both the Order on appeal and the instant Order, at issue are two distinct business judgments. The Order on appeal deals with Stonecrest COA's settlement of pending litigation. The instant Order addresses alleged conduct by the Stonecrest COA board from its creation until institution of the instant lawsuit. The latter issue is not affected by the appeal of the former.

The issue of amalgamation, to the extent it is an issue regarding an individual and a non-profit homeowners' association, is not an issue in the Order on appeal. The Order on appeal addresses conduct by Stonecrest COA at a point in time after Brock Fankhauser transitioned off the Stonecrest COA board. The Motion, as noted above, is an issue distinct from that regarding the settlement.

I therefore find that the Court retains jurisdiction over the Motion and that the Motion is not stayed by the Plaintiffs' Notice of Intent to Appeal. Furthermore, after carefully reviewing the record, the briefs submitted by the parties, and the applicable law, and after considering the arguments of counsel, I hereby GRANT the Motion.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

The Plaintiffs are unit owners in Stonecrest Villas of Tega Cay, a condominium community in York County. They brought this action against Stonecrest COA and several other parties seeking legal and equitable relief for alleged damages and defects resulting primarily from water intrusion. The Amended Complaint filed September 16, 2011, which is the Plaintiffs' current active pleading, asserts twelve causes of action against Stonecrest COA: breach of fiduciary duty, breach of contract, breach of contract

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accompanied by fraudulent acts, fraud and misrepresentation, equitable action for accounting,<sup>1</sup> conversion, civil conspiracy, breach of express warranty, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, breach of express warranties, and unfair trade practices act violation. For the reasons set forth below, Stonecrest COA is entitled to judgment as a matter of law on each of these causes of action.

#### STANDARD OF REVIEW

Summary judgment shall be granted "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 judgment as a matter of law." Rule 56(c), SCRPC. "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings" but "must present specific facts showing a genuine issue for trial." Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548, 558-59, 671 S.E.2d 79, 85 (Ct. App. 2008) (citations and quotations omitted). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 729 (Ct. App. 2005).

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<sup>1</sup> Pursuant to an agreement between counsel, this cause of action has been withdrawn.

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## FINDINGS AND CONCLUSIONS

### I. **STONECREST COA'S CONDUCT WAS REASONABLE AND IS PROTECTED BY THE BUSINESS JUDGMENT RULE.**

Though the Plaintiffs have taken the kitchen sink approach and asserted twelve causes of action against Stonecrest COA, their theory of liability boils down to this: Stonecrest COA has violated its obligations under the Master Deed and its bylaws to maintain and repair the community's common elements. These allegations are based on the following sections of the aforementioned documents:

- The Master Deed's Statement of Purpose, which states, in part: "Declarant has deemed it desirable to create a nonprofit, incorporated owners' association which will be delegated and assigned powers of maintaining and administering the Common Areas and facilities on the Property[.]"
- Section 5.4(a) of the Master Deed, which states, in part: "The Association shall be responsible for the maintenance and repair of all Common Elements, including the Limited Common Elements[.]"
- Section 13.1 of the Master Deed, which states, in part: "In the event of damage to or destruction of any Building as a result of fire or other casualty, the Association shall arrange for the prompt restoration and replacement of the damaged or destroyed Building[.]"<sup>2</sup>
- Section 2.1 of Stonecrest COA's bylaws, which states: "Except as otherwise specifically provided in the Condominium Documents, the Association shall be responsible for administering, operating and managing the Common Elements."
- Sections 5.13(a)-(d) and (k) of Stonecrest COA's bylaws, which state, in part: "The powers and duties to be exercised by the Executive Board shall include, but shall not be limited to, the following:

<sup>2</sup> This provision applies only in the event of a "fire or other casualty." Fire is not an issue in this case. Neither is any other "casualty," which is defined as an "accident." See Black's Law Dictionary at 209 (7th ed. 1999) and The American Heritage College Dictionary at 225 (4th ed. 2010). Therefore, this provision is inapplicable in this case.

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- (a) Operation, care, upkeep and maintenance of the Common Elements to the extent such operation, care, upkeep, and maintenance is not the obligation of the Owners;
- (b) Determination of the funds required for operation, administration, maintenance and other affairs of the Condominium and collection of the Common Expenses from the Owners, as provided in the Condominium Documents;
- (c) Employment and dismissal of personnel (including without limitation the Independent Manager) necessary for the efficient operation, maintenance, repair, and replacement of the Common Elements;
- (d) Adoption of rules and regulations covering the details of the operation, maintenance, repair, replacement, use and modification of the Common Elements; . . .
- (k) Making of repairs, additions, and improvements to or alterations or restoration of the Condominium in accordance with the other provisions of these Bylaws and the Master Deed, after damage or destruction by fire or other casualty, or as a result of a condemnation or eminent domain proceeding[.]”<sup>3</sup>

I find that Stonecrest COA has not violated any of these obligations. Rather, it is clear from the record that Stonecrest COA acted as quickly and efficiently as possible to pursue and obtain a monetary recovery from the parties it believed were actually responsible for the state of the common elements in order to finance the necessary repairs.

