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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Bentley D. Price, Circuit Court Judge

Circuit Court Case No. 2017-CP-07-01057
Appellate Case No. 2022-000867

Bittmint LLC and Harbour Town Surf Shop LLC.....Appellants,

v.

Lynda H. Johnson, Charles S. Giannone, and Sea Pines Resort, LLC,
.....Respondents.

**RECORD ON APPEAL
VOLUME III**

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STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	2017-CP-07-01057
	)	
	)	
	)	
	)	
BITTMINT, LLC AND HARBOUR	)	
TOWN SURF SHOP, LLC,	)	
PLAINTIFFS,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
LYNDA H. JOHNSON, CHARLES	)	
S. GIANNONE AND SEA PINES	)	
RESORT, LCC,	)	
DEFENDANTS.	)	

February 28 - March 2, 2022
Beaufort, South Carolina

B E F O R E:

THE HONORABLE HONORABLE BENTLEY PRICE, JUDGE.

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

EDWARD KUBEC, ESQ.
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Attorney for the Plaintiffs

JOHN LINTON, ESQ.
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Attorney for the Defendants

Proceedings Recorded by DCRP
Transcribed by Penny M. Johnson

I N D E X

(PW) - Denotes Plaintiff's Witness
(DW) - Denotes Defense Witness

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P R O C E E D I N G S

1
2 THE COURT: Good morning, ladies and gentlemen of the
3 jury. Sorry for the delay. Unfortunately, we had a little
4 clerical glitch as they indicated, but we're going to go
5 ahead and get started. We only have one trial this week and
6 it is a civil trial. No criminal trials this week. So we
7 are going to voir dire the entire panel and then I'm going
8 to go ahead and just be case specific and voir dire the
9 entire panel for the trial itself. If you are selected,
10 it's intended to be about a two-and-a-half-day trial. If
11 you are not selected, you will be excused from jury duty
12 because this is the only trial we have this week.

13 All right. So I'm going to ask you a series of
14 questions. If any of these apply to you, please stand,
15 indicate your juror number and how it applies to you. Some
16 of these -- they're not overly intrusive, but if there's
17 something that you want private, you don't want to share
18 with everybody, that's fine, just stay seated. And at the
19 end, I will ask if anybody wants to come up and discuss
20 anything in private with me.

21 I know this is a touchy subject for some and most, but
22 the Supreme Court rescinded the mask mandate. It actually
23 goes into effect tomorrow. I don't see what one day is
24 going to do, so if you are comfortable with taking your mask
25 off, you are certainly welcome to do it. It's no longer a

1 requirement in the court system as of tomorrow. I don't
2 think one day is going to affect anything. I don't think
3 I'm going to get in trouble for one day. Which is why we're
4 not wearing our mask because it got rescinded.

5 All right. Is anyone here not 18 years of age or
6 older?

7 (No response.)

8 THE COURT: There are none.

9 Is anyone here not a citizen of the United States?

10 (No response.)

11 THE COURT: There are none.

12 Is anyone here not a citizen and resident of Beaufort
13 County? Meaning, you have moved since you received your
14 notice.

15 (No response.)

16 THE COURT: There are none.

17 Can anyone here not read, write, speak or understand
18 the English language well?

19 (No response.)

20 THE COURT: There are none.

21 Does anyone here not have a sixth grade education or
22 its equivalent?

23 (No response.)

24 THE COURT: There are none.

25 Does anyone here have any mental or physical infirmity

1 that would preclude them from serving on a jury?

2 (No response.)

3 THE COURT: There are none.

4 Has anyone been convicted of a crime in federal or
5 state court, of a crime punishable by imprisonment for more
6 than one year and has not had their civil rights restored by
7 pardon or amnesty?

8 (No response.)

9 THE COURT: There are none.

10 Is anyone here a clerk, deputy clerk, constable,
11 sheriff, commissioned law enforcement officer, probate
12 judge, county commissioner, magistrate, county officer or
13 any person employed within the walls of any courthouse?

14 (No response.)

15 THE COURT: There are none.

16 Has anyone performed jury duty in the court of record,
17 where we are now, in the past prior calendar year?

18 Yes, sir, your juror number?

19 POTENTIAL JUROR: 6.

20 THE COURT: Yes, sir.

21 POTENTIAL JUROR: (Inaudible) last September.

22 THE COURT: Did you serve on a criminal or civil trial?

23 POTENTIAL JUROR: (Inaudible.)

24 THE COURT: Did you get transferred?

25 POTENTIAL JUROR: (Inaudible.)

1 THE COURT: You didn't serve on the jury itself? You
2 didn't sit over here, did you?

3 POTENTIAL JUROR: No, no, no.

4 THE COURT: Okay. You just had to keep calling back to
5 see --

6 POTENTIAL JUROR: Yes, sir.

7 THE COURT: Unfortunately, that doesn't disqualify you.

8 All right. Those are all the qualification questions
9 that I need to ask you. The next are exemptions. What that
10 means is that you're not disqualified from serving on the
11 jury, it's just an exemption that you can elect to take.
12 And if you elect to take it, we'll simply just summons you
13 back at a later date, meaning this week just doesn't work
14 well for you.

15 I remind you, this is a civil week. I promise you the
16 trial is going to start today, probably going to take two
17 and a half days. Or you can roll the dice and come back for
18 like a seven-week murder trial. Y'all pick. Roll the dice
19 however you want, but just letting you know.

20 Is anyone here age 65 years or older and wishes to
21 claim the exemption?

22 (No response.)

23 THE COURT: All right. There are none.

24 Has anyone served on a jury in the past three years?

25 (No response.)

1 THE COURT: There are none.

2 THE BAILIFF: One standing.

3 THE COURT: All right.

4 POTENTIAL JUROR: (Inaudible.)

5 THE COURT: Thank you, sir. We appreciate it. Court
6 of record in common pleas?

7 POTENTIAL JUROR: Yes, sir.

8 THE COURT: All right. You want to claim the
9 exemption?

10 POTENTIAL JUROR: Yes, sir.

11 THE COURT: All right. You may be excused.

12 All right. Does anyone have small children that are
13 under the age of seven that they have legal custody of, they
14 also have the principle care, custody and control of the
15 children and are unable to make arrangements for their
16 adequate care during this week?

17 (Juror stands.)

18 THE COURT: And who cares for the child?

19 POTENTIAL JUROR: In the mornings, sir, I do. My wife
20 works in the morning and I work at night.

21 THE COURT: Is the child in school?

22 POTENTIAL JUROR: Yes, sir.

23 THE COURT: We start at 10:00 a.m., does that affect
24 anything? We usually are done by around 4:45 to 5:00.

25 POTENTIAL JUROR: (Inaudible.)

1 THE COURT: All right. You're excused.

2 THE CLERK: What number?

3 THE COURT: What number are you?

4 POTENTIAL JUROR: (Inaudible.)

5 THE COURT: Okay. Have a good one.

6 Someone who is 65 years of age or older, does someone
7 care for someone, a family member or anybody who is 65 years
8 of age or older and cannot find adequate care for them this
9 week?

10 (No response.)

11 THE COURT: All right. There are none.

12 Is anyone a full time student, school teacher, crossing
13 guard, bus driver or serves in any school-related function
14 who is unable to serve this week because of that school
15 involvement?

16 (No response.)

17 THE COURT: All right. There are none.

18 Does anyone perform a service for a business,
19 commercial or agricultural enterprise whose services are so
20 essential to the operation of the enterprise that the
21 enterprise must close or cease to function if you are
22 required to perform jury duty this week?

23 Yes, sir?

24 POTENTIAL JUROR: I'm a licensed contractor and I've
25 started two houses and they're waiting on me (inaudible.)

1 THE COURT: We'll transfer you to another term.

2 POTENTIAL JUROR: Thank you.

3 THE COURT: Yes, ma'am?

4 POTENTIAL JUROR: (Inaudible.)

5 THE COURT: I'll transfer you to another week. What's
6 your juror number?

7 POTENTIAL JUROR: 167.

8 THE COURT: 167.

9 All right. Anybody else want to get out of jury duty,
10 this last one is your big one. Anyone employed as a guard
11 with the Department of Corrections at a penitentiary?

12 (No response.)

13 THE COURT: I knew you'd be lying if you stood up for
14 that one.

15 All right. That's all the questions that we need to
16 ask. If anybody has anything private or personal they'd
17 like to speak to me about, if they'll just go ahead and come
18 on up, we'll be happy to hear from you.

19 All right. Go all the way around. All right, come on
20 up. You just have to speak loud enough so the lady can hear
21 you on the computer.

22 POTENTIAL JUROR: (Inaudible.)

23 THE COURT: We'll get to that. If there's an issue,
24 just let us know at that time, okay? Thank you.

25 She can stay, yeah.

1 THE BAILIFF: No. 102, Your Honor.

2 THE COURT: Good morning.

3 POTENTIAL JUROR: (Inaudible.)

4 THE COURT: If you're doing something like that, I'll
5 excuse you.

6 POTENTIAL JUROR: I'm going to Australia in July.

7 THE COURT: There's no way of knowing. It's a random
8 thing. So just continue on.

9 POTENTIAL JUROR: (Inaudible.)

10 THE COURT: Yeah, but you'll need to get ready. Just
11 don't worry about it. We've got enough jurors. Thank you.

12 POTENTIAL JUROR: Thank you, sir.

13 THE COURT: He can be excused.

14 What's your juror number?

15 POTENTIAL JUROR: 102.

16 THE COURT: 102. He is in the military and is being
17 deployed on Friday. That's probably the best excuse we've
18 ever had.

19 THE BAILIFF: Juror 87, Your Honor.

20 THE COURT: Yes, sir. Just speak loud enough so she
21 can hear you.

22 POTENTIAL JUROR: (Inaudible.)

23 THE COURT: The only thing is there's probably a zero
24 percent chance unless deliberations just go on forever, and
25 I don't foresee that.

1 All right. He'll stay.

2 All right. If y'all will just give me one second, we
3 will proceed on with the voir dire as to the specific case.

4 (Pause.)

5 THE COURT: On the voir dire, did y'all have any
6 objections to either, the Plaintiffs or Defendants? Pretty
7 straightforward.

8 All right. Ladies and gentlemen of the jury, this is a
9 civil case, as I indicated, and it's Bittmint, spelled
10 B-I-T-T-M-I-N-T, LLC, and Harbour Town Surf Shop, LLP,
11 versus Linda Johnson, Charles Giannone and Sea Pines Resort.

12 So at this time, I'm going to allow the parties to
13 introduce themselves, the firms in which they work and the
14 parties that they represent. And then I'll ask you if you
15 have any close personal knowledge or friendship with any of
16 the attorneys or have been represented by any of the
17 attorneys or know any of the parties.

18 All right. We'll begin with the Plaintiff.

19 MR. KUBEC: Good morning, my name is Ed Kubec and this
20 is my law partner, Maureen Coffey with the law firm of
21 Coffey|Kubec, LLP. We represent the Plaintiffs, Bittmint,
22 LLC and Harbour Town Surf Shop, LLC. These are the owners
23 of those two companies. This is Alon Mintz and this is Amir
24 Bitton.

25 THE COURT: Does anybody know the attorneys or have

1 been represented by anyone in their firm or have any close
2 personal relationship with the two Plaintiffs?

3 Yes, ma'am?

4 POTENTIAL JUROR: (Inaudible.)

5 THE COURT: All right. What's your juror number?

6 POTENTIAL JUROR: 116.

7 THE COURT: And how do you know (inaudible)?

8 POTENTIAL JUROR: I worked (inaudible).

9 THE COURT: All right. Would that in any way affect
10 your ability to be fair and impartial in this case?

11 POTENTIAL JUROR: (Inaudible.)

12 THE COURT: All right. You may be excused. What's
13 your juror number again?

14 POTENTIAL JUROR: 116.

15 THE COURT: All right. You may be excused.

16 She came up and indicated that earlier as well
17 (inaudible).

18 Yes, sir?

19 POTENTIAL JUROR: (Inaudible.)

20 THE COURT: All right. Would that in any way affect
21 your ability to be fair and impartial?

22 POTENTIAL JUROR: (Inaudible.)

23 THE COURT: All right. Thank you very much. Stay with
24 us.

25 Yes, sir.

1 MR. LINTON: My name is John Linton. Along with my law
2 partner, we represent the Defendants. My law firm is
3 Walker, Gressette, Freeman & Linton. The Defendants are
4 Chuck Giannone, Ms. Lynda Johnson and Sea Pines Resort.
5 Over here is Rob Bender, Steve Birdwell and (inaudible).

6 THE COURT: Anybody familiar with their law firm or
7 ever been represented by anybody in their firm or recognize
8 any of the parties?

9 Your juror number?

10 POTENTIAL JUROR: (Inaudible).

11 THE COURT: All right. Who do you know?

12 POTENTIAL JUROR: Rob Bender.

13 THE COURT: All right. How do you know him?

14 POTENTIAL JUROR: I used to work (inaudible).

15 THE COURT: And would that in any way affect your
16 ability to fair and impartial about this case?

17 POTENTIAL JUROR: Yes.

18 THE COURT: All right. You may be excused.

19 Yes, sir, your juror number?

20 POTENTIAL JUROR: (Inaudible).

21 THE COURT: Yes, sir.

22 POTENTIAL JUROR: I live in Sea Pines and I
23 (inaudible).

24 THE COURT: Would that in any way affect your ability
25 to be fair and impartial?

1 POTENTIAL JUROR: (Inaudible.)

2 THE COURT: You just have to say yes or no really.

3 POTENTIAL JUROR: (Inaudible).

4 THE COURT: Because you know him, you wouldn't be able
5 to be fair?

6 POTENTIAL JUROR: (Inaudible.)

7 THE COURT: Got it. You can be excused.

8 All right. I'm going to read you now a list of boards
9 and then I'm going to read you a list of potential witnesses
10 in this case. If you have ever served on any of these
11 boards or been a member of any of these boards, please stand
12 and indicate in what capacity. And then as to the
13 witnesses, if you know any of them or have any close
14 personal relationship with them, if you'll please just stand
15 and indicate how you are associated or affiliated with the
16 witness.

17 All right. The company is Bittmint, LLC, Harbour Town
18 Surf Shop, Sea Pines Resort, Sea Pines Real Estate,
19 Riverstone Group, LLC, Kiawah Island Golf Resort, Community
20 Services Associates, The Inn at Harbour Town, Sea Pines
21 Architectural Review Corp., Sea Pines Commercial
22 Architectural Review Corp. or White Hat Properties.

23 Yes, ma'am, your juror number?

24 POTENTIAL JUROR: (Inaudible). I worked in real
25 estate, I'm not an agent or anything like that, but

1 administrative assistant at a, I guess, agency that would be
2 working with Sea Pines Real Estate. I directly have not
3 worked with them.

4 THE COURT: Yes, ma'am.

5 POTENTIAL JUROR: (Inaudible).

6 THE COURT: All right. Would that affect your ability
7 to be fair and impartial? You have to say yes or no.

8 POTENTIAL JUROR: (Inaudible).

9 THE COURT: Okay. Thank you, ma'am.

10 Yes, sir.

11 POTENTIAL JUROR: (Inaudible).

12 THE COURT: Okay. I appreciate that. That won't
13 affect your ability to be fair and impartial, will it?

14 POTENTIAL JUROR: (Inaudible).

15 THE COURT: Have you, anyone in your family, your
16 friends or anyone close to you been a patron of Lynda's on
17 Calhoun or the former Harbour Town Beauty Shop?

18 (No response.)

19 THE COURT: There are none.

20 I'm going to read you a list of potential witnesses.

21 If you have any affiliation with any of these, if you'll
22 please just stand and indicate how you are affiliated.

23 Meredith Bannon, Robert Bender, Amir Bitton, Stephen

24 Birdwell, Charles Giannone, Lynda Johnson, Alon Mintz or

25 Michael Mogil.

1 Your juror number?

2 POTENTIAL JUROR: 47.

3 THE COURT: Yes, ma'am.

4 POTENTIAL JUROR: (Inaudible).

5 THE COURT: Is Michael Mogil an attorney?

6 POTENTIAL JUROR: (Inaudible).

7 THE COURT: How do you know Michael Mogil?

8 POTENTIAL JUROR: I did guardian ad litem work.

9 THE COURT: Okay. Would that affect your ability to be
10 fair and impartial in this case?

11 POTENTIAL JUROR: No, it would not.

12 THE COURT: Thank you very much.

13 Yes, sir, your juror number?

14 POTENTIAL JUROR: (Inaudible.)

15 THE COURT: I'm sorry, what's the last thing you said?

16 POTENTIAL JUROR: (Inaudible.)

17 THE COURT: All right. You may be excused. What was
18 your juror number again?

19 POTENTIAL JUROR: 141.

20 THE COURT: All right. 141 will be excused.

21 Yes, ma'am?

22 POTENTIAL JUROR: Juror 82, are you talking about
23 Meredith Bannon, the attorney?

24 THE COURT: I'm not sure.

25 POTENTIAL JUROR: She has done some closings for my

1 clients.

2 THE COURT: All right. Will that affect your ability
3 to be fair and impartial?

4 POTENTIAL JUROR: No.

5 THE COURT: Okay.

6 Yes, sir.

7 POTENTIAL JUROR: (Inaudible).

8 THE COURT: Would that affect your ability to be fair
9 and impartial in this case?

10 POTENTIAL JUROR: Yes, sir.

11 THE COURT: What's your juror number?

12 POTENTIAL JUROR: (Inaudible.)

13 THE COURT: All right, 87 will be excused.

14 Have you or anyone close to you ever appeared before
15 Maureen Coffey when she was the municipal judge for the Town
16 of Hilton Head Island?

17 (No response.)

18 THE COURT: Nobody wants to confess that one.

19 Does anyone here own real property? Does anyone here
20 own commercial property, I guess is the question?

21 Yes, ma'am, your juror number?

22 POTENTIAL JUROR: (Inaudible.)

23 THE COURT: All right. What do you own?

24 POTENTIAL JUROR: (Inaudible.)

25 THE COURT: All right, what is it?

1 POTENTIAL JUROR: It's a storage facility and also
2 (inaudible).

3 THE COURT: Would that affect you in any way to be fair
4 and impartial in this case?

5 POTENTIAL JUROR: No, sir.

6 THE COURT: Yes, ma'am?

7 POTENTIAL JUROR: I own (inaudible).

8 THE COURT: Okay. Would that affect your ability to be
9 fair and impartial?

10 POTENTIAL JUROR: (Inaudible.)

11 THE COURT: Thank you.

12 Yes, sir.

13 POTENTIAL JUROR: (Inaudible.)

14 THE COURT: All right. Thank you, sir.

15 Has anyone on the jury panel or anyone close to you
16 been in a real property dispute other than an issue relating
17 to a boundary dispute, foreclosure or tax matter? Meaning,
18 don't worry about those.

19 (No response.)

20 THE COURT: All right. I'll explain all that at the
21 end, number eight.

22 All right. The catchall question -- well, let me get
23 to the defendants.

24 All right, I'm going to read you another series of
25 potential witnesses. Obviously, some of these are going to

1 overlap, so I'm not going to cross them out, I'm just going
2 to read them all. Again, if you have any relation to any of
3 these, please just stand and indicate how you do.

4 Amir Bitton, looks like Alon Mintz, Lynda Johnson,
5 Charles Giannone, Steve Birdwell, Rob Bender, Cliff McMakin,
6 Michael Mogil, Simon Frazier, Meredith Bannon. If you've
7 already stood for any of those, obviously, don't stand
8 again.

9 (No response.)

10 THE COURT: There are none.

11 Has anyone here ever worked or had someone by blood or
12 marriage work for Bittmint, LLC, Harbour Town Surf Shop or
13 Sea Pines Resort?

14 (No response.)

15 THE COURT: Does anyone here have any firsthand
16 knowledge of the property known as Shops 6 and 8 of the
17 Mariners Way Horizontal Property Regime located in Harbour
18 Town within Sea Pines?

19 (No response.)

20 THE COURT: There are none.

21 Does anyone here regularly shop at either the Harbour
22 Town General Store or Harbour Town Surf Shop? If so, please
23 stand.

24 (No response.)

25 THE COURT: Have you or any member of your immediate

1 family ever lived in or owned property in Sea Pines
2 Plantation?

3 You already stood, yes, ma'am.

4 Yes, sir, juror number?

5 POTENTIAL JUROR: (Inaudible.)

6 THE COURT: All right. Thank you, sir.

7 Yes, ma'am?

8 POTENTIAL JUROR: Juror 60, I also (inaudible).

9 THE COURT: Thank you, ma'am.

10 Yes, ma'am?

11 POTENTIAL JUROR: (Inaudible.)

12 THE COURT: Would that affect your ability to be fair
13 and impartial in this case?

14 POTENTIAL JUROR: (Inaudible.)

15 THE COURT: All right. Juror number?

16 POTENTIAL JUROR: (Inaudible.)

17 THE COURT: Have you or any member of your immediate
18 family ever been a party to a lawsuit involving real
19 property dispute or covenants?

20 Yes, ma'am?

21 POTENTIAL JUROR: So I was named in a civil lawsuit for
22 breach of commercial building (inaudible), then it was
23 dismissed.

24 THE COURT: All right. Your juror number?

25 POTENTIAL JUROR: 82.

1 THE COURT: Would that affect your ability to be fair
2 and impartial in this case?

3 POTENTIAL JUROR: No.

4 THE COURT: Has any member or immediate family member
5 ever been a party to a lawsuit involving a right of first
6 refusal claim?

7 (No response.)

8 THE COURT: There are none.

9 Have you or any member of your immediate family ever
10 sold a piece of property to a party that exercised an option
11 of right of first refusal?

12 (No response.)

13 THE COURT: There are none.

14 Have you or any immediate family member ever been
15 represented by anyone in these firms: Coffey/Kubec, the
16 Mogil Law Firm or Walker, Gressette, Freeman & Linton, LLC?

17 (No response.)

18 THE COURT: There are none.

19 Have you or any member of your immediate family ever
20 owned commercial property and the business occupying that
21 commercial property? We heard from some already, but
22 anybody else?

23 (No response.)

24 THE COURT: All right. Does anyone else have any
25 reason that they'd like to share with the Court why they

1 could not be fair and impartial in this case and follow the
2 law which I charge to you at the end of the case? Now is
3 your time to speak up.

4 (No response.)

5 THE COURT: All right. There are none.

6 All right. Any issue as to the voir dire from the
7 Plaintiffs?

8 MR. KUBEC: No, sir.

9 THE COURT: Unfortunately, y'all know the computer
10 system is down so we're going to have to do it the old
11 school way. How long do you think it will take us?

12 (Inaudible.)

13 THE COURT: We'll be in recess. I make a joke and now
14 I realize it was a very bad joke because -- it's not really
15 a joke, it's just something that I tell everybody. The old
16 school way was we would take the sheets of paper and put
17 them in capsules and you had to get a blind person to come
18 and actually pull the jurors out, but we never had enough
19 blind people to do it so we got computers. And now look,
20 that's exactly how we're going to do it today. So my joke
21 is not that funny anymore.

22 All right. We'll be in recess.

23 (Short recess.)

24 (Inaudible.)

25 THE COURT: Yes, sir, take your time.

1 We're in 21, 22 and 23 for the alternates.

2 (Inaudible.)

3 THE COURT: Sorry, I didn't hear you.

4 (Inaudible).

5 THE COURT: Oh, sorry.

6 Ladies and gentlemen, when you hear your name called,
7 if you'll please just bring your belongings to these
8 bailiffs and they will have you seated in the jury box.

9 Madam Clerk.

10 THE CLERK: Juror No. 280, Juror No. 304, Juror 308,
11 Juror 14, Juror 73.

12 THE COURT: You said 73?

13 THE CLERK: 73. Alternate number two, 243.

14 THE COURT: All right, ladies and gentlemen of the
15 jury, that is our jury selection for this trial for this
16 week. So if you are not sitting in the jury box, you can
17 go. All right. Before you leave, two things: Number one,
18 make sure that you give all of your tags, take your badges
19 off and give them to the nice lady at the door. And number
20 two, as far as we're concerned, your employer, your loved
21 ones think you're at jury duty, so enjoy the rest of your
22 day.

23 (Remaining jurors excused.)

24 THE COURT: All right. Ladies and gentlemen of the
25 jury, thank y'all so very much for being here. You've been

1 selected for the trial of this case. These are excellent
2 lawyers and you'll be treated to a very good,
3 well-put-together trial.

4 Before we get started, just wanted to kind of give you
5 the lay of the land, just what you can kind of expect.
6 Everyone that you see here, these are our wonderful
7 bailiffs. You've seen them throughout the entire process
8 this morning. This is your wonderful clerk. She's duly
9 elected here in Beaufort. And these are our wonderful
10 clerks that will be here with us running the courtroom this
11 week.

12 This is Amy. Yes, she is actually standing up. And
13 she is my law clerk. You will see Amy and I communicate,
14 basically, throughout the entire trial. We pass notes back
15 and forth. You'll see her asking questions. Trust us, it
16 has nothing to do with this trial. So don't be worried
17 about us communicating with one other. It's normally like,
18 you know, what time is the jurors' lunch going to be here
19 or, by the way, my other assistant called and said somebody
20 needed to see me this afternoon, just little things like
21 that. So don't be concerned about that.

22 You'll see our wonderful deputies and you've already
23 been introduced to the parties.

24 So at this point in time, I'm going to allow you to go
25 to lunch until two o'clock. We have some other matters that

1 we need to take up outside of your presence. That will give
2 you plenty of time to get something to eat and let your
3 employer and loved ones know that you've been selected for
4 jury duty and get back.

5 Give me your name, sir?

6 THE JUROR: (Inaudible.)

7 THE COURT: I'm sorry?

8 THE JUROR: (Inaudible.)

9 THE COURT: All right. You are sitting in the
10 foreman's chair, so you will be appointed the foreman of the
11 jury, okay? What that means is -- if you don't want the
12 duty, I'll give it to somebody else.

13 So you're only duty at this point in time is to ensure
14 that no one talks about the case. Nobody knows anything
15 about the case. I don't want anybody Googling or doing
16 anything like that. With that being said, that's your only
17 duty at this point in time. I'll explain your duties later.
18 So just throughout the trial, just make sure that nobody
19 discusses when we take breaks and if there are any issues or
20 emergencies that arise, you just need to let me know, okay?
21 You can have a seat. Thank you very much.

22 At this point in time, I'm going to allow y'all to go
23 to lunch and we'll see you back here at two o'clock.

24 (Jurors were excused for lunch break.)

25 THE COURT: Obviously, we're not going to be in this

1 courtroom. We're going to be in the one adjacent where the
2 court monitor is. She's been on here the whole time and
3 she's been able to hear everything we've said. How long do
4 you think it will take you to argue your motions in limine?

5 (Inaudible.)

6 THE COURT: Well, you said 15 and you said an hour.

7 (Inaudible.)

8 THE COURT: All right. It's been a day already for the
9 staff, so let's go ahead and let everybody go eat and we'll
10 come back and we'll just plow through it. Is that a
11 problem? Let's give it an hour so we can go get something
12 to eat.

13 (Inaudible.)

14 THE COURT: I don't know if y'all brought anything or
15 whatnot.

16 We'll be next door, so if y'all want to go ahead and
17 get all your stuff over there. We'll say 1:10 to give y'all
18 enough time. Because y'all still have to get all your stuff
19 over there and all that stuff and I don't want to rush
20 anybody. We'll see you then.

21 (Lunch recess.)

22 THE COURT: All right. Where do y'all want to start?
23 Or where should we start?

24 MR. KUBEC: Your Honor, the Plaintiffs have three
25 motions in limine.

1 THE COURT: Okay.

2 MR. KUBEC: The Defendants have four, I believe.

3 THE COURT: All right.

4 MR. KUBEC: We'll start with the Plaintiffs if you
5 don't mind.

6 THE COURT: All right. For the record, I've read it,
7 all three of them obviously relating to Sea Pines. So I'm
8 familiar with the facts and what you're asking for, but I'll
9 be happy to hear your arguments.

10 MR. KUBEC: Your Honor, the first motion in limine,
11 essentially, is to either exclude evidence related to a
12 purported right of first refusal that Sea Pines believes
13 that it held. (Inaudible) of that evidence relating to the
14 right of first refusal to certain aspects in this case.

15 Our position in the first motion in limine is that Sea
16 Pines never ever, ever held this right of first refusal.
17 This right of first refusal was created back in 1973,
18 commercial covenants that were created by Lighthouse Beach
19 Company. Lighthouse Beach Company assigned right of first
20 refusal for a company called Sea Pines Plantation Company in
21 1977. The assignment created a personal assignment and the
22 assignment was made to Sea Pines Plantation Company, but did
23 not include the language successors and assigns. It was
24 directly just to Sea Pines Plantation Company.

25 Sea Pines Plantation Company is long dead. It went in

1 bankruptcy in 1987 and was dissolved by the State of South
2 Carolina in 1991. That information is available (inaudible)
3 judicial notice (inaudible), I believe.

4 The law is when right of first refusal becomes a
5 personal right, it's no longer assignable to anybody than
6 the person holding it. The company, when it dies, the right
7 dies with it. It can't be asserted by Sea Pines Resort, LLC
8 some 30 years after it died. The right of first refusal,
9 Your Honor, is a key part of this case, an essential part of
10 this case. Did they have the right to do it or did they
11 not? For five years, we've been trying to debate the
12 summary judgment motion (inaudible). And here we are asking
13 the jury a question.

14 We need to know at this point is it a valid right, can
15 they use it as a defense in this case, can they use it for
16 justification of Sea Pines doing what they did, which is,
17 basically, step in the shoes -- you know, my clients had a
18 contract with the Defendants by purchasing property in Sea
19 Pines. Sea Pines exercised its right of first refusal and
20 that's the basis of the case. And they have a full right to
21 claim the Defendants breached their contract because they
22 should have sold the property to us and Sea Pines interfered
23 with our contract. No right of first refusal based on
24 (inaudible). That's in a nutshell what we're trying to
25 seek. I don't think they have a valid right of first

1 refusal (inaudible).

2 THE COURT: All right.

3 MR. KUBEC: That's just on the first. There are other
4 issues.

5 THE COURT: All right. I'm going to allow them to
6 address that one.

7 MR. WALKER: Thank you, Your Honor. Trenholm Walker
8 here for the Defendants. Obviously, we have a marked
9 disagreement about the assignability of the right of first
10 refusal. If I might walk back to the source document
11 because the law says that if -- it's the source document
12 that dictates whether it's assignable or not. And here, the
13 very first document was the commercial covenants that were
14 put on this property in 1973, the Lighthouse covenants that
15 clearly and unequivocally contain the right of first
16 refusal.

17 The law that the Plaintiff relies on is an unreported
18 case in Iowa that involved a personal contract between an
19 individual to sell farm property and retain a house site.
20 And the Iowa Supreme Court said that the personal right of
21 repurchase on the house site or the right of first refusal
22 on the house site was not assignable.

23 Here, we're dealing with one of the first planned
24 communities in South Carolina. The covenants at Sea Pines,
25 like most covenants in planned communities have a repurchase

1 option to give the developer some control over the master
2 plan and to change as time goes on. The covenants in this
3 case clearly indicate they're not a personal contract. They
4 definitely reserve the right to itself and if --

5 Do we have the notebook of exhibits?

6 Your Honor, if I might approach?

7 THE COURT: Absolutely.

8 MR. WALKER: (Inaudible). In there, you will see the
9 tabs, Your Honor. Tab 44 is the declaration of rights, the
10 Lighthouse Beach Company. Do you have that, Your Honor?

11 THE COURT: Yes, sir.

12 MR. WALKER: All right. And then if you go to what is
13 Page 11, and it is marked at the RMC Office as 1153, you'll
14 see a Paragraph 19, that is the right of first refusal that
15 everybody is talking about. In the event the owners desire
16 to sell a commercial property site on Hilton Head Island,
17 together with its improvements, if any, then said property
18 shall be offered for sale to the company at the same price
19 at which the highest bonafide offer has been made for the
20 property and the said company shall have 30 days within
21 which to exercise its option to purchase. And it goes on a
22 little more with some more detail about it.

23 What's important, Your Honor, is that these are
24 restrictive covenants over the entire community, as I was
25 saying not personal, and are -- if we look at the document

1 intended to bind successors and assigns.

2 So if we could go back to the first page -- my
3 apologies for jumping around, but the recitals on the cover
4 page 1143, at the bottom state: Now, therefore, that
5 paragraph, Lighthouse Beach Company does hereby declare that
6 the provisions contained herein are rights, restrictions,
7 conditions and affirmative obligations, all constituting
8 covenants running with the land. Not personal, running with
9 the land.

10 Then when we go to Page 2, Your Honor, under the
11 definitions, the first definition, one, whenever used
12 herein, the term "the company" shall refer to Lighthouse
13 Beach Company, its successors and assigns. And the reason
14 I'm reading this is intent is important.

15 If you go to the top of the next page, that's RMC Page
16 1145, number three defines the term "owner". The term
17 "owner" when used in these covenants and restrictions shall
18 refer to both the original owner, builder and developer of
19 any tract, subdivision or lot of land as well as any
20 subsequent owner -- that's important, any subsequent owner
21 of a parcel of land upon which commercial uses are to be or
22 have been made and shall specifically include the owner of a
23 condominium dwelling within a structure located on such
24 property.

25 Earlier, we were looking at 19, which is the right of

1 first refusal itself. And that refers back to the
2 definition of owner. In the event the owner desires to sell
3 a commercial property. That's the trigger.

4 Then if we go to Page 15 of the covenants, which is Sea
5 Pines Bates stamp 0119 at the top under part Roman Numeral
6 II, conditions, limitations, duration and violations, the
7 first sentence starts out: All covenants, restrictions and
8 affirmative obligations set forth in this declaration shall
9 run with the land and shall be binding on all parties and
10 persons claiming under them to specifically include, but not
11 be limited to the successors and assigns of any of the
12 company.

13 And then there's some more applicable language, but
14 that, Your Honor, we would submit, clear intent that it was
15 not a personal right that was granted to Lighthouse, but a
16 right that Lighthouse imposed on the property for the
17 duration of the planned community.

18 Exhibit 45 is the assignment itself in 1977 and their
19 only, only argument is it didn't say left to Sea Pines
20 Plantation Company, its successors and assigns. The law
21 says you look at the documents to see what the intent was.
22 The intent was clearly to run with the land.

23 Not only was it the intent, but the United States
24 District Court of South Carolina, the United States
25 Bankruptcy Court in 1987 and 1988, specifically, looked at

1 all these rights and approved the assignment of those rights
2 out of the bankruptcy court. So not only are they trying to
3 say that it doesn't run with the land, but the Plaintiffs
4 are collaterally attacking the orders of the bankruptcy
5 court that were approved by Judge Blatt and Judge Thurmond.
6 And those are at the back of -- I think those at the back of
7 Exhibit 46 -- at the back of 47, Your Honor. It's actually
8 Page 3, it's the -- Page 4 and 5 of Exhibit 47, Sea Pines
9 supplemental 0047 and 0048.

10 A critical component of the reemergence of entities
11 from bankruptcy and the reorganization proceeding was the
12 assignment of the developer rights and the court approved
13 it. If there was a challenge to it or somebody wanted to
14 raise a challenge to it, the time was then, not now. So we
15 have a second reason, which is that the federal court has
16 approved the assignment and approved their ability to be
17 assigned.

18 For those reasons, Your Honor, we submit to the Court
19 that the Motion in Limine to exclude any reference to the
20 right of first refusal because it's not assigned should be
21 overruled. We'd also point out, even as Plaintiffs' counsel
22 conceded, that it is pertinent to the defense of
23 justification. They have to prove absence of justification
24 of the alleged tortious interference and here, this is the
25 basis for the conduct that was taken. It was not

1 justification, it was the exercise of a legal right. Thank
2 you, Your Honor.

3 THE COURT: Thank you very much.

4 All right. What's your second argument?

5 MR. KUBEC: May I reply to that?

6 THE COURT: Sure.

7 MR. KUBEC: First of all, counsel says that the case
8 that we rely on is (inaudible) several cases also hold our
9 position throughout the United States. There are cases in
10 Iowa, Nebraska, working on contracts. It's, basically, well
11 known law throughout the United States that the rights of
12 first refusal are presumably personal and are not ordinarily
13 construed as transferrable or assignable unless a particular
14 clause granting the right refers to successors or assigns or
15 the instrument otherwise clearly shows that the right was
16 intended to be transferrable or assignable. Several
17 policies (inaudible) widespread presumption about the right
18 of first refusal are not assignable. The operators
19 (inaudible) unlike options that do so in a undefined
20 (inaudible) way.

21 What you look at, not the covenants that he showed you,
22 the '73 covenants, what you look at is the second exhibit
23 that he showed you, which is our request for additional
24 (inaudible) number two, I believe. And you look at that
25 language, that's the one about Sea Pines Company. They're

1 now the holder of the right. And that right says: It is
2 granted unto Sea Pines Plantation Company, not to Sea Pines
3 Planation Company and to anyone else. It is to Sea Pines
4 Company at that time in 1977. They're the holder of the
5 right. They can't transfer the right. They're dead. The
6 right died with them. The right died with them.

7 Everything he said about the bankruptcy court, we can
8 contest that. We can contest that for hours and hours and
9 hours. We're not going to do that before a jury, we're
10 going to do that through request for judicial notice.
11 Because that's not -- we don't believe that's an accurate
12 statement. That right died in bankruptcy and was never
13 accepted (inaudible). It was executory contract, that was
14 never accepted (inaudible) and it never came out like that.
15 We've given you an extensive, voluminous document here
16 called request for judicial notice (inaudible).

17 So, Your Honor, that right died, that right died in
18 1977. It died with Sea Pines Plantation.

19 THE COURT: All right. What's the second one?

20 MR. KUBEC: The second one?

21 THE COURT: Yes, sir.

22 MR. KUBEC: Now, this is our second Motion in Limine.
23 Again, it deals with the right of first refusal. This one
24 deals with the rule against perpetuities. And counsel
25 showed the record was created, this is Paragraph 19, in

1 1973. It was created in 1973. It was first exercised in
2 this case in, let's see -- I believe it was 2016, it was May
3 2nd of 2016 -- I'm sorry, May 2nd, 2017. So the right was
4 created in 1973, it was exercised 44 years later in May of
5 2017.

6 But the right of first refusal is a nonvested
7 contingent right. The only case in South Carolina holds
8 that right of first refusal violates the common law rule
9 against perpetuities because it is a nonvested contingent
10 right that may never be exercised. So it falls outside the
11 rule and it's not -- it's void, it's void ab initio. It
12 doesn't exist. There's one case in South Carolina that's
13 directly on point and that case is Webb V. Reames. We've
14 cited it in our Motion in Limine.

15 To argue now that they have this unfettered right to
16 exercise from here through the end of time directly violated
17 applying the rule against perpetuities, Webb V. Reames is
18 right on point. And bear with me one second. In Webb, the
19 court held that the right at stake, which is you, basically,
20 have one person who sold real property to the buyer. Seller
21 holds back a right to repurchase the property at any time by
22 paying the amount of money to the buyer.

23 The court said no, that's an invalid right of first
24 refusal. And the reason why is that -- the intention of
25 whether or not it was valid and the court said we agree with

1 Webb's contention challenging the validity of the right of
2 first refusal. The preemptive right is a contingent,
3 nonvested interest in that the grantee or the grantee's
4 heirs might never choose to sell the property. It is not an
5 interest conditioned on an event certain to occur. Because
6 the right or interest was one that might not vest either
7 within a life in being at the time of the creation of the
8 interest or until later than 21 years after, the interest
9 violates the rule against perpetuities and is, therefore,
10 void. It's the exact same circumstances in this case.

11 Now, the Defendants are going to argue well, the common
12 law doesn't apply. You've got to look to the statutory law
13 (inaudible) 1987. But there's exceptions, there's specific
14 exception in the statutory law. It doesn't apply at all to
15 this case because these are commercial nondonative deals.
16 The statutory rule against perpetuities does not apply to
17 commercial nondonative deals.

18 So then you have to go back and see what the common
19 laws says. And the only case in South Carolina, the only
20 law on point says right of first refusals are not valid
21 because they violate the rule against perpetuities because
22 they don't have any limitations. That's exactly the problem
23 in this case.

24 So again, the second Motion in Limine, right of first
25 refusal is never valid.

1 THE COURT: All right.

2 MR. LINTON: Thank you, Your Honor. John Linton on
3 behalf of the Defendant. Under the rule of perpetuities --
4 Your Honor, the Plaintiffs' argument is that the common law
5 rule against perpetuities applies in this case. Section
6 20-7-680 says: This chapter supercedes the common law rule
7 against perpetuities. That's it. That's the whole code
8 section.

9 It goes on to explain that the statutory rule is you
10 wait and see for 90 years and see if anything happens that
11 would violate it. We have, at least, 40 years before this
12 issue would be addressed. Actually, it also says if there
13 is an issue, the court can reform the document to say it's
14 got 90 years for this right to be exercised. Common law
15 does not apply.

16 The Plaintiffs then argue that because there's an
17 exception in the statute for nondonative transfers that that
18 means that the common law applies to nondonative transfers.
19 The statute says it supercedes all of the common law.
20 Supercedes means it's done, it's over.

21 And then we went and took a look at -- and this is
22 attached to the memo -- the uniform commission on state law,
23 the people that wrote the model statute here, what they had
24 to say about this exception for nondonative transfers. They
25 said, The rule against perpetuities is an inappropriate

1 instrument of social policy to use as a control on those
2 type of arrangements. A nonvested property interest power
3 of appointment or other arrangement excluded by the
4 statutory rule is not subject to any rule against
5 perpetuities, statutory or otherwise.

6 So point blank, the common law rule does not apply.
7 There are cases in Colorado and other places finding this.
8 There's no exception here.

9 Webb vs. Reames, the case that the Plaintiffs
10 mentioned, is a South Carolina case. It doesn't address the
11 statute. It was a personal right of first refusal, not
12 anything in covenants like what we have here. And
13 importantly, because this happens with court sometimes, you
14 know, the facts can dictate a decision. And there, somebody
15 had a right of first refusal, they sold the property for
16 \$64, kept a right to buy it back for \$64 any time that it
17 was sold. Here, the right has to do with executing on a
18 contract at the market price that the contract (inaudible),
19 it's a pretty big difference.

20 Our court has said in Queens Grant case that was in
21 2006, the court noted that there are many jurisdictions
22 interpreting covenants like this that have ruled that no
23 rule against perpetuities is applicable or violated. And in
24 that, after citing those, they cited the uniform statute and
25 made a note of it. That's the last time it's been

1 addressed.

2 So we would ask that the Plaintiffs' motion be denied.
3 The rule against perpetuities has nothing to do with this
4 case.

5 THE COURT: All right.

6 MR. KUBEC: May I have five minutes to address that,
7 Your Honor?

8 THE COURT: Sure.

9 MR. KUBEC: Webb V. Reames is a case that was decided
10 after (inaudible) statutory rule against perpetuities. It
11 specifically references the statutory rule against
12 perpetuities. There are two cases outside this jurisdiction
13 directly on point that address whether or not common law
14 survives (inaudible) rule against perpetuities. One is Buck
15 V. (Inaudible).

16 And the same exact arguments made by Defendants in this
17 case as in the Buck case. The court said Indiana has
18 adopted (inaudible) statutory rule against perpetuities.
19 However, the statute limits the applicability of uniform
20 rules and specifically provides the chapter does not apply
21 to nonvested property interest arising out of a nondonative
22 transfer.

23 Here, the Bucks grant of right to purchase the
24 additional 14 acres of noninvested property interest arising
25 out of a nondonative transfer. As a result, the uniform

1 rule is inapplicable to the preemptive right provision.
2 Nonetheless, the Indiana common law rule against
3 perpetuities is applicable and requires that (inaudible) 21
4 years and nine months.

5 Parties in that case went on to say, include the same
6 argument that says: Well, if the word supercede means
7 common law exist anymore. The court said no, that's not the
8 case. Common law continues to exist. Same holding in the
9 case New Bar Partnership vs. Martin, a North Carolina case
10 from 2012, 729 S.E.2d 675. Both of them support our
11 position that common law survives. It was not -- even if
12 they use the word supercede, it doesn't mean common law goes
13 away. This is a nondonative transfer. The statutory rule
14 doesn't apply (inaudible).

15 THE COURT: All right. What's your third one?

16 MR. KUBEC: Third Motion in Limine, Your Honor, there's
17 a 40-year statute of repose. And again, we're claiming that
18 -- bear with me a second. South Carolina Code Section
19 15-3-380 provides: No action shall be commenced in any case
20 for the recovery of real property or for any interest
21 therein against a person in possession or under a claim of
22 title by virtue of a written instrument unless that person
23 claiming his ancestor or grantor was actually in the
24 possession of the same or a part of within 40 years of the
25 commencement of such action.

1 Essentially, what we're saying in this one, Your Honor,
2 is Sea Pines Resort and none of its predecessors has been in
3 possession of this property (inaudible). By virtue of just
4 being in this action, they can't -- this is a right that,
5 basically, says -- this is a statute of repose if I haven't
6 been in possession of that property for 40 years, I cannot
7 (inaudible). In a nutshell, that's what it is. So we're
8 seeking to exclude again the right of first refusal being
9 used by them as (inaudible).

10 THE COURT: All right.

11 MR. WALKER: Your Honor, may I approach? We actually
12 have a very short memo on this.

13 THE COURT: Absolutely.

14 MR. WALKER: And the statute.

15 The fundamental problem with this argument is that
16 15-3-380 is a statute of limitations that deals with ouster
17 act. If a plaintiff claims under color of title, title to
18 the property and somebody has been on that property for 40
19 years, they've adversely possessed it, the plaintiff has not
20 been on the property for 40 years, then the plaintiff can't
21 bring the action. It's a defense. It's not a statute that
22 has any application here, no more than any other statute of
23 limitations. This is not an ouster case.

24 This is a case for breach of contract where these two
25 plaintiffs say that these two individual defendants breached

1 their purchase contract and that Sea Pines interfered with
2 it. It's not ouster. We aren't trying to get them out of
3 their units. We purchased the property, Sea Pines purchased
4 it, but we've honored their possession. They haven't been
5 in possession for 40 years. This has nothing to do with
6 this type of case. If they were possessing it for 40 years
7 and not paying rent and we claimed that we have title and we
8 went to dispossess them, but we haven't been in the property
9 for 40 years and it was our action against them, they could
10 raise the statute of limitations.

11 We have a case that we cite, the Sutton case from 1901
12 proven, old law, good law that the statute cannot be used as
13 a sword, it's purely a shield and it's referring to the
14 first edition of this statute. So we don't know where
15 they're coming from, but it's not a reason to exclude
16 reference to the right of first refusal in this case. Thank
17 you, Your Honor.

18 THE COURT: All right. Let's discuss the -- real
19 briefly before I make rulings on those, let's discuss this
20 judicial notice notebook. That's the remaining thing that
21 we need to discuss before we get started. Let me take a
22 look at it.

23 Basically, you're asking me to take judicial notice of
24 I guess what's in Exhibit A, which is what you discussed
25 previously, correct? What are you specifically asking me to

1 take judicial notice of?

2 MR. KUBEC: One is the right of first refusal
3 (inaudible) Paragraph 19.

4 THE COURT: Do you have any objection to that?

5 MR. WALKER: Your Honor, our objection is broader than
6 that. They're asking -- we understand it and we hadn't
7 heard the argument. They're asking the Court to take
8 judicial notice of certain documents and court orders and
9 then they want to argue against the substance of those.
10 They say the right of first refusal was not applicably
11 transferred even though it says it was transferred. The
12 critical component under Rule 201 of judicial notice is they
13 can't contradict it.

14 Another concern we have is whether they're trying to
15 get the documents in evidence or they're trying to have
16 notice as specific fact. If it's notice as specific fact,
17 then those facts have to be taken as true. The orders in
18 the bankruptcy court would have to be taken as true. And
19 the Court charges the jury on that.

20 What they're trying to do is they never named an
21 expert, so they don't have an expert to come in and testify
22 to any of these documents. I don't know where they're
23 going. I suspect they're just going to argue to the Court
24 or -- and this is something that the Court can develop with
25 opposing counsel, are they asking the Court to make specific

1 statements to the jury as to certain facts contained in
2 these documents? The facts have to be not subject to
3 reasonable dispute before we can get into the rules.

4 But, yes, we do object to taking judicial notice
5 without knowing specifically what facts in all these
6 documents they're seeking judicial notice of.

7 THE COURT: All right.

8 MR. KUBEC: Yes, Your Honor. We're seeking that
9 instructions to the jury (inaudible) and we realize that
10 (inaudible), but it's detailed in that most of these are
11 engine documents, most of them are court orders. All of
12 them are certified. And foundationally, we believe they're
13 all proper. We believe there's no hearsay exception. And
14 we believe that the Court is empowered to take judicial
15 notice and convey them to the jury. We didn't want to come
16 in here and belabor the jury going through court bankruptcy
17 orders from 1987 and trying to put them before the jury. We
18 thought we could do it with judicial notice (inaudible).

19 THE COURT: Yeah, but, I mean, I'm very, very reluctant
20 to get involved in anything that has to do with the facts of
21 the case. I mean, if you want to -- I'm just trying to
22 think of an alternative way that you could do it, again, not
23 to just belabor it before the jury, but I just can't come up
24 with anything.

25 But no, I'm not going to say these facts are accurate

1 and true because that's me getting involved in the facts of
2 the case and, obviously, I'm not -- they're the sole
3 determination of the facts and I'm the sole determination on
4 the law, so, obviously, that's the big distinction that we
5 constantly talk to them about, so I am very reluctant to get
6 involved in the facts whatsoever, so I'm not going to take
7 judicial notice of any documents. If there's documents that
8 need to be put in, if we want to fight about each and every
9 one of them at that time, I'm happy to do it.

10 Anything else?

11 MR. LINTON: Your Honor, we have our four Motions in
12 Limine as well.

13 THE COURT: All right. What are yours?

14 MR. LINTON: So our first two are as to certain damages
15 claimed by the Plaintiffs. The third one has to do with
16 motion to exclude opinion testimony because they haven't
17 named an expert, and whether a covenant is legally
18 enforceable or whether assignment is legally enforceable is
19 not the subject of lay opinion testimony, is the third one.

20 And the fourth one is the prior owner, two owners ago
21 of these two units was Chuck and Lynda's mother. And from
22 some of the deposition testimony, we think that the
23 Plaintiffs may try to testify that they talked to their
24 mother and she really wanted to sell it to them and try to
25 make it look to the jury like Sea Pines did something

1 against her wishes. And under the dead man's statute and
2 the hearsay rules, you have an interest in litigation, you
3 can't show up and testify as to a conversation with someone
4 who's deceased. So that's that one.

5 THE COURT: All right. What's number one and two,
6 damages issue?

7 MR. LINTON: Number one is there are two plaintiffs,
8 the Surf Shop damages. So number one, they claim damages
9 that they would have decreased the rent. So if Bittmint had
10 been able to buy the property, they say they would have
11 cancelled the lease and rented the Surf Shop for less. And
12 their lawyers produced a spreadsheet that did an analysis of
13 what the rent would look like and what the expenses would be
14 and what the mortgage would be to come up with a damages
15 number.

16 And Alon Mintz is the only witness identified for them
17 to talk about these damages, the lease differential
18 analysis. I asked him in his deposition, Did you have a
19 role in preparing this? He said, No. Did you give them any
20 information? He said, Maybe what the loan would have been.
21 And I asked him about the other assumptions.

22 There's an assumption in there that the mortgage would
23 be 20 years. He said he didn't know if it would be 20 or 30
24 years. They didn't have any loan commitment. He didn't
25 know exactly what the interest rate would be. He didn't

1 have any personal knowledge of the damages analysis.

2 So because he had no personal knowledge of the damages
3 analysis, it's completely hearsay prepared by his lawyers
4 and not by a witness. And there's no factual basis and it's
5 speculative based on his testimony that those assumptions
6 were assumptions that his lawyer made. We would move to
7 exclude in limine that lease differential analysis.

8 The second element of their damages is that the Surf
9 Shop -- and I think the Surf Shop and Bittmint also claim
10 the same damages, that they were going to buy certain food
11 service equipment and have a food service business. And
12 they made some improvements to join the three units
13 together. And they claim those as damages, even though they
14 did move the wall and they did buy some food service
15 equipment. And I asked them when they did that and they
16 said all before we were under contract to buy the property.
17 So they're claiming damages for relying on the fact that
18 they might have been able to buy the property.

19 And so -- I mean, I asked them, When did you buy all
20 that? Back in January. So it was before you went under
21 contract to purchase the property? Correct. So they
22 couldn't have incurred those damages in reliance on the
23 contract they're seeking to test.

24 The third is both Harbour Town Surf Shop and Bittmint,
25 whose members are Mr. Mintz and Mr. Bitton, claim emotional

1 damages in this case. They both said they want \$25,000 in
2 emotional damages for the suffering that the lawsuit has
3 caused them. They are not parties to the case. There's no
4 cause of action that would lead to a recovery of emotional
5 damages. We would ask that those claims be excluded as
6 well.

