

RECEIVED

Dec 28 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable William A. McKinnon

Appellate Case No. 2022-000580
Circuit Court Case No. 2018-CP-46-03726

The Grapevine of Riverwalk, Inc. Respondent,

v.

Riverwalk River District Building 6, LLC, Mark Mather, GRH Development Resources,
LLC, The Greens of Rock Hill, LLC, and Assured Administration, LLC,
.....Appellants.

**RECORD ON APPEAL
VOLUME II**

FORD WALLACE THOMSON LLC
Ainsley F. Tillman
Ian S. Ford
715 King Street
Charleston, South Carolina 29403
(843) 277-2011
Attorneys for Appellants

CLEMENT RIVERS LLP
Stephen L. Brown
Russell G. Hines
25 Calhoun Street, Ste. 400
Charleston, South Carolina 29401
(843) 720-5488
Attorneys for Respondent

INDEX

VOLUME I

Orders

Order on various motions (pre-trial), filed March 10, 2021.....	1
Order on Post-Trial Motions, filed Dec. 13, 2021	8
Remittitur from Court of Appeals, Jan. 26, 2022	15
Jury Verdict Form, filed Feb. 17, 2022.....	19
Order on Rule 59 Motion and Final Judgment, filed Apr. 19, 2022.....	21
Amended Order on Rule 59 Motion and Final Judgment, Apr. 19, 2022.....	26
Order on Defendants’ Motion to Stay and Plaintiff’s Rule 70 Motion, filed Aug. 15, 2022	31
Order Denying Motion to Alter or Amend Order on Motion to Stay, filed Oct. 10, 2022.....	36

Pleadings and Motions

Complaint, filed December 10, 2018.....	39
Lis Pendens, filed December 21, 2018	52
Answer, filed March 25, 2019	82
First Amended Summons and Complaint, filed March 25, 2020.....	95
Answer to First Amended Complaint, filed Apr. 9, 2020	119
Second Amended Complaint, filed Jan. 15, 2021	133
Motion to Strike and Answer to Second Amended Complaint, Jan. 29, 2021.....	158
Defendants’ Motion for Summary Judgment and Memorandum in Support, filed February 8, 2021	178
Plaintiff’s <i>Renewed</i> Motion for Summary Judgment, filed February 18, 2021	202

Plaintiff’s Memorandum in Opposition to Motion to Strike, Feb. 26, 2021	210
Defendants’ Pre-Trial Brief, filed Aug. 20, 2021	221
Stipulations Regarding Facts and Evidence for Purpose of Trial, filed Aug. 23, 2021.....	227
Plaintiff’s Motion for Directed Verdict/Specific Performance, filed Sept. 3, 2021	232
Plaintiff’s Motion for Award of Pre-Judgment Interest on Jury Verdict, filed Sept. 3, 2021.....	244
Plaintiff’s Motion for Attorney’s Fees and Costs, filed Sept. 3, 2021.....	250
Affidavit of Steven A. Meckler in Support of Plaintiff’s Motion for Award of Costs and Attorneys’ fees, filed Sept. 3, 2021.....	261
Defendants’ Post-Trial Motions, filed September 10, 2021	271
Defendants’ Memorandum in Opposition to Plaintiff’s Motion for Specific Performance, filed Oct. 8, 2021	290
Defendants’ Memorandum in Opposition to Plaintiff’s Motion for Fees and Costs, filed Oct. 8, 2021	295
Defendants’ Rule 59 Motion, filed December 22, 2021	313
Plaintiff’s Opposition to Motion, filed Jan. 3, 2022	316
Defendants’ Motion for Stay of Proceedings to Enforce Judgment, filed May 31, 2022	321
Plaintiff’s Rule 70 Motion to Compel Compliance with Final Judgment, for Contempt Order, and for Order Regarding Non-Payment of Rent Pending Appeal, filed June 3, 2022	328
Plaintiff’s Memorandum in Support of Motion to Compel, filed July 28, 2022.....	334
Defendants’ Memorandum in Support of Motion to Stay, filed July 29, 2022.....	464

VOLUME II

Defendants' Motion to Alter or Amend, filed August 24, 2022 478

Plaintiff's Opposition to Motion to Alter or Amend, filed Sept. 9, 2022.....519

Transcripts

Trial, Aug. 23 - 28, 2021..... 532

Melanie Sills,

Direct Examination by Mr. Staples..... 624

Cross-Examination by Mr. Martens 742

Redirect Examination by Mr. Staples..... 795

Alan Aschenbrenner,

Direct Examination by Mr. Staples..... 798

Cross-Examination by Mr. Marten..... 811

Brian Wilson,

Direct Examination by Mr. Staples..... 816

Cross-Examination by Mr. Martens 833

David Williams,

Direct Examination by Mr. Meckler 838

Cross-Examination by Mr. Martens 847

Anthony Swainey,

Direct by Mr. Staples 850

Cross-Examination by Mr. Martens 867

Redirect Examination by Mr. Staples..... 878

Recross Examination by Mr. Martens 879

Deposition of Craig Ostrander Read into the Record..... 895

Jason Ligon,

Direct by Mr. Meckler 897

Cross-Examination by Mr. Martens 912

Re-Direct Examination by Mr. Meckler 918

John Scott,

Direct by Mr. Meckler 919

Cross-Examination by Mr. Martens 930

Redirect Examination by Mr. Meckler 933

Recross Examination by Mr. Martens 934

VOLUME III

<i>End of Plaintiff's Case in Chief</i>	942
Todd Brockman,	
Direct by Mr. Martens	1010
Cross-Examination by Mr. Staples	1050
Redirect Examination by Mr. Martens.....	1056
Mark Mather,	
Direct by Mr. Martens	1059
Cross-Examination by Mr. Meckler	1079
Redirect Examination by Mr. Martens.....	1099
Transcript of hearing, Oct. 13, 2021	1188
Transcript of hearing, Feb. 28, 2022.....	1226

VOLUME IV

Trial Exhibits

Plaintiff's Exhibit 1.....	1247
Plaintiff's Exhibit 2.....	1298
Plaintiff's Exhibit 3.....	1299
Plaintiff's Exhibit 4.....	1302
Plaintiff's Exhibit 5.....	1304
Plaintiff's Exhibit 6.....	1305
Plaintiff's Exhibit 8.....	1306
Plaintiff's Exhibit 9.....	1311
Plaintiff's Exhibit 10.....	1320
Plaintiff's Exhibit 11.....	1323
Plaintiff's Exhibit 12.....	1324
Plaintiff's Exhibit 13.....	1328
Plaintiff's Exhibit 14.....	1341
Plaintiff's Exhibit 15.....	1349
Plaintiff's Exhibit 16.....	1356
Plaintiff's Exhibit 17.....	1357
Plaintiff's Exhibit 18.....	1358
Plaintiff's Exhibit 19.....	1360
Plaintiff's Exhibit 20.....	1361
Plaintiff's Exhibit 21.....	1362
Plaintiff's Exhibit 22.....	1363
Plaintiff's Exhibit 23.....	1369
Plaintiff's Exhibit 24.....	1372

Plaintiff's Exhibit 25.....	1377
Plaintiff's Exhibit 26.....	1388
Plaintiff's Exhibit 27.....	1379
Plaintiff's Exhibit 28.....	1381
Plaintiff's Exhibit 29.....	1382
Plaintiff's Exhibit 30.....	1384
Plaintiff's Exhibit 31.....	1385
Plaintiff's Exhibit 32.....	1386
Plaintiff's Exhibit 33.....	1387
Plaintiff's Exhibit 34.....	1388
Plaintiff's Exhibit 38.....	1389
Plaintiff's Exhibit 39.....	1391
Plaintiff's Exhibit 41.....	1403
Plaintiff's Exhibit 43.....	1404
Plaintiff's Exhibit 44.....	1444
Plaintiff's Exhibit 47.....	1479
Defendants' Exhibit 1.....	1505
Defendants' Exhibit 2.....	1506
Defendants' Exhibit 3.....	1509

Other Materials

Notice of Appeal, filed Jan. 12, 2022.....	1512
Notice of Appeal, filed April 29, 2022.....	1521

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	

The Grapevine of Riverwalk, Inc.,	)	C/A No. 2018-CP-46-03726
	)	
Plaintiff,	)	
	)	
v.	)	MOTION TO ALTER OR AMEND
	)	
Riverwalk River District Building 6, LLC,	)	
Mark S. Mather, GRH Development	)	
Resources, LLC, The Greens of Rock Hill,	)	
LLC and Assured Administration, LLC,	)	
	)	
Defendants.	)	
	)	

Defendant Riverwalk River District Building 6, LLC (“Building 6”) moves, pursuant to Rule 59(e) S.C. R. Civ. P., to alter or amend the court’s “Order on Defendants’ Motion for Stay of Proceedings and Plaintiff’s Rule 70 Motion to Compel Compliance with Final Judgment, for Contempt Order, and for Order Regarding Non-Payment of Rent Pending Appeal,” filed August 15, 2022 (“Order”) as set forth below.

BACKGROUND

On April 19, 2022, this court entered an Amended Order on Rule 59 Motion and Final Judgment in this action (the “Final Judgment”). The Final Judgment decided numerous issues, one of which is implicated by this motion – the Final Judgment granted Plaintiff specific performance of a purchase option within Plaintiff’s lease and ordered “[a]t the closing [of Plaintiff’s purchase], Plaintiff shall pay the Purchase Price as defined in the Lease Agreement, which price shall be further reduced by the total amount of **Base Rent** paid by Plaintiff since February 2, 2018, through the Closing Date.” Final Judgment at 4, ¶3. (emphasis added). Defendants timely appealed the Final Judgment and, then, on May 31, 2022, Defendants filed a

“Motion for Stay of Proceedings to Enforce Judgment” pending appeal. *See* Motion for Stay, filed May 31, 2022. On June 3, 2022, Plaintiff moved, pursuant to Rule 70 S.C. R. Civ. P., “to Compel Compliance with Final Judgment,” for sanctions and for other relief. *See* Pl’s. Rule 70 Motion, filed June 3, 2022. The parties’ competing motions came before the court for a hearing on August 1, 2022. On August 15, 2022, the court issued its Order.

Of relevance to this motion, the August 15 Order stayed Plaintiff’s obligation to “pay rent or any other charge under its Lease” during the pendency of Defendants’ appeal. *See* Order at ¶ 7. The Order is not consistent with the Final Judgment, because the Final Judgment only awarded Plaintiff a credit for “Base Rent” while the Order stays Plaintiff’s obligation to pay *any* “rent or other charge” under its Lease. Building 6 believes that this discrepancy is the result of an unintentional drafting error,¹ but Plaintiff takes the position that the Order entitles Plaintiff to use its Premises and the Common Areas of Building 6 for *free* during the pendency of Defendants’ appeal. Counsel’s efforts to resolve this matter through consultation have proven unsuccessful. Building 6 now moves this court, pursuant to Rule 59(e) S.C. R. Civ. P., to alter or amend its Order to clarify that the stay imposed by the Order only applies to “Base Rent,” and not “Additional Rent” or other charges that may become due under Plaintiff’s Lease.

¹ Counsel readily acknowledges that the proposed Order was drafted by Plaintiff’s Counsel and edited by Defendants’ Counsel prior to entry by the court.

ARGUMENT

- I. The Court should amend its Order because the Order grants Plaintiff relief in excess of that which was awarded through the Final Judgment and in excess of the relief Plaintiff requested through its motion for stay.

Plaintiff's motion to stay rent during appeal was based upon the following provision of the Final Judgment:

At the closing, Plaintiff shall pay the Purchase Price as defined in the Lease Agreement, which price shall be further reduced by the total amount of **Base Rent** paid by Plaintiff since February 2, 2018 through the Closing Date.

Final Judgment at 4. In support of its motion for stay, Plaintiff argued that, if the court did not stay Plaintiff's obligation to pay **Base Rent** pending Defendants' appeal, "there is a risk . . . that Plaintiff could ultimately pay an amount of **Base Rent** that would render the total price below \$0, resulting in a windfall to Defendants." Pl's. Mem. in Support, filed July 28, 2022, at 11. The court apparently accepted Plaintiff's argument and, over Defendants' objections, granted a stay. But the Order, as it was entered, appears to grant Plaintiff broader relief than this court ever intended or Plaintiff ever sought.

Not only does the Order stay Plaintiff's obligation to pay Base Rent during appeal, but it also appears to stay Plaintiff's obligation to pay *any* "rent or any other charge" that would otherwise be due under Plaintiff's Lease. Order at 4. To appreciate the significance, and presumed unintended consequence of the court's use of the phrase "rent or any other charge" in the Order, it is necessary to examine the Lease, the Final Judgment and the court's December 13, 2021 Order Regarding Post-Trial Motions. *See Exhibit 1* (Lease); *see also* Order Regarding Post-Trial Motions, filed Dec. 13, 2021; Final Judgment, filed April 19, 2022.

Under Plaintiff's Lease, "Base Rent" is defined as "the minimum annual base rent . . . shown by the below [published] schedule of Base Rent." Lease ¶ 6. In addition to "Base Rent,"

Plaintiff's Lease also obligates Plaintiff to pay "Additional Rent" which consists, primarily, of "Tenant's Proportionate Share of all such real estate taxes and assessments" and "Tenant's Proportionate Share of Landlord's costs and expenses incurred in maintaining and otherwise caring for the common areas ('Common Areas') of the Building." *See* Lease ¶ 12. Both the court's Order Regarding Post-Trial Motions and the Final Judgment held that Plaintiff should receive a credit for "Base Rent" but neither the Order Regarding Post-Trial Motions nor the Final Judgment determined that Plaintiff was entitled to a credit for "Additional Rent" payments that Plaintiff made under its Lease. Nor, for that matter, did Plaintiff ever seek a stay of its obligation to pay "Additional Rent" during Defendants' appeal. *See* Pl. Motion filed June 3, 2022 and Mem. in Support of Motion, filed July 28, 2022 ("Plaintiff contends that, pending appeal, all future **Base Rent** under the Lease should be abated or, alternatively, paid to the clerk of court."). By granting a stay of Plaintiff's obligation to pay *any* "rent or any other charge," it appears that the court unintentionally stayed Plaintiff's obligation to pay "Additional Rent" (i.e. – CAM expenses and property taxes) even though this court never determined that Plaintiff was entitled to forgo, or receive a "credit" for, those payments. The court should amend its Order to correct this discrepancy and to make clear that Plaintiff remains obligated to pay "Additional Rent" and other charges as those amounts become due under Plaintiff's Lease.²

² Even in a Horizontal Property Regime, Plaintiff would be obligated to pay its proportionate share of Common Area maintenance expenses and property taxes. *See* S.C. Code Ann. § 27-31-190 (Law. Co-op. 2007) ("The co-owners . . . are bound to contribute pro rata . . . toward the expenses of administration and of maintenance and repair of the general common elements and . . . toward any other expense lawfully agreed upon.").

II. As drafted, the Order unfairly foists the costs of common area maintenance and tax compliance upon others and bestows an unwarranted, unintended and significant windfall upon Plaintiff.

As the court is well aware, much of this litigation focused upon the parties' disagreement over Plaintiff's use of the Common Areas of Building 6 for the operation of its business. Ultimately, the court resolved that dispute in Plaintiff's favor when it ordered that "Plaintiff shall retain the right to jointly use the Common Areas with the remaining tenants . . . and Defendants shall not restrict or limit Plaintiff's right to use the Common Areas in conjunction with the remaining tenants of the building." *See* order filed Dec. 13, 2021, at 1-2. The court's order, which conferred upon Plaintiff a right to use the Common Areas and imposed upon Defendants a prohibition against "restricting or limiting" Plaintiff's rights, is an equitable remedy. *See Cullen v. McNeal*, 390 S.C. 470, 481, 702 S.E.2d 378, 384 (Ct. App. 2010).

It is a fundamental maxim that "he who seeks equity must do equity." *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 259, 715 S.E.2d 348, 358 (Ct. App. 2011)(internal citations omitted). At trial, Plaintiff's principal, Melanie Sills, testified that Plaintiff willingly and harmoniously "shared" the building's Common Areas with other tenants. If the Common Areas are, indeed, shared by all tenants then it would be patently unfair for Plaintiff to avoid paying its "fair share" for common area maintenance expenses tax obligations.³ The court should amend its Order to clarify that this court never intended to relieve Plaintiff of its obligation to pay "Additional Rent."

³ The argument becomes more compelling when one recognizes that Plaintiff is, by far, the largest "user" of the Building's Common Areas.

CONCLUSION

This court should alter or amend its Order, so that it is clear that the court never intended to relieve Plaintiff of its obligations to pay CAM charges, property taxes and other expenses that are defined as “Additional Rent” under its Lease. There is no equitable or legal basis to excuse Plaintiff from those obligations, this court never decided that Plaintiff should be relieved of the obligations, and Plaintiff did not even seek a stay of those obligations through its motion. Even if Plaintiff’s purchase of its Demised Premises had closed on May 31, 2022, Plaintiff would remain liable for its proportionate share of common area maintenance expenses and property taxes for Building 6. S.C. Code Ann. § 27-31-190 (Law. Co-op. 2007). The court should amend its Order to close the unintended “loophole” that Plaintiff now seeks to exploit.

August 24, 2022

s/ W. Keith Martens
W. Keith Martens
S.C. Bar 8645
HAMILTON MARTENS, LLC
P.O. Box 10940
Rock Hill, South Carolina 29731
(803) 329-7672
keith.martens@hamiltonmartens.com

ATTORNEYS FOR DEFENDANTS

COMMERCIAL LEASE AGREEMENT

THIS COMMERCIAL LEASE AGREEMENT (this "Lease") is made and entered into as of the Effective Date by and between Riverwalk River District Building 6, LLC, a South Carolina limited liability company, (hereinafter called "Landlord"), whose address is 2850 Cherry Road, Rock Hill, SC 29730, and telephone number is 803-324-7762, and The Grapevine of Riverwalk, Inc. a South Carolina S Corporation (hereinafter called "Tenant"), whose mailing address is 1750 Hwy 160 W, Suite 101, PMB 290, Fort Mill, SC, and telephone number is _____, for the uses and purposes mentioned below.

BACKGROUND STATEMENT

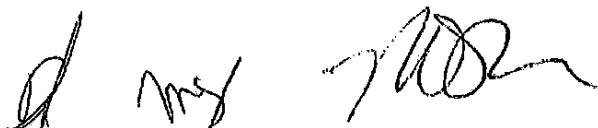
A. Landlord is the owner of certain real property, bearing current York County, SC, Tax Parcel Number 662-07-01-094, within the mixed-use project commonly known as "Riverwalk," in the City of Rock Hill, South Carolina, and anticipates constructing therein a mixed use retail, mercantile and residential building containing approximately 36,000 square feet, more or less (the "Building"). In anticipation of the completion of the Building, Landlord wishes to lease and demise to Tenant, and Tenant wishes to take and let from Landlord, certain space within the Building (such space, as more particularly defined hereinafter, being the "Demised Premises").

B. The parties now wish to enter into this Lease to document their agreement regarding the demise of the Demised Premises to Tenant, as more particularly set forth hereinafter.

NOW, THEREFORE, for and in consideration of the mutual promises and conditions herein contained, the above recitals (incorporated herein by this reference), and other good and valuable consideration, the receipt and sufficiency whereof which are hereby acknowledged, Landlord and Tenant, intending to be bound hereby, covenant and agree as follows:

1. **Demised Premises.** Landlord hereby leases and demises to Tenant and Tenant hereby takes and leases from Landlord that certain space comprised of approximately 1,490 square feet, more or less (being heretofore defined as the "Demised Premises"), having an anticipated street address of _____ Herron's Ferry Road, depicted as "Wine Shop" on Exhibit A attached hereto and being located within the Building.

2. **Term.** The term of this Lease shall commence on the date (the "Commencement Date") upon which Landlord delivers the Demised Premises to Tenant with Landlord's Work substantially completed and subject only to punchlist items of the type contemplated by Section 5.3 below, and shall end on the date which is ten (10) years therefrom (the "Initial Term"), unless sooner terminated pursuant to this Lease. Further, and so long as this Lease has not theretofore been terminated and so long as Tenant is not then in default hereunder, Tenant shall have the right to renew the term of this Lease for two (2) successive period(s) of five (5) years (each) by providing written notice of its election to renew the term hereof to Landlord by the date which is one hundred eighty (180) days prior to the expiration of the then existing term of this Lease (as it may have theretofore been renewed). Tenant shall have no right to exercise any option to renew the term of this Lease should any Tenant default then exist hereunder. Should Tenant fail to renew the term of this Lease as and within the time herein provided, its right and option to renew the term of this



GRH 000119

ROA 484

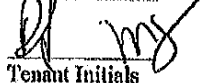
Lease shall terminate. Each such five (5) year period is referred to herein as a Renewal Term, and the Initial Term, as it may be renewed and extended by Tenant in accordance with the foregoing provision, is referred to herein as the "Term."

3. **Purpose.** The Demised Premises shall be used for the purpose of operating a wine and craft beer shop and bar therein doing business as "Grapevine Wine Shop / Wine Bar for such incidental uses thereto as may be approved by Landlord in advance and in writing, and for no other purpose or uses whatsoever, except as expressly outlined within this Lease relating to assignment and subletting of Demised Premises. Tenant covenants and agrees that at all times during the term hereof Tenant will actively conduct such a business in the Demised Premises, and keep the Demised Premises open for business during the customary business hours (not less than eight (8) hours per day, Tuesday through Sunday of the Building established by Landlord.

4. **Definition of "Lease Year".** The words "lease year," as used in this Lease, shall mean the period commencing on the Commencement Date, or, if the Commencement Date is not on the first day of a month, then on the first day of the following calendar month, and ending one (1) year thereafter, together with each subsequent and successive one (1) year period thereafter through the Term of this Lease; provided, however, that the period of the time, if any, beginning after the commencement of the last full lease year of this Lease and extending until the date of the expiration of the Term shall be deemed to be a "lease year" even though it comprises less than a full year.

5. **Completion of Building and Initial Improvement of Demised Premises, etc.**

5.1 **Completion of Building and Initial Improvement of Demised Premises.** Within thirty (30) days after the Effective Date, Landlord agrees to provide to Tenant (i) complete drawings, plans and specifications ("Development Plans") for the construction of the Building, including all improvements thereon, and all Landlord's Work (as defined herein); (ii) a site plan of the Building showing the location of existing utilities; (iv) a final grading plan for the Building and the parcel on which it is to be constructed (items (ii)-(iv) are collectively referred to herein as "Landlord's Information"). Tenant shall approve or disapprove of the proposed Landlord's Information within fifteen (15) days after receipt. The approved Landlord's Information shall become part of this Lease. If Tenant does not approve of Landlord's Information submitted or provide reasonable objections within fifteen (15) days, Landlord's Information shall be deemed approved. If Tenant has provided reasonable objections, Tenant and Landlord will work cooperatively to resolve them within fifteen (15) days. Landlord shall deliver possession of the Demised Premises to Tenant in the condition described in attached Exhibit B (all Landlord's Work set forth in Exhibit B is collectively referred to herein as "Landlord's Work"). Landlord represents that Landlord's Work shall be constructed in a good and workmanlike manner and in accordance with all applicable zoning, municipal, county, state and federal laws, ordinances and regulations and any covenants or restrictions of record (collectively, "Applicable Laws"), including without

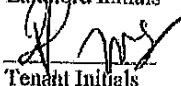

Landlord Initials

Tenant Initials

limitation the Americans with Disabilities Act. Landlord agrees to diligently proceed with Landlord's Work and will deliver possession to Tenant no later than the Delivery Deadline. The "Delivery Deadline" is defined as June 1, 2015. If Landlord fails to deliver possession of the Demised Premises by the Delivery Deadline, and provided that Tenant's failure to accept possession is not in violation of this Lease, then, for each day of delay thereafter, Tenant shall be entitled to credit one (1) day of free Base Rent against Base Rent due after the Rent Commencement Date. Notwithstanding any other provisions of this Lease to the contrary, Tenant shall have the right to terminate this Lease without further obligation to Landlord in the event that the construction of Landlord's Work has not been completed and delivery of possession given to Tenant by sixty (60) days following the Delivery Deadline, by giving written notice to Landlord of such termination at any time after such failure. If this Lease is terminated as provided herein, both parties shall automatically be released from any further liability or obligation whatsoever hereunder accruing after the date of termination arising out of or based upon this Lease, except for those liabilities which are, by their terms, to survive the expiration or termination hereof.

Landlord shall give Tenant written notice of its intent to deliver possession of the Demised Premises to Tenant with Landlord's Work completed not less than fourteen (14) days prior to delivery of possession ("Notice of Tender"). During the fourteen (14) day period, Tenant shall inspect the Demised Premises to determine if possession will be accepted with Landlord's Work completed subject only to minor punch list items, if any, identified by Tenant pursuant to Section 5.3 below. If Tenant determines that Landlord's Work is not complete subject only to such minor punch list items as are identified by Tenant pursuant to Section 5.3 below, Tenant will give a notice of non-completion prior to the end of the Notice of Tender period, which notice will describe the reasons for Tenant's determination. In such event, Landlord will then complete Landlord's Work and provide another Notice of Tender to be followed by another fourteen (14) day period for Tenant's inspection and determination if Landlord's Work is complete, subject only to punch list items, if any. Tenant's acceptance shall be in writing and delivered to Landlord with the punch list, if applicable. Tenant's failure to give a notice of non-completion prior to the end of any Notice of Tender period shall be deemed as Tenant's determination and acknowledgement that Landlord's Work has been completed as required by this Lease, subject only to such minor punch list items as may be identified by Tenant pursuant to Section 5.3 below. Upon Tenant accepting, or being deemed to have accepted, Landlord's Work pursuant to the terms hereof, Tenant shall be deemed as having acknowledged and agreed that Landlord's Work was completed in conformity with the terms of this Lease, subject only to the completion of such minor punch list items as may be identified by Tenant under Section 5.3 below.

Within sixty (60) days after receipt of the later of (i) Landlord's Information, or (ii) the Effective Date, Tenant will provide Landlord with a complete set of working drawings, plans and specifications, including signage and trade dress plans ("Tenant Plans") for construction of Tenant's improvements to the Premises ("Initial Tenant Improvements"). Landlord shall approve or disapprove of the proposed Tenant Plans within fifteen (15) days of receipt thereof. The


Landlord Initials


Tenant Initials

approved Tenant Plans shall become part of this Lease. If Landlord does not approve of the Tenant Plans submitted or provide reasonable objections within fifteen (15) days of receipt thereof, Tenant Plans shall be deemed approved. If Landlord has provided reasonable objections, Tenant and Landlord will work cooperatively to resolve them within fifteen (15) days.

If Landlord makes changes to the Development Plans after the Tenant Plans are approved, and such changes more than nominally affect the cost of the Initial Tenant Improvements, Landlord shall have the option to either pay for the additional cost to the Initial Tenant Improvements or give Tenant the option to terminate this Lease or accept the changes. If this Lease is terminated as provided herein, Tenant shall automatically be released from any further liability or obligation whatsoever arising out of or based upon this Lease, save for liabilities which are to expressly survive the termination of this Lease. If Tenant is required, given the nature of the changes to the Development Plans, to redraw the Tenant Plans, Landlord will reimburse Tenant for the reasonable cost thereof.

All of the Initial Tenant Improvements shall be performed at Tenant's cost and expense. Tenant shall fully equip the Demised Premises with all trade fixtures, lighting fixtures, furniture, furnishings, fixtures, floor coverings, any special equipment, and other items of personal property as may be necessary for the completion of the Demised Premises and the proper operation of Tenant's business therein. All improvements made to the Premises by Tenant are hereinafter sometimes called "Tenant's Improvements". Tenant shall construct the Initial Tenant Improvements in accordance with Applicable Laws. In performing and completing the Initial Tenant Improvements, Tenant shall not allow any statutory or equitable claim of lien, including, without limitation, claims for mechanic's or materialsman's liens, to arise against the Demised Premises or Building, and, in the event that any are claimed, Tenant shall provide Landlord with reasonable assurances of Tenant's ability to pay such liens in full if Tenant is unsuccessful in any good faith attempt to contest the same and Tenant shall bond off or discharge any such lien prior to foreclosure of the same by the lien claimant. On or before the Effective Date, Landlord shall sign a notice of non-responsibility in the form attached hereto as Exhibit D (a "Notice of Non-Responsibility"). Upon Landlord's execution of such Notice of Non-Responsibility, and prior to commencing the Initial Tenant Improvements, Tenant shall provide a copy of such notice to the general contractor in connection with the Initial Tenant Improvements and shall post a copy of the Notice of Non-Responsibility in a conspicuous place upon the Demised Premises during the construction of the Initial Tenant Improvements. Further, and prior to commencing the Initial Tenant Improvements, Tenant shall file with the York County Clerk of Court's office a "Notice of Project Commencement" in the form attached hereto as Exhibit E (a "Notice of Project Commencement"). Tenant shall indemnify and hold Landlord harmless from and against any costs, damages, and expenses, including, without limitation, attorneys' fees, arising from liens or claims of liens relating to the Initial Tenant Improvements, any other work upon or improvement to the Demised Premises by Tenant, or Tenant's failure to comply with the terms of this Lease with respect to improvements. The foregoing indemnity shall survive the termination or expiration of


Landlord Initials

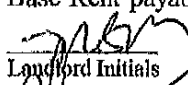

Tenant Initials

this Lease, notwithstanding any other provision hereof.

5.2 Option to Begin Tenant's Work Prior to Completion of Landlord's Work. Pursuant to Section 5.1 of this Lease, Landlord is required to deliver possession of the Demised Premises to Tenant with Landlord's Work completed. In the event that Tenant has satisfied or waived any contingencies to its obligations as expressly set forth herein and Landlord's Work is not yet fully complete but is sufficiently completed so that Tenant can begin the Initial Tenant Improvements without materially interfering with the completion of Landlord's Work, Tenant will be permitted early entry to the Demised Premises for the purpose of beginning the Initial Tenant Improvements. Notwithstanding Tenant's right to early entry to the Demised Premises, the actual date of delivery of possession as described in the definition of "Rent Commencement Date" in this Lease shall not occur until Landlord's Work is fully complete and accepted by Tenant in accordance with Section 5.1 hereof.

5.3 Punch List. Within fourteen (14) days after receipt of the Notice of Tender, Landlord and Tenant shall conduct a "walk-through" inspection of the Demised Premises and shall set out on a "punch list" any defects in Landlord's Work, or the Demised Premises noted by either party. Tenant shall be entitled to supplement the punch list for a period of thirty (30) days thereafter. The punch list shall set forth a time by which each punch list item shall be completed. Landlord agrees that any and all work performed by Landlord after delivery of the Demised Premises to Tenant shall not unreasonably interfere with Tenant's performance of the Initial Tenant Improvements, and Landlord shall be responsible for any and all costs resulting from any such unreasonable interference. If any item is not completed within the time set forth on the punchlist, then Landlord shall continue to be obligated to complete that item, but Tenant shall be entitled to complete any such item at any time following ten (10) days notice to Landlord, and Landlord shall reimburse Tenant for the reasonable costs of correcting or completing Landlord's Work within ten (10) days following a written demand by Tenant. In the event that Landlord fails to promptly pay said amount to Tenant, Tenant shall have the right to set off the costs incurred by Tenant in so correcting or completing Landlord's Work against the rent otherwise payable by Tenant.

6. Payment of Rent; Base Rent. Each monthly installment of rent and all other sums due Landlord by Tenant hereunder shall be paid to Landlord in advance, and without notice, demand, delay, or offset, on the first day of each month during the Term at 2850 Cherry Road, Rock Hill, SC 29730, or at such other place as may be designated in writing, from time to time, by Landlord. Landlord reserves, and Tenant covenants to pay to Landlord, without prior demand being made therefor, as base rent for the Demised Premises, the minimum annual base rent (the "Base Rent") for each lease year, payable in equal monthly installments, following the Rent Commencement Date, shown by the below schedule of Base Rent. All Base Rent shall be payable to Landlord in equal monthly installments and on the first day of each month during the Term following the Rent Commencement Date. For any partial month during the Term, the amount of Base Rent payable by Tenant shall be prorated based upon a thirty (30) day month, and for any

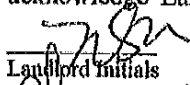

Landlord Initials

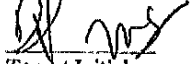

Tenant Initials

month during which prorated Base Rent is payable which commences following the first day of the month, then Tenant shall pay the amount of pro-rated Base Rent payable for that month to Landlord on the date upon which Tenant's obligation to pay Base Rent for that month commences.

<u>Initial Term</u>	<u>Base Rent</u>	<u>Monthly Installment of Base Rent</u>
Lease Year 1	\$ 26,820.00	\$ 2,235.00
Lease Year 2	\$ 27,356.40	\$ 2,279.70
Lease Year 3	\$ 27,903.53	\$ 2,325.29
Lease Year 4	\$ 28,461.60	\$ 2,371.80
Lease Year 5	\$ 29,030.83	\$ 2,419.24
Lease Year 6	\$ 29,611.45	\$ 2,467.62
Lease Year 7	\$ 30,203.68	\$ 2,516.97
Lease Year 8	\$ 30,807.75	\$ 2,567.31
Lease Year 9	\$ 31,423.90	\$ 2,618.66
Lease Year 10	\$ 32,052.38	\$ 2,671.03
First Renewal period		
Lease Year 11	\$ 32,693.43	\$ 2,724.45
Lease Year 12	\$ 33,347.30	\$ 2,778.94
Lease Year 13	\$ 34,014.24	\$ 2,834.52
Lease Year 14	\$ 34,694.53	\$ 2,891.21
Lease Year 15	\$ 35,388.42	\$ 2,949.04
Second Renewal Term		
Lease Year 16	\$ 36,096.19	\$ 3,008.02
Lease Year 17	\$ 36,818.11	\$ 3,068.18
Lease Year 18	\$ 37,554.47	\$ 3,129.54
Lease Year 19	\$ 38,305.56	\$ 3,192.13
Lease Year 20	\$ 39,071.68	\$ 3,255.97

7. **Rent Commencement; Commencement Agreement.** Tenant's obligation to pay Base Rent hereunder to Landlord shall commence on the date (such date being the "Rent Commencement Date") on which the earlier of the following occurs: (a) the date upon which Landlord delivers the Demised Premises to Tenant with Landlord's Work substantially completed, subject only to minor punchlist items as set forth in Section 5.3, as herein provided for, or (b) a temporary certificate of occupancy is issued by the City of Rock Hill for the Demised Premises. Following the Rent Commencement Date, Landlord and Tenant agree to cause to be prepared and executed between them a lease commencement agreement, in which (i) the dates of the Commencement Date and Rent Commencement Date are confirmed by the parties, (ii) the parties acknowledge Landlord's Work to have been completed as required by this Lease, and (iii) the


Landlord Initials


Tenant Initials

parties acknowledge Tenant's Proportionate Share (if not set forth herein).

8. **Landlord Reimbursement Obligation for Tenant's Work.** Following the completion of Tenant's Work, as provided by Section 5 above, Landlord shall pay to Tenant upon demand the total sum of FORTY FOUR THOUSAND SEVEN HUNDRED AND NO/100 DOLLARS (\$44,700.00), which shall be paid to Tenant incrementally in amounts of \$11,175 at the completion of 25% of Tenant's Work, 50% of Tenants Work, 75% of Tenant's Work and 100% of Tenant's Work in reimbursement for a portion of the costs incurred by Tenant in completing Tenant's Work.

9. **Statement of Gross Sales and Payment of Percentage Rent.** (Intentionally Omitted)

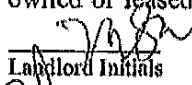
10. **Tenant's Records.** (Intentionally Omitted)

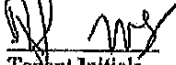
11. **Late Payments.** Tenant covenants and agrees to pay a Late Fee monthly, equal to the greater of One Hundred Dollars (\$100.00) or two percent (2%) of Base Rent and all other sums due under this Lease from the time said rents or sums accrue if they are not paid within ten (10) business days of when due, Landlord expressly reserving all other rights and remedies provided herein and/or by law in respect thereto. Tenant further agrees to pay (or to reimburse Landlord promptly if Landlord elects to pay) any and all costs and expenses incurred by Landlord in connection with the collection of delinquent rents and/or the enforcement of any of the provisions of this Lease, including reasonable attorneys' fees. Tenant further covenants and agrees to pay Landlord a "bad check" or "returned check" charge in the amount of FIFTY AND NO/100 DOLLARS (\$50.00) for each check of Tenant dishonored by Tenant's bank.

12. **Real Estate Taxes and Common Areas.**

(a) Landlord covenants that it will pay, when due, all real estate taxes and assessments imposed against the Building (including the Demised Premises). Tenant agrees that after the date of this Lease and during the term Tenant will pay Landlord, as additional rent ("Additional Rent"), Tenant's Proportionate Share (hereinafter defined) of all such real estate taxes and assessments. Tenant's Proportionate Share shall be 4.02%. The sum due by Tenant pursuant to this paragraph shall be prorated for any fraction of a year during the Term. Tenant further agrees that if any special assessment is imposed against the Building, Tenant will pay to Landlord promptly Tenant's Proportionate Share of such special assessment. For purposes of calculating Tenant's Proportionate Share, the Building shall in all events be deemed to contain at least 36,000 square feet.

(b) Tenant also agrees to pay all taxes and charges on all personal property owned or leased by it and located upon the Demised Premises so that no tax lien of any sort or

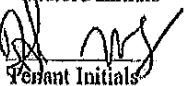

Landlord Initials


Tenant Initials

description against Tenant shall become a charge against the Demised Premises. Tenant shall be solely responsible for any and all business licenses required by any governmental authority.

(c) Tenant agrees to pay to Landlord, monthly as Additional Rent, Tenant's Proportionate Share of Landlord's costs and expenses incurred in maintaining and otherwise caring for the common areas ("Common Areas") of the Building (hereinafter collectively called the "Common Area Charge"). The Common Area Charge is equal to the total cost and expense incurred by Landlord in operating and maintaining the Common Areas, including, without limitation, (i) all costs to maintain, repair, replace, supervise, and administer the Building and the Common Areas thereof such as stairwells, common reception areas, common restrooms, common hallways and entranceways, parking areas, landscaping, sidewalks and other Building common areas; (ii) all costs to maintain, repair, replace, and replace any improvements in the Building's equipment and operating systems amortized over their useful lives and other capital improvements (other than those exclusively for the use of a particular tenant and other than those involved in the initial construction of the Building) to the Building, parking lots, landscaping, sprinkler systems, sidewalk, driveways, and the roofs amortized over their useful lives; (iii) any costs levied, assessed or imposed by, or at the direction of, or resulting from statutes or regulations, or interpretations thereof, promulgated by any governmental authority or insurer in connection with the use or occupancy of the Demised Premises or the common areas of the Building (excluding any increases resulting specifically from the particular use of another tenant of a portion of the Building); (iv) any property management fees and administrative costs, including, but not limited to, the cost of compensation (including employment taxes and fringe benefits) of all persons who perform regular and recurring duties connected with the management, operation, maintenance and repair of the Building, its equipment, parking facilities and the common areas; (v) amortization of any energy management system or other capital improvements installed by Landlord other than those installed solely for the benefit of a particular tenant of the Building, (vi) parking lot pavement repairs and maintenance and parking lot striping, sidewalk repairs and maintenance, trash and rubbish and garbage removal in the event Landlord provides dumpsters or common trash depositories, (vii) parking lot lighting, (viii) security, to the extent that Landlord elects, at its sole option and not as its obligation, to provide security for the Building or any of the Common Areas, (ix) Building signage repair and maintenance, (x) parking lot snow removal, and (xi) the costs of any assessments, dues, or other charges which are payable for the Building and the parcel of real property of which it is a part under any restrictive covenants of record. Such charges and expenses shall also expressly include depreciation on machinery and equipment used in any such maintenance, and other general Common Area repairs. In addition, the Common Area Charge shall also include charges for water, electricity, sewerage, and other utilities, if any of the same are not individually metered by Landlord to the individual tenant spaces within the Building, and the lighting of Tenant's signage (if Tenant is to have separate signage hereunder), if the same is connected with the parking lot light meter or is paid by Landlord. As to charges of the type contemplated by the foregoing sentence, Tenant shall pay 100% thereof, and not Tenant's Proportionate Share thereof solely, to the extent that the same can be separately allocated to the Demised Premises. Notwithstanding anything contained herein to


Landlord Initials

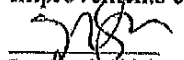

Tenant Initials

the contrary, Common Area Charge shall not include any janitorial or cleaning charges, utility charges, or costs to maintain, repair, replace equipment that solely service the residential use on the second, third, and fourth floors of the Building.

(d) Landlord shall obtain and keep in force during the term of this Lease a policy or policies of insurance, covering loss or damage to the Building, the Common Areas and the building of which the Demised Premises comprise a part, in an amount not less than eighty percent (80%) of the replacement costs thereof, providing protection against all perils included within the classifications of fire, extended coverage, vandalism (exclusive of glass and doors) special extended perils (all risk), together with public liability insurance with established limits of coverage deemed appropriate by Landlord for personal injury or injuries. Tenant shall pay as Additional Rent, each month with its installment of Base Rent, Tenant's Proportionate Share of the costs incurred by Landlord in insuring the Building and/or the Common Areas.

(e) Landlord shall estimate Tenant's Proportionate Share of real estate taxes, insurance, and the Common Area Charges on the basis of periods of twelve (12) months, commencing and ending on such dates as may be designated by Landlord, one-twelfth (1/12th) of which shall be paid monthly by Tenant with Base Rent as Additional Rent. Landlord may revise its estimate of such costs at any time with thirty (30) days written notice to Tenant. Tenant, upon notice, shall adjust its monthly installments during the remainder of the period to reflect such revised estimate. After the end of each designated twelve (12) month period, Landlord shall furnish Tenant a statement of the actual costs for the period, and there shall be an adjustment between Landlord and Tenant, with a payment to Landlord or a credit to Tenant, as the case may be, to the end that Landlord shall receive the entire amount of Tenant's Proportionate Share for such period, provided, however, Tenant shall have the right, at Tenant's expense and upon prior written notice to Landlord, to protest or contest any such taxes, assessments, impositions and charges, and Tenant shall not be in default for failure to pay any such taxes, assessments, impositions or charges during such protest or contest period. Tenant, however, shall not be allowed to protest or contest following any time where any such further contest or protest could result in a forfeiture of the Demised Premises, and after any such time Tenant shall promptly pay Tenant's Proportionate Share thereof to Landlord.

13. **Trade Fixtures.** Tenant agrees, at its own cost and expense and as more particularly provided for by Section 5 above, to fixture the Demised Premises with new trade fixtures. All trade fixtures installed in the Demised Premises by Tenant shall remain Tenant's property; provided, however, that nothing herein shall be deemed to affect Landlord's remedy of distraint. Tenant agrees to repair (or to reimburse Landlord for the cost of repairing) any damage to the Demised Premises occasioned by the installation or removal of said trade fixtures. The trade fixtures to be installed by Tenant are as set forth upon Exhibit C, attached hereto and incorporated herein by this reference. Save for installation of the trade fixtures, installation of the Initial Tenant Improvements contemplated by this Lease, and modification of Tenant's Signage from time to time

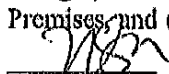

Landlord Initials

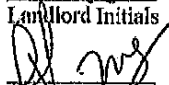
Tenant Initials

as set forth in this Lease, Tenant shall not otherwise modify or alter the Demised Premises or any part thereof without Landlord's prior written consent, save that Tenant may make during each lease year non-structural modifications to the interior of the Demised Premises having a cost of less than \$10,000.00 without Landlord's consent.

14. **Intentionally Omitted**

15. **Common Areas.** Tenant, its customers, employees and invitees shall have the non-exclusive right to use and enjoy, in common with Landlord, other tenants and their customers, employees and invitees, the Common Areas, which Landlord agrees to provide for the reasonable operation of the Building. Notwithstanding anything contained herein to the contrary, Tenant, its customers, employees and invitees shall not have access, use, or enjoyment of the lobby that services the upper floors and located on the first floor or any of the upper floors of the Building. The Common Areas shall not include any areas included within any portion of the Building demised to any tenant, and the nature and configuration of the Common Areas is subject to reasonable change and modification by Landlord. It is expressly understood that the Common Areas are intended primarily for the use by customers or clients of the businesses in the Building, and Tenant accordingly agrees that its employees will not use the Common Areas for the parking or storage of any automobile, truck or any other vehicle owned or used by any of its employees. Tenant further agrees that Landlord reserves the right, in its sole discretion, to designate specific parking area(s) for the use by the employees and/or customers of Tenant, and, if so designated, Tenant shall instruct its employees and/or customers, as the case may be, to park in any such designated areas. Landlord agrees that such parking spaces designated for Tenant's customers shall be reasonably close in proximity to the Demised Premises. In order to assist Landlord in the enforcement of the provisions of this paragraph, Tenant agrees that within ten (10) days after being requested so to do, Tenant will furnish Landlord a written statement containing the names of all employees, agents, and representatives employed by Tenant in or about the Demised Premises, and the license numbers of all vehicles owned or used by Tenant or said employees, agents or representatives. Tenant shall not park, or permit to be parked, any delivery vehicles in the Common Areas intended for the use by customers of the stores in the Building, nor permit merchandise delivery from such Common Areas if delivery access and loading and unloading zones are provided by Landlord. Landlord covenants that, at all times during the term hereof, it will, at its own cost and expense, maintain the Common Areas in a good condition of repair and adequately lighted and paved, and that there will be at least the minimum number of parking spaces sufficient to satisfy governmental requirements as of the date of this Lease. Anything in this paragraph to the contrary notwithstanding, Landlord expressly reserves the right, from time to time, (i) to construct other buildings and/or enlarge existing buildings on or over the Common Areas so long as the required minimum number of parking spaces shall be available, (ii) to increase, reduce, modify or alter the dimensions and locations of roadways, parking lots, sidewalks and buildings, provided such changes, additions or reductions do not unreasonably interfere with Tenant's use of the Demised Premises, and (iii) to enact reasonable rules and regulations (so long as the same do not materially


Landlord Initials


Tenant Initials

and adversely interfere with Tenant's permitted use) governing the use of the Common Areas.

16. **Landlord's Repairs and Right of Entry.** Landlord covenants that it will, at its own cost and expense and within five (5) business days after being notified in writing by Tenant of the need therefor, make such repairs to the Common Areas and outside utility lines and to the exterior of the Demised Premises (including the roof, gutters, downspouts and outside walls, but excepting all glass and doors), as may be necessary to keep the same in a good condition of repair; provided, however, that if the need for such repair is occasioned by the casualty resulting from negligence or willful act of Tenant, or any of its agents, employees, or contractors, such repairs shall be made by Landlord, but the cost of such repairs shall be charged to and be promptly paid for by Tenant subject to Tenant being given credit for any money Landlord actually receives in respect to such damage from its insurance. Anything in the foregoing to the contrary notwithstanding, Landlord shall have no liability whatsoever for damage or injury to person or property occasioned by its failure to make any such repair (e.g., injury damage to property resulting from leaks caused by a defect in the roof, outside walls, gutters and/or downspouts) unless, within five (5) business days after being notified in writing by Tenant of the need therefor, Landlord shall have failed to initiate such repair and thereafter diligently pursue it to completion and such failure shall not have been due to any cause beyond Landlord's control, including, without limitation, strikes and/or inability to obtain materials and/or equipment at reasonable prices. Landlord, its agents, employees and contractors, shall have the right, from time to time, to enter and use insofar as may be necessary the Demised Premises for the purpose of making any of the aforesaid repairs, and to enter the Demised Premises in the case of any emergency. In the event of Landlord's failure to initiate any such repair within the time provided, or in the event of an emergency, Tenant may effectuate repairs and, to the extent Landlord is responsible for the cost of such repair under this Lease, may invoice Landlord for same. Landlord shall thereafter reimburse Tenant within thirty (30) days of receipt of an invoice from Tenant and/or offset Tenant's rent equal to amount owed by Landlord, at its election.

17. **Tenant's Repairs.** Tenant covenants that it will, at all times during the term hereof and at its own cost and expense, keep the Demised Premises (including, without limitation, the interior and exterior heating and air conditioning system, toilets, sprinkler system, signage, pipes, plumbing, wires and conduits, electric lines, windows, doors, glass, fixtures and equipment) in a good condition of repair and in good working order (making such repairs and replacements as may be necessary), unless the need therefor is occasioned by fire or other casualty covered by Landlord's fire and extended coverage insurance policy (exclusive of any damage to glass or doors), in which event such repair and replacement shall be an expense of Landlord to the extent of such coverage. Tenant agrees to be responsible and liable for any freezing in pipes and/or within plumbing fixtures and shall pay for the repair of any damage caused thereby. In this regard, Tenant shall keep the Demised Premises at a sufficient temperature to prevent such freezing. Tenant understands and agrees that Tenant (not Landlord) shall be responsible for any condensation in or around the duct work used by heating and/or air conditioning.

Landlord Initials

Tenant Initials

18. **Tenant's Care of Common Areas.** Tenant covenants and agrees that it will, at all times during the term hereof, keep the Demised Premises and all Common Areas immediately adjoining the Demised Premises clean and free from obstruction, rubbish, and dirt. Tenant shall place all trash, rubbish and garbage in a proper closed receptacle and shall pay all costs incident to the removal thereof.

19. **Tenant's Failure to Repair and Remove Debris, etc.** Tenant agrees that if it fails to perform any obligation placed upon it by either Section 17 or Section 18 of this Lease, Landlord, in addition to other remedies provided by law and/or this Lease, may correct (or have corrected) such failure at the cost and expense of Tenant.

20. **Miscellaneous Covenants and Agreements of Tenant.** Tenant covenants and agrees that: (i) it will comply with all applicable laws, ordinances and regulations relating to its business conducted in the Demised Premises, (ii) it will promptly pay for all electricity, gas, water and other utilities consumed on, and all sewage disposal charges assessed against, the Demised Premises and all required meter deposits and connection fees relating to such utilities, (iii) it will promptly pay for lighting associated with Tenant's Demised Premises, (iv) it will not use the name of the Building for any purpose other than as the address of its business to be conducted in the Demised Premises, (v) it will not use, or permit to be used, the Demised Premises for any illegal or immoral purpose, (vi) it will conduct its business in such manner as will be in keeping with the character and reputation of the Building, (vii) it will make every effort to work harmoniously with other tenants in the Building, (viii) it will not, without the prior written consent of Landlord, which may be withheld in Landlord's sole discretion, (a) make any alteration to any structural portion of the Demised Premises, (b) use or permit to be used any advertising medium or device such as a phonograph that could be heard outside of the Demised Premises, or (c) hold a fire, bankruptcy, going-out-of-business or auction sale, (ix) it will permit Landlord or its representatives to enter the Demised Premises during the last twelve (12) months of the Term for the purpose of exhibiting the Demised Premises to prospective tenants, and to place a "For Rent" sign in a front show window during such period of time, (x) it will use the Demised Premises in compliance with all declarations of restrictive covenants which are of record, (xi) in the event that any utilities service is interrupted or discontinued to the demises premises, Tenant shall look solely to the provider thereof in damages, and Landlord shall have no responsibility or liability therefor, (xi) that, except for completion of Landlord's Work and the fulfillment of Landlord's repair obligations, Tenant acknowledges that it is accepting the Demised Premises, based upon its own inspections and evaluations of the Demised Premises for Tenant's intended purpose, in its present, existing "AS IS" condition, and "WITH ALL FAULTS", and (xii) Tenant has obtained all approvals, consents, and authorizations necessary to allow it to enter into and be bound hereby, and this Lease, once executed by Tenant, constitutes the legal and binding obligation of Tenant, enforceable in accordance with its terms.


Landlord Initials

Tenant Initials

21. **Insects and Rodents.** Tenant covenants that it will, at its own expense, take such steps as shall be necessary to keep the Demised Premises free of termites, roaches, rodents, insects and other pests and that it will save Landlord and the other tenants of the Building harmless from any damage caused thereby.

22. **Damage by Vandals.** If the doors, window frames, glass or any part of the exterior of the Demised Premises are damaged by persons breaking, or attempting to break, into the Demised Premises, or by vandals, Tenant covenants to repair immediately at its own expense any and all such damage.

23. **Fire Hazard.** Tenant covenants that, without the prior written consent of Landlord, it will not do anything which will increase the rate of fire insurance on the building of which the Demised Premises constitutes a part, and that if such consent is given, Tenant will pay Landlord the amount of the increase in the cost of such insurance, as and when the premiums become due.

24. **Care of Roof.** Except as a part of the Initial Tenant Improvements (if called for thereby), Tenant agrees that it will not (directly or by sufferance) place any debris on the roof of the Building, or cut, drive nails into or otherwise mutilate the roof or cause or consent to any penetration thereof without Landlord's prior written consent, which consent may be withheld in Landlord's sole discretion. Subject to the terms hereof, Landlord covenants to maintain the roof and all structural elements of the Building at all times during the initial lease term and any extensions.

25. **Condition on Termination.** Tenant covenants that it will, upon the expiration or earlier termination of this Lease, (a) deliver to Landlord, peaceably and quietly, the Demised Premises in the same good condition they are now in or shall hereafter be placed in, ordinary wear and tear and damage by casualty within the coverage of a standard fire insurance policy with extended coverage excepted, and (b) remove its trade fixtures and/or signs from the Demised Premises and to repair promptly any damage caused by such removal. Except for Tenant's trade fixtures, which may be removed from the Demised Premises by Tenant upon the expiration or termination hereof (subject to Landlord's rights of distraint), all property within the Demised Premises which constitutes a "fixture" shall, as further provided for below, be and become the sole property of Landlord upon the expiration or termination of this Lease.

26. **Improvements to Become Landlord's.** Tenant agrees that all additions and other improvements installed in the Demised Premises by it, that are not Trade Fixtures, including, without limitation, all electric wiring, electric fixtures, air conditioning systems, show window reflectors, screens, screen doors, awnings, awning frames and floor coverings (including carpeting but excepting rugs) shall immediately become the property of Landlord, and shall not be removed by Tenant at the expiration or earlier termination of this Lease, unless requested to do so by Landlord, in which event Tenant agrees to do so and to repair promptly any damage caused by any such removal.

Landlord Initials
Tenant Initials

27. **Tenant's Insurance.** Tenant agrees that it will hold Landlord and any agent of Landlord harmless from any and all injury or damage to person or property in, on or about the Demised Premises and the portion of Common Areas adjoining the Demised Premises, including, without limitation, all costs, expenses, claims or suits arising in connection therewith; provided, however, that this clause shall not apply to injury or damage caused by Landlord's own willful act or Landlord's failure to make any repair (which Landlord has herein agreed to make) within a reasonable time after Tenant's written notice of the need therefor. Tenant will, at all times during the term hereof, at its own cost and expense, carry with a company or companies, reasonably satisfactory to Landlord, public liability insurance on the Demised Premises and adjoining Common Areas, with limits of not less than One Million Dollars (\$1,000,000.00) for injury or death to one person and One Million Dollars (\$1,000,000.00) for injury or death to more than one person in any one accident and minimum property damage of Three Hundred Thousand Dollars (\$300,000.00), which insurance shall be written or endorsed so as to protect (meaning that such parties shall be additional insureds thereunder) Landlord, any agent of Landlord, and Landlord's lender or mortgagee as to the Building, as their respective interests may appear. Said policy or policies shall contain a provision insuring Tenant against all liability which Tenant might have under this hold harmless provision. Further, and whether as an endorsement to its general liability policy or by way of a separate policy, Tenant shall procure and maintain throughout the Term and with an insurer satisfactory to Landlord (i) workers' compensation insurance in such amounts as are required by law, and (ii) business interruption coverage with limits equal to at least one year's rent payable hereunder (upon which Landlord and its mortgagee as to the Building shall be additional insureds) and with a deductible of no greater than \$5,000.00. Tenant covenants that certificates of all such insurance policies shall be delivered to Landlord promptly without demand. If Tenant fails to provide such insurance, Landlord may, but shall not be required to, obtain such insurance and collect the cost thereof as a part of the rent herein reserved.

28. **Possession.** In the event Landlord elects to tender to Tenant possession of the Demised Premises prior to the Commencement Date, Tenant agrees to diligently prosecute, perform, complete, install and make operational all of Tenant's furniture, fixtures and equipment in a diligent manner, and to perform and complete such construction, fixturing or other activity that it may conduct pursuant to the terms hereof in a manner which will not interfere with the construction, development or operation of the Building or Landlord's completion of Landlord's Work. Tenant shall, prior to accepting such possession of the Demised Premises, deposit with Landlord policies or certificates of insurance evidencing compliance with Section 27 hereof.

29. **Mechanic's Liens.** Tenant shall not permit any mechanic's, materialman's or similar lien to be filed against any portion of the Demised Premises for any labor performed or material furnished in connection with any work performed or caused to be performed by Tenant, (and not relating to Landlord's failure to perform Landlord's obligations hereunder) to attach to the Demised Premises or the Building or the interest of Landlord or Landlord's lessor, if any,

Landlord Initials

Tenant Initials

therein or to Tenant's interest in this Lease or the Demised Premises at any time. Tenant covenants and agrees to indemnify, defend and hold harmless Landlord from and against any such lien or claim of lien and any and all costs, expenses and liabilities relating thereto. If any such lien is filed, then Tenant shall fully pay or discharge the same or post a bond regarding such lien in accordance with applicable law and in a manner acceptable to Landlord within ten (10) days of receipt of written notice of the filing thereof. If Tenant fails to fully pay or discharge such lien or post a bond regarding such lien in accordance with applicable law and in a manner acceptable to Landlord within ten (10) days of receipt of written notice of the filing thereof, then Landlord shall have the immediate right (but not the obligation) to pay and/or discharge such lien at Tenant's cost and expense, and Tenant shall, within ten (10) days of written demand, pay all Landlord's costs and expenses incurred in paying or discharging such lien. Tenant's failure to fully pay or discharge said lien or post a bond within the time specified shall also constitute an immediate default under the Lease and Tenant may exercise its rights to terminate and pursue any other remedies available at law or in equity. Prior to the commencement of any improvements to the Demised Premises, Tenant shall notify Landlord thereof so that Landlord may execute for Tenant, and Tenant may post in a conspicuous place upon the Demised Premises, a notice of non-responsibility as contemplated by the South Carolina Code of Laws.

30. **Security Deposit.** Contemporaneously with, or promptly following, the execution hereof by Tenant, Tenant shall deposit with Landlord a security deposit ("Security Deposit") in the amount of \$6,705.00 as security for the full and faithful performance by Tenant of all terms and covenants of this Lease required to be performed by Tenant. If at any time Tenant shall be in default in the performance of any of the covenants of this Lease, Landlord shall have the right, at its discretion, to use the Security Deposit, or so much thereof as may be necessary, to cure such default. In the event that Landlord utilizes all or any portion of the Security Deposit as aforesaid, Tenant shall, promptly following the request of Landlord so to do, restore with Landlord the Security Deposit or portion thereof so used by Landlord. No interest shall be paid by Landlord to Tenant with respect to the Security Deposit. The Security Deposit, or the remainder thereof, shall be returned to Tenant following the termination of this Lease, provided that Tenant has fully and faithfully carried out all its terms and covenants and paid all its Base Rent, Additional Rent, Late Charges and any other amounts due hereunder to Landlord. The Security Deposit does not constitute trust funds, and need not be kept separate by Landlord from its other funds.

31. **Damage by Fire or Other Casualty.** In the event the Demised Premises, or any part thereof, shall be damaged by fire or other casualty during the Term, Landlord agrees that it will restore the Demised Premises, with reasonable dispatch and to the extent of available insurance proceeds, to substantially the same condition they were in prior to such damage, and if the Demised Premises are rendered wholly or partially untenantable as a result of such damage, the Base Rent shall be equitably abated (according to the loss of use) during the period intervening between the date of such damage and the date the Demised Premises are restored. If Landlord fails to complete any repair or restoration of the casualty damage within one hundred and eighty (180) days of the

Landlord Initials

Tenant Initials

date of such casualty, Tenant may, at its sole discretion, terminate this Lease by written notice to the Landlord. If this Lease is so terminated, the rental payable hereunder shall be abated as of the date of Tenant's notice, and Tenant shall remove all of its property from the Demised Premises within sixty (60) days after the notice of termination is given. Anything in the foregoing to the contrary notwithstanding, if such damage occurs during the last two (2) years of the Term, and if such damage exceeds fifty percent (50%) of the then insurable value of the Demised Premises, either Landlord or Tenant may terminate this Lease as of the date of such damage, by giving to the other written notice of its intention so to do within thirty (30) days after the date such damage occurs.

Anything in this Lease to the contrary notwithstanding, Landlord shall have the right to terminate this Lease, at its sole and absolute election, as of the time of occurrence of any fire or other casualty, within sixty (60) days of such occurrence, if such fire or other casualty damages one or more adjoining or contiguous store(s) with an aggregate area of at least 4,000square feet.

32. **Condemnation.** In the event any portion of the Demised Premises, or at least twenty percent (20%), in the aggregate, of the customer parking areas of the Building, shall be taken by the exercise of the power of eminent domain (or sold to the holder of such power, pursuant to a threatened taking), this Lease may, at the option of Landlord or Tenant, be terminated by written notice given to the other within sixty (60) days after the date such taking or sale occurs. If this Lease is not so terminated, Landlord covenants that it will, at its own expense, promptly after the lapse of said sixty (60) days, repair such damage and do such work as may be required to repair and rebuild the Demised Premises and/or the Common Areas, with the view to restoring the Demised Premises and/or the Common Areas as nearly as practicable to the condition they were in immediately prior to such taking or sale; provided, however, that whether or not this Lease is so terminated, the Base Rent payable hereunder shall be equitably abated (according to the loss of use) from the date of such taking or sale. Tenant shall have no right in or to the proceeds of any award made in any such condemnation (or proceeds derived from any sale in lieu thereof), except to any portion of the award expressly allocated to the personal property and/or trade fixtures of Tenant.

33. **Option to Purchase.** Tenant shall have the Option to purchase the Premises during the third lease year with not less than 120 days advanced written notice to Landlord for \$270,000.00 (the "Purchase Price") in accordance with the Purchase and Sale Agreement as provided in Exhibit G. Landlord shall apply \$25,000 of Rent collected and the Security Deposit against the Purchase Price at the time of closing. Upon the purchase of the Leased Premises by Tenant, this Lease shall be terminated.

34. **Assignment and Subletting.** Tenant may not, without Landlord's prior written consent, not to be unreasonably withheld, conditioned, or delayed, assign any of its rights, interests, or obligations under this Lease or sublease all or any portion of the Demised Premises. No such sublease or assignment as is not consented to in writing by Landlord shall be effective, and shall not in any circumstance relieve Tenant of any of its obligations hereunder.

Landlord Initials

Tenant Initials

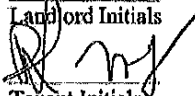
35. **Effective Date.** The "Effective Date" of this Lease shall be the later of the dates upon which it is executed by Landlord or Tenant.

36. **Subordination.** This Lease is subject and subordinate to all ground or underlying leases (if any) and to all mortgages which may now or hereafter affect such leases, the Demised Premises, the Building, or the land on which the Demised Premises are situated, and to all renewals, modifications and extensions thereof. The foregoing provisions shall be self-operative and no further instrument of subordination shall be required for this purpose; provided, however, that in confirmation of such subordination, Tenant shall, upon request of Landlord, execute and deliver, in recordable form, any instrument of subordination requested by Landlord, and Tenant hereby constitutes and appoints Landlord as Tenant's attorney-in-fact to execute any such subordination instrument on behalf of Tenant. Anything in the foregoing to the contrary notwithstanding, in the event of a foreclosure under any such mortgage, the holder of the note secured thereby or the purchaser at such foreclosure sale shall have the option to recognize this Lease, in which event this Lease shall continue in full force and effect and Tenant shall attorn to Landlord. Any such mortgage or deed of trust may at any time, at the request of the holder of the note secured thereby, be subordinated to this Lease.

37. **Waiver of Subrogation.** All fire insurance, extended coverage, and policies relating to other casualties carried by any party to this Lease covering the Demised Premises and/or the contents thereof shall expressly waive any right on the part of the insurer against any other party to this Lease, which right, to the extent not prohibited by or violative of any such policy, is hereby expressly waived. Landlord and Tenant each agree that policies will include such waiver clause or endorsement so long as the same shall be obtainable without extra cost, or if extra cost shall be charged therefor, so long as the party or parties in whose favor such waiver clause or endorsement runs pays such extra cost. If extra cost shall be chargeable therefor, each party shall advise the other of the amount of the extra cost, and the other party, at its election, may pay the same, but shall not be obligated so to do.

38. **Default and Remedies.** In the event the business being conducted in the Demised Premises shall at any time be substantially terminated or discontinued, or in the event Tenant shall default in the payment of any installment of rent herein reserved, or in the event Tenant shall default in the performance of any of the terms, covenants, conditions or provisions herein contained, binding upon Tenant and such default shall not be remedied within ten (10) days after written notice, thereof shall have been given by Landlord to Tenant (which such notice and right to cure, with respect to any monetary default, need be given only once in any calendar year prior to Landlord immediately exercising its remedies with respect to any such a subsequent default during such calendar year), or in the event Tenant shall be adjudicated a bankrupt or shall become insolvent or shall make a general assignment for the benefit of its creditors, or in the event a receiver shall be appointed for Tenant or a substantial part of its property and such receiver is not removed within:


Landlord Initials


Tenant Initials

thirty (30) days after appointment (each of the foregoing being an "Event of Default"), then and in each of such cases Tenant shall be deemed in material default of this Lease and Landlord shall have the right (in addition to all other rights and remedies provided by law), to (i) accelerate all rent and other charges and sums due hereunder, (ii) to the extent then allowed by applicable law, reenter and take possession of the Demised Premises, peaceably or by force, (iii) to terminate this Lease and, at Landlord's option, to remove any property therein, without liability for damage to, and without obligation to store, such property. In the event of such termination, Landlord may (but shall be under no obligation to) relet the Demised Premises, or any part thereof, from time to time, in the name of Landlord or Tenant, without further notice, for such term or terms, on such conditions, and for such uses and purposes, as Landlord, in its sole and absolute discretion, may determine, and may collect and receive all rents derived therefrom and apply the same, after deduction of all appropriate expenses (including, without limitation, attorneys' fees and other costs of collection) to the payment of the rent payable hereunder, Tenant remaining liable for any deficiency. Landlord shall not be responsible or liable for any failure to so relet the Demised Premises or any part thereof, or of any failure to collect any rent connected therewith.

In the event of any default by Landlord hereunder, Tenant shall provide Landlord with notice thereof and thirty (30) days to thereafter cure the same, failing which, subject to the other provisions hereof, Tenant may commence an action against Landlord for its actual damages, together with its attorneys' fees and costs, as its sole and exclusive remedy on account thereof.

