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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GEORGETOWN COUNTY  
Court of Common Pleas

The Honorable Kristi F. Curtis, Circuit Court Judge

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Circuit Court Case No. 2020-CP-22-00373  
Appellate Case No. 2023-001829  
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Jones Nissan, Inc.,

Respondent,

v.

THAG, LLC; Nissan of Sumter, LLC; Terry L. Holmes; and Merrill Lynch, Pierce,  
Fenner & Smith, Incorporated, Defendants,

Of which THAG, LLC and Nissan of Sumter, LLC are the Appellants.

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RECORD ON APPEAL – VOLUME 2 OF 2  
-----

July 10, 2024

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1 STATE OF SOUTH CAROLINA \* COURT OF COMMON PLEAS  
2 COUNTY OF GEORGETOWN \* TRANSCRIPT OF RECORD

3 -----X  
4 JONES NISSAN, INC., \*

5 Plaintiff, \*

6 vs. \*

Case No. 2020-CP-22-00373

7 THAG, LLC, et al., \*

8 Defendants. \*

-----X

9 July 13, 2023

10  
11 B E F O R E:

12 The Honorable Kristi Curtis, Presiding Judge

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

14 John Hudson, Esq.

Attorney for the Plaintiff

15 Christopher Ramsey, Esq.

16 Attorney for Defendant THAG, LLC

17  
18  
19  
20  
21  
22 Recorded by: Webex Virtual Courtroom

23 Transcribed by: Bobbi Fisher, RPR  
24 SC Official Court Reporter III  
25

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## E X H I B I T S

(None.)

## COURT REPORTER LEGEND

|                 |                                                                               |
|-----------------|-------------------------------------------------------------------------------|
| Dash (--)       | Indicates an interruption in speech                                           |
| Ellipses (...)  | Indicates trailing off in speech                                              |
| (ph)            | Indicates phonetic word                                                       |
| [Verbatim]      | Indicates the word is said as written                                         |
| (Indiscernible) | [Transcription] Indicates word(s) is not known due to audio recording quality |

## P R O C E E D I N G S

1  
2 THE COURT: Turning back now to Jones Nissan versus  
3 THAG, LLC.

4 MR. HUDSON: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. HUDSON: I think it's still morning anyway.  
7 Barely, yes.

8 MR. RAMSEY: We barely made the cut.

9 THE COURT: Mr. Hudson, you're here on behalf of the  
10 plaintiff, and Mr. Ramsey, you're here for the defendant?

11 MR. HUDSON: Yes, ma'am.

12 MR. RAMSEY: That's correct.

13 THE COURT: Initially, I do see that there -- the  
14 first matter on the docket is this motion to alter or  
15 amend.

16 MR. HUDSON: That's been ruled on. That's now moot.

17 THE COURT: That was pertaining to Judge Seals'  
18 order anyway --

19 MR. HUDSON: Correct.

20 THE COURT: -- if I'm not mistaken.

21 MR. RAMSEY: Yes, Your Honor.

22 THE COURT: So we have got a motion for summary  
23 judgment, and we have also got a motion for in camera  
24 review of some documents?

25 MR. HUDSON: That's right.

1 MR. RAMSEY: And, Your Honor, we can -- we can -- I  
2 think we'll be able to consent to one of those. I'll let  
3 you guess which one. The in camera review, that was  
4 actually -- we had discussions back and forth. I'll let  
5 Mr. Hudson address it, and then if I have anything to add,  
6 I'll chime in.

7 THE COURT: Okay. Go ahead, Mr. Hudson.

8 MR. HUDSON: Okay. Well, just so I'm clear, Chris,  
9 you're referring to discussions about the way we have  
10 postured this to be dealt with?

11 MR. RAMSEY: Yes, sir. Yeah, my -- through the  
12 emails we had back and forth, I think we had reached  
13 somewhat of an agreement that, you know, we had redacted  
14 some things, and you said, "Look, it needs to" -- you  
15 know, and I think I had actually proposed putting it in  
16 front of a judge and letting them, you know, make the  
17 call, so...

18 MR. HUDSON: That's correct. And, Your Honor, for  
19 your edification -- and Chris and I did work through that,  
20 so I think we can handle that efficiently. For your  
21 edification, it may make the most sense to argue summary  
22 judgment first just so that you have got some background  
23 and context for the case, because the documents that I'm  
24 going to rely on, at least in part, for the reasons why we  
25 should get access to some of this redacted information

1 will probably be informative to your decision, but we can  
2 try it from the back and work forward if you want,  
3 whatever you prefer.

4 THE COURT: We can hear the motion for summary  
5 judgment first. That's fine.

6 MR. HUDSON: Okay. Let's start there.

7 Your Honor, again, my name is John Hudson. I do  
8 represent the plaintiff, Jones Nissan, in this matter.

9 And this is a straight-up basic breach of contract  
10 dispute. We have also got other causes of action that we  
11 have alleged that we'll certainly deal with if we need to  
12 move forward, but we believe summary judgment is  
13 absolutely appropriate in this case because this is just a  
14 classic breach of contract.

15 What we have got here is you have got two  
16 sophisticated -- or you have got multiple sophisticated  
17 commercial entities who negotiated a deal. They entered  
18 into it through a series of contracts. Then these parties  
19 performed under the contractual agreement for in excess of  
20 two years. After that over-two-year period of time, the  
21 defendants stopped performing. And now that they have  
22 been sued, they have decided to bring some counterclaims  
23 to ostensibly justify the reasons for their failure to  
24 perform. But for the reasons I'm going to walk through,  
25 we will show that those counterclaims are pretextual, and

1 there is no proper result other than our motion for  
2 summary judgment on our breach of contract claim, as well  
3 as our conversion claim, as well as our veil piercing  
4 claim should be granted here today.

5 So I do have some documents that I would like to  
6 show the Court just to inform you on the details of the  
7 transaction. I'm pretty well versed at doing it by Zoom.  
8 This is my first rodeo with Webex, so I may need some  
9 input from you or my paralegal as we get going.

10 Are you seeing my screen now? Your Honor, can you  
11 see my screen?

12 THE COURT: Yes, sir.

13 MR. HUDSON: Okay. Good.

14 THE COURT: I think if you just open whatever  
15 document -- if you just double-click on whichever document  
16 you want to show me, I should be able to see it.

17 MR. HUDSON: Are you seeing that asset purchase  
18 agreement?

19 THE COURT: I can see the list of documents. I  
20 think you need to maybe double -- there we go. Now I'm  
21 seeing it.

22 MR. HUDSON: All right. By way of background, Your  
23 Honor, Jones Nissan, Inc., was the corporate entity that  
24 owned the Jones Nissan automobile dealership in Sumter  
25 from approximately 1990 through 2017, at which point in

1 time, they sold it.

2 The principals of Jones Nissan, Inc., are Jim Jones  
3 and his brother John. They own a couple of other  
4 dealerships in the area, one of which is Jones Chevy.  
5 They have been a fixture in the Sumter community for a  
6 long time, and as they aged and, you know, just things  
7 were changing business-wise, they decided to put on the  
8 market the Nissan dealership that they owned.

9 THE COURT: And let me stop y'all just a minute,  
10 because I live in Sumter, and so I have purchased two  
11 vehicles from Jones Nissan. One in, I'm going to say,  
12 2018 maybe that's my personal vehicle, and then we traded  
13 in a vehicle maybe in 2022. I purchased my son a vehicle  
14 from Jones Nissan. I'm pretty sure that my husband's car  
15 was purchased from Jones. It's like a Yukon so it was  
16 purchased maybe from Jones Chevrolet. I think it was  
17 slightly used when he bought it. That was probably also  
18 sometime around 2022, 2021. So we have purchased vehicles  
19 from both of those entities. So I need to throw that out  
20 there because, you know, I live in Sumter, and we only  
21 have a few dealerships here in Sumter, and we have  
22 purchased vehicles from them.

23 MR. HUDSON: Understood. I don't have any concern  
24 with any of that, Your Honor.

25 THE COURT: Mr. Ramsey, does that give you any

1 pause, sir?

2 MR. RAMSEY: No concern on my behalf, Your Honor.  
3 Has Your Honor had any dealings with Nissan of Sumter,  
4 which I guess would have been from, what, '17 through '19  
5 time frame?

6 THE COURT: Yes, sir. So I bought my car from  
7 Nissan of Sumter in 2018 and my son's vehicle sometime  
8 around 2022. So I'm guessing that would be the new  
9 entity.

10 MR. RAMSEY: And, Your Honor, if I might ask, were  
11 there any dealings that you had either with Jones Nissan  
12 or Nissan of Sumter that were, you know -- sounds like all  
13 the transactions probably went according to plan but were  
14 there any -- you know, anything negative or any complaints  
15 that you had against either of them?

16 THE COURT: It was not financed. We just purchased  
17 both vehicles. And we still have the vehicles serviced at  
18 the Nissan dealership in Sumter. But I don't know about  
19 my son's. My vehicle is still serviced by Nissan of  
20 Sumter. So, I mean, I haven't had any issues.

21 My husband purchased his car from Jones -- whatever  
22 entity. There are a couple that are right side by side,  
23 and I don't know ever know which one I'm -- when he gets  
24 his car serviced, I never know which one I'm supposed to  
25 take it to.

1 But, again, he purchased his vehicle from them, and  
2 they, I'm sure, still service that vehicle. So, again, my  
3 husband's vehicle is still being serviced by Jones  
4 Chevrolet, and my vehicle is still being serviced by  
5 Nissan of Sumter.

6 So I'm going to get everybody mad at me, and then  
7 I'm going to have to drive to Columbia to get my cars  
8 serviced.

9 MR. RAMSEY: Your Honor, not to delay this much, but  
10 may I have just a moment to confer with my client? I  
11 don't think there's any issue but...

12 THE COURT: Absolutely.

13 MR. RAMSEY: Mr. Holmes is actually on the video as  
14 well. Let me confer with him for just a moment, if that's  
15 okay.

16 THE COURT: Absolutely. Take your time. That's  
17 perfectly fine.

18 (Pause in the proceedings.)

19 MR. RAMSEY: Your Honor, if I could ask one other  
20 quick question. I know Sumter is kind of a small town.  
21 Has Your Honor had any other professional or social  
22 dealings with the Jones brothers? I believe their names  
23 are James and John Jones.

24 THE COURT: I don't know who -- which one -- who is  
25 who. So there's a -- there's a Jones who I think is an

1 architect who was in my rotary group. I don't think  
2 that's either one of them were ever in my rotary group. I  
3 think that was a different Jones family.

4 There's one who has maybe a wife that's a teacher at  
5 the school, but I don't know which one that is. I don't  
6 think I could pick them out of a crowd. I have never had  
7 any dealings with either one of them.

