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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2023-001494

Charleston SC Property Holdings, LLC, Hanahan SC Property Holdings, LLC, and Michael Flanagan, Receiver……..Respondents,

v.

Rittenberg OP, LLC, Hanahan OP, LLC, Goldner Management, LLC, SC Two OP Holdings, LLC, and Samuel Goldner…….……..Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. The trial court committed an error of law by prematurely terminating Lessees' leasehold rights to the Demised Premises where the merits of the underlying breach of lease claim are disputed and there has been neither a trial nor a determination of the merits of the parties' claims and defenses.

2. In deciding the Receiver's Lease Termination Motion, which necessarily disturbed the status quo as established at the time the receivership was approved, the trial courts failure to 1) compare the interests of the parties and whether the requested action would preserve the status quo or cause substantial injury, 2) examine the merits of the underlying claims, and 3) assess the time in the receivership's life at which the motion was being made constituted an abuse of discretion that resulted in the court erroneously granting the termination of the Master Lease.

STATEMENT OF THE CASE

This action arises from a dispute concerning a June 14, 2021 Master Lease Agreement between Appellants Hanahan OP, LLC (individually "Hanahan OP") and Rittenberg OP, LLC (individually "Rittenberg OP"), both Delaware limited liability companies, as lessees and Hanahan SC Property Holdings, LLC and Charleston SC Property Holdings, LLC, each South Carolina limited liability companies, as lessors (collectively "Lessors") for two parcels of real property, one located in Charleston County and the other located in Berkley County (collectively the "Demised Premises"), out of which Lessees were to take over and operate skilled nursing care facilities that had become distressed under the prior tenant/operator ("Master Lease"). Collectively Hanahan OP and Rittenberg OP and their parent companies, Goldner Capital Management, LLC and SC Two OP Holdings LLC, shall be referred to as "Lessees." See Affidavit of Goldner, ¶ 1.

On Tuesday, March 28, 2023 Lessors filed a Summons and Complaint in the Charleston County Court of Common Pleas alleging breach of the Master Lease for failure to pay rent and meet other financial benchmarks, in which Lessors requested additional relief as a result of the alleged breach of the Master Lease. See Complaint, Sections I.A., B., and E. At the same time Lessors also filed a Motion for Appointment of Receiver ("MAR") that included a request for an "**EXPEDITED HEARING**". See MAR. Lessors thereafter served their Summons and Complaint along with the MAR on Lessees on Wednesday, March 29, 2023. Thereafter, on Thursday, March 30, 2023, Lessors served a Notice of Hearing for their Motion for Appointment of Receiver ("Notice") on Lessees. The Notice stated that the hearing on the MAR was scheduled for Thursday, April 6, 2023, less than ten (10) days from the date on which the Lessees

were served with the Notice. Samuel Goldner ("Goldner"), the CEO, founder, principal and managing member of Goldner Capital Management, LLC, though named as an individual defendant by Lessors, was never served with the Summons and Complaint, the MAR, or the Notice by Lessors.[1] Due to Lessors' refusal to continue the hearing on the MAR from April 6, 2023, Lessees filed a Motion for Continuance on April 5, 2023 that was granted by the trial court and which initially moved the hearing on the MAR to Friday, April 7, 2023 before Judge McFaddin "reconsider[ed] the continuance motion" and ultimately moving the MAR hearing to Tuesday, April 11, 2023. See April 5-6, 2023 email correspondence between Court and Counsel.

On Monday, April 10, 2023, despite the inability of Goldner to assist in preparation of Lessees' opposition to the MAR due to his faithful observance of Passover (Thursday, April 6 and Friday, April 7, 2023) and Sabbath (Saturday, April 8, 2023), Lessees, in response and opposition to the MAR, were nonetheless able to obtain and file the Affidavits of Goldner and the Chief Operating Officer ("CEO") and the Chief Nursing Officer ("CNO") for Hanahan OP and Rittenberg OP, which operated the skilled nursing homes in the Demised Premises, in conjunction with Lessees' Motion to Dismiss, or in the alternative to Stay, and Compel

[1] The date of filing of the Summons and Complaint and the attempt to force a hearing on the MAR on April 6, 2023 in violation of Rule 6(d), SCRCP, is also noteworthy in that it appears that Lessors planned the timing of their filings to exploit the fact that Goldner, who is also a principal member of the Corporate Defendants, is a devout practicing member of the Jewish community and Passover in 2023 started at sundown on Wednesday, April 5, 2023. Passover 2023 ran from sundown on April 5, 2023 to nightfall on April 13, 2023, during which period, and including normal Sabbath observance, work, subject to certain restrictions, was only permitted on April 9, 10, and 11. Given that the observance of Passover involves extensive preparation and abstaining from most of the same activities that are avoided on the Sabbath, e.g., no driving or working during the first and last two days of Passover, Lessors' vociferous refusal to continue the hearing on the MAR from April 6, 2023 appeared to be a conscious tactical decision to utilize Goldner's faithful observance of Passover to handicap Goldner's ability to meaningfully participate in the defense of and opposition to the MAR.

Arbitration. See Motion to Dismiss and Compel Arbitration ("Motion to Dismiss") and Exhibits thereto. Given the extremely limited opportunity to prepare and take action in opposition to the MAR and the express language of the Master Lease arbitration clause that provides that "[t]he parties hereto agree that this Section 38.20 [sic][2] has been included to rapidly and inexpensively resolve any disputes between them with respect to the matters described above, and that this paragraph shall be grounds for dismissal of any court action commenced by any party with respect to a dispute arising out of such matters," and the dispositive impact compelling arbitration would have on the request to appoint a receiver, Lessees expressly "request[ed] an order of this Court granting expedited consideration of th[e] Motion [to Dismiss and Compel Arbitration] at the same time as [Lessors]' Motion for Appointment of Receiver."[3] See Motion to Dismiss, pp. 2-3, and Exhibit A, p. 48, Sec. 37.18; see also Apr. 11, 2023 Hr'g Tr. pp. 15:22-16:4.

