

STATE OF NORTH CAROLINA

FILED  
IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

COUNTY OF ORANGE

2019 DEC 13 P 1:34

19-CVS-1579

NORTH CAROLINA DIVISION SONS OF  
CONFEDERATE VETERANS, INC.,

Plaintiff,

v.

THE UNIVERSITY OF NORTH  
CAROLINA and THE UNIVERSITY OF  
NORTH CAROLINA BOARD OF  
GOVERNORS,

Defendants.

and

ALYASSA BOYD, WILLIAM HOLLAND,  
GINA BALAMUCKI, LILIYA OLIFERUK,  
ELIZABETH JONES, D'IVYION DREW,  
AND MICHELLE ROBERSTON,

Defendant-Intervenors.

**MOTION TO DISMISS**

**N.C. Rules of Civ. Pro. 12(b)(1) & 12(b)(6)**

COME NOW the Defendant-Intervenors, Alyassa Boyd, William Holland, Gina Balamucki, Liliya Oliferuk., Elizabeth Jones, De'Ivyion Drew, and Michelle Robertson (collectively "Intervenors") and move to dismiss the Complaint in this matter, pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. In support of their Motion, Movants incorporate attached Exhibit 1 and offer the following:

1. The Complaint purports to seek a declaratory judgment regarding (1) the applicability of N.C. Gen. Stat. § 100-2.1 to the Confederate monument in dispute (“the monument”); (2) the existence and terms of a contract between the United Daughters of the Confederacy (“UDC”) and Defendants relating to the ownership of the monument; and (3) the existence of a condition subsequent allegedly attached to the gift of the monument to UNC-Chapel Hill requiring that the monument be displayed “forever.” The Complaint also seeks injunctive relief variously requiring the display of the monument in its former position or its delivery to Plaintiff. The Complaint further seeks other forms of relief including “actual damages,” “costs and expenses,” and the “imposition of a constructive trust” upon the monument.

2. Plaintiff lacks standing to pursue the purported relief it seeks. The Plaintiff has the burden of proving the elements of standing: that it has or will suffer an injury in fact (a concrete and particularized invasion of a legally protected interest), that is traceable to the conduct of the Defendants, and that can only be remedied by a favorable decision of the Court. The Complaint fails to meet these elements.

3. The allegations in the Complaint fail to establish that Plaintiff has any legally protected interest at stake regarding the monument or its disposition. Plaintiff asserts that it was assigned an interest in the monument by the United Daughters of the Confederacy incorporated in 1992 (the 1992 UDC). (Complaint ¶¶ 10, 18). But the Complaint fails to allege that the 1992 UDC ever had a legal interest in the monument. The UDC members who helped raise funds for the monument in the early 1900s was a hereditary association established in 1897 (Complaint ¶ 21, Ex. D), and is separate and distinct from the 1992 UDC. The Complaint fails to allege or

demonstrate that the 1992 UDC is a successor in interest or otherwise received any assets that may have been owned by the 1897 UDC. Thus, the 1992 UDC could have no legal interest in the monument to assign to Plaintiff. Plaintiff therefore lacks standing to maintain this action, and the Court must dismiss it for lack of jurisdiction.

4. Even if the Complaint had alleged that the 1992 UDC was a successor in interest to the 1897 UDC, the allegations in the Complaint fail to establish that the 1897 UDC had any legal interest in the monument, because the allegations fail to establish the existence of any enforceable contract or of any condition subsequent entitling the 1897 UDC to an ownership interest. *See* paragraphs 7-13, below.

5. The Complaint purports to seek a declaratory judgment to enforce the provisions of N.C. Gen. Stat. § 100-2.1. By its express language however, that statute creates no private right of action to challenge the University's decision not to take affirmative steps to replace the monument. Even if the Plaintiff had standing, because the statute upon which Plaintiffs rely does not provide a cause of action, this Court has no jurisdiction to consider the matter or provide a remedy. Even if the Court were to find that Plaintiff had a legal interest in the monument, the Complaint should be dismissed for lack of subject matter jurisdiction because Plaintiffs have no claim under N.C. Gen. Stat. § 100-2.1.

