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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

H. Steven DeBerry, IV, Circuit Court Judge
And
R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2022-000152
Trial Court Case No. 2019-CP-26-01211

Gregory Cutlip, individually and as a member of the Legends Property Owners Association, Inc. and Parkland Property Owners Association, Inc., ...Respondent,

v.

LDY Properties, LLC, Estate and/or Trust of Larry D. Young, Legends Property Owners Association, Inc., Parkland Property Owners Association, Inc., Legends Properties, LLC, New Town Management, LLC, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, Robert L. Schechter, Richard Apolenis, John K. Manley, Michael Marino, Legends Golf Holding, LLC, Jigger Holdings, LLC, and Daniel Larry Young, Jr.,.....Defendants,

Of which LDY Properties, LLC; Larry D. Young; Legends Properties, LLC; and Legends Golf Holding, LLC are the Appellants.

APPELLANTS' RETURN TO RESPONDENT'S MOTION TO DISMISS

This is not the mere appeal of a denial of a motion to dismiss and the granting of a motion to amend a complaint. This is an appeal of the Plaintiff's circumvention of the South Carolina Rules of Civil Procedure to overturn an adjudication on the merits in favor of the Defendants. The

Court has appellate jurisdiction under South Carolina Code § 14-3-330 as the Orders affect a substantial right and strike part of the Defendants' Answers. The Orders are also intermediate orders involving the merits. Therefore, the Court should exercise its jurisdiction and not dismiss this appeal.

FACTUAL AND PROCEDURAL BACKGROUND

On March 1, 2019, Respondent Gregory Cutlip filed a Complaint purporting to bring a derivative action as a member of two incorporated property owners associations ("POAs"). (Ex. A, Compl.). In accordance with Rule 23 of the South Carolina Rules of Civil Procedure, derivative actions must comply with certain requirements, including:

> [T]he complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort.

Rule 23(b)(1), SCRCP. Cutlip's Complaint failed to comply with these three (3) requirements.

On August 5, 2020, the Appellants filed a Motion to Dismiss all derivative claims in the action based on Cutlip's failure to: (1) serve a verified complaint; (2) allege that the actions occurred while he was a member of the association; and (3) allege with particularity the efforts, if any, made by him to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. (Ex. B, Mot. to Dismiss). This was a Rule 41(b) Motion for Dismissal. *See* Rule 41(b), SCRCP ("For ***failure of the plaintiff*** to prosecute or ***to comply with these rules*** or any order of the court, a defendant may move for dismissal of an action or of any claim against him.") (emphasis added).

Thereafter, on September 13, 2020, Cutlip filed an Amended Complaint attempting to correct some of these deficiencies. (Ex. C, First Am. Compl.). Cutlip's Amended Complaint alleged that he sent a demand letter to counsel for the POAs on July 28, 2020, making various demands on their boards. (*Id.* at ¶ 44). Cutlip's own allegation shows that he did not comply with Rule 23 by making a demand *prior* to filing suit on March 1, 2019.

In a January 19, 2021 Memorandum, the Appellants argued that Cutlip's derivative claims were not properly initiated and were void *ab initio*, regardless of Cutlip's subsequent attempts to correct his pleading deficiencies. (Ex. D, Mem. in Support of Mot. to Dismiss). This argument was based on Cutlip failing to make a demand prior to filing suit and having no sufficient justification for failing to do so. (*Id.*). The Court held a hearing on the Motion to Dismiss. By Order dated March 3, 2021, Judge Benjamin Culbertson granted Appellants' Motion to Dismiss, stating:

> Defendant's Motion to Dismiss is GRANTED and plaintiff's derivative action is dismissed. Plaintiff's Amended Complaint fails to allege with particularity the efforts made by plaintiff to obtain the action he desires from the directors. *See* Rule 23(b)(1), SCRCP.

(Ex. E, March 3, 2021 Order). This dismissal operated as an "adjudication upon the merits." *See* Rule 41(b), SCRCP ("[A] dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for failure to join a party under Rule 19, ***operates as an adjudication upon the merits***.") (emphasis added).

Rather than appealing this adjudication upon the merits, Cutlip exploited a change in Circuit Court judges and moved to amend his Amended Complaint adding back in the derivative actions that had just been dismissed. (Ex. F, Pl.'s Mot. to Am. Compl. ¶ 3 (stating that "allegations have been added to address the Court's concern and bring the complaint into conformance with Rule 23(b) so that derivative claims may be asserted")). Plaintiff's additional allegations were premised on a March 15, 2021 pre-textual demand he made to the POA boards a mere day before

filing this Motion to Amend and premised on recharacterizing some prior requests for information as demands for the action he desires in this lawsuit. (Ex. G, March 15, 2021 Demand Letter); (Ex. H, Pl.'s Second Am. Compl. ¶¶ 23, 27, 33, 35 (filed on March 16, 2021)).[1]

On May 7, 2021, the Appellants filed a Memorandum in Opposition to Plaintiff's second attempt to retroactively cure his failure to comply with the requirements of Rule 23. (Ex. I, Mem. in Opp.). This Memorandum was based upon the grounds of *res judicata* and futility. (*Id.*). By Order dated May 28, 2021, Judge R. Ferrell Cothran, Jr. allowed Plaintiff to again amend his Complaint. (Ex. J, May 28, 2021 Order).

In June of 2021, several of the Defendants filed Motions to Dismiss all derivative claims in the action based on: (1) these claims being barred by the doctrine of *res judicata*, having already been dismissed by Court Order after a hearing; and (2) Plaintiff having failed to meet the requirements of Rule 23 by not making a demand upon the POA boards prior to filing this lawsuit and not sufficiently pleading a justification for that failure. (Ex. K, Mots. to Dismiss and Mem. in Support). By Order dated November 5, 2021, Judge H. Steven DeBerry, IV denied the Motions to Dismiss. (Ex. L, November 5, 2021).

ARGUMENT

The November 5, 2021 Order denying multiple Defendants' motions to dismiss the derivative claims is immediately appealable under South Carolina Code § 14-3-330. It affects a substantial right and strikes part of the Defendants' Answers. Relying on a mistaken understanding

[1] In this March 15, 2021 demand letter, Respondent's counsel refers to this demand as "our second demand" with the post-suit July 28, 2020 demand being the first demand. (Ex. G, March 15, 2021 Demand Letter, p. 1). However, when Respondent subsequently amends his Complaint, he recharacterizes the March 15, 2021 demand letter as "the fourth demand" and recharacterizes some prior requests for information as demands for the action he desires in this lawsuit. (Ex. H, Pl.'s Second Am. Compl. ¶¶ 23, 27, 33, 35).

of both the applicable law and the previous rulings in the case, the Order subjects Defendants to continued litigation in a matter that has already been adjudicated on the merits. As such, it is also an intermediate order involving the merits. Therefore, the Court has appellate jurisdiction.

I. The November 5, 2021 Order affects a substantial right and strikes part of the Defendants' Answers.

"The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by S.C.Code Ann. § 14–3–330." *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 708 (2005). That statute provides in pertinent part:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal: . . . (2) **An order affecting a substantial right made in an action when such order** (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) **strikes out an answer or any part thereof or any pleading in any action.**...."

S.C. Code § 14-3-330 (emphasis added). As the South Carolina Supreme Court has recognized, orders affecting substantial rights are immediately appealable. *Hagood*, 362 S.C. at 199, 607 S.E.2d at 711. Here, the substantial right affected by the Order is immunity from suit provided under the doctrine of *res judicata*.

A. *Res judicata* affords protection from relitigation of claims, which is a substantial right.

Res judicata is immunity from suit, not immunity from liability. "*Res judicata* bars relitigation of the same cause of action." *Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct. App. 1997). "Res judicata's fundamental purpose is to ensure that no one should be twice sued for the same cause of action." *Yelsen Land Co. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012) (citation and quotation marks omitted). "The doctrine flows from the principle that public interest requires an end to litigation and no one should be sued twice for the same cause of action." *Duckett v. Goforth*, 374 S.C. 446, 464, 649 S.E.2d 72, 81 (Ct. App. 2007). "Res judicata is the

branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies. Res judicata ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues." *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 108 (1999).

South Carolina courts have not ruled explicitly on whether *res judicata* qualifies as a substantial right. However, other jurisdictions have explicitly ruled that it does qualify as a substantial right. In *Bockweg v. Anderson*, the North Carolina Supreme Court addressed this issue and explained:

> [A] motion for summary judgment based on *res judicata* is directed at preventing the possibility that a successful defendant, or one in privity with that defendant, will twice have to defend against the same claim by the same plaintiff, or one in privity with that plaintiff. Denial of the motion could lead to a second trial in frustration of the underlying principles of the doctrine of *res judicata*. Therefore, we hold that the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable. N.C.G.S. § 1–277 (1983); N.C.G.S. § 7A–27(d) (1989)....Accordingly, we reject plaintiffs' contention that defendants' appeal in this case should be dismissed.

333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993).[2]

Other jurisdictions have also found denial of motions that are based on *res judicata* grounds are immediately appealable. *See, e.g., Buck v. Town of Berlin*, 163 Conn. App. 282, 135 A.3d 1237

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[2] *See also McCallum v. N. Carolina Co-op. Extension Serv. of N.C. State Univ.*, 142 N.C. App. 48, 51, 542 S.E.2d 227, 231 (2001) ("[T]he denial of summary judgment based on the defense of *res judicata* can affect a substantial right and may be immediately appealed."); *McCallum v. N. Carolina Co-op. Extension Serv. of N.C. State Univ.*, 142 N.C. App. 48, 51, 542 S.E.2d 227, 231 (2001) ("Denial of a summary judgment motion based on res judicata raises the possibility that a successful defendant will twice have to defend against the same claim by the same plaintiff, in frustration of the underlying principles of claim preclusion....Thus, the denial of summary judgment based on the defense of res judicata can affect a substantial right and may be immediately appealed."); *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) ("Defendant's argument in favor of appealability is that the denial of a motion to dismiss a claim for relief affects a substantial right when the motion to dismiss makes a colorable assertion that the claim is barred under the doctrine of collateral estoppel. We agree.").

(2016) ("While a denial of summary judgment generally is not considered a final judgment for purposes of appellate review, the denial of a motion for summary judgment based on the doctrine of res judicata is a final judgment for purposes of an appeal."); *Smith v. Union Bank & Tr. Co.*, 653 So. 2d 933, 934 (Ala. 1995) (allowing immediate appeal of "interlocutory order denying a dismissal" based on *res judicata* grounds); *Cayer v. Komertz*, 91 Conn. App. 202, 203 n.2, 881 A.2d 368, 370 n.2 (2005) ("We note that although the denial of a motion for summary judgment ordinarily is not appealable because it is not a final judgment, the denial of a motion for summary judgment on the basis of a claim of res judicata is a final judgment for purposes of appeal because it invokes the right not to go to trial on the merits."). Likewise, federal courts allow immediate appeal of such orders. *See E.E.O.C. v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 674 (4th Cir.1983) (noting that, under federal statutes, when a trial judge enters an order denying a motion to dismiss the action, which alleges a bar of *res judicata*, an interlocutory appeal may proceed upon an appropriate certification).

In addition, South Carolina courts have recognized as "substantial rights" those rights that would be functionally worthless if trial were allowed to proceed without their protection. For example, in *Hagood v. Sommerville*, the Supreme Court of South Carolina held that an order granting a motion to disqualify a party's attorney in a civil case was immediately appealable because it affected a substantial right. 362 S.C. at 199, 607 S.E.2d at 711. In that case, the trial court granted the motion to dismiss the petitioner's attorney because there was a conflict of interest with an expert witness. *Id.* at 194, 607 S.E.2d at 708. Petitioner argued that the right was substantial because, "the right would likely be lost if not immediately appealed." *Id.* at 195, 607 S.E.2d at 709. The Supreme Court found this line of reasoning persuasive. *Id.* at 197, 607 S.E.2d at 710.

The Court held: "[T]he right to be represented by ones preferred attorney is closely related to the right to a particular mode of trial, a well-established substantial right. *Id.* at 198, 607 S.E.2d at 710.

In this case, like in *Hagood*, the Order affects a substantial right related to the mode of trial. *Res judicata* is the right to be protected from relitigation of the same claims. Plaintiff is attempting to subject the Defendants to relitigation of the derivative claims that have already been decided, and the right to *res judicata* is the Defendants' only relief. Without this right, a party could be locked into ceaseless litigation with no hope of escape. Additionally, similar to the right in *Hagood*, the right will be lost if not allowed to be immediately appealed. *Res judicata* is supposed to *prevent* a party from being dragged into court on the same claims, not provide redress once it has already happened.

Plaintiff may argue that the Defendants maintain the ability to appeal the final judgment of the case. However, if Defendants are unable to immediately appeal the Order, their right to assert a *res judicata* defense is functionally worthless. Appealing at the conclusion of litigation is pointless because *res judicata* is designed to prevent the litigation in the first place. To require the Defendants to wait to appeal is equivalent to completely stripping them of their right. In such case, the Defendants could never obtain the protection intended by *res judicata* – the protection from relitigation of the same claims. This contravenes both the statutory language and public policy. *See Doe v. Howe*, 362 S.C. 212, 217, 607 S.E.2d 354, 356 (Ct. App. 2004) ("The order denying Doe's motion to proceed anonymously prior to trial has the effect of revealing his identity, the very thing he was seeking to keep confidential. Therefore, we find that the order is immediately appealable....").

B. The November 5, 2021 Order struck out the *res judicata* defense from the Defendants' Answers.

The effect of the Order is that Defendants are either required to relitigate the derivative claims or face a default judgment on those claims. Thus, the Defendants' *res judicata* defense has been eliminated by the Order. Moreover, as explained below, the Court's November 5, 2021 Order effectively bars the Defendants from raising the *res judicata* defense again in this proceeding.

C. The November 5, 2021 Order is distinguishable from contrary South Carolina cases finding orders not immediately appealable.

The appealed Orders at issue in this case are the result of Plaintiff's attempt to circumvent the South Carolina Rules of Civil Procedure. As such, they do not come with the scope of orders that South Carolina's appellate courts have previously found not to be immediately appealable. *See Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 540, 773 S.E.2d 144, 147 (2015) ("The trial court's order is quite distinct from other orders of bifurcation which have come before this Court....We are therefore free to evaluate the trial court's order as what it is—not merely what it appears to be—and hold that it is one which is immediately appealable."). Moreover, "the question of whether an order is immediately appealable is determined on a case-by-case basis." *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019).

In this very case, the Defendants previously obtained an adjudication on the merits as to Plaintiff's derivative claims. The Defendants moved to dismiss the derivative claims dismiss based on the Plaintiff's failure to comply with the requirements of Rule 23. (Ex. B, Mot. to Dismiss). Rule 41(b) of the South Carolina Rules of Civil Procedure provides for involuntary dismissal "[f]or failure of the plaintiff...to comply with" the Rules of Civil Procedure, including Rule 23 of the South Carolina Rules of Civil Procedure. Rule 41(b), SCRCP. By Order dated March 3, 2021, Judge Benjamin Culbertson granted Defendants' Motion to Dismiss, stating:

> Defendant's Motion to Dismiss is GRANTED and plaintiff's derivative action is dismissed. Plaintiff's Amended Complaint fails to allege with particularity the efforts made by plaintiff to obtain the action he desires from the directors. *See* Rule 23(b)(1), SCRCP.

(Ex. E, March 3, 2021 Order).[3] A post-suit demand, the only demand Plaintiff made, does not fulfill the Rule 23(b)(1) demand requirement. *See Carolina First Corp. v. Whittle*, 343 S.C. 176, 189–90, 539 S.E.2d 402, 409–10 (Ct. App. 2000) ("Such a pre-suit demand must be alleged, not in a conclusory fashion, but through particularized allegations....The particularized allegations must support an earnest, and not a simulated, effort with the managing body of the corporation to induce remedial action on their part."); *Star v. TI Oldfield Dev., LLC*, 962 F.3d 117, 135 (4th Cir. 2020) (applying South Carolina law) (stating that since the Rule 23 demand requirement is designed to give the directors an opportunity to take the action requested by the shareholder prior to suit, "a post-suit demand likely would not suffice" and, consequently, most evidence of post-suit demands is irrelevant). This dismissal under Rule 41(b) "operates as an adjudication upon the merits." *See* Rule 41(b), SCRCP. Thus, the Defendants obtained an "adjudication upon the merits" as to Plaintiff's derivative claims.

Rather than appealing this "adjudication upon the merits," Plaintiff attempted to circumvent the Rules of Civil Procedure and again amend his Complaint to reassert these derivative causes of action. (Ex. F, Pl.'s Mot. to Am. Compl. ¶ 3). The Orders at issue in this appeal are the direct result of Plaintiff's improper actions. Consequently, they do not fit the mold of other orders the appellate courts have addressed for immediate appealability. If dissatisfied with the

[3] The Court checked the "DECISION BY THE COURT" box on the order form. Although the order form contained an "ACTION DISMISSED: Rule 12(b)" check box, the Court did not check this box.

Court's March 3, 2021 Order, then Plaintiff's remedy was to appeal that Order, not circumvent the Rules of Civil Procedure and exploit a change of Circuit Court judges.

Furthermore, the November 5, 2021 Order is not a denial of a 12(b) motion to dismiss, which South Carolina's appellate courts have found to not be immediately appealable. *See, e.g., Moyd v. Johnson*, 289 S.C. 482, 482, 347 S.E.2d 97, 98 (1986); *Woodard v. Westvaco Corp.*, 319 S.C. 240, 460 S.E.2d 392 (1995). It is the denial of a Rule 41(b) motion to dismiss, which South Carolina's appellate courts have not addressed. It is also a failure by the Circuit Court to recognize Plaintiff's actions as a circumvention of the Rules of Civil Procedure.

This case is also distinguishable from other *res judicata* cases. In *Ballenger v. Bowen*, the Circuit Court denied the appellant's motion for summary judgment. 313 S.C. 476, 476, 443 S.E.2d 379, 379 (1994). The appellant asserted that the order was immediately appealable "because statements made in the order have the effect of striking their defense of *res judicata*/collateral estoppel." *Id.* at 476, 443 S.E.2d at 379–80. The Supreme Court stated that "the denial of summary judgment does not *finally* determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings." *Id.* at 477, 443 S.E.2d at 380 (emphasis in orig.).

This case is distinguishable. The Order being appealed is neither a denial of a motion for summary judgment nor denial of a 12(b) motion. The Order is functionally a reversal of the prior March 3, 2021 adjudication on the merits, which did have the effect of finally determining the merits of the derivative causes of action. Critically, unlike with a denial of the motion for summary judgment in *Ballenger*, in this case the *res judicata* issue cannot "be raised again later in the proceedings." The November 5, 2021 Order improperly held that "the prior dismissal of the derivative claims was not an adjudication on the merits." (Ex. L, November 5, 2021 ¶ 7). Ironically,

the doctrine of *res judicata* would bar the Defendants from relitigating whether the March 3, 2021 Order dismissing the derivative claims was an adjudication on the merits as required for the *res judicata* defense. Therefore, this case is notably distinct from any South Carolina appellate court cases finding orders were not immediately appealable. These Orders qualify for immediate appeal under South Carolina Code § 14-3-330.

II. The November 5, 2021 Order is also an intermediate order involving the merits.

Under South Carolina Code § 14-3-330(1), an intermediate order "involving the merits" is immediately appealable. S.C. Code § 14-3-330(1). "An order involves the merits when it finally determines some substantial matter forming the whole or a part of some cause of action or defense." *Tillman v. Tillman*, 420 S.C. 246, 249, 801 S.E.2d 757, 759 (Ct. App. 2017) (citations omitted); *Watson v. Underwood*, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014) ("An order 'involves the merits,' as that term is used in section 14–3–330(1), and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense."). As explained above, the Order finally determined whether there was a prior adjudication on the merits, which is a required part of the defense of *res judicata*. Therefore, the Court also has jurisdiction under South Carolina Code § 14-3-330(1).

