

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

IBERVILLE PROPERTIES, INC.,
a Louisiana corporation,

ROBERT E. GALLOWAY,

GALLOWAY CORPORATION,
a Virginia corporation,

and

PAUL A. GALLOWAY,

Plaintiffs,

v.

Case No.: CL12 - 3252

BAY CREEK AT CAPE CHARLES
COMMUNITY ASSOCIATION, INC.,
a Virginia nonstock corporation,

Serve: Richard S. Foster
Registered Agent
1100 Eaglewood Drive
Virginia Beach, VA 23454

RICHARD S. FOSTER, *res. 7-10-12*
Serve: 1100 Eaglewood Drive
Virginia Beach, VA 23454

JEFFREY A. FOSTER,
Serve: 1308 Boardwalk Way
Virginia Beach, VA 23451

S. SCOTT FOSTER,
Serve: 1604 Gampoint Court
Virginia Beach, VA 23454

ROBERT JARMAN,
Serve: 2601 Norris Lane
Chesapeake, VA 23321

BRETT G. CAMPBELL,
Serve: 3132 Nansemond Loop
Virginia Beach, VA 23456

FILED
VA. BEACH CIRCUIT COURT

2012 JUN 14 AM 8:50

TINA E. SHAWEN, CLERK

BY *[Signature]*

COMMUNITY GROUP, INC.,)
Serve: CT Corporation System,)
Registered Agent)
4701 Cox Road, Suite 301)
Glen Allen, Virginia 23060)
)
BAYMARK CONSTRUCTION CORPORATION,)
a Virginia corporation,)
Serve: Richard S. Foster)
Registered Agent)
1100 Eaglewood Drive)
Virginia Beach, VA 23454)
)
BAY CREEK, L.L.C.,)
a Virginia limited liability company,)
Serve: Richard S. Foster)
Registered Agent)
1100 Eaglewood Drive)
Virginia Beach, VA 23454)
)
BAY CREEK MARINA AND RESORT, LLC,)
a Virginia limited liability company,)
Serve: Richard S. Foster)
Registered Agent)
1100 Eaglewood Drive)
Virginia Beach, VA 23454)
)
BAY CREEK SOUTH, LLC,)
a Virginia limited liability company,)
Serve: CT Corporation Systems)
Registered Agent)
4701 Cox Road, Suite 301)
Glen Allen, Virginia 23060)
)
PENDER & COWARD, A PROFESSIONAL)
CORPORATION)
Serve: William A. Lascara N.S. 8-16-12)
Registered Agent)
222 Central Park Avenue, Suite 400)
Virginia Beach, VA 23462)
)
and)
)

BAY CREEK RESORT REALTY, LLC,
a Virginia limited liability company,
Serve: Richard S. Foster
Registered Agent
1100 Eaglewood Drive
Virginia Beach, VA 23454

Defendants.

COMPLAINT

Introduction

1. This declaratory judgment action seeks a determination that the property owners' association for the subdivision called Bay Creek at Cape Charles is not properly formed rendering it unable to collect annual dues from its members, including the plaintiffs, and further that the declarants for the subdivision and the association and its board of directors have failed to complete and maintain streets, street lights, irrigation systems and security systems due to self-dealing, have been guilty of continuing breaches of various duties and violations of applicable state and federal laws, and have damaged the plaintiffs in substantial amounts.

Parties, Jurisdiction, and Venue

2. Plaintiff Iberville Properties, Inc. (“**Iberville**”) is a Louisiana corporation and is the record owner of twenty-seven (27) lots in the Marina Village East Neighborhood (“**Marina Village**”) in the planned community known as Bay Creek at Cape Charles (“**Bay Creek at Cape Charles**”) located in the Town of Cape Charles, Northampton County, Virginia.

3. Plaintiff Robert E. Galloway (“**R. Galloway**”) is an individual residing in St. Petersburg, Florida who owns one (1) lot and one residence in Marina Village.

4. Plaintiff Galloway Corporation (“GC”) is a Virginia corporation and is a member of defendant Bay Creek Marina and Resort, L.L.C., its membership interest being purchased by

defendant Bay Creek, L.L.C., under the terms of a Membership Interest Purchase Agreement dated December 15, 2005 (the “**Membership Purchase Agreement**”).

5. Plaintiff Paul A. Galloway (“**P. Galloway**”) is an individual residing in Cape Charles, Virginia who owns fourteen (14) lots in Marina Village and the Colony Neighborhood and a residence in Marina Village.

6. Defendant Bay Creek at Cape Charles Community Association, Inc. (the “**Association**”) is a Virginia nonstock corporation with its principal office in Virginia Beach, Virginia and serves as the property owners’ association for Bay Creek at Cape Charles. A copy of its Articles of Incorporation (the “**Articles**”) is **Exhibit A**.

