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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Carmen Mullen, Circuit Court Judge

Appellate Case No. 2023-000924

KARON MITCHELL, KYLE MITCHELL,
and RABON & RABON, INC., *Respondents,*

v.

JACK RABON, NICOLE RABON, LANE
JEFFRIES, MCNAIR LAW FIRM, P.A., ATID
PROPERTIES, LLC, DAISY RIDGE, LLC,
FRIENDS OF LBS, LLC, SARAH GINSBURG,
JACOB BIDERMAN, GABRIEL YOSEF,
and MICHELLE COHEN, *Defendants*,

Of whom:
JACK RABON and NICHOLE RABON are *Appellants*,

and

ATID PROPERTIES, LLC and JACOB BIDERMAN, *Cross-Claimants,*

v.

MICHELLE COHEN, *Cross-Defendant.*

Motion to Dismiss

Howard W. Anderson III (#100329)
Truluck Thomason LLC
3 Boyce Avenue
Greenville, SC 29601
P: 864-331-1751
howard@truluckthomason.com

Respondents Karon Mitchell and Kyle Mitchell respectfully move to dismiss this appeal. A memorandum of law with appendix is being concurrently filed.

Dated: October 17, 2023

Respectfully submitted,

KARON MITCHELL
KYLE MITCHELL

s/Howard W. Anderson III
Howard W. Anderson III
(#100329)

TRULUCK THOMASON LLC
3 Boyce Avenue
Greenville, SC 29601
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Counsel for Respondents
Karon Mitchell and Kyle Mitchell

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JEFFRIES, MCNAIR LAW FIRM, P.A., ATID
PROPERTIES, LLC, DAISY RIDGE, LLC,
FRIENDS OF LBS, LLC, SARAH GINSBURG,
JACOB BIDERMAN, GABRIEL YOSEF,
and MICHELLE COHEN, *Defendants*,

Of whom:
JACK RABON and NICHOLE RABON are *Appellants*,

and

ATID PROPERTIES, LLC and JACOB BIDERMAN, *Cross-Claimants,*

v.

MICHELLE COHEN, *Cross-Defendant.*

Memorandum in Support of Motion to Dismiss

Howard W. Anderson III (#100329)
Truluck Thomason LLC
3 Boyce Avenue
Greenville, SC 29601
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R. 43, SCRCP 7

Respondents Karon Mitchell and Kyle Mitchell respectfully submit this memorandum in support of their concurrently filed Motion to Dismiss.

PROCEDURAL AND FACTUAL BACKGROUND

I. The Operative Complaint

This appeal arises out of the Court of Common Pleas. The Mitchells, together with Respondent Rabon & Rabon, Inc., filed an action against multiple parties. They included Appellants Jack Rabon and Nicole Rabon (the "Rabons"), as well as against various other Lane Jeffries and the McNair Law Firm, P.A. The Second Amended Complaint was operative complaint at the time of the orders below. It alleged six counts, including civil conspiracy, fraud, and breach of fiduciary duty. [App. 10-22].[1]

II. The Covenant Not to Execute

Although not filed with the Court of Common Pleas until 2023 (and then only in connection with the order at issue on appeal below), the Mitchells and Rabon & Rabon signed a covenant not execute in favor of the Rabons. [App. 35-37]. Under the terms of the covenant, the Mitchells and Rabon & Rabon stated, among other things, that they would not execute on any future judgment obtained in this action against the Rabons but would only collect upon a promissory note—provided that no statements made in an accompanying affidavit were ever adjudicated to have been false:

[1] Because the Record on Appeal has not yet been filed, an appendix of relevant documents has been prepared and attached to this Memorandum. "App." citations are to that appendix.

Plaintiffs do hereby promise and covenant for themselves, their executors, administrators, successors, and assigns not to execute against JACK AND NICOLE RABON, their heirs, administrators, legal representatives, successors or assigns, on any judgment that may be obtained by Plaintiffs on account of any and all claims, demands, damages, costs or expenses, arising from any act, omission, or occurrence, resulting or to result from the above captioned legal matter. Plaintiffs further covenant and promise that if they should attain a judgment against Jack and Nicole Rabon, their recovery will be limited to the Promissory Note agreed upon herein only. Plaintiffs further agree that, upon final winding up and dissolution of the Corporate Entities, Rabon & Rabon, Inc. and MB Boardwalk Entertainment, LLC, their attorney will cause any resulting judgment to be marked and entered as satisfied.

[…]

that they understand the terms of this Agreement and are entering it freely and voluntarily.

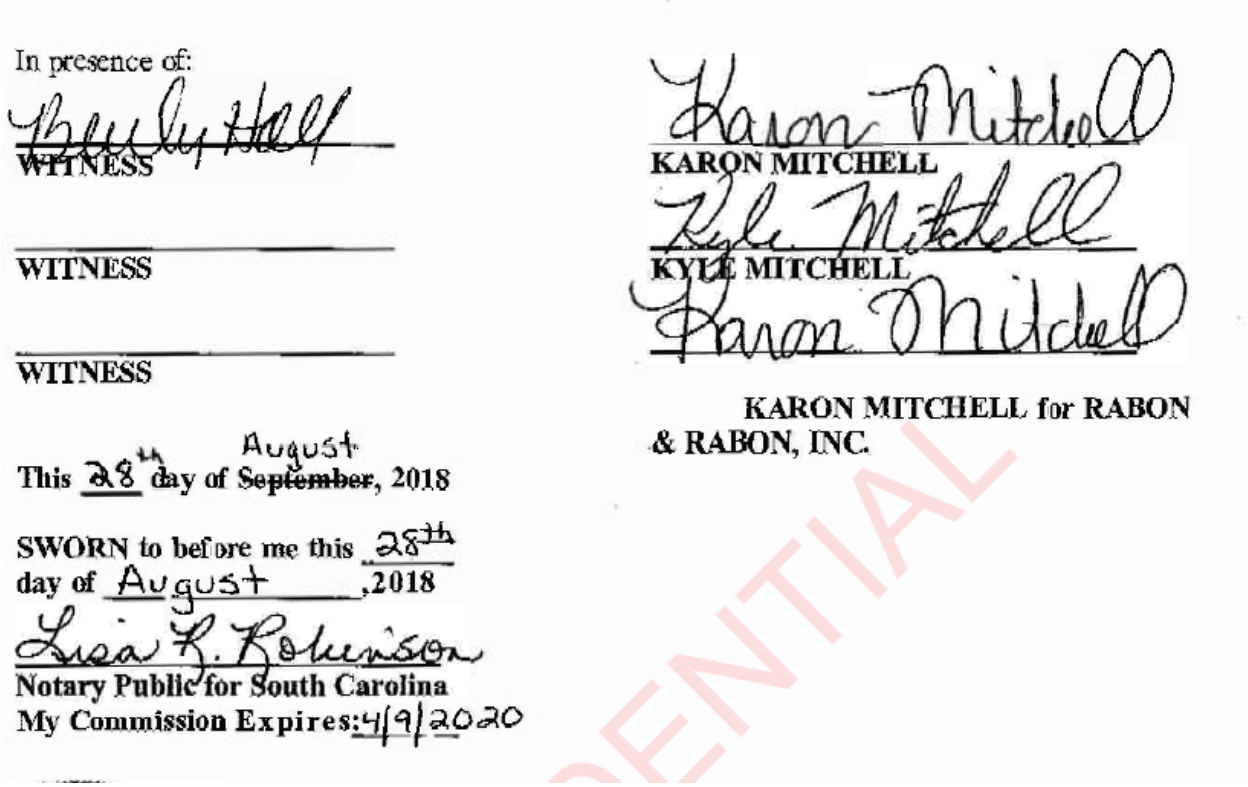
Additional and material consideration is being provided by Jack and Nicole Rabon and relied upon by Plaintiffs, to wit:

(a) Jack Rabon shall execute a promissory note in favor of Rabon & Rabon, Inc. in the amount of $315,000.00;
(b) Both Jack and Nicole Rabon shall swear an affidavit concerning their personal knowledge of the allegations contained in Plaintiffs' Complaint;
(c) Jack and Nicole Rabon shall produce of all emails, text messages and other communications with Sarah Ginsburg, Jacob Biderman, any agent of Atid Properties, LLC, any agent of Friends of LBS, LLC, Gabby Yosef, Michelle Cohen, Lane Jefferies, Henrietta Golding, and any other agent of McNair Law Firm to Plaintiffs immediately upon execution of this agreement.

