

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

Appeal from Sumter County

R. Ferrell Cothran, Jr., Circuit Court Judge

Unpublished Opinion No. 2021-UP-009 (S.C. Ct. App. Jan. 13, 2021)

Appellate Case No. 2021-000233

Paul Branco and Branco Investments, Inc.,
d/b/a Great American Cookie Co., ...Petitioners

v.

Hull Storey Retail Group, LLC and Sumter Mall, LLC, ...Respondents.

APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Paul Branco and Branco Investments, Inc., d/b/a Great
American Cookie Co., Respondents,

v.

Hull Storey Retail Group, LLC and Sumter Mall, LLC,
Appellants.

Appellate Case No. 2017-000998

Appeal From Sumter County
R. Ferrell Cothran, Jr., Circuit Court Judge

Unpublished Opinion No. 2021-UP-009
Submitted May 1, 2020 – Filed January 13, 2021

REVERSED

Miles Edward Coleman, of Nelson Mullins Riley &
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Retail Group, LLC, and Appellant Sumter Mall, LLC;
and John M. Markwalter, of Augusta, GA, for Appellant
Hull Storey Retail Group, LLC.

John S. Simmons, of Simmons Law Firm, LLC, of
Columbia, and Patrick McFadden Killen, of McGowan

Hood & Felder, LLC, of Sumter, both for Respondents.

PER CURIAM: Appellants, Hull Storey Retail Group, LLC and Sumter Mall, LLC,¹ appeal from an order of the trial court finding in favor of Respondents, Paul Branco and Branco Investments, Inc. d/b/a Great American Cookie Co., on Respondents' claim of tortious interference with contract. Appellants contend the trial court erred in (1) ruling there was tortious interference with contract when Respondents failed to demonstrate the existence of a valid and enforceable contract; (2) ruling Hull Storey's actions relating to the contract were unjustified; (3) awarding damages in an amount unsupported by any competent evidence; and (4) awarding damages arising from a purported contract that was entered by a then-dissolved corporation that lacked the capacity to transact, or by awarding damages to Paul Branco individually, when he was not a party to the purported contract. Because we find there was not a valid, enforceable contract with which Appellants could have interfered, we reverse.

This case involves a leased space in Sumter Mall by Paul and Anne Branco for the operation of a Great American Cookie Company (GACC) franchise and the subsequent attempt to sell the assets of the business of Branco Investments, Inc. (Branco Investments), to another GACC franchisee, Brooktenn, LLC (Brooktenn), near the expiration of the lease.² After the deal with Brooktenn fell through, Respondents brought this action against Appellants asserting causes of action for breach of contract with fraudulent intent, tortious interference with contract, fraud, and constructive fraud. Appellants answered asserting, among other things, that Respondents' claims were barred, in whole or in part, by the Statute of Frauds; that they were barred "because certain conditions precedent were not met in order for its claims to ripen"; and that "no lease was entered between Brooktenn[] and Hull Storey []." Appellants also counterclaimed for breach of contract asserting that Respondents failed to vacate the premises at the end of the lease on April 30, 2013; did not pay rent after the lease ended; and failed to leave the property in "broom clean" condition as required by the lease. Following a February 28, 2017 bench trial, the trial court filed an order on March 23, 2017, in favor of Respondents on their tortious interference with contract claim, awarding them \$63,625 after certain

¹ Hull Storey Retail Group, LLC (Hull Storey) managed leasing of available spaces on behalf of Sumter Mall, LLC (Sumter Mall).

² The parties and the trial court refer to Paul and Anne Branco and Branco Investments sometimes individually and sometimes interchangeably. For ease of reference in this opinion, we refer to them as Respondents in most instances.

set-offs.³ In anticipation of that order, Appellants filed a motion to amend the order under Rule 52(b), SCRPC, on March 21, 2017. Subsequently, Appellants filed a notice of appeal with this court on April 21, 2017. This court thereafter granted Appellants' motion to remand, holding the appeal in abeyance pending the trial court's resolution of Appellants' motion to amend. Following a February 9, 2018 hearing on Appellants' motion to amend, the trial court filed an amended order of judgment on March 2, 2018, reaffirming its award of \$63,625 to Respondents on their tortious interference with contract claim.

The record reveals as follows. On March 1, 2013, Respondents and Brooktenn entered into an agreement titled "Proposal for Purchase" (the Agreement), which was divided into two parts, setting forth terms and a purchase price of \$70,000 for the GACC store equipment and machinery in Sumter Mall and \$30,000 for the same in another GACC store in Magnolia Mall in Florence. The Agreement provided in regard to the Sumter Mall purchase, "This proposal is contingent upon [Brooktenn] getting a satisfactory lease from Hull Storey [] within 90 days of signed proposal." Following various communications regarding Brooktenn possibly becoming tenants of the GACC store in Sumter, Appellants took the position that Respondents were attempting to assign their soon-to-expire lease with them to Brooktenn, which triggered a provision in the lease requiring Respondents to pay all consideration they received in connection with the assignment to the landlord. Respondents maintained that the Agreement they entered with Brooktenn did not involve a lease assignment and, therefore, no consideration was owed under the provision. Appellants continued to attempt to collect a fee—eventually settling on a price of \$20,000—from either Respondents or Brooktenn. Negotiations stalled and Brooktenn never entered into a lease agreement nor accepted a lease assignment for lease of the Sumter Mall space, which was a necessary condition to the Agreement between Respondents and Brooktenn. Notably, Respondents presented evidence that, around the time Respondents' lease expired, a Hull Storey representative suggested to Brooktenn that Respondents would not be able to remove the equipment covered by the asset purchase agreement from the leased space and that Brooktenn could take over the store with the equipment still in it, pay Appellants \$20,000, not pay Respondents the \$70,000 pursuant to the Agreement, and come out of the deal \$50,000 better.

After considering all the testimony, the trial court determined Respondents had a valid contract with Brooktenn for the sale of assets; Hull Storey had knowledge of

³ The trial court found in favor of Appellants on Respondents' remaining claims, and no appeal has been taken in regard to those matters.

this contract; Hull Storey intentionally interfered with the Agreement resulting in the procurement of its breach; the interference was not justified; and as a result, Respondents were damaged by the lost opportunity to sell assets. While we certainly do not condone Appellants' tactics in this matter, we reluctantly agree with their argument that, based upon the contingency in the Agreement, Respondents failed to demonstrate the existence of a valid and enforceable contract that is necessary for a tortious interference with contract claim.

Standard of Review

"A tort action for damages is an action at law." *Santoro v. Schulthess*, 384 S.C. 250, 259, 681 S.E.2d 897, 901 (Ct. App. 2009). "In an action at law, tried without a jury, the appellate court standard of review extends only to the correction of errors of law." *Pope v. Gordon*, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006). "The trial judge's findings of fact will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or controlled by an erroneous conception of the application of the law." *Id.*

Preservation of All Issues

As an initial matter, Respondents, citing *Wallace v. Milliken & Co.*, 300 S.C. 553, 389 S.E.2d 448 (Ct. App. 1990), *aff'd as modified*, 305 S.C. 118, 406 S.E.2d 358 (1991), contend that none of the issues raised by Appellants on appeal are preserved because Appellants failed to renew what amounted to a Rule 41, SCRPC motion after they presented evidence. They argue that at the close of their evidence Appellants made a motion for a directed verdict, which is inapplicable to a matter tried without a jury, and our courts have recognized that the proper motion under such situation is an involuntary non-suit under Rule 41. After Appellants presented a witness in their case-in-chief, counsel failed to renew their motion. Thus, they argue Appellants waived the right for this court to review any and all arguments raised in this appeal.

In *Wallace*—a retaliatory discharge case in which the trial court found in favor of Wallace after a bench trial—this court stated as follows:

We need not entertain Milliken's contention that the trial judge erred in not granting its motion for involuntary dismissal under Rule 41 of the South Carolina Rules of Civil Procedure and made at the close of Wallace's case. After the trial judge denied its motion, Milliken offered

evidence. In doing so, Milliken waived its right to question on appeal the trial judge's denial of its motion.

300 S.C. at 559, 389 S.E.2d at 451. In so ruling, this court cited *Jones v. American Fidelity & Casualty Co.*, 210 S.C. 470, 43 S.E.2d 355 (1947) for the proposition that "an order erroneously denying a nonsuit will not be set aside where testimony thereafter introduced makes the case sufficient to be considered by the jury." However, this court still addressed Milliken's contention that the evidence was insufficient to support a finding of retaliatory discharge. 300 S.C. at 556, 389 S.E.2d at 450. Thus, this court declined only to address the denial of the involuntary nonsuit on appeal, as such was waived by Milliken's offer of evidence.

Our Rules of Civil Procedure provide:

When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment.

Rule 52(b), SCRCP.

We find no merit to Respondents' argument in this regard. *Wallace* stands for the proposition that a party waives the right, on appeal, to challenge a trial court's denial of a motion for involuntary dismissal under Rule 41, SCRCP, when the party thereafter introduces evidence. Even assuming Appellants' motion for directed verdict was properly considered by the trial court as a motion for dismissal or involuntary non-suit under Rule 41, Appellants are not challenging the denial of this motion by the trial court on appeal. As in *Wallace*, the Appellants here have the right to challenge the sufficiency of the evidence to support the trial court's findings.

Preservation Specific to the Issue

Respondents also challenge the preservation of this issue individually. They assert Appellants' argument that the Statute of Frauds prohibited enforcement of the contract at issue was never raised prior to judgment and, thus, the issue is not preserved. We disagree.

Arguably, even though the trial court did not specifically address Appellants' assertions concerning the Statute of Frauds, the issue is preserved as the trial court ruled Respondents had a "valid contract" with Brooktenn in spite of Appellants' argument to the contrary. The issue of unsatisfied contingencies and the failure of Brooktenn to enter into a lease with them was expressly raised to the trial court. At any rate, even if the specific argument concerning the Statute of Frauds was not ruled upon by the trial court, it is properly preserved because Appellants raised the Statute of Frauds in their answers, argued at trial that the contingency of the Agreement had not been met because Brooktenn had not entered into a lease with them, and again raised the requirement that a lease be in writing to be enforceable in their motion to amend. Thus, Appellants' stated issue on appeal encompasses the theory they raised to the trial court. *See Pye v. Estate of Fox*, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006) ("Generally, an issue must be raised to and ruled upon by the [trial] court to be preserved. . . . However, an exception to this rule exists [when] an issue is raised but not ruled upon at a [motion to amend] hearing."); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("A party *may* wish to file [a motion to amend] when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review."); *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review."); *see also Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring in result in part and dissenting in part) ("[When] the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.").

Failure to Demonstrate a Valid and Enforceable Contract

"The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." *Dutch Fork Dev. Grp. II, LLC v. SEL Props., LLC*, 406 S.C. 596, 604, 753 S.E.2d 840, 844 (2012) (quoting *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993)). "The right to recover for the unlawful interference with the performance of a contract presupposes the existence of a valid, enforceable contract." *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 277, 437

S.E.2d 168, 171 (Ct. App. 1993). The Agreement between Branco Investments and Brooktenn was contingent upon Brooktenn obtaining a "satisfactory lease" from Appellants. As acknowledged by the trial court, Appellants had the right to place conditions on a lease to Brooktenn—such as that they be paid \$20,000.⁴ In fact, Appellants could have denied a lease to Brooktenn for no stated reason. Although there is evidence in the record that Brooktenn had been *approved* for a lease, there is nothing to show that the terms for any lease had been worked out between Appellants and Brooktenn. Further, the evidence indicates Appellants' approval of Brooktenn's lease application was contingent on the payment of \$20,000, which did not occur. However, even assuming that testimony showed Brooktenn had been *approved* for a lease prior to the \$20,000 claim being made such that approval was not contingent on the payment of the money, the record is nonetheless clear that Brooktenn never succeeded in "getting a satisfactory lease" from Appellants as required by the Agreement.

As argued by Appellants, the record is devoid of any written lease agreement entered into between Brooktenn and Appellants. *See* S.C. Code Ann. § 27-35-20 (2007) ("Any agreement for the use or occupation of real estate for more than one year shall be void unless in writing."); S.C. Code Ann. § 32-3-10 (2007) ("No action shall be brought whereby: . . . (4) To charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them . . . [u]nless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized."); *Player*

⁴ The trial court recognized this in its oral ruling during the Appellants' Rule 52 motion. Specifically, the trial court noted that what changed this case for it was the testimony of the Brooktenn representative concerning Appellant's communication to him about taking over the GACC store with equipment Respondents would be unable to move, paying them the \$20,000, and Brooktenn would then save \$50,000. The court then stated as follows:

[T]he problem with the whole thing was the \$20,000 that your client kept insisting that it was an assignment. And that . . . was what threw the monkey wrench in the whole deal, *which I still think was fine*. Your client had a right to argue that, but it wasn't an assignment fee. They could charge [] [Brooktenn] 20-more thousand dollars to lease it. . . .

v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989) ("Any contract for an interest in land or any agreement that is not to be performed within one year must be in writing and signed by the party against whom it is seeking to be enforced."). Finally, the testimony makes clear that no lease for the Sumter Mall space was ever entered into between Brooktenn and Appellants. Because the Agreement was contingent upon Brooktenn "getting a satisfactory lease" and because no such lease was ever obtained, Respondents failed to meet the first element of "existence of a valid contract" with which Appellants could have interfered.

We find support for this in *Chitwood v. McMillan*, 189 S.C. 262, 1 S.E.2d 162 (1939). There, the state highway department awarded a contract to William F. Bowe, Jr. for certain road construction, with the contract including removal of buildings and structures from a right of way. *Id.* at ___, 1 S.E.2d at 162. Bowe then entered into a written agreement with A.B. Chitwood & Son—composed of A.B. Chitwood and his son, M.B. Chitwood—as subcontractors for this work. *Id.* Bowe thereafter sent A.B. Chitwood a letter instructing him it was necessary to enter into a new contract for the work and he would like to see A.B. Chitwood's son about the matter. *Id.* This letter also enclosed a letter sent to Bowe from C.R. McMillan, one of the highway department's engineers, stating that "[i]t will not be satisfactory for Mr. A.B. Chitwood to be connected with this project in any capacity," but it would be satisfactory for the son to do the work. *Id.* at ___, 1 S.E.2d at 162-63. A.B. Chitwood then brought an action against McMillan for unlawful interference with his contractual relations with Bowe, asserting McMillan's actions were actuated by personal malice toward him. *Id.* at ___, 1 S.E.2d at 163. McMillan raised in his defense that if there was such a contract with Bowe, the latter had no authority to enter into the same without first complying with requirements set forth in Bowe's contract with the highway department. *Id.* The contract between Bowe and the highway department provided "that the contract 'shall not be sublet, assigned, or otherwise disposed of, either in whole or in part, except with the written consent of the Chief Highway Commissioner,'" and that before such consent be requested, the contractor was required to "submit evidence that the party to whom it is proposed to make assignment is competent and responsible, together with a statement from the Surety Company concerned showing that the contract bond is authorized to cover all operations and obligations of the proposed assignee." *Id.*

The trial court granted McMillan a non-suit, finding "the subletting was never consented to by the [highway] [d]epartment and hence there was no valid existing contract with which [McMillan] could have interfered subjecting him to liability." *Id.* On appeal, our supreme court found A.B. Chitwood

offered no testimony either that the Chief Highway Commissioner had approved the sub-contract in writing or that Bowe had submitted satisfactory evidence of the competency and responsibility of A. B. Chitwood & Son, or that Bowe had filed a statement from his surety extending the bond coverage to A. B. Chitwood & Son. Nor did he offer to prove that these things would have been done but for the interference of the respondent.

Id. The court affirmed the trial court, holding as follows:

Before any question of liability for procuring a breach of contract arises, certain necessary factors and elements must appear—the first of which is the existence of a valid contract.

It was incumbent upon the appellant, before he could recover in this action, to show that the contract entered into between Bowe and A. B. Chitwood & Son, a partnership, was a valid and existing one, and this, in our opinion, he has failed to do because, admittedly, the validity of such a contract, or subletting, was conditioned and dependent upon the consent in writing of the Chief Highway Commissioner. It is conceded that this consent was never asked for nor given, nor were any of the prerequisites necessary for such consent furnished.

Id. at ___, 1 S.E.2d at 164.

Just as the contract allegedly interfered with in *Chitwood* was conditioned upon an action that never occurred, i.e., consent in writing from the highway department, so was the contract in the instant case conditioned upon an action that never occurred, i.e., Brooktenn securing a "satisfactory lease" from Appellants. Accordingly, as in *Chitwood*, Respondents failed to show the Agreement entered into between them and Brooktenn was a valid, enforceable one.

Plainly put, Respondents did not have a "valid, enforceable" contract in terms of an intentional interference with contract cause of action because it was conditioned upon Brooktenn obtaining a "satisfactory lease." *See Jackson*, 313 S.C. at 277, 437

S.E.2d at 171 ("The right to recover for the unlawful interference with the performance of a contract presupposes the existence of a valid, enforceable contract."). The Agreement was contingent upon Brooktenn entering into a lease with Appellants, Appellants had every right to refuse such a lease or place conditions upon the lease, and Brooktenn apparently found Appellants' lease terms unacceptable. Certainly, we find the testimony concerning Hull Storey encouraging Brooktenn to walk away from the Agreement with Respondents very troubling. As clearly recognized by Brooktenn, this appears to be an underhanded and deceitful way to conduct business. While these facts could, perhaps, support a cause of action for intentional interference with *prospective* contractual relations, based upon the contingency in the Agreement there simply was no valid, enforceable contract with which Appellants could have interfered to support a tortious interference with contract claim. See *Crandall Corp. v. Navistar Int'l Transp. Corp.*, 302 S.C. 265, 266, 395 S.E.2d 179, 180 (1990) (recognizing a cause of action for intentional interference with prospective contractual relations and noting in order to recover on such a cause of action "the plaintiff must prove: (1) the defendant intentionally interfered with the plaintiff's potential contractual relations; (2) for an improper purpose or by improper methods; (3) causing injury to the plaintiff"); *Santoro*, 384 S.C. at 263, 681 S.E.2d at 904 ("[A] cause of action for intentional interference with prospective contractual relations 'generally stands following the loss of an identifiable contract or expectation.'" (quoting *United Educ. Distrib., LLC*, 350 S.C. at 14, 564 S.E.2d at 328)). However, no action for intentional interference with prospective contractual relations was brought. Nor was such tried by consent. Therefore, it would be improper for this court to consider the same.

Because this issue is dispositive of the appeal, we need not address Appellants' remaining issues. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues on appeal when its determination of a prior issue is dispositive).

REVERSED.⁵

HUFF, THOMAS and MCDONALD, JJ., concur.

⁵ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA

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SC Court of Appeals

Paul Branco and Branco Investments, Inc., d/b/a Great American
Cookie Co.,

Respondents,

V.

Hull Storey Retail Group, LLC and Sumter Mall, LLC,

Appellants.

Appeal from Sumter County
R. Ferrell Cothran, Jr., Circuit Court Judge

Unpublished Opinion No. 2021-UP-009

PETITION FOR REHEARING

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Pursuant to Rules 221(a) and 240, SCACR, the Respondents Paul Branco and Branco Investments, Inc., d/b/a Great American Cookie Co. (hereafter "Branco") respectfully move the Court for rehearing and/or to alter its opinion no. 2021-UP-009 of January 13, 2021, which reversed the trial court's order finding in favor of Branco on his claim for tortious interference with contract. Because the Court's opinion overlooks evidence in the record that supports the trial court's findings of fact and conclusions of law, Branco respectfully requests that the Court rehear this matter or alter its opinion to affirm the rulings of the trial court and uphold the judgment. See, e.g., *Brown v. Dick Smith Nissan, Inc.*, 414 S.C. 101, 777 S.E.2d 208 (2015) (reinstating the trial judge's decision where there was evidence in the record to support the findings of fact and the Court of Appeals ignored such findings and substituted its own, thereby exceeding its standard of review); See also *Bass v. SC DSS*, 414 S.C. 558, 780 S.E.2d 252 (2015) (finding that "the Court of Appeals acted outside its limited scope of review" when, "rather than examining the record to discern whether there was any evidence put forward to support the jury verdict, the Court of Appeals seems to have searched the record for evidence to corroborate [the Defendant's] theory of the case.")

I. The Court Overlooked Evidence Which Supports the Existence of A Contract

Despite the well-defined standard of review, the Court instead appears to have disregarded the existence of at least some evidence of a valid contract or, in the alternative, improperly weighed the evidence and decided which evidence (specifically, a contingency provision contained within the contract) was more important. In doing so, the Court's opinion conflicts with the relevant case law and deviates from the standard of review.

On appeal from a bench trial, "the trial judge's findings of fact will not be disturbed . . . if there is **any evidence** to reasonably support his findings." *Meredith v. Mt. Pleasant Boat Bldg. Co.*, 286 S.C. 115, 333 S.E.2d 565 (1985) (emphasis added). "The trial court's findings are equivalent to a jury's findings in a law action." *Hardaway Concrete v. Hall Contracting Corp.*, 647 S.E.2d 488, 374 S.C. 216 (S.C. App. 2007) (internal citations omitted). Thus, the Court's standard of review extends only to correction of errors of law. *Hunt v. Forestry Comm'n.*, 358 S.C. 564, 595 S.E.2d 468 (2003).

The Court's opinion further misapprehends the evidence in the record to support the trial court's judgment; rather than reviewing the record on appeal to determine whether the low bar of "any evidence" to support the ruling was found, the Court appears to have focused solely on a supposedly unmet contingency in the asset purchase agreement, rather than the existence of the asset purchase agreement itself. In short, the Court has overlooked evidence in the record that supports the trial court's finding that a contract - the March 1st asset purchase agreement - existed between Branco and BrookTenn.

Electing to focus on the "red herring" of the lease provision in the asset purchase agreement between Branco and BrookTenn - instead of on the evidence establishing the existence of the asset purchase agreement itself - the Court improperly weighed the evidence. As a result, the Court disregarded the "any evidence" standard and instead elected to ground its opinion on its view of the evidence; namely, that the asset purchase agreement executed by Branco and BrookTenn never existed because an alleged contingency contained therein was not met. This ignores the fact that a valid contract was formed on March 1, 2013, regardless of whether it contained a contingency, as evidenced by the signatures of both parties thereto and the conduct of all involved. R. p. 359. Further, by its plain meaning, the contract was in effect for at least 90 days from the date of execution. The Court appears to ignore at least some evidence that the contingency contained in the asset purchase agreement was, in fact, satisfied, at least as testified to by BrookTenn's representative at trial. R. pp. 154-155.

Finally, the Court ignores the fact that the existence and validity of the contract was acknowledged by the interfering parties - Appellants Hull Storey Retail Group, LLC and Sumter Mall, LLC (collectively "Hull-Storey") - through both their words and conduct, to wit: Hull-Storey, when it learned of the asset purchase agreement, made demand upon Branco and BrookTenn for a "lease assignment fee" in the amount of \$70,000. If the asset purchase contract never existed, as this Court contends, then that necessarily begs the question - why would Hull-Storey assert it was owed additional monies as a result of the asset contract? R. pp. 155-157. Why would Hull-Storey contact BrookTenn and suggest it break its agreement with Branco? R. pp. 129-131; p. 157; p.160; pp. 360-362; pp. 378-379.

"[W]hen the existence of a contract is disputed or its terms are ambiguous, evidence that a party complied with the terms of the alleged contract or acted in conformity therewith is relevant

and admissible on the issues of the contract's existence, the meaning of its terms, and whether the contract was breached . . . A contract may arise from actual agreement of the parties manifested by words, oral or written, or by conduct.” *Conner v. City of Forest Acres*, 611 S.E.2d 905, 363 S.C. 460 (S.C. 2005) (internal citations omitted); See also *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 303, 468 S.E.2d 292, 300 (1996) (contract may be based on verbal understanding to which both parties have mutually assented and upon which both are acting); *Gaskins v. Blue Cross-Blue Shield of S.C.*, 271 S.C. 101, 105, 245 S.E.2d 598, 600 (1978) (“agreement” does not necessarily import any direct or express stipulation, nor is it necessary that it should be in writing; if there is verbal understanding to which both parties have assented, and upon which both are acting, it is an agreement).

A. The Court’s Reliance Upon *Chitwood v. McMillan* is Misplaced

The evidence in the case is that Branco decided not to renew its 10-year lease at the Sumter Mall and, instead, entered into an agreement to sell his assets to BrookTenn by way of a wholly separate asset purchase agreement, such contract containing certain performance requirements for BrookTenn. The Court’s reliance upon *Chitwood v. McMillan*, 189 S.C. 262, 1 S.E.2d 162 (1939) is thus in error, as the facts presented in *Chitwood* are wholly distinct from those here.

In *Chitwood*, a contract was entered into between SCDOT and Mr. Bowe for work to include, but not limited to, the removal of homes and structures from the right of way. Mr. Bowe subsequently entered into a subcontract with Chitwood to perform the removal work only and notified the SCDOT of same. SCDOT thereafter notified Mr. Bowe that it would not authorize Chitwood to work on the project and sent a letter advising of same. Chitwood thereafter brought suit against SCDOT, asserting a claim for intentional interference with his subcontract.

The Supreme Court, in affirming the trial court’s granting of a nonsuit in favor of SCDOT, found that Mr. Bowe was forbidden, pursuant to the terms of his contract with SCDOT, from entering into any subcontract without first obtaining written consent from SCDOT (which he failed to do). Here, the expiring Lease Agreement contains no such prohibition against Branco entering into a contract to sell his business (as well there would not be, as no business owner would agree to have their landlord dictate when or if the assets of his business could be sold) and the Asset Purchase Agreement was separate and distinct from the lease agreement. Accordingly, the Court’s reliance upon *Chitwood* is wholly inapposite, as *Chitwood* involved an underlying contract that

contained express terms forbidding subcontracts without prior approval. Here, there was no subcontract, nor did the mall's lease contain any prohibition against the sale of a privately held business.

Hull-Storey's sole involvement in the asset purchase transaction could have only occurred if Branco elected to try to assign or sublet the lease.¹ With no evidence in the record of any attempt to assign and/or sublet the existing lease - and at least some evidence in the record that BrookTenn had an asset purchase contract with Branco and had separately entered into an agreement for a lease with Hull-Storey, the Court of Appeals substituted its view of the evidence for that of the trial court in finding that the asset purchase contract was essentially rendered void for failure of Brooke Tenn to obtain a lease. See, e.g., Collins Entertainment Corp. v. Coats, et al., 355 S.C. 125, 584 S.E.2d 120 (Ct. App. 2003) (affirming trial court's finding that there was sufficient evidence of the existence of a contract even though the signatory differed, and further, the actions of the relevant parties served to ratify the contract).

For all of these reasons, the Court should grant this Petition for Rehearing and reconsider its decision overturning the findings of the trial court.

II. The Court Addressed an Issue that the Trial Court did not Address

The Court should reconsider its decision because it addressed an issue that the trial court did not address – namely, that because there was no written lease agreement entered into between BrookTenn and Hull-Storey, allegedly in violation of the Statute of Frauds, the underlying asset

¹ In fact, the record reflects that this case is not – and never was - about the enforcement of the assignment and subletting provision contained in section 16.1 of the Lease. R. p. 330. There is no evidence in the record that Branco elected to exercise his rights to assign or sublet under the Lease Agreement; indeed, Hull-Storey acknowledged as much in its briefing, admitting that Hull-Storey's demand for a lump sum payment was the result of its legitimate – but mistaken – view of a contractual right to a lease assignment payment, based upon its “perception” that the asset purchase agreement was an “end run” to attempt to avoid having to pay a lease assignment payment. App. Br. at p. 17. BrookTenn's representative testified that he was never getting an assignment. R. p. 88. In fact, his testimony was that the first he heard of the assignment provision was when he received an email on April 30, 2013 from Hull-Storey. R. p. 90; R. pp. 366-372. It was for the trial court to weigh and consider the credibility of this testimony. See, e.g., Okatie River v. Southeastern Site Prep, 353 S.C. 327, 577 S.E.2d 468 (Ct. App. 2003) (“Credibility determinations regarding testimony are a matter for the finder of fact, who has the opportunity to observe the witnesses, and those determinations are entitled to great deference on appeal.”)

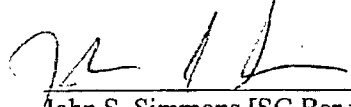
purchase agreement was a nullity. Because the trial record is devoid of any argument as to the Statute of Frauds – and Hull-Storey raised this argument for the first time in its post-trial motion for reconsideration – the Court should decline to consider this argument.

“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.” *Atl. Coast Builders v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012) (internal citations omitted). In this case, the trial court never ruled on the merits of the statute of frauds defense and this Court should refrain from doing so on appeal. See, e.g., *Semken v. Semken*, 379 S.C. 71, 664 S.E.2d 493 (Ct. App. 2008) (declining to address an additional sustaining ground because “it would be unfair to [Respondents] because this argument was not presented to the [lower]court”, [t]he parties never mentioned or discussed” the argument made for the first time on appeal, and the court “may ignore any such arguments”); See also *Cowburn v. Leventis*, 366 S.C. 20, 619 S.E.2d 437 (Ct. App. 2005) (declining to review an additional sustaining ground where “the issue was not argued to the trial court”).

Conclusion

This Opinion fails to address the entire record before the Court and deviates from the applicable standard of review. By disregarding evidence in the record that supports the trial court’s findings of fact and rulings of law, the Court of Appeals erred in reversing the judgment of the trial court. By solely focusing on the alleged contingency provision in the asset purchase agreement – instead of on the existence of the asset purchase agreement itself - the Court failed to acknowledge the existence of at least *some* evidence of a valid contract. Accordingly, Petitioners respectfully request that this Court grant this Petition and, upon further review, withdraw its opinion; address all the evidence in the record; and affirm the trial court’s judgment in this matter.

-Signature Page to Follow-



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Dated: Jan 26, 2021

RECEIVED

Jan 26 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Paul Branco and Branco Investments, Inc., d/b/a Great American
Cookie Co.,

Respondents,

V.

Hull Storey Retail Group, LLC and Sumter Mall, LLC,

Appellants.

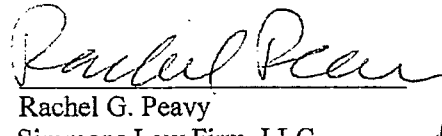
Appeal from Sumter County
R. Ferrell Cothran, Jr., Circuit Court Judge

Unpublished Opinion No. 2021-UP-009

PROOF OF SERVICE

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The South Carolina Court of Appeals

Paul Branco and Branco Investments, Inc., d/b/a Great
American Cookie Co., Respondents,

v.

Hull Storey Retail Group, LLC and Sumter Mall, LLC,
Appellants.

Appellate Case No. 2017-000998

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Huff

J.

Paul W. Roman

J.

Stephanie P. McDonald

J.

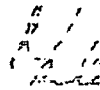
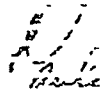
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FILED
Feb 03 2021

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The Honorable R. Ferrell Cothran, Jr.



THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
R. Ferrell Cothran, Circuit Court Judge

Appellate Case No. 2017-000998
Civil Action No. 2015-CP-43-596

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SC Court of Appeals

Paul Branco and Branco Investments,
Inc., d/b/a Great American Cookie Co., ... Respondents,

v.

Hull Storey Retail Group, LLC, and
Sumter Mall, LLC..... Appellants.

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INTRODUCTION

This appeal raises a simple question of law: can one be liable for tortious interference with contract when there is no valid contract with which to interfere? Plaintiffs Paul Branco and Branco Investments, Inc. allege Sumter Mall, LLC and Hull Storey Retail Group, LLC tortiously interfered with Branco Investments' contract with a third party for the sale of certain equipment and assets. The supposed contract, however, was only a proposed purchase agreement that was expressly made contingent on the satisfaction of certain conditions. Those contingencies were never satisfied, and thus there was no valid contract with which Sumter Mall and Hull Storey could interfere. Accordingly, they cannot, as a matter of law, be liable for tortious interference with contract.

Alternatively, even assuming, *arguendo*, that the proposed purchase agreement was a valid and enforceable contract, Sumter Mall's and Hull Storey's allegedly wrongful conduct—namely, attempting to negotiate lease terms to increase the revenue they generated from a property they owned and managed—was a justifiable assertion of their right, and thus cannot constitute a tortious interference with contract.

Furthermore, the damages amount awarded by the trial court was not supported by competent evidence but, rather, was based solely on Paul Branco's admittedly unsupported, wholly subjective, and speculative conjectures about what the assets at issue were worth to him. Indeed, any award of damages was improper because the party who purported to enter the supposed "contract"—Branco Investments, Inc.—was, at the time of the transaction and at the time it filed this lawsuit, in forfeiture of its corporate status and thus lacking the legal ability to enter the transaction or bring suit. Finally, even assuming there was a contract, interference, and a compensable injury (all of which are assumptions that, as explained below, are contrary to law and/or the facts of this case), the trial court erred by awarding damages to Paul Branco, who was not a party to the purportedly breached "contract" on which the trial court's award of damages was based.

STATEMENT OF THE ISSUES ON APPEAL

1. Did the trial court err by ruling Hull Storey was liable for tortious interference with contract when plaintiffs Paul Branco and Branco Investments, Inc. failed to demonstrate the existence of a valid and enforceable contract and thus failed to satisfy their burden of establishing an essential element of the claim?
2. Even assuming, *arguendo*, that a valid contract existed, did the trial court err by ruling Hull Storey's actions relating to that contract were unjustified?
3. Did the trial court err by awarding damages in an amount unsupported by any competent evidence but, rather, based solely on Plaintiffs' unsupported, subjective, and speculative assertions?
4. Did the trial court err by awarding damages arising from a purported contract that was entered by a then-dissolved corporation that lacked the capacity to transact, or by awarding damages to Paul Branco individually, when he was not a party to the purported contract?

STATEMENT OF THE CASE

Plaintiffs Paul Branco and Branco Investments, Inc. filed this lawsuit on March 5, 2015, asserting causes of action for (i) Breach of Contract with Fraudulent Intent, (ii) Tortious Interference with a Contract, (iii) Fraud, and (iv) Constructive Fraud. *See* Compl. (R. 17–26). Sumter Mall, LLC filed its Answer on April 14, 2015, denying the allegations of wrongdoing, asserting two counterclaims, and asserting eight affirmative defenses, including the Statute of Frauds. *See* Answer of Sumter Mall (R. 27–33). Hull Storey Retail Group, LLC likewise filed its Answer on April 14, 2015, denying the allegations of wrongdoing and asserting ten affirmative defenses, including the Statute of Frauds. *See* Answer of Hull Storey (R. 34–38).

Hull Storey filed a Motion for Judgment on the Pleadings on September 27, 2016. *See* Mot. for J. (R. 39–45). Judge Cooper conducted a hearing on the motion on November 28, 2016, and, on December 15, 2016, denied the motion. *See* Tr. of Nov. 28, 2016 hearing (R. 54–69); Order Denying Mot. for J. (R. 16). Plaintiffs' claims were tried in a bench trial before Judge Cothran on

February 28, 2017. *See* Trial Tr. at 1–220 (R. 70–288). At the conclusion of the bench trial, Judge Cothran took the matter under advisement.

A few weeks later, the trial court emailed to the parties' counsel a draft of the order the court intended to file. In response, on March 21, 2017, Hull Storey filed a Motion to Amend. *See* Mot. to Amend (R. 46–53). Two days later, the trial court filed its order, which was substantively identical to the draft it had previously circulated. *See* Order of J. (R. 10–15). The Order ruled in Plaintiffs' favor on the claim for tortious interference with a contract, ruled in Defendants' favor on the other causes of action, and ruled in Plaintiffs' favor on Hull Storey's counterclaims. *See id.* at 4–5 (R. 13–14). Notably, the trial court awarded judgment for Paul Branco individually. *See* Order of J. at 1, 3, and 5 (R. 10, 12, and 14) (awarding judgment and \$63,625 in damages to “the plaintiff,” which the Order defined as “Paul Branco”);¹ *see also* Circuit Court docket entry (R. 387) (noting judgment was awarded for “Branco, Paul”).

The trial court did not schedule a hearing on the Motion to Amend, nor did it express any indication of whether and when it might set a hearing or rule on the motion. Accordingly, out of an abundance of caution Hull Storey timely filed its Notice of Appeal on April 21, 2017. Hull Storey subsequently moved this Court to remand the case, without prejudice to refile the appeal, to allow the trial court to consider and rule upon the pending post-trial motion. On August 28, 2017, this Court granted the motion.

¹ The trial court arrived at this damages amount by taking \$70,000 (the revenue Branco allegedly lost as a result of the disruption of the supposed contract with Brooktenn) and reducing it by \$5,000 (which Branco recouped by selling to another entity some of the equipment that Brooktenn proposed to buy) and reducing the remaining amount by \$1,375 for the 15 days post-lease expiration during which Hull Storey and Sumter Mall allowed Branco to remain in the store without paying rent. *See* Order of J. at pp. 3 and 5 (R. 12 and 14).

Judge Cothran held a hearing on the post-trial motion on February 9, 2018, and filed an Amended Order of Judgement on March 2, 2018. *See* Hearing Tr. at 1–29 (R. 290–318); Amend. Order of J. (R. 1–9). The Amended Order reached the same outcome as the trial court’s earlier Order of Judgment, but included a slightly lengthier analysis of the claim for tortious interference with contract. As with the earlier Order, the trial court awarded judgment and damages to Paul Branco individually. *See* Amend. Order of J. at 1, 4, and 7 (R. 1, 4, and 7) (awarding judgment and damages to “the plaintiff,” which the Order defined as “Paul Branco”); *see also id.* at 7 (R. 7) (stating that as a result of Hull Storey’s supposed interference, “Branco lost the opportunity to sell his assets) (emphasis added). Hull Storey timely filed its Notice of Appeal.

STATEMENT OF THE FACTS

Sumter Mall, LLC owns the Sumter Mall, a retail shopping mall in Sumter, South Carolina. *See* Complaint at ¶ 3 (R. 21). Hull Storey Retail Group, LLC manages the mall on behalf of Sumter Mall, LLC. *See id.* at ¶¶ 2 and 4 (R. 3); Trial Tr. at 9:8–15 (R. 78). Both Sumter Mall and Hull Storey are Georgia Limited Liability Companies authorized to conduct business in South Carolina. *See* Answer at ¶¶ 2–3 (R. 28). This appeal arises from the lease of a storefront in the Sumter Mall.

I. The Brancos’ 2002 lease, and their efforts in 2012–13 to renew or transfer the lease.

On or about December 30, 2002, Paul Branco and Anne Branco entered into a lease with Sumter Mall, LLC to operate a Great American Cookie (“GAC”) franchise store and a Pretzel Time store in Unit 55 of the Sumter Mall. *See* Trial Tr. at 10:25 to 11:1–8 and 12:23–25 (R. 79–81); Pl.’s Trial Ex. 1 at p.1 (R. 321). The lease term was for ten years. *See* Trial Tr. 12:10–14 and 14:16–21 (R. 81 and 83); Pl.’s Trial Ex. 1 at p.1 (R. 321). Initially, the lease was to expire on April 30, 2013. *See* Trial Tr. 15:3–5 (R. 84). On April 30, 2013, Appellants extended

the Brancos' lease term to May 15, 2013. *See* Trial Tr. 189:14–23 (R. 258); Pl.'s Trial Ex. 8 (R. 366). The Brancos operated the GAC store in Unit 55 of the Sumter Mall from December 30, 2002 until May 15, 2013. *See* Amend. Order at 1 (R. 1). The Brancos also operated a second GAC store at the Magnolia Mall in Florence, South Carolina. *See* Trial Tr. 8:22–24 (R. 87).

In September of 2012, as the end of the Brancos' lease term drew near, Paul Branco engaged in discussions with Hull Storey's leasing representative, Lewis White,² regarding the potential renewal or extension of the lease of Unit 55 in the Sumter Mall. *See* Trial Tr. at 118:10–20, 119:23–25, 120:1–15, 121:12–17, 177:11–13, and 177:18–20 (R. 187–90 and 246); Pl.'s Trial Ex. 2 at pp. 1–2 (R. 347–48). Branco and White's preliminary discussions envisioned Branco's daughter taking over the lease of Unit 55 to operate a GAC store in the Sumter Mall. *See* Trial Tr. at 16:12–16 (R. 85); *id.* at 120:20–21 (R. 189). White indicated Hull Storey would be agreeable to this idea so long as Branco signed as a guarantor of his daughter's proposed lease. *Id.* at 20:1–15 (R. 89); Pl.'s Trial Ex. 3 at p. 1 (R. 357); Amend. Order of J. at 1–2 (R. 1–2). Although Hull Storey's proposal provided Branco's daughter with an opportunity to continue the family business by assuming occupancy and operating a GAC store in Unit 55 of the Sumter Mall, Branco rejected the idea because it was "critical" to him that he not act as a guarantor for his daughter. *See* Trial Tr. at 20:10–11 (R. 89); Amend. Order of J. at 2 (R. 2).

² White is a leasing representative for Hull Storey and had been so employed for approximately five-and-a-half years at the time of trial of this matter. *See* Trial Tr. at 175:14–19 (R. 244). White's responsibilities, as a leasing representative for Hull Storey, included leasing available spaces in shopping centers and malls and negotiating terms of leases, renewals, and assignments with tenants. *Id.* at 176:14–24 (R. 245). In September of 2012, White's duties included marketing available space within the Sumter Mall. *Id.* at 177: 2–5 (R. 246).

Branco continued in conversation and negotiations with White regarding a lease renewal. *See* Trial Tr. at 178:10–13 (R. 247). In September of 2012, White forwarded Branco a proposal for a five-year lease. *Id.* at 178:17–24 (R. 247). Negotiations were still ongoing in November of 2012, *see id.* at 179:8–24 (R. 248); Pl.’s Trial Ex. 2 at p. 2 (R. 348), and discussions about a lease renewal continued into 2013. *See* Trial Tr. at 180:9–20 (R. 249) (noting that on January 31, 2013, White and Branco were still negotiating a lease renewal of Unit 55 of the Sumter Mall, and that on that date, White provided Branco a lease renewal spreadsheet for GAC); *see also* Pl.’s Trial Ex. 2 at p. 9 (R. 355).

By early 2013, White was also contemplating marketing Unit 55 to other potential tenants. *See* Trial Tr. at 180:25 and 181:1–3 (R. 249–50). And although White and Branco appeared to be close to reaching an agreement on terms that Hull Storey’s real estate committee had authorized, White testified the parties did not have a “legal document or lease amendment memorializing the terms.” *Id.* at 180:1–3 (R. 249).

II. Branco Investments, LLC’s negotiation and execution of a contingent Proposal for Purchase with Brooktenn, LLC.

Meanwhile, unbeknownst to White and Hull Storey, in January 2013, Mr. Branco—on behalf of Branco Investments, LLC, which owned the equipment and other assets in the GAC stores in the Sumter and Florence malls—was engaged in discussions with Brooktenn, LLC (“Brooktenn”), a Georgia Limited Liability Company owned by Stewart Applebaum, about a possible transaction wherein Brooktenn would purchase Branco Investment’s assets located in the Florence and Sumter GAC stores. *Id.* at 20:24–21:16 (R. 89–90); *see also id.* at 180:14–20, 182:4–6, and 183:15–24 (R. 249, 251, and 252) (noting that as of January 31, 2013, Hull Storey was still negotiating with Branco and planning on him renewing the lease, and that

Branco had not yet informed Hull Storey he was negotiating with a third party to take over the store).

Although Branco was simultaneously negotiating a lease renewal with Hull Storey and a possible sale to Applebaum, neither Branco nor Applebaum disclosed to Hull Storey that Brooktenn intended to operate the store in the Sumter Mall. *See id.* at 105:7–11, 180:14–20, 182:4–6, and 183:15–24 (R. 174, 249, 251, and 252). Indeed, Branco deliberately refrained from informing White until sometime late in the first quarter of 2013 that Branco was in discussions with another operator about possibly taking over the space. *Id.* at 105:7–11 and 183:14–24 (R. 174 and 252). At that time, Branco informed White that the new operator would be another Great American Cookie franchise operator named Stewart Applebaum. *Id.* at 184:10–13 (R. 253). White testified that based on the limited information Branco gave him, and based on Branco's strategy of simultaneously negotiating a lease renewal and a potential sale of the franchise, Hull Storey's understanding was that the potential new GAC operator would come in via a lease assignment in the future. *Id.* at 186:20–187:6 (R. 255–56).

On March 1, 2013, Branco Investments and Brooktenn entered into a conditional agreement—titled a “Proposal for Purchase”—whereby Brooktenn would purchase the equipment and other assets owned by Branco Investments and located in the GAC stores in the Sumter and Florence malls. *See Trial Tr.* at 20:24–25, 21:1–2, 21:21–25, 22:1–5, 22:22–25, and 23:1–8 (R. 89–92); *Pl.’s Trial Ex. 4* (R. 359). The proposed agreement was expressly conditioned upon Brooktenn obtaining a satisfactory lease from Hull Storey for the Sumter Mall within 90 days after the proposed agreement was signed. *See Pl.’s Trial Ex. 4* (R. 359)

("This proposal is contingent upon Buyers getting a satisfactory lease from Hull Storey Gibson within 90 days of signed proposal.");³ *see also* Trial Tr. at 27:1-8 (R. 96).

The proposed purchase agreement indicates Branco and Applebaum understood and expected that Branco Investments and Brooktenn would be required to pay Hull Storey a transfer fee in order to transfer the operations of the GAC stores to Brooktenn and to allow Brooktenn to occupy the Sumter Mall. *See* Pl.'s Trial Ex. 4 (R. 359) (listing a line item for a "Mall Transfer Fee.....to be split 50/50 with seller (not to exceed \$2,500 for Seller)"); Trial Tr. at 24-25 and 92-95 (R. 93-94 and 161-64).⁴

III. Hull Storey's understanding of and response to the Proposal for Purchase.

As noted above, based on the limited information Branco disclosed to White about the potential sale to Brooktenn, and based on the fact that Branco continued negotiating a lease renewal even *after* disclosing that information to White, Hull Storey determined the proposed transaction between Branco Investments and Brooktenn contemplating Brooktenn's occupancy and operation of the GAC store in the Sumter Mall would be an assignment of Branco's lease of that space. *See* Trial Tr. at 185:3-187:6 and 190:13-25 (R. 254-56 and 259); *see also id.* at 104:20-106:19 (R. 173-75) (Applebaum admitting that months prior to Hull Storey's awareness of Applebaum's involvement, while Mr. Branco was negotiating his lease renewal with Hull Storey, Mr. Branco had shared with Applebaum the lease renewal proposal he planned to send Hull Storey and asked Applebaum to review and provide feedback on it).

³ The Proposal is also expressly conditioned on Brooktenn obtaining a lease from the lessor of the Florence Mall within 90 days. *See* Pl.'s Trial Ex. 4 (R. 359) ("This proposal is contingent upon Buyers getting a satisfactory lease from PREIT within 90 days of signed proposal."). Applebaum admitted Brooktenn never obtained or sought to obtain lease approval in Florence. *See* Trial Tr. at 96:5-7, 96:23-25, 99:5-7 (R. 165 and 167).

⁴ The Proposal for Purchase likewise contemplates a transfer fee to be paid to the franchisor. *See* Pl.'s Trial Ex. 4 (R. 359) ("GFG Transfer Fee.....to be paid for by Seller").

Shortly after learning of the proposed transaction, White sought more information from Branco about it. *See id.* at 185:3–186:19 (R. 254–55); Pl.’s Trial Ex. 7 (R. 365) (March 25, 2013 email from White asking Branco for information regarding the proposed store transfer to Brooktenn). In response, Branco informed White that the Proposal for Purchase offered to sell the Sumter Mall store to Brooktenn for \$70,000.00, of which \$45,000 was for Branco’s interest in the leasehold, and the \$25,000.00 balance was for Branco Investment’s equipment and inventory. *See* Trial Tr. at 198:4–9 (R. 267).⁵ Not surprisingly then, Hull Storey believed the proposed transaction amounted to Branco selling the leasehold interest to Brooktenn. *See id.* at 192:2–11 (R. 261). Accordingly, Hull Storey informed both Branco and Applebaum that it viewed the proposed arrangement between Branco Investments and Brooktenn as a lease assignment requiring either Branco or Brooktenn to make a payment to Hull Storey pursuant to section 16.2 of the lease. *Id.* at 86:24–87:7, 87:25–88:9, and 192:2–8 (R. 155–57 and 261).

In keeping with this view, on April 30, 2013, White emailed Branco and Applebaum extending Branco’s lease until May 15, 2015 and attaching a draft assignment and assumption of the subject lease. *Id.* at 46:6–13, 51:2–9, and 189:10–23 (R. 115, 120, and 258); Pl.’s Trial Ex. 8 at p.1 (R. 366). Neither Branco, Applebaum or Brooktenn executed the draft lease assignment agreement provided by White.⁶ *See* Trial Tr. at 190:16–17 (R. 259). Furthermore,

⁵ The Proposal for Purchase proposed a \$100,000 purchase price for both stores, allocating \$70,000 to the sale of the Sumter Mall store and its equipment and inventory, and allocation \$30,000 to the sale of the Florence Mall store and its equipment and inventory. *See* Pl.’s Trial Ex. 4 (R. 359). At trial, Branco effectively conceded this allocation was an arbitrary way of dividing up the total amount without any real rhyme or reason. *See* Trial Tr. at 127:16–25 and 166:3–10 (R. 196 and 235).

⁶ A review of the record confirms that this draft “Assignment, Assumption, Amendment and Ratification of Lease Agreement,” which was admitted into evidence in the trial of this matter as Plaintiff’s Exhibit 8, is the only written document drafted between Sumter Mall, LLC and Brooktenn, and no other written document purporting to be a lease between Hull Storey or Sumter Mall, LLC and Brooktenn has been proffered at any time.

Brooktenn never executed a lease with Sumter Mall and/or Hull Storey. *See* Amend. Order of J. at 2 (R. 2) (noting that a “lease agreement between Hull Storey and Brooktenn was never executed”).

The draft assignment and assumption that White sent to Branco and Applebaum was not as demanding as Hull Storey could have been under the terms of Branco’s existing lease. Specifically, section 16.2 of the Brancos’ lease that was then in force states that the *entirety* of any lease assignment fees received by the Brancos is payable to Landlord. *See* Pl.’s Trial Ex. 1 at § 16.1 (R. 330). Here, the Proposal for Purchase contemplated a transaction for \$70,000.00, of which Branco told White \$45,000 was for the leasehold interest. *See* Trial Tr. at 198:4–9 (R. 267). White, however, proposed an assignment and assumption that permitted Brooktenn to assume occupancy of Unit 55 and operate a GAC store upon payment of only \$20,000.00. *See* Trial Tr. at 45:6–14, 48:17–22, and 191:6–19 (R. 114, 117 and 260); Pl.’s Trial Ex. 8 at p.2 (R. 367). Several days before sending this draft assignment and assumption, White told Branco that Hull Storey’s real estate committee had approved this proposal, and, consistent with the document he subsequently sent, “Stewart’s deal has been approved *if we can determine a way to come up with 20,000.*” *See* Trial Tr. at 195:1–25 (R. 264) (emphasis added); Pl.’s Trial Ex. 5 at 2 (R. 361).

Both Branco and Brooktenn rejected Hull Storey’s and Sumter Mall’s proposal requiring payment of \$20,000.00 for Brooktenn to assume occupancy of Unit 55 and operate a GAC store there. *See* Compl. at ¶ 10 (R. 22); Trial Tr. at 87:25 and 88:1–11 (R. 156–57); Pl.’s Trial Ex. 12 (R. 378). Neither Branco nor Brooktenn made any sort of counteroffer regarding the issue of Brooktenn taking over Branco’s space, *see* Trial Tr. at 192:15–23 (R. 261), and Brooktenn never entered *any* lease agreement with Sumter Mall and/or Hull Storey as required by the Proposal for

Purchase, *id.* at 190:5–7, 191:22–24, and 193:2–6 (R. 260 and 262); Amend. Order of J. at 2 (R. 2) (noting a “lease agreement between Hull Storey and Brooktenn was never executed”).⁷ Applebaum testified that at some point following his and Branco’s refusal to sign the draft assignment and assumption,⁸ White told him orally that Branco Investments would be hard pressed to remove the equipment in Unit 55 and thus, if the proposed asset sale never materialized, Applebaum could simply obtain a lease from Hull Storey—including the \$20,000 up-front payment—and could likely take occupancy of Unit 55 with some equipment already in place. *See* Trial Tr. at 91:1–23 (R. 160). Applebaum—whose failure to obtain a lease with Hull Storey had already torpedoed his proposed agreement with Branco Investments—interpreted this suggestion as White’s encouragement to scuttle the proposed deal.

Branco’s lease of the Sumter Mall space expired and Hull Storey took the space back. *See* Trial Tr. at 56:19–21, 69:6–8, 164:9–11, and 192:19–20 (R. 125, 138, 233, and 261). Sumter Mall and Hull Storey moved forward by entering into an agreement with the Pizitz Group for the lease of the referenced space. *Id.* at 193:2–6 (R. 262).

STANDARD OF REVIEW

On appeal from a bench trial, “a reviewing court is free to decide questions of law with no particular deference to the trial court.” *Hunt v. Forestry Comm’n*, 358 S.C. 564, 569, 595 S.E.2d 846, 848–49 (Ct. App. 2004) (citations omitted); *see also Okatie River, LLC v. Se. Site Prep, LLC*, 353 S.C. 327, 334, 588 S.E.2d 327, 334 (2003) (“In an action at law, tried without a jury, the appellate court standard of review extends only to the correction of errors of law.”) (citations

⁷ Similarly, Brooktenn never secured (or even attempted to secure) a lease of the GAC store at the Florence Mall as required by the Proposal for Purchase to become effective. *See id.* at 96:23–25, 97:4–8, and 99:5–10 (R. 165–66 and 168); Pl.’s Trial Ex. 4 (R. 359).

⁸ Applebaum’s recollection of the chronology of the events was quite hazy, but he agreed the telephone conversation in question occurred “sometime in that time frame.” Tr. 91:1–4 (R. 160).

omitted). The trial court's findings of fact should not be disturbed unless they were "without evidentiary support." *Hunt*, 358 S.C. at 569, 595 S.E.2d at 848.

ARGUMENT

I. Hull Storey cannot be liable for tortious interference with contract because there was no enforceable contract with which to interfere.

It is axiomatic that there can be no tortious interference with contract unless there is a viable contract with which to interfere. The cause of action is expressly predicated on the existence of a "valid, enforceable" contract:

The elements of a cause of action for tortious interference with contract are: (1) *existence of a valid contract*; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages.

Dutch Fork Dev. Group II, LLC v. SEL Properties, LLC, 406 S.C. 596, 604, 753 S.E.2d 840, 844 (2012) (emphasis added); *see also Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct. App. 1993) ("The right to recover for the unlawful interference with the performance of a contract presupposes the existence of a *valid, enforceable* contract.") (emphasis added).

In the instant lawsuit, Hull Storey cannot have interfered with a contract between Branco Investments, Inc. and Brooktenn because there was no valid, enforceable contract with which to interfere. The proposed agreement between Branco Investments, Inc. and Brooktenn contained a contingency making the agreement dependent on Brooktenn obtaining a lease for the Sumter Mall location from Hull Storey within 90 days.⁹ *See* Pl.'s Trial Ex. 4 ("Proposal for Purchase") (R. 359)

⁹ In addition, the proposed agreement contained another contingency, namely that Brooktenn also obtain lease approval for the *Florence* mall within 90 days. *See* Pl.'s Trial Ex. 4 ("Proposal for Purchase") (R. 359) ("This proposal is contingent upon Buyers getting a satisfactory lease from PREIT within 90 days of signed proposal."). Brooktenn's failure to obtain lease approval in Florence (or even to *begin* the process of seeking lease approval in Florence, *see* Trial Tr. at 96:5-7, 96:23-25, 99:5-7 (R. 165 and 168), is yet another reason there is no valid, enforceable contract between Branco Investments, Inc. and Brooktenn.

("This proposal is contingent upon Buyers getting a satisfactory lease from Hull Storey Gibson within 90 days of signed proposal.").

There is no evidence this contingency was ever satisfied. Brooktenn *applied* for a lease for the Sumter Mall location, but the record before the trial court is entirely devoid of any document indicating Hull Storey ever entered a lease agreement with Brooktenn.¹⁰ Because lease agreements, as a matter of law, must be in writing, the contingency in the proposed agreement between Branco Investments, Inc. and Brooktenn could be satisfied *only* by Brooktenn obtaining a written, executed lease agreement for the Sumter Mall property. *See* S.C. Code Ann. § 27-35-20 ("Any agreement for the use or occupation of real estate for more than one year shall be void unless in writing."); *id.* § 32-3-10 ("No action shall be brought whereby . . . To charge any person upon any contract or sale of lands . . . or any interest in or concerning them . . . Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith."); *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d

¹⁰ At trial, Applebaum, the owner of Brooktenn, asserted Hull Storey had approved his lease application, *see* Trial Tr. at 86:3-16 (R. 155), but neither he nor Mr. Branco nor any other witness presented any document in support of that assertion or showing Brooktenn entered a lease with Hull Storey. Mr. Branco relied heavily on a text message he received from Hull Storey's leasing representative, Lewis White, which stated "Stewart['s] deal has been approved *if* we can come up with a way to get 20k." Pl.'s Trial Ex. 5 at p. 2 (text message dated April 22, 2013) (R. 361) (emphasis added). Branco and the trial court seized on that statement as evidence the lease had been approved. *See, e.g.*, Trial Tr. at 45:8-16, 54:11-16, 170:15-25, 172:2-7 (R. 114, 123, 239, and 241); *see also* Order of J. at 2 (R. 11) ("Branco was even told by Hull Storey that Brooktenn's lease application ' . . . has been approved if we can determine a way to come up with 20k.'") (emphasis in Order); Amend. Order of J. at 3 (R. 3) (same); *id.* at 2 (R. 2) ("Communications between Branco and Lewis White, a representative of Hull Storey, indicated that Hull Storey approved Brooktenn's lease application to operate a GAC franchise in Sumter Mall."). That conclusion, however, is contrary to White's plain and express meaning when he said the lease would be approved "*if*" Brooktenn paid \$20,000. Brooktenn refused to do so. *See* Pl.'s Trial Ex. 12 (R. 378) (email from Applebaum to White stating "We strongly oppose the imposition of the \$20,000" and "will not pay said cost"). Accordingly, the lease was never approved, much less executed. *See* Amend. Order of J. at 2 (R. 2) ("This lease agreement between Hull Storey and Brooktenn was never executed.").

891, 894 (1989) (holding a supposed oral modification to a retail property lease agreement was void because “[a]ny contract for an interest in land or any agreement that is not to be performed within one year must be in writing and signed by the party against whom it is seeking to be enforced” and the “[f]ailure to put such a contract in writing renders it void”); *see also In re Camelot Casino Cruises, Inc.*, 330 B.R. 263 (Bankr. M.D. Fla. 2005) (applying South Carolina law) (holding proposed commercial lease agreement void because it was not signed by both parties and there was no “meeting of the minds” between them as to all terms and conditions).

When this rule is applied to the present appeal, it is clear that Brooktenn never satisfied the proposed agreement’s contingency of “getting a satisfactory lease” for the Sumter Mall. The only written document exchanged between Sumter Mall, LLC, and Brooktenn was a draft “ASSIGNMENT, ASSUMPTION, AMENDMENT AND RATIFICATION OF LEASE AGREEMENT” (the “Draft Assignment”) emailed to both Branco and Applebaum on April 30, 2013.¹¹ The Draft Assignment includes a requirement that the tenant parties pay the \$20,000 assignment fee to Sumter Mall, LLC, and a requirement that Branco waive any claim against Sumter Mall and its agents. *See* Pl.’s Trial Ex. 8 at ¶¶ 4 and 7 (R. 368–69). No other written document purporting to be a Brooktenn lease for the Sumter Mall has been proffered, and none exists. The Draft Assignment was never signed, nor did the parties reach a meeting of the minds with respect to a lease between Brooktenn and Sumter Mall, LLC. In this context, any valid lease agreement of a storefront at Sumter Mall to Brooktenn for the ten year term requested would have to be in writing and signed by the parties. That did not occur, and in the absence of an enforceable lease between Hull Storey and Brooktenn, the contingency in the proposed agreement between

¹¹ The Draft Assignment was and attached to the Complaint as Exhibit C and was also presented as an exhibit at the bench trial. *See* Pl.’s Trial Ex. 8 (R. 366–72).

Branco Investments, Inc. and Brooktenn was not satisfied, and thus there was no valid and enforceable contract with which Hull Storey could interfere. *See Dutch Fork Dev. Group II, LLC*, 406 S.C. at 604, 753 S.E.2d at 844 (noting a claim for tortious interference with contract is predicated on the existence of a valid, enforceable contract); *Jackson*, 313 S.C. at 277, 437 S.E.2d at 171 (same); *see also BCD LLC v. BMW Mfg. Co., LLC*, 360 Fed. Appx. 428, 434 (4th Cir. 2010) (applying South Carolina law) (holding there was no tortious interference with contract where the contract at issue contained requirements and contingencies that had not been satisfied, because “[t]here can be no contract so long as, in the contemplation of the parties thereto, something remains to be done to establish contract relations”).¹²

Although Hull Storey repeatedly explained to the trial court that the contingencies in the Proposal for Purchase had not been satisfied and thus there was no contract with which to interfere, and although the trial court expressly noted in its Findings of Fact that the sole lease document exchanged between Hull Storey and Brooktenn was never agreed-upon and “was never executed,” *see* Amend. Order of J. at 2 (R. 2), the trial court’s Conclusions of Law nevertheless inexplicably assert in a single, summary sentence that “The court finds persuasive the evidence showing Branco Investments had a valid contract with Brooktenn for the asset sale, *id.* at 5 (R. 5). This conclusion was unsupported by the facts and is contrary to law.

¹² The South Carolina Court of Appeals has recently affirmed a trial court’s dismissal of claims for breach of contract and tortious interference where the “contract” at issue was an oral agreement that violated the Statute of Frauds. Because the Court’s opinion was not published, and because unpublished opinions lack precedential authority, *see* Rule 268(d)(2), SCACR, Appellants mention this recent ruling without citation merely to illustrate the continued vitality of the rule set out in the case law and statutes cited above involving a proposed contract dependent on a contingency that was never satisfied.

Courts of other jurisdictions considering retail lease agreements have likewise held that where an agreement is contingent on a condition that is not satisfied, there can be no tortious interference with contract because there was never an enforceable contract with which to interfere. *See First Union Mgmt. Corp., Inc. v. Kmart Corp.*, 1994 WL 385645 (Minn. Ct. App. 1994).

In sum, in the absence of a written, executed lease agreement between Hull Storey and Brooktenn (and there was none), and/or in the absence of evidence that Brooktenn obtained a lease agreement from the landlord of the Florence Mall (and there is none), there is no valid, enforceable contract between Branco Investments and Brooktenn. Without a contract with which to interfere, Hull Storey, as a matter of law, cannot be liable for tortious interference with contract.

II. Hull Storey cannot be liable for tortious interference with contract because the conduct supposedly constituting "interference" was justified.

Even assuming there was a valid, enforceable contract between Branco Investments, Inc. and Brooktenn (which there was not), Hull Storey cannot be liable for tortiously interfering with that contract because Hull Storey's actions were justified. Accordingly, for the reasons explained below, the trial court erred in ruling that Hull Storey's supposed interference "was not justified in anyway and there was no credible evidence of justification offered by defendants at trial or in the pleadings." See Amend. Order of J. at 5 (R. 5).

As noted above, one of the elements of tortious interference with contract is the "absence of justification" for the conduct that supposedly interfered with the contract. *Dutch Fork Dev. Group II, LLC*, 406 S.C. at 604, 753 S.E.2d at 844. Stated differently, a party's conduct that interferes with a contract "is justified . . . when acting in the advancement of its legitimate business interests or legal rights." *BCD LLC v. BMW Mfg. Co., LLC*, 360 Fed. Appx. 428, 435 4th Cir. 2010) (citing *Webb v. Elrod*, 308 S.C. 445, 418 S.E.2d 559 (1992)) (emphasis added).

The question of justification turns on whether Hull Storey's conduct had an "improper purpose," i.e., "malice or spite," or was carried out through "improper means," i.e., "violence, threats or intimidation, bribery, unfounded litigation, fraud, misrepresentation or deceit, defamation, duress, undue influence, misuse of inside or confidential information or breach of a fiduciary relationship." *Id.* at 435 (citing *Waldrep Bros. Beauty Supply, Inc. v. Wynn Beauty Supply*

Co., 992 F.2d 59, 62 (4th Cir. 1993)) (applying South Carolina law). Conversely, “[a] party is justified, however, when acting in the advancement of its legitimate business interests or legal rights.” *Id.* (emphasis added); see also *BCD LLC v. BMW Mfg. Co., LLC*, 2008 WL 304878, at *21 (D.S.C. Jan. 31, 2008) (“If some legitimate purpose or right exists, liability cannot be imposed even if the defendant exercises that right for a malicious reason.”) (citation omitted). If “some legitimate purpose or right exists, the improper purpose must predominate in order to create liability.” *BCD LLC*, 360 Fed. Appx. at 435 (citing *Crandall Corp. v. Navistar Int’l Transp. Corp.*, 302 S.C. 265, 395 S.E.2d 179, 180 (1990)).

Here, Hull Storey had a legitimate purpose and business interest in requesting a lump sum payment from Mr. Branco and/or Brooktenn, namely (1) what Hull Storey viewed—even if mistakenly—as a contractual right to a lease assignment payment,¹³ (2) a desire to recoup investments it had made in the common areas of the mall, or (3) a desire to generate revenue by leasing its real estate, including by the imposition of a lump-sum up-front charge in addition to a monthly lease payment. See, e.g., Trial Tr. 187:4–5 (R. 256) (Mr. White stating the landlord is “not into having tenants sell his place over improvements”); *id.* at 192:6–7 (R. 261) (“You don’t want the, you know, tenant to sell off our leasehold”); *id.* at 197:5–198:4 (R. 266) (Mr. White stating that based on the limited facts available to Hull Storey at the time, Hull Storey believed the proposed transaction to be a lease assignment and thus subject to the lease’s assignment fee provision); see also *id.* at 65:23–66:9 (R. 134–35) (Mr. Branco noting that Hull Storey’s stated

¹³ As noted in the Statement of the Facts, *supra*, the facts surrounding the development of the proposed agreement between Branco Investments, Inc. and Brooktenn give rise, at minimum, to a perception that the proposed agreement was an “end run” attempting to avoid having to pay a lease assignment payment to the landlord.

basis for requesting the \$20,000 payment was to recoup capital improvements such as new carpet it had installed in the common areas of the mall).

Sumter Mall is in the business of leasing its mall property for income and profit, and there was ample testimony about leasing of the Sumter Mall. The only asset of Sumter Mall is land and leasable space at the mall, and obtaining payment from tenants for the right to occupy the Sumter Mall—whether it be up-front payment or monthly rent or percentage rent or reimbursement for common area maintenance expenses or any other type of lawful payment—is the business of Sumter Mall and the justification for its actions. Indeed, the legitimacy of a landlord like Hull Storey charging an up-front “transfer” fee is demonstrated by the fact that the proposed agreement between Branco Investments, Inc. and Brooktenn expressly contemplated such a fee and agreed to split such fees 50/50 between them up to \$2,500 each, with any excess amount to be paid by Brooktenn. See Pl.’s Trial Ex. 4 (R. 359).

Sumter Mall, LLC’s right not to lease space to Brooktenn or to condition that lease on any lawful condition must be superior to Branco’s request to extend the lease or Applebaum’s request for a new lease. It is the essence of private property ownership. And the good faith assertion of one’s own right cannot constitute tortious interference with another’s contract, even if the assertion of that right causes one of the contracting parties to renege on the agreement:

One who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to perform an existing contract or enter into a prospective contractual relation with another does not interfere improperly with the other’s relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.

Restatement (Second) of Torts § 773; see also *Gailliard v. Fleet Mortgage Corp.*, 880 F. Supp. 1085, 1089 (D.S.C. 1995) (“A party who in good faith exercises a legal right ‘affords no basis for

an action by the second party for intentional interference with a contract' despite the fact it may cause a third party not to perform a contract.") (citing *Webb v. Elrod*, 308 S.C. 445, 418 S.E. 2d 559, 581 (S.C. App. 1992)).

Hull Storey's decision to exercise its legal right to charge a tenant or prospective tenant an up-front payment of \$20,000 in addition to ongoing monthly lease payments was justifiable business conduct and cannot support liability for wrongful interference with contract. *See Webb*, 308 S.C. at 448, 418 S.E.2d at 561 (holding the "exercise in good faith of a legal right" affords no basis for an action "for intentional interference with contract even though the consequence of the exercise of the legal right by the first party is to cause a third party not to perform another contract with the second party"). The 2002 lease between the Brancos and Sumter Mall was set to expire on April 30, 2013. Sumter Mall had no obligation to lease space to Brooktenn or to approve Brooktenn as a tenant, and the fact that Hull Storey sought to profit by leasing the space to a new tenant is the legitimate exercise of a justified business interest in generating profit.

Though South Carolina's courts have not previously considered this issue in the context of commercial retail real estate, at least one other jurisdiction's appellate court has done so and concluded a party had a legitimate business interest in generating rent revenue and thus the assertion of that right—even if it disrupted an agreement between two other parties—did not constitute tortious interference with contract. In *Union Mgmt. Corp., Inc. v. Kmart Corp.*, 1994 WL 385645 (Minn. Ct. App. 1994), a shopping center landlord entered an agreement with an Arby's franchisee allowing the franchisee to construct and operate an Arby's in the shopping center's parking lot. The landlord's agreement with the Arby's franchisee, however, was contingent on Kmart—the center's anchor tenant—giving "unconditional consent" to the construction of the Arby's in the shopping center's parking lot. *Union Mgmt. Corp.* at *1. Kmart

refused to consent unless the landlord gave Kmart 50% of the "ground rents" income received from the Arby's franchisee. *Id.* Kmart's position was based on a corporate policy that sought to generate revenue in return for parking lot developments that could disrupt visibility, traffic flow, drainage, etc. *Id.* Because Kmart withheld its unconditional consent, the deal between the landlord and the Arby's franchisee fell through. *Id.* The landlord sued Kmart for tortious interference with contract. The court ruled Kmart was not liable, in part because Kmart had a legitimate business interest in trying to extract rent concessions from the landlord. *Id.* at *2-4.¹⁴

Here too, Hull Storey had a legitimate purpose and business interest in requesting a lump payment from Mr. Branco and/or Brooktenn, and the assertion of Hull Storey's right to generate rental income from its property cannot, as a matter of law, render Hull Storey liable for tortious interference with contract.

III. The amount of damages awarded by the trial court was not supported by sufficient evidence but was instead based solely on speculation and conjecture.

Even if Hull Storey could be liable for tortiously interfering with the "contract" between Brooktenn and Branco Investments (and as explained above, it cannot), the trial court erred by awarding an amount of damages without any sufficient evidentiary basis. At trial, Mr. Branco alleged the assets owned by Branco Investments in the Sumter mall that Brooktenn proposed to buy were worth \$70,000 or more, but he provided no appraisal, costs of comparable equipment, or testimony or evidence of this valuation other than his own, unsupported opinion, and the fact that Brooktenn was willing to pay it.

Q: So you had agreed that the 70,000 was something that came out of your head?

¹⁴ The court also ruled Kmart could not be liable for tortious interference with contract because the contingency in the agreement between the landlord and Arby's franchisee contained a contingency that had not been satisfied, and thus there was no contract with which to interfere. See generally Part I, *supra*.

A: It's the value I put on equipment in Sumter, yes.

Q: Based on what?

A: My personal value.

* * *

A: I valued it that, yes, 70,000.

Q: Has anyone else independently valued it that?

A: Stewart Applebaum, he agreed to the purchase.

Q: Didn't Mr. Applebaum say he didn't care what the breakdown was because it was the two deals going together that mattered?

A: Well, that might be partly true

Trial Tr. at 128:1-22 (R. 197); *see also id.* at 126:22-23 (R. 195) ("The value of the equipment to me was 70,000 dollars.") (emphasis added); *id.* at 165:12-166:10 (R. 234-35) (Mr. Branco admitting he had no idea how much he'd paid for the equipment originally and admitting he had not created any estimate or undertaken any discernable process to reach his \$70,000 estimate).

During the bench trial, Hull Storey's trial counsel challenged this valuation, noting there was no support for it other than Mr. Branco's *ipse dixit*, and that the contract with Brooktenn contemplated the sale of two locations' equipment, and the price allocation of \$70,000 to one and \$30,000 to the other was a purely arbitrary way of dividing the total \$100,000 sales price. *See* Trial Tr. at 102:1-103:20 (R. 171-72).

When determining the amount of damages to award, the evidence "should be such that a court or jury can reasonably determine an appropriate amount." *Yadkin Brick Co., Inc. v. Materials Recovery Co.*, 339 S.C. 640, 646, 529 S.E.2d 764, 767 (Ct. App. 2000) (citation omitted). "Neither the existence, causation nor amount of damages can be left to [the judge or jury's] conjecture, guess or speculation," and "bald allegations are insufficient" to accurately establish a damages amount. *Id.* (citations omitted) (alteration in original). Where the sole "evidence" of damages is a party's self-serving estimate or approximation, any resulting calculation of damages based on

those guesses is “pure speculation.” *Collins. Enter., Inc. v. White*, 363 S.C. 546, 560, 611 S.E.2d 262, 269 (Ct. App. 2005).

In the trial of the instant lawsuit, Branco and Branco Investments failed to bear this evidentiary burden. Accordingly, the trial court’s calculation and award of damages was based on the plaintiff’s subjective beliefs, speculation, and conjecture. This was error and requires, at minimum, the Judgment to be reversed and remanded for a proper calculation of damages supported by reasonable evidence and testimony.

IV. The trial court erred by awarding damages to the wrong party and based on supposed injuries that occurred at a time when the allegedly injured party did not have the legal capacity to enter into the underlying transaction.

Even assuming there was a contract to interfere with, and even assuming Hull Storey’s conduct was not the justifiable pursuit of profit, the trial court nevertheless erred by awarding a judgment to Mr. Branco individually rather than to Branco Investments, Inc. The Proposal for Purchase was between Brooktenn and *Branco Investments, Inc.* (not Paul Branco himself). *See* Pl.’s Trial Ex. 4 (R. 359); *see also* Trial Tr. at 21:23–22:6 (R. 90–91); *see id.* at 22:25–23:1 (R. 91–92) (describing the Proposal for Purchase as “the agreement between Brooktenn, LLC, and Branco Investments”); *id.* at 23:22–24 (R. 92) (same); *id.* at 64:2–5 (R. 133) (“Q: Plaintiff’s Exhibit Number 4 is the deal between you and Brooktenn. That document is the deal between Brooktenn, LLC, and Branco Investments, Inc., correct? A: That is correct.”).

Further, the assets and equipment that Brooktenn proposed to buy were owned by Branco Investments, not by Mr. Branco individually. *See id.* at 64:7–11 (R. 133) (“Q: The equipment at the mall that you took out of there in the middle of May, all that equipment was ordered by Branco Investments Company, Inc., correct? A: Correct.”); *id.* at 65:2–5 (R. 134) (“Q: Just to be clear,

your deal with Mr. Applebaum for 100,000-dollars is Branco Investments selling assets to Brooktenn, LLC? A: That is correct.”).

Accordingly, the party allegedly injured by Hull Storey’s conduct was Branco Investments, Inc., not Mr. Branco individually. The trial court, however, awarded judgment and damages to Mr. Branco. *See* Order of J. at 1, 3, and 5 (R 10, 12, and 14) (awarding judgment and damages to “the plaintiff,” which the Order defined as “Paul Branco”); Amend. Order of J. at 1, 4, and 7 (R. 1, 4, and 7) (same); *see also* Court docket entry (R. 387) (listing award of judgment “For: Branco, Paul”).

In addition, the party who was allegedly injured—*i.e.*, Branco Investments—was in forfeiture of its corporate status from March 7, 2012 to July 1, 2015, a period that encompasses all of the acts and communications giving rise to the allegations of this lawsuit. *See* S.C. Sec. of State “Business Name Search,” *available at* <https://businessfilings.sc.gov/BusinessFiling/Entity/Search> (search for Branco Investments).¹⁵ Accordingly, the “contract” at issue was entered by an entity that lacked legal capacity to enter the transaction, and this lawsuit was filed by a party without the legal ability to carry on any business, both of which are contrary to the South Carolina Code. *See* S.C. Code Ann. § 33-14-210(d) (“A corporation dissolved administratively continues its corporate existence *but may not carry on any business* except that necessary to wind up and liquidate its business and affairs”) (emphasis added).¹⁶

¹⁵ By the time of trial and the Order of Judgment, Branco Investments had sought and received reinstatement of its corporate status.

¹⁶ Branco Investments was administratively dissolved as a result of its forfeiture. *See* S.C. Sec. of State, Business Filings FAQs, *available at* http://www.sos.sc.gov/Business_Filings_FAQs (stating when a business is in forfeiture, “the Secretary of State’s Office has administratively dissolved the entity”).

Accordingly, the trial court erred by awarding damages arising from a supposed contract entered by an entity without capacity to do so, and, even if damages were appropriate (and as explained above, they were not) the trial court erred by awarding them to the wrong party.

CONCLUSION

For the foregoing reasons, Appellants respectfully request this Court reverse the trial court's Amended Order of Judgment.

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November 7, 2018
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

R. Ferrell Cothran, Circuit Court Judge

Appellate Case No. 2017-000998
Civil Action No. 2015-CP-43-596

RECEIVED
OCT 26 2018
SC Court of Appeals

Paul Branco and Branco Investments, Inc.,
d/b/a Great American Cookie Co., ... Respondents,

v.

Hull Storey Retail Group, LLC, and
Sumter Mall, LLC, ... Appellants.

**FINAL BRIEF OF RESPONDENTS PAUL BRANCO AND
BRANCO INVESTMENTS, INC., D/B/A GREAT AMERICAN COOKIE CO.**

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INTRODUCTION

This case is about Appellants, corporate landlords, that leveraged their superior bargaining power to engage in unlawful conduct with the specific intent and purpose of extorting funds from their lessees, Respondents. When that failed, Appellants engaged in a concerted effort to tortiously interfere with contractual relations between Respondents and a third-party who was to take over Respondents' lease and assets. The trial court, in an order to which no challenges were properly preserved on appeal, correctly found that this behavior amounted to tortious interference and properly awarded damages to the lessee. Appellants now ask this Court to reverse the trial court based on numerous unpreserved issues.