8 MR. RAMSEY: Okay. Well, Your Honor, I have  
9 discussed with my client, and as long as Your Honor is  
10 confident you can be fair and impartial, then we have no  
11 objection.

12 THE COURT: I'm fine, but nobody is going to hurt my  
13 feelings -- you know, you just happened to get the bad  
14 luck to get a Sumter judge today. So it certainly doesn't  
15 hurt my feelings at all if you would rather that a  
16 non-Sumter judge hear this. That's perfectly fine.

17 MR. RAMSEY: We have no objection, Your Honor, as  
18 long as Your Honor has no concerns then. And we  
19 appreciate you bringing it to our attention.

20 THE COURT: I'm perfectly good with it.

21 Again, Mr. Hudson, any -- let me unmute you, sir.  
22 Do you have any heartburn over me hearing the case at all?  
23 Again, y'all are not going to hurt my feelings. I'm glad  
24 to do whatever you prefer.

25 MR. HUDSON: No, ma'am. We're ready to move

1 forward.

2 THE COURT: Okay. Then go right ahead.

3 MR. HUDSON: Okay. Your Honor, we have filed with  
4 the Court a memorandum in support of our motion. That was  
5 filed on May the 22nd of this year, I believe. That's  
6 right. So, you know, my argument will summarize the  
7 arguments made in that supporting memorandum, but I would,  
8 for the record, like to incorporate that entire memo into  
9 the exhibits into this argument.

10 Judge, in mid to late summer of 2016, my client,  
11 Jones Nissan, began communicating with an entity called  
12 THAG, LLC, through its authorized representatives, Terry  
13 Holmes and I believe a gentlemen named Mark Sanchez, about  
14 having THAG purchase the Jones Nissan automobile  
15 dealership. So those conversations progressed over a  
16 matter of months. And in January -- or, excuse me. In  
17 August of 2016, the parties reached a formal agreement for  
18 the sale of that dealership to take place.

19 What you are seeing or I hope you are seeing on your  
20 screen now is Exhibit A to our supporting memorandum.  
21 This is the asset purchase agreement between Jones Nissan,  
22 Inc., and THAG, LLC. THAG stands for Terry Holmes  
23 Automotive Group. THAG, LLC, is a single member limited  
24 liability company that is owned by Terry Holmes.

25 The primary consideration for the transaction was,

1 of course, the purchase price, and that, as shown by pages  
2 5 and 6 of the agreement, was to be an established price  
3 for the dealership's inventory, but additional monies for  
4 the fixed assets and what is called the blue sky of the  
5 dealership.

6 The number that was agreed upon between the parties  
7 was \$2.25 million, and that is shown here in Section 3,  
8 subpart B -- or, excuse me, Section 3, paragraph ii of the  
9 agreement.

10 This asset purchase agreement was amended multiple  
11 times over the subsequent months, and in January of 2017,  
12 an agreement was reached to further amend the agreement to  
13 allow for a portion of this blue sky purchase price to be  
14 financed by the then-dealership owners and sellers, Jones  
15 Nissan.

16 Is this making sense so far?

17 THE COURT: Yes.

18 MR. HUDSON: Okay. What I'm showing you now is  
19 Exhibit D to our supporting memorandum, and this is the  
20 third amendment to the asset purchase agreement. Pursuant  
21 to the terms of this amendment, my client agreed to owner  
22 finance \$650,000 of the purchase price. So that means  
23 \$650,000 of the 2.25 million that was agreed upon for the  
24 value of the blue sky.

25 The only way that my client would agree to finance

1 any portion of the purchase price was if they became a  
2 secured creditor. So each side had attorneys involve in  
3 the negotiation. There was some back and forth over the  
4 best way to structure this aspect of the deal, but what  
5 the parties ultimately agreed upon was for Mr. Holmes and  
6 his LLC -- THAG -- to establish an account at Merrill  
7 Lynch, to deposit and maintain a balance of no less than  
8 \$650,000 in that account, and for that account to be  
9 pledged to my client as collateral for the debt until it  
10 was satisfied.

11 So what you see in this third amendment that's on  
12 the screen is the asset purchase agreement was amended.  
13 In particular, paragraph three was amended to provide for  
14 seller financing. The established and agreed-upon terms  
15 were what's shown here. "At closing, Seller shall extend  
16 financing to Purchaser in the principal amount of \$650,000  
17 to be amortized over a period of 60 months at 6 percent  
18 interest per annum. The aforementioned financing shall be  
19 secured by pledge of Merrill Lynch Account No. SLP-02250  
20 pursuant to the terms of that pledged collateral account  
21 agreement dated January 12, 2017."

22 So once this amendment was executed, it became part  
23 of the asset purchase agreement that governed this overall  
24 transaction.

25 Now, I would encourage you to keep in mind the

1 reference to this Merrill Lynch account number, last four  
2 digits 2250, as well as the pledged collateral account  
3 agreement that was to be dated January 12 of 2017, and  
4 then the sum that was to be amortized over 60 months at  
5 6 percent interest. Because what you're about to see is  
6 the debt was memorialized by a promissory note that I will  
7 show you shortly. The parties entered into a pledge  
8 agreement to serve as the security interest for the  
9 financing. And then there is also a pledge collateral  
10 account control agreement that was provided by Merrill  
11 Lynch to THAG to allow the security interest to be  
12 perfected by THAG once the deal was entered into.

13 What I'm showing you now, Your Honor, is Exhibit F  
14 to our supporting memorandum. This is the pledged  
15 collateral account control agreement from Merrill Lynch  
16 that was to serve as the instruments that would allow my  
17 client's security interest in the \$650,000 loan to be  
18 perfected when the transaction closed.

19 We're here on the first page of it. You have got  
20 the account number redacted here, but I will represent to  
21 the Court -- and if you need to see an unredacted copy, I  
22 can certainly provide it, but the account number here is  
23 that 2250 account that was referenced in the amendment --  
24 the third amendment to the asset purchase agreement, and  
25 that was the account that was to serve as the collateral

1 for the loan that my clients made.

2 The third full paragraph under Section 2 of this  
3 account control agreement states, "The purpose of this  
4 agreement is to perfect the creditor's security interest  
5 in the account by granting creditor control over the  
6 account. However, this agreement does not create creditor  
7 security interest in the account in that the client and  
8 creditor have a separate pledge or security agreement for  
9 such purpose."

10 So we're about to see the pledge agreement in just a  
11 moment. If we move over here to paragraph 4 of this  
12 control agreement, this section deals with the client's  
13 authority over the account, and the client in this context  
14 is THAG, LLC, and Mr. Holmes. And what this agreement  
15 provided was that the client would not have the authority  
16 to give any entitlement orders with respect to or  
17 terminate or withdraw assets from the account, except as  
18 may be provided in Box C, without written consent by  
19 creditor. My client, Jones Nissan, was the creditor in  
20 the context of this agreement.

21 So if we move down to Box C -- and I apologize that  
22 this copy is not more legible than it is, but what this  
23 information indicates is that the client was permitted to  
24 withdraw income on the account, and specifically what he  
25 was permitted to do was he was authorized to receive all

1 interest and regular cash dividends earned on assets of  
2 the account monthly. But, beyond that, THAG was not  
3 permitted to do anything with the funds that were to be  
4 deposited into this particular account to serve as  
5 collateral for the secured transaction.

6 This account control agreement was signed by THAG on  
7 January the 12th of 2017. My client signed it on January  
8 the 20th of 2017 and then returned the original of this  
9 control agreement to THAG via its counsel. And that's on  
10 important detail. The reason that's important is because,  
11 when you look over here in the left margin of this  
12 agreement, it states, "The agreement may be executed in  
13 counterparts, but the preparer should provide the  
14 completed original to Merrill Lynch with signed,  
15 photocopied counterparts provided to client and creditor."

16 What ultimately happened in this case is, for some  
17 reason, this account control agreement appears never to  
18 have been provided to Merrill Lynch to perfect my client's  
19 security interest in the collateral. And as you will see  
20 shortly, THAG and Mr. Holmes and Nissan of Sumter ended up  
21 not honoring the pledge agreement that they entered into  
22 very soon after they entered into the agreement.

23 Exhibit G to our memorandum in support is the  
24 promissory note that memorialized the agreement to loan  
25 the funds. You see it's got a stated value on this note

1 of \$650,000. This note was executed by Mr. Holmes on  
2 February the 28th of 2017. That's the date that this sale  
3 transaction closed.

4 The terms of the note indicate that the obligor,  
5 THAG, LLC, through Mr. Holmes, promised to pay Jones  
6 Nissan \$650,000 with interest at a rate of 6 percent per  
7 annum. Past due interest to bear interest at the same  
8 rate. Principal and interest being payable as follows:  
9 59 consecutive equal annual installments of \$12,566.32,  
10 and a 60th consecutive installment of the balance then  
11 due, all in accordance with the amortization schedule  
12 attached hereto and made part hereof.

13 Now, one note just for the benefit of Your Honor:  
14 This reference to equal annual installments is a classic  
15 scrivener's error. That was intended to be monthly  
16 installments as specified by the language of the third  
17 amendment to the APA. I suspect we may hear on behalf of  
18 Mr. Holmes that, you know, the reference to the annual  
19 installments may make this promissory note ambiguous. It  
20 doesn't. And the primary reason it doesn't is because  
21 you're going to see that THAG and Mr. Holmes made payments  
22 under the terms of this note for 29 consecutive months  
23 before they stopped. So there was never any expectation  
24 that this note was to be paid over a term of 60 years. I  
25 mean, that just would not pass muster from a logical and

1 common sense standpoint.

2 The final paragraph of the note references what  
3 constitutes default status, and one of the critical  
4 aspects of the default rights that accrued to my client  
5 was that the obligor, which would be THAG and Mr. Holmes,  
6 agreed to pay all costs of collection, including a  
7 reasonable attorney's fee, in case payment shall not be  
8 made at maturity. So, by virtue of the language in this  
9 promissory note, my client is entitled to collect  
10 attorney's fees as well as costs associated with the  
11 pursuit of the outstanding balance of the debt owed.

12 Now, you see here at the end that Terry Holmes  
13 signed the note on behalf of THAG on February the 28th of  
14 2017.

15 Exhibit H to our supporting memo is the pledge  
16 agreement establishing the security interest in the debt  
17 and the loan that my client made to THAG. This, like the  
18 promissory note, was entered into on the closing date of  
19 the transaction: February the 28th of 2017.