All parties agree that control of Stonecrest COA was transitioned to the community owners on July 1, 2010, and the Plaintiffs and Stonecrest COA agree the common elements were not in good repair as of that date. In order to pay for repairs to the common elements, Stonecrest COA had only two options: (1) impose a large special assessment in at least the tens of thousands of dollars on each and every community

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<sup>3</sup> See note 2, *supra*.

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owner, or (2) pursue a recovery from the general contractor and developer pursuant to the holding of Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corporation, 349 S.C. 251, 562 S.E.2d 633 (2002), that “developers are held responsible for the condition of the common areas at the time these areas are deeded to the POA.” Id. at 259-60, 562 S.E.2d at 638.

Given the circumstances—few in the community desired a special assessment to fund repairs they believed were the responsibility of the community’s general contractor and developer—Stonecrest COA elected to pursue a recovery against the parties believed to be responsible, and it did so swiftly. On August 6, 2010, just 36 days after the transition to owner control, Stonecrest COA filed its Answer, Cross-Claim and Third-Party Complaint in this action, in which it responded to the Plaintiffs’ initial Complaint (which had been filed on June 2, 2010) and asserted cross-claims and third-party claims against the community’s general contractor, Fankhauser Property Group, Inc., and developer, Stonecrest Villas of Tega Cay, LLC, as well as the principal of those two entities, Brock L. Fankhauser (collectively, the “Fankhauser Defendants”). Stonecrest COA’s claims were based on the condition of the common elements at the time of transition and were asserted well within the statute of limitations.<sup>4</sup>

Stonecrest COA ultimately entered into a settlement agreement with the Fankhauser Defendants and various third- and fourth-party defendants for a total recovery of \$2.6 million to fund repairs to the common elements. This court approved

<sup>4</sup> This court previously found: “The record is clear that Brock Fankhauser’s menagerie of entities knew of water intrusion problems as early as the late spring or summer of 2008.” Order Denying Third-Party Plaintiff Fankhauser Property Group Inc.’s and Stonecrest Villas of Tega Cay LLC’s Motion to Amend Third-Party Complaint at p.6. Accordingly, the earliest the statute of limitations could have run was the late spring or summer of 2011.

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the settlement, finding it to be reasonable, and held that Stonecrest COA exercised sound business judgment when it agreed to the settlement. Specifically, this court found:

5. The Board of Directors for [Stonecrest] COA consulted with several licensed contractors to determine the scope of work required to fix the penetration problems and the cost of same.
6. The Board, either directly or through its counsel, consulted with Steve Gunn, Joel Whitley, Gino Colamari, and two other contractors.
7. Based upon the information received from these sources, the Board is reasonably confident that all reasonable and necessary repairs to prevent water intrusion can be made for \$2.6 million.
8. The bids the Board received from the contractors ranged from \$2 million to \$3.4 million, depending on the scope of work and unit estimates.
9. The Board of Directors believes that a budget of \$2.6 million would include the replacement of all stone, replacement of some or all of the hardiplank, reflashing, sealing the windows in-place, gutter modifications, surface water management improvements, and a contingency for the replacement of any damaged sheathing or studs.
10. The Board also considered the \$6 million proposed scope of repairs and cost of same as provided by the Plaintiffs' designated experts.
11. The Board of Directors considered this estimate to be too high for the reasons detailed in Iadanza's affidavit.
12. The Board is also concerned about the likelihood of actually recovering money from the various defendants (third and fourth party included) given its ability to capture insurance coverage and the difficulty/expense of capturing such coverage.
13. The Board of Directors also considered the cost of proceeding with the litigation as opposed to settling the claims now.
14. **The Court finds the Board's reasoning and it is [sic] conclusion to settle this matter for \$2.6 million as opposed to pursuing further litigation to be an exercise of sound business judgment under the circumstances.**

Order Granting Stonecrest Villas of Tega Cay Owners' Association, Inc.'s Motion for Partial Summary Judgment and Approval for Settlement as to Exterior Damages or in the Alternative Motion for Dismissal Pursuant to Rule 41(a)(2) South Carolina Rules of Civil Procedure (Motion signed October 12, 2012) (entered January 23, 2013) (emphasis added).

“Under the business judgment rule, a court **will not review** the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith.” Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 599, 538 S.E.2d 15, 25 (Ct. App. 2000) (emphasis added) (citations and quotations omitted). See also Dockside Ass'n, Inc. v. Detyens, 294 S.C. 86, 87, 362 S.E.2d 874, 874 (1987) (“[T]he business judgment rule **precludes judicial review** of actions taken by a corporate governing board absent a showing of a lack of good faith, fraud, self-dealing or unconscionable conduct.”) (emphasis added). Critically, “the burden of proving good faith is not on the governing board; **the burden of proving a lack of good faith is borne, rather, by those challenging the board's actions.**” Detyens, 294 S.C. at 87, 362 S.E.2d at 874 (emphasis added). Accordingly, this court's default position must be to defer to the decisions of a corporate board unless the challenging parties can produce evidence of bad faith.