7. Defendant Richard S. Foster (“**R. Foster**”) is an individual residing in Virginia Beach, Virginia and is (a) a director and President of the Association, (b) the managing member of Bay Creek, L.L.C. (which in turn is a member of Bay Creek South, LLC), Bay Creek Marina and Resort, LLC and Bay Creek Resort Realty, LLC, and (c) the President and owner of Baymark Construction Corporation.

8. Defendant Jeffrey A. Foster (“**J. Foster**”) is an individual residing in Virginia Beach, Virginia and is a director of the Association and the son of R. Foster.

9. Defendant S. Scott Foster (“**S. Foster**”) is an individual residing in Virginia Beach, Virginia and is a director of the Association and the son of R. Foster.

10. Defendant Robert Jarman (“**Jarman**”) is an individual residing in Chesapeake, Virginia and is a director of the Association and the son-in-law of R. Foster.

11. Defendant Brett Campbell (“**Campbell**”) is an individual residing in Virginia Beach, Virginia and is a director of the Association.

12. Defendant Baymark Construction Corporation ("**Baymark**") is a Virginia corporation with its principal place of business and registered office in Virginia Beach, Virginia and is the initial Declarant of Bay Creek at Cape Charles, named in the Declaration of Covenants, Conditions and Restrictions dated February 1, 2000 (the "**Declaration**") and recorded in the Clerk's Office of the Circuit Court of Northampton County (the "**Clerk's Office**") in the Deed Book 316, at page 656.

13. Defendant Bay Creek, L.L.C. ("**BC**") is a Virginia limited liability company with its principal place of business and registered office is located in Virginia Beach, Virginia and is the successor Declarant to Baymark by an Assignment of Declarant's Rights dated March 20, 2000 by Baymark, recorded in the Clerk's Office in Deed Book 318, page 199.

14. Defendant Bay Creek South, LLC ("**BC South**") is a Virginia limited liability company with its principal place of business is located in Virginia Beach, Virginia and is the second successor Declarant by an Assignment of Declarant's Rights dated February 28, 2008 by BC, recorded in the Clerk's Office as Instrument Number 080000472.

15. Defendant Bay Creek Marina and Resort, LLC ("**BCMR**") is a Virginia limited liability company with its principal place of business is located in Virginia Beach, Virginia and whose principal member is Baymark by assignment from BC.

16. Defendant Bay Creek Resort Realty, LLC ("**BC Realty**") is a Virginia limited liability company with its principal place of business in Virginia Beach, Virginia which conducted the sales of lots in Bay Creek at Cape Charles including a number sold to the plaintiffs.

17. Defendant Community Group, Inc. ("**Community Group**") is a Virginia corporation with offices in Virginia Beach, Newport News and Williamsburg, Virginia providing

management services to the Association including the collection of annual common expenses in the form of monthly assessments.

18. Defendant Pender & Coward, A Professional Corporation (“**Pender & Coward**”) is a professional corporation providing legal services to the Association including representation in collection of annual common expenses in the form of monthly assessments from the owners of lots in Bay Creek at Cape Charles including the Marina Village Neighborhood.

19. This Court is a proper venue for this action under Virginia Code § 8.01-262(1)-(3).

Background Facts

20. Bay Creek at Cape Charles is a planned residential community in the Town of Cape Charles in Northampton County, Virginia.

21. Baymark was the original Declarant under the Declaration (as supplemented and amended from time to time).¹ The Declaration creates binding obligations on the Association and all present and future owners in Bay Creek at Cape Charles. A copy of the Declaration is

Exhibit B.

¹ The Declaration of Covenants, Conditions, and Restrictions for Bay Creek at Cape Charles has been supplemented and/or amended by the following instruments duly recorded in the Clerk’s Office: (1) Supplement to Declaration of Covenants, Conditions and Restrictions dated August 1, 2000; (2) Supplement to Declaration of Covenants, Conditions and Restrictions dated August 1, 2000; (3) Amendment to Declaration of Covenants, Conditions and Restrictions dated October 18, 2000; (4) Supplement to Declaration of Covenants, Conditions and Restrictions dated March 5, 2001; (5) Amendment to Declaration of Covenants, Conditions and Restrictions dated March 15, 2001; (6) Amendment to Declaration of Covenants, Conditions and Restrictions dated September 5, 2001; (7) Supplement to Declaration of Covenants, Conditions and Restrictions dated September 25, 2002; (8) Supplement to Declaration of Covenants, Conditions and Restrictions dated May 19, 2003; (9) Supplement to Declaration of Covenants, Conditions and Restrictions dated May 19, 2003; (10) Supplement to Declaration of Covenants, Conditions and Restrictions dated June 14, 2004; (11) Supplement to Declaration of Covenants, Conditions and Restrictions dated January 20, 2005; (12) Supplement to Declaration of Covenants, Conditions and Restrictions dated May 3, 2005; (13) Supplement to Declaration of Covenants, Conditions and Restrictions dated May 20, 2005; (14) Supplement to Declaration of Covenants, Conditions and Restrictions dated February 24, 2005; (15) Supplement to Declaration of Covenants, Conditions and Restrictions dated December 29, 2005; and (16) Supplement to Declaration of Covenants, Conditions and Restrictions dated March 17, 2006. Additional supplements and amendments will be supplied by amendment to the Complaint.