COUNTER-STATEMENT OF ISSUES ON APPEAL¹

- I. Did Appellants fail to preserve any issues on appeal where Appellants' counsel made a motion for a "directed verdict" during the bench trial but failed to renew that motion at the close of the case?
- II. Did the trial court correctly rule that Appellant Hull Storey was liable for tortious interference with contract when there was substantial evidence in the record of the existence of a valid and enforceable contract?
- III. Did the trial court err by ruling Appellant Hull Storey's actions relating to that contract were unjustified where there was evidence of numerous actions on the part of Appellant Hull Storey taken for improper purpose and with actions constituting improper methods?
- IV. Did the trial court correctly award damages in an amount supported by competent evidence based on the trial court's credibility determination and review of the evidence?
- V. Did the trial court correctly award damages to a corporation and its principal officer who both had capacity to enter a contract?

¹ As set forth throughout Respondents' brief, Respondents contend that none of Appellants' issues are preserved. Nonetheless, a Counter-Statement of the Issues on Appeal is included so that the Court may focus on the appropriate issues and standards of review.

COUNTER-STATEMENT OF THE CASE

I. Factual History²

Respondents Paul Branco and Branco Investments, Inc., d/b/a Great American Cookie Co. (hereinafter collectively "Respondents" or "Branco"), owned and operated two Great American Cookie Company (hereinafter "GAC") franchises, one in the Sumter Mall and the other in the Magnolia Mall in Florence. (R. p. 21). Branco entered into a lease agreement (hereinafter "lease") with Sumter Mall, LLC, a South Carolina LLC under the control and direction of Appellant Hull Storey Retail Group, LLC (hereinafter collectively "Appellants" or "Hull Storey"), giving Branco a lease on Unit 55 in the Sumter Mall. (R. p. 21). The lease term was from December 30, 2002, to April 30, 2013. (R. p. 22).

Sometime in 2013, Respondent Branco Investments, Inc., the owner of the equipment and assets utilized in the Sumter Mall and Magnolia Mall GAC franchises, through Respondent Paul Branco, negotiated an asset sale agreement (hereinafter "Asset Purchase Agreement") with Brooktenn, LLC (hereinafter "Brooktenn"), a limited liability company owned by Stewart Applebaum (hereinafter "Applebaum"). (R. p. 359). Brooktenn owns and operates several GAC franchises in neighboring and other southeastern states. (R. p. 227, lines 12-14).

Pursuant to the Asset Purchase Agreement with Branco, Brooktenn submitted a lease application to Appellant Hull Storey, and Hull Storey approved Brooktenn's lease to operate a GAC franchise in the Sumter Mall. (R. p. 359). The approved lease agreement between Hull Storey and Brooktenn was not signed. (R. p. 359)

² The trial court ably and accurately stated the factual background of this case in its Findings of Facts and Conclusions of Law. (R. pp. 1-4). Thus, Respondents will use the trial court's factual findings as relevant to the issues on this appeal to briefly summarize the background of this case.

When Appellants became aware of Branco's deal with Brooktenn, Respondent made a demand of \$70,000 for a "lease assignment fee." (R. p. 155, lines 4-5, 13-20; p. 157, lines 14-18). Appellants knew and understood that Brooktenn was not taking an assignment of Branco's lease, but representatives from Appellants – specifically Hull Storey – nevertheless cited an assignment provision in the lease as a basis for the demand. (R. p. 155, lines 4-5, 13-20; p. 157, lines 14-18). Hull Storey eventually reduced its demand from \$70,000 to \$20,000. (R. p. 155, lines 4-5, 13-20; p. 157, lines 14-18).

Both Branco and Brooktenn were told by Hull Storey representatives that Brooktenn would not be allowed to operate in the Sumter Mall unless the \$20,000.00 was paid. (R. p. 129, line 23-p. 131, line 12, p. 157, lines 4-9, p. 160, lines 5-23; pp. 360-362; pp. 378-379). When both Branco and Brooktenn objected and pointed out that there was not a lease assignment, the representatives then told Branco that the \$20,000 was instead based on an effort to recoup capital investments made in the Sumter Mall. (R. p. 129, line 23-p. 131, line 12, p. 157, lines 4-9, p. 160, lines 5-23; pp. 360-362; pp. 378-379).

Once it became clear Branco would not pay the \$20,000, Hull Storey turned to Brooktenn for the money. (R. p. 129, line 23-p. 131, line 12, p. 157, lines 4-9, p. 160, lines 5-23; pp. 360-362; pp. 378-379). Hull Storey representatives subsequently contacted Applebaum and suggested Applebaum should break his Asset Purchase Agreement with Branco. (R. p. 129, line 23-p. 131, line 12, p. 157, lines 4-9, p. 160, lines 5-23; pp. 360-362; pp. 378-379). They even suggested to Applebaum that Brooktenn would come out \$50,000 "better" if it backed out of its deal with Branco. (R. p. 129, line 23-p. 131, line 12, p. 157, lines 4-9, p. 160, lines 5-23; pp. 360-362; pp. 378-379). Due to Appellants' conduct, Brooktenn withdrew from the agreement with Branco and abandoned

its effort to operate a franchise in Sumter. (R. p. 129, line 23-p. 131, line 12, p. 157, lines 4-9, p. 160, lines 5-23; pp. 360-362; pp. 378-379).

Due to the interference by Appellants – notably Hull Storey – with the Asset Purchase Agreement between Branco and Brooktenn, Branco lost \$70,000. (R. p. 359; p. 197, lines 6-16, p. 227, lines 15-25). Branco was ultimately able to sell some of the equipment for \$5,000, and after his relationship with Appellants terminated, he owed \$1,375 in rent. (R. p. 7).

II. Procedural History

Branco filed a complaint against Appellants on March 5, 2015. (R. pp. 17-26). Appellants answered on April 14, 2015, admitting that the Asset Purchase Agreement was a valid contract. (R. p. 30; 37).

After approximately two years of discovery and motions practice, this matter proceeded to a bench trial before Judge Cothran. During the bench trial, Appellants made a motion for a “directed verdict” but failed to renew that motion at the close of the case. (R. pp. 235-238). At the conclusion of the trial, the trial court circulated a proposed order among counsel. Without waiting for the order to be reviewed, edited, signed, or entered, Appellants filed a Motion to Alter or Amend. (R. pp. 46-53). Two days later, the trial court filed its order, which took Appellants’ objections into consideration as it made certain changes to the order. (R. pp. 10-15). The order ruled in Appellants’ favor on many issues but ruled in favor of Branco on the claim of tortious interference with contractual relations and awarded Branco \$63,625 in damages. (R. pp. 10-15).

Appellants did not renew their Motion to Alter or Amend or make a new Motion to Alter or Amend after the order was filed. Instead, Appellants filed a Notice of Appeal. Against the objections of Branco, Appellants subsequently moved this Court to remand the case, without

prejudice to refile the appeal, to allow the trial court to consider and rule upon the allegedly pending Motion to Alter or Amend. On August 28, 2017, this Court granted the motion.

Judge Cothran held a hearing on February 9, 2018, and filed an Amended Order of Judgment on March 2, 2018. (R. pp. 290-318; pp. 1-9). The Amended Order reached the same conclusions as the original order. (R. pp. 1-9).

STANDARD OF REVIEW

On appeal from a bench trial, “the trial judge’s findings of fact will not be disturbed . . . if there is any evidence to reasonably support his findings. *Meredith v. Mt. Pleasant Boat Bldg. Co.*, 286 S.C. 115, 116, 333 S.E.2d 565, 565 (1985) (emphasis added) (citing *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)). See also *Maddux Supply Co. v. Safhi, Inc.*, 316 S.C. 404, 406, 450 S.E.2d 101, 102 (Ct. App. 1994) (holding that the trial court’s findings of fact will not be disturbed unless those findings are “wholly unsupported by the evidence or controlled by an erroneous conception or application of the law”) Thus, the “appellate court standard of review extends only to the correction of errors of law.” *Hunt v. Forestry Com’m*, 358 S.C. 564, 569, 595 S.E.2d 846, 849 (Ct. App. 2004) (quoting *Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C.*, 353 S.C. 327, 334, 577 S.E.2d 468, 479 (2003)).

Moreover, an appellate court will not disregard the fact that the trial court is in a better position to determine the credibility of witnesses. *Cherry v. Thomasson*, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981). It is not for the appellate court to weigh the evidence. *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 343 S.C. 587, 594, 541 S.E.2d 257, 261 (2001).

ARGUMENT

There are two reasons this Court should affirm the trial court’s judgment.

First, none of the issues raised by Appellants are preserved.

Second, each of the issues raised by Appellants are substantively without merit for the following reasons: (1) Branco entered a valid contract with Brookterm; (2) Appellants – specifically Hull Storey – interfered with that contract for an improper purpose and with actions constituting improper methods; (3) the trial court’s award of damages was supported by ample evidence; and (4) the parties at issue had the requisite capacity and the trial court properly entered judgment.

This Court should affirm.

I. The issues raised in Appellants’ appeal are unpreserved and the Court should dismiss the entire appeal on this ground alone.

As a threshold matter, each of Appellants’ four issues are unpreserved for appeal.

“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate courts] with a platform for meaningful appellate review.” *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (citations omitted); *see also Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding that it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.). In cases tried without a jury, an appellant waives the right to question on appeal the trial court’s denial of a Rule 41, SCRCP, motion when the appellant presents evidence after the initial denial of the motion and fails to renew the motion at the close of the case. *See Wallace v. Milliken & Co.*, 300 S.C. 553, 559, 389 S.E.2d 448, 451 (Ct. App. 1990). The Supreme Court of South Carolina has further explained that “the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge.” *Herron*, 395 S.C. at 466, 719 S.E.2d at 642.

At the close of Respondents’ case, Appellants’ counsel – who is not the counsel it has for its current appeal – did make a motion for a “directed verdict,” which is inapplicable to a matter

tried without a jury.³ (R. pp. 235-238). Assuming that this constituted a valid motion for non-suit under Rule 41, SCRCP, after the trial court denied the motion as to the tortious interference claim, Appellants' counsel called an additional witness for its case-in-chief - a leasing representative for Hull Storey. (R. p. 244). Appellants' counsel never made a further motion, nor did counsel make any effort to renew the "directed verdict" motion. (R. pp. 280-288). Thus, Appellants plainly presented evidence after the initial denial, failed to renew the motion at the close of the case, and thus have waived the right for this Court to review any and all arguments raised in the appeal at bar. See *Wallace*, 300 S.C. at 559, 389 S.E.2d at 451.

In addition to Appellants' blanket failure to preserve any issues at bar for appeal by way of its failure to renew its "directed verdict" motion, each of Appellants' arguments are unpreserved for additional reasons.⁴

³ This Court has explained the distinction as follows:

We note initially that while [appellant's] motion at the close of the evidence was couched as a "directed verdict" motion, governed by Rule 50, SCRCP, this was a non-jury action. As Rule 50 by its nature is applicable to jury trials, the proper motion for [appellant] to have made was a motion for involuntary non-suit under Rule 41, SCRCP. "After the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant, . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." Rule 41(b), SCRCP . . . Therefore, [appellant's] appeal is from the master's factual findings as a judge in a non-jury action at law. . . . Thus, this court must affirm if there is any evidence to support the master's findings.

Waterpointe I Prop. Owner's Ass'n, Inc. v. Paragon, Inc., 342 S.C. 454, 458-59, 536 S.E.2d 878, 880-81 (Ct. App. 2000).

⁴ It appears Appellants' former counsel attempted to lodge some of the arguments raised in this appeal in a purported Motion to Amend. (R. pp. 46-53). However, Appellants cannot use Rule 52(b), SCRCP, to present to the Court an issue the party could have raised prior to judgment but did not, and the issue preservation rules plainly required Appellants to raise the issue at the close of the case. See *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733, *Wallace*, 300 S.C. at 559, 389 S.E.2d at 451. Moreover, Rule 52(b) by its express terms does not permit the parties to make new legal arguments, such as Appellants' Statute of Frauds argument or their legal capacity

Appellants' first argument is that there was a contingency in the contract that "could be satisfied only by Brooktenn obtaining a written, executed lease agreement for the Sumter Mall property." (App. Br. at 13). This argument that the Statute of Frauds prohibits enforcement of the contract at issue is simply not an argument that was ever raised prior to judgment and thus this issue is not preserved.

Appellants' second argument is that it had a legitimate purpose and business interest in requesting payment from Brooktenn or Branco. (App. Br. at 24). However, the transcript is bereft of any preserved argument before the judge that a legitimate purpose and business interest existed. While Appellants cite to some portions of testimony in their Brief, there was no actual argument on this point presented to the trial court before judgment. In fact, it does not appear that the words or phrases "legitimate," "purpose," "business interest," and "justified" were ever spoken by Appellants' counsel during trial or closing arguments, and the word "justification" was mentioned once in reciting the elements of tortious inference but never revisited. (R. p. 236, line 18-p. 238, line 7). Appellants simply did not do enough to preserve this issue as it was never raised to the trial judge during the trial. *See Wilder Corp*, 330 S.C. at 76, 497 S.E.2d at 733.

Appellants' third argument, that the amount of damages was without evidentiary support, was not addressed by then-counsel for Appellants during the "directed verdict" argument. In fact, other than a few questions and a fleeting mention in closing, there was virtually no discussion that the damages may have been without evidentiary support, and that limited discussion is not enough from which the trial court could glean "the precise nature of the alleged error," leaving the argument unpreserved. *See Herron*, 395 S.C. at 466, 719 S.E.2d at 642.

argument. *See* Rule 52(b), SCRPC. In any event, as has been thoroughly briefed by Respondents in their opposition to the previously filed Motion to Remand in this case, Appellants' purported Motion to Amend was a nullity.

Appellants' fourth and final argument that the trial court supposedly awarded damages to the wrong party was not raised in any capacity during the trial, before judgment, or in the post-trial motion in the case. (R. pp. 70-289; pp. 46-53). It is further worth noting that this allegedly problematic judgment was entered nearly a year and a half ago. (R. p. 387). Yet Appellants' Brief offers the first instance of this argument, and thus the trial court has had no opportunity to rule on this issue or provide this Court with any platform for meaningful review. *See Herron*, 395 S.C. at 465, 719 S.E.2d at 642.

For these additional reasons, Appellants' first, second, third, and fourth arguments are further precluded from appellate review. Appellants plainly ask this Court to disregard this State's issue preservation rules; however, Appellants' counsel are experienced appellate lawyers who are well-acquainted with issue preservation law. This Court and the Supreme Court of South Carolina frequently and stringently apply issue preservation rules in cases every day, even those involving important constitutional issues and substantial civil verdicts. *See State v. Stone*, 376 S.C. 32, 36, 655 S.E.2d 487, 488-89 (2007) (finding a victim impact evidence issue unpreserved in a capital case); *see also State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 771 S.E.2d 176 (2015) (finding countless issues unpreserved in a civil case involving a \$327,073,700 award of civil penalties). That is so, of course, because "the validity of a doctrine does not depend on whose ox it gores." *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 525 (1953).

Nonetheless, if this Court were to overlook Appellants' failure with regard to preservation, it should nonetheless affirm the trial court's order.

II. There is a cornucopia of evidence in the record to support the trial court's ruling that a valid contract existed between Branco and Brooktenn.

There is ample evidence in the record to support the trial court's finding that Branco entered into a contract with Brooktenn. Specifically, the trial court correctly ruled that Branco had a valid

contract with Brookteenn for the sale of its assets, namely the Asset Purchase Agreement. (R. p. 359). Appellants' arguments to the contrary are without merit.

Under South Carolina law, "an agreement between two or more persons upon sufficient consideration to either do or not do a particular act is a contract." *McPeters v. Yeargin Const. Co.*, 290 S.C. 327, 331, 350 S.E.2d 208, 210–11 (Ct. App. 1986) "Mutual promises . . . constitute a good consideration." *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 19, 738 S.E.2d 480, 490 (Ct. App. 2013) (quoting *Evatt v. Campbell*, 234 S.C. 1, 8, 106 S.E.2d 447, 451 (1959)). *See also Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 247 S.E.2d 434 (1978) (holding that in order for a contract to be binding, "there must be a mutual manifestation of assent" between the parties as to the terms of the contract").

A. The record shows that any supposed contingency in the contract was satisfied.

Even if Appellants are correct that the Asset Purchase Agreement can be read as having any contingency, there is abundant evidence that any such contingency was satisfied. In the written memorialization of the agreement,⁵ which was drafted by two non-lawyers, Brookteenn agreed to

⁵ In a footnote, Appellants argue that the Asset Purchase Agreement contained a second contingency, namely a second agreement regarding the purchase of certain assets relating to Branco's location in Florence. (See App. Br. at 12 n.9). This argument is unavailing. First, for the reasons discussed herein, this argument was unpreserved and the Asset Purchase Agreement was a valid contract between Branco and Brookteenn regarding the sale of Branco's assets in Sumter. Second, Applebaum squarely testified that the agreement relating to the Sumter location was "not at all" contingent, and "independent" of what occurred regarding the Florence location. (R. p. 178, lines 4-12). Third, even if this were two provisions of a single contract, the provision relating to the Florence location is separate and discrete from the provision relating to the Sumter location. (R. p. 359). Thus, on the plain face of the agreement, and as supported by the testimony in the case, to the extent the provision relating to Florence is problematic, it is severable. "A severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts The entirety or severability of a contract depends primarily upon the intent of the parties rather than upon the divisibility of the subject, although the latter aids in determining the intention." *Columbia Architectural Group, Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980) (quoting *Packard & Field v. Byrd*, 73 S.C. 1, 6, 51 S.E. 678, 679 (1905)). If the

purchase Branco's equipment in Sumter. (R. p. 359). This document also noted that Brooktern would "get[]" a satisfactory lease from Hull Storey. (R. p. 359). In spite of Appellants' argument that this never occurred, the trial court properly found that "Hull Storey approved Brooktern's lease application" (R. p. 2). Applebaum, in testimony the trial court found credible and upon which it heavily relied, explained as follows:

A: . . . We already had approval of the lease. They already told us that we had a lease.

Q: But you were approved for the lease, and then after the approval came the claim for the 20,000-dollars?

A: That's correct.

Q: All right. At no time during your conversations with the defendant about your lease application did they mention to you a lease assignment fee?

A: Never.

(R. p. 155, lines 4-5, 13-20; pp. 54-69). Applebaum further explained that as far as he was concerned, there was never a discussion about taking an assignment of Branco's lease because of the lease that he had with Hull Storey:

Q: Did they tell you at that time it was about a lease assignment, that you were taking Paul's lease?

A: First of all, they knew I wasn't taking Paul's lease because I had a new lease. We already had discussed it and that was in place.

(R. p. 157, lines 14-18). It is logical that the Court found this testimony credible, as Applebaum was the only witness to testify who had no pecuniary interest – personally or through his company – in the outcome of this trial. This testimony was further bolstered by texts to Branco directly

record in the case supports any proposition, it is that the Florence agreement was a separate agreement and Appellants' tortious interference caused the breach of a second contract.

which explained the lease had been approved. (R. pp. 360-362). As additional evidence that there was a contract at issue in this case, in its Answer to the tortious interference allegation in Plaintiff's Complaint that a valid contract existed, Appellants each responded, "[u]pon information and belief, [Branco] . . . entered into a contract with Brooktenn" (R. p. 30; 37).⁶

As noted by the trial court, it was only after Hull Storey approved the lease – and thus satisfied any applicable conditions in the Asset Purchase Agreement – that it wrongly demanded funds from Brooktenn to which it was not entitled and effectively killed Branco's contract with Applebaum. (R. pp. 2-3; pp. 54-69).

Appellants spend much of their argument in what amounts to a misdirection: Appellants claim that because there was no signed lease in the record, the Statute of Frauds precludes enforcement of the contract at issue. In addition to this argument being unpreserved as discussed above, it also misunderstands the nature of the contract at issue here. The Asset Purchase Agreement simply does not run afoul of the Statute of Frauds.⁷ Branco is not seeking damages for the breach of a lease between Brooktenn and Hull Storey, nor is Branco seeking damages for a tortious interference of a lease agreement between Brooktenn and Hull Storey. Branco is seeking damages for a tortious interference with the Asset Purchase Agreement between Branco and Brooktenn, which

⁶ Respondents would argue that the admission in Appellants' Answers provide an additional sustaining ground to affirm the trial court's decision as the admissions alone would be enough evidence for the trial court to determine a contract between Branco and Brooktenn existed.

⁷ As noted previously, Appellants did not properly preserve their Statute of Frauds argument. In any event, their argument speaks only to the lease and not the Asset Purchase Agreement. There is no allegation that the Asset Purchase Agreement itself fails under the Statute of Frauds. Assuming, *arguendo*, that the Statute of Frauds applies to the Asset Purchase Agreement, it was plainly a signed writing sufficient to indicate a contract for sale as it amounted to a written memorialization of the parties' agreement. See S.C. Code Ann. § 36-2-201(1). (R. pp. 360-362). Additionally, even under the Statute of Frauds the trial court was free to look to the understanding of the parties to the agreement. See S.C. Code Ann. § 36-2-201(1) ("A writing is not insufficient because it omits or incorrectly states a term agreed upon . . .").

for the reasons discussed herein, and as stated in the trial court's well-supported finding, constituted a valid contract.

Appellants would appear to take the position that this Court should weigh the evidence to determine, in the first instance, the efficacy of the approved lease between Hull Storey and Brooktenn as it relates to the Asset Purchase Agreement. Even if this Court were inclined to engage in such a task, there would still be some evidence in the record to support a valid lease between Hull Storey and Brooktenn. While there may be no fully executed lease in the record, and while such leases are generally subject to the Statute of Frauds, the inquiry does not end there.

This Court has recognized that the doctrine of estoppel can bar the defense of Statute of Frauds in a case at law. "[T]he party asserting the estoppel must show that he has suffered a definite, substantial, detrimental change of position in reliance on the contract, and that no remedy except enforcement of the bargain is adequate to restore his former position." *Atl. Wholesale Co. v. Solondz*, 283 S.C. 36, 41, 320 S.E.2d 720, 723 (Ct. App. 1984) (quoting *Collins Music Co. v. Cook*, 281 S.C. 580, 583, 316 S.E.2d 418, 420 (Ct. App. 1984)). There is evidence in the record that the lease would be valid under the estoppel exception to the Statute of Frauds. For example, there is at least some evidence that Brooktenn took the time it could have devoted to other business interest to negotiate its lease with Hull Storey. Of course, had this issue been raised or litigated at the trial court level, the exact extent of Brooktenn's reliance could have been explored.

Moreover, to the extent Appellants' make the seemingly strained argument that the absence of a written lease somehow invalidated the Asset Purchase Agreement under the Statute of Frauds, as discussed earlier in a pleading signed by their then-attorney Appellants specifically admitted that the Asset Purchase Agreement was a valid contract. (R. p. 30; 37). "In South Carolina, a pleading admitting a[n] . . . agreement that is within the statute of frauds may constitute a sufficient

writing within the statute so as to enable the court to enforce the contract; however, the pleading must be sufficiently definite and certain and it must be signed by the party to be charged or by his agent or attorney on his behalf. *Robert Harmon & Bore, Inc. v. Jenkins*, 282 S.C. 189, 193, 318 S.E.2d 371, 373-74 (Ct. App. 1984) (internal citations omitted); *see also Smith v. Traxler*, 224 S.C. 290, 295, 78 S.E.2d 630, 632 (1953) (acknowledging that "certain admissions made in appellant's answer" could destroy a Statute of Frauds defense, but that argument would be best addressed at the trial of the case).

Appellants' Statute of Frauds arguments, even if preserved, mischaracterize the contract at issue and do not create a reason to reverse the trial court's ruling.

B. Regardless of any supposed contingent language, the record is clear that Branco and Brooktenn manifested mutual assent and formed a contract.

To the extent the Court were to accept Appellants' argument that there was some unmet future condition relating to the Asset Purchase Agreement, there is still sufficient evidence to find that the Asset Purchase Agreement was a valid contract.

In *McPeters v. Yeargin Const. Co.*, 290 S.C. 327, 330, 350 S.E.2d 208, 210 (Ct. App. 1986), the construction company appellant met with employees, including respondent, to discuss ways to increase productivity. At the trial of the case, witnesses testified that the following general agreement was reached: if the employees, including respondent, agreed to finish the job on time so as to allow the appellant employer to receive a profit, then the appellant employer would agree to pay those employees a bonus of six months pay. *Id.* at 327, 350 S.E.2d at 210. Various officials from the appellant employer testified that the company "did not have a specific bonus policy and the payment of any bonuses was strictly discretionary with the company and subject to the final approval of its chairman." *Id.* At trial, the jury returned a verdict in favor of the respondent employee, and appellant employer appealed. *Id.*

In affirming the verdict and finding evidence of a valid contract, this Court held that there was valid consideration by way of the appellant employer's promise and the respondent employee's undertaking a responsibility to work harder. *McPeters*, 290 S.C. at 331, 350 S.E.2d at 211. Alternatively, the Court noted that there was evidence to reject appellant's contention that the bonuses were some discretionary future act that never occurred. *Id.*

Like the situation in *McPeters*, Branco promised to sell his equipment while Brooktenn agreed to undertake the responsibility of securing a lease (in addition to agreeing to pay \$70,000 for the equipment). Further, there was also evidence here by way of Hull Storey's lease approval for the trial court to reject Appellants' contention that the subsequent lease procurement was some unsatisfied discretionary future act. Like the situation in *McPeters*, there was instead evidence that the acquisition of a lease went to the performance of an act required by the contract, and did not strike a blow to the contract's formation. There is certainly evidence that Branco and Brooktenn exchanged, at a minimum, mutual promises. *See Baugh*, 402 S.C. at 19, 738 S.E.2d at 490 (explaining that mutual promises constitute good consideration). *See also Champion v. Whaley*, 280 S.C. 116, 122, 311 S.E.2d 404, 408 (Ct. App. 1984) ("The fact that no duty of performance can arise until the happening of a condition does not make the existence of the contract depend upon its happening . . .").

Applebaum himself explained as follows when referring to the written memorialization of his agreement with Branco, which was drafted by two non-attorneys:

Q: Okay. Yes, sir. And eventually you and Mr. Branco reached an agreement?

A: Yes.

Q: And you all memorialized that to writing; is that correct?

A: I'm sorry?

Q: You memorialized that to writing?

A: That's true.

...

Q: Is that the deal that you and Mr. Branco had about asset purchases?

A: Yes, sir.

Q: You were going to buy the assets from the Florence location that he had and the Sumter location that he had, correct?

A: Correct.

Q: All right. Exactly what were you buying pursuant to that agreement that you're holding in your hand there?

A: We're buying the equipment. We're buying, you know, the store basically, all the assets that were inside the store.

(R. p. 150, lines 1-8, p. 150, line 19-p. 151, line 6; p. 91, line 2-p. 92, line 9; p. 359; pp. 54-69).

Certainly, Branco and Brooktenn manifested a mutual intent to be bound by the Asset Purchase Agreement, as evidenced by the testimony in the case and the fact that Brooktenn did everything in its power to fulfill its promise to secure a lease with Hull Storey. (R. p. 150, lines 1-8, p. 150, line 19-p. 151, line 6; p. 91, line 2-p. 92, line 9; p. 359; pp. 54-69).

For these reasons, the trial court did not err in ruling that Branco and Brooktenn had a valid contract.

III. The trial court relied on the abundant evidence of Appellants' gross misconduct in the case to properly hold that Appellants – specifically Hull Storey – acted with improper purpose and/or improper methods.

Appellants' assertion that the actions of Hull Storey were justified belies the record in the case.

A party is liable for tortious interference with contract when, among other elements, its actions are "for an improper purpose" or when its actions are by "improper methods." *Love v.*

Gamble, 316 S.C. 203, 214, 448 S.E.2d 876, 882 (Ct. App. 1994). The *Love* Court explained the contours of these improper purposes and improper methods as follows:

Methods of interference considered improper are those means that are illegal or independently tortious, such as violations of statutes, regulations, or recognized common-law rules. Improper methods may include violence, threats or intimidation, bribery, unfounded litigation, fraud, misrepresentation or deceit, defamation, duress, undue influence, misuse of inside or confidential information, or breach of a fiduciary relationship.

Methods also may be improper because they violate an established standard of a trade or profession, or involve unethical conduct. Sharp dealing, overreaching, or unfair competition may also constitute improper methods.

Love, 316 S.C. at 215, 448 S.E.2d at 883 (quoting *Duggin v. Adams*, 360 S.E.2d 832, 836-37 (Va. 1987)). In *Webb v. Elrod*, 308 S.C. 445, 448, 418 S.E.2d 559, 561 (Ct. App. 1992), the Court specifically held that interference would be unjustified and serve no legitimate purpose if the purpose of an entity's "contacts was to procure the breach" of a contract.

Here, the evidence of improper purpose and improper methods is overwhelming. As explained by the trial court in its factual findings, and as supported by the record, in an effort to interfere with the Asset Purchase Agreement (1) Appellants – specifically Hull Storey – demanded funds that were only applicable if Branco was assigning the lease, which did not occur here and which Appellants knew was not occurring; (2) Appellants refused to allow Brooktenn to operate at their premises unless they were paid off; (3) Appellants unilaterally changed their justification for demanding the money when the payment was challenged; and (4) Appellants contacted Brooktenn directly and encouraged Brooktenn to break its contract with Branco by stating that Brooktenn would be better off if it backed out of the deal with Branco and paid Appellants directly. (R. pp. 2-3; p. 129, line 23-p. 131, line 12, p. 157, lines 4-9, p. 160, lines 5-23; pp. 360-362; pp. 378-379).

Further, Applebaum testified that Appellants' method of behavior was far from an appropriate, routine business dealing:

A: . . . I said I don't do business this way. I wouldn't stab somebody in the back.

Q: The suggestion was of the 70,000-dollars that you were supposed to give to Paul, don't give it to Paul, give us 20, and you come out 50,000-dollars to the better?

A: That's correct.

Q: And they knew of your deal obviously with Mr. Branco at that time?

A: They did.

(R. p. 160, line 16-p. 161, line 1; pp. 2-3) (making the factual finding that "Applebaum testified he has been in business for years and dealt with many malls and landlords but had never encountered this sort of behavior"). The tactics employed by Appellants, as supported by the evidence, offer numerous badges of improper purpose and improper methods: bribery; misrepresentation; duress; undue influence; sharp dealing; overreaching; unethical conduct; and violation of an established standard of a trade or profession. After weighing this evidence and credibility of the witnesses, the trial court agreed and properly ruled in Branco's favor. (R. p. 4).

The gravamen of Appellants' argument is that Hull Storey had some legitimate purpose for interfering with Branco's contract because Appellants were seeking to make money off their property. Appellants cite to federal cases for the generic proposition that legitimate business purposes are protected. (App. Br. at 16-19). Assuming these cases accurately state the proper rules under South Carolina law, as stated above the record correctly shows there was no legitimate business interest in Appellants' behavior. Under Appellants' definition of a legitimate business interest, there could be no such tort as tortious interference because in virtually each of these cases the culpable party acts to further its own self-interest. The problem is that the self-interested behavior outlined herein amounted to substantial self-dealing, unethical behavior, and protection of Appellants' interests above, and at the expense of, all else.

The trial court did review Appellants' purported motives and stated that "[t]his interference was not justified in any way and there was no credible evidence of justification offered by defendants at trial or in the pleadings." (R. p. 4) (emphasis added). Even if the Appellants are successful in scraping together some evidence of proper motive, and even if this issue was not precluded from review, it would still not eradicate the plentiful evidence "to reasonably support [the trial court's] findings. *Meredith*, 286 S.C. at 116, 333 S.E.2d at 565.

The Court should affirm the trial court on this issue.

IV. The trial court correctly entered a damage award of \$63,625 as it represented the actual loss suffered by Branco as a result of Appellants' tortious behavior.

The trial court reasonably determined the damages suffered by Branco in this case.

When calculating damages for breach of contract, damages should place a nonbreaching party in the position he would have enjoyed had the contract been performed. *Madren v. Bradford*, 378 S.C. 187, 195, 661 S.E.2d 390, 395 (Ct. App. 2008) (citing *Collins Entm't, Inc. v. White*, 363 S.C. 546, 559, 611 S.E.2d 262, 268–69 (Ct. App. 2005)). A party need not prove damages with mathematical certainty so long as the evidence allows a court to reasonably determine an appropriate amount. *Id.* When dealing with damages ascertained by a trial court in a bench trial, this Court has held that it should "defer to the trial court's decision" and that "questions regarding credibility and weight of evidence are exclusively for the trial judge." *Id.* (citing *Sheek v. Crimestoppers Alarm Systems*, 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989)).

In *Madren*, the trial court held that a putative purchaser breached a contract with his seller. *Madren*, 378 S.C. at 190–91, 661 S.E.2d at 392. The sole evidence noted by the Court on the issue of damages was the testimony of the respondent seller. *Id.* at 195–96, 661 S.E.2d at 395. Specifically, respondent seller testified that although he had spent \$82,000 on a large tract of land, the property at issue had since been subdivided and he estimated that \$25,000 of the initial purchase

price could be attributed to the property at issue. *Id.* He further testified that his best “estimate” of his time and labor in the home was \$40,000, and that the contract price was \$120,000 (although no appraisal had been completed). *Id.*

The Court affirmed the trial court’s damage award of \$55,000, which was calculated “by subtracting the [respondent’s] original purchase price for the House (\$25,000) and the [respondent’s] estimated cost of labor and materials (\$40,000) from the Contract’s purchase price of the House (\$120,000).” *Id.* at 96, 661 S.E.2d at 395. In affirming the award, the Court specifically “defer[red] to the trial court’s decision to believe [respondent’s] testimony regarding financial figures and use those figures in calculating damages.” *Id.*

Here, like in *Madren*, although the parties did not have an appraisal they had contractually agreed on a price of \$70,000 for the equipment at issue. (R. p. 359). As additional evidence, Branco testified that his equipment’s value was \$70,000, and specifically noted that there was unique equipment in the Sumter location that supported that value. (R. p. 197, lines 6-16). Further, Applebaum, a business owner aware of the nature of Branco’s business, agreed to pay \$70,000 for the equipment. (R. p. 227, lines 15-25).

Like the trial court in *Madren*, the trial court here found Branco’s testimony on the issue of value and financial figures credible, particularly as it was supported by the price listed in the Asset Purchase Agreement to which a third-party fellow business owner had agreed. (R. p. 7). The trial court thus used \$70,000 as the baseline value. (R. p. 7). From that number, like the court in *Madren*, the trial court here subtracted the value already received, namely the value received from the sale of some of the equipment (\$5,000) and unpaid rent owed to Appellants (\$1,375.00), for a total damage award of \$63,625. (R. p. 7).

Appellant thus incorrectly assert that the trial court entered its damage award without a "sufficient evidentiary basis." (App. Br. at 20). What Appellants actually offer in support can be liberally described as some competing evidence. However, as is the standard for reviewing these cases, the trial court only needed any evidence support its findings. *Meredith*, 286 S.C. at 116, 333 S.E.2d at 565.

If there is any distinguishing characteristic from *Madren* to the case at bar, it would be that the evidence of damages is even stronger in this case. Moreover, as Branco would have received \$70,000 had Appellants not tortiously interfered with the contract, the trial court's award placed Branco squarely in the position it would have been in had the contract been performed. See *Madren*, 378 S.C. at 195, 661 S.E.2d at 395.

The trial court's damage award was well-founded.

V. The issue of capacity and form of judgment was never raised below, but regardless the trial court correctly entered judgment in this case.

To the extent Appellants attack the trial court's imposition of judgment, the trial court's judgment should be affirmed.

As noted previously, the issue of capacity and the form of the judgment was not raised before the trial court in any form, and on that basis alone the Court should affirm the trial court's entry of judgment. An examination of Appellants' allegations counsels the same result.

Appellants' claim that Branco Investments, Inc. somehow lacked requisite capacity is meritless. The sole evidentiary basis for this assertion is an out-of-record citation⁸ to the Secretary of State's website. Yet there is a dearth of information in the record as to why the Secretary of State's

⁸ Branco would note that in addition to being unpreserved, Appellants cite to numerous documents not included in the Designation of Matter, and Appellants have never requested the Court take judicial notice of these documents and other sources.

website might have shown this information, what that notation actually meant in this case, and what processes were employed in arriving at that designation.⁹ It is plain that (1) Branco Investments, Inc., through Paul Branco, conducted business with Brooktenn and (2) Branco Investments, Inc. had full corporate status when virtually all legal proceedings relevant to this matter occurred and certainly during trial. This Court has rejected such hyper-technical corporate identity arguments in the service of process context:

A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, as is the case here, it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.

McCall v. IKON, 363 S.C. 646, 652–53, 611 S.E.2d 315, 318 (Ct. App. 2005) (quoting *Griffin v. Capital Cash*, 310 S.C. 288, 292, 423 S.E.2d 143, 146 (Ct. App. 1992)); see also *Long v. Carolina Baking Co.*, 193 S.C. 225, 239, 8 S.E.2d 326, 332 (1939) (“If a corporation has acquired a name by usage, an adjudication against it by the name so acquired is valid and binding.”). Regardless of its status, that Branco Investments, Inc. was selling off equipment (a maneuver thwarted by Appellants) is evidence that it was, at minimum, liquidating business assets. This is an expressly permitted activity even for dissolved corporations. See S.C. Code Ann. § 33-14-210(d).

If the Court were to set aside the preservation issues in this case, the only substantive argument remaining for Appellants would simply result in the remedy have having the trial court

⁹ For example, the Secretary of State must mail written notice to the effected corporation before dissolution, among a myriad of other technical requirements. See S.C. Code Ann. § 33-14-210(a). It is certainly within the realm of possibility, if not likelihood, that the Secretary of State's office may have failed to perform one of the many technical requirements set forth in the statute.

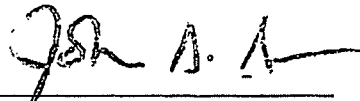
engage in the needless and ministerial task of adding another party to the judgment.¹⁰ For these reasons, the Court should affirm.

CONCLUSION

Based on the foregoing reasons, this Court should affirm the judgment of the trial court.

Respectfully submitted,

October 26, 2018

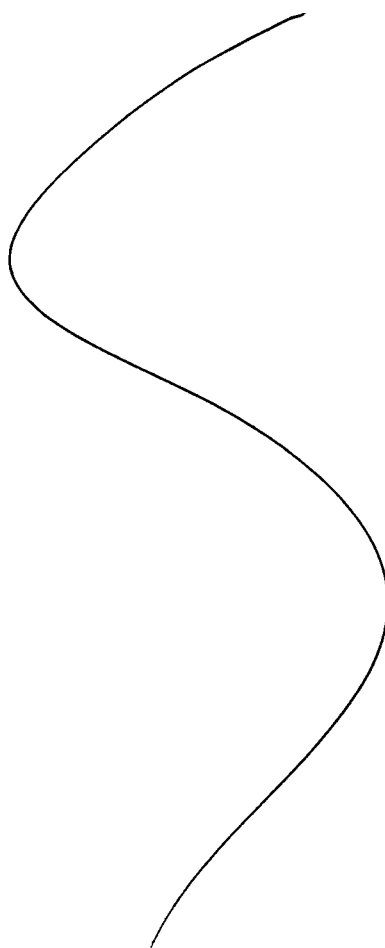


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¹⁰ It is worth noting that were the Court decide to add a party to the judgment, it would not change Appellants' obligation to pay post-judgment interest. "Post-judgment interest is in the nature of a penalty. . . . If, after appeal, a further *determination by the trial court* is necessary in order to *fix the amount of an award*, the award will not draw interest until the determination is made." *Babb v. Rothrock*, 310 S.C. 350, 354, 426 S.E.2d 789, 792 (1993). In *Vance v. Jacobs*, 294 S.C. 377, 379, 364 S.E.2d 755, 756 (Ct. App. 1988), the plaintiff obtained a jury verdict, and the trial judge entered a JNOV. The appellate court reversed the JNOV, and "remanded for entry of judgment on the verdict." *Id.* The appellate court ruled that interest ran from the date of the original judgment. *Id.*; see also *Edens v. S. Carolina Farm Bureau Mut. Ins. Co.*, 288 S.C. 435, 436, 343 S.E.2d 49, 50 (Ct. App. 1986). Thus, the direction to add a party or replace a party would require no further "determination" from the trial court, and certainly would not be necessary to fix the amount.



THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
R. Ferrell Cothran, Circuit Court Judge

Appellate Case No. 2017-000998
Civil Action No. 2015-CP-43-596

RECEIVED
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SC Court of Appeals

Paul Branco and Branco Investments,
Inc., d/b/a Great American Cookie Co., ... Respondents,

v.

Hull Storey Retail Group, LLC, and
Sumter Mall, LLC Appellants.

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INTRODUCTION

In this commercial property dispute, Plaintiffs Paul Branco and Branco Investments, Inc. allege Sumter Mall, LLC and Hull Storey Retail Group, LLC tortiously interfered with Branco Investments' contract to sell its equipment and assets to a third party. The trial court, after a bench trial, ruled Hull Storey was liable for tortious interference with contract and awarded damages to Paul Branco. This ruling and award of damages erred for the reasons explained in Hull Storey's primary brief, and, as explained below, none of the responsive arguments made by Mr. Branco and Branco Investments justify or excuse the trial court's errors.

ARGUMENT

- I. **In cases tried before a judge without a jury, a party need not make a motion for judgment to preserve issues regarding the sufficiency of the evidence.**

In their Response Brief, Mr. Branco and Branco Investments argue that because Hull Storey's trial counsel did not renew his motion for judgment at the conclusion of all evidence, Hull Storey and Sumter Mall "have waived the right for this Court to review any and all arguments raised in the appeal at bar." *See* Brief of Respondents at 7 (citing *Wallace v. Milliken & Co.*, 300 S.C. 553, 559, 389 S.E.2d 448, 451 (Ct. App. 1990)). This argument misapprehends the rules of issue preservation that apply to bench trials. Cases tried before a judge without a jury are subject to Rule 52, SCRCP, which clearly states a motion for judgment *is not required* to preserve a challenge to the sufficiency of the evidence:

When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings *may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment.*

Rule 52(b), SCRCP (emphasis added); *see also* Jean H. Toal *et al.*, APPELLATE PRACTICE IN SOUTH CAROLINA 75 (2d ed. 2002) ("In cases tried before a judge without a jury, a party need not make

a directed verdict motion to preserve for appeal an issue regarding the sufficiency of the evidence.”) (citing *Norell Forest Prods. V. H&S Lumber Co.*, 308 S.C. 95, 99, 417 S.E.2d 96, 99 (Ct. App. 1992)).

Indeed, the very case upon which Mr. Branco and Branco Investments rely—*Wallace v. Milliken & Co.*—illustrates that an appellate court *may* review a challenge to the sufficiency of the evidence even if the defendant did not renew its motion for judgment at the conclusion of all evidence. See *Wallace*, 300 S.C. at 556–58, 389 S.E.2d at 450–51 (analyzing at length and ruling on the appellant’s argument “that the evidence is insufficient to support a finding of retaliatory discharge”); see also *Wallace v. Milliken & Co.*, 305 S.C. 118, 123, 406 S.E.2d 358, 361 (1991) (analyzing and ruling on issue of whether the evidence was sufficient to support the trial court’s rulings).¹ Accordingly, under Rule 52, SCRPC and applicable precedent, the absence of a renewed motion for judgment at the conclusion of all evidence has no bearing on Hull Storey’s and Sumter Mall’s ability to challenge the trial court’s erroneous findings.

II. Each of the issues on appeal was either raised to the trial court or implicates jurisdiction and thus may be raised at any time.

In addition to the sweeping (and incorrect) preservation argument rebutted in Part I, *supra*, Mr. Branco and Branco Investments further argue that each of Hull Storey’s issues on appeal are individually unpreserved. See Brief of Respondents at 8–10. As explained more fully below, their argument is incorrect because three of the issues on appeal were raised to and ruled on by the trial court, and the fourth implicates jurisdiction and may be raised at any time.

¹ Mr. Branco and Branco Investments correctly note that a *separate* section of the Court of Appeals’ opinion in *Wallace* held a party must renew his motion for judgment at the conclusion of all evidence if he wishes to later challenge the trial court’s denial of his earlier motion for judgment. See *Wallace*, 300 S.C. at 559, 389 S.E.2d at 451. Hull Storey, however, has not challenged the trial court’s denial of its motion for judgment. Rather, Hull Storey challenges the sufficiency of the evidence to support the trial court’s findings. Such a challenge is permitted by Rule 52, SCRPC, and by *Wallace*, regardless of whether the motion for judgment was renewed or, for that matter, was ever made at all to the trial court.

As to Hull Storey's first issue on appeal—that the contract at issue was dependent on contingencies that were never satisfied and thus there was never an enforceable contract with which to interfere—Mr. Branco and Branco Investments erroneously argue this “is simply not an argument that was ever raised prior to judgment and thus this issue is not preserved.” *See* Brief of Respondents at 8. Contrary to their assertion, however, the issue of the unsatisfied contingencies, including the absence of a lease approval (whether in writing, as required by law, or otherwise), was expressly raised at trial:

[Hull Storey's trial counsel:] Regarding the tortious interference with contract claim, there must be existence of a valid contract In this case, the contract that I believe the plaintiff is alleging was tortiously interfered with had multiple contingencies, one of which was that my client entered into a lease with Brooktenn. *Those parties never entered into a lease and that contingency was never met.*

* * *

[T]here were contingencies that they entered into a contract for lease, that Brooktenn entered into a contract for lease at the Sumter Mall before these other pieces could fall into place. *That did not occur; nor did the lease at the Florence Mall occur. So there was not a valid contract in that regard.*

Trial Tr. 167:18 to 168:17 (R. 236–37) (emphasis added); *see also id.* at 191:20–24 (R. 260) (“Q. And they did not sign this agreement, correct? A. Correct. Q. But they didn’t sign any other lease agreements with you; is that correct? A. Correct.”); *id.* at 96:11–12 (R. 165) (“So you didn’t have a valid contract then, did you, if you got the contingency in there.”); *id.* at 195:1–5 (R. 264) (discussing the agreement’s contingencies and explaining that leases are “not valid deals until you have a legal document signed by both parties”).² This issue was raised to and ruled upon by the trial court.

² *See also* Answer of Hull Storey at pages 1 and 3 (R. 27 and 29) (“Plaintiff’s claims are barred, in whole or in part, by the Statute of Fraud. . . . Plaintiff’s claims are barred because certain conditions precedent were not met in order for its claims to ripen . . . Defendant further shows that no lease was entered between Brooktenn, LLC and Hull Storey Retail Group, LLC.”); Answer of Sumter Mall at pages 1 and 3 (R. 34 and 26) (same).

As to Hull Storey's second issue on appeal—that Hull Storey's actions were motivated and justified by its legitimate business interests—Mr. Branco and Branco Investments argue “the transcript is bereft of any preserved argument before the judge that a legitimate purpose and business interest existed.” See Brief of Respondents at 8. Contrary to their assertion, the transcript contains multiple discussions explaining Hull Storey's and Sumter Mall's justifiable reasons for seeking the payment at issue. See, e.g., Trial Tr. 185:3 to 187:6 (R. 254–56); Trial Tr. 191:25 to 192:11 (R. 260–61); Trial Tr. 65:23 to 66:9 (R. 134–35) (discussing Hull Storey's business interests that were explained to Mr. Branco as the basis for the payment requested). The fact that the transcript does not contain the precise phrase “legitimate business purpose” or “business justification” does not change the fact that the issue was raised to the trial court with sufficient clarity for the court to comprehend the issue. See *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (expressing concern about the “over-zealous application” of “error preservation rules” and discouraging a “hypertechnical application” of those rules resulting in appellate arguments being procedurally barred); *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011) (finding appellate courts should remain “mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner”).

Likewise, Hull Storey's third issue on appeal—that the amount of the damages award lacked adequate or reliable evidentiary support—was likewise raised to the trial court. See Trial Tr. 128:1–22 (R. 197) (challenging Mr. Branco's unsupported and self-serving valuation of the equipment); Trial Tr. 165:12 to 166:10 (R. 234–35) (same); Trial Tr. 102:1 to 103:20 (R. 171–72) (same). There is no doubt Hull Storey challenged the dubious valuation of the equipment with sufficient clarity to preserve it for appellate review. See *Herron* and *Lewis*, *supra* (rejecting a “rigid” and “hyper-technical” approach to preservation). Furthermore, contrary to Branco's assertion, the

fact that this issue was not discussed during the oral motion for judgment is immaterial to preservation in a bench trial. *See* Part I, *supra*.

Hull Storey's fourth issue on appeal—that the trial court awarded judgment to the wrong party, and the party who purported to enter the contract at issue was legally non-existent and thus unable to contract³—is preserved for appellate review because it implicates the court's jurisdiction and thus may be raised at any time, including for the first time on appeal. The South Carolina Supreme Court has held that an action instituted by a non-existent entity is a nullity over which the court lacks jurisdiction, and that this failing may be raised at any time, including on appeal:

[T]he the objection is really to the jurisdiction of the court, which may be entertained at any stage of the case, even *sua sponte* by this court.

* * *

[I]f there is a lack of legal entity, the whole action fails. . . . “[I]f an action is brought in the name of that which under the *lex fori* has no legal entity, it is as if there was no plaintiff in the record and therefore no action before the court”; which presents an instance of want of jurisdiction.

Commercial & Savings Bank of Lake City v. Ward, 146 S.C. 77, 143 S.E. 546, 548 (1928) (citation and internal quotation marks omitted) (second ellipses in original); *see also Arnal v. Fraser*, 371 S.C. 512, 517 n.2, 641 S.E.2d 419, 421 n.2 (2007) (“Subject matter jurisdiction may be raised at any time, including on appeal.”) (citing *State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004)). In sum, each of the issues on appeal was raised to the trial court or may be first raised now.

III. The contract's contingencies were never satisfied, and thus there was never an enforceable contract with which to interfere.

Despite claiming the Record contains a “cornucopia” of evidence that the Proposal for Purchase ripened into an enforceable contract, Mr. Branco's and Branco Investments' Brief fails

³ The relevant facts and legal analysis are explained in greater detail in Hull Storey's primary brief. In short, Branco Investments was in forfeiture of its corporate existence from March 7, 2012 to July 1, 2015. Accordingly, it was legally non-existent at the time it purported to enter the contract with Brooktekn in 2013 and at the time it filed this lawsuit on March 5, 2015.

to identify a single document, a single line of testimony, or any evidence of any other type constituting or discussing the existence of a written lease agreement between Hull Storey and Brooktenn, LLC. Likewise, the Record is completely devoid of any evidence—documentary or otherwise—to establish that Brooktenn and Hull Storey entered into a lease with particularized terms and conditions.⁴ Indeed, Mr. Branco and Branco Investments grudgingly concede that (i) leases are subject to the Statute of Frauds, and (ii) the Record is devoid of any written lease approval or agreement between Hull Storey and Brooktenn. *See* Brief of Respondents at 14. Similarly, the Trial Court’s amended order of judgment acknowledges that Brooktenn and Branco never executed a lease. *See* Amend. Order of J. at 2 (R. 2). Because there was no written lease agreement, the contingency in the Proposal for Purchase was not satisfied, and thus the Proposal for Purchase was not an enforceable contract. *See generally* Brief of Appellant at 12–16.

A. The alleged “admissions” in Appellants’ pleadings are irrelevant to the critical issue of whether Brooktenn obtained a lease agreement and, in any event, do not concede the agreement between Branco Investments and Brooktenn was an enforceable contract.

Mr. Branco and Branco Investments argue the Answers filed by Hull Storey and Sumter Mall contain an “admission” there was a “contract” between Brooktenn and Branco Investments.⁵

⁴ The Statute of Fraud requires that a lease be in writing and that “[t]he writing must reasonably identify the subject matter of the contract, sufficiently indicate a contract has been made between the parties, and state with reasonable certainty the essential terms of the agreement.” *Player v. Chandler*, 299 S.C. 101, 106, 382 S.E.2d 891, 895 (1989) (citing Restatement (Second) of Contracts, § 131 (1981)) (emphasis added); *see also In re Camelot Casino Cruises, Inc.*, 330 B.R. 263 (Banks. M.D. Fla. 2005) (applying South Carolina law) (holding a proposed commercial lease agreement was void under South Carolina’s Statute of Frauds due to the absence of a writing stating “the essential terms of the contract with reasonable certainty”).

⁵ Inexplicably, the Respondents’ brief essentially fails to acknowledge that tortious interference with a contract cannot stand upon the mere formation of a contract that is not yet binding. The well-established law of this State is that “[t]he right to recover for the unlawful interference with the performance of a contract presupposes the existence of a *valid, enforceable* contract.” *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct. App. 1993) (emphasis added); *see also BCD LLC v. BMW Mfg. Co. LLC*, 360 Fed. Appx. 428 (2010) (same) (quoting *Bi-Lo*).

See Brief of Respondents at 12 n.6 (and accompanying text); *id.* at 14–15. This argument fails for at least two reasons. First, the supposed “admission” is irrelevant to the critical question of whether Brooktenn ever obtained a lease agreement. The “admission” merely acknowledges that Branco Investments “entered into a contract” with Brooktenn, LLC, *i.e.*, the Proposal for Purchase.⁶ *That agreement is not the one barred by the Statute of Frauds*, and thus this “admission” does nothing to establish or affirm the existence of a lease agreement upon which the enforceability of the Proposal for Purchase depends. Second, the Answers’ acknowledgment that Branco Investments and Brooktenn had a contract is not an admission that the contract was *enforceable*.⁷ Rather, the Answers simply recognize the Proposal for Purchase was a contract that would become enforceable if—and only if—certain future conditions occurred;⁸ in other words, it was an “agreement to agree.” Because the contingencies never came to pass, however, the contract never ripened into an *enforceable* contract.

The South Carolina Supreme Court has employed similar reasoning and terminology when discussing a contract that was unenforceable under the Statute of Frauds because it contemplated a future occurrence that never materialized. *See Fici v. Koon*, 372 S.C. 341, 347, 642 S.E.2d 602, 605 (2007) (using the term “contract” more than 30 times to describe a written agreement but

⁶ See Answer of Hull Storey at ¶ 17 (R. 30); Answer of Sumter Mall at ¶ 17 (R. 37).

⁷ This is especially true in light of the fact that the Answers expressly denied liability for the claim and asserted that “Plaintiff’s claims are barred because certain conditions precedent were not met in order for its claims to ripen.” See Answer of Hull Storey at page 1 and at ¶¶ 20–21 (R. 27 and 30); Answer of Sumter Mall at page 1 and at ¶¶ 20–21 (R. 34 and 37).

⁸ Indeed, the very title of the agreement—a “Proposal for Purchase”—indicates its conditional and contingent nature. In an apparent effort to avoid the use of this revealing name, Mr. Branco’s and Branco Investments’ brief instead refers to the agreement as an “Asset Purchase Agreement.” See Brief of Respondents at 2 and *passim*.

nevertheless concluding that the “contract dated February 27 is nothing more than an agreement to agree which is unenforceable under the Statute of Frauds”).

Furthermore, the case upon which Mr. Branco and Branco Investments rely—*Robert Harmon & Bore, Inc. v. Jenkins*, 282 S.C. 189, 318 S.E.2d 371 (Ct. App. 1984)—is distinguishable and, to the extent it sheds any light on this issue, it actually supports Hull Storey’s position. See Brief of Respondents at 14–15. *Jenkins* is distinguishable from the instant proceeding in that the alleged admission in the defendant’s Answer was a frank concession that the parties had an oral agreement and provided specific details of that agreement.⁹ Here, in contrast, Hull Storey’s and Sumter Mall’s Answers did not concede the existence the disputed contract, namely the lease agreement between Brooktenn and Hull Storey, nor did the Answers supply the specific and necessary terms and conditions of that supposed agreement. Furthermore, even in *Jenkins*—a case in which the “admission” was significantly more damning than in the instant appeal—the Court nevertheless held it was *not* enough to establish the existence of a contract where no written contract had ever been executed. This was because even the level of detail in the Answer in *Jenkins* (which far exceeds the detail in the Answers in the instant lawsuit) was insufficient to serve as a writing memorializing a completed agreement:

The written admission must contain *all the essential elements of the contract, and the terms and conditions must be stated with reasonable certainty*, that is, all material parts must be contained in the memorandum, and it is insufficient where it omits an essential term. . . .

As to a writing relied on to establish a lease agreement in particular, the writing “must embody all the essential and material parts of the lease

⁹ In *Jenkins*, the relevant portion of the Defendant’s Answer contained a significant level of detail regarding the specific terms and conditions of the parties’ oral agreement. See *Jenkins*, 282 S.C. at 192, 318 S.E.2d at 373 (noting the parties’ discussions had contemplated a that the “proposed lease would be for a period of five (5) years at a rental of Four Thousand Five Hundred (\$4,500) dollars per month”) (quoting the defendants Answer). In contrast, the Answers in the case at bar are utterly silent as to the terms and conditions of the lease agreement.

contemplated to be thereafter executed with such clarity and certainty as to show that the minds of the parties had met on all material terms.

* * *

Moreover, while the purported memorandum sufficiently identifies the premises to be leased, defines a term, and prescribes a rental and time and manner of its payment, . . . nowhere does the memorandum specify when the five-year term would begin.

Under these circumstances, then, we cannot agree with the trial court that the answer of Jenkins and the Association provided a sufficient memorandum to remove the agreement from the statute of frauds.

Jenkins, 282 S.C. at 193–95, 318 S.E.2d at 374 (citations omitted). If the relatively detailed admission in the defendant’s pleadings in *Jenkins* was insufficient to satisfy the Statute of Frauds, the *de minimis* pleadings in the instant lawsuit undoubtedly do not.

B. Respondents’ arguments misapprehend the legal issue presented in this appeal.

In support of their argument that the Proposal for Purchase was an enforceable contract, Mr. Branco and Branco Investments argue that *that* agreement does not itself violate the Statute of Frauds. *See* Brief of Respondents at 13. Their argument misses the mark because it misapprehends the fundamental legal issue in this appeal. The issue before the trial court and before this Court is not whether the agreement between Branco Investments and Brooktenn, LLC was executed in written form. No one disputes that it was. But that fact should not be allowed to obscure the actual legal dispute here, namely that alleged discussions concerning a potential lease agreement between Brooktenn, LLC and Hull Storey were never reduced to a written document memorializing the terms of a an actual lease agreement between them. *That* is the relevant agreement that violates the Statute of Frauds, and in the absence of *that* written agreement, the contingencies of the Proposal for Purchase remain unsatisfied and render the Proposal for Purchase unenforceable.¹⁰

¹⁰ This conflation of the two contracts likewise renders Mr. Branco’s and Branco Investments’ reliance on S.C. Code Ann. § 36-2-201(1) fruitless. *See* Brief of Respondents at 13 n.7. That statute expressly states it applies only to contracts for the sale of goods worth more than \$500. *See* S.C. Code Ann. § 36-2-201(1); *see also id.* § 36-2-102 (“[T]his Chapter applies to transactions in

Even a valid contract is unenforceable in the absence of the satisfaction of conditions precedent to performance. *See Worley v. Yarborough Ford*, 317 S.C. 206, 210, 452 S.E.2d 622 (1994) (“A condition precedent entails something that is essential to a right of action In contract law, the term connotes any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises.”) (citations omitted). The Proposal for Purchase between Brooktenn and Branco contained a condition precedent, namely that Brooktenn must first obtain a “satisfactory lease” from Hull Storey before any obligation arose to tender payment to Branco for the equipment. Because Brooktenn never satisfied that condition precedent, Branco Investments could not enforce the Proposal for Purchase and require Brooktenn to pay for Branco’s equipment. Accordingly, the agreement between Brooktenn and Branco Investments was, and remains, unenforceable. Consequently, Mr. Branco and Branco Investments cannot establish the existence of an enforceable contract, which is a required element of a claim for tortious interference with a contract.

C. Respondents can neither raise the defense of estoppel nor establish its elements.

Mr. Branco’s and Branco Investments’ argue the doctrine of estoppel can overcome the absence of a written lease agreement between Brooktenn and Hull Storey. *See* Brief of Respondents at 14–15. Their argument, however, proves ineffective. “In order to overcome statutory requirements that an agreement be in writing, the party asserting estoppel must show that he suffered a definite, substantial, detrimental change of position in reliance on such agreement and that no remedy except enforcement of the bargain is adequate to restore his former position.” *Player v. Chandler*, 299 S.C. 101, 106, 382 S.E.2d 891, 894 (1989). In contrast, “[i]t is *not*

goods.”). Accordingly, that statute applies to the Proposal for Purchase (which included the sale of equipment for the baking and sale of cookies), but it is irrelevant to the question of whether a lease agreement ever existed between Brooktenn and Hull Storey.

sufficient to show merely that he has lost an expected benefit under the contract.” *Atlantic Wholesale Co., Inc. v. Solondz*, 283 S.C. 36, 41, 320 S.E.2d 720, 723 (Ct. App. 1984) (citations omitted) (emphasis added).

Estoppel is inapplicable here for at least three reasons. First, the law is clear that “the party asserting estoppel” must show he detrimentally relied on the oral agreement. *See Player*, 299 S.C. at 106, 382 S.E.2d at 894 (emphasis added). Here, however, the Record is devoid of any evidence or testimony that Mr. Branco or Branco Investments made any change in position (much less a “substantial, detrimental” one) in response to or based on Hull Storey’s alleged oral approval of Brooktenn’s lease application.¹¹ Second, the defense of estoppel is to be asserted by a party to the unwritten contract.¹² Here, however, Mr. Branco and Branco Investments are attempting to assert estoppel to legitimize a purported unwritten lease agreement to which they were not a party, *i.e.*, the supposed oral lease agreement between Brooktenn and Hull Storey. Third, even if Mr. Branco and Branco investments were able to assert estoppel as third parties to the alleged lease agreement, they cannot establish the factors necessary to defeat the Statute of Frauds’ requirement that lease

¹¹ Mr. Branco and Branco Investments attempt to gloss over this fact by arguing that *Brooktenn* spent time and effort pursuing this deal rather than other ones. *See* Brief of Respondents at 14. Even assuming *arguendo* that there was Record evidence to support this argument (and Respondents point to none), it is nevertheless irrelevant because *Brooktenn isn’t the party asserting estoppel*.

¹² This fact is illustrated in the cases cited above and finds further support in the rationale that prevents a third party from maintaining an action for the breach of another’s contract. *See Clardy v. Bodolosky*, 383 S.C. 418, 383 S.C. 418 (2009) (“Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third party is not, as such, recoverable by the plaintiff.”) (internal citations omitted); *see also Walker v. Preacher*, 188 S.C. 431, 199 S.E.2d 675 (1938) (analyzing the enforceability of an oral contract and noting “that the protection afforded by the statute is a personal privilege of the parties to the agreement”). In the instant appeal, because Mr. Branco and Branco Investments are strangers to the alleged agreement between Hull Storey and Brooktenn, they cannot avail themselves of the theory of estoppel to overcome the Statute of Frauds’ requirement that a lease must be in writing to be enforceable.

agreements must be in writing. As noted above, "[i]t is *not* sufficient to show merely that he has lost an expected benefit under the contract." *Atlantic Wholesale*, 283 S.C. at 31, 320 S.E.2d at 723. Mr. Branco's and Branco Investment's hope of receiving the benefit of payment for the equipment in the event that Brooktenn and Hull Storey entered into a lease is not a sufficient basis to apply estoppel to overcome the application of the Statute of Frauds. Furthermore, Mr. Branco and Branco Investments did not seek specific performance of the lease between Brooktenn and Hull Storey and did not present evidence that "no remedy except enforcement of the bargain is adequate to restore his former position." Accordingly, Mr. Branco and Branco Investments cannot now claim Hull Storey is estopped from asserting the defense of the Statute of Frauds.

D. Respondents' reliance on distinguishable case law cannot mask the fact that the Proposal for Purchase contained an unsatisfied contingency.

Mr. Branco and Branco Investments next argue that the contingency in the Proposal for Purchase was satisfied merely by Brooktenn's *intent* to obtain a lease agreement and that the failure to actually do so does not affect the enforceability of the Proposal for Purchase. *See* Brief of Respondents at 15-16. In support of this argument, they rely exclusively on *McPeters v. Yeargin Const. Co.*, 290 S.C. 327, 350 S.E.2d 208 (Ct. App. 1986), a case that is significantly distinguishable because the agreement in *McPeters* did not involve an unsatisfied contingency. In *McPeters*, an employer made an oral offer to an employee that, if the employee stayed on the job and completed it on time, the employer would give him a sizeable bonus. *See McPeters*, 290 S.C. at 330, 350 S.E.2d at 210. The employee stayed on the job and finished the project on time, but the employer refused to pay the bonus. *Id.* The employee brought suit, arguing the parties' agreement was an enforceable contract because he had done everything the agreement required of him. *Id.* Accordingly, the issue in *McPeters* was simply whether the employer's oral offer and the employee's acceptance by way of full performance constituted an enforceable contract.

The contract in *McPeters* was *not* made contingent on any future event (other than the employee's acceptance by performance) and thus the issue in that case was *not* whether the contract was enforceable despite an unsatisfied contingency. Mr. Branco and Branco Investments try to gloss over this distinction by arguing that because the employer in *McPeters* did not have a set bonus policy and the payment of bonuses was discretionary, the agreement in *McPeters* must (according to Branco) have been contingent on the future exercise of discretion. See Brief of Respondent's at 15–16. The flaw in that argument, however, is that the *McPeters* Court expressly rejected it, stating the oral offer made by the employer was *not* conditioned on a future exercise of discretion. See *McPeters*, 290 S.C. at 331, 350 S.E.2d at 211 (rejecting the employer's argument “that the payment of any bonuses to Mr. *McPeters* and the other employees was necessarily discretionary” and noting instead that the testimony of the witnesses who were present when the oral offer was made “made no reference in their testimony to his having said the payment of bonuses would be discretionary”).

In sum, *McPeters* involved a straightforward analysis of an oral offer and acceptance by performance—a contract that expressly was not made contingent on any future events. Here, in contrast, the Proposal for Purchase between Branco Investments and Brooktekn was expressly made contingent on future events—events that never occurred. Accordingly, the Proposal for Purchase, unlike the agreement in *McPeters*, never became enforceable.

IV. Hull Storey's conduct was justified.

As explained in Appellants' primary brief, even assuming there was a valid, enforceable contract between Branco Investments and Brooktekn (which there was not), Hull Storey cannot be liable for tortiously interfering with that contract because Hull Storey's actions were justified. See Brief of Appellants at 16–20. In response, Mr. Branco and Branco Investments rely on distinguishable case law and one snippet of testimony indicating Mr. Applebaum's (the principal

of Brooktenn) perception that Hull Storey's conduct was unfair. *See* Brief of Respondents at 18–20. Their reliance on *Webb v. Elrod*, 308 S.C. 445, 418 S.E.2d 559 (Ct. App. 1992) is unavailing. In that case, the Webbs bought two tracts of land from the Elrods. *Webb*, 308 S.C. at 446, 418 S.E.2d at 560. When the Webbs fell behind in their payments on the land, they sold lots on the land to third parties who purchased bonds for title and made monthly payments directly to the Elrods. *Id.* When the Webbs fell still further behind in their payments, Ms. Elrod contacted several of the third parties and advised them she would no longer accept payments from them and that she intended to foreclose on the Webbs' mortgages. *Id.* at 447, 418 S.E.2d at 560. The third parties then ceased making payments. The Webbs sued the Elrods, claiming this contact with the third parties had tortiously interfered with the Webbs' contracts with those third parties. *Id.* The Court of Appeals disagreed, holding the Elrod's exercise of a legal right did not constitute tortious interference, even if the result of that exercise was to cause third parties to renege on their contracts with the Webbs. *Id.* at 448, 418 S.E.2d at 561 ("The exercise in good faith of a legal right by a party to a contract affords no basis for an action by the second party for intentional interference with a contract even though the consequence of the exercise of the legal right by the first party is to cause a third party not to perform another contract with the second party.") (citations omitted).

Here too, like in *Webb*, Hull Storey's exercise of a legal right—the right to profit from the lease of its real estate by charging a tenant or prospective tenant an up-front payment of \$20,000 in addition to ongoing monthly lease payments—cannot constitute interference with the Proposal for Purchase even if Brooktenn's response was to renege on that agreement. Nor does Mr. Applebaum's self-interested perception of unfairness transform this exercise of a legal right into something improper. The Record is devoid of any evidence that Hull Storey's conduct was motivated by a subjective intent or purpose of interfering with a contract, and thus Hull Storey cannot be liable for the exercise of its rights. *See id.*

V. The damages award rests on inadequate and unreliable evidence.

In an attempt to defend the trial court's award of damages in an amount based on speculation and conjecture, Mr. Branco and Branco Investments point to this Court's opinion in *Madren v. Bradford*, 378 S.C. 187, 661 S.E.2d 390 (Ct. App. 2008). See Brief of Respondents at 20–22. They ignore, however, *Madren*'s admonition that “an amount of damages cannot be left to conjecture, guess, or speculation.” *Madren*, 378 S.C. at 195, 661 S.E.2d at 395 (citation omitted). They further ignore a key distinction between *Madren* and the instant proceeding, namely that in *Madren* the plaintiff knew his cost basis in the parcel to be sold, from which the fact finder could calculate damages. See *id.* at 195–96, 661 S.E.2d at 395. In contrast, Mr. Branco testified that *he did not know* his cost basis in the equipment. See Trial Tr. 165:12 to 166:10 (R. 234–35) (Mr. Branco admitting he had no idea how much he'd paid for the equipment originally and admitting he had not created any estimate or undertaken any discernable process to reach his \$70,000 estimate). Accordingly, the trial court's calculation of the damages amount rests on inadequate and unreliable evidence.

VI. The trial court erred by awarding damages arising from an agreement that Branco Investments lacked the capacity to enter and by awarding those damages to Mr. Branco, who was not a party to that agreement.

As explained in Hull Storey's primary brief, the trial court erred (i) by awarding damages to Mr. Branco, who was not a party to the Proposal for Purchase that was supposedly interfered with by Hull Storey, and (ii) by awarding damages in a lawsuit filed by Branco Investments while in forfeiture of its corporate status, and arising from a contract entered by Branco Investments while in forfeiture of its corporate status. See Brief of Appellants at 22–23. In response, Mr. Branco and Branco Investments raise four arguments, each of which is discussed briefly below.

First, Mr. Branco and Branco Investments argue that Hull Storey's brief impermissibly relied on materials outside of the Record. See Brief of Respondents at 23 n.8 (and accompanying

text). However, this Court may freely take judicial notice of matters of public record such as the publicly accessible business records posted by the Secretary of State. *See Cox v. Fleetwood Homes of Georgia, Inc.*, 329 S.C. 157, 160 n.2, 494 S.E.2d 462, 463 n.2 (Ct. App. 1997), rev'd on other grounds, 334 S.C. 55, 512 S.E.2d 498 (1999); *State v. Little*, 227 S.C. 60, 69, 86 S.E.2d 875, 879 (1955); *see also* Rule 201(b), SCRE.

Second, Mr. Branco and Branco Investments speculate that perhaps the administrative dissolution of Branco Investments might have been ineffective since—who knows?—there might have been a technical error in the administrative procedure of the dissolution. *See* Brief of Respondents at 23. This is mere speculation, and this Court should not give credence to conjecture that assumes (with no basis) that State employees and officers failed to properly perform their duties.

Third, Mr. Branco and Branco Investments argue that Branco Investments entry into the Proposal for Purchase was simply an effort to wind up and liquidate its business, which is permissible even for a dissolved corporation. *See* Brief of Respondents at 24. This assertion is belied, however, by the fact that Branco Investments subsequently sought and received reinstatement of its corporate status. If the attempt to sell its equipment and the filing of this lawsuit were merely the winding up and liquidation of Branco Investments business and affairs, there was no need to reactivate its corporate registration.

Finally, Mr. Branco and Branco Investments argue the trial court's error of awarding damages to the wrong plaintiff should be overlooked because it would be easy to correct on remand. *See* Brief of Respondents at 24. But while this error may be simple enough to correct on remand, it is nevertheless an error and Hull Storey submits that it is illustrative of the imprecision that infected the entirety of the trial court's analysis and ruling in this proceeding.

CONCLUSION

For the foregoing reasons, Appellants respectfully request this Court reverse the trial court's Amended Order of Judgment.

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November 7, 2018
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
R. Ferrell Cothran, Circuit Court Judge

Appellate Case No. 2017-000998
Civil Action No. 2015-CP-43-596

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SC Court of Appeals

Paul Branco and Branco Investments,
Inc., d/b/a Great American Cookie Co., ... Respondents,

v.

Hull Storey Retail Group, LLC, and
Sumter Mall, LLC Appellants.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the Final Brief of Appellant and the Final Reply Brief
of Appellants comply with Rule 211(b), SCACR.

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v.

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RECORD ON APPEAL

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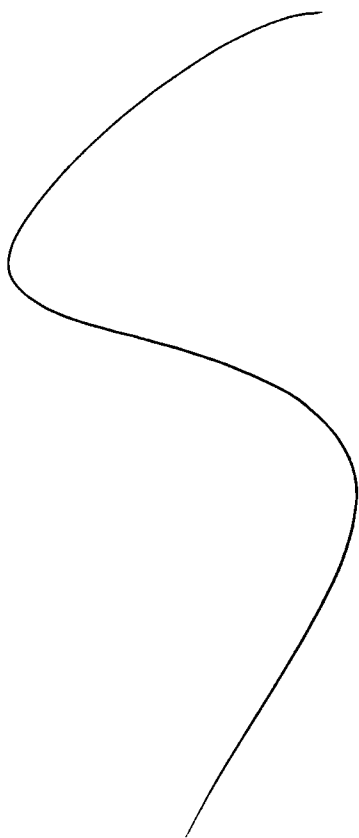
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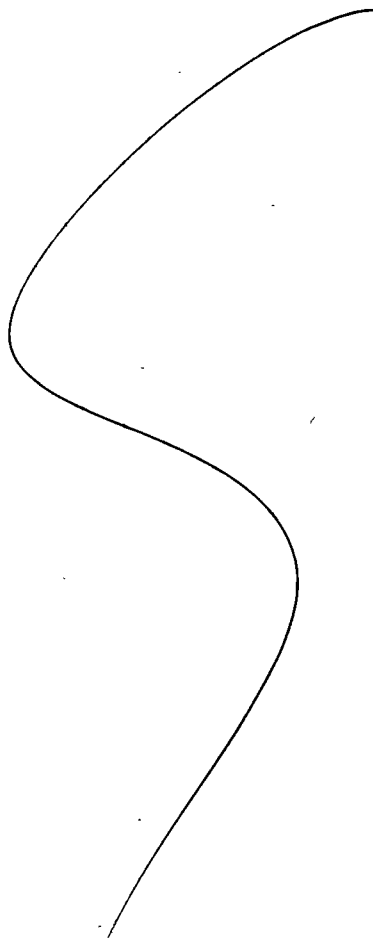
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CERTIFICATE OF COMPLIANCE



STATE OF SOUTH CAROLINA)
COUNTY OF SUMTER)

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT
2015-CP-43-596

Paul Branco and Branco Investments, Inc.)
d/b/a Great American Cookie Co.,)

Plaintiffs,)

vs.)

Hull Storey Retail Group, LLC and)
Sumter Mall, LLC,)

Defendants.)

AMENDED ORDER OF JUDGMENT

This matter came before this Court by way of a bench trial on February 28, 2017 before the Honorable Ralph Ferrell Cothran Jr. The plaintiffs appeared and were represented by Patrick M. Killen, Esq. The defendants also appeared and were represented by William Buxton, Esq. and Matthew Matson, Esq., of the Georgia bar. Judgment was entered in favor of plaintiffs on March 23, 2017. On March 21, 2017, the defendants filed a Motion to Amend Judgment under Rule 52(b) of the South Carolina Rules of Civil Procedure. Subsequently, the defendants filed a notice of appeal with the South Carolina Court of Appeals on April 21, 2017. On August 30, 2017, the Court of Appeals granted the defendants' motion to remand, holding the appeal in abeyance until this Court resolved the pending motion to amend. Plaintiffs filed a response to defendants' motion on February 7, 2018. A hearing on Defendant's motion was held on February 9, 2018. Plaintiffs appeared and were represented by Patrick M. Killen, Esq. and Derek A. Shoemake, Esq. Defendants appeared and were represented by Miles E. Coleman, Esq. and Timothy E. Madden, Esq. of the South Carolina Bar.

The court has carefully considered all facts and arguments raised by all parties and reaffirms its findings for the plaintiff, as amended, in the amount of \$63,625.00 in actual damages.

FINDINGS OF FACT

The plaintiff, Paul Branco (hereinafter "Branco"), owned and operated two Great American

Cookie Co. (hereinafter "GAC") franchises, one in the Sumter Mall and the other in the Magnolia Mall in Florence. Branco began the Magnolia Mall GAC franchise in Florence in 2001. Branco entered into a contract (hereinafter "lease") with defendant, Sumter Mall, LLC, a South Carolina LLC under the control and direction of Defendant Hull Storey Retail Group, LLC (hereinafter "Hull Storey"), giving Branco a lease on unit 55 in Sumter Mall. The lease term was from December 30, 2002 to April 30, 2013. Beginning in 2003, Branco operated a GAC store in unit 55 and paid monthly rent to the defendants as provided in the lease for the next ten (10) years and four (4) months.

In September of 2012, Branco and defendant Hull Storey began discussions about the possibility of Branco's daughter taking over from Branco and operating the GAC store in Sumter Mall. Ultimately, Branco was told by Hull Storey that, in order for Branco's daughter to be approved by Hull Storey as a lessee, Branco would have to sign as a guarantor on the daughter's lease. Branco was not interested in signing as a guarantor for his daughter and withdrew the proposal to have his daughter take over the GAC franchise.

Following this, Branco Investments, Inc. (hereinafter "Branco Investments"), the owner of the equipment and assets utilized in the Sumter Mall and Magnolia Mall GAC franchises, through Branco, negotiated an assets sale with Brooktenn, LLC (hereinafter "Brooktenn"), a Georgia limited liability company owned by Stewart Applebaum (hereinafter "Applebaum"). Brooktenn owns and operates several GAC franchises in neighboring and other southeastern states. Pursuant to the asset sale contract with Branco, Brooktenn applied submitted a lease application to Hull Storey. Communications between Branco and Lewis White, a representative of Hull Storey, indicated that Hull Storey approved Brooktenn's lease application to operate a GAC franchise in Sumter Mall. This lease agreement between Hull Storey and Brooktenn was never executed.

When Hull Storey became aware of Branco's deal with Brooktenn, Hull Storey made a demand of \$70,000.00 for a "lease assignment fee." Evidence suggested Hull Storey knew and

understood that Brooktenn, LLC was not taking an assignment of Branco's lease, but Hull Storey nevertheless cited paragraph 16.2 of the lease (which deals with lease assignments) as the basis for the demand. Hull Storey eventually reduced its demand from \$70,000.00 to \$20,000.00.

