THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Case No. 2020-CP-46-02006

Eastwood Construction Partners, LLC and
Eastwood Development Corporation, ... Appellants,

v.

GHD Brooks Creek, AF-Brooks Creek, LLC,
GHD River Falls, LLC, AF-River Falls, LLC,
Greenhawk Corporation, Inc. and TRI Pointe Homes, Inc., ...Respondents.

EASTWOOD SCACR 241(d)(7) PETITION
EXPEDITED REQUEST

Pursuant to Rule 241(d)(7), SCACR, Appellant Eastwood Construction Partners, LLC and Eastwood Development Corporation ("Appellants" or "Eastwood") files this petition and expedited request the Court of Appeals to review and vacate the Form-4 Orders of the Honorable Daniel D. Hall dated April 13, 2022, that lift the automatic stay of the Order on appeal and order the immediate cancellation of two *lis pendens*. Ex. A to Pet. ("Lift Orders"). Eastwood is seeking review of the Form-4s rather than awaiting formal, written orders to ensure that Defendants do not sell the properties at issue in this appeal before this Court can review the Circuit Court's orders.[1]

[1] As explained infra, both Properties are already under contract and ready to close.

Eastwood filed the two *lis pendens* against two parcels of land in York County, South Carolina, (the "Properties") that are the subject of Eastwood's pending appeal of the dismissal of its specific performance claims. If this Court does not vacate the Circuit Court's Lift Orders and the cancellation of *lis pendens* occurs, Respondents will consummate the sale of the Properties before Eastwood's appeal is complete,[2] mooting Eastwood's claim for specific performance before this Court has a chance to rule on the merits of the appeal. Contrary to the text and purpose of SCACR 241(c), the Circuit Court's Lift Orders destroys this Court's jurisdiction, it does not protect it.

I. FACTUAL BACKGROUND

Eastwood's appeal arises from a Civil Action styled *Eastwood Construction Partners, LLC et al. v. GHD Brooks Creek et al.*, Civil Action No. 2020-CP-02006 (S.C. 16th Judicial Cir.). Eastwood commenced the action for specific performance of a contract for the sale of the Properties Eastwood claims exists between it and various, Greenhawk-related land development entities. Eastwood also brought several other associated causes of action that were not resolved by the Circuit Court's partial summary judgment orders. Eastwood has filed appeals of the Circuit Court's partial summary judgment orders dismissing Eastwood's claims that would entitle it to specific performance of its claimed contract with Greenhawk and cancelling the *lis pendens*. The partial summary judgment orders were stayed pursuant to SCACR 241 until the Circuit Court entered the Lift Orders. Those appeals were consolidated and are pending before this Court with Eastwood's opening brief due on May 11, 2022.

[2] During the April 4, 2022 hearing on Respondents' motions to lift the automatic stay, Counsel for Greenhawk conceded that Greenhawk will sell the Properties shortly after the cancellation of the lis pendens.

A. The Properties and Parties

Eastwood is a residential home builder, building homes in the major metropolitan areas of North and South Carolina. Eastwood is based in the Charlotte, North Carolina area. Greenhawk[3] is a land development company based in Raleigh, North Carolina. Most of Greenhawk's land development activities are in the Raleigh and Greensboro areas of North Carolina, with a few properties in other areas including the properties at issue in this case. Greenhawk has no office or location in York County or the Charlotte area. TRI Pointe Homes, Inc. ("TRI Pointe") is a North Carolina corporation and homebuilder who intervened in the original action. TRI Pointe claims that it, not Eastwood, has a valid contract to purchase the lots in the Brooks Springs development, one of the two Properties at issue.

Prior to 2013, Greenhawk and Eastwood engaged in multiple business transactions where Greenhawk had either developed land into buildable lots or taken over existing land developments and completed the development of lots. Once the development work was complete, Greenhawk sold those completed, ready-to-build lots to Eastwood so Eastwood could construct homes. The transaction at issue in this case was an extension and continuation of that ongoing business relationship between Greenhawk and Eastwood

In 2013, Eastwood, through its then Vice President of Land, Joe Dority, identified the real property at issue in this case and placed all of the affected tracts under contract to purchase, including the payment of earnest money deposits. Ex. B to Pet., Deposition of Craig Briner, at 58:2–4 ("Briner Dep."). The purpose of that effort was to prevent others from gaining access to the property. The two properties were located off of Gold Hill Road in York County, South

[3] Appellant uses "Greenhawk" to refer to all Greenhawk entities captioned as Respondents in this appeal: GHD Brooks Creek, AF-Brooks Creek, LLC, GHD River Falls, AF-River Falls, LLC, and Greenhawk Corporation, Inc.

Carolina. One parcel was approximately 12 acres and the other was 51 acres. Ex. C to Pet., Compl., Ex. C. In anticipation of their purchase, Eastwood began preliminary development work on the Properties for the joint benefit of Greenhawk and Eastwood, including engineering, site design, and municipal related permitting. While the preliminary work was ongoing, Eastwood's Dority reached an agreement with Greenhawk's Craig Briner regarding the Properties. Pursuant to that agreement, Eastwood would assign its rights to purchase the properties to Greenhawk, Greenhawk would develop the properties in accordance with Eastwood's specifications, and Greenhawk would sell competed lots to Eastwood. Ex. D to Pet., Rule 30(b)(6) Deposition of Joseph Polite,[4] at 71:12–22 ("Eastwood 30(b)(6)"); Ex. E to Pet., Deposition of Joseph Polite ("Polite Dep."), at 51:1–13; Ex. F to Pet., Polite Dep., Ex. 23; Briner Dep., at 58:2–59:25.

