

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

SEP 24 2013

APPEAL FROM GREENVILLE COUNTY
Court Of Common Pleas

S.C. Supreme Court

D. Garrison Hill, Circuit Court Judge

Opinion No. 2013-UP-327 (S.C. Ct. App. Filed July 17, 2013)

Roper, LLC, Plaintiff,

v.

Harris Teeter, Inc., Carolina & Georgia
Immobilelienfonds I, L.P., GOA Realty Management I,
LLC, Germania of America, Inc., Miller & Martin, PLLC,
New Spring Community Church, John Doe, Richard
Doe, and Doe Corporation, Defendants,

Of whom, Germania of America, Inc., is the Petitioner,

And Harris Teeter, Inc., is the Respondent.

Appellate Case No. 2013-002015

APPENDIX

Sarah Day Hurley
Turner Padget Graham & Laney P.A.
Post Office Box 1509
Greenville, SC 29602
Phone: (864) 552-4651

ATTORNEYS FOR PETITIONER

Stephen R. H. Lewis, Esquire
John A. Hagins, Jr., Esquire
Covington Patrick Hagins Stern & Lewis
P.O. Box 2243
Greenville, SC 29602

ATTORNEYS FOR ROPER, LLC

W. Francis Marion, Jr., Esquire
Bonnie A. Lynch, Esquire
Haynsworth Sinkler Boyd, PA
P.O. Box 2048
Greenville, SC 29602-2048

ATTORNEYS FOR HARRIS TEETER, INC.

INDEX

RECORD ON APPEAL	1
FINAL BRIEF OF APPELLANT	256
FINAL BRIEF OF RESPONDENT HARRIS TEETER, INC.....	274
APPELLANT’S FINAL REPLY BRIEF	296
DECISION OF THE COURT OF APPEALS	306
APPELLANT’S PETITION FOR REHEARING	310
ORDER ENTERED AUGUST 22, 2013, DENYING PETITION FOR REHEARING	323

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

THE HONORABLE D. GARRISON HILL, CIRCUIT COURT JUDGE

Case No. 2010-CP-23-7266

Roper, LLC,..... Respondent,

v.

Harris Teeter, Inc., Carolina & Georgia Immobilelienfonds I, L.P.; GOA Realty
Management I, LLC; Germania of America, Inc.; Miller & Martin PLLC; New Spring
Community Church; John Doe; Richard Roe; and Doe Corporation,..... Defendants.

Of which Germania of America, Inc. is
the.....Appellant

and

Of which Harris Teeter, Inc. is
the.....Respondent.

RECORD ON APPEAL

Sarah Day Hurley, Esquire
Turner Padgett Graham & Laney P.A.
Post Office Box 1509
Greenville, South Carolina 29602
Telephone: (864) 552-4600
Fax: (864) 552-4620
Attorney for Appellant

John A Hagins, Jr
Stephen R. H. Lewis
Covington Patrick Hagins Stern & Lewis
Post Office Box 2243
Greenville, South Carolina 29602
Attorneys for Roper, LLC

W. Francis Marion, Jr., Esquire
Bonnie A Lynch, Esquire
Haynsworth Sinkler Boyd, PA
Post Office Box 2048
Greenville, South Carolina 29602
Telephone: (864) 240-3200
Fax: (864) 240-3300
Attorneys for Respondent

INDEX

I. ORDERS AND JUDGMENTS

Order granting Harris Teeter's Motion for Summary Judgment, entered on April 26, 2011 R-0003

Order denying Germania of America, Inc.'s Motion to Alter or Amend Judgment and denying Plaintiff's Motion to Alter or Amend Judgment, entered on May 17, 2011 R-0018

II. PLEADINGS AND MOTIONS

Harris Teeter's Motion to Dismiss or, Alternatively, for Summary Judgment, Affidavit of Jeff Sherman, and Memorandum of Law in Support of Motion to Dismiss/Summary Judgment, filed on November 9, 2010 R-0020

Amended Complaint, served and filed on November 24, 2010 R-0078

Answer to Amended Complaint by Germania of America, Inc., served on December 9, 2010 R-0094

Harris Teeter's Answer to Plaintiff's Amended Complaint, filed January 14, 2011 R-0101

Harris Teeter's Motion to Dismiss and/or for Summary Judgment, and Supplemental Affidavit of Jeff D. Sherman, filed and served on January 14, 2011 R-0107

Harris Teeter's Amended Memorandum of Law in Support of Motion to Dismiss/Summary Judgment, filed and served on February 23, 2011 R-0112

Plaintiff's Memorandum in Opposition to Defendant Harris Teeter's Motion to Dismiss/Summary Judgment, filed and served on February 23, 2011 R-0130

Harris Teeter's Reply in Support of its Motion to Dismiss and/or for Summary Judgment, filed and served on February 25, 2011 R-0138

Defendant Germania of America, Inc.'s Motion to Alter or Amend Judgment Pursuant to Rule 59(e), filed on May 6, 2011 R-0143

Plaintiff's Motion to Alter or Amend Judgment, filed on May 6, 2011 R-0146

III. COURT TRANSCRIPTS

Transcript of hearing on March 1, 2011 R-0149

R-0001

IV. OTHER MATERIALS

Proposed Order submitted by counsel for Harris Teeter via email to The
Honorable D. Garrison Hill on March 9, 2011 R-0197

Comments to proposed order submitted by counsel for Germania of America, Inc.
via email to The Honorable D. Garrison Hill on March 16, 2011 R-0212

Letter to The Honorable D. Garrison Hill from Harris Teeter's counsel responding
to Germania of America, Inc.'s March 16, 2011 letter on
March 17, 2011 R-0251

V. CERTIFICATE OF COUNSEL R-0253

R-0002

FILED-CLERK OF COURT
 STATE OF SOUTH CAROLINA GREENVILLE
 COUNTY OF GREENVILLE
 2011 APR 25 A 10 23
 Roper, LLC,
 Plaintiff,
 vs.
 Harris Teeter, Inc.; Carolina & Georgia
 Immobilelienfonds I, L.P.; GOA Realty
 Management I, LLC; Germania of
 America, Inc.; Miller & Martin PLLC;
 New Spring Community Church; John
 Doe; Richard Roe; and Doe
 Corporation,
 Defendants.

IN THE COURT OF COMMON PLEAS
 C. A. No. 2010-CP-23-7266
 ORDER GRANTING
 HARRIS TEETER'S
 MOTION FOR SUMMARY
 JUDGMENT

Defendant Harris Teeter, Inc. ("Harris Teeter") moves to Dismiss or, alternatively, for Summary Judgment as to Plaintiff's claims. A hearing was held on March 1, 2011, at which time the Motion, supporting and opposing Memoranda, evidence submitted by the parties, and the arguments of counsel were considered. For the reasons that follow, Harris Teeter's Motion for Summary Judgment is GRANTED.

UNDISPUTED FACTS

In 1995, Roper MT, LLC (Plaintiff's predecessor-in-interest) leased certain real property ("Property") in Greenville County to Harris Teeter for a twenty (20) year term under a written lease agreement ("Lease"). A Memorandum of the Lease was duly recorded in the Greenville County RMC office at Book 1641, Page 748.¹ By 2001, the Property and the landlord's Lease rights had been sold and were owned by the Defendant, Carolina & Georgia Immobilelienfonds I, L.P. ("CGI").

¹ Article 18.11 of the Lease prohibited the full Lease from being recorded with the RMC office. (Lease, Art. 18.11.)

hjt
 11 of

In mid-2001, Harris Teeter and Bi-Lo, LLC ("Bi-Lo") were negotiating a transaction whereby Bi-Lo would take an assignment of Harris Teeter's (tenant's) Leasehold estate and assume its Lease liabilities. By signed letter agreement dated June 12, 2001, CGI and Harris Teeter agreed that, if and when the Bi-Lo assignment and assumption of Lease became effective, CGI, as landlord, would thereafter "look solely to Assignee [Bi-Lo] for performance of the 'Tenant's' [Harris Teeter's] responsibilities under the Lease" ("Release"). Thereafter, Harris Teeter assigned its interest in the Lease by entering into an "Assignment and Assumption of Lease" with Bi-Lo which became effective on July 9, 2001. It was recorded in the Greenville County RMC office at Book 2189, Pages 1640-43. An executed copy of the Assignment and Assumption of Lease was sent to CGI under cover letter on July 9, 2001, thereby providing notice of the effective date of the Assignment and Assumption of Lease. Harris Teeter had no further involvement with the Lease or the Property from the effective date of the Assignment and Assumption of Lease going forward, and CGI looked solely to Bi-Lo for fulfillment of all Lease obligations.

Approximately six (6) years later, in April 2007, CGI sold the Property and its landlord Lease rights to Plaintiff. Prior to Plaintiff's purchase of the Property, Defendant, GOA Realty Management I, LLC ("GOA"), as general partner of CGI, executed an Affidavit on April 16, 2007 swearing that, among other things, Harris Teeter was not released from any Lease obligations. Harris Teeter had no knowledge of, and was not a party to, this Affidavit. It was only after Plaintiff's purchase of the Property that Harris Teeter first became aware of the Affidavit and the sale whereupon Harris Teeter promptly advised Plaintiff of its Release.

At the time of the sale, Plaintiff was aware of the Assignment and Assumption of Lease between Bi-Lo and Harris Teeter. However, Plaintiff did not contact Harris Teeter at any time

prior to its purchase of the Property to determine if Harris Teeter was still obligated under the Lease.

Harris Teeter has never had any business or contractual relations with Plaintiff. Harris Teeter was unaware of, and did not participate in, Plaintiff's purchase of the Property and the Lease, nor did it make any representations or have any communications with Plaintiff regarding the Property or the Lease.

Harris Teeter's first contact with Plaintiff was in September 2007, nearly six (6) months after its purchase from CGI, when Plaintiff's counsel sent a letter to Harris Teeter regarding its supposed obligations under the Lease. Harris Teeter immediately responded by advising Plaintiff's counsel that Harris Teeter had been released from the Lease obligations in 2001.

STANDARD OF REVIEW

The purpose of summary judgment is to dispose of claims that, after adequate time for discovery, have proven meritless. When the crucible of discovery has revealed that no facts exist that would allow the claimant to prevail, the defending party is entitled to judgment without the necessity of a trial, i.e., "as a matter of law." Rule 56, SCRCP. In such circumstances, a trial would be futile because no factual dispute exists for a trier of fact to resolve.

In deciding a motion for summary judgment, the court must interpret the evidence of record in the light most favorable to the non-moving party and construe any ambiguities and inferences most strongly to that party's favor. The non-moving party is entitled to have the credibility of its evidence presumed, for the court at this stage is forbidden from passing on credibility. This does not mean that the court is obligated to ignore evidence unfavorable to the non-moving party's position; nor is it required to stack inference upon inference to create some philosophical possibility that a factual issue may exist.

After the court views the evidence through this required lens, summary judgment – a drastic remedy to be invoked cautiously – is possible only if it is clear that no genuine issue of material fact appears. A genuine issue of material fact is one “that might affect the outcome of the suit under the governing law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A genuine issue of material fact remains – and summary judgment must consequently be denied – “if the evidence is such that a reasonable jury could return a verdict for the non-moving party.” Id. Put another way, where a verdict for the non-moving party is not reasonably possible under the facts presented, summary judgment is proper. Bloom v. Ravora, 339 S.C. 417, 529 S.E.2d 710 (2000). Nevertheless, a mere scintilla of evidence supporting the claim is sufficient to withstand summary judgment. Hancock v. Mid-South Mgt. Co. Inc., 2008 WL 5545318 (S.C. Sup. Ct. Jan. 26, 2009).

The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent cannot simply rest upon mere allegations or denials contained in the pleadings. Id.; SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990). Rather, the non-moving party must do more than “simply show that there is a metaphysical doubt as to the material facts, but must come forward with specific facts showing there is a genuine issue for trial.” Russell v. Wachovia Bank, N.A., 353 S.C. 208, 220, 578 S.E.2d 329 (2003) (citation omitted); Rule 56(e), SCRPC.

Summary judgment is not a disfavored procedural shortcut, but an important mechanism for weeding out “claims and defenses that have no factual basis,” Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986), and to expedite resolution of cases that do not require a fact-finder. Cox &

Floyd Grading, Inc. v. Kajima Construction Services, Inc., 356 S.C. 512, 517, 589 S.E.2d 789 (Ct. App. 2003).

CONCLUSIONS OF LAW

A. No Legal Duty to Record the Release

The ultimate issue in this case is whether Harris Teeter had a legal or fiduciary duty to record the Release. The determination of whether a legal duty exists is a question of law for the court. Sharpe v. South Carolina Dep't of Mental Health, 292 S.C. 11, 16, 354 S.E.2d 778, 781 (Ct. App. 1987). Plaintiff acknowledges that its claim is dependent on whether there is a duty to record a release under the South Carolina Recording Act, § 30-7-10 (the "Act"). This Court finds, as a matter of law, that Harris Teeter had no legal duty to record the Release under the Act.

The Act is a priority statute that addresses competing claims over real property. It does not create a legal duty to record. The Act simply provides that "innocent or bona fide purchasers of real property, who pay valuable consideration, are protected from the claims of creditors or lienholders whose claims were not on record at the time of conveyance to the bona fide purchaser." Spence v. Spence, 368 S.C. 106, 120, 628 S.E.2d 869, 876 (2006) (citing Epps v. McCallum Realty Co., 139 S.C. 481, 496-511, 138 S.E. 297, 302-07 (1927)). "Recording becomes material only when there are double conveyances, etc., by the same person." Epps, 139 S.C. at 498, 138 S.E. at 302 (citing Martin v. Quattlebam, 14 S.C. L. 205, 3 McCord 205).

The Act "relates solely to conveyances." Von Elbrecht v. Jacobs, 286 S.C. 240, 243, 332 S.E.2d 568, 569 (Ct. App. 1985). It "does not protect a bona fide purchaser against liens or other interests arising out of instruments not entitled to be recorded." Id. (citing G. W. Thompson, Thompson on Real Property Section § 4297 (1978)) (emphasis added). "The failure to record an instrument which is not required to be recorded does not affect or vitiate the instrument as to

anyone, and it is valid not only between the parties thereto, but also as to subsequent purchasers and encumbrances." 66 Am.Jur.2d Records and Recording Laws § 149 (2001) (emphasis added); see also Epps, 139 S.C. at 498, 138 S.E. at 302 ("As between the parties thereto, it is not necessary to the validity of any instrument contemplated by said Act that it be recorded.")

The Release, whereby CGI agreed to look solely to Bi-Lo for performance of the tenant's responsibilities under the Lease, did not convey an interest in land. Therefore, recordation under the Act was not necessary to protect the Release. Failure to record the Release did not affect its validity as between Harris Teeter and CGI or CGI's assignees or purchasers of the Property (i.e. Plaintiff). See 66 Am.Jur.2d Records and Recording Laws § 149 (2001); Epps, 139 S.C. at 498, 138 S.E. at 302.

B. No Fiduciary Duty to Record the Release

Since Harris Teeter had no legal duty to record the Release, the remaining issue is whether Harris Teeter had a duty, based on its relationship or communications with Plaintiff, to disclose the Release to Plaintiff. (See, discussion *supra* p. 4). There is no evidence showing a relationship or communications between Harris Teeter and Plaintiff that create a fiduciary or other duty on Harris Teeter to record or apprise Plaintiff of the Release. Therefore, Plaintiff's Causes of Action for Fraudulent Concealment, Promissory Estoppel and Negligent Misrepresentation, each requiring evidence of a direct relationship or communication between Plaintiff and Harris Teeter giving rise to a disclosure duty, are dismissed as a matter of law.

1. Fraudulent Concealment

Plaintiff's claim for Fraudulent Concealment is based on Harris Teeter's alleged failure to disclose to Plaintiff the existence, or the substance, of the Release relieving Harris Teeter of its Lease obligations. Fraudulent Concealment is based on *nondisclosure when there is a duty to*

speaks. Pitts v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 335, 574 S.E.2d 502, 510 (Ct. App. 2002) (quoting Ardis v. Cox, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (Ct. App. 1993) (emphasis added). "Non-disclosure becomes fraudulent concealment only when it is the duty of the party having knowledge of the facts to make them known to the other party to the transaction." Pitts, 352 S.C. at 335, 574 S.E.2d at 510 (quoting Lawson v. Citizens & S. Nat'l Bank of S.C., 259 S.C. 477, 481-82, 193 S.E.2d 124, 126 (1972)).

The duty to disclose may be reduced to three distinct classes: (1) where it arises from a *preexisting definite fiduciary relation* between the parties; (2) where one party *expressly reposes a trust and confidence in the other with reference to the particular transaction in question*, or else from the *circumstances of the case, the nature of their dealings, or their position towards each other*, such a trust and confidence in the particular case is *necessarily implied*; (3) where the *very contract or transaction itself, in its essential nature, is intrinsically fiduciary* and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.

Pitts, 352 S.C. at 335, 574 S.E.2d at 510 (citing Ardis, 314 S.C. at 517, 431 S.E.2d at 270) (emphasis added).

Plaintiff's claim fails as a matter of law because none of the "three distinct classes," creating a duty to disclose, existed with respect to Harris Teeter and Plaintiff.² With respect to the second class of relationships as cited by Pitts, there is no evidence showing that Plaintiff "expressly repose[d] a trust and confidence" in Harris Teeter with respect to Plaintiff's purchase of the Property or that from the "circumstances of the case, the nature of . . . [Harris Teeter's and Plaintiff's] dealings or their position towards each other, such a trust and confidence . . . [was] implied." Id.

Plaintiff cannot unilaterally assert that it imposed confidence in Harris Teeter without

² Plaintiff failed to plead that Harris Teeter had a preexisting definite fiduciary relationship with Plaintiff, and instead based its theory of Harris Teeter's duty to disclose on the second and third classes of relationships as cited by Pitts. (See Am. Compl. ¶¶ 27-31.) Therefore, this Order will only address the second and third classes as described in Pitts.

evidence that Harris Teeter accepted or induced the confidence placed in it. Steele v. Victory Sav. Bank, 295 S.C. 290, 295, 368 S.E.2d 91, 94 (Ct. App. 1988) (citing 36A C.J.S. Fiduciary (1961)) ("[A]s a general rule, a fiduciary relationship cannot be established by the unilateral action of one party. The other party must have actually accepted or induced the confidence placed in him.") Plaintiff concedes it had no contact with Harris Teeter prior to the sale of the Property.

It is undisputed that Harris Teeter neither participated in Plaintiff's purchase of the Property, nor made any representations or had any communications or negotiations with Plaintiff regarding the Property or Harris Teeter's liability under the Lease. Harris Teeter was not even aware of Plaintiff's purchase until approximately six (6) months after the sale. It is also undisputed that Harris Teeter and Plaintiff did not have a former or existing contractual or business relationship with one another. Considering the foregoing undisputed facts, this Court finds as a matter of law that Plaintiff did not expressly repose a trust and confidence in Harris Teeter with respect to Plaintiff's purchase of the Property, neither can such a trust and confidence be implied from the nature of their dealings as they had none. See Pitts, 352 S.C. at 336, 574 S.E.2d at 510 (court found no evidence to imply the existence of trust and confidence between parties who had no previous dealings with one another or a fiduciary relationship, and were involved in an arm's length commercial transaction).

With respect to the third "distinct class" as cited by Pitts, there is no evidence showing that "the very contract or transaction itself . . . is intrinsically fiduciary . . ." Pitts, 352 S.C. at 335, 574 S.E.2d at 510 (citing Ardis, 314 S.C. at 517, 431 S.E.2d at 270). It is undisputed that Harris Teeter and Plaintiff were effectively strangers with respect to Plaintiff's purchase of the Property. Harris Teeter was not a party to the purchase transaction and had no knowledge of it

until well after the fact, on September 26, 2007 when Plaintiff's counsel contacted Harris Teeter. Considering that the undisputed evidence shows that Harris Teeter was not a party to, or had knowledge of, the Property's purchase, Harris Teeter had no duty to disclose its Release to Plaintiff on the basis that they had a contract or transaction that was intrinsically fiduciary.

2. Promissory Estoppel

Plaintiff bases its Promissory Estoppel claim against Harris Teeter on the allegation that, by both conduct and representations, Harris Teeter

promised and represented to the Plaintiff, both orally and through documentation, including, but not limited to, an Affidavit dated April 16, 2007, that . . . Harris Teeter had not been released from any obligations under the lease agreements between Harris Teeter and owners of the property

(Am. Compl. ¶ 48.) Plaintiff's claim fails as a matter of law because there is no evidence showing that Harris Teeter made any promise to Plaintiff.

The elements of a Promissory Estoppel claim in South Carolina are:

(1) the presence of a *promise unambiguous in its terms*; (2) reasonable reliance upon the promise by the party to whom the promise is made; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise.

Woods v. State, 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct. App. 1993) (citing Powers Constr. Co. v. Salem Carpets, Inc., 283 S.C. 302, 322 S.E.2d 30 (Ct. App. 1984)) (emphasis added).

The undisputed facts show that there were no contacts or communications between Plaintiff and Harris Teeter until approximately six (6) months after Plaintiff's purchase of the Property. Thus, Harris Teeter made no promises to Plaintiff "orally" or otherwise. Plaintiff concedes that there were no communications between them prior to the sale of the Property.

Plaintiff asserts that it relied on "an Affidavit dated April 16, 2007." (Am. Compl. ¶¶ 24 & 26.) Assuming Plaintiff relied on this Affidavit, such reliance does not create a cause of

action against Harris Teeter, without Harris Teeter *at least* having knowledge of the Affidavit. It is undisputed that Harris Teeter was neither a party to, nor had knowledge of, the Affidavit. Consequently, there cannot be an "unambiguous promise" made by Harris Teeter to Plaintiff arising from the April 16, 2007 Affidavit regarding Harris Teeter's obligations under the Lease. Because there is no evidence showing that Harris Teeter made any oral or written promises to Plaintiff, Plaintiff's claim for Promissory Estoppel fails as a matter of law.

3. Negligent Misrepresentation

The basis of Plaintiff's Negligent Misrepresentation Cause of Action is that Harris Teeter "made false representations to the Plaintiff through . . . [its] conduct, words and documentation, including, but not limited to, the Affidavit dated April 16, 2007" (Am. Compl. ¶ 52.) However, the evidence shows that Harris Teeter made no representations to Plaintiff of any kind.

The elements of a Negligent Misrepresentation claim in South Carolina are:

(1) the *defendant made a false representation to the plaintiff*, (2) the defendant had a pecuniary interest in making the statement, (3) the *defendant owed a duty of care to see that he communicated truthful information to the plaintiff*, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

Hurst v. Sandy, 329 S.C. 471, 481, 494 S.E.2d 847, 852 (Ct. App. 1997) (citing Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993)) (emphasis added).

As noted above, there were no communications between Harris Teeter and Plaintiff regarding the Property or Harris Teeter's liability under the Lease prior to, or within five (5) months of Plaintiff's purchase of the Property. Moreover, Harris Teeter had no knowledge of, and was not a party to, the Affidavit on which Plaintiff bases this Cause of Action. Prior to Plaintiff's purchase, Harris Teeter made no representations, false or otherwise, to Plaintiff

regarding its obligations under the Lease.³ Failing on this essential element, Plaintiff's claim for Negligent Misrepresentation is dismissed as a matter of law.

C. Breach of Contract

Plaintiff's Breach of Contract claim against Harris Teeter is premised on the proposition that Harris Teeter was not released from the Lease by the June 12, 2001 letter agreement and is ultimately liable for default by any sub-lessee. The relevant inquiry becomes whether the June 12, 2001 letter agreement was a valid contract which released Harris Teeter of all obligations, including payment obligations, under the Lease. This Court finds, as a matter of law, that the release is valid and binding. Consequently, Plaintiff's Breach of Contract claim fails as a matter of law.

There is no question under the law that a release is a binding contract. Southern Glass & Plastics Co. v. Duke, 367 S.C. 421, 428, 626 S.E.2d 19, 22 (Ct. App. 2005) (citing Gardner v. Columbia Police Dep't, 216 S.C. 219, 223, 57 S.E.2d 308, 309 (1950)). To have a binding contract there must be an offer, acceptance, and valuable consideration. Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co., 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993) (citing Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984)). "The construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment." Middleborough Horizontal Prop. Regime Council v. Montedison S.p.A., 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995).

The plain and unambiguous language of the June 12, 2001 letter agreement exhibited a clear offer by Harris Teeter and corresponding acceptance by CGI. Harris Teeter's offer was that CGI "look solely to . . . [Bi-Lo] for performance of the 'Tenant's' responsibilities under the

³ As noted above, there was no duty of care flowing between Harris Teeter and Plaintiff with regards to Plaintiff's purchase of the Property and Lease. Harris Teeter was not involved with the sale and, as conceded by Plaintiff, there was no contact between it and Harris Teeter.

Lease after the Effective Date of the Assignment." (Release). Harris Teeter requested, and in turn received, acceptance of its offer through CGI's execution and return of the letter agreement.

Plaintiff attempts to defeat the June 12, 2001 letter agreement as being a valid contract by alleging that it "does not say what the final outcome was in regards to . . . Harris Teeter's obligations . . ." (Am. Compl. ¶ 23.) Despite Plaintiff's allegations, this Court finds that the conditional language in the letter agreement, (i.e. "[i]f it does close . . ." and "after the Effective Date of the Assignment") refers to the condition precedent - Harris Teeter and Bi-Lo executing the Assignment and Assumption of Lease and delivering it to CGI.⁴ Holmes, 379 S.C. at 477, 666 S.E.2d at 266 (quoting Brewer, 364 S.C. at 449, 613 S.E.2d at 805) (A condition precedent is defined as "'any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises.'") Plaintiff concedes that not only was the Assignment and Assumption of Lease fully executed and recorded, but that it also received a copy under cover letter dated July 9, 2001, the Effective Date. Hence, the condition precedent was satisfied, thereby rendering CGI's obligation unconditional to look solely to Bi-Lo for performance of the Tenant obligations under the Lease. In other words, once the condition was satisfied, the Release was, by its terms, self-executing without further acts.

Although Plaintiff did not contest the letter agreement in its briefing or in oral argument on grounds of lack of consideration, this Court finds that the letter agreement was supported by proper consideration. Hyman v. Ford Motor Co., 142 F.Supp.2d 735, 741 (D.S.C. 2001) (applying South Carolina law) (a valid release, like other contracts, must be based upon consideration). Whether a release is based on adequate consideration is determined by the same

⁴ "The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ." M&M Group, Inc. v. Holmes, 379 S.C. 468, 476, 666 S.E.2d 262, 266 (Ct. App. 2008) (quoting Brewer v. Stokes Kia, Izuzu, Subaru, Inc., 364 S.C. 444, 449, 613 S.E.2d 802, 805 (Ct. App. 2005)).

12
JH

R-0014

principles of adequate consideration that apply to other contracts. Id.

Consideration exists where there is a "*benefit to the promisor*" (CGI) or a loss or "*detriment to the promisee*" (Harris Teeter). Shayne of Miami, Inc. v. Greybow, Inc., 232 S.C. 161, 167, 101 S.E.2d 486, 489 (1957) (emphasis added). Consideration also exists where there is "forbearance to exercise a legal right" Prestwick Golf Club v. Prestwick Ltd. Pship., 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998) (citing Caine & Estes Ins. Agency, Inc. v. Watts, 278 S.C. 207, 293 S.E.2d 859 (1982)). Harris Teeter, as "promisee," suffered a "detriment" or "loss" in that, upon receiving the Release, it gave up all of its Lease rights to Bi-Lo even though it was not obligated to do so. Howard v. South Carolina Nat'l Bank, 288 S.C. 421, 425, 343 S.E.2d 41, 43 (Ct. App. 1986) ("Detriment," in the sense of consideration for a contract, means giving up by promisee of something that he had the right to keep, or doing something he had the right not to do). The detriment Harris Teeter experienced in foregoing its legal right to enforce the Lease obligations against Bi-Lo or its sub-tenant was sufficient consideration to support the Release.

Moreover, "consideration" may consist of the "performance of an act by a promisee that he or she is not legally obligated to perform" 17A Am. Jur. 2d Contracts §118 (2004). Here, Harris Teeter, the promisee, conveyed its leasehold to Bi-Lo, without being obligated to do so, for the purpose of, inter alia, obtaining the Release from its promisor, CGI. Also, and independently of the detriment to Harris Teeter, additional consideration existed by virtue of a "benefit to the promisor," CGI. CGI received the benefit of Bi-Lo's liability on the Lease instead of Harris Teeter's. A similar situation is found in Davis v. Blum, 104 S.C. 218, 88 S.E. 465 (1916) where the South Carolina Supreme Court found valid consideration in a creditor's agreement to look solely to another for payment of a debt. Relying upon defendant husband's

promise to pay for legal services performed on behalf of his wife, plaintiff judge undertook legal representation of the wife. Id. at 222, 88 S.E. at 466-67. When plaintiff sued defendant for payment, the Court found that legal consideration existed for the defendant's promise to pay by way of plaintiff's agreement to look solely to defendant (and not his wife) for payment. Id. at 222-23, 88 S.E. at 467. Such is the case here – consideration existed by way of Plaintiff's agreement (through its predecessor-in-interest) to look solely to Bi-Lo for all future tenant obligations under the Lease, and the benefit it received from obtaining Bi-Lo's liability on the Lease.

Having found that a valid contract existed between Harris Teeter and Plaintiff, the relevant inquiry becomes whether it constitutes a valid release under South Carolina law. "The construction of a release is, in the first instance, a question of law for the court." Wilson Group v. Quorum Health Res., 880 F.Supp. 416, 425 (D.S.C. 1995). A release "is the relinquishment of a right or claim by the person in whom the right exists to the person against whom it might have been enforced." Wilson Group, 880 F.Supp. at 425 (citing 18 S.C. Juris. Release § 2). "No set form of words is necessary to constitute a release," Gardner, 216 S.C. at 223, 57 S.E.2d at 310, and no "magic words" are required. Wilson Group, 880 F.Supp. at 425. Courts look to the instrument itself in determining the nature of the release. Campbell v. Bi-Lo, Inc., 301 S.C. 448, 451, 392 S.E.2d 477, 479 (Ct. App. 1990). "[I]f the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect." Holmes, 379 S.C. at 476, 666 S.E.2d at 266 (citing Ecclesiastes Production Ministries v. Outparcel Assocs., L.L.C., 374 S.C. 483, 498, 649 S.E.2d 494, 501 (Ct. App. 2007)).

This Court finds, as a matter of law, that the June 12, 2001 letter agreement is clear and unambiguous and meets the requirements of a valid release under South Carolina law, releasing

Harris Teeter of all obligations, including payment obligations, under the Lease. By signing the letter agreement, CGI agreed to relinquish its right to look to Harris Teeter for performance of the "'Tenant' responsibilities under the Lease," and instead "look solely to Assignee [Bi-Lo] for performance of the 'Tenant's' responsibilities under the Lease after the Effective Date of the Assignment." (Release.) CGI clearly gave up its right to require Harris Teeter's performance under the Lease – a right which CGI chose to release as against Harris Teeter, and enforce as against Bi-Lo. In turn, Harris Teeter gave up control of the Property and its rights under the Lease, and completed the assignment of the Lease to Bi-Lo.

IT IS THEREFORE ORDERED, that the Defendant Harris Teeter's Motion for Summary Judgment is GRANTED and that Plaintiff's Amended Complaint against the same is hereby dismissed *with prejudice*.



D. Garrison Hill
Circuit Judge

Dated: April 25, 2011

JUDGMENT IN A CIVIL CASE

2011 MAY 17 P 4 CASE NO: 2010CP2307266

FILED CLERK OF COURT
ROPER, LLC vs. Harris Teeter, Inc.
JAN 11 2011
U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;

☐ Other: _____

Defendant Germania of America, Inc.'s Motion to Alter or Amend Judgment is denied.

Dated at Greenville, South Carolina, this May 16, 2011.

PRESIDING JUDGE - D. GARRISON HILL

E. Benton Leinster, III P.O. Box 8874 Greenville,
SC 29604
John A. Hagins, Jr. Covington Patrick Hagins Stern
& Lewis 211 Pettigru St. Greenville, SC 29601
Stephen R. H. Lewis P.O. Box 2243 Greenville, SC
29602

W. Francis Marion, Jr. P.O. Box 2048 Greenville,
SC 29602-2048
Sarah Day Hurley P.O. Box 1509 Greenville, SC
29602
Robert E. Stepp 1310 Gadsden St. P.O. Box 11449
Columbia, SC 29211
Amy L. B. Hill 1310 Gadsden St. P.O. Box 11449
Columbia, SC 29211
James W. Sheedy 222 E. Main St. Rock Hill, SC
29730-4542

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of C
- Clerk of Court

R-0019

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

Roper, LLC.

2010 NOV -9 PM 3:02

C.A. NO.: 2010-CP-23-7266

Plaintiff,

v.

Harris Teeter, Inc.; Carolina & Georgia
Immobiliensfonds I, L.P.; GOA Realty
Management I, LLC; Germania of
America, Inc.; Miller & Martin PLLC;
New Spring Community Church; John
Doe; Richard Roe; and Doe Corporation,

Defendants.

MOTION TO DISMISS OR,
ALTERNATIVELY, FOR
SUMMARY JUDGMENT

The Defendant, Harris Teeter, Inc. ("Harris Teeter") hereby moves to dismiss or, alternatively, for summary judgment as to Plaintiff's First and Third Causes of Action for negligence and constructive fraud based on Harris Teeter's failure to record a Release of its liabilities under a lease. The grounds for this Motion are that:

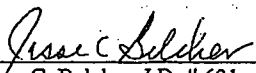
1. The S.C. Recording Act ("Act") did not impose a legal duty upon Harris Teeter or anyone to record anything;
2. Even if it did, the Release is not an instrument appropriate for recording under the Act;
3. Moreover, Plaintiff waived any duty of Harris Teeter to record the Release;
4. Thus, Plaintiff could not reasonably rely upon the public records to determine Harris Teeter's liabilities; and

R-0020

5. The proximate cause of Plaintiff's injury was its decision not to inquire of Harris Teeter, and to instead rely upon what third parties had to say about the existence of any liability of Harris Teeter.

Harris Teeter's Motion is based upon the pleadings, its supporting Memorandum of Law, and attached affidavit which is being herewith served upon Plaintiff's counsel.

Respectfully submitted,



Jesse C. Belcher, I.D. # 621
Bonnie A. Lynch, I.D. #77399
Haynsworth Sinkler Boyd, PA
Post Office Box 2048
Greenville, South Carolina 29602
Telephone (864)240-3321
Fax (864)240-3336

Attorneys for Harris Teeter, Inc.

November 9, 2010
Greenville, South Carolina

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)

Roper, LLC, 2010 MAY -9 P 3:02 C.A. NO.: 2010-CP-23-7266

Plaintiff,

v.

AFFIDAVIT
OF JEFF D. SHERMAN

Harris Teeter, Inc.; Carolina & Georgia
Immobilienfonds I, L.P.; GOA Realty
Management I, LLC; Germania of
America, Inc.; Miller & Martin PLLC;
New Spring Community Church; John
Doe; Richard Roe; and Doe Corporation,
Defendants.

Personally appeared before me Jeff D. Sherman who, first being duly sworn, deposes
and says that:

1. I am over 18 years of age.
2. I am an employee of Harris Teeter, Inc. ("Harris Teeter") whose title is Senior Vice President - Finance.
3. As such, I have personal knowledge of the matters set forth herein.
4. Prior to entering into the later referenced transaction with Bi Lo, Inc. ("Bi Lo"), Harris Teeter and Carolina & Georgia Immobilienfonds I, LLC ("CGI") entered into a letter agreement dated June 12, 2001, copy attached as Exhibit A.
5. Effective July 2001, Harris Teeter and Bi Lo entered into a Lease Assignment and Assumption, copy attached as Exhibit B, and a copy thereof was mailed to CGI on that date under cover letter attached as Exhibit C.

Page 1 of 2

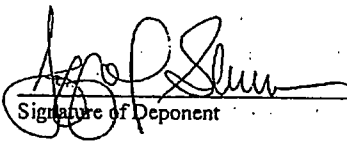
R-0022

6. Attached as Exhibit D is a copy of Harris Teeter's original Lease Agreement referred to in Exhibits A and B, above.

7. Shortly after receiving Ms. Moorhead's letter dated September 26, 2007, copy attached as Exhibit E, Harris Teeter, by letter attached as Exhibit F, responded advising her that Harris Teeter had been released from liability under the subject Lease.

8. Prior to this time, Harris Teeter, to the best of my knowledge, had not had any inquiries, communications or contacts with Roper, LLC or anyone known to be acting on its behalf.

FURTHER DEPONENT SAYETH NOT.


Signature of Deponent

Sworn to and subscribed before me this

8th day of November, 2010.


NOTARY PUBLIC FOR NORTH CAROLINA
MY COMMISSION EXPIRES:

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Roper, LLC,

Plaintiff.

v.

Harris Teeter, Inc.; Carolina & Georgia
Immobilienfonds I, L.P.; GOA Realty
Management I, LLC; Germania of
America, Inc.; Miller & Martin PLLC;
New Spring Community Church; John
Doe; Richard Roe; and Doe Corporation,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. NO.: 2010-CP-23-7266

MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO
DISMISS/SUMMARY JUDGMENT

-9 P 3 03

The Defendant, Harris Teeter, Inc. ("Harris Teeter") submits this Memorandum of Law in Support of its Motion to Dismiss or, alternatively, for Summary Judgment as to Plaintiff's First (negligence) and Second (constructive fraud) Causes of Action.

Both claims are fatally flawed as they are based upon Harris Teeter's breach of an alleged, yet non-existent, duty under the S.C. Recording Act, § 30-7-10 ("Act"), to publicly record in the Register of Deeds Office an agreement releasing Harris Teeter from liability as tenant under a written lease. Moreover, even if the Act were to impose a duty to record, the Harris Teeter release did not convey a real estate interest and is thusly not the type of instrument specified in the Act as being appropriate for recordation.

Plaintiff's claims also fail for yet other reasons. Plaintiff, as assignee of the Lease, is bound by the Lease's waiver of any duty of Harris Teeter to record its Lease liabilities. And, in view of this waiver, Plaintiff could not "reasonably rely" upon the public records to inform Plaintiff as to what Harris Teeter's liabilities might be at any given point in time. Indeed,

R-0024

Plaintiff's injury was proximately caused by Plaintiff's decision not to inquire of Harris Teeter and to instead rely upon representations made by Plaintiff's seller.

UNDISPUTED FACTS

In 1995, Roper MT, LLC (not Plaintiff) leased certain real property in Greenville County to Harris Teeter for a 20 year term under a written lease agreement ("Lease"). Sherman Aff. ¶ 6, Exhibit D. By 2001, the subject property and the landlord's Lease rights had been sold and were owned by the Defendant, Carolina & Georgia Immobilelienfonds 1, L.P. ("CGI").

In mid 2001, Harris Teeter and Bi Lo, LLC ("Bi Lo") were negotiating a transaction whereby Bi Lo would take an assignment of Harris Teeter's (tenant's) Leasehold estate and assume its Lease liabilities ("Bi Lo Lease Assignment/Assumption"). By signed letter agreement dated July 9, 2001, CGI and Harris Teeter agreed that, if and when the Bi Lo Lease Assignment/Assumption became effective, CGI, as landlord, would thereafter "look solely to Assignee [Bi Lo] for performance of Tenant's [Harris Teeter's] responsibilities under the Lease" ("Release"). *Id.* Aff. ¶ 4, Exhibit A. The Bi Lo Lease Assignment/Assumption became effective on July 9, 2001. *Id.*, ¶ 5, Exhibit B; and an executed copy thereof was sent to CGI, under cover letter, on that date. *Id.* ¶ 5, Exhibit C.

After releasing Harris Teeter in 2001, CGI, in April 2007, sold the property and its landlord Lease rights to Plaintiff. While Plaintiff was at that time admittedly aware of the Bi Lo Lease Assignment/Assumption, Plaintiff alleges that it was unaware of Harris Teeter's Release and assumed that Harris Teeter remained liable under the Lease. Plaintiff does not, and cannot, allege that it inquired of Harris Teeter in this regard or that it had any contacts or business relations with Harris Teeter prior to its purchase from CGI.

In 2009, Bi Lo defaulted on its Lease obligations to Plaintiff and ultimately filed proceedings under the U.S. Bankruptcy Code. Plaintiff in the present action seeks monetary damages against Harris Teeter, equal to Bi Lo's defaulted Lease obligations, for its failure to publicly record its Release.

DISCUSSION

Plaintiff's negligence and constructive fraud claims against Harris Teeter, based on Harris Teeter's failure to record the Release, fail as a matter of law. *No legal duty to record under Act.* Both claims allege that the Act imposed an affirmative duty upon Harris Teeter to publicly record its Release from liability; and that the failure to do so amounted to tortious misconduct. Contrarily, the Act does not require anyone to record anything. And, it does not impose personal liability upon anyone who fails to record something. Plaintiff cannot cite a single South Carolina case which holds to the contrary.

Instead, the Act is a real property title statute which provides that, while recordation remains optional, it is a precursor for establishing the priority of competing titles to the same real property.¹ It provides that all instruments conveying an interest in real estate (estate or lien):

are valid so as to affect the rights of subsequent creditors . . . , or purchasers for valuable consideration without notice, only from the day and hour when they are recorded . . . and the priority is determined by the time of filing of record.

§ 37-7-10.

"Recording becomes material only when there are double conveyances, etc. by the same person."

Epps v. McCullum Realty, 139 SC 481, 497, 138 S.E. 297 (1927). Any notion of a duty to record is dispelled since the Act recognizes that unrecorded property rights will prevail against recorded

¹ This is a "race/notice" statute. *Leasing Enterprises, Inc. v. Livingston*, 294 S.C. 204, 208, 363 S.E.2d 410, 412 (Cl. App. 1987). It is similar to that of many other states. The "race" is to record before "notice" of a competing claim.

property rights that are acquired by one who, for example, does not pay value. This statutory result would be subverted according to Plaintiff's view that the failure to record is a tortious act, entitling the one who records to recover monetary damages against the one who does not. Clearly, an act dealing with the priority of legal title to real estate -- without mentioning personal duties, liabilities or remedies - cannot be used as the basis for a tort claim.

Act is not applicable to releases. Moreover, even if the Act were to impose a duty to record, it would not require recordation of Harris Teeter's Release from liability. The Act applies only to instruments "conveying an interest in real estate." § 30-7-10, and becomes applicable only when there has been a "double conveyance." *Epps, supra*. The Release from liability conveyed nothing to Harris Teeter and certainly did not convey an interest in the real estate owned by Plaintiff. As one might expect, there are no reported South Carolina decisions applying the Act to instruments that do not convey an interest in real estate.

Aside from the above, Plaintiff's claims fail for other reasons. *Waiver of duty to record.* Plaintiff, as assignee of the Lease, agreed to be bound by its terms, including Article 18.11 stating: "This Lease shall not be recorded."² Plaintiff thusly waived any duty for Harris Teeter to publicly record what its liabilities were under the Lease. And, the mere fact that Harris Teeter's unrecorded liabilities were Released does not operate to nullify the waiver or resurrect a duty to record.

Reliance upon public records was not reasonable or proximate cause of injury. In view of this waiver, Plaintiff knew that it could not reasonably rely upon recorded documents to determine what Harris Teeter's Lease liabilities were. Plaintiff was thusly on actual or, at least, "inquiry notice" that it would need to go to the source and inquire of the perceived debtor, Harris

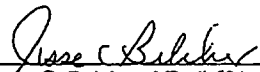
² Neither the Lease nor any other document dealing with Harris Teeter's Lease liabilities was ever recorded. Only a Memorandum of Lease was recorded (Book 1641 at Page 748) to show the legal description and permitted use of the demised property and the term of the leasehold estate.

Teeter, to confirm liability. Had it done so, Plaintiff would have learned of the Release. Instead, Plaintiff did not contact Harris Teeter until *after* Plaintiff completed its purchase from CGI, *Id.* ¶ 7, Exhibit E, and, upon doing so, was apprised of the Release. *Id.* ¶ 7, Exhibit F; ¶ 8. It is clear, that the proximate cause of Plaintiff's injury was its decision not to timely inquire of the perceived debtor, Harris Teeter, and to instead rely upon the affidavit of the perceived creditor, Plaintiff's seller, CGI, as to what Harris Teeter's liabilities might be. Complaint ¶ 26 (alleging that "the Plaintiff relied on this . . . affidavit").

SUMMARY

The Act's language dispels any notion of a duty to record. Even so, the Release was clearly not an instrument appropriate for recordation under the Act. Moreover, Plaintiff waived any duty of Harris Teeter to record its Lease liabilities. Thus, Plaintiff could not reasonably rely upon recordation to determine what Harris Teeter's liabilities might be. And, Plaintiff's injury was not proximately caused by Harris Teeter's failure to record; but was instead caused by Plaintiff's decision not to contact Harris Teeter and to instead rely upon the seller's representations. For each of these independent reasons, Plaintiff's claims should be dismissed.

Respectfully submitted,



Jesse C. Belcher, I.D. # 621
Bonnie A. Lynch, I.D. #77399
Haynsworth Sinkler Boyd, PA
Post Office Box 2048
Greenville, South Carolina 29602
Telephone (864)240-3321
Fax (864)240-3336

Attorneys for Harris Teeter, Inc.

November 9, 2010
Greenville, South Carolina



Post Office Box 33129
Charlotte, N.C. 28233-3129
Telephone: (704) 844-3100

June 12, 2001

Hugh Gage, Jr.
Carolina & Georgia Immobilienfonds I, LP
c/o Germania of America, Inc.
3340 Peachtree Road, NE
Suite 550
Atlanta, GA 30305

Re: *Proposed Assignment by Harris Teeter to BI-LO, LLC, a Delaware limited liability company ("Assignee") Relating to Lease dated April 20, 1995 as amended (the "Lease") for Store No. 260, Located in 401 Roper Mountain Road, Greenville, South Carolina*

Dear Bucky:

This letter will confirm certain matters that we have discussed relating to Harris Teeter's proposed Assignment of the referenced Lease to Assignee. This letter and any other information that has been supplied to you relating to the subject matter of this letter constitutes part of the Proprietary Information that you have agreed to keep confidential pursuant to our earlier letter agreement.

As we have discussed, Harris Teeter is proposing to assign the Lease to Assignee as part of a transaction whereby Assignee will take over Harris Teeter's business in a number of the Harris Teeter locations in the Atlanta metropolitan area. Even though no landlord consent is required to this proposed assignment, we wanted to notify you of the proposed assignment and to inform you of certain details concerning the transaction. We hope that the assignment transaction will close in approximately thirty (30) days. Harris Teeter and Assignee may or may not close the proposed Assignment transaction. If it does close, either Harris Teeter or Assignee will notify you of the completed Assignment and will provide you with a copy of the Assignment and Assumption Agreement whereby Harris Teeter's rights under the Lease have been assigned to Assignee and whereby Assignee assumes Harris Teeter's obligations under the Lease. Pursuant to the Assignment and Assumption Agreement, Assignee will be responsible for all of Harris Teeter's obligations under the Lease after the Effective Date of the Assignment. If the Lease is not assigned by Harris Teeter to Assignee, Harris Teeter will continue to be solely responsible for the "Tenant's" obligations under the Lease. We would appreciate your signing at the bottom of this letter to confirm that you have received a copy of this letter and that you will

EXHIBIT A

R-0029

Assignment and Assumption of Lease

In consideration of the sum of Ten Dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, HARRIS TEETER, INC., a North Carolina corporation ("Assignor"), does hereby ^(B-001) ASSIGN, TRANSFER, SET OVER and DELIVER unto BI-LO, LLC, a Delaware limited liability company ("Assignee"), all of the right, title and leasehold interest of the Assignor as tenant in, to and under that certain lease (the "Lease") for the premises located at 401 Roper Mountain Road in Greenville, South Carolina, Harris Teeter Store #260, said Lease being more particularly described on Exhibit A attached hereto and made a part hereof, and all of Assignor's right, title and interest in and to all security and advance rental deposits held by the landlord pursuant to the Lease, and all of the estate, benefits and privileges of the tenant in, to and under the Lease

TO HAVE AND TO HOLD unto Assignee, its successors and assigns, said leasehold estate and all the aforesaid right, title and interest of Assignor, for and during the remainder of the term and any extended term thereof. Assignor warrants that it is the owner and holder of a good leasehold estate in the premises demised by the Lease, that Assignor has full right and authority to assign same as aforesaid, and that Assignor shall warrant and defend title to same against the lawful claims of all persons whomsoever.

Assignee hereby assumes and agrees to perform all of the terms, covenants, obligations and conditions of the Lease which are required to be performed or complied with by the tenant under the Lease in respect of the period on and after the effective date of this Assignment.

Assignor hereby agrees to indemnify and hold the Assignee harmless from and against all liabilities, damages, costs and expenses (including, without limitation, reasonable attorneys' fees, disbursements and amounts paid in settlement of claims) arising out of the failure of the Assignor to perform its obligations as tenant under the lease in respect of the period prior to the effective date of this Assignment.

Assignee hereby agrees to indemnify and hold the Assignor harmless from and against all liabilities, damages, costs and expenses (including, without limitation, reasonable attorneys' fees, disbursements and amounts paid in settlement of claims) arising out of the failure of the Assignee to perform its obligations as tenant under the Lease in respect of the period on and after the effective date of this Assignment.

(The Remainder of This Page Intentionally Left Blank)

14752

Charlotte 426131.R, Store #260

EXHIBIT B

R-0031

IN WITNESS WHEREOF, Assignor and Assignee have caused this instrument to be executed as of July 9, 2001 (the "Effective Date").

In the Presence of

[Signature]
Harmon L. Marshall Jr.

ASSIGNOR:

Harris Teeter, Inc.

By:

[Signature]
Name: Frank J. Morgenthau II
Title: President

ASSIGNEE:

BI-LO, LLC

By:

[Signature]
Name: STEVEN L. PETERA
Title: CHIEF FINANCIAL OFFICER

In the Presence of

[Signature]
Harvey H. Pendergast

Charlotte 426132 S, Store #260

R-0032

STATE OF North Carolina)
COUNTY OF Mecklenburg)

ACKNOWLEDGMENT

I, a Notary Public of the County and State aforesaid, certify that
Fred J. Morganti, II personally came before me this day and
acknowledged that he is President of HARRIS TESTER, INC., a North
Carolina corporation, and that by authority duly given and as the act of the corporation,
the foregoing instrument was signed in its name by said person. Witness my hand and
official stamp or seal, this 9th day of July, 2001.

My Commission Expires:
June 8, 2004

Margaret Becker
Notary Public

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

ACKNOWLEDGMENT

I, a Notary Public of the County and State aforesaid, certify that
Steven L. Ortega personally came before me this day and
acknowledged that he is CFO of BI-LO, LLC, a Delaware
limited liability company and that by authority duly given and as the act of the company,
the foregoing instrument was signed in its name by said person. Witness my hand and
official stamp or seal, this 8th day of July, 2001.

My Commission Expires:
2-14-2007

H. Susan Jo Lott
Notary Public

Charlotte 426132 E, Store #260

R-0033

EXHIBIT A

Lease dated April 20, 1995, as amended to date, originally between Roper Mt. Rd. Assoc., L.L.C., as Landlord, and Harris Teeter, Inc., as Tenant, covering premises located at 401 Roper Mountain Road in Greenville, South Carolina.

Charlotte 426132 B, Store #260

R-0034

July 9, 2001

Mr. Hugh Gage, Jr.
Carolina & Georgia Immobilienfonds I, LP
c/o Germania of America, Inc.
3405 Peachtree Road, NE, Suite 550
Atlanta, Georgia 30305

Re: Assignment by Harris Teeter, Inc. to BI-LO, LLC of the Lease dated April 20, 1995,
as amended (the "Lease"), Harris Teeter Store No. 260 located in and/or known as
Roper Mountain, Greenville, South Carolina

Mr. Gage:

This letter will serve as notice that Harris Teeter, Inc. has assigned its interest as tenant in the
referenced Lease to BI-LO, LLC; and BI-LO, LLC has assumed the obligations of the tenant under
said Lease, effective July 9, 2001, pursuant to the attached Assignment and Assumption of Lease.

All correspondence with BI-LO, LLC related to the Lease should be sent to:

BI-LO, LLC
Post Office Box 99
Mauldin, South Carolina 29662
Attention: Real Estate Department

Street Address:
208 Industrial Boulevard
Greenville, South Carolina 29607
Attention: Real Estate Department.

Very truly yours,

HARRIS TEETER, INC.

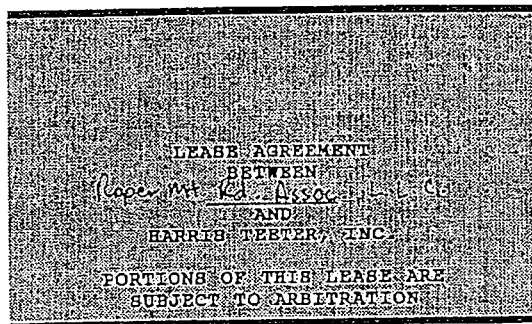
By: [Signature]
Title: President

BI-LO, LLC

By: [Signature]
Title: Chief Financial Officer

EXHIBIT C

R-0035



S11DU22:090JMT_LEASE_ROPER_MTN_V6.

EXHIBIT D

R-0036

TABLE OF CONTENTS

1	PREMISES	1
1.1	Demise by Landlord	1
1.2	Warranty of Title and Covenant of Quiet Enjoyment	1
2	CONSTRUCTION OF IMPROVEMENTS	2
2.1	Landlord's Obligation to Construct Improvements	2
2.2	Plans and Specifications	2
2.3	Changes to the Plans and Specifications	4
2.4	Preconstruction Meeting	4
2.5	Warranty of Construction	5
2.6	Tenant's Right of Entry	5
2.7	Completion for Occupancy	5
3	COMMENCEMENT OF TERM	6
3.1	Commencement Date	6
3.2	Conditions	6
3.3	Outside Date	7
3.4	Supplemental Memorandum	8
4	TERM	8
4.1	Initial Term	8
4.2	Extensions	8
4.3	Holding Over	8
5	RENT	8
5.1	Rent	8
5.2	Lease Year	9
5.3	No Partnership	9
6	PARKING AREAS	9
6.1	Description and Use	9
6.2	Landlord's Obligation to Construct Improvements	10
6.3	Indemnity	10
6.4	Liability Insurance	11
6.5	Parking Spaces	11
7	TENANT'S PROPERTY, IMPROVEMENTS AND SIGNS	11
7.1	Property	11
7.2	Alterations and Improvements	12
7.3	Signs	12
7.4	Satellite Dishes and Equipment	13
8	USE	13
8.1	Use of Premises	13
8.2	Exclusive Rights of Tenant	13
8.3	Enforcement	14
8.4	Compliance with Environmental Laws	14
8.5	Compliance With Other Laws	15
8.6	Sale of Beer and Wine	15

SHIDUA2:000001 LEASE ROVER_MTH_V6.

1

R-0037

	8.7	Seasonal Decorations	15
9		TAXES	15
	9.1	Landlord's Taxes	15
	9.2	Tenant's Taxes	16
	9.3	Right to Contest Taxes	16
	9.4	Tenant's Failure to Pay Taxes	16
	9.5	Proration of Taxes	16
10		REPAIRS AND MAINTENANCE	16
	10.1	Tenant's and Landlord's Repair Obligations	16
	10.2	Exemption to Tenant's Repair Obligations	17
	10.3	Emergency Repairs	17
	10.4	Surrender	18
11		UTILITIES	18
	11.1	Tenant's Obligations	18
	11.2	Landlord's Obligations	18
12		DAMAGE OR DESTRUCTION; INSURANCE	18
	12.1	Option to Cancel	18
	12.2	Tenant's Option to Repair or Restore	19
	12.3	Rent Abatement	19
	12.4	Tenant's Fire and Casualty Insurance	19
	12.5	Tenant's Casualty Insurance	20
	12.6	Public Liability Insurance	20
	12.7	Mutual Release	20
	12.8	Evidence of Insurance	20
13		CONDEMNATION	20
	13.1	Building	20
	13.2	Land	20
	13.3	Restoration	21
	13.4	Award	21
	13.5	Taking for Temporary Use	21
	13.6	Definitions	21
14		LANDLORD'S RIGHT OF ACCESS	21
	14.1	Right to Enter Premises	21
15		ASSIGNMENT AND SUBLETTING	22
	15.1	Tenant's Right to Assign or Sublease Without Landlord's Consent	22
	15.2	Landlord's Consent	22
	15.4	Continuing Liability of Tenant	23
	15.5	Transfer of Landlord's Interest	23
16		SUBORDINATION; ESTOPPEL CERTIFICATES	23
	16.1	Subordination	23
	16.2	Non-Disturbance	23
	16.3	Estoppel Certificates	23
	16.4	Landlord's Certificate	23

513DU2(090)HT_LEASE_ROPER_MTN_V6.

11

R-0038

17	DEFAULT; REMEDIES	24
17.1	Events of Default	24
17.2	Landlord's Remedies	25
17.3	Default by Landlord	26
17.4	Attorney's Fees and Expenses of Litigation	26
17.5	Force Majeure	27
18	INTERPRETATION	27
18.1	South Carolina Law Governs	27
18.2	Singular and Plural	27
18.3	Binding Effect	27
18.4	Remedies Cumulative	27
18.5	No Waiver	27
18.6	Time of Essence	28
18.7	No Oral Changes	28
18.8	Entire Agreement	28
18.9	Notices	28
18.10	Construction	28
18.11	Recording	28

SCHEDULE OF EXHIBITS

Exhibit A	Legal Description
Exhibit B	Site Plan
Exhibit C	Permitted Exceptions
Exhibit D	Sign Criteria
Exhibit E	Subordination, Attornment and Nondisturbance Agreement
Exhibit F	Tenant Estoppel Certificate

1 STATE OF SOUTH CAROLINA

LEASE AGREEMENT

2
3 COUNTY OF GREENVILLE

4 This Lease, made this 20 day of April, 1995, between
5 Roper Mt. Rd. Assoc., L.L.C. (the "Landlord"), and HARRIS
6 TEETER, INC., a North Carolina corporation (the "Tenant").

7 W I T N E S S E T H:

8 1 PREMISES

9 1.1 Demise by Landlord. Landlord leases unto Tenant and
10 Tenant leases from Landlord that certain approximately eight-acre
11 tract of land (the "Land"), a legal description of which is
12 attached to and made a part of this Lease as Exhibit A, together
13 with all improvements to be constructed thereon by Landlord (the
14 "Improvements") which Improvements include an approximately
15 60,217 square foot building (the "Building") (said Land and
16 Improvements being collectively referred to herein as the
17 "Premises"). A Site Plan showing the Premises as they are
18 presently intended by the parties to be configured is attached to
19 and made a part of this Lease as Exhibit B (the "Site Plan").

20 TO HAVE AND TO HOLD the Premises and all privileges and
21 appurtenances thereunto belonging unto the Tenant, for the stated
22 term, and upon and subject to all of the terms, conditions and
23 agreements stated in this Lease, which constitute the covenants
24 of this Lease.

25 1.2 Warranty of Title and Covenant of Quiet Enjoyment.
26 Landlord warrants that as of the date hereof and as of the
27 Commencement Date hereof:

28 (a) except as stated in Exhibit C, which is attached
29 to and made a part of this Lease, Landlord owns the Premises
30 in fee simple;

31 (b) the Premises are free from liens and encumbrances
32 except for those liens and encumbrances listed in Exhibit C
33 or specifically agreed to in writing by Tenant (the
34 "Permitted Exceptions"), none of which prohibit or restrict
35 the Tenant's proposed use of the Premises;

36 (c) Landlord has the right to enter into this Lease;

37 (d) The Premises will be zoned prior to the
38 Commencement Date (as defined in Section 3.1 below) so as to
39 permit the Tenant's proposed use of the Premises; and

40 (e) Tenant, upon timely payment of the rents reserved
41 and performance of each term and condition contained in this
42 Lease, shall at all times during the Lease term and any

11SDUA2-[090]HT_LEASE_ROPER_MTN_V6.

1 extension or renewal, peaceably and quietly have and enjoy
2 exclusive possession of the Premises without any disturbance
3 from anyone. Landlord may not construct any improvements on
4 the Premises without Tenant's prior written consent.

5 2 CONSTRUCTION OF IMPROVEMENTS

6 2.1 Landlord's Obligation to Construct Improvements.
7 Landlord, at its sole cost, agrees to construct the Improvements
8 on the Land in accordance with the Plans and Specifications.
9 Unless Tenant shall designate or approve a particular contractor
10 for Landlord to negotiate with (the "Designated Contractor"),
11 bids for construction of the improvements shall be solicited by
12 the Landlord from at least three responsible, responsive general
13 contractors, who shall be approved by the Tenant, which approval
14 shall not be unreasonably withheld. In the event Tenant shall
15 designate or approve a Designated Contractor, Landlord shall
16 negotiate with such contractor with respect to construction of
17 the Premises and shall submit the final negotiated guaranteed
18 maximum price to Tenant for approval, (the "Guarantee Maximum
19 Price"), and upon such approval, Landlord shall proceed to
20 negotiate and enter into a construction contract with the
21 Designated Contractor for construction of the Premises for the
22 Guaranteed Maximum Price.

23 2.2 Plans and Specifications.

24 (a) Landlord agrees to cause Landlord's architect to
25 meet with Tenant's architect or engineer, at a place
26 designated by Tenant, for the purpose of coordinating the
27 design work of Tenant and Landlord with respect to the
28 Premises.

29 (b) After this preliminary meeting, and based upon the
30 exterior dimensions of the Building, Landlord will cause
31 Landlord's architect to prepare and submit to Tenant for
32 approval on or before May 1, 1995 detailed site drawings,
33 including:

- 34 (i) grading and site drainage plans;
35 (ii) soil borings;
36 (iii) parking layout;
37 (iv) driveways and curb cuts;
38 (v) landscaping plan with irrigation system
39 layout;
40 (vi) lighting and utility layouts; and

1 (vii) such other site information as Tenant's
2 architect may reasonably request.

3 (c) Assuming Tenant receives Landlord's detailed site
4 drawings prior to May 1, 1995, and approves those drawings,
5 Tenant will cause Tenant's architect to prepare and submit
6 to Landlord on or before August 15, 1995 for approval (as to
7 structural design only with respect to the items described
8 in clause (i) below), said approval not to be unreasonably
9 withheld or delayed, detailed drawings for:

10 (i) the Building shell design, including the
11 roof, exterior walls, columns and footings (including
12 the front canopy design), utilities to 5'0" outside of
13 Building wall, and all openings;

14 (ii) the interior of the Building, including
15 mechanical, electrical, HVAC, and all of the design
16 information necessary to support Tenant's fixture plan;
17 and

18 (iii) a color front elevation of the Building.

19 (d) After Landlord has approved the structural design
20 of the Building, Landlord will cause its architect to
21 prepare a final site plan (the "Final Site Plan") and Tenant
22 will prepare and deliver to Landlord final drawings for the
23 Building. Thereafter, Landlord will cause its architect to
24 meet again with Tenant's architect at a place designated by
25 Tenant for a detailed review of the draft final drawings.
26 When the detailed drawings and specifications have been
27 approved by Landlord and Tenant and each page initialed by a
28 representative of Tenant and Landlord, the initialed
29 drawings and specifications shall constitute the Plans and
30 Specifications under this Lease.

31 (e) All submissions of drawings and specifications
32 will be deemed approved if not rejected noting specific
33 reasons for rejections within fifteen (15) days after the
34 date of receipt. If the parties have not agreed upon and
35 initialed the Plans and Specifications within one hundred
36 eighty (180) days after the date of approval of the site
37 drawings, either party may terminate the Lease by notice to
38 the other.

39 (f) Landlord agrees that it is Landlord's sole
40 responsibility to see that true copies of the Plans and
41 Specifications are delivered to Landlord's contractor and
42 all subcontractors and to see that all construction work
43 proceeds in accordance with the Plans and Specifications
44 rather than Tenant's preliminary drawings.

1 (g) Landlord shall cause the Final Site Plan to
2 indicate an area acceptable to Tenant for future expansion
3 (the "Expansion Area") in the general configuration as is
4 shown on the Site Plan attached as Exhibit E. Tenant shall
5 have the option to expand the Building and/or Tenant's
6 operations into all or part of the Expansion Area at any
7 time and from time to time during the term of this Lease
8 (including extensions) at its sole cost and expense. There
9 shall be no adjustment to the Rent (as defined in Section
10 5.1 below) as a result of such expansion.

11 **2.3 Changes to the Plans and Specifications.**

12 (a) The Plans and Specifications may be changed from
13 time to time by mutual agreement of the parties.

14 (b) If Tenant requests any change to the Plans and
15 Specifications which will increase Landlord's cost in
16 constructing the Improvements pursuant to the Plans and
17 Specifications, Landlord will furnish Tenant with an
18 analysis of the increased cost or, if unknown, of the
19 estimated increased cost, and if Tenant wishes to proceed
20 with the change and pay the increased cost, the parties will
21 execute a written memorandum setting forth the increased
22 cost and a description of any change in the Plans and
23 Specifications. For all changes so authorized, the actual
24 increased costs incurred by Landlord shall, upon Landlord's
25 furnishing Tenant adequate documentation of such increased
26 costs within ninety (90) days after they are incurred, be
27 added to the construction bid amount or, if applicable, the
28 Guaranteed Maximum Price, for the purpose of recomputing the
29 Minimum Rent in accordance with the provisions of Section
30 5.1 below. If Tenant's changes cause a delay in the
31 completion of construction, and if within thirty (30) days
32 after such delay occurs, Landlord notifies Tenant in writing
33 and provides adequate documentation of the extent of and
34 reasons for such delay, then the Outside Date provided for
35 in Section 3.3 will be extended by one day for each day of
36 delay caused by the changes.