20 In paragraph 1 that addresses the security interest  
21 aspect of this agreement, "collateral" is defined, and  
22 pursuant to the agreement, the collateral was to be  
23 comprised of Merrill Lynch Account No. 250, having a  
24 portfolio value of \$650,000, as more fully described in  
25 the pledge collateral account control agreement, which is

1 what I showed you a couple of exhibits ago -- that was the  
2 Merrill Lynch document -- appended hereto and made a part  
3 hereof or any reissue, replacement, or substitute thereof  
4 or therefore.

5 So the collateral for this loan transaction was not  
6 just Merrill Lynch Account 2250. It was Merrill Lynch  
7 Account 2250 with a portfolio value of no less than  
8 \$650,000 at all points in time until the outstanding debt  
9 was satisfied.

10 Paragraph 2 of the pledge agreement describes the  
11 import of delivery of the collateral. The first sentence  
12 there states that, "The lender hereby accepts delivery of  
13 the Collateral on behalf of itself and any future  
14 transferee of the Indebtedness."

15 What's important about this is the interest or the  
16 security interest did not become established until this  
17 pledge agreement, along with the account control  
18 agreement, which was to be attached to this agreement, was  
19 delivered to my client. The delivery of this document did  
20 not occur until some point in time after May the 10th of  
21 2017. That was over two months after the transaction  
22 closed. And the reason that that is critical is because,  
23 prior to the delivery of this pledge agreement with the  
24 attached account control agreement to my client,  
25 Mr. Holmes and THAG drained the pledged account to zero.

1 So my client never had an opportunity to perfect their  
2 security interest in the pledged account when the account  
3 actually met the terms of the agreements that the parties  
4 signed.

5 Paragraph 6 of the pledge agreement sets forth the  
6 various covenants that the pledgor, which would be  
7 Mr. Holmes and THAG, made when they entered into this  
8 document.

9 In subpart C, it establishes that the pledgor will  
10 not assign, sell, transfer, deliver, or otherwise dispose  
11 of the collateral or any interest therein or attempt to do  
12 the same without the prior written consent of the lender.

13 So once THAG and Mr. Holmes drained the account 2250  
14 to zero before the pledge agreement and the account  
15 control agreement was effectively delivered to my client,  
16 they were in breach of this pledge agreement. And when  
17 you look at subpart B of the default section, which is  
18 paragraph 8, it clearly states that, "Upon the occurrence  
19 of an event of default, the lender may declare all or any  
20 part of the indebtedness to be immediately due without  
21 notice and exercise such other rights and remedies as are  
22 available hereunder."

23 So that's critical, Your Honor, because if my client  
24 had been informed when these documents were finally  
25 delivered to it, that THAG and Mr. Holmes were already in

1 breach, they would have had the legal right to demand that  
2 their loan funds be repaid in full at that point in time,  
3 which would have been well over two years earlier than  
4 when my clients actually learned of the default and began  
5 recovery efforts.

6 And, again, on the attorney's fees issue, subpart E  
7 of this paragraph 8 indicates that my clients "have the  
8 right to recover all costs and expenses incurred in  
9 enforcing this security agreement and realizing upon any  
10 collateral and collecting any indebtedness, including a  
11 reasonable attorney's fee, whether suit is brought or not,  
12 and to the extent of the pledgor's liability for repayment  
13 of any indebtedness." So that's yet another basis upon  
14 which my clients have to claim attorney's fees.

15 The asset purchase agreement was assigned to Nissan  
16 of Sumter, LLC, by THAG and Mr. Holmes on February the  
17 28th of 2017. Once again, that was the date that this  
18 transaction closed.

19 So, Your Honor, what happened was my clients  
20 transferred the \$650,000 that they were obligated to  
21 transfer at closing. THAG and Mr. Holmes took possession  
22 of that money, but they did not handle that money as they  
23 were obligated to handle it.

24 Now, moving forward, THAG and Mr. Holmes and Nissan  
25 of Sumter ended up making monthly payments to my client in

1 the amount of \$12,566.32 from March of 2017 through  
2 July of 2019. I believe that's 29 months. Those payments  
3 were made by numerous entities. Sometimes they were made  
4 by Nissan of Sumter, LLC. Sometimes they were made by an  
5 account in the name of THAG, LLC. There was a time or two  
6 when payments were made by one of Mr. Holmes' dealerships  
7 in Myrtle Beach.

8 So what we have come to learn through discovery is  
9 that Mr. Holmes and THAG and Nissan of Sumter were in  
10 financial straits from the get-go. And at the time that  
11 they were trying to purchase Jones Nissan, they really  
12 didn't have the cash flow to do so. They weren't properly  
13 capitalized to be able to keep their purchase up and  
14 running and to have it remain a viable, going concern.  
15 They were robbing Peter to pay Paul. They were grabbing  
16 money out of one dealership's account, transferring it to  
17 another in order to make various debt payments that they  
18 owed at any given point in time.

19 But, in August of 2019, the bottom fell out, and  
20 that is when the payments to Jones Nissan stopped. And  
21 just so we have got a record on this, we have submitted as  
22 part of our supporting memorandum the affidavit of Neechie  
23 Oliver, who was the comptroller for Jones Nissan until the  
24 business was sold to THAG and Mr. Holmes. What she does  
25 is just confirm that the monthly payments were made, as I

1 have summarized to Your Honor, and they were made from  
2 March 2017 through July of 2019. The total sum of the  
3 payments that were, in fact, made is \$364,423.34.

4 She also testifies in her affidavit that the  
5 outstanding payments that would satisfy the debt on the  
6 loan totalled \$398,555.98, and that includes both  
7 principal and interest. And this is Exhibit K to our  
8 affidavit.

9 Your Honor, one of the exhibits to Ms. Oliver's  
10 affidavit that just kind of chronicled the payments that  
11 she testifies to are behind Exhibit 3 to Ms. Oliver's  
12 affidavit. These are the various receipts of payment that  
13 Jones Nissan generated in the ordinary course of its  
14 business, and they marry up to the payments she speaks to  
15 in the table in the body of her affidavit. So those are  
16 all behind Exhibit 3.

17 When my client did not receive the required monthly  
18 payment in August of 2019, it notified their attorney,  
19 Mr. Jack Erter. And Mr. Erter notified Mr. Holmes of his  
20 default status. And so he sent him this correspondence on  
21 August the 20th of 2019, putting him on notice of the  
22 default and demanding immediate payment of the note.

23 And he also notified Mr. Holmes and THAG -- and this  
24 is down here at the bottom of this exhibit. It says,  
25 "This is to further notify you that, as a consequence of

1 your default, lender/creditor is delivering to Merrill  
2 Lynch a notice of exclusive control as called for under  
3 the referenced pledge account control agreement."

4 So, at this point in time, it was my client's intent  
5 to send to Merrill Lynch the notice of exclusive control  
6 of Account 2250 to allow them to realize on the collateral  
7 that was supposed to be in that account that would allow  
8 the debt to be satisfied.

9 Well, when the control -- when the notice of account  
10 control was provided to Merrill Lynch, Mr. Erter was  
11 informed that Account 2250 had a balance of a mere \$700 in  
12 it at that point in time. And he was further informed  
13 that the pledged collateral account control agreement was  
14 apparently never provided to Merrill Lynch as it should  
15 have been by THAG, by Mr. Holmes, or on their respective  
16 behalfs.

17 So once the funds were not available to satisfy the  
18 outstanding debt from Account 2250, my clients decided to  
19 proceed with the litigation that brings us here today.

20 One thing I need to jump back and mention.  
21 Exhibit O to our supporting memorandum is a letter that  
22 was authored by Terry Holmes to my client, Mr. James  
23 Jones, in or around August the 14th of 2019. And  
24 Mr. Holmes testified to this in his deposition that, yes,  
25 he wrote this letter. And my client, Jim Jones, whose

1 affidavit is Exhibit M to our supporting memo, states  
2 that, yes, he received this letter from Mr. Holmes during  
3 this mid-August time frame.

4 But, Your Honor, really all of the issues that are  
5 before the Court now are addressed by this brief letter.  
6 It says, "Good morning, Mr. Jones. I am forwarding a  
7 check in the amount of \$2500. Due to the excessive debt  
8 and demands, I was forced to sell most of the dealerships  
9 and assets." Notice he does not reference a single  
10 dealership. He does not just refer to the Nissan of  
11 Sumter, LLC dealership; he refers to multiple.

12 He states, "I am forced to only send a portion of my  
13 payments as agreed upon. As I get my affairs in order, I  
14 intend to bring my payments back to the agreed upon  
15 amount. I appreciate your understanding in this matter,  
16 as I rectify my financial situation."

17 So what is borne out in Mr. Holmes' deposition  
18 testimony is that he was overleveraged. He owned probably  
19 six, if not more, dealerships during this 2017/2018/2019  
20 time frame. He had one in Sumter. He had one in  
21 Orangeburg. He had a couple in Myrtle Beach. He had one,  
22 maybe two in Georgia. And I believe he had one in  
23 Tennessee; I may be mistaken on that. But he also had one  
24 in Cheraw. He just got overleveraged, and he did not have  
25 the cash flow to satisfy his obligation to my clients on

1 the promissory note. That is the sole reason he stopped  
2 making these payments, and that is reflected -- truthfully  
3 so, I might add -- by this letter that is marked as  
4 Exhibit O. I mean, he says, "Listen, I was forced to sell  
5 most of my dealerships. I just couldn't keep them  
6 afloat." So my client becomes a victim of Mr. Holmes,  
7 THAG, and Nissan of Sumter's overleveraged status at this  
8 point in time.

9 There is no correspondence. There is no testimony  
10 that Mr. Holmes was able to provide in his deposition  
11 about any concerns he had with my client's performance  
12 under the asset purchase agreement. He didn't have any  
13 complaints about the way the transaction occurred. He  
14 didn't have any complaints about the equipment and the  
15 other rights that were conveyed to him through the deal  
16 until after he was sued in April of 2020. And, at that  
17 point in time, what he did was he just asserted a couple  
18 of counterclaims saying, "Well, you misrepresented the  
19 value of the business. It wasn't worth as much as you  
20 said it was. You were charging me exorbitant rent for the  
21 office space. It was well above fair market value. You  
22 didn't give me a couple of rows of cars that you were  
23 supposed to give me for me to sell leased cars on."

24 All of this is just smoke and mirrors, Your Honor,  
25 and an excuse for Mr. Holmes to, at this point in time,

1 try to find some way to overcome summary judgment. He did  
2 not mention any of those items one single time to anyone  
3 until after he retained counsel when he was sued. So I  
4 would just encourage Your Honor to look skeptically upon  
5 the arguments that you're about to hear from the other  
6 side and understand that they were borne of legal  
7 necessity once litigation was pending, not by any factual  
8 underpinnings or bona fide concerns that happened at or  
9 shortly after this transaction was entered into.