CONCLUSION

For the above-stated reasons, Appellants respectfully request that the Court deny Respondent's Motion to Dismiss and exercise its proper jurisdiction to determine this appeal. The trial court's Order should be evaluated "as what it is – not merely what it appears to be." *See Morrow*, 412 S.C. at 540, 773 S.E.2d at 147. These Orders are not merely a denial of a motion to dismiss and a grant of a motion to amend a complaint. They are the improper reversal of an adjudication on the merits in favor of Defendants, which Plaintiff obtained through circumvention

of the Rules of Civil Procedure and exploitation of a change in Circuit Court judges. As such, they: (1) are intermediate orders involving the merits; and (2) affect a substantial right and strike part of the Defendants' Answers. Therefore, the Court has appellate jurisdiction pursuant to South Carolina Code § 14-3-330.

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March 17, 2022
Columbia, South Carolina

EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	Civil Action No. _____
Gregory Cutlip, individually and as a member of the Legends Property Owners Association, Inc. and Parkland Property Owners Association, Inc.,	)	
Plaintiff,	)	
vs.	)	**Complaint** (Jury Trial Requested)
LDY Properties, LLC, Larry D. Young, Legends Property Owners Association, Inc., Parkland Property Owners Association, Inc., Legends Properties, LLC, and New Town Management, LLC, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, and Robert L. Schechter,	)	
Defendants.	)	

NOW COMES Gregory Cutlip, Plaintiff in the above-captioned matter, and submits his Complaint against the Defendants as follows:

Identity of Parties and Jurisdictional Allegations

1. Plaintiff is a citizen and resident of Horry County, South Carolina.
2. LDY Properties, LLC is a limited liability company registered to do business in South Carolina and having as its registered agent Larry D. Young who may be served at 1500 Legends Boulevard, Myrtle Beach, SC 29578.
3. Larry D. Young is an individual who resides and regularly transacts business in Horry County, South Carolina, and who may be served at 1500 Legends Boulevard, Myrtle Beach, SC 29578.

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4. Legends Property Owners Association, Inc. is a corporation registered to do business in South Carolina and having as its registered agent Richard M. Lovelace, Jr. who may be served at 1310 Second Avenue, Conway, SC 29526.
5. Parkland Property Owners Association, Inc. is a corporation registered to do business in South Carolina and having as its registered agent Richard M. Lovelace, Jr. who may be served at 1310 Second Avenue, Conway, SC 29526.
6. Legends Properties, LLC is a limited liability company registered to do business in South Carolina and having as its registered agent Larry D. Young who may be served at 1500 Legends Drive, Myrtle Beach, SC 29579.
7. New Town Management, LLC is a limited liability company registered to do business in South Carolina and having as its registered agent Michael Marino who may be served at 4590-D Girvan Drive, Myrtle Beach, SC 29579.
8. At all relevant times herein, Michael R. Latta is a resident of Horry County and a member of the Board of Directors for the Parkland Property Owners Association.
9. At all relevant times herein, Marienne Johnson is a resident of Horry County and a member of the Board of Directors for the Parkland Property Owners Association.
10. At all relevant times herein, Carl A. Rubano is a resident of Horry County and a member of the Board of Directors for the Parkland Property Owners Association.
11. At all relevant times herein, Camden C. McCarl is a resident of Horry County and a member of the Board of Directors for the Parkland Property Owners Association.
12. At all relevant times herein, Robert L. Schechter is a resident of Horry County and a member of the Board of Directors for the Parkland Property Owners Association.
13. At all relevant times herein, Larry D. Young is a member of the Boards of Directors for the Legends Property Owners Association and the Parkland Property Owners Association.
14. This Court has jurisdiction over the parties and subject matter of this action.
15. Venue is proper in this Court.

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As a First Claim Against All Defendants
(Failure to Comply with S.C. Code § 33-31-1601)

16. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.

17. On September 3, 2018, Mr. Cutlip requested copies of meeting minutes and other business records maintained by the Parkland Property Owners Association and the Legends Property Owners Association, in accordance with S.C. Code § 33-31-1601 *et seq.*

18. Defendants have failed to furnish the requested documents within the statutory timeframe of five business days and have instead provided excuses in an effort to frustrate and delay Mr. Cutlip's search for the truth regarding the actions of the respective POAs, in the following ways:

    a) Providing a false source of information by directing Mr. Cutlip to the community CPA, David Smith, who did not have the requested financial records or explanations;

    b) Ignoring Mr. Cutlip's emails with requests for clarification;

    c) Claiming unavailability for a meeting and ignoring requests for a meeting to review the information and documents requested by Mr. Cutlip;

    d) Attempting to intimidate Mr. Cutlip by accusing him of authoring an anonymous letter dated July 16, 2018, which Mr. Cutlip did not author, participate in authoring, or distribute;

    e) Attempting to intimidate Mr. Cutlip by publishing false and misleading information on the community website, www.parklandpoa.com, regarding Mr. Cutlip's alleged role in authoring/publishing the anonymous letter; and

    f) Demanding exorbitant fees as a pre-condition for Mr. Cutlip to have access to POA financial records.

19. Upon information and belief, Defendants have directed the respective POAs to frustrate and delay Mr. Cutlip's efforts to obtain the POA records.

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20. Wherefore, Mr. Cutlip prays this Honorable Court for an Order directing the respective POAs to furnish copies of the requested records without further delay, full cooperation in fulfilling Mr. Cutlip's requests for records, instructing the remaining Defendants not to interfere with this production; and for a judgment against Defendants for the actual and punitive damages as found by a jury.

As a Second Claim Against All Defendants
(Civil Conspiracy)

21. As an owner in the Parkland Development, Mr. Cutlip is a member of the Parkland Property Owners Association and the Legends Property Owners Association as the master association, and owns an undivided share of the common elements of the respective POAs.
22. Mr. Cutlip brings this derivative action on behalf of the Parkland Property Owners Association and the Legends Property Owners Association, to recover funds wrongfully diverted from the respective POA accounts.
23. Larry D. Young, on his own and by and through his affiliated companies, LDY Properties, LLC and Legends Properties, LLC (hereinafter "Developers") designed and created the Parkland Development and the Legends Development.
24. New Town Management, LLC provides property management services for the Parkland Property Owners Association and the Legends Property Owners Association, and otherwise acts as an agent for these associations as directed.
25. Upon information and belief, the Developers exercise such a level of authority and control over the Parkland POA and Legends POA that their separate identities are blurred and they are each the alter ego of the other.
26. In the alternative, Developers, Parkland POA, and Legends POA maintain separate identities but have reached agreements to act in concert as set forth herein.
27. Upon information and belief, the Defendants have combined for the purpose of diverting POA assessment funds and resources to the use and benefit of the Developers and their

properties, along with businesses owned by Young and his family members, at the expense of the respective POAs, as set forth more fully herein.

28. As a direct and proximate result of the Defendants' conspiracy, Mr. Cutlip and other similarly situated owners in the respective POAs have sustained special damages.

29. Wherefore, Mr. Cutlip prays this Honorable Court for a judgment against the Defendants for actual damages and punitive damages in an amount to be determined by a jury.

As a Third Claim Against Developers
(Breach of Fiduciary Duty)

30. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.

31. By virtue of the powers retained by Developers to control the governance of the Parkland Development and Legends Development, Developers owed fiduciary duties to the owners in these respective developments to avoid conflicts of interest and act in good faith and with due care to protect the owners' interests.

32. Developers have breached their fiduciary duties to Mr. Cutlip and the other owners in the following ways:

a) Failing to maintain roadways and amenities which serve the Parkland Development and Legends Development but are owned by Developers.

b) Failing to accept responsibility for maintenance and upkeep of the roadways and amenities which serve the Parkland Development and Legends Development but are owned by Developers.

c) Diverting funds from the Parkland POA and Legends POA for the stated purpose of maintaining and repairing the roadways and amenities which serve the Parkland Development and Legends Development but are owned by Developers.

d) Failing to transfer property to the common areas of the respective POAs.

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e) Failing to transfer property to the common areas of the respective POAs in a state of good repair and with sufficient capital to adequately maintain the property.

f) Failing to negotiate commercially reasonable contracts with vendors which are devoid of conflicts of interest.

g) Failing to disclose and avoid conflicts of interest.

h) Otherwise failing to act in the best interest of the owners with respect to areas within their discretion and control.

33. Wherefore, Mr. Cutlip and the other owners pray this Honorable Court to enter a judgment against the Developers for breach of fiduciary duties in an amount equal to the actual and punitive damages found by a jury.

<u>As a Fourth Claim Against Parkland POA and Legends POA</u>
(Breach of Fiduciary Duty)

34. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.

35. Parkland POA and Legends POA owe fiduciary duties to Mr. Cutlip and all owners within the respective associations to comply with the covenants and bylaws.

36. Parkland POA and Legends POA breached their fiduciary duties to Mr. Cutlip and other owners in the following ways:

a) Failing to make corporate records available upon request.

b) Failing to hold annual meetings and Board of Directors meetings.

c) Failing to make reasonable attempts to hold the annual meeting in May.

d) Failing to record and maintain minutes of meetings.

e) Failing to fill vacancies on the board of directors in a timely manner.

f) Failing to hold a board of directors meeting within ten (10) days of filling a vacancy.

g) Failing to approve a budget during a director meeting or through subsequent recordation.

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h) Failing to make reasonable investigative efforts to determine ownership of the roadways.

i) Failing to provide the promised infrastructure or drainage studies to the homeowners.

j) Failing to ensure the owners' assessments were spent on authorized maintenance to common areas or common expenses.

k) Failing to enforce strict compliance by the Developers with the covenants and bylaws.

l) Failing to prevent a deficit in the annual budget due to failure to enforce assessments.

m) Failing to prevent a deficit in the annual budget due to failure to approve a budget.

n) Failing to distribute the budget to the owners within the requisite time limit.

o) Failing to provide copies of audits to the homeowners in a timely manner.

p) Unauthorized spending of funds.

q) Failing to limit contracts with third parties to three (3) year terms.

r) Failing to make reasonable efforts to avoid conflicts of interest.

s) Failing to disclose potential conflicts of interest.

t) Failing to otherwise comply with the covenants and bylaws.

37. Wherefore, Mr. Cutlip and the other owners pray this Honorable Court to enter a judgment against the Parkland POA and Legends POA for breach of fiduciary duties in an amount equal to the actual and punitive damages found by a jury.

<u>As a Fifth Claim Against Parkland POA, Legends POA, and New Town</u>
(Negligence/Gross Negligence/Recklessness)

38. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.

39. Parkland POA, Legends POA, and New Town had a duty to act with due care in the management of the assessments from owners as well as the maintenance of the common elements.

40. Parkland POA, Legends POA, and New Town knew or should have known that owner funds were being spent on properties not owned by the POA, that contracts were being entered into which were not commercially reasonable and violated conflicts of interest, and that the covenants and bylaws were not being followed.

41. Parkland POA, Legends POA, and New Town failed to adequately investigate these matters even when brought to their attention by concerned owners, and failed to properly notify the owners once discrepancies between the operation and the covenants and bylaws were discovered.

42. At a Parkland POA board meeting held on August 11, 2018, Michael Marino and Carl L. Rubano responded to residents' questions and concerns by ignoring them, condescending yelling, and threats of lawsuits.

43. As a direct and proximate result of Parkland POA, Legends POA, and New Town's negligence/gross negligence/recklessness, Mr. Cutlip and other owners sustained actual damages.

44. Wherefore, Mr. Cutlip and the other owners pray this Honorable Court to enter a judgment against the Parkland POA, Legends POA, and New Town in an amount equal to the actual and punitive damages found by a jury.

<u>As a Sixth Claim Against All Defendants</u>
(Declaratory Judgment)

45. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.

46. This action is brought pursuant to the South Carolina Declaratory Judgment Act, S.C. Code § 15-53-10 *et seq.*

47. Developers exerted control over the respective POAs and levied assessments against Mr. Cutlip and other owners for the purported use of paying POA expenses.

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48. The decisions to levy assessments against Mr. Cutlip and the other owners was made by the Legends POA and Parkland POA, whose Board of Directors was appointed by Developers and thus had a conflict of interest.

49. The decisions to levy assessments or contract with third parties was unauthorized and invalid because of the lack of a duly authorized Board of Directors for Legends POA and Parkland POA, lack of a quorum for either association's board, and the aforementioned conflict of interest of those Board members appointed by the Developers.

50. Due to the conflict of interest of the Board of Directors, any votes authorizing assessments or expenditures were *ultra vires* and not protected by the business judgment rule.

51. The Legends POA and Parkland POA did not disclose their conflicts of interest, and in fact concealed them in the following ways:

    a) Failing to submit budgets showing certain contracts.

    b) Failing to disclose true ownership of property being maintained by the respective POAs.

    c) Failing to hold meetings, reach a quorum, or record and maintain board meeting minutes.

    d) Failing to hold annual meetings of the respective POA membership.

52. The third-party contracts entered into by the respective POAs were presumptively commercially unreasonable because the Developers exerted control over the decision whether to enter into these contracts.

53. Any money assessed against owners and collected by Legends POA and Parkland POA and applied to properties not part of the common elements is a violation of the covenants and bylaws.

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54. Any contracts entered into by the respective POAs were conflicts of interest and violated the covenants and bylaws limiting contracts to 3 years and requiring disclosure of potential and actual conflicts of interest.

55. Mr. Cutlip and other owners have sustained irreparable harm for which there is not an adequate remedy at law from the Defendants' self-dealing, conflicts of interest, failure to exercise due care in protecting the owners' interest and breach of fiduciary duties, by being deprived of funds in which to operate and by not being given the benefit of arms-length transactions.

56. Mr. Cutlip and other owners are entitled to and request that the Court issue an Order restraining Defendants from exercising any further action on behalf of the Legends POA or Parkland POA.

57. Mr. Cutlip and other owners are entitled to and request that the Court issue an Order for an accounting of all POA revenues collected and expenditures made during the existence of the respective POAs.

58. Mr. Cutlip and other owners are entitled to and request that the Court issue an Order conveying the roadways to the Legends POA and designate the same as "Common Areas" as described in the covenants and bylaws.

59. Mr. Cutlip and other owners are entitled to and request that the Court issue an Order removing the current board of directors of the Legends POA and the Parkland POA and appointing a fiduciary to officiate a member election for a new duly elected board of directors.

As a Seventh Claim Against Larry D. Young, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, and Robert L. Schechter
(Breach of Fiduciary Duty)

60. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.

61. Larry D. Young, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, and Robert L. Schechter each served on one or both of the Board of Directors of the Legends POA and the Parkland POA as previously alleged herein.

62. As a Board member, each Defendant owed a fiduciary duty to the respective Association to make decisions that are in the best interest of the Association and to avoid conflicts of interest in business dealings.

63. Each Defendant breached his/her fiduciary duty to the respective Association in the following ways:

a) Failing to make corporate records available upon request.

b) Failing to hold annual meetings and Board of Directors meetings.

c) Failing to make reasonable attempts to hold the annual meeting in May.

d) Failing to record and maintain minutes of meetings.

e) Failing to fill vacancies on the board of directors in a timely manner.

f) Failing to hold a board of directors meeting within ten (10) days of filling a vacancy.

g) Failing to approve a budget during a director meeting or through subsequent recordation.

h) Failing to make reasonable investigative efforts to determine ownership of the roadways.

i) Failing to provide the promised infrastructure or drainage studies to the homeowners.

j) Failing to ensure the owners' assessments were spent on authorized maintenance to common areas or common expenses.

k) Failing to enforce strict compliance by the Developers with the covenants and bylaws.

l) Failing to prevent a deficit in the annual budget due to failure to enforce assessments.

m) Failing to prevent a deficit in the annual budget due to failure to approve a budget.

n) Failing to distribute the budget to the owners within the requisite time limit.

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o) Failing to provide copies of audits to the homeowners in a timely manner.

p) Unauthorized spending of funds.

q) Failing to limit contracts with third parties to three (3) year terms.

r) Failing to make reasonable efforts to avoid conflicts of interest.

s) Failing to disclose potential conflicts of interest.

t) Failing to otherwise comply with the covenants and bylaws.

64. Wherefore, the Parkland POA and Legends POA are entitled to judgments against the individual members of the Board of Directors for their breaches of fiduciary duty as set forth herein.

As an Eighth Claim Against Larry D. Young, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, and Robert L. Schechter
(Negligence/Gross Negligence/Recklessness)

65. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.

66. In their capacity as Board members of the respective POAs, Larry D. Young, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, and Robert L. Schechter each had a duty to act with due care in the management of the assessments from owners as well as the maintenance of the common elements.

67. Defendants knew or should have known that owner funds were being spent on properties not owned by the POA, that contracts were being entered into which were not commercially reasonable and violated conflicts of interest, and that the covenants and bylaws were not being followed.

68. Defendants failed to adequately investigate these matters even when brought to their attention by concerned owners, and failed to properly notify the owners once discrepancies between the operation and the covenants and bylaws were discovered.

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69. At a Parkland POA board meeting held on August 11, 2018, Michael Marino and Carl L. Rubano responded to residents' questions and concerns by ignoring them, condescending yelling, and threats of lawsuits.

70. As a direct and proximate result of Defendants' negligence/gross negligence/recklessness, Mr. Cutlip and other owners sustained actual damages.

71. Wherefore, Mr. Cutlip and the other owners pray this Honorable Court to enter a judgment against Larry D. Young, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, and Robert L. Schechter in an amount equal to the actual and punitive damages found by a jury.

WHEREFORE, Mr. Cutlip on his own behalf and on behalf of the Parkland POA and Legends POA prays for judgment against the Defendants for the actual, consequential, special, and punitive damages in an amount to be determined at trial; for injunctive and declaratory relief requested; for Mr. Cutlip's attorney's fees and costs; and for such other and further relief as the Court deems proper.

THE BOSTIC LAW GROUP, P.A.

/s Christopher M. Ramsey

Christopher M. Ramsey
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cramsey@bosticlaw.com
Attorneys for Gregory Cutlip

February 28, 2019

Charleston, South Carolina

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ELECTRONICALLY FILED - 2020 Aug 05 12:05 PM - HORRY - COMMON PLEAS - CASE#2019CP2601211

EXHIBIT B

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 2019-CP-26-01211

Gregory Cutlip, individually and as a member of the Legends Property Owners Association, Inc. and Parkland Property Owners Association, Inc.,

Plaintiffs,

v.

LDY Properties, LLC, Larry D. Young, Legends Property Owners Association, Inc., Parkland Property Owners Association, Inc., Legends Properties, LLC, and New Town Management, LLC, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, and Robert L. Schechter,

Defendants.

DEFENDANTS' JOINT MOTION TO DISMISS ALL DERIVATIVE CLAIMS

TO: CHRISTOPHER M. RAMSEY, ESQUIRE, ATTORNEY FOR THE PLAINTIFF AND THE PLAINTIFF ABOVE NAMED:

YOU WILL PLEASE TAKE NOTICE that the Defendants, within ten days hereof, will jointly move before the presiding Judge for the Court of Common Pleas for Horry County, and they do hereby move, for an Order dismissing the Second, Third, Fourth, Fifth, and Sixth Causes of Action set forth in the Amended Complaint dated May 7, 2020. This Motion is based upon the failure of the Plaintiff to meet or plead the conditions precedent to filing a derivative lawsuit as set forth in Rule 23(b)(1) of the South Carolina Rules of Civil Procedure. Specifically, Plaintiff has failed to

1) serve a verified Complaint;

2) allege that the actions occurred while the Plaintiff was a member of the association;

3) allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members and the reasons for his failure to obtain the action or for not making the effort.