22. Baymark, by an Assignment of Declarant's Rights dated March 20, 2000, assigned all of its rights, powers, and privileges as the original Declarant under the Declaration to defendant BC, as successor Declarant. In turn, BC, by an Assignment of Declarant's Rights dated February 28, 2008, assigned all of its rights, powers and privileges as the successor Declarant to BC South.

23. By accepting the assignments, BC and then BC South undertook all obligations as the Declarant of Bay Creek at Cape Charles.

24. The Association is responsible for management, maintenance, operation and control of the Common Area in Bay Creek at Cape Charles, defined in the Declaration as "all real and personal property ... which the Association owns ... for the common use and enjoyment of the Owners." The internal affairs of the Association are governed by the By-Laws of Bay Creek at Cape Charles Community Association, Inc. (the "**By-Laws**"). A copy of the By-Laws is **Exhibit C**.

25. On June 3, 2005, Iberville purchased four (4) lots in Marina Village and on December 3, 2009, purchased from and received a deed of assumption for an additional twenty-three (23) lots from GC which had acquired the lots in satisfaction of an obligation owed by BCMR. A schedule listing each lot purchased by Iberville in Marina Village is **Exhibit D**.

26. On August 1, 2003, P. Galloway purchased six (6) lots in the Colony Neighborhood. On August 1, 2005, P. Galloway purchased an additional eight (8) lots in Marina Village, and on October 27, 2009, P. Galloway purchased a residence located on Lot No. 97 in Marina Village. A schedule listing each lot purchased by P. Galloway is **Exhibit E**.

27. On January 28, 2005, R. Galloway purchased Lot 92 and on November 13, 2009, purchased a residence located on Lot 53, each in Marina Village.

28. Since the time Iberville and the Galloways each purchased lots, the entities serving as Declarant have failed to complete and the Association and its directors have failed to properly maintain the Common Area as required by the Declaration and By-Laws.

29. Moreover, the Association and its directors have failed to allow the members of the Association, including Iberville and the Galloways, to elect directors-at-large to serve on the Association's board of directors (the "**Board**"), notwithstanding the terms of the Declaration and Bylaws.

30. Due to these failures and the Association's and the Board's failure to address the lack of completion and deteriorating conditions of the improvements in the Common Area, failure to maintain the Common Area, and failure to carry out the duties and obligations otherwise imposed on them by the Declaration and Bylaws, Iberville and P. Galloway stopped paying their monthly assessments to the Association.

31. On April 6, 2012, the Association filed in the General District Court of Northampton County three civil warrants against Iberville and three civil warrants against P. Galloway, seeking unpaid monthly assessments, together with attorney's fees, late fees, interest and costs.

Count I
Declaratory Judgment
(Against the Association and R. Foster, J. Foster, S. Foster, Jarman and
Campbell in their capacities as Directors or Officers of the Association)

The Board of the Association is Not Properly Constituted

32. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 31 of this complaint.

33. Each owner of a Unit, including a lot, in a Neighborhood of Bay Creek at Cape Charles is a Class "A" member of the Association, receiving one vote per Unit, and the sole Class "B" member is the Declarant, now BC South. (Declaration § 6.3(a)-(b).)

34. During the Class B Control Period, which terminates on the later of December 31, 2020 and the date on which 75% of the total Units in Bay Creek at Cape Charles have certificates of occupancy and have been conveyed to owners other than builders, the Declarant is permitted to appoint a majority of the members of the Board of the Association. (Declaration § 6.3 (b).)

35. Election of directors or their appointment by the Class B member shall take place at the Association's annual meeting. (By-Laws § 3.5.)

36. The By-laws provide that within 30 days of the date that certain ownership thresholds (each a "**Threshold**" and together the "**Thresholds**") are met, i.e., when owners other than Builders² own a certain percentage of the Units in Bay Creek at Cape Charles, the President shall call for a special election by which the Voting Members shall be entitled to elect one or more directors, each as an at-large director. (Bylaws § 3.5(a) and (b).)

37. Voting Members exercise the voting rights of Class A Members of the Association. Each Neighborhood is required to have a Voting Member chosen by a vote of the Class A Members in that Neighborhood. The election of the Voting Member is to take place within one year after the sale of the first Unit in a Neighborhood to a person other than a Builder (Declaration §§ 6.3(c) and 6.4(b)).

38. The By-laws place the first Threshold at 25 percent ownership. Within 30 days after the time that Class A members other than Builders own 25% of the Units in Bay Creek at

² A "**Builder**" is defined by the Declaration as "Any person who purchases one or more Units for the purpose of constructing improvements for later sale to consumers, or who purchases one or more parcels of land within Bay Creek at Cape Charles for further subdivision, development, and/or resale in the ordinary course of its business. Declaration, Article II.

