

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

MAGNOLIA GROUP, LLC

PLAINTIFF/COUNTER-DEFENDANT

VERSUS.

CIVIL ACTION NO. 1:13CV317LG-JMR

**O'DWYER REALTY, LLC, MARY BUNCH,
An Individual; LNG INVESTMENTS, LLC, LLOYD NICAUD,
An Individual; AND
GERALD RIGBY, AN INDIVIDUAL**

DEFENDANTS

O'DWYER REALTY, LLC

THIRD- PARTY PLAINTIFF

VERSUS

MACMILLAN GROUP, LLC

THIRD PARTY DEFENDANTS

**ANSWER, DEFENSES AND RESPONSE TO COMPLAINT, CROSS-CLAIMS
AND THIRD PARTY COMPLAINT**

COMES NOW, O'DWYER REALTY, LLC, also called O'Dwyer, and files this, its Answer, Defenses, and Response to Complaint, Cross-Claims and Third-Party Complaint and would show the following to-wit:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief may be granted from this Defendant.

SECOND DEFENSE

Mary Bunch was an independent contractor-sales agent for O'Dwyer Realty, LLC by and through a company known as the Macmillan Group, LLC who was and would have been the only person and entity to notify O'Dwyer Realty, LLC of the matters and things alleged in the Plaintiff's Complaint.

THIRD DEFENSE

Pursuant to Mississippi Code 11-1-65, O'Dwyer Realty, LLC cannot be held liable for punitive damages based on Respondeat Superior.

FOURTH DEFENSE

O'Dwyer Realty, LLC pleads the provisions of the Mississippi Code Annotated 85-5-7.

FIFTH DEFENSE

O'Dwyer Realty, LLC pleads the defenses of Contributory and Comparative Negligence.

SIXTH DEFENSE

O'Dwyer Realty, LLC avers that any award of punitive damages to the Plaintiff will be violative of the Constitutional safeguards provided to and under the Constitution of the State of Mississippi and the Mississippi Code Annotated 11-1-65.

SEVENTH DEFENSE

O'Dwyer Realty, LLC affirmatively pleads that every element of the Plaintiff's claim for punitive damages must be proven beyond a reasonable doubt because without such proof, said claim would violate O'Dwyer Realty, LLC's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution in Article 3, Section 14 of the Mississippi Constitution.

EIGHTH DEFENSE

At all relevant times, O'Dwyer Realty, LLC acted with the degree of care and skill necessary under the circumstances which would bar this claim.

NINTH DEFENSE

The Plaintiff's damages, if any, were caused by superseding and intervening acts for which O'Dwyer Realty, LLC had no control and thus would have no liability.

TENTH DEFENSE

O'Dwyer Realty, LLC did not know or suspect that the Plaintiffs were being treated improperly or being exploited as such terms are defined under Mississippi Law.

ELEVENTH DEFENSE

Plaintiff's damages, if any, were caused in whole or in part by acts of third persons whose activities were not controlled by, supervised by, or otherwise directed by O'Dwyer Realty, LLC and therefore there will be no liability on behalf of O'Dwyer Realty, LLC.

TWELVTH DEFENSE

O'Dwyer Realty, LLC did not make any illegal or improper use of Plaintiffs assets, funds, or resources.

THIRTEENTH DEFENSE

O'Dwyer Realty, LLC had no knowledge that the individual Lloyd Nicaud was a member of LNG Investments, LLC at the time of the conveyance from Magnolia Group, LLC to LNG Investments, LLC. Moreover, this Respondent was informed that the only members of LNG, Investments, LLC were Gerald Rigby and Kenneth Henry.

FOURTEENTH DEFENSE

O'Dwyer Realty, LLC pleads all applicable statutes of limitations and repose, which are a bar to this suit.

FIFTEENTH DEFENSE

This Respondent would assert the Doctrine of Estoppel where applicable.

SIXTEENTH DEFENSE

This Respondent would aver the Doctrine of Waiver of Right to Recover.