In this case, the Plaintiffs have not produced any evidence of bad faith on the part of Stonecrest COA.<sup>5</sup> Thus, the decision by Stonecrest COA to pursue and, ultimately,

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<sup>5</sup> At the hearing on the Motion, Plaintiffs' counsel argued that Stonecrest COA should be held responsible for the pre-transition conduct of one of its former officers, Brock Fankhauser, pursuant to S.C. Code § 33-31-842(c). However, Section 33-31-842 does not contemplate corporate liability for the alleged improper acts of officers. See, e.g., S.C. Code § 33-31-842(e) (establishing a statute of limitations for actions “against an officer”). Accordingly, I find that Stonecrest COA may not be held liable for the *ultra vires* acts of Mr. Fankhauser, if any. Moreover, even if there were potential corporate liability under

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recover a multi-million dollar, court-approved settlement in lieu of imposing a huge special assessment on its members—an unquestionably reasonable exercise of corporate discretion—is protected by the business judgment rule and entitled to judicial deference. See, e.g., Goddard v. Fairways Dev. Gen. P'ship, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) (holding that that a decision by the directors of a homeowners' association not to raise assessments for the purpose of repairing common elements was protected by the business judgment rule). See also Master Deed § 11.3 (“Failure of the Executive Board to exercise its authority under this section [to impose discretionary assessments] shall not be grounds for any action against the Association or the Executive Board[.]”). Accordingly, Stonecrest COA is entitled to judgment as a matter of law on all causes of action in the Amended Complaint.

**II. THE PLAINTIFFS HAVE NOT PROPERLY PLED AND CANNOT ESTABLISH THE ELEMENTS OF THEIR CAUSES OF ACTION AS AGAINST STONECREST COA.**

Though the business judgment rule entitles Stonecrest COA to summary judgment on all causes of action in the Amended Complaint, I further find that the Plaintiffs have not properly pled and cannot establish, with record evidence, one or more elements of each of the causes of action they have asserted against Stonecrest COA.<sup>6</sup>

**A. Breach of Fiduciary Duty.**

“To establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the

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Section 33-31-842, the Plaintiffs have not alleged a violation of that section, which they must do in order to obtain any recovery to which they might be entitled.

<sup>6</sup> Because the Plaintiffs are suing as individuals rather than as a class, each individual Plaintiff must personally establish every element of every cause of cause of action asserted in the Amended Complaint.

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defendant.” RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 335-36, 732 S.E.2d 166, 173 (2012). The Plaintiffs have not properly pled and cannot establish these elements as against Stonecrest COA.

Throughout this case, the Plaintiffs have asserted that Stonecrest COA owes them a fiduciary duty to repair the community’s common elements on demand. But a fiduciary relationship is unique and exists only “when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence.” Ellis v. Davidson, 358 S.C. 509, 519, 595 S.E.2d 817, 822 (Ct. App. 2004). Moreover, the defendant in a breach of fiduciary duty case must have “actually accepted or induced the confidence placed in him” because “a fiduciary relationship cannot be established by the unilateral action of one party.” Steele v. Victory Sav. Bank, 295 S.C. 290, 295, 368 S.E.2d 91, 94 (Ct. App. 1988). In this case, the Amended Complaint’s breach of fiduciary duty cause of action does not allege the Plaintiffs placed *any* trust in Stonecrest COA, much less *special* trust, nor does it allege that Stonecrest COA accepted or induced any confidence the Plaintiffs may have placed in it. Moreover, the record in this case, which is extensive, is wholly devoid of any evidence that the Plaintiffs placed *special* trust in Stonecrest COA or that Stonecrest COA accepted or induced any such trust.

Even if the Amended Complaint properly alleged the existence of a fiduciary relationship and the record contained evidence of such a relationship, the Plaintiffs still could not satisfy their burden of proof because no South Carolina court has ever found that a homeowners’ association owes a fiduciary duty to its members.<sup>7</sup> In fact, in O’Shea

<sup>7</sup> The only fiduciary duty even potentially recognized in the homeowners’ association context is a duty to assess. In Goddard, the court implied the existence of a duty to assess to make repairs to maintain

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v. Lesser, 308 S.C. 10, 416 S.E.2d 629 (1992), the South Carolina Supreme Court wrote: "We have never imposed the high standard of fiduciary duty on planned community organizations[.]" Id. at 15, 416 S.E.2d at 632. The court held that a community board similar to the board of directors of Stonecrest COA had a duty simply "to exercise judgment reasonably and in good faith." Id. Thus, I find Stonecrest COA does not stand in a fiduciary relationship with the Plaintiffs.<sup>8</sup> Moreover, like the Goddard court and pursuant to the business judgment rule, I find that even if Stonecrest COA owed a fiduciary duty to the Plaintiffs, it plainly did not violate that duty by declining to impose a large special assessment on its members and instead electing to pursue settlement of its claims against various other parties to this case. Accordingly, Stonecrest COA is entitled to judgment as a matter of law.

B. Breach of Contract.

In a breach of contract action, "the burden [is] upon the [plaintiff] to prove the contract, its breach, and the damages caused by such breach." Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). The Plaintiffs have not properly pled and cannot establish these elements as against Stonecrest COA.

common areas but found that, in light of the owners' desire to keep assessments low, the decision by the association's directors not to raise assessments was protected by the business judgment rule. 310 S.C. at 414, 426 S.E.2d at 832. In this case, the Plaintiffs have not pled a failure to assess.