7 The fourth is Harbour Town Surf Shop claims that had it
8 done this food service business, it would have made more
9 money, so they would like to ask for some damages. I think
10 they said \$50,000 sounded good to them, that they would have
11 made had they started selling food service in there.

12 Mr. Mintz is the only person, as I said, identified to
13 talk about this. I asked him if he had done any sort of
14 analysis. He said, No, I don't have it currently analyzed.
15 Then he even told me that he doesn't have the experience to
16 create an analysis of what it would cost. I asked him about
17 how much food cost, how much you charge and how you would
18 put together a damages analysis that would not be
19 speculative. He said he didn't even know how to do that.
20 So there's no witness to testify about that and those should
21 be excluded.

22 Fifth, on Harbour Town Surf Shop is that they claim
23 damages that they have been distracted by the lawsuit so
24 they ordered too much inventory during one year of the
25 lawsuit. They're going to ask the jury to return a verdict,

1 give them damages for ordering too much inventory they
2 couldn't sell during this lawsuit. It just has nothing to
3 do with the case. Distraction of principles in an LLC is
4 not recoverable.

5 So that's all with the Harbour Town Surf Shop.
6 Bittmint -- and these overlap and will be much faster -- are
7 the alleged damages for opportunity cost defined by the
8 benefits of the bargain, and those are speculative. What
9 Bittmint says, and this is the same lease differential
10 analysis I was talking about, the new lease that Bittmint
11 says it was going to have with Harbour Town Surf Shop they
12 say would be exactly all of the expenses, whatever those
13 were, and they have no idea what they would be, plus \$500 a
14 month. So Bittmint should get \$500 a month in damages.

15 And I said, Well, how much rent was Bittmint going to
16 charge? I don't know. It might have been \$2500 if the
17 expenses were 2,000, might have been 7500. They don't have
18 anyone, no witness who has knowledge who can say what the
19 rent was going to be and what those damages would be.

20 It's very clear under South Carolina law that damages
21 cannot be speculative. You don't have to be down to the
22 penny, but you do have to have some reasonable basis to ask
23 a jury to return a verdict in your favor. You can't just
24 say what you wanted to do or what you might have done. You
25 have to prepare an analysis.

1 We've already talked about the food service equipment.
2 Bittmint claims that damage as well. We've already talked
3 about the distraction of the principle managers.

4 That's it on the first two Motions in Limine. And I
5 think I, basically, covered the fourth on the dead man's
6 statute. And Mr. Walker is going to address the third on
7 the opinion testimony. It sort of goes with these other
8 things that we were talking about he's covering.

9 THE COURT: All right.

10 MR. WALKER: Your Honor, on the opinion testimony, I
11 don't know that you need to hear all that because we can
12 take it up in the testimony. At this point, they've not
13 named an expert. They do have a lawyer who will testify as
14 a fact witness. And we were anticipating that somebody
15 might want to talk about these covenants and their legal
16 effect, perhaps, it's the individual for the members or the
17 lawyer, but none are experts. And our motion was to have
18 the Court to instruct not to render opinions, but let's wait
19 and see if anybody tries to do that. We can take that up
20 then.

21 THE COURT: Fair enough.

22 Yes, sir.

23 MR. KUBEC: Thank you, Your Honor. In their argument
24 with regard to our client's damages, particularly with lease
25 differential analysis, they're asking you -- basically, this

1 is going to come down to the (inaudible).

2 THE COURT: The only concern I have -- and I don't
3 disagree with you, but is your witness going to get up there
4 and testify about this lease differential analysis that was
5 done?

6 MR. KUBEC: He's going to testify what his damages are
7 and how (inaudible). He's going to say hey, Your Honor, we
8 had an agreement and my agreement was I was going to pay --
9 Bittmint was going to receive \$500 more from Harbour Town
10 Surf Shop. That was our deal. That was our agreement. It
11 would be 500 more dollars than what we paid for a mortgage
12 on the property. That's going to be the testimony. It's
13 pretty simple.

14 The reason they couldn't answer the question four years
15 ago in depositions is -- it's just -- you have to ask the
16 right questions. Had they asked did you know what the
17 mortgage was going to be (inaudible). I can tell you what I
18 think the mortgage could have been in 2017 had this gone
19 through and you add \$500 to it, and that's what I would have
20 paid rent. And it would have gone to my client, Bittmint,
21 \$500. They would have gotten \$500 more. Again, it's a
22 weight and credibility issue as to what the calculations
23 are.

24 THE COURT: All right.

25 MR. KUBEC: Now, as regards to other damages, he

1 mentioned the emotional distress. We're not going to seek
2 emotional distress. (Inaudible). We also are not going to
3 seek damages for construction expenses or walls that -- what
4 happened was my client moved into two -- rented two pieces
5 of property and they eventually bought the property. They
6 took down the wall between the two properties. They did
7 this before the contract. And we're not going to seek
8 (inaudible).

9 THE COURT: All right.

10 MR. KUBEC: And we're not going to seek (inaudible).

11 THE COURT: All right.

12 Well, we're just going to -- I think we've somewhat
13 resolved most of y'all's Motions in Limine. We're just
14 going to have to see how the testimony plays out.

15 As for the Motions in Limine on behalf of the Plaintiff
16 as to exclude any discussion of evidence of right of first
17 refusal, to be quite honest with you, I think that's pretty
18 much the crux of the case. So, obviously, I'm going to deny
19 that and allow that as a question of fact for the jury and
20 I'm going to allow them to take that into consideration.

21 Anything else before we get started? Y'all ready to
22 go?

23 MR. KUBEC: One more thing, Your Honor.

24 THE COURT: Sure.

25 MR. KUBEC: I do request or we reserve out ability to

1 revisit (inaudible).

2 THE COURT: One hundred percent, not a problem. If you
3 have any issues, again, we'll just take it up one by one.

4 MR. KUBEC: Thank you.

5 THE COURT: You're more than welcome.

6 Bring them out.

7 THE BAILIFF: The jury is entering the courtroom, Your
8 Honor.

9 THE COURT: Thank you, sir.

10 (The jury enters the courtroom at 2:20 p.m.)

11 THE BAILIFF: The jury is seated, Your Honor.

12 THE COURT: Thank you, sir.

13 All right. Madam Clerk.

14 (Jury is sworn.)

15 THE COURT: All right. Ladies and gentlemen, thank you
16 very much for being on time. We took up a couple extra
17 things so we could get started here today. As I indicated
18 before, you don't know anything about the case, so when we
19 take recesses, if you please just would not discuss the case
20 that would be appreciative.

21 Mr. Foreman, I charge you to make sure that doesn't
22 transpire.

23 At this point in time, I'm going to allow the attorneys
24 to give what's called an opening statement. An opening
25 statement is exactly that. It's a statement indicating what

1 they believe that the evidence is going to show in this
2 case. It's not to be considered by you as evidence, it's
3 simply just what -- it's, basically, just the cliff notes as
4 to what they believe the entire trial is going to show.

5 We'll start with the Plaintiff.

6 OPENING STATEMENT BY MR. KUBEC:

7 MR. KUBEC: Your Honor, counsel, ladies and gentlemen
8 of the jury, I want you to (inaudible), but I want you to
9 imagine that you're a young adult, you're an entrepreneur.
10 You're from another country. You decide you want to come to
11 the United States and live. You want to come over here, you
12 want to raise a family, you want to lay down roots, you want
13 to make this your country.

14 So you settle down in Beaufort County, South Carolina
15 and you establish a life. You learn the culture. You work
16 hard to earn a living. You start a business, you're a
17 businessman. You're an entrepreneur. Several years of
18 working hard and, suddenly, your first dream is realized,
19 you open your first business. You open a few more
20 businesses. (Inaudible.) The one line of business
21 (inaudible) is clothing business. You're selling resort
22 wear, surf shop wear and you're doing in Bluffton, Hilton
23 Head Island, South Carolina, where you're catering to the
24 people who live here and to also tourists.

25 Now, I don't know, but there's a lot of perks on Hilton

1 Head Island. There's a lot of perks. So it's a wonderful
2 piece of business for you to have. But there's one
3 particular spot that you've got your eye on. It's kind of
4 the gem of all places on Hilton Head Island, Harbour Town.
5 And you want to open a shop in Harbour Town.

6 So you do what you do best, you work it, you work hard
7 and you're looking for a spot. And finally, you find a spot
8 to lease in Harbour Town. And this is a depiction of it,
9 simplistic, I'm going to show it to you. It's called Surf
10 Shop 6 in Harbour Town, South Carolina. And you lease the
11 shop. First lucky break. This business is good.

12 And meanwhile, in 2010 during the recession period,
13 you're working hard to make a living and you're doing okay,
14 it's not great, but you get through it, you get through the
15 recession. You say to yourself, this is fantastic, I've got
16 a little piece of Harbour Town that I'm renting. I rent
17 some other commercial buildings (inaudible), but there's one
18 thing that's missing. And what's missing is I don't own it.
19 I don't own it. But I really want to get it. I want to own
20 a building in Harbour Town. That's where I want to run a
21 business. That shows a sense of permanency, (inaudible) and
22 that's I've made it.

23 So you do what you do best. You get back on the
24 streets, you start walking the neighborhoods and you talk to
25 all the commercial property owners in Sea Pines and you let

1 everybody know that if anything comes out, I'm interested.
2 Lo and behold, 2015, this property comes on the market and
3 it happens to be right next to it, the general store. And
4 you buy it. This is your dream. I've got a little bit of
5 real estate down on Hilton Head, Harbour Town, I'm on my
6 way. Just about there. Just about there.

7 I'm not there yet. You know why, because I've been
8 using this shop and also this shop for a number of years.
9 And I'm paying a lot of money to the people who own this
10 shop. I want to get that property. I want to own this and
11 I will have my own little stretch in Harbour Town. It's
12 mine, I own it and I can use this to do whatever I like. I
13 can give it to my family one day.

14 So what do you do, you approach the owners of the shop
15 and you say, Can I buy this property from you? I've been
16 using it for years. I'd like to buy it. And they agree,
17 they agree. You work out a great deal with them, a good
18 price and they're going to sell it to you. You sign the
19 contract and you couldn't be happier. I'm going to have all
20 this property now in Harbour Town. Got my (inaudible). I'm
21 just about there. I've got it.

22 So you sign a contract, you're ready to go. You're
23 moving towards closing. And all of a sudden, you, the
24 entrepreneur, the person who thinks you've made it well,
25 somebody steps in, a big business steps in and says you know

1 what, we're not going to let you buy those shops. You know
2 why? You know why? Because we think it's a good deal.
3 Thank you very much for negotiating a great deal, but we're
4 going to come and buy it. You know why? We think we have a
5 right to do that. We have something called a right of first
6 refusal. This is an archaic, nebulous right created years
7 and years and years ago and we think we have that right.
8 Sorry, little guy, you're out of luck. We're taking this
9 property. We're buying it and not you.

10 And you being what you are, (inaudible) entrepreneur,
11 say, I'm not taking that. I don't understand it. So you go
12 to the owners and you say owners, we want you to sell us
13 that shop. We have a contract. The owners, they don't want
14 to mess with (inaudible). They say, no, we're going to sell
15 it to the business, you're out of luck.

16 Ladies and gentlemen, that's why we're here today.
17 That's why we're here today because the Defendants in this
18 case did not sell this property to my clients. And the
19 other Defendants, the big business (inaudible).

20 My name is Ed Kubec and I, along with my partner,
21 Maureen Coffey, represent the Plaintiffs. The Plaintiffs
22 are two corporate entities, Bittmint, LLC and Harbour Town
23 Surf Shop. The people who I've been talking about, the two
24 protagonists of my story are Mr. Mintz, Alon Mintz, and Mr.
25 Bitton, Amir Bitton, two entrepreneurs, two business owners

1 that came here to live the dream. And the facts are going
2 to show that the Defendants, Mr. Charles Giannone and Ms.
3 Lynda Johnson, did not sell that property (inaudible), they
4 sold it to the other Defendant, Sea Pines Resort. Sea Pines
5 Resort is a big business that came in and took that
6 property.

7 Specifically, the facts are going to show that in 2010,
8 Harbour Town Surf Shop, one of the Plaintiffs, which I'm
9 going to call Surf Shop to make it simple, Harbour Town Surf
10 Shop, which is owned by these two gentlemen, it's a 50/50
11 (inaudible), rented this shop number 6. This is the shop I
12 was talking about down in Harbour Town (inaudible).

13 They rented that shop from a woman named Lorraine
14 Giannone. Ms. Giannone is the parent of Charles Giannone
15 and Lynda Johnson. She also owned shop 8. Well, my guy set
16 up shop in there, opened up a surf shop. (Inaudible). Ms.
17 Giannone was working in shop eight where she had a hair
18 salon. Well, five years later, my client and Ms. Giannone
19 decided to cut a deal. She wanted to get out of Sea Pines,
20 move on (inaudible). By 2015, (inaudible).

21 At this point, my clients started negotiating with both
22 Ms. Giannone and her daughter, Lynda Johnson. They said
23 hey, we'd like to buy the property. Then they also found
24 out that shop five was available, which is the Harbour Town
25 General Store.

1 So in 2016, Bittmint, which is another company owned by
2 these gentlemen. They have two companies, one is Bittmint,
3 which is the Plaintiff, they own the real estate. Harbour
4 Town Surf Shop, the other Plaintiff, they manage the shop.
5 So what happened at that time, Bittmint bought the property
6 for \$900,000 (inaudible) and rented it to Harbour Town Surf
7 Shop. Harbour Town Surf Shop was now working with
8 (inaudible).

9 Let's fast-forward now. Fast-forward to 2016.
10 Unfortunately, Ms. Giannone passed away in August of 2016.
11 At this point, my client approached Ms. Johnson and said,
12 Ms. Johnson, by the way, (inaudible). She's the one who had
13 a relationship with my clients. So they negotiate. At
14 first, Ms. Johnson wants a lot of money. She wants \$920,000
15 for shop six and shop eight. And that price, my client is
16 just a good negotiator, they work it down. They work it
17 down to six and a quarter, but, eventually, they settle on a
18 number, \$580,000. Ms. Johnson agrees that we're going to
19 sell that property for \$580,000. And that agreement was
20 reached the end of January 2017. Mind you, all this is
21 taking place five years ago. Five years ago, we've been
22 waiting to get here and tell you that.

23 So on January 13th, 2017, the parties enter what's --
24 they sign a piece of paper called a letter of intent. This
25 is what we're going to do. We're going to sell this

1 property to Bittmint for \$580,000. Ms. Johnson signs that
2 piece of paper.

3 The same day she signs that piece of paper, January
4 31st, 2017, she talked to Mr. Bender, the gentleman over
5 there (inaudible). And says, Mr. Bender, I have an offer
6 from Bittmint from the tenants of the Surf Shop to buy the
7 property for \$580,000. Mr. Bender, at that point,
8 communicates that to the person sitting next to him, Mr.
9 Birdwell, who's the president, in an e-mail (inaudible).
10 Mr. Bender then does a financial analysis of what the deal
11 would be worth, piece of paper saying different scenarios.
12 It's an analysis. He goes back to Mr. Birdwell on February
13 1st.

14 For the next 60 days, Sea Pines Resorts does nothing.
15 Nothing. On March 17th, Bittmint, Mr. Mintz and Mr. Bitton,
16 sign a contract with Ms. Johnson and Mr. Giannone to sell
17 the property. First, we had a letter of intent, then we had
18 a contract on March 17th that says I'm going to sell this
19 property to you, shop six and shop eight, for \$580,000. The
20 contract also says that Harbour Town Surf Shop (inaudible).
21 So after it's all said and done, Bittmint would own six and
22 eight, would rent it through Harbour Town Surf Shop
23 (inaudible). And these two shops, they have a surf shop
24 here and a general store, that was the intent.

25 Well, that never happens. That never happens because

1 on May 2nd, my clients get a call from their attorney and
2 they're saying -- he says I've got some bad news for you.
3 Sea Pines Resort, LLC has decided that they're going to
4 exercise what they believe is a right of first refusal and
5 they're going to take shop eight just by paying the same
6 amount you're paying, \$580,000. We have this right -- Sea
7 Pines, we believe this right to that shop.

8 So what we do at that point, Mr. Bitton and Mr. Mintz,
9 we contest that. We say show us the right. Where does that
10 right come from? We don't believe you have the right. The
11 attorneys for Sea Pines then sends over one piece of paper
12 and says well, here's where the right is. We contest that.
13 They say oh, you're right. Here's where the right is. They
14 send a second piece of paper. They say no, that's not right
15 either. Finally, they send over a third piece of paper.
16 They say oh, this is the right. (Inaudible). At this time,
17 we know something is (inaudible). Our clients know
18 something is not right. So we send out a notice to Ms.
19 Johnson and Mr. Giannone saying we have rights. We want
20 that contract (inaudible). We're entitled to it.
21 (Inaudible). They change their mind. (Inaudible).

22 The evidence will show that Sea Pines was going to
23 exercise their right on May 2nd. On May 5th -- or May 4th,
24 they signed (inaudible). We didn't know that. We still
25 hadn't closed yet. Matter of fact, nobody directly -- the

1 two Defendants, Ms. Johnson and Mr. Giannone, they didn't
2 bother telling us. They didn't tell Mr. Mintz. They didn't
3 Mr. Bitton. They never even said anything. They had a
4 relationship for years. Particularly, Ms. Johnson, didn't
5 say one word. Not one word. So on May 11th, deal closes.

6 But before that, actually, on May 10th, my guys at this
7 point, they're not going to give up. They want to control
8 this property (inaudible), so they make an offer to Ms.
9 Johnson. They say tell you what, at least, can you lease it
10 to us for another ten years? Ms. Johnson's attorney just
11 writes back no. Well, how about this, how about we, Harbour
12 Town Surf Shop, instead of Bittmint, Harbour Town Surf Shop
13 says well, you know what, how about we offer you 590,000,
14 pay you \$10,000 more to buy it. The attorney for Ms.
15 Johnson and Mr. Giannone responds no, sorry (inaudible).

16 So here we are five years later -- actually, let's back
17 up. My clients (inaudible). I want to talk a little bit
18 about this right of first refusal. What is a right of first
19 refusal? What does it mean? Where does it come from?
20 First of all, where does it come from? It comes from a
21 piece of paper from 1973. The entity that owned this parcel
22 of Sea Pines, not just this property, but a bunch of
23 property (inaudible).

24 Well, they own the property. They're developing. Then
25 they say hey, you know what, in the future, I'm developing

1 this property, and anybody who wants to buy property that
2 I'm developing, here's the set of rules that they have to
3 follow. And one of these rules -- and you'll see
4 (inaudible).

5 And most of the rules -- well, we'll go into detail
6 (inaudible). But one of those rules is something called
7 right of refusal. And what that says is if I, the
8 declarant, and I sell a piece of property to Ms. Coffey and
9 Ms. Coffey turns around and sells it to any one of you,
10 sells it to any one of you, she has to offer it to me and I
11 can buy it at the same price that you wanted to offer, okay.
12 It's a perpetual way for the developer to hold onto a piece
13 of property from here to the end of time. So that's where
14 their right of first refusal comes from, a 1973 piece of
15 paper, okay, that you're going to see a lot more.

16 Well, my clients, we don't believe that right of first
17 refusal. We don't believe it's valid (inaudible). One of
18 which, we don't believe that right of refusal, which was
19 created in 1973. It was created by a company called
20 Lighthouse Beach Company. Lighthouse Beach Company is dead.
21 It died years ago. It died in the 80s, if not before.

22 Before it died, though, in 1977, it assigned the right
23 of first refusal to another company called Sea Pines
24 Plantation. And when it did so, it didn't do it in a proper
25 manner. They, basically, cut off the right at that point in

1 time. But Sea Pines Plantation is the only one who could
2 use that right. Sea Pines Plantation Company died sometime
3 in -- well, it officially died in 1991, well before the
4 Defendant Sea Pines Resort came into existence. They didn't
5 come into existence, I believe, until 2005. They never got
6 that right. They never got that right.

7 Now, also, let's just assume that right -- let's just
8 assume they did, okay. Let's just assume they did. In this
9 case, they didn't exercise it. They didn't follow the
10 rules. Their own rules in creating that right, they didn't
11 follow those rules. They had 30 days to exercise that
12 right. They didn't exercise that right within 30 days. It
13 took them months and months. They had enough information on
14 January 31, 2017 to exercise that right and they didn't do
15 it until May 2nd, 2017, which is far, far, far more than 30
16 days later.

17 So one, they didn't have the right. Two, even if they
18 did, they didn't exercise it in the right time. And third,
19 they did so completely for an improper purpose. When we
20 show you what these declarations mean, what they're trying
21 to prevent, what they're trying to do, you'll see that Sea
22 Pines had absolutely -- there's nowhere in those
23 declarations that Sea Pines can exercise a right of first
24 refusal because (inaudible).

25 Now, you're going to get -- Defendants are going to

1 show you something which I'm letting you know is a complete
2 red heron. They're going to say well, wait a minute, your
3 Mr. Mogil, he submitted something called a right of request
4 for waiver in which he was seeking a waiver of his right of
5 first refusal. If they really didn't think the right of
6 first refusal existed, why are you submitting this request
7 for waiver? Complete red heron. Once you see what
8 information is actually required for request for waiver and
9 once you see the declarations that never ever -- the piece
10 of paper that waived his rights (inaudible). It's just
11 smoke. You'll be able to see, too.

12 So where are now five years later? My clients filed
13 this lawsuit soon after these events happened in 2017. What
14 they're doing now is they're seeking to recover damages from
15 the individual Defendants, Charles Giannone and Lynda
16 Johnson, for breaching their contract to sell shops six and
17 eight for \$580,000. That's Bittmint, Plaintiff Bittmint
18 (inaudible).

19 Plaintiff Bittmint is also suing Sea Pines Resort for
20 interfering, for stepping in and saying I have this right
21 that doesn't exist to buy it. So Bittmint is also seeking
22 damages for interference from Sea Pines Resort. Harbour
23 Town Surf Shop is also suing Sea Pines saying they
24 interfered with Harbour Town Surf Shop, the two of them,
25 Bittmint, the owner, and Harbour Town Surf Shop cut a

1 sweetheart deal. I'm going to own this property. I'm going
2 to lease to Harbour Town Surf Shop for a heck of a lot less
3 money than Harbour Town Surf Shop was paying (inaudible).
4 And when Sea Pines came in and took that property, they
5 couldn't do that anymore. So we're seeking damages against
6 Sea Pines for interfering with that potential relationship.

7 And Harbour Town Surf Shop is also asserting a claim
8 for damages based on breach of contract of the intended
9 party of the contract between Surf Shop (inaudible) -- I'm
10 sorry, the contract between Bittmint and Ms. Johnson
11 (inaudible.)

12 So a lot of information, a lot of information. And I'm
13 going to do my best to try and simplify it for you. But one
14 thing I do want you to keep in mind, I want you to now go
15 back to the entrepreneur that I started with, one gentleman
16 came in with a dream, a dream to build a business, the dream
17 to live the American dream (inaudible). And I want all of
18 you to use -- and I trust you will, to use your experience,
19 your judgment, your common sense (inaudible) find in favor
20 of my client, Bittmint and Harbour Town Surf Shop
21 (inaudible). Thank you.

22 MR. LINTON: May it please the Court?

23 THE COURT: Yes, sir.

24 OPENING STATEMENT BY MR. LINTON:

25 MR. LINTON: Good afternoon. My name is John Linton.

1 Along with my partner, Trenholm Walker, we represent the
2 Defendants in this case, Charles Giannone, Lynda Johnson and
3 Sea Pines Resort, LLC.

4 You just heard a little bit of background on this case
5 on what the Plaintiff intends to prove. I want you to pay
6 close attention during the trial to things that you didn't
7 hear from them and things that you've heard from them and
8 things that is the last time you've ever heard. You are not
9 to put yourself in the shoes of any particular party.
10 You're charged with listening to the evidence. That means a
11 witness or a document should control your decision, not what
12 one of the lawyers say.

13 I'm here to give you a little forecast of what we think
14 the evidence will show. This case, as you heard, involves
15 commercial property in Sea Pines in Harbour Town. Sea
16 Pines, much like many of the communities on Hilton Head and
17 all over South Carolina has restricted covenants. These are
18 sets of covenants that are recorded at the deeds office.
19 These are recorded in the 70s and 80s (inaudible). It gives
20 the developer of the property rights. And those rights
21 (inaudible).

22 One of those rights in the covenants in Sea Pines is
23 the right of first refusal on property (inaudible). What
24 the right says is if you own a piece of property and you
25 want to sell it, you have to provide written notice to the

1 company of the transaction. And upon receiving written
2 notice, the company has 30 days to decide whether it wants
3 to buy the property or not.

4 You heard a little bit from the Plaintiffs that maybe
5 this was some big secret and nobody knew (inaudible) that
6 there was a right of first refusal. Well, what the evidence
7 is going to show is that everybody in this courtroom over
8 here knew well before any of this contract that we're here
9 today about that Sea Pines had a right of first refusal.
10 The reason you're going to hear Sea Pines decided to
11 exercise their right in this case, they own most of the
12 property around this property and it made sense to buy it
13 and it decided to exercise its right.

14 Even though everyone in this courtroom knew that Sea
15 Pines had that right, these Plaintiffs have sued these
16 individuals who had no choice, they had to sell it to Sea
17 Pines. And they have sued them for breaching the contract.
18 And they've been put through this lawsuit to be a part of it
19 for the last four years. And they've also sued Sea Pines
20 for exercising a right that everybody understood they had,
21 saying they interfered with their contract.

22 So let's back up a little bit and go through some of
23 the facts. Some of them, this will be the first time you've
24 heard them. You did hear that the Plaintiffs owned the
25 general store property. The Plaintiffs acquired that

1 property in 2015 (inaudible). What you didn't hear is that
2 they didn't close on the purchase of that property until
3 after a waiver request was sent to Sea Pines by the seller
4 saying you have the right of first refusal, do you want to
5 exercise it? Sea Pines waited 30 days after receiving that
6 and did not exercise its right of first refusal for the
7 general store. That happened all before any purchase
8 contract on the surf shop.

9 Now, Harbour Town Surf Shop leases that property. Now,
10 they entered into the lease, the current lease in February
11 of 2015. It runs through January 31st of 2025. That's a
12 long commercial lease. They've still got three years or so
13 left on it. Guess what, they're still the tenants. Sea
14 Pines is their landlord. They haven't been kicked out.
15 They are there, they pay rent. Guess what you're going to
16 hear, these guys actually get along. All of them, they get
17 along. They've run their business successfully with the
18 support of Sea Pines in that location for many years.

19 So Ms. Johnson and Mr. Giannone inherited this property
20 from their mother in 2016. They started thinking about
21 whether they wanted to sell it or not. They talked to Sea
22 Pines and they talked to the Plaintiffs because they
23 Plaintiffs were the tenants, it would make sense. They
24 didn't want to use a real estate agent and pay commission
25 (inaudible).

1 Now, they negotiated the contract with Bittmint for
2 \$580,000. You're going to see a copy of that contract. It
3 says the seller will request all waivers necessary from Sea
4 Pines and that the closing will not happen until all of Sea
5 Pines' rights are waived. Everybody agreed to that before
6 going in on the front end.

7 And then what you're going to hear is that Bittmint
8 agree that they would have their lawyer contact Sea Pines.
9 This is the big red heron that you heard about. They agreed
10 -- at this point, they knew what they had to do. They asked
11 their lawyer to contact Sea Pines and submit a waiver
12 request. That waiver request says, it is hereby understood
13 by all parties that Sea Pines has 30 days within which to
14 decide whether it wants to buy this property.

15 Plaintiffs sent that to Sea Pines. Then Sea Pines, Mr.
16 Bender, got back to them and said you know what, we're
17 thinking about it. (Inaudible) exercise our right. Would
18 you please send us a copy of the contract? They sent it,
19 said here you go. Here's everything you need to know to
20 evaluate whether you want to buy the property.

21 And then Sea Pines decided that it wanted to exercise
22 its right to first refusal and communicated that in a letter
23 from their lawyer back to the sellers of the property. And
24 then for the first time, Bittmint starts saying you don't
25 have a right of first refusal. We don't know what you're

1 talking about. We want to close. We'll offer the sellers
2 more money. This right that everybody knew about and
3 everybody agreed to on the front end, all of a sudden, they
4 had changed their tune.

5 Let's talk about some of the things that you're going
6 to be asked (inaudible). One is whether Mr. Bittmint has
7 admitted that there's a right of first refusal that Sea
8 Pines had by sending Sea Pines notice that it had a right of
9 first refusal and had 30 days to make a decision. Can they
10 come in here to this court after doing that and say that
11 there's no right?

12 You're also going to be asked to decide whether Lynda
13 Johnson and Chuck Giannone, the owners of the property,
14 breached the contract by selling to Sea Pines when they had
15 no choice? The contract says all waivers have to happen
16 before and everybody agree (inaudible).

17 Then you're going to have to decide whether Sea Pines
18 interfered with the contract. They were sitting in their
19 office and Bittmint came to them and said do you want to buy
20 this property? You have the right of first refusal. And
21 they're going to try to convince you that that was
22 interfering.

23 You didn't hear much about damages. You heard they're
24 going to seek damages. I challenge you to listen to the
25 testimony and look at the exhibits. And they have to offer

1 proof. If you're going to make any award (inaudible), but
2 you have to listen and they have to prove damages. And they
3 don't have legally any proof of damages.

4 The Defendants here did not breach the contract or
5 interfere with it in any way. They followed the rules, the
6 rules that everybody agreed to.

7 Now, before sitting down, I want to close with what I
8 started with, which is you need to judge the evidence and
9 the testimony, not what the lawyers say. You were made some
10 promises in the Plaintiffs' opening. You were told that
11 they were going to prove to you that Sea Pines does not have
12 a right of first refusal. You need to hear a witness say
13 that. You need to see an exhibit that says they don't have
14 a right of first refusal. The evidence is going to show
15 they do, everyone agreed that they did and (inaudible).

16 At the end of this case, we're going to ask you to
17 return a defense verdict (inaudible). Thank you.

18 THE COURT: All right. Call your first witness.

19 MR. KUBEC: Thank you, Your Honor. Plaintiffs call
20 Amir Bitton.

21 THE CLERK: Place your left hand on the Bible and raise
22 your right hand.

23 AMIR BITTON,

24 after being duly sworn, testified as follows:

25 THE CLERK: Please have a seat. Please make sure you

1 speak directly into the mic and state and spell your name.

2 THE WITNESS: First name is Amir, A-M-I-R, last name,
3 Bitton, B-I-double-T-O-N.

4 DIRECT EXAMINATION

5 BY MR. KUBEC:

6 Q Good afternoon, Mr. Bitton. How are you?

7 A Good, how are you.

8 Q Let's start by having you tell us something about
9 yourself. Where do you currently reside?

10 A Right now, I reside on Hilton Head Island, South
11 Carolina.

12 Q Where were you born and raised?

13 A I was born in Israel and was raised there until I was
14 21.

15 Q Where were you educated?

16 A I was educated in Israel in a regular high school and
17 then when I was 18, I joined the special forces of the
18 Israel Marines for three years.

19 Q When you were in special forces, did you work in Israel
20 at that time?

21 A No, I came immediately after my military service to
22 here because I had a big family that lived here.

23 Q What year was that?

24 A I'm sorry?

25 Q What year was that when you came to the United States?

1 A 1990.

2 Q Did you move right to Hilton Head or were you living
3 elsewhere?

4 A I was living with my family a little bit in New Jersey,
5 then moved to Florida, and then shortly after that, to
6 Hilton Head.

7 Q Why did you come here?

8 A Liked the place, for the opportunity. I wanted to live
9 by the beach.

10 Q When you first came here, what did you do for a living?

11 A I was working with family members in some resort and
12 surf wear. I was helping them out for the first year, then
13 became partner with them.

14 Q Tell us a little bit more about what your business
15 opportunities were after that.

16 A Well, since 1991, I was a part manager owner in a few
17 stores on Hilton Head in beachwear and resort and surf wear.
18 And since then, been in and out different business, owning
19 stores to restaurants, import company until the year 2000.
20 We opened another big store in Bluffton in 2000 and I owned
21 a bunch of businesses on and off. Some of them were
22 successful, some of them not, so we had to close them down.

23 Q What was the name of the store in Bluffton?

24 A Island Republic. Island Republic is currently open
25 since the year of 2000. It's still existing and operating.

1 Q How many years have you been involved in selling surf
2 wear and resort wear?

3 A About 30 years.

4 Q Who is Mr. Mintz?

5 A Mr. Mintz is my business partner.

6 Q How long has he been your business partner?

7 A We've been in business together since 2007.

8 Q Has Mr. Mintz been in all those businesses that you
9 mentioned?

10 A Since 2007, he was, but prior to that, he wasn't.

11 Q Let's start focusing now on the Harbour Town Surf Shop.
12 What is Harbour Town Surf Shop?

13 A Harbour Town Surf Shop is a surf shop and a resort wear
14 catered for tourists. That's what we've been doing since
15 1990, we've been catering to tourists and locals, as well.
16 But it's more like an upscale resort wear and brand name
17 surf wear that we sell.

18 If I can mention some brand names anybody knows around
19 here, it's like Salt Life, Billabong, Guy Harvey, O'Neal,
20 Hurley, which is a Nike division of surf. So a lot of
21 brands from Rainbow shoes, different brands that are very,
22 very well known around here or in the south, basically. So,
23 basically, we opened that shop in 2010, Harbour Town Surf
24 Shop. And then we just continue after that pursuing spaces
25 in Harbour Town to purchase the property or lease.

1 Q Mr. Bitton, I want to direct your attention to the
2 screen, the picture on the screen. Do you recognize that
3 building?

4 A Yes.

5 Q At the very bottom there of that screen, what is that?

6 A That's shops 6 and 8 in Harbour Town.

7 Q Do you lease that whole building, the stuff on top of
8 it, or just the bottom?

9 A No, just the bottom, the retail space.

10 Q What's on top?

11 A On top, it's a residential condominium.

12 Q And tell me about how you got involved (inaudible)?

13 A Well, for years, I've been dreaming to have a store in
14 Harbour Town because it's one of the prime location for
15 tourists destination in Hilton Head. Like every other week,
16 I was driving by Harbour Town or any location I think is
17 good just to check if anybody's maybe going out of business,
18 trying to find a space.

19 And I got lucky that day that I saw a gallery coming
20 out of there and I was asking what's the deal and they said
21 that they were going out of business. So we got in touch
22 with the landlord, and back then, it was Lorraine Giannone,
23 and we had a meeting with her. Luckily, she knew me from
24 prior businesses that I was catering to her daughter --

25 MR. WALKER: Objection to the extent he is repeating.

1 He's testifying to hearsay, what she knew, what she said.

2 THE COURT: All right.

3 You can't say what someone said. Just say what you did
4 as a result of what someone said, okay?

5 THE WITNESS: That's what -- I met her personally.

6 THE COURT: You can continue.

7 THE WITNESS: We met with her personally. And,
8 luckily, she knew me from prior doing business with her
9 family on my other retail establishments. In the beginning,
10 she was honest and she told me that there is a tenant that
11 --

12 MR. WALKER: Objection, Your Honor, hearsay, dead man's
13 statute.

14 THE COURT: All right. You can't say what somebody
15 else said or did, all right?

16 THE WITNESS: So, initially, there was another tenant
17 that was supposed to lease the space and they were supposed
18 to get some approval, so we were waiting. And that didn't
19 fall through and then we got lucky and she called me and
20 told me that I can get --

21 MR. WALKER: Objection, hearsay.

22 THE COURT: You can't say what somebody else said. You
23 can't say what she told you.

24 THE WITNESS: So, luckily, we got the space.

25 BY MR. KUBEC:

1 Q And what is the Harbour Town Surf Shop, LLC?

2 A It's just a company created for the retail store.

3 Q Who owns the Harbour Town Surf Shop, LLC?

4 A Sorry?

5 Q Who owns the Harbour Town Surf Shop, LLC?

6 A Me and Alon Mintz.

7 Q Now, back to 2010 when Harbour Town Surf Shop started
8 leasing that space, did you lease this entire building here,
9 entire bottom part?

10 A Correct.

11 Q Back in 2010?

12 A Well, we -- no, in 2010, we rented only shop 6, which
13 was the center, and to the right of it was the hair salon
14 that Lynda and her mom were working and owning. Later on,
15 in 2015, it came about that they were leaving the place and
16 they wanted to move somewhere else and we took over.

17 Q So you can see there's kind of two entranceways?

18 A Right.

19 Q Shop 6, is this shop 6 here?

20 A Correct.

21 Q And this is shop 8 here?

22 A Correct.

23 MR. KUBEC: Your Honor, one little bit of housekeeping,
24 we have a couple of exhibits.

25 THE COURT: Okay.

1 MR. KUBEC: They have not been premarked. Defendants
2 have a copy. When we get the next break, we can go through
3 and mark the exhibits. I'd like to pass the book to the
4 witness if that's okay with everyone.

5 THE COURT: Well, just show him what exhibit you want
6 him to take a look at and then if he can authenticate it, we
7 can let it in.

8 MR. KUBEC: I just didn't know.

9 BY MR. KUBEC:

10 Q Well, let me back up, 2015, what happens with this
11 space next door?

12 A Lynda wanted to move from the hair salon and move to
13 Bluffton, which is a town over, you know, outside of Hilton
14 Head. And we negotiated with her that we're going to take
15 over that space.

16 Q I'd like to show you in the book in front of you,
17 Exhibit No. 3. There's tabs. Refer to Exhibit 3, please.

18 A Yes, sir.

19 Q Can you identify that document? What is it?

20 A The commercial lease agreement you're referring to?

21 Q All right. What does it say?

22 A It's a commercial lease agreement. This lease was made
23 on the 23rd day of January 2015 between Lorraine Giannone
24 and Harbour Town Surf Shop.

25 Q And the second paragraph of that lease agreement, what

1 shops are being leased?

2 A Six and 8.

3 Q And refer to paragraph one where it says terms. When
4 did the terms start?

5 A The terms start on February 1st, 2015.

6 Q And when does it end?

7 A January 31st, 2020.

8 Q And refer to paragraph two of that commercial lease,
9 what does that say?

10 A That's an option to extend the lease.

11 Q For how long?

12 A It's for another term of five years.

13 Q Taking you through 2025?

14 A Correct.

15 Q Then look at paragraph four. For the initial first
16 five-year period, how much rent is Harbour Town Surf Shop
17 paying the owner?

18 A It's \$54,250 a year, which makes it \$4,520.83 per
19 month.

20 Q And if you look at paragraph two, does it tell you --
21 what does it tell you about rent during the second renewal
22 term?

23 A In paragraph two in the option, we're going to have,
24 basically, the first year is going to be 58,900 per year,
25 which is 4903.33 per month. That's for the first and

1 second. The third is going to be \$60,450, which makes it
2 5,037.50 a month. And that's for year three and four. And
3 for the last year, it's going to be \$62,000, which is going
4 to 5166.67 a month.

5 Q If you'd refer to the last page for me. There's a
6 signature on the bottom for Harbour Town Surf Shop. And
7 there's a written name. Your name is written in there?

8 A Yes, sir.

9 Q Do you recognize the signature above that?

10 A Yes.

11 Q Who's signature is that?

12 A Alon.

13 Q What about below it?

14 A That's mine.

15 Q Are you authorized to sign this on behalf of Harbour
16 Town Surf Shop, LLC?

17 A Yes, sir.

18 MR. KUBEC: Your Honor, I'd like to mark this as
19 Exhibit No. 3.

20 THE COURT: Any objection?

21 MR. WALKER: No objection, Your Honor.

22 THE COURT: Without objection.

23 (Plaintiff's Exhibit No. 3 admitted into evidence.)

24 BY MR. KUBEC:

25 Q Now, Mr. Bitton, what is Bittmint, LLC?

1 A Basically, to join -- my last name and Alon's last name
2 joined together. Bitt is part of Bitton and Mint is part of
3 Mintz.

4 Q Is it a company?

5 A It's a company. It's a real estate company we formed
6 in 2014. We were back then buying residential properties.
7 We just opened kind of a real estate company just so any
8 future deals on residential or commercial is going to be
9 assigned to that company.

10 Q In 2015, there was Harbour Town Surf Shop (inaudible).
11 What other businesses were you interested in Sea Pines?

12 A Well, at that time, that was available and we were
13 going to do that, but shortly after that, the general store
14 came available. Apparently, the owner got sick and he
15 couldn't operate, so he approached me and asked if I was
16 willing to make a bid on the store and the property. And I
17 was thrilled about that and I was like, heck, yeah, let's do
18 it. So, I mean, I knew there was other potential buyers,
19 basically, because he informed me of that and he told me
20 that whoever is going to give the highest bid --

21 MR. WALKER: Objection, Your Honor.

22 THE COURT: You can't say what somebody else said.

23 THE WITNESS: I knew that whoever was going to give the
24 highest bid, that was going to win that because that's what
25 it came down to. So I was consulting with friends that are

1 realtor and trying to see what's the business value and the
2 real estate value and I tried to give him the best price I
3 can.

4 BY MR. KUBEC:

5 Q Well, why were you interested in it?

6 A Harbour Town was a dream of mine since I moved to
7 Hilton Head. I had retail businesses, like I indicated,
8 since 1990 until like 2010 in different locations of Hilton
9 Head, but Harbour own was the prime location. And I always
10 dreamed to have (inaudible) owning the property because I
11 was tired of paying rent. So, basically, I wanted to own my
12 own businesses and be secure because the value of the
13 business is greater when you own the property.

14 Q Were you able to buy it?

15 A The general store? Frankly, we got it because we put
16 the highest bid.

17 Q Did you buy just the general store or did you buy the
18 property (inaudible)?

19 A No, we bought the business and property together.

20 Q How much was that?

21 A It was \$900,000.

22 Q And who, you say we bought it?

23 A Me and Alon, Bittmint.

24 Q Individually?

25 A No, it's the company Bittmint that bought it.

1 Q Did you finance that transaction?

2 A Yes, sir.

3 Q How much?

4 A We financed 700 of it.

5 Q When you financed it at that time, what was your
6 interest rate?

7 A Now, I know it's four and a half. It was four and a
8 half because we just recently had to renew that loan.

9 Q Now, Mr. Linton in his opening said something about a
10 request for waiver of the right of first refusal being
11 submitted in the general store transaction. Did you hear
12 him say that during his opening?

13 A I heard him say that.

14 Q Did you submit a request for waiver to anybody?

15 A Never knew about any waiver that was supposed to be
16 sent to anybody back then.

17 Q To your knowledge, did Mr. Mintz submit a waiver?

18 A No.

19 Q Did your attorney submit a waiver?

20 A No.

21 Q When's the first time you found out about this waiver?

22 A Well, just shortly after closing, I was going over some
23 e-mails that the lawyer were just cc'ing us and whoever he
24 was talking to, the other side's lawyer, the seller's
25 lawyer. Then I was going over some e-mails and I saw an

1 e-mail that Sea Pines didn't respond to whatever we
2 submitted to them and that was from the seller's lawyer.
3 And they forfeited their 30 days, so we can move on with
4 that, but we had already closed on that, I believe. But I
5 knew that after the fact.

6 Q But you never submitted a waiver?

7 A No.

8 Q Once you acquired the general store, does Bittmint
9 manage it?

10 A No, Harbour Town Surf Shop is the company that manages
11 it and operates it. Bittmint just own the real estate and
12 managed the administrative part of, you know, sending the
13 mortgages, insurance, whatever taxes for that property.

14 Q So Bittmint is the owner, Harbour Town Surf Shop is the
15 tenant. Do you have anything to document that relationship?

16 A We usually form a lease between any property that we
17 own if it's a tenant, if it's a business that we own. So
18 just for formality, we create a lease.

19 Q I'd like you to refer to Exhibit No. 6 in the book,
20 please.

21 A (Witness complies.)

22 Q What is that?

23 A I'm sorry?

24 Q What is that?

25 A It's a lease agreement between Bittmint and Harbour

1 Town Surf Shop.

2 Q When's it dated?

3 A June 27th, 2016.

4 Q I'd like you to look at the last page.

5 A Yes, sir.

6 Q You see the signature block there?

7 A Yes.

8 Q One for Bittmint?

9 A And one for Harbour Town.

10 Q The one for Bittmint, do you recognize the signature?

11 A Yes, it's Alon's.

12 Q Is Alon authorized to sign this on behalf of Bittmint?

13 A Yes.

14 Q And you're familiar with the terms of this lease
15 agreement, right?

16 A I'm sorry?

17 Q You're familiar with the terms of this lease agreement?

18 A Yes.

19 MR. KUBEC: Your Honor, I'd like to move this exhibit
20 as Plaintiff's No. 6.

21 THE COURT: Any objection?

22 MR. WALKER: He's identified it, just relevance. We
23 don't understand what the relevance is.

24 THE COURT: I'll allow it.

25 (Plaintiff's Exhibit No. 6 admitted into evidence.)

1 BY MR. KUBEC:

2 Q All right. Under this agreement, who's the landlord?

3 A Bittmint.

4 Q The tenant?

5 A Harbour Town Surf Shop.

6 Q And what's the property?

7 A Say that again.

8 Q What property is it?

9 A Shop number 5.

10 Q What is the length and terms of this lease agreement?

11 A Five years.

12 Q And when was the termination date?

13 A June 30th, '21.

14 Q And have the parties extended that lease termination
15 date?

16 A I'm sorry, say that again.

17 Q Have the parties extended that lease termination date?

18 A Yes.

19 Q What was the rent for the initial term?

20 A The initial term was \$5,000 per month.

21 Q Anything else?

22 A With cam, taxes, insurances and all the expenses, which
23 we call the triple net on a commercial.

24 Q What is cam?

25 A It's, basically, the trash, the security, the common

1 electric, anything that needs to be done there, we're
2 getting charged for it.

3 Q So in addition to \$5,000 per month, Harbour Town Surf
4 Shop was responsible for paying all those other expenses?

5 A Correct.

6 Q Insurance?

7 A Property taxes, common area services, garbage,
8 security, electric, outside electric for the common area and
9 all that. It's split between the tenants.

10 Q And then when the term got extended July 1st, 2021,
11 what happened to rent then?

12 A It went up to 5250.

13 Q Harbour Town Surf Shop is also responsible for --

14 A Paying all that.

15 Q -- for cam?

16 A Correct, cam, taxes and insurance.

17 Q And this lease is still in play between the two
18 companies now, right?

19 A Yes, sir.

20 Q Let's focus in now on the period of 2016. At this
21 point, you own the general store, you're leasing shops 6 and
22 8, right?

23 A Correct.

24 Q What happens next?

25 A Well, we took over the general store. We purchased it

1 and we went to a -- well, we started the first summer
2 without touching it because we took over in July, so we
3 didn't want to interfere with the summer and customers and
4 making a mess.

5 In January, we decided -- because 6 and 8 was already
6 one shop. It was two separate shops. And in 2015, when we
7 took over shop 8, we did major renovation in both stores,
8 new floors, new walls, took the wall that's separating
9 between those two stores. That was already one store, so
10 the only thing I had to do was continue to the general store
11 because I wanted to make it one big space. So we -- and the
12 store needed renovation and upgrading and all that at the
13 general store.

14 So in January of 2017, after we bought the store and
15 closed the deal on it, we went through a major renovation to
16 make it one big between shop 5, 6 and 8.

17 Q Well, let's focus on the period -- when did you buy the
18 general store?

19 A 2016.

20 Q When, what month?

21 A June.

22 Q June 2016. In January of 2016, you mentioned something
23 about a wall within the surf shop?

24 A Correct.

25 Q What did you do, take down the wall?

1 A We took all the walls down separating the stores,
2 basically.

3 Q Did Ms. Johnson know about that?

4 A Yes. We had to have an approval from Mr. Johnson --
5 Charles Giannone, I'm sorry.

6 Q Did either of the owners complain about that?

7 A No.

8 Q At this point in time, were you interested in acquiring
9 the surf shop?

10 A Since I moved into the surf shop and started listening
11 -- I was talking to the mom and to Lynda because we were
12 neighbors, so we would see each other on a daily basis. But
13 I been drilling them that I want to buy the property since
14 day one. In case, they are interested, please don't forget
15 me and I'll be a potential buyer for them.

16 Q Well, if I represent to you that Ms. Giannone passed
17 away in August of 2018, will you accept that?

18 A Right.

19 MS. COFFEY: 2016.

20 MR. KUBEC: I'm sorry, did I say 2018? I'm sorry.

21 BY MR. KUBEC:

22 Q Well, after Ms. Giannone passed away, what conversation
23 did you have with Ms. Johnson?

24 A Well, we know all along that Ms. Giannone owned the
25 store and she was going to inherit it to her kids. So they

1 couldn't do anything until, you know, they going to inherit
2 the property. So once the mom passed away, we knew that
3 they were going to inherit the property, so it was like we
4 took a notch up on negotiating with her. Like almost
5 everyday, I was asking what's going on and let's do a deal.
6 Basically, let's make a deal. Because she was interested in
7 selling. She told me that and she told Alon that many times
8 that when she going to inherit the store, she probably going
9 to sell.

10 So we were negotiating since probably 2010, '11 about
11 buying those stores. And, finally, the negotiation came
12 through after the mom passed away and they figure the Will
13 and who's going to get what and that's when we ready to talk
14 numbers.

15 Q Talking about numbers, did you discuss any price?

16 A Well, we never came with any price. She gave us the
17 price, the initial price she wanted and then we started from
18 there going down.

19 Q What was the initial price she gave you?

20 A The first price was around 900,000.

21 Q When was that?

22 A Shortly after -- you know, I mean, she knew she was
23 going to get the stores and all that. Everything happened
24 in like the end of 2016 to beginning of 2017, in those --
25 like from October, September, October to January 2017,

1 everything took place.

2 Q So the first number she threw out was 900,000?

3 A Correct.

4 Q Was that number acceptable to you?

5 A No, it wasn't acceptable. And she came up with that
6 number because six months prior to that, we purchased the
7 general store for that amount. And she was assuming it was
8 the same size store and so forth, but we came with out
9 explanation.

10 Q Was there further discussion on another number?

11 A Yes. Then it went down to six something and then we
12 negotiated more.

13 Q Was there further negotiation?

14 A Oh, yes, then she went down to 585. And then 585, I
15 knew it was the last number and then my business partner,
16 Alon, went over there to her shop and spoke to her and got
17 the number to 580, final number.

18 Q 580?

19 A Yes.

20 Q So when is that?

21 A Just the beginning of January, I think, just before we
22 -- you know, she asked us to do a letter of intent.

23 Q She asked you to do a letter of intent?

24 A She asked Alon, not me.

25 Q I want you to look at Exhibit No. 10. What is this

1 document?

2 A It's a letter of intent for purchase of real property.

3 Q Have you ever seen this document before today?

4 A Yes, I did.

5 Q Are you familiar with the terms of this document?

6 A Yes.

7 Q There's a signature above Bittmint, LLC, do you
8 recognize that signature?

9 A Yeah, it's Alon's signature.

10 Q Again, was Mr. Mintz authorized to sign this document
11 on behalf of Bittmint, LLC?

12 A Yes, sir.

13 Q To your knowledge, who created this document?

14 A Our lawyer, Mike Mogil.

15 Q And it's your understanding that Ms. Johnson requested
16 this letter?

17 A Yes, sir.

18 Q Did she tell you why?

19 A She didn't tell me specifically why, but she told Alon
20 and he told me why.

21 Q What did Alon tell you?

22 A That she wanted to drop it to Sea Pines.

23 Q In this document, look down in the fourth paragraph.
24 The parties agree that Bittmint, LLC will purchase the two
25 units in lot 6 and 8 for the sum of \$580,000; is that

1 correct?

2 A Where are you reading, I'm sorry? Oh, the parties,
3 yeah, go ahead.

4 Q You read it.

5 A No, go ahead.

6 Q The parties have agreed that Bittmint, LLC will
7 purchase the units -- the two units in lots 6 and 8 for the
8 sum of \$580,000. Is that the same offer that you --

9 A Correct.

10 Q The deal that you cut with her?

11 A Yes, sir.

12 Q Then it says, provided that the units (inaudible)
13 accept Harbour Town Surf Shop (inaudible)?

14 A This mean that there's going to be like a clean title
15 search and so forth, whatever they do in every real estate
16 transaction, I believe.

17 Q What is Harbour Town's Surf Shop's (inaudible)? Were
18 you contemplating at that time that Harbour Town Surf Shop
19 would stay (inaudible)?

20 A Oh, yeah, definitely, that's the purpose. We just
21 wanted to own the property of the surf shop, so it just
22 going to be at a greater value to our business and secure us
23 for the future.

24 Q At this time, did you -- you talked about the waiver
25 that happened earlier, the waiver that happened with the

1 general store, right?

2 A Right.

3 Q Did you at this time understand anything about the
4 right of first refusal?

5 A No. To be honest, we didn't know it exist. We knew
6 there was some waivers that they needed, but a lot of, you
7 know, properties and communities on Hilton Head need
8 different kinds of waivers and approval for tenants and so
9 forth for different reasons. So I wouldn't know what
10 specifically they needed.