This Motion will be further Supported by a Memorandum of Law.

s/ Arthur e. Justice, Jr.
Arthur E. Justice, Jr.
Turner Padget Graham & Laney, P.A.
Post Office Box 5478
Florence, SC 29502
(843) 656-4412
Attorneys for Parkland Property Owners Association, Inc., New Town Management, LLC, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, Robert L. Schechter, and Larry D. Young

DATE: August 5, 2020

s/ Everett A. Kendall, II
Everett A. Kendall, II
Murphy & Grantland, P.A.
Post Office Box 6648
Columbia, SC 29260
(803) 782-4100
Attorney for LDV Properties, LLC, Legend Properties, LLC, Larry D. Young in his capacity as a principal of LDV Properties, LLC and Legends Properties

DATE: August 5, 2020

s/ Tamara Fogner Boyer
Tamara Fogner Boyer
Thompson & Henry, PA
Post Office Box 1740
Conway, SC 29528
(843) 248-5741
Attorney for Legends Property Owners Association, Inc's

DATE: August 5, 2020

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EXHIBIT C

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	Civil Action No. 2019-CP-26-01211
Gregory Cutlip, individually and as a member of the Legends Property Owners Association, Inc. and Parkland Property Owners Association, Inc.,	)	
Plaintiffs,	)	
vs.	)	**Amended Summons**
LDY Properties, LLC, Larry D. Young, Legends Property Owners Association, Inc., Parkland Property Owners Association, Inc., Legends Properties, LLC, New Town Management, LLC, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, Robert L. Schechter, Richard Apolenis, John K. Manley, Michael Marino, Legends Golf Holding, LLC, and Jigger Holdings, LLC,	)	
Defendants.	)	

TO: DEFENDANTS AND THEIR COUNSEL

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Amended Complaint upon the subscriber, at 2236 Ashley Crossing Drive, Charleston, SC 29414, within thirty (30) days after the service hereof, exclusive of the day of service, and if you fail to answer the said Amended Complaint within the time aforesaid, the Plaintiff will apply to the Court for the relief demanded in the Amended Complaint, and judgment by default may be entered against you.

THE BOSTIC LAW GROUP, P.A.

/s Christopher M. Ramsey

Christopher M. Ramsey
2236 Ashley Crossing Drive
Charleston, SC 29414
(843) 571-2525
Fax: (843) 571-7050
cramsey@bosticlaw.com
Attorneys for Plaintiffs

September 13, 2020

Charleston, South Carolina

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	Civil Action No. 2019-CP-26-01211
Gregory Cutlip, individually and as a member of the Legends Property Owners Association, Inc. and Parkland Property Owners Association, Inc.,	)	
Plaintiffs,	)	
vs.	)	**Amended Verified Complaint** (Jury Trial Requested)
LDY Properties, LLC, Larry D. Young, Legends Property Owners Association, Inc., Parkland Property Owners Association, Inc., Legends Properties, LLC, New Town Management, LLC, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, Robert L. Schechter, Richard Apolenis, John K. Manley, Michael Marino, Legends Golf Holding, LLC, and Jigger Holdings, LLC,	)	
Defendants.	)	

NOW COMES Gregory Cutlip, Plaintiff in the above-captioned matter, and submits his Complaint against the Defendants as follows:

Identity of Parties and Jurisdictional Allegations

1. Plaintiff is a citizen and resident of Horry County, South Carolina. On March 20, 2016, Plaintiff purchased a house at 5008 Lindrick Court, Myrtle Beach, SC 29579, which is in the Parkland Development, and as such Plaintiff is a member of the Parkland Property Owners Association and the Legends Property Owners Association.
2. LDY Properties, LLC is a limited liability company registered to do business in South Carolina and having as its registered agent Larry D. Young who may be served at 1500 Legends Drive, Myrtle Beach, SC 29579

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3. Larry D. Young is an individual who resides and regularly transacts business in Horry County, South Carolina, and who may be served at 1500 Legends Drive, Myrtle Beach, SC 29579.

4. Legends Property Owners Association, Inc. is a corporation registered to do business in South Carolina and having as its registered agent Richard M. Lovelace, Jr. who may be served at 1310 Second Avenue, Conway, SC 29526.

5. Parkland Property Owners Association, Inc. is a corporation registered to do business in South Carolina and having as its registered agent Richard M. Lovelace, Jr. who may be served at 1310 Second Avenue, Conway, SC 29526.

6. Legends Properties, LLC is a limited liability company registered to do business in South Carolina and having as its registered agent Larry D. Young who may be served at 1500 Legends Drive, Myrtle Beach, SC 29579.

7. Larry D. Young, LDY Properties, LLC, and Legends Properties, LLC are referred to herein collectively as "Developers."

8. New Town Management, LLC is a limited liability company registered to do business in South Carolina and having as its registered agent Michael Marino who may be served at 4590-D Girvan Drive, Myrtle Beach, SC 29579.

9. At all relevant times herein, Michael R. Latta is a resident of Horry County and a member of the Board of Directors for the Parkland Property Owners Association.

10. At all relevant times herein, Marienne Johnson is a resident of Horry County and a member of the Board of Directors for the Parkland Property Owners Association.

11. At all relevant times herein, Carl A. Rubano is a resident of Horry County and a member of the Board of Directors for the Parkland Property Owners Association and a member of the Board of Directors for the Legends Property Owners Association.

12. At all relevant times herein, Camden C. McCarl is a resident of Horry County and a member of the Board of Directors for the Parkland Property Owners Association.

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13. At all relevant times herein, Robert L. Schechter is a resident of Horry County and a member of the Board of Directors for the Parkland Property Owners Association.

14. At all relevant times herein, Larry D. Young is a member of the Boards of Directors for the Legends Property Owners Association and the Parkland Property Owners Association.

15. At all relevant times herein, Richard Apolenis is an owner of a condominium in Legends subdivision in Horry County, and a member of the Board of Directors for the Legends Property Owners Association.

16. At all relevant times herein, John K. Manley is a resident of Horry County and a member of the Board of Directors for the Legends Property Owners Association.

17. Michael Marino is a resident of Horry County and, upon information and belief, the owner and/or an employee of New Town Management, LLC.

18. Legends Golf Holding, LLC is a limited liability company registered to do business in South Carolina and having as its registered agent Larry D. Young who may be served at 1500 Legends Drive, Myrtle Beach, SC 29579.

19. Jigger Holdings, LLC is a limited liability company registered to do business in South Carolina and having as its registered agent Daniel L. Young who may be served at 4371 Parkland Drive, Myrtle Beach, SC 29579.

20. This Court has jurisdiction over the parties and subject matter of this action.

21. Venue is proper in this Court.

As a First Cause of Action Against Larry D. Young, Legends Properties, LLC, Legends POA, Parkland POA, New Town Management, Legends POA Board Members, Parkland POA Board Members, and Michael Marino
(Failure to Comply with S.C. Code § 33-31-1601)

22. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.

23. On September 3, 2018, Mr. Cutlip requested copies of meeting minutes and other business records maintained by the Parkland Property Owners Association and the Legends Property Owners Association, in accordance with S.C. Code § 33-31-1601 *et seq.*

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24. New Town Management responded to Cutlip's document request on behalf of Parkland POA and Legends POA and at their direction.

25. The Parkland POA, Legends POA, and New Town Management failed to furnish the requested documents within the statutory timeframe of five business days and instead provided excuses in an effort to frustrate and delay Mr. Cutlip's search for the truth regarding the actions of the respective POAs, in the following ways:

    a) Providing a false source of information by directing Mr. Cutlip to the community CPA, David Smith, who did not have the requested financial records or explanations;

    b) Ignoring Mr. Cutlip's emails with requests for clarification;

    c) Claiming unavailability for a meeting and ignoring requests for a meeting to review the information and documents requested by Mr. Cutlip;

    d) Attempting to intimidate Mr. Cutlip by accusing him of authoring an anonymous letter dated July 16, 2018, which Mr. Cutlip did not author, participate in authoring, or distribute;

    e) Attempting to intimidate Mr. Cutlip by publishing false and misleading information on the community website, www.parklandpoa.com, regarding Mr. Cutlip's alleged role in authoring/publishing the anonymous letter; and

    f) Demanding exorbitant fees as a pre-condition for Mr. Cutlip to have access to POA financial records.

26. Upon information and belief, Larry D. Young, Legends Properties, LLC, the individual Legends POA Board members, Parkland POA Board members, and Michael Marino have participated in the effort to frustrate and delay Mr. Cutlip's attempts to obtain the POA records.

27. Wherefore, Mr. Cutlip prays this Honorable Court for an Order directing the respective POAs to furnish copies of the requested records without further delay, full cooperation in fulfilling Mr. Cutlip's requests for records, instructing the POA Board members and

Michael Marino not to interfere with this production; and for a judgment against these Defendants for the actual and punitive damages as found by a jury.

As a Second Cause of Action Against Developers, Legends POA, Parkland POA, New Town Management, Legends POA Board Members, Parkland POA Board Members, and Michael Marino
(Civil Conspiracy)

28. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.
29. Mr. Cutlip became an owner in the Parkland POA and Legends POA on March 20, 2016 with his purchase of a house in the Parkland Development.
30. As an owner in the Parkland Development, Mr. Cutlip is a member of the Parkland Property Owners Association and the Legends Property Owners Association as the master association, and owns an undivided share of the common elements of the respective POAs.
31. Through his purchase of a house in the Parkland Development, Mr. Cutlip succeeded to the rights and interests that his predecessor(s) in interest in title held, including any rights and interests held as a member of the Parkland POA and Legends POA prior to March 20, 2016. Such membership rights and interests devolved to Mr. Cutlip upon his purchase by operation of law.
32. At the time of any transactions which occurred after March 20, 2016 and up until the present day, Mr. Cutlip was and is an owner and member in the Parkland POA and Legends POA.
33. Mr. Cutlip brings this derivative action on behalf of the individual members of the Parkland Property Owners Association and the Legends Property Owners Association, to recover funds wrongfully diverted from the respective POA accounts.
34. Larry D. Young, on his own and by and through his affiliated companies, LDY Properties, LLC and Legends Properties, LLC (hereinafter "Developers") designed and created the Parkland Development and the Legends Development.

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35. New Town Management, LLC provides property management services for the Parkland Property Owners Association and the Legends Property Owners Association, and otherwise acts as an agent for these associations as directed.

36. Upon information and belief, the Developers exercise such a level of authority and control over the Parkland POA and Legends POA that their separate identities are blurred and they are each the alter ego of the other.

37. In the alternative, Developers, Parkland POA, and Legends POA maintain separate identities but have reached agreements to act in concert as set forth herein.

38. Upon information and belief, the Defendants have combined for the purpose of diverting POA assessment funds and resources to the use and benefit of the Developers and their properties, along with businesses owned by Young and his family members, at the expense of the respective POAs, as set forth more fully herein.

39. Prior to filing this action, Mr. Cutlip requested copies of meeting minutes and other business records from the respective POAs, but was refused and frustrated in that effort.

40. After filing this action, Mr. Cutlip sent subpoenas to Synovus Bank and other third-party entities to obtain documents showing how the POAs spent homeowner funds.

41. On June 30, 2020, Mr. Cutlip through counsel provided the Parkland POA, Legends POA, and their respective board members with over 160 pages of written discovery, 5,300 pages of documents, and 7 hours of audio/video recordings showing how POA funds were mismanaged and fraudulently diverted.

42. A conservative count of POA funds either stolen or mismanaged totals up to **$2,337,176.95** over the five-year period from July 2014 to June 2019.

43. POA funds were stolen across forty (40) different third-party accounts in order to benefit at least nine different entities either owned by or affiliated with Defendant Larry D. Young, his businesses, and/or his family.

44. In a letter dated July 28, 2020, Mr. Cutlip through counsel asked the Parkland POA and Legends POA within ten (10) business days to advise of what step(s) they intend to take to

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investigate the stolen and mismanaged funds, to report the results of that investigation to the resident members of the POAs, and to prevent future occurrences of stolen and mismanaged funds such as those detailed in Cutlip's document production.

45. As of the date of this filing, the Parkland POA and Legends POA have not responded regarding what steps, if any, they are willing to take to investigate the documented malfeasance, report their findings to the POA members, and prevent such misappropriation and fraudulent transfer of funds in the future.

46. As a direct and proximate result of the Defendants' conspiracy, Mr. Cutlip and other similarly situated owners in the respective POAs have sustained special damages.

47. Wherefore, Mr. Cutlip prays this Honorable Court for a judgment against these Defendants for actual damages and punitive damages in an amount to be determined by a jury.

As a Third Cause of Action Against Developers
(Breach of Fiduciary Duty)

48. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.

49. By virtue of the powers retained by Developers to control the governance of the Parkland Development and Legends Development, Developers owed fiduciary duties to the owners in these respective developments to avoid conflicts of interest and act in good faith and with due care to protect the owners' interests.

50. Developers have breached their fiduciary duties to Mr. Cutlip and the other owners in the following ways:

    a) Failing to maintain roadways, ponds, and amenities which serve the Parkland Development and Legends Development but are owned by Developers.

    b) Failing to accept responsibility for maintenance and upkeep of the roadways, ponds, and amenities which serve the Parkland Development and Legends Development but are owned by Developers.

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c) Diverting funds from the Parkland POA and Legends POA for the stated purpose of maintaining and repairing the roadways, ponds, and amenities which serve the Parkland Development and Legends Development but are owned by Developers.

d) Failing to transfer property to the common areas of the respective POAs.

e) Failing to transfer property to the common areas of the respective POAs in a state of good repair and with sufficient capital to adequately maintain the property.

f) Failing to negotiate commercially reasonable contracts with vendors which are devoid of conflicts of interest.

g) Failing to disclose and avoid conflicts of interest.

h) Otherwise failing to act in the best interest of the owners with respect to areas within their discretion and control.

51. Wherefore, Mr. Cutlip prays this Honorable Court to enter a judgment against the Developers for breach of fiduciary duties in an amount equal to the actual and punitive damages found by a jury.

As a Fourth Cause of Action Against Parkland POA and Legends POA
(Breach of Fiduciary Duty)

52. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.

53. Parkland POA and Legends POA owe fiduciary duties to Mr. Cutlip and all owners within the respective associations to comply with the covenants and bylaws and to act in the best interest of the owners collectively with respect to all POA decision-making.

54. Parkland POA and Legends POA breached their fiduciary duties to Mr. Cutlip and other owners in the following ways:

a) Failing to make corporate records available upon request.

b) Failing to hold annual meetings and Board of Directors meetings.

c) Failing to make reasonable attempts to hold the annual meeting in May.

d) Failing to record and maintain minutes of meetings.

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e) Failing to fill vacancies on the board of directors in a timely manner.

f) Failing to hold a board of directors meeting within ten (10) days of filling a vacancy.

g) Failing to approve a budget during a director meeting or through subsequent recordation.

h) Failing to make reasonable investigative efforts to determine ownership of the roadways.

i) Failing to provide the promised infrastructure or drainage studies to the homeowners.

j) Failing to ensure the owners' assessments were spent on authorized maintenance to common areas or common expenses.

k) Failing to enforce strict compliance by the Developers with the covenants and bylaws.

l) Failing to prevent a deficit in the annual budget due to failure to enforce assessments.

m) Failing to prevent a deficit in the annual budget due to failure to approve a budget.

n) Failing to distribute the budget to the owners within the requisite time limit.

o) Failing to provide copies of audits to the homeowners in a timely manner.

p) Unauthorized spending of funds.

q) Failing to limit contracts with third parties to three (3) year terms.

r) Failing to make reasonable efforts to avoid conflicts of interest.

s) Failing to disclose potential conflicts of interest.

t) Failing to otherwise comply with the covenants and bylaws.

55. Wherefore, Mr. Cutlip prays this Honorable Court to enter a judgment against the Parkland POA and Legends POA for breach of fiduciary duties in an amount equal to the actual and punitive damages found by a jury.

As a Fifth Cause of Action Against Parkland POA, Legends POA, POA Board Members, and New Town Management
(Negligence/Gross Negligence/Recklessness)

56. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.

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57. Parkland POA, Legends POA, the respective POA Board members, and New Town had a duty to act with due care in the management of the assessments from owners as well as the maintenance of the common elements.

58. Parkland POA, Legends POA, the respective POA Board members, and New Town knew or should have known that owner funds were being spent on properties not owned by the POA, that contracts were being entered into which were not commercially reasonable and violated conflicts of interest, and that the covenants and bylaws were not being followed.

59. Parkland POA, Legends POA, the respective POA Board members, and New Town failed to adequately investigate these matters even when brought to their attention by concerned owners, and failed to properly notify the owners once discrepancies between the operation of the POAs and the covenants and bylaws were discovered.

60. At a Parkland POA board meeting held on August 11, 2018, Michael Marino and Carl A. Rubano responded to residents' questions and concerns by ignoring them, condescending yelling, and threats of lawsuits.

61. As a direct and proximate result of Parkland POA, Legends POA, the respective POA Board members, and New Town's negligence/gross negligence/recklessness, Mr. Cutlip and other owners sustained actual damages.

62. Wherefore, Mr. Cutlip prays this Honorable Court to enter a judgment against the Parkland POA, Legends POA, the respective POA Board members, and New Town in an amount equal to the actual and punitive damages found by a jury.

<u>As a Sixth Cause of Action Against All Defendants</u>
(Declaratory Judgment)

63. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.

64. This action is brought pursuant to the South Carolina Declaratory Judgment Act, S.C. Code § 15-53-10 *et seq.*

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65. Developers exerted control over the respective POAs and levied assessments against Mr. Cutlip and other owners for the purported use of paying POA expenses.

66. The decisions to levy assessments against Mr. Cutlip and the other owners was made by the Legends POA and Parkland POA, whose Board of Directors was appointed by Developers and thus had a conflict of interest.

67. The decisions to levy assessments or contract with third parties was unauthorized and invalid because of the lack of a duly authorized Board of Directors for Legends POA and Parkland POA, lack of a quorum for either association's board, and the aforementioned conflict of interest of those Board members appointed by the Developers.

68. Due to the conflict of interest of the Board of Directors, any votes authorizing assessments or expenditures were *ultra vires* and not protected by the business judgment rule.

69. The Legends POA and Parkland POA did not disclose their conflicts of interest, and in fact concealed them in the following ways:

    a) Failing to submit budgets showing certain contracts.

    b) Failing to disclose true ownership of property being maintained by the respective POAs.

    c) Failing to hold meetings, reach a quorum, or record and maintain board meeting minutes.

    d) Failing to hold annual meetings of the respective POA membership.

70. The third-party contracts entered into by the respective POAs were presumptively commercially unreasonable because the Developers exerted control over the decision whether to enter into these contracts.

71. Any money assessed against owners and collected by Legends POA and Parkland POA and applied to properties not part of the common elements is a violation of the covenants and bylaws.

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72. Any contracts entered into by the respective POAs were conflicts of interest and violated the covenants and bylaws limiting contracts to 3 years and requiring disclosure of potential and actual conflicts of interest.

73. Mr. Cutlip and other owners have sustained irreparable harm for which there is not an adequate remedy at law from the Defendants' self-dealing, conflicts of interest, failure to exercise due care in protecting the owners' interest and breach of fiduciary duties, by being deprived of funds in which to operate and by not being given the benefit of arms-length transactions.

74. Mr. Cutlip and other owners are entitled to and request that the Court issue an Order restraining Defendants from exercising any further action on behalf of the Legends POA or Parkland POA.

75. Mr. Cutlip and other owners are entitled to and request that the Court issue an Order for an accounting of all POA revenues collected and expenditures made during the existence of the respective POAs.

76. Mr. Cutlip and other owners are entitled to and request that the Court issue an Order conveying the roadways to the Legends POA and designate the same as "Common Areas" as described in the covenants and bylaws.

77. Mr. Cutlip and other owners are entitled to and request that the Court issue an Order removing the current board of directors of the Legends POA and the Parkland POA and appointing a fiduciary to officiate a member election for a new duly elected board of directors.