Both Branco and Brooktenn were told by Hull Storey that Brooktenn would not be allowed to operate in the Sumter Mall unless the \$20,000.00 was paid. Branco was even told by Hull Storey that Brooktenn's lease application "... **has been** approved if we can determine a way to come up with 20k." (emphasis added). When both Branco and Brooktenn objected and pointed out that there was not nor would be a lease assignment, Hull Storey then told Branco that the \$20,000.00 was instead based on an effort to recoup capital investments made by the defendants in the Sumter Mall, such as carpet in the common areas of the building. Branco continued to refuse to pay the \$20,000.00.

Once it became clear Branco would not pay to it the \$20,000.000, Hull Storey turned to Brooktenn for the money. When Brooktenn refused, Hull Storey offered to finance the \$20,000.00 over the first twelve months of Brooktenn's lease. Brooktenn declined.

Evidence showed Hull Storey subsequently contacted Applebaum and suggested Applebaum should break his asset sale agreement with Branco. Hull Storey told Applebaum that Branco likely could not remove his equipment from the Sumter Mall and that, in exchange for \$20,000.00, Hull Storey would give Brooktenn the equipment for use in operation of Brooktenn's GAC store. It was even suggested by Hull Storey to Applebaum that Brooktenn would come out \$50,000.00 "better" if it backed out of its deal with Branco. Applebaum testified that due to Hull Storey's conduct, Brooktenn withdrew from the agreement with Branco and abandoned its effort to operate a franchise in Sumter. Applebaum testified he has been in business for years and dealt with many malls and landlords but had never encountered this sort of behavior (as employed by Hull Storey).

Because Brooktenn withdrew from the agreement with Branco Investments, Branco lost

\$70,000.00. Branco testified that after removing the equipment from the Sumter Mall, he was able to sell some of it for \$5,000.00 to another buyer. The remaining equipment is in Branco's possession but is of little value because, once removed from the store, it became obsolete.

This Court finds Branco neither renewed his lease with Hull Storey nor made, attempted to make or contemplated any assignment of his lease with the mall. Hull Storey allowed Branco to remain in the store until May 15, 2013. During that 15-day period Branco failed to pay rent to Hull Storey for an amount totaling \$1,375.00. Based on these facts, the court finds Hull Storey owes the plaintiff \$63,625 in actual damages.

CONCLUSIONS OF LAW

The plaintiff has alleged four causes of action in this case, breach of contract with fraudulent intent, tortious interference with a contract, fraud, and constructive fraud respectively.

(Breach of Contract with Fraudulent Intent)

To recover for a breach of contract, the plaintiff must prove: "(1) a binding contract; (2) a breach of contract; and (3) damages proximately resulting from the breach." *Hennes v. Shaw*, 397 S.C. 391, 725 S.E.2d 501 (2012).

In this case there was a valid contract between the plaintiff and defendant in the 10 year lease between Branco and Hull Storey. The plaintiff failed to prove defendant breached this contract. The plaintiff's arguments at trial and in the pleadings failed to show any specific language in the contract that the defendant violated. Therefore, the court finds for the defendant on this cause of action.

(Tortious Interference with a Contract)

To succeed on a claim for tortious interference with a contract the plaintiff must satisfy the following elements: "(1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." *Dutch Fork Dev. Group II, LLC v. Sel Props*, 406 S.C. 596, 604 (2012) quoting *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 517 (1993).

The court finds persuasive the evidence showing Branco Investments had a valid contract with Brooktenn for the asset sale discussed at length in this order's findings of fact. Hull Storey had knowledge of this contract. Hull Storey intentionally interfered with this agreement, and ultimately procured its breach, by deeming it a lease assignment and attempting to collect \$20,000 first from Branco and then from Brooktenn. Persuasive evidence was offered at trial that Branco had no intention of assigning its lease to Brooktenn, and that the contract between them was solely for the assets and equipment located in the Sumter Mall. Applebaum, testifying on behalf of Brooktenn, stated that he did not want an assignment of Branco's lease because "it might have had things in there that I didn't want that I wouldn't sign for or I wouldn't agree to." Transcript of Record pg. 84, *Paul Branco v. Hull Storey Retail Group, LLC, et al.*, 2015-CP-43-00596, February 28, 2017.

Notably, Hull Storey undermined Branco and Brooktenn's contract by suggesting Brooktenn should ignore its deal with Branco, gambling Branco would be unable to move his equipment which Hull Storey would then sell to Brooktenn for \$20,000.00 instead of the \$70,000 Brooktenn agreed to pay Branco. This interference was not justified in any way and there was no credible evidence of justification offered by defendants at trial or in the pleadings. Hull Storey argued at trial, and in their motion for consideration, that their actions in demanding the \$20,000.00 from Branco, and then from Brooktenn, were a legitimate exercise of their right to place conditions on the lease of their property in Sumter Mall. In support of their argument, Hull Storey cites Judge

Anderson's opinion from *BCD, LLC v. BMW Mfg. Co., LLC*, 2008 U.S. Dist. LEXIS 7410, 66-67, 69-70 (Dist. Ct. 2008).:

Absence of justification is an essential element of a tortious interference claim. *Waldrop Bros. Beauty Supply, Inc. v. Wynn Beauty Supply Co.*, 992 F.2d 59, 62 (4th Cir. 1993). The absence of justification means conduct that is carried out for an improper purpose, such as malice or spite, or through improper means, such as violence or intimidation. *Id.* at 63.

a. Improper Purpose

If some legitimate purpose or right exists, liability cannot be imposed even if the defendant exercises that right for malicious reasons. *Id.* Moreover, if a defendant acts for more than one purpose, the improper purpose must predominate in order to create liability. *Crandall Corp. v. Navistar Int'l. Transp. Corp.*, 302 S.C. 265, 395 S.E.2d 180 (S.C. 1990).

b. Improper means

Improper means are defined as "means that are illegal or independently tortious." *Love v. Gamble*, 316, S.C. 203, 448 S.E.2d 876, 883 (S.C. Ct. App. 1994) (internal quotes omitted). In South Carolina, "improper methods may include violence, threats, or intimidation, bribery, unfounded litigation, fraud, misrepresentation or deceit, defamation, duress, undue influence, misuse of inside or confidential information or breach of a fiduciary relationship." *Waldrop Bros.*, 992 F.2d at 63.

Hull Storey argues that seeking the \$20,000 fee from either Branco or Brooktenn as an assignment fee was a proper and legitimate exercise of its rights as a landlord. Both Branco and Brooktenn testified during trial that their asset sale contract was not, and was never intended to be, and assignment of Branco's lease to Brooktenn. Evidence further suggested that Hull Storey's rationale for demanding the \$20,000 shifted as the negotiations between Branco and Brooktenn unfolded. Branco testified that Hull Storey initially demanded the entire \$70,000 price of the asset sale contract between Branco and Brooktenn. "Q: The defendant put a demand on you of 70,000 dollars, correct? A: Initially, Yes." Transcript pp. 59-60. This demand was later lowered to \$20,000. When Branco refused to pay the \$20,000, Hull Storey attempted to collect the payment from Brooktenn. Brooktenn refused. Evidence also suggested that Hull Storey later attempted to claim the demanded \$20,000 as a "maintenance" fee for the common areas in the mall. This repeated prodding caused Brooktenn to walk away from the asset sale contract with Branco, after Hull

Storey's suggestion that Brooktenn could simply wait for Branco's lease to expire, and pay Hull Storey \$20,000 instead of the \$70,000 purchase price with Branco. Hull Storey briefly cites *Love v. Gamble* for a definition of improper means, as noted above. *Love v. Gamble* further states, however, that "[m]ethods also may be improper because they violate an established standard of a trade or profession, or involve unethical conduct. Sharp dealing, overreaching, or unfair competition may also constitute improper methods." *Id.* at 215, 448 S.E.2d 876 (citing *Duggin v. Adams*, 234 Va. 221, 228, 360 S.E.2d 832, 837 (1987)). Applebaum, testifying on behalf of Brooktenn, stated at trial that "[t]hey assumed Paul was going to leave that, and I said I don't do business this way. I wouldn't stab somebody in the back." Transcript pg. 91. The evidence at trial supports the conclusion that Hull Storey's interference with the asset sale contract was not justified, and was carried out through improper means.

As a result of Hull Storey's interference with Branco and Brooktenn's asset sale agreement, Brooktenn walked away from the deal and Branco lost the opportunity to sell his assets. The sale price on the contract was \$70,000 but this amount is offset by Branco's sale of some of the equipment for \$5,000 and unpaid rent owed to Hull Storey of \$1,375.00. After these deductions, the total amount of plaintiff's damages is \$63,625. Therefore, the court finds for the plaintiff on this cause of action for actual damages of \$63,625.

(Fraud and Constructive Fraud)

In the present case, the plaintiff argued that the defendant made a false, material representation that proximately caused his injuries. However, at trial the plaintiff never specified with statement made by the defendant was fraudulent and did not prove that he, Branco, relied on the false statement. Therefore the court finds for the defendants on this cause of action.

Finally, the court finds for the plaintiff on the defendant's counterclaim because no evidence was presented at trial to support this cause of action.

AND IT IS SO ORDERED.

March ____, 2018

The Honorable R. Ferrell Cothran
Chief Administrative Judge
Third Judicial Circuit



Sumter Common Pleas

Case Caption: Paul Branco , plaintiff, et al VS Hull Storey Retail Group Llc ,
defendant, et al
Case Number: 2015CP4300596
Type: Order/Other

So Ordered

s/ R. Ferrell Cothran, Jr., 2144

Electronically signed on 2018-03-02 11:59:01 page 9 of 9

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF SUMTER	)	2015-CP-43-596
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	)	
Plaintiffs,	)	
	)	
vs.	)	ORDER OF JUDGMENT
	)	
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Sumter Mall, LLC,	)	
	)	
Defendants.	)	
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Evidence showed Hull Storey subsequently contacted Applebaum and suggested Applebaum should break his asset sale agreement with Branco. Hull Storey told Applebaum that Branco likely could not remove his equipment from the Sumter Mall and that, in exchange for \$20,000.00, Hull Storey would give Brooktenn the equipment for use in operation of Brooktenn's GAC store. It was even suggested by Hull Storey to Applebaum that Brooktenn would come out \$50,000.00 "better" if it backed out of its deal with Branco. Applebaum testified that due to Hull Storey's conduct, Brooktenn withdrew from the agreement with Branco and abandoned its effort to operate a franchise in Sumter. Applebaum testified he has been in business for years and dealt with many malls and landlords but had never encountered this sort of behavior (as employed by Hull Storey).

Because Brooktenn withdrew from the agreement with Branco Investments, Branco lost \$70,000.00. Branco testified that after removing the equipment from the Sumter Mall, he was able to sell some of it for \$5,000.00 to another buyer. The remaining equipment is in Branco's possession but is of little value because, once removed from the store, it became obsolete.

This Court finds Branco neither renewed his lease with Hull Storey nor made, attempted to make or contemplated any assignment of his lease with the mall. Hull Storey allowed Branco to remain in the store until May 15, 2013. During that 15-day period Branco failed to pay rent to Hull Storey for an amount totaling \$1,375.00. Based on these facts, the court finds Hull Storey owes the plaintiff \$63,625 in actual damages.

CONCLUSIONS OF LAW

The plaintiff has alleged four causes of action in this case, breach of contract with fraudulent intent, tortious interference with a contract, fraud, and constructive fraud respectively.

(Breach of Contract with Fraudulent Intent)

To recover for a breach of contract, the plaintiff must prove: "(1) a binding contract; (2) a breach of contract; and (3) damages proximately resulting from the breach." *Hennes v. Shaw*, 397 S.C. 391, 725 S.E.2d 501 (2012).

In this case there was a valid contract between the plaintiff and defendant in the 10 year lease between Branco and Hull Storey. The plaintiff failed to prove defendant breached this contract. The plaintiff's arguments at trial and in the pleadings failed to show any specific language in the contract that the defendant violated. Therefore, the court finds for the defendant on this cause of action.

(Tortious Interference with a Contract)

To succeed on a claim for tortious interference with a contract the plaintiff must satisfy the following elements: "(1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." *Dutch Fork Dev. Group II, LLC v. Sel Props*, 406 S.C. 596, 604 (2012) quoting *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 517 (1993).

The court finds persuasive the evidence showing Branco Investments had a valid contract with Brooktenn for the asset sale discussed at length in this order's findings of fact. Hull Storey had knowledge of this contract. Hull Storey intentionally interfered with this agreement, and ultimately procured its breach, by deeming it a lease assignment and attempting to collect \$20,000 first from Branco and then from Brooktenn.

Notably, Hull Storey undermined Branco and Brooktenn's contract by suggesting Brooktenn should ignore its deal with Branco, gambling Branco would be unable to move his equipment which Hull Storey would then sell to Brooktenn for \$20,000.00 instead of the \$70,000 Brooktenn agreed to pay Branco. This interference was not justified in any way and there was no credible evidence of justification offered by defendants at trial or in the pleadings.

As a result of Hull Storey's interference with Branco and Brooktenn's asset sale agreement, Brooktenn walked away from the deal and Branco lost the opportunity to sell his assets. The sale price on the contract was \$70,000 but this amount is offset by Branco's sale of some of the equipment for \$5,000 and unpaid rent owed to Hull Storey of \$1,375.00. After these deductions, the total amount of plaintiff's damages is \$63,625. Therefore, the court finds for the plaintiff on this cause of action for actual damages of \$63,625.

(Fraud and Constructive Fraud)

In the present case, the plaintiff argued that the defendant made a false, material representation that proximately caused his injuries. However, at trial the plaintiff never specified with statement made by the defendant was fraudulent and did not prove that he, Branco, relied on the false statement. Therefore the court finds for the defendants on this cause of action.

Finally, the court finds for the plaintiff on the defendant's counterclaim because no evidence was presented at trial to support this cause of action.

AND IT IS SO ORDERED.

March ____, 2017

The Honorable R. Ferrell Cothran
Chief Administrative Judge
Third Judicial Circuit



Sumter Common Pleas

Case Caption: Paul Branco , plaintiff, et al VS Hull Storey Retail Group Llc ,
defendant, et al
Case Number: 2015CP4300596
Type: Order/Other

So Ordered

s/ R. Ferrell Cothran, Jr., 2144

Electronically signed on 2017-03-23 14:28:42 page 6 of 6

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

Paul Branco, Branco Investments, Inc.

d/b/a Great American Cookie Co.,

Plaintiff,

v.

Hull Storey Retail Group, LLC, and Sumter

Mail, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

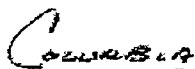
CIVIL ACTION NO: 2015-CP-43-0596

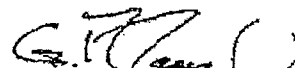
**ORDER DENYING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

This case came before the Court on November 28, 2016, upon the Defendant's Motion for Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. Counsel for both parties were present at the hearing.

The non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Hancock v. Mid-S. Mgmt. Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Having heard the arguments of counsel and considered the parties' pleadings, memoranda of law, and related documentation, this Court determines there are disputed issues of fact regarding Defendant's claims. Therefore, Defendant's Motion for Summary Judgment is hereby **DENIED**.
IT IS SO ORDERED.

 G. Thomas Cooper, Jr., South Carolina


G. Thomas Cooper, Jr.
Presiding Judge

December 14, 2016

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

Paul Branco, Branco Investments, Inc.,
d/b/a Great American Cookie Co.,

vs.

Hull Storey Retail Group LLC, and
Sumter Mall, LLC,

Defendant(s)

Submitted By: Patrick M. Killen & Jason L. Reddick
Address: 28 N. Main Street & 132 N. Main Street
Sumter, SC 29150 & Sumter, SC 29150

IN THE COURT OF COMMON PLEAS

RECORDED

2015 MAR -5 PM 4:54 CIVIL ACTION COVERSHEET

CLERK OF COURT
SUMTER COUNTY, S.C.

2015-CP - 43- 596

SC Bar #: 15531 and 100400
Telephone #: (803) 774-5026 and (803) 795-4467
Fax #: (803) 774-5028 and (803) 666-1479

Other:
E-mail: pkillen@mcgowanhood.com and
jasonleereddick@gmail.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☒ Breach of Contract (140) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20 -NI- - ☐ Notice/ File Med Mal (230) ☐ Other (299)	Torts - Personal Injury ☐ Assault/Slander/Libel (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Other (399)	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
Inmate Petitions ☐ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Administrative Law/Relief ☐ Reinstatement License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Other (799)	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Comm (990) ☐ Employment Security Comm (991) ☐ Other (999)
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Sexual Predator (510)		

Submitting Party Signature:

Patrick M Killen
Jason L Reddick

Date: March 5, 2015

SCCA / 234 (10/2014)

Page 1 of 3

R. 017

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

Paul Branco, Branco Investments, Inc.,
d/b/a Great American Cookie Co.,

RECORDED
2015 MAR -5) PM 4: 55
JANICE L. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.
IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT
Case No.: _____

2015-CP-43-596

Plaintiff,)

SUMMONS
(Jury Trial Demanded)

VS.)

Hull Storey Retail Group LLC, and
Sumter Mall, LLC,

Defendants.)

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said complaint, upon the subscriber, at his office, 28 North Main Street, Sumter, South Carolina 29150, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, or otherwise appear and defend, the Plaintiff in this action will apply to the Court for the relief demanded therein, and judgment by default will be rendered against you for the relief demanded in the Complaint.

MCGOWAN, HOOD & FELDER, LLC

THE LAW OFFICE OF
JASON L. REDDICK, LLC

Patrick M Killen

Patrick M. Killen
28 North Main Street
Sumter, SC 29150
(803) 774-5026
(803) 774-5028 Facsimile
pkillen@mcgowanhood.com
Attorney for Plaintiff

Jason L. Reddick

Jason L. Reddick
132 North Main Street
Sumter, SC 29150
(803) 795-4467
(803) 666-1479
jasonleereddick@gmail.com
Attorney for Plaintiff

Sumter, South Carolina

Date: 3/5/15

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

Paul Branco, Branco Investments, Inc.
d/b/a Great American Cookie Co.,

Plaintiff,

VS.

Hull Storey Retail Group LLC, and
Sumter Mall, LLC,

Defendants.

RECORDED

2015 MAR -5 PM 4:55

JANET L. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT
Case No.:

2015-CP-43- 596

COMPLAINT
(Jury Trial Demanded)

COMES NOW the Plaintiff, by and through his undersigned attorneys, who alleges the following:

1. The Plaintiff is a company organized in the State of South Carolina and doing business in Sumter County.
2. The Defendant, Hull Storey Retail Group, LLC (Hereinafter "Hull Storey"), is a corporation organized in the State of Georgia and doing business in Sumter County, South Carolina.
3. The Defendant Sumter Mall, LLC, is a Georgia Corporation registered to do business in the State of South Carolina, specifically with respect to doing business in Sumter County, South Carolina operating as Sumter Mall.
4. On December 30, 2002 Plaintiff and Hull Storey entered into a Lease Agreement for the lease of unit #55 of the Sumter Mall Shopping Center in Sumter, South Carolina. See Lease agreement attached hereto as Exhibit A.
5. Plaintiff notified Hull Storey that upon the expiration of the lease that it would be vacating the property.
6. A third party, Brooktenn, LLC, applied for a lease with Hull Storey and was approved to lease unit #55 of the Sumter Mall Shopping Center.

7. Upon approval of the lease, Brooktenn, LLC entered into agreement with the Plaintiff for the purchase of certain assets in order to operate a Great American Cookie franchise in Sumter. See Proposal for Purchase attached hereto as Exhibit B.
8. Defendant Hull Store then made a demand of Plaintiff for Twenty Thousand and no/100 (\$20,000.00) Dollars for a "lease assignment".
9. As the Plaintiff's lease with Hull Storey was to expire on April 30, 2013, there was no "assignment" of the lease in question.
10. Because the Plaintiff did not pay Twenty Thousand and no/100 (\$20,000) Dollars for a "lease assignment," the Defendants did not allow Brooktenn, LLC to operate in the Sumter Mall.
11. Because of the Defendants' actions, which were made in bad faith, the Plaintiff's purchase agreement with Brooktenn, LLC was never consummated resulting in a substantial revenue loss and other damages to the Plaintiff.

**FOR A FIRST CAUSE OF ACTION
(Breach of Contract with Fraudulent Intent)**

12. The Plaintiff reiterates the foregoing allegations as if fully set forth herein.
13. The Defendants, as stated above, breached their contract with the Plaintiff. The contract in question, the original lease agreement, was a binding contract. The failure on the part of the Defendants to perform under the contract was unjustifiable. The Plaintiff suffered a substantial loss of revenue in addition to other damages as a direct result of the Defendants' breach of said contract.
14. The Defendants' intent, as stated above, was fraudulent in that the Defendants made an intentional misrepresentation of the contract between the parties causing the Plaintiff to rely on such a misrepresentation which caused the Plaintiff to suffer substantial financial damages.
15. By attempting to require the Plaintiff to pay a "\$20,000.00" "lease assignment," the Defendants not only breached their contract with the Plaintiff, but also attempted to falsely represent the terms of the contract in an effort to fraudulently convert undue fees from the Plaintiff resulting in the aforementioned damages.

**FOR A SECOND CAUSE OF ACTION
(Tortious Interference with a Contract)**

16. The Plaintiff reiterates the foregoing allegations as if fully set forth herein.
17. Plaintiff and Brooktenn, LLC entered into a contract for the purchase of certain assets and inventory.
18. Defendant's had knowledge of the contract between Plaintiff and Brooktenn, LLC.
19. The Defendants drafted and presented a document entitled Assignment, Assumption, Amendment and Ratification of Lease Agreement (attached hereto as Exhibit C) ("Assignment") to Plaintiff.
20. In the Assignment, the Defendants make a demand for the payment of \$20,000.00 from Plaintiff. The Defendants had no justification for this demand.
21. As a result of the Defendants' demand for such payment, the contract between the Plaintiff and Brooktenn, LLC fell through, causing significant monetary damages to the Plaintiff.

**FOR A THIRD CAUSE OF ACTION
(Fraud)**

22. The Plaintiff reiterates the foregoing allegations as fully set forth herein.
23. The Defendants falsely and intentionally misrepresented to the Plaintiff that, pursuant to Article 16.2 of the Lease Agreement, they, the Defendants, were due an "Assignment Cost" of twenty thousand and no/100 (\$20,000) dollars.
24. This misrepresentation by the Defendants was material to the Plaintiff in that they directly affected the contract between the Plaintiff and Brooktenn, LLC.
25. As the Lease Agreement between the Plaintiff and the Defendants has expired, the Defendants should have known of the falsity of their allegations that an Assignment cost was due by the Plaintiff.
26. The Defendants intended that the Plaintiff pay to the Defendants Twenty Thousand Dollars (\$20,000.00) pursuant to their misrepresentation.

27. As a result of the Defendant's demand for payment, the contract between the Plaintiff and Brooktenn, LLC, fell through, causing significant monetary damages to the Plaintiff.

**FOR A FOURTH CAUSE OF ACTION
(Constructive Fraud)**

28. Plaintiff reiterates the foregoing allegations as if fully set forth herein.

29. The Defendants falsely misrepresented to the Plaintiff that, pursuant to Article 16.2 of the Lease Agreement, the Defendants were due an "Assignment Cost" of Twenty Thousand (\$20,000.00) Dollars.

30. This misrepresentation was material to the Plaintiff in that it directly affected the contract between the Plaintiff and Brooktenn, LLC.

31. As the lease agreement between the Plaintiff and the Defendants had expired, the Defendants should have known of the falsity of their allegation that an Assignment Cost was due by the Plaintiff.

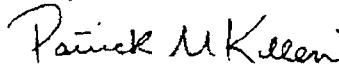
32. The Defendants intended that the Plaintiff pay to the Defendant Twenty Thousand (\$20,000.00) Dollars pursuant to their misrepresentation.

33. As a result of the Defendants' demand for payment, the contract between Plaintiff and Brooktenn, LLC fell through, causing significant monetary damages to the Plaintiff.

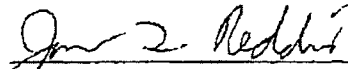
WHEREFORE, the Plaintiff prays the court to issue an Order granting the Plaintiff judgment for the following relief against the Defendants:

1. For appropriate damages to be proved at trial not to exceed Seventy-Five Thousand (\$75,000.00) Dollars;
2. Interest according to law;
3. Costs of this action incurred by the Plaintiff;
4. Such other and further relief as the court deems appropriate.

Respectfully submitted:



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Sumter, SC 29150
(803) 774-5026
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pkillen@mcgowanhood.com
Attorney for Plaintiff



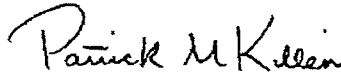
Jason L. Reddick
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132 N. Main Street
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(803) 795-4467
(803) 666-1479 (fax)
jasonleereddick@gmail.com
Attorney for Plaintiff

Sumter, South Carolina

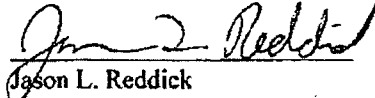
Dated: 3/5/15

DEMAND FOR JURY TRIAL

The Plaintiff hereby demands a trial by jury on all of the issues raised by the pleadings in this action.



Patrick M. Killen
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Attorney for Plaintiff



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Attorney for Plaintiff

RECORDED
2015 MAR -5 PM 4:55
JAMES J. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

RECORDED
2015 APR 14 PM 3:48

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT
Case No.: 2015-CP-43-596

Paul Branco, Branco Investments, Inc.
d/b/a Great American Cookie Co.,

CLERK OF COURT
SUMTER COUNTY, S.C.

Plaintiff,

v.

Hull Storey Retail Group LLC, and
Sumter Mall, LLC,

Defendants.

ANSWER AND COUNTERCLAIM
OF DEFENDANT SUMTER MALL, LLC

COMES NOW Defendant Sumter Mall, LLC, by and through the undersigned counsel,
and answers Plaintiff's Complaint by showing the following:

FIRST AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the Statute of Frauds.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief may be granted and should
be dismissed under Rule 12(b)(6).

THIRD AFFIRMATIVE DEFENSE

Plaintiff, through its actions and/or inactions, has effected a waiver of its claims.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred because certain conditions precedent were not met in order
for its claims to ripen.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by estoppel.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's damages, if any, were not proximately caused by Defendant.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims for fraud do not comport with the pleading requirements of Rule 9(b).

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff is not the correct party in interest to assert the claims for which it seeks relief.

NINTH AFFIRMATIVE DEFENSE

Defendant Sumter Mall, LLC responds to each enumerated allegation in the Plaintiff's Complaint as follows:

1. Paragraph 1 of Plaintiff's Complaint is denied. By way of further explanation, according to the South Carolina Secretary of State's corporation search page, Branco Investments, Inc. was administratively dissolved on March 7, 2012.
2. Paragraph 2 of Plaintiff's Complaint is denied. By way of further explanation, Hull Storey Retail Group, LLC is a limited liability company organized under the laws of the State of Georgia which is authorized to do business in South Carolina.
3. Paragraph 3 of Plaintiff's Complaint is denied. By way of further explanation, Sumter Mall, LLC is a limited liability company organized under the laws of the State of Georgia which is authorized to do business in South Carolina.
4. Paragraph 4 of Plaintiff's Complaint is denied. The Lease attached as Exhibit A is a document which speaks for itself, and Plaintiff's attempts to characterize the content of such document are specifically denied. Defendant further shows that the document is a Lease between Paul J. Branco and Anne Branco and Sumter Mall, LLC.

5. It is admitted that Paul Branco notified representatives of Sumter Mall, LLC that it intended to vacate at the expiration of the lease term. Defendant further shows that they did not vacate the property at the expiration of the Lease. All other allegations in paragraph 5 of Plaintiff's Complaint are denied.

6. Paragraph 6 of Plaintiff's Complaint is denied. Defendant further shows that no lease was entered between Brooktenn, LLC and Hull Storey Retail Group, LLC.

7. Paragraph 7 of Plaintiff's Complaint is denied. Defendant was made aware of the document which is attached as Exhibit B, which document speaks for itself, the other allegations are denied.

8. Paragraph 8 of Plaintiff's Complaint is denied.

9. It is admitted that the Lease expired on April 30, 2013, all other allegations in paragraph 9 are denied.

10. Paragraph 10 of Plaintiff's Complaint is denied.

11. Paragraph 11 of Plaintiff's Complaint is denied.

FIRST CAUSE OF ACTION
(Breach of Contract with Fraudulent Intent)

12. Defendant realleges, by reference, paragraphs 1 through 11 as if set forth fully.

13. It is admitted that the Lease was a binding contract between and among the parties to the Lease. The Lease expired on April 30, 2013. All other allegations in Paragraph 13 of Plaintiff's Complaint are denied.

14. Paragraph 14 of Plaintiff's Complaint is denied.

15. Paragraph 15 of Plaintiff's Complaint is denied.

SECOND CAUSE OF ACTION
(Tortious Interference with a Contract)

16. Defendant realleges, by reference, paragraphs 1 through 15 as if set forth fully.
17. Upon information and belief, Plaintiff or an affiliated entity, entered into a contract with Brooktenn, LLC, which was to include Plaintiff's purported leasehold interest at Sumter Mall. The contract speaks for itself.
18. It is admitted that Paul Branco informed representatives of Sumter Mall that he or a related entity had entered into an agreement with Brooktenn, LLC.
19. Paragraph 19 of Plaintiff's Complaint is admitted.
20. The document referenced in paragraph 20 is a writing which speaks for itself and any attempt to characterize the intent of its contents is expressly denied. The remaining allegations in paragraph 20 are denied.
21. Paragraph 21 of Plaintiff's Complaint is denied.

THIRD CAUSE OF ACTION
(Fraud)

22. Defendant realleges, by reference, paragraphs 1 through 21 as if set forth fully.
23. Paragraph 23 of Plaintiff's Complaint is denied.
24. Paragraph 24 of Plaintiff's Complaint is denied.
25. Defendant admits that the Lease has expired, the remaining allegations in Paragraph 25 of Plaintiff's Complaint are denied.
26. Paragraph 26 of Plaintiff's Complaint is denied.
27. Defendant is without sufficient information or belief to either admit or deny the allegations in Paragraph 27 of Plaintiff's Complaint, wherefore same are denied.

FOURTH CAUSE OF ACTION
(Constructive Fraud)

28. Defendant realleges, by reference, paragraphs 1 through 27 as if set forth fully.

29. Paragraph 29 of Plaintiff's Complaint is denied.

30. Paragraph 30 of Plaintiff's Complaint is denied.

31. Paragraph 31 of Plaintiff's Complaint is denied.

32. Paragraph 32 of Plaintiff's Complaint is denied.

33. Defendant is without sufficient information or belief to either admit or deny the allegations in Paragraph 33 of Plaintiff's Complaint, wherefore same are denied.

WHEREFORE, Defendant Sumter Mall, LLC prays this Honorable Court enter an order denying Plaintiff any relief requested and dismiss its Complaint.

Defendant Sumter Mall, LLC further responds by showing the following:

DEFENDANT SUMTER MALL, LLC'S COUNTERCLAIM

1. Defendant Sumter Mall, LLC ("Sumter Mall") shows that jurisdiction and venue are proper in this Court.
2. The facts and circumstances which give rise to Sumter Mall's counterclaim arise from the same or similar facts as Plaintiff's Complaint.
3. The Defendant would show unto the Court that due to the frivolous nature of this action he is entitled to an award of attorney's fees and costs for the defense of this action.

COUNT I - BREACH OF CONTRACT

Holding Over

3. Sumter Mall had a Lease with Paul Branco and Ann Branco (collectively "Tenant") for a space in the mall for them to operate a Great American Cookie franchise.
4. Tenant's lease term ended on April 30, 2013.
5. Tenant did not vacate the premises and surrender possession of the property on April 30, 2013.

6. Tenant did not pay rent after the lease term ended even though it remained in possession of the property. This was a breach of the Lease.

7. The amount of rent due for May 2013 is set forth in the Lease in Basic Lease Provisions 10 and General Lease Provisions Article III.

8. The Lease provided for a payment of \$2,750.00 for the months in year 10.

9. Because Tenant did not vacate the premises at the expiration of the Lease, Sumter Mall was entitled to additional rents under Article XXVII "Holding Over," which is calculated as 200% of Minimum Rent.

10. Sumter Mall is also entitled to payment for May 2013 as well as late fees and interest on this payment.

COUNT II – BREACH OF CONTRACT
(Condition of Premises)

11. Sumter Mall realleges paragraphs 1 through 10 as if set forth fully.

12. Upon surrender of the premises, Tenant was to leave the property "broom clean in the same condition as when tendered to Tenant, ordinary wear and tear excepted," per Article XXVI of the Lease.

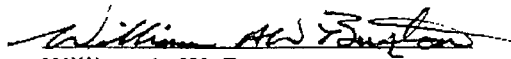
13. Tenant failed to leave the property broom clean and in the same condition as it was when tendered to Tenant.

14. Sumter Mall incurred costs in repairing and cleaning the property, which it would not have otherwise incurred.

15. Tenant is indebted to Sumter Mall for those costs.

WHEREFORE, Defendant Sumter Mall, LLC prays this Honorable Court enter judgment in its favor and against Plaintiff in an amount to be determined by a jury.

This 14th day of April, 2015.



William A. W. Buxton
Attorney for Plaintiff
325 West Calhoun Street
Post Office Box 3220
Sumter, SC 29151
(803) 778-7404, fax (803) 773-5645

Sumter, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

Paul Branco, Branco Investments, Inc.
d/b/a Great American Cookie Co.,

Plaintiff,

v.

Hull Storey Retail Group LLC, and
Sumter Mall, LLC,

Defendants.

RECORDED

2015 APR 14 PM 3:47

IN THE COURT OF COMMON PLEAS

THIRD JUDICIAL CIRCUIT

Case No.: 2015-CP-43-596

ANSWER OF DEFENDANT

HULL STOREY RETAIL GROUP, LLC

COMES NOW Defendant Sumter Mall, LLC, by and through the undersigned counsel,
and answers Plaintiff's Complaint by showing the following:

FIRST AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the Statute of Frauds.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief may be granted and should
be dismissed under Rule 12(b)(6).

THIRD AFFIRMATIVE DEFENSE

Plaintiff, through its actions and/or inactions, has effected a waiver of its claims.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred because certain conditions precedent were not met in order
for its claims to ripen.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by estoppel.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's damages, if any, were not proximately caused by Defendant.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims for fraud do not comport with the pleading requirements of Rule 9(b).

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff is not the correct party in interest to assert the claims for which it seeks relief.

NINTH AFFIRMATIVE DEFENSE

This Court does not have personal jurisdiction over Defendant Hull Storey Retail Group, LLC based upon Plaintiff's claims.

TENTH AFFIRMATIVE DEFENSE

Venue is not proper in Sumter County, South Carolina as to Defendant Hull Storey Retail Group, LLC.

ELEVENTH AFFIRMATIVE DEFENSE

Defendant Hull Storey Retail Group, LLC responds to each enumerated allegation in the Plaintiff's Complaint as follows:

1. Paragraph 1 of Plaintiff's Complaint is denied. By way of further explanation, according to the South Carolina Secretary of State's corporation search page, Branco Investments, Inc. was administratively dissolved on March 7, 2012.

2. Paragraph 2 of Plaintiff's Complaint is denied. By way of further explanation, Hull Storey Retail Group, LLC is a limited liability company organized under the laws of the State of Georgia which is authorized to do business in South Carolina.

3. Paragraph 3 of Plaintiff's Complaint is denied. By way of further explanation, Sumter Mall, LLC is a limited liability company organized under the laws of the State of Georgia which is authorized to do business in South Carolina.

4. Paragraph 4 of Plaintiff's Complaint is denied. The Lease attached as Exhibit A is a document which speaks for itself, and Plaintiff's attempts to characterize the content of such document are specifically denied. Defendant further shows that the document is a Lease between Paul J. Branco and Anne Branco and Sumter Mall, LLC.

5. It is admitted that Paul Branco notified representatives of Sumter Mall, LLC that it intended to vacate at the expiration of the lease term. Defendant further shows that they did not vacate the property at the expiration of the Lease. All other allegations in paragraph 5 of Plaintiff's Complaint are denied.

6. Paragraph 6 of Plaintiff's Complaint is denied. Defendant further shows that no lease was entered between Brooktenn, LLC and Hull Storey Retail Group, LLC.

7. Paragraph 7 of Plaintiff's Complaint is denied. Defendant was made aware of the document which is attached as Exhibit B, which document speaks for itself, the other allegations are denied.

8. Paragraph 8 of Plaintiff's Complaint is denied.

9. It is admitted that the Lease expired on April 30, 2013, all other allegations in paragraph 9 are denied.

10. Paragraph 10 of Plaintiff's Complaint is denied.

11. Paragraph 11 of Plaintiff's Complaint is denied.

FIRST CAUSE OF ACTION
(Breach of Contract with Fraudulent Intent)

12. Defendant realleges, by reference, paragraphs 1 through 11 as if set forth fully.

13. It is admitted that the Lease was a binding contract between and among the parties to the Lease. The Lease expired on April 30, 2013. All other allegations in Paragraph 13 of Plaintiff's Complaint are denied.

14. Paragraph 14 of Plaintiff's Complaint is denied.

15. Paragraph 15 of Plaintiff's Complaint is denied.

SECOND CAUSE OF ACTION
(Tortious Interference with a Contract)

16. Defendant realleges, by reference, paragraphs 1 through 15 as if set forth fully.

17. Upon information and belief, Plaintiff or an affiliated entity, entered into a contract with Brooktenn, LLC, which was to include Plaintiff's purported leasehold interest at Sumter Mall. The contract speaks for itself.

18. It is admitted that Paul Branco informed representatives of Sumter Mall that he or a related entity had entered into an agreement with Brooktenn, LLC.

19. Paragraph 19 of Plaintiff's Complaint is admitted.

20. The document referenced in paragraph 20 is a writing which speaks for itself and any attempt to characterize the intent of its contents is expressly denied. The remaining allegations in paragraph 20 are denied.

21. Paragraph 21 of Plaintiff's Complaint is denied.

THIRD CAUSE OF ACTION
(Fraud)

22. Defendant realleges, by reference, paragraphs 1 through 21 as if set forth fully.

23. Paragraph 23 of Plaintiff's Complaint is denied.

24. Paragraph 24 of Plaintiff's Complaint is denied.

25. Defendant admits that the Lease has expired, the remaining allegations in Paragraph 25 of Plaintiff's Complaint are denied.

26. Paragraph 26 of Plaintiff's Complaint is denied.

27. Defendant is without sufficient information or belief to either admit or deny the allegations in Paragraph 27 of Plaintiff's Complaint, wherefore same are denied.

FOURTH CAUSE OF ACTION
(Constructive Fraud)

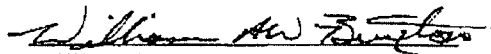
28. Defendant realleges, by reference, paragraphs 1 through 27 as if set forth fully.
29. Paragraph 29 of Plaintiff's Complaint is denied.
30. Paragraph 30 of Plaintiff's Complaint is denied.
31. Paragraph 31 of Plaintiff's Complaint is denied.
32. Paragraph 32 of Plaintiff's Complaint is denied.
33. Defendant is without sufficient information or belief to either admit or deny the allegations in Paragraph 33 of Plaintiff's Complaint, wherefore same are denied.

FIFTH CAUSE OF ACTION
(Attorney's Fees)

34. The Defendant would show unto the Court that due to the frivolous nature of this action he is entitled to an award of attorney's fees and costs for the defense of this action.

WHEREFORE, Defendant Hull Storey Retail Group, LLC prays this Honorable Court enter an order denying Plaintiff any relief requested and dismiss its Complaint.

This 14th day of April, 2015.


William A. W. Buxton
Attorney for Plaintiff
325 West Calhoun Street
Post Office Box 3220
Sumter, SC 29151
(803) 778-7404, fax (803) 773-5645

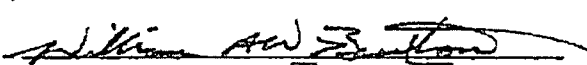
Sumter, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF SUMTER)
CASE NO.: 2015-CP-43-596
Paul Branco, Branco Investments, Inc., d/b/a)
Great American Cookie Co.,)
Plaintiff,)
vs.)
Hull Storey Retail Group LLC, and Sumter)
Mall, LLC)
Defendant.)

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

Plaintiff's Attorney: William A.W. Buxton, Bar No. 76123 Address: Post Office Box 3220, Sumter, S.C. 29151 Phone: 803-778-7404 Fax 803-773-5645 E-mail: buxton@curtisandcroft.com Other: _____	Defendant's Attorney: Patrick M. Killen, Bar No. _____ Address: 28 North Main Street Sumter, S.C. 29150 Phone: 803-774-5026 Fax _____ E-mail: _____ Other: _____
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: ☒ YES / ☐ NO	
SECTION II: Motion/Order Type	
☐ Written motion attached ☒ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for ☒ Plaintiff / ☐ Defendant September 20, 2016 Date submitted	
SECTION III: Motion Fee	
☐ PAID - AMOUNT: \$ _____ ☒ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☒ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____	
JUDGE'S SECTION	
☒ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____	

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF SUMTER	)	Case No.: 2015-CP-43-596
Paul Branco, Branco Investments, Inc.,	)	
d/b/a Great American Cookie Co.,	)	
	)	
Plaintiff,	)	SUMTER MALL, LLC AND
	)	HULL STOREY RETAIL GROUP, LLC'S
v.	)	MOTION FOR JUDGMENT
	)	ON THE PLEADINGS
Hull Storey Retail Group LLC, and	)	
Sumter Mall, LLC,	)	
	)	
Defendants.	)	

Pursuant to Rules 12(c) of the South Carolina Rules of Civil Procedure, Defendants Sumter Mall, LLC and Hull Storey Retail Group, LLC (collectively the "Defendants") by and through their undersigned attorney, William A. W. Buxton, files their Motion for Judgment on the Pleadings, as follows:

LEGAL STANDARD

"A motion for Judgment on the Pleadings is proper where pleadings entitle a party to judgment without proof, by disclosure of all facts, where the pleadings present no issue of fact or present merely an immaterial issue." *Rosenthal v. Unarco Industries, Inc.*, 278 S.C. 420, 422 (1982) citing *Wooten v. Standard Life and Casualty Insurance Company*, 239 S.C. 243, 122 S.E. (2d) 637 (1961).

ARGUMENT

Plaintiff has present four causes of action against the Defendants, some of which overlap each other and some of which contradict each other. Defendants will address each

cause of action separately, although some of the arguments will apply to multiple causes of action.

1. **Defendants are entitled to Judgment on the Pleadings regarding Plaintiff's First Cause of Action – Breach of Contract with Fraudulent Intent because Plaintiff has not alleged how Defendants have breached a contract which expired on its terms.**

Assuming all facts presented in Plaintiff's Complaint are taken as true, Plaintiff is not entitled to judgment on its Breach of Contract with Fraudulent Intent claim. None of Plaintiff's factual allegations set forth which of the provisions of the Lease Defendants are alleged to have violated. Paragraph 5 of the Complaint states, "Plaintiff notified Hull Storey that upon the expiration of the lease that it would be vacating the property." Plaintiff goes on to state the Defendants wanted a lease assignment fee and that another party, Brooktenn, LLC, was not allowed to operate in the Sumter Mall because that fee was not paid. Assuming arguendo these allegations are true, Plaintiff has not properly alleged how this was a breach of the lease or how an unrelated party's failure to open in the mall has anything to do with this lease.

Plaintiff has failed to point to a provision or requirement of the Lease that Defendants breached. Plaintiff has failed to allege how Defendants did not perform under the expired lease. Plaintiff has failed to allege with specificity what the intentional misrepresentation was.

Without the essential elements of a breach of contract case, this cause of action must be dismissed. Further, Plaintiff provides no notice of how Defendants' actions were made with fraudulent intent. This is simply because Plaintiff are attempting to extract money from a Defendants.

2. **Defendants are entitled to Judgment on the Pleadings regarding Plaintiff's Second Cause of Action – Tortious Interference with a Contract because Plaintiff has failed to allege how any of Defendants' actions intentionally procured the breach of a contract between Plaintiff and a third party.**

"The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." *Dutch Fork Dev. Group II, LLC v. Sel Props*, 406 S.C. 596, 604 (2012) quoting *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 517 (1993).

Defendant Sumter Mall, LLC had a Lease with Plaintiff. Near the end of the lease term the parties entered into negotiations to extend the Lease. According to Plaintiff, around the time of these negotiations, Plaintiff was trying to sell certain assets and inventory (along with a assets and inventory at another property) to a third party, Brooktenn, LLC. Plaintiff and Defendant were unable to come to mutually acceptable terms on their Lease extension. Plaintiff claims that Plaintiff and Defendant's failure to come to terms resulted in the other potential contract falling through. It is unfair for Plaintiff to blame Defendants for an unrelated contract falling through because of their inability to come to terms on a contract extension. It is disingenuous to say that Defendants intentionally procured the breach of the proposed contract between Plaintiff and Brooktenn.

3. **Defendants are entitled to Judgment on the Pleadings regarding Plaintiff's Third and Fourth Causes of Action – Fraud & Constructive Fraud because Plaintiff has not specifically laid out any facts which would support the allegation.**

The nine elements of fraud: a representation; its falsity; its materiality; knowledge of its falsity or a reckless disregard of its truth or falsity; intent that the representation be acted upon; hearer's ignorance of its falsity; hearer's reliance on its truth; hearer's right to rely; and

hearer's consequent and proximate injury, must be proven by clear, cogent and convincing evidence. *First State Sav. & Loan v. Phelps*, 299 S.C. 441, 446 (1989).

Under Article 16 of the Lease, Plaintiff had certain rights to assign the Lease or sublet the leased premises to a third party, which were subject to the approval of Defendant. Plaintiff and Defendant were unable to come to terms on an extension of the Lease, which Plaintiff was attempting to sell to Brookterm. Plaintiff's sale of its assets were apparently predicated on their ability to extend a lease, which they were unable to do. As the Lease was not ultimately extended, Plaintiff was not able to assign or sublet in accordance with Article 16. Article 16 provides for certain payments to Defendant Sumter Mall, LLC if an assignment or sublease is approved; however this never occurred.

Assuming for argument that Defendant made a statement that there was an "Assignment Cost" as alleged in Plaintiff's complaint, Plaintiff would be able to look to the terms of the Lease to determine whether or not it was true and whether they should have relied on it. It is possible that the parties had a disagreement as their interpretation of the Lease, but Plaintiff could simply look to the Lease to determine its rights under the Lease. Plaintiff has not set forth any set of facts under which it could recover for fraud and this claim must fail as a matter of law.

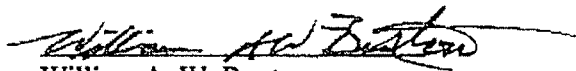
CONCLUSION

Plaintiff filed this specious action because Plaintiff wanted to extend the Lease and then sell off its leasehold interest to another party. Plaintiff failed to extend the Lease and it expired on its terms. Plaintiff has no cognizable action because of its failure to extend the Lease. Defendants did not act fraudulently, make any intentional misrepresentations, or

breach the Lease. Plaintiff has filed multiple causes of action to muddy the waters and extract money from Defendants because Plaintiff failed in selling off some of its business assets. Defendants should not be liable for Plaintiff's poor choices.

WHEREFORE Defendant pray that this Court grant Judgment in favor of Defendants on the Pleadings, with all costs and fees taxed to the Plaintiff.

This 27th day of September, 2016.



William A. W. Buxton
Attorney for Defendants
325 West Calhoun Street
Post Office Box 3220
Sumter, SC 29151
(803)778-7404

Sumter, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF SUMTER	)	2015-CP-43-596
	)	
Paul Branco, Branco Investments, Inc.	)	
d//b/a Great American Cookie Co.,	)	
	)	
Plaintiff	)	SCRCP RULE 52(b) MOTION TO AMEND JUDGMENT
	)	(ORDER)
Vs.	)	
	)	
Hull Storey Retail Group, LLC, and	)	
Sumter Mall, LLC,	)	
	)	
Respondent.	)	

COME NOW the Defendants, Hull Storey Retail Group, LLC and Sumter Mall, LLC and pursuant to SCRCP 52(b), respectfully ask the Court to reconsider and alter the findings in its Order of March __, 2017 (the "Order") which was emailed in draft form on March 9, 2017.

The Proposal for Purchase dated March 1, 2013, between Branco Investments, Inc. ("Branco") and Brooktenn, LLC ("Brooktenn") (the "Contingent Purchase Agreement") specifically states "[t]his proposal is contingent upon Buyers getting a satisfactory lease from Hull Storey Gibson within 90 days of signed proposal." The Order includes a finding that "Hull Storey approved Brooktenn's lease but attempted to get the \$70,000 purchase price from Branco by invoking paragraph 16.2 of the lease agreement between Hull Storey and Branco." The Respondent requests the Court to remove the finding that "Hull Storey approved Brooktenn's lease" as the record is replete of any signed lease document with Brooktenn.

"Any agreement for the use or occupation of real estate for more than one year shall be void unless in writing." S.C. Code Ann. § 27-35-20. To satisfy the requirement, the Brooktenn lease would have to be a written expression of agreement and signed by both Brooktenn and Sumter Mall, LLC. The Supreme Court of South Carolina has expounded on the writing requirement.

Contract for extension or renewal of lease must specify conditions of renewal with certainty. *Anderson v. Hall*, 155 S.C. 320, 152 S.E. 521 (1930). Any modification of written contract must

satisfy all requisites of valid contract. *Bishop Realty and Rentals, Inc. v. Perk, Inc.*, 292 S.C. 182, 355 S.E. (2d) 298 (S.C. App. 1987). South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. *Hughes v. Edwards*, 265 S.C. 529, 220 S.E. (2d) 231 (1975). The essential terms and conditions of a lease agreement include a definite agreement as to the extent and boundary of the property to be leased, the term of the lease, the rental as well as the time and manner of payment. This "meeting of minds" required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all of the circumstances should be known. *McClintock v. Skelly Oil Co.*, 232 Mo. App. 1204, 114 S.W. (2d) 181 (Mo. Ap. 1938). The record before us evinces no meeting of the minds between William A. Chandler and William D. Player during their February 5, 1985, telephone conversation. There is no indication that essential terms were discussed, and the mere referral to the original lease is not sufficient.

Assuming that an agreement had been reached during the February 5th telephone conversation, such a lease modification would be outside the Statute of Frauds. Any contract for an interest in land or any agreement that is not to be performed within one year must be in writing and signed by the party against whom it is seeking to be enforced. South Carolina Code Ann. § 27-35-20 (1976). Moreover, a contract required to be in writing by the South Carolina Statute of Frauds cannot be orally modified. *Windham v. Honeycutt*, 279 S.C. 109, 302 S.E. (2d) 856 (1983) (court held evidence of oral modification of the real estate contract as violative of the Statute of Frauds).

Player v. Chandler, 299 S.C. 101, 102-03; 382 S.E. 2d 891, 93-94; 1989 S.C. LEXIS 166, 3-5 (1989).

The only written document drafted between Sumter Mall, LLC, and Brooktenn was the draft ASSIGNMENT, ASSUMPTION, AMENDMENT AND RATIFICATION OF LEASE AGREEMENT emailed to both Branco and Brooktenn on April 30, 2013, and attached to the Complaint as Exhibit C (the "Draft Assignment"). Brooktenn sought the ten year term described in Section 6A of the Draft Assignment, and the Draft Assignment document includes the requirement that the tenant parties pay the \$20,000 assignment fee stated in Section 7 of the Draft Assignment to Sumter Mall, LLC, and the requirement that Branco waive any claim against Defendants is in Section 4. No other written document purporting to be the Brooktenn lease has been proffered. The Draft Assignment was never signed nor did the parties reach a meeting of the minds with respect to a lease between Brooktenn and Sumter Mall, LLC. In this context, to be a lease, any agreement of the parties for the lease of the space at Sumter Mall to Brooktenn for the ten year term requested would have to be in writing and signed by the parties. That

did not occur, and the Defendants request the Court remove the finding that "Hull Storey approved Brooktenn's lease".

The Order also includes a finding that "[t]his interference was not justified in anyway and there was no evidence of justification offered by defendant at trial or in the pleadings." The Defendant requests that the Court eliminate the finding. Judge Anderson of the U.S. District Court for the South Carolina District reviewed justification in a claim of tortious interference with contract under South Carolina law in BCD, LLC, v. BMW Mfg. Co., LLC, 2008 U.S. Dist. LEXIS 7410, 66-67 (Dist. Ct. 2008).

Absence of justification is an essential element of a tortious interference claim. *Waldrop Bros. Beauty Supply, Inc. v. Wynn Beauty Supply Co.*, 992 F.2d 59, 62 (4th Cir. 1993). The absence of justification means conduct that is carried out for an improper purpose, such as malice or spite, or through improper means, such as violence or intimidation. *Id.* at 63.

a. Improper Purpose

If some legitimate purpose or right exists, liability cannot be imposed even if the defendant exercises that right for malicious reasons. *Id.* Moreover, if a defendant acts for more than one purpose, the improper purpose must predominate in order to create liability. *Crandall Corp. v. Navistar Int'l. Transp. Corp.* 302 S.C. 265, 395 S.E. 2d 180 (S.C. 1990).

Id., 2008 U.S. Dist. LEXIS 7410, 66-67 (Dist. Ct. 2008).

b. Improper Means

Improper means are defined as "means that are illegal or independently tortious." *Love v. Gamble*, 316 S.C. 203, 448 S.E. 2d 876, 883 (S.C. Ct. App. 1994) (internal quotes omitted). In South Carolina, "improper methods may include violence, threats or intimidation, bribery, unfounded litigation, fraud, misrepresentation or deceit, defamation, duress, undue influence, misuse of inside or confidential information or breach of a fiduciary relationship." *Waldrop Bros.*, 992 F.2d at 63.

Id., at 69-70. Sumter Mall, LLC is in the business of leasing the Sumter Mall property for income and profit, and there was ample testimony about leasing of the Sumter Mall. The only asset of Sumter Mall, LLC is land and leasable space at the Sumter Mall, and obtaining payment from tenants for the right to occupy the Sumter Mall – whether it be up front payment or monthly rent or percentage rent or reimbursement for common area maintenance expenses or any other type of lawful payment – is the

business of Sumter Mall, LLC, and the justification for most if not all of its actions year by year. In the Order, the Court described that exact behavior by Sumter Mall, LLC.

Sumter Mall, LLC's right not to lease space to Brooktenn or to condition that lease on any lawful condition must be superior to Branco's request to extend the lease or for a new lease. It is the essence of private property ownership. "A party who in good faith exercises a legal right 'affords no basis for an action by the second party for intentional interference with a contract' despite the fact it may cause a third party not to perform a contract. *Webb v. Elrod*, 308 S.C. 445, 418 S.E. 2d 559, 581 (S.C. App. 1992)." Gailliard v. Fleet Mortgage Corp., 880 F. Supp. 1085, 1089-90; 1995 U.S. Dist. LEXIS 4197, 12 (Dist. SC 1995). So long as its actions are not for an improper purpose or conducted by improper means (there is no allegation of either), Sumter Mall, LLC, has the absolute right to place any conditions it wants on the lease or sale of its space and property rights.

The Lease Agreement dated December 30, 2002, between Sumter Mall, LLC and Paul J. Branco and Ann Branco expired on April 30, 2013. Sumter Mall, LLC, had no obligation to lease space to Brooktenn nor to approve Brooktenn as a tenant. Branco had no right to extend nor to continue to occupy the property. The Order includes findings that the value of the sale of Branco's property in the Sumter Mall, including the right to occupy space in the Sumter Mall (which Branco had no right to occupy after April 30, 2013), as measured by the Contingent Purchase Agreement was \$70,000, but the value Branco received for its property removed from the Sumter Mall was \$5,000. The \$65,000 difference in those two amounts represents a value inherent in the Sumter Mall (of which Branco had no ownership right) – not Branco's property. While not laid out in a linear fashion, the Court describes the affirmative justification for Sumter Mall to request payment of \$20,000 as a term in the Draft Assignment – Branco was proposing to sell to Brooktenn a package of physical property items belonging to Branco PLUS real property rights belonging to Sumter Mall, LLC, and was proposing to the Court that Sumter Mall, LLC be paid nothing.

It is interesting to note that Branco and Brooktenn recognized that a portion of the value of those combined assets being sold belong to the mall owner. The Contingent Purchase Agreement between Branco as seller and Brooktenn as buyer includes the following provision: "Mall Transfer Fee . . . to be split 50/50 with seller (not to exceed \$2,500 for Seller)." Without ever broaching the subject with Sumter Mall, LLC – the only party of the three that owns the right to occupy Sumter Mall after April 30, 2013 – Branco and Brooktenn collectively understood that they would have to pay some amount (\$2,500 as 50% for seller Branco and \$2,500 as 50% for buyer Brooktenn is a contemplated amount of \$5,000) to Sumter Mall, LLC, to purchase an extension of the right or a new right to occupy the Sumter Mall. Sumter Mall, LLC, had the absolute right to require any condition of leasing the property and to require payment of any amount, or they could decline to lease to Brooktenn or Branco at all, and structuring a draft agreement with Brooktenn as an assumption and assignment and including a requirement that Brooktenn make an up front payment of \$20,000 in the Draft Assignment was not only reasonable, it was entirely within the right of Sumter Mall, LLC. The Contingent Purchase Agreement is in the record and was discussed at trial and contemplates payment to Sumter Mall, LLC for the continued right to occupy space. The Court has determined the difference in value between Branco's property standing alone and the combination of Branco's property and Sumter Mall's property. The desire of Sumter Mall, LLC to act in its own financial interest is justification for its actions and was presented at trial, and the Defendants request the Court eliminate the finding "[t]his interference was not justified in anyway and there was no evidence of justification offered by defendant at trial or in the pleadings."

The Order includes a statement that "Defendant intentionally procured the breach of this contract by deeming it an assignment and attempting to collect \$20,000 from plaintiff. Defendant further undermined the contract by attempting to sell plaintiff's equipment to Brooktenn LLC for \$20,000." Defendants request that the Court delete this finding. There is no assertion that the

defendants at any time stopped the Plaintiff from removing its equipment and selling it to Brooktenn or anyone else, and the Court made a finding that Branco did remove the equipment and sold it (or some of it) to another party for \$5,000. An integral part of the Contingent Purchase Agreement was the acquisition by Brooktenn of the right to occupy land owned by Sumter Mall, LLC. Included in the "assets" Branco was attempting to sell to Brooktenn was the right to occupy land owned by Sumter Mall, LLC. Branco's Lease had expired, and Brooktenn has never had a lease with Sumter Mall, LLC. Defendant was under no obligation to lease space to Brooktenn, and construing the absolute right of Sumter Mall, LLC not to lease space to a party as an intentional procurement of the breach of the Contingent Purchase Agreement would work the untenable result of *requiring* Sumter Mall, LLC to lease space to the tenant of an expiring lease on pain of tort liability. What are the terms of the required lease extension? Is Sumter Mall, LLC permitted to increase the rent? Is it permitted to extend the exclusive provisions of its other tenants onto the premises as a condition of the occupancy? How long does the required lease with the extending tenant last? Is there a guarantor? If Sumter Mall, LLC, as a landowner, is not permitted to pursue its own legitimate interest free of tort liability, then it is not able to pursue or protect its interests at all. At the time for performance of its Contingent Purchase Agreement, Branco did not own an essential part of the thing it was attempting to sell. Sumter Mall, LLC, had no duty or obligation to enter into a new lease nor to ratify and agree to assign the lease, and the Defendant was free to condition its entry into a lease with Brooktenn on any lawful consideration. Branco was likewise free to remove its equipment and sell it separate from the assets of Sumter Mall, LLC, which it did. That Brooktenn and the Defendants could not come to terms on that new lease is not actionable against the Defendants, and the Defendants respectfully request that the Court remove the finding that the Defendants interfered with the Contingent Purchase Agreement.

Further, inherent to a tortious interference with contract claim is the question whether the defendant had a legitimate business interest underlying its action. Judge Anderson also looked at the

question of legitimate business interest in BCD, LLC, v. BMW Mfg. Co., LLC, 2007 U.S. Dist. LEXIS 2852

(Amended by BCD, LLC v. BMW Mfg. Co., LLC, 2007 U.S. Dist. LEXIS 4187 (D.S.C., Jan. 16, 2007)).

South Carolina law of tortious interference has never adopted the Stranger Doctrine, but has consistently provided protection to all parties of a contract from the tort. *Ross v. Life Ins. Co.*, 273 S.C. 764, 766, 259 S.E.2d 814, 815 (1979). This protection does not expressly encompass "all parties to an interwoven contractual arrangement," *Atlanta Mkt. Ctr. Mgmt. Co. v. McLane*, 269 Ga. 604, 503 S.E. 2d 278, 283, but does extend to parties engaged in legitimate business activity. See *Gaillard v. Fleet Mfg. Corp.*, 880 F. Supp. 1085, 1089 (D.S.C. 1995) (acknowledging "[i]nterference with a contract is justified when it is motivated by legitimate business purposes"); see also *Waldrup Bros. Beauty Supply, Inc., v. Wynn Beauty Supply Co.*, 992 F.2d 59, 60-61 (4th Cir. 1993) (asserting "the tort law of South Carolina does not make legitimate competitive behavior actionable").

Id. at 6-7. More recently, Judge Harwell of the U.S. District Court for the District of South Carolina found that

[w]hile intentional interference with contract and intentional interference with prospective contractual relations are distinct torts, they both require a plaintiff to show the defendant was a stranger to both the contract at issue and the business relationship giving rise to and underpinning the contract. See *Dutch Dork Dev. Grp. II, LLC v SEL Properties, LLC*, 406 S.C. 596, 604, 733 S.E. 2d 840, 844 (2012) (discussing intentional interference with contract); . . . This principle, often called the "stranger doctrine," prevents a party to an actual or prospective contract from being sued. (Citations omitted).

Jimmy Callum, Jr., v. CVS Health Corporation, 137 F. Supp. 3d 817, 861-862; 2015 U.S. Dist. LEXIS 13080, 98 (2015).

Because the procurement of the right to occupy space in the Sumter Mall is a contingency in the Contingent Purchase Agreement, and because Sumter Mall, LLC has a legitimate interest of its own in the subject matter – namely, in the leasing and occupancy of the Sumter Mall – the Defendants' action in pursuing those business interests in this case are not actionable, and its motive to capture the value of its premises in a lease with Brooktenn is reasonable. The Defendants did not go seek out Brooktenn to discuss the Contingent Purchase Agreement. Rather, Brooktenn and Branco approached Sumter Mall, LLC about extending the lease of space in the Sumter Mall. Sumter Mall, LLC's, choice of whether or not to lease space to Brooktenn and the terms and conditions of and payment for that potential lease of space are at the heart of Sumter Mall, LLC's legitimate business interest. In addition to the specific

requests to modify the findings in the Order as outlined above, the Defendants would ask the Court to modify its findings to provide that the Defendants' actions in this matter were in furtherance of its business interests and are not actionable.

RESPECTFULLY SUBMITTED this 14th day of March, 2017.



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706/434-1743

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SUMTER) COURT OF COMMON PLEAS
3) No. 20 15 CP 43 00596
4 PAUL BRANCO, et al)
5 Plaintiffs)
6 versus) TRANSCRIPT OF RECORD
7)
8 HULL STOREY RETAIL)
9 GROUP, et al)
10 Defendants)

Sumter, South Carolina

November 28, 2016

13 B E F O R E :

14 HONORABLE G. THOMAS COOPER, Judge Presiding

16 A P P E A R A N C E S :

17 For Plaintiff Branco: PATRICK KILLEN, Esq.

18 For Defendants: WILLIAM BUXTON, Esq.
19 MATTHEW MADISON, Esq.

20 Reporter Present: CRYSTAL HOLMES

22 HARRIET P. BENNETT
23 Reporter, S. C. Court Administration
24 46 Regency Oaks Drive
25 Summerville, S. C. 29485

I N D E X

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By Mr. Madison

p. 4, 11

4

By Mr. Killen

7, 14

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(Matter taken under advisement)

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EXHIBITS

NO EXHIBITS WERE PROFFERED OR INTRODUCED BY EITHER PARTY.

1 (The within matter came before the Court for hearing on
2 November 28, 2016)

3 THE COURT: All right. You are . . .

4 MR. KILLEN: Judge, I'm Patrick Killen here for the
5 Plaintiff.

6 THE COURT: All right. Could I see a copy?

7 (Brief pause)

8 THE COURT: Is this your motion, Mr. Buxton?

9 MR. BUXTON: Yes, sir, Your Honor.

10 THE COURT: You may proceed.

11 MR. BUXTON: Thank you, Your Honor.

12 MR. MADISON: I'm Matt Madison on behalf of the Defen-
13 dants in this case.

14 THE COURT: All right, Mr. Madison.

15 MR. MADISON: Just to give you a brief factual back-
16 ground on this case, this arises from a lease at the Sumter
17 Mall.

18 I represent the Defendants who are the owners and land-
19 lords there at the Mall. The Plaintiff is Paul Branco who
20 is doing business there.

21 There was a lease at the Mall that was expiring at a
22 time in early 2013, and Mr. Branco decided that he wished
23 to sell his business by putting the equipment to the new po-
24 tential operator at the Mall.

25 This Complaint came about when there was a contingent

1 transfer of the business and the extension of the lease
2 term.

3 What happened was the lease was not extended before the
4 Plaintiff did assign that lease to sell that leasehold bus-
5 iness in the property.

6 So in the first count of the complainant's breach of
7 contract is the lease, but the lease had expired on its own
8 term at the time that these factual allegations took place.

9 So there was no breach of the lease because the part-
10 ies failed to agree to an extension of the lease. So . .

11 THE COURT: So there was no lease?

12 MR. MADISON: Yes, Your Honor. The lease had expired.
13 That's correct.

14 In the other causes of action, they go on to talk about
15 various parts of the contract. Now, this contract was be-
16 tween Paul Branco, Plaintiff, and that third party who was
17 hoping to get a new lease from the landlords, my clients.

18 Now, they went through negotiations but did not sign a
19 lease, did not come to the full terms of the lease, and that
20 was a contingency in this contract.

21 The Plaintiff and the third party tried to do an equip-
22 ment and leasehold sale of this property and the property at
23 the Florence Mall. There were contingencies built in that
24 the sale could not go through unless that third party was
25 able to come to terms and sign a lease with my clients.

1 That never happened, so this -- the contract contingen-
2 cies that were not met made this deal fall through and they
3 were not -- no one was tortuously interfered with. They
4 were a party -- my client was a party that was negotiating
5 with these folks but they never came to terms and the lease
6 ended with no new lease given to the Plaintiff or to that
7 third party.

8 So there is no contract there, and I see this as being
9 just as simple as that. It could have been extended but
10 they failed to reach agreement on that under the terms of
11 extension.

12 They failed to come to terms with the third party so a
13 new lease came into being.

14 There was no contract in place so my client did nothing
15 wrong. The contingencies were never met and my client can-
16 not be forced to sign a lease with this third party just be-
17 cause the Plaintiff wants to sell the equipment and that
18 business.

19 THE COURT: All right. Mr. Killen.

20 MR. KILLEN: Thank you, Your Honor.

21 Your Honor, could I ask if Your Honor has the affidavit
22 of Paul Branco?

23 (Brief pause)

24 THE COURT: No, sir.

25 THE COURT: May I approach, Judge?

1 THE COURT: Yes, sir. Here is something but you can
2 hand it up.

3 MR. KILLEN: Yes, sir.

4 THE COURT: Thank you.

5 MR. KILLEN: Your Honor, I have just handed you the af-
6 fidavit of Paul Branco of Branco Investments, doing business
7 as Branco (Inaudible).

8 Judge, this is -- I will summarize it for you. This
9 is the affidavit of Paul Branco, and I would just remind the
10 Court that this is a motion for judgment on the pleadings.
11 I put on the affidavit a summary judgment motion, and I am
12 just trying to defeat the motion for summary judgment. I
13 am not trying to win the case on the merits today.

14 But counsel is correct that this was the basis or at
15 the heart of thing was the lease my clients had in the Mall
16 out here with Hull Storey Retail Group. The lease term was
17 December of '02 to April of 2013.

18 Before -- this is all in my client's affidavit. Be-
19 fore April of '13 when the lease was to expire and run its
20 course, my client entered into some negotiations with a com-
21 pany called Brooks LLC. Brooks was going to buy my client's
22 assets and whatever he had in the Sumter Mall Store and
23 another store which was made reference to that he had in
24 the Florence Mall. This was an asset purchase only.

25 He was not taking an assignment of the lease but was

7

1 buying the assets. Whatever equipment was there was among
2 what he was buying.

3 Brooks had negotiated its own lease with these folks.
4 The negotiations were for a new and independent lease, and
5 he was not taking an assignment of my client's lease.

6 THE COURT: The same site?

7 MR. KILLEN: Yes, sir, same site.

8 He has proof that he was not taking -- he was not mak-
9 ing an assignment or transfer of his lease.

10 That is very important in this case that it was his
11 own lease and that he was not taking an assignment or trans-
12 fer or whatever you want to call it of my client's lease.

13 So Hull got wind of these talks that my client was go-
14 ing to sell his assets to Mr. Brooks, and they demanded to
15 receive Twenty Thousand Dollars for a lease assignment fee.
16 That's what they told me.

17 They pointed to a certain paragraph in the lease --
18 called his attention to that, and they said paragraph 16.2
19 said that whenever you assign the lease we get all of the
20 money.

21 So if you assign the lease and somebody gives you a
22 Hundred Grand you've got to give us the Hundred Grand, or
23 give us Ten Grand or whatever it is. They said 16.2 says
24 you've got to give us the money, and we understand you have
25 negotiated with Mr. Brooks and he's going to pay you Seventy

8

1 Grand, so you owe us Seventy Grand, but we're going to give
2 you a discount. We're going to give you -- we're going to
3 let you just pay us Twenty Grand.

4 So my client says that paragraph 16.2 deals with the
5 lease transfers, assignments; I'm not assigning my lease to
6 him.

7 He's got his own lease. I'm just selling to him my
8 assets.

9 So the Defendant's at that point produced a new docu-
10 ment which is Exhibit 2 or Exhibit B, and the document is
11 called Assignment and Assumption of Lease agreement, Veri-
12 fication of Lease Agreement. This was right before the
13 lease of my client was set to expire.

14 So they presented him with this new document and said
15 we have to sign this and give them the Twenty Grand. My
16 client wouldn't sign it. Neither would the other fellow it
17 was brought to.

18 And so at that point my client spoke with a represent-
19 ative, and the representative of the Defendant said we're
20 going to get that Twenty THousand Dollars one way or another.
21 We're going to figure out a way to get that, and they then
22 said to my client and to Mr. Brooks that unless somebody
23 gives us Twenty Thousand Dollars Brooks is not going to be
24 operating in Sumter Mall.

25 So then after that, after that notification, Brooks

1 and my client got notification from a representative of
2 the Defendants -- the guy said something to the effect of,
3 well, you need to give us the Twenty Grand. We put in new
4 carpet in the Mall, a capital improvement, so you've got
5 to do that. You've got to give us the Twenty Grand.

6 Well, the lease, which was a twelve year lease, didn't
7 have anything in there about assessments or him having to
8 be taxed for capital improvements in the Mall.

9 At that point they told Brooks and my client that un-
10 less somebody gives us the Twenty Grand he will not come
11 in here.

12 So at that point the deal between my client and Brooks
13 was to end, and because he wasn't going to pay Twenty Grand
14 in negotiating his own lease.

15 So, Judge, what they were told was that they figured
16 out that they had somebody over a barrel, and they were
17 going to make this contract between my client and Brooks --
18 they were going to make it where somebody paid the Twenty
19 Grand or else they were -- they were going to get the Twenty
20 Grand as a windfall or the guy wasn't coming in the Mall.

21 So at that point Brooks said I'm tired of dealing with
22 this and he bolts, and my client lost Seventy Thousand Dol-
23 lars from the asset purchase.

24 They have changed their stories several times, but it
25 is clear they were trying to interfere with the contract

10

1 between my client and Brooks.

2 And as far as the contract, the lease expired. They
3 were mis-representing the terms of the contract with my
4 client by saying 16.2 says you have to give us the Twenty
5 Grand or Seventy Grand.

6 Your Honor, 16.2 deals with lease transfers and its
7 assumptions, and that is what happened here. They misrepre-
8 sented that and said that provision of the contract said
9 he had to pay that, but that's not what it says.

10 That is not the situation that there was with this
11 transfer.

12 It's very simple.

13 THE COURT: All right. Let's hear what Mr. Madison
14 has to say about that.

15 MR. KILLEN: Thank you, Your Honor.

16 THE COURT: Yes, sir.

17 (Brief pause)

18 MR. MADISON: What really happened here is the Plain-
19 tiff got out of sequence of what was going on on this at
20 that point.

21 THE COURT: All right.

22 MR. MADISON: They needed to extend this term if they
23 wanted to sell that to this third party.

24 THE COURT: Why?

25 MR. MADISON: Because if they don't have anything to

11

1 transfer . .

2 THE COURT: Why can't they sell their equipment?

3 MR. MADISON: They could sell their equipment and they
4 are free to do that, and I don't know if they have sold it
5 or not at this point, but they are free to do that.

6 And the provision that Mr. Killen was speaking about
7 is . .

8 THE COURT: Let me hear it factually as best we can
9 here.

10 MR. MADISON: I was . .

11 THE COURT: He says that Brooks was negotiating separ-
12 ately with your client for a new lease.

13 Is that true or not true?

14 MR. MADISON: Yes, Your Honor. It started out that
15 it was his extension and then it turned into the conversa-
16 tions directly with Brooks.

17 THE COURT: How did that break down? Why did that
18 break down?

19 MR. MADISON: Well, they got in conversation with my
20 client but they never signed the lease. They didn't agree
21 to terms on it.

22 They started down that road but they didn't get to a
23 finish line.

24 There was no lease signed.

25 THE COURT: So that it was a separate lease with some

12

1 separate terms?

2 MR. MADISON: Right. Yes, Your Honor.

3 THE COURT: And that never worked out, is that cor-
4 rect?

5 MR. MADISON: It never did, Your Honor.

6 THE COURT: All right. Then I guess the question is
7 why.

8 Why did it not work out?

9 MR. MADISON: I will tell you that originally it was
10 a lease transfer and then . .

11 THE COURT: Mr. Killen said there was no such thing
12 as a lease transfer.

13 MR. MADISON: His client changed the language to al-
14 low him to go directly to this third party because they had
15 figured out that they weren't going to come to terms on it
16 and because the lease says that my client would be entitled
17 to that Twenty Thousand Dollars.

18 THE COURT: What was the Twenty Thousand Dollars for?
19 What was it for exactly?

20 MR. MADISON: It is under that provision of the lease
21 Mr. Killen was speaking about.

22 It said if he assigns his interest in the lease that
23 all consideration paid shall be payable and belong to the
24 landlord, so once they figured out that they were going to
25 owe the landlord some money they said why don't you guys

13

1 directly talk, Brooks and the landlord.

2 THE COURT: And you say that they did -- he did talk
3 with your clients for a while?

4 MR. MADISON: They did for a while and they never did
5 sign a lease.

6 THE COURT: All right. I understand.
7 Anything further?

8 MR. KILLEN: Yes, sir. Well, Judge, again that para-
9 graph counsel refers to, 16.2, is dealing with a lease
10 assignment or lease transfers.

11 My client is very clear in his affidavit that there
12 never was a lease assignment.

13 It was . . .

14 THE COURT: Do they have copies of this?

15 MR. KILLEN: Yes, Your Honor, they do.

16 THE COURT: All right.

17 MR. KILLEN: And, in fact, they drew up a new document
18 to have signed but my client wouldn't sign it.

19 They knew my client wouldn't sign the lease, and as
20 they tried to get him to sign a new lease document they
21 knew he wouldn't sign a new lease and he never did sign a
22 new lease.

23 Neither my client nor Brooks signed a new lease, and
24 then after that is when they went into the capital improve-
25 ment thing.

14

1 All of this is in my client's affidavit, Your Honor.

2 THE COURT: All right.

3 (Brief pause)

4 THE COURT: Let me ask you to provide the Court with
5 proposed Orders within ten days.

6 Is that satisfactory?

7 MR. KILLEN: Yes, sir.

8 MR. MADISON: Yes, sir.

9 THE COURT: Thank you very much.

10 -----END OF REQUESTED TRANSCRIPT OF RECORD-----

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CERTIFICATE

I, HARRIET P. BENNETT, Court Reporter for South Carolina Court Administration, hereby certify that the foregoing Transcript was prepared to the best of my ability from the records of Crystal Holmes, having been heard in the Court of Common Pleas for Sumter County, South Carolina, on November 28 of 2016.

FURTHER, I certify that I am neither of kin nor counsel to any party to this matter, nor do I have any interest in the same.

November 10, 2017

Harriet P. Bennett

STATE OF SOUTH CAROLINA)
COUNTY OF SUMTER)

COURT OF COMMON PLEAS

PAUL BRANCO)

PLAINTIFF,)

v.)

TRANSCRIPT OF RECORD
15-CP-43-0596

HULL STOREY RETAIL
GROUP, LLC, ET.AL.)

DEFENDANT.)

February 28, 2017
Sumter, South Carolina

B E F O R E :

THE HONORABLE R. FERRELL COTHRAN, JR., JUDGE

A P P E A R A N C E S:

PATRICK M. KILLEN, ESQ.
Attorney for the Plaintiff

WILLIAM A. WALLACE BUXTON, ESQ.
Attorney for Defendant

FRANCES B. RAY, RPR
Circuit Court Reporter

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EXHIBITS

PLAINTIFF'S:

No.	Description	I.D./EVD.
1	Contract	15/15
2	Email	20/20
3	Email	21/21
4	Agreement	24/24
5	Email, text messages	35/35
6	Email	39/39
7	Email	43/43
8	Email	49/49
9	Letter	53/53
10	Letter	59/59
11	List	76/76
12	Email	90/90

DEFENDANT'S:

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2	Email	92/107
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1 THE COURT: Either side want to make
2 opening statement?

3 MR. KILLEN: I don't think that's
4 necessary, Judge.

5 THE COURT: Okay. All right, you may call
6 your first witness.

7 MR. KILLEN: Judge, I call Mr. Paul Branco
8 to the stand.

9 THE COURT: If you'd come around please,
10 sir.

11 THE CLERK: Place your left hand on the
12 Bible, raise your right hand. State your name
13 please.

14 THE WITNESS: Paul Joseph Branco.
15 WHEREUPON,

16 **PAUL BRANCO,**
17 having been duly sworn by the Clerk, testified
18 as follows:

19 THE CLERK: Thank you. Have a seat up
20 here please. Please state your full name and spell
21 your last name for the record.