6. This Court further lacks subject matter jurisdiction over this matter because the Declaratory Judgment Act requires that the Plaintiff demonstrate there is an actual controversy regarding their legal rights or interests. The Complaint fails to show that an actual justiciable controversy exists between the parties. In the absence of such a controversy, a Declaratory

Judgment ruling would be improper (akin to a judicial “advisory opinion”), and thus the Complaint should be dismissed under Rule 12(b)(1).

7. If the Court concluded that it has subject matter jurisdiction, the Complaint should be dismissed under Rule 12(b)(6) because it fails to state any claim upon which relief can be granted. The Complaint asserts that there was a contract between the members of the 1897 UDC and UNC. However, the allegations of the Complaint, even if taken as true, fail to establish that a valid or enforceable contract ever existed.

8. First, the Complaint fails to establish that the parties ever reached a “meeting of the minds” regarding the terms of or obligations under any supposed contract. The correspondence identified in the Complaint showed that UNC President Venable and members of the 1897 UDC monument committee coordinated efforts to raise funds for the monument, but does not establish any intention to create legally enforceable obligations.

9. Second, there was inadequate consideration both as to any underlying contract and any subsequent modification thereto.

10. Third, the purported contract and any subsequent oral modification fail to meet the requirements of the Statute of Frauds (N.C.G.S. § 22-2), which governs contracts pertaining to real estate. The monument is real property, and therefore covered by the Statute of Frauds, because it is a fixture and “by reason of its annexation to land or association in the use of land” it must be “regarded as a part of the land, partaking of its character.” *Little by Davis v. Nat’l Servs. Indus., Inc.*, 79 N.C. App. 688, 692, 340 S.E.2d 510, 513 (1986) (internal quotation marks omitted).

11. Fourth, the Complaint acknowledges that members of the 1897 UDC lacked the capacity to contract at the time of the purported agreement as a result of the law of coverture.

12. The Complaint fails to state any claim upon which relief can be granted because its allegations, if true, establish that the 1897 UDC (Plaintiff's purported predecessor in interest) provided the monument as an unconditional gift to the University. In support of its argument that the gift was conditioned, the Complaint cites only the UDC member's aspirational statement made during ceremonial remarks, "may [the monument] stand forever," Complaint ¶¶ 42, 85, but such statements could not have created a legal restriction on the gift. As a matter of contractual interpretation, the use of the word "may" indicates a permissive use and not a mandatory restriction on the use. *See In re Hardy*, 294 N.C. 90, 240 S.E.2d 367 (1978) ("Ordinarily when the word "may" is used in a statute, it will be construed as permissive and not mandatory."). In addition, as a matter of law, a donor cannot restrict or condition a gift after it has been delivered. Any condition on a gift must be clearly stated prior to its delivery and cannot be made after the fact. *Courts v. Annie Penn Mem'l Hosp., Inc.*, 111 N.C. App. 134, 139, 431 S.E.2d 864, 866 (1993) (citing *Thomas v. Houston*, 181 N.C. 91, 94, 106 S.E.2d 466, 486 (1921) ("a gift inter vivos is absolute and takes effect at the time delivery is completed, provided there are no conditions attached.")). According to the Complaint, the purported conditional statement at the unveiling ceremony was made after the monument was annexed to real property and ownership had transferred to UNC. *See* Complaint ¶¶ 42-44.

13. The Complaint fails to show that the UDC's comments at the unveiling created any reversionary or residual interest in the monument. North Carolina law is clear that conditions subsequent are disfavored and must be clearly stated. *Ange v. Ange*, 235 N.C. 506, 508, 71 S.E.2d 19, 20 (1952) ("A clause in a conveyance will not be construed as a condition subsequent unless it expresses, in apt and appropriate language, the intention of the parties to this effect and a mere

statement of the purpose for which the property is to be used is not sufficient to create such condition.”); *Town of Belhaven, NC v. Pantego Creek, LLC*, 793 S.E.2d 711, 717 (N.C. Ct. App. 2016) (quoting *Prelaz v. Town of Canton*, 235 N.C. App. 147, 155, 760 S.E.2d 389, 394 (2014) ) (“For a reversionary interest to be recognized, the deed must contain express and unambiguous language of reversion or termination upon condition broken. A mere expression of the purpose for which the property is to be used without provision for forfeiture or re-entry is insufficient to create an estate on condition.”). The statement, “may it stand forever as a perpetual memorial to those sons of the University who suffered and sacrificed so much at the call of duty,” does not satisfy the legal requirement to retain a reversionary interest and is not a legally enforceable restriction on the gift. Therefore, Plaintiff has no legally protected interest at stake and the Complaint should be dismissed for failure to state a claim.

