

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

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May 05 2025

S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
THE HONORABLE JOCELYN NEWMAN
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2024-001994
CIVIL ACTION NO. 2019-CP-21-40-06914

Opinion No. 6070 (S.C. Ct. App. filed July 10, 2024)

Spring Valley Interests, LLC,

PETITIONER,

versus

The Best for Last, LLC,

RESPONDENT.

APPENDIX VOLUME I (Pages 1-442)

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2019-CP-4006914

Appellate Case No.: 2022-000813

SPRING VALLEY INTERESTS, LLC, Appellant,

v.

THE BEST FOR LAST, LLC, Respondent.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Spring Valley Interests, LLC,

Plaintiff,

v.

The Best for Last, LLC,

Defendant.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2019CP4006914

**ORDER GRANTING DEFENDANT’S MOTION
FOR PARTIAL SUMMARY JUDGMENT**

App’x 0001

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This matter came before the Court upon the parties’ cross-motions for summary judgment – Defendant The Best for Last, LLC’s Motion for Partial Summary Judgment, filed on April 16, 2021, and Plaintiff’s Motion for Summary Judgment, which was filed on April 29, 2021. A hearing was conducted on these motions via WebEx on August 26, 2021. Plaintiff was represented by Kenneth R. Raynor and Defendant The Best for Last, LLC (“TBFL”) was represented by Kirby D. Shealy, III, and Luke M. Allen.

For the reasons set forth below, Defendant’s motion is GRANTED, and Plaintiff’s motion is DENIED.

FACTUAL AND PROCEDURAL BACKGROUND

This matter arises from the parties’ arguments regarding the enforceability of the purchase option contained in a loan agreement between Plaintiff and TBFL. Specifically, on May 3, 2017, Plaintiff entered into a written agreement to loan TBFL a total of \$800,000 to assist TBFL in acquiring real property. That agreement contained a purchase option in which TBFL granted Plaintiff a freely assignable and perpetual option to purchase a co-tenancy interest in the property.

On April 16, 2021, TBFL filed a motion for partial summary judgment arguing that the perpetual nature of the purchase option is unenforceable because it violates the rule of perpetuities. The Court agrees.



FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court agrees that the purchase option included in the loan agreement violates the common law rule against perpetuities. At common law, any interest is valid only if it is certain to vest, if ever, within the lifetime of a person at creation of the interest plus twenty-one years. *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 369-70, 628 S.E.2d 902, 917 (Ct. App. 2006). The co-tenancy interest contemplated by the parties is a “perpetual” purchase option that is not certain to vest in the future; nor, is the interest conditioned to vest on an event certain to occur in the future. Therefore, the purchase option is unenforceable because it violates the common law rule of perpetuities.

The Uniform Statutory Rule Against Perpetuities (USRAP) does apply in this case. Generally, USRAP supersedes the common law rule against perpetuities. S.C. CODE ANN. §27-6-80 (2021). However, USRAP does not apply to nonvested property interests arising out of a nondonative transfer. S.C. CODE ANN. §27-6-50(1) (2021). Here, the basis of the parties' arguments concerns—a nondonative transfer—the commercial transaction involving the purchase option. Because USRAP does not apply to nondonative transfers, the USRAP cannot supersede or replace the common law, thus the common law is the appropriate legal standard to conclude that the purchase option is unenforceable.

IT IS, THEREFORE, ORDERED that Defendant's Motion for Partial Summary Judgment is GRANTED, and Plaintiff's claims for declaratory relief and specific performance are dismissed.

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment is DENIED.

AND IT IS SO ORDERED.



Richland Common Pleas

Case Caption: Spring Valley Interests Llc vs Best For Last Llc

Case Number: 2019CP4006914

Type: Order/Summary Judgment

So Ordered

Jocelyn Newman

Electronically signed on 2022-05-18 13:15:58 page 3 of 3



STATE OF SOUTH CAROLINA
RICHLAND COUNTY

SPRING VALLEY INTERESTS, LLC,

Plaintiff,

vs.

THE BEST FOR LAST, LLC,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
2019-CP-

COMPLAINT
(Jury Trial Demanded)

NOW COMES the Plaintiff Spring Valley Interests, LLC and complaining of the Defendant The Best for Last, LLC and says and alleges as follows:

Count I – Reformation Due to Mutual Mistake

1. The Plaintiff Spring Valley Interests, LLC is a limited liability company organized under the laws of the State of South Carolina with its principal office located in Mecklenburg County, North Carolina.
2. The Defendant The Best for Last, LLC is a limited liability company organized under the laws of the State of South Carolina.
3. Pursuant to SC Code §15-7-10, Richland County, South Carolina is the proper venue for this action as the complaint seeks specific performance of a transfer of an interest in real property and said real property is located in Richland County, South Carolina.
4. The Defendant is the owner of certain real property located in Columbia, South Carolina and described as 9005 Two Notch Road, 237 Rabon Road and 241 Rabon Road and more particularly described on Exhibit A attached hereto. (hereinafter, the “Property”).
5. On or about the 3rd day of May 2017, the Plaintiff and White Interests Limited Partnership entered into a written agreement, entitled, Loan Agreement, (hereinafter, “Loan Agreement”), a copy of which is attached hereto as Exhibit B, pursuant to which White Interests Limited Partnership loaned to the Defendant

the sum of Eight Hundred Thousand Dollars and no/100s which the Defendant used to acquire the Property.

6. Under the terms of the Loan Agreement, the Defendant granted to the White Interests Limited Partnership an option to purchase a 74.425% undivided co-tenancy interest in the Property for a Purchase Price of Eight Hundred Thousand Dollars and no/100s.
7. The Loan Agreement referenced the Property as “9500 Two Notch Road, 237 Rabon Road and 241 Rabon Road.”
8. The Loan Agreement’s reference to the Property as being “9500 Two Notch Road, 237 Rabon Road and 241 Rabon Road” was the result of a mutual mistake of the Plaintiff and Defendant in that the reference should have been 9005 Two Notch Road, 237 Rabon Road and 241 Rabon Road.
9. The Defendant did not own property with the address of 9500 Two Notch Road.
10. Consistent with the terms of the Loan Agreement, the Defendant entered into a promissory note to evidence the loan and secured the loan with a mortgage on the Property, as 9005 Two Notch Road, 237 Rabon Road and 241 Rabon Road and more particularly described on Exhibit A attached hereto.
11. Under the circumstances of this case, it would be fair, just and equitable for the Court to issue an order reforming the Loan Agreement to correct the reference to the Property from “9500 Two Notch Road, 237 Rabon Road and 241 Rabon Road” was the result of a mutual mistake of the Plaintiff and Defendant to “9005 Two Notch Road, 237 Rabon Road and 241 Rabon Road” so as to effect the parties’ intent in entering the Loan Agreement.
12. The Plaintiff is entitled to an order reforming the Loan Agreement to correct the reference to the Property from “9500 Two Notch Road, 237 Rabon Road and 241 Rabon Road” was the result of a mutual mistake of the Plaintiff and Defendant to “9005 Two Notch Road, 237 Rabon Road and 241 Rabon Road.”

Count II – Specific Performance

13. The allegations of the preceding paragraphs are incorporated herein by reference as if more fully set forth herein.
14. On August 21, 2019, White Interests Limited Partnership gave notice to the Defendant of its Exercise of Option to Purchase.



15. Subsequently, on September 12, 2019, White Interests Limited Partnership assigned, conveyed and transferred to the Plaintiff all of its right, title and interest with respect to the purchase option and transfer of the Property thereby to the Plaintiff.
16. The Defendant has refused to comply with the Loan Agreement and its obligation to transfer the 74.425% undivided co-tenancy interest to the Plaintiff.
17. The Defendant's failure to transfer the 74.425% undivided co-tenancy to the Plaintiff constitutes a breach of the Loan Agreement.
18. The Plaintiff has been damaged due to the Defendant's breach of contract.
19. The Plaintiff does not have an adequate remedy at law for the Defendant's breach of contract.
20. Specific performance of the contract would be equitable between the parties.
21. The Plaintiff has performed its obligations under the Loan Agreement, including delivering to the Defendant the sum of Eight Hundred Thousand Dollars as called for in the Loan Agreement.
22. The Plaintiff has been and remains able and willing to perform its obligations under the Loan Agreement, including the completion of the exercise of the Purchase Option granted by the Defendant.
23. Under the circumstances of this case, it would be fair, just and equitable for the Court to issue an order directing the Defendant to specifically perform its obligations under the Loan Agreement and to complete the transfer of the 74.425% undivided co-tenancy interest in the Property to the Plaintiff for the Purchase Price of Eight Hundred Thousand Dollars and no/100s.
24. The Plaintiff prays the Court for an order directing the Defendant to specifically perform its obligations under the Loan Agreement and to complete the transfer of the 74.425% undivided co-tenancy interest in the Property to the Plaintiff for the Purchase Price of Eight Hundred Thousand Dollars and no/100s.
25. The Loan Agreement provided that the Plaintiff has as part of its remedies for a breach of the Loan Agreement the right to incur reasonable expenses (including attorneys' fees and litigation costs) to exercise any remedy or right and recover such expenses from the Defendant.



26. The Plaintiff has incurred reasonable expenses including attorneys' fees and litigation costs in exercising its rights under the Loan Agreement, specifically including seeking remedies in this litigation and is entitled to have and recover those expenses from the Defendant.

COUNT III

In the alternative that the Court exercises its discretion and does not grant the Plaintiff's request for an order directing the Defendant to specifically comply with its obligations under the Loan Agreement, then in said alternative the Plaintiff alleges as follows.

27. The Plaintiff incorporates herein by reference the allegations of the preceding paragraphs as if more fully set forth herein.
28. The Plaintiff is entitled to have and recover of the Defendant actual damages in an amount to be determined at the trial of this matter together with reasonable expenses (including attorneys' fees and litigation costs) it has incurred to exercise its rights and remedies under the Loan Agreement.

WHEREFORE, the Plaintiff Spring Valley Interests, LLC, LLC prays the Court as follows:

1. That the Court issue an order reforming the Loan Agreement to change the reference to the Property from "9500 Two Notch Road, 237 Rabon Road and 241 Rabon Road" was the result of a mutual mistake of the Plaintiff and Defendant to "9005 Two Notch Road, 237 Rabon Road and 241 Rabon Road."
2. That the Court issue an order directing the Defendant The Best for Last, LLC to specifically perform its obligations under the Loan Agreement and to complete the transfer of the 74.425% undivided co-tenancy interest in the Property to the Plaintiff for the Purchase Price of Eight Hundred Thousand Dollars and no/100s, less any amounts owed under the Promissory Note.
3. That the Plaintiff have and recover of the Defendant The Best for Last, LLC the reasonable expenses (including attorneys' fees and litigation costs) it has incurred to exercise its rights and remedies under the Loan Agreement.
3. In the alternative that the Court exercises its discretion to not issue an order compelling the Defendant to specifically perform its obligations under the Loan Agreement, then in that alternative, that the Plaintiff have and recover actual damages of the Defendant The Best for Last, LLC in an amount to be determined at the trial of this matter.



4. That the Plaintiff have a trial by jury on all issues of fact alleged herein.

Dated: December 11, 2019

RAYNOR LAW FIRM, PLLC

s/Kenneth R. Raynor

Kenneth R. Raynor

Attorney for Plaintiff

1822 Cleveland Avenue

Charlotte, NC 28203

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N.C. Bar No.: 10488

S.C. Bar No.: 11654

S.C. Fed. ID No.: 6769



**EXHIBIT A
LEGAL DESCRIPTION**

Parcel 1:

(9005 Two Notch Road, Columbia, SC 29223)

All that certain, piece, parcel or tract of land, with the improvements thereon, situate, lying and being in the County of Richland, State of South Carolina, and being more particularly shown and delineated on plat of survey "Composite Drawing Prepared for Protective Life Insurance Company, Lawyers Title Insurance Corporation and Spring Valley Commons-Columbia LLC," prepared by United Design Services, Inc., dated December 11, 1996 and designated as DWG#: UB-179, having the following courses, measurements, and boundaries, to-wit: BEGINNING at an existing 1/2" iron pipe marking the Southeasterly corner of the property conveyed to Louise Paschal by deed recorded in the Register of Deeds Office for Richland County in Deed Book 778 at Page 285 and lying in the Westerly boundary of the right of way of Two Notch Road (US Hwy. No. 1) and run with the Southerly boundary of the Paschal Property (now or formerly) N 60°30'30" W 224.05' to a point; thence leaving the Southerly boundary of the Paschal Property (now or formerly) and run with a new line then following Twenty (20) courses and distances: (1) S 27°40'50" W 36.60' to a point; (2) N 62°19'10" W 27.00' to a point; (3) N 27°40'50" E 12.50' to a point; (4) N 62°19'10" W 89.90' to a point; (5) S 27°40'50" W 12.50' to a point; (6) N 62°19'10" W 32.80' to a point; (7) S 27°40'50" W 12.50' to a point; (8) N 62°19'10" W 19.50' to a point; (9) S 27°40'50" W 112.70' to a point; (10) S 35°38'47" E 5.60' to a point; (11) S 13°25' 13" W 26.81' to a point; (12) S 62°19'10" E 53.62' to a point; (13) S 27°40'50" W 6.89' to a point; (14) S 62°19'10" E 62.97' to a point; (15) N 27°40'50" E 6.89' to a point; (16) S 62°19' 10" E 30.00' to a point; (17) N 27°40'50" E 61.00' to a point; (18) S 62°19'10" E 36.00' to a point; (19) N 27°40'50" E 103.49' to a point; and (20) S 60°30'30" E 197.68' to a point on the Westerly margin of the right-of-way of Two Notch Road; thence along the Westerly margin of the right-of-way of Two Notch Road N 30°39'35" E 25.01' to the point and place of BEGINNING, containing 0.794 acre, more or less, and being the same parcel shown as "Parcel D" on Plat prepared for Spring Valley Commons - Columbia, LLC, by United Design Services, Inc., dated December 9, 1996, revised September 24, 1997, and recorded in the Office of the Register of Deeds for Richland County, South Carolina in Plat Book 57 at Page 599.

TOGETHER WITH the rights under those easements contained in that certain Declaration of Easements and Restrictive Covenants dated September 9, 1997, and recorded in the Office of the RMC for Richland County, South Carolina in Deed Book D1410, Page 70.

TOGETHER WITH rights contained in that certain Easement Agreement dated December 24, 2013, filed for record March 20, 2014, and recorded in Book R1933, Page 1529.

TMS#: 19903-05-05

Derivation: This being the same property conveyed to Grantor by deed of DWB Richland, LLC dated May 3, 2017 and recorded May 9, 2017 in Deed Book 2209 at Page 1314 and by corrective

deed of DWB Richland, LLC dated May 3, 2017 and recorded August 21, 2017 in Deed Book 2237 at Page 2247.

Parcel 2:

(241 Rabon Road, Columbia, SC 29223)

All that certain piece, parcel or lot of land, with improvements thereon, containing One (1) acre, more or less, situate, lying and being on the Southwestern side of Rabon Road, about Nine (9) miles Northeast of the City of Columbia, in the County of Richland, State of South Carolina, being shown and designated as Tract "B" on a plat surveyed for Lila V. Medlin, by Janes C. Covington, C.E., dated September 21, 1951, revised by Joseph Keels, Engineer and Surveyor, December 7, 1960, and recorded in the Office of the Register of Deeds for Richland County in Plat Book 17 at Page 16. This property is also shown on a plat prepared for Deborah H. Holcombe by Benjamin H. Whetstone, R.L.S., dated April 28, 1984, and recorded in Plat Book Z at Page 9051. This conveyance is made subject to all restrictions, easements, and conditions of record.

TMS#: 17115-01-08

Derivation: This being the same property conveyed to Grantor by deed of DWB Richland, LLC dated May 3, 2017 and recorded May 9, 2017 in Deed Book 2209 at Page 1314 and by corrective deed of DWB Richland, LLC dated May 3, 2017 and recorded August 21, 2017 in Deed Book 2237 at Page 2247.

Parcel 3:

(237 Rabon Road, Columbia, SC 29223)

All that certain piece, parcel or tract of land, together with any improvements thereon, known as 237 Rabon Road, situate, lying and being in the County of Richland, State of South Carolina and being shown as containing approximately Two (2) acres on a plat prepared for Mrs. Lillie G. Medlin by James C. Covington, C.E., dated December 4, 1944 and recorded in the Office of the Register of Deeds for Richland County, South Carolina, in Plat Book "J" at Page 104; and being more particularly shown and delineated as a "Vacant Lot", containing One and Ninety Hundredths (1.90) acres on a plat prepared for Interprop, Inc., by Baxter Land Surveying Co., Inc., dated September 7, 2004, a copy of which was attached to the deed to the Grantor and is incorporated herein by reference; and having at the boundaries and measurements as shown on the last-mentioned plat, reference being craved thereto as often as necessary for a more complete and accurate legal description.

TMS#: 17115-01-09

Derivation: This being the same property conveyed to Grantor by deed of DWB Richland, LLC dated May 3, 2017 and recorded May 9, 2017 in Deed Book 2209 at Page 1314 and by corrective deed of DWB Richland, LLC dated May 3, 2017 and recorded August 21, 2017 in Deed Book 2237 at Page 2247.

LOAN AGREEMENT

THIS LOAN AGREEMENT (the "**Agreement**") is made and effective as of the 3rd day of May, 2017 by and between THE BEST FOR LAST, LLC, a South Carolina limited liability company ("**Borrower**"), and WHITE INTERESTS LIMITED PARTNERSHIP, a North Carolina limited partnership ("**Lender**").

WHEREAS, Lender has agreed to loan to Borrower funds in order to assist Borrower to acquire certain real property located in Columbia, South Carolina, to wit: 9500 Two Notch Road, 237 Rabon Road and 241 Rabon Road (collectively, the "**Property**") in the original principal amount of Eight Hundred Thousand and 00/100 Dollars (\$800,000.00) (the "**Loan Amount**"), which is to be evidenced by a promissory note made by Borrower in favor of Lender of even date herewith (the "**Note**") and secured by a second lien Mortgage of even date herewith (the "**Collateral Agreement**"); and

WHEREAS, Borrower and Lender desire to memorialize the terms of the loan herein.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. **Loan to Borrower.** Lender shall loan to Borrower the Loan Amount which shall be repaid as stated in the Note. Borrower shall, on demand of Lender, reimburse Lender for all costs to enter into this Agreement and administer the loan provided for herein.
2. **Lender's Purchase Option.** In consideration for making the Loan, the Borrower hereby grants to Lender the perpetual option to purchase a 74.425% undivided co-tenancy interest in the Property (the "**Purchase Option**") for a purchase price of Eight Hundred Thousand and 00/100 Dollars (the "**Purchase Price**"). The Purchase Option shall be exercised at the Lender's sole option by delivery of written notice no later than thirty (30) days before the intended closing. The Purchase Price shall be paid in cash or immediately available funds at the Closing. The Lender shall hold take title to the co-tenancy interest subject to (i) no mortgages other than the Borrower's then outstanding first lien mortgage, and (ii) a mutually acceptable co-tenancy agreement. The Purchase Option is freely assignable by the Lender.
3. **Remedies.** Upon the breach of this Agreement, the Collateral Agreement and/or the Note, Lender may exercise any one or more of the following rights and remedies:
 - a. Exercise any right that the Lender may have under this Agreement, the Note and/or any of the above-stated agreements.
 - b. Incur reasonable expenses (including attorneys' fees and litigation costs) to exercise any remedy or right and recover such expenses from Borrower.
 - c. Exercise any other right or remedy that a Lender has under law or in equity.
4. **Notices.** All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given (except as may otherwise be specifically provided herein to the contrary) if delivered by hand and receipted for by the



party to whom said notice or other communication shall have been directed or mailed by certified or registered mail with postage prepaid or shipped and receipted by express courier service charges prepaid by shipper addressed as follows (or to such other address as may be designated by notice given pursuant hereto):

To Borrower:

The Best For Last, LLC
PO Box 6926
Columbia, SC 29260

To Lender:

White Interests Limited Partnership
3925 Ayrshire Pl.
Charlotte, NC 28210

5. **Applicable Law.** This Agreement shall be construed and interpreted under the internal laws of the State of South Carolina without giving effect to the conflict of laws rules thereof. Borrowers and Lender hereby submit to the personal and subject matter jurisdiction of the federal and state courts located in Columbia, South Carolina.
6. **Binding Effect.** All of the terms and provisions of this Agreement by or for the benefit of the parties shall be binding upon and inure to the benefit of their successors and permitted assigns. The rights and obligations provided by this Agreement shall not be assignable except by the express written agreement of Borrower and Lender. Except as expressly provided herein, nothing herein is intended to confer upon any person other than the parties and their successors, any rights or remedies or by reason of this Agreement.
7. **Severability.** If any provision of this Agreement or the application of any provision to any party or circumstance is adjudged invalid or unenforceable to any extent, the application of the remainder of the provision to the party or circumstance, the application of the provision to other parties or circumstances and the application of the remainder of this Agreement shall not be affected. Each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.
8. **Counterparts; Electronic Copies.** This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same Agreement. This Agreement may be executed and delivered by facsimile or email/pdf. The parties agree to accept a digital/electronic image of this Agreement as executed, as a true and correct original and admissible as best evidence for the purposes of State law, Federal Rule of Evidence 1002, and the like statutes and regulations.
9. **Further Action.** The parties hereto shall, at any time from time to time, after the date hereof, upon request of any other party hereto, do, execute, acknowledge and deliver or cause to be done, executed, acknowledged and delivered, all such further acts, assignments, transfers, agreements assurances and powers of attorney as may be reasonably required to carry out the transactions herein contemplated.



10. **Agreement Drafted by TIMOTHY B. GAVIGAN, PLLC.** Each party hereby acknowledges that TIMOTHY B. GAVIGAN, PLLC prepared this Agreement on behalf of and in the course of its representation of the Borrower and that each party: (i) has been advised that a conflict may exist between its interest and those of the other parties; (ii) has been advised by TIMOTHY B. GAVIGAN, PLLC of the opportunity to seek the advice of independent counsel; and (iii) has had the opportunity to seek the advice of independent counsel.

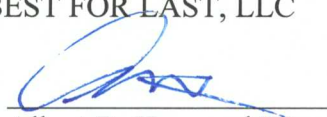
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IN WITNESS WHEREOF, the parties have executed and delivered this Agreement effective as of date set forth above.

BORROWER:

THE BEST FOR LAST, LLC

By: 

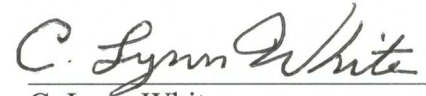
Name: Albert R. Heyward III

Title: Manager

LENDER:

WHITE INTERESTS LIMITED PARTNERSHIP

By: Commercial Real Estate Counsel, LLC,
General Partner

By: 

Name: C. Lynn White

Title: Manager

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
Spring Valley Interests, LLC	)	Case No.: 2019-CP-40-6914
	)	
Plaintiff,	)	ANSWER AND COUNTERCLAIMS
	)	
v.	)	
	)	
The Best for Last, LLC,	)	
	)	
Defendant.	)	

Defendant The Best for Last, LLC ("TBFL"), by and through its undersigned counsel, answers Plaintiff Spring Valley Interests, LLC's ("Plaintiff's") Complaint in the above-captioned action as follows:

FOR A FIRST DEFENSE

1. TBFL denies each and every allegation of Plaintiff's Complaint, including Plaintiff's Prayer for Relief, not specifically admitted, qualified or explained herein.

2. TBFL admits the allegations contained in Paragraphs 1 and 2 of Plaintiff's Complaint.

3. The allegations contained in Paragraph 3 of Plaintiff's Complaint state a legal conclusion that requires no response from TBFL. However, TBFL does not contest jurisdiction or venue in this matter.

4. Answering the allegations contained in Paragraph 4 of Plaintiff's Complaint, TBFL is informed and believes the Legal Description speaks for itself and denies any allegations inconsistent therewith.

5. Answering the allegations contained in Paragraphs 5, 6, and 7 of Plaintiff's Complaint, TBFL is informed and believes the Loan Agreement speaks for itself and denies any allegations inconsistent therewith.

6. TBFL admits the allegations contained in Paragraphs 8 and 9 of Plaintiff's Complaint.

7. Answering the allegations contained in Paragraph 10 of Plaintiff's Complaint, TBFL is informed and believes the Loan Agreement speaks for itself and denies any allegations inconsistent therewith.

8. TBFL admits the allegations contained in Paragraphs 11 and 12 of Plaintiff's Complaint.

9. Answering the allegations contained in Paragraph 13 of Plaintiff's Complaint, TBFL hereby realleges and incorporates herein by reference the preceding allegations of its Answer.

10. TBFL admits the allegations contained in Paragraphs 14 of Plaintiff's Complaint.

11. TBFL denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 15 of Plaintiff's Complaint.

12. TBFL denies the allegations contained in Paragraphs 16, 17 and 18 of Plaintiff's Complaint.

13. The allegations contained in Paragraphs 19 and 20 of Plaintiff's Complaint state legal conclusions that require no response from TBFL. To the extent a response is required, the allegations are denied.

14. TBFL denies the allegations contained in Paragraph 21 of Plaintiff's Complaint as stated, but TBFL admits that Plaintiff's predecessor in interest delivered the sum of Eight Hundred Thousand and No/100 (\$800,000.00) to TBFL as called for in the Loan Agreement.

15. TBFL denies the allegations contained in Paragraph 22 of Plaintiff's Complaint.

16. The allegations contained in Paragraph 23 of Plaintiff's Complaint state a legal conclusion that requires no response from TBFL. To the extent a response is required, the allegations are denied.

17. The allegations contained in Paragraph 24 of Plaintiff's Complaint require no response from TBFL. To the extent a response is required, the allegations are denied.

18. Answering the allegations contained in Paragraph 25 of Plaintiff's Complaint, TBFL is informed and believes the Loan Agreement speaks for itself and denies any allegations inconsistent therewith.

19. TBFL denies the allegations contained in Paragraph 26 of Plaintiff's Complaint.

20. Answering the allegations contained in Paragraph 27 of Plaintiff's Complaint, TBFL hereby realleges and incorporates herein by reference the preceding allegations of its Answer.

21. TBFL denies the allegations contained in Paragraph 28 of Plaintiff's Complaint.

FOR A SECOND DEFENSE

22. Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action and should be dismissed pursuant to Rule 12(b)(6), SCRCP.

FOR A THIRD DEFENSE

23. Plaintiff has failed to comply with the terms of the contract it seeks to enforce and has committed a prior material breach of the same; therefore, Plaintiff is barred from recovery under the contract.

FOR A FOURTH DEFENSE

24. Plaintiff has failed to act in good faith with respect to the transaction at issue to the prejudice of TBFL.

25. Plaintiff's claim for specific performance is barred by the doctrine of unclean hands and the principles of equity.

FOR A FIFTH DEFENSE

26. Plaintiff's claims are barred by the doctrines of estoppel, waiver, and laches.

FOR A SIXTH DEFENSE

27. TBFL hereby gives notice it intends to rely upon such other defenses that may become available or appear during the course of discovery and thus reserves their right to amend their Answer to assert any such defenses.

FOR AN EIGHTH DEFENSE AND FIRST COUNTERCLAIM
(Specific Performance)

28. TBFL hereby realleges and reincorporates herein by reference the preceding allegations of its Answer.

29. On May 3, 2017, TBFL and White Interests Limited Partnership (WILP) executed a Loan Agreement wherein WILP agreed to loan TBFL the amount of Eight Hundred Thousand and 00/100 Dollars (\$800,000.00) to acquire real property located in Columbia, South Carolina at 9005 Two Notch Road, 237 Rabon Road, and 241 Rabon Road (the "Property").

30. The loan set forth in the Loan Agreement is evidenced by a promissory note (the "Note") from TBFL to WILP and is secured by a second mortgage lien on the Property in favor of WILP (the "Mortgage"). A copy of the Mortgage is attached hereto as Exhibit 1 and incorporated herein by reference.

31. The Note provides that TBFL "shall have the right at any time or from time to time prepay this Note in whole or in part." A copy of the Note is attached hereto as Exhibit 2 and incorporated herein by reference.

32. Upon information and belief, WILP subsequently conveyed its interest in the Note, Mortgage, and Loan Agreement to Plaintiff.

33. By letter dated November 27, 2019, TBFL requested a payoff from Plaintiff for the full amount necessary to satisfy the outstanding Note and Mortgage.

34. Plaintiff refused to accept TBFL's tender of a payoff.

35. Plaintiff's refusal to accept a payoff as required by the Note and to release and satisfy the Mortgage constitutes a breach of the loan documents.

36. TBFL has been damaged by Plaintiff's refusal to accept a payoff and lacks an adequate remedy at law for Plaintiff's breach.

37. TBFL remains willing and able to tender the complete repayment of the outstanding balance of the loan to Plaintiff, and under the circumstances of the case, it would be just and equitable for the Court to issue an order directing Plaintiff to perform its obligations under the loan documents to accept TBFL's tender of a payoff of the Note and to release and satisfy the Mortgage.

FOR A NINTH DEFENSE AND SECOND COUNTERCLAIM
(Declaratory Judgment)

38. TBFL hereby realleges and reincorporates herein by reference the preceding allegations of its Answer.

39. Section 2 of the Loan Agreement provides:

Lender's Purchase Option. I[n] consideration for making the Loan, the Borrower hereby grants to Lender the perpetual option to purchase a 74.425% undivided co-tenancy interest in the Property (the "**Purchase Option**") for a purchase price of Eight Hundred Thousand and 00/100 Dollars (the "**Purchase Price**"). The Purchase Option shall be exercised at the Lender's sole discretion by delivery of a written notice no later than thirty (30) days before the intended closing. The Purchase Price shall be paid in cash or immediately available funds at the Closing. The Lender shall hold

take [sic] title to the co-tenancy interest subject to (i) no mortgages other than the Borrower's then outstanding first lien mortgage, and (ii) a mutually acceptable co-tenancy agreement. The Purchase Option is freely assignable by the Lender.

40. The Purchase Option reserves to the Lender a "freely assignable," "perpetual option" to purchase the Property at a price of Eight Hundred Thousand and 00/100 (\$800,000.00) Dollars.

41. The Purchase Option does not specify a time in which it can be terminated and effectively creates a non-vested property interest that could be exercised by any holder at any future date regardless of who owns the Property.

42. TBFL seeks a declaration pursuant to the South Carolina Declaratory Judgment Act, S.C. Code Ann. § 15-53-10, *et seq.* (Rev. 2005), that the Purchase Option is void on the basis that it violates the common law and Uniform Statutory Rule Against Perpetuities.

FOR A TENTH DEFENSE AND THIRD COUNTERCLAIM
(Equitable Estoppel)

43. TBFL hereby realleges and reincorporates herein by reference the preceding allegations of its Answer.

44. Should the Court refuse to direct specific performance of the loan payoff and/or find the Purchase Option enforceable, TBFL is informed and believes Plaintiff should be equitably estopped from exercising the Purchase Option.

45. On or about August 16, 2019, TBFL secured a financing commitment for \$3,100,000.00 from C-III Commercial Mortgage (the "Refinance Lender") for the purpose of refinancing the various debts encumbering the Property (the "Refinance") and delivered a non-refundable application fee of \$35,000 to the Refinance Lender.

46. On August 21, 2019, Plaintiff notified TBFL of its intention to exercise the Purchase Option.

47. While TBFL continued to pursue the Refinance, TBFL and Plaintiff thereafter entered into negotiations for a “mutually acceptable co-tenancy agreement,” as required by Section 2 of the Loan Agreement (the “Co-Tenancy Agreement”), the conclusion of such negotiations being a condition precedent to the closing of the Refinance.

48. TBFL and Plaintiff ultimately negotiated an amendment to the Loan Agreement, the Co-Tenancy Agreement, and other related documents and instruments including, but not limited to, the form of deed (collectively, the “Closing Documents”) pursuant to which the loan was to be satisfied through the conveyance of a 70% co-tenancy interest in the Property in favor of Plaintiff and a cash payment from Plaintiff to TBFL of approximately \$141,000 (the “Cash Payment”).

49. In reliance on Plaintiff’s prior representations regarding the loan being satisfied by the conveyance of a co-tenancy interest, the Cash Payment, and Plaintiff’s mortgage lien on the property thereafter being released, TBFL executed the Closing Documents, as prepared by Plaintiff’s counsel, on September 27, 2019 and, through its own counsel, tendered the executed Closing Documents to counsel for Plaintiff.

50. Counsel for Plaintiff instructed TBFL’s counsel to hold the original Closing Documents for recordation simultaneous with the documents and instruments to be executed and recorded by TBFL in connection with the Refinance.

51. Further relying on Plaintiff’s prior representations, TBFL thereafter pursued the Refinance with an intended closing date of October 2, 2019 such that it would not forfeit the non-refundable application fee of \$35,000 to the Refinance Lender.

52. Beginning on September 30, 2019 and continuing until October 1, 2019, Plaintiff attempted to demand changes to, renegotiate, and unilaterally modify the terms and conditions of the Closing Documents.

53. On the morning of October 1, 2019, the day prior to the scheduled closing of the Refinance, TBFL, in reliance on Plaintiff's assurance that it would proceed with the transaction contemplated by the Closing Documents, agreed to one or more of Plaintiff's additional demands so that the Refinance could close and it would not forfeit the non-refundable application fee of \$35,000 to the Refinance Lender.

54. Later on October 1, 2019, the day prior to the scheduled closing of the Refinance, Plaintiff unilaterally and without proper justification refused to enter into the Closing Documents despite prior assurances from Plaintiff to the contrary, with TBFL thereby forfeiting the non-refundable application fee of \$35,000 to the Refinance Lender.

55. Plaintiff's failure to comply with the terms of the Purchase Option provision and enter into a mutually acceptable co-tenancy agreement and other Closing Documents with TBFL negates Plaintiff's ability to now and/or again exercise the Purchase Option, and Plaintiff should be equitably estopped from exercising the Purchase Option.

FOR AN ELEVENTH DEFENSE AND FOURTH COUNTERCLAIM
(Breach of Contract)

56. TBFL hereby realleges and reincorporates herein by reference the preceding allegations of its Answer.

57. The Closing Documents represent a valid and binding contract between TBFL and Plaintiff.

58. TBFL carried out its obligations under the Closing Documents by negotiating and agreeing to a mutually acceptable co-tenancy agreement with Plaintiff.

59. On September 27, 2019, TBFL attempted to consummate the transaction contemplated in the Closing Documents by tendering the executed Co-Tenancy Agreement and deed representing the 70% co-tenancy interest in the Property to Plaintiff.

60. Plaintiff unjustifiably repudiated TBFL's tender of the Closing Documents and refused to follow through with the closing as set forth above.

61. Plaintiff's failure to comply with the terms of the Closing Documents and enter into the Co-Tenancy Agreement and other Closing Documents with TBFL constitutes a breach of the same.

62. As a direct consequence of Plaintiff's breach, TBFL was forced to forfeit the non-refundable \$35,000.00 application fee paid to the Refinance Lender.

WHEREFORE, having fully answered the allegations of Plaintiff's Complaint, TBFL prays:

- a. That Plaintiff's Complaint be dismissed;
- b. For the taxable costs of this action;
- c. For an Order directing Plaintiff to accept TBFL's tender of a payoff for the complete satisfaction of the Note and Mortgage;
- d. For a determination that the Purchase Option is void;
- e. Alternatively, for a determination that Plaintiff is equitably estopped from any further attempt to exercise the Purchase Option;
- f. For consequential damages flowing from Plaintiff's breach of the Closing Documents; and
- g. For such other and further relief as this Court may deem just and proper.

Respectfully submitted,

s/ Kirby D. Shealy III

Kirby D. Shealy III

ADAMS AND REESE LLP

P.O. Box 2285

Columbia, South Carolina 29202

Telephone: (803) 254-4190

Fax: (803) 779-4749

kirby.shealy@arlaw.com

*Attorneys for Defendant The Best For Last,
LLC*

January 17, 2020.



Exhibit 2

Book 2209-1341

2017034010 05/09/2017 09:24:18:477

Mortgage

Fee: \$16.00

County Tax: \$0.00

State Tax: \$0.00



2017034010

John T. Hopkins II

Richland County R.O.D.

Prepared by and mail after recording to:

Timothy B. Gavigan, PLLC
10700 Sikes Pl., Suite 375
Charlotte, North Carolina 28277

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

MORTGAGE OF REAL ESTATE

THIS MORTGAGE OF REAL ESTATE (this "**Mortgage**") is made this 3rd day of May, 2017, by and between **THE BEST FOR LAST, LLC**, a South Carolina limited liability company (the "**Mortgagor**"), whose address is P.O. Box 6926, Columbia, SC 29260, and **WHITE INTERESTS LIMITED PARTNERSHIP**, a North Carolina limited partnership (the "**Mortgagee**"), whose address is 3925 Ayrshire Place, Charlotte, NC 28210.