39. **Estoppel Certificates.** Within twenty (20) days after written request of Landlord, Tenant shall certify by a duly executed and acknowledged written instrument to any mortgagee or purchaser, or proposed purchaser, or any other person, firm or corporation specified by Landlord, as to the validity and force and effect of this Lease, as to the existence of any default on the part of any party thereunder, as to the existence of any offsets, counterclaims, or defenses thereto on the part of Tenant, and as to any other matters as may be reasonably requested by Landlord, all without charge but no more frequently than monthly. Tenant's failure or refusal to deliver such statement within such time shall be conclusive upon Tenant (i) that this Lease is in full force and effect, without modification except as may be represented by Landlord, (ii) that there are no uncured defaults in Landlord's performance or obligations hereunder, and (iii) that not more than one month's installment of Base Rent has been paid in advance of the due date. Further, and within twenty (20) days after written request of Tenant, Landlord shall certify by a duly executed and acknowledged written instrument to any lender of Tenant, or any other person, firm or corporation specified by Tenant, as to the validity and force and effect of this Lease, as to the existence of any default on the part of any party thereunder, as to the existence of any offsets, counterclaims, or defenses thereto on the part of Landlord, and as to any other matters as may be reasonably requested by Tenant, all without charge but no more frequently than monthly.

40. **Notices.** Any notice which may required or which may be given hereunder by either party shall be delivered by (i) United States registered or certified mail, postage prepaid, or

Landlord Initials

Tenant Initials

(ii) depositing the same with Federal Express or another nationally recognized overnight delivery carrier. Such notices shall be addressed as follows:

If to Landlord: Riverwalk River District Building 6, LLC
Attn: David Williams
2850 Cherry Road
Rock Hill, SC 29730

If to Tenant: The Grapevine of Riverwalk, Inc.
1750 Hwy 160 W, Suite 101, PMB 290
Fort Mill, SC 29708

Either party may modify from time to time the address to which notice to it is to be provided hereunder by providing written notice of such change to the other party.

41. **Quiet Enjoyment.** Subject to the terms, covenants and conditions set forth in this Lease, Landlord covenants that Tenant shall have and enjoy quiet and peaceable possession of the Demised Premises during the term hereof without hindrance, ejection or molestation by Landlord, subject to the provisions of this Lease.

42. **Short Form Lease.** The parties hereto agree that a short form of lease, of even date herewith, describing the Demised Premises, setting forth the term and referring to this Lease, shall, at the request of either party, be promptly executed and recorded (at the cost of the requesting party). In the event that the parties execute such a short form lease, then the parties shall also execute, and Landlord shall then hold, a termination agreement, to be recorded by Landlord upon the expiration or earlier termination of this Lease.

43. **Entire Agreement.** This Lease contains the entire agreement between the parties hereto, and cannot be altered or modified in any way except in writing signed by the parties hereto. All prior representations, discussions, covenants, or warranties of the parties with respect to the Demised Premises or the subject matter hereof are merged herein and superseded hereby.

44. **No Waivers.** Any failure of either party hereto to insist upon strict observance of any covenant, provision or condition of this Lease in any one or more instances shall not constitute or be deemed a waiver, at that time or thereafter, of such or any other covenant, provision or condition of this Lease.

45. **Pronouns.** Every pronoun used in this Lease shall be construed to be of such number and gender as the context shall require.

7282
Landlord Initials
Tenant Initials

46. **Headings.** The headings appearing on the margin of this Lease are intended only for inconvenience of reference, and are not to be considered in construing this instrument.

47. **Successors and Assigns.** This Lease and all the terms, covenants, conditions and provisions herein contained, shall be binding upon, and shall inure to the benefit of, the parties hereto and their respective heirs, personal representatives, successors and (if and when assigned in accordance with the provisions hereof) assigns.

48. **Brokerage Commissions.** Tenant represents that it has not been represented in connection with this Lease by a brokers. Landlord represents that it has not been by a broker. Tenant and Landlord hereby agree to indemnify and hold the other party harmless from any commissions or fees due to any broker or agent asserting a claim.

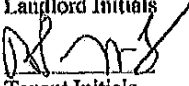
49. **Signage.** Tenant shall have the right to install at its costs one sign on the front façade of the Demised Premises and one sign on the rear façade of the Demised Premises which signs must be approved in writing at Landlords sole discretions and in conformity with the Architectural Design Review Guidelines of Riverwalk and in locations designated by the Landlord. TENANT SHALL BE RESPONSIBLE FOR ALL COSTS ASSOCIATED WITH ITS SIGNAGE ON THE BUILDING AND/OR ON THE BUILDING'S PYLON SIGN (OR MONUMENT SIGN, AS THE CASE MAY BE). Landlord shall use reasonable commercial efforts to cause for Tenant to have monument signage rights at the corner of Dunkins Ferry Road and Cherry Road, when and if such monument signage is installed. Landlord obligations hereunder are limited to Landlord's right to such signage.

50. **Maintenance.** On or before the commencement date of the term, Tenant shall furnish evidence to Landlord that Tenant has contracted for, and is having performed, preventive maintenance on all HVAC equipment in the Demised Premises, on at least a quarterly basis. In the event Tenant shall not have contracted for and/or provided evidence that such HVAC preventive maintenance is being and will be provided, Landlord shall have the right to so contract for said preventive maintenance to the HVAC equipment and charge the actual cost of said maintenance as Additional Rent hereunder. Landlord shall have the right to have any unscheduled remedial HVAC preventive maintenance performed deemed necessary to keep said equipment in operating condition and Tenant agrees to pay all of the charges arising therefrom as Additional Rent hereunder.

51. **Waiver of Homestead Exemption.** To the extent applicable, Tenant waives the benefit of the homestead exemption as to this Lease.

52. **Waste and Nuisance.** Tenant agrees not to suffer, permit or commit any waste, nor to allow, suffer or permit any odors, vapors, steam, water, vibrations, noise, loud music or other undesirable effects to emanate from the Demised Premises into other portions of the building of which the Demised Premises comprise a part or into the Common Areas or other portions of the


Landlord Initials


Tenant Initials

Building, or otherwise to allow, suffer or permit the Demised Premises or any use thereof to constitute a nuisance or unreasonably to interfere with the safety, comfort or enjoyment of the Building by Landlord or any other occupants of the Building or their customers, invitees or any others lawfully in or upon the Building. Upon written notice by Landlord to Tenant that any of the aforesaid is occurring, Tenant agrees forthwith to cease and discontinue the same and within one (1) day thereafter to make such changes in the Demised Premises and/or install or remove such apparatus or equipment therein or therefrom as may be required by Landlord for the purpose of obviating any such condition, and, if any such condition is not so remedied, then Landlord may, at its option, either: (i) enter upon the Demised Premises and cure such condition in any manner Landlord shall deem necessary and add the cost and expense incurred by Landlord therefor, together with all damages, including attorney's fees, sustained by Landlord, to the next installment of the Base Rent due and Tenant agrees to pay such amount, as Additional Rent hereunder, or (ii) treat such failure on the part of Tenant to remedy such condition as an "Event of Default" within the meaning of Section 38 of this Lease. Tenant hereby further agrees to indemnify and save Landlord harmless of and from all fines, claims, demands, actions, proceedings, judgments and damages (including attorneys' fees), of any kind or nature by anyone whomsoever arising or growing out of any breach or non-performance by Tenant of the covenants contained in this paragraph.

53. **Holding Over.** Any holding over by Tenant after the expiration of the Term with the written consent of Landlord shall be construed to create a tenancy from month to month at the same Base Rent reserved during the last lease year of the term, prorated on a monthly basis, and which tenancy shall otherwise be subject to the terms and conditions set forth in this Lease (including payment of Additional Rent). Tenant shall not be considered a tenant-at-will, a tenant-at-sufferance, or as any other form of Tenant other than a holdover tenant at the then existing Base Rent and on the other terms set forth in this Lease, notwithstanding any common law or statute to the contrary. Any holding over by Tenant after the expiration of the Term without the written consent of Landlord shall also be construed to create a tenancy from month to month, subject to the terms and conditions set forth in this Lease, except that the Base Rent shall be double the Base Rent reserved during the last lease year of the term, prorated on a monthly basis (notwithstanding any common law or statute to the contrary which might imply the creation of another form of tenancy in such circumstance). Tenant agrees to indemnify and save Landlord harmless from and against any and all costs, losses, damages, liabilities and/or expenses incurred by Landlord as a result of a delay by Tenant in surrendering possession of the Demised Premises at the expiration or earlier termination of the term, including, without limitation, any claims made by any succeeding tenant due to such delay in surrendering possession.

54. **Landlord's Financing.** Landlord's obligations hereunder are expressly conditioned upon Landlord receiving financing (the "Landlord Financing") on terms satisfactory to it in its discretion for the construction of the Building and, at Landlord's election, any other portion of Landlord's Work, by the date which is ninety (90) days from the Effective Date (the "Financing Date"). In the event that Landlord fails to notify Tenant by the Financing Date that it

Landlord Initials

Tenant Initials

has received the Financing, then Tenant shall provide Landlord with notice of the same, and, if Landlord, within ten (10) days from the date of Tenant's notice, fails to notify Tenant that it received the Financing, then this Lease shall automatically expire and terminate, in which event neither party shall have any further rights or obligations hereunder, save for rights and obligations which are to expressly survive the termination of this Lease.

55. **Parking.** Tenant shall comply and cause its employees to comply with Landlord's employee parking regulations for the Building, and Landlord shall provide Tenant with a detailed site plan indicating the location of employee parking for the Building. Landlord agrees to designate zero parking spaces immediately in front the Demised Premises as being reserved spaces for the use of Tenant, and its guests, customers, and invitees only.

56. **Limitation of Landlord's Liability; Transfer of Demised Premises.** Anything in this Lease to the contrary notwithstanding, the covenants, undertakings and agreements herein made on the part of Landlord are made and intended not for the purpose of binding Landlord personally or the assets of Landlord but are made and intended to bind only the Landlord's interest in the demised premises and building of which it is a part and in the rents and revenues derived therefrom, as the same may, from time to time, be encumbered (collectively, the "Landlord Interest"), and no personal liability shall at any time be asserted or enforceable against Landlord or its stockholders, officers or partners or their respective heirs, legal representatives, successors and assigns on account of the Lease or on account of any covenant, undertaking or agreement of Landlord in this Lease. Further, in no event shall any special, consequential, or punitive damages be awardable against or recoverable against Landlord or the Landlord Interest hereunder. In the event of any transfer(s) of Landlord's interest in the Demised Premises or the Building, other than a transfer for purposes of securing a debt only, the transferor shall be automatically relieved of any and all obligations and liabilities on the part of Landlord accruing from and after the date of such transfer, and Tenant agrees to attorn to the transferee.

57. **Exclusive-Use Granted to Tenant.** Landlord will restrict other businesses in the River District from operating and selling in a stand alone operation wine and or craft beer. This restriction will be memorialized by amendment to the Master Declaration by a restrictive covenant providing that no Parcel within the Development Property (defined as the River District, and excluding the River Pump House). Such covenant shall indicate that it is not intended to prohibit, and shall not act to prohibit, wine and or craft beer sales which are not stand-alone in nature (i.e. which are engaged in as a part of another use which would otherwise be permitted upon the Parcel (by way of example, and without limitation, a restaurant, liquor store, hotel, barber shop which sells beer, or grocery store). The restrictive covenant to be recorded is attached as Exhibit F.

58. **Mortgagee Protection.** Tenant agrees to give any mortgagee(s) of record, by registered mail, a copy of any notice of default served upon the Landlord, provided that prior to such notice Tenant has been notified in writing (by way of notice of assignment of rents and leases,

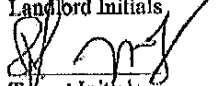
Landlord Initials

Tenant Initials

or otherwise) of the addresses of such mortgagee(s). Tenant further agrees that if Landlord shall have failed to cure such default within the time provided for in this Lease, then the mortgagee(s) shall have an additional thirty (30) days within which to cure such default or if such default cannot be cured within that time, then such additional time as may be necessary if within such thirty (30) days any mortgagee has commenced and is diligently pursuing the remedies necessary to cure such default (including but not limited to commencement of foreclosure proceedings, if necessary to effect such cure), in which event this Lease shall not be terminated while such remedies are being so diligently pursued.

59. **Miscellaneous Provisions.** This Lease is entered into, and shall be construed in accordance with and governed by, the laws of the State of South Carolina, without reference to principles of conflicts of laws. Any claim or cause of action arising hereunder or relating hereto shall be brought in a state court of competent subject matter jurisdiction located within York County, South Carolina, and the parties irrevocably consent to the personal jurisdiction of any such court for the purposes of such an action and waive any defense they may have as to the venue or convenience of any such a court for the purposes of such an action. THE PARTIES KNOWINGLY AND VOLUNTARILY WAIVE ANY RIGHT THEY MAY HAVE TO A TRIAL BY JURY IN ANY CLAIM OR CAUSE OF ACTION ARISING HEREUNDER OR RELATING TO THIS LEASE. This Lease may be executed in counterparts, the aggregate of which shall constitute a complete and fully executed version hereof, and may be executed by facsimile or like method of electronically reproduced signature, which signature hereon shall have the same force and effect as an original signature.

SIGNATURE PAGE TO FOLLOW


Landlord Initials

Tenant Initials

WHEREFORE, the parties now execute this Lease as of the dates below appearing.

WITNESSES:

LANDLORD:

RIVERWALK RIVER DISTRICT BUILDING 6, LLC
A South Carolina limited liability company

By: The Greens of Rock Hill, LLC
Its Manager

By: Assured Administration, LLC
Its Manager



As to Landlord

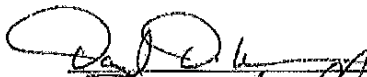
By: Mark S. Mather

Its: Manager

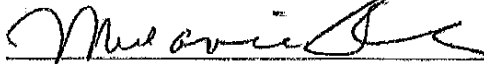
Date: 6/23/2014

TENANT:

THE GRAPEVINE OF RIVERWALK, INC
A South Carolina S-Corporation




As to Tenant

By: 

Its: President

Date: June 20, 2014

Landlord Initials

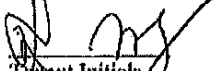
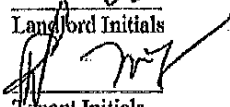

Tenant Initials

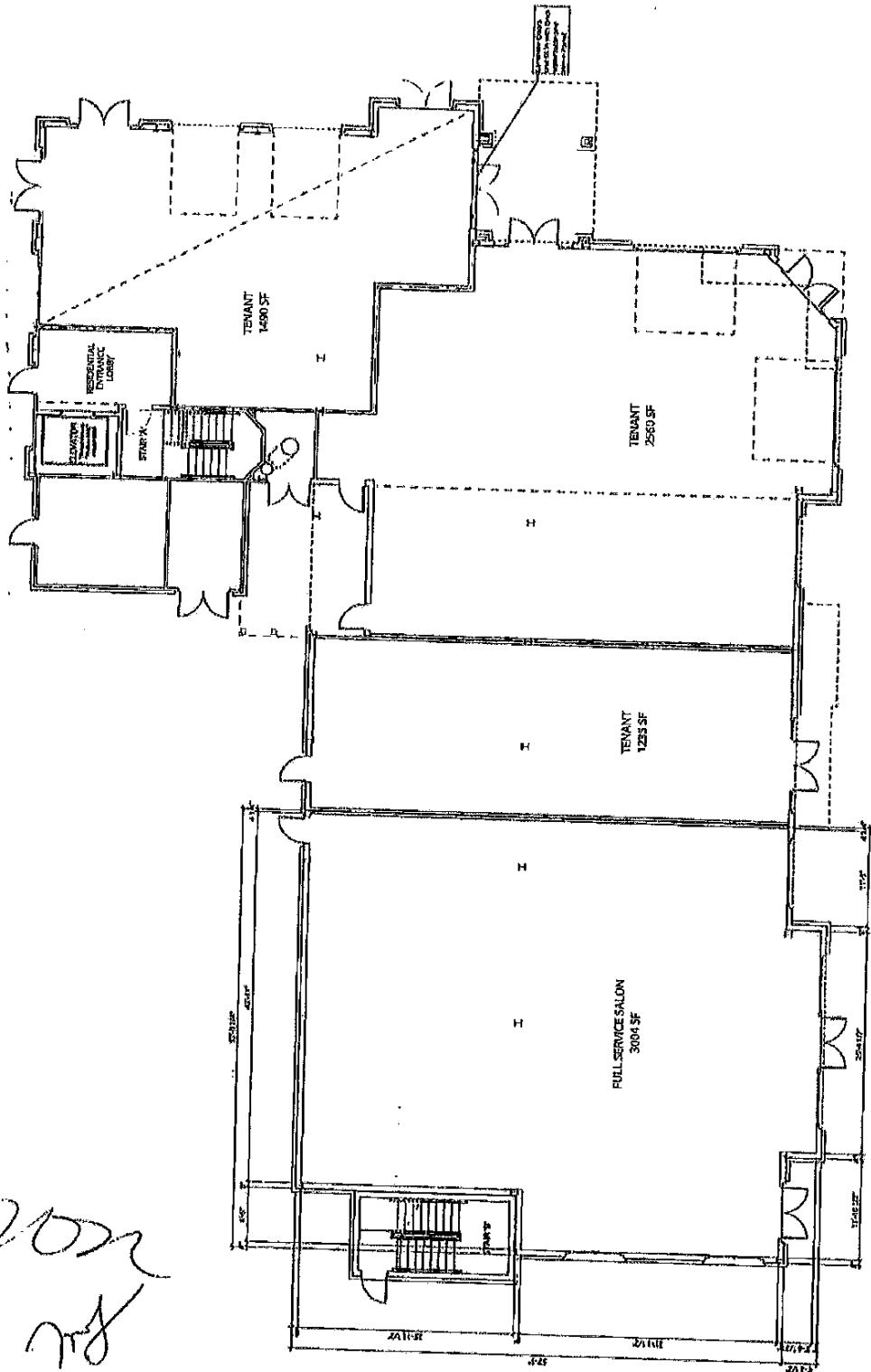
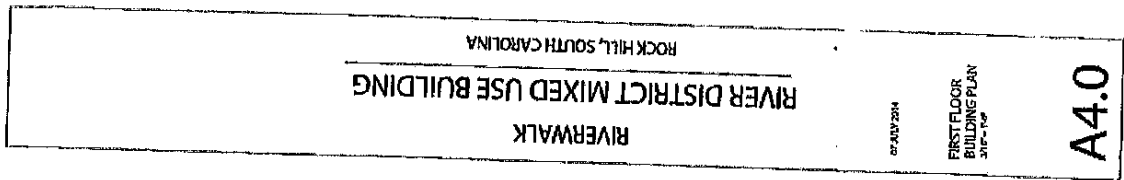
EXHIBIT A
Depiction of Building and Demised Premises

[SEE ATTACHED]


Langford Initials

Tenant Initials

GRH 000143

ROA 508

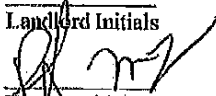


2022
d m

GRH 000144

ROA 509

EXHIBIT B
Description of Landlord's Work


Landlord Initials

Tenant Initials

GRH 000145

ROA 510

EXHIBIT C
Initial List of Trade Fixtures

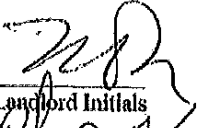
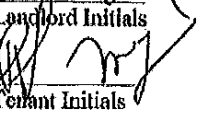

Landlord Initials

Tenant Initials

GRH 000146

ROA 511

EXHIBIT D
Form of Notice of Non-Responsibility


Landlord Initials

Tenant Initials

GRH 000147

ROA 512

EXHIBIT D

FORM OF NOTICE OF NON-RESPONSIBILITY

NOTICE OF NON-RESPONSIBILITY

1.0 Riverwalk River District Building 6, LLC ("Owner") is the owner and holder of the real property described in Exhibit A, attached hereto and incorporated herein by this reference (the "Premises"). Owner has leased a portion of the Premises (the "Leased Premises") to The Grapevine of Riverwalk, Inc ("Tenant").

2.0 Pursuant to Tenant's lease with Owner, Tenant will be undertaking upon the Leased Premises the completion of those improvements generally described upon Exhibit B, attached hereto and incorporated herein by this reference ("Tenant's Improvements").

3.0 Pursuant to South Carolina Code of Laws Section 29-5-80, Owner hereby notifies each party providing labor or material in connection with Tenant's Improvements that Owner will not be responsible therefor and has no responsibility for payment or performance in connection therewith.

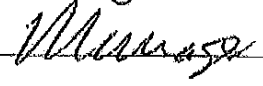
4.0 Pursuant to Tenant's lease with Owner, Tenant is providing this notice, at the direction of and on behalf of Owner, to you, as a person providing labor or materials in connection with Tenant's Improvements.

This 20th day of June, 2014

OWNER:

RIVERWALK RIVER DISTRICT BUILDING 6, LLC

BY: 

ITS: 

8632848v7

EXHIBIT E
Form of Notice of Project Commencement

202
Landlord Initials
Tenant Initials

EXHIBIT E**FORM OF NOTICE OF PROJECT COMMENCEMENT****NOTICE OF PROJECT COMMENCEMENT**

1.0 This Notice of Project Commencement is executed pursuant to South Carolina Code of Laws Section 29-5-23 The Grapevine of Riverwalk, Inc, a South Carolina S-Corp, as the tenant ("Tenant") of Riverwalk River District Building 6, LLC, the owner ("Owner") of a portion of the real property described upon Exhibit A, attached hereto and incorporated herein by this reference (the "Premises"). Tenant's address is 1750 Hwy 160 W, Suite 101, PMB 290, Fort Mill, SC, and Owner's address is 2850 Cherry Road, Rock Hill, SC, 29730.

2.0 Pursuant to the lease agreement between Tenant and Owner, Tenant will be undertaking upon the that portion of the Premises leased by it the completion of the improvements generally described upon Exhibit B, attached hereto and incorporated herein by this reference.

3.0 Tenant files this notice within fifteen (15) days of the commencement of the work contemplated herein, and directs that the Clerk of Court for York County index this notice in the real estate records for York County. This notice is accompanied by a filing fee of \$15.00 made payable to the Clerk of Court's Office.

4.0 Pursuant to the above-referenced statute, Tenant acknowledges that it will post upon the that portion of the Premises leased by it the name and address of Tenant's contractor, and a location notice containing the following statement, "The contractor on the project has filed a notice of project commencement at the county courthouse. Sub-subcontractors and suppliers to subcontractors shall comply with Section 29-5-20 when filing liens in connection with the project."

TENANT:

THE GRAPEVINE AT RIVERWALK, INC.

BY: Melanie SillsITS: president

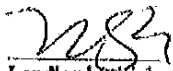
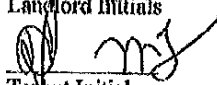
[Signature]
Witness 1

Elaine Brown
Witness 2

PERSONALLY appeared before me Melanie Sills, as the President of the within named Tenant, who, after being duly sworn, acknowledged his/her execution of the within instrument in such capacity and for the uses and purposes mentioned therein.

[Signature]
Notary Public for York County, SC
My Commission Expires: 1/10/22

EXHIBIT F
Restrictive Covenant


Landlord Initials

Tenant Initials

GRH 000151

ROA 516

challenge to an amendment must be made within six (6) months of its recordation or such amendment shall conclusively presumed to have been validly adopted. In no event shall a change of circumstances or conditions act to amend or modify, or be construed to intent or modify, any provision of this Supplement.

20. Certain Additional Restrictive Covenants. Each Parcel within the Annexed Property shall be held, used, conveyed, and operated subject the following restrictive covenants, which are intended to run with the land, except as otherwise expressly provided below:

(a) Restrictions for Benefit of BNA CPA Riverwalk, LLC Parcel. From and after the date hereof, (i) no tax preparation or accounting business shall have the naming rights upon any building constructed on the Annexed Property (except that BNA CPA Riverwalk, LLC shall have the right to name the building constructed upon the "BNA Parcel," as defined and described upon Exhibit B, attached hereto and incorporated by this reference), and (ii) no tax preparation or accounting business shall have the right to display signage (except upon any exterior tenant or occupant directory) upon the exterior of any building constructed upon the Annexed Property (except that BNA CPA Riverwalk, LLC may display such signage upon the building constructed upon the BNA Parcel). The foregoing restrictive covenants shall expire and terminate at such time as Bernard N. Ackerman, CPA, P.A., ceases to own or be a tenant of the BNA Parcel or any part thereof. Further, no building in excess of two (2) stories shall be constructed upon the Parcel within the Annexed Property described upon Exhibit C, attached hereto and incorporated herein by this reference. The foregoing restrictions are intended for the benefit of the BNA Parcel, and the Owner thereof shall have the right to specifically enforce such covenants.

(b) Restrictions for Benefit of Grapevine Parcel. From and after the date hereof, no Parcel within the Annexed Property (other than the "Pump House Parcel," as defined upon Exhibit D, attached hereto and incorporated herein by this reference) shall be used or operated as a stand-alone business engaged in the sale of wine and/or craft beer. The foregoing restrictive covenant shall not prohibit or be construed as prohibiting win and/or craft beer sales which are not stand-alone in nature (i.e. which are engaged in as a part of another use which would otherwise be permitted upon a Parcel (by way of example, and without limitation, a restaurant, liquor store, hotel, barber shop which sells beer, or grocery store)). The foregoing restrictive covenant is intended to be, and shall be, personal in nature and for the benefit of The Grapevine of Riverwalk, Inc., a South Carolina corporation, solely, and such covenant shall automatically expire and terminate, without the necessity of the execution or recordation of any further instrument, at such time as The Grapevine of Riverwalk, Inc. does not continuously operate upon the Grapevine Parcel (hereafter defined) a stand-alone business engaged in the sale of wine and/or craft beer. The term "continuous operation" shall not be construed to prohibit closing for periods of not greater than sixty (60) successive days within any period of three (3) calendar years or greater for rebranding, remodeling, or repairs. The "Grapevine Parcel" is defined as the Parcel described upon Exhibit E, attached hereto and incorporated herein by this reference. The foregoing restriction is intended for the benefit of The Grapevine at Riverwalk, Inc., and may be specifically enforced by The Grapevine at Riverwalk, Inc. during the term of such restriction.

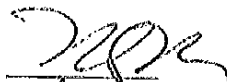
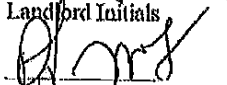
SIGNATURE PAGE TO FOLLOW

15 of 21

GRH 000152

ROA 517

EXHIBIT G
Purchase and Sale Agreement


Landlord Initials

Tenant Initials

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
2018-CP-46-03726

THE GRAPEVINE OF RIVERWALK, INC.,

Plaintiff,

v.

RIVERWALK RIVER DISTRICT
BUILDING 6, LLC, MARK S. MATHER,
GRH DEVELOPMENT RESOURCES, LLC,
THE GREENS OF ROCK HILL, LLC, and
ASSURED ADMINISTRATION, LLC

Defendants.

**PLAINTIFF'S OPPOSITION
TO DEFENDANTS' MOTION
TO ALTER OR AMEND**

NOW COMES the Plaintiff the Grapevine of Riverwalk, Inc., by and through its undersigned counsel, pursuant to the Court's request, and hereby submits its opposition to the Defendants' Motion to Alter or Amend the "Order on Defendants' Motion for Stay of Proceedings and Plaintiff's Motion to Compel Compliance with Final Judgment, for Contempt Order, and for Order Regarding Non-Payment of Rent Pending Appeal", which order was previously entered on August 15, 2022 (the "Order"):

ARGUMENT

Following the last hearing in this action on August 1, 2022, counsel for the parties submitted competing orders, which orders were duly considered by the Court, ultimately resulting in the issuance of the Order. Each of the proposed orders provided, in pertinent part, as follows: "Effective August 1, 2022, Plaintiff shall have no further obligation to pay rent or any other charge under the Commercial Lease Agreement ("Lease") between the parties which is at issue in this action." *See **Exhibit 1*** (Email from Keith Martens with attachment) (emphasis added). Now, apparently

unsatisfied with the language of their own submission, or due an oversight by Defendants' counsel, Defendants want a do-over, while simultaneously accusing Plaintiff of exploiting what Defendants characterize as an "unintended loophole" relating to Plaintiff's obligation to pay certain triple-net¹ charges under the Lease. The Court should not indulge Defendants' request for all of the following reasons.

First, the law in South Carolina holds that a party cannot use a motion to alter or amend an order or judgment to present an issue the party could have raised prior to entry of the order or judgment but did not. Gartside v. Gartside, 383 S.C. 35, 677 S.E.2d 621 (S.C. App. 2009). The fact that Plaintiff's obligations under the Lease were addressed in Defendants' own proposed order signifies that the issue now presented through Defendants' motion could have been raised prior to the entry of the Order, but was not. Defendants should therefore be precluded from raising it at this juncture. While the undersigned recognizes that no one is perfect, this case has been hotly litigated at every turn and counsel for both sides should be on heightened alert regarding the verbiage of proposed orders submitted to the Court. As they say, "the Devil is in the details". Moreover, this marks the second time following trial that Defendants have filed a motion to alter, amend or reconsider a prior order, and the continuing post-trial motions practice in this action has resulted in considerable expenditures of time and expense for all involved, much of which expenses Plaintiff contends it should not ultimately be required to bear.

Perhaps more importantly, the spirit and intent of the Court's prior orders was for the Lease to terminate upon the closing of the sale of the property, which closing was ordered by the Court to occur by May 31, 2022. Defendants elected not to comply with those prior orders and to pursue an appeal instead. But Defendants cannot have it both ways. Defendants cannot refuse to comply with

¹ In common commercial leasing parlance, "triple net" charges refers to the tenant's obligations to pay or reimburse the landlord for the common area maintenance, real estate taxes, and insurance on the building within which the leased premises are located.

the Court's prior orders for specific performance and simultaneously continue enforcing the Lease against Plaintiff. Instead, Defendants' recourse should be limited to establishing a compliant horizontal property regime for the Building², delivering a compliant deed of transfer³ to the clerk of court (or to Plaintiff directly), and then assessing the common area maintenance and other permitted charges to all unit owners (not just Plaintiff) as authorized by the Master Deed and the Horizontal Property Regime Act (the "Act"), S.C. Code § 27-31-190.⁴

Accordingly, and in light of the pending appeal of this action, Plaintiff contends that the future assessment and payment of such charges should be treated in one of the following ways: (1) the charges are assessed to Plaintiff but are not payable until thirty (30) days after the conclusion of Defendants' appeal; or (2) the charges are assessed to Plaintiff and are payable by Plaintiff in the regular course (i.e., within 30 days of Plaintiff's receipt of an invoice therefor) to the clerk of court or some other neutral third-party to be held in escrow pending the conclusion of Defendants' appeal. But in either case the charges should be assessed under the Master Deed and the Act, not the Lease.

Notwithstanding the foregoing, at this juncture, Defendants should not be permitted to assess any charges or amounts to Plaintiff until the horizontal property regime is established and the deed of transfer for Plaintiff's unit has been fully executed and delivered to the clerk of court, or to Plaintiff directly. That is only fair, as the delay in establishing a compliant horizontal property regime and delivering a compliant deed of transfer (which has yet to occur) was caused solely by

² This part has already been done. An Amended and Restated Master Deed was filed on September 1, 2022, upon agreement of the parties.

³ The parties remain in dispute over the form of the deed of transfer. Defendants maintain that a deed titled "Indenture Deed" is appropriate, while Plaintiff has insisted that the deed be titled "General Warranty Deed" in conformance with Paragraph 5 of this Court's Order entered on August 15, 2022. The Order requires the transfer deed to be delivered to the clerk of court no later than September 30, 2022, so while the issue may not yet be ripe for adjudication, Plaintiff respectfully requests that the Court reaffirm its prior directive that the deed be a "General Warranty Deed" in all respects, and not be labeled as an "Indenture Deed".

⁴ S.C. Code § 27-31-190 provides as follows: The co-owners of the apartments are bound to contribute pro rata in the percentages computed according to Section 27-31-60 toward the expenses of administration and of maintenance and repair of the general common elements and, in the proper case, of the limited common elements of the property and toward any other expense lawfully agreed upon.

Defendants' election to pursue an appeal in lieu of complying with this Court's order for specific performance, and other delays occasioned by Defendants' post-trial motions practice. Plaintiff has paid all rent and other charges due under the Lease through July 31, 2022, which means that, at worst, Defendants may lose out on recovering only one or two months' worth of charges (August and September 2022) for which it cannot assess Plaintiff and any other individual unit owners, assuming that Defendants otherwise comply with the Order from August 15, 2022 as related to delivery of the deed of transfer for Plaintiff's unit.

As a final point, Defendants' motion is also flawed because it equates the calculation of the Purchase Price under the Option to Purchase (which price is based, in part, on the amount of Base Rent paid by Plaintiff after February 1, 2018, which date was the original closing date set forth in Plaintiff's notice of exercise of the Option to Purchase) with Plaintiff's obligation to continue paying the common area maintenance, taxes, and other charges under the Lease during the pendency of Defendants' appeal. These matters are totally separate and distinct, and do not have any bearing on each other. The Option to Purchase is a specific provision of the Lease, as are the provisions regarding the payment of common area maintenance, taxes, and other items of Additional Rent. The Court determined that Plaintiff was entitled to specific performance of the Option to Purchase. Accordingly, the Lease should be terminated in its entirety, pending a reversal of this Court's rulings on appeal. Attempting to now parse out certain provisions of the Lease that may continue to be enforced by Defendants pending appeal (while other provisions cannot be so enforced, such as charging and collection of Base Rent) has the potential to create new and unforeseen problems for the parties that may lead to additional litigation and unnecessary burdens on the Court's time and resources, which can otherwise be avoided.

CONCLUSION

For all of the foregoing reasons, Defendants' Motion to Alter or Amend should be DENIED, and Plaintiff should be completely exempted and excused from paying any further charges under the Lease, however classified or characterized, and the Lease should be deemed terminated in all respects, pending the conclusion of Defendants' appeal or until such time as the horizontal property regime is established, a compliant deed of transfer for Plaintiff's unit is delivered, and assessments for such expenses are properly imposed against all unit owners pursuant to the Master Deed, the South Carolina Horizontal Property Regime Act, and other applicable law.

This the 9th day of September, 2022.

/s/ Christian H. Staples
Steven A. Meckler
South Carolina State Bar No. 68402
Christian H. Staples
South Carolina State Bar No. 101470
Shumaker, Loop & Kendrick, LLP
101 South Tryon Street, Suite 2200
Charlotte, North Carolina 28280
Telephone: (704) 945-2183
Facsimile: (704) 332-1197
smeckler@shumaker.com
cstaples@shumaker.com
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing document was electronically filed using the Court's e-filing system which will send notice of filing to the following:

W. Keith Martens
Steven D. Dluzneski
HAMILTON MARTENS, LLC
241 Oakland Avenue (29730)
P.O. Box 10940
Rock Hill, SC 29731
keith.martens@hamiltonmartens.com
steve.dluzneski@hamiltonmartens.com
Attorneys for Defendants

This the 9th day of September, 2022.

/s/ Christian H. Staples
Steven A. Meckler
South Carolina State Bar No. 68402
Christian H. Staples
South Carolina State Bar No. 101470
Shumaker, Loop & Kendrick, LLP
101 South Tryon Street, Suite 2200
Charlotte, North Carolina 28280
Telephone: (704) 945-2183
Facsimile: (704) 332-1197
smeckler@shumaker.com
cstaples@shumaker.com
Attorneys for Plaintiff

Staples, Christian H.

From: Keith Martens <keith.martens@hamiltonmartens.com>
Sent: Friday, August 5, 2022 9:01 AM
To: McKinnon, William A.
Cc: Staples, Christian H.; Meckler, Steven
Subject: Grapevine of Riverwalk, Inc. v. The Greens of Rock Hill (2018-CP-46-03726) - Proposed Order on Rule 62 and Rule 70 Motions
Attachments: Redline of Proposed Revisions - Proposed Order - 8.2.2022.docx

CAUTION: External Email

Dear Judge McKinnon:

Thank you for providing me an opportunity to review and comment upon the proposed order that Plaintiff's Counsel submitted to the court earlier this week. While I recognize that the proposed order submitted by Plaintiff's Counsel is merely Plaintiff's proposal, and not your final order, I feel that some of the language of the proposed order exceeds what (I recall) you directed for inclusion in the order. In addition, I had understood your directives concerning the procedure for re-drafting the Master Deed (paragraph 4 of the proposed order) differently than did Plaintiff's Counsel. I have attempted to redraft paragraph four in the way that I understood your instructions from the bench. Finally, I want to point out that the proposed order submitted by Plaintiff's Counsel includes a requirement that each party's nominee to re-draft the Master Deed must be a "resident" of South Carolina. That residency requirement would preclude my client from nominating its regular real estate attorney as its nominee. I do not call that being addressed during Monday's hearing, and I request that the court consider removing that language before entering an order.

My proposed revisions to the order (redline) are attached to this email. Thank you for considering my comments as you prepare and enter your order.

W. KEITH MARTENS**HAMILTON MARTENS, LLC****ATTORNEYS AT LAW****241 OAKLAND AVENUE (29730)****POST OFFICE BOX 10940 (29731)****ROCK HILL, SOUTH CAROLINA****PHONE: 803.329.7662****FACSIMILE: 803.329.7678****WWW.HAMILTONMARTENS.COM****KEITH.MARTENS@HAMILTONMARTENS.COM****CERTIFIED CIRCUIT COURT MEDIATOR**

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
2018-CP-46-03726

THE GRAPEVINE OF RIVERWALK, INC.,
Plaintiff,

v.

RIVERWALK RIVER DISTRICT
BUILDING 6, LLC, MARK S. MATHER,
GRH DEVELOPMENT RESOURCES, LLC,
THE GREENS OF ROCK HILL, LLC, and
ASSURED ADMINISTRATION, LLC

Defendants.

**ORDER ON DEFENDANTS' MOTION
FOR STAY OF PROCEEDINGS AND
PLAINTIFF'S RULE 70 MOTION TO
COMPEL COMPLIANCE WITH FINAL
JUDGMENT, FOR CONTEMPT ORDER,
AND FOR ORDER REGARDING NON-
PAYMENT OF RENT PENDING
APPEAL**

THIS MATTER was heard on August 1, 2022 in the Court of Common Pleas for York County, South Carolina, Sixteenth Judicial Circuit, the Honorable William A. McKinnon, presiding. Christian Staples and Steven Meckler appeared for Plaintiff and Keith Martens appeared for Defendants. Having reviewed and considered the motions and other materials submitted by the parties, and having heard the oral arguments of counsel for the parties, the Court hereby finds and concludes as follows:

- 1) Defendants' Motion for Stay of Proceedings pending appeal is granted, effective August 1, 2022, and subject to the terms and conditions of this Order.
- 2) Plaintiff's Rule 70 Motion to Compel Compliance with Final Judgment, for Contempt Order, and for Order Regarding Non-Payment of Rent Pending Appeal is granted in part, and denied in part, subject to the terms and conditions of this Order.
- 3) Defendants shall post a cash or surety bond, pursuant to Rule 62, SCRCF, and S.C. Code § 18-9-130, in the amount of \$950,000.00, on or before September 30, 2022, in order to

maintain the stay of the money judgment portions of the Final Judgment entered in this action on April 19, 2022. If Defendants fail to post the entirety of such bond on or before the deadline stated herein, then the stay shall automatically dissolve as to such money judgments ~~and Plaintiff may pursue an execution thereon without further order or notice, except as may be required by law.~~

~~4) _____ The Court finds that Defendants failed to comply with the directives of the Final Judgment relating to the Master Deed and the General Warranty Deed required thereby, and the Court also finds that Defendants have yet to satisfy the requirements under S.C. Code § 18-9-160 for a stay of execution of the order for specific performance. Specifically, Defendants failed to deliver a compliant General Warranty Deed by May 31, 2022, and Defendants also failed to record a Master Deed compliant with the language and spirit of the Final Judgment, or other equitable principles, by May 31, 2022. Therefore, pursuant to Rule 70, SCRPC, and the Court's inherent equitable powers, the Court hereby appoints a third-party attorney to create a Master Deed for Riverwalk River District Building 6 containing generally recognized commercial terms that are equitable to Plaintiff and a General Warranty Deed sufficient to transfer title to the unit originally leased by Plaintiff in said building. The costs and reasonable attorneys' fees incurred by such third-party attorney shall be split evenly between the parties upon receipt of an invoice therefor. In order to accomplish this appointment, on or before August 15, 2022, each party shall identify to the other party in writing the name of an attorney who is licensed to practice law in and resides in the State of South Carolina and is in good standing, whom the party proposes to prepare a Master Deed and a General Warranty Deed to facilitate the order for specific performance contained in the Final Judgment, pursuant to the directives contained in this Order. If by August 22, 2022 the parties are unable to agree to either identified attorney for such purposes, then by August 29, 2022 the two attorneys so identified shall confer and collectively appoint a third such independent attorney~~

residing in and practicing law in South Carolina and in good standing and who is willing to serve for such purposes. The third party attorney so agreed upon or appointed, as the case may be, shall act independently of the parties for such purposes, shall proceed under the Court's direction as set forth in this Order or otherwise, and shall have until September 30, 2022 to prepare and record the Master Deed with the Register of Deeds for York County and also to prepare the General Warranty Deed and deposit with the Clerk of Court for York County a fully executed and complete version thereof, sufficient to transfer title to the unit without further action (other than recording with the Register of Deeds for York County). Defendants are hereby ordered to fully execute the General Warranty Deed prepared pursuant to this Order, and the Clerk of Court is hereby directed to accept the deposit of such General Warranty Deed for Plaintiff's benefit pending Defendants' appeal, pursuant to S.C. Code § 18-9-160, to abide the judgment of the appellate courts, or until the stay is otherwise lifted. The Master Deed prepared pursuant to this Order shall amend, restate, and replace in all respects the Master Deed for Riverwalk River District Building 6 Horizontal Property Regime which was previously recorded with the Register of Deeds for York County (at Book 20214, Page 425), shall conform in all respects with the South Carolina Horizontal Property Act, S.C. Code § 27-31-10 *et seq.*, and shall contain only those provisions, addenda, attachments and exhibits which are typical and commercially reasonable for master deeds in South Carolina, and which are otherwise equitable to Plaintiff. The Court finds that the Master Deed recorded by Defendant Riverwalk River District Building 6, LLC on May 31, 2022 contains one or more provisions that may actually or potentially impair the rights of Plaintiff, including those established by this litigation. Therefore, pursuant to Rule 70, SCRCP, and the Court's inherent equitable powers, the Court directs the parties to proceed as follows to record an amended Master Deed:

- a. On or before August 15, 2022, each party shall identify to the other in writing the name of an attorney who is licensed to practice law in the State of South Carolina and who regularly practices in the area of commercial real estate whom the party proposes to draft and record an amended Master Deed for the Riverwalk River District Building 6 Horizontal Property Regime;
- b. On or before September 1, 2022, the two appointed attorneys shall communicate with one another to determine whether they agree upon the essential terms of an amended Master Deed and, if so, then they shall coordinate with one another to draft and record the amended Master Deed;
- c. Each party shall bear the costs and fees of its own nominated attorney;
- d. If the two attorneys nominated by the parties are unable to agree as to all terms of an amended Master Deed, then by September 1, 2022, those attorneys shall jointly nominate a third attorney who does not currently represent either party, is licensed to practice law in the State of South Carolina, regularly practices in the area of commercial real estate and who agrees to draft and record an amended Master Deed for the Riverwalk River District Building 6 Horizontal Property Regime. The costs and fees of any attorney so nominated shall be borne equally by the parties;
- e. The amended Master Deed shall be recorded by September 30, 2022 and, upon recording, shall replace the Master Deed that was recorded by Riverwalk River District Building 6, LLC on May 31, 2022. The amended Master Deed shall contain terms that are consistent with the provisions of the South Carolina Horizontal Property Regime Act, commercially reasonable and not unduly restrictive of Plaintiff's rights, including the right of Plaintiff to use Common Areas adjacent to

its space, as established by the judgment in this case. Riverwalk River District Building 6, LLC, and not Plaintiff, shall be designated as Declarant. The amended Master Deed may include such provisions as Riverwalk River District Building 6, LLC deems reasonable and prudent for the overall scheme of development for Building 6 and the River District, provided such provisions are otherwise consistent with this order.

5) On or before September 30, 2022, Riverwalk River District Building 6, LLC shall deposit with the York County Clerk of Court a fully-executed deed of conveyance that is sufficient to transfer title of Plaintiff's Leased Premises to Plaintiff without further action (other than recording and delivery). The deed of conveyance shall be a General Warranty Deed, and not an Indenture Deed, and shall make reference to the amended Master Deed. The York County Clerk of Court is directed to accept the deposit of such General Warranty Deed pursuant to S.C. Code § 18-9-160, to retain the deed and not to record it unless directed or authorized by subsequent order. Upon deposit of the General Warranty Deed, the stay of this court's judgment for specific performance shall remain in effect for the duration of the appeal, or until modified or rescinded by subsequent order issued by a court of competent jurisdiction.

~~4)6) If the Master Deed and the General Warranty Deed required hereby are not so recorded or deposited, as the case may be, on or before September 30, 2022, then the stay granted by this Order shall automatically dissolve as to the order for specific performance and Plaintiff may pursue an execution thereon without further order or notice, except as may be required by law, but such failure shall not relieve Defendants of the continuing obligation to have a compliant Master Deed and General Warranty Deed created and recorded as set forth above. Upon Plaintiff receiving a favorable and final ruling in Defendants' appeal of the order for specific performance,~~

~~or the stay being otherwise lifted, the Clerk of Court is hereby directed to release and deliver the General Warranty Deed to Plaintiff and, thereupon, Plaintiff is hereby authorized to record the same with the Register of Deeds for York County for the purposes of obtaining title to the unit of specific performance that is granted by this Order shall automatically dissolve.~~

~~5)7)~~ Effective August 1, 2022, Plaintiff shall have no further obligation to pay rent or any other charge under the Commercial Lease Agreement (“Lease”) between the parties which is at issue in this action. Consistent with the Final Judgment, the “Purchase Price” as defined in the Lease and Option to Purchase shall be further reduced by the sum of \$129,679.44, which is the amount of Base Rent paid by Plaintiff under the Lease since February 2, 2018. Plaintiff shall also be entitled to offset against the Purchase Price the \$25,000.00 rent credit and the \$6,705.00 security deposit as provided by the Option to Purchase. The General Warranty Deed prepared pursuant to this Order should therefore reflect an actual purchase price of \$108,615.56 after application of the foregoing credits/offsets. Property taxes for the year in which the transfer, sale, or closing occurs shall be prorated between the parties through the date thereof, but shall be limited to that portion or percentage of said taxes attributable to the unit only (not to Building 6 as a whole). ~~Consistent with the provisions of the Final Judgment, Defendants shall not interfere with Plaintiff’s use of its unit or the Common Areas / Common Elements.~~

~~6)8)~~ Plaintiff’s ~~request~~motion for ~~the Court to hold Defendants in contempt or to otherwise sanction Defendants~~and for other sanctions is denied.

IT IS SO ORDERED.

The Honorable William A. McKinnon

_____, 2022
_____, South Carolina

State of South Carolina)
) Court of Common Pleas
County of York)
 2018-CP-46-03726

The Grapevine Of Riverwalk,)
Inc.)
)
) vs.) Transcript of Record
)
Riverwalk River District)
Building 6, LLC; et al)
)
) Defendant)

August 23rd - 27th, 2021
York, South Carolina

B E F O R E:

Honorable William McKinnon, Judge

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

Steven A. Meckler, Esq.
Christian H. Staples, Esq.
Attorneys for the Plaintiff

Stephen D. Dluzneski, Esq.
Walter K. Martens, Esq.
Attorneys for the Defendant

Joy E. Holston
Official Court Reporter

I N D E X O F W I T N E S S E S

(IC) - Denotes In Camera
 (DW) - Denotes Defense Witness
 (PW) - Denotes State's Witness

(PW) Melanie Sills

Direct examination by Mr. Staples:	93
Cross-examination by Mr. Martens:	211
Redirect examination by Mr. Staples:	264

(PW) Alan Aschenbrenner

Direct examination by Mr. Staples:	267
Cross-examination by Mr. Marten:	280

(PW) Brian Wilson

Direct examination by Mr. Staples:	285
Cross-examination by Mr. Martens:	301

(PW) David Williams

Direct examination by Mr. Meckler:	306
Cross-examination by Mr. Martens:	316

1	<u>(PW) Anthony Swainey</u>	
2	Direct examination by Mr. Staples:	319
3	Cross-examination by Mr. Martens:	336
4	Redirect examination by Mr. Staples:	347
5	Cross-examination by Mr. Martens:	348
6		
7	<u>(PW) Deposition Read into the Record</u>	
8	Questions by Mr. Staples:	364
9	Answers by Mr. Meckler:	364
10		
11	<u>(PW) Jason Ligon</u>	
12	Direct examination by Mr. Meckler:	366
13	Cross-examination by Mr. Marten:	381
14	Redirect examination by Mr. Meckler:	387
15		
16	<u>(PW) John Scott</u>	
17	Direct examination by Mr. Meckler:	388
18	Cross-examination by Mr. Martens:	399
19	Redirect examination by Mr. Meckler:	402
20	Recross examination by Mr. Martens:	403
21		
22	<u>(DW) Todd Brockmann</u>	
23	Direct examination by Mr. Martens:	479
24	Cross-examination by Mr. Staples:	519
25	Redirect examination by Mr. Martens:	525

1	<u>(DW) Mark Mather</u>	
2	Direct examination by Mr. Martens:	528
3	Cross-examination by Mr. Meckler:	548
4	Redirect examination by Mr. Martens	568
5		
6		
7		
8		
9	Opening Statements by Mr. Staples:	83
10	Opening Statements by Mr. Martens:	88
11	Jury Charge:	593
12	Closing Arguments by Mr. Meckler:	609
13	Closing Arguments by Mr. Martens:	626
14	Jury's Verdict:	652
15	Certificate of Reporter	656
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

E X H I B I T S

Plaintiff's

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE#</u>
1	Commercial Lease Agreement		X	132
2	Letter 7/26/2017		X	158
3	Letter 10/5/2018 Meckler		X	187
4	Tenant Acceptance Letter		X	142
5	Email Mr. Brockmann		X	162
6	Email 5/1/2018		X	171
7	---- (Did not use this number)		-	
8	Stipulation		X	210
9	Website		X	97
10	Website		X	97
11	Email 6/15/12		X	105
12	Email 8/14/12		X	111
13	Email 2/29/14		X	114
14	Email 2/24/14		X	121
15	Email 4/18/14		X	128
16	Letter 9/14/15		X	141
17	Text 8/17/16		X	144
18	Email Mather		X	163
19	Email M. Sills		X	166
20	Text Message		X	167
21	Email Sills and Mather		X	169
22	Email Chain		X	172

E X H I B I T S

Plaintiff's

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE#</u>
23	Email Chain		X	175
24	Email 8/6/2018		X	177
25	Email 8/24/2018		X	180
26	Email 8/27/18		X	183
27	Letter 3/19/19		X	191
28	Email 9/12/2018		X	195
29	Email 10/2/2018		X	196
30	Photo		X	199
31	Photo		X	199
32	Photo		X	199
33	Photo		X	199
34	Photo		X	199
35	Email 3/7/2014		X	276
36	Redline Sketch		X	277
37	Sketch 505 Design		X	279
38	Email 9/20/2017		X	291
39	Email 1/18/18		X	292
40	Email 1/29/18		X	297
41	Email 3/7/2018		X	299
42	Email 2/14/2019		X	325
43	Construction Loan Agreement		X	328
44	Deposition		X	365

E X H I B I T SPlaintiff's

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE#</u>
45	CV Jason Ligon		X	367
46	CV Photos for Jason Ligon		X	367
47	Schedule of Jason Ligon		X	373
48	John Scott CV		X	390
49	John Scott Report		X	393

E X H I B I T SDefendant's

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE#</u>
1	Photo-Where is the patio		X	216
2	Email 8/31/2018		X	507
3	Email 11/12/2018		X	510

Court's

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE#</u>
1	Deposition of Mark Mather	X		153
2	Note from Jury	X		651

1 THE COURT: We are good to go on the record. So
2 unless y'all have any other suggestions we will go ahead
3 and get started. Obviously we have a lot of motions to
4 hear, we will go ahead and get started. And when my Law
5 Clerk has said the other Clerk is finished with the
6 introductory remarks to the jury and ready for roll call
7 y'all can head downstairs. So let's start with the
8 Plaintiff's motions. We have a motion to exclude
9 testimony.

10 MR. STAPLES: Yes, Your Honor. Thank you.
11 Plaintiff's first motion in-limine is to exclude testimony
12 from lay-witnesses that amounts to an expert opinion. I
13 think the motion, more or less, speaks for itself. I can
14 cite to you the State versus Westmoreland case. You know,
15 a lay-witness, they only testified in matters within its
16 own personal knowledge and may not offer opinion testimony
17 that requires special knowledge, skill, experience or
18 training. And I don't believe in this case there have
19 been any lay-witnesses that have offered an expert
20 opinion. So our position would be that any lay-witness
21 testimony that amounts to an expert opinion at this point
22 would be unfair surprise.

23 THE COURT: Is there a particular testimony you are
24 concerned about?

25 MR. STAPLES: There is not, Your Honor, but we just

1 want to have a standing, you know, order that that would
2 not be permitted. One of the Defendant's, Mr. Mather is,
3 we believe the testimony will reveal the owner and the
4 developer of the Riverwalk development in Rock Hill, we
5 wouldn't want him giving an expert opinion on anything
6 related to that.

7 THE COURT: Well, I mean, it is kind of a motion to
8 follow the rules of civil procedure. Lay testimony is,
9 lay expert testimony is not permitted. So, I mean unless
10 there is particular testimony, I am just going to, well, I
11 will grant your motion to exclude expert witness testimony
12 by lay witnesses. But I don't, I mean I am not ruling on
13 any particular witness. Will take it as it comes.

14 MR. MARTENS: Your Honor, just to respond. In
15 general I have no objection to that motion. I do want to
16 point out that there are at least two attorneys on the
17 witness list. Brian Wilson of Fort Mill and Todd
18 Brockmann of North Carolina.

19 THE COURT: Your witness list or the Plaintiff's
20 witness list?

21 MR. MARTENS: Both.

22 THE COURT: Both.

23 MR. MARTENS: And to the extent that it comes up and
24 it very well might, that those gentlemen are asked to give
25 a legal opinion about the legal effect of something. I

1 think they are qualified and would be entitled to do so as
2 attorneys of law. Again, I don't know that this is going
3 to come up but that is the only reason I raise it. We do
4 not intend to tender Mr. Mather as an expert in
5 development or an expert in anything. He is a lay witness
6 and he will testify as a lay witness. But that is the
7 only caveat, the only issue that I have with that motion.

8 THE COURT: Okay. Well, then, I mean it is granted
9 but I don't think that it has got a whole lot of effect to
10 the extent any particular witness' testimony comes up, I
11 will rule on it as it happens. Okay. And then there is
12 some exhibits you wanted to exclude?

13 MR. STAPLES: Well, not exhibits, Your Honor. We
14 just didn't want Counsel to be able to use exhibits during
15 opening statements and that is just based on the fact that
16 exhibits are documents, cannot be admitted into evidence
17 during opening statements. I don't intend to use any
18 exhibits in my opening. I don't know about Mr. Martens
19 but that is the basis for that motion.

20 THE COURT: Mr. Martens?

21 MR. MARTENS: I am not doing it, Your Honor.

22 THE COURT: All right. Well, that makes that easy.
23 All right. No exhibits during opening. Oh, which reminds
24 me. And you wish for this to be tried non-jury, Mr.
25 Martens, if we continue with a jury trial, the one thing

1 that I do that is unusual is I charge before close. So I
2 will charge the jury and you will have a copy of my
3 charge, the jury will have a copy of my charge in the jury
4 room. And then closing arguments will be the last thing
5 we do.

6 MR. MECKLER: Your Honor, if I may ask a question.
7 We have some proposed charges. Is it fine to give those
8 to you?

9 THE COURT: The earlier the better. Just, the best
10 way is to email them to Mr. Lonadier who is my law clerk
11 and just CC the Defense. Motion to preclude testimony
12 from unidentified witnesses. Are there any such
13 witnesses?

14 MR. STAPLES: Not to my knowledge.

15 THE COURT: Okay.

16 MR. STAPLES: And that brings us to the last motion
17 for the Plaintiff which is to exclude expert witnesses,
18 expert opinions not previously disclosed. Similar to the
19 previous motion, I don't, the Defendant's have not
20 identified any expert witnesses. And so this is a motion
21 to prevent them from showing up with an expert witness
22 here at trial. It would be unfair surprise, we have not
23 been able to take a discovery deposition of any such
24 person. I don't think that is going to be the case but I
25 just want to make clear.

1 THE COURT: No expert witness identified?

2 MR. MARTENS: Your Honor, I certainly understand the
3 Rules of Civil Procedure. I don't intend to have any
4 surprise.

5 THE COURT: Fair enough. Mr. Martens, your first
6 motion is regarding, is it particular evidence of lost
7 profits or lost profits evidence in general?

8 MR. MARTENS: So, Your Honor, the first motion is
9 evidence of lost profits in general, either evidence or
10 argument. And this motion is based upon the terms of
11 Grapevine's lease. And specifically paragraph 56 of the
12 lease provides that no personal liability shall at any
13 time be asserted or enforceable against the landlord or
14 its stockholders, officers or partners; or their
15 respective heirs, legal representatives, successors and
16 assigns on accountabilities for on account of any
17 covenant, undertaking or agreement of landlord in this
18 lease. Further, in no event shall any special
19 consequential or punitive damages be awardable against or
20 recoverable from landlord or the landlord interest
21 hereunder. Grapevine, within the last two months has
22 identified an expert, a gentleman named Jason Ligon, that
23 it intends to call to provide expert testimony on alleged
24 lost profits. Lost profits are well recognized as a
25 species of consequential damages. The lease says those

1 types of damages are not recoverable, the lease should be
2 enforced. South Carolina Courts say that where a proper
3 exclusion of consequential or incidental damages is
4 contractually agreed to, the Plaintiff's remedy is limited
5 by the terms of that exclusion. So for that, based on the
6 terms of the lease, we would move to preclude any evidence
7 of alleged lost profits. And for that matter we would
8 move to preclude any evidence of punitive damages.

9 THE COURT: Let me hear from the Plaintiff.

10 MR. MECKLER: The provision that he provided, his
11 motion in limine is not actually the entire paragraph
12 which is longer and has additional provisions to it.
13 Including that it is intended to bind the landlord's
14 interest in the demised premises of the building. Beyond
15 that, the law in South Carolina, provisions like that are
16 not favored by the Courts and that they are to be
17 construed against the party relying on them. In this
18 case, the Defendant, landlord. The contravene's public
19 policy is so broad that it would absolve Defendant for any
20 injury of Plaintiff for any reason. And if you go in
21 that, it says in event of transfer landlord's interest in
22 the demise premises, et cetera; the transfer shall be
23 automatically relieved of any and all obligations and
24 liabilities on part of the landlord, which would leave a
25 tenant or, Grapevine in this case, without any remedy for

1 the landlord's wrong. Ambiguity's in these types of
2 provisions are construed against the drafter, which in
3 this case is the landlord. And it should be liberal and
4 strongly construed against them. In this case it says, no
5 personal liability shall be asserted against the landlord.
6 So its limited to personal liability, there is no personal
7 liability, we have had deposition testimony that the
8 landlord entity has no employees, officers or directors.
9 It only applies to the landlord, if it applies at all.
10 And in this case there are five Defendants, only one of
11 which is the landlord which is Riverwalk River District 6,
12 LLC. The other Defendants, Mark Mather; GRH Development;
13 the treens of Rock Hill and Assured Administration are not
14 parties to this contract and therefore that limitation of
15 liability would not apply. River District 6, LLC is the
16 only party ID'd as the landlord. And so at best it would
17 apply to them but based upon the public policy of the
18 State, it's so broad that it wouldn't apply to anybody.

19 THE COURT: Mr. Meckler, tell me, I understand you
20 wrote an additional clause that was rather broad but that,
21 the clause that Mr. Marten has read to me is a pretty,
22 strikes me as a pretty guard variety exclusion of
23 consequential damages that shows up in contracts all the
24 time. How is it overbroad.

25 MR. MECKLER: It is overbroad because you can't take

1 it in just the one sentence. Once you add that final
2 sentence onto it, all the landlord has to do is transfer
3 its interest, the only thing that the landlord has is the
4 building. Everything is run through these other
5 companies. So landlord, no employees, no officers, no
6 directors. So, think about it, Your Honor, say --

7 THE COURT: Did they transfer their interest?

8 MR. MECKLER: They had not yet but it is the
9 provision if you read in the totality and the way the
10 Courts have read it, you read it liberally and construed.
11 So you have got a couple of issues with it. One, it is
12 personal liability. There is no person. It only applies
13 to the landlord and its officers, heirs. There are no
14 officers, these are all LLC's so they are managers. It
15 doesn't discuss managers in there. Whether they meant to
16 do it or not, they didn't and when you construe it
17 liberally in favor of the party seeking to have it
18 enforced, it doesn't include anybody in this arena, and it
19 certainly doesn't include parties that were not party to
20 this agreement.

21 THE COURT: All right. Mr. Martens.

22 MR. MARTENS: Let me first point out that an LLC,
23 which is the landlord entity is an LLC, is considered a
24 person under South Carolina law. It is a legal entity, it
25 is just like an individual. There is also in this case,

1 and this is why it is important, Your Honor. There is a
2 case, they are pursuing an amalgamation of interest
3 theories of liability. So he can say, these claims are
4 only against the landlord. But you look at their
5 pleadings and what they are asking this Court to do is
6 find a judgment against the landlord and then enforce it
7 against everybody that touched this project, including
8 Mark Mather who simply is a manager of one or more of the
9 LLC entities. So we think it is applicable, these are
10 business sophisticates, they negotiated this contract,
11 they entered this contract, they should be bound by this
12 contract.

13 MR. MECKLER: Your Honor, if I may. The other issues
14 is the claims in this case are not contractually based
15 claims. The first one for performance, which is an
16 equitable claim. You have got tortious interference which
17 is obviously, tort negligent misrepresentation, civil
18 conspiracy and veil piercing amalgamation. The
19 Allen-Parker, Lollis case, 1971 Supreme Court says that
20 those tort actions are not subject to the type of
21 limitation liability clauses that the Defendants are
22 citing to because they fall outside the negligence
23 representation, actually precontract and the torts are
24 unrelated to the contract itself. The amalgamation,
25 obviously we are going to have to see how the trial goes.

1 But we believe that it is going to show that, this is all
2 one big enterprise. There is not somebody else there,
3 there is nobody else in the landlord's position. Mark
4 Mather runs the one, he runs the other one, he runs the
5 other one and they all roll up into one. As a matter of
6 fact, I believe the 30(b)(6) testimony in deposition is
7 that all of these South Carolina companies roll up into
8 GRH. So that is where we are at. The limitation
9 liability, anything, it would only -- present, the
10 landlord on the contract not be extra contractual claims.
11 Corporations are not people, they have legal rights in the
12 State of South Carolina but if they wanted to apply to
13 something other than personal liability they should have
14 put --

15 THE COURT: Can I see a copy of the lease.

16 MR. MARTENS: I have got one that is marked.

17 THE COURT: I have got electronic copies but if you
18 have a paper copy.

19 MR. MECKLER: Paragraph 56, Your Honor.

20 THE COURT: All right.

21 MR. MARTENS: And, Your Honor, if I can respond very
22 briefly to Mr. Meckler.

23 THE COURT: Give me a second to read, please.

24 MR. MARTENS: Yes, sir.

25 (Whereupon, the Court reads a document.)

1 THE COURT: And Riverwalk Building 6, LLC, is an LLC?

2 MR. MARTENS: It is, Your Honor.

3 THE COURT: Okay. So last word on this Mr. Martens.

4 MR. MARTENS: Yes, sir. The consequence, the lost
5 profits, Counsel mentioned that there are tort claims in
6 this as well. Lost profits are consequential damages that
7 arise from a breach of contract, that contract. They
8 should be excluded.

9 THE COURT: Mr. Martens, you convince me, it appears
10 to me the Defendant is right. That I can only exclude
11 them as to the landlord itself. Because the contract
12 refers to stockholders all through the partners. And if
13 the land, it is an LLC, it has none of those three,
14 correct?

15 MR. MARTENS: That is correct.

16 THE COURT: So I am going to grant the motion to
17 exclude lost profits, damages, but only as to the
18 Riverwalk River District Building 6.

19 And then your next motion --

20 MR. MECKLER: If I may clarify, that is just for the
21 consequential damages that he has identified.

22 THE COURT: That is as to lost profits. Yes.

23 MR. MARTENS: Your Honor, the second part of that
24 motion that I mentioned, Mr. Ligon is an expert witness
25 that has been identified by the Plaintiff. And he has, he

1 has opined that Grapevine has suffered lost damages,
2 economic losses, specifically lost profits as a result of
3 Defendant's wrongful revocation of Grapevine's right to
4 use outdoor patio areas. Mr. Ligon, I took his deposition
5 in July and he testified that his entire analysis is based
6 upon assumption that Grapevine did, in fact, have a
7 personable patio areas. Mr. Ligon also admitted that if
8 that assumption were invalid or went away that his
9 analysis would go away because if it had no enforceable
10 right to use the patio, presumably it was not damaged by
11 the depravation of the use of that. The lease does not
12 confer any rights on Grapevine to use the patio or common
13 areas, rather, in its business. And, in fact, the
14 Plaintiff's allegations in this lawsuit are, include a
15 negligent misrepresentation claim based upon alleged
16 misrepresentations that Grapevine would be allowed to use
17 the patio when, in fact, the Defendants knew that the use
18 would not be permitted under the leases. So, in other
19 words, their claim is saying, you told us we could do it
20 but we really don't have that right. Mr. Ligon has said,
21 well, if they really don't have that right they really
22 don't have these damages. And so our argument, Your
23 Honor, is based upon what their claims are and what his
24 testimony is, the evidence cannot come in.

25 THE COURT: Mr. Martens, isn't that, what the

1 contract permits or doesn't permit is going to be a
2 question for the fact finder, right. That seems like a,
3 you are wanting to exclude damages testimony based on a
4 finding they didn't have the right to use the patio.
5 Isn't that a question for the fact finder?

6 MR. MARTENS: I think, if it is not entitled to
7 consequential damages, it is not a question, it is not a
8 question of contract interpretation because the contract
9 says you can't recover those damages as to the landlord.
10 And so there is, the evidence is there is no enforceable
11 right for use of the patio. Mr. Ligon has said there was
12 no enforceable right if there, it was just a gratuitous
13 use or a prescriptive use then these damages don't apply.

14 THE COURT: Right, I understand. But you are saying
15 that, the evidence is that there is no enforceable, isn't
16 that a question for the fact finder though. That is what
17 I am saying.

18 MR. MARTENS: We believe it is a matter of law,
19 provision of the lease for the Court to decide.

20 MR. MECKLER: Your Honor, I think you are absolutely
21 right. And Mr. Martens is not right, correct on this
22 matter. As a matter of fact, paragraph 15 of the lease
23 discusses common areas and specifically states, tenant,
24 its customers, employees and invitees shall have the
25 non-exclusive right to use and enjoy common with landlord,

1 other tenants and their customers and employees and
2 buddies in the common areas. And then actually goes on in
3 18, paragraph 18 charging the Plaintiff to actually clean
4 the common areas that is used. So I don't think that is
5 correct. And the issue about where his, the analysis goes
6 away, well of course. If the jury finds that they had,
7 they were entitled to use the patio then they will have
8 damages for not being able to use that. If the jury finds
9 that they weren't entitled to use the patio then there
10 won't be damages. The loss is the same, its whether the
11 jury would have awarded the damages.