Based on Lessors' request for one (1) hour for the MAR hearing and subject to the Court "drowning in non-jury matters and motions," the Court held a rushed and time-constrained hearing on Lessors' MAR on Tuesday, April 11, 2023. See April 6, 2023 email from Judge McFaddin to Counsel ; see also Apr. 11, 2023 Hr'g Tr., p. 23:13-14 ("Please you all, I wish I could hear more. I really do, but I've got a lot to do here today."). On April 12 Judge McFaddin

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[2] Section 37.18 contains a scrivener's error incorrectly referring to "this Section" as 38.20 instead of the correct section number 37.18. Further confirming the typographical nature of the incorrect identification is the fact that the Lease does not contain a Section 38.20.

[3] Despite the interrelation of the arbitration and receivership question, not to mention the fact that Lessors were clearly fine with Lessees receiving less than ten (10) days' notice of the hearing on Lessors' MAR, the Court, though it allowed and/or received discussion and argument concerning the Motion to Dismiss and Compel Arbitration, issued no ruling on Lessees' Motion to Dismiss and Compel Arbitration, which remains pending and is being held in abeyance until such time as the appeals of the receivership orders are resolved by the appellate courts.

filed an initial order appointing a receiver ("Short Order") and requesting Lessors' counsel to draft a formal order for the Court's consideration. See April 6, 2023 email from Judge McFaddin to Counsel; Short Order. On April 13, 2023 Lessors' counsel filed a proposed Order appointing a receiver for Judge McFaddin's consideration, in response to which Lessees immediately circulated specific objections to the proposed Order, including specifically that:

> Both the receivership statutes under which [Lessors] have sought appointment of a receiver and controlling South Carolina Supreme Court precedent require that whenever a receiver is appointed prior to the entry of final judgment, "there shall be inserted in the order of appointment a clause fixing the value of the property for which the bond may be given, as prescribed in § 15-65-50." S.C. Code Ann. § 15-65-60 (emphasis added); see also Truesdell v. Johnson, 144 S.C. 188, 142 S.E. 343, 348 (1928) (interpreting the provision under the previous receivership statute containing substantively identical language to Section 15-65-60 and holding that "[t]he provision for inserting a clause fixing the value of the property in the order appointing a receiver is mandatory").

April 13, 2023 email from Lessees' Counsel. After responding to correspondence from counsel regarding the proposed Order, Judge McFaddin ultimately entered the Order Appointing Receiver, as drafted by Lessors' counsel, on Friday, April 14, 2023 at 11:26 a.m. (the "Receivership Order"). See April 14 email from Judge McFaddin to counsel; Receivership Order. Despite the fact that it is mandatory under S.C. Code Ann. § 15-65-50 for an order appointing a receiver to insert a clause fixing the value of the property to allow a party to obtain redelivery of the property in question, Judge McFaddin's Receivership Order provided no such clause fixing the value of the property and instead stated only that the "Court will entertain any future request for bond by the Defendants in an amount commensurate with the facts of this case and applicable law." Receivership Order, p. 17, ¶ 26. By way of the Receivership Order, Michael F. Flanagan ("Receiver") was appointed as the Receiver for the Demised Premises and the personal property

utilized in the operation thereof. See Receivership Order, p. 4, ¶ 2. Later in the evening on Friday, April 14, 2023, Lessees filed their Rule 59(e) motion for reconsideration seeking to have the court reconsider, alter, and amend the Order on the grounds that it contained errors of law, failed to consider, address, or make findings as to certain statutory requirements, and created manifest injustice for Lessees. See Lessees' Rule 59(e) Motion for Reconsideration, Request for Stay Pursuant to Rule 62(a), and Offer of Bond. Consistent with Rules 7(b)(2), 8(a), and 8(e)(2), SCRCP, Lessees alternatively offered a bond pursuant to Paragraph 26 of the Order, which expressly stated that "the Court will entertain any future request for bond by the Defendants in an amount commensurate with the facts of this case and applicable law," and requested that the Order be stayed pursuant to Rule 62(a). See Motion for Reconsideration, Request for Stay Pursuant to Rule 62(a), and Offer of Bond; Order p. 17, ¶ 26.

By way of Form 4 Order on April 27, 2023 ("April Form 4 Order"), Judge McFaddin denied Lessees' request for reconsideration. See April Form 4 Order. By way this same April Form 4 Order, and despite Lessees' Motion to reconsider clearly and alternatively "request[ing] that the Court approve [Lessees]' Offer of Bond so that [Lessees] may pursue a bond and the execution and filing thereof to vacate the appointment of the receiver and direct the redelivery of the property to [Lessees] in accordance with S.C. Code Ann. § 15-65-60," Judge McFaddin also, baldly and without any explanation, simply denied Lessees' request for stay and offer of bond. See April Form 4 Order ("Defendants' Rule 59(e) Motion for Reconsideration, Request for Stay Pursuant to Rule 62(a), and Offer of Bond is respectfully denied.").

Lessees timely filed a Motion for Reconsideration of Judge McFaddin's denial of Lessees' request for stay and offer of bond on May 5, 2023. Despite timely filing the May 5,

2023 Motion requesting reconsideration of the April 27, 2023 Form 4 Order, a copy of the May 5, 2023 Motion was inadvertently not transmitted to Judge McFaddin via email or hardcopy as directed by Rule 59(g), thus the Motion to Reconsider remained pending.[4] Once the oversight concerning transmission of a copy of the timely filed May 5, 2023 Motion pursuant to Rule 59(g) was brought to the attention of Lessees' Counsel on November 17, 2023, a copy of the May 5, 2023 Motion was emailed to Judge McFaddin on November 20, 2023. Judge McFaddin ultimately issued an Order on March 28, 2024 denying Lessees' May 5, 2023 Motion. The foregoing Orders of Judge McFaddin were timely appealed by Lessees on April 29, 2024.

Despite Lessees' May 5 Motion to reconsider the denial of Lessees' offer of bond and request for stay remaining pending before Judge McFaddin, and instead of raising the Rule 59(g) issue to the Court as an easy way to dispose of Lessees' pending request for reconsideration of their offer of bond and request for stay, the filing of which "removes the finality of the challenged judgment," the Receiver filed a Motion to Approve Entry Into Operations Transfer Agreement and Lease Termination Agreement (the "Lease Termination Motion") on August 3, 2023, less than One Hundred (100) days after the creation of the receivership. Se. Hous. Found. v. Smith, 380 S.C. 621, 640, 670 S.E.2d 680, 690 (Ct. App. 2008). As with MAR, the Lease Termination Motion also urged the Court to expedite the hearing thereon. See Lease Termination Motion. The Lease Termination Motion was heard before Judge Young on August 23, 2023. Prior to the hearing on the Lease Termination Motion, Lessees did not file a memorandum of law in opposition to the Lease Termination Motion, however, at the hearing that was held by WebEx,

[4] Undersigned counsel believed, apparently mistakenly, that with the advent of e-filing that a copy of a motion to reconsider a judge's ruling was automatically sent to the ruling judge by the clerk's office upon acceptance of the filing.