WHEREAS, the Mortgagor is well and truly indebted to the Mortgagee as evidenced by Mortgagor's promissory note (the "**Note**") dated May 3, 2017, the terms of which are incorporated herein by reference, in the sum of Eight Hundred Thousand and 00/100 Dollars (\$800,000.00), said principal to be repaid in accordance with the terms of said Note;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS that Mortgagor, in consideration of the Indebtedness herein recited, and in order to secure payment thereof, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, irrevocably grants and conveys to Mortgagee and Mortgagee's successors and assigns, all of Mortgagor's right, title, and interest in and to the real property located in the County of Richland, State of South Carolina, described in Exhibit "A" attached hereto and incorporated herein by reference, together with all the buildings, improvements, appurtenances, easements, rights of way and privileges thereunto belonging, whether now existing or hereafter constructed, including all plumbing, heating, lighting, electrical and air conditioning equipment, fixtures, and any and all equipment or fixtures now or hereafter attached, connected or fitted thereto in any manner, or used in connection therewith, and all rents, issues, and profits which may arise or be had therefrom (all of which shall be referred to herein as the "**Property**"),

TO HAVE AND TO HOLD unto Mortgagee, Mortgagee's successors and assigns, forever.

And Mortgagor does hereby bind Mortgagor's successors, and assigns, to procure or to execute any further necessary assurances of title to the said Property, and also to warrant

and forever defend all and singular the said Property unto the said Mortgagee, Mortgagee's successors and assigns, from and against Mortgagor and Mortgagor's heirs, successors, personal representatives, or assigns, and all persons lawfully claiming or to claim the same or any part of the interest thereof,

TO SECURE to Mortgagee the following: (a) the repayment of the Indebtedness evidenced by the Note, together with all renewals, modifications, and extensions of said Indebtedness; (b) the payment of all other sums advanced in accordance herewith to protect the security of this Mortgage together with interest and charges thereon; (c) the performance of the covenants and agreements herein contained; (d) the repayment of any future advances made by Mortgagee pursuant to Paragraph 16 below ("Future Advances"), together with interest thereon. All of the above shall be hereinafter referred to collectively as the "Indebtedness."

Mortgagor further covenants and agrees as follows:

1. **WARRANTIES.** Mortgagor covenants with Mortgagee that Mortgagor is lawfully seized of fee simple title to the Property and warrants that Mortgagor has the absolute right to grant and convey the Property in fee simple without the joinder or consent of any other person, partnership, corporation or legal entity whatsoever; that title to the Property is marketable and unencumbered except for the current year's taxes; and that Mortgagor will warrant and defend generally the title to the Property against the lawful claims and demands of all persons unto the Mortgagee, Mortgagee's successors and assigns, forever.
2. **PAYMENT OF PRINCIPAL AND INTEREST.** Mortgagor shall promptly pay or cause to be paid when due all principal and interest due on the Indebtedness evidenced by the Note, including any late charges provided in the Note, and the principal and interest due on any other obligations secured by this Mortgage. Mortgagor shall also pay or cause to be paid when due any other Indebtedness secured by a lien on the Property or on any part of it.
3. **TAXES, INSURANCE AND OTHER CHARGES.** Mortgagor shall pay or cause to be paid all taxes, assessments, insurance premiums, and other charges, fines and impositions attributable to the Property by making payments, when due, directly to the person entitled to collect such payments. Mortgagor shall promptly furnish to Mortgagee all notices of the amount due under this Paragraph and receipts evidencing the timely payment of all such amounts.
4. **PRESERVATION AND MAINTENANCE OF PROPERTY.** Mortgagor shall keep the Property in good repair and shall not commit waste or permit impairment or deterioration of the Property. Upon default of Mortgagor in the performance of the obligation imposed hereunder, Mortgagor expressly grants to Mortgagee the right to enter upon the Property immediately and as often as Mortgagee desires in order to prevent or cure any such default by Mortgagor. Any amounts disbursed by Mortgagee pursuant to this Paragraph, with interest thereon at the highest lawful rate, shall become additional Indebtedness secured by this Mortgage.



5. **PROCEEDS FROM JUDICIAL SALE.** Without limitations, the lien of this Mortgage shall extend to the interest of Mortgagor in the proceeds from any judicial sale of the Property. The officer or other person in charge of any such sale or foreclosure is hereby directed to pay such excess proceeds to the holder of this Indebtedness to the extent necessary to retire the Indebtedness. Such person is hereby authorized, given a power of attorney, and directed to endorse any checks representing proceeds of sale as requested by the holder of the Indebtedness, pursuant to the provisions of this Paragraph.
6. **PROTECTION OF MORTGAGEE'S SECURITY.** If Mortgagor fails to perform all the covenants and agreements contained in this Mortgage, if a default occurs with respect to a prior lien, or if any action or proceeding is commenced which materially affects Mortgagee's interest in the Property, including, but not limited to, eminent domain proceedings, insolvency proceedings, building and housing code enforcement proceedings, arrangements or proceedings involving a bankrupt or decedent, or the enforcement of any prior lien against the Property, then Mortgagee at Mortgagee's option may make such appearances, disburse such sums and take such action as Mortgagee deems necessary to protect its interest hereunder, including, without limitation, disbursements for reasonable attorney's fees, repairs to the Property, curing defaults under prior liens and removal of liens. Any amounts disbursed by Mortgagee pursuant to this Paragraph shall become additional Indebtedness secured by this Mortgage. Such amounts shall be payable upon notice from Mortgagee, and shall bear interest from the date of disbursement at the highest lawful rate. Nothing contained in this Paragraph shall require Mortgagee to incur any expense or to take any action hereunder.
7. **FORBEARANCE BY MORTGAGEE NOT A WAIVER.** Forbearance by Mortgagee in exercising any right or remedy hereunder, or any related right or remedy otherwise afforded by law, shall not be a waiver of or preclude the subsequent exercise of any such right or remedy. The receipt by Mortgagee of any past due installments under the Note or any other late payments of the Indebtedness shall not deprive Mortgagee of the right to accelerate the maturity of the Indebtedness or of any other right of enforcement existing pursuant to the terms of this instrument. The procurement of insurance or the payment of taxes or other liens or charges by Mortgagee shall not be a waiver of Mortgagee's right to accelerate the maturity of the Indebtedness because of default hereunder.
8. **MORTGAGOR NOT RELEASED.** If Mortgagee agrees for the benefit of any debtor to extend the time for payments or to modify the amortization of the Indebtedness, or any part thereof, Mortgagee's action shall not release in any manner the continuing liability of Mortgagor or any other person on the Indebtedness. Mortgagor shall have no right to require Mortgagee to initiate proceedings against any obligor on the Indebtedness, to refuse to extend the time for payment by such person, or to refuse otherwise to modify the amortization of the Indebtedness.
9. **REMEDIES CUMULATIVE.** Every right and remedy provided in this Mortgage is distinct from and cumulative to every other right or remedy under this Mortgage or



afforded by law or equity. Every such right and remedy may be exercised concurrently, independently or successively.

10. SUCCESSORS AND ASSIGNS BOUND; JOINT AND SEVERAL LIABILITY;

CAPTIONS. The covenants and agreements herein contained and the rights arising hereunder shall inure to the benefit of the respective successors and assigns of Mortgagee and shall be binding upon the respective successors and assigns of Mortgagor. All covenants and agreements shall be joint and several.

11. CAPTIONS. The captions and headings of the Paragraphs of this Mortgage are for convenience only and are not to be used to interpret or define the provisions of this Mortgage. The words "Mortgagor" and "Mortgagee", whenever used herein, shall include all individuals, corporations (and if a corporation, its officers, employees, agents or attorneys), and any and all other persons or entities, and the respective heirs, personal representatives, successors and assigns of the parties hereto, and all those holding under either of them. The pronouns used herein shall include, when appropriate, either gender and both singular and plural. The word "Notes" shall also include one or more notes and the grammatical construction of sentences shall conform thereto.

12. NOTICE. Unless otherwise required by applicable law, any notice to Mortgagor provided for in this Mortgage shall be given by mailing such notice by certified mail, return receipt requested, addressed to Mortgagor's address stated herein or to such other address as Mortgagor may designate by notice. Any notice to Mortgagee shall be given by certified mail, return receipt requested, to Mortgagee's address stated herein or to such other address as Mortgagee may designate by notice. Any notice provided for in this Mortgage shall be deemed to have been given when sent in the manner designated herein.

13. SEVERABILITY. In the event that any provision or clause of this Mortgage or the Notes conflicts with any applicable law, the other provisions of this Mortgage and the Notes shall be given effect as fully as possible without the conflicting provision, and to this end the provisions of the Mortgage and the Notes are declared to be severable.

14. TRANSFER OF THE PROPERTY WITHOUT MORTGAGEE'S CONSENT.

Except for sales of timber from time to time, if all or any part of the Property or any legal or equitable interest therein is voluntarily or involuntarily sold, conveyed in trust, encumbered or otherwise transferred by any means, instrument or device whatsoever (including but not limited to any deed, lease, mortgage, deed of trust, assignment, option or contract), without Mortgagee's prior written consent, Mortgagee may, at its option, declare the Indebtedness to be immediately due and payable.

15. NECESSITY OF WRITING. The terms of this Mortgage may be modified in whole or in part only by a written instrument signed by Mortgagor and Mortgagee, and recorded in the Office of the Clerk of Court or Register of Mesne Conveyances in



the County in which the Mortgage is recorded. Any oral agreement to modify this instrument shall be void and of no force and effect.

16. FUTURE ADVANCES. If Mortgagee should agree in the future to loan additional monies to Mortgagor, this Mortgage will be modified to include such funds and interest thereon as though it was a part of the original note secured hereby.

17. DEFAULT; ACCELERATION; REMEDIES. If Mortgagor or Borrower (a) shall pay the Indebtedness when due, according to its terms, (b) shall pay promptly all taxes, assessments, and other charges against the Property when due, (c) shall maintain repairs, (d) shall keep the Property insured as provided herein, (e) shall pay any and all other sums when due, as herein provided, and (f) shall otherwise perform all of the covenants and conditions contained herein, then this mortgage conveyance shall be of no further force or effect. Otherwise, this Mortgage conveyance shall remain in full force and effect, and, at the option of the lawful owner and holder of the Indebtedness, all remaining unpaid Indebtedness and all installments thereof, shall be due and payable at once, without notice, upon any of the following events of default:

- a. Failure to pay any Notes and/or Indebtedness when due according to its terms and as required herein;
- b. Breach of any covenants or agreement contained in this Mortgage, and not related to payment of the Indebtedness, which breach is not cured within ten (10) days after Mortgagee has given Mortgagor notice of such breach;
- c. The voluntary or involuntary sale or other conveyance of the Property, or any portion thereof, or of any legal or equitable interest therein, including the transfer of any equity interest in the Borrower without the prior written consent of Mortgagee, as required hereinabove;
- d. Default under any loan documents entered into with Mortgagee in connection with the Indebtedness;
- e. Default under any obligation secured by a lien prior in right to the lien of this Mortgage;
- f. The insolvency of Mortgagor or the commencement of legal or equitable proceedings under any bankruptcy, reorganization, insolvency, moratorium or other law or laws for the relief of Debtors, or any laws related to Debtors, whether commenced by Mortgagor or by some party, including, without limitation, the appointment of a receiver, trustee, or liquidator over Mortgage or any of the Mortgagor's property.

In the event of any default as set forth above, Mortgagee shall have the right to pursue all remedies available to it hereunder, at law, or in equity, and should legal proceedings be instituted for the collection of the debt secured hereby, then and in that event, the said Mortgagee, Mortgagee's heirs, successors or assigns, shall have

the right to have a Receiver appointed to collect the rents and profits of the above described Property, with power to forthwith lease out the said Property anew, if he should so elect, who, after deducting all charges and expenses attending such proceedings, in the execution of said trust as Receiver, shall apply the residue of said rents and profits toward the payment of the debt secured hereby.

And it is further agreed, by and between the said parties, that should legal proceedings be instituted for the foreclosure of this Mortgage, or for any purpose involving this Mortgage, or should the debt hereby secured be placed in the hands of an attorney at law for collection, by suit or otherwise, that all costs and expenses incurred by Mortgagee, Mortgagee's heirs, successors or assigns, including a reasonable attorney fee, shall thereupon become due and payable as a part of the debt secured hereby, and may be recovered and collected hereunder.

18. **SOUTH CAROLINA LAW.** The validity, construction and effect of this Mortgage, the Note secured hereby, and of any other writing executed in connection herewith shall be governed by the laws of the State of South Carolina.

19. **WAIVER OF APPRAISAL RIGHTS.** The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. **THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.**

[The next page is the signature page.]

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IN WITNESS WHEREOF, the Mortgagor has hereunto set Mortgagor's Hand and Seal the date first above written.

Jana Poley
Witness
[Signature]
Notary

THE BEST FOR LAST, LLC

By: [Signature]
Name: Albert R. Heyward III
Title: Manager

STATE OF North Carolina)
COUNTY OF Mecklenburg)

PROBATE

PERSONALLY APPEARED before me the undersigned witness who, being duly sworn, deposes and says that s/he saw the within-named ALBERT R. HEYWARD III sign, seal and, as their act and deed, deliver the within Mortgage of Real Estate, and that s/he with the Notary whose signature appears above, witnessed the execution thereof.

Jana Poley
Witness

SWORN to before me this
3 day of May, 2017
[Signature] (L.S.)
Notary Public for North Carolina
My Commission Expires: 7/30/2018

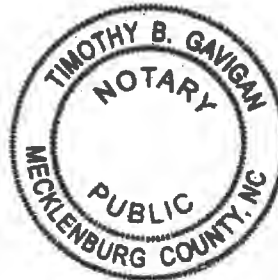


Exhibit A
Property**Parcel 1:**

(9005 Two Notch Road, Columbia, SC 29223)

All that certain, piece, parcel or tract of land, with the improvements thereon, situate, lying and being in the County of Richland, State of South Carolina, and being more particularly shown and delineated on plat of survey "Composite Drawing Prepared for Protective Life Insurance Company, Lawyers Title Insurance Corporation and Spring Valley Commons-Columbia LLC," prepared by United Design Services, Inc., dated December 11, 1996 and designated as DWG#: UB-179, having the following courses, measurements, and boundaries, to-wit: BEGINNING at an existing 1/2" iron pipe marking the Southeasterly corner of the property conveyed to Louise Paschal by deed recorded in the Register of Deeds Office for Richland County in Deed Book 778 at Page 285 and lying in the Westerly boundary of the right of way of Two Notch Road (US Hwy. No. 1) and run with the Southerly boundary of the Paschal Property (now or formerly) N 60°30'30" W 224.05' to a point; thence leaving the Southerly boundary of the Paschal Property (now or formerly) and run with a new line then following Twenty (20) courses and distances: (1) S 27°40'50" W 36.60' to a point; (2) N 62°19'10" W 27.00' to a point; (3) N 27°40'50" E 12.50' to a point; (4) N 62°19'10" W 89.90' to a point; (5) S 27°40'50" W 12.50' to a point; (6) N 62°19'10" W 32.80' to a point; (7) S 27°40'50" W 12.50' to a point; (8) N 62°19'10" W 19.50' to a point; (9) S 27°40'50" W 112.70' to a point; (10) S 35°38'47" E 5.60' to a point; (11) S 13°25' 13" W 26.81' to a point; (12) S 62°19'10" E 53.62' to a point; (13) S 27°40'50" W 6.89' to a point; (14) S 62°19'10" E 62.97' to a point; (15) N 27°40'50" E 6.89' to a point; (16) S 62°19' 10" E 30.00' to a point; (17) N 27°40'50" E 61.00' to a point; (18) S 62°19'10" E 36.00' to a point; (19) N 27°40'50" E 103.49' to a point; and (20) S 60°30'30" E 197.68' to a point on the Westerly margin of the right-of-way of Two Notch Road; thence along the Westerly margin of the right-of-way of Two Notch Road N 30°39'35" E 25.01' to the point and place of BEGINNING, containing 0.794 acre, more or less, and being the same parcel shown as "Parcel D" on Plat prepared for Spring Valley Commons - Columbia, LLC, by United Design Services, Inc., dated December 9, 1996, revised September 24, 1997, and recorded in the Office of the Register of Deeds for Richland County, South Carolina in Plat Book 57 at Page 599.

TOGETHER WITH the rights under those easements contained in that certain Declaration of Easements and Restrictive Covenants dated September 9, 1997, and recorded in the Office of the RMC for Richland County, South Carolina in Deed Book D1410, Page 70.

TOGETHER WITH rights contained in that certain Easement Agreement dated December 24, 2013, filed for record March 20, 2014, and recorded in Book R1933, Page 1529.

TMS#: 19903-05-05

Derivation: This being the same property conveyed to The Best For Last, LLC by deed of DWB Richland, LLC dated May 3, 2017 and recorded May 9, 2017 in Deed Book 2209 at Page 1314.

Parcel 2:

(241 Rabon Road, Columbia, SC 29223)

All that certain piece, parcel or lot of land, with improvements thereon, containing One (1) acre, more or less, situate, lying and being on the Southwestern side of Rabon Road, about Nine (9) miles Northeast of the City of Columbia, in the County of Richland, State of South Carolina, being shown and designated as Tract "B" on a plat surveyed for Lila V. Medlin, by Janes C. Covington, C.E., dated September 21, 1951, revised by Joseph Keels, Engineer and Surveyor, December 7, 1960, and recorded in the Office of the Register of Deeds for Richland County in Plat Book 17 at Page 16. This property is also shown on a plat prepared for Deborah H. Holcombe by Benjamin H. Whetstone, R.L.S., dated April 28, 1984, and recorded in Plat Book Z at Page 9051. This conveyance is made subject to all restrictions, easements, and conditions of record.

TMS#: 17115-01-08

Derivation: This being the same property conveyed to The Best For Last, LLC by deed of DWB Richland, LLC dated May 3, 2017 and recorded May 9, 2017 in Deed Book 2209 at Page 1314.

Parcel 3:

(237 Rabon Road, Columbia, SC 29223)

All that certain piece, parcel or tract of land, together with any improvements thereon, known as 237 Rabon Road, situate, lying and being in the County of Richland, State of South Carolina and being shown as containing approximately Two (2) acres on a plat prepared for Mrs. Lillie G. Medlin by James C. Covington, C.E., dated December 4, 1944 and recorded in the Office of the Register of Deeds for Richland County, South Carolina, in Plat Book "J" at Page 104; and being more particularly shown and delineated as a "Vacant Lot", containing One and Ninety Hundredths (1.90) acres on a plat prepared for Interprop, Inc., by Baxter Land Surveying Co., Inc., dated September 7, 2004, a copy of which was attached to the deed to the Grantor and is incorporated herein by reference; and having at the boundaries and measurements as shown on the last-mentioned plat, reference being craved thereto as often as necessary for a more complete and accurate legal description.

TMS#: 17115-01-09

Derivation: This being the same property conveyed to The Best For Last, LLC by deed of DWB Richland, LLC dated May 3, 2017 and recorded May 9, 2017 in Deed Book 2209 at Page 1314.

Exhibit 2

LOAN AGREEMENT

THIS LOAN AGREEMENT (the "**Agreement**") is made and effective as of the 3rd day of May, 2017 by and between THE BEST FOR LAST, LLC, a South Carolina limited liability company ("**Borrower**"), and WHITE INTERESTS LIMITED PARTNERSHIP, a North Carolina limited partnership ("**Lender**").

WHEREAS, Lender has agreed to loan to Borrower funds in order to assist Borrower to acquire certain real property located in Columbia, South Carolina, to wit: 9500 Two Notch Road, 237 Rabon Road and 241 Rabon Road (collectively, the "**Property**") in the original principal amount of Eight Hundred Thousand and 00/100 Dollars (\$800,000.00) (the "**Loan Amount**"), which is to be evidenced by a promissory note made by Borrower in favor of Lender of even date herewith (the "**Note**") and secured by a second lien Mortgage of even date herewith (the "**Collateral Agreement**"); and

WHEREAS, Borrower and Lender desire to memorialize the terms of the loan herein.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. **Loan to Borrower.** Lender shall loan to Borrower the Loan Amount which shall be repaid as stated in the Note. Borrower shall, on demand of Lender, reimburse Lender for all costs to enter into this Agreement and administer the loan provided for herein.
2. **Lender's Purchase Option.** In consideration for making the Loan, the Borrower hereby grants to Lender the perpetual option to purchase a 74.425% undivided co-tenancy interest in the Property (the "**Purchase Option**") for a purchase price of Eight Hundred Thousand and 00/100 Dollars (the "**Purchase Price**"). The Purchase Option shall be exercised at the Lender's sole option by delivery of written notice no later than thirty (30) days before the intended closing. The Purchase Price shall be paid in cash or immediately available funds at the Closing. The Lender shall hold take title to the co-tenancy interest subject to (i) no mortgages other than the Borrower's then outstanding first lien mortgage, and (ii) a mutually acceptable co-tenancy agreement. The Purchase Option is freely assignable by the Lender.
3. **Remedies.** Upon the breach of this Agreement, the Collateral Agreement and/or the Note, Lender may exercise any one or more of the following rights and remedies:
 - a. Exercise any right that the Lender may have under this Agreement, the Note and/or any of the above-stated agreements.
 - b. Incur reasonable expenses (including attorneys' fees and litigation costs) to exercise any remedy or right and recover such expenses from Borrower.
 - c. Exercise any other right or remedy that a Lender has under law or in equity.
4. **Notices.** All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given (except as may otherwise be specifically provided herein to the contrary) if delivered by hand and receipted for by the



party to whom said notice or other communication shall have been directed or mailed by certified or registered mail with postage prepaid or shipped and receipted by express courier service charges prepaid by shipper addressed as follows (or to such other address as may be designated by notice given pursuant hereto):

To Borrower:

The Best For Last, LLC
PO Box 6926
Columbia, SC 29260

To Lender:

White Interests Limited Partnership
3925 Ayrshire Pl.
Charlotte, NC 28210

5. **Applicable Law.** This Agreement shall be construed and interpreted under the internal laws of the State of South Carolina without giving effect to the conflict of laws rules thereof. Borrowers and Lender hereby submit to the personal and subject matter jurisdiction of the federal and state courts located in Columbia, South Carolina.
6. **Binding Effect.** All of the terms and provisions of this Agreement by or for the benefit of the parties shall be binding upon and inure to the benefit of their successors and permitted assigns. The rights and obligations provided by this Agreement shall not be assignable except by the express written agreement of Borrower and Lender. Except as expressly provided herein, nothing herein is intended to confer upon any person other than the parties and their successors, any rights or remedies or by reason of this Agreement.
7. **Severability.** If any provision of this Agreement or the application of any provision to any party or circumstance is adjudged invalid or unenforceable to any extent, the application of the remainder of the provision to the party or circumstance, the application of the provision to other parties or circumstances and the application of the remainder of this Agreement shall not be affected. Each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.
8. **Counterparts; Electronic Copies.** This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same Agreement. This Agreement may be executed and delivered by facsimile or email/pdf. The parties agree to accept a digital/electronic image of this Agreement as executed, as a true and correct original and admissible as best evidence for the purposes of State law, Federal Rule of Evidence 1002, and the like statutes and regulations.
9. **Further Action.** The parties hereto shall, at any time from time to time, after the date hereof, upon request of any other party hereto, do, execute, acknowledge and deliver or cause to be done, executed, acknowledged and delivered, all such further acts, assignments, transfers, agreements assurances and powers of attorney as may be reasonably required to carry out the transactions herein contemplated.



10. **Agreement Drafted by TIMOTHY B. GAVIGAN, PLLC.** Each party hereby acknowledges that TIMOTHY B. GAVIGAN, PLLC prepared this Agreement on behalf of and in the course of its representation of the Borrower and that each party: (i) has been advised that a conflict may exist between its interest and those of the other parties; (ii) has been advised by TIMOTHY B. GAVIGAN, PLLC of the opportunity to seek the advice of independent counsel; and (iii) has had the opportunity to seek the advice of independent counsel.

[The next page is the signature page.]



IN WITNESS WHEREOF, the parties have executed and delivered this Agreement effective as of date set forth above.

BORROWER:

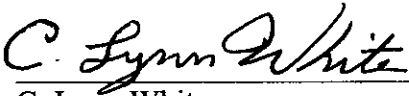
THE BEST FOR LAST, LLC

By: 
Name: Albert R. Heyward III
Title: Manager

LENDER:

WHITE INTERESTS LIMITED PARTNERSHIP

By: Commercial Real Estate Counsel, LLC,
General Partner

By: 
Name: C. Lynn White
Title: Manager

**SATISFACTION: THE DEBT
EVIDENCED BY THIS NOTE HAS
BEEN SATISFIED IN FULL THIS ____**
day of _____, _____.
Signed: _____

PROMISSORY NOTE

\$800,000.00

May 3, 2017

FOR VALUE RECEIVED, the undersigned THE BEST FOR LAST, LLC (the "**Maker**"), hereby promises to pay to the order of WHITE INTERESTS LIMITED PARTNERSHIP (the "**Payee**"), the principal sum of Eight Hundred Thousand and 00/100 Dollars (\$800,000.00) pursuant to the terms and conditions set forth herein.

PAYMENT OF PRINCIPAL AND INTEREST. The principal amount of this Promissory Note (the "**Note**") and any accrued but unpaid interest shall be due and payable as follows:

- (a) Interest shall be due and payable in the same manner as set forth in 9.1.1.1. of the Maker's Operating Agreement as if the Maker were an Initial Member (as defined in such Operating Agreement) and the Interest was the Maker's Preferred Return (as defined in such Operating Agreement); and
- (b) The principal shall be paid in full upon the first to occur of the following: (i) at the closing of the exercise of the Purchase Option provided for in the Loan Agreement of even date herewith between the Maker and the Payee, (ii) the refinance of the Company's mortgage debt, and (iii) the sale of the Company's real property.

All payments under this Note shall be applied first to accrued but unpaid interest, and next to outstanding principal.

INTEREST RATE. This Note shall bear interest, at the rate of eight percent (8%) per annum.

PREPAYMENT. The Maker shall have the right at any time or from time to time to prepay this Note in whole or in part. Partial prepayments shall be applied to installments due in reverse order of their maturity.

REMEDIES. No delay or omission on part of the holder of this Note in exercising any right hereunder shall operate as a waiver of any such right or of any other right of such holder, nor shall any delay, omission or waiver on any one occasion be deemed a bar to or waiver of the same or any other right on any future occasion. The rights and remedies of the Payee shall be cumulative and may be pursued singly, successively, or together, in the sole discretion of the Payee.

EVENTS OF ACCELERATION. The occurrence of any of the following shall constitute an "**Event of Acceleration**" by Maker under this Note:

COPY

- (a) Maker's failure to pay any part of the principal or interest as and when due under this Note within five (5) days from the due date;
- (b) Maker's default under the terms of any instrument securing this Note; and/or
- (c) Maker's becoming insolvent and not paying its debts as they become due.

ACCELERATION. Upon the occurrence of an Event of Acceleration under this Note, and in addition to any other rights and remedies that Payee may have, Payee shall have the right, at its sole and exclusive option, to declare this Note immediately due and payable.

WAIVERS BY MAKER. All parties to this Note including Maker and any sureties, endorsers, and guarantors hereby waive protest, presentment, notice of dishonor, and notice of acceleration of maturity and agree to continue to remain bound for the payment of principal, interest and all other sums due under this Note notwithstanding any change or changes by way of release, surrender, exchange, modification or substitution of any security for this Note or by way of any extension or extensions of time for the payment of principal and interest; and all such parties waive all and every kind of notice of such change or changes and agree that the same may be made without notice or consent of any of them.

EXPENSES. In the event any payment under this Note is not paid when due, the Maker agrees to pay, in addition to the principal and interest hereunder, reasonable attorneys', plus all other reasonable expenses incurred by Payee in exercising any of its rights and remedies upon default.

SECURITY. The payments under this Note are secured by:

- (a) A second (2nd) lien Mortgage of Real Estate of even date herewith given by Maker, as mortgagor, for the benefit of Payee, as mortgagee.

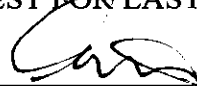
GOVERNING LAW. THIS NOTE SHALL BE GOVERNED BY, AND CONSTRUED AND INTERPRETED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF SOUTH CAROLINA, WITHOUT REGARD TO CONFLICTS OF LAW PRINCIPLES.

SUCCESSORS. All of the foregoing is the promise of Maker and shall bind Maker and Maker's successors, heirs and assigns; provided, however, that Maker may not assign any of its rights or delegate any of its obligations hereunder without the prior written consent of the holder of this Note.

[The next page is the signature page.]

IN WITNESS WHEREOF, Maker has duly authorized and executed this Note under seal as of the day and year first above written.

THE BEST FOR LAST, LLC

By:  (SEAL)

Name: Albert R. Heyward III

Title: Manager



STATE OF SOUTH CAROLINA
RICHLAND COUNTY
SPRING VALLEY INTERESTS, LLC,
Plaintiff,
vs.
THE BEST FOR LAST, LLC,
Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
2019-CP-4006914

**PLAINTIFF'S REPLY TO
DEFENDANT'S COUNTERCLAIM**

REPLY TO FIRST COUNTERCLAIM

NOW COMES the Plaintiff and Replying to the Defendant's Counterclaim says and alleges as follows:

28. The Plaintiff realleges and incorporates by reference the allegations of its Complaint.
29. Admitted.
30. The allegations of this paragraph are admitted, except it admitted that a copy of the Mortgage is attached as Exhibit 2.
31. It is admitted that the terms of the Note speak for themselves. It is admitted that the Loan Agreement and the Note are attached to the Counterclaim as Exhibit 1. Except as admitted, the remaining allegations of this paragraph are denied.
32. Admitted.
33. It is admitted that after the Plaintiff gave notice of its intention to exercise the Option to Purchase and in an effort to interfere with the exercise of the option, the Defendant did request a payoff of the outstanding amount owed under the Note and it is further admitted that the Plaintiff conveyed its intention to have the amounts owed under the Note credited to its purchase price as allowed under the Option to Purchase. Except as admitted, the remaining allegations of this paragraph are denied.



34. It is admitted that after the Plaintiff gave notice of its intention to exercise the Option to Purchase and in an effort to interfere with the exercise of the option, the Defendant did request a payoff of the outstanding amount owed under the Note and it is further admitted that the Plaintiff conveyed its intention to have the amounts owed under the Note credited to its purchase price as allowed under the Option to Purchase. Except as admitted, the remaining allegations of this paragraph are denied.
35. It is denied that the Plaintiff's response to the request for a payoff constituted a breach of the loan documents and therefore the allegations of this paragraph are denied.
36. It is denied that the Plaintiff's response to the request for a payoff constituted a breach of the loan documents and therefore the allegations of this paragraph are denied.
37. It is admitted that after the Plaintiff gave notice of its intention to exercise the Option to Purchase and in an effort to interfere with the exercise of the option, the Defendant did request a payoff of the outstanding amount owed under the Note and it is further admitted that the Plaintiff conveyed its intention to have the amounts owed under the Note credited to its purchase price as allowed under the Option to Purchase and the Plaintiff is still willing and able to apply said loan amount to the purchase price so that would not be just and equitable for the Court to issue an order as requested by the Defendant. Except as admitted, the remaining allegations of this paragraph are denied.

REPLY TO SECOND COUNTERCLAIM

38. The allegations of the preceding paragraphs are incorporated herein by reference as if more fully set forth.
39. Admitted.
40. It is admitted that the terms of the Purchase Option speak for themselves, subject to the laws of the State of South Carolina. Except as admitted, the remaining allegations of this paragraph are denied.
41. It is admitted that the terms of the Purchase Option speak for themselves, subject to the laws of the State of South Carolina. Except as admitted, the remaining allegations of this paragraph are denied.

42. It is denied that the Purchase Option violates the Rule Against Perpetuities or the common law of South Carolina and therefore, it is denied that the Defendant is entitled to the declaration it seeks.

REPLY TO THIRD COUNTERCLAIM

43. The Plaintiff realleges and incorporates by reference the preceding allegations as if more fully set forth herein.
44. Denied.
45. It is admitted that the Defendant sought financing from C-III Commercial Mortgage. Except as admitted, the remaining allegations of this paragraph are denied.
46. Admitted.
47. It is admitted that the Defendant refused to comply and honor the Exercise of the Option by the Plaintiff and in an effort to compromise the disagreement with the Defendant, the Plaintiff entered into negotiations with the Defendant as part of those negotiations, the parties discussed a con-tenancy agreement but, the Defendant never agreed to a Co-Tenancy Agreement as mention by Section 2 of the Loan Agreement and it is further denied that the conclusion of such negotiations was required to exercise the Option to Purchase or was a condition precedent to the closing of the Refinance. Except as admitted, the remaining allegations of this paragraph are denied.
48. Denied.
49. Denied.
50. Denied.
51. The Plaintiff is without sufficient information to form an opinion or belief as to the veracity of this allegation, therefore said allegations are denied.
52. It is admitted that after the Defendant breached the Loan Agreement by refusing to honor the Plaintiff's exercise of the Purchase Option, the Plaintiff and Defendant continued negotiations to resolve the dispute which included negotiations regarding a co-tenancy agreement acceptable to both parties and the Closing Documents but it is specifically denied that the parties reached a meeting of the minds on such topics and therefore the allegations of this paragraph are denied.

53. Denied.

54. Denied.

55. Denied.

REPLY TO FOURTH COUNTERCLAIM

56. The Plaintiff realleges and incorporates by reference the preceding allegations as if more fully set forth herein.

57. Denied.

58. Denied.

59. Denied.

60. Denied.

61. Denied.

62. Denied.

FIRST FURTHER REPLY AND DEFENSE – WAIVER

The Defendant's Tenth Defense and Third Counterclaim should be dismissed because the Defendant was specifically warned by counsel to not proceed with its loan application or move forward with the loan until it resolved any anticipated issues between it and the Plaintiff (or its principal) and thus the Defendant waived any claim based on a failure to resolve the issues arising from the Plaintiff's exercise of its Purchase Option and the Defendant's failure to honor the exercise.

SECOND FURTHER REPLY AND DEFENSE – EXCLUSION FROM APPLICATION OF RULE AGAINST PERPETUITIES

SC Code 27-6-20 specifically excepts the Purchase Agreement from the operation of the Uniform Statutory Rule Against Perpetuities and said provision is expressly asserted as a defense to any claims by the Defendant that the Purchase Agreement is not enforceable based on the Uniform Statutory Rule Against Perpetuities.

THIRD FURTHER REPLY AND DEFENSE – COMMON LAW RULE AGAINST PERPETUITIES SUPERSEDED BY RULE AGAINST PERPETUITIES

SC Code 27-6-80 expressly states that the Uniform Statutory Rule Against Perpetuities supersedes the common law rule against perpetuities and said provision is expressly asserted as a defense to any claims by the Defendant that the Purchase Agreement is not enforceable based on the common law rule against perpetuities.

FOURTH FURTHER REPLY AND DEFENSE – ESTOPPEL

The Defendant should be estopped from trying to assert its claim for the specific performance of the payoff of the Note (its Eight Defense and First Counterclaim and Tenth Defense Third Counterclaim) because the Defendant asserted this demand only after it had received the Notice of Exercise of Option to Purchase from the Plaintiff and made the effort to pay off the Note in an effort to defeat the Plaintiff's Right to exercise its option.

FIFTH FURTHER REPLY AND DEFENSE – UNCLEAN HANDS

After the Plaintiff gave notice of its exercise of the Purchase Option, the Defendant repudiated and breached the agreement and tried to force different terms on the Plaintiff. Subsequently, when the Defendant's efforts to force such terms on the Plaintiff, which included a reduction in its ownership interest from 74% to 70% failed, and after the Plaintiff continued to request that the Defendant honor his exercise of the Purchase Option, the Defendant attempted to pay off the loan but said request would have been in violation of the Loan Agreement and Purchase Option was made for the sole purpose of trying to defeat the Plaintiff's rights under the Purchase Option. Therefore, the Defendant's Eight Defense and First Counterclaim and Tenth Defense Third Counterclaim should be barred based on the doctrine of unclean hands.

SIXTH FURTHER REPLY AND DEFENSE – DEFENDANT'S EFFORT TO PAY OFF NOTE WOULD BE IN BREACH OF LOAN AGREEMENT

The provisions of the Loan Agreement between the parties specifically stated that upon the exercise of the Option to Purchase, the Plaintiff would take its title to the 74.425% undivided co-tenancy interest subject to no mortgages other than the Borrowers' then outstanding first lien mortgage and the Plaintiff is informed and believes that the Defendant planned on paying the Note with funds from a loan which was conditioned on placing a mortgage on the Property which would have been in violation of this provision of the Loan Agreement.