12 THE COURT: I am going to deny the motion in regard
13 to the patio, patio damages.

14 All right. Let me just turn to Mr. Meckler or Mr.
15 Staples. What is the relevance of the assault charge.

16 MR. MECKLER: They will put up Mr. Mather and talk
17 about how wonderful Brockmann is and how -- we may want to
18 bring that in to contract that. He was charged with
19 beating somebody up or hitting somebody at a wedding,
20 ended up having to pay restitution and fines and community
21 service. So just depends on how the case goes. I can't
22 predict now whether we would use it or not. But certainly
23 I don't think there is any reason to exclude at this
24 juncture.

25 THE COURT: Well, even if they bring in evidence that

1 he is a kind and a business man, a generous business man.
2 That is still, I assume this involved alcohol.

3 MR. MARTENS: Your Honor, that is part of the
4 problem, I don't know, we don't know.

5 MR. MECKLER: We could ask about it on the stand.
6 Like I said, Your Honor, I don't know if we are going to
7 use it, I just think it is a little early before we have
8 his testimony as to whether it would be used in
9 impeachment.

10 THE COURT: I don't want to get too far down this
11 rabbit hole right now. I am going to rule it cannot be
12 used without the parties making a profitable, letting the
13 Court know. I am not going to absolutely exclude it but
14 if you want to go down that route, let me know and we can
15 proffer and see where it goes.

16 And then the next one is Lisa Hill who is your
17 employee.

18 MR. MARTENS: She was, Your Honor, she was let go,
19 she is facing charges of embezzlement. It doesn't have
20 anything to do with this case. My client was, in fact,
21 the victim of that alleged crime. It is, it shouldn't
22 come in.

23 THE COURT: She has current charges pending?

24 MR. MARTENS: That is my understanding. She is
25 facing criminal charges in the State of North Carolina,

1 Federal Court related to this alleged theft.

2 THE COURT: Yes, sir.

3 MR. MECKLER: Same thing, Your Honor. I don't know
4 if we will use it or not. If it turns that it was an
5 issue in one of the depositions about a large balance of
6 debt on the books of the Defendant, landlord then, it is
7 related to that embezzlement and perhaps it is relevant as
8 to why they didn't close. But, Your Honor, we have been
9 defending this case for three years and we still don't
10 know why this thing hasn't, it seems to be a pretty
11 straightforward option to purchase. It may be relevant.

12 THE COURT: The Court's ruling will be the same as
13 the previous issue. It is not to be mentioned without
14 notifying the Court beforehand and we do a proffer.

15 All right. Let's see. Okay. There is an email
16 issue.

17 MR. MARTENS: Correct, Your Honor. And one other
18 issue that I failed to mention before. There is another
19 expert, John Scott who is a real estate appraiser, who did
20 an appraisal. We simply would ask the Court to exclude
21 his written report, it is hearsay. We took his
22 deposition. He said that large portions of that report
23 are simply downloaded from a property software, they are
24 not actually his work product. And we believe the
25 document should not come in. He can testify to what his

1 conclusion of the appraised value was, I have no objection
2 to that but we do object to the introduction of the
3 written appraisal report as evidence on a hearsay ruling.

4 THE COURT: His own report that he generated?

5 MR. MARTENS: Yes, sir.

6 THE COURT: And the basis is, the software
7 programming used generated some of the --

8 MR. MARTENS: He testified that large portions of the
9 report are data that, his firm purchases from third party
10 vendors. And that, statistics and analyzes and different
11 things that are incorporated into what reports to be his
12 appraisal are not his product. There are things that he
13 simply purchased from third parties. I can't examine
14 those third parties, I can't determine the veracity of the
15 information. It is by definition hearsay and in fact
16 there is a case, a South Carolina case, Bailey versus
17 Bailey where the Court of Appeals, 1987 case from the
18 Court of Appeals recognized that Family Court had properly
19 excluded a written appraisal report because clearly,
20 clearly the report was inadmissible hearsay.

21 THE COURT: That doesn't really help me. What was,
22 why was it obviously inadmissible hearsay.

23 MR. MARTENS: Because it is an out-of-court statement
24 made by someone other than the witness testifying, while
25 testifying at trial being submitted from the truth of the

1 matter asserted. They are trying to hand in a written
2 report.

3 THE COURT: Mr. Martens, this happens all the time, I
4 mean you get a toxicology report in a General Sessions
5 case. Toxicologist says, at the table showing the lethal
6 dose of Fentanyl or something. I mean, they didn't do
7 those tests themselves. They took that from another
8 source.

9 MR. MARTENS: That is correct. That is correct.
10 They have testing labs and the chains of custody and they
11 have different criteria to satisfy the threshold of
12 evidentiary support. What we know from Mr. Scott's
13 deposition is, he went out on the internet and he
14 purchased some data and dumped it into a report. Your
15 Honor, again, it is not a critical issue. We are
16 objecting to the report as hearsay. The Court may want to
17 defer ruling on that.

18 THE COURT: I am a little skeptical of argument. But
19 I will defer ruling on the written expert report. He can
20 refer to it any way even if it is not admitted.

21 MR. MARTENS: Sure. He can testify to what his
22 appraisal was.

23 THE COURT: I will defer ruling on, what was the
24 expert's name again?

25 MR. MARTENS: John Scott.

1 THE COURT: Okay. Mr. Scott's written report.

2 MR. MARTENS: And then Your Honor asked about the
3 email, the question with Anthony Swainey. As I previously
4 mentioned. Mr. Swainey is an employee of the Bank of the
5 Ozarks. There is a question about some exchange of some
6 information between my clients and Bank of the Ozarks
7 related to some financing or refinancing of this project.
8 Counsel for the Plaintiff, an email appears to be March of
9 last year. Plaintiff's Counsel sent a list of email
10 questions to Attorney --

11 THE COURT: The email question to another attorney
12 who was the attorney --

13 MR. MARTENS: The attorney for the bank.

14 THE COURT: Okay. Attorney for Bank of the Ozarks?

15 MR. MARTENS: Yes, sir.

16 THE COURT: Okay.

17 MR. MARTENS: That attorney forwarded the email to
18 Mr. Swainey and Mr. Swainey typed up a response to the
19 best of his knowledge without independent investigation,
20 is what it says, answering, one, two, three, four, five,
21 six; six specific questions that had been propounded via
22 email by Plaintiff's Counsel. This is clearly hearsay.
23 Mr. Swainey is on the witness list, Mr. Swainey can be
24 called to testify and this document which is previously
25 marked as Exhibit 5 from one of the depositions, I am not

1 sure which deposition this is, is hearsay and ought to be
2 excluded.

3 THE COURT: All right.

4 MR. MECKLER: Your Honor, Mr. Swainey will be here to
5 testify and he can authenticate the answers and that he
6 typed them.

7 THE COURT: Well, it is not an authentication
8 objection. I think it is a hearsay objection. Mr.
9 Martens, the document, seems to be a business record,
10 isn't it.

11 MR. MARTENS: It wasn't generated in the ordinary
12 course of business. It was an email in response to
13 questions that they asked, wasn't given under oath. There
14 are no, Defense Counsel was provided advanced notice or an
15 opportunity to be present or cross-examined. It is
16 definitional hearsay, Your Honor. They want to introduce
17 this document for the truth of what it says.

18 THE COURT: I agree with you but --

19 MR. MECKLER: Your Honor, we won't know if it is a
20 business record until Mr. Swainey and says, sir, this is
21 what we do and at the bank we have this --

22 THE COURT: Okay. I am going to defer ruling on the
23 email issue. But I will say, I am inclined to grant the
24 request, the motion on that. It just seems to me, as Mr.
25 Martens has just argued, that email from Counsel from a

1 litigation to Counsel to another party is not in the
2 ordinary course of business. But I will defer ruling on
3 that.

4 All right. And deposition testimony.

5 MR. MARTENS: Yes, sir. This is the supplemental
6 motion we filed yesterday afternoon. We were served with
7 deposition excerpts of three witnesses who Plaintiff
8 intends to introduce by deposition testimony during its
9 case-in-chief. And I want to address each of them
10 separately. David Williams has been, David Williams was
11 an employee of one of the Defendant's and negotiated the
12 terms of the lease with Plaintiff. He was not an employee
13 at the time he was deposed. He was not an officer or
14 director or managing agent at the time he was deposed. He
15 was not a person proffered under Rule 30(b)(6) at the time
16 he was deposed. Rule 32(a) specifically provides --

17 THE COURT: Hold on and let me pull up my copy too.
18 Okay, go ahead.

19 MR. MARTENS: Yes, sir. 32(a), at the trial upon
20 hearing of a motion on interlocutory proceedings, any part
21 or all of a deposition so far as admissible under the
22 rules may be used against any party who was present or
23 represented at the taking of the deposition or had
24 reasonable notice thereof. And then paragraph 2,
25 subparagraph 2 rather, the deposition of a party or anyone

1 who at the time of the taking of the deposition was an
2 officer or director or managing agent may be used by an
3 adverse party for any purpose. Mr. Williams was not a
4 party whose deposition was taken, he was not an officer,
5 director or managing agent when his deposition was taken.
6 I also want to point out, Your Honor, the only Defendant
7 when Mr. Williams was deposed was Riverwalk River District
8 Building 6; Mark Mather, GRH Development; the Greens of
9 Rock Hill and Assured Administration were not parties,
10 they were not representative at that deposition; they had
11 no reason to be there. They are attempting to introduce
12 the deposition testimony of a non-party witness who was
13 deposed when this case was in a different posture. And I
14 also want to point out, Your Honor, Mr. Williams is a
15 resident of York County. He has been subpoenaed by both
16 parties and he will be here to testify. We believe that
17 that should not have allowed.

18 THE COURT: Yes, sir. Are we doing the whole motion
19 now or just Mr. Williams?

20 MR. MARTENS: Just Mr. Williams.

21 THE COURT: Okay.

22 MR. MECKLER: We will concede on Mr. Williams that
23 they really don't --

24 THE COURT: Okay, sure.

25 MR. MECKLER: -- try to shorten the trial up.

1 THE COURT: Mr. Martens.

2 MR. MARTENS: The next one, Todd Brockmann. They
3 have designated deposition testimony and exhibits from a
4 deposition of Todd Brockmann. Mr. Brockmann is an
5 attorney. He has represented various clients of mine in
6 various capacities. He was deposed in June of this year.
7 He was not a party to the action. He was not an officer,
8 agent or a 30(b)(6) designee of any of these parties. He
9 too has been subpoenaed. He too will be here to testify.
10 We don't believe there is any provision under Rule 32(a)
11 that allows them to introduce the deposition testimony in
12 the manner they seek to do so.

13 THE COURT: Mr. Meckler.

14 MR. MECKLER: Yes, Your Honor. I will point you to
15 32(a)(3)(b), a witness is out-of-state. Mr. Brockmann is
16 a North Carolina resident. I know this because he lives
17 in the neighborhood with my partner. We tried to subpoena
18 him there. As a matter of fact, we sent him a subpoena
19 for documents, it was a South Carolina subpoena that we
20 got, and he just didn't reply, he didn't send us anything,
21 no rejection, no reply, didn't even show up at the hearing
22 which the Court was uncomfortable with because it was a
23 South Carolina subpoena and just punted it. And so under
24 that rule we can read Mr. Brockmann's transcript. It
25 doesn't require for him to be available or that we sent a

1 subpoena, that doesn't have anything to do with this
2 provision.

3 THE COURT: Mr. Martens.

4 MR. MARTENS: I want to point out that Plaintiff's
5 Counsel served Mr. Brockmann with a trial subpoena to be
6 here.

7 THE COURT: But is he a resident of North Carolina.

8 MR. MARTENS: He is a resident of -- but, Your Honor,
9 here is the point. Counsel can't have it both ways. They
10 can't serve South Carolina subpoena on North Carolina
11 residents and then say, oh, we get to read his deposition
12 because he is out of state.

13 THE COURT: Why not?

14 MR. MARTENS: Because it, well --

15 THE COURT: The rules don't prohibit as far as I
16 know.

17 MR. MARTENS: Actually it does. If you want to
18 subpoena a witness from, well, let me say this. The rules
19 don't allow you to subpoena out of party witnesses to
20 trial in this state. Counsel is charged with knowledge of
21 the rules. They served this man with a subpoena for this
22 trial. They should be bound by that. He is going to be
23 here.

24 THE COURT: I understand what you are saying. What
25 portion of the subpoena or the law regarding subpoenas,

1 they can't also use his deposition if he is from out of
2 state.

3 MR. MARTENS: I think the purpose for Rule 32(a) and
4 the out-of-state contemplates that you can't get the
5 witness to trial because he is not within the subpoena
6 power of the Court. They have attempted to use the
7 subpoena power of this Court to compel him to be here.
8 And, in fact, they filed in this proceeding affidavit of
9 service that he was served with a subpoena presumably so
10 that they could compel or seek some sort of sanction
11 against Mr. Brockmann if he didn't show up to testify.
12 They are, it is judicial estoppel, Your Honor, they can't
13 have it both ways. They can't subpoena him to court,
14 represent to this Court that he is compelled to be here
15 and then say, oh, but we also get to read his deposition
16 because we can't get him here.

17 THE COURT: I am going to deny the motion with regard
18 to Mr. Brockmann. I agree with you, Mr. Martens, the rule
19 is for witnesses that are not available by subpoena in our
20 State. I am going to deny the motion for Mr. Brockmann.

21 MR. MARTENS: And, Your Honor.

22 THE COURT: Mr. Martens, the Clerk's office is saying
23 they are ready to start jury roll call downstairs. If
24 y'all want to head downstairs for roll call. I don't
25 typically attend roll call. I will be down for jury

1 qualifications, selection. Do we have a witness list that
2 will be helpful to me for the jury selection and
3 qualification.

4 MR. MECKLER: Yes, Your Honor.

5 THE COURT: And as well as any proposed voir dire, if
6 the parties have it.

7 MR. MECKLER: I have Plaintiff's proposed voir dire.
8 If I can approach, Your Honor.

9 THE COURT: Please.

10 MR. MECKLER: I believe it identifies most if not all
11 the witnesses.

12 THE COURT: What witness' are in your voir dire?

13 MR. MECKLER: Yes sir, Your Honor.

14 THE COURT: Mr. Martens, if I can ask you about
15 question two. Do you have any witnesses that are not
16 listed on that, that are not parties in the case.

17 MR. MARTENS: One second, Your Honor.

18 THE COURT: Yes, sir.

19 MR. MARTENS: No, Your Honor.

20 THE COURT: All right. Mr. Martens, any proposed
21 voir dire?

22 MR. MARTENS: None other than what has been provided.

23 THE COURT: Counsel, I typically, I was asked, with
24 respect to the jurors, if they have any knowledge of the
25 case and I try to give a one-sentence description. And I

1 would say, a commercial dispute involving the lease of
2 the Grapevine Wine Bar. Is that satisfactory to both
3 sides?

4 MR. MECKLER: I would, at least with an option to
5 purchase.

6 THE COURT: A lease that the Plaintiff asserts --

7 MR. MECKLER: Yes sir, Your Honor.

8 THE COURT: If y'all will head downstairs.

9 MR. MECKLER: Thank you, Your Honor.

10 MR. MARTENS: Thank you, Your Honor. There is one
11 other question. We have several witnesses that are under
12 subpoena. Obviously our preference, I think we are in the
13 position that we can have those folks here in fairly short
14 notice. Do you prefer people to not sitting around the
15 court house.

16 THE COURT: How short is your notice.

17 MR. MARTENS: For Mr. Mather, probably 30 to 45
18 minutes; Todd Brockmann who may or may not be on subpoena
19 based on the issues we just discussed, probably going to
20 take about an hour to be here; Dave Williams lives in Fort
21 Mill and I assume he can probably be here in 30 to 45
22 minutes.

23 THE COURT: I would strongly prefer not to have hour
24 gaps in the trial, waiting for witnesses to arrive. So if
25 y'all can plan ahead. I don't object to them not being in

1 the building as long as you know when they are going to be
2 called and I just, I don't want to be telling the jury we
3 have to wait for an hour because we have got a witness who
4 is driving in.

5 MR. MECKLER: Your Honor, we also have Mr. Mather and
6 Mr. Williams on subpoena. I don't know that we can
7 represent that we can get them back here. We may move
8 regularly quickly if we get a jury seated.

9 THE COURT: Okay. They are still under subpoena.
10 So, Mr. Martens, you are just asking while they are under
11 subpoena can they go about their business and not be
12 present in the Court House all the time.

13 MR. MARTENS: Your Honor, my common practice is to
14 try to keep witnesses updated during the course of a trial
15 and say, it looks like we are going to need you here at
16 lunch time or it looks like we are going to need you here
17 no later than 2:00. And I have that conversation with
18 them an hour or two in advance so that we are not sitting
19 waiting on witnesses. And, obviously, it is your court,
20 your decision. But I would request that the witnesses
21 under subpoena will be allowed to be at ease and subject
22 to recall on sort notice.

23 MR. MECKLER: With respect with Mr. Mather would
24 depend on your ruling on the entry of the transcript.
25 That makes it easier for us if we don't have to have him

1 here personally. I think, Mr. Mather, if anybody, his
2 transcript should be admitted. I think Your Honor will
3 find that, we just haven't had that argument yet.

4 THE COURT: Mr. Martens, why don't you sit down with
5 Plaintiff's Counsel and see if y'all can figure out a
6 rough schedule for the witnesses and if we can work
7 something like that out I will be comfortable with it.

8 (Whereupon, move to jury qualification room for roll
9 call and qualify the jury.)

10 THE COURT: Mr. Meckler, you had an issue that you
11 mentioned to me in the elevator, tell me.

12 MR. STAPLES: Your Honor, I guess, if I have some
13 clarification it may help with it. I want to make sure I
14 understand the ruling first. You excluded compensatory
15 damages as to the -- with breach of contract only.

16 THE COURT: Correct.

17 MR. STAPLES: The lease agreement has a provision
18 that once the sales consummated the lease is terminated
19 and therefore that provision --

20 THE COURT: Once the lease is --

21 MR. STAPLES: The option goes through and they do the
22 sale, the lease then terminates which would include that
23 provision.

24 THE COURT: Right. But I think both sides would
25 agree that the sales has not been consummated, right.

1 MR. MARTENS: We will stipulate to that.

2 MR. STAPLES: I think we can probably wait until
3 later to address the issue I raised.

4 THE COURT: Okay. Tell me, Mr. Martens, you raised
5 the issue of the trial, your argument is it should be a
6 bench trial?

7 MR. MARTENS: Correct, Your Honor.

8 THE COURT: Tell me why.

9 MR. MARTENS: Because the lease calls for it and I,
10 Christopher, can I have a copy.

11 THE COURT: What paragraph.

12 MR. MARTENS: Paragraph 59, Your Honor.

13 THE COURT: It does say that.

14 MR. MARTENS: It does indeed, Your Honor. As you may
15 recall, when we argued this issue before, as I recall, you
16 stated, not included in your order, but you stated that it
17 was, in fact, a conspicuous provision of the lease. And I
18 think there was an issue about whether parties could waive
19 a waiver, our argument is that the mode of trial, jury
20 versus non-jury, is not an issue of concern until the
21 trial is upon us. And therefore while you may waive your
22 right to a jury trial, demanding a jury trial when you
23 have a right to insist upon non-jury, you have not waived
24 the right to insist upon non-jury.

25 THE COURT: Mr. Martens, I will be honest with you,

1 you just lost me completely.

2 MR. MARTENS: Yes, sir. Under the existing case law
3 the rules of court, in order to preserve your right to a
4 jury trial you have to ask for it. If you don't ask for
5 it within an appropriate period of time, in ten days of
6 filing your responsive pleading you have waived that
7 right. I believe the argument that I faced when I raised
8 this motion before was, well, the Defendants have waived
9 their right to a non-jury trial because they also asked
10 for a jury trial in the pleading. My argument, my
11 position, Your Honor, that the mode of trial, whether it
12 is jury or non-jury is of no consequence until it is time
13 for trial. And so we are entitled, we believe entitled to
14 enforce the non-jury trial provision of this lease.

15 THE COURT: Basically you are saying you have a
16 contractual right to permit you to change your mind as to
17 the mode of trial.

18 MR. MARTENS: Correct, Your Honor.

19 THE COURT: Let me hear from the Plaintiff.

20 MR. MECKLER: Yes, Your Honor, thank you. I guess
21 the first thing. This is a renewed motion. Your Honor
22 has already denied this motion back in March, I believe.
23 I read the motion, I don't believe there is any new
24 grounds for bringing it today. It is important to note
25 that back in the fall of 2020 the parties agreed, in fact,

1 with Judge Hall and with Ms. Strait to set this matter for
2 a date certain number one trial in February. And that
3 was, in fact, set for February 16th, 2021 and the only
4 reason that trial would not have gone forward as a jury
5 trial is because the Court House was closed due to COVID.
6 Now, Mr. Martens mentioned that the Defendants have
7 themselves, in fact, on two occasions also demanded a jury
8 trial. It was not until I filed the second amended
9 complaint early 2021 that they then filed an answer to
10 that and did not include a jury demand. Now, case law
11 tends to analyze it as well, if your amendment raises new
12 issues of fact then that might give them a basis to change
13 their position in terms of jury, non-jury. The second
14 amended complaint only added one new cause of action for
15 negligence misrepresentation. But it was based on the
16 same set of underlying facts. We had already plead fraud
17 and various claims and all the Defendants were parties
18 before the second amended complaint was filed. So all of
19 the Defendants had already, themselves, demanded a jury
20 trial. Now obviously we have all prepared for this trial
21 as it is going to be a jury trial. We just went through
22 the jury selection in some regard. I think, clearly the
23 contractual waiver, I think we could all agree, would not
24 apply to four out of the five Defendants. It could only
25 be enforceable by the landlord entity and it would only

1 apply to the breach of contract claims. We have alleged a
2 number of tort claims, Unfair Trade Practices, tortious
3 interference, civil conspiracy, things of that nature.

4 THE COURT: Well, I am not sure it is quite, the
5 language does say, any claim or cause of action arising or
6 relating to the lease. The lease as to the landlord, is
7 that the argument, is it broader than that.

8 MR. MECKLER: Well, I don't think so, Your Honor.
9 The McBride versus Floyd case, cannot claim a benefit
10 under a contract if you aren't a party to it, you didn't
11 pay any consideration for it. So these other Defendants
12 cannot claim the benefit --

13 THE COURT: I apologize, I wasn't clear. I meant
14 other claims against the landlord other than the breach of
15 contract.

16 MR. MECKLER: Well, our negligent misrepresentation
17 claim does relate to pre-leasing matters, issues before
18 the lease was actually executed, misrepresentations
19 regarding what the lease would say and what the option to
20 purchase was saying. And, you know, also the King versus
21 Shorter, (phonetic), case, this was previously briefed
22 before, Your Honor. And that is what I talked about
23 earlier, whether or not the amendment creates any issues
24 of fact which ours did not. So, again Your Honor, they
25 have already agreed to set this case for a date certain

1 trial and should be bound by that.

2 THE COURT: The situation where a party has a
3 contractual right to a jury trial and then they demand the
4 other mode of trial.

5 MR. MECKLER: I think it was a case that goes the
6 other way in essence.

7 MR. MARTENS: Right. I tend to agree. I think there
8 is, as I said before, a party may waive its right to
9 demand a jury trial by failing to --

10 THE COURT: Even if they have a contractual right but
11 there is no case law in this situation.

12 MR. MARTENS: I am not aware of any, Your Honor. We
13 just believe it is a matter of contract interpretation
14 that, and to respond to Counsel's argument regarding who
15 is a party to the lease. The only, the party that is
16 being sought to have this enforced is the Plaintiff. And
17 they clearly are a party and they clearly agree that any
18 claims arising out of or relating to this contract would
19 be tried non-jury.

20 THE COURT: I am going to deny the motion. My basis
21 for my ruling, I do think there is a contractual right to
22 have it tried non-jury but I think both by demanding a
23 jury trial and your pleadings and by agreeing with the
24 Clerk of Court and opposing counsel to set the matter for
25 a jury trial, I think that has been waived.

1 I think we are going to be ready. Will you check
2 with the Clerk and see if we are ready to go on.

3 BAILIFF: They are not ready, Your Honor.

4 THE COURT: Okay. Well, Mr. Martens, I think you had
5 a motion that are still unaddressed. Let's go ahead and
6 knock those out.

7 MR. MARTENS: Continuing on with our motion in limine
8 concerning the deposition excerpts. The final one that we
9 believe should not be introduced into a manner in which
10 Plaintiff, this is the deposition transcript of Mark
11 Mather. Mr. Mather was not a party to the case when he
12 was deposed, he was not represented by Counsel when he was
13 deposed. Any Defendant other than Riverwalk River
14 Building 6, and again, Mr. Mather is under the Court's
15 subpoena power, he is here and they can call him and
16 testify if they feel they need to do so. We believe, my
17 understanding and reading of Rule 32 is that Mr. Mather's
18 testimony could be admissible against Building 6 because
19 he was an officer, agent, principal of that entity at the
20 time he was deposed. It could not be admissible under
21 Rule 32 against any of the other Defendants because they
22 were not party to the case when that deposition was taken.
23 And our argument, Your Honor, is that any probative value
24 of being able to introduce his testimony from a deposition
25 when he is here and available is substantially outweighed

1 by dangers of unfair prejudice, confusing the issues or
2 misleading the jury. We think it would be very difficult
3 for the jury to comprehend and understand this testimony
4 that you are going to hear can be used against one of the
5 Defendant's but it can't be used against the other
6 Defendants. With him here, available to testify under
7 subpoena, we believe that Rule 403 would preclude this
8 evidence from coming in in the manner which Plaintiff
9 seeks to introduce it.

10 THE COURT: All right.

11 MR. STAPLES: Your Honor, I don't think that to be
12 the case. Just to give you some of the deposition entries
13 that are to that and then I will go over his argument
14 because they weren't parties. Mr. Mather testified that
15 he was a manager of the Greens of Rock Hill; that Assured
16 Administration, was the owner of Greens of Rock Hill; that
17 he is the manager of Assured; for GRH he would state his
18 title, he said he didn't know what it was, he would have
19 to check his documents. At his deposition he considered
20 himself a witness for Riverwalk District Building 6.

21 THE COURT: He is under subpoena, right. He will be
22 a witness in the proceedings?

23 MR. STAPLES: We would rather not have to call Mr.
24 Mather in our case. He said he controls the River
25 District and the 30(b)(6) said Mark is a principal and

1 owner of GRH. And there is a case on point, Your Honor.
2 In the Paschal case, it was a personal injury case. The
3 Plaintiff submitted a deposition excerpts from an
4 out-of-state doctor. Two of the three Defendants were not
5 parties at the time and they objected to that deposition
6 being submitted. The Court allowed the transcripts to be
7 admitted over their objections. The Appeals Court noted
8 that it was proper because the Defendants had a interest
9 similar to these, all rolled up into one company.
10 Defendants then identified any other inquiry that would
11 have altered the deposition and their interest were
12 properly represented. In this case, all the Defendants
13 had the same Counsel. Mr. Mather's deposition was taken,
14 I think, over a year and a half ago. They have had a year
15 and a half to redepose him if they felt there was
16 something in that deposition they didn't get to do or
17 cover or ask. But there was no harm to them. And on top
18 of that it is his client, he can call him in his
19 case-in-chief to rebut or he had the option when he filed
20 his objection to it to submit other line and page number
21 entries. But there is no harm in this case, there is
22 nothing that could be heard that they can't get in front
23 of the jury through their own case. In the Causey case,
24 Your Honor, they couldn't even bring that doctor in later
25 in the case to testify because he wasn't, he was out of

1 state.

2 THE COURT: Mr. Martens, you and Mr. Dluznesdi are
3 Counsel for all the Defendants, correct?

4 MR. MARTENS: That's correct, Your Honor.

5 THE COURT: And you were present --

6 MR. MARTENS: I was not.

7 THE COURT: Counsel, prior Counsel was present?

8 MR. MARTENS: Prior Counsel for Building 6 was
9 present.

10 THE COURT: One of the factors in the Paschal Court
11 mentions is, whether there were areas of inquiry that you
12 would have pursued that were not addressed by your
13 predecessor Counsel. Is there anything you want to put on
14 the record in that regard.

15 MR. MARTENS: Your Honor, I think the issues have to
16 do, this goes back to this amalgamation of, theory of
17 liability. And we will argue this at the appropriate
18 time. The standard of amalgamation of interest is not
19 just simply common control. But there are very specific
20 criteria that include, among other things, the evidence
21 that the various entities are somehow being used to
22 perpetrate a fraud or conduct some sort, if I had been
23 present or if I had known that five of my six clients or
24 four of my five clients were going to face an amalgamation
25 of theory liability when Mr. Mather was deposed I would

1 have asked or at least been able to ask questions that
2 address those issues. None of those issues were
3 addressed. The deposition excerpts that they seek to
4 introduce talk about the various entities and their
5 interrelationship with those kinds of things. But the
6 various entities were affected by that testimony weren't
7 present, were not aware that it was going to be an issue
8 because it was not an issue when the deposition was taken
9 and it is prejudicial to take a deposition of a fact
10 witness, Mr. Mather says in his deposition, I am simply
11 here as a witness for Building 6. They tried their best
12 to get him to talk about the interrelationship and his
13 other roles and other entities. And he said, look, I am
14 here as a witness for this Defendant, it is prejudicial,
15 it is unfair for them to take his deposition in one case
16 and then change the claim of the case and nobody ever had
17 a chance to deal with.

18 THE COURT: Thank you. I am not going to permit the
19 use of Mr. Mather's deposition based on the Paschal case.
20 I think this is a close call but the fact that Mr. Mather
21 is here and available to testify live I think weighs in
22 favor of these issues.

23 MR. MARTENS: Your Honor, I believe I have one final
24 issue and that has to do with the parol evidence rule.

25 THE COURT: Okay.

1 MR. MARTENS: We anticipate that the Plaintiff is
2 going to present a great deal of evidence attempting to
3 establish what they were told versus what they got in
4 their lease. And we believe that that evidence, prior
5 negotiations that are being introduced in an attempt to
6 alter or amend the terms of the written document are bared
7 by the parol evidence rule. So we would ask for a motion
8 in limine to preclude the Plaintiff from entering into
9 evidence of prior or contemporaneous negotiations,
10 promises, pledges, whatever they may be in an attempt to
11 argue that what the lease says isn't actually what the
12 lease means.

13 THE COURT: Okay. Let's take this up after lunch.
14 We have got to bring the jury in. I will be honest, Mr.
15 Martens, I practice as primarily a Plaintiffs lawyer. I
16 don't think I have looked at the parol evidence rule since
17 law school. I need to do some review myself. But I think
18 the jury is ready. We will select our jury, we will take
19 a lunch break and I will look at the Parol during lunch.

20 (WHEREUPON, the jury panel came into open court at
21 approximately 12:13 p.m.)

22 THE COURT: Ladies and gentlemen, I appreciate your
23 patience this morning. These courtrooms are not that big.
24 This shouldn't take that much longer but if there is
25 anyone who feels they are sitting too close to the person

1 next to them, to be comfortable during COVID, raise your
2 hand and the Bailiff will put you against the wall or find
3 you a chair in the back.

4 (No response.)

5 THE COURT: Ladies and gentlemen, this is the part of
6 that we are going to select the actual 12 jurors and two
7 alternates to sit on our first case this week. And the
8 reason that we have alternate jurors is in case a main
9 juror gets sick or has to leave the trial, has some kind
10 of family emergency, then we have alternates who are
11 available to step in and continue the trial. So, again, I
12 am going to ask questions. It is very important that you
13 answer honestly. My first question, ladies and gentlemen,
14 I am going to tell you, this case is Grapevine of
15 Riverwalk, Incorporated versus Riverwalk River District
16 Building 6, et al; which means and others. And then it
17 is case 2018-CP-46-3726. This is a dispute between
18 businesses involving the Grapevine Wine Bar in the
19 Riverwalk area, if you know what that is. And the
20 Plaintiff asserts that, among other things, that the
21 Defendant has breached a contract and the Plaintiff also
22 claims that they had a right to buy the premises that they
23 use for the wine bar and that the Defendant has wrongfully
24 denied them that opportunity. So if anyone, again, those
25 are just allegations, it is not evidence. But the reason

1 I am telling you that, is there anyone who knows anything
2 about this case, either you know somebody involved in it,
3 you heard people talk about it. Okay, yes sir, in the
4 back.

5 JUROR: I live in Baxter so I frequent Grapevine and
6 I know Dave, the owner.

7 THE COURT: So you live in Baxter Village in Fort
8 Mill.

9 JUROR: That's correct.

10 THE COURT: So you go to the Grapevine, not the
11 Grapevine in question in this case?

12 JUROR: I have been to both.

13 THE COURT: You have been to both. And you said you
14 knew who, sir?

15 JUROR: Dave, I think he owns Grapevine. I don't
16 know him personally, we just talk when we are there.

17 THE COURT: Okay. So you are a customer of the
18 Grapevine?

19 JUROR: Correct.

20 THE COURT: Okay. Do you believe that you could be
21 fair and impartial to both sides in this case?

22 JUROR: I do.

23 THE COURT: What is your juror number?

24 JUROR: 280.

25 THE COURT: Okay. Thank you, sir.

1 Yes, sir.

2 JUROR: I know Dave and his wife, Melanie.

3 THE COURT: Tell me your juror number, sir.

4 JUROR: 133.

5 THE COURT: Okay. And so you know them as customers
6 of the wine bar.

7 JUROR: I have been friends with Melanie since she
8 owned the, she used to own a FedEx business near Baxter
9 and Harris Teeter. And I know them since they opened the
10 wine bar in Baxter and then when they opened the wine bar
11 at Riverwalk.

12 THE COURT: And would you describe yourself as
13 personal friends with the Plaintiffs in this case?

14 JUROR: With Melanie more so, yes.

15 THE COURT: My inclination is to excuse juror 133.
16 Do you have an argument on that issue? Do you think you
17 could be fair and impartial to both sides in this case?
18 You would describe yourself as having a personal
19 relationship with at least one of the Plaintiff's in this
20 case?

21 JUROR: We had some real estate interactions before
22 in Baxter Village.

23 THE COURT: I am going to excuse you, sir. You are
24 excused from service on this case only. The Clerk will
25 tell you to call in and see if we need you later in the

1 week. You are excused. That was 133.

2 Ladies and gentlemen, I am going to ask the attorneys
3 to stand now. For the Plaintiff we have Steven Meckler
4 and Christian Staples themselves. These attorneys are at
5 the Shumaker Firm. So, ladies and gentlemen, my question
6 is, does anyone have a personal or social relationship
7 with these two lawyers or are you related to them by blood
8 or marriage or have you ever been represented by the
9 Shumaker Law Firm. If any of those things apply to you
10 please stand.

11 (No response.)

12 THE COURT: And for the Defense, Mr. Keith Martens
13 and Mr. Stephen Dluzneski of the Hamilton and Martens
14 Firm. Same questions, ladies and gentlemen, if anybody is
15 related to either of these lawyers by blood or marriage or
16 you have close personal or social relationship or you have
17 been represented by the Hamilton, Martens Law Firm, please
18 stand.

19 (No response.)

20 THE COURT: Ladies and gentlemen, I am now going to
21 read you a list of parties and some of these are going to
22 be businesses and some are going to be people and also
23 possible witnesses in this case. So if you have any kind
24 of business relationship of any of the businesses I am
25 going to read off or you have a personal or social

1 relationship or a marriage relationship, or you are blood
2 relative of any of the people that I name off, please
3 stand. Does that make sense to everybody.

4 (No response.)

5 THE COURT: Grapevine of Riverwalk, Incorporated;
6 Riverwalk River District Building 6, LLC and LLC is a
7 different type of Corporation; GRH Development Resources,
8 LLC; The Greens of Rock Hill, LLC; Assured Administration,
9 LLC; Mark Mather, M-A-T-H-E-R; Lauren Griffin; Malia
10 Sweat; Dan Blue who is a local attorney; The Morton and
11 Gettys Law Firm; John Scott; Jason Wiggin; Brian Wilson
12 who is a lawyer; Anthony Swainey who is a banker; Alan
13 Aschenbrenner; Andrew Staphaleno who is a private
14 investigator; Deputy McMillan; Todd Brockmann who is a
15 lawyer; David Williams; Greg Ostranger; Sylvia Balan,
16 B-A-L-A-N; and Leslie Grubb, G-R-U-B-B.

17 (No response.)

18 THE COURT: The record will reflect nobody stood.
19 All right. Ladies and gentlemen, I now am going to ask
20 some questions about your background. If these questions
21 apply to you stand up and then I will call on you and I
22 will followup and ask you if you can still be fair and
23 impartial in this case. So my first question is, has
24 anyone in the jury panel ever filed a lawsuit against
25 someone, where you sued someone in civil court or you were

1 sued yourself in civil court. And I am not counting
2 divorce actions. Other than divorce or Family Court has
3 anyone in the jury panel ever sued someone or been sued.
4 If so please stand.

5 What is your jury number, sir.

6 JUROR: 149.

7 THE COURT: And, sir, can you still be fair and
8 impartial to both sides in this case?

9 JUROR: Yes, sir.

10 THE COURT: Did you bring a lawsuit or did somebody
11 sue you.

12 JUROR: Brought a lawsuit.

13 THE COURT: Okay, thank you, sir. The gentleman in
14 the back there. What is your juror number, sir.

15 JUROR: 280.

16 THE COURT: 280. Did you bring a lawsuit or did
17 somebody sue you?

18 JUROR: I brought it.

19 THE COURT: Could you still be fair and impartial to
20 both sides in this case?

21 JUROR: Yes, sir.

22 THE COURT: Thank you, sir. Yes, ma'am.

23 JUROR: 210. Sued me.

24 THE COURT: Someone sued you?

25 JUROR: Yes.

1 THE COURT: Could you still be fair and impartial to
2 both sides in this case.

3 JUROR: I think so.

4 THE COURT: Thank you, ma'am. Has any member of the
5 jury panel ever purchased a condominium. In other words,
6 a piece of property that wasn't a stand alone home. You
7 bought property inside another bigger property. If that
8 applies to you please stand.

9 Yes sir, what is your juror number.

10 JUROR: 128.

11 THE COURT: And could you still be fair and impartial
12 to both sides in this case?

13 JUROR: Yes.

14 THE COURT: Thank you, sir. My next question is, has
15 any member of the jury panel or a member of their
16 immediate family ever signed or been a party to a
17 commercial lease. And what that means is, you rented
18 property as a business, commercial lease and you had a
19 business where you rented property or someone in your
20 family did. If that applies to you please stand.

21 Yes sir, what is your juror number?

22 JUROR: 9.

23 THE COURT: Could you still be fair and impartial to
24 both sides in this case?

25 JUROR: Yes, sir.

1 THE COURT: Yes, ma'am.

2 JUROR: 210.

3 THE COURT: Could you still be fair and impartial to
4 both sides in this case?

5 JUROR: Yes, sir.

6 THE COURT: My next question is, has any member of
7 the jury panel ever had a rental or lease contract with an
8 option to purchase the property. If you have ever had a
9 contract like that, your personal life or business, please
10 stand.

11 (No response.)

12 THE COURT: Has any member of the jury panel or a
13 member of their immediate family work at your job in real
14 estate development or real estate management or finance.
15 Any of those jobs, you work in the real estate industry.
16 Yes, ma'am.

17 JUROR: 85.

18 THE COURT: And, ma'am, could you still be fair and
19 impartial to both sides in this case?

20 JUROR: Yes.

21 THE COURT: Yes, ma'am.

22 JUROR: 190.

23 THE COURT: Could you still be fair and impartial to
24 both sides in this case?

25 JUROR: Does that include rental property?

1 THE COURT: Yes, if you work, yes. What is your
2 juror number?

3 JUROR: 103.

4 THE COURT: Could you still be fair and impartial to
5 both sides in this case?

6 JUROR: Yes.

7 THE COURT: Yes, sir.

8 JUROR: I work for a commercial real estate company
9 but in the security division.

10 THE COURT: What is your juror number, sir?

11 JUROR: 183.

12 THE COURT: Okay. And could you still be fair and
13 impartial in this case?

14 JUROR: Yes.

15 THE COURT: Okay. Ladies and gentlemen, and then my
16 last question, have you or any member of your family ever
17 had business dealings with an employee or company, the
18 Riverwalk Development. In other words, were you thinking
19 of opening a business or any kind of business dealings
20 with the Riverwalk Development in Rock Hill. If that
21 applies to you, please stand.

22 (No response.)

23 THE COURT: Any additional questions from Plaintiff?

24 MR. MECKLER: No, Your Honor.

25 THE COURT: From the Defense?

1 MR. MARTENS: No, Your Honor.

2 THE COURT: Thank you. My last catchall question, is
3 there any member of the jury panel who has any reason why
4 you could not be fair and impartial to both sides in this
5 case. So any reason at all where you think in this case
6 you could not be fair to both sides, if that applies to
7 you please stand.

8 (No response.)

9 THE COURT: So, ladies and gentlemen, I find the
10 members of the panel will be qualified to serve on this
11 case. So, ladies and gentlemen, what is going to happen
12 is, the Clerk of Court is going to pass out a computer
13 generated randomized list of you jurors to the attorneys.
14 And then we are going to select the jury.

15 MR. MARTENS: Your Honor, may we approach?

16 THE COURT: Yes, sir.

17 (Whereupon, a bench conference was held in the
18 presence of the jury panel out of the hearing of the
19 jury panel.)

20 THE COURT: Counsel, I told the Clerk's office to
21 print out all 49 jurors. That was a mistake on my part, I
22 didn't think that through. It is fixed, they fixed my
23 mistake. Ladies and gentlemen, I appreciate your
24 patience, we are very close to being done and then those
25 of you who are selected for the case, I am going to speak

1 to you very briefly and let you go get lunch. And
2 everyone who is not selected, I will let y'all go. We are
3 very close.

4 Ladies and gentlemen, what is happening now, the
5 computer has put a randomized order for all the jurors.
6 And I am going to give the attorneys a few minutes to
7 review the list before we get started.

8 (Whereupon, a short break was taken while attorneys
9 review list.)

10 THE COURT: Is the Plaintiff ready to proceed with
11 jury selection?

12 MR. STAPLES: Yes, Your Honor.

13 THE COURT: Is the Defense ready?

14 MR. MARTENS: Ready, Your Honor.

15 CLERK OF COURT: I will receive alternating strikes
16 beginning with Plaintiff using the numbers to the left of
17 the page.

18 MR. STAPLES: Number 12.

19 MR. MARTENS: Defendant strikes 20.

20 MR. STAPLES: 44.

21 THE COURT: Number on the left, please.

22 MR. STAPLES: 17.

23 MR. MARTENS: 15, Defendant.

24 MR. STAPLES: 21.

25 THE COURT: 21 will be an alternate, so another one.

1 MR. STAPLES: 5.

2 MR. MARTENS: Number 10.

3 MR. STAPLES: Number 2.

4 MR. MARTENS: Defendant strikes number 1.

5 CLERK OF COURT: Your first alternate is 21 through
6 23.

7 MR. STAPLES: 22.

8 MR. MARTENS: Defendant strikes 21.

9 CLERK OF COURT: Your second alternate are numbers 24
10 through 26.

11 MR. STAPLES: 26.

12 MR. MARTENS: Defendant strikes 24.

13 CLERK OF COURT: I would like to verify strikes for
14 both sides. I have the following strikes for the
15 Plaintiff. 12, 17, 5, 2; Alternate 1, 22; Alternate 2, 26.
16 Is this correct?

17 MR. STAPLES: Yes.

18 CLERK OF COURT: And I have the following strikes for
19 the Defendant. 20, 15, 10, 1; first Alternate, number 21;
20 and second Alternate, number 24. Is this correct?

21 MR. MARTENS: The second alternate was?

22 CLERK OF COURT: 24.

23 MR. MARTENS: That is correct.

24 CLERK OF COURT: Thank you. Ladies and gentlemen, as
25 I call your name please bring your personal belongings and

1 move to the jury box to my right where a bailiff will
2 direct you. Number 162, William McCarter; number 9, Ozgur
3 Artan; number 85, Brittany Garren; number 25, Steven
4 Boyce; number 83, Jessica Fuller; number 80, Margaret
5 Foshay; number 46, Christopher Cockerham; number 97, James
6 Gross; number 123, Darrell Johnson; number 48, Christopher
7 Conley; number 112, Crystal Herring; number 49, Kevin
8 Couick. And the first Alternate, number 81, Summer
9 Freeman. Second Alternate, Shawn Dumas.

10 THE COURT: All right. From the Plaintiffs, any
11 objection to jury selection or qualification?

12 MR. STAPLES: No objection.

13 THE COURT: From the Defense?

14 MR. MARTENS: No, Your Honor.

15 THE COURT: Ladies and gentlemen, if you are still
16 sitting out there on the benches thank you so much for
17 your patience and for your service. You are excused for
18 today. Make sure you understand how to call on the phone
19 system. We may have a second trial starting later in the
20 week. As far as today you are excused. Thank you very
21 much.

22 (Whereupon, the remaining jury panel was excused from
23 open court.)

24 THE COURT: Ladies and gentlemen, you are our twelve
25 jurors and two alternates in this case. Again, I very

1 much appreciate your service. I am just about to let you
2 go have lunch but I am going to give you a few rules
3 first. The first one is, you are not permitted to discuss
4 this case with anyone while it is still pending. So if
5 you are going to go home for lunch or see your family or
6 tonight at dinner, there is a very common and natural
7 question. They will say, how was court today, what is
8 going on. All you are permitted to tell them is you are a
9 juror in a civil case or you are a juror in a lawsuit.
10 After the case is over you can say as much or as little as
11 you want. You can talk about anything you want about what
12 happened. But until the verdict is decided you are not
13 permitted to discuss the case with anyone and that
14 includes each other until it is time for jury
15 deliberations. Until you have heard all the evidence in
16 the case and heard from the lawyers it is not fair for you
17 to begin deliberating until you heard anything. So some
18 of you may choose to go out to lunch together, that is
19 acceptable. But if you do that you can talk about
20 anything at all except this case. And so at the end of
21 the case when you have heard all the evidence you can go
22 back in the jury room and that will be your time to talk
23 about this case. Finally, please do not do any outside
24 research. We all have smart phones now, that is okay,
25 smart phones are great. But you will hear all the

1 evidence you need in the courtroom and I will explain the
2 law of South Carolina to you. So please do not Google the
3 names of the lawyers or look up Grapevine or please don't
4 Google the laws of South Carolina or contracts or anything
5 like that. You will hear everything you need in the
6 courtroom. All right. And then finally, York is a pretty
7 small town. You may run into one of these lawyers or me
8 at a restaurant or elevator or restroom. The attorneys
9 are not permitted to talk to you during court, during the
10 case except in the formal setting in the courtroom. If
11 you run into one of these folks out in the hall, they are
12 not going to say hello to you, they are not being rude,
13 they are just following the rules of court. With that
14 said, I appreciate your service and I will see you back at
15 2:30 today to begin the trial.

16 (Whereupon, the jury was excused from open court for
17 a lunch break.)

18 THE COURT: Anything to take up before lunch, from
19 the Plaintiff?

20 MR. MECKLER: Nothing from the Plaintiff.

21 THE COURT: From the Defense?

22 MR. MARTENS: Nothing from the Defense.

23 THE COURT: Folks, I will see you back at 2:00, we
24 will pick up at 2:00 with any pretrial matters and will
25 start the trial at 2:30.

1 (Whereupon, a lunch break was taken.)

2 THE COURT: Let's get back on the record. I have
3 done some review on the parol evidence rule. So I will be
4 happy to hear from you, Mr. Martens.

5 MR. MARTENS: Thank you, Your Honor. If it please
6 the Court. The issue with regards to the parol evidence
7 rule is this. The Defendant's position in this case that
8 we have a written contract, commercial sophisticated
9 parties and that contract governs the terms of their
10 relationship. There is, we anticipate that the Plaintiff
11 will attempt to introduce the evidence of prior or
12 contemporaneous agreements, understandings that were never
13 reduced to writing in an attempt to establish that what
14 the contract says is not really what the contract is. We
15 believe that the parol evidence rule precludes that and we
16 would ask that the Court enter a motion or enter an order
17 in limine that prevents the Plaintiff from introducing
18 parol evidence in an attempt to alter or amend the terms
19 of the written contract.

20 THE COURT: Mr. Martens, the contract is not as clear
21 as you say it is. When you say the contract is clear on
22 the issue the right to purchase, how is it clear.

23 MR. MARTENS: The issue really with the parol
24 evidence, Your Honor, really goes more to what the lease
25 premises includes. So the issue that we anticipate coming

1 up is, has to do with --

2 THE COURT: The patio?

3 MR. MARTENS: Yes, sir. And the written lease
4 agreement, paragraph one says, describes the demised
5 premises. It says, this is what the demised premises is.
6 And then it also makes reference to Exhibit A which is a
7 diagram of the lease premises. It is, the contract is
8 signed by Melanie Sills, the President of the Grapevine.
9 It is witnessed by Dave Sills, the Vice-President of the
10 Grapevine. Each page is initialed by the Sills' and the
11 diagram that shows the demised premises is also initialed
12 by the Sills'. What the Plaintiff would attempt to do is
13 to introduce two things. One, actually more than two.
14 One is preconstruction drawings that were provided that
15 showed outdoor dining as part of the proposed lease
16 premises. Those drawings predate the execution of the
17 lease. They will attempt to introduce testimony, from
18 their testimony and from David Williams who negotiated the
19 contract on behalf of the landlord, that we were told,
20 hey, just do what you are doing and that is what we want.
21 Whatever you have got in Baxter, that is what we want
22 here. Their testimony for that will be, we have a patio
23 in Baxter so we have, you are entitled to a patio here.
24 And then they will also attempt to introduce marketing
25 photographs and a press release that was in the Charlotte

1 Business Journal that refers to outdoor dining and et
2 cetera and argued that all of that evidence trumps what's
3 in the written contract. And we believe that is precisely
4 what the parol evidence rule is intended to prevent. This
5 issue was addressed not long ago, in 2017 by the South
6 Carolina Supreme Court in a case called Rodarte versus
7 University of South Carolina. And it had to do with perks
8 that were given to boosters, lifetime, if you give so much
9 money you will get tickets and all of this other stuff.
10 And so the issue in that case was, I was told I would get
11 lifetime tickets to basketball and I didn't get them or I
12 had to pay money for them. And the issue was, could they
13 introduce, could the Plaintiff introduce evidence that I
14 was promised benefits that are not actually in my
15 contract. There is evidence that I am entitled to more
16 than what the contract says. And the South Carolina
17 Supreme Court said, you may not. And they said this is
18 the very type of evidence that the parol evidence rule is
19 intended to preclude. And that is our argument. It is
20 not an issue about the purchase contract or the option to
21 purchase. It is an issue about the scope of the lease
22 premises, Your Honor.

23 THE COURT: So in your opinion, what enforceable
24 rights does this paragraph give to the Plaintiff.

25 MR. MARTENS: They have a right along with every

1 other tenant to use and enjoy the common areas.

2 THE COURT: What does that mean for a wine bar.

3 MR. MARTENS: The same thing it means for the beauty
4 salon or the running store. Folks can go out there, take
5 advantage of it. There is nothing in the lease that says
6 the wine bar gets to set up their table, gets to serve
7 their clientele, gets to make money.

8 THE COURT: That is my question. So if the visits is
9 a wine bar and they have the right to use the common area,
10 and I agree, it says non-exclusive use. What possible use
11 would they have for the common areas other than serving
12 customers.

13 MR. MARTENS: Common areas aren't just this patio.
14 There is parking, sidewalks, it is the amenities. All of
15 those things are designated as common areas. And in fact
16 if you look at the lease, it talks about common areas and
17 then it talks about limited common areas. This is a mixed
18 used building so it has got retail downstairs and it has
19 got residential upstairs. That common area, that
20 courtyard that they are calling their patio is just that,
21 it is a courtyard. Tenants can come down there and
22 whatever, play out in the sun or whatever they want to do.
23 It is a common area that all tenants and visitors have
24 equal right and access to. And more importantly, well
25 that is what the definition, that is the way the common

1 area is defined in the lease.

2 THE COURT: Right. Again, the tenant is a wine bar
3 so what use does, I understand that, there is an exclusion
4 for the common areas in the building, right. We are
5 talking about the outdoor common area, the patio and the
6 parking. For the patio, what was the use that was
7 envisioned. You say it is not for serving customers.
8 What is the use that was envisioned by the lease.

9 MR. MARTENS: Well, part of their setup are
10 sidewalks. Part of their setup was, so those are common
11 areas too.

12 THE COURT: What was the use that was envisioned for
13 the wine bar and the lease.

14 MR. MARTENS: It was not envisioned in the lease.
15 The lease calls for 1,490 square feet, demise premises.
16 They have 1,490 feet demised premises. They have a bar in
17 there, they have seating in there, they can serve their
18 customers in there. Everything they need to run their
19 business is contained within the four walls of those
20 leased premises.

21 THE COURT: But they also have the right to use the
22 patio. When you are telling me the contract is
23 unambiguous, I am not sure I agree with that. I mean, I
24 am struggling to envision, what is the use of the patio
25 for a wine bar that is not serving customers. It does say

1 it is nonexclusive, I don't know who the contract would
2 envision a two business when it is set up, it doesn't seem
3 to be very artfully drafted to me. But nevertheless, for
4 them to not being able, it has got to be clear and
5 ambiguous, doesn't it.

6 MR. MARTENS: We believe it is, Your Honor. When you
7 look at the description of the demised premisses in
8 Exhibit A as accepted by the tenant it doesn't say
9 anything about outdoor space. And our position, Your
10 Honor, that is a violation, it's just like this Rodarte
11 case, it is a violation of parol evidence rule for someone
12 subjectively, after the fact, after the dispute has
13 arisen, after we all end up in court, to be able to come
14 in and say, I know what the contract says but I was told
15 it was going to be something different than that. And
16 that is why I am entitled to circumvent what I agreed to.

17 THE COURT: Did your client let them use the common
18 areas until the lawsuit was commenced?

19 MR. MARTENS: That is not, they did let them use it
20 for a period of time. We believe the evidence is going to
21 show that the issue related to Grapevine being, having
22 outdoor seating actually arose prior to the filing of the
23 lawsuit. We believe the evidence will show that it is one
24 of the issues that led to this lawsuit.

25 THE COURT: Let me hear from the Plaintiff.

1 MR. MECKLER: Your Honor, you kind of, one of the key
2 points is that, the common area use, they did for two-plus
3 years used it under that common area provision. And the
4 testimony would be that they didn't receive any notice of
5 default, any notice of, they actually got a letter asking
6 to make sure they bring their patio furniture in because
7 there was going to be weather, they were worried about the
8 patio furniture blowing around. And then they also got a
9 request just to make sure you keep it clean in accordance
10 with paragraph, I think it is 18. So I think you are
11 right, it is ambiguous and we can bring the parol evidence
12 in to show that. And I think you have the discussions,
13 the pictures is showing the patio area and then the
14 subsequent use of the patio area. And then this dispute
15 arises. It was in October, the complaint was filed in
16 December, shortly thereafter. And on top of that, Your
17 Honor, the case he cited also cites the Slack v. James
18 which explicitly holds that the rule against parol
19 evidence does not apply to the negligent misrepresentation
20 and fraud. In the case he cited, one case didn't even
21 involve negligent misrepresentation and fraud. So you
22 have got the allowance to use it because of those,
23 negligent misrepresentation claims and then you got the
24 fact that that paragraph, it is just ambiguous. And if it
25 is not ambiguous then we ought to be granted a specific

1 performance, if they are saying the contact is clear. And
2 I think that it is clear, from what you have heard here,
3 that that provision is subject to interpretation. And the
4 only way you are going to be able to figure out what the
5 parties, what were they talking about at the time they
6 were discussing this contract. It is not as if we are
7 saying, hey, look, the patio ought to be included in the
8 option to purchase. It is not. But it was included in
9 the common area space.

10 THE COURT: And your contention is is that they still
11 should still be able to use it.

12 MR. MECKLER: Right now, it becomes whatever the
13 condominium association will resolve it that way. Once
14 the sale goes through this lease would terminate.

15 THE COURT: Mr. Martens, what about the argument that
16 it is not, that the parol evidence rule is a contract rule
17 and they have asserted tort claims as well, that the parol
18 evidence rule doesn't apply.

19 MR. MARTENS: Well, Slack v. James that Counsel cited
20 is actually a consumer contract. I believe the Court, in
21 deciding Slack V. James seized upon that, sophistication
22 of the parties. And so I think it is is a different
23 standard when you have two commercial entities. The cases
24 are fairly uniform across the board that when you have
25 commercial entities negotiating for their own rights the

1 Court's only job is to enforce the contract regardless of
2 the parties to take action to protect itself.

3 THE COURT: If it is ambiguous, right.

4 MR. MARTENS: Well, I think, I think it goes beyond
5 that. I think it goes beyond, if you don't bargain for
6 something then you can't use parol evidence to say that I
7 thought I was getting something other than what I have
8 bargained for. And, again, respond directly to your
9 question, we believe that the description of demised
10 premises is unambiguous. Counsel in his argument just
11 said, we don't think that is part of what we are entitled
12 to purchase. You are entitled to purchase the demised
13 premises, according to their interpretation of the
14 contract. And our position simply is, you can't have it
15 both ways. If the demised premises is the, you know, what
16 is inside of the four walls that you signed a lease for.
17 That is the demised premises. And, again, we are, kind of
18 circled back to some of the arguments I was making earlier
19 today about loss profits and are they entitled to pursue
20 those, for sales that are outside of their demised
21 premises. But our point is, if the demised, the testimony
22 we believe will be outdoor seating was an ultimate
23 importance to us as the prospective tenant. But you
24 didn't negotiate for that and you didn't ensure that was
25 in your lease. And it doesn't say anything about outdoor

1 seating as part of this lease space. And out point, Your
2 Honor, is they should be bound by what they signed, they
3 should not be allowed to talk about what people talked
4 about during negotiations or what diagrams they got to
5 look at because they were trying to decide if they were
6 interested in purchasing, I mean leasing in here. The
7 issue and I don't think that the seating, I think they are
8 entitled to talk about, it sat out there for two years,
9 okay, that is fine. That is not parol, that is not prior
10 or contemporaneous to the execution of the contract. What
11 I am talking about is, what we expect them to say is, Dave
12 Williams who worked for the landlord, developer at the
13 time, Dave told us, oh yeah, this will all be great, we
14 will do this, we will do that. They also are expected to
15 present testimony that they were provided diagrams that
16 showed out seating as part of the plan space and then they
17 will attempt to use that to say, look, this is what it
18 ought to be, not what is in our lease. Ladies and
19 gentlemen, what you ought to find is that, not this
20 diagram, the one that we initialed and attached to our
21 contract, but the one that we got when we were in our
22 space negotiations is what y'all ought to consider.

23 THE COURT: Aren't they also arguing the common area
24 provision includes the patio and gives them the right to
25 use it.

1 MR. MARTENS: I think they can argue that. My point
2 is, they shouldn't be allowed to introduce parol evidence
3 to make that argument. And when I say, parol evidence, I
4 am talking about evidence of things that occurred prior or
5 contemporaneous to the execution of the contract. The
6 negotiations, the exchange of building diagrams, markups
7 of what the space might look like. Those are the things
8 that the parol evidence rule says, you are a business, you
9 enter a contract, you better protect your own interest and
10 if you don't, don't come into the court and ask us to bail
11 you out because our job is to enforce the agreement that
12 you write.

13 THE COURT: I am going to deny the request and I find
14 paragraph 15 to be ambiguous. It has some very specific
15 provisions, it talks about the tenant not having any use
16 of the lobby or, but it also talks about the tenant has
17 the right to use common areas and the landlord can adapt
18 the rules and regulations so long as they do not
19 materially, adverse interfere with the tenant's permitting
20 use. Again, I don't know what was intended here, I don't
21 know how different businesses can all use the same patio.
22 But I think it is ambiguous. Anything else?

23 MR. MARTENS: Nothing from the Defendant.

24 THE COURT: Anything from the Plaintiff?

25 MR. STAPLES: We do have some stipulations, Your

1 Honor.

2 THE COURT: Okay.

3 MR. STAPLES: Let me tell you what we have got. This
4 is not been electronically filed yet, we can certainly do
5 that. We encountered an issue trying to file this
6 commercial lease agreement because it is such a large, I
7 guess, file size. But how would you prefer, I mean I have
8 three copies of the stipulations that are signed by
9 Counsel. I can hand those --

10 THE COURT: Stipulations will go into evidence, so we
11 can just put them into evidence as Exhibit 1 for the
12 Plaintiff or for the Defense, whatever y'all prefer.
13 Factual stipulations --

14 MR. STAPLES: Factual and then there is stipulations,
15 about seven exhibits and I have already numbered them 1
16 through 7 so I can do the stipulations as Exhibit 8 if
17 that works.

18 THE COURT: That would be great.

19 MR. STAPLES: Okay.

20 THE COURT: Any objections, Mr. Martens?

21 MR. MARTENS: No, Your Honor.

22 THE COURT: Okay.

23 MR. STAPLES: Would Your Honor like me read the
24 factual stipulations at this point.

25 THE COURT: If it is going into evidence as Exhibit 8

1 it is not necessary. It is in evidence and the parties
2 can refer to it.

3 MR. STAPLES: Okay.

4 THE COURT: And, Mr. Martens, let me just clarify my
5 ruling on the parol evidence issue. You still have the
6 right to object on any evidence they are attempting to
7 offer. I am not going to issue a blanket ruling.

8 MR. MARTENS: I understand.

9 MR. MECKLER: Your Honor, in terms of exhibits as we
10 go through the trial, how many copies do we need.

11 THE COURT: Just one for the Court Reporter and then,
12 you are welcome to have additional copies you can publish
13 to the jury if you want but what most parties do is use
14 the video screens and put evidence up on the screen. And
15 so just, one copy for the Court Reporter is going to be
16 sufficient.

17 MR. MECKLER: Okay.

18 MR. DLUZNESKI: And we have our proposed charge.

19 THE COURT: Okay.

20 MR. STAPLES: We have a hard copy of ours also.

21 THE COURT: Sure. That will be helpful. Mr.
22 Staples, I understand we had some agreements as to other
23 evidence.

24 MR. STAPLES: There are seven exhibits that we have
25 agreed.

1 THE COURT: So not that they are into evidence but
2 they are -- so 1 through 7. And there is a list of factual
3 stipulations is 8. So Plaintiffs 1 through 7 are not in
4 evidence, but are stipulated that they are authentic. It
5 is 2:30, I will have some initial remarks, it will take 10
6 to 15 minutes and then we have opening. Do y'all want to
7 start calling witnesses today.

8 MR. MECKLER: Mr. Staples is going to do it. It
9 won't take long.

10 MR. MARTENS: Mine won't be long.

11 THE COURT: Anything else to take up before I bring
12 the jury in?

13 MR. MECKLER: No, Your Honor.

14 THE COURT: From the Defense?

15 MR. MARTENS: No, sir.

16 THE COURT: Let's bring in the jury.

17 (Whereupon, the jury came into open court at
18 approximately 2:33 p.m.)

19 THE COURT: Ladies and gentlemen, welcome back. I
20 hope y'all had a good lunch. Was everyone able to follow
21 the rules I gave you before we took the lunch break.
22 Thank you. All right, ladies and gentlemen, we are about
23 to begin the trial of Grapevine Riverwalk versus Riverwalk
24 River Building District 6, et al. And before we start I
25 am going to ask the Clerk to swear you in.

1 (Whereupon, the jury was sworn at approximately 2:35
2 p.m.)

3 THE COURT: Ladies and gentlemen, what I am going to
4 do now is give you a very brief introduction to the trial
5 of this case and this is not my explanation of the law.
6 That will happen at the end of the case. This is an
7 explanation of procedure that we are going to follow in
8 the trial so you can better understand what is going to
9 happen. This is a civil case. So the Plaintiff, the
10 person bringing the lawsuit, the Plaintiff has the burden
11 of proof and it will be your job, as the jury, to
12 determine whether or not they have met that burden in this
13 case. Your job as jurors is to find and determine the
14 facts. You are the sole judge of the facts in this case.
15 And if at any time I make a comment that suggest that I
16 have a view of the facts you should disregard that
17 comment. As a Judge I am not permitted to have any view
18 on the facts of the case. You should determine the facts
19 from the testimony that you hear and any other evidence
20 introduced into court. It is up to you to determine if
21 there is any inferences that you may feel that may
22 properly be drawn from the evidence that you hear. It is
23 especially important that you preform your duty in
24 determining the facts diligently and conscientiously
25 because ordinarily there is no way to correct an error

1 made by a jury in the determination of the facts. On the
2 other hand, the same law that makes you, as the jury, the
3 Judge of the facts, makes me the judge of the law. The
4 law, as I explain it to you, is the only law you may
5 consider. You must accept and follow the law as I explain
6 it, even if you may disagree with it. I cannot tell you
7 what the facts are and you are not permitted to disagree
8 with me about what the law is or the way it ought to be.
9 Your job is to take the law as I give it to you and apply
10 it to the facts as you find them from the testimony of the
11 witnesses and any other evidence that is introduced.
12 Ladies and gentlemen, as I have explained to you already,
13 until you begin your deliberations in the jury room you
14 should not discuss the case with anyone including your
15 fellow jurors. Further I don't know what would be on the
16 news tonight, if something about this case is on the news
17 or the newspaper please don't read it or watch it. Just
18 turn it off. Please keep an open mind and don't decide
19 any issue into the case until all the evidence has been
20 presented, the parties have made their arguments and I
21 have instructed you on the law. And, again, please do not
22 do any outside research. You will hear all the evidence
23 that is available here in the trial and then I will give
24 you an instruction on the law of South Carolina and that
25 is all that you need, and don't do any outside research.