<sup>8</sup> Stonecrest COA previously sought partial summary judgment on this cause of action, but this court declined to address at that time the question of whether Stonecrest COA stands in a fiduciary relationship with its members on the grounds it desired a full and complete record. See Order Re: Stonecrest Villas of Tega Cay Condominium Owners' Motion for Partial Summary Judgment and Plaintiffs Motion for Summary Judgment (Fiduciary Duty Issue) (entered August 27, 2012). The discovery period has since concluded and the record has been fully developed. This issue, which is solely for the court to decide, is now ripe for resolution. See, e.g., Hendricks v. Clemson Univ., 353 S.C. 449, 459, 578 S.E.2d 711, 715 (2003) ("[T]he question of whether [a fiduciary duty] should be imposed between two classes of people is a question for the court."). As set forth above, I find that O'Shea lays the issue to rest and establishes, in essence, that Stonecrest COA's duty extends no farther than the duty set forth in S.C. Code § 33-31-842.

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The only contract referenced in the breach of contract cause of action is the Franchise Agreement between Epcon Communities Franchising, Inc. and Fankhauser Property Group, Inc. Amended Complaint at p.12, ¶ 1. The Plaintiffs allege they are intended third-party beneficiaries of that agreement. Id. at p.12, ¶ 2. This court has already rejected the latter contention, but even accepting it as true, the fact remains that Stonecrest COA was not a party to the franchise agreement and cannot be held liable for its alleged breach.

To the extent the Plaintiffs claim that either the community's Master Deed or Stonecrest COA's bylaws constitute a "contract" between them and Stonecrest COA, I first note that the Amended Complaint does not so allege. Secondly, neither the Master Deed nor the bylaws are "contracts" in the legal sense. "The necessary elements of a contract are an offer, acceptance, and valuable consideration." Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). Neither document contains an "offer"<sup>9</sup> by Stonecrest COA which was accepted by the Plaintiffs (or vice versa). Rather, the Master Deed simply "creat[ed] and establish[ed] the horizontal property regime," S.C. Code § 27-31-100, while the bylaws are merely a governing document setting forth how Stonecrest COA is to be regulated and managed, S.C. Code § 33-31-206. Moreover, because both documents are statutorily mandated, and because they imposed obligations on Stonecrest COA before any of the Plaintiffs purchased their units, they are not supported by valuable consideration. See, e.g., McLeod v. Sandy Island Corp., 265 S.C. 1, 11, 216 S.E.2d 746, 750 (1975) ("The authorities are clear that an agreement to do that which one is already legally bound to do is not sufficient consideration to support a

<sup>9</sup> "A valid offer identifies the bargained for exchange and creates a power of acceptance in the offeree." Id. (citations and quotations omitted).

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contract.”). Thirdly, to the extent either document can be considered a “contract,” neither can be the basis for a breach of contract cause of action against Stonecrest COA because neither document is signed by or on behalf of Stonecrest COA. See S.C. Code § 32-3-10.

Even if the Master Deed or the bylaws could be the basis for a breach of contract claim by the Plaintiffs against Stonecrest COA, there is no record evidence that Stonecrest COA has violated those documents. As set forth in Section I, *supra*, Stonecrest COA did the only thing it reasonably could do in the circumstances: pursue and obtain a monetary recovery from the Fankhauser Defendants. Its decision to do so is protected by the business judgment rule. Accordingly, Stonecrest COA is entitled to judgment as a matter of law.

C. Breach of Contract Accompanied by Fraudulent Acts.

“In order to recover for breach of contract accompanied by a fraudulent act, a plaintiff must establish: (1) a breach of contract; (2) that the breach was accomplished with a fraudulent intention, and (3) that the breach was accompanied by a fraudulent act.” Minter v. GOCT, Inc., 322 S.C. 525, 529-30, 473 S.E.2d 67, 70 (Ct. App. 1996). The Plaintiffs have not properly pled and cannot establish these elements as against Stonecrest COA.

“Having a contract is a prerequisite to proving breach of contract accompanied by a fraudulent act.” Armstrong v. Collins, 366 S.C. 204, 223, 621 S.E.2d 368, 377 (Ct. App. 2005). Accordingly, because there was no contract between the Plaintiffs and Stonecrest COA, this cause of action fails at the outset for the reasons set forth in Section II(B), *supra*.