Cape Charles, the President shall call for an election, by which the Voting Members will be entitled to elect one of the three directors to serve on the Board. The remaining two directors shall be appointees of the Class B Member. (By-Laws § 3.5(a).)

39. The second Threshold occurs at 50 percent ownership. Within 30 days after the time that Class A members other than Builders own 50% of the Units in Bay Creek at Cape Charles, the President shall call for an election, by which the Voting Members will be entitled to elect two of the five directors to serve on the Board. The remaining three directors shall be appointees of the Class B Member. (By-Laws § 3.5(b).)

40. The third Threshold is reached after the termination of the Class B Control Period. Within 90 days after termination of the Class B Period, the President shall call for an election, by which the Voting Members will be entitled to elect three of the five directors to serve on the Board. The remaining two directors shall be appointees of the Class B Member. (By-Laws § 3.5(c).)

41. Finally, the By-Laws provide that not later than the first annual meeting after the termination of the Class B Control Period, the Board shall be increased to seven directors and an election shall be held. Six directors shall be elected by the Voting Members. The Class B Member shall be entitled to appoint one director, until its Class B membership is terminated. (By-Laws § 3.5(d).)

42. Upon information and belief, the 25% Threshold has been met with respect to Bay Creek at Cape Charles. Notwithstanding, the President of the Association, R. Foster, has failed to hold elections for a Voting Member for each Neighborhood and no election of a member of the three member Board by Voting Members has been held. Consequently, the Board of the Association is improperly constituted.

43. Because such elections were not held, in contravention of the By-Laws, the members of the Association, including the plaintiffs, were not permitted to exercise their right to elect their share of directors on the Board.

44. The members have not otherwise been permitted to elect their share of directors on the Board at the Association's annual meeting, as required by the By-Laws.

45. The Board does not currently contain the correct percentage of directors elected by the Voting Members. There is currently too high of a percentage of directors appointed by the Class B Member, and too low a percentage of directors elected by Members.

46. As required by the Declaration, the Board of the Association annually establishes a budget for the payment of the common expenses for the Common Area in Bay Creek at Cape Charles. The monthly assessments imposed on members like the plaintiffs are based on this budget. Because the Board is improperly constituted, it cannot hold a valid vote to conduct business, including votes to approve such a budget or assessments to impose on the members of the Association. Nonetheless, the current Board has voted and has charged assessments to owners and further has authorized the suits filed against Iberville and P. Galloway.

47. A declaratory judgment is necessary to define the rights and obligations of the parties with respect to the Board of the Association and the ability of the current, improperly constituted Board to vote to impose, and based on that vote, charge, monthly assessments to the members of the Association.

48. There have been actual antagonistic assertions and denials of right between the parties as to these issues, as the Association, by vote of the improperly constituted Board, has charged assessments to Iberville, which it has refused to pay, and to P. Galloway, which he has refused to pay. This is an appropriate case for declaratory judgment under Va. Code § 8.01-184.

Count II
Declaratory Judgment
(Against the Association, and R. Foster, J. Foster, S. Foster, Jarman and Campbell in their
capacities as Directors or Officers of the Association)

The Association is Defectively Organized

49. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 48 of this complaint.

50. The Virginia Non-Stock Corporation Act requires that the Articles for the Association set forth, or if those Articles so provide, the Bylaws, any designations for classes of members, stating the qualifications and rights of the members of each class and confirming, limiting or denying the right to vote. Va. Code § 13.1-819A(3).

51. Neither the Articles nor the Bylaws contain the required statutory material.

52. The Virginia Non-Stock Corporation Act requires that the Articles for the Association set forth a statement of the manner in which directors shall be elected or appointed if any of them are not to be elected or appointed by one or more classes of members. Va. Code § 13.1-819A(4).

53. The Articles for the Association do not contain such provisions.

54. The Association is therefore defectively organized and all its actions since the filing of the Articles, including the collection of any previous monthly assessments or initial capital contributions and the suits for collection against Iberville and P. Galloway, are *ultra vires* and therefore void.

55. A declaratory judgment is necessary to define the rights and obligations of the parties with respect to the Association and its power to impose monthly assessments on the members of the Association.

56. There have been actual antagonistic assertions and denials of right between the parties as to these issues as the Association has charged assessments to Iberville, which it has refused to pay, and to P. Galloway, which he has refused to pay. This is an appropriate use for declaratory judgment under Va. Code § 8.01-184.

Count III

(Against the Association and R. Foster, in his capacity as President of the Association)

Breach of Declaration and By-Laws

57. Plaintiffs incorporate by reference the allegations set forth in Paragraphs 1 through 56 of this complaint.

58. One or more of the ownership Thresholds have been met, yet R. Foster, as President, has failed to call meetings, as required by the By-Laws, to allow the Voting Members to properly elect their share of directors on the Board.

59. One or more of the ownership Thresholds have been met, yet the Association, at its annual meetings, has failed to allow the Voting Members to properly elect their share of directors of the Board.