SEVENTEENTH DEFENSE

If the Plaintiff suffered any injury or damage as stated in the Complaint, which is denied, the same injury or damages resulted solely from the actions or admissions of the Plaintiff or of

entities other than this Defendant herein, for which this Defendant is in no way liable. Such acts or admissions on the part of others constitute the independent, intervening, superseding and sole proximate cause or proximate contributing cause of any damages of the Plaintiff and therefore the assessment of damages should be apportioned and contributable to the negligence or other fault of such persons or entities.

EIGHTEENTH DEFENSE

The Defendant adopts and incorporates by reference any and all other defenses asserted by and/or raised by any party in this litigation to the extent said defenses are not inconsistent with the position of this Defendant.

NINETEENTH DEFENSE

This Respondent would further assert any and all lawful defenses available to this Defendant at the time of trial and reserves the right to amend the Answer, Response, and Defenses, as additional information becomes available through Discovery or otherwise.

TWENTIETH DEFENSE

This Respondent would aver that in the event that it has failed to respond to any paragraph and/or subparagraph of this complaint, filed against it, then it generally denies same and demands proof thereof.

AND NOW,

ANSWERING paragraph by paragraph,

This Respondent, O'Dwyer Realty, LLC would Answer paragraph by paragraph as follows:

I.

JURISDICTION

The jurisdiction is admitted.

II.

THE PARTIES

- A. This Respondent lacks information and knowledge concerning the allegations of this paragraph and therefore would deny same, and demand strict proof thereof.
- B. Admitted.
- C. Admitted.
- D. Admitted.
- E. Admitted.
- F. Admitted.

III.

FACTUAL CONSIDERATIONS

A. This Respondent would admit that Mary Bunch was a sales agent of O'Dwyer. All other allegations are denied. Affirmatively, O'Dwyer would show that Mary Bunch was hired as an independent sales agent of the company known as the MACMILLAN GROUP, LLC, to prospect, list and sell property for O'Dwyer Realty, LLC. The Macmillan Group, LLC, which was a Mississippi limited liability company, was created in 2007 and dissolved in 2012. The Macmillan Group, LLC was paid Mary Bunch's sales commissions which were earned by Mary Bunch from O'Dwyer Realty, LLC during the time that Mary Bunch had an affiliation with O'Dwyer. This payment arrangement was instituted and created by Mary Bunch. The Macmillan Group, LLC's managing member was Mary Bunch, (See Exhibits 1, 2, 3 & 4, attached herewith and incorporated herein as if fully written, the Mississippi Secretary of State's reports concerning the Macmillan Group, LLC).

B. O'Dwyer admits that Rigby was a principal of Defendant LNG Investments, LLC. but denies the remaining allegations of the paragraph III (B). Affirmatively, O'Dwyer would

show that the principal of O'Dwyer, Avra O'Dwyer, was informed by Bunch that the principals and members of LNG were Gerald Rigby and Kenneth Henry.

C. It is admitted that O'Dwyer Realty, LLC, by and through the Macmillan Group, LLC and Mary Bunch listed the subject property and also admits the remaining allegation of this paragraph.

D. O'Dwyer admits the first two (2) sentences of this paragraph, but this Respondent lacks any information and knowledge concerning the remaining allegations of this paragraph and therefore would deny same and demand strict proof thereof.

E. O'Dwyer admits that all communications concerning the sale of the Bay Tech property were conducted by Bunch, and that O'Dwyer knew that Lloyd Nicaud was the adult son of Bunch. However, this Respondent lacks any information and knowledge concerning the remaining allegations of this paragraph and therefore would deny same and demand strict proof thereof. Furthermore, O'Dwyer was informed by Bunch that there were only two (2) members of the LNG, LLC and that there were Rigby and Henry.

F. Denied and strict proof is demanded. Affirmatively, O'Dwyer would show that it was led to believe that the best interest of the Plaintiff was a conveyance to LNG.

G. 1. Admitted that the property was withdrawn from the MLS service as stated, however, this Respondent lacks any information and knowledge concerning the remaining allegations of this paragraph and therefore would deny and demand strict proof thereof.

G. 2. It is admitted that LNG Investments, LLC did not own the property as of May 1, 2012. All remaining allegations of this paragraph are denied.