IN THE EVENT THAT ANY PORTION OF THE AFFIDAVIT(S) IS FOUND TO BE FALSE OR UNTRUE, OR ANY OF THE DOCUMENTS TO BE FRAUDULENTLY CREATED, THIS AGREEMENT IS NULL AND VOID.

[App. 35-36]. The filed version contains no countersignature from the Rabons (who were

pro se at the time, as recited in the document), nor did it contain a signature from the Mitchells' and Rabon & Rabon's counsel below:



In presence of:

WITNESS

WITNESS

WITNESS

This 28th day of ~~September~~ August, 2018

SWORN to before me this 28th day of August, 2018

Notary Public for South Carolina
My Commission Expires: 4/9/2020

KARON MITCHELL

KYLE MITCHELL

KARON MITCHELL for RABON & RABON, INC.

[App. 35-37].

III. The Stipulations of Dismissal Following Mediation

On August 3, 2021, court-annexed mediation occurred. [App. 27]. The mediator reported that the case was "partially settled: *some parties, but not all, will be dismissed; case to remain open."* [App. 27 (original emphasis)].

A little more than three weeks later, a stipulation of dismissal was filed. [App. 28-29]. Although the wording of that voluntary dismissal indicated that the "matter" was to be

dismissed, only counsel for the Mitchells, Rabon & Rabon and the counsel for the McNair Law Firm and Lane Jeffries were signatories—never the Appellant Rabons:

WE SO STIPULATE AND CONSENT:

By: s/Tucker S. Player
Tucker S. Player
SC Bar No. 16217
Player Law Firm, LLC
512 Village Church Dr
Chapin, SC 29036
tucker@playerlawfirm.com
(803) 315-6300
Attorney for Plaintiffs

By: s/J. Calhoun Watson
J. Calhoun Watson
(SC Bar No. 10089)
cwatson@robinsongray.com
Robert E. Stepp
(SC Bar No. 5335)
rstepp@robinsongray.com
ROBINSON GRAY STEPP & LAFFITTE, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400 Telephone
(803) 929-0300Fax
Attorneys for Defendants McNair Law Firm, P.A. and Lane Jefferies

[App. 26].

Later, that stipulation was amended—again, signed by counsel for the Mitchells, Rabon & Rabon, the McNair Law Firm, Lane Jeffries, but not the Appellant Rabons—to reflect that the dismissal was "with regard to the following Defendants: Lane Jefferies and McNair Law Firm, P.A. All other Defendants and claims remain pending for resolution by the presiding Court." [App. 29].

IV. The Motion to Declare the Covenant Not to Execute Void

Following an evidentiary hearing at which the Rabons pleaded their Fifth Amendment privilege against self-incrimination, the circuit court found that the covenant not to execute, which contained an express recission clause, was deemed rescinded because "the misrepresentations in Nicole Rabon's affidavit regarding her knowledge of fraud and her involvement in acting on behalf of Rabon & Rabon as evidenced by the exhibits, is substantial and material…." [App. 2-3].

V. The Notice of Appeal Before any Trial Has Been Held.

No trial has yet been held on any of the claims against the Appellant Rabons. Consequently, no judgment has yet entered. Nonetheless, the Rabons have appealed the declaration that the covenant not to sue is rescinded.

ARGUMENT

I. No Statutory Grant of Jurisdiction Exists.

By statute the General Assembly has created appellate jurisdiction with respect to four general categories of appeals:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
>
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
>
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code § 14-3-330. *See also Ashenfelder v. City of Georgetown*, 389 S.C. 568, 573 (Ct. App. 2010) (confirming that S.C. Code § 14-3-330 controls this Court's grant of jurisdiction) (citation omitted).

Appellants cannot show that any of those sections apply.

First, the order confirming the rescission of the covenant not to execute is interlocutory; no final judgment has yet entered. Until nothing is left for the circuit court to do in the action, no final judgment can issue—regardless as to whether some intermediate legal issues may have been decided. *See, e.g., Mid-State Distribs. v. Century Imps.*, 310 S.C. 330, 335 (1993) ("If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory. If a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment." (citation omitted)). Here, the circuit court has not yet held a trial on any of the claims against the Rabons. Thus, more is left to do in the circuit court.

Second, while some types of interlocutory orders are immediately appealable, the order rescinding the covenant not to execute is not one of those types of orders.

The order does not involve the "merits" of the claims against the Rabons at all. If the covenant had ever been enforceable,[2] its express terms contemplated "attain[ing] a judgment against Jack and Nichole Rabon," albeit one that would be satisfied via collection from a promissory note. [App. 35]. A covenant not to sue is a mechanism for a plaintiff to reach insurance coverage and/or recover from joint tortfeasors; it is not a release. *See, e.g.*, *In re Schiller*, 421 S.C. 404, 407 (2017) (per curium) ("[The disciplined attorney] discussed with Client the possibility of pursuing the at-fault driver's personal assets but Client understood the only way to secure payment more quickly was to accept the limits of the driver's insurance policy by way of a covenant not to execute and accept the limits of the UIM coverage on a policy release."); *Ackerman v. Travelers Indem. Co.*, 318 S.C. 137, 147

[2] "While a covenant not to execute is not a release, it is nonetheless a settlement between the parties to the agreement." *Wade v. Berkeley County*, 348 S.C. 224, 228 (2002) (citation omitted). In this state—without exception—settlement agreements are void unless they comply with R. 43(k), SCRCP. *See, e.g.*, *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637 (2006) (holding that even partial performance or party admission as to the existence of the agreement would not excuse non-compliance with the formalities of R. 43(k), SCRCP). Thus, settlement agreements must be "reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel." R. 43(k), SCRP. Because neither the Rabons nor counsel for the Mitchells and Rabon & Rabon countersigned the Mitchells' signature and because the document was not reduced to a court order, the document does not comply with the rules.

(Ct. App. 1995) ("The Ackermans are still entitled to recover damages from Scott; they merely agreed not to legally enforce the judgment.").

Nor is the order below one that "(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action." S.C. Code § 14-3-330(2). The Rabons will still have the right to appeal if a judgment is entered against them in the future. Making them wait does not injure their substantial rights, but does promoote the General Assembly's determination that, absent the narrow statutory exceptions, appeals are more efficient once all issues can be considered at the same time. *See Knowles v. Standard Sav. & Loan Asso.*, 274 S.C. 58, 59 (1976) (noting the "debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy" (quotation omitted)).

II. Claims About the Supposed Effect of the Improperly Executed Stipulation of Dismissal Is No Basis to Exceed this Court's Limited Statutory Jurisdiction.

In the Rabons' Initial Brief, they claim that the stipulation of dismissal signed with the McNair Law Firm and Lane Jeffries somehow precluded the circuit court from beginning its consideration of the claims against the Rabons. On the merits, that claim fails. To be effective, stipulations of dismissal require signature "by *all* parties who have appeared in the action from all parties who have appeared." R. 41(a)(1)(B), SCRCP (emphasis added). The Rabons, however, never signed a stipulation of dismissal (which would have been inconsistent with the potential judgment that the covenant to execute contemplated). In any

event, the order from the circuit court below does not show that the Rabons ever complained below. That means that the issue was tried by implied consent. R. 15(b), SCRCP. ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.").

