

Jul 12 2022

(g) Notwithstanding the foregoing provisions of this Section 10.3, all Rent (including all Annual Basic Rent and Additional Rent) otherwise payable with respect to any Expansion Space shall be fully abated until the earlier of (i) the date Tenant commences its normal business operation in such Expansion Space, and (ii) the date that is ninety (90) days following the date that such Expansion Space is added to the Leased Premises pursuant to Section 10.3(c) above.

(h) Subject to the foregoing provisions of this Section 10.3, and except as otherwise expressly provided herein, all the other then executory terms and conditions of this Lease shall apply to any Expansion Space as fully and completely as the same apply to the balance of the Leased Premises.

#### 10.4 Subordination of Expansion Space Rights

(a) Anything herein contained to the contrary notwithstanding, Tenant's Expansion Rights as provided in this Article X with respect to any Leasable Area are and shall be subordinate to any Third Party Leasing Rights with respect to such Leasable Area that are outstanding as of the date of Tenant's Expansion Notice. The term "Third Party Leasing Rights", with respect to any Leasable Area, shall mean any rights granted to any third party to lease such Leasable Area (including any such rights granted to other tenants of the Property pursuant to their leases, and any rights granted to other third parties pursuant to a letter of intent executed by Landlord).

(b) For purposes of this Article X, no Leasable Areas shall be considered "*available for leasing*" if, and for so long as, any Third Party Leasing Rights with respect to such Leasable Area are then outstanding. Nevertheless, if Tenant, in any Tenant Expansion Notice, shall so request, then Landlord, in its Landlord Expansion Notice, shall (i) identify any Leasable Areas that would then constitute Available Leasable Areas, but for the existence of outstanding Third Party Leasing Rights with respect thereto, and (ii) briefly describe such Third Party Leasing Rights.

(c) Following the delivery of any Tenant's Expansion Notice, Landlord, during the period commencing on the date of such Tenant's Expansion Notice and ending on the last day of Tenant's Exclusive Period, shall not (i) lease any Leasable Area which was *available for leasing* on the date of Tenant's Expansion Notice, or (ii) grant any Third Party Leasing Rights.

(d) Nothing contained in this Article X is intended, nor may anything herein be relied upon by Tenant, as a representation by Landlord or any other person as to the nature and extent of the Available Leasable Areas that may exist from time to time. Without limiting the foregoing, Landlord, subject to the provisions of Section 14.20 hereof, may convert any Leasable Area to offices for marketing or property management purposes, without notifying or offering such space to Tenant, or otherwise implicating Tenant's Expansion Rights.

#### 10.5 Duration

Tenant's Expansion Rights under this Article X shall continue until there are fewer than twelve (12) months then remaining in the Term, and Tenant shall no longer have any outstanding Renewal Options.

## 10.6 Disputes

Landlord and Tenant shall endeavor to resolve, in good faith, any disagreement arising as a result of Tenant's exercise of Expansion Rights under this Article X, failing which such disagreement shall be resolved in accordance with Article XII; provided that no disagreement between Landlord and Tenant regarding the contents of any Expansion Space Acceptance shall render any otherwise effective Expansion Space Acceptance ineffective.

## ARTICLE XI TERMINATION RIGHTS

### 11.1 Wachovia's Termination Right

(a) Subject to the terms and conditions of this Article XI, during the Initial Term of this Lease (but not during any Renewal Term), Wachovia shall have the right (herein called "Wachovia's Termination Right"), exercisable from time to time, to terminate this Lease with respect to all or any portion(s) of the then Leased Premises (other than the whole or any portion(s) of any Short-Term Additional Space then constituting a part of the Leased Premises). Wachovia may exercise Wachovia's Termination Right only by written notice to Landlord (each, a "Termination Rights Exercise Notice"), which shall (i) indicate whether Wachovia is exercising Wachovia's Termination Right with respect to the entirety of the then Leased Premises (which may be done only if no Short-Term Additional Space then constitutes a part of the Leased Premises), or less than the entirety of the then Leased Premises, (ii) in any case that Wachovia is exercising Wachovia's Termination Right with respect to less than the entirety of the then Leased Premises, specify, with particularity, the portion(s) of the Leased Premises with respect to which Wachovia's Termination Right is being exercised (such portion(s) of the Leased Premises being herein separately referred to as the "Vacate Space"), and be accompanied by a floor plan showing the location and configuration of the Vacate Space, (iii) the date upon which Wachovia is electing to terminate this Lease with respect to the entirety of the Leased Premises or the Vacate Space, as the case may be, which date shall not be earlier than the date that is nine (9) months after the date of Wachovia's Termination Rights Exercise Notice (such date being herein called the "Early Termination Date"). Notwithstanding the foregoing, Wachovia's right to specify Vacate Space comprising less than all of the then Base Leased Premises located on any floor of the Building, shall be contingent upon such Vacate Space being of a size and configuration that makes it separately leasable to third party tenants.

(b) Notwithstanding the provisions of Section 11.1(a) above, during the Integration Period, Wachovia's Termination Right shall be limited by the provisions of Section 3.3 of the Master Agreement.

(c) Notwithstanding anything to contrary contained herein, it is understood and agreed that Wachovia's Termination Right shall belong solely to Wachovia, and, notwithstanding any Assignment, shall survive as a right belonging solely to Wachovia for the balance of the Initial Term. Accordingly, Wachovia's Termination Right may be exercised, at anytime during the Initial Term, by, and only by, Wachovia (whether or not Wachovia is then the Tenant hereunder). Upon request of Wachovia made, from time to time, during any period that Wachovia is not the Tenant hereunder, Landlord shall acknowledge the foregoing in writing.

## 11.2 Effect of Termination

(a) If Wachovia, consistent with the provisions of Section 11.1 above, shall have exercised Wachovia's Termination Right with respect to the entirety of the then Leased Premises, then, as of the Early Termination Date, this Lease shall terminate and end as fully and completely as if the Early Termination Date was the Expiration Date.

(b) If, and in each case that, Wachovia, consistent with the provisions of Section 11.1 above, shall have exercised Wachovia's Termination Right with respect to less than the entirety of the then Leased Premises (*i.e.*, with respect to Vacate Space), then the following provisions shall apply:

(1) As of the Early Termination Date, this Lease shall terminate with respect to the Vacate Space only.

(2) Tenant shall surrender the Vacate Space on or prior to the Early Termination Date, which surrender shall be consistent with the provisions of Section 4.1 hereof (as applied to Vacate Space), *subject, however*, to the following provisions of this Section 11.2(b)(3) below. If Tenant shall fail to surrender the Vacate Space on or prior to the Early Termination Date, then, for the period commencing on the date immediately following the Early Termination Date and ending on the date that the Vacate Space shall be surrendered, Tenant shall continue to pay Annual Basic Rent and Additional Rent with respect to the Vacate Space on the same basis as prior to the Early Termination Date. Notwithstanding the foregoing, either Landlord or Wachovia may terminate Tenant's right to possess and occupy the Vacate Space at any time following the Early Termination Date upon thirty (30) days' prior written notice to the other party.

(3) If the Vacate Space is not (as of the date of the applicable Termination Rights Exercise Notice) in a Separately Leasable Condition, then, and only in such events, Landlord, promptly following the date of such Termination Rights Exercise Notice, shall proceed to cause the Demising Work with respect to such Vacate Space to be performed in accordance with the provisions of Section 5.7 hereof; *provided, however*, that any Demising Work performed by Landlord prior to the Early Termination Date shall be performed subject to, and in a manner that is consistent with, Tenant's continued use and occupancy of the Vacate Space until the Early Termination Date.

## ARTICLE XII DISPUTE RESOLUTION

### 12.1 Approvals and Consents

(a) Whenever, pursuant to any express provision of this Lease, one party hereto is required to obtain the consent or approval of the other party (either as a condition to the exercise of a right hereunder or otherwise), then the party from whom such consent or approval is required shall not unreasonably withhold, condition or delay such consent or approval, *unless*, pursuant to such express provision of this Lease, such party is granted the right to withhold such consent or approval in its sole or absolute discretion (in which event such party may withhold the same in its sole or absolute discretion). Nothing in this Section 12.1(a) shall be deemed to limit

or extend any time period expressly set forth in this Lease for a party to respond to a request for its consent or approval.

(b) With respect any such express provision of this Lease that requires one party hereto to obtain the consent or approval of the other party, if the party from whom such consent or approval is required, pursuant to the provisions of this Lease (including Section 12.1(a) above), not to unreasonably withhold, condition or delay such consent or approval, then such consent or approval shall be requested, and granted or denied, in accordance with the following provisions:

(i) The party requesting the approval or consent (the "Requesting Party") shall submit to the other party (the "Responding Party") a written request for approval or consent, together with (x) such information and supporting documentation specifically required under in the pertinent provision of this Lease or (y) if the pertinent provision of this Lease does not specifically require any information or supporting documentation, then such information and supporting documentation (if any) as is reasonably required to evaluate the request.

(ii) Unless a specific time period for the Responding Party's response is provided for in the pertinent provision of this Lease (in which case, such specific time period shall control), the Responding Party shall have ten (10) Business Days to (A) approve in writing the request, (B) deny in writing the request, or (C) if, and to the extent, the Requesting Party failed to submit, with its request, the information and/or documentation required to be submitted under Section 12.1(i)(x) or (y) above, as applicable, then, and only in such event, respond with a written demand for such information and/or documentation. If (x) the Responding Party fails to properly provide any of the above responses, and (y) such failure shall continue for a period of five (5) Business Days after delivery of a notice from the Requesting Party indicating such failure, which notice shall refer to this Section 12.1(b)(ii) and recite, in all capital letters (or other prominent display), the provisions of this Section 12.1(b)(ii), then the requested approval or consent shall be deemed granted.

(iii) If the Responding Party properly requests information and/or documentation pursuant to Section 12.1(b)(ii)(C) above, then within five (5) Business Days after the Requesting Party delivers same to the Responding Party, the Responding Party shall, in all events, respond as set forth in Section 12.1(b)(ii)(A) above or Section 12.1(b)(ii)(B) above. If (x) the Responding Party fails to timely so respond, and (y) such failure shall continue for a period of three (3) Business Days after delivery of a notice from the Requesting Party indicating such failure, which notice shall refer to this Section 12.1(b)(iii) and recite, in all capital letters (or other prominent display), the provisions of this Section 12.1(b)(iii), then the requested approval or consent shall be deemed granted.

(iv) All approvals, denials, and requests for additional documentation or information, when given, shall be in writing.

## 12.2 Dispute Resolution

Whenever, pursuant to any express provision of this Lease, a dispute is to be resolved pursuant to this Article XII, the following provisions shall apply:

(a) Any dispute to be resolved pursuant to this Article XII, shall be resolved by arbitration conducted under the auspices of JAMS or its successor in the State and in the county where the Property is located. Either party may initiate such arbitration by sending notice (an "Arbitration Notice") of a demand to arbitrate to the other party and to JAMS. The Arbitration Notice shall contain a description of the subject matter of the arbitration, the dispute with respect thereto, the amount involved, if any, and the remedy or determination sought.

(b) JAMS shall provide a list of three (3) available arbitrators from which each party may strike one. The remaining arbitrator shall serve as the arbitrator for the dispute. JAMS shall select arbitrators based on the nature of the dispute, which arbitrators shall be independent third parties who have not acted for or been employed by either party (or its Affiliate) within the five (5) years preceding initiation of the arbitration with appropriate skills, background and experience (and such persons shall have at least ten (10) years of applicable experience) to be able to effectively and professionally resolve the particular dispute.

(c) The arbitrator, so selected, shall schedule the arbitration within thirty (30) days after its appointment, and shall render its decision within thirty (30) days after the arbitration is concluded. The parties agree to arbitrate pursuant to JAMS' Streamlined Arbitration Rules as amended from time to time, and as modified to the extent practicable to give effect to the agreement of the parties as set forth in this Section 12.2 or in Section 12.3 below. Arbitration shall not be conducted in person unless either Landlord or Tenant shall request an in-person arbitration. The decision of the arbitrator shall be final and shall be binding upon the parties, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

(d) Landlord and Tenant agree to sign all documents and to take all other actions necessary to submit such dispute to arbitration and hereby waive any or all rights that it may at any time have to revoke the agreement to submit such disputes to arbitration and to abide by the decision rendered thereunder.

(e) This Article XII shall not apply to any disputes, except to the extent expressly provided herein.

### 12.3 Conduct of the Arbitration

Arbitration proceedings hereunder shall be subject to the following additional provisions:

(a) The hearing shall be conducted on a confidential basis without continuance or adjournment.

(b) Any offer made or the details of any negotiation of the dispute subject to arbitration prior to arbitration shall not be admissible.

(c) Each party shall be entitled to all rights and privileges granted by the arbitrator to the other party.

(d) The arbitrators shall have the power to impose on any party such terms, conditions, consequences, liabilities, sanctions and penalties as they deem necessary or

appropriate (which shall be conclusive, final and enforceable as the award on the merits) to compel or induce compliance with discovery and the appearance of, or production of documents in the custody or, any officer, director, agent or employee of a party any Affiliate of such party.

(e) Arbitrators may not award indirect, consequential or punitive damages or issue injunctive relief.

(f) Arbitrators shall be bound by the provisions of this Lease and shall not have the power to add to, subtract from, or otherwise deviate from such provisions.

(g) Landlord or Tenant's failure to perform any obligation hereunder shall not constitute a default under this Lease if such party's duty to perform such obligation is the subject of any arbitration or any dispute that would be submitted to arbitration if unresolved during such arbitration or until such dispute is otherwise resolved.

#### 12.4 Alternative Means of Arbitration with AAA.

In the event that JAMS or any successor shall no longer exist or if JAMS or any successor fails to refuse to, or is legally precluded from, accepting submission of such dispute, then the dispute shall be resolved by binding arbitration before the AAA under the AAA's commercial arbitration rules then in effect.

### ARTICLE XIII TENANT REMEDIES

#### 13.1 Generally

(a) The term "Landlord Event of Default" shall mean any one of the following events: (i) Landlord shall default in the payment of any monetary sum to Tenant when due, and such default shall continue for a period of ten (10) Business Days after written notice thereof from Tenant to Landlord; or (ii) Landlord shall default in its obligation to maintain any policy of insurance that Landlord is required to maintain under Section 6.4 or 6.5 hereof, and such default shall continue for a period of ten (10) Business Days after written notice from Tenant to Landlord of such default, which notice shall (x) specifically refer to Section 6.4 or 6.5 hereof, as applicable, and the insurance policy which Landlord has failed to maintain, and (y) state, in all capital letters and in a prominent place, that the continuance of such failure to maintain insurance for ten (10) Business Days after Landlord's receipt of such written notice will constitute a Landlord Event of Default under this Section 13.1(a)(ii); or (iii) Landlord shall default under any of its other obligations under this Lease (other than any default described in Section 13.1(a)(i) and (ii) above), and such default shall continue for a period of thirty (30) days after written notice from Tenant to Landlord thereof (or, if such default is curable but reasonably cannot be cured within such thirty (30) day period, then Landlord shall not commence the cure thereof within such thirty (30) day period or thereafter shall not diligently pursue such cure until the same is accomplished).

(b) If (i) Landlord shall default in the performance of any of Landlord's obligations under this Lease, and (ii) such default shall thereafter become a Landlord Event of Default hereunder (or, in cases of emergency only, such default shall continue for 24 hours after notice

thereof from Tenant to Landlord), then Tenant, without thereby waiving such default (and without limiting any other right or remedy it might have on account thereof, in law or in equity), may (but shall not be obligated to) perform such obligation for the account, and at the expense, of Landlord. In any such event, Landlord, within thirty (30) days after Tenant's delivery of an invoice therefor (together with reasonable supporting documentation), shall reimburse Tenant for any reasonable out-of-pocket expenses incurred by Tenant (including reasonable attorneys' fees) in connection with Tenant's performance of any such obligation for the account of Landlord pursuant to this Section 13.1(b), together with interest thereon, at the Applicable Rate, from the date that such expenses were incurred by Tenant to the date that the same are reimbursed to Tenant by Landlord.

(c) The exercise by Tenant of any one or more of the rights and remedies provided in this Lease shall not prevent the subsequent exercise by Tenant of any one or more of the other rights and remedies herein provided or otherwise permitted at law or in equity. Except as otherwise provided in this Lease, remedies provided for in this Lease are cumulative and may, at the election of Tenant, be exercised alternatively, successively, or in any other manner, and are in addition to any other rights provided for or allowed by law or in equity, including the right to claim that Tenant has been constructively evicted.

#### 13.2 Offset Rights

If (i) Landlord shall default in the payment of any monetary sum to Tenant when due (including any sums due and owing to Tenant pursuant to the provisions of Section 13.1(b) hereof), and (ii) such default shall thereafter become a Landlord Event of Default hereunder, then Tenant, without thereby waiving such default (and without limiting any other right or remedy it might have on account thereof, in law or in equity), may, at any time thereafter (if, and to the extent that, such sums remain unpaid), set-off the amount of such sums against any installments of Rent thereafter becoming due and payable to Landlord pursuant to the provisions of this Lease.

### ARTICLE XIV MISCELLANEOUS

#### 14.1 Notices

Any notice or other communications required or permitted to be given under this Lease (each, a "notice") must be in writing and shall be sent to all Notice Parties (*i.e.*, notices sent by Landlord shall be sent to all Tenant's Notice Parties, and notices sent by Tenant shall be sent to all Landlord's Notice Parties), and sent (i) by certified United States Mail, return receipt requested, or (ii) by Federal Express or other nationally recognized overnight courier service. Any notice shall be deemed given upon receipt or refusal thereof. Either party shall have the right to change its Notice Parties (by addition and/or subtraction), and/or the addresses thereof, and/or the party to whose attention a notice thereto shall be directed, by giving the other party notice thereof in accordance with the provisions of this Section 14.1; *provided that* (x) such notice of any such change shall become effective only upon the other party's receipt or refusal thereof, and (y) neither Landlord or Tenant may designate more than five (5) Notice Parties, in total, as its Notice Parties. Additionally, Tenant agrees that copies of all notices of a Landlord

Default Notices hereunder shall also be sent to each Interest Holder that notifies Tenant in writing of the address to which copies of such notices are to be sent. Any notice sent by either party pursuant to this Section 14.1 shall set forth the address of the Property.

#### 14.2 Brokers

(a) Tenant represents that it has not engaged any broker, agent or similar party with respect to the transactions contemplated by this Lease, nor has it dealt with any broker, agent or similar party with respect to the transactions contemplated by this Lease. Tenant agrees to indemnify and hold harmless Landlord from and with respect to any claims for a brokerage fee, finder's fee or similar payment with respect to this Lease which is made by any broker, agent or similar party with which Tenant has dealt and Landlord has not dealt.

(b) Landlord represents that it has not engaged any broker, agent or similar party with respect to the transactions contemplated by this Lease, nor has it dealt with any broker, agent or similar party with respect to the transactions contemplated by this Lease. Landlord agrees to indemnify and hold harmless Tenant from and with respect to any claims for a brokerage fee, finder's fee or similar payment with respect to this Lease which is made by any broker, agent or similar party with which Landlord has dealt and Tenant has not dealt.

#### 14.3 Binding on Successors

This Lease shall be binding upon and inure to the benefit of Landlord and its permitted successors and assigns, and shall be binding upon and inure to the benefit of Tenant and its permitted successors and assigns. Where appropriate the pronouns of any gender shall include the other gender, and either the singular or the plural shall include the other.

#### 14.4 Rights and Remedies Cumulative

Except as otherwise provided herein, all rights and remedies of Landlord and Tenant under this Lease shall be cumulative and none shall exclude any other rights or remedies allowed by law.

#### 14.5 Governing Law

This Lease shall in all respects be governed by, and construed in accordance with, the laws of the State, including all matters of construction, validity and performance, except laws governing conflicts of law; provided that to the extent the law of the jurisdiction where the Property is located requires that the laws of such jurisdiction apply to any aspect of this Lease, then, to that extent, such laws of such jurisdiction will also apply to the Property.

#### 14.6 Rules of Construction

The terms and provisions of this Lease shall not be construed against or in favor of a party hereto merely because such party is the "Landlord" or the "Tenant" hereunder or such party or its counsel is the draftsman of this Lease.

## 14.7 Authority and Qualification

Tenant warrants that all consents or approvals required of third parties (including its Board of Directors) for the execution, delivery and performance of this Lease have been obtained and that Tenant has the right and authority to enter into and perform its covenants contained in this Lease. Landlord warrants that all consent or approvals required of third parties (including its Board of Trustees) for the execution, delivery and performance of this Lease have been obtained and that Landlord has the right and authority to enter into and perform its covenants contained in this Lease. Landlord and Tenant each also represents and warrants that it is lawfully doing business in the State.

## 14.8 Severability

If any term or provision of this Lease, or the application thereof to any person or circumstance, shall to any extent be invalid or unenforceable, the remainder of this Lease, or the application of such provision to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each provision of this Lease shall be valid and shall be enforceable to the extent permitted by law.

## 14.9 Quiet Enjoyment

Landlord covenants that Tenant shall and may peacefully and quietly have, hold and enjoy the Leased Premises, subject to the other terms hereof; provided that no Event of Default shall then be outstanding.

#### 14.10 Limitation of Personal Liability

Tenant specifically agrees to look solely to Landlord's interest in the Property and, during the Integration Period, Landlord's interest in the other Integrated Properties (which interest, in either case, shall be deemed to include the rent and other income or proceeds derived from such Property and/or, if applicable, the other Integrated Properties) for the recovery of any monetary judgment against Landlord, it being agreed that neither Landlord nor any Landlord Party shall ever be personally liable for any such judgment or for any other liability or obligation of Landlord under this Lease beyond such interest in the Property (and, if applicable, the other Integrated Properties). The provision contained in the foregoing sentence is not intended to, and shall not, limit any right that Tenant might otherwise have (i) to obtain injunctive relief (or other equitable relief) against Landlord or any other person, (ii) to offset sums due and owing to Tenant against the Rent hereunder, or (iii) to prosecute any suit or action in connection with enforcement of Tenant's rights hereunder or Landlord's obligations hereunder.

### 14.11 Memorandum of Lease

Upon the written request of Tenant, Landlord and Tenant shall enter into a short form of this Lease for the purpose of recording the same, and Tenant shall, at Tenant's expense, have the right to record the same.

#### 14.12 Master Agreement

The Master Agreement has been executed and delivered by the parties thereto contemporaneous with the execution and delivery of this Lease. Throughout the Integration Period, (i) the Master Agreement shall be deemed integrated into, and shall form a material part of, this Lease, and (ii) this Lease shall be deemed integrated into, and shall form a material part of, the Master Agreement. Throughout the Integration Period, to the extent any provisions of this Master Agreement are expressly referenced in one or more provisions of this Lease, such referenced provisions of this Master Agreement shall be deemed incorporated into such provisions of this Lease, as fully as if expressly set forth herein, and shall be controlling in the case of any conflicts.

#### 14.13 Amendments

This Lease may not be altered, changed or amended, except by an instrument in writing signed by Landlord and Tenant.

#### 14.14 Entirety

This Lease, together with the Master Agreement, embodies the entire agreement between Landlord and Tenant relative to the subject matter of this Lease and all summaries, proposals, letters and agreements with respect to the subject matter of this Lease that were entered into prior to the date of this Lease shall be of no further force and effect after the date hereof.

#### 14.15 References

All references in this Lease to days shall refer to calendar days unless specifically provided to the contrary.

#### 14.16 Counterpart Execution

This Lease may be executed in any number of counterparts, each of which shall be an original, but such counterparts together shall constitute one and the same instrument.

#### 14.17 No Partnership

Nothing in this Lease creates any relationship between the parties other than that of lessor and lessee and nothing in this Lease, whether the computation of rentals or otherwise, constitutes the Landlord a partner of the Tenant or a joint venturer or member of a common enterprise with the Tenant.

#### 14.18 Captions

The captions and headings used in this Lease are for convenience and reference only and in no way add to or detract from the interpretation of the provisions of this Lease.

#### 14.19 Required Radon Notice

RADON IS A NATURALLY OCCURRING RADIOACTIVE GAS THAT, WHEN IT HAS ACCUMULATED IN A BUILDING IN SUFFICIENT QUANTITIES, MAY PRESENT A HEALTH RISK TO PERSONS WHO ARE EXPOSED TO IT OVER TIME. LEVELS OF RADON THAT EXCEED FEDERAL AND STATE GUIDELINES HAVE BEEN FOUND IN BUILDINGS IN THE STATE. ADDITIONAL INFORMATION REGARDING RADON TESTING MAY BE OBTAINED FROM YOUR COUNTY PUBLIC HEALTH UNIT.

#### 14.20 Changes by Landlord

(a) Landlord shall have the right at any time, without the same constituting an actual or constructive eviction and without incurring liability to Tenant therefor, to make reasonable alterations to the Common Areas (including the arrangement or location of entrances or passageways, doors and doorways, corridors, elevators, stairs, and bathrooms in the Common Areas), so long as:

(1) (x) the number of parking spaces located within the Parking Areas shall not be reduced, and (y) access to and from the Parking Areas (*i.e.*, the ingress and egress between Parking Areas and the street, and ingress and egress between the Parking Areas and the Leased Premises) shall remain equivalent to, or become better than, the access to and from the Parking Areas available on the Commencement Date;

(2) access to and from the Leased Premises (*i.e.*, the ingress and egress between the Leased Premises and the street) shall remain equivalent to, or become better than, the access to and from the Leased Premises available on the Commencement Date, and

(3) neither (i) the visibility of the ground floor portion(s) of the Leased Premises, nor (ii) the visibility or prominence of any Tenant's Building Signage shall be adversely affected.

(b) Landlord shall have the right to close, from time to time, portions of the Common Areas for such temporary periods as Landlord reasonably deems legally necessary and sufficient to evidence Landlord's ownership and control thereof so as to prevent any claim of adverse possession by, or any implied or actual dedication to, the public or any party other than Landlord, so long as a reasonable means of ingress and egress to and from the Leased Premises is maintained at all times.

(c) Landlord may make alterations to the Leasable Areas other than the Leased Premises; provided, however, that no reduction made to the aggregate amount of Leasable Areas shall reduce the denominator used in computing Tenant's Occupancy Percentage.

#### 14.21 Waiver of Jury Trial

LANDLORD AND TENANT EACH HEREBY WAIVES ITS RIGHT TO A JURY TRIAL OF ANY ISSUE OR CONTROVERSY ARISING UNDER THIS LEASE.

#### 14.22 Termination of Lease

If, as of any date occurring after the Commencement Date and prior to the Expiration Date, no space is demised under this Lease (i.e., (i) no Leased Premises shall be demised hereunder, and (ii) no Release Premises shall be demised hereunder), then, effective as of such date, this Lease (if, for any reason, not already terminated) shall automatically terminate and be of no further force or effect, and, accordingly, neither Landlord nor Tenant shall have any further rights or obligations hereunder (or under the Master Agreement with respect to this Lease).

### ARTICLE XV ADDITIONAL PROVISIONS

#### 15.1 Existing Mortgage(s)

15.1.1 The term "Existing Mortgage(s)" shall mean the following Mortgage(s) existing as of the date hereof: that certain Mortgage, Deed of Trust, Deed to Secure Debt or similar security instrument, Security Agreement, Assignment of Leases and Rents and Fixture Filing dated as of September 22, 2004, from First States Investors 3300, LLC, a Delaware limited liability company, to or for the benefit of Lehman Brothers Holdings Inc.

15.1.2 Simultaneous herewith, Tenant, Landlord and the Mortgagee under each Existing Mortgage shall execute, acknowledge and deliver a Mortgage SNDA with respect to such Existing Mortgage.

#### 15.2 Existing Overlease(s)

15.2.1 The term "Existing Overlease(s)" shall mean the following Overlease(s) existing as of the date hereof: none

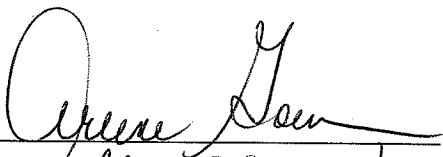
#### 15.3 Agreements Benefiting the Property

Landlord covenants and agrees that: (i) throughout the Term, it shall not amend, modify or supplement any easement or other agreement benefiting the Property (each a "Beneficial Agreement"), if any, in any manner that would shorten the term thereof (unless the term as shortened shall expire after the Outside Expiration Date), increase Tenant's obligations or otherwise adversely affect Tenant's rights hereunder; and (ii) it shall not terminate or cancel and/or take any action or fail to take any action that would result in the termination of any Beneficial Agreement prior to the Outside Expiration Date or such earlier date as this Lease shall expire or terminate.

IN WITNESS WHEREOF, the parties hereto have executed this Lease as of the date aforesaid.

LANDLORD:

Witness:

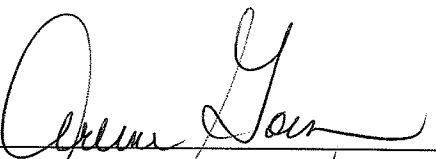
  
Name: ARIENE GORMAN

FIRST STATES INVESTORS 3300,  
LLC, a Delaware limited liability  
company

By:   
Name: Sonya A. Huffman  
Title: Vice President

TENANT:

Witness:

  
Name: ARIENE GORMAN

WACHOVIA BANK, NATIONAL  
ASSOCIATION, a national banking  
association

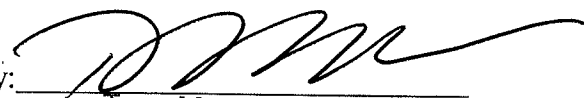
By:   
Name: Tom Markert  
Title: Vice President

Exhibit "A"  
Legal Description

All that certain piece, parcel, lot or tract of land with any improvements thereon, situate, lying and being in the Town of Beaufort, County of Beaufort, State of South Carolina, as shown on a plat prepared for The South Carolina National Bank by BES, Inc., dated June 13, 1986 and recorded July 2, 1986 in Plat Book 34 at Page 4, Office of the Register of Deeds for Beaufort County, and having the following metes and bounds: Beginning at an iron pin on the Northern right of way of Bay Street approximately 94 feet from the Western right of way of Charles Street, thence N53°22'20"W for a distance of 167.57 feet to an "X" on the concrete; thence turning and running N00°44'00"E for a distance of 198.45 feet to an iron pin; thence turning and running S89°41'30"E for a distance of 47.94 feet to an iron pin; thence turning and running N00°51'00"E for a distance of 133.61 feet to an iron pin; thence turning and running S89°30'00"E for a distance of 155.73 feet to an iron pin; thence turning and running S00°00'49"W for a distance of 62.88 feet to an iron pin; thence turning and running S00°21'45"E for a distance of 62.45 feet to the corner of a brick wall; thence turning and running S89°33'55"E for a distance of 104.24 feet to the corner of a brick wall; thence turning and running S01°09'30"E for a distance of 85.27 feet to an old fence corner; thence turning and running S88°20'38"E for a distance of 103.21 feet to an iron pin; thence turning and running S00°15'23"E for a distance of 136.08 feet to an iron pin; thence turning and running N89°16'00"W; thence turning and running for a distance of 73.09 feet to an iron pin; thence along lands of a museum S01°36'16"W for a distance of 80.92 feet to an iron pin at the point of beginning.

This being the same property conveyed to The South Carolina National Bank (now known as Wachovia Bank, National Association by virtue of that certain Affidavit of Name Change as recorded in Book 710 at Page 232 and that certain Affidavit of Merger and Name Change as recorded in Book 954 at Page 362), by deed of TXL Properties Limited 86-102, recorded June 23, 1993 in Book 633 at Page 270, Office of the Register of Deeds for Beaufort County.

TMS#: 121-004-000-0847 & 848

LESS AND EXCEPT:

All that certain lot of land, together with the improvements thereon, situated at 314 Charles Street in the City of Beaufort, County of Beaufort, State of South Carolina; containing 0.13 acres, more or less; lying within the northeast corner of Beaufort City Block 81; and being shown on a plat prepared by David E. Gasque, dated March 5, 1997, and recorded in Deed Book 933 at Page 122, Office of the Register of Deeds for Beaufort County, the said lot having such size, shape, dimensions, buttings and boundings, more or less, as will by reference to said plat more fully appear.

This being the same property conveyed to IBIS, Inc. by deed of Wachovia Bank of South Carolina, N.A., dated March 27, 1997 and recorded April 3, 1997 in Deed Book 933 at Page 119, Office of the Register of Deeds for Beaufort County.

TMS#: 121-004-000-0847B

**EXHIBIT A-1**

Site Plan



## EXHIBIT A-1

(continued)

### Site Plan (Parking Areas)

#### Key to attached site plan:

"Tenant Dedicated Parking Areas" = (i) Spaces, if any, designated "W"; (ii) all parking spaces if noted that Wachovia will lease, need, retain or have the right to use all parking (or other words of similar import); and/or (iii) the areas designated on the site plan as "for Wachovia parking" (or other words of similar import).

"Separate Charge Parking Areas" = Spaces, if any, designated "S". Separate Charge Parking Areas do not include any Tenant Dedicated Parking Areas, regardless of whether Wachovia charges its employees for use of same.

"Non-Dedicated Parking Areas" = (i) Spaces, if any, designated "AF" or otherwise indicated "AFRG Parking" or to be turned over or surrendered to AFRT and (ii) all parking areas that are not Tenant Dedicated Parking Areas or Separate Charge Parking Areas.