10 And look, at the end of the day, Mr. Holmes is a  
11 very sophisticated guy. He has served on the boards of  
12 various automotive dealers associations. He's owned a lot  
13 of dealerships. When times were good, he had an airplane.  
14 He ended up paying more for this dealership than he wanted  
15 to, but he made the decision to do that. Nobody made him  
16 do it.

17 If he felt like my clients were really charging more  
18 than it was worth, he should have negotiated a better deal  
19 for himself or walked away. He had either option  
20 available to him. He wanted this dealership. He felt  
21 like he could make it work, so he wasn't concerned about  
22 the price that was asked. He was not concerned about that  
23 price, and he voluntarily agreed to pay it.

24 So, Your Honor, once my clients demanded that the  
25 funds that should have been in the pledged collateral

1 account be paid to them and they learned that the funds  
2 were there to do so, Nissan of Sumter, THAG, and  
3 Mr. Holmes were in breach of their contract. As I  
4 mentioned previously, the debt that was owed at that point  
5 in time and that remains outstanding as of today is  
6 \$389,555.98.

7 We have a contingency legal agreement with my client  
8 that allows us to recover one-third of the net recovery --  
9 or, excuse me, one-third of the gross recovery in this  
10 matter. And so when you take one-third of that \$389,000  
11 sum that I just stated for you, that fee amount comes to  
12 \$129,839.01.

13 The expenses that my firm has in this case, as of  
14 the date of the filing of that supporting memo -- and they  
15 have gone up now, admittedly, but at the time, they were  
16 \$3,487.30.

17 We are --

18 THE COURT: Talk about --

19 MR. HUDSON: Yes, ma'am?

20 THE COURT: Talk about their contention that a  
21 portion of this has already been recovered with the  
22 settlement of Merrill Lynch.

23 MR. HUDSON: Your Honor, that is correct. So we  
24 have reached an agreement with Merrill Lynch. The amount  
25 is subject to a confidentiality agreement, but if you're

1 asking me to tell you what it is for purposes of this  
2 hearing, I'm certainly prepared to do so.

3 THE COURT: I guess what is your position with  
4 respect to whether or not that decreases this \$359,000?

5 MR. HUDSON: My position is that it doesn't.  
6 Merrill Lynch reached the agreement they did with us  
7 because they just didn't want to spend the money to fight  
8 it. The promissory note as well as the pledge agreement  
9 established the measure of damages we're entitled to in  
10 the event of default of either instrument. So we are  
11 entitled to recover the amount of the outstanding loan  
12 balance at the time of default, plus attorney's fees and  
13 costs, which is how we calculated the damages that we're  
14 seeking via this motion.

15 So, you know, to the extent they want to offer  
16 they're entitled to a credit or an offset, I don't believe  
17 they get it or would be entitled to it under these  
18 circumstances.

19 THE COURT: Okay. Mr. Ramsey, if I could hear from  
20 you, sir.

21 MR. HUDSON: Your Honor, can I just finish up real  
22 quick on the veil piercing issue?

23 THE COURT: Yes.

24 MR. HUDSON: That's the final component of this  
25 motion. All of these LLCs that Mr. Holmes establishes to

1 own and operate these dealerships are single member LLCs.  
2 When things started going south for him in 2017/2018, he  
3 ran into issues with essentially all his dealerships. I  
4 think there are one or two that are still in operation.  
5 He testified they were not profitable but they were still  
6 up and running.

7 Mr. Holmes is THAG. Mr. Holmes is Nissan of Sumter,  
8 LLC. Mr. Holmes is each and every one of the LLCs he  
9 establishes for purposes of his dealership operations.  
10 He's the sole owner. There are no officers. To the  
11 extent there are any, he serves in all those capacities  
12 and wears each of those hats.

13 Nissan of Sumter and THAG did not adhere to any  
14 corporate formalities. The companies were not capitalized  
15 at all. They were overleveraged from the get-go, and  
16 Mr. Holmes was the decision-maker for Nissan of Sumter as  
17 well as THAG. And when you look at the case law in our  
18 state that lays out what needs to be done in order for the  
19 corporate veil to be pierced, there are two factors.

20 So the first prong of the test requires an  
21 eight-factor analysis and looks to observance of the  
22 corporate formalities by the dominant shareholder. In  
23 this case, that is Terry Holmes.

24 Those factors -- and all of these don't have to be  
25 met. It's just some need to be met. But the eight

1 factors are whether the corporation was grossly  
2 undercapitalized. Mr. Holmes testified in his deposition  
3 that the reason he had to let go of Nissan of Sumter was  
4 that very reason; it was undercapitalized from the start.  
5 In fact, that's why he needed to ask my clients to owner  
6 finance 650 grand of the purchase price, because he didn't  
7 have the credit or the capital to otherwise consummate the  
8 transaction.

9 The second prong is the failure to observe corporate  
10 formalities. There were no corporate formalities that  
11 were adhered to by THAG or Nissan of Sumter.

12 The third factor is nonpayment of dividends. No  
13 dividends were ever paid by either LLC.

14 Element 4 is insolvency of the debtor corporation at  
15 the time. If the corporation wasn't insolvent at the time  
16 it entered into this transaction, it became insolvent  
17 within weeks, perhaps months thereafter, and Mr. Holmes  
18 knew or should have known as of February the 28th of 2017  
19 insolvency loomed on the horizon.

20 Element 5 is the siphoning of funds of the  
21 corporation by the dominant shareholder. The evidence  
22 paints the picture that Mr. Holmes took money out of  
23 Merrill Lynch Account 2250 to try to keep operations  
24 afloat elsewhere. He was robbing Peter to pay Paul, as  
25 the expression goes.

1           Element 6 is the non-functioning of other officers  
2 or directors. Mr. Holmes wore all hats, as I mentioned  
3 before.

4           And, finally, Element 8 is the fact that the  
5 corporation was merely a facade for the operations of the  
6 dominant stockholder. That was absolutely the case here.

7           And the case law states, Your Honor, that, you know,  
8 the conclusion to disregard the corporate entity must  
9 involve a number of the eight factors but need not involve  
10 them all. We have clearly met enough to satisfy the first  
11 prong of this test. And the case law for that proposition  
12 is Mid-S [sic] Management Company, Inc. v. Sherwood  
13 Development Corporation. That cite is 374 S.C. 588 or 649  
14 S.E.2d 135.

15           And then the second prong of the analysis, when  
16 you're evaluating whether a corporate veil should be  
17 pierced, comes down to fundamental unfairness and whether  
18 or not it would be fundamentally unfair to recognize the  
19 corporate entity. And what the case law summarizes that  
20 to mean is that it's simply that the individual  
21 businessman cannot be allowed to hide from the normal  
22 consequences of carefree entrepreneuring by doing so  
23 through a corporate shell. And that is absolutely how  
24 Mr. Holmes conducted his business when it came to the  
25 purchase of the Jones Nissan dealership, but beyond that,

1 the other dealerships that he was operating  
2 contemporaneously. That's why he had to get rid of all of  
3 it.

4 So, Your Honor, under the circumstances of this  
5 case -- and our argument is set forth in detail and  
6 substantively beginning on page 9 of our supporting  
7 memorandum, and it runs through page 12 of our memo.

8 So, in sum, we would ask that the Court grant Jones  
9 Nissan summary judgment on its claim for breach of  
10 contract as well as conversion. In particular, we're  
11 asking that the Court enter an award of actual damages for  
12 \$389,555.98. That's the outstanding debt owed based on  
13 principal and interest. We're also asking for an  
14 attorney's fees award in the amount of \$129,839.01. And  
15 then we're asking for an award of expenses in the amount  
16 of \$3,487.30 but we do have additional depositions we have  
17 taken since this number was calculated, so I would like to  
18 supplement information with the Court to provide an  
19 updated expense number to be considered before a decision  
20 is made, Your Honor.

21 THE COURT: Okay. Mr. Ramsey, if I could hear from  
22 you, please, sir.

23 MR. RAMSEY: Thank you, Your Honor. Can you hear me  
24 okay?

25 THE COURT: Yes, sir.

1           MR. RAMSEY: May it please the Court? Thank you,  
2           Your Honor. I am acutely aware that we have been going  
3           for a long time this morning, into the afternoon, and I am  
4           probably the one thing that stands in the way of the lunch  
5           break, so I will keep my remarks brief. Of course we'll  
6           incorporate our memo we submitted last evening and also  
7           Mr. Holmes' affidavit that we submitted a couple of days  
8           ago in support of not just his counterclaims but also, as  
9           Your Honor knows, you can view them as counterclaims or  
10          also as defenses. They're kind of two sides of the same  
11          coin.

12           Your Honor, Mr. Hudson makes an effective  
13          presentation, and it would probably be appropriate -- more  
14          appropriate, though, for after a trial before a finder of  
15          fact. You heard Mr. Hudson state that the Court should  
16          just disregard what Mr. Holmes had to say in his  
17          affidavit. If you read through his memo, I believe he  
18          devotes maybe one or two sentences to the counterclaims  
19          that we have asserted in this case.

20           Your Honor, importantly, as Your Honor knows, the  
21          standard on motion for summary judgment is a very high  
22          bar, and it's that way for a good reason, because we want  
23          the Court -- we want parties to have an opportunity to be  
24          heard and be heard on the merits of their case.  
25          Respectfully, it's not enough to just say, "Well, the

1 other side's points are meritless; just rule in my favor,"  
2 which is essentially what Mr. Hudson has done with respect  
3 to the defendant's counterclaims.

4 Your Honor, I think it's important to note what the  
5 relationship was here. We talk about a promissory note.  
6 And, Your Honor, this is different from -- as Your Honor  
7 knows, Jones Nissan is not a bank. This is another a  
8 situation where Terry Holmes or where the defendants went  
9 out and got a loan -- just a set-aside loan and then had  
10 nothing more to do with the bank aside from making  
11 payments. This was -- this promissory note, the  
12 collateral pledge agreement, were all part of a larger set  
13 of transactions in which it was understood that Nissan of  
14 Sumter was going to be coming in and assuming those assets  
15 and operating a dealership there at the property.

16 As Your Honor will see in our memo and also, Your  
17 Honor, we provided a copy of the -- of Terry Holmes'  
18 deposition, it was contemplated that this was going to be  
19 not just an asset purchase agreement but there would also  
20 be -- there would be an ongoing relationship in terms of,  
21 obviously, Nissan of Sumter was going to need a place to  
22 display its inventory. Nissan of Sumter was going to need  
23 to be able to have customers come in and be seen and have  
24 an opportunity to look at vehicles. And there was  
25 expectations back and forth between how much space was

1 going to be set aside for that.