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Even if a contract existed between the Plaintiffs and Stonecrest COA, the Plaintiffs stand no chance of prevailing on this cause of action because they have not alleged and cannot establish the requisite fraudulent intent on the part of Stonecrest COA or a fraudulent act accompanying the alleged breach. Critically, the alleged fraudulent act must be "separate and distinct from the act(s) constituting the breach," Smith v. Canal Ins. Co., 275 S.C. 256, 260, 269 S.E.2d 348, 350 (1980), and must relate "to the breaching of the contract and not merely to its making." Ball v. Canadian Am. Exp. Co., 314 S.C. 272, 276, 442 S.E.2d 620, 623 (Ct. App. 1994). Yet the Amended Complaint merely recites a number of alleged acts—most of which did not involve Stonecrest COA—that occurred prior to the Plaintiffs' purchase of their units. This court has already recognized as much in granting summary judgment to the Fankhauser Defendants on this cause of action. See Order Re: Defendants Brock L. Fankhauser, Fankhauser Property Group, Inc., and Stonecrest Villas of Tega Cay, LLC's Motion for Summary Judgment (entered March 8, 2013) (the "Fankhauser SJ Order") at p.5 ("In this case, the Plaintiffs' allegations repeatedly allege acts that arose prior to the Plaintiffs' respective purchases of their units and do not allege fraudulent acts accompanying any breach of contract."). Moreover, as in Minter, there is "no evidence of an independent fraudulent act which accompanied the [[alleged]] breach." 322 S.C. at 530; 473 S.E.2d at 70. Accordingly, Stonecrest COA is entitled to judgment as a matter of law.

D. Fraud

To prove fraud, a plaintiff must show: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity;

(7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury." Robertson v. First Union Nat'l Bank, 350 S.C. 339, 347-48, 565 S.E.2d 309, 313-14 (Ct. App. 2002) (citations and quotations omitted). All nine elements must be established by "clear, cogent and convincing evidence[.]" Id. at 348, 565 S.E.2d at 314 (citations and quotations omitted). The Plaintiffs have not properly pled and cannot establish these elements as against Stonecrest COA, much less by "clear, cogent, and convincing evidence."

The first defect in the Plaintiffs' fraud cause of action is that the elements are not pled with the particularity required by Rule 9(b), SCRCP. That rule provides, in pertinent part: "In all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." However, the Amended Complaint does not specifically allege any fraudulent representations allegedly made by Stonecrest COA. Rule 9(b) clearly contemplates specific, particular allegations regarding what was said (or not said) and by whom. The Plaintiffs' failure to specify the particular misrepresentations made by Stonecrest COA which allegedly rise to the level of fraud subjects this cause of action to dismissal.

The second defect with this cause of action is that there is no evidence in the record, much less "clear and convincing evidence," that Stonecrest COA made a material representation to the Plaintiffs with knowledge of the representation's falsity. "To be actionable, the representation must relate to a present or pre-existing fact and be false when made. Representations based on statements as to future events or unfulfilled promises are not usually actionable." Sauner, 354 S.C. at 408, 581 S.E.2d at 167. Yet the Plaintiffs cannot point to any statement (or nondisclosure) made by Stonecrest COA that

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Stonecrest COA knew was false at the time it was made. Stonecrest COA was not the seller of the Plaintiffs' units and thus had no duty of disclosure. To the extent the Plaintiffs assert Stonecrest COA has fraudulently failed to maintain the common elements, they have conflated breach of contract with fraud. "[M]ere breach of contract does not constitute fraud." Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995).

The only possible misrepresentation theory the Plaintiffs could even potentially raise—which they have not done to this point—is that Stonecrest COA “promised” to maintain the common elements even though at the time of making the “promise” it had no intention of keeping it. But there is no record evidence, to say nothing of “clear and convincing evidence,” that would support such a charge. Moreover, such a charge would be belied by the fact that Stonecrest COA in fact sued for and recovered funds with which to repair the common elements. Accordingly, Stonecrest COA is entitled to judgment as a matter of law.

E. Conversion.

“Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion of the owner's rights. To establish the tort of conversion, it is essential that the plaintiff establish either title to or right to the possession of the personal property.” Regions Bank v. Schmauch, 354 S.C. 648, 667, 582 S.E.2d 432, 442 (Ct. App. 2003) (citations and quotations omitted). “To prevail in an action for conversion, the plaintiff must prove either title or right to possession of the property at the time of the alleged conversion.” Richardson's Rests., Inc. v. Nat'l Bank of S.C., 304 S.C. 289, 294,

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403 S.E.2d 669, 672 (Ct. App. 1991). The Plaintiffs have not properly pled and cannot establish these elements as against Stonecrest COA.

This cause of action is apparently based on alleged "overpayments" by Stonecrest COA to a so-called "master association." However, these overpayments have not been established as fact. The record reflects that a Stonecrest COA board member ran some calculations that have led Stonecrest COA to conclude that it was previously over-invoiced by the master association and that, as a result, Stonecrest COA has been withholding payments to the master association pending a resolution of the issue. The dispute may eventually be settled via litigation, but any recovery will belong to Stonecrest COA, not the Plaintiffs. See Ward v. Griffin, 295 S.C. 219, 221, 367 S.E.2d 703, 704 (Ct. App. 1988) (holding that where misconduct results in a loss to a corporation rather than any particular stockholder, the cause of action belongs to the corporation). See also Fankhauser SJ Order at p.7 ("[A]ny recovery of monies transferred to a master association would nonetheless inure to the benefit of the COA party."). Moreover, conversion cannot arise where there is only a disputed claim and not an unquestionable and immediate right to payment. Owens v. Zippy Mart of S.C., Inc., 268 S.C. 383, 386, 234 S.E.2d 217, 218 (1977).