22 THE WITNESS: Paul Joseph Branco. That's
23 B-R-A-N-C-O.

24 **DIRECT EXAMINATION**

25 BY MR. KILLEN:

PW - P. BRANCO - DIRECT

- 1 Q Mr. Branco, you live in Florence County?
- 2 A Yes, sir.
- 3 Q How long have you lived in Florence?
- 4 A Twenty plus years.
- 5 Q You are married to Anne Branco?
- 6 A That is correct.
- 7 Q And that's Anne sitting back there in the pew?
- 8 A Yes, sir, it is.
- 9 Q And you have how many children?
- 10 A Four.
- 11 Q Their names?
- 12 A The oldest is Paul, then Stephanie, then Keith,
- 13 then Ryan.
- 14 Q All your children adults —
- 15 A Yes, sir.
- 16 Q —at this point? Okay. What do you do for a
- 17 living, Mr. Branco?
- 18 A I'm the comptroller and building and maintenance
- 19 manager for ACS Technologies in Florence, South
- 20 Carolina.
- 21 Q What does ACS Technology do?
- 22 A Software. It's a development company for faith
- 23 based community.
- 24 Q Okay. And what — when you say you're the, what
- 25 did you say, maintenance director?

PW - P. BRANCO - DIRECT

- 1 A My primary responsibility is comptroller.
2 Q Comptroller?
3 A I inherited the maintenance.
4 Q When you say comptroller you're talking about
5 finances?
6 A Correct.
7 Q Where is that business located or that
8 organization located?
9 A Florence.
10 Q Okay. How long have you been doing that?
11 A Fifteen plus years.
12 Q Okay. And you are how old now?
13 A I am now 60.
14 Q When did you start — have you always been,
15 before this company you work for now, have you been
16 self-employed?
17 A No. No, I hadn't been.
18 Q You — where did you go to college?
19 A Rutgers University in New Jersey.
20 Q The State of New Jersey of —
21 A Rutgers is the state university in Jersey,
22 correct.
23 Q When did you graduate from Rutgers?
24 A 1979.
25 Q All right. What did you do after you, upon

PW - P. BRANCO - DIRECT

1 graduation from college?

2 A I actually went to work for the university when I
3 graduated, and then I worked for various
4 construction companies in New Jersey.

5 Q What kind of work did you do for construction
6 companies?

7 A It varied. It was very broad, anywhere from
8 actual site construction, managing, to finance.

9 Q When were you first self-employed?

10 A First self-employment, again, self employed in
11 terms of Branco Investments would have been 2001.

12 Q What Branco was this?

13 A Branco Investments is a South Carolina
14 corporation. It was formed in 2001 to go into the
15 cookie franchise business.

16 Q So you formed that corporation to become a Great
17 American Cookie Franchisee, Inc.?

18 A Correct.

19 Q Is that correct? Okay. And what year was that
20 again?

21 A 2001.

22 Q All right. Did the corporate — what's the
23 corporate name for the Great American Cookie
24 Company? What do they call themselves?

25 A My corporate name?

PW - P. BRANCO - DIRECT

1 Q No, the people you had to deal with to get the
2 franchise.

3 A Oh, it started out as Mrs. Fields and then it
4 became another franchisor, and then it ultimately
5 wound up being Global Franchise Group.

6 Q Global Franchise Group?

7 A GFG, Global Franchise Group.

8 Q So you had to apply with GFG to get a, to be
9 franchisee for Great American Cookie Company?

10 A If I renewed, yes. Up until that point in time
11 everything was done through Mrs. Fields.

12 Q Okay.

13 A And the subsequent one. I forget —

14 Q The predecessor to —

15 A The predecessor to Global.

16 Q Global Group.

17 A Yeah.

18 Q Let me finish so she can take it down, okay.
19 Your original franchise deal with Great American
20 Cookie Company was with Mrs. Fields?

21 A I believe that was.

22 Q Okay. And then it became GFG, Global Franchising
23 Group?

24 A Ultimately.

25 Q And when did you apply for a franchise, a

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1 franchise for, to become a franchise to operate the
2 Great American Cookie Company store?

3 A That was back in 2003.

4 Q All right. Why did you decide to do that? What
5 prompted that?

6 A My wife and I were just looking for a business
7 opportunity. I was actually on a severance package
8 from a company that I had worked for so we decided
9 to look into some possibility of going into
10 business.

11 Q So you submitted an application to Mrs. Fields to
12 run a store or stores?

13 A Yes, sir.

14 Q For the Great American Cookie Franchise?

15 A Yes.

16 Q All right. I take it you were approved?

17 A We were approved. We were approved in Florence
18 first in 2001 and then in Sumter in 2003.

19 Q Okay.

20 A We actually had two franchises in stores so just
21 for the record.

22 Q So you had a store in Sumter and you had a store
23 in Florence?

24 A Yes, sir.

25 Q Sumter Mall and Magnolia Mall?

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1 A Correct.

2 Q All right. When did you begin operation on
3 the — or scratch that. What time frame are we
4 talking about when you wanted to go into the Sumter
5 Mall?

6 A It would have been, we probably started
7 construction sometime in January of 2003.

8 Q Did you contact the mall, the company that runs
9 the mall up there?

10 A Yes, sir.

11 Q Was it Hull Storey?

12 A Group.

13 Q Hull Storey Group. They're out of Augusta,
14 Georgia?

15 A Yes, sir.

16 Q Did you contact them about getting some space in
17 the Sumter Mall?

18 A I believe they actually came to me through
19 Mrs. Fields.

20 Q So Mrs. Fields had contacted them?

21 A They, I think you —

22 Q Asked you to operate at the mall?

23 A I believe it was dialogue there; and then we were
24 approached by the franchise agent for Mrs. Fields,
25 asked us whether or not we wanted to open a second

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1 store, this one being in Sumter.

2 Q Okay. And at some point you would have talked to
3 the mall about a lease, correct?

4 A Correct.

5 Q All right. Did, when you talked to the mall who
6 did you talk to, the mall people?

7 A Yeah, the mall people. I honestly don't remember
8 who I spoke to back in that day.

9 Q Was it somebody in Sumter or was it somebody in,
10 somebody in Augusta?

11 A It would have been somebody in Augusta. They
12 really didn't have anybody in Sumter.

13 Q Did you negotiate lease terms with them or did
14 they just tell you what the terms were?

15 A We negotiated lease terms.

16 Q All right. And what are the normal lease terms?
17 What do you negotiate on a lease like this?

18 A Typically the term, which in this case was ten
19 years, the rent, whatever the rent would have been,
20 typically breakpoints during the course of the lease
21 to allow for increases. I don't know if this one
22 actually had an increase; it probably did. I
23 haven't reviewed it that closely. And other things,
24 other items.

25 Q All right. You eventually signed a lease with

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- 1 them; is that correct?
- 2 A Correct. Anne and I sign signed it.
- 3 Q Mr. Branco, I'm gonna hand you a document, if you
- 4 can tell the judge what this is. Go ahead, tell the
- 5 Court what that is.
- 6 A This is the lease agreement between Sumter Mall,
- 7 LLC, as a landlord, and Paul J. and Anne Branco,
- 8 jointly.
- 9 Q Okay. Sumter Mall, LLC is a, some kind of
- 10 subsidiary or some kind of unit of Hull Storey
- 11 Gibson which is the company out of Augusta; is that
- 12 your understanding?
- 13 A To the best of my knowledge, yes, that is
- 14 correct.
- 15 Q All right. Now go back to the back page of that
- 16 to where the signatures are. I know there were some
- 17 addendums or something added to it. It's probably
- 18 six pages there from the back.
- 19 A Right, and I believe a lot of this is
- 20 construction.
- 21 Q All right. 6 or 7 pages in.
- 22 A I'm not seeing signatures here. Patrick.
- 23 Q All right.
- 24 A Oh, here it is, okay, I'm sorry.
- 25 Q All right.

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- 1 A Page 18.
- 2 Q Okay. And that has — is that your signature
- 3 there where it says Paul J. Branco?
- 4 A That is correct.
- 5 Q And Anne, your wife's signature?
- 6 A Yes.
- 7 Q And Daniel Nixon, that's somebody that signed on
- 8 behalf of the Mall, correct?
- 9 A That is correct.
- 10 Q So this is a lease that you signed. It was for
- 11 ten years that, under which you operated Great
- 12 American Cookie Company at the mall for about ten
- 13 years, correct?
- 14 A Yes.
- 15 Q All right, did you write this document?
- 16 A And let me just be clear, when we refer to Great
- 17 American Cookie Company in Sumter we're talking
- 18 about the Great American Cookie Company and the
- 19 Pretzel Time franchise, two franchises.
- 20 Q All right. That's what you meant earlier when
- 21 you said two franchises?
- 22 A Right, exactly.
- 23 Q So to be clear, the store at the Sumter Mall was
- 24 Great American Cookie Company and Pretzel Time?
- 25 A Correct.

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1 Q And pretzels are those soft pretzels with salt on
2 it?

3 A Those are them.

4 Q All right. Did you write this or did they write
5 it?

6 A They wrote this.

7 Q All right. You didn't — other than the terms as
8 far as the money, you didn't write any other thing
9 in this document, correct? I mean, you didn't even
10 negotiate that?

11 A No, I had an attorney review it but I did not
12 negotiate it.

13 MR. KILLEN: All right, Judge, I'd move
14 that in as Plaintiff's 1.

15 THE COURT: Any objection?

16 MR. BUXTON: The only objection I have is
17 just it looks like some of the language is cut off
18 on — if I can just, can I just —

19 MR. KILLEN: Judge, if he's got a copy
20 that's better than mine I'll be glad to use his.

21 (Attorneys confer.)

22 MR. KILLEN: It looks like something got
23 cut off, Judge. That's fine. We can use his copy
24 or whatever, that's fine.

25 THE COURT: So you have no objection to

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1 whatever copy is going in that's clear?

2 MR. BUXTON: No, Your Honor. I just want
3 to make sure we have the complete, clear copy.

4 THE COURT: Okay.

5 MR. KILLEN: Judge, this thing has been
6 copied probably fifty times; and you know how it is,
7 copy a copy, then you copy a copy and —

8 THE COURT: Okay.

9 MR. KILLEN: That's fine.

10 THE COURT: It's entered without
11 objection.

12 (WHEREUPON, Plaintiff Exhibit No. 1 was
13 marked for identification and admitted in
14 evidence.)

15 BY MR. KILLEN:

16 Q Now that's a ten year term on that lease,
17 correct?

18 A Correct.

19 Q All right.

20 A Ten years from the time construction was
21 completed.

22 Q Any problems over the course of that lease up
23 until the end which is what we're here about today?
24 Any problems with you paying or them complying with
25 their responsibilities under the lease, anything

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1 like that?

2 A Nothing major.

3 Q Okay. The lease was going to expire on what
4 date?

5 A April 30th, 2013.

6 Q Okay. And I guess you and Anne knew that the
7 lease was going to come up to, about to lapse at
8 some point, right, you knew it was coming?

9 A Absolutely.

10 Q All right.

11 A Anne was looking for the day. She was counting
12 the days down.

13 Q She got frustrated with running the store I take
14 it?

15 A We were in business for 13 years, 12 years at
16 that time, yeah, it was time.

17 Q What were your and Anne's intentions when this
18 lease was about to expire? I mean, what was your
19 thinking that y'all were going to do at that point?

20 A There were several options. My daughter was
21 managing the store so it was an option for her to
22 continue on under her name; and if that wasn't the
23 case, then we were just going to shut it down.

24 Q You didn't want to continue operating Great
25 American Cookie Company or the Pretzel operation?

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1 A No. We had a year-and-a-half left on the
2 Florence lease so we were looking to get out from
3 underneath both, and that's what we have since done.

4 Q Well, did you towards the end of the lease in the
5 last six months or so approach the landlord and ask
6 about an extension or a renewal —

7 A I don't know whether —

8 Q —or anything like that?

9 A I'm sorry. I don't know if I approached them or
10 they approached me; but sometime in September there
11 was, there was dialogue about lease renewal.

12 Q All right. Well, was it your intention to renew
13 the lease and continue operation in the mall?

14 A Only if my daughter could take it on, and in that
15 case we would have been removed from it so that's
16 where the discussions were.

17 Q About renewal?

18 A About a renewal, yes.

19 Q Okay.

20 A As far as us personally, the answer is no.

21 Q Who did you talk to at Hull Storey about doing a
22 lease renewal for your daughter?

23 A Lewis White.

24 Q All right. And Mr. White is a — what's his
25 capacity as far as you know at Hull Storey?

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1 A I don't know his official title, but he was the
2 leasing agent in my mind.

3 Q What does leasing agent mean?

4 A He was negotiating the lease on behalf of the
5 landlord.

6 Q Was he trying to sell the leases?

7 A Yes, I'm sure.

8 Q Okay. And he's an employee of Hull Storey,
9 correct?

10 A Correct.

11 Q All right. Now how intense were the negotiations
12 about your daughter taking over, talks about your
13 daughter taking over?

14 A I mean, there were emails back and forth about,
15 you know, rates and you know, breakpoints; and it
16 was really just about rent, there was discussions.

17 Q What's breakpoint?

18 A Breakpoint before percentage rank kicks in, what
19 point in time the rent actually increases during the
20 term of the lease, and those types of things.

21 Q Were you going to sign a renewal or new lease on
22 behalf of your daughter or was your daughter and her
23 husband, or fiance at that time, going to, going to
24 be signators on the lease with the mall?

25 A We were not going to guarantee the lease. They

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1 were going to have to get their own lease and get it
2 signed.

3 Q Your daughter and her fiance were —

4 A Daughter and fiance were going to have to sign
5 the lease.

6 Q All right. And it was clear between you and the
7 Mall that you were talking about your daughter?

8 A Absolutely.

9 Q I'm gonna hand you a document. If you could look
10 at that, Mr. Branco, and then tell the judge what
11 that is.

12 A Yes. This is an email from Lewis on
13 October 26th.

14 Q You say Lewis, you're talking about Lewis White?

15 A Lewis White.

16 Q The lease representative for Hull Storey,
17 correct?

18 A He's the representative for Hull Storey.

19 Q What does he say to you in that email?

20 A Well, you know, appreciate the time talking to
21 you, he's looked at the rental rates, the similar
22 locations, similar cookie establishments, and that
23 he's willing to propose a five year term with
24 somewhere between 37 and 40,000 depending on what
25 year the lease was in. And then he goes on to

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1 include some other sanitation fees, promotional
2 dues, and then a breakpoint of over 300,000 at
3 8 percent percentage rank.

4 Q And again, that's about your daughter?

5 A Yes.

6 Q Okay. Let me trade that out.

7 MR. KILLEN: Judge, I'd enter this as
8 Plaintiff's number 2.

9 THE COURT: Any objection?

10 MR. BUXTON: No, Your Honor.

11 THE COURT: It's in.

12 (WHEREUPON, Plaintiff Exhibit No. 2 was
13 marked for identification and admitted
14 into evidence.).

15 BY MR. KILLEN:

16 Q Now he doesn't, Mr. White in that email doesn't
17 mention your daughter; is that correct?

18 A That is correct.

19 Q He talking about numbers and that sort of thing?

20 A Correct.

21 Q Let me hand you another email. And look at that
22 email and see if you recognize it. If you do, tell
23 the judge what that is.

24 A I do recognize this.

25 Q And what is that?

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1 A Let me just look at this to see if this is —
2 sometimes these are email threads. Okay. This is
3 an email from Lewis White to me, February 6th. It
4 says, "As a followup to our conversation I have
5 attached the tenant application. I can pull credit
6 on your daughter and her fiance if you want to
7 explore the option. Again, it will likely be
8 difficult for me to gain approval on removing you as
9 a guarantor on the lease."

10 Q All right.

11 A And that was critical..

12 Q So they were suggesting you being a guarantor on
13 a lease that will be signed by your daughter and her
14 fiance; is that correct?

15 A That is correct.

16 MR. KILLEN: Judge, I'd move this in as
17 the next plaintiff exhibit.

18 THE COURT: Any objection?

19 MR. BUXTON: No objection.

20 (WHEREUPON, Plaintiff Exhibit No. 3 was
21 marked for identification and admitted
22 into evidence.)

23 BY MR. KILLEN:

24 Q Now at some point you began having conversations
25 with Mr. Stewart Applebaum, a company called

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1 Brooktenn, LLC, out of Georgia; is that correct?
2 A That is actually not correct. I think my first
3 conversation with Darryl Light and then after that
4 it was Stewart Applebaum.
5 Q But it was Brooktenn, LLC?
6 A Brooktenn, LLC, correct.
7 Q Can you give a guesstimation, or an estimation I
8 should say, on when this took place initially?
9 A Sometime mid, late January.
10 Q Of 2013?
11 A 2013.
12 Q Okay.
13 A No, 2012. Wait, whoa, my apologies. 2013,
14 correct.
15 Q All right. Let's just be clear, January of 2013?
16 A January of 2013, correct.
17 Q Okay. And Mr. Applebaum is in the courtroom.
18 A Yes, he is.
19 Q And that's the gentleman sitting beside Anne?
20 A Yes, he is.
21 Q Okay. And what were the nature of your
22 conversations with Mr. Applebaum in January of 2013?
23 A It involved the, both stores, the Florence store
24 and the Sumter store, and Brooktenn purchasing from
25 Branco Investments both stores, an asset purchase

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1 agreement, purchasing the assets of both stores.

2 Q When you say purchasing the assets what do you
3 mean?

4 A Equipment. No liabilities, no corporate
5 entities, strictly a asset purchase of the — and of
6 course, any inventories that might be on hand.

7 Q So he wasn't buying your company?

8 A No, sir.

9 Q He wasn't buying liabilities?

10 A No, sir.

11 Q Was there any discussion of Mr. Applebaum's
12 company or Brooktenn taking assignment of your lease
13 which was about to expire end of April 2013?

14 A Absolutely not. We were 90 days out from our
15 term ending.

16 Q Okay. Did you and Mr. Applebaum reduce your
17 agreement to writing?

18 A Yes, we did.

19 Q Your asset purchase?

20 A Yes, we did. We both signed off on it March the
21 1st.

22 Q All right. I'm gonna hand you a document and is
23 that the agreement that you had with Mr. Applebaum's
24 company Brooktenn, LLC?

25 A This is the agreement between Brooktenn, LLC, and

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1 Branco Investments. Signed on March 1st, 2013.

2 Q And that March 1st date, above that is your —
3 I'm sorry, above that is your signature, correct,
4 both of these dates anyway, but that's your
5 signature?

6 A Correct.

7 Q Paul Branco. That's Mr. Applebaum's signature?

8 A That is correct, to the best of my knowledge.

9 Q Okay.

10 MR. KILLEN: Judge, I move this in as the
11 next plaintiff's exhibit.

12 THE COURT: Any objection?

13 MR. BUXTON: No, Your Honor.

14 THE COURT: In without objection.

15 (WHEREUPON, Plaintiff Exhibit No. 4 was
16 marked for identification and admitted
17 into evidence.)

18 BY MR. KILLEN:

19 Q Let's go through this document a little bit,
20 Mr. Branco.

21 A Okay.

22 Q Again, this is your deal with Brooktenn, LLC, or
23 your company's deal with Brooktenn, LLC?

24 A Branco Investments and Brooktenn, correct.

25 Q Okay. The first thing says — and I'm just

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1 looking at the Sumter Mall part, not the Magnolia
2 Mall part.

3 A Okay.

4 Q And it says at the top, purchase price
5 70,000-dollars; is that correct?

6 A That is correct.

7 Q And you testified earlier what he was buying from
8 you, but let me go down a little bit. It says, GFG
9 transfer fee. That GFG, that's the franchise for —
10 that's the franchise company, that's —

11 A Franchisor.

12 Q Franchisor.

13 A I know, I mix them up myself, yes.

14 Q That's what that is, right?

15 A That is correct.

16 Q So what does that contemplate, what does that
17 mean?

18 A Transferring the franchise from us to Stewart.

19 Q That would be a fee that maybe GFG would charge
20 you all to —

21 A Right.

22 Q —for him to take over the franchise location or
23 something?

24 A Correct.

25 Q Okay. That doesn't have anything to do with the

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- 1 mall?
- 2 A No, it does not.
- 3 Q All right. That's dealing strictly with the
- 4 franchise?
- 5 A Correct.
- 6 Q Under that it says, mall transfer fee. It says
- 7 to be split 50/50 with seller not to exceed 2500
- 8 dollars with seller. What does that mean? What's
- 9 that contemplate?
- 10 A This is, this was actually put in here at the
- 11 request of Stewart and I can explain it as best I
- 12 understand it.
- 13 Q Well, —
- 14 A But —
- 15 Q You signed the contract with Mr. Applebaum and
- 16 this is y'all's deal so just tell the Court what it
- 17 means.
- 18 A This was for administrative fees for switching
- 19 the stores over.
- 20 Q Can you explain what that is. What are you
- 21 talking about?
- 22 A Transferring, I guess a transfer from one person
- 23 to the next. They're administrative fees.
- 24 Q Does it entail transfer—
- 25 A I'll be honest with you —

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1 Q Does it entail transferring stock of Branco
2 Investments over to Brooktenn?

3 A No, absolutely not.

4 Q Does it entail transferring any business interest
5 other than the assets of the business?

6 A No.

7 Q Does it entail transferring or assigning the
8 lease which was about to expire to Mr. Applebaum?

9 A No.

10 Q Under that it says store inventory. What all
11 were you selling? What all were the assets?

12 A Well, we had — of course, it was a list of
13 equipment. And in addition to that where it says
14 store inventory that has to do with whatever product
15 was left in the store.

16 Q That would be like cookie dough and pretzel
17 stuff?

18 A Cookie dough, pretzel stuff, cups, lids, a host
19 of things.

20 Q All right. Whatever was in there you're selling
21 to them —

22 A Correct.

23 Q —as far as inventory and assets?

24 A That is correct.

25 Q All right. Then under that it says something

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- 1 about machinery equipment had to be in good working
2 order. I think everybody knows what that means.
3 Under that it says, "This proposal is contingent
4 upon buyers getting a satisfactory lease from Hull
5 Storey Gibson within 90 days." What does that mean?
6 A That means Brooktenn entering into a lease
7 agreement with Hull Storey within 90 days in order
8 to, for this deal to be consummated.
9 Q Had Brooktenn filed or submitted to Hull Storey
10 an application for its own lease?
11 A Probably not at this time, but probably shortly
12 thereafter.
13 Q Okay. But it contemplated that Mr. Applebaum
14 with Brooktenn would get a new distinct independent
15 lease from that of Paul and Anne Branco?
16 A Absolutely.
17 Q Okay.
18 A This was to be a turnkey project.
19 Q All right. And you were selling them the same,
20 basically the same things you just described out of
21 the Florence location?
22 A Correct.
23 Q For 30,000-dollars?
24 A Correct.
25 Q Total sales price of 100,000 dollars?

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- 1 A Correct.
- 2 Q For the assets and inventory of the two stores?
- 3 A For the assets. The inventory would have been in
- 4 addition.
- 5 Q Okay.
- 6 A Based on the terms that we outlined in here.
- 7 Q All right. So eventually Mr. Applebaum applied
- 8 for a lease with Hull Storey?
- 9 A To the best of my knowledge, yes. I wasn't privy
- 10 to that.
- 11 Q And at some time you told somebody at Hull Storey
- 12 about Mr. Applebaum and his interest in —
- 13 A Correct. I don't remember whether there were
- 14 discussions before this was signed or after. There
- 15 probably was some discussion before that I might
- 16 have a perspective tenant for him.
- 17 Q Okay. Who did you tell that to?
- 18 A That would have been Lewis White.
- 19 Q Is that who you spoke to mostly at Hull Storey?
- 20 A Most, almost exclusively, yes.
- 21 Q Okay. I'm gonna hand you a document, Mr. Branco,
- 22 and if you could tell the Court what that is.
- 23 A This is a text message thread between myself and
- 24 Lewis White from Hull Storey.
- 25 Q All right, you had this transcribed?

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1 A Yes.

2 Q Okay. You have some software that'll do that?

3 A Correct.

4 Q All right. And this has got, it looks like,

5 about 20 text messages between you and Mr. White?

6 A Correct.

7 Q Okay.

8 A About that.

9 Q All right. On March the 4th, go down to where it

10 says March the 4th. That's a text message from you

11 to Lewis White, correct?

12 A That is correct.

13 Q And what did you say there?

14 A I said, "I will be providing your contact info to

15 Stewart Applebaum of Brooktenn, LLC. I also

16 forwarded the tenant app to him. We will need to

17 keep in touch regarding lease finalization for them

18 and progress as it relates to this. Thanks."

19 Q All right. You said you forwarded the tenant

20 application. That was being forwarded to Mr.

21 Applebaum for his lease with Hull Storey?

22 A That is correct.

23 Q All right. And that was an application that any

24 new potential lessee would sign or submit to them?

25 A Absolutely.

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1 Q All right. And then in the second sentence you
2 say, we will need to keep in touch regarding lease
3 finalization. Again, what does that contemplate?

4 A The reason for that is the date on this is
5 March 4th that I'm sending him this text message.
6 Our lease is due to expire at or around April 30th
7 and I knew that Stewart needed a minimum of 30 days
8 for attorney review, roughly. That's — and that
9 was his conversation, a conversation him and I had
10 together.

11 Q Now at some point — well, let me go back. When
12 you first told Mr. White about Mr. Applebaum what
13 was nature of that conversation?

14 A Well, the nature of the conversation was we have
15 a prospective tenant for you here that's looking for
16 a ten year lease. It will be a turnkey situation
17 where on April 30th we'll hand him the keys. May
18 1st he'll pick up the store and he'll be your next
19 tenant for ten years, you won't have any down time.

20 Q Okay.

21 A Subject to his approval obviously.

22 Q Did you have multiple conversations with him
23 about Mr. Applebaum's potentially coming in or just
24 want one or two?

25 A I don't remember how many conversations we had

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1 about it, but the intent of this text message was to
2 get the dialogue and the negotiations between
3 Stewart and Hull Storey started so they could get
4 their lease.

5 Q All right. At any time during those
6 conversations or these text messages that are on
7 that document, did Mr. White mention to you that
8 there was going to be, or that the mall was
9 considering the arrangement with Mr. Applebaum's
10 company to be a lease assignment?

11 A That was never mentioned in any text, emails, or
12 conversations.

13 Q Lease assignment, lease transfer?

14 A No, sir.

15 Q He's taking your lease?

16 A In none of the above.

17 Q All right. Now, and I'm doing this
18 chronologically. First of all, let me just —
19 Judge, if I could move that in as next plaintiff's
20 exhibit.

21 THE COURT: The text message?

22 MR. KILLEN: Yes, sir.

23 THE COURT: Number 5? What says Defense?

24 MR. BUXTON: Your Honor, I'm gonna object
25 as to foundation. I'm not familiar with the email

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1 by text. I don't know if this is a complete
2 collection of all the texts or not.

3 MR. KILLEN: He can cross-examine if he
4 wants to, Judge.

5 MR. BUXTON: I'm just not familiar with
6 how this is...

7 THE COURT: Have you got a copy of it?

8 MR. BUXTON: I've got a copy of it, yes,
9 Your Honor.

10 THE COURT: Okay. And you object to it
11 being introduced on what grounds?

12 MR. BUXTON: On foundation. I don't think
13 he's established that this is what it purports to
14 be.

15 THE COURT: Okay.

16 MR. KILLEN: Judge, he can cross-examine
17 my client and argue about the authenticity of it,
18 that's fine. He can argue that at the end of the
19 case if he wants to, but my client said what it is
20 and that gentleman is here, Mr. White.

21 THE COURT: I understand, but you know,
22 supposedly you said it was text messages that your
23 client transferred, right?

24 MR. KILLEN: He did it on some softwares.

25 THE COURT: Right.

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1 MR. KILLEN: By text messages to — email
2 by text where it comes up. It comes to your email
3 and you print it out.

4 THE COURT: So I mean, he's testified to
5 it; but normally, you know, it's something not
6 admissible unless he agrees it's, in fact, text
7 message and back and forth from his client to your
8 client. Now are you telling me that you had a
9 chance to look at it and it's things in there that
10 are not true text messages?

11 MR. BUXTON: Your Honor, I'm not sure. I
12 haven't independently authenticated it.

13 THE COURT: Okay. Well, he's testified
14 about one text message that he said he had objected
15 to. Is there other in there —

16 MR. KILLEN: There's two or three other
17 ones, but I don't want to take them out of order.

18 Paul, I don't want to take them out of
19 order.

20 THE COURT: I don't believe that I can
21 rule unless you deal with all of them. And he
22 objects to the one of them saying that's not what he
23 sent. Is that your position?

24 MR. BUXTON: Your Honor, I'm just not sure
25 if this is a complete collection because I believe

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1 he just testified that there was never any
2 discussion of any of those texts. I'm not sure if
3 this is, if any have been left out for any reason.

4 THE COURT: Okay. So I mean, I don't know
5 he's offering it to being complete. Do you have any
6 other texts that?

7 MR. BUXTON: No, Your Honor, I don't have
8 any text messages. This was provided to us in
9 discovery, but I'm not sure if it's, there are other
10 text messages or not. Your Honor, I'm not familiar
11 with this software, how it works.

12 THE COURT: Okay. So you — okay.
13 Objection it may not be complete. But having said
14 that, you can — do you have any objection any of
15 this is not authentic, not in fact text messages
16 from the two parts?

17 MR. BUXTON: I have no evidence or reason
18 to believe that these are not some of the text
19 messages.

20 THE COURT: Okay. Well, I'll allow them
21 in under the, in relation to my understanding that
22 you put up whatever evidence, may not be all of
23 them, I mean. Okay. If you'll tie they in fact
24 occurred, then I'll let them in.

25 (WHEREUPON, Plaintiff Exhibit No. 5

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1 was admitted into evidence.)

2 BY MR. KILLEN:

3 Q Okay, number 4.

4 A I have a copy.

5 Q Let me see, number 4. What is P-R-E-I-F?

6 A That's the landlord for the mall in Florence.

7 THE COURT: Okay, that didn't fit
8 anything.

9 MR. KILLEN: Sir?

10 THE COURT: So there's nothing about the
11 landlord for the mall in Sumter. That's the
12 Florence one.

13 MR. KILLEN: In both, it's both, great
14 American Cookie Sumter Mall.

15 THE COURT: I understand, but down there
16 it says he had 90 days to get a lease for Florence
17 Mall, nothing about getting a lease for Sumter Mall.

18 MR. KILLEN: That's right here, last line.
19 Sumter Mall authorization proposal contingent
20 getting —

21 THE COURT: Oh, I'm sorry, okay, I got
22 you.

23 MR. KILLEN: Now it's basically —

24 THE COURT: Yes, sir.

25 MR. KILLEN: —two leases on the same,

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1 they did two malls on the same.

2 THE COURT: Okay. I understand now, thank
3 you.

4 MR. KILLEN: These gentlemen drafted this
5 document amongst themselves.

6 THE COURT: Okay.

7 BY MR. KILLEN:

8 Q Mr. Branco, I'm gonna hand you another document
9 and then I'm gonna come back to Plaintiff's Exhibit
10 Number 5 in a minute.

11 A Okay.

12 Q But that's an email you got from Ashley Dolce; is
13 that right?

14 MR. BUXTON: Dolce.

15 MR. KILLEN: Ashley Dolce down at Hull
16 Storey.

17 THE WITNESS: Correct.

18 BY MR. KILLEN:

19 Q And she's a lawyer down there. Is that your
20 understanding?

21 A She represents herself as the — I saw somewhere,
22 counsel.

23 Q Okay. As far as you know that she's a lawyer?

24 A I know she's a lawyer.

25 Q Anyway, she works for the Defendant?

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- 1 A Correct.
- 2 Q All right. She sent you this email on March 20th
- 3 of 2013; is that correct?
- 4 A That is correct.
- 5 Q And she's talking about some fee that was
- 6 incurred. I don't know if it was city or something,
- 7 sanitation fee?
- 8 A Sanitation charge.
- 9 Q Sanitation disposal charges. We're not talking
- 10 about that, are we? That's not an issue.
- 11 A Not that I'm aware of.
- 12 Q Okay. Go to the next to the last sentence on
- 13 this email from Ms. Dolce. What does she say there?
- 14 A She says, "I understand you're in process of
- 15 trying to sell the business and I hate for this
- 16 small amount to hold up the deal."
- 17 Q All right. Trying to sell the business. She's
- 18 talking about the deal between you and Brooktenn,
- 19 correct?
- 20 A That is correct.
- 21 Q All right. And she says, I hate for this to hold
- 22 up the deal, the deal between you and Mr., you and
- 23 Brooktenn, LLC, —
- 24 A Correct.
- 25 Q —correct? All right. Any mention in this

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1 email about a lease, a lease assignment?

2 A No, sir.

3 Q Okay. By this time, by March 20 when she sent
4 you this, they knew about your deal with Brooktern,
5 LLC?

6 A They knew Stewart Applebaum for sure. They
7 probably knew of the deal as well.

8 Q Well, she says, I understand you're trying to
9 sell it, gonna sell it, and we don't want this to
10 hold up the deal so.

11 A Yes, she does. I'm sorry, yes.

12 Q All right. Did Ashley Dolce, who is a lawyer for
13 them, ever tell you that you were transferring
14 lease?

15 A No.

16 Q They considered you to be transferring a lease to
17 Brooktern, LLC?

18 A No, sir.

19 Q All right. So by March 20th of 2013 you hadn't
20 heard that phraseology from them at all, lease
21 assignment?

22 A No, sir.

23 Q All right.

24 MR. KILLEN: Judge, I'd like to put this
25 in too, I guess, plaintiff's 6.

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1 THE COURT: 6.

2 MR. BUXTON: No objection.

3 (WHEREUPON, Plaintiff Exhibit No. 6 was
4 admitted into evidence.)

5 BY MR. KILLEN:

6 Q All right. In March and April you were having
7 conversations with somebody at Hull Storey about
8 some lease terms either for your daughter or for
9 Brooktenn or they were sending you information; is
10 that correct?

11 A March or April? I'm sorry, rephrase that
12 question 'cause I'm...

13 Q Maybe even sooner, but sometime in the Spring of
14 2013 you were having conversations with Lewis White
15 about lease terms?

16 A Correct, rent terms, yes.

17 Q Rent terms?

18 A Rent terms, yes.

19 Q Yeah, whatever. And there's some correspondence
20 that says in the subject line, it says lease
21 renewal, all right. Why were you asking them about
22 lease terms if you were not intending on renewing
23 your lease?

24 A Again, the discussion was about rent and
25 breakpoints and that type of thing, but the —

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1 probably poor choice of words, but got picked up
2 early on lease renewal and it kind of carried
3 through. There were also discussions about new
4 lease with Brooktem but we were considering all
5 options until the end with my daughter.

6 Q Did you — whatever terms you got from Mr White.
7 Did you provide that information to Mr. Applebaum?

8 A Yes, I did.

9 Q Why did you do that?

10 A To determine whether or not they wanted to go
11 through with the purchase agreement.

12 Q Okay. At some point did someone from Hull Storey
13 come to you or approach you or contact you and tell
14 you that you owed them some money over and above
15 your normal rent payment for that last month?

16 A Yes.

17 Q Who was that?

18 A That would have been Lewis. And I presume you're
19 referring to the 20,000-dollars.

20 Q Lewis White.

21 A Lewis White.

22 Q When you first told Lewis White about your asset
23 purchase with Mr. Applebaum, did Lewis White or
24 anybody else at Hull Storey tell you that you were
25 assigning a lease and you owed them some money?

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1 A Absolutely not.

2 Q All right. Can you give an explanation on when
3 it was that somebody from Hull Storey first told you
4 that you owed them money?

5 A I would. It was probably about the end of March.

6 Q I'm gonna hand you a document, Mr. Branco. If
7 you could look at that document and tell us what
8 that is.

9 A That's an email from Lewis White to myself,
10 March 25th, 2013. And would you like me to read it
11 or?

12 Q Yes.

13 A Okay.

14 Q If you don't mind.

15 A "Paul, I'm trying to get the deal presented to
16 our ownership group and my VP has a few questions.
17 What is the final sale price of the business? I
18 believe you said 70,000; but what is the amount for
19 the equipment and fixtures, good will, etc.?
20 Ownership is just curious about the sale and I need
21 additional information. Anything you can provide
22 will be helpful. Thanks."

23 Q What was your — why did you think that he was
24 asking you about particulars of your deal with
25 Mr. Applebaum?

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- 1 A I had no idea at that point.
- 2 Q What did you respond to this email, or do you
- 3 have a phone conversation?
- 4 A There was probably a telephone conversation about
- 5 it. I'm sure I responded. Lewis and I had a very
- 6 good rapport.
- 7 Q When this email was sent on March 25, 2013, by
- 8 that time had you been told anything about a lease
- 9 assignment?
- 10 A No, sir.
- 11 Q By that time had you been told that paragraph
- 12 16.2 of the 2003 lease says you got to give them all
- 13 the money if you assign your lease?
- 14 A No, sir.
- 15 Q And receive funds from it?
- 16 A No, sir.
- 17 Q Let's go back to plaintiff's exhibit — oh,
- 18 Judge, I'd like to move that in.
- 19 THE COURT: Any objection?
- 20 MR. BUXTON: No, Your Honor.
- 21 (WHEREUPON, Plaintiff Exhibit No. 7 was
- 22 admitted into evidence.)
- 23 BY MR. KILLEN:
- 24 Q Going back to —
- 25 A This one right here, exhibit 5.

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- 1 Q Yeah, Plaintiff's Exhibit Number 5.
2 A Okay.
3 Q Look on page 2 of that. That's dated April 22.
4 There's a little bit of a gap, a little bit of a
5 gap, a little bit of a gap — sorry, between that
6 last exhibit we just talked about which would have
7 been 7 and —
8 A Correct.
9 Q —this text message.
10 A Correct.
11 Q On page 2 at the top there's a text message
12 that's dated 4/22/2013; is that correct?
13 A Correct.
14 Q And that's from Mr. White to you?
15 A Yes, it is.
16 Q And he says all I can get approved is
17 20,000-dollars to the LL. LL means landlord?
18 A That is correct.
19 Q At that point did you know what he was talking
20 about? About 20,000-dollars?
21 A At that point, yes.
22 Q All right. What did you think he was talking
23 about because you didn't receive the first notice,
24 the notice you got about the lease transfer or lease
25 assignment was later on, correct?

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1 A That's correct.

2 Q So what did you think he was talking about when
3 he said all I can get approved is 20,000-dollars?
4 Does that mean they wanted 20,000-dollars of a
5 70,000-dollar purchase? Did he tell you in which
6 they were basing that claim?

7 A Absolutely not.

8 Q So after you responded to his email asking you
9 what the 70,000-dollars were for, was for, you got a
10 text saying all I can get approved is
11 20,000-dollars?

12 A Correct.

13 Q Okay. By April 22nd, 2013, had anybody from Hull
14 Storey mentioned to you that you had to pay them
15 money for a lease assignment?

16 A No, sir.

17 Q Had they mentioned to you paragraph 16.2 of the
18 lease?

19 A Was I don't believe so.

20 Q All right. Well, did you explain and say what
21 are you talking about 20,000-dollars?

22 A Well, yeah, I said I'm not gonna pay it. And
23 they had no right to it.

24 Q Go down to — this is also on 22nd of April. It
25 looks like about three-and-a-half hours later.

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1 After he told you all he could get approved was
2 20,000-dollars.
3 A About an hour-and-a-half later.
4 Q It's at 2:30.
5 A At 2:30, okay. Several of them.
6 Q This is Mr. White. He sends you a text and says
7 what?
8 A At 2:30 he sends me a text saying Stewart's deal
9 has been approved if we can determine a way to come
10 up with 20,000.
11 Q Stewart's deal has been approved. What is
12 Stewart's deal?
13 A That would be his lease and him as — and him as
14 a tenant.
15 Q That's Mr. Applebaum, Brooktenn, LLC?
16 A That is correct.
17 Q Stewart's deal was a new independent, distinct
18 separate lease from yours?
19 A Correct.
20 Q When this was sent on April 22, 2013, again, had
21 you heard anything about the lease assignment?
22 A No, sir.
23 Q Paragraph 16.2?
24 A No, sir.
25 Q All right. I'm gonna hand you an email from

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1 Mr. White, and if you could look at that email.
2 That's to you and to Mr. Applebaum, correct?
3 A Yes.
4 Q And it's dated Tuesday, April 30th, 2013?
5 A Last day of our lease, correct.
6 Q All right. And Mr. White says, "Paul and
7 Stewart, attached is the Assignment Assumption
8 Amendment and Ratification of the lease agreement
9 and the letter extending the letter agreement
10 extending the lease through May 15 and the original
11 lease agreement. Please review and let me know if
12 you have any questions." Is that correct?
13 A That is correct.
14 Q And attached to that is this document called
15 Assignment Assumption Amendment Ratification of
16 lease agreement?
17 A That is correct.
18 Q All right. On April 30, 2013, is that the first
19 time that you had seen this document?
20 A Yes, sir.
21 Q And again, this document was drafted by Hull
22 Storey?
23 A Correct.
24 Q All right. Is this the first time that you know
25 of that Mr. Applebaum had seen this document?

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- 1 A To the best of my knowledge, yes.
- 2 Q All right. Was this the first time any language
3 like assignment of, assignment amendment
4 ratification was used with you all?
- 5 A Correct.
- 6 Q Okay. What did you think when you got this?
- 7 A Layman's terms or?
- 8 Q Whatever terms you want to use as long as you
9 don't use profanity.
- 10 A As long as I don't use profanity. Again, it was
11 an attempt for them to get 20,000 of the
12 70,000-dollars on the last day the lease was due to
13 expire and give us 15 days for both of us to do an
14 attorney review because we would have both had to
15 have done that. So it was just to get
16 20,000-dollars —
- 17 Q All right.
- 18 A —that they had predetermined.
- 19 Q Had you been given any advance warning by anybody
20 from Hull Storey we're putting this document for you
21 and Applebaum to sign?
- 22 A No.
- 23 Q Had anybody at Hull Storey at that time, at that
24 point said to you what you guys are doing is a lease
25 assignment and you're gonna owe some money, anything

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1 like that?

2 A No. We were emphatic that it was not a lease
3 assignment.

4 Q Mr. White acknowledged in an email that he had
5 been approved with —

6 A Text message or email.

7 Q I'm sorry, text message. This is Plaintiff's
8 Exhibit Number 6?

9 A Correct.

10 Q And the text message 4/22, which is eight days
11 before this email was out with this legal document
12 attached to it.

13 A All right. Plaintiff's Exhibit Number 5, and
14 yes.

15 Q 5, I'm sorry.

16 A Yes, he did.

17 Q On April 22nd he says Stewart's deal has been
18 approved.

19 A If we can determine a way to come up with 20,000.

20 Q And everything at that point apparently was
21 turning on 20,000-dollars?

22 A Absolutely.

23 Q So after he tells you he had been approved on the
24 22nd, you all get this document obviously drafted by
25 lawyers. It's got the word assign on it and invokes

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1 paragraph 16.2 of the lease, correct?

2 A Correct.

3 Q There's at the top something that email, the
4 email — I'm sorry, let me move this as the next
5 plaintiff's exhibit.

6 THE COURT: That's exhibit number? Any
7 objection?

8 MR. BUXTON: No objection.

9 (WHEREUPON, Plaintiff Exhibit No. 8 was
10 admitted into evidence.)

11 BY MR. KILLEN:

12 Q Now mentioned in that email, Mr. Branco, he says
13 attached is the letter agreement extending the lease
14 through May 15?

15 A Correct.

16 Q What's that talking about?

17 A That was granting us a 15 day extension on our
18 current lease so we could get — well, theoretically
19 so we could review this and 'cause our lease has
20 expired. It's April 30 so it was granting us 15
21 days to get it done.

22 Q Okay. In fact, look at Plaintiff's Exhibit
23 Number 5 again.

24 A Okay.

25 Q Look at or around page 3. And on Aril 26th, the

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1 first full text message, top of page 3.

2 A Correct.

3 Q You said to Mr. White, maybe you should have made
4 the extension 15 or 30/31 days, hindsight is most
5 often 2020?

6 A Correct.

7 THE COURT: And what number was that?

8 THE COURT REPORTER: Number 8.

9 MR. KILLEN: Plaintiff's Exhibit Number 8.

10 BY THE COURT:

11 Q Now, you mentioned in that email an extending —

12 A Correct.

13 Q And Mr. White's response to you was what? Also
14 on the 26th of April it looks like about two or
15 three months after you sent yours.

16 A That's fine, I will get a letter out today
17 stating the 15th.

18 Q "That's fine" means it's fine for you to have the
19 extension till the 15th, for the 15 day extension?

20 A Yes, that is correct.

21 Q All right. Now eventually they sent you also
22 with this — I don't think I have it attached — the
23 email, which is Plaintiff's Exhibit Number 8.

24 A Okay.

25 Q The April 30th email?

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- 1 A April 30th email.
- 2 Q All right. It says, also attached is the letter
3 agreement extending the lease through May 15th,
4 correct? Is that correct?
- 5 A That is correct.
- 6 Q All right. Let me step up and hand you this
7 document. Tell the Court what that is.
- 8 A This is a grant of the extension to May 15th and
9 a general release on behalf of Hull Storey.
- 10 Q All right. So this is the letter agreement that
11 Mr. White referred to in the email and in the April,
12 in the April — let me get my dates right. The
13 April 26th text message?
- 14 A Correct.
- 15 Q All right. Giving you 15 extra days?
- 16 A 15 extra days, correct.
- 17 Q All right. Now you and Anne signed this
18 document, correct?
- 19 A With strikeouts, yes.
- 20 Q I understand. That's your signatures at the
21 bottom?
- 22 A That is correct.
- 23 Q And then you struck out, it looks like, a couple
24 of sentences; is that correct?
- 25 A That is correct.

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1 Q All right.

2 A And initialed those?

3 Q All right. Why did you strike that sentence out?

4 A It was because I gave them a general lease for
5 any — I'm sorry, I'm reading through.

6 Q Why don't you read what you struck out. I think
7 I can read through the lines.

8 A Okay. "And warrants and represents that the
9 landlord is not in default under the lease. The
10 tenant is not aware of any facts with which the
11 passage of time would constitute default of the
12 landlord under the lease and tenant has no accrued
13 offsets, setoffs, deductions, claims, or defenses
14 against the landlord."

15 Q All right.

16 A I read that to mean that they were absolved of
17 any liability.

18 MR. KILLEN: Judge, I move that as the
19 next plaintiff's exhibit.

20 THE COURT: Any objection?

21 MR. BUXTON: No, Your Honor.

22 (WHEREUPON, Plaintiff Exhibit No. 9 was
23 admitted into evidence.)

24 BY MR. KILLEN:

25 Q Mr. Branco, you wanted 15 days, for whatever

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1 reason, they wanted you to sign a document saying
2 they're absolved of all liability having anything to
3 do with your relationship with them?

4 A That is correct.

5 Q All right. Is that why you struck out that part?

6 A That is correct.

7 Q All right.

8 A That, and we knew it wasn't true.

9 Q Now did you at some point go back to them about
10 the document they sent you on April 30th and ask
11 what they were talking about?

12 A I sent two text messages, two —

13 Q Which plaintiff's exhibit are you looking at?

14 A I'm looking at Exhibit 5.

15 Q All right.

16 A I sent two text messages on May the 2nd, and I
17 did not receive a response from either one. Now why
18 are you — I'm sorry, my apologies.

19 Q May 1st, 2013?

20 A May 1st, and then May 2nd. Why are you asking me
21 to sign a lease assignment when Stewart was
22 negotiating his own lease with Brooktenn. And then
23 I asked the same question again on May the 2nd.

24 Q Did you ever get an explanation from Mr. White or
25 anyone from Hull Storey in response to that?

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- 1 A No, sir.
- 2 Q All right. Now these text messages, that's how
3 you and Mr. White would communicate from time to
4 time?
- 5 A Text messaging, email, phone conversation, yes.
- 6 Q All right. And on that plaintiff's exhibit
7 that's got that stream of text messages, that's,
8 that has responses from him on there as well,
9 correct?
- 10 A Yes, this is both parties.
- 11 Q Okay. Now do you know if Mr. Applebaum was
12 talking to Hull Storey in mid to late April?
- 13 A Yes, I do.
- 14 Q All right. Was he — it looks like by April 22nd
15 or so he had been approved for his own lease?
- 16 A Correct.
- 17 Q For Mr. White?
- 18 A At the latest.
- 19 Q And so, for the next couple of weeks what was
20 going on with Mr. Applebaum of which you have
21 personal knowledge?
- 22 A I had a — Stewart had called me. He was
23 concerned about the way things were going. He said,
24 what are you gonna do, and I told him, I'm gonna
25 have to empty the store. And I could just, you

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1 know, through the prodding and whatnot, just from
2 conversation I felt like there was something going
3 on so I asked him if they'd approached him directly;
4 he said, yes, they had.

5 Q What did Stewart tell you about this claim that
6 you all were assigning a lease and accepting
7 assignment of a lease?

8 MR. BUXTON: Objection.

9 THE COURT: Objection?

10 MR. BUXTON: Did you say what did Stewart
11 tell you?

12 MR. KILLEN: What was Stewart's response
13 about this claim about the lease assignment.
14 Stewart's in here, Judge, they can cross-examine
15 him.

16 MR. BUXTON: Well —

17 THE COURT: Technically he hadn't
18 testified. You objecting to the hearsay?

19 MR. BUXTON: I was gonna. Yes, Your
20 Honor. Could I have Mr. Applebaum step out if we're
21 gonna have him testify as to what Mr. Applebaum is
22 gonna say?

23 THE COURT: Okay.

24 MR. KILLEN: That's fine. No, I don't
25 want —

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1 THE COURT: Step out —

2 MR. KILLEN: Judge, I'll just withdraw the
3 question.

4 MR. BUXTON: Technically it's hearsay.

5 THE COURT: So you want to sustain it or
6 you want to step back?

7 MR. KILLEN: He says it's hearsay, Judge.
8 That's fine, I'll just move on.

9 THE COURT: All right.

10 BY MR. KILLEN:

11 Q After they sent you the document on April 30th
12 and you had asked Mr. White why are y'all calling
13 this a lease assignment, did you hear anything from
14 anybody at Hull Storey?

15 A I did get a, I got a voice message from John
16 Hudson on May 6th.

17 Q Well, on May the 6th?

18 A On May the 6th.

19 Q When did you move out?

20 A We moved out, on May 15th we were out of there as
21 agreed.

22 Q All right.

23 A As agreed to Lewis' text extending us to the
24 15th. We were out by the 15th.

25 Q Did — let me hand you another document, Mr.

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1 Branco. It's a letter from Hull Storey dated
2 April 17. You recognize this document?

3 A There were a couple from Ashley. Let me just
4 make sure we're looking at the right one. I believe
5 this is the one that had to do with surrendering the
6 premises. Yes, I do.

7 Q All right. This is from Ashley Dolce, associate
8 general counsel?

9 A Correct.

10 Q And what's the nature of this letter, Mr. Branco?

11 A The letter has to do with what the premises,
12 condition the premises need to be left in when our
13 lease expires and we vacate the premises.

14 Q All right. She says she's the landlord for the
15 Cleveland Mall in Shelby, North Carolina. Is that a
16 typographical error? I'm looking on the first page,
17 first paragraph.

18 A I never noticed that, but that must be the case.

19 Q Okay. This is a — this letter is telling you
20 how to leave the premises when you vacate it,
21 correct?

22 A Correct.

23 Q And she cites the lease agreement which is
24 Plaintiff's Exhibit Number 1?

25 A Correct.

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1 Q So April 17, 2013, they knew you were leaving?

2 A Correct.

3 Q Thirteen days before they sent you that legal
4 document on April 30 saying that's a lease
5 assignment, correct?

6 A Correct.

7 Q You have any idea why on April 17 they're telling
8 you how to leave the premises and then 13 days later
9 they're sending you a legal document for you and
10 Applebaum to sign?

11 MR. BUXTON: Objection, speculation.

12 THE WITNESS: I was gonna speculate.

13 THE COURT: I'll sustain.

14 MR. KILLEN: I suspect he didn't know
15 anyway, Judge, trying to figure it out.

16 BY MR. KILLEN:

17 Q But anyway, that's a letter you got?

18 A This is a letter I received.

19 MR. KILLEN: Judge, I move this as next
20 plaintiff's exhibit.

21 THE COURT: Any objection?

22 MR. BUXTON: No objection.

23 THE COURT: All right, in, No. 10.

24 (WHEREUPON, Plaintiff Exhibit No. 10 was
25 marked for identification and admitted

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1 into evidence.)

2 BY MR. KILLEN:

3 Q Is it your understanding that the defendant's
4 theory was that when you entered into the hundred
5 thousand deal with Mr. Applebaum, hundred thousand
6 dollar deal with Mr. Applebaum, that constituted a
7 lease assignment?

8 A Yes, sir.

9 Q That's their —

10 A Oh, I'm sorry.

11 Q It's your understanding that's their theory?
12 That's what they base the claim for twenty thou—
13 70, then 20,000-dollars on, correct?

14 A Right, yes.

15 MR. BUXTON: Objection.

16 THE COURT: What's your objection?

17 MR. BUXTON: I believe he's asking if what
18 the defendant's theory is? That'd be speculation
19 again.

20 MR. KILLEN: All right, I'll just rephrase
21 it.

22 THE COURT: Okay.

23 BY MR. KILLEN:

24 Q The defendant put a demand on you of 70,000
25 dollars, correct?

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1 A Initially, yes.

2 Q And then they said they'd be generous and lower
3 it to 20?

4 A Correct.

5 Q All right. This is a legal document they sent
6 you on April 30 which is Plaintiff's Exhibit Number
7 8?

8 A Correct.

9 Q And you and Anne Branco are referred to as the
10 assignor and Brooktenn, LLC, is referred to as the
11 assignee, correct?

12 A Correct.

13 Q And they wrote in the third paragraph, whereas
14 assignor and assignee have agreed that assignor will
15 sell the business to assignee for a sum of
16 70,000-dollars, referred to parenthetically as the
17 assignment cost, which pursuant to article 16.2 of
18 the lease is payable entirely to the landlord.

19 A Correct and incorrect. That's what the letter
20 says.

21 Q I just asked you what the letter said.

22 A Okay.

23 Q Okay. So they sent you a document saying that
24 you would assign your lease to Mr. Applebaum for
25 70,000-dollars and that assignment fee was due to

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1 the defendant?

2 A That's what they said, yes.

3 Q All right. How many times did they contact you,
4 anyone from Hull Storey, about paying us this money,
5 paying them this money?

6 A I couldn't tell you definitively how many times.
7 I'm sure there were several, several.

8 Q Okay.

9 A They were involving towards the end of April I'm
10 sure, and into May.

11 Q Did you ever contemplate giving them the
12 20,000-dollars?

13 A I am now. No, truthfully I didn't. Truthfully I
14 did not.

15 Q All right. Now eventually you had conversations
16 with Mr. Applebaum and you're aware that they had
17 contacted Mr. Applebaum as well, correct?

18 A Correct.

19 Q And they had asked Mr. Applebaum to put the money
20 up to 20,000?

21 A Correct.

22 Q All right. And as far as you know did
23 Mr. Applebaum agree to pay them that money?

24 A No, he did not.

25 Q Okay. What happened with the deal between you

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1 and Mr. Applebaum, which is Plaintiff's Exhibit
2 Number 4, where Mr. Applebaum was going to give you
3 a hundred thousand dollars for the assets of the two
4 stores?

5 A Both deals fell through.

6 Q Did you ever get a dime from Mr. Applebaum
7 pursuant to that agreement?

8 A No, sir.

9 Q Did Mr. Applebaum tell you why he wasn't going to
10 follow through with that deal or give you the
11 hundred thousand dollars?

12 A Yes, he doesn't do business this way.

13 Q Right.

14 A Meaning —

15 MR. BUXTON: Objection.

16 THE WITNESS: With Hull Storey.

17 BY MR. KILLEN:

18 Q Now eventually you left the premises, correct?

19 A Correct.

20 Q In the middle of May. Did you take all of your
21 equipment out?

22 A Virtually all of it, yes.

23 Q The equipment, Mr. Applebaum's company Brooktenn
24 was gonna buy from you?

25 A Yes, sir.

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- 1 Q Okay. That was worth approximately
2 70,000-dollars?
- 3 A Approximately.
- 4 Q Were you able to sell any of that stuff after you
5 took it out of the mall?
- 6 A I sold the oven and some of the supplies. Some
7 of it was trashed. Some of it is still sitting in
8 my garage and...
- 9 Q Okay. How much of the 70,000-dollars worth of
10 the equipment did you sell approximately?
- 11 A Probably in the neighborhood of 5,000 dollars
12 roughly.
- 13 Q Okay. So from the sale of the equipment from the
14 Sumter Mall it was worth 70,000-dollars you sold
15 5,000-dollars?
- 16 A Correct.
- 17 Q Okay. Now the lease, the lease itself which is
18 Plaintiff's Exhibit Number 1, that document is in
19 the name of Paul and Anne Branco?
- 20 A Yes, it is.
- 21 Q All right. That's not in the name of Branco
22 Investments, Inc., correct?
- 23 A No, it is not.
- 24 Q All right. Now looking at Plaintiff's Exhibit
25 Number —

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1 A 4.

2 Q Plaintiff's Exhibit Number 4 is the deal between
3 you and Brooktenn. That document is the deal
4 between Brooktenn, LLC, and Branco Investments,
5 Inc., correct?

6 A That is correct.

7 Q All right. The equipment at the mall that you
8 took out of there in the middle of May, all that
9 equipment was ordered by Branco Investments Company,
10 Inc., correct?

11 A Correct.

12 Q All right. So the lease that the defendant was
13 claiming you were assigning to Mr. Applebaum in
14 exchange for 70,000-dollars was actually in a
15 different name. It was in your original name, Paul
16 and Anne Branco?

17 A That's correct.

18 Q All right. And so the defendant was claiming
19 that Branco Investments owed them 70,000-dollars for
20 a lease assignment when, in fact, the lease was in a
21 different name than the entity that was selling the
22 equipment to Mr. Applebaum's company, correct?

23 A That's correct.

24 MR. BUXTON: Objection, leading.

25 THE COURT: I'll overrule. Go ahead.

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1 BY MR. KILLEN:

2 Q Just to be clear, your deal with Mr. Applebaum
3 for 100,000-dollars is Branco Investments selling
4 assets to Brooktenn, LLC?

5 A That is correct.

6 Q All right. And Plaintiff's Exhibit Number 1,
7 which is the original lease, is in the name Paul and
8 Anne Branco?

9 A Correct.

10 Q Now did you receive a phone call after all this,
11 these emails were sent and they were making this
12 claim and all this? In late April did you receive a
13 phone call from somebody at Hull Storey?

14 A I received one in early May.

15 Q All right. From who?

16 A John Hudson.

17 Q John Hudson, who is he?

18 A VP. I don't know exactly what his title was, but
19 I know it started with VP.

20 Q All right. Before I ask you about the phone call
21 let me go back a little bit into April.

22 A Okay.

23 Q After you objected to this lease assignment as
24 they claimed it, did Mr. White approach you and tell
25 you that it was for something else other than rental

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1 lease assignment, this 20,000-dollars had to be
2 paid?

3 A Other than lease assignment?

4 Q Capital improvements?

5 A Capital — well, there was discussion about,
6 yeah, the landlord having spent money in the mall,
7 blah, blah, blah, and recouping funds and —

8 Q Carpet?

9 A —carpet.

10 Q Okay. Does your lease, the original lease,
11 Plaintiff's Exhibit Number 1, have a provision in it
12 that says you have to pay for carpet in the common
13 areas or anything like that?

14 A Not that I'm aware of, no.

15 Q Okay. But you were told before you received the
16 email April 30th of 2013 that maybe this
17 20,000-dollars was for some capital improvements
18 there?

19 A Right.

20 Q Some carpet or something?

21 A Correct.

22 Q All right. You got the call from Mr. Hudson
23 when?

24 A May the 6th.

25 Q Okay. Did you speak with him?

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1 A No, I did not. He left a voice message.

2 Q Okay. You have that with you?

3 A I do.

4 MR. KILLEN: Judge, can I play the voice
5 mail message?

6 THE COURT: Any objection?

7 MR. BUXTON: I haven't heard it before. I
8 don't know if we asked —

9 MR. KILLEN: I'll be glad to take it out
10 and let him listen to it, Judge.

11 THE COURT: You want to listen to it?

12 MR. BUXTON: I would like to listen to it
13 to make sure it's Mr. Hudson.

14 THE WITNESS: I've been carrying this
15 around for four years. I would like to make sure I
16 am there so it doesn't get deleted.

17 MR. KILLEN: Judge, can he step off the
18 bench and operate his phone in the conference room
19 for me?

20 THE COURT: Yes, sir. You can go do that.
21 You just can't talk to your lawyer about your
22 testimony.

23 THE WITNESS: Yes, sir.

24 THE COURT: All right, we'll take a break
25 while y'all do that.

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1 (WHEREUPON, a recess was taken from the
2 proceedings.).

3 THE COURT: I'm ready when y'all are.

4 MR. KILLEN: Yes, sir.

5 MR. KILLEN: Okay.

6 THE COURT: From a procedural standpoint,
7 I assume y'all listened to it. Is there any
8 objection?

9 MR. BUXTON: No objection so long as the
10 entire recording is played. It's only a couple of
11 minutes long.

12 THE COURT: Okay. And here's one of the
13 problems we have. Normally when this comes into
14 evidence my court reporter marks the document, a CD
15 or something comes in. Now how are we going to
16 preserve this for any appellate issues?

17 (Attorneys confer.)

18 MR. KILLEN: Judge, we'll just pass on
19 that piece of evidence.

20 THE COURT: And not play it?

21 MR. KILLEN: Not play it.

22 THE COURT: Okay.

23 MR. KILLEN: I don't think it's any value
24 added for either side, and I just...

25 THE COURT: We'll — that will keep the

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1 record clean.

2 MR. KILLEN: Yeah, we'll just pass.

3 THE COURT: Make my court reporter
4 happier.

5 BY MR. KILLEN:

6 Q All right. Mr. Branco, you all vacated the
7 premises on the 15th, correct?

8 A Correct.

9 Q All right. And you took out ovens, display
10 cases. Any other heavy equipment like that that I,
11 just that I didn't mention?

12 A Ice makers, pretzel warmers, mixers.

13 Q Okay.

14 A Oven, two different kinds of ovens. There were
15 pretzel ovens, cookie ovens, so yes.

16 Q Just, let me just be blunt. When you left the
17 premises on May 15th, 2013, was it in the same
18 condition other than normal wear and tear than when
19 you went in there in 2003?

20 A Truthfully it was in better condition; but it had
21 normal wear and tear on it, yes.

22 Q But you had taken out equipment so there were
23 maybe like a hole in the counter where some piece of
24 equipment went, that sort of thing?

25 A Cabinets there, countertops, those were all fixed

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1 in place. The displays, the ovens, all that was
2 moveable. Refrigerators, freezers.

3 Q Did you ever hear any objection from Hull Storey
4 that you had taken something that you were not
5 supposed to take?

6 A Absolutely not.

7 Q Okay. Who all, who did you deal with in the mall
8 that represents the interest of Hull Storey, the
9 landlord?

10 A Nancy Holmes was the person who was there for ten
11 years. There were a couple of other people in the
12 mall office, but typically it was Nancy. She
13 certainly handled the maintenance side of things.

14 Q Okay. You understand there's been a claim made
15 in this case that you left the place in disrepair?

16 A I understand that, yes.

17 Q All right. I'm gonna hand you a document,
18 Mr. Branco. This is an original document on
19 notebook paper.

20 A My handwriting.

21 Q That document is dated May the 15th of 2013,
22 correct?

23 A Correct.

24 Q And that's your handwriting?

25 A That is my handwriting.

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1 Q All right. Why did you create this piece of
2 paper, this document?

3 A This document was — well, as it's titled,
4 Discussed Restoration Cleaning with Nancy Holmes.
5 So this document was to satisfy the Mall's
6 requirements for us vacating the premises and making
7 sure that all the details were taken care of that
8 she had a concern for.

9 Q Okay. You felt the need to create this document?

10 A Absolutely.

11 Q Okay. And you got some I guess you would call
12 them, line items there? It looks like eight or
13 nine.

14 A These were her line items that I reduced to
15 writing.

16 Q Okay. And what is the first one? It says
17 spackle holes.

18 A Spackle holes, where anything was taken. In
19 other words, all the holes needed to be filled from
20 either anchors or anything else that might have been
21 in the walls.

22 Q And you all fixed that?

23 A Correct. The check marks next to this indicate
24 everything was completed.

25 Q All right. So the marks to the left are

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1 indicators that those items were taken care of?

2 A Correct.

3 Q All right. The first one is spackle holes. The
4 next one is VCT tile where displays were. What does
5 that mean?

6 A Where we took the two cookie displays out we were
7 down to the bare concrete and knocked the ceramic
8 tile, and she requested that we put VCT tile which
9 is kind of like what you see in a bathroom or
10 kitchen. It's a — I forget what the actual term
11 is.

12 Q Splash guard?

13 A No, that's actually called something else, but
14 it's a 12 by 12 tile that flexes when you put it.
15 It's a commonly used tile.

16 Q All right. So you put that in there at your
17 expense?

18 A I physically put that in there at my expense.

19 Q You paid for it and you did it?

20 A I paid for it and did it.

21 Q All right. The next one is fill holes where safe
22 was.

23 A Correct. That was —

24 Q What kind of hole is?

25 A That's where the — that's where the safe, that's

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1 where the safe was anchored down to the concrete
2 floor so I flash patched them.

3 Q Okay. Replace VCT tile in the back room. You
4 just talked about what that was, the same thing?

5 A That was a broken piece of tile that was in the
6 back room by the sink. I replaced it.

7 Q You also did that yourself?

8 A Correct.

9 Q All right. Leaving shelves in cooler?

10 A There was a discussion as to whether or not we
11 were gonna remove the shelves from the cooler,
12 whether she wanted us, whether she required that or
13 not; and she said, no, that was fine, we would leave
14 them.

15 Q Air conditioning works properly?

16 A She verified that, correct.

17 Q Lights in good order and working?

18 A Correct. All bulbs so that it was lit. Put in
19 all new bulbs for anything that was burned out.

20 Q Leaving the trans-lite fixtures?

21 A Trans-lite fixtures are — they're mounted on the
22 walls and they're for advertising, and it's a
23 translucent piece of plastic that goes in and
24 displays —

25 Q But you left it there?

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1 A I left them there, yes. And her — and she
2 agreed. Typically you might want those, she wanted
3 them removed, we could have removed them.

4 Q Okay. I think the next one, the last one says,
5 okay to leave cameras in place.

6 A Correct.

7 Q All right. Probably the most important line in
8 this document is the next one. Can you tell the
9 Court what that says.

10 A It says, all other items in store in good order,
11 no other issues.

12 Q All right. When she signed this she was saying
13 everything was okay as far as the premises were
14 concerned, correct?

15 MR. BUXTON: Objection.

16 THE WITNESS: That's correct.

17 MR. KILLEN: All right. Judge, I'd like
18 to move that in as the next plaintiff's exhibit.

19 MR. BUXTON: Judge, I object to this.
20 This was not provided in discovery. This is the
21 first we've seen of it. And when we asked in
22 discovery for any representatives of the defendant
23 which Nancy Holmes works for the defendant, she was
24 not listed as one of the people who there have been
25 correspondence with. And as far as the document

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1 production, produce any correspondence between them
2 and defendants, this was not provided. We have no
3 way to conduct this witness and we're surprised here
4 today.

5 MR. KILLEN: Judge, she works for them.
6 She should have kept a copy of it.

7 MR. BUXTON: We don't even know that she
8 signed this, Judge. This is the first we've ever
9 seen it. She said she created it and wrote all this
10 stuff and had her sign it. We should have had the
11 ability to question her about this prior to today.

12 THE COURT: Okay. Is she still working
13 for y'all?

14 MR. BUXTON: Yes, Your Honor.

15 THE COURT: Is she still in the Sumter
16 office?

17 MR. BUXTON: Yes, Your Honor.

18 THE COURT: Okay. Are y'all making a
19 claim that he's left the place in disrepair and owes
20 you money?

21 MR. BUXTON: Yes, Your Honor.

22 THE COURT: Okay. As far as that claim is
23 concerned then, I'm gonna let it in. And you can
24 contact her over lunch or whatever you want to, if
25 she wants to refute any of that, okay. And if you

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1 want, I'll give you time to — if she's not
2 available, if you need more time, I'll give it to
3 you to respond to that.

4 (WHEREUPON, Plaintiff Exhibit No. 11 was
5 marked for identification and admitted
6 into evidence.)

7 BY MR. KILLEN:

8 Q This document about which we were just speaking
9 is Plaintiff's Exhibit Number 11.

10 MR. KILLEN: That's all I have, Judge, at
11 this time. Oh, Judge, I just, I spoke with counsel.
12 Mr. Applebaum is from Atlanta and he needs to go as
13 soon as possible. I don't have any questions for
14 him, and counsel has agreed to let's take him out of
15 order so he can get back to Atlanta if that's all
16 right with the Court.

17 THE COURT: Sure. Okay.

18 MR. BUXTON: Just reserve cross until
19 after Mr. Applebaum goes and then go back to
20 Mr. Branco.

21 THE COURT: Okay.

22 MR. BUXTON: I think that's what you're
23 requesting, correct?

24 MR. KILLEN: Absolutely.

25 THE COURT: Is that what you want to do?

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1 MR. KILLEN: Yeah.

2 THE COURT: That will be fine. It may be
3 after lunch before you get to cross him. Is that
4 going to be a problem?

5 MR. BUXTON: That's fine with me.

6 THE COURT: Depends on how long, you know,
7 we either go to lunch at no later than one 'cause I,
8 if we don't, we don't ever get lunch and —

9 MR. BUXTON: I agree, Your Honor.

10 THE COURT: And I understand, you know.

11 MR. BUXTON: And we're just —

12 THE COURT: Lawyers may not do this but
13 two or three four times a year, but I do it every
14 day and so anyway.

15 MR. BUXTON: We're just doing that to
16 accommodate —

17 THE COURT: I understand.

18 MR. BUXTON: I'm not gonna waive any
19 rights to just —

20 THE COURT: While you're off the stand you
21 just can't, while you're off the stand you can't
22 talk about your testimony to your lawyer, okay.
23 Technically you're still on the stand under oath.

24 THE WITNESS: All right, thank you.

25 THE COURT: Thank you. You can step down.

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1 MR. KILLEN: I certainly understand
2 counsel's concern. He has full right to
3 cross-examine Mr. Branco. I will not speak with Mr.
4 Branco about his testimony until after he's properly
5 cross-examined.

6 THE COURT: No problem. All right, you
7 may call Mr. Applebaum.

8 MR. KILLEN: Judge, I call Stewart
9 Applebaum to the stand.

10 THE CLERK: Place your left hand on the
11 Bible, raise your right. State your name please.

12 THE WITNESS: Stewart Applebaum.

13 WHEREUPON,

14 **STEWART APPLEBAUM,**
15 having been duly sworn by the Clerk, testified
16 as follows:

17 THE CLERK: Have a seat up here. Please
18 state your full name, spell your last name for the
19 record.

20 THE WITNESS: Stewart Applebaum,
21 A-P-P-L-E-B-A-U-M. First name, S-T-E-W-A-R-T.

22 **DIRECT EXAMINATION**

23 BY MR. KILLEN:

24 Q Mr. Applebaum, I don't have nearly as many
25 questions for you as I did for Mr. Branco so I'll be

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1 quick and I understand you need to get on I-20
2 heading towards Atlanta?

3 A Yes, sir.

4 THE WITNESS: Thank you, Your Honor.

5 THE COURT: Yes, sir.

6 BY MR. KILLEN:

7 Q Let me just ask you a couple of background
8 questions. You're self-employed?

9 A Yes, sir.

10 Q What kind of business do you do?

11 A I'm in the cookie and pretzel business.

12 Q You're the franchisee for how many Great American
13 Cookie Company and Pretzel Time franchises?

14 A Right now about six.

15 Q Are they all in Georgia?

16 A No, some are in North Carolina and the rest are
17 in Georgia.

18 Q Any of those, any of those stores in the mall
19 owned and operated by the Defendant?

20 A Not that I'm aware of.

21 Q Okay. Now you understand that Mr. Branco and his
22 wife Anne were in the Sumter Mall pursuant to a
23 lease about which we've talked about today?

24 A Yes, sir.

25 Q All right. And they were operating a Great

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1 American Cookie Company and Pretzel Time franchise,
2 correct?

3 A Yes.

4 Q All right. Did you at some point have
5 communications with Mr. Branco or someone in your
6 office have communications with Mr. Branco about
7 purchasing the assets of his Great American Cookie
8 Company stores —

9 A Yes.

10 Q —that he had in Florence and Sumter?

11 A Yes.

12 Q All right. And what was the nature of those
13 conversations, what all were you trying to effect?

14 A We were — it was to see what kind of business he
15 did to look at the stores to see what kind of
16 equipment he had to see if it made sense for us to
17 go into this market.

18 Q Okay. And so you had discussions with him about
19 purchasing his equipment?

20 A Yes.

21 Q You remember the time frame on that?

22 A I think it was January of '13. Does that sound
23 right?

24 Q January of 2013?

25 A Yes.

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- 1 Q Okay. Yes, sir. And eventually you and Mr.
2 Branco reached an agreement?
- 3 A Yes.
- 4 Q And you all memorialized that to writing; is that
5 correct?
- 6 A I'm sorry?
- 7 Q You memorialized that to writing?
- 8 A That's true.
- 9 Q Okay. I'm gonna hand you Plaintiff's Exhibit
10 Number 4. Is Plaintiff's Exhibit Number 4 the deal
11 between your company and Mr. Branco's company?
- 12 A I'm sorry, I didn't hear you.
- 13 Q I'm sorry. I'll just get -- I'm sorry, I know I
14 was walking away.
- 15 A Yeah, I didn't hear you.
- 16 Q I understand. This is Plaintiff's Exhibit Number
17 4 you have in your hand, correct?
- 18 A Yes.
- 19 Q Is that the deal that you and Mr. Branco had
20 about asset purchases?
- 21 A Yes, sir.
- 22 Q You were going to buy the assets from the
23 Florence location that he had and the Sumter
24 location that he had, correct?
- 25 A Correct.

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1 Q All right. Exactly what were you buying pursuant
2 to that agreement that you're holding in your hand
3 there?

4 A We're buying the equipment. We're buying, you
5 know, the store basically, all the assets that were
6 inside the store.

7 Q All right. Were you buying his, any shares of
8 stock in his company?

9 A No.

10 Q Were you buying any liabilities that his company
11 had?

12 A No.

13 Q Were you buying any contracts that his company
14 was —

15 A No.

16 Q —of which his company was party?

17 A No.

18 Q Okay. You were strictly buying assets only?

19 A Assets only.

20 Q And does this document state that?

21 A It does.

22 Q All right. Let me look at that document,
23 Mr. Applebaum. Let me just ask you right here, this
24 document deals with the two stores, correct?

25 A Correct.

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1 Q All right. And the top of it is for the Sumter
2 Mall?

3 A Okay, yeah.

4 Q All right. And right there it says, mall
5 transfer fee. It says mall transfer fee. What does
6 that mean?

7 A In normal circumstances when you go in to a mall
8 there's usually, when things change hands there's a
9 fee to the mall for paperwork for their time to
10 operate, maybe four or five hundred dollars for the
11 paperwork on it.

12 Q Is that contemplating any transfer of a lease or
13 an assignment of a lease?

14 A No, no lease. That's just the transfer of for
15 the paperwork of if — we, we try to get a new lease
16 which we did, we were successful. They offered us a
17 new lease. It's, you don't want to start an old
18 lease where you have three months, a month left to
19 go on a lease, you don't want to get involved in
20 that.

21 Q So you were talking to Paul about all this?

22 A Yeah.

23 Q There was two or three months left on his lease?

24 A Correct.

25 Q All right. Did you even ever see the lease that

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1 Paul and Anne Branco has with the Sumter Mall?

2 A I don't believe so.

3 Q Okay. Well, why wouldn't you want to just take
4 their lease? Even if it had another five years on
5 it why wouldn't you just —

6 A 'Cause it might have had things in there that I
7 didn't want that I wouldn't sign for or I wouldn't
8 agree to.

9 Q Something that Paul may have agreed to but you
10 wouldn't?

11 A That's correct.

12 Q All right. When was the first time you had any
13 contact with the Sumter Mall people or the Hull
14 Storey people, or the people that run the mall?

15 A I don't remember dates on — I don't have the
16 dates, but I know that at one, I believe we came
17 down, Darryl and I and my wife, and we looked over
18 the two stores and we agreed that we were going to,
19 you know, go forward and Paul, I believe, contacted
20 somebody in the mall office and from there it just
21 took off. I don't know.

22 Q All right. Had, in early 2013 had Paul provided
23 you numbers that he had gotten from the mall about
24 your lease, your potential lease?

25 A I don't remember.

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1 Q Okay. But at no time during all of this that was
2 going on in 2013 were you gonna take an assignment
3 of —

4 A Not at all.

5 Q —of the Branco lease?

6 A I don't, normally, normally we do not take
7 assignments of leases. We always go for a brand new
8 lease whenever we buy a store.

9 Q All right. And to be clear, you had submitted a
10 lease application to Hull Storey?

11 A That is correct.

12 Q For a five or ten year's lease or something like
13 that?

14 A It was a five — it was two fives. It was five
15 and five more.

16 Q Okay. After the first five numbers went up?

17 A Yes, sir.

18 Q All right. But, and you submitted an application
19 to them?

20 A Yes.

21 Q And you were applying for your own distinct new
22 lease?

23 A Correct.

24 Q All right. When was the first time you heard
25 anything about there being a lease assignment

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1 between Mr. Branco and you and that somebody owed
2 these folks money?

3 A It was probably in April or something along those
4 lines. We already had approval of the lease. They
5 already told us that we had a lease. And I don't
6 remember who told us, it might have been Paul, who
7 said something to us about that they're asking me
8 for 20,000-dollars and I'm not giving it to them.

9 Q Did he tell you what that, the basis of the
10 2,000-dollar claim?

11 A I don't think we got into it he said, but that
12 was, that was what it was.

13 Q But you were approved for the lease, and then
14 after the approval came the claim for the
15 20,000-dollars?

16 A That's correct.

17 Q All right. At no time during your conversations
18 with the defendant about your lease application did
19 they mention to you a lease assignment fee?

20 A Never.

21 Q After Mr. Branco said he wasn't paying the
22 20,000-dollars, did they approach you about that?

23 A They did.

24 Q What'd they say?

25 A They said to us, well, if you want to take the

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1 store somebody's got to give us the 20,000; that's,
2 if Paul's not, you have to.

3 Q And the basis of the 20,000-dollars is what?

4 A That they wanted it. That they felt it was
5 coming to them, that it was part and parcel of the
6 lease that Paul had with them that there was money
7 coming to them at the other end.

8 Q And what was your response to that?

9 A Okay, then go ask Paul for the money, I'm not
10 involved.

11 Q That was a between them and Paul?

12 A I had no involvement in that.

13 Q All right. And they were basing the claim on the
14 deal between you and Paul for the assets?

15 A Yes.

16 Q All right. And the deal between you and Paul was
17 for 70,000-dollars for the assets and the Sumter
18 store?

19 A That is correct.

20 Q And they in turn said y'all owe us
21 70,000-dollars?

22 A No, well, not to me. They said — I believe they
23 said that to Paul, that they owe, he owes them
24 70,000-dollars but they would take 20.