37 **2.4 Preconstruction Meeting.** There shall be a
38 pre-construction meeting prior to actual construction and not
39 later than thirty (30) days after final approval of the Plans and
40 Specifications pursuant to Section 2.2 of this Lease, at a time
41 and place selected by Tenant. Tenant will give at least two (2)
42 weeks advance written notice of the preconstruction meeting. The
43 preconstruction meeting will be attended by a representative of
44 Landlord, Tenant, Landlord's contractor, and all major
45 subcontractors (grading, structural, mechanical, HVAC,
46 electrical, etc.). At the preconstruction meeting, Landlord will
47 cause its contractor to furnish for Tenant's approval:

1 (a) a detailed construction schedule (which shall
2 include delivery dates for Tenant's fixtures and equipment
3 to be installed by Landlord's contractor); and

4 (b) a schedule of values for the work described in the
5 Plans and Specifications, for Tenant's use in inspecting the
6 work as it progresses.

7 Unless Tenant has consented in writing to a postponement or
8 continuation of the preconstruction meeting (which consent Tenant
9 will not unreasonably withhold), Tenant shall have the right to
10 terminate this Lease by notice to Landlord if the preconstruction
11 meeting has not been held and the construction schedule and
12 schedule of values furnished within the time periods specified in
13 this Section, unless Landlord, within fifteen (15) days after
14 receipt of such notice, holds the preconstruction meeting and
15 causes to be furnished the construction schedule and schedule of
16 values.

17 2.5 Warranty of Construction. Landlord warrants that
18 (i) the Improvements will be constructed and Tenant's fixtures
19 and equipment installed in a good and workmanlike manner and in
20 compliance with all legal requirements, (ii) they will be so
21 constructed as to be structurally safe and sound and fit and
22 suitable for use as a supermarket, (iii) all materials used in
23 the construction of the Improvements shall be new, and (iv) all
24 fixtures and equipment will be installed without damage thereto
25 and in such a manner as to be fully and properly operational upon
26 completion of such installation.

27 2.6 Tenant's Right of Entry. Prior to completion of
28 construction by Landlord, Tenant shall be entitled to enter the
29 Premises for the purpose of inspecting the Premises, making
30 measurements, bringing in and setting up equipment and furniture,
31 and performing other work which may be required in order to ready
32 its store for opening. During this period Tenant shall not
33 materially interfere with Landlord's work, and Tenant agrees to
34 indemnify and save harmless Landlord against any loss or
35 liability arising out of Tenant's activities on the Premises.
36 Tenant's exercise of the rights conferred in this paragraph shall
37 not constitute acceptance of the Premises or approval of
38 Landlord's construction or installation of fixtures and
39 equipment.

40 2.7 Completion for Occupancy. The words "completed for
41 occupancy," for the purposes of this Lease, means that:

42 (a) the Improvements have been fully completed by
43 Landlord in accordance with the Plans and Specifications,
44 and Tenant's fixtures and equipment have been properly
45 installed, and operational and in new, undamaged and
46 operational condition, except for minor exterior and
47 interior punchlist items (not exceeding \$5,000.00 in the

1 aggregate for such interior items) which do not interfere
2 with Tenant's exclusive possession of the Premises, or its
3 ability to proceed with stocking its store and training its
4 employees, and all of Landlord's tools, scaffolding, surplus
5 building materials, waste, debris, and rubbish of every sort
6 on the Premises have been removed, except for such items on
7 the exterior of the Premises which do not interfere with
8 Tenant's access to the Premises, which items shall be
9 removed prior to Tenant's scheduled opening date;

10 (b) Landlord has delivered to Tenant all necessary
11 certificates of occupancy or similar approvals required in
12 the community for Tenant to open for business;

13 (c) exclusive possession of the Premises is available
14 for delivery to Tenant;

15 (d) The road improvements shown on Exhibit B, shall be
16 built and paved prior to Tenant opening for business.
17 Tenant shall have use of the road improvements at all times
18 during the Lease Term and any extensions thereof; and

19 (e) The two full service entrances to the site (and
20 the traffic signal at Roper Mountain Road and Frontage Road)
21 shown on Exhibit B, shall be in place prior to Tenant
22 opening for business, and the aforesaid entrances shall
23 remain as full service entrances (permitting left turns in
24 and out), and the aforesaid traffic signal shall remain in
25 operation at all times (excepting periods of temporary
26 outage due to replacement or repairs) during the term of
27 this Lease and any extensions thereof.



28 3 COMMENCEMENT OF TERM

29 3.1 Commencement Date. The term of this Lease shall begin
30 on the "Commencement Date" which is defined as the earlier of (a)
31 the date Tenant opens its store for business; or (b) the date
32 forty-five (45) days after the Improvements have been completed
33 for occupancy, provided that by such date all the conditions set
34 forth in Section 3.2 have been fulfilled; and provided further,
35 that if a Commencement Date determined in accordance with this
36 Section would occur between November 1 and January 9, Tenant, at
37 its option, may defer the Commencement date until the following
38 January 10.

39 3.2 Conditions. Tenant need not order its equipment or
40 fixtures until the conditions set forth in subparagraphs (a),
41 (b), and (f) below have been fulfilled, and the term of this
42 Lease shall not commence until all of the following conditions
43 have been fulfilled:

1 (a) The Premises have access to all streets and rights
2 of way adjoining the Land, except as otherwise indicated on
3 Exhibit A;

4 (b) The Land is zoned so as to permit the operation of
5 a food supermarket and there shall be no covenants or
6 restrictions affecting the Land which would prohibit Tenant
7 from operating a food supermarket business on the Land;

8 (c) All Improvements (including all offsite
9 improvements shown on the Site Plan) have been fully
10 completed. Landlord hereby represents that to the best of
11 its knowledge all traffic signals shown on the Site Plan are
12 in place and functioning and will be functioning as of the
13 Commencement Date, and no changes to such signals are
14 contemplated or proposed by the Landlord or applicable
15 governmental authorities;

16 (d) The physical condition of the Premises is such
17 that Tenant, provided it complies with applicable laws and
18 regulations, will not be prevented from obtaining all
19 licenses and permits which are necessary to the operation of
20 Tenant's business. Landlord agrees to join in any necessary
21 applications for such permits upon Tenant's request;
22 provided, however, that all such applications and the costs
23 of obtaining any licenses, permits or approval necessary for
24 the conduct of Tenant's business shall be at Tenant's sole
25 expense;

26 (e) Water, sewer and electric power lines have been
27 installed adjacent to the Building and hooked up for
28 Tenant's use;

29 (f) There will be no zoning or other restrictions
30 which would prevent Tenant from installing and maintaining
31 its signs as provided for in Section 7.3.

32 (g) Landlord has secured a nondisturbance agreement in
33 the form required by Section 16.2 from each mortgagee of the
34 Premises.

35 3.3 Outside Date. If the Premises have not been completed
36 for occupancy within one year after final approval of the Plans
37 and Specifications, (such completion date to be extended as
38 provided in Section 2.3(b) of this Lease, but not to be extended
39 pursuant to Section 17.5 of this Lease for more than one hundred
40 eighty (180) days (and then only to the extent Landlord shall
41 notify Tenant in writing within ten days after the occurrence of
42 the event giving rise to such an extension, and specifying in
43 such notice the length of the delay caused by such Force Majeure
44 event, such delay not to exceed thirty days for any given Force
45 Majeure event) (the "Outside Date")), Landlord agrees to pay to
46 Tenant, as liquidated damages, the sum of \$550.00 per day for

SIIDUA2:0901HT_LEASE_ROPER_MTN_V6.

7

R-0046

1 each day from the Outside Date until the date the Premises are
2 completed for occupancy. The parties agree that it would be
3 difficult or impossible to ascertain Tenant's damages arising
4 from such delays, and that the liquidated damages as stated in
5 this Section are a good faith estimate of the actual damages that
6 would be occurred by Tenant in the event of such delays. If
7 Landlord shall not have (i) commenced construction of the
8 Premises within six months and (ii) completed construction of the
9 Premises within eighteen months after final approval of the Plans
10 and Specifications, Tenant shall have the option to terminate
11 this Lease upon ten (10) days written notice to Landlord.

12 3.4 Supplemental Memorandum. When the Commencement Date
13 has been established, the parties agree to execute a supplemental
14 memorandum, in recordable form, stating the Commencement Date.

15 4 TERM

16 4.1 Initial Term. The term of this Lease shall be for
17 twenty (20) years and zero (0) months following the Commencement
18 Date unless terminated or extended as provided in this Lease.

19 4.2 Extensions. This Lease shall automatically be extended
20 for four (4) successive extension periods of five (5) years each,
21 each such extended term to begin upon the expiration of the
22 initial term of this Lease or the immediately preceding extended
23 term. All of the provisions of this Lease shall apply to each
24 extended term. Tenant shall have the right to terminate this
25 Lease and all subsequent extensions as of the expiration of the
26 initial term of this Lease or the expiration of any extension by
27 giving written notice to Landlord of its intention to terminate
28 the Lease not later than six (6) months prior to the expiration
29 of the initial term or of the current extension.

30 4.3 Holding Over. If Tenant remains in possession of the
31 Premises after the expiration or termination of this Lease or any
32 extension, Tenant's occupancy of the Premises shall be subject to
33 all of the terms and provisions of this Lease, except that either
34 party may terminate Tenant's tenancy upon thirty (30) days'
35 notice.

36 5 RENT

37 5.1 Rent. Beginning on the Commencement Date as defined in
38 Section 3.1, but subject to the provisions of Section 2.6 and the
39 rental income provisions below, Tenant agrees to pay to Landlord
40 rent for the Premises in the amount of Eight Hundred Eighty Eight
41 Thousand Two Hundred and No/100 Dollars (\$888,200.00) per year
42 (the "Rent"), which Rent shall be payable in equal monthly
43 installments on or before the tenth day of each month during the
44 lease term and all extensions, in the amount of Seventy Four
45 Thousand Sixteen and 67/100 Dollars (\$74,016.67) per month. If
46 the Lease term commences on a day other than the first day of a

1 month, rent shall be prorated based upon the number of days of
2 the month included in the Lease term.

3 The Rent shall be adjusted utilizing the bid for
4 construction of the Premises by the lowest responsive,
5 responsible general contractor described in Section 2.1 or, if
6 applicable, the Guaranteed Maximum Price negotiated with the
7 Designated Contractor. The parties acknowledge that the Rent
8 stated herein is based on a cost of construction of the Premises
9 of \$48.00 per square foot. If the bid for construction of the
10 Premises by the lowest responsive, responsible general contractor
11 is more or less than \$48.00 per square foot, the parties agree
12 that the Rent shall be adjusted in accordance with the following
13 formula:

14
$$.12 \times (\text{Difference between increased or decreased cost}$$

15
$$\text{of construction per Square Foot and } \$48.00) \times (\text{Square}$$

16
$$\text{Footage of Building}) = \text{Increase or Decrease of Rent.}$$

17 Beginning in the first month of the ninth year of the lease
18 term, the Rent shall increase in accordance with the following
19 schedule:

20	<u>Lease Years</u>	<u>Rent (per square foot)</u>
21	9 & 10	\$15.25
22	11 through 15	15.75
23	16 through 20	16.25
24	First Extension Period	16.75
25	Second Extension Period	17.25
26	Third Extension Period	17.75
27	Fourth Extension Period	18.25

28 5.2 Lease Year. The first Lease Year is that period
29 commencing on the Commencement Date and ending on the last day of
30 the month in which the first anniversary of the Commencement Date
31 occurs. Each Lease Year other than the first Lease Year shall
32 commence on the date next following the expiration of the
33 previous Lease Year and shall continue for a period of one full
34 year therefrom, unless this Lease or any applicable extension
35 expires or is terminated, in which event the last Lease Year
36 shall end on the date of such termination or expiration.

37 5.3 No Partnership. Nothing contained in this Lease shall
38 constitute Landlord and Tenant partners, associates or joint
39 venturers in the conduct of their respective businesses.

40 6 PARKING AREAS

41 6.1 Description and Use.

42 (a) The Site Plan attached as Exhibit B designates the
43 proposed location of all Improvements to be constructed, all

\\150UA2\0090\MT_LEASE_ROPER_MTN_V4.

9

R-0048

1 parking areas, driveways and delivery service areas
2 (collectively the "Parking Area").

3 (b) Landlord will not make any change to the Parking
4 Area without Tenant's prior written consent.

5 **6.2 Landlord's Obligation to Construct Improvements.**

6 (a) Landlord agrees to construct all Improvements and
7 all off-site improvements, as shown on the Site Plan, in a
8 good and workmanlike manner, and in full compliance with all
9 applicable laws and regulations, including without
10 limitation, the Americans With Disabilities Act and building
11 and zoning codes and laws regarding access for handicapped
12 persons. Landlord's construction obligations specifically
13 include:

14 (i) the obligation to grade and construct the
15 Parking Area in such manner as to provide adequate
16 drainage of storm water runoff;

17 (ii) the obligation to construct the Parking Area
18 in accordance with the provisions of Section 6.5;

19 (iii) the obligation to provide in the Parking Area
20 parking lot lighting sufficient to provide minimum
21 maintained illumination levels of at least three (3)
22 foot candles during hours of darkness when the Premises
23 are open for business; and

24 (iv) the obligation to provide tractor trailer
25 parking spaces and truck wells (equipped with sump
26 pumps, if provided in the Plans and Specifications),
27 for the exclusive use of Tenant at its grocery, meat
28 and produce service entrances, which spaces and truck
29 wells shall be a part of the Parking Area.

30 (b) Tenant agrees to maintain at its expense the
31 Improvements, including the Parking Area in good order and
32 repair.

33 (c) No building placed on an outparcel shall be more
34 than 16' high and sufficient on-site parking shall be
35 provided on all outparcels. The placement of the building
36 on an outparcel shall be subject to Tenant's consent, which
37 Tenant shall not unreasonably withhold.

38 **6.3 Indemnity.** Landlord agrees to indemnify and save
39 harmless Tenant from any loss, damage, harm, claim, action,
40 liability or expense (including reasonable attorney fees and
41 expenses of litigation) in connection with actual or alleged loss
42 of life, personal injury or damage to property occurring on or
43 about the Land, unless such loss of life, personal injury or

1 damage to property was occasioned solely by the act or omission
2 of Tenant, its agents or employees, in which event Tenant will
3 indemnify and save harmless Landlord from any loss, damage, harm,
4 claim, action, liability or expense (including reasonable
5 attorneys' fees) incurred by Landlord as a result of such act or
6 omission by Tenant, its agents or employees.

7 6.4 Liability Insurance. Tenant agrees to maintain on the
8 Land (specifically including without limitation the sidewalks in
9 front of Tenant's store) Commercial General Liability Insurance
10 with minimum combined limits of liability of not less than
11 \$1,000,000.00 per occurrence, and aggregate limits of not less
12 than \$2,000,000.00. Landlord shall be named as an additional
13 insured under such policy. At least annually during the term of
14 this Lease, Tenant will provide Landlord with a certificate from
15 its insurer evidencing the required coverage.

16 6.5 Parking Spaces.

17 (a) Landlord agrees to construct on the Land, the
18 parking areas and parking spaces as shown on Exhibit B, and
19 to maintain on the Land at all times at least the number of
20 parking spaces, and the configuration of the parking areas,
21 driveways and circulation routes as shown on Exhibit B,
22 unless the Tenant otherwise consents in writing or elects to
23 alter such configuration in connection with any alterations,
24 additions or improvements constructed by Tenant in
25 accordance with Section 7.2 below.

26 (b) All parking areas intended primarily for
27 automobile use must be constructed of not less than two
28 inches (2") of bituminous paving over a six inch (6") stone
29 base, with a soil compaction rating as recommended by a
30 reputable soils testing firm in accordance with generally
31 accepted industry standards, and all parking areas and
32 drives intended for truck traffic must be constructed as
33 above stated with at least an additional one inch asphalt
34 topping. The area adjacent to the Building's loading dock
35 must have a six inch (6") concrete pad extending out a
36 distance of sixty feet (60') from the loading dock.

37 (c) Landlord shall not permit cross-parking or
38 reciprocal parking on the Parking Areas by adjoining
39 property owners or tenants.

40 (d) Landlord shall not permit ingress and egress to
41 and from the Premises except in those locations as are shown
42 on Exhibit B.

43 7 TENANT'S PROPERTY, IMPROVEMENTS AND SIGNS

44 7.1 Property. All trade fixtures and equipment of whatever
45 nature purchased by Tenant and placed or installed in or upon the

\\SIS00A2\0090\PT_LEASE_ROPER_MTN_V6.

11

R-0050

1 Premises by Landlord or Tenant shall remain the property of
2 Tenant, and Tenant shall be entitled to remove such fixtures or
3 equipment at any time, provided Tenant repairs any damage to the
4 Premises caused by such removal.

5 7.2 Alterations and Improvements.

6 (a) Tenant shall be entitled to make alterations,
7 additions and improvements to the Building and improvements
8 to the Parking Area without Landlord's consent; provided,
9 however, that

10 (i) all such improvements must be constructed in
11 a good and workmanlike manner by reputable contractors;

12 (ii) all work must be in accordance with all
13 applicable laws, codes, and regulations; and

14 (iii) Tenant must furnish to Landlord, upon
15 completion of such construction, a set of as-built
16 drawings for any material alterations, additions, or
17 improvements made by Tenant.

18 (b) Any alteration, addition or improvement made by
19 Tenant shall become Landlord's property upon the expiration
20 or termination of this Lease or any extension, and Tenant
21 shall have no obligation to remove the same, unless the
22 parties otherwise agree in writing.

23 7.3 Signs.

24 (a) Tenant shall be entitled to install on the
25 Premises Tenant's signs advertising its business as shown on
26 Exhibit E which is attached to and made a part of this
27 Lease.

28 (b) Landlord shall, at its expense (which expense
29 shall not be included in the cost of construction for
30 purposes of adjusting the Rent as set forth in Section 5.1),
31 construct as a part of the Improvements a pylon sign (the
32 "Pylon Sign") of such design and at such location and for
33 such cost as shall be approved by Tenant in advance.
34 Landlord and Tenant agree that such cost shall not exceed
35 the sum of \$15,000.00. The Pylon Sign shall contain only
36 Tenant's name and logo and such other information as shall
37 be approved by Tenant in advance.

38 (c) Landlord has reviewed the sign criteria in
39 Exhibit E, has investigated local zoning ordinances and
40 reviewed any restrictions and/or covenants on the Land, and
41 based on such investigation, represents to Tenant that to
42 the best of the Landlord's knowledge, Tenant's signs,

1 including the "Pylon Sign," will not violate any zoning or
2 other restriction applicable to the Premises.

3 (d) The care and maintenance of such signs shall be
4 the sole responsibility of Tenant.

5 7.4 Satellite Dishes and Equipment. Tenant shall have the
6 right, subject to applicable zoning and other laws and
7 regulations, to install on the Premises (on the Building's roof
8 or wherever Tenant deems appropriate) a satellite dish,
9 communications antenna or similar equipment. Landlord has
10 investigated local zoning ordinances and reviewed any
11 restrictions and/or covenants on the Land, and based on such
12 investigation, represents to Tenant that to the best of the
13 Landlord's knowledge, as of the date of execution of this Lease,
14 the Premises are properly zoned for, and any and all local
15 ordinances, laws and regulations permit the installation and use
16 of satellite dishes, communication antenna and similar equipment
17 on the Premises. Upon request by Tenant, Landlord shall furnish
18 satisfactory evidence of such zoning to Tenant.

19 8 USE

20 8.1 Use of Premises.

21 (a) Tenant may use the Premises for any lawful
22 purpose.

23 8.2 Exclusive Rights of Tenant. Landlord hereby grants to
24 Tenant the exclusive right, as to any property adjacent to the
25 Land now owned or hereafter acquired by Landlord, to operate:

26 (a) a supermarket or grocery store;

27 (b) a delicatessen which sells meat, cheese or other
28 delicatessen items by weight or quantity (except that a
29 delicatessen restaurant not selling items for off-premises
30 consumption other than sandwiches and other menu items
31 served to on-premises customers shall be permitted);

32 (c) a bakery (except that a bagel or doughnut shop
33 shall be permitted);

34 (d) a seafood market;

35 (e) a gourmet coffee store which sells coffee beans or
36 ground coffee or coffee derived beverages for off-premises
37 consumption; provided, however that a restaurant which sells
38 gourmet coffee for on-premises consumption shall be
39 permitted;

40 (f) a florist or flower shop; and

1 (g) any other business which sells food or beverages
2 for off-premises consumption, except that Landlord may grant
3 to other tenants of Landlord the right to sell food and
4 beverage items which:

5 (i) are intended to be consumed on the Shopping
6 Center Tract or Landlord's adjacent property;

7 (ii) constitute only an incidental part of such
8 Tenant's primary business; or

9 (iii) are prepared take out items sold in the
10 normal operation of a restaurant, delivery or catering
11 business (including specialty take-out restaurants such
12 as pizza, Chinese or Mexican restaurants).

13 8.3 Enforcement. If Landlord violates the covenants
14 contained in Section 8.2 of this Paragraph, Tenant may pursue any
15 one or more of the following remedies:

16 (a) Tenant may terminate this Lease upon sixty (60)
17 days' written notice to Landlord (unless Landlord, within
18 such sixty (60) day period, shall cure the violation, or, if
19 the same cannot be cured within such period, shall have
20 commenced curing the violation and shall continuously and
21 diligently thereafter prosecute such cure to completion.
22 Upon such termination, neither party shall thereafter be
23 under any obligation to the other under this Lease;

24 (b) Tenant may recover from Landlord any damages
25 suffered by Tenant as a result of Landlord's violation;

26 (c) Tenant may enjoin Landlord or any tenant of
27 Landlord from permitting continued operation of any
28 establishment in violation of Landlord's covenants.

29 8.4 Compliance with Environmental Laws.

30 (a) Landlord warrants to Tenant, after inquiry and
31 inspection consistent with good commercial practice, that to
32 the best of its knowledge, the Land and the Premises are, as
33 of the date of this Lease, and will be, as of the
34 Commencement Date, free of hazardous substances (as defined
35 under all applicable environmental laws and regulations),
36 including, without limitation, any underground contamination
37 (whether as a result of migration onto or under the Land or
38 otherwise), asbestos, PCBs, formaldehyde, or underground
39 fuel tanks.

40 (b) Tenant, at all times during the term of this
41 Lease, agrees to conduct Tenant's business operations from
42 the Premises in compliance with all applicable environmental
43 laws and regulations, and will indemnify and save harmless

1 Landlord from any and all claims, damages, fines, judgments
2 penalties, costs, liabilities or losses (including, without
3 limitation, reasonable attorneys' fees and expenses of
4 litigation) arising during or after the Lease term as a
5 result of any violation by Tenant of applicable
6 environmental laws or regulations.

7 (c) Landlord agrees to indemnify and save harmless
8 Tenant from any and all claims, damages, fines, judgments,
9 penalties, costs, liabilities, or losses (including without
10 limitation, reasonable attorneys' fees and expenses of
11 litigation) arising during or after the Lease term from or
12 in connection with the presence or suspected presence of any
13 such hazardous substances in or on the Premises, except to
14 the extent the same are present solely as a result of the
15 acts of Tenant, Tenant's agents, employees, contractors or
16 invitees.

17 8.5 Compliance With Other Laws. Except for compliance with
18 environmental laws and regulations, which shall be governed by
19 the provisions of Section 8.4:

20 (a) Tenant agrees at Tenant's sole expense to comply
21 with applicable laws, ordinances, regulations and codes
22 affecting or relating to Tenant's use of the Premises or the
23 physical condition of the Improvements.

24 (b) Landlord agrees at Landlord's sole expense to
25 comply with such laws, ordinances, regulations and codes
26 affecting or relating to all other portions of the Premises
27 or the Land.

28 ~~8.6 Sale of Beer and Wine. Landlord represents to Tenant~~
29 ~~that, prior to commencement of construction of the Premises, the~~
30 ~~Premises will be properly zoned for the sale of beer and wine,~~
31 ~~and will be in compliance with any and all laws and regulations~~
32 ~~imposing any radius restrictions on the sale of beer and wine on~~
33 ~~the Premises. As a condition to commencement of the lease term,~~
34 ~~Landlord shall furnish satisfactory evidence thereof to Tenant.~~ *See 8.6 o
page 15a.

35 8.7 Seasonal Decorations. Tenant may, but shall not be
36 required to, decorate the Premises for seasonal occasions such as
37 Christmas or Easter.

38 9 TAXES

39 9.1 Landlord's Taxes. Landlord agrees to forward, or cause
40 the applicable taxing authority to send directly to Tenant the
41 appropriate ad valorem tax bill for the Premises, whereupon
42 Tenant shall pay such taxes directly to such taxing authority
43 prior to the date such taxes become delinquent, but in the case
44 where Landlord is forwarding the tax bill to Tenant, no sooner
45 than sixty (60) days after Tenant's receipt of such tax bill. If

8.6 Sale of Beer and Wine. Landlord represents to Tenant that, prior to commencement of construction of the Premises, the Premises will be properly zoned for the sale of beer and wine, and will be in compliance with any and all laws and regulations imposing any specific radius restrictions on the sale of beer and wine on the Premises. As a condition to commencement of the lease term, Landlord shall furnish satisfactory evidence thereof to Tenant. Notwithstanding the foregoing, Landlord makes no representation regarding Tenant's ability to obtain the appropriate licenses and permits for the sale of beer and wine, to the extent the availability of such license and permits depends on facts and circumstances beyond Landlord's control, including without limitation, the manner in which Tenant conducts its business in general, and specifically the manner in which it designs the interior of the Premises and operates its business in the Premises.



15a

R-0055

1 in such case, Landlord fails to forward such tax bill to Tenant
2 at least sixty (60) days prior to the delinquency date, therefor,
3 Landlord shall be responsible for any interest, charges or other
4 fees due as a result of the payment of the taxes after the
5 delinquency date.

6 9.2 Tenant's Taxes. Tenant agrees to pay all license,
7 privilege, ad valorem or other taxes levied, assessed or charged
8 against Landlord or Tenant on account of the operation of
9 Tenant's business or on account of property belonging to Tenant.

10 9.3 Right to Contest Taxes. Tenant may at its sole cost
11 and expense, contest any Taxes by appropriate proceedings
12 diligently conducted in good faith. Landlord will pay to Tenant,
13 upon receipt by Landlord, any refund ultimately obtained from the
14 taxing authorities. Tenant agrees to pay any increased Taxes
15 resulting from such contest. Tenant hereby indemnifies and
16 agrees to hold harmless Landlord from and against any cost,
17 damage or expense (including attorney's fees) in connection with
18 any such proceedings.

19 9.4 Tenant's Failure to Pay Taxes. If Tenant fails to pay
20 any taxes, assessments, or governmental charges required to be
21 paid by Tenant, Landlord may pay such taxes, assessments, or
22 governmental charges. Any sums so paid by Landlord shall be
23 deemed to be additional rental owing by Tenant to Landlord, due
24 and payable upon demand.

25 9.5 Proration of Taxes. Any payment to be made pursuant to
26 this Paragraph 9 with respect to the calendar year in which this
27 Lease commences or terminates shall bear the same ratio to the
28 payment which would be required to be made for the full year as
29 that part of the calendar year covered by the term of this Lease
30 bears to a full year.

31 10 REPAIRS AND MAINTENANCE

32 10.1 Tenant's and Landlord's Repair Obligations.

33 (a) Subject to Landlord's obligations for repairs due
34 to faulty materials or defects in workmanship as provided in
35 subparagraph (b), during the term of this Lease, Tenant at
36 its sole expense agrees to maintain in good order and repair
37 the Improvements, including exterior and structural supports
38 of the Building, including without limitation the walls,
39 roof, structural supports, exterior paint, exterior plate
40 glass, awnings, sidewalks, wells, septic tanks, water, sewer
41 and other utility lines located on the exterior of the
42 Building; provided, however, that Tenant shall not be
43 obligated to repair any damage caused by any act, omission
44 or negligence of the Landlord, its agents or invitees;

1 (b) Landlord agrees to make all necessary repairs to
2 the Premises arising out of faulty materials or defective
3 workmanship employed in the construction of the Improvements
4 by Landlord or Landlord's agents if such defects are
5 discovered prior to the first anniversary of the
6 Commencement Date. After Landlord's warranty period
7 expires, Landlord will assign to Tenant all available
8 warranties from Landlord's contractors and subcontractors
9 relating to the quality of materials and workmanship in the
10 construction of the Improvements. Landlord and Tenant agree
11 to cooperate in enforcing all warranties by Landlord's
12 contractors to either Landlord or Tenant.

13 10.2 Exemption to Tenant's Repair Obligations. Tenant
14 shall not be obligated to repair damages to the Premises covered
15 by Landlord's insurance, if any, except as otherwise provided in
16 Section 12.

17 10.3 Emergency Repairs.

18 (a) If, during Landlord's warranty period as provided
19 above, it shall be necessary in an emergency for Tenant to
20 make promptly any repairs or replacements required to be
21 made by Landlord, Tenant may proceed forthwith to have such
22 repairs and replacements made and pay the cost of the
23 repairs. Without limiting the generality of the foregoing,
24 the parties agree that any roof leaks which are not repaired
25 within ten (10) days (extended, however, for weather
26 conditions which do not permit roof work to be done) shall
27 constitute an emergency entitling Tenant to make such
28 repairs. Landlord acknowledges and agrees that it is
29 essential to the operation of Tenant's business that the
30 roof be kept in a good state of repair and free from leaks.
31 Landlord agrees to reimburse Tenant for the cost of making
32 such repairs or replacements within 30 days after receipt of
33 Tenant's bill for reimbursement of such costs to the extent
34 such repairs are the Landlord's obligation under
35 Section 10.1(b) above;

36 (b) During Landlord's warranty period as provided
37 above, Tenant agrees to give Landlord prior notice of the
38 need for any such repairs or replacements, to the extent
39 practicable under the circumstances;

40 (c) If Tenant makes an emergency repair on behalf of
41 Landlord, and Landlord fails to reimburse Tenant, Tenant may
42 deduct the amount of the bill from any amounts subsequently
43 due hereunder unless Landlord, acting in good faith,
44 notifies Tenant that it disputes the amount or validity of
45 the bill and within thirty (30) days thereafter commences
46 legal action to determine the validity and amount of the
47 bill. Upon the conclusion of such litigation any amount

1 adjudicated to be due Tenant may be deducted from any
2 amounts subsequently due Landlord hereunder.

3 10.4 Surrender. At the expiration of the term of this
4 Lease and any extensions, Tenant agrees to quit and surrender the
5 Premises to Landlord in as good a condition as when received,
6 reasonable wear and tear and damage by fire or other casualty and
7 permitted alterations under Section 7.2 excepted.

8 11 UTILITIES

9 11.1 Tenant's Obligations. Except as provided in Section
10 11.2, Tenant agrees to provide and pay for all electricity, heat,
11 water, gas, garbage disposal and janitorial services and other
12 utilities required by Tenant in the use of the Premises.

13 11.2 Landlord's Obligations. Landlord agrees to pay for
14 all utility charges accruing prior to the date Tenant's
15 refrigeration equipment has been permanently switched on for
16 Tenant's use.

17 12 DAMAGE OR DESTRUCTION; INSURANCE

18 12.1 Option to Cancel.

19 (a) If the Building is completely destroyed or damaged
20 in a "Substantial Amount" and such destruction occurs at any
21 time after the first fifteen (15) years of the Lease Term,
22 either party, at such party's option, may terminate this
23 Lease by giving written notice to the other party within
24 thirty (30) days following the damage or destruction, and
25 rent and other charges payable by Tenant under this Lease
26 shall be apportioned to the date of the damage or
27 destruction. Provided, however, that Landlord may not
28 terminate this Lease in such circumstances if Tenant elects
29 to rebuild or restore the Building as provided in Section
30 12.2, in which event the parties shall agree to extend the
31 Lease Term for such period as shall cause it to expire ten
32 (10) years beyond the initial Lease Term expiration date
33 (exclusive of the extension periods provided in Section 4.2,
34 which shall not be affected by the aforementioned lease term
35 extension).

36 (b) If the damage occurs prior to the last two Lease
37 Years of the Lease Term, "Substantial Amount" means fifty
38 percent (50%) of a reasonable estimate of the replacement
39 cost of the Improvements. If the damage occurs during the
40 last two Lease Years of the Lease Term, "Substantial Amount"
41 means twenty-five percent (25%) of a reasonable estimate of
42 the replacement cost of the Improvements.

43 (c) If Landlord exercises an option to cancel this
44 Lease pursuant to this Section and there are any remaining

1 extension periods which Tenant has an unexercised option to
2 terminate under Section 4.2 of this Lease, Tenant may
3 nullify Landlord's exercise of its option to cancel by
4 irrevocably releasing its option to terminate the next
5 extension or extensions, by notice to Landlord within thirty
6 (30) days after Landlord gives notice of cancellation.

7 12.2 Tenant's Option to Repair or Restore. If the Premises
8 are damaged by fire or other casualty, unless either party has
9 exercised such party's right to terminate, if any, under Section
10 12.1, Tenant, at its option, may restore the Premises to
11 substantially the same condition existing before the damage or
12 destruction, in such event Tenant shall retain all insurance
13 proceeds payable as a result of such casualty, and this Lease
14 shall remain in full force and effect except that rent shall
15 abate as provided in Section 12.3, and the Lease Term shall be
16 extended for a period equal to the rent abatement period provided
17 in Section 12.3 (in addition to the Lease Term extension provided
18 in Section 12.1). If Tenant does not elect to rebuild, as
19 aforesaid, and either party terminates this Lease as provided
20 herein, then all such insurance proceeds shall be payable with
21 respect to the damage or destruction of the Building and any
22 fixtures therein paid for by Landlord, shall be payable to
23 Landlord.

24 12.3 Rent Abatement. If the Premises are damaged or
25 destroyed by fire or other casualty and this Lease is not
26 terminated, the minimum rent reserved in this Lease shall be
27 reduced to an amount which bears the same ratio to the minimum
28 rent as the area of the Building then available for use in
29 Tenant's judgment bears to the entire area of the Building;
30 provided, however, that if so much of the Building is destroyed
31 or the Parking Area is damaged to such an extent that it is
32 unreasonable to expect Tenant to continue to operate its business
33 from the Building, Tenant may close its store for business. In
34 that event all rent shall abate from the date the store is closed
35 until the earlier of the date Tenant reopens for business at the
36 Premises or nine months after the date of such casualty or
37 destruction. If minimum rent abates under this Section, every
38 other charge payable by Tenant to Landlord shall abate in the
39 same proportion, but Tenant's responsibility for taxes and
40 insurance shall not abate.

41 12.4 Tenant's Fire and Casualty Insurance. Tenant shall
42 keep the Premises insured against loss or damage by fire and such
43 other risks as may be included in the Special Cause of Loss
44 Endorsement, or generally in the broadest form of all risks
45 insurance from time to time available (except that Tenant need
46 not carry earthquake and war risks insurance) in an amount equal
47 to one hundred percent (100%) of the full replacement value of
48 the Premises.

12.5 Tenant's Casualty Insurance. Tenant shall maintain adequate fire and extended coverage insurance on the contents of the Building and Tenant's fixtures, equipment and property located in the Building. Tenant may self insure plate glass.

12.6 Public Liability Insurance. Tenant shall maintain on the Premises, Commercial General Liability Insurance with minimum combined limits of not less than \$1,000,000.00 per occurrence, and aggregate limits of not less than \$2,000,000.00.

12.7 Mutual Release. Except as may be otherwise specifically provided in this Lease, neither Landlord nor Tenant nor their respective employees or agents shall be liable to the other for any business interruption, loss or damage to property, or injury to or death of persons occurring on the Premises or in any manner growing out of or connected with Tenant's occupation of the Premises or their condition, whether or not caused by the negligence or fault of Landlord or Tenant or their respective agents, employees, tenants, licensees or assigns. This release shall apply whether or not such business interruption, loss or damage to property or injury to or death of persons is covered by insurance. Nothing in this Section may be construed to impose any other or greater liability upon either Tenant or Landlord than would have existed in its absence.

12.8 Evidence of Insurance. Tenant agrees to provide to the Landlord prior to the Commencement Date, and annually thereafter, copies of policies or certificates of insurance evidencing coverages required by this Lease, including, without limitation, the coverage required by Section 6.4 of this Lease.

13 CONDEMNATION

13.1 Building. If all or any part of the Building is Taken for permanent use, Tenant at its option shall be entitled to cancel this Lease by giving written notice to Landlord within thirty (30) days after the Taking Date, and rent and other charges payable by Tenant to Landlord shall be equitably apportioned as of the Taking Date.

13.2 Land. If (a) more than twenty percent (20%) of the Land is Taken for permanent use, or (b) a part of the Land shall be permanently Taken so that the remaining portion does not allow for a parking ratio of 4.0 parking spaces per 1,000 square feet of gross leasable area of the Building with a minimum of one hundred fifty (150) spaces after the Taking, or (c) if a substantial amount of the Parking Area shall be permanently Taken, or (d) there is a permanent Taking of access to the Land from any adjoining street or road or if there are any alterations to any such adjoining street or road which in Tenant's judgment materially adversely affects the ability of Tenant to conduct its business from the Premises, then, in any of such events, Tenant at its option may cancel the Lease by written notice to Landlord

SIIDUA2:0908T LEASE_LOPER_MTN_V4.

20

R-0060

1 within thirty (30) days after the Taking Date, and rent and other
2 charges payable by Tenant to Landlord shall be equitably apportioned
3 to the Taking Date.

4 13.3 Restoration. If Tenant does not elect to cancel the Lease
5 pursuant to its rights, if any, under Sections 13.1 and 13.2, Tenant
6 shall receive the entire award payable as a result of such Taking,
7 (and in such event, Landlord assigns to Tenant Landlord's interest in
8 any award for the Taking), and Tenant shall repair and restore the
9 Premises so as to constitute the remaining portion of the Premises a
10 complete architectural unit as soon as is reasonably practicable.

11 13.4 Award. If Tenant elects to cancel this Lease under this
12 Article, such cancellation shall not constitute a waiver by Tenant of
13 any rights it may have to any portion of any award for the Taking that
14 results in such cancellation.

15 13.5 Taking for Temporary Use. If there is a Taking of the
16 Premises for temporary use, this Lease shall continue in full force
17 and effect; provided, however, that:

18 (a) If all of the Premises, or such part of the Premises as
19 shall make it unreasonable to expect Tenant to operate its
20 business, are taken for temporary use, rent shall abate during
21 the Taking. If such Taking continues for more than eighteen (18)
22 months, such taking shall be considered a Taking for permanent
23 use, and the provisions of Sections 13.1 and/or 13.2 above shall
24 govern to the extent such sections are thus applicable.

25 13.6 Definitions. As used in this Lease, the word

26 (a) Award: Means the award for proceeds of any
27 condemnation, less all expenses in connection therewith,
28 including all reasonable attorneys' fees;

29 (b) Taking: Means the taking of or damage to all or any
30 portion of the Premises as the result of the exercise of the
31 power of eminent domain, condemnation, or purchase under threat
32 of or in lieu of the exercise of such power;

33 (c) Taking Date: Means the date on which the condemning
34 authority shall have the right to possession of the Premises
35 which has been Taken.

36 14 LANDLORD'S RIGHT OF ACCESS

37 14.1 Right to Enter Premises. Landlord and Landlord's
38 representatives may enter the Premises during business hours after
39 reasonable notice to Tenant for the purpose of inspecting the
40 Premises, performing any work required of or permitted to be performed
41 by Landlord under the terms of this Lease, and exhibiting the Premises
42 to prospective mortgagees and, during the last six (6) months of the
43 Lease term, to prospective tenants. In the event of an emergency
44 Landlord need not give advance notice to Tenant and may enter during
45 hours other than business

1 hours, but shall give notice to Tenant as promptly as is
2 practicable under the circumstances. Landlord agrees that to the
3 extent practical it will not unreasonably interfere with the
4 operation of Tenant's business in the exercise of its rights
5 under this Paragraph.

6 15 ASSIGNMENT AND SUBLETTING

7 15.1 Tenant's Right to Assign or Sublease Without
8 Landlord's Consent.

9 (a) Tenant may, without the consent of Landlord,
10 sublet the Premises or assign this Lease to:

11 (i) any entity which may take over the business
12 of Tenant, or

13 (ii) to any entity which may, as the result of a
14 reorganization, merger, consolidation, or sale of
15 assets succeed to the business now carried on by
16 Tenant, or

17 (iii) to any entity in which Tenant or Tenant's
18 parent possesses voting rights to fifty percent (50%)
19 or more of the issued and outstanding stock (so long as
20 such entity remains a subsidiary of Tenant or of
21 Tenant's parent), or

22 (iv) to Tenant's parent, or

23 (v) to any entity which has acquired fifty
24 percent (50%) or more of the issued and outstanding
25 voting stock of Tenant or Tenant's parent.

26 (b) As a part of and incidental to its operation of a
27 supermarket, Tenant may, without the consent of Landlord,
28 sublet portions of its store for the purpose of operating a
29 pharmacy or other subleased departments.

30 15.2 Landlord's Consent.

31 (a) Except as provided in Section 15.1, Tenant may not
32 assign this Lease, or sublet all or any part of the
33 Premises, without Landlord's prior written consent in each
34 instance, which Landlord will not unreasonably withhold or
35 delay.

36 15.3 Continuing Liability of Tenant. Landlord may not
37 withhold Landlord's consent to an assignment or subletting based
38 upon Landlord's objection to any proposed use if that use is
39 permitted under the terms of Paragraph 8 of this Lease.

1 15.4 Continuing Liability of Tenant. In the event of an
2 assignment or sublease, Tenant agrees that Tenant will remain
3 jointly and severally liable, with the assignee or subtenant, for
4 the payment of the rent reserved under this Lease and for
5 performance of all of the other terms, conditions, and provisions
6 of this Lease which are required to be performed by Tenant,
7 notwithstanding any acceptance of rent or performance by Landlord
8 directly from the assignee or subtenant.

9 15.5 Transfer of Landlord's Interest. Landlord shall be
10 entitled to assign or transfer its interest in the Premises or in
11 this Lease provided the assignee or transferee expressly assumes
12 in writing the obligations of Landlord hereunder except for
13 accrued liabilities as of the date of the transfer or assignment.
14 Landlord shall not be relieved of accrued liabilities by an
15 assignment or transfer of this Lease or the Premises. In the
16 event of an assignment or transfer of Landlord's interest in
17 compliance with the terms of this Section, Tenant agrees to
18 attorn and look to the assignee or transferee as Landlord,
19 provided Tenant has first received a fully executed written
20 instrument of assignment or transfer complying with the
21 provisions of this Section.

22 16 SUBORDINATION; ESTOPPEL CERTIFICATES

23 16.1 Subordination. At Landlord's election this Lease
24 shall be subordinate to mortgages or deeds of trust held by
25 reputable lending institutions and secured by the Premises,
26 provided that such subordination shall be effective only if the
27 holder of each such mortgage or deed of trust enters into a
28 non-disturbance agreement with Tenant in accordance with Section
29 16.2, or if the applicable mortgage or deed of trust contains a
30 nondisturbance clause in accordance with Section 16.2.

31 16.2 Non-Disturbance. Landlord agrees to secure from each
32 mortgagee of the Premises a non-disturbance agreement, which must
33 be in the form attached to this Lease as Exhibit F, or must
34 contain provisions which afford Tenant equivalent protection to
35 those contained in Exhibit F, together with such other terms and
36 provisions as may be agreed upon by Tenant and the mortgagee.

37 16.3 Estoppel Certificates.

38 (a) Tenant agrees within ten (10) days after a request
39 by Landlord, to deliver to Landlord an Estoppel Certificate.
40 The certificate shall be a written instrument duly executed
41 and acknowledged by Tenant, and in the form attached hereto
42 as Exhibit G.

43 16.4 Landlord's Certificate. Landlord, within ten (10)
44 days after a request by Tenant, shall deliver to Tenant an
45 Estoppel Certificate. The certificate shall be a written
46 instrument duly executed and acknowledged by Landlord, and in

1 recordable form. The Estoppel Certificate shall contain the
2 following information:

3 (a) whether the Lease is in full force and effect, and
4 whether it has been modified (setting forth any
5 modifications);

6 (b) whether any default exists on the part of Tenant
7 (specifying any such default); and

8 (c) any other information with respect to this Lease
9 which Tenant may reasonably request.

10 17 DEFAULT; REMEDIES

11 17.1 Events of Default. Either one of the following events
12 shall constitute an Event of Default by Tenant under this Lease:

13 (a) Tenant fails to pay any installment of rental or
14 any other amount due Landlord as provided in this Lease and
15 such failure shall continue for a period of ten (10) days
16 after Tenant receives written notice thereof from Landlord;
17 or

18 (b) Tenant fails to comply with any term, provision,
19 or covenant of this Lease, other than the payment of rental
20 or other amounts by Landlord, and does not cure such failure
21 within thirty (30) days after notice from Landlord;
22 provided, however, that if the nature of the default is such
23 that it cannot, in the exercise of reasonable diligence, be
24 cured within the thirty (30) day period, Tenant shall not be
25 in default if it commences performance within such period
26 and diligently proceeds to cure the default within a
27 reasonable time.

28 However, if after receiving written notice from the
29 Landlord, Tenant believes that an Event of Default has not
30 occurred under the provisions of Sections 17.1(a) or 17.1(b),
31 Tenant may within the applicable cure period, request that the
32 matter be arbitrated under the supervision of the American
33 Arbitration Association with the cost of the arbitration paid by
34 the non-prevailing party, or, if the arbitrator's decision is
35 such that neither party shall be deemed to have prevailed, paid
36 equally by the Landlord and Tenant. The decision of the
37 arbitrator shall be binding and conclusive upon the parties.
38 Upon a request for arbitration, any exercise of Landlord's
39 remedies shall be stayed until the decision of the arbitrator.
40 In the case of an alleged monetary default, Tenant agrees to
41 deposit with a reputable third party the amount in dispute within
42 the applicable cure period, to be held by such party pending the
43 conclusion of the aforesaid arbitration. If an alleged
44 nonmonetary default involves the need for repairs to a condition
45 that threatens the public safety, Tenant will proceed to cause

1 such repairs to be made even though the aforesaid arbitration
2 shall still be pending. If, in such event, the arbitrator shall
3 conclude that Tenant is not solely responsible for making such
4 repairs, Landlord shall promptly reimburse Tenant for any portion
5 of the cost thereof which is not deemed to be Tenant's
6 responsibility.

7 17.2 Landlord's Remedies. If an Event of Default occurs,
8 Landlord, subject to the provisions of Section 17.2(b) regarding
9 disputed claims, may, provided it complies with all applicable
10 legal requirements for doing so, including furnishing Tenant with
11 prior written notice, re-enter the Premises and remove Tenant and
12 all property from the Premises, without liability to Tenant, and
13 exercise the following remedies:

14 (a) Landlord may attempt to relet the Premises without
15 terminating the Lease, in which case:

16 (i) Landlord may relet for such term or terms
17 (which may exceed the term of this Lease) and at such
18 rental and upon such other terms and conditions as
19 Landlord reasonably deems advisable.

20 (ii) Landlord shall be entitled to make
21 alterations or repairs which are reasonably necessary
22 in order to relet the Premises.

23 (iii) Landlord shall apply all rentals from each
24 reletting, in the following order, to the payment of:

25 (1) any indebtedness other than rent then
26 due from Tenant to Landlord;

27 (2) reasonable costs of reletting, including
28 alterations, repairs, brokerage fees and
29 attorneys' fees;

30 (3) rent then due and unpaid; and

31 (4) future rent as it becomes due and
32 payable.

33 (iv) Landlord shall be entitled to recover from
34 Tenant on a monthly basis the amount by which that
35 month's rent due under this Lease exceeds the rent from
36 such reletting (net of costs of reletting) for that
37 month.

38 (v) Landlord's reentry shall not be construed as
39 an election to terminate this Lease, unless Landlord
40 gives Tenant written notice of termination, or unless a
41 court of competent jurisdiction orders the termination
42 of this Lease.

1 (b). Landlord may terminate this Lease by giving Tenant
2 notice of termination at any time after Tenant's default,
3 notwithstanding any prior reletting without termination.
4 Upon termination, provided it has made a reasonable, good
5 faith effort to mitigate its damages, Landlord, in addition
6 to its other remedies, may recover from Tenant all damages
7 resulting from Tenant's default, including without
8 limitation:

- 9 (i) the cost of recovering the Premises;
10 (ii) reasonable attorneys' fees; and
11 (iii) the net present worth at the time of
12 termination of the Lease, of the excess, if any, of the
13 rent payable under Lease for the remainder of the
14 stated Lease term over the then reasonable rental value
15 of the Premises for the remainder of the stated Lease
16 term.

17 17.3 Default by Landlord. If Landlord fails to pay any
18 amount due or perform any other obligation under this Lease for
19 more than thirty (30) days after Tenant notifies Landlord of the
20 nonpayment or nonperformance, Tenant may exercise any one or more
21 of the following remedies (provided, however, that if a
22 nonmonetary default by its nature cannot in the exercise of
23 reasonable diligence be cured within thirty (30) days after
24 Tenant's notice, Landlord will not be in default if Landlord
25 commences performance within that period and diligently proceeds
26 to cure the default within a reasonable time, not to exceed in
27 any event one hundred twenty (120) days):

28 (a) Tenant may cure the default and deduct the cost of
29 curing the default from subsequent amounts due under the
30 Lease:

31 (b) Tenant may recover from Landlord any damages
32 resulting from Landlord's default.

33 (c) Tenant may terminate this Lease.

34 (d) Tenant may exercise any other remedy which it may
35 have under this Lease or applicable laws or principles of
36 equity.

37 17.4 Attorney's Fees and Expenses of Litigation. If any
38 delinquent amount due either party under this Lease is collected
39 by or through an attorney, the party obligated to pay the same
40 agrees to pay the other party's reasonable attorneys' fees and
41 expenses of litigation.

1 17.5 Force Majeure.

2 (a) For the purposes of this Lease the term "Force
3 Majeure" is defined as any period of delay which arises from
4 or through acts of God; strikes, lockouts or labor disputes;
5 explosions, sabotage, accident, riot, or civil disorder;
6 acts of war; fire or other casualty; legal requirements
7 beyond the reasonable control of the party delayed; delays
8 caused by the other party; and causes beyond the reasonable
9 control of the party.

10 (b) Subject to the limitations provided in Section
11 3.3, if either Landlord or Tenant is delayed or hindered in
12 the performance of any obligation or covenant contained in
13 this Lease, other than an obligation or covenant to pay
14 money, by reason of Force Majeure which occurs within the
15 time allowed for performance under the terms of this Lease,
16 then the applicable time period for performance of such
17 nonmonetary covenant or agreement shall be extended for the
18 period of the delay attributable to Force Majeure.

19 18 INTERPRETATION

20 18.1 South Carolina Law Governs. This Lease shall be
21 governed by, construed and enforced in accordance with the laws
22 of the State of South Carolina.

23 18.2 Singular and Plural. In construing this Lease,
24 feminine or neuter pronouns shall be substituted for those
25 masculine in form and vice versa, and plural terms shall be
26 substituted for singular and singular for plural in any place in
27 which the context so requires.

28 18.3 Binding Effect. The covenants, terms, conditions,
29 provisions, and undertakings in this Lease shall extend to and be
30 binding upon the heirs, executors, administrators, successors and
31 assigns of the respective parties hereto, as if they were in
32 every case named and expressed, and shall be construed as
33 covenants running with the land.

34 18.4 Remedies Cumulative. The specified remedies to which
35 the Landlord or Tenant may resort under the terms of this Lease
36 are cumulative and are not intended to be exclusive of any other
37 remedies or means of redress to which either may be lawfully
38 entitled in case of a breach or threatened breach by the other of
39 any provision or provisions of this Lease.

40 18.5 No Waiver. No waiver of a breach of any of the
41 covenants or conditions contained in this Lease shall be
42 construed to be a waiver of any succeeding breach of the same or
43 any other covenant or condition.

1 18.6 Time of Essence. Time is of the essence in every
2 particular, especially where the obligation to pay money is
3 involved.

4 18.7 No Oral Changes. No modification, release, discharge
5 or waiver of any of the provisions hereof shall be of any force,
6 effect or value unless in writing and signed by Landlord or the
7 duly authorized agent of Landlord.

8 18.8 Entire Agreement. This instrument contains the entire
9 agreement between the parties as of this day and the execution
10 hereof has not been induced by representations, promises or
11 understandings not expressed in this Lease, and there are no
12 collateral agreements, stipulations, promises or understandings
13 whatsoever between the parties in any way touching the subject
14 matter of this instrument which are not expressly set forth in
15 this Lease.

16 18.9 Notices. All notices required or permitted by the
17 terms of this Lease shall be deemed given only when deposited in
18 the United States Registered or Certified Mail, Postage Prepaid,
19 or, with verification of delivery, when received by telegram,
20 telefacsimile or commercial courier to either party, at the
21 address set forth below for each party. Either party may change
22 the address to which notices must be sent by giving notice to the
23 other party in accordance with this Section. The initial notice
24 address for each party is as follows:

25 Landlord: Roper Mountain Road Associates, LLC
26 Attention: David W. Glenn
27 P.O. Box 10588
28 Greenville, SC 29603
29 Telefacsimile No.: (803) 242-5498

30 Tenant: Harris Teeter, Inc.
31 Attention: Real Estate Department
32 Post Office Box 33129
33 Charlotte, North Carolina 28212
34 Telefacsimile No.: (704) 845-3476

35 18.10 Construction. The Lease shall not be construed
36 strictly against either party, but fairly in accordance with
37 their mutual intent as expressed in this Lease.

38 18.11 Recording. This Lease shall not be recorded, but the
39 parties agree to execute a Memorandum of this Lease for recording
40 purposes which shall set forth the manner of determination of the
41 Commencement Date, the term of the Lease and all extensions, a
42 legal description of the location of Tenant's Premises and a
43 description of Tenant's exclusive rights under this Lease. Upon
44 the request of either party, a supplemental Memorandum setting
45 forth the exact Commencement Date shall be ordered when the
46 Commencement Date has been determined.

1 IN WITNESS WHEREOF, Landlord and Tenant have caused this
2 Lease to be executed in several counterparts, each of which shall
3 be construed to be an original, and a copy of which is retained
4 by each of the parties, as of the day and year first above
5 written.

6 LANDLORD:

7 ATTEST:

8 C. C. Hughes
9 Secretary

By: Daniel W. Reed

10 [CORPORATE SEAL]

11 TENANT:

12 HARRIS TEETER, INC.

13 ATTEST:

14 Dwight W. Hawley
15 Secretary

By: Edmund J. [Signature]

President

16 [CORPORATE SEAL]

STATE OF South Carolina
COUNTY OF Greenville

I, Jennifer M. Choatham a Notary Public of said county and state, hereby certify that C. Guy Woolbright personally came before me this day and acknowledged that he is Secretary of Roper Mt. Rd. Assoc. Inc. a corporation, and that by authority duly given and as the act of the corporation, the foregoing instrument was signed in its name by its President, sealed with its corporate seal, and attested by himself as its Secretary.

WITNESS my hand and notarial seal this the 1ST day of May, 1995.

Jennifer M. Choatham
Notary Public

My Commission Expires:

12-30-03

[NOTARY SEAL]

STATE OF NORTH CAROLINA

COUNTY OF Calhoun

I, Cecilia Jeanette Paul a Notary Public of said county and state, hereby certify that Dwight Brantley personally came before me this day and acknowledged that he is Secretary of HARRIS TEETER, INC., a corporation, and that by authority duly given and as the act of the corporation, the foregoing instrument was signed in its name by its President, sealed with its corporate seal, and attested by him self as its Secretary.

WITNESS my hand and notarial seal this the 20th day of April, 1995.

Cecilia Jeanette Paul
Notary Public

My Commission Expires:

My Commission Expires September 19, 1995

[NOTARY SEAL]

LEATHERWOOD WALKER TODD & MANN, P.C.

ATTORNEYS AT LAW
THE LEATHERWOOD PLAZA
300 EAST MCBEE AVENUE, SUITE 500
GREENVILLE, SOUTH CAROLINA 29601
FAX: (864) 240-2477
TELEPHONE: (864) 242-6440

September 26, 2007

Mailing Address:
Post Office Box 87
Greenville, SC 29602-0087

COUNSELLOR
JAMES H. WATSON

D.R. LEATHERWOOD
1996-1999
WESLEY M. WALKER
1995-1999
FLETCHER C. MANN
1991-2000

WRITERS
Direct Dial: 864-240-2484
Direct Fax: 864-240-2478
E-Mail: jmoorhead@lwmm.com

JOHN E. JOHNSTON, JR.
HARVEY G. SANDERS, JR.
DAVID A. QUATTLEBAUM III
JOSEPH E. MAJOR
DUKE K. MCCALL, JR.
CARLE G. FLEWITT
J. RICHARD KELLY
A. MARKYN QUATTLEBAUM
JACK H. TEDARDS, JR.
P. MARION RUGES
MICHAEL J. GILES
MARK B. HOLMES
WILLIAM L. DENNIS
NATALIA M. MCNEW
ROBERT A. DENKIL
RICHARD L. FEW, JR.
STEVEN E. FARRAR
THOMAS W. EPTING
JAMES L. ROGERS, JR.
DAVID E. HODGE
FRANK C. WILLIAMS III
WILLIAM L. ITTAM
ROBERT D. MOSELEY, JR.
JAMES T. HEWITT
KURT M. BOZELSKY
J. TODD HYVIE

LAUREL R.S. BLAIR
JAMILE J. FRANCES III
JOHN P. BORDMAN
SEANN GRAY TZOUVELEKAS
WILLIAM B. SWENT
MICHELLE FULLER LYERLY
LAURIN MILFORD McDONALD
PETER A. RUTLEDGE
PAUL E. HAMMACK
CARLY V. HICKS
MARY IL WATERS
J. KURT SCHUMACHER, JR.
JENNIFER ADAMSON MOORHEAD
MARSHALEY C. MOSES
ALEXANDER N. MACCORMACK
OLIVIA T. ROWE
DANIEL D. NEWSON
ZANDRA L. SODISON
S. BROOKS CHAPMAN
JOHN M. WALKER
T. GRIFFIN BELL
THOMAS M. LARKIN
SALLIE S. HOLLER
JASON D. MAERTENS
MATTHEW M. STAAR

Harris Teeter, Inc.
Attn: Real Estate Department
701 Crestdale Drive
Matthews, NC 28105

Re: Lease (as amended, modified and supplemented from time to time, the "Lease") originally by and between Roper Mountain Road Development Associates, LLC as landlord and Harris Teeter, Inc. ("Harris Teeter") as tenant, dated April 20, 1995, concerning certain real property located at 401 Roper Mountain Road in Greenville, South Carolina (the "Property").

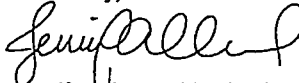
Dear Sirs:

Enclosed, please find an original notice letter we have attempted to send to your attention several times by certified mail; it has been rather a comedy of errors attempting to get the fully-correct address before we were able to confirm this one, and we sincerely apologize for the delay.

We represent the purchaser of certain property in Greenville, South Carolina affected by a lease originally entered into by Harris Teeter, Inc. (which later assigned its interest to BI-LO, LLC). Since the terms of the lease required the original tenant to remain jointly and severally liable with an assignee or sublessor, our client has asked that we get the enclosed new landlord information to you.

Please do not hesitate to call with questions or concerns.

Yours truly,



Jennifer Adamson Moorhead
Leatherwood Walker Todd & Mann, P.C.

JAM:bjm

EXHIBIT E

R-0072

LEATHERWOOD WALKER TODD & MANN, P.C.

ATTORNEYS AT LAW
THE LEATHERWOOD PLAZA
300 EAST MCBEE AVENUE, SUITE 500
GREENVILLE, SOUTH CAROLINA 29601
FAX: (864) 240-2477
TELEPHONE: (864) 242-6440

Mailing Address:
Post Office Box 87
Greenville, SC 29602-0087

JOHN E. JOHNSON, JR.
HARVEY G. SANDERS, JR.
DAVID A. QUATTLEBAUM III
JOSEPH E. MAJOR
DUSTIN K. MCCALL, JR.
EARLE G. FREYDORT
I. RICHARD KELLY
A. MARVIN QUATTLEBAUM
JACK H. TEDARUS, JR.
F. MARION HUGHES
MICHAEL J. GIBSE
MARK R. HOLMES
WILLIAM L. DENNIS
NATALMA M. MCQUEEN
ROBERT A. DEHOLL
RICHARD L. FEW, JR.
STEVEN E. FARNS
H. GIBERT SANDERS, III
THOMAS W. EPTING
JAMES L. ROGERS, JR.
DAVID E. HODGE
FRANK C. WILLIAMS III
WILLIAM L. FITZMAN
ROBERT D. NOBLEY, JR.
JAMES T. HEWITT

KURT M. ROZELSKY
I. TOD HYOB
LAUREL R.S. BLAIR
JAMILE J. FRANCIS III
JOHN F. RORDAN
BRANN GRAY TZOUVELIKAS
WILLIAM B. SWENT
MICHELE ELLER LYLES
LAURIN WELFORD McDONALD
PETER A. RUTLEDGE
PAUL E. HANSMACK
CARL V. HICKS
MARY H. WATTERS
J. KURT SCHUMACHER, JR.
JENNIFER ADAMSON MOOREHEAD
MARGARET C. MCCOY
ALEXANDRE N. MACCLENANAHAN
OLIVIA T. ROWE
BRICA B. NEWSON
ZANDRA L. JOHNSON
S. BROOKE CHAPMAN
JOHN M. WALKER
T. CRUPPIN BELL
THOMAS M. LARKIN
SALLIE S. HOLDER

May 7, 2007

COUNSEL
JAMES H. WATSON

D.B. LEATHERWOOD
1896-1899
WESLEY M. WALKER
1915-1929
FLETCHER C. MANN
1921-2000

WRITER'S
Direct Dial: 864-240-2478
Direct Fax: 864-240-2478
E-Mail: jmoorehead@lwvm.com

Via Certified Mail

Harris Teeter, Inc.
Attention: Real Estate Department
Post Office Box 33129
Charlotte, North Carolina 28212

Re: Lease (as amended, modified and supplemented from time to time, the "Lease") originally by and between Roper Mountain Road Development Associates, LLC as landlord and Harris Teeter, Inc. ("Harris Teeter") as tenant, dated April 20, 1995, concerning certain real property located at 401 Roper Mountain Road in Greenville, South Carolina (the "Property"), formerly known as Harris Teeter Store #260.

Dear Sirs:

This letter concerns that certain Lease originally between Harris Teeter and Roper Mountain Road Development Associates, LLC, the landlord's interest in which was acquired by Carolina & Georgia Immobilienfonds I, L.P. in 1997 and the tenant's interest in which was assigned to BI-LO, LLC in 2001.

Please be advised that, as of April 24, 2007, the Property and the landlord's interest in the Lease were purchased by Roper, LLC. Furthermore, although Roper, LLC shall continue to own the Property, Roper, LLC has assigned its rights and obligations as landlord under the Lease to The Delta Interests, LLC, which shall henceforth be acting in such capacity. This notice is being delivered to you for your records, as the original tenant under this Lease, which is still in full force and effect. Please direct all notices and any questions concerning the Lease to The Delta Interests, LLC at:

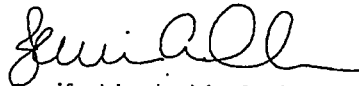
The Delta Interests, LLC
Attn: Mr. Thomas L. Thomason, Manager
753 Rabon Road
Laurens, South Carolina 29360
(864) 683-2792

R-0073

Page 2
May 7, 2007

Please do not hesitate to call with questions or concerns.

Yours truly,



Jennifer Adamson Moorhead
Leatherwood Walker Todd & Mann, P.C.

JAM:bjm

cc: The Delta Interests, LLC
753 Rabon Road
Laurens, South Carolina 29360

R-0074



**Harris
Teeter**

Post Office Box 10100
Matthews, N.C. 28106-0100
Telephone: (704) 844-3100

October 11, 2007

Via Federal Express

Jennifer Adamson Moorhead
Leatherwood Walker Todd & Mann, P.C.
The Leatherwood Plaza
300 East McBee Avenue, Suite 500
Greenville, South Carolina 29601
Phone: 864-242-6440

Re: Lease by and between Roper Mountain Road Development Associates, LLC
and Harris Teeter, Inc. dated April 20, 1995 (as amended, the "Lease") regarding
certain real property located in Greenville, South Carolina (the "Premises")

Dear Ms. Moorhead:

We received your letter dated September 26, 2007, which informs us that the shopping center upon which the Premises is located has been sold to a new owner. While we appreciate your diligence in sending us this information, we do not need this information as we no longer have liability under the Lease. I have enclosed for your files a Letter Agreement dated June 12, 2001 that was signed by our previous Landlord under the Lease. In this letter, our prior Landlord released Harris Teeter from liability with respect to the Lease. Obviously we relied on this release as part of our decision to assign the Lease to Bi-Lo, LLC.

Please call me with any questions; however, there is no need to maintain our contact information with respect to this location.

Very Truly Yours,

Taryn G. Mecia
Corporate Counsel

Enclosure

EXHIBIT F

R-0075

cc: Jeff Sherman

R-0076

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

Roper, LLC.

2010 NOV 9 P 3 02

C.A. NO.: 2010-CP-23-7266

Plaintiff.

v.