1 I trust and expect that all of you will follow those rules
2 but it is important that in any event that one of your
3 fellow jurors breaks those rules you have to let me know.
4 And the reason for that is, if I know during the trial I
5 can probably fix it, there are things I can do as a Judge
6 to fix it. If I find out after the trial it is very
7 likely I will have to do the whole trial all over again.
8 So, please, I hope and expect you will all follow the
9 rules and if somebody is not please let me know. In just
10 a moment the attorney for the Plaintiff will make what is
11 called an opening statement and then after that the
12 Defense will make an opening statement. Just a reminder,
13 although these are very important and they are very
14 helpful to jurors these are not the same things as
15 evidence. The attorneys arguing is not evidence. The
16 evidence will be presented to you by the testimony and the
17 sworn witnesses from the witness stand and any exhibits
18 that will be introduced into evidence. Also there will be
19 times and you may hear during the trial one of the lawyers
20 say, Your Honor, I have a question of law or, Your Honor,
21 I have a matter I need to take up. That means that
22 attorney has a legal issue that they need me to rule on.
23 So at that time you don't have to sit here and listen to
24 the legal arguments, I will excuse you to the jury room.
25 But that is what is going on in those situations where we

1 are having a legal discussion and a legal point and I will
2 make a ruling. Ladies and gentlemen, I do not permit
3 jurors to take notes. The reason for that is, it is my
4 experience that some jurors, based on their job or
5 education are better note takers than others. And I don't
6 want what happens in the jury room, when it comes time to
7 deliberate, to be a battle of who has the best notes. So
8 please pay close attention. The Court Reporter is taking
9 down what is happening, she is to your left. If you get
10 back in the deliberations room and there is an important
11 piece of evidence or there is an argument of who said
12 something or what exactly was said, the Court Reporter can
13 play back testimony from the trial, play back the
14 recording so you can hear it again. But I do not permit
15 jurors to take notes. You will hear me taking notes up
16 here on a computer. As a Judge I have to make legal
17 rulings and it is important that I take notes as I feel.
18 So if you hear me typing, that is what I am typing, ladies
19 and gentlemen, when you are determining what the facts are
20 in the case you must decide whether the testimony you hear
21 on the witness stand is believable. It is my job as the
22 Judge to determine, as a matter of law, whether to allow
23 the testimony into court or not. But once I allow it, it
24 is your job to determine whether or not it is believable.
25 In deciding whether or not to believe a witness, you have

1 the right to consider any interest the witness has, any
2 possible biased or prejudiced or whether the witness had
3 the opportunity to see or hear the things about which they
4 are testifying and the way they act on the witness stand.
5 You have the right to consider anything in the evidence in
6 the case that will help you evaluate the testimony of
7 witnesses. And therefore it is your duty, as jurors, to
8 pay very close attention to what the witnesses say and
9 what they hear. Finally, I want to ask you on your first
10 break to elect a foreperson of the jury. In South
11 Carolina everyone on the jury has, all of you must vote
12 unanimously on the verdict. However, the Foreperson has
13 two jobs. The first is, if there are any issues that need
14 to be brought to my attention the Foreperson will write a
15 note, give it to the bailiff and the bailiff will bring it
16 to me. If it is too hot in the jury room or if there is
17 not enough coffee or you can't hear what I am saying or
18 any issue at all, give a note to the bailiff, and bring it
19 to me and we will take care of it. Secondly, when it
20 comes time to deliberate in the jury room it is the
21 Forepersons job to make sure everyone has a chance to
22 speak and have their say and no one person is dominating
23 the discussion. Other than those two jobs everyone has
24 the same vote. I will ask on your first break to elect a
25 Foreperson and tell me what it is. Ladies and gentlemen,

1 we are ready to begin the trial now. To protect
2 everyone's rights I am going to give each side an
3 opportunity to object to anything I just said in case I
4 made a mistake and once that is done we will start. Any
5 objections from the Plaintiff?

6 MR. MECKLER: No objection, Your Honor.

7 THE COURT: From the Defense?

8 MR. MARTENS: None, Your Honor.

9 THE COURT: Ladies and gentlemen, the Plaintiff has
10 the burden of proof so they go first.

11 MR. STAPLES: May it please the Court. Ladies and
12 gentlemen, of the jury, good afternoon. My name is
13 Christian Staples and along with my law partner, Steve
14 Meckler, we have the pleasure of representing the
15 Grapevine of Riverwalk, the Plaintiff in this case. Now,
16 with us here today are Dave and Melanie Sills. They are
17 in the front row there, they are the owners of the
18 Grapevine. Now, Grapevine is a wine and craft beer shop
19 and bar located in the Riverwalk development in Rock Hill.
20 They sell beer and wine at the retail level and they also
21 have a bar where customers can sit and have a glass of
22 wine or a cold draft beer. If you are not familiar with
23 the Riverwalk development, it is a large mixed use
24 development located in Rock Hill, situated along the
25 Catawba River and they have a mix of residential living

1 spaces, commercial businesses similar to Grapevine and
2 other retailers. Like most small businesses Grapevine
3 operates pursuant to a written lease agreement with its
4 landlord. Grapevine's lease is not just any ordinary
5 lease. Grapevine signed a lease with an option to
6 purchase meaning that if they lease their space for two
7 years they have the option to purchase their space during
8 the third lease year on advance written notice to the
9 landlord of 120 days for a set purchase price. Now,
10 Grapevine's landlord is one of the Defendants in this
11 case. It is a legal entity called Riverwalk River
12 District Building 6, LLC; and we believe the evidence will
13 show that the landlord entity is ultimately owned and
14 controlled by an individual named Mark Mather. And Mr.
15 Mather is also a named Defendant in this case and he is
16 here in the front row, right behind my opposing Counsel,
17 Keith Martens table, who you will hear from next. Now the
18 evidence will show that after Grapevine signed its lease,
19 an option to purchase that it did everything it was
20 suppose to do. It opened its business, it paid its rent
21 each month and it was a good tenant. The evidence will
22 show that Grapevine's lease commenced in February of 2016.
23 In July of 2017 Grapevine hired a local attorney, a man
24 named Brian Wilson who you will hear from during the trial
25 of this case. And they hired Mr. Wilson to send a letter

1 to their landlord, giving written notice of their intent
2 to exercise the option to purchase and to buy their space.
3 Mr. Wilson's letter set a closing date for the sale of
4 February 2nd of 2018 which the evidence will show was the
5 first day of the third lease year. Now the landlord
6 acknowledged receipt of Mr. Wilson's letter but was unable
7 to commit to the closing date that Mr. Wilson proposed,
8 February 2nd of 2018. We believe the evidence will show
9 that the landlord was unable to commit to that date
10 because it had not done everything it was suppose to do to
11 put itself in a position to sell the space to Grapevine.
12 The evidence will show that what the landlord was suppose
13 to do was to establish what is called a horizontal
14 property regime for the building where Grapevine's
15 premises is located, Building 6 at the Riverwalk. It is a
16 medium sized building about four stories, it is a mix,
17 again, of commercial retailers on the first floor and
18 some residential apartments on the top floor. Now
19 horizontal property regime is basically a fancy legal term
20 for a condominiums owners associations. If you ever heard
21 of an HOA or known someone that lived in an HOA or had an
22 owners association then I submit that you know essentially
23 what a horizontal property regime is. In order to
24 establish horizontal property regime in South Carolina you
25 have to file what is called a master deed bylaws. And

1 those documents are then recorded with the Register of
2 Deeds. And the evidence will show that after the landlord
3 received Mr. Wilson's letter giving notice of Grapevine's
4 intent to buy their space that the landlord hired their
5 own attorney, a man by the name of Todd Brockmann. And
6 specifically hire him for the purpose of preparing the
7 master deed and bylaws and other legal documents that were
8 required in order to establish the horizontal property
9 regime. Now, for whatever reason the landlord was unable
10 to complete that process or to agree to any closing date
11 throughout the third lease year. The evidence will show
12 that Grapevine waited patiently for the landlord to
13 complete the process and to agree to a closing date.
14 Throughout 2018 Grapevine continued paying rent month
15 after month and repeatedly asked the landlord for updates
16 on the creation of the horizontal property regime and in
17 an attempt to set a closing date. The evidence will show
18 that by October of 2018 Grapevine was fed up, they waited
19 for months, they continued to pay rent when they felt very
20 strongly that they were entitled to purchase the space
21 back in February of 2018. So in early of October of 2018
22 Grapevine hired my law firm and my partner, Mr. Meckler.
23 Grapevine directed him to send a letter to the landlord.
24 And Mr. Meckler sent that letter giving that landlord
25 notice of an alleged default under the lease and the

1 option to purchase, for failing to sell the space pursuant
2 to the contract. When Mr. Meckler's letter did not prompt
3 any response from the landlord Grapevine had no other
4 option. They filed this lawsuit in December of 2018
5 seeking to compel the landlord to sell them the space
6 pursuant to the lease and the option to purchase and to
7 also recover all of the rent that they have paid dating
8 back to February of 2018. Now, Grapevine also alleges in
9 this case that the landlord and the other Defendants made
10 a number of misrepresentations to them regarding the
11 lease, the option to purchase and the landlord's ability
12 to complete the sale. Now, we have talked about a couple
13 of those Defendants. The first being the landlord entity,
14 Riverwalk River District Building 6, LLC; we talked about
15 Mr. Mather who is also a named Defendant in this case.
16 The other Defendants are legal entities; the Greens of
17 Rock Hill, LLC; Assured Administration, LCC; and GRH
18 Development Resources, LLC. The evidence will show that
19 all of those legal entities are ultimately owned and
20 controlled by Mr. Mather. The evidence will also show
21 that after Grapevine filed this lawsuit or right before
22 they did, that the landlord began, took some retaliatory
23 actions against Grapevine. You will hear that they
24 revoked their right to use the outdoor patio or common
25 areas for the seating and service of their customers, the

1 same areas that Grapevine had used for over three years
2 without issue or complaint from the landlord. You will
3 also hear evidence about the landlord tried to tell
4 Grapevine they couldn't sell appetizers, desserts, coffee,
5 things that they had sold from the very first day they
6 opened their door. Now at the end of all of the evidence
7 His Honor will instruct you on the law for the jury to
8 apply to this case. But as jurors, you are in the unique
9 position to be the ones who get to determine what the
10 facts are. You get to determine which witnesses are
11 credible, which documentary evidence should be entitled to
12 more weight than others. Now I submit if you use your
13 commonsense and apply your every day notions of integrity,
14 fairness and good faith this will be an easy case to
15 decide in Grapevine's favor. I thank you for your time
16 and attention as jurors today and we look forward to
17 presenting our case.

18 THE COURT: Mr. Martens.

19 MR. MARTENS: If it please the Court. Sticks and
20 stones may break my bones but words will never hurt me.
21 Something we have all heard thousands of times, something
22 our parents said to us when a kid was with us on a
23 playground. And words can't hurt you, words aren't
24 important, words don't really mean anything. Sticks and
25 stones break your bones, words can never hurt you. And as

1 we grow and we gain life experiences we learn, that
2 true words do matter, words are important, words have
3 power.

4 We, the people, of the United States, in order to
5 form a more perfect union, establish justice, insure
6 domestic tranquility, provide for the common defense,
7 promote the general welfare, and secure the blessings of
8 liberty to ourselves and our posterity, do ordain and
9 establish this Constitution.

10 Those are just words on paper. Those words on that
11 piece of paper lay the course for this nation. In fact,
12 those words on this paper laid the very foundation, the
13 laws and procedure that brings us all here today, a civil
14 jury trial. Words on paper matter. Words on paper are
15 important, they have purpose and they have power. Ladies
16 and gentlemen, my name is Keith Martens, I am an attorney
17 in Rock Hill and I represent the Defendants in this case.
18 Counsel told you those Defendants include this company
19 called Riverwalk River District Building 6, LLC; it was
20 Grapevine's landlord. They include some other entities
21 that are affiliated with Grapevine and landlord. And they
22 include Mark Mather who is a manager of some of those
23 entities. This is a case about words on paper. That
24 paper is a commercial lease agreement, that paper, the
25 commercial lease agreement was entered into between the

1 Grapevine of Riverwalk and its landlord. The evidence
2 will show that that was entered into in June of 2014 while
3 Riverwalk River District Building 6 was still in the
4 planning stages. What you will learn is that Riverwalk
5 River District Building 6 is located in what is called the
6 River District area of the Riverwalk subdivision along the
7 banks of the Catawba River. It is a mixed use
8 entertainment district. And as you have heard from
9 opposing counsel, one of the tenants is the Grapevine, the
10 Grapevine holds itself out as a craft wine and beer store.
11 You will learn as you listen to the evidence that
12 principals of the Grapevine and a representative of
13 Building 6 negotiated with one another and then they
14 entered into a written lease agreement in June of 2014.
15 You will hear that the principals of the Grapevine are
16 sophisticated business people. You will hear that they
17 own three different locations in York County and also the
18 separate corporate entities. You will hear that they own
19 a separate corporation that is a franchise, which means
20 they have set up a company with the right to sell
21 Grapevine franchises throughout the United States. You
22 will hear that they own and manage a host of other LLC's
23 that own property in Ashville, North Carolina and Tybee
24 Island, Georgia and Folly Island, South Carolina. These
25 principals of the Grapevine are business sophisticates,

1 ladies and gentlemen. They know what they are doing, they
2 know how to negotiate contracts and they know the
3 importance of the words on a piece of paper. You will
4 hear that Grapevine's principals negotiated for the right
5 to be the exclusive wine and craft beer store/bar in the
6 Riverwalk River District. You will also hear, as you
7 already have, they also negotiated an option to purchase.
8 You are going to hear a lot about this option to purchase
9 during the course of this trial. It is an issue of
10 dispute. We would not be here if there were not a
11 dispute, ladies and gentlemen. You are going to hear a
12 lot of testimony about why the option to purchase did not
13 close and who's to blame for that. You will hear about
14 what is in the lease but also, pay attention to what is
15 not in the lease. Listen to the testimony and look at the
16 lease, the lease will be in evidence. Pay attention to
17 whether the words on that piece of paper give Grapevine
18 the right to sell food, desserts, coffee, tobacco
19 products. And listen as the witnesses testify as to just
20 how much money Grapevine has made operating that business
21 and selling food, tobacco products, coffee, desserts.
22 Listen and pay attention to the lease to see if the lease
23 gives Grapevine any vested rights to outdoor seating. And
24 pay particular attention to the provisions of the lease
25 that discuss when Grapevine has a option to purchase and

1 how it should go about exercising that option. Pay
2 particular attention, ladies and gentlemen, to the term
3 lease year, because that term matters. What you will hear
4 is that the lease gave Grapevine an option to purchase
5 during the third lease year. You will hear testimony
6 about when the third lease year began and when does the
7 third lease year end. And pay attention, pay close
8 attention to when Grapevine declared a default by sending
9 a letter and pay close attention to when Grapevine filed
10 this lawsuit. Because those facts, those issues will be
11 very important as you decide this case and as you decide
12 whether or not there has been a breach of the contract and
13 whether or not Grapevine is entitled to the relief they
14 seek in this proceeding. I started out telling you words
15 are important. The words of a commercial lease matter,
16 the words mean something and there is a reason they are
17 there. Focus on the lease, what it says and what it
18 doesn't say. I am confident that if you do that, that you
19 will be able to return a verdict for the Defendant. A
20 jury trial is all about justice, it is about the fairness,
21 it is about what you are like. And in this courtroom the
22 parties are equal. It doesn't matter if Mark Mather owns
23 one business or a hundred; it doesn't matter if the
24 Grapevine's principals have real estate in other places.
25 There are people minus the law that come in here before

1 you for justice and that is what everyone asked for.
2 Thank you for your attention. I appreciate your service
3 and we look forward to presenting this case.

4 THE COURT: Mr. Meckler or Mr. Staples, call your
5 first witness, please.

6 MR. STAPLES: Call Melanie Sills.
7 Melanie Sills, being
8 first duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 By Mr. Staples:

11 Q Ms. Sills, state your name, please.

12 A My name is Melanie Sills and I am a co-owner of
13 Grapevine of Riverwalk with my husband, David Sills.

14 Q And where do you and Dave live?

15 A We have lived in York County for 16 or 17 years,
16 currently residing in Fort Mill.

17 Q Can you describe for the jury a little bit about the
18 Grapevine's business?

19 A Yes. It has accurately been described by my
20 attorney, wine and craft beer. We have a shop and we also
21 have a bar.

22 Q Did you sell anything other than beer and wine?

23 A Yes, sir. We sell cigars, coffee, desserts and small
24 plates.

25 Q Have you always sold those things for as long as you

1 have operated at the Riverwalk?

2 A Yes, sir.

3 Q Is the Grapevine of Riverwalk the only Grapevine
4 location?

5 A No, we have two others.

6 Q Please tell the jury about those other locations?

7 A Our first location opened in 2007 at the Baxter
8 Village neighborhood in Fort Mill. And we just recently
9 opened a third location at the York Market place right
10 here in the City of York.

11 Q And are all three locations generally the same in
12 terms of their business model and what they sell?

13 A Yes.

14 Q And are all three of those locations owned by you and
15 Dave?

16 A Yes.

17 Q You don't have any other business partners?

18 A No partners.

19 Q So tell the jury what attracted you initially to the
20 Riverwalk Development?

21 A It was similar to the Baxter Village location and
22 that it was a mixed use development. We looked for
23 development that is going to have restaurants within
24 walking distance and also homes where the residents can
25 also walk to our business.

1 Q Now, when you first considered opening a Grapevine at
2 Riverwalk was there much development there?

3 A There was nothing there. We were the very first
4 tenant. There were residents, I think, but that was it.

5 Q And tell the jury, currently, Grapevine's premises,
6 what kind of building is it in, what other tenants are
7 there.

8 A We have three floors of apartments upstairs. I think
9 it is 24 apartments in total and on the bottom floor is
10 all commercial tenants. And there are four of them.

11 Q And, Ms. Sills, do you know, does the Riverwalk, does
12 the Riverwalk Development maintain a website that would
13 have information about your business?

14 A Yes.

15 MR. STAPLES: Your Honor, I would like to present
16 Exhibit 1.

17 THE COURT: Are you introducing it into evidence, Mr.
18 Staples?

19 MR. STAPLES: I will be and I probably should say,
20 this may not be Exhibit 1 since we have premarked a few of
21 them. May I approach?

22 THE COURT: You may. Mr. Martens, any objection to
23 the introduction?

24 MR. MARTENS: Your Honor, I am not sure what the
25 purpose of the introduction is --

1 COURT REPORTER: Judge, I can't hear him.

2 THE COURT: Mr. Martens, the Court Reporter is asking
3 if you can turn the microphone on, having trouble hearing
4 you.

5 MR. MARTENS: Your Honor, we believe this document is
6 hearsay.

7 MR. STAPLES: My intention, Your Honor, that is a
8 printout of a website that I would like to project onto
9 the screen so that Ms. Sills' can describe the Grapevine.

10 THE COURT: Counsel, can y'all approach.

11 (Whereupon, a bench conference was held in the
12 presence of the jury but out of the hearing of the
13 jury.)

14 THE COURT: Let's make the record, are you making a
15 motion to admit it into evidence?

16 MR. STAPLES: I am, Your Honor.

17 THE COURT: Anything that you would like to put on
18 the record, Mr. Martens?

19 MR. MARTENS: I understand these are Exhibits 9 and
20 10. We object as each of these are hearsay.

21 THE COURT: What is Exhibit 10, I only saw one.

22 MR. MARTENS: A similar marketing --

23 THE COURT: I am going to overrule the objection.
24 Exhibits 9 and 10 are in evidence.

25

1 (Whereupon, Plaintiff's Exhibits 9 and 10 were
2 admitted into evidence.)

3 Q Ms. Sills, we have now projected the website onto the
4 screen. Do you recognize this website to be a website
5 maintained by Riverwalk?

6 A Yes. It is the, it is the Riverwalk Community
7 website.

8 Q And does this website depict some of the dining
9 options that are available in the River District?

10 A Yes.

11 Q And is the Grapevine Wine Shop listed on this
12 website?

13 A Yes.

14 Q Could you please read the description of the
15 Grapevine to the jury?

16 A Grapevine offers a unique and distinctive mix of
17 wines and specialty beers and locally roasted coffee.
18 There are multi-purpose space is home to both a retail
19 shop where you can purchase wines, beer, accessories and
20 cigars as well as an on-site bar area where you may enjoy
21 wine, beer, artisan cheese and desserts in the company of
22 friends and neighbors.

23 Q And is that an accurate description of the
24 Grapevine's business?

25 A Yes. I believe it was cut and pasted from our own

1 website.

2 Q Now, are you familiar with another website also
3 maintained by the Riverwalk Carolina that dedicated to the
4 specific building within what your premises is located?

5 A Yes.

6 MR. STAPLES: Your Honor, I would move, at this time,
7 Exhibit 10 into evidence.

8 THE COURT: Exhibit 10 is into evidence over
9 objection.

10 Q Ms. Sills, do you recognize this website?

11 A Yes. And that is a picture of our building.

12 Q Can you just describe very briefly to the jury the
13 different features of that building?

14 A The top three floors are residential apartments. And
15 the bottom floor contains four businesses at this time.
16 This must be a very early picture of it because it looks
17 like nobody is open quite yet.

18 Q And understanding that, are you able to point out to
19 the jury where your space actually is?

20 A I can touch this and circle it?

21 Q Yes, ma'am.

22 A It is not working.

23 Q There is a button that you press at the bottom. You
24 can just describe it, Melanie?

25 A You see the two cones, to the right of that all the

1 way to the light pole with the light on, the whole side,
2 on the bottom floor.

3 Q Is the building where the Grapevine is located,
4 sometimes referred to as the Grace Building?

5 A Yes.

6 Q And is that interchangeable with Building 6 in terms
7 of the descriptor of that building?

8 A It is probably more common known as the Grace
9 Building but it is the same as Riverwalk Building 6.

10 Q And now is this photo that I am bringing into range,
11 is that a picture of the Grapevine's space?

12 A Yes, part of it.

13 Q Can you describe just briefly to the jury what it is
14 we are looking at there?

15 A That is the bar area, you see our beer taps right
16 there on the wall, the wine hoods, you see some coffee set
17 up there. And the flowers were an opening gift from
18 someone and over to the left you can see part of our
19 retail area.

20 Q Okay. And is this a second photo of your premises?

21 A Yes.

22 Q Can you describe to the jury what we are looking at
23 in this picture?

24 A This would be part of our patio, this is considered
25 the front of our space. There are two garage doors that

1 open and it doesn't look quite the same anymore because we
2 have a sign and some awning. But, again, this was really
3 early.

4 Q Okay. Thank you, Ms. Sills. And, Ms. Sills, do you
5 and Dave both actively work in the Grapevine business?

6 A Yes.

7 Q What kind of things do you do?

8 A Everything from people management to running toilets.

9 Q Before you and Dave opened the Grapevine at Baxter
10 Village, your first location, did either of you have any
11 experience running a wine and craft beer shop?

12 A None.

13 Q What did you do before you opened the Grapevine?

14 A Before that, I ran franchise operations called the
15 USP Store and my husband had a job, regular 9 to 5 at a
16 company called Martins Sprocket and Gear.

17 Q And did you by chance negotiate either of the leases
18 that you, that were in effect for your UPS store
19 locations?

20 A I did not.

21 Q Now, other than the three Grapevine locations that
22 you told the jury about, do you have any other business
23 interest?

24 A Yes. We own some vacation rentals.

25 Q And do you manage those yourself?

1 A I do not. We have property managers for each one.

2 Q So you don't get involved in leasing those rental
3 properties to tenants or anything like that?

4 A No, sir.

5 Q Melanie, I want to ask you a few questions about the
6 Grapevine in Baxter, your first location. Do you rent or
7 own your space at Baxter?

8 A We own it.

9 Q Is that always been the case?

10 A Yes.

11 Q Is there outdoor seating available at the Baxter
12 Grapevine location?

13 A Yes, there is.

14 Q And has that always been the case?

15 A Yes.

16 Q Are outdoor seating areas important to the Grapevine
17 business model?

18 A Very much so.

19 Q Can you explain to the jury why that is?

20 A Well, we are able to seat more people which means we
21 can sell more wine and we can sell more beer. But also it
22 draws a crowd. If people see other people sitting outside
23 they are more likely to notice that we are actually there
24 and maybe entice them to stop.

25 Q And so do you consider the Baxter location of

1 Grapevine to be successful?

2 A Yes.

3 Q Now, I want to talk to you now about the Grapevine at
4 Riverwalk since that is the location that we are concerned
5 about for purposes of this trial. When did you first
6 consider bringing a Grapevine location to the Riverwalk?

7 A 2010, I believe it was.

8 Q And at that time Grapevine at Baxter Village was the
9 only location that you had?

10 A Yes.

11 Q What were you looking for at a second Grapevine
12 location?

13 A We wanted to replicate what we had at Baxter Village,
14 exactly.

15 Q And what does that mean in terms of what?

16 A We are looking for a mixed use neighborhood. We
17 wanted to own our space and be a part of the neighborhood.

18 Q And how did you become aware that the Riverwalk
19 Development might be a good fit for your second location?

20 A We had told our designer that we were in search of
21 another opportunity. He lives in Baxter, he has been a
22 UPS customer and he had helped us design our current
23 location. So and also get involved with neighborhoods and
24 they design everything from like Bass Pro Shops to mixed
25 used developments like this. So I had asked him to be on

1 the lookout for us for an opportunity.

2 Q And you mentioned your designer, who is he?

3 A His name is Alan Aschenbrenner and he is with 505
4 Design, where he was with 505 Design.

5 Q And did you work with Mr. Aschenbrenner and his
6 business, 505 Design, in connection with your Baxter
7 location?

8 A Yes.

9 Q Did Mr. Aschenbrenner introduce you to anyone in
10 particular associated with the Riverwalk Development?

11 A Yes, David Williams.

12 Q Did you meet with David Williams?

13 A We did, back in 2010 we did, yes.

14 Q Tell me what you recall about that first meeting with
15 Mr. Williams?

16 A I believe it was the first meeting, he put us in his
17 truck, I think he has a Pathfinder. He drove us all over
18 the Riverwalk Development before there were roads there
19 and told us the trial was going to be here and this is
20 going to be the area called the River District. And this
21 is where we want you to be. And he had us look at
22 something called the Pump House, we went into the Pump
23 House first.

24 Q Now at that time was it actually the Pump House
25 restaurant that is in business today?

1 A No, it was the old Pump House that had not been torn
2 down. They had visions of someone going in there and
3 turning it into a restaurant or maybe something like the
4 Grapevine.

5 Q So you were looking at that, what is now the Pump
6 House location to bring a Grapevine there?

7 A Yes. At that time it had rusty stairs and a wasp
8 nest and the pumps were actually still up there. My
9 husband went on the roof but I opted not to.

10 Q So I take it you did not move forward with that
11 opportunity?

12 A We did not.

13 Q So after that didn't work out what happened next, did
14 you reconnect with Mr. Williams at some point?

15 A Yes. It was a couple of years later, I can't
16 remember who approached, I think it might have been us, we
17 drove through and by this time there were now roads in the
18 development and it was looking like a place that we would
19 like to be. So I reached out to him in an email.

20 MR. STAPLES: Your Honor, I would like to place
21 Exhibit 11 into evidence.

22 MR. MARTENS: No objection.

23 THE COURT: No objection, Exhibit 11 is entered into
24 evidence without objection.

25

1 (Whereupon, Plaintiff's Exhibit 11 was admitted into
2 evidence.)

3 Q Ms. Sills, does this Exhibit 11 refresh your
4 recollection as to what happened next after you looked at
5 that location?

6 A Yes. I believe we, yes, we reached out to them and
7 we asked when they might start building other buildings,
8 something other than the Pump House that might work for
9 us.

10 Q And, Ms. Sills, if you don't mind, I have got this
11 projected to the jury. But I would like for you to just
12 read Dave Williams email to you on June 15th of 2020.

13 A Yes, I will follow up on Monday.

14 Q I am sorry, your email to Dave Williams.

15 A I am sorry. Hi Dave. Dave and i drove through a
16 couple of weeks ago. Riverwalk is looking really nice.
17 Alan mentioned something may be happening in the River
18 District soon. Are you the resource for opportunities.
19 Even though we couldn't make the Pump House work, we may
20 look at a second Grapevine over there. Looking for
21 approximately 1400 to 1500 square feet on an end where we
22 could have patio space. We would not require a hood or
23 grease trap. Alan also mentioned you might be willing to
24 sell a few of the spaces as opposed to leasing. We would
25 be most interested in an opportunity to buy space instead

1 of leasing. Sincerely, Melanie.

2 Q And you just read it but I take it Mr. Williams
3 responded to that email?

4 A Yes.

5 Q What did he say?

6 A He said he would follow up on Monday.

7 MR. STAPLES: Your Honor, I would like to introduce
8 Exhibit 12.

9 THE COURT: What is Exhibit 12.

10 MR. STAPLES: This is an email, Your Honor, from Dave
11 Williams to Ms. Sills with an attachment.

12 THE COURT: Any objection, Mr. Martens?

13 MR. MARTENS: Your Honor, we would object pursuant to
14 the parol evidence rule.

15 THE COURT: Counsel, can y'all approach.

16 (Whereupon, a bench conference was held in the
17 presence of the jury but out of the hearing of the
18 jury.)

19 THE COURT: Ladies and gentlemen, this is the first
20 of a legal issue that I mentioned to you. So I am going
21 to ask y'all to retire back to the jury room. This will
22 be a great time to elect a Foreperson.

23 (Whereupon, the jury was excused from open court.)

24 THE COURT: Mr. Staples, the Defense says that this
25 violates the parol evidence rule. I will be happy to hear

1 from you.

2 MR. MECKLER: Your Honor, if I may.

3 THE COURT: Yes, go ahead.

4 MR. MECKLER: I think this kind of goes back to the
5 whole story of how they got the negligent
6 misrepresentation to get them involved to sign this
7 contract. And this is kind of the starting of it. You
8 notice in here it talks about condominium units that are
9 going to be available. I am going to show you a master
10 declaration, separate covenant. It talks, it is part of
11 the entire, so the negligent misrepresentation wasn't as
12 if it was one conversation, hey this happened. It was
13 this whole thing and it starts with this when they start
14 talking about the condominium association. And that was
15 never done.

16 THE COURT: What is the alleged misrepresentation.

17 MR. MECKLER: There are several alleged
18 misrepresentations in this case. One is, we are going to
19 enter into this lease to purchase, with a purchase option
20 and you are going to be able to buy the unit. Exhibit G
21 has little spaces for the condominium development and the
22 unit and everything was going to be. The second thing has
23 to do with the patio space and you have got the common
24 area, you are going to be able to use the patio space,
25 everybody is working towards that because that is part of

1 their plan, that is part of what they are asking for. You
2 will hear from Mr. Williams, he will be explicit about it.
3 They weren't going to do this unless they purchased and
4 they wanted outdoor space and was absolute. And then you
5 see in here it starts even talking about, seller will
6 agree to restrict the use -- by the master declaration.
7 So that all kind of words to this negligent
8 misrepresentation that they are talking about. Master
9 declarations, condominiums, outdoor space and then when
10 they get to it, they still have the right to use the
11 outdoor space although they say they don't. But they let
12 them do it for two and a half years. Certainly ambiguous,
13 this tends to lead to, it is not ambiguous. They say, I
14 annotated, it sounds like from his arguments that, well,
15 there is nothing that required us to do the condominium or
16 to have that space ready which is contrary to the law
17 which we can talk about later. But this is the first kind
18 of, hey, here we are going to have this master
19 declaration, it is not going to be a problem. So they
20 rely upon all of that. And then into the lease that gets
21 us here today.

22 THE COURT: Mr. Martens, what about the argument that
23 there are other causes of action under the breach of
24 contract, negligent misrepresentation where this evidence
25 would clearly be admissible.

1 MR. MARTENS: Promise of future performance cannot be
2 the basis on the misrepresentation claim. It has to be a
3 present statement, a misrepresentation of present fact.

4 THE COURT: That there is no current intent to
5 actually do this.

6 MR. MARTENS: Correct. And the lease says what it
7 says. We can argue and we can talk the entire trial about
8 what that is. But I don't think they should be allowed to
9 bring in all of this prior back and forth marketing under
10 the guise of, you told us you were going to do a bunch of
11 stuff and then you didn't do it so now we are going to sue
12 you for misrepresentation.

13 THE COURT: We agree they have got to show that there
14 was a present, the misrepresentation was regard to what
15 their intent was at the time they made the
16 misrepresentation. But with that said, doesn't this,
17 isn't this relevant on that ground, on that basis.

18 MR. MARTENS: Well, again, we believe that it is
19 properly excluded under the parol evidence rule. Once
20 they have a contract, they have a contract. And what
21 negotiations or representations lead to that shouldn't be
22 coming in.

23 THE COURT: I am going to overrule the objection and
24 allow it.

25 MR. MARTENS: Your Honor, I don't want to unduly

1 delay the progress of the trial. And I understand your
2 ruling. I don't know if there, if I, and maybe you have
3 the same ruling on each issue and I, if I can note it so
4 we can move on.

5 THE COURT: That will be fine. I don't think the
6 Plaintiff will have any objection, sort of a continuing
7 objection. Make sure you object every time and say on the
8 same basis previously.

9 MR. STAPLES: We don't have any objection to that. I
10 think it would be beneficial for the case to proceed.

11 THE COURT: Thank you, Counsel. It is 3:30, Mr.
12 Meckler and Mr. Staples, how long do you anticipate your
13 first witness to be on the stand.

14 MR. STAPLES: I can tell you, Your Honor, about a
15 fifth of the way through my outline. Obviously there is a
16 lot more exhibits that we will need to go through.

17 THE COURT: We will go to about 4:30 and then we will
18 stop. Okay. Counsel, the jury has given me a note that
19 the Foreperson is Mr. Boyce, juror number 25. The jury
20 also sent a note saying, why are the jurors the only ones
21 that have to wear masks. That is my fault. I need to
22 enforce the mask rule. Attorneys and at the Counsel
23 table, they don't need to wear mask. And the Court staff
24 up here, we are socially distant, we don't have to wear
25 mask. But I am going to have to enforce the mask for

1 anyone else. The jury is correct to call me out on that.

2 MR. STAPLES: Your Honor, would now be a good time to
3 make sure we have admitted all the exhibits up to this
4 point. There is a concern. We had a couple of, I think
5 it was Exhibit 9 admitted. I think at this point they all
6 have been published to the jury anyway.

7 THE COURT: I have Exhibits 9, 10 and 11 are into
8 evidence.

9 MR. STAPLES: And this one we just had the ruling on.

10 THE COURT: It is in evidence as well.

11 (Whereupon, Plaintiff's Exhibit 12 was admitted into
12 evidence.)

13 THE COURT: Ladies and gentlemen, y'all have let me
14 know that Mr. Boyce is your Foreperson and you also sent
15 me a question. And the question is, why are the jurors
16 the only ones that have to wear our masks. And I will
17 tell you, that was my mistake and I was not really focused
18 on the folks sitting out there on the benches. So I have
19 corrected that and I have asked all the folks in the
20 benches to put mask on. As far as the courtroom staff, we
21 are socially distanced up here and not required to wear
22 mask. The attorneys, they have to be able to speak, they
23 have to be able to object so they are exempt from mask
24 requirement. You are right to call me out on that and I
25 apologize, I should have paid closer attention to the

1 folks on the benches. You can continue your examination.

2 MR. STAPLES: Thank you, Your Honor.

3 THE COURT: Yes, sir.

4 CONTINUE DIRECT EXAMINATION

5 By Mr. Staples:

6 Q So Ms. Sills, do you have what has been marked as
7 Exhibit 12 in front of you?

8 A It is an email.

9 Q An email from Dave Williams to you dated August 14th
10 of 2012?

11 A Yes.

12 Q And is there an attachment to that email?

13 A There is.

14 Q And what is that attachment?

15 A This was, what is known as a letter of intent. A lot
16 of people call them LLI'S to sell us a space in Building
17 1.

18 Q And what do you recall about the negotiations in the
19 letter of intent for Building 1?

20 A This release sums it up nicely. We have a price,
21 they were going to sell it to us upfront. There was not
22 going to be any lease to purchase option. There is a
23 closing date on here, the type of use is listed.

24 Q Is there anything in this letter of intent about a
25 condominium?

1 A Yes. On the middle page, the second page it mentions
2 condominium and then there is a paragraph regarding the
3 condominium.

4 Q Can you please read to the jury the paragraph about
5 the condominium?

6 A Okay. It says, buyer acknowledges that the premises
7 will be part of a mixed use condominium building comprised
8 of office and retail use. Condominium documents including
9 but not limited to a master deed declaration of trust and
10 rules and regulations will regulate the premises. Buyer
11 may also have a deposit with the condominium on the
12 closing date, amount equal to two months, condominium fees
13 to establish a working capital fund.

14 Q Does this letter of intent generally reflect what you
15 had told Dave Williams in the email that we looked at
16 earlier about what you wanted to do at Riverwalk?

17 A Yes, we wanted to purchase our space.

18 Q And did this deal come to fruition for Building 1?

19 A No, it did not. They never built Building 1, I don't
20 know, they didn't build Building 1 at that time.

21 Q So what happened after you learned that Building 1
22 would not be built back in 2012?

23 A Nothing. A few years went by and then they, I think
24 I heard from Dave Williams. Once again, for a third
25 opportunity, and different building, Building 6, the one

1 where we are located now.

2 MR. STAPLES: Your Honor, I will offer Exhibit 13
3 into evidence.

4 THE COURT: Any objection, Mr. Martens?

5 MR. MARTENS: Same objection indicated, Your Honor.

6 THE COURT: Let me see what it is. Okay. Admitted
7 into evidence over objection.

8 (Whereupon, Plaintiff's Exhibit 13 was admitted into
9 evidence.)

10 Q So, Ms. Sills, after the Building 1 deal fell through
11 for whatever reason, the Building wasn't built or whatnot
12 were you still interested in finding a location at
13 Riverwalk?

14 A Yes. We were searching other places too but nothing
15 was as appealing as Riverwalk, we couldn't find the right
16 neighborhood.

17 Q And do you recall reconnecting with David Williams a
18 couple of years later, sometime in early 2014?

19 A Yes.

20 Q And is this, is what I have handed you an email from
21 Dave Williams?

22 A Yes.

23 Q What is the date on that email?

24 A January 29th, 2014.

25 Q And would you please read Dave's email to you?

1 A Melanie/Dave. Please see the attached floor plan of
2 the River District Building. Do you guys have time next
3 Wednesday or Thursday to meet and discuss this
4 opportunity. Please suggest a time that works for you
5 both.

6 Q And is there, in fact, an attachment to that email?

7 A Yes.

8 Q What is that attachment?

9 A I believe that 505 Design created this. It is
10 rendering of what the Grace Building would become. And
11 there is also like an amphitheater type thing pictured.

12 Q And what is the title of this document. What are the
13 words on this.

14 MR. MARTENS: Your Honor, the witness' testimony,
15 this is a document prepared by 505 Design and it is being
16 admitted for the truth of the matter. We would object to
17 the document, it is hearsay.

18 THE COURT: What, is it an illustration.

19 MR. MARTENS: The document is hearsay, Your Honor.
20 It is being introduced for the truth of the matter
21 asserted in the document.

22 THE COURT: Ladies and gentlemen, I would ask y'all
23 to retire to the jury room one more time, please.

24 (Whereupon, the jury was excused from open court.)

25 THE COURT: Mr. Staples, he is saying it is hearsay.

1 MR. STAPLES: Well, I mean, Your Honor, the witness
2 received this email from Mr. Williams with the attachment.
3 She has personal knowledge about it. This is, the
4 schematic for the actual space, building that they are
5 currently occupying.

6 THE COURT: Tell me, what are you trying to show with
7 this piece of evidence?

8 MR. STAPLES: This schematic design has a depiction
9 of the tenant space that they, in fact, occupy. If you
10 look at page two and three, there is floor plans and it
11 depicts a wine shop with outdoor dining that is denoted
12 for use of the wine shop.

13 THE COURT: What is the point of it, why are we
14 looking at this.

15 MR. STAPLES: Again, this gets into the
16 misrepresentation claim that this is what the parties were
17 talking about, this is what the evidence has been. She
18 emailed Mr. Williams, here is what we are looking for. He
19 essentially said, yes, no problem, here is the schematic
20 design that is prepared.

21 THE COURT: And, Mr. Martens, it seems to me that
22 they are not offering it for the truth of the matter
23 asserted.

24 MR. MARTENS: Your Honor, I think that is exactly
25 what they are doing, offering for the truth of the matter.

1 This is a preliminary, obviously this proceeds the
2 execution of the lease by several months. And it is not
3 witness' document, it is not my client's document. It is
4 a document of 505 Design and it is being introduced to say
5 that we were, that there is, our space includes, to be
6 included with the patio. And, again, I am sorry. I hate
7 to be dragging the presentation of the evidence out, these
8 are very important issues, Your Honor.

9 THE COURT: Mr. Martens, I just don't agree. Maybe I
10 am missing something here. My view is, they are saying
11 this is what they were told it would be like. That is not
12 the truth of the matter asserted, is it. They are saying,
13 this is what we received from the other party. They are
14 not saying this is true, they are saying, this is what
15 they told us we were going to get.

16 MR. MARTENS: I think the document, the diagram, it
17 is hearsay, Your Honor. Being asserted that the space
18 that we were told, the space comes with a patio, and the
19 truth is the space comes with a patio. I understand your
20 ruling. And, again, I think I can do the same thing we
21 did before. I just want to make sure I am preserving the
22 record and I hate to be dragging this thing out. I don't
23 want to do that with the jury in here.

24 THE COURT: I understand. I mean, if you would like
25 to you can say something like, objection hearsay and I

1 will say either overruled or sustained and we can move on.

2 MR. MARTENS: That will be fine.

3 THE COURT: Let's bring the jury.

4 (Whereupon, the jury came into open court at
5 approximately 3:43 p.m.)

6 CONTINUE DIRECT EXAMINATION

7 By Mr. Staples:

8 Q So, Ms. Sills, we are looking at the schematic design
9 dated January 24th of 2014 and I believe you testified
10 this was a document prepared by 505 Design. Is that
11 correct?

12 A Correct.

13 Q And you testified that Alan Aschenbrenner works at
14 505, do you know if he worked at 505 back in January of
15 2014?

16 A He did.

17 Q And what was your understanding about what this
18 document was intended to show you or why was he sending
19 this to you?

20 A It is a marketing piece. He wanted us to see how
21 beautiful the building would be. He wanted us to see
22 where exactly our space would be. Patio or outdoor, this
23 is not a very good copy, outdoor dining, wine shop is
24 written on here. Wine shop and number of square feet.

25 Q What is that diagram there, is there any label on

1 this page to tell you what this is intended to show.

2 A That it was going to give me a mixed use building.

3 Q Does this reflect Building 6 in terms like a site
4 plan?

5 A Which page.

6 Q Page two?

7 A Okay. Yes. So there are the roads, Terrace Ferry,
8 Terrace Park, the B&A Building is represented. And then
9 our, the Grace Building is right next door.

10 Q Okay. And if you would flip to page three, is there
11 a blowup basically of the floor plan for Building 6?

12 A Yes. The bottom floor.

13 MR. STAPLES: Your Honor, if I may, I have a poster
14 board that I would like to --

15 THE COURT: Sure.

16 MR. MARTENS: The same objection, Your Honor.

17 Q Ms. Sills, are you able to see this poster board?

18 A Yes, that is better.

19 Q Does this depict the same thing that you are looking
20 at on your page?

21 A Not that one. Passed it by. It is part of the page.

22 Q And is it your understanding that this schematic
23 design package was presented to you as a marketing
24 opportunity to tell you what the opportunity would be for
25 your shop at the Riverwalk?

1 A Yes. It says wine shop and this is the space and the
2 area that we were discussing.

3 Q And does it include any areas for outdoor dining?

4 A On the diagram, it says outdoor dining, wine shop.

5 Q Now after you received this email with the schematic
6 package from Mr. Williams, do you recall meeting with him
7 again?

8 A We met with him quite often.

9 Q Had your desires changed in terms of what you were
10 looking at in terms of the space at the Riverwalk?

11 A No, sir. This one looked really good.

12 Q Now, did Mr. Williams offer you an opportunity to
13 purchase space in Building 6?

14 A Not initially.

15 Q What was he offering for you at Building 6?

16 A Well, there was a little bit of a misunderstanding
17 about that at first. We had a meeting and I thought he
18 was talking about letting us purchase. But my husband
19 picked up during that meeting that they were talking about
20 lease. And after we left the meeting, on the way home we
21 started talking about it and we had a little bit of a
22 disagreement ourselves. So the next time we met with them
23 we brought it up right up front and asked, are you
24 offering us an opportunity to purchase or is this just a
25 lease that you are offering. And at that time he said

1 that it was a lease.

2 Q And what did you say in response to that?

3 A We said we were only interested in purchasing since
4 we would be taking on quite a bit of risk being a first
5 tenant and the, the first tenant and the first one to sign
6 on with them. There is also, the old plant space that may
7 have contained pollution so we felt like it was a good
8 risk but we weren't willing to bet it on a lease where we
9 couldn't own. So we thanked them and said we were not
10 interested and we left, we left the meeting.

11 Q Did Mr. Williams give you any explanation as to why
12 he wasn't offering a purchase to you?

13 A Something to do with their lender, maybe. But I
14 don't specifically recall.

15 MR. STAPLES: Your Honor, I offer Exhibit 14.

16 THE COURT: What is Exhibit 14.

17 MR. STAPLES: Another email from Mr. Williams with
18 attached LLI's, letters of intent.

19 MR. MARTENS: The same objection as before, Your
20 Honor.

21 THE COURT: Objection is overruled for the reasons
22 previously stated.

23 (Whereupon, Plaintiff's Exhibit 14 was admitted into
24 evidence.)

25 THE COURT: Mr. Staples, do you have a copy for the

1 Court.

2 Q Ms. Sills, what have I handed you. Is that another
3 email from Mr. Williams?

4 A Yes, sir.

5 Q And what is the date of that email?

6 A February 24th, 2014.

7 Q Could you read, please, to the jury what Mr. Williams
8 told you on that day?

9 A We discussed the purchase option with our lender and
10 they will require a two-year lease as we discussed last
11 week. Attached is redline and clean version of the LLI
12 which reflects a two-year lease and purchase option.
13 Please review and let us know if you have any questions.
14 Thanks, Dave Williams.

15 Q Do you know if Mr. Williams actually spoke with the
16 lender?

17 MR. MARTENS: Objection, hearsay.

18 A I did not --

19 THE COURT: Ma'am, if there is an objection hold off.
20 I am going to overrule the objection. The question is,
21 did she know. You can answer.

22 A What was the question again.

23 Q Do you know if Dave Williams actually spoke with a
24 lender?

25 A We did not verify it but I assume that he had.

1 Q Did you know who the lender was at that point and
2 time that he was referring to?

3 A No, sir.

4 Q Do you have any reason to doubt what Mr. Williams was
5 telling you about it being a lender requirement?

6 A No. He had always been honest with us as far as I
7 knew.

8 Q And did you rely on what he told you in this email
9 about it being a lender requirement?

10 A Yes.

11 Q How so?

12 A It was the only reason we signed the lease was
13 because they added the purchase option.

14 Q And are there any attachments to Mr. Williams email?

15 A Yes. It is another letter of intent.

16 Q How is this letter of intent different from the one
17 we just looked at?

18 A I believe it is the same one. The part I am seeing,
19 they took the first one from the Building 6 and they
20 changed it to Building 1; adjusted the date and all of the
21 text accordingly.

22 Q So is it what we commonly refer to as a redline?

23 A A redline, yes.

24 Q Now, let's walk through some of the redline changes,
25 if we can. Is the date of the letter of intent redline.

1 A Yes, it was changed from August 14th of 2012 to
2 February 23rd, 2014.

3 Q Does that indicate to you this was based off the
4 prior LLI, Building 1?

5 A Yes.

6 Q And is there also a redline to the building number to
7 indicate that?

8 A Yes, it was changed from 1 to 6.

9 Q And what other changes is generally reflected in this
10 document?

11 A Let's see. Seller was changed to lessor; sale was
12 changed to lease; every instance of 1 was changed to 6,
13 almost like there is a number of those; the square footage
14 changed.

15 Q But essentially this looks like it was diverting this
16 letter of intent from a purchase to a lease. Is that
17 correct?

18 A Correct. Well, I believe the option to purchase is
19 here too.

20 Q So the condominium reference remains?

21 A Yes, the condominium, it still says condominium but
22 they added the word, option. And then it says the lessee
23 shall have the one time option to purchase the premises on
24 the second anniversary of the lease commitment date but
25 not less than 120 days advanced written notice to lessor

1 for \$270,000.00 dollars.

2 Q Was it your understanding that that condominium
3 option language there is what Mr. Williams was referencing
4 in his email when he talked about a lender requirement for
5 a purchase option?

6 A Yes.

7 Q Did you interpret this letter of intent and the
8 reference to a condominium option to mean that this space
9 that you would be leasing, subject to the option, would be
10 an actual condominium subject to condominium documents
11 like horizontal property regime, master deed, bylaws, all
12 of those things?

13 A Yes.

14 Q And then also attached to Mr. Williams email, does it
15 appear that there is a clean version of the redline?

16 A Without taking so much time, yes.

17 Q And looking at that clean version of the letter of
18 intent, is it signed by anyone?

19 A David Williams, authorized signatory, representing
20 Assured Group of Companies.

21 Q And did you know what the Assured Group of Companies
22 was?

23 A I never asked or questioned it but I assumed it was
24 the company that was formed to develop Riverwalk.

25 Q And if you would flip back to the first page,

1 Melanie, the email that Mr. Williams sent, read to the
2 jury what Mr. Williams' email address was on February 24th
3 of 2014?

4 A Dwilliams@assuredllc.com.

5 Q Now, this letter of intent is addressed to you and
6 your husband but it then list something called Three Dogs
7 Holdings, LLC. What is Three Dogs Holdings.

8 A Three Dog Holdings is the entity we used to hold our
9 Baxter Village condominium where our Grapevine of Fort
10 Mill is located.

11 Q Was it your intent to use Three Dogs Holdings if you
12 had identified a location for the Grapevine at Riverwalk?

13 A It is funny, because that didn't end up being the
14 lessee. Repeat the question, please.

15 Q Well, I guess my question is, do you know why Mr.
16 Williams would have addressed this letter of intent to you
17 and Dave at Three Dogs Holdings. Is that just because
18 that was the entity that he knew you had at Baxter?

19 A I don't think we had, well, this is just the
20 pre-leasing. We had not set up the Grapevine of
21 Riverwalk, Inc. yet so we just used an existing entity.
22 And then we created the Grapevine of Riverwalk, Inc.
23 later.

24 Q Is it your general practice to create a separate
25 entity for each of your locations?

1 A Yes.

2 Q And, Ms. Sills, is it your understanding that this
3 letter of intent, this clean version that was presented to
4 you for Building 6 was intended to form the basis for the
5 lease agreement that you signed?

6 A Yes.

7 Q Now, after these communications with Mr. Williams did
8 you inform him that you wanted to move forward and sign a
9 lease with an option to purchase that is reflected in this
10 LLI?

11 A Yes.

12 Q So what happened next, was a lease agreement
13 prepared?

14 A I believe it was.

15 Q And who prepared the lease?

16 A I am not sure who prepared it but it came from David
17 Williams. So the person that was going to lease it to us.

18 Q And when you received that lease with the option to
19 purchase did you have an opportunity to review it?

20 A I did.

21 Q And did you, in fact, do that?

22 A Yes.

23 Q Did you hire an attorney to review the lease for you?

24 A I did not.

25 Q Can you explain to the jury why you elected not to do

1 that?

2 A I read through it, it seemed straightforward. The
3 option to purchase was in there like I wanted, like we
4 wanted, it was me and my husband. Everything looked like
5 other leases I had read.

6 Q So you had some experience with commercial leases?

7 A Like we mentioned before, I had never negotiated a
8 lease before. We had been assigned a few leases but after
9 they were assigned at the UPS stores, I was familiar with
10 what they generally say.

11 Q And so you mentioned that you had an opportunity to
12 review the lease, did you actually make any comments or
13 proposed changes to the lease agreement?

14 A Yes.

15 MR. STAPLES: Your Honor, I offer Exhibit 15 into
16 evidence.

17 MR. MARTENS: No objection, Your Honor.

18 THE COURT: In evidence without objection.

19 (Whereupon, Plaintiff's Exhibit 15 was admitted into
20 evidence.)

21 Q Ms. Sills, do you recognize this email or an email
22 chain?

23 A Yes.

24 Q Can you describe to the jury generally what this is
25 showing?

1 A Yes. This seems to be the email chain that we used
2 to fix spelling errors and discuss things that might need
3 to be changed regarding the lease.

4 Q And did Mr. Williams ultimately approve and
5 incorporate some of your proposed changes into the lease?

6 A Yes.

7 Q Are there any attachments to this email chain?

8 A I saw two. Yes, two.

9 Q And what are those two attachments generally reflect?

10 A Okay. When we, one is just, I think it is the same,
11 the same document. But on one I had highlighted some
12 areas and made some comments. We wanted a set of doors
13 to, just turn into a wall.

14 Q And on that diagram, is it your recollection that
15 these attachments were attachments that you sent to Mr.
16 Williams?

17 A Yes. And I failed to mention that we were trying to
18 eliminate a hallway and just reform the outline of our
19 space slightly to benefit both spaces.

20 Q And is the diagram that you sent to Mr. Williams
21 generally similar to what we looked at previously with the
22 schematic design package?

23 A I believe it is the same, it may have something
24 different about it.

25 Q Does it still depict an outdoor dining space for the

1 wine shop location?

2 A Yes.

3 Q Did Mr. Williams say anything to you about, during
4 the negotiations of the lease, that these diagrams were
5 not reflected of what the lease would be or what the
6 tenant space, that you would not have access to outdoor
7 dining?

8 A Never. We constantly talked about how they would be,
9 the outdoor areas. The garage doors, the view of the
10 river.

11 Q And if I can direct your attention, Melanie, to page
12 four of the email chain. My question to you, does it
13 appear that one of the provisions of the lease that you
14 had commented on was paragraph 33?

15 A About the one-time option?

16 Q Yes.

17 A Okay. You want me to read it?

18 Q No. I just, does it appear, was that a provision of
19 the lease that you were making a comment on to Mr.
20 Williams?

21 A Yes.

22 Q And is it, is paragraph 33 what we, now is the option
23 to purchase provision in the lease?

24 A Yes except for the part that seems to be missing from
25 this is the, the notice with the 120 day notice.

1 Q So it is your testimony that this phase of the
2 negotiation, it wasn't the final language that was in the
3 lease but this is just negotiating for that provision. Is
4 that correct?

5 A Correct.

6 Q And did Mr. Williams agree to accept your change to
7 paragraph 33?

8 A It says changes made. And that would have been what
9 he replied.

10 Q Did you feel comfortable negotiating an option to
11 purchase provision without the assistance of a lawyer?

12 A I did.

13 Q Why is that. Tell the jury why you were --

14 A It seems black and white to me. It is very clear, it
15 says what we wanted, we came to an agreement, that they
16 would sell us our premises.

17 Q And a little further down that page, Melanie, did you
18 make a comment about the exhibits to the lease?

19 A Exhibits, I will need more info.

20 Q What do you recall about that?

21 A I don't think we have any info. I don't think we had
22 any exhibits at this point. I think it was just had a
23 place holders like one page said Exhibit A and the next
24 page said Exhibit B, et cetera.

25 Q And did Mr. Williams make any comment in response to

1 your statement about the exhibits?

2 A There is nothing written in here in red.

3 Q Do you recall any other time having a communication
4 with Mr. Williams about exhibits to the lease?

5 A He said they would be forthcoming.

6 MR. STAPLES: Your Honor, this is the lease
7 agreement. I would like to offer it into evidence.

8 MR. MARTENS: No objection.

9 THE COURT: Exhibit number?

10 MR. MARTENS: Number 1, Your Honor.

11 (Whereupon, Plaintiff's Exhibit 1 was admitted into
12 evidence.)

13 Q Ms. Sills, do you recognize that to be the lease
14 agreement that you signed?

15 A It looks like two copies. It is thicker than I
16 remembered, I am not if it is --

17 Q You are right, I am short a copy, let me get the
18 extra one from you. Okay.

19 MR. STAPLES: Your Honor, would you like a copy of
20 the lease?

21 THE COURT: I have got one.

22 MR. STAPLES: Your Honor, I would like to use a
23 poster board of this exhibit.

24 THE COURT: All right.

25 Q And, Ms. Sills, if you would, please, can you turn to

1 the signature page of the lease agreement. Let us know
2 when you are there.

3 A I am.

4 Q Okay. Is that your signature on behalf of the
5 tenant?

6 A It is.

7 Q So you signed as President. Was that your position
8 on June 20th of 2014?

9 A Yes.

10 Q And is this lease also signed by the landlord?

11 A Yes.

12 Q And can you tell who signed on behalf of the
13 landlord?

14 A Mark S. Mather is printed above signature.

15 Q When you signed this lease, did you know why all of
16 these other entities were here; Greens of Rock Hill and
17 Assured Administration?

18 A Well, it says they are managers and I didn't question
19 it, no. It says landlord.

20 Q Now, when you signed this lease on June 2014 had the
21 building or your premises been built yet?

22 A No.

23 Q So was that, did you feel you were taking a big risk
24 in that regard?

25 A Well, not really. We signed our option to purchase,

1 not option to purchase, we signed our sales or buyer
2 agreement at Baxter before they broke ground, on that
3 building. So, we had done it before.

4 Q Okay. If you would, please, turn to paragraph one of
5 the lease. Let me know when you are there.

6 A Okay.

7 Q Is it your understanding that paragraph one is the
8 definition of the demised premises?

9 A So you mean -- background statement?

10 Q Yes.

11 A Yes.

12 Q And do you see any reference to the words, wine shop,
13 in the paragraph one for the demised premises?

14 A Yes.

15 Q Now is there also an address for your space in this
16 paragraph?

17 A There is part of an address, there is a street name
18 which actually didn't even end up being our address at
19 all.

20 Q And is there a street number listed?

21 A No.

22 Q Do you know why there is not a street number listed?

23 A Because the building hadn't been built yet therefore
24 it didn't have an address assigned.

25 Q Now, when you read this provision of the lease and

1 the reference to the, "wine shop", in quotations, was it
2 your understanding that that referred to the diagrams we
3 have looked at for the tenant's space that was labeled
4 wine shop?

5 A It was my understanding but actually doesn't say
6 that.

7 Q When you signed the lease do you recall were the
8 exhibits present at that time?

9 A I don't recall but I don't believe they were because
10 the date on Exhibit 1 is very tiny, is later date than
11 what is on the signature page.

12 Q Melanie, if you would, turn back to the Exhibit A
13 diagram that was attached to your lease.

14 A Okay.

15 Q Do you see your initials on that page?

16 A I do.

17 Q And is that also your husband, Dave's, initials as
18 far as you know?

19 A To the left, yes.

20 Q Are you able to identify, for the jury, which tenant
21 space is occupied by the Grapevine?

22 A The one that says tenant, 1490SF.

23 Q This one right here in the corner?

24 A It is hard to see, but yes.

25 Q And is that space depicted as the wine shop?

1 A I don't see that it says that anywhere on here.

2 Q Do you see any outdoor dining areas?

3 A No.

4 Q And you mentioned earlier that this had a date that
5 was different than the date that you signed the lease. Is
6 that correct?

7 A Correct.

8 Q And what is the distinction that you are drawing with
9 the dates?

10 A Well, we signed the lease on, in June. And that,
11 yeah, on June 20th and it was countersigned on the 23rd.
12 And that little tiny date, I believe says, July 7th, 2014.

13 Q Do you have any explanation to why those dates don't
14 sync up?

15 A I don't, other than it must have been inserted after
16 we had signed in June.

17 Q Melanie, turn to paragraph 33 in your lease, please.

18 MR. MARTENS: Your Honor, just for the record, I will
19 object on the last question and testimony, it calls for
20 speculation on the witness' part and ask the Court to
21 instruct the jury not to consider what she stated on the
22 last document. Was asked if she knew and she said she
23 didn't and then she speculated to how it might have
24 happened.

25 THE COURT: Ladies and gentlemen, I am going to

1 instruct you to ignore the witness' testimony as to her
2 speculation as to what might have been the reason for that
3 document, since she testified she didn't know.

4 Q Melanie, are you looking at paragraph 33 in the
5 lease?

6 A Yes.

7 Q And can you describe for the jury what that provision
8 is?

9 A That is the option to purchase.

10 Q If you don't mind, I know I am asking you to read a
11 lot but just, so that we can all read through it, will you
12 please read that to the jury?

13 A Tenant shall have the option to purchase the premises
14 during the third lease year with not less than 120 days
15 advanced written notice to landlord or \$270,000.00, (the
16 purchase price). In accordance with the purchase and sale
17 agreement, has provided Exhibit G. Landlord shall apply
18 \$25,000.00 dollars of rent collected and security deposit
19 against the purchase price at the time of closing. Upon
20 the purchase of the lease premises by tenant this lease
21 shall be terminated.

22 Q And when you signed the lease did you understand that
23 provision?

24 A Yes.

25 Q Was it clear to you?

1 A Very quite clear.

2 Q It references an Exhibit G, purchase and sale
3 agreement. Do you have an Exhibit G attached to your copy
4 of the lease?

5 A Actually it looks like, no. I must have mixed up
6 something. I thought I saw it in the half I gave you.

7 MR. STAPLES: Your Honor, I would like to admit the
8 Exhibit G, purchase and sale agreement. I think we have
9 just gotten some Exhibits out of order here. Is there any
10 objection?

11 THE COURT: Clarify that Exhibit G is part of the
12 Exhibit 1 but the copy of Exhibit 1 that the witness has
13 doesn't have the Exhibit G. Is that correct?

14 MR. MARTENS: If that appears to be the case, the
15 witness can testify that there is duplicate copies. The
16 incomplete copy of the lease was, looks like it was
17 followed by a complete copy of the lease and I mean, I
18 don't have any objection just substituting the correct
19 copy.

20 THE COURT: Let's just substitute a complete copy of
21 the lease.

22 Q I am sorry about that, Melanie, it is kind of a
23 cumbersome document here. But, so now do you have, I
24 didn't give it to you. This is for reference there. Just
25 to clarify that, Melanie, is it your understanding that

1 when, that is Exhibit G, the purchase and sale agreement
2 that is attached to the lease?

3 A Yes.

4 Q And does that, in fact, appear to be a purchase and
5 sale agreement?

6 A It is, yes, outline of one.

7 Q And why do you say that?

8 A Well, the building hadn't been built yet. You have
9 to remember that. So it has got a little bit of
10 information but not knowing when the building would be
11 complete, it has got the price in here and then it has got
12 a bunch of blanks. So there is really, I think there was
13 a description of the building for the master deed; the
14 condominium trust yet; the attorneys aren't listed. It
15 was something that would happen a few years later so they
16 put blanks where it ought to be filled in. At the time we
17 would give the 120 days notice to purchase, exercise our
18 option.

19 Q So it is correct that this was intended to be like a
20 place holder that would be completed when you exercise the
21 option to purchase?

22 A Yes.

23 Q And is the purchase and sale agreement, are you and
24 your husband's initials on those pages?

25 A They are.

1 Q Did anyone ever tell you that this purchase and sale
2 agreement that was attached as Exhibit G was intended as
3 anything else other than a place holder for when you
4 exercised the option?

5 A No.

6 Q Is it your understanding that the purchase and sale
7 agreement would be executed in connection with the closing
8 on the sale?

9 A Yes, something that looked like this.

10 Q Now, the option also discusses the purchase price
11 that you will pay in the third lease year. Is that your
12 understanding?

13 A Yes.

14 Q And it talks about the purchase price of \$270,000.00
15 dollars but that the landlord shall apply \$25,000.00 in
16 rent collected and the security deposit but it does not
17 provide an amount for the security deposit, does it?

18 A Correct.

19 Q Did you actually pay a security deposit under the
20 lease?

21 A We did.

22 Q And do you recall offhand the amount of that security
23 deposit that was paid?

24 A \$6 thousand and something, one-hundred, I am not
25 one-hundred percent sure, \$6,705 or \$6,750. Oh, wait,

1 that was actually --

2 MR. STAPLES: Your Honor, I would like to move the
3 next exhibit into evidence. This is the, a security,
4 acknowledgment of a security deposit that was paid.

5 THE COURT: Any objection Mr. Martens?

6 MR. MARTENS: No objection.

7 THE COURT: Number 16 is in evidence without
8 objection.

9 (Whereupon, Plaintiff's Exhibit 16 was admitted into
10 evidence.

11 Q Ms. Sills, does this exhibit refresh your
12 recollection as to the amount of the security deposit that
13 you paid?

14 A Yes.

15 Q What is that amount?

16 A \$6,705.00 dollars.

17 Q Is this a letter signed by Dave Williams on September
18 14th of 2015 acknowledging that that amount had been paid?

19 A Yes.

20 Q Now at some point after you signed the lease and
21 around the time you actually took position and opened the
22 business, did Mr. Williams send a tenant acceptance letter
23 to you?

24 A Repeat the timing on that. I know I received one but
25 I missed the first part of the question.

1 MR. STAPLES: Your Honor, I move Exhibit 17 into
2 evidence as the tenant acceptance letter.

3 THE COURT: Any objection?

4 MR. MARTENS: Your Honor, no objection, it is a
5 stipulated Exhibit, Exhibit 4 in which we have already
6 stipulated. These facts in evidence are stipulated.

7 THE COURT: All right.

8 MR. STAPLES: I just want to make sure they are in
9 evidence because stipulation was really just to --

10 THE COURT: Exhibit 4 is in evidence without
11 objection.

12 (Whereupon, Plaintiff's Exhibit 4 was admitted into
13 evidence.)

14 Q Ms. Sills, you have already, you heard Mr. Martens,
15 that we have already stipulated to the fact of this tenant
16 acceptance letter. But just for the benefit of the jury,
17 what is your understanding of what this tenant acceptance
18 letter was intended to do?

19 A It indicated to us that the building has certificate
20 occupancy and that we were able to occupy and run a
21 business.

22 Q Does it provide a commitment date as defined in the
23 lease?

24 A The commitment date is February 2nd, 2016.

25 Q And is it your recollection that that is the, in fact

1 the commitment date under the lease?

2 A Yes.

3 Q And does this tenant acceptance letter also contain
4 an address for the lease premises?

5 A Yes. By this time we had one, 829 Terrace Park, Rock
6 Hill, South Carolina; Suite 104.

7 Q Do you have any reason to dispute any of the dates or
8 facts that are set forth in this tenant acceptance letter?

9 A No.

10 Q If your commitment date under the lease was February
11 2nd, 2016, is it your understanding that the first lease
12 year would have been February 2nd, 2016 through February
13 1st of 2017?

14 A Yes.

15 Q And then the second lease year would have been the
16 next year, February 2nd, 2017 to February 1st of 2018?

17 A Yes.

18 Q And then the third lease year which is the year you
19 are entitled to purchase the space would have been
20 February 2nd, 2018 through February 1st of 2019?

21 A Yes.

22 Q Now, after Grapevine opened and why don't you tell
23 the jury, did you in fact open for business in February of
24 2016?

25 A We did.

1 Q After that time did you receive any communications
2 from Dave Williams about your purchase option?

3 A I believe I received a text from him that said, it
4 requested that we not disclose our option to purchase to
5 anyone else.

6 THE COURT: Mr. Staples, we need to wind it up, you
7 have got another question or two.

8 MR. STAPLES: I am going to move to admit the text
9 message that she testified from Dave Williams.

10 THE COURT: Is it already premarked? It is going to
11 be 17?

12 MR. STAPLES: Yes.

13 MR. MARTENS: Without objection.

14 THE COURT: In evidence without objection.

15 (Whereupon, Plaintiff's Exhibit 17 was admitted into
16 evidence.)

17 Q If you would, please read to the jury the text
18 message that Dave Williams sent you and the date that he
19 sent you the text.

20 A This appears to be August 17th, 2016. It looks like
21 he sent me Mark Mather's direct contact information. And
22 below that it says, Melanie, also keep your purchase
23 option confidential as we did not, I think that is suppose
24 to be not, extend that option to other tenants. Thanks.

25 Q And do you recall any conversation with Mr. Williams

1 after you received this text?