$W =$  Wachovia spaces



**EXHIBIT B**

**Leased Premises**

**WALTER  
ROBBS  
CALLAHAN  
& PIERCE**  
Architects, PA

305 West Fourth Street  
Suite 2A  
Winston-Salem, NC 27101  
Telephone 336-725-1371  
Fax 336-725-1465

#### HATCH LEGEND:

- GROSS SQUARE FOOTAGE
- RENTABLE SQUARE FOOTAGE
- [Hatched] WACHOVIA 20 YR SPACE
- [Cross-hatched] TENANT AREA
- [Dotted] VACANT
- [Solid] 2 YR RELEASE AREA

#### BOMA AREA CALCULATIONS

|                           |       |
|---------------------------|-------|
| FLOOR "GROSS"             | 6,153 |
| FLOOR RENTABLE            | 5,523 |
| FLOOR USABLE              | 4,910 |
| 20 YEAR USABLE            | 4,910 |
| 20 YEAR RENTABLE          | 5,523 |
| TWO YEAR RELEASE USABLE   | 0     |
| TWO YEAR RELEASE RENTABLE | 0     |
| TENANT USABLE             | 0     |
| TENANT RENTABLE           | 0     |
| VACANT USABLE             | 0     |
| VACANT RENTABLE           | 0     |



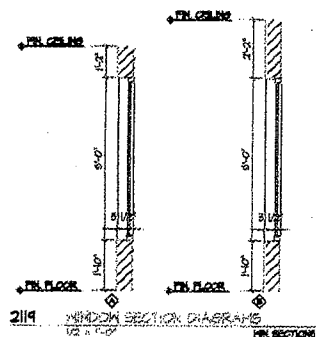
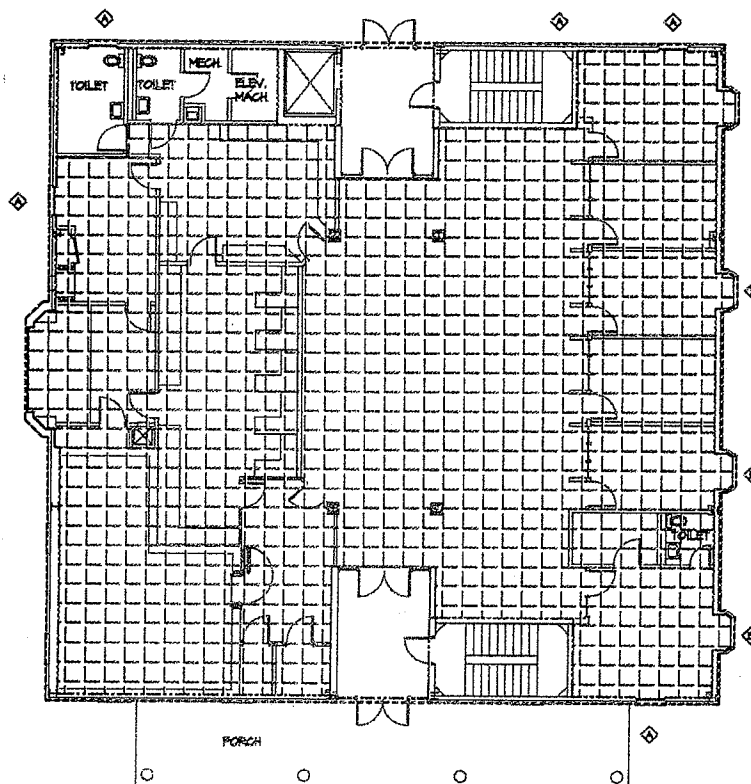
AMERICAN FINANCIAL  
REALTY TRUST

#### FLOOR AREA MEASUREMENTS

PIPEDREAM  
1011 BAY STREET  
BEAUFORT, SC  
PID 506584

PROJECT # 04-494  
DATE 05-18-04  
SCALE NTS

Δ2.1



**WALTER  
ROBBS  
CALLAHAN  
& PIERCE**  
*Architects, PA*

306 West Fourth Street  
Suite 2A  
Winston-Salem, NC 27101  
Telephone 336-725-1371  
Fax 336-725-1485

**HATCH LEGEND:**

- GROSS SQUARE FOOTAGE
- RENTABLE SQUARE FOOTAGE
- WACHOVIA 20 YR SPACE
- TENANT AREA
- VACANT
- 2 YR RELEASE AREA

| BOMA AREA CALCULATIONS    |          |
|---------------------------|----------|
| FLOOR "GROSS"             | 6,191 SF |
| FLOOR RENTABLE            | 5,586 SF |
| FLOOR USABLE              | 4,316 SF |
| 20 YEAR USABLE            | 4,316 SF |
| 20 YEAR RENTABLE          | 5,586 SF |
| TWO YEAR RELEASE USABLE   | 0 SF     |
| TWO YEAR RELEASE RENTABLE | 0 SF     |
| TENANT USABLE             | 0 SF     |
| TENANT RENTABLE           | 0 SF     |
| VACANT USABLE             | 0 SF     |
| VACANT RENTABLE           | 0 SF     |

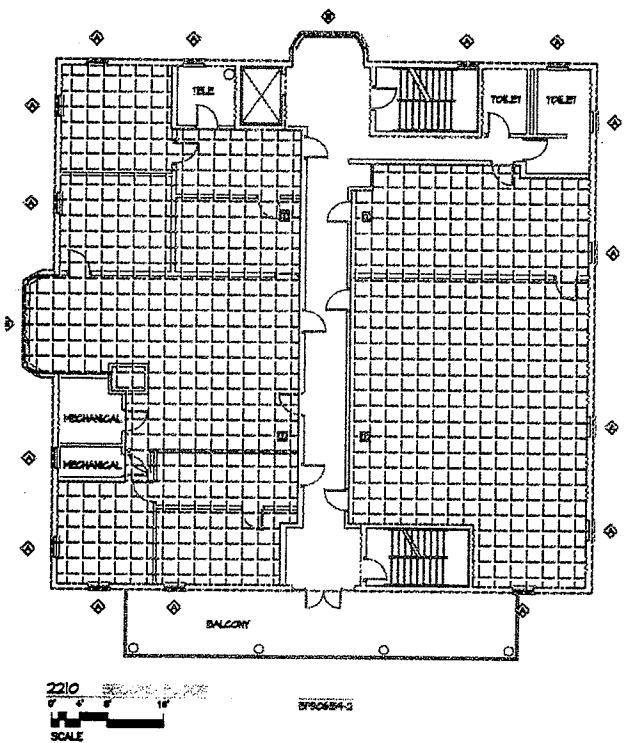
**WACHOVIA**

**AMERICAN FINANCIAL  
REALTY TRUST**

**FLOOR AREA MEASUREMENTS**

**PIPEDREAM**  
1011 BAY STREET  
BEAUFORT, SC  
PID 506584

|           |          |  |
|-----------|----------|--|
| PROJECT # | 04-494   |  |
| DATE      | 05-18-04 |  |
| SCALE     | NTS      |  |



**WALTER  
ROBBS  
CALLAHAN  
& PIERCE**  
Architects, PA

306 West Fourth Street  
Suite 2A  
Winston-Salem, NC 27101  
Telephone 336-725-1371  
Fax 336-725-1465

#### HATCH LEGEND:

- GROSS SQUARE FOOTAGE
- RENTABLE SQUARE FOOTAGE
-  WACHOVIA 20 YR SPACE
-  TENANT AREA
-  VACANT
-  2 YR RELEASE AREA

#### BOMA AREA CALCULATIONS

|                           |          |
|---------------------------|----------|
| FLOOR "GROSS"             | 6,191 SF |
| FLOOR RENTABLE            | 5,382 SF |
| FLOOR USABLE              | 4,202 SF |
| 20 YEAR USABLE            | 0 SF     |
| 20 YEAR RENTABLE          | 0 SF     |
| TWO YEAR RELEASE USABLE   | 0 SF     |
| TWO YEAR RELEASE RENTABLE | 0 SF     |
| TENANT USABLE             | 714 SF   |
| TENANT RENTABLE           | 915 SF   |
| VACANT USABLE             | 3,488 SF |
| VACANT RENTABLE           | 4,467 SF |



AMERICAN FINANCIAL  
REALTY TRUST

#### FLOOR AREA MEASUREMENTS

PIPEDREAM  
1011 BAY STREET  
BEAUFORT, SC  
PID 506584

PROJECT # 04-494  
DATE 05-18-04  
SCALE NTS

2.3

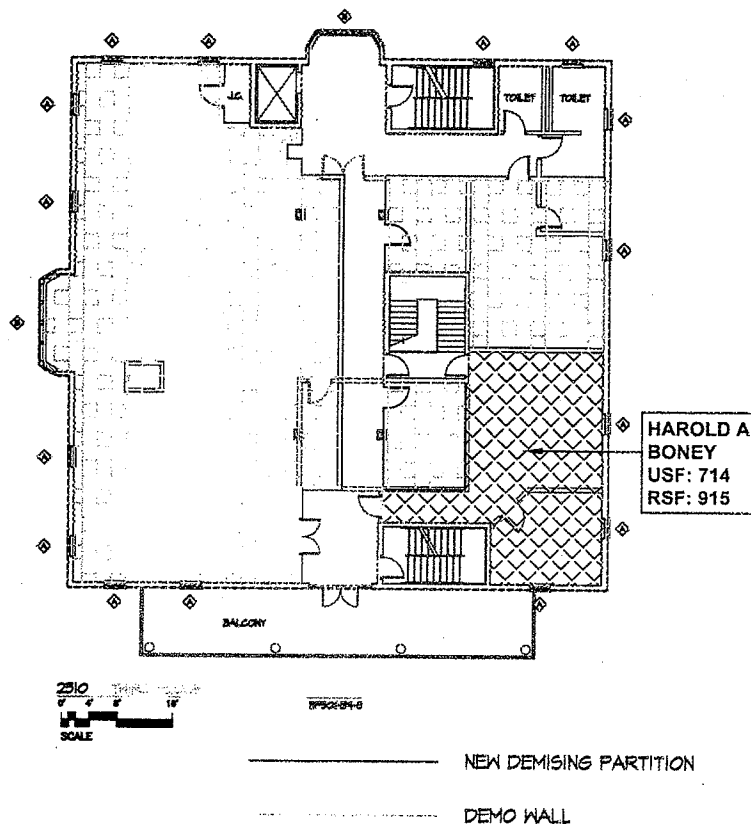


**EXHIBIT B-1**

Release Premises

**None**

**EXHIBIT C**Property Specific Information

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed thereto in the lease to which this Exhibit C is annexed.

1. Property Address: 1011 Bay Street, Beaufort, SC
2. Net Rentable Area of the Leased Premises: 11,109
3. Net Rentable Areas of the Release Premises: -0-
4. Net Rentable Areas of the Building: 16,491
5. Monthly Estimated OE Payment: 3,087
6. Building Operating Hours:
  - a. Monday through Thursday (other than Holidays) 8:00 a.m. through 6:00 p.m.
  - b. Friday (other than Holidays) 8:00 a.m. through 7:00 p.m.
7. Market Area shall mean: Metropolitan Beaufort, Southwest Downtown
8. Landscaping and Janitorial Specifications: Annexed hereto as Schedule 1
9. Rules and Regulations of the Building: Annexed hereto as Schedule 2
10. List of Reports and Studies Containing Environmental Information: Annexed hereto as Schedule 3

Exhibit C  
Schedule 1

Landscaping and Janitorial Specifications

## Landscaping Specifications

### 1. Lawn Maintenance:

- (a) **Mowing** - Mowing will be accomplished as needed during the growing season. Except when weather conditions dictate, the minimum mowing frequency **shall not exceed seven (7) days**. Mowing during all other periods of time will be performed if necessary based on turf growth.
- (b) **Edging** - The landscaping contractor (the "Supplier") shall edge plants, walkways, roadway edges, space between planter beds and lawn areas and all asphalt and hard surfaces by mechanical means each visit, **not to exceed 7 days**. Clippings shall be either vacuumed or blown off all surfaces, and removed from premises at the time edging is completed.
- (c) **Trimming** - Supplier shall use a string trimmer around trees, fences, fire hydrants, buildings, signs, walkways, roadway edges, driveways, curbs, etc. on **a weekly basis**. Clippings shall be either vacuumed or blown off all hard surfaces, and removed from premises when completed.
- (d) **Fertilization** - Turf fertilization shall be performed a minimum of **4 times annually**. The fertilization of shrubs, trees, ground cover, perennials etc. shall be performed bi-annually. When necessary, soil testing shall be done.
- (e) **Insects** - The Supplier shall be responsible for treatment of all grass damaging insects on a **preventive basis**.
- (f) **Disease** - Turf damage by disease shall be chemically treated to maintain all turf in a healthy and attractive condition.
- (g) **Weed Control** - The Supplier shall apply a **minimum of 3 times annually** and according to environmental and seasonal conditions, chemicals to control weeds in turf. Turf damage due to excessive weed conditions or improper application of chemicals shall be the responsibility of the Supplier. **Annually the Supplier shall apply a pre emergence weed control.**

### 2. PLANT, SHRUB AND PRUNING:

- (a) Plants and shrubs shall be pruned by the Supplier at the best time for flower bud development, foliage growth, and as the health of the plant may require.
- (b) Formal shrubs will be pruned/sheared as required maintaining their shape year round.
- (c) Informal shrubs will be pruned to remove older wood to maintain a healthy and natural appearance year round.
- (d) Removal of dead, diseased and or dying plant material will be performed as necessary.

## Landscaping Specifications

- (e) Perennial and ornamental shrubs will be pruned as required and cutback at the appropriate time of the growing season.
- (f) Shrubs shall not be clipped into a ball or box form unless such is required by the design.
- (g) Shrubs and plants adjacent to building entrance, night depositories and ATM's must be kept small in order to maintain Tenant's safety.
- (h) Shrubs located at parking lot ingress and egress must be pruned to ensure safe visibility for cars entering and exiting. **Shrubs are to be kept trimmed low to a maximum height of 36 inches and 12 inches away from the building in all cases.**

### 3. GROUND COVER MAINTENANCE:

- (a) Ground cover will be pruned as required to contain them within the confines of their beds and clear of shrubs year round.
- (b) Supplier shall remove non-hedge growth from hedges and shrubs; such as but not limited to Spanish moss, vines, and grasses.
- (c) Landscape areas must not create a place where a person can hide.

### 4. BED MAINTENANCE:

- (a) **Insects and Disease** - The Supplier is responsible for treatment of insects and disease. Any plant, which contracts root fungi, will be drenched with the appropriate treatment upon first observation.
- (b) **Weeds** - Weeds and grass growth will be removed and kept clear from all planters, beds, curbs and hard surface cracks and expansion joint areas using a chemical and mechanical means **weekly**.
- (c) **Mulching** - Supplier is to maintain all mulched beds at a **consistent two- (2) inch depth year round**. Mulched areas will be turned over starting in March and quarterly thereafter; depending on type of material used, to provide a fresh, neat and well-groomed appearance.

### 5. TREE MAINTENANCE:

- (a) **Pruning** - Pruning of trees will only be done **to a height no greater than twelve (12) feet**. The Supplier will be responsible for thinning trees for light penetration and air circulation and dead wood removal of dead, dying, diseased and/or **dying branches, sucker, etc.** **Branches and suckers are to be removed to a height of ten (10) feet.** All palm trees, regardless of size, shall be trimmed bi-annually, removing husks and palm fronds.
- (b) **Insects and Disease** - The Supplier is responsible for treatment of insects and diseases. The Supplier shall notify the Property Manager representative of any insect or fungus infestation and the control recommended prior to treatment.

## Landscaping Specifications

### 6. LITTER REMOVAL:

- (a) Supplier shall pick up all bottles, trash, leafs, sand, cans, fallen limbs, palm fronds, cigarettes and pieces of paper from the premises on a weekly basis year round.
- (b) Clippings shall be removed from the planter beds, turf, sidewalks, curbs/gutters and paved areas, subsequent to mowing, to the extent readily noticeable and/or if Property Manager specifies their removal.
- (c) Debris caused by normal seasonal wind and thunderstorms will be removed from site.
- (d) The Supplier shall arrange for an appropriate, suitable area, not on Tenant's property, in which normal litter (clippings, hedge trimmings and weeds) can be deposited. Litter and debris shall be removed from all turf and ground areas prior to mowing.

### 7. IRRIGATION MAINTENANCE:

- (a) The Supplier will be responsible for proper water management and that such systems are functioning properly. All systems should end their cycles as early in the morning as possible.
- (b) Supplier will be responsible for normal maintenance, including winterization, spring start-up, head replacement where necessary and time and day settings of controllers.
- (c) The Supplier shall maintain the irrigation system and pump station(s) for normal operation. All heads will be maintained for proper adjustment. Heads will be cleaned to provide proper arc and trajectory.
- (d) The Supplier is responsible to eliminate any and all over spray on buildings, signs, walkways and parking lots, etc.
- (e) The entire system, including, time clocks and controllers, shall to be checked completely weekly.
- (f) On systems with pumps, these items are to be checked every 3 months during season: Motor bearing, packing box and Motor grease cups.

### 8. GENERAL PROCEDURES:

- (a) In the event that time is lost due to heavy rains, the Supplier shall reschedule his crews and divide their times accordingly to visit each account during the time remaining. The Supplier shall work on Saturdays/Sundays if needed to make up rain days.
- (b) Any turf, tree, shrub ground cover damaged or destroyed due to the Supplier's operations, negligence, and misuse of chemicals or improper fertilization shall be replaced by Supplier.
- (c) Ants shall be exterminated with "Andro", or equal, applied adjacent to the mound weekly or as necessary. Inactive mounds shall be knocked down and blended with the

## Landscaping Specifications

natural grade. Treatment includes, but is not limited to lawn, planter beds, trees, walkways and parking lots.

### RESPONSE TIME PRIORITY CODES

Supplier shall comply with the following prioritization of established procedures in the performance of the services described herein. Property Manager's requirements hereunder for the specific occurrences set forth below shall in no way be construed to limit Supplier's obligations under this Agreement. Supplier is expected to act with prudence, exercising reasonable judgment.

| Priority Type Number | Priority Type Name | Priority Type Example                                                                                                                                                                                          | Remarks                                                               |
|----------------------|--------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------|
| 1                    | EMERGENCY          | <ul style="list-style-type: none"><li>Major irrigation problem(water flowing, cannot be shut off)</li><li>Broken glass in parking lot.</li></ul>                                                               | 2 Hours or less response time                                         |
| 2                    | Same Day Response  | <ul style="list-style-type: none"><li>Damaged or broken heads.</li></ul>                                                                                                                                       | Type 2 calls cannot be given after 2 PM; calls have to be 1's or 3's. |
| 3                    | 24 Hour Response   | <ul style="list-style-type: none"><li>Plant/turf dying.</li><li>Irrigation system running, check timing.</li><li>Storm damage clean-up</li><li>No Show.</li><li>Need trash picked up in parking lot.</li></ul> | Next Day Response                                                     |
| 4                    | One Week Response  | <ul style="list-style-type: none"><li>Quoted work.</li></ul>                                                                                                                                                   | Perform quoted work after approval's been received.                   |

# Janitorial Specification

## Typical Schedule of Services ("Janitorial Services")

|                           |                                                                | <u>Service</u> | <u>Minimum Frequency**</u> |
|---------------------------|----------------------------------------------------------------|----------------|----------------------------|
| <b>Basic Services:</b>    |                                                                |                |                            |
| <b>Space Cleaning:</b>    |                                                                |                |                            |
|                           | Emptying Waste Containers:                                     |                | Nightly                    |
|                           | Low Dusting:                                                   |                |                            |
|                           | Dusting: Teller Counters, Waiting Areas, Lobby:                |                | Nightly                    |
|                           | Dusting: Other:                                                |                | Weekly                     |
|                           | General Cleaning:                                              |                | Nightly                    |
|                           | High Dusting/Cleaning:                                         |                | Quarterly                  |
|                           | Glass Cleaning:                                                |                |                            |
|                           | Main Entrance Doors: (Interior/Exterior)                       |                | Nightly                    |
|                           | Other:                                                         |                | Weekly                     |
|                           | Cleaning Walk-Off Mats:                                        |                | Nightly                    |
|                           | Elevator Cleaning:                                             |                | Weekly                     |
|                           | ATM/Night Depository Cleaning:                                 |                |                            |
|                           | Financial Center ATM/ND                                        |                | Nightly                    |
|                           | ATM's within the Site Plan annexed to the Lease as Exhibit A-1 |                | Nightly                    |
|                           | Financial Center Exterior Cleaning:                            |                |                            |
|                           | Drive-up Windows:                                              |                | Nightly                    |
|                           | Night Depositories:                                            |                | Nightly                    |
|                           | Visual Automatic Teller Units:                                 |                | Nightly                    |
|                           | Damage Reporting:                                              |                | Nightly                    |
|                           | Vault/Coupon Booth Cleaning:                                   |                | Weekly                     |
|                           | Cleaning Blinds/Window Coverings:                              |                | Annually                   |
|                           | Exterior Window Cleaning:                                      |                | Annually                   |
| <b>Floor Care:</b>        |                                                                |                |                            |
|                           | Vacuuming Carpets and Rugs:                                    |                |                            |
|                           | Entrance Mats, Lobby, Teller Line:                             |                | Nightly                    |
|                           | Other Carpeted Areas:                                          |                | Weekly                     |
|                           | Sweeping/Dust Mopping:                                         |                | Nightly                    |
|                           | Damp Mopping:                                                  |                | Nightly                    |
|                           | Stripping and Re-Waxing Floors:                                |                | Quarterly                  |
|                           | Ceramic Tile/Marble Floor Cleaning:                            |                | Quarterly                  |
|                           | Shampooing Carpets and Rugs:                                   |                | Annually                   |
| <b>Restroom Services:</b> |                                                                |                |                            |
|                           | Cleaning:                                                      |                | Nightly                    |
|                           | Servicing:                                                     |                | Nightly                    |
| <b>Other Services:</b>    |                                                                |                |                            |
|                           | Policing Grounds:                                              |                | Nightly                    |
|                           | Day Porters and Day Maids:                                     |                | Provided Where Required    |

\*\*Additional service frequency may be required occasionally due to exceptional circumstances.

## Janitorial Specification

- A. GENERAL REQUIREMENTS: The janitorial contractor (the "Supplier") shall furnish all labor, management, supervision, tools, equipment, materials, supplies, and transportation necessary to provide Janitorial Services. Designated spaces include, but are not limited to, halls, restrooms, offices, conference rooms, kitchens, cafeterias, work areas, entranceways, lobbies, storage areas, elevators, vaults, ATM's within the Site Plan annexed to the Lease as Exhibit A-1, stairways, and other areas classified as Tenant property.
- B. Quality:
- a. Cleanliness quality means an entirely "like new" appearance or:
- 1) The absence of litter or undesirable debris, which can be eliminated.
  - 2) The absence of un-bonded dust build-up on any surface of any items subject to appropriate dusting techniques.
  - 3) The complete, comprehensive and detailed cleaning of any item subject to cleaning, including: corners, inside, outside, top, bottom, under and over all surfaces.
  - 4) The absence of any surface marks, spills or other undesirable bonded surface residue, which can be eliminated by appropriate damp or wet cleaning techniques.
  - 5) The absence of any soil, wax, or other undesirable bonded build-up, which can be eliminated by appropriate heavy duty, cycle or project cleaning techniques.
  - 6) The presence of appropriate surface gloss, protection, or reflective capacity in line with "like new" or designated gloss levels.
  - 7) The absence of minor spots, finger marks, or other limited surface soil, which can be eliminated by appropriate spot cleaning techniques.
  - 8) The absence of dust, lint and other in-fiber accumulation in fabric and carpeted areas, which can be eliminated by appropriate vacuum cleaning techniques.
  - 9) The issuance of maintenance and other work requests to eliminate or correct problems with damaged, non-functioning, repair or replacement oriented items which cannot be corrected through appropriate cleaning techniques (does not affect cleanliness measurements).
  - 10) The presence of appropriate levels of paper products, soap, and personal hygiene products in all restrooms and other dispensers to prevent any un-stocked situation.
- C. SUPPLIER FURNISHED ITEMS: The Supplier shall provide all facilities, equipment, materials, labor, transportation, and supplies to perform the Janitorial Services. Equipment, materials, and supplies furnished shall conform to the applicable specifications listed below.

## Janitorial Specification

Supplier may make substitutions if of equal quality. Items not listed shall be of acceptable commercial grade and quality.

- 1) Multi-fold Towels - Scott #180 (or equal)
- 2) Toilet Tissue – Georgia Pacific Savory-TM6120 (or equal)
- 3) Small Liners - Medium weight. Clear bags only.
- 4) Large Liners - Institutional brand (or equal), Clear bags only.
- 5) Anti-bacterial Lotionized Hand Soap
- 6) Tampax Tampons and Stay Free Sanitary Napkins: Supplier shall supply these items only where vending machines exist and proceeds shall go to Supplier. Property Manager shall control price where applicable.
- 7) Ladies sanitary bags & seat covers where dispensers for same exists.
- 8) Trash Bag Identification Tags – (Must be PreApproved by Property Manager)

### D. MANAGEMENT:

#### a. Allowable Work Hours:

- 1) All work shall be performed during “Cleaning Hours” as indicated below. If the Supplier desires to carry on work on Saturday, Sunday, Bank Holidays, or outside regular “cleaning hours”, the written approval of Tenant must be obtained.
1. Financial Centers (Bank Branches): (including financial centers located within an office building) – Financial Center Cleaning shall NOT start before the close of the vault, and all Services shall be completed, and Supplier Personnel out of the branch, by 11:00 PM, Monday through Friday, and by 6:00 PM for Branches open on Saturdays, unless otherwise specified on a location-by-location basis and communicated by the Tenant Corporate Real Estate Property Manager or designated Tenant Representative. **Exception: Vault vacuuming and cleaning of other areas that Tenant designates as “Secure” or “Restricted” must be performed during regular banking hours and must not interfere with normal operations.**

### E. JANITORIAL SERVICES REQUIREMENTS:

a. **Basic Services:** Basic services shall be performed at the locations and frequencies shown and shall consist of the services listed for the spaces indicated. Furniture and other items moved while performing basic services shall be returned to its original position. Performance requirements for these services include the following:

## Janitorial Specification

- 1) **Space Cleaning:** Space cleaning shall consist of the following services performed at the frequencies indicated in the Schedule of Services.
  1. **Emptying Waste Containers:** All waste containers including those in ATM Vestibules shall be emptied as necessary and contents handled in accordance with the Confidential Data Destruction Program (described in paragraph E(13) below) and plastic liners replaced. Any plastic liner with food wastes or that is soiled or leaking shall be replaced with a new plastic liner. Waste containers shall be washed as needed inside and outside using a disinfectant and shall be free of odors. After washing, containers shall be wiped dry and new plastic liners installed. Boxes, cans, bottles, and other items placed adjacent to waste containers and marked "TRASH" shall also be removed and disposed of.
  2. **Low Dusting:** All furniture, counters, partitions, radiators, equipment, hand railings in stairways, grills, window blinds, horizontal ledges, and sills shall be dusted.
  3. **General Cleaning:** Walls, doors, and partitions shall be wiped clean (including glass in partitions and doors) to a height of 9'-0" above floor level. If present, break room counters, appliances, chalkboards, chalk trays, and erasers shall be cleaned. Corridor, lobby, and entrance walls and doors shall be cleaned. Miscellaneous hardware and bright metal work shall be wiped clean. Drinking fountains shall be cleaned and disinfected; all surfaces shall be free of stains, smudges, and scale. Litter to be picked up in lobbies, office areas, break areas, elevators, and stairwells.
  4. **High Dusting/Cleaning:** All dust, lint, litter, and soil shall be removed from vertical and horizontal surfaces above 9'-0" from floor level, including overhead piping and ceiling areas. Walls shall be free of dirt, smudges, and marks. Ceilings shall be free of cobwebs and loose dirt.
  5. **Glass Cleaning:** Interior glass surfaces shall be maintained free of streaks, film, deposits, stains and handprints. Specific areas include, but are not limited to, glass table tops, partitions, doors and windows up to a height of 8'-0". Adjacent surfaces, such as window ledges, shall be kept clean as well. Care must be taken to not damage tinting or lettering.
  6. **Cleaning Walk-off Mats:** Each time floors are swept/dust mopped or vacuumed; walk-off mats in that area shall be cleaned. Soil and moisture underneath mats shall be removed and the floor cleaned as appropriate along with the rest of the floor. Mats shall be returned to their original locations afterward. The Supplier shall notify the Property Manager Representative in writing when walk-off mats are no longer effective because they are worn out.

## Janitorial Specification

7. Elevator Cleaning: Where present, all elevator doorjambes and sensors shall be maintained free of dirt, dust, debris, and foreign objects. Elevator tracks will also be maintained in the same manor to include a high gloss shine. Elevator floor indicator lights and call buttons shall be maintained free of dust, finger prints, and smudges.
  
8. ATM/Night Depository Cleaning (To Include ATM's Within the Site Plan Annexed to the Lease as Exhibit A-1): ATM's, Night Depositories, and ATM Cabinets/Vestibules shall be maintained free of dirt, dust, grime, smudge marks, handprints, gum, and any foreign material, such as advertisements and tape. This includes the monitor screen, keypad, envelope bins, light cover, and surrounding fascia. Remove all gum, spills, and debris from concrete in from of ATM. No chemicals shall ever be used on the ATM. A clean, lint-free cloth shall be used to wipe the ATM face, screen, and the ATM surround. Windex or any product containing ammonia on the ATM or the ATM surround must never be used. To remove spilled liquids, a mild soap mixed with water must be used. Accessible trash containers shall be maintained emptied and clean. Noticeable damage or graffiti shall be reported to the designated Property Manager Representative.
  
9. Financial Center Exterior Cleaning:
  - a. Drive-up Windows: Drive-up teller windows and frames shall be maintained free of dirt, pollen, streaks, smudge marks, tape and any other foreign material.
  - b. Night Depositories: Night depositories shall be maintained free of all deposits, tarnish, film, handprints, and cobwebs.
  - c. Visual Automatic Teller Units: VAT's shall be maintained free of dirt, dust, stains, advertisements, tape, or any other foreign matter.
  - d. Damage: Noticeable damage or graffiti to any of Tenant's property shall be reported to the designated Property Manager representative.
  
10. Vault/Coupon Booth Cleaning: Vault and Coupon Booth Floors shall be maintained free of all dirt, debris, dust, marks, and spots. Vault door thresholds shall be maintained accordingly. Where applicable, day gates shall be maintained free of handprints, and smudges. Cleaning of the vault doors is not part of this Agreement and should not be performed by the Supplier. ***Vault vacuuming must be performed during regular banking hours and must not interfere with normal operations and must be arranged with the Customer Service Representative at the Financial Center.***

## Janitorial Specification

11. Cleaning Blinds/Window Coverings: Venetian blinds, window draperies, including mini-blinds, shall be removed and cleaned free of all dust and embedded dirt, and re-hung in working order. Once removed for cleaning, the blinds shall be re-hung by the Supplier within 5 working days.
  12. Exterior Window Cleaning: Clean exterior windows by removing dirt and impurities from inside and outside of windows and doors and all glass frame-work, using a non-residue cleaner.
  13. Confidential Data Destruction: Any dry trash shall be collected by Supplier in a designated receptacle. Tenant's data destruction firm shall remove such dry trash from the Leased Premises.
- 2) **Floor Care:** Floor care shall consist of the following services.
1. Vacuuming: Carpeted areas (to include Elevators and ATM Vestibules) and Rugs shall be maintained free of dirt, debris, dust and spots. Light furniture, such as chairs and stands, shall occasionally be moved, vacuumed under, and replaced to original position. Special care must be given, while vacuuming, so as not to nick or otherwise damage furniture legs and bases, walls and doors, or other furnishings. Spot cleaning shall be performed as required to keep carpet free of gum, tar, stains, and deposits.
  2. Sweeping/Dust Mopping: Concrete/quarry tile, terrazzo, wood, and resilient flooring (to include ATM vestibules) shall be swept or dust mopped to remove all loose dirt, dust, and debris.
  3. Damp Mopping: Prior to damp mopping, floors shall be swept/dust mopped. Floors shall be damp mopped with an approved cleaning solution to remove dirt, streaks, smears, and stains. Spot Clean as needed.
  4. Stripping and Re-Waxing Floors: Resilient flooring shall be swept/dust mopped and stripped to remove all built-up wax and imbedded dirt prior to re-waxing. After application of wax, areas shall be buffed (if required) sufficiently for maximum gloss and uniform sheen from wall to wall, including corners. The re-waxed floor shall present a clean appearance free from scuffmarks or dirt smears. Furniture or other equipment moved during floor stripping and re-waxing shall be returned to their original positions.
  5. Cleaning of Ceramic Tile/Marble Floors: Ceramic Tile/Marble flooring to be machine scrubbed and cleaned to include grout.
  6. Shampooing Carpets and Rugs: Prior to shampooing by the steam or hot-water extraction method, carpets and rugs shall be vacuumed free of all loose soil and debris. Carpets and rugs shall be shampooed free

## Janitorial Specification

of streaks, spots, and stains, and have a bright, uniform color. Remove furniture from rooms before cleaning, or if impractical, place plastic film under and around the legs of chairs, tables and other furniture to prevent rust or furniture stains from developing on the carpet. After drying, furniture or other equipment moved for shampooing shall be returned to their original positions. Steam or Hot Water Cleaning Method does not apply for areas containing raised flooring.

- 3) **Restroom Services:** The following work requirements shall be performed each time restroom services are performed.
  1. **Cleaning:** Restroom fixtures, including water closets, urinals, lavatories, and sinks shall be washed inside and outside using a disinfectant, and shall be free of stains and odors. Brushes, sponges, and cloths that have been used to clean any other part of the restroom (including water closets, urinals, walls, floors, and partitions) shall not be used to clean lavatories or sinks. Floors shall be swept/dust mopped free of dirt, then mopped with a disinfectant. Floor drains shall be cleaned and flushed with a disinfectant. Wainscoting, partitions, walls, and doors shall be cleaned free of dirt, stains, and graffiti. Mirrors shall be cleaned and polished. All metal fixtures and hardware shall be cleaned. Waste containers shall be emptied, disinfected, and plastic liners replaced. If present, shower stall rooms and locker/dressing rooms shall be considered part of the restrooms, and cleaned accordingly.
  2. **Servicing:** Servicing restrooms shall include inspecting, cleaning, and replenishing all supply dispensers. Restroom supplies include, but are not limited to, paper towels, toilet tissue, sanitary napkins, and soap. The Supplier shall stock restrooms with sufficient supplies to insure they will last until the next scheduled service. If dispensers become empty before the next scheduled servicing, the Supplier shall replenish them.
- 4) **Other Services:**
  1. **Policing Grounds:** Cigarette butts, paper, bottles, cans, and other trash and refuse shall be removed from all grounds, sidewalks, and interior courts **within twenty (20) feet** of the buildings. Entrance doors and side glass (including frames) shall be clean and free of dirt and handprints. Exterior Ashtrays and receptacles to be cleaned. Remove gum, tar, etc. from surfaces.