G. 3. This Respondent lacked any information and knowledge concerning the allegations of this paragraph at the time of the activities. After careful investigation and review,

since such activities, O'Dwyer has learned that the acts complained of in Paragraph III (G) (3) are accurate and therefore admitted.

G. 4. Admitted.

G. 5. This Respondent lacked any information and knowledge concerning the allegations of this paragraph at the time of the activities. After careful investigation and review, since such activities, O'Dwyer has learned that the acts complained of in Paragraph III (G) (3) are accurate and therefore admitted.

G. 6. Denied and strict proof is demanded.

G. 7. Denied and strict proof is demanded.

G. 8. Denied and strict proof is demanded.

G. 9. Denied and strict proof is demanded.

IV.

LIABILITY

A. Denied and strict proof is demanded.

B. This Respondent lacks information and knowledge concerning the allegations of this paragraph and therefore would deny same, and demand strict proof thereof.

C. Denied and strict proof is demanded. Affirmatively, O'Dwyer's would show that it supervised Bunch and monitored Bunch, but was not informed of the alleged conflicting information. O'Dwyer's agents knew that Nicaud was Bunch's son, however O'Dwyer was not informed, told or knew that Nicaud was involved with LNG until after the conveyance. O'Dwyer was informed the only members of LNG, LLC were Rigby and Henry.

D. Denied and strict proof is demanded. Affirmatively, O'Dwyer would show that O'Dwyer was in compliance with all of the alleged duties stated herein, relied on

Bunch, had no reason not to believe Bunch and was not informed of the family connection with the LLC.

- E. This Respondent lacks information and knowledge concerning the allegations of this paragraph and therefore would deny same, and demand strict proof thereof.
- F. Denied and strict proof is demanded.

V.

DAMAGES

- A. Denied and strict proof is demanded.
- B. Denied and strict proof is demanded.

AND NOW, having fully answered this Respondent, O'Dwyer Realty, LLC would assert a Cross-Claim Against the following:

**CROSS-CLAIMS AGAINST MARY BUNCH, LNG INVESTMENTS, LLC. LLOYD
NICAUD AND GERALD RIGBY**

1.

O'Dwyer Realty, LLC incorporates each and every allegation, answer, defenses and response previously stated herein as if fully written, and further files this Cross-Claim against Mary Bunch, LNG Investments, LLC, Lloyd Nicaud and Gerald Rigby, individually.

2.

O'Dwyer asserts a Cross-claim against Mary Bunch and LNG Investments, LLC, Lloyd Nicaud and Gerald Rigby. Said claims arise from the transactions made a part of the Plaintiff's Complaint against O'Dwyer Realty, LLC, in this action.

3.

At all relevant times herein, the Cross-Plaintiff, O'Dwyer Realty, LLC was informed by Mary Bunch, who worked for Mary Bunch's alter ego-the Macmillan Group, LLC, which was paid commissions by O'Dwyer, LLC on behalf of Mary Bunch, that this was an arms-length transaction. O'Dwyer Realty, LLC had no knowledge that Mary Bunch's son, Lloyd Nicaud was a member of LNG Investments, LLC or that he was involved with LNG. Mary Bunch informed Avra O'Dwyer, the Principal of O'Dwyer Realty, LLC, that LNG Investments, LLC, was owned by Gerald Rigby, and Kenneth Henry. At no time prior to any closing between The Magnolia Group, LLC and LNG Investments, LLC was Avra O'Dwyer advised by Mary Bunch, or a representative of LNG Investments, LLC or any other person that the Bay Waveland School District had any interest whatsoever in the property in question. O'Dwyer Realty, LLC had no knowledge that LNG Investments, LLC or its members would do a "flip of the property" and make a profit from the sale to the School District.

4.

That the acts complained of in the Complaint against Defendants Mary Bunch, Lloyd Nicaud, Gerald Rigby and LNG Investments, LLC, if true, were done secretly, and without any knowledge on behalf of O'Dwyer Realty, LLC, Avra O'Dwyer, as principal, and any other agent or employee of the Respondent, O'Dwyer Realty, LLC.

5.