11 Q Did you know for a fact that right of first refusal was
12 on shops 6 and 8 --

13 MR. WALKER: Objection, leading, Your Honor.

14 THE COURT: I'll sustain the objection.

15 MR. WALKER: He said he didn't know what it was and now
16 he's telling him what to say.

17 THE COURT: I'll sustain it.

18 BY MR. KUBEC:

19 Q Were you aware of any right of first refusal on lots 6
20 and 8?

21 A No.

22 MR. KUBEC: Your Honor, I'd like to mark and move into
23 evidence Plaintiff's Exhibit No. 10.

24 MR. WALKER: No objection.

25 THE COURT: Without objection.

1 (Plaintiff's Exhibit No. 10 admitted into evidence.)

2 BY MR. KUBEC:

3 Q The letter of intent references a full formed contract
4 of sale. Was a full formed contract of the sale ever
5 entered into between the parties?

6 A I'm sorry, I couldn't hear you.

7 Q Was a full formed contract of sale ever entered into
8 between the parties?

9 A Yes.

10 Q When did that happen?

11 A On March 17th.

12 Q 2017?

13 A Correct.

14 Q I'd like you to refer to Exhibit No. 11, please. What
15 is this document?

16 A That's the contract that we entered with Johnson and
17 Giannone for purchasing shops 6 and 8.

18 Q First things first, go to the back page.

19 A (Witness complies.)

20 Q Do you see the signature blocks back there?

21 A On the last page?

22 Q Yes, sir.

23 A Yes, go ahead.

24 Q One for purchaser?

25 A Yes.

1 Q Bittmint, LLC?

2 A Correct.

3 Q Do you recognize that signature?

4 A Yes.

5 Q Whose signature is that?

6 A Alon's signature.

7 Q Was Mr. Alon Mintz authorized to sign this document on

8 behalf of Bittmint?

9 A Yes.

10 Q Let's go back to the first page. Who's the purchaser?

11 A The purchaser is Bittmint, LLC.

12 Q And paragraph one describes the property. Which

13 property were you buying?

14 A 147 Lighthouse Road, shop 6 and shop 8 in Mariners Way.

15 Q Shops 6 and 8, that's the surf shop property, correct?

16 A Right.

17 Q What is the purchase price?

18 A 580,000.

19 Q How much of it was being financed?

20 A 498,800.

21 Q And there's a section there that says financing

22 contingency, correct?

23 A Correct.

24 Q After signing this contract, what steps did you take to

25 obtain financing?

1 A To be honest with you, didn't need much because six
2 months prior to that, we went to a business bank and they
3 created a huge portfolio for all our businesses and our
4 personal financial, a really nice -- it's a banker. His
5 name is Tom. He was a really nice guy and he helped us go
6 to University of South Carolina. There was a lady over
7 there that helped us create all the portfolio on our
8 businesses so we wouldn't have any problem with business
9 banking.

10 So once we got approved for the general store loan, we
11 approached the guy and he's like you shouldn't have any
12 problem --

13 MR. WALKER: Objection, Your Honor.

14 THE WITNESS: We knew that we didn't have any problem
15 because --

16 MR. KUBEC: Hold on one second.

17 MR. WALKER: Hearsay, Your Honor.

18 THE COURT: I'll sustain the objection.

19 BY MR. KUBEC:

20 Q This gentleman, Tom, you referenced?

21 A Yes.

22 Q He's a banker, correct?

23 A Correct.

24 Q Is he the same banker you used with the general store
25 transaction?

1 A Correct.

2 Q (Inaudible). Were you required to give any additional
3 information?

4 A Just --

5 MR. WALKER: Objection, hearsay, what the bank required
6 of him.

7 THE COURT: I'll let him say what he gave the bank.

8 THE WITNESS: They asked us to give them just the
9 latest tax return. Because we purchased the general store
10 in June and we wanted to purchase the shops 6 and 8 in 2017,
11 so all he needed was an updated tax return for that year,
12 that's it, for 2017.

13 BY MR. KUBEC:

14 Q Any other information?

15 A That's it. He had everything else because of the
16 general store.

17 Q Did you handle most of that or did Mr. Mintz handle all
18 of that?

19 A Alon is usually in the office. I'm on the field most
20 likely, so he's the one dealing with all administrative
21 things.

22 Q Was he also involved in the financing?

23 A Yes.

24 Q I want you to look at Paragraph 6, please, second page.
25 Are you there?

1 A Yes.

2 Q I want you to focus on the second sentence, starts with
3 "the sellers". Do you see that?

4 A Paragraph 6?

5 Q Paragraph 6, second sentence.

6 A Go ahead.

7 Q Read it to me, or would you like me read it to you?

8 A Go ahead and read it.

9 Q The sellers shall obtain all appropriate waivers and
10 approvals from Sea Pines in the applicable Horizontal
11 Property Regime in 30 days from the date of execution
12 (inaudible). The sellers shall obtain all appropriate
13 waivers. Were you the seller?

14 A No.

15 Q Who was the seller?

16 A Lynda and Charles.

17 Q And the words appropriate waivers. At the time you
18 signed this contract, what did that mean to you then?

19 A I didn't know what kind of waivers, but, apparently,
20 they needed to submit some waivers to Sea Pines, I guess, or
21 to whoever.

22 Q So was it your responsibility to obtain appropriate
23 waivers?

24 A Was it what?

25 Q Was it your responsibility in this contract to obtain

1 appropriate --

2 A No, it wasn't. Even when we bought the general store,
3 it wasn't our responsibility. That's why we weren't aware
4 of any waivers.

5 MR. KUBEC: Your Honor, I'd like to mark for
6 identification and admit into evidence Plaintiff's Exhibit
7 No. 11.

8 THE COURT: Any objection?

9 MR. WALKER: No objection.

10 THE COURT: All right.

11 (Plaintiff's Exhibit No. 11 admitted into evidence.)

12 BY MR. KUBEC:

13 Q At this point, we have a signed contract with
14 Defendants Johnson and Giannone to buy the property. Were
15 you ever concerned about getting -- well, let's put it this
16 way. What happened if you didn't get the financing? Were
17 you concerned about getting financing?

18 A No, not really, because we own like seven, I think nine
19 different properties on Hilton Head, residential property
20 that are free of mortgage. And I could have refinanced
21 those in 30 days and get the money for them.

22 Q Was this property ever sold to Bittmint?

23 A Shops 6 and 8?

24 Q Yeah.

25 A No.

1 Q Why not?

2 A Because, basically, Sea Pines stole it out of my hand.
3 It was my retirement plan and they stole it from me,
4 basically.

5 MR. WALKER: Objection, Your Honor, to the
6 characterization (inaudible).

7 THE COURT: I understand, I'll sustain the objection.
8 BY MR. KUBEC:

9 Q How did you find out that -- did you ever come to
10 understand why it wasn't sold to you?

11 A No, not really. One day, we just got an e-mail from
12 their lawyer -- well, my lawyer got an e-mail from their
13 lawyer, from Sea Pines Resort lawyer that they were
14 exercising some right, that's it, and they're taking the
15 contract because it was a great deal. And I worked really
16 hard to get that deal and save me money on getting a deal
17 for the circumstances, but they decided they wanted it.

18 Q I want you to take a look at Exhibit No. 19.

19 MR. WALKER: Your Honor, on this particular exhibit, I
20 would ask that it not be shown on the screen until we talk
21 about it.

22 THE COURT: All right.

23 BY MR. KUBEC:

24 Q Mr. Bitton, have you ever seen this document before?

25 A Are you talking about the --

1 Q Let's back up, did you see this document back around
2 May of 2017?

3 A You're talking about the e-mail from Simon Frazier?

4 Q I don't know if it's in your book, it's the e-mail May
5 2nd, 2017?

6 A Yeah, there is -- okay, go ahead. The e-mail you're
7 referring to, right?

8 Q I may have the wrong exhibit. I apologize. Exhibit
9 19.

10 A The letter?

11 Q The letter.

12 A Got it.

13 Q Have you ever seen this document before?

14 A I seen it probably around the time --

15 Q In May of 2017, did you see this?

16 A I probably seen it at one point.

17 Q At some point in May of 2017, your attorney told you --

18 MR. WALKER: Objection, Your Honor. Don't start out
19 the question on a certain date your attorney told you
20 something. That's hearsay in the question and leading.

21 THE COURT: All right. Rephrase the question.

22 BY MR. KUBEC:

23 Q How did you find out that you weren't getting the
24 property?

25 A From my lawyer. He usually gets all the e-mails and

1 correspondence from whomever and then he just forward it to
2 us or call us and we go over it in his office.

3 Q What was your reaction?

4 A I was really upset. I was really upset. I was really
5 devastated. They made me spend almost a million dollars six
6 months prior giving me hopes and then -- next door in the
7 business that I've been building since 2010. And then,
8 suddenly, in 2017 decided because it's a great deal after I
9 negotiated as hard as I can and sweated on that place,
10 building and establishing the store, it's taken because it's
11 a great deal. So I was really, really upset and devastated.

12 Q Well, what did you do next?

13 A I asked to see the covenants or whatever, the first
14 right of refusal they had. That's the first thing I asked
15 my lawyer. I was like, I want to see what they're talking
16 about. So I asked them to mail us, e-mail us what are they
17 talking about, what kind of right they have.

18 Q Anything else?

19 A And, of course, we got three wrong responses until they
20 got us a document --

21 MR. WALKER: Objection. This is all based on hearsay.
22 He wasn't a party to these communications.

23 THE COURT: All right.

24 THE WITNESS: I was actually in the office with my
25 lawyer when we received all the documents, so I was there.

1 MR. WALKER: He's not a party to the e-mails, Your
2 Honor, that he's talking about. He's testifying to e-mails
3 to which he was not a party to. They were between Mr.
4 Frazier and Mr. Mogil. Mr. Mogil will be a witness.

5 THE COURT: Okay. Then I'll sustain the objection and
6 we'll wait on Mr. Mogil.

7 BY MR. KUBEC:

8 Q So you understand you're not getting the property. Did
9 you do anything else with regard to Ms. Johnson at that
10 point in time?

11 A No. Basically, we -- well, we did try -- we sat with
12 our lawyers -- I sat with my lawyer in a conference room and
13 we were talking about all that and what kind of rights they
14 have and they were getting -- he was getting response from
15 the other side lawyer about what they have and whatnot and
16 we were thinking about asking to extend the lease for
17 another ten years just to secure ourselves a little bit.

18 Q Look at Exhibit No. (Inaudible).

19 A Yes, sir.

20 Q This is an e-mail from who, Michael Mogil?

21 A Yes, that's an e-mail from Michael Mogil to Meredith.
22 Meredith is Lynda Johnson's lawyer.

23 Q And it says attaching an offer --

24 MR. WALKER: Objection, Your Honor, he's reading from
25 an e-mail that's not in evidence --

1 THE COURT: I agree, take it down.

2 MR. WALKER: -- and this witness was not a party to.

3 THE COURT: Yeah, take it down.

4 BY MR. KUBEC:

5 Q Let's look at the next exhibit, 25B. 25B, do you see
6 that?

7 A Yes, sir.

8 Q What does that document say?

9 MR. WALKER: Objection, Your Honor. I hate to stand up
10 all -- he's asking him to read e-mails that he was not a
11 party to.

12 BY MR. KUBEC:

13 Q Whatever is in the document (inaudible)?

14 A What are we looking at, 25B?

15 Q 25B.

16 A Are you referring to the amendment?

17 Q What is that document?

18 A You're referring to the amendment to the commercial
19 lease agreement?

20 Q Yes. Have you ever seen that document before?

21 A Yes.

22 Q Is that your signature on the bottom of it?

23 A Yes.

24 Q What is this document?

25 A Basically, asking to extend the lease that we have for

1 two five-year terms, so, basically, for ten more years. It
2 was dated May 10th, 2017.

3 Q So as of May 2017, May 10th, 2017 (inaudible). You
4 find out on May 2nd that you're not getting the property and
5 you draft this amendment. Do you know if this amendment was
6 ever sent over to Ms. Johnson?

7 A I believe it was sent to her lawyer.

8 Q Did Ms. Johnson accept that amendment?

9 A No.

10 MR. KUBEC: Your Honor, I'd like to mark and move into
11 evidence 25B.

12 MR. WALKER: No objection.

13 THE COURT: All right.

14 (Plaintiff's Exhibit No. 25B admitted into evidence.)

15 BY MR. KUBEC:

16 Q Mr. Bitton, I'd like to refer you to Exhibit 26. Go to
17 the second page and everything after that -- actually, the
18 third page. What is that document?

19 A That's the letter from Mike Mogil to Meredith Bannon
20 you're referring to?

21 Q What's attached to that letter?

22 A It's a new contract for \$590,000.

23 Q From who?

24 A From Harbour Town Surf Shop to Giannone and Johnson.

25 Q To do what? 590,000 for what?

1 A To sell us shops 6 and 8. It's just a new offer.

2 Q Was that offer communicated to Ms. Johnson?

3 A Both offer for the extension and the sale was rejected.

4 Q At this point, did you do anything else to try to get
5 that property back?

6 A Yes, after we tried those two strategies to stay on
7 board, then we got rejected, so we had to file a lawsuit.

8 Q Just so it's clear to the jury and everybody, Harbour
9 Town Surf Shop is still a tenant?

10 A Yes.

11 Q Still pays rent?

12 A Correct.

13 Q What about does Harbour Town Surf Shop still pay taxes?

14 A Yes.

15 Q Assessments?

16 A Yes.

17 Q Insurance?

18 A Yes.

19 Q When you and Alon were in the process of buying the
20 surf shop, did you have an agreement amongst the two of you
21 as to what Harbour Town Surf Shop would pay Bittmint once
22 Bittmint had the property?

23 A Usually with commercial that we lease, we take 500 out
24 a month extra from what the expenses are, if it's like, you
25 know, base rent, triple net, taxes, insurance, cam,

1 whatever. And, like I said, 500 out just for sending all
2 the checks because we have somebody that sends mortgage
3 check, insurance, take care of all that administrative to
4 carry the mortgage and maintain it and so forth. So,
5 basically, we do \$500 extra just to cover that.

6 Q So the mortgage is X dollars and X, Y and Z, and then
7 you add on \$500 on top of it, that's how much (inaudible)?

8 A Correct.

9 Q Pretty consistent with the lease you did earlier?

10 MR. WALKER: Objection, leading.

11 THE COURT: All right. Just ask a question, please.

12 BY MR. KUBEC:

13 Q Right now, you still own the general store?

14 A Yes, sir.

15 Q Bittmint does?

16 A Yes.

17 Q What's the value of that? What's the price per square
18 foot?

19 MR. WALKER: Objection, relevance.

20 THE COURT: I'll allow it.

21 THE WITNESS: I know now because we just got it
22 appraised, the general store, because we had to renew the
23 loan a few months ago. So the appraisal came out to be \$553
24 per square feet, that's the value of it when we appraised it
25 couple months ago.

1 MR. WALKER: Objection, it's hearsay, too. He quoting
2 what the appraiser said. If they want to bring an appraiser
3 in and subject him to cross-examination, they should do
4 that. We can't cross-examine him on his hearsay testimony.

5 THE COURT: All right.

6 MR. WALKER: We ask it be stricken.

7 THE COURT: I'm not going to strike it, but I will
8 allow you to cross-examine him on it. I'm going to overrule
9 it at this point.

10 MR. KUBEC: Your Honor, I have no further questions for
11 Mr. Bitton.

12 THE COURT: All right. Ladies and gentlemen of the
13 jury, we've been going for about an hour and a half, so
14 we're going to take a mid-afternoon break. Stretch your
15 legs, use the restroom and we'll get you right back in.
16 Remember, don't discuss anything about the case.

17 (The jury exits the courtroom at 3:52 p.m.)

18 THE WITNESS: May I step down?

19 THE COURT: Yes, sir, but you just can't discuss your
20 testimony. You're still under oath.

21 (Short recess.)

22 THE COURT: Yes, sir.

23 MR. WALKER: We do have one matter that we'd like to
24 take up before the jury comes back in.

25 THE COURT: All right.

1 MR. WALKER: At the close of Mr. Bitton's testimony, he
2 was asked by his lawyer about the value per square foot of
3 the general store, which is not the subject we're on. Mr.
4 Bitton testified to hearsay testimony that he reviewed an
5 appraisal and that appraisal had come back with a value of
6 \$553 per square foot.

7 Now, the appraisal is not in evidence, it's hearsay,
8 and his testimony about it is hearsay. But over and above
9 that, we have been completely ambushed. We did
10 interrogatories that ask the Plaintiff's to itemize their
11 damages, the standard damages. They supplemented the
12 damages that they claim with respect to not being able to
13 close was the lease differential for the Hilton Head Surf
14 Shop. They make no comment that they're seeking loss of the
15 value of the property, none.

16 I'll hand this up to the Court. It's response to
17 number three. And this is the last interrogatory response
18 we have. If we had known they were going to come in a year
19 and a half after the close of discovery and make an
20 allegation that they lost the increased value of this
21 property, they should have disclosed it and we should have
22 had a chance to examine who their witness was going to be.
23 We should have had a chance to get our own expert. But
24 instead, they waited until the day of the trial. And they
25 have yet to supplement answers to interrogatories to tell us

1 about these damages. There's no way we can get a witness.

2 So we would ask that the Court strike that testimony.

3 It's improper, it's abuse of discovery. It was not

4 disclosed and the jury should not consider it.

5 THE COURT: All right.

6 Anything?

7 MR. KUBEC: Yes, Your Honor. We've consistently
8 alleged -- we've consistently in response to interrogatories
9 said that we're entitled to the benefit of the bargain. The
10 benefit of the bargain is our property. The property is
11 worth X dollars now. That's the benefit of our bargain. An
12 owner is also entitled under the law to testify to the value
13 of his property. Well, Mr. Bitton owns the general shop.
14 He's entitled to testify as to the value of his property.

15 THE COURT: Well, let's go back to the portion of it's
16 not even the property in question here.

17 MR. KUBEC: But it's relevant (inaudible) because the
18 properties are (inaudible). You walk through it. They're
19 not attached.

20 THE COURT: I understand that.

21 MR. KUBEC: It's one stream of property. We've alleged
22 -- in response to discovery all along, we said they're
23 entitled to the benefit of the bargain. The benefit of the
24 bargain is I had a piece of property that's now worth X
25 dollars. (Inaudible).

1 MR. WALKER: They never disclosed -- we asked for an
2 itemization. And they were asked in their deposition about
3 their damages multiple times and they talked about the lease
4 differential. Nobody said this is my opinion of the value.
5 They didn't refer to any appraisal. This is the first time
6 we've ever heard of any proof in support of the benefit of
7 the bargain other than the \$500 that would have been made on
8 the lease.

9 We have no way to rebut this. They just say we said
10 benefit of the bargain so we can come in and testify to
11 anything. It doesn't matter we didn't answer those
12 interrogatories. It matters. We're entitled to notice.
13 We're entitled to have our own expert. We're entitled to
14 cross-examine that appraiser. It's not the same property.

15 THE COURT: Well, what I'm sitting here contemplating
16 is how do you put the rabbit back in the hat?

17 MR. WALKER: I think if you just told the jury that
18 they were to disregard the testimony about the value of the
19 general store, then that would be enough. And we can repeat
20 that in our closing argument and that would -- I think
21 that's all you can do and that's all we ask for is to strike
22 it and a curative comment that they're not to consider it.

23 MR. KUBEC: Your Honor, I have to disagree. They've
24 had five years to ask these questions. They've had five
25 years to figure out what the damages are and we told them

1 it's the opportunity of lost benefit of the contract. We've
2 never disclosed that -- I mean, we've never hid that. They
3 know the law as well as anybody else does.

4 THE COURT: Yeah, but did you disclose that you had
5 gotten an appraisal and it was \$535?

6 MR. KUBEC: We didn't get an appraisal on the surf
7 shop.

8 THE COURT: Yeah, but you back doored it. You're
9 admitting it because you're saying well, Your Honor, they're
10 contiguous. So, obviously, you're going to then be able to
11 say circumstantially that if they're contiguous and it's
12 that for the general store, it's that for the surf shop.

13 MR. KUBEC: (Inaudible.)

14 THE COURT: Yeah, but I don't like that, that's not
15 fair. I agree with Mr. Walker. I don't like that. The
16 other remedy is I can just say that you're not going to get
17 any value as to -- or any damages as to the lease
18 differential, just say that's out. So it doesn't matter
19 what he talks about. Which one? Those are your two
20 options. Curative instruction or I throw it out?

21 MR. KUBEC: Curative instruction.

22 THE COURT: Bring them out.

23 THE BAILIFF: The jurors are entering the courtroom,
24 Your Honor.

25 THE COURT: Thank you.

1 (The jury enters the courtroom at 4:11 p.m.)

2 THE BAILIFF: The jurors are seated, Your Honor.

3 THE COURT: Thank you very much.

4 All right, ladies and gentlemen, before we get started
5 with cross-examination, I am going to instruct you to
6 disregard any testimony on behalf of the witness as to the
7 square footage of the general store based on the appraisal
8 that he allegedly received. It is not the subject property
9 at issue and it is not to be for your consideration.

10 MR. WALKER: Thank you, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. WALKER:

13 Q Good afternoon, Mr. Bitton.

14 A Good afternoon.

15 Q I'd like to go over some things that I don't think are
16 in dispute. The first of them is that you negotiated a
17 lease with Lynda and Chuck's mother, you and your partner,
18 correct?

19 A Correct.

20 Q For spaces 6 and 8?

21 A Correct.

22 Q And at that time when you negotiated that lease, you
23 got her to agree -- or the two of you agreed that the first
24 term of that lease would be five years and then you, as
25 tenant, would have the right to renew it for another

1 five-year term, correct? That was the deal you made with
2 her, correct?

3 A Correct.

4 Q And Sea Pines has honored that. They have not tried to
5 put you out, have they?

6 A (Inaudible).

7 Q I'm sorry?

8 A (Inaudible).

9 Q Sea Pines has not -- has honored the lease that you
10 entered, correct?

11 A As they took over the store, they gave me hell,
12 basically.

13 Q In your deposition, the only thing you mentioned was
14 that somebody came by about a sign, but you got along well
15 with Mr. Bender. You know Mr. Bender over here?

16 A Uh-huh.

17 Q You said he's a good man, didn't you?

18 A Great guy.

19 Q And you get along with him, right?

20 A I do.

21 Q And things are okay now; are they not?

22 A Okay now, yeah.

23 Q So the lease is going on and you can stay till the end
24 of the term, correct?

25 A Correct.

1 Q And they just slipped into the shoes of Lynda and
2 Chuck, basically, correct?

3 THE COURT: You have to say yes or no for the record,
4 please, sir.

5 THE WITNESS: I don't know who slipped in what shoes.
6 He's trying to put words into my mouth and I don't want to
7 answer what he's trying to put in my mouth, you know. So I
8 don't know who slipped in whose shoes.

9 THE COURT: Rephrase the question.

10 BY MR. WALKER:

11 Q It was just a phrase, somebody steps into somebody
12 else's shoes. Now, I want to go over to this letter of
13 intent that you signed with -- I think it was with Lynda,
14 correct?

15 A No, Alon signed it.

16 Q Alon signed it, but you were aware of it, as I
17 understand?

18 A Yes.

19 Q And that letter of intent, which is your Exhibit No.
20 10. Do you have that in front of you?

21 A Yes, sir, I'm opening it up. Just give me a second.

22 Q The letter of intent was not a substitute for contract
23 of sale, but binding agreement between you and Lynda and
24 Chuck.

25 MR. KUBEC: Objection, Your Honor, compound.

1 MR. WALKER: I'll rephrase it.

2 BY MR. WALKER:

3 Q Do you have the agreement in front of you, the letter
4 of intent?

5 A I do.

6 Q What I'd like you to do is go down to the last
7 paragraph. You see it's six paragraphs. Starting with the
8 "the parties expressly".

9 A Go ahead.

10 Q It says, correct me if I'm reading it incorrectly, the
11 parties expressly and specifically agree that until a full
12 form contract of sale incorporating these terms and with
13 other terms and conditions, which are standard for sale of
14 retail commercial space on Hilton Head Island is executed,
15 the transaction is nonbinding. Correct? Is that what it
16 says?

17 A You read it, so it says that, yes.

18 Q So this letter of intent really was not binding --
19 there was no binding agreement until you had the contract of
20 sale, right? By it's terms, correct?

21 A I'm assuming, if that's what it says.

22 Q One thing that I would like us to get clear with the
23 jury on is what you knew after you purchased the general
24 store. You purchased the general store in 2015 or '16?

25 A June 2016.

1 Q June of 2016. And shortly after you purchased the
2 general store, you said you were looking through some
3 e-mails and documents and you saw something about a waiver
4 and the right of first refusal, correct?

5 A I saw something about -- something that was submitted
6 to Sea Pines and they refused to respond, so they forfeited
7 the 30 days, but it didn't say nothing about nothing. Not
8 the first right of refusal or even a waiver. It just said
9 they didn't do their part on whatever they needed to do and
10 we can move on with the sale, that's what it said.

11 Q But that dealt with the waiver of the right of first
12 refusal, didn't it?

13 A I wouldn't know that. I didn't do that. It was the
14 seller's lawyer, so I wouldn't know what they did. I never
15 seen any documents.

16 Q You found out shortly after that closing about the
17 right of first refusal and the failure to Sea Pines to
18 respond?

19 A No, I found out about the response from Sea Pines that
20 they didn't fulfill the 30 days, that's what I found out.

21 Q It was about the right of first refusal, wasn't it?

22 A I have no idea what it was about.

23 MR. WALKER: Your Honor, may we open this deposition?

24 THE COURT: Yes, sir.

25 MR. WALKER: May I approach?

1 THE COURT: Absolutely.

2 BY MR. WALKER:

3 Q Mr. Bitton, do you remember when my partner, Mr.
4 Linton, took your deposition, your sworn testimony ahead of
5 trial to find out what you were going to say?

6 A Yes, sir.

7 Q And I'd like you to go to Page 17 of that deposition.
8 Are you on Page 17?

9 A Yes, sir.

10 Q You see there are numbers on the left-hand side, line
11 numbers --

12 A Yes.

13 Q -- of your testimony? Go to Line 2, Mr. Linton asked
14 this question: So you found out after your purchase of the
15 general store that as part of that purchase, there had been
16 a waiver sent to Sea Pines and that Sea Pines let the waiver
17 of the right of first refusal sit for 30 days, so you were
18 able to buy the general store?

19 And your answer was: Apparently, that's what happened.
20 Correct?

21 A Yes.

22 Q And the question after that was: And you found that
23 out after you bought the general store?

24 And your answer was: Correct?

25 A Correct.

1 Q And then the question was: But before you bought and
2 you went under contract to buy --

3 And you said: Yes.

4 Let me finish, shops 6 and 8. And to the best of your
5 recollection, it was a couple of months after you bought the
6 general store that you found out that this whole right of
7 first refusal existed?

8 Answer: It was through the winter of 2016.

9 Correct?

10 A No. Keep reading.

11 Q Did I misread your answer?

12 A Yeah, I was talking about referring to the waiver. I
13 knew there was some waiver being submitted, but I didn't
14 know what waiver, what was consistent in the waiver, never
15 seen a waiver before in my life. Even after I found out
16 about that e-mail, I've never seen that waiver. So he can
17 say any waiver he wants and I guess there was a waiver. I
18 wasn't sure, and I didn't know what waiver was that. That
19 was my intention and my meaning.

20 Q You agree, though, the question specifically referenced
21 the waiver of the right of first refusal, correct, as stated
22 to you?

23 A I was referring to a waiver. And in all my deposition,
24 you can keep reading, I was referring to a waiver. I didn't
25 know what waiver exactly they needed.

1 Q But you knew a waiver was needed?

2 A Some type of waiver was needed. I found that out after
3 when we purchased the general store on that e-mail.

4 Q Did you think it would be a good idea to find out
5 specifically what was -- what right needed to be waived?
6 You knew something needed to be waived, did you --

7 A It wasn't my responsibility. It was the seller's
8 responsibility, so why should I worry about that?

9 Q Did you inquire?

10 A No.

11 Q So going into the contract of sale with Chuck and
12 Lynda, you knew that there had to be a waiver signed by Sea
13 Pines for you to proceed, correct?

14 A They needed some type of waiver, yes, that's what I
15 understood.

16 Q And you knew, too, that if they didn't get the waiver
17 that the transaction would not proceed?

18 A That, I didn't know.

19 Q Just so I understand, you knew you needed a waiver to
20 proceed with the deal, right?

21 A Yes.

22 Q So are you telling us if you didn't get the waiver, you
23 thought you were still okay and the deal would proceed?

24 A Yeah, because I didn't know what waiver they're
25 requiring.

1 Q So you just went into this not knowing anything about
2 this waiver?

3 A That's why I have lawyers and they're doing all the
4 documents for me and all the waivers and whatever needs to
5 be done, you know.

6 Q Your lawyer was Mr. Mogil and you would have depended
7 on him to advise you as to anything about this waiver,
8 correct?

9 A No.

10 Q You wouldn't rely on your own lawyer?

11 A Well, it was the seller's lawyer that was responsible
12 to submit any documents to whoever or waivers.

13 Q I'm not talking about submitting, who had the
14 obligation under the contract, what I'm talking about is did
15 you look to your lawyer, Mr. Mogil, to explain to you a
16 provision in the contract that said the appropriate waiver
17 had to be obtained from Sea Pines?

18 A What is your question? I don't understand.

19 Q I'm going to go to your contract of sale with Chuck and
20 Lynda. I'm sorry that it's unclear. Mr. Bitton, it's
21 Exhibit No. 11. Let's go to Page 2. Your lawyer asked you
22 about this. It says: Other terms. Other terms and
23 conditions of this contract are purchasers acquiring
24 property in as-is condition subject to the warranty set
25 forth in sections four and five.

1 Here's the sentence that I want to focus on, seller
2 shall obtain all appropriate waivers and approvals from Sea
3 Pines and the applicable Horizontal Property Regime within
4 30 days from the date of execution hereof?

5 My question is this, did you ask your lawyer about what
6 that waiver was for?

7 A No.

8 Q You are aware, though, that your lawyer wrote Sea Pines
9 and asked Sea Pines to waive it's right of first refusal --

10 MR. KUBEC: Objection, Your Honor.

11 Q -- you are aware of that; are you not?

12 THE COURT: What's your objection?

13 MR. KUBEC: Calls for speculation.

14 THE COURT: I'm sorry?

15 MR. KUBEC: Calls for speculation, assumes facts not in
16 evidence.

17 THE COURT: He can answer whether he was aware of that
18 or not.

19 BY MR. WALKER:

20 Q You know that now, do you not?

21 A Yes.

22 Q So your lawyer was aware of it, correct, to the best of
23 your knowledge?

24 A I cannot answer for my lawyer.

25 Q But you know he went to Sea Pines and asked for the

1 waiver, right?

2 A Apparently, he did, I guess.

3 MR. WALKER: That's all I have at this time.

4 THE COURT: Anything else for followup?

5 MR. KUBEC: No, Your Honor.

6 THE COURT: All right. Ladies and gentlemen, it is
7 4:30. And as I indicated, I don't normally like to take
8 y'all past 5:00 because I understand y'all have lives and
9 other things you need to get to as well. We've worked hard
10 today. We got everything in motion, so I think we're going
11 to go ahead and adjourn for the day.

12 Unless y'all have one witness that has to be somewhere
13 in the morning?

14 MR. KUBEC: No, Your Honor.

15 THE COURT: So I have to drive from Charleston because
16 I have to go back tonight --

17 You may be excused, I'm sorry.

18 So if y'all give me a little bit of leeway, we'll start
19 at ten o'clock tomorrow. So y'all just ease into your day.
20 Y'all have a wonderful rest of your evening and I look
21 forward to seeing y'all tomorrow morning at 10:00 a.m.

22 (The jury exits the courtroom at 4:27 p.m.)

23 THE COURT: Anything else before we adjourn for the
24 evening?

25 (No response.)

1 THE COURT: All right. Thank you very much. We will
2 see y'all tomorrow at 10:00 a.m.

3 TUESDAY, MARCH 1, 2022

4 (The jury enters the courtroom at 10:08 a.m.)

5 THE COURT: All right. Thank y'all so very much for
6 being here on time and we will proceed with the trial.

7 Call your next witness.

8 MR. KUBEC: Good morning, Your Honor.

9 THE COURT: Good morning.

10 MR. KUBEC: I call Robert Bender to the stand.

11 THE CLERK: Raise your right hand.

12 ROBERT BENDER,

13 after being duly sworn, testified as follows:

14 THE CLERK: Have a seat. Once you get settled, if
15 you'll just state your first name and spell out your last
16 name for the court reporter.

17 THE WITNESS: Robert Bender, B-E-N-D-E-R.

18 DIRECT EXAMINATION

19 BY MR. KUBEC:

20 Q Good morning, Mr. Bender. How are you?

21 A Good. Good morning.

22 Q Good morning. So who is your current employer?

23 A I work for the Sea Pines Resort.

24 Q How long have you worked there?

25 A I started in 1993.

1 Q (Inaudible)?

2 A About three years, I did have a gap with another resort
3 at one point.

4 Q When you started working for Sea Pines Resort, was it
5 actually another company at that point in time?

6 A It was Sea Pines Company at the time.

7 Q When did it become Sea Pines Resort?

8 A In 2005, I believe.

9 Q Why was there a change?

10 A There was no ownership.

11 Q Who used to own it?

12 A It was owned by shareholders, Sea Pines Associates.

13 Q Who owns it now?

14 A The Riverstone Group.

15 Q What's your current title?

16 A The director of recreation and marine operations.

17 Q How long have you had that position?

18 A For approximately 11 years.

19 Q So we're going to take you back to 2016, 2017. You
20 were the director of recreations and marine operations at
21 that point in time?

22 A Yes, sir.

23 Q Now, you started with the company, the former company
24 in 1993, correct?

25 A That's correct.

1 Q What was your job at that point?

2 A I was the recreation manager at the time, oversaw the
3 recreation program and activities.

4 Q And then you left Sea Pines and came back?

5 A That's correct.

6 Q When you came back, you were the director of recreation
7 and marine operations?

8 A That's correct.

9 Q Who do you report to?

10 A I report to Steve Birdwell.

11 Q And what is his role?

12 A He's the president of Sea Pines Resort.

13 Q Who does he report to?

14 A He reports to the ownership.

15 Q Is that the Riverstone Group?

16 A Yes, sir.

17 Q Any particular person in Riverstone Group?

18 A I would assume Matthew Goodwin, the chairman of the
19 board.

20 Q So your duties as a director of recreation and marine
21 operation, one of those is to oversee the various recreation
22 programs in the resort?

23 A That's correct.

24 Q And that includes the fitness centers?

25 A Includes fitness, recreation programs, family

1 activities, special events, bicycle rentals, swimming pools,
2 playground.

3 Q And you also oversee the Harbour Town (inaudible) and
4 operations?

5 A That's correct.

6 Q You have a working relationship with the charter boat
7 people?

8 A That's correct.

9 Q And you also work with the retail tenants in Harbour
10 Town?

11 A That's correct.

12 Q Do you work with all of the retail tenants in Harbour
13 Town or just some of them?

14 A We have business arrangements with most of them, but
15 not all, and I have relationships of one sort with all of
16 them.

17 Q Just so I understand, there are commercial tenants in
18 Harbour Town that are not in any way affiliated with Sea
19 Pines, correct?

20 A We do not have a business relationship or a lease
21 together, correct.

22 Q But you do lease some property?

23 A That is correct.

24 Q And you are the main contact for those tenants that
25 have a lease with Sea Pines Resort?

1 A That is correct.

2 Q And you were back in 2016 and '17?

3 A That is correct.

4 Q And you handle the leases?

5 A Yes.

6 Q And if there's a sale of the business, you get involved
7 in that?

8 A Yes.

9 Q Were you involved in the sale of Harbour Town General
10 Store?

11 A I was not.

12 Q How long have you known Mr. Bitton?

13 A I would say probably about eight, nine years. I don't
14 know exactly, but more than five years.

15 Q How do you know him?

16 A I know he has a business in Harbour Town.

17 Q Frequently interact with Mr. Bitton?

18 A Not frequently, but I would occasionally see him in
19 Harbour Town and we had, you know, cordial conversations
20 always.

21 Q How about Mr. Mintz, how long have you known Mr. Mintz?

22 A Same.

23 Q Five or six years?

24 A That's correct.

25 Q Is part of your responsibility to oversee the tenants

1 in Sea Pines and get to know the tenants themselves?

2 A Yes. We have a business relationship and we,
3 obviously, want to have a good relationship and make sure
4 they're successful.

5 Q So you're well aware that they own the general store,
6 correct?

7 A Yes.

8 Q But you don't deal with them with the general store
9 because that's not a tenant of Sea Pines?

10 A It's not that I don't deal with them. I stop in the
11 store and have conversation with them. We have a very
12 friendly relationship. I want to know what's going on with
13 the business so that other businesses may know what's going
14 on in Harbour Town. They were doing a renovation at one
15 time and we were very interested to know what was going on
16 and when it would reopen. We were getting questions from
17 guests and property owners.

18 Q Now, you're also aware that they operate the Harbour
19 Town Surf Shop?

20 A Yes.

21 Q And that's units 6 and 8; is that correct?

22 A That's correct.

23 Q Were you involved in the sale of the surf shop
24 property?

25 A Yes.

1 Q In fact, Ms. Johnson contacted you in the summer of
2 2016 and was talking to you about Sea Pines purchasing the
3 property, right?

4 A Lynda had called and mentioned that she was considering
5 selling the properties that her and her brother had
6 inherited.

7 Q You took that information and you told Mr. Birdwell?

8 A Yes.

9 Q You also told a fellow named Cliff McMakin?

10 A Cliff McMakin, that is correct.

11 Q What is his job?

12 A He's the director of resort development.

13 Q Is he still there?

14 A Yes, he is.

15 Q What did they tell you?

16 A Let's look into it.

17 Q At some point, did Ms. Johnson give you a number that
18 she was selling it for?

19 A Lynda mentioned at that time that she was looking at
20 approximately \$460,000 per unit, there are two units.

21 Q This was in the summer of 2016?

22 A I believe this was in late summer of 2016.

23 MR. KUBEC: Your Honor, if I may approach? I have a
24 couple exhibits.

25 THE COURT: Yes, sir.

1 BY MR. KUBEC:

2 Q Mr. Bender, I'm going to apologize in advance, some of
3 the e-mails in there are kind of small print.

4 A Okay. I'll do my best.

5 Q I'd like you to refer to Exhibit A. What is this
6 document?

7 A I just want to make sure I'm looking at the right
8 document. You said Exhibit A?

9 Q 8A?

10 A 8A.

11 Q And on top is (inaudible). What is this document?

12 A This is an e-mail.

13 Q From who?

14 A It's from me to Lynda.

15 Q Who else?

16 A And also copied is Cliff McMakin.

17 Q What's the date?

18 A Wednesday, August 24th, 2016.

19 Q Can you read what that e-mail says, please?

20 A Sure. Hello, Lynda, I appreciate your call this
21 morning and we do have a few followup questions, needs so
22 that we can properly evaluate the possible purchase of your
23 two retail spaces in Harbour Town. And this is a bullet
24 point list: Square footage of each space; can the two
25 spaces be separated again; who would pay for this; copy of

1 any leases for the two spaces; current rent being collected
2 on each space; copies of any financial statements for the
3 business that owns the two spaces; regime fees; any current
4 pending or future assessments that the purchase would be
5 responsible for; asking price for each space.

6 Please let me know if you have any questions and when
7 you have this information available. Many thanks, Rob.

8 Q At this point, you're interested in getting information
9 from her so you can do an analysis of whether to purchase
10 the property?

11 A That is correct.

12 Q Look at Exhibit 8B, which is the next one. Is that an
13 e-mail from -- well, explain to me what that is.

14 A This is an e-mail from myself to Lynda.

15 Q What does it say?

16 A It says, Lynda, I hope you received the following
17 e-mail this time. Many thanks, Rob.

18 Q So that e-mail is dated September 22nd. So in that
19 one-month interval, you haven't received any response that
20 you're aware of from Ms. Johnson?

21 A That's correct.

22 Q Let's also look at Exhibit 9. You can take it out of
23 the book if you'd like. Do you have that?

24 A I have it, yes.

25 Q What is Exhibit 9?

1 A These are some notes that I had taken, handwritten
2 notes.

3 Q Were the notes taken at the same time the event
4 occurred approximately, in the same time period?

5 A I'm sorry, when you say the event, what are you
6 referring to?

7 Q Well, you're taking notes, were these taken
8 contemporaneously with some event that took place?

9 A These would have been just through the course of any
10 conversations with Lynda.

11 Q So if you had a conversation (inaudible)?

12 A I may have if I felt it was pertinent at the time.

13 Q I want you to look at the top one. There's a little
14 handwritten notation there, it says 11/8/2016. What is
15 that?

16 A That was the date that I had written that note,
17 November the 8th of 2016.

18 Q And if you refer down, there's a section that says
19 asking price. What is that?

20 A It says asking price, \$460,000 each space.

21 Q And the next one?

22 A Tenant has to put wall back.

23 Q And the following?

24 A 1,550 square feet both spaces.

25 Q So it's safe to say that as of November 8th, 2016, Ms.

1 Johnson had told you she wanted \$460,000 for each space,
2 correct?

3 A That's what she had mentioned during that phone call.

4 Q Did you pass that information on to Mr. Birdwell?

5 A I believe it would have been.

6 Q What response did you receive from Birdwell?

7 A Evaluate whether this -- evaluate the cost of this and
8 if it's a good business decision.

9 Q Let's go down to the next date, it says 1/6/17. Those
10 are your notes, right?

11 A Yes, sir.

12 Q What does it say next?

13 A It says: Asking price now 650,000, 1,550 square feet,
14 equals \$419.35 per square foot.

15 Q So on January 6th, 2017, you had received a \$650,000
16 proposal, correct?

17 A I don't know if it was a proposal. She was saying that
18 this is what the price was. She had just mentioned that
19 that was the price. I won't say it was a proposal, it was
20 just letting me know what the price was.

21 Q You knew her property?

22 A I knew the property, yes, sir.

23 Q \$419.35 per square foot, that was your calculation?

24 A That is correct.

25 Q Let's refer back to Exhibit 8C.

- 1 A Just to clarify, 8C?
- 2 Q 8C. At the top, it says Bender 0101?
- 3 A Yes.
- 4 Q What is this document?
- 5 A This is an e-mail from me to Cliff McMakin.
- 6 Q What is the date?
- 7 A Wednesday, January the 18th, 2017.
- 8 Q Please read to me what you wrote to Mr. McMakin.
- 9 A Cliff, the owner of the retail space for Harbour Town
- 10 Surf Shop called Steve and I this morning to discuss the
- 11 listing. The current tenant has put in an offer of \$585,000
- 12 and she realizes that we have the right of first refusal. I
- 13 have attached a quick review of the space with some
- 14 financial modeling. Based on my calculations, it looks like
- 15 something we should strongly consider. Please let me know
- 16 when you have time to review it. Thanks, Rob.
- 17 Q You're referring to the owner of the retail space for
- 18 Harbour Town Surf Shop. Who is that?
- 19 A Lynda Johnson.
- 20 Q And you also refer to the current tenant has put in an
- 21 offer, 585. Who was the current tenant?
- 22 A It would have been the Harbour Town Surf Shop.
- 23 Q The gentlemen beside us?
- 24 A Yes, sir.
- 25 Q Then you conclude, based on your calculation, it looks

1 like something they should consider, correct?

2 A Yes.

3 Q This was going to Mr. McMakin?

4 A McMakin, yes.

5 Q Did a little financial analysis that you attached to
6 it, correct?

7 A I did some financial analysis. I don't know if I
8 attached it to this e-mail or not.

9 Q (Inaudible)?

10 A Yes.

11 Q Is that your financial analysis?

12 A Yes, it is.

13 Q You prepared this on January 18th, 2017?

14 A That's correct.

15 Q And at that time, you're aware that the square footage
16 of the office space was 1550 feet?

17 A Yes.

18 Q You did a calculation of value based on different cap
19 rates, correct?

20 A That is correct.

21 Q What's a cap rate?

22 A It's a metric used to determine a return and a value on
23 a piece of property.

24 Q And I just want to make sure I understand how it works.
25 So you calculated an average rent roll value of the real

1 estate, correct?

2 A Yes.

3 Q Is that a yearly average rent roll?

4 A Yes.

5 Q In this particular instance, it's \$58,964.58, correct?

6 A That was based on a ten-year projection of what the
7 average rent could be based on what the existing lease was
8 and what a potential rent rate would be after the existing
9 lease.

10 Q And then you calculated a value based on a percent cap,
11 correct?

12 A That's correct.

13 Q And what was that value?

14 A \$737,057.25.

15 Q You calculated one at ten percent, correct?

16 A That is correct.

17 Q But, also, your analysis -- let me understand this, the
18 lower the cap rate you use, the higher the value, that's the
19 way it's calculated, correct?

20 A That is correct.

21 Q Basically, you're dividing that 58964 number by the
22 percent, correct?

23 A That's correct.

24 Q Just below that, you use a comp, correct?

25 A Yes, that's in this document.

1 Q Why were you showing them a comp?

2 A Just to look at what a similar -- or another piece of
3 commercial property in Harbour Town would have sold for.

4 Q What was the cap rate for that?

5 A It was 6.32, which is remarkably low.

6 Q You applied that 6.32 percent to your number, the 589,
7 you had a much higher value?

8 A Yes, but that 6.32 number is a very misleading number.

9 Q It actually happened, though, didn't it?

10 A Yes.

11 Q I'd like you now to refer to Exhibit 8D, the next one.

12 A I'm sorry, there's nothing in here.

13 MR. KUBEC: May I approach?

14 THE COURT: Yes, sir.

15 BY MR. KUBEC:

16 Q You ever seen this document before?

17 A Yes, I have.

18 Q What is this?

19 A This is an e-mail from me to Lynda Johnson on
20 Wednesday, January 25th, 2017.

21 Q What does it say?

22 A Would you like me to read it?

23 Q Yes, read it.

24 A Hello, Lynda, thank you for dropping off the lease. As
25 part of our evaluation of the space, we need to understand

1 what assessments are currently being charged to your
2 locations and are there any other pending assessments. If
3 there are any assessments in place now, are you paying those
4 or is the tenant? We understand that there are numerous
5 improvements being made to the building, including the
6 repair to the roof and I assume those costs are being
7 assessed to each owner.

8 I look forward to hearing back from you. Many thanks,
9 Rob.

10 Q First thing you say is thank you for dropping off the
11 lease. What lease were you referring to?

12 A The lease for the Harbour Town Surf Shop.

13 Q Lease for the Harbour Town Surf Shop with who?

14 A It would have been with -- I don't understand.

15 Q They had a lease, who did they have a lease with?

16 A Lynda Johnson and Charles Giannone.

17 Q And you wanted to have a copy of that lease so you
18 could understand what?

19 A We wanted to understand the terms of the lease so that
20 we could use that in our evaluation of whether to purchase
21 the property or not.

22 Q This is January 25, correct?

23 A This e-mail is, yes.

24 Q And let's look at the next one, 8E.

25 A Yes.

1 Q It says Rob Bender 0014?

2 A Yes.

3 Q Do you recognize this document?

4 A Yes, I do.

5 Q What is this?

6 A This is an e-mail from me to Steve Birdwell and Cliff
7 McMakin on Wednesday, February the 1st, 2017.

8 Q Would you please read that one, first sentence?

9 A Lynda Johnson called me yesterday to tell me that the
10 tenant of the surf shop was dropping off an offer for the
11 space that she was going to give to her attorney to move
12 forward on the sale. She said the offer was going to be
13 \$580,000.

14 Q So as of January 31st, you knew that offer was being
15 made?

16 A I knew verbally that --

17 Q (Inaudible)?

18 A Lynda had verbally told me that there was an offer
19 being made.

20 Q And you then turned around and you told Mr. Birdwell
21 (inaudible)? Right, you had a conversation --

22 A You're asking me?

23 Q I'm asking you.

24 A Yes.

25 Q And you told him how much?

1 A Yes.

2 Q You told him what property?

3 A Yes.

4 Q \$580,000 on surf shop property, correct?

5 A That's correct.

6 Q And you attached your analysis in your e-mail to Mr.

7 Birdwell?

8 A There was an attachment. I can't tell by this e-mail

9 what the attachment was, but there was an attachment.

10 Q Go to the next page?

11 A Yes.

12 Q Same analysis you just did, right?

13 A That's correct.

14 Q Didn't change the number of the 580?

15 A This analysis is still from January the 18th, which had

16 the \$585,000 price in there.

17 Q Just so I understand, on January 31st, you had a

18 conversation with Lynda Johnson who told you about the

19 offer. The next day, you told Mr. Birdwell the terms of

20 that offer?

21 A So when you say the terms of the offer, I knew what the

22 price was, that was the only term that I knew. There's many

23 other terms in a real estate transaction, which I did not

24 know the terms.

25 Q You knew the property, correct?

1 A Yes, I knew which location.

2 Q You knew the buyer?

3 A Yes.

4 Q You knew the price?

5 A Yes.

6 Q You also had a copy of the lease in your hand?

7 A Yes, but, again, I will say there are many other
8 factors in a real estate transaction beyond those items.

9 Q By the way, do you recall at that point in time how
10 much time was left on the lease between Harbour Town Surf
11 Shop and Ms. Johnson?

12 A I believe there was another eight years with the
13 extension.

14 MR. KUBEC: Your Honor, I would like to move in
15 Exhibits 8A, B, C, D, E and Exhibit 9 into evidence.

16 THE COURT: Any objection?

17 MR. WALKER: No, Your Honor.

18 THE COURT: All right. Let's go ahead and mark them so
19 we don't get behind on them, please.

20 (Plaintiff's 8A through 8E and 9 admitted into
21 evidence.)

22 BY MR. KUBEC:

23 Q Eventually, you're aware that Harbour Town Surf Shop
24 and Mr. Giannone and Ms. Johnson entered into a contract?

25 A That's correct.

1 Q The surf shop was going to buy that property for
2 \$580,000, correct?

3 A That's my understanding.

4 Q Did you receive a copy of that contract at some point?

5 A I believe I received that on April 17th.

6 Q Between that period of time, February and April 17th,
7 you continued to work on this deal?

8 A Continued to research what type of costs were involved
9 in owning this property. There was renovation work taking
10 place at the building, roof project, repainting, shutters,
11 there were balcony concerns. There were numerous
12 maintenance issues. There were special assessments, future
13 assessments. We needed to understand what kind of
14 obligations and commitments it would be if we purchased the
15 property. And we didn't have all those answers right away.

16 Q But at some point, you communicated a detailed analysis
17 (inaudible)?

18 A I provided some financial modeling of what kind of rent
19 could be collected and what type of cap rate there could be
20 on that.

21 Q Please look at Exhibit 14A, please.

22 A Yes, sir.

23 Q What is this?

24 A This is an e-mail from me to Steve Birdwell and Cliff
25 McMakin dated Thursday, April 20th, 2017.

1 Q And there's an attachment to this. What is that?

2 A You want me to read the title of the attachment?

3 Q Yes, please.

4 A Harbour Town Surf Shop Real Estate Opportunity 4/20/17.

5 Q Is that a document you prepared?

6 A Yes, it would have been. Again, I say that, but I

7 don't see anything included in here, so I can't say

8 specifically.

9 Q Go to the next page, please.

10 A 14B?

11 Q 14B.

12 A Yes, sir.

13 Q First page is a written summary?

14 A Yes.

15 Q Second page has a little more financial information on

16 it?

17 A Yes.

18 Q Is it your conclusion from this document that Sea Pines

19 should buy that shop?

20 A That is correct.

21 Q You passed this information off to Mr. Birdwell?

22 A This would have been passed to Mr. Birdwell, correct.

23 Q So let's refer down to the -- on Page 14B, the sixth

24 paragraph that starts with (inaudible). Do you see that?

25 A Yes.

1 Q It says: With the master planning efforts underway for
2 Harbour Town, you see that?

3 A Yes.

4 Q And those master planning efforts at that time, so Sea
5 Pines were working -- Sea Pines was working with a -- they
6 were (inaudible), correct?

7 A That's correct.

8 Q And they wanted to build additional hotel rooms in
9 Harbour Town, correct?

10 A In the Harbour Town area, that was one consideration
11 was adding additional lodging units, hotel rooms, amongst
12 other projects.

13 Q And you wanted to put in a pool complex?

14 A A pool complex was one potential.

15 Q Additional parking?

16 A Additional parking, additional retail space.

17 Q And you wanted to find more retail, right?

18 A Yes.

19 Q That you could own?

20 A That's correct.

21 Q So gentlemen like Mr. Mintz and Mr. Bitton would no
22 longer own it, you would?

23 A It wasn't an either/or, it was something that we were
24 interested in buying. It had nothing to do with not
25 allowing them to buy it.

1 Q So the next line says (inaudible) additional retail
2 space in Harbour Town works strategically with the vision of
3 improving and expanding the guests experience, correct?

4 A That's what it says, yes.

5 Q So let me understand this, it's your opinion then that
6 your owning that shop would improve the guests experience
7 more than their owning it?

8 A I don't think it says, again, either/or that we would
9 do more than or different than them, it just said what we
10 would do. I wasn't comparing to what somebody could be
11 doing.