CERTIFICATE OF SERVICE

Harris Teeter, Inc.; Carolina & Georgia

Immobiliensfonds I, L.P.; GOA Realty

Management I, LLC; Germania of

America, Inc.; Miller & Martin PLLC;

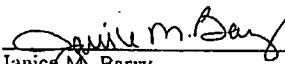
New Spring Community Church; John

Doe; Richard Roe; and Doe Corporation,

Defendants.

I HEREBY CERTIFY that true and correct copies of HARRIS TEETER, INC.'S
MOTION TO DISMISS OR, ALTERNATIVELY, FOR SUMMARY JUDGMENT.
MEMORANDUM OF LAW IN SUPPORT OF MOTION, and AFFIDAVIT OF JEFF D.
SHERMAN were served upon all counsel of record via U.S. Mail, postage prepaid, on this the
9th day of November, 2010 to the following address:

John A. Hagins, Jr., Esquire
Stephen R. H. Lewis, Esquire
Covington, Patrick, Hagins, Stern & Lewis, PA
P.O. Box 2343
Greenville, SC 29602


Janice M. Barry
Legal Assistant to Jesse C. Belcher
Haynsworth Sinkler Boyd, P.A.
P.O. Box 2048
Greenville, SC 29602

Page 1 of 1

R-0077

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
C.A. No. 20.0-CP-23-1266

Roper, LLC,

Plaintiff,

vs.

Harris Teeter, Inc.; Carolina & Georgia
Immobilienfonds I, L.P.; GOA Realty
Management I, LLC; Germania of America,
Inc.; Miller & Martin, PLLC; New Spring
Community Church; John Doe; Richard Roe;
and Doe Corporation,

Defendants.

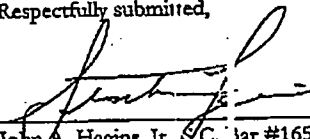
SUMMONS

(July Trial Demanded)

FILED
CLERK OF COURT
GREENVILLE, SC
2010 NOV 24 PM 1:19

YOU ARE HEREBY summoned and required to answer the Amended Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Amended Complaint on the subscribers at their offices, 211 Petriana Street, P.O. Box 2343, Greenville, South Carolina, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Amended Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court and judgment by default will be rendered against you for the relief demanded in the Amended Complaint.

Respectfully submitted,


John A. Hagins, Jr., S.C. Bar #1657
Stephen R.H. Lewis, S.C. Bar #12947
Covington, Patrick, Hagins, Stern & Lewis, PA
P.O. Box 2343
Greenville, SC 29602
(864) 242-9000
Attorneys for Plaintiff

November 24, 2010

Greenville, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
C.A. No. 2010-CP-23-7266

Roper, LLC,

Plaintiff,

vs.

Harris Teeter, Inc.; Carolina & Georgia
Immobilienfonds I, L.P.; GOA Realty
Management I, LLC; Germania of America,
Inc.; Miller & Martin, PLLC; New Spring
Community Church; John Doe; Richard Roe;
and Doe Corporation,

Defendants.

AMENDED COMPLAINT

(Jury Trial Demanded)

FILED
CLERK OF COURT
GREENVILLE CO S.C.
2010 NOV 24 PM 1:19

PLAINTIFF, complaining of the Defendants above-named, alleges as follows:

1. Plaintiff Roper, LLC ("Roper") is a South Carolina limited liability corporation with its principal offices in or near the County of Greenville, State of South Carolina.
2. Defendant Harris Teeter, Inc. ("Harris Teeter") is, upon information and belief, a North Carolina corporation doing business in the State of South Carolina.
3. Defendant Carolina & Georgia Immobilienfonds I, L.P. ("Carolina & Georgia") is, upon information and belief, a Georgia limited partnership doing business in the State of South Carolina and acting at all pertinent times herein as the general partner (Hansfried Heiler, President).
4. Defendant GOA Realty Management I, LLC ("GOA") is, upon information and belief, a Georgia limited liability corporation doing business in the State of South Carolina.
5. Defendant Germania of America, Inc. ("Germania") is, upon information and belief, a Georgia corporation with its principal office in Atlanta, Georgia and doing business through its controlled subsidiaries in Greenville County, State of South Carolina.

6. Defendant Miller & Martin, PLLC ("Miller") is, upon information and belief, a Tennessee limited liability company operating in the State of Georgia as a law firm and doing business in the State of South Carolina and, at all times herein, was engaged in the pertinent transaction regarding assignment of leases on the property in question.

7. Defendant New Spring Community Church ("New Spring") is, upon information and belief, an eleemosynary corporation doing business in Greenville County, South Carolina.

8. Defendants John Doe, Richard Doe and Doe Corporation ("Doe") are fictitious designations given for potential defendants as yet unknown specifically. This is required due to the great number of transactions in the history of this property; the changes of names of various corporations who dealt with this property, and unknown parties who may have dealt with the property who are not yet specifically known and cannot be precisely identified at this time.

9. At all times alleged herein, all relevant events took place in the County of Greenville, State of South Carolina, and arise out of the owning, leasing, and occupancy of a certain parcel of land located on Roper Mountain Road in Greenville, South Carolina, containing 8.353 acres of land, which appear on a survey prepared by Fant Engineering and Surveying Co., dated August 14, 1997, and recorded in the Office of the Register of Deeds of Greenville County in Plat Book 36-H, Pages 76-A and 76-B.

10. The property which is the subject of this action ("Roper Mountain Road Property") was owned by Roper MT, LLC ("Roper MT") and was leased to Defendant Harris Teeter on April 20, 1995, and, thereon, was situated a 61,217 sq. ft. building and a vacant land for parking, commencing during a period between November 1, 1995 until January 1, 1996, for a term of 20 years after the commencement date, all of which appears with the conditions and obligations in a 31-page lease with attachments and duly recorded in the RMC Office of Greenville County as required to place all persons and the public on recorded notice of the transaction and the terms of it.

11. On or about July 7, 2001, Defendant Harris Teeter did assign, transfer, set over and deliver unto Bi-Lo, LLC ("Bi-Lo"), being a Delaware limited liability company, all of their rights and title in the leasehold interest ("the lease to Bi-Lo") which included the terms and conditions of the assumption of the lease of Harris Teeter to the Landlord ("Assignment of Lease") which included the obligation in the Harris Teeter lease to pay rent to the Landlord for the term of the lease as described in Paragraph 5 ("Rent") and assumed by Bi-Lo without the recorded release of Defendant Harris Teeter. This assignment of the lease was duly recorded in the RMC Office of Greenville County.

12. This lease agreement to a substantial company, Defendant Harris Teeter, was a very important factor in the value of the property as it constituted an obligation by Defendant Harris Teeter to pay rent and any subsequent assignment of this lease, as drafted and as recorded and placed on the public record for all persons to receive recorded notice. The obligation of Defendant Harris Teeter gave strong reinforcement of property values and of the subsequent security of any future purchaser.

13. On or about October 1, 1997, Roper MT deeded this property to a certain conglomerate of developers operating in a relationship owned and controlled in whole or in part and through subsidiaries or allied companies known as "Germania of America, Inc." ("Germania") and, at that time, doing business as BRIL, LP, which later became known as Defendant Carolina & Georgia. This transfer of ownership of the property was duly recorded in the RMC Office of Greenville County on October 16, 1997, in order to give notice to the public and all interested persons as to the ownership of the property as required by law.

14. On or about July 7, 2001, Defendant Harris Teeter did assign its lease interest by way of a document known as "Assignment and Assumption of Lease" (unrecorded) and did transfer, set over and deliver the premises to Bi-Lo, LLC, believed to be a Delaware limited liability company.

This assignment included the right, title and leasehold interest of the premises and, particularly and very importantly, the lease of Defendant Harris Teeter's Store #260, located on Roper Mountain Road in Greenville County, South Carolina. The lease, executed by both parties, states as follows:

- a) That the property is transferred from Defendant Harris Teeter to Bi-Lo;
- b) That Bi-Lo has the same right to hold the property for the remainder and the extended term of the lease; Harris Teeter warrants that it is the owner and the holder of a good leasehold estate and has the full authority to assign it and will warrant and defend the title to do so against any lawful claims;
- c) That Bi-Lo, the Assignee, assumes and agrees to perform all the terms of the lease, which are required by it;
- d) That Defendant Harris Teeter, the Assignor, agrees to indemnify and hold harmless the Assignee Bi-Lo from any liabilities, damages, costs, and expenses, and that Bi-Lo, the Assignee, agrees to indemnify and hold Defendant Harris Teeter harmless from any of the same if it does not perform its obligations under the lease.

These are the sole contents of the assignment and assumption of this lease. Nothing herein releases Defendant Harris Teeter's lease payment obligations.

15. Thereafter, Bi-Lo entered into negotiations that would greatly and significantly change the entire use, character, value of this property, leasing the same to Defendant New Spring church. Plaintiff strongly objected to this use and transfer and sublease of the property.

16. On October 16, 2007, Bi-Lo and Defendant New Spring entered into a sublease agreement and specifically referred to the provisions of the "master lease" and provided that those provisions "shall prevail". This sublease provided, *inter alia*, a Paragraph 13 entitled "Laws, Waste or Nuisance", and provided that the sublessee, Defendant New Spring, would:

- a) Comply with all laws and ordinances in force;

- b) Not suffer, permit, or commit any waste or nuisance;
- c) Not conduct any auction, distress, fire, or bankruptcy sale, excluding the sale of obsolete equipment and shall, in any event, first notify and receive the sublessor's prior written approval.

17. Paragraph 14 of the sublease recites Defendant New Spring shall not permit businesses to be operated in or from the premises by concessionaire or licensee without prior written consent of sublessor nor, in Paragraph 15, sublet in part any part of the premises; nor in Paragraph 16, to install signs or devices which do not comply with applicable governmental laws, rules, regulations or ordinances and shall keep such fixtures in good repair.

18. At all times herein, Defendant Germania was represented by Defendant Miller & Martin, PLLC, Attorneys at Law, with a law practice comprised of transitional legal work. All allegations herein pertaining to this law firm are based upon information and belief as supplied to Plaintiff. There is no evidence that this law firm ever recorded or had recorded any type of release from rent payments. Plaintiff proposes an extension of time to explore the facts to determine if the action against Miller should proceed or should be dismissed in some form.

19. At no time during the course of the ownership of this property from the time it was acquired by Roper MT. and then leased to Defendant Harris Teeter on April 20, 1995, with various amendments thereafter, including Memorandum of Lease dated March , 1996, as recorded in the RMC Office of Greenville County on May 7, 1996, between Roper MT and Defendant Harris Teeter and various supplements to Memorandum of Lease dated September 20, 2000. The property was then sold to a subsidiary of Defendant Germania, being Defendant Carolina & Georgia and their general partner, Defendant GOA and, specifically, acquired the Assignment of Lease from Defendant Harris Teeter to Bi-Lo, LLC. Thereafter, the property was subleased to Defendant New Spring. At no time did Defendants Harris Teeter or Germania or its subsidiaries record the June 21,

2001, letter or any other document purporting to release Defendant Harris Teeter from rent payments. Specific reference is made to the failure to include, in any of these documents, that the duties that Defendant Harris Teeter had to the Landlord had in any way been terminated, modified, or released in its assignment to Bi-Lo, LLC.

20. Thus, when the property was acquired by Plaintiff from Defendant Carolina & Georgia, an examination of the record title did not reveal that any such termination, alteration, modification, or change had been made by Defendant Harris Teeter nor that Defendant Harris Teeter had entered any agreement with and by any documents which purported to accomplish such an important change. This is highly significant as Plaintiff would not have purchased the property as Landlord (through Assignment by the Delta interest) had they been aware that the most financially stable predecessor, Defendant Harris Teeter, having obligations under the lease to pay rent had terminated, or attempted to terminate, those obligations.

21. At some point in time, it now appears, unknown to Plaintiff (Plaintiff later learned that due to the failure of the Defendants to record any formal transactions or otherwise notice and advise Plaintiff by letter, recordation, or action through legal counsel, of any leaseholder's rights and obligations), their rights were significantly prejudiced. Defendant Harris Teeter was engaged in the act of assigning its lease to Bi-Lo, Inc. Prior to the acquisition of this property by Plaintiff, no evidence came to their attention that there were any material changes made in the obligations of the Defendant Harris Teeter lease by actual notice or record such changes. Much later, on or about April 2007, it, apparently, sought from the, then, Landlord, Defendant Germania and its subsidiary, Defendant Carolina & Georgia, by and through its subsidiary, Defendant GOA, some modifications as to its responsibility under Lease Agreement to a prior landlord on this property. Defendant Harris Teeter first wrote a letter on June 12, 2001, stating some possibilities and objections that it

might seek in assigning leases (specific reference is made to Paragraph 2 of the letter of June 12, 2001) and says to Defendants:

IF [emphasis added] it does close...will provide you with a copy of the Assignment and Assumption Agreement, whereby Harris Teeter's rights under the lease have been assigned to Assignee and whereby Assignee assumes Harris Teeter's obligations under the lease...IF [emphasis added] the lease is not assigned by Harris Teeter to Assignee, Harris Teeter will continue to be solely responsible for Tenant's obligations under the lease.

22. At no time whatsoever did Defendants Harris Teeter, Germania or its subsidiaries, or their legal counsel ever record or give notice to Plaintiff of any document purporting to give Defendant Harris Teeter relief from its obligations as a tenant to pay rent or to otherwise be responsible for its obligations as a tenant from the prior recorded lease agreement. To the contrary, Defendant Germania gave Plaintiff an affidavit presumably prepared by its counsel Defendant Miller & Martin that no such obligation had been released.

23. Defendant GOA, on behalf of Defendant Carolina & Georgia, acknowledged receipt of this letter indicating what Defendant Harris Teeter might do "if" certain things happened. A copy of this letter was not made available to Plaintiff until many years thereafter. Even so, the letter does not say what the final outcome was in regards to Defendant Harris Teeter's obligations as a Tenant to pay rent.

24. On April 16, 2007, Defendant GOA, as the authorized general partner of Defendant Carolina & Georgia, executed an Affidavit presumably prepared by its counsel Defendant Miller & Martin to induce purchase by Plaintiff in which said affidavit says, *inter alia*, "The Company is currently the Landlord under a Lease Agreement...and Harris Teeter, Inc. as Tenant dated April 20, 1995..." and further says, the company (Defendant Carolina & Georgia):

...has entered into a Purchase and Sale Agreement with The Delta Interests, LLC" (later assigned to Plaintiff) and pursuant to "the contract, one of the company's obligations as Seller of the property is to deliver to Purchaser an Affidavit certifying that the company has not [emphasis added] executed any document which would

release either Harris Teeter or Bi-Lo from any of the Tenant's obligations under the lease.

It further says:

The undersigned hereby certifies to the Purchaser (The Delta Interests assigning to Plaintiff) that: a) the company has not executed ~~any~~ [any] basis added] document which would release either Harris Teeter or Bi-Lo from any of the Tenant's obligations under the lease; b) to the Seller's actual knowledge, no party has executed any document; and, c) to the undersigned's actual knowledge, neither Harris Teeter nor Bi-Lo is in default in its obligations and duties as Tenant under the lease.

Attached as Exhibit "A".

25. At no time did The Delta Interests or their Assignee and subsidiary who acquired the property, Plaintiff Roper, LLC, ever receive actual information in any form that Defendant Harris Teeter or Bi-Lo had ever been released from or was in default as to "any of the Tenant's obligations under the lease" or "in default for the obligations and duties of the Tenant under the lease".

26. The Plaintiff relied on this correspondence and affidavit, which were false, inaccurate, deceptive, and fraudulent; that these acts were aided and abetted by other defendants listed herein or other defendants yet unknown.

FOR A FIRST CAUSE OF ACTION
(Fraudulent Concealment)

27. All prior allegations are incorporated herein by reference.

28. Defendants had knowledge of the existence of the June 21, 2001, letter, purporting to relieve Harris Teeter of its lease obligations and failed to disclose the existence of the letter and/or the content of the letter to the Plaintiff.

29. Defendants had a duty to disclose the letter itself, the existence of the letter, and/or the information contained in the letter to the Plaintiff prior to the closing of the transaction at issue in this case by virtue of one of the following set of circumstances:

a) The Plaintiff had expressly reposed a trust and confidence in the Defendants with reference to the particular transaction in question or, in the alternative, from the

circumstances of the transaction, the nature of the parties dealings and/or their position towards each other, such a trust and confidence under the circumstances was necessarily implied; and,

b) The very contract and transaction itself, in its essential nature, was intrinsically fiduciary and necessarily called for good faith and full disclosure without regard to any particular intention of the parties.

30. Defendants breached this duty by their nondisclosure to the Plaintiff of the relevant and significant facts relating to the June 21, 2001 letter.

31. As a result of the Defendants nondisclosure of these facts, the Plaintiff was significantly and seriously damaged by not being afforded proper and highly important information as to the claimed representation and status of Defendant Harris Teeter's obligations.

FOR A SECOND CAUSE OF ACTION
(Constructive Fraud as to Defendants Carolina & Georgia, (OA and Germania)

32. All prior allegations are incorporated herein by reference.

33. In giving Defendants who were engaged in the assignment and transfer of leases in the handling of this property, either as Landlords or as Tenants, this Plaintiff asserts that it has been damaged by constructive fraud in the breach of a legal and equitable duty due to the utter failure to make available to prospective purchasers, users of the property, purchasers of the property, leaseholds of the property that either:

a) Harris Teeter had not adequately, legitimately, and fully assigned its duties under its lease to the Roper Mountain Road property (as it may have attempted to do so) to Bi-Lo, LLC;

b) That these acts and omissions by Defendants relating to providing notice to Plaintiff of the June 21, 2001, letter, either jointly or separately, did act in a grossly negligent or intentionally false manner to deceive and to violate public and private confidence as to the

relationship and obligations of the parties under the legal documents of lease and ownership and sale of the property to Plaintiff and did thereby injure the public interests.

34. While these acts or omissions by these Defendants may not have been intentional and deliberate actual fraud, it would only be due to there was no deliberate intent to deceive but gross negligence and recklessness in legally handling, failing to record, failing to make public, and failing to advise members of the public as it proper to do. In their acts, they were aided and abetted by either the failure or negligence of legal advice and actions, which colluded and made possible the constructive fraud, causing damage to Plaintiff.

35. The elements of the constructive fraud are, although may not be actual dishonesty, that they knew: a) of the representations of they were making—or failing to make—when they had a duty to make these representations; and, b) knowing, or should—in the exercise of due care and good legal advice and knowledge—have known of the necessity to make the representations which caused damage to the Plaintiff. These elements are as follows:

a) Representation: The Defendants (collectively) gave to Plaintiff an affidavit dated April 16, 2007, clearly stating that the Seller, Defendants Carolina & Georgia and GOA, as subsidiaries of Defendant Germania, "...the company has not executed any document which would release either Harris Teeter or Bi-Lo from any of the Tenant's obligations under the lease" and "certifies to the Purchaser that: a) the company has not executed any document which would release either Harris Teeter or Bi-Lo from any of the Tenant's obligations under the Lease; b) to the undersigned's actual knowledge, no other party has executed any such document; and, c) to the undersigned's actual knowledge, neither Harris Teeter nor Bi-Lo is in default for the obligations and duties of the Tenants under the lease".

b) Falsity of the Representation: This information given above to the Plaintiff Purchaser, upon which they relied, was false or was recklessly given or omitted without any

regard to whether it was misleading as to Defendant Harris Teeter's position. Defendant Harris Teeter did not obtain a release from their obligations, and, under the Lease, does owe, and continues to owe, the rent as described in its Lease with any Landlord but, in either case, Defendant Harris Teeter owes rent money to Plaintiff.

c) Persons Making This Representation Knew or Should Have Known of the Falsity of Them: The Defendants are very large; staffed with highly paid executives; well able to employ legal representation of the highest quality to advise them of the law and what their obligation under the law should be. Even so, the information given to Plaintiff Purchaser by the Defendants was false, and the Defendants knew or should have known of its falsity.

d) Materiality: The inaccuracy—be it false or recklessly and heedlessly made—is material because the buildings are now vacant, and no rent has been paid to the Plaintiff resulting in damage to the Plaintiff.

e) Intent that the Representation Be Acted Upon: The actions of Defendants and representations made to the Plaintiff by the Defendants were intentional, and it was intended that they be acted upon by the Plaintiff, and, in fact, the Plaintiff did so act upon them.

f) The Plaintiff Was Ignorant of its Falsity: The Plaintiff had no knowledge or information that the representations made by the Defendants were false.

g) The Plaintiff's Reliance on its Truth: The Plaintiff relied on the truth of the representations made by the Defendants, evidenced by the Plaintiff's purchase and acquisition of the property.

h) The Plaintiff's Right to Rely Thereon: The Plaintiff's reliance on the misrepresentations was reasonable and legitimate considering the circumstances of the transaction.

36. As a result of the aforesaid constructive fraud, the Plaintiff was significantly and seriously damaged.

FOR A THIRD CAUSE OF ACTION**(Waste and Breach of Contract -- Solely as to Defendant New Spring)**

37. All prior allegations are incorporated herein by reference.

38. Despite complaints by Plaintiff, Bi-Lo, LLC subleased the property in question to Defendant New Spring. This church did not and does not operate as a traditional church, having significant elements of a commercial enterprise. The highest and best use of this building as a food operation, retail department store, or similar use was substantially damaged by the removal of the signage.

39. The Defendant New Spring, dealing entirely separately with the Plaintiff, not Bi-Lo, desired to remove the Bi-Lo sign and entered into an agreement with Plaintiff that they could remove the large commercial sign for a general retail and grocery store and replace it with a large sign for their commercial church, provided that, upon vacating the premises, they would: a) remove their sign; and, b) restore a large commercial sign.

40. Pursuant to this agreement, separate from the Bi-Lo lease or its obligations, the original sign was removed and the church's sign was erected.

41. Upon abandoning the property, despite the agreement, contract, promises, and demands of Plaintiff, Defendant New Spring, with ample income and wealth, has refused to do so and has committed waste on the property by damage and destruction and has breached their contract.

42. As a result thereof, Plaintiff is entitled to recover such damages as would restore the sign to its prior condition and to compensate the Landlord for the decrease in its value by this usage and damage to the sign.

FOR A FOURTH CAUSE OF ACTION**(Breach of Contract as to Defendants Harris Teeter, Carolina & Georgia, GOA and Germani.)**

43. All prior allegations are incorporated herein by reference.

44. A binding, valid contract existed between the Defendants and Plaintiff, including, but not limited to, the Lease Agreement dated April 20, 1995, and the Purchase and Sale Agreement executed on December 11, 2006. For each such agreement, there was an offer, an acceptance, and valuable consideration.

45. Defendants breached the contract(s) by failing to honor the terms and conditions of the contract(s).

46. As a direct and proximate result of the breach of the contract(s) by the Defendants, the Plaintiff has suffered damages.

FOR A FIFTH CAUSE OF ACTION
(Promissory Estoppel as to Defendants Harris Teeter,
Carolina & Georgia, GOA and Germania)

47. All prior allegations are incorporated herein by reference.

48. Defendants, both by conduct and representations, made a promise to the Plaintiff which was unambiguous in its terms. Defendants promised and represented to the Plaintiff, both orally and through documentation, including, but not limited to, an Affidavit dated April 16, 2007, that Defendant Harris Teeter had not been released from any obligations under the lease agreements between Harris Teeter and owners of the property, including Defendant Carolina & Georgia.

49. Plaintiff reasonably relied upon the promises and representations made by Defendants.

50. The reliance by the Plaintiff upon the promises and representations made by the Defendants was expected and foreseeable by the Defendants.

51. Plaintiff's reliance upon the promises and representations made by the Defendants has resulted in injury to the Plaintiff.

FOR A SIXTH CAUSE OF ACTION
(Negligent Misrepresentation as to Defendants Harris Teeter,
Carolina & Georgia, GOA and Germania)

51. All prior allegations are incorporated herein by reference.

52. Defendants, by and through their agents and servants, made false representations to the Plaintiff through their conduct, words, and documentation, including but not limited to, the Affidavit dated April 16, 2007, that Defendant Harris Teeter had not been released from any of its obligations under the April 20, 1995, Lease Agreement.

53. Defendants had a pecuniary interest in making the representations, and the representations were made in the course of the Defendants' business, profession, or employment.

54. Defendants owed a duty of care to the Plaintiff to see that truthful information was communicated to the Plaintiff by virtue of the Defendants possessing expertise or special knowledge that ordinarily made it reasonable for the Plaintiff to rely upon the Defendants. Defendants failed to disclose to the Plaintiff the June 12, 2001 letter from Defendant Harris Teeter to Defendant Carolina & Georgia, purporting to effect a release of Defendant Harris Teeter from its obligations thereafter.

55. Defendants breached the duty to the Plaintiff by failing to exercise due care in disclosing the existence of the letter to the Plaintiff.

56. Plaintiff, justifiably, relied upon the representations made by the Defendants.

57. As a direct and proximate result of the reliance by the Plaintiff on the representations made by the Defendants, Plaintiff has suffered a pecuniary loss as more particularly set forth herein.

WHEREFORE, Plaintiff prays for judgment against the Defendants as follows:

1. Constructive Fraud: For actual and punitive damages in an amount to be determined by the Court, including, but not limited to, all rents which would have been paid by Harris Teeter under the terms of their lease, together with interest thereon, and all rights for the

collection of such rents as pertain in the Lease of Harris Teeter which accrued to the benefit of Plaintiff and for punitive damages due to constructive fraud.

2. As to Defendant New Spring: Damages for waste and breach of contract which involve the damage and destruction of the property sign for the amount to restore it to its prior condition and value.

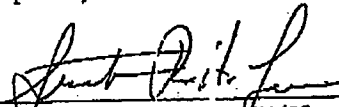
3. Breach of Contract as to Defendants Harris Teeter, Carolina & Georgia, GOA and Germania: For consequential damages as actual damages and reasonable attorneys' fees and costs of this action.

4. Promissory Estoppel as to Defendants Harris Teeter, Carolina & Georgia, GOA and Germania: For actual damages and reasonable attorneys' fees and costs of this action.

5. Negligent Misrepresentation as to Defendants Harris Teeter, Carolina & Georgia, GOA and Germania: For actual and punitive damages in an amount to be determined by the Court.

6. For such other and further relief as the Court may deem just and proper.

Respectfully submitted,



John A. Hagins, Jr., S.C. Bar #1657
Stephen R.H. Lewis, S.C. Bar #12947
Covington, Patrick, Hagins, Stern & Lewis, PA
P.O. Box 2343
Greenville, SC 29602
(864) 242-9000
Attorney for Plaintiff

November 24, 2010
Greenville, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Roper, LLC,)

Plaintiff)

vs.)

Harris Teeter, Inc.; Carolina & Georgia
Immobilienfonds I, L.P.; GOA Realty
Management I, LLC; Germania of America,
Inc.; Miller & Martin, PLLC; New Spring
Community Church; John Doe; Richard Roe;
and Doe Corporation,)

Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. No. 2010-CP-23-7266

FILED CLERK OF COURT
GREENVILLE CO. S.C.
2010 DEC 13 A 8:40

ANSWER TO AMENDED COMPLAINT
BY GERMANIA OF AMERICA, INC.

Defendant Germania of America, Inc. ("Germania"), through counsel, responds to the Plaintiff's Amended Complaint as follows:

First Defense

Germania responds to the numbered allegations of Plaintiff's Amended Complaint as follows:

1. The allegations in Paragraph 1 are admitted upon information and belief.
2. The allegations in Paragraph 2 are admitted upon information and belief.
3. Germania admits that defendant Carolina & Georgia Immobilienfonds I, L.P. was organized as a Georgia limited partnership. Except as specifically admitted herein, the allegations in Paragraph 3 are denied.
4. Germania admits that defendant GOA Realty Management I, LLC was organized as a Georgia limited liability corporation. Except as specifically admitted, herein, the allegations in Paragraph 4 are denied.

R-0094

5. Germania admits that it is a Georgia corporation with its principal office in Atlanta, Georgia. Except as specifically admitted herein, the allegations in Paragraph 5 are denied.

6. Germania admits that Miller & Martin, PLLC is a law firm operating in the State of Georgia. Germania is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 6, and therefore, denies same.

7. Germania is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 7, and therefore, denies same.

8. Germania is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 8, and therefore, denies same.

9. Germania is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 9, and therefore, denies same.

10. Germania admits the allegations in Paragraph 10 to the extent such allegations are consistent with matters of public record. Except as admitted, the allegations in Paragraph 10 are denied.

11. Germania admits that defendant Harris Teeter, Inc. and BI-LO, LLC, entered into an Assignment of Lease on or about July 7, 2001. Germania further admits the allegations in Paragraph 11 to the extent such allegations are consistent with matters of public record. Except as specifically admitted herein, the allegations in Paragraph 11 are denied.

12. Germania is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 12, and therefore, denies same.

13. Germania admits the allegations in Paragraph 13 to the extent such allegations are consistent with matters of public record. Except as admitted, the allegations in Paragraph 13 are denied.

14. Germania admits that defendant Harris Teeter, Inc. and BI-LO, LLC, entered into an Assignment of Lease on or about July 7, 2001. Except as specifically admitted herein, the allegations in Paragraph 14, including all subparts, are denied.

15. Germania is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 15, and therefore, denies same.

16. Germania is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 16, and therefore, denies same.

17. Germania is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 17, and therefore, denies same.

18. Germania admits that it has an attorney-client relationship with the law firm of Miller & Martin, PLLC. Except as specifically admitted herein, the allegations in Paragraph 18 are denied.

19. The allegations in Paragraph 19 are denied.

20. Germania is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 20, and therefore, denies same.

21. Upon information and belief, Germania admits only so much of the allegations in Paragraph 21 that allege that defendant Harris Teeter, Inc. wrote a letter on or about June 12, 2001. Except as specifically and expressly admitted herein, the allegations in Paragraph 21 are denied.

22. The allegations in Paragraph 22 are denied.

23. Upon information and belief, Germania admits only so much of the allegations in Paragraph 23 that allege that defendant GOA Realty Management I, LLC, signed a letter from Harris Teeter dated June 12, 2001. Except as specifically and expressly admitted herein, the allegations in Paragraph 23 are denied.

24. Upon information and belief, Germania admits only so much of the allegations in Paragraph 24 that allege that defendant GOA Realty Management I, LLC executed an affidavit dated April 16, 2007. Except as specifically and expressly admitted herein, the allegations in Paragraph 24 are denied.

25. Germania is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 25, and therefore, denies same.

26. The allegations in Paragraph 26 are denied.

27. In response to Paragraph 27, Germania incorporates herein its previous responses and allegations consistent herewith.

28. The allegations in Paragraph 28 are denied.

29. The allegations in Paragraph 29, including all subparts, are denied.

30. The allegations in Paragraph 30 are denied.

31. The allegations in Paragraph 31 are denied.

32. In response to Paragraph 32, Germania incorporates herein its previous responses and allegations consistent herewith.

33. To the extent the allegations in Paragraph 33 allege any wrongdoing, breach, constructive fraud, actual fraud, or misrepresentation by Germania, such allegations are denied. Germania is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 33(a), and therefore, denies same at this time. Furthermore, the

allegation in Paragraph 33(a) constitutes a legal conclusion to which Germania can neither admit nor deny at this time. All remaining allegations in Paragraph 33 are denied.

34. Germania admits that it did not deceive, and had no intent to deceive, either Plaintiff or any other party. To the extent the allegations in Paragraph 34 allege any wrongdoing, breach, constructive fraud, actual fraud, or misrepresentation by Germania, such allegations are denied.

35. The allegations in Paragraph 35, including all subparts, are denied.

36. The allegations in Paragraph 36 are denied.

37. In response to Paragraph 37, Germania incorporates herein its previous responses and allegations consistent herewith.

38. Germania is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 38, and therefore, denies same.

39. Germania is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 39, and therefore, denies same.

40. Germania is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 40, and therefore, denies same.

41. Germania is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 41, and therefore, denies same.

42. To the extent the allegations in Paragraph 42 are directed at Germania, such allegations are denied.

43. In response to Paragraph 43, Germania incorporates herein its previous responses and allegations consistent herewith.

44. The allegations in Paragraph 44 are denied.

45. The allegations in Paragraph 45 are denied.
46. The allegations in Paragraph 46 are denied.
47. In response to Paragraph 47, Germania incorporates herein its previous responses and allegations consistent herewith.
48. The allegations in Paragraph 48 are denied.
49. The allegations in Paragraph 49 are denied.
50. The allegations in Paragraph 50 are denied.
51. In response to Paragraph 51, Germania incorporates herein its previous responses and allegations consistent herewith.
52. The allegations in Paragraph 52 are denied.
53. The allegations in Paragraph 53 are denied.
54. The allegations in Paragraph 54 are denied.
55. The allegations in Paragraph 55 are denied.
56. The allegations in Paragraph 56 are denied.
57. The allegations in Paragraph 57 are denied.

For a Second Defense

Plaintiff's Amended Complaint fails to state a cause of action against Germania, and for this reason, the Amended Complaint should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

For a Third Defense

Plaintiff's claims against Germania should be dismissed because they are barred by the applicable statute of limitations.

For a Fourth Defense

Plaintiff's claims against Germania should be dismissed to the extent that Plaintiff is not the real party in interest.

For a Fifth Defense

Plaintiff's claims against Germania should be dismissed to the extent such claims may be barred by the doctrines of laches, waiver or estoppel.

Reservation and Non-Waiver

Germania reserves and does not waive any additional or further defenses as may be revealed by additional information that may be acquired in discovery or otherwise.

WHEREFORE, having fully answered the Amended Complaint against it, Germania of America, Inc. prays that the same be dismissed as to it with costs, and for such other and further relief as the Court may deem just and proper.

Dated: December 9, 2010

TURNER PADGET GRAHAM & LANEY P.A.


Sarah Day Hurley (SC Bar No. 16241)
P.O. Box 1509
Greenville, SC 29602
(864) 552-4651 (direct dial)
(864) 282-5965 (direct fax)
shurley@turnerpadget.com

Attorneys for Defendant Germania of America, Inc.

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Roper, LLC,)

Plaintiff,)

v.)

Harris Teeter, Inc.; Carolina & Georgia
Immobilierfonds I, L.P.; GOA Realty
Management I, LLC; Germania of
America, Inc.; Miller & Martin PLLC;
New Spring Community Church; John
Doe; Richard Roe; and Doe Corporation,)

Defendants.)

IN THE COURT OF COMMON PLEAS

2011 JAN 14 P 4: 47

C.A. NO.: 2010-CP-23-7266

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
JAN 14 2011

ANSWER OF DEFENDANT
HARRIS TEETER, INC.

Defendant, Harris Teeter, Inc. ("Harris Teeter"), by and through the undersigned counsel,
answering the allegations in Plaintiff's Amended Complaint, avers:

FOR A FIRST DEFENSE

1. Harris Teeter is without knowledge or information as to the allegations in Paragraph 1 of the Amended Complaint and, therefore, denies the same and demands strict proof thereof.
2. Harris Teeter admits the allegations in Paragraph 2 of the Amended Complaint.
3. Harris Teeter is without knowledge or information as to the allegations in Paragraphs 3 through 8 of the Amended Complaint and, therefore, denies the same and demands strict proof thereof.
4. Harris Teeter admits so much of the allegations of Paragraph 9 which are consistent with matters of public record. Except as admitted, Harris Teeter is without knowledge or information as to the remaining allegations in Paragraph 9 of the Amended Complaint and, therefore, denies the same and demands strict proof thereof.

R-0101

5. Harris Teeter admits so much of the allegations of Paragraph 10 which allege that on or about April 20, 1995 Harris Teeter, Inc. and Roper Mt. Rd. Assoc., L.L.C. ("RMRA") entered into a lease agreement ("Lease"), the terms of which are incorporated herein by reference. To the extent the allegations of Paragraph 10 are consistent with the terms of the Lease, those allegations are admitted and incorporated herein. Harris Teeter denies the remaining allegations of Paragraph 10 and demands strict proof thereof.
6. Harris Teeter admits so much of the allegations of Paragraph 11 that the Lease between RMRA and Harris Teeter, Inc. was assigned to Bi-Lo, LLC. RMRA did release Harris Teeter from any further obligations under the Lease. Harris Teeter denies the remaining allegations of Paragraph 11. In further answering Paragraph 11, Harris Teeter was released from all of its Lease obligations and rights by letter agreement dated June 12, 2001 between Harris Teeter and Defendant, Carolina & Georgia Immobilelienfonds I, L.P. ("CGI"), RMRA's successor-in-interest (the "Release").
7. Harris Teeter is without knowledge or information as to the allegations of Paragraph 12 of the Amended Complaint and, therefore, denies the same and demands strict proof thereof.
8. Harris Teeter admits so much of the allegations of Paragraph 13 which are consistent with matters of public record, but otherwise, Harris Teeter is without knowledge or information as to the allegations of Paragraph 13 of the Amended Complaint and, therefore, denies the same and demands strict proof thereof.
9. Harris Teeter craves reference to the "Assignment and Assumption of Lease" entered into between Harris Teeter and Bi-Lo, LLC and admits so much of the allegations of Paragraph 14, including all subparts, that are consistent therewith, the remaining allegations of Paragraph 14 are denied and strict proof is demanded thereof.

10. Harris Teeter is without knowledge or information as to the allegations of Paragraphs 15 through 18, including all subparts, of the Amended Complaint and, therefore, denies the same and demands strict proof thereof.
11. Harris Teeter admits so much of the allegations of Paragraph 19 which are consistent with matters of public record. Except as admitted, Harris Teeter is without knowledge or information as to the remaining allegations of Paragraph 19 of the Amended Complaint and, therefore, denies the same and demands strict proof thereof. To further answer the allegations of Paragraph 19, Harris Teeter avers that it did not record a letter dated June 12, 2001 between Harris Teeter and Defendant, CGI, or that it had an obligation to do so.
12. Harris Teeter is without knowledge or information as to the allegations of Paragraph 20 respecting Plaintiff's business decision to purchase the property at issue and, therefore, denies the same and demands strict proof thereof. Harris Teeter denies the remaining allegations of Paragraph 20 and demands strict proof thereof.
13. Harris Teeter admits so much of the allegations of Paragraph 21 which allege that Harris Teeter assigned the Lease to Bi-Lo, Inc. and that it entered into the Release with CGI. Harris Teeter craves reference to the Release, and admits the allegations of Paragraph 21 which are consistent therewith. Except as admitted, the remaining allegations of Paragraph 21 of the Amended Complaint are denied and strict proof is demanded thereof.
14. Harris Teeter admits so much of Paragraph 22 that it had no communication with Plaintiff prior to Plaintiff's alleged purchase of the property, but otherwise denies the same and demands strict proof thereof. Harris Teeter denies the remaining allegations of Paragraph 22 and demands strict proof thereof.

15. Harris Teeter craves reference to the Release and admits so much of the allegations of Paragraph 23 as are consistent therewith. Except as admitted, Harris Teeter denies the remaining allegations of Paragraph 23 and demands strict proof thereof.
16. Harris Teeter is without knowledge or information as to the allegations of Paragraphs 24 through 25 of the Amended Complaint and, therefore, denies the same and demands strict proof thereof.
17. Harris Teeter denies the allegations of Paragraph 26 and demands strict proof thereof.
18. Harris Teeter incorporates herein by reference the preceding paragraphs in response to Paragraph 27 of the Amended Complaint.
19. Harris Teeter denies the allegations of Paragraph 28 of the Amended Complaint and demands strict proof thereof. Harris Teeter avers that a letter, dated June 12, 2001, was sent to and subsequently signed by CGI which released Harris Teeter from any further obligations or rights under the Lease. Harris Teeter had no knowledge of Plaintiff's purchase of the property in 2007, and had no duty to disclose the Release.
20. Harris Teeter denies the allegations of Paragraphs 29 through 31, including subparts, and demands strict proof thereof.
21. Harris Teeter incorporates herein by reference the preceding paragraphs in response to Paragraph 32 of the Amended Complaint.
22. To the extent the allegations contained in Paragraphs 33 through 36, including subparts, are asserted against Harris Teeter, such allegations are denied and strict proof is hereby demanded.
23. Harris Teeter incorporates herein by reference the preceding paragraphs in response to Paragraph 37 of the Amended Complaint.

24. To the extent the allegations contained in Paragraphs 38 through 42 are asserted against Harris Teeter, such allegations are denied and strict proof is hereby demanded.
25. Harris Teeter incorporates herein by reference the preceding paragraphs in response to Paragraph 43 of the Amended Complaint.
26. Harris Teeter denies the allegations of Paragraphs 44 through 46 and demands strict proof thereof.
27. Harris Teeter incorporates herein by reference the preceding paragraphs in response to Paragraph 47 of the Amended Complaint.
28. Harris Teeter denies the allegations of Paragraphs 48 through 51 and demands strict proof thereof.
29. Harris Teeter incorporates herein by reference the preceding paragraphs in response to the second Paragraph 51 in the Amended Complaint. Harris Teeter hereby responds to the paragraphs in the sequence or order in which they appear in the Amended Complaint.
30. Harris Teeter denies the allegations of Paragraphs 52 through 57 and demands strict proof thereof.
31. Harris Teeter denies each and every other allegation not heretofore expressly explained, modified or admitted.
32. Harris Teeter generally alleges that Plaintiff failed to mitigate its damages and Harris Teeter is entitled to an offset thereof.

FOR A SECOND DEFENSE

33. Harris Teeter would show that Plaintiff has failed to state a claim upon which relief can be granted.

FOR A THIRD DEFENSE

34. Harris Teeter would show that by letter dated June 12, 2001, CGI released Harris Teeter from any further obligations or rights under the Lease.
35. CGI assigned its rights and obligations under the Lease to Plaintiff after releasing Harris Teeter from any further obligations or rights under the Lease.
36. Harris Teeter is released from any liability arising from the Lease.

FOR A FOURTH DEFENSE

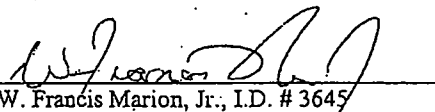
37. Harris Teeter would show that Plaintiff's claims against Harris Teeter should be dismissed because they are barred by the applicable statute of limitations.

FOR A FIFTH DEFENSE

38. Harris Teeter would show that Plaintiff's claims against Harris Teeter should be dismissed to the extent such claims may be barred by the doctrines of laches, waiver or estoppel.

WHEREFORE, having fully answered, Harris Teeter prays that Plaintiff's Amended Complaint be dismissed with costs and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,



W. Francis Marion, Jr., I.D. # 3645
Bonnie A. Lynch, I.D. #77399
Haynsworth Sinkler Boyd, PA
Post Office Box 2048
Greenville, South Carolina 29602
Telephone (864)240-3321
Fax (864)240-3336

Attorneys for Harris Teeter, Inc.

January 14, 2011
Greenville, South Carolina

STATE OF SOUTH CAROLINA)

) IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE)

Roper, LLC,)

2011 JAN 14 P 4:47

C.A. NO.: 2010-CP-23-7266

Plaintiff,)

v.)

MOTION TO DISMISS OR,
ALTERNATIVELY, FOR
SUMMARY JUDGMENT

Harris Teeter, Inc.; Carolina & Georgia)

Immobiliensfonds I, L.P.; GOA Realty)

Management I, LLC; Germania of)

America, Inc.; Miller & Martin PLLC;)

New Spring Community Church; John)

Doe; Richard Roe; and Doe Corporation,)

Defendants.)

To: Roper, LLC by and through their attorneys:

Please take Notice that Defendant, Harris Teeter, Inc. ("Harris Teeter") will move before the Presiding Judge of the Thirteenth Judicial Circuit at a time and place as designated by the court for an order granting Harris Teeter a dismissal of Plaintiff's causes of action as set forth in the Amended Complaint pursuant to Rule 12(b)(6) SCRPC or, alternatively, for summary judgment pursuant to Rule 54(c) FRCP on the basis:

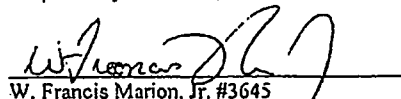
1. At the time Plaintiff purchased the subject property with the Lease, Harris Teeter had no relationship with Plaintiff, had made no representations to Plaintiff and had no duty to disclose to Plaintiff that Harris Teeter was released from the Lease years before Plaintiff purchased said property. Consequently, there can be no claim for Fraudulent Concealment, and Plaintiff's First Cause should be dismissed.
2. At the time Plaintiff purchased the subject property with the Lease, there were no communications, promises or representations between Plaintiff and Harris Teeter. Consequently, there can be no promissory estoppel and Plaintiff's Fifth Cause should be dismissed.

R-0107

3. At the time Plaintiff purchased the subject property with the Lease, there were no communications, promises or representations between Plaintiff and Harris Teeter. Consequently, there can be no claim for Negligent Misrepresentation, and Plaintiff's Sixth Cause should be dismissed.
4. In 2001, six years before Plaintiff purchased the subject property, Harris Teeter was released from the Lease on which Plaintiff's contract claim rests. Consequently, there can be no claim for breach of contract and Plaintiff's Fourth Cause should be dismissed.

Harris Teeter's Motion is based upon the pleadings, exhibits previously filed with this court, the attached affidavit and briefs and affidavits which may later be submitted to this court.

Respectfully submitted,



W. Francis Marion, Jr. #3645
Bonnie A. Lynch, I.D. #77399
Haynsworth Sinkler Boyd, PA
Post Office Box 2048
Greenville, South Carolina 29602
Telephone (864)240-3321
Fax (864)240-3336

Attorneys for Harris Teeter, Inc.

January 14, 2011
Greenville, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

Roper, LLC, 2011 JAN 19 P 4:47 C.A. NO.: 2010-CP-23-7266

Plaintiff,

v.

SUPPLEMENTAL AFFIDAVIT OF
JEFF D. SHERMAN

Harris Teeter, Inc.; Carolina & Georgia
Immobilelienfonds I, L.P.; GOA Realty
Management I, LLC; Germania of
America, Inc.; Miller & Martin PLLC;
New Spring Community Church; John
Doe; Richard Roe; and Doe Corporation,
Defendants.

Personally appeared before me, Jeff D. Sherman who, first being duly sworn, deposes
and says that:

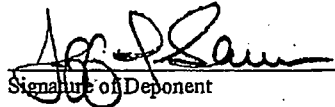
1. This Affidavit is submitted as a supplement to my previous Affidavit dated November 8, 2010 that was attached to Harris Teeter, Inc.'s ("Harris Teeter") Motion to Dismiss or in the Alternative for Summary Judgment to Plaintiff's original Complaint. Since the November 8, 2010 Affidavit was submitted, Plaintiff filed an Amended Complaint. Consequently, this Affidavit will address issues raised in the Amended Complaint that are not addressed in my original Affidavit.
2. By mutually executed letter agreement dated June 12, 2001 between Harris Teeter and Defendant Carolina & Georgia Immobilelienfonds I, L.P. ("CGI") (attached as Exhibit A to Nov. 8, 2010 Affidavit) Harris Teeter was released from its liability under the Lease as described in Exhibit A. Relying upon CGI's release, Harris Teeter assigned its interest in the Lease to Bi-Lo, Inc. ("Bi-Lo"), effective July 9, 2001. Harris Teeter had no further

R-0109

interactions with CGI or any other landlord of the property located at 401 Roper Mountain Road, Greenville, South Carolina, (the "Property") until September 26, 2007 when Ms. Moorhead, Plaintiff's counsel, wrote a letter to Harris Teeter informing it of Plaintiff's purchase of the Property. See Exhibit E to Nov. 8, 2010 Affidavit.

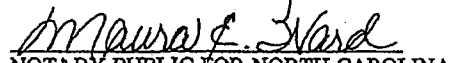
3. Harris Teeter did not maintain any control over, or interest, in the leased premises relying on CGI's release of Harris Teeter once Bi-Lo assumed the Lease obligations. Had CGI not released Harris Teeter from the Lease obligations for the Property, Harris Teeter would have taken additional action to protect its interests including, but not limited to, not leasing the property to Bi-Lo or refusing the sub-lease from Bi-Lo to New Spring Community Church, but Harris Teeter gave up this control and interest in reliance on CGI's release of Harris Teeter from the Lease obligations if Bi-Lo assumed the Lease.
4. Harris Teeter had no knowledge of, and was not a party to, the April 16, 2007 Affidavit executed by Defendant GOA Realty Management I, LLC as general partner of Defendant CGI until after Plaintiff's purchase of the Property.
5. Harris Teeter had no knowledge of, and did not participate in, Plaintiff's purchase of the Property and the Lease in April 2007. Harris Teeter made no representations and had no communications or negotiations with Plaintiff regarding the Property or Harris Teeter's liability under the Lease. Harris Teeter did not become aware of said purchase until it received Ms. Moorhead's letter dated September 26, 2007, Exhibit E to Nov. 8, 2010 Affidavit.

FURTHER DEPONENT SAYETH NOT.


Signature of Deponent

Sworn to and subscribed before me this

13th day of January, 2011.


NOTARY PUBLIC FOR NORTH CAROLINA
MY COMMISSION EXPIRES: 8/5/2012

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
Roper, LLC,)
Plaintiff.)
v.)
Harris Teeter, Inc.: Carolina & Georgia)
Immobilielienfonds I, L.P.; GOA Realty)
Management I, LLC; Germania of)
America, Inc.; Miller & Martin PLLC;)
New Spring Community Church; John)
Doe; Richard Roe; and Doe Corporation.)
Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. NO.: 2010-CP-23-7266

AMENDED
MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO
DISMISS/SUMMARY JUDGMENT

FILED CLERK OF COURT
GREENVILLE, SC
2011 FEB 23 11:00
PAGE 9

Defendant, Harris Teeter, Inc. ("Harris Teeter"), submits this Amended Memorandum of Law in Support of its Motion to Dismiss or, alternatively, for Summary Judgment as to Plaintiff's First (Fraudulent Concealment), Fourth (Breach of Contract), Fifth (Promissory Estoppel) and Sixth (Negligent Misrepresentation) Causes of Action.

The gravamen of Plaintiff's Amended Complaint rests upon two (2) erroneous assertions. 1) Plaintiff claims, without support, that Harris Teeter had some direct relationship with Plaintiff which required Harris Teeter to speak or act. No such relationship existed. There was no duty to speak or act. 2) Plaintiff claims a contract existed between it and Harris Teeter. There was no contract between them. Plaintiff's predecessor-in-interest released Harris Teeter from the lease that is the subject of this action, and on which Plaintiff bases its contract claim. Failing on these

essential assertions. Plaintiff's Amended Complaint against Harris Teeter must also fail and be dismissed.¹

UNDISPUTED FACTS

In 1995, Roper MT, LLC (Plaintiff's predecessor-in-interest) leased certain real property ("Property") in Greenville County to Harris Teeter for a twenty (20) year term under a written lease agreement ("Lease"). (J. Sherman Aff. ¶ 6, Nov. 8, 2010; Ex. D). A Memorandum of the Lease was duly recorded in the Greenville County RMC office. (Book 1641 at Page 748)². By 2001, the Property and the landlord's Lease rights had been sold and were owned by the Defendant, Carolina & Georgia Immobilelienfonds L.L.P. ("CGI"). (Am. Compl. ¶¶ 13 & 19.)

In mid-2001, Harris Teeter and Bi-Lo, LLC ("Bi-Lo") were negotiating a transaction whereby Bi-Lo would take an assignment of Harris Teeter's (tenant's) Leasehold estate and assume its Lease liabilities ("Bi-Lo Assignment and Assumption of Lease"). By signed letter agreement dated June 12, 2001, CGI and Harris Teeter agreed that, if and when the Bi-Lo Assignment and Assumption of Lease became effective, CGI, as landlord, would thereafter "look solely to Assignee [Bi-Lo] for performance of the 'Tenant's' [Harris Teeter's] responsibilities under the Lease" ("Release"). (Sherman Aff. ¶ 4; Ex. A). The Bi-Lo Assignment and Assumption of Lease became effective on July 9, 2001, (Sherman Aff. ¶ 5; Ex. B), and an executed copy thereof was sent to CGI, under cover letter, on that date (Sherman Aff. ¶ 5; Ex. C). The "Assignment and Assumption of Lease" was recorded in Book 2189 at Pages 1640-43 in the Greenville County RMC office. From the effective date of the "Assignment and

¹ On November 9, 2010, Harris Teeter filed a Motion to Dismiss or, alternatively, for Summary Judgment as to the original Complaint. Before that Motion was heard, Plaintiff amended its Complaint. While Plaintiff recast its claims against Harris Teeter in the Amended Complaint, the fatal flaws found in the original Complaint continue to exist in the Amended Complaint. Harris Teeter will, therefore, rely on the exhibits attached to its Motion respecting the original Complaint and incorporates those exhibits as though attached hereto.

² Under express provisions of the Lease, Article 18.11, the Lease could not be filed with the RMC office. (Ex. D.)

Assumption of Lease." CGI looked solely to Bi-Lo to fulfill the Lease obligations, and correspondingly, Bi-Lo fulfilled all Lease obligations from 2001 until 2009 when it filed for Bankruptcy.

In April 2007, CGI sold the Property and its landlord Lease rights to Plaintiff. (Am. Compl. ¶¶ 20 & 24.) While Plaintiff was at that time admittedly aware of the Bi-Lo Assignment and Assumption of Lease, (Am. Compl. ¶ 24), Plaintiff alleges that it was unaware of Harris Teeter's Release and assumed that Harris Teeter remained liable under the Lease (Am. Compl. ¶¶ 20, 22 & 25). Plaintiff does not allege (and cannot allege): that it contacted Harris Teeter prior to the purchase of the Property in 2007 to determine if Harris Teeter was still obligated under the Lease, that it obtained an estoppel certificate from Harris Teeter at anytime, or that it determined if Harris Teeter had any business relations with CGI after the Assignment and Assumption of Lease was signed and prior to its purchase from CGI. (Supp. J. Sherman Aff. ¶¶ 2 & 5, Jan. 13, 2011.) To the contrary, Plaintiff had no contact with Harris Teeter until approximately six (6) months after its purchase from CGI. Id. ¶ 5. In September 2007, Plaintiff's counsel sent a letter to Harris Teeter regarding obligations under the Lease. (Id.; Ex. E). Harris Teeter immediately responded by advising Plaintiff's counsel that Harris Teeter had been released from the Lease obligations in 2001. (Ex. F.) Plaintiff took no action in response to Harris Teeter's letter until three (3) years later with the institution of this lawsuit.

In 2009, Bi-Lo defaulted on its Lease obligations to Plaintiff and ultimately filed proceedings under the U.S. Bankruptcy Code. In the present action Plaintiff seeks monetary damages against Harris Teeter, equal to Bi-Lo's defaulted Lease obligations, despite the fact that Plaintiff had no relationship with Harris Teeter and that it became aware after its purchase of the

Property that Harris Teeter was released from the Lease approximately six (6) years prior to Plaintiff's purchase of the Property.

DISCUSSION

Plaintiff sued Harris Teeter on four (4) separate Causes of Action. Three Causes of Action, Plaintiff's First (Fraudulent Concealment), Fifth (Promissory Estoppel) and Sixth (Negligent Misrepresentation) Causes, require Harris Teeter to have made some representation to Plaintiff. It is undisputed that Harris Teeter made no representations to Plaintiff. Therefore, in order to maintain these Causes of Action, Plaintiff must prove as a matter of law that Harris Teeter had a duty to speak or act. Plaintiff cannot meet this burden. There was no legal duty flowing between Plaintiff and Harris Teeter. Plaintiff's Fourth Cause of Action for Breach of Contract must also fail since Harris Teeter was released from all obligations under the Lease well prior to Plaintiff's acquisition of the Property and Lease.

A. Fraudulent Concealment

Plaintiff's claim for Fraudulent Concealment is based on Harris Teeter's alleged failure to disclose to Plaintiff the existence, or the substance, of the June 12, 2001 letter relieving Harris Teeter of its Lease obligations. This Cause of Action fails because Plaintiff simply can not show that Harris Teeter had a duty to disclose to Plaintiff that it was released from the Lease. Harris Teeter had no knowledge of Plaintiff's purchase of the Property until months after the purchase when Plaintiff's counsel contacted Harris Teeter by letter dated September 26, 2007. (Ex. E; Supp. Sherman Aff. ¶ 2 & 5). Harris Teeter responded by letter dated October 11, 2007 by advising counsel that it had no liability under the Lease. (Ex. F.) No action was taken by Plaintiff regarding this letter until the filing of this lawsuit three (3) years later.

Fraudulent Concealment is based on nondisclosure when there is a duty to speak. Pitts v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 335, 574 S.E.2d 502, 510 (Cl. App. 2002) (quoting Ardis v. Cox, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (Cl. App. 1993) (emphasis added). "Non-disclosure becomes fraudulent concealment only when it is the duty of the party having knowledge of the facts to make them known to the other party to the transaction." Pitts, 352 S.C. at 335, 574 S.E.2d at 510 (quoting Lawson v. Citizens & S. Nat'l Bank of S.C., 259 S.C. 477, 481-82, 193 S.E.2d 124, 126 (1972)).

The duty to disclose may be reduced to three distinct classes: (1) where it arises from a preexisting definite fiduciary relation between the parties; (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.

Pitts, 352 S.C. at 335, 574 S.E.2d at 510 (citing Ardis, 314 S.C. at 517, 431 S.E.2d at 270) (emphasis added). "[W]here there is no confidential or fiduciary relationship, and an arm's length transaction between mature, educated people is involved, there is no right to rely," and, hence, there can be no claim for fraudulent concealment. Pitts, 352 S.C. at 334, 574 S.E.2d at 509 (quoting Ardis, 314 S.C. at 517, 431 S.E.2d at 270) (emphasis added). Here, there was no relationship between Harris Teeter and Plaintiff, much less a fiduciary relationship.

It is undisputed that none of the "three distinct classes," creating a duty to disclose, existed with respect to Harris Teeter.³ Considering that Harris Teeter and Plaintiff never did business with one another, did not have a current or former contractual or business relationship

³ Plaintiff failed to plead that Harris Teeter had a preexisting definite fiduciary relationship with Plaintiff, and instead bases its theory of Harris Teeter's duty to disclose on the second and third classes of relationships as cited by Ardis. (See Am. Compl. ¶¶ 27-31.)

with one another, and Harris Teeter did not engage in negotiations and/or representations with regard to Plaintiff's purchase of the Property, (Supp. Sherman Aff. ¶¶ 2 & 5). Plaintiff cannot show that it reposed a trust and confidence in Harris Teeter regarding the purchase of the Property. See Pitts, 352 S.C. at 336, 574 S.E.2d at 510 (court found no evidence to imply the existence of trust and confidence between parties who had no previous dealings with one another or a fiduciary relationship, and were involved in an arm's length commercial transaction). Plaintiff cannot unilaterally assert that it imposed confidence in Harris Teeter and use it as a sword against Harris Teeter, without Harris Teeter accepting that confidence placed in it. Steele v. Victory Sav. Bank, 295 S.C. 290, 295, 368 S.E.2d 91, 94 (Cl. App. 1988) (citing 36A C.J.S. Fiduciary (1961) ("[A]s a general rule, a fiduciary relationship cannot be established by the unilateral action of one party. The other party must have actually accepted or induced the confidence placed in him.") Harris Teeter and Plaintiff were effectively strangers with respect to Plaintiff's purchase of the Property. Plaintiff never once made inquiry to Harris Teeter before purchasing the Property despite having knowledge of the Assignment and Assumption of Lease between Harris Teeter and Bi-Lo. (Supp. Sherman Aff. ¶ 5). Had it done so, the Release would have been discovered. A fiduciary relationship cannot exist under these allegations and facts as a matter of law.

Plaintiff asserts that "[a]t no time whatsoever did . . . [Harris Teeter] ever record or give notice to Plaintiff . . . of the Release. (Am. Compl. ¶ 22.)"⁴ What Plaintiff fails to create is a duty on Harris Teeter's part to "record or give notice." There is no duty to record the Release.

⁴ This is not true. Harris Teeter provided notice when it was advised of Plaintiff's purchase of the Property six (6) months after the purchase when Plaintiff's counsel sent Harris Teeter Exhibit E, and Harris Teeter responded within fifteen (15) days via Exhibit F.

The S.C. Recording Act, § 30-7-10 (the "Act"), which sets forth the criteria for recording real estate transactions, only applies to instruments "conveying an interest in real estate," (S.C. Code Ann. § 30-7-10), and becomes applicable only when there has been a "double conveyance." Catawba Indian Tribe v. South Carolina, 865 F.2d 1444, 1449 (4th Cir. 1989) (applying South Carolina law) (quoting First Carolinas Joint Stock Land Bank v. Hudgens, 171 S.C. 18, 21, 171 S.E. 449, 451 (1933)). The Release conveyed nothing to Harris Teeter and certainly did not convey an interest in real estate. As one might expect, there are no reported South Carolina decisions applying the Act to instruments that do not convey an interest in real estate.

Additionally, Plaintiff, as assignee of the Lease, agreed to be bound by its terms, including Article 18.11 which states: "This Lease shall not be recorded" (Ex. D.) Neither the Lease nor any other document dealing with Harris Teeter's Lease liabilities was ever recorded. Only a Memorandum of Lease was recorded (Book 1641 at Page 748) to show the legal description, permitted use of the Property and the term of the Leasehold estate. Plaintiff knew that it could not reasonably rely upon recorded documents to determine what Harris Teeter's Lease liabilities were or were not. Plaintiff was thusly on actual or, at least, "inquiry notice" that it would need to go to the source and inquire of the perceived debtor, Harris Teeter, to confirm liability. Had it done so, Plaintiff would have learned of the Release. Instead, Plaintiff did not contact Harris Teeter until after Plaintiff completed its purchase from CGI. (Sherman Aff. ¶ 7; Ex. E; Supp. Sherman Aff. ¶ 5). and, upon doing so, was promptly apprised of the Release (Sherman Aff. ¶¶ 7; Ex. F).

The proximate cause of Plaintiff's injury was its decision not to timely inquire of the perceived debtor, Harris Teeter, and to instead rely upon the April 16, 2007 Affidavit of the

perceived creditor, Plaintiff's seller, CGI, as to what Harris Teeter's liabilities might be. (Am. Compl. ¶¶ 24 & 26.) As noted in Binkley v. Rabon Creek Watershed Conservation Dist., a party is charged with inquiry notice of every fact which due diligence would have discovered, including matters outside the chain of title (i.e. the Release). See infra pp. 10-11. Plaintiff is, therefore, charged with knowledge of the Release. Plaintiff cannot, as a matter of law, prove that Harris Teeter fraudulently concealed anything, therefore this claim should be dismissed.

B. Promissory Estoppel

In order to plead and prove a Promissory Estoppel claim in South Carolina, a plaintiff must show the following elements:

- (1) the presence of a promise unambiguous in its terms; (2) reasonable reliance upon the promise by the party to whom the promise is made; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise.

Woods v. State, 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct. App. 1993) (citing Powers Constr. Co. v. Salem Carpets, Inc., 283 S.C. 302, 322 S.E.2d 30 (Ct. App. 1984) (emphasis added).

There was no promise to Plaintiff by Harris Teeter and therefore this claim must correspondingly fail.

Plaintiff bases its Promissory Estoppel claim against Harris Teeter on the allegation that by both conduct and representations, Harris Teeter

promised and represented to the Plaintiff, both orally and through documentation, including, but not limited to, an Affidavit dated April 16, 2007, that . . . Harris Teeter had not been released from any obligations under the lease agreements between Harris Teeter and owners of the property

(Am. Compl. ¶ 48.) It is undisputed that there were no communications between Plaintiff and Harris Teeter until after Plaintiff's purchase of the Property. (Supp. Sherman Aff. ¶¶ 2 & 5). Hence, there can be no promises made "orally." Similarly, there can be no "documentation" on

which Plaintiff can reasonably rely since there was no communication between them and, as indicated above, there was no duty to record the Release.⁵

Plaintiff asserts that it relied on "an Affidavit dated April 16, 2007." (Am. Compl. ¶¶ 24 & 26.) Assuming Plaintiff relied on this Affidavit, such reliance does not create a cause of action against Harris Teeter. It is undisputed that Harris Teeter was not a party to, or had knowledge of, this Affidavit. (Am. Compl. ¶ 24; Supp. Sherman Aff. ¶ 4.) Consequently, there cannot be an "unambiguous promise" made by Harris Teeter to Plaintiff arising from the April 16, 2007 Affidavit regarding Harris Teeter's obligations under the Lease. There are no other documents on which Plaintiff claims a promise was made. Having no oral or written promises from Harris Teeter, Plaintiff's claim for Promissory Estoppel must fail as a matter of law.

C. Negligent Misrepresentation

To establish a Negligent Misrepresentation claim in South Carolina, the plaintiff must plead and prove the following elements:

(1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

Hurst v. Sandy, 329 S.C. 471, 481, 494 S.E.2d 847, 852 (Ct. App. 1997) (citing Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993)).

Plaintiff attempts to fit within this criteria by asserting two (2) factual grounds: 1) that Harris Teeter falsely represented to Plaintiff via the April 16, 2007 Affidavit that it remained liable under the Lease, and 2) that Harris Teeter had a duty to disclose to Plaintiff that it was no

⁵ Additionally, the "Assignment and Assumption of Lease," was recorded. Plaintiff is on inquiry notice of all matters which due diligence would have discovered, including matters outside the chain of title (*i.e.* the Release). See Binkley v. Rebon Creek Watershed Conservation Dist., discussed *infra* pp. 10-11.

longer liable under the Lease and failed to do so. (Am. Compl. ¶¶ 52 & 54.) Neither of these assertions can be supported as a matter of law.