Exhibit C  
Schedule 2

Rules and Regulations

1. OBSTRUCTION OF PASSAGEWAYS: The sidewalks, entrances, passages, courts, elevators, vestibules, stairways, corridors and public parts of the Property and the Building shall not be obstructed or encumbered by Tenant or used for any purpose other than ingress and egress.
2. PROJECTIONS FROM BUILDING: Except as expressly permitted under the Lease, no equipment or other fixtures shall be attached to any part of the outside walls or the window sills of the Building or otherwise affixed so as to project from the Building, without the prior written consent of Landlord, which consent shall not be unreasonably withheld or delayed. Landlord consents to all projections from the Building on the Commencement Date.
3. SIGNS: Except as expressly permitted under the Lease, no sign, advertisement or lettering shall be permanently affixed by Tenant to any part of the outside of the Leased Premises, without the prior written consent of Landlord, which consent shall not be unreasonably withheld or delayed. Landlord consents to all signs, advertisements and lettering permanently affixed to the outside of the Leased Premises on the Commencement Date.
4. WINDOWS: No bottles, parcels or other articles shall be placed on the window sills, in the halls or in any other part of the Building. No curtains, blinds, shades or screens shall be attached to or hung in, or used in connection with any window or door of the Leased Premises, nor shall the same be visible from the exterior of the Building without the prior written consent of Landlord, which consent shall not be unreasonably withheld or delayed. Such curtains, blinds and shades must be of a quality, type, design and color, and attached in a manner approved by Landlord. Notwithstanding the preceding two sentences, Landlord's consent shall not be required with respect to curtains, blinds shades or screens existing on the Commencement Date and or reasonably similar replacements thereof. All blinds shall be shut at the end of Building Operating Hours or as may otherwise be required to comply with local laws, ordinances, resolutions and regulations dealing with lighting.
5. ENTRANCE DOORS: Building entrance doors shall be kept closed at all times except for ingress and egress.
6. INTERFERENCE WITH OCCUPANTS: Tenants, their employees or others shall not make or commit any unreasonable noises or disturbances of any kind in the Building, nor smoke in the elevators, mark or defile the elevators, water closets, toilet rooms or the walls, windows, doors or any other part of the Property. Tenant and their employees will comply with the State's law regarding smoking in public places and will only smoke in designated areas. Tenant shall not permit to be played any musical instrument in the Leased Premises; permit to be played any radio, television, recorded or wired music in such unreasonably loud manner as to disturb or annoy other tenants of the Building; or permit any unusual odors to be emitted from upon the Leased Premises.

Canvassing, soliciting and peddling in the Building are prohibited, and Tenant shall cooperate to prevent the same.

7. MOVEMENT OF FURNITURE, FREIGHT OR BULKY MATTER: The following rules pertain to moving furniture, equipment and supplies in and out of the Building. Any movers selected by Tenant that do not adhere to the following rules will not be allowed to enter the Leased Premises or will be required to discontinue the move. The delivery of materials and other supplies to Tenants in the Building will be permitted only under the reasonable supervision of Landlord.
  - a) Clean masonite sections will be used as runners on all finished floor areas where heavy furniture or equipment is being moved with wheel or skid type dollies. The masonite must be at least one fourth inch thick, 4' x 8' wide sheets in elevator lobbies and corridors and 32" wide sheets through doors in the Building. All sections of masonite must be taped to prohibit sliding.
  - b) Tenant must cause its mover to provide and install protective coverings on all walls, door facings, elevator cabs and other areas along the route to be followed during the move. These areas will be inspected for damage after the move.
  - c) The moving company will be required to remove all boxes, trash, etc. when leaving the Building.
  - d) There shall not be used in the Leased Premises or in the Building either by Tenant or by others in the delivery or receipt of merchandise, supplies or equipment, any hand trucks except those equipped with rubber tires and side guards.
8. SAFES AND OTHER HEAVY EQUIPMENT: Landlord reserves the right to reasonably prescribe the weight and position of all safes and other heavy equipment so as to distribute properly the weight thereof and to prevent any unsafe condition from arising. Business machines and other equipment shall be placed and maintained by Tenant at Tenant's reasonable expense in settings sufficient in Landlord's reasonable judgment to absorb and prevent unreasonable vibration, noise and annoyance. Notwithstanding the preceding two sentences, Tenant shall not be required to move or remove any safes, business machines or other equipment existing in the Leased Premises or the Building on the Commencement Date.
9. NON-OBSERVANCE OR VIOLATION OF RULES BY OTHER TENANTS: Landlord shall not be responsible to Tenant for the non-observance or violation of any of these Rules and Regulations by any other tenants; provided, however, that Landlord shall enforce all rules in a uniform and non-discriminatory manner with respect to Tenant.
10. AFTER-HOUR USE: Landlord reserves the right to exclude during other than Building Operating Hours all persons who are not authorized in advance by Tenant to enter the Building on their behalf. Landlord shall in no case be liable in any manner for the admission or exclusion of any person from the Building.
11. PLUMBING FACILITIES USE: Tenant shall not use the Building's toilet rooms, water closets, sinks and other water and plumbing facilities for any purpose other than that for

which they were constructed and will not permit any foreign substance of any kind to be thrown therein.

12. VEHICLES: No bicycles, mopeds, motorcycles or other vehicles of any kind shall be brought into or kept in, on or about the Leased Premises, or Building, except in those locations specifically designated by Landlord for same. No automobiles, trucks or service vehicles or person working, or making deliveries or pickups in the Building shall park in any manner that encroaches on Building sidewalks or in any way obstructs Building entrances or fire lanes.
13. ANIMALS, SLEEPING AND COOKING: No animal of any kind (other than for seeing eye dogs used by the visually impaired) shall be brought into, kept in, on or about the Leased Premises. The Leased Premises shall not be used for lodging or sleeping purposes, and cooking therein is prohibited, except for in the kitchen and/or cafeteria areas. Microwave cooking within the Leased Premises is acceptable.
14. HEATING AND COOLING: Storage or placement of furniture in front of base board radiators is prohibited. Tenant shall not inhibit the flow of air by taping diffusers.
15. CONFLICT WITH LEASE: If these Rules and Regulations shall conflict or otherwise be inconsistent with the terms and conditions of the lease to which they are attached, the terms and conditions of the lease shall control.

Exhibit C  
Schedule 3

1. Entrix, Inc., Phase I Environmental Site Assessment (June 2004).
2. Real Estate Advisory, L.L.C., Asbestos Assessment (May 21, 1997).

Popular Name: Beaufort Main Financial Center  
Address: 1011 Bay Street, Beaufort, SC

**EXHIBIT D-1**

Form Of Mortgage  
Subordination, Non-Disturbance And Attornment Agreement

**RECORD AND RETURN TO:**

*[Insert Name and Address of Tenant's Attorneys]*

**MORTGAGE SUBORDINATION, NON-DISTURBANCE  
 AND ATTORNMENT AGREEMENT**

This Mortgage Subordination, Non-Disturbance Agreement and Attornment ("**Agreement**") made this \_\_\_ day of \_\_\_\_\_, \_\_\_ by and among \_\_\_\_\_, having an address of \_\_\_\_\_, \_\_\_\_\_, Attention: \_\_\_\_\_ ("**Mortgagee**"), \_\_\_\_\_, \_\_\_\_\_, having an office at \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, Attention: \_\_\_\_\_ ("**Tenant**") and \_\_\_\_\_, \_\_\_\_\_, having an office at \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, Attention: \_\_\_\_\_ ("**Landlord**").

**WITNESSETH:**

**WHEREAS**, Landlord is the owner in fee simple of that certain parcel or tract of land lying and being in the County of \_\_\_\_\_, City of \_\_\_\_\_ and State of \_\_\_\_\_, more particularly described in Schedule 1 annexed hereto (the "**Land**"; and together with the buildings and other improvements erected thereon, the "**Mortgaged Property**"); and

**[OR]**

**[WHEREAS**, Landlord is the sole owner of the lessee's interest under that certain [\_\_\_\_\_] (*Insert Name of Agreement of Overlease*), dated as of \_\_\_\_\_, between \_\_\_\_\_ and Landlord, (as the same heretofore has been or may hereafter be amended the "**Mortgaged Property**"); and

**WHEREAS**, Mortgagee is the owner and holder of that certain mortgage dated as of \_\_\_\_\_, 20\_\_ and made by Landlord that encumbers the Mortgaged Property (which mortgage, together with all increases, renewals, supplements, consolidations, reinstatements, amendments, modifications, substitutions and extensions thereof, all advances and re-advances

made thereunder and all sums secured thereby now or hereafter made are hereinafter referred to as the "**Mortgage**"; and

**WHEREAS**, Tenant has entered into a lease with Landlord, dated \_\_\_\_\_, 20\_\_ (such lease, as amended, modified or supplemented prior to the date hereof, the "**Property Lease**") for all or a portion of the Mortgaged Property ("**Leased Premises**"), and a true, correct and complete copy of the Lease has been delivered by Landlord to Mortgagee; [which Property Lease is currently integrated with, and subject to, that certain Master Agreement as defined in the Lease (such agreement, as amended, modified or supplemented prior to the date hereof, the "**Master Agreement**"), and a true correct and complete copy of the Master Agreement has been delivered by Landlord to Mortgagee (the term "**Lease**", as used herein, shall mean (i) the Property Lease together with the Master Agreement, for so long as the Property Lease and the Master Agreement shall remain integrated, and (ii) merely the Property Lease, from and after the point, if any, that the Property Lease and the Master Agreement are no longer integrated, except that, at all times references herein to particular Articles or Sections of the Lease, shall refer only to the particular Articles or Sections of the Property Lease, with references to Sections of the Master Agreement expressly so indicating)]<sup>1/</sup>; and

**WHEREAS**, subject to the provisions hereof, Mortgagee has agreed to recognize the status of Tenant in the event Mortgagee shall acquire the Mortgaged Property and Tenant has agreed to attorn to Mortgagee in any such event.

**NOW, THEREFORE**, in consideration of ten dollars and other good, valuable, sufficient and received consideration and intending to be legally bound hereby, Mortgagee and Tenant covenant and agree as follows:

1. Subject to the provisions hereof, the Lease and Tenant's interest thereunder is, and shall at all times continue to be, subject and subordinate in each and every respect to the lien of the Mortgage. The provisions of this Paragraph 1 shall be self-operative and no further instrument shall be required; however, Tenant, upon request, shall execute and deliver any certificate or other instrument which the Mortgagee may reasonably request to confirm said subordination by Tenant.

2. As long as no default then exists under the Lease that has theretofore continued beyond the expiration of any applicable notice and/or grace period, and would then permit Landlord to terminate the Lease pursuant to its terms, (i) Tenant shall not be named or

<sup>1/</sup> Include parenthetical if the lease is then integrated with the Master Agreement; otherwise, lease should merely be defined as the Lease (as opposed to the Property Lease, and any references to the Property Lease should be conformed).

joined in any action or proceeding to foreclosure or otherwise enforce the Mortgage (unless Tenant is a necessary party thereto under applicable law, in which event such naming or joinder of Tenant shall be subject to the provisions of this Agreement, including, without limitation, the provisions of clauses (ii) and (iii) of this sentence), (ii) the Lease shall not be terminated nor shall any of the rights of Tenant under the Lease be diminished or interfered with by Mortgagee (or by anyone claiming by, through or under Mortgagee), and (iii) Tenant's occupancy of the Leased Premises shall not be disturbed by Mortgagee (or by anyone claiming by, through or under Mortgagee). Upon (I) the transfer of the Landlord's interest in the Mortgaged Property, through a foreclosure or other enforcement of the Mortgage, to Mortgagee (or its designee or nominee) or to another purchaser at foreclosure, or (II) the transfer of the Landlord's interest in the Mortgaged Property, through the delivery of deed in lieu of foreclosure to Mortgagee (or its designee or nominee) (any such transfer described in either of clauses (I) or (II) of this sentence being herein called a "**Foreclosure Transfer**", and any such transferee being herein called "**Successor Landlord**"), the Lease shall continue as a direct lease between Successor Landlord or any subsequent successor as landlord under the Lease (a "**Subsequent Successor Landlord**"), as landlord, and Tenant, as tenant; provided, however, that neither Successor Landlord, nor any Subsequent Successor Landlord, shall be:

- (a) liable for any act or omission of the landlord under the Lease that occurred prior to the Foreclosure Transfer (or subject to any claim or counterclaim which Tenant may have against any such landlord based thereon); provided, however, that:
  - (1) Successor Landlord or any Subsequent Successor Landlord shall be obligated to cure any continuing default by the landlord under the Lease (other than a non-curable default, e.g., a breach of representation) that continues after the Foreclosure Transfer beyond a *reasonable cure period*; it being agreed that, for this purpose, a "*reasonable cure period*", with respect to any such default, shall mean a period equal in length to the period provided under the Lease for the landlord under the Lease to cure such a default, but commencing on the later to occur of (x) the date of the Foreclosure Transfer and (y) the first date that Successor Landlord shall have received notice of such default; and
  - (2) Successor Landlord and any Subsequent Successor Landlord shall be subject to any rent abatements or offsets to which Tenant is entitled under the Lease based on an act or omission of the landlord under the Lease prior to such Foreclosure Transfer; or
- (b) bound by any payments of rent which Tenant may have made prior to the Foreclosure Transfer, if the same were made more than thirty (30) days in advance of the due date therefor under the Lease (the parties hereto acknowledging that operating expense payments and tax payments made

in the manner provided in Article 2 of the Lease shall not, for this purpose, be deemed payments of rent made in advance of their due date); or

- (c) required to account for any security deposit other than any security deposit actually delivered to Successor Landlord; or
- (d) bound by any modification of the Lease (other than a modification of the Lease which does not affect, to more than a de minimis extent, the economic terms and conditions of the Lease) which is made after the date hereof without Mortgagee's written consent (which consent, Mortgagee agrees shall not be unreasonably withheld or delayed).

A notice or confirmation delivered pursuant to an express provision of the Lease shall not be deemed to be a modification of the Lease to the extent such notice or confirmation does not modify the contractual rights or obligations of Landlord or Tenant under the Lease.

3. Effective upon any Foreclosure Transfer, (i) Tenant shall be bound to Successor Landlord, and Successor Landlord shall be bound to Tenant, under all of the then executory terms, covenants and conditions of the Lease, except as provided elsewhere in this Agreement, (ii) Tenant does hereby attorn to and recognize Successor Landlord as the landlord under the Lease upon such terms, covenants and conditions, and (iii) Successor Landlord does hereby accept such attornment and recognize Tenant as the tenant under the Lease upon such terms, covenants and conditions. The foregoing attornment and recognition shall be effective and self-operative upon any Foreclosure Transfer without the execution of any further instruments, provided, however, that Tenant shall not be obligated to pay any rent to Successor Landlord until Tenant has received notice from Successor Landlord of such Foreclosure Transfer. Each party hereto shall execute and deliver any certificate or other instrument which the other party hereto may reasonably request to confirm such attornment and recognition.

4. If any default by Landlord would give Tenant the right, immediately or after lapse of a period of time, to cancel or terminate the Lease, Tenant shall not exercise such right until (a) Tenant shall have given Mortgagee written notice of such default, and (b) a *reasonable period of time* (but in no event less than thirty (30) days) shall have elapsed after the giving of such notice to Mortgagee without such default having been cured. For this purpose, a "*reasonable period of time*", with respect to any such default, shall mean a period equal in length to the period provided under the Lease for Landlord to cure such default; provided, however, (i) such period shall commence after the expiration of all cure periods available to the landlord under the Lease with respect to such default and (ii) if such default is of a type which cannot reasonably be cured by Mortgagee without it first obtaining possession of the Mortgaged Property (whether by the appointment of a receiver or otherwise), then such "*reasonable period of time*" shall be extended for such additional time as may be reasonably necessary for Mortgagee to obtain such possession, but only if (1) Mortgagee, within thirty (30) days after Tenant's notice to it of the default in question, shall have deliver to Tenant a notice indicating that Mortgagee intends to diligently proceed to obtain possession of the Mortgaged Property and thereafter to diligently proceed to cure such default, and (2) Mortgagee shall (A) from and after

Exhibit D-1 - Page 4

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such notice, diligently proceed to obtain possession of the Mortgaged Property, and (B) from and after obtaining such possession, diligently proceed to cure such default. Nothing in this Paragraph 4 shall obligate Mortgagee to cure any default by Landlord under the Lease. The notice and cure rights of Mortgagee set forth in this Paragraph 4 shall not apply to either (i) the termination rights of Tenant set forth in Article VI of the Lease, or (ii) the termination rights of Wachovia Bank, National Association (whether or not it is then the Tenant under the Lease) set forth in Article XI of the Lease.

5. Landlord represents to Tenant that, as additional security for the loan made by Mortgagee to Landlord and secured by the Mortgage, Landlord has assigned to Mortgagee the Lease and all rent payable thereunder, subject to a license to Landlord from Mortgagee to collect same unless and until such license is revoked by Mortgagee. If Tenant hereafter receives a notice (a "**Mortgagee Payment Notice**") from Mortgagee that such license has been revoked and directing Tenant to pay to Mortgagee all rent payable after the date that is twenty (20) days after the date of such notice, then, subject to the last sentence of this Paragraph 5, Tenant shall thereafter pay same to Mortgagee, subject to any rights of set-off or any counterclaim or other defense that Tenant may have against Landlord under the Lease or otherwise, until Tenant receives a notice (a "**Mortgagee Payment Revocation Notice**") from Mortgagee directing Tenant to resume payments to Landlord. Landlord agrees that: (i) Tenant shall have the right to rely on any Mortgagee Payment Notice and make payments of rent in accordance therewith; and (ii) any payments made to Mortgagee after the date of a Mortgagee Payment Notice (and, if Tenant thereafter receives a Mortgagee Payment Revocation Notice, prior to the date that is twenty (20) days after Tenant shall receive such notice) shall be deemed received by Landlord. Landlord hereby agrees that (I) Landlord shall indemnify, defend, and hold harmless, Tenant from and against any and all claims, demands, causes of action, fines, penalties, costs, expenses (including attorneys' fees and court costs), liens, or liabilities, if, and to the extent, caused by, or arising out of Tenant's payment of any rent under the Lease to Mortgagee from and after Tenant's receipt of a Mortgagee Payment Notice.

6. To the extent that the Lease shall entitle Tenant to notice of the existence of any mortgage and the identity of any mortgagee, this Agreement shall constitute such notice to Tenant with respect to the Mortgage and Mortgagee.

7. This Agreement may not be modified except by an agreement in writing signed by Tenant, Mortgagee and Landlord.

8. Tenant acknowledges that Mortgagee is an "Interest Holder" (as such term is defined in the Lease) and that Mortgagee shall be entitled to all rights and privileges of an Interest Holder, as set forth in Section 7.10 of the Lease.

9. All notices, demands, consents, approvals, advices, waivers or other communications (each, a "notice") which may or are required to be given by either party to the other under this Agreement shall be in writing and, unless otherwise required by law, shall be sent (a) by hand, (b) by United States Mail, certified or registered, postage prepaid, return receipt requested or (c) by a nationally-recognized overnight carrier, in each case addressed to

Exhibit D-1 - Page 5

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the party to be notified at the address for such party specified below, or to such other place in the continental United States as the party to be notified may from time to time designate by at least ten (10) days' notice to the notifying party. Each notice shall be deemed to have been given on the date such notice is actually received as evidenced by a written receipt therefor, and in the event of failure to deliver by reason of changed address of which no notice was given or refusal to accept delivery, as of the date of such failure. The addresses of the parties are as follows:

Mortgagee's notice address(es):

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with a copy to:

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Tenant's notice address(es):

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with a copy to:

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Landlord's notice address(es):

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with a copy to:

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10. Anything herein or in the Lease to the contrary notwithstanding, from and after the occurrence of any Foreclosure Transfer, the provisions of Section 14.10 of the Lease shall apply to Successor Landlord and any Subsequent Successor Landlord.

11. THE PARTIES HERETO EACH HEREBY WAIVE ITS RIGHT TO A JURY TRIAL OF ANY ISSUE OR COURTESY ARISING UNDER THIS AGREEMENT.

12. This Agreement shall be governed by the laws of the state in which the Mortgaged Property is located.

13. This Agreement shall bind, and inure to the benefit of, the parties hereto and their respective successors and assigns, which (i) in the case of Mortgagee, shall include any successor to it as the holder the Mortgage, (ii) in the case of Tenant, shall include any successor

to it as tenant under the Lease, and (iii) in the case of Landlord, shall include any successor to it as landlord under the Lease.

14. If any term of this Agreement or the application thereof to any person or circumstances shall to any extent be invalid or unenforceable, the remainder of this Agreement or the application of such term to any person or circumstances other than those as to which it is invalid or unenforceable shall not be affected thereby, and each term of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

15. This Agreement may be executed in any number of counterparts, each of which when executed and delivered will be deemed to be an original and all of which taken together, will deemed to be one and the same instrument.

16. (a) Tenant specifically agrees to look solely to Mortgagee's, any Successor Landlord's, or any Subsequent Successor Landlord's interest in the Mortgaged Property, including its interest in any loan secured by the Mortgaged Property, for the recovery of any monetary judgment against Mortgagee, any Successor Landlord, or any Subsequent Successor Landlord, it being agreed that Mortgagee, any Successor Landlord, and any Subsequent Successor Landlord shall never be personally liable for any such judgment or for any other liability or obligation of Landlord under this Agreement beyond such interest in the Mortgaged Property. The provision contained in the foregoing sentence is not intended to, and shall not, limit any right that Tenant might otherwise have (i) to obtain injunctive relief (or other equitable relief) against Mortgagee, any Successor Landlord, any Subsequent Successor Landlord, or any other person, (ii) to offset sums due and owing to Tenant against the Rent to the extent permitted hereunder, or (iii) to prosecute any suit or action in connection with enforcement of Tenant's rights hereunder or Mortgagee's, Successor Landlord's, or Subsequent Successor Landlord's obligations hereunder.

(b) Notwithstanding the foregoing, from and after a Foreclosure Transfer, the provisions of Section 16(a) above shall (in the case of Successor Landlord or any Subsequent Successor Landlord) be subject to the provisions of Section 14.10 of the Lease and Section 21 of the Master Agreement (which shall control in the event of a conflict).

**IN WITNESS WHEREOF**, the parties hereto have executed this agreement as of the day and year first written above.

**MORTGAGEE:**

**TENANT:**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

**LANDLORD:**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

**[Add Acknowledgments]**

Exhibit D-1  
Schedule 1

Description of the Mortgaged Property

**EXHIBIT D-2**

Form Of Overlease  
Subordination, Non-Disturbance And Attornment Agreement

**RECORD AND RETURN TO:**

*[Insert Name and Address of Tenant's Attorneys]*

**OVERLEASE SUBORDINATION, NON-DISTURBANCE  
AND ATTORNMENT AGREEMENT**

This Overlease Non-Disturbance Agreement ("**Agreement**") made this \_\_\_ day of \_\_\_\_\_, \_\_\_ by and among \_\_\_\_\_, having an address of \_\_\_\_\_, \_\_\_\_\_, Attention: \_\_\_\_\_ ("**Overlessor**"), \_\_\_\_\_, having an office at \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, Attention: \_\_\_\_\_ ("**Landlord**"), and \_\_\_\_\_, having an office at \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, Attention: \_\_\_\_\_ ("**Tenant**").

**WITNESSETH:**

**WHEREAS**, Overlessor is the sole owner in fee simple of (x) that certain piece, parcel or tract of land that is lying and being in the County of \_\_\_\_\_, City of \_\_\_\_\_ and State of \_\_\_\_\_, and that is more particularly described in Schedule 1 annexed hereto (the "**Land**" and together with the buildings and other improvements erected thereon, the "**Property**"); and

**WHEREAS**, Overlessor, as lessor Landlord, as tenant, are parties to a lease dated \_\_\_\_\_, \_\_\_ (said lease, as the same may hereafter be amended and/or restated from time to time, is hereinafter referred to as the "**Overlease**"), pursuant to which, Overlessor has leased to Landlord the Property;

**WHEREAS**, Tenant has entered into a lease ("**Lease**") with Landlord, dated as of \_\_\_\_\_, 20\_\_ for [a portion or portions of] the Property (the "**Leased Premises**"), and a true, correct and complete copy of the Lease, as executed, has been delivered by Landlord to Overlessor; and

**WHEREAS**, subject to the provisions hereof Overlessor has agreed to recognize the status of Tenant in the event of a termination of the Overlease and Tenant has agreed to attorn to Overlessor in any such event.

**NOW, THEREFORE**, in consideration of ten dollars and other good, valuable, sufficient and received consideration and intending to be legally bound hereby, Overlessor and Tenant covenant and agree as follows:

1. Subject to the provisions hereof, the Lease and Tenant's interest thereunder is, and shall at all times continue to be, subject and subordinate in each and every respect to the Overlease. The provisions of this Paragraph 1 shall be self-operative and no further instrument shall be required; however, Tenant, upon request, shall execute and deliver any certificate or other instrument which the Overlessor may reasonably request to confirm said subordination by Tenant.

2. As long as no default then exists under the Lease that has theretofore continued beyond the expiration of any applicable notice and/or grace period, and that would then permit Landlord to terminate the Lease pursuant to its terms, (i) Tenant shall not be named or joined in any action or proceeding brought by Overlessor (or by anyone claiming by, through or under Overlessor) to terminate the Overlease (unless Tenant is a necessary party thereto under applicable law, in which event such naming or joinder of Tenant shall be subject to the provisions of this Agreement, including, without limitation, the provisions of clauses (ii) and (iii) of this sentence), (ii) the Lease shall not be terminated nor shall any of the rights of Tenant under the Lease be diminished or interfered with by Overlessor (or by anyone claiming by, through or under Overlessor), and (iii) Tenant's occupancy of the Leased Premises shall not be disturbed by Overlessor (or by anyone claiming by, through or under Overlessor). Upon any termination of the Overlease in any such action or proceeding brought by Overlessor (or by anyone claiming by, through or under Overlessor), or any other termination of the Overlease (any such termination being herein called an "Overlease Termination", and Overlessor, as the party succeeding to the interest of the landlord under the Lease upon such Overlease Termination, being herein called "Successor Landlord"), the Lease shall continue as a direct lease between Successor Landlord, as landlord, and Tenant, as tenant; provided, however, that Successor Landlord (and any of its successors as landlord under the Lease) shall not be:

- (a) liable for any act or omission of the landlord under the Lease that occurred prior to the Overlease Termination (or subject to any claim or counterclaim which Tenant may have against any such landlord based thereon); provided, however, that:
  - (1) Successor Landlord (and its successors as landlord under the Lease) shall be liable for any such act or omission (and subject to any such claim or counterclaim) if, and to the extent that, (i) such act or omission constitutes a default by the landlord under the Lease (other than a *non-curable* default, e.g., a breach of representation), and (ii) such default continues after the Overlease Termination beyond a *reasonable cure period*; it being agreed that, for this purpose, a "*reasonable cure period*", with respect to any such default, shall mean a period equal in length to the period

provided under the Lease for Landlord to cure such a default, but commencing on the later to occur of (x) the date of the Overlease Termination and (y) the first date that Successor Landlord shall have received notice of such default; and

- (2) in all events, Successor Landlord (and its successors as landlord under the Lease) shall be subject to any abatements, offsets or rent credits which shall have accrued to Tenant as of the time of such Overlease Termination, or shall thereafter accrue to Tenant, based on any such act or omission pursuant to one or more provisions of the Lease; or
- (b) bound by any payments of rent which Tenant may have made prior to the Overlease Termination, if the same were made more than thirty (30) days in advance of the due date therefor under the Lease (the parties hereto acknowledging that operating expense payments and tax payments made in the manner provided in Article 2 of the Lease shall not, for this purpose, be deemed payments of rent made in advance of their due date); or
- (c) required to account for any security deposit other than any security deposit actually delivered to Successor Landlord; or
- (d) bound by any modification of the Lease (other than a modification of the Lease which does not affect, to more than a *de minimis* extent, the economic terms and conditions of the Lease) which is made after the date hereof without Overlessor's written consent (which consent, Overlessor agrees shall not be unreasonably withheld or delayed), provided, however, that in no event shall any written instrument executed and/or delivered by either or both of Landlord and/or Tenant under the Lease ever be deemed a modification of the Lease (regardless of the impact on the rights and obligations of Landlord and Tenant) if, and to the extent that, such instrument is required, permitted or contemplated to be executed and/or delivered by such party pursuant to such provisions of the Lease (or such instrument otherwise confirms any then existing provisions of the Lease, and/or any sets forth any determinations of either or both of Landlord and/or Tenant with respect thereto).

3. Effective upon any Overlease Termination, (i) Tenant shall be bound to Successor Landlord, and Successor Landlord shall be bound to Tenant, under all of the then executory terms, covenants and conditions of the Lease, except as provided elsewhere in this Agreement, (ii) Tenant does hereby attorn to and recognize Successor Landlord as the landlord under the Lease upon such terms, covenants and conditions, and (iii) Successor Landlord does hereby accept such attornment and recognize Tenant as the tenant under the Lease upon such terms, covenants and conditions. The foregoing attornment and recognition shall be effective and self-operative upon any Overlease Termination without the execution of any further

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instruments, provided, however, that Tenant shall not be obligated to pay any rent to Successor Landlord until Tenant has received notice from Successor Landlord of such Overlease Termination. Each party hereto shall execute and deliver any certificate or other instrument which the other party hereto may reasonably request to confirm such attornment and recognition.

4. If any default by Landlord would give Tenant the right, immediately or after lapse of a period of time, to cancel or terminate the Lease, Tenant shall not exercise such right until (a) Tenant shall have given Overlessor written notice of such default, and (b) a *reasonable period of time* shall have elapsed after the giving of such notice to Overlessor without such default having been cured. For this purpose, a "*reasonable period of time*", with respect to any such default, shall mean a period equal in length to the period provided under the Lease for Landlord to cure such default; provided, however, if such default is of a type which cannot reasonably be cured by Overlessor without it first obtaining possession of the Property, then such "*reasonable period of time*" shall be extended for such additional time as may be reasonably necessary for Overlessor to obtain such possession, but only if (1) Overlessor, within thirty (30) days after Tenant's notice to it of the default in question, shall have deliver to Tenant a notice indicating that Overlessor intends to diligently proceed to obtain possession of the Property and thereafter to diligently proceed to cure such default, and (2) Overlessor shall (A) from and after such notice, diligently proceed to obtain possession of the Property, and (B) from and after obtaining such possession, diligently proceed to cure such default. Nothing in this Paragraph 4 shall obligate Overlessor to cure any default by Landlord under the Lease; provided, however, that if Overlessor shall elect to deliver the notice referred to in clause (1) of this Paragraph 4, then Overlessor shall act in accordance with its intentions set forth in such notice unless and until Overlessor shall elect to retract such notice by another notice to Tenant, it being agreed that Overlessor may so retract such notice at any time, whereupon, however, the "*reasonable period of time*" shall automatically be deemed to have elapsed. The notice and cure rights of Overlessor set forth in this Paragraph 4 shall not apply to any rights of Tenant (or Wachovia Bank, National Association) to cancel or terminate the Lease (or surrender all or any portion of the Leased Premises) that are expressly set forth in one or more provisions of the Lease (including, without limitation, the termination rights of Wachovia Bank, National Association, that are expressly set forth in Article XI of the Lease).

5. To the extent that the Lease shall entitle Tenant to notice of the existence of any overlease and/or the identity of any overlessor, this Agreement shall constitute such notice to Tenant with respect to the Overlease and Overlessor.

6. This Agreement may not be modified except by an agreement in writing signed by Tenant and Overlessor.

7. Tenant acknowledges that Overlessor is an "Interest Holder" (as such term is defined in the Lease) and that Overlessor shall be entitled to all rights and privileges of an Interest Holder, as set forth in Section 7.10 of the Lease.

8. All notices, demands, consents, approvals, advices, waivers or other communications (each, a "notice") which may or are required to be given by either party to the

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other under this Agreement shall be in writing and, unless otherwise required by law, shall be sent (a) by hand, (b) by United States Mail, certified or registered, postage prepaid, return receipt requested or (c) by a nationally-recognized overnight carrier, in each case addressed to the party to be notified at the address for such party specified in the first paragraph of this Agreement, or to such other place in the continental United States as the party to be notified may from time to time designate by at least ten (10) days' notice to the notifying party. Each notice shall be deemed to have been given on the date such notice is actually received as evidenced by a written receipt therefor, and in the event of failure to deliver by reason of changed address of which no notice was given or refusal to accept delivery, as of the date of such failure.

9. Anything herein or in the Lease to the contrary notwithstanding, from and after the occurrence of any Overlease Termination, the provisions of Section 14.10 of the Lease shall apply to Successor Landlord.

10. TENANT AND OVERLESSOR EACH HEREBY WAIVE ITS RIGHT TO A JURY TRIAL OF ANY ISSUE OR CONTROVERSY ARISING UNDER THIS AGREEMENT.

11. This Agreement shall be governed by the laws of the state in which the Property is located.

12. This Agreement shall bind, and inure to the benefit of, the parties hereto and their respective successors and assigns, which (i) in the case of Overlessor, shall include any successor to it as the holder the lessor's interest in the Overlease, and (ii) in the case of Tenant, shall include any successor to it as tenant under the Lease.

13. If any provisions of this Agreement or the application thereof to any party hereto or circumstances shall, to any extent be invalid or unenforceable, the remainder of this Agreement or the application of such provisions to any other party hereto or circumstances other than those as to which it is invalid or unenforceable shall not be affected thereby, and all the provisions of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

14. This Agreement may be executed in any number of counterparts, each of which when executed and delivered will be deemed to be an original and all of which taken together, will deemed to be one and the same instrument.

**IN WITNESS WHEREOF**, the parties hereto have executed this agreement as of the day and year first written above.

**OVERLESSOR:**

**TENANT:**

By: \_\_\_\_\_  
Name:  
Its:

By: \_\_\_\_\_  
Name:  
Its:

**[Add Acknowledgments]**

Exhibit D-2  
Schedule 1

Description of the Property

**EXHIBIT D-3**

Form Of Subtenant  
Subordination, Non-Disturbance And Attornment Agreement

**RECORD AND RETURN TO:**

*[Insert Name and Address of Subtenant's Attorneys]*

**SUBTENANT SUBORDINATION, NON-DISTURBANCE  
 AND ATTORNMENT AGREEMENT**

This Subtenant Non-Disturbance and Attornment Agreement ("Agreement") made this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_ by and between \_\_\_\_\_, having an address of \_\_\_\_\_, \_\_\_\_\_, Attention: \_\_\_\_\_ ("Landlord") and \_\_\_\_\_, \_\_\_\_\_, having an office at \_\_\_\_\_, \_\_\_\_\_, Attention: \_\_\_\_\_ ("Subtenant").