60. The Association is in breach of the Declaration and By-Laws. The terms of the Declaration are enforceable by any Owner or its successor or assigns and any lack of compliance shall be grounds for an action or suit to receive sums due, for damages or injunctive relief, or for any other remedy available at law or equity by one or more aggrieved lot owners on their own behalf or as a class action. (Declaration § 1.2); Va. Code § 55-515A.

61. Iberville, R. Galloway, GC, and P. Galloway, each as a member of the Association, have suffered damages in the value of any monthly assessments paid to the Association that were imposed by the improperly constituted Board in breach of the Declaration and By-Laws.

62. Each of the plaintiffs is entitled to their actual damages, plus costs and a reasonable attorney's fee under Va. Code § 55-515, as determined by the Court.

Count IV
(Against R. Foster, J. Foster, S. Foster, Jarman and Campbell and
BC, Baymark, BCMR, BC South)

Breach of Fiduciary Duties of Care and Loyalty as Director

63. Plaintiffs incorporate by reference the allegations set forth in Paragraphs 1 through 62 of this complaint.

64. R. Foster, J. Foster, S. Foster, Jarman and Campbell are each a member of the Board of the Association and each owes a duty to the members of the Association, including the plaintiffs, to exercise ordinary care, in a reasonable and good faith manner, in the performance of their duties and to be loyal to the interests of the Association.

65. The Board and R. Foster as President of the Association have breached their fiduciary duty and duty of loyalty to the Association and its members, including the plaintiffs, by, among other things:

a. One or more of the ownership Thresholds having been met, the Board and R. Foster as President have knowingly and willfully failed to call meetings required by the By-Laws, to allow the Voting Members to properly elect their share of directors of the Board. Instead, each director serving on the current Board was appointed by the sole Class B Member, BC or BC South, both owned and controlled by R. Foster.

b. Upon information and belief, the Directors caused the Association at the direction of R. Foster as President to execute a promissory note in 2005 in the amount of \$1,076,500 (the "**Breakwater Note**") payable to one or more of the defendant entities controlled by R. Foster (BC, Baymark, or BCMR) and annual payments of over \$120,000 have been made

since from the assessments collected from members. The stated reason for the obligation was the construction of breakwaters to benefit the Association beach. Upon information belief, the actual cost of the breakwater was \$200,000 less than reported to the auditors for the Association and a substantial amount of the actual cost was paid from other sources. The Board either knew this or failed in its responsibility to exercise good business judgment.

c. The Board has consistently approved arrangements between the Association and entities related to or controlled by R. Foster to perform routine maintenance services on the Common Area. During 2009, these related transactions cost the Association a total of \$731,452. Such arrangements constituted self-dealing by R. Foster and members of the Board other than R. Foster failed to exercise good business judgment with respect to such related transactions.

66. As a consequence of such breaches by the Board, plaintiffs are entitled to a judgment against each director, jointly and severally, for (a) all amounts paid by each plaintiff for monthly assessments since the 25% Threshold was reached, (b) the diminution in value of the lots and houses owned by the plaintiffs as a consequence of such breaches. The plaintiffs also assert a derivative claim on behalf of the Association against BC, Baymark, BCMR, BC South or any other entity found to be owned or controlled by R. Foster (the “**Related Companies**”) and ask for judgment in the amount of all payments made by the Association on the Breakwater Note and all amounts paid to the Related Companies for routine maintenance on the Common Area.

Count V
(Against Baymark, BC, BC South, BCMR and the Directors)

Breach of Declaration (Payment of Declarant Assessments)

67. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 66 of this complaint.

68. The Declarant is required to pay assessments on Units owned by it in the same manner as other Owners or by paying the difference between the amount of assessments levied on all other Units and the amount of actual expenditures by the Association during the fiscal year. These obligations may be satisfied in the form of cash or by “in kind” contributions of services or materials. (Declaration § 8.7(b)).

69. In fiscal year 2009, the Board accepted a representation from counsel for the Declarant that improvements to the Common Area aggregating a notional value of \$2,283,000 satisfied all of the Declarant’s obligations to the Association for assessments for 2005, 2006, 2007, 2008 and 2009.

70. Upon information and belief, the improvements did not constitute “in kind contributions of services or materials” to the Association and the Declarant entities, Baymark, BC, BC South and BCMR are liable for payment of all Declarant assessments since at least 2005.

71. The Directors have not investigated these circumstances nor exercised good business judgment with respect to the alleged “in kind” contributions.

72. The Association is entitled to a judgment against the Declarant entities in the amount of all Declarant assessments since 2005 and the plaintiffs entitled to a personal judgment against the members of the Board in the amount of the diminution in value of the lots and houses owned by the plaintiffs caused by such breach.

73. Each of the plaintiffs is entitled to their actual damages, plus costs and reasonable attorneys’ fees under Va. Code § 55-515, as determined by the Court.