As a Seventh Cause of Action Against Larry D. Young, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, Robert L. Schechter, Richard Apolenis, and John K. Manley
(Breach of Fiduciary Duty)

78. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.

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79. Larry D. Young, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, Robert L. Schechter, Richard Apolenis, and John K. Manley each served on one or both of the Board of Directors of the Legends POA and the Parkland POA as previously alleged herein.

80. As a Board member, each Defendant owed a fiduciary duty to the respective Association to make decisions that are in the best interest of the Association and to avoid conflicts of interest in business dealings.

81. Each Defendant breached his/her fiduciary duty to the respective Association in the following ways:

a) Failing to make corporate records available upon request.

b) Failing to hold annual meetings and Board of Directors meetings.

c) Failing to make reasonable attempts to hold the annual meeting in May.

d) Failing to record and maintain minutes of meetings.

e) Failing to fill vacancies on the board of directors in a timely manner.

f) Failing to hold a board of directors meeting within ten (10) days of filling a vacancy.

g) Failing to approve a budget during a director meeting or through subsequent recordation.

h) Failing to make reasonable investigative efforts to determine ownership of the roadways.

i) Failing to provide the promised infrastructure or drainage studies to the homeowners.

j) Failing to ensure the owners' assessments were spent on authorized maintenance to common areas or common expenses.

k) Failing to enforce strict compliance by the Developers with the covenants and bylaws.

l) Failing to prevent a deficit in the annual budget due to failure to enforce assessments.

m) Failing to prevent a deficit in the annual budget due to failure to approve a budget.

n) Failing to distribute the budget to the owners within the requisite time limit.

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o) Failing to provide copies of audits to the homeowners in a timely manner.

p) Unauthorized spending of funds.

q) Failing to limit contracts with third parties to three (3) year terms.

r) Failing to make reasonable efforts to avoid conflicts of interest.

s) Failing to disclose potential conflicts of interest.

t) Failing to otherwise comply with the covenants and bylaws.

82. Wherefore, the Parkland POA and Legends POA are entitled to judgments against the individual members of the Board of Directors for their breaches of fiduciary duty as set forth herein.

As an Eighth Claim Against Michael Marino
(Conversion/Unjust Enrichment)

83. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.

84. By virtue of his position as owner/employee of New Town Management, LLC, Michael Marino performed tasks for POAs which New Town Management managed, including the Legends POA and Parkland POA.

85. On a frequent basis Michael Marino would incur various purported expenses when performing tasks for a POA, and when this occurred Mr. Marino would have New Town Management bill the respective Association for the reimbursable expense.

86. On a number of occasions, Michael Marino billed the Legends POA and Parkland POA for reimbursable expenses which either did not exist or which were not actually incurred in service for the Legends POA and Parkland POA, and should not have been billed to these POAs.

87. Upon information and belief, any reimbursable expenses reported by Michael Marino were paid directly by the POAs to Michael Marino, and he exercised dominion and control over these funds.

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88. As a direct and proximate result of Michael Marino's conduct as described above, the respective POAs and their individual members have sustained actual damages.

89. If Michael Marino's conduct was purposeful knowing the POAs should not have been billed for these expenses, then he has committed a conversion, and the respective POAs and/or their individual members are entitled to a judgment for actual damages, interest, punitive damages, and attorney's fees and costs in an amount to be determined by the jury.

90. If, in the alternative, Michael Marino's conduct was accidental, then he has retained an improper benefit under circumstances requiring him in equity to return these funds, and the respective POAs are entitled to a judgment for actual damages and interest.

As a Ninth Claim Against Legends Golf Holding, LLC and Jigger Holdings, LLC
(Conversion/Unjust Enrichment)

91. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.

92. Legends Golf Holding, LLC and Jigger Holdings, LLC own several real estate properties within Legends Resort, which are situated on real property adjacent to the Legends Golf Course, owned by Legends SCNC Golf Holdings, LLC.

93. Despite the similar name with one of the entities, the Legends POA does not hold any ownership share in Legends Golf Holding, LLC or in Jigger Holdings, LLC and is a separate and distinct legal entity from Legends Golf Holding, LLC and Jigger Holdings, LLC.

94. The real property currently owned by Legends POA, Legends Golf Holding, LLC and Jigger Holdings, LLC, including the real property currently owned by Legends SCNC Golf Holdings, LLC (operated as the Legends golf course), were at one time under common ownership by one or more of the Developers.

95. Upon information and belief, certain real estate properties owned by Legends Golf Holding, LLC and Jigger Holdings, LLC contain irrigation systems.

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96. For several irrigation stations located on property owned by Legends Golf Holding, LLC and Jigger Holdings, LLC, Grand Strand Water and Sewer Authority regularly sends invoices to Legends POA, and Legends POA pays them.

97. Legends POA derives no benefit from the aforementioned irrigation stations which are located on property owned by Legends Golf Holding, LLC and Jigger Holdings, LLC. Upon information and belief, Legends Golf Holding, LLC and Jigger Holdings, LLC receive the benefit of this irrigation water.

98. If Legends Golf Holding, LLC and Jigger Holdings, LLC intentionally derived the above-mentioned benefits at the expense of the Legends POA, then they have committed a conversion, and the Legends POA is entitled to a judgment for actual damages, interest, punitive damages, and attorney's fees and costs in an amount to be determined by the jury.

99. If, in the alternative, Legends Golf Holding, LLC and Jigger Holdings, LLC were unaware that they were obtaining benefits at the expense of Legends POA, or such was the result of a mistake, then they have retained an improper benefit under circumstances requiring them in equity to make reimbursement, and the Legends POA is entitled to a judgment for actual damages and interest.

WHEREFORE, Mr. Cutlip on his own behalf and on behalf of the Parkland POA and Legends POA prays for judgment against the Defendants for the actual, consequential, special, and punitive damages in an amount to be determined at trial; for injunctive and declaratory relief requested; for Mr. Cutlip's attorney's fees and costs; and for such other and further relief as the Court deems proper.

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THE BOSTIC LAW GROUP, P.A.

/s Christopher M. Ramsey

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Attorneys for Gregory Cutlip

September 13, 2020

Charleston, South Carolina

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EXHIBIT D

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 2019-CP-26-01211

Gregory Cutlip, individually and as a member of the Legends Property Owners Association, Inc. and Parkland Property Owners Association, Inc.,

Plaintiffs,

v.

LDY Properties, LLC, Larry D. Young, Legends Property Owners Association, Inc., Parkland Property Owners Association, Inc., Legends Properties, LLC, and New Town Management, LLC, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, and Robert L. Schechter,

Defendants.

MEMORANDUM IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS THE DERIVATIVE ACTIONS

TO: CHRISTOPHER M. RAMSEY, ESQUIRE, ATTORNEY FOR THE PLAINTIFF AND THE PLAINTIFF ABOVE NAMED:

BACKGROUND

On March 31, 2019, Plaintiff filed the Complaint in this Action against multiple defendants. On September 13, 2020, Plaintiff filed an Amended Verified Complaint, in which Plaintiff named several new parties, and attempted to cure pleading deficiencies in the original complaint.

In the Amended Complaint, Plaintiff alleges nine Causes of Action. Of those Nine Cause of Action, seven are filed as Derivative Cause of Action including Causes of Action 2, 3, 4, 5, 7, 8, and 9. These Causes of Action are deriviatve in nature because these Causes of Action are

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filed on behalf of the Plaintiff and all people who own property in the Legends Property and/or Parkland Property ("Owners").

No Exhibits or Affidavits were attached to the Complaint.

STANDARD OF LAW

Rule 23(b)(1) sets forth specific requirements for standing and pleading that must be met by a plaintiff prior to bringing a lawsuit in a derivative capacity. Specifically, the complaint:

(1) Must be verified;

(2) Allege that the plaintiff was a member at the time of the transaction of which he complains;

(3) Allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors and the members, and the reasons for his failure to obtain the action or for not making the effort.

In addition, the Rule states that "[t]he derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the rights of the corporation or association."

ARGUMENT

I. PLAINTIFF FAILED TO SEEK REDRESS FROM THE BOARDS OF DIRECTORS PRIOR TO INITIATING THIS DERIVATIVE CLAIM.

Subsequent to the filing of this Motion on August 5, 2020, Plaintiff filed an Amended Complaint, which attempts to remedy the pleading deficiencies of the original Complaint, filed March 1, 2019. Because the claim was improperly initiated, it is void *ab initio*, and the subsequent attempts to remedy the deficiencies are ineffective.

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In a Rule 23(b)(1) derivative action, a Complaint must "allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort." SCRCP Rule 23(b)(1). A demand allows the Board of Directors to make a reasonable business judgment on whether to follow the demand. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991). Only under exceptional circumstances can a shareholder bring a Rule 23(b)(1) action without a demand. *Carolina First Corp. v. Whittle*, 343 S.C. 176, 188, 539 S.E.2d 402, 409 (Ct. App. 2000). The shareholder must plead "with particularity the exceptional circumstances that demonstrate why a demand would be futile, i.e., why the Board of Directors should not be allowed to decide whether to institute litigation." *Id.*

If a demand in a derivative action does not meet the pleading requirements, then it must be dismissed. *Clearwater Tr. v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006). At a very minimum, a demand must identify the alleged wrongdoers, describe the reason the alleged harmful acts are wrong, and the damage to the corporation. *See Carolina First Corp. v. Whittle*, 343 S.C. 176, 188, 539 S.E.2d 402, 409 (Ct. App. 2000). Finally, the demand requires specific remedial relief. *See id.* The purpose of the demand is to allow the Board an opportunity to remedy the alleged wrong without investing costly resources in litigation. *See id.*

A. Plaintiff did not make a demand to either Association that the conduct of Defendants was wrong, nor did Plaintiff specify how either Association should remedy the conduct of Defendants.

For Plaintiff to recover, there must have been a demand to either Association about the conduct of the Defendants and Plaintiff must have requested specific remedial action for the Associations to remedy the conduct of Defendants. In the Amended Complaint, Plaintiff alleges

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that a letter was sent to counsel for the Associations on July 28, 2020 making various demands on the Boards. On its face, this allegation proves that Plaintiff did not comply with the Rule by making a demand *prior* to filing suit, and thus, did not comply with the demand portion of the SCRCP Rule 23(b)(1); therefore, there must be a reason as to why the demand would be futile.

B. Plaintiff did not plead any exceptional circumstances why a demand to the property associations would have been futile.

If the Plaintiff did not make a demand to the Associations about the conduct and remedy of the behavior of Defendants, then there must be exceptional circumstances why the demand would have been futile. Here, the words exceptional and futile are not even included in the Amended Complaint. There is no evidence that a demand would have been futile and furthermore, the reason for bypassing the demand is not stated with particularity. Again, with no Exhibits nor Affidavits, the reason for futility must be included within the Complaint, and since it is not mentioned, Plaintiff cannot successfully plead a demand would have been futile.

II. PLAINTIFF LACKS STANDING TO ASSERT DERIVATIVE CLAIMS FOR ANY TRANSACTION THAT OCCURRED PRIOR TO HIS OBTAINING MEMBERSHIP.

In his Amended Complaint, and through the course of discovery, Plaintiff is seeking to assert derivative claims based on transaction that occurred prior to his purchase of his house on March 20, 2016. Rule 23(b)(1) makes clear that claims can only be brought in relation to transaction that occur while the putative plaintiff is a member. In prior argument, Plaintiff has asserted that the "operation of law" provision in the Rule allows him to assert claims retroactive to the time his house was built. This conclusion is contrary to prior court interpretations of this phrase.

Examining the parallel provision of the Federal Rules, the Fourth Circuit has considered the meaning of the phrase "by operation of law" within Rule 23.1 and determined that this phrase

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is used in the rule to indicate the manner in which a party acquires rights and sometimes liabilities without any act or cooperation of the party himself. *See McQuillen v. National Cash Register Co.*, 22 F. Supp. 867, 872 (D. Md. 1938) citing *Whitaker v. Whitaker Iron Co.*, 249 F. 531, 161 C.C.A. 457 (4th Cir. 1918). In *Whitaker*, the Fourth Circuit held that ownership of stock did not devolve by operation of law onto individuals who were entitled to share in the proceeds of corporate stock pursuant to the terms of a will. Significantly, the Court stated the following on the matter:

> "Under these circumstances it cannot be said that any of the stock devolved by operation of law upon either of the appellants. 'An estate is said to 'devolve' on another when by operation of law, and without any voluntary act of the previous owner, it passes from one person to another; **but it does not devolve from one person to another as the result of some positive act or agreement between them.** The word is itself of intransitive signification, and does not include the result of an act which is intended to produce a particular effect. It implies a result without the intervention of any voluntary actor." *Id.* (emphasis added)

Additionally, the Court in *McQuillen* applied *Whitaker* to the facts of the case and held that shares of stock did not devolve upon two trustees by operation of law when the trustees purchased the stock. The Court stated "these shares were not in the estates when the plaintiffs were appointed trustees (in which event the shares would have devolved upon them by operation of law) but that they, as trustees, subsequently purchased such shares." *McQuillen*, 22 F. Sup. 867, 872.

In fact, in Wright & Miller, the words " ' operation of law' are used to designate any nonconsensual transaction by which plaintiff acquired the stock." The policy behind this is "thought to be sufficient to guard against the possibility that the shares were acquired primarily

for the purpose of maintaining a lawsuit…" § 1828 Plaintiff Must Have Been a Shareholder at the Time of the Transaction—In General.

Plaintiff purchased the property from the prior owners in a voluntary transaction. Thus, there was no "operation of law" that allows him to assert claims that arose prior to his ownership.

CONCLUSION

Plaintiff cannot recover in a derivative action absent any evidence of a demand made by Plaintiff prior to the lawsuit to Associations about the actions and remedial conduct of Defendants, or as to the exceptional circumstances as to why a demand would be futile. South Carolina Civil Procedure Rule 23(b)(1) clearly states that to bring a derivative action, a party must allege with particularity the efforts to remedy the situation or the exceptional circumstances as to why this effort would be futile. Here, there is no evidence that the Plaintiff did anything. Further, case law is clear that if the proper protocol is not followed, then the Causes of Action must be dismissed. Since there is no evidence that Plaintiff followed proper Rule 23(b)(1) protocol, then Derivative Causes of Action 2-5 and 7-9 should be dismissed as a matter of law.

Plaintiff also cannot recover for claims based on any transaction that occurred prior to March 20, 2016. If the derivative claims are allowed to proceed, Plaintiff's right to pursue claims beyond that period should be limited.

[Signature on the Following Page]

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Respectfully submitted,

MURPHY & GRANTLAND, P.A.

s/ Everett A. Kendall II
Everett A. Kendall, II, SC Bar No. 8450
Murphy & Grantland, P.A.
Post Office Box 6648
Columbia, SC 29260
(803) 782-4100

Attorney for LDY Properties, LLC, Legend Properties, LLC, Larry D. Young in his capacity as a principal of LDY Properties, LLC and Legends Properties, and Legends Golf Holdings, LLC

Columbia, South Carolina
January 19, 2020

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EXHIBIT E

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Horry
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP2601211

Gregory Cullip et al
PLAINTIFF(S)

LDY Properties LLC 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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ 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:

Defendant's Motion to Dismiss is GRANTED and plaintiff's derivative action is dismissed. Plaintiff's Amended Complaint fails to allege with particularity the efforts made by plaintiff to obtain the action he desires from the directors. See Rule 23(b)(1), SCRCP.

Defendant's Motion for Complex Case Designation is DENIED due to the dismissal of plaintiff's derivative action.

Plaintiff's Motion to Compel the Deposition of the Defendant filed 10/12/2020 is MOOT.
Defendant's Motion for Protection from Discovery is MOOT.
Plaintiff's Motion to Serve Additional Interrogatories is DENIED.

Plaintiff's Motion to Compel filed 11/18/2020 is PARTIALLY RESOLVED and GRANTED as follows:
Deposition of LDY Properties 30(b)(6) witness is 3/16-3/17/2021;
Deposition of Newtown Management 30(b)(6) witness is 4/19-4/20/2021;
Deposition of Susan Harper is 3/7-3/8/2021 provided deponent is re-scheduled.
Carl Rubano shall submit to an in-person virtual deposition on 4/29-4/30/2021.

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 03/03/2021 .

Christina Agnes Bisset for Michael Marino
Hannah Davis Stelson for Robert L Schechter,Camden C Mccarl,Carl A Rubano,Marianne Johnson,Michael R Latta,New Town Management LLC,Parkland Property Owners Association Inc,Larry D Young
Reginald Wayne Belcher for Robert L Schechter,Camden C Mccarl,Carl A Rubano,Marianne Johnson,Michael R Latta,New Town Management LLC,Parkland Property Owners Association Inc,Larry D Young
Douglas Michael Zeyicek for Jigger Holdings LLC
Joseph Jakob Kennedy for Legends Sonc Golf Holdings LLC,Century Resort Management LLC
Nicholas Clarence Chapman Stewart for Robert L Schechter,Camden C Mccarl,Carl A Rubano,Marianne Johnson,Michael R Latta,New Town Management LLC,Parkland Property Owners Association Inc
Everett Augustus Kendall, II for LDY Properties LLC,Legends Properties LLC,Larry D Young
G. Michael Smith, Sr. for Michael Marino,Legends Property Owners Association Inc
Legends Property Owners Association Inc
Parkland Property Owners Association Inc
Legends Golf Holding LLC
John Douglas Elliott for LDY Properties LLC,Legends Properties LLC,Larry D Young
Christopher Michael Ramsey for Gregory Cullip
Tamara Fogner Boyer for Carl A Rubano,Marianne Johnson,Michael R Latta,New Town Management LLC,Parkland Property Owners Association Inc
Brian Lincoln Craven for LDY Properties LLC,Legends Properties LLC,Larry D Young

NAMES OF ADDITIONAL ATTORNEYS SERVED BY E-MAIL

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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.

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Horry Common Pleas

Case Caption:	Gregory Cutlip , plaintiff, et al VS LDY Properties LLC , defendant, et al
Case Number:	2019CP2601211
Type:	Order/Electronic Form 4

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

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EXHIBIT F

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	Civil Action No. 2019-CP-26-01211
Gregory Cutlip, individually and as a member of the Legends Property Owners Association, Inc. and Parkland Property Owners Association, Inc.,)	
Plaintiffs,)	
vs.)	**Plaintiff's Motion to Amend Complaint**
LDY Properties, LLC, Larry D. Young, Legends Property Owners Association, Inc., Parkland Property Owners Association, Inc., Legends Properties, LLC, New Town Management, LLC, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, Robert L. Schechter, Richard Apolenis, John K. Manley, Michael Marino, Legends Golf Holding, LLC, and Jigger Holdings, LLC,)	
Defendants.)	

NOW COMES Gregory Cutlip, individually and as a member of the Legends Property Owners Association, Inc. and Parkland Property Owners Association, Inc., and submits his Motion to Amend the Complaint as follows:

1. This action was filed on March 1, 2019. Plaintiff has previously amended the Complaint one time, on September 13, 2020.
2. On March 5, 2021, the Court found that Plaintiff had not plead with particularity his efforts to obtain POA board action, and dismissed the Plaintiff's derivative claims pursuant to Rule 23(b), SCRCP.

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3. Plaintiff's proposed Second Amended Complaint (attached hereto) contains additional detail regarding Plaintiff's repeated efforts to obtain action by the POA boards, and includes the demand letters sent by Plaintiff to the Parkland POA and Legends POA as exhibits. The proposed Second Amended Complaint also describes why such actions by the Plaintiff were destined to fail, because of the conflicts of interest inherent in the POA boards. These allegations have been added to address the Court's concern and bring the complaint into conformance with Rule 23(b) so that derivative claims may be asserted.
4. Through discovery, the Plaintiff found evidence that the Boards of Parkland and Legends POAs mismanaged and misappropriated HOA resident-shareholders' funds, which totaled $2,337,176.95, primarily by spending POA funds on non-POA related expenses, including the business expenses of Legends Golf Courses, and POA funds spent on Defendant and POA Board Member Larry D. Young's business expenses and/or his family business expenses.
5. During discovery, Plaintiff learned that Daniel Larry Young, Jr. was a member of the Parkland POA Board. In the proposed Second Amended Complaint, Plaintiff seeks to add Daniel Larry Young, Jr. as a defendant in his capacity as a Parkland POA Board member. Plaintiff had already made claims against the previously known Parkland POA Board members.
6. On or about February 24, 2021, Defendant Larry D. Young died. Plaintiff seeks to replace Larry D. Young as a defendant with the Estate of Larry D. Young or the relevant trust handling his affairs.