Craig Briner was a founding member and at the time was president of Greenhawk Corporation. Briner Dep., at 15:24–16:6, 123:24. He was also one of Greenhawk Development, LLC's three managers with full authority to enter into agreements with Eastwood. Part of the reasoning for deciding to purchase the land and enter the agreement with Eastwood was that Eastwood would be buying the lots, providing a source of income and return on investment. Briner Dep., at 37:7–38:1. In the 2013-2014 time frame, through the middle of 2018, Mr. Briner was the sole person responsible for Greenhawk's land development activities. Once he had authority to proceed from Mr. Agarwal and Mr. DesVerges, Greenhawk's other managers at the time, no one else at Greenhawk had knowledge of what arrangements were made with Eastwood or other developers. Briner Dep., at 18:13–25.

[4] Mr. Polite was deposed first in his individual capacity and later as Eastwood's Rule 30(b)(6) designee.

B. The Eastwood-Greenhawk Agreement

Pursuant to the Eastwood-Greenhawk agreement, Eastwood assigned both land sale contracts to Greenhawk at roughly the same time. Ex. G to Pet., Compl., Ex. D ("Assignments"). Greenhawk provided no consideration to Eastwood for the assignments other than the agreement to develop the properties to Eastwood's specifications and then to sell the lots to Eastwood. *Id.* When Greenhawk closed on the actual purchase, Eastwood received reimbursement of the earnest money it had paid for the Brooks Springs property but nothing related to the River Falls property. Ex. H to Pet., Deposition of Jeff White ("White Dep."), Exs. 149, 150 (Settlement Statements). Both before and after Greenhawk closed on the Properties, Eastwood arranged and paid for development work all for Greenhawk's benefit. In total, Eastwood spent roughly $570,000 for development costs at River Falls and Brooks Springs. Ex. I to Pet., White Dep., Ex. 151 (Eastwood Costs). Of that amount, $360,000 was never reimbursed. Eastwood 30(b)(6), at 146:9–12. Rather, Greenhawk and Eastwood agreed that Greenhawk would treat Eastwood's early payments as advanced deposits for the purchase of lots in River Falls and Brooks Springs. Ex. J to Pet., Briner Dep., Ex. 95 (October 2016 Deposit Email); Ex. K to Pet., Deposition of Jeremy Medlin ("Medlin Dep."), Ex. 121. To date, Greenhawk has not sold lots to Eastwood, nor has it reimbursed Eastwood for the funds paid for its benefit. Eastwood 30(b)(6), at 146:9–12.

After Greenhawk closed on the Properties, Eastwood and Greenhawk worked together to develop the River Falls and Brooks Springs projects. Eastwood contracted with an engineering firm, Land Design, to provide consolidated services for both projects. *See, e.g.*, Ex. L to Pet., First Am. Compl., Ex. L. Land Design developed a plan for River Falls that called for the development of 138 individual lots. Ex M. to Pet., Dority Dep., Exs. 67–68. Land Design also created a site plan for Brooks Springs to have 58 townhome lots. Ex. N to Pet., Polite Dep., Ex. 29. Eastwood

paid all of these engineering and design expenses for the properties. Ex. I to Pet. Both sets of plans identify Eastwood as the home builder.

Briner testified unequivocally that he was the person at Greenhawk with the authority to enter the agreement with Eastwood. He confirmed that the terms of the lot purchase agreement with Eastwood were reached in conjunction with the approval by Greenhawk to enter into the transaction, accept the assignment of the land purchase contracts, and close the purchase. Briner Dep., at 18:15–25, 64:2–65:5.

Throughout development, Eastwood and Greenhawk agreed that, after all costs were factored in, the lot prices would be calculated such that Greenhawk would receive a 20% return. Briner Dep., at 56:7–20, 70:11–13, 75:7–16, 112:11–16; Eastwood 30(b)(6), at 16:19–21, 23:18–21, 39:6–18, 49:8–12, 101:12–102:10. This price agreement was borne out by the numerous "pro formas" sent from Greenhawk to Eastwood that show a projected IRR near 20% for both Properties. Ex. O to Pet., Briner Dep., Exs. 91–93, 96 (Pro Formas and Emails). Greenhawk included Eastwood in meetings and discussions where the pro forma analysis was discussed. Briner Dep., at 72:2–8. In other words, after all costs were accounted for, Eastwood would pay a lot price and on a schedule that allowed Greenhawk to reach the 20% IRR mark. Eastwood 30(b)(6), at 129:12–130:5; Briner Dep., at 56:7–20, 70:11–13, 75:7–16, 112:11–16.

Greenhawk's internal documents from 2016 confirmed that Eastwood was the intended buyer of the lots and that the costs, and cost increases were the prohibiting factor in having a final lot sales price. Ex P to Pet., Deposition of Linwood Jackson ("Jackson Dep."), Ex. 139. Even after this lawsuit began, Briner confirmed to Greenhawk that lot pricing had been delayed because of increased costs. However, Briner was also clear that the agreement to price lots at 20% over costs had never changed. Briner Dep., at 75:7-16

C. Eastwood And Greenhawk Work Jointly On Development But Experience Delays

Development at River Falls by Callahan Grading, the general contractor, began in 2014. Ex. Q to Pet., Briner Dep., Ex. 94. Due to wetlands incursions and other code violations by Callahan, work was immediately stopped in early 2015 until remediation efforts were approved. *Id.* There were other delays at both Properties due to general contractor errors, licensing problems, sewer connections, and other issues. Ex. R to Pet., Briner Dep., Ex. 98.