As indicated above, Harris Teeter made no representations to Plaintiff. (Supp. Sherman Aff. ¶ 5.) Harris Teeter was neither a party to, nor had knowledge of, the Affidavit. (Supp. Sherman Aff. ¶ 4.) Moreover, it had no duty to disclose the Release – even if it had known that Plaintiff was purchasing the Property, which Harris Teeter did not know. Simply put, Harris Teeter represented nothing to Plaintiff regarding its obligations under the Lease and had no duty to do so.

In addition to the foregoing arguments, Plaintiff cannot point to any pecuniary interest that Harris Teeter had respecting Plaintiff's purchase of the Property. At the time Plaintiff purchased the Property, Harris Teeter was no longer a party to the Lease and it had no former or current contractual relationship with Plaintiff. (Supp. Sherman Aff. ¶ 2.) As such there is simply no pecuniary interest on the part of Harris Teeter and it is, therefore, entitled to dismissal of this claim.

Even if there had been some representation by Harris Teeter (which there was not), Plaintiff could still not recover in this case. Here, Plaintiff was on notice of the Lease and the recorded "Assignment and Assumption of Lease" to Bi-Lo. Plaintiff was on notice that Bi-Lo was making, and had been making, the Lease payments for years. Plaintiff was also on notice that Harris Teeter was not making Lease payments and had not been for years. Despite this knowledge, Plaintiff did not contact Harris Teeter to inquire whether Harris Teeter was still obligated under the Lease. (Supp. Sherman Aff. ¶ 5.) As purchaser of the Property, Plaintiff is charged, as a matter of law, with actual notice of facts that could have been discovered by proper inquiry where there was sufficient evidence in the chain of title to put it on inquiry notice of an

interest in property. Kirton v. Howard, 137 S.C. 11. 37, 134 S.E. 859, 868 (1926); see also Moyle v. Campbell, 126 S.C. 180. 193-94. 119 S.E. 186, 190 (1923) (purchaser is charged with notice of all recorded instruments in chain of title and unrecorded instruments affecting title that are referred to in the recorded instruments); Binkley v. Rabon Creek Watershed Conservation Dist., 348 S.C. 58. 71, 558 S.E.2d 902. 909 (Cl. App. 2001) (citing 66 C.J.S. Notice § 19, at 454 (1998)) ("Notice of a deed is notice of its whole contents . . . and it is also notice of whatever matters one would have learned by any inquiry which the recitals of the instrument made it one's duty to pursue.")

By failing to obtain an estoppel certificate, or even communicate with Harris Teeter in any respect prior to Plaintiff's purchase of the Property, (Supp. Sherman Aff. ¶ 5). Plaintiff cannot complain of its lack of knowledge regarding Harris Teeter's release from the Lease obligations. Had Plaintiff communicated with Harris Teeter before the purchase (like it did after the purchase), the Release would have been discovered. Plaintiff simply cannot create liability on the part of Harris Teeter where Plaintiff could have "ascertain[ed] on . . . [its] own in the exercise of due diligence" that Harris Teeter was no longer liable under the Lease. AMA Management Corp. v. Strasburger, 309 S.C. 213, 223. 420 S.E.2d 868, 874 (Cl. App. 1992) (recognizing that there is no liability for misrepresentations where a plaintiff can ascertain the truth on its own by exercising due diligence.) Having failed to support the factors necessary to support a claim for Negligent Misrepresentation, this cause of action must fail as a matter of law.

D. Breach of Contract

The essence of Plaintiff's Breach of Contract claim is that Harris Teeter was not released from the Lease and is ultimately liable for the default by any sub-lessee. Plaintiff reaches these conclusions on the basis that "this [Release] letter was not made available to Plaintiff . . ." until

after it purchased the Property and that the letter "does not say what the final outcome was in regards to . . . Harris Teeter's obligations" (Am. Compl. ¶ 23.) Neither of these conclusions support Plaintiff's Breach of Contract claim.

First, as indicated above: Harris Teeter was a stranger to the transaction where Plaintiff purchased the Property. (Supp. Sherman Aff. ¶ 5.) Harris Teeter had no contact with Plaintiff prior to the sale of the Property. Id. Plaintiff's lack of knowledge of the Release letter does not defeat the prior owner's release of Harris Teeter from the obligations under the Lease.

Second, the validity of a release is a question of law. "The construction of a release is, in the first instance, a question of law for the court." Wilson Group v. Quorum Health Res., 880 F.Supp. 416, 425 (D.S.C. 1995). "[I]f the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect." M&M Group, Inc. v. Holmes, 379 S.C. 468, 476, 666 S.E.2d 262, 266 (Ct. App. 2008) (citing Ecclesiastes Production Ministries v. Outparcel Assocs., L.L.C., 374 S.C. 483, 498, 649 S.E.2d 494, 501 (Ct. App. 2007)). The release language of the June 12, 2001 letter is clear and unambiguous - CGI, the Lessor and Plaintiff's predecessor-in-interest, agreed to "look solely to [Bi-Lo] for performance of . . . [Harris Teeter's] responsibilities under the Lease" (Ex. A) - and thus fatal to Plaintiff's Breach of Contract claim.

Under South Carolina law, a release "is the relinquishment of a right or claim by the person in whom the right exists to the person against whom it might have been enforced." Wilson Group, 880 F.Supp. at 425 (citing 18 S.C. Juris. Release § 2). "No set form of words is necessary to constitute a release." Gardner v. Columbia Police Dep't, 216 S.C. 219, 223, 57 S.E.2d 308, 310 (1950), and no "magic words" are required. Wilson Group, 880 F.Supp. at 425. Courts look to the instrument itself in determining the nature of the release. Campbell v. Bi-Lo,

Inc., 301 S.C. 448, 451, 392 S.E.2d 477, 479 (Ct. App. 1990). "[P]articulate words and expressions in releases are given their ordinary meanings, unless the context indicates their use in a different sense." Gardner, 216 S.C. at 223, 57 S.E.2d at 309. There is no question under the law that a release is a binding contract. Southern Glass & Plastics Co. v. Duke, 367 S.C. 421, 428, 626 S.E.2d 19, 22 (Ct. App. 2005) (citing Gardner, 216 S.C. at 223, 57 S.E.2d at 309). Here, the Release is clear and should be enforced by the Court: CGI agreed and intended to "look solely to Assignee [Bi-Lo] for performance of the 'Tenant's' responsibilities under the Lease after the Effective Date of the Assignment." (Ex. A.)

The June 12, 2001 letter fits squarely within the definition of a release. By signing the letter CGI agreed to relinquish its right to look to Harris Teeter for performance of the "'Tenant' responsibilities under the Lease," and instead "look solely to Assignee [Bi-Lo] for performance of the 'Tenant's' responsibilities under the Lease after the Effective Date of the Assignment." (Ex. A.) CGI clearly gave up its right to look to Harris Teeter for performance under the Lease – a right which CGI could have enforced against Harris Teeter, but instead chose to rely on Bi-Lo. In turn, Harris Teeter gave up control of the Property and its rights under the Lease. (Supp. Sherman Aff. ¶ 3.)

Based on the Release with CGI, Harris Teeter completed the assignment of the Lease to Bi-Lo. (Ex. B; Supp. Sherman Aff. ¶¶ 2 & 3). It is undisputed that Plaintiff's predecessor-in-interest, CGI, was sent the "Assignment and Assumption of Lease" agreement between Harris Teeter and Bi-Lo, and that it was aware of the effective date of the assignment. (Ex. C.) As such, the terms of the Release were fulfilled in accordance with the agreement between Harris Teeter and CGI. Enforcing the Release against CGI's successor-in-interest is required in this instance. Correspondingly, Plaintiff's Breach of Contract claim should be dismissed.

Plaintiff's Amended Complaint does not seek to, and cannot, avoid the Release by claiming that it is invalid for lack of consideration. Hyman v. Ford Motor Co., 142 F.Supp.2d 735, 741 (D.S.C. 2001) (applying South Carolina law) (a valid release, like other contracts, must be based upon consideration). Nevertheless, Harris Teeter anticipates Plaintiff will make this assertion. Whether a release is based on adequate consideration is determined by the same principles of adequate consideration that apply to other contracts. Id. "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Prestwick Golf Club v. Prestwick Ltd. Pshp., 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998) (citing J.C. White Lumber Co. v. Allen, 306 S.C. 183, 410 S.E.2d 588 (Ct. App. 1991)).

More specifically, consideration exists where there is a "benefit to the promisor" (CGI) or a loss or "detriment to the promisee" (Harris Teeter). Shayne of Miami, Inc. v. Greybow, Inc., 232 S.C. 161, 167, 101 S.E.2d 486, 489 (1957) (emphasis added). In the present case, the "detriment" or "loss" to the "promisee," Harris Teeter, was that, upon receiving the Release, it gave up all of its Lease rights to Bi-Lo even though it was not obligated to do so. Howard v. South Carolina Nat'l Bank, 288 S.C. 421, 425, 343 S.E.2d 41, 43 (Ct. App. 1986) ("Detriment," in the sense of consideration for a contract, means giving up by promisee of something that he had the right to keep, or doing something he had the right not to do). Consideration also exists where there is "forbearance to exercise a legal right . . ." Prestwick Golf Club, 331 S.C. at 389, 503 S.E.2d at 186 (citing Caine & Estes Ins. Agency, Inc. v. Watts, 278 S.C. 207, 293 S.E.2d 859 (1982)). By executing the Release, Harris Teeter gave up its legal rights under the Lease, of which it was under no obligation to do. The detriment Harris Teeter experienced in foregoing its

legal right to enforce the Lease obligations against Bi-Lo or its sub-tenant was sufficient consideration to support the Release.

Moreover, and independently of the detriment to Harris Teeter, additional consideration existed by virtue of a "benefit to the promisor," i.e., CGI received Bi-Lo's liability on the Lease instead of Harris Teeter's. A similar situation is found in Davis v. Blum, 104 S.C. 218, 88 S.E. 465 (1916) where the South Carolina Supreme Court found valid consideration in a creditor's agreement to look solely to another for payment of a debt. Relying upon defendant husband's promise to pay for legal services performed on behalf of his wife, plaintiff judge undertook legal representation of the wife. Id. at 222, 88 S.E. at 466-67. When plaintiff sued defendant for payment, the Court found that legal consideration existed for the defendant's promise to pay by way of plaintiff's agreement to look solely to defendant (and not his wife) for payment. Id. at 222-23, 88 S.E. at 467. Such is the case here – consideration existed by way of Plaintiff's agreement (through its predecessor-in-interest) to look solely to Bi-Lo for all future tenant obligations under the Lease, (Ex. A), and the benefit it received from obtaining Bi-Lo's liability on the Lease.

Moreover, Plaintiff can not avoid the Release due to a claim of inadequate consideration. Adequacy of consideration is determined on the date the contract or release was entered into. Campbell v. Carr, 361 S.C. 258, 264, 603 S.E.2d 625, 628 (Ct. App. 2004).

[W]hen the consideration agreed upon for a release is something of value, courts generally will not avoid a release on the ground of inadequacy of consideration for the release because the contracting parties, not the court, must determine the quid pro quo This rule has been held to apply even though the settlement is improvident, and even when the releasor was ignorant of his rights.

Wilson Group, 880 F.Supp. at 426 (citations omitted) (emphasis in original). See also 17A Am. Jur. 2d Contracts §§ 117 & 125 (2004).⁶ Here, the parties agreed on the transfer to Bi-Lo. The owner gained a strong, new tenant, and Harris Teeter gave up its rights under the Lease.

Even if there was inadequate consideration (which there was not) to support the Release, the equitable doctrine of promissory estoppel supplies the requisite consideration. Duke Power Co. v. South Carolina Public Service Com., 284 S.C. 81, 100, 326 S.E.2d 395, 406 (1985) ("The principle of promissory estoppel is viewed as a substitute for, or an equivalent of, consideration.") The doctrine of promissory estoppel holds that

"an estoppel may arise from the making of a promise, even though without consideration, if it was intended that the promise should be relied upon and in fact it was relied upon, and if a refusal to enforce it would be virtually to sanction the perpetration of fraud or would result in other injustice."

Higgins Constr. Co. v. Southern Bell Tel. & Tel. Co., 276 S.C. 663, 665, 281 S.E.2d 469, 470 (1981) (quoting 28 Am. Jur.2d, Estoppel and Waiver, § 48 (1966) (emphasis added). The elements of equitable or promissory estoppel are (1) the presence of an unambiguous promise; (2) reasonable reliance upon the promise by the promisee (Harris Teeter); (3) such reliance is expected and foreseeable by the promisor (CGI); and (4) the promisee (Harris Teeter) is injured

⁶ As stated in American Jurisprudence,

[a] benefit to the promisor . . . is sufficient consideration for a contract, regardless of the amount of the benefit The term[] 'benefit' . . . [is] thus used in a legal or technical sense and has[s] no necessary reference to material advantage . . . to the party[] . . . or to any actual pecuniary gain

17A Am. Jur. 2d Contracts § 117 (2004) (citations omitted).

Consideration is not insufficient merely because it is inadequate. The legal sufficiency of consideration for a promise does not depend upon the comparative economic value of the consideration and of what is promised in return . . . and whatever consideration a promisor asserts to as the price of a promise is legally sufficient. Even a nominal consideration, such as \$1, will sustain a promise if it is the consideration in fact agreed upon.

Id. at §125 (citations omitted).

by his reliance. Trident Constr. v. Austin Co., 272 F.Supp.2d 566, 576-77 (D.S.C. 2003) (applying South Carolina law)).

In present context, CGI's promise to release Harris Teeter upon the consummation of the Bi-Lo Assignment and Assumption of Lease forms the promise upon which promissory estoppel in this case is based. (Ex. A.) There is no doubt that CGI's promise was unambiguous – CGI agreed to “look solely to Assignee [Bi-Lo] for performance of the ‘Tenant’s’ responsibilities under the Lease” (Ex. A.) Additionally, the promise was set forth in writing and mutually executed by CGI and Harris Teeter. (Ex. A.)

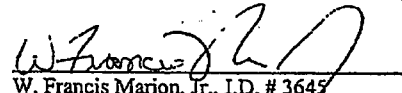
With respect to the second and third elements of promissory estoppel, Harris Teeter's reliance upon CGI's promise was reasonable, and expected and foreseeable by CGI. Harris Teeter's reliance upon CGI was reasonable as it was in writing and was asked for and received before Harris Teeter assigned its Lease rights to Bi-Lo. (Ex. A; Supp. Sherman Aff. ¶¶ 2 & 3). In view of this, CGI knew that Harris Teeter would rely upon its promise in deciding whether to consummate the proposed Bi-Lo transaction and, if so, upon what terms.

Lastly, there can be no question that if Plaintiff is not estopped from claiming against Harris Teeter, Harris Teeter could face a claim for un-made Lease payments caused by Bi-Lo's default – which could be in the millions of dollars. By relying on CGI's promise to look to Bi-Lo for future obligations under the Lease, Harris Teeter gave up its rights under the Lease, (Supp. Sherman Aff. ¶ 3), and would be damaged if it is now found to have some obligation after no contact with Bi-Lo or the Landlord for more than six (6) years (Supp. Sherman Aff. ¶ 2). Clearly, it would be a complete injustice to Harris Teeter. Therefore, Plaintiff's Breach of Contract claim should be dismissed.

Conclusion

For each of the independent reasons stated hereinabove, all of Plaintiff's claims against Harris Teeter should be dismissed.

Respectfully submitted,



W. Francis Marion, Jr., I.D. # 3645
Bonnie A. Lynch, I.D. #77399
Haynsworth Sinkler Boyd, PA
Post Office Box 2048
Greenville, South Carolina 29602
Telephone (864)240-3321
Fax (864)240-3336

Attorneys for Harris Teeter, Inc.

February 23, 2011
Greenville, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

2011 FEB 23 P 4:08

IN THE COURT OF COMMON PLEAS

Roper, LLC,

FILED-CLERK OF COURT
GREENVILLE CO. S.C.A. No.: 2010-CP-23-7266
FILED-CLERK OF COURT

Plaintiff,

MEMORANDUM IN OPPOSITION TO
DEFENDANT HARRIS TEETER'S
MOTION TO DISMISS/SUMMARY
JUDGMENT

v.

Harris Teeter, Inc., Carolina & Georgia
Immobilielienfonds I, L.P., GOA Realty
Management I, LLC, Germania of
America, Inc., Miller & Martin PLLC,
New Spring Community Church, John
Doe, Richard Doe, and Doe Corporation,

Defendants.

The Plaintiff, Roper, LLC, (hereinafter "Plaintiff") submits to the Court this Memorandum in Opposition to Defendant Harris Teeter's Motion to Dismiss/Summary Judgment.

FACTS

This dispute centers on a parcel of commercial real estate (hereinafter "the Property") located on Roper Mountain Road. The Property was originally owned by Roper MT. On or about April 20, 1995, Roper MT executed a twenty-year lease (hereinafter "Lease") with Defendant Harris Teeter, and a Memorandum of Lease was recorded on May 1, 1995 in Book

1641 at Page 748.¹ Roper MT then conveyed the property to Germania of America, Inc., which later became known as Defendant Carolina & Georgia Immobilelienfonds I, L.P. (hereinafter "Defendant Carolina & Georgia"), by Deed dated October 1, 1997 and recorded October 16, 1997. Subsequently, on July 9, 2001, Defendant Harris Teeter assigned the Lease to third-party Bi-Lo. This Assignment and Assumption of Lease (hereinafter the "Assignment") was recorded five years later on February 15, 2006 in Book 2189 at Page 1640.

In reliance upon Defendant Harris Teeter's strength as a tenant, Plaintiff sought assurances from Defendant Carolina & Georgia that Defendant Harris Teeter was still bound by the terms of the Lease.² Manfred Heiler, general partner of Defendant Carolina & Georgia, executed an affidavit which certified "that the [Defendant Carolina & Georgia] has not executed any document which would release either Harris Teeter or Bi-Lo from any of the tenant's obligations under the Lease." This affidavit, coupled with the recorded Assignment which makes no mention of releasing Defendant Harris Teeter's continuing liability under the Lease, provided reasonable certainty that the Lease terms remained unmodified. Based upon this fact, on or about April 16, 2007, the Plaintiff purchased the Property from Defendant Carolina & Georgia.

After Plaintiff purchased the Property, Plaintiff's real estate counsel at Leatherwood Walker Todd & Mann (hereinafter "Leatherwood") sent Defendant Harris Teeter the new landlord information for its records. On October 11, 2007, counsel at Leatherwood received correspondence from Taryn Mecia, corporate counsel for Defendant Harris Teeter, stating that Defendant Harris Teeter did not need the new landlord information as it no longer had liability

¹ The actual Lease was not recorded.

² Defendant Harris Teeter was not physically conducting business on the Property because it had entered into a sublease with Bi-Lo prior to Plaintiff purchasing the Property.

under the Lease. Attached to the October 11, 2007, correspondence was a letter dated June 12, 2001, from Defendant Harris Teeter's Vice President of Real Estate to Hugh Gage, Jr., Executive Vice President of Defendant Germania of America, Inc. This letter asserted that in the event of a future lease assignment, the assignee shall assume all of Defendant Harris Teeter's obligations under the Lease, and the landlord will look "solely to the Assignee for performance of the 'Tenant's' responsibilities under the Lease after the Effective Date of the Assignment." This communication was neither recorded as a modification to the Assignment dated July 9, 2001, nor was it disclosed to Plaintiff at any time prior to its purchase of the Property.

LAW

Summary judgment is appropriate only when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Café Associates, Ltd. v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991). Furthermore, all evidence and inferences from facts in the record should be considered in the light most favorable to the non-moving party. Tom Jenkins Realty, Inc. v. Hilton, 278 S.C. 624, 300 S.E.2d 594 (1983). Each conclusion, inference, and ambiguity arising out of the evidence should be construed most strongly against the party seeking summary judgment. Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001). Even when there is no dispute as to evidentiary facts, but only as to conclusions or inferences to be drawn from them, summary judgment should be denied. Nelson v. Charleston County Parks & Recreation Com'n, 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). Because it is a drastic remedy, summary judgment should be cautiously invoked to insure a litigant is not properly deprived of a trial on disputed factual issues. Helena

Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004); Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004).³

ARGUMENT

I. Summary judgment is improper because there are genuine issues of material fact.

A primary example of an important unresolved fact is the relationship of the parties and third-parties relating to this transaction and the duties that exist between them. Defendant Harris Teeter asserts that it has no duty to Plaintiff in this action; however, it is inappropriate to make such a conclusory statement without the relationship of the parties being fully determined. In a fraudulent concealment case, which Plaintiff has plead as its first cause of action, South Carolina courts have determined that nondisclosure is fraudulent when there is a duty to speak, Ardis v. Cox, 314 S.C. 512 (Ct. App. 1993), and have set forth three distinct classes of when a duty to disclose arises:

(1) where it arises from a preexisting definite fiduciary relation between the parties; (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.

Id.

In its Complaint, Plaintiff pleads that such a duty to disclose exists in this case, and Defendant Harris Teeter's assertion to the contrary is insufficient to resolve this issue. The unknown nature of the complete relationship of the parties demonstrates the

³ It is unclear as to whether Defendant Harris Teeter is basing its arguments on a Rule 12(b)(6) Motion to Dismiss or, alternatively, a Summary Judgment Motion under Rule 56, as Harris Teeter cited no law in its Memorandum on which to support either Motion. Regardless, Harris Teeter's arguments fail on both Motions, as it has not satisfied the burden of showing there is no genuine issue of material fact present in this action.

existence of genuine issues of material fact and shows that summary judgment is inappropriate.

Another example of a genuine issue of material fact is unknown circumstances surrounding the transaction itself. Even a cursory review of each party's memorandum for the pending motions shows different versions of facts for the same transaction. Plaintiff alleges certain facts in its Complaint that Defendant Harris Teeter denies. It appears that the intent of Defendant Harris Teeter's motion for summary judgment is to attempt to dispose of this matter quickly so to preclude discovery of evidence to support Plaintiff's allegations.

A third but critical example of a genuine issue of material fact is that Plaintiff has not been afforded the opportunity to review or to determine the existence of critical documents related to this transaction. The complicated set of facts surrounding transactions involving the Property include three conveyancing transactions wherein title to the subject property was vested in three different persons/entities. Associated with each of these transactions are important documents that have yet to be produced. Additionally, Plaintiff has knowledge of certain assignments and purported "release" documents, but has not even had the opportunity to further investigate as to the existence of additional documents or supporting documents. The veracity and validity of these documents, particularly the effectiveness of the "release," as well as the circumstances surrounding them, are at the heart of this case and must be fully adjudicated before this case can be resolved. As a result, summary judgment cannot be granted in this matter.

II. Defendant Harris Teeter's arguments fail because they are unsupported by facts.

Plaintiff's reliance on the recorded documents was reasonable. Defendant Harris Teeter takes two opposing positions regarding notice and the recorded instruments in question in this action. First, it purports that Plaintiff could not reasonably rely on recorded instruments because it claimed to have not duty to record relevant documents. (See Defendant Harris Teeter's Memorandum, p. 7). Defendant Harris Teeter then takes a conflicting stance when it alleges that because of the recorded Assignment, Plaintiff should have been on notice of the potential existence of a release. *Id.* at 10.

As to Defendant Harris Teeter's first argument, citing Catawba Indian Tribe of South Carolina v. State of South Carolina, 865 F.2d 1444, 1449 (4th Cir. 1989), it asserts that the South Carolina Recording Act (hereinafter "the Act") does not impose a duty to record documents that do not convey an interest in real estate. (See Defendant Harris Teeter's Memorandum, p. 7). ("...applicable only when there has been a 'double conveyance.'") However, Catawba is not analogous to the present case. In the current action, there is no question as to who holds legal title to the property; rather, the issue is whether Defendant Harris Teeter had either a legal or fiduciary duty to record the purported "release." Catawba involved a dispute that arose as to the enforceability of a treaty that conveyed an interest in real property which was not recorded in the RMC office. Defendant asserts that Catawba supports its interpretation of the Act, § 30-7-10, when Catawba never actually cites the Act. Additionally, common practice demonstrates that certain documents, such as a general durable power of attorney, are to be recorded in the Office of the Register of Deeds, even though they do not convey an interest in real estate.

Further, in citing Article 18.11 of the Lease, which provides that "[t]his Lease shall not be recorded...", Defendant Harris Teeter asserts Plaintiff should not rely on recorded documents

to determine what the liabilities of the involved parties. Defendant Harris Teeter further asserts that "[n]either the Lease nor any other documents dealing with Harris Teeter's Lease liabilities was ever recorded." *Id.* (emphasis added). The facts show otherwise. Both the Memorandum of Lease and the subsequent Assignment were recorded in the Office of the Register of Deeds for Greenville County. (See Memorandum of Lease in Book 1641 at Page 748 and Assignment and Assumption of Lease in Book 2189 at Page 1640). Both documents provide notice of Defendant Harris Teeter's continuing liability under the Lease. Defendant Harris Teeter relies on one insignificant Article in the Lease to refute the importance of these recorded documents and Plaintiff's reliance thereon. If it was Defendant Harris Teeter's goal to be released of all future duties in the recorded Assignment, it did not state so therein. Had Defendant Harris Teeter not intended for Plaintiff, or any other subsequent purchasers, to rely on the language in the recorded Assignment, it could have avoided any potential confusion by recording its purported "release" letter as well, which is consistent with their prior actions.

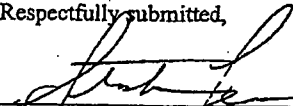
Finally, after maintaining that Plaintiff should not be able to reasonably rely on these recorded instruments, Defendant Harris Teeter then asserts a conflicting argument that contends that Plaintiff's knowledge of these documents due to recordation should put Plaintiff on notice for any unrecorded instruments. Defendant Harris Teeter recognizes that a "purchaser is charged with notice of all recorded instruments in a chain of title and unrecorded instruments affecting title that are referred to in the recorded instruments." *Moyle v. Campbell*, 126, S.C. 180, 193-94, 119 S.E. 186, 190 (1923) (emphasis added). Nowhere in the recorded Assignment is there any indication of an existing "release." "To afford notice of a provision in a recorded instrument, the language must be so intelligible and significant that it would naturally raise a well-grounded suspicion in the mind of a reasonably prudent person, or a person of ordinary

diligence and understanding, sufficient to suggest an inquiry that would lead to a knowledge of the facts." Fuller-Ahrens Partnership v. South Carolina Dept. of Highways and Public Transp., 311 S.C. 177, 183, 427 S.E.2d 920, 924 (S.C. App. 1993). The recorded Assignment between Harris Teeter and Bi-Lo contains no language which would give rise to such a suspicion. Rather, the language of the Assignment is concise, clearly stating that "Assignor warrants that it is the owner and holder of a good leasehold estate in the premises demised by the Lease, that Assignor has full right and authority to assign same as aforesaid, and that Assignor shall warrant and defend title to same against the lawful claims of all persons whomsoever." The simple fact is that this controversy could have been avoided if Defendant Harris Teeter had fulfilled its duty to give proper notice to the public of its purported "release."

CONCLUSION

For the forgoing reasons, Plaintiff respectfully requests that Defendant Harris Teeter's motion for summary judgment be denied.

Respectfully submitted,


John A. Hagins, Jr., S.C. Bar #1657
Stephen R.H. Lewis, S.C. Bar #12947
Covington, Patrick, Hagins, Stern & Lewis, PA
P.O. Box 2343
Greenville, SC 29602
(864) 242-9000
Attorney for Plaintiff

February 23, 2011
Greenville, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Roper, LLC,)

Plaintiff,)

vs.)

Harris Teeter, Inc.; Carolina & Georgia
Immobilielienfonds I, L.P.; GOA Realty
Management I, LLC; Germania of
America, Inc.; Miller & Martin PLLC;
New Spring Community Church; John
Doe; Richard Roe; and Doe Corporation,)

Defendants.)

IN THE COURT OF COMMON PLEAS

2011 FEB 25) P 4: 35

C. A. No. 2010-CP-23-7266

FILED-CLERK OF COURT
GREENVILLE CO. SC

**HARRIS TEETER'S REPLY
IN SUPPORT OF ITS
MOTION TO DISMISS AND/OR
FOR SUMMARY JUDGMENT**

In an effort to avoid Summary Judgment, Plaintiff relies on essentially two arguments: (1) that it has not had time to pursue discovery; and (2) that the pleadings create a question of fact and, therefore, defeat Harris Teeter's Motion for Summary Judgment. Both of these arguments fail because of one essential fact, which Plaintiff has not and cannot refute and further discovery cannot change. That fact is: *Plaintiff's predecessor in interest, Defendant, Carolina & Georgia Immobilelienfonds I, L.P. ("CGI"), signed the letter agreement dated June 12, 2001 releasing Harris Teeter from further obligation under the Lease ("Release").* The effect of which terminated the relationship between Harris Teeter, CGI and any of CGI's successors, i.e. Plaintiff.

1. No Fiduciary Duty flowed between Harris Teeter and Plaintiff

The parties agree as to the central issue in this case. Plaintiff acknowledges that issue to be: "whether Defendant Harris Teeter had either a *legal or fiduciary duty* to record the purported 'release.'" (Mem. in Opp'n to Def. Harris Teeter's Mot. to Dismiss/Summ. J., p. 4) (emphasis added). By this admission, Plaintiff necessarily does not contest the authenticity of the Release. Rather, Plaintiff's opposition to Harris Teeter's Motion rests on Harris Teeter's *duty to record the*

R-0138

release (whether that duty be legal or fiduciary). The determination of a legal duty is to be made by the court. Middleborough Horizontal Prop. Regime Council v. Montedison S.p.A., 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995). ("The construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment.")

Here, contrary to Plaintiff's assertion, there are no additional facts needed by this Court to decide whether Harris Teeter had a duty to record the Release. The admission that the Release is authentic, and the unrefuted evidence that 1) Harris Teeter and CGI entered into the Release, Ex. A; 2) the Release language is clear and unambiguous¹, Ex. A; and 3) Plaintiff had no direct contact with Harris Teeter prior to Plaintiff's purchase of the Property and Lease, (J. Sherman Aff. ¶ 8, Nov. 8, 2010; Supp. J. Sherman Aff. ¶ 5, Jan. 13, 2011), are all that is necessary for the Court to determine whether a legal duty existed requiring Harris Teeter to record the Release.

Further, all agree that to find fraudulent concealment, there must be a duty to disclose by Harris Teeter to Plaintiff. Three (3) distinct classes dictate when a duty arises for a party to speak or act. See Ardis v. Cox, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (Ct. App. 1993). Harris Teeter fits in none of them: 1) there was no "preexisting definite fiduciary relationship"; 2) there was no expressed trust and confidence flowing between Plaintiff and Harris Teeter arising out of the sale of the Property; and 3) there was no contract between Plaintiff and Harris Teeter. (See Mem. of Law in Supp. of Mot. to Dismiss/Summ. J., pp. 5-6.) No amount of discovery can alter these facts since Plaintiff and Harris Teeter had no contact with each other, and hence, no relationship between them.²

¹ "When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." Treadaway v. Smith, 325 S.C. 367, 376, 479 S.E.2d 849, 854 (Ct. App. 1996).

² Mr. Sherman's Affidavits, incorporated into Harris Teeter's Motion, clearly and unequivocally establish that there was no relationship between Harris Teeter and Plaintiff, much less a relationship requiring Harris Teeter to speak or act for the benefit of Plaintiff. Mr. Sherman swore in his first Affidavit that "[p]rior to this time, Harris Teeter, to the best of my knowledge, had not had any inquiries, communications or contacts with Roper, LLC or anyone known to be acting on its behalf." (J. Sherman Aff. ¶ 8.) In his Supplemental Affidavit, in response to the Amended Complaint, Mr. Sherman swore that "Harris Teeter had no knowledge of, and did not participate in Plaintiff's purchase of the Property and the Lease in April 2007. Harris Teeter made no representations and had no communications or negotiations with Plaintiff regarding the Property or Harris Teeter's liability under the Lease. Harris Teeter did not become aware of said purchase until it received Ms. Moorhead's letter dated September 26, 2007" (Supp. J. Sherman Aff. ¶ 5.)

Plaintiff argues that a genuine issue of material fact exists because it *plead* that Harris Teeter had a "duty to disclose." (Mem. in Opp'n to Def. Harris Teeter's Mot. to Dismiss/Summ. J., p. 4). Plaintiff's reference to its pleading, without more, is insufficient to withstand Harris Teeter's Motion. "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, *the opponent cannot simply rest on mere allegations or denials contained in the pleadings.*" Bennett v. Investors Title Ins. Co., 370 S.C. 561, 569, 635 S.E.2d 660, 665 (Ct. App. 2006) (citing Wogan v. Kunze, 366 S.C. 583, 591, 623 S.E.2d 107, 112 (Ct. App. 2005)) (emphasis added).³

2. Harris Teeter had no legal duty to Plaintiff arising from Plaintiff's purchase of the Lease and Property

The South Carolina Recording Act, § 30-7-10 (the "Act") does not impose an affirmative duty on Harris Teeter to record the Release. Therefore, it cannot, as a matter of law, form the basis of Harris Teeter's alleged legal duty to comply therewith. The Act merely provides that "innocent or bona fide purchasers of real property, who pay valuable consideration, are protected from the claims of creditors or lienholders whose claims were not on record at the time of conveyance to the bona fide purchaser." Spence v. Spence, 368 S.C. 106, 120, 628 S.E.2d 869, 876 (2006) (citing Epps v. McCallum Realty Co., 139 S.C. 481, 496-511, 138 S.E. 297, 302-07 (1927)).⁴ The Act "relates solely to conveyances." Von Elbrecht v. Jacobs, 286 S.C. 240, 243, 332 S.E.2d 568, 569 (Ct. App.

³"The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." Bennett, 370 S.C. at 569, 635 S.E.2d at 664 (citing Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 228, 612 S.E.2d 719, 722 (Ct. App. 2005)). "The moving party may discharge the burden of demonstrating the absence of a genuine issue of material fact by pointing out the absence of evidence to support the nonmoving party's case." Bennett, 370 S.C. at 569, 635 S.E.2d at 664-65 (citing Lenham v. Blue Cross & Blue Shield of S.C., Inc., 563 S.E.2d 331, 333, 349 S.C. 356 (2002)). "The nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Bennett, 370 S.C. at 569, 635 S.E.2d at 665 (citing Rife v. Hitachi Constr. Mach. Co., 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005)).

⁴ Plaintiff attempts to undermine the citation by Harris Teeter to Catawba Indian Tribe v. South Carolina, 865 F.2d 1444 (4th Cir. 1989) (applying South Carolina law) on the ground that Catawba does not cite the Act. Plaintiff's criticism is unfounded. Catawba clearly makes reference to this State's recording acts - "[s]ince 1698 South Carolina has had recording acts, Catawba, 865 F.2d at 1449 (citing Epps, 139 S.C. at 497, 138 S.E. at 302), and cites to Epps which, in turn, cites to a predecessor version of the Act. Epps, 139 S.C. at 497, 138 S.E. at 302. Catawba bolsters the proposition that the Act only applies to instruments "conveying an interest in real estate," (S.C. Code Ann. § 30-7-10), and that the Act "becomes material only when there are double conveyances by the same person" Catawba, 865 F.2d at 1449 (quoting First Carolinas Joint Stock Land Bank v. Hudgens, 171 S.C. 18, 21, 171 S.E. 449, 451 (1933)).

1985). It "does not protect a bona fide purchaser against liens or other interests arising out of instruments not entitled to be recorded." *Id.* (citing G. W. Thompson, Thompson on Real Property Section § 4297 (1978)) (emphasis added). "The failure to record an instrument which is not required to be recorded does not affect or vitiate the instrument as to anyone, and it is valid not only between the parties thereto, but also as to subsequent purchasers and encumbrances." 66 Am.Jur.2d Records and Recording Laws § 149 (2001) (emphasis added). Because, the Release did not convey an interest in land, Harris Teeter had no legal obligation to record it. Moreover, Harris Teeter's failure to record the Release did not affect its validity.

Plaintiff misconstrues Harris Teeter's argument regarding Plaintiff's reliance on the recorded instruments. (See Mem. in Opp'n to Def. Harris Teeter's Mot. to Dismiss/Summ. J., p. 6.) The thrust of Harris Teeter's argument was not that Plaintiff was unable to rely on the recorded instruments, but that because of Article 18.11 of the Lease (which prohibited the Lease from being recorded), Plaintiff was put on notice that the record may not contain *all* documents relating to Harris Teeter's liability under the Lease and that it would have to inquire with Harris Teeter to determine its full liability under the Lease. (Mem. of Law in Supp. of Mot. to Dismiss/Summ. J., p. 7.) The very fact that a Memorandum of the Lease, rather than the complete Lease, was recorded is evidence of the same.

Not in conflict with (as Plaintiff argues in its Opposition Memorandum), but in addition to, Harris Teeter further argued in its primary brief that Plaintiff was put on inquiry notice of all matters outside the chain of title (*i.e.* the Release).⁵ Plaintiff disputes this. Notwithstanding the fact that Harris Teeter had no legal duty to record the Release, Plaintiff was put in inquiry notice of the Release by (1) Article 18.11 of the Lease and the recorded Memorandum of Lease (rather than the complete Lease), (2) the recorded "Assignment and Assumption of Lease," which, its very existence,

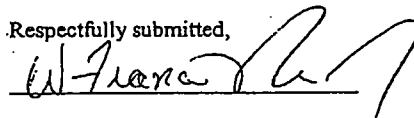
⁵ See Mem. of Law in Supp. of Mot to Dismiss/Summ. J., pp. 8, 10-11 and Binkley v. Rabon Creek Watershed Conservation Dist., 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Cl. App. 2001) for discussion regarding inquiry notice of matters outside the chain of title.

put Plaintiff of notice of a potential release, (3) Article 16.3(a) of the Lease entitled "Estoppel Certificate" which clearly envisioned Harris Teeter as the tenant providing an Estoppel Certificate upon the request of the Landlord, and (4) the knowledge that Bi-Lo, Inc., not Harris Teeter, was making, and had been making, the Lease payments for years. Under these uncontroverted facts and circumstances, Plaintiff cannot simply stick its head in the sand and claim lack of knowledge of the Release.

CONCLUSION

Plaintiff's failure to dispute the authenticity or meaning of the Release's language and, concomitantly, its failure to show a legal or fiduciary duty requiring Harris Teeter to record the Release renders Plaintiff's claims without merit entitling Harris Teeter to dismissal or Summary Judgment.

Respectfully submitted,



W. Francis Marion, Jr., I.D. # 3645
Bonnie A. Lynch, I.D. #77399
Haynsworth Sinkler Boyd, PA
Post Office Box 2048
Greenville, South Carolina 29602
Telephone (864)240-3321
Fax (864)240-3336

Attorneys for Harris Teeter, Inc.

February 25, 2011
Greenville, South Carolina

Doc. #786860 / 19207.0003

IN THE STATE OF SOUTH CAROLINA)
IN THE COUNTY OF GREENVILLE)

Roper, LLC,

Plaintiff,

vs.

Harris Teeter, Inc.; Carolina &
Georgia Immobilienfonds I, L.P.;
GOA Realty Management I, LLC;
Germania of America, Inc.;
Miller & Martin, PLLC; New Spring
Community Church; John Doe;
Richard Roe and Doe Corporation

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2010-CP-23-7266

Defendant Germania of America, Inc.'s
Motion to Alter or Amend Judgment
Pursuant to Rule 59(e)

ED-CLERK OF COURT
JULY 11 2011
GREENVILLE CO. S.C.

MAY - 6 P 11:33

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Defendant Germania of America, Inc. ("Germania") hereby moves the Court to alter or amend the judgment and order entered on April 26, 2011, in which the Court granted summary judgment to defendant Harris Teeter, Inc. (hereinafter the "Order"). As grounds for this motion, Germania respectfully submits that the Order does not address the arguments and issues raised by Germania's counsel concerning the validity of the alleged release. For the Court's ease of reference, a copy of Germania's submittal, along with the exhibits attached thereto, is submitted herewith and incorporated herein. For the reasons expressed below, Germania respectfully moves the Court to amend its judgment by addressing the arguments raised by Germania on the issue of the validity of the alleged release, including:

(1) A valid contract, to be properly formed, must involve "a meeting of the minds of the parties involved with regard to all essential and material terms of the agreement."

Hardaway Concrete Co. v. Hall Contracting Corp., 374 S.C. 216, 225, 647 S.E.2d 488, 492 (Ct.

App. 2007). The Order does not reflect whether the Court has determined, as a matter of law, that there was a meeting of the minds as to all essential and material terms of the agreement sufficient to determine that the June 12, 2001 letter constitutes a valid and enforceable release of Harris Teeter's payment obligations under the Lease.

(2) When construing a contract, a court must ascertain and give effect to the intention of the parties. Wallace v. Day, 390 S.C. 69, 700 S.E.2d 446, 449 (Ct. App. 2010). The Order does not indicate whether the Court has ascertained the intent of the parties in signing the June 12, 2001 letter and whether that letter was intended by the parties to constitute a release of Harris Teeter's payment obligations under the Lease.

(3) "A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation." Id., quoting S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001). "The uncertainty in interpretation can arise from the words of the instrument, or in the application of the words to the object they describe." Wallace v. Day, 700 S.E.2d at 449, quoting Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 242, 672 S.E.2d 799, 803 (Ct. App. 2009). "Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. The determination of the intent of the parties is then a *question of fact*." Wallace v. Day, *supra*, quoting McClellanville, 345 S.C. at 623, 550 S.E.2d at 303. Although the June 12, 2001 letter never mentions the words "release" or "payment," the Court has ruled, as a matter of law, that the letter agreement is "clear and unambiguous" and constitutes a valid release of Harris Teeter's payment obligations under South Carolina law. The Order fails to reflect that the June 12, 2001 letter is not reasonably susceptible to more than one interpretation, even though the letter itself does not mention these essential terms.

For all of these reasons, defendant Germania of America, Inc. moves the Court to amend or alter the Order granting summary judgment to Harris Teeter, Inc. on the Plaintiff's breach of contract claim.

Respectfully submitted,

TURNER PADGET GRAHAM & LANEY P.A.

Sarah Day Hurley
Sarah Day Hurley (SC Bar No. 16241)
P.O. Box 1509
Greenville, SC 29602
(864) 552-4651 (direct dial)
(864) 282-5965 (direct fax)
shurley@turnerpadget.com

Attorneys for Defendant Germania of America, Inc.

May 6, 2011

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Roper, LLC,

Plaintiff,

vs.

Harris Teeter, Inc., Carolina & Georgia
Immobilielienfonds I, L.P., GOA Realty
Management I, LLC, Germania of America,
Inc., Miller & Martin PLLC, New Spring
Community Church, John Doe, Richard
Doe, and Doe Corporation,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No.: 2010-CP-23-7266

**PLAINTIFF'S MOTION TO ALTER
OR AMEND JUDGMENT**

Under Rule 59 of the South Carolina Rules of Civil Procedure, Plaintiff moves this Court for reconsideration of the Court's Order filed April 26, 2011, and received by Plaintiff's counsel on April 27, 2011.

"To preserve an issue for review on appeal, a trial court must rule on the issue, or, if the trial judge fails to rule on the issue, the party must bring a motion to amend or alter the judgment." I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). A motion brought in accordance with S.C. R.C.P. 59(e) has two functions: (1) to address any previously raised and decided issues encompassed in the judgment and (2) to preserve issues for appeal in non-jury actions. Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Plaintiff now files this Motion to Alter or Amend the Court's April 26, 2011, Order on the grounds that genuine issues of material fact remain and that summary judgment is inappropriate at this time because of the lack of opportunity for proper discovery on the dismissed party.

This Court's Order Granting Harris Teeter's Motion for Summary Judgment is in error in stating that it is undisputed that Defendant Harris Teeter was released from its liabilities relating to the underlying Lease. (See Order, Undisputed Facts, pp. 1-2). Both in oral arguments and in submitted briefs Plaintiff argued the opposite in stating that "[t]he veracity and validity of these documents, particularly the effectiveness of the 'release,' as well as the circumstances surrounding them, are at the heart of this case and must be fully adjudicated before this case can be resolved." (Plaintiff's Memo in Opposition to Summary Judgment, p. 5). Further, in the May 2, 2011, deposition of Ms. Alison Boyer, attorney at Defendant Miller and Martin, PLLC, Ms. Boyer, who was counsel for Defendant Carolina & Georgia Immobilelienfonds I, L.P. at the time of the relevant transaction, agrees that the purported release letter was no release at all:

Page 35

16 Q: In your opinion, does this letter constitute
17 a valid contract?

....
22 A: No.

23 Q: Have you -- and why is that?

....
25 A: There's nothing definitive

Page 36

....
2 about the transaction that would come to this
3 release. It's just a proposal. There's no
4 consideration, and there's certainly no
5 evidence that Mr. Gage has authority to sign
6 on behalf of Carolina & Georgia.

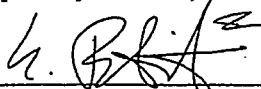
Deposition of Alison Boyer, Esquire, attorney for Miller and Martin, PLLC.

As to the second ground, summary judgment is inappropriate where "...further inquiry into the facts of the case is desirable to clarify the application of the law." Middleborough v. Montedison, 320 S.C. 470, 465 S.E.2d 765, 771 (Ct. App. 1995). The only discovery conducted

in this case has been minimal discovery requests to Defendant Miller and Martin, PLLC, and a deposition of Miller and Martin, PLLC, which was taken after the date of the Court's Order.

As a result, Plaintiff respectfully requests a hearing on this Motion to Alter or Amend the Court's Order filed April 26, 2011, in order to be heard on the issues set forth herein.

Respectfully submitted,



E. Benton Leinster, III (SC Bar #72661)
LEINSTER LAW FIRM
P.O. Box 8874
Greenville, SC 29604
Phone: (864) 232-3541
Fax: (864) 236-4047
bleinster@leinsterlaw.com

John A. Hagins, Jr. (SC Bar # 2389)
Stephen R. H. Lewis (SC Bar # 12947)
E. Benton Leinster, III (SC Bar #72661)
Covington Patrick Hagins Stern & Lewis
211 Pettigru Street (29601)
P.O. Box 2243
Greenville, SC 29602
Telephone (864) 242-9000
slewis@cphsl.com

May 6, 2011

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

ROPER, LLC,
PLAINTIFF,

-VS-

HARRIS TEETER, INC., ET AL,
DEFENDANT.

2010-CP-23-7266

MARCH 1, 2011

TRANSCRIPT OF RECORD

BEFORE:

THE HONORABLE D. GARRISON HILL, JUDGE

APPEARANCES:

BEN LINSEY, ESQUIRE
ATTORNEY FOR THE PLAINTIFF

SUSAN DRISCOLL, ESQUIRE
SARAH DAY HURLEY, ESQUIRE
W. FRANCIS MARION, JR., ESQUIRE
ROBERT E. STEPP, ESQUIRE
BONNIE LYNCH, ESQUIRE
ATTORNEYS FOR THE DEFENDANTS

HOLLIE M. JENKINS
CIRCUIT COURT REPORTER

TRANSCRIBED BY:
DANETTE HANKS
CIRCUIT COURT REPORTER

R-0149

INDEX

Motions Hearing

3

Certificate of Reporter

47

EXHIBITS

(NONE)

1 MARCH 1, 2011

2 (WHEREUPON, court convened with all parties present
3 and the following proceedings were had.)

4 THE COURT: Yes, sir, Mr. Marion. This is
5 2010-CP-23-7266.

6 MR. MARION: Thank you, Your Honor. Francis
7 Marion and Bonnie Lynch on behalf of Harris Teeter.
8 We're here on Harris Teeter's attachment and a motion to
9 dismiss/motion for summary judgment, but we filed
10 affidavits so we would be under Rule 56, the summary
11 judgment, Your Honor.

12 The central issue here is, which the parties agree
13 to, is whether Harris Teeter had a legal or fiduciary
14 duty to record a lease concerning the leased premises.
15 From Harris Teeter's standpoint, there is nothing else
16 in the record to be done, there's nothing the plaintiff
17 can do. The facts that are relevant to a determination
18 of the legal duties is an issue for the Court. And
19 based on the answers and the affidavit's we've submitted
20 there's no additional issues to be undertaken so it's a
21 pure legal question, Your Honor.

22 There are four causes of action against Harris
23 Teeter. They're fraudulent concealment, promissory
24 estoppel, negligent misrepresentation, and breach of
25 contract. Those first three deal explicitly with

R-0151

1 whether there's a duty or a relationship and that's what
2 I'll address first. The second one goes to the
3 contract.

4 THE COURT: Okay.

5 MR. MARION: So if I could, let me give you a
6 brief outline of the chronology of this thing. This
7 involves a lease agreement. Harris Teeter and the
8 predecessor in interest and title to the plaintiff was a
9 company known as Roper Mountain, LLC. In 1995, April of
10 1995, Harris Teeter and Roper Mountain, LLC entered into
11 a lease agreement. By October of that year the property
12 that was subject to the lease was finished and a deed
13 was recorded. Then three years later or two years
14 later, in October of '97, Roper Mountain, LLC sells that
15 property to Carolina & Georgia -- and I can't pronounce
16 their last name there, but we could just call it CGI for
17 short. So a deed was recorded in October of 1997.
18 Harris Teeter was not a part of that. It was the owner
19 of the property selling it to CGI. In June of 2001, six
20 years after the lease was in place, Harris Teeter wrote
21 to CGI a letter, which is Exhibit "A" to our original
22 motion, I'll put an asterisk here. When the complaint
23 was originally filed, we filed a motion to dismiss that
24 complaint. After discussions with Steven Lewis, the
25 complaint was amended, so rather than re-file all the

1 affidavits we left those affidavits in place and simply
2 incorporate them into the current motion because it
3 arises out of the same transaction, the same facts. It
4 just altered the causes of action slightly. So you
5 should have in there the original motion with, I
6 believe, six exhibits. And then when the filed the new
7 complaint, we filed a new motion with one additional
8 exhibit. So there should be about seven exhibits there.

9
10 In any event, if you look at Exhibit "A" to
11 our original brief, on June 21, 2001, Harris Teeter
12 wrote a letter to Mr. Hugh Gage at CG&I, indicating that
13 they wanted to lease the property, assign that lease, I
14 mean, to Bi-Lo. But before doing that, they wanted
15 CG&I's agreement that they would be released from any
16 further obligation under the lease. So as you'll see in
17 the second paragraph there of that letter they say, this
18 is what we're planning to do. We don't have to have
19 your approval because it's a grocery store and that's
20 the same business that we're in, but we wanted to give
21 you notice because we want to assign it. And if you
22 look at the bottom of that page, going over to the
23 second page, they say, they want you to acknowledge
24 receipt of this letter and that you will look solely to
25 the assignee for the performance of the, quote, tenants'

1 responsibility under the lease after the effective date
2 of the assignment. Obviously, they wanted that in
3 advance to decide whether they wanted to assign the
4 lease. If they couldn't get out of it, they may want to
5 do some other agreement. But CG&I agreed to that. As
6 you can see, they signed it down at the bottom and it
7 was sent back to Harris Teeter. Based on that letter,
8 they did enter into an assignment, which is in Exhibit
9 "B" where they assigned their interest in the lease to
10 Bi-Lo and under the assignment and assumption of the
11 lease.

12 Once that was done the assignment and
13 assumption of the lease was filed with the RMC office
14 and Harris Teeter had nothing further to do with this
15 property. Didn't have any communication with CG&I, none
16 with Bi-Lo on this property, they were out of it. Bi-Lo
17 continued on.

18 Then April of '07, six years later, five, six
19 years later, CG&I then sells -- enters into an agreement
20 to sell the property to the plaintiff. At that time,
21 the plaintiff got a certificate of estoppel from the
22 landlord. They never bothered to contact Harris Teeter
23 and they enter into this agreement. Harris Teeter had
24 nothing to do with it, didn't know anything about it.
25 After it was all signed, sealed and delivered as between.

1 CG&I and the plaintiff for the sale of the property,
2 some six months later, Harris Teeter gets a letter out
3 of the blue from a representative at the Wyche firm --
4 I'm sorry -- Leatherwood Firm, Ms. Moorehead, indicating
5 that they are writing to put Harris Teeter on notice of
6 the sale. And Harris Teeter responds back quickly, by
7 that Exhibit "F", on October 11th, 2007, saying here's
8 our release. We have a letter where we were released.
9 We have nothing to do with this property.

10 Now, almost three years later they file suit
11 and they name Harris Teeter in the suit and the
12 gravamen, the basis of their complaint is, we had some
13 legal duty to file the release with the RMC office. We
14 agree, and it's set forth in the plaintiff's responsive
15 brief, which is on file with the court, that the issue
16 here is, did Harris Teeter have a legal or fiduciary
17 duty to file the release? There's no dispute as to the
18 authenticity of the letter, no dispute as to the content
19 of the letter, no dispute that, you know, the signatures
20 are appropriate, no issue that it was accepted.

21 So their only basis is, from a legal
22 standpoint and I'll address that first. There is no
23 legal duty for Harris Teeter to do anything. The
24 recording statute, which is Section 30-70-10 of the
25 Code, is a statute which deals with filings of deeds and

1 mortgages and numerous other things. But all that
2 statute does is set forth a priority for competing
3 titles. It's a res notice statute. It's designed that
4 if a bona fide purchaser of value files a deed and
5 someone doesn't file it, it doesn't mean that the person
6 who files -- doesn't file has an invalid deed. It
7 simply means from a priority standpoint, the statute
8 defines priority. It goes back three hundred years.
9 And it relates solely to conveyances. So there is no
10 legal duty and that -- the authority -- and I won't go
11 through all the cases -- but the authorities are clear
12 and we set forth those in our brief. So there's no
13 legal duty for Harris Teeter to have done anything with
14 regard to the release letter. And that's the basis on
15 which they have sued Harris Teeter and they candidly
16 represent in their reply brief, that's one of the
17 issues. In fact is that in the concluding of their
18 brief they say, the simple fact is that this controversy
19 could have been avoided if Harris Teeter had fulfilled
20 its duty to give public notice by filing the release.
21 Well, that goes to the essence because there is no
22 public duty. There is no obligation under the law or
23 statute for Harris Teeter to have filed the letter of
24 release.

25 So that brings us around to the individual

1 causes of action. That undermines the legal duty.
2 They're trying to fit in kind of through the back door
3 by asserting causes of action based upon, as I said,
4 fraud, fraudulent concealment, promissory estoppel, and
5 negligent misrepresentation. Each one of those causes
6 of action have, as a necessary element, some direct
7 relationship, some direct contact that is created by,
8 you know, a special relationship or a contractual
9 agreement or something. None of that exist here.

10 So let me speak to fraudulent concealment
11 first. Fraudulent concealment is based on a non-
12 disclosure where there is a duty to speak. Non-
13 disclosure becomes fraudulent concealment only when
14 there is a duty of a party having knowledge of the facts
15 to make them known to the other party to a transaction.
16 Therein lies the problem that the plaintiff has. We
17 were not a party to the transaction. No dispute about
18 that, no fact about that. They know that. They dealt
19 solely with CGI in this transaction. Never contacted
20 us, never had anything to do with Harris Teeter.

21 Under the case law, Your Honor, there are
22 three basic ways to get at the fraudulent concealment
23 case. One is there's a duty when it arises from a pre-
24 existing definite fiduciary relationship between the
25 parties. Well, they didn't allege that so that's not a

1 consideration here. Another one is where one
2 party expressly reposes a trust and confidence in the
3 other with reference to a particular transaction in
4 question. Again, we had no contact with them. We
5 weren't part of the transaction. There was never
6 communication with us concerning this transaction, so
7 item number two under the case law doesn't fit.

8 Item number three is where the very
9 transaction itself in its essential nature is
10 intrinsically fiduciary. Well, that doesn't apply here
11 either, again, for the same reason as above. We were
12 not involved in the transaction. And the affidavits, as
13 I say, I'll cite you back. There are two affidavits
14 that we've submitted to the Court filed with each of the
15 motions when they were filed, from Jeff Sherman who is
16 the party with knowledge at Harris Teeter about this
17 situation. And in there he affirms that he didn't know
18 about it, had nothing to do with it. The last contact
19 they had with CGI was in 2001. Didn't have any contact
20 with Bi-Lo over this. Had nothing to do with. So from
21 a fiduciary -- I'm sorry -- from a fraudulent
22 concealment, there was never a duty to speak because
23 they don't fit within the categories of law that the
24 cases set forth.

25 Similarly, with promissory estoppel, in order

1 to plead and prove promissory estoppel the plaintiff
2 must show first and foremost the presence of a promise
3 unambiguous in its terms and that deals with a specific
4 relationship. So there's no promise here by Harris
5 Teeter.

6 Also, the Court goes on to say with the
7 reliance, you have to have reliance on the promissory
8 estoppel. There's no promise here, but also there can't
9 be a reliance because the Court says where there is no
10 confidential or fiduciary relationship, and an arms-
11 length transaction between mature, educated people is
12 involved, there's no right to rely. You have a
13 plaintiff, which is a corporation, has attorneys on
14 staff or had attorneys transacting with other attorneys,
15 an arms-length transaction, which we were not involved
16 in. So there can't be promissory estoppel.

17 With the negligent misrepresentation, again,
18 there's no duty to speak. There's no representation, no
19 duty to speak. The first element there is the
20 defendant, Harris Teeter, must have made a false
21 representation to the plaintiff. Harris Teeter made no
22 representation to the plaintiff, wasn't involved in any
23 of the transactions, had no dealing with them. So that,
24 too, there's no legal duty to speak, there's no
25 representation being made because there's no legal duty

1 to speak, and factually, there was no contact. There's
2 nothing else needed in the record to verify those points
3 because those are uniquely related to the plaintiff's
4 relationship with this transaction.

5 Finally, we then get down to the contract
6 claim, Your Honor. The contract is the release. And
7 that's, of course, a decision by the Court to look at
8 the terms of the contract. First and foremost, the
9 elements of a contract are here. There's consideration,
10 there's a benefit to the promisor, that to wit to the
11 promisee. I put that backwards, but there's a benefit
12 here that -- well, first the language is clear and
13 unambiguous. That's the first hurdle. It's clear and
14 unambiguous. CGI agreed to look to Bi-Lo for all the
15 terms and releases. So the language is clear and
16 unambiguous. There's no question here there was
17 consideration. That hasn't even been raised as an issue
18 in this case. But they got the financials of Bi-Lo, at
19 the time a very strong company, lots of stores around
20 despite the fact that its later problems had nothing to
21 do with it. And Harris Teeter gave up its rights under
22 the lease. If it had decided to sub-lease it to Bi-Lo,
23 they could have put provisions in there that protected
24 them so they could monitor the property. They didn't.
25 They completely released their right to monitor the

1 property.

2 So that in a nutshell, Your Honor, is our
3 position. It's all legal in nature. There's no legal
4 duty under the statutory law, under the case law, the
5 specific causes of action, there's no relationship
6 between the parties that would warrant any
7 representations being made, the contract is clear and
8 unambiguous and the language is clear. They released
9 us. So we would ask the Court for summary judgment on
10 that basis.

11 THE COURT: Thank you.

12 MR. STEPP: Your Honor, I'm Bobby Stepp.

13 THE COURT: Yes, sir.

14 MR. STEPP: I represent the Defendant, Miller
15 and Martin. We have a motion to dismiss under 12(b).
16 I'll be happy to address that now if that suits your
17 pleasure.

18 THE COURT: All right. Yes, sir.

19 MR. STEPP: A similar issue. I appreciate
20 the exposition of the facts by Mr. Marion and the
21 affidavits that he filed saved me some time. I'm not
22 going to repeat all of that. Miller and Martin, for
23 Your Honor's information, is a law firm that operates
24 principally out of Tennessee with an office in Atlanta
25 as well, that was representing the owner of the property

1 at the time of the sale to the plaintiff in 2007. Now,
2 the complaint alleges -- in the first version of the
3 complaint, Miller and Martin was sued by the plaintiff
4 for a violation of a recording act and the plaintiff
5 alleged that Miller and Martin, also similar to Harris
6 Teeter, had a duty to record something about this
7 release and put that on the record. That claim has now
8 been dropped. We're moving to dismiss that claim. And,
9 again, the complaint was amended. And now we're simply
10 being sued for fraud. So we've gone from violating a
11 recording a act to fraudulently concealing a fact. I
12 don't know that I'm making any progress for my client
13 here or not. It was a little hard to report. But none
14 the less, I'm still here.

15 So the claim against Miller and Martin is for
16 fraudulent concealment and the allegation is that Miller
17 and Martin as the lawyers for the seller in the
18 transaction had a duty to advise the plaintiff that
19 Harris Teeter had been released from its obligation
20 under the lease. And that claim was made
21 notwithstanding the fact that there's no allegation that
22 Miller and Martin made any representations or gave any
23 opinions or undertook any contractual responsibilities
24 to disclose anything to the plaintiff as a part of this
25 transaction. Remember, Miller and Martin is

1 representing the opposing party. And there's no
2 allegation that the plaintiff undertook any due
3 diligence directed to Miller and Martin or ask Miller
4 and Martin any question about the status of the lease.
5 So this frames up, what I think, is clearly a question
6 of law. And that is whether under these circumstances
7 there was any duty on the part of Miller and Martin to
8 speak, which Mr. Marion has said what triggers
9 fraudulent concealment claims, silence is actionable
10 only where there is a duty to speak. So the question
11 is, did Miller and Martin have a duty to speak. And as
12 Mr. Marion said, that duty arises only in very limited
13 circumstances under well-established clear and
14 longstanding South Carolina law. And those three
15 circumstances are as follows.

16 First, where there is a preexisting fiduciary
17 relationship. The Plaintiff doesn't allege that and in
18 its memo in opposition to my motion to dismiss has
19 conceded that no such preexisting fiduciary relationship
20 existed. So that one's off the table.

21 The second one, which was also mentioned by Mr.
22 Marion, is where one party expressly reposes a trust or
23 confidence in the other, which is recognized and
24 accepted by the party against whom the duty is asserted.
25 And so plaintiff alleges and argues in its memorandum

1 that because the release wasn't recorded, they were
2 relying on Miller and Martin, not their lawyers but the
3 other side's lawyers, to tell them something about the
4 nature of the release of Harris Teeter and that they
5 reposed a special trust and confidence in Miller and
6 Martin to tell them that. Well, the problem with that
7 is that there are absolutely no facts pleaded in the
8 complaint, and I don't think there could be, that could
9 set out exactly how that was communicated to Miller and
10 Martin and how Miller and Martin could have expressed
11 any acknowledgment that such a confidence was being
12 placed or that Miller and Martin had in anyway accepted
13 it.

14 Your Honor, we filed a reply brief, which I would
15 call the Court's attention to. And in that brief we
16 cited from *Burwell versus South Carolina National Bank*,
17 which is a 1986 case, which speaks to this very issue.
18 And the Court in *Burwell* says, as a general rule mere
19 respect for another's judgment or trust in his character
20 is usually not sufficient to establish a fiduciary
21 relationship. The facts and circumstances must
22 indicated that the one reposing the trust has foundation
23 for his belief that the one giving advice is acting not
24 in his own behalf, but in the interest of the other
25 party. So the standard is that the plaintiff would have

1 to, in the first instance allege and ultimately, of
2 course, prove, that they had some reasonable basis to
3 believe that Miller and Martin had ceased to act in the
4 interest of its client, the seller, and had begun to act
5 in the interest of the purchaser of the property. And
6 the fundamental problem is, of course, that's not in the
7 complaint and I don't know that there would be any facts
8 that could possibly support that sort of proposition.
9 So we think that there is no basis in law and we think
10 Your Honor can rule as a matter of law that under the
11 circumstances of this case, given the relationship of
12 the parties that as a matter of law the plaintiff could
13 not have reposed a trust and confidence in Miller and
14 Martin that was acknowledged and accepted by Miller and
15 Martin, such that plaintiff had a reasonable foundation
16 to believe that Miller and Martin was protecting the
17 Plaintiff's interest. And in the absence of that, we
18 think the claim against Miller and Martin should be
19 dismissed.

20 The final circumstance, as Mr. Marion again
21 had said, is where the transaction is inherently
22 fiduciary. And that's simply not the case here in many
23 respects. Now, plaintiff argues that, well, you could
24 read these cases to suggest that some duties might
25 arise. And maybe under some circumstances they do. But

1 there is not one case in South Carolina that hold that
2 even the party, even the seller as the party, not the
3 seller's counsel, but there's no case in South Carolina
4 that says that the seller and the buyer in a commercial
5 real estate transaction occupy a fiduciary relationship,
6 and that's why transaction lawyers get involved and
7 that's why there are a list of disclosures and
8 representations and warranties and checklists and
9 documents and all kinds of things that those guys make
10 happen to protect their client in the transaction.
11 Because, as Mr. Marion said, in an arms-length
12 transaction in South Carolina between sophisticated
13 commercial parties, there is no right to rely. You
14 don't get to just put your trust in the guy on the other
15 side of the table. You have to protect yourself. And,
16 well, you know, the lawyers are well schooled in how to
17 do that and people buying and selling commercial
18 property know well how to do it, and that's generally
19 how it's done. Now, in this case, apparently it wasn't
20 done and that's more credible from the plaintiff's point
21 of view but that's not my client's problem. It wasn't
22 my client's job to do it.