~~This cause of action suffers from further deficiencies.~~ First, there is no record evidence that Stonecrest COA took property to which the Plaintiffs had either title or right and converted it to its own use. Second, in order to recover, each individual Plaintiff must establish a specific, identifiable fund that Stonecrest COA is obligated to deliver to him or her. See, e.g., Richardson's Rests., 304 S.C. at 294, 403 S.E.2d at 672 ("There can be no conversion of money unless there is an obligation on the defendant to

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deliver a specific, identifiable fund to the plaintiff.”). No Plaintiff has done so. Third, because all funds obtained by Stonecrest COA from the Plaintiffs were pursuant to Stonecrest COA’s authority to levy and collect assessments from the community owners, this cause of action must fail because “conversion is a wrongful act” which “cannot arise from the exercise of a legal right.” Castell v. Stephenson Fin. Co., 244 S.C. 45, 51, 135 S.E.2d 311, 313 (1964). Fourth, because Stonecrest COA lawfully collected assessments from the Plaintiffs, a demand by the Plaintiffs for return of specified funds and a refusal by Stonecrest COA were required to transform Stonecrest COA’s possession of the funds into a potentially wrongful act. See, e.g., Roberts v. James, 158 S.E. 689, 691 (S.C. 1931) (“[P]ossession must first be transformed into a wrongful one by a refusal to surrender the property. Hence, demand and refusal are necessary for the maintenance of trover in all cases in which the defendant was rightfully in possession.”). The Plaintiffs have never made such a demand. Accordingly, Stonecrest COA is entitled to judgment as a matter of law.

F. Civil Conspiracy.

“The elements of a civil conspiracy in South Carolina are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages.” Pye v. Estate of Fox, 369 S.C. 555, 566-67, 633 S.E.2d 505, 511 (2006). “The ‘essential consideration’ in civil conspiracy 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.” Id. at 567, 633 S.E.2d at 511 (citations and quotations omitted). “In order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint

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assent of the minds of two or more parties to the prosecution of the unlawful enterprise.”  
Id. (citations and quotations omitted). The Plaintiffs have not properly pled and cannot establish these elements as against Stonecrest COA.

“In a civil conspiracy claim, one must plead additional acts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the complaint[.]” Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 115-16, 682 S.E.2d 871, 875 (Ct. App. 2009). “[T]he failure to properly plead such acts will merit the dismissal of the claim.” Id. at 116, 682 S.E.2d at 875. However, as set forth below, the Plaintiffs’ civil conspiracy claim does little more than reallege the acts complained of in the other causes of action.

- Paragraph 1 of the civil conspiracy claim contains boilerplate language incorporating prior allegations.
- The allegation in paragraph 2 of the civil conspiracy claim that Brock Fankhauser engaged in unauthorized private loans is also found at p.7, ¶ 19; p.8, ¶ 22(k); p.9, ¶ 6; p.11, ¶ 9; p.14, ¶4(k); p.21, ¶¶ 25 and 30; p.22, ¶ 2; p.23, ¶ 8; p.32, ¶ 13(c); and p.35, ¶ 8(c) and (e).
- The allegation in paragraph 3 of the civil conspiracy claim that the Defendants depleted Stonecrest COA’s reserves is also found at p.11, ¶ 13; p. 22, ¶ 4; and p.23, ¶ 6.
- The allegation in paragraph 4 of the civil conspiracy claim that the Defendants utilized assessments for improper purposes is also found at p.11, ¶ 12; p.21, ¶ 25; p.22, ¶¶ 2 and 4; p.23, ¶ 4; p.32, ¶ 13(c); and p.35, ¶ 8(e).
- The allegation in paragraph 5 of the civil conspiracy claim that Stonecrest COA failed to make repairs is also found at p.8, ¶ 22(g); p.11, ¶¶ 14-15; p.13, ¶ 4(c); p.14, ¶ 4(i); p.16, ¶ 10; p.17, ¶ 22; p.21, ¶ 24; p.23, ¶ 5; p.28, ¶ 6; and p.32, ¶ 12.
- The allegation in paragraph 6 of the civil conspiracy claim that the Defendants have mismanaged reserves and assessments is also found at p.8, ¶ 22(i); p.12, ¶ 21; p.22, ¶ 31; and p.23, ¶ 6.

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- The allegation in paragraph 7 of the civil conspiracy claim that Brock Fankhauser repaired certain homes but not others is also found at p.10, ¶6; p.11, ¶¶ 16-17; p.12, ¶ 19; p.14, ¶ 4(h) and (j); p.16, ¶ 12; p.17, ¶ 22; and p.33, ¶ 13(h).
- Paragraphs 8-11 are conclusory statements of the elements of a cause of action for civil conspiracy.

Because the civil conspiracy cause of action merely reasserts the allegations asserted in other causes of action and labels them “conspiracy,” the Plaintiffs, like the plaintiff in Kuznik, are “not entitled to maintain [their] conspiracy cause of action.” 342 S.C. at 611, 538 S.E.2d at 31. “Where the particular acts charged as a conspiracy are the same as those relied on as the tortious act or actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong.” Id. at 610, 538 S.E.2d at 31 (quoting Todd v. S.C. Farm Bureau Mut. Ins. Co., 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981)). See also Peoples Fed. Sav. & Loan Ass’n of S.C. v. Res. Planning Corp., 358 S.C. 460, 476, 596 S.E.2d 51, 59 (2004) (“A plaintiff cannot recover damages for a particular act or wrong and likewise recover on a conspiracy to do the act or wrong.”).