2 There was certainly -- as part of any contract,  
3 there's an expectation of good faith and fair dealing, and  
4 that's part of what we're arguing in our counterclaims,  
5 Your Honor, that Jones Nissan did not live up to that in  
6 terms of charging an exorbitant rent for the lot, not  
7 given the right amount of space that they had promised,  
8 not setting aside a building so that Jones -- so that  
9 Nissan of Sumter would have the use of those facilities,  
10 and then, on top of everything else, operating a competing  
11 dealership right next door. And, Your Honor, we're still  
12 going through discovery, and we'll find out to what extent  
13 they were offering Nissans at that competing dealership.

14 But those are all, Your Honor, part of our  
15 counterclaims. Again, I think the way Mr. Hudson would  
16 like the Court to view it is actually the opposite of what  
17 the standard of review is; that, at this stage, Your  
18 Honor, as the non-moving party, as Your Honor knows, we're  
19 entitled to every inference of fact to be found in our  
20 favor and in the light most favorable to the non-moving  
21 party.

22 We have asserted these counterclaims, Your Honor.  
23 Notably, counsel took Mr. Holmes' deposition for about  
24 eight hours, and I was struggling to find anywhere where  
25 he even asked him about the factual basis for his

1 counterclaims or why he was asserting what he was  
2 asserting. Really, the focus was all on the promissory  
3 note and his other documents, which that's his right, but  
4 now, you know, Your Honor, that's why we had to assert  
5 our -- send in the affidavit, because, frankly, during his  
6 deposition, those issues just weren't touched on for  
7 whatever reason.

8 So, Your Honor, that's our primary point is that, in  
9 terms of the -- both the plaintiff's claims and our  
10 counterclaims, there are simply -- there are genuine  
11 issues of material fact that are set forth succinctly in  
12 our -- in Mr. Holmes' affidavit. We don't think it's  
13 appropriate for the Court to just dismiss that or to not  
14 consider that.

15 We would take issue with the idea that -- Mr. Hudson  
16 said something about, "Well, these have never been raised  
17 before or they were only raised in response to this  
18 litigation." And if that's true, that's a fair point that  
19 he can make to the finder of fact about what amount of  
20 weight they should give to Mr. Holmes' testimony, but that  
21 goes to the weight of the testimony. It doesn't mean that  
22 it gets disregarded entirely.

23 Your Honor, the other reason why we contend summary  
24 judgment is inappropriate at this stage is, as Mr. Hudson  
25 alluded to and as the next motion even involves, we are

1 still right in the middle of doing discovery in this case.  
2 Mr. Hudson just recently took a deposition. He's asked to  
3 take another deposition of Marcus Sanchez, who is or was  
4 an officer of THAG. He mentioned that THAG doesn't have  
5 any officers; they did have employees and officers, and  
6 Marcus Sanchez was one of those.

7 So we're still engaging in discovery, Your Honor.  
8 Back in April, we submitted some written discovery.  
9 Importantly, we were asking, you know, what are the  
10 damages you're asserting? What are -- we did ask this  
11 question about the settlement, Your Honor, because, as  
12 Mr. Hudson alluded to, there's been this confidential  
13 settlement that -- I have a sense of how much they settled  
14 for, but I haven't seen it in writing and I haven't had it  
15 to provided to me. And, of course, we would take the  
16 position that this was money that was received. I mean,  
17 it was in the same case; Merrill Lynch was added later.  
18 And so these are all part of the same set of circumstances  
19 and transactions that gave rise to one alleged injury.

20 So I don't -- I think allowing -- you know, if Your  
21 Honor were to be inclined to grant -- even if summary  
22 judgment were granted, there would have to be a reduction  
23 in the amount -- a set-off in the amount of any monies  
24 that they received from Merrill Lynch because he plaintiff  
25 is not entitled to a double recovery.

1 But, Your Honor, we did submit some discovery back  
2 in April, touched on some of these key issues that we're  
3 arguing about here today. Did not receive a response. I  
4 sent a Rule 11 letter. Still did not receive a response  
5 and filed our motion to compel.

6 Importantly, Your Honor, I'm sure Mr. Hudson will  
7 say, "Well, that was -- you know, he's had his opportunity  
8 to do discovery. Why is he waiting this late?" You know,  
9 fair enough, but at the same time, Your Honor, at the time  
10 we submitted that discovery, there was no motion for  
11 summary judgment pending; that was filed a couple of weeks  
12 later. And I'm not accusing anyone of any inappropriate  
13 conduct, but just -- that's just the way the timeline has  
14 gone. We submitted discovery, the motion for summary  
15 judgment was filed after that, and we still don't have our  
16 discovery. We had to file a motion to compel on that.

17 So, for that additional reason, Your Honor,  
18 discovery being incomplete, we would submit that summary  
19 judgment is inappropriate at this stage.

20 I have touched on the set-off issue, Your Honor. I  
21 think Your Honor correctly raised that, and so I won't  
22 argue it any further.

23 As to the piercing of the corporate veil, Your  
24 Honor, if Your Honor looks -- I think there's been -- you  
25 know, I don't want to make it sound bad, but there's been

1 some mischaracterization of Mr. Holmes' testimony in terms  
2 of, if you really read his testimony, what he's talking  
3 about being in financial dire straits and having issues of  
4 possible undercapitalization, that was in reference to  
5 the -- you know, in 2017 when these -- when all this kind  
6 of came to a head. He's not -- or, I'm sorry. He's not  
7 talking about 2017 when these agreements were entered;  
8 he's talking about in 2019 when the payments,  
9 unfortunately, were stopped. That's when the financial  
10 hardship actually occurred, not back in 2017.

11 Obviously -- certainly, Nissan Motor Corporation  
12 wouldn't have been on board with any type of purchase of a  
13 dealership if they felt like Mr. Holmes' companies were in  
14 financial hardship back in 2017. They stood at  
15 1.6 million on that basis, so there was no reason to think  
16 that there was any issue back then. But we'll simply  
17 point to the testimony. Again, we don't think you get  
18 that far, Your Honor, because we don't think you get to  
19 the piercing of the corporate veil, so I wanted to raise  
20 that.

21 Again, THAG, LLC/Nissan of Sumter, LLC, did have  
22 officers, did have employees. It was not just a one-man  
23 show with Terry Holmes running everything. The simple  
24 fact that he was his own -- that it was a single member  
25 LLC does not in and of itself give rise to a breach of

1 the -- or a piercing of the corporate veil, Your Honor,  
2 and we would submit that it's extremely rare -- extremely  
3 rare circumstance for that type of claim, piercing the  
4 corporate veil, to be granted on a motion for summary  
5 judgment, especially under the facts that we have here  
6 today.

7 So, Your Honor, because there's genuine issues of  
8 material fact and discovery has not been completed, we  
9 would submit that summary judgment, at best, is premature  
10 at this point, but certainly should not be granted under  
11 these facts. Thank you.

12 THE COURT: Anything that y'all want to tell me with  
13 respect to the motion for in camera review of the  
14 documents?

15 Let me unmute you, Mr. Hudson. And if you want to  
16 unshare your screen, if that's a word.

17 I can hear you now.

18 MR. HUDSON: Okay. Your Honor, Mr. Ramsey is  
19 right -- can you hear me?

20 THE COURT: I can but now you -- I'm looking at --  
21 well, it says I'm viewing Terry Holmes' white board.  
22 Somebody is sharing their screen. There we go.

23 Okay. Mr. Hudson?

24 MR. HUDSON: Your Honor, it's technically correct  
25 that discovery is ongoing but the reality is, is this case

1 was slated to be tried in front of Judge Seals -- this is  
2 a bench trial -- the week following Memorial Day. It  
3 ended up getting continued the week before, I believe, but  
4 it's not like we're just in the middle of discovery now.  
5 This thing was filed in April of 2020, so we're over three  
6 years old, and we were on the cusp of trial, and we were  
7 ready to try the case. I believe Mr. Ramsey was up for a  
8 jury trial in Horry County, I believe, so, you know, it  
9 needed to be continued, which is fine. That's the way  
10 those things go.

11 But this case has got age on it. And the parties  
12 did make a run at trying to resolve it. We mediated it,  
13 and that's where we made some headway with Merrill Lynch  
14 but we couldn't do it with Mr. Holmes and THAG and Nissan  
15 of Sumter.

16 Now, so you know, I have told you my position on a  
17 potential credit or set-off; I don't think they get one.  
18 But the amount that was paid by Merrill Lynch was  
19 \$125,000. So that's what they paid to get out of the  
20 case.

21 But, you know, one thing that Mr. Holmes relies on  
22 in his affidavit is this notion about rent and it being  
23 exorbitant --

24 THE COURT: Mr. Hudson, I don't mean to cut you off,  
25 sir, but I have another docket starting at 1:30. So if

1 y'all want me to hear whatever you want to tell me with  
2 respect to the second motion for an in camera review of  
3 the documents, then I need to ask you to move to that.

4 MR. HUDSON: All right. Well, on that final point,  
5 they haven't produced a lease to substantiate their  
6 positions. And the lease that does exist is with another  
7 landlord; it's not the Jones Nissan. So they haven't done  
8 anything to support their counterclaims. There's no  
9 factual basis to the affidavit. It's sham. It should be  
10 disregarded.

11 Now, on the other motion for in camera review, do  
12 you have the motion available to you, Your Honor, that I  
13 filed?

14 THE COURT: Yes, sir. I have got it right in front  
15 of me.

16 MR. HUDSON: Okay. If you go to the exhibit of the  
17 motion, you'll see some correspondence between Mr. Ramsey  
18 and myself. And then about midway through -- and I'm  
19 sorry that those documents were not Bates numbered, but  
20 you'll see redacted portions of an email thread. Are you  
21 able to locate those?

22 THE COURT: I have got the email thread in front of  
23 me.

24 MR. HUDSON: Okay. So if you start towards the back  
25 and then we'll work forward. On the first email I'm

1 looking at is dated February the 28th, 2017, 2:59 p.m.,  
2 from Mark Sanchez to Greg Weathers. Just let me know when  
3 and if you have that, and I'll keep going.

4 THE COURT: Running from backwards forwards, I think  
5 that's what you indicated --

6 MR. HUDSON: Yes, ma'am.

7 THE COURT: -- I see, on Thursday, March 2nd, from  
8 the wire room to a Tammie Weathers. I see from wire room  
9 to Tammie Weathers at 4:42 p.m. Again, wire room to  
10 Tammie Weathers. I see an email from Greg Weathers to  
11 Tammie Weathers on Thursday, March 2nd. I see one from  
12 Greg Weathers to Mark Sanchez on Thursday, March 2nd at  
13 4:48 p.m.