In any event, complaining that the circuit court has supposedly exceeded its jurisdiction is not a basis for a premature appeal. *See generally Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470 (1991) ("Avoidance of trial is not a 'substantial right' entitling a party to immediate appeal of an interlocutory order.") (citation omitted).

CONCLUSION

Because no appellate jurisdiction exists, this Court should dismiss the appeal.

Dated: October 17, 2023

Respectfully submitted,

KARON MITCHELL
KYLE MITCHELL

s/Howard W. Anderson III
Howard W. Anderson III
(#100329)

TRULUCK THOMASON LLC
3 Boyce Avenue
Greenville, SC 29601
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howard@truluckthomason.com

Counsel for Respondents
Karon Mitchell and Kyle Mitchell

APPENDIX

ELECTRONICALLY FILED - 2023 Mar 09 3:24 PM - HORRY - COMMON PLEAS - CASE#2017CP2605757

STATE OF SOUTH CAROLINA)) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS 15th JUDICIAL CIRCUIT C.A. No. 2017-CP-26-05757
Karon Mitchell, Kyle Mitchell, and Rabon & Rabon, Inc., Plaintiffs, vs. Jack Rabon, Nicole Rabon, Lane Jeffries, McNair Law Firm, P.A., Atid Properties, LLC, Daisy Ridge, LLC, Friends of LBS, LLC, Sarah Ginsburg, Jacob Biderman, Gabriel Yosef, and Michelle Cohen, Defendants. Atid Properties, LLC and Jacob Biderman, Cross-Claimants, vs. Michelle Cohen, Cross-Defendant.	ORDER GRANTING DECLARATORY RELIEF

This Horry County case and its companion cases are assigned to me as Business Court matters. This Motion for Declaratory Judgment was heard on February 6th 2023 in Beaufort County by consent of all parties. Karon and Kyle Mitchell represented by Lauren Martel, Tucker Player representing Rabon & Rabon, and Nicole and Jack Rabon represented by their counsel, Alan Lazenby, were all present. The Plaintiffs move this Court for Declaratory Relief to rescind the Covenant Not to Execute entered between the Mitchells and the Rabons due to material false

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statements in the Affidavit of Nicole Rabon. Specifically, the language contained in the Covenant Not to Execute states the following:

> IN THE EVENT THAT ANY PORTION OF THE AFFIDAVIT(S) IS FOUND TO BE FALSE OR UNTRUE, OR ANY OF THE DOCUMENTS TO BE FRAUDULENTLY CREATED, THIS AGREEMENT IS NULL AND VOID.

The Plaintiffs made as exhibits to this motion the Covenant Not to Execute, the Affidavits of Nicole Rabon and Jack Rabon, letters sent on behalf of Rabon & Rabon authored by Nicole Rabon, a Lis Pendens signed by Nicole Rabon, bank statements for "Daisy Ridge," wire transfers from Bank of Austria and a grouping of bank statements including ATM withdrawals.

At the hearing, the following witnesses were called by the Plaintiffs:

1. Jack Rabon invoked his Fifth Amendment right not to testify under oath;
2. Nicole Rabon invoked her Fifth Amendment right not to testify under oath;
3. Karon Mitchell testified as to the evidence demonstrating false statements on the Affidavit of Nicole Rabon and her chronology of loss as a shareholder. Ms. Mitchell testified the Plaintiffs relied upon the statements contained in Nicole Rabon and Jack Rabons' Affidavits to be true and accurate when they entered into the Covenant Not to Execute. Testimony at this hearing revealed Nicole Rabon had knowledge of fraudulent acts by attorney Lane Jefferies and Jack Rabon and that she acted on behalf of Rabon & Rabon which is contrary to what she stated in her Affidavit.

I find and conclude the Covenant Not to Execute is viewed as a contract and general contract principles should be applied when construing it. *Pee Dee Stores, Inc. v. Doyle,* 672 S.E.2d 700, 802-803 (S.C. Ct. App. 2008). I further find that contrary to Defendants' arguments, the misrepresentations in Nicole Rabon's affidavit regarding her knowledge of fraud and her involvement in acting on behalf of Rabon & Rabon as evidenced by the exhibits, is substantial and

material and therefore the request for Declaratory Judgment by the Plaintiffs is granted. The Covenant Not to Execute is hereby rescinded.

IT IS SO ORDERED!

_____
Carmen Mullen, Presiding Judge
15th Judicial Circuit
March 7, 2023

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Horry Common Pleas

Case Caption: Karon Mitchell , plaintiff, et al VS Jack Rabon , defendant, et al

Case Number: 2017CP2605757

Type: Order/Other

So Ordered

s/Carmen T Mullen 2142

ELECTRONICALLY FILED - 2023 May 08 8:45 AM - HORRY - COMMON PLEAS - CASE#2017CP2605757

STATE OF SOUTH CAROLINA)) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS 15th JUDICIAL CIRCUIT
Karon Mitchell, Kyle Mitchell, and Rabon & Rabon, Inc., Plaintiffs, vs. Jack Rabon, Nicole Rabon, Lane Jeffries, McNair Law Firm, P.A., Atid Properties, LLC, Daisy Ridge, LLC, Friends of LBS, LLC, Sarah Ginsburg, Jacob Biderman, Gabriel Yosef, and Michelle Cohen, Defendants. Atid Properties, LLC and Jacob Biderman, Cross-Claimants, vs. Michelle Cohen, Cross-Defendant.	C.A. No. 2017-CP-26-05757 AMENDED ORDER GRANTING DECLARATORY RELIEF

Counsel for Defendants Jack and Nicole Rabon timely filed a Motion to Alter or Amend the March 7, 2023, Order Granting Declaratory Relief. Having considered the Defendants' motion and without a hearing, this Court Amends its prior order to add the following:

The Covenant Not to Execute required Jack and Nicole Rabon to provide affidavits and to provide documentation to support their statements. The Covenant further provided that if any portion of the affidavits was found to be false or untrue, or if the documents were found to be fraudulently created, then the Covenant would be null and void. I find Nicole Rabon's

misrepresentations in her affidavit as to her knowledge and participation in the fraudulent acts committed by Jack Rabon, Lane Jefferies, herself, and others in this case are material and caused harm to the Mitchells in their attempt to settle the case with Lane Jefferies and McNair. Lane Jefferies would have known Nicole Rabon lied in her affidavit about her involvement in acting on behalf of Rabon & Rabon, and could have used that dishonesty to influence Jack or Nicole Rabon, or both, to change their testimony had the case not settled with Jefferies and McNair. Further, while a settlement of three million dollars may appear significant, fraud of this magnitude might have garnered a larger settlement against Jefferies and McNair had this misrepresentation not occurred as testified to by attorney Tucker Player. I further find that the case law raised by Defendants, *Ackerman v. McMillan*, 314 S.C. 268, 442 S.E.2d 618 (Ct. App. 1994) and *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 440 S.E.2d 364 (1993), have no application to the case before me.

In *Ackerman*, a buyer of certain real property filed suit against the sellers, alleging a breach of contract after the sellers decided to withdraw their offer of sale. 314 S.C. at 269, 442 S.E.2d at 618. While the special referee found that the buyer was not entitled to damages because she failed to apply for financing pursuant to the contract of sale, *id.* at 270-71, 442 S.E.2d at 619, the Court of Appeals found this failure was not the reason the sellers withdrew their offer of sale, *id.* at 271, 442 S.E.2d at 619. Accordingly, the buyer's breach was insufficient for the sellers to rescind their contract. *Id.* In addition, the court found rescission was not proper because the purpose of the contract was not frustrated since the buyer nonetheless secured financing prior to closing. *Id.* at 271, 442 S.E.2d at 620. *Ackerman* is clearly distinguishable under these facts from the present case.