SEVENTH FURTHER REPLY AND DEFENSE- NO CONTRACTUAL REQUIREMENT FOR CO-TENANCY AGREEMENT AS CONDITION PRECEDENT

Section 2 of the Loan Agreement did not require that the parties enter into a mutually acceptable co-tenancy agreement as a condition precedent to the Plaintiff's exercise of its Purchase Agreement rather the Loan Agreement simply provided that a mutually acceptable co-tenancy agreement was an allowable lien or condition on the title to the co-tenancy interest being conveyed and this lack of a condition precedent is asserted in bar of the Defendants Tenth Defense and Third Counterclaim.

EIGHT FURTHER REPLY AND DEFENSE – NO MEETING OF THE MINDS

After the Plaintiff gave notice of the exercise of its Option to Purchase, the Defendant refused to honor the notice and requested exercise of the option and asserted claims which included unfounded demands for the incorporation of additional terms into the Loan Agreement which materially changed the terms of the Agreement.

This action by the Defendant was a breach of the Loan Agreement.

Subsequently, the parties entered into negotiations in an effort to resolve said dispute, and these negotiations included a proposed transfer of a 70% undivided interest in the Property, among other proposed terms.

The Plaintiff and the Defendant did not reach an enforceable agreement as a result of these negotiations because there was no meeting of the minds on the terms of an agreement or contract. Therefore, the Defendant's Third and Fourth Counterclaim are barred as no enforceable agreement existed between the parties.

NINTH FURTHER REPLY AND DEFENSE- NO CONSIDERATION

No consideration existed to support the contract the Defendant alleges in its Tenth Defense and Third Counterclaim and Eleventh Defense and Fourth Counterclaim and therefore these defenses should be rejected by the Court and these counterclaims should be dismissed.

TENTH FURTHER REPLY AND DEFENSE – STATUTE OF FRAUDS

No written document, executed by the Plaintiff exists, to support the agreement alleged by the Defendant to have been created as a result of these negotiations described in the Defendant's Third and Fourth Counterclaims, therefore these counterclaims are barred by the Statute of Frauds, S.C. Code §39-5-140.

ELEVENTH FURTHER REPLY AND DEFENSE- BREACH OF CONTRACT

After the Plaintiff gave notice of its exercise of the Purchase Option, the Defendant refused to honor the exercise and demanded that the Plaintiff agree to different terms which

conduct constituted a breach of the agreement between the parties. The breach of contract by the Defendant is expressly pled in bar of the Defendant's Counterclaims.

TWELFTH FURTHER REPLY AND DEFENSE- ALTERNATIVE CLAIM FOR SPECIFIC PERFORMANCE OF CONTRACT ALLEGED BY DEFENDANT

In the alternative that the Court determines that the Plaintiff and Defendant did reach an enforceable agreement as alleged by the Defendant to support its Tenth Defense and Third Counterclaim and Eleventh Defense and Fourth Counterclaim, then in said event, the Plaintiff requests the Court to specifically enforce said agreement.

WHEREFORE, the Plaintiff, having responded to the Defendant's Counterclaim, prays the Court as follows:

1. That the Defendant's counterclaims be dismissed with prejudice.
2. That the Plaintiff have and receive the relief it originally sought in its Complaint.
3. That the costs of this action be taxed to the Defendant.
4. That the Plaintiff have and receive a jury trial on all issues of fact alleged herein.
5. For such other and further relief as the Court deems just and proper.

Dated: March 17, 2020

RAYNOR LAW FIRM, PLLC

s/Kenneth R. Raynor

Kenneth R. Raynor

Attorney for Plaintiff

1822 Cleveland Avenue

Charlotte, NC 28203

Phone 704.413.3400; Fax 704.731.0774

ken@raynorlawfirm.com

N.C. Bar No.: 10488

S.C. Bar No.: 11654

S.C. Fed. ID No.: 6769

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing was served on the date below as follows:



RECEIVED

Jun 13 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2019-CP-4006914

SPRING VALLEY INTERESTS, LLC,
Appellant,

v.

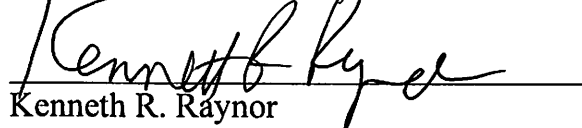
THE BEST FOR LAST, LLC,
Respondent.

NOTICE OF APPEAL

Spring Valley Interests, LLC appeals the Order Granting Defendant's Motion for Partial Summary Judgment of the Honorable Jocelyn Newman dated May 18, 2022. Appellant received notice of entry of this order on May 18, 2022.

Dated: June 13, 2022

RAYNOR LAW FIRM, PLLC



Kenneth R. Raynor

Attorney for Spring Valley Interests, LLC

1822 Cleveland Avenue

Charlotte, NC 28203

Phone 704.413.3400; Fax 704.731.0774

ken@raynorlawfirm.com

N.C. Bar No.: 10488

S.C. Bar No.: 11654

S.C. Fed. ID No.: 6769

Other Counsel of Record:

Kirby Shealy, III
Adams and Reese, LLP
1501 Main Street, 5th Floor
Columbia, SC 29201
Attorney for Respondent
Phone: 803.254.4190

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	Civil Action No. 2019-CP-40-06914
Spring Valley Interests, LLC,	)	
	)	
	)	DEFENDANT THE BEST FOR LAST,
	)	LLC'S MOTION FOR PARTIAL
v.	)	SUMMARY JUDGMENT AND
	)	MEMORANDUM IN SUPPORT
The Best for Last, LLC,	)	
	)	
	)	
Defendant.	)	
_____	)	

TO: KENNETH RAYNOR, ATTORNEY FOR PLAINTIFF:

PLEASE TAKE NOTICE that Defendant The Best for Last, LLC ("TBFL"), by and through its undersigned attorneys, will move ten (10) days hence, or as soon thereafter as counsel may be heard, for an order pursuant to Rule 56, of the *South Carolina Rules of Civil Procedure*, granting it partial summary judgment as to certain causes of action set forth in the pleadings in this case on the grounds that there exists no genuine issue of material fact and TBFL is entitled to judgment in its favor as a matter of law.

This motion is based upon the pleadings that have been filed in this action, related documents exchanged in discovery, Plaintiff's deposition testimony (the transcript of which is attached as **Exhibit A**), the deposition of Timothy Gavigan (the transcript of which is attached as **Exhibit B**), this memorandum of law, and such oral argument as may be heard by the Court.

BACKGROUND

This case arises out of a loan agreement between TBFL and Plaintiff through which Plaintiff loaned TBFL money to assist in TBFL's acquisition of real property. (See Plaintiff's Complaint at ¶¶ 1-10; TBFL's Counterclaim at ¶¶ 29, 30). In consideration for the loan, TBFL granted Plaintiff a freely assignable and perpetual option to purchase a co-tenancy interest in the

property. (*Id.*) At the center of this dispute is the enforceability of the purchase option contained in the loan agreement and, to the extent the option was ever enforceable, whether Plaintiff has now waived the right to exercise the purchase option.

UNDISPUTED FACTS

TBFL is a South Carolina limited liability company composed of Albert Heyward as the sole manager, Albert's son Rhett Heyward, Jim Cantey and Robert Jenkins. (Ex. B at 15:5-19). TBFL was formed in May of 2017 for the purpose of owning, developing, and managing certain self-storage properties in Columbia, South Carolina (the "Property"). (Ex. A at 24:1-6). In order to obtain additional financing for the purchase of the Property, Albert Heyward enlisted the help of Lynn White, a frequent business associate, and Tim Gavigan, Mr. White's long-time transactional attorney. (Ex. A at 15:20-16:1; Ex. B at 16:1-16).

On May 3, 2017, TBFL and Mr. White, through his entity White Interests Limited Partnership ("Plaintiff"), executed a written loan agreement (the "Loan Agreement") wherein Plaintiff agreed to loan TBFL the sum of \$800,000.00 to assist TBFL in acquiring the Property.¹ Ex. B at 18:1-9. In consideration for the loan, the Loan Agreement granted Plaintiff a freely assignable and perpetual option to purchase a 74.425% undivided co-tenancy interest in the Property (the "Purchase Option"). (Ex. B at 21:13-19). The Purchase Option was exercisable at Plaintiff's sole discretion, had no time limitations, and provided that Plaintiff would take title to the co-tenancy interest subject to (i) no mortgages other than TBFL's then outstanding first mortgage, and (ii) "a mutually acceptable co-tenancy agreement." *Id.* Specifically, Section 2 of the Loan Agreement provides:

Lender's Purchase Option. I[n] consideration for making the Loan, the Borrower hereby grants to Lender the perpetual option to purchase a 74.425% undivided co-

¹ White Interests Limited Partnership assigned its right to exercise the Purchase Option to Plaintiff Spring Valley Interests, LLC. Ex. B at 32:23-33:2. Both entities are solely owned by Mr. White.

tenancy interest in the Property (the **“Purchase Option”**) for a purchase price of Eight Hundred Thousand and 00/100 Dollars (the **“Purchase Price”**). The Purchase Option shall be exercised at the Lender’s sole discretion by delivery of a written notice no later than thirty (30) days before the intended closing. The Purchase Price shall be paid in cash or immediately available funds at the Closing. The Lender shall hold take [sic] title to the co-tenancy interest subject to (i) no mortgages other than the Borrower’s then outstanding first lien mortgage, and (ii) a mutually acceptable co-tenancy agreement. The Purchase Option is freely assignable by the Lender.

(Ex. B at 21:13-19).

The loan set forth in the Loan Agreement is evidenced by a promissory note (the **“Note”**) from TBFL to Plaintiff and is secured by a second mortgage lien on the Property in favor of Plaintiff (the **“Mortgage”**). The Note provides that the principal on the loan shall be paid in full upon the first to occur of the following: **“(i) at the closing of the exercise of the Purchase Option provided for in the Loan Agreement of even date herewith between [TBFL] and [Plaintiff], (ii) the refinance of [TBFL’s] mortgage debt, and (iii) the sale of [TBFL’s] real property.”** The Note also stated that TBFL **“shall have the right at any time or from time to time prepay this Note in whole or in part.”** (Ex. B at 26:21-27:2). The Loan Agreement, Note, and Mortgage were drafted by Mr. Gavigan as counsel for Plaintiff. (Ex. B at 25:5-26:5).

On August 16, 2019, TBFL paid a \$35,000 non-refundable application fee to secure a financing commitment of \$3,100,000.00 from C-III Commercial Mortgage (the **“Refinance Lender”**) in order to refinance the first mortgage lien encumbering the Property (the **“Refinance”**). (Ex. B at 28:21-25). On August 21, 2019, upon learning that TBFL had tendered the \$35,000 non-refundable application fee towards the Refinance, Plaintiff sent TBFL a letter entitled **“Notice of Exercise of Option to Purchase.”** (Ex. A at 39:2-11). The letter notified TBFL that Plaintiff was exercising his option to purchase a 74.425% undivided co-tenancy interest in the Property, and that the closing was **“to occur at the earlier of (i) twenty-nine (29) days from the date of this Notice,**

or (ii) one (1) day immediately preceding a refinance of [TBFL's] existing outstanding mortgage indebtedness.” (Ex. A at 41:4-5).

With a tentative closing date for the Refinance set in late September, the parties began negotiating the “mutually acceptable co-tenancy agreement” required by the Purchase Option. On September 12, 2019, Plaintiff sent TBFL an email containing a first draft of the transaction documents. (Ex. B at 32:5-15). Thereafter, between September 13, 2019 and September 18, 2019, the parties’ attorneys worked together on the essential terms through which Plaintiff would take an interest in the Property. On September 19, 2019, Plaintiff and TBFL met at the office of Plaintiff’s attorney to discuss the settlement of the Purchase Option and to resolve a number of issues that had arisen during the negotiations. (Ex. B at 38:24-39:10). The meeting was successful, with the parties reaching an agreement for Plaintiff’s mortgage to be satisfied through the conveyance of a 70% co-tenancy interest in the Property in favor of Plaintiff and a cash payment from Plaintiff to TBFL of approximately \$141,000. (Ex. A at 53:7-16; Ex. B at 40:1-13). Following the meeting, Plaintiff’s attorney wrote to TBFL’s attorney that: “I’m pleased to advise that we were able to get Lynn and Albert to come to an agreement on moving forward.” (Ex. B at 39:7-14).

On September 25, 2019, TBFL’s attorney wrote to Plaintiff’s attorney in response to the original September 12, 2019 email: “The conveyance documents you prepared for the option exercise are acceptable once corrected for the agreed 70% interest. If you can get those cleaned up and remove the watermarks, I will get Albert and friends scheduled for execution on Thursday or Friday.” (Ex. B at 45:19-46:8). On September 26, 2019, Plaintiff’s attorney responded with the revised conveyance documents, which included a co-tenancy agreement, amendments to the Loan Agreement, and other documents, including the form of deed (the “Closing Documents”), all of

which reflected the agreement reached by the parties at the September 19, 2019 meeting. (Ex. B at 40:1-13, Ex. B at 47:13-23). However, Plaintiff's counsel included an additional request that TBFL reimburse Plaintiff for "additional legal fees incurred to defend [TBFL's] challenge of the option." (Ex. B at 47:5-9).

In reliance on Plaintiff's representations regarding the loan being satisfied by the conveyance of a co-tenancy interest, the cash payment, and Plaintiff's mortgage lien on the Property thereafter being released, TBFL executed the Closing Documents on Friday, September 27, 2019 and, through its own counsel, tendered the executed Closing Documents to Plaintiff and offered to overnight ship the original deed. (Ex. B at 50:8-15). Plaintiff likewise signed and executed the Closing Documents, after which his attorney advised TBFL's attorney, "I'll send you [Plaintiff's] signature pages on Monday." (Ex. B at 51:10-52:10). Through phone conversations, Plaintiff's attorney requested that TBFL hold the original deed to the Property for recordation simultaneous with the documents and instruments to be executed and recorded by TBFL in connection with the Refinance, which was scheduled to occur on October 2, 2019. (Ex. B at 50:5-25).

The following day, September 28, 2019, Plaintiff's attorney wrote to TBFL's attorney again asking about reimbursement for \$6,500 in legal fees. (Ex. B at 47:12-13). TBFL's attorney responded the following Monday, September 30, 2019, stating his client's position was that each party should be responsible for its own fees related to the conversion of the Purchase Option to a co-tenancy agreement. (Ex. B at 54:3-21). After additional discussion on the issue, TBFL ultimately acceded to Plaintiff's demand to pay a portion of Plaintiff's fees in order to ensure that the closing could be consummated. (Ex. B at 55: 2-13). However, in response to TBFL's agreement to reimburse Plaintiff \$6,500 in fees, Plaintiff's counsel wrote that his client believed the initial refusal of the reimbursement was too late and "opened the deal up for retrade." (Ex. B

at 55:13-20). Plaintiff thereafter attempted to unilaterally insert terms into the Closing Documents, including reneging on the sharing of the success fee and other terms related to the Refinance. (Ex. B at 56:18-57:25).

Plaintiff initiated this action on December 11, 2019, by filing of a summons and complaint asserting causes of action against TBFL for reformation of a mortgage and specific performance. Plaintiff contends the August 21, 2019 notice to TBFL was a valid exercise of the Purchase Option and seeks specific performance as to the transfer of the 74.425% undivided co-tenancy interest in the Property. Compl. at ¶¶ 13-36. TBFL filed a timely answer and asserted counterclaims against Plaintiff for (1) specific performance, (2) a declaratory judgment, (3) equitable estoppel, and (4) breach of contract.

LEGAL STANDARD

“The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a factfinder.” *Singleton v. Sherer*, 377 S.C. 185, 197-98, 659 S.E.2d 196, 203 (Ct. App. 2008). Summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRPC. “In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party.” *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010).

“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.” *Singleton*, 377 S.C. at 197-98, 659 S.E.2d at

203. Instead, “[t]he nonmoving party must come forward with specific facts showing there is a genuine issue for trial.” *Id.* at 198, 659 S.E.2d at 203. “It is not sufficient for one to create an inference that is not reasonable or an issue of fact that is not genuine.” *Evans v. Stewart*, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct. App. 2006). “Although summary judgment is a drastic remedy which should be cautiously invoked, where a verdict is not reasonably possible under the facts presented, summary judgment is proper.” *Id.*

ARGUMENT

TBFL’s second counterclaim seeks a declaratory judgment, pursuant to S.C. Code Ann. § 15-53-10, *et seq.*, that the Purchase Option violates the common law and/or Uniform Statutory Rule Against Perpetuities (“USRAP”) and is therefore unenforceable. Alternatively, to the extent the Purchase Option is deemed enforceable, TBFL is informed and believes Plaintiff has waived his rights under the Purchase Option by having already exercised the option and then failing to close the transaction negotiated by the parties. In either case, there are no genuine issues of material fact and TBFL is entitled to judgment as a matter of law.

A. The Purchase Option is Unenforceable Under the Common Law and Uniform Statutory Rule Against Perpetuities.

As set forth above, TBFL granted Plaintiff a “freely assignable,” “perpetual option to purchase a 74.425% undivided co-tenancy interest in the Property for a purchase price of Eight Hundred Thousand and 00/100 Dollars.” At common law, the rule against perpetuities limited the remote vesting of contingent interests by providing that any interest is valid only if it is certain to vest, if ever, within the lifetime of a person at creation of the interest plus twenty-one years. *Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 369-70, 628 S.E.2d 902, 917 (Ct. App. 2006). According to the Uniform Statutory Rule Against Perpetuities (USRAP), a nonvested property interest is invalid unless “(1) when the interest is created, it is

certain to vest or terminate no later than twenty-one years after the death of an individual then alive; or (2) the interest either vests or terminates within ninety years after its creation.” S.C. Code Ann. § 27-6-20 (1991).

The Purchase Option constitutes a contingent, nonvested preemptive right to purchase an interest in the Property at any point in the future. *Love v. Love*, 208 S.C. 363, 374, 38 S.E.2d 231, 236 (1946) (“It is not enough that a contingent event may happen, or even that it will probably happen, within the limits of the Rule against Perpetuities; if it can possibly happen beyond those limits, an interest conditioned on it is too remote.”). The Purchase Option is similarly not conditioned on an event certain to occur in the future. *Webb v. Reames*, 326 S.C. 444, 446, 485 S.E.2d 384, 385 (Ct. App. 1997) (holding that a contingent, nonvested interest not conditioned on an event certain to occur violated the rule against perpetuities). Because the Purchase Option is one that might not vest either within a life in being at the time of the creation of the interest or until later than twenty-one years thereafter, the Purchase Option violates the common law rule against perpetuities and is therefore void from its creation.

To the extent there is any argument as to whether the Purchase Option is otherwise “saved” by the existence of an exception contained in the USRAP, TBFL maintains that the USRAP does not entirely displace the common law rule against perpetuities. The USRAP provides that certain “nondonative” transfers are excluded from operation of the USRAP. *See* S.C. Code Ann. § 27-6-50(1) (stating that the USRAP “does not apply to . . . a nonvested property interest . . . arising out of a nondonative transfer”). The implication of this exception is that commercial transactions, such as the one entered into between TBFL and Plaintiff, can never be subject to the rule against perpetuities. However, no South Carolina court has interpreted the USRAP to mean that the rule against perpetuities is no longer applicable to commercial transactions. Furthermore, this reading

is inconsistent with both the plain language of the statute as well as the State's longstanding policy "that nonvested property interests tend to restrain the free alienability of property and interfere with its beneficial use." *Queen's Grant II Horizontal Prop. Regime*, 368 S.C. at 369, 628 S.E.2d at 917 (citing 61 Am. Jur. 2d *Perpetuities and Restraints on Alienation* § 6 (2005)).

The common law rule against perpetuities does not contain any general exclusion for "nondonative" transfers, and in that regard the common law rule differs from the USRAP. Section 27-6-80 of the South Carolina Code provides that the USRAP "supersedes" the common law rule against perpetuities. The word "supersede" means "to annul, make void, or repeal by taking the place of[.]" *Black's Law Dictionary* 1479 (8th ed. 2004). On the other hand, the word "abolish" means "to annul, eliminate or destroy[.]" *Id.* Had the General Assembly wanted to "abolish" the entirety of the common law rule against perpetuities by passing the USRAP, it would have done so. Instead, the specific use of the word "supersede" only means that the USRAP replaced the common law rule with the statutory provisions regarding the types of transfers that the USRAP applies to, but left the common law in place as to the types of transfers to which it does not apply. As the USRAP explicitly does not apply to nondonative transfers, there is nothing to "supersede," or with which to replace the common law.

While no South Carolina case has squarely decided the issue of whether the adoption of the USRAP means that commercial transactions can never violate the rule against perpetuities, our Supreme Court in *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.* had the occasion to apply the USRAP to a right of first refusal in a commercial transaction, but it expressly declined to do so. 368 S.C. at 370, 628 S.E.2d at 917 ("We decline to resolve this issue because there is no justiciable controversy surrounding the right of first refusal provision."). Courts in other jurisdictions have likewise expressly declined to read such a broad prohibition into the

USRAP, instead finding that the common law rule against perpetuities remains in effect for certain nondonative, commercial transfers. *See New Bar Partnership v. Martin*, 221 N.C. App. 302, 729 S.E.2d 675 (2012) (“Thus, we conclude that the USRAP did not replace the common law [rule against perpetuities] as to preemptive rights arising from nondonative transfers such as that at issue here”); *Byke Construction Co. v. Miller*, 140 Ariz. 57, 58-60, 680 P.2d 193, 194-96 (App. 1984) (refusing to find that the USRAP displaces the common law rule with respect to all nondonative, commercial transactions); S.C. Code Ann. § 27-6-70 (“This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states that have enacted it.”).

Finally, the South Carolina Court of Appeals in *Webb v. Reames* – a case that is particularly noteworthy because it was decided after the enactment of the USRAP – held that a contingent, nonvested, perpetual option to purchase real estate at a price of \$64 violated the rule against perpetuities. 326 S.C. 444, 446, 485 S.E.2d 384, 385 (Ct. App. 1997) (“The right represented an attempt by the grantor Blease to reserve to the [sic] himself his heirs, and assigns a perpetual option to purchase the property described at the price of \$64. Because the right or interest was one that might not vest either within a life in being at the time of the creation of the interest or until later than 21 years thereafter, the interest violates the rule against perpetuities and is therefore void.”).

Here, TBFL’s second counterclaim seeks a declaration that the Purchase Option, which on its face reserves to Plaintiff a “freely assignable,” “perpetual option” to purchase the Property at a fixed price, is void on the basis that it violates the rule against perpetuities. The USRAP does not apply to the non-donative transfer contemplated in this case, which, in this case, entitles Plaintiff to a declaratory judgment finding that the Purchase Option violates the rule against perpetuities and is therefore void.

B. Alternatively, if the Purchase Option is deemed enforceable, Plaintiff has waived the right to exercise the option.

Plaintiff's failure to close the Purchase Option and proceed with the purchase of an interest in the Property under the terms agreed to and after executing the Closing Documents constitutes a waiver of Plaintiff's right to enforce the option. Option contracts generally have three main characteristics: (1) they are unilateral contracts where the optionor, for a valuable consideration, grants the optionee a right to make a contract of purchase but does not bind the optionee to do so; (2) they are continuing offers to sell, irrevocable during the option period; and (3) the transition of an option into a contract of purchase and sale can only be effected by an unqualified and unconditional acceptance of the offer in accordance with the terms and within the time specified in the option contract. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 108, 531 S.E.2d 287, 292 (2000). It is well settled in South Carolina that option contracts are strictly construed in favor of the optionor and against the optionee. *See Cotter v. James L. Tapp Co.*, 267 S.C. 647, 230 S.E.2d 715 (1976). "Furthermore, if the option requires performance in a certain manner, time is of the essence and exact compliance with the terms of the option [is] required." *Id.* at 340 S.C. at 108, 531 S.E.2d at 292.

In the instant case, Plaintiff exercised the Purchase Option on August 21, 2019, by tendering the notice letter to TBFL. After weeks of extensive negotiations, the parties reached an agreement as to the fundamental terms of the transaction and, as of September 30, 2019, two days prior to the October 2, 2019 closing of the Refinance, had both executed their respective counterparts of the Closing Documents. (Ex. B at 51:17-52:12). TBFL ultimately acceded to Plaintiff's final demand for \$6,500 in attorney's fees in to ensure the deal was finalized prior to the Refinance closing. At that moment, the parties had reached an agreement as to the fundamental

terms by which Plaintiff would take an interest in the Property, and TBFL had expressed a clear intent and willingness to move forward and to take any action necessary to finalize the deal. (Ex. B at 50:22-25).

Plaintiff's action for specific performance of the Purchase Option rests in equity. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107, 531 S.E.2d 287, 291 (2000). By exercising the option and then failing to close on the agreement reached by the parties, Plaintiff has abandoned any right to demand specific performance under the Purchase Option. *See S. Silica Min. & Mfg. Co. v. Hoefer*, 215 S.C. 480, 496, 56 S.E.2d 321, 327 (1949) ("A right once abandoned may not be revived without the consent of both parties."); *Faulkner v. Millar*, 319 S.C. 216, 221, 460 S.E.2d 378, 381 (1995). Accordingly, Plaintiff's forfeiture of his rights under the Purchase Option precludes Plaintiff's claim of specific performance. *Norton v. Matthews*, 249 S.C. 71, 152 S.E.2d 680 (1967) ("He who seeks equity must do equity.").

CONCLUSION

For the reasons set forth above, TBFL respectfully requests that this Court grant its motion for partial summary judgment as to both TBFL's claim for declaratory relief and Plaintiff's claim for specific performance.

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April 16, 2021.

STATE OF SOUTH CAROLINA
RICHLAND COUNTY
SPRING VALLEY INTERESTS, LLC,
Plaintiff,
vs.
THE BEST FOR LAST, LLC,
Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
2019-CP-4006914

**PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

NOW COMES the Plaintiff and moves the Court for an order granting summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure granting it the relief sought in the Complaint, specifically specific performance of the Purchase Option described in the Complaint, and dismissing the Defendant's Counterclaims on the grounds that there exists no genuine issue of material fact and the Plaintiff is entitled to such relief as a matter of law.

The Motion for Summary Judgment is based on the pleadings that have been filed in this action, the related documents exchanged in discovery, the depositions of the Plaintiff, the transcript of which has been filed with the Court by counsel for the Defendant, the deposition of Timothy Gavigan, the transcript of which has been filed with the Court by counsel for the Defendant, and the deposition of the Defendant, the transcript of which is being filed contemporaneously herewith as Exhibit A and Exhibit B, Plaintiff's Memorandum In Support of Motion for Summary Judgment and in Opposition to Defendant's Motion for Partial Summary Judgment, and such oral arguments as may be heard by the Court.

Dated: April 29, 2021

RAYNOR LAW FIRM, PLLC

s/Kenneth R. Raynor

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing was served on the date below as follows:

☒ By depositing a copy of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service addressed to the party/attorney or attorneys for said parties.

Kirby Shealy, III
Adams and Reese, LLP
1501 Main Street, 5th Floor
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Dated: April 29, 2021

s/Kenneth R. Raynor

Kenneth R. Raynor

RAYNOR LAW FIRM, PLLC

STATE OF SOUTH CAROLINA
RICHLAND COUNTY
SPRING VALLEY INTERESTS, LLC,
Plaintiff,
vs.
THE BEST FOR LAST, LLC,
Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
2019-CP-4006914

**PLAINTIFF'S MEMORANDUM IN
SUPPORT OF ITS MOTION TO FOR
SUMMARY JUDGMENT**

The issues in this case arise simply because the Defendant's principal, Albert Heywood simply tried to force the Plaintiff to accept a membership interest in The Best For Last in response to the Plaintiff's Notice of Exercise of the Purchase Option which clearly called for a transfer of a co-tenancy interest in the real property owned by The Best For Last. This action by the Defendant is what has led to this litigation. As explained below, the Defendant's actions constitute a breach of the Purchase Option which is not excused by any of the hosts of defenses and counterclaims the Defendant has tried to assert. These defenses and counterclaims should be rejected and the Court should enter summary judgment in favor of the Plaintiff ordering the Defendant to specifically comply with the Purchase Option.

FACTS

On May 3, 2017, the Defendant, The Best for Last, LLC ("TBFL") and White

Interest Limited Partnership (“WILP”) entered into a Loan Agreement wherein WILP agreed to loan the Defendant \$800,000 to buy property located in Columbia. (Para 29 Counterclaim.)

The loan set forth in the Loan Agreement was evidenced by a note and was secured by a second mortgage lien on the property.

WILP subsequently conveyed its interest in the Note, Mortgage, and Loan Agreement to the Plaintiff. (Para. 32 Counterclaim.)

Section 2 of the Loan Agreement granted the Lender the Option to Purchase the 74.425% undivided co-tenancy interest in the property. The language read as follows:

Lender's Purchase Option. In consideration for making the Loan, the Borrower hereby grants to Lender the perpetual option to purchase a 74.425% undivided co-tenancy interest in the Property (the "Purchase Option") for a purchase price of Eight Hundred Thousand and 00/100 Dollars (the "Purchase Price"). The Purchase Option shall be exercised at the Lender's sole option by delivery of written notice no later than thirty (30) days before the intended closing. The Purchase Price shall be paid in cash or immediately available funds at the Closing. The Lender shall hold take title to the co-tenancy interest subject to (i) no mortgages other than the Borrower's then outstanding first lien mortgage, and (ii) a mutually acceptable co-tenancy agreement. The Purchase Option is freely assignable by the Lender.

One of the issues in this case is whether the language in the Purchase Option highlighted above constituted a condition precedent to the exercise of the option that the parties would enter into “a mutually acceptable co-tenancy agreement.” Tim Gavigan, an attorney representing TBFL drafted the Loan Agreement. Mr. Gavigan testified that the Purchase Option does not include any language creating such a condition precedent, although he could have drafted such language if he desired. Gavigan testified that the cited

language was simply an acceptable exception to title just as the first lien mortgage was an acceptable exception. Gavigan P. 63, L. 18- P. 65, L.10.

On August 16, 2019, the Defendant applied for a financing commitment from C-III Mortgage, its Refinance Lender, for a loan in the amount of \$3,100,000 and delivered its \$35,000 non-refundable application fee to the Refinance Lender. Para. 45, Counterclaim. The purpose of the Refinance Loan was to refinance various debt on the Property. The loan was to be in the name of a sole borrower, TBFL. Albert Heywood, the TBFL manager who made the application did not make any effort to determine how the Purchase Option or an exercise would affect the closing of the loan. However, the exercise of the option, assuming TBFL honored it and conveyed the co-tenancy interest in the Property would have prevented TBFL from meeting the loan requirement of a single owner. Bethea, P. 8, L. 6-16.

TBFL's principal, Heyward, knew that Spring Valley's exercise of the Purchase Option could create a problem that would interfere with the completion of the loan and in fact submitted his paperwork on the option to his attorneys for review before he made the application for the loan. Heyward, P. 50, L. 1-12.

On August 21, 2019, the Plaintiff notified the Defendant of its intention to exercise the Purchase Option. (Para. 46, Counterclaim).

On September 27, 2019, the Defendant executed and delivered the Closing Documents to the Plaintiff. (Para 49, Counterclaim). The Plaintiff continued to demand changes or modifications to the terms of the Closing Documents. (Para. 52, Counterclaim).

On October 1, 2019, the Plaintiff refused to enter the Closing Documents. Para. 54.

Completing the sale and purchase of the co-tenancy interest should have been an easy transaction to complete.

However, The Best For Last objected to the exercise of the option and inexplicitly demanded that Spring Valley exercise the option by becoming a member of TBFL. Bethea, P. 14, L. 19. This demand was completely contrary to the language of the Purchase Option. The Purchase Option and or the Loan Agreement makes no reference to the Plaintiff becoming a member of TBFL as a result of the exercise of the option. Instead, the language of the Purchase Option clearly states that the option is “to purchase a 74.425% undivided co-tenancy interest in the Property...” The basis for the Defendant’s demand was that the Defendant, or its attorney, thought that the economics of the deal it had negotiated would be ridiculous unless it was folded into a membership interest, with the Plaintiff receiving a windfall and the Defendant receiving the corresponding detrimental consequences on the other side. Gavigan, P. 61, L. 12-16.

It is important to note that this demand for Spring Valley to be a member of the TBFL would translate into it receiving a 74.425% of 50% interest instead of 74.425% of 100%. Bethea, P. 22, L. 7.

This demand that the Plaintiff become a member in TBFL, instead of an owner of 74.425% co-tenancy interest in the Property caused the exercise of the option to fall apart. Gavigan P. 59, L. 10.

The parties attempted to resolve the dispute generated by TBFL’s response to the exercise of the option. The parties reached a general outline of a resolution wherein Spring

Valley would receive a 70% co-tenancy interest in an effort to resolve the dispute. Gavigan, P. 62, L. 10. As part of this general settlement, the parties expected to receive considerable funds from a refinance loan which would be disbursed as they agreed. The proposed disbursement of the funds was set forth in a spreadsheet. Gavigan, P. 62, 19- P. 63, L. 3. So, while there was a general agreement outline for a resolution of the dispute, the parties still needed to resolve the specifics of how the money would be disbursed to each party. The discussions of the disbursement of the funds included who was going to pay the attorney's fees and who was going to get reimbursed for attorneys' fees. Gavigan, P. 63, L. 4. The parties never got a complete agreement on the issue of who was going to be paying the attorneys' fees and how much. Gavigan, P. 63, L. 8.

The attorneys for the parties drafted various documents to reflect the general plan of settlement. As they did so, they continued negotiations regarding the specific details of how the loan proceeds would be distributed as was required for a final settlement. The attorney for TBFL eventually drafted a final version of the documents which would reflect the general agreement and delivered a copy of the same executed by his client to Gavigan, the attorney for Springs, conditioned on Spring Valley signing the same. These documents included a co-tenancy agreement, an amendment to the loan agreement, and various other documents typical of a real estate closing. Bethea, P. 27, L. 12. These negotiations bogged down by TBFL's demand that some of the loan proceeds be used to pay its attorney. This demand would result in a smaller amount of money going to Spring Valley. In response, Spring Valley demanded that loan proceeds be used to pay its expenses. TBFL rejected this demand. Then, later TBFL communicated that it was willing to pay said sums.

However, at that time, Springs responded by saying no and demanded that it receive the full 74.% co-tenancy interest as called for by the Loan Agreement. TBFL refused. And as a result, Spring Valley never delivered executed copies of the documents. Bethea, P. 26, L.24-P. 27, L. 6.

The Defendant never closed the refinance loan in its sole name as borrower, as it applied for the loan, although it was in communications with the lender until December 13, 2019 at which time it informed the lender that it would not move forward. Heyward, P. 62, L. 23 - P. 63, L.12.

Spring Valley filed the complaint in this action seeking specific performance of the Option.

ISSUE I: The Rule Against Perpetuities Does Not Bar the Enforcement of the Purchase Option.

In response, TBFL raised a host of defenses/counterclaims. In its Ninth Defense/ and Second Counterclaim, the Defendant seeks a declaratory judgment that the Purchase Option violates the common law and/or Uniform Statutory Rule Against Perpetuities(“USRAP”) and is therefore unenforceable. The Defendant’s Motion for Summary Judgment raises this issue as grounds for partial summary judgment.

The Defendant’s assertion of the USRAP simply ignores the plain language of Act which states that it does not apply to nondonative transactions.

The South Carolina Statutory Rule Against Perpetuities, SC Code §27-6-50, sets forth several exceptions to the Statutory Rule Against Perpetuities. SC Code §27-6-50 (1) provides one exception:

a nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of (i) a premarital or postmarital agreement, (ii) a separation or divorce settlement, (iii) a spouse's election, (iv) a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties, (v) a contract to make or not to revoke a will or trust, (vi) a contract to exercise or not to exercise a power of appointment, (vii) a transfer in satisfaction of a duty of support, or (viii) a reciprocal transfer;
(Emphasis Added)

It is obvious that a commercial transaction is a nondonative transfer and thus exempted from the operation of the Statutory Rule Against Perpetuities. It is equally obvious that a transaction in which a purchase option is conveyed as part of a loan agreement is a nondonative transfer so exempted. The Defendant offers some policy reasons in an attempt to avoid the application of this exemption to commercial transactions generally, and the Purchase Agreement, specifically. However, the Legislature rejected these policy considerations when it enacted the statutory act with the nondonative transfer exception.