25 Q All right. Did they eventually come to you and

PW - S. APPLEBAUM - DIRECT

1 ask you for the 20,000-dollars?

2 A Yes.

3 Q Do you know the time frame on that?

4 A I don't, but it was, I believe it was — I don't
5 remember who it might, I think it was Mr. White that
6 came to me and said — I don't remember the framing
7 of it, but I know he came and he said, well, if Paul
8 is not gonna give us the money, then you're gonna
9 have to give us the money in order to get the lease.

10 Q And what was your response to that?

11 A Hell no.

12 Q Why?

13 A I don't pay key money.

14 Q Did they tell you at that time it was about a
15 lease assignment, that you were taking Paul's lease?

16 A First of all, they knew I wasn't taking Paul's
17 lease because I had a new lease. We already had
18 discussed it and that was in place. There was
19 nothing about an assignment. I wouldn't, I wasn't
20 taking any assignment.

21 Q Did you send an email to Mr. White talking about
22 this 20,000-dollars?

23 A Yes.

24 Q Is that what you have in your hand there?

25 A Yes.

PW - S. APPLEBAUM - DIRECT

1 Q What's the date on that document?

2 A The date on this document is May 3rd, 2013, 5:45
3 p.m.

4 Q All right. What did you say in the email of May
5 3, 2013?

6 A "We have received and received the above email
7 and its attachments. We have several comments. The
8 agreement Brooktenn has for the purchase of Great
9 American Cookies at the Sumter Mall is between
10 Brooktenn and Branco Investments, South Carolina
11 Corporation, and not with Paul and Anne. Brooktenn
12 is not assuming, not assuming their lease,
13 therefore, there should not be any assignment costs.
14 We strongly oppose the importance of the
15 20,000-dollar assignment cost and will not pay said
16 cost."

17 Q Okay.

18 MR. KILLEN: Judge, I'd like to move that
19 in as the next plaintiff's exhibit.

20 MR. BUXTON: No objection.

21 THE COURT: Okay. 12 is in without
22 objection.

23 (WHEREUPON, Plaintiff Exhibit No. 12 was
24 marked for identification and
25 admitted into evidence.)

PW - S. APPLEBAUM - DIRECT

1 BY MR. KILLEN:

2 Q And this email that you sent is in response to
3 the email on April 30th from Lewis White; is that
4 correct?

5 A That's correct.

6 Q And the email of April 30th from Mr. White is —
7 the email of April 30th is Plaintiff's Exhibit
8 Number 8, that's where Mr. White had sent you all
9 this document that says lease assignment and
10 assumption at the top of it, correct?

11 A Yeah.

12 Q All right. When that email was sent to you on
13 April 30, which is Plaintiff's Exhibit Number 8, was
14 that the first time you heard about a lease
15 assignment?

16 A Yes.

17 Q In all your conversations with these folks
18 leading up to your application for a lease and
19 whatever followup came and then they told you you
20 were approved, was there anything about a lease
21 assignment?

22 A No.

23 Q That you were taking the assignment of Paul and
24 Anne Branco lease?

25 A No.

FW - S. APPLEBAUM - DIRECT

1 Q Okay. Now sometime in that time frame you had a
2 conversation with Mr. White by telephone, correct?

3 A Okay. I'm sure I had a number of conversations
4 with them.

5 Q At some point did Mr. White tell you that instead
6 of paying Mr. Branco the 70,000-dollars you could
7 give it to them and use Mr. Branco's equipment?

8 A Yes and no. What he said, what he said the way I
9 remember it, was that Paul is going to be leaving
10 and he's not going to be able to get his equipment
11 out; and since the equipment is there, if you gave
12 us the 20,000-dollars you would be able to take over
13 the store the way it is.

14 Q And use the equipment that they believe Paul was
15 going to leave there?

16 A They assumed Paul was going to leave that, and I
17 said I don't do business this way. I wouldn't stab
18 somebody in the back.

19 Q The suggestion was of the 70,000-dollars that you
20 were supposed to give to Paul, don't give it to
21 Paul, give us 20, and you come out 50,000-dollars to
22 the better?

23 A That's correct.

24 Q And they knew of your deal obviously with Mr.
25 Branco at that time?

PW - S. APPLEBAUM - CROSS

1 A They did.

2 Q Okay. Thank you, Mr. Applebaum, that's all I
3 have right now.

4 (WHEREUPON, Defendant Exhibits 1 and 2
5 were marked for identification only.)

6 **CROSS-EXAMINATION**

7 BY MR. BUXTON:

8 Q Mr. Applebaum.

9 A Yes.

10 Q Do you still have exhibit 4 in front of you, the
11 proposal?

12 A I have no idea.

13 Q If you can just look.

14 A I have 4.

15 Q Are you familiar with that document?

16 A I am.

17 Q Did you draft that document?

18 A Yeah.

19 Q Okay. And if you'll look there under the Great
20 American Cookie Sumter Mall it says, GFG transfer
21 fee to be paid by seller. Do you see that?

22 A Yes.

23 Q What amount was that?

24 A I believe the fee for transferring to GFG was
25 around 2500-dollars.

PW - S. APPLEBAUM - CROSS

- 1 Q Okay. And who determines that?
- 2 A Great American Cookies, GFG.
- 3 Q And y'all had agreed that that amount was going
- 4 to be paid; is that correct?
- 5 A That is correct.
- 6 Q And so that was gonna come out of the hundred
- 7 thousand dollars that was being paid and it was
- 8 going to be paid by Mr. Branco; is that right?
- 9 A I don't know where it was coming from, but
- 10 Mr. Branco agreed to pay, pay the transfer fee for
- 11 his franchise to us.
- 12 Q Okay. And then the mall transfer fee that's
- 13 listed in the next line there?
- 14 A Yes, sir.
- 15 Q That was gonna be split 50/50. Who made that
- 16 determination?
- 17 A Same conversation. We decided we would split it
- 18 rather than have him do the whole thing on it.
- 19 Q And it says not to exceed 2500 for the seller.
- 20 Do you know if you wrote that in or Mr. Branco wrote
- 21 that in?
- 22 A I believe Mr. Branco added that, and he said that
- 23 his portion wouldn't be more than 2500 and we agreed
- 24 to that.
- 25 Q So if it was 50/50 then that amount y'all —

PW - S. APPLEBAUM - CROSS

1 A It would be up to 50/50 up to 2500 and then we
2 would take the balance. That's the way I interpret
3 what this says.

4 Q So this, just going by that it could have been
5 5,000-dollars, correct?

6 A It could have.

7 Q It could have been 20,000-dollars, correct?

8 A Could have.

9 Q Okay. And the seller Mr. Branco was gonna pay
10 2500 of that, and you were gonna pay the remainder;
11 is that correct.

12 A No, that would have been he would have paid 1250
13 and we would have paid 1250, and then we would have
14 paid the difference in whatever that was.

15 Q Okay. Where are you getting the 1250 number
16 from?

17 A Well, it says 50 percent, it says to be split
18 50/50 with the seller not to exceed 2500. If you
19 take 2500 split, split it in half, it's 1250.

20 Q Well, it says not to exceed 2500 for the seller,
21 correct?

22 A No, it's — that's not the way I'm reading it.
23 It's to be — okay. The transfer fee to be split
24 50/50 with the seller not to exceed 2500 to the
25 seller. Okay, I read it wrong, I apologize.

PW - S. APPLEBAUM - CROSS

1 Q So that language contemplates it could be
2 5,000-dollars, correct?

3 A Could be.

4 Q 50/50 — 2500 to the seller would be
5 5,000-dollars, correct?

6 A It could be, okay.

7 Q And if it was more than 5,000-dollars the seller
8 was capped at 2500; is that right?

9 A That is correct.

10 Q Okay. And who determines what that amount is
11 gonna be?

12 A I would assume that the mall that was doing the
13 paperwork. Now that would have been for a
14 combination of the Sumter and — it would have been,
15 no, it was for both of them. Each one is
16 2,500-dollar cap. They — in my experiences over
17 the years I have never seen where these fees are
18 over 1000, 1500-dollars. In most cases that's what
19 the mall charges for transferring from one person to
20 another.

21 Q And what was that fee in the Magnolia Mall sale?

22 A I don't know; I didn't buy it.

23 Q So the bottom portion of the contract never
24 happened; is that correct?

25 A It didn't happen, neither part, because of the

PW - S. APPLEBAUM - CROSS

1 failure of Sumter.

2 Q Well, 'cause — there were a lot of failures if
3 you look at this; weren't there?

4 A What failures?

5 Q Did you ever get a lease with Preif at the
6 Florence Mall?

7 A No, 'cause we didn't —

8 Q So this —

9 A We didn't, this was just put in place but we
10 never went forward with Magnolia.

11 Q So you didn't have a valid contract then, did
12 you, if you got the contingency in there?

13 A We had this in anticipation of going forward with
14 that.

15 Q Did you try to get a lease with Magnolia Mall?

16 A We hadn't come to that yet because he still had a
17 year-and-a-half on the lease, and this was to be
18 that we were going, once we sell, once we finished
19 with mag— with Sumter, what we were going to do is
20 then go and see if we could get a new lease with the
21 mall of Florence that's — what's the name of it?
22 Magnolia.

23 Q So you never tried to get a lease with Magnolia;
24 is that correct?

25 A That's correct.

PW - S. APPLEBAUM - CROSS

1 Q And you would agree that this is one deal,
2 correct, with two different properties?

3 A That's correct.

4 Q And so you never even tried to get a lease on the
5 second property so even if my clients had entered
6 into a lease with you, it's still possible this
7 would have fallen through?

8 A Yes.

9 Q Did you ever discuss the transfer fee for the
10 Magnolia Mall property?

11 A Of what? Transferring of what?

12 Q There's two fees mentioned in the second portion,
13 GFG transfer fee and —

14 A Well we know what — the GFG transfer is the
15 same. I don't remember what it is. It's about,
16 it's about 2,500-dollars for the transfer of a
17 franchise agreement between new, a franchisee or a
18 new franchisee and old franchisee.

19 Q You said there was about a year-and-a-half left
20 on the Florence Mall lease; is that correct?

21 A That's what I remember, yeah.

22 Q And y'all were working to get that extended so
23 that you would have a lease in that bay as well; is
24 that correct?

25 A No, we were looking — what we were going to do

PW - S. APPLEBAUM - CROSS

1 once we owned Sumter, what we planned on doing is
2 then approaching Florence and getting a new lease.

3 Q So really there was no way you were gonna have a
4 lease on the Magnolia Mall in the next 90 days if
5 they still had a year-and-a-half left on this lease;
6 isn't that right?

7 A That's correct.

8 Q So there's no way that this was ever going to go
9 forward the way that it's written; isn't that right?

10 A Okay, I just thought this was, this was the
11 framework for what the deal was gonna be.

12 Q But you're telling me right now you never tried
13 to get a lease at Magnolia Mall. This deal was
14 never going to go through like this.

15 A Yeah, but what we were doing, what you don't
16 understand is we're talking about making the
17 framework for whatever the deal was for both. Was
18 gonna be the same type of a deal on both. Yours was
19 first. This was going to be what was in place.
20 Once we started with going to with them there would
21 be that 90 days would kick in.

22 Q According to what?

23 A According to our word.

24 Q It says 90 days from the signing of this
25 contract; isn't that right?

PW - S. APPLEBAUM - CROSS

- 1 A Okay, it does and —
- 2 Q And you signed the contract on March 1st,
- 3 correct?
- 4 A Okay.
- 5 Q And you never attempted to get a contract at the
- 6 Magnolia Mall?
- 7 A That is correct.
- 8 Q So there was no way you were going to do it
- 9 within 90 days of the signing of this contract?
- 10 A Okay.
- 11 Q So —
- 12 A I don't know what you're trying for me to say.
- 13 You're asking me a question. It's obvious that I
- 14 can't get, I couldn't have done this part of the
- 15 deal. This was for the front part and we were using
- 16 this as a framework for the back part.
- 17 Q What equipment — you said you owned six
- 18 franchises of Great American Cookie; is that
- 19 correct?
- 20 A No, I own one Pretzel and five Great Americans.
- 21 Q And do those all have the same typical equipment
- 22 in them?
- 23 A Yes.
- 24 Q Did the Florence Mall and the Sumter Mall have
- 25 similar equipment to each other?

PW - S. APPLEBAUM - CROSS

- 1 A Yes.
- 2 Q Would you say it was exactly the same equipment?
- 3 A No.
- 4 Q What was different about it?
- 5 A I believe, if I remember correctly, that the
- 6 Florence, the Florence Mall had more freezers in it
- 7 and more, different type of refrigeration than the
- 8 Sunter Mall.
- 9 Q So the Florence Mall had more equipment in it; is
- 10 that correct?
- 11 A Different.
- 12 Q You said it had more freezers?
- 13 A It had — yeah, it had freezers in it, upright
- 14 freezers.
- 15 Q May I approach. I'm showing you what's been
- 16 marked as Defendant's Exhibit Number 1.
- 17 A You have a better copy? I can't read this first
- 18 part.
- 19 Q No, I do not.
- 20 A Okay.
- 21 Q Can you read the top part of that first page
- 22 where it says from Paul Branco?
- 23 A It says from Paul Branco v. Applebaum.
- 24 Q And who is that?
- 25 A My wife.

PW - S. APPLEBAUM - CROSS

- 1 Q And then what's the next portion?
- 2 A It says reference Florence and Summit.
- 3 Q And do you see where it says lightdar@aol. com?
- 4 A I'm sorry?
- 5 Q After —
- 6 A Yeah, light@aol.com.
- 7 Q And who is that?
- 8 A That's my partner.
- 9 Q Okay. And so you're partners with Darryl Light?
- 10 A And Valerie Applebaum.
- 11 Q Valerie Applebaum, sorry. And do you see the
- 12 date on this email?
- 13 A February 11th, '13, 4:07.
- 14 Q Okay. And that was about a month before you
- 15 approached the mall about a lease; isn't that right?
- 16 A Probably, yeah.
- 17 Q Okay. And I know you said you have some trouble
- 18 reading that first paragraph.
- 19 A I'm old, and I need glasses and...
- 20 Q And so can you just read it for me and see what
- 21 you can make out there.
- 22 A Why don't we do it easier. You have it in front
- 23 of you. Can you make it out and read it, and I'll
- 24 just agree or not agree.
- 25 Q All right. This is from Paul, from Paul Branco

PW - S. APPLEBAUM - CROSS

1 to your business partners. "I have returned the
2 proposal noting one exception and I'm apologizing
3 for reneging on one point. The purchase price for
4 Sumter is 70,000. This was a number I'd come to
5 early on as being the figure I wanted for the Sumter
6 store. I should not have considered compromising on
7 that. The 30 thou, the 30K for Florence was simply
8 derived from subtracting 30K from Sumter from 100K
9 total selling price plain and simple." You see
10 that?

11 A Yes, sir.

12 Q Were you made privy to those —

13 A Numbers?

14 Q —"conversations and those numbers?"

15 A Yes.

16 Q Did you weigh in at all on what the total amount
17 was gonna be?

18 A I, I think Darryl spoke with Paul at that time
19 and I think that was the asking price and we agreed
20 to — I don't remember, I don't remember whether
21 this was written, but I know we'd spoken about it
22 and we agreed to this, that we would do it that way.
23 Why, that was what he wanted, it didn't matter to
24 us.

25 Q So you didn't have, you didn't care how it was

PW - S. APPLEBAUM - CROSS

1 split, you just knew it was a hundred thousand
2 dollars total, right?

3 A Right.

4 Q And you would agree the equipment in the two
5 stores was very similar, correct?

6 A Yes.

7 Q Do you have any idea why one store would say
8 70,000-dollars for the equipment and one would be
9 30,000-dollars for the equipment when you're talking
10 about the same equipment?

11 A No. It didn't bother me. It's the way he wanted
12 to structure it because I think what he wanted to do
13 was have us to be assured of taking the second store
14 as well.

15 Q You would agree it could have been 50,000 for
16 each, correct?

17 A Do I agree what?

18 Q That the split could have been 50,000 and 50,000?

19 A It could have been.

20 Q Okay.

21 MR. BUXTON: Your Honor, I would move to
22 place this into evidence.

23 THE COURT: Any objection?

24 MR. KILLEN: This thing is multiple pages.
25 Are you talking about this whole thing?

PW - S. APPLEBAUM - CROSS

1 MR. BUXTON: Yes. I intended to get this
2 with them, but since he hadn't gone, yes, sir.

3 MR. KILLEN: Yes, sir, that's fine. No
4 objection, Judge.

5 THE COURT: All right, it's in without
6 objection.

7 (WHEREUPON, Defense Exhibit No. 1 was
8 admitted into evidence.)

9 BY MR. BUXTON:

10 Q I show you what's been marked as Exhibit 2. It's
11 another series of emails. If you could flip to the
12 fifth page. Just for the note, it says at the
13 bottom it's 8. 1-8.

14 A That's correct.

15 Q You see at the top of the page it says Hull
16 Storey Lease Renewal 2013 Applebaum?

17 A Okay.

18 Q You see that?

19 A Yes.

20 Q Yes. And if you'll look in the middle of that
21 page there's an email from Paul Branco to Stewart
22 Applebaum. You see that?

23 A Yes.

24 Q Could you read that out loud please, the
25 contents?

PW - S. APPLEBAUM - CROSS

1 A "Please review, please review the lease proposal
2 that I was going to present to Hull Storey and
3 provide any feedback. Paul Branco."

4 Q This appears to be the middle of January; isn't
5 that correct?

6 A It is.

7 Q In the middle of January you hadn't had any
8 conversations with the Sumter Mall folks at all
9 about operating in their store, in their mall, had
10 you?

11 A That's correct.

12 Q In fact, it was about a month-and-a-half, two
13 months later before you ever talked to them; is that
14 right?

15 A It was about a, I don't remember the exact date.
16 I don't have the exact date, but it was, I thought
17 it was somewhere in February 'cause the first
18 contact we had was in January.

19 Q Did you provide any feedback on these lease
20 terms?

21 A I don't remember.

22 Q Did you ever have any conversations with
23 Mr. Branco about the lease terms?

24 A I don't remember..

25 Q Do you have, did you request him to send these

PW - S. APPLEBAUM - CROSS

1 lease terms to you?

2 A I don't remember, I might have. I don't
3 remember.

4 Q Do you have any recollection of why he would be
5 sending lease renewal terms to you?

6 A No.

7 Q And it's your testimony that even though you were
8 providing feedback and getting the terms of the
9 lease renewal that you never had any intention of
10 even signing that lease?

11 A No, I said I don't remember. I don't have any
12 remembrance to. I can't testify to something that I
13 don't remember.

14 Q You testified earlier that you never intended to
15 have assignment of the lease; didn't you?

16 A That is correct, because I remember that.

17 Q Then why would he be sending you the terms—

18 A I don't know, you have to ask Paul. When you
19 speak to him later you can ask him.

20 Q You don't remember if you provided any feedback
21 or changes on the lease terms that he proposed here?

22 A One thing understand, I didn't come here to lie
23 to you or anything. If I don't remember something
24 you want me to tell you something that's not true or
25 something that you want to hear, I don't do that. I

PW - S. APPLEBAUM - REDIRECT

1 came here to testify to the truth that I remember.
2 This is five years ago. What did you have for
3 dinner on Tuesday the third of April, do you
4 remember?

5 Q I'm looking for the truth too.

6 A Well, not to be badgering me with something like
7 this, that's silly. I don't remember. Do you want
8 me to tell you something that I don't remember?

9 MR. BUXTON: That's all I have. If I
10 could introduce Exhibit 2 into evidence.

11 THE COURT: What say — any objection?

12 MR. KILLEN: Let me ask counsel, Judge,
13 off the record.

14 (Attorneys confer.)

15 MR. KILLEN: No objections, Your Honor.

16 THE COURT: No objection?

17 MR. KILLEN: No objection.

18 THE COURT: All right, it's in without
19 objection.

20 (WHEREUPON, Defense Exhibit No. 2 was
21 admitted into evidence.)

22 MR. KILLEN: Judge, I just have a couple
23 of followups.

24 THE COURT: Okay.

25 **REDIRECT EXAMINATION**

PW - S. APPLEBAUM - REDIRECT

1 BY MR. KILLEN:

2 Q Mr. Applebaum, I just got a couple of questions
3 for you —

4 A All right.

5 Q —then you can hit the road.

6 A Go ahead.

7 Q This document, which is Plaintiff's Exhibit
8 Number 4, which is the deal between you and Branco
9 Investments or your company and Branco Investments
10 —

11 A Yes.

12 Q —did a lawyer draw that up, or did you and
13 Mr. Branco come up with that between yourselves?

14 A I don't remember. I believe we — a lawyer did
15 not draw it up. This is something that I think, I
16 don't remember if we did or we got input from Paul
17 and we put it together. I think that's how it was
18 done.

19 Q All right.

20 THE COURT: I'll take judicial notice that
21 a lawyer did not draw that.

22 BY MR. KILLEN:

23 Q Well, you had a good lawyer asking you — counsel
24 is a good lawyer and he was nit picking this deal
25 and I just want to be clear. You and Mr. Branco

PW - S. APPLEBAUM - REDIRECT

1 aren't attorneys. You don't have any legal training
2 on how to draw up legal contracts?

3 A Not at all.

4 Q All right. Now that document counsel was asking
5 you about the Florence, you couldn't get a lease in
6 Florence and all that. Your deal for the Sumter
7 Mall wasn't contingent upon what happened in
8 Florence?

9 A Not at all.

10 Q So you could have had the Sumter deal independent
11 of the Florence deal?

12 A That is correct.

13 Q In fact, the Florence deal was gonna come after
14 the Sumter deal because at the time you were
15 negotiating with Mr. Branco about all that it was at
16 least a couple of years he was on the lease in
17 Florence?

18 A A year-and-a-half if I remember correctly.

19 Q All right. And the reason that you didn't pay
20 Mr. Branco the 70,000 or the 100,000 total which
21 includes both malls, is because what the mall, the
22 Sumter Mall was doing to you all?

23 A Yes.

24 Q All right. Didn't have anything to do with
25 freezers in Florence?

PW - S. APPLEBAUM - REDIRECT

1 A No.

2 Q Or what equipment is in the Florence Mall and why
3 70/30 and all that, correct?

4 A Correct.

5 Q All right. Now, the last question, you were
6 asked about this Defendant's Exhibit Number 2, I
7 think, about some numbers that were sent to you from
8 Mr. Branco. I guess it's these things.

9 A Yep.

10 Q Again, even in January of 2013 you all didn't
11 have any intent for there to be a lease transfer, or
12 I'm sorry, a lease assignment, which is their term?

13 A No.

14 Q In fact, wouldn't it be nonsensical for
15 Mr. Branco whose lease was gonna expire on
16 April 30th to get a renewal of his lease and then
17 assign it to you and be subjected to paragraph 16.2
18 of their contract? That would be insane.

19 A I think so.

20 Q Mr. Branco is a pretty good business man; isn't
21 he?

22 A I like to think I'm better, but that's another
23 story.

24 Q Thank you. That's all I have.

25 PLAINTIFF BRANCO: You've been at it

1 longer.

2 THE WITNESS: Your Honor, thank you for
3 letting me change and coming, I appreciate it.

4 THE COURT: You're welcome.

5 Anything else for him?

6 MR. BUXTON: That's right.

7 THE WITNESS: No problem, I'll stay.

8 THE COURT: All right.

9 THE WITNESS: Thank you.

10 THE COURT: You have a safe trip.

11 All right. Is this a good time frame for
12 lunch or y'all got something you can do in 15
13 minutes?

14 MR. KILLEN: No, sir.

15 MR. BUXTON: It'd be a good time to break
16 for lunch.

17 MR. KILLEN: Judge, that's my case and I
18 may put somebody up on re-call. That's plaintiff's
19 case right now.

20 THE COURT: Okay. So what time y'all want
21 to come back? Since we don't have a jury it suits
22 me any time say y'all.

23 (Whereupon, a lunch break was taken.)

24 MR. BUXTON: I'd like to call Mr. Branco.

25 THE COURT: Come around please, sir. I

DW - P. BRANCO - DIRECT

1 remind you, you're still under oath.

2 THE WITNESS: Yes, sir.

3 (WHEREUPON, Defense Exhibit No. 3 was
4 marked for identification.)

5 BY MR. BUXTON:

6 Q I'm going to show you what's been marked
7 Defendant's Exhibit 3. Is it your understanding
8 that is the Complaint that was filed in this case?

9 A Appears to be.

10 Q Okay. And you are the plaintiff in that case
11 Paul Branco and Branco Investment, Inc.; is that
12 correct?

13 A That is correct.

14 Q Okay.

15 MR. BUXTON: Your Honor, I move to have
16 this admitted into evidence, the Complaint and its
17 attachments.

18 MR. KILLEN: I don't think the Complaint
19 or pleadings are evidence, Judge.

20 THE COURT: Yeah, they're normally not.

21 MR. BUXTON: They were not verified, but
22 they have attachments on them I was going to ask him
23 about. I can rip the attachments off.

24 THE COURT: Well, you can just ask him
25 about — I mean, they're all in the court file.

DW - P. BRANCO - DIRECT

1 MR. BUXTON: That's right.

2 THE COURT: They're part of the court to
3 see and I read them so and you simply can ask him
4 about any attachments that are filed because that's
5 documents at the Clerk's Office which are part of
6 this case.

7 MR. BUXTON: Yes, Your Honor.

8 BY MR. BUXTON:

9 Q If I could draw your attention to the second page
10 of that Complaint.

11 Is this admitted? I'm sorry.

12 MR. KILLEN: Again, Judge, that's not
13 evidence.

14 THE COURT: I understand it's his
15 pleadings. He's just asking him question about it.

16 MR. BUXTON: I'm gonna ask him if the
17 statement's true, that they're alleging to be true.

18 THE COURT: Okay, that's fine.

19 THE WITNESS: Okay.

20 THE COURT: We don't have a jury here, but
21 I understand.

22 MR. KILLEN: Okay. Yes, sir.

23 THE COURT: Go ahead. I've read the
24 Complaint so I'm the one that's going to hear it all
25 anyway.

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1 MR. KILLEN: Yes, sir.

2 BY MR. BUXTON:

3 Q On that second page number 7, do you see that
4 sentence that says, "Upon approval of release
5 Brooktenn, LLC, entered into agreement with the
6 plaintiff for the purchase of certain assets in
7 order to operate a Great American Cookie franchise
8 in Sumter."

9 A Yes.

10 Q Do you know when Brooktenn was approved for a
11 lease with the Sumter Mall?

12 A I do not.

13 Q Do you know if Brooktenn was ever approved for a
14 lease with the Sumter Mall?

15 A Only based on what I've heard from Stewart
16 Applebaum and what I've read in text message that
17 came back.

18 Q And what is your understanding of when they were
19 approved for a lease with Sumter Mall?

20 A There was never a timeline given.

21 Q Do you know if it was before or after you and Mr.
22 Applebaum entered into your proposal?

23 A It could have been. The agreement was through
24 31, I believe, 3-1.

25 Q 3-1. And you're not sure if he was approved

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1 before after that?

2 A I wasn't involved in those negotiations.

3 Q Okay. Attached there is the lease agreement
4 which I believe was already admitted as Plaintiff's
5 Exhibit A.

6 A Correct.

7 Q If I can get you to turn to the paragraphs 16.1,
8 and it's entitled Assignment and Subletting. Do you
9 see that?

10 A I do see that.

11 Q Before I ask you about that specifically I
12 believe you testified that you were involved in the
13 negotiation of this lease; is that correct?

14 A That is correct, yes.

15 Q And you had an attorney review it before you
16 signed it, correct?

17 A Yes.

18 Q Okay. And you negotiated certain terms within
19 this lease, correct?

20 A There were some that we negotiated, yes.

21 Q Okay. Have you ever read Paragraph 16.1 and
22 16.2?

23 A I have.

24 Q Okay. And did you initial there at the bottom of
25 that page indicating that that was a portion of the

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- 1 lease that you had —
- 2 A Yes, those are, those are my initials.
- 3 Q Okay. At what point did you determine that you
- 4 were going to assign the lease to Mr. Applebaum?
- 5 A I never determined that. There was never
- 6 supposed to be an assignment of this lease. Our
- 7 lease was due to expire April 30th, and we planned
- 8 on turning the keys over to him at that point in
- 9 time.
- 10 Q Would you agree that if you had intended to
- 11 assign it that there would be certain stipulations
- 12 that are spelled out here in 16.1 and 16.2 that
- 13 would apply to that situation?
- 14 A If we had assigned it, yes.
- 15 Q And some of those stipulations are that landlord
- 16 may grant or deny that sole and absolute discretion
- 17 in assignment; is that correct?
- 18 A That is totally correct, yes.
- 19 Q And the consideration for an assignment is due to
- 20 the landlord; is that correct?
- 21 A That is correct.
- 22 Q Okay. And it's your testimony that you never
- 23 intended to renew the lease with Sumter Mall and
- 24 have it assigned; is that right?
- 25 A Not to Stewart Applebaum for sure.

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1 Q Did you ever intend to have it renewed and
2 assigned to anyone else?

3 A It was a possibility for my daughter, but we
4 hadn't gotten into the lease terms so I don't know
5 whether it would have been assignment of the lease
6 or would have been a new lease in her name.

7 Q And when did you make those determinations?

8 A They were done back in early 2013.

9 Q Okay. Are you alleging today that the Mall has
10 breached any of the terms of this lease?

11 A Yes.

12 Q Any specific paragraphs?

13 A Well, they invoked 16.1 and it doesn't apply.
14 This was not a lease assignment, never was, never
15 was intended to be. I wouldn't assign a lease 60
16 days before it's due to expire.

17 Q Are you alleging that they have breached that
18 16.1?

19 A I'm alleging that they breached the lease —

20 Q Okay.

21 A —because it was not supposed to be assigned.
22 There was never discussion of assignment.

23 Q Can I get you to turn to Defendant's Exhibit 2.
24 Do you have that in front of you?

25 A You might need to direct me to that. There are a

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- 1 bunch of pages.
- 2 Q They're right here, I'm sorry. This is — I'm
- 3 gonna go ahead and show you Defendant's Exhibit 1
- 4 and 2. I'm gonna ask you about them in just a
- 5 moment.
- 6 A Okay.
- 7 Q All right. Now I've got some questions about
- 8 Defendant's Exhibit 2.
- 9 A All right.
- 10 Q Do you see that, first page?
- 11 A First page, correct, yes.
- 12 Q And that says — what does it read at the top?
- 13 A It says Sunter Mall Lease Extension Proposal.
- 14 Q And that was from?
- 15 A Lewis White to myself.
- 16 Q Okay. And what's the date on that?
- 17 A That date is September 21st, 2012.
- 18 Q Is that the first time that you and Mr. White
- 19 discussed the expiration and renewal of your lease?
- 20 A To my recollection it would have been.
- 21 Q Okay. And did y'all have any phone conversations
- 22 prior to that or around that time?
- 23 A I couldn't tell you that at this point.
- 24 Q Okay.
- 25 A May have, I may not have, I don't know.

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1 Q Okay. And he asks in that second line, can you
2 give me a call when you get a chance next week. You
3 see that?

4 A Yes.

5 Q Do you recall if you had a phone conversation
6 with him at that time?

7 A I had several phone conversations with him over
8 time.

9 Q Okay.

10 A Can I recall specifics of that particular one,
11 no.

12 Q Okay. And then on that second page there appears
13 to be another email from Mr. White to you on
14 October 15th; is that correct?

15 A That is correct.

16 Q And at this point you had, what, about five
17 months left on your term roughly?

18 A Six.

19 Q Six months left on your term. And can you just
20 read that first sentence, first two sentences of
21 that email from Mr. White to you?

22 A Where it starts Paul?

23 Q Yes, sir.

24 A "Paul, I appreciate the time to discuss the lease
25 renewal. The lower terms I'm willing to propose to

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1 my ownership group."

2 Q Okay. Is it your understanding that that was a
3 followup to a discussion y'all had about the lease
4 renewal?

5 A Absolutely.

6 Q And at that time you had indicated to Mr. White
7 that you intended to renew the lease; is that
8 correct?

9 A No, I conveyed to Mr. White that we were
10 considering renewing the lease. It was always a
11 consideration.

12 Q Right. And y'all were actually discussing terms?

13 A Correct.

14 Q ---for that renewal, correct?

15 A Right.

16 Q And nobody was held to anything at that point.
17 Nobody was required to enter a renewal or extend or
18 anything at that point, correct?

19 A Correct.

20 Q Y'all were just discussing the possibility?

21 A Predominantly around my daughter.

22 Q Okay.

23 A That's why it's a five year term in here.

24 Q Okay. And you'd agree that at this point either
25 you or Sumter Mall, Lewis and the Mall folks could

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- 1 say, this leases is about to expire, it's just gonna
2 go over, y'all will move out and that will be the
3 end of it.
- 4 A We could have both said that, yes.
- 5 Q All right. Either party could just say we're not
6 interested in doing anymore deals together, correct?
- 7 A Absolutely.
- 8 Q Nobody was forced to enter into any of this?
- 9 A Could have done the day before, day after too.
- 10 Q Right.
- 11 A Yeah.
- 12 Q And then the next page y'all are discussing the
13 lease renewals in November, correct?
- 14 A November 26th.
- 15 Q And at that point it's still a renewal of the
16 lease?
- 17 A Right.
- 18 Q And then if you flip over two pages there's an
19 email from Lightdar to Paul Branco, do you see that?
- 20 A Yes.
- 21 Q And who is Lightdar?
- 22 A That is Darryl Light.
- 23 Q And what is the date on that email?
- 24 A That email is January 18th.
- 25 Q Okay. And he works with Mr. Applebaum; is that

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1 correct?

2 A They're partners.

3 Q And do you recall how got put in touch with Mr.
4 Applebaum?

5 A Yes. I briefly they came through Global, which
6 was a franchise group.

7 Q Okay. And they approached you through Global; is
8 that correct?

9 A I believe that's the way it came about.

10 Q And when it says, just met with Stewart, Valerie
11 looks good, go for it, do you know what he was
12 referring to when he said that?

13 A Yes, I was sharing with him the rent figures that
14 were being proposed and he thought they could live
15 with that.

16 Q Okay.

17 A If we wanted to pursue a purchase agreement.

18 Q If you wanted to pursue a purchase agreement why
19 would you be proposing rent terms to a third party?

20 A Because if Hull Storey came in and said they
21 wanted 500,000 dollars a year for this store, they
22 would not have even, they would not have even
23 considered a lease, I should say a contract.

24 Q Well, but you had nothing to do with the lease
25 between Sumter Mall and Brooktern, did you?

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1 A No, I didn't.

2 Q But this makes it look like you were negotiating
3 on their behalf; wouldn't you agree?

4 A It might make it look like that, but I was not
5 negotiating on their behalf. I was sharing
6 information that I was discussing with Lewis White.

7 Q And at that point it was still the lease renewal
8 that you were sharing with Darryl Light and Mr.
9 Applebaum; is that correct?

10 A As I stated earlier, the lease renewal became the
11 common term within these transactions. It's
12 probably poor wording.

13 Q Poor wording on whose behalf?

14 A Us non-attorneys.

15 Q So it was your understanding at this time that
16 there was gonna be no lease renewal; is that what
17 you're saying now?

18 A There was not gonna be a lease renewal with
19 myself and the Mall. Actually, I believe at this
20 point in time, January 18th, we were still looking
21 at possibility my daughter as well. It wasn't until
22 I received an email or text — I forget which —
23 from Lewis saying we would have to, my wife and I
24 would have to personally guarantee the lease that we
25 decided that we weren't gonna pursue that further.

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1 Q So in January you were considering either
2 assigning lease to your daughter or to Brooktenn?

3 A I was never considering assigning a lease.

4 Q But you were gonna renew it and then have someone
5 else take the place of you on the lease?

6 A No, my daughter was gonna get her own lease or
7 Brooktenn was gonna get their own lease.

8 Q Well, then why are you forwarding this stuff to
9 other people if it has nothing to do with the lease
10 that those other parties are gonna get?

11 A Because they're rent figures.

12 Q And was there any —

13 A They were needed to make business decisions
14 whether to move forward or not.

15 Q Were these rent figures for Brooktenn or were
16 they for a renewal deal that you were negotiating
17 with Mr. White?

18 A I wasn't negotiating a deal with Mr. White. I
19 was talking about possibly my daughter coming in.

20 Q Well, you were — had Stewart Applebaum review a
21 lease proposal that you sent to Mr. White, correct,
22 according to this email?

23 A A lease proposal?

24 Q This email says, please review the lease proposal
25 that I was going to present.

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- 1 A These are rent proposals is what they are.
- 2 Q Okay. And then you got attached a lease a couple
- 3 of pages later with the terms for a five year lease
- 4 with Sumter Mall, correct?
- 5 A That's not a lease; those are rent figures.
- 6 Q So —
- 7 A That's not a lease. A lease is a lot more pages
- 8 than that.
- 9 Q You were negotiating the terms of the lease,
- 10 correct?
- 11 A I was — I was exploring the rent.
- 12 Q The rent for somebody else to pay?
- 13 A Somebody besides me, yes, either my daughter or
- 14 Brooktenn.
- 15 Q And when were you gonna let Sumter Mall know
- 16 about that, that, hey, this is just something I'm
- 17 trying to do for somebody else?
- 18 A Truthfully, when Stewart and us had completed our
- 19 confidentiality agreement and our asset purchase
- 20 agreement.
- 21 Q You were already talking to Stewart about it in
- 22 January, correct?
- 23 A Yes.
- 24 Q But you were negotiating the —
- 25 A 'Cause that was part and parcel to negotiating a

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1 deal.

2 Q But you were negotiating the lease renewal terms
3 with Mr. White at that time?

4 A Yes.

5 Q And then you were gonna have Brooktenn use those
6 renewal terms, correct?

7 A Well, that would have been discussion between
8 Brooktenn and Hull Storey at that point in time.

9 Q So why didn't you just have Brooktenn go straight
10 to Hull Storey?

11 A Because we didn't have all our documents in
12 place. We weren't, we weren't, we weren't completed
13 with what we were doing. We didn't have a
14 confidentiality agreement in place, and we didn't
15 have an asset purchase agreement in place.

16 Q Isn't it true that there was about 25,000-dollars
17 worth of equipment in the Sumter Mall?

18 A No, there was 70,000.

19 Q There's 25,000-dollars worth of equipment, but
20 you wanted to sell the store for 70,000 because you
21 were negotiating a lease renewal; isn't that right?

22 A The value of the equipment to me was 70,000
23 dollars.

24 Q Okay. Can you turn to Exhibit Number 1 for a
25 moment.

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1 A Show me Exhibit Number 1 please. Oh, this one.
2 I have it.

3 MR. KILLEN: That'd be Defendant's Exhibit
4 Number 1 or plaintiff's?

5 MR. BUXTON: Defendant's Exhibit Number 1.

6 MR. KILLEN: All right.

7 THE WITNESS: Yes.

8 BY MR. BUXTON:

9 Q Do you recognize that email?

10 A Yes, I do.

11 Q And that's from you to Valerie Applebaum and
12 Darryl Light, correct?

13 A Correct.

14 Q And can you read that email for me, the first two
15 paragraphs?

16 A "I returned proposal noting one exception, and I
17 apologize for reneging on one point. Purchase price
18 for Sumter is 70,000. This was a number I had come
19 up to, I had come to" — excuse me, this is a little
20 blurry. "This was a number I had come to early on
21 as being the figure I wanted from the Sumter store.
22 I should not have considered compromising on that.
23 The 30K for Florence was certainly derived by
24 subtracting the 70K from Sumter from the 100K total
25 selling price plain and simple."

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- 1 Q So you had agreed that the 70,000 was something
2 that came out of your head?
- 3 A It's the value I put on equipment in Sumter, yes.
- 4 Q Based on what?
- 5 A My personal value.
- 6 Q But it was the same equipment that was in the
7 Florence Mall that you agreed to was worth 30,000,
8 correct?
- 9 A Not the same equipment, no.
- 10 Q What was different about the equipment?
- 11 A There were different ice makers, different
12 refrigerators, freezers, walk-in coolers. It was
13 different.
- 14 Q So there's 40,000-dollars worth of more equipment
15 in the Sumter Mall?
- 16 A I valued it that, yes, 70,000.
- 17 Q Has anyone else independently valued it that?
- 18 A Stewart Applebaum, he agreed to the purchase.
- 19 Q Didn't Mr. Applebaum say he didn't care what the
20 breakdown was because it was the two deals going
21 together that mattered?
- 22 A Well, that might be partly true because if the
23 Sumter deal had gone through and the Florence deal
24 hadn't, then he would have paid 70,000-dollars for
25 the equipment in Sumter which would have meant that

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1 he valued it 70,000.

2 Q So that's not what it says here though, is it?

3 A Says where?

4 Q In this email that you wrote.

5 A Yes, it is.

6 Q You came up with the value—

7 A I said that —

8 Q —that you want.

9 A —that made the value of the equipment in

10 Florence 30.

11 Q Well, Mr. Applebaum said he didn't care how you

12 valued it because the deals were being done

13 together.

14 A Well, he did care how he valued it 'cause he

15 signed the agreement.

16 Q He signed the agreement that was contingent on

17 both of these sales going through. That's why it

18 didn't matter if it was 70 on one and 30 on the

19 other because it was a 100,000-dollar deal together,

20 right?

21 A When you combine the two stores, if both deals

22 went through the answer is yes; if the Florence deal

23 had fallen through, no. The value of the contract

24 would have been 70,000-dollars for the Sumter store,

25 and he would have taken that.

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- 1 Q And how do you know that?
- 2 A Because we were there. We were there.
- 3 Q You were where?
- 4 A We were at the point of him getting a lease and
- 5 signing we'd be giving him the keys so that on March
- 6 1st he took the store over. We were there. We had
- 7 done our due diligence, we were done.
- 8 Q When was that?
- 9 A Well, we signed the agreement on March the 1st.
- 10 Q So you were done at March 1st?
- 11 A We had an agreement in place on March the 1st
- 12 that we both agreed to. 70,000 for Sumter, 30,000
- 13 for Florence.
- 14 Q So long as all these other contingencies were met
- 15 which weren't, correct?
- 16 A What other contingencies?
- 17 Q The lease, having the fees paid?
- 18 A Well, there could have been a couple of
- 19 showstoppers, yes, but they weren't — Stewart was
- 20 approved for a lease.
- 21 Q That second paragraph —
- 22 A And there was no mall transfer fee in the
- 23 contract lease agreement, in the, in the lease
- 24 agreement.
- 25 Q Paragraph 2 of Defendant's Exhibit 1 says, "The

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1 Florence transaction has a potential to be much more
2 complicated given the fact that the lease is not
3 expiring for 18 months."

4 A Correct.

5 Q "If it was a slam dunk the split wouldn't have
6 mattered to me either way."

7 A That's correct.

8 Q What does that mean about the slam dunk?

9 A What the Florence — because for a couple of
10 reasons. Number one, we hadn't entered into really
11 discussions with the Preif group about the Florence
12 Mall, and we weren't — so we didn't have any rent
13 figures to go on to see whether or not it was even
14 workable for him. There were a lot of things that
15 could have come up with Sumter Mall but with
16 Florence Mall or Magnolia Mall, we just, we weren't
17 that far along.

18 Q So you hadn't started negotiating renewal terms
19 with the Magnolia Mall at that point. Is that what
20 you're —

21 A Brief discussions, but not any, not any intense
22 negotiations, no.

23 (WHEREUPON, Defense Exhibit No. 4 was
24 marked for identification only.)
25

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1 BY MR. BUXTON:

2 Q I show you what's been marked as Exhibit 4.

3 A Okay.

4 Q Does this document look, does this document look
5 familiar to you?

6 A Yes.

7 Q Were you involved in answering the questions
8 presented in this document?

9 A I believe I was, yes.

10 Q And if you'll look on page 2, question number 5.

11 (Attorneys confer.)

12 BY MR. BUXTON:

13 Q Did you participate in all the answering of this
14 question, number 5?

15 A Yes, I did.

16 Q Okay. And it says — What is question number 5
17 asking there?

18 A "Identify what goods, property rights, good will,
19 and other consideration were to be exchanged from
20 Paul Branco and Branco Investments, Inc., to Stewart
21 Applebaum and Brooktenn, LLC, under the proposal for
22 purchase."

23 Q And then you've got a list of different assets
24 there. Was that for the two stores, or was that for
25 one store?

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- 1 A This is for one store.
- 2 Q And which store was that?
- 3 A Sumter.
- 4 Q And what is the last item that you see under that
- 5 question?
- 6 A Going concern with employees, customers, good
- 7 will.
- 8 Q And what is that?
- 9 A It's an accounting book entry is what that is.
- 10 Q Okay. And what does a going concern of business
- 11 mean to you?
- 12 A What does a going concern mean? It could mean a
- 13 lot of things. Getting a turnkey operation, not
- 14 having to build a store, not having to purchase all
- 15 new equipment, not having to remodel, it could mean
- 16 a lot of things.
- 17 Q I'm asking—
- 18 A It could go on and on.
- 19 Q I'm asking what it means in answer to the
- 20 question that you answered.
- 21 A And I just answered that.
- 22 Q So that's what it meant in this case?
- 23 A That's partly what it means, yes.
- 24 Q Did it mean a lease term for space at the mall so
- 25 they could operate this—

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- 1 A Absolutely not.
- 2 Q —cookie store?
- 3 A Absolutely not.
- 4 Q So how is that turnkey if they've got nothing to
- 5 operate, no space to operate on?
- 6 A If Hull Storey gives them a lease we got a
- 7 finalized deal.
- 8 Q But you're saying here that you're selling that
- 9 going concern so they can come in on day one and
- 10 operate; aren't you?
- 11 A Yes.
- 12 Q You're selling the lease term so they'll have a
- 13 place to operate the cookie store?
- 14 A No, I'm not selling lease term. I'm selling the
- 15 equipment and a going concern. I'm selling a
- 16 turnkey operation. The key never got turned.
- 17 Q If you'll look on page 4, number 9.
- 18 A Okay.
- 19 Q In that question you mentioned some sale of
- 20 equipment specifications.
- 21 A I do.
- 22 Q Yes, sir. Number — or that third line, can you
- 23 read that, the sale of equipment?
- 24 A The sale of equipment to the Pizitz Group, cookie
- 25 company Florence store?

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- 1 Q And that —
2 A 25,000?
3 Q And that line says 25,000.
4 A Consistent with my 30,000.
5 Q And then the sale of the oven in the next line?
6 A Correct.
7 Q And that was at the Sumter store, correct?
8 A That was from the Sumter store, correct.
9 Q To the Pizitz Group who was going to operate in
10 Florence; is that right?
11 A Yes. Well, to the Pizitz Group, not for them
12 operating in Florence.
13 Q Did —
14 A That oven got shipped someplace else, and I can't
15 even tell you where right now.
16 Q Okay. And the sale of the mixer and merlin, do
17 you know what store that was from?
18 A Yes, that was from the Sumter store.
19 Q How about the countertop machines there, the
20 tailored counter of soft serve machine?
21 A They were included in the sale to the Pizitz
22 Group.
23 Q What store was that from?
24 A Florence.
25 Q Okay. So the only equipment you have listed here

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- 1 is the 3500-dollars for the Doyon oven from Sunter?
- 2 A Correct.
- 3 Q Okay.
- 4 A Well, no, mixers, merlin, cooling rack, small
- 5 wears, I'm sorry, that was Stefanos — no, my
- 6 apologies.
- 7 Q And who is that? Who is Stefanos?
- 8 A They're a Italian restaurant in Florence.
- 9 Q If I can get you to turn your attention to
- 10 Plaintiff's Exhibit Number 7.
- 11 A I need that back.
- 12 Q Do you recognize that email?
- 13 A I certainly do.
- 14 Q And did you receive that email from Mr. White?
- 15 A Yes, I did.
- 16 Q And did you ever respond at all to Mr. White
- 17 about that?
- 18 A I don't know whether I did or I didn't.
- 19 Q Do you remember having a phone call with Mr.
- 20 White after this email was written?
- 21 A I had probably plenty of phone calls with
- 22 Mr. White after this email was sent, yes.
- 23 Q Regarding—
- 24 A Text messages, more emails. Regarding this?
- 25 Q Yes.

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1 A I don't know, I can't tell for, I can't say for
2 certain.

3 Q You don't know if you ever explained via email or
4 phone or text at all what the breakdown for
5 70,000-dollars was?

6 A No, I don't remember whether I did or didn't.

7 Q So if Mr. White recalls that you said it was
8 25,000 for the equipment and 45,000 for the lease
9 whole improvements, you wouldn't have any
10 recollection of that?

11 A No, I would not. I don't believe that's the way
12 I put it.

13 Q And the 25,000 for equipment was about what you
14 got at the Florence store, correct?

15 A That's what I — that's what the asset, that's
16 what I sold the Florence store for.

17 Q What did you sell the Florence store?

18 A What did I sell? The same thing I sold it to,
19 was trying to sell it to the Sumter store.

20 Q Okay. Did you, who did you sell the equipment —
21 or excuse me, you said there was about 18 months
22 left on the lease at Florence, correct?

23 A Correct.

24 Q When you're —

25 A Well, 18 months in, that depends on what point.

DW - P. BRANCO - DIRECT

- 1 Q I'm sorry—
- 2 A The Florence lease was due to expire in August of
- 3 2015 so somebody else is going to have to do that
- 4 math.
- 5 Q And did you ever discuss with Preif was the
- 6 landlord in this case, right?
- 7 A Yes, they were.
- 8 Q Did you ever discuss with them renewal terms?
- 9 A I don't remember whether I did or didn't.
- 10 Q Okay.
- 11 A I did have some discussions with them, but I
- 12 don't know if it was specifically about renewal
- 13 terms. I don't know that we'd gotten that far.
- 14 Q How much equipment do you still have left over
- 15 from the Sumter store?
- 16 A I have the two displays, and the displays are the
- 17 things that come to mind they're sitting in my
- 18 garage. Probably some small wares that we just
- 19 haven't gotten rid of.
- 20 Q Okay, so not much left, two displays and some
- 21 small wares?
- 22 A Right.
- 23 Q What's the value of that equipment that you have
- 24 left over?
- 25 A The displays, nothing.

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1 Q And the small wares?

2 A They were specifically for Great American Cookie.
3 They were stipulated in their design plan. They
4 were obsolete when our lease expired at Sumter Mall.
5 The only way they could have been reused is if they
6 were sold to Stewart Applebaum and he took a lease
7 with Sumter Mall. That's the only way Global would
8 have let them continue with those displays.

9 Q So today you don't believe they're worth
10 anything?

11 A I don't believe so, no. We tried selling them
12 but we didn't. We just gave them. Bogus people
13 trying to scam your bank information.

14 Q But you're trying to get the mall owner to pay
15 you 70,000-dollars for that equipment; is that
16 right?

17 A It's the value that I put on the equipment at
18 Sumter Mall, absolutely.

19 Q But you just made that up value up?

20 A Worth every penny of it too, worth every penny of
21 it.

22 Q But now it's worth zero, or close to zero?

23 A Yeah, once it was pulled out. So were the signs.
24 The signs are now LED. They used to be neon. They
25 were worthless. I trashed those; I had to.

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1 Q So did you try to sell them to anybody else?

2 A No, they were not, they were not, they were not
3 saleable. You're missing my point. The signs were
4 neon; they had gone to LED. You couldn't put them
5 in another Great American Cookie or Pretzel Time.
6 They weren't in the specs for them. The same thing
7 with the displays. They were all brand new
8 displays. They went to a whole different design.
9 You couldn't re-sell them to somebody in a Great
10 American Cookie.

11 Q So they were obsolete at the time you were trying
12 to sell them?

13 A They were obsolete when I pulled them out of the
14 store. That's when they became obsolete.

15 Q And they —

16 A Up until that point in time they had a value, and
17 it was 70,000 dollars.

18 Q The arbitrary value of 70,000?

19 A The value was 70,000-dollars and Stewart
20 Applebaum agreed to it.

21 Q So long as the full 100,000-dollar deal went
22 through?

23 A Not true. The 70,000 could have gone through.
24 The 30,000 could have failed and he still would have
25 paid me 70,000 for Sumter and we would have closed

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1 out the Florence store and that would have been the
2 end of the Florence, or sold it off to the Pizitz
3 Group if they wanted it. Of course, they weren't
4 even in the mix at that time.

5 Q Who is the Pizitz Group?

6 A The Pizitz Group is a group out of — it's
7 another franchisee. I forget where they're from.
8 They might be out of Atlanta also. My wife is also
9 shaking her head no, so.

10 Q I'm gonna show you Plaintiff's Exhibit Number 4.

11 A Yes.

12 Q This is the proposal for purchase that you and
13 Mr. Applebaum entered into, correct?

14 A Correct.

15 Q And it was contingent on Mr. Applebaum's group
16 getting a satisfactory lease with Hull Storey Gibson
17 within 90 days of signing the proposal, correct?

18 A That is correct.

19 Q And did they ever sign that lease?

20 A Did they ever sign a lease with Hull Storey?

21 Q Yes.

22 A They weren't given a lease; they were given a
23 lease assignment. And, no, they did not sign it.

24 Q So that contingency was not met, correct?

25 A It was interfered with.

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1 Q But you just said a second ago that if the
2 Magnolia Mall hadn't gone through you still would
3 have gotten your 70,000 on Sumter, right?

4 A That is correct.

5 Q Would you still have the ability to go forward
6 with the Magnolia Mall if the Sumter one didn't go
7 through?

8 A No.

9 Q So why is it that one contingency is okay, but
10 the other one is not?

11 A 'Cause the equipment was worth 70,000 dollars to
12 Stewart in Sumter.

13 Q But you knew it wasn't worth 70?

14 A It was worth every bit of 70,000 and then some.

15 Q And then some?

16 A And then some.

17 Q But it's worth zero now?

18 A When we pulled it out it became obsolete.

19 Q Okay. So as long — did you ever, did they ever
20 get a lease with Preif on the Magnolia Mall?

21 A No. Once Sumter fell through this whole deal
22 collapsed.

23 Q But as long as Sumter went through it was okay if
24 the second deal collapsed; is that what you're
25 saying?

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1 A Yes, that would have been, there would have been
2 no turning back. It would have had to have been
3 okay.

4 Q You don't think Mr. Applebaum would have been
5 upset that he'd overpaid by so much on the first
6 mall and not gotten—

7 A It wasn't overpaying.

8 Q Just let me finish my question. He paid — he
9 agreed that the breakdown was okay because it was
10 both of these deals together; didn't he?

11 A He agreed to 70,000-dollars for Sumter.

12 Q As long as the two deals that are on one page
13 together went through together, right?

14 A No.

15 Q Where does it say that?

16 A Not right.

17 Q Where does it say that?

18 A He said that and I'm saying it. Sumter could
19 have gone through, Magnolia could have failed, and
20 he would have paid 70,000-dollars for Sumter and it
21 would have been worth it for him.

22 Q But he could have gone through with Magnolia
23 without Sumter going through, correct?

24 A He could have.

25 Q Did y'all go forward with that deal?

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- 1 A We did not.
- 2 Q 'Cause you knew it was a much better deal for him
3 than you, right?
- 4 A No, I sold the —
- 5 Q You made up the whole —
- 6 A I sold it for 25. I sold it for less than the
7 30. How could it possibly have been a better deal
8 for me. You know what I sold it for. I was dead-on
9 on both.
- 10 Q When did your lease expire with, at Sumter Mall?
- 11 A April 30th.
- 12 Q And when did you make —
- 13 A It was extended to May 15th.
- 14 Q When did it expire?
- 15 A It expired April 13th and was extended to
16 April 30th. The original expiration date was
17 April 30th.
- 18 Q And you stayed until May 15th, correct?
- 19 A We stayed in good faith based on a text message
20 we received from Lewis White.
- 21 Q And did you pay rent for May of 2013?
- 22 A No, I did not.
- 23 Q And why did you not do that?
- 24 A Because of all costs I had associated with
25 clearing the store out which I shouldn't have had to

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1 do.

2 Q And so you made the decision that you weren't
3 gonna pay the rent, but you didn't have a deal that
4 you didn't get, didn't have to pay the rent,
5 correct?

6 A No, obviously I didn't.

7 Q No deal. So the rent was 2750-dollars a month
8 and you decided that you just weren't gonna pay it?

9 A Well, you know, I didn't get paid for my claim
10 either so.

11 Q For your claim to rent?

12 A No, for my claim to clear out a store that they
13 broke an agreement on.

14 Q No, you moved out your equipment at the end of
15 your lease term and they gave you a few extra days,
16 but you never paid to be in there.

17 A Yeah, that's what it sounds like.

18 Q That is what it sounds like.

19 A Yeah.

20 Q So you owe Sumter Mall 2750-dollars for May rent
21 that you decided that you shouldn't have to pay.

22 A Again, I view it as an offset.

23 Q Can I get you to look at Plaintiff's Exhibit
24 Number 10. I'm sorry, I have to bring that up to
25 you.

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- 1 A You have to bring that up to me. Yes.
- 2 Q And is it your — are you familiar with this
- 3 document?
- 4 A Yes, I am.
- 5 Q This was presented to you toward the end of the
- 6 lease term basically outlining the condition of the
- 7 space that you were going to leave; isn't it?
- 8 A That is correct.
- 9 Q Okay. And is it your belief that you lived up to
- 10 everything that you needed to in this?
- 11 A Absolutely, the mall signed off on it.
- 12 Q And where did the mall sign off on it?
- 13 A We were given that earlier and signed off on it.
- 14 She's your mall representative.
- 15 Q You know when it was given it to you and she
- 16 signed off on it?
- 17 A It was given to me on May 15th, the day she
- 18 signed it.
- 19 Q But you drafted that document and gave it to her,
- 20 correct?
- 21 A I drafted that document in conversation with her
- 22 about what needed to be completed to vacate the
- 23 store.
- 24 Q You wrote it all out and you checked everything
- 25 off and then you signed it, correct?

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- 1 A We both signed it, correct.
- 2 Q But you drafted the whole thing?
- 3 A That's my handwriting, yes. I wrote it down. I
- 4 would say that it was drafted between the two of us
- 5 and I wrote it down.
- 6 Q And why did you draft that?
- 7 A Because I knew they'd come back to me looking for
- 8 every nickel and dime.
- 9 Q You wrote it in response to this letter; didn't
- 10 you?
- 11 A No, not at all.
- 12 Q Not at all?
- 13 A Not at all. It's just good standard operating
- 14 procedure when you leave a premises to get the mail
- 15 to sign off on it or whoever you're dealing with.
- 16 Q So who came up with each of those line items?
- 17 Did it come out of the information provided in this
- 18 letter?
- 19 A That was a discussion with Nancy as we walked
- 20 around the store to determine what needed to be
- 21 done. All those were to her request.
- 22 Q On that third page of this letter you see the
- 23 second paragraph?
- 24 A Right.
- 25 Q The sixth line, can you read that, those last

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1 couple of sentences, that paragraph?

2 A Starts with what word?

3 Q The Sumter Mall.

4 A "The Sumter Mall management cannot accept return
5 of the premises. Such acceptance of surrender shall
6 only come from undersigned or landlord's otherwise
7 authorized agent from corporate office" —

8 Q And you received this document, correct?

9 A They never appeared there. They were never at
10 the mall. Nancy was the only one there.

11 Q Instead you drafted something and gave it to the
12 maintenance person at the mall to sign; isn't that
13 right?

14 A The mall representative.

15 Q The mall representative—

16 A The mall representative—

17 Q —in your mind.

18 A The mall representative from the mall at the time
19 that we were leaving the facility.

20 Q That's not what this says though, is it?

21 A No, that's not what this says.

22 Q It says the undersigned or the Mall's
23 representative. And the Mall representative you
24 always dealt with was Lewis White; wasn't it?

25 A For the most part, yeah. Well, no, that's not

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1 true. On day to day operations we dealt with Nancy.
2 We dealt with Nancy on all operations at the mall.
3 As a matter of fact, anything to do with maintenance
4 was dealt with through Nancy, not anybody from the
5 corporate office or Ashley Dolce or whoever else.
6 It was Nancy, Nancy Holmes. And I can tell you
7 Nancy was there for ten years.

8 Q That's number, Plaintiff's Exhibit Number 11?

9 A Uh-huh.

10 Q So Nancy came up with all these items; is that
11 what you're saying?

12 A These items came up with discussions between
13 Nancy and I. Yes, that's what I'm saying.

14 Q So if Nancy says she doesn't what VCT tile is,
15 then she just agreed that all these things are fine;
16 she doesn't know what they are but they're fine.

17 A I would find it hard to believe that Nancy
18 doesn't know what VCT tile is.

19 Q When did you write this document?

20 A Either the 13th, 14th, or the 15th.

21 Q What day did you —

22 A After Nancy and I reviewed what needed to be
23 completed still. I can't tell exactly what date I
24 wrote it. I can tell you it was signed.

25 Q What did you move out your equipment?

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1 A It, I believe around May 15th.

2 Q Did you do this before or after you moved your
3 equipment?

4 A During. We were moving equipment while we were
5 doing repairs. And it was Nancy's recommendation to
6 put the VCT tile down.

7 Q Do you agree that the countertops had burns from
8 the pretzel maker on them?

9 A Where the pretzel warmer was, yes. The formica
10 underneath was from the heat had come off of the
11 glue. The glue had separated, yes.

12 Q And did you make any attempt to repair that?

13 A No, I did not.

14 Q Did you make a decision that you didn't have to
15 do that on your own or was that done?

16 A That decision was made between Nancy and myself
17 that it was fine. It's not on the list to be
18 completed.

19 Q It's not on the list that you made.

20 A That she signed.

21 Q Is that what you're saying?

22 A That's right, it's not on here. I didn't see it.

23 Q Looking back at that proposal, Exhibit Number 4,
24 you would agree that there was a mall transfer fee
25 contemplated in both the Sumter deal and the

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- 1 Florence deal; wouldn't you?
- 2 A No, I would not.
- 3 Q But you signed this; didn't you?
- 4 A Yes, I did.
- 5 Q Are you saying that — well, explain that to me.
- 6 It was not contemplated that there was gonna be a
- 7 mall transfer fee that are each spelled out in this
- 8 document?
- 9 A There was a mall transfer fee spelled out in
- 10 Florence. This was put in at Stewart's request.
- 11 Q But you signed it?
- 12 A Yes.
- 13 Q Just like the document that you put together for
- 14 Nancy, right?
- 15 A Yes.
- 16 Q Okay.
- 17 A That doesn't mean I was anticipating a mall
- 18 transfer fee from Sumter. We weren't transferring
- 19 anything. It was a lease, it was the termination of
- 20 a lease, we were done.
- 21 Q So you were transferring a lease in Florence?
- 22 A I'm not transferring any lease.
- 23 Q In Florence?
- 24 A No.
- 25 Q In Florence?

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1 A No. In Florence, no, we never got that far. We
2 don't know what we were doing.

3 Q So what — I agree. So what was the mall
4 transfer fee in Florence gonna be for?

5 A If there was a transfer fee imposed in Florence.

6 Q So it's okay to pay in Florence, but not okay to
7 pay in Sumter?

8 A Sumter was an assignment fee. We weren't
9 assigning the lease. Florence had 18 months left on
10 it. We were in negotiations. We didn't know
11 whether we would complete that lease or transfer it
12 over. I actually had a conversation with Prief
13 about the mall transfer fee, and they weren't gonna
14 impose that because we were so far into the lease.
15 That was for when early on if you got into a lease
16 and you canceled out and you had to switch out, then
17 they would impose that fee.

18 Q But you contemplated in both, both —

19 A Stewart made allowance for it in both sections.

20 Q Right, and he was going to pay part of it, and
21 you were going to pay part of it?

22 A If it existed.

23 Q And it did?

24 A No, it didn't.

25 Q Isn't it —

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1 A It didn't.

2 Q So what—

3 A It did not exist and it still doesn't exist.

4 Q When you tried to assign your lease Lewis White
5 told you that under the terms of the lease the Mall
6 —

7 A We weren't assigning a lease.

8 MR. KILLEN: Objection, Judge. My
9 client's been very clear, and I've let this go — he
10 keeps saying, when you tried to assign the lease,
11 when you attempted to sign the lease. My client's
12 been very clear there was no lease assignment.

13 THE COURT: Right.

14 MR. KILLEN: Now if he wants to say when
15 you did X, Y Z.

16 THE COURT: You have any evidence there
17 was a lease assignment?

18 MR. BUXTON: That's what the whole
19 negotiation was about. That's why he was sending
20 emails for three months prior—

21 THE WITNESS: It's not in the lease. It's
22 not in any document —

23 MR. KILLEN: Paul, Paul, Paul.

24 THE COURT: Okay, I understand. I just
25 hadn't seen any. Go ahead. I mean, I...

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1 MR. KILLEN: Counsel keeps saying when you

2 —

3 MR. BUXTON: When somebody —

4 THE COURT: I hadn't seen evidence of a
5 lease assignment. That lease was up. There's no
6 assignment, and there wasn't any terms upon
7 assignment. That lease was up.

8 MR. BUXTON: And he's testified he tried
9 to renew it for five years.

10 THE COURT: That's for his daughter.

11 MR. BUXTON: So he can assign it to his
12 daughter.

13 THE WITNESS: That was my, that was my
14 daughter's.

15 THE COURT: His daughter. He testified he
16 was going to renew it and put it in his daughter's
17 name and y'all wanted him to be a grantee or a
18 grantor on the payment, and he wouldn't do that.
19 That's what's before me at this point. I don't see
20 anything in any document. Now you may have it, but
21 I don't see anything about a transfer. The lease
22 was up. If it was three years into the lease, ten
23 left, we're talking about a transfer. So go ahead,
24 I mean...

25 MR. BUXTON: Yes, Your Honor.

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1 THE COURT: You may have some evidence to
2 the contrary, but at least at this point there's not
3 any.

4 BY MR. BUXTON:

5 Q This document does, though, you would agree that
6 there, it was contemplated that there are transfer
7 fees when it says mall transfer fee?

8 A On Stewart's part, absolutely.

9 Q On — what do you mean on Stewart's part?

10 A This was a request from Stewart to put it in this
11 agreement. This was to satisfy him as it related to
12 mall transfer fee, and he testified to that.

13 Q And you agreed to it?

14 A I agreed to that if there was an existence of it,
15 and there wasn't.

16 Q You both signed this document.

17 A There was no, there was no assignment of the
18 lease in Sumter so therefore, none of the provisions
19 after April 30th of this lease applied. None, not a
20 single one.

21 Q But there could still be —

22 A Florence —

23 Q —a mall transfer fee?

24 A —had 18 months left on it; and in that case,
25 yes, there could have been a mall transfer fee.

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1 Q There could have been one on either one thought?

2 A No, there couldn't have been. I just got through
3 explaining it to you, no.

4 Q So this is meaningless, these lines that you—

5 MR. KILLEN: Judge, this is getting
6 ridiculous. It says what it says. My client has
7 testified to what that means —

8 THE WITNESS: It's meaningless to me.

9 MR. KILLEN: I'm not — my client's
10 testified to this. Mr. Applebaum said what it
11 meant. Paul has said what it meant. He's not
12 getting the answer he wants, I understand that, but
13 he's asked it about fifty times. It's kind of
14 getting ridiculous.

15 THE COURT: Okay, move on.

16 BY MR. BUXTON:

17 Q Do you contend that any statements — I withdraw
18 that.

19 MR. BUXTON: May have I just a moment,
20 Your Honor?

21 THE COURT: Sure.

22 MR. BUXTON: I just have a couple.

23 THE COURT: Okay.

24 BY MR. BUXTON:

25 Q Regarding the 20,000-dollars that my client is

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1 calling an assignment fee, would you agree that you
2 could have paid that or someone could have paid that
3 as a part of this deal and your proposal would have
4 gone through?

5 A If we agreed to blackmail the answer is yes, or
6 extortion, whatever term you want to use. The
7 answer would be yes. We did not. We did not. I'm
8 not cut from that cloth.

9 Q And that was a business decision that you made?

10 A That's a business decision I made.

11 Q Okay, so —

12 A From my part. What Stewart did was a decision he
13 made from his part. But I wasn't gonna pay
14 20,000-dollars to something that wasn't deserved.

15 MR. BUXTON: That's all I have, Your
16 Honor.

17 THE COURT: Okay. Anything further?

18 MR. KILLEN: Yes, sir, just a few.

19 **CROSS-EXAMINATION**

20 BY MR. KILLEN:

21 Q Mr. Branco, there was much made of the
22 70,000-dollars and the 30,000-dollars for asset
23 purchases in the Sunter store and the Florence
24 store?

25 A Correct.

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- 1 Q And I just want to be clear about that. You own
2 that equipment, correct?
- 3 A I did.
- 4 Q And you still own some of it?
- 5 A Unfortunately, yes.
- 6 Q All right. And you know what you paid for it?
- 7 A Yes.
- 8 Q And you know what it's worth?
- 9 A I know what it's worth.
- 10 Q A person convey his own property, correct?
- 11 A That is absolutely correct.
- 12 Q All right. Mr. Applebaum owns several of these
13 franchises?
- 14 A Yes, he does.
- 15 Q And presumedly when he opens up a franchise in
16 any of these malls in which he operates he buys his
17 equipment?
- 18 A Correct.
- 19 Q He knows fair market value for it?
- 20 A Yes, he does.
- 21 Q And he's gonna pay fair market value for it,
22 correct?
- 23 A That is correct.
- 24 Q Not a penny less, not a penny more?
- 25 A Stewart, yes.

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1 Q When you determine the value of something you
2 have a willing seller and you have a willing buyer?

3 A That is correct.

4 Q The willing seller and the willing buyer, they
5 agree on a price based on what they believe the
6 property be worth, correct?

7 A That is correct.

8 Q All right. And so when you and Mr. Applebaum
9 were working on that deal, the 70,000-dollars and
10 the 30,000-dollars, those are the figures that you
11 all came up with after talking about what equipment
12 would be sold, what it was, what use it has, etc.?

13 A Exactly. I asked 70 and he agreed to pay it.

14 Q All right. In fact, you had valued the equipment
15 in the Florence store 30,000-dollars?

16 A Correct.

17 Q And after this deal fell through because of the
18 actions that we're here about today and we're
19 talking about —

20 A Absolutely.

21 Q —you ended up selling that equipment that you
22 had valued 30,000-dollars to Mr. Applebaum, you sold
23 it to somebody else for 25,000-dollars?

24 A That is correct.

25 Q Okay. So you were within 15 or 20 percent of

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1 fair market value as per your agreement with
2 Mr. Applebaum, correct?

3 A I would say I was dead-on.

4 Q All right. Now you were asked a bunch of
5 questions about Plaintiff's Exhibit Number 4 which
6 is your deal with Stewart Applebaum. You may have
7 it.

8 A Plaintiff's Exhibit Number 4, yes, the proposal.

9 Q Yeah. The deal that bears your signature and Mr.
10 Applebaum's signature?

11 A Correct.

12 Q Okay. And there was all this questioning about
13 you didn't have a lease in Florence, you didn't have
14 the lease, and all these contingencies and all this.
15 Let's be very clear, why did Stewart Applebaum not
16 follow through with that deal that's encapsulated o
17 n that document?

18 MR. BUXTON: Objection, speculation.

19 MR. KILLEN: Do you know? There's no jury
20 here, Judge.

21 THE COURT: I understand that. And he —

22 MR. BUXTON: He's already testified.

23 THE COURT: Applebaum testified the reason
24 he didn't follow through is because they weren't
25 gonna pay 20,000-dollars and they they offered him

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1 —

2 MR. KILLEN: Yes, sir.

3 THE COURT: So he couldn't move equipment
4 out, and therefore, he'd save \$50,000 by paying them
5 20 instead of the 70 is what he testified to.6 MR. KILLEN: Yes, sir. Well, I'll
7 rephrase it. I'll rephrase it.

8 THE COURT: Okay.

9 BY MR. KILLEN:

10 Q Counsel for the defendant was asking you about
11 contingencies that are listed in here. This
12 proposal is contingent. It's got the word
13 contingent in there a couple of times. Were any of
14 those contingencies violated? In other words, was
15 the reason that that deal was not followed through
16 upon because of any of those contingencies were not
17 met in there, or was it due to the actions of Hull
18 Storey?

19 A Absolutely due to the actions of Hull Storey.

20 Q Okay. You were asked a moment ago towards the
21 end about this lady out at the mall, her name is
22 Nancy?

23 A Yes.

24 Q What's her last name?

25 A Holmes.

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1 Q Nancy Holmes. And she was characterized by
2 defense counsel as the maintenance person?

3 A Yes.

4 Q Regardless of what her title is out there is she
5 a custodian? Is she a janitor? What does she do
6 out there? You dealt with her for a long time.

7 A Not a custodian, not a janitor. Now, Nancy ran
8 the mall, I mean, if there was a problem that's who
9 you went to. You know, they had a couple of — I
10 forget what you call them — but Nancy was the
11 person that if there was, if there was a mechanical
12 issue or something in that nature she was the person
13 that you went to. She was there for ten years. She
14 was there for the full term of our lease.

15 Q If you had any issues you had to talk to the
16 landlord about?

17 A It would be Nancy.

18 Q It would be Nancy.

19 A It would be Nancy.

20 Q The landlord would be Hull Storey, correct?

21 A That is correct.

22 Q All right. Any issues pertaining to your lease
23 you had with them —

24 A Over the years?

25 Q Yeah, over — who would you go to?

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- 1 A Who would I go to? Nancy.
- 2 Q Did you go to these lawyers down there in
- 3 Augusta?
- 4 A No, absolutely not.
- 5 Q Okay. Was she the mall's representative in
- 6 Sumter?
- 7 A Absolutely.
- 8 Q Okay. Now when you stayed in there after May the
- 9 — after April 30th, from April 30th, was that the
- 10 last day —
- 11 A May 15 — April 30th was the last day. We were
- 12 there from May 1st to May 15th on the extension.
- 13 Q 15 day extension?
- 14 A 15 day extension.
- 15 Q Okay. Did — you had, Mr. White had sent you
- 16 email which we talked earlier saying that you had a
- 17 15 day extension, correct?
- 18 A Correct.
- 19 Q All right.
- 20 A I believe it was a text message.
- 21 Q All right. So you relied upon that?
- 22 A In good faith, yes.
- 23 Q During that 15 days did Nancy or any
- 24 representative of Hull Storey come in to you and go,
- 25 get out of here, get the heck out of here, you ain't

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1 supposed to be here, you're overstaying your lease?

2 A No.

3 Q Anything like that?

4 A No.

5 Q Okay. Were you were served with eviction papers?

6 A No.

7 Q Where they trying to get you out?

8 A No.

9 Q Okay. You were out of the premises on May 15 of
10 2013, correct?

11 A Correct.

12 Q This lawsuit, the underlying suit about which
13 we're here today, was filed in March of 2015,
14 correct?

15 A Yes.

16 Q Okay. Did you from May of 2013 — let's go to
17 May of 2014, let's go to December of 2014, let's go
18 to March of 2015. Did you ever hear from anybody at
19 the mall saying you left some burnt countertops in
20 there?

21 A No, sir.

22 Q Did you ever hear that there's any problem with
23 the condition of the premises after you left it?

24 A No, sir.

25 Q Was the first time that you heard about anything

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1 like that after we brought this action?

2 A Yes.

3 MR. KILLEN: That's all I have, Judge.

4 THE COURT: Okay.

5 MR. BUXTON: Just a couple of followups.

6 THE COURT: All right.

7 **REDIRECT EXAMINATION**

8 BY MR. BUXTON:

9 Q I believe you just testified that you know what
10 you paid for the equipment and you know what it's
11 worth. Do you recall that line of questioning?

12 A I know what it was worth. I can't tell you
13 offhand exactly what I paid for it. I know what it
14 was worth. It was worth 70,000.

15 Q Do you know — do you have any —

16 A To me, 70,000.

17 Q To anyone else it's worth 70?

18 A Stewart Applebaum.

19 Q Do you know what — do you have any idea what you
20 paid for the equipment at the Sumter Mall?

21 A Off the top of my head, absolutely not.

22 Q Do you have any idea what you paid for the
23 equipment at the Florence Mall?

24 A Off the top of my head, absolutely not.

25 Q Okay. Did you have any estimates that you pulled

1 together any estimate of value what it was worth?

2 A It wouldn't matter. It was worth 70,000 to me.

3 Q Did you have any estimate of value that you
4 compiled to come up with the numbers?

5 A No, I did not.

6 Q So if you thought it was worth a hundred million
7 dollars then —

8 A He was willing to pay it; we had a deal. Two
9 hundred million we still had a deal. Three hundred,
10 we still had a deal.

11 MR. KILLEN: Nothing further, Judge.

12 THE COURT: You can step down.

13 Anybody need a break? Any of y'all need a
14 break? Are y'all ready—

15 MR. KILLEN: If I could run to the
16 restroom just five minutes.

17 (WHEREUPON, a recess was taken from the
18 proceedings.)

19 MR. BUXTON: Your Honor, at this time I
20 would move for a directed verdict.

21 THE COURT: Okay.

22 MR. BUXTON: The basis being we have four
23 counts before you, one is a breach of contract. The
24 plaintiffs have pointed to no provisions of the
25 contract which have been breached. The contract on

1 April 30th, 2013, expired on its own terms, and
2 there's no provision that any evidence has been
3 presented that any of the provisions were violated
4 by the landlord the mall there.

5 There are two counts of fraud. One is for
6 fraud and one is for constructive fraud. These are
7 the third and fourth causes of action. Fraud must
8 be proven with specificity. I'm pointing to
9 specific representations: Their falsity,
10 materiality, the knowledge of the falsity or
11 disregard of it, of its truth, with the, coupled
12 with the intent that those representations be acted
13 upon. The plaintiffs have pointed to no specific
14 statements which were false or any representations
15 upon which they could have reasonably relied which
16 they acted upon at this point, and so those two
17 cases of action should be denied as a matter of law.

18 Regarding the tortious interference with
19 contract claim, there must be existence of a valid
20 contract, the wrongdoer's knowledge thereof, his
21 intentional procurement of its breach, the absence
22 of justification, and resulting damages. In this
23 case, the contract that I believe the plaintiff is
24 alleging was tortiously interfered with had multiple
25 contingencies, one of which was that my client

1 entered into a lease with Brooktenn. Those parties
2 never entered into a lease and that contingency was
3 never met. The parties cannot force my client to
4 enter into a lease such that that contingency is met
5 and that their proposal could go forward for the
6 sale of this business. They have demonstrated that
7 they were still able to sell the equipment in the
8 second part of the contract and that my client did
9 nothing to prevent them from selling the equipment
10 in the first portion of that. My client was a
11 necessary party to that contract and that there were
12 contingencies that they entered into a contract for
13 lease, that Brooktenn entered into a contract for
14 lease at the Sumter Mall before these other pieces
15 could fall into place. That did not occur; nor did
16 the lease at the Florence Mall occur. So there was
17 not a valid contract in that regard.