The Amended Complaint also does not properly allege—and there is no record evidence establishing—special damages resulting from the alleged conspiracy. “A civil conspiracy is a combination of two or more parties joined for the purpose of injuring the plaintiff thereby causing him *special damage*.” Future Group, II v. Nationsbank, 324 S.C. 89, 100, 478 S.E.2d 45, 50 (1996) (emphasis added). Damages resulting from civil conspiracy are called “special” because they must result from the combination/conspiracy above and beyond the damages which result from the underlying acts. See, e.g., Pye, 369 S.C. at 568, 633 S.E.2d at 511 (“Because the quiddity of a civil conspiracy claim is the

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damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action.”). See also Hackworth, 385 S.C. at 117, 682 S.E.2d at 875 (“If a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed.”). Though paragraph 9 of the civil conspiracy claim contains the conclusory allegation that the “Plaintiffs have incurred special damages,” it does not specify what those damages are or how they resulted from the alleged conspiracy as opposed to the alleged underlying acts. Moreover, there is no evidence in the record establishing that the Plaintiffs suffered damages specifically as a result of the alleged conspiracy.

The civil conspiracy claim fails for still two more reasons. First, there is no evidence in the record that Stonecrest COA combined with anyone else “for the purpose of injuring” the Plaintiffs, and thus the Plaintiffs cannot establish that Stonecrest COA intended to cause them harm. Second, “a civil conspiracy cannot exist when the alleged acts arise in the context of a principal-agent relationship because by virtue of the relationship such acts do not involve separate entities.” McMillan v. Oconee Mem’l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886-87 (2006). To the extent the alleged conspiracy was between Brock Fankhauser and Stonecrest COA during the pre-transition period in which Mr. Fankhauser was an officer of Stonecrest COA, no conspiracy could have existed because Mr. Fankhauser was Stonecrest COA’s agent. Accordingly, Stonecrest COA is entitled to judgment as a matter of law.

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G. Breach of Express Warranty.<sup>10</sup>

In order to recover for breach of an express warranty, a plaintiff must prove three elements: (1) the existence of the warranty; (2) a breach of the warranty by the failure of the goods to conform to the warranted description; and (3) damages proximately caused by the breach. First State Sav. & Loan v. Phelps, 299 S.C. 441, 448, 385 S.E.2d 821, 825 (1989). The Plaintiffs cannot establish the existence of an express warranty given by Stonecrest COA.

S.C. Code § 36-2-313 sets forth how express warranties are created. It states: "Express warranties by the seller are created as follows . . . ." S.C. Code § 36-2-313(1). Stonecrest COA cannot possibly have given an express warranty under this section because it was not the "seller" of the Plaintiffs' units. The term "seller" means "a person who sells or contracts to sell goods." S.C. Code. § 36-2-103(1)(d). Stonecrest COA did not sell or contract to sell "goods"<sup>11</sup> to the Plaintiffs and there is no record evidence to the contrary. The only party in this case which could even potentially have given an express warranty is the developer, Stonecrest Villas of Tega Cay, LLC. Accordingly, Stonecrest COA is entitled to judgment as a matter of law.

<sup>10</sup> This section covers both the tenth and fourteenth causes of action asserted in the Amended Complaint.

<sup>11</sup> The term "goods" is defined as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Title 36, Chapter 8) and things in action. 'Goods' also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (§ 36-2-107)." S.C. Code § 36-2-105(1). This definition does not apply to real property, and thus Article 2 of the Uniform Commercial Code is inapplicable in this case regardless of who the seller was. See also Fankhauser SJ Order at p.5 (finding that the UCC only applies to the sale of "goods," which does not include the Plaintiffs' condominium units).

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H. Breach of Implied Warranty of Merchantability.

S.C. Code § 36-2-314(1) sets forth how an implied warranty of merchantability is given. It states: "[A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." The Plaintiffs cannot establish the existence of such a warranty given by Stonecrest COA.

As discussed in Section II(G), *supra*, Stonecrest COA is not and was not a "seller" of "goods," and thus it could not possibly have given an implied warranty of merchantability. That fact in and of itself entitles Stonecrest COA to summary judgment, but Section 36-2-314(1) contains the additional requirement that, for this warranty to be implied, the "seller" must also be a "merchant." A "merchant" is "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." S.C. Code § 36-2-104. Stonecrest COA clearly does not fall under this definition either. There is no record evidence to the contrary, and Stonecrest COA is entitled to judgment as a matter of law.

To the extent the cause of action for breach of the implied warranty of merchantability may be read to assert a breach of the implied warranty of workmanlike service, such a cause of action is likewise inapplicable to Stonecrest COA. An implied warranty of workmanlike service provides that "in constructing a home, a builder warrants that the home is fit for its intended use as a dwelling, that the home was constructed in a workmanlike manner, and that the home is free of latent defects." Fields

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v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 561, 658 S.E.2d 80, 88-89 (2008). Stonecrest COA is an owners' association, not a "builder" and it did not "construct" the Plaintiffs' units. It did not give—indeed, it could not have given—a warranty of workmanlike service and thus cannot be held liable for a breach of such a warranty.