That the listing of the property for O'Dwyer Realty, LLC was done by and through Mary Bunch, by and through the Macmillan Group, LLC.

6.

That at all times Mary Bunch was the listing agent, and had the only access to the building. The only access to the building, known by O'Dwyer, was by and through Mary Bunch.

7.

That it was not until it became public knowledge of the School District purchase of the building that O'Dwyer Realty, LLC became aware of the interest of the Bay St. Louis/Waveland School District in the Building. Mary Bunch and Macmillan Group had severed its affiliation with O'Dwyer and was now working with another real estate company at the time that it became known by O'Dwyer that the School District had purchased the property.

8.

COUNT ONE

BREACH OF FIDUCIARY DUTY AND MISREPRESENTATION

The Cross-Plaintiff would further assert a claim against Mary Bunch for Breach of Fiduciary Duty to O'Dwyer Realty, LLC, and/or misrepresentation if the allegations alleged in the complaint are found to be true, then Defendant Bunch breached her Fiduciary Duty to O'Dwyer Realty, LLC, and/or misrepresented the facts to O'Dwyer Realty, LLC. O'Dwyer Realty, LLC has suffered damages to be determined through Discovery and at trial.

9.

COUNT TWO

INDEMNITY

That if the acts of the Cross-Defendants MARY BUNCH, LNG INVESTMENTS, LLC, LLOYD NICAUD AND GERALD RIGBY caused the Plaintiff damages which O'Dwyer shall be responsible or accountable to said Plaintiff, then said Cross-Defendants should indemnify and hold O'Dwyer Realty, LLC harmless from any and all damages, cost, fees, and actual or punitive damages so awarded, including O'Dwyer's attorney's fees in this action.

10.

COUNT THREE

GENERAL DAMAGES FOR O'DWYER REALTY

NOW COMES, O'DWYER REALTY, LLC and asserts its claim for actual and compensatory damages, attorney's fees, pre-judgment and post-judgment interest as allowed by law as against the cross-defendant's herein.

AND NOW, O'Dwyer Realty, LLC does hereby file this Third-Party Complaint, and said Third-Party Plaintiff would file an action against the following:

1.

PARTIES

This respondent **O'Dwyer Realty, LLC**, would assert a Third Party Complaint against:

a. The McMillian Group, LLC, can be served with process as required by law.

That McMillian Group, LLC, Third Party Defendant, although dissolved, failed to, and did not comply with the statutory provisions for dissolution, and can be served with process through service on Mary Bunch, or Agent for Service, Lloyd Nicaud, 7714 Moanalua Way, Diamondhead, Mississippi 39525. (See Exhibit 1, 2, 3, & 4 attached herewith and incorporated herein as if fully written, Documents from the Mississippi Secretary of State's Office referencing the Macmillan Group, LLC).

2.

O'Dwyer Realty, LLC incorporates each and every allegation, answer, defenses and response previously stated herein as if fully written, and further files this Third-Party-claim against The McMillian Group, LLC.

3.

O'Dwyer asserts a Cross-Claim against The McMillian Group, LLC, said claims arise from the transactions made a part of the Plaintiff's Complaint against O'Dwyer Realty, LLC, in this action.

4.

FACTS

O'Dwyer Realty, LLC would show that it had no knowledge of who the principals of LNG Investment, LLC were prior to the closing on the Bay Tech Property between the Plaintiffs and LNG Investments, LLC, other than Gerald Rigby and Kenneth Henry. This was conveyed to the principal of O'Dwyer Realty by Mary Bunch directly.

5.

More importantly, Mary Bunch never informed O'Dwyer Realty, LLC that the Bay St. Louis/Waveland School District was interested in the property, had an interest in purchasing the property, had an two (2) appraisals on the property, had inspected the property, nor had any contact with LNG Investments, LLC about the purchase of the property prior to LNG Investments, LLC obtaining title.

6.

COUNT ONE

BREACH OF FIDUCIARY DUTY AND MISREPRESENTATION

The Cross-Plaintiff would further assert a claim against the Macmillan Group, LLC for Breach of Fiduciary Duty to O'Dwyer Realty, LLC, and/or misrepresentation, for which O'Dwyer Realty, LLC has suffered damages to be determined through Discovery and at trial.