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In *Kiriakides*, a landlord commenced an ejectment action against its lessee to collect a miniscule amount of past rent owed due to a rent increase under a commercial lease. 312 S.C. at 273-74, 440 S.E.2d at 365. The landlord argued that the past rent owed permitted it to eject the lessee and to forfeit the lease "no matter how trivial, inadvertent, non-prejudicial, or technical the breach." *Id.* at 275, 440 S.E.2d at 366. The South Carolina Supreme Court rejected this argument and held that a forfeiture of a commercial lease was not enforceable where the breach was immaterial. *Id.* at 276, 440 S.E.2d at 366. *Kiriakides* is also distinguishable from this case because *Kiriakides* is an ejectment action based on a miniscule portion of unpaid rent from a commercial lease.

As far as the equitable argument made by the Defendants alleging the Rabons performed under the Covenant Not to Execute and provided "voluminous information" subjecting Jack Rabon to criminal liability (for which he has never been charged nor prosecuted) and assisted in securing a settlement with Jefferies and McNair, it must be remembered that: (1) Jack and Nicole Rabon caused the fraud to occur in the first place and (2) that it is Jack Rabon who accused his sister Karon Mitchell of stealing from the family business, starting this flurry of litigation wherein the Rabons at every juncture of this litigation have had unclean hands.

Finally, as to Defendants' characterization of this motion for Declaratory Judgment as the "legal equivalent to Lucy pulling the football away from Charlie Brown," what the Defendants fail to recognize that they are not of similar character to Charlie Brown, but rather Lucy, and are the authors of their financial downfall due to their own greed.

It is for these aforementioned reasons that this Court amends by adding to its March 7, 2023, Order Granting Declaratory Relief.

IT IS SO ORDERED!

Carmen Mullen
15th Judicial Circuit
May 5, 2023

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Horry Common Pleas

Case Caption: Karon Mitchell , plaintiff, et al VS Jack Rabon , defendant, et al

Case Number: 2017CP2605757

Type: Order/Amend

So Ordered

s/Carmen T Mullen 2142

ELECTRONICALLY FILED - 2017 Oct 23 11:24 AM - HORRY - COMMON PLEAS - CASE#2017CP260757

IN THE STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	
Karon Mitchell, Kyle Mitchell, and Rabon &) Rabon, Inc.,)	Case Number: 2017-CP-26-05757
Plaintiff,)	
vs.)	**SECOND AMENDED COMPLAINT**
)	**(JURY TRIAL DEMANDED)**
Jack Rabon, Nicole Rabon, Lane Jeffries,) McNair Law Firm, P.A., Atid Properties,) LLC, Daisy Ridge, LLC, Friends of LBS,) LLC, South State Bank, Sarah Ginsburg,) Jacob Biderman, Gabriel Yosef, and) Michelle Cohen,)	
Defendants.)	
_____)	

CIV-591-02

Plaintiffs complaining of Defendants hereby allege:

PARTIES AND JURISDICTION

1. Plaintiff Karon Mitchell is a citizen and resident of the County of Horry, State of South Carolina.

2. Plaintiff Kyle Mitchell is a citizen and resident of the County of Horry, State of South Carolina.

3. Plaintiff Rabon & Rabon, Inc. is a South Carolina Corporation with its principal place of business located in the County of Horry, State of South Carolina. This action is being brought in part as a derivative suit, pursuant to S.C. Code §33-7-400, by Kyle Mitchell, a shareholder.

4. Defendant Jack Rabon is a citizen and resident of Horry County, State of South Carolina.

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5. Defendant Nicole Rabon is a citizen and resident of Horry County, State of South Carolina.

6. Defendant Lane Jeffries is a citizen and resident of Horry County, State of South Carolina.

7. Defendant McNair Law Firm, P.A. is a South Carolina professional association and can be served via its registered agent for service of process, Melissa B. Schumpert, 1221 Main Street, Columbia, South Carolina 29201.

8. Defendant Atid Properties, LLC, is a South Carolina limited liability company and can be served via its registered agent for service of process, Clear Accounting Solutions, LLC, 4612 Oleander Drive, Suite 201, Myrtle Beach, South Carolina, 29577.

9. Defendant Friends of LBS, LLC, is a South Carolina non-profit company and can be served via its registered agent for service of process, Leah Aizenman, 812 Green Bay Trl, Myrtle Beach, South Carolina, 29577.

10. Defendant Daisy Ridge, LLC is a South Carolina limited liability company and can be served via its registered agent for service of process, E. Robert Frenz, Jr., 111 Executive Center Drive, Suite 231, Columbia, South Carolina, 29210.

11. Defendant South State Bank is a South Carolina Corporation and can be served via its registered agent, V. Nicole Comer, 700 Gervais Street, Columbia, SC 29201.

12. Defendant Sarah Ginsburg is a citizen and resident of Horry County, State of South Carolina and, upon information and belief, lives in the State of New York.

13. Upon information and belief, Defendant Jacob Biderman is a citizen and resident of Vienna, Austria.

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14. Defendant Gabriel "Gabi" Yosef is a citizen of Chile.

15. Defendant Michelle Cohen is a citizen and resident of Horry County, State of South Carolina.

16. Venue and jurisdiction are proper before this Court.

FACTUAL BACKGROUND

17. The Estate of Peggy Jo Hardee Rabon was opened on September 15, 2014, file number 2014-ES-26-01933.

18. Plaintiff Karon Mitchell is an heir and beneficiary of the Estate of Peggy Jo Hardee Rabon [hereinafter the "Estate"].

19. Plaintiff Kyle Mitchell is a shareholder of Plaintiff Rabon & Rabon, Inc.

20. Defendant Jack Rabon is currently the Personal Representative for the Estate and acting President and Vice President of Rabon & Rabon, Inc.

21. At all times relevant to this Complaint, Defendant Lane Jeffries was an employee working for Defendant McNair Law Firm, PA.

22. Defendant Jacob Biderman is the alter-ego for Defendants Friends of LBS, LLC and Atid Properties, LLC.

23. Prior to her death, Peggy Jo Hardee Rabon was the majority shareholder in Rabon & Rabon, Inc.

24. In October 2014, Defendant Jack Rabon used his position as the personal representative of the Estate to vote the decedent's shares in favor of him being elected the President and Vice-President of Rabon & Rabon, Inc.

25. On August 20, 2015, Defendant Jack Rabon made a motion in the Horry County Probate

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Court to sell two properties owned by Rabon & Rabon, Inc. A copy of the motion is attached as **Exhibit A**. The properties to be sold are described as follows:

> All that certain piece, parcel or lot of land situate, lying and being in the City of Myrtle Beach, Dogwood Neck Township, Horry County, South Carolina, shown and designated as Lot Three (3) of Block Nineteen (19) according to a map or plat of Hotel Section of Myrtle Beach, as made in June and July if 1926, under the supervision of Stanley H. Wright, Engineer, which map or plat is recorded in the Clerk of Court's Office for Horry County in Plat Book 1 at page 84, reference to which is hereby made as a part and parcel of this description.
>
> TMS # 181-11-03-005/ PIN # 444-01-04-0044 [hereinafter the "Brick House"]
>
> All those certain pieces, parcels or lots of land, with improvements thereon, situate, lying and being in the City of Myrtle Beach, Dogwood Neck Township, Horry County, South Carolina, shown and designated as Lot Numbers Seventeen (17) and Eighteen (18) of Block Nineteen (19), as shown on a map of the Hotel Section of Myrtle Beach made in June and July 1926, under the supervision of Stanley H. Wright, Engineer, and recorded in the office of the RMC for Horry County, South Carolina, in Plat Book 1 at page 84, reference to which is craved as forming a part of these presents.
>
> TMS # 181-11-03-002 / PIN # 444-01-04-0051
>
> All that certain piece, parcel or lot of land, with improvements thereon, situate, lying and being in the City of Myrtle Beach, Dogwood Neck Township, Horry County, South Carolina, shown and designated as Lot Number Two (2) of Block Nineteen (19), as shown on a map of the Hotel Section of Myrtle Beach made in June and July 1926, under the supervision of Stanley H. Wright, Engineer, and recorded in the office of the RMC for Horry County, South Carolina, in Plat Book 1 at page 84, reference to which is craved as forming a part of these presents.
>
> TMS # 181-11-03-004 / PIN # 444-01-04-0043[collectively hereinafter "Sea Palms 3"]

26. In his motion and in direct representations to Plaintiffs, Defendant Jack Rabon represented

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that Defendant Friends of LBS, LLC agreed to pay $145,000.00 to Rabon & Rabon, Inc. for the Brick House and $397,000.00 for Sea Palms #3, for a total of $542,000.00.