During this time period, Joe Dority personally monitored the initial development at the River Falls site and worked with Briner. Briner Dep., at 59:11–14, 60:1–6, 99:2–6. Dority served as the primary point of contact for various contractors, and he was listed as the primary contact for the City of Tega Cay's storm water and sediment control plan. Ex. S to Pet., Polite Dep., Ex. 7; Ex. T to Pet., Dority Dep., Ex. 70.

Greenhawk and Eastwood worked closely together on the development timelines for both Properties. Ex. U to Pet., Am. Compl., Ex. J. After Dority left Eastwood, Eastwood's engineer, Pat Quinn, would occasionally visit the Properties and report back to Mr. Briner. Because this was part of the overall agreement, Eastwood (or Dority or Quinn) was never compensated by Greenhawk for those efforts. Briner Dep., at 78:3–19.

1. Eastwood Purchases and gives to Greenhawk the land necessary for River Falls entrance.

In 2014, Greenhawk and Eastwood were informed by the South Carolina Department of Transportation ("SCDOT") that the planned entrance to River Falls would have to be moved a few feet down Gold Hill Road. However, the land acquired by Greenhawk did not encompass the area where SCDOT dictated the entrance had to be. To satisfy SCDOT and facilitate development of River Falls, Eastwood paid $55,741 for the 2316 square feet of land, or .055 acres, needed to move

River Falls' entrance on Gold Hill Road. *See* Ex. V to Pet., Helms Settlement Statement, BATES ECP_0012091; Ex. W to Pet., Deed from Caroline Helms to Eastwood Development Corp. The cost of that sliver of land equated to a cost per acre of over $900,000. The land owner was apparently aware of the predicament Eastwood and Greenhawk were in and used that to her advantage. *See* Ex. X to Pet., June 10, 2014 Email from Joe Dority to Craig Briner, BATES ECP_0013183. In addition to an exorbitant purchase price, Eastwood also agreed to build the Seller an improved driveway, with a security gate, and granted her an easement to the River Falls entrance road. *See* Ex. Y to Pet., Helms Purchase and Sales Agreement, BATES GHD_0016151, ¶3. In 2018, Eastwood transferred the sliver of land to Greenhawk for no cash consideration. Briner Dep., at 61:17–62:8; Eastwood 30(b)(6), at 122:1–4, 141:21–24; Ex. Z to Pet., Quitclaim Deed from Eastwood to Greenhawk, BATES ECP_0005870. Eastwood gave Greenhawk that vital piece of land for no consideration other than the Greenhawk's agreement to develop and sell lots to Eastwood.

2. Development delays.

Throughout the time from 2013 through 2018, Greenhawk experienced numerous development delays. With delays, Greenhawk's costs could not be finalized so a written lot purchase agreement could be arrived at. However, both Greenhawk and Eastwood consistently understood that Greenhawk was preparing lots to Eastwood's specifications and that Eastwood would buy those lots.

At multiple times, Eastwood pressed Greenhawk for costs so that the terms could be computed, but Greenhawk's development delays prevented that from happening. Ex. AA to Pet., Polite Dep., Exs. 9, 10, 12, 14–16, 17; Briner Dep., Exs. 97–98 (Eastwood Follow-Up Emails). Eastwood inquired in April 2016; October 2016; December 2016; February 2017 ("Mike Conley

(of Eastwood) is eager to this these projects started"); March 2017 (Eastwood is "anxiously awaiting those lots"); and May 2017 ("Good news they [River Falls and Brooks Springs] will be ours!"). Again, Greenhawk understood that the parties were waiting on costs.

Compounding the delays and problems with the Properties, in July 2018, the towns of Fort Mill and Tega Cay both passed new builder "impact fees" that affected pricing. Briner Dep., 132:10–133:12; Ex. BB to Pet., Polite Dep., Ex. 25. In July 2018, Eastwood asked Greenhawk to join in the lawsuit that was challenging the impact fees because Eastwood lacked standing to be a plaintiff; it was not a landowner in the affected jurisdiction. Ex. CC to Pet., Polite Dep., Ex. 27. Greenhawk declined, but both parties knew the impact fee litigation was central to the calculation of final costs. As it turned out, the lawsuit persisted through 2019 and was not resolved initially until January 2020.

3. Brooks Springs: Eastwood is still waiting on lots at the agreed-upon price.

In the wake of the impact fees, on October 31, 2018, Greenhawk sent a draft lot purchase agreement ("LPA") to Eastwood for the Brooks Springs lots, which it believed were nearing completion. Eastwood 30(b)(6), at 53:7–12. Eastwood did not respond to the October 2018 LPA because there were key cost items that were not yet accounted for. Chief among those were the new impact fees. Polite Dep., at 194:13–195:12; Ex. DD to Pet., Polite Dep., Ex. 26.

At no point did Eastwood tell Greenhawk that it no longer wished to buy lots at Brooks Springs. Polite Dep., at 234:6–9. (In fact, the only written record at Greenhawk of the alleged rejection was made in June 2020, after this lawsuit was commenced, and was prepared "for the file.")

Shortly after the impact fee case concluded, Joe Polite called Briner about Brooks Springs and River Falls. During the call, both Briner and Polite agreed that Eastwood and Greenhawk had

a lot purchase contract. Polite Dep., at 167:8–24. Polite confirmed the conversation by email, and Briner did not respond or disagree. Ex. F to Pet.; Briner Dep., at 170:4–8.[5]

Unbeknownst to Eastwood, and in breach of the agreement with Eastwood, Greenhawk offered Brooks Springs to other builders and eventually entered into a contract with TRI Pointe in August 2019 to sell it all of the lots in Brooks Springs. Ex. GG to Pet., Briner Dep., Ex. 105 ("TRI Pointe and GH LPA"). Despite an obligation to close in 2019, Greenhawk was not able to deliver lots to TRI Pointe because of continued development issues and costs. In other words, Greenhawk elected to enter into a contract with TRI Pointe before its costs were known, the claimed issue that prevented it to arrive at final lot prices with Eastwood. Further, according to current Greenhawk COO Jeff White, Greenhawk is losing money on the lots it sold to TRI Pointe because it priced them too early. Ex. HH to Pet., White Dep., at 57-58.