14 MR. HUDSON: Next page.

15 THE COURT: I see emails from John Hudson to Chris  
16 Ramsey. John Hudson to Chris Ramsey.

17 MR. HUDSON: So you mentioned that email from Greg  
18 Weathers to Mark Sanchez on March the 2nd at 4:48 p.m.  
19 The next page behind that should have an email down  
20 towards the bottom from Mark Sanchez to Greg Weathers on  
21 February the 28th at 2:59 p.m.

22 THE COURT: Yes, I do see -- I couldn't see it. It  
23 looks like most of it is redacted.

24 MR. HUDSON: Yes, ma'am. And if you look at the  
25 handwritten annotation out to the right, it says, "THAG,

1     LLC, 5LP02213." That is another Merrill Lynch account  
2     that belonged to THAG. It was essentially their operating  
3     account. It is my suspicion that what happened on  
4     February the 28th or shortly thereafter is that, when my  
5     client sent the \$650,000 loan from Mr. Erter in Sumter to  
6     Mr. Weathers in Pawleys Island, Mr. Sanchez and perhaps  
7     Mr. Weathers -- I don't know, but somebody said rather  
8     than putting that \$650,000 in Account 2250, which was the  
9     collateralized account and where that money should have  
10    gone, it was directed into Account 2213, which would have  
11    been in violation of the pledge agreement.

12           And all of the redactions that we see in these  
13    two-plus pages of emails are between Mark Sanchez and Greg  
14    Weathers, who was the closing attorney for their side of  
15    the transaction.

16           So it is my initial belief that these communications  
17    are not privileged at all because the case law is crystal  
18    clear that, just because there is communication between an  
19    attorney and a client does not necessarily render that  
20    communication privileged. It may be, but it's got to be  
21    established that it was intending to seek or garner legal  
22    advice and that it was also confidential in nature.

23           THE COURT: So my question is -- it looks like y'all  
24    have agreed that you would have a judge review those items  
25    in camera -- and that's your motion, is for a judge to

1 review them in camera.

2 MR. HUDSON: Would like for you to do that, yes,  
3 ma'am.

4 THE COURT: Okay. And, Mr. Ramsey, I believe you're  
5 in agreement with that?

6 MR. RAMSEY: That's correct, Your Honor.

7 THE COURT: Okay. Do y'all want to email me some  
8 instructions on how you want to accomplish that?

9 MR. RAMSEY: We can probably take a -- John, what do  
10 you think about taking a stab at, you know, some sort of  
11 consent order? And I would provide an unredacted version  
12 to Your Honor or to Your Honor's law clerk.

13 THE COURT: A secured file share?

14 MR. HUDSON: Yeah, I'm not sure we need to go that  
15 far because our position is very clear. One, I don't  
16 think those communications will be privileged, but even if  
17 they are, the crime/fraud exception potentially applies to  
18 officiate the privilege. So that's all we're looking to  
19 have adjudicated.

20 MR. RAMSEY: And, Your Honor, I think -- obviously,  
21 my objective was just to say, if a judge looks at it and  
22 says it meets that exception, then -- but I think the --  
23 it has to be reviewed.

24 MR. HUDSON: I agree with that. The Court should  
25 review it and then make a decision. I just wanted the

1 Court to be aware of our arguments as to why, upon review,  
2 we believe we should be entitled to it.

3 THE COURT: I understand. Okay. So I guess what I  
4 need from y'all is how you intend for that to take place.  
5 I'm fine for it to be by some kind of file share, but I  
6 just need to know the specifics of how you-all want to  
7 accomplish that. In other words, how are you going to get  
8 the documents to me for my review?

9 MR. HUDSON: It would come from Mr. Ramsey, since he  
10 has the unredacted versions. I don't have anything I can  
11 provide that would be helpful.

12 MR. RAMSEY: And, John, if it's okay with you, I  
13 will -- I guess I'll provide -- not that it's very lengthy  
14 or anything, but I will provide the full string -- I think  
15 it's seven or eight pages -- and I can highlight the ones  
16 that were -- unless I need to do -- unless you prefer that  
17 I send both -- send unredacted and redacted. I was just  
18 thinking, that way, someone could look at the same page  
19 and see what was redacted.

20 THE COURT: I believe I have the redacted version.  
21 It's an exhibit to Plaintiff's motion for in camera  
22 review.

23 MR. HUDSON: Correct.

24 MR. RAMSEY: So I don't need to make any marks on  
25 the unredacted version. Just send it as it is? Okay.

1           THE COURT: I'm glad to do that. And I will take  
2 the motion for summary judgment under advisement. I will  
3 email you-all with my ruling.

4           MR. HUDSON: All right. Thank you, Your Honor.

5           MR. RAMSEY: Thank you, Your Honor.

6           THE COURT: Thank you.

7           (The above matter concluded.)  
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## 1 CERTIFICATE OF TRANSCRIBER

2 CASE NAME/NUMBER: Jones Nissan v. THAG, LLC

3 2020-CP-22-00373

4 DATE OF HEARING: 7/13/23

5 COURT REPORTER/MONITOR: Webex Virtual Courtroom

6 \*\*\*\*\*

7 I, Bobbi Fisher, do hereby certify that the  
8 foregoing transcript is a true and correct record of the  
9 recorded proceedings; that said proceedings were  
10 transcribed to the best of my ability from the audio  
11 recording and supporting information, and that I am  
12 neither counsel for, related to, nor employed by any of  
13 the parties to this case, and I have no interest,  
14 financial or otherwise, in its outcome.

15  
16 *Bobbi Fisher*17 /s/ Bobbi Fisher

18 Bobbi Fisher, RPR and Certified Transcriber

19 Date Submitted: 2/1/24

20  
21 NOTE: PURSUANT TO RULE 607(h)(1)(B), SCACR, "A COURT  
22 REPORTER SHALL RECEIVE THE FEE OF \$1.00 PER PAGE FOR  
23 FURNISHING A COPY OF A PREVIOUSLY PREPARED TRANSCRIPT."  
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25 800) FROM OPPOSING PARTY OR NON-PARTIES MUST BE SENT TO  
THIS REPORTER AT BFISHER@SCCOURTS.ORG.

Jones Nissan v. THAG LLC; 2020-CP-22-00373

Curtis, Kristi F. <kcurtisj@sccourts.org>

Wed 8/16/2023 4:30 PM

To:john@mcleod-lawgroup.com <john@mcleod-lawgroup.com>;Chris Ramsey <cramsey@bosticlaw.com>

Dear all: I heard Plaintiff's motion for summary judgment in the above case on July 13<sup>th</sup> via WebEx and took the matter under advisement. After review, I am granting the motion in part and find as follows:

Plaintiff's motion for summary judgment is GRANTED on the causes of action for breach of contract and conversion. Plaintiff has met its burden of proving a prima facie case that Defendant breached the terms of the Promissory Note and Pledge Agreement and owes Plaintiff a balance of \$389,555.98. Defendant has failed to come forward with sufficient evidence that there exists any genuine issue of material fact with respect to these claims.

Defendant makes assertions that Plaintiff misrepresented the market value of the dealership. However, Defendant Holmes acknowledges in his deposition testimony that he was not forced to enter into any of the agreements with Plaintiff or to pay any particular amount. The contract documents evidence that Defendant had time to conduct its own inquiry into the value of the business, and both parties were sophisticated business entities represented by counsel. The fact that THAG, LLC may have agreed to pay too much is not a valid defense.

Defendant also contends Plaintiff charged too much rent pursuant to the lease agreement. Again, the deposition testimony of Holmes establishes that the rent amount was set forth in the lease agreement (presumably between MarGin Properties as Landlord and Sumter Real Estate Holdings as Tenant, as referenced in the Second Amendment to the Asset Purchase Agreement, Para. 12(b)(viii)). I do not see where either party submitted the lease agreement as an exhibit. However, Holmes specifically testified in his deposition that the \$32,500 "was the amount of the lease agreement" and states "we agreed to do that to get started along the way." [Holmes deposition at 94-98]. Again, Defendant voluntarily entered into the lease agreement and cannot now contend that holding him to those terms was a breach of the parties' contract.

Defendant Holmes makes the bare assertion in his affidavit that Plaintiff violated the terms of the noncompete by operating another car dealership next door to the Defendant's dealership. However, the Noncompete provision does not prevent Plaintiff from operating a car dealership. The noncompete clause states that Plaintiffs will not directly or indirectly "compete with the business of Purchaser by engaging in any new Nissan brand motor vehicle sales or service dealership" for a period of five years. [Asset Purchase Agreement, Para. 12(b)(iv). Ex. A. to Plaintiff's Memo in Support of SJ] Defendant has failed to set forth by affidavit or otherwise any facts showing that Plaintiff breached the terms of the noncompete.

I do find there are genuine issues of material fact with regard to Plaintiff's remaining causes of action, and that an award of attorney fees is premature.

As to Defendant's counterclaims, Plaintiff bares the initial burden of coming forward with facts to show there is no genuine issue of material fact. None of Plaintiff's affidavits or exhibits expressly address these counterclaims. I therefore find that summary judgment with respect to the counterclaims would not be appropriate.

Mr. Hudson, please draft a proposed order consistent with your memo and supplemental memo in support of summary judgment and email it to Mr. Ramsey for review before e-filing it for my review and signature.

Thank you,  
Kristi Curtis

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IN THE STATE OF SOUTH CAROLINA  
COUNTY OF GEORGETOWN

Jones Nissan, Inc.,

Plaintiff,

vs.

THAG, LLC; Nissan of Sumter, LLC; Terry L.  
Holmes; and Merrill Lynch, Pierce, Fenner &  
Smith, Incorporated,

Defendants.

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Civil Action No. 2020-CP-22-00373

**ORDER**

This matter comes before the Court on Plaintiff's motion for summary judgment as to its claims for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) conversion, and (4) piercing the corporate veil as well as to Defendants' counterclaims. For the reasons set forth below, the Court grants Plaintiff's motion as to its claims for breach of contract and conversion. The Court denies Plaintiff's motion as to its claim that it is entitled to pierce the corporate veil. The Court also grants in part and denies in part Plaintiff's motion for summary judgment as to Defendants' counterclaims.

**FINDINGS OF FACT**

Plaintiff Jones Nissan, Inc. ("Plaintiff") owned and operated the Jones Nissan automobile dealership ("the dealership") in Sumter, South Carolina from 1990 until early 2017. In July 2016, Plaintiff entered into an "Asset Purchase Agreement" ("the contract") with defendant THAG, LLC ("THAG") pursuant to which THAG agreed to purchase the dealership for \$2,250,000.00 cash along with other considerations. The contract was amended multiple times by the parties prior to the transaction closing in early 2017. At all relevant times, defendant Terry Holmes ("Holmes") was the sole member of THAG and had complete control over the company.