7. The claims against the Defendants are nearly identical. Discovery is ongoing. This case has not appeared on a trial roster.
8. Plaintiff submits that justice requires the amendments be allowed, and the amendments will not prejudice any other party. Thus, the amendments should be freely granted in accordance with Rule 15, SCRCP.
9. At the time of filing this motion, Plaintiff reached out to all defense counsel to see if they would consent to the amendment, but does not expect consent to be forthcoming.

WHEREFORE, the Plaintiff prays this Honorable Court to grant his motion for leave to amend the Complaint.

THE BOSTIC LAW GROUP, P.A.

/s Christopher M. Ramsey

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Attorneys for Plaintiffs

March 15, 2021

Charleston, South Carolina

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EXHIBIT G

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also admitted in NC, KY and PA
D. Scott Drescher
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Seth P. Saunders
also admitted in VA
Danielle G. Walker*
*admitted in CA only

March 15, 2021

Legends Property Owners Association, Inc.
c/o Michael G. Smith, Sr., Esq. and Tamara F. Boyer, Esq.
Thompson & Henry, P.A.
P.O. Box 1740
Conway, SC 29528

Parkland Property Owners Association, Inc.
c/o Reginald Belcher, Esq. and Hannah Stetson, Esq.
Turner Padget
P.O. Box 5478
Florence, SC 29502

Re: **Gregory Cutlip vs. LDY Properties LLC, et al.**
Case No. 2019-CP-26-01211
Horry County Court of Common Pleas

Dear Counsel,

Kindly forward this letter on to your respective clients. This is our second demand to all Legends and Parkland POA Board Members concerning this matter.

As you are well aware, on June 30, 2020, our office furnished you with Gregory Cutlip's responses to discovery along with links to our document production. We also communicated in a July 28, 2020 letter to the POA Boards that the documents demonstrate an alarming pattern of mismanagement, fraud, and deception upon the resident members of the Legends and Parkland POAs, by the respective boards, with the assistance and participation of New Town Management. At that point in time, a conservative count of $2.3 million of HOA funds had been discovered spent on non-HOA related expenses, including Larry D. Young business expenses and/or his family business expenses, between July 2014 and June 2019.

Mr. Cutlip also communicated that discovery has shown nine (9) different entities either owned by or affiliated with Larry D. Young and his family have benefited from the misappropriated HOA funds: LDY Properties, LLC, Declarant Legends Properties, LLC, Moorland Landscape SC, Inc., Legends Group, Ltd., Legends Real Estate, Gleneagles Cottages, LLC, Hans & Company, LLC d/b/a Ailsa Pub, Legends Golf Holding, LLC, and Jigger Holding, LLC. You were also referred to the documents produced for the details of how and where HOA funds were mismanaged or misused.

Since the July 28, 2020 letter, we have discovered that yet another Young family business and Declarant is also benefiting from Legends POA funds, as it has been discovered that Legends POA funds are being used to pay the annual taxes for the properties owned by Declarant Legends Scottish Village, LLC. This Young family LLC was dissolved on March 17, 2014, but is still operating today and using Legends POA non-profit corporation funds to pay their business expenses. In addition, discovery shows that Legends POA paid the annual property taxes of the other Declarant, Legends Properties, LLC.

Furthermore, without any disclosure to the residents, it has been discovered that Legends POA has been paying (with residents' funds) the electric bills for the Legends Golf course parking lot lights. According to the Grand Strand Water & Sewer Authority, the Legends POA has been paying for some of the costly Legends Golf course irrigation bills as well. All of the above-mentioned expenses paid by Legends POA call into question the status of Legends and Parkland POAs as non-profit

corporations, which have been receiving benefits as tax-exempt organizations. Legends and Parkland POAs have not been operating as non-profit organizations and have possibly assisted other businesses in potential tax evasion.

It has now been over 8 months since Mr. Cutlip served his discovery responses and documentation showing the mismanagement and misappropriation of Legends POA and Parkland POA funds to the respective board members, through their counsel, and over 7 months since his letter requesting that the board members act on this information. To date, no response from the POAs has been received. Likewise, the POAs have not issued any communication to the resident-shareholders of the POAs regarding these findings. Therefore, it is obvious that the Legends and Parkland Board Members have chosen to ignore the demand letter and information provided.

As previously explained, the Legends and Parkland POA Board members each owe fiduciary duties to the resident members of their respective associations. While prior to this lawsuit, perhaps a Board member could claim ignorance as to the ongoing fraud being perpetrated by and upon the respective POAs, this is no longer the case, especially when Mr. Cutlip furnished voluminous documents illustrating this fraudulent scheme as the result of months of review of Legends and Parkland POA bank records and documents, supplied both by the POAs themselves and by third parties in response to subpoenas.

As board members owing fiduciary duties to their respective POAs, the board members have a duty to investigate any fraudulent activity or mismanagement of funds entrusted to their care, and to prevent such activities from re-occurring. Now, <u>after 7+ months of the POAs being made aware of such fraudulent activities</u>, there is still no action to date from the POA Board Members and New Town Management to correct such known issues, or to communicate to the resident-shareholders what is happening to their money. It is evident that the POA Board Members and New Town Management are continuing to mismanage HOA funds, as shown by the latest subpoenaed POA Synovus Bank Records through August 2020, and it is obvious that the POA Board Members and New Town Management are continuing to engage in misconduct, regardless of Mr. Cutlip's furnished discovery, with reckless disregard to the adverse effect this may have on the Parkland residents and their POA funds.

Accordingly, Mr. Cutlip demands that the Parkland and Legends POAs take the following actions within thirty (30) days of the date of this letter:

1. Send a letter to all Parkland residents notifying them of the fraudulent scheme and illegal activities that Mr. Cutlip has discovered, including the relevant details such that the residents can understand the fraudulent scheme and the amount of money stolen from them over the years. The letter must include an explanation that each Board Member will be stepping down from office effective immediately and will agree not to accept future appointment to either POA board. If the Board is unwilling or unable to send out such a letter conveying the truth to the POA members, then Mr. Cutlip and counsel intend to send a communication to the Parkland resident-shareholders regarding the details of this matter and the unwillingness of the POA Board members to communicate to the Parkland residents and take the appropriate course of action.

2. Remove New Town Management along with Michael Marino as property manager for the Legends and Parkland POAs. The POAs agree not to re-hire either to do any type of business within the Legends Resort area.

3. Calculate all Legends and Parkland POA residents' monetary losses caused by New Town Management and Mr. Marino, due to mismanagement from inception, and identify all questionable and illegal activities. Then take appropriate legal action: file lawsuits against New Town Management, LLC, Mr. Marino, and any other members/owners of New Town Management who participated in the fraud. Report them to law enforcement, SLED, South Carolina Department of Revenue and IRS, and have the government agencies decide on what further actions they deem appropriate.

4. Report to law enforcement, South Carolina Department of Revenue and IRS on all involved, current and past Board Members of Legends and Parkland POAs' illegal activities, and have the government agencies decide on what further actions are deemed appropriate.

5. Calculate all Legends and/or Parkland residents' monetary losses, created by Larry D. Young, his family and/or Young's businesses (LDY Properties, LLC, Declarant Legends Properties, LLC, Moorland Landscape SC, Inc., Legends Group, Ltd., Legends Real Estate, Gleneagles Cottages, LLC, Hans & Company, LLC d/b/a Ailsa Pub, Legends Golf Holding, LLC, Jigger Holding, LLC, and Declarant Legends Scottish Village, LLC). Demand that Larry D. Young's businesses

and the businesses of his family and relatives reimburse the Parkland POA and Legends POA for all expenses wrongly paid for by the POAs, and file suit against them for recovery of these funds if they refuse. Report them to law enforcement, SLED, South Carolina Department of Revenue and IRS, and have the governments agencies decide on what further actions are deemed appropriate.

6. Calculate all Legends and/or Parkland residents' monetary losses, created by Legends Golf Course, for Legends POA paying for the Legends Golf Course parking lot light bills, and costly irrigation system. Identify who was responsible for this type of arrangement/agreement between Legends POA and Legends Golf Course, as discovery responses state that no such contract/agreements exist. Demand that the Legends Golf Course reimburse the Legends POA for all expenses wrongly paid for by Legends POA, and file suit against the Legends Golf Course for recovery of these funds if they refuse. Report responsible parties to law enforcement, SLED, South Carolina Department of Revenue and IRS, and have the government agencies decide on what further actions are deemed appropriate.

7. All current Parkland and Legends POAs Board Members formally resign from their positions as directors and/or officers of the Parkland and/or Legends POAs, and agree not to serve on either POA board again.

8. Pay back to the respective POAs all misappropriated or mismanaged funds. As of June 30, 2020, the known amount misappropriated was at least $2,337,176.95. If the POA Board Members are willing to come forward and disclose the details of additional stolen POA funds and pay them back, they are welcome to do so.

Should the Boards fail or refuse to take the above actions, Gregory Cutlip will ask the Court to allow him to proceed with a derivative action on behalf of the Parkland POA and the Legends POA, in an effort to recoup the funds that have been mismanaged or misappropriated, and to hold the culpable parties responsible.

Sincerely,

Christopher M. Ramsey

CC: Gregory Cutlip
Everett A. Kendall, II, Esq.
Douglas M. Zayicek, Esq.

EXHIBIT H

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	Civil Action No. 2019-CP-26-01211
Gregory Cutlip, individually and as a member of the Legends Property Owners Association, Inc. and Parkland Property Owners Association, Inc.,	)	
Plaintiffs,	)	
vs.	)	**Second Amended Summons**
LDY Properties, LLC, Estate and/or Trust of Larry D. Young, Legends Property Owners Association, Inc., Parkland Property Owners Association, Inc., Legends Properties, LLC, New Town Management, LLC, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, Robert L. Schechter, Richard Apolenis, John K. Manley, Michael Marino, Legends Golf Holding, LLC, Jigger Holdings, LLC, and Daniel Larry Young, Jr.,	)	
Defendants.	)	

TO: DEFENDANTS AND THEIR COUNSEL

YOU ARE HEREBY SUMMONED and required to answer the Second Amended Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Second Amended Complaint upon the subscriber, at 2236 Ashley Crossing Drive, Charleston, SC 29414, within thirty (30) days after the service hereof, exclusive of the day of service, and if you fail to answer the said Second Amended Complaint within the time aforesaid, the Plaintiff will apply to the Court for the relief demanded in the Second Amended Complaint, and judgment by default may be entered against you.

THE BOSTIC LAW GROUP, P.A.

/s Christopher M. Ramsey

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Attorneys for Plaintiffs

Charleston, South Carolina

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	Civil Action No. 2019-CP-26-01211
Gregory Cutlip, individually and as a member of the Legends Property Owners Association, Inc. and Parkland Property Owners Association, Inc.,	)	
Plaintiffs,	)	
vs.	)	**Second Amended Verified Complaint** (Jury Trial Requested)
LDY Properties, LLC, Estate and/or Trust of Larry D. Young, Legends Property Owners Association, Inc., Parkland Property Owners Association, Inc., Legends Properties, LLC, New Town Management, LLC, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, Robert L. Schechter, Richard Apolenis, John K. Manley, Michael Marino, Legends Golf Holding, LLC, Jigger Holdings, LLC, and Daniel Larry Young, Jr.,	)	
Defendants.	)	

NOW COMES Gregory Cutlip, Plaintiff in the above-captioned matter, and submits his Complaint against the Defendants as follows:

Identity of Parties and Jurisdictional Allegations

1. Plaintiff is a citizen and resident of Horry County, South Carolina. On March 20, 2016, Plaintiff purchased a house at 5008 Lindrick Court, Myrtle Beach, SC 29579, which is in the Parkland Development and part of Legends Community, and as such Plaintiff is a member of the Parkland Property Owners Association, Inc. and the Legends Property Owners Association, Inc.
2. LDY Properties, LLC is a limited liability company registered to do business in South Carolina.
3. Larry D. Young is an individual who resided in Horry County, South Carolina until his death on or about February 24, 2021. Because Mr. Young is deceased, his estate and /or

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trust(s) are named as the party defendant, and all references herein to Mr. Young are directed to his estate and /or trust(s).

4. Legends Property Owners Association, Inc. is a corporation registered to do business in South Carolina and having as its registered agent Richard M. Lovelace, Jr. who may be served at 1310 Second Avenue, Conway, SC 29526.
5. Parkland Property Owners Association, Inc. is a corporation registered to do business in South Carolina and having as its registered agent Richard M. Lovelace, Jr. who may be served at 1310 Second Avenue, Conway, SC 29526.
6. Legends Properties, LLC is a limited liability company registered to do business in South Carolina.
7. Larry D. Young, LDY Properties, LLC, and Legends Properties, LLC are referred to herein collectively as "Developers."
8. New Town Management, LLC is a limited liability company registered to do business in South Carolina and having as its registered agent Michael Marino who may be served at 4590-D Girvan Drive, Myrtle Beach, SC 29579.
9. At all relevant times herein, Michael R. Latta is a resident of Horry County and a member of the Board of Directors for the Parkland Property Owners Association.
10. At all relevant times herein, Marienne Johnson is a resident of Horry County and a member of the Board of Directors for the Parkland Property Owners Association.
11. At all relevant times herein, Carl A. Rubano is a resident of Horry County and a member of the Board of Directors for the Parkland Property Owners Association and a member of the Board of Directors for the Legends Property Owners Association.
12. At all relevant times herein, Camden C. McCarl is a resident of Horry County and a member of the Board of Directors for the Parkland Property Owners Association.
13. At all relevant times herein, Robert L. Schechter is a resident of Horry County and a member of the Board of Directors for the Parkland Property Owners Association.

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14. At all relevant times herein, Larry D. Young was a member of the Boards of Directors for the Legends Property Owners Association and the Parkland Property Owners Association until his death on or about February 24, 2021.

15. At all relevant times herein, Richard Apolenis is an owner of a condominium in Legends subdivision in Horry County, and a member of the Board of Directors for the Legends Property Owners Association.

16. At all relevant times herein, John K. Manley is a resident of Horry County and a member of the Board of Directors for the Legends Property Owners Association.

17. At all relevant times herein, Daniel Larry Young, Jr. is a resident of Horry County and a member of the Board of Directors for the Parkland Property Owners Association.

18. Michael Marino is a resident of Horry County and, upon information and belief, the owner and/or an employee of New Town Management, LLC.

19. Legends Golf Holding, LLC is a limited liability company registered to do business in South Carolina and having as its registered agent Larry D. Young who may be served at 1500 Legends Drive, Myrtle Beach, SC 29579.

20. Jigger Holdings, LLC is a limited liability company registered to do business in South Carolina and having as its registered agent Capitol Services which may be served at 2 Office Park Court, Suite 103, Columbia, SC 29223.

21. This Court has jurisdiction over the parties and subject matter of this action.

22. Venue is proper in this Court.

Factual Allegations Common to All Counts

23. On April 11, 2018, due to the escalation of growing negativity among the Parkland residents, and concerns about allegations regarding the activities of the Parkland Property Owners Association Board Members; Mr. Cutlip contacted New Town Management via email in his **first demand** (see **Exhibit A**) and asked to be provided POA Board Meeting Minutes; POA Budget data, and the DesChamps Law Firm invoice that was paid with POA funds.

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24. On April 13, 2018, New Town Management furnished the DesChamps Law Firm invoice of $5,000.00 to Mr. Cutlip via email.

25. On April 13, 2018, Cutlip then sent another email communication to New Town Management (see **Exhibit B**) and included questions to the Parkland POA Board Members (Marienne Johnson, Michael Latta, Camden C. McCarl, Carl A. Rubano, Michael R. Latta and Robert L. Schechter), asking to provide additional information on the $5,000.00 of HOA funds spent on legal services to create a petition for the Legends Drive Special Tax District and election procedure of Board Members. Mr. Cutlip never received his requested information. Up to the present time, none of the POA Board Members or New Town Management has provided Mr. Cutlip's requested information from his April 2018 request. The POA Board Members never sent one email to Mr. Cutlip, and none of them ever explained why they refused to respond to a POA resident-shareholder.

26. After Mr. Cutlip read and studied the available POA governing documents, Mr. Cutlip discovered that the governing documents have multiple issues:

    a) Parkland Development Declaration of Covenants, Conditions and Restrictions are only for Phases 20 & 23; for the rest of the Phases 18, 19, 21, 22, 26, 27, 28 and 29 there were no Covenants, Conditions and Restrictions. Mr. Cutlip's property is located in Phase 27.

    b) By-Laws of Legends Property Owners Association, Inc were incomplete, as the referenced exhibit "A" was missing;

    c) No amendments were available nor provided to reflect some of the current operations;

    d) Parkland Property Owners Association and Legends Property Owners Association Board Members did not follow some of the laws and rules of governing documents.

27. On September 3, 2018, Mr. Cutlip made a formal demand for copies of meeting minutes and other business records maintained by the Parkland Property Owners Association and the Legends Property Owners Association, of which he is a resident and member. Mr.

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Cutlip sent his formal request via email and certified USPS mail on September 4, 2018 (see **Exhibit C**) to the Board of Directors and New Town Management, explaining his purpose and reasoning for his formal demand. A copy of this **second, formal demand** (Pre-lawsuit) for POA records and information is attached hereto and incorporated herein by reference as **Exhibit D**.

28. New Town Management responded on behalf of Parkland POA and Legends POA, but ultimately did not provide the documents and information requested. New Town Management and the Associations' CPA re-directed Mr. Cutlip back and forth between them via emails (see "Denial Recap Emails" as **Exhibit E**), in an obvious effort to frustrate and delay Mr. Cutlip for a period of 8 weeks (September 3, 2018 through Nov 1, 2018), ultimately requesting Mr. Cutlip to provide available dates and times to visit the property manager's office, as the property manager stated in his October 7, 2018 voice mail message (recording available upon request): "*I got your information and what I would like for you to do, is set up an appointment or time to come in and see me. Let's go over line by line item and I'll be tickled to death to go ahead and give you all the information you are requesting*".

29. On October 25, 2018, Mr. Cutlip provided 5 different dates and times to Mr. Marino (Property Manager for which New Town Management), for Cutlip's counsel to meet with New Town Management to obtain Cutlip's September 3, 2018 POA formal requested records and information (see **Exhibit F**). New Town Management never even responded back to Mr. Cutlip's email communication, after providing numerous optional dates and times to meet.

30. On March 1, 2019, Mr. Cutlip brought this lawsuit in part to obtain the documents and information requested, and to which he was entitled to review as a resident and member of both the Parkland and Legends POAs.

31. During the discovery process, Mr. Cutlip was able to obtain documents from multiple sources showing that the Parkland POA and Legends POA had been mismanaging and

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misappropriating funds, primarily by spending POA funds on non-POA expenses including business expenses of Larry D. Young companies and his family's companies.

32. On June 30, 2020, Mr. Cutlip furnished the Boards of the Parkland POA and Legends POA, through counsel, with the voluminous documentation and explanations of the mismanaged and misappropriated funds, which totaled $2,337,176.95.