In order for a developer to actually deliver lots a final plat must be approved by the governing authorities and it must be recorded. The final Brooks Springs plat was not recorded until May 2020. The final Brooks Springs plat conforms with the Eastwood site plan, which is actually attached as an exhibit to the TRI Pointe-Greenhawk LPA for Brooks Springs. Briner Dep., at 172:14–173:12; TRI Pointe and Greenhawk LPA, Ex. A.

Greenhawk sold 13 lots in Brooks Springs to TRI Pointe in May 2020. Eastwood learned of Greenhawk's sale of the Brooks Spring lots to TRI Pointe only when Mr. Polite and another Eastwood officer drove by the site in and saw ongoing home construction. Eastwood 30(b)(6), at 140:7–13.

The TRI Pointe contract required delivery of all of the 51 lots and TRI Pointe has claimed Greenhawk is in breach of contract for failure to deed the remaining 38 lots. Both Greenhawk and

[5] Briner now says he disagrees with Polite's summary of the call. Briner Dep., at 170.

TRI Pointe have confirmed that they are ready and willing to close the sale of the remaining 38 lots as soon as they are able.

4. River Falls: Greenhawk is under contract to sell the River Falls Property.

As of September 2020, River Falls' development was not complete, nor was it close to being completed. In fact, most of the entitlements and permits at that point had expired. Ex. II to Pet., Medlin Dep., Ex. 131. As of 2018, the job site "was basically abandoned." Consequently, Greenhawk had no idea of its costs to develop lots. Briner Dep., at 117:1–118:5.

Long after Eastwood's lawsuit was initiated, and after the *lis pendens* was on file, on February 22, 2021, Greenhawk entered into a contract with Taylor Morrison of Carolinas, Inc. ("Taylor Morrison") to sell it the River Falls Property in its undeveloped state. Ex. JJ to Pet., Eastwood Br. in Opposition to Mots. to Lift Stay ("Eastwood Oppo. Br."), Ex. 2. Taylor Morrison accepted the contract knowing there was a dispute about Greenhawk's ability to sell the River Falls Property. *See id.* Taylor Morrison is ***not*** a party to the underlying suit.

Greenhawk has completely abandoned its agreement to develop lots and to sell those to Eastwood. Greenhawk has confirmed that both Greenhawk and Taylor Morrison are ready and willing to close the sale of the undeveloped River Falls property as soon as they are able.

Greenhawk has also refused to reimburse Eastwood for the $350,000 it expended for Greenhawk's behalf from 2013 and 2014 on River Falls and Brooks Springs. Instead, Greenhawk has taken the position that it is entitled to both keep Eastwood's funds and also not sell Eastwood lots on the properties sourced, named, and designed by Eastwood. The combination of those palpable failures required Eastwood to file this lawsuit.

5. Eastwood files suit and *lis pendens*; Respondents move for partial summary judgment.

After numerous communications with Greenhawk about its contract breaches—both the failure to deliver lots and the failure to reimburse Eastwood for funds expended—Eastwood filed suit against Greenhawk on June 30, 2020, and simultaneously filed *lis pendens* against both Properties. Greenhawk moved to dismiss the Complaint, and Eastwood filed a First Amended Complaint. Judge Hall denied Greenhawk's motion to dismiss. Greenhawk moved the Court to reconsider its decision—that motion was also denied on September 25, 2020.

On September 4, 2020, TRI Pointe moved to intervene in the suit and was allowed to do so. Eastwood filed a Second Amended Complaint on October 30, 2020. Greenhawk answered and counterclaimed against Eastwood. TRI Pointe cross-claimed against Greenhawk for breach of contract for failure to deliver lots, and counterclaimed against Eastwood. TRI Pointe later voluntarily dismissed its cross-claim against Greenhawk without prejudice. Eastwood filed its Third Amended Complaint on January 7, 2021.

In late 2021, Greenhawk and TRI Pointe filed motions for partial summary judgment seeking dismissal of Eastwood's claims for specific performance and all other claims directly affecting title to the Properties. Eastwood filed a brief in opposition to both motions. Ex. KK to Pet., Eastwood Br. in Opposition to Summary Judgment. The Circuit Court held a hearing on the motions on December 10, 2021. Eastwood objected to the motions as premature, arguing that Respondents were rushing the summary judgment process to consummate sale of the Properties Eastwood claims it is entitled to purchase before Eastwood—the party with the burden of proof—had completed discovery.

On January 14, 2022, the Circuit Court granted TRI Pointe's motion in a written Order. Ex. LL to Pet., TRI Pointe Partial Summary Judgment Order. Eastwood moved the Court to

reconsider, and, on February 15, 2022, the Court denied Eastwood's motion to reconsider the TRI Pointe Order. Ex. MM to Pet., TRI Pointe Motion to Reconsider Order. On February 15, 2022, the Court granted Greenhawk's motion in a written Order. Ex. NN to Pet., Greenhawk Partial Summary Judgment Order. Eastwood moved the Court to reconsider, and, on March 8, 2022, the Court denied Eastwood's motion to reconsider the Greenhawk Order. Ex. OO to Pet., Greenhawk Motion to Reconsider Order. Eastwood timely appealed both Orders on March 11, 2022.