Pursuant to the contract's third amendment, Plaintiff, at THAG and Holmes' request, agreed to owner-finance \$650,000.00 of the \$2,250,000.00 purchase price. The terms and conditions of the financed portion of the sale price were memorialized through a combination of documents, namely a promissory note, a "Pledged Collateral Account Control Agreement," and a "Pledge Agreement," all of which were signed by Holmes purportedly on behalf of THAG. The parties' financing agreement required that THAG or its assigns at all times maintain a sufficient balance in Merrill Lynch Account No. XXX-XX250 ("the pledged account") to satisfy the outstanding balance of the financed portion of the purchase price of the dealership as contemplated in the third amendment to the Asset Purchase Agreement. The agreement also gave Plaintiff a security interest in the pledged account and allowed Plaintiff to issue a "Notice of Exclusive Control" to take control of the pledged account if THAG defaulted on its debt obligation. Defendants initially funded the pledged account with \$650,000.00 as required. However, Defendants, either individually or through their agents, failed to deliver the Pledged Collateral Account Control Agreement to Merrill Lynch and consequently failed to notify Merrill Lynch of the agreed upon limits on Defendants' rights to dispose of the funds in the pledged account.

THAG, via Holmes, assigned the contract to defendant Nissan of Sumter, LLC ("Nissan of Sumter") on February 28, 2017. Nissan of Sumter thus assumed THAG's obligations under the contract, including payment of the \$650,000 debt obligation.

Defendants made monthly payments of \$12,566.32 or \$12,566.33 on the \$650,000.00 debt obligation from March 2017 through July 2019. Despite still owing 31 of the 60 required payments, Defendants never made another required payment after July 2019. On August 20, 2019, Plaintiff notified Defendants of their default on the promissory note, and in exercise of its rights

under the note, demanded that the then outstanding debt of \$360,035.15 be satisfied in full.<sup>1</sup> Defendants failed to satisfy the outstanding debt.

After Defendants defaulted and failed to satisfy the outstanding debt, Plaintiff attempted to exercise its contractual rights to collect the outstanding debt from the designated, collateralized funds on deposit in the pledged Merrill Lynch account. However, the designated, collateralized funds had already been withdrawn, transferred, or otherwise disposed of by Defendants and were no longer in the account nor available to Plaintiff to satisfy the debt. Defendants, who sold the dealership in 2019, have never paid the remaining \$389,555.98 they agreed to pay Plaintiff.

In April 2020, Plaintiff filed this action and asserted ten claims against Defendants: (1) breach of contract, (2) breach of contract accompanied by a fraudulent act, (3) conversion and civil theft, (4) breach of the implied covenant of good faith and fair dealing, (5) fraud, (6) constructive fraud, (7) money had and received, (8) quantum meruit, (9) piercing the corporate veil/alter ego, and (10) accounting. Defendants answered and asserted counterclaims against Plaintiff for breach of contract and breach of the implied covenant of good faith and fair dealing.

Plaintiff subsequently moved for summary judgment on its claims for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) conversion, and (4) piercing the corporate veil. Plaintiff also moved for summary judgment on Defendants' counterclaims and requested that the Court award Plaintiff attorneys' fees based on the parties' contract documents. In response, Defendants submitted an affidavit of Terry Holmes in which Holmes repeated the allegations in Defendants' counterclaims.

The Court heard oral argument on Plaintiff's motion on July 13, 2023.

---

<sup>1</sup> Although Plaintiff's written demand stated the outstanding debt at the time as \$360,035.15, that amount represented the outstanding principal only. The correct debt amount, with interest included, was \$389,555.98.

### **LEGAL STANDARD**

A trial court must grant summary judgment if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRPC. In reviewing a summary judgment motion, the court must view “the evidence and all inferences which can reasonably be drawn therefrom . . . in the light most favorable to the nonmoving party.” *Quail Hill, LLC v. Richland Cty.*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010). However, “it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.” *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

### **CONCLUSIONS OF LAW**

Viewing the evidence and all reasonable inferences in the light most favorable to Defendants, the Court finds that no genuine issue of material fact exists as to Plaintiff’s claims for breach of contract and conversion against Defendants THAG, Nissan of Sumter, and Holmes, and therefore Plaintiff is entitled to judgment as a matter of law on those claims. Likewise, the Court finds that no genuine issue of material fact exists as to the portions of Defendants’ defenses and counterclaims that are based on (1) Plaintiff’s alleged misrepresentation of the market value of the dealership, (2) the amount of rent Plaintiff charged Defendants, and (3) Plaintiff’s alleged violation of the terms of the noncompete clause in the Asset Purchase Agreement. No evidence supports those contentions by Defendants, and the Court therefore finds that Plaintiff is entitled to judgment as a matter of law as to those contentions.

The Court finds genuine issues of material fact exist as to Plaintiff's remaining claims against Defendants and as to Defendants' remaining counterclaims. The Court further finds that an award of attorneys' fees is premature.

**I. Plaintiff's Breach of Contract and Conversion Claims**

**A. Breach of Contract**

It is undisputed that the contract between Plaintiff and Defendants required Defendants to pay Plaintiff \$650,000.00, plus interest, in 60 monthly installments. It is further undisputed that Defendants failed to make all the required payments. Defendants therefore breached the contract as a matter of law.

A plaintiff asserting a breach of contract claim must prove "the existence of a contract, its breach, and damages caused by such breach." *Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 652, 780 S.E.2d 263, 272–73 (Ct. App. 2015). The breaching party is "liable for whatever damages follow as a natural consequence and a proximate result of such breach." *Id.* The interpretation and enforcement of an unambiguous contract is a question of law for the court and can be properly disposed of at summary judgment. *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491, 732 S.E.2d 205, 209 (Ct. App. 2012). This Court must apply the plain language of the agreement and enforce its terms according to their plain meaning. *Bardsley v. Gov't Emps. Ins. Co.*, 405 S.C. 68, 76, 747 S.E.2d 436, 440 (2013).

The contract documents at issue are clear and unambiguous. Plaintiff agreed to finance \$650,000.00 of the purchase price for the dealership in exchange for THAG's agreement to repay the \$650,000, plus interest, over the course of 60 months. THAG voluntarily entered into the Pledged Collateral Control Agreement with Plaintiff, in which it agreed that the pledged Merrill Lynch account would be maintained for the benefit of Plaintiff and that Plaintiff could exercise

exclusive control over the account under specified conditions of default with proper notice. THAG, via Terry Holmes, voluntarily executed the promissory note memorializing their commitment to pay the \$650,000 plus interest and voluntarily entered into the Pledge Agreement granting Plaintiff a security interest in the pledged account and the right to collect and satisfy the debt from the account if Defendants defaulted on the debt. When they executed the promissory note, THAG and Holmes expressly waived any rights to “demand, presentment, notice of non-payment, dishonor, protest, and notice of protest.”

There is no dispute that THAG voluntarily entered into the Asset Purchase Agreement or its three amendments. In fact, Defendants admitted that THAG entered into these contracts in their answer to the amended complaint. There is also no dispute that, pursuant to the contract’s third amendment, THAG was required to pay Plaintiff \$650,000 amortized over 60 months at 6% interest. Defendant Holmes also admitted this fact in a letter he wrote to Plaintiff in August 2019. Further, there is no dispute that THAG made only 29 of the required 60 monthly payments or that THAG failed maintain sufficient funds in the pledged account to cover the outstanding debt obligation in the event of default.

Defendant Holmes admitted at his deposition that he did not read the contract documents before signing them. His failure to read the contract documents is no defense to Plaintiff’s claims. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 81, 749 S.E.2d 139, 146 (Ct. App. 2013) (“[A] party who signed a contract is deemed to have read and understood ‘the effect’ of the contract.”).

Thus, no genuine issue of material fact exists as to Defendants’ breach of the unambiguous agreements. The Court therefore finds that Plaintiff is entitled to summary judgment on its claim for breach of contract.

## **B. Conversion**

Plaintiff is entitled to summary judgment on its conversion claim because Defendants drained the pledged Merrill Lynch account despite Plaintiff's security interest and entitlement to exercise exclusive control over the account if Defendants defaulted on their debt obligation.

Conversion is "the unauthorized assumption and exercise of the rights of ownership over goods or personal chattels belonging to another, to the alteration of their condition or to the exclusion of the rights of the owner." *Mullis v. Trident Emergency Physicians*, 351 S.C. 503, 506–07, 570 S.E.2d 549, 550 (Ct. App. 2002). Money may be the subject of conversion if "it is capable of being identified and there may be conversion of determinate sums even though the specific coins and bills are not identified." *Id.* at 507, 570 S.E.2d at 551 (quoting *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 498, 392 S.E.2d 789, 792 (1990)).

The Court finds Plaintiff is entitled to summary judgment on its conversion claim. Defendants funded the Merrill Lynch account with \$650,000, agreed to maintain a sufficient balance in the account at all times to cover the outstanding debt obligation, and agreed that Plaintiff was entitled to issue a notice and take exclusive control over the account if Defendants defaulted. Nonetheless, Defendants drained the account when they still owed Plaintiff the determinative sum of \$389,555.98. Defendants therefore unlawfully converted the funds in the account, and Plaintiff is entitled to judgment as a matter of law on its conversion claim. *See Mullis*, 351 S.C. at 507, 570 S.E.2d at 551 (affirming a judgment on a conversion claim because the plaintiff identified a determinative sum improperly withheld by the defendant).

## **C. Damages**

The Court finds Plaintiff is entitled to recover actual damages in the amount of \$389,555.98, which is the amount of the outstanding debt at the time of the breach. It is undisputed

*issue for trial.*” (first alteration in original)). The Court finds each of these allegations is meritless as both a counterclaim and a defense to Plaintiff’s claims.

As to Defendants’ assertion that Plaintiff misrepresented the market value of the dealership, Holmes acknowledged in his deposition testimony that he was not forced to enter into any of the agreements with Plaintiff or to pay any particular amount. The contract documents evidence that Defendants had time to conduct their own inquiry into the value of the business, and all parties were sophisticated business entities represented by counsel. The fact that Defendants may have agreed to pay too much or more than they should have is not a valid defense to Plaintiff’s claims, nor is it a valid basis for a breach of contract counterclaim. Accordingly, the Court grants summary judgment in favor of Plaintiff on this portion of Defendants’ counterclaims and defenses.