27. Defendant Lane Jeffries represented to Plaintiffs that Defendant Friends of LBS, LLC agreed to pay $145,000.00 to Rabon & Rabon, Inc. for the Brick House and $397,000.00 for Sea Palms #3, for a total of $542,000.00. See **Exhibit B**.

28. The representations made by Defendants Jack Rabon and Defendant Jeffries were false.

29. Defendants Jack Rabon and Lane Jeffries knew the aforementioned representations were false at the time they were made to Plaintiffs.

30. Friends of LBS, LLC actually agreed to pay $777,000.00 for the Brick House and Sea Palms #3.

31. In August 2015, Plaintiff Karon Mitchell contacted Defendant Ginsburg and Defendant Biderman about the proposed sales contracts. Both Defendants Ginsburg and Defendant Biderman confirmed that only $542,000.00 was being paid for the Brick House and Sea Palms #3. These statements were false.

32. On August 25, 2017, Plaintiffs executed a "Written Consent of Shareholders in Lieu of a Shareholders' Meeting of Rabon & Rabon, Inc." [attached as **Exhibit C**] based on the false representations of Defendants Jack Rabon, Lane Jeffries, Sara Ginsburg and Jacob Biderman. **Exhibit C** consented to the sale of the Brick House and Sea Palms #3 to Friends of LBS, LLC for $542,000.00.

33. Based on **Exhibit C**, the Probate Court issued a Consent Order approving of the sale of the Brick House and Sea Palms #3 to Friends of LBS, LLC on August 26, 2015. **Exhibit D**.

34. On August 26, 2015, Defendant Sarah Ginsburg organized Defendant Atid Properties, LLC

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for herself and Defendant Biderman. **Exhibit E**.

35. Defendant Friends of LBS, LLC assigned its rights to purchase the Brick House and Sea Palms #3 to Atid Properties, LLC.

36. On August 27, 2015, E. Robert Frenz, Jr. organized Defendant Daisy Ridge, LLC for Defendants Jack Rabon and Nicole Rabon using a fraudulent address in Greenville, South Carolina. **Exhibit F**.

37. Defendant Lane Jeffries referred Defendant Jack Rabon to E. Robert Frenz, Jr. to perform the creation of Defendant Daisy Ridge, LLC. **Exhibit G**.

38. Defendant Jack Rabon informed E. Robert Frenz, Jr. that Defendant Daisy Ridge, LLC maintained a physical office at 745 North Pleasantburg Drive, Greenville, South Carolina. This representation was false. **Exhibit H**.

39. Prior to the execution of the contract for the sale the Brick House and Sea Palms #3, Defendants Biderman, Ginsburg, Jeffries, Jack Rabon and Nicole Rabon all agreed that Friends of LBS, LLC would pay $542,000.00 to Plaintiff Rabon & Rabon, Inc. as per the sales contracts, and an additional $235,000.00 to Defendants Jack, Nicole Rabon, and Lane Jeffries outside of the closing. **Exhibit I**.

40. Defendant Lane Jeffries stated that the money outside the closing was necessary to make sure that Plaintiff Karon Mitchell never received any of the proceeds.

41. Defendant Michelle Cohen owns MC Real Estate Company, LLC and was the real estate agent for the sale of the Brick House and Sea Palms #3.

42. Defendant Gabi Yosef is the brother of Defendant Cohen and was managing the Sea Palms Hotel #4 at the time of the sale of the Brick House and Sea Palms #3.

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43. On or about September 1, 2015, Defendant Biderman transferred $100,000.00 to a Bank of Chile account in the name of Defendant Yosef. Upon the transfer of the $100,000.00 to the Bank of Chile, Defendant Yosef gave $100,000.00 in cash to Defendant Jack Rabon, Defendant Nicole Rabon, and Defendant Lane Jeffries.

44. Defendant Nicole Rabon took the $100,000.00 in cash to Defendant South State Bank and used the counting machines there to verify the sum.

45. Defendant Nicole Rabon used the equipment at Defendant South State Bank to count the $100,000.00 as an authorized employee of the bank, during normal working hours for the bank.

46. Upon verifying the sum of $100,000.00, Defendant Nicole Rabon placed the cash into a sealed envelope, wrote across the seal, and gave the envelope back to Gabi Yosef.

47. The real estate closing for the Brick House and Sea Palms #3 occurred on September 3, 2015.

48. The closing attorney for the transactions was Melanie Emery of Emery Law, LLC.

49. At no time did any Defendant reveal to the closing attorney that any funds were being paid outside of the closing. **Exhibit J**.

50. Defendants Atid Properties, LLC, Ginsburg and Biderman paid a total $548,106.84 to Emery Law, LLC via wire transfers and checks at the closing for the Brick House and Sea Palms #3. **Exhibit K**.

51. None of the funds paid to Defendants Jack Rabon, Nicole Rabon, Lane Jeffries or Daisy Ridge, LLC were listed on the HUD-1 Settlement Statement for the closing.

52. Defendant McNair Law Firm, LLC represented the Seller, Plaintiff Rabon & Rabon, Inc. with regards to the closing for the Brick House and Sea Palms #3.

53. The closing attorney for closing for the Brick House and Sea Palms #3 received an attorney

fee of $1250.00.

54. Defendant Michelle Cohen was paid $5000.00 in real estate commissions for the closing.

55. Defendant McNair Law Firm, PA received an attorney fee of $12,000.00 for the closing for the Brick House and Sea Palms #3.

56. Defendant Biderman initiated a wire transfer of $135,000.00 to a PNC Bank account in the name of Defendant Daisy Ridge, LLC on September 2, 2015 from his bank in Austria. **Exhibit L**.

57. The only signatories on the PNC Bank account in the name of Daisy Ridge, LLC are Defendants Jack Rabon and Nicole Rabon. **Exhibit M.**

58. The wire transfer from Defendant Biderman was categorized as a "loan" to avoid suspicion and hide its actual purpose. **Exhibit N**.

59. The wire transfer initiated by Defendant Biderman did not reach the PNC bank account of Daisy Ridge, LLC on September 3, 2017.

60. Defendants Jack Rabon, Nicole Rabon, and Lane Jeffries demanded that additional security be paid for the $135,000.00 wire transfer before they would close on the property on September 3, 2017.

61. Defendant Biderman issued three checks to Defendant McNair Law Firm, PA in the amount of $135,000.00 on the day of the closing. These checks were never given to the closing attorney and were intended as security for the wire transfer from Biderman initiated in Austria.

62. The three checks totaling $135,000.00 were given to Defendant Lane Jeffries, who signed a receipt for the three checks on September 3, 2017. **Exhibit O**.

63. On September 3, 2015, Defendants Ginsburg and Jack Rabon signed their names to the HUD-1 Statement drafted by Emery Law, LLC that represented $548,106.84 was paid for the

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properties and closing costs. These representations were false as $783,106.84 was actually paid for the properties and closing costs.

64. Defendant Jack Rabon executed two separate Affidavits of Taxable Transfers, sworn under oath, that indicated only $542,000.00 was paid to purchase the Brick House and Sea Palms #3. These affidavits were false as $777,000.00 was paid to purchase these properties. **Exhibit P**.

65. After the closing was complete, Defendants Jack Rabon, Nicole Rabon, Lane Jeffries, Michelle Cohen, and Gabi Yosef met at a separate location where Gabi Yosef handed the sealed envelope with $100,000.00 cash to Jack Rabon.