No South Carolina Appellate Court has addressed the issue of whether the “nondonative” exception covers commercial transactions. Two courts have referenced the statutory rule as noted by the Defendant’s Memorandum, but neither applied the statutory rule. The Plaintiff’s assertion of the *Webb v Reames* 326 S.C. 444. 485 S.E.2d 384 (1997) is misplaced and misleading. The instrument in question in *Webb* was created in 1955, a date before the effective date of the Statutory Rule Against Perpetuities. So, the statutory rule would not apply as evidenced by the Court’s failure to even consider applying it to the issues in the case. Similarly, TBFL’s Memorandum refers to the case of *Queen's Grant v.*

Greenwood Development, 628 S.E.2d 902, 368 S.C. 342 (S.C. App. 2006). However, the court in *Queens*’ expressly stated that it did not address the issue on the grounds "... there is no justiciable controversy surrounding the right of first refusal provision." Thus, the Queens Court never made a decision regarding the Acts’ applicability to the right of first refusal involved.

However, every case the author below could find which dealt with the effect of the “nondonative transfer” exception to the uniform statutory act has held that the exemption frees commercial transactions from the operation of the uniform statutory act.

The exclusion found in this subsection of the model statute results in the exclusion of most nondonative transfers, i.e., commercial-type transactions, from the operation of the model act. *See, Shaver v. Clanton*, 31 Cal. Rptr. 2d 595, 26 Cal.App.4th 568 (Cal. App. 1994) holding that the Uniform Act changed California law by explicitly excluding such commercial transactions from coverage under the rule. The rule is now irrelevant to such transactions. *Id.*

As the *Shaver* court explained the rationale for the nondonative transfer exception:

Until the adoption of the Uniform Act, California common law applied the rule against perpetuities to commercial transactions. Accordingly, the rule was applied to such interests as options to renew, rights of first refusal, and commercial leases. 6 The Uniform Act changed California law by explicitly excluding such commercial transactions from coverage under the rule. 7 The rule is now irrelevant to such transactions: "It makes no sense to apply a rule based on family-oriented donative transfers to interests created by contract whose nature is determined by negotiations between the parties." (Rep., supra, at p. 2516.) "The rationale for this exclusion is that the rule against perpetuities is a wholly inappropriate instrument of social policy to use as a control over such arrangements. The period of the rule--a life in being plus 21 years--is not suitable for nondonative transfers...." (1991 Addition to Law

Revision Com. com., 54A West's Ann.Prob.Code § 21225 (1994 pocket supp.) p. 60; [hereafter Commission 1991 Addition].)

The Law Revision Commission Comment explains, "[S]ubdivision (a) [of Section 21225] is ... inconsistent with decisions holding the common law rule to be applicable to the following types of property interests or arrangements when created in a nondonative, commercial-type transaction..."

Shaver v. Clanton, 31 Cal.Rptr.2d 595, 26 Cal.App.4th 568 (Cal. App. 1994).

There are numerous cases in accord with *Shaver*, including the following: *Juliano & Sons Enterprises, Inc. v. Chevron, U.S.A., Inc.*, 593 A.2d 814, 250 N.J.Super. 148 (N.J. Super. App. Div. 1991) ("that nondonative commercial transactions are excluded from the Act..."), *Whiting Oil & Gas Corp. v. Atl. Richfield Co.*, 321 P.3d 500 (Colo. App. 2010) (the Act "as set forth in sections 15–11–1102 and 15–11–1102.5, does not apply to invalidate ... [a] nonvested property interest or a power of appointment arising out of a nondonative transfer." § 15–11–1105(1)(a), C.R.S.2009. This provision generally "limits the application of the rule against perpetuities to donative transfers of property, thereby freeing commercial transactions from the rule's arcane vesting requirements."...)

The purchase option was a "nondonative transfer" arising from the commercial transaction wherein the Plaintiff's predecessor loaned money to the Defendant. Therefore, by operation of the nondonative exception provision, the South Carolina Statutory Rule Against Perpetuities did not apply to the purchase option and would not be grounds for voiding the Purchase Option.

Abolishment of Common Law Rule Against Perpetuities

The South Carolina Statutory Rule Against Perpetuities expressly states that the Act supersedes the common law. SC Code §27-6-300. “Supersede” means “to annul, make void, or repeal by taking the place of[.]” *New Bar P'ship v. Martin*, 729 S.E.2d 675 (N.C. App. 2012) citing *Black's Law Dictionary* 1479 (8th ed.2004). But state courts have taken divergent approaches as to whether the superseding language in the Model Statutory Rule Against Perpetuities abolishes the common law rule entirely as opposed to only transactions not excluded from the statutory rule. Compare, *New Bar P'Ship, supra* with *Shaver, supra*. Similarly, see *Old Port Cove Holdings v. Condo. Ass'n*, 986 So.2d 1279 (Fla. 2008) (“We agree that this language reflects an intent to abrogate the common law rule. We disagree, however, that it reflects a clear intent to do so retroactively.”) TBFL’s Memorandum in Support of Its Motion for Partial Summary Judgment implies that the case of *Byke Const. Co., Inc. v Miller* 140 Ariz. 57, 680 P.2d 193 (1984) dealt with the issue of whether the uniform statutory rule abolished the common law. However, a careful reading of *Byke* shows that it was not applying the Uniform Statutory Rule at all and certainly was not addressing whether the adoption of the Uniform Act replaced the Arizona common law rule.

This issue of whether the common law rule survives the enactment of the uniform statutory rule has not been addressed directly by any South Carolina reported case.

However, the intent of the South Carolina Legislature in enacting this bill was to abolish the common law Rule Against Perpetuities as evidenced by the title of the bill which was:

CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO PROPERTY AND CONVEYANCES, BY ADDING CHAPTER 6 SO AS TO ABOLISH THE COMMON LAW RULE AGAINST PERPETUITIES AND REPLACE IT WITH A STATUTORY RULE AGAINST PERPETUITIES WHICH ADOPTS PROVISIONS WHICH PREVENT THE DEFEAT OF THE TRANSFEROR'S INTENT. A12, R26, H2093 1987.
(Emphasis Added).

The title of the bill states that the purpose of the bill is to add a chapter to the Code of Laws to abolish the Common Law Rule Against Perpetuities and Replace with a statutory rule against perpetuities. The legislative's intent of the Statutory Act can not be any clearer. Therefore, the common law would not apply to the transaction at hand because the Statutory Rule abolished and replaced the common law rule in South Carolina.

As succinctly stated by one Court,

We so conclude because the Commissioner's comment to the Uniform Rules so suggests. It states that:

Since the Common-law Rule Against Perpetuities is superseded by this Act (or a statutory version or variation thereof is repealed by this Act), a nonvested property interest, power of appointment, or other arrangement excluded from the Statutory rule by this section is not subject to any rule against perpetuities, statutory or otherwise.

Juliano & Sons Enterprises, Inc. v. Chevron, U.S.A., Inc., 593 A.2d 814, 250 N.J. Super. 148 (N.J. Super. App. Div. 1991)

Even though the Plaintiff contends that the common law was abolished and does not apply to the Purchase Option, the Plaintiff contends that the common law rule would not automatically apply to bar the enforcement of the Purchase Option. "Where the parties to an option contract do not specify a time for performance, a reasonable time will be implied..." *King v. Oxford*, 282 S.C. 307, 318 S.E.2d 125 (S.C. App. 1984). The implication of a reasonable time would meet the deadlines imposed by the common law rule. In fact,

this was the approach taken by the *Byke Const.* case cited in TBFL's memorandum which basically held that an implied reasonable time would by definition be one which avoided the rule against perpetuities. The general rule that "Where a contract sets no date for performance, time is not of the essence of the contract and it must be performed within a reasonable time..." has been applied to a host of different contractual subjects. See, *Drews Co., Inc. v. Ledwith-Wolfe Associates, Inc.*, 371 S.E.2d 532, 296 S.C. 207 (S.C. 1988)

Most, if not all, reported South Carolina cases applying the common law rule did so in cases involving donative transfers. The purpose of the common law rule would not seem to be served by application to a situation such as the case at hand. The reason being is that the rule was developed to protect devisees of property from burdensome restrictions imposed by often distant and long dead relatives. The Rule does not seem designed to apply to a situation wherein a corporate entity seeks to apply the rule to avoid the very agreement it negotiated and agreed to as part of a complex loan arrangement. Any concerns the Defendant had with the effects of the provision could have been avoided by simply negotiating different terms.

The South Carolina Statutory Rule Against Perpetuities exempts the Purchase Option for its deadlines. The common law is no longer effective to apply to the Purchase Option. Simply put, there is no genuine issue as to the Rule Against Perpetuities applying to the Purchase Option. Therefore, the Defendant's counterclaim for a declaratory ruling that the Purchase Option is void should be dismissed as the Second Counterclaim fails to state a claim upon which relief can be granted as a matter of law.

ISSUE II: The Best For Last's Argument That the Plaintiff Waived Its Right To Exercise the Option By Failing To Proceed with The Purchase Ignores The Fact That the Defendant Breached the Option Agreement When It Refused To Convey The Property And That The Plaintiff Simply Failed To Enter A Contract For A Compromise of the Dispute Over The Plaintiff's Breach

The Best For Last recitation of the history of the transactions between the parties is a clumsy sleight of hand effort to distort the fact that the Defendant refused to honor its commitment to convey the property in response to the Plaintiff's notice of exercise of the option. The consummation of the exercise of the option should have been fairly simple. TBFL would accept the Plaintiff's tender of the purchase price and deliver a deed to the Plaintiff. However, that did not happen. Instead, TBFL objected to the tender. Heywood, the principal directing TBFL, simply refused to convey the co-tenancy interest because he wanted a transfer of a membership interest in TBFL and not a transfer of a 74.425% co-tenancy interest in the real estate. Of course, the position was totally contrary to the wording of the Purchase Option itself.

As a result, the parties attempted to work out a compromise of the Defendant's breach. The parties were close to a resolution and in fact reached a general plan for the resolution which included TBFL conveying a 70% co-tenancy interest to the Plaintiff. However, the parties were still in the process of working out the specifics of the distribution of the monies from the re-finance loan initiated by TBFL. One of the issues involved the payment of attorney's fees. The compromise effort broke down over the issue of attorneys' fees and thus no final agreement was reached on the compromise. After, the breakdown and TBFL's continued refusal to transfer the property in response to the option, the Plaintiff filed this lawsuit seeking to compel performance.

So, the simple answer to this issue is that the Defendant can not treat a failure to compromise the dispute over the Defendant's breach of the Purchase Option as a failure by the Plaintiff to complete the purchase of the property under the terms of the Purchase Agreement. The Plaintiff never had a chance to complete the purchase because the Defendant refused to convey the 74.425% interest in the Property.

ISSUE III: The Defendant's Claim Of A Condition Precedent Is Contrary to the Express Language of the Purchase Option And Is Not Grounds To Prevent Entry of Summary Judgment In Favor of The Plaintiff.

No Condition Precedent of Mutually Agreed Co-Tenancy Agreement

In addition to objecting to the exercise of the Purchase Option on the grounds that the transfer was to be in the form of an interest in the limited liability company, the Defendant take the position that the terms of the Purchase Option contained a condition precedent that the Plaintiff and the Defendant work out a mutually agreeable co-tenancy agreement. The Defendant asserts this position as justification for objecting to the exercise of the Purchase Option in its Third and Fourth Counterclaims.

Heywood, TBFL's principal even claimed that this language included the right to claim a reduction in the percentage of interest transferred. So, under the Defendant's position, it could render the Purchase Option meaningless simply by refusing to agree to a co-tenancy agreement. Heywood, P. 58, L. 6.

The Defendant bases this position on the following language of the Purchase Option provision:

"The Lender shall hold take title to the co-tenancy interest subject to (i) no mortgages other than the Borrower's then outstanding first lien mortgage, and (ii) a mutually acceptable co-tenancy agreement."

It is obvious that this language does not set a condition precedent that there must be a first lien mortgage on the property as a condition precedent. In fact, Heywood in the 30(b)(6) deposition of TBFL admitted such. It is what it appears to be: that is a clause that describes acceptable exceptions to the title at the time of transfer. Included in the same clause, is a mutually acceptable co-tenancy agreement as another acceptable exception to the title. However, this language does not require either exception to exist as a condition to the exercise of the Purchase Option.

It should be noted that the Defendant's position on the condition precedent issue is totally contrary and repugnant to its position that the Purchase Option called for a transfer in the form of membership interest in the limited liability company. The reason being is that there would be no need for a co-tenancy agreement if membership interest were being transferred as there would be a single owner of the land, TBFL.

A condition precedent entails something that is essential to a right of action, as opposed to a condition subsequent, which is something relied upon to modify or defeat the action. In contract law, the term connotes any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises. 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."

Worley v. Yarborough Ford, Inc., 317 S.C. 206, 452 S.E.2d 622 (S.C. App. 1994)

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." *Id.*

It is easy to clearly express an intention that a provision is a condition precedent in a contract. The use of language such as "is contingent upon" is unequivocal and patently indicates a condition precedent. *M & M Group, Inc. v. Holmes*, 666 S.E.2d 262, 379 S.C. 468 (S.C. App. 2008). Such language was not used in the Purchase Agreement to make a "mutually acceptable co-tenancy agreement" a condition precedent to the Plaintiff's exercise of the option.

Generally, "a condition precedent may not be implied when it might have been provided for by the express agreement." *Worley, supra*. Implied covenants are disfavored and must clearly arise from the language used or be indispensable to effectuate the intent of the parties. *Id.*

South Carolina case law is replete with instances of courts rejecting litigant's claims that contract provisions are condition precedent where such intention is not clearly established by the language of their agreement.

For example, language in a subcontract which provided that '(t)he balance of the contract price shall be paid . . . within thirty . . . days after full and final payment for the work by' the owners to the general contractor was interpreted by the Court to merely set the time of payment and not as creating a condition precedent to payment. *Elk & Jacobs Drywall v. Town Contractors, Inc.*, 229 S.E.2d 260, 267 S.C. 412 (S.C. 1976).

Similarly, contract provisions concerning a title examination do not rise to the level of a condition precedent to the buyer's purchase in *Lowcountry v. Charleston Southern Univ.*, 656 S.E.2d 775, 376 S.C. 399 (S.C. App. 2008). The Court noted this language extended Buyer certain options in the event of title deficiencies, including the right to "[a]ccept such title and/or condition of Property as [the seller] can convey as performance in full" but the buyer could proceed at its own peril in electing to tender the purchase price in exchange for a quitclaim deed from the seller.

Another illustration is *Byrd v. Livingston* (S.C. App. 2012) where the words "25' easement (measured equally from center of the existing road) for purposes of ingress and egress, runs with land, subject to verification of feasibility by TIAA/Hancock – express grant superceding [sic] and canceling the 66' grant, son's parcel included" did not constitute a condition precedent that the defendant's son ratify the settlement agreement at issue.

"In ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes at the time the contract was entered. Parties are governed by their outward expressions and the court is not free to consider their secret intentions." *Ellie, Inc. v Miccidhi*, 358 S.C. 78, 594 S.E.2d 485 (Ct. App 2004).

In regard to ascertaining intent of the parties in the case at hand, the situation of the parties, along with their purposes at the time the contract was entered, support the position that the Purchase Agreement's reference to a mutually acceptable co-tenancy agreement was not a condition precedent. No buyer would make the exercise of his option to purchase conditioned on the seller mutually agreeing to a mutually acceptable co-tenancy agreement. The reason being is that the seller could defeat the exercise of the option by failing to agree

to any reasonable proposed co-tenancy agreement. So, the purposes of the contract argue against the finding of the language being a condition precedent.

Moreover, one can own undivided interest in real property without being a party to a co-tenancy agreement. However, the Defendant could have required the specific terms of a co-tenancy agreement be included in the Loan Agreement/Purchase Option if it felt such an agreement was a condition of the exercise of the option.

Importantly, the attorney for the Defendant, Tim Gavigan, who drafted the Purchase Option language gave testimony that directly contradicted the Defendant's position on this issue. Gavigan testified that the Purchase Option does not include any language creating such a condition precedent, although he could have drafted such language if he desired. Gavigan testified that the cited language was simply an acceptable exception to title just as the first lien mortgage was an acceptable exception. Gavigan P. 63, L. 18- P. 65, L.10.

The language in the Lender's Option to Purchase limited the allowed exceptions to the title the Defendant would transfer to the Plaintiff upon the exercise of the option. This language did not require that the parties enter into a mutually acceptable co-tenancy agreement. Therefore, the language did not create a condition precedent to the exercise of the option. The Defendant's Third and Fourth Counterclaims, which rest upon the claim of condition precedent, should be dismissed as these claims fail to state a claim upon which relief can be granted. Thus, the Defendant's Third and Fourth Counterclaims should be dismissed.

ISSUE IV: The Defendant's Fourth Counterclaim for Breach of Contract Should Be Dismissed Because It Seeks to Enforce a Contract For the Compromise of the Dispute Over the Defendant's Refusal To Tender the Property which

Would Have Been for a Conveyance of an Interest In Real Property Which Violates the Statute of Frauds, But Which No Meeting of The Minds Was Reached.

The Defendant's Fourth Counterclaim refers to a contract it labels as "the Closing Documents" as a binding contract between the parties. Para 57, 58 Counterclaim. These Closing Documents reflected the general plan to resolve the dispute created when the Defendant refused to convey the property on the basis that the conveyance should have been in the form of a membership interest in the limited liability company. The Closing Documents constituted of an amendment to the Loan Agreement, the Co-Tenancy Agreement, and other related documents and instruments including, but not limited to the form of the deed, collectively the Closing Documents pursuant to which the loan was to be satisfied through the conveyance of a 70% co-tenancy interest in the Property in favor of Plaintiff and a cash payment from Plaintiff to TBFL of approximately \$141,000. Para. 48, Counterclaim.

As described above, in response to the Defendant's refusal to tender the 74.425% interest, the parties engaged in complex negotiations to resolve the resulting dispute. They did agree to a general plan for the resolution under which the Plaintiff would receive a 70% interest in the Property instead of a 74.425% interest. The parties never finalized their compromise agreement due to the breakdown in the discussions over the issue of attorneys' fees. While the Defendant tendered signed documents to the Plaintiff's attorney, these documents were to be held in trust until the Plaintiff agreed to all of the terms, including the disputed attorneys' fees. Moreover, the Plaintiff's attorney

There is no dispute that Spring Valley never delivered an executed copy of the documents submitted by the Defendant after the blow-up over the attorneys' fees. The parties did not reach a meeting of the minds on the compromise agreement. So, there is no contract to enforce.

Even if the Defendant claims that an agreement over the dispute caused by its refusal to convey the 74.425% interest was reached, such agreement would be barred by the Statute of Frauds.

The Statute of Frauds provides, in pertinent part, as follows:

No action shall be brought whereby: . . . (4) To charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them ...

Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized. S.C. Code Ann. § 32-3-10(4) (emphasis added).

In order to satisfy the statute of frauds, there must be a writing signed by the party against whom enforcement is sought, and "the writings must establish the essential terms of the contract without resort to parol evidence. *Springob v. Univ. of S.C.*, 407 S.C. 490, 757 S.E.2d 384 (S.C. 2014).

On August 16, 2019, the Defendant secured its financing commitment from the Refinance Lender and delivered its \$35,000 non-refundable application fee to the Refinance Lender. Para. 45, Counterclaim. This payment was made before the Plaintiff notified the Defendant of its intention to exercise the Purchase Option. Para. 46. The

Defendant's application for the Re-finance Loan and payment of the fee to the lender was made independent of the Plaintiff's exercise of the Purchase Option. The application and payment were not made on condition of the completion of the Closing Documents because those negotiations were started after the application and payment were made. So, the Defendant can not claim it relied upon the negotiations conducted after the exercise of the option to pay the application fee. The Defendant assumed that risk on its own without an agreement on the Purchase Option or the Closing Documents to avoid the application of the statute of frauds to bar its contract claim.

The contract the Defendant seeks to enforce was not executed by the Plaintiff. Therefore, the statute of frauds bars the Defendant's breach of contract claim. The Defendant's Fourth Counterclaim should be dismissed.

ISSUE V: The Defendant's Estoppel Defense Fails As A Matter of Law Because It Breach of the Purchase Option Agreement Was the Cause of the Harm It Asserts.

The Defendant's Tenth Defense and Third Counterclaim raises Equitable Estoppel to oppose the Plaintiff's claim to enforce the Purchase Option. A summary of the Defendant's position is that the Defendant paid the non-refundable application fee and then spent time drafting and negotiating documents, which it refers to as the "Closing Documents, as part of the negotiations with the Plaintiff to resolve the dispute caused by the Defendant's failure to honor the Purchase Agreement. But, the Defendant can not assert this as the basis for equitable estoppel.

"Estoppel arises when a party, relying upon what another has said or done, changes his position to his detriment." *Gibbs v. Kimbrell*, 311 S.C. 261, 268, 428 S.E.2d 725, 729

(Ct.App.1993). A claim of estoppel includes elements for the party asserting estoppel and the party estopped. E.g., *Provident Life and Accident Ins. Co. v. Driver*, 317 S.C. 471, 477, 451 S.E.2d 924, 928 (Ct.App.1994) (listing the elements of equitable estoppel: as to the estopped party, a misrepresentation or nondisclosure, intent to induce the other party to act, and actual or constructive knowledge of the true facts; and as to the party claiming estoppel, lack of knowledge, or means of acquiring knowledge of the true facts, reasonable reliance, and prejudicial change of position).

Queen's Grant v. Greenwood Development, 628 S.E.2d 902, 368 S.C. 342 (S.C. App. 2006).

Unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. *First Union Nat. Bank of South Carolina v. Soden*, 333 S.C. 554, 511 S.E.2d 372 (Ct.App.1998).

Heywood testified that before he made the application for the loan, he was aware that the exercise of the Purchase Option would be a problem with the closing of the loan. In fact, he retained counsel to look at the issue prior to making the application and paying the non-refundable fee. The negotiations referenced resulted from TBFL's failure to honor its obligations under the Purchase Option. Of course, the failure to honor the option was based on the demand that Spring Valley become a member of TBFL and not an owner of a 74.425% interest in the Property. So, the loss of the deposit and the need to engage in the negotiations was caused by TBFL's breach of the Purchase Option, not any reliance on a representation by Spring Valley.

CONCLUSION

The Plaintiff gave notice of its right to exercise the Purchase Option. The Defendant refused to honor the Purchase Option and instead demanded that the Plaintiff accept an ownership interest in TBFL. The parties attempted to resolve the resulting dispute, but those efforts eventually collapsed. The Purchase Option is not voided by the Statutory Uniform Rule Against Perpetuities as the statute exempts nondonative transfers. The common law rule against perpetuities does not apply as it has been abolished by the Statutory Act. The Plaintiff is entitled to a summary judgment ordering the Defendant to specifically perform the Purchase Option.

Dated: March 20, 2020

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing was served on the date below as follows:

☒ By depositing a copy of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service addressed to the party/attorney or attorneys for said parties.

Kirby Shealy, III
Adams and Reese, LLP
1501 Main Street, 5th Floor
Columbia, SC 29201

Dated: March 20, 2020

RAYNOR LAW FIRM, PLLC

s/Kenneth R. Raynor
Kenneth R. Raynor

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	Civil Action No. 2019-CP-40-06914
Spring Valley Interests, LLC,	)	
	)	
Plaintiff,	)	DEFENDANT THE BEST FOR LAST,
v.	)	LLC'S REPLY BRIEF IN SUPPORT OF
	)	MOTION FOR SUMMARY JUDGMENT
The Best for Last, LLC,	)	
	)	
Defendant.	)	
_____	)	

Defendant The Best for Last, LLC ("TBFL") filed a motion for partial summary judgment and supporting memorandum on April 16, 2021¹, seeking a declaratory judgment that the Purchase Option that is the subject of this lawsuit violates the rule against perpetuities. Alternatively, TBFL argued Plaintiff Spring Valley Interests, LLC ("Plaintiff") had waived its right to enforce the Purchase Option by exercising the option and then failing to close the transaction negotiated by the parties. On April 29, 2021, Plaintiff filed a cross-motion for summary judgment on its claim for specific performance and a supporting memorandum responding to TBFL's arguments. The parties' motions are scheduled to be heard on August 25, 2021.

As set forth in TBFL's motion for summary judgment and memorandum in support, there are no genuine issues of material fact as to the enforceability of the Purchase Option. TBFL respectfully requests that the Court enter judgment in its favor as a matter of law pursuant to Rule 56, SCRCP.

ARGUMENTS

I. The factual summary recited in Plaintiff's memorandum fails to paint the full picture of the parties' negotiations.

¹ TBFL incorporates by reference all prior arguments made in its Motion for Summary Judgment and Memorandum in Support.

In opposing TBFL's motion and asserting its own right to summary judgment, Plaintiff minimizes and omits key pieces of the factual record in an effort to cast this dispute as nothing more than TBFL making unreasonable demands and then breaching its contractual obligations to Plaintiff when those demands weren't met. In particular, Plaintiff continues to describe the negotiations surrounding the "mutually acceptable co-tenancy agreement" required by the Purchase Option as a "challenge" or "objection" to Plaintiff's exercise of the option. (Pltf's Mem. in Opp., p. 4). Plaintiff also attributes its failure to close the conversion as having been caused by TBFL's demand that Plaintiff "become a member of TBFL, instead of an owner of a 74.25% co-tenancy interest in the Property." (*Id.*). Additionally, Plaintiff characterizes the negotiations as having been "bogged down by TBFL's demand that some of the loan proceeds be used to pay its attorney." (Pltf's Mem. in Opp., p. 5). Plaintiff's recitation of the facts fails to paint a complete and accurate picture of the parties' dealings.

To recap: on August 16, 2019, TBFL paid a \$35,000 non-refundable application fee to secure a financing commitment of \$3,100,000.00 from C-III Commercial Mortgage (the "Refinance Lender") in order to refinance the first mortgage lien encumbering the Property (the "Refinance"). (TBFL's Mem. In Supp., Ex. B at 28:21-25). On August 21, 2019, upon learning that TBFL had tendered the \$35,000 non-refundable application fee towards the Refinance, Plaintiff sent TBFL a letter stating that it was exercising the Purchase Option. According to the letter, the closing of the option was "to occur at the earlier of (i) twenty-nine (29) days from the date of this Notice, or (ii) one (1) day immediately preceding a refinance of [TBFL's] existing outstanding mortgage indebtedness." (Ex. A at 41:4-5). The parties thereafter began negotiating the "mutually acceptable co-tenancy agreement" required by the Purchase Option, while simultaneously pursuing the Refinance of the first mortgage.

During the negotiations over the co-tenancy agreement, TBFL took the position that the agreement should contain terms and conditions that reflect the economics and management structure embedded in TBFL's operating agreement "as if the Maker (sic) were an Initial Member" in accordance with TBFL's understanding of the arrangement and the plain language of the Promissory Note. Ultimately, however, the parties reached an agreement that did not require Plaintiff to become a member of TBFL. Rather, the final agreement, pursuant to which Plaintiff agreed to close the option, provided that Plaintiff's loan would be converted into a 70% co-tenancy interest in the Property. The agreement failed to close, not because of any demand that Plaintiff become a member of TBFL rather than the owner of a co-tenancy interest, as suggested by Plaintiff, but because Plaintiff refused to deliver the executed closing documents and follow through with the conversion under the terms negotiated and agreed to by the parties.

With respect to the issue of attorney's fees, Plaintiff again has the facts backwards. Throughout the negotiations related to the co-tenancy agreement, TBFL consistently took the position that each party would be responsible for their own legal fees related to the closing and conversion of the Purchase Option into the co-tenancy agreement, while the fees incurred in the joint pursuit of the Refinance of the first mortgage would be shared based on the parties' resulting ownership interest of 70/30. (Ex. B at 54:8-17). Indeed, the pursuit of the Refinance was done for the mutual benefit of both parties, each of whom would be taking an interest in the Property and would be expected to share in the expenses in proportion to their ownership. Plaintiff's response was to demand that TBFL pay a share of its attorney's fees, \$6,500, incurred in connection with negotiations surrounding the co-tenancy agreement. (Ex. A at 55:2-13). TBFL initially rejected this demand as being completely unjustified, but two hours later agreed to the reimbursement in the interest of closing the conversion so the Refinance could proceed. Accordingly, TBFL only

“bogged down” the negotiations to the extent that it didn’t immediately agree to Plaintiff’s unreasonable demand for attorney’s fees.

II. The case of *Webb v. Reames* is controlling, and no South Carolina appellate court has held that the common law rule against perpetuities no longer applies to commercial, nondonative transfers.

TBFL’s motion seeks a declaration that the Purchase Option, which on its face reserves to Plaintiff a “freely assignable,” “perpetual option” to purchase the Property at a fixed price, is void on the basis that it violates the rule against perpetuities. In support of its motion, TBFL cites to the case of *Webb v. Reames*, in which the South Carolina Court of Appeals held that a contingent, nonvested, perpetual option to purchase real estate at a price of \$64 violated the rule against perpetuities. 326 S.C. 444, 446, 485 S.E.2d 384, 385 (Ct. App. 1997). However, in its motion for summary judgment, Plaintiff describes TBFL’s reliance on the *Webb* case as “misplaced and misleading.” (Pltf.’s Mem. in Opp., p. 7). Plaintiff notes that the “instrument in question in *Webb* was created in 1955, a date before the effective date of the Statutory Rule Against Perpetuities. So the statutory rule would not apply as evidenced by the Court’s failure to even consider applying it to the issues in the case.” (*Id.*)

Contrary to Plaintiff’s assertion, the Court in *Webb* did, in fact, consider the Uniform Statutory Rule Against Perpetuities (USRAP) when deciding the case. This is evidenced by the *Webb* Court’s direct reference to the savings clause in the USRAP codified at S.C. Code Ann. § 27-6-60(B). The fact also remains that because no South Carolina appellate court has ever interpreted the USRAP to mean that non-donative or commercial transactions can never be subject to the rule against perpetuities, *Webb* is the only post-USRAP era South Carolina case that can be seen as offering any guidance on this issue. But even while no other South Carolina cases are directly on point, courts in other jurisdictions have expressly declined to read such a broad

prohibition into the USRAP, instead finding that the common law rule against perpetuities remains in effect for certain nondonative, commercial transfers. *See New Bar Partnership v. Martin*, 221 N.C. App. 302, 729 S.E.2d 675 (2012) (“Thus, we conclude that the USRAP did not replace the common law [rule against perpetuities] as to preemptive rights arising from nondonative transfers such as that at issue here”). Again, if the South Carolina General Assembly had intended to “abolish,” rather than “supersede,” the common law rule against perpetuities, it could have done so. It matters little that the title of the bill introduced in the General Assembly uses the word “abolish” when the actual language of the statute states the USRAP was intended to “supersede” the common law. But, as set forth in detail in TBFL’s supporting memorandum, because the USRAP explicitly does not apply to nondonative transfers, there is nothing to “supersede,” or with which to replace the common law. (TBFL’s Mem. in Supp., pp. 7-10).

Accordingly, TBFL is entitled to a declaratory judgment finding that the Purchase Option violates the rule against perpetuities and is therefore void.

III. Plaintiff waived the right to enforce the Purchase Option after failing to close the agreement negotiated by the parties.

TBFL’s motion for summary judgment further argues that even assuming the Purchase Option is enforceable, Plaintiff waived the right to enforce the option by exercising it and then failing to consummate the agreement reached by the parties. In response, Plaintiff describes TBFL’s accurate recitation of the facts in its memorandum in support of summary judgment as a “clumsy [sleight] of hand effort to distort the fact that the Defendant refused to honor its commitment to convey the property in response to the Plaintiff’s notice of exercise of the option.” (Pltf’s Mem. in Opp., p. 13).

Plaintiff exercised the Purchase Option on August 21, 2019, by tendering the notice letter to TBFL. The letter stated that closing was “to occur at the earlier of (i) twenty-nine (29) days

from the date of this Notice, or (ii) one (1) day immediately preceding a refinance of [TBFL's] existing outstanding mortgage indebtedness.” (Ex. A at 41:4-5). Plaintiff suggests that the process after it exercised the option should have been simple: “TBFL would accept the Plaintiff’s tender of the purchase price and deliver a deed to the Plaintiff.” (Pltf’s Mem. in Opp., p. 13). However, this simplistic view of the dispute is divorced from the actual circumstances of the transaction.

There is no question that Plaintiff exercised the Purchase Option in direct response to TBFL’s decision to refinance the first mortgage on the Property. Upon learning that TBFL was pursuing the Refinance, Plaintiff hired Tim Gavigan, the same lawyer that drafted the Purchase Option on behalf of TBFL, to handle the conversion of the Loan into the co-tenancy agreement in conjunction with the Refinance. (Ex. A at 31:5-19). Given that Plaintiff was going to be added as a borrower as part of the Refinance of the first mortgage, the co-tenancy agreement necessarily had to be in place before the Refinance could close. (*Id.*). While counsel for TBFL had entirely legitimate concerns about the tax consequences of the co-tenancy agreement², the negotiations that the parties subsequently engaged in over the next month were never about whether or not Plaintiff had the Purchase Option, could exercise the Purchase Option, or was going to receive a co-tenancy interest in the Property following the exercise of the Purchase Option. Rather, the parties were negotiating the terms of the “mutually-acceptable co-tenancy agreement” required by the circumstances of the Refinance and the Purchase Option itself.

Plaintiff describes the agreement reached by the parties following those extensive negotiations as a “compromise of the Defendant’s breach.” (Pltf’s Mem. in Opp., p. 13). This is the closest Plaintiff comes to admitting that Plaintiff voluntarily engaged with TBFL in the pursuit of the Refinance and the co-tenancy agreement because doing so was in both of their best interests

² Research conducted at the time suggested that the taxes on the Property would have increased by as much as \$100,000 under a co-tenancy agreement. (Ex. B at 43:17-24).

at the time. Moreover, not once during the negotiations did Plaintiff explicitly demand specific performance or notify TBFL that it was in breach of the Purchase Option. Plaintiff now argues that it could not have waived the right to enforce the Purchase Option because it voluntarily negotiated different terms with TBFL rather than demanding specific performance. Yet, that is precisely what a “waiver” is. *See Edwards v. Rouse*, 290 S.C. 449, 451-52, 351 S.E.2d 174, 176 (Ct. App. 1986) (“Waiver is an intentional relinquishment of a known right.”). Our courts have always recognized a party’s right to waive strict compliance with a contract to purchase real estate. *Id.* (“Waiver can consist of an expression of intention not to demand a certain thing.”); *see also, e.g., White v. Felkel*, 222 S.C. 313, 72 S.E.2d 531 (1952) (defendant vendor who was aware that vendee had sold timber rights waived his right to require perfect title); *Ramsay v. Brailsford*, 2 S.C. Eq. (2 Des.) 582 (1808) (defendant vendor who took possession of house waived right to require delivery of paid up bonds prior to sale). Plaintiff’s claim for specific performance is merely an attempt to get a second bite at the apple after it has already once exercised—and failed to close—the Purchase Option. *See S. Silica Min. & Mfg. Co. v. Hoefer*, 215 S.C. 480, 496, 56 S.E.2d 321, 327 (1949) (“A right once abandoned may not be revived without the consent of both parties.”).

CONCLUSION

For the reasons set forth above, TBFL respectfully requests that this Court grant its motion for partial summary judgment as to both TBFL’s claim for declaratory relief and Plaintiff’s claim for specific performance.

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Attorneys for The Best For Last, LLC.

August 18, 2021.



State of South Carolina)
County of Richland)

In The Court of Common Pleas
Fifth Judicial Circuit
2019-CP-40-06914

Spring Valley Interests, LLC,)

Plaintiff,

VS.

The Best For Last,

Defendant.

Transcript of Record
VIA WEBEX

August 26, 2021

B E F O R E:

The Honorable Jocelyn Newman, Judge

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

Kenneth R. Raynor, Esquire
Attorney for the Plaintiff

Kirby D. Shealy, III, Esquire
Attorney for the Defendant

Elizabeth B. Harris, CVR-M-CM
Circuit Court Reporter



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I N D E X

<u>Witness/Description</u>	<u>Page No.</u>
Certificate Page.	31

E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>Ev.</u>
	No exhibits introduced.	

1 THE COURT: *Spring Valley Interests v. Best For Last.*
2 Cross-motions for summary judgment. Great.

3 MR. RAYNOR: We tried to get it all done at one time,
4 Your Honor. So, tried to be efficient.

5 THE COURT: Right. Well, you know the easiest thing
6 is to deny summary judgement, but when you've got cross
7 motions for summary judgement, you kind of have to decide.
8 So, okay. That's fine. That's my job; that's what y'all
9 pay me to do.