Count VI
(Against Baymark, BC, BC South and BCMR)

Breach of Declaration (Failure to Complete Improvements)

74. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 73 of this complaint.

75. The Declarant entities Baymark, BC and BC South have the responsibility to complete the essential improvements to the Common Area in Bay Creek at Cape Charles.

76. Streets, irrigation systems, street lighting and security systems are still incomplete.

77. Allowance for value to be available to the Declarant entities was made at the time GC sold its membership interest in BCMR to BC under the Membership Purchase Agreement. The value of GC's membership interest in BCMR was reduced by approximately \$1.8 million to allow for the obligation to complete all infrastructure improvements in Bay Creek at Cape Charles, including streets, street lights, irrigation systems and security systems.

78. The Association is entitled to a judgment against the Declarant entities, jointly and severally, in the amount of the cost to complete all infrastructure improvements at Bay Creek at Cape Charles.

79. Plaintiffs are entitled to a judgment against the Declarant entities, jointly and severally, in the amount of the diminution in the value of their lots due to the failure to complete improvements at Bay Creek at Cape Charles.

80. Each of the plaintiffs is entitled to their actual damages, plus costs and reasonable attorneys' fees under Va. Code § 55-515, as determined by the Court.

Count VII
(Against the Association)

Breach of Declaration (Failure to Maintain Common Areas)

81. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 80 of this complaint.

82. The Association is responsible for the management, maintenance, operation and control of the Common Areas in Bay Creek at Cape Charles. (Declaration § 6.1).

83. The Association has failed to maintain such Common Areas. Street lights are inoperable, street surfaces are broken and numerous other maintenance items have not been performed. Iberville and R. Galloway have brought these matters to the attention of the Association and its representatives on numerous occasions.

84. Each of the Plaintiffs has suffered damages in the diminution of the value of their properties and by the payment of prior assessments which monies were not used for maintenance.

85. Plaintiffs are entitled to their actual damages, plus costs and reasonable attorneys' fees under Va. Code § 55-515, as determined by the Court.

Count VIII
(Against the Board)

86. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 85 of this complaint.

87. Duties of the Board include, *inter alia*: "providing for the operation, care, upkeep and maintenance of the Area of Common Responsibility consistent with Bay Creek at Cape Charles Community – Wide Standard"; "designating, hiring and dismissing personnel necessary to carry out the Association's rights and responsibilities where appropriate"; and "making or

contracting for the making of repairs, additions and improvements to or alterations of the Common Area in accordance with the [Declaration] and [the By-Laws]. (By-Laws § 3.17).

88. The duties of the Board also include “enforcing by legal means the provisions of the Governing Documents and bringing any proceedings on behalf of ... the Owners concerning the Association.” (By-Laws § 3.17).

89. As members, the plaintiffs have the right to require the members of the Board to exercise good business judgment in the fulfillment of these duties and to be loyal to the interests of the Association.

90. The Board has failed to carry out the foregoing duties or exercise good business judgment. The Board members have failed to, *inter alia*: (a) require the Declarant entities to complete the infrastructure improvements in the Common Area, by litigation or otherwise, (b) maintain the improvements which do exist in the Common Area, (c) use due diligence to investigate all contracts and arrangements for the performance of maintenance in the Common Area to insure that such arrangements have market rates and arms-length terms.

91. Plaintiffs have suffered damages in the diminution in the value of their properties and in the amount of monthly assessments previously paid.

92. Plaintiffs are entitled to their actual damages plus costs and reasonable attorneys’ fees under Va. Code § 55-515, as determined by the Court.

Count IX
(Against Community Group and Pender & Coward)

Violation of the Fair Debt Collection Practices Act

93. The plaintiffs incorporate by reference the allegations set forth in Paragraphs 1 through 92 of this complaint.

94. Community Group and Pender & Coward are debt collectors as defined by the Fair Debt Collection Practices Act (15 U.S.C. §§ 1692-1692p) (the “**FDCPA**”), acting to collect the debts of a third party, the Association, and P. Galloway is a consumer as defined by the FDCPA.

95. On May 31, 2011, Community Group sent letters by certified and regular mail to P. Galloway in an attempt to collect past-due monthly assessments and related debts owed to the Association. The May 31, 2011 letters were the first communications sent by Community Group to P. Galloway attempting to collect past-due monthly assessments and related fees. Since the initial communications, Community Group has continued to send written correspondence to P. Galloway in an attempt to collect past-due homeowner’s fees and related debts owed to the Association. True and accurate copies of letters sent to P. Galloway from Community Group are attached as **Exhibit F**.

96. On September 26, 2011, Pender & Coward sent letters by certified and regular mail to P. Galloway in an attempt to collect past-due homeowner’s fees and related debts owed to the Association. The September 26, 2011 letters were the first communications sent by Pender & Coward to P. Galloway attempting to collect past-due monthly assessments and related fees. Since the initial communication, Pender & Coward has continued to send written correspondence to P. Galloway in an attempt to collect past-due homeowner’s fees and related debts owed to the Association. True and accurate copies of letters sent to P. Galloway from Pender & Coward are attached as **Exhibit G**.