7.

COUNT TWO

INDEMNITY

That in the event that O'Dwyer Realty, LLC is found to be liable to the Plaintiff, then this Third-Party Defendant should indemnify and hold O'Dwyer Realty, LLC harmless from any damages to the Plaintiff, including an award for damages, costs, fees, attorney's fees, interest and any other damages sought by the Plaintiff.

8.

COUNT THREE

GENERAL DAMAGES

GENERAL DAMAGES FOR O'DWYER REALTY

NOW COMES, O'DWYER REALTY, LLC and asserts its claim for actual and compensatory damages, attorney's fees, pre-judgment and post-judgment interest as allowed by law.

Wherefore, premises considered, the Respondent herein requests the Court accepts its answer, dismiss all actions against it, allow its Cross-Claims to go against the Defendant and its Third-Party Complaint to go against Cross-Defendants; and award to O'Dwyer Realty, LLC any and all damages it may be entitled to in an action of this nature.

RESPECTFULLY SUBMITTED, this the 6th day of September, 2013.

O'DWYER REALTY, LLC,
Defendant/Cross-Plaintiff/Third-
Party Plaintiff

By: Donald J. Rafferty
DONALD J. RAFFERTY, Attorney for
O'DWYER REALTY, LLC

Law Offices of Donald J. Rafferty, P. A.
2118 18th Street (39501)
Post Office Box 4252
Gulfport, MS 39502-4252
MS Bar No. 4599
PH: (228) 868-5421
FX: (228) 868-5422
donaldr Rafferty@bellsouth.net

CERTIFICATE OF SERVICE

I, Donald J. Rafferty, do hereby certify that I have this day delivered a true and correct copy of the above, foregoing document in a manner prescribed by law to:

Hon. Ben Galloway
Owen, Galloway and Meyers

Hon. Jason Purvis

Hon. Chris Howdesell

This service effective this the 6th day of September, 2013:

- Handing same to said attorney (s)
- Delivering same to the office said attorney(s)
- Depositing a copy thereof in the United States Mail, postage pre-paid and addressed as indicated above.
- Depositing a copy thereof in the United States Mail, certified, return receipt, restricted delivery, address correction requested, postage pre-paid and addressed as indicated above.
- Faxing as well as mailing.
- Electronically via Email as indicated above.
- Electronically filed the foregoing document with the Clerk of the Court using the ECF system with sent notification the above named individual(s) and depositing a copy thereof in the United States Mail, postage pre-paid and addressed as indicated above.

Donald J. Rafferty
DONALD J. RAFFERTY, MS BAR NO. 4599

Law Offices of Donald J. Rafferty, P. A.
2118 18th Street (39501)
Post Office Box 4252
Gulfport, MS 39502-4252
MS Bar No. 4599
PH: (228) 868-5421
FX: (228) 868-5422
donaldr Rafferty@bellsouth.net



Search Results Include Filings Through 08/29/2013 12:00 AM

Search

- [By Business Name](#)
- [By Business ID](#)
- [By Officer Name](#)
- [By Registered Agent](#)
- [New Corporations](#)
- [Annual Report](#)
- [File Corporate Annual Report](#)
- [File LLC Annual Report](#)
- [Verification](#)
- [Verify Certification](#)
- [Online Orders](#)
- [Register for Online Orders](#)
- [Order Good Standing](#)
- [Miscellaneous](#)
- [Look Up an SIC](#)

[Business](#)

[Home](#)

Date: 9/4/2013 [View Filed Documents](#)

Name History

Name	Name Type
The Macmillan Group LLC	Legal
Limited Liability Company - Domestic - Information	
Business ID:	919619
Status:	Dissolved
Creation Date:	9/24/2007
State of Incorporation:	MS
Principal Office Address:	213 ROSE ST. GREENVILLE MS 38701
Listing Address:	No Address

Registered Agent

Agent Name: [Nicaud, Lloyd](#)
Office Address: 724 Dunbar Ave
 Bay St Louis MS 39520

Mailing Address:

[Officers & Directors](#)

[Home](#) | [Accessibility Policy](#) | [Contact Us](#) | [E-mail Us](#) | [Links](#) | [Search](#)

Copyright © 2013 Mississippi Secretary of State. All rights reserved.