66. The $100,000.00 in cash paid to Defendants Jack Rabon, Nicole Rabon and Lane Jeffries was never reported to the Probate Court, any Plaintiff, the closing attorney, or any governmental authority.

67. The $135,000.00 paid via wire transfer to Daisy Ridge, LLC for the benefit of Defendants Jack Rabon, Nicole Rabon and Lane Jeffries was never reported to the Probate Court, any Plaintiff, the closing attorney, or any governmental authority.

68. Defendants Jack Rabon, Nicole Rabon, and Lane Jeffries attempted to perpetrate an identical scheme of receiving illegal monies for properties owned by MB Boardwalk Entertainment, LLC as demonstrated by a proposal written by Nicole Rabon. **Exhibit Q**.

69. Defendant McNair Law Firm, PA is liable through the legal concept of *respondeat superior* for the actions of Defendant Jeffries as its employee during all times relevant to the allegations herein.

70. Defendant South State Bank is liable through the legal concept of *respondeat superior* for the actions of Defendant Nicole Rabon as its employee during all times relevant to the allegations

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herein.

71. Defendant Friends of LBS, LLC is liable directly and through the legal concept of agency for the actions of Defendants Biderman and Ginsburg as its agents during all times relevant to the allegations herein

72. Plaintiffs first learned of the actions of Defendants in March 2017.

FOR A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Civil Conspiracy)

73. The allegations of the previous paragraphs are hereby repeated and incorporated herein.

74. All Defendants combined and conspired in a common scheme cause injury to Plaintiffs.

75. As a direct and proximate result of Defendants' conspiracy, Plaintiffs suffered special damages, to wit: the loss of $235,000.00 in proceeds from the sale of the Brick House and Sea Palms 3 and all associated costs. In addition, Plaintiffs are entitled to punitive damages against all Defendants.

FOR A SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Fraud in a Probate Proceeding, S.C. Code § 62-1-1016)

76. The allegations of the previous paragraphs are hereby repeated and incorporated herein.

77. All Defendants combined and conspired in a common scheme cause injury to Plaintiffs.

78. The common scheme utilized by Defendants was a form of fraud as defined by S.C. Code § 62-1-106.

79. All Defendants benefitted in some way through the fraudulent scheme perpetrated against Plaintiffs.

80. The fraudulent scheme was used in connection with a probate proceeding and/or used to circumvent the provisions and purposes of this code.

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81. As a direct and proximate result of the fraudulent scheme, Plaintiffs suffered injury and are entitled pursuant to S.C. Code § 62-1-106 to recover all actual damages to the extent of the benefit received by each Defendant. In addition, Plaintiffs are entitled to punitive damages against all Defendants.

FOR A THIRD CAUSE OF ACTION AGAINST DEFENDANTS JACK RABON, LANE JEFFRIES, ATID PROPERTIES, LLC, MCNAIR LAW FIRM, PA, MICHELLE COHEN, JACOB BIDERMAN, FRIENDS OF LBS, LLC AND SARAH GINSBURG
(Fraud)

82. The allegations of the previous paragraphs are hereby repeated and incorporated herein.

83. Defendants made representations to Plaintiffs that were false.

84. Defendants made representations to Plaintiffs that were material to their agreement to sell the Brick House and Sea Palms #3.

85. Defendant knew their representations were false and intended Plaintiffs to rely on those false representations and agree to the sale of the Brick House and Sea Palms #3.

86. Plaintiffs did justifiably rely on the false representations of Defendants and did not know that those representations were false.

87. As a direct and proximate result of Defendants' fraud, Plaintiffs suffered special damages, to wit: the loss of $235,000.00 in proceeds from the sale of the Brick House and Sea Palms #3 and all associated costs. In addition, Plaintiffs are entitled to punitive damages as determined by a jury.

FOR A FOURTH CAUSE OF ACTION AS TO DEFENDANTS ATID PROPERTIES, LLC AND JACK RABON
(Voidable Transfer pursuant to S.C. Code § 62-3-713)

88. The allegations of the previous paragraphs are hereby repeated and incorporated herein.

89. The sale of the Brick House and Sea Palms #3 constituted a substantial conflict of interest on behalf of the personal representative of the Estate and is therefore voidable pursuant to S.C. Code §

62-3-713.

90. Defendant Atid Properties, LLC was aware of the fraud, did not act in good faith, and is not entitled to protection pursuant to S.C. Code § 62-3-714.

91. The sale of the Brick House and Sea Palms #3 that occurred on September 3, 2015 is null and void and must be rescinded.

FOR A FIFTH CAUSE OF ACTION AS TO DEFENDANT ATID PROPERTIES, LLC AND JACK RABON

(Voidable Transfer pursuant to S.C. Code § 38-8-310)

92. The allegations of the previous paragraphs are hereby repeated and incorporated herein.

93. The sale of the Brick House and Sea Palms constituted a substantial conflict of interest on behalf of the President of Rabon & Rabon, Inc. and is therefore voidable pursuant to S.C. Code § 38-8-310.

94. Defendant Atid Properties, LLC was aware of the fraud, did not act in good faith, and is not entitled to protection as a bonafide innocent purchaser.

95. The sale of the Brick House and Sea Palms #3 that occurred on September 3, 2015 is null and void and must be rescinded.

FOR A SIXTH CAUSE OF ACTION AS TO DEFENDANT JACK RABON

(Breach of Fiduciary Duty)

96. The allegations of the previous paragraphs are hereby repeated and incorporated herein.

97. Defendant's actions constitute a breach of his statutory duties to the Estate and all beneficiaries of the Estate.

98. Defendant's actions constitute a breach of his statutory duties to the corporation, Rabon & Rabon, Inc., and all shareholders of the corporation.

99. As a direct and proximate result of these breaches of fiduciary duties, Plaintiffs Kyle

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Mitchell and Rabon & Rabon, Inc. suffered and continue to suffer injury.

100. Pursuant to S.C. Code § 62-3-712, Plaintiff Karon Mitchell is entitled to recover all damages suffered from Defendant Jack Rabon for these breaches of fiduciary duty.

101. Pursuant to S.C. Code § 33-8-300, Plaintiffs Kyle Mitchell and Rabon & Rabon, Inc. are entitled to recover all damages suffered from Defendant Jack Rabon for these breaches of fiduciary duty.

WHEREFORE, Plaintiffs demand a jury trial and pray for an award of actual damages, compensatory damages, special damages, and punitive damages against all Defendants. In addition, Plaintiffs pray this Court issue an Order voiding the sale of both the Brick House and Sea Palms #3, and award all attorney's fees and costs against Defendants, all in an amount to be determined by a jury.

RESPECTFULLY SUBMITTED

PLAYER LAW FIRM, LLC

/s/Tucker S. Player, Esq.
S.C. Bar # 16217
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Columbia, SC 29210
(803) 772-8008-telephone
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Tucker@playerlawfirm.com
Attorney for Plaintiffs

Columbia, South Carolina
This 19th day of October, 2017

ELECTRONICALLY FILED - 2017 Oct 23 11:24 AM - HORRY - COMMON PLEAS - CASE#2017CP260757

ELECTRONICALLY FILED - 2017 Oct 23 11:24 AM - HORRY - COMMON PLEAS - CASE#2017CP2605757

IN THE STATE OF SOUTH CAROLINA)) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Karon Mitchell, Kyle Mitchell, and Rabon & Rabon, Inc., Plaintiff, vs. Jack Rabon, Nicole Rabon, Lane Jeffries, McNair Law Firm, P.A., Atid Properties, LLC, Daisy Ridge, LLC, Friends of LBS, LLC, South State Bank, Sarah Ginsburg, Jacob Biderman, Gabriel Yosef, and Michelle Cohen, Defendants. CIV-591-02	Case Number: 2017-CP-26-05757 **VERIFICATION** **(JURY TRIAL DEMANDED)**

Personally appeared before the undersigned officer, duly authorized by law to administer oaths, Kyle Mitchell, who deposes and says that he is a shareholder of Rabon & Rabon, Inc. and a Plaintiff in the above-captioned suit. Also appearing is Karon Mitchell, who deposes and says that she is a Plaintiff in the above-captioned suit. Both Karon and Kyle Mitchell swear and affirm that the information contained herein is true and correct to the best of their knowledge and belief, that where the information contained in said complaint is with their own knowledge, said information is true, and where derived from information and knowledge of others, they believe the same to be true.