**WITNESSETH:**

**WHEREAS**, Landlord is the landlord under that certain Lease, dated \_\_\_\_\_, made by Landlord and \_\_\_\_\_, as tenant ("Tenant") (said lease, as the same may hereafter be renewed, amended, modified, supplemented, extended, replaced and/or restated from time to time, is hereinafter referred to as the "Lease"), which Lease covers certain space (the "Premises") in the building located at \_\_\_\_\_ (the "Property") and more particularly described on Schedule 1 annexed hereto; and

**WHEREAS**, Tenant, as sublandlord and Subtenant have entered into a certain agreement of sublease, dated as of \_\_\_\_\_, as amended by \_\_\_\_\_ (none if left blank) (the "Sublease") initially covering [a portion of] the Premises (the "Subleased Premises").

**NOW, THEREFORE**, in consideration of ten dollars and other good, valuable, sufficient and received consideration and intending to be legally bound hereby, Landlord and Subtenant covenant and agree as follows:

1. Subject to the provisions hereof, the Sublease and Subtenant's interest thereunder is, and shall at all times continue to be, subject and subordinate to the Lease in each and every respect to the terms, covenants, provisions and conditions of the Lease. The provisions of this Paragraph 1 shall be self-operative and no further instrument shall be required; however, Subtenant, upon request, shall execute and deliver any certificate or other instrument which the Landlord may reasonably request to confirm said subordination by Subtenant.

2. As long as no default then exists under the Sublease that has theretofore continued beyond the expiration of any applicable notice and/or grace period, and that would then permit Tenant to terminate the Sublease pursuant to its terms, (i) Subtenant shall not be named or joined in any action or proceeding brought by Landlord (or by anyone claiming by, through or under Landlord) to terminate the Lease (unless Subtenant is a necessary party thereto under applicable law, in which event such naming or joinder of Subtenant shall be subject to the provisions of this Agreement, including, without limitation, the provisions of clauses (ii) and (iii) of this sentence), (ii) the Sublease shall not be terminated nor shall any of the rights of Subtenant under the Sublease be diminished or interfered with by Landlord (or by anyone claiming by, through or under Landlord), and (iii) Subtenant's occupancy of the Subleased Premises shall not be disturbed by Landlord (or by anyone claiming by, through or under Landlord); provided, however, that the foregoing provisions of this sentence are not intended to apply in the event of (x) any termination of the Lease by Tenant (or Wachovia Bank, National Association) pursuant to an express right granted to it under the Lease, (y) any termination of the Lease by Landlord pursuant to an express right granted to it under the Lease (other than any right of termination granted to Landlord under Article 7 of the Lease or otherwise based upon a default by Tenant under the Lease), or (z) any automatic termination of the Lease occurring pursuant to an express provision of the Lease providing therefor (other than any automatic termination of the Lease provided for under any provision contained in Article 7 of the Lease or otherwise triggered by a default by Tenant under the Lease), (any termination described in any of clauses (x), (y) or (z) being herein called a "Non-Recognition Lease Termination"). Upon any termination of the Lease (other than a Non-Recognition Lease Termination), the Sublease shall continue as a direct lease between Landlord, as landlord (Landlord, as the party succeeding to the interest of Tenant, as landlord under the Sublease, being herein called "Successor Landlord") and Subtenant, as tenant; provided, however, that Successor Landlord (and its successors as landlord under the Sublease) shall not be:

- (a) liable for any act or omission of the landlord under the Sublease that occurred prior to the termination of the Lease (or subject to any claim or counterclaim which Subtenant may have against any such landlord based thereon); provided, however, that Successor Landlord (and its successors as landlord under the Sublease) shall be liable for any such act or omission (and subject to any such claim or counterclaim) if, and to the extent that, (i) such act or omission constitutes a default by the landlord under the Sublease (other than a *non-curable* default, e.g., a breach of representation), and (ii) such default continues after the termination of the Lease beyond a *reasonable cure period*; it being agreed that, for this purpose, a "*reasonable cure period*", with respect to any such default, shall mean a period equal in length to the period provided under the Lease for Landlord to cure a similar such default, but commencing on the later to occur of (x) the date of the termination of the Lease and (y) the first date that Successor Landlord shall have received notice of such default; or
- (b) bound by any payments of rent which Subtenant may have made prior to the termination of the Lease, if the same were made more than thirty (30) days in advance of the due date therefor under the Sublease (the parties hereto acknowledging that operating expense payments and tax payments made in

the manner provided in the Sublease shall not, for this purpose, be deemed payments of rent made in advance of their due date); or

- (c) required to account for any security deposit other than any security deposit actually delivered to Successor Landlord; or
- (d) bound by any modification of the Sublease (other than a modification of the Lease which does not affect, to more than a *de minimis* extent, the economic terms and conditions of the Sublease) which is made after the date hereof without Landlord's written consent (which consent, Landlord agrees shall not be unreasonably withheld or delayed).

3. Effective upon any termination of the Lease (other than a Non-Recognition Lease Termination), (i) Subtenant shall be bound to Successor Landlord, and Successor Landlord shall be bound to Subtenant, under all of the then executory terms, covenants and conditions of the Lease, except as provided elsewhere in this Agreement, (ii) Subtenant does hereby attorn to and recognize Successor Landlord as the landlord under the Lease upon such terms, covenants and conditions, and (iii) Successor Landlord does hereby accept such attornment and recognize Subtenant as the tenant under the Lease upon such terms, covenants and conditions. The foregoing attornment and recognition shall be effective and self-operative upon any termination of the Lease (other than a Non-Recognition Termination) without the execution of any further instruments, provided, however, that Subtenant shall not be obligated to pay any rent to Successor Landlord until Subtenant has received notice from Successor Landlord of such termination of the Lease and Landlord's acceptance of Subtenant's attornment hereunder. Each party hereto shall execute and deliver any certificate or other instrument which the other party hereto may reasonably request to confirm such attornment and recognition.

4. If any default by Tenant, as sublandlord, would give Subtenant the right, immediately or after lapse of a period of time, to cancel or terminate the Sublease, Subtenant shall not exercise such right until (a) Subtenant shall have given Landlord written notice of such default, and (b) a *reasonable period of time* shall have elapsed after the giving of such notice to Landlord without such default having been cured. For this purpose, a "*reasonable period of time*", with respect to any such default, shall mean a period equal in length to the period provided under the Lease for Landlord to cure a similar such default; provided, however, if such default is of a type which cannot reasonably be cured by Landlord without it first obtaining possession of the Premises, then such "*reasonable period of time*" shall be extended for such additional time as may be reasonably necessary for Landlord to obtain such possession, but only if (1) Landlord, within thirty (30) days after Subtenant's notice to it of the default in question, shall have deliver to Subtenant a notice indicating that Landlord intends to diligently proceed to obtain possession of the Premises and thereafter to diligently proceed to cure such default, and (2) Landlord shall (A) from and after such notice, diligently proceed to obtain possession of the Premises, and (B) from and after obtaining such possession, diligently proceed to cure such default. Nothing in this Paragraph 4 shall obligate Landlord to cure any default by Tenant, as sublandlord, under the Sublease; provided, however, that if Landlord shall elect to deliver the notice referred to in clause (1) of this Paragraph 4, then Landlord shall act in accordance with its intentions set forth in such notice unless and until Landlord shall elect to retract such notice by another notice to Subtenant, it being agreed that Landlord may so retract

such notice at any time, whereupon, however, the "*reasonable period of time*" shall automatically be deemed to have elapsed. The notice and cure rights of Landlord set forth in this Paragraph 4 shall not apply to any rights of Subtenant to cancel or terminate the Sublease (or surrender all or any portion of the Subleased Premises) that are expressly set forth in one or more provisions of the Sublease.

5. (a) As used herein, the following terms shall have the following meanings:

- (i) "**Sublease Rent**", for any period, shall mean all rent, additional rent (but excluding all additional rent attributable to overtime or premium services furnished to Subtenant upon request) and other consideration to be paid by the Subtenant to Sublandlord under the Sublease for such period.
- (ii) "**Underlying Lease Rent**", for any period, shall mean all Annual Basic Rent and Additional Rent (but excluding all additional rent attributable to overtime or premium services furnished to Sublandlord upon request) which shall accrue under the Lease (or that would have accrued under the Lease but for the termination thereof) with respect to the space demised by the Sublease during such period.

(b) Anything in this Agreement contained to the contrary notwithstanding if, in any case that Landlord shall succeed to the interest of Tenant, as sublandlord, under the Sublease, (i) the net present value of the Underlying Lease Rent for the period from the date of such succession (the "**Succession Date**") until the end of the term of such Sublease (determined without regard to any extension or renewal terms), *exceeds* (ii) the net present value of the Sublease Rent for the period from the Succession Date until the end of the term of such Sublease (determined without regard to any extension or renewal terms), then Subtenant, in lieu of paying the Sublease Rent as and when due under the Sublease for such period, shall pay to Landlord the Underlying Lease Rent for such period. Similarly, if the additional rent payable under the Sublease with respect to overtime or premium services furnished to Subtenant upon request is less than the corresponding rates under the Lease, then the Lease rates for such services shall apply. Upon the Succession Date, the Sublease shall automatically and without further act of either of the parties hereto be deemed amended to accomplish the foregoing provisions of this Paragraph 5, any contrary provisions in this Agreement notwithstanding.

(c) For purposes of determining: (i) the net present value of the Sublease Rent and Underlying Lease Rent, the applicable discount rate shall equal the Prime Rate (as defined in the Lease) and all amounts shall be discounted from the dates that such amounts are to be paid to the Succession Date; and (ii) any portion of the Sublease Rent and Underlying Lease Rent attributable to operating expenses or real estate taxes on any date, the parties hereto shall assume that real estate taxes and operating expenses will continue to escalate, from and after such date, at the average annual percentage rate that same escalated for the three (3) years immediately preceding such date.

(d) If Subtenant exercises any extension or renewal option contained in the Sublease (as in effect on the Lease Termination Date), then the provisions of Paragraph 5(b) hereof shall apply separately to such extension or renewal term *mutatis mutandis*, and thus, Subtenant shall

pay the greater of the Sublease Rent and the Underlying Lease Rent for such extension or renewal term.

6. This Agreement may not be modified except by an agreement in writing signed by Landlord and Subtenant.

7. All notices, demands, consents, approvals, advices, waivers or other communications (each, a "**notice**") which may or are required to be given by either party to the other under this Agreement shall be in writing and, unless otherwise required by law, shall be sent (a) by hand, (b) by United States Mail, certified or registered, postage prepaid, return receipt requested or (c) by a nationally-recognized overnight carrier, in each case addressed to the party to be notified at the address for such party specified in the opening paragraph of this Agreement, or to such other place in the continental United States as the party to be notified may from time to time designate by at least ten (10) days' notice to the notifying party. Each notice shall be deemed to have been given on the date such notice is actually received as evidenced by a written receipt therefor, and in the event of failure to deliver by reason of changed address of which no notice was given or refusal to accept delivery, as of the date of such failure.

8. Anything herein or in the Sublease to the contrary notwithstanding, from and after the Succession Date, the provisions of Section 14.10 of the Lease shall be deemed incorporated into the Sublease and shall apply to Successor Landlord.

9. LANDLORD AND SUBTENANT EACH HEREBY WAIVE ITS RIGHT TO A JURY TRIAL OF ANY ISSUE OR CONTROVERSY ARISING UNDER THIS AGREEMENT.

10. This Agreement shall be governed by the laws of the state in which the Property is located.

11. This Agreement shall bind, and inure to the benefit of, the parties hereto and their respective successors and assigns, which (i) in the case of Landlord, shall include any successor to it as the holder the lessor's interest in the Lease, and (ii) in the case of Subtenant, shall include any successor to it as subtenant under the Sublease.

12. If any provisions of this Agreement or the application thereof to any party hereto or circumstances shall, to any extent be invalid or unenforceable, the remainder of this Agreement or the application of such provisions to any other party hereto or circumstances other than those as to which it is invalid or unenforceable shall not be affected thereby, and all the provisions of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

13. This Agreement may be executed in any number of counterparts, each of which when executed and delivered will be deemed to be an original and all of which taken together, will deemed to be one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of the day and year first written above.

**LANDLORD:**

**SUBTENANT:**

By: \_\_\_\_\_  
Name:  
Its:

By: \_\_\_\_\_  
Name:  
Its:

**[Add Acknowledgments]**

Exhibit D-3  
Schedule 1

Description of the Property

**EXHIBIT E-1**Form Of Estoppel (Tenant)

\_\_\_\_\_  
and its successors and/or assigns

\_\_\_\_\_  
Attention: \_\_\_\_\_

Re: Premises at \_\_\_\_\_

Ladies and Gentlemen:

The undersigned ("Tenant") is the tenant under that certain lease (the "Original Lease") dated as of \_\_\_\_\_, 2004 between First States Investors [\_\_\_\_], LLC, as landlord, and Wachovia Bank, National Association, as tenant. Tenant hereby certifies to you that, to the best knowledge and belief of the individual executing this certificate on behalf of Tenant, as of the date hereof:

1. The Original Lease has not been modified or amended except as follows (none if left blank):  
\_\_\_\_\_  
(the Original Lease, as so amended and modified, the "Lease"). The Lease is in full force and effect and constitutes a complete statement of the agreements, covenants, terms and conditions of the landlord under the Lease ("Landlord") and Tenant with respect to the letting of the premises leased thereunder (the "Leased Premises").
2. The Commencement Date occurred on: \_\_\_\_\_ and the Expiration Date is currently scheduled to occur on \_\_\_\_\_.
3. Tenant's current monthly payments on account of Annual Basic Rent and the Monthly Estimated OE Payment and the dates through which each have been paid, are described below.  
Annual Basic Rent (monthly amount): \_\_\_\_\_ ; Date paid through: \_\_\_\_\_  
Monthly Estimated OE Payment: \_\_\_\_\_ ; Date paid through: \_\_\_\_\_
4. Except as set forth in the Lease, Tenant is entitled to no allowances, rent abatements, or other concessions.
5. Tenant has [\_\_\_\_] unexercised options to renew the Lease for up to \_\_\_\_ successive periods of \_\_\_\_ years each. Except as expressly set forth in the Lease, Tenant does not have any right to lease additional space, reduce the size of the Leased Premises, extend the term of the Lease, terminate the Lease, purchase the Leased Premises or any other rights or options with respect to the Leased Premises.
6. Tenant has not received any notice of any default by Tenant under the Lease that has not been cured other than (none, if left blank): \_\_\_\_\_.

7. Tenant has not delivered any notice of any default by Landlord under the Lease that has not been cured other than (none, if left blank): \_\_\_\_\_.
8. Tenant has no actual knowledge of any event which, with the giving of notice, the passage of time or both, would constitute a material default by Landlord under the Lease other than (none, if left blank): \_\_\_\_\_.
9. To Tenant's actual knowledge, Tenant has no existing defenses or offsets against the enforcement of the Lease other than (none, if left blank): \_\_\_\_\_.
10. Tenant has not sublet, transferred or hypothecated its interest under the Lease except as follows: \_\_\_\_\_ (none if left blank).
11. Tenant has not deposited any monies or instruments to secure any of its agreements and obligations under the Lease and has not paid any Rent more than thirty (30) days in advance of the due date, other than (none, if left blank): \_\_\_\_\_.
12. The party executing this certificate on behalf of Tenant is fully authorized and empowered to do so, and no consent, vote or approval is required which has not been given or taken.
13. This certificate may not be changed, waived or discharged orally, but only by an instrument in writing.
14. This certificate shall not have the effect of modifying any provision of the Lease.

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed thereto in the Lease. The certifications herein made shall be binding upon Tenant, and shall inure to your benefit. Tenant acknowledges that you may rely on this certificate in conjunction with your purchase and/or loan and thereafter ownership and operation of the Property and/or your extension of one or more loans secured by the Property.

Dated: this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Tenant Name: \_\_\_\_\_

By: \_\_\_\_\_  
 Name: \_\_\_\_\_  
 Its: \_\_\_\_\_

**EXHIBIT E-2**Form Of Estoppel (Landlord)

\_\_\_\_\_  
and its successors and/or assigns

\_\_\_\_\_  
Attention: \_\_\_\_\_

Re: Premises at \_\_\_\_\_

Ladies and Gentlemen:

The undersigned ("Landlord") is the landlord under that certain lease (the "Original Lease") dated as of \_\_\_\_\_, 2004 between First States Investors [\_\_\_\_], LLC, as landlord, and Wachovia Bank, National Association, as tenant. Landlord hereby certifies to you that, to the best knowledge and belief of the individual executing this certificate on behalf of Landlord, as of the date hereof:

1. The Original Lease has not been modified or amended except as follows (none if left blank):  
\_\_\_\_\_  
(the Original Lease, as so amended and modified, the "Lease"). The Lease is in full force and effect and constitutes a complete statement of the agreements, covenants, terms and conditions of the Landlord and the tenant under the Lease (the "Tenant") with respect to the letting of the premises leased thereunder (the "Leased Premises").
2. The Commencement Date occurred on: \_\_\_\_\_ and the Expiration Date is currently scheduled to occur on \_\_\_\_\_.
3. Tenant's current monthly payments on account of Annual Basic Rent and the Monthly Estimated OE Payment and the dates through which each have been paid, are described below.  
Annual Basic Rent (monthly amount): \_\_\_\_\_ ; Date paid through: \_\_\_\_\_  
Monthly Estimated OE Payment: \_\_\_\_\_ ; Date paid through: \_\_\_\_\_
4. Tenant has [\_\_\_\_] unexercised options to renew the Lease for up to \_\_\_\_ successive periods of \_\_\_\_ years each.
5. Landlord has not delivered any notice of any default by Tenant that has not been cured other than (none, if left blank): \_\_\_\_\_.
6. Landlord has not received any notice of any default by Landlord under the Lease that has not been cured other than (none, if left blank): \_\_\_\_\_.
7. Landlord has no actual knowledge of any event which, with the giving of notice, the passage of time or both, would constitute a material default by Tenant under the Lease other than (none, if left blank): \_\_\_\_\_.

8. Tenant has not deposited any monies or instruments to secure any of its agreements and obligations under the Lease, other than (none, if left blank): \_\_\_\_\_.
9. The party executing this certificate on behalf of Landlord is fully authorized and empowered to do so, and no consent, vote or approval is required which has not been given or taken.
10. This certificate may not be changed, waived or discharged orally, but only by an instrument in writing.
11. This certificate shall not have the effect of modifying any provision of the Lease.

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed thereto in the Lease. The certifications herein made shall be binding upon Landlord, and shall inure to your benefit.

Dated: this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Landlord Name: \_\_\_\_\_

By: \_\_\_\_\_  
Name:  
Its:

$\beta$ 

$W = \text{Wachovia spaces}$



-----Original Message-----

From: richard.belthoff <[richard.belthoff@wellsfargo.com](mailto:richard.belthoff@wellsfargo.com)>

To: eshaver326 <[eshaver326@aol.com](mailto:eshaver326@aol.com)>

Cc: harwood.weatherly <[harwood.weatherly@wellsfargo.com](mailto:harwood.weatherly@wellsfargo.com)>; brian.a.amick <[brian.a.amick@wellsfargo.com](mailto:brian.a.amick@wellsfargo.com)>; cscottgraber <[cscottgraber@gmail.com](mailto:cscottgraber@gmail.com)>

Sent: Wed, Jun 27, 2018 3:03 pm

Subject: RE: Beaufort SC (1011 Bay St) (BE 142517) - Community Event Parking

Ms. Harnett,

I believe you have misconstrued my letter. You have NO RIGHT to lease out or grant the use of the Tenant Dedicated Parking Areas at the above location whether before or after Wells Fargo's normal business hours without Wells Fargo's consent because Wells Fargo has been granted in the Lease the exclusive

right to use the Tenant Dedicated Parking Areas on a 24/7 basis. Therefore, your suggestion of coming to the parking lot during normal business hours to help set up for an event does not solve the issue. You have no right whatsoever to grant the use of the Tenant Dedicated Parking Areas in the first place. These parking areas are not common area under the Lease. If another event wishes to use the parking lot, you must obtain the prior written consent of Wells Fargo. You have no unilateral right to grant such access. We respectfully request that you cease granting the use of the lot without our prior knowledge and consent (and as I provided in my letter, Wells Fargo will be reasonable with respect to such requests). Thank you for your cooperation.

-Rich Belthoff  
SVP & Managing Counsel  
T: 704.374.7948

**From:** u <[eshaver326@aol.com](mailto:eshaver326@aol.com)>  
**Sent:** Wednesday, June 27, 2018 2:48 PM  
**To:** Belthoff Jr, Richard C. <[richard.belthoff@wellsfargo.com](mailto:richard.belthoff@wellsfargo.com)>  
**Cc:** Weatherly, Ervin H. <[harwood.weatherly@wellsfargo.com](mailto:harwood.weatherly@wellsfargo.com)>  
**Subject:** Re: Beaufort SC (1011 Bay St) (BE 142517) - Community Event Parking

Dear Mr. Belthoff:

Please understand that we would never allow the use of the parking lot except after business hours. That was definitely true that night. The Beaufort Area Hospitality people arrived early to prevent the lot from filling up with people looking for free event parking. From now on I will arrive at the parking lot before events to make sure that only customers parked there at closing time.

I know that my priority has always been for the success of the bank. With that in mind, I have done all I can to ensure more parking,

I own a half acre lot contiguous to the bank parking lot. I have always encouraged Wells Fargo employees and trainees to use that lot. My third floor tenants have been instructed to park on that lot and have been very cooperative. You might suggest that Wells Fargo employees take advantage and park there as well - as they did in the past.

For the years I have owned this property I have noticed that the lot is often full, with more cars than there are employees of the bank..Recently, I watched a man walk away from the bank. I asked the parking lot attendant who it was and she replied that he worked at the "other" Wells Fargo office. I do not know which division it is, nor how many employees are there, but if they would park on my other lot that would alleviate much of the problem, maybe enough that WF could do without the attendant, as they did in the past.

If someone would contact me I would be glad to provide the other office with ID so we would not have to monitor that lot.

Esther Shaver Harnett

-----Original Message-----

From: richard.belthoff <[richard.belthoff@wellsfargo.com](mailto:richard.belthoff@wellsfargo.com)>  
To: eshaver326 <[eshaver326@aol.com](mailto:eshaver326@aol.com)>  
Cc: cscottgraber <[cscottgraber@gmail.com](mailto:cscottgraber@gmail.com)>  
Sent: Wed, Jun 27, 2018 2:11 pm  
Subject: Beaufort SC (1011 Bay St) (BE 142517) - Community Event Parking

Please see attached correspondence.

-Rich Belthoff

---

Richard C. Belthoff, Jr. | SVP & Managing Counsel | Wells Fargo Law Dept.  
MAC D1053-300 | 301 S. College St., 30th Floor | Charlotte, NC 28202  
T: 704.374.7948 | F: 877.572.7039 | E: [Richard.Belthoff@WellsFargo.com](mailto:Richard.Belthoff@WellsFargo.com)

This message may contain confidential and/or privileged information. If you are not the addressee or authorized to receive this for the addressee, you must not use, copy, disclose, or take any action based on this message or any information herein. If you have received this message in error, please advise the sender immediately by reply e-mail and delete this message. Thank you for your cooperation.

|                                |   |                                        |
|--------------------------------|---|----------------------------------------|
| STATE OF SOUTH CAROLINA        | ) | IN THE COURT OF COMMON PLEAS           |
|                                | : | FOURTEENTH JUDICIAL CIRCUIT            |
| COUNTY OF BEAUFORT             | ) | C.A. NO.: 2018-CP-07-02378             |
|                                | ) |                                        |
| EDDIE B. LEWIS, JR.            | ) |                                        |
|                                | ) |                                        |
| Plaintiff,                     | ) | <b>Affidavit of Esther S. Harnett,</b> |
|                                | ) | <b>Representative of Saul, LLC's</b>   |
|                                | ) |                                        |
| versus                         | ) |                                        |
|                                | ) |                                        |
| SAUL, LLC and WELLS FARGO BANK | ) |                                        |
| NATIONAL ASSOCIATION           | ) |                                        |
|                                | ) |                                        |
| Defendants.                    | ) |                                        |

PERSONALLY appeared be me, Esther S. Harnett, who, being first duly sworn, deposes and says as follows:

1. I, Esther Shaver Harnett, am over the age of eighteen (18) years old and am otherwise mentally competent to execute this affidavit. I make this testimony on my own personal knowledge of the matters set forth herein.
2. I have been the owner of Saul, LLC since on or around November 18, 2013.
3. I have knowledge of and reviewed the Lease entered into by Saul, LLC and Wachovia, which was assumed by Wells Fargo Bank.
4. During my time as owner of Saul, LLC, I have worked directly with Wells Fargo in order to organize and provide maintenance when requested by Wells Fargo pursuant to the Lease.
5. My responsibilities include providing and coordinating repairs and maintenance when requested by Wells Fargo to the subject property located at 1011 Bay Street, Beaufort, S.C. pursuant to the terms of the Lease.
6. Saul, LLC has fully released the Tenant Dedicated Parking Area to Wells Fargo, and has no right to lease out or grant use of the Tenant Dedicated Parking Areas at 1011 Bay Street, Beaufort, South Carolina pursuant to the terms of the Lease.
7. Saul, LLC was never notified by Wells Fargo of any need for repairs and maintenance to the parking lot which Wells Fargo maintains complete control over prior to May 26, 2016.

8. Saul, LLC has not undertaken any maintenance or repairs to the parking lot prior to May 26, 2016, as Saul has given complete control to Wells Fargo pursuant to the terms of the Lease.
9. Wells Fargo on at least one occasion that I know of exercised control over the parking area by performing repair/maintenance to the same without Saul, LLC's input or approval.<sup>1</sup>

FURTHER DEPONENT SAYETH NOT.

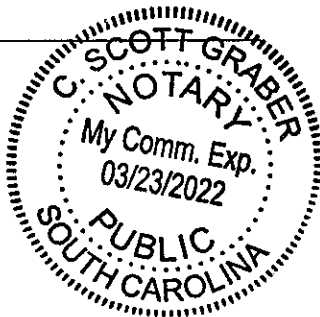
Dated this 10 of January, 2020.

Esther S. Harnett

Esther S. Harnett

SWORN TO before me this 10  
day of January, 2020.

[Signature] (Seal)  
Notary Public for South Carolina  
My Commission Expires: \_\_\_\_\_



<sup>1</sup> On April 25, 2018, Wells Fargo added striping paint and ADA Symbols to parking lot, without the permission or input of Saul, LLC.

## Certificate of Electronic Notification

### Recipients

**Laura Robinson** - Notification transmitted on 01-20-2020 04:16:28 PM.

**Morgan Templeton** - Notification transmitted on 01-20-2020 04:16:28 PM.

**David Nasrollahi** - Notification transmitted on 01-20-2020 04:16:28 PM.

**Cory Fleming** - Notification transmitted on 01-20-2020 04:16:28 PM.

\*\*\*\*\* IMPORTANT NOTICE - READ THIS INFORMATION \*\*\*\*\*

NOTICE OF ELECTRONIC FILING [NEF]

-

**A filing has been submitted to the court RE:** 2018CP0702378

**Official File Stamp:** 01-20-2020 04:15:23 PM

**Court:** CIRCUIT COURT

Common Pleas

Beaufort

**Case Caption:** Eddie B Lewis Jr VS Saul Llc , defendant, et al

**Document(s) Submitted:** Motion/Summary Judgment

- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits

**Filed by or on behalf of:** Morgan S. Templeton

This notice was automatically generated by the Court's auto-notification system.

-

**The following people were served electronically:**

Morgan S. Templeton for Saul Llc

David Ali Nasrollahi for Saul Llc, Saul, Llc

Cory Howerton Fleming for Eddie B Lewis, Jr

Laura W Robinson for Wells Fargo Bank National  
Association, Wells Fargo Bank, National  
Association

**The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:**

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Eddie B. Lewis, Jr.,

Plaintiff,

vs.

Saul, LLC and Wells Fargo Bank, NA,

Defendant.

IN THE COURT OF COMMONS PLEAS  
FOURTEENTH JUDICIAL CIRCUIT

Case No. 2018-CP-07-02378

**DEFENDANT WELLS FARGO  
MOTION TO SET ASIDE JUDGMENT  
PURSUANT TO RULE 60, SCRPC**

YOU WILL PLEASE TAKE NOTICE that Co-Defendant Wells Fargo Bank, NA (“Wells Fargo”), by and through its undersigned attorney, will move for an Order pursuant to Rule 60, SCRPC seeking relief from a judgment order.

Wells Fargo seeks relief from the Order Granting the Defendant Saul, LLC (“Saul”) Summary Judgment which was entered by the Court on March 24, 2020. This motion is made in accordance with the South Carolina Rules of Civil Procedure, and will be supported by sworn Affidavits of Wells Fargo representatives, and a Memorandum of Law In Support.

The Motion is based on the following:

1. Pursuant to Rule 60, SCRPC this motion is timely because it has been filed within one (1) year of the date the Honorable Deadra L. Jefferson entered the Order granting Saul’s Motion for Summary Judgment.
2. Wells Fargo submits it is entitled to relief under Rule 60(b)(3), SCRPC because Saul’s Summary Judgment Motion argument and supporting Affidavit contained significant misrepresentations as to the contractual relationship of the Parties.
3. Wells Fargo further submits that there were significant misrepresentations by Saul as to the responsibility for the condition and maintenance of the common areas, parking lot, and

landscaped areas of subject leased premises pursuant to the clear and unambiguous terms of the binding Lease agreement entered into between Wells Fargo and Saul.

4. The misrepresentations regarding the terms of the binding Lease are the cornerstone of any potential culpability or responsibility for the claims made by Plaintiff in this matter.
5. Wells Fargo further submits it is entitled to relief under Rule 60(b)(2), SCRCF, based on newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), SCRCF.

Respectfully submitted,

VERNIS & BOWLING OF COLUMBIA, LLC

s/Douglas E. Leadbitter

Douglas E. Leadbitter, SC Bar No. 68430

1401 Main Street, Suite 655

Columbia, South Carolina 29201

Tel: (803) 234-5416

dleadbitter@scarolina-law.com

ATTORNEYS FOR WELLS FARGO, NA

March 19, 2021

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

EDDIE B. LEWIS.,

Plaintiff,

vs.

SAUL, LLC, and WELLS FARGO BANK  
NATIONAL ASSOCIATION,

Defendants.

IN THE COURT OF COMMON PLEAS  
FOURTEENTH JUDICIAL CIRCUIT  
C/A No: 2018-CP-07-02378

**Defendant Saul, LLC's Memorandum in  
Opposition to Defendant Wells Fargo Bank,  
NA's Motion for To Set Aside Judgement**

**TO: DOUGLAS E. LEADBITTER, ATTORNEY FOR DEFENDANT WELLS FARGO,  
NA.:**

Defendant, Saul, LLC ("Saul"), by and through its undersigned attorneys, hereby submits the following Memorandum in opposition to Defendant Wells Fargo, NA's ("Wells Fargo") Motion to Set Aside Judgment pursuant to Rule 60, SCRPC. The Honorable Judge Deadra Jefferson correctly granted Saul's Motion for Summary Judgment; however, almost a year later Wells Fargo now brings an untimely and baseless Motion to Set Aside which for the reasons set forth below should be denied:

**SUMMARY OF ARGUMENT**

The standard for granting relief under Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party. Rouvet v. Rouvet, 696 S.E.2d 204, 208 (Ct. App. 2010). The party requesting relief in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle her to relief. See BB&T v. Taylor, 633 S.E.2d 501, 503 (2006). Given this, the burden of proof lies on Wells Fargo to show this Honorable

Court's ruling should be set aside. Id. Wells Fargo's Motion to Set Aside should be denied for the following reasons: 1) the Motion to Set Aside is so devoid of any articulable and particular argument that it fails pursuant to Rule 7(b), SCRCP; 2) Wells Fargo lacks standing to bring this Motion; 3) Wells Fargo failed to present this Court with any arguments, motions, memorandums when the Motion was first heard thus waiving any of its incorrect arguments; 4) Wells Fargo's Motion is untimely pursuant to Rule 59, SCRCP; as a) This Court was not misrepresented by Saul as the full Lease was reviewed by this Honorable Court; and b) Wells Fargo's newly discovered evidence is simply affidavits of its own clients which cannot be viewed as "new evidence" under Rule 60, SCRCP; 5) Wells Fargo's newly discovered evidence violates the parole evidence rule.

#### **PROCEDURAL HISTORY**

On December 5, 2018, Plaintiff Eddie R. Lewis ("Plaintiff") filed a Complaint against Defendants Saul and Wells Fargo based on theories of negligence and premises liability. Plaintiff then filed an Amended Complaint on January 1, 2019. On January 17, 2019, Saul filed its Answer to the Plaintiff's Amended Complaint. Wells Fargo then filed its Answer to the Plaintiff's Amended Complaint, which does not contain any cross-claims against Saul. Saul moved for Summary Judgment ("Motion") as to the Plaintiff's Amended Complaint on January 20, 2020 based on the terms of the Lease. (See Mot. for Summ. J., filed Jan. 20, 2020.) Attached to this Motion as an exhibit was a full and complete copy of the Lease. (Id., at Ex. A.) On March 17, 2020, the Honorable Judge Deadra Jefferson heard arguments on the Motion. Counsel for the Plaintiff and Saul were present for this hearing; however, ***counsel for Wells Fargo failed to appear***. Wells Fargo failed to file a Motion for Continuance. In addition, Wells Fargo failed to file any responsive Memorandums to Saul's Motion. On March 24, 2020, this Court, after careful consideration of the record, granted Saul's Motion as to the claims brought by the Plaintiff. (Order

Granting Summ. J., filed Mar. 24, 2020.) Neither the Plaintiff nor Wells Fargo filed a Motion to Reconsider. Neither party appealed this Court's Order. Now, almost a year to the date since then entry of this Court's Order, Wells Fargo challenges this Honorable Court's Order *for the first time* and seeks relief pursuant to Rules 60(b)(2) and (b)(3), SCRCP. For the following reasons, Wells Fargo's Motion should be denied.