Due to the use of DHTML and Java, this Web site is optimized for Microsoft Internet Explorer 5+ or Netscape 6+.

"Eth. 1"



Officers & Directors

- Search
- [By Business Name](#)
 - [By Business ID](#)
 - [By Officer Name](#)
 - [By Registered Agent](#)
 - [New Corporations](#)
 - Annual Report
 - [File Corporate Annual Report](#)
 - [File LLC Annual Report](#)
 - Verification
 - [Verify Certification](#)
 - Online Orders
 - [Register for Online Orders](#)
 - [Order Good Standing](#)
 - Miscellaneous
 - [Look Up an SIC](#)

Name	Title(s)
Mary G Bunch 724 Dunbar Ave Bay St Louis MS 39520	Manager One
Lonagcio Smith 213 ROSE ST. GREENVILLE MS 38701	Member
Lonagcio Smith 213 ROSE ST. GREENVILLE MS 38701	President

[Click here to go back to the Corporation](#)

[Business](#)

[Home](#)

[Home](#) | [Accessibility Policy](#) | [Contact Us](#) | [E-mail Us](#) | [Links](#) | [Search](#)

Copyright © 2013 Mississippi Secretary of State. All rights reserved.
 Due to the use of DHTML and Java, this Web site is optimized for Microsoft Internet Explorer 5+ or Netscape 6+.

"Eth. 2"



Date: 9/4/2013

Search

- [By Business Name](#)
- [By Business ID](#)
- [By Officer Name](#)
- [By Registered Agent](#)
- [New Corporations](#)
 - Annual Report
- [File Corporate Annual Report](#)
- [File LLC Annual Report](#)
 - Verification
- [Verify Certification](#)
 - Online Orders
- [Register for Online Orders](#)
- [Order Good Standing](#)
 - Miscellaneous
- [Look Up an SIC](#)

Current Name: The Macmillan Group LLC

Image	Date	Document
	9/14/2012	Notice to Dissolve/Revoke
	5/14/2011	Annual/Status Report
	10/15/2010	Amendment
	9/24/2007	Creation Filing

[View the images on-line!!](#) Netscape users, use the button.

[Click here to go back to the Corporation](#)

[Business](#)

[Home](#)

[Home](#) | [Accessibility Policy](#) | [Contact Us](#) | [E-mail Us](#) | [Links](#) | [Search](#)

Copyright © 2013 Mississippi Secretary of State. All rights reserved.

Due to the use of DHTML and Java, this Web site is optimized for Microsoft Internet Explorer 5+ or Netscape 6+.

"Eth 3"

F0101 - Page 1 of 2

OFFICE OF THE MISSISSIPPI S

P.O. BOX 136, JACKSON, MS 39205-0136 (601) 359-1333

Certificate of Amendment



The undersigned corporation, pursuant to Senate Bill No. 2395, Chapter 402, Laws of 1994, hereby executes the following Certificate of Amendment and sets forth:

1. Name of the Limited Liability Company

The Macmillan Group LLC

2. The future effective date is (Complete if applicable)

[Empty box]

3. The amendment to the certificate is as follows

To remove Lloyd Nicaud as an officer and member of the company.

[Empty box]

[Empty box]

[Empty box]

[Empty box]

102294244

By: Signature

Mary Burch

(Please keep writing within blocks)

Printed Name

Mary Burch

Title

President/Member

Street and Mailing Address

Physical Address

724 Dunbar Avenue

P.O. Box

[Empty box]

City, State, ZIP5, ZIP4

Bay St. Louis

MS

39520 -

F0101 - Page 2 of 2

OFFICE OF THE MISSISSIPPI SECRETARY OF STATE
P.O. BOX 136, JACKSON, MS 39205-0136 (601) 359-1333
Certificate of Amendment



By: Signature (Please keep writing within blocks)

Printed Name Title

Street and Mailing Address

Physical Address

P.O. Box

City, State, ZIP5, ZIP4

102294244