18 If the Court finds that there was a valid
19 contract despite these contingencies, my client did
20 not intentionally procure the breach of that
21 contract as both parties were still free to sell the
22 assets which the plaintiffs have represented was the
23 basis of the deal was to sell these assets. My
24 client has done nothing to stop them from selling
25 those assets which they did do for the Florence

1 Mall. And I believe that their claim failed as a
2 matter of law based on all those points.

3 They had no lease that expired. They made
4 no fraudulent statements, and there was a contract
5 that did not commence because there were multiple
6 contingencies. And if there was a contract, my
7 client did not intentionally procure the breach.

8 THE COURT: Okay. You want to address
9 that, Mr. Killen?

10 MR. KILLEN: Yes, sir, unless you're going
11 to deny it without me addressing it like you did the
12 last case I had.

13 THE COURT: No, you address it, we'll see.

14 MR. KILLEN: Yes, sir. The first cause of
15 action is breach of contract and counsel's position
16 is, well, the contract expired and so therefore
17 there's no contract; and if there's no contract,
18 there can't be a breach of contract. My response to
19 that is, it is the defense that was asserting
20 paragraph 16.2 which is a lease assignment portion
21 or the provision of the contract to extract money
22 out of these folks. There's plenty of testimony
23 from my client and from Mr. Applebaum had come to
24 them at the end there saying you got to pay a lease
25 assignment based on paragraph 16.2 of the contract.

1 So they were asserting the contract misrepresenting
2 what that means and applying that facts that it
3 should not apply to; but they were, they were using
4 the contract to try to get the money arguing that
5 paragraph 16.2 applied. But they can't do that and
6 then come in and say, well, there's no contract
7 because the contract expired.

8 It was an intentional breach of the
9 contract, intentional misrepresentation of what the
10 contract said about a lease assignment; and that
11 certainly, as Your Honor pointed out earlier,
12 there's been no evidence there was a lease
13 assignment. And they were using that paragraph in
14 the contract improperly; that's a breach of the
15 contract. As to the tortious interference contract
16 claim, there's been plenty of evidence that — I'm
17 trying to use the right word, phrase here. There's
18 been plenty of testimony pretty much uncontroverted
19 that these people were putting the squeeze on
20 Mr. Branco and Mr. Applebaum. There's the one text
21 message from Mr. White to Mr. Branco that says
22 Applebaum has been approved as long as we can get
23 this 20,000-dollars, we need to figure out a way to
24 get this 20,000-dollars, Applebaum has been
25 approved. It doesn't say anything about an

1 assignment, doesn't use the word transfer, anything
2 like that. And then if that, and if the testimony
3 that Mr. Branco and Mr. Applebaum gave where they
4 were basically asserting that they were getting the
5 squeeze put on them, to use the mafia term, if
6 that's not enough, one of the last questions I asked
7 Mr. Applebaum was, I said, what did they tell you
8 about the deal you had with Branco. And he said,
9 they told me to just not do that, just give me the
10 20, give us the 20 grand and you'll come out 50
11 grand or better. And he basically testified they
12 were telling him, Mr. White was telling him, don't
13 follow through with your deal with Branco 'cause he,
14 you can come in with us, give us 20 grand and you're
15 gonna save 50 grand, you can use Branco's equipment.
16 Clearly, a lot of inferences can be made but that
17 last statement by Mr. Applebaum was pretty direct.

18 And as far as the fraud, the fraud
19 misrepresentation, I know there's a lot of elements
20 to that; but representations were made about what
21 paragraph 16.2 meant. Representations were made
22 that it applies to this case when we would submit it
23 did not. A lot of — there was, there was an
24 attempt in April there to try to create the reality
25 that there was a lease assignment. All that was

1 misrepresented.

2 And as far as materiality, the texts from
3 Mr. White to Mr. Branco, Applebaum has been approved
4 if we can get the 20 grand. The whole project which
5 was Applebaum moving into this Mall and the mall in
6 Florence, was revolving around that 20,000-dollars.
7 It was material to this whole thing. And he, and I
8 even asked Mr. Applebaum, I said, so everything was
9 revolved around that, for everything to happen the
10 way it was supposed to happen between you and Branco
11 and the Mall in Florence, somebody had to give them
12 20,000-dollars. And they relied on that. They were
13 gonna rely on that even though they said, no, they
14 weren't gonna do it. But those were fraudulent
15 statements, Judge.

16 So I would ask that Your Honor deny the
17 motion for directed verdict at this time. I think
18 there's plenty of evidence to go forward.

19 THE COURT: Okay. You know, as far as
20 breach of contract is concerned, I don't know that
21 contract was breached by merely they used the
22 provisions in 16 to interfere with the contract that
23 he had with Applebaum by claiming that, you know,
24 they were entitled to the whole 70 and that they
25 would settle for 20 and that deals with the last

1 sentence in paragraph 16.2 where it says that if
2 he's — but all that's contingent on a situation
3 where he's assigning the lease where a lease is
4 gone. I mean, if the lease doesn't exist anymore,
5 then, you know, in his contract with Applebaum was
6 contingent on Applebaum being able to get a lease
7 and there's certainly evidence that the lease was
8 approved but that they were throwing the
9 20,000-dollars in and that 20,000-dollar fee based
10 on the way I read paragraph 16.2 is only there if
11 somebody is trying to assign their lease and signed
12 the business during the lease term. And that wasn't
13 the situation here.

14 If the plaintiff had, in fact, negotiated
15 renewal of the lease, either he first talked by
16 doing it in his daughter's name; but if he renewed
17 the lease for an additional five or ten year term,
18 and then tried to enter into a contract with
19 Applebaum, then it would be an assignment of that
20 contract and they would be entitled to any of their
21 profit based on the last sentence in paragraph 16.2;
22 but that didn't happen. He never obtained an
23 assignment, assignment never was done, nor was ever
24 a renewal of the lease. And so I clearly think
25 that, you know, for, interference of contract I deny

1 your motion on that.

2 And whether it's kind of tricky as far as
3 the breach of contract. Really we're not in a
4 situation where either side breached a contract that
5 existed. They misused the paragraph and messing
6 with the contract he had with tenant or Brooktenn.
7 I'll think a little bit more about the fraud and I
8 may end up, I don't know if the elements have been
9 met on the fraud situation or not; but I think
10 clearly number four is still there and I'm gonna
11 deny your motion. I don't know that number one has
12 been a breach of contract because the contract
13 didn't exist once — at the end of April the
14 contract is gone away, there was no renewal, there
15 was no extension other than they gave him a 15 day
16 extension to get out and then that rental issue is
17 still up so. I'll deny your motion at this point.

18 I don't know that there's been a breach of
19 contract you can proceed under, but there's the
20 other cause of action. Okay, you want to proceed?

21 MR. BUXTON: Yes, Your Honor. Defense
22 calls Lewis White.

23 THE COURT: All right.

24 THE CLERK: Place your left hand on the
25 Bible, raise your right hand. State your name

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1 please.

2 THE WITNESS: Lewis White.

3 WHEREUPON,

4 **LEWIS WHITE,**

5 having been duly sworn by the Clerk, testified
6 as follows:

7 THE CLERK: Thank you. Have a seat up
8 here please. Please state your full name, spell
9 your last name for the record.

10 THE WITNESS: William Lewis White, Jr.
11 Last name White, W-H-I-T-E.

12 **DIRECT EXAMINATION**

13 BY MR. BUXTON:

14 Q Mr. White, please tell the Court how you're
15 employed.

16 A I'm a leasing representative of Hull Property
17 Group so I'm an agent, I'm a landlord.

18 Q And how long have you been there?

19 A About five-and-a-half years.

20 Q And have you been a leasing agent the entire
21 time?

22 A I was.

23 Q And do you have responsibilities for particular
24 properties within that operation?

25 A Yes.

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- 1 Q And is Sumter Mall one of the properties within
2 the organization that you're responsible for?
3 A Has been in the past, yeah.
4 Q Okay. You're aware of the lease that Mr. Branco
5 had with all this that dates back to 2003; is that
6 correct?
7 A Right.
8 Q And did you have any involvement in negotiating
9 that lease?
10 A Not the original lease, no.
11 Q You wouldn't have been with the company back
12 then?
13 A No.
14 Q What are your responsibilities as far as they go
15 being a leasing representative for the company?
16 A To lease available spaces in the malls and the
17 shopping centers.
18 Q And that would include negotiating lease terms
19 with tenants?
20 A Yes.
21 Q Would that include renewals?
22 A Yes.
23 Q And assignments?
24 A Right.
25 Q And new leases?

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1 A Yes.

2 Q Okay. And back in September of 2012 were you
3 tasked with Sumter Mall as one of the properties
4 that you were leasing?

5 A Yes.

6 Q And during that time do you recall — actually,
7 if I could refer you to Defendant's Exhibit 2, I
8 might have to bring it up there. Do you recognize
9 that document?

10 A Yes.

11 Q And that appears to be an email that you sent to
12 Mr. Branco back in September 2012; is that correct?

13 A Right.

14 Q And do you remember if you had conversations or
15 correspondence with Mr. Branco prior to that email?

16 A I'm not sure. We probably had talked prior to
17 this on the phone.

18 Q And why did y'all talk prior to that, or why did
19 y'all start having conversations?

20 A Talking about a lease renewal on a space.

21 Q And typically how far — this lease was set to
22 expire the end of April 2013, correct?

23 A Right.

24 Q How far in advance would you start talking to a
25 tenant about a renewal?

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1 A Typically I like to start them six to eight
2 months, kind of get an idea what's going on.

3 Q And is it your recollection that you contacted
4 him first or if he contacted you first?

5 A I'm not sure about that.

6 Q You're not sure who initiated it, but at that
7 point you were discussing basically his intentions
8 at the end of the term? Is that—

9 A Right.

10 Q Okay. And what did, what did Mr. Branco want to
11 do as far as the end of the term?

12 A He was talking about a lease renewal.

13 Q Okay. And if you look at that second page it
14 looks like that's another email that you sent to
15 him; is that correct?

16 A That's right.

17 Q And y'all were — and why'd you send that email
18 to him?

19 A These were proposed terms for the lease renewal
20 that I was gonna present to the landlord.

21 Q And that lease renewal has years one and two or
22 years three through five so that was gonna be with a
23 five year term?

24 A Right.

25 Q Do you know who proposed the length of that term?

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- 1 A Looks like I proposed it in this email.
- 2 Q You proposed it. And the deal that was expiring
- 3 was a ten year term; is that right?
- 4 A Right.
- 5 Q But here y'all were just going to renew for five
- 6 years; is that right?
- 7 A Right.
- 8 Q Okay. And on that next page that's another email
- 9 from you to Mr. Branco. What's the date on that
- 10 third page?
- 11 A November 26th.
- 12 Q And do you recall if y'all were having phone
- 13 calls during this time, or was it mainly by email?
- 14 A I'm not real sure to be honest with you, probably
- 15 had a few phone calls.
- 16 Q Did you ever meet with him out at the property or
- 17 any of the time?
- 18 A No.
- 19 Q But at this point you're still passing back terms
- 20 for a lease renewal, right?
- 21 A Right.
- 22 Q And that's about two months into y'all's
- 23 conversations?
- 24 A Right.
- 25 Q Did y'all ever come to terms on a lease renewal?

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1 A I had terms that were approved in a real estate
2 committee, but we did not have a legal document or
3 lease amendment memorializing the terms.

4 Q If you'll look at that next to the last page I
5 think the email and the document behind it go
6 together. It's an email dated January 31st, 2013.
7 Do you see that?

8 A Yeah.

9 Q And at that point what is the name of the
10 attachments you have there on to the email? Right
11 under the date it has an attachment to the email.
12 Do you see that?

13 A GAC renewal sheet.

14 Q Okay. And so as of January 31st you were still
15 planning on a renewal for that space; is that
16 correct?

17 A That's right.

18 Q Okay. At that point the renewal was gonna be
19 with the same tenant, right?

20 A Right.

21 Q If it were with a new tenant would you call it a
22 lease renewal or would you have a different term for
23 that?

24 A A different term.

25 Q Okay. Were you in negotiations with any other

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- 1 parties to lease that space at that time?
- 2 A The lease was expired so I probably put out some
3 fillers because a bay was available.
- 4 Q The bay, the space was gonna be available at the
5 end of April, correct?
- 6 A Right.
- 7 Q And at that point the mall could lease, could
8 renew with Mr. Branco or they could lease to
9 somebody else, right?
- 10 A Right.
- 11 Q How many lease renewals would you say that you
12 have been involved with?
- 13 A I probably do 50 to 60 a year.
- 14 Q And these are something that's typical to see
15 with a tenant who's in a mall who wants to continue
16 operating their store, right?
- 17 A Right.
- 18 Q Was there anything at this point of January 31st
19 that was different or unusual about this, or was it
20 just a typical kind of deal?
- 21 A Seemed to be pretty typical at this point.
- 22 Q And at this point had Mr. Branco indicated that
23 he felt good about the deal and that it was gonna go
24 through?
- 25 A We had discussed terms, and again, it looks like

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1 we were pretty close but I'm not sure — again, we
2 didn't have a real document memorializing terms at
3 this point.

4 Q At this point had he told you that he was
5 forwarding these terms on to a third party?

6 A No, I don't believe so.

7 Q So it wasn't until later that you found out that
8 he was negotiating with a third party?

9 A Right.

10 Q And do you recall when the first time that he
11 brought to your attention that there was another
12 party who was gonna be operating the store was?

13 A I don't remember the exact date, but it was into,
14 it was into 2013.

15 Q Okay.

16 A Probably the first quarter.

17 Q And the terms that you and Mr. Branco had
18 discussed were terms that were gonna be for his
19 store at the property, correct?

20 A Correct.

21 Q And you at that point were not negotiating with
22 other, other parties for that space; is that right?

23 A That's right.

24 Q But you were free to do that under the lease
25 terms; were you not?

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1 A That's right, yeah.

2 Q Okay.

3 A Bay was available at the end of the term.

4 Q Okay. If I could get you to — this was
5 Plaintiff's Exhibit Number 1. I believe you stated
6 that you did not have anything to do with
7 negotiating that document, correct?

8 A Correct.

9 Q You were not with Hull Property Group at that
10 time, okay. But this was the lease that was
11 expiring that you were talking to Mr. Branco about
12 renewing; is that right?

13 A That's right.

14 Q Okay. And as part of those renewal discussions
15 did he tell you — strike that. I believe you said
16 it was the first quarter of 2013 when you found out
17 that there was another party that was gonna be
18 involved; is that correct?

19 A Sometime, right, in the first quarter.

20 Q And do you recall if what Mr. Branco said about
21 this third party how they were gonna be involved in
22 this deal?

23 A He said he had an operator that he was discussing
24 to possibly take over the space.

25 Q Okay. An operator would be somebody else who is

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1 gonna continue on in the same line of business; is
2 that right?

3 A Right.

4 Q And so was gonna continue to be a Great American
5 Cookie —

6 MR. KILLEN: I would object to the
7 leading, Judge.

8 THE COURT: Don't lead.

9 BY MR. BUXTON:

10 Q All right. Did he tell you who was gonna be the
11 new operator at the store?

12 A It was another Great America Cookie franchise
13 operator, Applebaum.

14 Q At this point were you dealing with Branco or
15 were you dealing with Applebaum?

16 A Early on I was dealing with Branco.

17 Q I'm gonna show you Plaintiff's Exhibit 4 and 7.
18 Do you recognize that, Plaintiff's Exhibit 4?

19 A I do.

20 Q When did you become privy to that document?

21 A I don't know if I saw this during our lease
22 negotiations or once this lawsuit was filed.

23 Q Okay.

24 A I can't remember.

25 Q Was that presented to you prior to the lease

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1 renewal discussions?

2 A No.

3 Q Okay. And if you'll look at Plaintiff's Exhibit
4 Number 7. What's the date on that email?

5 A March 25th, 2013.

6 Q And that's an email from you to Mr. Branco,
7 correct?

8 A Right.

9 Q And do you recall why it was that you sent this
10 email to Mr. Branco?

11 A Assignments are something the landlord likes to
12 contemplate because, you know, we got a new operator
13 coming in and a landlord likes to get as much
14 information as possible and likes to know what's
15 being sold and what's contemplated if there is a
16 lease assignment.

17 Q You said an assignment. Was that your
18 understanding of what was happening?

19 A Right.

20 Q And what was that understanding based upon?

21 A That he had another operator that wanted to come
22 in and take over his space.

23 Q Another operator that was gonna take over the
24 existing space that he's operating in?

25 A Right.

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1 Q And what were the terms of that going to be?

2 A He had mentioned 70,000. I believe 45,000 was —
3 there was a portion, I think 25 was for equipment.
4 45 was for the goodwill and for the business I
5 believe.

6 Q And so in this email you were asking him about
7 the breakdown for that, but he doesn't respond to
8 this email; is that right?

9 A Right.

10 Q Did he ever — did y'all talk after this email?

11 A Yes.

12 Q And did you ask him again about the 70,000?

13 A Yeah, I'm sure I did 'cause that was the point of
14 the landlord was trying to get additional
15 information on.

16 Q And what did he tell you about the breakdown?

17 A There was a portion it for the equipment, then a
18 portion of it was going towards the goodwill and the
19 ongoing business.

20 Q Now at this point were y'all still talking about
21 renewal under the terms that y'all been negotiating
22 for the past four or five months?

23 A I believe so.

24 Q And it was your understanding, what was your
25 understanding about how this third party was gonna

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1 come in?

2 A It was a lease assignment. The landlord is very,
3 you know, he protects his property rights, wants to
4 know what's going on with his property. He's not
5 into having tenants sell his place over
6 improvements.

7 Q Have you ever seen other cases where there's been
8 a tenant that —

9 MR. KILLEN: Judge, I'm gonna object to
10 other cases. They're not relevant to this case.

11 MR. BUXTON: Not lawsuits.

12 MR. KILLEN: Or other laws, other leases.

13 THE COURT: Explain to me how it's
14 relevant.

15 MR. BUXTON: He's explaining what the
16 landlord's concern is about a selling off a lease
17 whole term.

18 THE COURT: I understand. I understand
19 the concerns, but they didn't have a lease. There
20 wasn't an assignment. That doesn't matter.

21 MR. BUXTON: Well, he just testified that
22 there was going to be an assignment that was being
23 negotiated.

24 THE COURT: There was no assignment. I
25 mean, it hasn't been done. It hadn't been

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1 memorialized, it wasn't new, it doesn't exist. And
2 just, you know, he can testify to that, but it
3 wasn't in place so it wasn't any of his business
4 what was going on with him and Mr. Applebaum until
5 it was such he had some lease with them. But go
6 ahead, you can ask him the question.

7 BY MR. BUXTON:

8 Q At this point I believe you just testified that
9 there was going to be an assignment of the lease; is
10 that right?

11 A If we were to do a lease with Branco and
12 Applebaum, then that's the way the landlord was
13 going to consider it. I'm just the agent of the
14 landlord, the landlord is considering an assignment
15 if we were to do a lease with them. The lease was
16 expiring though. At the end of the term it was
17 available.

18 Q But at that point you were talking about a
19 renewal with Mr. Branco with an assignment to Mr.
20 Applebaum?

21 A Right.

22 Q That was your understanding of the deal that was
23 being presented?

24 A That's right.

25 Q And you presented —

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1 THE COURT: Is there any documentation
2 that supports that?

3 MR. BUXTON: Yes, Your Honor, I'm about
4 to.

5 THE COURT: Okay.

6 MR. BUXTON: It may have already been
7 admitted if I can just...

8 THE COURT: Okay.

9 BY MR. BUXTON:

10 Q I'm gonna show you what's been marked as
11 Plaintiff's Exhibit 8. Do you recognize that
12 document?

13 A Yeah.

14 Q And what is the date on that email?

15 A This is April 30th, 2013.

16 Q And that's an email from you, and who is it to?

17 A Paul and Stewart.

18 Q And could you read that?

19 A "Attached a lease assignment assumption amendment
20 and ratification of lease agreement. The letter
21 agreement extends the lease through May 15th and the
22 original lease. Please review and let me know if
23 you have any questions."

24 Q And this, attached to it is that assignment; is
25 that correct?

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- 1 A That's correct.
- 2 Q And you presented that to Mr. Branco and Mr.
- 3 Applebaum, correct?
- 4 A Right.
- 5 Q Did Mr. Applebaum ever sign any other lease?
- 6 A No.
- 7 Q Did Mr. Branco ever sign any renewal or extension
- 8 of a lease?
- 9 A No.
- 10 Q Did they draft any leases that they presented to
- 11 you?
- 12 A Not that I can recall, no.
- 13 Q But you presented this assignment to them in
- 14 April; is that correct?
- 15 A That's correct.
- 16 Q Was this lease ever, this assignment ever signed?
- 17 A No.
- 18 Q Did Mr. Branco contact you after he received it
- 19 with any marks or counterproposals?
- 20 A Not that I can recall, no.
- 21 Q Do you know why you sent this to Mr. Branco?
- 22 A 'Cause this is what the landlord considered this
- 23 to be. If we were to do a deal between, with Branco
- 24 and Applebaum, the landlord was gonna consider it an
- 25 assignment, otherwise the lease expired.

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1 Q And on that second page, which it's the
2 attachment there, you can see the third paragraph
3 under the recitals, Whereas landlord has agreed.

4 A Right.

5 Q Could you read that?

6 A Let's see, the third paragraph, "Whereas,
7 assignor/assignee have agreed assignor will sell the
8 business to assignee for the sum of 70,000-dollars.
9 The assignment cost which pursuant to 16.2 of the
10 lease is payable entirely to the landlord and,
11 whereas, landlord has agreed to accept
12 20,000-dollars as full satisfaction for the
13 entitlement of the assignment cost."

14 Q So that was the deal that you were presenting to
15 Mr. Branco and Mr. Applebaum; is that correct?

16 A That's what the landlord had approved for me to
17 present.

18 Q And that's what you presented to them?

19 A Right.

20 Q And they did not sign this agreement, correct?

21 A Correct.

22 Q But they didn't sign any other lease agreements
23 with you; is that correct?

24 A Correct.

25 Q And as far as, do you recall when the discussions

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1 about the 20,000-dollars began?

2 A When Applebaum was brought into the picture to
3 take over the business, you know, we referred to
4 16.2 of the lease document and, you know, discussed
5 how the landlord was due any consideration. You
6 don't want the, you know, tenant to sell off our
7 leasehold, that this is what I had approved to get
8 this deal done.

9 Q And you made that clear to Mr. Branco; didn't
10 you?

11 A Yes.

12 Q And y'all had some text messages and some emails
13 and conversations about that?

14 A I believe so, yeah.

15 Q All right. And did Mr. Branco or Mr. Applebaum
16 ever come up with any counterproposals to this
17 assignment?

18 A Not that I can recall after I signed it.
19 Basically I think the lease expired, we took our bay
20 back.

21 Q Did they come up with any other amounts of
22 assignment fee they were willing to take?

23 A Not that I can recall, no.

24 Q Okay. And that was sent on April, the same day
25 that the lease was set to expire, correct?

DW - L. WHITE - DIRECT

- 1 A Right.
- 2 Q And you never came to any terms — did you ever
3 come to any terms on a lease with either of the two
4 parties, Branco or Applebaum?
- 5 A No, we didn't. We signed a lease with another
6 operator.
- 7 Q Okay. And whose is that other operator?
- 8 A It's the Pizitz Group.
- 9 Q Okay. And do you know if the terms of that deal
10 are similar to the terms of this deal?
- 11 A I believe they were better and we had more lease
12 terms.
- 13 Q So the Pizitz Group paid more?
- 14 A Right.
- 15 Q And they extended for, they had a longer lease;
16 is that right?
- 17 A That's right.
- 18 Q Okay. And did Mr. Branco ever tell you that he
19 was making the business decision that he didn't want
20 to pay the assignment fee?
- 21 A I don't recall that.
- 22 Q Do you recall how he left it after he received
23 this document in front of you?
- 24 A I think the deal basically fell apart. I mean,
25 it was a good bay. I knew we were going to be able

DW - L. WHITE - DIRECT

1 to lease it, and so I kind of wanted to go for a
2 cleaner deal and so that's what I pursued.

3 Q So you reached out to other operators?

4 A Right.

5 Q And came to an agreement with someone else?

6 A Right.

7 Q Okay. Do you know when Mr. Branco vacated the
8 premises?

9 A I believe it was May 15th.

10 Q And do you know if he paid rent for May?

11 A I don't believe so.

12 Q Do you know what the amount of rent due for May
13 was?

14 A I don't recall the exact amount.

15 Q You got the lease there in front of you?

16 THE COURT: 2750-dollars.

17 THE WITNESS: Yeah, 2750.

18 THE COURT: He admitted he didn't pay it,
19 and he owes half of that, 1325, of those 15 days.
20 You agree with that?

21 MR. BUXTON: Okay.

22 BY MR. BUXTON:

23 Q One of the things that has come up is that
24 Mr. Applebaum was approved for a lease. Can you
25 explain what the lease approval process is.

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1 A We go through a real estate committee which is
2 where I present my deals and then they are approved
3 by ownership, but they're not valid deals until you
4 have a legal document signed by both parties and the
5 concept.

6 Q And in this deal you mentioned via these text
7 messages, if I can show you Plaintiff's Exhibit
8 Number 5. April 22nd, that second page, it's the
9 one that says, to you. You see that April 22nd,
10 2013?

11 A Yeah.

12 Q And what does that state there, 2:35 p.m.?

13 THE COURT: What date is that?

14 MR. BUXTON: April 22nd, 2013.

15 THE COURT: Okay.

16 THE WITNESS: Stewart's deal has been
17 approved if we can determine a way to come up with
18 20,000.

19 BY MR. BUXTON:

20 Q And just a few days later you sent him the
21 assignment deal that you were referring to; is that
22 right?

23 A Right.

24 Q But they never signed that, correct?

25 A Correct.

DW - L. WHITE - DIRECT

1 Q Do you recall having conversations with
2 Mr. Applebaum in March of 2013?

3 A We talked. I'm not sure if it was around —
4 yeah, I assume so. It was around that time.

5 Q Okay. And if you look at that first page it says
6 towards the bottom, March 4th, 2013.

7 THE COURT: Are we still on exhibit 5?

8 MR. BUXTON: Yes, Your Honor.

9 THE COURT: Okay.

10 BY MR. BUXTON:

11 Q You see the paragraph that says, I will be
12 providing?

13 A Right.

14 Q And my understanding is that was a text that
15 Mr. Branco sent to you. Is that your understanding?

16 A That's the way it looks, yeah.

17 Q At that point had you been negotiating with Mr.
18 Applebaum or had you been negotiating with Mr.
19 Branco?

20 A Mr. Branco.

21 Q So this tenant application that's referred to
22 here, do you know what that is?

23 A That's a application that we like to see, you
24 know, that we want — it's just got general
25 information about proposed tenant.

DW - L. WHITE - DIRECT

1 Q And it was your understanding that that was for
2 an assignment of the terms that you've been
3 negotiating?

4 A Right.

5 Q Okay. And as far as the assignment goes, if
6 you'll go back to the lease, what's your
7 understanding of how assignments are treated under
8 the lease?

9 A If you've — 16.1 there's five points that you
10 got to provide information about the proposed
11 assignee, you know, balance sheet information and
12 their financials, personal references, full
13 description of the use and premises proposed by
14 transferee, name and address. Just, we like to get
15 as much information as we can about the opposed
16 transferee as possible.

17 Q So that's the type of information you were trying
18 to get that you referenced in this text?

19 A Right.

20 Q It also says, The landlord may grant or deny sole
21 absolute discretion; does it not?

22 A That's right.

23 Q And then what about 16.2, what does it say about
24 tenant assigning?

25 A "Tenant assigns its interest in a lease. All

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1 consideration payable to tenant in connection. Such
2 assignment shall be payable and belong to the
3 landlord."

4 Q And what did Mr. Branco tell you was the
5 consideration he was getting for his interest in
6 the lease?

7 A The total number was 70,000.

8 Q And what did he attribute to the lease holder?

9 A I believe it was 45,000, 25 for the equipment.

10 Q So these texts that you were writing and the
11 email that you sent, is it fair to say you were
12 operating under this portion of the lease?

13 A That's correct.

14 Q Okay. Did he give you any reason to believe you
15 were operating otherwise?

16 A No.

17 Q Okay.

18 MR. BUXTON: Your Honor, that's all I have
19 at this time.

20 THE COURT: Okay. Let me ask you one
21 question, let me look at that exhibit number 5 and 8
22 that you testified from. Okay, go ahead.

23 **CROSS-EXAMINATION**

24 BY MR. KILLEN:

25 Q Mr. White, you're an employee of Hull Storey?

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- 1 A Right.
- 2 Q Been employed with them since 2013?
- 3 A 2011, yeah.
- 4 Q Okay. You're employed with them today?
- 5 A Yes.
- 6 Q You've come here today under subpoena, or did you
- 7 come here today to help your employer?
- 8 A Help my employer.
- 9 Q All right. You owe duty and loyalty to your
- 10 employer; don't you?
- 11 A Right.
- 12 Q So when you come to court to testify you're gonna
- 13 do what you can to help your employer?
- 14 A Yes.
- 15 Q Okay. Now Plaintiff's Exhibit Number 5, let me
- 16 hand you that. That's the text message stream
- 17 between you and Mr. Branco. You acknowledge that's
- 18 a text message stream, is that the word? It's a
- 19 conversation by text message between you and
- 20 Mr. Branco; is that correct?
- 21 A Yes.
- 22 Q All right. How many pages is that? Is that
- 23 three pages?
- 24 A Three pages.
- 25 Q All right. Look over those three pages and tell

DW - L. WHITE - CROSS

- 1 me in which of those text messages you told Mr.
2 Branco that he and Mr. Applebaum were engaged in a
3 lease assignment or where Mr. Branco told you that
4 he was assigning his lease to Mr. Applebaum?
5 A The reference is 20,000 on the second page so
6 that's in reference to an assignment.
7 Q All right. Read that to me, read that to the
8 Court.
9 A All I can get approved is 20,000 to the landlord.
10 Q All right. Is the word assignment in there?
11 A No, but that's what it's in reference to.
12 Q All right. I didn't ask you what it's in
13 reference to, I asked you what it says, 'cause what
14 it's in reference to is subject to interpretation;
15 is that not true?
16 A Yes.
17 Q All right. Does it say anything about a lease
18 assignment or a lease transfer or any word like
19 that?
20 A No, but we had other conversations too.
21 Q Just answer the question, then you can explain.
22 A It's not in the text message. It's not in the
23 text message.
24 Q All right. Does any text message in that
25 plaintiff's exhibit say anything about an assignment

DW - L. WHITE - CROSS

1 or even a transfer?

2 A No.

3 Q All right. Now you emailed in Plaintiff's
4 Exhibit Number 7 —

5 A Well, it does say on the last page, it says, "You
6 asked me to sign a lease assignment when Stewart was
7 negotiating his own lease for Brooktenn."

8 Q All right. That's a text from Paul to you,
9 correct?

10 A From Paul, yes.

11 Q From Paul Branco to Lewis White. And what's it
12 say?

13 A "Why are you asking me to sign a lease assignment
14 when Stewart has negotiated his own lease term with
15 Brooktenn."

16 Q Right. Okay. And elsewhere in there you tell
17 Mr. Branco that Stewart's been approved?

18 A The real estate committee has approved, yes.

19 Q Does it say real estate committee? Tell me what
20 it says. Your lawyer can ask you in a minute — if
21 he hasn't asked you I can bring it up. Just answer
22 the question as I ask it.

23 A Yes, Stewart's deal has been approved.

24 Q All right. Your exact words, Stewart's deal has
25 been approved?

DW - L. WHITE - CROSS

- 1 A Uh-huh.
- 2 Q Stewart Applebaum?
- 3 A Uh-huh.
- 4 Q If we can get 20,000-dollars; is that correct?
- 5 A Correct.
- 6 Q All right. Now you emailed Paul Branco on —
- 7 well, let me go back. Mr. Branco told you in that
- 8 plaintiff's exhibit you hold in your hand which is
- 9 the text message stream, he told you about Stewart
- 10 Applebaum; is that correct, maybe on March 4th?
- 11 A Yes.
- 12 Q And he says, "I'm gonna forward you the
- 13 information about Applebaum and your tenant
- 14 application." Is that correct?
- 15 A Said he's forwarding the tenant application to
- 16 him.
- 17 Q He forwarded it to who? Mr. Applebaum?
- 18 A Yes.
- 19 Q So on March 4 you knew about Applebaum at the
- 20 latest?
- 21 A Yes.
- 22 Q Is that correct?
- 23 A Yes.
- 24 Q And then on March 25th you sent this — this is
- 25 Plaintiff's Exhibit Number 7. You sent Mr. Branco

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1 an email in which you want to know the details of
2 the 70,000-dollars; is that correct?

3 A Yes.

4 Q All right. And so at that point at the latest
5 you knew that Applebaum and Stewart, I'm sorry,
6 Stewart and Applebaum and Paul Branco had a deal,
7 they had a deal of some kind?

8 A They were discussing a deal, yes.

9 Q Well, you knew they were discussing a deal where
10 something was going to be sold, correct?

11 A Yeah.

12 Q All right. In April, I'm sorry, in March or
13 April when that email was sent, did you ever tell
14 Paul Branco in writing that, hey, what you guys are
15 doing is an assignment?

16 A I don't —

17 Q It's going to cost you, it's going to cost you
18 whatever Applebaum pays you you're gonna have to pay
19 us. Did you ever tell him in writing?

20 A I don't know if I did or not. That's the way the
21 landlord considered it.

22 Q That's the way the landlord considered it.

23 A Yeah.

24 Q All right. But you were negotiating on behalf of
25 the landlord?

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1 A Correct.

2 Q All right. Do you have anything in writing
3 whether it's a text or email or a letter where
4 you're informing Mr. Branco that what you guys are
5 doing is a lease assignment, there's gonna be a big
6 fee?

7 A Yeah, the document, the assumption assignment
8 document.

9 Q That's the first time?

10 A I don't know if that's the first time. We had
11 talked about it, 16.2 of the lease.

12 Q You had talked about paragraph 16.2 of the lease
13 —

14 A Yes.

15 Q —with Paul Branco?

16 A Yeah.

17 Q Where is that in writing?

18 A Probably a phone conversation.

19 Q It's a phone conversation, all right. Ashley
20 Dolce sent you an email around April 30; is that
21 correct? And attached to it was this document that
22 talks about an assignment.

23 A I don't have that document.

24 Q Do you have that with you there?

25 A No, I don't.

DW - L. WHITE - CROSS

1 Q All right. Plaintiff's Exhibit Number 8, it's
2 from L. White to Paul Branco and Applebaum. You
3 send that to them?

4 A Right.

5 Q All right. In an answer to a question your
6 counsel asked you earlier you said you had presented
7 that to Stewart Applebaum and Paul Branco.

8 A That's what the landlord allowed me to present to
9 them to get a deal done with them.

10 Q When you presented that's — when you say present
11 that means you emailed it to them?

12 A Right.

13 Q Present is a fancy word to say you sent it to
14 them on email. Is that fair to say?

15 A Fair to say.

16 Q All right. And attached to that email was this
17 document drawn up by Ashley Dolce apparently, is
18 that correct, —

19 A Correct.

20 Q —who's a lawyer for Hull Storey; is that
21 correct?

22 A Correct.

23 Q All right. The reason I keep asking you, I'm not
24 trying to give you a hard time. She has to take
25 down what you say.

DW - L. WHITE - CROSS

1 A That's fine.

2 Q Okay. Do you have anything in writing before
3 April 30 when you sent that email to those two
4 fellas that says anything about a lease assignment
5 whether it's from them or to them?

6 A I don't think I do in writing.

7 Q All right. Now how much commission were you
8 going to make on the 20 grand?

9 A I'm paid a salary. I'm not gonna make any
10 commission.

11 Q No commission, okay. You consider yourself a
12 smart business man, Mr. White?

13 A Yes.

14 Q Okay, and you probably are. You would agree with
15 me, and I'm gonna use southern slang here, you from
16 the south?

17 A Uh-huh.

18 Q All right. Is that a yes?

19 A Yes.

20 Q It wouldn't make a lick of sense for Paul Branco
21 to renew a lease in April that was about to expire
22 at the end of the month, renew it for five years or
23 ten years, and then assign it to somebody else and
24 have to turn around and give Hull Storey all the
25 money from it pursuant to paragraph 16.2? That

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1 wouldn't make a lick of sense, would it?

2 A I imagine the landlord said the same thing which
3 is why we got our bay back when the lease expired.

4 Q You got your what?

5 A We got our bay back in the mall.

6 Q You didn't answer my question. I wasn't asking
7 you about the landlord. It wouldn't make a lick of
8 sense for Paul Branco to renew a lease that's gonna
9 expire in a matter or weeks, renew it for five years
10 or ten years?

11 MR. BUXTON: Asked and answered.

12 MR. KILLEN: It wasn't answered, Judge.

13 THE COURT: No, it wasn't.

14 BY MR. KILLEN:

15 Q For Paul Branco to renew a lease five years, ten
16 year lease, whatever you guys do, it's gonna expire
17 a couple of weeks, he renews it for five years, turn
18 around is gonna assign it to somebody, and then
19 whatever money he gets, in this case it's gonna be
20 70,000-dollars according to you all, turn around and
21 give it to y'all. That wouldn't make any sense,
22 would it?

23 A That's what we had approved by landlord. If you
24 want to get our deal done that's what he had to do.

25 Q All right, you're not gonna answer the question.

DW - L. WHITE - REDIRECT

1 A I don't make decisions for Paul Branco. He can
2 do whatever he wants to.

3 Q I'm not asking you if it makes sense for him to
4 do that.

5 A If he wanted to sell the business and he wanted
6 to stay and he wanted to sell his portion or
7 whatever, then that's the deal he had to.

8 Q Let me ask it like this, it's your position and
9 you want this Court to believe that Paul Branco was
10 gonna renew a lease that was about to expire, assign
11 it to Stewart Applebaum, get the money from Stewart
12 Applebaum, and then pay it to y'all; is that your
13 theory?

14 A Go through that again.

15 Q Do you want this Court to believe that in March
16 and April of 2013 Mr. Branco was contemplating
17 renewing a lease that was gonna expire on
18 April 30th, and he was going to renew it for five
19 years to ten years and then he was gonna assign it
20 to Stewart Applebaum and then pay you all the money.
21 Is that your theory? Yes or no.

22 A It was either that or let the lease expire, yes.

23 Q All right, thank you, sir. That's all I got.

24 THE COURT: Anything further?

25 MR. BUXTON: Just briefly.

DW - L. WHITE - REDIRECT

REDIRECT EXAMINATION

1 BY MR. BUXTON:

2 Q On exhibit number 5, the text message thread that
3 y'all were just looking at, there's a gap between
4 March 4th and April 22nd; is that correct? On that
5 first page there's a —
6

7 A Yes.

8 Q Do you know if there were any other texts sent
9 during that time?

10 A Not that I'm aware of, I don't know.

11 Q You didn't create this document, did you?

12 A No.

13 Q So it's possible that you had other texts and
14 you're not aware of them?

15 A Right.

16 Q Did you have any phone calls during that time?

17 A I'm sure we did.

18 Q Okay. Did you have any conversations about
19 continuing those same terms that Mr. Branco had been
20 negotiating with you for the past four months on the
21 renewal?

22 A Say that again.

23 Q Did y'all have anymore conversations about the
24 renewal terms?

25 A Yes.

DW - L. WHITE - REDIRECT

1 Q Okay. And those conversations revolved around
2 him assigning those renewal terms to Mr. Applebaum?

3 A Right.

4 Q And that was your understanding of the deal?

5 A Right.

6 Q And did he ever tell you anything that made you
7 think otherwise of the deal?

8 A No, the landlord would not, you know, that was
9 the landlord's thought of it too.

10 MR. KILLEN: Judge, he can't testify about
11 what the landlord thinks. He's already testified he
12 has to go down there, present the deal with some
13 board, what the landlord thinks, he's apparently not
14 —

15 THE WITNESS: What they had approved.

16 THE COURT: Well, he can testify, you
17 know, he's already testified about email that he had
18 approved. But what the landlord thinks, how does he
19 know that, he's not the landlord. Okay.

20 MR. BUXTON: He's the representative, Your
21 Honor.

22 BY MR. BUXTON:

23 Q Did you ever have any correspondence with Mr.
24 Applebaum during this gap where he proposed a lease
25 to you?

1 A I'm not sure if it was during that gap, but I did
2 at some point around this time of year.

3 Q Okay.

4 MR. BUXTON: That's all I have, Your
5 Honor.

6 THE COURT: Okay. Anything further?

7 MR. KILLEN: Nothing from me, Judge.

8 THE COURT: Thank you, sir. You can step
9 down.

10 MR. BUXTON: I don't have anymore
11 witnesses, Your Honor.

12 THE COURT: Okay. You got anything?

13 MR. KILLEN: Judge, I would just make a
14 motion for directed verdict on their counterclaim.
15 They counterclaimed for 6,000-dollars saying he owed
16 them two percent for he's what you call the holdover
17 tenant. It's two hundred percent minimum. They
18 didn't present any of that in their case. There was
19 testimony about 15 days and, you know, half of his
20 minimum rent, that's fine. And there was also no
21 testimony other than there was a cause of action in
22 there he left the premises in bad condition. There
23 was no testimony about that other than somebody said
24 something about a burnt tabletop or something. But
25 there's been no — their Complaint says they've

1 incurred all these expenses to fix all that stuff;
2 but there's been no testimony about that, no
3 invoices or receipts or anything from contractors in
4 here.

5 THE COURT: Okay. You want to address any
6 of that?

7 MR. BUXTON: Yes, Your Honor. As far as
8 the rent, I think he's admitted that he owes some
9 rent whether it's the holdover rent that the lease
10 provides for or not. He's admitted that he didn't
11 pay for the term that he stayed in after the—

12 THE COURT: And he's admitted to that.

13 MR. BUXTON: Right.

14 THE COURT: Okay.

15 MR. BUXTON: And I did not present any
16 invoices as far as the damage to the countertop, but
17 he did admit that it was a burnt countertop that he
18 left behind that he was supposed to fix as part of
19 that lease but.

20 THE COURT: Well, he says he wasn't
21 supposed to fix it and the lady said it was okay.
22 And then he claimed y'all didn't call any time after
23 that to, you know, to tell him he had to fix it.
24 And I guess he sent in his deposit of 2400-dollars
25 whatever it was in the lease. Nobody has mentioned

1 whether that was returned to him or whether that —
2 I don't know what happened to that so, and whether
3 y'all applied that. Normally you apply it, you list
4 things that they left torn up and say, I'm gonna
5 apply this to the — I don't know, none of that came
6 in so, okay. Okay, all right. Anything else?

7 MR. KILLEN: Nothing further from the
8 plaintiff, Judge.

9 THE COURT: All right. I'll — do y'all
10 want to argue anything or you just — if not, I'm
11 gonna take the evidence and go read it and let y'all
12 know. It'll probably be tomorrow, the next day,
13 before I can tell you.

14 MR. KILLEN: You think my argument will
15 convince you one way or the other? 'Cause I think
16 you're smart enough to hear the evidence and —

17 THE COURT: Whatever you want to do.

18 MR. KILLEN: I don't think I need to do
19 it; but if counsel wants to do it, then I'll do it.

20 THE COURT: If you want to do it you can.
21 I don't know whether it'll do any good or not. I
22 got the issues pretty good, I mean. Unless you can
23 argue to me what the law is or what the law is not.

24 MR. BUXTON: Judge, I know we had a lot of
25 testimony about whether this was an assignment or

1 whether this was a new deal or what. It sounds like
2 there was so much confusion between the parties.
3 What I know is Sumter Mall through Mr. White was
4 operating under the belief that he was negotiating
5 with Mr. Branco had for about four months when he
6 decided that he wanted to bring in a new operator so
7 that he could get this deal done. Now the question
8 was made, you know, would Mr. Branco do that knowing
9 that he was gonna have to assign, get that
10 assignment. I'm not sure Mr. Branco realized that
11 when he brought this assignment up, even though he's
12 the one who negotiated the deal with the original
13 landlord. So the point whether that makes sense or
14 not, maybe it doesn't make sense but that was the
15 document that my folks were operating under and
16 there was this renewal that was gonna be under the
17 same terms and there's no reason that they would
18 have talked about doing a five year renewal to not
19 do it with Mr. Branco. They were doing it with the
20 idea that there was gonna be an extension, he wanted
21 to sell off that lease term which called going
22 concern in his interrogatory responses in which he
23 told Mr. White he was valued at 45,000-dollars which
24 makes a lot of sense when you see that all these
25 cookie stores have the same equipment in them. You

1 got two ten year old leases, one in Florence, one in
2 Sumter. They got the same equipment; it's probably
3 worth 25, 30,000-dollars. It's not worth
4 70,000-dollars unless you've got a five year lease
5 term that you negotiated at a favorable rate with
6 the landlord, which is what he did and he wanted to
7 assign. And then Lewis told him about the
8 assignment fee and he said, oh, we don't want to do
9 an assignment now or, we don't know, that wasn't our
10 deal. Well, that was the deal that was presented,
11 but that was the only document that was ever
12 presented with an assignment and he decided that he
13 didn't like that term that was in the lease.

14 THE COURT: I hate to interrupt you, but
15 let me ask you this, the document you're talking is
16 the one that was presented on April 30th?

17 MR. BUXTON: Yes, Your Honor.

18 THE COURT: Okay, go ahead. I just, that
19 was the only one I knew about. I just want to be
20 sure I didn't miss something 'cause y'all hadn't
21 shown me evidence.

22 MR. BUXTON: Well, yeah, there weren't any
23 other leases that were out there except the one that
24 was about to expire. There were discussions about
25 renewal terms, but there was no other lease. It

1 wasn't, all right, you just deal with Mr. Applebaum
2 now. It was all through him so he could gain that
3 benefit of selling off the lease hold. And the
4 reason I wanted to bring up other assignments is
5 because we've seen this happen a lot of times where
6 people do negotiate at the end of a lease so they
7 can sell off this turnkey that he talked about.
8 It's not turnkey if you don't have a lease. You can
9 just start dealing with the new guy. The turnkey
10 is, we'll get you these terms and you can take the
11 equipment with you. And that works out great for
12 the seller, but it doesn't always work out great for
13 the landlord. And we've seen it happen a lot of
14 times where the new tenant just doesn't have the
15 ability to operate. And so the whole thing is this
16 turnkey which includes a lease term which is
17 evidenced by the fact that they were negotiating
18 renewal terms back in January two months before they
19 ever brought it to the attention of the mall. Once
20 that came into play Lewis told him about the
21 assignment fee and then they started backtracking,
22 oh, this is actually just about the assets. It
23 wasn't about the assets. It was about trying to
24 sell off a lease hold interest which they don't have
25 the right to do except through those provisions of

1 the lease. I just want to make sure we tied all
2 that up. I'm not trying to belabor the point.

3 THE COURT: I understand. Thank you.
4 Mr. Killen.

5 MR. KILLEN: Judge, I think it's pretty
6 clear from the evidence what happened, and I
7 understand what the defense is trying to do. We've
8 presented a solid case in chronological order. It's
9 very clear what happened. Once Hull Storey got wind
10 that Paul Branco had a deal with Applebaum which
11 they got notice of in March, nothing from them in
12 March or April, until April 30, anything about a
13 lease assignment. And they're playing all these
14 word games — well, he, the one word was
15 contemplate, what were you contemplating doing, and
16 what was the landlord thinking, what was Mr. Branco
17 thinking and contemplating. There's not one
18 document — and mind you, Judge, a lot of these
19 documents that are put into evidence, several of
20 them are lawyers. They got lawyers down there
21 writing letters for them, and nothing says anything
22 about a lease assignment. When they finally send
23 this document that they drafted and it's
24 self-serving in several ways, the assignor is
25 selling his business to the assignee and it invokes

1 paragraph 16.2 and everybody agrees that the money
2 has to go to the landlord. And as soon as Paul
3 Branco and Stewart Applebaum got that on the email,
4 both of them send emails or texts or whatever back
5 to Mr. White saying, what are you talking about
6 lease assignment. I mean, there's just, there's
7 nothing in there.

8 And then Mr. Applebaum testifies,
9 Mr. White told me to bail on Mr. Branco, you're
10 gonna save 70 grand, give us 20, you got 52 or
11 better, 52 grand or better, and you can use his
12 equipment, we'll let you use his equipment, he can't
13 get it out of there. I mean, and not one word, not
14 one cross-examination question from counsel to Mr.
15 Applebaum about that. But it's just mind boggling
16 what these people tried to do, Judge. They put the
17 squeeze on these guys. And I just wonder how many
18 people, how many people roll over and pay that
19 20,000-dollars. I mean, Mr. White sends, Mr. White
20 sends a text message saying Stewart Applebaum's been
21 approved if we can get the 20,000-dollars.

22 So Judge, there's been plenty of evidence
23 they were messing with this contract between
24 Mr. Branco and Applebaum and it was fraudulent
25 activity and Mr. Branco lost 70,000-dollars. He

1 recovered about ten of it by selling his stuff off.
2 So he's damaged about 60,000-dollars and that's what
3 we're asking for. That's all I have.

4 THE COURT: He said in his testimony it
5 was five.

6 MR. KILLEN: Okay, five. I'm sorry,
7 Judge, I can't remember everything. That's about
8 right. 65,000-dollars —

9 THE COURT: He first testified he sold the
10 oven and some other things for five, and then when
11 he was asked on cross-examination he sold the oven
12 for 3500, but he didn't talk about the other things
13 so that was my recollection of his testimony. Okay.
14 Thank you.

15
16 * * * END OF REQUESTED TRANSCRIPT OF RECORD * * *

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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE }

I, FRANCES B. RAY, Registered Professional Reporter (RPR), court reporter for the State of South Carolina, Third Judicial Circuit, do hereby certify that the foregoing proceeding is a stenographic report and was transcribed through computer-aided transcription; that the foregoing transcript contains a true record of the proceedings.

I further certify that I am neither counsel for, nor related to nor employed by any of the parties connected to the action, nor am I financially interested in the action.

Witness my hand at Florence, South Carolina, this 5th day of May, 2017.

Frances B. Ray

FRANCES B. RAY, RPR

State of South Carolina	)	Court of Common Pleas
	)	Third Judicial Circuit
County of Sumter	)	Case No. 2015-CP-43-00596
	)	
Paul Branco and Branco	)	
Investments Inc., d/b/a	)	
Great American Cookie Co.,	)	
	)	
Plaintiffs,	)	
	)	
-vs-	)	Transcript of Record
	)	
Hull Stoney Retail Group LLC	)	
and Sumter Mall LLC,	)	
	)	
Defendants.	)	
	)	

February 9, 2018
Manning, South Carolina

B E F O R E:

The Honorable R. Ferrell Cothran, Judge

A P P E A R A N C E S:

Derek Shoemake, Esquire
Attorney for the Plaintiff

Timothy E. Madden, Esquire
Miles Coleman, Esquire
Attorneys for the Defendant

Krystal J. Smith
Circuit Court Reporter

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>

(No Exhibits Presented)

COURT REPORTER LEGEND

dashes --	intentional or purposeful interruption or change in thought
ellipses . . .	trailing off
[ph]	phonetically written
[sic]	written as said

1 FEBRUARY 9, 2018

2 (WHEREUPON, the proceedings began at 10:55 a.m.)

3 THE COURT: Okay. I'm ready when y'all are.

4 MR. MADDEN: May it please the Court. Your Honor, my
5 name is Tim Madden. I live in Greenville, and I'm happy to
6 be in Manning today.

7 THE COURT: It's a long ride.

8 MR. MADDEN: It is a long ride and it's early in the
9 morning, but I was telling your bailiffs I come through
10 Manning on my way to the beach a good bit, but I never have
11 been in this courtroom. It sure is a beautiful place.

12 THE COURT: Thank you.

13 MR. MADDEN: We appreciate your accommodating us to be
14 heard on this motion in the Branco v. Hull Storey and Sumter
15 Mall matter.

16 As the Court is aware through the correspondence, I
17 became involved in the case obviously after the trial and
18 during this phase since the filing of the motion to
19 reconsider and really for purposes of the appeal, and my
20 partner, Miles Coleman, and I have undertaken to represent
21 the defendants as part of the appellate process.

22 In that regard, our clients have asked us to argue the
23 motion that's before you today and, with the Court's
24 permission, I'll jump into that motion.

25 THE COURT: Okay.

1 MR. MADDEN: I am assuming, but I don't want to ever
2 operate by an erroneous assumption. But I'm assuming that
3 the Court has some of the file from Sumter over here or has
4 the opportunity to obtain it. But if you need me to give you
5 anything, I'm glad to present that to you.

6 THE COURT: Okay. And I don't -- I have -- I've got
7 y'all's motions. I don't have the file itself.

8 MR. MADDEN: Do you have a copy of the order that you
9 signed?

10 THE COURT: Yes.

11 MR. MADDEN: Okay.

12 THE COURT: And I'm -- I'm very familiar with the facts
13 of this case in that this, you know, whole case was unusual
14 from the get-go.

15 MR. MADDEN: Yes, sir.

16 THE COURT: And what -- what turned out in trial was not
17 what I had expected with pretrial conferences from the
18 attorneys and in chambers, and so it totally changed as the
19 testimony came. So . . .

20 MR. MADDEN: Yes, sir. Well -- and that was my next
21 question as to what level of background you wanted me to go
22 into, but with your comments, I'm going to assume you've got
23 a --

24 THE COURT: I -- yeah.

25 MR. MADDEN: -- pretty good memory of the background. I

1 have a copy of the transcript I'll leave with you --

2 THE COURT: Okay.

3 MR. MADDEN: -- if you'd like to have that as you're --
4 as you're looking at it, but with respect to the motion that
5 we have before you, without abandoning anything that we have
6 in our written motion, I'd like to focus the oral argument
7 really on -- on a particular area.

8 And in summarizing that area, it is that the evidence in
9 the record in this case does not support a finding and
10 conclusion that there was a tortious interference with
11 contractual relations.

12 THE COURT: Okay.

13 MR. MADDEN: The reason the evidence does not support
14 that is because there is insufficient evidence to establish
15 the existence of all of the elements of tortious
16 interference. As the Court is aware and as found in the
17 order, there are four elements to a tortious interference
18 case. One is the existence of a valid contract, and that's
19 one that we challenge.

20 THE COURT: Right.

21 MR. MADDEN: Two is the knowledge of the contract by the
22 defendant. I'm going to skip that one.

23 THE COURT: Right.

24 MR. MADDEN: Three is the intentional procurement of the
25 breach. We're going to skip that one.

1 Four is the absence of justification, and we're going to
2 talk about that one.

3 THE COURT: Okay.

4 MR. MADDEN: And five is damages, and today we're not
5 going to talk about that one, but we may talk about that at
6 some other time.

7 THE COURT: Okay.

8 MR. MADDEN: So let's talk about first, because it's a
9 necessary element of getting into it, whether or not there
10 was a valid contract. We submit to you that there was not.

11 In order for there to be a valid contract here, there
12 had to be a contractual agreement between Mr. Branco or Mr.
13 Branco's company, whichever entity it was, and this entity
14 known as BrookTenn for the purchase of these cookie stores in
15 these two malls, and that contract as it was presented to you
16 or that agreement as it was presented to you as a contract
17 was memorialized in Plaintiff's Exhibit 4, and you'll
18 remember Plaintiff's Exhibit 4 was a one-page document that
19 was -- and I'll hand up a copy of that, if you'd like.

20 THE COURT: Okay.

21 MR. MADDEN: But it's a very simple summary, which
22 actually the -- thank you. The testimony by Mr. Applebaum
23 was it was a framework.

24 THE COURT: Okay. I don't have a clerk.

25 MR. MADDEN: If you don't mind, I'll walk it up.

1 THE COURT: Thank you, sir.

2 MR. MADDEN: Thank you, sir.

3 THE COURT: All right.

4 MR. MADDEN: So -- so the testimony was it was a
5 framework. Well, first of all, a framework is not a
6 contract. Just like a memorandum of intent, a memorandum of
7 understanding, a memorandum to enter into a contract is not a
8 contract, a framework is not a contract.

9 So out of the gate, we think reflecting on the law as
10 outlined in that case BCD v. BMW, there's not an enforceable
11 contract in play here. Basically, even if there is a
12 contract though, the essential elements within that document
13 were contingencies, and the contingencies were never
14 satisfied.

15 One of the contingencies that this framework outlines is
16 that this contract was contingent upon -- this agreement was
17 contingent upon the buyer getting a satisfactory lease from
18 Hull Storey Gibson. Okay? Setting aside the technicality
19 that Hull Storey Gibson wasn't the owner of the property. As
20 you know, Sumter Mall was the owner of the property. Setting
21 that aside for a minute, there is no evidence, zero evidence
22 in the record, of a lease agreement between the purchaser,
23 BrookTenn, and Hull Storey of Sumter Mall. Zero.

24 What there is in the record is evidence of
25 communications about the possibility of a lease agreement.

1 What there is in the record are discussions about a proposed
2 lease agreement, but there's zero evidence of the existence
3 of a lease agreement, and that's fatal to a contract being in
4 existence because for there to be a lease agreement, as you
5 know, there has to be a signed lease agreement because
6 otherwise it could violate the statute of frauds.

7 So out of the gate, without the contingency being met,
8 we've lost one of the key elements to interfere -- for
9 tortious interference because there isn't a contract.

10 Secondly, there is no evidence in the record and, in
11 fact, there is evidence to the contrary, that any of those
12 elements in the second half of Plaintiff's Exhibit 4 were
13 ever attempted or effectuated. That's all about the other
14 mall, the Florence store in the Magnolia Mall. And the
15 evidence is clear that BrookTenn made no effort to get a
16 lease from PREIT, who is the -- I assume is the landlord in
17 the Magnolia Mall. There was never a lease of the Magnolia
18 Mall.

19 So to the extent this contract, if that's what it is,
20 has contingencies, these contingencies in two places were
21 never satisfied. And because they were never satisfied,
22 there's not a contract to be interfered with.

23 Given my three-hour drive down here, I'm going to assume
24 for the sake of argument we need to go on to the next one
25 point so that --

1 THE COURT: Okay.

2 MR. MADDEN: And without abandoning that argument, let's
3 talk about the absence of justification.

4 The law says when it comes to tortious interference with
5 contracts that the absence of justification means that the
6 conduct that's complained of is carried out either for an
7 improper purpose or through improper means. Well, improper
8 purpose means malice, spite, bad reasons, bad -- bad stuff.
9 Improper means means violence, intimidation, strong-arm
10 tactics, something that leaves somebody with no reasonable
11 choice. And that comes out of that BCD v. BMW case.

12 We submit to you every action taken by the owners of
13 Sumter Mall in this case was taken for a proper purpose, for
14 a proper reason, and it's called negotiated. These folks own
15 the mall. They're in the business of leasing property.
16 They're in the business of collecting rents, whether those
17 rents and payments associated with leases -- whether those
18 rents or payments come from prepayments, upfront payments,
19 assignment fees, payments for capital improvements, common
20 area maintenance charges, or just regular old -- or overage
21 rents.

22 Whatever it is, as the owners of this asset, their --
23 their mission in life is to collect rents from tenants when
24 those tenants use the space that are their property rights
25 that they are offering out for rent. And so everything that

1 the Sumter Mall people did here was in furtherance of that
2 protection of that property interest and property right.

3 What Sumter Mall did here is it set conditions on the
4 leasing of the property. It said for us to lease this
5 property to BrookTenn, assign -- or to lease it to Branco and
6 assign it to BrookTenn, we need \$20,000. That's our deal.
7 That's our opportunity for you folks. If you want to further
8 this opportunity, that's what we're presenting to you. Pay
9 us the \$20,000; you can have the space under these terms and
10 conditions. And nobody paid them the \$20,000.

11 And what the -- whether that was a fair business deal is
12 not the question. The question is whether it was a tortious
13 business opportunity and whether that was done with an
14 improper purpose. Well, certainly we've eliminated that.

15 Then the question is whether it was done with improper
16 means. There's no evidence in the record of any improper
17 means. The evidence in the record consists of text messages,
18 email messages, descriptions about a few phone calls, but
19 nobody says a gun was held to my head. Nobody said that I
20 was being physically threatened or there was any violence.

21 Sumter Mall was doing what it had every right to do in
22 setting those terms and conditions. The best argument that
23 the plaintiff could have on that is that, if there was a
24 contract, that the Sumter Mall people tried to get the breach
25 of the contract by communicating directly with the BrookTenn

1 folks, and that was Mr. Applebaum.

2 But when the Court looks at the evidence, it doesn't say
3 that even through Mr. Applebaum -- it doesn't say that the
4 Sumter Mall people told them to breach. What it said is that
5 there were discussions about what happens if you don't pay
6 this money, what happens if you don't enter into this
7 agreement, and what could occur if Branco left the equipment
8 in the property and then BrookTenn took it over.

9 So the conclusions, as you wrote them in the order, the
10 findings as you wrote them in the order were somewhat a
11 stretch from the testimony given by Mr. Applebaum and by Mr.
12 White about those communications. Whatever they were, they
13 were part of these ongoing negotiations which occurred over a
14 long period of time in the early part -- in the latter part
15 of 2012 and the early part of 2013.

16 While you or I might have done it differently and while
17 in retrospect I'm sure this crowd would have done it
18 differently, this conduct is not actionable as a tort. This
19 conduct does not create an opportunity or a requirement for
20 Sumter Mall to now pay for a lost business opportunity.

21 Mr. Branco could have saved this business opportunity. For
22 \$20,000, he could have not ever met you. For \$20,000, he
23 could have recognized that part of the price of doing
24 business, however he wanted to share it with the BrookTenn
25 folks, he could have collected a net of 50. It was \$70,000

1 and he would have collected a net of 50, and he would have
2 been on his way. He chose to be stubborn and back out, and
3 that's his right, just like it was Sumter Mall's right to
4 offer the terms under which this property could be let.

5 So we ask you to recognize that the evidence does not
6 support those key elements of tortious interference. There
7 is no contract and, even if there is, it doesn't support the
8 justification prong. And with those findings, you would
9 amend your -- we request that you amend your -- amend your
10 order and there'll be no judgment in favor of the plaintiff.

11 THE COURT: Okay. And the problem that I had at trial,
12 what changed this case, was the testimony of Mr. Applebaum
13 that your people said they banked on the fact that it had
14 been so long for whatever reasons of trying to get this
15 worked through that the plaintiff is not going to come get
16 his equipment. So therefore, you just pay us the 20 and
17 we'll -- and you can just take the store and you're going to
18 save \$50,000 because you don't have to pay him 70. That was
19 -- that was the issue. Short of that, we wouldn't be here
20 today.

21 MR. MADDEN: Yes, sir. I understand. And I'll -- and,
22 of course, I only can rely on the transcript because I wasn't
23 there, and your memory is obviously going to be better than
24 mine, but I'm going to -- I would like to hand you page 91 of
25 the transcript --

1 THE COURT: Okay.

2 MR. MADDEN: -- where Mr. Applebaum testified on that
3 point.

4 THE COURT: Okay.

5 MR. MADDEN: Now, Judge, I can understand how you -- how
6 you could conclude or could think from hearing that that that
7 was something that was nefarious, but look at what Mr.
8 Applebaum is saying. He says yes and no. He says that Paul
9 was going to be leaving that equipment.

10 We don't know if Paul was going to be leaving the
11 equipment or not, but we know that Mr. White in that
12 conversation was negotiating -- was in a position to
13 negotiate about the possibility of this lease. And -- and
14 what he was saying is the reality is if the equipment is
15 there, you already have it and can pick it up and run with
16 it.

17 But balance that testimony with the fact that Mr. Branco
18 testified earlier in the -- in the -- or -- yes, earlier
19 anyway, I think, in the case that this was a whole turnkey
20 operation. So there's no evidence that Mr. Branco was going
21 to do anything other than this, other than leave this
22 equipment there. He never talked about he was going to take
23 that equipment out. He talked about I'm selling it sitting
24 there turnkey. Remember those words that he said?

25 THE COURT: Yeah. But my understanding -- my

1 understanding of that was that that was only if Mr. Applebaum
2 was going to be able to lease it from your client.

3 MR. MADDEN: And --

4 THE COURT: That he -- that it was not a renewal
5 situation. He was -- that's where the \$20,000 came in. It
6 was the \$20,000, you know, renewal situation on assignment
7 fee. That if he was going to assign the lease to Mr.
8 Applebaum, there's a \$20,000 fee.

9 The lease had expired. He wasn't going to assign it.
10 It was all a deal with a new lease that -- that Applebaum had
11 -- if he could acquire a new lease from y'all, then he'd
12 leave all the equipment there and he could start running the
13 company.

14 MR. MADDEN: Right. Back to what I was saying earlier,
15 all of these contingencies that were built into the deal.
16 But remember, Mr. Brown -- the lease had not expired. It
17 went on for a few months past this -- this key date, but
18 Branco had no right to lease something he didn't own.

19 So he -- and our folks, rightfully so, didn't have the
20 -- a need to negotiate with anybody except the existing
21 tenant. So for them to say we'll negotiate with you, Branco,
22 and you can assign it, but there's going to be a \$20,000 fee,
23 that's a legitimate business angle for the Sumter Mall folks
24 to approach it from.

25 THE COURT: My recollection was that the lease had

1 expired or was fixing to expire, and it wasn't a situation
2 that he was renewing it or that he was assigning it. The
3 lease was gone and he -- and he was not going to renew it or
4 assign it. He was going to leave.

5 MR. MADDEN: Yes. But the evidence in the record is
6 that the communications that started back in November of 2012
7 and carried forward over the January time period were
8 initially Mr. Branco -- or Mr. Branco testified that
9 initially his communications with the landlord were the
10 possibility of a renewal for his daughter --

11 THE COURT: Right.

12 MR. MADDEN: -- to run the store.

13 THE COURT: And they wanted --

14 MR. MADDEN: And then later, those communications were
15 -- now, I'm looking at selling it to somebody else.

16 THE COURT: Because he -- they wanted -- your clients
17 wanted him to guarantee his daughter, and after he looked --

18 MR. MADDEN: That's right.

19 THE COURT: -- at the financial aspect --

20 MR. MADDEN: He said I'm not doing it.

21 THE COURT: I'm not doing that.

22 MR. MADDEN: That's right.

23 THE COURT: So he decided he was just going to sell it,
24 was not going to renew the lease, and he was going to sell
25 his equipment. And -- and his testimony, as I recall, was he

1 was just trying -- y'all were going to have an empty space.
2 He was going to give y'all a new tenant who was going to come
3 in and obviously be able to use this equipment. So it was
4 going to be a win for y'all and a win for him.

5 But the -- the problem with the whole thing was the
6 \$20,000 that your client kept insisting that it was an
7 assignment fee. And that -- that was what threw the monkey
8 wrench in this whole deal, which I still think was fine.
9 Your client had a right to argue that, but it wasn't an
10 assignment fee. They could charge Mr. Applebaum 20-more
11 thousand dollars to lease it. He probably wasn't going to
12 take that.

13 It just crossed the line in my opinion when they went to
14 him and said, listen, you just hold tight. He's not going to
15 get this equipment. We'll -- we'll, you know, circumvent
16 y'all's contract and give you the equipment. All you've got
17 to do is pay us \$20,000 and you get the whole nine yards and
18 beat him out of -- you're saving 50 and beating him out of
19 70.

20 MR. MADDEN: Yes.

21 THE COURT: That's how I got to where I was because of
22 that issue.

23 MR. MADDEN: Yes, sir. And respectfully, the -- the --
24 the transcript does not reveal that the facts were as you
25 just described them, but rather the transcript reveals in

1 that page 91 the communication, according to Mr. Applebaum,
2 that was had. And taking that communication into context of
3 the overall back and forth, the fact that there was a
4 document being passed back and forth, I think it's a -- it's
5 a stretch to go from -- to go to the point of tortiously
6 interfering because we know -- we know that Sumter Mall had
7 no way of knowing whether Paul Branco was going to leave his
8 equipment there or not.

9 I mean these are sophisticated business people, and
10 certainly Mr. Applebaum didn't want the space unless the
11 equipment was there, and the deal fell apart. We understand
12 that, but it's not rising to the level of a tortious
13 interference.

14 THE COURT: Okay.

15 MR. MADDEN: Thank you, sir.

16 THE COURT: Thank you. Yes, sir?

17 MR. SHOEMAKE: Your Honor, my name is Derek Shoemake.
18 I'm here for Mr. Branco, along with Mr. Killen.

19 If it's okay with Your Honor, I made some procedural
20 arguments that I'd like to reserve the right to address these
21 points. That way it flows a little better.

22 THE COURT: Okay.

23 MR. SHOEMAKE: If that's all right with Your Honor.

24 So, you know, the issues that they take issue with is
25 the existence of a valid contract and the absence of

1 justification.

2 I would notice -- note that in terms of the existence of
3 a valid contract, we are here on this Rule 52 motion, and
4 that's not referenced anywhere in the Rule 52 motion that I
5 can -- the way I read it, any argument about the existence of
6 a valid contract in terms of taking issue with the final
7 order. I would just note that that's not in there.

8 But to the extent we look at that, Your Honor, I mean we
9 have here -- you know, one thing I would like to note is, as
10 noted in the record here, is that we're not dealing with an
11 attorney-drafted contract. This is two business folks trying
12 to draft one contract and, you know, the elements -- the
13 essential elements of a contract is you have mutual promises.
14 You have one party saying, you know, I promise that I'll get
15 a lease and pay you 70,000, and the other guy says I promise
16 I'll give you my stuff. You have a mutual exchange of
17 promises.

18 You found as a matter -- you found as a matter of fact
19 there was a meeting of the minds. You made factual findings.
20 So we think there was a contract.

21 In terms of the justification, Your Honor, basically
22 what you have is they're saying, you know, because there was
23 this lease approval, we had the ability to effectively do
24 whatever we wanted. And, you know, Your Honor, they didn't
25 have the discretion to do what they did, which is to demand

1 the 20,000 that really they were not entitled to.

2 Then they change the agreement for the reason -- or the
3 reason that they demanded the 20, and then they specifically
4 induced a third party to walk away. And, Your Honor, you
5 were handed up page 91, and I would note that if you continue
6 to read page 91, Mr. Applebaum says they assumed Paul was
7 going to leave that, and that's -- Your Honor, you made a
8 credibility finding and he was credible.

9 The second piece he says -- upon questioning, he says
10 his objection was, you know, rather than \$70,000, you give us
11 20. You're 50 grand ahead. He says that's correct. So I
12 think if you read the entirety of the page, you find that
13 justification.

14 Your Honor, they mentioned the absence of sort of a, you
15 know, bad faith or, you know, justification and, again, I
16 would notice here that they could have waited out the lease.
17 There was a couple months left, and then they could've went
18 and done whatever they wanted with it. Instead, knowing
19 there was this agreement in place, they reached out to Mr.
20 Applebaum to say, you know, you should -- you should come to
21 us.

22 There's a case they cite, Webb v. Elrod, for this
23 proposition they have a legitimate business purpose. If you
24 really open that case up, what you see is that in that case
25 the third party there never suggested that the person back

1 out of the contract. And what that case really stands for --
2 and I cite that in my response in opposition.

3 What that case really stands for is also the inverse
4 proposition, the idea that in Webb that party never reached
5 out to the third party and said you know what you need to do?
6 You need to come to me or either break the contract and come
7 out ahead. And that's what happened here, which makes this
8 case a little bit different, Your Honor.

9 And so -- and again, I could go on, but I think that
10 summarizes it and I can follow it up if you need it. That
11 summarizes why I think the substance is wrong and, Your
12 Honor, we circle back to the preserved point.

13 You know, we believe that under Rule 52, you're supposed
14 to file these motions after a judgment is entered. Here, it
15 was filed before, ten days elapsed, nothing was filed, and I
16 think if you look at the text of your order, it actually
17 addresses a lot of the stuff they put in, and a lot of the
18 arguments they took, you obviously reflected on. So even if
19 it is timely filed, we'd argue that it's moot because you
20 inherently considered that in issuing your order.

21 So we believe it's untimely, it's moot, and we don't
22 believe on the substance they win.

23 THE COURT: Thank you, sir.

24 MR. SHOEMAKE: Thank you, Your Honor.

25 MR. MADDEN: Mr. Coleman is going to argue in response.

1 THE COURT: Okay.

2 MR. COLEMAN: Thank you, Your Honor. May it please the
3 Court.

4 Miles Coleman, and I'll respond briefly, if I may, to
5 Mr. Shoemake. It may make more sense if I take it in the
6 reverse order that he did, if that's not excessively
7 confusing.

8 I'll start with the -- with the procedural point that
9 he's made, whether this motion is properly before you. Your
10 Honor, I think that's easily disposed of. That's the same
11 argument Mr. Shoemake -- or technically Mr. Warren at the
12 time, his former colleague, made to the Court of Appeals, and
13 the Court of Appeals rejected that argument and sent it back
14 down.

15 If you'll indulge me, let me read just a short excerpt
16 from the appellate brief that I think will take care of this
17 simply enough. This was the argument that we, Hull Storey,
18 made to the Court of Appeals arguing that this motion should
19 properly be heard and ruled on by Your Honor.

20 We argue there's no jurisdictional twilight zone whereby
21 this court, the Court of Appeals, sends the matter back to
22 the trial court, but the trial court refuses to rule on the
23 motion. Either the motion is pending, in which case the
24 Court of Appeals should send it back, or it's not, in which
25 case they should keep it. And that is, in fact, of course,

1 what the Court of Appeals did in ruling.

2 And again, if you'll indulge me to read from their
3 order?

4 THE COURT: Certainly.

5 MR. COLEMAN: That the appeal will be held in abeyance
6 pending the Circuit Court's resolution of the motions. I
7 think there's no question it's properly before you and is
8 appropriate for a ruling.

9 As to the two substantive points that Mr. Shoemake made
10 just a moment ago, first was that we did not in the Rule 52
11 motion challenge the existence of the contract. I would
12 respectfully disagree with that and I think you'll note on
13 the first and second pages of that Rule 52 motion we pointed
14 out that the -- that the alleged contract at issue is
15 contingent upon the existence of a lease agreement, and we go
16 on to argue that that lease agreement never came to be.

17 I think that pretty clearly argues in the Rule 52 motion
18 and it makes it appropriate now for us to argue today that
19 there was no contract, never consummated, with which Hull
20 Storey could interfere.

21 The -- the second point that Mr. Shoemake made that I
22 again would respectfully disagree with -- he argued that in
23 the Webb v. Elrod case, it's distinguishable from this case.
24 He said that in Webb v. Elrod the -- the acting party, the
25 party who allegedly committed the tort, did not reach out to

1 affirmatively take the initiative to reach out to and try to
2 procure a breach, but that, again according to Mr. Shoemake,
3 here that is what we did.

4 I would argue that that's not what happened here. Hull
5 Storey didn't take the initiative and on its own go out, find
6 BrookTenn, and encourage them to breach a contract. In fact,
7 what happened is that over a period of months, Mr. Branco was
8 negotiating with Hull Storey and, without telling Hull
9 Storey, was passing along those terms and that information to
10 BrookTenn.

11 It was then BrookTenn who took the initiative of filing
12 an approval application. They were the ones who made the
13 first contact. The negotiations were already underway, and
14 then, of course, communications occurred between the parties.

15 And as Mr. Madden has argued already, it was in the
16 course of that negotiation that Mr. Shoemake and Mr. Branco
17 are arguing rose to the level of a tortious interference.

18 I bring that up merely to say that I think this case is
19 not distinguishable from Webb v. Elrod. I think they're
20 analogous. We weren't the ones -- we, Hull Storey -- who
21 affirmatively went out and tried to look for a contract to
22 disrupt. We didn't go out looking with the intent to procure
23 a breach of the contract. Instead, it was BrookTenn who
24 approached us and then, in the course of negotiations, the
25 deal fell apart.

1 Unless Your Honor has any further questions and unless
2 Mr. Madden has anything to add, I'll take my seat.

3 THE COURT: Okay. Yes, sir?

4 MR. SHOEMAKE: Your Honor, very, very briefly. I would
5 just make two very quick points.

6 On the procedural issue, there is a motion that was
7 filed. That is a fact that can be looked up on the docket.
8 My argument is that motion wasn't timely filed.

9 And to the extent the Court of Appeals sent it back,
10 I've noticed that the Court of Appeals never rejected or
11 accepted any argument. They simply sent a one-paragraph
12 order to give Your Honor the discretion to address this
13 motion pending on the docket as you saw fit.

14 The other issue -- I think the factual issues speak for
15 themselves. I think I've already addressed the argument; so
16 I don't think I need to beat that dead horse unless Your
17 Honor wants to hear more.

18 THE COURT: No.

19 MR. SHOEMAKE: Thank you, Your Honor.

20 THE COURT: Okay. I'll -- I'll let y'all know. I'll
21 read these cases again. I read everything in y'all's brief
22 and read all these cases.

23 I just distinguish -- you know, there's \$20,000. And my
24 recollection -- and it's been a while -- that the lease had
25 ended or that the lease was going to end. Do y'all -- the

1 lease is not -- I mean I understand it was about to end, but
2 did he let y'all know he wasn't going to renew it in some
3 way?

4 The big issue was y'all were trying to collect an
5 assignment fee, and he was not going to assign the lease.
6 The lease -- he was going to let the lease terminate, and
7 that the new tenant would have to negotiate a lease with Hull
8 Storey.

9 And it's that -- because my recollection -- the \$20,000
10 was assignment. If you took the -- in a normal lease, if a
11 new tenant came in, that \$20,000 wouldn't be on the table.
12 It would be a lease in terms of whatever, but the fact that
13 it was an assignment is when they're entitled to collect the
14 20 and, you know, all of that would have been fine until then
15 at the end.

16 And that's what Mr. Applebaum testified to, and his
17 testimony was critical in that he said the reason he walked
18 away is he thought that your clients were being unethical in
19 trying to sabotage the contract he had with the plaintiff,
20 and that he wasn't going to do business with people who would
21 do something like that and that's why he walked away from it.

22 It cost them, you know, their profit. I mean that's
23 what -- but for that action, we've got people negotiating a
24 lease and maybe, you know -- and your clients had a right to
25 negotiate with anything they wanted to with the new tenant,

1 but that wasn't seeming what was happening in trial, and
2 Applebaum's testimony is what swayed everything for me. If
3 he hadn't have come and testified, this case would have been
4 totally different, but I'll -- I'll look at it again.