**A. Wells Fargo's Motion to Set Aside violates Rule 7(b), SCRCP, and should be denied**

"Rule 7(b)(1), SCRCP requires that motions 'shall state with particularity the grounds therefor, and shall set forth the relief or order sought.'" Camp v. Camp, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010). "The particularity requirement 'is to be read flexibly in recognition of the peculiar circumstances of the case.'" Id. "By requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that the court can comprehend the basis of the motion and deal with it fairly." Id.

Wells Fargo's five paragraph motion presents exceedingly vague claims of "misrepresentation" and "newly discovered evidence;" however, it is devoid of any specific evidence or facts that support these claims. Wells Fargo did not elaborate on what it perceives as misrepresentations and why it is a misrepresentation. Wells Fargo fails to identify what "new evidence" it has obtained, the dates it learned of the "new evidence," or how the "new evidence" was found. Wells Fargo did not attach the affidavits it claims to have. Wells Fargo did not even cite to a single case upon which it will rely in support of its arguments. As of the date of this Memorandum, it has been Three-Hundred and Seventy-Two (372) days since this Honorable Court granted Saul's Motion. Despite this inordinate amount of time passing, Wells Fargo still has not

set forth with particularity the basis for its arguments. Saul, and more importantly this Honorable Court, is left speculating what Wells Fargo has based this untimely motion on.

Given that Saul has not been a party to the litigation of this matter for over a year, it would be prejudicial to require Saul to reargue its Motion for Summary Judgment, or relitigate this case for that matter, after such a significant delay. This severe prejudice has burdened Saul with loss of time, fees, and costs. Further, because this Motion is so devoid of articulable information, facts, law, etc., Saul is prejudiced by having to make assumptions when drafting this Memorandum in Opposition to Wells Fargo's assertions. Given the fact that Wells Fargo has had over a year to provide such information, facts, evidence, and law to this Honorable Court and Saul, but seems to have intentionally failed to do so, Wells Fargo's Motion to Set Aside should be denied pursuant to Rule 7(b), SCRCP.

**B. Wells Fargo was not a party to the Order and therefore lacks standing to bring this Motion to Set Aside**

In its most basic sense, “[s]tanding refers to a party’s right to make a legal claim or seek judicial enforcement of a duty or right.” See Preservation Society of Charleston v. SCDHEC, 430 S.C. 200, 209, 845 S.E.2d 481, 486 (2020). This Court’s Order dealt entirely and solely with the claims asserted by Plaintiff. See J. Jefferson Order, filed March 24, 2020, p. 1. In fact, the Order does not contain any final judgment as to any claims asserted by Wells Fargo against Saul, *because there are none*. As mentioned before, Wells Fargo never brought claims against Saul in this matter. Nevertheless, Wells Fargo now seeks for this Honorable Court to set aside its Order dismissing claims of the Plaintiff against a co-defendant. Rule 60(b), SCRCP, provides that “the court may relieve a party or his legal representative from a final judgment, order or proceeding....” Pursuant to the plain terms of Rule 60(b), SCRCP, Wells Fargo is not a party or the legal representative of

a party to this Court's Order, which was issued as to the Plaintiff's claims against Saul. See gen. Narruhn v. Alea London Ltd., 404 S.C. 337, 745 S.E.2d 90 (2013). Wells Fargo is improperly attempting to step into the shoes of the Plaintiff, but it has no right to do so. Because of that, Wells Fargo's Motion to Set Aside should be denied.

**C. Wells Fargo failed to make any arguments at the appropriate time and therefore waived any rights to raise them at this time**

The procedural history of this matter truly encapsulates the flaws in Wells Fargo's arguments to set aside this Honorable Court's Order. Namely, it shows that each and every argument ostensibly raised in Wells Fargo's motion was available to it at the date of the hearing on Saul's motion for summary judgment. Waiver is a voluntary and intentional abandonment of a known right. SPUR at Williams Brice Owners Ass'n v. Lalla, 415 S.C. 72, 91, 781 S.E.2d 115, 125 (Ct. App. 2015). Acts inconsistent with the continued assertion of a right may give rise to waiver. Provident Life & Acc. Ins. Co. v. Driver, 317 S.C. 471, 478, 451 S.E.2d 924, 928 (Ct. App. 1994). Saul filed its Motion for Summary Judgment as to Plaintiff's claims on January 20, 2020. On March 17, 2020, this Honorable Court heard arguments on the Motion. Counsel for Plaintiff and Saul were present for this hearing; meanwhile, ***counsel for Wells Fargo failed to appear***. Wells Fargo did not file a formal Motion for Continuance of the Motion. Wells Fargo failed to file any responsive Memorandum to Saul's Motion. On March 24, 2020, this Court, after careful consideration of the record, correctly granted Saul's Motion as to the claims brought by the Plaintiff. Wells Fargo did not file a Motion to Reconsider, nor did Wells Fargo appeal this Honorable Court's decision. On March 19, 2021, Wells Fargo ***for the first time*** has challenged this Honorable Court's Order claiming relief pursuant to Rule 60(b)(3) and (b)(2), SCRCp.

A plain reading of the assertions found in Wells Fargo's Motion to Set Aside shows that Wells Fargo's arguments are based on documents ***that were available to this Honorable Court at the time of the hearing***. Specifically, the Motion to Set Aside states that:

2. Wells Fargo submits it is entitled to relief under Rule 60(b)(3), SCRCF because Saul's Summary Judgment Motion argument and supporting Affidavit contained significant misrepresentations as to the contractual relationship of the parties.
3. Wells Fargo further submits that there were significant misrepresentations by Saul as to the responsibility for the condition and maintenance of the common areas, parking lot, and landscaped areas of subject leased premises pursuant to the clear and unambiguous terms of the binding Lease agreement entered into between Wells Fargo and Saul.
4. The misrepresentations regarding the terms of the binding Lease are the cornerstone of any potential culpability or responsibility for the claims made by Plaintiff in this matter.

Wells Fargo Motion to Set Aside, filed March 19, 2021, ¶¶ 2-4. Wells Fargo argues that Saul's arguments and supporting Affidavit contained misrepresentations. As shown above, Saul's Motion and Affidavit was filed and served on Wells Fargo on January 20, 2020. Wells Fargo's never filed any responsive memorandums to this Court on Saul's Motion. Counsel for Saul made its arguments with the Court on March 17, 2020. ***Wells Fargo's counsel failed to appear at the hearing, despite being on notice.*** On March 24, 2020, Judge Jefferson issued her Order which explicitly states that she reviewed the record, which contained a full copy of the Lease, when she made her ruling. See Order Granting Summ. J., filed Mar. 24, 2020. Wells Fargo never filed a Motion for Reconsideration. Wells Fargo never appealed the Order. Despite Wells Fargo's allegations of misrepresentation that were present in Saul's Motion and supporting Affidavit, Wells Fargo failed to do even the bare minimum to argue against Saul's Motion. Further, Wells Fargo's "newly discovered evidence" is ostensibly just its own client's Affidavits. Evidence is not "newly discovered," for purposes of a motion for relief from judgment, if it is known to the party

at trial and in the party's possession. See Southeastern Housing Foundation v. Smith, 380 S.C. 621, 670 S.E.2d 680 (Ct. App. 2008).

As such, the two erroneous and vague bases for Wells Fargo's Motion to Set Aside are documents and information that were either before the Court or known by Wells Fargo at the time of the hearing of the Motion. Wells Fargo had ample opportunities to raise any arguments that it had, and to give this Honorable Court a fair opportunity to hear its arguments at the time the Motion was heard. However, despite being put on notice of Saul's arguments and supporting Affidavit on January 20, 2020, Wells Fargo's counsel did nothing until March 19, 2021. Wells Fargo has waived any rights to raise any arguments that should have been made at the time of the hearing.

Even if there were misrepresentations, which are adamantly denied, Wells Fargo should have raised those arguments *at the time of the hearing or through a motion to reconsider*. Further, if Wells Fargo is relying on Affidavits of its own clients as this "newly discovered evidence" then they should have been provided *at the time of the hearing*. Per Wells Fargo's own Motion to Set Aside, these alleged misrepresentations were before the Court at the time of the hearing, and Wells Fargo failed to take any action. Therefore, Wells Fargo waived these arguments and the Motion to Set Aside should be denied.

**D. Wells Fargo's Motion to Set Aside pursuant to Rule 60(b), SCRCP is merely an untimely Rule 59, SCRCP Motion**

Wells Fargo's Motion to Set Aside is simply a Rule 59 Motion cloaked in baseless assertions of "misrepresentations" and "newly discovered evidence." A review of Wells Fargo's Motion to Set Aside shows that it is seeking to have a proverbial "second bite of the apple," when its counsel failed to even take the first bite.

- i. **Wells Fargo’s “misrepresentation” assertion is based on arguments that should have been made at the time of the hearing, and are thus barred by Rule 59, SCRCP**

As shown above, the “misrepresentations” argument erroneously set forth by Wells Fargo asserts that:

there were significant misrepresentations by Saul as to the responsibility for the condition and maintenance of the common areas, parking lot, and landscaped areas of subject leased premises pursuant to the clear and unambiguous terms of the binding Lease agreement entered into between Wells Fargo and Saul.

Motion to Set Aside ¶ 3. Wells Fargo blatantly and intentionally ignores the fact that the Lease was made as an exhibit to the Motion. Saul’s Motion was premised on “contract interpretations” under the terms of the Lease. The Honorable Judge Deadra Jefferson ruled on this “contract interpretation” after hearing oral arguments made by counsel for Saul and Plaintiff, and thoroughly and judiciously considering the record ***which contained the Lease***. In fact, Judge Jefferson’s Order intricately cites to the Lease when coming to her final decision that Saul was entitled to Summary Judgment as to the Plaintiff’s claims. Wells Fargo erroneously asserts that Judge Jefferson was misled by misrepresentations; however, Wells Fargo’s Motion fails to explain how any “misrepresentations” made in argument can change the terms and conditions of the Lease, which was provided as an exhibit to the Motion. Moreover, Wells Fargo cannot do so because the terms of the Lease were plainly understood by the Honorable Court.

Wells Fargo asserts that the arguments set forth in the Motion for Summary Judgment and supporting Affidavit contained significant misrepresentations as to the contractual relationship of the Parties. Once again, Wells Fargo is improperly attempting to reargue the Motion for Summary Judgment, ***which it failed to do so at the time of the hearing***. Nevertheless, the plain language of

the Lease speaks for itself. Wells Fargo does not and cannot deny that Judge Jefferson had and reviewed the Lease prior to making her ruling.

Wells Fargo did not file a memorandum in opposition to the Motion, did not appear at the hearing on the Motion, and did not file a Motion to Reconsider this Court's Order. Saul's Motion and supporting Affidavit was filed with the Court on January 20, 2020. The hearing on the Motion did not take place until March 17, 2020. It was not until March 19, 2021, did Wells Fargo first assert that the Motion and supporting Affidavit contained "misrepresentations." Wells Fargo failed to raise any issues for almost a year. Wells Fargo then, comes to this Honorable Court and asserts a Rule 60(b) motion based on "misrepresentation." In reality this is an untimely Rule 59 Motion to Reconsider on arguments that should have been made during the hearing that Wells Fargo did not attend, file a Motion for Continuance, submit a memorandum in opposition, or timely file any motions to reconsider. Rule 59, SCRCP, provides that a motion to alter or amend the judgment shall be served not later than 10 days after receipt of the written notice of the entry of the order. Wells Fargo did not file this Motion to Set Aside within this strict timeframe, therefore the Motion should be denied.

**ii. Wells Fargo' "newly identified evidence" is baseless and as such the Motion to Set Aside is in reality an untimely Motion to Reconsider pursuant Rule 59, SCRCP**

Wells Fargo arbitrarily asserts that it has "newly discovered evidence" that could not have been discovered in time to move under Rule 59, SCRCP. As mentioned above, the Motion to Set Aside lacks any clear indication as to what is the "newly discovered evidence." Nevertheless, Saul believes the only "newly discovered evidence" identified by Wells Fargo in its Motion to Set Aside are "Affidavits of Wells Fargo representatives." As of the date of filing this Memorandum, Three-Hundred and Seventy-Two (372) days from the date of Judge Jefferson's Order, neither this

Honorable Court nor Saul have been provided with these alleged Affidavits. Wells Fargo cannot truly present to this Honorable Court that it could not have discovered Affidavits from its *own* client. See fn. 1. Wells Fargo cannot candidly maintain that Affidavits of its clients are “newly discovered evidence.” If this is taken as true, Counsel for Wells Fargo presents facts that indicate that it had not communicated with its own client regarding the Motion for almost a year. This self-serving assertion that Affidavits of clients are “newly discovered evidence” would have the Courts, parties, and the public with never ending cases where any ruling or final decision can be reargued endlessly based on “newly discovered evidence” drafted by the losing party. As shown above, evidence is not “newly discovered,” for purposes of a motion for relief from judgment, if it is known to the party at trial and in the party’s possession. See Southeastern Housing Foundation v. Smith, 380 S.C. 621, 670 S.E.2d 680 (Ct. App. 2008). Affidavits of a Wells Fargo representative regarding the terms of the Lease which were known by Wells Fargo at the time of the Motion and were in its possession are not “newly discovered evidence.”

Given this, there is no “newly discovered evidence,” this is merely a frivolous attempt to reargue the Motion well beyond the time afforded under Rule 59, SCRCP. As such, the Motion is untimely and should be denied.

**E. Wells Fargo cannot raise issues regarding newly discovered evidence which would violate the parole evidence rule**

Wells Fargo next argues that it is entitled to relief pursuant to Rule 60(b)(2), SCRCP, based on the vague assertion of “newly discovered evidence.” Even if Wells Fargo had any “newly discovered evidence,” the Court issued its ruling based upon the terms of the Lease and the parole evidence rule prevents the introduction of extrinsic evidence of agreements. The parole evidence rule states that a valid written contract, which is complete, and the terms of which are not

ambiguous, cannot be contradicted, added to, altered, or varied by extrinsic evidence. Garnett v. WRP Enterprises, Inc., 380 S.C. 206, 669 S.E.2d 591 (2008). The full and unambiguous Lease has been provided to this Honorable Court at the time of the filing of the Motion and at the hearing. This Honorable Court's Order eloquently interpreted the rights and responsibilities owed under the Lease, and in the end correctly found that Saul's Motion should be granted.

After failing to make any arguments on the Motion for almost a year, Wells Fargo attempts to call into question this Court's ruling on a Lease's interpretation based on "newly found" extrinsic evidence, which clearly violates the parole evidence rule. For these reasons, Wells Fargo's Motion to Set Aside Judgment should be denied.

### **CONCLUSION**

The Honorable Judge Deadra Jefferson correctly determined the responsibilities and duties under the plain and ordinary reading of the Lease, finding that Saul was entitled to Summary Judgment as to the Plaintiff's claims. For this reason, and the reasons set out above, the undersigned attorneys respectfully request that this Court deny Defendant Wells Fargo's Motion to Set Aside Judgment Pursuant to Rule 60, SCRCP. Additionally, Defendant Saul, LLC request this Court to award of attorney's fees, costs, and sanctions associated with having to research the applicable statutes and case law and draft this memorandum in opposition to Defendant's baseless Motion to Set Aside.

**SIGNATURE INTENTIONALLY ON FOLLOWING PAGE**

Dated this 31st day of March, 2021

WALL TEMPLETON & HALDRUP, P.A.

s/Morgan S. Templeton  
Morgan S. Templeton (SC Bar #15456)  
David A. Nasrollahi (SC Bar #103242)  
Post Office Box 1200  
Charleston, South Carolina 29402  
843-329-9500  
**Attorneys for Defendants Saul, LLC**

|                                |   |                                          |
|--------------------------------|---|------------------------------------------|
| STATE OF SOUTH CAROLINA        | ) | IN THE COURT OF COMMON PLEAS             |
|                                | ) | FOURTEENTH JUDICIAL CIRCUIT              |
| COUNTY OF BEAUFORT             | ) | C.A. NO.: 2018-CP-07-02378               |
|                                | ) |                                          |
| EDDIE B. LEWIS, JR.            | ) |                                          |
|                                | ) |                                          |
| Plaintiff,                     | ) | <b>Plaintiff's Memorandum in</b>         |
|                                | ) | <b>Response to Defendant Wells Fargo</b> |
| versus                         | ) | <b>Bank, NA's Motion to Set</b>          |
|                                | ) | <b>Aside Judgment</b>                    |
| SAUL, LLC and WELLS FARGO BANK | ) |                                          |
| NATIONAL ASSOCIATION           | ) |                                          |
|                                | ) |                                          |
| Defendants.                    | ) |                                          |
| _____                          | ) |                                          |

**TO: DOUGLAS E. LEADBITTER, ATTORNEY FOR DEFENDANT WELLS FARGO, NA:**

The Plaintiff, Eddie B. Lewis, Jr., by and through his undersigned counsel, hereby submits the following Memorandum in response to Defendant Wells Fargo, NA's ("Wells Fargo") Motion to Set Aside Judgment pursuant to Rule 60, SCRCF. The Honorable Judge Deadra Jefferson granted Saul's Motion for Summary Judgment on March 17, 2020.

### **PROCEDURAL HISTORY**

On December 5, 2018, Plaintiff Eddie R. Lewis (Plaintiff) filed a Complaint against Defendants Saul and Wells Fargo based on negligence and premises liability. Plaintiff then filed an Amended Complaint on January 7, 2019. On January 17, 2019, Saul files its Answer to the Plaintiff's Amended Complaint. On February 11, 2019, Wells Fargo files its Answer to the Plaintiff's Amended Complaint, which does not contain any cross claims against Saul.

On June 27, 2019, Plaintiff served both Wells Fargo and Saul with his first set of interrogatories and request for production. Saul provided their responses within 30 days of the request, however Wells Fargo failed to timely respond to this discovery request. On December

11, 2019, counsel for the Plaintiff wrote a Rule 11 letter to Wells Fargo's Attorney at the time, Laura Robinson, requesting that they respond within ten (10) days. On December 11, 2019, Plaintiff served his second set of interrogatories and request for production on Wells Fargo. Wells Fargo failed to timely respond to that set of discovery requests as well.

On January 23, 2020, counsel for the Plaintiff again wrote Laura Robinson a Rule 11 letter requesting responses to both sets of discovery within ten (10) days. The following day, Laura Robinson indicated that discovery responses would be provided on January 27, 2020. However, Wells Fargo failed to comply with that request as well. Therefore, on February 14, 2020, Plaintiff filed a Motion to Compel responses to both sets of discovery, the first set being nearly seven (7) months past due. (See Mot. To Compel, filed Feb. 14, 2020)

During this time, Saul moved for Summary Judgment as to the Plaintiff's Amended Complaint on January 20, 2020, based on the terms of the Lease.

On March 5, 2020, all parties were notified that both the Motion to Compel and the Motion for Summary Judgment were scheduled to be heard on March 17, 2020. Nonetheless, Wells Fargo failed to respond to the outstanding discovery requests.

On March 13, 2020, Laura Robinson contacted counsel for the Plaintiff and informed him that she was leaving the law firm of Vernis and Bowling and that Charles Blackburn would be taking over the case. She then asked if the Plaintiff would consent to continue the Motion to Compel scheduled for the next week. Counsel for the Plaintiff agreed to a Consent Order that would require that Wells Fargo provide responses within thirty (30) days of the Order.

On the morning of March 17, 2020, Charles Blackburn called counsel for the plaintiff and confirmed that a Consent Order would be entered on the Motion to Compel scheduled to be heard at 10:00 a.m. that day. Mr. Blackburn agreed to prepare the Consent Order and submit it for

signature. He then informed counsel for the Plaintiff that he would not be attending the hearing that day.

On March 17, 2020, the Honorable Judge Deadra Jefferson heard arguments on Saul's Motion of Summary Judgment. Counsel for the Plaintiff and Saul were present for this hearing, however, counsel for Wells Fargo failed to appear. Counsel for the Plaintiff informed the Court that the Motion to Compel was resolved on a Consent Order and that Mr. Blackburn indicated that he was not going to attend the hearing.

Notwithstanding the agreement made by Mr. Blackburn, Wells Fargo still failed to respond to the outstanding discovery requests and failed to submit the proposed Consent Order. Therefore, on June 18, 2020, Plaintiff's counsel wrote counsel for Wells Fargo requesting discovery answers. No answers were received prompting Plaintiff's counsel to file a second Motion to Compel Discovery on July 1, 2020. This Motion to Compel hearing took place via Webex on August 6, 2020 and was heard by the Honorable Judge Brooks P. Goldsmith. Present and appearing were Plaintiff's Counsel and Wells Fargo Counsel, Charles Blackburn. Prior to the hearing, the parties notified the Court that they had reached an agreement. The Plaintiff would agree to continue the Motion to Compel, and Wells Fargo would answer outstanding discovery within thirty (30) days of August 6, 2020. Ultimately, Wells Fargo began to provide responses to discovery on August 31, 2020.

### **PLAINTIFF'S RESPONSE**

In this action, it is uncontested that either Saul or Wells Fargo was responsible for the area of the subject property where the Plaintiff was injured. No other person or entity had any ownership or control of this property. No party to this action has ever asserted that any other person

or entity had ownership or control of this property. Therefore, the issue of the control of the property and the resulting duty to business invitees became a disagreement between Saul and Wells Fargo.

When Saul filed the Motion for Summary judgement, it was clear that the motion was made solely on the argument that Wells Fargo was the only entity that had control of the property and a resulting duty to business invitees. Saul did not argue that the property was not unreasonably dangerous. Nor did Saul argue that the condition of the property was not the proximate cause of the Plaintiff's injuries. While procedurally the Motion was directed to the Plaintiff, it was clear that Saul was seeking a ruling that, as a matter of law, it had no control of the property and therefore Wells Fargo had to be the party that had such control and the resulting legal duty.

The Plaintiff had filed two separate sets of discovery requests that were ignored by Wells Fargo. When the motion for Summary Judgement was filed, Wells Fargo had almost two months to produce answers and documents to refute the arguments forwarded by Saul. It would be reasonable to assume that since Wells Fargo did not produce any documents or other evidence to refute Saul's argument, file any responsive memorandum, or even attend the hearing, that Wells Fargo either could not refute the argument or simply acquiesced to it.

The Order on the Summary Judgement Motion issued by the Court reflected the conclusion that because Wells Fargo had exclusive control of the property in question, they had the resulting duties to business invitees. That is the argument that Saul forwarded in their Motion and attached exhibits. Wells Fargo had the opportunity to oppose that argument but simply chose not to.

The Motion to Set Aside Judgement makes assertions concerning Saul's arguments leading up to and during the hearing on their Summary Judgement Motion. The Plaintiff is simply not in a position to respond to the assertions. Furthermore, Wells Fargo has not clearly identified which

arguments constitute misrepresentation, nor have they presented any affidavits or other filings to support the claims. Without more, the Plaintiff is not able to address Wells Fargo's assertions.

RESPECTFULLY SUBMITTED,

**/s/ Cory H. Fleming**

Cory H. Fleming  
Moss, Kuhn & Fleming, P.A.  
SC Bar #: 6999  
P O Drawer 507  
Beaufort, South Carolina 29901  
(843) 524-3373 telephone  
(843) 524-1302 fax  
Attorneys for Eddie B. Lewis, Jr.

Beaufort, South Carolina  
July 2, 2021

|                           |   |                              |
|---------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA   | ) | IN THE COURT OF COMMON PLEAS |
|                           | ) | FOURTEENTH JUDICIAL CIRCUIT  |
| COUNTY OF BEAUFORT        | ) | CASE NO.: 2018-CP-07-02378   |
|                           | ) |                              |
| EDDIE B LEWIS, JR.,       | ) |                              |
|                           | ) |                              |
| Plaintiff,                | ) | <b>MOTION TO COMPEL</b>      |
|                           | ) |                              |
| SAUL, LLC AND WELLS FARGO | ) |                              |
| BANK NATIONAL ASSOCIATION | ) |                              |
|                           | ) |                              |
| Defendants.               | ) |                              |

---

PLEASE TAKE NOTICE that the above named Plaintiff, Eddie B. Lewis, Jr., will ten (10) days following the filing of this Notice of Motion and Motion or as soon thereafter as counsel may be heard, move, before the presiding judge of the Court of Common Pleas for the County of Beaufort, South Carolina, for an Order in the above-captioned matter requiring Wells Fargo National Bank Association ("Wells Fargo") to fully answer the Plaintiff's First Set of Interrogatories and Request for Production the Plaintiff served upon Wells Fargo originally on June 27, 2019 (Exhibit A) and The Plaintiff's Second Set of Interrogatories and Request for Production were served upon Wells Fargo on December 11, 2019 (Exhibit B).

On December 11, 2019, the undersigned wrote counsel for Wells Fargo following up on the Plaintiff's First Set of Interrogatories and Request for Production (Exhibit C). No response was received from the December 11, 2019 correspondence. On January 23, 2020, the undersigned wrote counsel for Wells Fargo requesting status of responses to both sets of discovery requests (Exhibit D). While it has been represented that discovery responses are forthcoming, to date, no discovery responses have been provided. The Motion is being made pursuant to South Carolina Rules of Civil Procedure 26, 33, and 37.

The undersigned counsel affirms that they have communicated with Wells Fargo counsel and is informed and believe that the substance of the instant motion is either opposed, or cannot be produced in a reasonable time frame as Wells Fargo has failed to produce the requested materials. Therefore, the undersigned has complied with Rule 11 of the South Carolina Rules of Civil Procedure.

*(Signature page to follow)*

February 13, 2020

Respectfully submitted,  
MOSS, KUHN & FLEMING, P.A.

s/ Cory H. Fleming  
Cory H. Fleming  
SC Bar #:6999  
1501 North Street  
P O Drawer 507  
Beaufort, SC 29901  
843-524-3373  
Attorney for the Plaintiff

# EXHIBIT “A”

LAW OFFICES

MOSS, KUHN & FLEMING, P.A.

JAMES H. MOSS

H. FRED KUHN, JR.

CORY H. FLEMING

1501 North Street P.O. Drawer 507 - Beaufort, South Carolina 29901-0507

TELEPHONE 843-524-3373

FAX 843-524-1302

\*ALSO MEMBER OF GA BAR

June 27, 2019

Joseph P. Bias, Esquire  
Vernis & Bowling  
1401 Main Street, Suite 655  
Columbia, South Carolina 29201

RE: *Eddie B. Lewis, Jr. v. Saul, LLC et al*  
2018-CP-07-02378

Dear Joseph:

Enclosed please find the *Plaintiff's First Set of Interrogatories and Request for Production to the defendant's, Wells Fargo, National Association*, discovery requests. Should you have any questions or concerns do not hesitate to give me a call or email.

With kindest regards, I am,

Very truly yours,

MOSS, KUHN & FLEMING, P.A.

Cory H. Fleming

CHF/tk

Cc: Morgan S. Templeton

ELECTRONICALLY FILED - 2021 Jul 02 3:20 PM - BEAUFORT - COMMON PLEAS - CASE#2018CP0702378

|                            |   |                              |
|----------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA    | ) | IN THE COURT OF COMMON PLEAS |
|                            | ) |                              |
| COUNTY OF BEAUFORT         | ) | CASE NO: 2018-CP-07-02378    |
|                            | ) |                              |
| EDDIE B. LEWIS, JR.,       | ) |                              |
|                            | ) |                              |
| Plaintiff,                 | ) |                              |
|                            | ) |                              |
| v.                         | ) | PLAINTIFF'S FIRST SET OF     |
|                            | ) | INTERROGATORIES TO           |
| SAUL, LLC and WELLS FARGO, | ) | DEFENDANT, WELLS FARGO,      |
|                            | ) | NATIONAL ASSOCIATION         |
| Defendant.                 | ) |                              |

**TO JOSEPH P. BIAS, ATTORNEY FOR THE DEFENDANT, WELLS FARGO,  
NATIONAL ASSOCIATION:**

The Plaintiff herein, by and through his undersigned attorney, hereby requires the Defendant, Wells Fargo, National Association, to answer under oath the Interrogatories hereinafter set forth within thirty (30) days after service thereof, in accordance with the provisions of Rule 33 of the South Carolina Rules of Civil Procedure.

1. Give the name and address of each person whom you know to be a witness concerning the facts in this case and state whether or not a written or recorded statement has been taken from each such witness and provide the name and address of each person who has possession of each such statement.
2. Set forth a list of photographs, plats, sketches, or other prepared documents in your possession that relate to the claim of this case.
3. Set forth names and addresses of all insurance companies which have liability and underinsured insurance coverage relating to the claim, and set forth the number(s) of the policies involved and the amount or amounts of liability coverage provided in each policy.
4. List the names and addresses of any expert witnesses whom the party proposes to use as a witness at the trial of the case.

5. For each person known to the party or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform plaintiff of the important facts known to or observed by such witness, or provide a copy of any written or recorded statement taken from such witness.
6. List the names of all persons and/or entities to which you or anyone on your behalf have issued subpoena(s) seeking information in this matter.
7. Set forth the names of all employees who were working on the date of the incident at the Wells Fargo Bay Street, Beaufort, South Carolina location where the plaintiff fell.
8. Identify all employees with personal knowledge of the plaintiff's fall or his injuries.
9. Describe any and all training manuals, rules, regulations or other policies whether written, electronic or other, that in anyway relate to the defendant's rules regarding inspection and maintaining their facilities. List all inspection, maintenance, forms or reports.
10. Provide the name and any identifying number of any report(s) that are to be completed in the event a patron falls or is injured.
11. List all claims filed against the defendant as a result of falls from 2009 to the present. Please provide the names, addresses, and telephone numbers of any person claiming to have fallen on the premises of the Wells Fargo Bay Street, Beaufort, South Carolina location.
12. Give the name, address and telephone number of any attorney representing any person claiming to have fallen at the incident location for the last ten (10) years.
13. List all reports that were filed when the Plaintiff fell on the date of the accident.

14. State whether or not there are surveillance cameras for the parking lot area where the Plaintiff fell and if so state the defendant's policy on retention of such surveillance tapes or recording devices.

15. Give the names, addresses, telephone numbers and current status of all employees who were present at the incident location which is the subject of this law suit at the time the plaintiff fell.

These interrogatories shall be deemed continuing so as to require supplemental answers if you or your attorney obtain further information between the times answers are served and the time of trial.

MOSS, KUHN & FLEMING, P.A.

By: \_\_\_\_\_

Cory H. Fleming

SC Bar #: 6999

P. O. Box 507

Beaufort, SC 29901-0507

(843) 524-3373

(843) 379-1322 Fax

cory@mossandkuhn.com

ATTORNEYS FOR PLAINTIFF

Beaufort, South Carolina  
June 21, 2019

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Hon. Deadra L. Jefferson  
Presiding Circuit Court Judge

---

Appellate Case No.: 2021-001170

---

Eddie B. Lewis. . . . . Respondent

v.

Saul, LLC and Wells Fargo Bank National Association, . . . . .

Of Whom Saul, LLC is the Appellant and

Of Whom Wells Fargo Bank National Association is also the Respondent.

---

**Appendix Volume 2**

---

Morgan S. Templeton, S.C. Bar 15456  
David A. Nasrollahi, S.C. Bar 103242  
Wall Templeton & Haldrup, P.A.  
145 King Street, Suite 300  
Post Office Box 1200  
Charleston, South Carolina 29402  
Telephone: 843.329.9500  
Facsimile: 843.329.9501

ATTORNEYS FOR PETITIONER SAUL, LLC

|                            |   |                              |
|----------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA    | ) | IN THE COURT OF COMMON PLEAS |
|                            | ) |                              |
| COUNTY OF BEAUFORT         | ) | CASE NO: 2018-CP-07-02378    |
|                            | ) |                              |
| EDDIE B. LEWIS, JR.,       | ) |                              |
|                            | ) |                              |
| Plaintiff,                 | ) |                              |
|                            | ) |                              |
| v.                         | ) | PLAINTIFF'S FIRST REQUEST    |
|                            | ) | FOR PRODUCTION TO            |
| SAUL, LLC and WELLS FARGO, | ) | DEFENDANT, WELLS FARGO,      |
|                            | ) | NATIONAL ASSOCIATION.        |
| Defendant.                 | ) |                              |

---

TO JOSEPH P. BIAS, ATTORNEY FOR THE DEFENDANT, WELLS FARGO,  
NATIONAL ASSOCIATION:

YOU WILL PLEASE TAKE NOTICE, that the Plaintiff, by his undersigned attorney requests, pursuant to the South Carolina Rules of Civil Procedure, Rule 34, that the defendant above named respond to this request within thirty (30) days of service, and to produce and permit the inspection, copying, and/or photographing of:

1. All documents, photographs, statements of witnesses, reports, records, and any other written or recorded information relating in any way to the matters and things alleged in Plaintiff's Complaint.
2. Any current curriculum vitae for all expert witnesses identified in the defendant's responses to the Interrogatories served upon them by the Plaintiff.
3. Copies of any book chapters, articles, treatises, or other publications authored or coauthored by each of the expert witnesses identified in the defendant's responses to Interrogatories served upon them by this Plaintiff.
4. A copy of all documents, materials and tangible items described in defendant's Answers to Interrogatories.
5. Copies of any and all statements, either written or recorded, letters, or other prepared materials given by any person, group, corporation or entity who has any information, knowledge, opinions or facts which are or may be applicable to this action.
6. Copies of any and all policy and procedure for investigating a fall within or upon the facility at issue in this lawsuit.

7. Copies of any and all logs indicating routine inspections of the premises for dangerous or unsafe condition for a period of seven (7) days leading up to and including the date of accident referenced in the lawsuit.
8. Copies of any and all photographs or video footage that contains images of the Plaintiff before, during and after his fall.
9. Copies of any and all photographs or video footage that contains images of the location where Plaintiff fell before, during and after Plaintiff fell.
10. Copies of any and all policies and procedures for keeping the premises at issue in this lawsuit free and clear of dangerous and unsafe conditions.
11. Copies of any and all incident reports created by, possessed by or reviewed by this defendant, its agents, servants and employees that involves or relates to the incidents referred to in this lawsuit.
12. Any and all documentation in defendant's or defendant's counsel's possession indication that Plaintiff has been injured prior to or subsequent to this accident giving rise to this lawsuit whether work related or not and regardless of whether a claim for damages was made.