The Circuit Court's summary judgment orders were only partial and addressed only Eastwood's claims for specific performance of the alleged contract. As a result, Eastwood's other claims for damages, as well as Respondents' counterclaims, are still pending.

In the Orders—which were substantively identical—the Court did ***not*** find or hold that Eastwood's claims were frivolous or legally impossible, only that, in the Court's judgment, there were no genuine issues of material fact about the existence of a legally enforceable contract between Eastwood and Greenhawk entitling Eastwood to specific performance. Based on its determination that there were no genuine issues of fact, the Court concluded that Respondents were entitled to judgment as a matter of law and that the *lis pendens* on the Properties should be cancelled.

6. Respondents move to lift the automatic stay.

On March 15, 2022, and March 18, 2022, TRI Pointe and Greenhawk respectively moved the Circuit Court, pursuant to SCACR 241(c), to lift the stay of the effectiveness of the partial summary judgment order. The stated purpose of these motions was to lift the *lis pendens* and allow Greenhawk to sell the Brooks Springs lots to TRI Pointe and to sell the River Falls property to Taylor Morrison. At the April 4, 2022, hearing on the motions, Greenhawk's counsel admitted that the sale would take place quickly if the stay was lifted and the *lis pendens* were cancelled.

Although the effect of the granting of the motions would have the effect of mooting Eastwood's appeal and potentially dispossessing this Court of appellate jurisdiction, the Circuit Court granted the motions on April 13, 2022. The Circuit Court entered Form-4s granting Defendants' motions. In order to ensure that Defendants do not close the sales of the Properties before this Court can review the Lift Orders, Eastwood is filing this petition prior to the entry of formal, written orders. Eastwood files this petition to remedy that error because the Circuit Court's decision to lift the stay was erroneous both as a matter of law and of fact.

D. Eastwood's Pending Appeal and Respondents' Efforts To Consummate The Sale Of The Properties.

Eastwood is appealing the Circuit Court's orders granting Respondents' motions for partial summary judgment on the grounds that: 1) summary judgment was premature; 2) the record establishes genuine issues of material fact about the existence of a contract between Eastwood and Greenhawk; and 3) even on the disputed facts Respondents were not entitled to judgment as a matter of law.

Eastwood has a right to appeal the Circuit Court's partial summary judgment orders. SCACR 201; SCRCP 54(b). Eastwood filed its notices of appeal on March 11, 2022. Ex. PP to Pet., Combined Notices of Appeal. The South Carolina Court of Appeals consolidated the appeals, and Eastwood's opening brief is not due until May 11, 2022. Ex. QQ to Pet., CoA Briefing Order. It is therefore unlikely that the appeal will be fully briefed until August 2022.

However, Greenhawk is eager and prepared to sell both Properties. If the Circuit Court's Lift Orders is allowed to stand, the Properties will be gone before Eastwood's appeal even starts. The contracts for the sale of the Properties are already fully executed. Because counsel for Greenhawk conceded that Greenhawk anticipates selling the Properties soon after the *lis pendens*

are cancelled the possibility of the Properties being sold is not merely speculative, but virtually assured. This Court must intervene to prevent that eventuality.

If the Court allows the Circuit Court's Lift Orders to stand, it will not matter if this Court later agrees with Eastwood and disagrees with the Circuit Court, because the *only* remedy for Eastwood's specific performance claim—the Properties themselves—will be unavailable. Greenhawk will sell the Properties soon after the stay is lifted and long before Eastwood has had the chance to exercise its legal rights. This unacceptable situation is barred by statute, rule, and case law.

II. IT WAS ERROR FOR THE CIRCUIT COURT TO LIFT THE AUTOMATIC STAY AND CANCEL THE *LIS PENDENS*

By lifting the automatic stay and allowing cancellation of the *lis pendens*, the Circuit Court has rendered the contested issue moot. Respondents concede that they will sell the Properties quickly, well before Eastwood's appeal has been heard. As a result, Eastwood will be left without a remedy, and any decision this Court renders will be purely "academic." In sum, the Circuit Court's Lift Orders violates the text and purpose of SCACR 241.

"[T]he cancellation of a notice of *lis pendens* is directly appealable under § 14–3–330." *Lebovitz v. Mudd*, 289 S.C. 476, 479, 347 S.E.2d 94, 96 (1986) ("*Lebovitz I*"). "As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision." SCACR 241(a). "Because the order cancelling the notices of *lis pendens* is appealable, the appeal acts as an automatic stay of further proceedings upon the order." *Lebovitz I*, 289 S.C. at 479, 347 S.E.2d at 96. (citing Supreme Court Rule 41, § 1(A)); *see also* S.C. Code Ann. § 18-9-220 ("In cases not provided for in Sections 18-9-130 and

18-9-150 to 18-9-180, the notice of appeal shall stay proceedings in the court below upon the judgment appealed from . . . .").

An appellee may move for a lift of the automatic stay only under certain circumstances: the "court should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." SCACR 241(c)(2). Respondents did not contend that lifting the stay was necessary to protect the Circuit Court's jurisdiction, but instead claimed that it was necessary to prevent the Circuit Court's partial summary judgment orders from becoming moot. However, Respondents offered no explanation as to how retaining the stay would in any way moot the Circuit Court's partial summary judgment orders. Its only argument was that the stay **delays** the effectiveness of the order. However, that is true in all appeals; it is the nature of an appeal. Rather, Respondents had the situation backwards—lifting the stay moots Eastwood's appeal and its specific performance claim. Maintaining the stay merely delays Respondents' desired outcome.