Lessees' counsel argued in opposition to the Lease Termination Motion, orally raising each of the points subsequently reduced to writing in Lessees' Motion to Reconsider. See Aug. 23, 2023 Hr'g Tr. pp. 5:22-6:1; 7:24-8:5; 8:21-25; 9:3-18; Aug. 30, 2023 Motion to Reconsider. Specifically, Lessees' counsel argued that the Receiver's Lease Termination Motion was premature because Lessors' claims to right of possession of the Demised Premises are disputed and no trial or determination of the merits of the parties' claims and defenses has been had or made, and that, by granting the motion to terminate the Lease and authorizing the transfer of the possession and operation of the Demised Premises to a new tenant, the Court was irrevocably disturbing the status quo. In discussing the premature nature of the Receiver's Lease Termination Motion, Lessees' counsel also specifically directed the Court's attention to several factors commonly considered by courts passing on motions to disturb the status quo of a receivership prior to a trial and determination of the merits of a case. Despite the argument of Lessees' counsel, Judge Young granted the Lease Termination Motion from the bench and entered a formal order to that same effect shortly thereafter on August 23, 2023. See Aug. 23, 2023 Order of Judge Young.

Lessees' counsel timely filed a Motion to reconsider or in the alternative to stay the August 23, 2023 Order pursuant to Rule 62(a), SCRCP, on August 30, 2023. See Aug. 30, 2023 Motion to Reconsider. Despite the fact that Lessees' counsel specifically opposed the granting of the Lease Termination Motion during the motion hearing on the grounds that it was premature and would irrevocably alter the status quo before any trial or determination of the merits of the parties' claims and defenses, Judge Young summarily rejected Lessees' Motion to reconsider on the grounds that "[a] party cannot use Rule 59(e) to present to the court an issue the party could

have raised prior to judgment but did not." See Sep. 8, 2023 Order (alteration in original; citation omitted). Lessees' timely appealed Judge Young's August 23 and September 8 Orders on September 13, 2023.

STATEMENT OF THE FACTS

The parties to this dispute signed a commercial Master Lease for two properties, including the Demised Premises and the personal property used therein and about, in South Carolina that the Lessors own, in which the Lessees' have a leasehold interest, and at which the Lessees, through their Operating Entity, Vivant Healthcare, operated skilled nursing care facility businesses. See Master Lease; see also Exhibit E to Motion to Dismiss. Lessors allege that Lessees have breached the Master Lease governing the relationships between the parties. See generally Compl. The Master Lease, as negotiated and agreed to by Lessors and Lessees, expressly contains an arbitration provision in Section 37.18 calling for all disputes arising out of or in connection with the Master Lease to be submitted to final and binding arbitration before the Chicago Rabbinical Council (the "Beit Din"). See Master Lease, p. 48, Sec. 37.18. Moreover, Section 37.18, as agreed to by and between Lessors and Lessees, further directs that the binding arbitration clause "has been included to rapidly and inexpensively resolve any disputes between [the parties] with respect to the matters described above, and that this paragraph shall be grounds for dismissal of any court action commenced by any party with respect to a dispute arising out of such matters." Id. Thus, although Lessees have not filed an answer in the underlying action, they nonetheless expressly deny Lessors allegations of breach of lease, insolvency, and that the Demised Premises, or their rents and profits, are in danger of being lost or materially injured or impaired.

Disputes have arisen among the Lessors and Lessees regarding primarily financial issues arising out of the Master Lease. Despite the typical landlord-tenant/rent dispute nature of the dispute between the Lessors and Lessees, the Lessors have sought to dishonor and evade the heavily negotiated and agreed upon dispute-resolution procedures in the Master Lease by filing a state court action on the eve of Passover, a multi-day religious holiday, during which observant Jews are specifically prohibited from working, seeking the emergency appointment of a receiver on the grounds of conclusory allegations regarding operational safety issues that were strongly rebutted in the sworn Affidavits of Goldner, and the CEO and CNO of Lessees' Operating Entity. See Affidavits of Goldner, Whimpey, and Francois. The filing and pursuit of this lawsuit in contravention of the terms of the Master Lease appear to an attempted end-run to secure the termination of Appellants' leasehold rights without requiring Lessors to first satisfy their burden of proof at a trial on the merits of Lessors' breach of contract claims, all at great prejudice to Lessees' due process rights and in violation of the express terms of the Master Lease regarding dispute resolution. See Affidavit of Goldner, ¶¶ 5-9; Master Lease p. 48, Sec. 38.17. Contrary to Lessors' allegations, Appellants have significantly improved each of the properties since commencement of the Master Lease in June 2021, and were still in the process of making further improvements to the physical structures as well as the level of care provided to residents, and the financial performance of the properties up to the appointment of the receiver. See Affidavit of Goldner, ¶¶ 5-9; Affidavit of Whimpey, ¶¶ 3-8, 12; Affidavit of Francois, ¶¶ 3-5. While there have been some financial issues with the properties resulting in dispute between the Lessors and Lessees regarding rent owed under the Master Lease, many of the issues raised by Lessors in the Complaint and MAR relating to the renovations and citations for code violations at the subject

properties arise from the Lessors' own refusal to make available monies set aside in the Master Lease for capital expenditures to be paid by Lessors. Consequently, Lessees distinctly deny that they have breached the Master Lease and further maintain that it is Lessors who are breaching their obligations under the Master Lease by, inter alia, not providing proper capital expenditure funding, by refusing to provide access to financial information to which Lessees are entitled, by not providing proper notice of various actions taken by Lessors' representatives, and by completely disregarding the dispute resolution provisions that the parties negotiated, agreed to, and by which they are bound, in the Master Lease.

Due to the pendency of Lessees' Motion to Dismiss and Compel Arbitration, which was filed seeking to enforce the parties' mutually agreed upon dispute resolution provisions provided for in the Master Lease, Lessees have yet to file an answer in the underlying action and, accordingly, Lessors action alleging breach of lease has not progressed past the filing of Lessors' Complaint.