12 Q Management believes owning additional retail space in
13 Harbour Town works strategically with the vision of
14 improving and expanding the guests experience. Again, how
15 is your ownership better than your ownership of improving
16 the guests experience?

17 A That's not what the statement was saying.

18 Q That's what it says, right?

19 A Again, I don't see anywhere where it's comparing what
20 we would do differently than them.

21 Q But you're going to own the property. Matter of fact,
22 the next sentence, you say, all the while growing
23 profitability of Harbour Town. One of the purposes of doing
24 this was you could make more profit?

25 A We own many property -- commercial properties in the

1 Harbour Town area and we thought this would be a good
2 addition to that portfolio.

3 Q If you bought this property, you would make more
4 profit?

5 A We are a for-profit company. We are a resort. We are
6 a for-profit company and we are also in the guests service
7 business. We are always looking at opportunities to expand
8 that guests opportunity.

9 Q Well, I don't understand how the guests experience
10 would be better if you owned it as opposed to these
11 gentlemen?

12 A Again, I'm not making a value statement or a
13 comparison. We felt it was a good opportunity for our
14 business.

15 Q And then the next sentence says, Additionally, the
16 management believe this space is listed at an attractive
17 price. Very attractive price, wasn't it?

18 A We thought it was a very fair price for both Lynda, the
19 seller, and us as the buyer.

20 Q (Inaudible)?

21 A We thought it was an attractive price for both based on
22 the financial analysis.

23 Q (Inaudible)?

24 A We thought it was a good deal for both parties.

25 Q Mr. Birdwell (inaudible)?

1 A Yes.

2 Q He then passed that up the corporate ladder to

3 Riverstone Group, correct?

4 A That is correct.

5 Q And they approved it, right?

6 A That is correct.

7 Q And this is -- (inaudible). Do you have that document

8 in front of you?

9 A Yes, sir.

10 Q You see there's two e-mails -- there's actually three

11 e-mails on that. I want you to focus on the top one and the

12 next one. The one below is an e-mail from Jeff Hariman

13 (ph). Who's Jeff Hariman?

14 A He's the former director of finance at Sea Pines

15 Resort.

16 Q And Jeff Gilante (ph), who is Jeff Gilante?

17 A He works in the corporate office for Riverstone Group.

18 Q What does he do there?

19 A I don't know. I'm not involved with them.

20 Q And you're copied, obviously, correct?

21 A That is correct.

22 Q Subject is Harbour Town Surf Shop model, correct?

23 A That is correct.

24 Q And this e-mail (inaudible)?

25 A Yes.

1 Q And there's an e-mail above it from Gilante?

2 A Yes.

3 Q He copies you on it, correct?

4 A Yes.

5 Q It's got a model, correct?

6 A I assume so.

7 Q I cleaned it up a little bit, revised the format,
8 correct?

9 A That's what it says.

10 Q And attached to that is Exhibit B, copy of a model,
11 correct?

12 A Yes.

13 Q And you received a copy?

14 A Yes, I received a copy.

15 Q And you looked at it?

16 A I have seen it, yes.

17 Q Was there anything in this model that you disagreed
18 with?

19 A I did not produce it. I have not used a model like
20 this. I'm not familiar with it, but I saw it.

21 Q Is there anything you disagreed with?

22 A I can't say I disagreed with anything because I'm not
23 familiar with it and versed in it.

24 Q You read it?

25 A I read the e-mail and I saw the document. I can't say

1 -- I'm not familiar with it. I don't understand it enough
2 to say whether I agree with it or have any changes.

3 Q Correct, but you didn't call up anybody after you
4 received it or e-mail anybody and say hey, I saw this and I
5 don't agree with it?

6 A I wasn't educated enough on this document to know
7 whether there would be an error or not.

8 Q Let's look at it. It says purchase price is \$580,
9 correct?

10 A It says \$580,000. You said \$580.

11 Q \$580,000, correct?

12 A Yes.

13 Q And the interest rate on there is 4.29 percent?

14 A Yes, I see that.

15 Q So the company is doing a financial analysis, correct?

16 A Again, I was not involved in this. I don't know
17 exactly what Jeff Gilante was doing.

18 Q So when did Sea Pines decide to make the decision to
19 purchase the property?

20 A That would have been early May.

21 Q Were you involved in that decision?

22 A I had made a recommendation to Steve Birdwell, my
23 supervisor, that we should move forward and he had approval
24 from ownership.

25 Q Did you tell Mr. Bitton and Mr. Mintz at that time that

1 you were purchasing the property?

2 A I did not have communication with them.

3 Q When did you tell them?

4 A It was through our attorneys.

5 Q You never spoke to them? You never talked to them?

6 A I did not.

7 Q When did your attorneys tell them?

8 A On May the 2nd.

9 Q You weren't involved with it?

10 A No.

11 Q When was the next involvement that you had with Mr.

12 Bitton or Mr. Mintz?

13 A I don't recall.

14 Q Do you recall when this transaction closed?

15 A I believe it was May the 11th.

16 Q Did Sea Pines do an appraisal of the property?

17 A We did not.

18 Q Did Sea Pines do an inspection of the property?

19 A Not before the purchase.

20 Q You didn't do any inspection of the property before the
21 purchase?

22 A We did not. The terms of the agreement were as-is.

23 Q You could have done an inspection on your own, right?

24 A We could have.

25 Q You could have done an appraisal on your own?

1 A We could have. We chose not to.

2 Q Because you were in a hurry to close this deal, weren't
3 you?

4 A No, the conditions of the contract were the property
5 was as-is. An appraisal, we felt -- based on our financial
6 modeling, we felt we knew what a fair price would be.

7 Q So after the fact, you did an inspection, correct?

8 A We did, yes. We thought it was important to know the
9 condition of the property that we purchased as-is.

10 Q I'd like you to take a look at Exhibit 30A, please. Do
11 you have that document in front of you?

12 A Yes, I do.

13 Q What is that?

14 A It is an e-mail from Tony Worco (ph) to Jeff Hariman
15 and I was copied on the e-mail.

16 Q Who is Tony Worco?

17 A Tony Worco is our former director of facility services.

18 Q What were you instructing Mr. Worco?

19 A I wasn't instructing him anything. I was copied on
20 this e-mail.

21 Q What was his role?

22 A Again, he was our director of facility services,
23 oversaw the various facilities that the resort owns and
24 operates.

25 Q And Mr. Worco is writing this to Herman and copied you

1 on it, right?

2 A That is correct.

3 Q This is in regard to inspecting the property at Harbour
4 Town, right?

5 A This was in regard to inspecting the Harbour Town Surf
6 Shop property, correct.

7 Q At this point in time, May 13, no inspection had been
8 performed, correct?

9 A It had not occurred before this point.

10 Q Now, let's look at the next e-mail, Exhibit 30B.
11 That's an e-mail from you to allstar20@ (inaudible),
12 correct?

13 A Yes.

14 Q May 15th, right?

15 A Yes.

16 Q Allstart20, that's Amir and Alon. You're sending an
17 e-mail to Amir and Alon, right?

18 A It's my understanding that was their e-mail address,
19 yes.

20 Q So four days after you close on the property, correct,
21 you're sending them this e-mail, correct?

22 A Yes.

23 Q And probably 13 days after you told them that you were
24 taking the property, you sent them this e-mail, correct?

25 A I don't know about saying we were taking the property,

1 we purchased the property.

2 Q You told them you were taking it, they weren't buying
3 it?

4 MR. WALKER: Objection, Your Honor. He's already said
5 that he didn't tell them anything.

6 THE COURT: Asked and answered.

7 BY MR. KUBEC:

8 Q So this e-mail says, Good afternoon, Amir and Alon.
9 Our recent purchase of the commercial space that you occupy
10 at Harbour Town Surf Shop, I first want to say we welcome
11 working with you and look forward to a successful
12 relationship. Do you think it's an appropriate e-mail
13 (inaudible)?

14 A Yes, we wanted to have a successful relationship with
15 them. We wanted to be business partners working together,
16 yes.

17 Q Well, (inaudible)?

18 A Again, we wanted to have a good working relationship
19 with them.

20 MR. KUBEC: Your Honor, I would like to mark and
21 introduce into evidence Exhibit 14A, B, C and Exhibit 30A.

22 THE COURT: All right. Pass them up for the court
23 reporter.

24 MR. WALKER: No objection to those.

25 MR. KUBEC: And, I'm sorry, 30B.

1 (Plaintiff's Exhibit Nos. 14A, B and C and 30A and B
2 admitted into evidence.)

3 BY MR. KUBEC:

4 Q Mr. Bender, you've heard a lot about the right of first
5 refusal in this case?

6 A Yes.

7 Q What do you know about it?

8 A I know that the resort has the option to exercise the
9 right of first refusal.

10 Q Where does that right come from?

11 A My understanding, it comes from the covenants of Sea
12 Pines. I'm not well versed in the covenants.

13 Q (Inaudible)?

14 A I have not.

15 Q Have you ever seen a piece of paper that says Sea Pines
16 Resort, LLC has the right of first refusal?

17 A It's not part of my operation, no, I have not.

18 MR. KUBEC: I have no further questions.

19 THE COURT: All right.

20 CROSS-EXAMINATION

21 BY MR. LINTON:

22 Q Good morning. Let's start with these e-mails you were
23 asked about, Plaintiff's 8A, 8B, 8C, 8D and 8E. Now, you
24 were asked detailed questions about those e-mail
25 communications with (inaudible) and the analysis you were

1 doing on how much the surf shop property might be worth. Do
2 you remember all that?

3 A Yes, I do.

4 Q Did anything in these e-mails say anything about
5 contract -- about any contract to purchase the surf shop at
6 that point in time?

7 A No, not at all, just conversations.

8 Q Were you presented with any contract to evaluate?

9 A Nothing.

10 Q Did you have any notice of any contract terms at that
11 time?

12 A Not at all.

13 MR. LINTON: May I approach, Your Honor?

14 THE COURT: Absolutely.

15 BY MR. LINTON:

16 Q I want to hand you what's been marked as Plaintiff's --
17 or Defendant's Exhibit 9. Let me find one that doesn't have
18 writing on it for you.

19 A Yes.

20 Q Are you familiar with that document?

21 A Yes, I am.

22 Q And have you seen a copy of it before?

23 A Yes, I have.

24 Q Did you see a copy of it in your role with Sea Pines?

25 A Yes, I did.

1 Q What is it?

2 A It's a request for waiver and/or assessments.

3 MR. LINTON: At this time, Your Honor, we would move
4 Defendant's Exhibit 9 into evidence.

5 THE COURT: Any objection?

6 MR. KUBEC: No, Your Honor.

7 THE COURT: All right. Without objection.

8 (Defendant's Exhibit No. 9 admitted into evidence.)

9 BY MR. LINTON:

10 Q What's the date of this document, Mr. Bender?

11 A It's April the 13th of 2017.

12 Q And is that approximately the date the resort received
13 this document?

14 A That is correct.

15 Q Do you see an attorney listed on this document?

16 A Yes, there is an attorney listed, the law office of
17 Michael Mogil.

18 Q And who is Michael Mogil?

19 A He's an attorney that was handling the real estate
20 transaction for the Plaintiff.

21 Q For the purchasers?

22 A For the purchasers, yes, Amir and Alon.

23 Q Do you see where it references the legal address of the
24 property here?

25 A Yes.

1 Q What property is that referring to?

2 A Where it says Beaufort County property identification
3 number?

4 Q No, where it says legal address right above that?

5 A Oh, I'm sorry, legal address, shops 6 and 8 Mariners
6 Way, HPRLX1B Harbour Town.

7 Q So it's talking about the surf shop?

8 A That is correct.

9 Q And this says that the sales price is \$580,000?

10 A That is correct.

11 Q And there's a contract between Bittmint and Lynda
12 Johnson and Charles Giannone?

13 A Yes, it list the sellers as Lynda Johnson and Charles
14 Giannone and the purchaser as Bittmint, LLC.

15 Q Is this April 13th document the first time Sea Pines
16 knew of a contract between Harbour Town Surf Shop -- between
17 Bittmint, excuse me, and Lynda Johnson --

18 MR. KUBEC: Objection, calls for speculation.

19 THE COURT: He can answer as to whether he has personal
20 knowledge of it.

21 THE WITNESS: This was the first time in writing, yes.

22 BY MR. LINTON:

23 Q Is this the first time you personally knew of an actual
24 contract?

25 MR. KUBEC: Objection, misstates evidence.

1 THE COURT: You can answer it.

2 THE WITNESS: Yes.

3 BY MR. LINTON:

4 Q In writing?

5 A Yes, in writing.

6 Q Let's look down at the last paragraph here. Do you see
7 here -- I'll mark on my copy here, what I'm marking? Right
8 there.

9 A Yes.

10 Q This says: The above referenced property is hereby
11 offered for sale to the company pursuant to the same terms
12 and price contained in the current contract of sale with
13 bonafide purchaser referenced above. It is hereby
14 understood by all parties that the company has 30 business
15 days from receipt of this offer in which to determine its
16 repurchase option. Did I read that correctly?

17 A That is correct.

18 Q Mr. Bender, I believe you already testified that you
19 received the actual contract on April 17th, 2017?

20 A That is correct.

21 Q And who sent you that contract?

22 A Michael Mogil, an attorney.

23 Q And Michael Mogil is the attorney for Bittmint?

24 A That is correct.

25 Q And was that contract -- if you'll turn in your exhibit

1 notebook up there to Plaintiff's Exhibit 11.

2 A Yes.

3 Q Is that the contract that Mr. Mogil sent you on April
4 17th?

5 MR. KUBEC: Objection, Your Honor, that's speculative.
6 That's -- sidebar, Your Honor, on this one?

7 MR. LINTON: It's in evidence, Your Honor.

8 MR. KUBEC: Objection withdrawn, Your Honor.

9 THE COURT: All right.

10 BY MR. LINTON:

11 Q This contract that's in evidence that Bittmint is going
12 to buy the property for \$580,000, their lawyer sent it to
13 you on April 17th, 2017?

14 A That is correct.

15 Q And that's the first time Sea Pines had any written
16 notice of the terms of the contract?

17 A That is correct.

18 MR. LINTON: That's all the questions I have.

19 Thank you, Mr. Bender.

20 MR. KUBEC: Your Honor, may I?

21 THE COURT: Absolutely.

22 REDIRECT EXAMINATION

23 BY MR. KUBEC:

24 Q Let's back to this form, Exhibit 9.

25 A I have it in front of me.

1 Q Who created it?

2 A I don't know who created it, but it was sent from
3 Michael Mogil's office.

4 Q There's a logo on top, what does the logo say?

5 A Sea Pines Resort.

6 Q So wouldn't you assume that Sea Pines Resort is the one
7 who created it with their logo on top of it?

8 A When you say create, you mean the original document or
9 created this actual information with the seller and
10 purchaser.

11 Q This is a document that was created by Sea Pines
12 Resort?

13 A So there's two different -- again, I'm a little
14 confused here. There would have been an original document
15 that the resort would have created, but this document of who
16 filled in the information would have been somebody in
17 Michael Mogil's office.

18 Q Correct, because it's a standard form that Sea Pines
19 uses, correct?

20 A That is correct. That is my understanding.

21 Q And there's three pieces of information in here,
22 correct? It tells you who's buying it, who's selling it and
23 what the price is, correct?

24 A Those are on there. There are additional pieces of
25 information, but those three are on there, that's correct.

1 Q The sales price, 580, correct?

2 A That is listed on here, yes.

3 Q The purchaser, Bittmint?

4 A That is correct.

5 Q The sellers, Lynda Johnson and Charles Giannone,
6 correct?

7 A Yes.

8 Q It says legal address, shops 6 and 8, Mariners Way,
9 correct?

10 A Yes.

11 Q It identifies who the attorney is, Mike Mogil, correct?

12 A That is correct.

13 Q And the only other thing is a tax identification
14 number, correct?

15 A There's some phone numbers and addresses and so forth
16 on here in the paragraph at the bottom.

17 Q Paragraph at the bottom. Now, let me understand
18 something here. You're not too familiar with the terms of
19 the right of first refusal, correct? You just said that
20 earlier, right?

21 A Yes. I'm familiar with the term. I understand what it
22 means. I don't know where in the covenants it is.

23 Q Correct. You have no idea whether or not the covenants
24 require an actual contract, a contract in your hand would
25 trigger the right of first refusal, do you?

1 A No, but I know what this document says here that we
2 have to understand --

3 Q You don't know what the covenants say, do you?

4 A I do not.

5 Q You don't know if the covenants require a contract, do
6 you?

7 A I do not.

8 MR. KUBEC: No further questions.

9 THE COURT: Mr. Linton, anything as a followup?

10 MR. LINTON: No, Your Honor.

11 THE COURT: You may step down. Thank you very much.

12 Call your next witness.

13 MS. COFFEY: Ms. Johnson.

14 THE CLERK: Please raise your right hand.

15 LYNDA JOHNSON,

16 after being duly sworn, testified as follows:

17 THE CLERK: Once you get settled, state your first name
18 and spell out your last name for the court reporter, okay?

19 THE WITNESS: My first name is Lynda and my last name
20 is Johnson, J-O-H-N-S-O-N.

21 DIRECT EXAMINATION

22 BY MS. COFFEY:

23 Q Good morning, Ms. Johnson.

24 A Am I supposed to call you Ms. Coffey or Maureen?

25 Q You can call me whatever you want.

1 A Okay. Good morning, Maureen.

2 Q And your mother is Lorraine Giannone?

3 A Yes.

4 Q And am I saying that right?

5 A Yes, you're saying it fine.

6 Q And she was the original owner of shops 6 and 8?

7 A Yes.

8 Q And you had a hair salon in one of the shops?

9 A Yes, I did.

10 Q And was your salon in operation when Alon and Amir
11 rented the store?

12 A Yes.

13 Q So you've known Alon and Amir for a number of years?

14 A Yes, ma'am.

15 Q And then you and your brother inherited the shops from
16 your mother?

17 A Correct.

18 Q As we heard Mr. Bender testify just a few minutes ago,
19 you contacted Sea Pines on or about 8/24/16 about selling
20 the shop?

21 A No.

22 Q You didn't?

23 A I contacted Mr. Bender, but my mom had just passed away
24 August of 2016, and I was not going to hire a real estate
25 office because I knew these gentlemen were interested in

1 buying the shop. So I contacted him to find out about what
2 the price would be on the shop, rather than go to a realtor.
3 I didn't want to pay for a commission.

4 You have to understand, I'm friends with Rob. I've
5 known them for a long time. Just like I'm friends with Alon
6 and Amir. So we talked back and forth. I believe I went to
7 the man just to get a price, or how else would I have a clue
8 what the shops were worth.

9 Q Can you look at Exhibit 8?

10 A These numbers over here?

11 MS. COFFEY: May I approach the witness?

12 THE WITNESS: Do I go by the number here?

13 BY MS. COFFEY:

14 Q I think there's (inaudible).

15 A Oh.

16 Q (Inaudible).

17 A It's okay. Here's my problem, my little Boykin Spaniel
18 scratched my eye. I wear contacts that are for distance and
19 up close, but I'm going to try with readers. My eye is
20 bothering me. I'll try, Maureen.

21 Q Okay. Is that an e-mail from Mr. Bender to you?

22 A I'm assuming it is, yes.

23 Q Well, at the very top, it says -- I mean, it's hard to
24 read, but it says Rob Bender to Lynda Johnson?

25 A Right. Right.

1 Q And can you -- can you read -- well, the date says
2 Wednesday, August 24th, is that 2016?

3 A Yes.

4 Q And --

5 A And my mom had just passed away August 15th.

6 Q So this was just nine days later?

7 A Right.

8 Q And do you have any reason to believe that this e-mail
9 isn't correct?

10 A Well, I didn't read it all, but... may I just speak?
11 I, actually -- for me, I went to them at first to try to
12 find a price on the shop. I wasn't putting it on the
13 market.

14 Q Right, I understand. Correct me if I'm wrong, does the
15 e-mail say, Hello, Lynda, I appreciate your call this
16 morning and we do have a few followup questions, needs so we
17 can properly evaluate the possible purchase of your two
18 retails spaces in Harbour Town?

19 A Yes.

20 Q So then Mr. Bender misunderstood your request?

21 A No, I believe he understood my request.

22 Q But that doesn't say we're going to give you a price
23 valuation, that says evaluate the possible purchase of your
24 two retails spaces in Harbour Town?

25 A Yes.

1 Q So you contacted them on or about nine days after your
2 mom passed to discuss (inaudible)?

3 A Yes, may I tell you -- explain why?

4 Q Well, we'll get to it.

5 A Okay.

6 Q And then as you heard Mr. Bender just testify, on or
7 about November 8th, 2016, you contacted him again with an
8 updated price?

9 A I'm sure if Rob said that, I did.

10 Q And as you heard Amir testify yesterday and you just
11 said, you knew they were interested in the shop?

12 A Yes.

13 Q So you were shopping both with Sea Pines and with --

14 A I just wanted to sell the shop and I was trying to get
15 a fair price on my property.

16 Q And it would be advantageous to you if they were in a
17 bidding war?

18 A They wouldn't have been in a bidding war, we all knew
19 that because Sea Pines had first right of refusal, so we had
20 to come up with a number and then Sea Pines had the option
21 of taking it at that number. Sea Pines had no reason to go
22 higher than that number.

23 Q If there was a deal already made, but they could have
24 just said we're going to take -- they could have avoided the
25 right of first refusal altogether if they just said to you

1 we'll take the property for \$600,000?

2 A Yes, they could have.

3 Q But that probably would have trigger Alon and Amir to
4 say well, we'll offer you 610?

5 A Which they did offer me more.

6 Q Exactly. So it was advantageous for Sea Pines rather
7 than purchase it when they had all the information in
8 January to wait until there was a contract and take it at a
9 price that prevented a bidding war?

10 A Yes.

11 Q And just as you said, Sea Pines needed a price. What
12 does that mean to you?

13 A I don't understand the question.

14 Q You just said -- explain to me what the right of first
15 refusal means.

16 A I was told by my lawyer and I believe -- this was five
17 years ago, four and a half years ago, I know I knew about
18 the right of first refusal. Honestly, I don't know how I
19 knew about the right of first refusal. My mom, probably,
20 she might have told me. But the right of first refusal is
21 Sea Pines has the option to take the property when you put
22 it for sale, when the owner of the property puts it for
23 sale.

24 MS. COFFEY: May I approach, Your Honor?

25 THE COURT: Absolutely.

1 BY MS. COFFEY:

2 Q And Lynda, you may remember, we took this deposition?

3 A Yes.

4 Q And by your own admission, you really don't know what
5 the right of refusal (inaudible), the alleged right of
6 refusal?

7 A I don't know what the legal term is, I know what I told
8 you, what I just said I thought it was. I don't know
9 legally.

10 Q But just because you think it means something and I
11 actually think it means something else doesn't actually
12 really affect whether or not there actually is a right of
13 first refusal. Your reasonable belief that there is and my
14 reasonable belief that there isn't doesn't really affect
15 whether or not there is a right of first refusal, correct?

16 A Correct, but that's why I hired a lawyer to tell me
17 what we needed to do and she's the one that told me Sea
18 Pines has right of first refusal.

19 Q When did she tell you that?

20 A When we first started negotiating on the property with
21 Alon and Amir, I believe. Again, Maureen, this is like five
22 years ago. I can't tell you the date.

23 Q So why did you drop the lease off to Rob on 1/25/17?

24 A I don't remember doing that. If Rob said I did, I did.
25 I can't tell you why I did.

1 Q And then let's turn to, I believe it's Page 27 of your
2 -- well, before we get there, so you and Alon signed a
3 letter of intent on 1/31/17?

4 A Yes.

5 Q And why did you do that?

6 A I don't know. They brought me the letter. It was
7 nonbinding, it said it at the bottom of the letter, and my
8 brother never looked at it, so I didn't think that much of
9 it. I signed it.

10 Q You didn't ask Alon for it, to get something in
11 writing?

12 A I might have.

13 Q And that same day that you signed the letter of intent,
14 you called Rob Bender and told him that the tenant of the
15 surf shop is dropping off an offer for the space and you
16 were going to give the offer to your attorney to move
17 forward on the sale? That's what Mr. Bender just testified
18 to.

19 A Okay, then I did.

20 Q And you told him the offer was 580, correct?

21 A If that's what Mr. Bender said, I'm sure it was. I
22 don't mean to not answer these questions, but this was five
23 years ago.

24 Q We're going to try and refresh. Let's turn to Page 22
25 of your deposition.

1 A Okay.

2 Q So on Page 22 -- we had been talking about the letter
3 of intent?

4 A Correct.

5 Q So on Page 22, at the top, I asked the question: Okay,
6 do you see what this date is?

7 And you answered: The 31st of January?

8 A I don't have that on my page.

9 Q At the top of Page 22?

10 A Can you repeat that?

11 Q Look at Line 1.

12 A Okay.

13 Q Does your question say, question: Okay, do you see
14 what date this is?

15 A No, it doesn't. Mine says that on Page 23.

16 MS. COFFEY: May I approach the witness?

17 THE COURT: Sure.

18 BY MS. COFFEY:

19 Q So at the top of Page 23, it says: Okay, you see what
20 date this is?

21 Is that correct?

22 A Yes.

23 Q And then you said, The 31st?

24 A Yes.

25 Q Okay. And we're talking about the letter of intent?

1 A Okay.

2 Q And then turn to Page 27, which might be your Page 28.

3 A My Line 1 says: Of 585, on 27.

4 Q Look at Page 28. Does it say, Negotiate on your own?

5 A Yes.

6 Q So back on your -- the bottom of your Page 26, Line 25.

7 A You want me to go to Page 26 now, Line 25, okay.

8 Q And who did you -- I said, Did you -- and then we go to
9 the next page -- negotiate on your own with?

10 A That's on Page 28, yeah.

11 Q And then it says: Yes.

12 Then I asked you, You all were -- were there no
13 attorneys involved at this time?

14 And you said, No.

15 And then the question I asked you was, Okay, when did
16 you call your attorney?

17 And then you answered, I honestly can't give you an
18 exact date, but it was pretty much right after we got the
19 offer from them?

20 A Okay.

21 Q Okay. And then I asked, Okay, after you received the
22 offer from them, you contacted your attorney, what did you
23 think was taking place in your mind?

24 And you answered, My lawyer was going to write things
25 up.

1 Correct?

2 A I guess that's what I thought in my mind.

3 Q Right. And then you gave the offer to Sea Pines
4 because you knew you had to, correct?

5 A I did not give that offer on January 31st to Sea Pines.

6 Q Okay. But in here, it says on Line 17: And I know
7 it's a day that we had to give this offer to Sea Pines.

8 That's what you answered?

9 A Okay. But I hadn't looked at any of the dates back
10 then and you were deposing me for over an hour. So I don't
11 remember.

12 Q And then later you said, Then someone from Sea Pines
13 told you they were going to take it at that price?

14 A I don't remember if I said it and you wrote it down.

15 Q Well, that's what the --

16 A Where is it, Maureen?

17 Q Look at Line 23 -- Page 28, Line 23.

18 A Okay. And Sea Pines said they were going to take it at
19 that price, okay.

20 Q So you did say it?

21 A I probably did say it if you wrote it.

22 Q Under oath?

23 A Under oath, I'm sure I said it.

24 Q And you understand the right of first refusal, you have
25 to have a price first and then Sea Pines gets to refuse it

1 or take it, that's your understanding?

2 A Yes.

3 Q And you were -- you wanted to speed things along,
4 didn't you?

5 A Yes.

6 Q You knew you had to give this offer to Sea Pines?

7 A Correct.

8 Q And you gave the written offer to Sea Pines on or about
9 January 31st because you were trying to speed the sale along
10 because you knew Sea Pines had to have the first right of --

11 A No, I did not give it to Sea Pines.

12 Q Well, you testified that you did?

13 A Well, I testified wrong then.

14 Q But that's what you --

15 A I probably didn't remember and you told me I did, so I
16 might have said yes.

17 Q I'm just -- that's what your deposition said, okay?

18 A Honestly, Maureen, I don't remember now and I didn't
19 remember then exactly the date that I gave it to Sea Pines.

20 Q Okay. Did you tell Alon and Amir that there was some
21 snafu in the title and that was what was delaying the sale?

22 A I don't remember that at all.

23 Q You don't?

24 A No.

25 Q Can you go to the page that's on the top that says

1 HTSS022?

2 A Okay.

3 Q So you gave the written offer, the letter of intent on
4 Sea Pines on January 31st. And your understanding --

5 A No, I --

6 MR. LINTON: Objection, Your Honor --

7 THE WITNESS: I already told you I did not --

8 THE COURT: Hold on. Hold on. Hold on.

9 What's your objection?

10 MR. LINTON: Your Honor, she's already testified three
11 or four times that she did not give the letter of intent to
12 Sea Pines ever. And then a portion of the deposition was
13 inappropriately read where she was talking about the actual
14 time that the offer was accepted later in April or March,
15 and that that was given to Sea Pines. And now she's using
16 that to ask inappropriate questions.

17 THE COURT: What's inappropriate about the question?

18 MR. LINTON: It assumes a fact not in evidence.

19 THE COURT: All right.

20 What was your last question?

21 MS. COFFEY: My last question was that 30 days had
22 passed since she gave Sea Pines Alon and Amir's written
23 offer on March -- written offer on January 31st.

24 THE COURT: I thought she testified she's not aware of
25 the dates.

1 Can you answer that, ma'am?

2 THE WITNESS: Yes, I do not remember giving them that
3 on the 31st.

4 THE COURT: All right.

5 MS. COFFEY: But when I asked her the question in the
6 deposition, it said: And I know this is the date that we
7 had to give this offer to Sea Pines.

8 THE COURT: Ask her if she recalls it.

9 BY MS. COFFEY:

10 Q Do you recall the date - do you recall when you hired
11 Meredith Bannon?

12 A I really don't. I mean, it was -- you have to
13 understand, you're all lawyers, you deal with this all the
14 time. I just had -- in these four years, I've been in three
15 and a half different shops because of problems with
16 Coronavirus and Covid. My son was in the hospital for two
17 months in a coma. And you're asking me to go back and
18 remember this and that. I honestly can't remember these
19 dates.

20 If you have them written down, I guess they're true,
21 but I don't remember. If you're asking me to honestly tell
22 you if I remember this, I do not. I do not remember the
23 date I hired Meredith. You can ask Meredith that. I'm sure
24 she has the legal paperwork.

25 Q If I told you that Meredith Bannon conducted a title

1 search on March 8th, you think you may have hired her before
2 then?

3 MR. LINTON: Objection, Your Honor.

4 THE WITNESS: Probably.

5 THE COURT: I mean, she's testifying honestly. She's
6 stuck with the answer that she gives her.

7 BY MS. COFFEY:

8 Q So let's just look at 0022. It's hard to read, but the
9 last text from you is on March 6th, which would have been
10 shortly -- do you see that?

11 A Huh-uh, it's not on 0022 -- oh, they're all 00 -- where
12 do you want me to look, Maureen, I'm sorry?

13 Q At the bottom, does it say --

14 A Where it says coming by today? Okay.

15 Q You texted Mr -- is this text an accurate -- were you
16 texting Mr. Alon Mintz? Is this between you and Alon?

17 A I take it that it was.

18 Q I'm just saying do these represent texts between you
19 and Mr. Mintz?

20 A How would I know that?

21 Q A lot of times you're talking about picking up rent
22 checks?

23 A I did pick up rent checks from them.

24 Q I think Alon went to Mexico and you asked him about
25 that?

1 A Did he say that?

2 Q He did.

3 A I don't remember.

4 Q You don't know if these are --

5 A They traveled a lot.

6 Q Let's look at HTSS0020.

7 A Okay.

8 Q Does that top say: Text message Lynda?

9 A Yes.

10 Q And then it says: Alon Mintz?

11 A Yes.

12 Q When you were discussing picking up the rent checks,

13 how did you normally communicate with these guys?

14 A Communicate, you mean how did I pick up the rent check?

15 Q Or discuss like I'm going to come to Island Republic or

16 are you want me to come by the shop?

17 A I guess text messages. Sometimes we just talked, we

18 were neighbors.

19 Q No, but do you have any reason to believe that these

20 are not an accurate representation of your text messages

21 between you and Alon?

22 A No.

23 Q So then let's go back to HTSS0022, where it says --

24 now, this is March 6th.

25 A This timeline, my little pea brain can't jump around

1 like that. I don't know if you all can follow, but.

2 Q What was your understanding from you're not sure where
3 of this alleged right of first refusal?

4 A I already told you what my understanding was.

5 Q I know, but my pea brain is not getting it either.

6 A Okay. All I thought it was is that I -- if I was
7 selling my shop, whoever I got to buy the shop, Sea Pines
8 had first right of refusal.

9 Q And what did that mean?

10 A That meant that they could take the shop. They had the
11 first right to take the shop.

12 Q Okay. And did you understand there to be any sort of
13 time limit?

14 A No.

15 Q They could just take --

16 A I mean, I did not understand that. I'm sure there was
17 a time limit, but I didn't understand that. That's why I
18 hired a lawyer. I don't understand any of that.

19 Q And let's think about this, so the way that's set up,
20 the developer, okay, like --

21 A Like Sea Pines, you mean? Is that the developer?

22 Q Yes, whoever owns the first right of refusal, it begins
23 with the developer.

24 A Okay.

25 Q So they put in their covenants that when you sell your

1 property, you have to get their approval first?

2 A Right.

3 Q But you can't just sell it to Jim Bob, you have to sell
4 it to whomever they want you to sell it to?

5 A Well, that's wrong. I can attempt to sell it to
6 whoever I want to sell it to.

7 Q But if they don't want you to sell it to them, they can
8 exercise this alleged first right of refusal, right?

9 A If they don't want me to sell it to them, they can
10 offer to buy it, yes, or they can buy it at the price I got
11 from Jim Bob.

12 Q Right, but they, essentially, control who you sell it
13 to because they can either buy it or you can sell it --

14 A I don't see it like that. I see it like I could offer
15 it to any one of these people or any one of you and then Sea
16 Pines has the right to say yes or no.

17 Q Correct.

18 A But they're not telling me who to sell it to.

19 Q But if they say no, we're going to buy it, then
20 they've, essentially, told you you can't sell it to Jim Bob?

21 A Okay.

22 Q And developers aren't in the business of building
23 houses or neighborhoods so that they can own all the
24 property, correct? They want to sell it?

25 A I don't know anything about their business.

1 Q Let's go back to 0022.

2 A Okay.

3 Q Coming by today to pick up checks. My lawyer said go
4 ahead with the sale. So I'm assuming on March 6th, you have
5 a lawyer?

6 A Okay.

7 Q And your lawyer would have been --

8 A How do we know this is March 6th? I don't see any date
9 on this piece of paper.

10 Q Okay. It's very hard to see, but if you look under --
11 it says: Hey, I'll call you later. Thanks. Do you see
12 that in green?

13 A No, not on my paper.

14 MS. COFFEY: May I approach?

15 THE COURT: Absolutely.

16 THE WITNESS: I can't see that.

17 BY MS. COFFEY:

18 Q So does that say March 6th?

19 A Yes.

20 Q And then it says: Coming by today to pick up checks.
21 My lawyer said go ahead with the sale of shops, just sell
22 them separately for 290 each, so one to Chuck and one to me.
23 Have your lawyer draw up a formal offer and we will sign it?

24 A Yes.

25 Q Is there anything significant about that date?

1 A No, not to me.

2 Q Not to you. But it was slightly after 30 days after
3 you gave the letter of intent to Sea Pines?

4 A I already told you I did not give the letter of intent
5 to Sea Pines January 31st. Actually, Maureen, I never gave
6 the letter of intent to Sea Pines. I believe my lawyer did.
7 So I never gave a letter to anyone.

8 Q So your lawyer gave the letter of intent to Sea Pines?

9 A Yes.

10 Q What was the purpose of the letter of intent?

11 A What do you mean?

12 Q Why did -- okay, you didn't ask them to put something
13 in writing?

14 A What do you mean I asked them to put something in
15 writing?

16 Q The offer into writing, the letter of intent, what was
17 the purpose of it?

18 A Are you talking about them giving me an offer, to put
19 that in writing?

20 Q Yes.

21 A Is that the letter of intent?

22 Q Yes.

23 A What was the question now?

24 Q So why did you ask them for a letter of intent?

25 A Probably because my lawyer told me to.

1 Q I think it's already in evidence. Go to the evidence
2 book and let's look at No. 11.

3 A I have two different books here.

4 Q I'm sorry, the -- not the deposition book. Look at the
5 binder.

6 A Okay. Okay.

7 Q And do you recognize that document?

8 A Offer and contract for sale, yes.

9 Q And does it purport to state that the purchaser is
10 Bittmint and you and Chuck are the sellers?

11 A Yes.

12 Q And is this is a contract whereby you agreed to sell
13 shops 6 and 8 to Bittmint for \$580,000?

14 A Yes.

15 Q Did you sell it to them for that?

16 A No.

17 Q And can you look at -- turn to Page 2 and look at item
18 six.

19 A Okay.

20 Q So Line 2 says seller, which would be you and Chuck?

21 A Yes.

22 Q The sellers are just you and Chuck, correct?

23 A Right.

24 Q Shall obtain all appropriate waivers and approvals from
25 Sea Pines on the applicable Horizontal Property Regime?

1 A Uh-huh.

2 Q Did you attempt to obtain any waivers?

3 A No, Alon offered for their lawyer to do it.

4 Q But you didn't ask Alon to contact his lawyer?

5 A No.

6 Q On the text messages, top page HTSS0022.

7 A Okay.

8 Q If you'll go down -- when I asked you at the
9 deposition, you said that you asked him to do it because
10 your lawyer was too expensive. Do you remember that?

11 A I do remember. I think we were joking, or I was
12 joking.

13 Q Oh, you were joking?

14 A About my lawyer being expensive because you were asking
15 me why I wouldn't do that and I said I don't know, I believe
16 my lawyer was too expensive. You said you wish you were her
17 then.

18 Q You're correct, I did. So when I asked you, I said,
19 Why did you ask Alon to do it?

20 A Uh-huh.

21 Q And that's when you responded that she cost a lot of
22 money?

23 A Yes.

24 Q But you did ask Alon to have his lawyer contact Sea
25 Pines?

1 A I don't believe I asked him. I believe he volunteered,
2 but I don't remember exactly. I believe he was trying to --
3 we were trying to speed this up and he said that he had --
4 again, Maureen, five years ago, I believe he said something
5 to the extent that they had just been through this with the
6 grocery and they could get it done quicker and get it in.

7 Q But it still is your duty to obtain the waiver?

8 A It is. I guess I didn't know that.

9 Q So did you do anything between March 17th and May 4th
10 when you signed the deed to sell your property to Sea Pines
11 to comply with this contract, the contract between you and
12 Bittmint?

13 A I don't understand the question. What would I have
14 done?

15 Q Well, you had obligations. One, obtain the waiver; two
16 --

17 A No, the only thing I did was put it all in my lawyer's
18 hands. Again, I know nothing about the law in reading these
19 papers. I do hair. I don't even have a computer, so this
20 all went to my lawyer.

21 Q So can you look at 29A?

22 A These papers?

23 Q No, put that away. The binder. Do you recognize that
24 document?

25 A Not really. It says that it's a recorded Beaufort

1 County auditor document.

2 Q Does it say a warranty deed?

3 A Yes.

4 Q And does it say Lynda Johnson, that you're the grantor?

5 A Yes.

6 Q And that Sea Pines is the grantee?

7 A Yes.

8 Q So is this a true and accurate representation of the
9 deed of property from you to Sea Pines?

10 A I have no idea.

11 Q Well, do you have any reason to suspect this is not an
12 accurate representation?

13 A No.

14 Q And if I tell you that it's properly recorded, do you
15 believe me?

16 A Yes. It says Beaufort County auditor.

17 Q The recording information in that top right-hand
18 corner?

19 A Okay, yes.

20 Q So I'm just going to purport to you this is the correct
21 deed?

22 A Okay.

23 Q Can you show me in this deed where it says that Sea
24 Pines has the first right of refusal?

25 A Do you want me to read --

1 MR. LINTON: Your Honor, we have an objection. The
2 witness is being asked about a document that she says she
3 doesn't really know anything about. The lawyer has told her
4 this is a true and accurate copy and I represent to you that
5 it's real and I want to ask you questions about it.

6 THE COURT: All right. Do you recognize the document,
7 ma'am?

8 THE WITNESS: Not really.

9 THE COURT: When would she have been privy to that
10 document?

11 MS. COFFEY: I'm assuming she had to sign it.

12 BY MS. COFFEY:

13 Q On 29A, can you turn to Page 3?

14 A Uh-huh.

15 Q Is that your signature?

16 A Yes.

17 Q And it's witnessed by, it looks like Ms. Bannon, your
18 lawyer?

19 A Uh-huh.

20 Q And Ms. Peluso, her paralegal?

21 A Okay.

22 Q On May 4th?

23 A Yes.

24 Q Did you sign this in Ms. Bannon's office?

25 A Yes.

1 Q Does that look like your accurate signature?

2 A Yes, that's my signature.

3 Q So is this a document that you've seen before?

4 A Unfortunately, I've probably seen it, but I don't know
5 that I've read all of that.

6 Q But this is your signature?

7 A Yes.

8 Q So this is your signature, this is a deed?

9 A Okay.

10 Q Can you look at the deed and tell me if there's
11 anywhere in there where you see that Sea Pines has first
12 right of refusal?

13 A Well, is this the deed after we've already sold the
14 property to Sea Pines?

15 Q Yes.

16 A Then why would that be in there?

17 Q Well, because it's the deed conveying the property and
18 the associated rights with that property. You're conveying
19 it to someone?

20 A Okay.

21 Q Okay. So that's how deeds work.

22 A Okay.

23 MR. LINTON: Objection, Your Honor.

24 THE COURT: Yeah, you can't testify to her. Ask her a
25 question and she'll answer it.

1 MR. LINTON: An additional objection, Your Honor, these
2 are legal opinions about what deeds do and don't do.

3 THE COURT: I just now said she can't testify.

4 Just ask her a question.

5 BY MS. COFFEY:

6 Q Is it in here, that's the question?

7 A Is what in here?

8 Q Is there a right of first refusal?

9 A I don't see anything that says right of first refusal.

10 Q Did you -- when your lawyer informed you that Sea Pines
11 was going to exercise -- and it was your lawyer that
12 informed you that Sea Pines was going to exercise its right
13 to first refusal?

14 A I think so.

15 Q Well, however you found out, at some point you found
16 out, correct?

17 A Right.

18 Q And when you found out, did you let Amir and Alon know?

19 A Know what?

20 Q That Sea Pines was going to exercise its first right of
21 refusal and take the property and that you wouldn't be
22 completing the sale with them?

23 A I don't remember that either. I don't know if I told
24 them or if my lawyer told them or if Sea Pines told them.

25 Q But you had a personal relationship with them; did you

1 not?

2 A As I did with Sea Pines and my lawyer.

3 Q Right. Okay. Did you know Alon and Amir longer than
4 you knew Ms. Bannon?

5 A Yes, but I probably saw Ms. Bannon a lot more the last
6 five years.

7 Q But back then, this is May 2nd, 2017.

8 A Okay.

9 Q On May 2nd, 2017, you had known Alon and Amir for
10 approximately how many years?

11 A Eight, nine.

12 Q And you worked next to them every day for a number of
13 years, correct?

14 A No, I did not see them every day. Sometimes they
15 weren't at the shop. They owned like eight shops, eight or
16 nine shops. They weren't always in Harbour Town.

17 Q But you saw --

18 A I dealt with their sales people that were there every
19 day.

20 Q You, at least, saw them on a regular basis?

21 A A weekly basis, maybe. I didn't deal with them every
22 day, Maureen. A lot of times in my shop, I was too busy to
23 walk outside the shop in a day.

24 Q And after my clients realized that there was an issue
25 with the sale, did they offer to extend the lease? Did they

1 ask you to extend the lease?

2 A They did, yes. They asked me to extend the lease at
3 some point and they offered more money at some point.

4 Q And did you extend the lease?

5 A Again, I called my lawyer, to which -- maybe I can't
6 say in court what she said, but anyway.

7 Q Did you?

8 A No, I did not extend the lease because my lawyer told
9 me I couldn't legally extend the lease.

10 Q But did you accept the additional offer of the higher
11 price on the property?

12 A By accept, you mean did I take it? No, I heard them
13 offer me that. I called my lawyer and she said that I was
14 not legally allowed to take that because we had already
15 entered into some with Simon Frazier.

16 Q With Sea Pines?

17 A With Sea Pines.

18 Q But you had a contract with my clients and you --

19 A As far as I understand this, Maureen, I had a contract
20 with them and we were going forward selling them the
21 property. I didn't care who bought the property. I want --
22 honestly, I like you guys, but, honestly, I didn't care. I
23 was just trying to sell the property.

24 But I also understood that Sea Pines had first right of
25 refusal and that's where we were going with the property. I

1 never hired a real estate or tried to sell the property to
2 anybody else. I guess I knew at some point in the back of
3 my head that it was either going to be them or Sea Pines, to
4 whom I was friends with all parties.

5 Q But when the second offer came, the offer of 590,000,
6 did you accept it?

7 A I would have loved to, who wouldn't want more money,
8 but my lawyer told me I couldn't. It sounds like I got
9 messed up on the first deal. I should have asked for a lot
10 more money in the first place.

11 MS. COFFEY: Do you have an objection to me admitting
12 the deed?

13 MR. LINTON: No.

14 THE COURT: All right. Without objection.

15 (Plaintiff's Exhibit No. 29A admitted into evidence.)

16 MS. COFFEY: Do you have an objection to me admitting
17 the text messages?

18 MR. LINTON: No.

19 MS. COFFEY: I'd like to move to admit the text
20 messages.

21 THE COURT: Without objection.

22 (Plaintiff's Exhibit No. 32 admitted into evidence.)

23 THE COURT: How much longer do you think you have with
24 this witness?

25 MS. COFFEY: Not very long.

1 BY MS. COFFEY:

2 Q Did you have a written contract with Sea Pines?

3 A I don't remember. I'm sure I did. I might not have it
4 personally. Meredith might have it.

5 Q Do you remember telling me that you would like to see
6 the boys succeed? You called them the boys.

7 A Yes, the men.

8 Q And that you would like to sell them the shops?

9 A Yes.

10 MS. COFFEY: Your Honor, nothing further.

11 THE COURT: Ladies and gentlemen, we're going to go
12 ahead and take our -- well, it would be a mid-morning break,
13 but we started so late. So y'all just excuse yourselves for
14 about ten or 15 minutes and then we'll come back and finish
15 up with this witness.

16 (The jury exits the courtroom at 11:58 a.m.)

17 THE WITNESS: Do I get to go down, too?

18 THE COURT: You do, you just can't -- your under oath,
19 so you can't discuss any of your testimony with anybody.
20 You can simply just go to the restroom.

21 (Short recess.)

22 THE BAILIFF: The jury is entering the courtroom, Your
23 Honor.

24 THE COURT: Thank you.

25 (The jury enters the courtroom at 12:09 p.m.)

1 THE BAILIFF: The jury is seated, Your Honor.

2 THE COURT: Thank you very much.

3 Mr. Linton.

4 CROSS-EXAMINATION

5 BY MR. LINTON:

6 Q Good afternoon.

7 A Hi, John.

8 Q Lynda, in your testimony earlier, you were asked a
9 whole bunch of questions about the nonbinding letter of
10 intent. Do you remember that?

11 A Yes.

12 Q And you said several times that you never transmitted
13 that to Sea Pines?

14 A Yes.

15 Q At one point, you mentioned that maybe your lawyer
16 transmitted it to Sea Pines at some point. Do you remember
17 that?

18 A I remember mentioning that, yes.

19 Q Do you know whether or not your lawyer actually sent
20 that to Sea Pines?

21 A I don't think she did, but.

22 Q But if she did, you would have no way of knowing when
23 she did it, whether it was --

24 A Correct.

25 Q -- during this lawsuit or before or whenever, correct?

1 A Right.

2 Q Did you ever discuss Sea Pines' right of first refusal
3 with Plaintiffs in this case?

4 A Yes.

5 Q Tell me about that.

6 A I believe it was with Alon in my shop and we were
7 discussing the right of first refusal, which I believe they
8 knew about because they had just finished a transaction with
9 the general store. And I said to Alon at 580 --

10 MR. KUBEC: Objection, Your Honor.

11 THE COURT: Stand up and object.

12 MR. KUBEC: Objection, Your Honor.

13 THE COURT: What's your objection?

14 MR. KUBEC: Hearsay, Your Honor.

15 THE COURT: What was the question?

16 MR. LINTON: It's an admission of a party opponent,
17 Your Honor.

18 MR. KUBEC: Speculation, Your Honor.

19 THE COURT: I'll overrule it.

20 Go ahead, ma'am, you can answer the question.

21 THE WITNESS: Where was I? I spoke to Alon about the
22 shops. We were talking about Sea Pines' first right of
23 refusal. I said that I thought 580 was way too low for two
24 shops in, like their lawyer called it, the gem of Hilton
25 Head Island property. And I said Sea Pines might take it

1 for that price, to which we laughed and Alon said, They
2 never take commercial property.

3 BY MR. LINTON:

4 Q And that was all before you entered into the contract?

5 A Yes.

6 Q You wanted to sell the shops?

7 A Yes.

8 Q You wanted to sell them at a fair price?

9 A Yes.

10 Q Did you want to do anything to break the rules?

11 A No.

12 MR. LINTON: That's all I have, Your Honor.

13 THE COURT: Anything else as a followup?

14 MS. COFFEY: No, Your Honor.

15 THE COURT: All right. You may step down.

16 Call your next witness.

17 MR. KUBEC: Your Honor, Plaintiff calls Alon Mintz.

18 THE COURT: Okay.

19 THE CLERK: Please raise your right hand.

20 ALON MINTZ,

21 after being duly sworn, testified as follows:

22 THE CLERK: Have a seat. Once you get settled, state
23 your name and spell out your last name for the court
24 reporter.

25 THE WITNESS: Alon Mintz, A-L-O-N, M-I-N-T-Z.

DIRECT EXAMINATION

BY MR. KUBEC:

Q Good afternoon, Mr. Mintz. How are you today?

A Good, how are you.

Q Let's start with your background. Tell us where you currently live.

A Currently, I live on Hilton Head Island.

Q Were you born on Hilton Head Island?

A No, I was born in Israel. I came here in 2001. I was in San Francisco for three weeks or so. After that, I came to Hilton Head and stayed there for a year or so. I came back to Israel, worked in a retail shop over there. I worked very hard. I worked about 12 hours a day every day. After that, I came back here and came back to work in a retail store for another year or so.

After that, I obtained some houses. I tried to make it and open a business on Hilton Head, which I did. I did in 2003, I opened my first business, a deli. I was the only one that operated it. I was working about six months in a row with no days off from early morning to late night.

And after that, in 2006, I managed my business partner, my current business partner, Amir Bitton, his shop. And a year after that, we became business partners.

Q Before you moved to the United States, were you educated in Israel?

1 A Yes, I was. I did 12 years of high school. After
2 that, I joined the military for three years.

3 Q Are you an owner of Harbour Town Surf Shop?

4 A Correct.

5 Q How much of that do you own?

6 A Fifty percent.

7 Q What about Bittmint, are you an owner of that company?

8 A Yes, also, 50 percent.

9 Q We've had some discussions in this case about the
10 acquisition of the general store. Do you recall back in
11 2016 buying the general store?

12 A Yes.

13 Q And there's been a lot of discussion in this case about
14 the right of first refusal and waivers and things like that.
15 In 2016, when Bittmint was buying the general store, were
16 you involved much in that transaction?

17 A No, I wasn't, actually. It was the seller's obligation
18 at that time to deal with anything regarding the sale. So I
19 wasn't really involved with it.

20 Q So you never personally asked anybody to obtain any
21 sort of waivers for a right of first refusal?

22 A No. Again, it was the seller's obligation, not the
23 buyer's.

24 Q Did you even understand in 2016 when you were buying
25 the surf shop what a right of first refusal meant?

1 A When I was buying the surf shop or the general store?

2 Q I'm sorry, the general store.

3 A The general store, at that time, waiver, no, I have no
4 clue too much about the waiver. I found out after actually,
5 after I purchased the shop from the previous owner, they
6 actually showed me (inaudible) general store, so he
7 mentioned to me there was some waivers that he would have to
8 look at.

9 Q Did you understand what those waivers had to do with at
10 that point?

11 A No. No, I didn't. I didn't care because --

12 Q You got the store?

13 A I got the store and I bought it. Why would I?

14 Q I'm going to forward now to your negotiations or
15 discussions with Ms. Johnson about buying the surf shop.

16 A Okay.

17 Q At some point in time -- you heard testimony earlier
18 today from the Defendant, correct, that there was \$920,000
19 on the table, correct?

20 A Correct.

21 Q Did you make that proposal to Ms. Johnson?

22 A No, I did not.

23 Q Did she make that to you?

24 A Yes, she made it.

25 Q And did you negotiate subsequently?

1 A Yes. We had a very, very long negotiation. She
2 started off with 920,000, which wasn't acceptable to us.
3 She thought at that time that because we bought the general
4 store for 900,000, she would get the same amount, which
5 wasn't acceptable to us anyway. It might be from somebody
6 else, but not from us.