23 You know, finally, Your Honor, in that respect
24 -- we put this in a reply brief and it's just something
25 that I wanted to mention because I think we're in an

1 area where we need to be very careful. If the Courts go
2 around and start saying that I, as the lawyer for one
3 party has some duties to another party, we start putting
4 lawyers in terrible conflict of interest situations and
5 make it impossible for lawyers to do their job. One of
6 the fundamental ethical responsibilities is that we
7 shall not act in a conflict of interest situation. And
8 yet the very allegations of this complaint would seek to
9 put Miller and Martin in the impossible position of
10 having to protect the interest of the purchaser of the
11 property, while at the same time protecting the interest
12 of the seller. And, again, it's not a situation where
13 Miller and Martin was asked any question or as far as I
14 know, whether the client was asked any question.
15 There's just an assumption. This case is based on the
16 assumption that Miller and Martin was under some duty to
17 act and we think that assumption's not justified in law
18 and in fact. So we would ask the Court to dismiss just
19 that one claim. That's the only claim against Miller
20 and Martin for fraudulent concealment and we would ask
21 that it be dismissed.

22 THE COURT: So wouldn't that really be like a
23 third-party legal malpractice claim? Wouldn't you have
24 to have expert testimony on whether there is a duty in
25 the first place?

1 MR. STEPP: We raised that and we've raised
2 the fact that there was no -- that's right. I agree. I
3 think they sort of dismissed that. In their memorandum
4 they said they're not asserting that, so I didn't
5 address it in the argument. But in our motion and we,
6 of course, rely on everything in our motion and
7 everything in our brief, but we raise the point that
8 there was no affidavit to support a third-party
9 malpractice claim. And we also cited the law that
10 attorneys acting within the scope of their employment
11 for their client, provided we don't get too far off the
12 reservation, frankly are immune from suit to opposing
13 parties for what we do on behalf of our client. So we
14 raise that issue as well.

15 THE COURT: So define the reservation. If the
16 -- and I don't know enough about the transaction,
17 perhaps, but were there warranties and representations
18 about -- and I saw reference to an affidavit by Mr.
19 Hylar that there was no document that released Harris
20 Teeter. So was there an actual expressed warranty and
21 representation that there were no releases as part of an
22 asset purchase agreement? Or I don't know how that
23 transaction was structured.

24 MR. STEPP: I don't know the answer to that
25 question.

1 THE COURT: Okay.

2 MR. STEPP: But if there were, and then that
3 might be -- you know, of course, the seller is a party
4 to this case to and if there was a breach of
5 representation or warranty by the seller, I'm not saying
6 that's not actionable. I'm just saying you can't get
7 past the seller to the seller's lawyer.

8 THE COURT: Okay. Well, that's my question.

9 MR. STEPP: Yeah.

10 THE COURT: If the representation was, for
11 instance, there are no liens on the property or assets
12 or whatever, when, in fact, the lawyer knows there are
13 and there's not a duty to record them, there would be no
14 way for the buyers to definitively ascertain there's a
15 lien out there because there's no recording requirement.
16 The lawyer doesn't have any obligation even if he knows
17 that representation is wrong, ---

18 MR. STEPP: I think a lawyer has a duty not to
19 permit his client to make a misrepresentation to a third
20 party provided, that's a big provided, ---

21 THE COURT: Okay.

22 Mr. STEPP: --- that the lawyer knows that the
23 representation is inaccurate.

24 THE COURT: And there's no evidence of that?

25 MR. STEPP: There is not. In fact, you know,

1 they've had -- they asked, while this was pending they
2 served some discovery on me about tell us what we had in
3 the file about this letter releasing Harris Teeter. I
4 responded. So they have it. Our response was we didn't
5 know nothing about it.

6 THE COURT: All right. Mr. Linser, you've
7 been sitting there very quiet.

8 MR. LINSER: Should I just pack it up and go
9 home now?

10 THE COURT: No, no, no.

11 MR. LINSER: I brought a lot of paper with me
12 so I guess I'll make good use of it. Ben Linser here on
13 behalf of the plaintiff. I apologize that neither Mr.
14 Lewis nor Mr. Hagins could be here, but I'm here in
15 their stead.

16 Your Honor, I'll just address, if we'll go in
17 reverse order, if that's okay with you, what you were
18 just talking about in terms of from the law firm. I
19 think you're exactly right. This is not a malpractice
20 claim and we didn't plead it that way for a reason.
21 This is not about a mistake, but this is an issue of
22 whether there was fraudulent concealment. And so the
23 affidavit that you mentioned, Your Honor, is a typical
24 affidavit that originates from an attorney's office in a
25 real estate closing. And the affidavit was critical to

1 my client purchasing this property, but it asked the
2 very question, now are you sure there's nothing else
3 modifying these leases and everything and Harris
4 Teeter's on the hook, and that's essentially why my
5 client purchased the property, in reliance on that. Are
6 you sure? And the affidavit signed by defendant
7 Carolina & Georgia or CGI, however you want to say that,
8 said no. In fact, there's other conversations. Are you
9 sure? That's correct. So, Your Honor, and we did ask a
10 request to admit, was this document or was this alleged
11 release letter in the file? We got those back. It says
12 it was not in the file. But maybe the question should
13 be asked and probably could only be determined in a
14 deposition, did you have knowledge of this? Were you
15 aware of this letter? And to be quite frank, Your
16 Honor, if they were not aware, then in all likelihood
17 Miller and Martin likely is not a party to this action.
18 If they were aware and helped prepare that affidavit,
19 knew that it was wrong, gave it to their client, signs
20 it and gives it to us, I think it's a whole nother story
21 and they're not going anywhere.

22 THE COURT: I thought he said they've already
23 denied it. There's no ---

24 MR. LINSEY: They said it wasn't in their
25 file. And if they want to go on record of saying they

1 had no knowledge of it ---

2 THE COURT: Well, what evidence do you have of
3 it?

4 MR. LINSEY: Pardon?

5 THE COURT: What evidence do you have that
6 they had knowledge?

7 MR. LINSEY: Well, they prepared the
8 affidavit. They gave it to their client. Their client
9 then signed and in the conversations from my client to
10 CGI they rely exclusively on that issue. So in terms of
11 the evidence, I don't know. I don't know, Your Honor.
12 I don't know whether or not -- it's a little bit ---

13 THE COURT: Are you willing to vouch for your
14 client's testimony. Is that what you're telling me?

15 MR. LINSEY: No, Your Honor, and that's why I
16 think this -- it can't just be summarily dismissed on
17 the front end. I think with a deposition we can find
18 out under oath who knew what. And then it could -- you
19 know, then we could probably resolve this one way or the
20 other pretty quickly. But, no, I'm not willing to vouch
21 for my clients or for the defendants either, Your Honor.
22 But I think that's the issue. If they knew about it and
23 prepared an affidavit saying otherwise, then that --
24 then I don't think that summary judgment is appropriate
25 under the fraudulent concealment law. And that's the

1 issue with Miller and Martin, that's it. Okay?

2 THE COURT: Okay. All right. Well, tell me
3 about Harris Teeter.

4 MR. LINSEY: All right. Well, with Harris
5 Teeter, Your Honor, I appreciate Mr. Marion giving a
6 recitation of the facts. There are a couple of key
7 facts, I think, though that were left out.

8 One, we talk about the lease. We talk about
9 the previous owner issued a -- or entered into a lease
10 with Harris Teeter. Well, real important in the
11 reliance -- and the phrase that my client relied on was
12 they're at 15.4, which is in an exhibit of the
13 Defendant's memorandum, continuing liability of tenant,
14 of Harris Teeter. It says in the event of an assignment
15 or sub-lease, tenant, i.e., Harris Teeter, agrees that
16 Harris Teeter will remain jointly and severally liable
17 with the assignee for the payment of the rent preserved
18 under this lease. So, in other words, they're on the
19 hook even with an assignment and that's what we relied
20 on. Okay? That's the language that is purportedly now
21 been changed. So that's a key fact to remember. One,
22 Harris Teeter in the original lease stays on the hook
23 for the rents, even with an assignment. Okay? So when
24 that lease was entered into back in, I think 1995, and
25 an assignment of lease or assignment of rents was

1 recorded thereafter, no issue for that's recorded on the
2 books. And then we go through, and there is a sale to
3 CGI. Then, two, another really important
4 factor that was an issue. There's a mortgage from
5 Carolina & Georgia issued to New York Life. Okay? That
6 was in 1997, shortly after they purchased it. It
7 doesn't appear to be a purchase money mortgage. It was
8 a couple of months after they purchased it. But this
9 mortgage on the public records has a couple of different
10 provisions in it. One is, mortgagor CGI covenants it
11 will not, without prior written consent of the
12 mortgagee, which was New York Life, do the following:
13 Modify the lease so as to reduce the term thereof or the
14 rent payable thereunder or to change any renewal
15 provision. A little bit further, take any other action
16 with respect to any lease which would tend to impair the
17 security of mortgagee under this mortgage.

18 Last one, sell, assign, transfer mortgage,
19 pledge or otherwise dispose of or encumber, etcetera.
20 This mortgage, which was on the public records, has a
21 prohibition of any assignment or anything that would
22 essentially alter the status of their collateral that
23 they're not -- that's being pledged ---

24 THE COURT: Well, how can you enforce that?

25 MR. LINSEY: How can I enforce this mortgage?

1 Well, under the law that they cited, they talked about
2 the doctrine of inquiry notice, Your Honor, and say,
3 just a reasonable inspection of the records, including
4 the public records, if you can find that, you're under
5 inquiry notice. Your Honor, this was on record back in
6 1997 and here we are with this alleged release that for
7 some reason they wanted to keep confidential. It says
8 in the first paragraph, you have agreed to keep this
9 confidential. They talk about that. And then they go
10 through and there's a lot of strange language in here
11 that talks about or that's contingent, may happen, if
12 that, may or this, et cetera. So I don't even know the
13 validity of the release, but we'll get to that in a
14 second. But how you enforce that is that they had
15 notice of this. They had inquiry, constructive or maybe
16 even actual notice of this mortgage and the covenants
17 and restraints provided herein because it was on the
18 public records.

19 THE COURT: All right. You lost me there.

20 MR. LINSEER: Okay.

21 THE COURT: That mortgage covers the property.

22 MR. LINSEER: Okay.

23 THE COURT: And it's in favor of New York

24 Life?

25 MR. LINSEER: Yes.

1 THE COURT: And the mortgagee or ---

2 MR. LINSER: Yeah.

3 THE COURT: Is who?

4 MR. LINSER: The Mortgagor is CGI, who gives
5 the mortgage.

6 THE COURT: Yeah, okay.

7 MR. LINSER: And then New York Life is the
8 mortgagee who says, okay, fine. They loan them the
9 money. Okay? They loan the money.

10 THE COURT: So what does the lender's contract
11 with the seller have to do with your rights as a buyer
12 against a previous tenant?

13 MR. LINSER: Well, this is important -- I
14 don't know if the answer to that -- I think the parties
15 are a little bit different in this situation, but if
16 you're asking what does that have to do with Harris
17 Teeter as a tenant, essentially? Well, the issue is,
18 they're going to modify terms that they know about on
19 the public records and violate an existing mortgage in
20 place and then be released of liability.

21 THE COURT: They're not even a party to that.

22 MR. LINSER: No, they're not, Your Honor, but
23 they are entering into a contract that they know that
24 CGI cannot enter into. They entered the release with
25 CGI. And if Harris Teeter knows that they're prohibited

1 from doing that, they don't have any ---

2 THE COURT: How do they know that CGI didn't
3 talk to New York Life and New York Life gave them
4 permission to do it?

5 MR. LINSEER: Because it's not in the public
6 records.

7 THE COURT: So what?

8 MR. LINSEER: That's what our statute requires,
9 Your Honor. Our statute ---

10 THE COURT: Requires for what?

11 MR. LINSEER: Well, there's a whole list of
12 things. We've got mortgages, leases or contracts,
13 certificates of renunciation of dower, assignments,
14 releases.

15 THE COURT: But you're talking about using the
16 recording statute to create a duty and put that duty on
17 a tenant of a commercial lease based on the fact that a
18 mortgage has to be recorded and the mortgage is against
19 the owner of the underlying property. I just don't
20 understand where you're going with that.

21 MR. LINSEER: Well, if Harris Teeter willingly
22 enters into a contract that they know the other side is
23 not authorized to do and will therefore breach another
24 contract, they're not allowed to do that, Your Honor.

25 THE COURT: On what ---

1 MR. LINSE: Well, the validity of the
2 release, well then this will be breached and it will
3 call the note, Your Honor, and the validity of the
4 release, in addition to it not being recorded, will not
5 be valid because it's entered into in violation of the
6 mortgage, Your Honor.

7 THE COURT: Do you have some kind of case
8 where that's happened where they said you can't do that?

9 MR. LINSE: No, Your Honor. No, I don't,
10 Your Honor, but I think if they do that and damages
11 result, well then I think that's the issue there. If
12 there's nothing legally preventing them from breaching a
13 contract, well then there's nothing legally preventing
14 the damaged party from then suing because of their
15 intentional breach of another contract. So if they're
16 not legally prevented from doing so then I guess that's
17 why we're here because of damages that resulted
18 therefrom.

19 THE COURT: Would New York Life have a claim
20 against Harris Teeter for interference of a contract?

21 MR. LINSE: I think they would if it hadn't
22 been satisfied, but it has been satisfied. But, yes,
23 Your Honor, if that was still there I think that they
24 would under -- they call it, you know, interference with
25 a contractual relationship. They caused a breach of a

1 contract with a third-party. I think that they would.
2 But that's a moot issue because it's satisfied. But I
3 don't want to get hung up on that, Your Honor. I think
4 getting to the duty, they did have a duty to record and
5 this would have been resolved a lot earlier and we
6 wouldn't even be here if this had been recorded. Mr.
7 Marion talked about a couple of -- I think the duty
8 arises from two different places or could potentially.
9 One is from the recording statute. Mr. Marion cites the
10 statute and says it only resolves priority. Well, Your
11 Honor, it also is notice to third-parties. That's the
12 point of the statute as well. And if you look at just
13 the language of the statute, it says all deeds -- and
14 then it gives a list of about forty different documents
15 of deeds, of conveyances, tenements, marriage
16 settlements, lease or contracts, all assignments,
17 satisfaction, releases and generally all instruments in
18 writing convey an interest in real estate etcetera are
19 valid so as to affect the rights of subsequent creditors
20 or purchasers for valuable consideration without notice.
21 That's what my client is. And so they did have a duty
22 to record this release.

23 And, Your Honor, it's a -- there's a little
24 bit -- it's a little bit strange as to the facts and
25 what's going on here because it wasn't so simple as, oh,

1 we entered into this release and we had a new
2 assignment. The timing is very strange. This alleged
3 release here was done in 2001. And then the subsequent
4 assignment of that release was recorded almost five
5 years later. I don't know why. I think there's a lot
6 going on here that we don't know about and I think we're
7 trying to shut the door to the courthouse before we can
8 do any true discovery. But we've got the release letter
9 here in 2001, and then the assignment which logically
10 would flow right after that, the next month, maybe a few
11 months. Almost five years later we've got that recorded
12 of record. But regardless my client doesn't deny that
13 he saw that, he saw the assignment to Bi-Lo. But,
14 again, he had no knowledge of this release and he relied
15 on the lease language. It says Harris Teeter's on the
16 hook regardless of how many assignments occur. But this
17 alleged release letter, this alleged release is nowhere
18 to be found in the public records and it's discovered
19 after the fact. So in terms of a duty to record, the
20 statute, one arises in the statute. It specifically
21 says, release. But even so, Your Honor, if the statute
22 is interpreted so as not to require releases or
23 assignments or satisfactions to be recorded, under the
24 theory of fraudulent concealment in the case that both
25 opposing counsel has cited, *Artis v. Cox*, there are

1 distinct classes wherein -- situations where a duty can
2 arise, a duty to disclose. And we talked about there
3 were three classes. One was a pre-existing fiduciary
4 relationship and we didn't plead that, Your Honor. But
5 the last two is where one party expressly reposes a
6 trust and confidence in the other with reference to the
7 particular transaction in question or else from the
8 circumstances of the case, the nature of their dealings
9 or their position towards each other. Such a trust and
10 confidence in a particular case is necessarily implied.
11 Your Honor, if my client can't rely on an affidavit that
12 is assumedly prepared by seller's counsel and counsel
13 can say, well, you know, sorry, we're not on the hook
14 for that. We didn't sign that. Your Honor, I don't
15 think that is the intention of protection of third
16 parties. This isn't a malpractice case and we didn't
17 plead it as that on purpose. It's a fraudulent
18 concealment case where the circumstances surrounding it
19 are that we should be able to rely on those
20 representations, Your Honor. And so that's the second
21 source of a duty. The first one is statute. If not so,
22 secondly from *Artis v. Cox*. And then the last -- other
23 case or other class where a duty arises is where the
24 very contract or transaction itself, in its essential
25 nature, is intrinsically fiduciary and necessarily

1 calls for perfect good faith and full disclosure. Your
2 Honor, this isn't just a statement. This is an
3 affidavit given by CGI.

4 And, again, if Miller and Martin wants to go
5 on the record and say they didn't prepare that affidavit
6 and they had no knowledge of this alleged release
7 letter, then maybe we can talk, Your Honor. But I don't
8 -- that hasn't occurred yet. They did answer a request
9 to admit and I think preliminary requests for production
10 or interrogatories. They did say that, and said it
11 wasn't in their file, Your Honor. But if they'll say
12 they had no knowledge of it, I think that's a different
13 story.

14 And, lastly, Your Honor, I don't want to jump
15 over this, but I do think it's important to look at. We
16 all talked about this release or this alleged release.
17 Defendants' entire case rest on the validity of this
18 letter here, and it being a valid release. Okay, if
19 it's not valid then Harris Teeter is still on the hook.
20 And, Your Honor, there are serious ambiguities here in
21 this. We start out with you've agreed -- well, we
22 talked about the confidential nature of it. First line,
23 second paragraph, Harris Teeter's proposing to assign
24 this lease as part of the transactions, etcetera.
25 Harris Teeter may or may not close that proposed

1 assignment transaction. If it does close, either Harris
2 Teeter etcetera will etcetera. A little further down.
3 If the lease is not assigned by Harris Teeter to
4 assignee, Harris Teeter will continue to be solely
5 responsible for tenants obligations etcetera. And then
6 it says, confirm that you got it and then confirm, as
7 Mr. Marion said, that you'll look solely to the
8 assignee. This is a letter. But if anything, Your
9 Honor, it's more of a letter of intent rather than a
10 release. A full release with full consideration with --
11 or with adequate consideration of both parties. Again,
12 I think discovery flushes that out. So just to
13 summarily dismiss and accept this as a contract and as a
14 valid release, I think is premature, Your Honor.

15 And so we would respectfully request that both
16 motions be denied. First as to Miller and Martin and
17 second as to Harris Teeter.

18 THE COURT: Let me try to understand a little
19 better your position about the recorded ... Let me just
20 use a different scenario than what we've got here.
21 First of all, so you can tell me that it's completely
22 different, and second of all, so maybe I can understand
23 it a little better. But let's say we have a bank who
24 lets an owner of a property, commercial property borrow
25 money, puts a mortgage on the property, it's just a

1. simple mortgage. It doesn't have all these endless
2 terms in it. And let's say that the owner is leasing
3 the property to a tenant who's running a business on it.
4 And they have a lease that is recorded and the bank
5 knows about it, but it came into existence after the
6 mortgage. And let's say that furthermore the owner and
7 the tenant come to an agreement whereby they tell the
8 tenant he doesn't have to pay any rent anymore. Are you
9 telling me that unless that's recorded that the bank can
10 go after a tenant for monies payable on the lease if the
11 mortgage has some agreement about that?

12 MR. LINSER: Well, Your Honor, if I understand
13 you correctly, yes. Because there's -- you record
14 what's called the assignment of rents, etcetera. And
15 the mortgage is typically given in reliance upon those
16 terms remaining ---

17 THE COURT: I know that. But that doesn't
18 have that in there. This mortgage don't have that in
19 there.

20 MR. LINSER: And your mortgage does not?

21 THE COURT: No.

22 MR. LINSER: So it's different from this one?

23 THE COURT: Yeah.

24 MR. LINSER: Okay.

25 THE COURT: But I'm trying to -- and I don't

1 mean to mix arguments here, but you're trying to say
2 that the recording statute basically gives you a cause
3 of action against a tenant.

4 MR. LINSER: No, but there are damages that
5 have occurred. It's just not ---

6 THE COURT: Well, yeah, the bank -- they might
7 have -- well, the bank is out the money that they
8 otherwise would have gotten towards their mortgage
9 because the owner decided to cut the tenant a break.

10 MR. LINSER: He doesn't have the right to do
11 that anymore because now he has encumbered his property
12 and subordinate his rights to the bank and the mortgage
13 typically has a due on sale clause or if there's a
14 modification. Those terms in that mortgage that would
15 all of a sudden -- you know, I don't really own my
16 house, the bank does.

17 THE COURT: Correct. Correct. Perhaps my
18 example was flawed. But it seems to me like you're
19 trying to impose a duty on strangers to the transaction.
20 Harris Teeter is not part of this purchase agreement
21 between your client and the people at Martin and Miller
22 represent. How can a lease that's -- when did they buy
23 the property?

24 MR. LINSER: 2007.

25 THE COURT: Okay. You're saying that a lease

1 written six years before that can be attacked on the
2 ground that it's not valid by somebody who's not even a
3 party to it?

4 MR. LINSEY: Well, sure, Your Honor. It's a
5 twenty year lease and my client's primary if not --
6 overwhelmingly primary reason for buying this was
7 because of this lease in place and that language saying,
8 I've got a good tenant. Otherwise, you don't buy it.
9 I've got a good tenant. And for Harris Teeter not to
10 record a release that is required to be recorded ---

11 THE COURT: Well, you say it's required. But
12 what language are you relying on? That language just
13 says to be valid or something like that.

14 MR. LINSEY: Yes, sir. I'm relying on that
15 language.

16 THE COURT: Read it to me again. I don't have
17 it front of me.

18 MR. LINSEY: Okay. I can hand it up.

19 THE COURT: I can read too.

20 MR. LINSEY: It's a long statute. I've put it
21 in the middle there. It's 30-7-10, I believe.

22 THE COURT: ... in your argument?

23 MR. LINSEY: Well, I think the next line is
24 who I am, the subsequent purchaser for value without
25 notice.

1 THE COURT: Okay.

2 MR. LINSER: So that's who my client is. I
3 think it's an or in there, subsequent creditor or
4 subsequent purchaser for value without notice, I think
5 is the language. And so that release -- it's not
6 attacking the actual structure of it. But it's saying
7 it's not valid as to that person, that's my client. And
8 so this release is not valid as to my client, thereby
9 maintaining the original lease, keeping Harris Teeter on
10 the hook under the original language of the original
11 lease.

12 THE COURT: All right. What about that, Mr.
13 Marion.

14 MR. MARION: Your Honor, I think if you read
15 the whole paragraph, it doesn't say what Mr. Linser said
16 it said. But beyond that, the case law doesn't say
17 that.

18 THE COURT: Well, that's what I was wondering,
19 if there was any cases?

20 MR. MARION: Yes, sir, Your Honor, and this is
21 all in our brief where we incorporate, but let me just
22 highlight a couple of cases for you, the *Elbert versus*
23 *Jacobs* case. This is where property was bought out of a
24 tax lien. The lien was never filed so the question was,
25 someone bought the property and indeed it was filed and

1 the lien was not filed. And the question was, did the
2 person who bought it for the tax lien have a valid
3 title. So the Court says there, the lien creates a
4 creature of statute rather than conveyance evidenced by
5 written instruments. It's not encumbered by the
6 recording act, which relates solely to conveyances.
7 It's a priority statute. That's all it is doing. It
8 doesn't create a duty. Contrary to my friend's opinion,
9 there are no cases which say that. It would run counter
10 because that would, in effect, invalidate non-recorded
11 documents, which the case of *Epps versus McCollum*
12 *Realty*, a 1927 case, which is still good law,
13 specifically holds as between parties it is not
14 necessary to the validity of any instrument contemplated
15 by the act that it must be recorded. Recording becomes
16 material only where there is a double conveyance by the
17 same person. It is a priority statute. It doesn't
18 invalidate what my friend's position in effect is, it
19 invalidates the release. That is perfectly valid. All
20 it is is a priority.

21 Your Honor's position that -- I mean, your
22 query about we're being bound to a transaction we're not
23 a party to is exactly the point. We had nothing to do
24 with this transaction. The statute doesn't create a
25 duty. The lease, if you read through the lease, it says

1 that the lease will not be filed. By its own terms the
2 lease will not be filed. They filed only a short
3 memorandum, which there have been modifications since
4 the title has changed. The lease also contemplates
5 estoppel certificates, which is exactly what they should
6 have done buying the property. They were on notice and
7 should have gone out and gotten estoppel certificates,
8 which we were obligated to get under the lease.

9 The notion that we are somehow bound by a
10 mortgage, assuming the terms say what my friend says it
11 says, that we're bound by that, is completely erroneous.
12 There are no cases to that point. We aren't bound by
13 that. If the landlord decides he wants to change our
14 lease arrangement, he can do so. It may be a problem
15 for him with his -- contractually, but has nothing to do
16 with us. So here, there simply are no facts that we
17 were part of the transaction or that the statute created
18 any duty, period. The law is clear on that point, and I
19 won't burden the Court with going through all the cases,
20 but we cite both in the primary brief and reply brief
21 the cases which are dead on point. And it does not --
22 it's only priority statute. It does not create an
23 obligation. In fact, if it did, it would invalidate
24 non-filed documents, which it would not do. And that's
25 our position, Your Honor. Thank you.

1 THE COURT: All right. Thank you very much.
2 I appreciate all your arguments and I'm going to grant
3 the motion as to Harris Teeter. I think it's a matter
4 of law.

5 MR. MARION: Thank you, Your Honor.

6 THE COURT: They're entitled to judgment in
7 that. Mr. Marion prepare an order and give a copy to
8 Mr. Linser. As to Martin and Miller's motion, what I
9 hear Mr. Linser saying is he needs more time to do
10 discovery. I'm going to allow thirty more days to take
11 whatever depositions. Complete whatever discovery that
12 he needs to. Attempt to find the information. If there
13 is no new evidence, I'm going to grant Martin and
14 Miller's motion as well. All right.

15 MR. MARION: Thank you, Your Honor.

16 MS. HURLEY: Your Honor, I'm very sorry. I'm
17 Sarah Hurley. I represent one of the co-defendants,
18 Germania of America.

19 THE COURT: Yes, ma'am.

20 MS. HURLEY: And I apologize. I was hoping to
21 get your attention.

22 THE COURT: I'm sorry if I overlooked you.

23 MS. HURLEY: No, no, no. It's okay. May I
24 briefly be heard on just one issue that I hope will aid
25 the court.

1 THE COURT: Sure.

2 MS. HURLEY: And I understand you just ruled.

3 But as far as the breach of contract claim, which is
4 also made against my client, that is based on this
5 purported release, which is the letter agreement that
6 was written by a representative of Harris Teeter and
7 signed by a representative of CG&I. And it is my
8 understanding that whether that is in fact a valid
9 release of Harris Teeter's payment obligations under the
10 lease that they were a party to is actually a contested
11 fact that has not been decided at this juncture. I
12 believe that if the Court ---

13 THE COURT: Wait. Who do you represent?

14 MS. HURLEY: I represent the co-defendant
15 Germania of America.

16 THE COURT: Okay.

17 MS. HURLEY: One of the co-defendant's in the
18 case.

19 THE COURT: Okay.

20 MS. HURLEY: And I believe, Your Honor, that
21 the validity or effectiveness of this purported release
22 is a contested issue in this proceeding and I may be --
23 you know, it's a little unorthodox for me as a co-
24 defendant to sort of take sides with the plaintiff on an
25 issue, but I ---

1 THE COURT: Well, where is the evidence of it
2 being a contested fact? Because we've already been here
3 an hour and a half.

4 MS. HURLEY: Well, let me put it this way,
5 Your Honor -- well, it's a letter that's a little over a
6 page long. It does not say that Harris Teeter is
7 released of its payment obligation. It says that you
8 will agree to look to -- I can't remember -- Bi-Lo for
9 responsibilities under the lease. I think it gives an
10 argument that can be made that that is, in fact, an
11 ambiguous letter. I don't think it's clear and
12 unambiguous. But in any event, I think that some
13 discovery should be allowed on the effect of that
14 letter. Otherwise, the Court in granting the motion to
15 dismiss will have to, I think, decide that the lease is
16 in fact a clear and unambiguous document, that there was
17 consideration to support it and that was in effect at
18 the moment of the lease.

19 THE COURT: Okay.

20 MS. HURLEY: I think the plaintiff, if I
21 understand the plaintiff correctly, the position they're
22 taking is that this letter, if it's treated as a lease,
23 purports to be an amendment to the lease documents to
24 which Harris Teeter and the plaintiff's predecessor were
25 parties and to which the plaintiff is now the landlord.

1 So I believe that there is a -- that there are issues in
2 fact and that discovery should be allowed on the issue
3 of whether that release is effective. And I appreciate
4 your letting me be heard.

5 THE COURT: Oh, sure. Absolutely.

6 MS. HURLEY: And I apologize for interrupting.

7 THE COURT: No, that's okay. I understand.

8 All right. What about that, Mr. Marion?

9 MR. MARION: Your Honor, I agree it's a little
10 unorthodox for a co-defendant who has not raised it at
11 any time prior to this point, by answer or otherwise, to
12 take a position that the plaintiff has not taken.
13 That's pretty unorthodox to me. And there is -- no,
14 it's a question of law, Your Honor, of interpretation.
15 It is clear. They have not challenged it. In their
16 reply brief they didn't challenge it.

17 THE COURT: You know you'd do the same thing
18 if you had to.

19 MR. MARION: Never, Your Honor.

20 MR. LINER: The plaintiff has said that in
21 their initial brief, that it was -- that we have
22 questioned the validity of, I think it was the validity
23 of the document. So that, we have gone -- that's in our
24 memorandum, our first memorandum.

25 THE COURT: Okay. All right. Well, I

1 understand your argument and I appreciate you making it,
2 but I do find it's still not a material factor at this
3 point. It's a matter of law. Okay. Thank you.

4 MR. MARION: Thank you, Your Honor.

5 MR. LINSEY: Thank you, Your Honor.

6

7 (END OF REQUESTED TRANSCRIPT OF RECORD)

CERTIFICATE OF REPORTER

1

2
3 I, the undersigned Danette P. Hanks, Official Court
4 Reporter for the Thirteenth Judicial Circuit of the
5 State of South Carolina, do hereby certify that the
6 foregoing is a true, accurate, and complete transcript
7 of record of all the proceedings had and evidence
8 introduced in the trial/hearing of the captioned case,
9 relative to appeal, in the Circuit Court for Greenville
10 County, South Carolina, on the 1st day of March, 2011.

11 This transcript may contain quoted material. Such
12 material is reproduced as read by the speaker.

13 I do further certify that I am neither of kin,
14 counsel, nor interest to any party hereto.

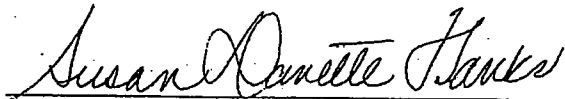
15 November 11, 2011

16

17

18

19



Circuit Court Reporter

Hurley, Sarah D.

From: Marion, Frankie [fmarion@hsblawfirm.com]
Sent: Wednesday, March 09, 2011 2:18 PM
To: ghillj@sccourts.org
Cc: slewis@covpatlaw.com; rstepp@sowellgray.com; Jim Sheedy; Hurley, Sarah D.
Subject: Roper v Harris Teeter et al; C. A. No. 2010-CP-23-7266
Attachments: Greenville-787585-v4-Roper v. Harris Teeter- Order Granting Harris Teeter's Motion for Summary Judgment.DOC; roper v harris teeter sj order.pdf; Francis Marion Jr. .vcf

Dear Judge Hill,

Per your instructions, attached please find a proposed Order Granting Harris Teeter's Motion for Summary Judgment with regard to the above-styled case. I have attached both a MS Word and pdf version for your convenience. If we need to make any changes or I can assist further, please let me know.

Best regards,

<<Greenville-787585-v4-Roper v. Harris Teeter- Order Granting Harris Teeter's Motion for Summary Judgment.DOC>> <<roper v harris teeter sj order.pdf>>

W. Francis Marion, Jr.
Haynsworth Sinkler Boyd, P.A.
P.O. Box 2048
75 Beattie Place
Greenville, South Carolina 29602

Direct Dial 864.240.3216
Fax 864.240.3300
<<Francis Marion Jr. .vcf>>

CONFIDENTIALITY NOTICE: This e-mail and any files transmitted with it are confidential and may contain information which is legally privileged or otherwise exempt from disclosure. They are intended solely for the use of the individual or entity to whom this e-mail is addressed. If you are not one of the named recipients or otherwise have reason to believe that you have received this message in error, please immediately notify the sender and delete this message immediately from your computer. Any other use, retention, dissemination, forwarding, printing, or copying of this e-mail is strictly prohibited.

IRS CIRCULAR 230 NOTICE: Internal Revenue Service regulations generally provide that, for the purpose of avoiding federal tax penalties, a taxpayer may rely only on formal written advice meeting specific requirements. Any tax advice in this message, or in any attachment to this message, does not meet those requirements. Accordingly, any such tax advice was not intended or written to be used, and it cannot be used, for the purpose of avoiding federal tax penalties that may be imposed on you or for the purpose of promoting, marketing or recommending to another party any tax-related matters. mmcorp

3/9/2011

R-0196

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Roper, LLC,)

Plaintiff,)

vs.)

Harris Teeter, Inc.; Carolina & Georgia)
Immobilierienfonds I, L.P.; GOA Realty)
Management I, LLC; Germania of)
America, Inc.; Miller & Martin PLLC;)
New Spring Community Church; John)
Doe; Richard Roe; and Doe)
Corporation,)

Defendants.)

IN THE COURT OF COMMON PLEAS

C. A. No. 2010-CP-23-7266

**ORDER GRANTING
HARRIS TEETER'S
MOTION FOR SUMMARY
JUDGMENT**

This matter came before the Court on Defendant Harris Teeter, Inc.'s ("Harris Teeter"), Motion to Dismiss or, alternatively, for Summary Judgment as to all of Plaintiff's claims in its Amended Complaint as against Harris Teeter. A hearing was held on March 1, 2011, at which time the Motion, supporting and opposing Memoranda, evidence submitted by the parties, and the arguments of counsel were considered. For the reasons set forth herein, Harris Teeter's Motion for Summary Judgment is GRANTED.

UNDISPUTED FACTS

The operative facts are not in dispute and can be summarized as follows: In 1995, Roper MT, LLC (Plaintiff's predecessor-in-interest) leased certain real property ("Property") in Greenville County to Harris Teeter for a twenty (20) year term under a written lease agreement ("Lease"). A Memorandum of the Lease was duly recorded in the Greenville County RMC

R-0197

office at Book 1641, Page 748.¹ By 2001, the Property and the landlord's Lease rights had been sold and were owned by the Defendant, Carolina & Georgia Immobilelienfonds I, L.P. ("CGI").

In mid-2001, Harris Teeter and Bi-Lo, LLC ("Bi-Lo") were negotiating a transaction whereby Bi-Lo would take an assignment of Harris Teeter's (tenant's) Leasehold estate and assume its Lease liabilities. By signed letter agreement dated June 12, 2001, CGI and Harris Teeter agreed that, if and when the Bi-Lo assignment and assumption of Lease became effective, CGI, as landlord, would thereafter "look solely to Assignee [Bi-Lo] for performance of the 'Tenant's' [Harris Teeter's] responsibilities under the Lease" ("Release"). Thereafter, Harris Teeter assigned its interest in the Lease by entering into an "Assignment and Assumption of Lease" with Bi-Lo which became effective on July 9, 2001. It was recorded in the Greenville County RMC office at Book 2189, Pages 1640-43. An executed copy of the Assignment and Assumption of Lease was sent to CGI under cover letter on July 9, 2001, thereby providing notice of the effective date of the Assignment and Assumption of Lease. Harris Teeter had no further involvement with the Lease or the Property from the effective date of the Assignment and Assumption of Lease going forward, and CGI looked solely to Bi-Lo for fulfillment of all Lease obligations.

Approximately six (6) years later, in April 2007, CGI sold the Property and its landlord Lease rights to Plaintiff. Prior to Plaintiff's purchase of the Property, Defendant, GOA Realty Management I, LLC ("GOA"), as general partner of CGI, executed an Affidavit on April 16, 2007 swearing that, among other things, Harris Teeter was not released from any Lease obligations. Harris Teeter had no knowledge of, and was not a party to, this Affidavit. It was only after Plaintiff's purchase of the Property that Harris Teeter first became aware of the Affidavit and the sale whereupon Harris Teeter promptly advised Plaintiff of its Release.

¹ Article 18.11 of the Lease prohibited the full Lease from being recorded with the RMC office. (Lease, Art. 18.11.)

At the time of the sale, Plaintiff was aware of the Assignment and Assumption of Lease between Bi-Lo and Harris Teeter. However, Plaintiff did not contact Harris Teeter at any time prior to its purchase of the Property to determine if Harris Teeter was still obligated under the Lease.

Harris Teeter has never had any business or contractual relations with Plaintiff. Harris Teeter was unaware of, and did not participate in, Plaintiff's purchase of the Property and the Lease, nor did it make any representations or have any communications with Plaintiff regarding the Property or the Lease.

Harris Teeter's first contact with Plaintiff was in September 2007, nearly six (6) months after its purchase from CGI, when Plaintiff's counsel sent a letter to Harris Teeter regarding its supposed obligations under the Lease. Harris Teeter immediately responded by advising Plaintiff's counsel that Harris Teeter had been released from the Lease obligations in 2001.

STANDARD OF REVIEW

Rule 56(c) of South Carolina Rules of Civil Procedure provides, in relevant part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

S.C. R. Civ. P. 56(c).

Summary Judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Citizens and S. Nat'l Bank of S.C. v. Lanford, 313 S.C. 540, 443 S.E.2d 549 (1994). In ruling on motions for Summary Judgment, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. Johnston v. Bowen, 313 S.C. 61, 437 S.E.2d 45 (1993). The moving party on the motion bears the burden of showing that there is no genuine issue of

material fact and that it is entitled to judgment as a matter of law. McCall v. State Farm Auto. Ins. Co., 359 S.C. 372, 376, 597 S.E.2d 181, 183 (Ct. App. 2004) (citing Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 130, 558 S.E.2d 271, 273 (Ct. App. 2001) (quoting Rule 56(c), SCRCP)).

"The moving party may discharge the burden of demonstrating the absence of a genuine issue of material fact by pointing out the absence of evidence to support the nonmoving party's case." Bennett v. Investors Title Ins. Co., 370 S.C. 561, 569, 635 S.E.2d 660, 664-65 (Ct. App. 2006) (citing Lanham v. Blue Cross & Blue Shield of S.C., Inc., 563 S.E.2d 331, 333, 349 S.C. 356 (2002)). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." Bennett, 370 S.C. at 569, 635 S.E.2d at 665 (citing Wogan v. Kunze, 366 S.C. 583, 591, 623 S.E.2d 107, 112 (Ct. App. 2005)). "The nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Bennett, 370 S.C. at 569, 635 S.E.2d at 665 (citing Rife v. Hitachi Constr. Mach. Co., 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005)).

CONCLUSIONS OF LAW

A. No Legal Duty to Record the Release

The ultimate issue in this case, as identified in Plaintiff's Memorandum in Opposition to Harris Teeter's Motion, is whether Harris Teeter had a legal or fiduciary duty to record the Release. (Mem. in Opp'n to Def. Harris Teeter's Mot. to Dismiss/Summ. J., p. 6). The determination of whether a legal duty exists is a question of law for the court. Sharpe v. South Carolina Dep't of Mental Health, 292 S.C. 11, 16, 354 S.E.2d 778, 781 (Ct. App. 1987). Plaintiff acknowledges that its claim is dependent on whether there is a duty to record a release under the

South Carolina Recording Act, § 30-7-10 (the "Act"). This Court finds, as a matter of law, that Harris Teeter had no legal duty to record the Release under the Act.

The Act is a priority statute that addresses competing claims over real property. It does not create a legal duty to record. The Act simply provides that "innocent or bona fide purchasers of real property, who pay valuable consideration, are protected from the claims of creditors or lienholders whose claims were not on record at the time of conveyance to the bona fide purchaser." Spence v. Spence, 368 S.C. 106, 120, 628 S.E.2d 869, 876 (2006) (citing Epps v. McCallum Realty Co., 139 S.C. 481, 496-511, 138 S.E. 297, 302-07 (1927)). "Recording becomes material only when there are double conveyances, etc., by the same person." Epps, 139 S.C. at 498, 138 S.E. at 302 (citing Martin v. Quattlebam, 14 S.C. L. 205, 3 McCord 205).

The Act "relates solely to conveyances." Von Elbrecht v. Jacobs, 286 S.C. 240, 243, 332 S.E.2d 568, 569 (Ct. App. 1985). It "does not protect a bona fide purchaser against liens or other interests arising out of instruments not entitled to be recorded." Id. (citing G. W. Thompson, Thompson on Real Property Section § 4297 (1978)) (emphasis added). "The failure to record an instrument which is not required to be recorded does not affect or vitiate the instrument as to anyone, and it is valid not only between the parties thereto, but also as to subsequent purchasers and encumbrances." 66 Am.Jur.2d Records and Recording Laws § 149 (2001) (emphasis added); see also Epps, 139 S.C. at 498, 138 S.E. at 302 ("As between the parties thereto, it is not necessary to the validity of any instrument contemplated by said Act that it be recorded.")

The Release, whereby CGI agreed to look solely to Bi-Lo for performance of the tenant's responsibilities under the Lease, did not convey an interest in land. Therefore, recordation under the Act was not necessary to protect the Release. Failure to record the Release did not affect its validity as between Harris Teeter and CGI or CGI's assignees or purchasers of the Property (*i.e.*

Plaintiff). See 66 Am.Jur.2d Records and Recording Laws § 149 (2001); Epps, 139 S.C. at 498, 138 S.E. at 302.

B. No Fiduciary Duty to Record the Release

Since Harris Teeter had no legal duty to record the Release, the remaining issue is whether Harris Teeter had a duty, based on its relationship or communications with Plaintiff, to disclose the Release to Plaintiff. (See discussion *supra* p. 4). There is no evidence showing a relationship or communications between Harris Teeter and Plaintiff that create a fiduciary or other duty on Harris Teeter to record or apprise Plaintiff of the Release. Therefore, Plaintiff's Causes of Action for Fraudulent Concealment, Promissory Estoppel and Negligent Misrepresentation, each requiring evidence of a direct relationship or communication between Plaintiff and Harris Teeter giving rise to a disclosure duty, are dismissed as a matter of law.

1. Fraudulent Concealment

Plaintiff's claim for Fraudulent Concealment is based on Harris Teeter's alleged failure to disclose to Plaintiff the existence, or the substance, of the Release relieving Harris Teeter of its Lease obligations. Fraudulent Concealment is based on *nondisclosure when there is a duty to speak*. Pitts v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 335, 574 S.E.2d 502, 510 (Ct. App. 2002) (quoting Ardis v. Cox, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (Ct. App. 1993) (emphasis added)). "Non-disclosure becomes fraudulent concealment only when it is the duty of the party having knowledge of the facts to make them known to the other party to the transaction." Pitts, 352 S.C. at 335, 574 S.E.2d at 510 (quoting Lawson v. Citizens & S. Nat'l Bank of S.C., 259 S.C. 477, 481-82, 193 S.E.2d 124, 126 (1972)).

The duty to disclose may be reduced to three distinct classes: (1) where it arises from a *preexisting definite fiduciary relation* between the parties; (2) where one party *expressly reposes a trust and confidence in the other with reference to the particular transaction in question*, or else from the *circumstances of the case*, the

nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.

Pitts, 352 S.C. at 335, 574 S.E.2d at 510 (citing Ardis, 314 S.C. at 517, 431 S.E.2d at 270) (emphasis added).

Plaintiff's claim fails as a matter of law because none of the "three distinct classes," creating a duty to disclose, existed with respect to Harris Teeter and Plaintiff.² With respect to the second class of relationships as cited by Pitts, there is no evidence showing that Plaintiff "expressly repose[d] a trust and confidence" in Harris Teeter with respect to Plaintiff's purchase of the Property or that from the "circumstances of the case, the nature of . . . [Harris Teeter's and Plaintiff's] dealings or their position towards each other, such a trust and confidence . . . [was] implied." Id.

Plaintiff cannot unilaterally assert that it imposed confidence in Harris Teeter without evidence that Harris Teeter accepted or induced the confidence placed in it. Steele v. Victory Sav. Bank, 295 S.C. 290, 295, 338 S.E.2d 91, 94 (Ct. App. 1988) (citing 36A C.J.S. Fiduciary (1961) ("[A]s a general rule, a fiduciary relationship cannot be established by the unilateral action of one party. The other party must have actually accepted or induced the confidence placed in him.") Plaintiff concedes it had no contact with Harris Teeter prior to the sale of the Property.

It is undisputed that Harris Teeter neither participated in Plaintiff's purchase of the Property, nor made any representations or had any communications or negotiations with Plaintiff

² Plaintiff failed to plead that Harris Teeter had a preexisting definite fiduciary relationship with Plaintiff, and instead based its theory of Harris Teeter's duty to disclose on the second and third classes of relationships as cited by Pitts. (See Am. Compl. ¶¶ 27-31.) Therefore, this Order will only address the second and third classes as described in Pitts.

regarding the Property or Harris Teeter's liability under the Lease. Harris Teeter was not even aware of Plaintiff's purchase until approximately six (6) months after the sale. It is also undisputed that Harris Teeter and Plaintiff did not have a former or existing contractual or business relationship with one another. Considering the foregoing undisputed facts, this Court finds as a matter of law that Plaintiff did not expressly repose a trust and confidence in Harris Teeter with respect to Plaintiff's purchase of the Property, neither can such a trust and confidence be implied from the nature of their dealings as they had none. See Pitts, 352 S.C. at 336, 574 S.E.2d at 510 (court found no evidence to imply the existence of trust and confidence between parties who had no previous dealings with one another or a fiduciary relationship, and were involved in an arm's length commercial transaction).

With respect to the third "distinct class" as cited by Pitts, there is no evidence showing that "the very contract or transaction itself . . . is intrinsically fiduciary . . ." Pitts, 352 S.C. at 335, 574 S.E.2d at 510 (citing Audis, 314 S.C. at 517, 431 S.E.2d at 270). It is undisputed that Harris Teeter and Plaintiff were effectively strangers with respect to Plaintiff's purchase of the Property. Harris Teeter was not a party to the purchase transaction and had no knowledge of it until well after the fact, on September 26, 2007 when Plaintiff's counsel contacted Harris Teeter. Considering that the undisputed evidence shows that Harris Teeter was not a party to, or had knowledge of, the Property's purchase, Harris Teeter had no duty to disclose its Release to Plaintiff on the basis that they had a contract or transaction that was intrinsically fiduciary.

2. Promissory Estoppel

Plaintiff bases its Promissory Estoppel claim against Harris Teeter on the allegation that, by both conduct and representations, Harris Teeter

promised and represented to the Plaintiff, both orally and through documentation, including, but not limited to, an Affidavit dated April 16, 2007, that . . . Harris

Teeter had not been released from any obligations under the lease agreements between Harris Teeter and owners of the property

(Am. Compl. ¶ 48.) Plaintiff's claim fails as a matter of law because there is no evidence showing that Harris Teeter made any promise to Plaintiff.

The elements of a Promissory Estoppel claim in South Carolina are:

(1) the presence of a *promise unambiguous in its terms*; (2) reasonable reliance upon the promise by the party to whom the promise is made; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise.

Woods v. State, 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct. App. 1993) (citing Powers Constr. Co. v. Salem Carpets, Inc., 283 S.C. 302, 322 S.E.2d 30 (Ct. App. 1984) (emphasis added).

The undisputed facts show that there were no contacts or communications between Plaintiff and Harris Teeter until approximately six (6) months after Plaintiff's purchase of the Property. Thus, Harris Teeter made no promises to Plaintiff "orally" or otherwise. Plaintiff concedes that there were no communications between them prior to the sale of the Property.

Plaintiff asserts that it relied on "an Affidavit dated April 16, 2007." (Am. Compl. ¶¶ 24 & 26.) Assuming Plaintiff relied on this Affidavit, such reliance does not create a cause of action against Harris Teeter, without Harris Teeter *at least* having knowledge the Affidavit. It is undisputed that Harris Teeter was neither a party to, nor had knowledge of, the Affidavit. Consequently, there cannot be an "unambiguous promise" made by Harris Teeter to Plaintiff arising from the April 16, 2007 Affidavit regarding Harris Teeter's obligations under the Lease. Because there is no evidence showing that Harris Teeter made any oral or written promises to Plaintiff, Plaintiff's claim for Promissory Estoppel fails as a matter of law.

3. Negligent Misrepresentation

The basis of Plaintiff's Negligent Misrepresentation Cause of Action is that Harris Teeter

"made false representations to the Plaintiff through . . . [its] conduct, words and documentation, including, but not limited to, the Affidavit dated April 16, 2007" (Am. Compl. ¶ 52.) However, the evidence shows that Harris Teeter made no representations to Plaintiff of any kind.

The elements of a Negligent Misrepresentation claim in South Carolina are:

(1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

Hurst v. Sandy, 329 S.C. 471, 481, 494 S.E.2d 847, 852 (Ct. App. 1997) (citing Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993)) (emphasis added).

As noted above, there were no communications between Harris Teeter and Plaintiff regarding the Property or Harris Teeter's liability under the Lease prior to, or within five (5) months of Plaintiff's purchase of the Property. Moreover, Harris Teeter had no knowledge of, and was not a party to, the Affidavit on which Plaintiff bases this Cause of Action. Prior to Plaintiff's purchase, Harris Teeter made no representations, false or otherwise, to Plaintiff regarding its obligations under the Lease.³ Failing on this essential element, Plaintiff's claim for Negligent Misrepresentation is dismissed as a matter of law.

C. Breach of Contract

Plaintiff's Breach of Contract claim against Harris Teeter is premised on the proposition that Harris Teeter was not released from the Lease by the June 12, 2001 letter agreement and is ultimately liable for default by any sub-lessee. The relevant inquiry becomes whether the June 12, 2001 letter agreement was a valid contract which released Harris Teeter of all obligations,

³ As noted above, there was no duty of care flowing between Harris Teeter and Plaintiff with regards to Plaintiff's purchase of the Property and Lease. Harris Teeter was not involved with the sale and, as conceded by Plaintiff, there was no contact between it and Harris Teeter.

including payment obligations, under the Lease. This Court finds, as a matter of law, that the release is valid and binding. Consequently, Plaintiff's Breach of Contract claim fails as a matter of law.

There is no question under the law that a release is a binding contract. Southern Glass & Plastics Co. v. Duke, 367 S.C. 421, 428, 626 S.E.2d 19, 22 (Ct. App. 2005) (citing Gardner v. Columbia Police Dep't, 216 S.C. 219, 223, 57 S.E.2d 308, 309 (1950)). To have a binding contract there must be an offer, acceptance, and valuable consideration. Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co., 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993) (citing Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984)). "The construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment." Middleborough Horizontal Prop. Regime Council v. Montedison S.p.A., 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995).

The plain and unambiguous language of the June 12, 2001 letter agreement exhibited a clear offer by Harris Teeter and corresponding acceptance by CGI. Harris Teeter's offer was that CGI "look solely to . . . [Bi-Lo] for performance of the 'Tenant's' responsibilities under the Lease after the Effective Date of the Assignment." (Release). Harris Teeter requested, and in turn received, acceptance of its offer through CGI's execution and return of the letter agreement.

Plaintiff attempts to defeat the June 12, 2001 letter agreement as being a valid contract by alleging that it "does not say what the final outcome was in regards to . . . Harris Teeter's obligations" (Am. Compl. ¶ 25.) Despite Plaintiff's allegations, this Court finds that the conditional language in the letter agreement, i.e. "[i]f it does close . . ." and "after the Effective Date of the Assignment") refer to the condition precedent - Harris Teeter and Bi-Lo executing

the Assignment and Assumption of Lease and delivering it to CGI.⁴ Holmes, 379 S.C. at 477, 666 S.E.2d at 266 (quoting Brewer, 364 S.C. at 449, 613 S.E.2d at 805) (A condition precedent is defined as "any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises.") Plaintiff concedes that not only was the Assignment and Assumption of Lease fully executed and recorded, but that it also received a copy under cover letter dated July 9, 2001, the Effective Date. Hence, the condition precedent was satisfied, thereby rendering CGI's obligation unconditional to look solely to Bi-Lo for performance of the Tenant obligations under the Lease. In other words, once the condition was satisfied, the Release was, by its terms, self-executing without further acts.

Although Plaintiff did not contest the letter agreement in its briefing or in oral argument on grounds of lack of consideration, this Court finds that the letter agreement was supported by proper consideration. Hyman v. Ford Motor Co., 142 F.Supp.2d 735, 741 (D.S.C. 2001) (applying South Carolina law) (a valid release, like other contracts, must be based upon consideration). Whether a release is based on adequate consideration is determined by the same principles of adequate consideration that apply to other contracts. Id.

Consideration exists where there is a "benefit to the promisor" (CGI) or a loss or "detriment to the promisee" (Harris Teeter). Shayne of Miami, Inc. v. Greybow, Inc., 232 S.C. 161, 167, 101 S.E.2d 486, 489 (1957) (emphasis added). Consideration also exists where there is "forbearance to exercise a legal right . . ." Prestwick Golf Club v. Prestwick Ltd. Pship., 331 S.C. 385, 389, 505 S.E.2d 184, 186 (Ct. App. 1998) (citing Caine & Estes Ins. Agency, Inc. v. Watts, 278 S.C. 207, 295 S.E.2d 559 (1982)). Harris Teeter, as "promisee," suffered a

⁴ "The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ." M&M Group, Inc. v. Holmes, 379 S.C. 468, 476, 666 S.E.2d 262, 266 (Ct. App. 2008) (quoting Brewer v. Stokes Kia, Izuzu, Subaru, Inc., 364 S.C. 444, 445, 613 S.E.2d 802, 805 (Ct. App. 2005)).

"detriment" or "loss" in that, upon receiving the Release, it gave up all of its Lease rights to Bi-Lo even though it was not obligated to do so. Howard v. South Carolina Nat'l Bank, 288 S.C. 421, 425, 343 S.E.2d 41, 43 (S.C. App. 1986) ("Detriment," in the sense of consideration for a contract, means giving up by promisee of something that he had the right to keep, or doing something he had the right not to do). The detriment Harris Teeter experienced in foregoing its legal right to enforce the Lease obligations against Bi-Lo or its sub-tenant was sufficient consideration to support the Release.

Moreover, "consideration" may consist of the "performance of an act by a promisee that he or she is not legally obligated to perform . . ." 17A Am. Jur. 2d Contracts §118 (2004). Here, Harris Teeter, the promisee, conveyed its leasehold to Bi-Lo, without being obligated to do so, for the purpose of, inter alia, obtaining the Release from its promisor, CGI. Also, and independently of the detriment to Harris Teeter, additional consideration existed by virtue of a "benefit to the promisor," CGI. CGI received the benefit of Bi-Lo's liability on the Lease instead of Harris Teeter's. A similar situation is found in Davis v. Blum, 104 S.C. 218, 88 S.E. 465 (1916) where the South Carolina Supreme Court found valid consideration in a creditor's agreement to look solely to another for payment of a debt. Relying upon defendant husband's promise to pay for legal services performed on behalf of his wife, plaintiff judge undertook legal representation of the wife. Id. at 222, 88 S.E. at 466-67. When plaintiff sued defendant for payment, the Court found that legal consideration existed for the defendant's promise to pay by way of plaintiff's agreement to look solely to defendant (and not his wife) for payment. Id. at 222-23, 88 S.E. at 457. Such is the case here -- consideration existed by way of Plaintiff's agreement (through its predecessor-in-interest) to look solely to Bi-Lo for all future tenant obligations under the Lease, and the benefit it received from obtaining Bi-Lo's liability on the

Lease.

Having found that a valid contract existed between Harris Teeter and Plaintiff, the relevant inquiry becomes whether it constitutes a valid release under South Carolina law. "The construction of a release is, in the first instance, a question of law for the court." Wilson Group v. Quorum Health Res., 880 F.Supp. 416, 425 (D.S.C. 1995). A release "is the relinquishment of a right or claim by the person in whom the right exists to the person against whom it might have been enforced." Wilson Group, 880 F.Supp. at 425 (citing 18 S.C. Juris. Release § 2). "No set form of words is necessary to constitute a release," Gardner, 216 S.C. at 223, 57 S.E.2d at 310, and no "magic words" are required. Wilson Group, 880 F.Supp. at 425. Courts look to the instrument itself in determining the nature of the release. Campbell v. Bi-Lo, Inc., 301 S.C. 448, 451, 392 S.E.2d 477, 479 (Ct. App. 1996). "[I]f the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect." Holmes, 379 S.C. at 476, 666 S.E.2d at 266 (citing Ecclesiastes Production Ministries v. Outparcel Assocs., L.L.C., 374 S.C. 483, 498, 649 S.E.2d 494, 501 (Ct. App. 2007)).

This Court finds, as a matter of law, that the June 12, 2001 letter agreement is clear and unambiguous and meets the requirements of a valid release under South Carolina law, releasing Harris Teeter of all obligations, including payment obligations, under the Lease. By signing the letter agreement, CGI agreed to relinquish its right to look to Harris Teeter for performance of the "Tenant" responsibilities under the Lease," and instead "look solely to Assignee [Bi-Lo] for performance of the Tenant's responsibilities under the Lease after the Effective Date of the Assignment." (Release.) CGI clearly gave up its right to require Harris Teeter's performance under the Lease - a right which CGI chose to release as against Harris Teeter, and enforce as against Bi-Lo. In turn, Harris Teeter gave up control of the Property and its rights under the

Lease, and completed the assignment of the Lease to Bi-Lo.

IT IS THEREFORE ORDERED, that the Defendant Harris Teeter's Motion for Summary Judgment is GRANTED and that Plaintiff's Amended Complaint against the same is hereby dismissed *with prejudice*.

Dated: March ____, 2011

The Honorable D. Garrison Hill
Judge, Thirteenth Judicial Circuit

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

FILED CLERK OF COURT
GREENVILLE COUNTY
PAUL B. WICKENSIMER

2011 MAY -3 A 9:56

REPLY TO:

Lindsay L. Casenhiser

E-Mail: LCasenhiser@TurnerPadget.com
Writer's Direct Dial: (864) 552-4629
Direct Fax: (864) 282-5972

April 29, 2011

The Honorable Paul B. Wickensimer
Greenville County Clerk of Court
Greenville County Courthouse
305 E. North Street
Greenville, SC 29601

Re: Roper, LLC v. Harris Teeter, Inc.; Carolina & Georgia Immobilelienfonds I, LP;
GOA Realty Management I, LLC; Germania of America, Inc.; Miller & Martin,
PLLC; New Spring Community Church; John Doe; Richard Doe; and Doe
Corporation
C.A. No.: 2010-CP-23-7266
TPGL File No.: 987.440

Dear Mr. Wickensimer:

Please find enclosed copy of correspondence with attachments from Sarah Day Hurley to Judge Hill in the above referenced matter. I would appreciate your causing to be filed and returning the filed copy to me in the enclosed self-addressed stamped envelope.

Sincerely,
TURNER, PADGET, GRAHAM & LANEY, P.A.

Lindsay L. Casenhiser
Lindsay L. Casenhiser
Paralegal to Sarah Day Hurley

Enclosure

cc: W. Francis Marion, Jr., Esquire (w/ enclosures)
Stephen R. H. Lewis, Esquire (w/ enclosures)
Robert I. Stepp, Esquire (w/enclosures)
James W. Sheedy, Esquire (w/ enclosures)

TPGL 3798157v1

BUSINESS • LITIGATION • SOLUTIONS

200 East Broad Street • Suite 250 (29601) • PO Box 1509 • Greenville, SC 29602
Phone (864) 552-4600 • Fax (864) 552-4620 • turnerpadget.com

R-0212

Hurley, Sarah D.

From: Hurley, Sarah D.
Sent: Wednesday, March 16, 2011 12:23 PM
To: ghillj@sccourts.org
Cc: Marion, Frankie; rstepp@sowellgray.com; slewis@covpatlaw.com; Jim Sheedy
Subject: Roper, LLC v Harris Teeter, Inc., et al.; C. A. No. 2010-CP-23-7266
Attachments: doc02120620110316122252.pdf

Dear Judge Hill,

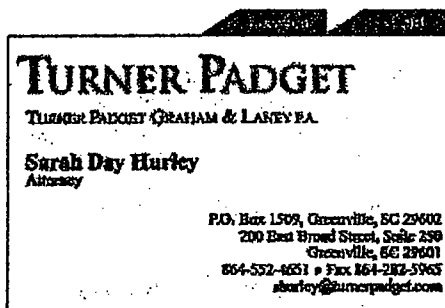
Attached please find correspondence in which we are providing our comments to the proposed order on Harris Teeter's Motion for Summary Judgment.

We would appreciate it if you would disregard my earlier email and letter (the letter erroneously referred to the June 12, 2001 letter by the wrong date). We have corrected that error in the attached revised correspondence.

I apologize to the Court and the other parties for any inconvenience, and thank you for your consideration.

With best regards,

Sarah Day Hurley
Counsel for defendant Germania of America, Inc.



3/16/2011

R-0213

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

REPLY TO:

Sarah Day Hurley

E-Mail: SHurley@TurnerPadget.com

Writer's Direct Dial: (864) 552-4651

Direct Fax: (864) 282-5965

March 16, 2011

The Honorable D. Garrison Hill
213 Courthouse
305 E. North Street
Greenville, SC 29601

Re: Roper, LLC vs. Harris Teeter, Inc.; Carolina & Georgia Immobilelienfonds I, LP;
GOA Realty Management I, LLC; Germania of America, Inc.; Miller & Martin,
PLLC; New Spring Community Church; John Doe; Richard Roe; and Doe
Corporation

C. A. No. 2010-CP-23-7266

Dear Judge Hill:

This firm represents defendant Germania of America, Inc. in the above-referenced case. I am writing in response to the proposed order that was submitted to the Court on Wednesday, March 9, 2011, in connection with the Court's ruling on defendant Harris Teeter, Inc.'s Motion to Dismiss or, In the Alternative, for Summary Judgment. As discussed below, our concerns with the proposed order pertain to the Court's ruling on the Plaintiff's claim for breach of contract against Harris Teeter, Inc. ("Harris Teeter"). We would respectfully ask the Court to consider our comments below.

The basis for the Plaintiff's breach of contract claim is Harris Teeter's failure to pay rent under a lease agreement it entered into with the previous landlord in April 1995, as described in the Complaint (hereinafter referred to as the "Lease"). Harris Teeter denies that it is liable for payment under the Lease, based upon an alleged "release" obtained pursuant to a letter signed on or about June 12, 2001 (hereinafter referred to as the "June 2001 letter").

As an initial matter, we would note that the proposed order erroneously states that there is no dispute concerning the June 2001 letter, or its alleged terms. (See Proposed Order, under the "Undisputed Facts" section, p. 2). To the contrary, as I mentioned at the hearing, Germania agrees with the Plaintiff that there is, at least at this stage of the litigation, a genuine issue of material fact concerning whether the June 2001 letter constitutes a valid release of Harris

BUSINESS • LITIGATION • SOLUTIONS

200 East Broad Street • Suite 250 (29601) • PO Box 1509 • Greenville, SC 29602
Phone (864) 552-4600 • Fax (864) 552-4620 • turnerpadget.com

R-0214

TURNER PADGET

The Honorable D. Garrison Hill
March 16, 2011
Page 2

Teeter's payment obligations under the Lease. In this regard, we believe the June 2001 letter is reasonably susceptible of more than one interpretation, and therefore cannot, as a matter of law, be determined to be a clear and unambiguous release of Harris Teeter's payment obligations under the Lease.

The proposed order appropriately states that contract formation requires an offer, acceptance, and valuable consideration. However, it fails to also note that a valid contract, to be properly formed, must also involve "a meeting of the minds of the parties involved with regard to all essential and material terms of the agreement." Hardaway Concrete Co. v. Hall Contracting Corp., 374 S.C. 216, 225, 647 S.E.2d 488, 492 (Ct. App. 2007). Because the June 2001 letter does not reflect critical terms of contract formation – such as the intent of the parties and whether consideration flowed to the landlord, Harris Teeter has not carried its burden of proof to show that the June 2001 letter constitutes a valid release of Harris Teeter's payment obligations under the Lease.

In Wallace v. Day, 390 S.C. 69, 700 S.E.2d 446 (Ct. App. 2010), the court explained that, "[w]hen interpreting a contract, a court must ascertain and give effect to the intention of the parties." Id. at 74, 449. A court determines the intention of the parties by looking first to the contract itself. If the language is clear and unambiguous, "the determination of the parties' intent is a question of law for the court." Id. Furthermore, whether an ambiguity exists in the language of a contract is also a question of law.

"A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation." Id., quoting S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001). "The uncertainty in interpretation can arise from the words of the instrument, or in the application of the words to the object they describe." Wallace v. Day, 700 S.E.2d at 449, quoting Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 242, 672 S.E.2d 799, 803 (Ct. App. 2009). "Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. The determination of the intent of the parties is then a *question of fact*." Wallace v. Day, supra, quoting McClellanville, 345 S.C. at 623, 550 S.E.2d at 303.

Therefore, in determining whether the June 2001 letter constitutes a valid and enforceable release of Harris Teeter's payment obligations under the Lease, and whether the terms of such letter are clear and unambiguous and capable of only one reasonable interpretation, we would ask the Court to consider the following in its ruling:

TURNER PADGET

The Honorable D. Garrison Hill

March 16, 2011

Page 3

(1) The June 2001 letter never mentioned the words "release" or "payment."