STANDARD OF REVIEW

The appointment of a receiver is fundamentally an action in equity. See Wadsworth Industries, Inc. v. Westgate Knitting, Inc., 264 S.C. 106, 109, 212 S.E.2d 571, 572 (1975). In its review of an action in equity, the appellate court has jurisdiction to find facts and rule upon issues of law in accordance with its own views of the preponderance of the evidence. See Townes Assoc., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

S.C. Code Ann. § 15-65-10(1) establishes the circumstances under which a court may make a prejudgment appointment of a receiver.

A receiver may be appointed by a judge of the circuit court, either in or out of court:

> Before judgment is rendered, on the application of either party, when [the applicant] establishes an apparent right to property which is the subject of the action and which is in the possession of an adverse party and the property, or its rents and profits, are in danger of being lost or materially injured or impaired, . . .

S.C. Code Ann. § 15-65-10(1). The appointment of a receiver is a drastic remedy, only allowed under the most compelling circumstances, and only should be granted with great caution and reluctance. See Midlands Utility, Inc. v. S. C. Dept. of Health and Environmental Control, 301 S.C. 224, 391 S.E.2d 535 (1989); Vasiliades v. Vasiliades, 231 S.C. 366, 98 S.E.2d 810 (1957); Wrenn v. Wrenn, 228 S.C. 588, 91 S.E.2d 267 (1956). The appointment of a receiver is fundamentally an action in equity, and one who has unclean hands is not entitled to use the sword of equity to his benefit. See Wadsworth Industries, Inc. v. Westgate Knitting, Inc., 264 S.C. 106, 109, 212 S.E.2d 571, 572 (1975).

ARGUMENT

Summary of Argument

"The appointment of a receiver pendente lite by the court [is] purely a provisional remedy —to preserve the assets of the estate." Vasiliades, 231 S.C. at 376, 98 S.E.2d at 815. Despite preservation of the status quo being the universally recognized purpose of the appointment of a receiver pendente lite, the Court's August 23, 2023 Order granting the Lease Termination Motion obliterated the status quo less than One Hundred (100) days after the creation of the receivership by granting the ultimate relief Lessors seek, i.e., terminating the Lessees' leasehold rights to the Demised Premises and transferring the possession and operation of those properties to a new tenant/operator, without ever requiring the Lessors to prove the merits of their causes of action alleging breach of lease by the Lessees. Having destroyed the status quo by terminating and

transferring Lessees' leasehold rights to the Demised Premises without ever requiring Lessors to prove the merits of their claims or providing Lessees their rightful opportunity to present their defenses and counterclaims to an arbitrator, the trial court's August 23, 2023 Order constituted an abuse of discretion that was both wildly premature and grossly inequitable. Accordingly, this appeal seeks the reversal of the August 23, 2023 Order granting the Lease Termination Motion and requests the restoration of the status quo ante to allow this dispute to be resolved in accordance with the parties' expressly agreed upon dispute resolution procedures provided in the Master Lease, after the conclusion of which any party may thereafter seek timely relief concerning the continuance or termination of the receivership as may be appropriate at that time.

I. The trial court committed an error of law by prematurely terminating Lessees' leasehold rights to the Demised Premises where the merits of the underlying breach of lease claim are disputed and there has been neither a trial nor a determination of the merits of the parties' claims and defenses.

The purpose of appointing a receiver is merely "to preserve the property pending the litigation so that relief awarded by the judgment, if any, may be effective." Porter v. Brown, 149 S.C. 151, 162 n.1, 146 S.E. 810, 814 n.1 (1929) (Cothran, J., concurring in result) (emphasis added); see Vasiliades, 231 S.C. at 376, 98 S.E.2d at 815 (1957) ("The appointment of a receiver pendente lite by the court was purely a provisional remedy—to preserve the assets of the estate."). The appointment of a receiver, "a drastic remedy, [that] should be granted only with reluctance and caution," is not intended to provide an end-run around a plaintiff's burden of proving his case on the merits. Richland Cnty. v. S.C. Dep't of Revenue, 422 S.C. 292, 313, 811 S.E.2d 758, 769 (2018) (quoting Midlands Util., Inc., 301 S.C. at 228, 391 S.E.2d at 538); Wadsworth Industries, Inc., 264 S.C. at 113, 212 S.E.2d at 574 (affirming appointment of a receiver but expressly stating that "[o]bviously, all interested parties are entitled to litigate at an

appropriate hearing any issues involving any claim on the merits"); Pelzer v. Hughes, 27 S.C. 408, 415, 3 S.E. 781, 785 (1887) ("It should be borne in mind that a complaint may be entitled to a preliminary injunction although this right to the relief prayed may ultimately fail. A court of equity will, in many cases, interfere by injunction to preserve property in statu quo, during the pendency of a suit, in which the rights to it are to be decided; and that, without expressing, or often without having the means of forming, any opinion as to such rights."); DeWalt v. Kinard, 19 S.C. 286, 296 (1883) (McGowan, J., concurring) (noting that the appointment of a receiver for real property, the right to possession of which was disputed by the parties, "could only have the salutary effect of preserving the issues of the property pending litigation, then to be delivered to that party who may finally be decided to be entitled to the same.") (emphasis added); see also Pelzer, 27 S.C. at 415-16, 3 S.E. at 785 ("It is universally conceded that the power of appointment [of a receiver] is a delicate one, and is to be exercised with great circumspection" and as 'a rule, a receiver will not be appointed during the progress of a cause, unless there is the strongest reason to believe that the plaintiff is entitled to the relief demanded in his complaint, and there is danger that the property will be materially injured before the case can be determined.'") (internal quotation marks and citation omitted); Clinkscales v. Pendleton Mfg. Co., 9 S.C. 318, 323 (1878) ("[W]here there was a Receivership pendente lite…the sole object of the Receivership is to preserve the property, to answer the purposes of a decree, as between the parties to the suit, without affecting the interest of third persons not parties…"). However, an end-run is precisely what the trial court's August 23 Order sanctions for Lessors, securing the termination of Lessees' leasehold rights without requiring Lessors to first satisfy their burden of proof at a trial on the merits of Lessors' breach of lease claims, all at great prejudice to Lessees

and in violation of their due process rights and contractual rights to have disputes resolved by arbitration in accordance with the terms of the Master Lease. In stark contrast to the shortcut permitted to Lessors by the trial court's August 23 Order, the Supreme Court has made clear as far back as 1883 that where a plaintiff pursues an action to recover possession of real property upon an allegation of breach of contract, "unless this allegation was admitted an issue [i]s presented which the defendant ha[s] the right to have tried by a jury." DeWalt, 19 S.C. at 290.

