

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
PLANTER'S PLACE OWNERS)
ASSOCIATION, DENNIS R. HENSLEY,)
AND ARLY SLEPSKI,)
Plaintiffs,)

v.)

PLANTER'S PLACE, LLC, SHANNON)
IV, CHURCHILL FORGE, INC., and)
TODD ABEDON,)
Defendants.)

PLANTER'S PLACE, LLC; CHURCHILL)
FORGE, INC.; AND TODD ABEDON,)
Defendants/Third-)
Party Plaintiffs,)

v.)

ALL SEASONS WINDOW & DOOR)
MFG., INC.; APARTMENT)
RESTORATION GROUP; APARTMENT)
SERVICES OF CHARLESTON;)
BLACKJACK CHIMNEY & GUTTER;)
IFKY, Inc. d/b/a THE COLORWORKS OF NC;))
HARWELL & ASSOCIATES, INC.;)
LAWRENCE WINDOW DISTRIBUTOR,)
INC.; MAGNOLIA MANAGEMENT)
GROUP, INC.; WILLIAM J. PELLONI, II,)
individually and d/b/a PELCO)
CONSTRUCTION & REMODELING;)
PELCO CONSTRUCTION, LLC,)
individually and d/b/a PELCO)
CONSTRUCTION & REMODELING;)
PELCO INDUSTRIES, INC.,)
individually and d/b/a PELCO)
CONSTRUCTION & REMODELING;)
SHIPTECH AMERICA, LLC;)
TUCKER ARCHITECTURAL)
ASSOCIATES, INC; TUCKER ROOFING &)
REPAIR, INC., and BOB MILLER, INC.,)
Third-Party)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO: 04-CP-10-1588

PLAINTIFFS' TRIAL BRIEF

COMES NOW Plaintiffs, Planter's Place Owners' Association, Dennis Hensley, and Arly Slepki (collectively "Plaintiffs") by and through their undersigned attorneys, and submit the within Trial Brief to the Court:

PRELIMINARY STATEMENT

Defendants Planter's Place, LLC ("PPLLC"), Churchill Forge, Inc. a/k/a Churchill Forge Properties ("Churchill"), and Todd Abedon ("Abedon") owed duties to the Plaintiffs to develop, maintain, and repair the Planter's Place condominium complex and to fund sufficiently the homeowners regime account. Defendants have caused damages to Plaintiffs through their negligence, which includes but is not limited to, violating the applicable building codes and failing to act in accordance with standards of professional care. Further, Defendants have breached the implied warranties of workmanship and habitability and their acts and omissions constitute unfair trade practices under South Carolina law. Effectively, the Defendants have developed and put into the stream of commerce rotting, leaking condominiums at the Planter's Place complex.

FACTS

A. Original Development by Shannon IV.

In 1984, Planters Place was developed as 36 "townhouse style" condominium units ("units") by Shannon IV, a South Carolina Partnership made up of the following experienced real estate investors: (a) two individuals (Allen Howell and Robert Royall), (b) Ashley Real Estate, and (c) Evergreen Associates. The units were designed by Third-Party Defendants Joseph Tucker and Tucker Architectural Associates, Inc. ("Collectively Tucker"), and the builder

was Third-Party Defendant Bob Miller, Inc. (“Miller”).

Once constructed, Shannon IV attempted to sell the units individually, but sold just four of them. [A. Howell Depo. at 22, ln. 22-25]. Shannon IV held the remaining 32 units as inventory, and Third-Party Defendant Magnolia Management (“Magnolia”) managed these units as rental properties for several years. Magnolia’s management of the complex included soliciting bids for any work that needed to be performed at Planter’s Place. [A. Howell Depo. at 49, ln. 10-23; A. Howell Depo. at 50, ln. 17-21].

B. Initial Discovery and Repair of Water Intrusion.

By 1994/1995, Shannon IV and Magnolia were on notice of water intrusion and wood rot existing at Planter’s Place. Further, in October 1997, Third-Party Defendant The Apartment Restoration Group (“Apartment Restoration”) provided Magnolia with a scope of work identifying moderate to severe water damage to the units because of inadequate building procedures, problems with the roofs and the windows, and a general lack of flashing on the units. In February 1999, Apartment Restoration made a second proposal for work to correct the problems at the complex. Apartment Restoration completed the work in early 2000.

Thereafter, in February 2000, Magnolia solicited a bid for complete roof replacement for all units and flashing work from Harwell and Associates. In March 2000, this bid was accepted, and Harwell and Associates’ work proceeded over the next 12 months.