Although Harris Teeter contends that the the June 2001 letter constitutes a release of its payment obligations under the Lease, the document itself never mentions either of the words "release" or "payment." Furthermore, it does not contain the phrase "payment obligation." The claimed "release" pertains to a long-term, commercial real estate lease, pursuant to which the tenant is obligated to pay millions of dollars. The June 2001 merely states that the landlord would agree to "look solely to" Bi-Lo for "performance" of the tenant's "responsibilities" under the Lease.

Notably, the tenant has multiple responsibilities under the Lease. For example, the tenant is obligated to maintain certain improvements, including the parking lot, in good order and repair (§ 6.2(b)); the tenant is required to maintain certain insurance for casualty and general liability (§§ 6.4, 12.5, 12.6); the tenant is required to maintain the property in good order and to make repairs, as needed, to the building, including exterior and structural supports of the Building (§ 10.1); the tenant is obligated to pay all utilities, including electricity, heat, water, gas, garbage disposal (§ 11.1). The June 2001 letter did not mention a "release" of any payment obligation under the Lease, but simply asked for an agreement that the landlord would look to Bi-Lo for performance of the tenant's "responsibilities" under the Lease. A reasonable interpretation of the language in the June 2001 letter is that it did not constitute a release of any obligation by Harris Teeter *for payment of rent*, but rather, that the landlord was agreeing to look solely to Bi-Lo for maintenance of the building, grounds, insurance, and other responsibilities of the tenant occupying the facilities under the Lease.

(2) The June 2001 letter does not recite or reflect consideration.

There is also no mention or recitation of consideration flowing to the landlord in the June 2001 letter. If, in fact, the letter constitutes an effective and valid release of Harris Teeter's payment obligations under the Lease, the consideration flowing to the landlord should be plain and clear under the terms of the alleged agreement. As the proposed order indicates, in order for consideration to exist, there must be a benefit to the promisor (landlord) or a loss to the promisee (Harris Teeter). Nothing in the June 2001 letter indicates any loss at all to Harris Teeter; to the contrary, it suggests that there is a benefit – a significant benefit – flowing only to Harris Teeter, with nothing of value given in return to the landlord.

TURNER PADGET

The Honorable D. Garrison Hill
March 16, 2011
Page 4

(3) The June 2001 letter did not mention that it was an amendment to the Lease.

An ambiguity in a contract "can arise from the words of the instrument, or in the application of the words to the object they describe." Wallace v. Day, 700 S.E.2d at 449, quoting Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 242, 672 S.E.2d 799, 803 (Ct. App. 2009). Therefore, in construing the alleged release, it would also be appropriate for the Court to consider the terms of the Lease.

Pursuant to the express and unambiguous terms of the Lease, in the event of any assignment or sublease by Harris Teeter, Harris Teeter would continue to be liable for payment of rent under the Lease:

15.4 Continuing Liability of Tenant. In the event of an assignment or sublease, Tenant agrees that Tenant will remain jointly and severally liable, with the assignee or subtenant, for the payment of the rent reserved under this Lease and for performance of all of the other terms, conditions, and provisions of this Lease which are required to be performed by Tenant, notwithstanding any acceptance of rent or performance by Landlord directly from the assignee or subtenant. (emphasis added)

See Lease Agreement Between Roper Mt. Rd. Assoc. LLC and Harris Teeter, Inc.
p. 23 (copy attached).

The June 2001 letter does not say whether it was, or was intended to be, an amendment to the Lease. Therefore, an ambiguity exists, within the four corners of the letter, concerning the effect of the letter, and whether it was intended to be, and was in fact, an amendment of material and essential terms of the Lease concerning Harris Teeter's payment obligations.

Notably, despite Harris Teeter's protestations that it has been released from its payment obligations under the Lease, the June 2001 letter, at the time it was written and entered into, also clearly sought to minimize its significance as a purported legal document. Indeed, the author of the letter wrote that the letter was intended simply *to provide notice* to the landlord of Harris Teeter's intent to assign the Lease to Bi-Lo. For example, the June 2001 letter stated, in a somewhat casual and informal tone: *"Even though no landlord consent is required to this proposed assignment, we wanted to notify you of the proposed assignment and to inform you of certain details concerning the transaction."* Harris Teeter further stressed that the transaction was not a certainty: *"Harris Teeter and Assignee may or may not close the proposed*

TURNER PADGET

The Honorable D. Garrison Hill
March 16, 2011
Page 5

Assignment transaction." In closing, the author asked: "We would appreciate your signing at the bottom of this letter to confirm that you have received a copy of this letter and that you will look solely to Assignee for performance of the "Tenant's" responsibilities under the Lease after the Effective Date of the Assignment."

For all of these reasons, we would submit that, in viewing all reasonable inferences in favor of the non-moving parties, it is simply impossible to conclude, based upon the letter itself, that the parties had a meeting of the minds and intended, without a doubt, to amend essential terms of the Lease by releasing Harris Teeter of its payment obligations. Therefore, we believe that summary judgment in favor of Harris Teeter, on the breach of contract claim, is inappropriate at this time.

Conclusion

Germania submits that the June 2001 letter is reasonably susceptible of more than one interpretation concerning whether it was intended to be a "release" of Harris Teeter's payment obligations, whether there was consideration flowing to the landlord, and whether the parties intended to amend material terms of the Lease, i.e., the payment terms. We respectfully submit that the issue of the validity of the June 2001 letter as a "release" is a question of fact, and therefore, that Harris Teeter is not entitled to summary judgment on the breach of contract claim. Furthermore, discovery in this case has not been completed, and we request an opportunity to conduct discovery on this issue, without prejudice, of course, to Harris Teeter to renew its motion for summary judgment at a later date. Alternatively, we would ask the Court to include in its order a discussion and ruling on the matters outlined above.

Very truly yours,

Sarah Day Hurley
Sarah Day Hurley

SDH:daq
cc:

W. Francis Marion, Jr., Esq.
Stephen R. H. Lewis, Esq.
Robert E. Stepp, Esq.
James W. Sheedy, Esq.

R-0218

**Harris
Teeter**Post Office Box 33128
Charlotte, N.C. 28233-3128
Telephone: (704) 544-3100

June 12, 2001

Hugh Gage, Jr.
Carolina & Georgia Immobilienfonds I, LP
c/o Germania of America, Inc.
3340 Peachtree Road, NE
Suite 550
Atlanta, GA 30305

Re: Proposed Assignment by Harris Teeter to BI-LO, LLC, a Delaware limited liability company ("Assignee") Relating to Lease dated April 20, 1993 as amended (the "Lease") for Store No. 260, Located in 401 Roper Mountain Road, Greenville, South Carolina

Dear Bucky:

This letter will confirm certain matters that we have discussed relating to Harris Teeter's proposed Assignment of the referenced Lease to Assignee. This letter and any other information that has been supplied to you relating to the subject matter of this letter constitutes part of the Proprietary Information that you have agreed to keep confidential pursuant to our earlier letter agreement.

As we have discussed, Harris Teeter is proposing to assign the Lease to Assignee as part of a transaction whereby Assignee will take over Harris Teeter's business in a number of the Harris Teeter locations in the Atlanta metropolitan area. Even though no landlord consent is required to this proposed assignment, we wanted to notify you of the proposed assignment and to inform you of certain details concerning the transaction. We hope that the assignment transaction will close in approximately thirty (30) days. Harris Teeter and Assignee may or may not close the proposed Assignment transaction. If it does close, either Harris Teeter or Assignee will notify you of the completed Assignment and will provide you with a copy of the Assignment and Assumption Agreement whereby Harris Teeter's rights under the Lease have been assigned to Assignee and whereby Assignee assumes Harris Teeter's obligations under the Lease. Pursuant to the Assignment and Assumption Agreement, Assignee will be responsible for all of Harris Teeter's obligations under the Lease after the Effective Date of the Assignment. If the Lease is not assigned by Harris Teeter to Assignee, Harris Teeter will continue to be solely responsible for the "Tenant's" obligations under the Lease. We would appreciate your signing at the bottom of this letter to confirm that you have received a copy of this letter and that you will

Doc. Number 419643.1

R-0219

look solely to Assignee for performance of the "Tenant's" responsibilities under the Lease after the Effective Date of the Assignment.

We appreciate your assistance. If you have any questions concerning this letter, please call me right away. Please sign this letter as indicated and fax a copy of this fully signed letter to me no later than June 22, 2001. After faxing a copy of it to me, please mail the original to me in the enclosed envelope.

Very truly yours,

Ted S. Barnes

Ted S. Barnes
Vice President of Real Estate

Acknowledged and Agreed:

Hugh B. Case, Jr.
HUGH B. CASE, JR.

Print Name and Title: *EXECUTIVE VICE PRESIDENT*
GOA REALTY MANAGEMENT I, LLC
GENERAL PARTNER

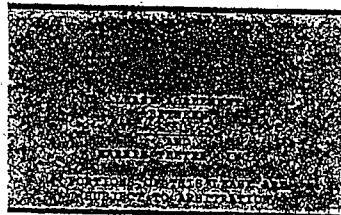
For and on behalf of the above-named
Landlord

7099 3400 001A 3057 253A

U.S. Postal Service	
CERTIFIED MAIL RECEIPT	
(Domestic Mail Only. For Insurance Coverage Forwarding)	
PS	1
70-240	34
Postage	1.90
Postage Paid	1.50
Postage Due	0.74
Return to: <i>GOA REALTY MANAGEMENT I, LLC</i> <i>3400 70th Ave. NE, Suite 550</i> <i>Atlanta, GA 30305</i>	

Doc. Number: 419043.1

R-0220



REDACTED LEASE BOOK WITH VLS

TABLE OF CONTENTS

1	PREMISES	1
1.1	Devises by Landlord	1
1.2	Warranty of Title and Covenant of Quiet Enjoyment	1
2	CONSTRUCTION OF IMPROVEMENTS	2
2.1	Landlord's Obligation to Construct Improvements	2
2.2	Plans and Specifications	2
2.3	Changes to the Plans and Specifications	4
2.4	Preconstruction Meeting	4
2.5	Warranty of Construction	5
2.6	Tenant's Right of Entry	5
2.7	Completion for Occupancy	5
3	COMMENCEMENT OF TERM	6
3.1	Commencement Date	6
3.2	Conditions	6
3.3	Outside Date	7
3.4	Supplemental Memorandum	8
4	TERM	8
4.1	Initial Term	8
4.2	Extensions	8
4.3	Holding Over	8
5	RENT	8
5.1	Rent	8
5.2	Lease Year	9
5.3	No Partnership	9
6	PARKING AREAS	9
6.1	Description and Use	9
6.2	Landlord's Obligation to Construct Improvements	10
6.3	Indemnity	10
6.4	Liability Insurance	11
6.5	Parking Spaces	11
7	TENANT'S PROPERTY, IMPROVEMENTS AND SIGNS	11
7.1	Property	11
7.2	Alterations and Improvements	12
7.3	Signs	12
7.4	Satellite Dishes and Equipment	13
8	USE	13
8.1	Use of Premises	13
8.2	Exclusive Rights of Tenant	13
8.3	Enforcement	14
8.4	Compliance With Environmental Laws	14
8.5	Compliance With Other Laws	15
8.6	Sale of Beer and Wine	15

REDACTED LEASE BOOK WITH VLS

8.7	Seasonal Decorations	15
9	TAXES	15
9.1	Landlord's Taxes	15
9.2	Tenant's Taxes	15
9.3	Right to Contest Taxes	16
9.4	Tenant's Failure to Pay Taxes	16
9.5	Proration of Taxes	16
10	REPAIRS AND MAINTENANCE	16
10.1	Tenant's and Landlord's Repair Obligations	16
10.2	Exemption to Tenant's Repair Obligations	17
10.3	Emergency Repairs	17
10.4	Surrender	18
11	UTILITIES	18
11.1	Tenant's Obligations	18
11.2	Landlord's Obligations	18
12	DAMAGE OR DESTRUCTION; INSURANCE	18
12.1	Option to Cancel	18
12.2	Tenant's Option to Repair or Restore	19
12.3	Rent Abatement	19
12.4	Tenant's Fire and Casualty Insurance	19
12.5	Tenant's Casualty Insurance	20
12.6	Public Liability Insurance	20
12.7	Mutual Release	20
12.8	Evidence of Insurance	20
13	CONDEMNATION	20
13.1	Building	20
13.2	Land	20
13.3	Restoration	21
13.4	Award	21
13.5	Taking for Temporary Use	21
13.6	Definitions	21
14	LANDLORD'S RIGHT OF ACCESS	21
14.1	Right to Enter Premises	21
15	ASSIGNMENT AND SUBLETTING	22
15.1	Tenant's Right to Assign or Sublease Without Landlord's Consent	22
15.2	Landlord's Consent	22
15.4	Continuing Liability of Tenant	23
15.5	Transfer of Landlord's Interest	23
16	SUBORDINATION; ESTOPPEL CERTIFICATES	23
16.1	Subordination	23
16.2	Non-Disturbance	23
16.3	Estoppel Certificates	23
16.4	Landlord's Certificate	23

17	DEFAULT; REMEDIES	24
17.1	Events of Default	24
17.2	Landlord's Remedies	25
17.3	Default by Landlord	26
17.4	Attorney's Fees and Expenses of Litigation	26
17.5	Force Majeure	27
18	INTERPRETATION	27
18.1	South Carolina Law Governs	27
18.2	Singular and Plural	27
18.3	Binding Effect	27
18.4	Remedies Cumulative	27
18.5	No Waiver	27
18.6	Time of Essence	28
18.7	No Oral Changes	28
18.8	Entire Agreement	28
18.9	Notices	28
18.10	Construction	28
18.11	Recording	28

SCHEDULE OF EXHIBITS

Exhibit A	Legal Description
Exhibit B	Site Plan
Exhibit C	Permitted Exceptions
Exhibit D	Sign Criteria
Exhibit E	Subordination, Attornment and Nondisturbance Agreement
Exhibit F	Tenant Estoppel Certificate

1 STATE OF SOUTH CAROLINA
2
3 COUNTY OF GREENVILLE LEASE AGREEMENT
4 This Lease, made this 20 day of April, 1985, between
5 Roper Mt. Rd. Assoc., L.L.C. (the "Landlord"), and RITA
6 FETTER, INC., a North Carolina corporation (the "tenant").

7 **W I T N E S S E T H**

8 **1. PREMISES**

9 1.1 **Lease by Landlord.** Landlord leases unto Tenant and
10 Tenant leases from Landlord that certain approximately eight-acre
11 tract of land (the "Land"), a legal description of which is
12 attached to and made a part of this Lease as Exhibit A, together
13 with all improvements to be constructed thereon by Landlord (the
14 "Improvements") which Improvements include an approximately
15 60,217 square foot building (the "Building") (said Land and
16 Improvements being collectively referred to herein as the
17 "Premises"). A Site Plan showing the Premises as they are
18 presently intended by the parties to be configured is attached to
19 and made a part of this Lease as Exhibit B (the "Site Plan").

20 TO HAVE AND TO HOLD the Premises and all privileges and
21 appurtenances thereto belonging unto the Tenant, for the stated
22 term, and upon and subject to all of the terms, conditions and
23 agreements stated in this Lease, which constitute the covenants
24 of this Lease.

25 1.2 **Warranty of Title and Covenant of Quiet Enjoyment.**
26 Landlord warrants that as of the date hereof and as of the
27 Commencement Date hereof:

28 (a) except as stated in Exhibit C, which is attached
29 to and made a part of this Lease, Landlord owns the Premises
30 in fee simple;

31 (b) the Premises are free from liens and encumbrances
32 except for those liens and encumbrances listed in Exhibit C
33 or specifically agreed to in writing by Tenant (the
34 "Permitted Exceptions"), none of which prohibit or restrict
35 the Tenant's proposed use of the Premises;

36 (c) Landlord has the right to enter into this Lease;

37 (d) The Premises will be zoned prior to the
38 Commencement Date (as defined in Section 3.1 below) so as to
39 permit the Tenant's proposed use of the Premises; and

40 (e) Tenant, upon timely payment of the rents reserved
41 and performance of each term and condition contained in this
42 Lease, shall at all times during the Lease term and any

RECORDED IN THE PUBLIC RECORDS OF THE

1 extension or renewal, peaceably and quietly have and enjoy
2 exclusive possession of the Premises without any disturbance
3 from anyone. Landlord may not construct any improvements on
4 the Premises without Tenant's prior written consent.

5 **2. CONSTRUCTION OF IMPROVEMENTS**

6 **2.1 Landlord's Obligation to Construct Improvements.**

7 Landlord, at its sole cost, agrees to construct the Improvements
8 on the Land in accordance with the Plans and Specifications.
9 Unless Tenant shall designate or approve a particular contractor
10 for Landlord to negotiate with (the "Designated Contractor"),
11 bids for construction of the Improvements shall be solicited by
12 the Landlord from at least three responsible, responsive general
13 contractors, who shall be approved by the Tenant, which approval
14 shall not be unreasonably withheld. In the event Tenant shall
15 designate or approve a Designated Contractor, Landlord shall
16 negotiate with such contractor with respect to construction of
17 the Premises and shall submit the final negotiated guaranteed
18 maximum price to Tenant for approval, (the "Guaranteed Maximum
19 Price"), and upon such approval, Landlord shall proceed to
20 negotiate and enter into a construction contract with the
21 Designated Contractor for construction of the Premises for the
22 Guaranteed Maximum Price.

23 **2.2 Plans and Specifications.**

24 (a) Landlord agrees to cause Landlord's architect to
25 meet with Tenant's architect or engineer, at a place
26 designated by Tenant, for the purpose of coordinating the
27 design work of Tenant and Landlord with respect to the
28 Premises.

29 (b) After this preliminary meeting, and based upon the
30 exterior dimensions of the Building, Landlord will cause
31 Landlord's architect to prepare and submit to Tenant for
32 approval on or before May 1, 1985 detailed site drawings,
33 including:

34 (i) grading and site drainage plans;

35 (ii) soil borings;

36 (iii) parking layout;

37 (iv) driveways and curb cuts;

38 (v) landscaping plan with irrigation system
39 layout;

40 (vi) lighting and utility layouts; and

RECORDED IN THE PUBLIC RECORDS OF THE

2

R-0223

224

(vii) such other site information as Tenant's architect may reasonably request.

(c) Assuming Tenant receives Landlord's detailed site drawings prior to May 1, 1985, and approves those drawings, Tenant will cause Tenant's architect to prepare and submit to Landlord on or before August 15, 1985 for approval (as to structural design only with respect to the items described in clauses (i) below), said approval not to be unreasonably withheld or delayed, detailed drawings for:

(i) the building shell design, including the roof, exterior walls, columns and footings (including the front canopy design), utilities to 5'± outside of building wall, and all openings;

(ii) the interior of the Building, including mechanical, electrical, HVAC, and all of the design information necessary to support Tenant's fixture plan; and

(iii) a color front elevation of the building.

(d) After Landlord has approved the structural design of the building, Landlord will cause its architect to prepare a final site plan (the "Final Site Plan") and Tenant will prepare and deliver to Landlord final drawings for the building. After Tenant has delivered to Landlord the final drawings, Landlord will cause its architect to meet again with Tenant, Landlord will cause its architect to prepare a detailed review of the drawings at a place designated by Tenant for a detailed review of the drawings. When the detailed drawings and specifications have been approved by Landlord and Tenant and each page initialed by a representative of Landlord and Tenant, the initialed drawings and specifications shall constitute the Plans and Specifications under this lease.

(e) All submissions of drawings and specifications will be deemed approved if not rejected noting specific reasons for rejections within fifteen (15) days after the date of receipt. If the parties have not agreed upon and initiated the Plans and Specifications within one hundred eighty (180) days after the date of approval of the site drawings, either party may terminate the Lease by notice to the other.

(f) Landlord agrees that it is Landlord's sole responsibility to see that true copies of the Plans and Specifications are delivered to Landlord's contractor and all subcontractors and to see that all construction work proceeds in accordance with the Plans and Specifications rather than Tenant's preliminary drawings.

(g) Landlord shall cause the Final Site Plan to indicate an area acceptable to Tenant for future expansion (the "Expansion Area") in the general configuration as is shown on the Site Plan attached as Exhibit B. Tenant shall have the option to expand the Building and/or Tenant's operations into all or part of the Expansion Area at any time and from time to time during the term of this Lease (including extensions) at its sole cost and expense. There shall be no adjustment to the Rent (as defined in Section 5.1 below) as a result of such expansions.

2.3 Changes to the Plans and Specifications.

(a) The Plans and Specifications may be changed from time to time by mutual agreement of the parties.

(b) If Tenant requests any change to the Plans and Specifications which will increase Landlord's cost in constructing the Improvements pursuant to the Plans and Specifications, Landlord will furnish Tenant with an analysis of the increased cost or, if unknown, of the cost of such change, and if Tenant wishes to proceed with the change, Tenant will pay the increased cost, the parties will execute a written agreement setting forth the increased cost and a description of any change to the Plans and Specifications. For all changes so authorized, the actual increased costs incurred by Landlord shall, upon Landlord's furnishing Tenant adequate documentation of such increased costs, be paid within ninety (90) days after they are incurred, be added to the Maximum Rent and amount or, if applicable, the Guaranteed Maximum Price for the term of the recouping the Minimum Rent in accordance with the provisions of Section 3.1 below. If Tenant's changes cause a delay in the completion of construction, and if within thirty (30) days after a delay occurs, Landlord notifies Tenant in writing and provides adequate documentation of the extent of and reasons for such delay, then the outside date provided for in Section 3.3 will be extended by one day for each day of delay caused by the changes.

2.4 Preconstruction Meeting. There shall be a pre-construction meeting prior to actual construction and not later than thirty (30) days after final approval of the Plans and Specifications pursuant to Section 2.2 of this Lease at time and place selected by Tenant. Tenant will give at least two (2) weeks advance written notice of the preconstruction meeting. The Landlord, Tenant's architect, contractor, and all major subcontractors (grading, structural, mechanical, HVAC, electrical, etc.). at the preconstruction meeting. Landlord will cause its contractor to furnish for Tenant's approval.

(a) a detailed construction schedule (which shall include delivery dates for Tenant's fixtures and equipment to be installed by Landlord's contractor); and

(b) a schedule of values for the work described in the Plans and Specifications, for Tenant's use in inspecting the work as it progresses.

Unless Tenant has consented in writing to a postponement or continuation of the preconstruction meeting (which consent Tenant will not unreasonably withhold), Tenant shall have the right to terminate this Lease by notice to Landlord if the preconstruction meeting has not been held and the construction schedule and schedule of values furnished within the time periods specified in this section, unless Landlord, within fifteen (15) days after receipt of such notice, holds the preconstruction meeting and causes to be furnished the construction schedule and schedule of values.

2.5 Warranty of Construction. Landlord warrants that (i) the improvements will be constructed and Tenant's fixtures and equipment installed in a good and workmanlike manner and in compliance with all legal requirements, (ii) they will be so constructed as to be structurally safe and sound and fit and suitable for use as a supermarket, (iii) all materials used in the construction of the improvements shall be new, and (iv) all fixtures and equipment will be installed without damage thereto and in such a manner as to be fully and properly operational upon completion of such installation.

2.6 Tenant's Right of Entry. Prior to completion of construction by Landlord, Tenant shall be entitled to enter the premises for the purpose of inspecting the premises, making measurements, bringing in and setting up equipment and furniture, and performing other work which may be required in order to ready its store for opening. During this period Tenant shall not materially interfere with Landlord's work, and Tenant agrees to indemnify and save harmless Landlord against any loss or liability arising out of Tenant's activities on the premises. Tenant's exercise of the rights conferred in this paragraph shall not constitute acceptance of the premises or approval of Landlord's construction or installation of fixtures and equipment.

2.7 Completion for Occupancy. The words "completed for occupancy," for the purposes of this lease, means that:

(a) the improvements have been fully completed by Landlord in accordance with the Plans and Specifications, and Tenant's fixtures and equipment have been properly installed, and operational and in new, undamaged and operational condition, except for minor exterior and interior punchlist items (not exceeding \$5,000.00 in the

aggregate for such interior items) which do not interfere with Tenant's exclusive possession of the premises, or its ability to proceed with stocking its store and training its employees, and all of Landlord's tools, scaffolding, surplus building materials, waste, debris, and rubbish of every sort on the premises have been removed, except for such items on the exterior of the premises which do not interfere with Tenant's access to the premises, which items shall be removed prior to Tenant's scheduled opening date;

(b) Landlord has delivered to Tenant all necessary certificates of occupancy or similar approvals required in the community for Tenant to open for business;

(c) exclusive possession of the premises is available for delivery to Tenant;

(d) The road improvements shown on Exhibit B, shall be built and paved prior to Tenant opening for business. Tenant shall have use of the road improvements at all times during the Lease Term and any extensions thereof; and

(e) The two full service entrances to the site (and the traffic signal at Roper Mountain Road and Frontage Road) shown on Exhibit B, shall be in place prior to Tenant opening for business, and the ~~above~~ entrance shall ~~be~~ ^{be} ~~in place~~ ^{be} ~~operational~~ ^{be} ~~at all times~~ ^{be} ~~excepting periods of temporary~~ ^{be} ~~outage due to replacement or repairs~~ ^{be} during the term of this lease and any extensions thereof.

3. COMMENCEMENT OF TERM

3.1 Commencement Date. The term of this Lease shall begin on the "Commencement Date" which is defined as the earlier of (a) the date Tenant opens its store for business; or (b) the date forty-five (45) days after the improvements have been completed for occupancy, provided that by such date all the conditions set forth in Section 3.2 have been fulfilled; and provided further, that if a Commencement Date determined in accordance with this Section would occur between November 1 and January 9, Tenant, at its option, may defer the Commencement date until the following January 10.

3.2 Conditions. Tenant need not order its equipment or fixtures until the conditions set forth in subparagraphs (a), (b), and (c) below have been fulfilled, and the term of this Lease shall not commence until all of the following conditions have been fulfilled:

R-0225

226

(a) The Premises have access to all streets and rights of way adjoining the land, except as otherwise indicated on Exhibit A;

(b) The Land is zoned so as to permit the operation of a food supermarket and there shall be no covenants or restrictions affecting the Land which would prohibit Tenant from operating a food supermarket business on the Land;

(c) All Improvements (including all offsite improvements shown on the site plan) have been fully completed. Landlord hereby represents that to the best of its knowledge all traffic signals shown on the site plan are in place and functioning and will be functioning as of the Commencement Date, and no changes to such signals are contemplated or proposed by the Landlord or applicable governmental authorities;

(d) The physical condition of the Premises is such that Tenant, provided it complies with applicable laws and regulations, will not be prevented from obtaining all licenses and permits which are necessary to the operation of Tenant's business. Landlord agrees to join in any necessary applications for such permits upon Tenant's request; provided, however, that all such applications and the costs of obtaining any licenses, permits or approval necessary for the conduct of Tenant's business shall be at Tenant's sole expense;

(e) Water, sewer and electric power lines have been installed adjacent to the building and hooked up for Tenant's use;

(f) There will be no zoning or other restrictions which would prevent Tenant from installing and maintaining its signs as provided for in Section 7.3.

(g) Landlord has secured a nondisturbance agreement in the form required by Section 16.2 from each mortgagee of the Premises.

3.3 Outside Date. If the Premises have not been completed for occupancy within one year after final approval of the Plans and Specifications, (such completion date to be extended as provided in Section 2.3(b) of this Lease, but not to be extended pursuant to Section 17.5 of this Lease for more than one hundred eighty (180) days (and then only to the extent Landlord shall notify Tenant in writing within ten days after the occurrence of the event giving rise to such an extension, and specifying in such notice the length of the delay caused by such Force Majeure event, such delay not to exceed thirty days for any given Force Majeure event) (the "Outside Date")), Landlord agrees to pay to Tenant, as liquidated damages, the sum of \$550.00 per day for

REDACTED LEASE DOCUMENT

7

each day from the Outside Date until the date the Premises are completed for occupancy. The parties agree that it would be difficult or impossible to ascertain Tenant's damages arising from such delays, and that the liquidated damages as stated in this Section are a good faith estimate of the actual damages that would be incurred by Tenant in the event of such delays. If Landlord shall not have (i) commenced construction of the Premises within six months and (ii) completed construction of the Premises within eighteen months after final approval of the Plans and Specifications, Tenant shall have the option to terminate this Lease upon ten (10) days written notice to Landlord.

3.4 Supplemental Memorandum. When the Commencement Date has been established, the parties agree to execute a supplemental memorandum, in recordable form, stating the Commencement Date.

4 TERM

4.1 Initial Term. The term of this Lease shall be for twenty (20) years and zero (0) months following the Commencement Date unless terminated or extended as provided in this Lease.

4.2 Extensions. This Lease shall automatically be extended for four (4) successive extension periods of five (5) years each, each such extended term to begin upon the expiration of the initial term of this Lease or the immediately preceding extended term. All of the provisions of this Lease shall apply to each extended term. Tenant shall have the right to terminate this Lease and all subsequent extensions as of the expiration of the initial term of this Lease or the expiration of any extension by giving written notice to Landlord of its intention to terminate the Lease not later than six (6) months prior to the expiration of the initial term or of the current extension.

4.3 Holding Over. If Tenant remains in possession of the Premises after the expiration or termination of this Lease or any extension, Tenant's occupancy of the Premises shall be subject to all of the terms and provisions of this Lease, except that either party may terminate Tenant's tenancy upon thirty (30) days' notice.

5 RENT

5.1 Rent. Beginning on the Commencement Date as defined in Section 3.1, but subject to the provisions of Section 2.6 and the rental income provisions below, Tenant agrees to pay to Landlord rent for the Premises in the amount of Eight Hundred Eighty Thousand Two Hundred and No/100 Dollars (\$888,200.00) per year (the "Rent"), which Rent shall be payable in equal monthly installments on or before the tenth day of each month during the lease term and all extensions, in the amount of Seventy Four Thousand Sixteen and 67/100 Dollars (\$74,016.67) per month. If the Lease term commences on a day other than the first day of a

REDACTED LEASE DOCUMENT

R-0226

227

1 month, rent shall be prorated based upon the number of days of
2 the month included in the Lease term.

3 The Rent shall be adjusted utilizing the bid for
4 construction of the Premises by the lowest responsive,
5 responsible general contractor described in Section 2.1 or, if
6 applicable, the Guaranteed Maximum Price negotiated with the
7 Designated Contractor. The parties acknowledge that the Rent
8 stated herein is based on a cost of construction of the Premises
9 of \$48.00 per square foot. If the bid for construction of the
10 Premises by the lowest responsive, responsible general contractor
11 is more or less than \$48.00 per square foot, the parties agree
12 that the Rent shall be adjusted in accordance with the following
13 formula:

14 $.12 \times (\text{Difference between increased or decreased cost}$
15 $\text{of construction per square foot and } \$48.00) \times (\text{Square}$
16 $\text{Footage of Building}) = \text{Increase or Decrease of Rent.}$

17 Beginning in the first month of the ninth year of the lease
18 term, the Rent shall increase in accordance with the following
19 schedule:

20	Lease Years	Rent (per square foot)
21	9 & 10	\$15.25
22	11 through 15	15.75
23	16 through 20	16.25
24	First Extension Period	16.75
25	Second Extension Period	17.25
26	Third Extension Period	17.75
27	Fourth Extension Period	18.25

28 **5.2 LEASE TERM.** The first Lease Year is that period
29 commencing on the Commencement Date and ending on the last day of
30 the month in which the first anniversary of the Commencement Date
31 occurs. Each Lease Year other than the first Lease Year shall
32 commence on the date next following the expiration of the
33 previous Lease Year and shall continue for a period of one full
34 year thereafter, unless this Lease or any applicable extension
35 expires or is terminated, in which event the last Lease Year
36 shall end on the date of such termination or expiration.

37 **5.3 NO PARTISANSHIP.** Nothing contained in this Lease shall
38 constitute Landlord and Tenant partners, associates or joint
39 venturers in the conduct of their respective businesses.

40 **6 PARKING AREAS**

41 **6.1 Reservation and Use.**

42 (a) The Site Plan attached as Exhibit B designates the
43 proposed location of all Improvements to be constructed, all

RENOVATION LEASE BOOK 101111

9

1 parking areas, driveways and delivery service areas
2 (collectively the "Parking Area").

3 (b) Landlord will not make any change to the Parking
4 Area without Tenant's prior written consent.

5 **6.2 Landlord's Obligation to Construct Improvements.**

6 (a) Landlord agrees to construct all Improvements and
7 all off-site improvements, as shown on the Site Plan, in a
8 good and workmanlike manner, and in full compliance with all
9 applicable laws and regulations, including without
10 limitation, the Americans with Disabilities Act and building
11 and zoning codes and laws regarding access for handicapped
12 persons. Landlord's construction obligations specifically
13 include:

14 (i) the obligation to grade and construct the
15 Parking Area in such manner as to provide adequate
16 drainage of storm water runoff;

17 (ii) the obligation to construct the Parking Area
18 in accordance with the provisions of Section 6.3;

19 (iii) the obligation to provide in the Parking Area
20 parking lot lighting sufficient to provide minimum
21 maintained illumination levels of at least three (3)
22 foot candles during hours of darkness when the Premises
23 are open for business; and

24 (iv) the obligation to provide tractor trailer
25 parking spaces and truck walls (equipped with sump
26 pumps, if provided in the Plans and Specifications),
27 for the exclusive use of Tenant at its grocery, meat
28 and produce service entrances, which spaces and truck
29 walls shall be a part of the Parking Area.

30 (b) Tenant agrees to maintain at its expense the
31 Improvements, including the Parking Area in good order and
32 repair.

33 (c) No building placed on an outparcel shall be more
34 than 16' high and sufficient on-site parking shall be
35 provided on all outparcels. The placement of the building
36 on an outparcel shall be subject to Tenant's consent, which
37 Tenant shall not unreasonably withhold.

38 **6.3 Indemnity.** Landlord agrees to indemnify and save
39 harmless Tenant from any loss, damage, harm, claim, action,
40 liability or expense (including reasonable attorney fees and
41 expenses of litigation) in connection with actual or alleged loss
42 of life, personal injury or damage to property occurring on or
43 about the Land, unless such loss of life, personal injury or

RENOVATION LEASE BOOK 101111

10

R-0227

228

1 damage to property was occasioned solely by the act or omission
2 of Tenant, its agents or employees, in which event Tenant will
3 indemnify and save harmless Landlord from any loss, damage, harm,
4 claim, action, liability or expense (including reasonable
5 attorneys' fees) incurred by Landlord as a result of such act or
6 omission by Tenant, its agents or employees.

7 6.4 **Liability Insurance.** Tenant agrees to maintain on the
8 Land (specifically including without limitation the sidewalks in
9 front of Tenant's store) Commercial General Liability Insurance
10 with minimum combined limits of liability of not less than
11 \$1,000,000.00 per occurrence, and aggregate limits of not less
12 than \$2,000,000.00. Landlord shall be named as an additional
13 insured under such policy. At least annually during the term of
14 this Lease, Tenant will provide Landlord with a certificate from
15 its insurer evidencing the required coverage.

16 6.5 **Parking Spaces.**

17 (a) Landlord agrees to construct on the Land, the
18 parking areas and parking spaces as shown on Exhibit B, and
19 to maintain on the Land at all times at least the number of
20 parking spaces, and the configuration of the parking areas,
21 driveways and circulation routes as shown on Exhibit B,
22 unless the Tenant otherwise consents in writing or elects to
23 alter such configuration in connection with any alterations,
24 additions or improvements constructed by Tenant in
25 accordance with Section 7.2 below.

26 (b) All parking areas intended primarily for
27 automobile use must be constructed of not less than two
28 inches (2") of bituminous paving over a six inch (6") stone
29 base, with a soil compaction rating as recommended by a
30 reputable soils testing firm in accordance with generally
31 accepted industry standards, and all parking areas and
32 drives intended for truck traffic must be constructed as
33 above stated with at least an additional one inch asphalt
34 topping. The area adjacent to the Building's loading dock
35 must have a six inch (6") concrete pad extending out a
36 distance of sixty feet (60') from the loading dock.

37 (c) Landlord shall not permit cross-parking or
38 reciprocal parking on the Parking Areas by adjoining
39 property owners or tenants.

40 (d) Landlord shall not permit ingress and egress to
41 and from the Premises except in those locations as are shown
42 on Exhibit B.

43 7 **TENANT'S PROPERTY, IMPROVEMENTS AND SIGNS**

44 7.1 **PROPERTY.** All trade fixtures and equipment of whatever
45 nature purchased by Tenant and placed or installed in or upon the

1 Premises by Landlord or Tenant shall remain the property of
2 Tenant, and Tenant shall be entitled to remove such fixtures or
3 equipment at any time, provided Tenant repairs any damage to the
4 Premises caused by such removal.

5 7.2 **Alterations and Improvements.**

6 (A) Tenant shall be entitled to make alterations,
7 additions and improvements to the Building and improvements to
8 the Parking Area without Landlord's consent; provided,
9 however, that

10 (i) all such improvements must be constructed in
11 a good and workmanlike manner by reputable contractors;

12 (ii) all work must be in accordance with all
13 applicable laws, codes, and regulations; and

14 (iii) Tenant must furnish to Landlord, upon
15 completion of such construction, a set of as-built
16 drawings for any material alterations, additions, or
17 improvements made by Tenant.

18 (b) Any alteration, addition or improvement made by
19 Tenant shall become Landlord's property upon the expiration
20 or termination of this Lease or any extension, and Tenant
21 shall have no obligation to remove the same, unless the
22 parties otherwise agree in writing.

23 7.3 **Signs.**

24 (a) Tenant shall be entitled to install on the
25 Premises Tenant's signs advertising its business as shown on
26 Exhibit B which is attached to and made a part of this
27 Lease.

28 (b) Landlord shall, at its expense (which expense
29 shall not be included in the cost of construction for
30 purposes of adjusting the Rent as set forth in Section 5.1),
31 construct as a part of the Improvements a pylon sign (the
32 "Pylon Sign") of such design and at such location and for
33 such cost as shall be approved by Tenant in advance.
34 Landlord and Tenant agree that such cost shall not exceed
35 the sum of \$15,000.00. The Pylon sign shall contain only
36 Tenant's name and logo and such other information as shall
37 be approved by Tenant in advance.

38 (c) Landlord has reviewed the sign criteria in
39 Exhibit B, has investigated local zoning ordinances and
40 reviewed any restrictions and/or covenants on the Land, and
41 based on such investigation, represents to Tenant that to
42 the best of the Landlord's knowledge, Tenant's signs,

EXHIBIT B (SEE PAGE 10) 11

EXHIBIT B (SEE PAGE 10) 12

R-0228

including the "Pylon sign," will not violate any zoning or other restriction applicable to the Premises.

(d) The care and maintenance of such signs shall be the sole responsibility of Tenant.

7.4 **Satellite Dishes and Equipment.** Tenant shall have the right, subject to applicable zoning and other laws and regulations, to install on the Premises (on the Building's roof or wherever Tenant deems appropriate) a satellite dish, communications antenna or similar equipment. Landlord has investigated local zoning ordinances and reviewed any restrictions and/or covenants on the land, and based on such investigation, represents to Tenant that to the best of the Landlord's knowledge, as of the date of execution of this Lease, the Premises are properly zoned for, and any and all local ordinances, laws and regulations permit the installation and use of satellite dishes, communication antennae and similar equipment on the Premises. Upon request by Tenant, Landlord shall furnish satisfactory evidence of such zoning to Tenant.

8 USE

8.1 Use of Premises.

(a) Tenant may use the Premises for any lawful purpose.

8.2 **Exclusive Rights of Tenant.** Landlord hereby grants to Tenant the exclusive right, as to any property adjacent to the land now owned or hereafter acquired by Landlord, to operate:

(a) a supermarket or grocery store;

(b) a delicatessen which sells meat, cheese or other delicatessen items by weight or quantity (except that a delicatessen restaurant not selling items for off-premises consumption other than sandwiches and other menu items served to on-premises customers shall be permitted);

(c) a bakery (except that a bagel or doughnut shop shall be permitted);

(d) a seafood market;

(e) a gourmet coffee store which sells coffee beans or ground coffee or coffee derived beverages for off-premises consumption; provided, however that a restaurant which sells gourmet coffee for on-premises consumption shall be permitted;

(f) a florist or flower shop; and

W:\00000001\1218_120001_1201_01

13

(g) any other business which sells food or beverages for off-premises consumption, except that Landlord may grant to other tenants of Landlord the right to sell food and beverage items which:

(i) are intended to be consumed on the Shopping Center Tract or Landlord's adjacent property;

(ii) constitute only an incidental part of such Tenant's primary business; or

(iii) are prepared take out items sold in the normal operation of a restaurant, delivery or catering business (including specialty take-out restaurants such as pizza, Chinese or Mexican restaurants).

8.3 **Enforcement.** If Landlord violates the covenants contained in Section 8.2 of this Paragraph, Tenant may pursue any one or more of the following remedies:

(a) Tenant may terminate this Lease upon sixty (60) days' written notice to Landlord (unless Landlord, within such sixty (60) day period, shall cure the violation, or, if the same cannot be cured within such period, shall have commenced curing the violation and shall continuously and diligently thereafter prosecute such cure to completion. Upon such termination, neither party shall thereafter be under any obligation to the other under this Lease;

(b) Tenant may recover from Landlord any damages suffered by Tenant as a result of Landlord's violation;

(c) Tenant may enjoin Landlord or any tenant of Landlord from permitting continued operation of any establishment in violation of Landlord's covenants.

8.4 Compliance with Environmental Laws.

(a) Landlord warrants to Tenant, after inquiry and inspection consistent with good commercial practice, that to the best of its knowledge, the land and the Premises are, as of the date of this Lease, and will be, as of the Commencement Date, free of hazardous substances (as defined under all applicable environmental laws and regulations), including, without limitation, any underground contamination (whether as a result of migration onto or under the land or otherwise), asbestos, PCBs, formaldehyde, or underground fuel tanks.

(b) Tenant, at all times during the term of this Lease, agrees to conduct Tenant's business operations from the Premises in compliance with all applicable environmental laws and regulations, and will indemnify and save harmless

W:\00000001\1218_120001_1201_01

14

R-0229

230

1 Landlord from any and all claims, damages, fines, judgments
2 penalties, costs, liabilities or losses (including, without
3 limitation, reasonable attorneys' fees and expenses of
4 litigation) arising during or after the Lease term as a
5 result of any violation by Tenant of applicable
6 environmental laws or regulations.

7 (c) Landlord agrees to indemnify and save harmless
8 Tenant from any and all claims, damages, fines, judgments,
9 penalties, costs, liabilities, or losses (including without
10 limitation, reasonable attorneys' fees and expenses of
11 litigation) arising during or after the Lease term from or
12 in connection with the presence or suspected presence of any
13 such hazardous substances in or on the Premises, except to
14 the extent the same are present solely as a result of the
15 acts of Tenant, Tenant's agents, employees, contractors or
16 invitees.

17 8.5 Compliance with Other Laws. Except for compliance with
18 environmental laws and regulations, which shall be governed by
19 the provisions of Section 8.4:

20 (a) Tenant agrees at Tenant's sole expense to comply
21 with applicable laws, ordinances, regulations and codes
22 affecting or relating to Tenant's use of the Premises or the
23 physical condition of the improvements.

24 (b) Landlord agrees at Landlord's sole expense to
25 comply with such laws, ordinances, regulations and codes
26 affecting or relating to all other portions of the Premises
27 or the Land.

28 8.6 Sale of Beer and Wine. Landlord represents to Tenant
29 that, prior to commencement of construction of the Premises, the
30 Premises will be properly zoned for the sale of beer and wine,
31 and will be in compliance with any and all laws and regulations
32 imposing any radius restrictions on the sale of beer and wine on
33 the Premises. As a condition to commencement of the lease term,
34 Landlord shall furnish satisfactory evidence thereof to Tenant. *See 8.6 on
35 page 15a.

36 8.7 Seasonal Decorations. Tenant may, but shall not be
37 required to, decorate the Premises for seasonal occasions such as
38 Christmas or Easter.

39 9 TAXES

40 9.1 Landlord's Taxes. Landlord agrees to forward, or cause
41 the applicable taxing authority to send directly to Tenant the
42 appropriate ad valorem tax bill for the Premises, whereupon
43 Tenant shall pay such taxes directly to such taxing authority
44 prior to the date such taxes become delinquent, but in the case
45 where Landlord is forwarding the tax bill to Tenant, no sooner
46 than sixty (60) days after Tenant's receipt of such tax bill. If

8
5.6 Sale of Beer and Wine. Landlord represents to Tenant
that, prior to commencement of construction of the Premises, the
Premises will be properly zoned for the sale of beer and wine, and
will be in compliance with any and all laws and regulations
imposing any specific radius restrictions on the sale of beer and
wine on the Premises. As a condition to commencement of the lease
term, Landlord shall furnish satisfactory evidence thereof to
Tenant. Notwithstanding the foregoing, Landlord makes no
representation regarding Tenant's ability to obtain the appropriate
licenses and permits for the sale of beer and wine, to the extent
the availability of such license and permits depends on facts and
circumstances beyond Landlord's control, including without
limitation, the manner in which Tenant conducts its business in
general, and specifically the manner in which it designs the
interior of the Premises and operates its business in the Premises.



1 in such case, Landlord fails to forward such tax bill to Tenant
2 at least sixty (60) days prior to the delinquency date, therefor,
3 Landlord shall be responsible for any interest, charges or other
4 fees due as a result of the payment of the taxes after the
5 delinquency date.

6 9.2 **Tenant's Taxes.** Tenant agrees to pay all license,
7 privilege, ad valorem or other taxes levied, assessed or charged
8 against Landlord or Tenant on account of the operation of
9 Tenant's business or on account of property belonging to Tenant.

10 9.3 **Right to Contest Taxes.** Tenant may at its sole cost
11 and expense, contest any Taxes by appropriate proceedings
12 diligently conducted in good faith. Landlord will pay to Tenant,
13 upon receipt by Landlord, any refund ultimately obtained from the
14 taxing authorities. Tenant agrees to pay any increased taxes
15 resulting from such contest. Tenant hereby indemnifies and
16 agrees to hold harmless Landlord from and against any cost,
17 damage or expense (including attorney's fees) in connection with
18 any such proceedings.

19 9.4 **Tenant's Failure to Pay Taxes.** If Tenant fails to pay
20 any taxes, assessments, or governmental charges required to be
21 paid by Tenant, Landlord may pay such taxes, assessments, or
22 governmental charges. Any sums so paid by Landlord shall be
23 deemed to be additional rental owing by Tenant to Landlord, due
24 and payable upon demand.

25 9.5 **Expiration of Taxes.** Any payment to be made pursuant to
26 this Paragraph 9 with respect to the calendar year in which this
27 Lease commences or terminates shall bear the same ratio to the
28 payment which would be required to be made for the full year as
29 that part of the calendar year covered by the term of this Lease
30 bears to a full year.

31 10 REPAIRS AND MAINTENANCE

32 10.1 **Tenant's and Landlord's Repair Obligations.**

33 (a) Subject to Landlord's obligations for repairs due
34 to faulty materials or defects in workmanship as provided in
35 subparagraph (b), during the term of this Lease, Tenant at
36 its sole expense agrees to maintain in good order and repair
37 the Improvements, including exterior and structural supports
38 of the Building, including without limitation the walls,
39 roof, structural supports, exterior paint, exterior plaza
40 glass, awnings, sidewalks, walls, septic tanks, water, sewer
41 and other utility lines located on the exterior of the
42 Building; provided, however, that Tenant shall not be
43 obligated to repair any damage caused by any act, omission
44 or negligence of the Landlord, its agents or invitees;

RENTAL PROPERTY LEASE, JAMES ROYER, MDX, VA

16

1 (b) Landlord agrees to make all necessary repairs to
2 the Premises arising out of faulty materials or defective
3 workmanship employed in the construction of the Improvements
4 by Landlord or Landlord's agents if such defects are
5 discovered prior to the first anniversary of the
6 Commencement Date. After Landlord's warranty period
7 expires, Landlord will assign to Tenant all available
8 warranties from Landlord's contractors and subcontractors
9 relating to the quality of materials and workmanship in the
10 construction of the Improvements. Landlord and Tenant agree
11 to cooperate in enforcing all warranties by Landlord's
12 contractors to either Landlord or Tenant.

13 10.2 **Exception to Tenant's Repair Obligations.** Tenant
14 shall not be obligated to repair damages to the Premises covered
15 by Landlord's insurance, if any, except as otherwise provided in
16 Section 12.

17 10.3 **Emergency Repairs.**

18 (a) If, during Landlord's warranty period as provided
19 above, it shall be necessary in an emergency for Tenant to
20 make promptly any repairs or replacements required to be
21 made by Landlord, Tenant may proceed forthwith to have such
22 repairs and replacements made and pay the cost of the
23 repairs. Without limiting the generality of the foregoing,
24 the parties agree that any roof leaks which are not repaired
25 within ten (10) days (extended, however, for weather
26 conditions which do not permit roof work to be done) shall
27 constitute an emergency entitling Tenant to make such
28 repairs. Landlord acknowledges and agrees that it is
29 essential to the operation of Tenant's business that the
30 roof be kept in a good state of repair and free from leaks.
31 Landlord agrees to reimburse Tenant for the cost of making
32 such repairs or replacements within 30 days after receipt of
33 Tenant's bill for reimbursement of such costs to the extent
34 such repairs are the Landlord's obligation under
35 Section 10.1(b) above;

36 (b) During Landlord's warranty period as provided
37 above, Tenant agrees to give Landlord prior notice of the
38 need for any such repairs or replacements, to the extent
39 practicable under the circumstances;

40 (c) If Tenant makes an emergency repair on behalf of
41 Landlord, and Landlord fails to reimburse Tenant, Tenant may
42 deduct the amount of the bill from any amounts subsequently
43 due hereunder unless Landlord, acting in good faith,
44 notifies Tenant that it disputes the amount or validity of
45 the bill and within thirty (30) days thereafter commences
46 legal action to determine the validity and amount of the
47 bill. Upon the conclusion of such litigation any amount

RENTAL PROPERTY LEASE, JAMES ROYER, MDX, VA

17

R-0231

232

1 adjudicated to be due Tenant may be deducted from any
2 amounts subsequently due Landlord hereunder.

3 10.4 Surrender. At the expiration of the term of this
4 Lease and any extensions, Tenant agrees to quit and surrender the
5 Premises to Landlord in as good a condition as when received,
6 reasonable wear and tear and damage by fire or other casualty and
7 permitted alterations under Section 7.2 excepted.

8 11 UTILITIES

9 11.1 Tenant's Obligations. Except as provided in Section
10 11.2, Tenant agrees to provide and pay for all electricity, heat,
11 water, gas, garbage disposal and janitorial services and other
12 utilities required by Tenant in the use of the Premises.

13 11.2 Landlord's Obligations. Landlord agrees to pay for
14 all utility charges accruing prior to the date Tenant's
15 refrigeration equipment has been permanently switched on for
16 Tenant's use.

17 12 DAMAGE OR DESTRUCTION; INSURANCE

18 12.1 Option to Cancel.

19 (a) If the Building is completely destroyed or damaged
20 in a "substantial amount" and such destruction occurs at any
21 time after the first fifteen (15) years of the Lease Term,
22 either party, at such party's option, may terminate this
23 Lease by giving written notice to the other party within
24 thirty (30) days following the damage or destruction, and
25 rent and other charges payable by Tenant under this Lease
26 shall be apportioned to the date of the damage or
27 destruction. Provided, however, that Landlord may not
28 terminate this Lease in such circumstances if Tenant elects
29 to rebuild or restore the Building as provided in Section
30 12.2, in which event the parties shall agree to extend the
31 Lease Term for such period as shall cause it to expire ten
32 (10) years beyond the initial Lease Term expiration date
33 (exclusive of the extension periods provided in Section 4.2,
34 which shall not be affected by the aforementioned lease term
35 extension).

36 (b) If the damage occurs prior to the last two Lease
37 years of the Lease Term, "substantial amount" means fifty
38 percent (50%) of a reasonable estimate of the replacement
39 cost of the Improvements. If the damage occurs during the
40 last two Lease Years of the Lease Term, "substantial amount"
41 means twenty-five percent (25%) of a reasonable estimate of
42 the replacement cost of the Improvements.

43 (c) If Landlord exercises an option to cancel this
44 Lease pursuant to this Section and there are any remaining

REDACTED PAGE 18

18

1 extension periods which Tenant has an unexercised option to
2 terminate under Section 4.2 of this Lease, Tenant may
3 nullify Landlord's exercise of its option to cancel by
4 irrevocably releasing its option to terminate the next
5 extension or extensions, by notice to Landlord within thirty
6 (30) days after Landlord gives notice of cancellation.

7 12.2 Tenant's Option to Repair or Restore. If the Premises ~~are~~
8 are damaged by fire or other casualty, unless either party has
9 exercised such party's right to terminate, if any, under Section 12.1, Tenant, at its option, may restore the Premises to
10 substantially the same condition existing before the damage or
11 destruction, in such event Tenant shall retain all insurance
12 proceeds payable as a result of such casualty, and this Lease
13 shall remain in full force and effect except that rent shall
14 abate as provided in Section 12.3, and the Lease Term shall be
15 extended for a period equal to the rent abatement period provided
16 in Section 12.3 (in addition to the Lease Term extension provided
17 in Section 12.1). If Tenant does not elect to rebuild, as
18 aforesaid, and either party terminates this Lease as provided
19 herein, then all such insurance proceeds shall be payable with
20 respect to the damage or destruction of the Building and any
21 fixtures therein paid for by Landlord, shall be payable to
22 Landlord.

23 12.3 Rent Abatement. If the Premises are damaged or
24 destroyed by fire or other casualty and this Lease is not
25 terminated, the minimum rent reserved in this Lease shall be
26 reduced to an amount which bears the same ratio to the minimum
27 rent as the area of the Building then available for use in
28 Tenant's business bears to the entire area of the Building;
29 provided, however, that if so much of the Building is destroyed
30 or the Parking Area is damaged to such an extent that it is
31 unreasonable to expect Tenant to continue to operate its business
32 from the Building, Tenant may close its store for business. In
33 that event all rent shall abate from the date the store is closed
34 until the earlier of the date Tenant reopens for business at the
35 Premises or nine months after the date of such casualty or
36 destruction. If minimum rent abates under this section, every
37 other charge payable by Tenant to Landlord shall abate in the
38 same proportion, but Tenant's responsibility for taxes and
39 insurance shall not abate.

40 12.4 Tenant's Fire and Casualty Insurance. Tenant shall
41 keep the Premises insured against loss or damage by fire and such
42 other risks as may be included in the Special Cause of Loss
43 Endorsement, or generally in the broadest form of all risks
44 insurance from time to time available (except that Tenant need
45 not carry earthquake and war risks insurance) in an amount equal
46 to one hundred percent (100%) of the full replacement value of
47 the Premises.

REDACTED PAGE 19

19

R-0232

233

12.5 **Tenant's Casualty Insurance.** Tenant shall maintain adequate fire and extended coverage insurance on the contents of the Building and Tenant's fixtures, equipment and property located in the Building. Tenant may self insure plate glass.

12.6 **Public Liability Insurance.** Tenant shall maintain on the Premises, Commercial General Liability Insurance with minimum combined limits of not less than \$1,000,000.00 per occurrence, and aggregate limits of not less than \$2,000,000.00.

12.7 **Mutual Release.** Except as may be otherwise specifically provided in this Lease, neither Landlord nor Tenant nor their respective employees or agents shall be liable to the other for any business interruption, loss or damage to property, or injury to or death of persons occurring on the Premises or in any manner growing out of or connected with Tenant's occupation of the Premises or their condition, whether or not caused by the negligence or fault of Landlord or Tenant or their respective agents, employees, tenants, licensees or assigns. This release shall apply whether or not such business interruption, loss or damage to property or injury to or death of persons is covered by insurance. Nothing in this Section may be construed to impose any other or greater liability upon either Tenant or Landlord than would have existed in its absence.

12.8 **Evidence of Insurance.** Tenant agrees to provide to the Landlord prior to the Commencement Date, and annually thereafter, copies of policies or certificates of insurance evidencing coverages required by this Lease, including, without limitation, the coverage required by Section 6.4 of this Lease.

13. COMMENCEMENT

13.1 **Building.** If all or any part of the Building is Taken for permanent use, Tenant at its option shall be entitled to cancel this Lease by giving written notice to Landlord within thirty (30) days after the Taking Date, and rent and other charges payable by Tenant to Landlord shall be equitably apportioned as of the Taking Date.

13.2 **Land.** If (a) more than twenty percent (20%) of the Land is Taken for permanent use, or (b) a part of the Land shall be permanently Taken so that the remaining portion does not allow for a parking ratio of 4.0 parking spaces per 1,000 square feet of gross leasable area of the Building with a minimum of one hundred fifty (150) spaces after the Taking, or (c) if a substantial amount of the Parking Area shall be permanently Taken, or (d) there is a permanent Taking of access to the Land from any adjoining street or road or if there are any alterations to any such adjoining street or road which in Tenant's judgment materially adversely affects the ability of Tenant to conduct its business from the Premises, then, in any of such events, Tenant at its option may cancel the Lease by written notice to Landlord

REDACTED

within thirty (30) days after the Taking Date, and rent and other charges payable by Tenant to Landlord shall be equitably apportioned to the Taking Date.

13.3 **Restoration.** If Tenant does not elect to cancel the Lease pursuant to its rights, if any, under Sections 13.1 and 13.2, Tenant shall receive the entire award payable as a result of such Taking, (and in such event, Landlord assigns to Tenant Landlord's interest in any award for the Taking), and Tenant shall repair and restore the Premises so as to constitute the remaining portion of the Premises a complete architectural unit as soon as is reasonably practicable.

13.4 **Award.** If Tenant elects to cancel this Lease under this Article, such cancellation shall not constitute a waiver by Tenant of any rights it may have to any portion of any award for the Taking that results in such cancellation.

13.5 **Taking for Temporary Use.** If there is a Taking of the Premises for temporary use, this Lease shall continue in full force and effect; provided, however, that:

(a) If all of the Premises, or such part of the Premises as shall make it unreasonable to expect Tenant to operate its business, are Taken for temporary use, rent shall abate during the Taking. If such Taking continues for more than eighteen (18) months, such taking shall be considered a Taking for permanent use, and the provisions of Sections 13.1 and/or 13.2 above shall govern to the extent such sections are thus applicable.

13.6 **Definitions.** As used in this Lease, the word

(a) **Award:** Means the award for proceeds of any condemnation, less all expenses in connection therewith, including all reasonable attorneys' fees;

(b) **Taking:** Means the taking of or damage to all or any portion of the Premises as the result of the exercise of the power of eminent domain, condemnation, or purchase under threat of or in lieu of the exercise of such power;

(c) **Taking Date:** Means the date on which the condemning authority shall have the right to possession of the Premises which has been Taken.

14. LANDLORD'S RIGHT OF ACCESS

14.1 **Right to Enter Premises.** Landlord and Landlord's representatives may enter the Premises during business hours after reasonable notice to Tenant for the purpose of inspecting the Premises, performing any work required of or permitted to be performed by Landlord under the terms of this Lease, and exhibiting the Premises to prospective mortgagees and, during the last six (6) months of the Lease term, to prospective tenants. In the event of an emergency Landlord need not give advance notice to Tenant and may enter during hours other than business

REDACTED

1 hours, but shall give notice to Tenant as promptly as is
2 practicable under the circumstances. Landlord agrees that to the
3 extent practical it will not unreasonably interfere with the
4 operation of Tenant's business in the exercise of its rights
5 under this Paragraph.

6 **15 ASSIGNMENT AND SUBLETTING**

7 **15.1 Tenant's Right to Assign or Sublease Without**
8 **Landlord's Consent.**

9 (a) Tenant may, without the consent of Landlord,
10 sublet the Premises or assign this Lease to:

11 (i) any entity which may take over the business
12 of Tenant, or

13 (ii) to any entity which may, as the result of a
14 reorganization, merger, consolidation, or sale of
15 assets succeed to the business now carried on by
16 Tenant, or

17 (iii) to any entity in which Tenant or Tenant's
18 parent possesses voting rights to fifty percent (50%)
19 or more of the issued and outstanding stock (so long as
20 such entity remains a subsidiary of Tenant or of
21 Tenant's parent), or

22 (iv) to Tenant's parent, or

23 (v) to any entity which has acquired fifty
24 percent (50%) or more of the issued and outstanding
25 voting stock of Tenant or Tenant's parent.

26 (b) As a part of and incidental to its operation of a
27 supermarket, Tenant may, without the consent of Landlord,
28 sublet portions of its store for the purpose of operating a
29 pharmacy or other subleased departments.

30 **15.2 Landlord's Consent.**

31 (a) Except as provided in Section 15.1, Tenant may not
32 assign this Lease, or sublet all or any part of the
33 Premises, without Landlord's prior written consent in each
34 instance, which Landlord will not unreasonably withhold or
35 delay.

36 **15.3 Continuing Liability of Tenant.** Landlord may not
37 withhold Landlord's consent to an assignment or subletting based
38 upon Landlord's objection to any proposed use if that use is
39 permitted under the terms of Paragraph 8 of this Lease.

1 **15.4 Continuing Liability of Tenant.** In the event of an
2 assignment or sublease, Tenant agrees that Tenant will remain
3 jointly and severally liable, with the assignee or subtenant, for
4 the payment of the rent reserved under this Lease and for
5 performance of all of the other terms, conditions, and provisions
6 of this Lease which are required to be performed by Tenant,
7 notwithstanding any acceptance of rent or performance by Landlord
8 directly from the assignee or subtenant.

9 **15.5 Transfer of Landlord's Interest.** Landlord shall be
10 entitled to assign or transfer its interest in the Premises or in
11 this Lease provided the assignee or transferee expressly assumes
12 in writing the obligations of Landlord hereunder except for
13 accrued liabilities as of the date of the transfer or assignment.
14 Landlord shall not be relieved of accrued liabilities by an
15 assignment or transfer of this Lease or the Premises. In the
16 event of an assignment or transfer of Landlord's interest in
17 compliance with the terms of this Section, Tenant agrees to
18 attorn and look to the assignee or transferee as Landlord,
19 provided Tenant has first received a fully executed written
20 instrument of assignment or transfer complying with the
21 provisions of this Section.

22 **16 SUBORDINATION; ESTOPPEL CERTIFICATES**

23 **16.1 Subordination.** At Landlord's election this Lease
24 shall be subordinate to mortgages or deeds of trust held by
25 reputable lending institutions and secured by the Premises,
26 provided that such subordination shall be effective only if the
27 holder of each such mortgage or deed of trust enters into a
28 non-disturbance agreement with Tenant in accordance with Section
29 16.2, or if the applicable mortgage or deed of trust contains a
30 non-disturbance clause in accordance with Section 16.2.

31 **16.2 Non-Disturbance.** Landlord agrees to secure from each
32 mortgagee of the Premises a Non-Disturbance agreement, which must
33 be in the form attached to this Lease as Exhibit F, or must
34 contain provisions which afford Tenant equivalent protection to
35 those contained in Exhibit F, together with such other terms and
36 provisions as may be agreed upon by Tenant and the mortgagee.

37 **16.3 Estoppel Certificates.**

38 (a) Tenant agrees within ten (10) days after a request
39 by Landlord, to deliver to Landlord an Estoppel Certificate.
40 The certificate shall be a written instrument duly executed
41 and acknowledged by Tenant, and in the form attached hereto
42 as Exhibit G.

43 **16.4 Landlord's Certificates.** Landlord, within ten (10)
44 days after a request by Tenant, shall deliver to Tenant an
45 Estoppel Certificate. The certificate shall be a written
46 instrument duly executed and acknowledged by Landlord, and in

1 recordable form. The Estoppel Certificate shall contain the
2 following information:
3 (a) whether the Lease is in full force and effect, and
4 whether it has been modified (setting forth any
5 modifications);
6 (b) whether any default exists on the part of Tenant
7 (specifying any such default); and
8 (c) any other information with respect to this Lease
9 which Tenant may reasonably request.
10 17. DEFULTS; REMEDIES
11 17.1 Events of Default. Either one of the following events
12 shall constitute an Event of Default by Tenant under this Lease:
13 (a) Tenant fails to pay any installment of rental or
14 any other amount due Landlord as provided in this Lease and
15 such failure shall continue for a period of ten (10) days
16 after Tenant receives written notice thereof from Landlord;
17 or
18 (b) Tenant fails to comply with any term, provision,
19 or covenant of this Lease, other than the payment of rental
20 or other amounts by Landlord, and does not cure such failure
21 within thirty (30) days after notice from Landlord;
22 provided, however, that if the nature of the default is such
23 that it cannot, in the exercise of reasonable diligence, be
24 cured within the thirty (30) day period, Tenant shall not be
25 in default if it commences performance within such period
26 and diligently proceeds to cure the default within a
27 reasonable time.
28 However, if after receiving written notice from the
29 Landlord, Tenant believes that an Event of Default has not
30 occurred under the provisions of Sections 17.1(a) or 17.1(b),
31 Tenant may within the applicable cure period, request that the
32 matter be arbitrated under the supervision of the American
33 Arbitration Association with the cost of the arbitration paid by
34 the non-prevailing party, or, if the arbitrator's decision is
35 such that neither party shall be deemed to have prevailed, paid
36 equally by the Landlord and Tenant. The decision of the
37 arbitrator shall be binding and conclusive upon the parties.
38 Upon a request for arbitration, any exercise of Landlord's
39 remedies shall be stayed until the decision of the arbitrator.
40 In the case of an alleged monetary default, Tenant agrees to
41 deposit with a reputable third party the amount in dispute within
42 the applicable cure period, to be held by such party pending the
43 conclusion of the aforesaid arbitration. If an alleged
44 nonmonetary default involves the need for repairs to a condition
45 that threatens the public safety, Tenant will proceed to cause

RENTAL PAYMENT, LEASE, NOTICE, AND WAIVER

24

1 such repairs to be made even though the aforesaid arbitration
2 shall still be pending. If, in such event, the arbitrator shall
3 conclude that Tenant is not solely responsible for making such
4 repairs, Landlord shall promptly reimburse Tenant for any portion
5 of the cost thereof which is not deemed to be Tenant's
6 responsibility.