Thus, where, as in this case, the rights of a landlord against a tenant are not established by unrefuted evidence, the tenant's right to possession of the property remains and cannot be revoked until there has been a final determination of all issues at trial. Id. at 293 ("A person in possession of real property is presumed to have title until the contrary appears, and we do not see by what authority he can be deprived of such possession until the question of title has been tried, even though it should be made to appear, prima facie, that he was insolvent.") (emphasis added); see also Kirven v. Lawrence, 244 S.C. 572, 580, 137 S.E.2d 764, 768 (1964) (explaining that due to the contested nature of the case, the right to possession of the real property at issue remained in the defendants "[u]ntil there has been a final determination of all issues" on the merits) (emphasis added). Accordingly, given that this case has not even progressed beyond the filing of Lessors' Complaint, no discovery has been conducted, the Lessors have not been required to prove the merits of their claims, and the Lessees have never been "given the opportunity to present all relevant and admissible evidence in support of [their] position," Halsey v. Simmons, 432 S.C. 54, 58, 849 S.E.2d 578, 580 (2020), it is wildly premature and an abuse of discretion for the trial court to impose remedies based on the Lessors' disputed allegations of breach of lease that destroy the status quo and erect a serious obstacle and/or bar to Lessees regaining possession

of and recommencing business operations in the Demised Premises, and thereby inflict great and irreparable loss and injury on Lessees even if they ultimately prevail on the merits of this action at trial.[5] [6] Brookshire v. Farmers' Alliance Exch., 71 S.C. 451, 456, 51 S.E. 442, 443 (1905) (explaining the distinction between a hearing on "a preliminary motion for a receiver," which is

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[5] As perviously noted, Lessees have not even filed an answer to Lessors' Complaint. Instead Lessees, pursuant to the dispute resolution provisions of the Master Lease and in response to Lessors' Complaint served on March 29, 2023, filed a Motion to Dismiss and Compel Arbitration on April 10, 2023. Lessees' Motion to Dismiss and Compel Arbitration is still pending and is currently being held in abeyance until the receivership issues on appeal are resolved by the appellate courts.

[6] See, e.g., Bohn v. Black, 2019 NCBC 34, ¶ 55 (N.C. Super. Ct. 2019) ("It would also be premature to address the Bohns' requests for a constructive trust and permanent injunction. In the Order granting the Bohns' motion for a preliminary injunction, the Court concluded that they had shown a likelihood of success on the merits of the claim for unjust enrichment and that a constructive trust is an available remedy for that claim….Defendants have not moved to dissolve the preliminary injunction, which remains in force, and the claim for unjust enrichment will proceed to trial. The Court believes it would be more appropriate to resolve the disputed facts underlying the claim for unjust enrichment before imposing or denying remedies based on that claim.") (emphasis added); 65 Am. Jur. 2d Receivers § 6 (2011) ("[A] receiver's primary purpose is to preserve the property's value for those to whom it is ultimately determined that the property belongs so to accommodate all claims possible.") (emphasis added); U.S. Sec. & Exch. Comm'n v. Quan, Civil No. 11-723 ADM/JSM, *15-16 (D. Minn. Apr. 30, 2012) ("Additionally, a distribution plan is premature at this stage [for the receivership estate], because the merits of the SEC's case have not been resolved. A determination has not yet been made as to whether the frozen funds will be disgorged….Accordingly, because the potential for disgorgement exists, the funds will not be distributed at this time.") (emphasis added); US v. Vanguard Inv. Co., Inc., 667 F. Supp. 257, 263-64 (M.D.N.C. 1987) (noting that a "receiver's role is essential in protecting the rights of all interested parties," and holding that the plaintiff's request for the "ultimate remedy it seeks," dissolution and liquidation of defendant, "[wa]s premature as the receiver has not entered his report or recommendation nor have the merits of th[e] action been resolved by trial or dispositive motion.") (emphasis added); Southern Connecticut Gas Co. v. Housing Authority, 191 Conn. 514, 527 (Conn. 1983) ("It is clear from the record that, in this case, there were a number of disputed issues with regard to payments for "current service" and entitlement to attorney's fees. Apart from our conclusion that termination of the receivership was premature until these issues were resolved, we express no opinion on their merits. We have made no determination concerning either the procedural or the substantive soundness of the petitioner's claims that there are still sums due and owing to it. Only a new trial can properly adjudicate these claims and the respondent's defenses thereto.") (emphasis added).

neither a trial of nor "judgment on the merits," and "a final hearing to determine the solvency or insolvency of defendant corporation, the necessity for the appointment of a receiver after a hearing on the merits, and to make final disposition of the assets of the defendant corporation in the event the court should finally determine to take control of and administer the same") (emphasis added); Turner v. Byars, 226 S.C. 289, 294-96, 85 S.E.2d 100, 101-03 (1954) (holding that, in an action "contest[ing] the [defendant's] right of possession under his claim of a contract to purchase the property," the trial court wrongfully ejected the defendant from the real property during the pendency of the litigation and prior to a trial of the case on the merits).

Moreover, due to the premature nature of the August 23 Order and the ultimate relief granted thereby, the trial court, in deciding that the terms of the Operations Transfer Agreement and Lease Termination Agreement "as described and defined in the [Receiver's] Motion are appropriate and the Receiver is authorized…to transition operations [of the properties]…to [a] New Operator" and to "to terminate that certain Master Lease Agreement (the 'Master Lease') dated June 14, 2021 by and among Plaintiffs (as lessors) and Defendant Hanahan OP LLC and Defendant Rittenberg OP LLC (as lessees)", necessarily assumes and finally decides the contested facts and merits of the breach of lease claim in favor of Lessors and against Lessees without ever requiring Lessors to prove the merits of their claims or giving Lessees a meaningful opportunity to be heard. See August 23, 2023 Order (emphasis added). More plainly stated, for the trial court to decide that the termination and transfer of Lessees' leasehold rights to the Demised Premises to a new tenant/operator was "appropriate" required a predicate determination by the trial court that Lessees had breached the Master Lease, had no valid defenses or counterclaims thereto, and, as such, had no meritorious claim of right to the Demised Premises.