C. Purchase, Redevelopment, and Conversion by Planter’s Place, LLC, Churchill Forge and Todd Abedon

In 2000, Churchill and Abedon began discussing the purchase of the property with Shannon IV. Churchill’s and Abedon’s plan was to redevelop the units for sale as individual townhouse condominiums.

Churchill through its expressly authorized agent, Abedon who was Vice-President of the

corporation, contracted to purchase the units in May 2001. PPLLC was organized in July 2001, and on the day of closing, Churchill assigned its contract with Shannon IV to PPLLC for \$10. The real estate transaction to purchase the 32 units from Shannon IV's inventory was closed on July 26, 2001 in the name of PPLLC using funds from Churchill to consummate the sale.

Over the course of several months, Churchill, PPLLC, and Abedon redeveloped the complex in preparation of selling the 32 units as individual properties. The redevelopment included painting of the buildings by Third-Party Defendant IFKY, Inc. d/b/a The Colorworks of NC ("Colorworks") and replacing windows with new ones manufactured by Third-Party Defendant All Seasons Windows & Door Mfg., Inc. ("All Seasons"). The All Seasons windows were installed by Third-party Defendant Lawrence Window Distributor, Inc. ("Lawrence Window"). Additionally, Third-Party Defendant William J. Pelloni, individually, and d/b/a PELCO Construction and Remodeling and PELCO Construction, LLC d/b/a PELCO Construction and Remodeling (Collectively "PELCO") performed exterior and interior redevelopment work.

By August of 2002, Churchill, PPLLC, and Abedon had completed the conversion at Planter's Place by selling the final units held in inventory. By this time, 32 units had been directly sold to purchasers and preparations to turn over the Planter's Place Homeowners Association ("HOA") to the new unit owners began.

The redevelopment work which began in 2001 constituted code violations in many instances, and a building permit was not procured for the work, which in and of itself constituted a code violation. All of the vendors were hired by Abedon and were paid by Churchill corporate checks.

During the redevelopment, the conversion units were managed by Churchill and were

marketed to potential buyers as newly renovated, in good condition, and as having a recent roof replacement. There was no disclosure of any of the problems with the units. However, during redevelopment, and even after all units had been sold, PPLLC, Churchill and Abedon knew of the repeated water intrusion and structural issues with the complex.

D. Planter's Place Homeowner's Association

At the time of Shannon IV's sale of the units to PPLLC, the HOA had inadequate reserves. [A. Howell Depo. at 119, ln. 1-21]. Additionally, the property had been operating at a loss for Shannon IV for several years prior to the sale.

After the initial purchase contract was signed, Shannon IV, Churchill, and Abedon negotiated additional terms for the sale that included re-deeding the common elements to the homeowners association due to a defect in the original deed and amending the by-laws so that Churchill could have exclusive control over the homeowners association via a sole director. Abedon was made the sole director of the association on behalf of PPLLC and Churchill.

PPLLC tendered the HOA to the homeowners in August 2002. However, there were no or little capital reserves because the regime fee established by PPLLC, Churchill, and Abedon was insufficient to fund the operation of the property. Scott Strople, of First Realty, was recommended by PPLLC, Churchill and Abedon to the new HOA board of directors and managed the HOA from September 2002 through December 2002. On February 1, 2003, Adams Properties ("Adams") took over the property management responsibilities and has remained the property management company since that time.

After Adams took over management of the property, it was learned that there were inadequate capital reserves, that the property contained latent defects which resulted in a subsequent loss of insurance coverage, and that the termite bond had not been paid for two years.

Over the last two years, Adams has recommended, and the homeowners have approved by vote, a monthly regime fee that is almost double of that established by PPLLC, Churchill and Abedon in order to temporarily stop the water leaks and to build a reserve. No large scale repairs to the property have been done due to the cost to complete the work.

E. Willful and Wanton Conduct

The conduct of the developers was willful and wanton. Their conduct was summarized by architect Myles Glick as follows:

- 1) they overlooked the need to fix the buildings, sometimes negligently;
- 2) every owner/developer knew of the problems with the buildings;
- 3) they failed to investigate the causes of the leaks and rot;
- 4) Abedon willfully neglected the chimney, window, and flashing problems;
- 5) Abedon did not do due diligence, or covered it up if he did;
- 6) they violated the standard of care for developers; and,
- 7) they violated the implied warranty of habitability by putting the units in the stream of commerce.

Glick summarized his perception of the developers by saying, "Some people rob people with plans of construction. And that's what went on here."