MOSS, KUHN & FLEMING, P.A.

By: \_\_\_\_\_

Cory H. Fleming  
SC Bar #: 6999  
P.O. Box 507  
Beaufort, SC 29901-0507  
(843) 524-3373  
(843) 379-1322 Fax  
[cory@mossandkuhn.com](mailto:cory@mossandkuhn.com)  
ATTORNEYS FOR PLAINTIFF

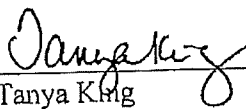
Beaufort, South Carolina  
June 27, 2019

CERTIFICATE OF MAILING

The undersigned, Tanya King, Paralegal at MOSS, KUHN & FLEMING, P.A., states that a true and accurate copy of the attached *Plaintiff's First Set of Interrogatories and Request for Production to the defendant's, Wells Fargo, National Association* were placed in an envelope with first class postage prepaid through regular USPS Mail, and mailed to the following:

Joseph P. Bias, Esquire  
Vernis & Bowling  
1401 Main Street, Suite 655  
Columbia, South Carolina 29201

MOSS, KUHN & FLEMING, P.A.

  
Tanya King

Beaufort, South Carolina  
June 27, 2019

# EXHIBIT “B”

LAW OFFICES  
MOSS, KUHN & FLEMING P.A.

COPY

JAMES H. MOSS  
H. FRED KUHN, JR.  
CORY H. FLEMING\*

1501 North Street P.O. Drawer 507~Beaufort, South Carolina 29901-0507  
TELEPHONE 843-524-3373  
FAX 843-524-1302

\*ALSO MEMBER OF GA BAR

December 11, 2019

Laura W. Robinson, Esquire  
Vernis & Bowling  
1401 Main Street, Suite 655  
Columbia, South Carolina 29201

RE: *Eddie B. Lewis, Jr. v. Saul, LLC et al*  
2018-CP-07-02378

Dear Laura:

Enclosed please find the *Plaintiff's Second Set of Interrogatories and Request for Production to the defendant's, Wells Fargo, National Association*, discovery requests. Should you have any questions or concerns do not hesitate to give me a call or email.

With kindest regards, I am,

Very truly yours,

MOSS, KUHN & FLEMING, P.A.

Cory H. Fleming

CHF/tk

Cc: Morgan S. Templeton

|                            |   |                              |
|----------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA    | ) | IN THE COURT OF COMMON PLEAS |
|                            | ) |                              |
| COUNTY OF BEAUFORT         | ) | CASE NO: 2018-CP-07-02378    |
|                            | ) |                              |
| EDDIE B. LEWIS, JR.,       | ) |                              |
|                            | ) |                              |
| Plaintiff,                 | ) |                              |
|                            | ) |                              |
| v.                         | ) | PLAINTIFF'S SECOND SET OF    |
|                            | ) | INTERROGATORIES TO           |
| SAUL, LLC and WELLS FARGO, | ) | DEFENDANT, WELLS FARGO,      |
|                            | ) | NATIONAL ASSOCIATION         |
| Defendant.                 | ) |                              |

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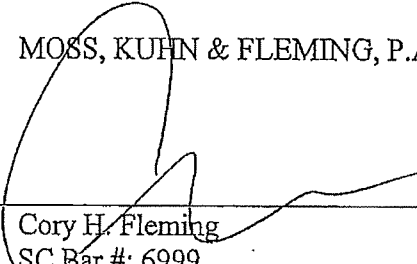
**TO LAURA W. ROBINSON, ATTORNEY FOR THE DEFENDANT, WELLS FARGO, NATIONAL ASSOCIATION:**

The Plaintiff herein, by and through his undersigned attorney, hereby requires the Defendant, Wells Fargo, National Association, to answer under oath the Interrogatories hereinafter set forth within thirty (30) days after service thereof, in accordance with the provisions of Rule 33 of the South Carolina Rules of Civil Procedure.

1. Set forth a complete list of all employees and their addresses who worked at the Wells Fargo 1011 Bay Street, Beaufort, South Carolina location from May 23, 2015 to May 23, 2016.
2. Set forth a list of the names and addresses of any person that has made any type of complaint concerning the condition of the parking lot at the 1011 Bay Street location from May 23, 2014 to May 23, 2016.
3. Set forth a list of all maintenance, repairs or other work performed in the parking lot area at the 1011 Bay Street location from May 23, 2011 to May 23, 2016. Provide the name and addresses of the individuals, company, and/or vendors who performed said maintenance repairs or other work.

4. Set forth a list of names of employees or other persons that would have knowledge of any work, repairs or maintenance that was performed inside or outside the 1011 Bay Street Location from May 23, 2011 to May 23, 2016.

MOSS, KUHN & FLEMING, P.A.

By: 

Cory H. Fleming

SC Bar #: 6999

P. O. Box 507

Beaufort, SC 29901-0507

(843) 524-3373

(843) 379-1322 Fax

[cory@mossandkuhn.com](mailto:cory@mossandkuhn.com)

ATTORNEYS FOR PLAINTIFF

Beaufort, South Carolina  
December 11, 2019

|                            |   |                              |
|----------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA    | ) | IN THE COURT OF COMMON PLEAS |
|                            | ) |                              |
| COUNTY OF BEAUFORT         | ) | CASE NO: 2018-CP-07-02378    |
|                            | ) |                              |
| EDDIE B. LEWIS, JR.,       | ) |                              |
|                            | ) |                              |
| Plaintiff,                 | ) |                              |
|                            | ) |                              |
| v.                         | ) | PLAINTIFF'S SECOND REQUEST   |
|                            | ) | FOR PRODUCTION TO            |
| SAUL, LLC and WELLS FARGO, | ) | DEFENDANT, WELLS FARGO,      |
|                            | ) | NATIONAL ASSOCIATION.        |
| Defendant.                 | ) |                              |

TO LAURA W. ROBINSON, ATTORNEY FOR THE DEFENDANT, WELLS FARGO,  
NATIONAL ASSOCIATION:

YOU WILL PLEASE TAKE NOTICE, that the Plaintiff, by his undersigned attorney requests, pursuant to the South Carolina Rules of Civil Procedure, Rule 34, that the defendant above named respond to this request within thirty (30) days of service, and to produce and permit the inspection, copying, and/or photographing of:

1. Copies of any and all emails, vendor request, work orders, etc., concerning the parking lot and the exterior areas of the property located at 1011 Bay Street location for the dates of May 23, 2011 to May 23, 2016.
2. Copies of any and all emails to or from Harwood Weatherly concerning the parking lot or the exterior areas of the 1011 Bay Street location for the dates of May 23, 2011 to May 23, 2016.

MOSS, KUHN & FLEMING, P.A.

By: \_\_\_\_\_

Cory H. Fleming  
SC Bar #: 6999  
P. O. Box 507  
Beaufort, SC 29901-0507  
(843) 524-3373  
(843) 379-1322 Fax  
[cory@mossandkuhn.com](mailto:cory@mossandkuhn.com)

Beaufort, South Carolina  
December 11, 2019

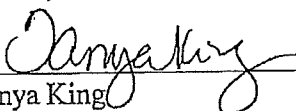
ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF MAILING

The undersigned, Tanya King, Paralegal at MOSS, KUHN & FLEMING, P.A., states that a true and accurate copy of the attached *Plaintiff's Second Set of Interrogatories and Request for Production to the defendant's, Wells Fargo, National Association*, were placed in an envelope with first class postage prepaid through regular USPS Mail, and mailed to the following:

Laura W. Robinson, Esquire  
Vernis & Bowling  
1401 Main Street, Suite 655  
Columbia, South Carolina 29201

MOSS, KUHN & FLEMING, P.A.

  
Tanya King

Beaufort, South Carolina  
December 11, 2019

# EXHIBIT “C”

LAW OFFICES  
MOSS, KUHN & FLEMING P.A.

COPY

JAMES H. MOSS  
H. FRED KUHN, JR.  
CORY H. FLEMING\*

1501 North Street P.O. Drawer 507~Beaufort, South Carolina 29901-0507  
TELEPHONE 843-524-3373  
FAX 843-524-1302

\*ALSO MEMBER OF GA BAR

December 11, 2019

Laura W. Robinson, Esquire  
Vernis & Bowling  
1401 Main Street, Suite 655  
Columbia, South Carolina 29201

RE: *Eddie B. Lewis, Jr. v. Saul, LLC et al*  
2018-CP-07-02378

Dear Laura:

Enclosed please find the *Plaintiff's First Set of Interrogatories and Request for Production to the defendant's, Wells Fargo, National Association*, discovery requests that was served upon your firm on June 27, 2019 and to date no responses have been received. Please let this serve as consultation in compliance with Rule 11 of the South Carolina Rules of Civil Procedure. Please provide responses to my office within ten (10) days in order to avoid a formal Motion to Compel being filed.

With kindest regards, I am,

Very truly yours,

MOSS, KUHN & FLEMING, P.A.

Cory H. Fleming

CHF/tk

Cc: Morgan S. Templeton

# EXHIBIT “D”

LAW OFFICES

MOSS, KUHN & FLEMING P.A.

JAMES H. MOSS  
H. FRED KUHN, JR.  
CORY H. FLEMING\*

1501 North Street P.O. Drawer 507~Beaufort, South Carolina 29901-0507  
TELEPHONE 843-524-3373  
FAX 843-524-1302

\*ALSO MEMBER OF GA BAR

January 23, 2020

Laura W. Robinson, Esquire  
Vernis & Bowling  
1401 Main Street, Suite 655  
Columbia, South Carolina 29201

RE: *Eddie B. Lewis, Jr. v. Saul, LLC et al*  
2018-CP-07-02378

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Very truly yours,

MOSS, KUHN & FLEMING, P.A.

Cory H. Fleming

CHF/tk

Cc: Morgan S. Templeton

|                                          |   |                                    |
|------------------------------------------|---|------------------------------------|
| STATE OF SOUTH CAROLINA                  | ) | IN THE COURT OF COMMON PLEAS       |
|                                          | ) | IN THE FOURTEENTH CIRCUIT          |
| COUNTY OF BEAUFORT                       | ) |                                    |
|                                          | ) | C.A. NO.: 2018-CP-07-02378         |
| Eddie B. Lewis, Jr.,                     | ) |                                    |
|                                          | ) |                                    |
| Plaintiff,                               | ) |                                    |
|                                          | ) |                                    |
| v.                                       | ) | <b>DEFENDANT WELLS FARGO BANK,</b> |
|                                          | ) | <b>NATIONAL ASSOCIATION</b>        |
| Saul, LLC and Wells Fargo Bank, National | ) | <b>MEMORANDUM OF LAW IN</b>        |
| Association,                             | ) | <b>SUPPORT OF RULE 60, SCRPC</b>   |
|                                          | ) | <b>MOTION</b>                      |
| Defendants.                              | ) |                                    |
| _____                                    | ) |                                    |

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This matter comes before the Court by way of a Motion to Set Aside an Order granting summary judgment pursuant to Rule 60, SCRPC filed by Defendant Wells Fargo Bank, National Association ("Wells Fargo").

Saul, LLC ("Saul") previously was granted summary judgment on March 24, 2020. Laura Robinson contacted opposing counsel on March 13, 2020 and informed them of her immediate resignation from Vernis & Bowling and that Charles Blackburn would be taking over. Laura Robinson asked opposing counsel to consent to a continuance in an email, but that consent was not given. *See, Exhibit A - Emails.*

Charles Blackburn filed a notice of appearance on March 16, 2020 however, for reasons unknown, Mr. Blackburn did not attend the hearing on March 17, 2020 and did not file a response to the Order after it was entered.

## FACTUAL BACKGROUND

This is a premises liability case that arose out of an alleged trip and fall by the Plaintiff, Eddie Lewis, at a banking location in Beaufort, South Carolina that was formerly leased by Wells Fargo. Wells Fargo leased the subject premises from Saul, LLC.

Saul, LLC filed a Motion for Summary Judgment asserting that various provisions in the Wells Fargo lease proved that Saul, LLC gave Wells Fargo "complete control" of the parking lot and the "tenant dedicated parking", therefore Saul was not responsible to Plaintiff for his alleged injuries as a matter of law.

## STANDARD OF REVIEW

Rule 60, SCRCP gives the Court broad discretion, in the interest of justice to seek relief from a final judgment, order, or proceeding for a fraud upon the Court.

## ARGUMENT

### **I. The factual assertions and legal arguments made by Saul, LLC in the summary judgment motion and affidavit constituted a lack of candor to the Court.**

Saul, LLC's owner, Esther Shaver Harnett, made numerous factual claims in an affidavit which was submitted in support of Saul's summary judgment motion. Her sworn statement contained misrepresentations, or at best, half-truths that blatantly lack candor to the Court regarding the lease with Wells Fargo, which constitute a fraud upon the Court. Ms. Harnett stated that she gave Wells Fargo "complete control of the parking lot pursuant to the terms of the lease". *See, Exhibit B - Affidavit of Esther Harnett.*

A Wells Fargo employee, Mr. Gerald Scott Wooten, has provided a sworn affidavit concerning the lease and the control of the leased property that are wholly opposite of Harnett's affidavit. Mr. Wooten's affidavit states that control of the common areas was never given to

Wells Fargo pursuant to the lease or otherwise. *See, Exhibit C - Affidavit of Gerald Scott Wooten.*

To the contrary, very specific lease provisions that Saul had with Wells Fargo (the relevant portions of which have never been edited, altered, or re-negotiated) directly address the responsibility of the landlord to make repairs and maintain the common areas. Another critical lease provision, which was not provided to the Court at the summary judgment motion hearing, actually defines the common areas. *See, Exhibit E - Lease Common Areas Definition.* This lease provision is very specific and clearly identifies the parking lot, sidewalks, and landscaped areas as common areas. The provisions make the landlord solely responsible for all common areas which include the parking lot, sidewalks, and landscaped areas. The lease provisions on page 72 of the lease at Section 5.5 "Repairs By Landlord" in clear and unambiguous language dictates that Saul as the Landlord is responsible to repair and maintain the common areas which include the parking lot, sidewalks, and landscaped areas; *See, Exhibit D - Lease Repairs By Landlord (actual copy); See also, Exhibit C - Affidavit of Gerald Scott Wooten.*

It must be noted that the "Repairs By Landlord" provision of the lease is actually partially quoted in the proposed subject Order (presented by Saul to the Court). However, closer scrutiny of the language of the Order and a comparison to the lease language reveals the Order is actually confusing mishmash of quotes from different sections of the lease. *See, Exhibit D - Lease, Repairs by Tenant.*

As can clearly be seen in the actual copy of the lease, and the provisions quoted in the subject Order are confusing. This "cherry-picking" or combination of portions of different lease provisions is another example of the lack candor to the Court.

As further proof of the lack of candor to the Court, Saul ignored the Plaintiff's sworn testimony about the fall. Plaintiff testified in his deposition exactly where he was traversing, which was on a common area (landscaped area) that the Plaintiff and his counsel has asserted "looked like a sidewalk". The Plaintiff wasn't traversing the parking lot, but was in a common area, as defined in the lease. *See, Exhibit E - Lease Common Areas Definition.*

To be sure, the sidewalk and the landscape surround area where the Plaintiff fell is adjacent to the parking lot. When Plaintiff lost his balance or tripped, he landed *in* an adjacent parking lot space. The parking lot itself was not alleged to have been the source of the hazard. This may seem like a trivial factual distinction, but it is important in the context of candor to the Court. Saul knew where and how Plaintiff testified he fell. Saul's sworn affidavit and the resulting subject Order with findings of fact regarding the parking lot and Plaintiff's fall contradict the facts of this case which have been confirmed through discovery.

In South Carolina, in premises liability cases lessors (landlords) have a duty to maintain common areas that remain under the control of the lessor pursuant to a lease agreement. Conner v. Farmers and Merchants Bank, 243 S.C. 132, 132 S.E.2d 385 (1963) (lease imposed duty on landlord to keep rented premises in repair). Interestingly, there is no mention in the Harnett affidavit of common areas, sidewalks, or landscaping which Saul is *also* clearly responsible for pursuant to the lease.

Saul's presentation of the facts and evidence to support the summary judgment motion focusing on the parking lot were on their face an attempt to do an end-around premises liability law with misrepresentations about the subject lease, the parking lot, and the circumstances of the subject accident, which at best, showed a lack of candor to the Court.

**II. After discovered evidence consisting of boastful comments made by Esther Harnett to a Wells Fargo employee months after the Summary Judgment Order are additional proof of the lack of candor to the Court.**

Esther Harnett boasted about grant of summary judgment after the fact implying her success in Court was not legitimate as if she had gotten away with something. Wells Fargo was moving out of the leased premises at the end of the lease term months after the grant of summary judgment. Esther Harnett had an in-person meeting with Ervin H. Weatherly, the Wells Fargo Property Portfolio Manager, during this process. In this meeting, Esther Harnett stated to Mr. Weatherly in a mocking tone she was able to use "nasty letters" written by another Wells Fargo employee, Richard Belthoff about the parking lot and parking spaces against Wells Fargo. She further boasted that she got the case dismissed because Wells Fargo is a bunch of idiots. *See, Exhibit F - Affidavit of Ervin H. Weatherly.* Mr. Weatherly was aware of the letters and the issues with the parking lot that Ms. Harnett was referring to and believes that she was bragging about her misrepresentations in her affidavit. *See, Exhibit F - Affidavit of Ervin H. Weatherly.* The boastful comments by Harnett is further proof of the lack of candor to the Court regarding the lease and the "facts" of Harnett's affidavit, which was offered as support for the subject Order.

**III. If Wells Fargo is not a party to the subject Order granting summary judgment, then no part of any finding of fact or conclusion of law in favor of Saul, LLC is applicable or binding on Wells Fargo**

The subject Order findings of fact and conclusions of law are not binding on Wells Fargo. According to argument B submitted by Saul, LLC in it's Memorandum of Law, Saul asserts that Wells Fargo was not a party to the subject Order granting summary judgment. If that assertion is correct, then none of the Order findings of fact concerning any aspect of the subject lease is binding in any way in this action, or in any other action, on Wells Fargo. Recently, Wells Fargo made a demand for indemnification pursuant to the subject lease after the Order granting

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We believe, based on the lack of candor to the Court, that the subject Order granting the summary judgment should simply be vacated as argued hereinabove. However, Saul should not be able to assert both positions: (a) that Wells Fargo was not a party to the subject Order granting summary judgment and cannot challenge the finding of fact and conclusions of law, and (b) the subject Order is nevertheless binding on Wells Fargo. If the Court does not vacate the Order in it's entirety, then according to Saul's own argument, the subject Order should not be binding in any way on Wells Fargo since a determination that it is binding would result in a fundamental unfairness to Wells Fargo under the circumstances of this case.

In sum, Saul went to great lengths to include findings of fact in the subject Order granting summary judgment to establish that Saul had purportedly given control of the parking lot to Wells Fargo. First, Saul ignored or told half-truths, and perhaps even misrepresented the binding lease provisions and definitions concerning the common areas, the parking lot, the sidewalks, and the landscaping areas of the leased premises. Second, Saul made confusing factual statements and half-truths about the lease terms and which entity was responsible for or controlled the parking lot; Third, Saul exaggerated trivial and irrelevant past disputes with Wells Fargo over the parking lot (which are entirely irrelevant to this case) to make the bogus assertion that Wells Fargo "controlled" the parking lot. Fourth, Saul ignored the sworn testimony of the Plaintiff about the location of the fall; Fifth Harnett about her Court success implying it was not

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### **CONCLUSION**

For the reasons stated herein, this Court should grant the relief sought by Wells Fargo and vacate the subject Order granting summary judgment; or in the alternative, issue an Order that the findings of fact and conclusions of law in the subject Order granting Summary Judgment are in no way binding on Wells Fargo for any purpose in this action or in any other action.

VERNIS & BOWLING OF COLUMBIA, LLC

s/ Douglas E. Leadbitter

Douglas E. Leadbitter (S.C. Bar No.: 68430)

1401 Main Street, Suite 655

Columbia, SC 29201

(803) 234-5416

dleadbitter@scarolina-law.com

Attorneys for Defendant Wells Fargo Bank

National Association

|                                          |   |                                    |
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VERNIS & BOWLING OF COLUMBIA, LLC

s/ Douglas E. Leadbitter

Douglas E. Leadbitter (S.C. Bar No.: 68430)

1401 Main Street, Suite 655

Columbia, SC 29201

(803) 234-5416

dleadbitter@scarolina-law.com

Attorneys for Defendant Wells Fargo Bank

National Association

*Exhibit A - Emails*

On Mar 13, 2020, at 11:55 AM, Laura Robinson <lrobinson@scarolina-law.com> wrote:

Good morning Cory and Morgan,

I am resigning from Vernis & Bowling today and Charles Blackburn (copied here) will be taking over the representation of Wells Fargo. I know there is a motions hearing scheduled for Tuesday, and I am asking on Charles' behalf for your consent to continue the hearing. Charles will get up to speed as quickly as he possibly can, but he will not be prepared by Tuesday. HOPEFULLY, Charles will be able to send Cory the responses that will resolve the motion to compel and that hearing will never be necessary. But for both motions scheduled for Tuesday, will you please do Charles the professional courtesy of giving him a minute to get up to speed on the case before he has to be in front of a judge on it?

I have enjoyed working with both of you and look forward to seeing you again sometime soon!

Thank you,

Laura

**Laura W. Robinson**

Managing Attorney

**Vernis & Bowling of Columbia, LLC**

1401 Main Street, Suite 655

Columbia, SC 29201

Tel: 803-234-5416

Mobile: 803-760-2249

Fax: 803-978-6246

[lrobinson@scarolina-law.com](mailto:lrobinson@scarolina-law.com)

[Click Here for my contact info](#)

<image002.jpg>

**THIS E-MAIL IS INTENDED ONLY FOR THE ABOVE-NAMED RECIPIENT(S) AND IS CONFIDENTIAL** This e-mail message and attachments, if any, are intended solely for the use of the addressee hereof. In addition, this message and attachments, if any, may contain information that is confidential, privileged and exempt from disclosure under applicable law. If you are not the intended recipient of this message, you are prohibited from reading, disclosing, reproducing, or otherwise using this transmission. Delivery of this message to any person other than the intended recipient is not intended to waive any legal right or privilege. If you have received this message in error, please promptly notify the sender by e-mail and immediately delete this message and attachments, if any, from your system.

**From:** Cory Fleming [mailto:cory@mossandkuhn.com]  
**Sent:** Friday, March 13, 2020 1:49 PM  
**To:** Laura Robinson <lrobinson@scarolina-law.com>  
**Cc:** Morgan S. Templeton <Morgan.Templeton@WallTempleton.com>; Charles Blackburn <cblackburn@scarolina-law.com>  
**Subject:** Re: Lewis, Jr., Eddie B. v. Saul, LLC and Wells Fargo Bank, NA:

Laura

Sorry to hear your leaving the case. Wish you well in the future. As to the motion, I would be willing to consent to an Order allowing 30 days to respond to discovery. Obviously we have been waiting for some time now.

Thank you.

Cory Fleming  
[cory@mossandkuhn.com](mailto:cory@mossandkuhn.com)  
(843)986-6379

Please excuse the auto correct  
sent from my iPhone

**From:** Morgan S. Templeton <Morgan.Templeton@WallTempleton.com>  
**Sent:** Friday, March 13, 2020 2:05 PM  
**To:** Cory Fleming; Laura Robinson - 3/13/20 - DND  
**Cc:** Charles Blackburn  
**Subject:** RE: Lewis, Jr., Eddie B. v. Saul, LLC and Wells Fargo Bank, NA:

Laura,

I am sorry as well to hear that. Unfortunately, I am not able to consent to a continuance of the summary judgment motion. The case is scheduled to be mediated with plaintiff on 4/2 and the case is subject to trial after 4/15. As such, I need to have the motion heard.

*Exhibit B - Affidavit of Esther Harnett*

|                                |   |                                 |
|--------------------------------|---|---------------------------------|
| STATE OF SOUTH CAROLINA        | ) | IN THE COURT OF COMMON PLEAS    |
|                                | : | FOURTEENTH JUDICIAL CIRCUIT     |
| COUNTY OF BEAUFORT             | ) | C.A. NO.: 2018-CP-07-02378      |
|                                | ) |                                 |
| EDDIE B. LEWIS, JR.            | ) |                                 |
|                                | ) |                                 |
| Plaintiff,                     | ) | Affidavit of Esther S. Harnett, |
|                                | ) | Representative of Saul, LLC's   |
|                                | ) |                                 |
| versus                         | ) |                                 |
|                                | ) |                                 |
| SAUL, LLC and WELLS FARGO BANK | ) |                                 |
| NATIONAL ASSOCIATION           | ) |                                 |
|                                | ) |                                 |
| Defendants.                    | ) |                                 |

PERSONALLY appeared be me, Esther S. Harnett, who, being first duly sworn, deposes and says as follows:

1. I, Esther Shaver Harnett, am over the age of eighteen (18) years old and am otherwise mentally competent to execute this affidavit. I make this testimony on my own personal knowledge of the matters set forth herein.
2. I have been the owner of Saul, LLC since on or around November 18, 2013.
3. I have knowledge of and reviewed the Lease entered into by Saul, LLC and Wachovia, which was assumed by Wells Fargo Bank.
4. During my time as owner of Saul, LLC, I have worked directly with Wells Fargo in order to organize and provide maintenance when requested by Wells Fargo pursuant to the Lease.
5. My responsibilities include providing and coordinating repairs and maintenance when requested by Wells Fargo to the subject property located at 1011 Bay Street, Beaufort, S.C. pursuant to the terms of the Lease.
6. Saul, LLC has fully released the Tenant Dedicated Parking Area to Wells Fargo, and has no right to lease out or grant use of the Tenant Dedicated Parking Areas at 1011 Bay Street, Beaufort, South Carolina pursuant to the terms of the Lease.
7. Saul, LLC was never notified by Wells Fargo of any need for repairs and maintenance to the parking lot which Wells Fargo maintains complete control over prior to May 26, 2016.

8. Saul, LLC has not undertaken any maintenance or repairs to the parking lot prior to May 26, 2016, as Saul has given complete control to Wells Fargo pursuant to the terms of the Lease.
9. Wells Fargo on at least one occasion that I know of exercised control over the parking area by performing repair/maintenance to the same without Saul, LLC's input or approval.<sup>1</sup>

FURTHER DEPONENT SAYETH NOT.

Dated this 10 of January, 2020.

Esther S. Harnett

Esther S. Harnett

SWORN TO before me this 10  
day of January, 2020.

[Signature] (Seal)  
Notary Public for South Carolina  
My Commission Expires: \_\_\_\_\_



<sup>1</sup> On April 25, 2018, Wells Fargo added striping paint and ADA Symbols to parking lot, without the permission or input of Saul, LLC.

*Exhibit C - Affidavit of Gerald Scott Wooten.*

STATE OF SOUTH CAROLINA  
COUNTY OF BEAUFORT

Eddie B. Lewis, Jr.,

Plaintiff,

vs.

Saul, LLC and Wells Fargo Bank, NA,  
Defendant.

IN THE COURT OF COMMONS PLEAS  
FOURTEENTH JUDICIAL CIRCUIT

Case No. 2018-CP-07-02378

**Gerald Scott Wooten,**  
**Employee of Wells Fargo**

PERSONALLY appeared before me, G. Scott Wooten, who being first duly sworn deposes and states the following:

- (1) I, Gerald Scott Wooten, am over the age of eighteen (18) years of age and am mentally competent and execute this affidavit. I make this testimony on my own personal knowledge of the matters set forth.
- (2) I am employed by Wells Fargo Bank in the Corporate Property Group as a Property Portfolio Manager.
- (3) My responsibilities include: All aspects of property management related to a portfolio of branch banks, ATMs, night deposits, Wells Fargo Advisor offices, Wells Fargo Home Mortgage locations and other properties in support of Wells Fargo business. I directly or indirectly manage five (5) property managers, and we collectively manage most of the Wells Fargo Retail facilities in North Carolina and South Carolina.
- (4) I have personal knowledge of the Lease that Wells Fargo had with Saul, LLC for the property located at 1011 Bay Street, Beaufort, South Carolina.

- (5) I have personal knowledge of the allegations made in the above captioned lawsuit by Saul, LLC specifically pertaining to the lease provisions of the former Wells Fargo Bank location at 1011 Bay Street, Beaufort, South Carolina.
- (6) The lease at issue in this matter specifically and unambiguously states that Saul, LLC had control of and responsibility for the maintenance of common areas and parking lot at the 1011 Bay Street property.
- (7) I have personal knowledge of the Affidavit sworn to by Esther Harnett in support of the Summary Judgment Motion filed by Saul, LLC in this case.
- (8) I have personal knowledge of the letters which Richard Belthoff wrote to Esther Harnett regarding the parking area that are referenced in the Saul, LLC Summary Judgment Motion.
- (9) Esther Harnett's sworn statements in numbered Paragraph 6 of her Affidavit are patently false and contrary to the unambiguous lease provisions pertaining to the "Tenant Dedicated Parking Areas". Saul, LLC did not at any time "release" or transfer any aspect of Landlord control or responsibility for the maintenance of the common areas and parking lot to Wells Fargo. The "Tenant Dedicated Parking Areas" lease provision simply gives Wells Fargo use of dedicated parking spaces at the 1011 Bay Street property.
- (10) Esther Harnett's sworn statements in numbered Paragraph 7 of her Affidavit in this case are also patently false and contrary to the unambiguous lease provisions. Wells Fargo did not voluntarily or otherwise assume control of or responsibility for the maintenance of the common areas, or parking lot at any time during the lease term.
- (11) Esther Harnett's sworn statements in numbered Paragraph 8 of her Affidavit in this case are also patently false and contrary to the unambiguous lease provisions. Saul, LLC did not give complete control of the maintenance or repairs to the common area or parking lot to Wells Fargo at any time during the lease term.

(12) Esther Harnett's sworn statements in numbered Paragraph 9 of her Affidavit in this case are also patently false and contrary to the unambiguous lease provisions. On or about April 25, 2018, without prior notice to Wells Fargo, Esther Harnett unilaterally attempted to paint over the designated handicapped spaces at the 1011 Bay Street property. Wells Fargo objected to Harnett's actions. In an effort to resolve the disagreement created by Saul, LLC, over the handicapped spaces, Wells Fargo simply repainted the handicapped designations. This action by Wells Fargo, did not repudiate, alter, or change any aspect of the lease or the obligations of the Landlord for the control and maintenance of the common areas and parking lot.

(13) I believe, based on the above paragraphs and information sworn to by Mr. Weatherly regarding the February 21, 2021 meeting with Harnett; the Harnett misrepresentation of the Belthoff letters; the misrepresentation of the lease provisions; and other misrepresentations contained in Esther Harnett's Affidavit, that the granting of the Summary Judgment Motion was based on substantial misrepresentations of fact.

FURTHER AFFIDANT SAYETH NOT.

Gerald Scott Wooten  
Corporate Property Group  
Property Portfolio Manager

Sworn to and Subscribed before me on this  
21 day of April, 2021  
*[Signature]*  
 Notary Public for South Carolina  
North  
 My Commission Expires 12-31-2022

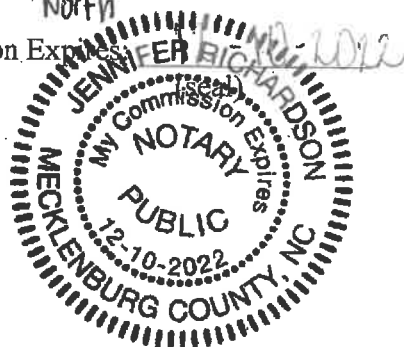


*Exhibit D - Lease Repairs By Landlord (actual copy)*

*Exhibit D - Lease, Repairs by Tenant (actual copy)*

option, cancel or discharge the same, and upon Landlord's demand, Tenant shall promptly reimburse Landlord for all reasonable costs incurred in canceling or discharging such liens. Except to the extent that such costs are caused by Landlord's actions.

(c) Tenant shall indemnify and hold Landlord harmless from and against all costs (including reasonable attorneys' fees and costs of suit), losses, liabilities, or causes of action if, and to the extent, arising out of the performance of any Alterations, including any Tenant Created Lien asserted in connection therewith.

(d) Landlord and Tenant expressly agree and acknowledge that no interest of Landlord in the Leased Premises or the Property shall be subject to any lien for improvements made by Tenant in or for the Leased Premises, and that Landlord shall not be liable for any lien for any improvements made by Tenant, such liability being expressly prohibited by the terms of this Lease. Landlord may file in the public records of the county in which the Building is located, a public notice containing a true and correct copy of this paragraph.

#### 5.5 Repairs by Landlord

(a) Landlord shall keep and maintain, and make all needed repairs to, the Base Building and the Common Areas in good condition and repair in accordance with the standards generally applicable with respect to Comparable Buildings (any such maintenance and/or repairs for which Landlord is responsible being herein collectively called "Landlord Repairs").

(b) If, and to the extent that, the need for any Landlord Repair arises out of any negligent or wrongful act or omission by Tenant or any Tenant Party, then Tenant, within thirty (30) days after written demand, shall pay or reimburse Landlord for all the reasonable out-of-pocket costs incurred by Landlord in performing such repair (together with interest thereon, at the Applicable Rate, from the date incurred to the date so paid or reimbursed).

(c) Landlord shall promptly make all Landlord Repairs (considering the nature and urgency of the repair), and perform the same in a good and workmanlike manner. Access to the Leased Premises in connection with the making of any such repairs shall be governed by the provisions of Section 4.2 above.

(d) If Landlord should fail to make any Landlord Repair with reasonable promptness after written notice from Tenant, then Tenant's cure rights under Section 13.1(b) hereof shall be applicable to the extent provided therein, and, as provided therein, Tenant may (except to the extent that the provisions of Section 5.5(b) hereof are applicable) recover the reasonable cost thereof from Landlord.

#### 5.6 Repairs by Tenant

(a) Tenant, at its expense, shall keep and maintain, take good care of, and make all needed repairs to, (i) the Leased Premises (inclusive of the Leasehold Improvements), excluding, however, the components of the Base Building located within the Leased Premises, and (ii) any Tenant Property located outside of the Leased Premises (any such maintenance and/or repairs for which Tenant is responsible being herein collectively called "Tenant Repairs").