In the absence of such an assumption of facts favorable to Lessors as to the merits of their breach of lease claim, i.e., that Lessees breached the Master Lease, there would be no basis for the trial court to conclude that it was "appropriate" to terminate Lessees' leasehold rights to the Demised Premises.

This assumption of facts is clearly contrary to the controlling precedent established by the Supreme Court's decision in DeWalt.[7] Specifically, the DeWalt Court, reversing the trial court's grant of the plaintiff's request to appoint a receiver to take possession of contested real property in the possession of the defendant, held that the trial court's assumption of facts concerning the merits of plaintiff's case constituted an error of law and that "[a] person in possession of real property is presumed to have title until the contrary appears, and we do not see by what authority he can be deprived of such possession until the question of title has been tried, even though it should be made to appear, prima facie, that he was insolvent." DeWalt, 19 S.C. at 293 (emphasis added). In so holding, the Supreme Court expressly admonished that:

> The Circuit judge seems to have assumed that the defendant admitted the plaintiff's title, but we do not so understand the pleadings, and it must be remembered that the motion was heard upon the pleadings alone, no evidence

[7] The Supreme Court's prohibition on the assumption of facts by the trial court as to the merits of a plaintiff's claims prior to the trial thereof is also consistent with the rights enshrined in the Due Process Clause, which "requires all parties be given 'an opportunity to be heard in a meaningful way.'" Halsey, 432 S.C. at 57, 849 S.E.2d at 580 (quoting Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008)). Thus, to allow the trial court's August 23 Order to stand based on assumptions derived from nothing more than Lessors' Complaint would run afoul of both DeWalt and the Supreme Court's recent reaffirmation in Halsey that "[t]he law, however, does not permit a court to issue judgment against a party before giving that party an opportunity to present evidence in support of her position." 432 S.C. at 58, 849 S.E.2d at 580 ("The special referee did not grant involuntary dismissal pursuant to Rule 41(b), a directed verdict pursuant to Rule 50, or a summary judgment pursuant to Rule 56. The special referee made factual findings and issued judgment in the middle of a trial after hearing from only one witness.").

> whatever having been submitted. Hence no facts should have been assumed except such as were alleged in the complaint and admitted in the answer. Now the plaintiff alleged that he had title to the premises in question and went on to state particularly how he derived his title; but the defendant in his answer, while admitting certain facts set out in the complaint, distinctly denied that plaintiff had title, and thus an issue was presented properly triable by a jury.

Id. (emphasis added); id. at 290 ("The main purpose [of plaintiff's action] was to recover possession of real property upon the allegation that plaintiff had title thereto, and unless this allegation was admitted an issue was presented which the defendant had the right to have tried by a jury….").

As perviously noted, in light of the broadly worded arbitration provision agreed to by the Lessors and Lessees in Section 38.17 of the Master Lease, Lessees have not even filed an Answer in this lawsuit, moving instead to dismiss Lessors' action and compel arbitration in accordance with the express terms of Section 38.17, which states that the parties' agreement to arbitrate "shall be grounds for dismissal of any court action commenced by any party with respect to a dispute arising out of such matters." See Master Lease, p. 48, Sec. 38.17. Consequently, as opposed to the situation in DeWalt in which the defendant had answered the plaintiff's complaint, the trial court here did not even have an answer upon which to justify assuming facts as to the merits "alleged in the complaint and admitted in the answer." DeWalt, 19 S.C. at 293. Moreover, any filings that Lessees have submitted to the trial court in opposition to the receivership and in support of compelling arbitration have forcefully contested and "distinctly denied" the Lessors' allegations of breach of lease, insolvency, and that the Demised Premises, or their rents and profits, are in danger of being lost or materially injured or impaired. Id. at 293-94; see also Affidavits of Goldner, Whimpey, and Francois. Therefore, in light of the fact that Lessees have most definitely not admitted Lessors' allegations, it was a clear error of

law for the trial court to assume the merits of Lessors' claims since Lessees have a right, secured by both the DeWalt and the Due Process Clause, to have Lessors prove the merits of their claims before the trial court grants relief based on those claims.

The error of the trial court in assuming contested facts in Lessors' favor, which is tantamount to a decision on the merits of the underlying claims, is further highlighted by the parties' written arbitration agreement in the Master Lease that explicitly divests the circuit court of jurisdiction to determine the merits of the present dispute between the parties.[8] Palmetto Wildlife Extractors, LLC v. Ludy, 435 S.C. 690, 699, 869 S.E.2d 859, 864 (Ct. App. 2022) ("[P]arties to a contract may agree that an arbitrator rather than a court will resolve disputes arising out of the contract.") (quoting Henry Schein, Inc. v. Archer & White Sales, Inc., __ U.S. __, 139 S. Ct. 524, 527, 202 L.Ed.2d 480 (2019)) (change in original). Given that preliminary

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[8] The arbitration provision in Section 38.17 of the Master Lease broadly and expressly provides that:

> With respect to disputes, problems or claims arising out of or in connection with this Lease ("Disputes"), the parties shall, in good faith, use their reasonable best efforts to resolve the Dispute. If within ten (10) days of the arising of the Dispute, the parties are unable to resolve the Dispute in good faith, both parties shall make good faith efforts to agree upon and engage a third-party arbitrator. If after thirty (30) days from the good faith effort to agree upon and engage a third party arbitrator, the Members are unable to agree upon an, either party may submit to final and binding arbitration before the Chicago Rabbinical Council (the "Beit Din"). The decision of the Beit Din shall be binding upon the parties with respect to all disputes submitted. The provisions of this Section 38.[17] may be enforced by any court of competent jurisdiction, and the parties seeking enforcement shall be entitled to an award of all costs, fees and expenses, including attorneys' fees, to be paid by the parties against whom enforcement is ordered.…The parties hereto agree that this Section 38.[17] has been included to rapidly and inexpensively resolve any disputes between them with respect to the matters described above, and that this paragraph shall be grounds for dismissal of any court action commenced by any party with respect to a dispute arising out of such matters.

motions concerning a receivership are neither a trial on nor determinative of the merits of underlying claims, defenses, or counterclaims, and that the parties agreed in the Master Lease to divest the circuit court of jurisdiction over the merits of the parties' dispute, the trial court should have denied or held the Receiver's Motion in abeyance, thereby allowing for resolution of the "disputed facts underlying the claim for [breach of lease] before imposing or denying remedies based on that claim." Bohn, 2019 NCBC 34, ¶ 55; see also Ludy 435 S.C. at 699, 869 S.E.2d at 864 (affirming that plaintiff's request for the appointment of a receiver, judicial dissolution, and accounting could only be resolved by the circuit court, but reversing circuit court to the extent it failed to compel plaintiff's remaining causes of action to arbitration for determination of their arbitrability and, if arbitrable, their merits, where the parties contractually agreed that even the gateway question of arbitrability was to be decided by an arbitrator).