5 MR. MADDEN: Thank you, Your Honor.

6 MR. SHOEMAKE: Thank you, Your Honor.

7 MR. MADDEN: And I'll be glad to leave you with a copy
8 of the transcript if you'd like.

9 THE COURT: That would be nice. It would save me from
10 having to get one.

11 MR. SHOEMAKE: Your Honor, do you have a copy of my
12 filed response as well?

13 THE COURT: I have -- yeah. I have a copy of the
14 response to his motion. Yeah. Thank you.

15 MR. MADDEN: Yes, sir. Thank you.

16 THE COURT: I'll read this again and be sure my memory
17 is correct.

18 MR. SHOEMAKE: Here you go, Judge. I just want to make
19 sure you have this. This is the memo.

20 THE COURT: Okay. And I --

21 MR. SHOEMAKE: Your Honor, I'd like to pass this up,
22 just to make sure.

23 THE COURT: Sure.

24 MR. SHOEMAKE: That's our brief response.

25 THE COURT: On this one? You want this one? I've got

1 it. There's two copies. Do you need this back? Because
2 obviously, the one you gave me has got page 91 in it.

3 MR. MADDEN: If it has 91 in it --

4 THE COURT: Yeah.

5 MR. MADDEN: -- I'll take that.

6 THE COURT: Yeah. Because you may need it. Yeah, I got
7 a copy of that.

8 MR. MADDEN: Thank you, sir.

9 THE COURT: Thank y'all.

10 MR. SHOEMAKE: Thank you, Your Honor, for taking time
11 out of your day to see us here today.

12 MR. COLEMAN: Thank you, Judge.

13 MR. MADDEN: Yes, sir. Thank you.

14 (WHEREUPON, the proceedings ended at 11:28 a.m.)

15

16 --- END REQUESTED TRANSCRIPT ---

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1 State of South Carolina)
2) Certificate
3 County of Florence)
4

5 I, the undersigned, Krystal J. Smith, Notary Public and
6 Official Court Reporter for the Twelfth Judicial Circuit of
7 the State of South Carolina, do hereby certify that the
8 foregoing pages, numbered 1 through 28, constitute a true,
9 accurate, and complete Transcript of Record of all the
10 proceedings had and evidence introduced in the hearing of the
11 above captioned case, relative to appeal, in the Court of
12 Common Pleas for Sumter County, South Carolina, held in
13 Manning, South Carolina, on the 9th day of February, 2017.

14 I do further certify that I am neither of kin, counsel,
15 nor interest to any party hereto.

16
17 Krystal J. Smith

18 Court Reporter

19
20 Florence, South Carolina

21 March 26, 2018

22 **NOTE:** PURSUANT TO RULE 607(h)(1)(B), SCACR, "A COURT REPORTER SHALL RECEIVE THE FEE OF \$.75
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KRYSTAL J. SMITH, COURT REPORTER
12TH CIRCUIT AT LARGE
P.O. BOX 13563
FLORENCE SC 29504

Plaintiff
Ex 1

LEASE AGREEMENT

By and Between

Sumter Mall, LLC, as Landlord,

and

Paul J. Branco and Anne Branco, jointly and severally, as Tenant

for

Unit # 55

in

Sumter Mall Shopping Center

Sumter, South Carolina

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This Lease Agreement, made and entered into this 20 day of December 2002
("Commencement Date") by and between the Landlord and the Tenant hereinafter named.

BASIC LEASE PROVISIONS:

1. **Landlord:** Sumter Mall, LLC
2. **Landlord's Address:**
c/o Hull Storey Retail Group
3632 Wheeler Road
Augusta, GA 30909
P.O. Box 204227
Augusta, GA 30917-4227
Phone (706)863-2222, Fax (706)868-7457
3. **Tenant:** Paul J. Branco and Anne Branco, jointly and severally
4. **Tenant's Address:** 436 Guildford Circle
Florence, SC 29501
5. **Tenant's Trade Name:** Great American Cookie Company
6. **Premises:** Unit # 55 in Sumter Mall Shopping Center, in the City of Sumter, Sumter County, State of South Carolina (hereinafter called the "Shopping Center"); and being a store unit of approximately 650 square feet of floor area. The Premises is shown in the approximate location cross-hatched on the site plan attached hereto as Exhibit "A".
7. **Lease Term:** Commencing on the Rent Commencement Date and expiring on the last day of the month containing the day before the tenth (10th) anniversary of the Rent Commencement Date
8. **Target Delivery Date:** January 31, 2003
9. **Rent Commencement Date:** The earlier of ninety (90) days after Landlord delivers the Premises to Tenant or upon the date that Tenant opens for business whichever occurs first.
10. **Minimum Rent:**

Years 1-3:	\$2,416.67 per month
Years 4-7:	\$2,583.33 per month
Years 8-10:	\$2,750.00 per month
11. **Percentage Rent Rate:** 8% **Breakpoint:**

Years 1-3:	\$300,000.00
Years 4-7:	\$325,000.00
Years 8-10:	\$350,000.00
12. **Prepaid Rent:**

First month's Minimum Rent:	\$2,416.67
CAM, Insurance:	\$-0-
Taxes:	\$-0-
13. **Security Deposit:** \$2,416.67
14. **Common Area Maintenance, Taxes and Insurance Contribution:** \$-0- per month.
15. **Permitted Use:** Tenant shall use Premises solely for the purpose of the retail sale of Great American Cookie Company cookies, cookie cakes, ice cream, soft drinks, slushees, cookie tins and baskets, pretzel time pretzels and pretzel items and for no other purposes whatsoever.
16. **Promotional Fund:** \$41.66 per month
17. **Sanitation:** \$14.63 per month
18. **Brokers:** N/A

Each of the foregoing definitions and basic provisions shall be construed in conjunction with and limited by the references thereto in the General Lease Provisions and the other provisions of this Lease. In the event of a conflict between the Basic Lease Provisions and the General Lease Provisions and other

1.1 Demise. In consideration of the obligation of Tenant to pay rent as herein provided and in consideration of the other terms, covenants and conditions hereof, Landlord hereby demises and leases to Tenant, and Tenant hereby takes from Landlord, the Premises, TO HAVE AND TO HOLD said Premises for the Lease Term, and upon the terms and conditions set forth in this Lease.

1.2 Reserved Easement. Landlord shall have the exclusive right to use all or any part of the roof of the Premises for any purpose; to erect additional stories or structures over all or any part of the Premises; and to erect in connection with the construction thereof temporary scaffolds and other aids to construction on the exterior of the Premises, provided that access to the Premises shall not be denied. Landlord shall have the right during the Lease Term to install, relocate, maintain and operate columns, shafts, ducts, pipes, conduits, facilities and structures comprising the HVAC system and/or permitting the conveyance of utilities and mechanical systems in and through the space above the ceiling in the Premises.

1.3 Lease Term. This Lease shall become fully effective and binding as of the Effective Date. The "Lease Term" means that period commencing on the Commencement Date and continuing through the Expiration Date, unless sooner terminated as provided in this Lease or by law or unless extended in accordance with the provisions of the Basic Lease Provisions (if applicable).

1.4 Ratification of Dates. At any time following the Rent Commencement Date, Landlord may furnish to Tenant a letter agreement that will set forth and ratify the Rent Commencement Date and the expiration date of the Lease Term, and Tenant agrees to execute and return the same to Landlord within thirty (30) days after receipt.

ARTICLE II - OCCUPANCY AND ACCEPTANCE OF PREMISES:

2.1 Acceptance of Premises. By occupying the Premises, Tenant shall be deemed to have inspected and accepted the same and to have acknowledged that the same comply fully with Landlord's covenants and obligations hereunder. It is hereby acknowledged by Tenant that the Premises are Leased to the Tenant on an "AS IS, WHERE IS" basis, without any representations or warranties, express or implied.

2.2 Delivery. If Landlord does not deliver possession of the Premises to Tenant or complete any of Landlord's Work on or before the Target Delivery Date for any reason, Landlord shall not be subject to any liability therefor. Such failure of delivery shall not affect the validity of this Lease or the obligations of Tenant hereunder. If Landlord does not deliver possession of the Premises to Tenant within ninety (90) days after the Target Delivery Date for any reason (including, without limitation, Landlord's inability to terminate any existing occupancy of the Premises), Landlord may at any time terminate this Lease without liability by delivering written notice to Tenant with no further obligations thereafter accruing from Landlord to Tenant. In all events, if Landlord does not deliver possession of the Premises to Tenant for any reason within twelve (12) months after the Target Delivery Date, then this Lease shall terminate and neither party shall have any further liability to the other.

ARTICLE III - RENT:

3.1 Minimum Rent: Minimum Rent shall accrue hereunder from the Commencement Date, and shall be payable to Landlord at Landlord's Address. Minimum Rent shall be payable in advance, without notice, demand or offset. Tenant shall pay Minimum Rent in monthly installments in the amounts specified in the Basic Lease Provisions. The Prepaid Rent set forth in the Basic Lease Provisions shall be due and payable upon the execution of this Lease Agreement, and all other installments of Minimum Rent shall be due on the first day of each calendar month succeeding the Commencement Date during the Lease Term. If the Commencement Date is other than the first day of the calendar month, then the Minimum Rent for such fractional month shall be prorated based on the ratio of number of days remaining in such calendar month to the number of days in such calendar month. If Landlord adds a fifth (5th) anchor store to the Shopping Center, Minimum Rent and Percentage Rent shall increase by ten percent (10%) upon the opening of each such anchor store.

3.2 Percentage Rent: In addition to the Minimum Rent, Tenant shall also pay Percentage Rent for each calendar year during the Lease Term in an amount equal to (i) the Gross Sales made in or from the Premises during such calendar year less the Breakpoint multiplied by (ii) the Percentage Rent Rate. Percentage Rent shall be paid annually, without notice, demand or offset, and shall be due on or before the sixtieth (60th) day following the end of such calendar year. If this Lease should commence on a date other than the first day of a calendar year or terminate on a date other than the last day of a calendar year, Percentage Rent for such partial calendar year following the Commencement Date or preceding the termination date, as the case may be, shall be paid on the

other receipts whatsoever of all business conducted in or from the Premises, including mail, telephone, catalogue or internet orders made from, received or filled at the Premises, deposits not refunded to purchasers, sales to employees, sales through vending machines or other devices, and sale upon installment or credit shall be treated as a sale for the full price in the month during which such sale was made, irrespective of the time when Tenant receives payment from its customer. No deduction shall be allowed for uncollected or uncollectible credit accounts. Gross Sales shall not include, however, any sums collected and paid out for any sales or excise tax imposed by any duly constituted governmental authority, nor shall it include the exchange of merchandise between the stores of Tenant, if any, where such exchanges are made solely for the convenient operation of the business of Tenant and not for the purpose of consummating a sale which has heretofore been made in or from the Premises and/or for the purpose of depriving Landlord of the benefit of a sale which otherwise would be made in or from the Premises, nor the amount of returns to shippers or manufacturers, nor the amount of any cash or credit refund made upon any sale where the merchandise sold, or some part thereof, is thereafter returned by purchaser and accepted by Tenant, nor sales of Tenant's fixtures. If during the Lease Term, within a radius of three (3) miles from the perimeter of the Shopping Center, Tenant or any entity controlled by, controlling or under common control with Tenant, directly or indirectly, operates or owns a business under Tenant's Trade Name or otherwise directly or indirectly operates or owns any similar type of business not so operated or owned on the date Landlord executed this Lease, then while Tenant or such entity is directly or indirectly owning or operating said other business, Tenant shall include the Gross Sales of such other business in the Gross Sales made from the Premises for the purpose of computing the Percentage Rent due hereunder.

3.4 Late Payment. In the event any payment of Minimum Rent, Percentage Rent or Common Area Maintenance, Taxes and Insurance Contribution is received more than five (5) days after the due date for any reason whatsoever it is agreed that the Minimum Rent for the month shall be increased by an amount equal to ten (10%) percent of the late payment. If any Minimum Rent, Percentage Rent or Common Area Maintenance, Taxes and Insurance Contribution shall remain unpaid for thirty (30) days after the Rent payment is due, the late payment for that month shall be further increased by an additional ten (10%) percent (for a total of 20%). Any such increases shall be payable as Additional Rent hereunder and shall be payable immediately on demand. If any such increase in Additional Rent is payable more than twice during any calendar year, the Landlord may cancel the Lease by giving thirty (30) days written notice to Tenant. If twice during the Lease Term a check of Tenant's shall not be paid by Tenant's bank immediately upon presentation, Landlord may require, by giving written notice to Tenant (and in addition to any penalty arising out of the above), that all future rent payments are to be made by cash, cashier's check, or money order, and that the delivery of Tenant's personal or corporate check will no longer constitute a payment of rent provided in this Lease. Any acceptance by personal or corporate check thereafter by Landlord shall not be construed as a subsequent waiver of said rights.

ARTICLE IV - SALES REPORTS AND RECORDS:

4.1 Sales Reports. On or before the twentieth (20th) day of each calendar month during the Lease Term, Tenant shall deliver to Landlord a statement of Gross Sales made during the preceding calendar month. In addition, within sixty (60) days after the expiration of each calendar year and within sixty (60) days after the termination of this Lease, Tenant shall deliver to Landlord statement of Gross Sales during the preceding calendar year (or partial calendar year), certified to be correct by the owner. Tenant shall furnish similar statements for its licensees, concessionaires and subtenants, if any. All such statements shall be in such form as Landlord may require. Tenant shall, at the request of Landlord, make available to Landlord the quarterly store sales reports of Tenant for any period during the Lease Term. In addition to all other information provided by Tenant, Tenant shall provide a copy of the form used to report sales to the state tax commission of the state within which the Premises are located.

4.2 Books and Records. Tenant shall keep in the Premises or at some other location in the city where the Premises are located a permanent and accurate set of books and records of all sales of merchandise and revenue derived from business conducted in the Premises and all supporting records such as tax reports and banking records. All such books and records shall be retained and preserved for at least twenty-four (24) months after the end of the calendar year to which they relate and shall be subject to inspection and audit by Landlord and its Agents at all reasonable times.

4.3 Landlord's Audit Rights. In the event Landlord is not satisfied with the statement of Gross Sales submitted by Tenant, Landlord shall have the right to have its auditors make a special audit of all books and records, wherever located, pertaining to sales made in or from the Premises. If such statements are found to be incorrect to an extent of more than four (4%) percent over the figures submitted by Tenant, Tenant shall pay for such audit. Tenant shall promptly pay to Landlord any deficiency or Landlord shall promptly refund to Tenant any overpayment (to the extent such

including, among other facilities, parking areas, sidewalks, landscaping, curbs, truckways, delivery passages, loading areas, malls, public toilets, public meeting rooms, private street and alleys, lighting facilities, drinking fountains and the like, but excluding space in buildings designed for rental or commercial purposes as the same may exist from time to time, and further excluding streets and alleys maintained by a public authority. Landlord reserves the right to change from time to time the size, dimensions and location of the Common Area, as well as the size, dimensions, identity and type of any buildings in the Shopping Center and to build additional buildings and improvements in the Shopping Center. Tenant, and its employees, customers and invitees shall have the nonexclusive right to use the Common Area as constituted from time to time, such use to be in common with Landlord, other tenants of the Shopping Center and other persons entitled to use as Landlord may from time to time prescribe. Tenant shall not take any action which would interfere with the rights of other persons to use the Common Area. Landlord may temporarily close any part of the Common Area for such periods of time as may be necessary to prevent the public from obtaining prescriptive rights or to make repairs or alterations.

5.2 Maintenance. Landlord shall be responsible for the maintenance of the Common Area, the manner of maintenance and the expenditures therefor shall be in the sole discretion of Landlord.

5.3 Tenant's Common Area Maintenance Contribution. Intentionally omitted.

ARTICLE VI - USE AND CARE OF PREMISES:

6.1 Permitted Use. The Premises may be used only for the Permitted Use specified in the Basic Lease Provisions, and for no other purpose. Tenant shall use in the transaction of business in the Premises the Tenant's Trade Name specified in the Basic Lease Provisions and no other trade. Tenant shall not at any time leave the Premises vacant, but shall in good faith continuously operate throughout the Lease Term conduct and carry on its fully stocked and staffed business in the entire Premises for the Permitted Use. Tenant shall operate its business in an efficient and reputable manner so as to produce the maximum amount of sales from the Premises. Tenant shall not use the Premises in any manner which would violate the exclusive of any other existing Tenant as same are listed in Exhibit "D" attached hereto and incorporated herein by this reference. Tenant shall procure at its sole expense any permits and licenses required for the transaction of business in the Premises.

6.2 Tenant's Use and Insurance. Tenant shall not, without Landlord's prior written consent, keep anything within the Premises or use the Premises for any purpose which increases the insurance premium cost or invalidates any insurance policy carried on the Premises or other parts of the Shopping Center. All property kept, stored or maintained within the Premises by Tenant shall be at Tenant's sole risk.

6.3 Noxious Use. Tenant shall not permit any objectionable or unpleasant odors nor any sounds to emanate from the Premises; nor place or permit any radio, television, loudspeaker or amplifier on the roof or outside the Premises or where the same can be seen or heard from outside the building; nor place any antenna, awning or other projection on the exterior of the Premises; nor take any other action which would disturb or endanger other tenants of the Shopping Center or unreasonably interfere with their use of their respective Premises; nor do anything which would tend to injure the reputation of the Shopping Center.

6.4 Maintenance. Tenant shall take good care of the Premises and keep the same free from waste at all times. Tenant shall keep the Premises and sidewalks, serviceways and loading areas adjacent to the Premises neat, clean and free from dirt and rubbish at all times, and shall store all trash and garbage within the Premises, and removal of garbage and trash shall be made only in the manner and areas prescribed by Landlord. Tenant shall not operate an incinerator or burn trash or garbage within the Shopping Center. The Tenant is responsible for its own pest control service for the Premises.

6.5 Prohibited Uses. Tenant shall not use the Premises, or permit or fail to prevent the Premises to be used, (a) for any purpose or in any manner that violates any laws, ordinances, or governmental regulations or which is a public or private nuisance or which would result in an increase in Landlord's insurance premiums for the Shopping Center, (b) for the sale or display of pornography, nudity, graphic violence, drug paraphernalia, or any goods and/or services that, in the sole and absolute discretion of Landlord, are inconsistent with the image of a family-oriented shopping center, (c) as a massage parlor, adult bookstore or second-hand store, or (d) to conduct an auction, distress, fire, bankruptcy or going-out-of-business sale or similar sales.

6.6 Display Windows. Tenant shall maintain all display windows in a neat, attractive condition, and shall keep all display windows, exterior electric signs and exterior lighting under any

treat, dispose or permit the escape or release on, under, about or from the Premises, or any part thereof, of any Hazardous Materials. If Tenant's Permitted Use requires the use and/or storage of any Hazardous Materials on, under or about the Premises, Tenant shall fully and promptly comply with all Hazardous Materials Laws at all times during the Lease Term, and at the expiration or earlier termination of the Lease Term, Tenant shall remove and dispose of all Hazardous Materials affecting the Premises and the Shopping Center resulting from the use or occupancy thereof by Tenant or Tenant's agents, employees, suppliers, contractors, subtenants, successors and assigns.

(b) **Indemnity.** Tenant shall indemnify, protect, defend and hold Landlord (and Landlord's partners, joint venturers, shareholders, affiliates and property managers, and their respective officers, directors, employees and agents) and Landlord's Mortgagee harmless from and against any and all Claims arising out of, in connection with, or directly or indirectly arising out of the use, generation, manufacture, production, storage, treatment, release, disposal or transportation of Hazardous Materials by Tenant, or any successor, assignee or sublessee of Tenant, or their respective agents, contractors, employees, licensees, or invitees, on, under, about or from the Premises or the Shopping Center. Any defense of Landlord pursuant to the foregoing indemnity shall be by counsel reasonably acceptable to Landlord. Tenant's obligations hereunder shall survive the termination or expiration of this Lease.

(c) **Reporting.** Tenant shall notify Landlord in writing, immediately after any of the following: (i) Tenant has knowledge, or has reasonable cause to believe, that any Hazardous Material(s) have been released, discharged or located on, under or about the Premises or the Shopping Center, or (ii) Tenant receives any warning, notice of inspection, notice of violation or alleged violation, or Tenant receives notice or knowledge of any proceeding, investigation, order or enforcement action, under any Hazardous Materials Law regarding the Premises or the Shopping Center.

(d) **Definitions.** "Hazardous Materials" means any chemical, compound, material, substance or other matter: (a) defined as a hazardous substance, hazardous material or waste, or toxic substance under any Hazardous Materials Law, (b) regulated, controlled or governed by any Hazardous Materials Law or other legal requirements, (c) petroleum or a petroleum product, or (d) asbestos, formaldehyde, or radioactive material. "Hazardous Materials Laws" means any and all legal requirements relating to Hazardous materials or environmental conditions on, under or about the Premises or the Shopping Center.

ARTICLE VII - MAINTENANCE AND REPAIRS:

7.1 **Landlord's Obligations.** Landlord shall at its expense maintain only the roof, foundation, and the structural soundness of the exterior walls of the Premises, specifically excluding those items to be maintained by Tenant pursuant to Section 7.2 below, in good repair and condition except for reasonable wear and tear and except that Landlord shall not be required to make any repairs occasioned by the act or negligence of Tenant, its agents, employees, sub-tenants, licensees, concessionaires and invitees. Tenant shall give immediate written notice to Landlord of the need for repairs performable by Landlord and Landlord shall not be responsible for failure to make any such repair until a reasonable time after such notice. Landlord's liability for such repairs shall be limited to the cost of such repairs.

7.2 **Tenant's Obligations.** Tenant shall keep the Premises in good clean condition and make all needed repairs and replacements to the Premises, including without limitation, to the glass; windows, doors, and other exterior openings; door, window and other openings and closing devices; window, door and other frames, moldings, lock and hardware; lighting, electrical, heating, air conditioning and plumbing systems, fixtures, ducts, conduits; fire protections and sprinkler systems; pipes, wiring in, under and above the Premises, and installations, electrical, plumbing, and other utility outlets, fixtures, bulbs, tubes and other parts between the Premises and the curb in front of and behind the Premises (including any such items in, on and under any canopy), but specifically excluding those items to be maintained by Landlord pursuant to Section 7.1 above. In addition, Tenant shall make any repairs to the Premises or the Shopping Center occasioned by the act or negligence of Tenant, its agents, employees, sub-tenants, licensees, concessionaires and invitees. With respect to the HVAC system, Tenant shall contract with a qualified air conditioning service company approved by Landlord for the monthly maintenance and the repair and replacement, as necessary, of the HVAC system. Should it become necessary for Tenant to replace or substantially disturb any HVAC unit serving the Premises, and such unit is presently located on the rooftop, Tenant shall notify Landlord and replacement shall require submittal to Landlord of equipment data and design, and Landlord shall require that any new or replacement unit shall be one designed for "rooftop" installation. Tenant shall keep and maintain the Premises in a clean, sanitary and safe condition in accordance with applicable law and all directions, rules and regulations of the health officer, fire marshal, building inspector or other proper officials of the governmental agencies having jurisdiction and Tenant shall comply with all

surrender the Premises in good order, condition and repair, reasonable wear and tear excepted. Tenant, at its own expense, shall install and maintain such fire extinguishers and other fire protection devices as may be required from time to time by any agency having jurisdiction thereof or by the insurance underwriter insuring the building in which the Premises are located.

If any repairs required to be made by Tenant under this Lease are not made within ten (10) days after written notice delivered to Tenant by Landlord, Landlord may at its option make such repairs without liability to Tenant for any loss or damage which may result to Tenant's stock or business by reason of such repairs, and Tenant shall pay the Landlord upon demand as Additional Rent hereunder the cost of such repairs plus interest at the Interest Rate from the date of payment by Landlord until repaid by Tenant.

ARTICLE VIII - ALTERATIONS:

8.1 **Alterations.** Tenant shall not make any alterations, additions or improvements to the Premises without the prior written consent of Landlord, except for the installation of unattached, movable trade fixtures which may be installed without drilling, cutting or otherwise defacing the Premises. All alterations, additions, improvements and fixtures (other than unattached, movable trade fixtures) which may be made or installed by either party upon the Premises including any floor covering cemented or adhesively attached, shall remain upon and be surrendered with the Premises and become the property of Landlord at the termination of this Lease, unless Landlord requests their removal in which event Tenant shall remove the same and restore the Premises to their original condition at Tenant's expense.

8.2 **Required Remodeling.** Tenant shall retain the services of a registered architect or store planner to assist it with the development of plans, specifications and sample boards pertinent to the renovation of Tenant's Premises. Thereafter, subsequent to Landlord's approval thereof and subject to the terms and conditions of Exhibit C attached hereto and made a part hereof, Tenant shall perform, pursuant to approved plans and specifications, a complete renovation of the Premises as to provide Landlord with its prototypical Great American Cookie Store, attached hereto as Exhibit "G", including:

1. **Interior.** Tenant shall provide new floor and wall treatments. Tenants merchandise display fixtures, equipment and cash wrap shall be new or in a like new condition. Tenant shall assure that there is ample lighting within the Premises to adequately illuminate Tenant's Premises and merchandise. Tenant's ceiling shall be new or in a like new condition. No stained, off-color, tarnished or tattered ceiling tiles or grid shall be allowed. Tenant's architect or store planner shall design elements into the interior renovation so as to provide an exciting and unique shopping experience for Tenant's customers.

2. **Store Front.** Tenant shall provide Landlord with an open store front design. The entrance into Premises shall be no less than the greater of twelve (12) feet or forty (40) percent of the width of the Premises. Tenant shall modify the architectural design elements and aesthetics of the store front to provide a tie in to the theme of the interior of the Premises. Tenant is encouraged to use a variety of paints, laminates, ceramic tile, metals, fabrics and other natural and man made materials to provide the desired look and feel.

3. **Sign Band.** Tenant shall renovate the sign band area in the same manner as described in the finishes portion above as provided in Exhibit "B". The storefront signband shall vary in height, depth, and materials. **A uniform signband shall be specifically avoided and will not be approved by Landlord.** The signband shall be designed as an integral part of the storefront paying special attention to materials, colors, signage, and store merchandising. Tenant shall employ architectural design elements to provide a dimensional and textured surface over which and adjacent to the area where Tenant's sign shall be installed subsequent to Landlord's written approval of store front design and signage submittals. Tenant is encouraged to use a variety of paints, laminates, ceramic tile, metals, fabrics and other natural and man made materials to provide the desired look and feel. Tenant shall not open for business with out an approved and installed sign, unless specifically permitted to do so in writing by Landlord. Should Tenant violate this provision and open for business either with no sign or a sign that has not been approved by Landlord then Tenant shall pay to Landlord the sum of five hundred dollars (\$500.00) per day as liquidated damages with respect to such violation until such violation is cured.

In the event Tenant requires assistance with regard to securing the service of an architect or store planner it shall advise Landlord accordingly and Landlord shall provide Tenant with acceptable providers of such services.

reference. Tenant agrees to indemnify Landlord and hold him harmless against any loss, liability or damage resulting from such work, and Tenant shall, if requested by Landlord, furnish bond or other security satisfactory to Landlord against any such loss, liability or damage. Tenant shall give Landlord at least fifteen (15) days prior written notice of Tenant's intention to commence any construction work within the Premises. In connection therewith, Landlord or Landlord's representatives shall have the right to go upon and inspect the Premises at all reasonable times, and shall have the right to post and keep posted thereon notices of non-responsibility or such other notices that Landlord may deem to be proper for the protection of Landlord's interest in the Premises.

8.4 Mechanics Liens. Tenant shall keep the Premises and all other parts of the Shopping Center free from any and all liens arising out of any work performed, materials furnished or obligations incurred by or on behalf of Tenant. Within ten (10) days after written request therefor by Landlord, Tenant shall (a) bond against or discharge any mechanics' or materialmen's lien or (b) furnish Landlord with a copy of the recorded waiver of lien, recorded release of lien, or of the recorded bond discharging such lien. Tenant shall reimburse Landlord as Additional Rent for any and all costs and expenses including, without limitation, attorneys' fees, which may be incurred by Landlord by reason of the filing of any such liens and/or removal of same, such reimbursement to be made within ten (10) days after receipt by Tenant from Landlord of a statement setting forth the amount of such costs and expenses such reimbursement to be paid to Landlord in the manner and at the place provided in this Lease.

ARTICLE IX - LANDLORD'S RIGHT OF ACCESS: USE OF ROOF:

9.1 Landlord's Right of Entry. Landlord shall have the right to enter upon the Premises at any time for the purpose of inspecting the same, or for making repairs to the Premises, or for making repairs, alterations or additions to adjacent Premises, or for showing the Premises to prospective purchasers, lessees, or lenders. Landlord shall use reasonable care not to interfere with Tenant's business during such repairs and alterations, but no interruption, diminution or interference with Tenant's business shall give rise to any abatement or reduction of any rent nor to any claim for loss of business.

9.2 Roof. Use of the roof above the Premises is reserved to Landlord and Tenant shall not enter upon the roof without the prior consent of Landlord. In the event that Tenant makes any alteration or repair requiring the presence of Tenant or any agent of Tenant upon the roof, Landlord shall have the right to thereafter inspect the roof. Tenant agrees to indemnify Landlord and hold Landlord harmless against any loss, liability or damage resulting from such alteration or repair or the invalidation of any roof warranties, and Tenant shall, if requested by Landlord, furnish bond or other security satisfactory to Landlord against any such loss, liability or damage. Tenant shall be responsible for any damage to the roof caused by Tenant or any agent of Tenant.

ARTICLE X - SIGNS: STORE FRONTS:

10.1 Tenant's Signs and Store Front. Except as provided below, Tenant shall not, without Landlord's prior written consent (a) make any changes to the store front or (b) install any exterior lighting, decorations or paintings or (c) erect or install any signs, window or door lettering, placards, decorations or advertising media of any type which can be viewed from the exterior of the Premises, excepting only dignified displays of customary type for its display windows. Notwithstanding the foregoing, Tenant shall, prior to opening the Premises to the public for business, install a storefront and an exterior sign over the exterior of the front entry to the Premises. Tenant's store front and all signs, lettering, placards, decorations and advertising media shall conform in all respects to all legal requirements and the Store Front and Sign Criteria established by Landlord for the Shopping Center from time to time in the exercise of its sole discretion (a copy of the current Store Front and Sign Criteria being attached hereto as Exhibit "B" and incorporated herein by this reference), and shall be subject to Landlord's approval with respect to the shape, size, weight, lighting, color, general appearance and method of attachment. Tenant shall keep all signs and Tenant's store front in good condition and in proper operating order at all times.

10.2 Landlord's Signs. Landlord may display an appropriate "For Rent" sign on the exterior of the Premises for the period commencing six (6) months prior to the end of the Lease.

ARTICLE XI - UTILITIES:

11.1 Landlord's Obligations. Landlord agrees to provide at Commencement Date the utility service connections necessary to supply water, electricity, telephone service and sewerage service to the Premises.

11.2 Tenant's Obligations. Tenant shall promptly pay all charges for electricity, water, gas,

Tenant.

11.3 Trash Removal Charge. Tenant, at Tenant's expense, shall at all times keep the Premises orderly, neat, safe, clean and free from rubbish and dirt, and shall store all trash and other solid waste within the Premises or in such areas as may be designated by Landlord for such storage. Landlord may direct the use of solid waste disposal contractors at such intervals as Landlord may require. Tenant shall be solely responsible for and shall promptly pay, in a manner and at the place provided in this Lease, all fees and charges for trash removal required to properly service the Premises irrespective of whether such charges are initially paid in advance by Landlord, or otherwise. Landlord, at its sole option, may elect to furnish any or all services required for trash removal from the Premises, the cost of which will be, at Landlord's election, paid as Additional Rent to Landlord (which payment shall include a fifteen percent (15%) administrative fee to Landlord), each calendar month during the Lease Term in the manner specified in Section 3.1 for the payment of Minimum Rent, based upon Landlord's allocation thereof amongst Shopping Center occupants determined in its sole and absolute discretion. At any time during the Term hereof, Landlord may, upon thirty (30) days' prior written notice to Tenant, discontinue furnishing trash removal services to the Premises without thereby affecting this Lease in any manner or otherwise incurring any liability to Tenant except that Landlord will no longer be required to furnish trash removal services to the Premises. If Landlord does not provide such services, Tenant shall arrange for the regular pickup of all trash, garbage and other solid waste.

ARTICLE XII - INDEMNITY AND PUBLIC LIABILITY INSURANCE:

12.1 Indemnity. Tenant shall indemnify, protect, defend and hold Landlord (and Landlord's partners, joint venturers, shareholders, mortgagees, affiliates and property managers, and their respective officers, directors, members, employees and agents) harmless from and against any and all claims, costs, loss, liability, damage or expense (including without limitation, reasonable attorneys fees and court costs) ("Claims") arising out of or in connection with loss of life, personal injury, property damage, economic loss or other damages arising from (a) the use, occupation, improvement or maintenance of the Premises or the Shopping Center or any work or activity in or about the Premises or Shopping Center by Tenant or Tenant's assignees or subtenants or their respective agents, employees, contractors, licensees or invitees, (b) any activity, condition or occurrence in or about the Premises, (c) the filing or potential filing of any mechanic's or materialmen's lien against the Premises or the Shopping Center in connection with any work done or caused to be done by Tenant, (d) any breach or failure to perform any obligation imposed on Tenant under this Lease, or (e) any act or omission of Tenant or Tenant's assignees or subtenants or their respective agents, contractors, employees, customers, invitees or licensees, except to the extent such Claims arise out of or in connection with the negligence or willful misconduct of Landlord. Upon notice and request from Landlord, Tenant shall, at Tenant's sole expense and by counsel satisfactory to Landlord, defend any action or proceeding brought against Landlord by reason of any such Claim. If Landlord (or Landlord's partners, joint venturers, affiliates, shareholders, Mortgagee and property managers, or their respective officers, directors, employees and agents), without fault on Landlord's part, is made a party to any litigation commenced by or against Tenant, then Tenant shall indemnify, protect, defend and hold each of such persons harmless from and against any and all Claims arising out of incurred or paid by any such person in connection with such litigation. Tenant, as a material part of the consideration to Landlord hereunder assumes all risk of, and waives all Claims against Landlord for, loss of life, personal injury, property damage, economic loss or other damages in, upon or about the Premises, from any cause whatsoever, except to the extent caused by Landlord's negligence or willful misconduct.

Landlord shall have the right to engage its own attorneys in connection with the provisions of this Article XII or any other provision of this Lease, including, without limitation, any defense of Landlord or intervention by Landlord, notwithstanding any contrary provisions of the laws or court decisions of the State in which the Shopping Center is located, and Tenant shall reimburse Landlord for the reasonable costs thereof. The obligations of this Article XII shall survive the expiration or earlier termination of this Lease.

12.2 Insurance. Tenant shall procure and maintain throughout the Lease Term a policy or policies of:

- (i) Comprehensive general liability insurance with broad form contractual liability coverage, at its sole cost and expense, insuring both Landlord and Tenant against all claims, demands or actions arising out of or in connection with Tenant's use or occupancy of the Premises, or by the condition of the Premises, or Tenant's indemnity obligations set forth in this Lease; the limits of such policy or policies to be in an amount of not less than \$2,000,000 in respect of injuries or death due to any one

Tenant (or for which Tenant is legally liable) and located in the Shopping Center, in an amount not less than one hundred percent (100%) of their full replacement cost.

Such insurance shall be written by insurance companies licensed to do business in the State in which the Shopping Center is located and otherwise satisfactory to Landlord. Tenant shall obtain a written obligation on the part of each insurance company to notify Landlord at least ten (10) days prior to cancellation of such insurance. Such policies or duly executed certificates of insurance shall be promptly delivered to Landlord and renewals thereof shall be delivered to Landlord at least thirty days prior to the expiration of the respective policy terms. If Tenant should fail to comply with the foregoing requirements relating to insurance, Landlord may obtain such insurance and Tenant shall pay the Landlord on demand as Additional Rent hereunder the premium cost thereof plus interest at the Interest Rate from the date of payment by Landlord until repaid by Tenant.

ARTICLE XIII - NON-LIABILITY FOR CERTAIN DAMAGES & LIMITATION OF ACTIONS:

13.1 Limitation on Liability. Landlord and Landlord's agents and employees shall not be liable to Tenant for any injury to persons or damage to property caused by the Premises or other portions of the Shopping Center being or becoming out of repair or by defect in or failure of equipment, sprinkler systems, pipes or wiring, or broken glass, or by the backing up of drains, or by gas, water, steam, electricity or oil leaking, escaping or flowing into the Premises (except where due to Landlord's willful failure to make repairs required to be made hereunder, after the expiration of a reasonable time after written notice to Landlord of the need for such repairs), nor shall Landlord be liable to Tenant for any loss or damage that may be occasioned by or through the acts or omissions of third parties or other Tenants of the Shopping Center. Landlord shall not be liable in damages or otherwise for any discontinuance, failure or interruption of service to the Premises of Utilities or the Air Conditioning System and Tenant shall have no right to terminate this Lease or withhold rent because of the same. Landlord shall not be liable for any damages arising from any use, act or failure to act of any other tenant or occupant or their employees, invitees, customers, agents or contractors or any other person in or about the Shopping Center.

13.2 Limitation on Actions. Except as provided by any other provisions of this Lease which may prescribe a shorter period, any claim, demand, right or defense of any kind by Tenant which is based upon or arises in connection with this Lease or negotiations prior to execution, shall be barred unless Tenant commences an action thereon within twelve (12) months after the date of occurrence of the act or omission to which the claim, demand, right or defense relates; Tenant hereby waives any statutory limitations periods under applicable state law which may prescribe a longer period.

ARTICLE XIV - DAMAGE BY CASUALTY:

14.1 Landlord's Obligation to Rebuild. Tenant shall give immediate written notice to Landlord of any damage caused to the Premises by fire or other casualty. In the event that the Premises shall be damaged or destroyed by fire or other casualty insurable under standard fire and extended coverage insurance and Landlord does not elect to terminate this Lease as hereinafter provided, Landlord shall proceed with reasonable diligence and at its sole cost and expense to rebuild and repair Premises, and this Lease shall continue in force and effect. If the Premises or any part of the Shopping Center is damaged by fire or other casualty to such an extent that rebuilding thereof cannot reasonably be completed within thirty (30) days after such casualty, then Landlord may elect either to terminate this Lease or to proceed to rebuild and repair the Premises, or other part of the Shopping Center. Landlord shall give written notice to Tenant of such election within sixty (60) days after the occurrence of such casualty. Landlord's obligation to rebuild and repair under this Article XIV shall in any event be limited to restoring the Premises to substantially the condition in which the same existed prior to such casualty, exclusive of any work performed, any improvements, fixtures and equipment installed by Tenant.

14.2 Tenant's Obligation to Rebuild. Tenant agrees that promptly after completion of such work by Landlord, Tenant will proceed with reasonable diligence and at Tenant's sole cost and expense to restore, repair and replace any alterations, additions, improvements, fixtures, signs and equipment installed by Tenant. Tenant agrees at all times to keep its merchandise, fixtures and other property situated within the Premises insured against fire and other casualties.

14.3 Abatement. Tenant agrees that during any period of reconstruction or repair of the Premises it will continue the operation of its business within the Premises to the extent practicable. During the period from the occurrence of the casualty until Landlord's repairs are completed, the Minimum Rent shall be reduced to such extent as may be fair and reasonable under the circumstances; however, there shall be no abatement of the Percentage Rent, Additional Rent and

party agrees to cause its insurance policies to contain a clause pursuant to which the insurer (a) waives all right of subrogation against the other party for losses covered by such policy and (b) agrees that such policy shall not be invalidated because the insured has hereby waived any right of recovery for losses covered by such policy.

ARTICLE XV - EMINENT DOMAIN:

15.1 Taking Resulting in Lease Termination. If any of the floor area of the Premises, or more than thirty (30%) percent of the Common Area of the Shopping Center, should be taken for any public or quasi-public use under any governmental law, ordinance or regulation or by right of eminent domain or by private purchase in lieu thereof, this Lease shall terminate. If any other part of the Shopping Center shall be so taken resulting in cancellation of the Lease of any other tenant in the Shopping Center, Landlord may terminate this Lease by notice to Tenant. Upon any such termination the rent shall be abated during the unexpired portion of this Lease, effective on the date physical possession is taken by the condemning authority.

15.2 Taking Not Resulting in Lease Termination. If thirty (30%) percent or less of the Common Area of the Shopping Center should be taken, this Lease shall not terminate (except as provided above). Following such partial taking, Landlord shall make all necessary repairs or alterations required to make the remaining portions of the Shopping Center whole.

15.3 Condemnation Proceeds. All compensation awarded for any taking (or the proceeds of private sale in lieu thereof) of the Premises or Common Area shall be the property of Landlord, and Tenant hereby assigns its interest in any such award to Landlord; provided however, Landlord shall have no interest in any award made to Tenant for loss of business or for the taking of Tenant's fixtures and other personal property if a separate award for such items is made to Tenant.

ARTICLE XVI - ASSIGNMENT AND SUBLETTING:

16.1 Assignment and Subletting by Tenant. Tenant shall not assign, mortgage, encumber, or in any manner transfer this Lease or any estate or interest therein, or sublet the Premises or any part thereof, or grant any license, concession or other right of occupancy of any portion of the Premises without the prior written consent of Landlord, which Landlord may grant or deny in its sole and absolute discretion. Prior to any transfer of this Lease, Tenant shall provide the following information to Landlord:

- (A) Name, address and ownership of the proposed transferee.
- (B) Current balance sheet and profit and loss statement for the proposed transferee covering at least three (3) years, which shall be certified as true and correct by the proposed transferee.
- (C) A full description of the terms and conditions of the proposed transferee, including copies of all purchase and sale agreements.
- (D) A full description of the proposed use of the premises by the proposed transferee.
- (E) A list of personal, business and credit references of the proposed transferee.

Notwithstanding anything contained herein to the contrary, in no event shall Landlord be required to consent to any transfer of this Lease (i) if the financial condition of the transferee is not equal or better than the transferor, (ii) the proposed use is not for the Permitted Use or under the Tenant's Trade Name or is in conflict with any exclusives granted by Landlord prior to the date of the transfer, (iii) if there is any increase in insurance risk, (iv) if the proposed transferee has an unsatisfactory business reputation or character (e.g.: prior bankruptcies or involvement in criminal litigation), (v) the proposed transferee will not generate substantially the same Percentage Rent as Tenant herein, or (vi) the proposed subtenant shall not use and occupy the entire Premises.

Consent by Landlord to one or more assignments or sublettings shall not operate as a waiver of Landlord's rights as to any subsequent assignments and sublettings. Landlord may, at his option, require payment of \$500.00 as an administrative fee in consideration for granting any assignment or subletting of the Premises. Notwithstanding any assignment or subletting Tenant and any guarantor of Tenant's obligations under this Lease shall at all times remain fully and primarily responsible and liable for the payment of the Rent herein specified and for compliance with all of its other obligations under the Lease.

Annual Rent in effect prior to the effective date of the Occupancy Transaction. If Tenant assigns its interest in this Lease, all consideration payable to Tenant in connection with such assignment shall be payable and belong to Landlord.

16.3 Landlord's Termination Right. If Tenant requests consent to an assignment of this Lease or a subletting of the entire Premises in accordance with this Article, within thirty (30) days after receipt of such request, Landlord shall have the right to terminate this Lease with no further obligations thereafter accruing from Landlord to Tenant, such termination to be effective thirty (30) days after receipt of Landlord's termination notice by Tenant. Failure of Landlord to give Tenant written notice of termination shall not constitute or be deemed Landlord's consent to such assignment or subletting. If Landlord shall exercise its termination right hereunder, Landlord shall have the right to enter into a lease or other occupancy agreement directly with the proposed assignee or subtenant, even if such rents and other consideration exceed the rent payable under this Lease by Tenant.

16.4 Assignment by Landlord. In the event of the transfer and assignment by Landlord of its interest in this Lease and in the building containing the Premises to a person expressly assuming Landlord's obligations under the Lease, Landlord shall thereby be released from any further obligations hereunder, and Tenant agrees to attorn to and look solely to such successor in interest of the Landlord for performance of such obligations. Any Prepaid Rent, Security Deposit or other security given by Tenant to secure performance of Tenant's obligations hereunder may be assigned and transferred by Landlord to such successor in interest, and Landlord shall thereby be discharged of any further obligation relating thereto. Tenant agrees promptly to execute such documents as shall evidence recognition of such succession to Landlord and attornment by Tenant.

ARTICLE XVII - PROPERTY TAXES AND INSURANCE:

17.1 Tenant's Personal Property. Tenant shall be liable for and shall pay prior to delinquency all taxes levied against personal property and fixtures placed by Tenant in the Premises. If any such taxes are levied against Landlord or Landlord's property and Landlord elects to pay the same or if the assessed value of Landlord's property is increased by inclusion of personal property and fixtures placed by Tenant in the Premises and Landlord elected to pay the taxes based on such increase, Tenant shall pay to Landlord upon demand that part of such taxes for which Tenant is primarily liable hereunder.

17.2 Rent Tax. In the event a tax on rentals is now or hereafter imposed, such tax shall be paid upon demand by Tenant to Landlord as Additional Rent hereunder.

ARTICLE XVIII - DEFAULT BY TENANT AND REMEDIES:

18.1 The following events shall be deemed to be events of default by Tenant under this Lease:

- (A) The failure by Tenant to make any payment of Minimum Rent, Percentage Rent, Additional Rent or any other payment required to be made by Tenant hereunder (collectively, "Rent"), when due, and such failure continues for five (5) days after written notice thereof from Landlord to Tenant; or
- (B) The failure by Tenant to make any payment of Rent when due twice within a calendar year, and Landlord shall have given Tenant written notice of each such failure, whether or not Tenant shall subsequently cure such failure; or
- (C) The failure by Tenant to observe or perform any of the covenants, conditions or provisions of this Lease to be observed or performed by Tenant, other than Paragraph (A) above, where such failure shall continue for a period of thirty (30) days after written notice thereof from Landlord to Tenant; or
- (D) The insolvency of the Tenant or the execution by Tenant of an assignment for the benefit of creditors; or
- (E) The filing by or for reorganization or arrangement under any law relating to bankruptcy or insolvency; or
- (F) The appointment of a receiver or trustee to take possession of substantially all of Tenant's assets located at the Premises or of Tenant's interest in this Lease; or
- (G) The failure of Tenant to open for business, (i) fully stocked, (ii) with all of Tenant's

A. Terminate this Lease, in which event Tenant shall immediately surrender the Premises to Landlord, and if Tenant fails to do so, Landlord may, without prejudice to any other remedy which he may have for possession or arrearage in rent, enter upon and take possession of the Premises and expel or remove Tenant and any other person who may be occupying said Premises or any part thereof, by force if necessary, without being liable for prosecution or any claim of damages therefor; and Tenant agrees to pay to Landlord on demand the amount of all loss and damage which Landlord may suffer by reason of such termination, whether through inability to relet the Premises on satisfactory terms or otherwise.

B. Enter upon and take possession of the Premises and expel or remove Tenant and any other person who may be occupying said Premises or any part thereof, by force if necessary, without being liable for prosecution or any claim for damages therefor, and, if Landlord so elects, relet the Premises on such terms as Landlord may deem advisable and receive the rent therefor; and Tenant agrees to pay to Landlord on demand any deficiency that may arise by reason of such reletting. No re-entry or re-taking possession of the Premises by Landlord shall be construed as an election to terminate this Lease, unless Landlord furnishes to Tenant a written notice of termination.

C. Enter upon the Premises, by force if necessary, without being liable for prosecution or any claim for damages therefor, and do whatever Tenant is obligated to do under the terms of this Lease; and Tenant agrees to reimburse Landlord on demand for any expenses which Landlord may incur in this effecting compliance with Tenant's obligation under this Lease, and Tenant further agrees that Landlord shall not be liable for any damages resulting to the Tenant from such action.

D. Enter upon the Premises and post a "For Rent" sign.

Pursuit of any of the foregoing remedies shall not preclude pursuit of any other remedies herein provided or provided by law, nor shall pursuit of any other such remedy constitute a forfeiture or waiver of any rent due to Landlord hereunder or of any damages accruing to Landlord by reason of the violation of any of the terms, provisions and covenants herein contained. Forbearance by Landlord to enforce one or more of the remedies herein provided upon an event of default shall not be deemed or construed to constitute a waiver of such default. In determining the amount of loss or damage which Landlord may suffer by reason of termination of this Lease or the deficiency arising by reason of any reletting by Landlord as above provided, allowance shall be made for the expense of repossession and any repairs or remodeling undertaken by Landlord following repossession, and then shall be added to the Minimum Rent herein provided for the period from the date of an event of default until the end of the Lease Term together with a sum equal to the average Percentage Rent required to be paid hereunder by Tenant during the two full calendar years (January 1 through December 31) immediately preceding the date of such termination or reletting (or if two full calendar years have not then elapsed then the period between the Commencement Date of this Lease and the date of such termination or reletting with proportionate adjustment for partial years) multiplied by the number of calendar years or portion thereof falling within such period.

Notwithstanding anything contained herein to the contrary if Tenant has other lease(s) with Landlord or its agent and Tenant is in default hereof or with respect to those other lease(s) then, in that event, all such leases, including this Lease, shall be deemed to be in default and all rights and remedies afforded to Landlord hereunder and/or with respect to such other leases shall become available to Landlord.

18.2 Attorney's Fees. In the event that at any time during the Lease Term either Landlord or Tenant shall institute any action or proceeding against the other relating to the provisions of this Lease, or any default hereunder, then, and in that event, the unsuccessful party in such action or proceeding agrees to reimburse the successful party for the reasonable expense of attorney fees and disbursements incurred therein by the successful party.

18.3 Waivers. Tenant expressly waives any and all rights of redemption granted by or under any present or future laws if Tenant is evicted or dispossessed for any cause, or if Landlord obtains possession of the Premises by reason of the violation by Tenant of any of the terms, covenants

18.4 Interest on Unpaid Amounts. Any amounts which may be owing by Tenant to Landlord which remain unpaid for more than five (5) days after the due date shall accrue interest at the rate of the lesser of (i) four percent (4%) over the Prime Rate as set forth in the Wall Street Journal, and (ii) the highest amount permitted by law (the "Interest Rate").

ARTICLE XIX SECURITY DEPOSIT; PREPAID RENT:

19.1 Security Deposit. Tenant, concurrently with the execution of this Lease, has deposited with Landlord the Security Deposit as security for the full and faithful performance of every provision of this Lease to be performed by Tenant. If Tenant defaults with respect to any provision of this Lease, including but not limited to the provisions relating to the payment of rent, Landlord may use any rent or any sum in default, or for the payment of any other amount which Landlord may spend or become obligated to spend by reason of Tenant's default or to compensate Landlord for any other loss or damage which Landlord may suffer by reason of Tenant's default. If any portion of the Security Deposit is so used or applied, Tenant shall, within five (5) days after written demand therefor, deposit cash with Landlord in an amount sufficient to restore the Security Deposit to its original amount. If Tenant is in default under this Lease more than two times within any twelve-month period, irrespective of whether or not such default is cured, then, without limiting Landlord's other rights and remedies provided for in this Lease or at law or equity, the Security Deposit shall automatically be increased by an amount equal to the greater of: (a) three times the original Security Deposit; or (b) three months Minimum Rent, which shall be paid by Tenant to Landlord forthwith on demand. Landlord shall not be required to keep the Security Deposit separate from its general funds and Tenant shall not be entitled to interest on such deposit. If Tenant shall fully and faithfully perform each provision of this Lease to be performed by it, the Security Deposit or any balance thereof shall be returned to Tenant (or at Landlord's option, to the last assignee of Tenant's interest hereunder) at the expiration of the Lease Term and upon Tenant's vacating of the Premises. The mortgagee shall not be liable to the Tenant for the return of the Security Deposit unless Security Deposit has been delivered to the mortgagee.

19.2 Prepaid Rent. Landlord hereby acknowledges receipt from Tenant of the Prepaid Rent stated in the Basic Lease Provisions, to be applied to the first and last accruing installments of Minimum Rent, CAM, Insurance and Taxes. Upon the occurrence of any event of default by Tenant, Landlord may from time to time, without prejudice to any other remedy provided herein or provided by law, use such amount set forth as the last month's installments of Minimum Rent, CAM, Insurance and Taxes to the extent necessary to make good any arrears of Rent and any other damage, injury, expense or liability caused to Landlord by such event or default, and Tenant shall pay to Landlord on demand the amount so applied in order to restore the last month's Prepaid Rent to its original amount.

ARTICLE XX - LANDLORD'S LIEN:

In addition to the statutory Landlord's lien, Landlord shall have at all times a valid security interest to secure payment of all Rent and other sums of money becoming due hereunder from Tenant, and to secure payment of any damages or loss which Landlord may suffer by reason of the breach by Tenant of any covenant, agreement or condition contained herein, upon all goods, wares, equipment, fixtures, furniture, improvements and other personal property of Tenant presently, or which may hereafter be, situated on the Premises, and all proceeds therefrom, and such property shall not be removed therefrom without the consent of Landlord until all arrearage in rent as well as any and all other sums of money then due to Landlord hereunder shall first have been paid and discharged on all the covenants, agreements and conditions hereof have been fully complied with and performed by Tenant. Upon the occurrence of an event of default by Tenant, Landlord may, in addition to any other remedies provided herein or under the Uniform Commercial Code as adopted by the State in which the Premises are located, enter upon the Premises and take possession of any and all goods, wares, equipment, fixtures, furniture, improvements and other personal property of Tenant situated on the Premises, without liability for trespass or conversion, and sell the same at public or private sale, with or without having such property at the sale, after giving Tenant reasonable notice of the time and place of any public sale or the time after which any private sale is to be made, at which sale the Landlord or its assigns may purchase unless otherwise prohibited by Law. Unless otherwise provided by law, and without intending to exclude any other manner of giving Tenant reasonable notice, the requirement of reasonable notice shall be met if such notice is given in the manner prescribed in the Lease at least ten (10) days before the time of the sale. Any sale made pursuant to the provision of this paragraph shall be deemed to have been a described Premises or where the property is located after the time, place and method of sale and a general description of the types of property to be sold have been advertised in a daily newspaper published in the county, in which the Shopping Center is located for five consecutive days before the date of the sale. The proceeds from any such disposition, less any and all expenses connected with the taking of possession, holding and selling of the property (including reasonable attorney's fees and legal expenses), shall be applied as a credit against the indebtedness secured by the security interest granted in this paragraph, any surplus shall be paid to Tenant or as

ARTICLE XXI- TERMINATION/RELOCATION:

In consideration for the occupancy charges set forth in the Basic Lease Provisions, which Tenant acknowledges are less than fair market value and constitute fair and adequate consideration, Tenant hereby agrees that Landlord may terminate this Lease upon giving at least ninety (90) days written notice to Tenant if the Landlord, in its sole discretion, determines it will redevelop, reconfigure or retenant the Premises or Shopping Center in a manner incompatible with Tenant's use or location in the Shopping Center. Upon the aforesaid termination of this Lease, all Rent and other obligations of Tenant pursuant to this Lease shall be null and void and of no effect. In addition, Landlord shall have the right and option on at least thirty (30) days written notice to relocate Tenant to another location existing or to be constructed in the Shopping Center so long as Landlord shall pay all reasonable moving expenses incurred by Tenant.

ARTICLE XXII - SUBORDINATION & ESTOPPEL:

This Lease is subordinate to any mortgage or deed to secure debt (hereinafter referred to as "Mortgage") that may now or hereafter be placed upon the Shopping Center and to any and all advances to be made thereunder, or modifications, replacements or extensions thereof. If Landlord sells, transfers, or conveys Landlord's interest in the Premises or this Lease, or if the same is foreclosed judicially or nonjudicially, or otherwise acquired, by a Mortgagee, upon the request and at the sole election of Landlord's successor, Tenant shall attorn to said successor, provided said successor accepts the Premises subject to this Lease. Tenant also agrees that any Mortgagee may elect to have this Lease made prior to its Mortgage, and in the event of such election and upon notification of such Mortgagee to Tenant to that effect, this Lease shall be deemed prior in lien to such Mortgagee, whether the Lease is dated or filed prior to subsequent to the date of such Mortgagee. It is the intent of the parties that the foregoing provisions be self-operative. Tenant shall, within fifteen (15) days after request by Landlord, execute and deliver to Landlord a written declaration in recordable form prepared by Landlord or Landlord's Mortgagee: (a) ratifying this Lease and declaring it subordinate to all Mortgages; (b) expressing the commencement and termination dates thereof; (c) certifying that this Lease is in full force and effect and has not been assigned, modified, supplemented or amended (except by such writings as shall be stated); (d) stating that all covenants and conditions under this Lease to be performed by Landlord have been satisfied (or stating those not satisfied); (e) stating that there are no defenses or offsets against the enforcement of this Lease by the Landlord or stating those claimed by Tenant; (f) stating the amount of advance Rent, if any (or none, if such is the case), deposited with Landlord and (g) stating such other items as Landlord may reasonably request. Landlord and Landlord's Mortgagees and purchasers of the Shopping Center shall be entitled to rely upon any such declaration provided pursuant to this paragraph.

ARTICLE XXIII - PROMOTIONAL FUND:

(a) Landlord shall establish and maintain an advertising and promotional service (hereinafter referred to as the "Promotional Service") to create and implement professional marketing and advertising programs for the benefit of the Retail Center. Such programs may include, special and seasonal events, shows, displays, signs, decor packages, community relations efforts, advertising, promotional literature, market research, tenant education and motivation and other activities designed to attract customers to the Retail Center. Landlord may establish the Promotional Service as a Merchants Association or a Marketing Fund.

(b) If Landlord establishes a Merchants Association, Tenant agrees to join, maintain membership in and cooperate with any such Merchants Association. All funds collected or contributed by Landlord for the Merchants Association shall be delivered by Landlord to the Merchants Association and Landlord shall have no liability to account (except to said Merchants Association) for any such funds. If Landlord establishes a Marketing Fund, Landlord shall appoint a committee, hereafter called the Advisory Committee. Landlord shall maintain books and records of all contributions to and expenditure of the Marketing Fund. The Advisory Committee may include representatives of the Major Stores and will include at least as many representatives of the tenants in the enclosed portion of the Retail Center as there are representatives of the Major Stores. Landlord will also be a member of the Advisory Committee. The sole function of the Advisory Committee will be to review, advise and comment upon programs and activities created by the Marketing Fund and to suggest programs and activities that might be beneficial to the Retail Center. The Advisory Committee will not have the right to control the activities of the Marketing Fund. Landlord may, at any time, add or dismiss members of the Advisory Committee or dissolve the Advisory Committee entirely.

(c) Tenant shall pay to Landlord, as its contribution to the Promotional Service, a Promotional Charge, payable, in advance, on the first day of each calendar month of the Term during which the

labeled "Urban Consumers: in the table entitled "Consumer Price Index: United States City Average" published monthly by the United States Department of Labor, Bureau of Labor Statistics, for the month which is the twelfth (12th) month following the Commencement Date, and each successive twelve (12) month anniversary thereof of such Lease, and the denominator of which is such index number for the month and year in which the Commencement Date occurs. If during the Term such Price Index is discontinued, such other index as most nearly accomplishes the purpose of this subparagraph shall be used.

ARTICLE XXIV - NOTICES:

Whenever any notice is required or permitted hereunder such notice shall be in writing. Any notice or document required or permitted to be delivered hereunder shall be deemed to be delivered, whether or not actually received, when deposited with a receipted courier mail service or in the United States Mail, postage prepaid, Certified or Registered Mail, Return Receipt Requested, addressed to the parties hereto at the respective addresses set out in the Basic Lease Provisions (even if Tenant shall have vacated) or at such other addresses as the party receiving notice shall have theretofore specified by written notice. If "Tenant" is more than one person, corporation or other entity, all of them shall join in executing any such written notice specifying a different address or Landlord may elect to disregard such change of address. In the event that Tenant moves, Tenant shall notify Landlord in writing within ten (10) days of such new address.

ARTICLE XXV - EXCULPATION:

TENANT HEREBY WAIVES THE RIGHT TO TERMINATE THIS LEASE FOR LANDLORD'S DEFAULTS, TENANT'S REMEDIES BEING LIMITED TO THE RIGHT TO SEEK DAMAGES OR SPECIFIC PERFORMANCE. IN THE EVENT TENANT MAKES ANY CLAIM OR ASSERTS ANY CAUSE OF ACTION AGAINST LANDLORD: (A) TENANT'S SOLE AND EXCLUSIVE REMEDY SHALL BE AGAINST THE CURRENT RENTS, ISSUES, PROFITS AND OTHER INCOME LANDLORD RECEIVES FROM LANDLORD'S OPERATION OF THE SHOPPING CENTER, NET OF ALL CURRENT OPERATING EXPENSES, LIABILITIES, RESERVES AND DEBT SERVICE ASSOCIATED WITH SAID OPERATION ("NET INCOME" FOR PURPOSES OF THIS SECTION ONLY), AND SUBJECT TO THE RIGHTS OF LANDLORD'S MORTGAGEES; (B) NO OTHER REAL, PERSONAL OR MIXED PROPERTY OF LANDLORD, WHEREVER LOCATED, SHALL BE SUBJECT TO LEVY ON ANY JUDGMENT OBTAINED AGAINST LANDLORD, (C) IF SUCH NET INCOME IS INSUFFICIENT TO SATISFY ANY JUDGMENT, TENANT WILL NOT INSTITUTE ANY FURTHER ACTION, SUIT, CLAIM OR DEMAND, IN LAW OR IN EQUITY, AGAINST LANDLORD FOR OR ON THE ACCOUNT OF SUCH DEFICIENCY, AND (D) TENANT SHALL HAVE NO RIGHT TO PERFORM OR CURE ANY SUCH ALLEGED DEFAULTS OF LANDLORD AT LANDLORD'S EXPENSE. THE LIMITATIONS SET FORTH IN THIS SECTION SHALL BE ENFORCEABLE BY LANDLORD AND/OR BY ANY PARTNER, MEMBER, TRUSTEE, OFFICER, EMPLOYEE, AGENT OR PROPERTY MANAGER OF LANDLORD.

ARTICLE XXVI- SURRENDER OF POSSESSION:

Upon expiration or earlier termination of the Lease Term, whether by lapse of time or otherwise, Tenant shall promptly and peacefully surrender the Premises to Landlord. The Premises shall be surrendered broom clean in the same condition as when tendered to Tenant, ordinary wear and tear excepted. All property and improvements not removed at the end of the Lease Term shall be deemed abandoned and shall become Landlord's property and may be sold, destroyed, removed or used by Landlord in its sole discretion. All costs incurred by Landlord in connection with such abandoned property shall be due and owing by Tenant to Landlord. No termination or expiration of this Lease shall relieve Tenant from any indemnities, liabilities, monetary obligations or other obligations which shall have accrued or relate to a period prior to the termination or expiration of this Lease.

ARTICLE XXVII - HOLDING OVER:

If Tenant fails to timely deliver possession of and vacate the Premises as required by Article XXVI above, Tenant's occupation thereafter shall be a tenancy at sufferance on the same terms and

and costs and expenses, including attorney's fees, related thereto, together with interest on all such sums at the Interest Rate.

ARTICLE XXVIII - MISCELLANEOUS:

28.1 Relationship. Nothing herein contained shall be deemed or construed by the parties hereto, nor by any third party, as creating the relationship of principal and agent or of partnership or of joint venture between the parties hereto, it being understood that neither the method of computation of rent, nor any other provision contained herein, nor any acts of the parties hereto, shall be deemed to create any relationship between the parties hereto other than the relationship of Landlord and Tenant. Whenever herein the singular number is used, the same shall include the plural, and words of gender shall include each other gender.

28.2 Captions. The captions used herein are for convenience only and do not limit or amplify the provisions hereof.

28.3 No Waiver. One or more waivers of any breach of covenant, term or condition of this Lease by either party shall not be construed as a waiver of a subsequent breach of the same covenant, term or condition. Landlord's acceptance of partial Rent or performance by Tenant shall not be deemed to be an accord and satisfaction or a waiver of any preceding breach by Tenant of any term, covenant or condition of this Lease or of any right of Landlord to a forfeiture of this Lease by reason of such breach, regardless of Landlord's knowledge of such preceding breach at the time of Landlord's acceptance. The consent or approval by either party to or of any act by the other party requiring such consent or approval shall not be deemed to waive or render unnecessary consent to or approval of any subsequent similar act. No term, covenant or condition of this Lease shall be deemed to have been waived by Landlord unless such waiver is in writing and executed by Landlord.

28.4 Force Majeure. Whenever a period of time is herein prescribed for action to be taken by Landlord, Landlord shall not be liable or responsible for, and there shall be excluded from the computation of any such period of time, any delays due to strikes, riots, acts of God, shortages of labor or materials, war, governmental laws, regulations or beyond the control of Landlord. At any time when there is outstanding a mortgage, deed of trust or similar security instrument covering Landlord's interest in the Premises, Tenant may not exercise any remedies for default by Landlord hereunder unless and until the holder of the indebtedness secured by such mortgage, deed of trust or similar security instrument shall have received written notice of such default and a reasonable time for curing such default shall thereafter have elapsed.

28.5 Quiet Enjoyment. Landlord agrees that if Tenant shall perform all of the covenants and agreements herein required to be performed by Tenant, Tenant shall, subject to the terms of this Lease, at all times during the continuance of this Lease have the peaceable and quiet enjoyment and possession of the Premises from and against anyone claiming by, through or under Landlord.

28.6 Entire Agreement. This Lease contains the entire agreement between the parties, and no agreement shall be effective to change, modify or terminate this Lease in whole or in part unless such agreement is in writing and duly signed by the party against whom enforcement of such change, modification or termination is sought.

28.7 Controlling Law. The laws of the state in which the Shopping Center is located shall govern the interpretation, validity, performance and enforcement of this Lease. If any provision of this Lease should be held to be invalid or unenforceable, the validity and enforceability of the remaining provisions of this Lease shall not be affected thereby.

28.8 Successors and Assigns. The terms, provisions, and covenants contained in this Lease shall apply to, inure to the benefit of and be binding upon parties hereto and their respective heirs, successors in interest and legal representatives except as otherwise herein expressly provided.

28.9 Effect of Addendum. In the event any provision of an Addendum attached hereto shall be inconsistent with a provision in the body of the Lease, the provision as set forth in the Addendum shall be deemed to control.

28.10 Tenant. If Tenant is more than one person, corporation or other entity (l) all persons, corporations and other entities constituting by, Tenant shall be jointly and severally liable as Tenant hereunder.

28.11 Exhibits. There are attached hereto and incorporated herein by reference the following Exhibits and Addenda: Exhibit "A" - Site Plan, Exhibit "B" - Sign Criteria, Exhibit "C" - Construction

accomplished without the aid, intervention or employment of any broker or finder, of any kind. Tenant shall indemnify, protect, defend and hold Landlord (and Landlord's partners, joint venturers, affiliates, shareholders and property managers, and their respective officers, directors, employees and agents) harmless from and against any and all Claims arising out of or in connection with any Claims made by any person claiming to be a broker or finder with regard to this Lease other than the Brokers, including, without limitation, Claims for commissions and all costs of enforcing this indemnity against Tenant. The obligations of this Section 28.12 shall survive the expiration or earlier termination of this Lease. Tenant acknowledges that neither Landlord nor any of Landlord's employees, agents, representatives, contractors nor brokers has made any representation or warranty of any kind respecting (a) the condition of the Premises or the Shopping Center, (b) the suitability thereof for Tenant's use and the conduct of Tenant's business, (c) occupancy or operation within the Shopping Center of any other person or entity, (d) occupancy costs (it being understood that any estimates of occupancy costs contained in this Lease are estimates only and are not binding upon Landlord).

28.13 No Option. The submission of this Lease to Tenant for examination does not constitute a reservation of or option for the Premises and this Lease becomes effective only upon execution by Landlord and Tenant. Tenant acknowledges that Landlord or Landlord's agents and employees have made no representations or promises, either express or implied, with respect to the Premises or the Shopping Center except as herein expressly set forth and Tenant further acknowledges no rights, easements, or licenses are acquired by Tenant by implication or otherwise, except as herein expressly set forth.

28.14 Security. Tenant shall be solely responsible for providing security for the Premises. Tenant acknowledges that Landlord is not an insurer of security for the Premises or the parking lot and that Landlord does not undertake to provide security for the Premises or the parking lot. Tenant hereby releases Landlord from and against any and all claims, actions or causes for alleged liability associated with the security of the Premises or the parking lot.

28.15 Warranty of Authority. If in any event Tenant is a corporation or partnership, Tenant represents and warrants that it is duly formed and in good standing, and has full corporate or partnership power and authority, as the case may be, to enter into this Lease and has taken all corporate or partnership action, as the case may be, necessary to carry out the transaction contemplated herein, so that when executed, this Lease constitutes a valid and binding obligation enforceable in accordance with its terms. Tenant shall provide Landlord with corporate resolutions or other proof in a form acceptable to Landlord, authorizing the execution of this Lease at the time of such execution.

28.16 Time is of the Essence. Time is of the essence with respect to each and every provision of this Lease.

28.17 Memorandum of Lease. This Lease shall not be recorded, but at the request of Landlord, at any time after the Commencement Date, Landlord and Tenant will execute and deliver a short form memorandum of Lease in recordable form containing the basic provisions of this Lease acknowledging that Tenant has accepted possession and reciting the exact Commencement Date and termination of this Lease. Within thirty (30) days after the expiration or earlier termination of the Lease Term, Tenant shall execute and deliver to Landlord a notice of termination in a recordable form reasonably acceptable to Landlord and sufficient to cause a title insurance company to insure over such short form memorandum of lease.

28.18 Rules and Regulations. Tenant agrees to comply with and observe the rules and regulations attached hereto as Exhibit "E" and incorporated herein by this reference. Landlord reserves the right from time to time to amend or supplement said rules and regulations, and to adopt and promulgate additional rules and regulations applicable to the Premises and the Shopping Center. Notice of such amended or additional rules and regulations shall be given to Tenant, and Tenant agrees thereupon to comply with and observe all rules and regulations and amendments and additions thereto.

28.19 Tenant Allowance. Landlord will provide Tenant with a construction allowance of up to Nine Thousand Seven Hundred and Fifty Dollars (\$9,750.00) to be used for the build out of the Premises exclusive of furniture, fixtures and equipment payable upon: (i) presentation of certified cost of completion certificate, (ii) release of mechanics liens, (iii) upon store opening, (iv) copies of paid invoices and (v) receipt of payment of the first month's rent.

28.20 Exclusive. Provided that Tenant is not in default under any terms and conditions of the Lease beyond any applicable cure period, the Landlord covenants and agrees that during the term of this Lease and any extensions thereof, the Landlord shall not directly or indirectly enter into any leases

of Gross Sales in lieu of minimum rent until such violation no longer exists.

Executed as of the date stated above.

Cathy Masly
WITNESS

LANDLORD:
SUMTER MALL, LLC

Daniel E. Nixon
By: Daniel E. Nixon
As Its: Authorized Agent

TENANT:

Jay S. Brett
WITNESS

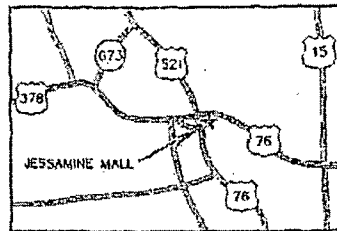
Paul J. Branco
PAUL J. BRANCO

Jay S. Brett

Anne Branco
ANNE BRANCO

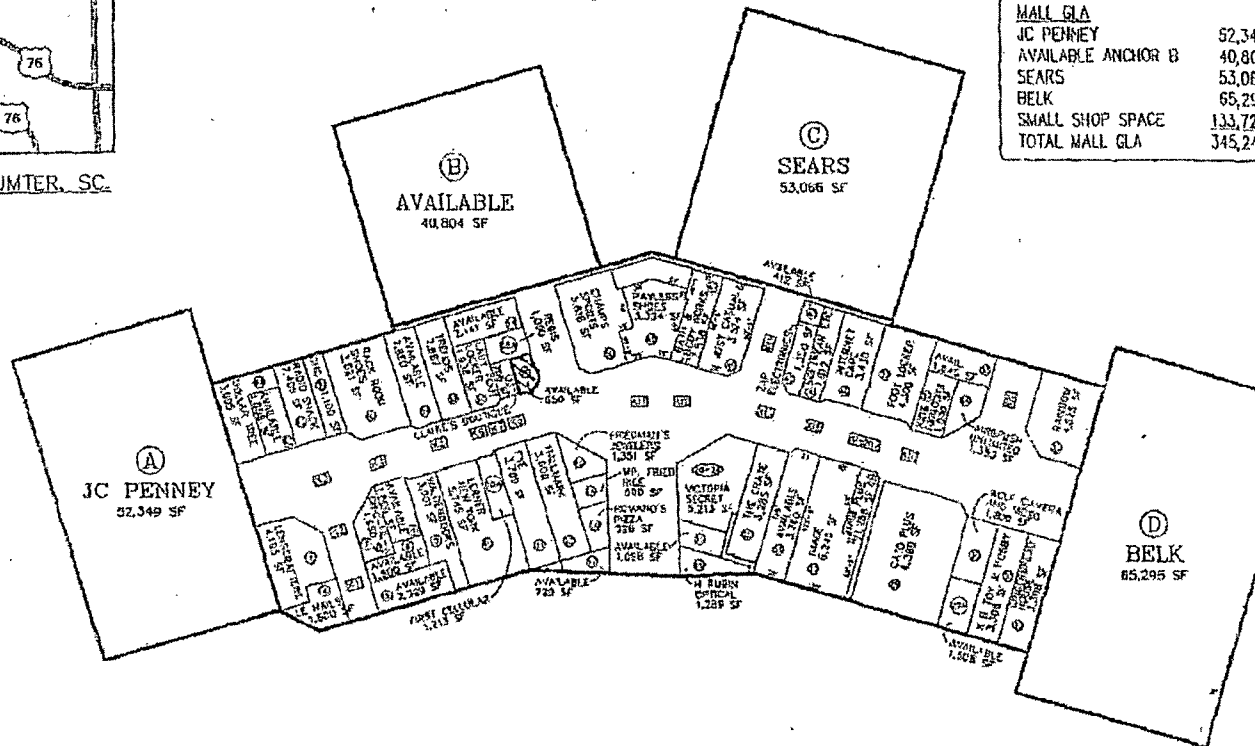
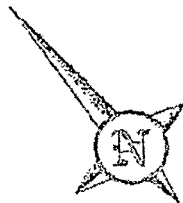
DO NOT SCALE. THIS PLAN IS NOT TO BE USED TO DETERMINE THE LOCATION OF ANY BUILDING OR IMPROVEMENT IN THE SHOPPING CENTER. THIS PLAN IS NOT TO BE USED TO DETERMINE THE LOCATION OF ANY BUILDING OR IMPROVEMENT IN THE SHOPPING CENTER. THIS PLAN IS NOT TO BE USED TO DETERMINE THE LOCATION OF ANY BUILDING OR IMPROVEMENT IN THE SHOPPING CENTER.

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LOCATION MAP - SUMTER, SC

- K1 FANTASY ENTERTAINMENT
- K2 AVAILABLE
- K3 AVAILABLE
- K4 AVAILABLE
- K5 GOLD N DIAMOND
- K6 AVAILABLE
- K7 AVAILABLE
- K8 THINGS REMEMBERED
- K11 AVAILABLE
- K12 WIRELESS ACCESSORIES
- K13 AVAILABLE
- K14 FANTASY ENTERTAINMENT
- K15 PIERCING PAGODA
- K16 AVAILABLE
- K17 AVAILABLE
- K18 JEWEL TIME
- K20 KIDDIE RIDES



SITE DATA INFORMATION

MALL GLA	
JC PENNEY	52,349
AVAILABLE ANCHOR B	40,804
SEARS	53,066
BELK	65,295
SMALL SHOP SPACE	133,728
TOTAL MALL GLA	345,242

Hull Storey Retail Group

DEFINITIVE DESIGNS
PLANNING, DRAFTING AND DESIGN

1270 BELK DR FRONTAGE ROAD
AUGUSTA, GA 30909 (706) 860-6037

EXISTING LEASE PLAN

JESSAMINE MALL

SUMTER, SOUTH CAROLINA

FIG.	DATE	SCALE	SHEET NO.
HS-97-135	10-21-02	1"=100'	1

Tenant's fascia sign (hereinafter called "Sign") shall be designed, built, installed and maintained in strict accordance with the following criteria.

I. DESIGN:

(A) Interior signs shall be individually lighted letters mounted directly to the sign fascia. Exterior signs shall be individually lighted letters and mounted on a continuous metal bar or raceway. All letters or symbols shall be formed with metal sides and plastic faces; the letters shall have a minimum depth of four (4) inches with the plastic faces being a minimum of three-sixteenths (3/16) inch thick. The Sign shall be lighted adequately to achieve an even lighting level across the face of the letter. All wiring and electrical devices shall be hidden from view. If a raceway or wiring bar is provided, it shall be colored to match the sign fascia.

(B) Mounting of the Sign shall be performed in a workmanlike manner. Tenant accepts responsibility for any damage to the property caused by Tenant's sign installer.

(C) All materials used in the fabrication and mounting of the Sign, including but not limited to fasteners, bolts and screws, shall be rustproof. If the sign fascia is metal, then the fascia shall be protected from galvanic reaction with all metal parts of the Sign.

II. SIZE: The sign shall conform to the following size and location requirements:

(A) The length of the Sign shall not be greater than eighty percent (80%) of the frontage of the Demised Premises. The length of the Sign shall be measured from the outer edge of the first letter to the outer edge of the last letter.

(B) The vertical height of the Sign shall not be greater than fifty percent (50%) of the sign fascia, and in no case shall the vertical height of the Sign be less than eighteen (18) inches. The vertical height of the Sign shall be measured from the tallest letter and shall include the tails of lower case letter that extend below the line. In cases where Sign letters are stacked, the vertical height measurement shall include all stacked letters and the spaces between letter rows. Raceways and wiring bars shall be included in the vertical height measurement.

III. LOCATION: The Sign shall be centered on the Tenant's storefront horizontally, and shall be centered on the sign fascia vertically. If the fascia is angular, the Sign shall be mounted perpendicular to the ground and diagonal bracing shall be attached to the rear of the sign.

IV. LANDLORD'S APPROVAL: **TENANT SHALL NOT BE PERMITTED TO OPEN FOR BUSINESS UNTIL SUCH TIME AS LANDLORD HAS APPROVED ITS SIGN DRAWINGS AND TENANT'S SIGN HAS BEEN FABRICATED AND INSTALLED PURSUANT TO THOSE APPROVED DRAWINGS.** Tenant, at Tenant's sole expense shall have its Sign constructed by a professional sign company who shall submit to Landlord, prior to beginning the fabrication thereof three (3) copies of the plans and specifications with respect thereto. Such plans shall include detailed information concerning the size, location, materials, color, electrical devices and connections. Landlord shall have ten (10) working days from receipt of the plans to: (i) approve, (ii) approve as noted and/or, (iii) not approve including the reasons for such non-approval. Landlord shall have the right to delay Tenant's opening until Tenant has installed its Sign pursuant to the plans and specifications as approved by Landlord and Landlord has inspected and approved such Sign and its installation. There shall be no abatement of Rent in the event that the opening of Tenant's store in its Premises is delayed due to the failure of Tenant or Tenant's sign company to comply with the provisions hereof.