2 A Repeat, please.

3 Q Do you recall having any further conversation with
4 Mr. Williams?

5 A No, I respected his wishes.

6 Q All right.

7 MR. STAPLES: Your Honor, now is a good a time as
8 any.

9 THE COURT: All right. Ladies and gentlemen, that is
10 going to conclude our testimony for today. I will let you
11 go in just a second. I remind you of the rules we have
12 talked about. Please don't discuss this case with each
13 other or with anyone else. Please don't do any research
14 tonight otherwise we will see you back at 9:30 tomorrow
15 morning. Thank you very much.

16 (Whereupon, the jury was excused from open court for
17 the day.)

18 THE COURT: Anything to take up before we conclude
19 today? We will start back at 9:30 in the morning.

20 (Whereupon, the trial will resume the next morning at
21 9:30 a.m.)

22 August 24, 2021.

23 THE COURT: Counsel, juror 112, Ms. Herring, called
24 in and she said one of her child's friend's that she rides
25 to school with in the morning tested positive for COVID,

1 and that Ms. Herring had chills in court yesterday and
2 therefore she thinks that it may be COVID as well. There
3 is no test or anything. The Clerk's office told her to
4 stay home, given that we are social distancing I think we
5 should proceed but I will be happy to hear from Counsel on
6 that. The jurors are socially distance.

7 MR. MECKLER: I would hate to stop.

8 THE COURT: That is why we socially distance the
9 jurors.

10 MR. MECKLER: Are you going to warn the jurors.

11 THE COURT: I will and we will have, we will select
12 an alternate randomly from the two alternates but I will
13 inform the jurors.

14 MR. MARTENS: What happens if the jury says, we are
15 scared.

16 THE COURT: That is something, I feel like we should
17 proceed but you gentlemen, as Counsel, have the situation,
18 if you have jurors that you feel uncomfortable receiving.
19 I am also willing to just, to declare a mistrial but I
20 want to hear from y'all.

21 MR. MECKLER: Can we take a minute to talk to our
22 client.

23 THE COURT: Sure.

24 (Whereupon, a short break was taken.)

25 MR. MECKLER: Your Honor, we are prepared to proceed.

1 THE COURT: What I would like to do is talk to the
2 jury and just bring them in and tell them what happened
3 and see if they are comfortable. If the jurors tell me
4 they are comfortable, I will hear from the parties. And
5 if you make a motion for a mistrial, Mr. Martens, I will
6 make the decision on it. But I think the best thing is
7 just to be strict and tell the jury what has happened and
8 see if they are comfortable proceeding or if they are not
9 comfortable. Is that agreeable to the parties.

10 MR. MECKLER: I think it is fair.

11 MR. MARTENS: I have no problem with that, Your
12 Honor.

13 THE COURT: Let's bring them in.

14 (Whereupon, the jury came into open court at
15 approximately 10:10 a.m.)

16 THE COURT: Ladies and gentlemen, thank y'all for
17 being back promptly this morning. I do need to talk to
18 you about something that has come up. I am sure you have
19 noticed you are now 13 in instead of 14. Unfortunately
20 juror 112 called in this morning and she said that her
21 daughter's friend that she carools with in the morning
22 tested positive for COVID. And she also said she is not
23 feeling well in court yesterday and she had chills. So
24 between those two things, obviously we told her to stay
25 home. I don't know if she will call us back and tell us

1 that she got tested or not. I can't order her to get
2 tested. But that means there is a chance that you may
3 have been exposed to COVID yesterday. Obviously, we don't
4 like redoing trials in court but I also, we don't like
5 jurors being afraid that they are going to catch COVID
6 during the trial. So my question to y'all is, do you feel
7 comfortable preceding in this trial. And I am just going
8 to ask, a couple of things to think about. Then I am
9 going to ask you, does anyone not feel comfortable
10 proceeding given that that has happened. And then I will
11 talk to the lawyers after that but I wanted to make sure
12 y'all had a chance to be heard on that issue. So take a
13 couple of seconds to think about it and in a couple of
14 seconds I will ask you to raise your hand if you are
15 uncomfortable continuing with the trial based on that
16 information.

17 Ladies and gentlemen, I will ask you to raise your
18 hand if you are not comfortable continuing with the trial.

19 (No jurors raised their hand.)

20 THE COURT: All right, ladies and gentlemen, I
21 appreciate that and I will ask y'all to go back to the
22 jury room and I will speak to the lawyers.

23 (Whereupon, the jury was excused to the jury room.)

24 THE COURT: For the record, no juror raised their
25 hand in response to my question. Mr. Martens.

1 MR. MARTENS: Your Honor, speaking with my client, he
2 is very uncomfortable with the idea of exposing folks.
3 And I am sorry. Speaking with my client and hearing to be
4 uncomfortable exposing his fellow citizens to potential
5 life threatening danger, it essentially amounts to a
6 dispute over money. And under the circumstances we are
7 uncomfortable proceeding with this threat of COVID, the
8 threat of COVID with this jury and we would request a
9 mistrial.

10 THE COURT: Does the Plaintiff still prefer to
11 proceed?

12 MR. MECKLER: Your Honor, we are prepared to proceed.

13 THE COURT: Well, what is the preference from the
14 Plaintiffs?

15 MR. MECKLER: We prefer to proceed, Your Honor.

16 THE COURT: Mr. Martens, I am going to deny the
17 motion. I feel like I have spoken to the jury, talked to
18 them about the risk. If one juror had raised their hand I
19 would have granted the motion and sent everybody home.
20 But all the jurors say they are prepared to proceed, we
21 are socially distancing the jurors, the jurors are wearing
22 masks. They all said they are ready to proceed. I think,
23 we already done one day of trial. I am going to go ahead
24 and proceed. We have two alternates for a reason. I will
25 ask the Clerk's office if they can put two scraps of

1 paper, two post-it notes in an envelope or something and
2 pick one randomly, please.

3 MR. MARTENS: Your Honor, my question is. One is,
4 how long will it take to seat an alternate. And two, how
5 do we account for an alternate who has missed a day of
6 testimony.

7 THE COURT: Mr. Martens, the alternates have been
8 present for the whole trial.

9 MR. MARTENS: So you are going to pick an alternate
10 and seat on the jury.

11 THE COURT: Correct. We just have to randomly choose
12 which alternate.

13 MR. MARTENS: I understand. Yes, Your Honor.

14 THE COURT: Juror 81 and juror 67. Got two post-it
15 notes folded up.

16 CLERK OF COURT: 81.

17 THE COURT: Juror 81, that is Ms. Freeman is now a
18 principle juror and we have one alternate. Counsel,
19 anything else we need to take up before we begin.

20 MR. MECKLER: Just one thing, Your Honor. I need to
21 renew my request to submit portions of the transcript of
22 Mark Mather under Rule 32. And as an admission of the
23 party opponent. I would like to do that now.

24 THE COURT: So let me make sure I am analyzing this
25 properly. The admission by a party opponent, that gets

1 you around the hearsay rule. But that doesn't get it into
2 evidence. You still got Rule 32, correct.

3 MR. MECKLER: Correct.

4 THE COURT: My ruling, based on Rule 32, is that
5 given the case I read yesterday, it is a very close call.
6 Given Mr. Mather is present, he can be called and present
7 live testimony. I am going to deny the motion.

8 MR. MECKLER: And, Your Honor, I would ask that we be
9 able to proffer that into the record and I am referencing,
10 if it is okay I will jut reference the notice we filed.

11 THE COURT: Have you filed it with the Clerk's
12 office, the motion?

13 MR. MECKLER: Yes.

14 THE COURT: Okay. Anything from the Defense?

15 MR. MARTENS: Yes, Your Honor. One issue. And I am
16 not, I don't know if it has to be done at this point but I
17 do want to raise it to the Court's attention. Plaintiff
18 is seeking some remedies that are equitable in nature,
19 some remedies that are legal in nature. And in particular
20 with regard to this breach of contract claim, the breach
21 of contract accompanied by fraud which flows from that.
22 There is a remedy pled for specific performance and there
23 is a remedy pled for breach of contract. I believe the
24 Plaintiff is required to elect and proceed under one of
25 those two remedies. They are not allowed to pursue both.

1 And again, I am not sure they have to make that election
2 now but I want to bring it to the Court's attention
3 primarily because the equitable remedy is a matter to be
4 decided by the Court, not the jury. And then the other
5 issue that I wanted to bring to the Court's attention and
6 it may be more appropriate in the charge conference.
7 Reviewing Plaintiff's jury charge form, they have got what
8 we believe are purely equitable matters for the Court to
9 decide, potentially being submitted to the jury and I just
10 want to make sure I have raised that on the record as
11 early as possible. We don't believe that is appropriate
12 and we would object to that.

13 THE COURT: Well, I mean, I think Mr. Martens is
14 correct, may be a little bit premature. What is your
15 position on these.

16 MR. MECKLER: It would be premature at this point,
17 Your Honor. I think at the close of evidence, I think if
18 Your Honor grants then I think we do have to make that
19 election. I do want to correct something, Your Honor, I
20 said that was filed, we did attempt to file it last night,
21 the transcript. It was rejected because of how the
22 exhibits were done.

23 THE COURT: Mark it as a Court's exhibit now, if you
24 have a copy of it we can put it in as a Court's exhibit.

25

1 (Whereupon, Court's Exhibit 1 was marked for
2 identification only.)

3 MR. STAPLES: And, Your Honor, in that same vein, the
4 stipulations that me and Mr. Martens had, those were
5 electronically filed last evening. I believe we had
6 marked those as Exhibit 8 to the trial. Would you like
7 those to be a Court's exhibit or go ahead and get those
8 admitted.

9 THE COURT: Are they stipulations on legal issues or
10 factual stipulations.

11 MR. STAPLES: They are factual stipulations and then
12 there are stipulations as to a handful of exhibits.

13 THE COURT: If the stipulations were factual issues,
14 it should be an exhibit that goes back with the jury, a
15 regular exhibit. Stipulations as to legal issues should
16 be a Court's exhibit.

17 MR. STAPLES: There is no legal stipulations.

18 MR. MARTENS: I agree, Your Honor. And it was
19 introduced as an exhibit.

20 THE COURT: That will be fine. Hand those to the
21 Court Reporter and she will mark them as an exhibit.

22 (Whereupon, Plaintiff's Exhibit 8 was admitted into
23 evidence.)

24 MR. STAPLES: Your Honor, I don't know that this is
25 the appropriate time to talk about jury charge but

1 similar, the perspective, there are several in there that
2 deal with about how parol evidence may or may not be used.
3 We believe that is an evidentiary issue for the Court
4 which the Court has decided as inappropriate for a jury
5 charge.

6 THE COURT: Let's not get into the jury charges right
7 now. Our jury has been patient, let's pick up the trial.
8 Bring them in.

9 (Whereupon, the jury came into open court at
10 approximately 10:22 a.m.)

11 THE COURT: Ladies and gentlemen, thank you for your
12 patience, I have talked it over with the attorneys. And
13 given your willingness to serve we are going to continue
14 with the trial. We do have one small matter. Ms.
15 Freeman, can you raise your hand. Mr. Freeman, we have
16 lost a juror now, so we took the two alternate juror
17 numbers and put them on a scrap of paper and put them in a
18 coffee cup and drew them out and you were selected. So
19 you are now on the voting 12. All right. Mr. Staples,
20 continue with your examination.

21 MR. STAPLES: All right.

22 CONTINUE DIRECT EXAMINATION

23 By Mr. Staples:

24 Q Melanie, good morning.

25 A Good morning.

1 Q One thing I forgot to ask you about yesterday was, to
2 have you tell the jury a little bit about where you grew
3 up, where you went to school and that kind of thing. Will
4 you please take a moment and do that.

5 A Let's see. I was born in Louisiana and my father's
6 job transferred us to Alabama and then to Georgia. That
7 is where the rest of my family still lives. I had a job
8 with Aetna and they transferred me from my job in Georgia
9 to Charlotte. And then they transferred me back to
10 Georgia. But I met Dave here in Charlotte. We had a long
11 distance relationship for a little bit and then he
12 eventually transferred his job and we got married, lived
13 in Georgia for ten years and then we moved back to York
14 County.

15 Q Can you tell the jury about where you went to school,
16 like college?

17 A Yes. I went through a variety of schools. I put
18 myself through night school holding down a full-time job.
19 I graduated with a two-year Associate Degree from Dekalb
20 College which is now, I think it is known as Perimeter
21 College that is in the Atlanta Metro area. When I
22 transferred with my job I continued my college at UNCC.
23 Did not graduate from there. Transferred back to Georgia,
24 it took me like 10 years to get my four-year degree. I
25 finally graduated from Georgia State in 2000.

1 Q Thank you. Now, I believe where we left off
2 yesterday was we had, we brought through the execution of
3 the lease agreement. Do you remember?

4 A I am sorry, one more time.

5 Q Well, I am just, we went through your execution of
6 the lease agreement with the option to purchase, right?

7 A Yes.

8 Q Okay. And I think we established that the first
9 lease year when your rent commencement date was February
10 2nd, 2016?

11 A Yes.

12 Q And what I want to ask you now, that first lease
13 year, roughly 2016, did the Grapevine have any issues with
14 its landlord that year?

15 A Not at all.

16 Q And what about the first half of 2017, running
17 through, maybe through June of 2017. Were there any major
18 issues with the landlord during that time?

19 A None.

20 Q Did you receive any notices of default from your
21 landlord in 2016 or the first half of 2017?

22 A None, not until 2019, I believe.

23 Q And we will get there. Were you using outdoor common
24 areas, patio space in 2016 and 2017?

25 A Yes.

1 Q So that means you had what, you had tables and chairs
2 set up outside?

3 A Yes, for over three years.

4 Q Tell the jury, what did you do to up-fit that space.
5 Did you spend money on signs or awning's?

6 A Yes. We had to get a loan and we did a pretty nice
7 build-out, you know, with walls and tables and chairs in
8 the beginning. And we think we did a really nice job. We
9 paid for a walk-in cooler and a lot of product to sell,
10 hired employees.

11 Q Do you recall approximately what you spent from that
12 up-fit work?

13 A A good question. Offhand I don't but at least
14 \$200,000.00 if not \$300,000.00.

15 Q Now, in July of 2017 did you hire an attorney to
16 assist with giving your landlord notice of your intent to
17 exercise the option to purchase?

18 A I am sorry, I am still dwelling on my last answer.
19 Will you repeat.

20 Q Let's go back to the timeline, July of 2017, did you
21 hire an attorney to send a letter to your landlord?

22 A Yes.

23 Q And who did you hire?

24 A Brian Wilson.

25 Q Is he a local attorney in Fort Mill?

1 A He is. My accountant recommended him.

2 MR. STAPLES: Your Honor, I would like to offer what
3 has been stipulated as Exhibit 2 into evidence.

4 THE COURT: Any objection?

5 MR. MARTENS: No objection.

6 THE COURT: And this is a letter from Mr. Wilson?

7 MR. STAPLES: It is.

8 THE COURT: Exhibit 2 is entered into evidence
9 without objection.

10 (Whereupon, Plaintiff's Exhibit 2 was admitted into
11 evidence.)

12 Q Ms. Sills, what is the date of this letter?

13 A July 26th, 2017.

14 Q And is the letter that you hired Mr. Wilson to send
15 on your behalf?

16 A Yes.

17 Q Is it your understanding that this letter satisfied
18 Grapevine's duty to give advanced written notice of 120
19 days of its intent to exercise the option to purchase?

20 A I believe it was more than 120 days.

21 MR. MARTENS: Objection, Your Honor, calls for a
22 legal conclusion.

23 THE COURT: I am going to allow the question.

24 Q Melanie, did Mr. Wilson's letter request a particular
25 closing date for the sale?

1 A Yes.

2 Q What date did he request?

3 A February 2nd, 2018.

4 Q Did you instruct him to request that particular date?

5 A Yes.

6 Q Is there any reason why you chose that date?

7 A It was the first day of the third lease year.

8 Q Now, do you recall having any discussion with Mr.

9 Wilson maybe in July or perhaps August of 2017 about

10 whether the landlord had done everything it was, it needed

11 to do in order to actually sell you the space?

12 A Yes.

13 Q What do you recall about that conversation?

14 A He mentioned something about a horizontal property
15 regime, which I don't think I have ever heard of before.

16 He said it had not been created and it would need to be
17 created before the sale could be completed.

18 Q And does Mr. Wilson actually reference that in
19 paragraph two of his letter?

20 A Yes.

21 Q Were you surprised to hear that in the summer of 2017
22 that the landlord still had work to do before it could
23 sell you the space?

24 A Definitely.

25 Q And at that point your business has been open for

1 approximately a year and a half, is that correct?

2 A Yes and we had signed that agreement in 2014 so that
3 was three years prior.

4 Q Did you expect that the landlord would have, for a
5 lack of a better term, condo-minimized that building so
6 that it would be in a position to sell you the space when
7 the time came for you to exercise the option?

8 A Yes. I honestly thought when you built a building
9 with separate suites that they were automatically condo,
10 considered condo's.

11 Q Now after sending this letter in July of 2017 did Mr.
12 Wilson continue to represent the Grapevine?

13 A One more time, sorry.

14 Q Did Mr. Wilson continue to represent the Grapevine
15 after sending this letter?

16 A Yes.

17 Q And is it your understanding that Mr. Wilson was in
18 contact with representatives for the landlord?

19 A Constant contact.

20 Q And do you know, were you given any indication about
21 whether the landlord would be able to meet the closing
22 date that was proposed in Mr. Wilson's letter?

23 A It became apparent that that might not happen.

24 Q Do you recall exactly what you were told about that,
25 did the landlord commit to that date?

1 A Everything that I saw in correspondence with that,
2 they could not commit to February 2nd, 2018 or any other
3 date.

4 Q And were you given any explanation as to why they
5 could not commit to that date other than the fact that
6 they needed to establish this regime?

7 A Nothing terribly concrete.

8 Q Is that frustrating to you at all?

9 A Very frustrating.

10 Q Now is the particular timing back at that point in
11 time, was the particular timing of the closing important
12 to you for any reason?

13 A At the time it was. We were trying to use a 1031
14 exchange.

15 Q Can you tell the jury a little bit about what that
16 is?

17 A It was, it is the only time we have done one. To my
18 understanding is that it is a way to defer taxes by
19 selling one investment property and exchanging it or
20 trading it for another.

21 Q And despite all of that was the Grapevine at
22 Riverwalk, Incorporated going to be the entity that
23 ultimately purchased the space?

24 A Yes.

25 Q Do you know if the landlord engaged its own attorney

1 sometime in 2017 after receiving Mr. Wilson's letter?

2 A Yes.

3 Q Do you recall who that attorney was?

4 A Todd Brockmann.

5 Q And do you happen to know what work Mr. Brockmann was
6 doing in connection with the landlord's efforts to
7 complete the sale?

8 A I believe, I saw emails that he was suppose to be
9 working on getting everything ready.

10 Q Do you recall whether or not Mr. Brockmann, have you
11 ever seen an email in which he states there is a contract
12 required to selling the space?

13 A Will you repeat the question.

14 MR. STAPLES: Why don't I offer Exhibit 5, this is a
15 stipulated Exhibit.

16 THE COURT: Any objections, Mr. Martens?

17 MR. MARTENS: No objection.

18 THE COURT: It is an email of Mr. Brockmann?

19 MR. STAPLES: Correct.

20 THE COURT: Number 5 is into evidence without
21 objection.

22 (Whereupon, Plaintiff's Exhibit 5 was admitted into
23 evidence.)

24 Q Ms. Sills, does this appear to be an email from Todd
25 Brockmann dated January 19th of 2018?

1 A Yes.

2 Q And so that would have been roughly a week or two
3 before your proposed closing date of February 2nd, 2018.
4 Is that right?

5 A Yes.

6 Q Could you please read Mr. Brockmann's email to the
7 jury.

8 A Where do we stand on getting the condo plat for the
9 building completed. You have a contract that requires
10 selling the space in a couple of weeks so we need to get
11 this done as soon as possible. Thanks.

12 MR. STAPLES: Your Honor, I offer the next Exhibit
13 which is an email from Mark Mather. This is not
14 stipulated so this will have to fall in line with where
15 ever we left off yesterday.

16 COURT REPORTER: The next one will be 18.

17 THE COURT: Any objection, Mr. Martens?

18 MR. MARTENS: No objection.

19 THE COURT: Number 18 is in evidence without
20 objection.

21 (Whereupon, Plaintiff's Exhibit 18 was admitted into
22 evidence.)

23 Q Ms. Sills, is this an email from Mark Mather on
24 January 30th of 2018 to your attorney, Brian Wilson?

25 A Yes.

1 Q Could you please read Mr. Mather's email.

2 A I have attached two documents for your review. Our
3 draft master deed and bylaws and our architectural plan
4 from construction. Please refer to Exhibit B which is in
5 draft form. We will substitute the details below in the
6 final version. Please note that the demised premise and
7 the lease and the property, the same definition. And then
8 there is an Excel chart with five different units.
9 Designated the square feet for some of them.

10 Q And based on the square footages for the different
11 units in that table of, does it appear that Grapevine's
12 unit would have been 1A?

13 A Yes. The rest of the first floor I assume is the
14 6618 and then apartments are the two, three and four. So
15 they have equal square footage on this floor.

16 Q So it seems pretty clear from this email that the
17 documents that Mr. Mather sent were in draft form. He
18 says that a couple of times throughout the email. Do you
19 agree with that?

20 A Yes.

21 Q And on January 30th of 2018 that would have been,
22 what, two or three days before your proposed closing date?

23 A Yes. I don't remember what days of the week those
24 were but, yes.

25 Q Is it your understanding that these documents that

1 Mr. Mather had emailed the master deed, the bylaws, the
2 architectural plans, all needed to be reported to the
3 Register of Deeds for York County in order to be
4 effective?

5 A That is my understanding, yes.

6 Q And does Mr. Mather's email say that he is agreeing
7 to close on February 2nd of 2018 or giving any indication
8 to that effect?

9 A No closing date mentioned.

10 Q Was Grapevine ready, willing and able to purchase the
11 space on February 2nd of 2018?

12 A Yes.

13 Q I think we can all obviously agree that the closing
14 did not occur on that date or we wouldn't be here, right?

15 A Correct.

16 Q So what did you and Dave do at that point, after
17 February 2nd, 2018 came and went, what was your plan?

18 A To continue to pursue a closing date.

19 Q Did you ask Mr. Wilson, your attorney, to review
20 these documents that Mr. Mather had provided?

21 A Yes.

22 Q And did he in fact do that?

23 A He did.

24 Q And what was Mr. Wilson's opinion about the
25 documents, did he determine they were acceptable?

1 A He said that they had worked, yes.

2 Q Did you communicate an approval of those documents
3 back to the landlord?

4 A Yes.

5 MR. STAPLES: Your Honor, I offer the next Exhibit,
6 an email from Melanie Sills to Mr. Mather.

7 THE COURT: Exhibit 19.

8 MR. MARTENS: Without objection.

9 THE COURT: All right, into evidence without
10 objection.

11 (Whereupon, Plaintiff's Exhibit 19 was admitted into
12 evidence.)

13 Q Melanie, could you please read this email to the
14 jury, the email that you wrote at the top of the page.

15 A The documents look fine. Please let us know a good
16 closing date. April 23rd or 24th would work for us. I
17 need to check with Brian Wilson to get it on his schedule.

18 Q Do you recall receiving any response from Mr. Mather
19 to this email?

20 A No.

21 Q Is it your recollection that Mr. Wilson was in
22 contact with the landlord in February, March of 2018
23 trying to determine if the landlord was ready to close?

24 A Yes.

25 Q And prior to April 3rd had you received any

1 indication that he landlord was, in fact, ready to close?

2 A No.

3 Q Did your husband, Dave, also make some attempts to
4 communicate with Mr. Mather and representatives of the
5 landlord regarding the closing date?

6 A Yes, we emailed; we texted. We actually, actually he
7 went to their offices, showed up in person.

8 Q You mentioned text messages. Is it your
9 understanding that your husband had a text exchange with
10 Mr. Mather?

11 A Yes.

12 MR. STAPLES: Your Honor, I offer the next Exhibit,
13 text message between Dave Sills and Mark Mather.

14 MR. MARTENS: No objection.

15 THE COURT: Into evidence without objection.

16 (Whereupon, Plaintiff's Exhibit 20 was admitted into
17 evidence.)

18 Q Melanie, does this appear to be a printout of the
19 text exchange that you are familiar with?

20 A Yes.

21 Q Could you read to the jury the text?

22 A The one in the dark circle is from my husband, David
23 Sills. It says, Mark, emailed regarding our spot per your
24 request. Confirmation of closing date so we can arrange
25 and proceed. Thanks.

1 And Mark replied two days later on Thursday, April
2 12th at 4:17 p.m. Let's set Tuesday, April 17th. Please
3 use email for contacting me and his email address.

4 Q Was that text message the first indication that you
5 had that the landlord was ready to propose a date or set a
6 date?

7 A Yes.

8 Q And did you find anything, maybe unreasonable about
9 that?

10 A Yes.

11 Q Can you explain that to the jury, please?

12 A Well he was proposing, he basically gave us two days,
13 a Friday and a Monday. There was a weekend between there.
14 And very short notice and my experience, closings need a
15 little bit more notice. Attorneys have calendars, usually
16 they are packed for things like this. I would expect at
17 least two weeks heads-up instead of two days.

18 Q Did Grapevine pay rent in February, March and April
19 of 2018?

20 A We have been paying rent every month up until this
21 month.

22 Q Did Mark Mather's text, appears to inform Dave that
23 maybe he doesn't want to have this communication by a
24 text, he says please use email?

25 A This was the last text exchange between us as far as

1 I know.

2 Q Did your husband then move the communications to
3 email?

4 A Yes.

5 MR. STAPLES: Your Honor, I offer the next Exhibit,
6 it is an email exchange between Dave Sills and Mark
7 Mather.

8 MR. MARTENS: No objection, Your Honor.

9 THE COURT: It is admitted, 21, without evidence.

10 (Whereupon, Plaintiff's Exhibit 21 was admitted into
11 evidence.)

12 Q And Melanie, I want to direct your attention to the
13 bottom half of this page first. Does that appear to be an
14 email or is it an email from Dave Sills to Mark Mather?

15 A Yes.

16 Q What is the date of that email?

17 A April 9th.

18 Q And do you think that that email is what we looked at
19 where your husband texted Mark and said, Mark emailed you
20 about our spot per your request. Is that what he was
21 referring to?

22 A Yes, the text was the next day, April 10th.

23 Q All right. And then up at the top, another email
24 from your husband to Mr. Mather. This one is on April
25 16th, is that correct?

1 A Yes.

2 Q So this email would have come after Mr. Mather's text
3 from April 12th, proposed closing date on April 17th. Can
4 you read your husband's email to the jury, please.

5 A Mark, thanks for your reply text earlier, we will
6 keep this to email per your request. You have got pieces
7 moving on the chest board but between the various
8 appraisals and finance people and the time that each takes
9 to get their parts done, we are looking at week of May
10 14th. This gives us all the time and a little buffer to
11 make sure all is lined up. Can you make this work with
12 your schedule. Thanks, Dave.

13 Q Did Mr. Mather respond to your husband's email?

14 A I don't think so.

15 Q To your knowledge, was the landlord actually ready,
16 willing and able to close on April 17th, the date proposed
17 by Mr. Mather?

18 A No.

19 Q How do you know that.

20 A Because Brian checked, there is a way he can check
21 the County to see if the horizontal property regime had
22 been filed and it had not, still has not.

23 Q And you had approved those documents on April 3rd, is
24 that right?

25 A I think we actually approved them a little earlier

1 but in writing, yes.

2 Q And are you also aware from subsequent communications
3 that you have seen, that the landlord was not, in fact,
4 ready, willing and able to close on April 17th?

5 A Yes.

6 MR. STAPLES: Your Honor, I offer the next, it is a
7 stipulated Exhibit. Your Honor, next Exhibit will be
8 stipulated Exhibit number 6.

9 THE COURT: Any objection, Mr. Martens?

10 MR. MARTENS: No objection.

11 THE COURT: Number 6 is into evidence without
12 objection.

13 (Whereupon, Plaintiff's Exhibit 6 was admitted into
14 evidence.)

15 Q Melanie, is this an email from Mr. Mather on May 1st
16 of 2018?

17 A Yes.

18 Q And it is sent to Debbie McMillan, do you know who
19 Debbie McMillan is?

20 A At the time she was his girlfriend and also worked in
21 the company in some regard.

22 Q Can you please read Mr. Mather's email to the jury.

23 A Let's get our records together for the closing. Not
24 anything more than a home closing. Although I need to
25 have the letter for the outdoor seating part of the

1 package.

2 Q Do you know what the outdoor, the letter for the
3 outdoor seating part of the package refers to?

4 A I honestly do not but, I don't.

5 MR. STAPLES: Your Honor, I offer the next Exhibit,
6 an email chain.

7 THE COURT: Is it a stipulated Exhibit?

8 MR. STAPLES: It is not.

9 THE COURT: Exhibit 22. Any objection, Mr. Martens?

10 MR. MARTENS: Give me just one moment, Your Honor.

11 THE COURT: Yes, sir.

12 MR. MARTENS: No objection.

13 THE COURT: Exhibit 22 is in evidence without
14 objection.

15 (Whereupon, Plaintiff's Exhibit 22 was admitted into
16 evidence.)

17 Q Melanie, this is an email chain, so let's walk
18 through it. Can you first read the email, the email at
19 the top, is it an email from Debbie McMillan to your
20 husband and to you from May 3rd of 2018?

21 A Yes.

22 Q Can you please read Ms. McMillan's email?

23 A Dave, contrary to what you may heard it is much more
24 than an easy process. We have been working on it for
25 months and continue to do so. I will be in touch with

1 each moving part making sure the process keeps moving
2 forward. Have a great day. Regards, Debbie McMillian.

3 Q Is it clear from that email that the landlord had not
4 completed the horizontal property regime as of May 3rd of
5 2018?

6 A Yes.

7 Q Can you infer from that, that clearly the landlord
8 was not ready, willingly and able to close on April 17th,
9 the date proposed by Mr. Mather?

10 MR. MARTENS: Your Honor, can you infer from what
11 someone meant, I think that is --

12 THE COURT: I am going to sustain the objection.
13 Rephrase the question.

14 Q Melanie, if the landlord was not ready to close on
15 May 3rd, 2018, was the landlord ready to close on April
16 17th?

17 A No.

18 Q Let me direct you now, Melanie, of page four of the
19 email. And I am looking at the page numbers, not the
20 dates. And at the bottom of that page you see an email
21 from Todd Brockmann from May 3rd of 2018?

22 A Yes.

23 Q And you testified earlier that Mr. Brockmann was the
24 attorney working for the landlord, is that right?

25 A Yes.

1 Q Can you please read Mr. Brockmann's email to the
2 jury?

3 A I need to get the condo stuff complete so it will not
4 be tomorrow. Let me get a handle on it and I can figure
5 out the timing. Thanks, Todd Brockmann.

6 Q Now, the email directly above that and it kind of
7 goes back over to page three, is an email from Sean Phelan
8 at Nexsen Pruet. Who is Sean Phelan?

9 A Another attorney that was attempting to get the deal
10 closed on our behalf.

11 Q And what does Mr. Phelan say to Todd Brockmann on May
12 3rd of 2018?

13 A Thanks, Todd. Let us know when you have a timeline
14 so we can gear up on our end. Will you be preparing the
15 deed or shall Mack and Mack plan on it. They are handling
16 the title. Thanks. Sean Phelan, Nexsen Pruet.

17 Q Does it appear on page three that Mr. Brockmann
18 responded to Mr. Phelan's email?

19 A Yes.

20 Q Can you please read Mr. Brockmann's email?

21 A I am fine having our team prepare the convenance and
22 closing documents. I will focus on getting the condo unit
23 in transfer or form. I also handle getting the consent
24 and the partial release from the lender. Thanks.

25 Q Did you have any understanding of what the consent

1 and partial release from the lender refers to?

2 A Yes.

3 Q Explain that, please.

4 A I think they have to agree to, since they financed
5 the building, they have to agree to release our unit for
6 sale.

7 Q Is it your understanding from this email that that
8 had not been done as of May 3rd of 2018?

9 A Yes.

10 MR. STAPLES: Your Honor, I offer the next exhibit,
11 this is another email chain between Debbie McMillan and
12 Melanie Sills and others.

13 THE COURT: Exhibit 23. Any objection, Mr. Martens.

14 MR. MARTENS: Give me just a moment.

15 THE COURT: Yes, sir.

16 MR. MARTENS: No objection.

17 THE COURT: Exhibit 23 is in evidence without
18 objection.

19 (Whereupon, Plaintiff's Exhibit 23 was admitted into
20 evidence.)

21 Q Melanie, this is another email chain so let's start
22 at the last page and work our way forward. This last
23 email is from Rebecca Hancock, the legal assistance to
24 Brian Wilson, the attorney you were working with at that
25 time. Is it correct that she emailed Debbie McMillan on

1 May 18th, 2018 stating Mr. Wilson asked me to reach out to
2 you and see if the seller is ready to close on the
3 Grapevine of Riverwalk?

4 A Yes.

5 Q And did Ms. McMillian respond to that email?

6 A Yes.

7 Q Can you please read Ms. McMillan's email.

8 A On May 18th, 2018. We are not, our surveyors and
9 attorneys are working on plat issues. We will let you
10 know when we are ready. Thanks. Regards, Debbie
11 McMillan.

12 Q And that email is dated May 18th of 2018?

13 A Yes.

14 Q All right. Can I direct you now to the very first
15 email at the top of the page of this document, the one
16 from Ms. McMillan on June 6th, 2018?

17 A Okay.

18 Q Can you please read that email to the jury?

19 A I am still waiting on the architect to return my call
20 regarding BOMA. I have tried several times in the last
21 week and have had no response. Regards, Debbie McMillan.

22 Q Do you have any idea what a BOMA is?

23 A I looked it up. It means building owners and
24 management association, I believe.

25 Q And we are now into June 6th of 2018. Is that right?

1 A Yes.

2 Q And does it look like the landlord has completed the
3 horizontal property regime at that time?

4 A No.

5 Q Does Ms. McMillan tell you, she thinks they might be
6 able to have that completed or be able to set a closing
7 date?

8 A No.

9 Q Did Grapevine pay rent in May, June of 2018?

10 A Yes.

11 MR. STAPLES: The next Exhibit, Your Honor, is an
12 email of Melanie Sills and Ms. McMillan.

13 MR. MARTENS: No objection, Your Honor.

14 THE COURT: Thank you, sir. Exhibit 24 into evidence
15 without objection.

16 (Whereupon, Plaintiff's Exhibit 24 was admitted into
17 evidence.)

18 Q If I can direct you to page two of this document, in
19 the middle of the page. On June 8th, 2018 do you see an
20 email from Debbie McMillan?

21 A Yes.

22 Q Can you please read her email?

23 A Got ahold of architect who will be working on the
24 BOMA.

25 Q Okay. And then what is the email directly above

1 that?

2 A It is from my husband to Debbie with a whole bunch of
3 people on carbon copy. Debbie, now a solid month on this,
4 on this email. What is the update. Cheers, Dave.

5 Q And what is the date of your husband's email?

6 A July 9th, 2018.

7 Q And does it appear that Ms. McMillan sent some kind
8 of an update on July 11th of 2018, apparently to inform
9 you that she had gotten ahold of an architect or somebody
10 named Michael?

11 A Yes.

12 Q And in the very first email on this document --

13 A I will add that I thought it was curious that there
14 was no email address from Michael, it was erased.

15 Q Okay.

16 MR. MARTENS: Objection, Your Honor. She testified
17 that it was erased, she doesn't know that, speculation.

18 THE COURT: I will allow it in response.

19 Q Melanie, I just want to understand, what was the very
20 first email on this document. Is it an email from your
21 husband to Debbie McMillan?

22 A Just an update for all. Debbie, where are we on
23 this.

24 Q And what is the date of that email?

25 A August 6th.

1 Q So by August 6th, 2018 you still did not have an
2 update from horizontal property regime?

3 A No.

4 MR. STAPLES: My next Exhibit, Your Honor, an email
5 from Dave Sills to Debbie McMillan.

6 THE COURT: Exhibit 25.

7 Q Melanie, what is the date on this email --

8 THE COURT: Hold on one second. Any objection, Mr.
9 Martens?

10 MR. MARTENS: Well, not necessarily an objection,
11 Your Honor. There is, it appears to be more than just
12 what an email, there is some additional stuff at the top
13 of that from, it looks like Mr. Staples partner. I am not
14 sure. Is it the entire document or just the --

15 MR. STAPLES: I am just referencing the email that is
16 complete on that page, I tried to eliminate some
17 unnecessary pages.

18 THE COURT: But you are putting into evidence
19 communications among attorneys at your Firm.

20 MR. STAPLES: I believe it was a communication
21 between my partner and Mr. Brockmann which we may,
22 actually admit later on in our case. I don't have any
23 concern about admitting that portion of that email.

24 THE COURT: Mr. Martens?

25 MR. MARTENS: No objection.

1 THE COURT: 25 into evidence without objection.

2 (Whereupon, Plaintiff's Exhibit 25 was admitted into
3 evidence.)

4 Q Melanie, what is the date on this email that your
5 husband sent to Debbie McMillan on the middle of this
6 page?

7 A August 24th, 2018.

8 Q And can you please read his email?

9 A Confirming my email trail of consistent follow-up
10 regarding our space purchase. Proper documentation is
11 important. Where are we in the process and when can we
12 expect to close. Cheers, Dave.

13 Q So we have now looked at emails that go all the way
14 up through August 24th, 2018 reflecting attempts by you or
15 your husband to get an update on this horizontal property
16 regime and decide a closing date?

17 A Yes, sir.

18 Q And have you seen anything in these emails to
19 indicate that the landlord ever completed the horizontal
20 property regime?

21 A No.

22 Q And with exception for the text message that Mr.
23 Mather sent to your husband in April, have you seen
24 anything in any of these emails indicating that the
25 landlord was willing to set a closing date?

1 A No.

2 Q Was Grapevine ready, willing and able to complete the
3 sale throughout 2018?

4 A Yes.

5 Q Tell the jury, how was Grapevine going to fund its
6 purchase of the space?

7 A We have always had the cash.

8 Q But were you at one point intending to use an SBA
9 loan or a loan from a bank?

10 A I was going to use a 1031 exchange at one time. It
11 is always better to borrow than just lay out all the cash.

12 Q Did you, in fact, apply for a loan with any banks
13 around that time period?

14 A Yes.

15 Q Do you recall which bank?

16 A Pinnacle Bank.

17 Q Did you have to pay a fee or anything like that?

18 A \$3,000.00 dollar, non-refundable application fee.

19 Q Now in late August of 2018, after all of these emails
20 we looked at, do you recall an incident with Mr. Mather
21 coming into the Grapevine space or into your business?

22 A Yes.

23 Q Tell the jury about that, please.

24 A He approached several members of my staff on multiple
25 days about, including my husband, about cars parked, I

1 guess double parked. There are no lines on the road at
2 that time, but they were parking on the curb on our side,
3 near the curb, not on the curb.

4 Q Was it your customers cars?

5 A I don't know. Sometimes it would be Dave or me or
6 our delivery people, like when we get deliveries, there is
7 no delivery zone. All of our doors are on the front so it
8 is easiest to park there, unload and bring stuff in. The
9 times, I know we have done it it was brief. If other cars
10 were there, I don't know who they belong to.

11 Q Do you recall anything that Mark said specifically to
12 your husband during any of those incidents?

13 A Yes. He said, don't be on the wrong side of this
14 contract or you will never use the patio again.

15 Q What was the context for that?

16 A I honestly don't know what he meant because we had a
17 contract in writing. What is the wrong side of the
18 contract, what does that mean.

19 Q Is that the first time you had heard any mention
20 about not being able to use your patio?

21 A I think so. It has been a long time.

22 Q Do you recall, did you say anything to Mr. Mather
23 after that incident?

24 A I am sorry, one more time.

25 Q Do you recall, did you say anything to Mr. Mather

1 after that incident or did you send him an email?

2 A Oh, yes.

3 MR. STAPLES: Your Honor, I offer the next Exhibit.

4 It is an email from Grapevine to Mr. Mather.

5 THE COURT: Exhibit 26.

6 MR. MARTENS: No objection, Your Honor.

7 Q Melanie, are you familiar with this email?

8 A Yes.

9 Q I know it is a little bit lengthy. Can you please
10 read it to the jury.

11 A Sure. Mark, we understand that you may be frustrated
12 with the parking situation outside --

13 COURT REPORTER: Please slow down.

14 THE COURT: Any objection?

15 MR. MARTENS: No objection.

16 THE COURT: 26 is into evidence without objection.

17 (Whereupon, Plaintiff's Exhibit 26 was admitted into
18 evidence.)

19 A Mark. We understand that you may be frustrated with
20 the parking situation outside of our storefront. But
21 please keep in mind that in most cases we have no control
22 over who parks where nor have the ability to enforce
23 parking restrictions. While we will be mindful of this
24 parking situation in the future we are not responsible for
25 making people park in the right spaces, places, sorry.

1 Coming into our business and venting your frustration to
2 our employees and in front of our patrons is not good for
3 employee morale nor for the reputation and good will of
4 our business or Riverwalk. Who wants to come into a
5 seemingly hostile environment rather than the relaxing
6 environment we are trying to create. We ask that if you
7 continue to have issues with this or any other situation
8 and would like to discuss it with us, that you do so in an
9 appropriate manner directly with us and not with our staff
10 nor in our space during business hours. Thank you.

11 Melanie Sills and my phone number and Dave Sills and his
12 phone number.

13 Q Did you ever receive any response from Mr. Mather?

14 A No.

15 Q Do you feel like this incident soared the
16 relationship somewhat?

17 A I think it has already soared.

18 Q Around that time period, late August, did you come to
19 any conclusion about whether the landlord was ever going
20 to finalize the horizontal property regime or agree to a
21 closing date?

22 A No.

23 Q Did you feel like you had given the landlord enough
24 time to do the things that he needed to do to be able to
25 sell you the space?

1 A More than enough time.

2 Q We heard from Mr. Martens yesterday that words
3 matter, right, actions matter. We have looked at emails
4 where you and your husband are continuously asking for
5 updates throughout 2018, and you are being put off, told
6 that we are waiting on this or working on that, waiting on
7 the architects to return our call. Did Grapevine do
8 everything that it was suppose to do?

9 A It is my opinion. But, yes, I think we did.

10 Q Is there anything in your mind that is ambiguous
11 about the option to purchase. I mean, it says you have
12 the right to purchase the space during the third lease
13 year on advanced written notice of 120 days. Right?

14 A To me there is nothing ambiguous about it.

15 Q You signed the lease, you opened for business, you
16 paid rent every month, you sent notice through an
17 attorney, you set a closing date. You waited for months,
18 what else could you have done?

19 A Well, we were told by Brian Wilson that we might have
20 to file a complaint.

21 Q Take legal action?

22 A Yes.

23 Q Do you recall about when you got serious about doing
24 that?

25 A Around that time, I believe, maybe even before, not

1 one-hundred percent certain.

2 Q And did you ever consider that maybe instead of
3 filing a lawsuit that you could just find another space
4 or, you know, close that business and go somewhere else?

5 A Yes. I think a lot of people have a
6 misunderstanding, it is not just like selling your house
7 and moving it. We had done a build-out, we had put, paid
8 to put drywall up, toilets in, furniture specifically for
9 that space, walk-in cooler, a kitchen. We had taken out a
10 loan, we still owed money on the loan. And we had gotten
11 to know people, we really enjoyed our customers there. We
12 had built good will. It is just not that easy. And there
13 is something called a personal guarantee that they make
14 you sign when you sign a lease like this. So that kind of
15 obligates you to continue to pay the lease even if you
16 leave or some monetary damages. We kind of felt stuck.

17 Q How long was your lease term?

18 A It was ten years with two, five year options to
19 extend. So ten years to start.

20 Q If the lease commencement date was in February of
21 2016, the lease runs through 2026.

22 A 2026.

23 Q So if you don't close and buy the space you are still
24 bound by the lease. Is that your understanding?

25 A That is my understanding.

1 MR. STAPLES: Your Honor, I move Exhibit 3 into
2 evidence.

3 THE COURT: Any objection?

4 MR. MARTENS: No objection.

5 THE COURT: Exhibit 3 into evidence without
6 objection.

7 (Whereupon, Plaintiff's Exhibit 3 was admitted into
8 evidence.)

9 Q Melanie, are you familiar with this document?

10 A Yes.

11 Q It is a letter from Mr. Meckler, right, my partner?

12 A Yes.

13 Q Dated October 5th, 2018?

14 A Yes.

15 Q Directed to your landlord, Riverwalk River District
16 Building 6, LLC?

17 A Yes.

18 Q And is it your understanding that the purpose of this
19 letter was to give your landlord written notice of the
20 alleged default under the lease and the option to
21 purchase, for failing to complete the sale?

22 A Yes.

23 Q Did this sending of this letter prompt any response
24 from the landlord that you are aware of?

25 A No.

1 Q So after this letter was sent and you still didn't
2 get a closing date from the landlord, what did you do?

3 A I think we tried for still a couple of more months to
4 come to terms and decided to file a complaint.

5 Q Do you recall, roughly, when the complaint was filed?

6 A December 10th, 2018.

7 Q Now, was that during the third lease year that you
8 filed the complaint?

9 A It was.

10 Q Why didn't you wait until the end of the third lease
11 year?

12 A Well, December 10th is right in the middle of the
13 Holidays and my experience, not a whole lot happens during
14 the Holidays. So that puts us in January. And by now I
15 figured we would have set a closing date in January.
16 Every opportunity was given. And also, if they had come
17 up to the closing table we would have dropped this
18 lawsuit.

19 Q So in some way, did you think by filing the complaint
20 was a way to try to get their attention?

21 A Yes.

22 Q Did you also or do you know if the lawyers
23 representing you also filed something called a lis pendens
24 in connection with the complaint?

25 A Yes.

1 Q And do you know what a lis pendens is?

2 A I believe it is kind of like a lien or notification
3 that when someone runs a title or on the building to be
4 able to see there is a pending action.

5 Q Okay. And now, I think you might hear from Mr.
6 Martens during the trial of this case that filing that lis
7 pendens somehow frustrated the landlord's ability to
8 complete the regime or to actually sell you the space.
9 But did anyone ever ask you to withdraw your lis pendens?

10 A No.

11 Q Melanie, can you just tell the jury in your own
12 words, what are you seeking in this lawsuit, why did you
13 file this lawsuit?

14 A We still want to purchase our condo.

15 Q And are you seeking to recover rent that you had
16 paid?

17 A That would be wonderful. We feel like every time we,
18 we send that rent check every month that it, it is highway
19 robbery.

20 Q Do you know how much money Grapevine has paid in
21 rent, dating back to February, 2018?

22 A Let's see. In the neighborhood of \$102 thousand,
23 \$102,336.54.

24 Q And if the jury were to somehow find that the closing
25 could have occurred at any point during the third lease

1 year and that you are only entitled to recover rent after
2 the third lease year, do you know what you have paid in
3 lease years, four, five and six, through today's date?

4 A Yes. \$74,239.04.

5 Q Now is part of what you are alleging in this lawsuit,
6 that the landlord took certain actions, landlord and the
7 other Defendants, Mr. Mather, took actions in retaliation
8 against the Grapevine's business for filing the lawsuit?

9 A That is what happened, yes.

10 Q Please tell the jury about that, what actions were
11 taken?

12 A Well, when we first exercised our option to purchase
13 a giant pile of dirt appeared and blocked our river view.
14 And then after we filed the lawsuit we received a letter
15 of default which is like an eviction notice that we were
16 not allowed to use our patio and we had to remove all
17 items from the patio. And then I don't know the other
18 dates, but at some point we received letters of default
19 for serving coffee, selling cigars and selling food. And
20 there was one other thing that we found odd. Some no
21 smoking signs appeared just on our building. And by this
22 time there were other buildings that had been built in the
23 neighborhood. And a lot of the signs were really
24 concentrated around our doorways. And I might be missing
25 something.

1 Q That's okay. You have given a lot, let's go back and
2 break some of that down. Okay.

3 MR. STAPLES: Your Honor, I offer our next exhibit.
4 This is a letter from prior Counsel for the Defendant to
5 Mr. Meckler.

6 MR. MARTENS: No objection, Your Honor.

7 THE COURT: This is 27, without objection.

8 (Whereupon, Plaintiff's Exhibit 27 was admitted into
9 evidence.)

10 Q Melanie, is this letter something you have seen
11 before?

12 A Yes.

13 Q Now, it is sent to my partner, Mr. Meckler from
14 someone named Dan Ballou. Do you know who Dan Ballou is?

15 A I do.

16 Q Who is he?

17 A He was Defendant's former Counsel.

18 Q And is the gist of this letter that Mr. Ballou is
19 telling the Grapevine that they can no longer use their
20 outdoor patio areas?

21 A Yes.

22 Q And the date, what is the date of this letter?

23 A March 19th, 2019 which was the same day they had to
24 answer the complaint we had filed in December.

25 Q So this letter was sent after you had filed the

1 complaint?

2 A Yes.

3 Q And is this letter also sent after the end of the
4 third lease year?

5 A Yes.

6 Q What did you do when you found out about this letter.
7 Did you comply?

8 A We did, we removed all of our furniture, planters,
9 dog bowls.

10 Q Why did you do that?

11 A For some reason we were still trying to play nice and
12 do everything we were told in hopes that they would sell
13 us our condo.

14 Q So did you remove the patio furniture under protest
15 in essence, you didn't agree that you had no right to use
16 it?

17 A I thought we said, maybe not so clearly, but it says
18 that our guest are allowed to use the common area. We
19 thought we had permission to use it. We were very
20 surprised.

21 MR. STAPLES: Your Honor, can I use a couple of
22 poster boards. They are enlargements of provisions --

23 THE COURT: All right.

24 Q Melanie, you mentioned that you thought your use of
25 the outdoor areas was permitted as part of the common

1 areas. And the lease has a provision dealing with common
2 areas, doesn't it?

3 A It does, a pretty long one.

4 Q I tell you what. Can I get access to Exhibit 1 so
5 that she can read the lease.

6 I am going to hand you the lease which is the
7 provision we have up on this board.

8 A Okay.

9 Q I don't know if everybody can see this, the print is
10 small. Can you please read just the first sentence of
11 paragraph 15, common areas?

12 A Sure. Tenant, its customers, employees and invitees
13 shall have the non-exclusive right to use and enjoy, in
14 common with landlord, other tenants and their customers,
15 employees and invitees the common areas which landlord
16 agrees to provide for the reasonable operation of the
17 building.

18 Q Are these outdoor patios essentially common areas?

19 A That is my understanding.

20 Q Does your lease obligate you to do anything with
21 respect to the common areas?

22 A I think it says we need to keep them clean, don't
23 park on them.

24 Q Let me direct you to provision 18 in your lease. If
25 you would turn to that, please. And I will put that up on

1 the poster for the jury. Can you please read paragraph 18
2 of the lease.

3 A Tenant, convenience agrees that it will, at all times,
4 during the term hereof keep the demise premisses and all
5 common areas immediately adjoining the demise premises
6 clean and free from obstruction, rubbish and dirt. Tenant
7 shall place all trash, rubbish and garbage in proper
8 closed receptacle and shall pay all cost incident to the
9 removal thereof.

10 Q Did Grapevine do those things. Did you clean up the
11 common areas, the areas that you used?

12 A Yes.

13 Q Did you always do that?

14 A Even stacked our chairs and tables at the end of the
15 night.

16 Q Do you think that it is odd that the lease would you
17 require you to care for an area that doesn't also give you
18 the right to use?

19 A Seems unusual.

20 Q When Grapevine had its furniture outside and was
21 using it, or patios, would you ever prevent anyone from
22 sitting down, maybe bringing down a lunch and even if they
23 weren't your customer?

24 A It happened all the time. We were located right at
25 the --

1 Q -- so you didn't claim it exclusively as yours, did
2 you?

3 A No. We always offered to get someone a beverage. So
4 they sat there, if they refused it was not a big deal.

5 Q Now, do you recall any discussion with the property
6 manager for your building, I believe her name was Silvia
7 Balan with New South Properties. Did you have any
8 discussion with her about these outdoor common areas,
9 patio areas?

10 A Yes.

11 MR. STAPLES: Your Honor, I offer the next Exhibit,
12 it is an email from Silvia Balan to the Sills.

13 THE COURT: Exhibit 28, any objection.

14 MR. MARTENS: No objection, Your Honor.

15 (Whereupon, Plaintiff's Exhibit 28 was admitted into
16 evidence.)

17 Q Melanie, was Silvia Balan the person that was acting
18 as your property manager in 2018?

19 A Yes.

20 Q And can you read her email to the jury, please?

21 A Sure. Hello Kim.

22 Q Tell the jury who Kim is.

23 A Kim is our general manager that operates our
24 Grapevine location. Please move inside any patio
25 furniture. We don't want any damages during the upcoming

1 storm. Please confirm getting this email. Thank you.

2 Q What is the date on that email?

3 A September 12th, 2018.

4 Q And did Silvia Balan tell you that you couldn't use
5 the outdoor patio at that date?

6 A No.

7 Q In fact, she is actually telling you to bring it
8 inside because they don't want any damage from the storm,
9 right?

10 A Correct.

11 Q Did Ms. Balan tell you you couldn't have that patio
12 furniture there?

13 A No.

14 MR. STAPLES: Your Honor, I offer the next Exhibit.
15 It is.

16 THE COURT: Number 29.

17 MR. MARTENS: No objection, Your Honor.

18 THE COURT: In evidence without objection.

19 (Whereupon, Plaintiff's Exhibit 29 was admitted into
20 evidence.)

21 Q Melanie, there are two emails in this Exhibit. Can
22 you please turn to the, page two and look at the earliest
23 email. Does it appear that Ms. Balan informed your
24 husband on October 1st, 2018. She says, Hi Dave. I sped
25 through your lease and I did not find any language about

1 the patio. Is that what that email says.

2 A Yes.

3 Q Do you know why Ms. Balan would have been reviewing
4 your lease to determine if it said anything about the
5 patio?

6 A I think, Dave was concerned based on the comment from
7 Mark during his interaction about the parking. So he
8 asked her.

9 Q And remind the jury of what Mark's comment was?

10 A Don't be on the wrong side of this contract or you
11 will never use this patio again.

12 Q And so that prompted your husband to reach out to the
13 property manager, Ms. Balan, to try to clarify whether he
14 could use the outdoor patio?

15 A Yes.

16 Q Okay. And then your husband replies back to Ms.
17 Balan with a question, right, what did he ask her.

18 A So that means we can use it, so that means we can use
19 it but are responsible for it or not. Cheers, Dave.

20 Q And then Ms. Balan responded back to your husband?

21 A Dave. This means -- bullet point one. Landlord did
22 not grant you the right to use, to use of the outdoor
23 patio unless you got something in writing after the lease
24 execution. I do not know if you have a permit/license for
25 the outdoor patio but the usage of the patio should be in

1 compliance with all applicable laws, ordinances and
2 regulations. Your insurance should cover the outdoor
3 patio together with the demised premises. You are
4 responsible for cleaning the outdoor patio as long as you
5 use it. Please let me know if you have any questions.
6 Best Regards.

7 Q Now, you told this jury earlier that you always
8 cleaned up after on the patio area, right?

9 A Yes.

10 Q Did you have a license to sell beer and wine on the
11 outdoor patios?

12 A Yes.

13 Q Did you have insurance that would cover anything that
14 might happen on the outdoor patio?

15 A Yes.

16 Q Did Ms. Balan tell you that you could not use the
17 patio in this email?

18 A No.

19 Q Did she tell you you needed to move your furniture
20 inside?

21 A No.

22 MR. STAPLES: Your Honor, if it would be easier, I
23 have five photographs of Grapevine's premises that, just
24 offer them all in.

25 THE COURT: Individual --

1 MR. STAPLES: Individual Exhibits but just to save
2 the back and forth.

3 THE COURT: That would be Exhibits 30 through 34.
4 Show them to Mr. Marten to see if he has an objection.

5 MR. MARTENS: No objection, Your Honor.

6 THE COURT: Exhibits 30 through 34 into evidence
7 without objection.

8 (Whereupon, Plaintiff's Exhibits 30 through 34 were
9 admitted into evidence.)

10 Q Melanie, we looked at some photographs of the
11 Grapevine's space at Riverwalk in connection with the
12 websites, very early on in your testimony. And you
13 described to the jury that this was the front side. I
14 think it looks a little different because it now has your
15 sign and the awning. Is that right?

16 A Yes.

17 Q And are these your tables and chairs out in front?

18 A They are.

19 Q And does this next photo depict a common scene at the
20 Grapevine on a busy day?

21 A They are enjoying themselves.

22 Q And how about that. Is that a different patio area?

23 A This is, one is the front and this other is this side
24 area, between the buildings.

25 Q And is this what your space looks like now?

1 A Yes.

2 Q Now, you also talked about how after you filed this
3 lawsuit you were told that you could no longer sell food,
4 coffee, cigars, things like that, right?

5 A Correct.

6 Q And when were you told that. Do you recall
7 approximately when that was?

8 A In 2018, 2019; 2019 and 2020.

9 Q What was your response to that?

10 A Well, we did remove our patio obviously but we
11 didn't, we had you respond on the other items. And we
12 still continued to serve Gelato and our food items and
13 coffee.

14 Q Do you recall if my response was based on the fact
15 that the landlord was, in fact, promoting that you
16 actually sold those things on its own website?

17 A Yes.

18 Q We looked at that, right?

19 A Yes.

20 Q It said what the Grapevine sells?

21 A Yes.

22 Q Now, Melanie, I would be remiss if I didn't ask you,
23 have you done anything that may have upset your landlord?

24 A Social media posts.

25 Q Tell the jury about that, please?

1 A We did not, the whole lawsuit was completely
2 transparent. No one knew that we filed that because that
3 was based on the condo sale. When we were told to pick up
4 our patio then it became apparent that there was a
5 problem. So we felt the need to inform our customers that
6 had been using the patio for three years prior. The next
7 time they came in they were not going to have a patio to
8 sit on.

9 Q So you put something up on, what was it, Facebook?

10 A Facebook, yes.

11 Q Did you also put something on your front door?

12 A Immediately, yes, we did put some posters up. But I
13 don't know if it was that day.

14 Q Why did you do that, to inform your customers?

15 A Yes. We have very limited staff and, what happened
16 to your patio. I had to answer that question 20 to 30
17 times a day, would take up a lot of time. So we just
18 decided to put it on the door so people could read
19 everything they needed to know about the situation.

20 Q So that they would know that they could not sit
21 outside?

22 A And the reason why.

23 Q Did the landlord ask you to take that stuff down?

24 A Yes.

25 Q Did you do that?

1 A No.

2 Q Why not?

3 A For the same reason, we still felt like we needed to
4 inform our customers.

5 Q Did you mention Mr. Mather's name in any of those
6 posts?

7 A No, not that I recall.

8 Q In hindsight do you regret doing that at all, even
9 just a little?

10 A Of course, I was mad. I was very upset.

11 Q Despite all of these issues you have had with your
12 landlord, do you still want to purchase your space at
13 Riverwalk?

14 A Very much.

15 Q Why is that?

16 A We still think it is a good investment. It is right
17 there on the river, Riverwalk is a great neighborhood,
18 there are great people that live there. We still want to
19 serve the community.

20 Q And do you feel like you have done everything that
21 you were suppose to do under the lease, under the option
22 to purchase, to put yourself in a position to be able to
23 buy that space?

24 A Yes.

25 Q Have you always been ready, willing and able to

1 complete the sale and buy the space?

2 A Yes.

3 Q Do you consider the landlord to be in breach of its
4 contractual obligations in the lease and the option to
5 purchase for failing to complete the sale?

6 A I do.

7 Q How long have you waited to buy this space?

8 A Since 2014. If you want to go back further, we can
9 go back to 2010. We will say 2014 when we signed the
10 lease.

11 Q And you think words matter, the option to purchase
12 matter?

13 A Words matter, yes.

14 MR. STAPLES: Your Honor, if I can have a moment to
15 confer.

16 THE COURT: Yes, sir.

17 MR. STAPLES: Your Honor, my only other thing is just
18 to make sure we have got all the Exhibits into evidence
19 and published to the jury. And I don't have any further
20 questions at this time.

21 THE COURT: All right. Cross-examination, Mr.
22 Martens? Why don't y'all approach the bench for a second,
23 let's talk about scheduling.

24 (Whereupon, a bench conference was held in the
25 presence of the jury but out of the hearing of the

1 jury.)

2 THE COURT: Ladies and gentlemen, I just conferred
3 with the lawyers and given that it is 11:35 and the
4 Defense is ready to start their cross-examination, rather
5 than starting that before lunch, we are going to take an
6 early lunch break. It is now 11:35, be back at 1:00
7 o'clock. No discussions with anyone, please don't do any
8 outside research. See you guys at 1:00 o'clock.

9 (Whereupon, the jury was excused for a lunch break.)

10 THE COURT: Anything from the Plaintiff before we
11 recess for lunch?

12 MR. STAPLES: No, Your Honor.

13 THE COURT: From the Defense?

14 MR. MARTENS: Your Honor, the only thing, I should
15 have asked for this last night as we recessed. If you can
16 remind Ms. Sill she is under oath and that she is not to
17 discuss her testimony.

18 THE COURT: Yes ma'am, you understand you are still
19 under oath and still on the witness stand. You can't
20 discuss, you are welcome to talk to your lawyers but you
21 can't discuss your testimony.

22 MS. SILLS: Yes, sir.

23 THE COURT: Let's everybody be back at 1:00 o'clock.

24 (Whereupon, a lunch break was taken.)

25 THE COURT: Okay, anything before we bring the jury

1 in.

2 MR. MECKLER: Your Honor, two quick things. You had
3 talked about the alleged remedies earlier. Upon further
4 research I believe that the election of remedies occurs
5 after the jury determines the verdict. And then we elect
6 which one to take. And then I have got one additional
7 proposed jury charge.

8 THE COURT: Okay. So if we wait until after the jury
9 determines a verdict, how do we handle, I mean if the jury
10 were to return a verdict in your favor then that would
11 include damages for the breach. How do we adjust that if
12 you convince me to grant specific performance.

13 MR. MECKLER: At that point we would have to make the
14 election that we want, the property or do we want the
15 damages for the breach. Now that wouldn't affect the
16 negligent misrepresentation of the tort claims.

17 THE COURT: And you would waive all of the damages if
18 you elected specific performance.

19 MR. MECKLER: Only to the breach of contract.

20 MR. STAPLES: And I would add, I believe South
21 Carolina law says that you can recover specific
22 performance and special damages and to the extent we have
23 special damages.

24 THE COURT: All right. Mr. Martens.

25 MR. MARTENS: Our position on that with regards to

1 damages is --

2 COURT REPORTER: I can't hear, Your Honor.

3 MR. MARTENS: I am sorry. Our position would be that
4 special damages are expressly precluded by the terms of
5 the lease. 1986 case of Harper versus Ethridge deals with
6 the issue of election of remedies. And it says where a
7 complaint joins legal and equitable causes of action it
8 requires different modes of trial and substantially
9 different remedies. Courts have generally required
10 election prior to trial. And again, our contention is,
11 our position rather is that they are seeking specific
12 performances. It is a bench trial, it is not a legal
13 matter, they are not entitled to a jury as a matter of
14 right. So we do believe that they need to make an
15 election before the jury begins to deliberate on their
16 legal causes of action.

17 THE COURT: Mr. Meckler, you told me you had a case
18 saying the exact opposite, right.

19 MR. MARTENS: Your Honor, I will readily admit, this
20 is the first time I have ever dealt with this issue.

21 THE COURT: It is for me too.

22 MR. MECKLER: It is Homeland Training Center, LLC.

23 THE COURT: Hold on, let me pull up, what is the
24 cite.

25 MR. MECKLER: It is Homeland Training Center, LLC v.

1 Summit Point; 594 F3d 285, it is a Fourth Circuit opinion
2 but it is, looking at West Virginia law. It is my
3 understanding the District Court of South Carolina in
4 Foleg (phonetic), cites to that case favorably. It says
5 basically, a party who finds action for breach of contract
6 was not precluded from abandoning its initial claim for
7 specific performance and pursuing a claim for damages.
8 And a party may pursue both the claim for breach and
9 specific performance. Those remedies are not
10 inconsistent. And then there is a case of Franke
11 Associates v. Russell. 295 SC 327. And that is an
12 election between, with a breach of contract quantum meruit
13 theory of recovery. Court of Appeals sent it back so they
14 did not have to make that election. As Defense Counsel
15 already said, his caveat was it can't be the same mode of
16 trial. We are in a jury trial. I mean, we both filed
17 motions for summary judgment, those were denied. We went
18 to a trial jury, here we are now. So that would not apply
19 because it is the same mode, method of trial right now.

20 THE COURT: Mr. Martens, tell me your cite.

21 MR. MARTENS: Our cite is 290 SC 112; 348 SE 2nd 374.

22 THE COURT: Mr. Martens, this is new to me too. By
23 my understanding is that specific performance is an
24 equitable remedy for a legal cause of action. Am I
25 correct on that. Is that your understanding? The breach

1 of contract is still cause of action. It is simply asking
2 for equitable remedy instead of money damages.

3 MR. MARTENS: I believe that, that is essentially is
4 consistent with my understanding. Either you can enforce
5 the contract or you can sue for damages for breach of the
6 contract.

7 THE COURT: This case that you have given me, I mean
8 it seems, the case involves a partnership dispute where
9 there is one legal cause of action where the guy wanted an
10 accounting and he shared profits. And then there was
11 other completely different cause of action where he is
12 assuming he was, he was no longer a partner. And that, I
13 mean this seems to be a different scenario to where, the
14 jury is going to determine whether or not a contract exist
15 and if it was breached. And if the jury does find against
16 your client then I think after the verdict would be the
17 time then, I think the Plaintiff would then be able to
18 elect between money damages awarded by the jury on the
19 contract cause of action or specific performance.

20 MR. MARTENS: And I am not sure that I disagree with
21 that. I guess my only question, concern is that in order
22 for the Court to order specific performance you would have
23 to determine that it meets the criteria, there is four or
24 five elements of a specific performance cause of action.
25 And that is a different issue than simply was there a

1 breach of the contract. So that issue is, can the
2 contract be specifically enforced as exist. And, again, I
3 am not trying to throw a monkey wrench in the proceedings
4 or in this case but I want to make sure I have raised this
5 issue because I believe it is the Defense's obligation to
6 do so. And we are going to require or request, if there
7 is a judgment in the Plaintiff's favor, we are going to
8 move to require an election of remedies.

9 THE COURT: And I think at that point it would, that
10 would be appropriate and that would require the Plaintiff,
11 we have to have a verdict form that separates out the tort
12 causes of action from the contract causes of action. And
13 my understanding is, at that point, if the Plaintiff
14 receives a verdict they would have to choose between
15 asking for specific performance or accepting the monetary
16 damages on the contract cause of action. Okay. That
17 seems to be the way we are going to go. But I will keep
18 reading and I appreciate the case, Mr. Martens. That is
19 the closest case that I have found so far. That is the
20 Harper versus Ethridge from 1986. Anything else to take
21 up?