33. On July 28, 2020, Mr. Cutlip issued a **third demand** to the Boards of the Parkland POA and Legends POA that they inform the resident members of the mismanaged and misappropriated funds, terminate New Town Management as the property manager, resign their respective positions as board members, and re-pay the funds that were wrongfully diverted from the Parkland and Legends POAs. A copy of the third demand is attached hereto and incorporated herein by reference as **Exhibit G.**

34. Mr. Cutlip and counsel received no response from the Parkland POA or Legends POA Boards to the July 28, 2020 letter. In their pleadings, all of the Parkland POA and Legends POA Boards Members denied the substantive allegations, but never provided any evidence or proof to contradict Mr. Cutlip's documentation. On the contrary, Legends POA provided some records and a general ledger, which contained further evidence of stolen and/or mismanaged HOA funds.

35. On March 15, 2021, Mr. Cutlip issued yet another demand to the Boards of the Parkland POA and Legends POA that they inform the resident members of the mismanaged and misappropriated funds, terminate New Town Management as the property manager, investigate the mismanaged and misappropriated funds, file lawsuits against the parties responsible and those who wrongly received the mismanaged and misappropriated funds, resign their respective positions as board members, and re-pay the funds that were wrongfully diverted from the Parkland and Legends POAs. A copy of the **fourth demand** is attached hereto and incorporated herein by reference as **Exhibit H.**

36. While Mr. Cutlip has acted in good faith in notifying the Parkland and Legends POA Boards of the mismanagement and misappropriation of funds, and affording them an

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opportunity to take appropriate action, his effort to get the Boards to act is ultimately futile for the following reasons:

a) An objective inquiry would lead a board to investigate and file suit against the individual board members for their role in participating or allowing the mismanagement/misappropriation of funds, and there is a conflict of interest in asking a board to sue its own directors;

b) Board members Larry D. Young and/or Daniel Larry Young, Jr. hold ownership interests in LDY Properties, LLC, Legends Properties, LLC, Legends Golf Holding, LLC, and Jigger Holdings, LLC, which are entities against which Mr. Cutlip has asked the respective POAs to take action, but the Youngs understandably would be unwilling to sue their own companies;

c) Larry D. Young caused some or all of the board members to be appointed to their current positions, and served on both boards, so there is a loyalty to Larry D. Young among the board members and an unwillingness to sue him or his business interests or those of his family;

d) The filing of a lawsuit against third-party entities that have wrongly obtained funds from the POAs would be an implicit admission by the board members that they negligently or willfully allowed funds to be diverted outside the POA, opening up possible liability to the board members; and

e) The board members know that in the entire history of the Legends POA and Parkland POA, there has never been an official meeting because a quorum cannot be maintained. Thus, the board members realize that they will never be held accountable for their actions and will serve at their own pleasure, unless and until a legal action holds them accountable and forces them out.

As a First Cause of Action Against Larry D. Young, Legends Properties, LLC, Legends POA, Parkland POA, New Town Management, Legends POA Board Members, Parkland POA Board Members, and Michael Marino
(Failure to Comply with S.C. Code § 33-31-1601)

37. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.

38. On September 3, 2018, Mr. Cutlip requested copies of meeting minutes and other business records maintained by the Parkland Property Owners Association and the Legends Property Owners Association, in accordance with S.C. Code § 33-31-1601 *et seq.*

39. New Town Management responded to Cutlip's document request on behalf of Parkland POA and Legends POA and at their direction.

40. The Parkland POA, Legends POA, and New Town Management failed to furnish the requested documents within the statutory timeframe of five business days and instead

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provided excuses in an effort to frustrate and delay Mr. Cutlip's search for the truth regarding the actions of the respective POAs, in the following ways:

a) Providing a false source of information by directing Mr. Cutlip to the community CPA, David Smith, who did not have the requested financial records or explanations;

b) Ignoring Mr. Cutlip's emails with requests for clarification;

c) Claiming unavailability for a meeting and ignoring requests for a meeting to review the information and documents requested by Mr. Cutlip;

d) Attempting to intimidate Mr. Cutlip by accusing him of authoring an anonymous letter dated July 16, 2018, which Mr. Cutlip did not author, participate in authoring, or distribute;

e) Attempting to intimidate Mr. Cutlip by publishing false and misleading information on the community website, www.parklandpoa.com, regarding Mr. Cutlip's alleged role in authoring/publishing the anonymous letter; and

f) Demanding exorbitant fees as a pre-condition for Mr. Cutlip to have access to POA financial records.

41. Upon information and belief, Larry D. Young, Legends Properties, LLC, the individual Legends POA Board members, Parkland POA Board members, and Michael Marino have participated in the effort to frustrate and delay Mr. Cutlip's attempts to obtain the POA records.

42. Wherefore, Mr. Cutlip prays this Honorable Court for an Order directing the respective POAs to furnish copies of the requested records without further delay, full cooperation in fulfilling Mr. Cutlip's requests for records, instructing the POA Board members and Michael Marino not to interfere with this production; and for a judgment against these Defendants for the actual and punitive damages as found by a jury.

As a Second Cause of Action Against Developers, Legends POA, Parkland POA, New Town Management, Legends POA Board Members, Parkland POA Board Members, and Michael Marino
(Civil Conspiracy)

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43. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.

44. Mr. Cutlip became an owner in the Parkland POA and Legends POA on March 21, 2016 with his purchase of a house in the Parkland Development.

45. As an owner in the Parkland Development, Mr. Cutlip is a member of the Parkland Property Owners Association and the Legends Property Owners Association as the master association, and owns an undivided share of the common elements of the respective POAs.

46. Through his purchase of a house in the Parkland Development, Mr. Cutlip succeeded to the rights and interests that his predecessor(s) in interest in title held, including any rights and interests held as a member of the Parkland POA and Legends POA prior to March 21, 2016. Such membership rights and interests devolved to Mr. Cutlip upon his purchase by operation of law.

47. At the time of any transactions which occurred after March 21, 2016 and up until the present day, Mr. Cutlip was and is an owner and member in the Parkland POA and Legends POA.

48. Mr. Cutlip brings this derivative action on behalf of the individual members of the Parkland Property Owners Association and the Legends Property Owners Association, to recover funds wrongfully diverted from the respective POA accounts.

49. Larry D. Young, on his own and by and through his affiliated companies, LDY Properties, LLC and Legends Properties, LLC (hereinafter "Developers") designed and created the Parkland Development and the Legends Development.

50. New Town Management, LLC provides property management services for the Parkland Property Owners Association and the Legends Property Owners Association, and otherwise acts as an agent for these associations as directed.

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51. Upon information and belief, the Developers have been exercising such a level of authority and control over the Parkland POA and Legends POA that their separate identities are blurred and they are each the alter ego of the other.

52. In the alternative, Developers, Parkland POA, and Legends POA maintain separate identities but have reached agreements to act in concert as set forth herein.

53. Upon information and belief, the Defendants have combined for the purpose of diverting POA assessment funds and resources to the use and benefit of the Developers and their properties, along with businesses owned by Young and his family members, at the expense of the respective POAs, as set forth more fully herein.

54. Prior to filing this action, Mr. Cutlip requested copies of meeting minutes and other business records from the respective POAs, but was refused and frustrated in that effort as detailed above.

55. After filing this action, Mr. Cutlip sent subpoenas to Synovus Bank and over 40 subpoenas to other third-party entities to obtain documents showing how the POAs spent homeowner funds.

56. On June 30, 2020, Mr. Cutlip through counsel provided the Parkland POA, Legends POA, and their respective board members with over 160 pages of written discovery, 5,300 pages of documents, and 7 hours of audio/video recordings showing how POA funds were mismanaged and fraudulently diverted.

57. A conservative count of POA funds either stolen or mismanaged totals up to **$2,337,176.95** over the five-year period from July 2014 to June 2019.

58. POA funds were stolen across forty (40) different third-party accounts in order to benefit at least nine different entities either owned by or affiliated with Defendant Larry D. Young, his businesses, and/or his family.

59. In a letter dated July 28, 2020, Mr. Cutlip through counsel asked the Parkland POA and Legends POA within ten (10) business days to advise of what step(s) they intend to take to investigate the stolen and mismanaged funds, to report the results of that investigation to

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the resident members of the POAs, and to prevent future occurrences of stolen and mismanaged funds such as those detailed in Cutlip's document production.

60. As of the date of this filing, the Parkland POA and Legends POA have not responded regarding what steps, if any, they are willing to take to investigate the documented malfeasance, report their findings to the POA members, and prevent such misappropriation and fraudulent transfer of funds in the future.

61. As a direct and proximate result of the Defendants' conspiracy, Mr. Cutlip and other similarly situated owners in the respective POAs have sustained special damages.

62. Wherefore, Mr. Cutlip prays this Honorable Court for a judgment against these Defendants for actual damages and punitive damages in an amount to be determined by a jury.

As a Third Cause of Action Against Developers
(Breach of Fiduciary Duty)

63. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.

64. By virtue of the powers retained by Developers to control the governance of the Parkland Development and Legends Development, Developers owed fiduciary duties to the owners in these respective developments to avoid conflicts of interest and act in good faith and with due care to protect the owners' interests.

65. Developers have breached their fiduciary duties to Mr. Cutlip and the other owners in the following ways:

a) Spending HOA funds on developing the Developers' own real estate properties, clearing and preparing the land for future construction and land development.

b) Failing to maintain roadways, ponds, and amenities which serve the Parkland Development and Legends Development but are owned by Developers.

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c) Failing to accept responsibility for maintenance and upkeep of the roadways, ponds, and amenities which serve the Parkland Development and Legends Development but are owned by Developers.

d) Diverting funds from the Parkland POA and Legends POA for the stated purpose of maintaining and repairing the roadways, ponds, and amenities which serve the Parkland Development and Legends Development but are owned by Developers.

e) Failing to transfer property to the common areas of the respective POAs.

f) Failing to transfer property to the common areas of the respective POAs in a state of good repair and with sufficient capital to adequately maintain the property.

g) Failing to negotiate commercially reasonable contracts with vendors which are devoid of conflicts of interest.

h) Failing to disclose and avoid conflicts of interest.

i) Otherwise failing to act in the best interest of the owners with respect to areas within their discretion and control.

66. Wherefore, Mr. Cutlip prays this Honorable Court to enter a judgment against the Developers for breach of fiduciary duties in an amount equal to the actual and punitive damages found by a jury.

As a Fourth Cause of Action Against Parkland POA and Legends POA
(Breach of Fiduciary Duty)

67. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.

68. Parkland POA and Legends POA owe fiduciary duties to Mr. Cutlip and all owners within the respective associations to comply with the covenants and bylaws and to act in the best interest of the owners collectively with respect to all POA decision-making.

69. Parkland POA and Legends POA breached their fiduciary duties to Mr. Cutlip and other owners in the following ways:

a) Failing to make corporate records available upon request.

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b) Failing to provide the full and current governing documents, reflecting the current operations.

c) Failing to answer simple questions regarding governance of the POAs.

d) Failing to hold annual meetings and Board of Directors meetings.

e) Failing to make reasonable attempts to hold the annual meeting in May.

f) Failing to record and maintain minutes of meetings.

g) Failing to fill vacancies on the board of directors in a timely manner.

h) Failing to hold a board of directors meeting within ten (10) days of filling a vacancy.

i) Failing to approve a budget during a director meeting or through subsequent recordation.

j) Failing to make reasonable investigative efforts to determine ownership of the roadways.

k) Failing to provide the promised infrastructure or drainage studies to the homeowners.

l) Failing to ensure the owners' assessments were spent on authorized maintenance to common areas or common expenses.

m) Failing to provide and/or disclose to the residents the additional, non-contractual payments to New Town Management.

n) Failing to enforce strict compliance by the Developers with the covenants and bylaws.

o) Failing to prevent a deficit in the annual budget due to failure to enforce assessments.

p) Failing to prevent a deficit in the annual budget due to failure to approve a budget.

q) Failing to distribute the budget to the owners within the requisite time limit.

r) Failing to provide copies of audits to the homeowners in a timely manner.

s) Unauthorized spending of funds.

t) Failing to limit contracts with third parties to three (3) year terms.

u) Failing to make reasonable efforts to avoid conflicts of interest.

v) Failing to disclose potential conflicts of interest.

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w) Failing to otherwise comply with the covenants and bylaws.

70. Wherefore, Mr. Cutlip prays this Honorable Court to enter a judgment against the Parkland POA and Legends POA for breach of fiduciary duties in an amount equal to the actual and punitive damages found by a jury.

As a Fifth Cause of Action Against Parkland POA, Legends POA, POA Board Members, and New Town Management
(Negligence/Gross Negligence/Recklessness)

71. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.

72. Parkland POA, Legends POA, the respective POA Board members, and New Town had a duty to act with due care in the management of the assessments from owners as well as the maintenance of the common elements.

73. Parkland POA, Legends POA, the respective POA Board members, and New Town knew or should have known that owner funds were being spent on properties not owned by the POA, that contracts were being entered into which were not commercially reasonable and violated conflicts of interest, and that the covenants and bylaws were not being followed.

74. Parkland POA, Legends POA, the respective POA Board members, and New Town failed to adequately investigate these matters even when brought to their attention by concerned owners, and failed to properly notify the owners once discrepancies between the operation of the POAs and the covenants and bylaws were discovered.

75. At a Parkland POA board meeting held on August 11, 2018, Michael Marino and Carl A. Rubano responded to residents' questions and concerns by ignoring them, condescending yelling, and threats of lawsuits.

76. As a direct and proximate result of Parkland POA, Legends POA, the respective POA Board members, and New Town's negligence/gross negligence/recklessness, Mr. Cutlip and other owners sustained actual damages.

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77. Wherefore, Mr. Cutlip prays this Honorable Court to enter a judgment against the Parkland POA, Legends POA, the respective POA Board members, and New Town in an amount equal to the actual and punitive damages found by a jury.

As a Sixth Cause of Action Against All Defendants
(Declaratory Judgment)

78. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.

79. This action is brought pursuant to the South Carolina Declaratory Judgment Act, S.C. Code § 15-53-10 *et seq.*

80. Developers exerted control over the respective POAs and levied assessments against Mr. Cutlip and other owners for the purported use of paying POA expenses.

81. The decisions to levy assessments against Mr. Cutlip and the other owners was made by the Legends POA and Parkland POA, whose Board of Directors was appointed by Developers and thus had a conflict of interest.

82. The decisions to levy assessments or contract with third parties was unauthorized and invalid because of the lack of a duly authorized Board of Directors for Legends POA and Parkland POA, lack of a quorum for either association's board, and the aforementioned conflict of interest of those Board members appointed by the Developers.

83. Due to the conflict of interest of the Board of Directors, any votes authorizing assessments or expenditures were *ultra vires* and not protected by the business judgment rule.

84. The Legends POA and Parkland POA did not disclose their conflicts of interest, and in fact concealed them in the following ways:

a) Failing to submit budgets showing certain contracts.

b) Failing to disclose true ownership of property being maintained by the respective POAs.

c) Failing to hold meetings, reach a quorum, or record and maintain board meeting minutes.

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d) Failing to hold annual meetings of the respective POA membership.

85. The third-party contracts entered into by the respective POAs were presumptively commercially unreasonable because the Developers exerted control over the decision whether to enter into these contracts.

86. Any money assessed against owners and collected by Legends POA and Parkland POA and applied to properties not part of the common elements is a violation of the covenants and bylaws.

87. Any contracts entered into by the respective POAs were conflicts of interest and violated the covenants and bylaws limiting contracts to 3 years and requiring disclosure of potential and actual conflicts of interest.

88. Mr. Cutlip and other owners have sustained irreparable harm for which there is not an adequate remedy at law from the Defendants' self-dealing, conflicts of interest, failure to exercise due care in protecting the owners' interest and breach of fiduciary duties, by being deprived of funds in which to operate and by not being given the benefit of arms-length transactions.

89. Mr. Cutlip and other owners are entitled to and request that the Court issue an Order restraining Defendants from exercising any further action on behalf of the Legends POA or Parkland POA.

90. Mr. Cutlip and other owners are entitled to and request that the Court issue an Order for an accounting of all POA revenues collected and expenditures made during the existence of the respective POAs.

91. Mr. Cutlip and other owners are entitled to and request that the Court issue an Order conveying the roadways to the Legends POA and designate the same as "Common Areas" as described in the covenants and bylaws.

92. Mr. Cutlip and other owners are entitled to and request that the Court issue an Order removing the current board of directors of the Legends POA and the Parkland POA and

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appointing a fiduciary to officiate a member election for a new duly elected board of directors.

As a Seventh Cause of Action Against Estate and/or Trust of Larry D. Young, Daniel Larry Young, Jr., Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, Robert L. Schechter, Richard Apolenis, and John K. Manley
(Breach of Fiduciary Duty)

93. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.

94. Larry D. Young, Daniel Larry Young, Jr., Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, Robert L. Schechter, Richard Apolenis, and John K. Manley each served on one or both of the Board of Directors of the Legends POA and the Parkland POA as previously alleged herein.

95. As a Board member, each Defendant owed a fiduciary duty to the respective Association to make decisions that are in the best interest of the Association and to avoid conflicts of interest in business dealings.

96. Each Defendant breached his/her fiduciary duty to the respective Association in the following ways:

a) Failing to make corporate records available upon request.

b) Failing to provide the full and current governing documents, reflecting the current operations.

c) Failing to answer simple questions regarding governance of the POAs.

d) Failing to hold annual meetings and Board of Directors meetings.

e) Failing to make reasonable attempts to hold the annual meeting in May.

f) Failing to record and maintain minutes of meetings.

g) Failing to fill vacancies on the board of directors in a timely manner.

h) Failing to hold a board of directors meeting within ten (10) days of filling a vacancy.

i) Failing to approve a budget during a director meeting or through subsequent recordation.

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j) Failing to make reasonable investigative efforts to determine ownership of the roadways.

k) Failing to provide the promised infrastructure or drainage studies to the homeowners.

l) Failing to ensure the owners' assessments were spent on authorized maintenance to common areas or common expenses.

m) Failing to provide and/or disclose to the residents the additional, non-contractual payments to New Town Management.

n) Failing to enforce strict compliance by the Developers with the covenants and bylaws.

o) Failing to prevent a deficit in the annual budget due to failure to enforce assessments.

p) Failing to prevent a deficit in the annual budget due to failure to approve a budget.

q) Failing to distribute the budget to the owners within the requisite time limit.

r) Failing to provide copies of audits to the homeowners in a timely manner.

s) Unauthorized spending of funds.

t) Failing to limit contracts with third parties to three (3) year terms.

u) Failing to make reasonable efforts to avoid conflicts of interest.

v) Failing to disclose potential conflicts of interest.

w) Failing to otherwise comply with the covenants and bylaws.

97. Wherefore, the Parkland POA and Legends POA are entitled to judgments against the individual members of the Board of Directors for their breaches of fiduciary duty as set forth herein.

<u>As an Eighth Claim Against Michael Marino</u>
(Conversion/Unjust Enrichment)

98. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.

99. By virtue of his position as owner/employee of New Town Management, LLC, Michael Marino performed tasks for POAs which New Town Management managed, including the Legends POA and Parkland POA.

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100. On a frequent basis Michael Marino would incur various purported expenses when performing tasks for a POA, and when this occurred Mr. Marino would have New Town Management bill the respective Association for the reimbursable expense.

101. On a number of occasions, Michael Marino billed the Legends POA and Parkland POA for reimbursable expenses which either did not exist or which were not actually incurred in service for the Legends POA and Parkland POA, and should not have been billed to these POAs.

102. Upon information and belief, any reimbursable expenses reported by Michael Marino were paid directly by the POAs to Michael Marino, and he exercised dominion and control over these funds.

103. As a direct and proximate result of Michael Marino's conduct as described above, the respective POAs and their individual members have sustained actual damages.

104. If Michael Marino's conduct was purposeful knowing the POAs should not have been billed for these expenses, then he has committed a conversion, and the respective POAs and/or their individual members are entitled to a judgment for actual damages, interest, punitive damages, and attorney's fees and costs in an amount to be determined by the jury.