Defendants also contend Plaintiff charged too much rent pursuant to the commercial lease agreement entered into in conjunction with the Second Amendment to the Asset Purchase Agreement. Again, the deposition testimony of Holmes establishes that the rent amount was set forth in the lease agreement (presumably between MarGin Properties as Landlord and Sumter Real Estate Holdings as Tenant, as referenced in the Second Amendment to the Asset Purchase Agreement at paragraph 12(b)(viii)). Defendant Holmes specifically testified in his deposition that the \$32,500 rent “was the amount of the lease agreement” and stated “we agreed to do that to get started along the way.” Again, Defendants voluntarily entered into the lease agreement and cannot now contend that holding them to those terms was a breach of the parties’ contract. Accordingly, the Court grants summary judgment in favor of Plaintiff on this portion of Defendants’ counterclaims and defenses.

Finally, Defendant Holmes makes the bare assertion in his affidavit that Plaintiff violated the terms of the noncompete clause in the Asset Purchase Agreement by operating another car

dealership next door to the Defendants' dealership. However, the noncompete provision does not prevent Plaintiff from operating a car dealership. The noncompete clause, at paragraph 12(b)(iv) of the Asset Purchase Agreement, states that Plaintiff will not directly or indirectly "compete with the business of Purchaser *by engaging in any new Nissan brand motor vehicle sales or service dealership*" for a period of five years. Defendants have failed to set forth by affidavit or otherwise any facts showing that Plaintiff breached the terms of the noncompete. Accordingly, the Court finds no genuine issue of material fact exists and Plaintiff is entitled to judgment as a matter of law on this portion of Defendants' counterclaims and defenses.

### **III. Plaintiff's Remaining Claims and Defendants' Remaining Counterclaims**

The Court finds genuine issues of material fact exist with regard to the remaining claims on which Plaintiff moved for summary judgment.<sup>2</sup> The Court also finds genuine issues of material fact exist as to the remaining portions of Defendants' counterclaims—specifically, the allegations in subparagraphs c, d, and e of paragraph 57 and subparagraphs c, d, and e of paragraph 61 of Defendants' Answer and Counterclaims filed on May 1, 2023.

### **IV. Plaintiff's Request for Attorneys' Fees**

Plaintiff asserts that it is entitled to an award of attorneys' fees under the terms of the contracts referenced above, the promissory note and Pledge Agreement in particular. The Court finds that an award of attorneys' fees is premature at this stage and therefore denies Plaintiff's request at this time. Plaintiff is free to raise its request for attorneys' fees again at a later date.

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<sup>2</sup> Plaintiff did not move for summary judgment on its claims for breach of contract accompanied by a fraudulent act, fraud, constructive fraud, money had and received, quantum meruit, and accounting. The Court therefore makes no ruling as to those claims.

### **CONCLUSION**

For the reasons set forth above, the Court hereby GRANTS Plaintiff's motion for summary judgment as to its claims for breach of contract and conversion and awards Plaintiff actual damages in the amount of \$389,555.98. The Court further GRANTS Plaintiff's motion for summary judgment as to the portions of Defendants' counterclaims and affirmative defenses that are based upon (1) the market value of the dealership, (2) the amount of rent charged by Plaintiff, and (3) the noncompete provision in the parties' contract.

The Court DENIES summary judgment as to Plaintiff's remaining claims and as to the remaining portions of Defendants' counterclaims.

The Court DENIES Plaintiff's request for attorneys' fees as premature at this stage.

**IT IS SO ORDERED.**

---

The Honorable Kristi Lee Curtis  
Circuit Court Judge

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September 5, 2023

*Via U.S. Mail and Email: [kcurtisj@sccourts.org](mailto:kcurtisj@sccourts.org)*

The Honorable Kristi F. Curtis

215 North Harvin Street

Sumter, SC 29150

Re: Jones Nissan, Inc. v. THAG, LLC et al.

Case No. 2020-CP-22-00373

Georgetown County Court of Common Pleas

Dear Judge Curtis,

I represent the current Defendants (THAG, LLC; Nissan of Sumter, LLC; and Terry L. Holmes) in the above-referenced case. On July 13, 2023, we appeared before Your Honor via WebEx and argued the Plaintiff's Motion for Summary Judgment. On August 16, 2023, Your Honor sent an e-mail to counsel (a copy of which is enclosed) which outlined your decision on the motion. Counsel for Plaintiff was directed to prepare a proposed Order and share with opposing counsel prior to submitting it to Your Honor for review, editing, and signature.

Mr. Hudson shared his proposed Order with me. I raised a few concerns about the contents of the Order. Mr. Hudson asked for guidance on how to proceed. Your Honor directed Mr. Hudson to submit his proposed Order, and that I could then submit my issues with the proposed Order as written. To be clear, the intent of this letter is not to re-argue matters that were heard on July 13, or to take issue with Your Honor's findings as outlined in your August 16 e-mail; rather, it is to bring attention to areas where the proposed Order may be in conflict with your e-mail, and issues that were raised at the hearing but not directly addressed in your e-mail or the proposed Order.

## Issue 1: Whether Summary Judgment Is Granted as to Defendants' Counterclaims

Your Honor's e-mail states in part, "As to Defendant's counterclaims, Plaintiff bares the initial burden of coming forward with facts to show there is no genuine issue of material fact. None of Plaintiff's affidavits or exhibits expressly address these counterclaims. I therefore find that summary judgment with respect to the counterclaims would not be appropriate." Notwithstanding this language in Your Honor's e-mail, the proposed Order states that the Motion for Summary Judgment as to Defendants' counterclaims is granted in part and denied in part. The proposed Order apparently relies

upon other statements in the e-mail which are critical of Defendants' arguments as found in Defendants' counterclaims and Terry Holmes' testimony. However, Defendants would point to the e-mail's ultimate conclusion – that summary judgment would be inappropriate as to Defendants' counterclaims – and would ask that the proposed Order reflect Your Honor's ruling in this regard.

#### Issue 2: Whether Summary Judgment Is Granted Against Terry Holmes Individually

Your Honor's e-mail states that Plaintiff is granted summary judgment on its claims for breach of contract and conversion against "Defendant." The Defendants in this case are THAG, LLC; Nissan of Sumter, LLC; and Terry L. Holmes individually. The e-mail refers to "Defendant" in the singular and does not identify which of the 3 Defendants summary judgment is being granted against. The proposed Order prepared by Mr. Hudson states that summary judgment is being granted against all 3 Defendants.

Plaintiff does not allege that Terry Holmes entered into any contract in his individual capacity. Every contract signed by Terry Holmes references that he is signing on behalf of THAG, LLC or Nissan of Sumter, LLC. Plaintiff made a separate claim for piercing the corporate veil, but Your Honor found that genuine issues of material fact remained regarding Plaintiff's "remaining causes of action."

I submitted to Mr. Hudson that it was a reasonable interpretation of Your Honor's e-mail that you intended to grant summary judgment only against one or both of the corporate Defendants, and not against Mr. Holmes individually. I would respectfully request clarification regarding which Defendant(s) the summary judgment is against.

#### Issue 3: Whether Defendants Are Entitled to a Set-Off for the Merrill Lynch Settlement

Your Honor's e-mail does not mention the Plaintiff's settlement with Merrill Lynch and the effect of these settlement proceeds on the Plaintiff's judgment. In their Memo, Defendants argued that they were entitled to a set-off for any settlement funds received from co-Defendant Merrill Lynch. Defendants were informed and believed that Merrill Lynch paid a significant sum to settle the claims against it by Plaintiff.<sup>1</sup>

At oral argument, Mr. Hudson conceded that Plaintiff had received \$125,000.00 in settlement funds from co-Defendant Merrill Lynch, and in exchange had dismissed with prejudice all claims against Merrill Lynch. However, Mr. Hudson argued that this settlement should not result in a set-off against any judgment that Plaintiff might obtain. I would respectfully request that Your Honor's

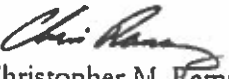
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<sup>1</sup> On April 26, 2023, Defendants submitted discovery requests to Plaintiff asking, *inter alia*, for information and documents concerning the amount and terms of the Merrill Lynch settlement. Those requests were not answered, resulting in a Motion to Compel. Defendants' discovery requests are still outstanding and the Motion to Compel is scheduled for a hearing on September 14.

Order address whether the Defendants are entitled to a set-off of \$125,000 for the Merrill Lynch settlement.

With highest regards, I remain

Sincerely,

  
Christopher M. Ramsey

Encls.

CC: John D. Hudson, Esq.  
THAG, LLC  
Nissan of Sumter, LLC  
Terry L. Holmes

RE: Jones Nissan v. THAG LLC; 2020-CP-22-00373

Curtis, Kristi F. <kcurtisj@sccourts.org>

Tue 9/19/2023 1:53 PM

To: Chris Ramsey <cramsey@bosticlaw.com>; John Hudson <john@mcleod-lawgroup.com>

Cc: Melissa Urch <melissa@mcleod-lawgroup.com>; Nick Charles <nick@mcleod-lawgroup.com>; Curtis, Kristi F. Law Clerk (Gulie Moore) <kcurtislc@sccourts.org>

Dear all: I have reviewed the proposed order along with the Defendant's objections and made some revisions to the order. I do find it was appropriate to grant summary judgment as to Defendant's counterclaims that pertained to the purchase price, the lease amount, and the noncompete. I did not find it appropriate to grant judgment against Holmes individually, as I denied the motion for summary judgment as to the cause of action for piercing the corporate veil. I did not make any ruling with respect to the request for a set-off of the Merrill Lynch settlement funds.

The revised order has now been signed and e-filed.

Thanks,

Kriti Curtis

From: Chris Ramsey <cramsey@bosticlaw.com>

Sent: Tuesday, September 5, 2023 11:24 AM

To: John Hudson <john@mcleod-lawgroup.com>; Curtis, Kristi F. <kcurtisj@sccourts.org>

Cc: Melissa Urch <melissa@mcleod-lawgroup.com>; Nick Charles <nick@mcleod-lawgroup.com>; Curtis, Kristi F. Law Clerk (Gulie Moore) <kcurtislc@sccourts.org>

Subject: Re: Jones Nissan v. THAG LLC; 2020-CP-22-00373

**\*\*\* EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. \*\*\*

Judge Curtis,

Please find attached a letter outlining the Defendants' issues with the proposed Order as written. I am also attaching Your Honor's e-mail of August 16 for reference. Thank you for your consideration.

Chris

Christopher M. Ramsey

The Bostic Law Group, P.A.

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**RECEIVED**

**Aug 22 2024**

**SC Court of Appeals**

**Certificate of Counsel**

I hereby certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

/s/ Christopher M. Ramsey  
Christopher M. Ramsey

July 10, 2024