22 MR. STAPLES: Your Honor, I brought this up a couple
23 of times about these stipulations and it has come to my
24 attention, they have not made their way into evidence. So
25 I would just move that this be admitted as a stipulated

1 exhibit. It is number 8.

2 THE COURT: Okay. Any objection, Mr. Martens?

3 MR. MARTENS: No objection.

4 THE COURT: Exhibit 8 into evidence.

5 (Whereupon, Plaintiff's Exhibit 8 was admitted into
6 evidence.)

7 MR. STAPLES: And, Your Honor, I was going to ask as
8 well, is it your preference to read the factual
9 stipulations to the jury at some point? I mean I think we
10 would request that.

11 THE COURT: Yes. Let me ask my, since there are
12 stipulations that both sides have agreed to you can ask
13 that it be read in your case, in any part of your
14 case-in-chief that you want.

15 MR. STAPLES: Okay. I will confer with Mr. Meckler
16 when they do that towards the end.

17 MR. MECKLER: Your Honor, I think that we would ask
18 that those be read after Ms. Sills steps down from the
19 witness stand.

20 THE COURT: Okay. Counsel, let me make sure I am
21 reading this correctly. Paragraph one, there is a written
22 commercial lease agreement, that is stipulating to a valid
23 contract between the parties?

24 MR. MECKLER: Yes, Your Honor.

25 THE COURT: Mr. Martens, that is your understanding

1 as well?

2 MR. MARTENS: Yes, sir.

3 THE COURT: That helps clean up the verdict form a
4 little bit. Let's bring the jury back in.

5 (Whereupon, the jury came into open court at
6 approximately 1:20 p.m.)

7 THE COURT: Ladies and gentlemen, thank you for being
8 prompt. Did everyone follow the instructions I gave you
9 over the lunch break? Thank you, I appreciate that,
10 ladies and gentlemen. All right, Mr. Martens,
11 cross-examination.

12 CROSS-EXAMINATION

13 By Mr. Martens:

14 Q Ms. Sills, if you would, please, if you can grab
15 Exhibits 13 and 15. I have them laid out on the table for
16 you. I will ask you a couple of questions about that to
17 begin.

18 MR. MARTENS: May it please the Court.

19 THE COURT: Yes, sir.

20 Q Ms. Sills, I first want to ask you about a couple of
21 the Exhibits we looked at yesterday during your direct
22 examination. And do you have Exhibit 13 available to you?

23 A Yes.

24 Q And Exhibit 13, as I understood your testimony, is an
25 email that Dave Williams sent to you in January of 2014.

1 Correct?

2 A Correct.

3 Q As I understood your testimony, that Mr. Williams'
4 email contained several schematic drawings that depicted
5 the space that was being proposed for Grapevine, correct?

6 A Correct.

7 Q And the date of Mr. Sills' email is January 29th,
8 correct, right?

9 A You mean Mr. Williams?

10 Q Mr. Williams, I am sorry, Mr. Williams' email?

11 A Yes.

12 Q Yet the schematic diagrams that are attached to that
13 email are dated September 24th of 2014, are they not?

14 A That appears to be the case.

15 Q And remind the jury, you executed your lease
16 agreement in June of 2014, right?

17 A Correct.

18 Q And so the schematic diagram that was introduced
19 during your testimony yesterday is being the one that you
20 relied upon to enter the lease, actually postdates the
21 execution of the lease, does it not?

22 A This was in January, these were marketing materials.
23 It is not the only thing. Yes, the picture of this looked
24 good to us.

25 Q But specifically, the schematic diagram that you

1 testified to shows wine shop and outdoor dining. That
2 schematic is from September of 2014, isn't it?

3 A That is the date that was printed on there. But we
4 received on January 29th, 2014.

5 Q So it is your testimony that you received a document
6 that had the date of September in January?

7 A Yes.

8 Q Okay. Now, Exhibit 15 is dated April 18th of 2014,
9 correct?

10 A Yes.

11 Q And you testified that attached to Exhibit 15 was
12 another schematic drawing of your space, correct?

13 A Yes.

14 Q And that schematic drawing also has a date of
15 September 24th of 2014, correct?

16 A It looks that way.

17 Q So that also, that diagram, if the date on it is
18 correct, also postdates the execution of the lease,
19 correct?

20 A Or it's an error.

21 Q Well, but do you know. You know why someone would
22 date a document September 24th if it was generated in
23 January?

24 A I have no idea.

25 Q And if, in fact, the date on that document is correct

1 it could not have been something that you relied upon in
2 executing the lease, correct?

3 A The date is incorrect. I remember highlighting this.

4 Q And the, you testified to this yesterday. But the
5 building in which Grapevine was going to lease space was
6 still in the design phase when you negotiated the lease,
7 correct?

8 A Correct.

9 Q And there were lots of diagrams and drawings that
10 went back and forth with the various versions and
11 revisions to the planned space?

12 A I wouldn't say a lot.

13 Q But there were some, correct?

14 A There were some.

15 Q Sure. And then when you actually executed the lease
16 in June, let me hand you that, paragraph one describes
17 demised premises, correct?

18 A Yes.

19 Q And it says that the landlord leases and demises to
20 the tenant and the tenant takes and leases from the
21 landlord that certain space comprised of approximately
22 1,490 square feet, more or less, having an anticipated
23 street address depicted as wine shop on Exhibit A,
24 attached hereto and be located within the building.
25 Correct?

1 A That's what that says, yes.

2 Q And Exhibit A is an attachment to the lease, correct?

3 A Yes.

4 Q And it is initialed by you and your husband?

5 A It is, but wine shop is not depicted on here.

6 Q Right. Neither is the patio space or outdoor area,
7 is it?

8 A None of it. This is not what was intended to be put
9 into the lease.

10 Q And the description of the demised premises makes no
11 reference to outdoor patio, does it?

12 A It doesn't but the common area provision does.

13 Q We will talk about that. Now you testified this
14 morning that you were told to remove tables and chairs
15 from the common area after it became apparent that
16 Grapevine was going to file a lawsuit. Is that correct?

17 A No.

18 Q Okay. Did you not testify this morning that you were
19 asked to remove chairs and tables in March of 2019,
20 correct?

21 A That's correct.

22 Q That was after the lawsuit was actually filed?

23 A Yes.

24 Q Yes. And you testified that you did so because you
25 wanted to play nice and just try to get to a resolution,

1 correct?

2 A Correct.

3 Q I will hand you a document and ask if you can
4 identify that?

5 A These are posters that are posted on our entry doors.

6 MR. MARTENS: Your Honor, I would move to introduce
7 this as Defendant's Exhibit number 1.

8 THE COURT: Any objection?

9 MR. MECKLER: Your Honor, I would object that it is,
10 I have never seen that, somebody tries to introduce
11 evidence in another parties case, they usually wait until
12 their case. We have no objection to the document itself.

13 THE COURT: Defense 1 is into evidence.

14 (Whereupon, Defendant's Exhibit 1 was admitted into
15 evidence.)

16 Q And this is the document, this is something you
17 referred to this morning. And after you received a letter
18 asking you to remove your tables and chairs from the patio
19 areas you posted this placard in your door, right?

20 A The placard is a poster, yes.

21 Q Okay. And you left it up, in fact it was up when you
22 were deposed in December of 2020, correct?

23 A It was.

24 Q Is it still up today?

25 A It is not.

1 Q And was that, the purpose of that, was that
2 attempting to place nice and resolve this dispute?

3 A The purpose of this was to inform our customers why
4 there was no more patio furniture on the patio.

5 Q And on March 25th of 2019 you posted what you call
6 breaking news on Grapevine's website, correct?

7 A Correct.

8 Q And what was the purpose of that?

9 A To inform our customers about why the tables and
10 chairs aren't going to be there the next time they are
11 visiting.

12 Q Is that playing nice?

13 A It wasn't playing at all, it was information for our
14 customers.

15 Q Sure.

16 A This isn't a game to us.

17 Q And on March 29th you posted a picture of your
18 husband picking up stacks of chairs?

19 A Yes, sir.

20 Q Was that an attempt to play nice and inform your
21 customers that there wasn't going to be a patio?

22 A Yes. Pictures are like a thousand words.

23 Q And on April 1st you posted the planned event was
24 canceled?

25 A Yes. And it had been our biggest event to date from

1 the prior year.

2 Q And was that an attempt to play nice and resolve the
3 dispute?

4 A We had requested one-time use of the common area to
5 still put this event on and we were denied. So we had to
6 cancel an event that we had already started marketing.

7 Q And on April 5th you posted a picture of some folks
8 sitting in lawn chairs in front of the Grapevine?

9 A Yes.

10 Q With the caption, we love our customers?

11 A We do.

12 Q Is that an attempt to play nice and resolve this
13 dispute?

14 A Again, this is not a game we are playing. This is
15 just a social media post, people sitting in chairs.

16 Q April 5th you also posted a notice asking people to
17 attend the City of Rock Hill's City Council meeting on
18 Monday, April 8th with a picture of your, a diagram of
19 your lease premises along with it?

20 A Yes.

21 Q On April 8th you posted something on Grapevine's
22 website announcing that CN2, a local news channel will be
23 here tomorrow at 11:00, please come out?

24 A Yes.

25 Q Is that an attempt to play nice and resolve this

1 dispute?

2 A We hoped that it would be resolved, yes.

3 Q On April 9th you posted a link to the CN2 story on
4 your website?

5 A Yes.

6 Q Was that an attempt to play nice and resolve this
7 dispute?

8 MR. STAPLES: Your Honor, I am going to object to the
9 badgering of the witness. I think he is entitled to ask
10 you about the documents and show them to her. But his
11 commentary would be inappropriate, I believe.

12 THE COURT: I am going to overrule the objection,
13 this is cross-examination.

14 Q Please answer the question, Ma'am?

15 A This was a CN2 story.

16 Q And then on April 21st of 2019 you posted an
17 announcement that you were going to be closed for Easter,
18 but if you are bored go ahead and take another look at our
19 dispute. Take a look at this diagram.

20 A Yes. I posted that.

21 Q On June 25th of 2019 you posted developers who don't
22 provide anywhere to sit outside or use the restroom and
23 can't get restaurants to sign actual leases, bring in food
24 trucks. Please support the permanent restaurants, staff
25 and Pump House. Thank you for your continued support. We

1 all are for the success of this development but continue
2 to scratch our heads at most choices being made here.

3 A Yes, I posted that.

4 Q And did you think that would help resolve the
5 dispute?

6 A I still believe this, but had nothing to do with the
7 dispute as far as I can tell.

8 Q You posted on the Riverwalk Commons owner's site,
9 being nice, running a good business, doing all the right
10 things and the right ways and staying quiet didn't work
11 for us for over three years. It got us ignored to the
12 point we had to file a lawsuit and that resulted in our
13 patio going bye bye. Most people have already forgotten
14 about us, it is okay, really. Just stay positive.

15 A Yes. That is a private group. That is not like
16 public.

17 Q And the members are, everybody that owns property,
18 either a business or a home in the Riverwalk subdivision?

19 A Not everyone. It is a voluntary group that you can
20 join if you meet those criteria.

21 Q And the criteria are if you own a home at the
22 Riverwalk?

23 A Or a business, yes.

24 Q Okay. But you did that to try to draw attention to
25 this dispute, correct?

1 A I did it to draw the attention that we had lost our
2 patio usage. Never said word one about this dispute prior
3 to the patio being revoked.

4 Q Right. And in September of last year you found out
5 that a group which Mr. Mather is an investor was opening a
6 restaurant in Riverwalk, correct?

7 A Will you repeat the question?

8 Q Yes, ma'am. You found out sometime last Fall that a
9 restaurant called Libby's Bistro was going to opening in
10 the Riverwalk River District, correct?

11 A Correct.

12 Q And Libby's Bistro was and is located in a building
13 that is not the same building that you are in?

14 A Correct.

15 Q And you found out that Libby's Bistro was going to be
16 applying for lawn premises, liquor, wine and beer license?

17 A I did.

18 Q And you filed a protest of that application?

19 A I did.

20 Q And the reason you filed the protest is because Mr.
21 Mather happened to be an investor in Libby's Bistro, LLC?

22 A My understanding is he is the only investor.

23 Q And the only reason you filed your protest was
24 because of Mr. Mather's involvement of this venture?

25 A I did not want to be in competition with my landlord.

1 Q And you effectively held up the liquor license,
2 didn't you?

3 A My understanding is there were other things that held
4 that out.

5 Q And you required, well, Debbie McMillan, a
6 representative of Libby's Bistro to go to Columbia and
7 attend a hearing?

8 A I did not require her to.

9 Q But you knew that would be consequence of filing a
10 protest to the license application, didn't you?

11 A No.

12 Q And you included in your protest letter the statement
13 that you were willing to attend a hearing?

14 A I was willing to attend a hearing. I did not know
15 that she would be required to attend the hearing.

16 Q So you really weren't playing nice, were you?

17 A At that point, when was that?

18 Q That would have been in September of last year.

19 A I think I always played nice. I was trying to let
20 people know, our customers know how we have been treated.
21 I don't believe that is fair.

22 Q Now you would agree with me, would you not, that the
23 lease, Exhibit 1, governs the relationship with the
24 Grapevine and its landlord, correct?

25 A The lease that would be null and void once we were

1 permitted to purchase our premises there, that lease?

2 Q Ms. Sill, did Grapevine enter into a commercial lease
3 agreement with Riverwalk River District Building 6, LLC in
4 June of 2014?

5 A Yes, along with the other signatures, I guess.
6 Assured Group, the Greens of Rock Hill.

7 Q Is it your testimony that Assured Group and Greens of
8 Rock Hill are parties to this lease?

9 A They are listed right above Mark Mather's signature.

10 Q Let's look at that. And the lease actually says that
11 the landlord is Riverwalk, let me see if I can turn this
12 around so you can see. The landlord is Riverwalk River
13 District Building 6, LLC, a South Carolina limited
14 liability company, correct. That is what it says on the
15 signature page of the lease?

16 A Correct.

17 Q And what it says on the first page of the lease is
18 that the lease is entered into, lie and between Riverwalk
19 River District Building 6, LLC; and the Grapevine of
20 Riverwalk. Correct?

21 A Okay, yes.

22 Q And Greens of Rock Hill is not listed as a party to
23 that lease?

24 A Why is it, can I ask a question. Why is it on the
25 signature, why is it part of the signature?

1 Q You see it says, Riverwalk by the Greens of Rock Hill
2 as manager?

3 A Right.

4 Q By Assured Administration and its manager?

5 A Right, yes.

6 Q And so would that --

7 A Why is that there?

8 Q Well, that is probably a question to ask an attorney.

9 THE COURT: Just answer the questions you are asked.

10 A Okay, I am sorry.

11 Q And you are a business woman, aren't you?

12 A I do my best.

13 Q And you have done quite well, haven't you?

14 A I, we do our best. We wake up every day and put our
15 shoes on and hit the pavement.

16 Q You hold yourself out as an entrepreneur with proven
17 start-up and ongoing business success as the owner and
18 operator of multiple businesses, don't you?

19 A That is on my in-link profile.

20 Q You have a double-major college degree?

21 A Yes.

22 Q Before you opened the Grapevine location in Baxter
23 you owned and operated two UPS store?

24 A Yes.

25 Q You are listed by the South Carolina Secretary of

1 State's website as the registered agent of Three Dog
2 Holdings, LLC?

3 A Yes.

4 Q That is a real estate holding company that is owned
5 and operated by you and your husband, Dave Sills?

6 A Yes.

7 Q You are listed as the registered agent of a company
8 called Bonve holdings?

9 A Yes.

10 Q That is another real estate holding company that is
11 owned by you and your husband, Dave Sills?

12 A Yes.

13 Q And that company owns a condominium in Ashville and
14 another in Fort Mill, correct, a home in Fort Mill?

15 A Yes.

16 Q You are listed as the registered agent of a company
17 called Proso, LLC?

18 A Yes.

19 Q That is a real estate holding company that owns a
20 condominium in Folly Beach, South Carolina?

21 A Yes.

22 Q You are listed as a registered agent by a company
23 called Tipsi Tpsi of Hill, LLC?

24 A Yes.

25 Q What is that?

1 A Something we may be doing something with shortly.

2 Q Okay. You are listed as the registered agent of
3 Grapevine of Fort Milling?

4 A Yes.

5 Q You are listed as the registered agent of Grapevine
6 of Riverwalk?

7 A Yes.

8 Q You are listed as the registered agent of Grapevine
9 of York, Inc.

10 A Yes.

11 Q And you also hold yourself out or listed as the
12 President of a company called Grapevine, Franchising, Inc.

13 A Yes.

14 Q And Grapevine Franchising, Inc. is a company that you
15 and your husband set up to sell Grapevine Franchise
16 opportunities on a Nationwide basis?

17 A We haven't sold a single one.

18 Q And setting up a franchise, franchise or is a fairly
19 complex legal task, isn't it?

20 A It is. We had a lot of help.

21 Q And to set up a franchise you are required to submit
22 filings with the Federal Trade Commission?

23 A Yes.

24 Q You are required to have detailed franchise
25 disclosure documents that people who may be interested in

1 your franchise have an opportunity to review before
2 signing a contract?

3 A Yes.

4 Q You have detailed written contracts to be used when
5 people actually purchase franchises that would govern the
6 terms of the relationship between franchisor and
7 franchisee?

8 A Yes.

9 Q So you do understand the legal significance of a
10 contract, don't you?

11 A Yes.

12 Q And you understand that a lease is a contract?

13 A Yes.

14 Q And you understand that the words of a contract mean
15 something?

16 A Yes.

17 Q And in fact, do you still have Exhibit 15 up there
18 with you?

19 A I do.

20 Q Would you grab that, please. If you would, please
21 turn to page two of Exhibit 15, if you will.

22 A Okay.

23 Q And, again, Exhibit 2 is an email exchange between
24 you and Dave Williams regarding proposed terms of the
25 lease agreement between Grapevine and its landlord,

1 correct?

2 A Correct.

3 Q And this is an email that you sent to Mr. Williams in
4 April of 2014, as you were beginning to put revisions
5 together for a final executable version of the lease,
6 correct?

7 A It was a reply to his email.

8 Q All right. So you wrote to Mr. Williams after
9 reviewing a draft of the lease, correct?

10 A I am sorry, I was reading.

11 Q This email exchange, some words are written in black
12 and some words are in red. It is an email exchange
13 between you and Dave Williams regarding the terms that
14 would ultimately be incorporated into Grapevine's lease,
15 correct?

16 A Yes.

17 Q And the words that are written in black are your
18 words and the words that are written in red are Mr.
19 Williams response to your words, correct?

20 A Yes.

21 Q You wrote initially, the lease, these are the things
22 that we would like to provide. Then you ask him to add
23 language to the lease to identify the tenant as a South
24 Carolina S Corporation. Correct?

25 A It says to change the tenant to a blank, a South

1 Carolina S Corporation.

2 Q And Mr. Williams responded back, that change is fine.
3 There will be a lease guarantee from the both of you.
4 Right?

5 A Yes.

6 Q Now, the next section down, the next section down you
7 asked for a revision of the description. And you say, I
8 know that they had a restaurant planned in our bar, we
9 don't fit strictly in a retail category. I think we are
10 categorized as mercantile. I would also like to see
11 restaurant listed here just to cover our basis. Right?

12 A That is what it says.

13 Q And you asked him to add the name, mercantile as a
14 description because that is what Grapevine considered
15 itself to be, as a mercantile establishment.

16 A I just remembered our space in Baxter Village was
17 considered mercantile and I didn't want to be categorized,
18 so we just thought it should be categorized the same way.

19 Q And you also asked him to include restaurant just to
20 make sure all the bases are covered?

21 A Correct.

22 Q And Mr. Williams responded, changes made as you
23 requested, or as requested. Right?

24 A Right.

25 Q You went down to paragraph B and noted a typo and

1 they corrected the typo that you requested them to
2 correct. Yes?

3 A Yes.

4 Q With regard to paragraph two, you asked him to change
5 the initial lease term to five years. And Mr. Williams
6 responded back and said, ten years is what we had agreed
7 to in the LLI and is what our lender will require. Right?

8 A Correct.

9 Q And you ultimately executed a lease with a ten year
10 term?

11 A Yes.

12 Q Under paragraph three, purpose. You asked them to
13 change to purpose of operating a wine craft beer shop and
14 bar therein doing business as Grapevine Wine Shop/Wine
15 Bar. Correct?

16 A Correct.

17 Q At your request the changes were made to the draft
18 lease?

19 A Yes.

20 Q You asked them to remove some language after the
21 word, whatsoever. And they said we can't remove that.

22 A I don't know what it pertains to.

23 Q Okay. You requested some changes about revisions of
24 completion of the building, correct?

25 A Yes. We wrote all of this. You want me to read it?

1 Q No, I think the point, Ms. Sills, is you were
2 directly involved in the drafting and the negotiation of
3 the terms of Grapevine's lease, weren't you?

4 A I was presented a lease this thick and I requested
5 some changes, yes.

6 Q Now, you didn't request any change to the description
7 demised premises, did you?

8 A There was a typo, no reference.

9 Q You didn't request the inclusion of any language that
10 would give Grapevine an exclusive right to any specific
11 portion of the common areas?

12 A I didn't think I needed to because the common area
13 was described and the use thereof. And it seemed like we
14 had permission to use it.

15 Q You did request a change of the lease with regard to
16 the paragraph titled, purpose. And you asked them to
17 change it to, for the purpose for operating a wine and
18 craft beer shop and bar therein doing business, Grapevine
19 Wine Shop/Wine Bar. Correct?

20 A I don't know what it said before. It is very
21 difficult to take these things and snippets out of context
22 without what I was referencing at the time.

23 Q That's right.

24 A So I don't know what it says.

25 Q The reason it is difficult to take them out of

1 context is because that is not a final version of the
2 lease, right?

3 A This isn't a lease at all, this is an email.

4 Q And the version of the lease that you were reviewing
5 when you drafted that wasn't a final version either, was
6 it?

7 A No.

8 Q And the final version is the one that you and your
9 husband, that you signed as President of Grapevine on June
10 20th and Mr. Mather signed it on June 2rd, 2014, right?

11 A Yes.

12 Q And that is the final version of the lease?

13 A It didn't have all of the exhibits, it didn't have a
14 firm address. But, yes, with an option to purchase.

15 Q And at the time you and your husband initialed each
16 page and executed that document you were satisfied with
17 the form of the document, correct?

18 A Yes, we are trusting people. We didn't know we had
19 to be looking for gotcha's or the rug to be swept out from
20 under us.

21 Q Sure. But you understood that you were in a
22 negotiation?

23 A Sure.

24 Q And you understood it was a business arrangement?

25 A Yes.

1 Q And you are a business woman?

2 A Yes.

3 Q And you have owned and operated several other
4 companies as a business woman?

5 A Yes.

6 Q Now, let's look at paragraph 33.

7 A The option to purchase?

8 Q Yes, ma'am. Paragraph 33 reads, tenant shall have
9 the option to purchase the premises during the third lease
10 year of not less than 120 days advanced written notice to
11 landlord or \$270,000.00 dollars in accordance of the
12 purchase and sale agreement as provided in Exhibit G. Did
13 I read that correctly?

14 A Yes.

15 Q Lease years are defined in the lease, isn't it?

16 A It is.

17 Q Turn to paragraph 4 of Exhibit 1, definition of lease
18 year. Are you there?

19 A Yes.

20 Q It says the words, lease year, as used in this lease
21 shall mean the period commencing on the commencement date
22 or if the commencement date is not on the first day of the
23 month then on the first day of the following calendar
24 month and ending one year thereafter. Did I read that
25 correctly?

1 A Yes.

2 Q Do you recall when Grapevine's commencement date was?

3 A February 2nd.

4 Q That wasn't the first day of the month, was it?

5 A It was not.

6 Q And so the first lease year would have begun under
7 the terms of the lease that you signed on March 1st of
8 2016, correct?

9 A Let me read this. This is the first time this has
10 come up. There is an or in there. It says the words,
11 lease year, as used, let me read it. Yeah, there is an or
12 in there.

13 Q Right. It says its either on the commencement date
14 or if the commencement is not the first day of the month
15 then on the next, the first day of the next calendar
16 month, correct?

17 A Yes.

18 Q So as your lease, Grapevine's lease defines lease
19 year, the first lease year would have begun on March 1st
20 of 2016, correct?

21 A According to the lease but I would like to look at
22 the commencement letter again.

23 Q Sure. That is Exhibit 4, the tenant acceptance
24 letter. And what is tenant, what does Exhibit 4 say as
25 far as the commencement date?

1 A It says that commencement date, as defined in the
2 lease, occurred on February 2nd, 2016. So I think, again,
3 this is something where both parties misunderstood.

4 Q What is the misunderstanding, Ms. Sills? Doesn't it
5 say that if the commencement date is not the first of the
6 month?

7 A Sure.

8 Q Then the first lease year begins on the first day of
9 the following --

10 A It is one month. Why are we just having this
11 discussion now, why wasn't this brought up three years
12 ago.

13 Q Well, I wasn't your attorney three years ago, but you
14 were represented.

15 MR. STAPLES: Your Honor, I have an objection, Your
16 Honor, may I approach?

17 THE COURT: You may.

18 (Whereupon, a bench conference was held in the
19 presence of the jury but out of the hearing of the
20 jury.)

21 THE COURT: Ladies and gentlemen, we have been going
22 for a little over an hour and there is a matter I need to
23 take up with the lawyers. I am going to take a short
24 break, y'all can use the restroom or whatever and we will
25 get you back in just a few minutes.

1 (Whereupon, the jury was excused from open court.)

2 THE COURT: Counsel, I am reading Rule 36. This is
3 the Rule 36. Any matter admitted is conclusively
4 established unless the Court on motion permits withdrawal
5 or amendment of the admission. Subject to the provisions
6 of Rule 16 governing amendments of a pre-trial order, the
7 Court may permit withdrawal or amendment when the
8 presentation of the merits of the action will be subverted
9 thereby. And the party who obtained the admissions fails
10 to satisfy the Court that withdrawal or amendment will
11 prejudice him in maintaining his action or defense on the
12 merits.

13 I don't know what the word, subserve, means.

14 MR. MECKLER: Your Honor, we are not about to start a
15 trial or pretrial conferences. We are literally in the
16 middle of trial, you have got the date on it, some time
17 ago. Duty to timing supplement discovery to review what
18 they have changed. But they can't now, for their own
19 convenience ignore an admission that was made that long
20 ago.

21 THE COURT: Mr. Martens, that does appear to be the
22 case. Rule 16 is pretrial procedure. And it says, Rule
23 36 says subject to the procedure of Rule 16 responses may
24 be amended.

25 MR. MARTENS: And, Your Honor, I will tell the Court,

1 as an officer of the Court, I will represent to Counsel
2 and to the Court that I specifically reviewed prior
3 admissions to make sure that there is not going to be an
4 issue and obviously overlooked that in my review. We
5 believe that lease year is a defined term of the lease and
6 whether, I mean the lease says what it says. And if I
7 made the same mistake that Brian Wilson made I should be
8 allowed to withdraw that request and amend the response.
9 I don't see how the prejudice --

10 MR. MECKLER: Your Honor the 30(b)(6) witness
11 admitted the same thing in his testimony for Riverwalk
12 River District Building 6, the landlord.

13 THE COURT: Before I make my ruling I am going to see
14 if there is any case law interpreting Rule 36.

15 All right, Counsel, I haven't read the cases yet but
16 it does appear there are two cases on this issue. One is
17 Barber versus Hobbs, 313 SC 319, Court of Appeals
18 decision; and the other is Tuomey Regional versus
19 McIntosh, that is a Supreme Court opinion, 315 SC 189.
20 Let me look at them real quick.

21 The second case seems to stand on the proposition and
22 this is the Tuomey case. If I permit the amendment
23 opposing party is permitted to offer the prior admission
24 as evidence as well as the amended. The Barber case
25 involves an amendment request made following examination

1 of the witness at trial. The Barber case, the Court of
2 Appeals affirmed the decision by the trial Judge to permit
3 amendment of the request to admit at trial after the
4 witness had been examined at trial. And it says, there is
5 a two-part test, is the presentation of the merits
6 furthered by the amendment and did the party who obtained
7 the admission establish prejudice. Let me hear from the
8 Plaintiff on prejudice on this issue.

9 MR. MECKLER: The prejudice on the issue would be,
10 Your Honor, we are on the second day of trial. It is the
11 first time they are raising this, served some time ago,
12 there was no effort to amend it. He said he reviewed it,
13 still didn't make an effort to amend it. And the 30(b)(6)
14 for the landlord, in his deposition was asked, do you
15 agree that February 2nd, 2018 was during the third lease
16 year. His response is, I do.

17 THE COURT: Mr. Martens, talk with me. My guess is,
18 this is, you are arguing that the request to purchase was
19 not timely exercised?

20 MR. MARTENS: Yes, that is part of it, Your Honor.
21 It is not as critical as I believe Counsel believes it nor
22 is it, I mean I did, I will, I want it on the record that
23 this was not intentional subterfuge on my part. I was
24 not, when I reviewed our request for admissions prior to
25 trial to see if there was anything I needed to amend, I

1 did not see that request or that response. It is
2 something that I overlooked. And just like everybody else
3 had looked at this, I probably should have read the lease
4 more carefully before I drafted that response.

5 THE COURT: On the merits, though. If I agree with
6 you and I let you, I let you make the amendment what is
7 the legal, what is the legal significance of the March 1st
8 date.

9 MR. MARTENS: Well, the significance is, they
10 attempted to schedule a closing before the third lease
11 year even began. They will see testimony from some of the
12 attorneys that were involved, is that by January of 2018
13 purchaser's Counsel was beginning to make threats of
14 litigation and classifying this as to the breach of
15 contract. We were not even into the third lease year as
16 defined by the lease. That is the legal significance
17 because we were being threatened with litigation before
18 the third lease year even commenced.

19 MR. MECKLER: I haven't seen that, Your Honor. But
20 he actually admits that is the third lease year twice in
21 the 30(b)(6) deposition. Now what is the point of having
22 to -- request to admit if you can't rely on any of this.
23 Now we have got a request to admit and we have got the
24 transcript of their Corporate Representative. There is a
25 pretty good Fourth Circuit case that I cannot remember the

1 name of it right now. But it says when a Corporate
2 Representative says what it is, that issue is forever in
3 stone. And he says, I don't know, they can't come back
4 and add something. The reality is, it didn't close ever.
5 So they were working on it the next year anyways
6 throughout 2018. They don't have to wait forever, they
7 can file a suit. But when they admit that and they don't
8 take any actions to correct it and we deposed their
9 Corporate Rep and he admits it. It is not just an
10 oversight of the attorney, it is an admission of a party
11 and we have it in two different places.

12 THE COURT: Thank you. Mr. Martens, that is not in
13 your particularly critical point in your defense. Let me
14 make sure I am understanding. You are telling me that the
15 legal significance of that date is that you would like to
16 be able to say that early, prior to the end of the second
17 lease year the other, the Grapevine folks were threatening
18 litigation?

19 MR. MARTENS: Before the lease year -- the option
20 period began.

21 THE COURT: And there is no other legal significance
22 to it?

23 MR. MARTENS: That is --

24 THE COURT: To allow you to amend admission at trial
25 is a fairly, that is a heavy ask and that does not seem to

1 be a particular important point. So that would, I am not
2 inclined to grant it. Is there anything else you need
3 that for?

4 MR. MARTENS: I don't believe so, Your Honor.

5 THE COURT: The first factor, would the merits be
6 served by, subserve is the word they use, by allowing an
7 amendment. And given this to me, is a fairly, a point, I
8 am going to say no and I am going to deny your request.

9 MR. MARTENS: I will move on to other areas.

10 THE COURT: Okay. Tell me what exactly do you want
11 me to say to the jury?

12 MR. MECKLER: Just an instruction, just like he said,
13 that Defendant has admitted that February 2nd of 2018
14 falls within the third lease year.

15 THE COURT: Okay. In fact, I am going to just read
16 this admission. That seems to be the cleanest, least
17 subject to an objection. Let's take a break. Will see
18 everybody in ten minutes.

19 (Whereupon, a short break was taken.)

20 THE COURT: Counsel, give me your attention for just
21 a moment. I have a note from the jury that says, we are
22 not seeing the documents that the attorneys are talking
23 about. Could the attorneys be better about displaying
24 them.

25 MR. MARTENS: I am struggling with this technology.

1 THE COURT: I will tell you, do you have these
2 documents on a laptop, for both sides, like where you can
3 pull up on your computers. Because you can plug an HDMI
4 connection directly into your laptop and show on the TV
5 screens anything you want. Zoomed in stuff on text, you
6 can highlight and that is often what folks do. And
7 obviously you can do whatever you want but the jury is
8 saying they are having trouble seeing the documents. What
9 I will do, I will tell them they will have copies of all
10 the documents in evidence when they are deliberating. But
11 for what it is worth, if y'all can use alternative means
12 of displaying documents. Let's bring the jury in.

13 (Whereupon, the jury came into open court at
14 approximately 2:41 p.m.)

15 THE COURT: Ladies and gentlemen, I have received a
16 note that says, we are not seeing the documents that they
17 are talking about, could the attorneys be better about
18 displaying them. I appreciate y'all pointing that out,
19 the attorneys, we have all spoken and they will do a
20 better job. Some of the documents have small print and
21 they are doing the best they can to make sure you have a
22 chance to see them. Also when it comes time to deliberate
23 you will have physical copies of all of these documents
24 with you in the jury room that you can look through, you
25 can pass around. So you don't have to memorize what you

1 are seeing on the screen. You will have copies of
2 everything. Secondly, ladies and gentlemen, there was a
3 question right before we took break regarding what the
4 lease year meant in the contract. And I am going to
5 instruct you that one of the Defendant's, Building 6 has
6 admitted that February 2nd of 2018 fell within the third
7 lease year of the Plaintiff's lease and had a closing, the
8 premises occurred on that date. The closing would have
9 occurred with the period specified in the option to
10 purchase. All right. Mr. Martens.

11 CONTINUE CROSS-EXAMINATION

12 By Mr. Martens:

13 Q Ms. Sills, I am going to move to another line of
14 questioning and I would like you to take a look, if you
15 will with me, at paragraph 33.

16 A Yes.

17 THE COURT: Ladies and gentlemen, let's try this. If
18 you are having trouble seeing the language that the
19 attorney is speaking about just raise your hand and that
20 will be a signal to the lawyers, maybe they need to zoom
21 in closer or something like that. That may help a little
22 bit.

23 Q And I believe you testified yesterday that section 33
24 said what you wanted it to say, correct?

25 A Yes.

1 Q And you were satisfied with the terms of that
2 language from paragraph 33?

3 A At the time, yes.

4 Q And, in fact, you wouldn't have signed the lease if
5 paragraph 33 had not been in the form that you would have
6 found acceptable, correct?

7 A Correct.

8 Q And so by the fact that you initialed on that page
9 and signed the lease, can we take from that that you as
10 the President of Grapevine found that to be an acceptable
11 term of Grapevine's lease?

12 A Yes.

13 Q And at the time you executed the lease you intended
14 that paragraph 33 would govern the option to purchase?

15 A In the third lease year.

16 Q Right. In the third lease year. And that document,
17 that paragraph 33, says you would have an option to
18 purchase during the third lease year of not less than a
19 120 days advance written notice in accordance with a
20 purchase and sale agreement that's provided in Exhibit G.
21 And Exhibit G is referring to an Exhibit of the lease,
22 correct?

23 A Yes.

24 Q And if you would, turn with me to Exhibit G. Let me
25 know when you are there.

1 A I am there.

2 Q And do your initials appear on every page of Exhibit
3 G?

4 A Yes.

5 Q Does your husband's initials appear on each page of
6 Exhibit G?

7 A Yes.

8 Q Did you and your husband, at the time Grapevine
9 executed this lease, intend for Exhibit G to be the
10 governing purchase and sale agreement?

11 A It was the outline of an agreement, yes.

12 Q And when you signed the lease did you understand and
13 agree that the essential terms of a purchase and sale
14 agreement as outlined in Exhibit G would be the essential
15 terms of a contract for purchase?

16 A The essential terms, yes.

17 Q Right. And we knew we had to still identify a
18 condominium unit, right. Correct?

19 A Correct, had not been built yet.

20 Q And we knew that it would have to be a horizontal
21 property regime created, yes?

22 A That is what the lease says, yes.

23 Q And we knew that we would have to identify a buyer's
24 attorney, a seller's attorney and an escrow agent,
25 correct?

1 A Correct.

2 Q But otherwise Exhibit G set forth the essential terms
3 of what Grapevine believed or intended would eventually
4 become the parties purchase and sale agreement, correct?

5 A Correct.

6 Q Okay. Now you testified that Grapevine was at all
7 time, during the third lease year, ready, willing and able
8 to purchase?

9 A Correct.

10 Q At any time during the third lease year or within a
11 120 days prior to the third lease year, did Grapevine
12 tender a \$25,000.00 dollar earnest money deposit to its
13 landlord pursuant to Exhibit G?

14 A Exhibit G was never signed. Usually escrow money is
15 given at the time a contract is executed.

16 Q At any time during the third lease year did Grapevine
17 ever tender a contract in the form of Exhibit G to its
18 landlord in order to exercise a purchase?

19 A No, we were trying to get a contract date or a
20 closing date scheduled so we could put it in the agreement
21 along with the other information.

22 Q And you understood that in order to execute a
23 purchase contract for the space that Grapevine would
24 require a written contract?

25 A Repeat the question.

1 Q Yes, ma'am. You understood as part of a real estate
2 transaction, the way those transactions typically work, is
3 that there is a written contract that sets forth the
4 essential terms of the transaction, correct?

5 A Correct.

6 Q And that written contract is executed by the parties,
7 correct?

8 A Correct.

9 Q And then at some point after that contract is
10 executed the parties schedule a closing?

11 A Correct.

12 Q Now, we have looked at lots of correspondence that
13 your Counsel sent, emails that you and your husband sent
14 requesting closing dates. But my question is, did you
15 ever tender a purchase contract?

16 A How could we, I am answering a question with a
17 question. But we didn't have the information to fill in
18 these blanks. There were no condominium documents, none
19 of these things were in there. And I also depended on my
20 attorney to do what needed to be done in order to get this
21 done.

22 Q Did you ever instruct your attorney to tender a
23 purchase contract?

24 A I don't recall but that was the end goal.

25 Q Did you ever instruct your attorney to tender a

1 \$25,000.00 dollar deposit to, as consideration for a
2 purchase contract?

3 A No. The condominium documents had to precede.

4 Q Right. That was the seller's obligation, right, is
5 to prepare the condominium documents?

6 A Correct.

7 Q Earnest money and a purchase offer would have been
8 buyer's obligations, correct?

9 A Correct.

10 Q And you never tendered a purchase money, right?

11 A Right.

12 Q And you never tendered a contract signed by you and
13 your husband on behalf of Grapevine?

14 A Depending on my attorney and I was assuming he was
15 doing things properly.

16 Q Right. But, and again, I am not trying to malign
17 anyone's attorney. But that would have been an issue
18 between you and your attorney, right?

19 A I was using his guidance and I don't believe he
20 steered me wrong. So I don't know where you are going
21 with this.

22 Q Let me ask this question. You would agree with me
23 that it would not be the seller's responsibility to
24 prepare a contract for you, right?

25 A It has happened before but --

1 Q But there is nothing that obligates the seller to do
2 that, is it?

3 A I don't think so.

4 Q And you would agree with me that the Exhibit G that
5 was intended to be the form of the contract specified that
6 upon execution of the contract there would be a \$25,000.00
7 earnest money deposit?

8 A Well, let me look at it. Yes, it says deposit due
9 upon execution of this agreement.

10 Q And none of the emails or correspondence that we
11 looked at earlier during your testimony mentioned anything
12 about, here is our earnest money or when can we give you
13 our earnest money or how do we get a contract executed.
14 It is not mentioned, is it?

15 A It is not.

16 Q You only ask, when can we set a closing date?

17 A Correct.

18 Q And when can we get the condo documents?

19 A Correct.

20 Q Then in April 7th of 2018 when you asked for a
21 closing date, that would have been within the third lease
22 year.

23 A I am sorry, repeat the question.

24 Q Yes, ma'am. You testified earlier about various
25 dates when things occurred. Your Counsel asked if there

1 had been a closing as of a certain date. April 7th of
2 2018 would have been within the third lease year, correct?

3 A April 7th of 2018 would have been in the third lease
4 year.

5 Q So under the terms of the lease with the purchase
6 option that you negotiated and executed, closing would
7 have been compliant with the terms of the option, correct?

8 A April?

9 Q Of 2018.

10 A Yes.

11 Q Okay. And on May 3rd of 2018, that still would have
12 been within the third lease year?

13 A Yes.

14 Q May 18th, that still would have been during the third
15 lease year?

16 A Yes.

17 Q June 6th of 2018, that still would have been during
18 the third lease year?

19 A Yes.

20 Q July 9th was a date you mentioned. That would have
21 been within the third lease year?

22 A Yes.

23 Q August 6th you talked about. That would have been
24 within the third lease year, correct?

25 A Correct.

1 Q August 24th, that would have been within the third
2 lease year, yes?

3 A Yes.

4 Q August 27th of 2018, that would have been within the
5 third lease year.

6 A Say that one more time.

7 Q August 27th?

8 A Of 2018, yes.

9 Q And in fact when your attorney sent a default letter
10 on October 5th, was still within the third lease year?

11 A Yes.

12 Q And when your attorneys filed suit on December 10th
13 of 2018, still within the third lease year, right?

14 A Right.

15 Q And so the period of time that the parties have
16 contractually agreed that this purchase could take place
17 have not expired when Grapevine declared its landlord in
18 default, correct?

19 A The period of time but the way I read the option is,
20 it is giving 120 days notice then the closing could occur
21 120 days later.

22 Q Right.

23 A But, yes, all of, from February 2nd, 2018 to February
24 1st of 2019 was all in the third lease year. But we gave
25 120 days notice and a proposed closing date and did not

1 receive affirmative or an alternate closing date. Just
2 says 120 days notice so I gave 180.

3 Q And you never tendered earnest money deposit and you
4 never --

5 A We could not get them to do the things they needed to
6 do to write the contract.

7 Q Where is the lease that it is the seller's
8 responsibility to write the contract?

9 A It doesn't but it is their responsibility to form the
10 horizontal property regime.

11 Q Now, Ma'am, the reason you attempted to execute the
12 option at the earliest possible date that you could under
13 the terms of your contract was because you believed that
14 was in Grapevine's best interest?

15 A Definitely.

16 Q Because you wanted to stop paying rent.

17 A We wanted to start paying our own mortgage, our own
18 mortgage, not someone else's.

19 Q And you didn't think that there was anything
20 dishonest about trying to do what was in your best
21 interest as long as you were in compliance with the
22 contract, correct?

23 A I am kind of insulted, actually, that you would say.
24 Not at all.

25 Q And you would agree that contracting parties, as long

1 as they are acting in good faith and they are acting
2 within the terms of their contract, they have the right to
3 negotiate and act in their own best interest, don't they?

4 A Yes.

5 Q And there is nothing unfair or deceptive about any
6 of that, is it?

7 A No.

8 Q Now, you have testified earlier today that you
9 believe that Grapevine should recover all rent payments
10 from February 2nd of 2018 on, correct?

11 A Yes.

12 Q And is there a specific provision of your lease
13 agreement that you were relying upon in support for that
14 position?

15 A No. But it seems only fair.

16 Q Grapevine continued to pay rent, correct?

17 A Yes, we are still paying rent.

18 Q Sure. And Grapevine is continuing to have use of its
19 premises, pursuant to the lease?

20 A That is up for debate. But the inside the walls,
21 yes.

22 Q Continuing to do business at that location?

23 A Despite several default notices, yes.

24 MR. MARTENS: Your Honor, would you just ask the
25 witness to answer my questions instead of editorializing

1 it every time.

2 THE COURT: Ma'am, as much as you can please directly
3 answer the question. But you are allowed to explain your
4 answers.

5 MS. SILLS: Okay.

6 Q Now, your testimony, I believe, this morning was,
7 sort of the entipus of this lawsuit is you just want to
8 purchase your space. That is why you filed the lawsuit,
9 correct?

10 A Correct.

11 Q And Building 6, Riverwalk River District Building 6,
12 LLC is Grapevine's landlord under this lease, correct?

13 A Yes.

14 Q Mark Mather is not a party to the lease agreement, is
15 he?

16 A He signed it.

17 Q Just as you did. He signed it as a representative of
18 a Corporate entity, didn't he?

19 A Yes.

20 Q Assured Administration, LLC was not a party to the
21 lease agreement or the purchase option?

22 A Again, it is printed in there.

23 Q GRH Development, LLC is not a party to the lease or
24 to the purchase option, is it?

25 A Repeat?

1 Q Yes, ma'am. GRH Development Resources, LLC, one of
2 the Defendant's in this case is not a party to your lease,
3 is there?

4 A Greens of Rock Hill, let me look at this. No, but
5 they act as a landlord.

6 Q They are not a party to this lease, are they?

7 A Property manager. No.

8 Q Greens of Rock Hill, LLC is not a party to this
9 contract, is it?

10 A It is printed on the signature page.

11 Q Where?

12 A Right under the landlord.

13 Q It says the Riverwalk River District Building 6 by
14 the Greens of Rock Hill as manager?

15 A Correct.

16 Q And on page one of the lease where it list the
17 parties. It says Riverwalk River District Building 6
18 called landlord and the Grapevine of Riverwalk called
19 tenant, correct?

20 A Correct.

21 Q Those are the parties to the lease, aren't they?

22 A I'm reading that the landlord, there are three
23 companies listed. I thought we went through this earlier.
24 My answer hasn't changed.

25 Q When Grapevine and you and your husband were looking

1 at space and considering various locations in the
2 Riverwalk District you didn't have any direct dealings
3 with Mark Mather during that process, did you?

4 A We did not.

5 Q And as you were negotiating the terms of the
6 commercial lease agreement, Exhibit 1, you didn't have any
7 direct communication or contact with Mr. Mather about the
8 terms of the lease agreement?

9 A Exhibit 1.

10 Q Yes, ma'am. The lease that has been introduced as
11 Exhibit 1.

12 A Oh, okay. Will you repeat the question?

13 Q Yes, ma'am. You didn't deal with Mr. Mather in terms
14 of negotiating the terms of the lease?

15 A No.

16 Q If you will, turn to paragraph three of the lease
17 agreement, please.

18 A The purpose?

19 Q Yes, ma'am. The purpose.

20 A Okay.

21 Q And the purpose as set forth in Grapevine's lease is
22 that the demise premises shall be used for the purpose of
23 operating a wine and craft beer shop in bar therein doing
24 business as the Grapevine Wine Shop/Wine Bar for such
25 incidental uses as may be approved by the landlord in

1 advance and in writing and for no other purpose or uses
2 whatsoever except as expressly outlined within this lease
3 relating to the assignment, correct?

4 A Correct.

5 Q There is nothing in the lease that says that
6 Grapevine will have a right to operate as a restaurant?

7 A No.

8 Q There is nothing in the lease that says Grapevine
9 will have the right to sell ice-creams and pastries?

10 A Not specifically.

11 Q Is there anything generally?

12 A Well generally you will find those things in a wine
13 bar.

14 Q Okay. And as you negotiated for this provision of
15 the lease you could have said add that to the lease
16 because those are the kinds of things we want to do when
17 we lease space from you, correct?

18 A I could have.

19 Q And you did not, did you?

20 A I did not.

21 Q You could have negotiated for a provision that said
22 we can sell tobacco products as part of our business,
23 correct?

24 A Correct.

25 Q But you did not, did you?

1 A I did not. Those are all things that we had sold at
2 our Baxter Village location.

3 Q That is exactly right, Ma'am. You knew what your
4 business was as you were negotiating this lease?

5 A As did the landlord.

6 Q But it wasn't the landlord's job to protect
7 Grapevine's interest, was it?

8 A It is a partnership, it should be.

9 Q Wasn't it a commercial negotiation?

10 A I see the landlord tenant relationship as a
11 partnership.

12 Q Okay. But you agree with regard with the lease you
13 actually signed, nothing says we can operate as a
14 restaurant?

15 A I have to read every word but, it is hard to memorize
16 every word.

17 Q Sure. Look at the backgrounding statements,
18 subparagraph A on the first page of the lease.

19 A Where it says mercantile.

20 Q And the word, mercantile, was a specific word that
21 you asked to be included in the lease?

22 A Correct.

23 Q You also asked to have included in the lease the
24 word, restaurant, to make sure you had all of your bases
25 covered?

1 A Correct. And I believe he said he had updated it.

2 Q But that didn't make it into a lease that was signed
3 by the parties?

4 A It appears not.

5 Q And you initialed the page that says mercantile and
6 not restaurant?

7 A No, they was suppose to be a restaurant nextdoor. So
8 this is a description of the building.

9 Q But, Ma'am, my question is specifically with regard
10 to Grapevine.

11 A Okay, yes.

12 Q Nothing in Grapevine's lease authorizes Grapevine to
13 operate as a restaurant, does it?

14 A Many wine bars are classified as restaurants. Most
15 have full kitchens, all kinds of tapist, we just have a
16 small place like break, almonds. We do have a full DHEC
17 certified kitchen.

18 Q Right. And, in fact, you have testified in the
19 administrative law court that Grapevine is considered a
20 restaurant?

21 A It could be because of the kitchen certification.

22 Q But you didn't negotiate for a provision of the lease
23 that says we can operate as a restaurant, did you?

24 A Wine bar and restaurant are sometimes, I mean a wine
25 bar can be a restaurant.

1 Q But doesn't the lease govern with regard with what
2 Grapevine can and can't do, isn't this the deal that you
3 negotiated and entered into?

4 A Yes, it is the lease.

5 Q And the lease says what it says, yes?

6 A It sure does.

7 Q And it doesn't say what it doesn't say, right?

8 A Or such incidental uses thereto.

9 Q As maybe approved in advance and in writing by the
10 landlord, correct?

11 A Yes.

12 Q And did Grapevine get written consent of the landlord
13 to operate as a restaurant?

14 A No but it says bar.

15 Q Did Grapevine ever get written consent of the
16 landlord to have exclusion possession of any common areas?

17 A Exclusive how?

18 Q Did Grapevine ever negotiate and receive advance
19 written consent of the landlord to set up chairs and
20 tables in the common area of the building?

21 A Repeat the question.

22 Q Did Grapevine get landlord's advance written consent
23 to set up chairs and tables in the common area of the
24 building?

25 A Written, I believe the common area description gives

1 us permission.

2 Q And so you are relying upon the description of common
3 area as the authority to set up your business and
4 operating on the patio areas or common areas of the
5 building?

6 A Yes and we did for three years.

7 Q And, in fact, the issue about the use of the common
8 areas only came up when the parties began discussion what
9 would happen when this lease ends and what premises
10 Grapevine would actually be acquiring under its option to
11 purchase?

12 A No, sir.

13 Q Didn't you testify earlier that the first time the
14 issues of the patio or common areas came up would have
15 been, I believe your testimony would have been in August
16 of 2018? As I understood your testimony, Mr. Mather came
17 and spoke to your husband and said, don't find yourself on
18 the wrong side of this contract?

19 A He said that. It wasn't a discussion.

20 Q And that all occurred during the third lease year,
21 yes?

22 A Yes.

23 Q And that all occurred as the parties were attempting
24 to reconcile their differing agreements or differing
25 positions on what needed to occur in order for the

1 purchase option to be executed?

2 A That occurred during a time when Mr. Mather came into
3 my business and pulled my husband out to basically scream
4 at him for double parking in front of the Grapevine. It
5 wasn't a negotiation discussion.

6 Q Now I believe you testified this morning, I am going
7 to hand you a couple of exhibits. Let's look at 28 first.
8 That was an email that you received from, or your manager
9 received from the property manager in September of 2018?

10 A Yes.

11 Q And Exhibit 29. That was an email you received or
12 your husband received from the property manager on October
13 2nd in response to a question that he asked about access
14 and use of the common areas, correct?

15 A This was a result of that conversation between Mr.
16 Mather and my husband.

17 Q Did the fact that Grapevine had just been served with
18 a lawsuit for a personal injury that occurred in the
19 common area of Building 6 have anything to do with your
20 husband's question?

21 A I don't believe so.

22 Q You do recall that there was a lawsuit related to a
23 patron of your business who was bitten by a dog?

24 A Yes.

25 Q And that dog attack occurred in the common area, not

1 in your leased premises?

2 A On the steps in front. And it wasn't an attack, it
3 was an accidental bite.

4 Q But the dog bite occurred on the common area?

5 A Yes.

6 Q Not in your leased premises?

7 A Correct. And their insurance handled it because it
8 is covered.

9 Q And your husband asked about access to patio and
10 outside seating in just a few days your attorney accepted
11 service of that lawsuit on behalf of the Grapevine,
12 correct?

13 A I am sorry. Will you slow down with your question.

14 Q Sure. Your husband asked about, what are our rights
15 for outdoor seating on October 1st.

16 A October 2nd or maybe it was the 1st. Yes, October
17 1st.

18 Q And the lawsuit that arose from a dog bite on the
19 common area of Building 6 was accepted by your attorneys a
20 week later. Does that sound right?

21 A I honestly don't remember when that happened, it has
22 been settled, it is over. It was an unfortunate accident.

23 Q And as we sit here today Grapevine's position is that
24 paragraph 33, the purchase option, correct?

25 A Yes.

1 Q And Exhibit G to the lease governs the terms of
2 purchase?

3 A Most of them, it is an outline.

4 Q With the exception of the things would have to be
5 filled in later, once the building is complete and the
6 property regime is created?

7 A Yes.

8 MR. MARTENS: Nothing further, Your Honor.

9 THE COURT: Any redirect, Mr. Staples?

10 MR. STAPLES: Very briefly, Your Honor.

11 THE COURT: Yes, sir.

12 REDIRECT EXAMINATION

13 By Mr. Staples:

14 Q Melanie, I have a few more questions for you. I know
15 it has been a long day. We looked at this earlier. The
16 description of your business is on the Defendant's
17 website, is it not?

18 A Yes.

19 MR. STAPLES: Nothing further.

20 THE COURT: Anything else, Mr. Martens?

21 MR. MARTENS: Nothing, Your Honor.

22 THE COURT: Thank you, Ma'am, you can step down. Mr.
23 Staples, you can call your next witness. Oh, Counsel, I
24 believe you had asked about having stipulations read?

25 MR. STAPLES: Yes, Your Honor.

1 THE COURT: Let's go ahead and do that. Ladies and
2 gentlemen, I am about to read you a set of stipulations.
3 These are facts that have been agreed on by both sides in
4 the case so you should treat these facts if they have been
5 proven by evidence in court. All right.

6 The parties agree the following facts are not in
7 dispute. Number one. There is a written commercial lease
8 agreement between the Grapevine of Riverwalk as tenant and
9 the Riverwalk River District Building 6, LLC; as landlord.

10 Number two. On July 26th of 2017 an attorney
11 representing the Grapevine of Riverwalk gave written
12 notice to the landlord of the Grapevine's intent to
13 exercise its option to purchase under the lease.

14 Number three. The written notice of Grapevine's
15 intent to exercise its option to purchase requested a
16 closing date of February 2nd, 2018.

17 Number four. The address for the demised premises as
18 defined in the lease is 829 Terrace Park, Suite 104, Rock
19 Hill.

20 Number five. Riverwalk River District Building 6,
21 LLC is the owner of Building 6 within what the demised
22 premises under the lease are located.

23 Number six. The Grapevine of Riverwalk paid
24 \$6,705.00 to Riverwalk River District Building 6 as a
25 security deposit under the lease.

1 Number seven. The Grapevine of Riverwalk has paid
2 rent to the River District in accordance with the lease.

3 Number eight. The commencement date and the written
4 commencement date as those terms are defined in the lease
5 was February 2nd, of 2016.

6 On October 5th, 2018, this is number nine, an
7 attorney representing the Grapevine gave written notice to
8 Riverwalk River District Building 6 of its alleged breach
9 of the lease, an option to purchase.

10 Number ten. Mr. David Williams was employed by GRH
11 Development Resources, LLC as the managing director of the
12 development and in that capacity he was generally
13 responsible for overseeing the construction of Building 6
14 within what the demised premises are located and also
15 responsible for the negotiation of the lease with the
16 Grapevine of Riverwalk.

17 Number eleven. Debbie McMillan has been employed as
18 office manager of GRH Development Resources from
19 approximately October of 2017 to the present.

20 Number twelve. Todd Brockmann is an attorney who was
21 engaged by on behalf of Riverwalk Building District 6, I
22 am sorry, Riverwalk River District Building 6, LLC to
23 assist with the creation of a horizontal property regime
24 for Building 6 in which the demised premises are located.

25 Number thirteen. Mark S. Mather is an employee of

1 GRH Development Resources, LLC.

2 Number fourteen. Mark S. Mather is the managing
3 member of GRH Development Resources.

4 Number fifteen. The Greens of Rock Hill is the
5 majority owner, 99.8 percent and the manager of Riverwalk
6 River District Building 6, LLC.

7 Greens of Rock Hill is owned and managed by Assured
8 Administration, LLC.

9 Mark S. Mather, number seventeen. Mark Mather is the
10 managing member of Assured Administration, LLC.

11 And number eighteen, Silvia Balan of New South
12 Properties was the property manager for Building 6 at
13 Riverwalk in 2018. All right. Thank you, ladies and
14 gentlemen.

15 MR. STAPLES: We call Alan Aschenbrenner.

16 Alan Aschenbrenner, being
17 first duly sworn, testified as follows:

18 DIRECT EXAMINATION

19 By Mr. Staples:

20 Q Good afternoon. Would you please introduce yourself
21 to the jury.

22 A My name is Alan Aschenbrenner.

23 Q And what do you do for a living?

24 A I am an architect by training and I work for a real
25 estate development company.

1 Q And what is the name of the real estate development
2 company that you currently work for?

3 A Cambridge Holdings based in Dallas, Texas.

4 Q And where did you work before Cambridge?

5 A At 505 Design.

6 Q And what is 505 Design?

7 A It is an architecture and design firm.

8 Q About how long did you work there, what were the
9 approximate dates of your tenure?

10 A Joined in early 2006 and left in May of 2015.

11 Q And just tell the jury very briefly, what positions
12 did you hold at 505 or what was your job at 505?

13 A Sure. I was the second employee in the Charlotte
14 office. We had an office in Boulder, Colorado and in San
15 Francisco. So I started out as a design architect. And
16 when I left the company I was a partner in the firm, one
17 of five partners.

18 Q And have you ever done any work as a designer
19 architect for Dave and Melanie Sills?

20 A I have. Our firm designed their Baxter Village
21 location.

22 Q Did you also do any work in connection with the
23 location at the Riverwalk?

24 A We did.

25 Q Have you ever done any work for the owner or

1 developer of the Riverwalk Development?

2 A I have a long history of working together.

3 Q Tell the jury specifically kind of what things did
4 you do at 505 on behalf of the Riverwalk Development?

5 A Early on in the development of the community, I think
6 it is a thousand acres, we, our firm partnered up with
7 another firm, Land Design. We worked on hundreds of
8 projects together and we were responsible for the project
9 vision and metrics book. I think we issued that in 2010.
10 So it was really a planning document to help them envision
11 the entire community. It was sort of a, telling the story
12 to future home builders, future residents, future tenants
13 in the commercial buildings. So it was really to help
14 them envision and create value for the land that they
15 owned.

16 Q And do you know David Williams?

17 A I do.

18 Q Was, were you working with David Williams when you
19 were working for the Riverwalk developer to create that
20 vision board that you described?

21 A Yes. He was our primary contact.

22 Q Did you play any role in introducing the Sills' to
23 Mr. Williams?

24 A So, yeah. We and at the time I believe Dave and his
25 family lived in Baxter Village. And so we knew each

1 other, our kids knew each other, went to school together,
2 our wives are good friends. And I am sure we have had a
3 few glasses of wine or beer at the Grapevine over the
4 years.

5 Q And tell the jury a little bit, why were you making a
6 connection between the Sills' and Mr. Williams, why would
7 you make that introduction?

8 A So, I mean the Grapevine was one of the first
9 projects that I worked on when I was at 505. I was a lot
10 younger and had less gray hair. But, you know, I had
11 spent a number of years prior to joining 505. I was a
12 stay at home dad, we had three boys under the age of three
13 and a half and we lived in Baxter. And I knew the Springs
14 family well, I was the town architect for Baxter. I was
15 involved in the commerce building which is the building
16 that the Grapevine is in. And so I got to know Dave and
17 Melanie and I knew what their model was and I thought it
18 was a great model. And I thought there is a lot of cool
19 master plans communities happening in the Southeast that
20 would be a great fit for their concept. And so, you know,
21 any time we worked as a firm on another project in the
22 community, we were involved in a lot of master planned
23 communities in the Carolina's. If the opportunity was
24 there for that match I would introduce them to the
25 developer to see if they could work out a deal.

1 Q And did you know what the Grapevine was looking for
2 in terms of a potential second location?

3 A Yes. I mean, I think they always were very clear
4 about their vision. We helped them create the visuals
5 behind it but they were always very clear that they wanted
6 to purchase their space. And that they were the
7 neighborhood wine bar, right. So it was a place for the
8 community to gather and just like their Baxter location,
9 part of our design efforts were in helping them select
10 fabrics for awnings and signage and outdoor lighting and
11 all of the outdoor furniture. All of those things that
12 were involved in their space.

13 Q So is it your understanding that Grapevine was
14 essentially looking to emulate, to replicate exactly what
15 they were doing at Baxter Village in their second
16 location?

17 A I mean, it can't ever be exact because every mixed
18 use building is different in shape and size and ceiling
19 heights and all of that. But the idea was that the color
20 scheme, the brand, the furniture, the vibe of the place
21 would be consistent.

22 Q Okay. I am going to hand you what has been
23 previously marked as Exhibit 13. Mr. Aschenbrenner, have
24 I handed you what is marked as Exhibit 13?

25 A Yes.

1 Q And it is an email from David Williams, is that
2 correct, to Melanie Sills?

3 A Correct.

4 Q From early of 2014?

5 A That's right.

6 Q And is there an attachment to that exhibit that, is
7 there an attachment to that email?

8 A It is.

9 Q And is that the schematic design package for the
10 mixed use building at the Riverwalk?

11 A Yes.

12 Q And what is the date on that design package?

13 A The 24th of January of 2014.

14 Q And do you recognize that schematic design package as
15 being something that was prepared by 505 Design?

16 A It was.

17 Q Was that prepared at the request of the Riverwalk
18 developer?

19 A It was.

20 Q Okay. And it appears that Mr. Williams has, in fact,
21 or did, in fact, send that on to Ms. Sills. Is that
22 correct?

23 A Correct.

24 Q And if you would turn with me to the second and third
25 pages of that. I believe there was a floor plan for that

1 building in particular?

2 A The floor plan, the site plan is on the second page.

3 Q Okay. And do you see where the tenant space is
4 labeled, wine shop?

5 A Yes.

6 Q And does that wine shop space also show areas denoted
7 for outdoor dining?

8 A It does.

9 Q Was that tenant space intended to, wine shop
10 reference intended to refer to the Grapevine?

11 A Yes. They were the only wine shop that we talked to.

12 Q And so was it your understanding that that package
13 there was intended to be a presentation to Grapevine
14 specifically as a marketing or an inducement for them to,
15 hey, come to the Riverwalk, we would love to have you
16 here.

17 MR. MARTENS: Your Honor, I have an objection. The
18 only way he would possibly know what would be hearsay.

19 THE COURT: Mr. Staples, I am going to sustain the
20 objection unless you can lay a foundation for that
21 question.

22 MR. STAPLES: Fair enough.

23 Q Mr. Aschenbrenner, was the Riverwalk developer trying
24 to promote an active outdoor type of lifestyle vibe, you
25 know, if you will, for the Riverwalk development?

1 A Absolutely.

2 Q And as part of that vision for this potential future
3 development at that point, did that include your
4 understanding, you know, that tenants would have access to
5 outdoor areas?

6 A Without question.

7 Q In your communications with Mr. Williams or frankly
8 anyone else on behalf of the Riverwalk development did
9 anyone ever tell you that that was not the intent, for the
10 Grapevine to have outdoor dining areas?

11 A No.

12 Q Now, there are a couple of dining areas that are
13 depicted. Is that correct?

14 A Yes.

15 Q There is one that is in front of the premises and
16 then there is one over to the side. Am I describing that
17 accurately?

18 A For the wine shop, yes.

19 Q Do you recall having any discussion specifically
20 about that outdoor dining area with Mr. Williams?

21 A Yes.

22 Q Can you tell the jury what you recall about that,
23 please.

24 MR. MARTENS: Objection, hearsay.

25 THE COURT: If y'all can approach, please.

1 (Whereupon, a bench conference was held in the
2 presence of the jury but out of the hearing of the
3 jury.)

4 THE COURT: Objection overruled.

5 Q Okay, Mr. Aschenbrenner, what do you recall about a
6 conversation with Mr. Williams regarding that sign,
7 outdoor dining area?

8 A So, I mean as I recall, at the time we were working
9 on the mixed use building. There was negotiation work
10 going on with the adjacent building that is referred as to
11 the B&A building, I think that is Bernie Ackerman's
12 business and so there was a shared property line. And
13 really, something that our firm always focused on is the
14 space between buildings because that is where people
15 gather. And so as we were working through the design of
16 the building and we were working with the civil engineer
17 that was on staff with the Assured group or the landlord,
18 we were working with them on the grading, finished floor
19 elevations to figure out where to get access to the
20 building. We have to provide accessible entrances and all
21 of that as the architect for the project. But also it was
22 largely governed by the discussion with the Grapevine and
23 how to make that space in between the buildings the best
24 space it could be for the community.

25 Q Okay.

1 A There were also discussions about generators and
2 transformers and meter banks and all of those things that
3 are part of civil engineer's work, not always thought of
4 on buildings and where they land and how they impact the
5 tenants.

6 MR. STAPLES: Your Honor, I offer my next exhibit.
7 It is an email from David Williams to Mr. Aschenbrenner
8 and others.

9 THE COURT: We are up to 35.

10 COURT REPORTER: Yes, sir. That is 35.

11 MR. MARTENS: Your Honor, the objection pursuant to
12 the parol evidence rule.

13 THE COURT: Yes, sir. The objection is overruled as
14 previously stated. Exhibit 35 is into evidence over
15 objection.

16 (Whereupon, Plaintiff's Exhibit 35 was admitted into
17 evidence.)

18 Q Mr. Aschenbrenner, is that your email address on this
19 email?

20 A It was at the time, yes.

21 Q At the time. And could you please read the first
22 paragraph of that email which begins at the City of Rock
23 Hill?

24 A Sure. And this is from Dave Williams. I met with
25 the City of Rock Hill Building official this morning to

1 discuss the possibility of locating the BNA generator on
2 property owned by Assured as shown on the attached civil
3 redline sketch. And they approved this idea, we will need
4 to work out the easements, et cetera.

5 Q And could you continue on, please, and read the next
6 paragraph?

7 A Sure. At our meeting last Thursday we had all agreed
8 that relocating the generator would be best for both BNA
9 and Assured to create an inviting courtyard area between
10 the buildings and I wanted to confirm this before we
11 re-plat the BNA parcel showing a side property line that
12 will be offset from the BNA building by five feet.