DAMAGES

The Plaintiffs' Damages are in excess of \$4.3 million. These damages include an engineering and construction repair estimate of approximately \$3.6 million, relocation expenses during reconstruction of \$600,000, and other miscellaneous expenses of \$97,000.

The Plaintiffs' will also request a punitive damages jury instruction due to the gregarious

conduct of the developers which constituted willful, wanton, and in reckless disregard of the plaintiff's rights. See generally Taylor v. Medenica, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996).

PROCEDURAL POSTURE

The Plaintiffs brought this suit on April 8, 2004. An amended complaint was filed on December 8, 2004 setting forth claims for the sale of defective condominiums against Shannon IV, Churchill, PPLLC, and Abedon (who acted on his own behalf and as an agent for PPLLC and Churchill).

More than 30 depositions have taken place to date, including the following: Scott Strople (8/2/05), Andrew Delosi (8/2/05), Christopher Wyett (8/11/05), Shawn Howell (8/26/05), Allen Howell (9/23/06), Todd Abedon (9/19/05, 11/30/05), Arly Slepski (9/26/05), Dennis Hensley (9/26/05), Michel Kanapaux (10/21/05), William Pelloni (10/27/05, 4/6/06), Charlie Lawrence (10/26/05, 2/22/06), Karen Harris (11/30/05), Mary Conway (11/30/05), William Akins (12/20/05), Charles Still (12/20/05), Dreyfus Browder (12/22/05), David Helfrich (12/22/05), William Reisberg (1/11/06), Amy Norton (1/16/06), Stephen Barley (1/17/06), Myles Glick (1/18/06, 4/6/06), Lisa Pelloni (1/19/06), Robert Sisroy (1/20/06), Joseph Yantorn (2/2/06), Joseph Tucker (4/4/06), Beth Colley (4/5/06), Anne Taylor (4/5/06), Herbert "Larry" Cantley (4/10/06), and Frank Resnek (4/12/06).

Extensive and meaningful discovery has been engaged in by all parties, and various Motions for Summary Judgment have been made and denied. The case is set for a date certain trial on May 22, 2006, and trial is expected to last 7 to 10 days.

Defendant Shannon IV has settled with Plaintiffs for \$1 Million, and there will be an offset for the Court to determine should the jury find the remaining Defendants liable and award damages.

ARGUMENT

I. DEFENDANTS WERE NEGLIGENT.

Defendants breached their duties to Plaintiffs by failing to develop the units free from defects, by developing a property with construction defects that were code violations, by inadequately repairing the units, and by failing to conform to standards of professional care thereby placing defective homes into the stream of commerce. A “cause of action for negligence requires: (1) the existence of a duty on the part of the defendant to protect the plaintiff; (2) the failure of the defendant to discharge the duty; (3) injury to the plaintiff resulting from the defendant’s failure to perform.” South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 375, 346 S.E.2d 324, 325 (1986)(Ness, C.J.); see also Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 482-83, 238 S.E.2d 167, 168 (1977)(elements for an action in tort are a duty, breach of that duty, proximate causation, and injury).

A. Defendants owed duties to the Plaintiffs.

Defendants owed duties to Plaintiffs to not place defective units into the stream of commerce. “A legal duty is that which the law requires to be done or forborne with respect to a particular individual or the public at large[.]” Byerly v. Connor, 307 S.C. 441, 443, 415 S.E.2d 796, 798 (1992). South Carolina imposes a legal duty to not put defective products, including homes, into the stream of commerce. See Kennedy v. Columbia Lumber and Mfg. Co., Inc., 299 S.C. at 344, 384 S.E.2d at 736 (noting that it is intolerable to permit one to place defectively constructed homes into the stream of commerce). Additionally, South Carolina law allows this stream of commerce liability to be imposed on a party even if they are not in privity of contract

with the harmed party. See Terlinde v. Neely, 275 S.C. 395, 399, 271 S.E.2d 768, 770 (1980)(Lewis, C.J.)("[T]he imposition of tort liability to a third party as a result of contractual obligations despite the absence of privity between the tortfeasor and the third party . . . [because] [t]he key inquiry is foreseeability, not privity.")¹