97. Community Group failed to disclose in the initial written communication with P. Galloway that it was attempting to collect a debt and that any information obtained will be used for that purpose, and failed to disclose in subsequent communications that the communications were from a debt collector, as required by the FDCPA, 15 U.S.C. § 1692e(11).

98. Neither Community Group nor Pender & Coward sent P. Galloway, within five days after the initial communications, written notice containing the information required by the FDCPA, 15 U.S.C. § 1692g, including (a) the amount of the debt; (b) the name of the creditor to whom the debt is owed; (c) a statement that unless the consumer, within 30 days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector; (d) a statement that if the consumer notifies the debt collector within the 30-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and (e) a statement that, upon the consumer's written request during the 30-day period, the debt collector will provide the consumer with a name and address of the original creditor, if different from the current creditor. In fact, as of the date of the filing of this complaint, P. Galloway has never received written notice from either Community Group or Pender & Coward containing the required information.

99. Community Group acted as a debt collector and acted with actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that its communications with P. Galloway for purposes of collecting debts allegedly owed to the Association were subject to the requirements of the FDCPA.

100. Pender & Coward acted as a debt collector and acted with actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that its communications with P. Galloway for purposes of collecting debts allegedly owed to the Association were subject to the requirements of the FDCPA.

101. Upon information and belief, Community Group's and Pender & Coward's violations were intentional, did not result from a bona fide error, and were not in good faith in conformity with any advisory opinion of the Federal Trade Commission.

102. Upon information and belief, Community Group does not maintain procedures reasonably adapted to avoid any such violation of the FDCPA.

103. Upon information and belief, Pender & Coward does not maintain procedures reasonably adapted to avoid any such violation of the FDCPA.

104. Based on the FDCPA, P. Galloway is entitled to his actual damages, plus statutory damages, costs and a reasonable attorney's fee as determined by the court.

Count X
(Against BC, BC South, Baymark, BCMR, and BC Realty)

Violation of the Interstate Land Sales Full Disclosure Act

105. Plaintiffs incorporate by reference the allegations set forth in Paragraphs 1 through 104 of this complaint.

106. BC, BC South, Baymark, and BCMR (collectively, the "**Developer**") all acted as declarant and developer for Bay Creek at Cape Charles. BC Realty, Progressive Title, and Markowitz acted as developer's agent with respect to the sale of lots in Bay Creek at Cape Charles. BC transferred 25 lots in Marina Village to GC.

107. The lot sales directly from the Developer to Iberville (4 lots), P. Galloway (14 lots) and R. Galloway (1 lot) were subject to the requirements of the Interstate Land Sales Full Disclosure Act, 15 U.S.C. Sections 1701 *et. seq.* (the "**Disclosure Act**").

108. The transfer of the 25 lots directly from the Developer to GC and the subsequent transfers of 23 lots by GC to Iberville were all subject to the requirements of the Disclosure Act.

109. Neither the Developer nor BC informed any of the plaintiffs of their rights under the Disclosure Act, as required by 15 U.S.C.S. § 1703, and failed to provide the required property report, or file such a report on record, prior to transferring lots.

110. The Developer failed to file a statement of record with HUD pertaining to any of the transferred lots, in violation of the Disclosure Act.

111. At the time the 23 lots were transferred to Iberville, GC still had not received the required reports and disclosures, and no report was filed on record. Consequently, Iberville also did not receive the required disclosures and reports.

112. These violations were material. The information and reports that were not properly provided would have influenced each of the plaintiff's decision to accept the lots.

113. Additionally, the Developer misrepresented -- and continues to misrepresent -- facts that should have been disclosed prior to the sale any lots to the plaintiffs under the Disclosure Act. For example, the Developer, with knowledge that its statements were false, misrepresented and continues to misrepresent to the plaintiffs that the roads in Marina Village will be paved (and subsequently will be put under warranty and maintained by the Association). To date, the Developer has not paved the roads or otherwise completed development.

114. Each of the plaintiffs is entitled to rescission of the transfer of each of the lots.

115. Each of the plaintiffs is entitled to a monetary award equal to at least the purchase price of each lot, plus pre-judgment interest equal to the equity used to purchase each lot.

116. Each of the plaintiffs is entitled to interest, court costs, and reasonable amounts for attorneys' fees, independent appraisers' fees, and travel to and from the lot under the Disclosure Act.