7 17.2 Landlord's Remedies. If an Event of Default occurs,
8 Landlord, subject to the provisions of Section 17.2(b) regarding
9 disputed claims, may, provided it complies with all applicable
10 legal requirements for doing so, including furnishing Tenant with
11 prior written notice, re-enter the Premises and remove Tenant and
12 all property from the Premises, without liability to Tenant, and
13 exercise the following remedies:

14 (a) Landlord may attempt to relet the Premises without
15 terminating the Lease, in which case:

16 (i) Landlord may relet for such term or terms
17 (which may exceed the term of this Lease) and at such
18 rental and upon such other terms and conditions as
19 Landlord reasonably deems advisable.

20 (ii) Landlord shall be entitled to make
21 alterations or repairs which are reasonably necessary
22 in order to relet the Premises.

23 (iii) Landlord shall apply all rentals from each
24 reletting, in the following order, to the payment of:

25 (1) any indebtedness other than rent then
26 due from Tenant to Landlord;

27 (2) reasonable costs of reletting, including
28 alterations, repairs, brokerage fees and
29 attorneys' fees;

30 (3) rent then due and unpaid; and

31 (4) future rent as it becomes due and
32 payable.

33 (iv) Landlord shall be entitled to recover from
34 Tenant on a monthly basis the amount by which that
35 month's rent due under this Lease exceeds the rent from
36 such reletting (net of costs of reletting) for that
37 month.

38 (v) Landlord's reentry shall not be construed as
39 an election to terminate this Lease, unless Landlord
40 gives Tenant written notice of termination, or unless a
41 court of competent jurisdiction orders the termination
42 of this Lease.

RENTAL PAYMENT, LEASE, NOTICE, AND WAIVER

25

R-0235

236

(b) Landlord may terminate this Lease by giving Tenant notice of termination at any time after Tenant's default, notwithstanding any prior reletting without termination. Upon termination, provided it has made a reasonable, good faith effort to mitigate its damages, Landlord, in addition to its other remedies, may recover from Tenant all damages resulting from Tenant's default, including without limitation:

(i) the cost of recovering the Premises;

(ii) reasonable attorneys' fees; and

(iii) the net present worth at the time of termination of the Lease, of the excess, if any, of the rent payable under Lease for the remainder of the stated Lease term over the then reasonable rental value of the Premises for the remainder of the stated Lease term.

17.3 **Default by Landlord.** If Landlord fails to pay any amount due or perform any other obligation under this Lease for more than thirty (30) days after Tenant notifies Landlord of the nonpayment or nonperformance, Tenant may exercise any one or more of the following remedies (provided, however, that if a nonmonetary default by its nature cannot in the exercise of reasonable diligence be cured within thirty (30) days after Tenant's notice, Landlord will not be in default if Landlord commences performance within that period and diligently proceeds to cure the default within a reasonable time, not to exceed in any event one hundred twenty (120) days):

(a) Tenant may cure the default and deduct the cost of curing the default from subsequent amounts due under the Lease;

(b) Tenant may recover from Landlord any damages resulting from Landlord's default.

(c) Tenant may terminate this Lease.

(d) Tenant may exercise any other remedy which it may have under this Lease or applicable laws or principles of equity.

17.4 **Attorney's Fees and Expenses of Litigation.** If any delinquent amount due either party under this Lease is collected by or through an attorney, the party obligated to pay the same agrees to pay the other party's reasonable attorneys' fees and expenses of litigation.

17.5 Force Majeure.

(a) For the purposes of this Lease the term "Force Majeure" is defined as any period of delay which arises from or through acts of God; strikes, lockouts or labor disputes; explosions, sabotage, accident, riot, or civil disorder; acts of war; fire or other casualty; legal requirements beyond the reasonable control of the party delayed; delays caused by the other party; and causes beyond the reasonable control of the party.

(b) Subject to the limitations provided in Section 3.3, if either Landlord or Tenant is delayed or hindered in the performance of any obligation or covenant contained in this Lease, other than an obligation or covenant to pay money, by reason of Force Majeure which occurs within the time allowed for performance under the terms of this Lease, then the applicable time period for performance of such nonmonetary covenant or agreement shall be extended for the period of the delay attributable to Force Majeure.

18 INTERPRETATION

18.1 **South Carolina Law Governing.** This Lease shall be governed by, construed and enforced in accordance with the laws of the State of South Carolina.

18.2 **Singular and Plural.** In construing this Lease, feminine or neuter pronouns shall be substituted for those masculine in form and vice versa, and plural terms shall be substituted for singular and singular for plural in any place in which the context so requires.

18.3 **Binding Effect.** The covenants, terms, conditions, provisions, and undertakings in this Lease shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the respective parties hereto, as if they were in every case named and expressed, and shall be construed as covenants running with the land.

18.4 **Remedies Cumulative.** The specified remedies to which the Landlord or Tenant may resort under the terms of this Lease are cumulative and are not intended to be exclusive of any other remedies or means of redress to which either may be lawfully entitled in case of a breach or threatened breach by the other of any provision or provisions of this Lease.

18.5 **No Waiver.** No waiver of a breach of any of the covenants or conditions contained in this Lease shall be construed to be a waiver of any succeeding breach of the same or any other covenant or condition.

18.6 Time of Payment. Time is of the essence in every particular, especially where the obligation to pay money is involved.

18.7 No Oral Changes. No modification, release, discharge or waiver of any of the provisions hereof shall be of any force, effect or value unless in writing and signed by Landlord or the duly authorized agent of Landlord.

18.8 Entire Agreement. This instrument contains the entire agreement between the parties as of this day and the execution hereof has not been induced by representations, promises or understandings not expressed in this Lease, and there are no collateral agreements, stipulations, promises or understandings whatsoever between the parties in any way touching the subject matter of this instrument which are not expressly set forth in this Lease.

18.9 Notices. All notices required or permitted by the terms of this Lease shall be deemed given only when deposited in the United States Registered or Certified Mail, Postage Prepaid, or, with verification of delivery, when received by telegram, telefacsimile or commercial courier to either party, at the address set forth below for each party. Either party may change the address to which notices must be sent by giving notice to the other party in accordance with this Section. The initial notice address for each party is as follows:

Landlord: Hoper Mountain Road Associates, LLC
Attention: David W. Olson
P.O. Box 10248
Greenville, SC 29603
Telefacsimile No.: (803) 242-5498

Tenant: Harris Teeter, Inc.
Attention: Real Estate Department
Post Office Box 33123
Charlotte, North Carolina 28212
Telefacsimile No.: (704) 845-3476

18.10 Construction. The Lease shall not be construed strictly against either party, but fairly in accordance with their mutual intent as expressed in this Lease.

18.11 Recording. This Lease shall not be recorded, but the parties agree to execute a Memorandum of this Lease for recording purposes which shall set forth the manner of determination of the Commencement Date, the term of the Lease and all extensions, a legal description of the location of Tenant's Premises and a description of Tenant's exclusive rights under this Lease. Upon the request of either party, a supplemental Memorandum setting forth the exact Commencement Date shall be ordered when the Commencement Date has been determined.

IN WITNESS WHEREOF, Landlord and Tenant have caused this Lease to be executed in several counterparts, each of which shall be construed to be an original, and a copy of which is retained by each of the parties, as of the day and year first above written.

LANDLORD:

ATTEST:

[Signature]
Secretary

(CORPORATE SEAL)

By: *[Signature]*

TENANT:

HARRIS TEETER, INC.

ATTEST:

[Signature]
Secretary

(CORPORATE SEAL)

By: *[Signature]*

President

STATE OF South Carolina
COUNTY OF Greenville

I, Jennifer M. Chatham, a Notary Public of said county and state, hereby certify that C. Guy Weirbright personally came before me this day and acknowledged that he is Secretary of Koger Mfg. Co., Inc. a corporation, and that by authority duly given and as the act of the corporation, the foregoing instrument was signed in its name by its President, sealed with its corporate seal, and attested by himself as its Secretary.

WITNESS my hand and notarial seal this the 15th day of May, 1995.

Jennifer M. Chatham
Notary Public

My Commission Expires:

12-30-03

(NOTARY SEAL)

\\SQUAD0001\TEAM\NOTES\NOTV_M

30

STATE OF NORTH CAROLINA
COUNTY OF Cabarrus

I, Cecilia Jonette Paul, a Notary Public of said county and state, hereby certify that Walter Bradley personally came before me this day and acknowledged that he is Secretary of HARRIS TRUCK, INC., a corporation, and that by authority duly given and as the act of the corporation, the foregoing instrument was signed in its name by its President, sealed with its corporate seal, and attested by himself as its Secretary.

WITNESS my hand and notarial seal this the 20th day of April, 1995.

Cecilia Jonette Paul
Notary Public

My Commission Expires:

My Commission Expires September 15, 1995

(NOTARY SEAL)

\\SQUAD0001\TEAM\NOTES\NOTV_M

31

R-0238

239

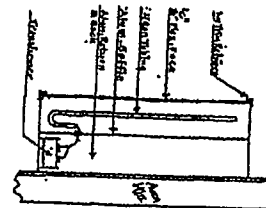
EXHIBIT A

ALL that certain place, parcel, tract or lot of land situate, lying and being on the western side of Roper Mountain Road in Greenville County, South Carolina, consisting 8.137 acres, more or less, as shown on a plat entitled "Rainbow Sign Company - Roper Mountain Road, Greenville, SC" prepared by Fox Engineering & Surveying Co., Inc., dated August 2, 1994, and having, according to said plat, the following metes and bounds:

Beginning at a concrete monument (broken) at the intersection of the western side of the right of way of Roper Mountain Road with the northern side of the right of way of Frontage Road (Pinewood Drive) and running thence with the right of way of Frontage Road the following courses and distances: N. 83-48-03 W. 122.99 feet to a concrete monument (broken); S. 74-03-37 W. 123.93 feet to a concrete monument; S. 84-21-07 W. 125.14 feet to an old 5/8 inch R-bar; and N. 77-08-54 W. 123.12 feet to a concrete monument; thence leaving the right of way of Frontage Road and running N. 31-50-37 E. 417.04 feet to an old 5/8 inch O.T.; thence N. 61-53-39 W. 213.62 feet to an old 5/8 inch R-bar; thence N. 40-33-54 E. 279.27 feet to an old 5/8 inch R-bar; then S. 42-09-40 E. 27.46 feet to an old 1 inch O.T.; thence on a curve to the left, the chord bearing of which is S. 88-64-37 E. 64.04 feet to an old 5/8 inch R-bar; C.T.; thence on a curve to the left, the chord bearing of which is N. 18-02-35 E. 33.36 feet to a new 3/4 inch 5/8 inch R-bar; thence N. 40-33-30 E. 64.32 feet to an old 5/8 inch R-bar; thence S. 47-35-03 E. 499.08 feet to an old 5/8 inch R-bar on the western side of the right of way of Roper Mountain Road; thence 282.07 feet to an old 5/8 inch R-bar; S. 25-54-54 W. 56.52 feet to a concrete monument; S. 25-45-23 W. W. 123.54 feet to a concrete monument, and S. 44-15-39 W. 60.72 feet to a concrete monument (broken), the point of beginning.

ALSO: All that certain place, parcel, tract or lot of land situate, lying and being at the northeastern corner of the above-described 8.137 acre tract in Greenville County, South Carolina and having the following metes and bounds:

Beginning at a concrete monument (broken) at the intersection of the western side of the right of way of Roper Mountain Road with the northern side of the right of way of Frontage Road (Pinewood Drive) and running thence with the right of way of Frontage Road the following courses and distances: N. 83-48-03 W. 122.99 feet to a concrete monument (broken); S. 74-03-37 W. 123.93 feet to a concrete monument; S. 84-21-07 W. 125.14 feet to an old 5/8 inch R-bar; and N. 77-08-54 W. 123.12 feet to a concrete monument; thence leaving the right of way of Frontage Road and running N. 31-50-37 E. 417.04 feet to an old 5/8 inch O.T.; thence N. 61-53-39 W. 213.62 feet to an old 5/8 inch R-bar; thence N. 40-33-54 E. 279.27 feet to an old 5/8 inch R-bar, being the TRUE POINT OF BEGINNING; thence from said true point of beginning, S. 42-09-40 E. 27.46 feet to an old 1 inch O.T.; thence on a curve to the left, the chord bearing of which is S. 88-64-37 E. 64.04 feet to an old 5/8 inch R-bar; thence on a curve to the left, the chord bearing of which is N. 18-02-35 E. 33.36 feet to a new 3/4 inch O.T.; thence on a curve to the right, the chord bearing of which is N. 12-34-36 E. 57.01 feet to an old 5/8 inch R-bar; thence N. 40-33-30 E. 64.32 feet to an old 5/8 inch R-bar; thence N. 47-35-03 E. 25.24 feet to a point; thence S. 41-08-00 W. 205.12 feet to a point; thence S. 42-00-51 E. 25.94 feet to the point of beginning.



THIS SIGN BEARING THE WORDS "HARRIS TEETER" IS THE PROPERTY OF HARRIS TEETER, INC.

Harris Teeter

EXHIBIT B

R-0239

240

STATE OF _____
COUNTY OF _____

**SUBORDINATION, ASSIGNMENT
AND NON-DISTURBANCE AGREEMENT**

THIS AGREEMENT, made this _____ day of _____, 19____,
among **KARLIS TRSTER, INC.** (the "Tenant"), _____
(the "Landlord"), (the "Lender"), and _____

WITNESSETH:

WHEREAS:

1. By lease agreement dated _____, 19____,
(the "Lease"), Landlord leased to Tenant premises (the
"Premises") located at _____ which is
more particularly described in Exhibit "A" to the Lease;

2. Lender is the owner and holder of indebtedness secured
by a deed of trust which constitutes a lien against the Premises
(the "Deed of Trust"); and

3. Tenant has agreed to subordinate the lease to the Deed
of Trust upon the terms and conditions stated in this Agreement;

NOW, THEREFORE, in consideration of their mutual promises,
Lender and Tenant agree as follows:

1. **Subordination.** The Lease and all renewals,
modifications, and extensions of the Lease are subject and
subordinate to the Deed of Trust and all renewals, modifications,
and extensions of the Deed of Trust.

2. **Assignment.** Tenant agrees to attorn to the Lender if
Lender acquires title to the Premises by foreclosure or
otherwise, or to any third party who acquires title to the
Premises at a foreclosure sale under the Deed of Trust, in each
case under all of the terms, conditions, and covenants of the
Lease; provided, however, that

(a) Tenant shall be under no obligation to pay any
rent or render any performance to the Lender or any such
third party until it has received notice (in the manner
provided in the Lease) of its obligation to do so from the
party entitled to such payment or performance, together with
a copy of such party's title insurance policy or other
satisfactory evidence of title; and

(b) The Lender or purchaser must assume all
obligations of the Landlord under the Lease, from the date
of the purchase or foreclosure, and the rights and

obligations of the Tenant and the Lender, or third party
purchaser, upon such attornment, to the extent of the then
remaining balance of the term of the Lease and any
extensions and renewals, shall be as set forth in the Lease,
which is incorporated in the Agreement by reference, except
that the Lender or purchaser shall not be

(i) liable for any act or omission of any prior
landlord (including the Landlord) except to the extent
of any Tenant rights of rent offset, credit or
holdback, or reduction in the rent shall continue in
order to be fully utilized with respect to any act or
omission of any prior landlord.

(ii) bound by any rent paid by the Tenant for more
than the current month to any prior landlord (including
the Landlord).

Notwithstanding the foregoing, the Lender or purchaser will
be obligated to remedy any non monetary default (such as, for
example, a failure to repair) by any prior landlord (including
the Landlord) that continues after the Lender or purchaser
succeeds to the Landlord's interest in the Premises, provided
that in no event will the Lender be liable for any damages
resulting from such default prior to the date Lender succeeds to
such interest except to the extent any Tenant rights of rent
offset, credit or holdback, or reduction in rent shall continue
in order to be fully utilized with respect to any act, omission
or default of any prior landlord. Tenant will, upon written
request from Lender or purchaser, notify Lender or purchaser of
any defenses or rent offsets, credits or holdbacks in reductions
in rent to which Tenant is entitled as a result of acts,
omissions or defaults of any landlord.

3. **Payment of Rent to Lender.** If Lender becomes a
mortgagee in possession of the Premises or exercises its rights
under the loan documents securing its loan to Landlord to have
rental payments made directly to Lender without taking possession
of the Premises, Tenant agrees to make all payments of rent
directly to Lender upon Lender's written instructions to Tenant.
If and to the extent that Lender demands and receives any such
payments from Tenant:

(a) Landlord agrees that Tenant may rely upon such
written instructions of Lender and need not obtain other
confirmation of Lender's right and authority to receive such
payments;

(b) Landlord, to the extent of such rental payments,
releases and discharges Tenant from liability under the
lease for such payments, to the same extent as if they had
been made to Landlord; and

(c) Landlord agrees to look solely to Lender for recovery of any such payments made by Tenant in the event Landlord disputes Lender's right to receive such payments.

4. **Non-Disturbance.** The Lender agrees that so long as Tenant is not in default under the Lease beyond any applicable cure periods:

(a) the Tenant's possession of the Premises and its rights and privileges under the Lease will not be diminished or interfered with and its occupancy of the Premises will not be disturbed; and

(b) Tenant will not be named as a party to any foreclosure proceedings unless Tenant's joinder is required by law.

5. **Modification of Lease.** Tenant agrees that so long as the Premises are subject to the lien of the Deed of Trust, Tenant will not, without the prior written consent of the Lender, enter into any agreement modifying the Lease in any material respect (including without limitation, any modification of the rent, term or commencement date).

6. **Termination by Landlord.** Landlord agrees that Landlord will not terminate the Lease or give notice to Tenant of termination of the Lease without the prior written consent of the Lender, not to be unreasonably withheld or delayed.

7. **Lender's Right to Cure Landlord Defaults.** So long as the Premises are subject to the lien of the Deed of Trust, Tenant will give Lender duplicate notice of any claimed default on the part of Landlord, in the manner provided by the Lease, at the address set forth in this Agreement, and will permit Lender to cure any default by Landlord under the Lease during any period when the Landlord would be entitled to do so, and for (i) 10 days after such period, if any, with respect to any default which can be cured by the payment of money, and (ii) with respect to any other default, for thirty (30) days after such period, if any (which period, if any, shall for purposes of this provision be presumed to last for no more than 30 days after such default), and for such reasonable additional time as may be required to effect a cure, if Lender, acting diligently, cannot effect the cure within such 30-day period, but promptly commences to cure the default and notifies Tenant in writing that it has so commenced such cure efforts within such period, and proceeds diligently to effect such cure, which must be completed within 90 days after the default in any event.

8. **Notices.** All notices required or permitted by the terms of this Agreement shall be deemed given only when deposited in the United States Registered or Certified Mail, Postage Prepaid, or, with verification of delivery, when received by

telegram, cable, telex, commercial courier or any other generally accepted means of business communication, to a party at the address set forth below for each party. A party may change the address to which notices must be sent by giving notice to the other parties in accordance with this Paragraph. The initial notice address for each party is as follows:

If to Lender:

If to Tenant:

Barrie Tester, Inc.
Post Office Box 33129
Charlotte, North Carolina 28237-3129
Attention: Real Estate Department

If to Landlord:

9. **Interpretation and Effect.** This Agreement:

(a) shall remain in effect at all times during the Lease or any extension or renewal of the Lease, notwithstanding any default or foreclosure under the Deed of Trust.

(b) binds the parties and their successors and assigns; and

(c) may not be modified except by a writing executed by all parties.

R-0241

242

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized officers, all as of the date first stated above.

ATTEST:

Secretary
(CORPORATE SEAL)

ATTEST:

Secretary
(CORPORATE SEAL)

ATTEST:

Secretary
(CORPORATE SEAL)

TENANT:

KARLIS TETTER, INC.

By: _____
President

LESSOR:

By: _____
President

LANDLORD:

By: _____
President

STATE OF NORTH CAROLINA

COUNTY OF _____

I, _____, a Notary Public of said county and state, here certify that _____ personally appeared before me this day and acknowledged that he is _____ Secretary of KARLIS TETTER, INC., a corporation, and that by authority duly given, and as the act of the corporation, the foregoing instrument was signed in its name and by its President, sealed with its corporate seal, and attested by _____ self as its Secretary.

WITNESS my hand and official seal this the _____ day of _____, 19____.

My Commission Expires: _____
Notary Public

STATE OF _____

COUNTY OF _____

I, _____, a Notary Public of said county and state, here certify that _____ personally appeared before me this day and acknowledged that he is _____ Secretary of _____, a corporation, and that by authority duly given, and as the act of the corporation, the foregoing instrument was signed in its name and by its _____ President, sealed with its corporate seal, and attested by _____ self as its Secretary.

WITNESS my hand and official seal this the _____ day of _____, 19____.

My Commission Expires: _____
Notary Public

R-0242

STATE OF _____
COUNTY OF _____

I, _____, a Notary Public of said
county and state, here certify that _____
personally appeared before me this day and acknowledged that he
is _____ Secretary or _____ a Corporation,
and that by authority duly given, and as the act of the
corporation, the foregoing instrument was signed in its name and
by its _____ President, sealed with its corporate seal, and
attested by _____ self as its _____ Secretary.

WITNESS my hand and official seal this the _____ day of
_____, 19____.

My Commission Expires: _____ Notary Public

(NOTARY SEAL)

EXHIBIT F

ESTOPPEL CERTIFICATE

TO: Whom It May Concern

RE: Lease dated: _____
Between: _____ Lessor
and BAKKIS TRUCK, INC., Lessee on premises located and
addressed as follows: _____

Providing for rental of not less than \$ _____ payable
monthly in advance during the initial lease term.

Gentlemen:

The undersigned Lessee hereby confirms the following
information:

1. That it has accepted possession of the premises demised
pursuant to the terms of Lease referred to above.
2. That the improvements and space required to be furnished
according to said Lease have been completed.
3. That there are no set-offs or credits against rental, nor
have rentals been prepaid for a period of more than 30 days.
4. That the Landlord has complied with all requirements of an
inducement nature relating to construction and occupancy by other
tenants as required by the Lease.
5. That it has no knowledge of any default which presently
exists or any condition which with passage of time or giving of
notice would become a default under the terms of the Lease referred
to above.
6. Rental payments commenced on _____.
7. The initial term of the Lease begins _____ and
ends _____. Option periods extend through _____.
8. That said Lease is in full force and effect and has not
been assigned, modified, supplemented or amended in any way, except
the following:

9. That it has no notice of a prior assignment,
hypothecation or pledge of rent of or under the Lease.
10. All other terms and conditions of the Lease remain
unchanged.

R-0243

11. This Certificate is given to state the condition of the Lease referred to herein as it affects the Lessor and the Lessee and in no way shall this Certificate serve to modify any terms or conditions of the Lease.

Dated: _____

HARRIS TRISTAR, INC.

By: _____
President

R-0244

FIRST AMENDMENT TO LEASE

THIS FIRST AMENDMENT entered into this 16th day of June, 1994, by and between ROPER MOUNTAIN ROAD DEVELOPMENT ASSOCIATES, LLC ("Landlord") and HARRIS TEETER, INC. ("Tenant").

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Landlord and Tenant hereby amend the Lease Agreement between the parties dated April 20, 1993 (the "Lease"), as follows:

1. The parties acknowledge that Landlord's name, incorrectly stated in the Lease, is "Roper Mountain Road Development Associates, LLC."
2. Section 12.2 of the Lease is amended to read in its entirety as follows:

"12.2 Tenant's Obligation to Repair or Restore. If the Premises are damaged by fire or casualty during the first fifteen (15) years of the Lease Term, or if the Premises are damaged by fire or other casualty after the first fifteen (15) years of the Lease Term but this Lease is not terminated pursuant to Section 12.1, Tenant shall at its option either (i) restore the Premises to substantially the same condition existing before the damage or destruction, or (ii) elect not to restore the Premises. If Tenant elects not to restore the Premises, Tenant shall continue to be obligated to pay minimum rent, property taxes, insurance premiums and maintenance for the remaining term of the Lease, Tenant shall clear all debris from the property, secure any remaining improvements to the extent reasonably practical so that such will not be further damaged by the elements, and maintain the property in a clean, safe and slightly condition for the remaining term of the Lease. Tenant shall retain all insurance proceeds payable as a result of such casualty. If this Lease is not terminated pursuant to Section 12.1, it shall remain in full force and effect except that if Tenant elects to restore, rent shall abate as provided in Section 12.3 and the Lease Term shall be extended for a period equal to the rent abatement period provided in Section 12.3 (in addition to any Lease Term extension provided in section 12.1). Tenant shall bear full responsibility for the adequacy of the insurance. If the fire or other casualty occurs after the first fifteen (15) years of the Lease Term and this Lease is terminated pursuant to Section 12.1, all insurance proceeds resulting from such damage or destruction of the Building and any fixtures therein paid for by Landlord shall be payable to Landlord (or Landlord's mortgagee, if applicable, pursuant to Section 12.4)."

3. Section 12.3 is replaced in its entirety by the following:

"12.3 Rent Abatement. If the Premises are damaged or destroyed by fire or other casualty and Tenant elects to restore the Premises in accordance with Section 12.2, the minimum rent reserved in this Lease shall be reduced to an amount which bears the same ratio to the minimum rent as the area of the Building then available for use in Tenant's judgment bears to the entire area of the Building; provided, however, that if so much of the Building is destroyed or the Parking Area is damaged to such

an extent that it is unreasonable to expect Tenant to continue to operate its business from the Building, Tenant may close its store for business. In that event all rent shall abate from the date the store is closed until the earlier of the date Tenant reopens for business at the Premises or three months after the date of such casualty or destruction. If minimum rent abates under this Section, every other charge payable by Tenant to Landlord shall not abate. In no event shall rent abate if Tenant elects not to fully restore the Premises.

4. Section 12.4 is amended by adding the following at the end of the section:

Tenant agrees that if Landlord provides Tenant with written notice of the name and address of the first mortgagee of the Premises, Tenant will (i) direct its insurer to pay to such mortgagee any insurance proceeds that would otherwise be payable to Landlord pursuant to the provisions of section 12.2, and (ii) cause such insurers to list such mortgagee as a certificate holder with the right to receive 30 days prior notice of any cancellation of such policy.

Except as provided above, the Lease remains in full force and effect.

IN WITNESS WHEREOF, the undersigned have executed this Amendment as of the date first above written.

Witnesses:

ROPER MOUNTAIN ROAD DEVELOPMENT ASSOCIATES, LLC

By: David W. Otero
Its Authorized Member

By: DKG, INC., a Georgia Corporation
Its Authorized Member

By: Debra S. Garret
Its President

(Corporate Seal)

HARRIS TEETER, INC.

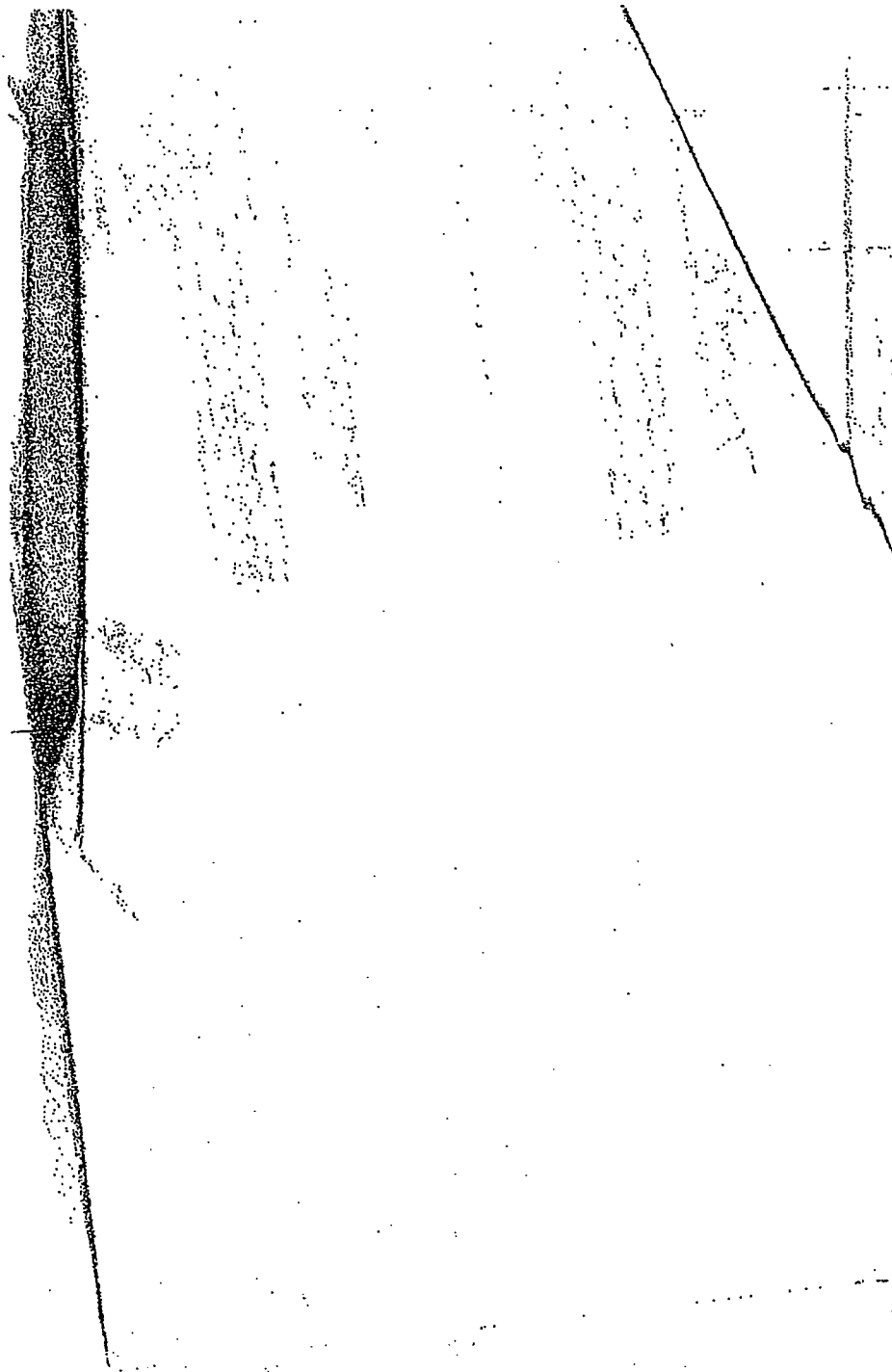
By: William H. Hester, Jr.
President

ATTEST:

Clayton L. Hensley

R-0245

246



R-0246

154
1655/527

SUPPLEMENT TO MEMORANDUM OF LEASE
BETWEEN
ROPER MOUNTAIN ROAD DEVELOPMENT ASSOCIATES, LLC (the "Landlord")
AND
HARRIS TESTER, INC. (the "Tenant")

1. This is a supplement to the Memorandum of Lease between Landlord and Tenant, which was recorded May 7, 1996 in the Office of the Register of Mease Conveyances for Greenville County, South Carolina in Deed Book 1641 at page 748, regarding an unrecorded Lease between Landlord and Tenant, dated April 20, 1995, as amended by Addendum to Lease, dated June 14, 1995, and Second Amendment to Lease Agreement, dated December 1995.
2. The purpose of this supplement is to set forth the term of the Lease, which commenced on August 14, 1996 and will terminate on August 13, 2016. Tenant has four (4) renewal options of five (5) years at the expiration of the initial term.
3. All other provisions set forth in the Memorandum of Lease remain unchanged.
4. This Supplement to Memorandum of Lease is not a complete summary of the Lease. The provisions of the Lease are incorporated by reference in this Supplement to Memorandum of Lease.

Witness:

Samuel
David W. Glenn

LANDLORD:
Roper Mountain Road Development
Associates, LLC

By: David W. Glenn
David W. Glenn
Authorized Member

16-21 2261

1230

Witness:

Paul Pann
Cecilie Paul

TENANT:
Harris-Tester, Inc. (SEAL)

By: John W. Smith
President

Attest: John W. Smith
Test. Secretary

(CORPORATE SEAL)

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

ACKNOWLEDGEMENT

I, a Notary Public of the County and State aforesaid, certify that David W. Glenn personally came before me this day and acknowledged that he is the authorized member of Roper Mountain Road Development Associates, LLC, a South Carolina limited liability company, and that by authority duly given, and as the act of Roper Mountain Road Development Associates, LLC, the foregoing instrument was signed in its name.

Witness my hand and official seal, this 6th day of September, 1996.

David W. Glenn (SEAL)
Notary Public for South Carolina

My commission expires: 12-30-03

Handwritten text, possibly a signature or initials, located in the upper left quadrant of the page.

Handwritten text, possibly a signature or initials, located in the upper right quadrant of the page.

R-0248

**SECOND AMENDMENT
TO LEASE AGREEMENT**

THIS SECOND AMENDMENT TO LEASE AGREEMENT is executed as of this day of December, 1995, between KOPER MOUNTAIN ROAD DEVELOPMENTS, L.L.C., a limited liability company ("Landlord"), and HARRIS TRUCK, INC., a North Carolina corporation ("Tenant").

WITNESSETH:

WITNESSETH: Landlord and Tenant entered into a certain Lease Agreement dated April 29, 1995 and First Amendment thereto dated June 16, 1995 (the "Lease"), and desire to clarify, amend and supplement the same by this Second Amendment ("Second Amendment"). Capitalized terms used herein shall have the meaning ascribed in the Lease. Paragraph references are to those of the Lease.

WHEREFORE, FOR VALUABLE CONSIDERATION, each to the other in hand paid, the receipt and adequacy whereof is hereby expressly acknowledged, THE PARTIES AGREE AS FOLLOWS:

1. Section 2.7(d): The second sentence is deleted and the following sentence substituted therefor:
 "Subject to Section 13.2, unavoidable temporary closings or temporary relocations necessitated by public authority or other temporary circumstances beyond Landlord's control ("temporary" meaning less than eighteen (18) months), Tenant shall have the use of all road improvements at all times during the Lease Term and any extensions thereof; and"
2. Section 3.2(c): The following clause is added:
 "provided, Tenant will not object to deviation from such form required by an institutional mortgagee (bank, saving and loan, insurance company or the like) which does not materially change Tenant's rights and/or obligations under this Lease or such form."
3. Section 5.1:
 - 3.1 In the first sentence the phrase "the provisions of Section 2.5 and" is deleted.
 - 3.2 The following is added as a last paragraph of Section 5.1:

The Rent (per square foot) set forth in columnar form above beginning with the ninth year of the Lease Term shall be adjusted to take into account any increase or decrease in Rent prior thereto resulting from application of the formula set forth above. The parties further acknowledge and agree that the bid obtained for construction of Premises is \$56.32 per square foot and that the application of the formula set forth above results in a rent of \$15.75 per square foot for the first eight years of the lease term, and corresponding increases as set forth below in the rent for the remainder of the lease term and the Extension Periods:

Lease Years	Rent (per square foot)
9 & 10	\$16.25
11 through 15	\$16.75
16 through 20	\$17.25
First Extension Period	\$17.75
Second Extension Period	\$18.25
Third Extension Period	\$18.75
Fourth Extension Period	\$19.25

4. Section 6.2(b): is deleted and the following substituted therefor:
 "From and after the Commencement date Tenant, at its expense, subject to the provisions of Section 10.1, shall maintain the Premises in accordance with Section 10.1.1.1."
5. Section 6.2(c): is deleted. Wherever an "outparcel" is referred to in the Lease, the same shall be deleted.
6. Section 6.5: Section 6.5(a) is amended by adding as a last sentence the following:
 "Landlord shall not be in default with regard to the foregoing by reason of a Taking as such Term is defined in Section 13.6 below."
7. Section 1.3: "Landlord" as used in this Section means only the Landlord from time to time of the Premises and not a predecessor Landlord acquiring property adjacent to the Premises; provided, however, that if such predecessor or any third party owning such adjacent property violates the provisions of Section 6.2, Landlord shall not grant or allow such adjacent property or such adjacent property owners any cross easements or access easements or any other rights to

utilize any portion of the Premises for access, ingress or egress to or from such adjacent property or parking for such adjacent property.

8. Section 9.1: The following is added to the end of this Section: "ad valorem taxes" or "taxes" as used herein means and includes:

- a. real estate taxes and special assessments (other than special assessments related to development of the Premises by Landlord),
- b. annual benefits, levies, fees, water and sewer rents and other governmental charges assessed against the Premises, and
- c. due to a change in the method of taxation, any franchise, rental income, or profit tax only to the extent levied against Landlord in lieu of or direct substitution for or in addition to ad valorem real estate taxes that otherwise would be paid by the Tenant under the terms of this Lease.

9. Section 10.1:

9.1 Section 10.1(a) is amended by substituting the term "Premises" for the term "Improvements".

9.2 Section 10.1(b) is amended by inserting in the first sentence the following after "Date": "and written notice thereof given to Landlord no later than thirty (30) days after said first anniversary."

10. Section 12: Section 12.2 is amended by adding the following:

"The annual Rent for the ten (10) year extension period following the initial Term of the Lease as provided in Section 12.1(a) shall commence with the Rent the Tenant paid during the year preceding the commencement of the aforesaid Extension Period and continue thereafter at the same rate as the rent that would otherwise have been payable thereafter during the initial term of the Lease (i.e., years one (1) through twenty (20), but never exceeding in any event the rent that would have been due in year twenty (20). Thereafter the rent shall increase as provided in the chart in Section 5.1, as the same may be modified based on actual construction costs, for the various extension periods. For example, if the building burns in year

fourteen (14) upon recommencement of rent payments, the rent for the next ten years would start with the rent that was due in year fourteen (14) and thereafter the rent shall escalate in accordance with the provisions of the Section 5.1. but upon reaching the level of rent that would have been due in year twenty (20), the rent shall remain fixed at that level until the expiration of both (i) the aforesaid ten (10) year extension period and (ii) the remaining portion of the initial lease term that was left at the time of the casualty. Thereafter the rent shall be the rent that would have been due during the first extension period in accordance with said Section 5.1 (assuming Tenant elects to extend the lease term for such first five (5) year extension) and escalating for each successive five (5) year extension period in accordance with said Section 5.1.

In any event, if the proceeds of any insurance are paid to Tenant, Tenant shall have no right to terminate this Lease until such amounts are paid to Landlord."

11. References to "Exhibit F" in the Lease shall mean "Exhibit G" and references to "Exhibit G" shall mean "Exhibit F".

12. Exhibit F: Is amended as follows:

12.1 § 2 is amended to read: "That the Premises have been 'completed for occupancy' as such term is defined in the Lease."

12.2 § 4 is amended to read: "That Landlord has complied with all requirements relating to construction and occupancy as required by the Lease."

IN WITNESS WHEREOF, each of the parties has caused this Lease to be duly executed as of the day and year first above written.

LANDLORD

ROVER MOUNTAIN ROAD
DEVELOPMENT, L.L.C.
a limited liability company

By: [Signature]
Its: President

TENANT

HARRIS TERRY, INC.
a North Carolina corporation

By: [Signature]
Its: President

R-0250

Haynsworth
Sinkler Boyd, PA

GREENVILLE CHARLESTON COLUMBIA FLORENCE

ATTORNEYS AND COUNSELORS AT LAW

W. FRANCIS MARION, JR.
DIRECT DIAL NUMBER 864-240-3318
EMAIL FMARION@hbsinkfirm.com
78 SEATTLE PLACE, 11TH FLOOR (28601-2110)
POST OFFICE BOX 2048 (28602-2048)
GREENVILLE, SOUTH CAROLINA
TELEPHONE 864.240.3200
FACSIMILE 864.240.3336
WEBSITE www.hbsinkfirm.com

March 17, 2011

VIA EMAIL

The Honorable D. Garrison Hill
Judge, Thirteenth Judicial Circuit
305 East North Street, Suite 213
Greenville, SC 29601

Re: *Roper, LLC v. Harris Teeter, Inc.; Carolina & Georgia Immoilelienfonds I, L.P.; GOA Realty Management I, LLC; Germania of America, Inc.; Müller & Martin, PLLC; New Spring Community Church; John Doe; Richard Roe; and Doe Corporation*
C. A. No. 2010-CP-23-7266

Dear Judge Hill:

I am writing in response to Germania of America, Inc.'s ("Germania") March 16, 2011 letter to you regarding Harris Teeter's proposed order in the above-referenced case.

Germania, although not a party to the Summary Judgment briefing, submits that Plaintiff's breach of contract claim against Harris Teeter should survive Summary Judgment on two essential grounds. One, the June 12, 2001 letter agreement was not a release and two, there was no consideration supporting the June 12, 2001 letter agreement. Both issues were fully briefed and argued to the Court and as the Court ruled, correctly we believe, these arguments fail as a matter of law.

As a preliminary matter, there is no dispute that the June 12, 2001 letter agreement says what it says – that Defendant, Carolina & Georgia Immoilelienfonds I, L.P. ("CGI") "will look solely to Assignee for performance of the 'Tenant's' responsibilities under the Lease after the Effective Date of the Assignment." Germania contends that the June 12, 2001 letter agreement is not a release because it does not use the words "release," "payment" or refer to the document as an amendment of the Lease. However, under South Carolina law (and as discussed at pages 12 and 13 of Harris Teeter's Memorandum in Support of its Motion for Summary Judgment) "[n]o set form of words is necessary to constitute a release," Gardner v. Columbia Police Dep't, 216 S.C. 219, 223, 57 S.E.2d 308, 310 (1950), and no "magic words" are required. Wilson Group v. Quorum Health Res., 880 F.Supp. 416, 425 (D.S.C. 1995).¹ CGI's argument that the June 12, 2001 letter does not specifically refer to Harris Teeter's payment obligation under the Lease has no basis. The plain and unambiguous language of the agreement refers to *all* of Harris Teeter's obligations under the Lease - CGI "will look solely to Assignee for performance of the 'Tenant's' responsibilities under the

¹ The issue is also addressed in the proposed order on page 14.

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

Lease" There is no limitation as to the responsibilities that are being assigned as CGI suggests.

Despite the fact that Plaintiff did not raise in its briefing or at the March 1, 2011 hearing an argument pertaining to a lack of consideration, Harris Teeter notes that it fully briefed the issue at pages 14 through 17 in its Memorandum. In short, proper consideration existed by way of a benefit to CGI by receiving Bi-Lo's liability on the Lease. Additional consideration existed by way of a detriment to Harris Teeter in that it gave up its legal rights under the Lease to control the leased premises.²

Lastly, there is no merit to Germania's contention that the June 12, 2001 letter agreement was not a release because Harris Teeter's Assignment and Assumption of Lease with Bi-Lo was not a certainty. Again, this argument was addressed by Harris Teeter at the hearing and in the proposed order at pages 11 through 12. The conditional language in the letter was a condition precedent, which, once satisfied, rendered CGI's obligation unconditional. At that point CGI agreed to look solely to Bi-Lo for performance of the Tenant obligations under the Lease.

We believe his Honor's rulings at the hearing are correct and, an order should be issued on that basis. We appreciate your time and consideration in this matter.

Very truly yours,

HAYNSWORTH SINKLER BOYD, P.A.



W. Francis Marion, Jr.

WFMjr/sdm

cc (via email):

John A. Hagins, Esq.
Stephen R. H. Lewis, Esq.
Sarah Day Hurley, Esq.
Robert E. Stepp, Esq.
James W. Sheedy, Esq.
Susan E. Driscoll, Esq.

Doc.#789396/19207.0003

² This issue was also discussed in the proposed order at pages 12 through 14.

R-0252

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

THE HONORABLE D. GARRISON HILL, CIRCUIT COURT JUDGE

Case No. 2010-CP-23-7266

Roper, LLC,..... Respondent,

v.

Harris Teeter, Inc., Carolina & Georgia Immobilelienfonds I, L.P.; GOA Realty
Management I, LLC; Germania of America, Inc.; Miller & Martin PLLC; New Spring
Community Church; John Doe; Richard Roe; and Doe Corporation,..... Defendants.

Of which Germania of America, Inc. is
the.....Appellant

and

Of which Harris Teeter, Inc. is
the.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material. Furthermore,
the undersigned hereby certifies that the Record on Appeal complies with the Supreme
Court's Order dated August 13, 2007, concerning personal data identifiers and other
sensitive information.

[SIGNATURE ON FOLLOWING PAGE]

R-000253

Respectfully submitted,

By: Sarah Day Hurley
Sarah Day Hurley, (SC Bar No.:16241)
Turner Padgett Graham & Laney P.A.
Post Office Box 1509
Greenville, South Carolina 29602
Phone: (864) 552-4651
Fax: (864) 282-5965

ATTORNEYS FOR APPELLANT

R-000254

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Civil Action No.: 2010-CP-23-7266

Roper, LLC Respondent

vs.

**Harris Teeter, Inc., Carolina & Georgia Immobilelienfonds I, L.P.,
GOA Realty Management, LLC, Germania of America, Inc.,
Miller & Martin, PLLC, New Spring Community Church,
John Doe, Richard Roe, and Doe Corporation,**

of which Germania of America, Inc. is the Appellant

FINAL BRIEF OF APPELLANT

Sarah Day Hurley (SC Bar No. 16241)
Turner Padget Graham & Laney, P.A.
Post Office Box 1509
Greenville, South Carolina 29602
(864) 552-4600
Attorneys for Appellant

Other Counsel of Record:

John A. Hagins, Jr.
Stephen R. H. Lewis
Covington Patrick Hagins Stern & Lewis
P.O. Box 2243
Greenville, SC 29602
Attorneys for Roper, LLC

E. Benton Leinster, III
P.O. Box 8874
Greenville, SC 29604
Attorney for Roper, LLC

W. Francis Marion, Jr.
Haynsworth Sinkler Boyd, PA
P.O. Box 2048
Greenville, SC 29602-2048
Attorneys for Harris Teeter, Inc.

Table of Contents

	Page
Table of Authorities	ii
Statement of Issues on Appeal	iii
Statement of the Case	1
Argument and Citation of Authorities	4

Table of Authorities

Cases

<u>Beaufort Realty Co. v. Beaufort Cnty.</u> , 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001)	4
<u>Hardaway Concrete Co. v. Hall Contracting Corp.</u> , 374 S.C. 216, 225, 647 S.E.2d 488, 492 (Ct. App. 2007)	6
<u>HK New Plan Exchange Property Owner I, LLC v. Coker</u> , 375 S.C. 18, 24, 649 S.E.2d 181, 184 (Ct. App. 2007)	7
<u>North American Rescue Products, Inc. v. Richardson</u> , 2011 S.C. App. LEXIS 332.....	4
<u>Pee Dee Stores, Inc. v. Doyle</u> , 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009). 5, 7	
<u>S.C. Dep't of Natural Res. v. Town of McClellanville</u> , 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001)	7
<u>Wallace v. Day</u> , 390 S.C. 69, 700 S.E.2d 446 (Ct. App. 2010)	6, 7, 10

Statement of Issues on Appeal

Did the trial court err in granting summary judgment to Harris Teeter, Inc. on the Plaintiff's breach of contract claim?

Statement of the Case

On September 7, 2010, Plaintiff Roper LLC commenced this lawsuit against the following entities: Harris Teeter, Inc. ("Harris Teeter"); Carolina & Georgia Immobilelienfonds I, LP ("C&G"); GOA Realty Management I, LLC ("GOA"); Germania of America, Inc. ("Germania"); Miller & Martin, PLLC ("Miller & Martin"); New Spring Community Church ("New Spring Church"); Richard Roe; and Doe Corporation. Initially, the complaint alleged negligence and constructive fraud in connection with the Plaintiff's purchase and ownership of certain commercial property located on Roper Mountain Road, in Greenville, South Carolina, defined in the complaint as the "Roper Mountain Road Property" (hereinafter, the "Property"). Plaintiff served an Amended Complaint on November 24, 2010, pursuant to which it alleged fraudulent concealment, constructive fraud, breach of contract, promissory estoppel, and negligent misrepresentation. (Amended Complaint) (R. pp. 78-93).¹

The Property contains 8.353 acres, including a 60,217 square foot building and adjacent land for parking (hereinafter the "Property"). (Amended Complaint, ¶¶ 9-10) (R. p. 2). The Property was initially occupied by Harris Teeter pursuant to a certain Lease Agreement Between Roper Mt. Rd. Assoc., LLC and Harris Teeter, Inc. (hereinafter the "Lease") (R. pp. 36-71). On or about July 9, 2001, Harris Teeter assigned its interests in the property to Bi-Lo, Inc. (Assignment and Assumption of

¹ On June 10, 2011, Defendant New Spring Community Church was dismissed from the case by joint stipulation of the parties. In addition, Defendant Miller & Martin, PLLC was dismissed on summary judgment by order entered on July 20, 2011. Defendants C&G and GOA have never made an appearance.

Lease) (R. pp. 31-33). Plaintiff subsequently acquired the Property in April 2007, and sought to enforce Harris Teeter's payment obligations under the Lease. (See May 7, 2007 letter from attorney Jennifer Adamson Moorhead) (R. pp. 73-74). Harris Teeter has refused to honor the payment terms of the Lease, claiming that the previous owner released it of all of its obligations, including payment obligations, pursuant to a June 12, 2001 letter agreement between Harris Teeter and C&G. (June 12, 2001 letter) (R. pp. 29-30, p. 75) (hereinafter the "June 2001 letter").

The issue on appeal is the legal effect of the June 2001 letter upon which Harris Teeter claims to have been released. The trial court ruled that the June 2001 letter is clear and unambiguous, and as a matter of law, constitutes a valid release of Harris Teeter's payment obligations under the Lease. Appellant Germania appeals the court's ruling on the grounds that: (1) the letter is vague and ambiguous, and is susceptible of more than one reasonable interpretation; (2) the letter is invalid as a release because it failed to recite or reflect any consideration exchanged to support the purported release; and (3) the parties should be allowed an opportunity to conduct discovery on the intention of the parties to the June 2001 letter.

In response to Plaintiff's pleadings, Harris Teeter filed a Motion to Dismiss or Alternatively, for Summary Judgment on November 9, 2010, and again on January 14, 2011. (R. pp. 20-28, pp. 107-108). Harris Teeter served an amended brief on February 23, 2011. (R. pp. 112-129). Harris Teeter moved to dismiss, or for summary judgment, on all claims against it.

On March 1, 2011, the circuit court held a hearing on Harris Teeter's Motion to Dismiss or for Summary Judgment. (Transcript) (R. pp. 149-195). At the time of the

hearing, no depositions had been taken, and only limited written discovery had been exchanged. At the hearing, the circuit court judge ruled in favor of Harris Teeter and ordered summary judgment in its favor on all claims asserted by Plaintiff.

Counsel for Harris Teeter submitted a proposed order on March 9, 2011. (R. pp. 196-211). On March 16, 2011, counsel for Germania submitted comments on the proposed order, asking the court to consider the ambiguities in the June 2001 letter. (R. pp. 212-218). The court entered its order on April 25, 2011, granting summary judgment to Harris Teeter on all of Plaintiff's claims. (R. pp. 3-17).

On May 6, 2011, Germania served its Motion to Alter or Amend Judgment Pursuant to Rule 59(e). (R. pp. 143-145). At the same time, Plaintiff served its Motion to Alter or Amend Judgment. (R. 146-148). The court denied both motions on May 17, 2011. (Form 4 order) (R. pp. 18-19). Appellant Germania timely served its Notice of Appeal on June 17, 2011. Germania now appeals only that portion of the court's order pursuant to which the court ruled that the June 12, 2001 letter constitutes a valid and effective release of Harris Teeter's payment obligations under the Lease. (See Order, pp. 11-15) (R. pp. 13-17).

Argument and Citation of Authorities

The basis for the Plaintiff's breach of contract claim is Harris Teeter's failure to pay rent under the Lease. (Amended Complaint, ¶¶ 43-46) (R. pp. 90-91). Harris Teeter denies that it is liable for payment under the Lease, and claims that it has been released of all obligations under the Lease pursuant to the June 2001 letter. Germania submits that the June 2001 letter is vague and ambiguous, and its terms far too indefinite, for the trial court to have concluded, as a matter of law, that the letter constitutes a valid and effective release.

1. Germania's Standing to Bring this Appeal

As an initial matter, Germania notes that, although the order being appealed from granted summary judgment to a co-defendant, and although there are no claims of Germania's that have been denied, Germania has standing to bring this appeal. Rule 201(b) provides that "Only a party aggrieved by an order, judgment, sentence or decision may appeal." Rule 201(b) SCACR. The word "aggrieved" has been interpreted to mean "a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation." North American Rescue Products, Inc. v. Richardson, 2011 S.C. App. LEXIS 332, citing Beaufort Realty Co. v. Beaufort Cnty., 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001).

All of the claims asserted against Germania in this case depend upon an assumption that the June 2001 letter constitutes an effective and valid release of Harris Teeter. If the June 2001 letter is not an effective release, however, there is no basis for

any of Plaintiff's claims against Germania or the other remaining defendants. Although Germania has other valid defenses to Plaintiff's claims, and has denied and continues to deny that it breached any contract or made any misrepresentations to the Plaintiff, its potential liability in the case has been substantially affected by the ruling below. For this reason, Germania is an "aggrieved" party under the order and has standing to bring this appeal.

2. Standard of Review

Upon review of the grant of a summary judgment motion, the appellate court "applies the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is appropriate only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009). Summary judgment is appropriate "when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ," but it is not appropriate "when further inquiry into the facts of the case is desirable to clarify the application of the law." Id. All evidence and inferences, and "all ambiguities, conclusions, and inferences arising in and from the evidence" are to be viewed in a light most favorable to the non-moving party. Id. (internal citations omitted).

With respect to matters of contract construction, summary judgment is inappropriate if a contract is ambiguous "because the intent of the parties cannot be gathered from the four corners of the instrument." Id. "The court is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to

impart an intent unexpressed when the contract was executed.” Id. “Construction of an ambiguous contract is a question of fact to be decided by the trier of fact.” Id. (internal citations omitted).

3. The Trial Court Erred in Determining that the June 2001 Letter Constitutes a Release as a Matter of Law.

The June 2001 letter is reasonably susceptible of more than one interpretation, and therefore cannot, as a matter of law, be determined to be a clear and unambiguous release of Harris Teeter’s payment obligations under the Lease.

A valid contract, to be properly formed, must involve “a meeting of the minds of the parties involved with regard to all essential and material terms of the agreement.” Hardaway Concrete Co. v. Hall Contracting Corp., 374 S.C. 216, 225, 647 S.E.2d 488, 492 (Ct. App. 2007). Because the June 2001 letter does not reflect critical terms of contract formation – such as the intention of the parties and whether consideration flowed to the landlord –, there is insufficient evidence to conclude, as a matter of law, that the June 2001 letter constitutes a valid release of Harris Teeter’s payment obligations under the Lease.

In Wallace v. Day, 390 S.C. 69, 700 S.E.2d 446 (Ct. App. 2010), the court explained that, “[w]hen interpreting a contract, a court must ascertain and give effect to the intention of the parties.” Id. at 74, 449. A court determines the intention of the parties by looking first to the contract itself. If the language is clear and unambiguous, “the determination of the parties’ intent is a question of law for the court.” Id. Furthermore, whether an ambiguity exists in the language of a contract is also a question of law. “A contract is ambiguous when the terms of the contract are reasonably

susceptible of more than one interpretation.” Id., quoting S.C. Dep’t of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001). “An ambiguous contract is a contract capable of being understood in more than one way or a contract unclear in meaning because it expresses its purpose in an indefinite manner.” HK New Plan Exchange Property Owner I, LLC v. Coker, 375 S.C. 18, 24, 649 S.E.2d 181, 184 (Ct. App. 2007). Furthermore, the “uncertainty in interpretation can arise from the words of the instrument, or in the application of the words to the object they describe.” Wallace v. Day, 700 S.E.2d at 449, quoting Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 242, 672 S.E.2d 799, 803 (Ct. App. 2009).

(a) The June 2001 Letter Never Mentions the Words “Release” or “Payment.”

The circuit court granted Harris Teeter’s motion, and concluded as a matter of law, that the June 2001 letter is clear and unambiguous as a release even though the letter itself does not contain the words “release” or “payment.” Furthermore, the letter does not contain the phrase “payment obligation.” The claimed “release” pertains to a long-term, commercial real estate lease pursuant to which the tenant is obligated to pay potentially millions of dollars. If, in fact, the letter was intended to release Harris Teeter from any and all liability for payment under the Lease, its author failed to state such intention with any clarity or certainty. The letter merely states that the landlord will agree to “look solely to” Bi-Lo for “performance” of the tenant’s “responsibilities” under the Lease.

The word “responsibilities” is not defined or explained in the June 2001 letter, which presumably was written by a representative of Harris Teeter, given that it was signed and sent by an officer of Harris Teeter. In the context of a long-term commercial

lease, such as this one, the word “responsibilities” could mean different things. For instance, the tenant has multiple responsibilities under the Lease, including a duty to maintain certain improvements, including the parking lot, in good order and repair (§ 6.2(b)) (R. p. 49); a duty to maintain certain insurance for casualty and general liability (§§ 6.4, 12.5, 12.6) (R. pp. 50, 60); a duty to maintain the property in good order and to make repairs, as needed, to the building, including exterior and structural supports of the Building (§ 10.1) (R. pp. 56-57); and, a duty to pay all utilities, including electricity, heat, water, gas, garbage disposal (§ 11.1) (R. p. 58). A reasonable interpretation of the language in the June 2001 letter is that it did not constitute a release of any obligation by Harris Teeter for payment of rent, but rather, that the landlord was agreeing to look to Bi-Lo for maintenance of the building, grounds, insurance, and other responsibilities of the tenant occupying the facilities under the Lease.

(b) The June 2001 Letter Does Not Recite or Reflect Consideration.

There is also no mention or recitation of consideration flowing to the landlord in the June 2001 letter. If, in fact, the letter constitutes an effective and valid release of Harris Teeter’s payment obligations under the Lease, the consideration flowing to the landlord should be plain and clear under the terms of the agreement. In order for consideration to exist, there must be a benefit to the promisor (landlord) or a loss to the promisee (Harris Teeter). Nothing in the June 2001 letter indicates any loss at all to Harris Teeter; to the contrary, it suggests that there is a benefit – a significant benefit -- flowing only to Harris Teeter, with nothing of value given in return to the landlord.

(c) The June 2001 Letter Does Not Mention Any Amendment to the Lease.

Pursuant to the express and unambiguous terms of the Lease, in the event of any assignment or sublease by Harris Teeter, Harris Teeter would continue to be liable for payment of rent under the Lease:

15.4 Continuing Liability of Tenant. In the event of an assignment or sublease, Tenant agrees that Tenant will remain jointly and severally liable, with the assignee or subtenant, for the payment of the rent reserved under this Lease and for performance of all of the other terms, conditions, and provisions of this Lease which are required to be performed by Tenant, notwithstanding any acceptance of rent or performance by Landlord directly from the assignee or subtenant. (emphasis added)

(Lease, p. 23) (R. p. 63).

It would not be unreasonable to expect that any change of terms to a long-term commercial lease, such as the one here, would require an actual amendment to the lease. Essentially, by ruling as it did the trial court has determined that the June 2001 letter constitutes an amendment to the Lease. However, the June 2001 letter does not say whether it was, or was intended to be, an amendment to the Lease. Therefore, an ambiguity exists, within the four corners of the letter, concerning the effect of the letter, and whether it was intended to be, and was in fact, an amendment of material and essential terms of the Lease concerning Harris Teeter's payment obligations.

Indeed, any significance of the proposed agreement set forth in the June 2001 letter appears to have been deliberately minimized by Harris Teeter at the time it wrote the letter. The letter states, for example, that the purpose of the letter was simply *to provide notice* to the landlord of Harris Teeter's intent to assign the Lease to Bi-Lo. The June 2001 letter also stated, in a somewhat casual tone: "*Even though no landlord*

consent is required to this proposed assignment, we wanted to notify you of the proposed assignment and to inform you of certain details concerning the transaction.” Harris Teeter further stressed that the transaction was not a certainty: “Harris Teeter and Assignee may or may not close the proposed Assignment transaction.” In closing, the author asked: “We would appreciate your signing at the bottom of this letter to confirm that you have received a copy of this letter and that you will look solely to Assignee for performance of the “Tenant’s” responsibilities under the Lease after the Effective Date of the Assignment.” (R. pp. 29-30).

(d) Parties Should Be Allowed Opportunity to Conduct Discovery.

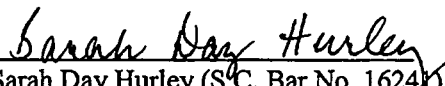
Because the June 2001 letter is vague and ambiguous, and reasonably susceptible of more than one interpretation, there are questions of fact regarding the parties’ intent in signing the June 2001 letter. These are questions of fact that will need to be resolved by a jury.² For these reasons, the parties should be allowed an opportunity to conduct discovery on the intention of the parties to the June 2001 letter. (Transcript, pp. 44-45) (R. pp. 191-193).

² “Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. The determination of the intent of the parties is then a *question of fact*.” Wallace v. Day, *supra*, quoting McClellanville, 345 S.C. at 623, 550 S.E.2d at 303 (emphasis added).

Conclusion

Germania submits that the June 2001 letter is reasonably susceptible of more than one interpretation concerning whether it was intended to be a "release" of Harris Teeter's payment obligations, whether there was consideration flowing to the landlord, and whether the parties intended to amend material terms of the Lease, i.e., the payment terms. In viewing all reasonable inferences in favor of the non-moving parties, it cannot be determined, as a matter of law, that the parties had a meeting of the minds and intended to release Harris Teeter from its payment obligations. Because the letter is ambiguous and the intention of the parties cannot be ascertained from the letter itself, the validity of the June 2001 letter as a "release" is a question of fact and summary judgment on the breach of contract claim was inappropriate. For all of these reasons, Germania requests that the order below be reversed to the extent it granted summary judgment to Harris Teeter on the breach of contract claim, and that the case be remanded for the parties to conduct discovery on this issue as well as the remaining claims in the case.

Respectfully submitted,


Sarah Day Hurley (S.C. Bar No. 16241)
Turner Padgett Graham & Laney, P.A.
Post Office Box 1509
Greenville, South Carolina 29602
(864) 552-4600
Attorneys for Appellant
Germania of America, Inc.

March 5, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

THE HONORABLE D. GARRISON HILL, CIRCUIT COURT JUDGE

Case No. 2010-CP-23-7266

Roper, LLC,..... Respondent,

v.

Harris Teeter, Inc., Carolina & Georgia Immobilelienfonds I, L.P.; GOA Realty
Management I, LLC; Germania of America, Inc.; Miller & Martin PLLC; New Spring
Community Church; John Doe; Richard Roe; and Doe Corporation,..... Defendants.

Of which Germania of America, Inc. is
the.....Appellant

and

Of which Harris Teeter, Inc. is
the.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this *Final Brief of Appellant* complies with
Rule 211(b), SCACR.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

By: Sarah Day Hurley
Sarah Day Hurley, (SC Bar No.:16241)
Turner Padgett Graham & Laney P.A.
Post Office Box 1509
Greenville, South Carolina 29602
Phone: (864) 552-4651
Fax: (864) 282-5965

ATTORNEYS FOR APPELLANT

March 5, 2012
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY

D. Garrison Hill, Circuit Court Judge

Case No. 2010-CP-23-7266

Roper, LLC.....Respondent,

v.

Harris Teeter, Inc., Carolina & Georgia
Immobilelienfonds I, L.P.; GOA Realty
Management I, LLC; Germania of America,
Inc.; Miller & Martin PLLC; New Spring
Community Church; John Doe; Richard Roe;
and Doe Corporation,.....Defendants,

Of which Germania of America, Inc. is the Appellant

and

Of which Harris Teeter, Inc. is the.....Respondent.

FINAL BRIEF OF RESPONDENT, HARRIS TEETER, INC.