10 Let's first hear from -- I don't know. Mr. Raynor,
11 let me hear from you.

12 MR. RAYNOR: So ---

13 MR. SHEALY: I'm, I'm sorry to interrupt. I, I, Your
14 Honor, I think our motion was filed first and, I mean ---

15 MR. RAYNOR: I would, I would agree with that, Your
16 Honor. Mr. Shealy did file his motion first. I will say,
17 too, his motion, if allowed, would be determinative of my
18 motion. In other words, it would probably lead to a
19 dismissal of our case, although I'm not conceding he's
20 right, but anyway. So, I think that may be the proper
21 procedure to follow, to hear the defendant's motions first
22 and let us follow up, and I'll go any way you want us to
23 go, Your Honor, whichever.

24 THE COURT: No. That's fine. I'm happy to hear from
25 Mr. Shealy first. I was just picking really, not...

1 MR. SHEALY: Just rolling the dice.

2 THE COURT: Exactly. So, that's fine. Mr. Shealy,
3 let me hear from you.

4 MR. SHEALY: May it please the court, Your Honor?
5 Kirby Shealy. I am here for the defendant, The Best For
6 Last, in this commercial dispute. Your Honor, we've
7 submitted a fair amount of paper to you. I, I -- I'll try
8 to distill the, the operative facts, at least from our
9 standpoint, as succinctly as I can. But the legal issues,
10 I think, are relatively simple despite the fact that we've
11 given you a lot, a lot of paper.

12 So, Your Honor, this arises out of a investment that
13 was cobbled together to purchase a self-storage facility.
14 The Best For Last is one of the, the record owners of this
15 self-storage facility. The -- to obtain enough capital to
16 make the purchase, The Best For Last approached a --
17 another LLC, White Interests Limited Partnership, which has
18 since transferred its interest to the current plaintiff,
19 Spring Valley Interests, and obtained a loan of \$800,000
20 to, to -- as a-- it was a -- it, it was a -- in exchange
21 for a second mortgage on the property behind the first
22 mortgage to purchase the property in 2017.

23 As part of the agreement to lend the money, I'll just
24 say the plaintiff prepared a loan agreement that contained
25 a -- an option, an option to purchase. Both sides have put

1 that option language in our respective papers, and it says:

2 In consideration for making the loan, the
3 borrower grants to lender the perpetual option to
4 purchase a 74.425 percent undivided cotenancy
5 interest in the property.

6 So, so -- and, and I may have misspoken earlier. The
7 record owner at this point is The Best For Last. The, the
8 plaintiff has, has a mortgage on the property at this
9 point, but it's this purchase option that is the subject of
10 this dispute. This is a -- this purchase option is not
11 tied to the, the loan itself. The borrower can pay off the
12 loan and still the lender would maintain this, this option
13 to purchase.

14 It's the fact that it's the perpetual option to
15 purchase that is freely assignable -- this option language
16 does not appear in the, the mortgage, the record, lien
17 against the, the property and so this, this purchase option
18 exists in perpetuity if, if, if you read it just and give
19 it its plain meaning.

20 So, in, in September of 2019 -- I'm sorry, in August
21 of 2019, The, The Best For Last initiated a refinance of
22 the first mortgage. And shortly after that, the plaintiff
23 sent a letter notifying The Best For Last that it was
24 exercising the option. The -- and, and one of the, one of
25 the other particularly important or salient parts of this

1 option language, option agreement is that the -- it says:

2 The purchase price shall be paid in cash or
3 immediately available at the closing. The lender
4 shall hold, take title to the cotenancy interest
5 subject to no mortgages other than the
6 borrower's, borrower's then outstanding first
7 lien mortgage; and, two, a mutually acceptable
8 cotenancy agreement.

9 So, so by exercising the option, there was, according
10 to the option language itself -- the parties needed to
11 negotiate a mutually acceptable cotenancy, which they did,
12 which they, over the next month, they, they negotiated
13 that. And then the closing on the, the exercise of the
14 option took place on September 27, 2019. The closing
15 documents were signed by the defendant, and actually the,
16 the, the testimony is they were actually signed by the
17 plaintiff but not delivered, held by the plaintiff's
18 attorney.

19 Over the ensuing weekend, the, the, the deal fell
20 apart because the plaintiff, insisting that the defendant
21 pay \$6500, I think it was, in attorney's fees, that, that,
22 that was not in the agreement that the parties had actually
23 signed. And by Monday morning, the, the, the deal had
24 fallen apart.

25 So, the plaintiff filed this lawsuit and is seeking a

1 couple of points of action: reformation, which is not
2 really in dispute here; and specific performance of the
3 option agreement. And then my client filed an answer and
4 counterclaims, among them seeking a declaratory judgment
5 that the option agreement is unenforceable as violating the
6 rule against perpetuities. We filed a motion for partial
7 summary judgment seeking a judgment against the plaintiff
8 on its specific performance claim in our favor on the
9 declaratory judgment action.

10 So, Your Honor, our primary, primary basis for our
11 motion is that on its face, the option agreement violates
12 the rule against perpetuities because it grants a perpetual
13 option that's freely assignable that is not tied to life
14 and being plus twenty-one years.

15 The -- and, and I would point out, Your Honor, that,
16 that, that some of the arguments that we are making today
17 were argued previously on a motion to dismiss filed by the
18 plaintiff with respect to our counterclaims. That motion
19 was dismissed, was denied, and Judge Manning, you know,
20 made, made some findings and it's in, in that motion, in
21 that order that, that aren't, aren't dispositive necessary
22 or, or -- but has at least some bearing upon what's before
23 you today.

24 The, the plaintiff takes the position that, well, the
25 statutory rule against perpetuities was enacted and, and

1 completely abolished the common law against perpetuities.
2 And whether that is the case or not appears to be an open
3 question in South Carolina, but we are guided by the case
4 of *Webb v. Reames*, which was decided after the enactment of
5 the Uniform Statutory Rule Against Perpetuities. And the,
6 and the reason that, that, that the plaintiff is taking
7 that position is because the, the statutory rule against
8 perpetuities that were the act says that, that it does not
9 apply to nondonative transfers. This is -- nobody's
10 arguing that this is some sort of donative transfer. This
11 is a commercial transaction. But there's case law out
12 there that says that, well, you know, it, it doesn't, it
13 doesn't completely abolish the rule against -- the common
14 law against perpetuities, and so to the extent that it
15 doesn't apply to nondonative transfers, the common law rule
16 against perpetuities applies.

17 And so, Your Honor, we have a long history in this
18 state of, of, of, of taking a narrow view toward restraints
19 on alienation like this. And so, you know, we, we assert
20 that from the beginning, as a threshold matter that the,
21 that the option agreement as written is just -- is
22 unenforceable.

23 If it's deemed to be enforceable, our secondary
24 position is that with respect to the plaintiff's cause of
25 action for specific performance, that being an equitable

1 cause of action, the plaintiff has essentially taken the
2 defendant down the primrose path to the finish line and
3 then refused to close. We take the position that you can't
4 -- an option can't be exercised and then, and then have
5 that exercise withdrawn at the, at the, at the party's whim
6 over and over and over again. Our case law says that an
7 option agreement like that needs to be narrowly construed,
8 particularly against the drafter, and it was the, it was
9 the plaintiff that drafted this option agreement. And so
10 having exercised the option but failed to close, we would
11 assert that the, that the plaintiff has had its bite at the
12 apple and, therefore, has, has waived the right to any
13 further exercise -- any future exercise of the option and,
14 therefore, specific performance should be denied and, and
15 that cause of action should be dismissed.

16 So, Your Honor, if, if the court rules in our favor on
17 our motions, what we would be left with is we, you know, we
18 still have an obligation. We still owe the, the plaintiff
19 the money that was loaned, and payments have been made on
20 that loan in accordance with the terms of the note, you
21 know, all of this time. We would still owe that loan
22 principal back, but if we pay that back, then the parties
23 are, are no longer entwined with each other with respect to
24 this, this particular investment. So for those reasons,
25 Your Honor, we believe that the motion for our partial

1 summary judgment in favor of the defendant as to those two
2 causes of action is proper, and we would ask for an order
3 granting that relief. Thank you.

4 THE COURT: Yes, sir, Mr. Raynor.

5 MR. RAYNOR: Good morning, Your Honor. Thank you.
6 Ken Raynor of the Mecklenburg County bar.

7 I, I do want to focus on the first issue of the
8 applicability of the rule against perpetuities before I go
9 into any lengthy discussion of facts, but I will correct my
10 friend, Mr. Shealy, on one thing. I think he misspoke. He
11 said that this option agreement was drafted by the
12 plaintiff. Actually, this document was drafted by the
13 defendant's attorney at the time, Mr. Gavigan, and I'll
14 come back to that in a minute, but that is one thing I did
15 want to point out.

16 And, Your Honor, I don't know if I can share my
17 screen. I don't see it activated here. I'm better at
18 talking with pictures than words, I guess. Yes, there we
19 go. If you will give me a moment.

20 (A PAUSE.)

21 MR. RAYNOR: So, I think you have a copy of this.
22 This is the document that we're talking about, the purchase
23 option, and the, the question, the first issue is does this
24 document, is it controlled by the statutory rule against
25 perpetuities? In other words, would the statutory rule bar

1 the enforcement of this document? And, Your Honor, the
2 statutory rule has a provision, Section 27-6050, which
3 contains numerous exceptions and the very first exception
4 is what's called a nondonative transfer, and then they have
5 some exceptions for the exception that doesn't apply.

6 Case law throughout the country, as far as I know, has
7 universally ruled that a commercial transaction like the
8 one we're talking about is a nondonative transfer and,
9 therefore, the statutory rule against perpetuities does not
10 apply to that transaction. And so, in fact, Your Honor,
11 part -- and we cited some case law in our memorandum that
12 talked about this. One of the reasons that came about for
13 the development of this interest in a uniform statutory
14 rule against perpetuities was the recognition that while
15 this rule started out applying to things that we normally
16 think of like wills and bequests, part of estates where
17 somebody wanted to tie up property in a family forever -- I
18 guess because they didn't trust their heirs to take care of
19 the property or whatever -- that that logic didn't apply to
20 complex commercial transactions where, you know,
21 complicated deals and sophisticated business people did not
22 need that protection. And so that was part of the whole
23 impetus for developing the statutory rule. And like I've
24 said, cases all throughout the country have held in a
25 variety of situations that the statutory rule does not

1 apply, and clearly this transaction between two commercial
2 entities is a nondonative transfer. I, I don't even think
3 Mr. Shealy would disagree with that.

4 The -- now, Mr. Shealy tries to get around that
5 exception from the application of the rule by saying, well,
6 the common law applies. If you look at the section I have
7 on the screen here, 27-6-80, the statute spells out the
8 affect on the common law and the case -- I mean, the affect
9 is pretty clear. It says: This chapter supersedes the
10 common law rule against perpetuities.

11 Supersedes is defined as replaces, and if there's any
12 question as to what the South Carolina legislature intended
13 when they enacted the rule, I would just refer the court to
14 the title of the legislation that was introduced into the
15 respective legislative bodies, and it says that:

16 This statute was to abolish the common law rule
17 against perpetuities and replace it with a
18 statutory rule against perpetuities.

19 There can't be a clearer expression of legislative
20 intent than that.

21 The -- so, cases throughout the country that's been --
22 you know, complied with this issue basically say when, you
23 know:

24 The state has the statutory provision enacted,
25 the transaction is entered after the effective

1 date of the transaction, that the common law rule
2 doesn't apply. Therefore, a commercial
3 transaction is not governed by the statutory rule
4 over the common rule.

5 And I, I've just cited one of the cases I cited in the
6 brief.

7 Now, Mr. Shealy has said, well, the common law still
8 applies because this case, *Reames* -- I'm sorry, *Webb v.*
9 *Reames* somehow adopted that position and, Your Honor, I
10 don't -- it's interesting. I'll just put it up on the
11 screen. This is the language from that case that the Court
12 of Appeals referenced. And the reference, the only
13 reference in that case is on this paragraph where the court
14 basically said that they agreed that the preemptive right
15 in that case was a contingent, non-vested interest that,
16 you know, that was not conditioned on an event within the
17 common law period of time.

18 And, you know, it's funny, Your Honor. In the same
19 paragraph, they cite or where they make a reference -- and
20 again I'm going to come to that reference -- they cite case
21 law from Missouri. They cite case law from Kansas. They
22 cite case law from Colorado. I don't think they were
23 saying those states' common law rule applies to South
24 Carolina. They were just pointing out the position that in
25 this, what this preemptive right in this case meant.

1 And then I have highlighted in yellow that's on the
2 screen the sole language from that case, which basically
3 all it said was:

4 See also South Carolina Code 27-6-60(b), saving
5 cause provision of Uniform Statutory Rule Against
6 Perpetuities.

7 That's the sole extent of the *Webb v. Reames*
8 discussion of the statutory rule. There is nothing in this
9 opinion that said the common law, you know, survived the
10 statutory rule after the effective date of the statutory
11 rule, nothing that supports that position that Mr. Shealy's
12 trying to foist this case on the court.

13 I would also note, Your Honor, that in the *Webb v.*
14 *Reames* case, the transaction involved was entered into
15 1955. That was well before the effective act of the
16 statute. And to further prove a point that the common law
17 did not survive the statute for transactions after the
18 effective date of the statute, it is important, I think, to
19 look at 27-6-60 which I have on the screen now. It talks
20 about the effect of timing.

21 This 27-6-60 has two provisions -- (A) which is the
22 effective date -- and it says this in subsection -- I'm
23 sorry: Except as -- I'm sorry:

24 Except as extended by subsection (B), this
25 chapter applies to all appointments and powers

1 created after July 1, 1987.

2 And then -- so that's the effective date. That's what
3 the statute applies to, transactions after that date. And
4 then if you go to subsection (D), it says: That for a
5 non-vested property right created before the effective
6 date.

7 So, one to which a common law would apply -- and, by
8 the way, this is the provision that the Supreme Court --
9 I'm sorry, the Court of Appeals referenced in *Webb*. For
10 one that was created prior to 1987, there is this, what's
11 called a saving provision in 60(b), which just means that
12 if -- a court, upon a petition, can go back and be asked to
13 reform the transaction so it doesn't the rule against
14 perpetuities.

15 So, the distillation of all that is the statutory rule
16 solely applies for transactions after July 1, 1987. The
17 common law, while it still applied for transactions before
18 that date, whereas a provision in the new statute for a
19 reformation or a savings clause.

20 And, Your Honor, to kind of show you the, I guess,
21 proof of the point, there would be no need for a savings
22 clause solely for a common law application in cases that
23 happened before July 1, 1987, if the common law was going
24 to be applied to cases, you know, transactions after the
25 effective date of the statutory law. And then the other

1 point I would make is what good does a uniform statutory
2 rule have if now you're going to have the uniform rule and
3 you're going to have the common law? So, really there's no
4 benefit from enacting the statutory rule against
5 perpetuities unless you do what the title of the
6 legislation said: you are replacing, you are abolishing
7 common law.

8 So, Your Honor, we would certainly -- I, I think the,
9 the statutory provision, to sum it up, does not apply
10 because there is a -- this is a nondonative transfer. This
11 is a commercial transaction. It is -- the common law does
12 not apply.

13 And, you know, one thing, too. I, I talked about the,
14 you know, the rules for commercial transactions are
15 different. One of the differences of the, one of the
16 differences of the -- including these estate kind of, kind
17 of transfers that a commercial transfer -- courts,
18 including courts in South Carolina where no date is stated
19 in a commercial transaction for something to be
20 accomplished, courts routinely apply a reasonable date.
21 And so that in and of itself is a kind of illustration of
22 why commercial cases were excluded, but that would apply in
23 this case. So, I contend that the statutory rule does not
24 apply, the common law does not apply and so, therefore,
25 the, the court should enter a rule -- ruling that the

1 ruling against perpetuities does not bar the enforcement of
2 the option.

3 So, I'll, I'll be glad to address anything you want to
4 hear about rule against perpetuities. If not, I'll go on
5 to the rest of the case, Your Honor.

6 THE COURT: I don't have any questions. I thought I'd
7 never hear anything about the rule against perpetuities
8 again in my life, but you all have proven me wrong. But
9 let me hear what -- but let's please move beyond that to
10 some other things.

11 MR. RAYNOR: Okay. So, the next part I want to get
12 into is the, the remaining parts of the defendant's case
13 about waiver. And, Your Honor, I think it's important. I
14 am very impressed with Mr. Shealy's work here. He has
15 taken what is evidence of a breach of contract by his
16 client, a flat out breach of contract, and somehow spun
17 this into a theory of waiver. And to put that in
18 perspective, I do want to go into the facts now underlying
19 the transaction, underlying the breach in response to the
20 exercise or the attempt to exercise the option and then
21 what Mr. Shealy has talked about, this effort to close the
22 option.

23 Back up just a little bit. Mr. Heyward, who is the
24 principal of the defendant, Best for Last, Mr. Lynn White,
25 who is the principal in both Spring Valley Interests and

1 its predecessor, have done business together for quite some
2 time. They have invested in storage facility purchases
3 before. Mr. Heyward is the one who kind of ramrodded the
4 project involving the Spring Valley self-storage facility,
5 and he did that on two front. One front, he went and
6 solicited investors who would be members of The Best For
7 The Last, the LLC which is the owner which ended up
8 purchasing the property. Those members did not have enough
9 money to close that purchase. So, Mr. Heyward went to his
10 friend Lynn White, who is the owner of Spring Valley
11 Interests, and wanted him to participate in the purchase of
12 this property. Mr. White said I'll do that; I'll do the
13 investment. I'll loan the money with the right to purchase
14 the property and, and basically protect what I think is
15 called a lifetime exchange position.

16 Mr. Heyward went to his attorney, Mr. Gavigan, and
17 said go do what Mr. White says to do to make this work.
18 And so Mr. Gavigan, who is the attorney for Best For The
19 Last, went and talked to Mr. White, and Mr. Gavigan
20 prepared the document that is the loan agreement with the
21 option. That's why I say it was not the plaintiff who
22 prepared this. The drafter was the defendant.

23 The -- now, Mr. Heyward did not look at that document
24 until right before he signed it. He asked no questions
25 that he could remember to anybody, particularly to any

1 attorney and particularly to Mr. Gavigan about what it
2 meant. And, Your Honor, I think what happened, Mr. Heyward
3 was not realizing that he had created a conflict. He had
4 sold one package to his investors in The Best For Last.
5 But the loan arrangement that Mr. White and The Best For
6 Last attorney put on paper conflicted with what Mr. Heyward
7 wanted to happen, with what he had promised to happen to
8 the other -- the investors in The Best For Last.

9 Now fast forward a little bit. Mr. Heyward goes and
10 applies for a loan in the name of Best For The Last. No
11 question about that. That was going to be the sole
12 borrower. He was going to refinance their existing loan.
13 At that -- shortly after that, although Mr. White told him
14 he should not do that, he should not make that application
15 for that loan, Mr. Heyward did it anyway. After that, Mr.
16 White gave notice of his exercise to -- exercise, I'm
17 sorry, notice to exercise the option, and this is where
18 this great fiction starts, this great effort to spin the
19 facts, and it starts with this myth that there was a
20 cotenancy agreement that was a condition precedent to
21 exercising the option.

22 The first thing, though, Your Honor, if you look at
23 this loan, this purchase option, it clearly says that the
24 right is to purchase a 74-point-something percent interest.
25 It clearly does not say that right has to be exercised in

1 the form of a membership interest in Best For Last. But as
2 I'm getting ready to show you, the defendant, when in
3 response to this option, exercise of the option, their
4 response was, first of all, it's got to be done by you
5 becoming a member of the LLC instead of being a cotenant.
6 And, and secondly, we're not going to give you -- we never
7 had an intention of giving you s semi 4 percent interest,
8 and, and you're probably scratching your head and, like,
9 well, where is that coming from? It's not in the
10 agreement. Absolutely. It was a breach of the agreement.

11 Now, and then that breach, they tried to cover their
12 track because after they breached, there was an effort to
13 try to resolve the dispute. That effort would -- entailed
14 there being a co -- cotenancy relationship. They, they
15 reached, like, a general consensus about how to get that
16 done, and then they had some details that they had to work
17 out, and we'll get to it in a minute. Those details never
18 got worked out because the, the defendant wanted their
19 attorney's fees paid. Mr. White said, well, wait a minute.
20 I'm not paying your attorney for fighting with me about
21 breaching the contract. So, then he wanted his attorney's
22 fees paid. They said no, and so while documents they then
23 signed -- they were never delivered. In fact, they were
24 delivered to their attorney on their expressed condition
25 that he could deliver them when that dispute got worked out

1 finally and, as Mr. Shealy said, they blew that dispute up
2 fighting about the attorney's fees. So, it wasn't just my
3 client. It was the defendant. In fact, it was the
4 defendant who put the match to that fire.

5 So, that put us in a position of they're now saying,
6 oh, well. You exercised the option and we tried to work
7 with you, but then you walked away from it. No, Your
8 Honor. They exercised the option, they breached, we tried
9 to resolve it, and it didn't work out.

10 This, this whole -- if there's any question about
11 that, I have on the screen the deposition testimony from
12 Rob Betheau -- Bethea, I'm sorry, who is testifying in this
13 case, and this is interesting, Your Honor. He's testifying
14 as a 30(b)(6) deponent. I sent a 30(b)(6) deposition
15 notice. They nominated him to be one of the deponents, and
16 I asked the question. And again, a lot of gobbledygook
17 from a transactional attorney, so I just kind of distilled
18 it, and I asked him the question:

19 So, are you saying that The Best For Last would
20 have been willing just to convey the 74.425
21 percent interest?

22 His answer: No. It was never willing to convey
23 that amount.

24 And then: Why not?

25 My client didn't believe that's the -- to be the

1 proper amount.

2 Your Honor, and what's so crazy about that, that
3 agreement clearly says 74.425 percent.

4 And so now they took and tried to justify their breach
5 by saying, well, the: An accepted cotenancy agreement is a
6 conditioned precedent in the exercise of the option. And
7 they do it based on this language that I have on the
8 screen. And it's important, Your Honor, that there's two
9 provisions to this language, and we say this is -- it's
10 acceptable exceptions to title, and there are two
11 provisions. One, it says: Subject to no mortgages. And
12 they agree, Your Honor, that this language doesn't require
13 that there be a first mortgage on this property. They're
14 not saying that that's a condition precedent. Even Mr.
15 Heyward admitted that doesn't mean they have to have a
16 first mortgage before my client can exercise the option.
17 And then number two, it just lists a mutual acceptable
18 cotenancy agreement. It does not make that a condition
19 precedent, and so where are they getting that requirement
20 that this is a condition precedent?

21 And I would, I would divert a little bit, Your Honor.
22 Normally in case law in every jurisdiction, including South
23 Carolina, a condition precedent has to be clearly stated so
24 there's no question that's what it is. In this case,
25 that's not the case. They are relying upon a myth of a

1 cotenancy agreement. But if there's any question about
2 what the parties meant this to be, I would just refer you
3 to the deposition testimony of their attorney, Mr. Gavigan,
4 the attorney that drafted this for the defendant, and I
5 asked him, you know:

6 Did this language require this to be anything
7 other than it's an acceptable exception to the
8 title?

9 He said: Yes.

10 That it required that there be a cotenancy
11 agreement?

12 He said: No, absolutely not.

13 I said: Mr. Gavigan, if you had intended that to
14 be the case, could you draft language making it a
15 condition precedent?

16 And he said: Yes, I could.

17 So, there was no condition precedent intended by the
18 drafter of this document that there be a mutually
19 acceptable cotenancy agreement any more than there was an
20 intent that there be a first mortgage. These were just
21 listed acceptable exceptions to title: if they had a first
22 mortgage, if they had a mutually accepted cotenancy
23 agreement.

24 And then, Your Honor, the -- to go back to where I
25 started, this is deposition testimony from the other 30(b)

1 deponent witness for 30(b)(6), Mr. Heyward. I asked him:
2 Was one of the reasons you gave for objecting to
3 that transfer the fact that you wanted that
4 transfer to be in the form of an equity owner in
5 the LLC?

6 In other words, they wanted Mr. White not to be a
7 cotenant but they owned interest, a membership interest of
8 50 percent in the LLC. His answer was: Yes.

9 Now, Your Honor, as I said, there is nothing in that
10 agreement, absolutely nothing that requires that Mr.
11 White's cotenancy agreement is converted to a membership
12 interest in The Best For Last, but that's what they were
13 requiring. And I think, Your Honor, that is how Mr.
14 Heyward was trying to reconcile the deal that he had made
15 with his other investors and what he had -- his attorney
16 had done with Mr. White and his company.

17 By the way, Your Honor, that -- even a 50 percent
18 interest would reduce that 74.425 percent to a 37 percent
19 interest. I think actually that interest would have been
20 less based on the -- but it doesn't matter because there
21 was no requirement that he be a member.

22 And then I'll point out one more thing, and this is
23 the, I guess, the fallacy that they don't recognize that
24 their argument about the cotenancy agreement when they're
25 demanding that he be a member of the LLC. If Mr. White's

1 company, in the exercise of the option, had been required
2 to be a member of the LLC Best For Last, there would not be
3 a cotenancy agreement at all. There would not be a
4 cotenancy agreement because there would only be one owner,
5 and that would be The Best for Last, and they all would be
6 members of it, including the plaintiff. So, there would
7 not be a need for a cotenancy agreement. That just shows
8 you how I think they're kind of making up this myth as they
9 go along.

10 The -- and then, Your Honor, to finalize it, so what
11 happened, they demanded -- they're, they're not going to
12 convey 74.425. They demanded that my client be a member,
13 not a cotenant, totally against the language of the option.
14 As an effort to work that out, the attorneys, you know,
15 went back and forth. The evidence you'll see, they reached
16 out to a mediator. The guy almost mediated this dispute is
17 what it looked like. They got a general principle kind of
18 put together, but as, in Mr. Gavigan's testimony, they
19 didn't have all the details. They had a general idea, but
20 where they didn't finish the transaction is they had a --
21 what's called a flow of funds that were going to come into
22 the company, and so they had to agree on who was going to
23 get that money and where it was going to go. And as part
24 of that, it was the, the attorney's fee dispute. And so
25 that was not a, a, a -- the result of a exercise of the

1 option by Mr. White. That was a result of trying to
2 resolve the dispute created by The Best for Last's breach
3 when the option was exercised. And so I would hope the
4 court doesn't let the defendants spin these facts into
5 something it's not.

6 And it's, it's interesting, Your Honor, that is what
7 Mr. Shealy is trying to do -- and I'll just throw this out.
8 He's trying to basically say, well, that resulted into some
9 kind of contract, and my client didn't go forward with it.
10 He knows that can't be the case because the statute of
11 frauds would not allow that because that contract was not
12 signed in the sense that the signature was not delivered.

13 So, Your Honor, to summarize, the -- this evidence
14 shows that when my client exercised, attempted to exercise
15 the option, he was met with a flat out refusal to honor the
16 option language. The defendant refused to convey 74.425
17 percent. The defendant demanded that Mr. White become a
18 member of the LLC and not be able to become a cotenant
19 despite absolutely no language supporting that position.
20 And my client should not be punished because they spent
21 time trying to resolve it when ultimately it fell apart
22 over the dispute about attorney's fees, which again, as I
23 said, the defendant started that dispute when he tried to
24 make my client be responsible for some of their attorney's
25 fees.

1 So, Your Honor, we would contend that there's been no
2 waiver because we never got a chance to exercise the
3 option. There was no requirement for a cotenancy
4 agreement. The defendant was in breach and still is in
5 breach. And we would ask for an order granting summary
6 judgement and ordering the specific -- the defendants to
7 specifically form the option and to transfer the property
8 in exchange for the money that we tried to tender. And
9 I'll be glad to answer any questions you have, Your Honor.

10 THE COURT: I don't have any at this point. I'm going
11 to hear again from Mr. Shealy. Hold on.

12 MR. SHEALY: Sorry. Thank you. I just realized I was
13 talking to myself.

14 Briefly, Your Honor, I just, I do want to say that,
15 that Mr. Raynor is correct that the loan agreement was
16 drafted by Tim Gavigan. And, and on its, on its face it
17 says that he's drafting it in the course of the
18 representation of the borrower. The reason for my
19 confusion and misstating the facts is that that same Tim
20 Gavigan, when it came to the exercise of the option,
21 represented the plaintiff in the, in the proceedings to
22 exercise the option and in the negotiation of the mutually
23 acceptable tenancy agreement.

24 Your Honor, what's important is that, you know, what
25 is described by the plaintiff as a breach of this contract

1 is, you know, if you look at the, the notice of exercise of
2 the option, it says that, that the plaintiff is going to
3 exercise its option at a closing to take place, you know,
4 about a month later either, either just before the
5 refinancing, or I think it's twenty-nine days later. And
6 the, the, the parties -- I mean, it's not that the, that
7 the defendant failed to come to the closing table, failed
8 to, failed to close. The plaintiffs tendered closing based
9 upon the mutually acceptable joint tenancy -- cotenancy
10 agreement that the parties had negotiated, and it's the
11 plaintiff that failed to return the signatures. So, to
12 call that a breach is, is, I think, stretching beyond what,
13 what actually happened.

14 And all this is laid out in the materials that we've
15 given you. I apologize for their length, but, but this
16 does come down to, I think, very simple legal principles.

17 And so one other thing I wanted to, to mention is sort
18 of the background for a cotenancy agreement. This is a, a
19 self-storage facility in which there are certain costs
20 associated with the operation of the facility, and the, the
21 parties' discussions had to do the sharing of those costs
22 and, and whether the, whether the plaintiff was going to
23 share in, in certain fees that were baked into The, The
24 Best For Last, LLC, operating agreement and, and whether it
25 did that as a member of the LLC or as a cotenant jointly

1 participating in or, or sharing responsibility for the
2 operation, the ongoing operation of this facility. The
3 insurance, the taxes, the -- whatever. Employee expenses,
4 utilities, whatnot. Those were the sorts of things that
5 needed to be worked out and, you know, the specific terms
6 are, are really, really no, no moment to the, the
7 cross-motion because they, they did work out an agreement
8 that was signed by both parties, just that the plaintiff
9 failed to return signatures and decided to, to, to walk
10 away from the deal before his, his attorney could, could
11 return the signatures as was, was planned on the Friday
12 that this closing took place.

13 So, Your Honor, again, the, the rule against
14 perpetuities, that issue is -- concerns the, the court's
15 interpretation of the statute, whether the, the statutory
16 rule against perpetuities has a carve-out for nondonative
17 transfers, and so the, the common law rule would still
18 apply to that or whether it covers the whole field.

19 And, Your Honor, there are cases that have said that
20 the, that the intention was for commercial transactions to
21 still be subject to the, the common law rule against
22 perpetuities. There are excellent policy reasons why you
23 wouldn't want to have somebody have a perpetual, preemptive
24 right in a, in a piece of property that could be exercised
25 out of the blue and a, a -- the person holding title to the

1 property has no idea that the preemptive right exists
2 because it's not even, it's not even on the public record.

3 So, so, again, we believe that that is the -- that
4 threshold issue should decide the case but if it doesn't,
5 this is -- the court should exercise its, its equitable
6 jurisdiction, determine that the, that the equitable maxims
7 of one who seeks equity should do equity should apply, and
8 that that waiver is -- has taken place here such that the,
9 the plaintiff is in no position to seek specific
10 performance because it has had its bite at the apple.
11 That's all I have, Your Honor.

12 THE COURT: Okay, y'all have given me a lot to read,
13 and I thought I had a handle on things until I heard you
14 speaking, and now I'm not so sure. So, I'm going to read
15 everything and let y'all know something on both motions.

16 MR. RAYNOR: Okay.

17 THE COURT: Thank you.

18 MR. RAYNOR: Thank you, Your Honor.

19 MR. SHEALY: Thank you very much, Your Honor.

20 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, **VIA
WEBEX**, ON THE 26TH DAY OF AUGUST, 2021.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/S/Elizabeth B. Harris, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

SEPTEMBER 12TH, 2022

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT
 COUNTY OF RICHLAND Civil Action No. 2019-CP-40-06914

_____	)	
SPRING VALLEY INTERESTS, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	(Taken via Zoom)
	)	
THE BEST FOR LAST, LLC,	)	
	)	
Defendant.	)	
_____	)	

30(b)(6) DEPOSITION
 of
 SPRING VALLEY INTERESTS, LLC
 by
 CONARD LYNN WHITE

(Attending via Zoom in Mecklenburg County)

Witness Located at:

Raynor Law Firm, PLLC
 1822 Cleveland Street
 Charlotte, North Carolina

On Tuesday, December 22, 2020

REPORTER: CHRISTINE A. TAYLOR, RPR
 Notary Public
 (via Zoom in Union County)

A P P E A R I N G

For the Plaintiff: Kenneth R. Raynor, Esq.
 (via Zoom) Raynor Law Firm, PLLC
 1822 Cleveland Avenue
 Charlotte, North Carolina 28203
 704.413.3400
 ken@raynorlawfirm.com

For the Defendant: Kirby D. Shealy, III, Esq.
 (via Zoom) Adams and Reese, LLP
 1501 Main Street, Fifth Floor
 Columbia, South Carolina 29201
 803.254.4190
 kirby.shealy@arlaw.com

Also Present: Albert Heyward
 (via Zoom)

* * * * *

I N D E X

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1 Pursuant to Notice in the aforementioned
2 matter and in accordance with the South Carolina Rules
3 of Civil Procedure, this deposition of CONARD LYNN WHITE
4 was taken via Zoom by defendant beginning at 10:27 a.m.
5 on December 22, 2020, before CHRISTINE A. TAYLOR,
6 Registered Professional Reporter and Notary Public.

7 Pursuant to NCGS 10B-25, CONARD LYNN WHITE,
8 called as a witness and upon first being duly sworn
9 remotely, testified as follows:

10 EXAMINATION BY MR. SHEALY

11 Q. My name is Kirby Shealy. I'm a lawyer here in
12 Columbia, South Carolina, with the firm of Adams and
13 Reese, and I am here today to take the deposition of
14 Spring Valley Interests, LLC, and I understand that
15 you are the designee to speak on Spring Valley
16 Interests' behalf. Is that your understanding as
17 well?

18 A. Yes.

19 Q. Okay. First, I'm going to go through some ground
20 rules and then I'll show you some documents, but I
21 don't anticipate this taking very long. Have you
22 ever had your deposition taken before?

23 A. I think I have a time or two.

24 Q. All right. And in the times that you've had your
25 deposition taken, were those cases involving some

1 sort of business dispute?

2 A. One involved a murder charge where someone in one of
3 my businesses came in and with false ID and got very
4 drunk and was asked to leave, and she left. And when
5 she left, she drove across a busy highway and got hit
6 by a car and killed. And as the landlord, I got sued
7 for that.

8 Q. Okay.

9 A. Fortunately, I ended up making money on it, but that
10 wasn't the way I like to make money.

11 Q. All right. Any other occasions?

12 A. Yeah. There's been one other. I'm trying to
13 remember what it was all about. Oh, yeah, there was
14 a business dispute. Someone's property fell over on
15 my property and did a considerable amount of damage,
16 and I just settled an insurance claim on that -- not
17 too many months ago.

18 Q. That was property you owned down in Horry County?

19 A. Yes.

20 Q. All right. Well, so as I imagine Mr. Raynor has
21 already indicated to you and as you probably already
22 know, a deposition is just an opportunity for lawyers
23 in a particular case to put the witnesses in that
24 case under oath and to ask them questions. It's part
25 of the process that lawyers call discovery. So I'm

1 going to ask you a series of questions, a few just to
2 get know you a little bit because we've never met,
3 and then ask about Spring Valley Interests' knowledge
4 about the topics that were contained in the
5 deposition notice that I issued for today's
6 deposition. If at any point today I ask you a
7 question that you find vague or confusing or if I use
8 words you don't know or use them in a way that you do
9 not understand, please let me know, and I'll do my
10 best to rephrase. It's not my intention today to try
11 to confuse you in any way, but I will readily admit
12 that I will ask a poor question from time to time
13 because I'm thinking at the same time that I'm
14 talking and sometimes that doesn't work out very
15 well.

16 A. Question.

17 Q. Yes, sir.

18 A. If you ask me for information I consider
19 confidential, I don't plan to answer that. Is that
20 fine?

21 Q. Well, it might be and it might not be, but can work
22 through those things as we get to them. Generally
23 speaking, if you have an issue with some question
24 that I pose to you, you need to direct your question
25 or whatever -- you know, whatever issue you might

1 have to me rather than to your lawyer. If it
2 involves matters that you think are confidential, you
3 know, there are certainly provisions that would allow
4 you to confer with your lawyer to figure that out.
5 But, otherwise, you need to direct those questions or
6 issues to me.

7 And because we're on this format of video
8 conference where we're -- you and your lawyer are in
9 the same, but the court reporter is in a different
10 location and I'm in a different location, it's
11 particularly important that we not talk over each
12 other because our court reporter is trying to make a
13 record of these proceedings. And so it's also
14 important that you make a verbal response to my
15 questions, in other words, yes, no, yellow, 1946,
16 whatever the answer happens to be, and at sufficient
17 volume for our court reporter to take down your
18 answers.