PPLLC, Churchill, and Abedon were developers of the units and are liable to Plaintiffs because they owed duties to Plaintiffs by virtue of their developer status. See generally Roundtree Villias Association v. 4701 Kings Corporation, 282 S.C. 415, 423, 321 S.E.2d 46, 50-51 (1984)(noting that a lender can be liable for construction defects if they are active participants in the construction or repairs made). Abedon, on behalf of PPLLC and Churchill, selected and hired the vendors, oversaw construction of the units, approved bids for redevelopment, and approved payments by Churchill to the vendors for redevelopment costs. Therefore, PPLLC, Churchill and Abedon cannot escape liability because contractors were hired for the redevelopment because of their material participation in the project and by virtue of developer status. See, e.g., Allison v. Home Savings Association of Kansas City, 643 S.W.2d 847,

¹ In Terlinde v. Neely, the plaintiffs (residential home owners) brought a cause of action for negligent construction and breach of implied warranty against the defendants, the individuals that constructed the residence. 275 S.C. at 396, 271 S.E.2d at 768. Defendant originally constructed the residence and then sold the residence to the original homeowner. Id. The residence had some construction problems with it and the original homeowner fixed these problems. Id. Years later, the original homeowner sold the residence to the plaintiffs. Id. After this "second sale" of the residence, there were additional problems that had not appeared before. Id. The plaintiffs had qualified individuals inspect the property and these individuals discovered various latent structural defects associated with the residence. Id., 271 S.E.2d at 768-69. The defendants argued that they did not owe a duty or implied warranty to the plaintiffs because they lacked privity of contract as the plaintiffs were subsequent home purchasers. Id. at 397-98, 271 S.E.2d at 769. Chief Justice Lewis noted that lack of privity was not a viable defense in this matter because it was foreseeable by the defendants that the plaintiffs were the type of class that would purchase the residence that they created and were under a duty of care to construct the residence in a manner that conformed with industry standards. Id. at 399, 271 S.E.2d at 770. Specifically, "by placing [the home] into the stream of commerce, the [defendants] owes a duty of care to those who will use his product, so as to render him accountable for negligent workmanship." Id.

851 (Mo. Ct. App. 1982)(holding a developer liable for negligent construction of a residence when developer had residence constructed for the purpose of resale and is in the best position to ensure that the contractor constructs the residence accordingly). See generally Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co., 517 A.2d 336, 347 (Md. Ct. App. 1986)(“The developer is, in a sense, the builder of the project, even though he may delegate to others the physical acts of construction.”).²

A second basis for liability is that Churchill, PPLLC, and Abedon were aware that the repairs and renovations were inadequate and were merely temporary repairs. See generally Point East Condominium Owners’ Association, Inc. v. Cedar House Associates Company, 663 N.E.2d 343, 352 (Ohio Ct. App. 1995)(holding a developer-seller of condominiums liable for the negligent construction that was performed by the general contractor that was performed on their behalf and when developer was involved in the construction process). They intended to sell the units while concealing serious issues with the property and units, and it was foreseeable that the concealment of the issues would lead to injury to the purchasers.

A third basis for liability is that Churchill, PPLLC, and Abedon owed fiduciary duties to the HOA which they breached when the units were redeveloped and repaired for individual

² As stated by the Maryland Court of Appeals:

As the owner and occupier of land, a developer owes a nondelegable duty to those who may come upon the land, and the nature and extent of that duty is fixed by the status of the person claiming it. Where possession of the land is surrendered, that liability may be interrupted. Where the surrender of possession is permanent by reason of sale of the property, the allocation of duties between vendor and vendee with respect to bodily harm resulting from dangerous conditions not apparent to a vendee, depends upon a number of factors. Where the dangerous condition arises after transfer of possession, the vendor is generally not liable. However, where the condition existed at the time of transfer, the vendor's duty to third parties and to the vendee will survive the sale and transfer if the vendor knew or had reason to know of the condition and of the risk involved, and failed to disclose that information to the vendee.

Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co., 517 A.2d at 346.

resale by limiting the scope of work that was to be completed. See Dunes West v. Georgia-Pacific, 349 S.C. 251, 260, 562 S.E.2d 633, 638 (2002)(holding the developer has a fiduciary duty to the POA [homeowners' association] to transfer common areas that are in good repair).

Finally, PPLLC, Churchill, and Abedon redeveloped and renovated the units in violation of the applicable building codes and industry standards which has been held to be negligence per se. See, e.g., Kincaid v. Landing Development Corp., 289 S.C. 89, 93, 344 S.E.2d 869, 872 (Ct. App. 1986)(noting that violation of a Code adopted by a local authority is negligence per se).