14. In addition to all the above, the information provided in attached Exhibit 1 shows that Plaintiff lacks standing and has no legal claim for relief.

WHEREFORE, Defendant-Intervenors respectfully request that the Court:

1. Dismiss the Complaint with prejudice;
2. Enter judgment for the Defendant and Defendant-Intervenors on all claims;
3. Grant such other relief as the Court deems appropriate.

A proposed order is attached.

Respectfully submitted, this the 13<sup>th</sup> day of December 2019.

**Lawyers' Committee for Civil Rights Under Law**



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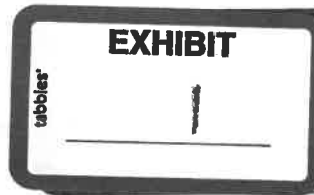
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December 11, 2019

**Via U.S. Mail and Email**

Ripley Rand  
555 Fayetteville Street, Suite 1100  
Raleigh, NC 27602  
ripley.rand@wbd-us.com

***Re: North Carolina Division Sons of Confederate Veterans, Inc. v. UNC  
and UNC Board of Governors, 19 CVS 1579***

Dear Mr. Rand:

On behalf of our University of North Carolina Chapel Hill student and faculty clients, we write to raise concerns about the Consent Judgment, Declaratory Judgment and Order (“Consent Order”) entered in the above-captioned matter, and to ask that the University of North Carolina (“UNC”), and the UNC Board of Governors (“BOG”) act immediately to take any actions necessary to protect UNC’s interests and to recover the 2.5 million dollars dedicated to paying that judgement.

As set out below, it appears that the Consent Order won court approval only because the parties concealed the plaintiff’s lack of standing from the court and failed to advise the court of the frivolousness of the legal claims on which the Consent Order is based. It is apparent that in pursuing this Consent Order, the BOG sought to use the court system to circumvent laws that would otherwise prohibit the actions that the Consent Judgment requires—the transfer of the Confederate monument and UNC’s payment of \$2.5 million. These circumstances, along with the amount of the settlement payment, cause us to question whether the Board acted consistent with its fiduciary duties in approving this Consent Order.

We urge the BOG to carefully consider this information and to take all necessary action to meet its fiduciary obligations to protect UNC’s interests and to recover the 2.5 million dollars to be paid to support a white supremacist organization whose values are antithetical to UNC’s mission.

Our concerns are informed significantly by statements made by the president of the North Carolina Division of the Sons of Confederate Veterans (SCV), Kevin Stone, shortly after the Consent Order was filed. Mr. Stone made the statements in a letter to SCV’s members explaining the negotiations with the BOG. See attached Exhibit 1, “Letter to the Men of the North Carolina Division.” In the letter, Kevin Stone, who signed the Consent Order on the Plaintiff’s behalf, explained how the parties secretly worked together to craft a meritless lawsuit in order to convey possession of the Confederate monument and 2.5 million dollars to a custodial trust for its care.



*Further, we have not allowed the issue of standing to be mentioned in any way in the settlement so as not to hamper any future suits we may have to file regarding other memorials.*

*In addition, the settlement terms specify that we are not setting an automatic judicial precedent for other memorials across the state – this is a special case where the University chose to work uniquely with the SCV and create a carved out exception to the Monument Protection Act that would give us what we want while at the same time preventing any further damage to the law that has yet to be enforced by the state.*

6. The BOG and SCV worked together on a legal theory that would allow disposition of the Monument without implicating N.C. Gen. Stat. 100-2.1 (the “Monument Protection Act”) and avoid negative precedents interpreting that law, and intentionally kept their negotiations secret from the public and even some members of the BOG.