A. The Circuit Court's Decision To Lift The Stay Moots The Contested Issue: Eastwood's Claim For Specific Performance.

By lifting the automatic stay, the Circuit Court mooted the contested issue Eastwood is appealing: Whether there is a genuine issue of material fact regarding Eastwood's claim for specific performance and whether Eastwood's specific performance claim fails as a matter of law. With the stay lifted and *lis pendens* cancelled, the Circuit Court has allowed Respondents to sell the Properties at issue, unless this Court intervenes. As a result, this Court will be able to provide no effective remedy, thus mooting the contested issue on appeal and violating SCACR 241(c).

> A case is moot where a judgment rendered by the Court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the Court. Where there is no actual controversy, this Court will not decide moot or academic questions.

S.C. Ret. Sys. Inv. Comm'n v. Loftis, 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013). "[M]oot appeals result when intervening events prevent a decision on appeal from having an immediate impact on the parties." *Cromwell v. Brisbane*, No. 2015CP1000939, 2016 WL 10732385, at *2 (S.C. Com. Pl. Aug. 08, 2016) (quoting 15 S.C. Jur. Appeal and Error § 19 (Supp. 2014)).

If a circuit court allows the sale of contested property during the pendency of an appeal, it violates SCACR 241(c)(1). *See id. Cromwell* was a quiet title action for land on James Island, South Carolina. Two parties, Nordic Group, LLC and Associated Developers, Inc., both contended that they were entitled to purchase the disputed land. After the circuit court issued an order for the sale of the property to Associated Developers, Nordic appealed and petitioned the circuit court for a writ of supersedeas under SCACR 241.[6] The circuit court granted Nordic's petition, reasoning that selling the property at issue during the pendency of Nordic's appeal would moot the very issue Nordic was appealing:

> Whether the Subject Property should be sold to Associated or instead sold to Nordic is precisely the contested issue on appeal. . . .
>
> Accordingly, after considering the arguments of counsel and the memoranda of the parties in relation to Nordic's request for a supersedeas, this Court finds it necessary to issue a stay preventing enforcement of its final Order during the pendency of the appeal in order to prevent a contested issue from becoming moot.

Cromwell, 2016 WL 10732385, at *2.

Though the procedural posture differs from the present suit, the contested issue does not. Here, as in *Cromwell*, there are multiple parties with alleged claims to real property. Here, as with *Cromwell*, the cancellation of the lis pendens and subsequent sale of the Properties would moot

[6] Since the circuit court's order in *Cromwell* was an order directing the sale of land, it was not stayed, as per S.C. Stat. Ann. § 18-9-170, a provision not at issue in the present suit. Also, Nordic originally moved for an injunction to the circuit court's order, a motion that was later converted by the circuit court as a petition for supersedeas under SCACR 241(c).

the contested issue Eastwood is appealing. Here, as in *Cromwell*, the alienation of the property during the appeal violates SCACR 241(c). At the April 4, 2022 hearing on Respondents' motions to lift the automatic stay, Counsel for Greenhawk admitted that, once the *lis pendens* is cancelled, Greenhawk will move quickly to close the sales of the Properties to TRI Pointe and Taylor Morrison. By lifting the stay and cancelling the *lis pendens*, the Circuit Court has not protected this Court's jurisdiction during the appeal but mooted it.

Common sense also reveals the fallacy in Respondents' mootness argument, and Respondents did not explain how failing to lift the stay would render their desired remedy "moot." Greenhawk owns the Properties. If Eastwood's appeal fails, Greenhawk will still own the Properties and will be free to consummate the contracts for sale of the Properties by selling lots in Brooks Springs to TRI Pointe and the River Falls property to Taylor Morrison. The ability to alienate and sell the Properties is not mooted by maintaining the stay, it is merely delayed.

By contrast, ***lifting the stay*** moots Eastwood's specific performance claim, because it is Eastwood who loses the right to specific performance, likely before its appeal is even briefed, let alone decided. Eastwood's appeal presents multiple grounds for reversal, and none of the grounds are futile as a matter of law.

SCACR 241(c) requires a party seeking to lift the stay to show that maintaining the stay will cause a "contested issue" to become moot. Respondents' focus on exercising their property rights should the appeal be unsuccessful does not demonstrate how the contested issue will become moot if the stay is maintained. Rather, because the "contested issue" here is whether Eastwood is entitled to the Properties, lifting the stay actually moots that issue. That result is directly contrary to the language and intent of SCACR 241(c). Therefore, it was error for the Circuit Court to grant

Respondents' motions, and the Circuit Court's Lift Orders should be vacated and the automatic stay reinstated.

B. A Previous Decision Of This Court Directly Supports Maintaining The Automatic Stay.

In further support of vacating the Circuit Court's Lift Orders, this Court previously addressed a case almost identical to the underlying suit, *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002).

1. *Pond Place* Decision

In *Pond Place*, both this Court and the Supreme Court concluded that the stay should remain in place in a real property dispute until the matter was fully and finally resolved, including resolution of the appeal. That case demonstrates the propriety of vacating the Circuit Court's Lift Orders and reinstating the stay during the pendency of Eastwood's appeal.

In *Pond Place*, a group of homeowners in a subdivision brought a declaratory judgment action against their fellow subdivision lot owners and other entities to void an amendment to restrictive covenants. *Id.* at 7, 567 S.E.2d at 884. The amendment reduced the minimum lot size from five acres to one acre and therefore would allow owners to subdivide their lots and sell the new, smaller lots, to others. *Id.* Incidental to the lawsuit, the group of homeowners also filed a *lis pendens* on the subdivision. *Id.* at 8–9, 567 S.E.2d at 885. The lot owners filed counterclaims for slander of title and frivolous civil action.