Kyle Mitchell

Karon Mitchell

Sworn to and subscribed before me this 19th day of October, 2017.

Valarie E. Causey

Notary Public
Horry County,
South Carolina

My commission expires: March 6, 2024

VALARIE E CAUSEY
Notary Public, State of South Carolina
My Commission Expires Mar. 6, 2024

ELECTRONICALLY FILED - 2017 Oct 23 11:24 AM - HORRY - COMMON PLEAS - CASE#2017CP2605757

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
Karon Mitchell, Kyle Mitchell, and Rabon & Rabon, Inc.,	)	Civil Action No. 2017-CP-26-05757
Plaintiffs,	)	
vs.	)	
Jack Rabon, Nicole Rabon, Lane Jeffries, McNair Law Firm, P.A., Atid Properties, LLC, Daisy Ridge, LLC, Friends of LBS, LLC, Sarah Ginsburg, Jacob Biderman, Gabriel Yosef, and Michelle Cohen,	)	**STIPULATION OF DISMISSAL WITH PREJUDICE**
Defendants.	)	
Atid Properties, LLC and Jacob Biderman,	)	
Cross-Claimants,	)	
vs.	)	
Michelle Cohen,	)	
Cross-Defendant.	)	

Pursuant to Rule 41(a)(1)(B) of the South Carolina Rules of Civil Procedure, the parties agree and stipulate that this matter be **DISMISSED** with prejudice.

[Signature page follows]

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ELECTRONICALLY FILED - 2021 Aug 30 7:15 PM - HORRY - COMMON PLEAS - CASE#2017CP2605757

WE SO STIPULATE AND CONSENT:

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Attorneys for Defendants McNair Law Firm, P.A. and Lane Jefferies

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

CIRCUIT COURT

ELECTRONICALLY FILED - 2021 Sep 08 2:44 PM - HORRY - COMMON PLEAS - CASE#2017CP2605757

KARON MITCHELL, KYLE MITCHELL, AND RABON & RABON, INC. v. JACK RABON, NICOLE RABON, LANE JEFFRIES, MCNAIR LAW FIRM, P.A., ATID PROPERTIES, LLC, DAISY RIDGE, LLC, FRIENDS OF LBS, LLC, SARAH GINSBURG, JACOB BIDERMAN, GABRIEL YOSEF, AND MICHELLE COHEN

Docket Nos. 2017-CP-26-05757

PROOF OF ADR

Pursuant to the South Carolina Alternative Dispute Resolution Rules (SCADR):

1. Alternative Dispute Resolution (ADR) was conducted on **August 3, 2021** in the form of: **Mediation**.

2. The neutral was: **Karl A. Folkens.**

3. Present at the ADR conference were:

   __X__ Plaintiffs *(individually and through representatives)*

   __X__ Defendants *(individually and through representatives)*

   __X__ Lawyers for Plaintiff: *Tucker S. Player, Esq., Thomas A. Pendarvis, Esq., Thomas C. Brittain, Esq. & Joseph R. Weston, Esq.*

   __X__ Lawyers for Defendants*: J. Calhoun Watson, Esq., Robert E. Stepp, Esq. & Douglas C. Baxter, Esq.*

   __X__ Representatives for insurance carrier: *Various claims representatives in the different cases.*

4. As a result of ADR, this case should be considered (check one):

   _____ fully Settled by Consent Judgment to be filed by

   _____ fully settled by Voluntary Dismissal to be filed by

   __X__ partially settled: *some parties, but not all, will be dismissed; case to remain open.*

   _____ at an impasse.

5. Further comments of the neutral: *This case was mediated with five other cases.*

Submitted: September 3, 2021

KARL A. FOLKENS, Mediator
karl@folkenslaw.com
P. O. Box 6139, Florence, SC 29502-6139
(843) 665-0100; FAX (843) 665-0500

MA21-203A
SCADR 104A (04/2021)

ELECTRONICALLY FILED - 2022 Aug 23 3:20 PM - HORRY - COMMON PLEAS - CASE#2017CP260575

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF HORRY)	FIFTEENTH JUDICIAL CIRCUIT
Karon Mitchell, Kyle Mitchell, and Rabon & Rabon, Inc.,)	Civil Action No. 2017-CP-26-05757
Plaintiffs,)	
vs.)	
Jack Rabon, Nicole Rabon, Lane Jeffries, McNair Law Firm, P.A., Atid Properties, LLC, Daisy Ridge, LLC, Friends of LBS, LLC, Sarah Ginsburg, Jacob Biderman, Gabriel Yosef, and Michelle Cohen,)	**AMENDED STIPULATION OF DISMISSAL WITH PREJUDICE**
Defendants.)	
Atid Properties, LLC and Jacob Biderman,)	
Cross-Claimants,)	
vs.)	
Michelle Cohen,)	
Cross-Defendant.)	

Pursuant to Rule 41(a)(1)(B) of the South Carolina Rules of Civil Procedure, the parties agree and stipulate that this matter be **DISMISSED** with prejudice with regard to the following Defendants: Lane Jefferies and McNair Law Firm, P.A. All other Defendants and claims remain pending for resolution by the presiding Court.

[Signature page follows]

WE SO STIPULATE AND CONSENT:

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ELECTRONICALLY FILED - 2023 Feb 06 9:48 AM - HORRY - COMMON PLEAS - CASE#2017CP260757

STATE OF SOUTH CAROLINA COUNTY OF HORRY Karon Mitchell, Kyle Mitchell, and Rabon & Rabon, Inc., Plaintiffs, vs. Jack Rabon, Nicole Rabon, Lane Jefferies, McNair Law Firm, P.A., Atid Properties, LLC, Daisy Ridge, LLC, Friends of LBS, Sarah Ginsburg, Jacob Biderman, Gabriel Yosef, and Michelle Cohen, Defendants.	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT C.A. No.: 2017-CP-26-05757 **RABON DEFENDANTS' RETURN TO MOTION**

Defendants Jack Rabon and Nicole Rabon ("The Rabons") hereby submit this Return to Plaintiffs Karon and Kyle Mitchell's ("The Mitchells") Motion for Declaratory Judgment. For the reasons set forth below this Motion should be denied.

1. The Mitchells seek to rescind the Covenant Not to Execute entered between the Mitchells and the Rabons because they claim to have "proof that the Affidavit of Nicole Rabon contained false statements." This Covenant is is attached hereto as **Exhibit A**.
2. The Rabons will not contest testimony from Attorney Tucker Player they anticipate will support the Mitchells' contentions. However, the Rabons contend that the alleged breaches of the Covenant do not support rescinding it in this case.

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3. Settlement documents are viewed as contracts and general contract principles should be applied in construing them. *Pee Dee Stores, Inc. v. Doyle*, 672 S.E.2d 799, 802-803 (S.C. Ct. App. 2008). In *Ackerman v. McMillan*, the Court noted:

> In order to warrant a repudiation, a breach must be so fundamental and substantial as to defeat the purpose of the contract. Gibbs v. G.K.H., Inc., --- S.C. ----, 427 S.E.2d 701 (Ct.App.1993). Where the breach is not so material as to defeat the purpose of the contract, the nonbreaching party is compensated by damages. Childress v. C.W. Myers Trading Post, Inc., 247 N.C. 150, 100 S.E.2d 391 (1957).