*Prior to this point, we could not mention ANY of this to you at meetings or over the Tar Heel email list because all negotiations were required to be 100% confidential. For their part, knowledge by the media, the leftists, UNC faculty, and even other members of the Board not privy to the negotiations that their leadership was working with the SCV would have torpedoed the whole thing....*

*There have been those who say we’ve ‘lost the respect’ of the BOG, etc. while during this whole time, we were working directly with them and for the honour of our ancestors. What we have accomplished is something that I never dreamed we could accomplish in a thousand years and all at the expense of the University itself. This is a major strategic victory, and I look forward to continuing to move the Division forward.*

The apparent misrepresentations to the court relating to SCV’s standing to bring the lawsuit are particularly disturbing. Mr. Stone signed a verified complaint alleging under oath that the SCV had standing to bring the suit and then sent a letter to his members admitting not only that that claim had no merit, but also that the standing issue was being intentionally concealed from the court. It further appears that the BOG collaborated in concealing the standing deficiency from the court because the BOG needed this agreement to be in the form of a court-ordered agreement so it could circumvent the Monument Act, and other countervailing laws. If the court knew SCV lacked standing, the court would have to dismiss the case for lack of jurisdiction. If the court dismissed the case, the BOG would have no legal means of transferring the monument to SCV along with the \$2.5 million for its maintenance.

Also troubling is that the parties asked the court to approve a Consent Order based on exceedingly faulty legal foundations—legal arguments that would be exposed as frivolous if they were tested through actual adversarial litigation. The legal theory underpinning the Consent Order is that the Monument was a “conditional gift” to non-party UDC. Consent Order, Conclusions of Law, ¶¶9, 11, 12. This legal conclusion is based upon statements made by a UDC member at the unveiling of the Monument, saying “may it stand forever as a perpetual memorial to those sons of the University who suffered and sacrificed so much at the call of duty.” Consent Order, Finding of Fact, ¶32. The Consent Order concludes that UNC’s failure to return the monument to its place after its removal violated that condition and therefore ownership interest in the Monument reverted to the UDC. Consent Order, Conclusion of Law, ¶12.

in the Complaint, even if those claims and allegations were true. This raises substantial concerns about the BOG's compliance with its fiduciary duties and the unlawful disbursement of public funds.

Lastly, N.C.G.S. § 114-2.4 requires that the Attorney General review all proposed settlement agreements of more than \$75,000, and "submit . . . a written opinion regarding the terms of the proposed agreement and the advisability of entering into the agreement, prior to entering into the agreement." It is unclear whether this necessary review by the Attorney General took place before the Consent Order was signed. Notably, while Chancellor Guskiewicz's written statement on December 6 asserts that the settlement agreement was "reviewed and authorized by the Attorney General," at a faculty meeting that same day when asked specifically if the AG's office had approved the settlement, he characterized the AG's involvement differently, stating: "as was indicated in the FAQ that went out today, this went through the UNC system office but the attorney general of North Carolina reviewed and approved the authority for the system office and the board of governors to enter into a settlement agreement."

This is matter of grave public interest, particularly as it concerns the dubious transfer of \$2.5 million in public funds to support the work of a white supremacist organization, apparent improprieties in securing the court's approval of the Consent Order, and serious questions about the BOG's fidelity to its legal, ethical, and fiduciary duties. We therefore respectfully request that you act immediately to take any actions necessary to protect the interests of UNC and to recover the 2.5 million dollars of public funds allocated to expand and perpetuate the racist and destructive "Lost Cause" ideology.

Sincerely,



Jon Greenbaum



Elizabeth Haddix



Mark Dorosin  
LAWYERS' COMMITTEE FOR CIVIL  
RIGHTS UNDER LAW

Encl. Exhibits 1 and 2

Cc w/encl: C. Boyd Sturges III, Attorney for Plaintiff  
Josh Stein, North Carolina Attorney General

us, and UNC.

This we did. We made proposed changes to the Monument Protection Law that would have made it a felony to destroy a monument and that would have closed any loopholes that were left in the law, including enforcement and standing, in the version that was passed in 2015. The trade-off for a stronger law was that Silent Sam would be given to us along with an unspecified amount of funding (presumably between \$300,000 and \$500,000) to locate the memorial as we wished on easily accessible property in the central part of the state where it would be displayed very prominently. One thing that was crystal clear throughout was that Silent Sam would not come back to UNC's campus because of the possibility of casualties tied to ongoing protests and clashes between pro- and anti-monument groups.