B. Defendants' breaches were the proximate cause of the Plaintiffs' damages.

Defendants' breach of duties to the Plaintiffs in failing to properly develop the townhomes has resulted in damages to the Plaintiffs. "Negligence is deemed to be the proximate cause of an injury when, without such negligence, the injury would not have occurred or could have been avoided." McNair v. Rainsford, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct. App. 1998); see also Allen v. Long Mfg. NC, Inc., 332 S.C. 422, 432, 505 S.E.2d 354, 359 (Ct. App. 1998)("As with any claim of liability for negligence, the breach of duty of care must be the proximate cause of the resulting injury."). "Proximate cause is the efficient or direct cause of an injury . . . [but] does not mean the sole cause." Hurd v. Williamsburg County, 353 S.C. 596, 613, 579 S.E.2d 136, 145 (Ct. App. 2003); see also Wills v. Floyd Brace Co., Inc., 279 S.C. 458, 461-62, 309 S.E.2d 295, 297-98 (Ct. App. 1983)(Sanders, C.J.)(“Proximate cause is the efficient or direct cause of an injury. Negligence is deemed to be the proximate cause of an injury when, without such negligence, the injury would not have occurred or could have been avoided.”).

Churchill, PPLLC, and Abedon's acts and omissions in the redevelopment of the units in 2002 have led to damages to the units and misrepresentations to the purchasers and include but are not limited to the following:

- 1) incomplete/inadequate replacement and repainting of the exterior siding;
- 2) improper installation of the windows;
- 3) insufficient roof repairs; and,
- 4) failing to maintain adequate reserves for the regime.

PPLLC, Churchill, and Abedon's acts and omissions have been the proximate causes of the injuries sustained by Plaintiffs'. These injuries were foreseeable by the developers as they were aware that homeowners would be purchasing these units. See, e.g., Hubbard v. Taylor, 339 S.C. 582, 589, 529 S.E.2d 549, 552 (2000) ("Legal cause is proved by establishing foreseeability, i.e., that the injury occurred as a natural and probable consequence of the defendant's negligence.").

II. DEFENDANTS PLANTER'S PLACE, LLC CHURCHILL FORGE, AND TODD ABEDON BREACHED THEIR IMPLIED WARRANTIES.

An implied warranty extends to both original purchasers, and subsequent purchasers. See Arvai v. Shaw, 289 S.C. at 164, 345 S.E.2d at 717 ("The determining factor [of an implied warranty] is not whether the defendant actually builds the defective house, but that he places it, by the initial sale, into the stream of commerce."). This is especially true when a subsequent purchaser suffers from damages associated from latent construction defects. See, e.g., Carroll's Mobile Homes, Inc. v. Hedegard, 342 N.E.2d 619, 621 (Ind. Ct. App. 1976).

"[A] builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner." See Kennedy v. Columbia Lumber and Mfg. Co., Inc., 299 S.C. at 344, 384 S.E.2d at 736. The redevelopment of the units in 2001 through 2002 included many deficiencies attributable to Churchill, PPLLC, and Abedon. These deficiencies breached the implied warranties of workmanlike manner and

habitability, and included the following:

- 1) improper installation of the windows;
- 2) use of windows that are unsuitable for the coastal environment;
- 3) degradation and rotting of the siding on the units;
- 4) a lack of a moisture barrier on the units; and,
- 5) numerous roofing and flashing problems.

Notably, no building permit was obtained for the redevelopment work (costing approximately \$600,000) completed by the contractors for PPLLC, Churchill, and Abedon. Even Defendants' own expert, William Riesberg stated that many of these constituted code violations. Riesberg stated that the failure to obtain a building permit was reckless and a violation of the building code and went on to state that the sporadic replacement of wood in 2002 was insufficient. Riesberg also opined that new code violations were created by the window installation.

During the deposition of PELCO, William Pelloni testified that he had numerous conversations with Abedon regarding the improper installation of the windows, the roof leaks, and that the siding repairs performed by Colorworks was not an adequate repair of the rotted siding. Both PELCO and Colorworks bid the siding repair and painting of the units, but PELCO's bid included a larger amount of siding replacement than that proposed by Colorworks. PPLLC, Churchill, and Abedon knew of the difference in the amount of repairs and that with the Colorworks repairs not all rotted siding would be replaced; however, Abedon still chose to have Colorworks complete the exterior siding and painting work.