13 Q Does it appear that Mr. Williams reference any
14 attachments in that email?

15 A Yes. The civil redline sketch.

16 MR. STAPLES: Your Honor, this is my next exhibits,
17 the civil redline sketch.

18 MR. MARTENS: The same objection, Your Honor.

19 THE COURT: Objection is overruled.

20 Q Mr. Aschenbrenner, does this appear to be the civil
21 redline sketch.

22 THE COURT: For the record, this is Exhibit 36 into
23 evidence over objection.

24 (Whereupon, Plaintiff's Exhibit 36 was admitted into
25 evidence.)

1 A Yes.

2 Q And can you describe to the jury, briefly, what this
3 shows. I know it is hard for them to see at this point.

4 A Yes. So, a redline sketch is kind of back and forth
5 where we work with our client to help solve an issue or
6 resolve a conflict. And what this shows is the property
7 line and the, what was proposed as the generator location.
8 But suffice it to say that the, the adjacent building had
9 proposed a generator location which requires three to six
10 feet clearance around it. And then a wall around that and
11 that was directly adjacent to the front door for the
12 residential component of the mixed use building as well as
13 sort of, came into the patio space for the wine shop.

14 Q And is it your understanding that the Riverwalk
15 developer ultimately did, in fact, relocate that
16 generator?

17 A Yes. And part of that was also to make sure that the
18 property line, the shared property line with the BNA
19 building would be as close to their building as possible
20 and part of that was our discussion with the landlord to
21 keep as much of the patio on their property instead of the
22 adjacent property so that they could offer that, that
23 patio space to their residents and tenants.

24 MR. STAPLES: Your Honor, my next exhibit is another
25 sketch, similar to the one that we just admitted.

1 MR. MARTENS: The same objection, Your Honor.

2 THE COURT: The same ruling by the Court. Objection
3 is overruled. So Exhibit 37 into evidence over objection.

4 (Whereupon, Plaintiff's Exhibit 37 was admitted into
5 evidence.)

6 Q Mr. Aschenbrenner, is this a sketch that would have
7 been prepared around this time by 505 Design?

8 A Yes, it is.

9 Q And does this illustrate perhaps a little bit clearer
10 than that redline sketch, what it is that you guys were
11 talking about in terms of the relocation of the generator?

12 A It does. Yes, you can see the location labeled BNA
13 for the generator. And then in an attempt to illustrate,
14 you know, hard scape and land scape and how you would
15 screen some of those uses to preserve the integrity of the
16 experience for people using the space.

17 Q And just to be clear, the wine shop refers to the
18 Grapevine?

19 A Yes.

20 Q And this outdoor, this outdoor seating area with
21 tables and chairs was intended to benefit the wine shop?

22 A Yes.

23 Q After the Sills signed their lease at Riverwalk, did
24 they retain you to do some design and work for the new
25 location?

1 A Yes, I did the up-fit.

2 Q You did, in fact, do that up-fit?

3 A Yes.

4 Q Did part of that up-fit package include
5 recommendations for how to up-fit the outdoor patio areas?

6 A Yes.

7 Q And did the Sills actually implement those
8 recommendations, did they buy the furniture that you had
9 proposed?

10 A They did.

11 MR. STAPLES: Nothing further, Your Honor.

12 THE COURT: Mr. Martens.

13 CROSS-EXAMINATION

14 By Mr. Martens:

15 Q Mr. Aschenbrenner, good afternoon.

16 A Good afternoon.

17 Q Exhibit 37 which is up on this poster board. That is
18 a drawing that you did for your client, the landlord?

19 A For Assured Group, Dave Williams, yes.

20 Q And Exhibit 36, what you described as the redline
21 sketch, that was a document that you prepared for your
22 client, the landlord?

23 A That's correct.

24 Q And this wasn't a document that you prepared for
25 Grapevine?

1 A It was not.

2 Q And the redline wasn't a document you prepared for
3 Grapevine?

4 A It was not.

5 Q And I want to ask you this very, take a look at
6 Exhibit 13. And you were asked about some dates on this
7 document?

8 A Yes.

9 Q The date that is depicted on the color sketch of
10 Building 6 is what date?

11 A January 24.

12 Q Of 2014?

13 A 2014.

14 Q Flip to the next page. The document titled schematic
15 design. What is the date on that document?

16 A I can't read it on this printout.

17 Q Does it appear to be 24, September of 2014?

18 A It looks to me it says something for January,
19 something, something but I can't read it, it is on a
20 photocopy. I am sorry, I am looking at the revision date.

21 Q Look under schematic design on the right-hand side of
22 the page. What is the date posted there?

23 A I see something September, 2014.

24 Q Okay. So it is September of 2014?

25 A Right.

1 Q Several months later than the color photograph that
2 they looked a moment ago, the color sketch, correct?

3 A That's the, well, I am not entirely sure because I
4 can't read but sometimes there is an issue date for a set,
5 like a schematic package and then there is a revision date
6 that occurs along the way. But I don't, it is hard for me
7 to see the numbers.

8 Q The fact that the color sketch is dated January of
9 2014 and the floor plans are dated September, 2014, does
10 that suggest to you that these documents were created in
11 different points and time?

12 A They could very well be.

13 Q And if that were true then this would not be a
14 matched set of documents, correct?

15 A What I, I don't know what you mean by matched set of
16 documents.

17 Q I guess what I mean, there is no way for us to know,
18 is there, that all of these documents were produced at the
19 same point in time as part of the single package. One
20 page is dated January and other pages are dated in
21 September, correct?

22 A I don't know. Is there a difference between produced
23 at the same time or packaged at the same time. I am not
24 sure I, it is possible that there could have been multiple
25 exhibits put together for a purpose to present to a

1 prospect or something. It appears that --

2 Q Let me do this. Flip over to the next color diagram,
3 color schematic design that is Building --

4 A Yes.

5 Q And what is the date on that document?

6 A So typically when I look at the date I am looking at
7 the bottom right under revisions where it generally will
8 have a one, two, three and then a date. And that says 24,
9 January, 2014.

10 Q Why does the document, the schematic design, 24,
11 September 2014 in the far right-hand column, if it was
12 prepared in January.

13 A So typically there is an issue date of each phase of
14 a documentation.

15 Q Do you know the answer to my question in regard to
16 these documents?

17 A I am sorry. Can you ask the question again?

18 Q Yes, sir. If the documents were produced on a date
19 other than 24, September 2014, why do they bear the date,
20 24, September 2014?

21 A The only reason I could think would be that that was
22 a, that was a deadline or issue date for the package.
23 Typically you establish that date with a client and then
24 that is when the documents are issued for pricing or
25 before the next phase advances.

1 Q These are schematic designs, right?

2 A They are.

3 Q And they are not final finished plans?

4 A No.

5 Q And the building construction had not even been begun
6 when these schematic designs were produced?

7 A No.

8 Q And your Firm did not serve as the architect for the
9 actual construction of the building, did it?

10 A We were the design architect and we teamed up with an
11 architect of record.

12 Q Another company that was actually in place for the
13 final design?

14 A That's correct. For the documentation. It is a
15 schematic, not a final design. But the execution of the
16 construction documents.

17 Q Would have been a Firm other than yours?

18 A That's correct.

19 Q Okay.

20 MR. MARTENS: Nothing further, Your Honor.

21 THE COURT: Any redirect?

22 MR. STAPLES: No, Your Honor.

23 THE COURT: You can step down. Call your next
24 witness.

25 MR. STAPLES: Brian Wilson.

1 Brian Wilson, being
2 first duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 By Mr. Staples:

5 Q Good afternoon, Mr. Wilson.

6 A Good afternoon.

7 Q Would you please introduce yourself to the jury?

8 A I am Brian Wilson, I am a lawyer in Fort Mill. I
9 practice law in York County since 1985.

10 Q What type of law do you practice?

11 A I am a real estate lawyer.

12 Q Have you represented the Grapevine of Riverwalk?

13 A I have.

14 Q What were you hired to do?

15 A They had entered into a lease purchase agreement and
16 it had a term of years under which they would be a tenant
17 and should they choose, then they have the option to
18 convert the tenancy into, under a horizontal property
19 regime or condominium. And unlike most clients they
20 actually practiced due diligence or were ahead of the game
21 and didn't wait until they were in a pickle. And they
22 came to me and we exercised, I helped them exercise their
23 option to buy the land as a condominium. So that is why I
24 was hired and that is what I did.

25 Q Mr. Wilson, I am going to hand you what has been

1 previously introduced into evidence as Plaintiff's 2. Is
2 that a letter you sent on the behalf of Grapevine of
3 Riverwalk?

4 A It is.

5 Q Who was it directed to?

6 A To David Williams.

7 Q On behalf of?

8 A Well, he was the landlord seller's agent.

9 Q And is that letter dated July 26th of 2017?

10 A It is.

11 Q Was your letter delivered as it was addressed?

12 A It was.

13 Q And is it your intent in sending that letter to give
14 the landlord notice of Grapevine's intent to exercise its
15 option to purchase paragraph 33 of the lease agreement?

16 A It says exactly what you just said.

17 Q And did your letter propose any particular closing
18 date for the sale?

19 A It did. It proposed the closing date of February
20 2nd, 2018.

21 Q And why did you propose that particular closing date?

22 A Because that would have been the first day of, that
23 they could have exercised their option under the contract
24 documents. And, like I said, they had their ducks lined
25 up and they were ready to go.

1 Q And does that letter start at least 120 days notice
2 between the date of the letter and the proposed closing
3 date?

4 A It does.

5 Q Did you review Grapevine's lease prior to sending
6 that letter?

7 A I did.

8 Q Did you review the option to purchase contained in
9 paragraph 33 of that lease?

10 A I did.

11 Q And did you review the purchase and sale agreement
12 that is attached as Exhibit G to the lease?

13 A I did.

14 Q Does, in fact, your letter make a reference to that
15 purchase and sale agreement attached as Exhibit G to the
16 lease?

17 A It does.

18 Q And is it your understanding that the parties would
19 execute that purchase and sale agreement in connection
20 with the closing on the transaction?

21 A It does.

22 Q And now, I think we looked at the purchase and sale
23 agreement, we have all seen where there are some blanks in
24 that document that would need to be filled in. It was not
25 executed by the parties. Can you please tell the jury

1 what information would need to be provided in order to
2 complete Exhibit G. And I can hand you a copy of it if
3 you would like to look through it.

4 A Exhibit G should be some template for what a contract
5 would be in the future. So let's see what it is. Yes,
6 Exhibit G is a template for what a proposed future
7 contract might look like should the tenant exercised their
8 option to purchase. And as I set forth in my letter of
9 July 26th, I reference Exhibit G and I noted I had done a
10 review of the records with the South Carolina Secretary of
11 State's Office and York County Clerk of Court and neither
12 of those governmental offices revealed the existence of a
13 condominium project as was required in order to enter into
14 a contract. You have to specify what it is you are buying
15 so there had to be a condominium first for them to specify
16 what they are buying, second. And horizontal, a
17 condominium is a very specific thing, there is a master
18 deed that is created. There are rules and regulations of
19 a property owner's association. There are architectural
20 drawings that say you own from the floor of this elevation
21 to the floor of the elevation above you; if there is a
22 tenant; if there is another unit above you and what the
23 exterior parameters are of it. So it is very specific and
24 it is known to people in the real estate world what that
25 is.

1 Q Now, we heard some questioning from Mr. Martens
2 earlier about whether or not the Grapevine had actually
3 tendered any escrow deposit under this agreement. Could I
4 direct you, please, to section 3.1 of the purchase and
5 sale agreement, it is on page four. Let me know when you
6 are there, it is the very bottom paragraph. It is under
7 deposit on page four. I have one question for you there.
8 Does the purchase and sale agreement identify an escrow
9 agent to where that escrow deposit would be paid?

10 A It does not.

11 Q So would it then make sense that the Sills would not
12 know who to tender any escrow deposit to?

13 A That is --

14 MR. MARTENS: Objection, Your Honor, calls for
15 speculation.

16 THE COURT: I am going to sustain the objection.

17 Q Mr. Wilson, did you ever advise the Sills to tender
18 an escrow deposit?

19 A I did not. They were not in a position to do so. We
20 weren't in the position to create that contract in Exhibit
21 G until the landlord had created an actual thing for them
22 to buy. They had sold, previously, a piece of commercial
23 property. Under the tax code they could have done what is
24 known under, as a 1031 exchange where generally if you
25 sell one piece of commercial property and replace it with

1 a like kind property within a certain period of time you
2 don't have to pay a capital gain on the first sale. So
3 they had arranged such that would have been consistent
4 with a second closing time, to sell another piece of
5 commercial property to have funds on hand so that they
6 could replace it with this piece of property. So there
7 were funds on hand from that from which they could
8 complete the purchase had there been something for them to
9 purchase.

10 Q And I understand all of that. Would it make sense to
11 tender any escrow deposit before you actually had an
12 executed sale agreement.

13 THE COURT: Counsel, can y'all approach.

14 (Whereupon, a bench conference was held in the
15 presence of the jury but out of the hearing of the
16 jury.)

17 Q Mr. Wilson, can you send money to an escrow agent if
18 you don't know who the agent is?

19 A No.

20 Q Okay. Now, after you sent the letter on July of
21 2017, do you recall receiving an immediate response back
22 from the landlord?

23 A I do not recall receiving an immediate response back
24 from the landlord.

25 MR. STAPLES: Your Honor, I offer my next exhibit.

1 It is an email from, a couple of emails from Mr. Wilson to
2 Ms. McMillan.

3 MR. MARTENS: No objection, Your Honor.

4 THE COURT: Into evidence without objection.

5 (Whereupon, Plaintiff's Exhibit 38 was admitted into
6 evidence.)

7 Q Mr. Wilson, are you familiar with these emails that
8 you sent?

9 A I am.

10 Q And why did you send these emails?

11 A Well, I hadn't heard anything back in response from
12 my July 26th letter.

13 Q And I guess the last email, at least in this exhibit,
14 is dated September 20th, 2017, is that right?

15 A It is.

16 Q So approximately a two-month period you had not
17 received any response from the landlord?

18 A From July 26th to September 20th, correct.

19 Q And did that concern you at all that you had not
20 received a response?

21 A It did and it looks like, in bold I had tendered the
22 question, does Riverwalk River District Building 6, LLC
23 intend to honor its contract.

24 MR. STAPLES: Your Honor, I offer my next exhibit.
25 An email chain between Mr. Wilson and others.

1 MR. MARTENS: No objection.

2 THE COURT: That will be Exhibit 39, into evidence
3 without objection.

4 (Whereupon, Plaintiff's Exhibit 39 was admitted into
5 evidence.)

6 Q Mr. Wilson, if I can direct you to page 11 of this
7 email chain. Does that indicate when you first received a
8 response from the landlord following your letter in July
9 of 2017?

10 A Are you referring to Travis Hege?

11 Q Yes.

12 A So he said on October 13th, the copy and their
13 lawyer, Todd Brockmann and Debbie McMillan, an email to me
14 apologizing for the delay. We have been out of the
15 office.

16 Q Does it go on to say that looking forward to working
17 with you to get this completed?

18 A He does. And he would let me know once he determined
19 what needed to be done on their end and would touch base
20 to get it completed.

21 Q And now, if you flip forward to page 10 for me,
22 please. There is an email that you sent back to Mr. Hege,
23 Travis Hege on October 26th of 2017.

24 A Are you referring to October 26th?

25 Q Yes.

1 A Yes, that is an email from me to him. I copied him,
2 my client on that.

3 Q Melanie Sills?

4 A Yes.

5 Q And is the gist of your email, that you informed him
6 that, you say, Dear Mr. Hege, you will need an architect
7 licensed engineer to sign off on the condominium plans.
8 And at the bottom of your email, you asked him to confirm.
9 Will we be able to close on this condominium on February
10 2nd. Is that accurate up to this point?

11 A It is.

12 Q And then did you, in fact, offer to assist with the
13 creation of that regime?

14 A I did.

15 Q Did Mr. Hege or anyone else take you up on that
16 offer?

17 A They did not.

18 Q Now eventually does this email chain reflect that you
19 were in communication with Mr. Brockmann who was the
20 landlord's attorney?

21 A It would. I do remember communicating with Mr.
22 Brockmann.

23 Q In fact on November 7th of 2017 he emailed you and
24 requested that you direct any future emails to his
25 attention, on page eight of this email chain. Is that

1 correct?

2 A It is. Please direct any future emails to my
3 attention. That is from him to me.

4 Q And if you would turn, please, to page six of the
5 email chain. An email from Mr. Brockmann up at the top.
6 Does he say, we are working with the bank and the engineer
7 on this process. We cannot commit to any particular date
8 at this point so please wait for us to advise on the
9 timing.

10 A Correct, that is dated November 28th, 2017.

11 Q And then on page five it looks like you had some
12 follow-up with Mr. Brockmann in early January of 2018
13 asking him to advise on the status formation of the
14 regime?

15 A And I reminded him it was scheduled to close in four
16 weeks and if it was not going to be ready to please let me
17 know, the anticipated date of readiness and any proposed
18 accommodations that they were going to give to the seller
19 for any delay on closing date.

20 Q And then on page four, Mr. Brockmann, on January 4th
21 of 2018, again informed he could not commit to any
22 particular date at this point?

23 A It is in process but we cannot commit to any
24 particular date at this point.

25 Q And you replied to him on that same day and it is a

1 lengthy email, it spans a couple of pages but do you
2 ultimately recall making some proposal to Mr. Brockmann
3 about what Grapevine could do with its rent payments if
4 that closing date was not met?

5 A Yes. I stated that, while the horizontal property
6 regime, so that is the accompanying documents, the master
7 deed, is still being processed 42 months after entering
8 into the contract. That I suggested that the contract be
9 amended to keep the seller from being in breach of
10 contract. And that paragraph, the contract be amended to
11 reflect the base rent of zero dollars until the seller is
12 able to complete the sale and that the buyer would
13 continue to pay its share of taxes and common area
14 expenses that is set forth in paragraph 12 of the lease.
15 And the amounts which would have been base rents continued
16 to be paid in place of an escrow be applied to the
17 purchase price to allow the horizontal property regime
18 time to be completed. And if that escrow amount exceeded
19 the purchase price then the escrow payments would cease
20 and this gives the seller incentive to complete the
21 horizontal property regime and allows the parties to move
22 forward in good faith.

23 Q And did Mr. Brockmann respond to that email?

24 A He did not.

25 Q Did you interpret that to mean that Mr. Brockmann was

1 unable to --

2 MR. MARTENS: Objection, Your Honor, it is not
3 relevant how he may have interpreted Mr. Brockmann's
4 silence in response.

5 THE COURT: I am going to allow. What was the
6 question again, sir?

7 Q Maybe it wasn't most artful. I guess, did you
8 interpret Mr. Brockmann's, back that he had told you on
9 two occasions that he could not commit to any particular
10 closing date, that Mr. Brockmann was not going to be in a
11 position to close this deal on February 2nd, 2018?

12 A Well, in fact there is an email to me from Mr.
13 Brockmann dated January the 18th where I noted, I found no
14 response to my correspondence of January the 4th. So that
15 was two weeks later. And in the absence of response or
16 any showing of good faith I have referred my clients to
17 attorney, Josh Howard, who has prior litigation experience
18 involving this building. And it was not too late for your
19 client to provide evidence of good faith to close the sale
20 on this condominium unit as promised. And if your client
21 breaches the contract without explanation then my clients
22 are left with only one recourse. Please advise if your
23 client has any explanation for its absence of diligence in
24 completing this conveyance. It has been 175 days since
25 notice of exercise of option to purchase was delivered to

1 your client.

2 Q Did you ever receive any indication that the landlord
3 would be ready, willing and able to complete the sale on
4 February 2nd of 2018?

5 A No, I did not.

6 MR. STAPLES: Your Honor, my next exhibit, email
7 exchange between Mr. Wilson and Ms. McMillan.

8 MR. MARTENS: No objection, Your Honor.

9 THE COURT: Number 40 in evidence without objection.
10 (Whereupon, Plaintiff's Exhibit 40 was admitted into
11 evidence.)

12 Q Mr. Wilson, are you familiar with these emails?

13 A I am.

14 Q That you sent to Ms. McMillan?

15 A I did.

16 Q Does it appear that on January 22nd, 2018 you had a
17 call with Ms. McMillan and then you sent her a copy of
18 Exhibit G which is the purchase and sale agreement?

19 A I did.

20 Q And then on January 29th of 2018 you asked Ms.
21 McMillan if she had any update?

22 A I did.

23 Q And did Ms. McMillan respond to you over your emails?

24 A She did not.

25 Q I have handed you what has been previously marked as

1 Exhibit 18. Is that an email from Mr. Mather on January
2 30th of 2018 providing you some draft master deed and
3 bylaws and architectural plans for construction?

4 A It is.

5 Q Do you have any idea why Mr. Mather sent you those
6 documents?

7 A I presumed it was to close on the sale of the
8 condominium.

9 Q And were they final documents or were they draft
10 documents?

11 A They were draft documents.

12 Q And on January 30th, 2018, that would have been what,
13 two or three days before the closing date that you had
14 proposed?

15 A Correct.

16 Q Does Mr. Mather state in his email that he will
17 provide or complete the final documents, to substitute the
18 details in the final version?

19 A We will substitute the details below in the final
20 version. Please note that the demised premises and the
21 lease of the property are --

22 Q -- did you ever receive a final version from Mr.
23 Mather or from Mr. Brockmann or from anyone else?

24 A I did not.

25 Q Did you ultimately review those documents at the

1 request of Melanie Sills?

2 A I did.

3 Q And did you approve those documents?

4 A Amazingly, yes.

5 Q And was that approval communicated back to the
6 landlord and the developer?

7 A It would have been to Brockmann and to Ms. Sills.

8 MR. STAPLES: Your Honor, my next exhibit email from
9 Mr. Wilson to Ms. McMillan.

10 MR. MARTENS: No objection.

11 THE COURT: Exhibit 41 into evidence without
12 objection.

13 (Whereupon, Plaintiff's Exhibit 41 was admitted into
14 evidence.)

15 Q Mr. Wilson, I just want to focus you on the email on
16 the first page that carries over to page number 2. It
17 says an email dated March 27th of 2018. Are you able to
18 read that, what you wrote to Ms. McMillan on that date to
19 the jury.

20 A Debbie, it appears that the condo documents have been
21 created and are ready to be recorded by the developer.
22 The Grapevine is ready, willing and able to perform their
23 purchase. Is the developer ready to complete the sale.
24 Please advise.

25 Q And to the best of you knowledge, was the Grapevine

1 actually ready, willing and able to close on the purchase
2 of the premises?

3 A They were.

4 Q And is it your recollection that Grapevine was always
5 ready, willing and able to complete the purchase from
6 February 2nd of 2018 through, and here we are, March 27th,
7 2018?

8 A To the best of my knowledge, yes.

9 Q Did you receive any response from Ms. McMillan to
10 your email of March 27th, 2018?

11 A I did not.

12 Q Did anyone tell you that Grapevine did not have the
13 right to purchase this space?

14 A No.

15 Q Did anyone ever tell you there was not a valid and
16 enforceable lease, an option to purchase for that space?

17 A No.

18 Q Did anyone ever object to your letter from July 26th,
19 2017 giving the landlord notice of Grapevine's intent to
20 exercise their option to purchase?

21 A No.

22 Q To your knowledge did the landlord ever complete the
23 horizontal property regime?

24 A To my knowledge, I don't believe they have even to
25 now.

1 Q And to your knowledge, has the landlord ever agreed
2 to a closing date?

3 A To my knowledge they have not.

4 MR. STAPLES: Your Honor, if I may have a moment to
5 confer.

6 Nothing further, Your Honor.

7 THE COURT: Mr. Martens.

8 CROSS-EXAMINATION

9 By Mr. Martens:

10 Q Good afternoon, Mr. Wilson.

11 A Good afternoon.

12 Q You were serving as purchaser's counsel in this
13 transaction, correct, sir?

14 A I tried to.

15 Q And in a real estate transaction the purchaser has
16 certain obligations?

17 A Correct.

18 Q In this particular transaction, part of the seller's
19 obligation was to prepare horizontal pro regime acts and
20 master deed and types of things that would be necessary to
21 create a condominium that the Grapevine could purchase,
22 correct?

23 A Correct.

24 Q And I believe your testimony was that fairly early in
25 2018 Mr. Mather sent you a draft document reflecting that

1 that work had been completed?

2 A There were draft documents, we just went through the
3 email chain that reflected that.

4 Q And they were acceptable to you and buyer's counsel?

5 A Yes.

6 Q Did you ever, as buyer's counsel, tender or proffer a
7 form of a purchase contract on behalf of your client?

8 A No. Because we didn't have a horizontal property
9 regime created in order to specify what was being
10 purchased.

11 Q With the exception of that omission, the fact that
12 there wasn't a horizontal property regime to identify a
13 particular piece of property, was it your understanding
14 that Exhibit G to the lease would be the governing
15 document of any purchase transaction?

16 A A form of that that would have contained the
17 particulars.

18 Q And would have been needed to transform Exhibit G
19 from an attachment, from a lease to an actual purchase
20 contract?

21 A To complete the material terms of the document and
22 execute it.

23 Q Beginning at page, GRH301, Mr. Wilson.

24 A I am there.

25 Q So you complete the material terms, what terms would

1 need to be completed in order to transform Exhibit G into
2 a purchase contract?

3 A Like I said, you need to have the actual horizontal
4 property regime so you can identify what is being
5 purchased.

6 Q So that would be --

7 A More or less, C, which is the identifying, where you
8 identify what is this thing.

9 Q Section C?

10 A The purchase price is set forth, all of that is in
11 there; complete the closing date.

12 Q So Part E, select the closing date.

13 A Yes.

14 Q Part G?

15 A Where, again, that is where you have got to create
16 the master deed, register it with the Clerk of Court.

17 Q Part H would need to be completed?

18 A Yes, same thing.

19 Q Part I, would need to be completed?

20 A And then you would have created a proposed budget for
21 the whole, not just this unit but the whole thing. And
22 then generally how condominiums are done. If you are
23 buying ten percent of the whole condominium then ten
24 percent of the expenses would be your expense. And so
25 generally they set forth, of course on the front end they

1 don't know exactly what all the expenses are; taxes,
2 insurance, common area maintenance. But they, there are
3 people that are in real estate can sort of generally do
4 that.

5 Q And that would fall under section J?

6 A That would be under J.

7 Q And then you would need to select attorneys?

8 A Then the condominium documents, the form of the
9 condominium deed. So here is what the deed is going to
10 look like is under K; and the buyers's attorney, the
11 seller's attorney, the brokers.

12 Q Are there any other terms that would need to be
13 changed, negotiated, revised in order to transform Exhibit
14 G into an actual purchase contract other than the ones we
15 just discussed?

16 A You can do very simple contracts and you can do very
17 complicated contracts. So as long as you identify, what
18 is it that is being sold, what is the purchase price, when
19 are we doing it, who are the parties buying and selling.
20 Those are the material provisions of any contract so you
21 can do that on a postcard and that is enforceable. And
22 you can have a hundred page document and that to be
23 enforceable.

24 Q And in your letter that you sent in July of 2017, you
25 specifically referred to this Exhibit G, right?

1 A I did.

2 Q And you, and the reason you did that was because you
3 understood that Exhibit G set forth the material terms
4 that the parties had already negotiated for this proposed
5 transaction?

6 A Generally speaking that is what I would have done.

7 Q They had the price and who was going to get what
8 credits, how those things were going to be applied. And
9 the only thing we had to do was create a horizontal
10 property regime, pick a closing date, pick a closing
11 attorney and close it?

12 A Yes. The purchase price on here, who the parties
13 are. The meat on the bone is the condominium itself and
14 the budget and the percentages. And those were absent on
15 this.

16 Q And you weren't proposing to renegotiate the terms of
17 that Exhibit G?

18 A No. The parties had entered into a contract. I
19 wasn't trying to renegotiate it until the very end there.
20 You say that I said, okay, now if it looks like you can't
21 perform then how about we do these other things.

22 Q Thank you, that is all I have.

23 THE COURT: Any redirect?

24 MR. STAPLES: No, Your Honor.

25 THE COURT: Counsel, can I see y'all briefly.

1 (Whereupon, a bench conference was held in the
2 presence of the jury but out of the hearing of the
3 Dave.)

4 Dave Williams, being
5 first duly sworn, testified as follows:

6 THE COURT: Call your next witness.

7 DIRECT EXAMINATION

8 By Mr. Meckler:

9 Q Good afternoon, Mr. Williams.

10 A Good afternoon.

11 Q We are going to try to be quick. I know the jury is
12 getting tired and we are going to try to get to the point
13 and get you out of here. If you could just, state your
14 name for the jury and let them know who you are.

15 A Dave Williams.

16 Q Mr. Williams, who did you work for back in June of
17 2014?

18 A In June of 2014 I worked for GRH Development
19 Resources.

20 Q Okay. And you were involved on the front end meeting
21 with Melanie and David on the lease opportunity for
22 Riverwalk?

23 A Yes.

24 Q And your involvement in reviewing the lease, oversee
25 the construction, did all on the building that they

1 occupy?

2 A Yes.

3 Q And they were looking to emulate their concept at
4 Baxter Village, correct?

5 A Yes.

6 Q And they wanted a lease with the condition that they
7 had an option to purchase?

8 A Yes.

9 Q And a location that would have outdoor space that
10 they could use?

11 A Yes.

12 Q And having that option to purchase was actually a
13 condition of them for signing the lease, correct?

14 A Yes.

15 Q And at the time the, you informed them that the space
16 was not for sale outright?

17 A Correct.

18 Q But that is what they really wanted, they wanted to
19 purchase that outright initially, correct?

20 A That is my understanding.

21 Q And you discussed with them that the purchase option
22 was a requirement of their lender that would require them
23 to lease for at least two years?

24 A That was my understanding. I was not in direct
25 contact with our lender on that requirement.

1 Q Understood but that is what you conveyed to Melanie
2 and Dave at Grapevine?

3 A Yes.

4 Q And the purchase price of \$270,000.00 dollars was
5 based on the cost of their space, based on the pro rata
6 share of initial construction. Is that correct?

7 A Yes.

8 Q And that is a price that ended up in the lease
9 agreement?

10 A Yes.

11 Q And you were the one that negotiated the lease
12 agreement, correct?

13 A Yes.

14 Q And you did that on behalf of the lender?

15 A Yes.

16 Q And you are working for GRH Developments at the time,
17 correct?

18 A Yes.

19 Q And you informed Mark Mather about the option to
20 purchase that was contained in that lease, correct?

21 A Yes. We informed Mark about the option to purchase.
22 I am not sure what level of detail we went into at the
23 time but he was informed.

24 Q He was aware of it?

25 MR. MARTENS: Your Honor, if he can speak up.

1 THE COURT: Mr. Williams, try to speak up.

2 Q And in any event Mr. Mather is the one that signed
3 the lease?

4 A Yes.

5 Q And it is my understanding that no other commercial
6 tenant at Riverwalk had or was offered an option to
7 purchase. Is that correct?

8 A To the best of my knowledge that is correct.

9 Q And their lease was executed before the building was
10 constructed?

11 A Yes.

12 Q And they were the first commercial tenant at the
13 Riverwalk Building?

14 A Correct.

15 Q And they discussed with you before they signed that
16 lease that they wanted outdoor seating because it was at
17 Baxter and it had been very successful?

18 A Correct.

19 Q And so the lease had a provision for use of the
20 common area where they could put out their patios and
21 chairs and use it, correct?

22 A I don't recall that specific, but that is typical in
23 any lease, the common areas are used by all the tenants.

24 Q Okay. And you actually showed them drawings which
25 show the property with the patio, chairs and tables and

1 everything, correct?

2 A Yes. We had several marketing brochures prepared
3 that showed that concept.

4 Q And the only explanation you could provide at your
5 deposition has to --

6 MR. MARTENS: Your Honor, may I. I understand, I am
7 going to have to object to the continuing leading of the
8 witness.

9 MR. MECKLER: Your Honor, I may lead a witness who is
10 adverse to us. Mr. Williams was a representative from the
11 landlord who is adverse in this party. Under the rules I
12 am allowed.

13 THE COURT: Go ahead. I will overrule the objection.

14 Q And when you were deposed you had no explanation as
15 to when the lease was signed, there was no written
16 provision for the outdoor use other than the common area?

17 A That is correct, that is my recollection. You know,
18 the figure attached to the lease was the latest drawing
19 from the architectural drawings at the time and both
20 parties overlooked including anything that outlined the
21 outdoors.

22 Q And y'all wanted to keep the lease with the option to
23 purchase confidential, correct?

24 A We did.

25 Q Because you didn't want other tenants knowing that

1 that was something that Grapevine had gotten?

2 A At the time it was not in the company's best
3 interest.

4 Q Okay. And you remember receiving the letter from Mr.
5 Wilson executing the purchase option?

6 A Yes.

7 Q And did you respond to Mr. Wilson?

8 A No.

9 Q Did you give the letter to Mark Mather?

10 A Yes.

11 Q And did you give it to him because he was the owner?

12 A Yes.

13 Q And at the time you were the managing director for
14 GHR Development, correct?

15 A Yes.

16 Q During your deposition Mr. Staples asked you about a
17 website called Riverwalk Carolina's. Do you recall that?

18 A Yes.

19 Q And you said it was just the name of the website that
20 the landlord and other parties use to market the location,
21 building and space. Is that correct?

22 A That was the domain name for the project.

23 Q Right. And do you recall landlord, photographs of
24 the Grapevine space?

25 A Yes.

1 Q And they were taken at Grapevine and it was a stage
2 photo shoot for marketing purposes?

3 A Correct.

4 Q And that marketing shot actually showed Grapevine
5 with the tables and the chairs on the patio being used and
6 people enjoying the space, correct?

7 A I know it showed with the doors up, I don't recall
8 the location of the tables.

9 Q But it depicted the outdoor scene?

10 A Yes.

11 Q And you recall them using the outdoor patio space,
12 correct?

13 A Correct.

14 Q And that they had tables and chairs and customers and
15 others would come in and drink and hang out and enjoy?

16 A Yes.

17 Q And at the time, at least when you were deposed, you
18 did not feel that that was a violation or unauthorized use
19 of the lease, of the space, correct?

20 A Correct.

21 Q And nobody deemed that to be a default, not the
22 landlord or anyone else, correct?

23 A Not that I am aware of.

24 Q And the only conversations that you had about the
25 outdoor patio space was with the property manager by just

1 making sure all the trash was picked up?

2 A Correct.

3 Q And you were there until --

4 A July of 2017.

5 Q Okay. But you never had any discussions with anybody
6 along the lines of whether they had permission or were not
7 authorized to use that patio space?

8 A Not that I recall.

9 Q And you indicated that at the time Grapevine was the
10 only restaurant space there, is that correct?

11 A During the deposition?

12 Q Yes.

13 A In 2017 the Pump House would have also been active
14 and I believe maybe the Grass Taps.

15 Q I was referring to Grace Building 6. Is it fair to
16 say that your position was Grapevine was the only
17 restaurant in Grace Building 6?

18 A Well, it was the only wine bar, there was another
19 restaurant called the Brass Taps.

20 Q In your deposition the question to you was, and I
21 will get it if you want me to. But tell me this is
22 correct.

23 Question. So far as you know back in time, you know,
24 Grapevine had outdoor seating. I mean they are the only
25 restaurant space. Right?

1 A Correct. That's correct.

2 Q The next question was. I mean that they are the only
3 ones that would have had, you know, a restaurant that
4 would have been with outdoor seating. You don't recall
5 anything about that being improper use.

6 And your response was, no.

7 A Correct.

8 Q And then the question was. Do you think it is
9 misleading at all from the Grapevine's perspective to be
10 shown schematic drawings depicting outdoor spacing for
11 Riverwalk and GRH to overly promote marketing outdoor
12 dining and things like that if, in fact, the lease does
13 not provide them the use of the outdoor patio.

14 And your answer was. I mean the site was marketed
15 for outdoor seating.

16 Is that correct?

17 A Correct.

18 Q And then it goes on. There is some objections. And
19 then the question is. In your opinion is that misleading
20 at all.

21 And your answer --

22 MR. MARTENS: Your Honor, I am going to object to
23 this at this point. The same issue as before. We dealt
24 with this motion in limine. Mr. Williams was not an
25 employee or a manager at the time of his deposition. And

1 the question seeks the admission of a known party, he was
2 not a party when he gave the deposition and he is not a
3 party today. It is improper to ask this witness what he
4 thinks about propriety or impropriety.

5 MR. MECKLER: Your Honor, we are not moving to submit
6 his transcript. I am asking if he agrees with what he
7 said. He was the representative of the landlord,
8 negotiating the space with them. If he felt it was
9 misleading --

10 THE COURT: I am going to permit the question. Just
11 put the deposition aside and just ask the question
12 directly.

13 MR. MECKLER: Okay.

14 Q Given what we have just discussed, in your opinion
15 was that misleading?

16 MR. MARTENS: Objection, calls for speculation. The
17 party is not here as an expert.

18 THE COURT: He was the party that negotiated the
19 lease. I am going to allow the question.

20 A The site was marketed with the outdoor space, two
21 sites in that building were marketed for outdoor space.

22 Q And the question was, in your opinion is that
23 misleading at all?

24 A I could see in this case how that could be construed
25 as misleading.

1 Q Thank you, Mr. Williams. And my last question is, as
2 far as you know Grapevine complied with all of its terms,
3 correct?

4 A To the best of my knowledge.

5 Q Those are all the questions I have. Thank you.

6 THE COURT: Mr. Martens.

7 CROSS-EXAMINATION

8 By Mr. Martens:

9 Q Good afternoon, Mr. Williams. During your
10 negotiations with Melanie Sills that resulted in the
11 execution to the lease agreement, did she have an
12 opportunity to make whatever revisions, suggestions,
13 changes that she wanted to insert into the lease
14 provisions?

15 A Yes.

16 Q Dave and Melanie Sills have an opportunity to consult
17 with Counsel if they chose to do so prior to entering into
18 the lease?

19 A Yes.

20 Q Did you provide a complete copy of the lease
21 agreement to them for review prior to execution?

22 A I believe so, yes.

23 Q I have looked at this before. But the purpose of
24 the, stated in the lease agreement, doesn't say anything
25 about restaurant use, does it?

1 A Which paragraph?

2 Q Paragraph three, sir.

3 A It does not.

4 Q And it doesn't say anything about Grapevine having
5 exclusive use of any common areas?

6 A Which paragraph?

7 Q Paragraph 15.

8 A It is not exclusive right to use the common areas.

9 Q That means it is in conjunction with anybody else,
10 everybody else, as a tenant or a occupant of the building?

11 A Correct.

12 Q Were you actually present when Dave and Melanie Sills
13 executed this lease agreement?

14 A I don't recall.

15 Q Okay. And you negotiated the lease but Mr. Mather
16 signed the lease in his capacity as a manager of the
17 landlord entity, correct?

18 A I negotiated the lease in conjunction with Matt
19 Blackum. And, yes, Mark had this, authority to sign on
20 behalf of the company.

21 Q And so the agreement governed Grapevine's occupancy
22 of this space was what was set forth in Exhibit 1 executed
23 by the parties, right?

24 A Correct.

25 Q And what you may have discussed or subjectively

1 agreed or understood isn't as important as what is in this
2 document, is it?

3 A Correct.

4 Q And the reason there is a written document because
5 sometimes people like you move on and there has to be
6 something to guide the parties relationship, correct?

7 A Correct.

8 Q Thank you, that is all I have.

9 THE COURT: Any redirect?

10 MR. MECKLER: No, Your Honor.

11 THE COURT: Any objection releasing this witness from
12 his subpoena?

13 MR. MARTENS: None from the Defendant, Your Honor.

14 MR. MECKLER: No, Your Honor.

15 THE COURT: Thank you, sir, you are excused. Ladies
16 and gentlemen, that will end the testimony for today. I
17 will let you go. Remember, please don't discuss this case
18 with anyone, with each other or anyone at home. Please
19 don't do any outdoor research. Other than that, thank you
20 for your attention, we will see you back at 9:30.

21 (Whereupon, the jury was excused from open court for
22 the day.)

23 THE COURT: Anything from the plaintiff before we
24 break for the day?

25 MR. MECKLER: Nothing that I can think of, Your

1 Honor.

2 THE COURT: Anything from the Defense?

3 MR. MARTENS: No, Your Honor.

4 THE COURT: Will see y'all at 9:30 tomorrow.

5 (Whereupon, the trial will resume the next day at
6 9:30 a.m.)

7 August 25, 2021.

8 THE COURT: Our jury is up, is the Plaintiff ready to
9 proceed?

10 MR. MECKLER: Yes we are, your Honor.

11 THE COURT: Is the Defense ready to proceed?

12 MR. MARTENS: Ready, Your Honor.

13 THE COURT: Bring the jury, please.

14 (Whereupon, the jury came into open court at
15 approximately 9:42 a.m.)

16 THE COURT: Good morning, ladies and gentlemen,
17 welcome back. Was everyone able to follow the
18 instructions I have been giving you over night. Thank you
19 very much. Call your next witness.

20 MR. STAPLES: Call Anthony Swainey.

21 Anthony Swainey, being
22 first duly sworn, testified as follows:

23 DIRECT EXAMINATION

24 By Mr. Staples:

25 Q Good morning.

1 A Good morning.

2 Q Would you please introduce yourself to the jury.

3 A Sure, my name is Anthony Swainey, I work with Bank
4 OZK.

5 Q And what is your position with Bank OZK?

6 A Managing director of the commercial real estate
7 group.

8 Q And is that for the entire bank?

9 A Yes, sir.

10 Q Okay. How long have you worked at Bank OZK?

11 A Since November 17th of 2008.

12 Q And does Bank OZK, is that recently known as the Bank
13 of the Ozarks?

14 A Yes, former name was Bank of the Ozarks.

15 Q Has Bank OZK or Bank of the Ozarks played any role in
16 connection with the development out at Riverwalk?

17 A We finance various developments out there.

18 Q And are you the person at the bank that would be most
19 knowledgeable about those financing activities?

20 A Yes, sir.

21 Q Is Building 6 at the Riverwalk, where the Grapevine's
22 premises is located, one of the buildings that the bank
23 financed?

24 A Yes, sir.

25 Q Did Mr. Mather play any role in connection with those

1 loans?

2 A He was, yes, he did.

3 Q Can you describe what his role was?

4 A Sure. He is the owner of various entities that are
5 borrowers and guarantors of the loan.

6 Q And I believe at your deposition testimony in this
7 case you used the word that he was a sponsor?

8 A Correct.

9 Q What is a sponsor?

10 A That it is an analogous term we use when the
11 individual may not be a guarantor of our loan but an owner
12 of a entity that is a guarantor of our loan.

13 Q And, Mr. Swainey, do you also know David Williams?

14 A I do.

15 Q Did he play any role in the connection with the
16 banks's financing down at the Riverwalk?

17 A He did.

18 Q What was Mr. Williams role?

19 A He was, we would consider him a developer of the
20 project.

21 Q A developer of the project, correct?

22 A Yes.

23 Q Okay.

24 A That would just be a term we would use.

25 Q And I believe in your deposition you testified that

1 he was also your point of contact, correct?

2 A Correct.

3 Q Did you have any discussions with Mr. Williams
4 regarding Grapevine's lease?

5 A I believe I did back in 2014.

6 Q And do you recall, generally, what those
7 conversations were about?

8 A I don't recall the specifics. It was just general
9 lease terms.

10 Q Okay. But the bank knew that Grapevine had signed a
11 lease in Building 6 down at the Riverwalk development?

12 A Yes.

13 Q Back approximately at the time that they did, in
14 fact, sign that lease in June of 2014?

15 A Correct.

16 Q Did you know at that time that Grapevine's lease
17 contained an option to purchase?

18 A Yes, I believe we did.

19 Q And did that fact, was that any concern to the bank
20 at that time?

21 A No, sir.

22 Q Did the bank play any role in negotiating or drafting
23 the Grapevine's lease?

24 A No, sir.

25 Q Are you generally aware that one of the allegations

1 Grapevine has made in this case is that David Williams,
2 acting on behalf of the Riverwalk developer,
3 misrepresented that the two-year lease requirement before
4 Grapevine could purchase the space was a lender
5 requirement?

6 A I am, am I generally aware of that? I have heard
7 that through these proceedings, yes.

8 Q Did Bank OZK or Bank of the Ozarks require that
9 Grapevine lease its space for two years before it could
10 exercise its purchase option and buy the space?

11 A No, sir.

12 Q Did Bank of the Ozark require that Grapevine lease
13 its space for any period of time before it could exercise
14 its purchase option and buy the space?

15 A No.

16 Q To the best of your knowledge did anyone at the bank
17 ever tell Mr. Williams that Grapevine had to lease its
18 space for two years before it could purchase its space?

19 A No.

20 Q Does the bank still have an active or outstanding
21 loan on Building 6?

22 A Yes.

23 Q In light of that fact, is there anything that the
24 bank would have to do before the landlord could sell the
25 premises to Grapevine?

1 A Can you repeat that question.

2 Q Sure. In light of the fact that there is an
3 outstanding loan issued by the bank for Building 6, if the
4 landlord wanted to sell Grapevine's premises to the
5 Grapevine, is there anything that the bank would have to
6 do in order to make that happen?

7 A Yes.

8 Q Can you please tell the jury what that would be?

9 A We would require a modification of our loan to allow
10 the release of that potential, I am not sure if the
11 property has been subdivided yet, to offer a release.

12 Q I was going to say, I believe the phraseology you
13 used was a partial release of --

14 A Yes.

15 Q Does that basically mean that because the loan
16 applies to the entire building, if the landlord is going
17 to sell part of that building, that that part that is sold
18 would have to be released from collateral. Grapevine's
19 premises would no longer be subject to the loan?

20 A That is correct.

21 MR. STAPLES: Your Honor, I offer my next exhibit, it
22 is an email from Craig Ostrander to Chris Rodriguez
23 regarding that partial release of collateral.

24 THE COURT: We are up to Exhibit 42. All right.

25 MR. MARTENS: No objection.

1 THE COURT: Into evidence without objection.

2 (Whereupon, Plaintiff's Exhibit 42 was admitted into
3 evidence.)

4 Q Mr. Swainey, are you familiar with that email?

5 A I believe so, yes.

6 Q What is the date on that email?

7 A February 14, 2019.

8 Q Do you know if this email was sent after Grapevine
9 filed its lawsuit?

10 A That I do not know.

11 Q Is the evidence in this case shows that Grapevine
12 filed its lawsuit in December of 2018, did this email come
13 after that?

14 A Yes, that would be accurate.

15 Q And if the evidence in this case shows that the third
16 lease year, under Grapevine's lease, ran from February 2nd
17 of 2018 through February 1st of 2019, did this email come
18 after that?

19 A Yes.

20 Q Does this email, is this email from Mr. Ostrander and
21 the request for that partial release for collateral that
22 we discussed?

23 A Yes.

24 Q Are you aware of any, any request for a partial
25 release of the collateral pertaining to Grapevine's space

1 was communicated to the bank prior to that date of
2 February 14, 2019?

3 A Sir, there is another email that I remember reading
4 but I do not remember.

5 Q Okay. Is there any reason why the bank would not
6 agree to release Grapevine's space as partial collateral?

7 MR. MARTENS: Your Honor, objection, calls for
8 speculation.

9 THE COURT: He is an Officer of the bank, so I am
10 going to allow it.

11 A Would you repeat the question?

12 Q Yes, sir. Is there any reason why the bank would not
13 agree to release Grapevine's space as partial collateral
14 for the loan?

15 A Yes.

16 Q There is a reason why it would?

17 A There could be a number of reasons.

18 Q Okay. Are you aware of any reason in this instance
19 why it would not agree to release that collateral?

20 A We had not performed our full due diligence at this
21 point. So I can't answer that question.

22 Q Okay. To your knowledge, did the landlord ever
23 follow through with its request for the partial release of
24 collateral?

25 A Not to my knowledge.

1 Q Do you know if an appraisal was ever completed in
2 connection with that request.

3 A I do not think the bank ordered an appraisal but I
4 could be incorrect.

5 Q And you testified earlier that a partial release of
6 collateral would require a loan modification. Is that
7 correct?

8 A Yes.

9 Q And in connection with a loan modification, does that
10 typically mean that the borrower would have to put up
11 additional collateral or perhaps provide an additional
12 guarantor of the loan?

13 A If we were to modify the loan there could be various
14 options.

15 Q And if, in fact, the bank would require a borrower to
16 put up additional collateral or provide additional
17 guarantee, do you agree that those are things that would
18 cost the developer more money or increase the developer's
19 potential liability in an event of a default under the
20 loan?

21 A Those would be things that would cause more risk to
22 the borrower, yes.

23 Q Did the bank ever complete a partial release of
24 collateral for Grapevine's space and Building 6 at the
25 Riverwalk development?

1 A No, sir.

2 Q And do you believe that the reason it did not
3 complete that partial release because the landlord never
4 followed through with its request?

5 A Yes.

6 Q Did the bank do anything to prevent or delay a
7 partial release of collateral for Grapevine's space?

8 A No.

9 MR. STAPLES: Your Honor, my next Exhibit is a
10 construction loan agreement, Building 6.

11 MR. MARTENS: No objection.

12 THE COURT: Exhibit 43 in evidence without objection.
13 (Whereupon, Plaintiff's Exhibit 43 was admitted into
14 evidence.)

15 THE COURT: Counsel, can I see y'all at sidebar real
16 quick.

17 (Whereupon, a bench conference was held in the
18 presence of the jury but out of the hearing of the
19 jury.)

20 Q Mr. Swainey, the Judge raised a good point about the
21 prior Exhibit that we looked at, the email from Mr.
22 Ostrander to Rick Rodriguez. Is it your understanding
23 that Craig Ostrander is someone that was employed on
24 behalf of the Riverwalk development?

25 A At one time he was employed.

1 Q And is Rick Rodriquez, who Mr. Ostrander sent that
2 email to, was he at that time an employee of the Bank of
3 the Ozark?

4 A Yes, sir.

5 Q And is Rick Rodriquez someone that worked with you?

6 A Yes, sir.

7 Q Okay. If you would then, turn back to that
8 construction loan agreement. And I know this is a lengthy
9 document but are you generally familiar with this?

10 A Yes, sir.

11 Q Let's just walk through some of the basics of this.
12 This is a construction loan agreement. Is this the
13 document that memorializes the bank's loan for the purpose
14 for the initial financing for construction of Building 6
15 at the Riverwalk?

16 A Yes, sir.

17 Q And the lender is Bank of the Ozarks, what is now
18 known as Bank of OZK?

19 A Correct.

20 Q Who is the borrower under this loan?

21 A Riverwalk River District Building 6, LLC.

22 Q If you would, please, turn to page 32 of the
23 agreement. I believe that is the signature page.

24 A Yes, sir.

25 Q Did you sign this loan agreement on behalf of Bank of

1 the Ozarks?

2 A I did.

3 Q And who signed the loan agreement on behalf of the
4 borrower, Riverwalk River District Building 6, LLC?

5 A It was signed by the sole member and manager of
6 Greens of Rock Hill, LLC; which is a sole member and
7 manager of Riverwalk River District Building 6, LLC;
8 Assured Administration, LLC; by Mark Mather, the manager.

9 Q And there is also on this signature page a couple of
10 guarantors, the Greens of Rock Hill, LLC; and Assured
11 Administration, LLC; does it appear that Mark Mather
12 signed on behalf of both of those entities as manager?

13 A Yes, sir.

14 Q Now, the presence of guarantors on this loan, does
15 that mean that if the borrower, Riverwalk River District
16 Building 6, LLC, were to default under the loan, that the
17 bank could pursue, not only the borrower but also each of
18 the guarantors?

19 A Yes, that is correct.

20 Q Is it your understanding that the financials for RB6
21 and Greens of the Rock Hill roll up to Assured
22 Administration?

23 MR. MARTENS: Your Honor, hearsay.

24 THE COURT: I am going to overrule the objection.

25 Q Do you want me to repeat the question?

1 A If I recall correctly, they do roll up to Assured
2 Administration.

3 Q And according to this document, Mark Mather is the
4 manager of Assured Administration?

5 A Yes, that is correct.

6 Q And is the fact that these financials do, in fact,
7 roll up to a higher tier entity, Assured Administration,
8 is that why the bank required these guarantors or one
9 reason why the bank --

10 A One reason, yes.

11 Q Is another reason because the borrower entity,
12 Riverwalk River District Building 6, LLC did not have
13 sufficient liquidity or net worth to secure the loan by
14 itself without guarantors?

15 A That could be one other reason, yes.

16 Q If this RB6, this Building 6, LLC, is that what we
17 might call a single purpose entity?

18 A Yes, I believe it was.

19 Q Can you describe for the jury just generally what a
20 single purpose entity is?

21 A A single purpose entity is typically used to hold
22 property and then you will have an owner of that entity,
23 it could be an individual or another entity, that would
24 own that entity. And, well, I will let you explain why we
25 have limited liability companies, if you would like.

1 Q Well, sure. Well, I guess in follow-up to that, is
2 it a single purpose entity or a single asset entity
3 generally only has one asset or a limited amount of
4 assets?

5 A Correct, correct.

6 Q And typically in the real estate context you see that
7 where the entity, the only asset that it really has the
8 building that it owns, not simply a bank account for
9 operating expenses?

10 A That's correct.

11 Q Mr. Swainey, if you would, please, turn to the next
12 page, page 32. I am sorry 33. This is an information
13 schedule for the loan, is that correct?

14 A Yes, that is correct.

15 Q So does this schedule lay out the basic terms of the
16 loan?

17 A Some of the terms, yes.

18 Q And just to walk through it quickly. The borrower is
19 identified, again, as Riverwalk River District Building 6,
20 is that correct?

21 A Yes.

22 Q And then we have the two guarantors, Assured
23 Administration, LLC; and the Greens of Rock Hill, LLC;
24 right?

25 A Correct.

1 Q And the bank is Bank of the Ozarks?

2 A Correct.

3 Q Would you read to the jury, please, the purpose of
4 the loan at the bottom of that page?

5 A To finance a construction of a four-story
6 approximately 36,000 gross square foot mixed use,
7 (retail/apartment; (24 unit) project in Rock Hill, S.C.,
8 (the project).

9 Q So you testified to it earlier, just to confirm. The
10 purpose of this loan was to finance the construction of
11 Building 6 at Riverwalk?

12 A That's correct.

13 Q And is it your understanding that building was going
14 to be mixed use, approximately 36,000 square feet, retail,
15 apartments. What is the amount of the loan reflected in
16 this document?

17 A Lesser of two-million, fifty thousand, forty-eight
18 percent of the cost according to the development budget or
19 forty-nine percent of the value of the premises.

20 Q And do you know what amount, in fact, was initially
21 provided to the borrower?

22 A I believe two-million, fifty was the amount.

23 Q If you would turn with me to the next page, on page
24 34. There is a listing of retail tenants. Is the
25 Grapevine of Riverwalk, Inc. one of the tenants that is

1 listed there?

2 A Yes, sir.

3 Q Turn back to page 33. What is the effective date of
4 the loan agreement?

5 A June 30th, excuse me, July 30th, 2014.

6 Q And if the evidence shows that Grapevine's lease had
7 been fully executed by June 23rd, 2014, you agree that
8 this loan was made shortly after Grapevine signed its
9 lease?

10 A Yes, sir.

11 Q Turn to page 21 of the loan agreement. I want to
12 direct you to approximately the middle of that page, the
13 section of tenant leases and leasing. Could you please
14 read the second to the last paragraph on that page that
15 begins, borrower shall at all times.

16 A Borrower shall at all times promptly and faithfully
17 perform or cause to be performed all of the covenants,
18 conditions and agreements contained in all tenant leases
19 and retail leases, hereafter existing on part of the
20 landlord. Lessor or licensor, thereunder to be kept and
21 performed. Borrower shall not do or suffer to be done any
22 act that might result in a default by the landlord.
23 Lessor or licensor under any such tenant lease or retail
24 lease and shall not further assign any such tenant lease
25 or retail lease or any such rents except to bank as

1 provided under documents.

2 Q That is fine, thank you. Is this section on tenant
3 leases and leasing, these are covenants that the borrower
4 makes to the bank, is that correct?

5 A Yes, that is correct.

6 Q And so the bank or the borrower promised to the bank
7 that it would promptly and faithfully perform all of its
8 obligations under leases and that it would not permit
9 itself to be in default of any lease, is that a fair
10 description of that covenant?

11 A Yes, that is correct.

12 Q And does the next covenant on the next paragraph say
13 that borrower, Riverwalk River District Building 6, LLC,
14 in this instance, shall interact with any tenants in a
15 professional manner consistent with management practices
16 for properties similar to the improvements in the area
17 which the improvements are located, including its
18 decisions with respect to the enforcement of borrowers
19 obligations under the tenant leases, and it goes on. Did
20 I read that correctly?

21 A Yes, sir.

22 Q Has the bank undertaken any independent investigation
23 into whether its borrower is in compliance with those two
24 covenants?

25 A No, it has not.

1 Q Is it your general understanding that what Grapevine
2 alleges in this case is that Riverwalk River District
3 Building 6, LLC, as the landlord, is in breach of its
4 lease for failing to sell the space to the Grapevine
5 pursuant to an option to purchase contained in its lease
6 agreement and has otherwise acted unprofessionally and
7 wrongfully?

8 MR. MARTENS: Your Honor, I am going to object.
9 Allegation of this lawsuit are a matter of record. What
10 Mr. Swainey's understanding of those allegations, it is of
11 zero relevance.

12 THE COURT: I am going to sustain the objection.

13 Q Can I have a moment to confirm?

14 THE COURT: Yes, sir.

15 Q Mr. Swainey, if the borrower, Riverwalk River
16 District Building 6 did, in fact, breach its lease
17 agreement with Grapevine, would that also be a breach of
18 its covenant under the construction loan agreement?

19 A It would.

20 Q Thank you, nothing further.

21 THE COURT: Mr. Martens.

22 CROSS-EXAMINATION

23 By Mr. Martens:

24 Q Mr. Swainey, good morning.

25 A Good morning.

1 Q Now, you are not the original relationship manager of
2 the Bank of OZK for this relationship, correct?

3 A That is correct.

4 Q Scott Gad?

5 A That is correct.

6 Q And, in fact, Scott Gad was the relationship manager
7 in 2014 when this loan would have been taken out, correct?

8 A Sir, I do not recall the time at which Scott was at
9 the bank but I do believe at the beginning of 2014 he was
10 a relationship manager.

11 Q And so you don't have any knowledge about what Mr.
12 Gad, as the relationship manager, may have told
13 representatives of Riverwalk River District Building 6
14 about what the bank would or would not require as
15 conditions of this loan, correct?

16 A That is correct. He could have said something
17 outside of my knowledge.

18 Q And if Mr. Gad had told the bank's customer,
19 Riverwalk River District Building 6 that we will require a
20 two-year lease commitment, you would not have been privy
21 to that discussion, correct?

22 A That is correct.

23 Q And you would not have knowledge about what Mr. Gad
24 may or may not have said, correct?

25 A Unless it was memorialized in a document, that is

1 correct.

2 Q And at that point in time Mr. Gad had authority to
3 speak on behalf of the bank, did he not?

4 A He was not able to approve a loan on behalf of the
5 bank but he did have authority to go about his business,
6 yes.

7 Q Okay. Now, you were the primary underwriter for this
8 loan, correct?

9 A Once Scott left the bank I became the underwriter
10 loan officer.

11 Q And you wrote what is called a credit memo, right?

12 A Correct.

13 Q And a credit memo is an internal bank document that
14 the bank would use in its underwriting process and to
15 determine whether or not to underwrite this loan?

16 A Correct.

17 Q And do you recall, sir, that in that credit
18 memorandum that you drafted you specifically mentioned a
19 lease with Grapevine of Riverwalk as a material term that
20 the bank would want to see as a condition of making the
21 loan?

22 A Yes, I reference that their lease had been executed
23 or was soon to be executed.

24 Q And that was something that the bank considered
25 important, wasn't it?

1 A Yes.

2 Q In fact, the bank considered that to be a condition
3 of making this loan, didn't it?

4 A We had certain conditions that we required of the
5 loan of the borrower.

6 Q And one of those conditions was they had to have at
7 least two retail leases entered into with tenants?

8 A Correct.

9 Q And your credit memorandum specifically mentioned
10 Grapevine of Riverwalk as one of the two tenants that the
11 bank would require as a condition of the loan, correct?

12 A Do you have the credit memo that I referenced, to
13 answer that question?

14 Q I don't know that I have it. I can probably find it
15 if the Court would like me to do so.

16 THE COURT: Well, I will leave it up to you but I
17 will give you some time to look for it, if you would like.

18 Q Let me and I will let my associate look for that and
19 if we find it we will come back to that. And you were
20 asked some questions about who was the bank's contact with
21 the borrower. And Matt Blackum was actually the primary
22 contact from the borrower, correct?

23 A Yes, I would say so.

24 Q Okay. And so Mr. Gad was the bank's primary contact;
25 Matt Blackum was Riverwalk River District Building 6

1 primary contact. And the, the two principals that were
2 negotiating the terms of this loan, correct?

3 A Yes, sir. I would say that, that Matt and Dave
4 Williams worked closely together. And so I would say that
5 both of them were my contacts.

6 Q If you will, let's take a look at Exhibit 43. I want
7 to ask you some questions about that as loan, the
8 construction loan agreement. Now, do you have it in front
9 of you, sir?

10 A Yes, sir.

11 Q So the jury understands. So the term of, the life of
12 a loan at the bank. A credit memorandum is an internal
13 document, right?

14 A That's correct.

15 Q And that precedes the execution of a loan agreement?

16 A Yes, absolutely.

17 Q If you look at page 12 of Exhibit 43, under retail
18 leases. Would you read the first sentence of paragraph
19 4.1.5 to the jury?

20 A Borrower shall have deliver to bank, certified fully,
21 executed copies at least two retail leases for all or a
22 portion of the retail premises. Such retail leases
23 meaning the following requirements.

24 Q Okay. You can stop there. And then if you would
25 look farther down where the sentence begins, bank hereby

1 consents to and approves. Can you read that to the jury.

2 A Sure. Bank hereby consents to and approves of the
3 following retail leases and agrees that such retail leases
4 satisfy the requirements of this section, 4.1.5a.

5 I. That certain commercial lease agreement entered
6 into by, and between borrower as landlord and Three Amigos
7 Company, LLC; d/b/a Charlotte Running Company, LLC; as
8 tenant dated June 16th, 2014.

9 II. That certain commercial lease agreement entered
10 into by and between borrower as landlord and the Grapevine
11 of Riverwalk, Inc. as tenant dated June 23rd, 2014.

12 III. That certain commercial lease agreement entered
13 into by and between borrower as landlord and Glow Beauty
14 Lounge, LLC as tenant dated June 5th, 2014.

15 Q Okay. So the bank required as a condition of its
16 loan retail leases, correct?

17 A Yes.

18 Q Bank specifically mentioned in its loan agreement
19 with the borrower that the lease agreement with Grapevine
20 would satisfy the bank's requirement, correct?

21 A Yes. At least one other lease, that's right.

22 Q Turn over to the next page and look with me, section
23 6.1.14, under tenant leases.

24 A Yes, sir.

25 Q And this is under a section of the loan agreement

1 called representations, warranties and covenants, correct?

2 A That's correct.

3 Q And representations and warranties reads and I am
4 looking on page 16, sir, if you will.

5 In order to induce the bank to enter into this loan
6 agreement and to make the loan as herein provided,
7 borrower and guarantor make the representations and
8 warranties set forth below in this section. Did I read
9 that accurately, sir?

10 A Yes, sir.

11 Q Now turn over to paragraph 6.1.14. Read that.

12 A All of the retail, this is titled, tenant leases.
13 All of the retail leases and tenant leases are valid and
14 in full force in effect, in accordance with all of their
15 terms. And there is no default by any party thereunder
16 including without limitation any default retail tenant and
17 the payment of rent, additional rent or other charges due
18 and payable under the retail leases. Except as to the
19 tenants no other parties are in possession of any portion
20 of the premises as leases or otherwise. And there are no
21 oral or unrecorded leases applicable for effecting the
22 premises.

23 Q What does that mean?

24 A The entire paragraph?

25 Q Yes, sir?

1 A That, generally leases are in full force and effect.
2 And at this time there is no rent due to anyone and there
3 is no default by the tenants.

4 Q And it also says there is nobody in possession of any
5 portion of the premises as lessees or otherwise without a
6 recorded lease agreement, correct? Is that correct?

7 A Yes, that is correct.

8 Q And that was a representation and a warranty that the
9 bank required of the landlord as a condition of making the
10 construction loan, correct?

11 A That is correct.

12 Q So the bank required its borrower to warrant that the
13 leases that we represented to you, as actual leases, are
14 valid and enforceable and in effect, correct?

15 A Yes, that is correct.

16 Q If you will, sir, turn over to page 23, paragraph
17 6.2.19. And section 6.2.19, is still in a section called
18 borrowers, covenants and agreements, right? It is in a
19 section called borrowers, covenants and agreements?

20 A Yes, sir. I will confirm that, just one second.
21 That's correct.

22 Q What are borrowers, covenants and agreements?

23 A They are agreements that the borrower is willing to
24 make to the loan and states that they will not, that they
25 will continue to abide by those.

1 Q So they are promises that the borrower makes to the
2 lender to say, these are the things that we will continue
3 to do once you make your loan?

4 A That's correct.

5 Q Turn over to page 23, paragraph 6.2.19. Tell me when
6 you are there.

7 A I am here.

8 Q Paragraph 6.2.19 reads that borrower shall not,
9 without the prior written approval of the bank, terminate,
10 amend or otherwise modify or permit any other entity or
11 person to terminate, amend or otherwise modify any retail
12 lease. And then it continues with some other language.
13 Did I read that correctly, sir?

14 A Yes.

15 Q And so as a condition of making this loan the bank
16 obtained a covenant from its borrower, that the borrower
17 would not terminate, amend or otherwise modify any of the
18 retail leases that had been represented as being enforced,
19 correct?

20 A Without bank's consent.

21 Q That's correct. Without bank's consent. And these
22 are all material terms of the loan, correct?

23 A Termination amending or otherwise modifying?

24 Q Well all the terms we just looked at. Those are all
25 things that the bank insisted upon as a condition of

1 loaning Riverwalk River District Building 6?

2 A Are you referring to the covenants and agreements?

3 Q Yes sir, the covenants, the warranties. Everything
4 that is in this document is stuff that the bank required
5 to be in the document before it would make, fund the loan,
6 correct?

7 A Yes, that is correct.

8 Q Okay. I understand your title is Market President?

9 A Managing Director.

10 Q Managing Director. And you, a big chunk of your work
11 is commercial lending, right?

12 A Yes.

13 Q And a big chunk of that is making loans like this to
14 entities like Riverwalk River District Building 6?

15 A Correct.

16 Q And you had a lot of clients who were landlords of
17 buildings with commercial tenants?

18 A Correct.

19 Q And it is not at all uncommon in your line of work to
20 have instances where your borrower or landlords get in
21 disputes with their tenants, is it?

22 A I would say that is, I cannot remember what you said
23 at the beginning. You said it is not at all uncommon. it
24 happens from time to time, yes.

25 Q Let me ask it this way. In your line of work is it

1 common or uncommon for borrowers who are landlords to
2 sometimes have disputes with their tenants?