7 So we start to negotiate at that time. It took a
8 while. It took months and months of negotiation. And she
9 came down to 750 at one point, 650, 625 and, again, there
10 was negotiations, in which we kind of agreed it was 585.
11 And coming up to that number, we met -- in mid-January,
12 2017, I met her in her hair salon. And out of my nature of
13 negotiation, I took her another \$5,000 down on the price, so
14 I took it down to 580.

15 At that point, we were both very, very excited because
16 the whole time, she wanted to sell us the property and we
17 wanted to buy it and, finally, we agreed on the price and we
18 hugged it out. At that time, we didn't want to also wait,
19 so she asked me at that time that she needs to get something
20 in writing to give to Sea Pines.

21 So at that time, I said okay, I'll do that if that's
22 what you need. I'm referring to the letter of intent.
23 That's when she actually asked me to give her that. And
24 that's when I asked my lawyer at that time, Mike Mogil, to
25 do so.

1 Q You asked Mr. Mogil to do what?

2 A To draft something in writing. And then he told me --
3 he called it letter of intent. I said okay. And he draft
4 that and we signed it January 31st, 2017.

5 Q Look at Exhibit No. 10 in front of you.

6 A Okay.

7 Q Is that a copy of the letter of intent?

8 A Yes, it is.

9 Q And Ms. Johnson asked you to prepare that?

10 A Yes.

11 Q Why?

12 A I think at that time, she tried to save as much as she
13 can on her lawyer expense. I wouldn't mind because I
14 negotiated less than what she actually wanted and I felt
15 kind of bad because she actually -- we kind of agreed on 585
16 and I took her down to 580, so I felt okay, I'll take it on
17 me.

18 Q And is that your signature on the document?

19 A Yes, it is.

20 Q Do you recall where you were when you signed it?

21 A I don't.

22 Q What else was discussed with Ms. Johnson, if anything,
23 about the letter of intent?

24 A At that time, after we signed it and -- at that time,
25 we were very in touch on a daily basis -- not a daily basis,

1 but a couple times a week on the phone and stuff like that,
2 especially -- she needed to get some rent checks from the
3 property and she moved to Bluffton from Hilton Head. So we
4 had a store, basically, in the Bluffton area, so I would
5 drop her off the checks over there. So we used to
6 communicate on the phone a lot of times.

7 So a week after that, after signing that, she asked me
8 about what's going on with the rent checks. And I told her,
9 I'll drop it off for you in my store in Bluffton. And then
10 she mentioned to me that she actually drop off the letter of
11 intent to Sea Pines. So I knew they had that in their
12 hands.

13 Q Let's look at the contract of sale.

14 A Which number is that?

15 Q Exhibit No. 11.

16 A Okay.

17 Q So after you sign the letter of intent, the next piece
18 of paper that shows up is this contract of sale, correct?

19 A Correct. We made the contract after that, my lawyer
20 did.

21 Q And that's your signature on the contract, correct?

22 A Correct.

23 Q I'm going to go over a couple of terms in here with
24 you, okay?

25 A Okay.

1 Q I just want to look at Paragraph 3, which refers to a
2 financing contingency?

3 A Okay.

4 Q So at this point in time in March of 2017, and even
5 after you signed the contract, what did you do to seek
6 financing (inaudible)?

7 A When I had the contract in March of '17, I contacted
8 the same officer that actually did the loan for the general
9 store prior to that, which his name is Tom Hence (ph). He
10 was our banker that did the closing for us for the property
11 for the general store, so I contact him. Since it was a
12 next-door space, we wanted to actually use the same bank for
13 that purpose. I gave him at that time a copy of the
14 contract. I gave him the tax return, current financial
15 statement that they required, and I think that's about it.
16 That's all he needed.

17 Q Did you have any conversations with (inaudible)?

18 MR. LINTON: Objection, hearsay.

19 THE COURT: He can say whether he had a conversation.

20 But you can't say what he said.

21 THE WITNESS: Yes, I did.

22 BY MR. KUBEC:

23 Q So after that conversation, did you believe you were
24 going to be able to get financing?

25 A No, I did not have any issue regarding that.

1 Q Would you look, please, at the next exhibit, No. 12?
2 What is that document?

3 A The earnest check I gave Ms. Lynda when we signed the
4 contract on March 17 for \$2,000.

5 Q Why did you give her that check?

6 A That's what it required from the contract, to give her
7 that. That was my obligation for that contract.

8 Q Let's look at now Paragraph 6 in that contract.

9 A Okay. Other terms?

10 Q Other terms, second sentence. The sellers shall obtain
11 all appropriate waivers and approvals from Sea Pines and the
12 applicable Horizontal Property Regime within 30 days from
13 the date of execution hereof. You're not the seller in this
14 contract, right?

15 A No, I'm the buyer.

16 Q Ms. Johnson just came and testified that you said you
17 would submit some sort of waiver to Sea Pines. Is that
18 accurate?

19 A No, it's not accurate. So when we signed the contract,
20 she asked me to actually go to my lawyer and ask him to get
21 some waivers for Sea Pines. So, again, I knocked off -- I
22 felt kind of bad because I knocked off -- again, lower than
23 what she wanted, so I said okay, I'll do it through my
24 lawyer because she said at that time she wanted to save,
25 again, as much expense as she could from her lawyer. So

1 that's why I approached my lawyer to check on the waivers.
2 But she asked me only about the waivers. From my
3 understanding at that time, they already had the contract.

4 Q And Ms. Johnson was looking at some texts between the
5 two of you earlier in your testimony (inaudible)? Can you
6 look at the copy in front of you, please? Do you have
7 those?

8 A I don't have copies.

9 Q Was there any issue at this point in time about
10 speeding the process to get this (inaudible)?

11 A I'm sorry, could you ask that again?

12 Q Sure. Were there any conversations with anybody at
13 this time about speeding the process to get this
14 (inaudible)?

15 A At what time?

16 Q After this contract was signed March 17th, then the
17 next couple (inaudible)?

18 A Well, we both wanted to actually do it as fast as we
19 can because she wanted to get the funds and I wanted to get
20 the store, so we both kind of wanted to expedite the
21 process.

22 Q So you never told her hey, I'm going to go get my
23 attorney?

24 A No, she asked me to get my attorney to check on those
25 waivers. I didn't know at that time even what it is exactly

1 we were preparing, but it was kind of was a checkbox for me.
2 So I did it just to help her out to save her some funds on
3 her lawyer expenses.

4 Q Had you heard about the thing caused this right of
5 first refusal?

6 A No, at that time, I did not know anything about it.

7 Q (Inaudible)?

8 A No, I did not know.

9 Q She didn't have a conversation with you like she
10 testified where she specifically told you about the right --

11 A She said waiver, nothing about the first right of
12 refusal.

13 Q So in your mind, waiver and first right of refusal is
14 --

15 A Two separate things.

16 Q Let's step back in time. Before you purchased -- or
17 were under contract to purchase the surf shop, okay, the
18 purchasing entity would have been Bittmint, correct?

19 A Correct.

20 Q And at that time, surf shop was the tenant in the
21 property?

22 A Correct.

23 Q You were under a lease with Sea Pines?

24 A I'm sorry?

25 Q You were under a lease with -- I'm sorry, with Ms.

1 Johnson and Mr. Giannone, correct?

2 A Yes.

3 Q And how much time was left under that lease at that
4 point?

5 A In 2017, three years with an option for another five
6 years.

7 THE COURT: Repeat your answer.

8 THE WITNESS: About three years for the lease and then
9 with our option to extend it for another five years.

10 BY MR. KUBEC:

11 Q If Bittmint had purchased the property, would you have
12 continued with that same lease terms that you had with Ms.
13 Johnson and Mr. Giannone?

14 A No, I would not. The purpose of our actually
15 purchasing that side is to, first of all, lower the rent for
16 the Harbour Town Surf Shop. Our goal was to, basically, pay
17 just the mortgage, plus \$500 to Bittmint, Harbour Town Surf
18 Shop and, obviously, Harbour Town would pay all the
19 assessment and regime and everything else. That would be
20 very beneficial for Harbour Town Surf Shop, that the rent is
21 going to be lower.

22 There's no more secure as being an owner of property
23 than renting it from somebody. It's securing your life. I
24 can give as an example, I don't know if this is good or not,
25 but renting a house or owning your own house, same thoughts

1 kind of we had.

2 In business, it may be a little bit different because
3 you have more value for the business as well. When you own
4 the property, you have different options. You're not
5 limited with what you can do. And you, as a tenant, because
6 we are a tenant as well and we were going to be more
7 beneficial for the payment, the monthly payment of the rent
8 and, also, secure us for a lifetime. So that was the
9 purpose.

10 Q That was an agreement that you had with Mr. Bitton?

11 A Yes.

12 Q But you never did buy the property, right?

13 A No, I did not.

14 Q What happened?

15 A Sea Pines -- on May 2nd, I got an e-mail from my
16 lawyer, Mike Mogil. He forwarded me an e-mail that they got
17 from Sea Pines' lawyer that they exercise the first right of
18 refusal. That was kind of the first time I heard this first
19 right of refusal.

20 So when that occurred, I was angry. I was pissed. I
21 mean, I worked -- me and my business partner worked so hard,
22 so hard to -- let's put on the side we negotiated this whole
23 deal. We are there from 2010 every day from 9:00 to 9:00.
24 This is our main bread and butter to secure our family. And
25 when it got to that point, I just collapsed. I couldn't

1 understand where it's coming from.

2 Especially, when we buy the general store a year prior
3 to that -- and I knew, again, that there was some waivers at
4 that time that never said anything about it, that just let
5 us buy the property. I couldn't really understand why they
6 would let me buy the general store and not buy the other
7 side of the shop. Why? Why prevent me from growing? For
8 what reason? I was very, very angry, very pissed off.

9 Q What did you do about it?

10 A First thing, I went to my lawyer, Mike Mogil. The
11 first thing is we really wanted to stay in the space, so we
12 actually wanted to have the option to extend the lease for
13 another two five years just to secure ourself as tenants
14 over there. We weren't sure of what was going on.

15 At the same time after that, we actually offered
16 \$10,000 more, \$590,000 we offered her to purchase the shop,
17 which they didn't agree. If they would, we would buy it for
18 that price.

19 Q Was that offer --

20 A Buy Harbour Town Surf Shop, not by Bittmint, other
21 company.

22 Q Was that rejected?

23 A Yes, it was.

24 Q Did Ms. Johnson ever tell you why it was rejected?

25 A No.

1 Q Did you have any conversations with her about it?

2 A No.

3 Q Did she ever talk to you about -- at this point in time
4 in May after you found out that Sea Pines was going to come
5 in and take that property, did Ms. Johnson reach out to you
6 and talk to you about it?

7 A No. From there, it was just lawyers.

8 Q By the way, did you ever deal with Mr. Giannone at all
9 about this?

10 A No, I did not. Actually, I think this is the first
11 time I've seen him.

12 Q So Ms. Johnson was the one who was negotiating
13 everything?

14 A Yes. I mean, the whole time, we had a very good
15 relationship, me and Lynda. We used to see each other not
16 on a daily basis, but we saw each other quite a bit. And
17 the entire time, she actually really wanted to sell us the
18 shops for a long time.

19 Q Let's back to the contract (inaudible).

20 A Okay.

21 Q The signatures on it. Where were you guys when you
22 signed off on it?

23 A We were in my office located next to (inaudible).

24 Q So Ms. Johnson came to your office (inaudible)?

25 A Correct. She came with the contract already signed and

1 I just signed on it. After that, she told me she was going
2 to Sea Pines to drop off a copy. Again, we're trying to
3 move forward the entire process.

4 And a week after that, I actually -- again, we talked
5 back and forth on some rents. I had to give her some rents
6 for the spaces. And at that time, I asked her what's going
7 on and she said she had just dropped off the contract over
8 there. At that point, she actually asked me to check with
9 my lawyer if he can check what's going on with the waiver.
10 So that's why I actually -- my lawyer approached Sea Pines
11 with those waivers.

12 Q So you have a contract, the property is not sold to
13 you, the property eventually winds up going to Sea Pines?

14 A Correct.

15 Q You tried to offer a longer lease term, that failed,
16 correct?

17 A Correct.

18 Q Harbour Town Surf Shop offered more money, correct?

19 A Correct.

20 Q So your potential deal with Mr. Bitton, that's not
21 going to happen?

22 A No, it's not.

23 Q And you're out of that sweetheart deal, right?

24 A I'm sorry?

25 Q You're out of that sweetheart deal?

1 A Yeah, I'm out. Sea Pines took over, took over my
2 dream.

3 Q Has Harbour Town Surf Shop suffered any damages?

4 A Oh, yes, they did. Because if I would purchase it,
5 Bittmint would have purchased shops six and eight at that
6 time, Harbour Town would just pay the mortgage, plus \$500.
7 So there's a big difference between the mortgage and \$500
8 than paying the base rent to Sea Pines under our lease.

9 Q And how much -- if you had gotten a mortgage back in
10 2017, how much would you have paid?

11 A For the mortgage?

12 Q Yeah.

13 A I think it was around \$3100 a month, plus \$500, which
14 we needed to pay Bittmint, so it would be about \$3600.

15 Q So \$3600 a month is what you would have approximately
16 paid Bittmint?

17 A Bittmint, correct.

18 Q At that point in time, you're paying over \$4500?

19 A Correct.

20 Q So you're losing around \$900 a month?

21 A Correct.

22 Q And Sea Pines' rent keeps going up every so often,
23 right?

24 A Correct.

25 Q As it goes higher (inaudible)?

1 A Correct.

2 MR. LINTON: Your Honor, we have an objection to this?

3 THE COURT: What is it?

4 MR. LINTON: It's a calculation.

5 THE COURT: Let me see it, please.

6 (Court reviews document.)

7 THE COURT: Who created this?

8 MR. LINTON: Your Honor, in Mr. Mintz's deposition, he
9 testified that these calculations were made by his lawyer
10 and he had no personal knowledge of them.

11 THE COURT: All right.

12 MR. KUBEC: This is not the same calculation that was
13 discussed in the deposition, Your Honor. This is a
14 calculation (inaudible).

15 May we approach the bench, Your Honor?

16 MR. LINTON: And this will be the first time that I've
17 seen it.

18 THE COURT: Sure.

19 (Sidebar conference.)

20 BY MR. KUBEC:

21 Q What amount was your (inaudible)?

22 MR. LINTON: Your Honor, we object, calls for
23 speculation.

24 THE COURT: I agree. I'll sustain it.

25 BY MR. KUBEC:

1 Q What was the interest rate of Harbour Town Surf Shop
2 (inaudible)?

3 THE COURT: Let's see if he actually knows it.

4 THE WITNESS: I'm sorry, sir, repeat the question.

5 BY MR. KUBEC:

6 Q When the general store was purchased, you got a loan,
7 right?

8 A Right.

9 Q Do you recall the terms of the interest rate?

10 A Yes, one-half percent.

11 Q Do you recall how long the amortization period was?

12 A Twenty years with a five-year (inaudible).

13 Q Now, how much was paid on the debt?

14 A I'm sorry? How much was the monthly payment on the
15 mortgage?

16 Q Sure.

17 A \$4,463.

18 Q And that was a larger loan, correct?

19 A Yes, it was, for 700,000.

20 Q Any reason to believe you weren't going to get that
21 same interest rate with the same terms for the Harbour Town
22 Surf Shop --

23 MR. LINTON: Objection, Your Honor, that calls for
24 speculation.

25 THE COURT: I agree. I sustain the objection.

1 Don't answer it.

2 BY MR. KUBEC:

3 Q No doubt in your mind, though, you would have been
4 receiving -- you would have been paying a lot less than you
5 were paying (inaudible)?

6 MR. LINTON: Objection, Your Honor, calls for --

7 THE COURT: I'll let him answer that one.

8 THE WITNESS: Yes, I would pay much less to Bittmint
9 than the base rent I'm paying right now to Sea Pines.

10 MR. KUBEC: Your Honor, I have no further questions.

11 THE COURT: All right. Mr. Linton.

12 CROSS-EXAMINATION

13 BY MR. LINTON:

14 Q Good afternoon, Mr. Mintz.

15 A Good afternoon.

16 Q How are you doing?

17 A Good. How are you?

18 Q All right. So I want to talk a little bit more about
19 your background and your business. You and Mr. Bitton are
20 business partners?

21 A Correct.

22 Q You guys both own some residential real estate that you
23 rent out to make money, right?

24 A Correct.

25 Q You guys own the Island Tattoo Company?

1 A Correct.

2 Q You guys own Island Fitness One?

3 A Used to.

4 Q Used to?

5 A Yeah, it's closed down.

6 Q Allstar Island Republic Souvenir Shop?

7 A Yeah, that's the shop in Bluffton.

8 Q How many souvenir shops do you own?

9 A I'll give you the names. I'll organize it, if you

10 don't mind. Island Republic, Harbour Town Surf Shop, that's

11 connected to the general store, Treasure Island,

12 (inaudible). Those are souvenir shops. Then we have -- you

13 want me to continue?

14 Q Yes.

15 A We own Island Tattoo Company as well and we just opened

16 a pizza place as well.

17 Q You said you have an office, a headquarters for this --

18 A Yes.

19 Q -- this corporate structure?

20 A Yes.

21 Q You work out of the corporate headquarters for all

22 these businesses?

23 A That's my main office, yeah.

24 Q Let's talk a little bit about the sale of the general

25 store. You mentioned in your testimony that you knew right

1 after the transaction or during the transaction of the
2 general store that there was some sort of waiver, but I
3 think you said you had no clue what that was, right?

4 A Yes, I knew there was some waivers (inaudible).

5 Q Is that right? You didn't know anything about a right
6 of first refusal in the general store transaction?

7 A No.

8 Q You weren't aware from your experience purchasing the
9 general store that before you could buy a commercial
10 property in Sea Pines that Sea Pines had a right of first
11 refusal?

12 A No.

13 Q Do you remember when I took your deposition in this
14 case?

15 A Yes.

16 Q You said you hadn't heard anything about right of first
17 refusal?

18 A When?

19 Q At the point of the general store?

20 A When I purchased the general store, no.

21 Q You hadn't heard about it before you went under
22 contract on the surf shop, right?

23 A Correct.

24 Q Let's turn to Page 30.

25 A All right.

1 Q You see where it says question? So you were aware in
2 your experience with the general store --

3 A So what am I looking at, which line?

4 Q Line 1.

5 A Okay.

6 Q Are you with me?

7 A Page?

8 Q Thirty.

9 A Okay. I'm with you.

10 Q So you were aware in your experience with the general
11 store, purchasing it, that before you could buy a property,
12 commercial property in that area, Sea Pines had a right of
13 first refusal. They either had to say no or wait 30 days?

14 Answer: I heard there is something like that, yes.

15 Okay. When did you first hear about that?

16 Answer: I guess when the time passed and we were
17 willing to close on the property and then they called me and
18 said we could go ahead and close. That's it. So I guess
19 about that time.

20 A Uh-huh.

21 Q You mentioned in your testimony that at some point
22 Lynda Johnson --

23 A Can I respond to that?

24 Q No.

25 A Oh, okay.

1 Q That was your testimony, right?

2 A Yes, but when I took this testimony, that was after I
3 actually -- in 2017, May 2017, that's the first time I heard
4 of first right of refusal. This deposition happened in
5 2019, two years after that. At that time, I connected the
6 waiver part to the first right of refusal being the same
7 thing. So when you asked me those questions at that time,
8 that's what I understood. That's why I answered like that.

9 Q The question was if you knew at the time you bought the
10 general store that there was a right of first refusal and
11 you answered yes, right?

12 A Because, again, I connected -- that was in 2019, so I
13 connected that you meant waivers and first right of refusal
14 was the same thing, so that's why I answered that way.

15 Q Harbour Town Surf Shop is still operating under its
16 lease with Sea Pines, right?

17 A Correct.

18 Q Sea Pines has fully honored that lease completely,
19 right?

20 A Correct.

21 Q Now, you mentioned that at some point Lynda Johnson
22 promised you she was going to drop off the contract at Sea
23 Pines' office?

24 A I'm sorry, can you repeat that?

25 Q You said in your testimony that Lynda Johnson told you

1 she was going to drop off the contract with Sea Pines?

2 A She didn't promise, she told me.

3 Q She told you?

4 A Yes.

5 Q But you don't know whether she actually did that or
6 not?

7 A Well, she told me a week after she did.

8 Q But you don't know whether she actually did?

9 A If she told me she did, I will take her word.

10 Q And you are aware -- you did ask your lawyer to contact
11 Sea Pines about getting the waiver, correct?

12 A Yes, because she asked me to, so I did it.

13 Q You're aware that in that communication, Sea Pines
14 asked your lawyer for a copy of the contract, right?

15 A I wasn't aware of that.

16 Q You weren't aware of that?

17 A No.

18 MR. LINTON: No further questions, Your Honor.

19 THE COURT: Anything on followup?

20 REDIRECT EXAMINATION

21 BY MR. KUBEC:

22 Q Mr. Mintz, Mr. Linton just asked you a question about
23 the lease (inaudible), right?

24 A Right.

25 Q How much do you have left?

1 A Left? How many more years?

2 Q How many more years?

3 A About three years, less than this lawsuit.

4 Q This lawsuit has been going on --

5 A This lawsuit is longer than that.

6 Q Three years from now, Sea Pines can decide they don't
7 want to have you?

8 A Correct, I'll be out.

9 Q And you heard Mr. Bender testify earlier that he had to
10 take that contract as is, he had to match the terms,
11 correct?

12 A Correct.

13 Q And one of those terms was you were going to get to
14 stay in that property, right?

15 A Yeah.

16 Q So he couldn't kick you out then. He had to keep you,
17 right?

18 A Right. He had to honor the lease.

19 Q But in three years, they can give you the boot?

20 A Right.

21 MR. KUBEC: Nothing further.

22 THE COURT: You may step down.

23 Ladies and gentlemen, how about we go ahead and take
24 our lunch break. If y'all just come back at two o'clock,
25 we'll go ahead and begin then.

1 (The jury exits the courtroom at 12:55 p.m.)

2 THE COURT: I always ask the lawyers how they want to
3 handle it. The young gentleman in the black jacket has been
4 asleep, basically, this entire time. So option A is I can
5 either chew him out and give him the option to stay on the
6 jury or not, or I can just kick him off and put the
7 alternate on. Y'all want to think about it over lunch?

8 MR. LINTON: Yes, sir.

9 MR. KUBEC: Yes, sir.

10 THE COURT: Think about it over lunch. I actually lied
11 to them, we're going to come back at 2:15. So y'all enjoy
12 your lunch and we'll be back at 2:15.

13 (Lunch recess.)

14 MS. COFFEY: I'd like to just wake him up, please. I
15 don't want to embarrass him by dismissing him.

16 THE COURT: I won't embarrass him. I'll bring him in
17 by himself.

18 MS. COFFEY: I still prefer you just ask him to wake
19 up.

20 THE COURT: That's not -- that's usually not a good
21 thing to be talking to jurors about, about waking up.

22 MR. WALKER: We think that if that's his tendency so
23 far that it's not going to change. His lack of attention is
24 going to continue. So we think it's appropriate to
25 substitute the alternate.

1 THE COURT: I tend to agree because the other two
2 alternates are very aware. I mean, they're paying attention
3 to everything. I can just -- I mean, I can just be
4 apologetic and say you missed the testimony this morning,
5 there's nothing we can do to play that back for you, so,
6 unfortunately, you know, based on that fact, I hate that
7 you're tired, but that's just the way life goes. We're just
8 going to have to dismiss you. Because he missed, basically,
9 the entire morning.

10 Bring the juror to me and find out who the first
11 alternate is.

12 MS. COFFEY: The issue of the documents, we could not
13 agree.

14 (The juror enters the courtroom.)

15 THE COURT: Hey. So, obviously, they got on you this
16 morning about sleeping. You missed most of the morning. Do
17 you want me to just excuse you? I have no problem doing
18 that if that's something you wish me to do. I could just
19 replace you with an alternate. Just let you go because you
20 missed most of the morning.

21 THE JUROR: All right.

22 THE COURT: All right. Thank you very much. You have
23 a great day.

24 (The juror was released.)

25 THE COURT: Let's take up something real quick before

1 we bring them out.

2 What documents are you attempting to try to get in?

3 MS. COFFEY: They're, basically, the documents that I
4 submitted under the judicial notice. I understand your
5 hesitation because of the facts, so --

6 THE COURT: So what are you trying to get in? Let's
7 start there.

8 MS. COFFEY: What I'm trying to get in is like the
9 January 1972 commercial covenants because they're -- under
10 901 and 902(4), they're self-authenticating documents,
11 certified copies of public records. All these documents,
12 the '73 covenants, the assignment and then the articles of
13 amendment of Sea Pines Plantation, the declaration of --
14 dissolution of forfeiture, the relative bankruptcy
15 documents, they're relative because this right that they're
16 claiming that they have -- every right that they have would
17 have come out of this bankruptcy. Sea Pines Associates is
18 the entity that came out of the bankruptcy that was assigned
19 whatever rights may have been assigned and then Sea Pines
20 Resort takes from Sea Pines Associates.

21 So it's very relevant to whether or not the right of
22 first refusal is valid and it exist. It's germane to what
23 the whole center of this case is, that's why it's relevant.
24 And under hearsay exceptions 803(14), (15) and (16), that's
25 how they would get in.

1 THE COURT: What's y'all's position? I mean, are they
2 germane to the case? I guess that's one of the first
3 questions.

4 MR. WALKER: There would have to be a witness who would
5 identify them. It may be that they're not hearsay, but they
6 have to come in through a witness. There has to be a
7 foundation.

8 THE COURT: I agree.

9 MR. WALKER: They can't come up and say I'm going to
10 put this in evidence and while I'm at it, I'm going to put
11 these orders in from '87. There are five bankruptcy orders
12 and all these other documents and say we'll just give them
13 to the jury. What they want to do is get up and argue then
14 to the jury, the fact finder, and they shouldn't be allowed
15 to do it. They had three years before discovery was over to
16 get an expert, to get somebody to identify them and now,
17 they're trying to do it in this funky way where they don't
18 have any witness. I've never seen an exhibit come in that's
19 not through a witness.

20 THE COURT: Well, I certainly am not going to take
21 judicial notice of any fact.

22 MS. COFFEY: I'm not asking for judicial notice of any
23 fact. I didn't think -- just like I understand it's not
24 appropriate for you to go into the purview of facts. The
25 reason why a bankruptcy expert wasn't named is because I

1 didn't think it was appropriate for anyone to tell you what
2 these certified court orders say. I didn't think it was
3 appropriate.

4 I also don't see -- they're court orders. They're
5 ancient documents. I'm not -- I just need to get them into
6 the record.

7 MR. WALKER: She could have had -- I agree that a
8 witness cannot testify to legal conclusions, but a witness
9 certainly could lay a foundation to these. And I still
10 don't know where Plaintiffs are headed on this. Are they
11 going to say, Your Honor, now that these are in, we're going
12 to argue to the jury like Mr. Kubec did on opening
13 statement, it doesn't say successors and assigns and,
14 jurors, that means it's not assignable. I don't think it's
15 appropriate nor can they argue it to the jury. But it's
16 going to the jury room if it's in evidence. We have jurors
17 looking at this, looking at all this trying to make heads or
18 tails of it.

19 THE COURT: I agree with you. I've never seen it done
20 before either.

21 So what remaining witnesses do you have that you will
22 be able to somehow, somehow get these -- what are you going
23 to -- what relevance does it have, I guess is the next
24 question?

25 MS. COFFEY: The relevance it has is that any rights

1 that may or may not have derive from this bankruptcy of Sea
2 Pines. This is a 1973 covenant. And out of the bankruptcy,
3 there were certain -- every single right was assigned. And
4 Sea Pines Associates is a new entity. They bought all the
5 rights out of Sea Pines and the associate it -- or whatever
6 rights they bought out of the bankruptcy.

7 So whether this right survived the bankruptcy and
8 actually got to Sea Pines Associates, which is where they
9 derive their interest, Sea Pines Associates sold to Sea
10 Pines Resort, it's extremely germane.

11 THE COURT: I agree. How are we going to get it in,
12 though? That's where I'm completely lost.

13 MS. COFFEY: It's self-authenticating documents.

14 THE COURT: I'll take a look at it.

15 Who's next?

16 MS. COFFEY: Mr. Mogil.

17 THE COURT: So are you going to attempt to go over any
18 of these documents with Mr. Mogil?

19 MS. COFFEY: I will now.

20 MR. LINTON: Your Honor, we've got an objection to
21 that. He's the closing attorney. I took his deposition and
22 I asked him, are you going to offer any opinions about any
23 of these covenants? Do you have opinions about this? Are
24 you an expert witness? Are you going to testify to legal
25 conclusions? No, no, no, no, no.

1 MS. COFFEY: He's not going to testify to legal
2 conclusions. I'm just going to ask him if he can identify
3 these documents. They're public record.

4 THE COURT: Okay. Let's see what happens.
5 Bring them out.

6 THE BAILIFF: The jury is entering the courtroom.

7 THE COURT: Thank you.

8 (The jury enters the courtroom at 2:15 p.m.)

9 THE BAILIFF: The jury is seated, Your Honor.

10 THE COURT: Thank you very much.

11 Ladies and gentlemen of the jury, as you have probably
12 recognized, unfortunately, the gentleman this morning was
13 very, very tired and, unfortunately, slept through most of
14 the testimony this morning. This is a very important case
15 to both parties. I need everybody's undivided attention, so
16 I, unfortunately, had to excuse him. So we have placed the
17 first alternate, Mr. Deon, onto the jury.

18 Call your next witness.

19 MR. COFFEY: Yes, Your Honor. We would like to call
20 Mr. Mogil to the stand, please.

21 THE CLERK: Raise your right hand.

22 MICHAEL MOGIL,

23 after being duly sworn, testified as follows:

24 THE CLERK: Have a seat. Once you get settled, if
25 you'll state your first name and spell out your last name

1 for the court reporter.

2 THE WITNESS: Michael Mogil, M-O-G-I-L.

3 DIRECT EXAMINATION

4 BY MS. COFFEY:

5 Q Mike, can you tell me what your educational background
6 is?

7 A College and law school.

8 Q Where did you go to college?

9 A School out of Philadelphia, Haverford College.

10 Q Where did you go to law school?

11 A Tulane Law School in New Orleans.

12 Q And what type of law do you practice?

13 A I've had a general practice for approximately the last
14 25 years mixed between transactional and litigation.

15 Q Are you familiar with Mr. Alon Mintz and Mr. Amir
16 Bitton?

17 A Yes.

18 Q How do you know them?

19 A I've known them socially. Mr. Bitton was probably one
20 of the first people I met when I moved to the area in the
21 late 90s. And I've represented them in their entities in
22 numerous matters since probably about 2000.

23 Q And who represented them during the purchase of the
24 general store?

25 A My firm did.

1 Q And where is the general store located?

2 A Harbour Town general store is in the Harbour Town
3 community, kind of near the oak tree and the playground.
4 Right across the way from the playground if I remember.

5 Q Tell us a little bit about that transaction, the
6 purchase of the Harbour Town general store.

7 A An entity was formed or existed called Bittmint, LLC.
8 Bittmint entered into a contract to purchase the real
9 property and the business together. There was an existing
10 business there. I don't believe I prepared the contract. I
11 think it was prepared by either the seller or a realtor, I
12 don't remember. The transaction closed in 2016. My firm
13 did the closing. There was a lender involved. Now that
14 I've reviewed the documents since the last time we looked,
15 it was MBSC locally. The lender had a law firm, the seller
16 had a law firm and I represented Bittmint and its partners.

17 Q And did anything unusual take place in that
18 transaction?

19 A Not to my -- nothing unusual, no. It was a smooth
20 transaction.

21 Q In that transaction, did you request any type of
22 waiver?

23 A Did I request any type of waiver?

24 Q Yes.

25 A No.

1 Q And was a waiver issued in that transaction?

2 A Are you referring to the waiver that's in question here
3 today?

4 Q The waiver -- any type of waiver that was with the
5 general store? Was there a waiver issued by Sea Pines in
6 the general store closing?

7 A No. It was -- in that contract, in that situation, the
8 seller's counsel, who's name was Maria Parker, communicated
9 internally or outside of my review with Sea Pines, whoever
10 she was communicating with, in order to inquire about any
11 waiver.

12 Ultimately, at the end of the transaction before we
13 closed, she produced a memorandum that said that Sea Pines
14 was not issuing a waiver and they weren't denying a waiver.
15 They weren't taking any position on it. That's kind of the
16 summarization of that memorandum. She provided that
17 memorandum to myself and the lender. All parties had it.

18 Q So no waiver was issued nor was the alleged right of
19 first refusal -- the alleged right to take (inaudible)?

20 A It was not exercised and no formal waiver was entered.
21 I didn't see any formal waiver.

22 Q Can you take a look at Exhibit 10 (inaudible)?

23 A Okay.

24 Q And what is that?

25 A It's titled letter of intent for purchase of real

1 property. I or my office would have drafted that.

2 Q You know why you drafted it?

3 A My recollection is that probably Mr. Mintz asked me --
4 told me that the seller wanted something in writing about
5 his company's intentions to proceed with the purchase and
6 asked me to draft up something quickly to present to their
7 side. If I recall, it was not that long after -- I believe
8 Mr. -- Ms. Johnson, Mr. Johnson, I believe their mother had
9 owned the property and maybe she passed and they were taking
10 over and he wanted me to put something together to quickly
11 move the ball forward towards a purchase.

12 Q Can you read the date of that letter?

13 A Looks like it was signed by one of the two parties on
14 January 31st, 2017. I can't tell who -- they both signed it
15 on the same date, but that's the date on here.

16 Q Can you look at Exhibit No. 11. Do you recognize that
17 document?

18 A Yes.

19 Q And what is it?

20 A This is offer and contract for sale of real property.
21 It's kind of a standard form contract. I personally drafted
22 it, not my office and kind of modeled it off of -- whenever
23 we do a nonbroker, real estate broker supervised
24 transaction, we have a form and we customize it for the
25 transaction. I probably took a look at the Harbour Town

1 General Store contract in preparing this since that had been
2 a successful transaction and it was directly next door.
3 Different parties, but it was similar real estate.

4 Q Can you -- when was it signed?

5 A It was signed, looks like, March 17th, 2017, by all
6 parties. Mr. Mintz for the purchaser and for the sellers,
7 they both signed it. It looks like they all dated it the
8 17th of March.

9 Q And on Page 2, Paragraph 6, can you read me the --
10 Paragraph 6, Line 2, (inaudible)?

11 A Seller or sellers shall obtain all appropriate waivers
12 and approvals from Sea Pines and the applicable Horizontal
13 Property Regime within 30 days from the date of execution
14 hereof. Property is subject to existing leases with Harbour
15 Town Surf Shop, LLC.

16 Q And did the seller obtain any waiver?

17 A I don't know if they obtained or didn't obtain. They
18 did not provide a waiver.

19 Q How could a purchaser ask Sea Pines to grant a waiver
20 of property that it doesn't own? I mean, is that possible?

21 MR. LINTON: Objection, Your Honor.

22 THE COURT: What's the objection?

23 MR. LINTON: Calls for speculation. She's asking how
24 can a purchaser contemplate something.

25 THE COURT: I'll sustain the objection. Just rephrase

1 it, please.

2 BY MS. COFFEY:

3 Q Does it make sense that a purchaser who doesn't own
4 property could ask an entity to waive some alleged right
5 over property it doesn't own?

6 THE COURT: Don't answer that.

7 He hasn't been qualified as an expert. He can't give
8 his opinion.

9 MS. COFFEY: Not as an expert.

10 THE COURT: He would have to give his opinion and he
11 can't do that. You said does it make sense, so that would
12 then be his opinion.

13 BY MS. COFFEY:

14 Q How did you come about requesting a waiver?

15 A The contract provided that seller shall obtain. At
16 some point, I believe it was Mr. Mintz asked my office, me
17 and my assistant to involve in trying to procure whatever
18 waiver was required by the contract because I think the
19 seller asked him to do that. I think he told me she can't
20 do it or somebody is away or out of town, can you proceed
21 with it. And it is kind of unusual that the purchaser's
22 side would ask simply because they don't own the property.
23 But in this particular case, we then proceeded with the
24 standard process to do that.

25 Q What, if anything, did you do to request any type of

1 waiver?

2 A I would have asked my real estate paralegal at the
3 time, who at the time handled 50 percent of our
4 transactions, to send to Sea Pines the form that we used for
5 all the residential transactions. It's a preprinted form
6 that Sea Pines created and circulated in the real estate
7 closing business in Hilton Head, so everybody has it. I
8 would have asked her to send it to Sea Pines. She may have
9 -- she probably gave it to me to look at. I'm not sure if
10 she sent it directly or if I sent it.

11 There was a question about who to send it to because we
12 had looked at Maria Parker's memorandum from the year before
13 to see who she asked, I think, and I don't think that person
14 was still working for Sea Pines. So, ultimately, my
15 assistant told me to get in touch with Rob Bender, who was
16 here today, and to reach Rob either by phone or e-mail. And
17 I believe I sent it to him by e-mail. The documents had
18 been produced. It was nothing unusual to me at that point.

19 Q Can you look at Exhibit 13?

20 A Okay.

21 Q Do you recognize this document?

22 A This document has two e-mails, one from me to Rob
23 Bender, April 3 at 12:48 p.m., and one from Rob back to me,
24 April 3 at 4:10 p.m.

25 Q Does this document represent an accurate representation

1 of the e-mail you sent?

2 A Yes, I believe I produced this document off of our
3 computer.

4 Q So can you read me what you sent to Mr. Bender?

5 A Sure. Rob, I represent the contract purchaser for 147
6 Lighthouse Road, Suites A and B, shops 6 and 8, Mariners
7 Way. In connection with the standard SPR waiver, I was
8 asked by my client to contact you for further processing.
9 Please let me know the process or what further information
10 SPR, which means Sea Pines Resort, might need.
11 Historically, this is usually processed by the seller's
12 side, but the seller informed my client that I should be in
13 contact with you.

14 Q And what did Mr. Bender reply?

15 A Michael, it is my understanding that your firm handled
16 the closing for your client in 2016 for the purchase of the
17 general store in Harbour Town and thus completed all the
18 necessary paperwork at that time for the waiver. This
19 transaction is no different from that previous transaction
20 and should be handled the same. Sincerely, Rob.

21 MR. COFFEY: Do you have any objection to be moving
22 this in evidence?

23 MR. LINTON: No objection.

24 THE COURT: All right. Without objection.

25 (Plaintiff's Exhibit No. 13 admitted into evidence.)

1 BY MR. COFFEY:

2 Q What did you take Mr. Bender's response to mean?

3 A To submit the form that we used -- I'll take a step
4 back. Since I've been working in Hilton Head, every time
5 there's a Sea Pines closing with residential property,
6 certainly, we use this form. So I took that to mean we
7 submit the form to Sea Pines requesting whatever waiver
8 existed.

9 Q What happened, do you recall, during this transaction?

10 A I think I submitted the form to Mr. Bender directly or
11 maybe Sara did and I think it was acknowledged as received.
12 And this would have been somewhere during the first week of
13 April. I guess it was right before the golf tournament.
14 Nothing happened for a week. I know I went away during the
15 golf tournament. I didn't hear from -- at that point in
16 time, I don't think we had heard from the seller, the lawyer
17 representing the sellers. I just assumed the transaction
18 was on track and, you know, was busy handling all the other
19 matters that we handle every day. I really wasn't focused
20 on the minute-to-minute of this.

21 Q Did you at some point get some further communication
22 from Mr. Bender?

23 A I don't -- if there is, if you could refresh me with
24 it. I don't remember hearing from Mr. Bender again. I
25 don't have a recollection after I sent the document over.

1 He may have -- just thinking about it, he may have said send
2 the contract, but that would have been close to when I sent
3 the waiver request form. There's a preprinted form. He
4 received it and he may have contacted me back either by
5 phone or e-mail and said well, can you send the contract of
6 sale, which I had, and I probably sent it to him, just
7 regular business, ordinary course of business, not even
8 thinking about it, really.

9 Q But in the normal course of business when you request a
10 waiver, do you normally send a contract with it or is it
11 required?

12 A To be frank with you --

13 MR. LINTON: Objection, Your Honor.

14 THE COURT: He can testify as to what his common
15 practice is.

16 MR. LINTON: But she also asked him whether it's
17 required by law, basically, that the contract be provided
18 and that's a legal conclusion?

19 THE COURT: Just testify as to what your common
20 practice is, please.

21 THE WITNESS: I, frankly, personally probably never
22 sent a request for a waiver or a contract to Sea Pines or
23 any of the other plantations. I've always had an
24 administrative person in my office handle that completely.
25 So I'm not sure how it's normally done. I know there's a

1 form. I really don't know what normally happens.

2 BY MS. COFFEY:

3 Q Well, let's look at that form. Is that a
4 representation of what you or someone in your office might
5 have sent to Sea Pines?

6 A Yes, it is. I probably would have seen this on the
7 computer screen, actually. I don't remember ever seeing it
8 in paper, but I was probably asked to review it. It's not a
9 signed document, so probably looked at it real good or Sarah
10 may have just sent it herself. It simply says who we are,
11 we're representing the purchaser, the legal address of the
12 property involved, tax map and who the sellers are and it
13 list a sales price.

14 Q Is there any like line or box or anything that suggest
15 a contract should be sent?

16 A On this one page, I don't -- I don't see the word
17 contract on this page.

18 Q And, again, you just said what was on that -- is there
19 anything on that document, sellers, purchasers, price that
20 looks different than the information that was given in the
21 letter that you drafted?

22 A No, the only difference is the letter of intent doesn't
23 have the tax map number on it. The Sea Pines form that has
24 Sea Pines letterhead on it ask for the tax information.

25 Q Other than that, (inaudible)?

1 A In terms of the price, the parties, yes.

2 Q From March 17th, 2017 till May 2nd, 2017, when you
3 received a communication from Mr. Frazier, did you hear from
4 the sellers at all?

5 A I don't think so. We may have -- at some point before
6 May 2nd, my paralegal may have had -- received and maybe
7 copied me that the Bannon Law Firm was representing the
8 sellers in this transaction, but did we discuss the
9 transactions, no, I don't believe so. We weren't right
10 about to close at that moment, so it wasn't really on the
11 radar screen.

12 Q So if you go back to number 13 in our book. Your 0011.
13 I think it's Page 2.

14 A Okay. I have it. It's an e-mail message?

15 Q Yes.

16 A Okay.

17 Q Is that an e-mail that was sent to you?

18 A It wasn't sent to me. At that moment in history,
19 realestate@mogillaw.com was either Mark or Leslie's e-mail
20 address. But it was addressed to me, it was sent -- it
21 wasn't sent to my personal e-mail. That's why I say it may
22 have come to a paralegal who may have forwarded it to me.

23 Q Is there any reason for you to believe that this isn't
24 an accurate representation of an e-mail that was sent that
25 was addressed to you?

1 A No, that's -- our law firm owns the e-mail address that
2 it came to and we still use that e-mail address today. So
3 it's a fairly typical communication between a seller's side
4 and a buyer's side. The seller's side is introducing
5 themselves and telling us what they're going to do kind of
6 thing. It's an intro letter.

7 Q And after this, what was the next thing that you heard
8 or any type of communication about this deal?

9 A I don't think I heard anything further from the Bannon
10 side or from Meredith. Meredith Bannon is the owner of
11 Bannon Law Firm and she would normally be my contact there.
12 I don't recall talking to her much about this or hearing
13 from her.

14 Around May 2nd, I got a message -- it was a voicemail
15 late in the afternoon from Simon Frazier. Simon is a
16 long-time lawyer in the community who left me a voice
17 message referencing this transaction saying we needed to
18 talk. And then I think he sent an e-mail that night or the
19 next day -- he left a voicemail saying there was an issue
20 and then I think he followed up with an e-mail before I
21 could call him back.

22 Q Could you turn to Exhibit No. 18?

23 A Okay.

24 Q Is this a representation of an e-mail from Mr. Frazier
25 to you?

1 A Yes, it's an e-mail May 2nd at 4:03 p.m. to me, copied
2 to Jeff Hariman.

3 Q Did you receive this e-mail?

4 A Yes.

5 Q And do you have any reason to believe that this is not
6 an accurate representation of the e-mail?

7 A No, this is the e-mail that I produced from my computer
8 file. The only thing I don't know, Ms. Coffey, is if I
9 received it on the 2nd or if I looked at it the next
10 morning. I just don't remember, but I definitely received
11 it.

12 MS. COFFEY: Do you have any objection to moving this
13 into evidence?

14 MR. LINTON: No objection.

15 THE COURT: All right. Without objection.

16 (Plaintiff's Exhibit No. 18 admitted into evidence.)

17 BY MS. COFFEY:

18 Q Can you tell us what this e-mail said?

19 A Do you want me to read it line by line?

20 Q Or summarize, yes.

21 A Michael, that's me, I am representing the Sea Pines
22 Resort, LLC, which has elected to exercise its right of
23 first refusal to purchase shop 6 and shop 8, Mariners Way,
24 Horizontal Property Regime LX1V. It is my understanding the
25 purchase price is \$580,000. I'm also sending out letters

1 today to the sellers notifying them of this action, copies
2 attached. Please let me know who is representing the
3 sellers and I will also notify him/her. I also called and
4 left you a voicemail message about this matter.

5 Please let me know what date you have that you gave
6 notice to Sea Pines Resort, LLC of the purchase price in
7 terms of this transaction. I do not believe the sellers
8 have given notice to Sea Pines Resort, LLC. It would be
9 helpful to know when you believe proper and full notice was
10 given to Sea Pines Resort, LLC.

11 Please do not hesitate to call me if you wish to
12 discuss the matter further.

13 Q And what was your response?

14 A When I read it, if it was during -- whenever the next
15 business day, if it wasn't too late at night or in the
16 morning, I would have probably first called either Alon or
17 Amir to let them know what I had received.

18 And then I probably then immediately tried to reach
19 Simon. I've had a professional relationship for many years
20 with him. He's not foreign to me. This just didn't come
21 from Mars. We've worked against each other and together
22 many times, so I probably would have called him. I don't
23 know if I reached him immediately directly, but we
24 definitely talked within the next day or so.

25 Q And can you turn to Tab No. 22? What, if anything, did

1 you do in response to hearing the news that they were going
2 to exercise alleged right of first refusal?

3 A Well, I probably talked to him and he explained to me
4 what was going on and then I sent him this e-mail on May 4th
5 at 5:38 p.m.

6 Simon, please refer me to the covenant, By-Law or other
7 provisions under which Sea Pines Resort, LLC elects its
8 right of first refusal for the subject property and, if
9 possible, any additional documents or references which guide
10 how said rights are exercised. I was briefly looking online
11 and could not find it at first glance.

12 Q And what, if anything, did he respond to you?

13 A I'd have to be referred. We had e-mail and some verbal
14 communications. I'm sure he sent an e-mail in response, but
15 I don't have my records unless you refer them to me.

16 Q Can you look at the second page of Tab No. 22?

17 A Okay.

18 Q And at the top?

19 A I'm looking at Bates stamp Mogil 0021, this would be a
20 document I produced that's from him to me dated May 9th at
21 2:26 p.m.

22 Mike, the additional covenants, which apply to class B
23 in commercial lands are in Deed Book -- he references a Deed
24 Book. He says these CCRs, which means covenants and
25 restrictions include a repurchase option.

1 Q Okay.

2 A Before that, I had sent him an e-mail.

3 Q All right. Can you look at Mogil 0222? It's the next
4 page.

5 A Okay.

6 Q You sent an e-mail and down further, he responded to
7 the e-mail. This is the first e-mail he responded to. What
8 did he say?

9 A This was probably in response to my earlier one. Mike,
10 the right of first refusal appears in several places, Deed
11 Book 173, Page 46, Deed Book 92, Page 152 and Deed Book 128
12 at Page 185.

13 Q Did you do a little research about these?

14 A I probably tried to open them up. I recall they didn't
15 all open. The county public record system doesn't always
16 work as smoothly when you try to find something by book and
17 page as it does by grantor name. So I probably looked them
18 up and then I asked him more information because I didn't
19 see what he was referring to. You want me to review the
20 e-mail chain?

21 Q Yeah, review the e-mail.

22 A So in response to that message from Simon Frazier, who
23 referred me to three different books and pages on the online
24 system, I wrote to him on May 9th at 12:50.

25 Simon, we should further discuss this issue. The

1 covenants references you sent are consistent with what I
2 found online and each by their terms appear to only govern
3 Class A residential sites. Without even reaching to the
4 procedures that are intended to be followed and instances
5 where the company intends to exercise its rights, I do not
6 find any rights of first refusal which apply to the
7 commercial area of Sea Pines, including Mariners Way.

8 My client desires to purchase the property and without
9 the benefit of additional information objects and does
10 hereby confirm its objection to the exercise by Sea Pines of
11 an option to repurchase shop 6 and shop 8 and does hereby
12 request that Sea Pines withdraw its intent to exercise and
13 permit the parties under contract to proceed with the
14 transaction as stated. I'm available to discuss further.

15 Q And what was his response to you?

16 A Mike, the additional covenants, which apply to Class B
17 and commercial lands are in Deed Book 124, Page 35, Deed
18 Book 172, Page 316 and Deed Book 209, Page 1745. These CCRs
19 include a repurchase option.

20 Q And, in fact, do those refer to the Mariners Way units,
21 shops 6 and 8, those three?

22 MR. LINTON: Objection, Your Honor.

23 THE COURT: Based on?

24 MR. LINTON: It's a legal opinion as to whether these
25 covenants refer to any specific piece of property. I ask

1 this witness in his deposition if he was going to testify
2 about any particular set of covenants and he said no.

3 THE COURT: Okay. I'll sustain the objection.

4 MS. COFFEY: I believe he said -- his response to that
5 question was, Only if I'm asked for an opinion.

6 THE COURT: What was the question?

7 MS. COFFEY: I asked him did the covenants that Mr.
8 Simon sent him, Deed Book 124, Page 35, et cetera, did they
9 apply to the subject property?

10 THE COURT: He'd have to give his opinion as to whether
11 he thought that it applied to the property or not, correct?

12 MS. COFFEY: Correct. And in his deposition, he
13 responded he would give his opinion if asked.

14 THE COURT: Well, he's not an expert, so he can't give
15 his opinion. So you can reask the question, but I'm not
16 going to allow him to answer.

17 MS. COFFEY: Okay.

18 BY MS. COFFEY:

19 Q What was your response to Mr. Frazier when he sent you
20 this e-mail?

21 A I don't remember if the next response was a phone call
22 or an e-mail, but I probably asked for more information or
23 evidence that these generalized covenants from 40 or 50
24 years ago applied to this transaction. On the surface, I
25 hadn't concluded to myself at this point that we were

1 governed by this.

2 MS. COFFEY: I would ask Exhibit No. 22 be moved into
3 evidence.

4 MR. LINTON: No objection.

5 THE COURT: Without objection.

6 (Plaintiff's Exhibit No. 22 admitted into evidence.)

7 BY MS. COFFEY:

8 Q Did Mr. Frazier send you something else?

9 A I believe he did.

10 Q Besides those three that he sent you?

11 A I believe he sent me something else. I think we
12 continued to dialogue for a week or so more.

13 Q Will you look at Exhibit No. 23?

14 A Okay.

15 Q Is this an e-mail that you received?

16 A Yes, it was the same day later in the afternoon.

17 Mike, the applicable repurchase option is contained in
18 the commercial use covenants dated January 25, 1973 and
19 recorded in Deed Book 206, Page 1143, copy attached, see
20 section 19. I do not believe that the Sea Pines Resort will
21 back off its intention to purchase this property.

22 At this point, I guess I was trying to resolve this
23 with him and make them withdraw.

24 Q Right. So Mr. Frazier, who represents Sea Pines, sent
25 you six sets of references, none of which applied?

1 MR. LINTON: Objection, Your Honor. Whether they
2 applied or not is a legal conclusion.

3 THE COURT: Rephrase the question, please.

4 BY MS. COFFEY:

5 Q On the third try, did you receive a document that may
6 have applied to this case?

7 A The e-mail -- I won't say the third try, I don't how
8 many interludes there were, but the e-mail attached
9 something called commercial use
10 covs-lighthousebeachcode206page1143.pdf.

11 Q Can you turn to our Exhibit 1?

12 A Okay.

13 Q Is this an accurate representation of what was attached
14 to the e-mail sent to you by Mr. Frazier?

15 A Can you reference me to the -- oh, here it is. The
16 exhibit that you just pointed me to, it's handwritten in
17 that it's Deed Book 206, Page 1143, which is the same
18 labeling that Mr. Frazier used for the attachment.

19 I probably wouldn't have printed out that attachment
20 when I looked at it. I may have looked at it the next day
21 because I filed an action, I believe, the next day. I was
22 probably looking at it online whatever he attached. But
23 it's the same commercial use covenants.

24 Q Okay. And you reviewed these covenants?

25 A I probably looked at the section that he referenced to

1 me to look at and he actually wrote -- I believe that's his
2 writing or it may have been somebody else's, but it's not my
3 office's writing, it says, repurchase option at part one,
4 number 19 assigned to Sea Pines 246, page 2087. So I
5 probably either this day or the next day would have looked
6 at that as well. I think he sent it with it.