PPLLC, Churchill, and Abedon were also aware of the extensive problems with the flashing and roof problems at Planter's Place. This knowledge that the flashing was not installed

correctly and that the roofing problems were evident has been demonstrated through numerous letters and communications to PPLLC, Churchill, and Abedon. As one example, during redevelopment when unit 1038 had a roof leak, PELCO did work on it. Abedon communicated to PELCO that he did not want too much money spent. However, after the work on this unit was completed pursuant to Abedon's instructions, PELCO communicated to Abedon that it would only be a temporary repair and that the unit needed \$5,000 more of work to fix the problem correctly. Abedon refused and authorized this repair. Abedon's instructions to PELCO were to only stop leaks, not to do preventative measures or to correct the cause of the leak. Abedon would not authorize payment to PELCO for work beyond the limited scope of work he instructed.

The above unit history is just one specific example of the breached of the warranties of workmanlike manner and habitability by PPLLC, Churchill, and Abedon. Because the problems illustrated here exist throughout the complex, Defendants have breached these warranties as to each of the units placed into the stream of commerce and have caused damages to Plaintiffs.

The roofs continue to leak and water intrusion continues to occur, after the repairs by PPLLC, Churchill and Abedon. and this indicates that the developer did not perform their responsibilities.

III. DEFENDANTS VIOLATED THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT.

“Under South Carolina’s Unfair Trade Practices Act ([SC]UTPA), unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are deemed unlawful.” Robertson v. First Union National Bank, 350 S.C. at 350, 565 S.E.2d at 315. Private causes of action under SCUTPA must allege that the defendant’s deceptive acts or practices adversely affect the public interest. See Daisy Outdoor Adver. Co. v. Abbott, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (1996).

A. Defendants’ actions were unfair and deceptive in nature.

Defendants’ actions were unfair and deceptive in nature. “‘An act is ‘unfair’ when it is offensive to public policy or when it is immoral, unethical, or oppressive; a practice is ‘deceptive’ when it has a tendency to deceive.’” Johnson v. Collins Entertainment Co., Inc., 349 S.C. 613, 636, 564 S.E.2d 653, 665 (2002)(Toal, C.J.)(external citations omitted) see, e.g., SCNB v. Silkes, 295 S.C. 107, 111-12, 367 S.E.2d 421, 423 (Ct. App. 1988)(noting that a breach of contract alone is not sufficient for a UTPA claim); see generally Prestwick Golf Club, Inc. v. Prestwick Ltd. Partnership, 331 S.C. 385, 503 S.E.2d 184 (1998); see, e.g., Johnson v. Collins Entertainment Co., Inc., 349 S.C. 613, 636, 564 S.E.2d 653, 665 (2002)) (“The South Carolina Unfair Trade Practices Act makes it unlawful to engage in ‘[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.’”); see, e.g., Noack Enterprises v. Country Corner Interiors, 290 S.C. 475, 351 S.E.2d 347 (noting that deceptive acts that affect the public interest are those under SCUTPA).

B. Defendants’ actions have the potential for repetition.

Defendants’ actions are capable of repetition. “Unfair or deceptive acts or practices have

an impact upon the public interest if the acts or practices have the potential for repetition.” Crary v. Djebelli, 329 S.C. 385, 387, 496 S.E.2d 21, 23 (1998); see, e.g., Crary v. Djebelli, 329 S.C. at 388, 496 S.E.2d at 23 (“The potential for repetition may be shown . . . by showing the same kind of actions occurred in the past[.]”); see, e.g., Crary v. Djebelli, 329 S.C. at 388, 496 S.E.2d at 23 (showing company’s procedures create a potential for repetition meets deceptive act requirement); see, e.g., Singleton v. Stokes Motors, Inc., 358 S.C. 369, 381, 595 S.E.2d 461, 468 (2004)(Toal, C.J.)(noting that when deceptive acts are common in the industry, they are capable of repetition and subject to UTPA claims); see also Prestwick Golf Club, Inc. v. Prestwick Ltd. Partnership, 331 S.C. 385, 393-94, 503 S.E.2d 184, 188 (Ct. App. 1998)(noting the use of alleged deceptive act for solicitation of business can be deceptive to meet UTPA claim). PPLLC, Churchill, and Abedon’s deceptive practices include breaches of duty, concealment, and failure to honor warranties. These practices are all capable of repetition.

All Defendants have testified that they have bought, sold, and/or developed numerous complexes. Abedon, and another member of PPLLC (Christopher Wyett) are still actively purchasing and redeveloping condominium communities, including a \$22 Million acquisition in Augusta, Georgia. This type of business is a main focus of the Defendants and gives an opportunity for repetition.

Therefore, because of the deceptive nature of the acts and omissions by PPLLC, Churchill, and Abedon and the potential for repetition, the SCUPTA applies to the case at hand, and the jury should hear and decide on this cause of action.