105. If, in the alternative, Michael Marino's conduct was accidental, then he has retained an improper benefit under circumstances requiring him in equity to return these funds, and the respective POAs are entitled to a judgment for actual damages and interest.

<u>As a Ninth Claim Against Legends Golf Holding, LLC and Jigger Holdings, LLC</u>
(Conversion/Unjust Enrichment)

106. Mr. Cutlip realleges and incorporates all prior allegations as though restated herein verbatim.

107. Legends Golf Holding, LLC and Jigger Holdings, LLC own several real estate properties within Legends Resort, which are situated on real property adjacent to the Legends Golf Course, owned by Legends SCNC Golf Holdings, LLC.

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108. Despite the similar name with one of the entities, the Legends POA does not hold any ownership share in Legends Golf Holding, LLC or in Jigger Holdings, LLC and is a separate and distinct legal entity from Legends Golf Holding, LLC and Jigger Holdings, LLC.

109. The real property currently owned by Legends POA, Legends Golf Holding, LLC and Jigger Holdings, LLC, including the real property currently owned by Legends SCNC Golf Holdings, LLC (operated as the Legends golf course), were at one time under common ownership by one or more of the Developers.

110. Upon information and belief, certain real estate properties owned by Legends Golf Holding, LLC and Jigger Holdings, LLC contain irrigation systems.

111. For several irrigation stations located (and originally installed in the early 1990s by the Developers) on property owned by Legends Golf Holding, LLC and Jigger Holdings, LLC, Grand Strand Water and Sewer Authority regularly sends invoices to Legends POA, and Legends POA pays them.

112. Legends POA derives no benefit from the aforementioned irrigation stations which are located on property owned by Legends Golf Holding, LLC and Jigger Holdings, LLC. Upon information and belief, Legends Golf Holding, LLC and Jigger Holdings, LLC receive the benefit of this irrigation water.

113. If Legends Golf Holding, LLC and Jigger Holdings, LLC intentionally derived the above-mentioned benefits at the expense of the Legends POA, then they have committed a conversion, and the Legends POA is entitled to a judgment for actual damages, interest, punitive damages, and attorney's fees and costs in an amount to be determined by the jury.

114. If, in the alternative, Legends Golf Holding, LLC and Jigger Holdings, LLC were unaware that they were obtaining benefits at the expense of Legends POA, or such was the result of a mistake, then they have retained an improper benefit under circumstances

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requiring them in equity to make reimbursement, and the Legends POA is entitled to a judgment for actual damages and interest.

WHEREFORE, Mr. Cutlip on his own behalf and on behalf of the Parkland POA and Legends POA prays for judgment against the Defendants for the actual, consequential, special, and punitive damages in an amount to be determined at trial; for injunctive and declaratory relief requested; for Mr. Cutlip's attorney's fees and costs; and for such other and further relief as the Court deems proper.

THE BOSTIC LAW GROUP, P.A.

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EXHIBIT I

STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CASE NO.: 2019-CP-26-01211
Gregory Cutlip, individually and as a member of the Legends Property Owners Association, Inc. and Parkland Property Owners Association, Inc., Plaintiffs, v. LDY Properties, LLC, Larry D. Young, Legends Property Owners Association, Inc., Parkland Property Owners Association, Inc., Legends Properties, LLC, and New Town Management, LLC, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, and Robert L. Schechter, Richard Apolenis, John K. Manley, Michael Marino, Legends Golf Holding, LLC, and Jigger Holdings, LLC, Defendants.	**DEFENDANTS LDY PROPERTIES, LLC, LEGEND PROPERTIES, LLC, LARRY D. YOUNG IN HIS CAPACITY AS A PRINCIPAL OF LDY PROPERTIES, LLC AND LEGENDS GOLF HOLDINGS, LLC'S MEMORANDUM IN OPPOSITION OF PLAINTIFFS' MOTION TO AMEND COMPLAINT**

TO: CHRISTOPHER M. RAMSEY, ESQUIRE, ATTORNEY FOR THE PLAINTIFF AND THE PLAINTIFF ABOVE NAMED:

The LDY Defendants oppose Plaintiff's second attempt to retroactively cure his prior failure to comply with the requirements of Rule 23(a)(1) of the South Carolina Rules of Civil Procedure. The LDY Defendants include: LDY Properties, LLC; Legends Properties, LLC; Legends Gold Holdings, LLC; and Larry D. Young. This opposition is based upon the following facts:

- Plaintiff is seeking to pursue derivative claims that actually belong to other Defendants in this case—Legends POA and Parkland POA.
- All derivative claims were dismissed by prior Order of this Court because Plaintiff failed to meet or plead the required pre-suit demands set forth in Rule 23(a)(1). Thus, these restated claims are *res judicata*.
- Plaintiff has ineffectively attempted to cure the prior defects by making a second post-suit demand on the POA boards, more than two years late.

- The allegations of the proposed Second Amended Complaint, on their face, demonstrate the futility of this action by Plaintiff.

BACKGROUND

On March 31, 2019, Plaintiff filed the Complaint in this Action against multiple defendants. On September 13, 2020, Plaintiff filed an Amended Verified Complaint, in which Plaintiff named several new parties, and attempted to cure pleading deficiencies in the original complaint.

In the Amended Complaint, Plaintiff alleges nine Causes of Action. Of those Nine Cause of Action, seven are filed as Derivative Cause of Action including Causes of Action 2, 3, 4, 5, 7, 8, and 9. These Causes of Action are derivative in nature because these Causes of Action are filed on behalf of the Plaintiff and all people who own property in the Legends Property and/or Parkland Property ("Owners").

All Defendants Jointly filed a Motion to Dismiss all of the Derivative Causes of Action. After full briefing and hearing, Judge Culbertson granted the Motion and dismissed all of the derivative claims. A copy of the Order, dated March 5, 2021, is attached hereto at Exhibit A.

Subsequent to the Order, on March 15, 2021, Plaintiff attempted again to remedy the failure to make a demand. A copy of the letter from counsel for Plaintiff, Mr. Chris Ramsey, to counsel for the POAs, is attached hereto at Exhibit B. This Motion was filed one day later—on March 16, 2021.

LEGAL STANDARD

Rule 15(a), SCRCP, sets forth the standard for granting motions to amend a pleading. It provides in pertinent part:

> A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so

> amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party.

Rule 15(a), SCRCP. Despite the normal latitude given to a party seeking to amend a pleading, courts in South Carolina have held that leave may be denied where the proposed amendment would be futile. See *Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 680–81 (Ct. App. 2010), rev'd, 401 S.C. 1, 736 S.E.2d 242 (2012), citing *Higgins v. Med. Univ. of S.C.*, 326 S.C. 592, 604–05, 486 S.E.2d 269, 275 (Ct.App.1997).

One such instance of where amendment may be futile, and thus leave denied, is where a prior Motion to Dismiss the same claims has already been granted. In *Higgins*, the Court explained:

> In many instances, plaintiffs dismissed pursuant to 12(b)(6) are granted leave to amend. *See Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *Dockside Ass'n v. Detyens, Simmons & Carlisle*, 297 S.C. 91, 374 S.E.2d 907 (Ct.App.1988) (citing *Foman* and stating that where a complaint is dismissed under 12(b)(6), plaintiff should be granted leave to file an amended complaint). In *Foman*, the United States Supreme Court stated:
>
> > In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the [trial court], but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the [rules].
>
> Here, however, any amendment of the Higginses' complaint which alleges the doctors were paid by UMA ultimately would be futile, in view of *Proveaux*. *See also Abell v. Bell*, 229 S.C. 1, 91 S.E.2d 548 (1956) (noting that "subsequent legislation may be of service as indicating the construction given to the former by the legislature itself"). Thus, the dismissal of the doctors is final.

Higgins, 486 S.E.2d at 275.

ARGUMENT

Plaintiff's attempt to re-assert claims already dismissed is futile. Therefore, the Plaintiff's Motion to Amend the Amended Complaint should be denied.

I. The Issue of Whether Plaintiff may Pursue Derivative Claims has Already Been Decided and Cannot be Re-litigated.

Plaintiff is unable to bring an amended complaint because the matter has been adjudicated on the merits and Res Judicata bars any further litigation. "Res Judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Judy v. Judy,* 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011) (citing *Plum Creek Dev. Co. v. City of Conway,* 334 S.C. 30, 512 S.E.2d 106 (1999)). This doctrine prevents the litigant both from raising issues which were actually adjudicated as well as any issues which the party may have raised. *Id.* Res Judicata is meant to prevent parties from being sued twice for the same cause of action. *Yelsen Land Co. v. State,* 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012). This protects the public interest by ensuring that there is an end to litigation. *Duckett v. Goforth,* 374 S.C. 446, 464, 649 S.E.2d 72, 81 (Ct.App.2007).

South Carolina courts have provided three elements that must be shown for Res Judicata to act as a bar to further litigation: (1) Identity of the parties; (2) identify of the subject matter; and (3) adjudication of the issue in the former suit. *Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C. 467, 419 S.E.2d 217 (1992). In this case, these restated claims fulfill all three elements of Res Judicata because the identity of both the parties and the subject matter has remained the same, and an involuntary dismissal satisfies the third element.

Rule 41(b) of the South Carolina Rules of Civil Procedure applies to motions to dismiss for failure to comply with "these rules." The Court granted the Defendants' Joint Motion to Dismiss these claims because Plaintiff failed to comply with the procedural and pleading

requirements of Rule 23(b)(1). Therefore, this matter has been adjudicated as an involuntary dismissal, which "operates as an adjudication upon the merits." SCRCP 41(b). Because this matter has already been fully addressed and decided by the court, any further action is barred by Res Judicata.

Plaintiff may claim that they are merely curing the defects in the original complaint rather than bringing a new cause of action. However, Plaintiff is unable to cure the defects in the original complaint because the pre-suit demand requirement cannot be met. Additionally, while voluntary dismissals are considered without prejudice and allow Plaintiff to amend, this action was involuntarily dismissed. SCRCP 41. The court fully dismissed the cause of action, and as such Plaintiff has neither the ability nor the opportunity to cure the defects in the original complaint.

The fundamental purpose of Res Judicata is to ensure that no one should be sued twice for the same cause of action and to prevent endless litigation. *Judy*, 393 S.C. at 173, 712 S.E.2d at 414 (citing *First Nat'l Bank of Greenville v. U.S. Fid. & Guar. Co.*, 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945)). Plaintiff repeatedly amending their complaint when the matter has been adjudicated simply in an attempt to repair their errors defeats this purpose. Restated claims previously dismissed by order of the court being refiled is the exact situation that the doctrine exists to prevent. Therefore, Plaintiff's amended complaint is barred by the doctrine of Res Judicata.

II. The New "Demand" by the Plaintiff and the new Allegations in the Second Amended Complaint are Ineffective to Give Plaintiff Standing to Pursue the Derivative Claims.

Plaintiff fails to meet the demand requirement found in SRCRP Rule 23(b)(1) because the demand was issued post-suit rather than pre-suit. In a Rule 23(b)(1) derivative action, a Complaint must "allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or

members, and the reasons for his failure to obtain the action or for not making the effort." SCRCP Rule 23(b)(1). The purpose of the demand requirement is to "affor[d] the directors an opportunity to exercise their reasonable business judgment and waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991). This allows the Board to remedy an alleged wrong without investing the resources in litigation. *See Carolina First Corp. v. Whittle*, 343 S.C. 176, 188, 539 S.E.2d 402, 409 (Ct. App. 2000). At the very minimum, a demand must "identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused to the corporation, and request remedial relief." Id. at 189, 539 S.E.2d at 409. The demand requirement was further addressed in a prior brief to this court, which is incorporated by reference.

Additionally, the Fourth Circuit Court of Appeals held that a post-suit demand does not fulfill the requirement under Rule 23(b)(1). *Star v. TI Oldfield Dev., LLC*, 962 F.3d 117, 135 (4th Cir. 2020). Evidence of post-suit demands are deemed largely irrelevant because they do not suffice to meet the demand requirement. *Star*, 962 F.3d at 135. The court relied on South Carolina law and examined the South Carolina Rules of Civil Procedure to make their ruling. *Star*, 962 F.3d at 134. The court stated that a federal court must look to, "the substantive law of the state of incorporation – here, South Carolina," when determining "the sufficiency of the pre-suit demand." *Id.*

In *Carolina First Corp. v. Whittle*, the Court of Appeals held that while the Plaintiff did make a pre-suit demand of some kind, the Complaint did not set forth any particularized allegation nor any particularized remedy for the Board to solve the problem. 343 S.C. at 189-190, 539 S.E.2d at 410 (Ct. App. 2000). The Complaint alleges that the Plaintiffs demanded "certain information"

and "certain actions," and that they made a supplemental demand after the suit was filed. However, the Court held that the allegations "must support an earnest, and not a simulated, effort with the managing body of the corporation to induce remedial action on their part." *Id.*

Similarly, in *Star v. TI Oldfield Dev., LLC*, the Fourth Circuit Court of Appeals held that a resident's derivative complaint did not satisfy the demand requirement because they included a post-suit demand. 962 F.3d 117, 135 (4th Cir. 2020). In that case, the board of directors brought an action against development association under allegations of mismanagement. *Star*, 962 F.3d at 124. These allegations included claims of breach of fiduciary duty, self-dealing, and breach of contract, among others. *Id.* at 125. Resident of the development moved to intervene in the action and ultimately filed a derivative action with many similar claims. *Id.* at 127. A special master ruled that the resident failed to meet Rule 23(b)(1)'s demand requirement because he failed to make a pre-suit demand. *Id.* at 128. The court affirmed the special master's ruling because resident's purported demand occurred after his filing of the suit. *Id.* at 135. The court further argued that a post-suit demand is insufficient because it fails to allow directors the chance to agree to any demands or act. *Id.* According to the court, the entire purpose of the demand requirement is to allow directors to exercise their business judgment when deciding whether to waive the legal rights of the corporation. *Id.*

In this case, like the plaintiff in both *Star* and *Carolina First Corp*, Plaintiff attempted to make a supplemental demand after filing suit. Further, the *only* evidence of any demand occurred post-suit. Plaintiff's attempt to supply a demand years after the filing of the original complaint, and the day before the filing of an amended complaint, exemplifies a "simulated" rather than "earnest" effort. *Carolina First Corp*, 343 S.C. at 189-190, 539 S.E.2d at 410. This imitation of a

legitimate demand does not represent a genuine attempt to persuade the board to act, and therefore fails the demand requirement under Rule 23(b)(1).

Plaintiff argues that the demand has been remedied through amendment. However, Plaintiff not only failed to meet the demand requirement, but it is impossible to do so. Plaintiff's only evidence of a demand occurs post-suit, and consequently cannot fulfill the requirement even if amended. Evidence of post-suit demands are irrelevant, as allowing them to satisfy the demand requirement would frustrate its very purpose. *Star*, 962 F.3d at 135. Plaintiff's new demand is merely an attempt to circumvent established procedural safeguards. These safeguards protect the opportunity of the directors to act without engaging in costly litigation. *Carolina First* Corp, 343 S.C. at 188, 539 S.E.2d at 409. Producing a demand years after filing suit hardly provides directors the opportunity to avoid litigation. As such, Plaintiff fails to meet the demand requirement of 23(b)(1).

CONCLUSION

The court should deny Plaintiff's motion to amend complaint because Plaintiff's complaint is futile. Not only has Plaintiff failed to meet the demand requirement of Rule 23(b)(1) but it would be impossible to do so with a post-suit demand. Furthermore, even if Plaintiff were able to remedy the defects in the amended complaint, Res Judicata bars any further litigation because the matter has been adjudicated on the merits and dismissed by previous order of the court.

[Signature Page to Follow]

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

s/Everett A. Kendall, II

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Columbia, South Carolina
May 7, 2021

EXHIBIT J

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	Civil Action No. 2019-CP-26-01211
Gregory Cutlip, individually and as a member of the Legends Property Owners Association, Inc. and Parkland Property Owners Association, Inc.,	)	
Plaintiffs,	)	
vs.	)	**Order**
LDY Properties, LLC, Larry D. Young, Legends Property Owners Association, Inc., Parkland Property Owners Association, Inc., Legends Properties, LLC, New Town Management, LLC, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, Robert L. Schechter, Richard Apolenis, John K. Manley, Michael Marino, Legends Golf Holding, LLC, and Jigger Holdings, LLC,	)	
Defendants.	)	

This matter came before the Court on May 11, 2021 for a hearing to consider Plaintiff's Motion to Amend the Complaint. The motion included as an attachment the proposed Second Amended Complaint. Plaintiff submits that the amendment is necessary in order to add more specific factual allegations concerning Plaintiff's efforts to obtain action by the POA Boards and the reasons for any failure to obtain the action or for not making the effort, as required under Rule 23(b)(1), SCRCP. Defendants argue that leave should be denied because any such amendment would be futile.

Rule 15(a), SCRCP, provides that leave to amend "shall be freely given when justice so requires and does not prejudice any other party."

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After reviewing the pleadings, the proposed Second Amended Complaint, the briefs of counsel, and the oral arguments at the hearing, the Court GRANTS Plaintiff's Motion to Amend the Complaint. The Court finds that the interests of justice require that Plaintiff be allowed to amend the Complaint, and that the amendment does not prejudice any other party. Plaintiff shall have 30 days from the entry of this Order to file his Second Amended Complaint.

IT IS SO ORDERED.

_____
The Honorable R. Ferrell Cothran, Jr.
Judge, Third Judicial Circuit

Date: _____

Manning, South Carolina

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Horry Common Pleas

Case Caption:	Gregory Cutlip , plaintiff, et al VS LDY Properties LLC , defendant, et al
Case Number:	2019CP2601211
Type:	Order/Amend

So Ordered

s/ R. Ferrell Cothran, Jr., 2144

EXHIBIT K

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 2019-CP-26-01211

Gregory Cutlip, individually and as a member of the Legends Property Owners Association, Inc. and Parkland Property Owners Association, Inc.,

Plaintiffs,

v.

LDY Properties, LLC, Estate and/or Trust of Larry D. Young, Legends Property Owners Association, Inc., Parkland Property Owners Association, Inc., Legends Properties, LLC, and New Town Management, LLC, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, and Robert L. Schechter, Richard Apolenis, John K. Manley, Michael Marino, Legends Golf Holding, LLC, Jigger Holdings, LLC, and Daniel Larry Young, Jr.

Defendants.

DEFENDANTS LDY PROPERTIES, LLC, LEGEND PROPERTIES, LLC, LARRY D. YOUNG IN HIS CAPACITY AS A PRINCIPAL OF LDY PROPERTIES, LLC, AND LEGENDS GOLF HOLDINGS, LLC'S MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS ALL DERIVATIVE CLAIMS

TO: CHRISTOPHER M. RAMSEY, ESQUIRE, ATTORNEY FOR THE PLAINTIFF AND THE PLAINTIFF ABOVE NAMED:

Defendants Estate and/or Trust of Larry D. Young, Daniel Larry Young, Jr., Legends Properties, LLC, LDY Properties, LLC and Legends Golf Holdings, Inc. (hereinafter "LDY Defendants") hereby move to dismiss all derivative claims set forth in the Plaintiff's Second Amended Complaint (contained in the Second, Third, Fourth, Fifth, Seventh, Eighth, and Ninth Causes of Action), as these claims are barred by the doctrine of *res judicata*.

This Court has already ruled that the Plaintiff failed to comply with the requirements of Rule 23(a)(1) of the South Carolina Rules of Civil Procedure. Specifically, the Court ruled that the Plaintiff failed to make a demand on the respective property owner's associations and failed to allege with particularity the efforts made to obtain the actions he desires from the Board of

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Directors of the property owner's association. Therefore, the Court ruled that the Plaintiff did not comply with the rules established in Rule 23(b)(1) of the South Carolina Rules of Civil Procedure. Since this Court has already dismissed these causes of action with prejudice, the Plaintiff is barred from re-litigating these claims under the doctrine of *res judicata*. Further, the derivative Causes of Action alleged against Danny Larry Young, Jr. should also be dismissed as Plaintiff again fails to comply with SCRCP Rule 23(b)(1).