7 MS. COFFEY: Do you have any objection?

8 MR. LINTON: No objection.

9 THE COURT: Without objection.

10 (Plaintiff's Exhibit No. 1 admitted into evidence.)

11 BY MS. COFFEY:

12 Q And then the section that's referenced -- it's under
13 Tab 2, Deed Book 246 at 2087, you see that?

14 A Yes.

15 Q And what is that?

16 A Yeah, it's a printout of an assignment at Deed Book
17 246, Page 2087. It's a like a two-page document with
18 signatures.

19 MR. LINTON: Your Honor, we have an objection to this
20 line of questioning.

21 THE COURT: Ladies and gentlemen, I need to take a
22 minute outside of your presence. If you will please excuse
23 us. Go ahead and take a quick break and we'll get you back
24 in.

25 (The jury exits the courtroom at 2:59 p.m.)

1 THE COURT: Thank you.

2 MR. LINTON: Your Honor, if this assignment is a
3 document that he looked up at the time to do his job as the
4 closing attorney, then we have no problem without
5 authenticating it and putting it into evidence if it's
6 otherwise admissible. But I just wanted to pause because I
7 felt like we were getting ready to get where he was going to
8 be offering testimony about documents he didn't see at the
9 time, maybe has looked up since and offering opinions or
10 suggesting that the assignment is valid or not valid, which
11 are all expert opinions he said he wouldn't be giving.

12 THE COURT: So we'll just proffer the testimony.

13 What were you going to testify to?

14 THE WITNESS: What were you going to ask me, Maureen?

15 BY MS. COFFEY:

16 Q I was going to ask you if you reviewed this document?

17 A I've reviewed it, yes.

18 Q And based on your review, what did you do?

19 A I quickly concluded that it didn't solve the problem or
20 lead me to the result that this was definitely an
21 enforceable document, so I filed a lis pendens I believe the
22 next day or the next day after to protect Bittmint's
23 position in the contract because it didn't seem like -- I
24 didn't feel like they were controlled by this?

25 Q So you filed a lawsuit?

1 A I filed a lis pendens, which gives you 20 days, I
2 believe, to -- a lis pendens, you file a notice in the
3 public records that a suit has been filed or may be filed
4 within 20 days. And that's how you typically start an
5 action that's based on a contract involving real property.
6 I didn't file the suit right away, I just filed the lis
7 pendens.

8 Q Did you think this document supported the position that
9 Sea Pines had (inaudible)?

10 A It was really kind of impossible to tell at this point.
11 I mean, these were 40, 50-year-old documents. They don't
12 really -- they reference different companies, different
13 entities in them. I didn't really -- at this point, I had
14 never researched these issues because this had never come
15 up.

16 So there's Lighthouse Beach Company, there's Sea Pines
17 Plantation Company. There's nothing involving any specific
18 parcel, so I -- you know, there's no legal exhibits that say
19 all the different -- you'd have to do a lot of research from
20 here to really figure out what it meant. So I concluded we
21 needed to act because it probably doesn't bind us.

22 MR. LINTON: Your Honor, he said in his testimony
23 several times what he concluded about the applicability of
24 the covenants. He's not identified to talk about that.
25 He's identified to talk about the facts of what happened,

1 not what opinions he reached.

2 I asked him in his deposition, I said, You're not
3 prepared to go into detail about these covenants?

4 Not as deposition testimony, no. I'm not an expert,
5 no. I'm in court as counsel -- arguments as counsel
6 advocating a position, but as a fact witness, I'm not going
7 to tell you what covenants are about.

8 Okay. So just so I'm clear because it's a unique
9 scenario to be both a lawyer for a party and a witness in
10 the same case. I just want to make sure that when we go try
11 this case, I know what's going to happen. Do I understand
12 you correctly that you may stand up from counsel table and
13 make an argument to the judge regarding the covenants, but
14 you are not going to stand on the witness stand under oath
15 as a witness and discuss the enforceability or applicability
16 of covenants?

17 Answer: That's correct.

18 THE COURT: I'm going to allow him to testify what he
19 did as a result of his review, i.e., filing the lis pendens,
20 but he can't give his opinion as to what the -- the legal
21 opinion as to the documents.

22 All right. Let's take a five-minute break.

23 Sir, you're more than welcome to be excused, but come
24 right back.

25 (Short recess.)

1 THE COURT: All right. Bring them in.

2 THE BAILIFF: The jury is entering the courtroom, Your
3 Honor.

4 THE COURT: All right.

5 (The jury enters the courtroom at 3:12 p.m.)

6 THE BAILIFF: The jury is seated, Your Honor.

7 THE COURT: All right. You may proceed.

8 BY MS. COFFEY:

9 Q Mr. Mogil, what we marked as Plaintiff's 1, the 1973
10 commercial use covenants, it referenced an assignment and
11 that's Exhibit No. 2. Do you have Exhibit No. 2 over there?

12 A Yes.

13 Q Did you review this assignment?

14 A Yes, I just don't know if it was this day or the next
15 day.

16 Q And based on your review of this assignment, what did
17 you do?

18 A I believe the next step -- I didn't agree with Mr.
19 Frazier and then I filed what's called a lis pendens, which
20 is a legal document that we can now file with e-filing.
21 It's a notice in the court records that either a lawsuit has
22 been commenced or will be commenced within 20 days. So it
23 puts the world on notice that there's a lawsuit coming
24 involving these parties and this property. I think when you
25 filed the lis pendens, you type in the tax map number.

1 Q Just to clarify, this assignment at Deed Book 246, Page
2 2087, you saw and reviewed?

3 A I looked at everything that Mr. Frazier referenced me
4 to, I just didn't agree.

5 MS. COFFEY: I'd like to move this into evidence,
6 Exhibit No. 2.

7 MR. LINTON: No objection.

8 THE COURT: Without objection.

9 (Plaintiff's Exhibit No. 2 admitted into evidence.)

10 BY MS. COFFEY:

11 Q And after the lis pendens, what did you do?

12 A It was immediately before or immediately after, in
13 addition to my dialogue with Mr. Frazier, I was then in
14 contact with Ms. Bannon's office, who was representing the
15 seller. I probably asked her not to close, saying we
16 thought it was a breach of contract for her clients, the
17 sellers, to sell to Sea Pines instead of my clients. And
18 then at some point, since this was a contract for 580, I
19 drafted -- Mr. Mintz, I believe, signed an offer for another
20 entity to purchase this property for more money. And I sent
21 that to Ms. Bannon.

22 Q Can you look at Exhibit 24. Do you recognize this?

23 A Yes, it's a letter that I wrote.

24 MS. COFFEY: I'd like to move this letter into
25 evidence.

1 MR. LINTON: No objection.

2 THE COURT: Without objection.

3 (Plaintiff's Exhibit No. 24 admitted into evidence.)

4 BY MS. COFFEY:

5 Q Can you read the first paragraph?

6 A Dear Meredith -- that's Meredith Bannon, she's the
7 lawyer on the other side -- I understand you represent the
8 sellers of the above-referenced two units at Mariners Way,
9 HPR, which is Horizontal Property Regime, Harbour Town that
10 are currently under lease to my client, Harbour Town Surf
11 Shop, LLC, and under contract to be sold to my client,
12 Bittmint, LLC. As you are aware, Sea Pines Company has
13 through it's attorney, Simon Frazier, communicated that it
14 intends to exercise a right of first refusal and intends to
15 purchase the units directly from your clients.

16 There are a number of issues presented by the exercise
17 of the option, including determination of exactly what
18 rights Sea Pines has, if any, and how those rights are to be
19 exercised, some of which I'm addressing directly with Simon.
20 There are also issues which relate to the lease and your
21 client's obligations under the current contract of sale.

22 Q And after this letter, what did you do?

23 A After sending the letter?

24 Q Uh-huh.

25 A This letter is dated May 9th and I believe I filed the

1 lis pendens on May 10th.

2 Q And after filing the lis pendens, what did you do?

3 A Probably right around that time frame an offer for a
4 higher purchase price was tendered on behalf of Harbour Town
5 Surf Shop to Ms. Bannon asking her to review that with her
6 client by me.

7 Q And what was the result?

8 A It wasn't accepted. I'd have to look to -- it was done
9 by e-mail. Even though there were phone calls in between,
10 I'd have to be referred to her e-mail response.

11 Q Did your clients purchase the property for a higher
12 price?

13 A It was -- in so many words in her communication back,
14 it was rejected. It was either by an e-mail or a letter,
15 but I'm pretty sure it was by an e-mail. She rejected it
16 and that was -- so there was no second purchase.

17 Q Can you look at No. 26B?

18 A Okay.

19 Q Do you recognize this?

20 A This is an e-mail chain that I produced.

21 Q And is it an e-mail sent?

22 A There's an e-mail sent by me to Meredith. It says,
23 Meredith, addressed to your clients, Mr. Giannone and Ms.
24 Johnson, please refer to the attached letter of May 11th
25 with contract and earnest -- EMD, dated May 10th.

1 She responded, Mike, my clients reject your offer dated
2 May 11, 2017. My clients reject an extension of the lease
3 as the sale is pending to Sea Pines after the exercise of
4 their right of first refusal.

5 I don't have those letters in front of me, but I think
6 in addition to the contract, in the alternative, we asked
7 that the lease term be extended, on behalf of Harbour Town
8 Surf Shop that the lease also be extended in addition to the
9 purchase.

10 MS. COFFEY: I'd move this into evidence.

11 MR. LINTON: No objection.

12 THE COURT: Without objection.

13 (Plaintiff's Exhibit No. 26B admitted into evidence.)

14 BY MS. COFFEY:

15 Q Would you look at 26A?

16 A Okay.

17 Q Is this an e-mail?

18 A Yes. This is the same e-mail that I -- that was on the
19 second of the two e-mails on the other page.

20 Q And behind it, is there something behind it?

21 A Well, in the tab, it has my e-mail saying, Meredith,
22 addressed to your clients, Mr. Giannone and Ms. Johnson,
23 please refer to the attached letter of May 11th with
24 contract and EMD dated May 10th. Then there's my letter of
25 May 11th, which is a signed letter, which was an attachment.

1 You want me to read it?

2 Q Yes.

3 A Dear Meredith, without prejudice to the rights of
4 Bittmint, LLC to purchase your client's property under its
5 pending contract of sale or to the enforceability of said
6 contract, I am enclosing a backup offer made by Harbour Town
7 Surf Shop, LLC, the current tenant, to purchase the property
8 for \$590,000, together with proof of earnest money deposit.
9 Please let me know your client's position and acceptance or
10 counteroffer.

11 Q And is there another attachment?

12 A Another attachment is a contract that I drafted or my
13 office drafted, initialed and signed, initialed by Mr. Mintz
14 and Mr. Bitton dated May 10th.

15 MR. LINTON: No objection.

16 THE COURT: Without objection.

17 (Plaintiff's Exhibit No. 26A admitted into evidence.)

18 BY MS. COFFEY:

19 Q And was this offer and contract accepted?

20 A No, per the other e-mail, she said it was rejected and
21 that they would also not extend the lease that we had
22 requested.

23 Q After the lease extension request was rejected and the
24 higher priced contract offer was rejected and you filed the
25 lis pendens, what steps did you take after that to protect

1 your clients' rights?

2 A Well, immediately, I know I continued -- I think I
3 wasn't aware that the transaction with Sea Pines had
4 concluded. I was continuing to talk, I think, to Mr.
5 Frazier to see if things could be worked out. Ultimately,
6 in May, probably within the 20 days from the lis pendens, I
7 filed a lawsuit, which is this lawsuit, on behalf of
8 Bittmint, LLC against Sea Pines and the sellers.

9 Q And what did you allege in the lawsuit?

10 A I think --

11 THE COURT: Hold on, you can't talk about -- yeah.

12 BY MS. COFFEY:

13 Q From the time you filed the lis pendens to the time you
14 filed the lawsuit, did you research these issues?

15 A Yes.

16 Q Did you look at any documents?

17 A Yes, I looked at documents. I researched the whole
18 issue.

19 Q In researching documents, did you look at any
20 bankruptcy documents?

21 A I have looked at bankruptcy documents related to Sea
22 Pines since this case began. I don't know if I saw them --
23 we ordered a title search of something and I don't know if
24 they were in the title search or came up later. But I have
25 looked at them, but I don't know if it was that week or

1 later.

2 Q Did you attempt independently to determine the validity
3 of this alleged right?

4 MR. LINTON: Your Honor, we have an objection.

5 THE COURT: Yes, he would have to be giving his opinion
6 as to whether it, in fact, was accurate or not.

7 MS. COFFEY: May I approach?

8 THE COURT: Absolutely.

9 BY MS. COFFEY:

10 Q Can you identify that document?

11 A The first document is a certified true copy of the
12 document recorded in office of registrar of deeds for
13 Beaufort County on November 17th, 1987, and it's called a
14 limited warranty deed.

15 Q And on the first page of that limited warranty deed, do
16 you know what it references? Can you read it?

17 MR. LINTON: Your Honor, we have an objection to the
18 witness reading something that's not in evidence.

19 THE COURT: Is it not in evidence?

20 MS. COFFEY: Not at the moment. I'd like to move that
21 into evidence under Rule 901. (Inaudible) it's a
22 self-authenticating ancient public document. It's relevant
23 to this suit because it concerns the parties, Lighthouse
24 Beach and Sea Pines Plantation Company, which were parties
25 -- the people that were involved in the -- the companies

1 that were involved in the covenants and the assignments.
2 And under 803 (14), (15) and (16), they are hearsay
3 exceptions because they involve an interest (inaudible).

4 THE COURT: Same objection?

5 MR. LINTON: Yes, Your Honor. This is a document that
6 he has testified he doesn't think he reviewed other than for
7 the purposes of litigation. It's an expert opinion.
8 There's no foundation for it. He's not identified to talk
9 about it.

10 THE COURT: I'll be limited as to what he can testify
11 to, but I'm going to let it in as an exception under 803
12 (16) statements of ancient documents stating that it's in
13 existence for 20 years or more and the authenticity which
14 has been already established.

15 Go ahead.

16 BY MS. COFFEY:

17 Q Can you just read the first paragraph?

18 A Limited warranty deed. Now, know all men by these
19 presence that on or about November 24, 1986, Gardner
20 Matthews Plantation Company, Case 8603801, Hilton Head
21 Holdings Corporation, Case 8603802, Hilton Head Hotel
22 Company, 8603803, Vacation Resorts Holding, Inc., 8603804,
23 Vacation Resorts, Inc., 8603805, the Hilton Head Company,
24 Inc., 860308, Hilton Head Holdings Corporation, formerly
25 known as Gin Holding Corp., 8603868, Hilton Head Company

1 Delaware Corporation, 8603869, Sea Pines Plantation,
2 8603870, Hilton Head Holdings Corporation, 8603869, Sea
3 Pines Plantation, 8603870 and 71, Hilton Head Company of
4 Delaware Corp, 8603884, and Sea Pines Plantation Company,
5 8603885 filed for bankruptcy under Chapter 11 of the United
6 States Bankruptcy Code.

7 On November 24, 1986, the United States District Judge
8 Sol Blatt, Jr. withdrew the reference of the above-stated
9 cases to the United States Bankruptcy Court and the cases
10 were retained and reserved in the United States District
11 Court pursuant to United States Code Sections 157 and 1334.

12 Q Can you read the next paragraph?

13 A Whereas, by order of the district court entered
14 November 26th, 1986, John F. Curry was appointed interim
15 trustee for the --

16 MR. LINTON: Your Honor.

17 THE WITNESS: -- above-named debtors --

18 THE COURT: Hold on, he has an objection.

19 What is it?

20 MR. LINTON: We have an objection to having a witness
21 just read a document in that is not relevant. They haven't
22 established any relevance of this. The only way to do that
23 would be an expert opinion from somebody about these issues.
24 Just saying that a document is old and reading it into the
25 record is not evidence. It's not relevant. It hasn't been

1 put at issue in this case.

2 MS. COFFEY: The document references Sea Pines Company
3 and other entities that their assets came out of the
4 bankruptcy and purchased by Sea Pines Associates, in which
5 Sea Pines Resort derives all of their rights and all of
6 their assets out of that document.

7 THE COURT: What's the question?

8 MS. COFFEY: I was just trying to explain the
9 relevance.

10 THE COURT: Oh, I thought you were asking him a
11 question.

12 MR. LINTON: Your Honor, that's the point. The lawyer
13 can't establish a foundation for it. The witness has to do
14 that. The lawyer can't testify --

15 THE COURT: I agree. That's why I thought it was a
16 question. I was confused. Just ask him a question about
17 it.

18 BY MS. COFFEY:

19 Q Is Sea Pines Plantation Company a party in that
20 document?

21 A The document is a deed executed by Hilton Head
22 Liquidation Corp, formerly known as Sea Pines Plantation
23 Company, a South Carolina corporation. The references are
24 to a number of other entities in the deed. It's signed by
25 John Curry as trustee for the liquidation, formerly known as

1 Sea Pines Plantation Company.

2 Q And that document references that Hilton Head
3 Liquidation Corporation, formerly known as Sea Pines
4 Plantation Company was -- was it put into bankruptcy?

5 A On the face of the document, there's a case number for
6 Sea Pines Plantation Company. It says it filed for
7 bankruptcy under case 8603885.

8 Q Does that document reference -- it doesn't reference
9 the sale?

10 A This document just on its face says, Hilton Head
11 Liquidation Corp, a South Carolina corporation by John
12 Curry, it's trustee, in consideration of the premises, in
13 consideration of one dollar to-wit, paid in hand, Sea Pines
14 Plantation Company, whose address is P.O. Box 7000, Hilton
15 Head Island, South Carolina 29938 hereinafter referred to as
16 the grantee, the receipt whereof is hereby acknowledged as
17 granted, bargained, sold, conveyed and released and by these
18 presence does grant, bargain, sell, convey and release unto
19 the said grantee, successors and assigns forever all of its
20 right, title and interest, whatever that same may be and all
21 of the property described in Exhibit E, which is attached
22 hereto, incorporated herein by reference subject to the
23 permitted exceptions listed on Exhibit 8, which are attached
24 hereto and incorporated herein by reference.

25 Q Can you turn to Page 431?

1 THE COURT: Can you ask him a question? Him just
2 reading it doesn't do anything. He has to be able to
3 explain how, in fact, he knows what this information may be
4 or what he did with the information. Just reading it
5 doesn't do anything.

6 BY MS. COFFEY:

7 Q Did you come to the conclusion that there may be an
8 issue with the assets that came out of this bankruptcy?

9 MR. LINTON: Your Honor, we have an objection. What
10 conclusions he reached based on review of documents calls
11 for an expert opinion --

12 THE COURT: He's right. Y'all can keep asking the
13 questions, I'm going to keep telling him he's right because
14 he cannot give his opinion. He has not been deemed as
15 expert.

16 BY MS. COFFEY:

17 Q When you reviewed the documents, did the documents
18 state that there's no successors or debtors --

19 MR. LINTON: Objection, Your Honor. That calls for an
20 interpre -- when you look at this document that she's asking
21 him to interpret, he would have to read the whole thing
22 right here to see if those particular words are in it. And
23 what is the relevance? He's identified to talk about the
24 contract, which he's talked about, Sea Pines exercising its
25 right of first refusal, Sea Pines supposed interference with

1 the contract. He is not identified to talk about any of
2 this. No foundation has been established. He is not a
3 witness to any of this.

4 MS. COFFEY: Your Honor, he reviewed the information
5 that was sent to him by Sea Pines Resort, which then led him
6 to determine --

7 THE COURT: Don't say anything that you --

8 MS. COFFEY: Led him to file a lawsuit.

9 THE COURT: We've established that.

10 MS. COFFEY: Based on -- whether he's correct or not,
11 based on his determination that there wasn't a right.

12 MR. LINTON: Your Honor, we would ask that that be
13 stricken.

14 THE COURT: Ladies and gentlemen of the jury, I'm going
15 to take some matters up with the attorneys. We will excuse
16 you and get you right back in.

17 (The jury exits the courtroom at 3:38 p.m.)

18 THE COURT: All right. So to be clear, I let it in as
19 an ancient document, that's about it. And so he is not
20 going to be able to testify about all the conclusionary
21 aspects that he took into consideration in utilizing that
22 document to file his lawsuit and what it led him to believe.

23 I have already agreed with them a thousand times. He
24 is not an expert. Y'all don't have an expert. He's not
25 going to be deemed an expert. You can't ask him about the

1 validity of the actual document.

2 Bring them out.

3 With all due respect, if I were you, I'd move on.

4 MS. COFFEY: I got it.

5 THE BAILIFF: The jury is entering the courtroom.

6 THE COURT: Thank you.

7 (The jury enters the courtroom at 3:39 p.m.)

8 THE BAILIFF: The jury is seated, Your Honor.

9 THE COURT: Thank you.

10 Yes, ma'am.

11 MS. COFFEY: May I approach the witness?

12 THE COURT: Absolutely.

13 BY MS. COFFEY:

14 Q Have you ever seen that?

15 A Have I seen the document, yes.

16 MS. COFFEY: Do you have an objection to this?

17 MR. LINTON: Your Honor, at this point, we would have
18 an objection. The fact that a document is ancient and
19 someone has seen it is not a basis to admit it.

20 THE COURT: I didn't say it was.

21 MR. LINTON: Well, she asked if we had an objection.

22 THE COURT: Okay.

23 MR. LINTON: I was saying that we do. I don't think
24 this witness has knowledge about this. There's been no
25 foundation for any of these documents.

1 THE COURT: Are you withdrawing your request?

2 MS. COFFEY: I'm going to try and --

3 THE COURT: Ask him two more questions and let's see
4 what he knows.

5 BY MS. COFFEY:

6 Q What is that document?

7 A The document is entitled Articles of Incorporation of
8 Sea Pines Plantation Company.

9 Q What's the year of that document?

10 A The stamp on it says it's filed November 2, 1987.

11 MS. COFFEY: Again, I'm going to request it be moved
12 into evidence as a self-authenticating document, an ancient
13 document that pertains to interest in property that is
14 relevant to the core of this lawsuit in that Sea Pines
15 Plantation Company, again, in bankruptcy, how they derived
16 --

17 THE COURT: Hold on, you can't testify. I'm going to
18 take it under a 403 analysis. What's the relevance of it?

19 MS. COFFEY: The relevance of it, it talks about that
20 it's an amendment change from Sea Pines Plantation Company
21 and how they became Hilton Head Liquidation Company.

22 THE COURT: Just ask him if he knows that.

23 BY MS. COFFEY:

24 Q Do you know if Sea Pines Plantation Company eventually
25 became Hilton Head Liquidation Company?

1 THE COURT: Not by referring to the document, just if
2 you know it?

3 THE WITNESS: Outside of the -- well, I know it from
4 the preparation of this case.

5 THE COURT: There you go, there's your answer.
6 Next question.

7 MR. LINTON: Your Honor, if he's learning things from
8 the preparation of this case after --

9 THE COURT: I didn't say I was going to let it in. I
10 told her to ask the next question.

11 BY MS. COFFEY:

12 Q Did you review the document at any time?

13 A At any time prior to today, yes.

14 Q And has Sea Pines Plantation Company dissolved?

15 A I don't know really. I don't know. The Defendant in
16 this case or the party that exercised the right was Sea
17 Pines Resort, LLC, so I haven't seen -- there's a sign that
18 may say Sea Pines Plantation somewhere, but they're not a
19 party here.

20 MS. COFFEY: Nothing further. Thank you.

21 THE COURT: Thank you, ma'am.

22 MS. COFFEY: I moved this one in.

23 THE COURT: Correct.

24 MS. COFFEY: Plaintiff's 33.

25 (Plaintiff's Exhibit No. 33 admitted into evidence.)

1 MR. LINTON: We don't have any further questions of
2 this witness.

3 THE COURT: You may step down. I hope you have a
4 wonderful rest of your day. Thank you for being here.

5 Call your next witness.

6 MR. KUBEC: Your Honor, Plaintiff's call Steve
7 Birdwell.

8 THE CLERK: Raise your right hand.

9 STEVE BIRDWELL,

10 after being duly sworn, testified as follows:

11 THE CLERK: Have a seat. Once you get settled, if
12 you'll state your full name and spell out your last name for
13 the court reporter.

14 THE WITNESS: Steve Birdwell, B-I-R-D-W-E-L-L.

15 DIRECT EXAMINATION

16 BY MR. KUBEC:

17 Q Good afternoon, Mr. Birdwell. How are you?

18 A Good afternoon.

19 Q Mr. Birdwell, you're currently employed by Sea Pines
20 Resort, LLC, correct?

21 A Yes.

22 Q They're a Defendant in this case?

23 A Yes.

24 Q You're the president of that company?

25 A I am.

1 Q Been the president since 2006, correct?

2 A That's correct.

3 Q And you report to Matthew Goodwin?

4 A Our chairman, yes, Matthew Goodwin.

5 Q This on the screen, what is this?

6 A It's a picture of Harbour Town.

7 Q Where is that located?

8 A It's located within Sea Pines Resort.

9 Q (Inaudible) discussion shops 6 and 8 known as the
10 Mariners (inaudible) portion of Harbour Town, correct?

11 A Mariners Way.

12 Q Mariners Way. (Inaudible)?

13 A I can't see the X, but I see the building.

14 Q Is that the right spot?

15 A Yes, it looks like it is.

16 Q (Inaudible)?

17 A Yes, it is, very proud of it.

18 Q A lot of people go through there every day, don't they?

19 A Yes, we love it.

20 Q Lighthouse is kind of the focal point of (inaudible),
21 isn't it?

22 A Yes, it is. It's a focal point of the island and,
23 certainly, Sea Pines Resort.

24 Q Now, we've been talking about shops 6 and 8
25 (inaudible), correct?

1 A Yes.

2 Q Do you recognize the location right here?

3 A Yes.

4 Q What is that?

5 A That's the surf shop.

6 Q And around the corner here, what is that?

7 A That is the general store.

8 Q Have you been in the general store?

9 A I have.

10 Q How recent?

11 A It's been a couple years.

12 Q When you went through there, were they still connected?

13 A Yes, one of the walls is opened and you could walk

14 between the stores.

15 Q Come into the surf shop and walk through and go out

16 (inaudible)?

17 A Yes, you can.

18 Q (Inaudible)?

19 A Well, the first floor is commercial and above that is

20 residential.

21 Q (Inaudible)?

22 A That's correct.

23 Q Does Sea Pines Resort own (inaudible)?

24 A We do not.

25 Q So you own the bottom?

1 A Well, we own the surf shop. We don't own the general
2 store.

3 Q I want to ask you something, we've heard a lot about
4 this right of first refusal and covenants, correct?

5 A Yes.

6 Q Do the same rules apply to the commercial buildings as
7 apply to (inaudible)?

8 A Well, there are covenants that apply to all those
9 properties.

10 Q Are they the same?

11 A You know, I'm not a lawyer. I would say we've got a
12 lot of legal documents here. We rely on our lawyers. You
13 know, there's several sets of covenants that apply to the
14 properties.

15 Q The right of first refusal (inaudible)?

16 A Well, our right of first refusal is documented in
17 several different -- you know, of the legal documents and
18 the right is spelled out in several different sets of
19 covenants.

20 Q (Inaudible)?

21 A Well, there's a difference between the first floor
22 commercial space and then the residential units that are
23 above that.

24 Q Well, you personally said yourself (inaudible) right of
25 first refusal (inaudible)?

1 A Well, we have a right on all those properties. And
2 when they have changed hands, when they have sold, we have
3 reviewed that right and we haven't used our right to
4 purchase any of those properties.

5 Q But you specifically said we're not -- Sea Pines is not
6 going to enforce that right (inaudible), you said that?

7 A I don't recall saying that.

8 Q I'd like to show you a document, Exhibit 34.

9 MR. WALKER: Excuse me, Your Honor.

10 THE COURT: Was this disclosed in discovery?

11 MR. KUBEC: No.

12 THE COURT: Ain't coming in.

13 MR. KUBEC: It's impeachment. He just testified --

14 THE COURT: Let me see it.

15 MR. WALKER: Your Honor, I'll withdraw the objection.

16 THE COURT: Yeah, I would, too. I got about to the
17 third paragraph.

18 (Plaintiff's Exhibit No. 34 admitted into evidence.)

19 BY MR. KUBEC:

20 Q Do you have a copy of this?

21 A No. Thank you.

22 Q Mr. Birdwell, I'd like you to read the second paragraph
23 -- well, first of all, what is this document?

24 A This is a letter that was issued to Sea Pines'
25 residents.

1 Q You wrote it, right?

2 A I signed it, along with our chairman, Matthew Goodwin.

3 Q And the logo on top says Sea Pines Resort, right?

4 A Yes.

5 Q And it's dated June 19, 2017, correct?

6 A That's correct.

7 Q Do you recall -- Sea Pines acquired the surf shop
8 property on May 11th, May 12th, 2017, right?

9 A That's correct.

10 Q So approximately one month before you wrote this
11 letter?

12 A Well, one month before we -- we purchased the property
13 one month before we wrote the letter.

14 Q Read the second paragraph.

15 A The right of repurchase has been included in the Sea
16 Pines covenants for more than 40 years. It only applies
17 when an owner wants to sell a property in Sea Pines. Resort
18 cannot force or compel residents to sell their property.

19 Q Read the next.

20 A Harbour Town area has many individual residential
21 property owners. Sea Pines Resort currently has no interest
22 in purchasing individual condominiums in the Harbour Town
23 area. Further, we believe it would be nearly impossible to
24 assemble any significant number of sellers to create a
25 manageable property. Therefore, Harbour Town property

1 owners should not be concerned about the right of
2 repurchase.

3 Q So you're telling these people right here, I don't
4 know, three or four feet right above the surf shop, people
5 who live here, you've got to nothing to be concerned about
6 (inaudible), correct?

7 A Well, we didn't really say that. We said that we
8 didn't currently have any interest in purchasing individual
9 condominiums.

10 Q Currently, one month after you purchased the shop below
11 them?

12 A Yes.

13 Q Right?

14 A Five years ago.

15 Q You made a distinction between commercial and
16 residential, didn't you?

17 A We indicated we didn't have an interest in purchasing
18 any properties at that time.

19 Q At that time?

20 A Right.

21 Q So you treated the commercial owners differently than
22 you treated the residential owners, correct?

23 A I don't know whether to say we treated them
24 differently. There was concerns about our right of first
25 refusal and we wrote this letter to sort of calm people's

1 concerns.

2 Q You told residential owners you're not going to
3 exercise the right of first refusal against them, didn't
4 you?

5 A We said that we didn't have any interest in purchasing
6 any property at this time.

7 Q But you would do it against commercial residents,
8 right?

9 A This was addressing residential purchases.

10 Q That is correct. Now, you own residential property in
11 Sea Pines, don't you?

12 A Yes, I personally do.

13 Q Personally, right?

14 A Yes.

15 Q Let's back up a little bit. You started working with
16 Sea Pines Resort in 1992?

17 A Yes, 1992.

18 Q Before that, you were a CPA?

19 A Yes, I was a CPA and still hold my CPA license.

20 Q Still doing that continuing education?

21 A Yes.

22 Q You were an accountant for about ten years?

23 A Pardon me?

24 Q You were an accountant about ten years before that?

25 A Yes, I guess so.

1 Q But when you started with Sea Pines Resort in 1992, it
2 was a different company, right?

3 A That was Sea Pines Company under the ownership of Sea
4 Pines Associates.

5 Q And then you've worked for Sea Pines ever since 1992?

6 A There was one break in, I think it was 1998. I left
7 the company and moved to Nashville, Tennessee. I was gone
8 for about nine months.

9 Q Then you came back and you were the financial officer
10 at one point?

11 A Chief financial officer, yes.

12 Q And sometime in 2005, the company you used to work for,
13 Sea Pines Associates, merged into Sea Pines Resort, LLC?

14 A Yes, it did.

15 Q The current Defendant in this case, correct?

16 A Right.

17 Q When did you move from the CFO position?

18 A That happened in 2006.

19 Q So since 2006, you've been responsible for overseeing
20 the management of all of Sea Pines Resort?

21 A That's correct.

22 Q You wear a lot of hats, don't you?

23 A Yep, and we've got a great team in place.

24 Q You manage the financial aspect of the company?

25 A Well, we have a great accounting department and

1 director of finance.

2 Q But you're the boss, you oversee all of that?

3 A Yes.

4 Q You oversee the facilities, employment, correct?

5 A Yes.

6 Q (Inaudible) planning, all that kind of stuff, right?

7 A Yep.

8 Q You're the guy at the top of the food chain, right?

9 A I'm the president.

10 Q How many employees are there in Sea Pines?

11 A It fluctuates by season. We currently have about 600
12 employees.

13 Q How many did you have back in 2016, 2017?

14 A We had fewer than we have today. Probably -- I would
15 be guessing, but probably in the 4 or 500 range.

16 Q So Sea Pines Resorts, that's a lot of people. You own
17 a lot of property, too. You own golf courses, right?

18 A Right.

19 Q You operate those golf courses?

20 A We do.

21 Q How many do you own?

22 A We own three golf courses.

23 Q Tennis center, do you own that?

24 A Yes, we do, Harbour Town -- the Sea Pines Racket Club.

25 Q Restaurants?

1 A We own a number of restaurants.

2 Q Do you own the restaurants or just own the property?

3 A Well, most cases, we actually operate the restaurants,

4 some restaurants we own the property and are leased.

5 Q You run the hotel in Harbour Town?

6 A We do own and operate the hotel.

7 Q How about Sea Pines Resort, what is Sea Pines Resort?

8 A Well, you've named many of the things that include Sea

9 Pines Resort or fall under the umbrella. We also do

10 vacation rentals in the homes and villas and town homes that

11 we manage.

12 Q What is Sea Pines Real Estate?

13 A Sea Pines Real Estate is a real estate brokerage firm.

14 Q You own that?

15 A We do. We have a license agreement with the realtors

16 that work under Sea Pines Real Estate.

17 Q So it's another revenue (inaudible)?

18 A It is.

19 Q So you have a lot of revenue streams?

20 A We do.

21 Q Golf courses, correct?

22 A Yes, sir.

23 Q (Inaudible) facilities?

24 A Yes.

25 Q (Inaudible)?

1 A Yes.

2 Q Hotel revenues?

3 A Right.

4 Q Gate fees?

5 A No, the gate fees are collected by the community
6 association, CSA, so we don't get the gate fees.

7 Q And you also receive revenues from commercial
8 properties, correct?

9 A We receive the rents from the commercial properties.

10 Q In fact, Sea Pines is the largest commercial land
11 holder in Harbour Town?

12 A Yes, we are. We own the majority of the commercial
13 property.

14 Q And if it was up to you, you would own them all,
15 correct?

16 A We certainly have an interest in owning additional real
17 estate. We have passed on the opportunity to purchase the
18 general store that we've been talking about.

19 Q Looking back, do you wish you had bought the general
20 store?

21 A Well, we just couldn't. The price that was being
22 offered was higher than we could justify.

23 Q You have to admit commercial property has gone up a lot
24 since 2016 (inaudible)?

25 A We haven't had them valued, but I would think they've

1 gone up in value.

2 Q As has most property on Hilton Head, correct?

3 A That's correct.

4 Q So let's focus in on the surf shop property. You spoke
5 with Ms. Johnson in 2016 about the prospect of buying that
6 shop, correct?

7 A Yes, I did.

8 Q Had a couple phone calls with her?

9 A Yes.

10 Q Did you meet with her in person?

11 A I don't recall an in-person meeting. We talked on the
12 phone several times.

13 Q She was interested in selling?

14 A She was interested in selling.

15 Q And you told her that Sea Pines Resort was definitely
16 interested in buying?

17 A Yes, we would have.

18 Q And at one point, she offered to take 900,000 for it or
19 maybe more?

20 A I think the offer was at 920,000 for the two units that
21 she owned.

22 Q Did you ever meet her brother, Mr. Giannone?

23 A I don't think that Chuck and I had met previously.

24 Q Okay. So Lynda was doing all the negotiation on behalf
25 of the ownership?

1 A Yes. Most of the discussions were with Rob Bender and
2 not necessarily myself. We talked a couple times on the
3 phone.

4 Q Well, if Mr. Bender got word of something, he would
5 probably pass it up to you?

6 A Yes.

7 Q You were interested in acquiring the property on behalf
8 of Sea Pines, right?

9 A We were interested in taking a look at it and
10 considering it.

11 Q I'd like you to look at Exhibit 8E in your book. There
12 should be a book up there of exhibits.

13 A Okay.

14 Q This is an e-mail from Mr. Bender to you, correct?

15 A Yes, it appears to be. Also, included Cliff McMakin.

16 Q So Mr. Bender is telling you that he received an offer
17 on the surf shop, correct?

18 A Yes.

19 Q Why don't you read it?

20 A It says, Lynda Johnson called me yesterday to tell me
21 that the tenant of the surf shop was dropping off an offer
22 for the space and she was going to give it to her attorney
23 to move forward on the sale. She said the offer was going
24 to be \$580,000. I asked her about any current anticipated
25 assessments due to the projects taking place at Mariners Way

1 and what I was able to gather from her limited understanding
2 was that she paid in full a \$4,000 special assessment. She
3 seemed to think that there were no other assessments beyond
4 the normal cam. I told her that we were continuing to
5 evaluate our interest. I suggest the three of us touch base
6 on this soon. Thanks, Rob.

7 Q There's a reference to an attachment on that e-mail,
8 correct?

9 A I didn't see a reference on what I just read.

10 Q We also have an earlier e-mail in there that refers to
11 a prior e-mail?

12 A There is an e-mail below that is an e-mail that went
13 from Rob to Cliff.

14 Q And that's in January?

15 A January 18th. The prior e-mail was on February the
16 1st.

17 Q So as of February 1st, you were aware that Ms. Johnson
18 had been made an offer for \$580,000, correct?

19 A It appears that I did.

20 Q And along with that e-mail from Mr. Bender, there's an
21 e-mail below where there's an attachment to it, right?

22 A There is an e-mail below that and then there is an
23 attachment.

24 Q If you would look at Exhibit 8C.

25 A Okay.

1 Q Do you see the second page, there's a document attached
2 to it?

3 A Yes.

4 Q What is the date of that document?

5 A The date of the e-mail and the date of the document is
6 January 18th, 2017.

7 Q It's an analysis from Mr. Bender, correct?

8 A That's correct.

9 Q And he forwarded that to you on February 1st, correct?

10 A I'm assuming that prior e-mail had the attachment. It
11 didn't really say it that way in what I read.

12 Q Mr. Bender does a little assessment here, correct?

13 A Yes.

14 Q And comes to a value, basically, saying here's the
15 deal, here's the price, here's the buildings, shops 6 and 8,
16 tells you when the lease expires, correct?

17 A Correct.

18 Q So far, you're with me?

19 A Yes.

20 Q Tells you the square footage of the building, correct?

21 A Yes.

22 Q Asking price per square foot, correct?

23 A Right.

24 Q Runs through some information about real estate taxes
25 and regime fees?

1 A Correct.

2 Q How much insurance is paid?

3 A Right.

4 Q And who pays for the assessments, right? Tenant pays
5 the assessments. Tenant pays real estate taxes. Tenant
6 pays regime fees and tenant pays the insurance. All that's
7 there, right?

8 A Yes, all that's there.

9 Q All that's there. So that's information in your hands
10 at this point on February 1st, correct?

11 A Right.

12 Q And then at the bottom, Mr. Bender does an analysis
13 where he determines the average rental for the real estate.
14 Do you see that?

15 A Yes.

16 Q He comes up with a number, right, 58,964?

17 A Per year, yes.

18 Q Per year?

19 A Per year for ten years.

20 Q So if we're going to rent this space, this is the
21 amount of money Sea Pines is going to get per year, roughly,
22 58,900, correct?

23 A That's correct.

24 Q Then he does an evaluation based on that number,
25 correct?

1 A That's correct.

2 Q He does one at eight percent?

3 A He does one at eight percent cap rate.

4 Q Eight percent, that's worth \$737,000, correct?

5 A That's correct.

6 Q Then he does one at ten percent, correct?

7 A Correct.

8 Q And he refers to a comparable property because he used

9 a comp below as a comparison, correct?

10 A That's correct.

11 Q He refers to that one being at \$474.18, correct?

12 A That's correct.

13 Q Then he uses the cap rate of 6.32. All this

14 information is available for you as of February 1st, 2017,

15 correct?

16 A Yes.

17 Q So at this point, did you tell Mr. Bender to proceed

18 along and buy the property?

19 A No, I think I needed to get some approvals from

20 Riverstone.

21 Q (Inaudible), right?

22 A That's right.

23 Q But you're well aware on February 1, 2017 that an offer

24 had been made on the property?

25 A We were aware that -- we had a verbal understanding an

1 offer was being made.

2 Q You knew who was buying, right?

3 A I believe we did know who was buying it. Yeah, the
4 current tenant.

5 Q You knew how much?

6 A Yes.

7 Q 580,000?

8 A 585,000, I think was the price.

9 Q Originally, it was, but then on February -- I'm sorry,
10 January 28th, look at the e-mail again, 8E?

11 A The 18th?

12 Q 8E.

13 A 8E. It was 580,000.

14 Q So at some point then, did Sea Pines do a further
15 analysis (inaudible)?

16 A I think that maybe Matt Goodwin asked for some
17 additional analysis.

18 Q You're not sure?

19 A I'm pretty sure that he did.

20 Q Well, let's take a look at exhibit -- well, do you know
21 when?

22 A It would have been during this same timeframe in early
23 February.

24 Q Do you have a copy of the analysis that was done in
25 February?

1 A I don't have it. I mean, I don't know if we did any
2 additional analysis, honestly.

3 Q You bought the property in May, correct?

4 A That's correct.

5 Q So sometime between February 1st when you found out
6 there was an offer on it, some months transpired? Some
7 months passed by, right? And you probably lost a week in
8 there somewhere because of (inaudible), right, kind of
9 business when the golf tournament goes on?

10 A Golf tournament happens in April, right.

11 Q Why don't you take a look at Exhibit 14A.

12 A Okay.

13 Q (Inaudible), correct?

14 A That's correct.

15 Q The bottom one is dated April 20th, 2017, from Rob
16 Bender to you and Cliff McMakin, right?

17 A That's right.

18 Q Mr. Bender is attaching a summary of the Harbour Town
19 Surf Shop real estate?

20 A Yes.

21 Q He says, I'm available to meet to discuss further if
22 you want, correct?

23 A That's correct.

24 Q Then above it, later on, sends you another e-mail,
25 right?

1 A Yes, same day at 11:20.

2 Q Your comment, attached is revised copy. So you must
3 have made some revision to it (inaudible), correct?

4 A Made an adjustment to it and he sent it back to me.

5 Q Refer to the next document, Exhibit (inaudible).

6 A Okay.

7 Q What is that document?

8 A It's titled Harbour Town Surf Shop real estate
9 opportunity.

10 Q (Inaudible)?

11 A I'm sorry.

12 Q You want a second to look at it before I ask you
13 questions about it?

14 A Okay.

15 Q Let me know when you're done.

16 A Okay.

17 Q What is this?

18 A This is a summary of the opportunity to purchase the
19 Harbour Town Surf Shop property.

20 Q The first page is kind of a written summary and the
21 second page is the numerical?

22 A Yes.

23 Q It's pretty similar to that same financial summary,
24 analysis Mr. Bender gave you back on the first day of
25 February, isn't it?

1 A Similar, he's made a few modifications to it.

2 Q Pretty minor, though, right?

3 A Appears to be very similar to what he had prepared
4 earlier.

5 Q On the first page of the summary, he refers to -- if
6 you look to the next to the last paragraph, Mr. Bender
7 writes, With the master planning efforts underway in Harbour
8 Town. And I asked him a bunch of questions about that
9 earlier. What was going on at that point in time?

10 A Well, one thing that was happening in April of 2017 is
11 we were recovering from Hurricane Matthew that had hit the
12 Harbour Town area very hard. So we had all that underway.
13 The hurricane hit in October of 2016 and so in the spring of
14 2017, we were trying to clean up from the significant
15 hurricane that has passed through. At the same time, we had
16 some master planning efforts that were underway to improve
17 and expand offerings in Harbour Town.

18 Q You're always doing upgrades in Harbour Town, right?

19 A We're always looking to upgrade our facilities and we
20 were looking at the Harbour Town area.

21 Q (Inaudible), right?

22 A We do.

23 Q You want your facility to be right up there with Kiawah
24 Island?

25 A Well, we have many competitors, including Kiawah.

1 Q You want to be the best, though, don't you?

2 A We do want to be the best, obviously.

3 Q So the concept of having a surf shop in that property
4 doesn't really coincide with wanting to have a Grade A,
5 Class A top of the line facility, doesn't it?

6 A I don't agree with that.

7 Q It would be much nicer to have boutique selling exotic
8 spa wear?

9 A No, we never had made any decisions like that. Amir
10 and Alon run a very nice store. We're very proud of the
11 store.

12 Q So, again, this analysis that you received from Mr.
13 Bender (inaudible) very similar to the one you received on
14 February 1st, two and a half months earlier, correct?

15 A Yeah, I mean, it appears to be a little more detailed
16 and a few changes to the format.

17 Q And you agree with his assessment that the space was
18 listed at an attractive price?

19 A I did agree with him that the property was listed at an
20 attractive price.

21 Q This was a good deal?

22 A It was a very fair price. I think it was fair for
23 Lynda and Chuck and it was a fair offering price for the
24 purchaser.

25 Q It's a good deal? It's more than fair, it's a good

1 deal?

2 A It's a fair price.

3 Q We've met before, haven't we?

4 A We have.

5 Q We met in a conference room some place and I asked you
6 a bunch of questions, correct?

7 A That's correct.

8 Q At your deposition. And when we were at that
9 deposition, I'll be happy to show it to you, you said the
10 whole time this was a good price. Do you dispute that now?

11 A I'm not disputing it, it was a fair price.

12 Q So in this memo, Mr. Bender writes, he writes, Manager
13 believes owning additional retail space in Harbour Town
14 works strategically with the vision of improving and
15 expanding the guests experience all the while growing
16 profitability in Harbour Town. You agreed with him, right?

17 A I agree with the statement, yes.

18 Q And you eventually passed this memo up to the boss?

19 A I did.

20 Q Now, let me ask you, why is it -- why does management
21 believe that Sea Pines owning the surf shop is better than
22 those gentlemen owning the surf shop?

23 A Well, we never came to that conclusion. We own a
24 majority of the commercial property in Harbour Town and we
25 have an interest in owning additional commercial property in

1 Harbour Town.

2 Q And one of the reasons Mr. Bender and you wrote to your
3 boss why you wanted to buy this property is because you
4 believed owning this retail space works strategically with
5 the vision of improving Harbour Town more so than them,
6 right?

7 A We never said that. We owned the majority of all the
8 other commercial property and we felt like in the long run,
9 it would be best if we owned additional commercial property.

10 Q You get a nice little profit out of owning that
11 property of the surf shop, right?

12 A We collect the rents that are included under the lease.

13 Q You don't pay property taxes, right?

14 A All those are standard commercial lease and the tenant
15 pays those costs.

16 Q And rent?

17 A And rent.

18 Q Any idea how much how much (inaudible)?

19 A I think the analysis here shows they pay roughly 5,000
20 a month or so.

21 Q A month?

22 A Yes.

23 Q I'd like you to look at 14C.

24 A Okay.

25 Q So this is an e-mail from you to Mr. Goodwin, right?

1 A Yes.

2 Q He's (inaudible)?

3 A He's our chairman.

4 Q And this is on April 20th, 2017, the same day as we're
5 talking about now. Same day we're talking about this
6 assessment you got from Mr. Bender, right?

7 A That's correct.

8 Q And you're sending him an e-mail at 11:38 a.m.,
9 correct?

10 A Correct.

11 Q And you say, Matt, a retail space within the Mariners
12 Way building in Harbour Town is contracted for sale.
13 Contract price is 580. I recommend using our right of
14 repurchase to purchase this property. A short summary of
15 the opportunity attached. Please let me know if you would
16 like to discuss further. Correct?

17 A Correct.

18 Q Now, it appears it took three months to get to this
19 point. After all the information (inaudible) on February
20 1st. Same analysis, basically, as the one on April 20th.
21 You needed to get approval from the boss, correct?

22 A We didn't have the contract of sale until just a few
23 days before this.

24 Q But all the other information, correct?

25 A We hadn't seen the contract.

1 Q You had every other piece of information, right?

2 A We knew there was an offer that was being made, but we
3 had not seen a contract.

4 Q But you asked Mr. Bender, you passed it up to Mr.
5 Bender to ask for his approval, correct?

6 A No, I passed it up to Mr. Goodwin.

7 Q Yes, I'm sorry, you passed it up to Mr. Goodwin?

8 A That's correct.

9 Q Now, let's look at Exhibit 14D?

10 A 14D, okay.

11 Q What is this?

12 A This is an e-mail back from Matthew Goodwin to myself.

13 Q Responding, right?

14 A That's correct.

15 Q Responding to the e-mail you just sent, right?

16 A That's correct.

17 Q What's the time stamp on that?

18 A It is April 20th at 11:46.

19 Q 11:46. So you sent an e-mail out to him at 11:38 and
20 he responds at 11:46, correct?

21 A That's correct.

22 Q And what's his response? Oh, let's buy it?

23 A Let's buy it.

24 Q I agree. Eight minutes took the big guy to make the
25 decision, right?

1 A That's right. He was aware the memo was coming.

2 Q So in your mind, you had to wait until a contract, had
3 a contract in hand, right, before I can make that decision,
4 that's your belief?

5 A Well, we needed to know what the terms and conditions
6 were.

7 Q You knew who the buyer was January 31st. You knew what
8 the number was, didn't you?

9 A Well, you have to have a contract to act on that.

10 Q That's your opinion, right, you need to have a
11 contract?

12 A We needed to know the terms of the contract. A verbal
13 commitment was not made yet, it wasn't documented yet.

14 Q He said let's buy it, correct?

15 A Matthew said, Let's buy it. I agree.

16 Q Let's move up a little bit further to the next line
17 where it says it would be helpful. Do you see that?

18 A Yes.

19 Q It would be helpful to look at a financial model
20 showing the return in the meantime before we possibly
21 redevelop or want to use the space for ourselves?

22 A That's correct.

23 Q And you were contemplating at the time we're going to
24 use the space for ourselves, right?

25 A No, we weren't. Matt may not have been aware or hadn't

1 focused on the fact that there was a lease in place.

2 Q Well, you got the lease. Mr. Bender got the lease way
3 back January 18th. You sent the information to him
4 (inaudible).

5 A We were aware. Matthew Goodwin may not have been aware
6 that we had a lease (inaudible). We had not contemplated
7 using it ourselves. And to this day, we have not
8 contemplated that.

9 Q Excuse me?

10 A And to this day, we still have not contemplated using
11 it ourselves, using the space ourselves.

12 Q Because you had to lease it, right?

13 A You asked me if we had contemplated --

14 Q You had to lease -- you couldn't kick them out once you
15 bought the property?

16 A We didn't want to kick them out.

17 Q But you couldn't?

18 A No, we couldn't and we didn't want to.

19 Q Let's back up, you couldn't, right?

20 A There was a lease in place and we planned on having a
21 lease.

22 Q You had to keep the lease in place?

23 A That's right.

24 Q You had to abide by the terms of that contract that
25 they made with the tenants, correct?

1 A That's correct.

2 Q That's why they're still in that property, you couldn't
3 kick them out, right?

4 A We don't want to kick them out.

5 Q Did you ever get a financial model?

6 A I think that we did.

7 Q The boss says it would be helpful to do something, it
8 probably means something, doesn't it?

9 A Yeah.

10 Q Go do it, right?

11 A That's right.

12 Q Do you recall receiving that model?

13 A I do remember receiving it.

14 Q Do you know who prepared that model?

15 A I think that Jeff Gilante in Richmond and Rob Bender,
16 along with Jeff Hariman worked on the model.

17 Q Would you take a look at 15C for me, please.

18 MR. KUBEC: Before, I do that, I'd like to move 14D?

19 MR. LINTON: No objection, Your Honor.

20 THE COURT: All right.

21 MR. KUBEC: I'd also like to mark 14C.

22 MR. LINTON: No objection.

23 THE COURT: Without objection.

24 (Plaintiff's Exhibit Nos. 14C and 14D admitted into
25 evidence.)

1 BY MR. KUBEC:

2 Q Do you have that document in front of you?

3 A I have 15C, yes.

4 Q There's a series of e-mails on that document?

5 A Yes, three e-mails, right.

6 Q The top one is from Jeff Gilante?

7 A Jeff Gilante, right.

8 Q And he attaches a (inaudible) model, correct?

9 A Yes. I haven't looked at the attachment yet, but I
10 believe he did.

11 Q You're copied on that?

12 A I am copied on that.

13 Q And you received a copy of this model?

14 A Yes.

15 Q And if you look at the next page, I think it's 15D?

16 A That's correct.

17 Q And you received this model?

18 A I did.

19 Q Did you look at the model at the time?

20 A I did take a quick look at it.

21 Q The question is, is there anything that stood out at
22 that time that you received that you disagreed with, found
23 was not correct?