19 It may be from time to time that I prompt you
20 to give a verbal response and -- but -- and I just
21 know from experience taking depositions in this
22 format that I and you and our court reporter are
23 going to have to exercise a fair amount of patience
24 to make sure that we get this done and get it done
25 efficiently. So, you know, there may be moments

1 where our Internet connection is not as strong as we
2 would like, and that may impede your ability to
3 understand something I'm asking you, or it may impede
4 my ability to understand you as you're providing a
5 response in which case we'll just have to repeat.
6 But this is -- these are all hurdles that we have to
7 overcome to be able to get this done and remain safe.

8 And I appreciate the fact that you're wearing
9 a mask today as is your lawyer. That may from time
10 to time cause me some difficulty understanding you.
11 If that's an issue, I may ask you to repeat. And
12 just forgive me if that gets tedious.

13 Do you have any questions today before we get
14 started?

15 A. I'm ready.

16 MR. RAYNOR: Kirby, I do have one
17 point. This goes back to the confidentiality
18 thing. We have talked about tripping over the
19 attorney-client privilege in this case.

20 MR. SHEALY: Yes, sir.

21 MR. RAYNOR: I would ask the witness
22 that if at any point he thinks your questioning
23 is eliciting a response that would require him
24 to disclose attorney-client communication, that
25 he let us know that, and then we will address

1 that concern. Does that make sense?

2 MR. SHEALY: It does make sense. I
3 appreciate and, you know, agree with that.

4 MR. RAYNOR: Does that make sense,
5 Lynn?

6 THE WITNESS: Yes.

7 MR. RAYNOR: So, you know, if Kirby
8 asks a question and you think he's asking you
9 that your response would have to be something
10 you talked about with your attorney that's
11 confidential, I think that may be what he was
12 referring to. That would be a way of
13 addressing that.

14 MR. SHEALY: It is not my intention
15 today to ask you any questions that --
16 pertaining to your communications with
17 Mr. Raynor or any other lawyer, but it may
18 be -- and Mr. Raynor and I have already
19 discussed this, it may be from time to time
20 that something I ask you, you know, may come
21 close to that line, and I'm going to try and
22 avoid that. But if there's any question, you
23 know, you have the opportunity to discuss that
24 with Mr. Raynor, and he'll give you the
25 appropriate instructions.

1 Another thing that we need to put on
2 the record is that this deposition is being
3 taken pursuant to a limited waiver agreement
4 that the parties have entered into. That
5 agreement is being circulated and executed, but
6 we are operating as if it is in place. And so
7 I just wanted to make sure that that was also
8 in the record.

9 Is that a fair recitation of the
10 agreement, Mr. Raynor.

11 MR. RAYNOR: Yes, it is.

12 MR. SHEALY: Any other housekeeping
13 matters that we need to put on the record?

14 MR. RAYNOR: Not from me.

15 MR. SHEALY: One more thing I'm
16 required by our rules to inform you, Mr. White,
17 is at any point you can take a break. This is
18 not an endurance contest. And I may ask for a
19 break or anybody participating may ask that we
20 take a break. If, however, during a break in
21 the deposition you discuss the substance of
22 your testimony with anyone, the rules would
23 allow me to inquire into the substance of that
24 communication.

25 Now, taking a break for purposes of

1 determining whether the attorney-client
2 privilege is different. But if the
3 communication pertains to the substance of your
4 testimony and does not pertain to whether the
5 determination of whether the attorney-client
6 privilege applies, I'm allowed to inquire into
7 the substance of that communication, and I'm
8 also required to give you that fair warning.
9 Does that make sense?

10 THE WITNESS: Yes. I also say one
11 piece of information. I'm not in the greatest
12 of health. I've fallen twice in the last year
13 and a half.

14 MR. SHEALY: Yes, sir.

15 THE WITNESS: The first time I fell, I
16 was home alone. I had just taken my wife and
17 daughter and granddaughter to the airport to go
18 to Europe. And I was on the floor for 16 hours
19 and I couldn't walk, I couldn't crawl, and I
20 had to inch along. It took 16 hours to get to
21 my cell phone to call 911, and I did a huge
22 amount of damage to the nerves in my left
23 shoulder, arm, and hand, and that hasn't fully
24 healed. They heal very slowly.

25 Then about six weeks ago I fell again

1 and broke my shoulder. So I'm not as I used to
2 be a couple years ago.

3 BY MR. SHEALY:

4 Q. Well, I appreciate your telling me that. My next
5 question was going to be: Are you under the
6 influence of any medication or anything else that
7 would impair your ability to think or understand my
8 questions or to testify today?

9 A. No.

10 Q. Okay. But if your -- the consequences of those
11 injuries causes you to need to take a break, do not
12 hesitate to do that?

13 A. Okay. That's why I was telling you. My endurance
14 isn't like it used to be.

15 Q. Yes, sir. Okay. Could you state your full name for
16 the record?

17 A. Conard Lynn White.

18 Q. And, Mr. White, where do you live?

19 A. I live in Charlotte now and it's the second time I've
20 lived here.

21 Q. And how long have you lived in Charlotte?

22 A. This time since 1986.

23 Q. Okay. And have you ever lived in Richland County --

24 A. No.

25 Q. -- South Carolina?

1 A. No.

2 Q. All right. Do you have any relatives that live in
3 Richland County, South Carolina?

4 A. No.

5 Q. Okay. So, Mr. White, you've been designated -- my
6 understanding is you've been designated to testify on
7 behalf of Spring Valley Interests, LLC, today in
8 response to the Notice of Deposition that I issued in
9 this case. Is that your understanding?

10 A. Yes.

11 Q. All right. I'm going to show you that deposition
12 notice. And if I can get to it --

13 MR. RAYNOR: I've got a copy right
14 here I can show him.

15 Q. I'm putting it on the screen. Can you see it,
16 Mr. White?

17 A. Yes.

18 Q. Have you seen this deposition notice before?

19 A. It's moving a little fast for me to see it.

20 Q. Okay. I'm sorry. I'll give you as much time as you
21 need to look at it.

22 A. I've seen that, yes.

23 Q. All right. And you've seen the exhibit to the
24 deposition notice?

25 A. I have that in front of me, yes.

1 Q. All right. We'll mark this, Madam Court Reporter,
2 Exhibit 1 to today's deposition.

3 All right, sir. So do you believe, Mr. White,
4 that you are the person most knowledgeable to testify
5 on behalf of Spring Valley Interests, LLC, with
6 respect to all 13 topics in the deposition notice?

7 A. I can testify to most of these things. I may not be
8 the most knowledgeable person. I did a lot of this
9 through Tim Gavigan, and Tim is more knowledgeable
10 than I am because he was on the front line doing the
11 talking, and I was in the back room making decisions
12 about what I wanted to do.

13 Q. Yes, sir. All right. If you'll let me know if we
14 approach a -- if we talk about a topic and you feel
15 like Mr. Gavigan is more knowledgeable than you about
16 that particular topic and, of course, his deposition
17 is scheduled to take place after this one, and I'll
18 ask him about those topics. Is that fair?

19 A. Fair.

20 Q. Okay. So, first, I just want to ask you about the
21 formation of Spring Valley Interests. Do you
22 remember when it was formed?

23 A. I don't remember the exact date. It's in the
24 documents, but it's been probably a couple of years
25 ago or so.

1 Q. And do you know the purpose for which it was formed?

2 A. Yes. It's consistent with the way I normally hold my
3 assets in the single asset entities.

4 Q. Okay. And so Spring Valley Interests, LLC, holds
5 what asset?

6 A. It owns the purchase option and has the loan that I
7 made to the -- to the entity that owns the properties
8 that we're talking about in the Spring Valley -- in
9 the Spring Valley area.

10 Q. All right. So this Spring Valley Storage Center is
11 the -- is the entity or the property that Spring
12 Valley Interests, LLC, holds an interest in; is that
13 correct?

14 MR. RAYNOR: Objection.

15 A. I hold a note and I hold a purchase option in that
16 property.

17 Q. Yes. Forgive me. You said that better than I did in
18 trying to formulate the question.

19 All right. And so prior to -- I understand
20 that Spring Valley Interests was assigned those --
21 those assets from White Interests Limited
22 Partnership; is that correct?

23 A. Yeah, for the most part. I'm going through the
24 process of redoing my estate plan.

25 Q. Yes, sir.

1 A. This is one thing that came up in that exercise that
2 I needed to get that asset into a single-asset
3 entity, and that's why I did that.

4 Q. All right. And White Interests Limited Partnership
5 was the entity that originally held the note and the
6 purchase option and the mortgage on this Spring
7 Valley property; correct?

8 A. I think that's right.

9 Q. All right. Does it currently hold any assets today?

10 A. Pardon?

11 Q. Does White Interests Limited Partnership hold any
12 assets today?

13 A. Absolutely.

14 Q. It does?

15 A. Yes.

16 Q. But do those assets have anything to do with the
17 property pertaining to the Spring Valley Storage
18 Center?

19 A. No.

20 Q. All right. Let me ask some sort of general questions
21 about White Interests Limited Partnership. Has it
22 conducted other business transactions with Albert
23 Heyward and/or entities that Albert Heyward has been
24 involved in?

25 A. Albert and I have been partners in various projects

1 for about 25 years.

2 Q. Okay. And Spring Valley Interests was not a party to
3 any of those other transactions; correct?

4 A. No.

5 Q. Okay. Was White Interests Limited Partnership?

6 A. White Interests Limited Partnership owns several
7 single-asset entities and has acquired those
8 periodically over a good period of time.

9 Q. Okay. Does it own -- does it own Spring Valley
10 Interests?

11 A. Well, Spring Valley Interests was created to replace
12 White Interests Limited Partnership as the owner of
13 the assets that we're talking about.

14 Q. Okay. Who are the members of Spring Valley
15 Interests, LLC?

16 A. I'm going to give you an answer, and I'm not going to
17 give you a full answer. It's owned by three trusts
18 primarily and a couple of other people or entities.

19 Q. All right. And so what is your connection to the
20 owners or the members of Spring Valley Interests?

21 A. Well, White Interests Limited Partnership owns Spring
22 Valley Interests.

23 Q. Okay.

24 A. Does that answer your question? I'm not sure I
25 understood the question.

1 Q. Well, that was the answer to a question I posed to
2 you earlier. I was wondering if White Interests
3 Limited Partnership owned Spring Valley Interests,
4 and so I understand that it does?

5 A. Yes.

6 Q. Okay. And so then the question I was posing to you
7 is, okay, what's -- are you one of the partners in
8 White Interests Limited Partnership?

9 A. I'm a minor partner.

10 Q. All right. And there are other individuals that are
11 partners in White Interests Limited Partnership?

12 A. No.

13 Q. All right. The other partners are, you mentioned,
14 trusts?

15 A. Trusts are the primary owners. And there's a
16 corporation that is also a part owner.

17 Q. Okay. And who's the owner of the corporation?

18 A. I am.

19 Q. Okay. All right. And you mentioned that you and
20 Albert Heyward had been business partners in various
21 deals through about 25 years. Have those deals
22 always concerned self-storage facilities?

23 A. All but one that I can think of.

24 Q. Okay. And, approximately, how many --

25 A. All but two that I can think of.

1 Q. Okay. And, approximately, how many deals have
2 you-all, you know, been involved in together?

3 A. I don't know exactly. I guess maybe eight or ten.

4 Q. All right. And in any of those deals before this one
5 was your -- or an entity that you're connected with,
6 did it have -- did it take an interest in the deal
7 via a loan with a purchase option?

8 A. No. That would not be normal.

9 Q. Okay. Are there any deals where at one point or
10 another you had a -- or an entity that you're
11 connected with have a joint tenancy arrangement with
12 other owners in the project?

13 A. Yes.

14 Q. Okay. What other deals involved a joint tenancy
15 arrangement?

16 A. I'm involved in lots of deals, at least 17, and
17 they've all been different. And I can't remember all
18 the details. I don't try to.

19 Q. Yes, sir. Are there any -- any of those deals,
20 though, that you do remember that involved at one
21 point or another a joint tenancy arrangement?

22 A. Well, we normally put an LLC together, and there are
23 various members of that that participate in the
24 ownership of the projects that we're doing.

25 Q. Okay. But my question had to do with a joint tenancy

1 arrangement. Do you remember any deals in particular
2 that involved at one point in the ownership -- in the
3 history of the ownership a joint tenancy arrangement?

4 A. Does joint tenancy mean co-tenancy? I'm not sure
5 what you mean by that.

6 Q. Well, I mean, if you call it a co-tenancy or a joint
7 tenancy, I'm thinking of those two things as being
8 the same, but if in your mind they are different --

9 A. Well, the answer -- if they're the same, the answer
10 is yes.

11 Q. Okay. So can you remember particular deals where
12 there were co-tenancies or joint tenancy
13 arrangements?

14 A. Yes.

15 Q. All right. And what do you know -- how do you recall
16 those deals -- or how do you refer to those deals?
17 Do you talk to -- refer to them by where they're
18 located?

19 A. Well, historically, we have used location as part of
20 the name of the entity because that's important to
21 people to know where you're located.

22 Q. Sure.

23 A. We haven't tried to establish a brand to use
24 everywhere. We try to localize it because this is a
25 local business.

1 Q. All right. So the particular deals that you remember
2 that involved a co-tenancy or joint tenancy
3 arrangement at one point or another during the
4 ownership of the property, can you name those by
5 where they're located?

6 A. I could name one.

7 Q. Which one?

8 A. Recent. We call it All-Star Storage at Goose Creek.

9 Q. Okay. And --

10 A. And it is in Goose Creek, which is a suburb of
11 Charleston.

12 Q. Now, is that the Clements Ferry property?

13 A. No.

14 Q. Okay. Clements -- if I say Clements Ferry, you're
15 familiar with that terminology too?

16 A. Yes.

17 Q. Okay. That's a different deal than the All-Star at
18 Goose Creek property?

19 A. Totally.

20 Q. All right. So let me ask you about the Goose Creek
21 property. Is that -- is that property still subject
22 to a co-tenancy arrangement?

23 A. Yes.

24 Q. Okay. Is there -- do you have any -- and so did an
25 entity of -- that you own or are connected to, did it

1 loan money to that project initially?

2 A. I have loaned money to that project. I don't think
3 it was initially, but somewhere along the line I did.

4 Q. Okay. And is it the -- is that entity's present
5 intention to eventually convert the co-tenancy
6 arrangement to a full participation in the LLC that
7 owns it?

8 A. No.

9 Q. Okay. All right. The Clements Ferry deal that I
10 mentioned earlier, was -- did an entity of yours loan
11 money to that project originally?

12 A. I invested money in that project originally.

13 Q. Okay. But was it -- were you --

14 A. I invested a million dollars initially and I have
15 since answered cash calls loaning the project another
16 600 and some thousand dollars.

17 Q. Did -- were you ever considered a lender with a --
18 holding a mortgage on the project?

19 A. Well, I invested a million dollars worth of equity in
20 the project to start with.

21 Q. Okay.

22 A. I've since loaned it 600 some thousand dollars as a
23 lender.

24 Q. So you had --

25 A. Answering cash calls, which I'm sorry had to answer.

1 Q. So if I understand, you invested as a member of the
2 LLC that owns that project?

3 A. Yes.

4 Q. All right. But then you loaned -- you loaned the LLC
5 additional cash?

6 A. Yes.

7 Q. Okay. And the -- was it the member of the LLC that
8 loaned the cash or was it some other entity that
9 loaned the cash to the LLC?

10 A. The lender was White Interests Limited Partnership.

11 Q. All right. And did White -- was White Interests
12 Limited Partnership the member of the LLC as well?

13 A. No.

14 Q. So did White Interests Limited Partnership at one
15 point have a mortgage on the Clements Ferry property?

16 A. I don't believe we did that, but I might be in the
17 process of doing that now.

18 Q. Okay. In any of these prior deals, did an entity of
19 yours that you either own or control do a 1031
20 exchange?

21 A. I've done 1031 exchanges.

22 Q. Okay. So you know what I'm talking about when I say
23 a 1031 exchange?

24 A. Yes.

25 Q. Okay. Have you ever done a 1031 exchange in a

1 project that you've been involved in with Albert
2 Heyward?

3 A. I'm trying to remember. I can't remember if I have
4 or not. I may have, but I can't tell you for sure
5 right now.

6 Q. If it comes to you, just -- you can just interrupt
7 and we can go back to this topic. Okay.

8 I want to talk about this particular deal, the
9 Spring Valley self-storage facility. What do you
10 remember about how this deal was put together?

11 A. I have been familiar with that project for several
12 years. It was at one point managed by Albert
13 Heyward's management company. I think they were
14 called The Heyward Group or something like that. And
15 Albert managed that for an investor and friend of
16 ours, and he has since passed away. He was a very
17 rich person and a very nice man.

18 When he died -- before -- I'm going to leave
19 one thing out. Before he died, the property was
20 partially burned down by a disgruntled tenant, and it
21 was renovated very nicely with quality materials and
22 it became available and Mr. -- what you call it --
23 died, and I found out about it through Rhett, who's
24 Albert's son.

25 Q. Yes, sir.

1 A. Rhett told me he was planning to invest some of his
2 money in it. Rhett had never invested in a project
3 before. So I figured if he was going to be the area
4 manage and had some of his own money in it, he would
5 do everything possible to make it succeed. So I just
6 decided I would participate in it as well.

7 Q. All right. And so was a group formed to take
8 ownership of the asset?

9 A. I had nothing to do with any of that, but the answer
10 is yes.

11 Q. Okay. What's your knowledge or understanding of how
12 that came together?

13 A. Well, I think Albert recruited some people that
14 invested in it in a way that I would have never
15 considered because it made no sense. You know, it
16 just -- it just didn't make sense, the way he was
17 trying to do it. A terrible bad deal for everybody
18 that would have gone along with it, and that includes
19 his son.

20 Q. Okay. So you're aware of how the deal was put
21 together and it was not something that you were --
22 you wanted to participate in?

23 A. Absolutely right.

24 Q. Okay. And what about it was a bad deal for the
25 investors involved?

1 A. Well, they were going to get diluted by 50 percent.

2 So, you know, why invest a dollar to get 50 cents of
3 value? It didn't make sense. I'm a fairly rich
4 person, but I didn't get rich doing stupid things,
5 and that would be a stupid thing.

6 Q. Okay. And so -- but did you -- were you approached
7 by Albert Heyward or Rhett Heyward about being
8 involved?

9 A. Actually, I don't remember who approached me, but I
10 think it was probably Tim Gavigan.

11 Q. Tim Gavigan approached you?

12 A. I'm pretty sure that's what happened. He asked me if
13 I was interested in participating, and I was.

14 Q. All right. And Tim Gavigan --

15 A. Not on the basis they had tried to do things with.

16 Q. Yes, sir. Now, Tim Gavigan, what's your relationship
17 to him?

18 A. Tim's been one of my primary transaction attorneys
19 for 20 some years. He's both licensed in North and
20 South Carolina and he was a CPA, and he cuts through
21 the bullshit better than most attorneys that I've
22 ever been around. He gets right to the heart of the
23 matter. That's why I've used him a lot.

24 Q. Okay. So you believe that he is the one that
25 mentioned potentially --

1 A. I can't say with 100 percent certainty, but I believe
2 that that's the way I heard about the opportunity.

3 Q. Okay. All right. So -- and then what were the terms
4 upon which you were -- I guess what were the terms
5 that were pitched to you as a means of participating
6 in this investment opportunity?

7 A. I came in as a lender initially loaning \$800,000 and
8 they carried an interest rate of 8 percent. But more
9 importantly, I had a purchase option to buy in as a
10 co-tenant an equity position converting that loan to
11 equity.

12 Q. And --

13 A. And I only get 74 points -- I think it's 74.25
14 percent ownership as a co-tenant.

15 Q. And why was the deal structured that way with you
16 being a lender at the beginning and then with the
17 option to convert to an equity position in the
18 property?

19 A. At some point I was asked if I would participate in
20 the project, and I said I would put 6 or 8 hundred
21 thousand dollars in it, which I ended up putting 800
22 as a loan with a purchase option.

23 Q. All right. Was it your intention or was it White
24 Interests Limited Partnership's intention to do a
25 1031 exchange with respect to this project?

1 A. That's an option I would want to keep open, but it
2 wasn't part of the plan I had.

3 Q. Okay. So there was -- there was a possibility or an
4 option for you to do that, to make that election and
5 do a 1031 exchange with this project; correct?

6 A. I had no plan to do it, but I had the ability to do
7 it.

8 Q. Okay. And what was the -- what was the exchange --
9 if you had done an exchange, what would the -- what
10 investment would you have exchanged with this one to
11 shield the gain that you would have otherwise
12 recognized?

13 A. I never identified any specifics.

14 Q. Okay. Let me ask you this. So I'm aware that you --
15 an entity of yours that you own owned an interest in
16 the DollHouse in Myrtle Beach; is that correct?

17 A. Myrtle Beach was owned by an entity called Restaurant
18 Row Waterway, LLC.

19 Q. Yes, sir.

20 A. I was the majority owner of that initially, and
21 eventually I owned 100 percent of it.

22 Q. Okay. And at the time that this Spring Valley deal
23 was put together, was that asset, the DollHouse, was
24 it for sale?

25 A. Yes.

1 Q. Okay. Now, is that the same asset that suffered the
2 property damage that you mentioned at the beginning
3 of the deposition?

4 A. Yes.

5 Q. Okay. And you -- so an adjoining property owner's
6 building fell on the improvements to the property
7 occupied by the DollHouse?

8 A. Yes.

9 Q. All right. And did you bring a lawsuit or -- every
10 time I say "you," you know, I'm being very general in
11 saying that. I appreciate your --

12 A. Well, Restaurant Row Waterway, LLC, sued the adjacent
13 property owner and eventually collected some amount
14 of money for damages.

15 Q. Did it also make a recovery from its own insurance?

16 A. No.

17 Q. Okay. So it made a recovery. Did the recovery
18 reimburse the LLC for the losses it incurred from the
19 property damage?

20 A. I'm not sure I understand the question.

21 Q. So I assumed that the property damage, you know,
22 involved -- well, let me back up.

23 When the incident occurred where the adjoining
24 land owner's building fell on the DollHouse, was the
25 DollHouse repaired?

1 A. No.

2 Q. Okay. So it never --

3 A. It wasn't repaired. It was cleaned up. It cost 20
4 some thousand dollars to remove the debris that fell
5 from next door onto my property. The city was giving
6 me hell like it was my problem. I had nothing to do
7 with it.

8 Q. Okay.

9 A. But I did spend money to get it cleaned up to get
10 them off my butt.

11 Q. But the building itself was not damaged?

12 A. Yeah, the building was damaged.

13 Q. And was that damage repaired?

14 A. It's been repaired. I didn't repair it.

15 Q. Okay. But -- so it's repaired by the owner that
16 purchased it?

17 A. As the person that purchased it I think has repaired
18 it. I haven't been down there for a while. So I
19 don't know firsthand what has gone on exactly.

20 Q. Yes, sir. So I think I understand. So you recovered
21 an amount of money from the adjoining land owner, and
22 that money reimbursed the costs that the LLC that
23 owned the DollHouse had incurred in cleaning up its
24 own property?

25 A. That was part of it, but only part of it.

1 Q. So it didn't fully reimburse the cost of the cleanup?

2 A. It reimbursed the cost of the cleanup, but it didn't
3 reimburse the cost of the damages at the place.

4 Q. You didn't incur the cost to repair the damage?

5 A. I did incur it in the form of selling the property
6 for less than I could have sold it for through a good
7 repair.

8 Q. Well, I was getting there. I understood that that's
9 kind of what happened, but so the property, when it
10 was sold, was it sold for a profit or for a loss?

11 A. For a loss.

12 Q. Okay. And so there was no need to do a 1031
13 exchange?

14 A. Absolutely not. You know, we haven't finished the
15 tax returns yet. It will be done next year for this
16 year's tax year. And my CPA tells me I will have a
17 loss of about \$750,000.

18 Q. I'm sorry. I didn't mean to cut you off.

19 A. Well, so there's, you know, a 1031 would be a
20 ridiculous thing to even think about.

21 Q. Right. Okay. We understand each other there.

22 When was the sale that -- where you incurred
23 the loss, when was that consummated?

24 A. Sometime -- sometime this past year. I don't
25 remember. Spring or summer, somewhere in that range.

1 Q. The spring or summer of 2020 or 2019?

2 A. 2019.

3 Q. All right.

4 A. No, wait -- I'm sorry. Let me make sure. I'm trying
5 to remember. One or the other. I can't tell you
6 right this minute. I've got all that documented.

7 Q. Okay.

8 A. I just don't have it memorized.

9 Q. All right. Understood. Okay. So going back to
10 Spring Valley Interests, you -- well, let me show you
11 a couple more documents and just see if I can get you
12 to identify those.

13 So at the outset of the -- putting this deal
14 together, White Interests Limited Partnership loaned
15 the project \$800,000; correct?

16 A. Correct.

17 Q. Okay. And it did that subject to a loan agreement
18 correct?

19 A. Yes.

20 Q. All right. And I'm going to show you a document.
21 Can you see the document I'm putting on the screen?

22 A. Barely.

23 Q. If I make it bigger, does that help?

24 A. Yeah. My eyesight is not great.

25 MR. RAYNOR: Do you want to mark that,

1 Kirby? I can show him the paper copy.

2 Q. Sure. The document I'm showing you is called "Loan
3 Agreement" at the top and it is four pages in length.
4 And I'm showing you the last page now. Does this
5 page bear your signature, Mr. White?

6 A. Yes.

7 Q. Do you also recognize Albert Heyward's signature?

8 A. Yes.

9 Q. Let's mark this as Exhibit 2. And, Mr. Raynor, if
10 you would, show him a paper copy. And the question
11 is to you, Mr. White, is this the loan agreement
12 under which that \$800,000 was loaned to the Spring
13 Valley project?

14 A. I believe it is.

15 Q. All right, sir. And I note in looking at the loan
16 agreement, it appears that Mr. Gavigan represented
17 the borrower in the transaction. Is that your
18 understanding?

19 A. I don't know if that's true or not. I think it might
20 be true, but I'm not positive.

21 Q. If you'll look at paragraph 10 on page 3.

22 A. Okay. Yeah, I see that.

23 Q. Okay. And Mr. Gavigan was making sure everybody knew
24 that he had prepared the agreement on behalf of and
25 in the course of his representation of the borrower,

1 and the borrower was The Best for Last, LLC. Do you
2 see that?

3 A. I saw that.

4 Q. Okay. And, also, I just wanted to point to you or
5 point you to the -- so the -- this is the purchase
6 option that you mentioned earlier in your testimony
7 in paragraph 2 of this Exhibit 2; correct?

8 A. Yes.

9 Q. Okay. And was -- can you explain to me, did you have
10 a communication with Tim Gavigan in which you
11 informed him that you wanted to structure this loan
12 this way with this purchase option?

13 A. Yes.

14 Q. Okay. And what was the purpose of structuring it
15 this way?

16 A. The purchase option was a valuable asset. I would
17 have never considered doing the loan without that.

18 Q. But -- so why do a loan and upfront rather than just
19 taking an equity position upfront?

20 A. I wanted my options open to do a 1031 if that
21 opportunity raised its head.

22 Q. Okay. So this -- you understood that having -- that
23 having this set up as a loan with a purchase option
24 would keep the door open for you to do a 1031
25 exchange; is that correct?

1 A. Yes. That's right.

2 Q. All right. Now, I'm going to show you another
3 document. Okay. Can you see the document I put on
4 the screen?

5 A. Promissory note, yes.

6 Q. Okay. Is this the note that you held as part of
7 making the loan to the Spring Valley project?

8 A. Yes.

9 Q. And you recognize this document as being that note?

10 A. I believe it is.

11 Q. Okay. All right. We'll mark this as Exhibit 3,
12 Ms. Taylor.

13 I just want to ask you, Mr. White, did you
14 have any communications with Mr. Gavigan about the
15 way this note was structured?

16 A. If we did, it was fairly brief. I don't remember a
17 specific conversation.

18 Q. Okay. I'm --

19 A. We had to have talked some, but I don't remember a
20 lengthy conversation that we had.

21 Q. All right. I'm pointing you to the paragraph of the
22 note entitled "payment of principal and interest."
23 Do you see that?

24 A. Yes.

25 Q. Okay. And paragraph -- subparagraph A talks about

1 the payment of interest; correct?

2 A. Yes.

3 Q. And it makes reference to paragraph 9.1.1.1 of the
4 maker's operating agreement. Do you see that?

5 A. Yes.

6 Q. Were you privy to or did you have a chance to review
7 the maker's operating agreement?

8 A. I never -- I've never seen it.

9 Q. Okay. So did you ask for this particular
10 subparagraph to be put in the note?

11 A. I saw that it was included and I agreed to it. I
12 don't think I ever asked for it.

13 Q. Okay. And it describes this as -- that you would be
14 paid as if you were an initial member in The Best for
15 Last, LLC; correct?

16 A. Yes.

17 MR. RAYNOR: Well, objection.

18 Kirby, just for the record, it says as
19 if the maker were an initial member. I think
20 under the document The Best for Last is the
21 maker.

22 MR. SHEALY: That's true. We can go
23 off the record.

24 (Off-the-record discussion.)

25 BY MR. SHEALY:

1 Q. We can go back on the record. And Mr. Raynor's
2 objection is well taken.

3 So -- all right. And then looking at
4 paragraph -- subparagraph B talks about the payment
5 of principal. And did you have any communications
6 with Mr. Gavigan about the way the payment schedule
7 for the repayment of the principal was to be set
8 forth in the note?

9 A. I had a fairly lengthy discussion with Tim about
10 repayment of principal and refinancing of the project
11 because there was an advantage to be -- there was a
12 timing issue that I had to deal with. And it was
13 important that I exercised my purchase option before
14 the project was refinanced because I was entitled to
15 70 some percent of the excess loan proceeds which
16 means my purchase option would not have cost the full
17 \$800,000. It would have been less than that.

18 Q. Okay. So is subparagraph B consistent with what your
19 desires were for the schedule for the repayment of
20 the principal?

21 A. All that was committed to writing and it's in one of
22 the documents.

23 Q. Well, I mean, is this the writing to which it was
24 committed?

25 MR. RAYNOR: He's asking you about

1 this document. I'm going to show him a paper
2 copy, Kirby.

3 MR. SHEALY: Sure. Yeah.

4 A. I'm sorry, I've lost -- I don't understand the
5 question at this point.

6 Q. Well, your last response said your desires were all
7 committed to writing. And what I'm wondering is, is
8 this note which is marked as Exhibit 3, is that
9 correct, or have we marked it already?

10 MR. RAYNOR: Yeah, 3.

11 Q. Is this note the writing on which your desires were
12 committed with respect to the --

13 A. I don't think so. Look for something that says
14 notice of exercise of option to purchase, and that's
15 where the writing has occurred.

16 Q. Okay. I'll get to that momentarily. I'm focused on
17 at the point that this deal was put together, you
18 talked about your desires and the schedule of the
19 repayment of the principal was important to you. And
20 I wanted to confirm whether subparagraph B of
21 exhibit -- of the paragraph entitled payment of
22 principal and interest in Exhibit B accurately
23 reflected what your desires were for the schedule for
24 the repayment of the loan principal?

25 A. Well, I think if you'll find another document, you'll

1 find a better answer than I can give you verbally
2 right now.

3 Q. So you don't know whether this subparagraph --

4 A. I know it's documented. It's not in that document.
5 It's in a different document.

6 Q. Okay. So I mean what I'm trying to get is to -- so
7 you don't know whether subparagraph B that I'm
8 showing you on Exhibit 3 accurately reflects your
9 desires with respect to the repayment of principal?

10 A. I don't know what that means, but, again, I do know
11 that there's documents, and this isn't it, that spell
12 out what my desires were. And I would refer you to
13 the one called "Notice of Exercise to Purchase
14 Option."

15 Q. Okay. All right. So that's Exhibit 3. Okay. So
16 let me show you another document and this is an
17 e-mail. Can you see that, Mr. White?

18 MR. RAYNOR: What is the Bates stamp
19 number for that?

20 MR. SHEALY: It's not on this. I just
21 used the copy that you sent yesterday.

22 MR. RAYNOR: Okay. What is the date.

23 MR. SHEALY: August 21, 2019.

24 BY MR. SHEALY:

25 Q. Mr. White, do you recognize this document?

1 A. Yes, I do.

2 Q. Okay. And is this an e-mail that you sent to Albert
3 Heyward on August 21, 2019?

4 A. Yes, it is.

5 Q. Okay. And what gave rise to your sending this e-mail
6 to Mr. Heyward?

7 A. I learned that he had put up, I believe, a \$35,000
8 deposit that was nonrefundable before we had any real
9 indication that we could get a loan, and I thought it
10 was an absolute stupid thing to do. I thought it
11 then and I still think it was.

12 Q. Well, who is the "we" that put up the 35,000?

13 A. I believe it's The Best for Last.

14 Q. Okay. And you nor any entity that you own or
15 controlled was a member of The Best for Last at that
16 point; correct?

17 A. I was not.

18 Q. So what's your --

19 A. It affected what I was going to be able to purchase,
20 and I didn't want see them piss \$35,000 away like
21 they did.

22 Q. So but you -- what interest did you have to determine
23 if the loan proposal could be made to work in an
24 acceptable way at this point?

25 A. What information did I have?

1 Q. No. I mean what interest did you have in determining
2 if the loan proposal was being investigated by the
3 The Best for Last, what interest did you have as a
4 secondary lienholder in determining if that loan
5 proposal could be made to work in an acceptable way?

6 A. Well, I had a purchase option and I wanted to protect
7 as much as I could for that reason.

8 Q. And do you know at the point that you sent this
9 e-mail in, had you exercised the purchase option?

10 A. I had not, but I planned to.

11 Q. And what was -- what made you decide that you were
12 going to exercise the purchase option?

13 A. I'd always intended to exercise the purchase option,
14 just a matter of when.

15 Q. All right. I'm going to have this e-mail marked as
16 Exhibit 4.

17 All right. So earlier, Mr. White, you
18 mentioned the exercise of the option to purchase.
19 And I'm going to show you a document and ask if you
20 can identify it. Do you recognize this document?

21 A. Can you show me a little more of it?

22 Q. Yes, sir.

23 MR. RAYNOR: Do you want me to show
24 him a paper copy, Kirby?

25 A. I have a paper copy here beside me.

1 Q. And so do you recognize this document?

2 A. Yes.

3 Q. What is it?

4 A. It's what it says it is. Notice of exercise of the
5 option to purchase.

6 Q. All right. And does this document bear your
7 signature as the manager of Commercial Real Estate
8 Counsel, LLC, the manager of White Interests Limited
9 Partnership?

10 A. Yes.

11 Q. All right. And was this sent to Mr. Heyward?

12 A. I sent it to -- I believe I did send it to Albert.
13 I'm not sure who else I copied.

14 Q. It says on its face that it was sent -- also copied
15 to Rhett Heyward -- no, it was copied to Mr. Heyward
16 via e-mail, not Rhett Heyward, but Albert Heyward.

17 A. Okay.

18 Q. Do you see that?

19 A. Yes.

20 Q. And you also copied Tim Gavigan?

21 A. Yes.

22 Q. Okay. So let's mark this as Exhibit 5.

23 All right. Earlier when we were talking about
24 the schedule for the repayment of principal, you said
25 that there was another document that had more

1 accurately reflected your desires with respect to the
2 repayment of principal and you made reference to the
3 notice of exercise of option to purchase. Does this
4 document reflect the schedule -- your desires with
5 respect to the schedule for the repayment of
6 principal?

7 A. Yes.

8 Q. Okay. Now, this purchase was never closed; correct?

9 A. Right.

10 Q. We'll talk about that more in a moment. But so as
11 we're sitting here today, Spring Valley Interests
12 still has a mortgage on the property that's the
13 subject of this litigation; correct?

14 A. Yes.

15 Q. And the The Best for Last is current on its payments
16 on that mortgage?

17 A. I don't know if it is or not. I'm checking on that
18 now, but I don't have the answer now.

19 Q. Okay. So your testimony is you don't know one way or
20 the other whether it's current?

21 A. I have raised the question myself. I have not gotten
22 an answer yet.

23 Q. Okay. All right. So after the Notice of Exercise of
24 Option to Purchase was issued, Mr. Gavigan got Rob
25 Bethea in our office involved; is that your

1 understanding?

2 A. I don't know at what point -- I think Albert got Rob
3 involved a long time earlier, a year or two maybe. I
4 don't know. It's been a long time.