IV. DEFENDANTS TODD ABEDON AND CHURCHILL FORGE ARE LIABLE FOR THE TORTIOUS ACTS OF DEFENDANT PLANTER'S PLACE, LLC.

In addition to their liability as a joint venturer and joint tortfeasor in this matter, Churchill and Abedon are additionally liable for their tortious conduct performed in behalf of PPLLC.

A. Defendant Todd Abedon as an agent and as the manger for PPLLC is liable for his own torts.

An analysis of agency law points to Abedon's individual liability in this matter. "[A]n agent is liable to a third person for damages resulting from the violation of a duty which such agent owes to the third person . . ." Lawlor v. Scheper, 232 S.C. 94, 101 S.E.2d 269, 271 (1957). "To incur liability [an agent] must ordinarily be shown to have in some way participated in or directed the tortious act." Hunt v. Rabon, 275 S.C. 475, 477, 272 S.E.2d 643, 644 (1980). See generally RESTATEMENT (FIRST) OF AGENCY § 213 (1933)("A person conducting an activity through servants or other agents is subject to liability: (a) if he is negligent in the conduct of such activity; or (b) if he permits his servants or other agents to act negligently upon his premises or with his instrumentalities.").

Secondly, a corporate officer incurs personal liability for the tortious acts of a company, if the officer participated individually in the wrongful act. See, e.g., BPS, Inc. v. Worthy, 362 S.C. 319, 327, 608 S.E.2d 155, 160 (Ct. App. 2005)("To incur liability he [corporate officer] must ordinarily be shown to have in some way participated in or directed the tortious act."). Abedon was the registered agent, organizer, and a manager of PPLLC and made a large number of the decisions relating to the redevelopment at the Planter's Place complex. See, e.g., Multimedia Pub. of South Carolina, Inc. v. Mullins, 314 S.C. 551, 556, 431 S.E.2d 569, 572 (1993)("A corporate director is chargeable with all matters pertaining to the corporation's affairs, of which he has or should have knowledge in the exercise of the duties required of him as a

director.”)

Abedon was an agent of Churchill and the manager of PPLLC and cannot deny that he materially and individually participated in the redevelopment of the Planter's Place units. Deposition testimony by vendors used by PPLLC, Churchill, and Abedon has been given establishing that Abedon personally limited the scope of work and redevelopment of the units. Abedon limited the scope of the work by what he was willing to pay. Therefore, Abedon is individually liable for his own tortious conduct in the redevelopment of the units because he supervised the redevelopment and his negligence caused damages to the Plaintiffs.

B. Defendant Churchill Forge was a agent for Planter’s Place, LLC .

A corporation can be an agent for a principal. See generally Midlands Utility, Inc. v. South Carolina DHEC, 298 S.C. 66, 378 S.E.2d 256 (Ct. App. 1989). Further, “an agent is liable to a third person for damages resulting from the violation of a duty which such agent owes to the third person . . .” Lawlor v. Scheper, 232 S.C. 94, 101 S.E.2d 269, 271 (1957). “To incur liability [an agent] must ordinarily be shown to have in some way participated in or directed the tortious act.” Hunt v. Rabon, 275 S.C. 475, 477, 272 S.E.2d 643, 644 (1980).

It is undisputed in this case that Churchill wrote the checks to the vendors for the redevelopment of the complex and performed management duties. Churchill’s employees and agents directed how and when payments were to be made for redevelopment. Additionally, Churchill employees were notified of and aware of the problems that existed at the Planter’s Place complex during redevelopment and after the conversion had been completed. Therefore, Churchill is liable as an agent for PPLLC because it materially participated in the redevelopment of the Planter’s Place complex as an agent.

C. Planter’s Place, LLC is the alter ego of Churchill Forge, Inc.

It is settled authority that the doctrine of piercing the corporate veil is not to be applied without substantial reflection. Sturkie v. Sifly, 280 S.C. 453, 313 S.E.2d 316, 318 (Ct. App. 1984). However, one can pierce the corporate veil in appropriate situations. See, e.g., Baker v. Equitable Leasing Corp., 275 S.C. 359, 367, 271 S.E.2d 596, 600 (1980).³ See, also Dumas v. InfoSafe Corp., 320 S.C. at 193, 463 S.E.2d at 644 (Ct. App. 1995)(noting that one can be held personally liable for the acts of a corporation when such corporation is undercapitalized from its inception). When a corporation is undercapitalized, the corporate veil may be pierced. See Hunting v. Elders, 597 S.C. 217 (Ct. App. 2004).