I. Breach of Implied Warranty of Fitness for a Particular Purpose.

S.C. Code § 36-2-315 governs implied warranties of fitness for a particular purpose. It states: "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section (§ 36-2-316) an implied warranty that the goods shall be fit for such purpose." Once again, the Plaintiffs cannot establish the existence of such a warranty given by Stonecrest COA because Stonecrest COA is not and was not a "seller" of "goods" and could not possibly have given such a warranty. Stonecrest COA is, therefore, entitled to judgment as a matter of law.

J. Unfair Trade Practices Act Violation.

In order to prevail in an action for violation of the SCUTPA, a plaintiff must prove three elements: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected the public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)." RFT Mgmt., 399 S.C. at 337, 732 S.E.2d at 174 (citations and quotations omitted). The Plaintiffs cannot establish these elements as against Stonecrest COA.

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The first element is derived from S.C. Code § 39-5-20, which provides: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." However, there is no record evidence that Stonecrest COA engaged in "trade or commerce" with the Plaintiffs, much less that it employed unfair or deceptive practices in the conduct thereof. "Trade or commerce is defined as 'the advertising, offering for sale, sale or distribution of any services and any property . . . and any other . . . thing of value[.]'" Foggie v. CSX Transp., Inc., 315 S.C. 17, 24, 431 S.E.2d 587, 591 (1993) (quoting S.C. Code § 39-5-10(b)). The Plaintiffs have not established—and cannot establish—that Stonecrest COA advertised, offered to sell, sold, or distributed any services, property, or other thing of value to them. The reason is simple: Stonecrest COA merely serves as a community administrator pursuant to governing documents which were put in place before the Plaintiffs ever purchased their units. See, e.g., Ward v. Glover, 2006 WL 3707893 at \*8 (Me. Super. Ct. 2006) (interpreting the identical definition of "trade or commerce" in Maine's UCC and holding that a condominium association did not provide "products or services" but rather that it was a "non-profit organization that runs a condominium"). Accordingly, it cannot be held liable to the Plaintiffs under the SCUTPA.

Moreover, the Plaintiffs cannot establish that any alleged "unlawful trade practice" committed by Stonecrest COA had an "adverse impact on the public interest." "To be actionable under the Unfair Trade Practices Act, an unfair or deceptive act or practice must have an impact upon the public interest. The act is not available to redress a private wrong where the public interest is unaffected." Columbia E. Assocs. v. Bi-Lo, Inc., 299 S.C. 515, 522, 386 S.E.2d 259, 263 (Ct. App. 1989). Though the Amended

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Complaint does contain the conclusory assertion that the Defendants' alleged actions affect the public interest because they are "capable of repetition," it contains no factual allegations supporting that assertion and the record contains no evidence supporting it. An adverse effect on the public must be established with specific facts showing that "members of the public were adversely affected by the unfair conduct or that they were likely to be[.]" Jefferies v. Phillips, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994) (citations and quotations omitted). Otherwise, "all we are left with is a speculative claim of adverse public impact and that will not suffice for a recovery under the [SC]UTPA." Id. (citations and quotations omitted). But the Amended Complaint's SCUTPA cause of action is nothing more than a rehashing of the allegations of its other causes of action with a SCUTPA label applied. This cannot support a recovery under SCUTPA. See, e.g., Columbia E. Assocs., 299 S.C. at 522, 386 S.E.2d at 263 ("[A] deliberate or intentional breach of a valid contract, without more, does not constitute a violation of the Unfair Trade Practices Act.").

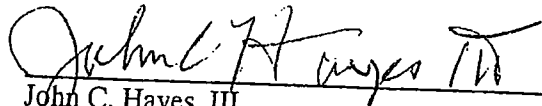
Stonecrest COA is a private, non-profit entity in which only community owners are members. Nothing it does affects the public at large. Its alleged conduct, even if repeated, could not possibly affect anyone other than its own members. Indeed, if Stonecrest COA were never to repair the common elements, it is probable that no one outside the community would even notice. Clearly, the allegations against Stonecrest COA are of private, intracorporate wrongs which do not affect the public interest. See, e.g., Jefferies, 316 S.C. at 527, 451 S.E.2d at 23 ("[C]onduct which only affects the parties to the transaction provides no basis for a [SC]UTPA claim."). Accordingly, Stonecrest COA is entitled to judgment as a matter of law.

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**THEREFORE**, the Court finding no genuine issue of material fact that would entitle Plaintiffs to relief, Stonecrest Villas of Tega Cay Condominiums Owners Association, Inc. is entitled to judgment as a matter of law, and

**THEREFORE**, the Defendant, Stonecrest Villas of Tega Cay Condominiums Owners Association, Inc. is granted summary judgment as to all of Plaintiffs' causes of action directed to it.

**IT IS SO ORDERED!**

  
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John C. Hayes, III  
Judge, Sixteenth Judicial Circuit

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April 5<sup>th</sup>, 2013  
Myrtle Beach, South Carolina