BACKGROUND

In March of 2016, Plaintiff bought a home in in the Parkland Development in the Legends Community in Myrtle Beach, SC. (Exhibit A: Plaintiff's Amended Complaint Paragraph 1). Residents of the Parkland Development are governed by the Parkland Property Owners Association, Inc, and the Parkland Property Owner's Association, Inc is governed by the master association, which is the Legends Property Owners Association, Inc. (hereinafter "Owners Associations").

On March 31, 2019, Plaintiff filed the Complaint in this Action against multiple defendants including the LDY Defendants and the Owners Associations. On September 13, 2020, Plaintiff filed an Amended Complaint, in which Plaintiff named several new parties. In the Amended Complaint, seven of the nine Causes of Action were derivative in nature. (*Id.*)

The Defendants jointly filed a Motion to Dismiss all of the derivative Causes of Action. On March 3, 2021, a hearing was held in front of Judge Benjamin H. Culbertson. On March 5, 2021, Judge Culbertson filed a Form 4 Order granting the Motion to Dismiss the derivative causes of action declaring the Plaintiff's Amended Complaint "fails to allege with particularity the efforts made by plaintiff to obtain the action he desires from the directors." (Exhibit B: Form 4 Order granting Defendants' Motion to Dismiss). The Court did not specify that the Order did not operate

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as adjudication on the merits. (*Id.*) This Order did not end the case but dismissed the seven derivative Causes of Action.

On March 15, 2021, Plaintiff attempted to remedy the failure by making a demand on the Owners Associations. (Exhibit C: Demand Correspondence). Just one day later, the Plaintiff filed its Second Amended Summons and Complaint, which contains the same seven derivative Causes of Action that were included in the Plaintiff's Amended Summons and Complaint. (Exhibit D: Second Amended Summons and Complaint). The Second Amended Complaint included Daniel Larry Young, Jr., as a new defendant. (*Id.*) In the Second Amended Summons and Complaint, the Plaintiff presents the same facts argued in the original hearing, and also includes reference to the March 15, 2021, demand that was served the day prior (*Id.*).

On March 16, 2021, Plaintiff also filed a Motion to Amend the Complaint. (Exhibit E: Motion to Amend Amended Complaint). On May 11, 2021, a hearing was held in front of Judge R. Ferrell Cothran Jr. On May 11, 2021, Judge Cothran issued an Order that "justice requires that Plaintiff be allowed to amend the Complaint, and that the amendment does not prejudice any other party." (Exhibit F: Order granting the Motion to Amend the Amended Complaint). Judge Cothran presumably granted the Motion to Amend the Amended Complaint on the theory that the Amended Complaint was not futile but did not address the issue of *res judicata* in his Order.

ARGUMENT

The Plaintiff's derivative Causes of Action should be dismissed again, as these Causes of Action have already been heard by Judge Culbertson. While the Plaintiff may amend his Complaint, the Plaintiff cannot amend his Complaint to add causes of actions that have already been litigated, and thus, these Causes of Action are barred by *res judicata*.

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I. **Plaintiff may not pursue the derivative Causes of Action in the Second Amended Complaint because the Court has already decided these Causes of Action should be dismissed and therefore these Causes of Action are barred by the doctrine of *res judicata*.**

"Res Judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011) (citing *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 512 S.E.2d 106 (1999)). This doctrine prevents the litigant both from raising issues which were actually adjudicated as well as any issues which the party may have raised. *Id.* *Res judicata* is meant to prevent parties from being sued twice for the same cause of action. *Yelsen Land Co. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012). This protects the public interest by ensuring that there is an end to litigation. *Duckett v. Goforth*, 374 S.C. 446, 464, 649 S.E.2d 72, 81 (Ct.App.2007).

South Carolina courts have provided three elements that must be shown for *res judicata* to act as a bar to further litigation: (1) Identity of the parties; (2) identify of the subject matter; and (3) adjudication of the issue in the former suit. *Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C. 467, 419 S.E.2d 217 (1992).

The Motion to Dismiss granted by Judge Culbertson was made pursuant to Rule 41(b), based on Plaintiff's failure to comply with Rule 23(b)(1). If the Plaintiff fails to comply with the Rules of Civil Procedure, a Defendant may move for a Motion to Dismiss a Cause of Action. SCRCP Rule 41(b). Unless in its Order for Dismissal the Court otherwise specifies, "a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for failure to join a party under Rule 19, operates as an adjudication on the merits." *Id.*

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Here, the Plaintiff has attempted to circumvent the South Carolina Rules of Civil Procedure. Since the Amended Summons and Complaint was not dismissed, the Plaintiff attempted to file a Second Amended Summons and Complaint with the **exact same Causes of Action with almost identical Cause of Action language** with the Amended Summons and Complaint. The only section of the Second Amended Summons and Complaint that differs from the Amended Summons and Complaint is the facts section. All of the facts presented in the Facts section were argued in front of Judge Culbertson with the exception of the March 15 Demand letter, which was served after Judge Culbertson had already dismissed the derivative Causes of Action.

This case satisfies all three elements of res judicata. The identity of the parties are the exact same and the Causes of Action are almost identically worded, so the subject matter is identical. Finally, the Form 4 Order filed by Judge Culbertson did not specify that the Dismissal was not an adjudication on the merits; therefore, the Dismissal did operate as an adjudication on the merits. Further, this case does not have to do with the lack of jurisdiction, improper venue, or joinder under Rule 19(a), so these exceptions do not apply. Therefore, Plaintiff's Second Amended Complaint is barred by the doctrine of *res judicata*.

II. Despite the new "Demand," Plaintiff still fails to meet the pleading requirements of SCRCP Rule 23(b)(1); therefore, Plaintiff's derivative Causes of Actions alleged against Danny Larry Young, Jr. should be dismissed.

Plaintiff fails to meet the demand requirement found in SRCRP Rule 23(b)(1) because the demand was issued post-suit rather than pre-suit. In a Rule 23(b)(1) derivative action, a Complaint must "allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort." SCRCP

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Rule 23(b)(1). The purpose of the demand requirement is to "affor[d] the directors an opportunity to exercise their reasonable business judgment and waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991). This allows the Board to remedy an alleged wrong without investing the resources in litigation. See *Carolina First Corp. v. Whittle*, 343 S.C. 176, 188, 539 S.E.2d 402, 409 (Ct. App. 2000). At the very minimum, a demand must "identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused to the corporation, and request remedial relief." Id. at 189, 539 S.E.2d at 409. The demand requirement was further addressed in a prior brief to this court, which is incorporated by reference.

Additionally, the Fourth Circuit Court of Appeals held that a post-suit demand does not fulfill the requirement under Rule 23(b)(1). *Star v. TI Oldfield Dev., LLC*, 962 F.3d 117, 135 (4th Cir. 2020). Evidence of post-suit demands are deemed largely irrelevant because they do not suffice to meet the demand requirement. *Star,* 962 F.3d at 135. The court relied on South Carolina law and examined the South Carolina Rules of Civil Procedure to make their ruling. *Star*, 962 F.3d at 134. The court stated that a federal court must look to, "the substantive law of the state of incorporation – here, South Carolina," when determining "the sufficiency of the pre-suit demand." *Id.*

In *Carolina First Corp. v. Whittle*, the Court of Appeals held that while the Plaintiff did make a pre-suit demand of some kind, the Complaint did not set forth any particularized allegation nor any particularized remedy for the Board to solve the problem. 343 S.C. at 189-190, 539 S.E.2d at 410 (Ct. App. 2000). The Complaint alleges that the Plaintiffs demanded "certain information" and "certain actions," and that they made a supplemental demand after the suit was filed. However,

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the Court held that the allegations "must support an earnest, and not a simulated, effort with the managing body of the corporation to induce remedial action on their part." *Id.*

Similarly, in *Star v. TI Oldfield Dev., LLC*, the Fourth Circuit Court of Appeals held that a resident's derivative complaint did not satisfy the demand requirement because they included a post-suit demand. 962 F.3d 117, 135 (4th Cir. 2020). In that case, the board of directors brought an action against development association under allegations of mismanagement. *Star,* 962 F.3d at 124. These allegations included claims of breach of fiduciary duty, self-dealing, and breach of contract, among others. *Id.* at 125. Residents of the development moved to intervene in the action and ultimately filed a derivative action with many similar claims. *Id.* at 127. A special master ruled that the resident failed to meet Rule 23(b)(1)'s demand requirement because he failed to make a pre-suit demand. *Id.* at 128. The court affirmed the special master's ruling because resident's purported demand occurred after his filing of the suit. *Id.* at 135. The court further argued that a post-suit demand is insufficient because it fails to allow directors the chance to agree to any demands or act. *Id.* According to the court, the entire purpose of the demand requirement is to allow directors to exercise their business judgment when deciding whether to waive the legal rights of the corporation. *Id.*

Here, like in both *Star* and *Carolina First Corp*, Plaintiff attempted to make a supplemental demand after filing suit. Further, the only evidence of any demand occurred post-suit. Judge Culbertson adjudicated this issue with all of the Defendants except Danny Larry Young, Jr., who is the lone party who was added after Judge Culbertson dismissed the Plaintiff's derivative claims. Plaintiff's attempt to supply a demand years after the filing of the original complaint, and the day before the filing of a second amended complaint, exemplifies a "simulated" rather than "earnest" effort like the Plaintiff in *Carolina First Corp.* This imitation of a legitimate demand does not

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represent a genuine attempt to persuade the board to act, and therefore fails the demand requirement under Rule 23(b)(1).

Plaintiff argues that the demand has been remedied through amendment. However, Plaintiff not only failed to meet the demand requirement, but it is impossible to do so. Plaintiff's only evidence of a demand occurs post-suit, and consequently cannot fulfill the requirement even if amended. Evidence of post-suit demands are irrelevant, as allowing them to satisfy the demand requirement would frustrate its very purpose. Plaintiff's new demand is merely an attempt to circumvent established procedural safeguards. These safeguards protect the opportunity of the directors to act without engaging in costly litigation. Producing a demand years after filing suit hardly provides directors the opportunity to avoid litigation. As such, Plaintiff fails to meet the demand requirement of 23(b)(1).

CONCLUSION

Plaintiff may not pursue the derivative Causes of Action in the Second Amended Complaint because the Court has already decided these Causes of Action should be dismissed and therefore these Causes of Action are barred by the doctrine of *res judicata*, and the Defendants Motion to Dismiss the derivative cause of action should be granted. Further, with respect to Defendant Danny Larry Young, Jr., the Plaintiff fails to comply with the requirements of Rule 23(b)(1); therefore, Plaintiff's derivative Causes of Action alleged against Larry Danny Young, Jr. should be dismissed as well.

[Signature Page to Follow]

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

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Columbia, South Carolina
September 9, 2021

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ELECTRONICALLY FILED - 2021 Jun 17 4:16 PM - HORRY - COMMON PLEAS - CASE#2019CP2601211

STATE OF SOUTH CAROLINA COUNTY OF HORRY Gregory Cutlip, individually and as a member of the Legends Property Owners Association, Inc. and Parkland Property Owners Association, Inc., Plaintiff, v. LDY Properties, LLC, Estate and/or Trust of Larry D. Young, Legends Property Owners Association, Inc., Parkland Property Owners Association, Inc., Legends Properties, LLC, New Town Management, LLC, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, Robert L. Schechter, Richard Apolenis, John K. Manley, Michael Marino, Legends Golf Holdings, LLC, and Jigger Holdings, LLC, and Daniel Larry Young, Jr. Defendants.	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT C/A No. 2019-CP-26-01211 **MOTION TO DISMISS ALL DERIVATIVE CLAIMS**

TO: PLAINTIFF AND CHRISTOPHER M. RAMSEY, ATTORNEY FOR PLAINTIFF

Collectively, the Defendants Legends Property Owners Association, Inc., Parkland Property Owners Association, Inc., New Town Management, LLC, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, Robert Schechter, Richard Apolenis, John K. Manley, Daniel Larry Young, Jr., The Estate and/or Trust of Larry D. Young in his former capacity as a member of the Legends POA Board and Parkland POA Board, and Michael Marino hereby move to dismiss all derivative claims against them set forth in the Second Amended Verified Complaint (contained in the Second, Fourth, Fifth, Sixth, Seventh and Eighth causes of action). This Motion is made on the grounds that Plaintiff has failed to meet the requisites of Rule 23(b)(1) of the South Carolina Rules of Civil Procedure, having failed to make a demand upon the Boards

prior to the filing of this lawsuit and having failed to sufficiently plead a justification for that failure and/or that a demand would have been futile. Therefore, the derivate claims should be dismissed as a matter of law as to all moving Defendants herein.

Respectively submitted this 17th day of June, 2021.

WE SO MOVE:

TURNER, PADGET, GRAHAM & LANEY, P.A.

s/RW Belcher

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THOMPSON & HENRY, P.A.

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PROPERTY OWNERS ASSOCIATION, INC., CARL RUBANO, IN HIS CAPACITY AS A MEMBER OF THE LEGENDS POA BOARD, RICHARD APOLENIS, JOHN K. MANLEY, ESTATE AND/OR TRUST OF LARRY D. YOUNG, IN HIS FORMER CAPACITY AS A MEMBER OF THE LEGENDS POA BOARD, DANIEL LARRY YOUNG, JR., IN HIS CAPACITY AS A MEMBER OF THE LEGENDS POA BOARD, AND MICHAEL MARINO, IN HIS CAPACITY AS A REPRESENTATIVE OF THE LEGENDS POA BOARD

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ATTORNEYS FOR MICHAEL MARINO

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 2019-CP-26-01211

Gregory Cutlip, individually and as a member of the Legends Property Owners Association, Inc. and Parkland Property Owners Association, Inc.,

Plaintiffs,

v.

LDY Properties, LLC, Larry D. Young, Legends Property Owners Association, Inc., Parkland Property Owners Association, Inc., Legends Properties, LLC, and New Town Management, LLC, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, and Robert L. Schechter, Richard Apolenis, John K. Manley, Michael Marino, Legends Golf Holding, LLC, and Jigger Holdings, LLC,

Defendants.

MOTION TO DISMISS ALL DERIVATIVE CLAIMS

TO: CHRISTOPHER M. RAMSEY, ESQUIRE, ATTORNEY FOR THE PLAINTIFF AND THE PLAINTIFF ABOVE NAMED:

Defendants Larry D. Young, Daniel Young, Legends Properties, LLC, LDY Properties, LLC and Legends Golf Holdings, Inc. hereby move to dismiss all derivative claims against them set forth in the Second Amended Complaint (contained in the Second, Third, Sixth, Seventh and Ninth causes of action). This Motion is made on the following grounds:

1. These claims are barred by the doctrine of *res judicata*, having already been dismissed by Court Order after a hearing.

2. Plaintiff has failed to meet the requisites of Rule 23(b)(1) of the South Carolina Rules of Civil Procedure having failed to make demand upon the Board prior to filing this lawsuit and having failed to sufficiently plead a justification for that failure.

Therefore, these claims should be dismissed as a matter of law.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

s/ Everett A. Kendall, II
Everett A. Kendall, II, SC Bar No. 8450
Murphy & Grantland, P.A.
Post Office Box 6648
Columbia, SC 29260
(803) 782-4100

Attorney for LDY Properties, LLC, Legend Properties, LLC, Larry D. Young in his capacity as a principal of LDY Properties, LLC and Legends Golf Holdings, LLC

Columbia, South Carolina
June 10, 2021

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EXHIBIT L

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	Civil Action No. 2019-CP-26-01211
)	
Gregory Cutlip, individually and as a)	
member of the Legends Property Owners)	
Association, Inc. and Parkland Property)	
Owners Association, Inc.,)	
)	
Plaintiff,)	
)	
vs.)	**Order Denying Estate and/or Trust of Larry D. Young and Legends Properties, LLC's Motion to Dismiss the First Cause of Action**
)	
LDY Properties, LLC, Estate and/or Trust of)	
Larry D. Young, Legends Property Owners)	
Association, Inc., Parkland Property Owners)	
Association, Inc., Legends Properties, LLC,)	
New Town Management, LLC, Michael R.)	
Latta, Marienne Johnson, Carl A. Rubano,)	
Camden C. McCarl, Robert L. Schechter,)	
Richard Apolenis, John K. Manley, Michael)	
Marino, Legends Golf Holding, LLC, Jigger)	
Holding, LLC, and Daniel Larry Young, Jr.,)	
)	
Defendants.)	
)	

This matter came before the Court on September 13, 2021 for a hearing on Defendants Estate and/or Trust of Larry D. Young and Legends Properties, LLC's Motion to Dismiss the First Cause of Action. After considering the Complaint, the filed briefs, and the arguments of counsel, this Court makes the following findings and conclusions of law:

1. The Complaint alleges that the Plaintiff is a resident and member of the Parkland Property Owners Association and Legends Property Owners Association. Complaint at ¶ 1.
2. The Complaint alleges that Larry D. Young was a sitting board member of the Parkland POA and Legends POA. Complaint at ¶ 14.
3. The Complaint further alleges that Plaintiff requested copies of meeting minutes and other business records from the POAs pursuant to S.C. Code § 33-31-1601 *et seq.*, and that Larry D. Young and Legends Properties, LLC directly interfered with Plaintiff's ability to receive the requested documents. Complaint at ¶¶ 38, 41.

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4. After taking the allegations in the Complaint as true, along with all inferences therefrom in the light most favorable to the Plaintiff, the Court finds that the Plaintiff has stated a claim for relief against the Estate and/or Trust of Larry D. Young and Legends Properties, LLC under the First Cause of Action (Failure to Comply with S.C. Code § 33-31-1601) sufficient to withstand a Motion to Dismiss.

IT IS THEREFORE ORDERED that Estate and/or Trust of Larry D. Young and Legends Properties, LLC's Motion to Dismiss Plaintiff's First Cause of Action is DENIED.

IT IS SO ORDERED.

The Honorable H. Steven DeBerry, IV
Judge, Fifteenth Judicial Circuit

Date: _____

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Horry Common Pleas

Case Caption:	Gregory Cutlip , plaintiff, et al VS LDY Properties LLC , defendant, et al
Case Number:	2019CP2601211
Type:	Order/Dismissal

H. Steven DeBerry, IV

Circuit Court Judge 2771

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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

H. Steven DeBerry, IV, Circuit Court Judge
And
R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2022-000152
Trial Court Case No. 2019-CP-26-01211

Gregory Cutlip, individually and as a member of the Legends Property Owners Association, Inc. and Parkland Property Owners Association, Inc., ...Respondent,

v.

LDY Properties, LLC, Estate and/or Trust of Larry D. Young, Legends Property Owners Association, Inc., Parkland Property Owners Association, Inc., Legends Properties, LLC, New Town Management, LLC, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, Robert L. Schechter, Richard Apolenis, John K. Manley, Michael Marino, Legends Golf Holding, LLC, Jigger Holdings, LLC, and Daniel Larry Young, Jr.,.....Defendants,

Of which LDY Properties, LLC; Larry D. Young; Legends Properties, LLC; and Legends Golf Holding, LLC are the Appellants.

PROOF OF SERVICE

I certify that I have served Appellants' Return to Respondent's Motion to Dismiss, Return to Respondent's Motion to Lift Stay, and Return to Respondent's Motion for Costs and/or Sanctions on Respondent Gregory Cutlip by depositing a copy of them in the United States Mail, postage prepaid, on March 17, 2022, addressed to his attorney of record, Christopher T. Ramsey, 2236 Ashley Crossing Drive, Charleston, South Carolina 29414.

MURPHY & GRANTLAND, P.A.

Everett A. Kendall, II

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Attorneys for Appellants

March 17, 2022
Columbia, South Carolina