3 A It happens from time to time.

4 Q In fact, when you were deposed you said it is common?

5 A Okay, it is common.

6 Q And in your line of work, at least as of the date of
7 your deposition in May of this year, you had never
8 requested or required a meeting with one of the borrower,
9 with a borrower who was a client of yours because you
10 learned about a dispute between your borrower and one of
11 its commercial tenants, had you?

12 A I do not recall.

13 Q And you never requested or required, with
14 specifically with regard to Building 6, you have never
15 requested or required a meeting as a result of anything
16 you have learned about this lawsuit?

17 A That's correct.

18 Q And as a result of anything you have learned about
19 this lawsuit you have never requested or required,
20 requested or issued a notice of default against your
21 borrower?

22 A That's correct.

23 Q Correct?

24 A Yes, that's correct.

25 MR. MARTENS: May I have a moment to consult with my

1 client?

2 THE COURT: Yes, sir.

3 Q Mr. Swainey, when did you become aware of this
4 lawsuit?

5 A I do not recall.

6 Q Several months ago, at least?

7 A At least.

8 Q And for several months the bank hasn't declared a
9 default as a result of anything it has learned about this
10 lawsuit?

11 A That's correct.

12 Q And a result of this knowledge of this lawsuit,
13 haven't requested any meeting with the borrower to try to
14 determine whether a default should be declared?

15 A That's correct.

16 Q Thank you, nothing further.

17 THE COURT: Mr. Staples?

18 MR. STAPLES: Very briefly, Your Honor.

19 REDIRECT EXAMINATION

20 By Mr. Staples:

21 Q Mr. Swainey, just to be clear, without any leases
22 assigned there would not be a loan for Building 6?

23 A That is correct. We require at least two leases to
24 be signed.

25 Q The Grapevine of Riverwalk is not a party to that

1 construction loan agreement, is it?

2 A No, sir.

3 Q Was it a requirement of that construction loan
4 agreement that Grapevine lease its space for two years
5 before it exercised an option to purchase?

6 A Not that I am aware of, no.

7 Q Do the words of that loan agreement matter?

8 A Yes.

9 Q Nothing further.

10 THE COURT: Mr. Martens?

11 RECROSS-EXAMINATION

12 By Mr. Martens:

13 Q Mr. Swainey, just so we are clear on this. You have
14 no knowledge of what Mr. Gad may have conveyed in his
15 discussions with Mr. Blackum about what the bank would not
16 require, correct?

17 A That's correct.

18 Q Thank you.

19 THE COURT: Mr. Staples, anything else?

20 MR. STAPLES: Not from the witness, Your Honor.

21 THE COURT: Any objection to this witness being
22 excused from his subpoena?

23 MR. STAPLES: Not from the Plaintiff.

24 THE COURT: From the Defense?

25 MR. MARTENS: No, Your Honor.

1 THE COURT: You can step down. Thank you, sir. Call
2 your next witness.

3 MR. MECKLER: Your Honor, at this time we are going
4 to read in the 30(b)(6) deposition transcript portions for
5 Riverwalk. If it please the Court, I was going to sit up
6 there and play the part of the 30(b)(6) witness and let
7 Mr. Staples read the questions.

8 MR. MARTENS: Your Honor, as I understand the rules,
9 the time they seek to do that is meant, an opportunity for
10 me to assert objections. I don't know if that is
11 something we want to take up outside --

12 THE COURT: Ladies and gentlemen, I will ask y'all to
13 step back to the jury room for a moment.

14 (Whereupon, the jury was excused from open court.)

15 THE COURT: Yes, sir.

16 MR. MARTENS: So, Your Honor, for the Defense there
17 are a couple of issues I want to raise. And the first is
18 really primarily, I understand the Court may allow this
19 and we argued this through motion in limine and I need to
20 raise it as an objection. And it is similar to the
21 objection we raised with regard to the deposition
22 testimony of Mark Mather. And that is that at the time
23 these depositions were taken the only party, the only
24 Defendant to the case was Riverwalk River District
25 Building 6, LLC. Mr. Mather, I am sorry, Mr. Ostrander

1 and Silvia Balan were designated as 30(b)(6)
2 representatives of Riverwalk River District Building 6.
3 Mr. Mather was not present or represented; GRH Development
4 Resources was not present or represented; Greens of Rock
5 Hill was not present or represented; and Assured
6 Administration was not present or represented. And we
7 understand that the deposition of a 30(b)(6) designee can
8 be introduced against an adverse party, which couldn't be
9 introduced against Riverwalk River District Building 6.
10 Our concern is that the jury will not be able to
11 differentiate between the various Defendants and who
12 represents through this process. And so under the
13 provisions of Rule 403 we believe that potential
14 prejudiced to the Defendants who were not present, had not
15 had an opportunity to be represented outweighs the
16 probative value of the testimony. And we would ask that
17 it be excluded and then depending on Your Honor's ruling
18 there are some specific objections that I think, required
19 to raise before they begin to publish that testimony.

20 THE COURT: I am going to deny the motion. Mr.
21 Martens, this is the 30(b)(6) designee of the principle
22 Defendant in this case. So I think the probative value of
23 that evidence is substantial. So I am going to deny your
24 motion.

25 MR. MARTENS: Now, moving onto the substance of the

1 testimony. On page 78 of Mr. Ostrander's testimony. Let
2 me see if I can get there. Lines 21 through 25, the
3 attorney ask if the landlord is in breach or not in
4 breach. And we believe that calls for a legal conclusion
5 of a non-legal non-expert business; non-attorney witness.
6 And believe, for that reason we believe that it would be
7 improper to allow that question to be asked. If the
8 witness was present testifying I would raise that
9 objection during the testimony. But since I wasn't there
10 I have to raise it at this point.

11 THE COURT: Mr. Meckler.

12 MR. MECKLER: It is a little bit confusing. It is a
13 question to a party as to whether or not that party
14 breached the agreement it is a party to.

15 MR. MARTENS: Breach is a legal term, Your Honor.

16 MR. MECKLER: I think it is within common lay person
17 knowledge as to whether or not they breached an agreement
18 they are a party to.

19 THE COURT: This testimony is Riverwalk's witness
20 saying that they did not breach the option by failing to
21 close. Is that correct.

22 MR. MARTENS: That's correct.

23 THE COURT: Tell me the significance of that
24 testimony.

25 MR. MARTENS: I think it is an improper question.

1 THE COURT: No, I understand that. But what is the
2 significance of the testimony.

3 MR. MARTENS: I think it is more helpful to us more
4 than it is to them, frankly.

5 THE COURT: That is why I am asking that question. I
6 think I am missing something here.

7 MR. MARTENS: And I said, actually the line of
8 questioning continues on page 79 and then onto page 80
9 down through line 23. And the objection, and I said it as
10 if it were just for those specific things. But it is
11 really those three pages of examination are a series of
12 questions that call for legal conclusions. Who is
13 required to do this, who is required to do that. And we
14 believe all of that line of examination calls for legal
15 conclusion and it is an improper line of examination of a
16 lay witness and would ask that it be excluded.

17 THE COURT: I am going to deny the motion. If this
18 were any witness other than the 30(b)(6) designee of the
19 Defendant I would grant the motion. But I think that is a
20 fair question.

21 MR. MARTENS: Now, in Silvia Balan's testimony at
22 page 101. On pages, I am sorry, lines 2 through 25, Your
23 Honor. Again, the same objection. She was designated on
24 certain matters and she is being asked to provide for a
25 legal conclusion and I was not there and I was not counsel

1 of record at the time but I note that Counsel asserted
2 that this witness was not designated to testify as to
3 these issues. And so not only is it an improper line of
4 questioning of a lay witness but it is also something that
5 apparently was outside the scope of her deposition.

6 THE COURT: Do we have the notice. Let me see. Ms.
7 Balan is property manager, right?

8 MR. MARTENS: Property, that's right.

9 THE COURT: As I understand it, Mr. Ostrander was the
10 prior designee and then she came in to answer a couple of
11 issues.

12 MR. MECKLER: We have the transcript, the sealed
13 transcript that has the notice. It may be attached to
14 that and we are going to see if we have it there.

15 MR. STAPLES: It does appear that Exhibit 1 is the
16 amended notice of deposition.

17 MR. MECKLER: Your Honor, the party designates the
18 witnesses. We don't get to choose who --

19 MR. MARTENS: Right, I wasn't there so I don't know
20 what she --

21 THE COURT: And neither does the Court. I mean,
22 that's, I mean, whoever has the information, I just, what
23 was she designated to respond to. Based on what I heard
24 so far and this seems pretty far afield of the property
25 manager's responsibilities.

1 MR. MECKLER: It was a bizarre, if I remember
2 correctly, Craig Ostrander there and then all of a sudden
3 he said, we are going to put Silvia Balan in. And then go
4 back to Craig Ostrander.

5 THE COURT: This is a notice but there is no
6 discussion on the record about what witnesses are
7 responding to what questions.

8 MR. MECKLER: The only discussion was, I think Mr.
9 Staples said, well, Dan, I don't understand what she is
10 here for because you are not stating what people are
11 designated for. He just had his witnesses there for the
12 30(b)(6).

13 THE COURT: And what was their response.

14 MR. MECKLER: I don't think he responded. I asked
15 the question, you know, do you understand you have been
16 designated as a Corporate Representative of the landlord.
17 And she says, I do.

18 THE COURT: My experience in practice is when you
19 have a witness that you are providing on a 30(b)(6) you
20 designate what questions, what areas they are responsive
21 to. Without, I mean --

22 MR. MARTENS: And I have to believe that Counsel of
23 record asserted an objection, that it was outside the
24 scope of her designation.

25 THE COURT: I know and there has got to be something

1 -- he says she's not designated as a witness and
2 testifies. There has got to be some discussions.

3 MR. MECKLER: He just says, she is not designated as
4 a witness to testify as to interpreting the lease. You
5 can still answer -- at some point in here -- I don't know.
6 He didn't say what she was there to testify to.

7 THE COURT: Can I see the full transcript.

8 MR. MECKLER: I wasn't there but I read it. I
9 thought it was odd that Dan just showed up with two people
10 and he didn't make any designations.

11 THE COURT: Where in the deposition does it switch to
12 --

13 MR. MECKLER: 81, I believe, Your Honor.

14 THE COURT: Is it switching in?

15 MR. MECKLER: It switches back.

16 THE COURT: There is an off the record conversation
17 right before she begins testifying, I would assume was
18 about --

19 MR. STAPLES: My recollection that it was, either,
20 right after we took our lunch break. You know, the
21 witnesses switched. I asked her questions and then she
22 left and we continued on with Mr. Ostrander. She was
23 there as the property manager but, you know, I don't
24 believe in this transcript there is any discussion about
25 the topics that she particularly was going to respond to.

1 And frankly I don't really recall having any off of the
2 record conversation. He raised that objection that
3 doesn't state what topic she was there for.

4 THE COURT: When does it switch back.

5 MR. MECKLER: Somewhere between page 108 and 127.

6 MR. MARTENS: Your Honor, we do have in the record
7 what she was not designated for. It says she was not
8 designated as a witness to testify as to interpreting the
9 lease and those issues. And that was his objection and
10 that's --

11 THE COURT: That is his objection.

12 MR. STAPLES: But his objection is based on the fact
13 that she wasn't the designated representative to testify
14 as to those issues.

15 MR. MECKLER: She is the property manager, in her
16 testimony, she reviewed the lease. Here is what I am
17 looking at, at 108. Dan objects to the form and Mr.
18 Staples says, frankly Dan, I am not really sure what you
19 designated her for.

20 He said, he said he's a witness for all the topics
21 but then we have got her here. So what is she designated
22 for. Mr. Ballou. Listen, we have agreed to proceed with
23 her on issues of New South Property Management. You are
24 asking her to interpret whether there is a breach of the
25 lease or it is unfair misrepresentation, afar field at

1 that. We have plenty of time to talk to Craig on those
2 issues. What I am saying is to the extent the witness is
3 being presented with knowledge of specific areas
4 designated your 30(b)(6), we are prepared to testify to
5 that.

6 Then Mr. Staples. Okay, tell me what numbers of the
7 Exhibit she is qualified to testify about. I mean, I am
8 not trying to make this difficult.

9 Mr. Ballou. I am not either. You are trying to use
10 this witness to try to get to the areas that are really
11 beyond her. She can testify but I am just making the
12 objection because, well, go ahead.

13 And he never provided the numbers that Mr. Staples
14 asked for.

15 THE COURT: There is a discussion page 14 where, at
16 the beginning of Mr. Ostrander's testimony where there is
17 a question, Is there any topic that you do not have any
18 knowledge or information that you were not going to be
19 designee for. And then he replies. To the extent that
20 Silvia is better prepared to answer a question.

21 MR. MECKLER: Then Mr. Staples actually asked at the
22 end on page 108 to tell him the topics that she is there
23 for. And he won't identify the numbers. He just says,
24 she is here to talk about, we have agreed to proceed with
25 our issues of New South Property Management. And then Mr.

1 Staples going on to say, on 109. Well, okay, tell me what
2 numbers and exhibit she is qualified to testify about. I
3 mean, I am not trying to make this difficult. And Mr.
4 Ballou did not provide the numbers. He went on to say,
5 she can testify.

6 THE COURT: Counsel, this is a tough, I am going to
7 grant the motion regarding that question. The basis is,
8 she is the property manager and it is very unclear from
9 the deposition transcript but I think if there is an
10 objection where an attorney says, this is not the witness
11 I am designating to answer that question, I think, the
12 obligation is on the questioning side to say, well, who is
13 the 30(b)(6) designee for that topic. And that wasn't
14 done.

15 MR. MECKLER: I stop with her on page 108.

16 THE COURT: At the time that, page 101 Mr. Ballou
17 says, she is not designated to testify on interpreting the
18 lease.

19 MR. MECKLER: I see.

20 THE COURT: And at that point, I think it is
21 incumbent upon the question to say, well, who is your
22 designee on that topic. And that is never asked. I mean,
23 what is Mr. Ballou's obligation other than saying, she is
24 not my designee on that topic.

25 MR. MECKLER: Are we just referring to page 101.

1 THE COURT: I am looking at page 101.

2 MR. MECKLER: I am figuring out which lines to cross
3 out.

4 THE COURT: Right.

5 MR. MARTENS: And we move to strike 2 through 25
6 based on that objection, Your Honor. And that and it
7 calls for a legal conclusion of a lay witness.

8 THE COURT: I am going to deny the motion on the
9 second basis because she is a 30(b)(6) designee of the
10 principle Defendant. But I am going to grant the motion
11 as to you, strike page 101, line 2 through page 102, line
12 25.

13 MR. MARTENS: Effectively to 102, line 1.

14 THE COURT: Okay. All right. I am going to the
15 motion on the basis, the record is very unclear but Mr.
16 Ballou does make an objection. Mr. Ballou does say, she
17 is not my designee on this topic. And in the absence of
18 any further discussion I am going to have to go with that
19 objection.

20 MR. MECKLER: I want to make sure I cross that out
21 before I read the question.

22 THE COURT: Mr. Martens, are you okay with the other
23 side reading the deposition?

24 MR. MARTENS: I am.

25 THE COURT: Okay. Anything else we need to take up.

1 All I need to instruct the jury on is the fact that, this
2 testimony you are reading in is only to be held against
3 the single Defendant that was represented by at that time.
4 That is pretty much what I would say.

5 MR. MECKLER: Are you going to instruct them that
6 portions of the deposition transcript --

7 THE COURT: I will tell them that this is a
8 deposition under oath. The Defendant, Corporation,
9 designated these folks to speak on its behalf officially
10 and the deposition is sworn testimony on behalf of the
11 Corporation. And then I will also say, the other
12 Defendants in the case were not represented at this time.
13 Therefore this testimony may only be held against or
14 considered against Riverwalk Building 6.

15 MR. MECKLER: Can I be heard on this.

16 THE COURT: Sure.

17 MR. MECKLER: Again, this deposition took place back
18 in December 10th of 2019. I think that the risk of harm
19 to the other Defendants really is not there because they
20 had 21 months to take that deposition and get any
21 additional information they wanted.

22 MR. MARTENS: Again, parties don't depose their own
23 witnesses.

24 THE COURT: This testimony is the official testimony
25 of the Corporation. How could it be used against other

1 Defendants. Conspiracy cause of action, is that what you
2 are concerned about, Mr. Martens.

3 MR. MARTENS: There is a lot about Craig Ostrander
4 that goes, you know, who is this picture of and where,
5 what is his role and who is this person and what is their
6 role. And it really goes, it is really far outside of
7 that the dispute was at the time which was a
8 landlord/tenant dispute between Building 6. And it gets
9 into, well, Mr. Mather, what does he own, what does he
10 control, who is this guy over here, who does he work for.
11 And its, that is the concern, is they are going to take a
12 witness of Building 6 and its going to be confusing to the
13 jury to say, well, we can use this as to Building 6 but
14 can't use it as to other parties which is the basis for
15 our Rule 403 motion.

16 MR. MECKLER: Your Honor, it is just facts. I am
17 asking a party to --

18 THE COURT: Counsel, we had this issue earlier and
19 somebody provided me with a case on point. Can y'all give
20 me that point again.

21 MR. MECKLER: I have got it. Paschal v. Causey. 420
22 SE 2nd 863. 309 SC 206, 1992.

23 THE COURT: Mr. Martens, do your different clients
24 have a common interest on, that seems to be the factor of
25 the Paschal case. It seems to me they do but I am much

1 less familiar with the facts than y'all are as far as what
2 the various other entities are alleged to have done.

3 MR. MECKLER: Allegations of all entities are the
4 same.

5 MR. MARTENS: There is a, and I will have to take
6 this up at some point. There is a theory of amalgamation
7 of the interest with the Plaintiffs seeking to hold all
8 Defendants liable based on the theory that they are
9 somehow amalgamated entity that ought to be considered as
10 one as opposed to separate entities. And that includes
11 Mr. Mather.

12 MR. MECKLER: We don't have separate cause of action,
13 this entity did this or this entity did that. They are
14 all the same.

15 THE COURT: Amalgamation claim aside. Is there any
16 difference in interest between these entities? I mean the
17 breach of contract is only, would only be against
18 Riverwalk Building 6. And there is a conspiracy claim,
19 negligence misrepresentation claim. Is that against
20 Building 6?

21 MR. MECKLER: That is against all Defendants because
22 they are a single enterprise.

23 THE COURT: Put amalgamation aside. What claims are
24 asserted against the other Defendants other than
25 conspiracy?

1 MR. MARTENS: Tortious interference with contract.

2 THE COURT: Who is that asserted against?

3 MR. MARTENS: Everybody at Building 6 and Unfair
4 Trade Practices.

5 THE COURT: That is a very close call. I think what
6 I am going to do, I am going to permit the deposition to
7 be used and I am going to give a limited instruction, the
8 limited instruction is probably not great but that, I mean
9 reading of Paschal, I mean that is the best solution. I
10 mean, I don't think it is fair to the Plaintiff to exclude
11 the deposition testimony entirely. And given that, I
12 think the best I can for you, Mr. Martens, is give a
13 limited instruction, the testimony is only to be
14 considered against Riverwalk Building 6.

15 Do you gentlemen need a break before we pick up
16 again. Let's take a ten minute break.

17 (Whereupon, a short break was taken.)

18 THE COURT: Let's bring the jury, please.

19 (Whereupon, the jury came into open court at
20 approximately 11:14 a.m.)

21 THE COURT: All right, ladies and gentlemen, you are
22 about to hear portions of a deposition read to you. And a
23 deposition is sworn testimony that is given out of court.
24 And in this case you are going to hear deposition
25 testimony of the Defendant, Riverwalk River District

1 Building 6, LLC. Obviously that is a Corporate entity,
2 they can't really speak. So what we do legally is they
3 designate people to speak on their behalf. Corporations
4 says, this is our spokes person on this issue. So what
5 you are going to hear is sworn testimony of the official
6 designee of that Corporation or that LLC. There is one
7 little wrinkle. There is now, as you have heard, there
8 are multiple Defendants in this case. The other
9 Defendants other than Riverwalk River District Building 6,
10 including Mr. Mather; GRH Development; The Greens of Rock
11 Hill; and Assured Administration, those other entities.
12 They were not involved in the lawsuit at the time this
13 deposition was taken. So I am going to instruct you that
14 what you are about to hear, this deposition, you may
15 consider it only against Riverwalk River District Building
16 6 and not the other Defendants because they were not
17 involved in the lawsuit at the point this deposition was
18 taken. All right. The attorneys will read parts of the
19 deposition.

20 (Whereupon, the deposition of Craig Ostrander was
21 read into the record starting at 11:16 a.m., ended at
22 11:40 a.m.)

23 MR. STAPLES: Your Honor, if it is appropriate we
24 would move this into evidence.

25 THE COURT: Any objection, other than what was

1 previously stated?

2 MR. MARTENS: No objection.

3 (Whereupon, Plaintiff's Exhibit 44 was admitted into
4 evidence.)

5 THE COURT: Counsel, can I see y'all at the bench
6 about scheduling, please.

7 (Whereupon, a bench conference was held in the
8 presence of the jury but out of the hearing of the
9 jury.)

10 THE COURT: Ladies and gentlemen, what I just talked
11 about with the lawyers is a scheduling, it is quarter
12 till, there are two witnesses remaining for the Plaintiff
13 before they rest their case and the attorneys say these
14 will not be very lengthy witnesses. We are going to hear
15 from both of those witnesses and then I will send you home
16 for the day. And the reason for that, that will be the
17 end of the Plaintiff's case and there are a lot of legal
18 issues that the attorneys and I have to deal with after
19 one party rest their case. So rather than have you sit in
20 a room while we do that we are just going to let you head
21 out for the day and report back at 9:30 tomorrow. Okay.
22 Two more witnesses and you will be home for the day.
23 Mr. Staples, call your next witness.

24 MR. MECKLER: Jason Ligon.

25 Jason Ligon, being

1 first duly sworn, testified as follows:

2 DIRECT EXAMINATION

3 By Mr. Meckler:

4 Q Good morning.

5 A Good morning to you.

6 Q If you could, just introduce yourself to the jury.

7 A My name is Jason Ligon, I am a Director with the
8 LitCon Group.

9 Q And what is your profession?

10 A So my profession and what LitCon Group does, is we,
11 we are consultants primarily for attorneys. So we get
12 involved when there are commercial disputes or
13 construction disputes and we will help determine the
14 damages. So that entails financial analysis, accounting,
15 investigative type activities.

16 Q And how long have you been doing this type of work
17 for?

18 A Been doing it for about 13 years now.

19 Q And what is your educational background?

20 A So I went to Virginia Tech where I received a degree
21 in Finance and then I have an MBA from the University of
22 North Carolina in Charlotte.

23 Q I would like to hand you the first document there if
24 you can identify that for me?

25 A This is my CV and resume.

1 Q Is that a true and accurate copy of it?

2 A Yes.

3 MR. MECKLER: I would like to move that into
4 evidence, Your Honor.

5 THE COURT: Any objection?

6 MR. MARTENS: No objection.

7 THE COURT: Into evidence without object, 45 and 46.
8 (Whereupon, Plaintiff's Exhibit 45 and 46 were
9 admitted into evidence.)

10 Q What is 46?

11 A This is a more summarized version of my CV, this is
12 more promotional photos on it and stuff like that.

13 Q And so, my understanding, let me ask you this. Do
14 you provide forensic accounting services?

15 A I do.

16 Q And did you do that in a way of quantifying and
17 critiquing damages, calculations on a variety of different
18 matters?

19 A I do.

20 Q I think, are you a certified fraud examiner?

21 A Yes, I am.

22 Q And tell me, have you ever acted as an expert
23 witness?

24 A This will be my first time giving expert testimony.
25 I have testified in other matters.

1 Q And tell me about those matters and what you have
2 been asked to do?

3 A I testified in February of this year on a matter in
4 Mecklenburg County, it was a marital dispute. The husband
5 owned numerous businesses and development and
6 construction. And he had been diverting monies to his
7 father-in-law, ownership of these business, sorry, his
8 father and essentially trying to avoid alimony and child
9 support payments.

10 Q Okay. But do you frequently get involved as an
11 expert for attorneys and parties that are in disputes?

12 A Yes. So in my 13 years, I started as a consultant so
13 I mainly provide a supporting role to other testifying
14 experts and you build a resume, you build your experience
15 and then ultimately the client is to become a testifying
16 expert yourself.

17 Q And are you here today to discuss, as to a reasonable
18 degree, your opinions regarding a forensic examination of
19 Grapevine's income related to the patio, the Grapevine
20 location at Riverwalk District Building 6?

21 A Yes, I am.

22 Q Do you believe that you are familiar with the
23 standards of care applicable to forensic experts regarding
24 commercial residential buildings in York County as they
25 exist today?

1 A In York County, maybe not specifically. But I can
2 testify on financial matters, yes.

3 Q So it doesn't really matter where they are, the
4 finances don't change based on --

5 A Numbers are numbers.

6 Q Okay. Do you have experience putting together
7 forensic reports such as the one you completed in this
8 matter to provide valuations to individuals and entities
9 and government agencies regarding the value, the market
10 value of the matters you investigated?

11 A Yes.

12 Q What have you been asked to do here today?

13 A I was asked to perform an analysis to determine if
14 and how much money was lost by the loss of the patio at
15 the Grapevine.

16 Q Okay. And is that consistent with your experience
17 and training?

18 A It is.

19 Q And this experience and training, something that the
20 normal lay person, they don't have the experience and
21 training you have, correct?

22 A Absolutely.

23 MR. MECKLER: Your Honor, I would like to tender Mr.
24 Ligon to the Court and jury as an expert in the area of
25 forensic examination within this matter.

1 THE COURT: Forensic financial examination. Any
2 objection, Mr. Martens?

3 MR. MARTENS: No objection.

4 THE COURT: Ladies and gentlemen, I have accepted
5 this witness as an expert in forensic financial
6 examination. Expert witnesses are different than regular
7 witnesses. Most witnesses are only able to give evidence
8 that they personally perceive. What they say, what they
9 heard, what they said. They are not able to give their
10 opinion. Expert witnesses are the exception to that rule,
11 they are permitted to give their opinion as to issues in
12 the case. However, just because they are experts does not
13 mean you have to believe their testimony. Your job as
14 jurors is to evaluate their testimony just the same as any
15 other witness and decide whether or not you should believe
16 or believe it in part or in all.

17 Q Mr. Ligon, tell the jury, what was it, the specific
18 task you were asked to complete in this matter?

19 A To analyze the business' profits, more specifically
20 their sales and their expenses to determine if there was a
21 loss related to the patio.

22 Q And so the premise being, we have got a patio, it
23 generates income. At some point we don't have the patio,
24 we lose whatever income we were generating in that patio.
25 Is that what you are looking at?

1 A Right. More broadly, what I consider, a disruption
2 to the business. So the business is operating one way,
3 something changes and now we have a new operating
4 environment that I was analyzing.

5 Q Does it matter to you why the business changed. I
6 mean, if they had use of the patio and then they didn't
7 have use of the patio?

8 A Not specifically. It is something that I wanted to
9 consider and in my discussions with the business owners,
10 we want to look at what changed at the business, what
11 factors are taking place.

12 Q Did you prepare a report, I suppose, or schedule?

13 A Right. I prepared a series of schedules, looks like
14 you have them there. There is no narrative report though.

15 Q And what did you use, what was the method you
16 undertook to do your work?

17 A It is a lengthy process. But I will kind of start at
18 the base of it. It is really considered a pyramid. We
19 gather data and then we build blocks, ultimately, to get
20 to our final result of what the damage might be. So the
21 main source of information is the Grapevine of Riverwalk
22 and Baxter's financial data. So this is input, I believe,
23 by a bookkeeper for the majority of this period. That is
24 consolidated into financial statements so we receive
25 financial statements I believe, on a monthly basis for

1 both entities. And so that's really where I started my
2 analysis, is using this data.

3 Q Where did you get that data from, did that come from
4 Ms. Sills?

5 A That would have been the Sills', through Counsel.

6 Q And when you say both entities, you looked at what,
7 which entity are you talking about?

8 A Right. The Grapevine of Riverwalk, the one that is
9 involved in this suit but then I also looked at the, we
10 can call the sister location, the one in Baxter village in
11 Fort Mill.

12 Q And so you request data that gives you data and then
13 what do you do with that data to come to your conclusion?

14 A A lot of spread sheets. And so ultimately what we
15 are doing is we are taking the data, we want to make sure
16 it looks correct, nothing is out of place. Then we are
17 analyzing it to look at trends, to look at and more
18 particular profitability and for a restaurant business we
19 are looking at all sales, we are looking at food sales and
20 then the expenses of the business.

21 Q I am going to hand you a document, a stack of
22 documents. If you could identify that for me.

23 A These appear to be the schedules that I prepared for
24 this matter.

25 Q Okay. And is all of this your work in here?

1 A Yes, this is my work.

2 MR. MECKLER: Your Honor, I would like to move this
3 into evidence.

4 THE COURT: Any objection?

5 MR. MARTENS: Your Honor, our objection is the one
6 that we stated in our motion in limine, I believe this is
7 outside the scope of recoverable damages.

8 THE COURT: Subject to that objection I am going to
9 permit it.

10 (Whereupon, Plaintiff's Exhibit 47 was admitted into
11 evidence.)

12 Q If you could, just kind of walk us through this
13 report and tell us what conclusions you came to and how we
14 determine that looking at your documents.

15 A Okay. So before I start I going into my ultimate
16 conclusion I would like to point out that the time period
17 we are looking at here begins in April of 2018. And then
18 we are evaluating loss profits through the end of the
19 lease because the patio is not being used currently and we
20 are expected it not to be used until, you know, the end of
21 the lease. So this does include damages that essentially
22 have already occurred and then damages that are going to
23 incur in the future.

24 Q And did you choose April of 2018 because that is when
25 the Sills' were told they could no longer use that patio?

1 A I believe they lost the patio or was instructed to
2 vacate in March of 2019 but instead of -- we started in
3 April of 2019.

4 Q Fair enough. And in going through the documents,
5 what are the conclusions you came to?

6 A Well the ultimate conclusion is that the total loss
7 profits are \$311,000.00. But that comes from and I will
8 break down this schedule for you guys. The first row is
9 alcohol loss profits. And then you have food and
10 non-alcoholic. Both of those product categories at
11 Grapevine were treated differently and we get to those why
12 we treated them differently. But alcohol sales and food
13 sales differ a little bit in how there were, you know,
14 conducted or executed at the business. So this is
15 profits. So I think it is probably a good time for me to
16 just explain what this loss profit is. So my activity or
17 my goal here is to determine loss sales. So how many
18 bottles of wine, for example, were not sold because they
19 lost the patio. But I also have to consider that they
20 avoided because they did not make those sales. So if you
21 sold a bottle wine or would have sold a bottle of wine for
22 \$50.00 dollars, \$50.00 dollars is not your damage. Your
23 damage would be \$50.00 dollars less the cost or expenses
24 you would pay to sell that bottle of wine. So it is not
25 just sales, we are talking about expenses as well. So

1 that, this is the top level summary. These are the loss
2 profits.

3 Q Okay. And you have got some graphs in here, shows
4 alcohol sales, et cetera. What is the purpose of those
5 graphs?

6 A So one of the things, the first step in approaching a
7 loss profits case, we actually have to make sure there is
8 a damage, right. So I am a visual, graphical person. I
9 think you will have access to these so you can look at
10 them as well. You know, we are looking for trends. We
11 are looking to see if the, the information that, you know,
12 the Sills' lost the patio at this time. Let's look at the
13 before and after, let's see how sales were before and see
14 how they were after the event. So graphically we looked
15 at, all right, what is the trend. And as you can see that
16 they just put up, there is a lot going on. The black
17 dotted line is the period in which they did not have the
18 period. And you can see here, you know, the black dots
19 starts in March of 2019. You see through June of 2019
20 they are still hanging on at a reasonable level. And then
21 we start to see a decline. And then that shaded blue
22 area, that is the COVID impact. So that is when COVID 19
23 and that's special circumstances here. But you can see
24 that this decline started prior to the COVID 19 situation.

25 Q And so when you do your analysis do you take

1 something like that COVID 19 decline and do a count in
2 developing your numbers?

3 A Absolutely, yes.

4 Q So you don't treat that COVID period as if it was a
5 period without COVID, you discounted for that. Is that
6 correct?

7 A I considered COVID but what is interesting and this
8 is the importance of that sister location and the reason
9 why we split food sales from alcohol sales. If you look
10 at the sister location in Baxter, alcohol sales actually
11 held pretty strong. I believe there was only a slight dip
12 from previous years and that might be because the
13 Grapevine at Baxter has a retail component to it. It is
14 not solely focused on indoor drinking a glass of wine at a
15 bar. They are selling bottles, they are selling bottles
16 of beer and they also have the patio at the Baxter.

17 Q So during COVID people were more inclined to drink
18 outside, that affects it perhaps.

19 A I would agree with that, yes.

20 Q And so you, looking back on your first page of
21 Schedule I. You have got alcohol lost profits, food and
22 non-alcohol beverage lost profits and your subtotal, any
23 future. How are you coming up with your totals. Is that
24 a per month analysis or how did you come up with that?

25 A We do it on an annual basis. So, you know, 2019,

1 2020, 2021 and then the future loss profits are kind of a
2 different calculation and that is why they are summarized
3 in that one column.

4 Q And what is the conclusion you came to regarding
5 Grapevine's loss of profits, not income but profits
6 related to their loss of use of the patio at Grapevine of
7 Riverwalk?

8 A So my conclusion there is, you know, conversations
9 with the Sills', learning about their business, seeing
10 what changed. The only thing that was changed that was
11 brought up was the loss of the patio. And then right
12 around when that loss happened we see a decline and then
13 therefore what we are calculating here is the loss profits
14 that would have started on April 2019 and continue.

15 Q And what is the numbers you came to, what is the
16 total loss?

17 A The total loss is \$311,045.00.

18 Q And that is through the end of the lease?

19 A Through the end of the lease, yes.

20 Q And that is 2026.

21 A Yes, it is January of 2026. I think it terminates in
22 February, 2026.

23 Q So, tell me what you, what you asked the Sills about
24 and what kind of information you go to come up with this
25 number other than their straight financial information?

1 A I need to learn about the operations, I need to learn
2 about what products they are selling. I need to learn
3 about their expenses. Because one thing I had to consider
4 here is if they had the patio, there is an expense to
5 having the patio, right. You would expect, if you are
6 doing more sales volume you might have to hire another
7 person, help bring drinks out or clean up. You might have
8 more materials, napkins or something like that. You would
9 also have additional sales, you would have to buy
10 additional products and stuff like this. So just learning
11 about their business and then learning about what changed.
12 And then we also had conversations about how the Baxter
13 location and the Riverwalk location were comparable as
14 well.

15 Q You understand, craft beer, wine shop with outdoor
16 seating?

17 A Right. So my understanding product mix is almost
18 identical except the Riverwalk location did sell coffee.
19 So, again, that is another reason you are going to see the
20 food and no-alcohol beverage split off. There is a slight
21 deviation between Baxter and Riverwalk.

22 Q Okay. You took that difference in your count in
23 coming up with your numbers?

24 A Yes, that is correct.

25 Q So help me explain to the jury, so you get this

1 information, you have this analysis, you have these
2 discussions and then you calculated and you put it into
3 these different spread sheets, correct?

4 A That's correct.

5 Q And how did you verify that \$311,045.00?

6 A So this is probably a good time to talk about the
7 importance of the Baxter location in this calculation. We
8 used what we call like a bench marker yard stick method.
9 So you have the event at Riverwalk where they lose the
10 patio. Baxter continues operating without any disruption,
11 their patio is still being used. Their business is still
12 performing like normal. And so that is where we do a
13 comparison between the two entities to determine, all
14 right, we have to assume that if they had the patio they
15 are operating very similarly to Baxter. And then we are
16 going to then determine the Riverwalk lost sales based on
17 this ratio to the Baxter Village location.

18 Q Okay. And then, the bottom of this board you have
19 monthly loss profits and it says 9, 12, 5. There are
20 different numbers there. Can you explain that to the
21 jury?

22 A Right. So this calculation is going to be used in a
23 future, in a schedule four actually. But this is just the
24 monthly loss. So in 2019 I determined that Grapevine was
25 losing \$3,100.00 dollars a month; in 2020, \$5,300.00; and

1 then in the first five months of 2021 it was \$7,500.00.

2 Q So those were months out?

3 A Those are the months that have already happened.

4 This is mainly just to feed schedule four.

5 Q Was there anything that you asked for you needed to
6 review to prepare this report that you were not given
7 access to?

8 A Not particularly. We obviously needed financial
9 data, right. I did bring up tax returns at one point. I
10 was told that they were not produced in this litigation so
11 I did determine that, you know, this financial information
12 would ultimately be used for taxes or whatever else the
13 business might need it for. So this was sufficient.

14 Q And you were comfortable with the financial
15 information you received?

16 A I was, yes.

17 Q And are you comfortable with the number that you put
18 down here, \$311,045.00 dollars representing Grapevine's
19 damages for loss of use of their patio?

20 A Yes, through the end of the lease.

21 Q Okay. And are you comfortable with that to a
22 reasonable degree of certainty?

23 A To a reasonable degree of certainty, yes.

24 Q Thank you, those are all the questions I have.

25 THE COURT: Mr. Martens.

CROSS-EXAMINATION

By Mr. Martens

Q Mr. Ligon, your analysis is based entirely on assumption that the Grapevine of Riverwalk had a vested right to seat people in the outdoor common area that had been wrongfully taken away from it, correct?

A My analysis is based on the fact that they operated using the patio from 2016 through 2019. The assumption is, they should have that going forward.

Q And you assumed that they occupied the outdoor space pursuant to an enforceable right, correct?

A Can you clarify or maybe word that differently. I am not tracking.

Q Sure.

MR. MECKLER: Your Honor, i am going to object to the extent he is asking for a legal opinion on the lease. That is not what he is here for. He can certainly ask him what his opinion is --

THE COURT: I am going to overrule the objection.

Q For purposes of your analysis and your work on this case, have you assumed that Grapevine of Riverwalk had an enforceable right to use the patio space?

A Enforceable rights are throwing me off. I would say I have assumed that they would continue using the patio as they did, as exactly as they did from 2016 to 2019.

1 Q And do you recall I asked you that same question at
2 your deposition?

3 A Yes.

4 Q And do you recall at your deposition you said, yes,
5 right. When I asked that question your answer was, right,
6 I have been asked to assume that they should have had
7 access to the patio?

8 A Yes.

9 Q And so your analysis was based upon that assumption?

10 A That they would have use of the patio, yes.

11 Q And I asked at your deposition if that assumption
12 were invalid, how would that affect your analysis?

13 A Right.

14 Q Do you recall that?

15 A I believe you asked me in my deposition if they did
16 not have an enforceable or if it was gratuitous use and
17 they did not have access. So you asked me to assume the
18 opposite and that would, yes, there would not be loss
19 profits from the patio, if they could not use the patio.

20 Q Right. Because if they were just using it through
21 gratuity then that was not any enforceable right that they
22 lost when they were asked to stop using it, right?

23 A I think what you are talking about is something that
24 is in dispute here and will be decided whether they had a
25 right or didn't have a right. And my calculation is just

1 assuming that they did have the patio, this would be the
2 amount of money that was lost.

3 Q And if you were made aware of the fact that Grapevine
4 had admitted that its lease affords it no rights to put
5 tables and chairs in the outdoor common areas, would that
6 of changed your analysis.

7 MR. MECKLER: Objection to the premise, Your Honor.

8 THE COURT: I am going to sustain the objection to
9 that. His testimony is limited to the difference in
10 profits.

11 MR. MARTENS: May I approach, Your Honor?

12 THE COURT: You may.

13 (Whereupon, a bench conference was held in the
14 presence of the jury but out of the hearing of the
15 jury.)

16 Q Mr. Ligon, in connection with your analysis you
17 didn't review Grapevine's lease, did you?

18 A No.

19 Q And you didn't review any other document that would
20 have indicated to you whether or not the patio was part of
21 the demised premises?

22 A No.

23 Q And the manner in which you calculated alleged loss
24 profits was to, essentially compare the business of
25 Grapevine of Riverwalk to the business of Grapevine of

1 Baxter, during the period of time you analyzed?

2 A That's correct.

3 Q And the assumption you made in doing that wasn't the
4 only difference between the two locations was that Baxter,
5 I am sorry, Grapevine of Baxter had access to outdoor
6 seating whereas Grapevine of Riverwalk did not?

7 A Right. Yes, one of the factors, yes.

8 Q You didn't visit either location in connection with
9 your work?

10 A No.

11 Q You did not account or take into account where the
12 Sills' lived in relation to the two locations?

13 A No.

14 Q Were you made aware that the Sills' are residents of
15 Baxter Village?

16 A I do not know that.

17 Q Were you aware that their Baxter location served all
18 of their friends and neighbors that live around them?

19 A Okay.

20 Q You weren't made aware of that?

21 A I don't know if that is really, really matters to me.
22 I am really looking at the numbers. Who is buying at a
23 location does not really matter to me.

24 Q You did not look at or obtain any detailed
25 information about the staffing at either location?

1 A The only numbers are the information I have on
2 staffing, the cost for staffing.

3 Q You did not look at or analyze the availability of
4 customer parking in the two locations?

5 A No, I didn't analyze parking.

6 Q You did not look at or consider whether or not Baxter
7 Village or Riverwalk is a more established entertainment
8 destination?

9 A That was considered in my analysis.

10 Q You did not compare zoning requirement or local
11 ordinances that may apply in one location but not the
12 other?

13 A Don't know how that would be applicable to my
14 analysis.

15 Q Well, for example, the City of Rock Hill had a
16 mandatory mask requirement that was not imposed upon
17 Baxter Village because it is not in the City of Rock Hill.
18 Did you consider that as far, did you take that into
19 account?

20 A No. That would be a very nuance situation. I did
21 take into account and docked sales from the Riverwalk
22 location to account for the fact that the State had
23 mandated 53 percent occupancy and a period of time where
24 there was to go, we have taken out some monies to account
25 for, okay, given the limitation on operation, we have

1 docked that.

2 Q You were not made aware of negative social media
3 posts that the Sills' posted in relation to this dispute
4 with regard to the Riverwalk location?

5 A First I heard of it was in my deposition.

6 Q So you didn't consider on how that might affect
7 business?

8 A I don't see how that would affect the business.

9 Q Did you look at any local ordinances or laws to
10 determine whether that Grapevine or Riverwalk was even
11 permitted to sell and serve alcohol in the common areas?

12 A I did not look at anything specifically, no.

13 Q Would that make a difference in your analysis if you
14 would have learned that Rock Hill City ordinances do not
15 permit open containers in public spaces unless there is a
16 special license for that.

17 MR. MECKLER: Your Honor, objection. I don't believe
18 there is any foundation in the evidence for this.

19 THE COURT: I am going to sustain the objection.

20 Q And your analysis and your calculation is based on
21 assumption that Grapevine would continue to lease its
22 space through the end of the lease year?

23 A Correct.

24 Q I am sorry, the end of the lease term.

25 A In the lease term, 2026, yes. If they terminate the

1 lease for some reason then this calculation would need to
2 be updated because whenever that lease cuts off is when
3 the damage stops.

4 Q For example, they exercise the purchase option that
5 terminated whatever rights they may or may not have had
6 under this lease, that would affect the analysis?

7 A Well, I have to assume or have assumed in my
8 calculation that the option is not going to happen. If it
9 does then we will need to consider if the patio is part of
10 that option or however that ends up being treated.

11 Q You don't have enough information to testify as to
12 the effect of that at this point in time, do you?

13 A I can't testify to the lease option being exercised
14 or how that would impact my analysis at this point.

15 Q Thank you, sir.

16 THE COURT: Any redirect, Mr. Meckler.

17 MR. MECKLER: Yes, sir.

18 REDIRECT EXAMINATION

19 By Mr. Meckler:

20 Q Mr. Ligon, are you still comfortable with your
21 numbers?

22 A I am.

23 Q And the things that Counsel asked you about doesn't
24 change your opinion, does it?

25 A No. And I am just hearing about these things and I

1 haven't seen a social media post, I haven't seen any of
2 that information.

3 Q I hear you. But the, that wouldn't change the
4 numbers that you work with because that would have been
5 banked in, right?

6 A Yes, it is banked in. If sales were up or down, it
7 is in my analysis.

8 Q And if the jury wanted to, they could look at your
9 report. You actually have monthly numbers in your
10 schedule?

11 A Yes. It goes into some painful details, I apologize.

12 Q Have you ever seen someone drink wine through a mask?

13 A Not yet.

14 Q Thank you.

15 THE COURT: Any recross?

16 MR. MARTENS: No, Your Honor.

17 THE COURT: Thank you. Call your next witness.

18 MR. MECKLER: We call John Scott to the stand.

19 John Scott, being
20 first duly sworn, testified as follows:

21 DIRECT EXAMINATION

22 By Mr. Meckler:

23 Q Good afternoon.

24 A Good afternoon.

25 Q If you could, just introduce yourself to the jury so

1 we know who you are.

2 A My name is John Scott. I am a commercial real estate
3 appraiser. Been appraising for almost 28 years. I am
4 from Charlotte, a 1993 graduate of Wofford College.
5 Started appraising right after school and this is pretty
6 much been my career.

7 Q Mr. Scott, what is your educational background?

8 A A English Major from Wofford College.

9 Q And you took in college courses in appraisal?

10 A Yes. Designated member of the Appraisal Institute
11 and hold several State licenses.

12 Q And what State are you licensed in?

13 A North Carolina, South Carolina, Georgia, Tennessee,
14 Virgina and West Virginia.

15 Q What is Integra Realty Resources?

16 A It is a National appraisal Company, kind of a
17 franchise organization of which our ownership group has
18 seven locations in the Southeast.

19 Q And how long have you been appraising properties?

20 A Almost 28 years.

21 Q And what does that even, what does that mean,
22 appraising properties. What do you do?

23 A We go out and look at properties and essentially like
24 your home appraisal, we put a value on it. We focus
25 mainly on commercial with some consulting.

1 Q I want to hand you a couple, start with this one.

2 Mr. Scott, I am going to hand you this document. If you
3 could just identify it for me.

4 A It is our, my qualifications.

5 Q Is that your Curriculum Vitae, basically?

6 A Yes.

7 Q And it has your experience and professional
8 activities and affiliations, licenses and education on it?

9 A Correct.

10 MR. MECKLER: Your Honor, I would like to move that
11 into evidence.

12 THE COURT: Exhibit 48, I believe.

13 MR. MARTENS: No objection.

14 THE COURT: Into evidence without objection.

15 (Whereupon, Plaintiff's Exhibit 48 was admitted into
16 evidence.)

17 Q Mr. Scott, are you here today to discuss to a
18 reasonable degree of appraising and property evaluations,
19 your opinions regarding the fair value and fair market
20 value of the Grapevine location at Riverwalk District
21 Building 6, more specifically known as Suite 104?

22 A Yes.

23 Q And what makes you qualified to come in here and tell
24 these people what that, what that property is worth?

25 A Just my experience and years of appraising similar

1 type properties.

2 Q And you do both residential and commercial or you
3 primarily commercial?

4 A Primarily commercial, we do do residential.

5 Q Have you ever acted as an expert witness before?

6 A Yes.

7 Q How many times?

8 A Once.

9 Q And was that for a government agency?

10 A No.

11 Q Who was that for?

12 A It was a court proceeding between a developer and a
13 lender.

14 Q Do you have special skills that a lay person wouldn't
15 have to be able to make these appraisals?

16 A Yes.

17 MR. MECKLER: And, Your Honor, I would tender Mr.
18 Scott as an expert in property evaluation and appraisals.

19 THE COURT: Any objection.

20 MR. MARTENS: No objection.

21 THE COURT: All right. Ladies and gentlemen, I have
22 accepted Mr. Scott as an expert in commercial appraisal
23 and the same caveat, that does not mean you have to
24 believe what he says, you should evaluate his testimony
25 the same as any other witness.

1 Q Mr. Scott, how did you first become involved in this
2 case?

3 A Mr. Staples reached out to see if we would appraise
4 the property.

5 Q And what exactly were you asked to do?

6 A To appraise the fee simple interest of the property,
7 assuming that it could be subdivided to an individual
8 unit.

9 Q What do you mean by fee simple interest?

10 A It is not encumbered by a lease.

11 Q Okay. So basically if that was, if that property was
12 sold to the Grapevine as an individual unit what would it
13 be worth?

14 A To Grapevine or any other use, yes.

15 Q Or any other user. Okay. Did you prepare a report?

16 A We did.

17 Q And I am going to hand you this document, if you
18 could identify that for me.

19 A This is our appraisal report.

20 MR. MARTENS: Madam Court Reporter, please note the
21 objection for the record.

22 COURT REPORTER: Okay. I am sorry, Judge, I was
23 writing number 49 down.

24 THE COURT: I don't think it has been admitted yet.
25 At this point he may wish to admit and that would be

1 Exhibit 49. Admitted over objection.

2 (Whereupon, Plaintiff's Exhibit 49 was admitted into
3 evidence.)

4 Q And tell me, what are the steps that you take to
5 appraise a property like the one here?

6 A First you identify the problem, you identify the
7 property, what is the interest being appraised, who is
8 your client, what is the intended use, who is the intended
9 user. From there you look at kind of the macro market, in
10 this case, York County, Rock Hill as a whole. You bring
11 it down to kind of a submarket location, then you look at
12 it property specific, comparable sales, comparable
13 rentals, if applicable construction cost. And then you,
14 you know, you gather your research, your data, your
15 experience. And you conclude to either a single value or
16 you conclude to, if they want an as is value or upon
17 completion of renovations or, you know, historical value,
18 whatever the scope is. But the ultimate goal is to get it
19 down to the value conclusion.

20 Q And in this case what exactly did you do with respect
21 to finding out what the value of Suite 104 of the
22 Riverwalk Building 6 was?

23 A Again, identify the problem what we were looking at,
24 the fee simple interest of an individual unit assuming it
25 could be subdivided. We looked at Rock Hill, we looked at

1 census date, demographic data, people moving in, people
2 moving out. We looked at the Riverwalk development
3 itself, how is that going. We looked for comparables
4 within Riverwalk. We looked for comparables outside of
5 Riverwalk in similar locations. And we utilized the sales
6 comparison approach which is, if you couldn't buy this
7 unit but you could buy another unit like it, what did that
8 unit sale for in comparison of what we think our subject's
9 value is. We looked at what would it rent for. Then you
10 run the rental rates through, expenses and you apply a cap
11 rate to it to come up with two different value conclusions
12 that you reconcile. That is essentially what we did with
13 this one.

14 Q Did you do anything in this case that you would do
15 for any other appraisal?

16 A No.

17 Q Okay. You said you used the sales --

18 A Comparison approach.

19 Q Comparison approach. What does that mean exactly.

20 A It is just, you find like properties that are sold
21 and, you know, for residential it would be houses within a
22 similar neighborhood or the same neighborhood.

23 Q So for instance if, if Grapevine had to go buy
24 another property because they couldn't get this one, that
25 is what you were looking at, that is what it would cost?

1 A Yes.

2 Q Okay. And what, where were these other properties
3 that you looked at and how many did you look at?

4 A We would have probably in an average course of
5 research look at 10 to 12, 4 or 5 would make it in the
6 report. We would look first within Riverwalk and finding
7 no similar condo sales we would expand to other areas
8 maybe in Rock Hill, Fort Mill. And then even in the
9 surrounding areas of Mecklenburg County where you would
10 have similar land values or rental rates or similar
11 properties.

12 Q Are there any software programs or anything you use
13 to help you in formulating your opinion?

14 A We use Word and Excel and proprietaries, software
15 grouping that Integra has that merges the Word and Excel
16 together.

17 Q Anything else as far as background data or any other
18 information?

19 A We subscribe to Reese, CoStar, Real Capital
20 Analytics, Trap, LoopNet, Precretsi, (phonetic), and a
21 couple of others we will use census data, labor. I can't
22 remember where labor data comes from but some information
23 for like CoreLogic. And this really provides like macro
24 market overviews, demographics or people moving into York
25 County or are they moving out. Things that kind of give

1 you an idea of where, the trend of a property may be or
2 the rent of an area may be.

3 Q Is that the typical kind of information that an
4 appraiser will use to review and formulate their opinions?

5 A Yes. All appraisers start with the macro market area
6 which rely on all or at least a component of that, those
7 different data sources.

8 Q Okay. So you reviewed all the data from the area,
9 the development, like properties. You run your
10 calculations, you have done your cost value approach,
11 sales comparison approach. You have looked at the land,
12 the building area, the size and what was your conclusion
13 as to what the value, Suite 104 at Riverwalk Building
14 District number 6 was?

15 A \$430,000.00.

16 Q And you prepared an executive summary?

17 A Yes.

18 Q And I have got that up here. It is on the screen.
19 Just so we make sure we got the right place. Grapevine
20 Wine Shop, right?

21 A Yes.

22 Q 829 Terrace Park Road?

23 A Yes.

24 Q Rock Hill, Riverwalk River District Building 6?

25 A Yes.

1 Q 1,448 square feet, built in 2016. Is that all
2 correct?

3 A It is correct.

4 Q Are there any qualifications or concerns you have
5 about publishing that number to the jury in this case?

6 A No.

7 Q Are you comfortable and confident that that is the
8 correct appraisal value for the Grapevine premises at
9 Riverwalk?

10 A I am.

11 Q Is there anything you could think of that you didn't
12 consider or look at that would change or alter in any way
13 modify that number?

14 A No.

15 Q You know, there is something interesting in your
16 report. I think you pulled a deed perhaps? It is title
17 to real estate. If you can turn to that.

18 A I have got it.

19 Q What is this that I am looking at, title to real
20 estate?

21 A It is the transfer letter of the site from the
22 original seller to the current owner.

23 Q And who was the original seller?

24 A The Greens of Rock Hill, LLC.

25 Q And who was it sold to?

1 A Riverwalk, or Riverwalk River District Building 6,
2 LLC.

3 Q And does it list what was paid for that property?

4 A It says no consideration.

5 Q Does that mean no money was paid for it?

6 A Yes.

7 Q And whose signature is on the deed?

8 A It looks like Suzanne Wilson.

9 Q Who is the notary?

10 A Sorry. Mark Mather.

11 Q Mark Mather. Does it have him listed as manager of
12 the Assured Administration?

13 A It does.

14 Q And as the sole member manager of the Greens of Rock
15 Hill?

16 A yes.

17 Q Now, following that is an affidavit in your report
18 that looks like it came from the Tax Assessors Office as
19 well. Do you see that?

20 A I do.

21 Q And who is that an affidavit of?

22 A Excuse me?

23 Q Whose affidavit is that?

24 A It would be of the sale but it would be, it looked
25 like it was signed by Mark Mather.

1 Q And on the first page, number three, paren C, does it
2 say, transferred, entities for no consideration?

3 A Yes.

4 Q And are those publicly available documents?

5 A They are.

6 Q Is that just so you know who owns the property and
7 kind of what the history is, make sure there is nothing
8 funny.

9 A It is. We are required to address the prior three
10 year history. And if there is a transaction within that
11 three year period, comment on whether we think that price
12 or that rental rate is at market.

13 Q That means that, are you comfortable to a reasonable
14 degree of certainty, with everything you have looked at,
15 everything that is in the report, I am not going to have
16 you go through it because I think it would bore the people
17 to death, no offense. But are you comfortable that that
18 \$430,000.00 is the correct number for the value of the
19 Grapevine property should it be sold?

20 A Yes.

21 Q All right. Thank you. Those are all the questions I
22 have for right now.

23 THE COURT: Mr. Martens.

24 CROSS-EXAMINATION

25 By Mr. Martens:

1 Q Mr. Scott, an appraisal is an attempt to determine or
2 predict market value of a real estate asset, correct?

3 A That is correct.

4 Q Lenders use appraisals to make sure they are going to
5 have adequate collateral for their loans, correct?

6 A Yes.

7 Q Owners of property might use an appraisal to make
8 sure they are not selling their property for too little or
9 too much?

10 A Yes.

11 Q Purchasers rely on appraisals to make sure they are
12 not paying too much for something that they want to
13 purchase?

14 A Yes.

15 Q And as an appraiser you assume if that property goes
16 into a buy/sale transaction that the buyer and the seller
17 will exchange items of equal or nearly equal value?

18 A Yes. The premises each, the buyer and seller are
19 both working in their best interest.

20 Q And typically in a sales transaction buyer will give
21 up cash and the seller will give up property?

22 A That's correct.

23 Q And at the end of that transaction the seller should
24 have cash equal to the value of the property that it gave
25 up?

1 A That's correct.

2 Q And the purchaser should have property equal to the
3 cash that it gave up?

4 A Yes.

5 Q And if the evaluation is correct and the transaction
6 closes for the evolution neither purchaser or seller has
7 really lost or gained anything of value. They just
8 swapped one thing for the other?

9 A The sales transaction should have nothing to do with
10 the valuation. That is an agreement between the buyer and
11 the seller. The appraisal is just, you know, lending
12 institution, just a way to make sure that they are
13 covered. But in theory, it should be the buyer gets the
14 property, the seller gets the agreed upon amount of money.

15 Q Right. And for purposes of your appraisal, this
16 particular piece, particular unit, this property, you
17 appraised it as if it were a condominium that is presently
18 capable of being bought and sold?

19 A That is correct.

20 Q So in order for a purchaser to require that asset
21 they would have to give up something of value?

22 A Yes, assuming that the, they would pay the sales
23 price.

24 Q The purchaser wouldn't be entitled to get it for
25 free, in other words?

1 A No.

2 Q Okay. And, sir, your appraisal did not include any
3 outdoor space, right?

4 A That's correct.

5 Q And you looked at the property records and talked to
6 your client what you should and should not appraised?

7 A Yes. We have looked at the property records. As of
8 the date of inspection, when we were out there, there was
9 no outdoor seating. It was my understanding we were to
10 appraise the unit itself.

11 Q When you say the unit, you are talking about the --

12 A Within the walls.

13 Q -- the heated space that is currently occupied by
14 Grapevine of Riverwalk?

15 A Correct.

16 Q Thank you, sir.

17 THE COURT: Mr. Meckler.

18 REDIRECT EXAMINATION

19 By Mr. Meckler:

20 Q It is an interesting question about purchasing, give
21 or take, if someone had an agreement to purchase the
22 Grapevine property that you have appraised for
23 \$270,000.00, that is what they pay, correct? That is what
24 the sales agreement is.

25 A Yes. If that is the option to purchase with them,

1 you know, a lease or a sales agreement, that is what is
2 paid. I was under the assumption we were talking about
3 market value.

4 Q We are. And then the fair market value, though, is
5 \$430,000.00?

6 A Correct.

7 Q So, gosh, if I am a seller and I am selling something
8 for \$270,000.00 but it is really worth \$430,000.00 I could
9 have gotten \$160,000.00 more than that if I sold it for
10 fair market value?

11 A Correct.

12 Q But if I had a sales contract, that is the price I
13 have to sell it for, correct?

14 A That is correct.

15 Q And likewise, if I have an agreement to buy a
16 property for \$270,000.00, but it appraises at \$430,000.00,
17 and I don't have that property sold to me I lost the
18 benefit of that increase in value, correct?

19 A Yes.

20 Q Thank you.

21 THE COURT: Mr. Martens.

22 RECROSS-EXAMINATION

23 By Mr. Martens:

24 Q Counsel's question was about what you, what somebody
25 might lose or gain. And the loss of the gain would only

1 be measured by the difference, right, between the sales
2 price and the appraisal?

3 A You are talking about the \$270 versus --

4 Q Yes.

5 A If I am following you, yes. I mean, if you can only
6 sell it for \$270 but you could sell it for \$430, your loss
7 is the delta.

8 Q Just the delta, that is what we are talking about, is
9 the delta, right?

10 A (Witness nods head.)

11 THE COURT: Anything else from the Plaintiff?

12 MR. MECKLER: No sir, Your Honor.

13 THE COURT: Thank you, sir, you are excused. Any
14 further witnesses from the Plaintiff?

15 MR. MECKLER: No sir, Your Honor.

16 THE COURT: Ladies and gentlemen, this brings up to
17 the point that we talked with you about. The Plaintiff
18 has rested their case. So that means it will be the
19 Defense turn and there are legal matters we have to take
20 up before we get to the Defense case. And given that we
21 have not taken a lunch break and this will likely take
22 several hours, rather than holding you in a room and wait
23 on us, we will send you home for the day. the same rules,
24 please don't discuss this case with each other or anyone
25 else. Don't do any outside research, otherwise we will see

1 you back at 9:30 tomorrow morning. Thank you very much.

2 (Whereupon, the jury is excused from open court for
3 the day.)

4 THE COURT: Counsel, we will pick back up at 2:15.
5 We will have time to get lunch. Mr. Meckler, one thing I
6 want to, if you don't mind thinking about this over the
7 break. The testimony of the bank, this is kind of an
8 unusual case for specific performance. Most of the cases,
9 you know, person owns the property and then the Court
10 says, if they grant it, sell it. Or you own a classic
11 Corvette and the Judge says, sell it. In this case there
12 are other third parties that are not parties to this
13 lawsuit that would have to sign off on the sale.

14 MR. MECKLER: It's not, how shall I say. It is not
15 our problem, not your problem, that would be their
16 problem. What it would do is it would put them, perhaps
17 in breach of their agreement with the bank. But they
18 should have thought about that before they signed a lease
19 with an option to purchase because Grapevine is not, and
20 the banker testified, Grapevine wasn't a party to that.
21 That is not their problem, that is a whole independent
22 problem.

23 THE COURT: But if I order specific performance and
24 they refuse they are not just in breach, they are in
25 contempt, right.

1 MR. MECKLER: Who is?

2 THE COURT: If I were to order specific performance
3 and the Defendant did not do it they are in contempt,
4 aren't they?

5 MR. MECKLER: Yes. If they don't comply with your
6 order, yes.

7 THE COURT: How can I hold them in contempt if a
8 third party bank has a security interest that they refuse
9 to sign off on.

10 MR. MECKLER: That is their problem. It doesn't
11 affect you, Your Honor. I mean it is, then they will have
12 a contractual dispute with their bank but they put
13 themselves in that situation. Grapevine didn't sign off
14 on the loan documents, they weren't a party to it.

15 THE COURT: I will keep thinking. That seems to me
16 to be a strong argument for money damages if, in fact,
17 there is breach rather than specific performance. Because
18 they don't have clear title. Not to that condo.

19 MR. MECKLER: They have clear title of the building.

20 THE COURT: But not to the --

21 MR. MECKLER: They will be in breach of their loan
22 agreement.

23 THE COURT: It is not just a breach of contract. The
24 bank will object to, they don't have a legally enforceable
25 security interest?

1 MR. MECKLER: They don't have any right to object to
2 it. They could argue that somehow they got some security
3 interest in the building. But they don't have any right,
4 the bank has no rights within this here. Because the only
5 issues are, did they agree to sell them a property. They
6 were ready, willing and able and they didn't do it. The
7 consequence of specific performance is not the burden of
8 the Court or us, that is their burden to deal with. They
9 put themselves in that position. If they had Grapevine
10 sign onto that loan document, maybe it would be something
11 else. If there was something in the lease agreement that
12 said, hey look, we can only sell this if our lender
13 approves the option to purchase, that would be something.
14 But it doesn't say that. And so whether it puts them in a
15 bind, it might but any judgment puts a party in a bind.
16 They have got other obligations, there are people that,
17 when you issue a money judgment somebody else may have a
18 lien on funds that these people get. That argument could
19 go on.

20 THE COURT: Right. But that, but money is fungible.
21 We are at a totally different category with this, you are
22 asking for specific performance.

23 MR. MECKLER: The bank approved the lease, the lease
24 had the option to purchase in the third lease year. We
25 are beyond the third lease year. So I don't see how the

1 bank can then come back and complain.

2 THE COURT: They are testifying on the stand that the
3 bank has to be satisfied, the collateral has enough value
4 or meaning, the loan has to be rewritten. It requires the
5 bank's approval to do that.

6 MR. MECKLER: And, so under, let's see, Rule 70. It
7 has a provision for not the Court but for the Court to
8 assign somebody the task of handling all of those things
9 incident to specific performance. Which would include, I
10 guess, if you want to or its really not, it really
11 wouldn't be the Judge's or the judgments, wouldn't have to
12 do that. Still it is their responsibility but the Judge,
13 you, could assign somebody to take on that task. for
14 instance, if they go to the bank and ask for the release,
15 it is just a release or if they didn't finish up the
16 master deed or the condominium documents or present deed
17 you can appoint somebody to take that over for them and
18 handle all of those issues.

19 THE COURT: No, I understand. But your argument is
20 making the assumption that the bank's job is just
21 ministerial. It appears to me the bank has a really
22 enforceable right and they can choose to approve or not
23 approve this transaction. That is what makes up, I think,
24 a very different -- isn't that true. Isn't that what he
25 testified, the bank has a contractual right of refuse and

1 say, we are not going to allow this to be --

2 MR. MECKLER: The only thing the bank has a
3 contractual right to do is to declare them in default of
4 their convenience. The bank doesn't have any interest in
5 the property.

6 THE COURT: What is their effect of release of
7 collateral? The collateral is what your client is trying
8 to take possession of, right?

9 MR. MECKLER: All they have is a loan agreement with
10 the bank, the release of collateral is just for them. And
11 it releases them from that, the covenant that says, they
12 can't amend or alter. If they amend or alter, that is one
13 thing. They are not doing that. They have already
14 breached. If we find that we are right, they are already
15 in violation of their convenience. So all it does is
16 breach the agreement between them and the bank. Grapevine
17 shouldn't be punished because they entered into a bad
18 agreement with the bank. That is not Grapevine's fault.

19 THE COURT: Well, again, it is not punishment. I
20 mean, assuming that you are right and the jury agrees with
21 you, you would get money damages. I mean, special
22 performances is extraordinary, excuse me, specific
23 performance is an extraordinary remedy.

24 MR. MECKLER: There is nothing in the law that says,
25 if you meet the elements of specific performance caveat,

1 if there is a bank that made a loan to the person that is
2 suppose to sell it to you, you can't get it. That is just
3 not the way the law reads. You have to assume that almost
4 every property has some sort of encumbrance or mortgage or
5 something like that. The agreement between them and the
6 bank is a damages issue, it is not an us issue. And if
7 they need to sell that property or if they need to pay the
8 bank off to be able to transfer the property that is on
9 them, not on us and certainly not on Your Honor.

10 THE COURT: I am going to give the Plaintiff time to
11 address the Court, I will give you a chance to respond
12 before lunch. Do you have any thoughts on that issue?

13 MR. MARTENS: The issue, Your Honor's hit the nail on
14 the head. It is the same argument, maybe close to the
15 argument that I made on summary judgment on this issue.
16 And if the Court assumes, which is what I think the
17 Plaintiff is driving at, is that Exhibit G to the lease
18 agreement is the contract that they want to enforce. The
19 contract actually does have a provision about obtaining
20 lease and clear title. And it says, if the cost to the
21 seller that is more than \$10,000.00 dollars then there is
22 an out. We don't have to go forward with this. And if
23 that is the contract they want to enforce, that may or may
24 not satisfy their requirements. But absolutely, you know,
25 in theory I suppose convey title to them subject to the