Ackerman v. McMillan, 442 S.E.2d 618, 619-620 (S.C. Ct. App. 1994). This principle of contract construction is so ingrained in the law, our courts require any breach of a contract to be material before it will rescind or repudiate the contract – **even if the contractual provision in question provides that any breach will justify rescission of the contract.**

4. In *Kiriakides v. United Artists Communications, Inc.,* 440 S.E.2d 364 (S.C. 1993), the landlord sought to enforce a provision of a commercial lease which allowed it to terminate the lease late in paying rent. The trial court applied equitable principles and refused to terminate the lease and the landlord appealed. The South Carolina Supreme Court noted that the landlord's position would allow it to terminate the lease "no matter how trivial, inadvertent, non-prejudicial, or technical the breach." *Id.* at 366. The Court held that the lease could only be terminated in the event of a substantial or material breach.
5. The Rabons submit that any breach of the Covenant was insubstantial and did not defeat the purpose of the Covenant - which was to secure information (testimony and documents) to support Rabon & Rabon, Inc.'s claims against the

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remaining Defendants in this case. The Rabons submit that their cooperation was essential in securing a favorable settlement to the lawsuit.

6. Equitable principles also support denying the Mitchells' Motion. Here the testimony will show that the Rabons fully performed their part of the agreement and provided voluminous and detailed information to Rabon & Rabon, Inc.'s attorney, even though that information was prejudicial to them. As a matter of equity, the Mitchells cannot sit back and allow the Rabons to fully perform under the agreement, reap the benefit of the Rabons' performance, and then claim the agreement should not be enforced.
7. The Mitchells contend that it is "unjust and inequitable" to allow Mr. Rabon, as a shareholder of Rabon & Rabon, Inc., to recover settlement funds received from the other Defendants because he caused the corporation's damages. This argument is without merit for 2 reasons. First, the settlement funds belonging to Rabon & Rabon, Inc. are a direct result of the damage caused by and paid by the other Defendants. The damage caused by the other Defendants is much greater than any harm caused by Mr. Rabon. Second, the Mitchells knew about Mr. Rabon's role in the plan **yet they reached a settlement agreement with him anyway**.
8. Finally, this court should consider the effect of granting the Mitchells' Motion. If the Motion is granted, the Mitchells will have to litigate all of the claims again. Not only that, but they will have to defend Mr. Rabon's counterclaims. There is a history of contentious litigation between the Mitchells and the Rabons that was resolved by the Settlement Agreement and the Covenant. The Rabons

submit that that it is in the best interests of the parties and the Court for the Motion to be denied, with attorney's fees and costs awarded to the Rabons.

February 6, 2023 By: s/D. Alan Lazenby
D. Alan Lazenby, Esq.

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ATTORNEY FOR RABON DEFENDANTS

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EXHIBIT A

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IN THE STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	
Karon Mitchell, Kyle Mitchell, and Rabon &) Rabon, Inc.,)	Case Number: 2017-CP-26-05757
Plaintiff,)	
vs.)	**COVENENT NOT TO EXECUTE**
Jack Rabon, Nicole Rabon, Lane Jeffries, McNair Law Firm, P.A., Atid Properties, LLC, Daisy Ridge, LLC, Friends of LBS, LLC, Sarah Ginsburg, Jacob Biderman, Gabriel Yosef, Michelle Cohen,)	
Defendants.)	
CIV-591-02	

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Plaintiffs do hereby promise and covenant for themselves, their executors, administrators, successors, and assigns not to execute against JACK AND NICOLE RABON, their heirs, administrators, legal representatives, successors or assigns, on any judgment that may be obtained by Plaintiffs on account of any and all claims, demands, damages, costs or expenses, arising from any act, omission, or occurrence, resulting or to result from the above captioned legal matter. Plaintiffs further covenant and promise that if they should attain a judgment against Jack and Nicole Rabon, their recovery will be limited to the Promissory Note agreed upon herein only. Plaintiffs further agree that, upon final winding up and dissolution of the Corporate Entities, Rabon & Rabon, Inc. and MB Boardwalk Entertainment, LLC, their attorney will cause any resulting judgment to be marked and entered as satisfied.

Both Jack and Nicole Rabon affirmatively assert that they are not represented by counsel in either the probate of the Estate of Peggy Jo Rabon, case number **2014-ES-26-01933,** or the civil litigation pending in the Horry County Court of Common Pleas, caase number **2017-CP-26-05757**. Jack and Nicole Rabon both declare that they have had the opportunity to have this agreement reviewed by an attorney and chose not to do so. Both Jack and Nicole Rabon declare

that they understand the terms of this Agreement and are entering it freely and voluntarily.

Additional and material consideration is being provided by Jack and Nicole Rabon and relied upon by Plaintiffs, to wit:

(a) Jack Rabon shall execute a promissory note in favor of Rabon & Rabon, Inc. in the amount of $315,000.00;
(b) Both Jack and Nicole Rabon shall swear an affidavit concerning their personal knowledge of the allegations contained in Plaintiffs' Complaint;
(c) Jack and Nicole Rabon shall produce of all emails, text messages and other communications with Sarah Ginsburg, Jacob Biderman, any agent of Atid Properties, LLC, any agent of Friends of LBS, LLC, Gabby Yosef, Michelle Cohen, Lane Jefferies, Henrietta Golding, and any other agent of McNair Law Firm to Plaintiffs immediately upon execution of this agreement.

IN THE EVENT THAT ANY PORTION OF THE AFFIDAVIT(S) IS FOUND TO BE FALSE OR UNTRUE, OR ANY OF THE DOCUMENTS TO BE FRAUDULENTLY CREATED, THIS AGREEMENT IS NULL AND VOID.

Plaintiffs hereby declare and represent that no promise or inducement or agreement not herein expressed has been made to them and that this covenant contains the entire agreement between the parties hereto, and the terms of this Covenant are contractual and not merely a recital and that Jack and Nicole Rabon made no representations as to the possibility of recovery of any monies by Plaintiffs. The undersigned further covenants and agrees that this covenant shall apply to all known, unknown, anticipated, and unanticipated injuries and damages resulting from the allegations in Plaintiffs Amended Complaint.

[SIGNATURE PAGES ATTACHED]

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In presence of:

WITNESS

WITNESS

WITNESS

KARON MITCHELL

KYLE MITCHELL

KARON MITCHELL for RABON & RABON, INC.

This 28th day of ~~September~~ August, 2018

SWORN to before me this 28th day of August, 2018

Notary Public for South Carolina
My Commission Expires: 4/9/2020

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Oct 17 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Carmen Mullen, Circuit Court Judge

Appellate Case No. 2023-000924

KARON MITCHELL, KYLE MITCHELL, AND RABON & RABON, INC., *Respondents,*

v.

JACK RABON, NICOLE RABON, LANE JEFFRIES, MCNAIR LAW FIRM, P.A., ATID PROPERTIES, LLC, DAISY RIDGE, LLC, FRIENDS OF LBS, LLC, SARAH GINSBURG, JACOB BIDERMAN, GABRIEL YOSEF, AND MICHELLE COHEN, DEFENDANTS, *Defendants*,

Of whom:
JACK RABON AND NICHOLE RABON are *Appellants*,

and

ATID PROPERTIES, LLC AND JACOB BIDERMAN, *Cross-Claimants,*

v.

MICHELLE COHEN, *Cross-Defendant.*

Proof of Service

Howard W. Anderson III (#100329)
TRULUCK THOMASON LLC
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CERTIFICATE OF SERVICE

I hereby certify that a .pdf copy of the Motion to Dismiss and the Memorandum in Support of the Motion to Dismiss were emailed to the following counsel of record at their primary email address listed in the Attorney Information System:

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Lauren L. Martel
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Tucker S. Player
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Dated this 17th of October, 2023.

Respectfully submitted,

s/Howard W. Anderson III
Howard W. Anderson III
(#100329)

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Counsel for Respondents
Karon Mitchell and Kyle Mitchell