Given that the "sole object of the Receivership [pendente lite] is to preserve the property, to answer the purposes of a decree [on the merits], as between the parties to the suit, without affecting the interest of third persons not parties", and the caution and circumspection with which the power of appointment is required to be wielded, it is patently obvious that the trial court's August 23 Order

II. In deciding the Receiver's Lease Termination Motion, which necessarily disturbed the status quo as established at the time the receivership was approved, the trial courts failure to 1) compare the interests of the parties and whether the requested action would preserve the status quo or cause substantial injury, 2) examine the merits of the underlying claims, and 3) assess the time in the receivership's life at which the motion was being made constituted an abuse of discretion that resulted in the court erroneously granting the termination of the Master Lease.

Although South Carolina courts have yet to address what factors should be considered when deciding a motion to disturb the status quo being preserved by a receivership prior to a trial

and determination of the merits of a case, other jurisdictions when considering whether to disturb the status quo by lifting a stay of litigation of actions that compete with the receivership estate have typically 1) compared the interests of the parties and whether the requested action will preserve the status quo or cause substantial injury, 2) examined the merits of the underlying claims, and 3) assessed the time in the receivership's life at which the motion is being made. See generally US v. ESIC Capital, Inc., 675 F. Supp. 1462, 1462-63 (D. Md. 1987) ("ESIC I"); S.E.C. v. Wencke, 742 F.2d 1230, 1231 (9th Cir. 1984) (citing S.E.C. v. Wencke, 622 F.2d 1363, 1373 (9th Cir. 1980)).

Despite Lessees' counsel directing the Court's attention to these factors, the trial court failed to give any consideration to these factors in concluding that it would lay waste the the status quo by allowing the termination and transfer of Lessees' leasehold rights in the Demised Premises to a new tenant/operator. As such, the Court's failure to properly assess and weigh these factors led the trial court to erroneously grant the Receiver's Lease Termination Motion. Even assuming arguendo that the merits of Lessors' claims are colorable, both the first and third factors decisively weigh in favor of denying the Receiver's Lease Termination Motion and preserving the status quo of the receivership estate.

First, to properly analyze the interests of the parties and whether the Lease Termination Motion preserves or disturbs the status quo, it must recognized that "where there [i]s a Receivership pendente lite…the sole object of the Receivership is to preserve the property, to answer the purposes of a decree, as between the parties to the suit, without affecting the interest of third persons not parties…." Clinkscales, 9 S.C. at 323; DeWalt, 19 S.C. at 296 (McGowan, J., concurring) (noting that the appointment of a receiver for real property, the right to possession of

which was disputed by the parties, "could only have the salutary effect of preserving the issues of the property pending litigation, then to be delivered to that party who may finally be decided to be entitled to the same."). At the time the appointment of the receiver was finalized, the status quo was that Lessees' held leasehold rights to the possession and operation of the Demised Premises under the Master Lease and that a relationship of landlord and tenant existed between Lessees and Lessors. Given the status quo ante, it is pellucid that the termination of Lessees' leasehold rights to the Demised Premises and the transfer of those rights and the operation of the Demised Premises to non-party third persons alters the status quo and is violative of the "sole object" of receiverships pendente lite as so clearly laid down in Clinkscales. Moreover, the transfer of the possession and operation of Demised Premises to new tenants/operators, who are non-party third persons, has created a situation where even if Lessees prevail on the merits of the case, it is highly unlikely that Lessees will be able to regain possession of the Demised Premises from the new tenants/operators or to recommence Lessees' business operations therein without significant difficulty and cost. As such, allowing the Receiver to enter into the Operations Transfer Agreement and Lease Termination Agreement has caused and will continue to cause serious, and potentially irreparable, harm to Lessees by drastically altering the status quo.

In contrast to the specter of irreparable harm facing Lessees as a result of the granting of the Receiver's Motion, the only "harm" to which the Lessors and the Receiver could point was continuing costs to operate the receivership, for which Lessors asked, and the non-mitigation of alleged damages for which Lessees may be responsible if Lessors were to ultimately prevail on the merits of their underlying claims. The non-mitigation of damages for which Lessees might be responsible cannot be considered a harm to either the Receiver or the Lessors as the payment for

any potential increased damages would fall solely on Lessees. As to the additional costs of the receivership if the Receiver's Lease Termination Motion had been denied or held in abeyance, Lessors should not now be allowed to claim as "harm" the costs of the receivership for which they petitioned the trial court to justify irrevocably altering the status quo to the Lessees' detriment. The Lessors knew the costs associated with the receivership and the Receiver when they asked the trial court to appoint the Receiver, such that to now allow Lessors to point to those costs as justification for the premature termination of Lessees' leasehold rights and entry into the Operations Transfer Agreement with a new operator without an adjudication on the merits—and, in fact, before this Court has even decided the threshold issue of Lessees' pending Motion to Dismiss and Compel Arbitration—is to let the Lessors have their cake and eat it too. If the Lessors did not want to incur the costs associated with the receivership then they should not have moved for the appointment of the Receiver or so vociferously objected to Lessees' numerous requests for the trial court to fix the value of the Demised Premises for purposes of complying with the receivership statutes (including Sections 15-65-50 and 15-65-60) and allowing Lessees to post a bond and regain possession of the Demised Premises pending arbitration of the dispute between the parties in accordance with the Master Lease. Truesdell v. Johnson, 144 S.C. 188, 142 S.E. 343, 348 (1928) (interpreting the provision under the previous receivership statute containing substantively identical language to Section 15-65-60 and holding that "[t]he provision for inserting a clause fixing the value of the property in the order appointing a receiver is mandatory, and without such clause the order is void.") (emphasis added).