With the help of the House leadership, we got enough support there to proceed to the Senate with a draft of a much stronger amended Monuments Law. In the Senate, however, the plan floundered...with the combination of the just-ended budget stalemate and the loss of some more conservative seats in the 2018 elections and thus, with the lack of a super-majority to override a potential gubernatorial veto, they did not have the courage or the heart to make the deal happen. [We will continue to work strongly in the next session for the adoption of this stronger legislation.]

At that point this summer, we were despondent and thought that despite the exorbitant expense and almost certain waste of money and zero chance of winning, we were going to have to instruct our attorney to sue just so we could say we tried honourably.

Thus, our attorney began work on a law suit and informed the Board of Governors that we would be launching major legal action. Because of that, we now announce that today we have indeed filed that legal suit against the Board of Governors and University, and our legal action has immediately met with an offer from them to settle.

As part of that settlement, what we've ended up with is legal possession of Silent Sam, and over \$2 million in a dedicated trust (that we requested) for the perpetual care of Silent Sam and the purchase of land on which to prominently display him, to build a small museum for the public, and to build a comprehensive Division headquarters for the benefit of the membership.

Further, we have not allowed the issue of standing to be mentioned in any way in the

heritage. It is what drives us. This judicial settlement not only will insure the future of Silent Sam, but also the legal and financial support for our continued and very strong actions in the future.

I accept full responsibility for the actions taken by our Attorney, and I am the only person in the Division with full knowledge of these plans. I did this to maintain operational security as previously indicated, and also it was my duty as your elected Commander as I did not want any other men on my staff to suffer if this strategy failed. I was fully within my Constitutional authority to do so, and I believe my actions were and are in the best interests of the Division, the Memorial, and future generations of North Carolinians that will be able to visit and appreciate Silent Sam in a fitting and historically accurate environment and place of Honour.

"To you, Sons of Confederate Veterans, we will commit the vindication of the cause for which we fought. To your strength will be given the defense of the Confederate soldier's good name, the guardianship of his history, the emulation of his virtues, the perpetuation of those principles which he loved and which you love also, and those ideals which made him glorious and which you also cherish. Are you ready to die for your country? Is your life worthy to be remembered along with theirs? Do choose for yourself this greatness of soul?

"Not in the clamor of the crowded street. Not in the shouts and plaudits of the throng. But in ourselves are triumph and defeat."

[General Stephen D. Lee]

We have much to do, and we will continue until victory is ours, for the honour and memory of our ancestors, for our history, and for our children and their legacy.

See you on the front lines...

Kevin Stone

Commander NC Division SCV

DO SUMTHIN'

# WHITEHALL PROFESSIONAL SERVICES

APPRAISALS • CONSIGNMENTS • ESTATE SALES • AUCTIONS  
Merritt Leigh Hampton, ISA, 703 East Franklin Street, Chapel Hill, NC 27514  
919-260-9684, cmlhampton@nc.rr.com

## Appraisal for Replacement Values for Insurance Purposes Prepared for The Historic Properties Department of the University of North Carolina at Chapel Hill Completed January 2006

This appraisal is provided subject to the terms and conditions hereinafter set forth, all of which are a part thereof.

This appraisal was made at the request of the Historic Properties Department (Client) of the University of North Carolina at Chapel Hill and is intended solely for its use. It is not an indication or certification of title or ownership of any of the valued objects. The identification of the interest of the Client is simply that which has been represented to Merritt Leigh Hampton, ISA (Appraiser) by such party and no inquiry or investigation has been made nor is any opinion given as to the truth of such representation.

The Appraiser has no present or contemplated future interest in the appraised items or any interest that would bias the appraisal report. Employment to make the appraisal and compensation for it were not contingent upon values found. The appraisal was based only on the readily apparent identity of the items appraised, and no further opinion or guarantee of authenticity, genuineness, attributions of authorship has been made.