5 Q. Well, do you know what Rob Bethea's role was before
6 the Notice of Exercise of Option to Purchase?

7 A. I saw a couple of letters he wrote that were full of
8 shit.

9 Q. I'm sorry, I didn't catch the last part.

10 A. I said I saw a couple of letter he wrote that were
11 full of shit.

12 Q. Okay. And those letters that he wrote were
13 transmitted when?

14 A. Months before any of this happened.

15 Q. Okay. And has -- to your knowledge, has Rob Bethea
16 ever represented an entity that you own or control?

17 A. Yes.

18 Q. Who is that?

19 A. Restaurant Row Waterway, LLC.

20 Q. What's the name of it?

21 A. Restaurant Row Waterway, LLC.

22 Q. And when was that representation?

23 A. I don't remember dates that well anymore, but it
24 would be three or four years ago.

25 Q. And when did that representation conclude?

1 A. When I -- well, it concluded at least a couple of
2 years ago.

3 Q. Did it conclude before the notice of exercise of
4 option to purchase was issued?

5 A. Long before.

6 Q. Is that the only entity that you have owned or
7 controlled that Rob Bethea ever represented?

8 A. Yes, as far as I know.

9 Q. Rob Bethea has never represented you individually in
10 any respect; correct?

11 A. I don't think so.

12 Q. Now, you mentioned a couple of letters you saw that
13 you said were full of shit. What -- tell me what
14 your recollection of those -- the content of those
15 letters was.

16 A. One of the letters indicated that it would be normal
17 for everybody to come into the deal on the same basis
18 meaning that screwed up The Best for Last deal which
19 I would never consider coming into. He had no idea.
20 He had never even talked to me about it, and he
21 claimed to have read my mind. And that pissed me off
22 because that's just dishonest as hell.

23 Q. Okay. And do you know the approximate date of the
24 letter you're talking about?

25 A. No, but it's several months before any of this

1 happened. Apparently, Albert had gone to him a year
2 or two before any of this came up. It's a long time
3 back.

4 Q. Okay. And you saw it was a letter or was it an
5 e-mail?

6 A. I'm pretty sure it was a letter, but I couldn't say
7 for sure.

8 Q. All right. To whom was the letter addressed?

9 A. I think -- I think it was addressed to Albert. I
10 couldn't say for sure, but I think it was.

11 Q. Okay. Were you -- I mean, were you copied on the
12 letter or how did you come into possession of the
13 letter?

14 A. I think -- I think somebody gave it to Tim and Tim
15 may have shown it to me. I'm not positive of any of
16 that, but that's my best guess.

17 Q. You had seen that letter months before the Notice of
18 Exercise of Option to Purchase was issued?

19 A. Yes. Several months. Those are not one and the
20 other. They're, you know, a long ways apart.

21 Q. Okay. And earlier you said you saw a couple of
22 letters. Did you see more than one communication
23 from Rob Bethea?

24 A. That's the one I remember most. I think there was
25 another one that was just about as ridiculous.

1 Q. Do you remember the contents of that communication?

2 A. No, I don't.

3 Q. All right. And so what was ridiculous about the one
4 that you do remember is Mr. Bethea's discussion about
5 what was normal in a deal like this?

6 A. He was implying that it would be normal for everybody
7 to come into the deal on the same basis. And I -- I
8 have never considered going into any deal that damn
9 stupid in my life and I never will. So he was trying
10 to read my mind without ever having talked to me and
11 put it on paper that he knew what I was thinking.
12 And that pisses me off, frankly.

13 Q. Okay. Understood. All right. So you're aware that
14 after this Notice of Exercise of Option to Purchase,
15 Exhibit 5, was issued, there was a fair amount of
16 negotiation as to how the purchase would be
17 structured; correct?

18 A. Yes.

19 Q. All right. And Mark McKnight got involved. Does
20 that ring a bell with you?

21 A. Pardon?

22 Q. There's a lawyer named Mark McKnight or Marcus
23 McKnight?

24 A. No, that means nothing to me.

25 Q. Okay.

1 A. Well, I don't know, maybe it does mean something.
2 Albert brought somebody up from somewhere, I think
3 Columbia. And we spent a day in Tim's office trying
4 to work some things out. That may be who that was.
5 I don't remember his name.

6 Q. Okay.

7 A. He was a decent enough guy. We just had to get it
8 worked out.

9 Q. Okay. So there was a meeting that you do recall that
10 involved Albert Heyward and another person from
11 Columbia, and I'll represent to you my understanding
12 is that it was --

13 A. I think it was Columbia. I couldn't be positive of
14 that.

15 Q. Well, I mean, to be fair to you, I'll represent to
16 you it's my understanding that was a lawyer from
17 Columbia named -- and, actually, I may be calling him
18 the wrong name. It's either Marcus Knight or Marcus
19 McKnight, and I think -- but in any event, there was
20 a conversation in Mr. Gavigan's office concerning the
21 structure of this purchase?

22 A. Well, it was concerning trying to make the deal work,
23 get everybody on board to get on with what we were
24 supposed to be doing.

25 Q. Okay. Who needed to get on board?

1 A. It will take me a minute, but I can look here. I
2 think I've got some notes from that meeting that he
3 took and left copies of it with me. I had notes on
4 the piece of tablet paper if I could find that.

5 Q. Okay.

6 A. It wasn't yellow. It's a white paper. No, that's
7 not it.

8 Yeah, I found the piece of paper.

9 Q. All right. Just so I understand what you're looking
10 at because I'm not in the same room with you --

11 A. I don't know how to do this. These are his notes
12 from that meeting that he left a copy of with me.

13 Q. Okay.

14 A. This was a proposal that we talked through and were
15 about to agree on. And I'm not sure why it fell
16 apart, but it fell apart eventually.

17 MR. RAYNOR: Do you want me to scan
18 this and send it to you, Kirby?

19 MR. SHEALY: That would be great.

20 Q. So the document that you've just identified is the
21 notes that the lawyer from Columbia that I'll
22 represent to you is Mark Knight?

23 A. Yeah. Those are his notes that he left a copy of
24 with me. It looked like we were close to coming up
25 with something that was going to work for everybody,

1 but it never happened.

2 MR. RAYNOR: Let me get this scanned
3 real quick and I'll have it e -- mailed to you.

4 MR. SHEALY: Ken, before you leave the
5 room, let's just -- okay. So this will be
6 Exhibit 6 to the deposition will be these
7 notes.

8 MR. RAYNOR: Okay. That will work.

9 MR. SHEALY: Why don't we go ahead and
10 take a five-minute break since we've going for
11 a little bit.

12 MR. RAYNOR: Okay.

13 (Recess taken from 11:43 a.m. until 11:49 a.m.)

14 BY MR. RAYNOR:

15 Q. Mr. White, the meeting that you were just describing
16 that you found the notes from that are now Exhibit 6,
17 when did that meeting take place?

18 A. I don't know if there's any date on that document or
19 not.

20 Q. I'm looking at it now?

21 A. 9/19/19.

22 Q. Okay. So September 19, 2019, is when you believe
23 that meeting took place in Tim Gavigan's office?

24 A. Yes.

25 Q. Okay. All right. And when you left that meeting,

1 did you believe that there was an agreement in
2 principle as to how the purchase would be structured?

3 A. I wouldn't say there was an agreement in principle,
4 but it looked like we were going to reach an
5 agreement. Everybody was nodding yes and such.

6 Q. Okay.

7 A. So no real documents were ever prepared or that --
8 I've kind of forgotten why this fell apart, but it
9 looked pretty promising at the time.

10 Q. So I'll just represent to you that a fair amount of
11 drafting took place after that meeting on
12 September 19, 2019. And do you recall -- do you
13 recall an attempt to close this transaction taking
14 place on September 27, 2019?

15 A. That may have happened. It may not. I don't know.

16 Q. All right.

17 A. I don't remember. I've seen a lot of documents
18 following this meeting. I know it was a positive
19 meeting and I felt good about it. But I don't
20 know -- I don't remember much happening after that.

21 Q. Okay. Did you ever sign any documents to document
22 this transaction?

23 A. Not that I know of.

24 Q. Okay. You never met with Mr. Gavigan and sat down to
25 sign the documents?

1 A. Not that I recall. Again, this was a positive
2 meeting. I felt good about it and then I don't
3 remember anything ever happening afterwards.

4 Q. Well, did you have communications with Mr. Gavigan --
5 and I don't want to know the substance of those
6 communications, but did you have communications with
7 Mr. Gavigan after the meeting on September 19, 2019?

8 A. I don't recall that we talked about it in any
9 specific, but I'm quite sure I did have communication
10 with him after that meeting.

11 Q. Okay. All right. And just so that I'm aware, so you
12 brought with you to the deposition today a file that
13 you maintained?

14 A. This is just -- again, assorted documents and other
15 things that I've accumulated and I think all those --
16 at least part, I don't know all, have been
17 communicated to you mainly through Tim's office.
18 Tim's a much better record keeper than I am, and I
19 think he gave you everything he had available.

20 Q. Okay. So -- but I'm just -- let me make sure I'm
21 clear. What you brought with you today is a file you
22 maintain with respect to the Spring Valley entity?

23 A. Yes.

24 Q. Have you been using those documents, the documents in
25 that file to help refresh your recollection in your

1 testimony?

2 A. I've looked through it a couple of times to help me
3 remember.

4 MR. SHEALY: Okay. Mr. Raynor, to the
5 extent -- if you -- I'm going to rely on you.
6 To the extent there are any other documents in
7 that file that have not been produced in
8 discovery, I mean, I appreciate you sending me
9 the notes, but if there are any other documents
10 in that file, I think I'm entitled to them
11 under the rules.

12 MR. RAYNOR: I'll send them to you.

13 MR. SHEALY: Okay. Thank you.

14 THE WITNESS: You're welcome to them,
15 but I would be surprised if you don't already
16 have everything.

17 MR. RAYNOR: We'll look and we'll send
18 it to him.

19 BY MR. SHEALY:

20 Q. All right. So, Mr. White, you said this earlier,
21 you're not sure why this deal fell apart?

22 A. This deal on this piece of paper we just
23 communicated?

24 Q. Yeah, the --

25 A. I don't know why it fell apart. I can't remember.

1 Obviously, it did fell apart. But right after the
2 meeting, I felt like we accomplished something. I
3 felt like it was a very positive meeting, then kind
4 of nothing happened that I can recall.

5 Q. All right. So you don't remember that the bones of
6 contention were that kept this purchase from closing?

7 A. I thought we were pretty much all in agreement with
8 what this outline would indicate. And, you know, it
9 breaks it down who was going to get what when the
10 refinance occurred. And it looks like that I was
11 supposed to get -- looks like \$311,000, and my
12 purchase option would be exercised. Then I would end
13 up owning 70 percent as a tenant in common. And,
14 again, I felt good, but nothing -- nothing happened.
15 So I don't know why it died, but it just died on the
16 vine.

17 Q. All right. So you don't have any recollection of any
18 disputes over sharing of costs or anything like that
19 that led to this transaction not closing?

20 A. I made some major concessions in this meeting. And
21 maybe more than I should have, but I was willing to
22 do what I agreed to. And, again, I don't know why it
23 just didn't happen.

24 Q. All right. Do you have any other notes in the file
25 that you brought with you today concerning

1 negotiation points that, you know, were issues for
2 you from -- going forward from September 19, 2019?

3 A. Not that I know of. Again, I've been through this
4 file a couple of times looking for things that would
5 help me remember.

6 Q. Okay. And you don't recall reviewing any
7 documents -- draft documents to -- in furtherance of
8 making the transaction that is sketched out in
9 Exhibit 6 --

10 A. I don't recall any documents. If I did there, should
11 be a copy in this file, and there isn't.

12 MR. SHEALY: All right. I may be
13 close to finished. If we can just take a
14 couple of minutes and I may be about done.

15 MR. RAYNOR: Okay.

16 MR. SHEALY: Mr. White, I do want to
17 thank you for your patience with me today.

18 (Recess taken from 11:57 a.m. until 12:03 p.m.)

19 BY MR. SHEALY:

20 Q. Mr. White, I want to go back to the loan agreement
21 and -- which is -- is that Exhibit 2, Ms. Taylor?
22 I'm just guessing.

23 MR. RAYNOR: Yes, Exhibit 2.

24 Q. Can you see that on the screen again, Mr. White?

25 A. I have a paper copy in front of me.

1 Q. Okay. All right. And do you see the last sentence
2 of paragraph 2, lender's purchase option?

3 A. Paragraph 2?

4 Q. Yes, sir.

5 A. The last sentence?

6 Q. Yes, sir. Where it says, "The lender shall hold take
7 title to the co-tenancy interest."

8 MR. RAYNOR: Just for the record, the
9 last sentence, Kirby, is "The purchase option
10 is freely assignable" --

11 MR. SHEALY: You're right.

12 MR. RAYNOR: Just to be technical
13 about it.

14 BY MR. SHEALY:

15 Q. The penultimate sentence starts, "The lender shall
16 hold take title to the co-tenancy interest." Do you
17 see that, Mr. White?

18 A. Yes, I see that.

19 Q. Okay. And do you see the second -- there are two
20 sort of conditions in that. One is "no mortgages
21 other than the borrower's then outstanding first lien
22 mortgage," and the second is "a mutually acceptable
23 co-tenancy agreement." Do you see that?

24 A. Yes.

25 Q. All right. When, if ever, did the parties come to a

1 mutually acceptable co-tenancy agreement?

2 A. I don't think that ever happened, although, it
3 doesn't have to happen for me to exercise my purchase
4 option.

5 Q. And what makes you think it doesn't have to happen?

6 A. It's not a condition precedent.

7 Q. But the taking title of the co-tenancy interest is
8 subject to a mutually acceptable co-tenancy
9 agreement; correct?

10 MR. RAYNOR: Well, objection.

11 A. I would suggest you might ask Tim that question
12 instead of me.

13 Q. Okay.

14 A. I'm not an attorney and don't pretend to be.

15 Q. You would defer to Mr. Gavigan with respect to how
16 that is supposed to --

17 A. He was probably the author of this document.

18 Q. Okay. All right. And let me just -- I've got a
19 couple of more things. Does Spring Valley claim
20 damages in this case?

21 A. We hope we don't have to, but we will if need be.

22 Q. In what way would Spring Valley have been damaged?

23 A. That purchase option has a lot of value.

24 Q. Okay. And your claim is that the failure to close on
25 the purchase option was --

1 A. It's been very damaging to Spring Valley, and we will
2 come after someone if we need to. That's not what we
3 want to do, but that's certainly an option.

4 Q. How is it damaging to Spring Valley?

5 A. Pardon?

6 Q. How is the -- without accepting the premise that it
7 was The Best for Last's fault that the purchase
8 option failed to close, but how is the failure to
9 close damaging to Spring Valley?

10 A. Spring Valley will not have an equity interest in the
11 project and that's worth on the high side of
12 \$2 million.

13 Q. All right. And so that's -- if the property is sold
14 and Spring Valley is not an equity interest, at that
15 point it would be damaged, is that what you're
16 saying?

17 MR. RAYNOR: Objection. You can
18 answer.

19 THE WITNESS: Pardon?

20 MR. RAYNOR: I'm just making an
21 objection for the record, but you can answer.

22 THE WITNESS: You're objecting?

23 MR. RAYNOR: Yeah, but for the record.
24 You can answer.

25 THE WITNESS: I can answer?

1 MR. RAYNOR: Yes, sir.

2 A. It would seem to me that Spring Valley would be
3 damaged considerably.

4 Q. Okay. But that would be only in the event that the
5 property were sold and Spring Valley were not at that
6 time an equity owner in the property; correct?

7 MR. RAYNOR: Objection.

8 A. No. I don't think that's correct.

9 Q. What's incorrect about that, what I just said.

10 A. I'm being damaged in any event if I can't exercise
11 that option.

12 Q. So what are the damages --

13 A. I suffer from cash flow that I'm not getting right
14 now, and I'll be suffering from capital gains that I
15 would, otherwise, be entitled to. And we're talking
16 about substantial sums of money. And that's all I
17 care to say about it.

18 Q. Okay. Capital gains that you'd be entitled to. I
19 just need to understand that. You would only
20 recognize a capital gain if there were a sale for
21 more than your equity -- more than you had in it;
22 right?

23 A. There's an appraisal. And if you look at the
24 appraisal and look at the percentage of the ownership
25 that I'm supposed to have, you get a quick number and

1 it's on the high side of \$2 million. And that's
2 supposed to be fine-tuned in court. We're not in
3 court yet so we don't need to beat that to death
4 today.

5 Q. Okay. So, in other words, you don't own today the
6 percentage of the property that you think you should
7 as of today?

8 A. That's right.

9 Q. All right. Do you recall that The Best for Last
10 tendered payoff of the -- of Spring Valley Interests'
11 mortgage at some point in the fall of 2019?

12 MR. RAYNOR: Objection.

13 THE WITNESS: He objected.

14 MR. RAYNOR: You can answer. I'm
15 objecting for the record. That's all.

16 Q. Well, let me pose the question this way: Do you
17 recall that The Best for Last asked for a payoff from
18 Spring Valley Interests in the fall of 2019?

19 A. I recall they're not entitled to do that.

20 Q. That's --

21 A. Yeah, if they ask the question, it's irrelevant.
22 They're not entitled to do it.

23 Q. Okay. But you don't -- the answer to my question
24 is -- or I need an answer to my question. I
25 understand your position about whether they were

1 entitled to do that or not. But do you recall
2 receiving a request for a payoff of the mortgage?

3 MR. RAYNOR: Objection.

4 A. I don't recall. I don't recall a request, but I have
5 seen something in a document somewhere that indicates
6 that that request may have been made.

7 Q. Okay. And was a payoff figure ever given to The Best
8 for Last in response to that request?

9 A. No, not that I know of.

10 Q. Do you know why?

11 A. Well, first of all, they're not entitled to it, so
12 why worry about it.

13 Q. And so you're saying that they're not entitled --
14 that The Best for Last is not entitled to pay off the
15 mortgage?

16 A. Not until I exercise my purchase option.

17 Q. Okay. That's your position is that they -- that
18 until such time as you exercise your purchase option,
19 they are unable to pay off the mortgage?

20 MR. RAYNOR: Objection.

21 A. And it would also unable to borrow the money because
22 I'm the head of who the lender would be. And lenders
23 don't operate that way, as you probably know.

24 Q. All right. Mr. White, other than the e-mail that I
25 showed you that I think was Exhibit 4 from you to

1 Mr. Heyward, were there ever any other written
2 communications other than the e-mail to Mr. Heyward
3 and the Notice of Exercise of the Option to Purchase,
4 there ever any other written communications between
5 you and any agent of The Best for Last from August of
6 2019 to today?

7 A. I had -- I had communication with Tim. And Tim may
8 have had communication with somebody from The Best
9 for Last, and he could probably answer that a whole
10 lot better than I could.

11 Q. Other than the two documents we've identified today
12 that were sent -- signed by and sent by you, you're
13 not aware of any other direct communications in
14 writing from you in the time period I mentioned?

15 A. Not from me. I know there's been communications
16 between Tim and whoever the prospective lender was at
17 the time.

18 Q. Okay. All right. And just for the record, you know,
19 we've been talking the property or the Spring Valley
20 self-storage facility, is it your understanding that
21 that property is located on three tracts of land:
22 9005 Two Notch Road, 237 Rabon Road, and 241 Rabon
23 Road?

24 A. Yeah. I don't know if those are the exact addresses,
25 but there are three pieces of property.

1 Q. Okay. And, finally, who's the manager of Spring
2 Valley Interests?

3 A. I am.

4 Q. And are there any other officers of Spring Valley
5 Interests?

6 A. No.

7 MR. SHEALY: All right. I have no
8 further questions. Thank you again for your
9 attention today. Please answer questions that
10 Mr. Raynor may have.

11 MR. RAYNOR: I don't have any
12 questions.

13 (Whereupon, the foregoing deposition was concluded
14 at 12:18 p.m. Signature was reserved.)

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SPRING VALLEY INTERESTS, LLC,

Plaintiff,

V.

THE BEST FOR LAST, LLC,

Defendant.

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(Taken via Zoom)

DEPOSITION
of
TIMOTHY B. GAVIGAN

(Attending via Zoom in Mecklenburg County)

On Tuesday, December 22, 2020

REPORTER: CHRISTINE A. TAYLOR, RPR
Notary Public
(via Zoom in Union County)



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Also Present: Albert Heyward
(via Zoom)

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1 Pursuant to Notice in the aforementioned matter
2 and in accordance with the South Carolina Rules of Civil
3 Procedure, this deposition of TIMOTHY B. GAVIGAN was
4 taken via Zoom by defendant beginning at 12:27 a.m. on
5 December 22, 2020, before CHRISTINE A. TAYLOR, Registered
6 Professional Reporter and Notary Public.

7 Pursuant to NCGS 10B-25, TIMOTHY B. GAVIGAN,
8 called as a witness and upon first being duly sworn
9 remotely, testified as follows:

10 EXAMINATION BY MR. SHEALY

11 Q. Mr. Gavigan, again, I'm Kirby Shealy. We met just a
12 moment ago off the record. And I hate meeting people
13 via this video conference format such as the world we
14 live in today. I'm a lawyer at Adams and Reese in
15 Columbia. You, I believe, are familiar with my law
16 partner, Rob Bethea, but I don't think you and I have
17 ever worked on anything together. Is my recollection
18 correct?

19 A. I think so.

20 Q. Okay. I am here today to take your deposition in a
21 lawsuit between The Best for Last and Spring Valley
22 Interests. And, of course, you have been involved in
23 the transactions that this lawsuit arises out of.

24 And understanding that you are a lawyer and
25 have duties to one or more clients, Mr. Raynor, who

1 represents Spring Valley Interests, and I have entered
2 into a limited waiver agreement that we anticipate
3 that you may from time to time in answer to a
4 question, whether intentionally or unintentionally,
5 have to reveal information that would otherwise be
6 attorney-client privilege, we have agreed that to the
7 extent that that happens, nobody will take issue with
8 you over that, but there will be no -- that does not
9 result in the waiver entirely of the attorney-client
10 privilege that you have with any -- with any client in
11 this case. Is that a fair recitation of our
12 agreement, Mr. Raynor?

13 MR. RAYNOR: Yes, it is.

14 MR. RACINE: Kirby, excuse me, along
15 those lines then what I will do, instead of
16 shouting out objection to every single question
17 like that, I'll just say we'll make a blanket
18 objection to all attorney-client privilege, but
19 in light of that agreement, I'll just reserve
20 all objections for later.

21 MR. SHEALY: Okay. Terrific.

22 MR. RACINE: Thank you.

23 MR. SHEALY: We want to make this as
24 easy on everybody as possible.

25 MR. RAYNOR: If I may just add,

1 gentlemen, we did this with Mr. White, if the
2 witness feels like that there's an answer that
3 would require the disclosure of attorney-client
4 privilege, he may want to alert you, Russ, so
5 you-all can talk about whether or not that's
6 more than incidental. Is that fair, Kirby?

7 MR. SHEALY: Yeah. If there's any
8 question that comes up where Mr. Gavigan has a
9 question about whether he can or should answer
10 and needs to consult with you, Russ, we are
11 totally fine with that and you-all take whatever
12 time you need to to figure that out.

13 MR. RACINE: Thank you.

14 THE WITNESS: Just for my
15 clarification, if I don't take that avenue, do I
16 waive it? Are you putting the onus on me in
17 light of your -- instead of your agreement?

18 MR. SHEALY: Well, it's not that we're
19 putting any onus on you. We just are -- I mean,
20 if you have some discomfort, we don't want to --
21 you to -- I mean, you have this right under the
22 rules. If you have some discomfort about what
23 you -- about an answer, that is entirely up --
24 you can consult with your lawyer about that.

25 THE WITNESS: I get that. I have

1 discomfort about the entire deposition.

2 MR. SHEALY: I understand.

3 THE WITNESS: That being said, I
4 thought the negotiated agreement and then Russ's
5 waiver of all privilege, I'm okay relying on
6 that. I just as soon not go through this thing
7 wondering whether this is something that rises
8 above the level of what you two agreed to, that
9 I don't even know what that means.

10 MR. RAYNOR: Tim, we're -- if I may
11 interject, Kirby -- we're not trying to
12 intentionally elicit responses that would
13 violate the attorney-client privilege. We're
14 not -- you correct me if I'm wrong, Kirby --
15 we're not trying to do that.

16 MR. SHEALY: Correct.

17 MR. RAYNOR: We're trying to avoid
18 that. It's really hard, though, given the
19 nature of the beast. And it was the same way
20 when Rob testified yesterday, you know, you-all
21 are involved in it. And so we realize that even
22 though we're not trying to ask you questions
23 that would require disclosure of attorney-client
24 privilege, you may make some reference more so
25 than most depositions, in fact, where somebody

1 would argue, well, that was an incidental
2 disclosure, therefore, you waive the whole
3 thing. So that's what that waiver was trying to
4 avoid.

5 And, you know, to give you comfort that
6 you could say, yeah, I got this e-mail and I
7 gave it to my client, for example,
8 without having to worry about, you know, I
9 waived the privilege.

10 But certainly -- and I don't think
11 we've had anybody do this, but, certainly, we
12 won't -- if people -- if there is a response
13 that you think goes beyond that, you know,
14 something very substantive you talked to your
15 client about, then you need to let Russ know
16 that, hey, I need to talk to you and then you
17 call can maybe talk to us, we can figure it out.

18 Does that make sense? Is that a fair
19 approach, Kirby?

20 MR. SHEALY: It is. It is.

21 MR. RAYNOR: Russ, does that work for
22 you?

23 MR. RACINE: Yeah, I think that's fine.
24 As you said, Ken, by the nature of this
25 deposition, almost everything is going to be

1 some form of attorney-client privilege. And so
2 my understanding is the agreement is anything
3 testified to in the deposition is not a waiver
4 of any additional information or something else
5 that Tim would want to keep confidential. And
6 if you ask him a specific question that for --
7 maybe the example would be discussions to a
8 particular client about trade secrets or
9 something that, you know, maybe even gets a
10 heightened form of protection, he can ask me, we
11 can talk about it, and then either answer or
12 reserve the right to wait and answer later,
13 something like that. Does that make sense?

14 MR. RAYNOR: Right.

15 MR. SHEALY: It does.

16 MR. RACINE: Okay.

17 MR. SHEALY: We're trying to both, you
18 know, give you as much comfort as we can,
19 Mr. Gavigan, and also at the same time, you
20 know, get this exercise done in a way that is
21 not too cumbersome.

22 THE WITNESS: Okay.

23 MR. RACINE: And I apologize, Albert,
24 can you identify yourself? Who are you?

25 MR. SHEALY: I'll identify Albert.

1 Albert is the manager of The Best for Last.

2 MR. RACINE: Okay. So he's your
3 client?

4 MR. SHEALY: Well, The Best for Last is
5 my client. Albert, as its manager, is the
6 corporate representative.

7 MR. RACINE: Okay. All right.

8 MR. SHEALY: Okay. Everybody ready to
9 get started? Madam Court Reporter, you can
10 swear in Mr. Gavigan.

11 COURT REPORTER: He was sworn.

12 MR. SHEALY: Okay. You've already done
13 that.

14 BY MR. SHEALY:

15 Q. Mr. Gavigan, I don't know whether you've ever given a
16 deposition before. Have you ever had occasion to give
17 a deposition?

18 A. No.

19 Q. All right. But you are a member of the Bar, so I will
20 make this as brief as possible. As you're aware, you
21 know, this is part of the discovery process in a
22 matter that's in litigation. You're under oath, the
23 same as you would be put under if you were testifying
24 in court.

25 I am going to ask you a series of questions,

1 first to get to know you a little bit, and then ask
2 you about certain actions and certain documents that
3 have been prepared that relate to the dispute between
4 The Best for Last and Spring Valley Interests. If at
5 any point I ask you a question that you find to be
6 vague or confusing or if I use words you don't know or
7 use them in a way that you do not understand, please
8 let me know. It's not my intention today to try to
9 confuse you. It's more likely that you will use words
10 that I don't know or use them in a way that I don't
11 understand and I'll have to ask you to give me more
12 explanation because your practice and mine do not
13 really overlap.

14 And -- but as we've talked about, if you
15 have -- if there's some question that -- where you
16 need to talk to Mr. Racine, you know, we certainly
17 want to you do that. But, otherwise, if it's just a
18 question you don't understand me, just direct that
19 question back to me, and this will go pretty smoothly.

20 If at any point -- I am just required by rules
21 to make -- to inform you about this. If at any point
22 any of us wants to take a break, you can do that. But
23 during that break if you discuss the substance of your
24 testimony with anyone except for where the
25 attorney-client privilege applies, I'm allowed under

1 our rules to inquire into the substance of that
2 communication. But outside of that, I have no plans
3 to ask you about your communications with Mr. Racine.
4 And I will do my level best to avoid asking you
5 questions that would cause you to elicit
6 attorney-client privileged communications.

7 So with all that being said, do you have any
8 questions of me before we get started?

9 A. No.

10 Q. Could you state your full name for the record?

11 A. Timothy Brian Gavigan.

12 Q. And, Mr. Gavigan, and you are a member of the North
13 Carolina Bar and the South Carolina Bar; correct?

14 A. Correct.

15 Q. Where did you get your education?

16 A. Which education?

17 Q. Your undergraduate education first?

18 A. University of North Carolina at Greensboro.

19 Q. And then your law degree?

20 A. Widener University School of Law.

21 Q. And when did you finish law school?

22 A. May 1989.

23 Q. And has your license to practice law in -- ever been
24 suspended or revoked for any reason in any
25 jurisdiction where you've ever held a license to

1 practice law?

2 A. No.

3 Q. Have you ever been censured or received a private
4 reprimand by the Bar of any state?

5 A. No.

6 Q. And can you describe your area or areas of practice?

7 A. I can.

8 Q. And what are those areas that you practice in?

9 A. Transactional law, estate planning, estate
10 administration.

11 Q. All right. Have you ever been involved in any -- or
12 practiced in the area of litigation?

13 A. No.

14 Q. Have you ever offered testimony in any litigated
15 matter before?

16 A. No.

17 Q. Have you ever been qualified as an expert witness in
18 any case?

19 A. No.

20 Q. And what's the name of your firm?

21 A. Gavigan Law, PLLC.

22 Q. And how long has Gavigan Law, PLLC, been in existence?

23 A. In its current name or in its entirety?

24 Q. Well, in its current name first.

25 A. A year and a half.

1 Q. And then in some prior iteration?

2 A. 22 years.

3 Q. Have you ever practiced law with any other firm?

4 A. Yes.

5 Q. With whom did you practice?

6 A. At what time?

7 Q. Well, at any point in your career.

8 A. You want a history of my practice?

9 Q. Just hitting the high spots. Just -- if you could
10 just give me, you know, who you practiced with.

11 A. Well, I started out with Wishart Norris Henninger &
12 Pittman, then I practiced with Moreau Marks & Gavigan,
13 and then I practiced with Timothy B. Gavigan, PLLC,
14 now Gavigan Law, PLLC.

15 Q. All right, sir. Have you ever practiced law with
16 Mr. Raynor?

17 A. Yes.

18 Q. Okay. In what firm?

19 A. Wishart Norris Henninger & Pittman.

20 Q. All right. How much of your practice is in North
21 Carolina versus South Carolina?

22 A. I don't know.

23 Q. Do you have any -- or have you ever been licensed in
24 any other state other than those two states?

25 A. No.

1 Q. And as I understand it, you're a South Carolina
2 resident, but your office is in Charlotte; is that
3 correct?

4 A. Correct.

5 Q. All right. I may ask you more background, but
6 that's -- we'll move into sort of the substance of
7 this. So did you act as counsel for The Best for Last
8 when it purchased a self-storage facility that's just
9 commonly known as Spring Valley Self-Storage?

10 A. Yes.

11 Q. And have you represented the members of The Best for
12 Last at any other -- in any other deals?

13 A. What do you mean?

14 Q. Well, that's a good -- are you aware of who the
15 members of The Best for Last are?

16 A. Not all of them.

17 Q. Have you worked with Albert Heyward on other deals
18 before?

19 A. Yes.

20 Q. Have you worked with Jim Canty before?

21 A. I don't recall.

22 Q. Okay. How about Rhett Heyward?

23 A. I don't recall.

24 Q. Okay. Or Robert Jenkins?

25 A. No, never Robert Jenkins.

1 Q. Okay. And I understand -- I was just deposing Spring
2 Valley Interests before this deposition began. And
3 Lynn White, you know, indicated that he had worked
4 with you for over 25 years on various deals; is that
5 accurate?

6 A. I guess that's his memory of it, yeah.

7 Q. Okay. Do you know or do you have a recollection of
8 how -- of who contacted you to handle this transaction
9 of the purchase of the Spring Valley Self-Storage
10 center?

11 A. My recollection is it was Albert Heyward.

12 Q. Do you recall how Lynn White's -- one or more of his
13 companies became involved in the deal?

14 A. My recollection is Albert asked me to contact Lynn to
15 see if he had an interest in participating in a loan
16 for the deal.

17 Q. Okay. And, ultimately, White Interests Limited
18 Partnership made a loan to The Best for Last?

19 A. If that's what the documents say. I don't have it in
20 front of me.

21 Q. Did you bring your file today to the deposition?

22 A. I've got it.

23 Q. Okay. Well, let me show you a document. Can you see
24 that?

25 A. Yes.

1 Q. Do you recognize this document?

2 A. Yes.

3 Q. Okay. And what is it?

4 A. It's a loan agreement.

5 Q. All right. Is it a loan agreement that you drafted?

6 A. I don't know if what you have on screen is the one I
7 drafted, but it looks like one I did draft.

8 Q. All right. I'll just refer you to paragraph 10 of
9 this document which would appear to indicate that you
10 did draft it. Does that give you some indication
11 that, in fact, you did?

12 A. I don't see paragraph 10 yet. Can I scroll this or do
13 you have to scroll it?

14 Q. Well, I don't know whether you can or not. I have it
15 up on the screen as just paragraph 10?

16 MR. RAYNOR: We only have page --

17 A. We've only got page 1.

18 MR. RAYNOR: -- the top. It just shows
19 like the top of the first page on my screen.

20 MR. RACINE: Yeah, same here.

21 MR. SHEALY: Let me stop sharing and
22 try to share again.

23 BY MR. SHEALY:

24 Q. Can you see it now?

25 A. I can.

1 Q. Okay. All right. And I'm showing you what -- page 3
2 of this document. Does that paragraph give you some
3 indication that you, in fact, did draft this?

4 A. It does.

5 Q. And was this the loan agreement that you drafted for
6 White Interests Limited Partnerships loan of \$800,000
7 to The Best for Last?

8 A. It looks like, yes.

9 Q. We'll mark it as Exhibit 1 to your deposition.

10 And, as I understand it, you did not represent
11 White Interests Limited Partnership in this
12 transaction; correct?

13 A. Correct.

14 Q. Did White Interests Limited Partnership inform you of
15 certain conditions on which it would make this loan?

16 A. What do you mean?

17 Q. Well, I mean, was it -- were there particular terms
18 that it informed you that it, you know, wanted this
19 loan to be subject to?

20 A. Subject to? You mean besides the interest, the
21 repayment, and the option?

22 Q. Well, I mean, those would be terms that I -- that I
23 would have said would have been perhaps things that
24 White Interests Limited Partnership might have
25 indicated that it was -- were important to it. But

1 did it -- was it interested in holding a purchase
2 option as part of the conditions for making this loan?

3 A. Was it -- I don't understand the question. I mean,
4 it's in the loan document. I don't understand what
5 you're asking me.

6 Q. Well, what I'm really trying to figure out is why was
7 the purchase option included in the loan agreement?

8 A. Because those were the terms that White Interests gave
9 for making its loan.

10 Q. And what -- in the course of your transaction
11 practice, do you see lenders structuring things this
12 way where they maintain a purchase option?

13 A. Not commercial lenders.

14 Q. Okay. Is the -- having -- holding a purchase option,
15 is that -- does that open the door for a lender to
16 make a 1031 exchange down the road?

17 A. Does it open the door for a 1031 exchange? I guess it
18 depends on the lender and what they're doing in their
19 lives. I'm not sure what you're asking me.

20 Q. Well, I mean, I certainly understand that an investor
21 in a deal might want to structure that investment as a
22 loan with a purchase option for a number of reasons;
23 correct?

24 A. Yeah. Whatever -- whatever they -- yeah, that's
25 correct.

1 Q. If an investor wants to make a 1031 exchange but is
2 waiting on another piece of property to be sold, is
3 making a loan and then taking a purchase option a way
4 of keeping the option of making a 1031 exchange later
5 available?

6 A. If an investor makes a loan with a purchase option.
7 Hard to say. It depends on the facts in the
8 transactions. They're all specific.