In addition to the relative rights of and damage to the parties weighing in favor of maintaining the status quo and denying the Receiver's Lease Termination Motion, an assessment

of the time in the receivership's life at which the Receiver's Lease Termination Motion was made also weighs in favor of denial of the Lease Termination Motion. "Receiverships can get old," however this one had hardly been born when the Receiver moved to obliterate the status quo. U.S. v. ESIC Capital, Inc., 675 F. Supp. 1464, 1466 (D. Md. 1987) ("ESIC II")("[Receivership] just reached its second birthday…With the passage of two years here, the Court does not suggest the receivership is still in its infancy. But, as receiverships go, this one is relatively youthful.") As previously noted, the Receiver's motion to disturb the status quo came less than One Hundred (100) days from the establishment of the receivership and, as such, this receivership was most certainly in its infancy. See SEC v. Stanford Int'l Bank Ltd., 2011 WL 1758763, at *2 (5th Cir. 2011) (upholding a stay one year into a receivership); Levin v. Ruby Trading Corp., 352 F.2d 508, 509 (2nd Cir. 1965) (upholding denial of a lessee's "motion to terminate the 'temporary' receivership of [a] building instituted nearly three years ago"); SEC v. Universal Fin., 760 F.2d 1034, 1039 (9th Cir. 1985) (holding unresolved factual and legal issues in four-year-old receivership justified continuation of stay); ESIC I, 675 F. Supp. at 1464 (holding two year old receivership was "still relatively young" such that "lifting the stay now is premature"); ESIC II, 675 F. Supp. at 1466 (upholding a stay two years into a receivership and noting that "as receiverships go, this one is relatively youthful"); FTC v. 3R Bancorp, 2005 WL 497784, at *3 (N.D. Ill. 2005) (upholding a stay because the receiver had little more than three months to unravel the "labyrinthine entanglements" of the receivership); SEC v. Stanford Int'l Bank, Ltd., Inc., Civil Action No. 3:09-CV-0298-N (N.D. Tex. May 6, 2011) (lifting a stay when the receivership was "relatively young" at "just over two years old").

If the arbitration or litigation of this case drags on for many years, it is possible under different circumstances that this factor may at a later date weigh in favor of granting a motion to dispose of the receivership estate, however, to do so almost immediately after the receivership was established simply assisted the Lessors in making an end-run to obtain the ultimate relief they sought, the ouster of Lessees from their leasehold rights, without Lessors having to prove the merits of their underlying claims. Frankly, a cynical mind would certainly conclude that neither the Lessors nor the Receiver ever intended for the receivership to "preserve the property, to answer the purposes of a decree, as between the parties to the suit, without affecting the interest of third persons not parties," pending resolution of the merits of the parties' claims and defenses. Clinkscales, 9 S.C. at 323. Indeed the trial by ambush tactics employed since the filing of Lessors' Complaint along with the lightening speed with which the Receiver, with the blessing of the Lessors, moved to demolish the status quo that the trial court had just agreed, at Lessors' behest, to protect pending resolution of the merits of the parties' claims and defenses would suggest as much. Given that the disingenuous invocation and use of a receiver not to protect the status quo pending trial on the merits but to circumvent a party's due process and contractual rights and the summary termination of that party's property rights is most certainly antithetical to the delicacy and "great circumspection" with which the court's power to appoint a receiver is required to be wielded, the time in the receivership's life, less than One Hundred (100) days from its inception, at which the Receiver's Lease Termination Motion was made most certainly weighs in favor of maintenance of the status quo. Moreover, given that the sole object of a receivership pendente lite, such as in this case, is to preserve the property pending litigation so that it can then to be delivered to that party who may finally be decided to be entitled to the same after the

resolution of the merits of the parties' claims and defenses, the question of time should be viewed through the lens of the life of the underlying dispute and its resolution. The date on which the Receiver's Lease Termination Motion was made was a mere One Hundred Twenty-Eight (128) days from the filing of Lessors' Complaint. There is no Circuit Court in this State in which a case of this nature, value, and complexity could be tried on its merits within One Hundred Twenty-Eight (128) days, and, in fact, the deadline for arbitration or mediation as required by the Rule 5 of the ADR Rules is "three hundred (300) days from the date of the filing of the action." Accordingly, given that the sole purpose of a receivership pendente lite being to preserve the status quo until trial of the merits, the filing of the Lease Termination Motion by the Receiver within One Hundred Twenty-Eight (128) days of the filing of Lessors' Complaint, a period in which no party could reasonably expect the resolution of a similarly situated lawsuit, should have definitely weighed in favor of the trial court denying or holding in abeyance the Lease Termination Motion as premature. See Levin v. Ruby Trading Corp., 352 F.2d 508, 509 (2nd Cir. 1965) (upholding denial of a lessee's "motion to terminate the 'temporary' receivership of [a] building instituted nearly three years ago," but noting that no trial had yet been held and directing that the receivership "be dissolved unless plaintiff brings the action to trial within four months from the date of this opinion.").

Consequently, at the time the Lease Termination Motion was before the trial court, the factors illuminated in ESIC I, ESIC II and other similar cases as applied to the receivership pendente lite in this case and its universally recognized purpose clearly dictated the denial or holding in abeyance of the Receiver's Motion. As such, the trial court's August 23, 2023 Order prematurely disrupted the status quo well before any resolution of the underlying merits of the

parties' claims and defenses could be had, and in so doing the August 23, 2023 Order constituted an abuse of discretion that completely subverted the pendente lite receivership's "sole object" of preserving the property until the parties' disputed rights thereto are finally determined on the merits. Clinkscales, 9 S.C. at 323.

CONCLUSION

In light of the foregoing arguments as to the premature and inequitable nature of the trial court's August 23, 2023 Order granting the Receiver's Lease Termination Motion, Lessees request that this Court reverse the August 23, 2023 Order with instruction for the trial court to direct 1) the reestablishment of the status quo as it existed at the time the receivership was originally approved, and 2) the preservation of the status quo, absent the posting of bond by Lessees in accordance with S.C. Code Ann. § 15-65-50, -60, until such time as the merits of the parties' underlying claims and defenses are decided in accordance with the dispute resolution provisions of the Master Lease.

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