*Exhibit E - Lease Common Areas Definition*

"Change in Control Transaction" shall have the meaning assigned to such term in Section 8.1.1.

"Closing" shall mean the closing and transfer of title to the Property to Landlord pursuant to the Purchase Agreement.

"Commencement Date" shall have the meaning assigned to such term in Section 1.1(a).

"Common Areas" shall mean (i) the Building's lobbies and corridors (located outside of Leasable Areas), including the Building's elevators, escalators, stairways and other Building Systems providing ingress and egress thereto and therefrom, (ii) the Building's loading and freight delivery areas (located outside of Leasable Areas), including any freight elevators located therein, (iii) the Building's lavatories (located outside of Leasable Areas), (iv) the Building's electrical, telephone and other utility or service rooms, closets and shafts (located outside of Leasable Areas), (v) the Parking Areas, (vi) the sidewalks, curb areas, plazas, walkways, driveways and other passageways upon the Land, together with any other landscaped areas of the Land (other than any Drive-Through Banking Facilities which, as herein-above provided, comprise part of the Leased Premises), and (vii) any other areas of the Property available, from time to time, for the common use of tenants and other occupants of the Property (and their customers, guests and invitees).

"Communications Equipment" shall have the meaning assigned to such term in Section 3.5(a).

"Comparable Buildings" shall mean buildings within the Market Area that have a use, quality, age, configuration and construction that is comparable to that of the Building.

"Contemplated OE Includable Capital Item" shall have the meaning assigned to such term in Section 2.4(a).

"Contemplated Sublease Area" shall have the meaning assigned to such term in Section 8.2.1.

"Contract of Sale" shall have the meaning assigned to such term in Section 9.1.1.

"Coterminous Expansion Space" shall have the meaning assigned to such term in Section 10.3.

"Coterminous Former Release Premises" shall have the meaning assigned to such term in Section 1.7(e).

"Damaged Property" shall have the meaning assigned to such term in Section 6.3(a).

"Damages Period" shall have the meaning assigned to such term in Section 7.1(b).

"Demising Work" shall have the meaning assigned to such term in Section 5.7(a).

"Demising Work Costs" shall have the meaning assigned to such term in Section 5.7(a).

"Overlease SNDA" shall mean a subordination, non-disturbance and attornment agreement between an Overlessor and Tenant in the form annexed as Exhibit D-2 hereto, and in proper form for recording, together with such changes thereto that are both proposed by an Overlessor and approved by Tenant; *it being agreed that* Tenant shall not unreasonably withhold its approval of any such proposed change so long as (i) such proposed change is customary (at the time in question), and (ii) such proposed change does not (to more than a de minimis extent) decrease Tenant's rights, or increase Tenant's obligations, from those contained in the form of Overlease SNDA annexed as Exhibit D-2 hereto.

"Parking Areas" shall mean the parking areas and facilities for the Property as indicated on Exhibit A-1 hereto, together with (i) any walkways, driveways and other passageways upon the Land providing ingress and egress between such areas and facilities and the Building and/or between such areas and facilities and the Building, and (ii) any additional improvements now or hereafter located on the Land related to the foregoing areas and facilities.

"Personnel Costs" shall have the meaning assigned to such term in Section 2.2(c).

"Portfolio Properties" shall mean all properties acquired by Landlord pursuant to the Purchase Agreement.

"Preliminary Period" shall mean the first two Lease Years (*i.e.*, the period commencing on the Commencement Date and expiring on the last date of the second (2nd) Lease Year).

"Premises Submeter" shall have the meaning assigned to such term in Section 3.1(a).

"Primary Demising Work" shall have the meaning assigned to such term in Section 5.7(a).

"Primary Demising Work Costs" shall have the meaning assigned to such term in Section 5.7(a).

"Prime Rate" shall mean the "*prime rate*" announced by Wachovia Bank, National Association, or its successor, from time to time (or if the "*prime rate*" is discontinued, the rate announced as that being charged to said bank's most credit-worthy commercial borrowers).

"Prohibited Uses" shall have the meaning assigned to such term in Section 4.8(b).

"Prose" means, collectively, (i) the Land, and (ii) all improvements now or hereafter located on the Land, including (x) the Building (inclusive of all improvements, betterments and/or equipment that, from time to time, are affixed or attached thereto, or otherwise constitute a part thereof), (y) the Common Areas (within or outside of the Building), including all sidewalks, curbs, plazas, paved walkways, driveways and other passageways upon the Land (as well as any other landscaping upon the Land), and (z) any Drive-Through Banking Facilities which comprise part of the Leased Premises, and (iii) any personal property belonging to Landlord which is located within or upon the Land and/or Building, and used in connection with the operation thereof.

"Property Manager" shall have the meaning assigned to such term in Section 3.6(a).

*Exhibit F - Affidavit of Ervin H. Weatherly*

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Eddie B. Lewis, Jr.,

Plaintiff,

vs.

Saul, LLC and Wells Fargo Bank, NA,

Defendant.

IN THE COURT OF COMMONS PLEAS  
FOURTEENTH JUDICIAL CIRCUIT

Case No. 2018-CP-07-02378

**Ervin H. Weatherly,**  
**Employee of Wells Fargo**

PERSONALLY appeared before me, Ervin H. Weatherly, who being first duly sworn deposes and states the following:

- (1) I, Ervin W. Weatherly, am over the age of eighteen (18) years of age and am mentally competent and execute this affidavit. I make this testimony on my own personal knowledge of the matters set forth.
- (2) I am employed by Wells Fargo Bank in the Corporate Property Group as a Property Portfolio Manager.
- (3) My responsibilities include: managing and coordinating the maintenance, repair, and upkeep of properties owned by Wells Fargo Bank.
- (4) I have personal knowledge of the allegations made in the above captioned lawsuit by Saul, LLC specifically pertaining to the lease provisions of the former Wells Fargo Bank location at 1011 Bay Street, Beaufort, South Carolina.
- (5) I also have personal knowledge of the affidavit sworn to by Esther Harnett in support of the summary judgment motion filed by Saul, LLC in this case.
- (6) On or about February 22, 2021 during a final walk through of the closing of the Wells Fargo branch at 1011 Bay Street, Beaufort, South Carolina I met with Esther Harnett.

(7) During this in-person meeting with Esther Harnett, we engaged in a short conversation about this lawsuit. She stated to me that she provided her lawyers with the “nasty letters” she had previously received from a Wells Fargo employee, Richard Belthoff, regarding the parking lot and parking spaces at the 1011 Bay Street Well Fargo branch location.

(8) Esther Harnett further stated in a mocking tone during the February 22, 2021 meeting that she was able to use the Belthoff “nasty letters” against Wells Fargo to get Saul, Inc. dismissed from the present lawsuit because “Wells Fargo is a bunch of idiots”.

(9) I have knowledge of the Belthoff letters to which Esther Harnett was referring, her affidavit, and the lease provisions at issue in this lawsuit that make her, as the Landlord, solely responsible for maintenance and repair of 110 Bay Street property common areas including the parking lot.

(10) I believe at the February 24, 2021 meeting, Harnett was bragging that she misrepresented the content of the Belthoff letters, the lease provisions, and the facts of her sworn affidavit.

FURTHER AFFIDIANT SAYETH NOT.

  
Ervin H. Weatherly  
Corporate Property Group  
Property Portfolio Manager

Sworn to and Subscribed before me on this  
21<sup>st</sup> day of April, 2021

  
Notary Public for South Carolina

My Commission Expires: 7/5/2028  
(seal)

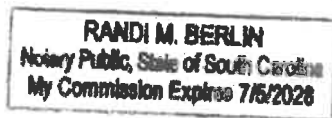


*Exhibit G - Correspondence from Morgan Templeton*



**Wall Templeton**  
ATTORNEYS

Morgan S. Templeton  
Morgan.Templeton@WallTempleton.com  
Telephone: 843.329.9500  
Facsimile: 843.329.9501

May 13, 2021

**VIA ELECTRONIC MAIL:**

Douglas Leadbitter  
1401 Main Street, Suite 655  
Columbia, South Carolina 29201

Re: *Eddie B. Lewis Jr. v. Wells Fargo Bank, N.A.*  
Civil Action Nos.: 2018-CP-07-02378

Dear Douglas,

I am in receipt of your May 6, 2021 letter, demanding my already dismissed client, Saul, LLC, ("Saul") and its insurance carrier to defend and indemnify Wells Fargo Bank National Association ("Wells Fargo") in this case. After reviewing of all the information, we currently possess, we respectfully decline Wells Fargo's request for defense and indemnity related to the above referenced lawsuit.<sup>12</sup>

As a preliminary note, your letter incorrectly states that "[t]he finding of the Court in the Order Granting Summary Judgement is thus, not the law of this case." This is a gross misrepresentation of the law and practice in South Carolina. There is a final ruling made by the Honorable Deadra Jefferson which has found *as a matter of law* that "Saul cannot be held liable under South Carolina's premises liability laws for property over which Saul had no control." (Order Granting Summ. J., filed Mar. 24, 2020 p. 5). Despite Wells Fargo's Rule 60 Motion to Set Aside and letter, Rule 60 provides that "[a] motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation." S.C.R.C.P. Rule 60(b). (emphasis added). Given this, Judge Jefferson's March 24, 2020 Order granting Saul's Motion for Summary Judgement is still the law of the case and, as of the date of this letter, is final. For this reason alone, Saul declines Wells Fargo's request.

Additionally, we vehemently disagree with what you assert the evidence "conclusively proves." Nevertheless, Saul asserts that these "arguments" are untimely and baseless. The information that is referenced in your letter was clearly and unequivocally in Wells Fargo's counsel's possession at the time Saul filed its Motion for Summary Judgement. Additionally, and more importantly, Wells Fargo and its counsel failed to appear, argue, or make any attempt to assert its position regarding Saul's Motion for Summary Judgment at the appropriate time. Not until May 6, 2021, has Wells Fargo raised these specific arguments for the first time. Unfortunately, this is much too late and improper under South Carolina law. Further, Saul would reference Wells Fargo to its

<sup>1</sup> In setting out this response, Saul does not admit any liability and in fact reaffirms its position that it has denied any and all liability to the Plaintiff in this matter.

<sup>2</sup> Further, your letter states that the Rule 60 motion was set to be heard on May 13, however, this is a clerical error as the motion as scheduled for May 12, 2021 with Judge McCoy. Pursuant to the S.C. Rules of Civil Procedure, Wells Fargo's motion needs to be heard by the ruling Court, Judge Deadra Jefferson. As such, the motion was removed from Judge McCoy's May 12, 2021 Common Pleas Non-Jury Roster.

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Memorandum in Opposition for further support that the Motion to Set Aside should be denied. Given this, Saul demands that Wells Fargo withdraw its Motion to Set Aside by May 17, 2021.

In regard to your assertion that Wells Fargo will assert an action seeking indemnification against Saul, LLC and Mrs. Harnett personally cannot be taken as anything but Wells Fargo's continued frivolous intent to harass and injure my clients based on an unreasonable understanding of the facts and misinterpretation of the law. Saul contends that Wells Fargo's continued actions in this matter are rising to the level of becoming a violation of S.C. Code Ann. § 15-36-10.

Should Wells Fargo fail to withdraw its Motion to Set Aside, Saul identifies the hold harmless/indemnification provision in the Lease:

6.6 Hold Harmless

(a) Landlord shall not be liable to Tenant, or to any Tenant Party, for any damage to person or property to the extent caused by any negligent act or omission of Tenant or any Tenant Party; and Tenant agrees to and does hereby indemnify, defend and hold harmless, Landlord and all Landlord Parties from and against any and all claims, demands, causes of action, fines, penalties, costs, expenses (including reasonable attorneys' fees and court costs), liens or liabilities to the extent caused by any willful misconduct, or negligent act or omission, of Tenant or any Tenant Party.

The relevant attorney's fees provision from the subject Lease is as follows:

7.4 Attorney's Fees

If either party shall bring any legal action or proceeding in any court of competent jurisdiction to enforce its rights or the other party's obligations under this Lease, or if the parties hereto shall otherwise become adverse parties in any such action or proceeding, then the prevailing party in such action or proceeding shall be entitled to be reimbursed by the non-prevailing party for all reasonable attorneys' fees and disbursements actually incurred by the prevailing party (without regard to any statutory presumption) in connection with such action or proceeding (at all levels, before, during and after trial, and on appeal).

Wells Fargo has breached the Lease by failing to indemnify and hold Saul harmless in this matter as it has been established as the law of this case that Saul did not have control over the subject property. Further, Wells Fargo's Motion to Set Aside is in direct breach of the above provisions. Please accept this letter as notice that should Judge Jefferson deny Wells Fargo's Motion to Set Aside, Saul will file the appropriate Motion/action seeking Attorney's fees, costs, and other damages to be determined by the Court in connection with this action. Additionally, Saul will file an action seeking indemnification against Wells Fargo, for damages arising out of Wells Fargo's breach, which will include attorney's fees and costs in connection with this action and enforcement of the Lease.

Douglas Leadbitter  
May 13, 2021  
3 | Page

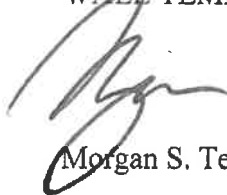
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Finally, Saul notes that Wells Fargo is the only one of the two Co-Defendants to have taken “shots” by filing its Motion to Set Aside that is baseless, untimely, and frivolous. Wells Fargo’s actions, and inactions, have caused and continue to cause Saul to incur unnecessary fees and costs over a matter that has already been intricately and appropriately ruled upon by the Honorable Deadra Jefferson. Saul prays that Wells Fargo take the time to review its file and review the appropriate case law and statutes prior to continuing its unfounded arguments.

Nothing in this letter shall be construed as a waiver or limitation of any rights Saul has under South Carolina law. Additionally, nothing in this letter should be interpreted as admission of liability or an assumption of any duties. Please do not hesitate to contact us if we can provide any additional information.

Sincerely,

WALL TEMPLETON & HALDRUP, P.A.



Morgan S. Templeton

MST/sjs

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

EDDIE B. LEWIS.,

Plaintiff,

vs.

SAUL, LLC, and WELLS FARGO BANK  
NATIONAL ASSOCIATION,

Defendants.

IN THE COURT OF COMMON PLEAS  
FOURTEENTH JUDICIAL CIRCUIT  
C/A No: 2018-CP-07-02378

**Defendant Saul, LLC's Memorandum in  
Reply Opposing Wells Fargo Bank, NA's  
Memorandum of Law in Support of its  
Motion for To Set Aside Judgement**

Defendant, Saul, LLC ("Saul"), by and through its undersigned attorneys, hereby submits the following reply to Defendant Wells Fargo, NA's ("Wells Fargo") Memorandum of law in support of its Rule 60, SCRPC, Motion. Saul hereby fully incorporates by reference its Memorandum in Response to Wells Fargo's Motion to Set Aside and also Plaintiff Eddie B. Lewis' ("Plaintiff") Memorandum in Response to Defendant Wells Fargo Bank, NA's Motion to Set Aside Judgment. For the reasons set forth below, and as set forth in the aforementioned pleadings, this Court should deny Wells Fargo's motion.

**INTRODUCTION**

The sole motion before this Honorable Court is one made pursuant to Rule 60, SCRPC, - not Rules 56 or 59. Wells Fargo's motion seeks to impugn Saul for obtaining summary judgment by arguing it made misrepresentations to the Court. In doing so, Wells Fargo wants this Court to accept Wells Fargo's revisionist history to justify its request to set aside an Order that was properly entered. Despite Wells Fargo's assertions to the contrary, every document, affidavit, argument, and pleading submitted by Saul to this Court was equally provided to Wells Fargo in advance of the Court hearing the motion for summary judgment. Instead of responding in a timely fashion to

Saul's arguments, or even appearing at the hearing to oppose the motion, Wells Fargo waited until now to accuse Saul of wrongdoing. Wells Fargo wants this Court to ignore Wells Fargo's own culpable conduct. Wells Fargo offers no evidence, explanation, or excuse to justify why it consistently and repeatedly failed to appear, argue, or even articulate their position in this matter when it was appropriate to do so. Even this motion was not properly or timely presented and still fails to present the clear and convincing evidence required by Rule 60, SCRCP, to support their position. As this Court is being asked to review what Saul submitted in this matter, it is critical that this Court scrutinize the relevant and undisputed procedural history of this matter to determine if Wells Fargo is entitled to the equitable relief it seeks. Saul has done nothing improper and Wells Fargo is not entitled to any relief.<sup>[1]</sup>

#### **RELEVANT PROCEDURAL HISTORY**

On December 5, 2018, Plaintiff filed a Complaint against Defendants Saul and Wells Fargo based on theories of negligence and premises liability. Plaintiff then filed an Amended Complaint on January 1, 2019. On January 17, 2019, Saul filed its Answer to the Plaintiff's Amended Complaint. Wells Fargo has never filed any cross-claim against Saul.

Saul moved for summary judgment ("Motion") on January 20, 2020, based on the terms of the Lease. (See Mot. for Summ. J., filed Jan. 20, 2020.) The Motion contained multiple exhibits and fully set forth Saul's argument in the case. Attached to this Motion as an exhibit was a full and complete copy of the Lease. (Id., at Ex. A.).

Fifty-Seven days later, on March 17, 2020, the Honorable Judge Deadra Jefferson heard arguments on the Motion. This was not a consent motion. It was a contested motion. Counsel for

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<sup>[1]</sup> No argument or affidavit is presented suggesting that counsel for Saul did anything improper.

the Plaintiff and Saul were present for this hearing; however, ***counsel for Wells Fargo failed to appear***. Wells Fargo's, then counsel, received notice of the hearing. Counsel asked for consent to continue the motion, but the undersigned did not agree. Wells Fargo failed to file a Motion for Continuance.<sup>1</sup>

Furthermore, the undersigned (Morgan S. Templeton) received a phone call from Mr. Blackburn at or around 2:37 p.m. on March 16, 2020, in which he advised that he would be appearing on behalf of Wells Fargo but would not be appearing at the hearing. See Exhibit 9. (Affidavit of Morgan S. Templeton). During this call, Mr. Blackburn informed the undersigned that he had read the motion for summary judgment, that he did not believe he had a basis to oppose the motion, and that he would not be attending the hearing on the Motion. Id. As explained in Plaintiff's Memorandum, on March 17, 2020, counsel for Wells Fargo also informed Plaintiff's Counsel that he was not going to attend the hearing on the Motion. (See Pl. Memorandum in Resp. at pg. 2-3.). Additionally, the fact that counsel for Wells Fargo indicated he was not going to attend the hearing was relayed onto this Court. (See Pl. Memorandum in Resp. at pg. 3.). Despite having fifty-seven days' notice of the Motion, Wells Fargo failed to file any responsive Memorandums to Saul's Motion. The Court heard arguments and granted the Motion.

On March 18, 2020, Saul submitted its proposed Order to the Court, which a Notice of Electronic file was sent to all parties of record as instructed by the Court.<sup>2</sup>

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<sup>1</sup> Counsel for Wells Fargo emailed Saul requesting a continuance of the hearing on March 13, 2021; however, Saul declined to consent on March 13, 2021 as mediation was scheduled on April 2, 2020 and the matter was subject to trial after April 15, 2020. See Exhibit 3 (Email from Morgan Templeton on March 13, 2020).

<sup>2</sup> It should be noted that Charles Grant Blackburn filed a Notice of Appearance on March 16, 2020 (See Exhibit 4. NEF of Notice of Appearance) and was served electronically with a copy of the Proposed Order Granting Saul's Motion for Summary Judgment. See Exhibit 5. (NEF of Proposed Order March 18, 2020).

On March 24, 2020, this Court, after careful consideration of the record, granted Saul's Motion as to the claims brought by the Plaintiff. (Order Granting Summ. J., filed Mar. 24, 2020.) Indeed, this Court made multiple changes (a total of approximately 15) to the proposed Order before signing it. (See and compare Exhibits 1 and 2).<sup>3</sup> Neither the Plaintiff nor Wells Fargo filed a Motion to Reconsider. Neither party appealed this Court's Order.

On March 26, 2020, counsel for Wells Fargo, Charles Blackburn, emailed regarding Saul's dismissal from this matter and expressed no concern with Saul's dismissal. See Exhibit 6 (Email from Charles Blackburn on March 26, 2020).

On March 19, 2021, Three-Hundred and Sixty (360) days later, Wells Fargo filed a five paragraph Motion to Set Aside Judgment pursuant to Rule 60, SCRP, which failed to include any supporting documents or cite to any case law, nor any affidavits in support of the motion as contemplated by Rule 6, SCRPC. Not until after Four-Hundred and Sixty-Nine (469) days had passed, on July 6, 2021, did Wells Fargo submit its support for this motion, which is well after the one-year time period for a Rule 60 motion.

### **SUMMARY OF THE ARGUMENT**

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<sup>3</sup> A side-by-side review of Saul's Proposed Order and this Court's Order highlights the edits and revisions made by this Honorable Court prior to entering the Order. The Court made a total of fifteen (15) changes/revisions to Saul's Proposed Order. These revisions included the following: 1) a Header was added, which included six additional lines; 2) The opening paragraph was completely changed; 3) a Footnote was added; 4) the words "Applicable Law" was struck; 5) The Finding of Facts section was moved to the front of the Order; 6) The first line of the Find of Facts section of the Proposed Order was struck; 7) the numbering of the paragraphs in the Findings of Facts section were struck; 8) throughout the Order the introductory signals were struck by Judge Jefferson; 8) the words "This Court makes the following conclusions of law" were struck; 9) The applicable legal standards sections were moved under the Conclusions of Law; 10) the numbering of the paragraphs in the Conclusions of Law section was struck; 11) The Summary Judgment Standard was completely revised which consisted of two paragraphs; 12) Additions to the citations under the Premises Liability Standard, which consisted of seven additions of the South Carolina Reporter citations; 13) A clerical edit was made on page 5 of the Order, which consisted in the addition of the word "Further;" 14) A conclusory sentence and paragraph was added which accounted for five additional sentences; and finally 15) the Order section was struck by the Court.

Wells Fargo's Motion to Set Aside Judgment should be denied because a) Wells Fargo's failed to preserve and argue their position against Summary Judgment; b) Wells Fargo's Memorandum of Law in Support contains numerous misstatements and incorrect statements which evidence it's lack of candor with the Court; c) the appropriate standard of review is under Rule 60, SCRCP, and not a reargument of the Motion for Summary Judgment; d) Wells Fargo has failed to present any newly discovered evidence to support its Rule 60 Motion; e) there has been no fraud on the part of Saul; and f) Wells Fargo's has not come to court with clean hands and is not entitled to equitable relief under Rule 60 and its actions are designed to create a burden shifting argument all of which are designed to deprive Saul of its due process rights.

**i. Wells Fargo's Memorandum of Law is full of errors, misstatements, and incorrect statements.**

Despite Wells Fargo's inflammatory accusations that Saul committed "half-truths" and blatant "lack of candor to the Court," Wells Fargo's very own Memorandum of Law is rife with errors and misstatements.

**a. Wells Fargo's accusation that the Court was not provided with critical Lease provisions is false as clearly evidenced by the record.**

Wells Fargo states "[a]nother critical lease provision, which was not provided to the Court at the summary judgment motion hearing, actually defines the common areas. *See, Exhibit E-Lease Common Areas Definition.*" Saul attached the full and complete lease to its Motion as Exhibit A, **which did include Wells Fargo's Exhibit E.** It is clear from the record that the full lease was provided to the Court. This false accusation made by Wells Fargo, ironically, encapsulates Wells Fargo's lack of candor to the Court.

**b. Saul did not mishmash quotes from different sections of the Lease.**

Next, Wells Fargo misstates the following:

It must be noted that the “Repairs by Landlord” provision of the lease is actually partially quoted in the proposed subject Order (presented by Saul to the Court). However, closer scrutiny of the language of the Order and a comparison to the lease language reveals the Order is actually confusing mishmash of quotes from different sections of the lease. *See, Exhibit D-Lease, Repairs by Tenant.*

Saul’s Proposed Order cites directly to the Lease by stating the following:

2. Pursuant to the terms of the lease, Saul “shall keep and maintain, and make all needed repairs to, the . . . Common Areas in good condition and repair in accordance with the standards generally applicable with respect to Comparable Buildings . . . .” *See id.* at § 5.5(a). With respect to Wells Fargo’s repair and maintenance obligations, the lease states:

Tenant, at its expense, shall keep and maintain, take good care of, and make all needed repairs to, (i) the Leased Premises (inclusive of Leasehold Improvements), excluding, however, the components of the Base Building located within the Leased Premises, and (ii) any Tenant Property located outside the Leased Premises . . . .

*See id.* at § 5.6(a).

The Court’s Final Order states as follows:

Pursuant to the terms of the lease, Saul “shall keep and maintain, and make all needed repairs to, the . . . Common Areas in good condition and repair in accordance with the standards generally applicable with respect to Comparable Buildings . . . .” *Id.* at § 5.5(a). With respect to Wells Fargo’s repair and maintenance obligations, the lease states:

Tenant, at its expense, shall keep and maintain, take good care of, and make all needed repairs to, (i) the Leased Premises (inclusive of Leasehold Improvements), excluding, however, the components of the Base Building located within the Leased Premises, and (ii) any Tenant Property located outside the Leased Premises . . . .

*Id.* at § 5.6(a).

The Lease, which is Exhibit A to the Motion, states:

#### 5.5 Repairs by Landlord

(a) Landlord shall keep and maintain, and make all needed repairs to, the Base Building and the Common Areas in good condition and repair in accordance with the standards generally applicable with respect to Comparable Buildings (any such maintenance and/or repairs for which Landlord is responsible being herein collectively called “Landlord Repairs”).

...

## 5.6 Repairs by Tenant

(a) Tenant, at its expense, shall keep and maintain, take good care of, and make all needed repairs to, (i) the Leased Premises (inclusive of the Leasehold Improvements), excluding, however, the components of the Base Building located within the Leased Premises, and (ii) any Tenant Property located outside of the Leased Premises (any such maintenance and/or repairs for which Tenant is responsible being herein collectively called “Tenant Repairs”).

As can be seen there was no “confusing mishmash of quotes from different sections of the lease.” Saul clearly used punctuation marks commonly known as “ellipsis” to indicate that there were intentional omissions of a word, sentence, or section which did not alter the text or original meaning. Just so it is clear Saul, by using an ellipsis, left out the following from Section 5.5 and 5.6 of the Lease which are highlighted in bold:

**“Landlord shall keep and maintain, and make all needed repairs to, the **Base Building and the Common Areas** in good condition and repair in accordance with the standards generally applicable with respect to Comparable Buildings **(any such maintenance and/or repairs which Landlord is responsible being herein collectively called “Landlord Repairs”)**.”**

Tenant, at its expense, shall keep and maintain, take good care of, and make all needed repairs to, (i) the Leased Premises (inclusive of Leasehold Improvements), excluding, however, the components of the Base Building located within the Leased Premises, and (ii) any Tenant Property located outside the Leased Premises **(any such maintenance and/or repairs for which Tenant is responsible being herein collectively called “Tenant Repairs”)**.

None of the information which was intentionally omitted from these sections in the lease actually confuse or mishmash different sections of the Lease. Saul directly quoted and cited to the very exhibit which Wells Fargo has now attached as an Exhibit to its Memorandum of Law. Notwithstanding this, the *entire* Lease was made an Exhibit to Saul’s Motion, which in total make up One-Hundred and Seventy-Seven pages. Wells Fargo states that Saul has cherry picked or combined different portions of different lease provisions is simply incorrect. Saul intentionally chose the sections of the Lease that were applicable to its argument, and still included the entire

lease as an exhibit to its Motion. It is simply impracticable and downright ridiculous to assert that Saul should have quoted the entire One-Hundred and Seventy-Seven pages of the Lease to the Court, which would have been irrelevant and a complete waste of time. Again, had Wells Fargo felt the Lease was improperly quoted or cited, it could have appeared in court and argued this point. It did not.

**c. Wells Fargo's contention that the Plaintiff testified exactly where he fell is a misstatement of the facts**

Wells Fargo asserts that Saul ignored the Plaintiff's sworn testimony about the exact location of the fall. Wells Fargo relays onto this Honorable Court that the location of the fall was a sidewalk. Once again, this is a misstatement of the facts that were known at the time of the hearing.<sup>4</sup> After a full and reasonable review of the deposition transcript of the Plaintiff's deposition it is clear that the location of the Plaintiff's fall is nothing but unconfirmed, other than being in the Tenant-Dedicated Parking Area. To be clear the Plaintiff's deposition transcript establishes that the Plaintiff does not know whether he fell on the sidewalk or the asphalt.

The Plaintiff was given a "map" of the subject area and was asked to mark in red pen where he fell. See Exhibit 7. (Dep. of Eddie B. Lewis 28:12-20.) The Plaintiff clearly marks in red pen an "X" which is in the Tenant-Dedicated Parking Area. See Exhibit 8. Next, the Plaintiff went on to assert that he was walking on the sidewalk by the planters while leaving Wells Fargo. Id. at 29:23-25 - 30:1-21. Finally, and most importantly, the Plaintiff went on to state the following:

16 Q. For purposes of the transcript, what I think  
17 you just indicated was that you think you, more than  
18 likely, fell on the sidewalk area as opposed to the  
19 asphalt on the parking lot?  
20 A. I said when I started down, I probably

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<sup>4</sup> Since being granted Summary Judgment, Saul has not participated in discovery. Further, Wells Fargo's Memorandum of Law fails to include any supporting documents related to this assertion.

21 fell -- when I went down, I probably hit -- it's  
 22 hard to say. I don't even remember if there was a  
 23 car there. **I don't remember that. The only thing I**  
 24 **remember is I fell down. That's the only thing I**  
 25 **can tell you.** And I remember putting my hand down

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1 to stop my fall. It kind of dazed me a minute, and  
 2 this woman had her hand on my back and told me not  
 3 to move.

Id. at 85:16-25 - 86:1-3. (emphasis added). As shown by the Plaintiff's very own deposition transcript, Wells Fargo's assertion that the location of the Plaintiff's fall on a sidewalk is confirmed through discovery is a misstatement, misleading, and lacks candor with this Court.

Despite Wells Fargo attempting to mislead this Court by stating it is undisputed where the Plaintiff fell, which as show is clearly incorrect, the sidewalk area is located in an area that was in complete control of Wells Fargo. The Lease states:

"Parking Areas" shall mean the parking areas and facilities for the Property as indicated on Exhibit A-1 hereto, together with (i) any walkways, driveways and other passageways upon the Land providing ingress and egress between such areas and facilities and the Building and/or between such areas and facilities and the Building...."

See Exhibit A to Motion: page 16. Pursuant to Section 1.2 of the Lease, Saul leased the subject property to Wells Fargo with the right to use on an *exclusive basis*, the Tenant-Dedicated Parking Areas and on a non-exclusive basis, the non-Dedicated Parking Areas and all the other Common Areas. Id. at pg. 23- 24 (emphasis added). Additionally, attached as Exhibit C to the Motion, is an email sent by Rich Belthoff, counsel for Wells Fargo, which specifically asserts that "Wells Fargo has been granted in the Lease the exclusive right to use the Tenant Dedicated Parking Areas on a 24/7 basis." See Exhibit C to Motion. Further, the email states that "[t]hese parking areas are not common area under the Lease." Id. Once again, reading the Lease as a whole and in light of Rich

Belthoff's emails, it is clear that the walkways and other passageways in the Tenant-Dedicated Parking Area are included and under the exclusive control of Wells Fargo. Furthermore, the Belthoff emails are an admission by Wells Fargo as to control of the property and, of course, no evidence refuting that statement has been presented to the Court.

Finally, and as explained in Saul's Motion, Section 5.6(s) of the Lease provides that Wells Fargo, at its expense, shall keep and maintain, take good care of, and make all needed repairs to the Leased Premises...and (ii) any Tenant Property located outside of the Leased Premises (any such maintenance and/or repairs for which Tenant is responsible being herein collectively called Tenant Repairs.)" See Exhibit A. pg. 72 to Motion. Moreover, Section 5.6(e) of the Lease states that, "[i]n any such event, Tenant shall notify Landlord of the need for any such Tenant Repair and its request that Landlord perform the same, and Landlord shall endeavor to respond timely to each such request." Id. at pg. 73.

**d. Wells Fargo's assertion that Judge Jefferson's Order is not binding on it is a gross misstatement of the law of South Carolina.**

Wells Fargo, without any legal citations or support, concludes Judge Jefferson's Order regarding its finding of facts and conclusion of law is not binding on Wells Fargo. "The written order is the trial judge's final order and as such constitutes the final judgment of the court." Ford v. State Ethics Com'n, 344 S.C. 643, 646, 545 S.E.2d 821, 823 (2001). Rule 60 explicitly provides that "[a] motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation." S.C.R.C.P. Rule 60(b). (emphasis added). South Carolina Courts have long held that that an Order not appealed from is binding on all parties before the Court and constitutes the law of the case. See Walker v. Hannon, 191 S.C. 14, 3 S.E.2d 243, 245 (1939).

Taking into consideration the assertions made by Wells Fargo that Saul has lacked candor with the Court, it is clearly shown that it is truly Wells Fargo who has misrepresented the facts and law in this case.

**ii. The only appropriate standard of review is pursuant to Rule 60, SCRCP**

The only matter before this Court is the Motion under Rule 60, SCRCP, and not a Motion for Summary Judgment or Motion to Reconsider. Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party. Rouvet v. Rouvet, 388 S.C. 301, 696 S.E.2d 204, 208 (Ct. App. 2010). The party requesting relief in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle her to relief. See BB&T v. Taylor, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006).