24 A I didn't look at it in total detail, but I had no
25 reason to disagree with anything that was here.

1 Q So the purchase price is listed, correct?

2 A Yes, the purchase price at 580,000.

3 Q At this time, were you contemplating financing this
4 purchase, correct?

5 A It had been suggested that we consider placing some
6 down on the property.

7 Q Right. So you did an analysis based on the thought
8 that you were going to finance it, right?

9 A The team prepared the analysis.

10 Q And one of the assumptions they made was they could get
11 an interest rate of 4.29 percent at the time, correct?

12 A That's what this analysis showed.

13 MR. KUBEC: I'd like to move into evidence Exhibit 15C
14 and 15D.

15 MR. LINTON: No objection.

16 THE COURT: All right.

17 (Plaintiff's Exhibit Nos. 15C and 15D admitted into
18 evidence.)

19 BY MR. KUBEC:

20 Q So by April 24th, you have a financial analysis, things
21 are moving forward, you're going to get financing, correct?

22 A Well, we were considering the financing.

23 Q You still haven't -- well, you haven't decided whether
24 to purchase the property yet, had you?

25 A We had not made a final decision on that.

1 Q By the way, at any time during (inaudible) January 31st
2 and February 1st when you found out about this until now,
3 did you have any conversations with Mr. Mintz or Mr. Bitton
4 about this?

5 A I did not.

6 Q Did you even know them at that point?

7 A I think I may have met Amir before. I'd been in his
8 stores and met him briefly.

9 Q Very briefly, right?

10 A Very briefly, yes.

11 Q They had been tenants for a number of years, but you
12 hadn't had much interaction with them?

13 A We didn't own the stores and I was only in the stores a
14 few times.

15 Q Wasn't really interested in getting to know the
16 property owners in Sea Pines?

17 A I enjoyed meeting property owners in Sea Pines.

18 Q Did you specifically ever seek them out?

19 A I wasn't sure how often they were actually in Harbour
20 Town and in the stores.

21 MR. KUBEC: Your Honor, would it be appropriate
22 (inaudible).

23 THE COURT: Well, I'm going to end it for the day then.
24 I don't want to send them out and bring them back in. We've
25 only got 20 more minutes anyway before I'm going to send

1 them home. I don't keep them past 5:00.

2 Ladies and gentlemen, this is a good spot to break, so
3 we're going to go ahead and adjourn for the day. I'll see
4 you here tomorrow at 10:00 a.m.

5 (The jury exits the courtroom at 4:37 p.m.)

6 THE COURT: Mr. Birdwell, you will stay under oath.
7 All that means is you can't discuss your testimony with
8 anybody, but apart from that, you're good to go.

9 THE WITNESS: Thank you.

10 THE COURT: We'll see y'all tomorrow morning.

11 (Court was adjourned for the day.)

12 WEDNESDAY, MARCH 2, 2022

13 THE COURT: You can bring them out.

14 THE BAILIFF: The jury is entering the courtroom, Your
15 Honor.

16 THE COURT: Thank you.

17 (The jury enters the courtroom 10:08 a.m.)

18 THE BAILIFF: The jury is seated.

19 THE COURT: Thank you very much.

20 Ladies and gentlemen, thank you very much for being
21 here on time. We'll go ahead and proceed.

22 CONTINUED DIRECT EXAMINATION

23 BY MR. KUBEC:

24 Q Good morning, Mr. Birdwell.

25 A Good morning.

1 Q When we left off yesterday, we were talking about
2 financial modeling and analysis that Sea Pines Resorts was
3 doing in connection with purchasing the surf shop. Do you
4 remember all that?

5 A I do.

6 Q And that's roughly the time period of April 20th
7 through April 24th, 2017; is that correct?

8 A That's correct.

9 Q At some point in time, you made the decision to move
10 forward and purchase the shops, correct?

11 A Yes, we, obviously, checked with our chairman and he
12 agreed.

13 Q For what they (inaudible)?

14 A We'd have to go back and look at the documents when
15 Matt responded, really. I guess he asked for additional
16 analysis, but I'm not sure of the exact date, in that late
17 April time.

18 Q If you would take a look, please, at Exhibit 17C,
19 please.

20 A 17C.

21 Q You'll note there's four e-mails, I believe, on that
22 page. Do you see the bottom e-mail?

23 A I do, yes.

24 Q That's an e-mail from you to Jeff Hariman. Please
25 remind me of who he is.

1 A Jeff Hariman is our former director of finance.

2 Q Cliff McMakin?

3 A And Cliff is our director of resort development.

4 Q And Mr. Bender.

5 A And Mr. Bender.

6 Q And you say, I think we should move forward with

7 financing and closing. It appears Jay is finalizing the

8 financing. Who is Jay?

9 A That's Jay Jones. He's the chief financial officer at

10 the Riverstone Group.

11 Q And the e-mail right above that, Mr. Bender asked, do

12 we need to do something with the waiver, correct?

13 A That's correct.

14 Q Your response was, I recommend getting Simon Frazier

15 involved and notifying the parties of our intention to

16 purchase the property, correct?

17 A It says purchase these properties.

18 Q These properties. Who's Simon Frazier?

19 A Simon is our lawyer that was going to close and did

20 close the transaction for us.

21 Q Mr. Frazier, he's done a lot of business with Sea Pines

22 over the years?

23 A He's done a lot of work with Sea Pines over the years.

24 Q In your mind, is he well respected?

25 A Very well respected. He's Charles Frazier's nephew and

1 Joe Frazier's son.

2 Q People may not know who Charles Frazier is.

3 A Charles Frazier is the originating founder of Sea Pines
4 community and his brother, Joe, were two men from
5 Hinesville, Georgia that started Sea Pines in the early 50s.

6 Q The final e-mail in that stream says -- this is from
7 you, says, Rob and I just spoke to Simon. He will notify
8 the parties of our intention to purchase the property and
9 start working on it, correct?

10 A That was from Jeff Hariman.

11 Q To you?

12 A To me, right.

13 Q And to your knowledge, did that happen? Did Mr.
14 Frazier notify the parties?

15 A Yes, I believe he did.

16 Q Soon thereafter?

17 A Yes. These e-mails were on May the 1st and 2nd. It
18 was shortly after that.

19 Q Who is Charles Minor or Charlie Minor?

20 A Charlie Minor is a Sea Pines residential property
21 owner. He, at the time, was also serving as the chairman of
22 the Association of Sea Pines Plantation Property Owners
23 Association.

24 Q What is that?

25 A It's better known as ASPO, but it's one of two property

1 owners associations in Sea Pines. ASPO represents the
2 residential community.

3 Q Who is Mark Griffith?

4 A Mark Griffith is another Sea Pines property owner, and
5 he served as the chairman of Community Services Associates,
6 better known as CSA.

7 Q Who is CSA?

8 A CSA is the main property owners association in Sea
9 Pines and they represent all property owners, including
10 commercial property owners, resort property owners and
11 residential property owners.

12 Q I'd like you to take a look at Exhibit 20 in your book,
13 please, Mr. Birdwell. Please tell us what this is.

14 A This is an e-mail I sent to Charlie Minor and Mark
15 Griffith.

16 Q What is the date?

17 A The date is Thursday, May 4th, 2017.

18 Q Subject (inaudible)?

19 A Correct.

20 Q Basically, you say, I wanted to make you aware that we
21 are using a right of repurchase to buy commercial space in
22 Mariners Way in Harbour Town. The space is currently leased
23 to the surf shop on the front side of the building. I have
24 spoken with the sellers of the property and they seem fine
25 with our purchase. I don't expect any issues. I wanted you

1 to be aware of the strategic purposes.

2 Why are you telling Mr. Minor in this exhibit about
3 strategic purposes to purchase the property?

4 A Well, there was interest in our right of repurchase or
5 right of first refusal and they're the chairman of the two
6 property owners associations in Sea Pines and I thought I
7 should let them know.

8 Q Let them know you were exercising a strategic purpose
9 to buy this property?

10 A Yes, sir.

11 Q (Inaudible)?

12 A No, because I thought they'd be interested in the
13 purchase and the use of our right of first refusal.

14 Q By May 4th, are you aware of whether or not these two
15 gentlemen knew that you were exercising your right of first
16 refusal?

17 A I don't know that I recall that I knew whether they
18 knew or not.

19 Q So you let other people, board members and associations
20 know about it, but you didn't tell these guys?

21 A As you know, Simon Frazier was handling it for us and
22 he was going to be communicating with all the parties,
23 including their lawyer.

24 Q So that might have happened?

25 A It could have happened. I just wouldn't have been

1 informed.

2 Q I mentioned earlier that Jay Jones was a financial --

3 A Chief financial officer.

4 Q Chief financial officer of Riverstone, correct?

5 A That's correct.

6 Q And they are the ones who own Sea Pines Resort,
7 correct?

8 A That's correct.

9 Q So as of May 4th, you're still considering whether to
10 finance the purchase of (inaudible) or buy it straight out
11 with cash, right?

12 A We were still considering whether we were going to do
13 that or not.

14 Q Eventually -- well, let's look at Exhibit No. 27.

15 MR. KUBEC: I'd like to move into evidence Plaintiff's
16 17C and 20.

17 Any objection?

18 MR. LINTON: No objection, Your Honor.

19 THE COURT: Without objection.

20 (Plaintiff's Exhibit Nos. 17C and 20 admitted into
21 evidence.)

22 BY MR. KUBEC:

23 Q What is this document, Mr. Birdwell?

24 A This is an e-mail that was sent from Jay Jones to
25 myself and Jeff Hariman.

1 Q And what's the date?

2 A The date is Thursday, May 11th, 2017.

3 Q And Mr. Jones writes to you, following are the terms
4 for financing. Please confirm these are acceptable and we
5 will move forward with (inaudible), correct?

6 A Correct.

7 Q So it says the borrower will be Sea Pines Resort,
8 correct?

9 A Yes.

10 Q Are you borrowing money from Riverstone, is that what's
11 going on?

12 A No, I believe Jay had a bank that he was going to be
13 utilizing.

14 Q Then it refers to the loan amount and then he says the
15 rate. What's the rate?

16 A The rate today is 4.15 percent fixed.

17 Q So as of May 11th at 5:40 in the evening, you're still
18 contemplating getting financing?

19 A Yeah, Jay is sending us potential terms of the finance.

20 MR. KUBEC: I'd like to move into evidence Exhibit 27,
21 please.

22 MR. LINTON: No objection.

23 THE COURT: Without objection.

24 (Plaintiff's Exhibit No. 27 admitted into evidence.)

25 BY MR. KUBEC:

1 Q Again, this was at 5:40 in the afternoon on May 11th?

2 A Yes.

3 Q Now, I'd like you to take a look at the next exhibit,
4 No. 28.

5 A Okay.

6 Q What is this document?

7 A There is two e-mails here. The top one is an e-mail I
8 sent to Rob Bender and Cliff McMakin.

9 Q What's the timestamp on that?

10 A It is 6:04 p.m.

11 Q So that's 25 minutes after (inaudible)?

12 A That's correct.

13 Q Tell us what you say.

14 A It says, Good deal. We are the proud owner of a surf
15 shop.

16 Q So you must have gotten some information. Great, good
17 deal, we now own a surf shop. You must have gotten some
18 information?

19 A Yes, I believe that we received information that the
20 sale had closed.

21 Q You don't own a surf shop, do you?

22 A We own the real estate on the surf shop.

23 Q There's two exclamation points, so you were pretty
24 happy about it?

25 A We were pleased and very pleased with the shop.

1 Q So you had just bought the shop from Mr. Giannone and
2 Ms. Johnson?

3 A Yes.

4 Q Did you have a written contract there?

5 A Well, we used our right of first refusal, so the
6 contract was the contract that had previously been signed.

7 Q (Inaudible), my clients, Amir and Alon (inaudible)?

8 A I thought there was a signed contract.

9 Q (Inaudible)?

10 A I thought there was a signed contract that was dated in
11 March some time.

12 Q (Inaudible)?

13 A Okay. Well, I thought there was a contract.

14 THE COURT: Don't look at me, I don't have one.

15 BY MR. KUBEC:

16 Q (Inaudible)?

17 A No, I thought in the documents we had produced a signed
18 contract.

19 Q They never got it?

20 A Okay.

21 Q It would be nice to be able to ask some questions about
22 that.

23 MR. WALKER: Objection, Your Honor, that's not a
24 question. He's just starting to make a little argument.

25 THE COURT: Yeah, let's don't jab the witness. Just

1 ask a question.

2 BY MR. KUBEC:

3 Q So a few days earlier, you were advising Mr. Minor and
4 Mr. Griffith, the two board chairmans, about the repurchase
5 situation, correct?

6 A Correct.

7 Q What was going on at that point in time at Sea Pines?
8 Why were you letting them know?

9 A Well, in 2017, we were also in the middle of proposing
10 an amendment to the Sea Pines covenants. So I had been
11 working with Charlie and Mark on that. And that was one of
12 the things we were working on at the time.

13 Q What was the amendment?

14 A We wanted to expand the number of hotel rooms that we
15 have at Harbour Town. The inn is doing quite well, but it's
16 limited with the number of rooms and we wanted to increase
17 the number of rooms we have.

18 Q (Inaudible)?

19 A We were going to have to have a referendum and all Sea
20 Pines property owners would have to vote in the referendum.
21 And we needed to get a large support, we needed 75 percent
22 of property owners to vote in favor.

23 Q And one of the ways you get more rooms is by having
24 greater density rights, correct?

25 A Well, we have -- there's an agreement that's been in

1 place since the 1980s that limits the number of hotel rooms
2 that can be built within certain areas of Sea Pines, and
3 that's what we needed to change. We needed to change that
4 agreement.

5 Q And your right of first refusal that you believe you
6 had is important for that, correct?

7 A Well, the right of first refusal didn't have really
8 anything to do with the referendum that was being proposed.

9 Q Why did you bring it to Mr. Minor and Mr. Griffith's
10 attention?

11 A There was some interest they had, especially Charlie in
12 maybe modifying the way the right of first refusal worked.

13 Q Right. Basically, you were trying to bargain off at
14 this point in time saying hey, the owners in Sea Pines will
15 give us more rooms if we, basically, say we're not going to
16 exercise our right of first refusal with regards to
17 residential property, right? That's what was going on with
18 that, right?

19 A No, no, we weren't agreeing to not use our right. We
20 -- that wasn't really what was being discussed.

21 Q Not at all?

22 A No, Charlie had an idea that we could change it to a
23 different type of right where it would be a right of first
24 offer instead a right of first refusal.

25 Q Bear with me just a second.

1 A Sure.

2 Q Let's take a look at Exhibit 31A.

3 A 31A.

4 Q Let's just focus on that bottom. Your e-mail is on
5 that first page. Focus on the bottom e-mail from Minor to
6 you and others on June 10th.

7 A Yes.

8 Q You see that?

9 A Yes.

10 Q The first sentence says, The ASPPEO board meeting is
11 going to be tricky (inaudible); is that what it says?

12 A Yes. This is an e-mail from Charlie Minor.

13 Q Go to the next page, please, turn over. Under the
14 bullet items that Mr. Minor is suggesting to you, read the
15 second one, please.

16 A Right of purchase should be presented as a homeowner
17 benefit. You need a written policy that includes SPR's
18 agreement in advance to waive right of first refusal when a
19 homeowner decides to sell their property. SPR needs to
20 differentiate between residents and commercial properties
21 and reveal their goal to upgrade Harbour Town and the
22 acquisition of the surf shop. Better SPR makes it public
23 than reading about the lawsuit in the packet.

24 MR. KUBEC: I'd like to move in Exhibit 31A, please.

25 MR. WALKER: No objection.

1 THE COURT: All right.

2 (Plaintiff's Exhibit No. 31A admitted into evidence.)

3 BY MR. KUBEC:

4 Q Let's get to this right of first refusal that we've
5 been talking about for two and a half days. Before we look
6 at that, I'd like you to look at Exhibit 23, which is
7 already in evidence.

8 A 23?

9 Q Is that document before you?

10 A Yes, it is.

11 Q Okay. And that document, that's an e-mail from
12 Frazier, Mr. Simon Frazier, the attorney you were just
13 talking about?

14 A Right.

15 Q And then Mike Mogil, who is the attorney who represents
16 Mr. Bitton and Mr. Mintz, and Meredith Bannon, who is the
17 attorney representing Mr. Giannone and Ms. Johnson?

18 A That's correct. We went through those yesterday.

19 Q And he says in this e-mail the applicable repurchase
20 option as contained in commercial use covenants dated
21 January 25, 1973, and recorded in Deed Book 206, Page 1143
22 (inaudible)? That's what this document is, correct?

23 A Right.

24 Q (Inaudible), correct?

25 A That's correct.

1 Q So this is where the right of first refusal commercial
2 properties actually stems from, correct?

3 A This is one of the documents that has the right of
4 first refusal in it.

5 Q This is the only document that has the right of first
6 refusal. This is the one you testified at your deposition,
7 correct, that this was the applicable document, that's what
8 Mr. Frazier says, correct?

9 A That's correct. There are other documents that have
10 right of first refusal as well.

11 Q Prior in time?

12 A Pardon me?

13 Q Other documents related to commercial use or
14 residential use?

15 A This is the one that applies to the commercial use.

16 Q And this is a commercial building, correct?

17 A That's correct.

18 Q So -- well, even before I start, you're sophisticated
19 (inaudible)? Is this the only covenant you've ever seen in
20 your life?

21 A No, in Sea Pines, unfortunately, there's a series of
22 legal documents that are applicable to the operation of the
23 --

24 Q (Inaudible)?

25 A Other documents, yes.

1 Q (Inaudible)?

2 A Yes.

3 Q So it's safe to say that -- the purpose of a
4 declaration, correct me if you think I'm wrong, okay, is for
5 a developer, an owner of land to, basically, say I own a
6 piece of property. I'm going to do something with it. If
7 anybody wants to buy it, these are the rules you have to
8 follow. Is that pretty accurate?

9 A Yeah, I think rules or standards is a good way to
10 phrase it. But I'm not a lawyer, so we depend and have
11 always depended on great lawyers. We can look at the legal
12 documents, but we would have relied on them to help us and
13 get it right.

14 Q I understand. Well, I believe (inaudible)?

15 A That's correct.

16 Q So these are a declaration from Lighthouse Beach Shop,
17 correct?

18 A That's correct.

19 Q And it's from 1973. And I apologize to the ladies and
20 gentlemen of the jury as we go through this document, it's
21 going to take a little bit of time.

22 A Okay.

23 Q And the next sentence says Lighthouse Beach Company
24 desires (inaudible) specific covenants (inaudible). The
25 next sentence says, Whereas, Lighthouse Beach Company

1 recognizes that said properties are situate in an
2 environmentally sensitive area and that any development of
3 said property is a matter of concern for developing
4 (inaudible). You see that?

5 A Yes.

6 Q Now, recitals, like I said, we talked about this, you
7 do a lot of contracts?

8 A I've seen a lot of contracts, yes.

9 Q Recitals are, basically, setting out the purpose of a
10 document that follows, correct?

11 A I assume so, I'm not a lawyer.

12 Q (Inaudible)?

13 A Yes.

14 Q The recital, basically, is the intention of what the
15 parties are talking about that follows, correct?

16 A Yes.

17 Q Come down, Lighthouse Beach Company desires to ensure
18 that all properties now or hereinafter owned by it or
19 developer pursuant to an orderly plan which contemplates,
20 among other things, the environmental impact on the
21 community at large of any proposed developments deemed for
22 such property, correct?

23 A Correct.

24 Q And let's skip down to next page. It says, It being
25 the true intent. Do you see that part there?

1 A Yes.

2 Q The true intent and purpose of this declaration must
3 (inaudible) sole principle covenant (inaudible) Lighthouse
4 Beach Company subsequent to the (inaudible) of this
5 declaration. We know from the first page that that was
6 recorded because it was (inaudible), correct?

7 A Correct.

8 Q And then it says, and such other property as may be
9 needed subject to the covenants herein by specific reference
10 (inaudible). All right. So these are the recitals. These
11 are the (inaudible) what this is all about, correct?

12 A Yes.

13 Q Do you see there anywhere in that language that we've
14 showed you so far where it says these covenants have
15 anything to do with Sea Pines Resort -- not Sea Pines
16 Resort, with Lighthouse Beach Company making a good deal for
17 itself?

18 A It's just setting out the covenants that are going to
19 be applied to the property.

20 Q Protecting environmentally sensitive area, correct?

21 A Right.

22 Q And to ensure that the community is developed pursuant
23 to an orderly plan which contemplates, among other things,
24 the environmental impact on the community at large. They're
25 talking about an environmental sensitive area and

1 environmental protection, correct?

2 A Correct.

3 Q Nothing about Lighthouse Beach Company wanting to make
4 a good deal for itself?

5 A All the different things you've read is setting up the
6 document that they're about to record.

7 Q Let's go look at some of the restrictions that was
8 documented, okay?

9 A Okay.

10 Q Covenants, restrictions and (inaudible) obligations
11 applicable to commercial property owned by Lighthouse Beach
12 Company. (Inaudible) or other structures shall be erected
13 (inaudible) and finished plot so in the first location in
14 such building or structure to (inaudible) parking area and a
15 construction area shall have been approved in writing. That
16 deals with construction, got to get plans done, right?

17 A Plans done and approved.

18 Q Flip to the next one, number two. (Inaudible) on
19 commercial property must be completed within one year.
20 (Inaudible) finish construction in one year, right?

21 A I believe that's what it says.

22 Q Number three, shall be the responsibility of the owner
23 of land subject to these covenants that the development of
24 any unclean, unsightly or unkept conditions at any buildings
25 on the grounds. So we're dealing with the owner's condition

1 of the building, correct?

2 A Correct.

3 Q Go to the next one, number four. No obnoxious or
4 offensive (inaudible), right?

5 A Yes.

6 Q The surf shop (inaudible) obnoxious activity?

7 A No, not at all.

8 Q Says the company reserves the right (inaudible)?

9 A Yes.

10 Q Go to number six, each commercial property owner shall
11 provide adequate space for off-street parking, right?

12 Number six deals with parking?

13 A Yes.

14 Q Number seven, each commercial property owner shall
15 provide receptacles for the garbage (inaudible). Garbage,
16 make sure we can't see that unsightly (inaudible), right?

17 A That's right.

18 Q That ties in with the beginning where we were talking
19 about --

20 A Esthetics.

21 Q -- esthetics. Number eight, provide prior to
22 construction and use of commercial structure on any
23 commercial property proper and suitable provisions shall be
24 made for the disposal of sewage?

25 A Yes.

1 Q Number ten -- I'm sorry, number nine. The company
2 reserves onto itself, its successors and assigns perpetual
3 and (inaudible) and reasonable easement and right on and
4 over and under the ground (inaudible) and use of electric
5 and telephone pole wires, cables, et cetera?

6 A Utility easement.

7 Q That's a utility easement. Number ten --

8 THE COURT: How many are these?

9 MR. KUBEC: Getting to the end, Your Honor. We've got
10 three more.

11 THE COURT: All right.

12 BY MR. KUBEC:

13 Q Number 11 and number 10, what does that deal with?

14 A I can't read it from here really.

15 Q Okay. I'll read it to you. The company reserves onto
16 itself, its successors and assigns perpetual (inaudible)
17 release on and over and under the ground to construct a
18 bicycle path.

19 A Okay.

20 Q Bicycle path. Let's just go to two more. Go to number
21 12. No trailer, tent, barn or tree house, correct?

22 A I can't read it, but yes, that's probably what it says.

23 Q Number 13, it says no fuel tanks or similar storage
24 units, correct?

25 A Okay.

1 Q The whole purpose of this is to make sure we had nice,
2 clean, esthetic community, right?

3 A That's correct.

4 Q None of these have anything to do with Lighthouse Beach
5 Company being able to buy something to get a good deal,
6 right?

7 A Not yet.

8 Q Not yet. All right. Well, let's go to the right of
9 first refusal, okay?

10 A Okay.

11 Q Which is embodied in this declaration talking about all
12 these esthetics. Are you familiar with this language?

13 A I am.

14 Q In the event the owner decides to sell a commercial
15 property site on Hilton Head Island, together with its
16 improvements, if any, then said property shall be offered
17 for sale to the company at the same price at which the
18 highest bonafide offer has been made for the property. And
19 the said company shall have 30 days within which to exercise
20 its option to purchase said property at this price. That's
21 what it says so far, right?

22 A Yes.

23 Q Okay. Again, this is Lighthouse Beach Company. This
24 isn't Sea Pines Resort. Lighthouse Beach Company back in
25 1973, right?

1 A That's correct.

2 Q So just what I read so far, okay. Third line down
3 says, Said property shall be offered to sell to the company,
4 correct?

5 A That's correct.

6 Q It doesn't say how it has to be offered for sale. It
7 doesn't say it has to be a contract, does it? It just says
8 offered for sale, correct?

9 A That's correct. I think --

10 Q It says offered for sale, right?

11 A That's what it says. And you're going to read we
12 needed written notice coming up.

13 Q Offered for sale. Doesn't say you have to give me a
14 contract, right?

15 A It does not say that.

16 Q It doesn't say you have to give me a piece of paper on
17 it that says waiver or request for waiver, does it?

18 A It does not.

19 Q And it also just says to the company at the same price.
20 We have an offer to make to the company at the same price,
21 just talks about the price, right?

22 A Right.

23 Q It doesn't talk about assessments or insurance and all
24 that, says price, correct?

25 A That's correct.

1 Q All right. So right now, basically, it says okay, you
2 get an offer at the same price, you have 30 days within
3 which to exercise it, correct?

4 A We haven't read the full sentence yet.

5 Q We're getting there. We're getting there. But as of
6 right now, the first clause, the first independent clause as
7 my English teacher from fourth grade used to tell me, says
8 offer and price, correct?

9 A That's correct.

10 Q Go to the next one then, should the company fail or
11 refuse within 30 days after receipt of written notice of the
12 price and terms exercise its option to purchase the property
13 at written price, then the owner of said property shall have
14 the right (inaudible).

15 So the second independent clause says -- this one says
16 well, after -- should the company fail or refuse within 30
17 days after receipt of written notice of the price and terms,
18 correct?

19 A Correct, price and terms, written notice.

20 Q All right. First clause, nothing about writing.
21 Second clause says written?

22 A Price and terms.

23 Q But there's nothing in there that says you, the owner
24 of the property, Mr. Giannone and Ms. Johnson, have to give
25 me a contract. It doesn't say that?

1 A No, it doesn't say that.

2 Q No, not at all.

3 A We have to have written notice with the price and
4 terms.

5 Q Part of that says that. The first clause doesn't say
6 that, does it?

7 A No, but it's all in one sentence. All in one long
8 sentence.

9 Q It doesn't say I have to have a contract before I act,
10 though, right? None of that says I need a contract if I'm
11 Lighthouse Beach Company?

12 A It doesn't say that.

13 Q It doesn't say any request for waiver or written
14 notice, does it?

15 A It says we need written notice.

16 Q But does it say request for waiver? It doesn't say --
17 let me ask you this, it doesn't say -- who has to give that?
18 The seller, right? The property should be offered at the
19 same price by the seller.

20 A Yes, I think the first part of the sentence says that.
21 In the event the property owner wants to sell.

22 Q The owner?

23 A The owner wants to sell.

24 Q So as we know, as of 1973, Lighthouse Beach Company was
25 the one that proclaimed this right of first refusal?

1 A And the rest of the covenants.

2 Q As of 1973?

3 A That's correct.

4 Q And all that other stuff that's in there dealing with
5 esthetics and everything, right?

6 A That's right.

7 Q But there's still nothing in this document that says
8 Lighthouse Beach Company, you can exercise that right of
9 first refusal if it's a good deal?

10 A It doesn't state any reason.

11 Q The whole document talks about garbage, it talks about
12 sidewalks, it talks about keeping your property clean. It
13 doesn't talk about a good deal, does it?

14 A It doesn't indicate a reason why we would exercise our
15 right of first refusal. The property is just supposed to be
16 offered to us for sale.

17 Q It does say a reason. It says environmental esthetics;
18 does it not?

19 A No, in this paragraph here, it doesn't indicate any
20 reason. Just the property is supposed to be offered to us
21 for sale.

22 Q Doesn't say because you wanted to buy it for a good
23 deal, does it?

24 THE COURT: We've asked and answered that one. Move
25 on.

1 MR. KUBEC: Thank you.

2 BY MR. KUBEC:

3 Q Prior to exercising -- well --

4 MR. KUBEC: Your Honor, I have no further questions for
5 Mr. Birdwell.

6 THE COURT: Thank you, sir.

7 CROSS-EXAMINATION

8 BY MR. WALKER:

9 Q Mr. Birdwell, I'm going to pick up where Mr. Kubec left
10 off. Do you understand this right of first refusal in
11 Paragraph 19 can only be exercised if it's for environmental
12 reasons?

13 A No.

14 Q Through the array of provisions he was talking about
15 earlier dealing with not just substances, the time review
16 and all that and keeping the property clean, does that
17 further the environmental (inaudible)?

18 A No, it doesn't.

19 Q Is there any restriction in this right of first refusal
20 that would keep you or limit you to the reason for why you
21 want to exercise it?

22 A No, I don't think that it does.

23 Q Does this refer to a bonafide offer?

24 A Yes, it does, bonafide offer.

25 Q To you consider a nonbinding letter of intent to be a

1 bonafide offer?

2 MR. KUBEC: Objection, Your Honor, calls for legal
3 conclusion.

4 THE COURT: I'll allow it.

5 BY MR. WALKER:

6 Q Do you consider --

7 A No.

8 Q When you're sitting there and it comes to you, do you
9 consider a nonbinding letter of intent signed by one seller
10 and not the other as a bonafide offer?

11 A I wouldn't consider that to be a bonafide offer.

12 Q What would it take? Would it take the signatures of
13 both sellers and a set price with the terms to constitute a
14 bonafide offer?

15 A I think that it would.

16 Q Did you know what the terms of this transaction were
17 before you got the contract on April 17th?

18 A We did not.

19 Q Did you know it was an as-is transaction, meaning no
20 warranty is the condition of the property before you got
21 that contract?

22 A We did not know.

23 Q If I might, I'd like to go back to where this
24 examination started. Mr. Kubec gave you a letter that you
25 co-signed with Matt Goodwin, June 19, 2017, and he read from

1 that while we had a picture of Mariners Way up there. You
2 remember that?

3 A I do remember that. I'm glad we're bringing this
4 letter back up. It's a very great letter --

5 Q Well, let me ask you a question. What I would like you
6 to do, he had you read certain portions of it. Would you
7 read the fifth paragraph dealing with commercial properties?

8 A Sure. The fifth paragraph?

9 Q I think that's the one.

10 A This is a letter that was sent to all Sea Pines
11 property owners. We do have plans to improve the retail
12 stores and other commercial areas in Harbour Town. We will
13 continue to acquire commercial properties in Harbour Town
14 when and if it becomes available and if we can work out
15 acceptable terms with the current owner. Once again, we
16 believe sellers of commercial property should consider this
17 process to be a benefit for multiple reasons.

18 Q How long has Sea Pines had this plan, long-range plan
19 to try to improve Harbour Town? Did it just start with the
20 acquisition of these two units?

21 A No, we've been working on and continuing to work on
22 improvements in Harbour Town since we have owned the
23 property.

24 Q Does owning various properties allow you to upgrade
25 other things in Harbour Town as well, give you the financial

1 incentive to do it?

2 A Sure.

3 Q So even if you were not planning to go out and change
4 things at the surf shop tomorrow, there's still a long-term
5 benefit in your eyes, if I understand you?

6 A Yeah, sure. We own almost all commercial property in
7 Harbour Town and this would just help us with the future of
8 improving Harbour Town.

9 Q And if you improve the commercial area in Harbour Town,
10 how would that work to the benefit of tenants who have shops
11 there?

12 A It should drive additional people to Harbour Town and,
13 hopefully, increase everyone's sales.

14 Q So if your boat floats up, their boat floats up?

15 A That's correct.

16 Q They said you were think -- or they implied you wanted
17 to kick them out. Did you ever want to kick these two good
18 businessmen out of their shop?

19 A We absolutely did not. We were pleased that they owned
20 the shops.

21 Q Are they a good tenant?

22 A They are.

23 Q They pay their rent on time?

24 A They do.

25 Q They pay the taxes?

1 A Yes, they do.

2 Q They pay the insurance?

3 A Yes.

4 Q Do they pay every obligation under the lease on time?

5 A Yes, they do.

6 Q Do you consider them a class A tenant?

7 A We do.

8 Q Why in the world would you want to get rid of a Class A
9 tenant?

10 A We didn't want to. We didn't want to get rid of them.

11 Q At the appropriate time, would you consider extending
12 that lease if they still wanted to be there?

13 MR. KUBEC: Objection, Your Honor, calls for
14 speculation.

15 THE COURT: He's the one that makes the decisions.
16 He's the top dog, so he would be the one that would make
17 that decision. So I'll overrule it.

18 You can answer it.

19 THE WITNESS: We currently have three years left on the
20 lease and we absolutely would consider extending the lease.
21 We normally do that in the last year of a lease in Harbour
22 Town.

23 BY MR. WALKER:

24 Q But if everything works, if it's still a good
25 relationship, would you consider that?

1 A We certainly would consider extending the lease.

2 Q Would you have any incentive to go out and get somebody
3 else to replace an established business with a low clientele
4 and gets plenty of foot traffic, would you have any reason
5 to do that?

6 A No, we have a great tenant in place. We would
7 absolutely consider extending that lease.

8 MR. WALKER: Your Honor, I don't think Plaintiff
9 admitted 34, Plaintiff's Exhibit 34. We would move to admit
10 it.

11 THE COURT: You did admit it?

12 They did, okay.

13 It's in evidence.

14 MR. WALKER: One moment.

15 THE COURT: Take your time.

16 (Pause.)

17 MR. WALKER: Your Honor, that's all I have of Mr.
18 Birdwell at this time.

19 Hold on one second.

20 THE COURT: Okay.

21 BY MR. WALKER:

22 Q Earlier, Mr. Birdwell, this morning, you were asked
23 about a written contract. Were you referring to the written
24 contract between Chuck and Lynda as sellers and Alon and
25 Amir as buyers?

1 A Yes, that was the contract I was referring to.

2 Q The one that's in evidence?

3 A The one that I believe is in evidence, yes.

4 Q You weren't referring to a separate contract to
5 purchase between Sea Pines Resort and Bittmint?

6 A No, no. The contract that was done between Chuck and
7 Lynda and Amir and Alon.

8 MR. WALKER: Thank you very much.

9 THE COURT: Anything as a followup?

10 MR. KUBEC: Yes, Your Honor.

11 REDIRECT EXAMINATION

12 BY MR. KUBEC:

13 Q Just so I understand, there's no separate contract
14 between Sea Pines and Ms. Johnson and Mr. Giannone
15 (inaudible)?

16 A Contract to purchase.

17 Q To purchase?

18 A Yeah, we didn't have a separate contract.

19 Q So you just testified you loved having them as a tenant
20 and wouldn't get rid of them, an established business. Then
21 why didn't you let them buy the property?

22 A We had the right to buy it and we opted to do that. It
23 was our decision.

24 Q To make more money?

25 A No, mainly, so we can continue to improve Harbour Town

1 for the future.

2 MR. KUBEC: Thank you, Your Honor.

3 THE COURT: You may step down.

4 Call your next witness.

5 MR. KUBEC: We would just like to introduce Plaintiff's
6 28.

7 MR. WALKER: No objection, Your Honor.

8 THE COURT: All right.

9 (Plaintiff's Exhibit No. 28 admitted into evidence.)

10 MR. KUBEC: Your Honor, we have no further witnesses.

11 THE COURT: So the Plaintiff rest?

12 MR. KUBEC: Yes, Your Honor.

13 THE COURT: Ladies and gentlemen of the jury, there's
14 some matters that I need to take up outside of your
15 presence. So if you will excuse me, I'll take those up and
16 bring you right back in.

17 (The jury exits the courtroom at 10:58 a.m.)

18 THE COURT: All right. Any motions that we need to
19 take up at this time?

20 MR. WALKER: Your Honor, at this time, the Defendants
21 make a motion for directed verdict as to all causes of
22 action in the Complaint. I'll go through the various causes
23 of action and the grounds for the motion for directed
24 verdict.

25 The first cause of action in the Complaint is a claim

1 for breach of contract by Bittmint against Mr. Giannone and
2 Ms. Johnson. It's undisputed that the contract in section 6
3 required that the seller obtain all appropriate waivers from
4 Sea Pines. The testimony is undisputed that the buyer
5 agreed to seek them. But regardless of whether the buyer
6 sought them or the seller sought them, those waivers were
7 not obtained. And since that was a condition of the
8 contract, the condition precedent to allow for the
9 possibility of the exercise the right of first refusal,
10 there was no breach of the contract.

11 Further, in the waiver that was submitted by Mr. Mogil,
12 who's the lawyer for Bittmint, at the bottom, he expressly
13 stated that the above-referenced property is hereby offered
14 for sale to the company pursuant to the same terms and price
15 contained in the current contract of sale with the bonafide
16 purchaser referenced above.

17 So within this waiver form that their agent sent, there
18 was a separate offer to purchase. Sea Pines, the company,
19 accepted that offer. And their acceptance of that offer
20 means that through the actions of Plaintiff Bittmint that
21 there was no breach of contract.

22 So as to the first cause of action for damages, that
23 would be the basis. There's no breach of contract. And
24 this really is the pivotal cause of action. As you know,
25 all the other causes of action flow from this one. If there

1 was no breach of the purchase contract, then there's no
2 tortious interference with the contract, there is no
3 tortious interference with perspective contractual
4 relations.

5 Plaintiffs have sought damages in their Answers to
6 Interrogatories. They've limited the damages that they're
7 seeking, but they also seek specific performance. We would
8 also move on the remedy of specific performance. They
9 didn't breach it, but we think that they're not entitled to
10 the remedy as specific performance here because they have
11 not shown the elements necessary to obtain the remedy as
12 specific performance first. The two individual Defendants
13 no longer hold title to the property, so they can't
14 specifically perform.

15 And the law -- and I'm quoting now from a 2004 case,
16 which is Campbell vs. Carr, is that in order to compel
17 specific performance, which is a remedy invoked by the
18 Court, not the jury, a court of equity must find there's
19 clear evidence of a valid agreement. The agreement had been
20 partly carried into execution on one side with the
21 approbation of the other. And the party who comes to compel
22 performance has performed on his or her part or has been and
23 remains able and willing to perform his or her part.

24 Well, here, there was no breach, so there's no basis
25 for trying to compel performance further. There was no

1 proof in the Plaintiffs' case that they were ready, willing
2 and able and had the funds available to proceed.

3 Additionally, the law as stated in this case is specific
4 performance should be granted only if there is no adequate
5 remedy at law. These Plaintiffs have sued for damages,
6 which is an adequate remedy at law.

7 Further, the law is that specific enforcement of the
8 contract is equitable between the parties. We say it's not
9 equitable because they didn't breach and they no longer have
10 the property.

11 We'd also point out, and this is probably something
12 that pervades all their causes of action, that while they've
13 talked about the right of first refusal, there is no cause
14 of action within the Complaint to obtain a declaratory
15 judgment that the right of first refusal is not applicable
16 or was never assigned.

17 They have three purported causes of action all seeking
18 damages. One is based on the rule against perpetuities.
19 One is based on the ouster statute of limitation. And one
20 is based on what they call unlawful assignment. None of
21 those three give rise to a cause of action for damages.

22 Basically, there's no cause of action, no cause of
23 action called violation of rule against perpetuities or
24 violation of assignment law or -- and there's no affirmative
25 claim based on the statute of limitations, which is a

1 defense. So those claims fall out. Without them, there's
2 no DJ saying based on that, there is no right of first
3 refusal.

4 So whether or not Sea Pines has the right of first
5 refusal, and we say it does, there's no proof that it
6 doesn't really doesn't matter because they've not sought a
7 declaratory judgment to that effect.

8 The next cause of action is the second cause of action
9 for tortious interference with a contract. Obviously, there
10 can be no tortious interference with a contract if there's
11 no breach of contract. Two of the essential elements of
12 tortious interferences are the intentional -- there are
13 three: Intentional procurement of a breach without
14 justification that results in a breach of the contract.
15 There's no breach of the contract. There's no proof that
16 Mr. Birdwell or Mr. Bender intentionally induced them to
17 breach and they have to show an absence of justification.
18 We're looking at the justification right up there, Section
19 19. So as a matter of law, there is no fact that reasonably
20 can be construed from a proof that there was tortious
21 interference with the contract.

22 The third cause of action is legal damages for alleged
23 violation of the rule against perpetuities. We've already
24 talked about that. There is no such claim. The statute is
25 not written in a way nor is the common law rule one on which

1 one can base a cause of action. Further, as Mr. Linton said
2 in the motions in limine, the common law rule against
3 perpetuities has been superceded.

4 The fourth cause of action is invalid assignment of
5 rights. Again, there is no cause of action known as invalid
6 assignment of rights. They admit there's no cause of action
7 for invalid assignment of rights. They had a filing
8 associated with either their amended complaint, second
9 amended complaint or an opposition to summary judgment where
10 they admitted that none of these three causes of action were
11 causes of action.

12 On the fifth cause of action, they seek to set aside
13 the deed to the property. And in that cause of action, they
14 say that the -- that the individual defendants and Sea Pines
15 acted unfairly. They don't allege fraud. They don't allege
16 constructive trust. They don't allege any of the legal
17 grounds to set aside the deed. They just say it's unfair.

18 There's no law that says if you show a transaction is
19 unfair, the deed is set aside. There is law that says if
20 you have ridiculously low consideration, like at a tax sale
21 where somebody pays \$20 and it's worth \$50,000 that that can
22 be set aside, but we're not dealing with unfairness of
23 consideration.

24 The sixth cause of action is one by Harbour Town Surf
25 Shop that it's a third party beneficiary of the contract.

1 The law on who's a third party beneficiary was addressed in
2 detail last week by our State Supreme Court in the Grand
3 Strand medical case where a class action was brought against
4 Blue Cross Blue Shield on the basis that the patients were
5 third party beneficiaries of the reimbursement contract
6 between the hospital and Blue Cross.

7 The court went into detail and said for a party to be a
8 third party beneficiary, the four corners of the contract
9 have to plainly disclose that the claimed third party
10 beneficiary was intended by both parties, not just one
11 party, but both parties to benefit from the contract.

12 And here, there's no proof at all from the testimony of
13 any of the sellers that they were there intended -- the
14 contract was intended to benefit Harbour Town Surf Shop. It
15 was intended to benefit Bittmint, who was the purchaser. So
16 they have not established -- Harbour Town Surf Shop has not
17 established the basis for being a third party beneficiary.

18 An additional ground for that relates back to the first
19 cause of action, since there was no breach, then that claim
20 fails even if they were. But we're saying that as a matter
21 of law, they can't be considered a third party beneficiary.
22 If they wanted to make Harbour Town a third party
23 beneficiary, they could have put it in the contract, they
24 didn't do it. Their lawyer drafted it, not Lynda and
25 Chuck's lawyer. They didn't do that.

1 The seventh cause of action, we've talked about.
2 That's SC Code 15-3-380, statute of limitations for ouster.
3 It's totally inadequate.

4 The eighth cause of action is for tortious interference
5 with perspective contractual relationships. Here, there
6 was no proof that anybody here, Lynda, Chuck or Sea Pines
7 Resort knew that there was going to be a lease from Bittmint
8 to Harbour Town Surf Shop.

9 One essential element of that claim is that the
10 Defendants need to know that there's a contract that's going
11 to be entered into and they didn't know about it. They have
12 not proved that they knew about it. And they have not shown
13 that there was an intentional breach, such that they
14 couldn't enter the contract for the reasons I've already
15 said.

16 As to damages, we would submit that they did not carry
17 the burden of proof on damages. It's left to speculation.
18 There was no proof that they had a loan or what the interest
19 rate would be, what their payment would be. They had three
20 years to get somebody to come in and do it. They could have
21 gone to the bank and had their banker testify. They didn't
22 do any of that. They're trying to back into it by looking
23 at term sheets -- not term sheets, but just spreadsheets or
24 analyses that Sea Pines did. But that's not proof that they
25 could have gotten a loan and what the terms would be. They

1 say well, we would have gotten \$500 a month. Well, for how
2 long? They have not done anything to liquidate their
3 damages. They could of, they didn't.

4 They talked about benefit of the bargain damages, but
5 the only benefit of the bargain damages that they disclosed
6 were the \$500 over and above what the actual cost was, the
7 mortgage payments. It's triple net lease, that's a
8 pass-through anyway. But those have not been identified or
9 calculated with finality.

10 We would also move for -- and I think those are the
11 only money damages. They talked about Harbor Town Surf
12 Shop, that they would have paid less, but they didn't say
13 exactly what the differential was. But there's no liability
14 to Harbor Town Surf Shop. There's not a party to the
15 contract.

16 The final basis would be on punitive damages.
17 Obviously, punitive damages are not recoverable for breach
18 of contract. They have tortious interference. We say
19 there's no tortious interference for the grounds I've
20 already said. But there's no proof -- independent of that
21 ground, there's no proof of willful, intentional, reckless,
22 heedless conduct that would warrant punitive damages. There
23 was nothing like that that was elicited on the examination
24 of any of the witnesses on our side, not from Mr. Giannone,
25 Ms. Johnson, Mr. Bender or Mr. Birdwell. They said we did

1 it because of the right of first refusal.

2 They make a huge deal out of well, it was a good deal
3 and you stole it from us and all that. Well, if we have the
4 right, we don't have to say what the reason is. And that is
5 an overall ground for directed verdict, but since we had the
6 right of first refusal, it was all legal. You can't be sued
7 for intentional infringement of the contract or breach of
8 contract for abiding by a covenant that's on the land and
9 doing what -- these two individual Defendants can't be sued
10 for doing what they're obligated to do. And Sea Pines can't
11 be sued for what it had a right to do.

12 So for all these reasons, we'd ask for a directed
13 verdict on the causes of action, on the actual damages, on
14 punitive damages. And we'd further suggest and move that
15 they're not entitled to equitable relief. They have an
16 adequate remedy at law. Thank you very much.

17 THE COURT: While he's doing that, will you give Amy a
18 copy of the Complaint, please? I just don't want to print
19 it out. It takes too long.

20 Mr. Kubec, I'll be happy to hear from you.

21 MR. KUBEC: Thank you, Your Honor. With regard to the
22 breach of contract, Your Honor, which is our first cause of
23 action, the Defendants base their position on the fact that
24 they exercised the right of first refusal. There is no
25 evidence before this Court at this point in time that Sea

1 Pines Resort, LLC, also had right of first refusal. The
2 only evidence before this Court is that document on the
3 screen that says Lighthouse Beach Company had a right of
4 first refusal. There's no causal connection. There's been
5 no testimony or documentary evidence, nothing in this case
6 so far that says Sea Pines Resort, LLC also had a right of
7 first refusal. That in itself is a fatal flaw in the entire
8 directed verdict motion.

9 There's no right of first refusal in the possession of
10 Sea Pines Resort, LLC. There's no exercise of it. They
11 interfered with the contract because the right of first
12 refusal is not (inaudible), so they can't claim at this
13 point in the case that they exercised the right of first
14 refusal to make all these positions.

15 What the evidence shows right now is, basically, that
16 my clients had a contract, the Defendants, Mr. Giannone and
17 Ms. Johnson, did not deliver it to them. Sea Pines Company
18 claimed they had a right of exercise, but they don't have
19 any evidence of that. There's a breach because the property
20 was not delivered to my clients. There's evidence
21 (inaudible) damages.

22 The fact that my client did not receive that property
23 is sufficient evidence that at the time of that contracting
24 testified to by their own witnesses, who valued it at close
25 to \$750,000 in their own reports and it was then sold for

1 \$580,000 that my clients at that point in time were out
2 \$190,000. There's also evidence of what similar properties
3 next door were worth, sufficient evidence for a jury to come
4 back and say this is the amount that that property was
5 valued back in 2017 and today. So if you want to look at
6 the bargain damages, either back in 2017 and at the present
7 time, there's sufficient damage before the Court.

8 Now, with regard -- so the whole premise is oh, breach
9 of contract. There's no evidence -- again, no evidence that
10 Sea Pines Resort, LLC owns that right. Nothing. Nothing.
11 So from there, everything else kind of flows.

12 Then he talks about specific performance and says hey,
13 if there's an adequate remedy of law, well, then, you can't
14 give specific performance. That's a misstatement of the
15 law, but the law in South Carolina says when there's a
16 unique property involved, such as in real estate, then yes,
17 even if there is adequate damages, yes, the Court is
18 empowered to (inaudible).

19 We move on then -- the predicate for their saying okay,
20 there's no cause of action or -- by the way, the issue of
21 the right of first refusal, that's an element that goes to
22 justification. That's an element as to whether or not Sea
23 Pines Resort had the ability to come in here and tell Ms.
24 Johnson and Mr. Giannone don't sell that property to
25 Bittmint because we're justified because we have this right

1 of first refusal. Again, that's a direct element in the
2 case that right now, there is no justification because they
3 don't own it. Lighthouse Beach Company owns it.

4 So right now, we've satisfied our burden of proving
5 there was no justification for them interfering. We had a
6 contract. They came in, they said you can't sell it. We
7 think we have a right, but we have nothing to show you that
8 we do. We took it away from you. These gentlemen that we
9 knew they knew they had a contract. There's evidence of the
10 fact that they had a contract in March of 2017. It showed
11 up in their hands in April of 2017, then my clients did not
12 get the property. And again, we've testified as to what
13 their damages were in two different ways. Bittmint would
14 have gotten the benefit of its bargain with the Harbor Town
15 Surf Shop of the \$500 per month extra, which is now
16 \$20,000 -- \$29,000 that Bittmint sends them.

17 So again, first breach of contract case exist supports
18 the second cause of action for potential interference. It
19 also supports the separate cause of action perspective
20 interference of contractual relationships because again,
21 we've established damage, we've established they've known
22 about the contract. And all of the elements for that cause
23 of action are there. There's --

24 With regard to the third party beneficiary claim, the
25 contract itself between Mr. Giannone, Ms. Johnson and

1 Bittmint specifically references we are taking this piece of
2 property subject to an existing lease between Harbour Town
3 Surf Shop and the sellers of the property. That in itself
4 is evidence that Harbour Town Surf Shop is going to benefit
5 from this contract. It's right there in the document
6 itself.

7 There's also testimony before the Court that they
8 talked about the relationship. She knew they were going to
9 stay in the property. She knew that they were going to get
10 less rent by renting it to themselves than they were going
11 to have to pay to Sea Pines, that's not an issue. And the
12 contract -- they said okay, go with the four corners of the
13 contract, well, it's right there in the March 17th contract.

14 Again, on the issue of damages. We talked about
15 damages, again, we had the lease differential. Both
16 witnesses testified to that. You have the difference of
17 fair market value of the property, whether you want to look
18 at it at the time of the transaction or if you want to look
19 at it at the present time. And we've also --

20 There's some talking about well, you know, they
21 couldn't establish the amount of the loan. Well, one of the
22 reasons you couldn't go into evidence about the amount of
23 the loan is because they repudiated the contract. They came
24 in and said -- before my clients even had to finance the
25 property, to finance -- the financing contingency that we

1 could waive any fine, that was our right. Both of my
2 clients testified we had the money. We had the money and we
3 were ready to go. We didn't even have to get financing.
4 But in case we need to get financing, this is what we're
5 working on. We would have gotten financing at this point
6 because we had no reason to believe otherwise based on
7 discussions they had with their bank.

8 But regardless, there was an anticipatory repudiation
9 at that point in time, which, basically, cut off my guys
10 that we didn't need to do anything else at that point in
11 time. They didn't have to go find out exactly what their
12 financing was after that because the property had already
13 been sold to somebody else before the final closing.

14 So we put on every piece of evidence that we could and
15 we've established what they could have done and where they
16 were at the time when that transaction was made.

17 Thank you.

18 THE COURT: Thank you, sir. Anything else?

19 MR. WALKER: Your Honor, they put up and put into
20 evidence the commercial use covenants. They've talked about
21 them. Simon Frazier sent an e-mail that said these are the
22 covenants that apply. They're Book 206, 1143, that these
23 covenants.

24 But even if we push those covenants aside, push them
25 aside, let's look at two things. We had a contract that

1 said that the seller, undertaken by the buyer, had to obtain
2 the appropriate waiver. There's no proof of any other
3 waiver. The only waiver submitted was by Mr. Mogil and Sea
4 Pines did not sign that waiver. So they didn't get a
5 conditioned proceeding. That conditioned proceeding was not
6 satisfied. Second thing is, in that waiver, Mr. Mogil for
7 the purchaser said that it was offered and he affirmed the
8 offer to the company. Now, they're trying to repudiate
9 that.

10 The other thing -- and I'm not going through all -- I'm
11 going to spare you going through the grounds again, but on
12 the third party beneficiary, the fact that it said that it
13 sold subject to a lease means that it was the existing
14 lease. It didn't say there's going to be a change in the
15 lease. It was an encumbrance on the property and they
16 identified it as a encumbrance. To have what the Plaintiffs
17 say be true, it would have had to say that although subject
18 to an existing lease, the parties intend to change that
19 lease. But there was no notice to anybody they intended to
20 change the lease. In fact, the only reasonable conclusion
21 is to the contrary.