The values noted represent the Appraiser's opinion as to the Replacement Value of the items and are to be used only for the function of obtaining insurance coverage or insurance reimbursement and any other use renders them null and void. The values are based on the whole ownership and possessory interest undiminished by any liens, fractional interests or any other form of encumbrance or alienation. The values expressed herein are based on the Appraiser's best judgment and opinion and are not a representation or warranty that the items will realize that value if offered for sale at auction or otherwise. The values expressed are based on current information and no opinion is hereby expressed as to any future value nor, unless otherwise stated, as to any past value.

Unless otherwise stated herein, values expressed are based on the general expertise and qualifications of the Appraiser as to the appropriate market and valuation for the items and purpose involved. Where an appraisal is based not only on the item, but also on data or documentation supplied herewith, this appraisal shall so state by making reference thereto and, where appropriate, attaching copies hereto. For all objects valued in this appraisal, the Appraiser or a Client-approved agent of the Appraiser personally viewed, examined and counted multiples of where applicable, all appraised items.

Stated values are given per item unless clearly stated as being per lot. The total of individual item values shall not be construed as an appraisal value for the whole lot, but merely as the addition of single values. Where values are given by lot, the value per lot is for the whole and no opinion is given as to individual values. Where the appraisal is based on a sample of a larger whole, it has been so stated and it is based on the assumption that the sample delivered is representative and fair. No opinion or warranty is hereby made as to the fairness or representative nature of any large whole from which the sample was drawn.

Unless expressly stated, the conditions of the items are good for its type with serious deficiencies and repairs noted. Ordinary wear and tear common to the items is not noted. For appraised items that have been damaged, the Appraiser and/or her agent has personally viewed and examined the items after the damage occurred.

The term Replacement Value is to be interpreted as the price at which the item would most commonly be purchased by the public at retail, and within the scope of this appraisal report, consideration is given with regard to artistic merit, quality, desirability, form characteristics and period of execution. As applicable,

# WHITEHALL PROFESSIONAL SERVICES

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Merritt Leigh Hampton, ISA, 703 East Franklin Street, Chapel Hill, NC 27514  
919-260-9664, crnlhampton@nc.rr.com

SIGNATURE ADDENDUM TO THE  
APPRAISAL FOR REPLACEMENT VALUE FOR INSURANCE PURPOSES  
FOR THE HISTORIC PROPERTIES COLLECTION  
OWNED BY THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL

I, David P. Lindquist, American Society of Appraisers Retired, contributed substantially to the identification of the items and the establishment of the values reported in the attached appraisal, and accept responsibility and accountability for said identification and valuations.

Signed: \_\_\_\_\_

David P. Lindquist

Date: \_\_\_\_\_

1/20/06  
January 20, 2006

**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing MOTION TO DISMISS has been served on all parties and/or counsel by U.S. Postal Service, first-class delivery, with a courtesy copy by direct transmission to the electronic mailing addresses shown below:

Ripley Rand  
Womble Bond Dickinson  
555 Fayetteville Street  
Suite 1100  
Raleigh, NC 27601  
Ripley.rand@wbd-us.com

C. Boyd Sturges III  
Davis, Sturges & Tomlinson  
101 Church St.  
PO Drawer 708  
Louisburg, NC  
bsturges@dstattys.com

This the 13<sup>th</sup> day of December, 2019.

  
Mark Dorosin

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

COUNTY OF ORANGE

19-CVS-1579

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THE UNIVERSITY OF NORTH  
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ALYASSA BOYD, DE'IVYION DREW,  
ELISABETH JONES, GINA BALAMUCKI,  
WILLIAM HOLLAND, LILIYA OLIFERUK,  
and MICHELLE ROBINSON,

Defendant-Intervenors.

**ORDER**

THIS MATTER came before the Court upon Defendant-Intervenors Motion to Dismiss, which sought to dismiss Plaintiffs' action pursuant to NC Rule of Civil Procedure 12(b)(1) and 12(b)(6). After reviewing the motion, the pleadings, and the arguments from counsel, the Court finds that Defendant-Intervenors' Motion should be granted as Plaintiffs lack standing to bring this action and Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Defendant-Intervenors' Motion are granted as Plaintiffs lack standing to bring this action and Plaintiffs'



Complaint fails to state a claim upon which relief can be granted and therefore, this action is dismissed with prejudice.

This the \_\_\_\_\_ day of December, 2019.

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Superior Court Judge Presiding