The lot owners moved for summary judgment on the homeowner group's declaratory judgment claim. The Circuit Court granted the motion, and the homeowners appealed. While the appeal was pending:

> [The lot owners] applied to the Circuit Court to have the automatic stay lifted, which would ***"allow[ ] them to freely alienate their property during the pendency of the appeal*** . . . or, alternatively, "require the appellants to post sufficient bond to

> compensate defendants for any economic damages which they might suffer if they cannot sell the property during the automatic stay, yet ultimately prevail on the appeal."

Pond Place, 351 S.C. at 10–11, 567 S.E.2d at 886 (emphasis added). The circuit court denied the request to lift the stay and to require a bond "because neither of the counterclaims had yet been addressed by the court and, in his discretion, the judge did not 'find bond appropriate in this case.'" *Id.* at 10–11, 567 S.E.2d at 886. After the circuit court declined to lift the stay,

> [The lot owners] moved for reconsideration of this order because the "stay imposed by the Appeal … to the Court of Appeals ***effectively enjoins these Defendants from freely selling their land."*** The court disagreed and denied [the lot owners'] motion for reconsideration; however, it granted leave to petition the appellate court for supersedeas. On October 13, 1995, the South Carolina Supreme Court filed its order ***refusing*** to lift the automatic stay or require a bond.

Id. at 11, 567 S.E.2d at 886 (emphasis added) (alterations in original). Ultimately, this Court affirmed the circuit court's summary judgment order, resulting in the stay being lifted after all appeals had been exhausted. Nevertheless, on the subsequent appeal of the slander of title claims, this Court reemphasized the propriety of the stay during the pendency of the original appeal:

> not[ing] our Supreme Court inherently agrees with this holding [that the filing of a lis pendens was authorized] in that it refused to dissolve the lis pendens ***before a full adjudication of the declaratory judgment action was completed***.

Id. at 29, 567 S.E.2d at 896 (emphasis added).

2. <u>*Pond Place* is almost identical to the present suit.</u>

The lot owners in *Pond Place* raised the exact same arguments that Respondents raised in the Circuit Court in a case with almost the exact same posture—the circuit court, the Court of Appeals, and the Supreme Court all rejected those arguments in *Pond Place*. The Circuit Court in this case should have done the same.

Respondents' only argument under SCACR 241(c) was that maintaining the stay moots the Circuit Court's partial summary judgment orders. In addition to the legal and logical fallacy of the argument, *Pond Place* likewise demonstrates the error of that position.

The procedural and substantive posture of this case and *Pond Place* are identical. As in *Pond Place,* the Circuit Court's summary judgment orders did not resolve all the claims in the suit. *See* Ex. RR to Pet., Third Am. Compl.; Ex. SS to Pet., Greenhawk Answer to Third Am. Compl. Likewise, there are still outstanding claims and counterclaims that are unresolved. *Id.* Thus, even if Eastwood's appeal is not successful, as in *Pond Place*, the maintenance of the stay would still be proper until the end of Eastwood's appeal.

Greenhawk and TRI Pointe's argument for lifting the automatic stay is not really about mootness, but instead it is about delay—that Greenhawk should be allowed to sell the Properties now and not have to wait for the Circuit Court's orders to be reviewed on appeal. As *Pond Place* clearly demonstrates, Respondents' desire for the prompt ability to alienate the Properties does not equate to mootness.

C. The Cases Cited By The Respondents Stand For The Proposition That *Only* When A Plaintiff's Claim Is A Clear, Legal Impossibility Should The Stay Be Lifted.

The authorities Respondents cited in their motions before the Circuit Court are inapposite and distinguishable. One is nonbinding. This is in stark contrast to this Court's decision in *Pond Place*, which is almost precisely on point.

Indeed, it is notable that Respondents could cite only two cases to support their arguments. There are approximately 214 South Carolina appellate cases where a *lis pendens* was involved.[7]

[7] This number is reached by searching Westlaw for South Carolina authority for "'lis pendens'" and then filtering by appellate courts.

In only two of those cases was the stay lifted, the two cited by Respondents. However, the common thread in both of those cases is that the courts were faced with situations where the plaintiffs' claims were legal impossibilities; the facts were largely immaterial to the ultimate conclusions. *See Lebovitz v. Mudd*, 293 S.C. 49, 54, 358 S.E.2d 698, 701 (1987) ("*Lebovitz II*") (dismissing fraudulent conveyance claim on plain reading of statute); *Carolina Park Associates, LLC v. Marino*, No. 2010-CP-10-6042, 2011 WL 9369844 (S.C. Com. Pl. June 27, 2011) (dismissing a collateral attack on foreclosure sale).

In other words, there was no authority for the Circuit Court to lift the stay in the present suit where Eastwood's specific performance claim had not been declared a legal impossibility. In fact, this Court has specifically recognized that a *lis pendens* is proper and appropriate where the claim at issue is one for specific performance. *Pond Place*, 351 S.C. at 18, 567 S.E.2d at 890 (citing *Panfel v. Boyd*, 187 Ga. App. 639, 371 S.E.2d 222 (1988); *Hauptman v. Edwards, Inc.*, 170 Mont. 310, 553 P.2d 975 (1976); *Wendy's of South Jersey v. Blanchard Mgmt. Corp. of N.J.*, 170 N.J. Super. 491, 406 A.2d 1337 (Ch. Div. 1979)). The Circuit Court's Lift Orders runs counter to long standing precedent.