22 Last, on the remedies, the Plaintiff cannot get
23 specific performance and benefit of the bargain. The two
24 are entirely inconsistent. The Plaintiff Bittmint has to
25 choose. It can get specific performance and incidental

1 damages related to the specific performance. Specific
2 performance affirms the contract. Damages says it was
3 breached and we get the benefit of the bargain. When they
4 get specific performance, they are getting the property.
5 They are getting the benefit of the bargain.

6 So if Your Honor allows the claim to stay, and we
7 respectfully submit it should not remain, then they need to
8 elect because they can't argue to the jury and then go to
9 the Court for specific performance. We want to know what
10 they're going for and we're entitled to know. Thank you.

11 THE COURT: Fair enough.

12 MR. KUBEC: Your Honor, may I address that?

13 THE COURT: Sure.

14 MR. KUBEC: In his initial argument, he referenced rule
15 against perpetuities. Again, our position, which I believe
16 was stated in our Motion in Limine and at pretrial, that the
17 rule against perpetuities are (inaudible). We talked about
18 it ad nauseam in our Motion in Limine and will be happy to
19 repeat it if Your Honor would like.

20 With regard to specific performance, that option comes
21 -- we have that option until after all the evidence is
22 presented. We don't have to make a decision now. The law
23 is crystal clear on that. The issue can go to the jury and
24 then the decision can be made after that fact. That's the
25 law in South Carolina. It's not you have to make a choice

1 ahead of time. It can be done after information goes to the
2 jury.

3 And I'll just cite a specific case here, it says --
4 Adams vs. Willis, it says, However when land is the subject
5 matter of the agreement, jurisdiction of equity from the
6 Court specific performance is undisputed. It does not
7 depend on the inadequacy of legal remedy. And that's Adams
8 vs. Willis, Your Honor.

9 Also, there's evidence before the Court that this
10 document was assigned to a company called Sea Pines
11 Plantation Company. And we've taken the position in our
12 Motion in Limine and then here that that right died when it
13 was transferred to Sea Pines Plantation Company because the
14 granting language said only to Sea Pines Plantation Company
15 and not to Sea Pines Plantation Company, its successors and
16 assigns.

17 And the law throughout this country is that when you
18 have an assignment of a personal right of a first refusal
19 that is a personal right, it dies when the holder dies at
20 that point in time. And there's no evidence before the
21 Court now that Sea Pines Plantation is still alive. In
22 fact, the only document I think you may have says it's dead.
23 No further argument, Your Honor.

24 THE COURT: Fair enough.

25 All right. I'm going to take this under advisement.

1 I'm going to take a couple of minutes to take a look at
2 everything. In the event that I don't grant the directed
3 verdict as to all claims, how many witnesses do y'all have?

4 MR. WALKER: We have one, maybe two. May I have about
5 ten minutes to simplify with my witness?

6 THE COURT: To do what?

7 MR. WALKER: Just to meet with my witness to -- I think
8 we can cull a lot out.

9 THE COURT: Take all the time that you need. Just let
10 me know when you're ready.

11 MR. WALKER: Just have ten minutes?

12 THE COURT: Yeah, just tell one of the deputies or
13 bailiffs that you're ready and I'll come back out.

14 MR. WALKER: Excellent. Thank you, Your Honor. Thank
15 you for your accommodation.

16 THE COURT: Sure.

17 (Short recess.)

18 THE COURT: All right. So let's talk. I have some
19 questions. All right. Here's the way I see this case:
20 There was a contract and negotiation entered on behalf of
21 Bittmint and Ms. Johnson. Mr. Giannone is just here by
22 product of he was a co-owner and he just enjoyed the trial
23 and all of my humor.

24 I don't know why they made y'all stay here, but maybe
25 you enjoyed a little bit of it.

1 Anyway, so byproduct of that, Mr. Mogil is obviously
2 made aware by his clients that they intend to purchase said
3 property from Ms. Johnson. Sea Pines Resort, I assume
4 through Danny Dennison, who may or may not be the head of
5 this real estate administration, somebody some way sends him
6 this waiver, which he then indicates that he has not sent to
7 his clients, but he sends it over.

8 The waiver obviously says that based on the
9 contractual relationship, which we all agree at this point
10 in time was in existence between Ms. Johnson and Bittmint,
11 indicates that they are going to sell the property from
12 Lynda Johnson and Charles Giannone to the purchaser,
13 Bittmint, for the sales price of \$580,000. It comes to the
14 attention of the real estate administration and it says that
15 no less than 30 days prior to the proposed closing date.
16 However, the closing date on this document is TBD, so
17 there's no violation of anything there.

18 It later says that the above referenced property is
19 hereby offered for sale to the company. I assume Sea Pines
20 Resort, the company. Pursuant to the same terms and price,
21 same terms and price, which is the lease agreement, which is
22 currently by the surf shop, and the price, which is
23 \$580,000, contained in the current contract of sale, which
24 was between Bittmint and Ms. Johnson, with the bonafide
25 purchaser referenced above, Bittmint. It is hereby

1 understood by all parties, Bittmint and Ms. Johnson, that
2 the company has 30 days, Sea Pines, from receipt of this
3 offer, this, which would be an offer of sale, in which to
4 determine its repurchase option, i.e., whether, in fact, it
5 has the right of first refusal.

6 All right. This document then gets circulated, is my
7 understanding, and, ultimately, gets circulated up to the
8 top dog in these cases. And they have extensive
9 negotiations or communications via e-mail about whether, in
10 fact, they would like to exercise their right of first
11 refusal.

12 At this point in time, the way I see it, Ms. Johnson is
13 stuck. She has nowhere to go. They either come in and
14 pluck this right away and take it for the 580, or they agree
15 not to exercise their right and she's stuck contractually
16 selling it to them. So she's got no dog in this fight. All
17 right. She did what she was supposed to do. She entered
18 into a contract with the people that came to her that said
19 they wanted to purchase the property and she did everything
20 correctly. She gave them a fair price. And then she's
21 stuck. That's the way I see her role in all of this. She
22 has no -- nothing that she can do. They're either going to
23 take it from her and buy it for that amount. I don't think
24 she -- in my opinion, I don't even think she could
25 renegotiated with Sea Pines at all. I think Sea Pines is

1 stuck with that.

2 Now, I think she could go back and renegotiate with
3 them and that may have made Sea Pines get stuck into a
4 higher price, you see what I'm saying? I think maybe she
5 could have contractually went back and said eh, I don't
6 know, Sea Pines has got deep pockets, which is what she
7 probably should have done, and gone back to them and said
8 eh, they'll pay 750 because they've got deeper pockets than
9 y'all do. Which she didn't, so she only got stuck with the
10 580. That's the way I see her role and responsibility in
11 all of this.

12 In doing so, they, being -- so the question then begs,
13 is it a legal question or is it a factual question whether,
14 in fact, Sea Pines Resort had the right of first refusal
15 based on the assignments? The question is, is that a legal
16 question or is that a factual question through the
17 covenants?

18 What is your opinion?

19 MR. WALKER: In my opinion, it's a legal question.

20 THE COURT: Okay.

21 MR. WALKER: I don't think that the jury is equipped to
22 make a legal call. You construe the instrument. So it
23 would be a legal call.

24 THE COURT: Okay.

25 MR. WALKER: And depending on what Your Honor does, we

1 do not think that they have proved they don't have the
2 right, which is what they had to do. They put in the
3 original covenants and assignment, but they didn't have
4 anybody come to say they don't have the right. They just
5 left it hanging. They could have had an expert. It's a
6 legal question.

7 THE COURT: Correct me where I'm wrong. Beach Company
8 Developer, correct?

9 MR. WALKER: This is a hypothetical?

10 THE COURT: No, this is factual. So the original
11 developer is Beach Company when they did the covenant -- I
12 mean, Lighthouse. Assigned it to Sea Pines, whichever one,
13 association or LLC, correct?

14 MR. WALKER: Sea Pines Plantation Company, yes, sir.

15 THE COURT: And then their allegation is that when the
16 bankruptcy occurred, that one time single assignment to Sea
17 Pines Plantation exhausted, it was over. So when the new
18 Sea Pines came in and purchased all the rights that they had
19 through the bankruptcy court, which was assigned through
20 bankruptcy court and I guess Judge Blatt had some
21 involvement, that they, the new owners, did not acquire the
22 original rights by the -- I'm going to call the Plantation
23 because it's easier to keep it like that.

24 MR. WALKER: That's my understanding of their theory,
25 that it was a non-transferrable right when it was

1 transferred from Lighthouse to Sea Pines Plantation Company.
2 And we argued that in the Motion in Limine, correct. We say
3 it was transferrable because you look at the intent, you
4 look at the covenant and all the things that we brought up
5 and they say it's not because it lacked the magic word. We
6 disagree vigorously. And the bankruptcy court allowed the
7 assignment, approved the assignment.

8 THE COURT: Go ahead.

9 Thank you, Mr. Walker.

10 I'm thinking through this with y'all. Go ahead.

11 MR. KUBEC: (Inaudible) Sea Pines Plantation
12 (inaudible).

13 THE COURT: Right, in 1986, it went bankrupt and it was
14 gone, correct.

15 MR. KUBEC: Our position is when it contacts the
16 bankruptcy, that first right of refusal died in the
17 bankruptcy or it's still either in the context of bankruptcy
18 and it never got passed through to them because there was a
19 sale of assets (inaudible) --

20 THE COURT: Well, let me stop you there and ask you
21 this question: If that is, in fact, true and accurate, why
22 would Sea Pines Resort ever create a document such as this?
23 This document would be null and void and there's no reason
24 for anybody to ever have it.

25 The other concern that I have is that the property

1 owners had -- where's the letter?

2 Lorraine, would you hand me the letter?

3 MS. COFFEY: Your Honor, I think I could clear this up
4 real quick.

5 THE COURT: Hold on, I want to see this letter.

6 Thank you very much. Sorry about that.

7 So in April, we have the waiver. May, we have the
8 sale. And in June, every -- apparently, the only way that I
9 could read into this circumstantially is that the president
10 of Sea Pines had been getting some type of heat or somebody
11 -- it got to him that the residents were concerned because
12 they had exercised this right and they had bought this
13 commercial property. He felt as though it was a concern
14 that he needed to address with all the property owners. So
15 in doing so, if they weren't on notice prior to the letter,
16 they sure as heck were on notice at this point in time.

17 Well, the owners of the condominium complexes must have
18 known that there was some type of right of, they call it
19 repurchase because they got scared about it to some extent
20 because he wrote a letter trying to dispel their concerns.
21 Because he says in here that there's been considerable
22 misinformation being circulated regarding Sea Pines Resorts'
23 right of repurchase, which has been included in the Sea
24 Pines covenants for over 40 years. And it only applies,
25 which we agree, when an owner wants to sell a property in

1 Sea Pines. Obviously, Sea Pines can't go in and just say
2 we're going to take your property. It's the right of first
3 refusal. They have to say I don't want to live here
4 anymore. I'm moving to, God forbid, I don't know,
5 Charleston.

6 So with that being said, they then -- the way I
7 gathered his testimony was the reason that they didn't -- or
8 he was dispelling the concerns about buying all these
9 residential properties was they didn't want to be property
10 managers. That's the way I gathered that. That they are a
11 business for money, they do restaurants, they do golf
12 courses, they do commercial property and the last thing they
13 want to do is be one huge HOA. That's the way I took that
14 testimony from him. If I'm wrong, sorry I'm wrong.

15 Well, I'm kind of right based on the letter. Further,
16 we believe it would be nearly impossible to assemble any
17 significant number of sellers to even create a manageable
18 property, meaning you have to have 80 units to have an HOA.
19 And why would you have an HOA for one unit if one person
20 wants to -- if they want to go out and buy these?

21 He says in the event the resort has an interest in
22 purchasing residential property, we are working with
23 homeowners to assure them a full value and possibly even a
24 premium value if they choose to sell. That sentence really
25 wouldn't matter because they would be stuck with the

1 agreement that they have between the buyer and the
2 purchaser. They may be just saying they would throw a
3 little something on top of it. Our purchase offers assure
4 values to you plus other significant benefits to the
5 sellers.

6 To some degree, it's correct. It says the resort
7 believes its purchase proposal is a huge benefit to sellers,
8 not a liability. He's correct to the extent that if the
9 buyer bails on them or they don't have the right amount that
10 Sea Pines can come in and purchase it even if the other
11 buyer maybe can't get funding or something along those
12 lines. So it would be a benefit to have two buyers.
13 Basically, you always have a backup buyer that potentially
14 could purchase the property at all times. Right?

15 We will continue to acquire commercial properties to
16 benefit the town. We can work out acceptable terms. Once
17 again, we believe sellers of commercial properties should
18 consider this process as a benefit for multiple reasons. We
19 are also planning to build a new -- then they're building
20 some kind of --

21 Lorraine, those are the originals. Will you take
22 those?

23 Yes, sir -- well, yes, ma'am, I'm sorry, you said you
24 wanted to address it.

25 MS. COFFEY: The assignment that we're talking about

1 only applies to the commercial properties that come out of
2 Lighthouse Beach Corporation. There are other several
3 commercial properties which are not governed by the original
4 1973 commercial covenants out of Lighthouse Beach because
5 Sea Pines Plantation Company also had other properties, like
6 in the south beach area. So those covenants are not
7 impaired by this assignment for the Lighthouse Beach
8 commercial property. And, in fact, the residential
9 covenants of 1974, there's no assignment there either.

10 So the assignment really is particular to the
11 Lighthouse Beach properties commercially as covenants, which
12 only -- you know, those are Harbor Town properties, but
13 there's a lot of other covenants and right of first refusals
14 that would not die necessarily because of the assignment.
15 The assignment is limited to the Lighthouse Beach properties
16 in that chain.

17 So it doesn't get rid of the entire right of first
18 refusal for all of Sea Pines Plantation. It should under a
19 rule against perpetuities argument, but under the assignment
20 argument, that is limited just to the properties that go on
21 the chain of Lighthouse Beach. There's a lot of other
22 commercial properties that are in Sea Pines that do not get
23 their chain back to Lighthouse Beach. Very limited.

24 THE COURT: I see what you're saying.

25 All right. Anybody want to address that or no?

1 MR. WALKER: Well, I understood her to say that -- and
2 perhaps, I'm wrong, that these particular covenants apply to
3 Harbor Town, but there are other commercial properties, such
4 as commercial properties in south beach, different parts.
5 So we don't think it changes the focus of this inquiry,
6 which is on the commercial use covenants of Harbour Town.
7 That's where we are. I think it's more than --

8 THE COURT: Was that developed by Lighthouse?

9 MR. WALKER: They originally developed it and they sold
10 properties, yeah. It was meant to govern the commercial
11 properties at Harbour Town. And she's absolutely right,
12 there's other covenants at south beach. They have other
13 covenants, different grantor, all that stuff, but we're
14 focused only on --

15 THE COURT: I understand.

16 Give me two seconds.

17 (Short recess.)

18 THE COURT: All right. Please be seated.

19 Ms. Coffey, I understand what your argument is, so
20 correct me if I'm wrong, that Sea Pines, obviously, moving
21 forward has developed a lot of property in the Resort, I
22 would assume. And in doing so, since they were the original
23 builders and developers, they get to create whatever
24 covenants that they want for those properties. Is there
25 anything that's indicating that for Harbour Town, which was

1 not developed by Sea Pines, it was developed by Lighthouse,
2 that they have been operating under the auspices that they
3 adopted the covenants and have been living under those
4 covenants because they didn't develop the property and they
5 can't change them because they inherited them from
6 Lighthouse?

7 So what I'm saying is this, Sea Pines over here on this
8 side says well, as to Harbour Town, we're stuck. We don't
9 get to create new covenants because we inherited them when
10 we purchased the property out of bankruptcy from Lighthouse,
11 and so they are operating under that auspice that they have
12 no way of changing it because they can't. But they can do
13 whatever the heck they want over here because they are the
14 developer and they can create any covenant that they want.
15 It's over.

16 All right. I'll grant the motion for a directed
17 verdict. You have 15 days from today's date to file any
18 motions that you would like. And if there's anything
19 further, I will be here the rest of the day. I will be here
20 tomorrow and I'll be here Friday, but as far as this --

21 MR. KUBEC: Your Honor, I don't understand that logic
22 at all --

23 THE COURT: I --

24 MR. KUBEC: -- can you please explain that to us?

25 THE COURT: Yes. The reason, in my opinion, that they,

1 being Sea Pines, have been creating that document and they
2 have a separate and complete entity that handles the
3 purchase of these properties in Sea Pines, which is --

4 Lorraine, hand it back to me, please.

5 They have created -- they, being Sea Pines Resort,
6 under Harbour Town purchase of properties, in that
7 restricted area, what you had on the video, they inherited
8 that property. They inherited those covenants. They
9 inherited those restrictions. But when they purchased the
10 rights and assignments that they -- what do y'all call it?
11 I keep calling it Beach Company.

12 MR. WALKER: Lighthouse was the original, but it's now
13 Resorts.

14 THE COURT: Right. So Sea Pines has been working under
15 the auspices that they can't create anything new because
16 they can't. They purchased the rights and assigns from
17 Lighthouse. So they have created an entirely separate
18 company, which is real estate administration -- not company,
19 a sector of Sea Pines, which sends these out to everybody
20 that wants to purchase the property because they know that
21 they have the right of a first refusal as to those
22 properties that they inherited that were developed by
23 Lighthouse. How hard is that -- that's not hard to
24 understand?

25 MR. KUBEC: (Inaudible).

1 THE COURT: And I'm telling you that from a legal
2 standpoint they did.

3 MR. KUBEC: You've made a decision?

4 THE COURT: That's correct.

5 MR. KUBEC: Saying the right was assigned to Sea Pines
6 Resort, LLC?

7 THE COURT: That's correct. So your appeal will be
8 based on that.

9 Fair enough?

10 MR. KUBEC: One argument. Let me back up. Give me a
11 moment, it's important, Your Honor.

12 THE COURT: You've got to create your record. I don't
13 disagree with you in the slightest.

14 MR. KUBEC: When we came in here, the discussion
15 focused on this piece of paper here, this contract, right?

16 THE COURT: Correct.

17 MR. KUBEC: Which the rights still has its foundation
18 in the Lighthouse Beach covenant, correct?

19 THE COURT: Yes.

20 MR. KUBEC: Okay. So there's evidentiary facts in
21 dispute. There's a letter of intent that was sent out on
22 January 31st, a piece of paper that went -- that Ms. Johnson
23 testified, and Mr. Mintz testified, also, that within a week
24 after that letter of intent wound up in Sea Pines' hands.

25 So let's just give them the benefit of the doubt, it's

1 February 10th, 2017. Sea Pines is sitting on that February
2 10th, 2017. Thirty days go by, nothing. We're at March
3 10th, 2017, nothing. Nothing. That right is gone, it's
4 toast. Because they did not exercise it within that 30-day
5 period.

6 Then we come along to this piece of paper, which is on
7 April 13, '17, a month after the right expired the first
8 time. So it's a question of fact, is this a contract? Is
9 this a new contract, basically? It's not signed by Mr.
10 Mogil, it's not signed by Mr. Mintz, it's not signed by Mr.
11 Bitton, it's not signed by anybody. It's just a piece of
12 paper.

13 It said after the right that came from the 1973
14 covenants that they showed -- that they never have any
15 evidence saying they got their hands on, it expired. It
16 doesn't exist anymore. So is this question of fact, is this
17 a new contract that resets that 30-day period? Question of
18 law, question of fact? I believe it's a question of fact.

19 THE COURT: All right. Your record is clear.

20 Anything further?

21 MR. KUBEC: Nothing from the Defendants, Your Honor.

22 THE COURT: All right. Thank y'all very much. 15 days
23 from --

24 MR. KUBEC: Your Honor, actually, there's no ruling
25 with regard to the rule against perpetuities. I'd like to

1 have a definitive ruling on how that applies to this case.

2 THE COURT: All right. First cause of action, as to
3 breach of contract against Defendants Johnson and Giannone,
4 I find that there is no breach whatsoever. As I indicated
5 before, Ms. Johnson entered into a contract with the
6 purchasers of Bittmint. Sea Pines exercised its right to
7 purchase it at that exact same price. No other amendments
8 were made to the contractual relationship or obligations
9 under that lease and I find that Sea Pines was going to have
10 to buy that from Ms. Johnson as is. And they did exactly
11 that. They exercised their right of first refusal. They
12 purchased from Defendant Johnson. Obviously, the lease was
13 an encumbrance upon that purchase and, therefore, there's no
14 breach whatsoever, so I find that Ms. Johnson and Mr.
15 Giannone did not -- there was no breach of contract and
16 they're out of the case.

17 Second cause of action, interference with the
18 contractual relationship against Defendant Resort. Is that
19 the tortious interference?

20 MR. WALKER: That's correct, Your Honor.

21 THE COURT: All right. I find that Sea Pines did not
22 tortuously interfere whatsoever with the contract
23 whatsoever, that the negotiations were held on behalf of Ms.
24 Johnson and Bittmint, that they had no right or obligation
25 or anything whatsoever in negotiating the price or the

1 encumbrances or the leases that would come along with the
2 actual property itself. And that their obligation under
3 their contract with the seller, Ms. Johnson, that if they,
4 in fact, invoke their right to purchase the property under
5 their right of first refusal, they must purchase it with the
6 exact same terms and conditions in which she negotiated.
7 And that's exactly what they did. So tortious interference
8 is being dismissed.

9 The 1973 covenants, this is under the third cause of
10 action, which is the rule against perpetuities against the
11 Defendant Sea Pines. The '73 covenants right to repurchase
12 clause is not an enforceable right because, as worded, it is
13 a preemptive right that is a contingent nonvested interest
14 in that the owners might never choose to sell the property.
15 It is therefore an interest not conditioned on an event
16 certain to occur within 21 years of a person and being or at
17 all which clearly is a violation of the common law rule
18 against perpetuity.

19 As a direct and proximate result of Resorts
20 ill-conceived reliance on an invalid clause, the Resort has
21 unlawfully interfered with Bittmint's contract of sale.
22 Plaintiffs have sustained and are entitled to recover
23 damages in the amount to be determined at trial, including
24 without limitation costs, tortious interference of contract.

25 As a further result of their actions -- all right,

1 well, I find that they did have the right. Obviously, that
2 is based on the belief that -- or the Plaintiffs' belief
3 that the Lighthouse Beach Company document entitled
4 Commercial Use Covenants dated January 25th, 1973, this
5 applicability of the '73 covenants to this transaction,
6 Plaintiff strongly denies. I have indicated in my ruling
7 that I believe that it did apply and that the Beach Company
8 vested those rights -- I mean, that Sea Pines received those
9 rights from Lighthouse and have been operating in the
10 auspices for the entire time that they were, in fact, bound
11 by that obligation.

12 All right. I've already made my ruling as to invalid
13 assignment of rights against the Defendant Sea Pines.

14 I am obviously going to deny the fifth cause of action
15 to set aside the deed against the Defendants.

16 Third party beneficiary, I don't believe that there has
17 been any actual damages whatsoever to the third party
18 beneficiary.

19 Violation of statute of repose, I reject that one in
20 its entirety.

21 Intentional interference with perspective contractual
22 relationships against Defendant Resort, what's that one?

23 MR. WALKER: That's the surf shop, Hilton Head Surf
24 Shop. It's not a party to the contract, says it would have
25 entered a new lease at less money. And because the Resort

1 exercised the right of first refusal, it was unable to do
2 that and that was an intentional unjustified interference
3 with their potential contract.

4 THE COURT: All right. I find there was no intent.

5 And, obviously, I am not going to require any form of
6 specific performance because under the terms of the
7 contract, I find that Sea Pines had every right to purchase
8 the property.

9 Anything further?

10 MR. KUBEC: Nothing from the Defendant, Your Honor.

11 THE COURT: All right. Well, again, as I indicated, 15
12 days from today's date to file any motions. I'll be happy
13 to hear them. I will be available for anything that anybody
14 needs for the rest of the week as well.

15 Thank y'all very much.

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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

I, PENNY M. JOHNSON, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording and supporting information; and that I am neither counsel for, related to, nor employed by any of the parties to this case, and I have no interest, financial or otherwise, in its outcome.

August 19, 2022

Penny M. Johnson
Penny M. Johnson
Court Reporter III

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	2017-CP-07-01057
	)	
	)	
	)	
	)	
BITTMINT, LLC AND HARBOUR	)	
TOWN SURF SHOP, LLC,	)	
PLAINTIFFS,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
LYNDA H. JOHNSON, ET AL,	)	
DEFENDANTS.	)	
_____	)	

May 18, 2022
Via WebEx

B E F O R E:

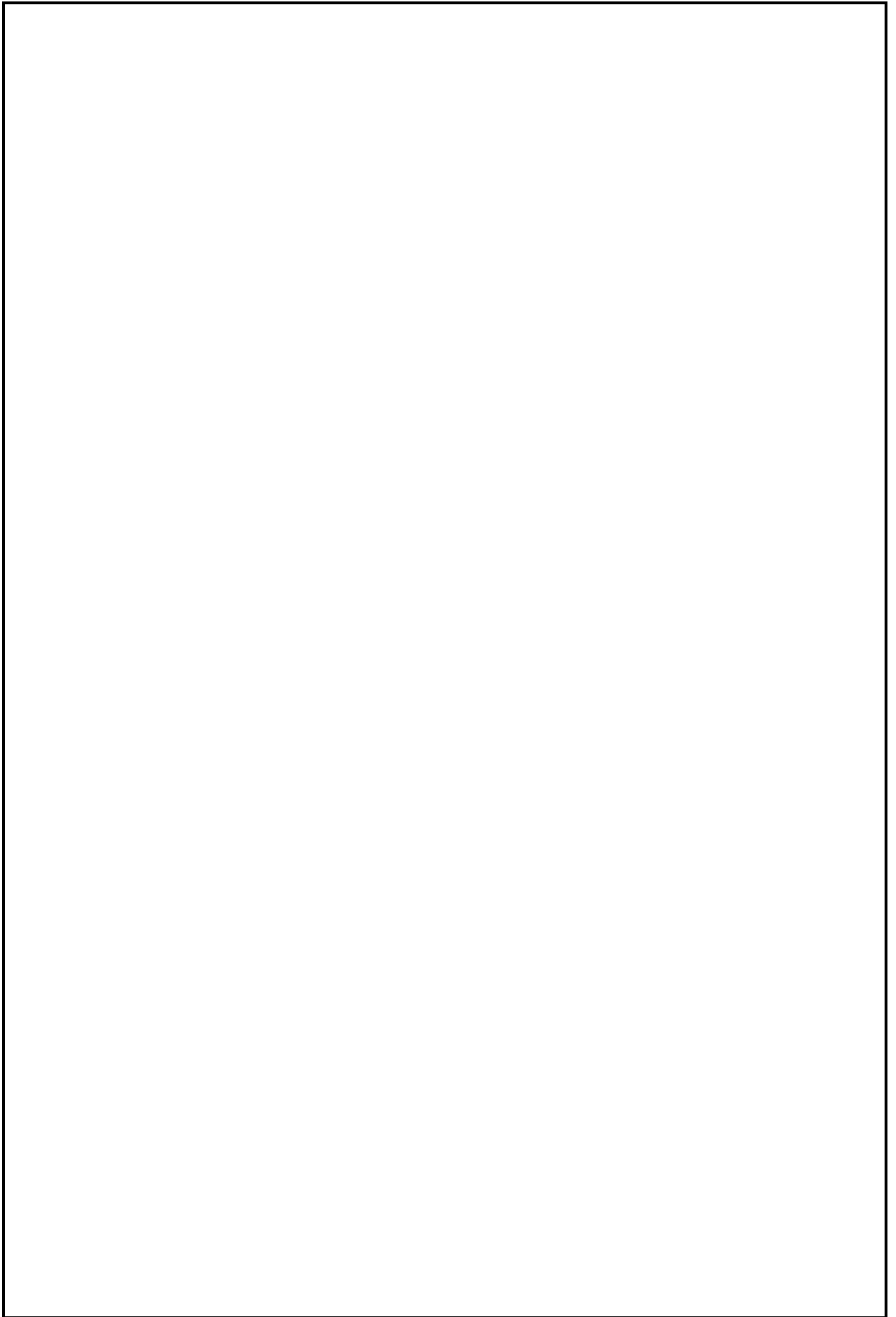
THE HONORABLE BENTLEY D. PRICE, JUDGE.

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

ED KUBEK, ESQ.
Attorney for the Plaintiffs

JOHN P. LINTON, JR., ESQ.
G. TRENHOLM WALKER, ESQ
Attorney for the Defendants

Proceedings Recorded by DCRP
Transcribed by Penny M. Johnson



I N D E X

(There were no witnesses called.)

E X H I B I T S

(There were no exhibits submitted.)

P R O C E E D I N G S

(WHEREUPON, the proceedings were held via WebEx.)

COURT REPORTER'S NOTE: Due to remote platform interruption and video-audio interference throughout the hearing, those instances are denoted with "audio distortion" in the transcript.

THE COURT: All right. Next is motion for reconsideration as to Bittmint vs. Lynda Johnson.

All right. This is Bittmint's motion to reconsider or to alter or amend.

MR. KUBEK: Good morning, Your Honor. Ed Kubek on behalf of Plaintiffs, Bittmint, LLC and Harbour Town, LLC. This case concerns a contract for my client, Bittmint, LLC, Plaintiff, to purchase shops 6 and 8 in the Mariner's Way Horizontal Property Regime in the Harbour Town basin in Sea Pines from Defendants, Lynda Johnson and Charles Giannone. That contract was not consummated because Defendant Sea Pines Resort exercised its claim of right of first refusal to purchase those properties.

The Court found on motion for a directed verdict brought by the Defendants that Ms. Johnson and Mr. Giannone had not breached their contract and that Sea Pines had not interfered with the contractual relations in finding that Sea Pines Resort had inherited the right of first refusal and by implication or inference, Sea Pines had exercised

1 that right of first refusal on a timely basis and in a
2 proper manner.

3 However, Plaintiffs presented substantial credible
4 evidence attacking both the enforceability of the right of
5 first refusal and the proper and timely exercise of the
6 right by Sea Pines Resorts. In addition, Plaintiffs
7 advanced alternative legal grounds establishing the
8 invalidity of the right of first refusal.

9 Plaintiffs' evidence and legal arguments follows:
10 First, the right of first refusal is void because it
11 violates common law rule of perpetuities. Second reason the
12 right of first refusal cannot be utilized by Sea Pines is
13 because it was converted to a personal right in 1977 that
14 could not be assigned by Sea Pines. The third reason,
15 there's absolutely no evidence on the record showing that
16 Sea Pines had ever acquired the right of first refusal. The
17 fourth reason is that the right of first refusal does not
18 run with the land, in particular with respect to the sellers
19 of this property, Ms. Johnson and Mr. Giannone.

20 Now, those are the reasons why the right of first
21 refusal is invalid to being with, in the first place. We
22 ask the Court to reconsider its motion determining that
23 there was validity.

24 Now, even assuming there was validity, what happens
25 next is that the evidence at trial showed that Sea Pines,

1 nevertheless, failed to exercise its right in a timely and
2 proper manner. Because one, the right of first refusal does
3 not clearly define what notice must be given to the holder.
4 Two, reasonable notice of Bittmint's bonafide offer was
5 provided to Sea Pines. Three, Sea Pines failed to undertake
6 a reasonable investigation of the offer and terms. Four,
7 the request for a waiver that's a big issue in this case
8 raises at most a question of fact as to its relevance in
9 this case and its applicability. And five, the Defendants
10 Sea Pines failed to match the terms of the offer that were
11 presented to Ms. Johnson and Mr. Giannone.

12 So we again ask the Court to reconsider its decision
13 based on these material facts that were presented that a
14 jury should decide on whether or not this particular right
15 of first refusal, even if it did exist, was exercised in a
16 timely and proper manner.

17 The right of first refusal, Your Honor, stems, as you
18 may recall, from a declaration of rights, restrictions,
19 affirmative obligation and covenants affecting commercial
20 property of Lighthouse Beach Company, Limited Partnership,
21 dated 1973. We refer to these as the 1973 covenants.
22 Section 19 of those covenants provides the right of first
23 refusal.

24 It says: In the event the owner desires to sell a
25 commercial property site on Hilton Head Island together with

1 its improvements, if any, then said property shall be
2 offered to sell to the company at the same price at which
3 the highest bonafide offer has been made for the property.
4 Said company shall have 30 days within which to exercise its
5 option to purchase said property at this price. Should the
6 company fail or refuse within 30 days after receipt of
7 written notice of the price and terms -- first time terms
8 appears in this, by the way, to exercise its option to
9 purchase said property at the offered price, then the owner
10 of said property shall have the right to sell said property
11 subject, however, to all covenants and limitations contained
12 herein at a price not lower than at which it was offered to
13 the company.

14 Also, it's important what's stated in those 1973
15 covenants is the issue dealing with whether or not those
16 covenants run with the land. Specifically, covenants say:
17 Therefore, Lighthouse Beach Company does hereby declare that
18 the provisions contained herein are rights, restrictions,
19 conditions and affirmative obligations all constitute
20 covenants running with the land, which is conveyed by
21 Lighthouse Beach Company by deed or other instrument in
22 which reference is specifically made to these covenants.
23 Specifically made to these covenants, that's repeated three
24 times in these covenants.

25 1977, April of 1977, the declarant, Lighthouse Beach

1 Company, assigns that right of first refusal to Sea Pines
2 Plantation Company. That's the only thing that's part of
3 this assignment or right of first refusal. Nothing else in
4 the assignment. Right of first refusal is assigned over to
5 Sea Pines Plantation Company. And in that assignment, it
6 does not use the magic words successors and assigns, it just
7 passes the property on to Sea Pines Plantation Company.

8 Fast forward ten years, mid-80s, Sea Pines Plantation
9 Company, all of Sea Pines goes into bankruptcy. Meanwhile,
10 the Defendants' parents, Charles Giannone and Lynda
11 Giannone, they purchase the property in 1986. This property
12 was located in the Mariner's Cove Horizontal Property
13 Regime. It's a condo regime. Individuals owned those
14 properties, whether they were commercial, whether they were
15 residential. And the common elements in the regime are
16 owned by the regime itself.

17 Now, Sea Pines Plantation, it never gets out of
18 bankruptcy. It dies. It's dead. It never escapes. And
19 that entity is long gone. Meanwhile, the deed from
20 Giannones to the parents, the Giannone parents, it makes no
21 reference whatsoever to the 1973 covenants. 2006,
22 subsequently, Mr. Giannone, the parent, father, passes away.
23 Ms. Giannone, the mom, she passes away in 2016. Properties
24 are then deeded to the Defendants, Mr. Giannone and Ms.
25 Johnson, their children, in 2016 by deed of distribution.

1 Neither one of those deeds makes any reference whatsoever to
2 the 1973 covenants or the right of first refusal.

3 March 17, 2017, the parties enter into a contract of
4 sale. May 2nd, 2017, Sea Pines exercised its right of first
5 refusal and the property is sold -- its claimed right of
6 first refusal and the property is sold to Sea Pines on May
7 11th, 2017.

8 Rule against perpetuities, Your Honor, is the first
9 basis I would like to ask the Court to reconsider. Common
10 law rule against perpetuities is that no interest in real
11 property is good unless it must vest, if at all, not later
12 than 20 years after some life in being at the creation of
13 the interest. The right of first refusal that fails to
14 establish a termination date within the life of being plus
15 21 years is a perpetual option that violates the rule
16 against perpetuities. This is the holding set forth in Webb
17 V. Reames, which is the seminal case in South Carolina
18 dealing with rights of first refusal and the rule against
19 perpetuities.

20 That case also holds that a right of first refusal that
21 violates the rules against perpetuities is void ab initio.
22 It never existed. These people never had a right to
23 exercise a right of first refusal because the 1973 covenants
24 have no language whatsoever establishing a termination date.

25 If anyone wants to take reference to what that actually

1 looks like, there's a Colleton River Plantation off the
2 island that mentions 1991 used such a savings club by
3 referencing then President George Bush and his kin. They
4 also reference the owners of the properties in that regime
5 and their kin. That's recorded at 579, Page 1796 and 1991.

6 Now, since 1973 covenants have no termination date, it
7 is therefore perpetual option and it's void. The Defendants
8 come along and they say well, you don't even look at the
9 common law. Common law is abolished in 1987 by the "audible
10 distortion" of the statutory rule. However, that's
11 completely opposite to the holding in Webb vs. Reames which
12 decided ten years later in 1997 that says no, common law
13 does apply. In that particular case, it basically was
14 dealing with a deed that was executed in 1955 for real
15 property. It specifically cited the statutory rule against
16 perpetuities and nevertheless held that common law still
17 applies.

18 Moreover, the statutory rule specifically says it does
19 not apply to nondonative commercial transactions like the
20 one in this particular case. This was not a gift. The
21 declarant didn't declare all this because it was making a
22 donative transfer to the people down the road. So because
23 the rule against perpetuities is nonspecifically -- because
24 it does specifically exclude nondonative transfers, it never
25 abolished the common law rule.

1 This was also decided by courts in other jurisdictions
2 in North Carolina, in Indiana, both of which are referenced
3 in our pleadings. The exact same issue that says no, common
4 law rule continues to exist.

5 So all owners of the subject property, including
6 Defendants Johnson and Giannone took that property free and
7 clear of the right of first refusal. And the legislature
8 can't go ahead and change that ipso facto after the fact.
9 That's recognized really by Section 27.6-60 of the rule
10 against perpetuities. That specifically recognizes it with
11 regard to donative transfers that common law still does
12 apply and provides a mechanism to deal with that.

13 So again, we'd ask the Court to reconsider its ruling
14 in light of the fact that the rule against perpetuities is
15 applicable and it makes this right of first refusal void, ab
16 initio and cannot be used by Sea Pines.

17 With regard to the transfer, the assignment, the 1970s
18 assignment, that created a personal right that rendered the
19 right of first refusal nonassignable in the future. So when
20 its holder dies, the right dies with it. The holder was Sea
21 Pines Plantation Company. Sea Pines Plantation Company died
22 in the bankruptcy. We'd ask the Court to take judicial
23 notice of the fact that there was a changed name to Hilton
24 Head Liquidation "audible distortion". We'd ask the Court
25 to take judicial notice that in 1991, that company was

1 dissolved, forfeited its license, no longer existed in the
2 State of South Carolina "audible distortion" judicial
3 notice. Again, we'd ask the Court to do such in its motion
4 for reconsideration.

5 So the only interest that transferred in 1977 was this
6 right of first refusal. It wasn't granted successors and
7 assigns and it died when Sea Pines Plantation Company died
8 in the 80s, early 90s.

9 Now, also, there was no evidence, none whatsoever on
10 the record that Sea Pines Resort, LLC, the Defendant in this
11 case, took by assignment or any other piece of paper the
12 right of first refusal. It wasn't our burden to prove that
13 it was.

14 That takes us to the next point, which I think from
15 reading the Court's decision, transcript, the Court said
16 that okay, listen, Sea Pines Resort inherited that right.
17 It acquired some properties after the bankruptcy and it
18 inherited the right. And I interpreted that inheritance to
19 mean that okay, this was passed by -- essentially, that the
20 right came -- it ran with the land. And that was an
21 argument that was never proffered by the Defendants in this
22 case. The first time it appears is in their opposition to
23 our motion for reconsideration.

24 Well, if that were accurate, then you would have to --
25 the burden of showing restrictions in the deed or covenants

1 running with the land is on the party "audible distortion"
2 Sea Pines Resorts in this case. And restrictive covenants
3 run with the land if one, an expressed intention can be
4 found that the reasonable parties to this development
5 develop intended for the covenants to run with the land.
6 Two, the covenants touch and concern the real property. And
7 three, the party required to observe the covenant is either
8 actual or constructive notice of the covenant. Covenants
9 that restrict the free use of property must be strictly
10 construed against limitations with properties for use.
11 Well, there's doubt that that must be in favor of free use
12 of the property.

13 Well, the covenants here specifically say you've got to
14 make reference to these 1973 covenants in the granting deed
15 to the holder. They're not referenced anywhere. And that's
16 what the covenants require. So that's the intent. The
17 intent -- if they didn't express intention -- that was done
18 in the original 1973 covenants that say in order to run with
19 land, it must be expressed in the deed conveying the
20 property to the Johnsons, the Johnsons' parents. That did
21 not exist.

22 Whether or not the covenants touch or concern the land,
23 that's a separate issue. No evidence the right of first
24 refusal touch or concern the benefit -- there's no evidence
25 of privity, whether it be horizontal or vertical privity.

1 Sea Pines never owned the subject property. Sea Pines
2 Resort never owned the Mariner's regime properties.

3 So again, another reason we'd ask the Court to set
4 aside its decision is because right of first refusal does
5 not run with the land. There's no evidence of such.

6 Now, again, I mentioned this earlier. Assuming that it
7 was a valid right of first refusal takes us to the next
8 step. Was that right exercised in a timely and proper
9 manner by Sea Pines? The '73 covenants, that right of first
10 refusal, it's not a picture of clarity, I'll put it that
11 way. It is confusing and there's ambiguities and the
12 ambiguities create significant factual questions.

13 Specifically, what notice was required to trigger the
14 30-day exercise period? What terms, if any, other than the
15 price are required to be a bona fide owner? Was adequate
16 notice of the offer given to Sea Pines? Was the offer a
17 bona fide offer? Was the right of first refusal triggered?
18 Did Sea Pines undertake a proper investigation of the offer
19 terms? When does the right of first refusal expire? What
20 was the factual relevance of the request for a waiver, which
21 is something that the Defense has relied on heavily in this
22 case. And, finally, did Sea Pines actually even match the
23 offer when it came time to exercise it? All of these are
24 questions of fact that should have been presented to the
25 jury, never had that chance.

1 Again, just -- and I know I'm taking up quite a bit of
2 time here, Your Honor. The first issue, Your Honor, there's
3 no South Carolina decision articulating the task in
4 determining when an offer contains sufficient information to
5 trigger the obligation to respond. But courts in other
6 jurisdictions assigned this issue held that any method that
7 gives the rights holder sufficient notice of a potential
8 sale and reasonably discloses the terms of the sale is
9 sufficient to trigger the right of first refusal.

10 In this case, a letter of intent was created on January
11 31, 2017. Ms. Johnson, Defendant Johnson requested that
12 letter of intent to be created so she could give it to Sea
13 Pines Resort. That same day, Mr. Bender spoke to an
14 executive at Sea Pines, spoke to Ms. Johnson. She said hey,
15 I'm dropping off an offer that's going to be made by
16 Bittmint in this case. Mr. Bender then the next day sends
17 an e-mail to the boss --

18 THE COURT: I'm familiar with the facts.

19 MR. KUBEC: Okay. The facts will show that by January
20 7th of 2017, Sea Pines had notice in writing of what the
21 terms were. The 30-day period should have expired by March
22 7th, 2017. At that point, the right is gone. Sea Pines
23 then after claims that this request for waiver is relevant
24 changes the dynamic, sets the period back or whatever
25 they're claiming.

1 That's something that the jury should have decided
2 because it's questions of fact that is the meaning of the
3 request for waiver, whether or not notice was sufficient and
4 whether or not Sea Pines in any way, shape or form was
5 outside this jurisdiction requires because there's none
6 here, again, on the right of first refusal says they had an
7 affirmative obligation once they got notice to go ahead and
8 to determine to do an investigation to determine whether or
9 not they should exercise their option. They didn't do that.
10 They didn't do that.

11 Mr. Bender, who is here present with us today, prepared
12 a memo on June -- I'm sorry, on January 1st, okay, detailing
13 the price, the property, the purchaser, the seller, the
14 existing lease terms, the square footage, who was required
15 to pay the expenses. He did an analysis of whether or not
16 it was a good deal based on different comp breaks. He
17 passed that up to Mr. Birdwell that same day. That same
18 memo except for minor changes was presented four months
19 later to the main guy, Steve Goodwin, or Mack Goodwin, who
20 took less than ten minutes to make the decision whether or
21 not to purchase the property.

22 So our point is that property that it had more than
23 adequate information on February 7th, it should have been
24 decided by March -- within 30 days, it wasn't, and at that
25 point in time, they lost their right to the right of first

1 refusal. And we ask that -- we believe at a minimum those
2 questions should have been presented to the jury and we ask
3 for the Court to reconsider its decision to grant their
4 motion on those grounds, also.

5 And, finally, Your Honor, one thing we'd like to also
6 ask the Court to reconsider is we request that it take
7 judicial notice of 16 facts contained in 12 officially
8 recorded documents. These facts are self-authenticating as
9 public records and ancient documents. They're excepted from
10 hearsay as public records. Records affecting an interest in
11 property. Statement of documents affecting an interest in
12 property and statements in ancient documents. The documents
13 were relevant to prove that Sea Pines never had a first
14 refusal because the right became personal in nature and the
15 right to not "audio distortion" bankruptcy hearings.

16 For all reasons stated, we'd ask that the Court vacate
17 its decision to grant the motion for directed verdict.

18 THE COURT: Thank you, sir.

19 Mr. Walker. Mr. Linton.

20 MR. WALKER: Thank you, Your Honor. Trenholm Walker
21 and John Linton for Sea Pines Resort.

22 We are not going to go through every single ground and
23 rehash what we did at the directed verdict motion of the
24 trial because I think Your Honor fully grasped the facts and
25 correctly ruled on the issue.

1 First thing I want to bring up is we don't even have to
2 get to the right of first refusal and whether it was valid
3 or invalid for two reasons. First, the contract of sale was
4 contingent on obtaining a waiver from Sea Pines.

5 Sea Pines did not sign the waiver, therefore, there's
6 no breach of contract. They don't have a breach of contract
7 claim for that reason. Second, independent of the contract,
8 their attorney, the purchasers' attorney, Mr. Mogil,
9 submitted a waiver form, which the Court is fully familiar
10 with, it was Defendant's Exhibit 9 admitted into evidence
11 that said, we hereby offer to the company to sell you this
12 property on the same terms and conditions. And I think that
13 was April 13th when that was submitted. So the Plaintiffs
14 themselves submitted a proposal to the company, which the
15 company accepted. So there are two independent reasons why
16 we don't get to the right of first refusal.

17 When we get to the right of first refusal, the only
18 reasonable inference from the evidence in the Plaintiff's
19 case is that the right of first refusal applied. We sat
20 here for two days, we heard Lynda Johnson say everybody knew
21 it applied. In fact, I told Alon and Amir they're going to
22 exercise it and they said no, they never exercise it.

23 We heard from Mogil, their lawyer, that he submitted
24 the waiver form and that everybody knows it applies to every
25 property in Sea Pines. They put into evidence the e-mail

1 from Simon Frazier to Mr. Mogil that said here are the
2 covenants that apply, the commercial use covenants, the
3 Lighthouse covenants from 1973. Then the first exhibit of
4 the Plaintiffs was what, Exhibit No. 1 was the Lighthouse
5 Covenants. There was no reason for them to be in evidence
6 if they didn't apply. Now, they say well, they don't apply
7 because of these legal reasons. Well, we went through those
8 legal reasons.

9 They didn't put up an expert in their case to say
10 here's why it doesn't apply. Instead, all the lay testimony
11 said it did apply and that was in their case. They didn't
12 call any hostile witness, Mr. Birdwell, Mr. Bender, Ms.
13 Johnson, but they have to accept the consequences that it
14 didn't apply. They've thrown in this argument in their
15 motion that there wasn't a reference in the deed. The deed
16 never was in evidence. That's just new facts they're trying
17 to get the Court to look at not in the record.

18 Also, we would add the reference that it needs to be
19 refer to doesn't mean in every single transaction. It can
20 be in the chain of title. Nobody came in this court and
21 said here's the chain of title and here's what's in the
22 chain. So the only reasonable inference was what the Court
23 concluded, that it applied. They wouldn't have submitted a
24 request for waiver if it didn't apply.

25 So we don't think there was any error with the Court

1 directing a verdict as far as "audio distortion" rules
2 against perpetuities. It specifically does not apply
3 neither the common law rule nor the statute applies to
4 nondonative transactions. And we made that clear. We
5 provided to the Court in our briefs the comments of the
6 uniform law that these transactions were not meant to be
7 subject to rule against perpetuities.

8 They've also brought up this assignment, that the
9 assignment was personal. We argued that two times, maybe
10 three times. And we're here clearly dealing with a set of
11 covenants that specifically say they are to run with the
12 land and they run with the land. And there was nothing that
13 said the transfer to Sea Pines Plantation Company was "audio
14 distortion". In fact, the underlying covenants that were
15 assigned say they do run with the land. We're really
16 puzzled on this side why they say they don't run with the
17 land and they expressly state they run with the land and
18 they started with that. So they run with the land.

19 When we get down to the other parts of their argument
20 about there's a reasonable question of fact as to whether it
21 was properly exercised, there is no question of fact. What
22 they put into evidence was a letter of intent that said it's
23 not binding. It's a nonbinding letter of intent. And it
24 was not signed by one of the sellers. So in no way could
25 that constitute compliance.

1 When we looked up on that screen of the terms of
2 Section 19 of the commercial use covenants, it said
3 according to the same terms and conditions. We didn't know
4 what the terms and conditions were until we got the contract
5 on April 17th. We exercised that right on May 2nd. So they
6 really don't have a case that we didn't exercise it in time.
7 I don't get the rest of it, that it's unfair and that type
8 of thing. It was timely exercised.

9 With respect to these documents and judicial notice, I
10 think they're confusing judicial notice and the hearsay
11 rule. Judicial notice would require the Court to instruct
12 the jury on specific facts. It has nothing to do with
13 creating an issue of fact.

14 On the admissibility of the document, even if a
15 document is admissible under the exceptions to hearsay,
16 there has to be a witness. I just can't walk in the
17 courtroom and say well, this ancient document, I'm going to
18 put that in. Here's an ancient document, I'm putting that
19 in. It's like any other exhibit. You have to have a basis
20 for it. It has to have context. It has to have foundation.
21 They never called a witness to put it in.

22 So Your Honor, we think you correctly ruled the first
23 time. We don't think they've brought up anything that
24 changes what we argued back on March 2nd, and we'd ask you
25 to deny the motion to reconsider.

1 Thank you.

2 THE COURT: Thank you very much. All right. Again, I
3 am very familiar with the facts. I had adopted y'all's
4 previous arguments as to my granting the motion for directed
5 verdict. But out of an abundance of caution, I'll take a
6 look at everything and y'all will have my decision at the
7 end of the day.

8 Thank you very much.

9 Oh, go ahead, Mr. Linton.

10 MR. LINTON: Your Honor, this is Lynda Johnson and
11 Chuck Giannone's motion for fees under the contract with
12 Bittmint. The contract says in the event of litigation, the
13 prevailing parties shall be entitled to fees and court
14 costs. We filed our motion for fees, which was 193,000 of
15 fees and 11,000 in change of costs.

16 And the response from Bittmint, there were three
17 arguments. Two had to do with the amounts. They said that
18 the fees should be cut in half because we represent the
19 resort and the individual owners. And we filed a reply and
20 said that's fine, we'll cut the fees in half. 96,614.25.
21 On the costs, they said you have \$11,123.67 of costs, but
22 the contract says court costs so travel expenses, the hotel
23 rooms during the trial, meals need to be cut out. We said
24 that's fine. We cut it down to \$7,004.39 of costs. So I
25 think two out of the three arguments we've agreed with out

1 of a matter of just moving this along.

2 The third was that because Sea Pines exercised the
3 right of first refusal, the contract between Johnson and
4 Giannone and Bittmint for the sale never came to fruition,
5 which I just don't understand that. They sued Lynda
6 Johnson, the hairdresser, and her brother --

7 THE COURT: For breach of contract.

8 MR. LINTON: -- Chuck Giannone for breach of contract,
9 breach of this contract. It says in any litigation over
10 breach of contract, the prevailing party shall be entitled
11 to fees. So we would ask for those fee amounts, which
12 totals, fees and costs, \$103,618,64.

13 THE COURT: Did you do an affidavit as to that?

14 MR. LINTON: There is an affidavit filed with our
15 motion as to the full amounts and then the reply just notes
16 the changes.

17 THE COURT: Okay.

18 MR. LINTON: You want a copy of the reply that has the
19 exact amounts that we're requesting?

20 THE COURT: Yes.

21 All right. While they're doing that, I'll just take a
22 look at everything obviously through the -- I've already
23 taken a look at it one time, but I didn't realize there was
24 a supplemental portion where y'all had agreed to a
25 reduction, that's why I wanted to see it. I had taken a

1 look at the first one.

2 Do we need to make a copy of that and get it back to
3 you, John?

4 MR. LINTON: No.

5 THE COURT: All right. I'll take it under advisement
6 and you'll have my answer by the end of the day.

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CERTIFICATE OF TRANSCRIBER

I, PENNY M. JOHNSON, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording and supporting information; and that I am neither counsel for, related to, nor employed by any of the parties to this case, and I have no interest, financial or otherwise, in its outcome.

November 2, 2022

Penny M. Johnson
Penny M. Johnson
Court Reporter III