WHEREFORE, by counsel, respectfully request that this Court enter an Order:

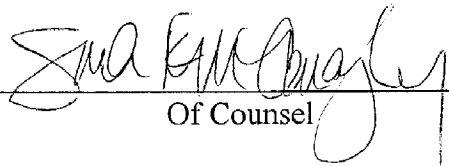
- (a) granting judgment to the plaintiffs on their claims against the defendants;
- (b) granting a declaratory judgment to the plaintiffs, declaring that:
 - (i) the Board of the Association is not properly constituted and thus cannot conduct a valid vote, properly adopt a budget for payment of the common expenses for the Common Area in Bay Creek at Cape Charles, or charge monthly assessments to the members, including the plaintiffs;
 - (ii) Iberville and P. Galloway are not in breach of the Declaration, By-Laws or any other Governing Documents of the Association by failing to pay improperly charged monthly assessments; and
 - (iii) Iberville and P. Galloway are not indebted to the Association for the payment of any monthly assessments that were wrongfully charged by the improperly constituted Board.
- (c) granting a declaratory judgment to the plaintiffs declaring that the Association is defectively organized under Virginia law and therefore all actions since the filing of the Articles, including collection of any monthly assessments or initial contributions and the suits for collection against Iberville and P. Galloway;
- (d) awarding Iberville damages:
 - (i) against the Association in an amount not less than \$62,900.00, with the exact amount to be proved at trial, for any wrongfully charged monthly assessments, paid to the Association by Iberville, plus initial capital contributions wrongfully collected by the Association and paid by Iberville in the approximate amount of \$900.00;

- (ii) against the Board and the Association for breaches of the Declaration fiduciary duties and the duty of the loyalty owed to Iberville in an amount not less than \$2,190,000, with the exact amount to be proved at trial, plus punitive damages in the amount of \$350,000.00;
 - (iii) against Bay Creek, L.L.C. for violations of the Disclosure Act in an amount not less than \$4,068,421.19, with the exact amount to be proved at trial;
- (e) rescinding all transfers of lots from the Developer to any of the plaintiffs;
- (f) awarding R. Galloway damages:
 - (i) Against the Association in an amount not less than \$13,775.00, with the exact amount to be proved at trial, for any wrongfully charged monthly assessments, paid to the Association by R. Galloway, plus initial contributions wrongfully collected by the Association and paid by R. Galloway in the appropriate amount of \$225.00;
 - (ii) against the Association and the Board for breaches of the Declaration their fiduciary duties and the duty of loyalty owed to Iberville in an amount not less than \$423,794.86, with the exact amount to be proved at trial, plus punitive damages in the amount of \$150,000.00;
 - (iii) against Bay Creek, L.L.C. for violations of the Disclosure Act in an amount not less than \$1,151,794.80;
- (g) awarding Galloway Corporation damages:
 - (i) Against the Association in an amount not less than \$135,000, with the exact amount to be proved at trial, for any wrongfully charged monthly

- assessments, paid to the Association by Galloway Corporation, plus initial capital contributions wrongfully collected in the amount of \$5,625 by the Association and paid by Galloway Corporation;
- (ii) against the Association and the Board for breaches of the Declaration and their fiduciary duties and duty of loyalty owed to Galloway Corporation in an amount not less than \$2,765,278.00, with the exact amount to be proved at trial, plus punitive damages in the amount of \$350,000.00;
 - (iii) against Bay Creek, L.L.C., for violations of the Disclosure Act in an amount not less than \$2,765,278.00;
- (h) awarding P. Galloway damages:
- (i) against the Association in an amount not less than \$101,364.77, with the exact amount to be proved at trial, for any wrongfully charged monthly assessments, paid to the Association by P. Galloway, plus initial capital contributions in the amount of \$3,150 wrongfully collected by the Association and paid by P. Galloway;
 - (ii) against the Board and the Association for breaches of the Declaration and their fiduciary duties and duty of loyalty owed to P. Galloway in an amount not less than \$658,000.00, with the exact amount to be proved at trial, plus punitive damages in the amount of \$350,000.00;
 - (iii) against Community Group, Inc. and Pender & Coward, A Professional Corporation, for violations of the Fair Debt Collection Practices Act in the amount of his actual damages, plus statutory damages of \$1,000 per incident, with the exact amount to be proved at trial;

- (iv) against Bay Creek, L.L.C. for violations of the Disclosure Act in an amount not less than \$1,956,000, the exact amount to be proven at trial.
- (i) awarding the Association damages against Bay Creek, L.L.C., Baymark Construction Corporation, Bay Creek Marina and Resort, LLC, and Bay Creek South, LLC;
- (i) in an amount not less than \$921,652.18 for payments on the Breakwater Note and the aggregate amount received by such defendants for contracts or arrangements involving maintenance of the Common Area, with the exact amount to be proved at trial, to reimburse the Association for monies paid under self-dealing transactions;
- (ii) \$1,800,000 for the cost to complete all improvements in the infrastructure.
- (j) awarding pre- and post-judgment interest and costs as provided by law;
- (k) awarding the plaintiffs reasonable attorney's fee as provided by law; and
- (l) granting the plaintiffs such further relief as the Court deems equitable and just.

IBERVILLE PROPERTIES, INC.,
ROBERT E. GALLOWAY, GALLOWAY
CORPORATION and PAUL A.
GALLOWAY



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