It is undisputed in this case that Churchill corporate officers/employees funded and owned PPLLC. In fact, the dominant owner in PPLLC, Frank Resnek, who owned 50% of PPLLC, also owned 50% of the corporate stock in Churchill. See, e.g., DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Company, 540 F.2d 681, 685 (4th Cir. 1976)(noting that when substantial ownership of all the stock in a corporation is in the hands of only a few persons, courts are not hesitant in permitting one to pierce the corporate veil.)

Churchill Forge contracted for the purchase of the Planter's Place complex. PPLLC was not formed until after the contract had been signed, and the assignment to PPLLC was accomplished with just \$10. All of the members of PPLLC were Churchill employees: Frank Resnek was President, Christopher Wyett was employed in the property management division, and Todd Abedon. PPLLC utilized the services of Churchill employees, including Abedon and

³ South Carolina considers a two part test in determining whether or not one can pierce the corporate veil. See generally Dumas v. InfoSafe Corp., 320 S.C. 188, 463 S.E.2d 641 (Ct.App.1995). Some factors to consider in permitting one to pierce the corporate veil include whether or not the corporation is undercapitalized, the failure to observe corporate formalities, nonfunctioning of other officers or other directors, the absence of corporate records. Hunting v. Elders, 359 S.C. 217, 225, 597 S.E.2d 803, 807 (Ct. App. 2004). Once this has been looked at, "[t]he second prong requires that a plaintiff prove the 'fundamental unfairness' of recognizing the corporate veil[.]" Multimedia Pub. of South Carolina, Inc. v. Mullins, 314 S.C. 551, 553, 431 S.E.2d 569, 572 (1993).

Wyett, to carry on operations without paying a management fee. Churchill's tax returns are void of any evidence of payments made to it by PPLLC for the extensive services provided. These transactions are without economic substance and further support an alter ego/piercing the corporate veil theory.

One of the most persuasive pieces of evidence of an alter ego theory is the alleged assignment of the purchase contract from Churchill to PPLLC for \$10 and the settlement journal entry produced by Defendants in this case. The journal entry was prepared by Churchill employees and notes contributions by Christopher Wyett and Frank Resnek. The contribution by Frank Resnek was noted as a wire transfer from Churchill to the closing attorney in order to fund the cash balance due at closing. There is also statement on the journal entry page beside Abedon's name with the notation "did not fund his share." Moreover, the journal entry does not show a payment from PPLLC to Churchill for the alleged \$10 payment for the assignment of the Planter's Place purchase contract with Shannon IV, and Defendants have not produced evidence otherwise indicating the \$10 payment was made.

Finally, the PPLLC members received excess distributions, while inadequately funding the redeveloping of the units and failing to leave assets in the corporation to service its warranty obligations. See, e.g., Dumas v. InfoSafe Corp., 320 S.C. 188, 192, 463 S.E.2d 641, 643 (Ct. App. 1995)(noting that there is an element of fundamental unfairness when an individual officer of a corporation acts in a self-serving manner with regard to property of the corporation). See also Cumberland Wood Products, Inc. v. Bennett, 308 S.C. 268, 272, 417 S.E.2d 617, 619 (Ct. App. 1992)(noting that one proves fundamental unfairness when a defendant was made aware of the claims against the corporation).

Therefore, because the corporate veil can be pierced, PPLLC can be established as the

alter ego of Churchill.

V. **DEFENDANT PLANTER'S PLACE, LLC ILLEGALLY DISTRIBUTED PROFITS TO ITS MEMBERS**

Under the Limited Liability Act of 1996, SC Code 33-44-101, et. seq., a distribution may not be made to the members if "the limited liability company would no be able to pay is debts as they become due in the ordinary course of business." See SC Code 33-44-406. Plaintiffs named expert, Converse Chellis, CPA, will opine that the distributions of nearly \$900,000 made to the members of PPLLC should not have been made due to the notice to PPLLC of the potential debts and liabilities to be incurred as a result of the problems that existed at Planter's Place complex. PPLLC did not take reasonable steps under the circumstances to make a determination whether a distribution should have been made and/or to establish sufficient reserves to account for known contingencies. Therefore, the individual members are liable to the extent of the distributions received from PPLLC. Churchill handled the funds and performed the unlawful disbursement.

CONCLUSION

This is but an overview of the extreme and egregious conduct engaged in by Defendants relating to the Planter's Place units, and the law governing such.

Respectfully submitted,

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