Carolina Park demonstrates the rare circumstances under which lifting the automatic stay might be appropriate. In *Carolina Park*, plaintiffs brought suit after a foreclosure sale of the property in question, a foreclosure sale that plaintiffs failed to contest. *Carolina Park Assocs., LLC v. Marino*, 400 S.C. 1, 5, 732 S.E.2d 876, 878 (2012).[8] After summary judgment was granted on plaintiffs' constructive trust claims, defendants then moved the circuit court to lift the automatic

[8] Though the South Carolina Supreme Court issued an opinion in the *Carolina Park* case, that opinion did not address the trial court's decision to lift the automatic stay and cancel the *lis pendens*, the proposition for which Respondents cite the case.

stay and cancel the *lis pendens*. *See generally Carolina Park*, 2011 WL 9369844 (trial court order). The circuit court granted defendants' motion and lifted the stay, reasoning that

> ***[s]ince the foreclosure extinguished all of CPA's legal and equitable right, title, and interest in and to the subject property***, CPA cannot now legitimately maintain "an action affecting the title to real property" as a matter of law, including a constructive trust claim. CPA did not appeal the foreclosure decree and final order. Any effort by CPA to roll back the title of the subject real estate ***is a collateral attack on the foreclosure and an assertion of a legal or equitable right to the property, both of which are statutorily barred.***

Id. (emphasis added). Since ownership of the property in question could not "be challenged under clear statutory law," the court lifted the stay and extinguished the *lis pendens*. *Id.*

The *Carolina Park* Court underscored the legal impossibility of the claims before it by drawing a contract with *Lebovitz*:

> In *Lebovitz* the Court did not have before it the question of whether the automatic stay should be lifted pending the appeal ***where there is no legitimate basis for claiming an interest in the real property as a matter of law and significant harm would ensue if the stay were not lifted.***

Id. (emphasis added).[9] The futility of the claims in *Carolina Park* was central to that court's decision. Eastwood's specific performance claim does not suffer from the same flaw.

Here, the Circuit Court previously ruled that there was no genuine dispute of material fact entitling Eastwood to specific performance by Greenhawk, and Greenhawk and TRI Pointe are entitled to judgment as a matter of law. That is a different species of conclusion from that in *Carolina Park*. Whereas the court in *Carolina Park* identified clear, statutory barriers to those plaintiffs' claims, in this case the Circuit Court ruled that the record did not present a genuine dispute of material fact. The latter conclusion is one of degrees, and one about which reasonable

[9] Even in *Lebovitz*, the South Carolina Supreme Court, though initially lifting the automatic stay, later reversed itself and reinstated the lis pendens. *Lebovitz II*, 293 S.C. at 54, 358 S.E.2d at 701.

minds may differ. Respondents would like to stretch the Circuit Court's partial summary judgment orders beyond the legal conclusions actually reached and convert them into declarations about the legal futility of Eastwood's claims, but the Circuit Court's orders do not reach so far. *See* Exs. LL and NN to Pet.

Furthermore, the situation in *Carolina Park* was not going to lead to a change in ownership of the property at issue, because defendants were going to develop the land they already owned. Here, by contrast, Greenhawk is already under contract to convey the Properties for development by other entities, one of which is a nonparty.

The resolution of Eastwood's claim to specific performance is not a question of clear statutory law. The Circuit Court previously ruled only that there was no genuine issue of material fact and, based on those facts, Respondents were entitled to judgment as a matter of law. Eastwood has contested the propriety of the timing of the Court's partial summary judgment orders, the finding that there were genuine issues of material fact, and the legal conclusions that result from those findings. Reasonable minds may differ. If they do, but the automatic stay is not put back into place, Eastwood will be deprived of its ***only*** remedy and, for all intents and purposes, its appellate rights.

III. CONCLUSION

For the aforementioned reasons, Appellants respectfully ask this Court to vacate the Circuit Court's April 13, 2022 Orders lifting the automatic stay in this case pending Eastwood's appeal, and further grant any and other such relief as this Court may deem just and necessary.

Respectfully submitted,

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April 13, 2022

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Case No. 2020-CP-46-02006

Eastwood Construction Partners, LLC and
Eastwood Development Corporation, ... Appellants,

v.

GHD Brooks Creek, AF-Brooks Creek, LLC,
GHD River Falls, LLC, AF-River Falls, LLC,
Greenhawk Corporation, Inc. and TRI Pointe Homes, Inc., ...Respondents.

PROOF OF SERVICE

I, Lynn G. Ivey, an employee of the Moore Bradley Myers Law Firm, P.A., certify that I have served the Notice of Appeal, Verification of Allen Nason, Eastwood SCACR 241 (d)(7) Petition, Expedited Request, and Exhibit List on the Respondents by transmitting by electronic mail, addressed to their attorneys of record as follows:

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April 13, 2022

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201
VIA Electronic Filing

Re: Eastwood Construction Partners, LLC et al v. GHD Brooks Creek, LLC et al, Case No. 2020-CP-46-02006

Dear Ms. Kitchings:

I hope you are well. Please find enclosed via electronic filing the following documents:

- Notice of Appeal
- Verification of Allen Nason;
- Eastwood SCACR 241(d)(7) Petition, Expedited Request;
- Copy of Confidentiality Order in matter;
- Exhibit List; and
- Selected Exhibits A through SS not believed to be covered by the confidentiality order.

We will be sending our firm check for the filing fee tomorrow, and will file a proof of service shortly. In addition, we are delivering to the Clerk of Court's office tomorrow those exhibits which we believe are covered by the existing confidentiality order so that they may be filed under seal. Please let us know if a motion is needed or if these should be handled in a different manner.

Please contact our office with any questions or concerns. Thank you for your assistance with these filings.

Sincerely,

Lynn G. Ivey
Assistant to James Edward Bradley

Enclosures
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