W. Francis Marion, Jr., S.C. Bar. #3645
Bonnie A. Lynch, S.C. Bar #77399
HAYNSWORTH SINKLER BOYD, P.A.
Post Office Box 2048
Greenville, South Carolina 29602
Telephone: (864) 240-3200
Fax: (864) 240-3300

Attorneys for Respondent, Harris Teeter, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	1
STANDARD OF REVIEW	3
ARGUMENT	4
I. GERMANIA WAS NOT "AGGRIEVED" BY THE LOWER COURT'S ORDER AND, THEREFORE, LACKS STANDING TO APPEAL.....	4
II. THE LOWER COURT PROPERLY FOUND THAT THE RELEASE WAS UNAMBIGUOUS AND SUPPORTED BY PROPER CONSIDERATION	6
1. <u>The Language of the Release is Plain, Clear and Unambiguous, Reflecting the True Intent of the Parties and a "Meeting of the Minds"</u>	6
A. <u>No "Magic Words" Are Needed</u>	8
B. <u>No Statement of Amendment Needed</u>	11
2. <u>The Release is Supported by Valid Consideration</u>	13
3. <u>Germania's Request for Additional Discovery</u>	17
CONCLUSION.....	17

TABLE OF AUTHORITIES

Cases

<u>Arant v. Mack</u> 204 S.C. 287, 28 S.E.2d 846 (1944)	7
<u>Bannon v. Knauss</u> 282 S.C. 589, 320 S.E.2d 470 (Ct. App. 1984).....	8, 10
<u>Beaufort Realty Co. v. Beaufort Cnty.</u> 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001).....	4, 17
<u>Bennett v. Investors Title Ins. Co.</u> 370 S.C. 561, 635 S.E.2d 660 (Ct. App. 2006).....	17
<u>Branch Banking & Trust Co. of S.C. v. Carolina Crank & Core, Inc.</u> 362 S.C. 647, 608 S.E.2d 896 (Ct. App. 2005).....	7
<u>Builder Mart of Am., Inc. v. First Union Corp.</u> 349 S.C. 500, 563 S.E.2d 352 (Ct. App. 2002).....	5
<u>Campbell v. Bi-Lo, Inc.</u> 301 S.C. 448, 392 S.E.2d 477 (Ct. App. 1990).....	8
<u>Davis v. Blum</u> 104 S.C. 218, 88 S.E. 465 (1916)	14, 15
<u>Duke Power Co. v. South Carolina Public Service Comm'n.</u> 284 S.C. 81, 326 S.E.2d 395 (1985)	15
<u>Gardner v. Columbia Police Dep't</u> 216 S.C. 219, 57 S.E.2d 308 (1950)	8
<u>Gill v. Ruggles</u> 104 S.C. 461, 89 S.E.2d 503 (1916)	7
<u>Hardee v. Hardee</u> 355 S.C. 382, 585 S.E.2d 501 (2003)	4
<u>Higgins Constr. Co. v. Southern Bell Tel. & Tel. Co.</u> 276 S.C. 663, 281 S.E.2d 469 (1981)	15
<u>Howard v. South Carolina Nat'l Bank</u> 288 S.C. 421, 343 S.E.2d 41 (Ct. App. 1986).....	14

<u>Hyman v. Ford Motor Co.</u> 142 F.Supp.2d 735 (D.S.C. 2001).....	13
<u>Lindsay v. Lindsay</u> 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997).....	12
<u>M&M Group, Inc. v. Holmes</u> 379 S.C. 468, 666 S.E.2d 262 (Ct. App. 2008).....	12
<u>Middleborough Horizontal Prop. Regime Council v. Montedison S.p.A.</u> 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995).....	3
<u>Powell v. Bank of Am.</u> 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008).....	4
<u>Prestwick Golf Club v. Prestwick Ltd. Pshp.</u> 331 S.C. 385, 503 S.E.2d 184 (Ct. App. 1998).....	13, 14
<u>Roberts v. Gaskins</u> 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997).....	11
<u>Shayne of Miami, Inc. v. Greybow, Inc.</u> 232 S.C. 161, 101 S.E.2d 486 (1957)	13
<u>Sphere Drake Ins. Co. v. Litchfield</u> 313 S.C. 471, 438 S.E.2d 275 (Ct. App. 1993).....	6
<u>Steffenson v. Olsen</u> 360 S.C. 318, 600 S.E.2d 129 (Ct. App. 2004).....	7
<u>Trident Constr. v. Austin Co.</u> 272 F.Supp.2d 566 (D.S.C. 2003).....	15
<u>United States v. Bestfoods</u> 524 U.S. 51 (1998).....	5
<u>Wilson Group v. Quorum Health Res.</u> 880 F.Supp. 416 (D.S.C. 1995).....	8

Other Authorities

Rule 56(c), SCRCF	3
Rule 201(b), SCACR	4

STATEMENT OF ISSUES ON APPEAL

- I. Does Germania have standing to pursue this appeal?
- II. Did the lower court properly find that the Release was unambiguous and supported by proper consideration?

STATEMENT OF THE CASE

In 1995, Roper Mt. Rd. Assoc., LLC, leased certain real property ("Property") in Greenville County to Respondent, Harris Teeter, Inc. ("Harris Teeter"), for a twenty (20) year term under a written lease agreement ("Lease"). (R. at 23, ¶ 6; R. at 47, ¶ 4.1). By 2001, Roper Mt. Rd. Assoc., LLC, sold the Property and the landlord's Lease rights to Defendant, Carolina & Georgia Immobilelienfonds I, L.P. ("CGI"), a subsidiary of Appellant, Germania of America, Inc. ("Germania"). (R. at 81, ¶ 13; R. at 83-84, ¶19.)

In mid-2001, Harris Teeter and Bi-Lo, LLC ("Bi-Lo"), were negotiating a transaction whereby Bi-Lo would take an assignment of Harris Teeter's (tenant's) Leasehold estate and assume its Lease liabilities. By signed letter agreement dated June 12, 2001, CGI and Harris Teeter agreed that, if and when the Bi-Lo assignment and assumption of Lease became effective, CGI, as landlord, would thereafter "look solely to Assignee [Bi-Lo] for performance of the 'Tenant's' [Harris Teeter's] responsibilities under the Lease" ("Release"). (R. at 22, ¶ 4; R. at 29-30). Upon reliance on the Release, Harris Teeter assigned its interest in the Lease by entering into an "Assignment and Assumption of Lease" with Bi-Lo that was executed and became effective on July 9, 2001. (R. at 22, ¶ 5; R. at 31-34; R. at 109-10, ¶¶ 2-3). Harris Teeter provided CGI with notice of the effective date of the Bi-Lo Assignment and Assumption of Lease by sending an executed copy thereof under cover letter dated July 9, 2001. (R. at 22, ¶ 5; R. at 35). From the effective date of the Bi-Lo Assignment and Assumption of Lease, Harris Teeter

had no further involvement or transactions with the Lease, Property, CGI or any other landlord of the Property. (R. at 109-10, ¶¶ 2-3.) Harris Teeter did not maintain any control over, or interest in, the Property, relying on CGI's release of Harris Teeter once Bi-Lo assumed the Lease obligations. (R. at 110, ¶ 3.) CGI looked solely to Bi-Lo to fulfill the Lease obligations and, correspondingly, Bi-Lo fulfilled all Lease obligations from 2001 until 2009 when it filed for Bankruptcy.

Approximately six (6) years later, in April 2007, CGI sold the Property and its landlord Lease rights to Plaintiff. (R. at 84-86, ¶¶ 20 & 24.) Prior to Plaintiff's purchase of the Property, Defendant, GOA Realty Management I, LLC ("GOA"), as general partner of CGI, executed an Affidavit on April 16, 2007, swearing that, among other things, Harris Teeter was not released from any Lease obligations. (R. at 85-86, ¶ 24.) Harris Teeter was not a party to, and had no knowledge of this Affidavit until six (6) months after Plaintiff's purchase of the Property. (R. at 110, ¶ 4.)

At the time of the sale, Plaintiff was aware of the Bi-Lo Assignment and Assumption of Lease, (R. at 85-86, ¶ 24), but failed to contact Harris Teeter prior to the purchase of the Property in 2007 to determine if Harris Teeter was still obligated under the Lease. (R. at 110, ¶ 5.) Plaintiff had no contact with Harris Teeter until approximately six (6) months after its purchase from CGI. (R. at 110, ¶ 5.) In September 2007, Plaintiff's counsel sent a letter to Harris Teeter regarding Harris Teeter's purported obligations under the Lease. (R. at 110, ¶ 5; R. at 72-74.) Harris Teeter immediately responded by advising Plaintiff's counsel that Harris Teeter was released from the Lease obligations in 2001. (R. at 75-76.) Plaintiff took no action in response to Harris Teeter's letter until almost three (3) years later with the institution of this lawsuit.

In October 2007, Bi-Lo and Defendant, New Spring Community Church ("New Spring"), entered into a sublease of the Property. (R. at 82-83, ¶ 16.) In 2009, Bi-Lo defaulted on its Lease obligations to Plaintiff and ultimately filed proceedings under the U.S. Bankruptcy Code. In the present action, Plaintiff sought monetary damages against Harris Teeter, equal to Bi-Lo's defaulted Lease obligations.

In addition to Germania's statement of the case, Harris Teeter notes that Germania never participated in the briefing to the lower court regarding Harris Teeter's Motion for Summary Judgment ("Motion"). Germania's first appearance in opposition to the Motion was at the March 1, 2011 hearing only *after* the lower court orally granted the Motion. (R. at 190, 42:1-25.) Germania, like Plaintiff, failed to submit any affidavit to support any of its arguments made at the hearing or in its March 16, 2011 letter to the lower court regarding Harris Teeter's proposed order. (R. at 213-50.) Germania now appeals the lower court's ruling granting Harris Teeter Summary Judgment.

STANDARD OF REVIEW

When reviewing a grant of summary judgment this Court applies the standard set forth in Rule 56(c), SCRCP. "The construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment." Middleborough Horizontal Prop. Regime Council v. Montedison S.p.A., 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995).

When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous.

Hardee v. Hardee, 355 S.C. 382, 387, 585 S.E.2d 501, 503 (2003) (citing references omitted).

ARGUMENT

I. GERMANIA WAS NOT “AGGRIEVED” BY THE LOWER COURT’S ORDER AND, THEREFORE, LACKS STANDING TO APPEAL

Germania asserts that it has standing to bring this appeal; however, Germania is not a real party in interest to this litigation and, consequently, cannot be “aggrieved” by the lower court’s Order. “Only a party aggrieved by an order, judgment, sentence or decision may appeal.” Rule 201(b), SCACR. “*A party cannot appeal from a decision which does not affect his or her interest, however erroneous and prejudicial it may be to some other person’s rights and interests.*” Beaufort Realty Co. v. Beaufort Cnty., 346 S.C. 298, 301, 551 S.E.2d 588, 589-90 (Ct. App. 2001) (emphasis added).

“There is no material distinction in general standing principles juxtaposed to the ability of an ‘aggrieved party’ to appeal pursuant to Rule 201(b), [SCACR]” Powell v. Bank of Am., 379 S.C. 437, 447, 665 S.E.2d 237, 242 (Ct. App. 2008). “‘As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation One must be a real party in interest, i.e., a party who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action.’” Powell, 379 S.C. at 445, 665 S.E.2d at 241 (quoting Ex parte Morris, 367 S.C. 56, 62, 624 S.E.2d 649, 652 (2006)).

There is nothing in the record below showing that Germania was a party to the Lease, the Release, the April 2007 Affidavit, or any of the deeds transferring the Property

to and from its numerous owners.¹ Plaintiff's Amended Complaint alleges, in multiple paragraphs, that CGI is a mere subsidiary of Germania –

“5. Germania . . . doing business through its controlled subsidiaries in Greenville County, ...
* * *

19. The property was then sold to a subsidiary of Defendant Germania, being Defendant Carolina & Georgia and their general partner, Defendant GOA At no time did Defendants Harris Teeter or Germania or its subsidiaries
* * *

21. [O]n or about April 2007, it, apparently, sought from the, then, Landlord, Defendant Germania and its subsidiary, Defendant . . . CGI, by and through its subsidiary, Defendant GOA
* * *

22. At no time whatsoever did Defendants Harris Teeter, Germania or its subsidiaries . . .
* * *

35. a) The Defendants (collectively) gave to Plaintiff an affidavit dated April 16, 2007 clearly stating that the Seller, Defendants, . . . CGI and GOA, as subsidiaries of Defendant Germania”

(R. at 79, ¶ 5; R. at 83-85, ¶¶ 19, 21 & 22; R. at 88, ¶ 35 a).)

As the parent company of CGI, Germania is not liable for the contracts or actions of its subsidiary, CGI. Builder Mart of Am., Inc. v. First Union Corp., 349 S.C. 500, 507, 563 S.E.2d 352, 356 (Ct. App. 2002) (quoting Carroll v. Smith-Henry, Inc., 281 S.C. 104, 105-106, 313 S.E.2d 649, 650 (Ct. App. 1984) (“As a general rule, a parent or holding corporation is not liable on the contracts of its subsidiary. The mere fact of the ownership of a majority of all the stock of its subsidiary does not render the parent corporation liable on the contracts of the subsidiary.”); see also United States v. Bestfoods, 524 U.S. 51, 61 (1998) (noting that it is a general principle of corporate law that a parent corporation is not liable for the acts of its subsidiaries). The evidence in the record indicates Germania

¹ The Release and the April 2007 Affidavit were executed by GOA, as CGI's general partner, and Harris Teeter. (R. at 29-30; R. at 85-86, ¶ 24.) Germania did not sign nor was it a party to these documents.

is simply the parent company of CGI. Therefore, it is not responsible for the actions and contracts of CGI. Germania has only a nominal or technical interest in the litigation and was thusly not "aggrieved" by the lower court's Order.

II. THE LOWER COURT PROPERLY FOUND THAT THE RELEASE WAS UNAMBIGUOUS AND SUPPORTED BY PROPER CONSIDERATION

The instant appeal boils down to two (2) legal questions – 1) whether the language of the Release is ambiguous and capable of more than one interpretation and 2) whether the Release is supported by consideration.

Germania's ambiguity arguments revolve around a common theme, to wit, the Release should have said something more than it did and, therefore, it is ambiguous and invalid. Whether the Release could have been written differently is immaterial where the language of the Release is plain, clear and unambiguous.

Germania's lack of consideration argument also fails since it is readily apparent on the face of the Release that Harris Teeter suffered detriment by surrendering its rights under the Lease, and CGI realized a benefit by obtaining Bi-Lo's liability under the Lease. Additionally, consideration exists via promissory estoppel.

1. The Language of the Release is Plain, Clear and Unambiguous, Reflecting the True Intent of the Parties and a "Meeting of the Minds"

Under South Carolina law, "the cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties" Sphere Drake Ins. Co. v. Litchfield, 313 S.C. 471, 473, 438 S.E.2d 275, 277 (Ct. App. 1993). In so doing, it is the court's responsibility to look to the language of the agreement itself and, where it determines that the language of the agreement is clear and unambiguous, the language of the agreement alone determines the agreement's force and effect. Id. In that circumstance, the "terms should be

applied according to their plain and ordinary meaning and consideration of extrinsic evidence to alter that meaning is improper.” Steffenson v. Olsen, 360 S.C. 318, 322, 600 S.E.2d 129, 131 (Ct. App. 2004).

It is also clear that “[a] party to a written contract, where there is no ambiguity or indefiniteness in the essentials, cannot say their minds did not meet.” Arant v. Mack, 204 S.C. 287, 294, 28 S.E.2d 846, 849 (1944). Rather, a *signed written understanding of the parties actually provides direct evidence of the mutual agreement as to the intention of the parties*. See Branch Banking & Trust Co. of S.C. v. Carolina Crank & Core, Inc., 362 S.C. 647, 654, 608 S.E.2d 896, 900 (Ct. App. 2005) (holding that a party’s signature of written understanding at request of the other party proves mutual agreement of intention of parties). Accordingly, “*when there . . . [is] a meeting of the minds and . . . [the parties] reduce[] the contract between them to writing, and execute same, the contract speaks for itself and shows what the agreement between the parties [is] . . .*” Gill v. Ruggles, 104 S.C. 461, 467, 89 S.E.2d 503, 505 (1916) (emphasis added).

In the instant case, the language of the Release is clear and unambiguous. The parties’ intent was clearly stated: Harris Teeter would no longer be liable under the Lease and CGI would look solely to Bi-Lo to fulfill all of Harris Teeter’s obligations (the “Tenant’s’ responsibilities”) under the Lease. (R. at 29-30.) Because the language of the Release is clear and unambiguous, Germania cannot now say that there was no “meeting of the minds.” Arant, 204 S.C. at 294, 28 S.E.2d at 849 (“A party to a written contract, where there is no ambiguity or indefiniteness in the essentials, cannot say their minds did not meet.”) Germania’s after-the-fact attempt to create an ambiguity in the Release by asserting that the Release should have stated something different has no merit and should be rejected.

Bannon v. Knauss, 282 S.C. 589, 593, 320 S.E.2d 470, 472 (Ct. App. 1984) (citing references omitted) (“Interpretation of the contract is governed by the objective manifestation of the parties’ assent at the time the contract was made It does not depend on the subjective, after the fact meaning one party assigns to it.”)

A. No “Magic Words” Are Needed

First, Germania argues an ambiguity exists in the Release because the Release does not contain the words “release,” “payment” or “payment obligation,” evidencing that the parties did not intend for it to be a release. The clear language of the Release refutes this argument.

South Carolina law is clear that such words are not necessary to form a release. It is well established in South Carolina that a release “is the relinquishment of a right or claim by the person in whom the right exists to the person against whom it might have been enforced.” Wilson Group v. Quorum Health Res., 880 F.Supp. 416, 425 (D.S.C. 1995) (citing 18 S.C. Juris. Release § 2). Of particular importance is that “[n]o set form of words is necessary to constitute a release,” Gardner v. Columbia Police Dep’t, 216 S.C. 219, 223, 57 S.E.2d 308, 310 (1950), and no “magic words” are required. Wilson Group, 880 F.Supp. at 425. Courts look to the instrument itself in determining the nature of the release. Campbell v. Bi-Lo, Inc., 301 S.C. 448, 451, 392 S.E.2d 477, 479 (Ct. App. 1990). “[P]articular words and expressions in releases are given their ordinary meanings, unless the context indicates their use in a different sense.” Gardner, 216 S.C. at 223, 57 S.E.2d at 309.

The lower court properly found that this language of the Release was clear and unambiguous and met the requirements of a valid release. The Release clearly stated that CGI “will look *solely* to Assignee [Bi-Lo] for performance of the “*Tenant’s*”

responsibilities under the Lease . . .” (R. at 29-30) (emphasis added). The plain and ordinary meaning of this language clearly shows that CGI intended to and, in fact, did relinquish its right to look to Harris Teeter for performance under the Lease – a right which CGI could have enforced against Harris Teeter – and instead chose to look “solely” to Bi-Lo. In turn, Harris Teeter gave up control of the Property and its rights under the Lease. (R. at 110, ¶ 3.)

Germania also argues that the Release is ambiguous because “responsibilities” was not defined. Germania’s argument has no basis. The plain and clear language of the Release refers to all of Harris Teeter’s obligations under the Lease, including the payment obligation - “Pursuant to the Assignment and Assumption Agreement, Assignee [Bi-Lo] will be responsible for *all of Harris Teeter’s obligations* under the *Lease . . .*” and CGI “will look *solely* to Assignee [Bi-Lo] for performance of the ‘*Tenant’s*’ responsibilities under the *Lease . . .*” (R. at 29-30) (emphasis added). The use of the word “all” shows the parties’ intent that CGI look to Bi-Lo to fulfill *all* of Harris Teeter’s responsibilities under the Lease, including its payment obligation. Further, the Release identifies the Lease with a capital “L” and places quotation marks around and capitalizes “Tenant,” (R. at 29-30), a term defined in the Lease as Harris Teeter (R. at 40.) By placing quotation marks around “Tenant,” CGI clearly intended to, and did, look to Bi-Lo to fulfill the “Tenant’s” responsibilities.

Germania lastly argues that because “responsibilities” is not defined in the Release, a reasonable interpretation is that CGI was only agreeing to look to Bi-Lo to fulfill the tenant responsibilities associated with occupying the Property. The plain language of the Release refutes this.

First, Germania fails to cite any language in the Release supporting such an interpretation. Second, the Release refers to all of the "Tenant's" responsibilities under the Lease (see discussion immediately above), *not some* of the Tenant's responsibilities as Germania argues. To carve out the Tenant's obligation to pay from the other provisions of the Lease has no basis in law or fact. To reach such a strained interpretation of the Release would require this Court to disregard the clear language of the Release and the Lease. Neither document makes a distinction between a "Tenant's" obligation to pay rent and its other responsibilities under the Lease.² Bannon, 282 S.C. at 593, 320 S.E.2d at 472 (citing references omitted) ("Interpretation of the contract is governed by the objective manifestation of the parties' assent at the time the contract was made It does not depend on the subjective, after the fact meaning one party assigns to it.") Importantly, Paragraph 15.4 refers to the "Tenant's" continuing liability. (R. at 63, ¶ 15.4.) Pursuant to the Release, CGI agreed to look "*solely* to Assignee [Bi-Lo] for performance of the '*Tenant's*' responsibilities under the *Lease* . . . ," including Paragraph 15.4. (R. at 29-30) (emphasis added). The practical result thereof was that CGI agreed to look solely to Bi-Lo who effectively stepped into the shoes of Harris Teeter, the former "Tenant" under the Lease.

² Paragraph 15.4 of the Lease specifically states that in the event of an assignment the "*Tenant* will remain jointly and severally liable . . . for the payment of rent . . . *and* for performance of all of the other terms, conditions, and provisions of this Lease which are required to be performed by Tenant" (R. at 63, ¶ 15.4) (emphasis added).

B. No Statement of Amendment Needed

Germania also argues that the Release is ambiguous because the Release does not state that it is an "amendment" to the Lease.³ There is no requirement under the Lease or at law that the word "amendment" be used when changing a contract, hence, this argument fails as well.

Germania's assertion that the Release must state that it is an amendment to avoid the threat of ambiguity fails. The simple fact is that the language of the Release is clear, plain and unambiguous – CGI agreed to release Harris Teeter and look solely to Bi-Lo for performance of the "Tenant's" obligations. (R. at 29-30.) Germania fails to cite any authority for the proposition that an amendment must state that it is an "amendment" to avoid the threat of ambiguity. Instead, all that is required is for the modification to meet the formal requirements of a valid contract – offer, acceptance and consideration. Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997). The Release meets all of these requirements.⁴ The Lease provides that any modification, release, discharge or waiver to any provision of the Lease must be "in writing and signed by the Landlord or the duly authorized agent of Landlord," nothing more. (R. at 68, ¶

³ This argument is simply a restatement of Germania's first argument regarding the purported necessity of including the words "release," "payment" or "payment obligation." Hence, Harris Teeter incorporates its arguments set forth above in section II.1.A herein.

⁴ The plain and unambiguous language of the Release exhibited a clear offer by Harris Teeter and corresponding acceptance by CGI. Harris Teeter's offer was that CGI "look solely to . . . [Bi-Lo] for performance of the 'Tenant's' responsibilities under the Lease after the Effective Date of the Assignment." (R. at 29-30). Harris Teeter requested, and in turn received, acceptance of its offer through CGI's execution and return of the letter agreement. (R. at 29-30). Valid consideration existed as discussed in section II.2. below.

18.7.) Since the Release is in writing and is signed by the Landlord, CGI, it meets the modification requirements of the Lease. Nothing more is needed.

Germania also implies that because of the long-term nature of the Lease, if the parties intended for the Release to amend the Lease then surely the parties would have used the word “amendment” in the Release. However, because the language of the Release is clear and unambiguous, this Court is required to enforce the same despite the fact the word “amendment” did not appear in the language of the Release. Lindsay v. Lindsay, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct. App. 1997) (citing Ellis v. Taylor, 316 S.C. 245, 449 S.E.2d 487 (1994) (“The court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties’ failure to guard their rights carefully.”))

Lastly, Germania contends that the parties did not intend for the Release to be an amendment as evidenced by Harris Teeter’s conditional language in the Release, (*i.e.* “[i]f it does close . . .” and “after the Effective Date of the Assignment”). This language unmistakably refers to a condition precedent – Harris Teeter and Bi-Lo executing the Assignment and Assumption of Lease agreement and delivering it to CGI.⁵ Holmes, 379 S.C. at 477, 666 S.E.2d at 266 (quoting Brewer, 364 S.C. at 449, 613 S.E.2d at 805) (A condition precedent is defined as “any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises.”) It is undisputed that the Assignment and Assumption of Lease was fully executed, (R. at 31-

⁵ “The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ.” M&M Group, Inc. v. Holmes, 379 S.C. 468, 476, 666 S.E.2d 262, 266 (Ct. App. 2008) (quoting Brewer v. Stokes Kia, Izuzu, Subaru, Inc., 364 S.C. 444, 449, 613 S.E.2d 802, 805 (Ct. App. 2005)).

34), and that Plaintiff received a copy under cover letter dated July 9, 2001, the Effective Date (R. at 22, ¶ 5; R. at 35). Hence, the condition precedent was satisfied, thereby rendering CGI's obligation to unconditionally look solely to Bi-Lo for performance of the Tenant obligations under the Lease. Once the condition was satisfied, the Release was, by its terms, self-executing without further acts.

2. The Release is Supported by Valid Consideration

A valid release, like other contracts, must be supported by proper consideration. Hyman v. Ford Motor Co., 142 F.Supp.2d 735, 741 (D.S.C. 2001) (applying South Carolina law). The detriment suffered by Harris Teeter in giving up its legal rights under the Lease, and, independently, the benefit received by CGI in obtaining Bi-Lo's liability on the Lease, all of which are apparent from the face of the Release, amply supports the lower court's finding that the Release was supported by consideration. Further, additional consideration exists via promissory estoppel.

"Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Prestwick Golf Club v. Prestwick Ltd. Pshp., 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998) (citing J.C. White Lumber Co. v Allen, 306 S.C. 183, 410 S.E.2d 588 (Ct. App. 1991)). More specifically, consideration exists where there is a "benefit to the promisor" (CGI) or a loss or "detriment to the promisee" (Harris Teeter). Shayne of Miami, Inc. v. Greybow, Inc., 232 S.C. 161, 167, 101 S.E.2d 486, 489 (1957) (emphasis added). Consideration also exists where there is "forbearance to exercise a legal right"

Prestwick, 331 S.C. at 389, 503 S.E.2d at 186 (citing Caine & Estes Ins. Agency, Inc. v. Watts, 278 S.C. 207, 293 S.E.2d 859 (1982)).

In the present case, Harris Teeter, as "promisee," suffered a "detriment" or "loss" in that, upon receiving the Release, it gave up all of its Lease rights to Bi-Lo even though it was not obligated to do so. Howard v. South Carolina Nat'l Bank, 288 S.C. 421, 425, 343 S.E.2d 41, 43 (Ct. App. 1986) ("Detriment," in the sense of consideration for a contract, means giving up by promisee of something that he had the right to keep, or doing something he had the right not to do). As a result thereof, Harris Teeter had no legal right to maintain any control over the Property or to protect its interests in the Lease by, for example, refusing the sub-lease from Bi-Lo to New Spring. (R. at 110, ¶ 3.) The language of the Release plainly and clearly reflects that Harris Teeter would relinquish all rights under the Lease, thus causing CGI to look solely to Bi-Lo for fulfillment of the same. (R. at 29-30.) The detriment Harris Teeter experienced was, alone, sufficient consideration to support the Release.

Independent of the detriment suffered by Harris Teeter, additional consideration existed by virtue of a "benefit to the promisor," CGI, who received Bi-Lo's liability on the Lease instead of Harris Teeter's. The plain language of the Release clearly reflects the benefit to CGI – that CGI will look to Bi-Lo to fulfill the "Tenant's" obligations under the Lease. (R. at 29-30.) A similar situation is found in Davis v. Blum, 104 S.C. 218, 88 S.E. 465 (1916), in which the South Carolina Supreme Court found valid consideration in a creditor's agreement to look solely to another for payment of a debt. Relying upon defendant husband's promise to pay for legal services performed on behalf of his wife, plaintiff judge undertook legal representation of the wife. Id. at 222, 88 S.E.

at 466-67. When plaintiff sued defendant for payment, the Court found that legal consideration existed for the defendant's promise to pay by way of plaintiff's agreement to look solely to defendant (and not his wife) for payment. Id. at 222-23, 88 S.E. at 467. Such is the case here – consideration existed by way of CGI's agreement to look solely to Bi-Lo for all future tenant obligations under the Lease, (R. at 29-30), and the benefit it received from obtaining Bi-Lo's liability on the Lease.

Even if there was inadequate consideration (which there was not) to support the Release, the equitable doctrine of promissory estoppel supplies the requisite consideration. Duke Power Co. v. South Carolina Public Service Comm'n., 284 S.C. 81, 100, 326 S.E.2d 395, 406 (1985) ("The principle of promissory estoppel is viewed as a substitute for, or an equivalent of, consideration.") The doctrine of promissory estoppel holds that

"an estoppel may arise from the making of a promise, even though without consideration, if it was intended that the promise should be relied upon and in fact it was relied upon, and if a refusal to enforce it would be virtually to sanction the perpetration of fraud or would result in other injustice."

Higgins Constr. Co. v. Southern Bell Tel. & Tel. Co., 276 S.C. 663, 665, 281 S.E.2d 469, 470 (1981) (quoting 28 Am. Jur.2d, Estoppel and Waiver, § 48 (1966) (emphasis added)). The elements of equitable or promissory estoppel are (1) the presence of an unambiguous promise; (2) reasonable reliance upon the promise by the promisee (Harris Teeter); (3) such reliance is expected and foreseeable by the promisor (CGI); and (4) the promisee (Harris Teeter) is injured by his reliance. Trident Constr. v. Austin Co., 272 F.Supp.2d 566, 576-77 (D.S.C. 2003) (applying South Carolina law)).

In present context, CGI's promise to release Harris Teeter upon the consummation of the Bi-Lo Assignment and Assumption of Lease forms the promise upon which promissory estoppel in this case is based. (R. at 29-30.) There is no doubt that CGI's promise was unambiguous – CGI agreed to "look solely to Assignee [Bi-Lo] for performance of the 'Tenant's' responsibilities under the Lease" (R. at 29-30.) Additionally, the promise was set forth in writing and mutually executed by CGI and Harris Teeter. (R. at 29-30.)

With respect to the second and third elements of promissory estoppel, Harris Teeter's reliance upon CGI's promise was reasonable, expected, and foreseeable by CGI. Harris Teeter's reliance upon CGI's promise was reasonable as it was in writing and was asked for and received before Harris Teeter assigned its Lease rights to Bi-Lo. (R. at 29-30; R. at 109-10, ¶¶ 2-3). In view of this, CGI knew that Harris Teeter would rely upon its promise in deciding whether to consummate the proposed Bi-Lo transaction and, if so, upon what terms.

Lastly, by relying on CGI's promise to look to Bi-Lo for future obligations under the Lease, Harris Teeter gave up its rights under the Lease, and, therefore, was not able to protect its purported interest in the Lease by, among other things, refusing the sub-lease from Bi-Lo to New Spring. (R. at 110, ¶ 3.) There is no question that Harris Teeter would be damaged if it is now found to have some obligation for un-made Lease payments caused by Bi-Lo's default after no contact with Bi-Lo or the Landlord for more than six (6) years. (R. at 109-10, ¶ 2.) Clearly, it would be a complete injustice to Harris Teeter.

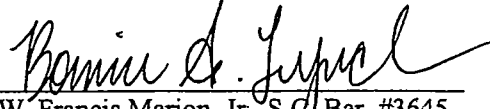
3. Germania's Request for Additional Discovery

As set forth above, the language of the Release is plain, clear and unambiguous. Thus, the use of extrinsic evidence to interpret the parties' intent is unnecessary. Moreover, Germania failed to present any evidence to the lower court (other than counsel's legal arguments) showing that CGI and Harris Teeter did not intend for the Release to relieve Harris Teeter of all of its obligations under the Lease. (R. at 213-50; R. at 190-93, 42:16-45:4). It is well established in South Carolina that in order to defeat Summary Judgment, "[t]he *nonmoving party must come forward with specific facts* showing there is a genuine issue for trial." Bennett v. Investors Title Ins. Co., 370 S.C. 561, 569, 635 S.E.2d 660, 665 (Ct. App. 2006) (emphasis added). "[A]rguments of counsel are not evidence." Beaufort Realty Co., 346 S.C. at 302, 551 S.E.2d at 590 (citing McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933)). Considering the foregoing, Germania's request for an opportunity to conduct discovery regarding the parties' intent should be denied not only because it is unnecessary, but because Germania failed to show that the parties' intent was anything other than what was reflected in the unambiguous language of the Release.

CONCLUSION

Considering the foregoing, the lower court's Order was amply supported by the facts and well-established law of this State, thus, this Court should affirm the same and deny the relief requested by Germania.

Respectfully submitted,



W. Francis Marion, Jr., S.C. Bar. #3645

Bonnie A. Lynch, S.C. Bar #77399

HAYNSWORTH SINKLER BOYD, P.A.

Post Office Box 2048

Greenville, South Carolina 29602

Telephone: (864) 240-3200

Fax: (864) 240-3300

Attorneys for Respondent, Harris Teeter, Inc.

March 5, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Civil Action No.: 2010-CP-23-7266

Roper, LLC Respondent

vs.

**Harris Teeter, Inc., Carolina & Georgia Immobilelienfonds I, L.P.,
GOA Realty Management, LLC, Germania of America, Inc.,
Miller & Martin, PLLC, New Spring Community Church,
John Doe, Richard Doe, and Doe Corporation,**

Of whom Germania of America, Inc., is the Appellant

and

Of which Harris Teeter, Inc., is the, ... Respondent

APPELLANT'S FINAL REPLY BRIEF

Sarah Day Hurley (SC Bar No. 16241)
Turner Padget Graham & Laney, P.A.
Post Office Box 1509
Greenville, South Carolina 29602
(864) 552-4600
Attorneys for Appellant

Other Counsel of Record:

John A. Hagins, Jr.
Stephen R. H. Lewis
Covington Patrick Hagins Stern & Lewis
P.O. Box 2243
Greenville, SC 29602
Attorneys for Roper, LLC

E. Benton Leinster, III
P.O. Box 8874
Greenville, SC 29604
Attorney for Roper, LLC

W. Francis Marion, Jr.
Bonnie A. Lynch
Haynsworth Sinkler Boyd, PA
P.O. Box 2048
Greenville, SC 29602-2048
Attorneys for Harris Teeter, Inc.

TABLE OF CONTENTS

I.	Germania has Standing to Bring this Appeal.....	1
II.	The Claimed Release Fails for Lack of Clarity and Definiteness.....	1
III.	The Claimed Release Fails for Lack of Consideration.....	3
IV.	Germania's Request for Time to Conduct Discovery.....	3

TABLE OF AUTHORITIES

Cases

<u>Branch Banking and Trust Co. v. Carolina Crank & Core, Inc.</u> , 362 S.C. 647, 652, 608 S.E.2d 896, 899 (Ct. App. 2005).....	3
<u>HK New Plan Exchange Property Owner I, LLC v. Coker</u> , 375 S.C. 18, 24, 649 S.E.2d 181, 184 (Ct. App. 2007).....	2
<u>Pee Dee Stores, Inc. v. Doyle</u> , 381 S.C. 234, 242, 672 S.E.2d 799, 803 (Ct. App. 2009).....	2, 4
<u>S.C. Dep't of Natural Res. v. Town of McClellanville</u> , 345 S.C. 617, 623, 550 S.E.2d 299, 303 (2001)	4
<u>Wallace v. Day</u> , 390 S.C. 69, 75, 700 S.E.2d 446, 450 (Ct. App. 2010)	1, 4

I. Germania has Standing to Bring this Appeal.

Respondent Harris Teeter, Inc. submits that Germania is not the real party in interest and lacks standing to bring this appeal. (Respondent's Brief, p. 4). Germania agrees with Harris Teeter that, based upon the nature of Germania's relationship with the other defendants, Germania is not, and should not be, liable for any claims in this case. Despite the obvious corporate distinction between Germania and the other defendants, however, plaintiff has alleged that all of the defendants, including Germania, knew about the purported release, and failed to disclose the existence of such document despite having a duty to do so. (Amended Complaint, ¶¶ 28-29) (R. pp. 86-87). At this juncture, there has been no ruling by the lower court that Germania is not liable. For this reason, although Germania agrees that its liability is questionable, and that it certainly should be dismissed from the case, it remains exposed to the claims of fraudulent concealment, constructive fraud, promissory estoppel, negligent misrepresentation, fraud allegations and other claims asserted against it in the Amended Complaint, based upon the claimed release of Harris Teeter. For this reason, Germania respectfully submits that it has been aggrieved by the lower court's ruling and has standing to bring this appeal.

II. The Claimed Release Fails for Lack of Clarity and Definiteness.

This Court has stated before that it has "not only the authority but also the responsibility to recognize an ambiguity in a contract when determining whether the trial court appropriately relied on the contract's language in granting summary judgment." Wallace v. Day, 390 S.C. 69, 75, 700 S.E.2d 446, 450 (Ct. App. 2010). "An ambiguous contract is a contract capable of being understood in more than one way or a contract unclear in meaning because it expresses its purpose in an indefinite manner." HK New

Plan Exchange Property Owner I, LLC v. Coker, 375 S.C. 18, 24, 649 S.E.2d 181, 184 (Ct. App. 2007). Although Harris Teeter argues that “no magic words are needed” in order to have a valid release, the June 2001 letter, if it was intended as a release of Harris Teeter, (and Germania believes that it was not), failed to state its terms with any clarity or definiteness.

For example, the opening sentence of the June 2001 letter states, somewhat informally, that the letter was intended to “*confirm certain matters that we have discussed relating to Harris Teeter’s proposed Assignment*” of the Lease. (R. p. 29). The author of such letter thus indicated that he was seeking to confirm their discussion. He did not state that the purpose of the letter was to reduce an agreement of the parties to writing, or that it was to confirm the release of Harris Teeter, as Harris Teeter now contends. Although any intention to release and discharge Harris Teeter from its financial obligations could have easily been stated unequivocally and with clarity of purpose, it was not. The intention of the parties simply cannot be gleaned from the four corners of this document.

This Court has further noted that ambiguities in a contract may arise “in the application of the words to the object they describe.” Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 242, 672 S.E.2d 799, 803 (Ct. App. 2009). Harris Teeter contends that the June 2001 letter constitutes a release of its payment and other obligations under the Lease, but the clear and unequivocal terms of the Lease state that such a release, upon assignment, is not possible:

15.4 Continuing Liability of Tenant. In the event of an assignment or sublease, Tenant agrees that Tenant will remain jointly and severally liable, with the assignee or subtenant, for the payment of the rent reserved under this Lease and for performance of all of the other terms,

conditions, and provisions of this Lease which are required to be performed by Tenant, notwithstanding any acceptance of rent or performance by Landlord directly from the assignee or subtenant.

Lease, § 15.4 (R. p. 63). The Lease plainly provides that Harris Teeter will remain jointly and severally liable for payment of rent, even upon assignment of the Lease. For this reason alone, whether the June 2001 letter constitutes a valid release of Harris Teeter's payment obligations is a question of fact, and the decision of the lower court should be reversed.

III. The Claimed Release Fails for Lack of Consideration.

Harris Teeter was not required to obtain the landlord's consent when it assigned the Lease to Bi-Lo. The author of the June 2001 letter acknowledged as much when he wrote "*Even though no landlord consent is required to this proposed assignment, we wanted to notify you of the proposed assignment and to inform you of certain details concerning the transaction.*" (June 2001 letter) (R. p. 29). Consequently, Harris Teeter gave no benefit to the landlord when it assigned the Lease to Bi-Lo and purportedly obtained for itself a complete release of all payment obligations under the long-term, multi-million dollar Lease. Absolutely no benefit was provided to the landlord, CGI, in connection with the June 2001 letter, as CGI was getting no more than it already had – a tenant. "Consideration that is wholly past is not valuable consideration." Branch Banking and Trust Co. v. Carolina Crank & Core, Inc., 362 S.C. 647, 652, 608 S.E.2d 896, 899 (Ct. App. 2005).

IV. Germania's Request for Time to Conduct Discovery.

Harris Teeter argues that "Germania failed to present evidence to the lower court" regarding the intentions of CGI, and that because Germania "failed to show that the

parties' intent was anything other than what was reflected in" the June 2001 letter, Germania 's request should be denied. (Respondent's Brief, p. 17). Harris Teeter is wrong.

Whether an ambiguity exists in a contract is a question of law for the court. Peedee, 381 S.C. at 242, 672 S.E.2d at 803. Only after the court determines that the language is ambiguous is it appropriate for the court to consider extrinsic evidence on the intent of the parties. Wallace v. Day, 390 S.C. at 75, 700 S.E.2d at 449, quoting S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 303 (2001). Because extrinsic evidence of intent of the parties is only appropriate upon a determination that the intent of the parties cannot be found within the four corners of the contract, it would not have been appropriate for Germania to submit evidence on that issue at the hearing on Harris Teeter's motion.

For all of these reasons, Germania requests that the decision of the lower court be reversed, and that the case be remanded to allow discovery on the intent of the parties to the June 2001 letter.

Respectfully submitted,


Sarah Day Hurley (S.C. Bar No. 16241)
Turner Padgett Graham & Laney, P.A.
Post Office Box 1509
Greenville, South Carolina 29602
(864) 552-4600
Attorneys for Appellant
Germania of America, Inc.

March 5, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

THE HONORABLE D. GARRISON HILL, CIRCUIT COURT JUDGE

Case No. 2010-CP-23-7266

Roper, LLC,..... Respondent,

v.

Harris Teeter, Inc., Carolina & Georgia Immobilelienfonds I, L.P.; GOA Realty
Management I, LLC; Germania of America, Inc.; Miller & Martin PLLC; New Spring
Community Church; John Doe; Richard Roe; and Doe Corporation,..... Defendants.

Of which Germania of America, Inc. is
the.....Appellant

and

Of which Harris Teeter, Inc. is
the.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the *Appellant's Final Reply Brief* complies
with Rule 211(b), SCACR.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

By: Sarah Day Hurley
Sarah Day Hurley, (SC Bar No.:16241)
Turner Padgett Graham & Laney P.A.
Post Office Box 1509
Greenville, South Carolina 29602
Phone: (864) 552-4651
Fax: (864) 282-5965

ATTORNEYS FOR APPELLANT

March 5, 2012
Greenville, South Carolina



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

July 17, 2013

Ms. Sarah Day Hurley
PO Box 1509
Greenville SC 29602

Mr. W. Francis Marion, Jr.
PO Box 2048
Greenville SC 29602

Ms. Bonnie Allen Lynch
PO Box 2048
Greenville SC 29602

Re: Roper, LLC v. Harris Teeter
Appellate Case No. 2011-194147

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

Jenny A. Kitchings (CS)
CLERK

cc: D. Garrison Hill

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Roper, LLC, Plaintiff,

v.

Harris Teeter, Inc., Carolina & Georgia
Immobilelienfonds I, L.P., GOA Realty Management I,
LLC, Germania of America, Inc., Miller & Martin PLLC,
New Spring Community Church, John Doe, Richard
Doe, and Doe Corporation, Defendants,

Of whom Germania of America, Inc. is the Appellant,

And Harris Teeter, Inc., is the Respondent.

Appellate Case No. 2011-194147

Appeal From Greenville County
D. Garrison Hill, Circuit Court Judge

Unpublished Opinion No. 2013-UP-327
Heard January 9, 2013 – Filed July 17, 2013

AFFIRMED

Sarah Day Hurley, of Turner, Padget, Graham, & Laney,
PA, of Greenville, for Appellant.

W. Francis Marion, Jr. and Bonnie Allen Lynch, of
Haynsworth, Sinkler, Boyd, PA, of Greenville, for
Respondent.

PER CURIAM: Germania of America, Inc. (Germania) appeals the trial court's grant of summary judgment in favor of co-defendant Harris Teeter, Inc. on plaintiff Roper, LLC's breach of contract claim. We affirm.

We hold the trial court correctly found the Letter Agreement was clear and unambiguous and met the requirements of a valid release. *See S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-303 (2001) (stating the determination of whether a contract's language is ambiguous is a question of law); *Thalia S. ex rel. Gromacki v. Progressive Select Ins. Co.*, 401 S.C. 395, 399, 736 S.E.2d 863, 865 (Ct. App. 2012) (stating the construction and enforcement of an unambiguous contract is a question of law for the court and thus can be properly disposed of at summary judgment); *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) (defining an ambiguous contract as one where the terms of the contract are inconsistent on their face or are reasonably susceptible of more than one interpretation); *ERIE Ins. Co. v. Winter Consrt. Co.*, 393 S.C. 455, 461, 713 S.E.2d 318, 321 (Ct. App. 2011) ("When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect and the court must construe it according to its plain, ordinary, and popular meaning."); *Gardner v. City of Columbia Police Dep't*, 216 S.C. 219, 223, 57 S.E.2d 308, 310 (1950) ("No set form of words is necessary to constitute a release."). In the Letter Agreement between Harris Teeter and Germania's subsidiary, Carolina & Georgia Immobilelienfonds I, L.P. (CGI), Harris Teeter stated Bi-Lo would "be responsible for *all* of Harris Teeter's obligations under the Lease after the Effective Date of the Assignment." (Emphasis added). Further, Harris Teeter requested CGI sign the Letter Agreement "to confirm that you have received a copy of this letter and you will look solely to [Bi-Lo] for performance of 'Tenant's' responsibilities under the Lease after the Effective Date of the Assignment." By signing the Letter Agreement, CGI "Acknowledged and Agreed" to the terms of the agreement. We hold the Letter Agreement was not ambiguous and clearly was a release of Harris Teeter from the Tenant's responsibilities under the Lease, including the obligation to pay rent.

In addition, we disagree with Germania's assertion the Letter Agreement does not recite or reflect consideration. See *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003) (stating the necessary elements of a contract are offer, acceptance, and valuable consideration); *Hennes v. Shaw*, 397 S.C. 391, 399, 725 S.E.2d 501, 505 (Ct. App. 2012) (defining "valuable consideration" as "some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."). By executing the Letter Agreement, CGI received the benefit of having Bi-Lo liable for the Tenant's responsibilities under the Lease. Thus, the Letter Agreement was supported by consideration.

We also disagree with Germania's argument that the Letter Agreement is not an effective release as a matter of law because such a significant change would require an actual amendment to the Lease. The Lease provided that no changes could be oral and "No modification, release, discharge or waiver of any of the provisions hereof shall be of any force, effect or value unless in writing and signed by Landlord or the duly authorized agent of Landlord." CGI agreed, in writing, to look only to Bi-Lo for all of the Tenant's obligations, which include the payment of rent. Accordingly, the Letter Agreement met the requirements for a valid modification of the Lease.

Finally, we find no merit to Germania's assertion it should be allowed to conduct discovery. As stated above, we hold the Letter Agreement was not ambiguous. Therefore, no further discovery was needed.

AFFIRMED.¹

HUFF, THOMAS, and GEATHERS, JJ., concur.

¹ We need not address any remaining issues. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address the remaining issues when a prior issue was dispositive).

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Appellate Case No.: 2011-194147
Civil Action No.: 2010-CP-23-7266

RECEIVED

AUG 01 2013

SC Court of Appeals

Roper, LLC, ...Respondent,

vs.

Harris Teeter, Inc., Carolina & Georgia Immobilelienfonds I, L.P.,
GOA Realty Management, LLC, Germania of America, Inc.,
Miller & Martin, PLLC, New Spring Community Church,
John Doe, Richard Roe, and Doe Corporation,

of which Germania of America, Inc. is the Appellant.

PETITION FOR REHEARING

Appellant Germania of America, Inc. ("Germania") hereby petitions this Court for rehearing, pursuant to Rules 219, 221, and 240 of the South Carolina Appellate Court Rules, of its unpublished Opinion No. 2013-UP-327, filed July 17, 2013. That order affirmed the trial court's entry of summary judgment in favor of co-defendant, Harris Teeter, on the plaintiff Roper LLC's breach of contract claim. Germania's petition seeks rehearing and reconsideration of the Court's order on the issue of whether the June 2001 letter constituted a valid release of Harris Teeter's payment obligations under the Lease.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Roper LLC commenced this lawsuit against Appellant Germania of America, Inc., and others, including Harris Teeter, Inc., alleging fraud, negligent misrepresentation, and breach of contract in connection with the sale and lease of a parcel of commercial property located in Greenville, South Carolina. The Property at issue contains 8.353 acres, including a 60,217 square foot building and adjacent land for parking. The Property was initially occupied by Harris Teeter as the Tenant pursuant to a certain "Lease Agreement Between Roper Mt. Rd. Assoc., LLC and Harris Teeter, Inc." (the "Lease"). On or about July 9, 2001, Harris Teeter assigned its interests in the Property to Bi-Lo, Inc. pursuant to an Assignment and Assumption of Lease.

Prior to the assignment, Harris Teeter sent a letter to co-defendant, Carolina & Georgia Immobilelienfonds I, LP ("CGI"), which at the time was the landlord under the Lease. The letter, dated June 12, 2001, notified CGI of a "proposed" assignment of the Lease to Bi-Lo, which Harris Teeter indicated "may or may not close." (R. pp. 29-30). Among other things, Harris Teeter asked CGI to countersign the letter to confirm receipt of the letter and [to confirm] that CGI would look solely to Bi-Lo for performance of the Tenant's responsibilities under the Lease.

Plaintiff acquired the Property in April 2007, and thereafter, sought to enforce Harris Teeter's payment obligations under the Lease. Harris Teeter refused to pay any rent due under the Lease, claiming that CGI had released it of all of its obligations, including payment obligations, pursuant to the June 12, 2001 letter agreement between Harris Teeter and CGI.

On a Motion for Summary Judgment filed by Harris Teeter, the circuit court ruled that the June 2001 letter was a clear and unambiguous release of Harris Teeter's payment obligations under the Lease. The circuit court denied Plaintiff's and Appellant Germania's Motions to Alter or Amend Judgment Pursuant to Rule 59(e). Appellant filed an appeal with this Court, which affirmed the circuit court's entry of summary judgment in favor of Harris Teeter on the Plaintiff's breach of contract claim.

ARGUMENT

I. THE COURT OVERLOOKED A MATERIAL PROVISION IN THE LEASE IN DETERMINING WHETHER THE JUNE 2001 LETTER CONSTITUTES A VALID RELEASE OF HARRIS TEETER.

The Court's decision holds that the June 2011 letter constitutes a valid and effective release of Harris Teeter's payment obligations under the Lease. "The term 'release' has been defined as the 'relinquishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced.' A release is an agreement providing that a duty owed to the maker of the release is discharged immediately." Ecclesiastes Production Ministries v. Outparcel Assoc., 374 S.C. 483, 492, 649 S.E.2d 494, 498 (Ct. App. 2007). "Whether a particular agreement constitutes a release is to be determined from the intent of the parties." Id.

The intent of the parties must be ascertained not just by looking at the June 2001 letter itself, but to the Lease terms in their entirety. "In South Carolina, two contracts executed at different times relating to the same subject matter, entered into by the same parties, are to be construed as one contract and considered as a whole." Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485, 492 (Ct. App. 2004). Thus, where one instrument

explains, amplifies, or limits the other, the documents will be construed together in order to give effect to the entire agreement. See Ellie, Inc., 594 S.E. 2d at 492-93, supra, and cases cited therein. "In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties." Ellie, Inc., 594 S.E.2d at 493. Therefore, intent is determined by looking at the contents of the entire agreement, and not from any particular phrase or provision. Id.

For this reason, a determination that the June 2001 letter constitutes a valid release of Harris Teeter's payment obligations, (and therefore a valid amendment to the Lease), necessarily requires that the intent of the parties (and CGI) to release Harris Teeter be expressed clearly, unequivocally, and without ambiguity, in the context of the entire Lease agreement. The Court must "ascertain and give effect to" the intention of the parties. Wallace v. Day, 390 S.C. 69, 74, 700 S.E.2d 446, 449 (Ct. App. 2010). As the Court noted in its decision, a contract is ambiguous "where the terms of the contract are inconsistent on their face or are reasonably susceptible of more than one interpretation." Opinion No. 2013-UP-327, citing Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997).

In determining that the June 2001 letter clearly and unambiguously releases Harris Teeter from the Lease, the Court overlooked the importance of Section 15.4 of the Lease, which provides:

15.4 Continuing Liability of Tenant. In the event of an assignment or sublease, Tenant agrees that Tenant will remain jointly and severally liable, with the assignee or subtenant, for the payment of the rent reserved under this Lease and for performance of all of the other terms, conditions, and provisions of this Lease which are required to be performed by Tenant, notwithstanding any acceptance of rent or performance by Landlord directly from the assignee or subtenant.

This provision cannot be reconciled with the June 2001 letter, which states that CGI would “look solely” to Bi-Lo for performance of the Tenant’s “responsibilities” under the Lease. Section 15.4 of the Lease clearly states otherwise. (R. p. 63).

Section 15.4 expressly provides that – notwithstanding any agreement by the landlord to accept performance or payment of rent by the subtenant – the Tenant, i.e., Harris Teeter, would remain jointly and severally liable for payment of the rent.¹ Therefore, when read together as one agreement, the terms of the Lease and June 2001 are patently inconsistent. Because the June 2001 letter is an obvious contradiction to Section 15.4 of the Lease, the agreement is ambiguous as a matter of law and the order granting summary judgment to Harris Teeter should be reversed.

II. THE COURT ERRED BY READING WORDS INTO THE CONTRACT.

Furthermore, “[a] contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.” Southern Glass & Plastics Co. v. Kemper, 399 S.C. 483, 732 S.E.2d 205, 209 (Ct. App. 2012), quoting Hansen ex rel. Hansen v. United Servs. Auto. Ass’n, 350 S.C. 62, 68, 565 S.E.2d 114, 116 (Ct. App. 2002).

The June 2001 letter was written in the context of a long-term commercial lease arrangement, under which Harris Teeter was the tenant and responsible for payment of

¹ The author of the June 2001 letter also wrote: “If the Lease is not assigned by Harris Teeter to Assignee, Harris Teeter will continue to be solely responsible for the “Tenant’s” obligations under the Lease. (emphasis added). This statement is an implicit acknowledgement by Harris Teeter that, once the Lease was assigned, it would remain jointly and severally liable for payment of rent.

rent. It is simply not reasonable to conclude that CGI intended to amend material and essential terms of the Lease in such an informal fashion.² Generally understood business practices suggest that sophisticated parties would not typically amend a 20-year commercial real estate lease with an informal document that fails to use key words, such as “amendment”, “release”, “payment”, “rent”, or other similar language that would typically be used to reflect the parties’ intentions. The fact that none of these words are expressed in the June 2001 leaves serious doubt as to the intention of the parties.³

To determine, as this Court has, that the June 2001 letter is a clear and unambiguous release of Harris Teeter, necessitates a reading of terms into the agreement that were not clearly stated or intended by the parties. “The intention of the parties and the meaning[, which] are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument, and when such contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed. Hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed.” Park Regency, LLC v. R&D Development of the Carolinas, LLC, 402 S.C. 401, 412, 741 S.E.2d 528, 534 (Ct. App. 2012) (quoting McPherson v. J.E. Sirmine & Co., 206 S.C. 183,

² The June 2001 letter, which was authored and sent by a representative of Harris Teeter, never stated that it was intended to be an amendment to the Lease. To the contrary, the letter expressed rather casually that the purpose of the letter was to “notify” CGI of the proposed assignment and to “inform” CGI of “certain details concerning the transaction.” It is not at all clear from the June 2001 letter agreement that CGI understood and/or intended the letter to constitute an amendment to the Lease and/or a release of Harris Teeter’s joint and several liability for payment of rent.

³ Similarly, the term “responsibilities” is not defined in the June 2001, but could reasonably be interpreted to refer to the tenant’s multiple non-payment obligations under the Lease. (See, e.g., Lease §§ 6.2(b), 6.4, 12.5, 12.6, 10.1, and 11.1) (R. pp. 49-50, 56-58, and 60).

204, 33 S.E.2d 501, 509 (1945)). Similarly, “[t]he court is without authority to consider parties’ secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed.” Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009). It is improper for a court to declare the intentions of the parties when those intentions have not been clearly expressed in the written agreement. Because the intent of CGI to release Harris Teeter from the Lease is not clearly stated or even implied, the Court should reconsider its decision affirming the lower court’s grant of summary judgment.

III. THE COURT’S DECISION IS CONTRARY TO PRECEDENT SET BY THIS COURT AND THE SUPREME COURT.

This Court and the South Carolina Supreme Court have found that contract terms that would appear to be much clearer than the ones at issue here to be ambiguous as a matter of law. See, e.g. Southern Atlantic Financial Servs., Inc. v. Middleton, 356 S.C. 444, 448, 590 S.E.2d 27, 30 (S.C. 2003) (finding that provisions in a promissory note were “patently ambiguous” where the note stated that the lender “may” give written notice of default, but that the date of acceleration on the note “must” be at least 30 days after such notice); S.C. Langston v. Niles, 265 S.C. 445, 454, 219 S.E.2d 829, 832 (S.C. 1975) (holding “unhesitatingly” that lease assignment was ambiguous because it did not “spell out” certain details relating to payment of rent and interest on a loan); Crystal Pines Homeowners Assoc. v. Phillips, 394 S.C. 527, 534, 716 S.E.2d 682, 686 (Ct. App. 2011) (finding deed of real estate was ambiguous with respect to the parties’ road maintenance obligations); Wallace v. Day, 390 S.C. 69, 76-77, 700 S.E.2d 446, 450 (Ct. App. 2010) (finding that terms of real estate contract’s default provisions were reasonably susceptible to more than one interpretation and that summary judgment

should not have been granted); Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 240, 672 S.E.2d 799, 803 (Ct. App. 2009) (finding that a settlement agreement was ambiguous, and therefore summary judgment was not appropriate, because the term “landlord/tenant claims” was reasonably susceptible to more than one interpretation); HK New Plan Exchange Property Owner I, LLC v. Coker, 375 S.C. 18, 23-24, 649 S.E.2d 181, 183-84 (Ct. App. 2007) (finding that a lease amendment which did not expressly release one of the co-tenants from the original lease was ambiguous, and therefore, the lower court’s entry of summary judgment was reversed); Bishop v. Benson, 297 S.C. 14, 17-18, 374 S.E.2d 517, 519 (Ct. App. 1988) (having “little difficulty in finding ambiguity in the contract regarding the intent of the parties” as to when certain conditions were to be performed).⁴

By way of further example, in the case of Wallace v. Day, *supra*, this Court found that the following language in a real estate contract was reasonably susceptible to more than one interpretation:

If Buyer or Seller fails to perform any covenant of this Agreement, the other may elect to seek any remedy provided by law, including but not limited to attorney fees and actual costs incurred (as defined in paragraph 17), or terminate this Agreement with a five day written notice.

Wallace, 700 S.E.2d at 450. The buyer had failed to close by the deadline under the contract, and the seller then treated the contract as abandoned by the buyer. The buyer sought specific performance, and argued that the default provision above provided for two options: “(1) elect to seek any remedy provided by law; or (2) terminate the agreement with a five day written notice.” *Id.* They argued that the seller had opted to

⁴ The Court further noted in Pee Dee Stores that the settlement agreement at issue did not contain a definition of “landlord/tenant claims” and noted that reasonable minds could “certainly differ” as to the meaning of “landlord/tenant claims.” *Id.*, at 803-04.

invoke the second alternative, but that she had failed to give the requisite notice. On the other hand, the seller argued that the contract allowed her to seek any remedy at law, and that she had no further obligation to the buyer. Id.

This Court found that the contract terms were ambiguous, and therefore, the parties' intent at the time of entering into the contract was an issue of fact that should not have been decided on summary judgment. Accordingly, the Court reversed the master's entry of summary judgment in favor of the buyer. Id.

This Court reached a similar conclusion in HK New Plan Exchange Property Owner I, LLC v. Coker, 375 S.C. 18, 649 S.E.2d 181 (Ct. App. 2007). There, the contract at issue was a commercial real estate lease that had been amended. The question was whether one of the original co-tenants had been released by the lease amendment, which stated in part:

This agreement is entered into by the Landlord and Tenant, as set forth above, and is intended to be an amendment of the Lease described above. Any provision of this amendment which is inconsistent with any provision(s) of the Lease shall supersede the provision(s) in the Lease. Also, any ambiguities and conflicts between this Amendment and the Lease shall be read in favor of the Amendment. Except as amended hereby, all other terms and conditions of the Lease shall remain in full force and effect, and the terms of this Amendment shall be fully incorporated into, and apply in addition to the terms of, the Lease.

HK New Plan, 649 S.E.2d at 182-83.

The Court found that the amendment created ambiguities in the contract. The amendment referred to and was executed by only one of the co-tenants as the tenant, but "did not specifically state" that the other co-tenant was released from the original lease. Id. at 184. Therefore, the Court found that "a question is raised regarding the parties' intent, and the matter should be determined by a jury." Id.

The June 2001 letter at issue in this case is even less clear than the lease amendment that was reviewed in HK New Plan, as the June 2001 failed to say anything about a purported amendment to the Lease terms. Based on the precedent set forth in HK New Plan and the other precedents cited above, the Court should reconsider its decision.

IV. THE COURT ERRED IN FINDING THAT THE JUNE 2001 LETTER AGREEMENT WAS SUPPORTED BY CONSIDERATION.

“An age-old definition of consideration is, ‘a benefit to the party promising, or a loss or detriment to the party to whom the promise is made.’” Shayne of Miami, Inc. v. Greybow, Inc., 232 S.C. 161, 167, 101 S.E.2d 486, 489 (S.C. 1957). “A valid offer ‘identifies the bargained for exchange and creates a power of acceptance in the offeree.’” Sauner v. Public Service Authority of South Carolina, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (S.C. 2003), quoting Carolina Amusement Co. v. Connecticut Nat’l Life Ins. Co., 313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993).

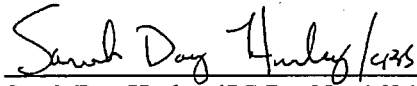
As the promisor, CGI should have obtained a benefit from giving the purported release. The problem with the June 2001 letter is that it fails to reflect or recite a benefit flowing to CGI, in exchange for providing a release to Harris Teeter. According to the Court’s decision, CGI received the benefit of having Bi-Lo liable for the Tenant’s responsibilities under the Lease. However, that analysis is flawed because Bi-Lo was already liable for those obligations under the terms of the Lease as previously agreed to between the parties. The terms of the Lease specifically provided that any subtenant or assignee would be jointly and severally liable, along with Harris Teeter, for payment of rent. (Lease, ¶ 15.4) (R. p. 63). Therefore, CGI gained no benefit by giving a purported release to Harris Teeter. “Consideration that is wholly past is not valuable consideration.” Future Group, II v. Nationsbank, 324 S.C. 89, 97, 478 S.E.2d 45, 49

(S.C. 1996). For this reason, the June 2001 letter does not constitute a valid release of Harris Teeter's payment obligations, as the purported release was not supported by consideration.

CONCLUSION

For all the reasons stated herein, the Court's Order and Decision dated July 17, 2013 is subject to further review and reformation.

Respectfully submitted,



Sarah Day Hurley (SC Bar No. 16241)

Turner Padgett Graham & Laney, P.A.

Post Office Box 1509

Greenville, South Carolina 29602

(864) 552-4600

Attorneys for Appellant

Germania of America, Inc.

August 1, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Appellate Case No.: 2011-194147
Civil Action No.: 2010-CP-23-7266

RECEIVED

AUG 01 2013

SC Court of Appeals

Roper, LLC, ...Respondent,

vs.

Harris Teeter, Inc., Carolina & Georgia Immobilelienfonds I, L.P.,
GOA Realty Management, LLC, Germania of America, Inc.,
Miller & Martin, PLLC, New Spring Community Church,
John Doe, Richard Roe, and Doe Corporation,

of which Germania of America, Inc. is the Appellant.

PROOF OF SERVICE

I certify this 1st day of August 2013 that I have served a copy of the PETITION
FOR REHEARING upon other counsel of record, by mailing same, postage prepaid in
the United States mail, addressed to the following:

John A. Hagins, Jr., Esquire
Stephen R. H. Lewis, Esquire
Covington Patrick Hagins Stern & Lewis
P.O. Box 2243
Greenville, SC 29602

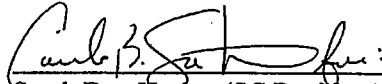
E. Benton Leinster, III, Esquire
P.O. Box 8874
Greenville, SC 29604

ATTORNEY FOR ROPER, LLC

ATTORNEYS FOR ROPER, LLC

W. Francis Marion, Jr., Esquire
Bonnie A. Lynch, Esquire
Haynsworth Sinkler Boyd, PA
P.O. Box 2048
Greenville, SC 29602-2048

ATTORNEYS FOR HARRIS TEETER, INC.


Sarah Day Hurley (SC Bar No. 16241)
Turner Padgett Graham & Laney, P.A.
Post Office Box 1509
Greenville, South Carolina 29602
(864) 552-4600
Attorneys for Appellant
Germania of America, Inc.

August 1, 2013

The South Carolina Court of Appeals

Roper, LLC, Respondent,

v

Harris Teeter, Inc., Carolina & Georgia
Immobilelienfonds I, L.P., GOA Realty Management I,
LLC, Germania of America, Inc. Miller & Martin PLLC,
New Spring Community Church, John Doe, Richard
Doe, and Doe Corporation, Defendants,

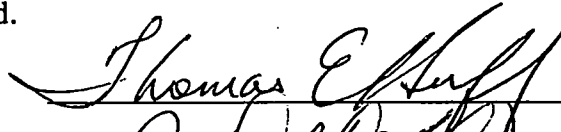
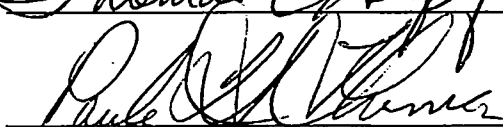
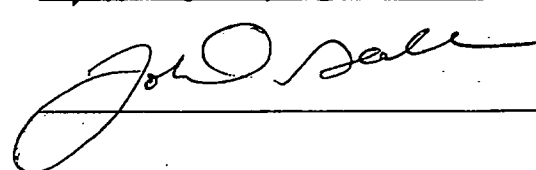
Of whom, Germania of America, Inc., is the Appellant

And Harris Teeter, Inc., is the Respondent.

Appellate Case No. 2011-194147

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 J.
 J.
 J.

Columbia, South Carolina

cc:

Sarah Day Hurley
W. Francis Marion, Jr.
Bonnie Allen Lynch

FILED

August 22, 2013