**a. Wells Fargo's argument regarding misrepresentation does not reach anywhere near the difficult standards under Rule 60, SCRCP**

The record unequivocally evidences a complete and utter failure by Wells Fargo to raise any argument at the appropriate time on Saul's Motion. The overwhelming majority of Wells Fargo's arguments in its Memorandum of Law in Support of its Motion rely on information and documents which were available to Wells Fargo at the time of the hearing, without any explanation as to why they were not raised at the time of the hearing. In fact, and most telling, the Wells Fargo memorandum simply states: "...for reasons unknown, Mr. Blackburn, did not attend the hearing on March 17, 2020, and did not file a response to the Order after it was entered." According to Plaintiff's Memorandum in Response, on the day of the hearing for the Motion for Summary Judgment, counsel for Wells Fargo informed Plaintiff's Counsel that he was not going to attend the hearing. (See Pl. Memorandum in Resp. pg. 2-3.) Further, the fact that counsel for Wells Fargo

indicated he was not going to attend the hearing was relayed onto this Court. (Id. at pg. 3.) Furthermore, the undersigned (Morgan S. Templeton) received a phone call from Mr. Blackburn at or around 2:37 p.m. on March 16, 2020, in which he advised that he would be appearing on behalf of Wells Fargo. See Exhibit 9. (Affidavit of Morgan S. Templeton). The following day, on March 17, 2021, Mr. Blackburn called the undersigned to inquire about the hearing. Id. During this call, Mr. Blackburn informed the undersigned that he had read the motion for summary judgment, that he did not believe he had a basis to oppose the motion, and that he would not be attending the hearing on the Motion. Id.

Rule 60(b), SCRCP, provides that a motion pursuant to this rule be made within a reasonable time. As shown above, Wells Fargo waited Three-Hundred and Sixty days since the Court's Order was entered to first raise its Motion pursuant to Rule 60(b), SCRCP. **Nowhere in the record is there any explanation for this delay.** Wells Fargo has not provided a single argument as to why there has been such a delay to the filing of its Motion to Set Aside or Memorandum of Law in Support. Wells Fargo's Memorandum of Law in Support details the following "arguments" regarding information that was known at the time of the hearing, namely:

1. Issues relating to Esther S. Harnett's Affidavit, which was filed as an exhibit to Saul's Motion on January 20, 2020, and was available at the hearing on March 17, 2020;
2. Issues relating to the terms of the Lease, which was filed as an exhibit to Saul's Motion on January 20, 2020, and was available at the hearing on March 17, 2020;
3. Issues relating to the Deposition of Plaintiff Eddie B. Lewis, which took place on November 14, 2019, and was available to Wells Fargo; and
4. Issues relating to the emails sent by Rich Belthoff, which was made as an exhibit to Saul's Motion on January 20, 2020, and was available at the hearing on March 17, 2020.

A majority of the arguments set forth by Wells Fargo relate entirely to documents and affidavits which were available at the time of the hearing. It is undisputed that despite having counsel of record, Wells Fargo neglected to make even the most basic argument against Saul's Motion. Now, in the context of a Rule 60(b) Motion to Set Aside, Wells Fargo is attempting to take its second bite of the proverbial apple, even though it ignored its first opportunity. The appropriate approach would have been to address these concerns *at the time of the hearing*. To allow Wells Fargo to now bring its arguments regarding a Motion for Summary Judgment that was heard on March 17, 2020, stands for the proposition that litigation has no end, counsel and clients who do nothing in response to a properly failed motion and who later determine they are dissatisfied with the outcome can come back to Court and hit "reset" flies in the face of the notion of time deadlines/limitations. As has been stated by another court, "[i]f procrastination is the thief of time, as the philosophers moralize, it is also the pillager and despoiler of rights, privileges and prerogatives." Gloeckner v. School Dist. of Baldwin, 175 A.2d 73, 76 (Pa. 1961).

Wells Fargo sat on its hands for an unreasonable amount of time and now come to this Court in an improper attempt suggest impropriety on the part of Saul, so as to reargue Summary Judgment because they are now dissatisfied with the result. Wells Fargo's Motion to Set Aside Judgment should be denied.

**iii. The record lacks any newly discovered evidence.**

A trial court may relieve a party from a final judgment, order, or proceeding if "newly discovered evidence which by due diligence could not have been discovered in time to move from a new trial under Rule 59(b)" is presented to the trial court. Rule 60(b)(2), SCRCP. Trial courts are empowered to grant a new trial if a party establishes the newly discovered evidence (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3)

could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching. See Morin v. Innegrity, LLC, 424 S.C. 559, 819 S.E.2d 131 (Ct. App. 2018). Evidence is not “newly discovered” if it is known to the party at trial and in the party's possession. Lanier v. Lanier, 364 S.C. 211, 218, 612 S.E.2d 456, 459 (Ct. App. 2005).

Wells Fargo submits its “newly discovered evidence” as affidavits from Ervin H. Weatherly and Gerald Scott Wooten, both employees of Wells Fargo. The overwhelming majority of the information contained in these newly discovered Affidavits concern information relating to issues with the Lease, Esther S. Harnett’s Affidavit, and the Belthoff emails, all of which were available to Wells Fargo at the time of the hearing. There is no explanation in either Affidavits, regarding these issues, which explain why this information was not known to the party at the time of the hearing on the Motion in 2020. Further the record supports the fact that the Lease, Esther S. Harnett’s Affidavit, and the Belthoff emails were filed on January 20, 2020 and were available to Wells Fargo. As such, the record establishes that the majority of the arguments presented in these Affidavits were known to the parties, i.e. Wells Fargo, at the time of the hearing and were in Wells Fargo’s possession as they were filed with the Court.

Nevertheless, Saul will break down the two affidavits in order to show they should not be considered newly discovered evidence:

**a. Affidavit of Gerald Scott Wooten is not newly discovered evidence.**

Mr. Wooten’s affidavit states that a) he has personal knowledge of the lease and disagrees with Esther Harnett’s affidavit; and b) he has issues relating to matters that occurred on April 25, 2018, including the Belthoff emails.

First, Mr. Wooten’s affidavit violates the Parole Evidence Rule. The parole evidence rule states that a valid written contract, which is complete, and the terms of which are not ambiguous,

cannot be contradicted, added to, altered, or varied by extrinsic evidence. Garnett v. WRP Enterprises, Inc., 380 S.C. 206, 669 S.E.2d 591 (2008). The full and unambiguous Lease was provided to this Court at the time of the filing of the Motion and at the hearing. Nothing in Mr. Wooten's affidavit will change the result if a new hearing is granted as his affidavit cannot be used to interpret the terms of the Lease. Indeed, Wells Fargo does not even argue ambiguity.

Second, Mr. Wooten's affidavit concerns issues that were known or should have been known to Wells Fargo prior to the date of the hearing. Despite Wells Fargo obtaining the Affidavit on April 21, 2021, and of course, only presenting it to the Court on July 6, 2021, which is 109 days after filing the instant motion, there remains no evidence or testimony from anyone as to why this was not discovered before. In fact, nowhere in Wells Fargo's Memorandum of Law or supporting Affidavits does it explain why Mr. Wooten's Affidavit was not available prior to the hearing.

Third, Mr. Wooten's affidavit is simply cumulative and impeachment testimony. The Court was presented with the entire lease. Mr. Wooten's Affidavit is simply that he disagrees with Ms. Harnett's affidavit, which was filed on January 20, 2020. This could have been presented in 2020 prior to the hearing. It was not. Nothing in Mr. Wooten's affidavit changes the terms of the lease. Mr. Wooten's Affidavit is not newly discovered and Wells Fargo's Motion to Set Aside should be denied.

**b. Affidavit of Ervin H. Weatherly is not newly discovered evidence.**

Weatherly's affidavit states that a) he has personal knowledge of the lease and disagrees with Esther Harnett's affidavit; b) arguments relating to his interpretation regarding an alleged interaction with Esther Harnett on February 22, 2021; and c) issues relating to matters that occurred on April 25, 2018, including the Belthoff emails.

First, and once again, Mr. Weatherly's affidavit violates the Parole Evidence Rule for the same reasons set forth above with Mr. Wooten's affidavit. Any sworn statements by Mr. Weatherly in his Affidavit regarding the lease violates the parole evidence rule. The full and unambiguous Lease has been provided to this Honorable Court at the time of the filing of the Motion and at the hearing. Nothing in Mr. Weatherly's affidavit will change the result if a new hearing is granted as his affidavit cannot be used to interpret the terms of the Lease.

Second, Mr. Weatherly's Affidavit concerns matters that were known or should have been known to Wells Fargo prior to the date of the hearing: i.e. the Belthoff emails. As already explained, these emails were made an exhibit to the Motion at the time of filing and were available to Wells Fargo at the time of the hearing. Any argument that the Belthoff emails were misrepresented by Saul should have been made at the time of the hearing. Additionally, Mr. Weatherly's Affidavit contains a self-serving conclusory assertion that Ms. Harnett was bragging that "she misrepresented the content of the Belthoff letters, the lease provisions, and the facts of her sworn affidavit". Other than the alleged statements that "she was able to use the Belthoff 'nasty letters' against Wells Fargo," the Affidavit fails to explain how/why this statement is a misrepresentation. Indeed, Saul did rely on the Belthoff email and presented it to the Court. The Belthoff emails unequivocally takes the position that the parking area is Wells Fargo's dominion and under its control. Regardless, the Belthoff emails were filed with Saul's Motion on January 20, 2020 and were available to Wells Fargo on March 17, 2020.

Third, Mr. Weatherly's affidavit is simply an effort to create an issue of fact to revisit summary judgment. The Court was presented with the entire lease, the Belthoff emails, and the Affidavit of Esther S. Harnett. Wells Fargo received them as well and did nothing. Mr. Weatherly's Affidavit is simply an attempt to create a material issue of fact under the guise of a

Rule 60(b) Motion. All that is being attempted is an effort to impeach Ms. Harnett. Nothing in Mr. Weatherly's affidavit changes the terms of the lease, nor does it demonstrate that this Court's prior conclusion was incorrect. Mr. Weatherly's Affidavit is not newly discovered and Wells Fargo's Motion to Set Aside should be denied.

**iv. There has been no fraud on the part of Saul as Wells Fargo failed to appear and argue at the appropriate time and thus has not established their inability to counter the arguments and supporting documents submitted by Saul**

A claim of fraud upon the court, as a ground for relief from judgment, requires proof by clear and convincing evidence. Sanders v. Smith, 431 S.C. 605, 848 S.E.2d 604 (Ct. App. 2020). A party may not prevail on a motion for relief of judgment on the basis of fraud where he or she has access to disputed information or has knowledge of inaccuracies in an opponent's representations ***at the time of the alleged misconduct***. Raby Const., L.L.P. V. Orr, 358 S.C.10, 594 S.E.2d 478 (2004) (emphasis added). A judgment may be set aside on the ground of fraud only if the fraud is "extrinsic" and not "intrinsic." See Corley v. Centinnial Const. Co., 247 S.C. 179, 188, 146 S.E.2d 609, 613-14 (1966). The Corley Court stated that:

'Equitable relief from a judgment is denied in cases of intrinsic fraud, on the theory that an issue which has been tried and passed upon in the original action should not be retried in an action for equitable relief against the judgment, and that otherwise litigation would be interminable; relief is granted for extrinsic fraud on the theory that by reason of the fraud preventing a party from fully exhibiting and trying his case, there never has been a real contest before the court of the subject matter of the action.'

Id. The essential distinction between intrinsic and extrinsic fraud for purposes of relief from judgment is the ability to discover the fraud. See Ray v. Ray, 474 S.C. 79, 647 S.E.2d 237 (2007).

**a. Wells Fargo failed to raise the arguments at the time of the hearing and cannot as a matter of law claim extrinsic fraud upon the Court at this time**

Wells Fargo's motion fails to identify by clear and convincing evidence of extrinsic fraud upon the Court. Virtually all of the arguments set forth by Wells Fargo relate to arguments made by Saul in its Motion for Summary Judgment, which could have been presented by Wells Fargo then. All of the materials presented by Saul were made available to Wells Fargo prior to the hearing on Saul's Motion for Summary Judgment. Saul did not hide any of its evidence or information. Nowhere in Wells Fargo's Motion to Set Aside or Memorandum of Law in Support is there any reason given as to why Wells Fargo failed to file a responsive memorandum, appear at the hearing, file a motion to reconsider, or appeal this Court's Order.

A party may not prevail on a motion for relief of judgment on the basis of fraud where he or she has access to disputed information or has knowledge of inaccuracies in an opponent's representations *at the time of the alleged misconduct*. Raby Const., L.L.P. V. Orr, 358 S.C.10, 594 S.E.2d 478 (2004). (emphasis added). Wells Fargo's baseless arguments that a fraud was committed upon the Court is entirely based on information and supporting documents that were available to Wells Fargo at the time of the alleged misconduct. See Id. Wells Fargo's Motion to Set Aside based on arguments related to fraud upon the Court should be denied.

**b. There has been no showing of extrinsic fraud in this matter**

Wells Fargo asserts that Esther S. Harnett bragged about misrepresenting the contents of the Belthoff emails, the lease provisions, and the facts of her sworn testimony. Saul's Motion for Summary Judgment which was supported by the lease, the Belthoff emails, and the Affidavit of Esther S. Harnett were filed on January 20, 2020. Nowhere has it been explained or even argued that Wells Fargo was unable to discover the alleged fraud that was committed by Saul. As such, there is no extrinsic fraud in this matter. See Ray v. Ray, 474 S.C. 79, 647 S.E.2d 237 (2007). Statements made by Esther S. Harnett regarding Saul's dismissal after the fact based on exhibits

and arguments that were available to Wells Fargo at the time of the hearing is not extrinsic fraud. Wells Fargo has the burden of proof to establish a claim of fraud upon the court, as a ground for relief from judgment, by clear and convincing evidence. See Sanders v. Smith, 431 S.C. 605, 848 S.E.2d 604 (Ct. App. 2020). The record is devoid of any argument, documents, or information that explains how or why Wells Fargo could not have discovered the alleged fraud at the time of the hearing. Wells Fargo failed to appear or argue its position at the time of the hearing. Wells Fargo has failed to prove by clear and convincing evidence that extrinsic fraud was committed. See Id.

**v. Wells Fargo has not come to Court with clean hands and has attempted to shift the burden of proof in deprivation of Saul's due process rights**

Movant seeking relief from judgment has the burden of presenting evidence proving facts essential to entitle relief. Sanders v. Smith, 431 S.C. 605, 848 S.E.2d 604 (Ct. App. 2020). Wells Fargo filed its Motion on March 19, 2021, which asserts that it will be supported with “sworn Affidavits of Wells Fargo representatives, and a Memorandum of Law....” On July 6, 2021, one-hundred nine (109) days after the filing of its Motion, Wells Fargo filed its affidavits and Memorandum of law. As evidenced by the Plaintiff’s Memorandum in response, Saul was left to guess as to what Wells Fargo’s allegations and evidence presented was going to be. What has been revealed now, is simply Wells Fargo attempts to reargue a Motion for Summary Judgment in the context of a Rule 60(b) Motion. Pursuant to Rule 60(b), SCRCP, the burden of proof lies entirely on Wells Fargo, not Saul. What cannot be ignored is Wells Fargo’s conduct. Relief from judgment is largely an equitable principal. As the maxim goes, “he who seeks equity must do equity”. Provident Life & Accident v. Driver, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (1994). Wells Fargo has not done equity in this instance. It sat on its hands and does not come to Court

with clean hands. See gen. Associate Spring Corp v. Roy F. Wilson, 410 F. Supp. 967, 978 (D.S.C. 1976) (applying SC law and collecting cases noting parties who seek equity must come with clean hands).

Wells Fargo has caused this situation by its failure to appear, oppose a motion, and its decision to make baseless accusations in an effort to avoid the consequences of its own inaction. Wells Fargo's original motion is devoid of articulable information, facts, law, etc. Saul and the Plaintiff have articulated that they were unable to address Wells Fargo's allegations in their original filings. Finally, when Wells Fargo was forced to provide a more meaningful motion (well after the one year requirement), Saul was given three-days to respond. Despite having the affidavits relied upon (dated April 21, 2021), Wells Fargo's did not provide them until this Court set a deadline of July 6, 2021. Despite Wells Fargo bearing the burden of proof, Saul has essentially had to defend itself in the "dark," and has created the impression that Saul has done something improper. Saul continues to maintain its request for a hearing on the matter so as to make a full and complete record of this matter. Wells Fargo has had over a year to provide clear and convincing evidence that Saul acted improperly. It has failed to do so within the one-year time period contemplated by Rule 60. Wells Fargo's Motion to Set Aside should be denied pursuant to Rule 7(b), SCRCP.

### **CONCLUSION**

This Court should deny Wells Fargo's Rule 60 motion as it has failed to meet its burden of proof by clear and convincing evidence. Wells Fargo is improperly trying to apply a Rule 56 or 59 standard. Saul was properly granted summary judgment on March 17, 2020, and that Order remains proper.

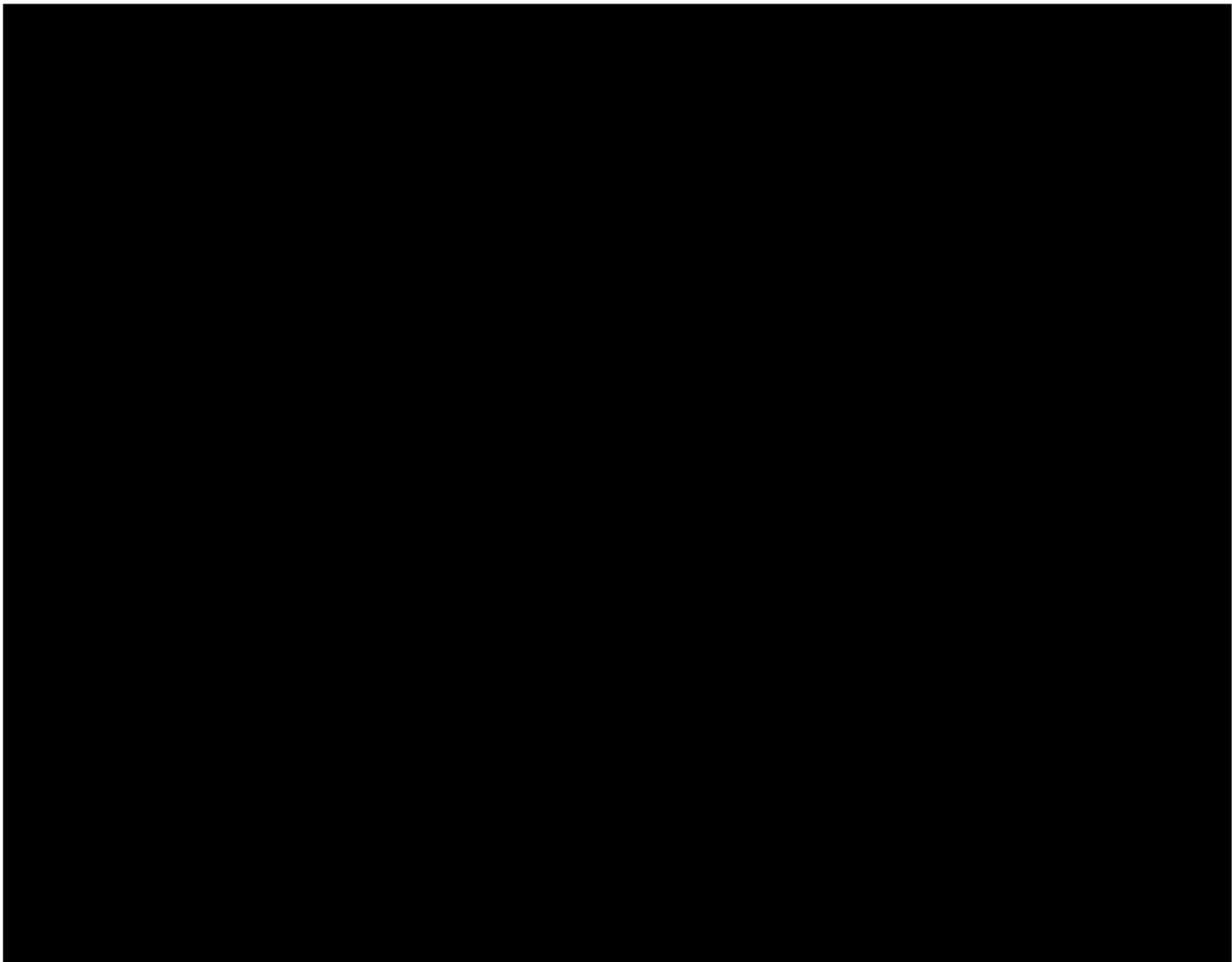
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Dated this 9th day of July, 2021.

WALL TEMPLETON & HALDRUP, P.A.

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843-329-9500  
**Attorneys for Defendants Saul, LLC**



**From:** Morgan S. Templeton  
**Sent:** Friday, March 13, 2020 2:05 PM  
**To:** Cory Fleming <cory@mossandkuhn.com>; Laura Robinson <lrobinson@scarolina-law.com>  
**Cc:** Charles Blackburn <cblackburn@scarolina-law.com>  
**Subject:** RE: Lewis, Jr., Eddie B. v. Saul, LLC and Wells Fargo Bank, NA:

Laura,

I am sorry as well to hear that. Unfortunately, I am not able to consent to a continuance of the summary judgment motion. The case is scheduled to be mediated with plaintiff on 4/2 and the case is subject to trial after 4/15. As such, I need to have the motion heard.

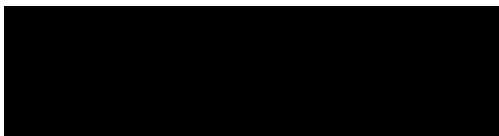
I wish you well for whatever your next steps take.

Morgan

**Morgan S. Templeton**  
**Attorney**

---

Telephone: (843) 329-9500  
Facsimile: (843) 329-9501



**Wall Templeton & Haldrup, P.A.**

145 King Street, Suite 300 (29401)  
Post Office Box 1200  
Charleston, South Carolina 29402  
[www.WallTempleton.com](http://www.WallTempleton.com)

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**From:** Cory Fleming [mailto:cory@mossandkuhn.com]  
**Sent:** Friday, March 13, 2020 1:49 PM  
**To:** Laura Robinson <lrobinson@scarolina-law.com>  
**Cc:** Morgan S. Templeton <Morgan.Templeton@WallTempleton.com>; Charles Blackburn <cblackburn@scarolina-law.com>  
**Subject:** Re: Lewis, Jr., Eddie B. v. Saul, LLC and Wells Fargo Bank, NA:

Laura

Sorry to hear your leaving the case. Wish you well in the future. As to the motion, I would be willing to consent to an Order allowing 30 days to respond to discovery. Obviously we have been waiting for some time now.

Thank you.

Cory Fleming  
[Cory@mossandkuhn.com](mailto:Cory@mossandkuhn.com)  
(843)986-6379

Please excuse the auto correct  
Sent from my iPhone

On Mar 13, 2020, at 11:55 AM, Laura Robinson <[lrobinson@scarolina-law.com](mailto:lrobinson@scarolina-law.com)> wrote:

Good morning Cory and Morgan,

I am resigning from Vernis & Bowling today and Charles Blackburn (copied here) will be taking over the representation of Wells Fargo. I know there is a motions hearing scheduled for Tuesday, and I am asking on Charles' behalf for your consent to continue the hearing. Charles will get up to speed as quickly as he possibly can, but he will not be prepared by Tuesday. HOPEFULLY, Charles will be able to send Cory the responses that will resolve the motion to compel and that hearing will never be necessary. But for both motions scheduled for Tuesday, will you please do Charles the professional courtesy of giving him a minute to get up to speed on the case before he has to be in front of a judge on it?

I have enjoyed working with both of you and look forward to seeing you again sometime soon!

Thank you,

Laura

**Laura W. Robinson**

Managing Attorney

**Vernis & Bowling of Columbia, LLC**

1401 Main Street, Suite 655

Columbia, SC 29201

Tel: 803-234-5416

Mobile: 803-760-2249

Fax: 803-978-6246

[lrobinson@scarolina-law.com](mailto:lrobinson@scarolina-law.com)

[Click Here for my contact info](#)

<image002.jpg>

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|                                |   |                                         |
|--------------------------------|---|-----------------------------------------|
| STATE OF SOUTH CAROLINA        | ) | IN THE COURT OF COMMON PLEAS            |
|                                | : | FOURTEENTH JUDICIAL CIRCUIT             |
| COUNTY OF BEAUFORT             | ) | C.A. NO.: 2018-CP-07-02378              |
| EDDIE B. LEWIS, JR.            | ) |                                         |
|                                | ) |                                         |
| Plaintiff,                     | ) |                                         |
|                                | ) | <b>AFFIDAVIT OF MORGAN S. TEMPLETON</b> |
| versus                         | ) |                                         |
|                                | ) |                                         |
| SAUL, LLC and WELLS FARGO BANK | ) |                                         |
| NATIONAL ASSOCIATION           | ) |                                         |
|                                | ) |                                         |
| Defendants.                    | ) |                                         |
|                                | ) |                                         |

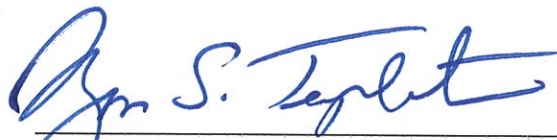
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PERSONALLY appeared before me, Morgan S. Templeton, who being duly sworn, alleges and says as follows:

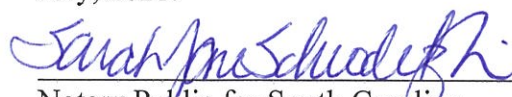
1. I am over the age of nineteen (19) and am otherwise competent to make this affidavit. I have personal knowledge of the matters set forth herein.
2. I am a member in good standing of the South Carolina bar and have been licensed to practice law since 1998.
3. I am lead counsel of record for Saul, LLC ("Saul") in the above captioned matter.
4. On March 16, 2020, at or around 2:37 p.m., I received a phone call from Charles Blackburn. Mr. Blackburn advised he was appearing on behalf of Wells Fargo Bank. According to the electronic docket, Mr. Blackburn filed a notice of appearance in this case the same day.
5. To the best of my memory and belief, Mr. Blackburn called to inquire about the hearing scheduled for March 17, 2020, regarding Saul's motion for summary judgment. During the call Mr. Blackburn informed me that he had read the motion for summary judgment, that he did not believe he had a basis to oppose the motion, and that he would not be attending the hearing on March

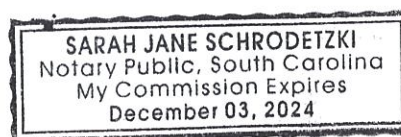
17, 2020. He further advised that the pending motion to compel against Wells Fargo brought by Plaintiff had been resolved by consent.

FURTHER DEPONENT SAYETH NOT.

  
Morgan S. Templeton

SWORN TO before me this 8<sup>th</sup> day of  
July, 2021.

 (Seal)  
Notary Public for South Carolina  
My Commission Expires: December 3, 2024



**From:** [efiledonotreply@sccourts.org](mailto:efiledonotreply@sccourts.org)  
**To:** [David Nasrollahi](#)  
**Subject:** Courtesy NEF RE: 2018CP0702378  
**Date:** Monday, March 16, 2020 3:38:31 PM

---

**\*\*\*\*\* IMPORTANT NOTICE - READ THIS INFORMATION \*\*\*\*\***  
**NOTICE OF ELECTRONIC FILING [NEF]**

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**A filing has been submitted to the court RE: 2018CP0702378**

**Official File Stamp:** 03-16-2020 03:38:05 PM  
**Court:** CIRCUIT COURT  
Common Pleas  
Beaufort  
**Case Caption:** Eddie B Lewis Jr VS Saul Llc , defendant, et al  
**Event(s):** Notice/Notice of Appearance  
**Filed by or on behalf of:** Charles Grant Blackburn

This notice was automatically generated by the Court's auto-notification system.

---

**The following people were served electronically:**

Morgan S. Templeton for Saul Llc  
David Ali Nasrollahi for Saul Llc, Saul, Llc  
Cory Howerton Fleming for Eddie B Lewis, Jr  
Laura W Robinson for Wells Fargo Bank National Association,  
Wells Fargo Bank, National Association

**The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:**

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**From:** [efiledonotreply@sccourts.org](mailto:efiledonotreply@sccourts.org)  
**To:** [David Nasrollahi](#)  
**Subject:** Courtesy NEF RE: 2018CP0702378  
**Date:** Wednesday, March 18, 2020 10:45:33 AM

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**\*\*\*\*\* IMPORTANT NOTICE - READ THIS INFORMATION \*\*\*\*\***  
**NOTICE OF ELECTRONIC FILING [NEF]**

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**A filing has been submitted to the court RE: 2018CP0702378**

**Official File Stamp:** 03-18-2020 10:45:00 AM  
**Court:** CIRCUIT COURT  
Common Pleas  
Beaufort  
**Case Caption:** Eddie B Lewis Jr VS Saul Llc , defendant, et al  
**Event(s):**  
Notice/Notice of Appearance  
Order/Order Cover Sheet \$25.00

**Document(s) Submitted:** Proposed Order/Summary Judgment  
**Filed by or on behalf of:** John Joseph Dodds, IV

This notice was automatically generated by the Court's auto-notification system.

---

**The following people were served electronically:**

Morgan S. Templeton for Saul Llc  
Charles Grant Blackburn for Wells Fargo Bank National Association  
David Ali Nasrollahi for Saul Llc, Saul, Llc  
Cory Howerton Fleming for Eddie B Lewis, Jr  
Laura W Robinson for Wells Fargo Bank National Association, Wells Fargo Bank, National Association

**The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:**

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|                         |   |                                    |
|-------------------------|---|------------------------------------|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS       |
|                         | ) | FOURTEENTH JUDICIAL CIRCUIT        |
| COUNTY OF BEAUFORT      | ) | CIVIL ACTION NO.: 2018-CP-07-02378 |

|                      |   |
|----------------------|---|
| EDDIE B. LEWIS, JR., | ) |
|                      | ) |

|            |   |
|------------|---|
| Plaintiff, | ) |
|            | ) |

|     |   |
|-----|---|
| vs. | ) |
|     | ) |

|                                |   |
|--------------------------------|---|
| SAUL, LLC and WELLS FARGO BANK | ) |
| NATIONAL ASSOCIATION,          | ) |
|                                | ) |

|             |   |
|-------------|---|
| Defendants. | ) |
|-------------|---|

**ORDER GRANTING  
DEFENDANT SAUL, LLC'S  
MOTION FOR SUMMARY  
JUDGMENT**

|                  |                          |
|------------------|--------------------------|
| Presiding Judge: | Hon. Deadra L. Jefferson |
|------------------|--------------------------|

|                       |                    |
|-----------------------|--------------------|
| Plaintiff's Attorney: | Cory Fleming, Esq. |
|-----------------------|--------------------|

|                       |  |
|-----------------------|--|
| Defendant Saul, LLC's |  |
|-----------------------|--|

|           |                       |
|-----------|-----------------------|
| Attorney: | John Dodds, Jr., Esq. |
|-----------|-----------------------|

|                  |                |
|------------------|----------------|
| Date of Hearing: | March 17, 2020 |
|------------------|----------------|

|                 |                |
|-----------------|----------------|
| Court Reporter: | Karen Andersen |
|-----------------|----------------|

This matter came before the Court on March 17, 2020 for a hearing on Defendant Saul, LLC's ("Saul") motion for summary judgment as to all claims asserted by Plaintiff Eddie B. Lewis, Jr. ("Plaintiff"), filed January 20, 2020. After careful consideration of the record, the Court makes the following findings of fact and conclusions of law and Grants Saul's Motion for Summary Judgment.<sup>1</sup>

**FINDINGS OF FACT**

Saul is the owner of certain real property and improvements located at 1011 Bay Street, Beaufort, South Carolina (the "subject property"). At all times relevant hereto, Defendant Wells Fargo National Association ("Wells Fargo") leased the subject property from Saul pursuant to a written lease agreement (the "lease"). The lease term is September 22, 2004 to September 30, 2024. Lease at § 1.1(a).

<sup>1</sup> Counsel for the Plaintiff was provided with a copy of the proposed Order and had no objection to the relief sought or the verbiage contained herein.

¶ 11. As a result of the incident, Plaintiff filed the instant lawsuit against Saul and Wells Fargo sounding in traditional common law premises liability. Specifically, as it relates to Saul, Plaintiff alleges that Saul had a duty “to warn invitees and/or business visitors of the hazardous, unsafe, and unreasonably dangerous condition of the sidewalks” and breached its duty by “failing to maintain said premises in a reasonably safe condition for invitees and/or business visitors.” Amend. Compl. at ¶ 12.

At the hearing, counsel for the Plaintiff stated that the Plaintiff does not disagree with the above facts, and does not disagree with Saul’s interpretation of the lease agreement.

### CONCLUSIONS OF LAW

#### I. Summary Judgment Standard

“Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law.” Evening Post Pub. Co. v. Berkeley County Sch. Dist., 392 S.C. 76, 81, 708 S.E.2d 745, 748 (2011); Rule 56(c), SCRCP. “Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986)). In considering a motion for summary judgment, “the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party.” Id.

“Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law... Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.” USAA Property & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008).

## II. Premises Liability

In a negligence action, a plaintiff must show: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached the duty by a negligence act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) the plaintiff suffered an injury or damages. See, e.g., Sabb v. S.C. State Univ., 350 S.C. 416, 567 S.E.2d 231, 237 (2002). "An essential element in a cause of action based upon negligence is the existence of a legal duty of care owed by the defendant to the plaintiff." Platt v. CSX Transp., Inc., 388 S.C. 441, 697 S.E.2d 575, 577 (2010). "Without a duty, there is no actionable negligence." Id. "The existence of a duty owed is a question of law for the courts." Doe v. Greenville Cnty. Sch. Dist., 375 S.C. 63, 651 S.E.2d 305, 309 (2007).

Premises liability is a theory of negligence that establishes the duty owed to someone injured on a landowner's property as a result of conditions or activities on the land. Singleton v. Sherer, 377 S.C. 185, 659 S.E.2d 196, 204 (Ct. App. 2008). Under South Carolina premises liability law, an owner or occupier of property is the person having control, rather than ownership, of the premises. Dunbar v. Charleston & W. Carolina Ry. Co., 211 S.C. 209, 44 S.E.2d 314, 317 (1947) ("As a general rule, liability for injuries caused by dangerous instrumentalities terminates with cessation of control thereover, and the liability of a landowner, likewise, is terminated ordinarily when he parts with possession of the premises in question."). "One who controls the use of the property has a duty of care not to harm others by its use." Miller v. City of Camden, 329 S.C. 310, 494 S.E.2d 813, 815 (1997). "Conversely, one who has no control owes no duty." Id.

When land is occupied by a lessee pursuant to a lease, the law of property regards the lease as equivalent to a sale of the premises for the term of the lease. Byerly v. Connor, 307 S.C. 441, 415 S.E.2d 796 (1992). "In the absence of an agreement to the contrary, the lessor surrenders