V. APPLICABLE LAWS: Tenant is responsible for securing all necessary permits and approvals from governmental authorities having jurisdiction. Tenant shall further cause the Sign to be fabricated and installed to comply with all applicable laws, rules and ordinances promulgated by the governmental authorities having jurisdiction, and in accordance with the plans approved by Landlord.

VI. OTHER SIGNAGE: Tenant shall not place any under canopy signage in front of the Demised Premises without prior written approval of Landlord. In the event Landlord determines that under canopy signs are desirable for the Shopping Center, Tenant shall place such a sign according to specifications provided by Landlord. Tenant shall be prohibited from placing any other signage on, about or in front of the Shopping Center, or the Demised Premises, without the prior written consent of Landlord. This shall include but not be limited to: banner signs, marquee signs, trailer signs, billboard signs, and window painted signs. If Tenant violates this restriction, Landlord shall have the right, without notice to Tenant, to remove such sign without liability therefore.

VII. MAINTENANCE: Tenant shall maintain the Sign during the term of this Lease and any extension thereof. The Sign shall be kept clean and in operating condition and Tenant shall develop a continuing maintenance program to ensure same.

VIII. TEMPORARY TENANT SIGNAGE: Temporary signage shall comply with all sections of this Exhibit with the only

I. GENERAL REQUIREMENTS

A. Tenant shall retain the services of a registered architect or store planner to assist it with the development of plans, specifications and sample boards pertinent to the renovation of Tenant's Premises. Thereafter, subsequent to Landlord's approval thereof and subject to the terms and conditions of this Exhibit C Tenant shall perform, pursuant to approved plans and specifications, a complete renovation of the Premises, including:

1. Interior. Tenant shall provide new floor and wall treatments. Tenant's merchandise display fixtures, equipment and cash wrap shall be new or in a like new condition. Tenant shall assure that there is ample lighting within the Premises to adequately illuminate Tenant's Premises and merchandise. Tenant's ceiling shall be new or in a like new condition. No stained, off-color, tarnished or tattered ceiling tiles or grid shall be allowed. Tenant's architect or store planner shall design elements into the interior renovation so as to provide an exciting and unique shopping experience for Tenant's customers.
2. Store Front. Tenant shall provide Landlord with an open store front design. The entrance into Premises shall be no less than the greater of twelve (12) feet or forty (40) percent of the width of the Premises. Tenant shall modify the architectural design elements and aesthetics of the store front to provide a tie in to the theme of the interior of the Premises. Tenant is encouraged to use a variety of paints, laminates, ceramic tile, metals, fabrics and other natural and man made materials to provide the desired look and feel.
3. Sign Band. Tenant shall renovate the sign band area in the same manner as described in the finishes portion above as provided in Exhibit "B". The storefront signband shall vary in height, depth, and materials. **A uniform signband shall be specifically avoided and will not be approved by Landlord.** The signband shall be designed as an integral part of the storefront paying special attention to materials, colors, signage, and store merchandising. Tenant shall employ architectural design elements to provide a dimensional and textured surface over which and adjacent to the area where Tenant's sign shall be installed subsequent to Landlord's written approval of store front design and signage submittals. Tenant is encouraged to use a variety of paints, laminates, ceramic tile, metals, fabrics and other natural and man made materials to provide the desired look and feel. Tenant shall not open for business without an approved and installed sign, unless specifically permitted to do so in writing by Landlord. Should Tenant violate this provision and open for business either with no sign or a sign that has not been approved by Landlord then Tenant shall pay to Landlord the sum of five hundred dollars (\$500.00) per day as liquidated damages with respect to such violation until such violation is cured.

Hereinafter referred to as "Tenant's Work".

- B. Tenant acknowledges that the Premises have been inspected by Tenant and Tenant accepts the Leased Premises in its current "AS IS, WHERE IS" condition, movable property belonging to the prior tenant excepted. Movable located within the Premises that belong to the prior tenant shall not be used by Tenant unless these movables are still within the Premises when the Premises are turned over to Tenant for the commencement of construction.
- C. Tenant must provide Landlord with written documentation that either (i) Tenant has an audited net worth in excess of \$25,000,000 or (ii) Tenant's funds necessary for the design, construction and fixturing of the new store are held in escrow in a bank acceptable to both Landlord and Tenant. A Certificate of Deposit or Letter of Credit from a bank and in a form agreeable to Landlord shall likewise be acceptable. These funds of Tenant shall be assignable to Landlord during the entire construction process in the event Tenant defaults on this Lease after construction has begun. Landlord shall have the right to draw upon these funds on behalf of the Tenant based on progress completion reports from the General Contractor and/or the Landlord's architect.

II. DESIGN

- A. Tenant's Work shall be performed by Tenant in accordance with all governmental requirements and the Final Landlord Approved Tenant Plans, as herein after defined. Tenant agrees to provide Landlord, for Landlord's prior written approval (not to be unreasonably withheld), the full plans and specifications for such Tenant's Work, including without limitation: initial interior improvements, exterior modifications and/or changes, exterior signage construction and sign band treatments, roof penetrations, sprinkler system modifications, HVAC work or electrical, gas, sewer, water or cable utility work or any other utility work to be performed by Tenant.

forwarded to Landlord for its records. Subject to the approval of Landlord and any department stores Landlord shall allow Tenant to provide a "pop out" storefront design utilizing a ninety-five percent (95%) open storefront in the area as indicated on the attached Lease Plan

- C. Three (3) stamped sets of the plans and specifications referred to in II.A. above shall be submitted to the Landlord's Project Manager for review and approval. Tenant shall allow two weeks for the initial review process.
1. All specifications shall be typed and placed on the architectural drawings or on a separate 24" x 36" plan sheet.
 2. All revisions are to be made by change to the drawings and not by addendum.
 3. Design of exterior and interior components shall be in accordance with Landlord's Minimum Specifications governing Tenant's work, which shall be available at Landlord's office for viewing and/or copying. Tenant's storefront shall be as generally indicated on the building elevation attached hereto as Exhibit C-1. Design of shop storefront must be approved by Landlord.
- D. It is suggested that Tenant's plans be reviewed and approved by the Landlord prior to any applications for permits or any other application prerequisites; as this should prevent reapplication if contract drawings require revisions.
- E. One (1) set of the final revised plans and specifications shall be returned to the Tenant and marked "Approved for Construction". These drawings shall be the basis for final acceptance of all work performed by the Tenant and his contractor. The final approved plans and specifications for the Tenant's Work shall be referred to in this Lease as the "Final Tenant Plans". Such Final Tenant Plans must remain on the jobsite at all times for the use of the Landlord or any designated representative. Approval of the Final Tenant Plans by Landlord shall not constitute the assumption of any responsibility for their accuracy, efficacy, or sufficiency.

III. CONSTRUCTION

- A. Construction of the finish of Tenant's building shall be the responsibility of Tenant. Tenant shall secure bids from or negotiate with a general contractor or contractors for the construction of the Tenant's Work for Tenant's Premises. Tenant shall obtain Landlord's prior written approval of Tenant's general contractor chosen, approval of whom shall not be unreasonably withheld. In order to be considered, the Tenant's general contractor must be licensed in the city, county or state where the work is to be performed. Such contractor must also submit for review and written approval a completed AIA Contractor's Qualification Statement form. Tenant must also provide Landlord with a copy of the construction contract and construction schedule before construction commences.
- B. Once the Final Tenant Plans are approved, no mobilization of construction onto the property shall occur until the following items have been released to Landlord:
1. Tenant's Certificate of Liability insurance indicating Landlord as additional insured. Limits of at least One Million (\$1,000,000) Dollars for each person and One Million (\$1,000,000) Dollars for each occurrence for bodily injury and in limits of One Million (\$1,000,000) Dollars aggregate for property damage.

Tenant's Certificate of Worker's Compensation verifying coverage amounts of One Hundred Thousand (\$100,000) Dollars for all Tenant's employees to be engaged in work at this location under this Lease.

2. Contractor's Certificate of Liability insurance indicating Landlord as additional insured. Limits of at least One Million (\$1,000,000) Dollars for each person and One Million (\$1,000,000) Dollars for each occurrence for bodily injury and in limits of One Million (\$1,000,000) Dollars aggregate for property damage.
4. Contractor's Certificate of Worker's Compensation verifying amounts of One Hundred Thousand (\$100,000) Dollars for all of Contractor's employees to be engaged in work on this project under this Lease.

5. A copy of the Demolition (if necessary) and Building Permit

- C. Tenant shall Indemnify Landlord for all liens filed as a result of Tenant's construction. Tenant shall be required to bond out any liens filed against Landlord or Landlord's property resulting from Tenant's work within ten (10) days of the date the lien is filed.
- D. Construction shall not commence unless and until Tenant has received a written Notice to Proceed. Landlord reserves the right to approve all staging areas, work areas, and actual job site. Tenant must also keep all such areas clean and safe on a daily basis.
- E. Landlord may require Tenant to use Landlord's original roofing or termite subcontractor and any other necessary subcontractors, if any, in order to maintain existing warranties. Tenant must determine from Landlord if this requirement applies to Tenant's work before Tenant's work commences.
- F. Tenant is to notify Landlord in writing that the construction is complete, that the Tenant's architect (if other than that of the Landlord's) has inspected and approved such work within thirty (30) days of completion of Leased Premises, and that the work has been performed in accordance with Tenant's Final Plans and all governmental requirements.
- G. Upon completion of Tenant's construction and Landlord's receipt of Tenant's notice under Section III, F., Landlord's Project Manager will make final inspection of Tenant's buildout in conjunction with Tenant's architect and/or construction administrator. At that time, Landlord will require the following additional information be made available to Landlord's Project Manager.
 - 1. Tenant having furnished to Landlord an architect's AIA Certificate of Completion that the Premises have been constructed in accordance with the Tenant's Final Plans and all government requirements and are one hundred percent (100%) complete. Tenant also having furnished to Landlord as-built plans.
 - 2. Copy of Tenant's Certificate of Occupancy.
 - 3. Final approval letter and inspection certificate from the State Fire Marshal's Office.
 - 4. Copy of Certificate of Final Lien Waiver from Tenant's general contractor, running to the benefit of Landlord and Tenant.
 - 5. Any construction contrary to the Final Tenant Plans be corrected prior to the Tenant receipt of Tenant Construction Allowance. If Tenant does not make the necessary corrections, after receiving written notice of same from Landlord, Landlord has the option to make the necessary repairs and Tenant, within ten (10) days after demand, shall reimburse Landlord for the actual costs incurred, plus twenty percent (20%) of that amount.

2. The delivery or shipping of merchandise, supplies and fixtures to and from the Premises shall be subject to such rules and regulations as in the judgement of Landlord are necessary for the proper operation of the Premises or Shopping Center.

3. All garbage and refuse shall be kept in the kind of container specified by Landlord, and shall be placed outside the Premises prepared for collection in the manner and at the times and places specified by Landlord. Tenant shall pay the cost of removal of any of Tenant's refuse or rubbish.

4. No radio or television or similar device shall be installed without first obtaining in each instance Landlord's prior written consent. No aerial, antenna, satellite dish or similar device shall be erected on the roof or exterior walls of the Shopping Center or on the grounds, without the prior written consent of Landlord. Any such device so installed without such consent shall be subject to removal without notice at any time, without liability to the Landlord therefor; costs incurred by Landlord for such removal shall be paid by Tenant.

5. No loudspeakers, televisions, phonographs, radios or other devices shall be used in a manner so as to be heard or seen outside of the Premises without the prior written consent of Landlord.

6. Tenant shall keep the Premises cooled and heated to a sufficient level so that Tenant's Premises does not create a negative air flow causing the Premises to be cooled and/or heated by Landlord's heating and cooling system servicing the Common Areas. Further, Tenant shall keep the Premises at a temperature sufficient to prevent freezing of water in pipes and fixtures. Failure to comply with this provision shall result in an assessment of fifty dollars (\$50.00) per day of such failure to comply and be deemed an event of Default pursuant to Article XVIII hereof.

7. Tenant shall keep exterior areas immediately adjoining the Premises clean and free from snow, ice, dirt and rubbish to the satisfaction of Landlord, and Tenant shall not place or permit any obstruction or merchandise outside Tenant's Premises without the prior written permission of Landlord.

8. The plumbing facilities shall not be used for any purpose other than that for which they are constructed, and no foreign substance of any kind shall be deposited therein. Tenant shall be responsible for the expense of any breakage, stoppage, or damage to all sanitary sewer lines up to the limit of Tenant's private sewer line, whether or not such lines are located within the Premises, resulting from a violation of this provision by the Tenant, its employees, agents or invitees.

9. Tenant shall, at Tenant's cost, employ a qualified pest extermination contractor, whose services shall be scheduled not less than monthly and so as not to unreasonably interfere with the operation of the Shopping Center.

10. Tenant shall not burn any trash or garbage of any kind in or about the Shopping Center.

11. Tenant and its employees shall park their motor vehicles only in those parking areas designated for that purpose by Landlord.

12. Tenant shall not make noises, cause disturbances, or create odors which may be offensive to other tenants of the Shopping Center or their employees, agents, customers or invitees.

13. Neither Tenant nor its agents or employees shall enter upon the roof at any time without the express prior approval of Landlord.

14. Neither Tenant, its agents nor its employees shall solicit business in the parking area or other Common Areas, nor shall Tenant, its agents or its employees, distribute or display any handbills or other advertising matter in or on automobiles or other vehicles parked in the parking area, or in other Common Areas. If any such materials are distributed, Tenant shall pay Landlord for the cost of cleanup.

15. Neither Tenant, its agents nor its employees shall make any commercial use of any of the Common Area.

16. Tenant shall not conduct any business activity from the Premises which is unlawful or of an unsavory character.

17. Tenant shall not install nor permit to be installed any vending machines, ATM's, telephones, or other similar devices of any type or nature within the Premises except where for the exclusive use of Tenant's employees and where such machines are located in the non-sales area of the Premises (the "backroom"). In the event that Tenant violates this covenant, Landlord shall advise Tenant of such violation and Tenant shall immediately remove such machinery. In the event that Tenant does not comply with Landlord's request, Landlord shall have the right to remove same with no liability thereto and dispose of such machinery as it deems appropriate all at Tenant's sole cost and expense.

18. Tenant shall maintain days and hours of operation for the Premises in the Shopping Center as set by Landlord. The Shopping Center shall be closed for business on Thanksgiving Day and Christmas Day. Landlord, in its sole discretion, shall have the right to reduce or eliminate Operating Hours on any or all of New Year's Eve, New Year's Day, Thanksgiving Eve, Christmas Eve, Labor Day, Memorial Day, and the Fourth of July. If Tenant shall fail to operate during all such hours, in addition to constituting an Event of Default hereunder, Tenant shall be required to pay, for each hour that Tenant shall fail to be open, liquidated damages equal to the greater of Fifty and No/100 Dollars (\$50.00) or ten percent (10%) of Tenant's average hourly Gross Sales computed for the month immediately preceding the month in question. Notwithstanding the foregoing, Tenant shall have the right to close the Premises up to twenty-four (24) hours no more than three (3) times per calendar year for the purposes of inventory or in the event of a manager's death. If Tenant shall request Landlord's approval of the opening of the Premises for business for periods exceeding those specified above and Landlord shall approve such request, Tenant shall pay for any additional costs incurred by Landlord

To establish a standard procedure to allow contractors to build out tenant storefronts, tenant's store and landlord projects in an orderly, safe, and neat manner. To also establish a procedure whereas any construction or repair project can be done with the minimum inconvenience and interference with daily mall operations, tenant store operations, and customers.

II. PRELIMINARY

After the work has been awarded, Contractor is to be notified in writing of the following:

1. Before any construction work begins or material is brought on site, the Contractor is to report to the Property Manager and give to him/her a copy of the liability insurance. Normal liability insurance requirements are \$1-3 million combined single limit. (List additional insured as Mall.)
2. Show a copy of general contractor's license.
3. Show building permits.
4. Show proof of Workmen's Compensation certificates.
5. Deliver \$500.00 security deposit to the Property Manager.
6. Inform Property Manager and determine if Lease has been signed; if there is no signed Lease:

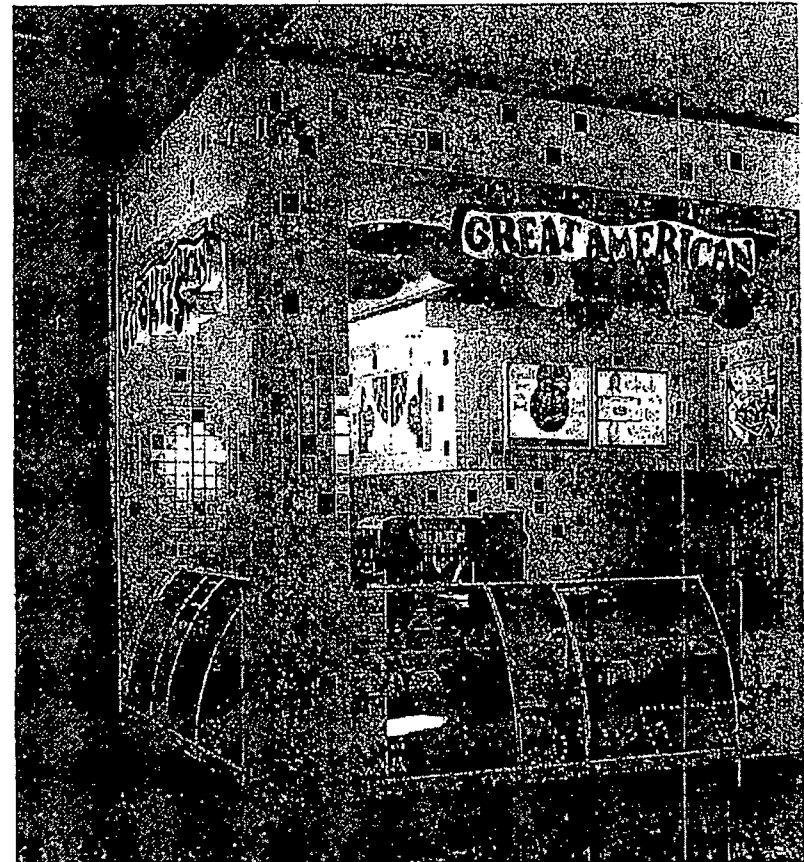
There will be absolutely (i) NO work started; or (ii) No demolition started (without approval from the Landlord or the Property Manager).

III. PROCEDURE

1. Dust covers or shields are to be installed prior to any work beginning.
 - a) Dust shields are not to be nailed or mechanically fastened to the floor or ceiling. Mall floors or ceilings are not to be damaged in any way. 2'X4's, or equal, are to be wedged between ceiling and floor and braced to existing storefront. All dust shields are to be painted in a neat manner, with color to blend with existing Mall colors.
 - b) In some cases, and only in an individual case will clear Plexiglas covers be allowed. Before Plexiglas covers can be substituted for plywood or similar dust shields, approval must be obtained through the Property Management office.
2. Contractors are to obtain their own trash containers. Location of such containers is to be determined by Mall Management.
3. No Mall utilities are used by Contractors.
4. No construction work is to take place in the common area of the Mall. All work is to take place behind dust shields.
5. No loud noise, such as breaking up of concrete floors (air hammers) is to take place during Mall store hours.
6. If fire main is shut down, the Fire Department is to be notified. All sprinkler work is to be done by the Landlord's sprinkler company, paid for by the Contractor.
7. All roof penetrations are to be done by Landlord's roof contractor, paid for by Contractor.
8. No fire exits or fire corridors are to be blocked or used for storage.
9. Any work that is to be done after Mall hours, the Property Manager is to be notified a day in advance. Cost for extra security to be borne by the Contractor.

*Great American
Cookies.*

Great American Cookies became an instant retail phenomenon in 1977 when the first store opened in Atlanta, Georgia's Perimeter Mall. Founded on the strength of a generations-old family chocolate chip recipe, the company eventually set the standard for gourmet cookie sales in shopping centers nationwide.



Sumter Mall Lease Extension Proposal

Page 1 of 1

WEX2

From: Lewis White <lewhite@hullstoreygibson.com>

To: paulbranco <paulbranco@aol.com>

Subject: Sumter Mall Lease Extension Proposal

Date: Fri, Sep 21, 2012 3:55 pm

Paul,

I know you said you are in New Jersey for a few days but I did want to touch base. I am back in the office today and I reviewed your file. Can you give me a call when you get a chance next week? I want to send a proposal that is aggressive and is workable for both sides. Now that I have more information, I want to get your thoughts and feedback about the right terms and conditions

I talked to the agent to that handles Sykes and he said that they have no plans to leave. He showed me a recent correspondence with their management that confirmed everything is going very well. Sykes has a 5 year option and there is zero indication that they will not exercise. Also, Sykes has a tremendous amount money invested in the building. All indications are that they will be there for the long term. I look forward to hearing your thoughts and working on a renewal that is workable for both sides. Thank you.

Lewis White
Leasing Representative
Hull Storey Gibson Companies, LLC
1190 Interstate Parkway
Augusta, GA 30909
706-434-1737 office
706-831-6100 mobile

From: Lewis White <lwwhite@hullstoreygibson.com>
To: paulbranco <spaulbranco@aol.com>
Subject: FW: Sumter- Great American Cookie Lease Renewal
Date: Fri, Oct 26, 2012 11:22 am

From: Lewis White
Sent: Monday, October 15, 2012 6:14 PM
To: paulbranco@aol.com
Subject: Sumter- Great American Cookie Lease Renewal

Paul,

I appreciate you time to discuss this lease renewal. Below are terms that I am willing to propose to my ownership group. These terms are based off of other comparable "cookie" uses and GAC locations. Please take a look and let me know if you have any questions.

Sumter Mall
Suite ID: 55
Current Lease Expiration: 4/30/2012
-Term: 5 years
-Years 1-2: \$37,260/year
-Years 3-5: \$40,200/year
-Sanitation: \$357.48/year
-Promotional Dues: \$499.92/year
-Percentage Rent and Breakpoint: 8% over \$300,000
-Sykes Co-Tenancy: In the event that Sykes does not exercise its option, there will be a 1 year cure period for the Landlord to find another tenant to backfill the space. If after the 1 year period a lease is not in place, Tenant will have the one time right (60 day time period) to terminate this lease.

Lewis White
Leasing Representative
Hull Storey Gibson Companies, LLC
1190 Interstate Parkway
Augusta, GA 30909
706-434-1737 office
706-831-6100 mobile

RE: Sumter- Great American Cookie Lease Renewal

Page 1 of 2

From: Lewis White <lwhite@hullstoreygibson.com>
To: paulbranco <paulbranco@aol.com>
Subject: RE: Sumter- Great American Cookie Lease Renewal
Date: Mon, Nov 26, 2012 12:05 pm

Paul

I hope you and your family had a good Thanksgiving. Just touching base on this lease renewal to see if you have any feedback on the proposed terms. Please give me a call when you have a minute to discuss. Thank you

Lewis White
Leasing Representative
Hull Storey Gibson Companies, LLC
1190 Interstate Parkway
Augusta, GA 30909
706-434-1737 office
706-831-6100 mobile

From: Lewis White
Sent: Friday, October 26, 2012 11:23 AM
To: 'paulbranco@aol.com'
Subject: FW: Sumter- Great American Cookie Lease Renewal

From: Lewis White
Sent: Monday, October 15, 2012 6:14 PM
To: paulbranco@aol.com
Subject: Sumter- Great American Cookie Lease Renewal

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-Percentage Rent and Breakpoint: 6% over \$300,000
-Sykes Co-Tenancy: In the event that Sykes does not exercise its option, there will be a 1 year cure period for the Landlord to find another tenant to backfill the space. If after the 1 year period a lease is not in place, Tenant will have the one time right (60 day time period) to terminate this lease

Lewis White

<http://www.augustagast.com/locations/sumter-gac-cookie-lease>

6/24/2015

8/12/2015

1-8

R. 349

Re: Samter- Great American Cookie Lease Renewal

Page 2 of 2

Leasing Representative
Hull Storey Gibson Companies, LLC
1190 Interstate Parkway
Augusta, GA 30909
706-434-1737 office
706-831-6100 mobile

<https://mail.google.com/mail/u/0/sd/en-us/PrintMessage>

8/12/2015

8/12/2015

1-7

R. 350

RE: Fwd: Hull Storey Lease Renewal 2013 Applebaum.xlsx

Page 1 of 1

From: lighter <lighter@adl.com>
To: paulbranco <paulbranco@adl.com>
Subject: RE: Fwd: Hull Storey Lease Renewal 2013 Applebaum.xlsx
Date: Fri, Jan 18, 2013 6:31 am

Just met with Stewart and Valerie. Looks good, go for it.

Sent from my Verizon Wireless 43 LTE Smartphone

----- Original message -----

From: Paul Branco <paulbranco@adl.com>
Date:
To: Stewart Applebaum <stew.applebaum@gmail.com> <stewapplebaum@gmail.com>
Subject: Fwd: Hull Storey Lease Renewal 2013 Applebaum.xlsx

Please review the lease proposal that I was going to present in Hull Storey and provide any feedback.

Paul Branco - Sent from my DROID

----- Original Message -----

Subject: Hull Storey Lease Renewal 2013 Applebaum.xlsx
From: Paul Branco <Paul.Branco@adstechnologies.com>
To: PAUL BRANCO@AOL.COM
CC:

http://mail.adl.com/cgi-bin/mailman/private/message

8/14/2015

8/12/2015

1-8

R. 351

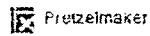
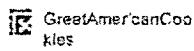
Re: Hull Storey Lease Renewal 2013 Applebaum.xlsx

Page 1 of 1

From: Darryl Light <lightdar@aol.com>
To: paulbranco <paulbranco@aol.com>
Subject: Re: Hull Storey Lease Renewal 2013 Applebaum.xlsx
Date: Fri, Jan 18, 2013 9:41 pm

What did they propose the Percent Breakpoint dollar amount with their proposal? Is your current breakpoint the \$350,000 number?

Darryl Light
Tri-City Cookie Co., Inc.
Brooktown, LLC
DBA: Great American Cookies, Pretzelmaker
TN, VA, GA, NC, SC
(423) 341-7156 cell
(866) 904-6921



-----Original Message-----

From: Paul Branco <paulbranco@aol.com>
To: Stewart Applebaum <stewartapplebaum@gmail.com>; lightdar <lightdar@aol.com>
Sent: Fri, Jan 18, 2013 2:59 pm
Subject: Fwd: Hull Storey Lease Renewal 2013 Applebaum.xlsx

Please review the lease proposal that I was going to present to Hill Storey and provide any feedback.

Paul Branco - Sent from my DROID

----- Original Message -----

Subject: Hull Storey Lease Renewal 2013 Applebaum.xlsx
From: Paul Branco <Paul.Branco@acstechnologies.com>
To: PAULBRANCO@AOL.COM
CC:

<https://mail.aol.com/webmail/std/en-us/P.inlMessage>

6/24/2015

8/12/2015

1--9

R. 352

Lease Proposals

Page 1 of 1

From: laurence.spaulding@holl.com

To: whitewire@holl.com

Subject: Lease Proposals

Date: Thu Jan 24, 2015 10:01 am

Attachments: Holl Storey Lease Renewal 2015 vss (21K)

Please see attached

RJB

<https://app1.holl.com/webmail/notes/PrintMessage>

6/24/2015

8/12/2015

1-10

R. 353

Hull Storey - Sumter Mall

5 Year Proposal

	Current	1-2 Years	3-5 Years
Base Rent	2,583.33	3,105.00	3,350.00
Rent Adj'm	166.67	-	-
Marketing & Adv	56.29	-	-
Promo Dues	-	41.67	41.67
Sanitation	-	29.83	29.83
% Rent	-	86.67	86.67
Total Rent	2,806.29	3,263.17	3,508.17
Annualized	33,675.48	39,158.00	42,098.00
Sales	313,000.00	313,000.00	313,000.00
% of Rent	10.8%	12.5%	13.4%

10 Year Proposal

	Current	1-5 Years	5-10 Years
Base Rent	2,583.33	2,850.00	3,000.00
Rent Adj'm	166.67	-	-
Marketing & Adv	56.29	-	-
Promo Dues	-	41.67	41.67 Cap \$600 Annual
Sanitation	-	29.83	29.83 Cap \$450 Annual
% Rent (8% > \$350,000)	-	-	-
Total Rent	2,806.29	2,921.50	3,071.50
Annualized	33,675.48	35,058.00	36,858.00
Sales	313,000.00	313,000.00	313,000.00
% of Rent	10.8%	11.2%	11.8%

	Current	1-2 Years	3-5 Years
Base Rent	2,583.33	2,850.00	2,950.00
Rent Adj'm	166.67	-	-
Marketing & Adv	56.29	-	-
Promo Dues	-	41.67	41.67 Cap \$600 Annual
Sanitation	-	29.83	29.83 Cap \$450 Annual
% Rent (8% > \$350,000)	-	-	-
Total Rent	2,806.29	2,921.50	3,021.50
Annualized	33,675.48	35,058.00	36,258.00
Sales	313,000.00	313,000.00	313,000.00
% of Rent	10.8%	11.2%	11.6%

8/12/2015

1-11

R. 354

RE: Lease Proposals

Page 1 of 1

From: Lewis White lewiswhite@hullstoreygibson.com
To: paulbranco paulbranco@aol.com
Subject: RE: Lease Proposals
Date: Thu, Jan 31, 2013 2:24 pm
Attachments: GAG Renewal Spreadsheet- JM FINAL xlsr (19K)

Paul,

Attached are terms that I am willing to propose to my ownership group for approval. I reviewed this with my VP and after a closer look at 21 comparable Great American Cookie Stores and the average occupancy cost is over 18%. The fact is, you have a very strong store in the Sumter Mall. Based off of our discussions, I will propose to keep the base rent lower and set breakpoint where the landlord can benefit based off of your continued strong sales. I do not know if the ownership will agree to this but I will give one of these two scenarios a try if you are in agreement. Please let me know if you have any questions.

Lewis White
Leasing Representative
Hull Storey Gibson Companies, LLC
1190 Interstate Parkway
Augusta, GA 30909
706-434-1737 office
706-831-6100 mobile

From: paulbranco@aol.com [mailto:paulbranco@aol.com]
Sent: Thursday, January 24, 2013 10:07 AM
To: Lewis White
Subject: Lease Proposals

Please see attached

PJB

Imported to Outlook from an external email message

8/12/2015

8/24/2015

1-12

R. 355

Hull Storey - Sumter Mall

5 Year Proposal

	Current	1-2 Years	3-5 Years	
Base Rent	2,750.00	3,320.00	3,350.00	(Breakpoint is fixed at 8% of sales over \$300,000 for the term of the lease)
Rent Adj'm				
Marketing & Adv				
Promo Dues	41.67	41.67	41.67	
Sanitation	29.79	29.83	29.83	
% Rent				
Total Rent	2,821.46	3,391.50	3,421.50	
Annualized	33,857.52	40,698.00	41,058.00	
Sales	313,000.00	313,000.00	313,000.00	
% of Rent	10.8%	13.0%	13.1%	

10 Year Proposal

	Current	1-2 Years	3-5 Years	6-7 Years	8-10 Years	
Base Rent	2,750.00	\$3,200.00	\$3,300.00	\$3,550.00	\$3,800.00	(Breakpoint is fixed at 8% over \$300,000 for year 1-5 and 8% over \$350,000 for years 6-10)
Rent Adj'm						
Marketing & Adv						
Promo Dues	41.67	\$41.67	\$41.67	\$50.00	\$50.00	Fixed Amounts
Sanitation	29.83	\$29.83	\$29.83	\$37.50	\$37.50	Fixed Amounts
% Rent (8% > \$350,000)						
Total Rent	2,821.50	3,271.50	3,371.50	\$3,637.50	\$3,887.50	
Annualized	33,858.00	39,258.00	40,458.00	\$43,650.00	\$46,650.00	
Sales	313,000.00	313,000.00	313,000.00			
% of Rent	10.8%	12.5%	12.9%			

8/12/2015

1-13

R. 356

RE: Lease Proposals

Page 1 of 2

Ex 3

From: Lewis White <lwhite@hullstoreygibson.com>
To: paulbranco <paulbranco@aol.com>
Subject: RE: Lease Proposals
Date: Wed, Feb 6, 2013 6:22 pm
Attachments: Hull Storey Tenant Application Ink.pdf (269K)

Paul,

As a follow up to our conversation, I have attached the tenant application. I can pull credit on your daughter and her fiancé if you want to explore the option. Again, it will likely be difficult for me to gain approval on removing you as a guarantor on the lease.

Also, I will propose the percentage rent be set at 8% over \$325,000 for years 1-5 and 8% over \$350,000 in years 6-10, assuming you are in agreement with the base rent terms. Let me know if you have any questions. Thanks.

Lewis White
Leasing Representative
Hull Storey Gibson Companies, LLC
1190 Interstate Parkway
Augusta, GA 30909
706-434-1737 office
706-831-6100 mobile

From: Lewis White
Sent: Thursday, January 31, 2013 2:24 PM
To: 'paulbranco@aol.com'
Subject: RE: Lease Proposals

Paul,

Attached are terms that I am willing to propose to my ownership group for approval. I reviewed this with my VP and after a closer look at 21 comparable Great American Cookie Stores and the average occupancy cost is over 18%. The fact is, you have a very strong store in the Sumter Mall. Based off of our discussions, I will propose to keep the base rent lower and set breakpoint where the landlord can benefit based off of your continued strong sales. I do not know if the ownership will agree to this but I will give one of these two scenarios a try if you are in agreement. Please let me know if you have any questions.

Lewis White
Leasing Representative
Hull Storey Gibson Companies, LLC
1190 Interstate Parkway
Augusta, GA 30909
706-434-1737 office
706-831-6100 mobile

<https://mail.aol.com/webmail-std/en-us/PrintMessage>

6/24/2015

R. 357

RE: Lease Proposals

Page 2 of 2

From: paulbranco@aol.com [mailto:paulbranco@aol.com]

Sent: Thursday, January 24, 2013 10:07 AM

To: Lewis White

Subject: Lease Proposals

Please see attached.

PJB

Brooktenn, LLC
3101 Dickson Street
Atlanta, GA 30319

E-4

Proposal for Purchase

Great American Cookies
Sumter Mall
Sumter, SC

Purchase Price.....\$70,000

GFG Transfer Fee.....to be paid for by Seller

Mall Transfer Fee.....to be split 50/50 with seller (not to exceed \$2,500 for Seller)

Store Inventory to be valued and purchased by Brooktenn at the time of transfer of ownership. Inventory consists of unopened boxes of non-food merchandise with current logos and designs and unopened boxes of food items all with current dates.

It is the seller's responsibility to see that all machinery and equipment is in good working condition at time of sale.

This proposal is contingent upon Buyers getting a satisfactory lease from Hull Storey Gibson within 90 days of signed proposal.

Great American Cookies
Magnolia Mall
Florence, SC

Purchase Price.....\$30,000

GFG Transfer Fee..... to be paid for by Seller

Mall Transfer Fee.....to be split 50/50 with seller (not to exceed \$2,500 for Seller)

Store Inventory to be valued and purchased by Brooktenn at the time of transfer of ownership. Inventory consists of non-food merchandise with current logos and designs and food items all with current dates.

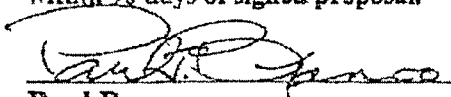
It is the seller's responsibility to see that all machinery and equipment is in good working condition at time of sale.

Excluded equipment from Magnolia Mall location:

(3) Taylor counter top soft serve machines.

Small Cube Ice Machine.

This proposal is contingent upon Buyers getting a satisfactory lease from PREIT within 90 days of signed proposal.


Paul Branco
Branco Investments, Inc.

Date: 3-1-2013


Stewart Applebaum
Brooktenn, LLC

Date: 3/1/13

Es S

This email was created using the 'Email My Texts' App

Email Texts for : (2) Hull Storey-Lewis White, 8436218321 7068316100,
8436218321

To YOU

Date : 10/26/2012 11:23:52 AM

Let me know if you don't receive the email- I just resent to
paulbranco@aol.com- this is lewis white

To : Hull Storey-Lewis White

Date : 12/12/2012 08:09:38 PM

Hey Lewis, got the e-mail and we're working on it. Just a super busy
time of year for me. Hope to get back with you real soon.

To : Hull Storey-Lewis White

Date : 01/28/2013 11:52:17 AM

Hey Lewis, just wanted to confirm that you received my e-mail last
week. Hope you're doing well.

PJB

To YOU

Date : 01/28/2013 11:53:44 AM

Who is this and ill check? Thanks

To : Hull Storey-Lewis White

Date : 01/28/2013 11:54:35 AM

Paul Branco - GAC Sumter mall

To YOU

Date : 01/28/2013 11:55:35 AM

I did- I hope to have a response by Wednesday- thanks

To : Hull Storey-Lewis White

Date : 03/04/2013 01: 6:13 PM

I will be providing your contact info to Stewart Applebaum of
Brooktenn, LLC. I have also forwarded the Tennant appl to him. We
will need to keep in touch regarding lease finalization for them and
progress as it relates to this. Thanks,

To : Hull Storey-Lewis White

Date : 04/22/2013 10:58:44 AM

Saw where you tried to call me. I'm going to be in a meeting all day.
What's up?

To YOU

Date : 04/22/2013 11:01:31 AM
All I can get approved is \$20,000 to the LL

To : Hull Storey-Lewis White
Date : 04/22/2013 12:40:35 PM
Have you/the owner approved Stewart and Brooktenn as potential tenants? Have you agreed to the term and rates?

*Asking
if
approved*

To : Hull Storey-Lewis White
Date : 04/22/2013 12:45:53 PM
Is the 5 year deal with me extending my lease still an option, or is that off the table?

To YOU
Date : 04/22/2013 02:35:48 PM
Stewarts deal has been approved if we can determine a way to come up with 20k.

To : Hull Storey-Lewis White
Date : 04/22/2013 06:26:22 PM
Has he reviewed the lease and agreed to the terms or haven't you gotten that far yet?

To : Hull Storey-Lewis White
Date : 04/23/2013 02:51:39 PM
Saw you tried to call again. This payroll debacle is killing me. What's up?

To YOU
Date : 04/23/2013 02:53:50 PM
Trying to get this figured out. What do you want to do?

To : Hull Storey-Lewis White
Date : 04/24/2013 01:48:22 PM
Tick, tock ... What's happening? Thought I would've had something from you by now. Did you send the proposal to my e-mail?

To : Hull Storey-Lewis White
Date : 04/26/2013 10:52:07 AM
Give me your thoughts please. Will I have something to review today or will this be rolling into next week?

To YOU
Date : 04/26/2013 10:52:55 AM
It will be next week

To : Hull Storey-Lewis White
Date : 04/26/2013 10:58:49 AM
Ok, but that pretty much eats up the 7 day extension. I was hoping not

to have to keep scheduling and rescheduling my guys. Any idea what the holdup is?

To : Hull Storey-Lewis White

Date : 04/26/2013 11:01:50 AM

Maybe you should hav made the extension 15 or 30/31 days. Hindsight is most often 20/20.

To YOU

Date : 04/26/2013 11:03:56 AM

That's fine I will get a letter out today stating the 15th.

To : Hull Storey-Lewis White

Date : 05/01/2013 06:39:30 PM

Why are you asking me to sign a lease assignment when Stewart was negotiating his own lease for Brooktenn?

To : Hull Storey-Lewis White

Date : 05/02/2013 06:07:23 PM

Why are you asking me to sign a lease assignment when Stewart was negotiating his own lease for Brooktenn?

All : Hull Storey-Lewis White

Date : 05/08/2013 04:10:43 PM

-----Original Message-----

To: 7068316100

To: 2146322993

From: 8436218321

Subject:

And as I stated in my letter, June 30th would be the next target date. I'm getting tired of these Chinese fire drills.

Number of text messages = 24

This email was created using the 'Email My Texts' App

Ex 6

Matthew Matson

From: Ashley Dolce
Sent: Wednesday, March 20, 2013 10:38 AM
To: Lewis White
Cc: paulbranco@aol.com
Subject: RE: Great American Cookie - JM

Yes, I was just reviewing our collections ledger.

Mr. Branco -

A letter was sent to you last April regarding an increase in the sanitation disposal charges for the Great American Cookie store at the Sumter Mall. The new charge is \$29.79 per month. Several subsequent notices have been sent regarding this increase, however, the monthly payment has not been adjusted. At this point, we are showing underpayments totaling \$575.49. I would be willing to split the past charges with you (\$287.75) provided you also pick up the new trash charge of \$29.79 beginning in April. I understand you're in the process of trying to sell the business and I'd hate for this small amount to hold up the deal. Please let me know if this is something we can work together on.

Thanks,

Ashley W. Dolce
Hull Storey Gibson Companies, LLC
1190 Interstate Parkway
Augusta, GA 30909
(706) 434.1728 direct dial
(706) 863-4933 fax
adolce@hullstoreygibson.com

From: Lewis White
Sent: Wednesday, March 20, 2013 10:31 AM
To: Ashley Dolce
Cc: paulbranco@aol.com
Subject: RE: Great American Cookie - JM

Paul Branco- paulbranco@aol.com

Is this about his outstanding balance? I have this on REC next week.

From: Ashley Dolce
Sent: Wednesday, March 20, 2013 10:29 AM
To: Lewis White
Subject: Great American Cookie - JM

Lewis - do you have any email contact for this tenant? Thanks!

Ashley W. Dolce
Hull Storey Gibson Companies, LLC

1190 Interstate Parkway
Augusta, GA 30909
(706) 434-1728 direct dial
(706) 863-4933 fax
adolce@hullstorevgibson.com

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GAC- Sumter

Page 1 of 1

From: Lewis White <lwhite@hullstoreygibson.com>
To: paulbranco <paulbranco@aol.com>
Subject: GAC- Sumter
Date: Mon, Mar 25, 2013 11:25 am

Paul,

I am trying to get this deal presented to our ownership group and my VP has a few questions..

What is the final sales price of the business? I believe you said \$70,000 but what is this amount for? The equipment and fixtures, goodwill, etc? Ownership is just curious about the sale and I need additional information. Anything you can provide will be helpful. Thanks.

Lewis White
Leasing Representative
Hull Storey Gibson Companies, LLC
1190 Interstate Parkway
Augusta, GA 30909
706-434-1737 office
706-831-6100 mobile

Sumter- Great American Cookie

Ex 8

Page 1 of 1

From: Lewis White <lwhite@hullstoreygibson.com>

To: paulbranco <paulbranco@aol.com>; stewapplebaum <stewapplebaum@gmail.com>

Cc: John Hudson <jhudson@hullstoreygibson.com>

Subject: Sumter- Great American Cookie

Date: Tue, Apr 30, 2013 3:21 pm

Attachments: 3256_001.pdf.pdf (510K), 3257_001.pdf.pdf (80K), JM - Great American Cookie Company - Lease.pdf (1850K)

Paul and Stewart,

Attached is the Assignment, Assumption, Amendment and Ratification of the Lease Agreement, the letter agreement extending the lease thru May 15th and the original lease agreement. Please review and let me know if you have any questions.

Lewis White
Leasing Representative
Hull Storey Gibson Companies, LLC
1190 Interstate Parkway
Augusta, GA 30909
706-434-1737 office
706-831-6100 mobile

ASSIGNMENT, ASSUMPTION, AMENDMENT AND RATIFICATION OF LEASE AGREEMENT

THIS ASSIGNMENT, ASSUMPTION, AMENDMENT AND RATIFICATION OF LEASE AGREEMENT (this "Agreement"), is made as of this _____ day of _____, 2013 ("Effective Date") by and among Paul J. Branco and Anne Branco, jointly and severally, ("Assignor"), and Brookteem, LLC, a Georgia limited liability company ("Assignee"), and Sumter Mall, LLC, a Georgia limited liability company ("Landlord").

RECITALS:

Whereas, Landlord and Assignor are parties to Lease Agreement dated December 30, 2002, (as amended by Letter Agreement dated April _____, 2013) (collectively, the "Lease") for Unit 55 (the "Premises") containing approximately 650 square feet of floor area located in the Sumter Mall, in the City of Sumter, County of Sumter, State of South Carolina ("the Shopping Center"), as more particularly described in the Lease; and

Whereas, Assignor and Assignee have agreed that Assignor will sell the business to Assignee for a sum of seventy thousand and no/100 dollars (\$70,000.00) (the "Assignment Cost"), which, pursuant to Article 16.2 of the Lease, is payable entirely to Landlord; and

Whereas, Landlord has agreed to accept twenty thousand and no/100 dollars (\$20,000.00) as full satisfaction of its entitlement to the Assignment Cost;

NOW, THEREFORE, in consideration of the mutual promises contained herein, the parties covenant and agree as follows:

1. Recitals. The recital paragraphs above and the Lease are incorporated into this Agreement as if rewritten below in their entirety.

2. Representations.

A. Assignor's Representations. Assignor represents and warrants to Assignee and to Landlord that, as of the Effective Date: (a) it has the full right, power and authority to enter into this Agreement without the prior consent of any person, corporation or governmental entity; (b) the execution of this Agreement will not conflict with or result in a breach of any agreement to which Assignor is a party or by which it may be bound; and (c) the Lease is in full force and effect and has not been amended, modified or supplemented except as stated above and by this Agreement.

B. Assignee's Representations. Assignee represents and warrants to Assignor and to Landlord that, as of the Effective Date: (a) it is a limited liability company, duly organized, validly existing and in good standing under the laws of Georgia and is authorized to do business in South Carolina; (b) the execution of this Agreement constitutes the binding obligation of Assignee and has been authorized pursuant to Assignee's Operating Agreement; (c) it has the full right, power and authority to enter into this Agreement without the prior consent of any person, corporation or governmental entity; and (d) the execution of this Agreement will not conflict with or result in a breach of Assignee's Operating Agreement or Articles of Organization or any agreement to which Assignee is a party or by which it may be bound.

3. Assignment, Assumption and Consent. Assignor hereby assigns its interest in the Lease to Assignee on the terms and conditions contained in the Lease. From and after the Effective Date, Assignor shall be released from performing any of the obligations of the Lease accruing after the Effective Date, but not before (e.g., Assignor is not released from its obligation to defend Landlord against tort claims arising in the Premises prior to the Effective Date even if the claim is not raised by a claimant until after the Effective Date). The "Effective Date" of this assignment and transfer shall be the date this Agreement is executed by the last of Landlord, Assignor and Assignee and delivered to all. Any rent, charges or other sums due under the Lease shall be paid by Assignee and Assignor contemporaneously with the signing of this document.

Assignee hereby accepts the assignment of Assignor's interest in the Lease as of the Effective Date, on the terms and conditions contained in the Lease. Assignee covenants and agrees to assume the obligations of "Tenant"

under the Lease and to pay, perform and abide by all of the covenants, terms, conditions, agreements and other obligations on the part of the "Tenant" to be performed, paid or observed under the Lease. Assignee agrees to use the Premises only for the Permitted Use and only under Tenant's Trade Name.

Landlord hereby consents to the assignment of the Lease from Assignor to Assignee. Landlord's consent contained herein shall not be deemed consent to, or a waiver of, Landlord's right to consent to any future assignments for which Landlord's consent is required pursuant to the Lease.

4. Releases. Assignor hereby releases Landlord and its agents, employees, attorneys, directors, shareholders, partners, managers, officers and successors and assigns (the "Landlord Entities"), from any and all claims, demands, damages, liabilities, liens, obligations, actions, charges, costs and expenses (including attorneys' fees) either at law or in equity, of any kind or nature whatsoever, whether known or unknown, direct or indirect, matured or hereafter existing (collectively, "Claims"), by reason of any matter, cause or thing whatsoever, existing or arising at any time, whether prior to or on or after the Effective Date, and relating, directly or indirectly, to the Premises, Shopping Center and/or the Lease. Assignor acknowledges that it may hereafter discover facts different from, or in addition to, those which it now knows or believes to be true with respect to the claims and liabilities released hereunder, and acknowledges that this instrument shall remain effective in all respects, notwithstanding such different or additional facts or the discovery thereof.

5. Attorneys' Fees. The parties agree that in the event of litigation arising out of or related to this Agreement, the prevailing party (or most successful party) shall be entitled to recover all reasonable attorneys' fees and costs and expenses necessitated thereby.

6. Amendment. The Lease is hereby amended, modified and supplemented as follows:

A. Lease Term. The Lease Term shall be extended for an additional term of ten (10) years beginning April 16, 2013 and ending April 15, 2023 ("Additional Term") with no further options to renew or extend the term of the Lease. The Additional Term shall be on the terms and conditions set forth in the Lease as amended hereby, other than the one-time obligations of Landlord which have been fully performed.

B. Minimum Rent. Effective April 16, 2013, the Minimum Rent shall be as follows:

<u>Date</u>	<u>Per Annum</u>	<u>Per Month</u>
April 16, 2013- April 15, 2015	\$38,400.00	\$3,200.00
April 16, 2015- April 15, 2018	\$39,500.00	\$3,300.00
April 16, 2018- April 15, 2020	\$42,600.00	\$3,550.00
April 16, 2020- April 15, 2023	\$45,600.00	\$3,800.00

C. Percentage Rent. Effective April 15, 2013, the Percentage Rent shall be ten percent (10%) of Gross Sales in excess of the following annual Breakpoint:

<u>Date</u>	<u>Annual Breakpoint</u>
April 16, 2013- April 15, 2023	\$350,000.00

D. Sanitation. Effective April 16, 2013, the Sanitation charge shall be fixed as follows:

<u>Date</u>	<u>Per Annum</u>	<u>Per Month</u>
April 16, 2013- April 15, 2015	\$357.48	\$29.79

April 16, 2015- April 15, 2018	\$450.00	\$37.50
April 16, 2018- April 15, 2020	\$450.00	\$37.50
April 16, 2020- April 15, 2023	\$450.00	\$37.50

E. Promotional Fund. Effective April 16, 2013, the Promotional Fund charge shall be as follows:

<u>Date</u>	<u>Per Annum</u>	<u>Per Month</u>
April 16, 2013- April 15, 2015	\$499.92	\$41.66
April 16, 2015- April 15, 2018	\$600.00	\$50.00
April 16, 2018- April 15, 2020	\$600.00	\$50.00
April 16, 2020- April 15, 2023	\$600.00	\$50.00

7. Assignment Fee. Upon the Effective Date, as a condition precedent to the effectiveness of Landlord's consent to the foregoing assignment, Assignor shall remit an assignment fee to Landlord in the amount of twenty thousand and no/100 dollars (\$20,000.00).

8. Guaranty. The Guaranty Agreement attached hereto as Exhibit "A" is incorporated by reference to this Agreement.

9. Interpretation, Amendment and Modification. This Agreement shall be interpreted under the laws of the State of South Carolina. The recitals to this Agreement are incorporated in this Agreement. This Agreement is the product of negotiation and the parties agree that it shall be interpreted in accordance with its fair and apparent meaning and not for or against either party. This Agreement contains the entire agreement between the parties with respect to the Landlord's approval of the Assignment of the Lease. All prior negotiations or agreements, whether oral or written about the Assignment, are superseded and merged herein. If any provision of this Agreement or its application to any person or circumstance shall be declared invalid or unenforceable, the remaining provisions of this Agreement, or the application of such provision to persons or circumstances other than those to which it is invalid or unenforceable, shall not be affected thereby and each provision shall be valid and enforceable to the extent permitted by law. This Agreement may not be changed or amended except by a writing duly authorized and executed by the party against whom enforcement is sought.

10. Ratification. As amended hereby, the Lease is ratified, remains and shall continue in full force and effect.

11. Definitions. Any capitalized terms not defined herein shall have the meaning given them in the Lease.

12. Binding Effect. All provisions contained in this Agreement shall be binding upon, inure to the benefit of, and be enforceable by, the respective heirs, executors, representative, successors and assigns of Assignor, Assignee and Landlord.

13. Estoppel. Assignor and Assignee each certifies to Landlord that (i) the Lease has not been amended, modified or supplemented, except by this Assignment, Assumption and Landlord's Consent; and (ii) Landlord is not in default under the Lease under the terms of the Lease.

14. Counterparts and Effectiveness. This Agreement may be executed in counterparts, which, when taken in their entirety, shall constitute one original.

IN WITNESS WHEREOF, the parties have executed this Agreement by themselves or their duly authorized officers as of the day and year first above written.

LANDLORD

SUMTER MALL, LLC, a Georgia limited liability company

By: Sumter Mall Manager, Inc., a Georgia corporation
Its Manager

Witness Signature

Print Name of Witness

By: _____

Name: _____

Its: _____

Date: _____

ASSIGNEE

BROOKTENN, LLC a Georgia limited liability company

Witness Signature

Print Name of Witness

By: _____

Name: _____

Its: _____

Date: _____

ASSIGNOR

PAUL J. BRANCO

Witness Signature

Print Name of Witness

Address: 436 Guildford Circle, Florence, SC 29501

Date: _____

ANNE BRANCO

Witness Signature

Print Name of Witness

Address: 436 Guildford Circle, Florence, SC 29501

Date: _____

Exhibit "A"

LEASE GUARANTY AGREEMENT

WHEREAS, Landlord and Tenant have simultaneously executed or are about to execute the Assignment, Assumption, Amendment and Ratification of Lease Agreement (the "Agreement"); and,

WHEREAS, Stewart Applebaum, hereinafter referred to as "Guarantor" has a financial interest in Tenant; and,

WHEREAS, Landlord would not enter into the Agreement if Guarantor did not execute and deliver to Landlord this Lease Guaranty,

NOW, THEREFORE, for and in consideration of the execution of the foregoing Agreement by Landlord and as a material inducement to Landlord to execute said Agreement, Guarantor hereby jointly, severally, unconditionally and irrevocably guarantees the prompt payment by Tenant of all rentals and all other sums payable by Tenant under the Lease and the faithful and prompt performance by Tenant of each and every one of the terms, conditions and covenants of the Lease to be kept and performed by Tenant as such are defined in the Lease.

It is specifically agreed and understood that the terms of the Lease may be altered, affected, modified or changed by agreement between Landlord and Tenant, or by a course of conduct, and said Lease may be assigned by Landlord or any assignee of Landlord without consent or notice to Guarantor and that this Guaranty shall thereupon and thereafter guarantee the performance of said Lease as so changed, modified, altered or assigned.

This Guaranty shall not be released, modified or affected by failure or delay on the part of Landlord to enforce any of the rights or remedies of the Landlord under said Lease, whether pursuant to the terms thereof or at law or in equity.

No notice of default need be given to Guarantor, it being specifically agreed and understood that the guarantee of the undersigned is a continuing guarantee under which Landlord may proceed forthwith and immediately against Tenant or against Guarantor following any breach or default by Tenant or for the enforcement of any rights which Landlord may have as against Tenant pursuant to or under the terms of the within Lease or at law or in equity.

Landlord shall have the right to proceed against Guarantor hereunder following any breach or default by Tenant without first proceeding against Tenant and without previous notice to or demand upon either Tenant or Guarantor.

Guarantor hereby waives (a) notice of acceptance of this Guaranty, (b) demand of payment, presentation and protest, (c) all right to assert or plead any statute of limitations as to or relating to this Guaranty and the Lease, (d) any right to require the Landlord to proceed against the Tenant or any other Guarantor or any other person or entity liable to Landlord, (e) any right to require Landlord to apply to any default any security deposit or other security it may hold under this Lease, (f) any right to require Landlord to proceed under any other remedy Landlord may have before proceeding against Guarantor, (g) any right of subrogation.

Guarantor does hereby subrogate all existing or future indebtedness of Tenant to Guarantor to the obligations owed to Landlord under the Lease and this Guaranty. The obligations of Tenant under the Lease to execute and deliver stoppage statements and financial statements, as therein provided, shall be deemed to also require the Guarantor to do and provide the same relative to Guarantor.

The term "Landlord" whenever hereinabove used refers to and means the Landlord in the foregoing Lease specifically named and also any assignee of said Landlord, whether by outright assignment or by assignment for security, and also any successor to the interest of said Landlord or of any assignee in such Lease or any part thereof, whether by assignment or otherwise. So long as the Landlord's interest in or to the Premises or the rents, issues and profits therefrom, or in, to or under the Lease, are subject to any mortgage or deed of trust or assignment for security, no acquisition by Guarantor of the Landlord's interest in the leased premises or under the Lease shall affect

the continuing obligation of Guarantor under this Guaranty, which shall nevertheless continue in full force and effect for the benefit of the mortgagee, beneficiary, trustee or assignee under such mortgage, deed of trust or assignment, of any purchase at sale by judicial foreclosure or under private power of sale, and of the successors and assigns of any such mortgagee, beneficiary, trustee, assignee or purchaser.

The term "Tenant" whenever hereinabove used refers to and means the Tenant in the foregoing Lease specifically named and also any assignee or sublessee of said Lease and also any successor to the interests of said Tenant, assignee or sublessee of such Lease or any part thereof, whether by assignment, sublease or otherwise.

The obligations of the Guarantor hereunder shall include payment to Landlord of all reasonable costs of any successful legal action by Landlord against Guarantor, including reasonable attorney fees.

IN WITNESS WHEREOF, the Guarantor has hereto caused these presents to be executed this _____ day of _____, 2013.

GUARANTOR:

Stewart Applebaum

Ex 9



April 26, 2013

Paul J. Branco & Ann Branco
d/b/a Great American Cookie Co.
Via email to: paulbranco@aol.com

Re: Lease Agreement dated December 30, 2002, by and between Sumter Mall, LLC ("Landlord"), and Paul J. Branco and Ann Branco d/b/a Great American Cookie Co. ("Tenant"), for the use of approximately 650 square feet of retail space located within the Sumter Mall in Sumter, South Carolina (the "Lease").

Dear Tenant:

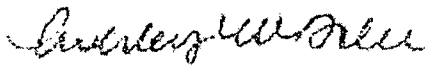
My firm, Hull Storey Gibson Companies, LLC, acts as the managing agent for the Landlord of the Sumter Mall in Sumter, South Carolina, and is authorized to give notices and make demands on its behalf.

The Lease expires on April 30, 2013. Notwithstanding the Lease expiration date, and without waiving the Landlord's rights under the Lease and South Carolina law, the Landlord hereby agrees, upon Tenant's signature below, to an extension of time for Tenant to vacate the Premises to no later than May 15, 2013.

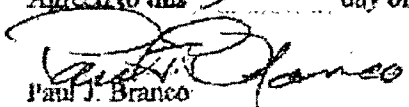
Correspondence dated April 17, 2013, provided the Lease standards for surrender of the Premises and this writing reaffirms and reiterates those standards. By signature below, Tenant confirms the extension of time to vacate the Premises to May 15, 2013, and ~~acknowledges and represents that Landlord is not in default under the Lease and Tenant is not aware of any facts which, with the passage of time, would constitute a default of the Landlord under the Lease, and Tenant has no accrued offsets, credits, deductions, claims or defenses against the Landlord.~~

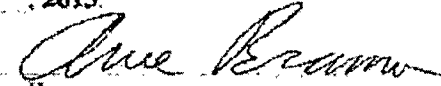
Very truly yours,

HULL STOREY GIBSON COMPANIES, LLC


Ashley W. Dolce
Associate General Counsel

Agreed to this 3rd day of May, 2013.


Paul J. Branco


Ann Branco

Ex 10



April 17, 2013

Paul J. Branco
Ann Branco
d/b/a Great American Cookie Co.
436 Guildford Circle
Florence, South Carolina 29501

Via Certified Mail, RRR
No. 70122920000053435170
and email to: paulbranco@aol.com

Re: Lease Agreement dated December 30, 2002, by and between Sumter Mall, LLC ("Landlord"), and Paul J. Branco and Ann Branco d/b/a Great American Cookie Co. ("Tenant"), for the use of approximately 650 square feet of retail space located within the Sumter Mall in Sumter, South Carolina (the "Lease").

Dear Tenant:

My firm, Hull Storey Gibson Companies, LLC, acts as the managing agent for the Landlord of the Cleveland Mall in Shelby, North Carolina, and is authorized to give notices and make demands on its behalf. We are sorry to hear that the Tenant will be vacating at the end of the Lease term, on or before April 30, 2013.

Please call the Sumter Mall management office to arrange for an inspection of the Premises. At that time, mall management will take photos, measurements and other repair documentation regarding the condition of the Premises and will forward such to the Landlord for review with its property management and construction teams. Upon receipt of these items, the Landlord will formulate a comprehensive list of items that will need repair under the Lease before the Landlord will accept surrender of the Premises. The list will thereafter be provided to Tenant for repairs to be made prior to vacating.

Pursuant to the Lease:

Upon expiration or earlier termination of the Lease Term, whether by lapse of time or otherwise, Tenant shall promptly and peacefully surrender the Premises to Landlord. The Premises shall be surrendered broom clean in the same condition as when tendered to Tenant, ordinary wear and tear and damage by casualty excepted. All property and improvements not removed at the end of the Lease Term shall be deemed abandoned and shall become the Landlord's property and may be sold, destroyed, removed or used by Landlord in its sole discretion. All costs incurred by Landlord in connection with such abandoned property shall be due and owing by Tenant to Landlord. No termination or expiration of this Lease shall relieve Tenant from any indemnities, liabilities, monetary obligations or other obligations which have accrued or relate to a period prior to the termination or expiration of this Lease.

Furthermore, Tenant, at its sole cost and expense, is to have kept the Premises in good clean condition and make all needed repairs and replacements to the Premises, including, but not limited to: the glass; windows, doors and other exterior openings; door, window and other opening and closing devices; window, door and other frames, moldings, lock and hardware; lighting, electrical, heating, air conditioning and plumbing systems within and exclusively serving the Premises, fixtures, ducts, conduits; pipes, wiring in, under and exclusively serving the Premises, and installations, electrical, plumbing, and other utility outlets, fixtures, bulbs and tubes. Tenant is also responsible for the preventative maintenance and repairs of the HVAC system, as well as the fire extinguishers and other fire protection devices.

Therefore, in order for the Tenant to properly surrender the Premises, meeting the normal wear and tear standard under the Lease, the paint and affixed décor shall be in good condition, without damage or shadow marks; all interior portions of the Premises shall be in good order and repair, including but not limited to the doors and door closing devices, restrooms, the stock rooms, the loading and storage areas, the employee offices and lounges and any other interior portions of the building; the light bulbs, ballasts and light fixtures shall all be in proper working order; the ceiling and carpet tiles shall not be stained or damaged and electrical wires shall not be left exposed or uncapped; the plumbing shall be in good working order with no slow or clogged drains; the HVAC system shall be in proper condition and all preventative maintenance requirements shall be updated through the date of surrender, and written evidence of said preventative maintenance must be provided to Landlord. The fire suppression system shall be in proper working order and properly inspected and maintained through the date of surrender. All keys to the Premises, including any mailbox keys should be returned to mall management upon surrender.

Tenant is not to have made any alterations, additions or improvements to the Premises without the prior written consent of Landlord, except for the installation of unattached, movable trade fixtures. All alterations, additions, improvements and fixtures (other than unattached, movable trade fixtures), made or installed by either party upon the Premises shall remain in and be surrendered with the Premises at the termination of the Lease, unless Landlord requests their removal and any damages caused by such removal are repaired at Tenant's expense.

Therefore, all tenant fixtures, including racks, counters, shelves, cash wraps and other fixtures and equipment of every kind and nature necessary in Tenant's business, shall remain the property of the Tenant. Upon removal of such fixtures, Tenant must repair any damage caused by the installation or removal before the surrender date. Upon removal of the shelving units, any missing or damaged carpet or missing or broken floor tiles must be repaired and the floor must be cleaned to remove the shelving row marks or the floor tiles should be replaced. Also the Tenant must remove its sign and cause any holes to be filled and any discolorations to the façade to be repaired and repainted.

ACQUISITION • DEVELOPMENT • REDEVELOPMENT

1190 Interstate Parkway • Atlanta, Georgia 30309 • (770) 865-2222 • Fax: (770) 865-7457

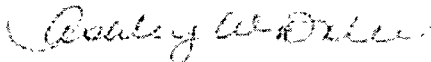
If a satellite dish was installed on the roof, the dish shall be removed and any damage caused by such removal shall be repaired. The Premises shall be properly cleaned and free from debris, trash and rubbish and all removed items shall be properly disposed of. The Landlord reserves the right to make additional claims for maintenance or repair as set forth under the Lease, which are not specifically set forth in this letter.

Furthermore, until the Premises is surrendered in accordance with the Lease standards and Landlord accepts return of possession of the Premises, the Tenant shall be deemed to remain in possession of the Premises and the term shall be extended in accordance with the holdover provisions of the Lease and/or South Carolina law. Return of keys to mall management does not indicate that the Landlord has accepted surrender of the Premises. The Sumter Mall management cannot accept return of the Premises. Such acceptance of surrender shall only come from the undersigned or Landlord's otherwise authorized agent from the corporate office.

As you have probably surmised, our firm has experienced substantial costs in rectifying tenant responsibilities upon vacating, which costs have required a vigilant Landlord approach. Thank you for your cooperation and prompt attention to this matter. Should you have any questions or concerns regarding this notice, please contact John Hudson at 706.434.1724 or jhudson@hullstoreygibson.com. For questions regarding the standards for surrender, please contact me at adolee@hullstoreygibson.com or 706.434.1728.

Very truly yours,

HULL STOREY GIBSON COMPANIES, LLC



Ashley W. DoLee
Associate General Counsel

ACQUISITION • DEVELOPMENT • REDEVELOPMENT

1190 Interstate Parkway • Augusta, Georgia 30909 • (706) 863-2222 • Fax (706) 868-7457

Ex 11

JE 15-13

Discussed Restoration & Cleaning
with Nancy Holmes

- * Spackle Holes
- + VET Title where displays were
- * Fill Holes where Gate was
- + Replace (1) VET title back room.
- * Leaving shelves in Cooler
- + Air Conditioning Works Properly
- + Lights in good order & working
- + Leaving Trans-Lite Fixtures
- * Ok to leave cameras in place

All other items in Store in
Good order No other Issues.

* Nancy Holmes

Nancy Holmes

Mnt. Tech

* Paul B. Bance

Paul Bance

843-621-8321

----- Forwarded message -----

From: **Stewart Applebaum** <stewapplebaum@gmail.com>

Date: Fri, May 3, 2013 at 5:45 PM

Subject: Re: Sumter- Great American Cookie

To: Lewis White <lwhite@hullstorevgibson.com>

Ex 12

Mr. White,

We have received and reviewed the above email and its attachments. We have several comments. The agreement Brooktenn has for the purchase of Great American Cookies at Sumter Mall is between Brooktenn and Branco Investments, Inc. (a South Carolina corporation) and not with Paul and Anne Branco. Brooktenn is not assuming their lease, therefore, there should not be any assignment costs.

We strongly oppose the imposition of the \$20,000.00 "Assignment Cost" and will not pay said cost.

Stewart Applebaum
Brooktenn, LLC

On Tue, Apr 30, 2013 at 3:19 PM, Lewis White <lwhite@hullstorevgibson.com> wrote:
Paul and Stewart,

5/7/2013

Attached is the Assignment, Assumption, Amendment and Ratification of the Lease Agreement, the letter agreement extending the lease thru May 15th and the original lease agreement. Please review and let me know if you have any questions.

Lewis White
Leasing Representative
Hull Storey Gibson Companies, LLC
1190 Interstate Parkway
Augusta, GA 30909
706-434-1737 office
706-831-6100 mobile

Share the Fun of Cookies!

Stewart Applebaum
R&B Cookies, Inc.
Brooktenn, LLC
dba Great American Cookies, Pretzelmaker
GA, NC, SC
404-290-4935 (cell)
stewapplebaum@gmail.com

 Right-click here to
download pictures. To
help protect your

 Right-click here to
download
pictures. To help
protect your

Share the Fun of Cookies!

Valerie Applebaum
R&B Cookies, Inc.
Brooktenn, LLC,
dba Great American Cookies, Pretzelmaker
GA, SC, NC
vapplebaum@gmail.com
404-290-4445 (cell)

 Right-click here to
download pictures. To
help protect your

 Right-click here to
download
pictures. To help
protect your

Ex 1

Re: Florence and Sumter

Page 1 of 2

From: paulbranco <paulbranco@aol.com>
To: vapplebaum <vapplebaum@gmail.com>, lighted <lighted@aol.com>
Subject: Re: Florence and Sumter
Date: Mon, Feb 11, 2013 4:07 pm
Attachments: Sumter and Florence Purchase proposal PDF (54K)

I have returned the proposal to my leasing agent, and I apologize for hanging on one point. My purchase price for Sumter was \$70K. This was a number I had come to early on as being the figure I wanted from the Sumter store. I should not have considered compromising on that. The \$36K for Florence was simply derived from subtracting the \$70K for Sumter from the \$106K total selling price, plain and simple.

The Florence transaction has the potential to be much more complicated given the fact that the lease is not expiring for 18 months. If it was a slam dunk, the split wouldn't have mattered to me either way.

There are (2) equipment exceptions to the Florence purchase. One is the small ice maker next to the flake machine. It hasn't been used in quite some time and frankly, with the big machine in the back room as a backup, I seriously doubt you will ever need it. The other are the (3) yogurt machines.

I will need to know your intentions for Florence should the leasing agent be unwilling to renegotiate the remainder of the current term into a longer lease. So please advise.

I trust you will find this acceptable.

-----Original Message-----
From: Valerie Applebaum <vapplebaum@gmail.com>
To: paulbranco <paulbranco@aol.com>
Sent: Fri, Feb 8, 2013 1:34 pm
Subject: Florence and Sumter

Paul,

Please sign the attached and return.

Thanks,
Stewart

Share the fun of Cookies!

Valerie Applebaum
R&B Cookies, Inc.
Brookfield, LLC,
dba Great American Cookies, Brookfield, IL
GA, SC, NC
1311 Plover Way, Suite 100
404-250-4445 (call)

<https://mail.google.com/webmail/stidron-us/PrintMessage>

8/12/2015

6/24/2016

1-21

R. 380

Brooktenn, LLC
3101 Dickson Street
Atlanta, GA 30319

Proposal for Purchase

Great American Cookies
Sumter Mall
Sumter, SC

Purchase Price.....\$70,000

GFG Transfer Fee....to be split 50/50 with seller (not to exceed \$2,500 for Seller)

Mall Transfer Fee.....to be split 50/50 with seller (not to exceed \$2,500 for Seller)

Store Inventory to be valued and purchased by Brooktenn at the time of transfer of ownership.

Great American Cookies
Magnolia Mall
Florence, SC

Purchase Price.....\$30,000

GFG Transfer Fee....to be split 50/50 with seller (not to exceed \$2,500 for Seller)

Mall Transfer Fee.....to be split 50/50 with seller (not to exceed \$2,500 for Seller)

Store Inventory to be valued and purchased by Brooktenn at the time of transfer of ownership.

It is the seller's responsibility to see that all machinery and equipment is in good working condition at time of sale.

Excluded equipment from Magnolia Mall location:

(3) Taylor counter top soft serve machines.

Small Cube Ice Machine.


Paul Branco - Branco Investments, Inc.

2-11-13

8/12/2015

1-23

R. 381

Sale Proposal

Page 1 of 1

From: Valerie Applebaum <vapplebaum@gmail.com>
To: paul@rbc-llc.com
Subject: Sale Proposal
Date: Fri, Feb 22, 2013 5:30 pm
Attachments: sumter florence proposal 2 22.13 signed sa.pdf (506K)

Paul,

Attached is our proposal for the purchase of Great American Cookies at Sumter Mall and Magnolia Mall in SC.

Stewart

Share the Fun of Cookies!

Valerie Applebaum
R&B Cookies, Inc.
Brookton, LLC,
dba Great American Cookies, Pretzelmaker
GA, SC, NC
vapplebaum@gmail.com
404-290-4445 (cell)

 cid:image001.jpg@01C
C584C.91EDEE80

 cid:image002.jpg
@01C584C.91E
DEEB0

http://www.greatamericancookies.com/

2/12/2015

6/24/2015

1-28

R. 382

Brookteenn, LLC
3101 Dickson Street
Atlanta, GA 30319

Proposal for Purchase

Great American Cookies
Sumter Mall
Sumter, SC

Purchase Price \$70,000

GFG Transfer Fee To be paid for by Seller
Mall Transfer Fee to be split 50/50 with seller (not to exceed \$2,500 for Seller)
Store Inventory to be valued and purchased by Brookteenn at the time of transfer of ownership. Inventory consists of unopened boxes of non-food merchandise with current logos and designs and unopened boxes of food items all with current dates.
It is the seller's responsibility to see that all machinery and equipment is in good working condition at time of sale.
This proposal is contingent upon buyers getting a satisfactory lease from Hull Storey Gibson within 90 days from date of signed proposal.

Great American Cookies
Magnolia Mall
Florence, SC

Purchase Price \$30,000

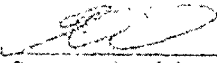
GFG Transfer Fee To be paid for by Seller
Mall Transfer Fee to be split 50/50 with seller (not to exceed \$2,500 for Seller)

Store Inventory to be valued and purchased by Brookteenn at the time of transfer of ownership. Inventory consists of unopened boxes of non-food merchandise with current logos and designs and unopened boxes of food items all with current dates.
It is the seller's responsibility to see that all machinery and equipment is in good working condition at time of sale.

Excluded equipment from Magnolia Mall location:
(3) Taylor counter top soft serve machines.
Small Cube Ice Machine.

This proposal is contingent upon buyers getting a satisfactory lease from PREIT within 90 days from date of signed proposal.

Paul Branco
Branco Investments, Inc.


Stewart Applebaum
Brookteenn, LLC

8/12/2015

7-29

R. 383

Report

Page 1 of 1

From: [Giovanni G. \(giovanni.g@usdoj.gov\)](#)

To: ["Giovanni G." <giovanni.g@usdoj.gov>](#); ["Giovanni G." <giovanni.g@usdoj.gov>](#)

Subject: [REDACTED]

Date: Thu, Feb 14, 2013 5:07 pm

Attachments: Giovanni G. (giovanni.g@usdoj.gov) - Rev 02 15 13 RDR - (1).doc

POB

()

U.S. Department of Justice, Office of the Inspector General

8/12/2010

Page 1 of 1

1-30

Brookteenn, LLC
3101 Dickson Street
Atlanta, GA 30319

Proposal for Purchase

Great American Cookies
Sumter Mall
Sumter, SC

Purchase Price.....\$70,000

GFG Transfer Fee....to be paid for by Seller

Mall Transfer Fee.....to be split 50/50 with seller (not to exceed \$2,500 for Seller)

Store Inventory to be valued and purchased by Brookteenn at the time of transfer of ownership. Inventory consists of unopened boxes of non-food merchandise with current logos and designs and unopened boxes of food items all with current dates.

It is the seller's responsibility to see that all machinery and equipment is in good working condition at time of sale.

This proposal is contingent upon Buyers getting a satisfactory lease from Hull Storey Gibson within 90 days of signed proposal.

Great American Cookies
Magnolia Mall
Florence, SC

Purchase Price.....\$30,000

GFG Transfer Fee.... to be paid for by Seller

Mall Transfer Fee.....to be split 50/50 with seller (not to exceed \$2,500 for Seller)

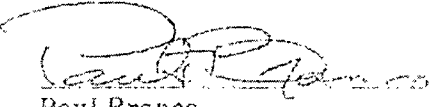
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It is the seller's responsibility to see that all machinery and equipment is in good working condition at time of sale.

Excluded equipment from Magnolia Mall location:

(3) Taylor counter top soft serve machines.

Small Cube Ice Machine.


Paul Branco
Branco Investments, Inc.

Stewart Applebaum
Brookteenn, LLC

Date: 2-28-13

Date: _____

8/12/2015

1-31

R. 385

Matthew Matson

From: Lewis White
Sent: Friday, October 26, 2012 11:23 AM
To: 'paulbranco@aol.com'
Subject: FW: Sumter- Great American Cookie Lease Renewal

2x2

From: Lewis White
Sent: Monday, October 15, 2012 6:14 PM
To: paulbranco@aol.com
Subject: Sumter- Great American Cookie Lease Renewal

Paul,

I appreciate you time to discuss this lease renewal. Below are terms that I am willing to propose to my ownership group. These terms are based off of other comparable "cookie" uses and GAC locations. Please take a look and let me know if you have any questions.

Sumter Mall
Suite ID: 55
Current Lease Expiration: 4/30/2012
-Term: 5 years
-Years 1-2: \$37,260/year
-Years 3-5: \$40,200/year
-Sanitation: \$357.48/year
-Promotional Dues: \$499.92/year
-Percentage Rent and Breakpoint: 8% over \$300,000
-Sykes Co-Tenancy: In the event that Sykes does not exercise its option, there will be a 1 year cure period for the Landlord to find another tenant to backfill the space. If after the 1 year period a lease is not in place, Tenant will have the one time right (60 day time period) to terminate this lease.

Lewis White
Leasing Representative
Hull Storey Gibson Companies, LLC
1190 Interstate Parkway
Augusta, GA 30909
706-434-1737 office
706-831-6100 mobile



Sumter County Third Judicial Circuit Public Index



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Switch View

Paul Branco , plaintiff, et al VS Hull Storey Retail Group Llc , defendant, et al

Case Number:	2015CP4300596	Court Agency:	Common Pleas	Filed Date:	03/05/2015
Case Type:	Common Pleas	Case Sub Type:	Breach of Cont 140	File Type:	Jury
Status:	Judgment	Assigned Judge:	Clerk Of Court C P, G S, And Family Court		
Disposition:	Judgment	Disposition Date:	03/23/2017	Disposition Judge:	Cothran, R. Ferrell Jr
Original Source Doc:		Original Case #:			
Judgment Number:	2015CP4300596	Court Roster:			

Case Parties	Judgments	Tax Map Information	Associated Cases	Actions	Financials		
For:	Branco, Paul	Against:	Hull Storey Retail Group Llc	Judg. Amount:	\$63,625.00	Judgment Date:	03/23/2017
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	03/23/2017 --
Notes:	None						
Judgment Details							
Claims Code	Detail Desc.			Detail Amount		Detail Date	
None							

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
R. Ferrell Cothran, Circuit Court Judge

Appellate Case No. 2017-000998
Civil Action No. 2015-CP-43-596

Paul Branco and Branco Investments,
Inc., d/b/a/ Great American Cookie Co., ... Respondents,

v.

Hull Storey Retail Group, LLC, and
Sumter Mall, LLC, ... Appellants.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: 

Timothy E. Madden

SC Bar No. 11786

E-mail: tim.madden@nelsonmullins.com

Miles E. Coleman

SC Bar No. 78264

E-mail: miles.coleman@nelsonmullins.com

104 S. Main Street, Suite 900

Post Office Box 10084 (29603-0084)

Greenville, South Carolina 29601

Telephone: (864) 373-2300

Attorneys for Appellants

October 18, 2018
Greenville, South Carolina