9 Q. Were you aware at the time that you drafted -- have I
10 already marked this as Exhibit 1, Ms. Taylor? Okay.

11 At the time that you drafted Exhibit 1, were
12 you aware that White Interests Limited Partnership had
13 a desire to do a 1031 exchange at some point in the
14 future?

15 A. No.

16 Q. You didn't have any communication with any agent of
17 White Interests Limited Partnership about the
18 possibility of doing a 1031 exchange?

19 A. I don't recall any.

20 Q. Okay. Were you aware of any property that White
21 Interests Limited Partnership held or owned in Horry
22 County, South Carolina, at the time that Exhibit 1 was
23 drafted?

24 A. No.

25 Q. Well -- and were you aware of any entity under control

1 by Lynn White that owned property in Horry County,
2 South Carolina, at the time Exhibit 1 was drafted?

3 A. Yeah, I guess so. 2017? Probably.

4 Q. And at the time that Exhibit A was drafted, was the
5 property that an entity owned by Lynn White owned in
6 Horry County, South Carolina, for sale?

7 A. I don't know.

8 Q. Did Lynn White discuss with you the particular terms
9 of the purchase option that were to be included in
10 Exhibit 1?

11 A. Well, yeah, he gave me the terms. They're in the
12 agreement.

13 Q. Okay. And the -- I note that the way this is drafted
14 is the borrower was to grant the lender a perpetual
15 option. What does perpetual option mean?

16 A. I assume it means forever.

17 Q. An option that could be exercised at any point in the
18 future?

19 A. I assume that's what the word perpetual meant.

20 Q. Well, you're the drafter. I just wanted to know what
21 you meant when you drafted it.

22 A. Well, you'd have to ask Mr. White. They're his terms.

23 Q. Okay. All right. And then I want to show you --
24 point you to the penultimate sentence in this
25 paragraph that begins "The lender shall hold take

1 title to the co-tenancy interest." Do you see that?

2 A. I do.

3 Q. Okay. And there are two what I would call
4 conditions -- and maybe you would use a different word
5 to describe them -- conditions of the -- taking the
6 co-tenancy interest. Is that a fair characterization
7 of them?

8 MR. RAYNOR: Objection.

9 A. Say that again.

10 Q. Are there two conditions to the co-tenancy interest
11 that the lender would take if he exercised the
12 purchase option?

13 MR. RAYNOR: Objection.

14 A. Are there two conditions?

15 Q. To the co-tenancy interest that the lender would take
16 if it exercised the purchase option?

17 A. I don't mean to be thick, Kirby. I still don't
18 understand what you're asking me.

19 Q. Okay. Well, so what I'm trying to figure out is when
20 the sentence says "the lender shall hold take title to
21 the co-tenancy interest subject to," what is meant by
22 taking an interest subject to the two things that
23 follow it?

24 A. Well, first off, "hold take title" is an obvious typo.
25 But subject 2 is just clarification that there would

1 only be one mortgage on the property, which is the one
2 that Mr. White knew at the time this loan was being
3 made, and just a blanket acceptable co-tenancy
4 agreement.

5 Q. Now, there's the term "a mutually acceptable
6 co-tenancy agreement"; correct?

7 A. Right.

8 Q. All right. At the time Exhibit 1 was drafted, had --
9 were you aware of a mutually acceptable co-tenancy
10 agreement having been entered into by the parties?

11 A. No, we didn't need to. They've done these before. It
12 was just -- it's just general language that they used.

13 Q. All right. And when you say "they've done these
14 before," tell me what you mean.

15 A. Well, Lynn and Albert, you know as well as I do,
16 they've done a ton of these deals.

17 Q. Okay. And have some of them been set up this way with
18 a co-tenancy that is anticipated at the beginning?

19 A. Yeah.

20 Q. Okay. Now, in the other deals that they've done that
21 have this co-tenancy agreement anticipated, have --
22 eventually have -- if the lender has exercised the
23 purchase option, has the lender come into the deal as
24 a member of the LLC that holds the property?

25 A. No.

1 Q. The lender has, in all prior circumstances, taken a
2 co-tenancy?

3 A. Yes.

4 Q. Do you remember the -- do you remember particular
5 deals where that's what happened?

6 A. Well, I think Goose Creek is that way.

7 Q. Okay. Any others that you can think of?

8 A. Clements Ferry is that way.

9 Q. Okay. And to do the 1031 exchange, you don't have
10 to -- you don't have to eventually come into the LLC,
11 you can just take the co-tenancy; correct?

12 A. Who's doing the 1031 exchange in your fact pattern? I
13 don't understand what you're asking.

14 Q. Well, that's because I'm sort of thinking out loud.

15 If a party wants to do a 1031 exchange and
16 they -- they have to exchange dirt for dirt; correct?

17 A. Correct.

18 Q. Okay. And the -- so they can't exchange a fee simple
19 title to property for an interest in an LLC, for
20 instance? That doesn't work; is that right?

21 A. Correct.

22 Q. Okay.

23 A. That's right.

24 Q. Okay. I may come back to this momentarily, but I want
25 to move on.

1 Okay. So this deal was put together and you
2 drafted a loan agreement, and were there any other
3 documents that you drafted that documented White
4 Interests Limited Partnership's interest in the
5 property, if you will?

6 A. You mean the loan transaction?

7 Q. Correct.

8 A. Promissory note.

9 Q. Okay. Was there also a mortgage?

10 A. I'd have to look at my file.

11 Q. Okay. The -- well, if you want to look at your file.
12 Would it be normal for that loan to be secured by a
13 mortgage on the property?

14 A. Just depends on the deal.

15 Q. Okay. Well, I'd invite you to look at your file if
16 that would help refresh your recollection as to
17 whether this particular transaction was secured by a
18 mortgage?

19 A. Okay. I'll look right now.

20 Q. Okay.

21 A. Yes, there was a mortgage.

22 Q. Okay. And you mentioned a promissory note. Let me
23 see if I can show you. All right. I'm going to show
24 you a document and I'll just -- Madam Court Reporter,
25 this will be Exhibit 2 -- and ask if you recognize

1 this?

2 A. It looks like the note.

3 Q. And the terms of the promissory note, were those terms
4 provided to you by Lynn White?

5 A. Yes.

6 Q. The -- I note that the -- I'm showing you the payment
7 of principal and interest provision which has two
8 subparagraphs. Do you see that?

9 A. Yes.

10 Q. And it's -- subparagraph A says, "Interest shall be
11 due and payable in the same manner that's set forth
12 9.1.1.1 of the maker's operating agreement." And the
13 maker is The Best for Last; correct?

14 A. Correct.

15 Q. All right. And then it says, "as if the maker were an
16 initial member." Is that a typo?

17 A. No.

18 Q. That's not a typo?

19 A. No.

20 Q. All right. Just reading it myself, the -- it would
21 seem that should say the payee were an initial member?

22 A. Oh, yeah, I guess it should be. You're right.

23 Q. Okay. So the intention was for that to read "the
24 maker's operating agreement as if the payee were an
25 initial member"?

1 A. Correct.

2 Q. Okay. "And the interest was the maker's preferred
3 return"; do you see that?

4 A. I see that.

5 Q. Okay. And were you -- were you privy to the maker's
6 operating agreement?

7 A. Yes.

8 Q. Did you prepare it?

9 A. I did.

10 Q. Okay. And do you know whether that operating
11 agreement was shared with White Interests Limited
12 Partnership?

13 A. I don't know for certain, but I assume it was.

14 Q. Okay. And then the second paragraph sets out the
15 schedule or certain events that trigger the payment in
16 full of the principal amount of the loan; correct?

17 A. Correct.

18 Q. And these were -- these were also terms that White
19 Interests Limited Partnership gave to you?

20 A. Correct.

21 Q. Okay. And then there's a provision about prepayment
22 of the loan. Do you see that?

23 A. Yes.

24 Q. Okay. And am I correct in reading that The Best for
25 Last had the right to prepay the note in whole or in

1 part at any time?

2 A. That's what it says.

3 Q. Okay. All right. And this was executed by Albert
4 Heyward for The Best for Last?

5 A. Looks like it, yes.

6 Q. Okay. And I assume it's part of the -- you're putting
7 together this loan transaction, you secured
8 Mr. Heyward's signature on the promissory note?

9 A. I did.

10 Q. Okay. And I may have asked you this, and to the
11 extent I've already gone over this, I apologize. But
12 at the time that the -- that this loan transaction was
13 closed, you were not aware whether or not White
14 Interests Limited Partnership had some interest in
15 preserving the ability to conduct a 1031 exchange at
16 some point in the future?

17 A. I was not aware of any.

18 Q. Okay. All right. So all of this that we've been
19 looking at was all done back in the spring of 2017;
20 correct?

21 A. Yes.

22 Q. Okay. And then in the summer of 2019, The Best for
23 Last decides to refinance the first position loan on
24 the property?

25 A. That's my understanding.

1 Q. Okay. And were you approached about doing that --
2 handling that transaction for the The Best for Last?

3 A. I was.

4 Q. Okay. And so tell me, I mean, how that -- how that
5 worked. Were you -- did somebody on behalf of The
6 Best for Last approach you and with -- and ask you to
7 handle that transaction?

8 A. Albert Heyward told me they were going to do it and
9 asked me what my fee quote was.

10 Q. Okay.

11 A. And as usual, he spit all over my fee quote.

12 Q. Okay. And -- but you agreed to handle the
13 transaction; correct?

14 A. For my fee quote. I don't know that we ever got to
15 that point.

16 Q. Did something arise that caused you to not move
17 forward with handling the transaction?

18 A. Yeah. Albert said he didn't want me to do it because
19 this arose between he and Lynn.

20 Q. Okay. And this is the dispute that's the subject of
21 this litigation?

22 A. Correct.

23 Q. Okay. And do you know approximately when, you know,
24 you sort of stood down from handling the transaction
25 for The Best for Last?

1 A. Well, I never stood up to handle the transaction for
2 The Best for Last, never got there.

3 Q. You never actually got a signed engagement letter or
4 fee agreement from The Best for Last?

5 A. I don't recall getting one, no.

6 Q. But you did after you -- after Albert Heyward
7 approached you originally about handling the
8 transaction, you did later represent White Interests
9 Limited Partnership with respect to its option to
10 purchase?

11 A. I did.

12 Q. Okay. I'm going to show you a document.

13 A. After I received Albert's consent, by the way.

14 Q. Okay. All right. I'm going to show you a document
15 and ask if you can identify this?

16 A. It's White Interests' Notice of Exercise of Option to
17 Purchase.

18 Q. All right. Did you draft this document for White
19 Interests Limited Partnership?

20 A. Yes.

21 Q. And you saw that it was transmitted to Mr. Heyward?

22 A. Yes.

23 Q. All right. Let's mark this as Exhibit 3.

24 And, Mr. Gavigan, do you remember how Rob
25 Bethea got involved in this transaction?

1 A. My recollection is when Albert, in my words, fired me
2 from the refi, he said he was going to take it to Rob.
3 And that's -- I assume that's what he did and that's
4 how Rob got involved.

5 Q. And from that point forward, were you and Mr. Bethea
6 communicating back and forth about the exercise of the
7 option to purchase?

8 A. Well, the first thing we communicated back and forth
9 on was me representing Spring Valley Interests and
10 Lynn White. And Rob secured, I assume, The Best for
11 Last consent or else we wouldn't have moved forward
12 with that. And then, yeah, we moved on to this
13 transaction, the option.

14 Q. Okay. Now -- but you -- you did not ever handle from
15 that point forward the refinance of the primary debt?

16 A. I handled it on behalf of Spring Valley Interests.

17 Q. Okay. Well, because Spring Valley Interests was going
18 to be one of the borrowers; is that correct?

19 A. Correct.

20 Q. Okay. All right. I think these are all in sort of
21 date order, but I've got a series of e-mail chains to
22 show you --

23 A. Okay.

24 Q. -- that we'll move through the best we can.

25 The first e-mail I'm going to show you is --

1 this was Bates labeled as part of the production --
2 document production in this case as The Best for Last
3 423 through 460. And I'm going to put that up on the
4 screen.

5 All right. Can you see the e-mail that is
6 dated September 12, 2019?

7 A. Yes.

8 Q. All right. And that e-mail appears from you to
9 Mr. Bethea?

10 A. Looks like it, yes.

11 Q. Okay. So this, from what I can tell, is your
12 transmitting to Mr. Bethea the first draft of
13 transaction documents for the purchase that is set
14 forth in the option to purchase?

15 A. Looks like it, yeah.

16 Q. Okay. And I'll just scroll through because this
17 document, I believe, contains all of the attachments.
18 And are these attachments that I'm showing you all
19 documents that you drafted on behalf of Spring Valley
20 Interests?

21 A. Well, so far what you've scrolled, they were drafted
22 by me. I don't know what else is on there.

23 Q. So that we're -- we don't get confused, is it your
24 understanding that White Interests Limited Partnership
25 assigned its rights with respect to the Spring Valley

1 Self-Storage Facility to Spring Valley Interests, LLC?

2 A. Yes.

3 Q. So your engagement was by -- if I say -- if I say
4 Spring Valley Interests or White Interests Limited
5 Partnership, we're talking about -- I mean, I know
6 those are two separate entities, but your engagement
7 was with one or the other or both, I guess?

8 A. Correct.

9 Q. Okay. All right. So if I scroll through all of
10 these -- and if I go too quickly, let me know -- does
11 this look like this set of documents that you drafted
12 to try to consummate this purchase?

13 A. Yes.

14 Q. Okay. And were the -- was the sale consummated on the
15 terms using this draft of the documents that you
16 prepared?

17 A. Consummated, no. That's why we're here; right?

18 Q. Right. So it wasn't consummated, but it was also --
19 it was also negotiated after this first draft;
20 correct?

21 A. Negotiated after the draft?

22 Q. In other words, this first draft, there were multiple
23 rounds of changes to this draft; correct?

24 A. Oh, I assume -- I don't know. I'd have to look at the
25 documents and footers. I'm assuming they were.

1 Q. Okay. We'll go through a few e-mails to verify that
2 or not?

3 A. Okay.

4 Q. But -- so, again, I'm still scrolling and this all
5 looks like documents that you prepared to -- in
6 furtherance of this transaction to purchase the
7 co-tenancy in the Spring Valley Self-Storage property?

8 A. Correct.

9 Q. All right. So I've gotten to 460, and that all looks
10 like your work product; correct?

11 A. Correct.

12 Q. Okay. Then I'm going to show you a document Bates
13 labeled 463 through 474 and ask if you recognize the
14 e-mail that I am showing you.

15 A. It looks like an e-mail from Rob to me.

16 Q. All right. Do you recall receiving this e-mail from
17 Mr. Bethea?

18 A. More or less. I'm sure I did if that's what it says.

19 Q. Okay. And there were certain attachments that went
20 with the e-mail that I have included. Do you recall
21 these attachments?

22 A. No.

23 Q. Do you recall discussing the concerns that Mr. Bethea
24 expresses in the e-mail dated September 13, 2019, with
25 Mr. Bethea?

1 A. Let me read the e-mail. I recall -- yeah, I recall
2 that being the gist of their position versus Lynn's
3 position, yes.

4 Q. Okay. And was it ever your understanding that the
5 parties intended, when the loan agreement that we
6 looked at earlier was entered into, that when White
7 Interests Limited Partnership exercised its option to
8 purchase that it would come into the Spring Valley
9 deal subject to the waterfall and sponsor share
10 reflected in the operating agreement for Spring
11 Valley -- sorry, for the subject to the operating
12 agreement for The Best for Last?

13 A. No. That was never my understanding.

14 Q. Okay. The -- all right. Mr. Bethea asked at the end
15 of this first paragraph, says that there's a reference
16 to a communication from you to the bank explaining
17 what was going to happen so that they would approve
18 the White Interests Limited Partnership convertible
19 loan. And he asked if you could try to locate that
20 document. Did you ever look for that document?

21 A. I -- no. I may have looked -- tried to look for it.
22 It was a long time ago, but I don't -- I don't know
23 what he's talking about.

24 Q. All right. So -- well, let me ask you this: One of
25 the things that's attached is -- appears to be an

1 e-mail from you to somebody named Jessamie Vincent
2 dated April 27, 2017. Do you see that?

3 A. I do.

4 Q. And who -- do you know who Jessamie Vincent is?

5 A. Not off the top of my head.

6 Q. Okay.

7 A. She's identified in that e-mail.

8 Q. Right. Okay. But you don't know who that is?

9 A. Her title is in that e-mail, isn't it?

10 Q. Well -- right here. Okay.

11 A. Yeah.

12 Q. All right. So she is a representative of First
13 Palmetto Bank; correct?

14 A. Correct.

15 Q. And was First Palmetto Bank the lender for the primary
16 loan, purchase money loan that allowed for the
17 purchase of the self-storage facility?

18 A. I'd have to check my files to be absolutely sure, but
19 I'm assuming they were.

20 Q. Okay. Have you dealt with Jessamie Vincent on any
21 other transaction that you're aware of?

22 A. Not that I'm aware of, no.

23 Q. Do you know whether there was some that the First
24 Palmetto Bank had any hesitancy to issue the loan
25 knowing there was going to be a second position loan

1 behind it?

2 A. I don't recall any.

3 Q. You don't remember one way or the other?

4 A. Well, I mean, if you're refreshing recollection, go
5 back up to that e-mail, I told them there was
6 secondary financing and they did the deal.

7 Q. Okay. And did you explain what the purpose of that
8 secondary financing was?

9 A. To provide the additional funds needed to close. I
10 don't know that I said anything beyond that. No, I
11 don't remember. I don't.

12 Q. Okay. Let's move on.

13 MR. RAYNOR: Did you mark that as an
14 exhibit, Kirby?

15 MR. SHEALY: Did we? If we didn't,
16 let's mark it as the next in order. Is that
17 Number 3?

18 MR. RAYNOR: 4. Let me ask you this:
19 Did you mark the e-mail, the documents that were
20 dated September 12, 2019, as an exhibit?

21 MR. SHEALY: That's Bates 423
22 through 460?

23 MR. RAYNOR: Yeah.

24 MR. SHEALY: I intended to, and forgive
25 me. So that document would be 4, and so the one

1 we were just we were looking at would be 5.

2 BY MR. SHEALY:

3 Q. All right. Mr. Gavigan, moving along. I'm showing
4 you an e-mail string. This is labeled -- Bates
5 labeled 483 through 484.

6 MR. RAYNOR: Just a second, if you
7 would. Let me grab that, please.

8 Okay. I'm with you. Are we marking
9 this one 6.

10 MR. SHEALY: This will be 6.

11 Q. Mr. Gavigan, do you recall this e-mail string? I
12 think it goes from the bottom up.

13 A. I mean, it looks like an e-mail string. I recall it
14 now that you're showing it to me, yeah.

15 Q. All right. There's a reference to Mark Knight. Are
16 you familiar with Mark Knight?

17 A. I am.

18 Q. Okay. A lawyer at Nexsen Pruitt here in Columbia?

19 A. Correct.

20 Q. All right. And there's reference to a meeting with
21 without -- with Lynn White that was going to be taking
22 place. Do you see that?

23 A. There's reference to what now?

24 Q. There's -- what I'm looking at in particular is Rob
25 Bethea's e-mail dated September 18, 2019, thanking you

1 for your call, and then he copied Mark Knight, who
2 would be accompanying Albert up to the meeting
3 tomorrow. Do you recall -- do you recall a meeting
4 between Albert Heyward and Mark Knight and Lynn White
5 in your office?

6 A. Yes.

7 Q. Okay. And what was discussed in that meeting?

8 A. The settlement of the option to purchase.

9 Q. Okay.

10 A. The terms upon which it would be done.

11 Q. Okay. And at the conclusion of that meeting, did you
12 feel like that the parties had reached an agreement
13 about the terms of the purchase?

14 A. Yes.

15 Q. Okay. All right. So we've marked this as an exhibit.
16 And do you recall generally what the -- generally what
17 those terms were?

18 A. Lynn dictated two terms. He said he'll reduce the 74
19 point whatever percent down to 70 percent and he'll
20 participate in Albert's success fee. Those were the
21 two terms that he offered to amend a loan agreement
22 and finish this deal.

23 Q. And your understanding was those terms were acceptable
24 at that point to The Best for Last?

25 A. They're acceptable to Albert.

1 Q. All right. I'm showing you another document that's
2 Bates labeled -- oh, I'm sorry, now I'm showing it to
3 you. It's Bates labeled 485 through 491, which we'll
4 mark as Exhibit 7. It's another e-mail string.
5 Now -- and you're only included on part of this e-mail
6 string. Let me scroll down.

7 All right. It includes an e-mail from you to
8 Rob dated Thursday, September 19; correct?

9 A. Looks like it, yeah.

10 Q. And does this -- does this e-mail sort of recount the
11 broad terms of the agreement that you just described a
12 moment ago?

13 A. Yes.

14 Q. Okay. And the plan was for you to draft certain
15 documents to document that agreement; correct?

16 A. Correct.

17 Q. Okay. All right. Now, I don't want to be unfair
18 because this string includes some other things. Okay.
19 So it has this -- it starts with this e-mail from you
20 to Mr. Bethea copying Mark Knight. And then there's
21 an e-mail back to you from Mark Knight sort of
22 discussing some details; correct?

23 A. It looks like it, yeah.

24 Q. Okay. All right. And then an e-mail back from you to
25 Mark Knight dated September 20th that, again, where

1 you're responding back on discussing the details of
2 this settlement?

3 A. Correct.

4 Q. Okay. All right. And then an e-mail back to you from
5 Mark Knight. Again, this is September 20, 2019, and
6 then Rob Bethea sends you an e-mail dated
7 September 19, 2019, responding to your initial report
8 asking if the same terms of the settlement could be
9 rolled into the LLC versus a co-tenancy; is that -- am
10 I stating that correctly?

11 A. Looks like it, yeah.

12 Q. Okay. All right. And so then you responded back to
13 Mr. Bethea, said that Mr. White very much wanted this
14 to be a co-tenancy and not the LLC arrangement;
15 correct?

16 A. Correct.

17 Q. All right. And there was a question -- this is where
18 I'm going with this. There was a question that
19 everybody had at this point as to whether there was a
20 risk of a negative property tax consequence to this
21 arrangement. Do you remember the -- do you remember
22 that question being raised?

23 A. I do.

24 Q. Okay. And I understand this as being -- the issue is
25 whether or not this is an accessible transferable

1 interest, is that the term of art?

2 A. Yes.

3 Q. Okay. And because I'm not a transactional lawyer, I'd
4 love it if you'd explain to me what that -- what an
5 accessible transferable interest is?

6 A. It's essentially a transaction that in this case would
7 give -- I guess it's Richland County, the assessor,
8 the ability to reassess the value of the property for
9 property tax purposes based on the economics of the
10 deal.

11 Q. Okay. Now, did anybody at the lender -- on behalf of
12 the lender raise the accessible transferable interest
13 issue in the course of trying to get the refinance
14 undocumented?

15 A. Not that I recall.

16 Q. Okay. Did you do an analysis of whether there was a
17 risk of an accessible transferable interest taking
18 place?

19 A. We did an analysis of what the resulting tax increase
20 could be.

21 Q. Okay. And did you determine that there -- that if it
22 occurred, that there would be an increase?

23 A. I'd have to look it up.

24 Q. Okay. I think I have something that shows that.

25 A. Okay.

1 Q. So you recall doing the analysis?

2 A. I do.

3 Q. Or having the analysis done in your office?

4 A. Yes.

5 Q. Okay. So -- all right. Okay. And then so I'm going
6 to show you a document that's Bates labeled 502 to
7 504. And this appears to be an e-mail from you to
8 Lynn White, Rob Bethea, Albert Heyward, and Mark
9 Knight, and the -- there's a memo attached that you've
10 called ATI research; correct?

11 A. Correct.

12 Q. Okay. All right. And so do you recall sending this
13 e-mail?

14 A. I do.

15 Q. And Brian Gavigan is what relation to you?

16 A. It's my son. He's an associate in this firm.

17 Q. Okay. And so he did the research about whether the
18 taxes would go up if this went through as a
19 co-tenancy?

20 A. Correct.

21 Q. Okay. And so what's the ultimate conclusion?

22 A. Well, it looks like the ultimate conclusion is --
23 let's see. It looks like the ultimate conclusion is a
24 \$99,000 tax bill.

25 Q. All right. Do you know what the tax bill had been

1 prior to this point?

2 A. No.

3 Q. Okay. Did -- based upon your, you know, sharing of
4 this memo, did you feel like that the ATI, or the
5 accessible transferable interest, was, you know, a
6 risk that was worth addressing by structuring the deal
7 differently?

8 A. Everybody dismissed it as immaterial.

9 Q. All of the parties, to your knowledge?

10 A. Yes. All of the parties.

11 Q. All right. So let's see that document we were just
12 looking at is Exhibit 8. We're getting there. I
13 appreciate your patience, Mr. Gavigan.

14 A. Sure.

15 Q. I'm showing you a document Bates labeled 671 to 673.
16 Okay. This is another e-mail string between you and
17 Mark Knight and Rob Bethea. Let's go to the bottom.

18 All right. And this is an e-mail from Mark
19 Knight to you and then there are -- there's an e-mail
20 back to Mark Knight from you. You all worked on and
21 made changes to the agreement -- or the documents that
22 were part of this transaction for the next several
23 days; correct?

24 A. I don't know how many days, but Marcus, I think -- if
25 you're asking me about Marcus, Marcus was involved in

1 nothing more than the exhibit of the CMBS loan funds
2 and that math.

3 Q. Okay.

4 A. That's my recollection.

5 Q. All right. Rob was also involved in this e-mail
6 string; correct?

7 A. Looks like it, yeah.

8 Q. Okay. And it's some discussion about who would bear
9 the costs of the legal fees; correct?

10 A. For the loan closing.

11 Q. Okay. And was -- were you all able to work that out?

12 A. I don't recall.

13 Q. Okay. All right. Well, look at the last e-mail.
14 Does that indicate to you that you-all were working
15 out an agreement on who was sharing the fees for the
16 loan?

17 A. Looks like it, yeah.

18 Q. All right. So let's mark this as Exhibit 9.

19 I'm next going to show you a 676 that's Bates
20 labeled 676. It's a single page. And this is an
21 exchange of e-mails between you and Rob Bethea. Now,
22 this is a -- this is Rob getting back to your initial
23 transmittal of the proposed transaction documents that
24 we looked at a while ago, September 12th, and Rob got
25 back to you with the agreed upon -- said that they

1 were acceptable once corrected for the agreed
2 70 percent interest; is that right?

3 A. Looks like it.

4 Q. All right. And so there was supposed to be an
5 execution of all the documents on Thursday or Friday
6 of that week, so September 26th to 27th. Does that
7 appear correct to you?

8 A. I'm assuming so.

9 Q. Okay.

10 A. It's been so long since we did this deal.

11 Q. Yeah. Okay. So this is Exhibit 10.

12 I'm next going to show you a string marked 678
13 through 679. And ask if I can -- if you recognize
14 this chain. So Mark Knight is still involved in
15 making comments to the various documents; correct?

16 A. Looks like it.

17 Q. And even on the co-tenancy agreement; correct?

18 A. Yes, looks like it.

19 Q. Okay. And then you have -- you responded back on
20 September 25 with various points, both on the loan
21 documents and the flow of funds, and then issue about
22 the legal fees as well; correct?

23 A. Yeah. These are the same e-mails you just showed me
24 last exhibit. These aren't new continuing e-mails.
25 Those are the exact same ones.

1 Q. Well, I think we haven't seen this e-mail from Mark
2 Knight dated September 25th, say "I don't follow your
3 point 2"; correct?

4 A. I suppose.

5 Q. All right. But then you -- all right. So at
6 11:10 a.m. on September 25 you sent an edited set of
7 documents based upon the comments that have been
8 received from both Rob and Mark; correct?

9 A. Looks like it, yeah.

10 Q. Okay. All right. Thank you.

11 A. You're welcome.

12 Q. This is Exhibit 11.

13 I'm going to next show you a document Bates
14 labeled 784. It's one page. And this is the
15 following day, an e-mail from you to Rob Bethea and
16 Albert Heyward copying Lynn White is -- which you are
17 transmitting a settlement statement; correct?

18 A. Yes.

19 Q. Okay. There was an issue about the fees incurred to
20 deal with the -- what you describe as the challenge to
21 the option put forth by The Best for Last; correct?

22 A. Correct.

23 Q. Okay. That will be Exhibit 12.

24 MR. RAYNOR: 11 is 784?

25 MR. SHEALY: 678 through 679 is 11.

1 784 is 12.

2 MR. RAYNOR: Thank you. That's what I
3 thought.

4 Q. I'm showing you a document that is Bates labeled 797.
5 All right. And this is another exchange between you
6 and Rob Bethea. Now we're in Friday, September 27,
7 2019; correct?

8 A. Correct.

9 Q. Okay. Mr. Bethea was providing you some data to
10 update the closing statement and then you -- you asked
11 if Albert Heyward had responded to Mr. White's claim
12 that his fees should be picked up by The Best for
13 Last; correct?

14 A. Correct.

15 Q. Okay. And this is -- and your e-mail is 12:01 p.m. on
16 September 27, 2019; correct?

17 A. Correct.

18 Q. This is Exhibit 13.

19 I'm going to now show you a document Bates
20 labeled 798, a single page. And now this is an
21 exchange that starts at 1:07 p.m. on Friday,
22 September 27, where you are transmitting an updated
23 settlement statement to Rob. And Rob responds at
24 1:15 p.m., "Thank you, Tim, I'm review with Albert
25 when he gets here." Do you see that?

1 A. I do.

2 Q. And you said, "We're on standby over here." Was --
3 did you anticipate that Mr. White would execute the
4 closing documents on Friday, September 27th?

5 A. Yes.

6 Q. When you said, "We're on standby over here," was he in
7 your office at that point?

8 A. No.

9 Q. But the plan was for him to come to your office and
10 execute?

11 A. Not unless there were recordables that he needed to
12 sign. Typically, we try to sign everything
13 electronically.

14 Q. Okay. So you were going to transmit everything to him
15 electronically to sign rather than having him come to
16 your office?

17 A. To the extent it wasn't a recordable, yes.

18 Q. All right. But the -- but you all were trying --
19 aiming to get this done on the afternoon of
20 September 27, 2019?

21 A. It looks that way, yeah.

22 Q. All right. So this is Exhibit 14.

23 I know this is tedious. This is fourth from
24 the last is what I'm getting ready to show you. This
25 is a document Bates labeled 800. All right. Now, can

1 you see that?

2 A. Not yet. I got it.

3 Q. Now, so about three hours have passed is what it looks
4 like?

5 A. Right.

6 Q. Did you and Mr. Bethea have any telephone
7 communications in the interim?

8 A. I don't recall.

9 Q. So do you recall receiving this e-mail from Mr. Bethea
10 at 4:26 p.m. on Friday, September 27th, where he said
11 he has everything executed here and will hold the deed
12 until we record the C-III mortgage next week. Do you
13 recall receiving that?

14 A. Yeah, I guess I did. No, I don't specifically recall
15 receiving it, but it looks like I did, yeah.

16 Q. Did you specifically instruct Mr. Bethea not to send
17 you the deed, just to hold on to it?

18 A. I don't recall one way or the other.

19 Q. Okay. I mean, the deed that we're talking about would
20 have been recorded in Richland County; correct?

21 A. Correct.

22 Q. Okay. And that was the -- that was the seller's --
23 what the seller was tendering in this transaction was
24 the deed to an interest in the real property; correct?

25 A. Correct.

1 MR. RAYNOR: Objection.

2 Q. But you don't recall the substance of your -- of any
3 communications -- of any telephone communications with
4 Mr. Bethea in which you indicated that it just made
5 sense for him to hold on to the deed?

6 A. I don't recall.

7 Q. Okay. As of this point in the afternoon, were the
8 documents signed on your end?

9 A. I don't recall.

10 Q. Were the documents ever signed on your end?

11 A. I don't know without looking. I assume they were.

12 Q. Can you check your file and see if you have signed
13 copies of the documents from Spring Valley Interests?

14 A. Yeah.

15 Q. I'll give you time to do that.

16 A. Thank you. They were.

17 Q. Okay. And so -- and, specifically, the documents that
18 we're talking about, I'm just looking at the
19 recitation of the attachments that are described in
20 Mr. Bethea's e-mail to you. He said the memo of
21 co-tenancy agreement was partially executed, but you
22 had a signature in your file from your client in
23 that -- to that document as well; correct?

24 A. Correct.

25 Q. All right. And you had a signature to the settlement

1 statement from your client; correct?

2 A. Yes.

3 Q. All right. And you had a co-tenancy agreement that
4 was executed by your client; correct?

5 A. Say that again. I had what now?

6 Q. A co-tenancy agreement?

7 A. Yes.

8 Q. And an assignment and assumption of leases executed by
9 your client; correct?

10 A. Yes.

11 Q. Okay. All right. We'll mark this document as
12 Exhibit 15.

13 Okay. We're almost there. Next going to show
14 you a document Bates labeled 859 to 861 and it's --
15 again, it's an e-mail string. Okay. This e-mail
16 string again starts with the e-mail from Rob Bethea
17 that we were just looking at before, but there -- then
18 there's an e-mail from you on Saturday morning
19 September 28th at 7:53 a.m. in which you posed four
20 different questions to Mr. Bethea; correct?

21 A. Correct.

22 Q. And you indicated that you would send Spring Valley
23 Interests signature pages on Monday; correct?

24 A. Correct.

25 Q. Mr. Bethea responded on Saturday, September 28th at

1 10:23 a.m.; correct?

2 A. Correct.

3 Q. Okay. And then, again, you sent another question on
4 Saturday, September 28th at 3:21 p.m. asking if The
5 Best for Last was rejecting all offers regarding the
6 legal fee ask?

7 A. Correct.

8 Q. All right. Now, at the point that you're asking these
9 questions, you've gotten partially executed documents
10 from The Best for Last including to the settlement
11 statement, and you've got signatures in your file from
12 your client as well on the same settlement statement;
13 correct?

14 A. No.

15 Q. And why is that?

16 A. Well, that e-mail is dated September 28, and the
17 signature pages that I have from the buyer are dated
18 September 30.

19 Q. Okay. All right. So the buyer gives you -- provides
20 you with the signatures on September 30?

21 A. I have to assume so. That's the date of those
22 documents.

23 Q. All right. So there's, again, another e-mail from Rob
24 to you on September 30th in which there's -- you-all
25 are still talking about the fees related to the

1 conversion of the loan to a co-tenancy?

2 A. Correct.

3 Q. All right. And then finally your e-mail dated
4 September 30, 2019. Do you know whether your client
5 signed the documents after this e-mail dated
6 September 30, 2019, or not?

7 A. I don't know.

8 Q. Okay. All right. This is going to be Exhibit 16.

9 All right. I'm going to show you a document
10 marked as -- or Bates labeled as 862 to 863 and we'll
11 go ahead and mark this as Exhibit 17. Okay. And,
12 again, this is another e-mail string. It starts with
13 an e-mail from Mark Knight indicating his fees and
14 then another e-mail from him in which there was -- he
15 indicated there was an adjustment downward of his
16 fees. Do you see that?

17 A. Yes, I see it.

18 Q. Okay. And then an e-mail from you to Mark Knight and
19 Rob Bethea dated October 1st in which there's still a
20 discussion about the legal fee reimbursement?

21 A. Correct.

22 Q. Okay. And Rob, again responding back on October 1st
23 about an hour later, asking for the -- you know, some
24 documentation for authority for the demand for fee
25 reimbursement; correct?

1 A. Correct.

2 Q. Okay. And then what I think may be the last document
3 I'm going to show you this afternoon, which is 866 is
4 the Bates label, and we'll mark that as Exhibit 18.

5 So here is where -- is your e-mail to Rob dated
6 October 1st, 2019, where -- from my view, this is
7 where the deal falls apart. Is that a -- would you
8 agree with that assessment?

9 A. Let's see. Looks like it, yeah.

10 Q. Okay. So The Best for Last actually as of 11:19 a.m.
11 on October 1st had conceded to the reimbursement of
12 \$6,500 that had been demanded; correct?

13 A. Correct.

14 Q. And a revised settlement statement was sent to you at
15 that time; correct?

16 A. I don't know. Did he send it?

17 Q. Well, it just --

18 A. I'll take him at his word in the e-mail, yeah.

19 Q. And then you told him that the deal's off, basically?

20 A. Looks like it.

21 Q. Okay. All right. Let's take about a five-minute
22 break and I may be done, but let me look through my
23 notes.

24 Mr. Gavigan, thank you for your patience. I
25 know this is tedious and uncomfortable, but appreciate

1 your working with me through all of that, and let me
2 look through a couple of things and I'll be right
3 back.

4 A. Okay.

5 (Recess taken from 1:57 p.m. until 2:06 p.m.)

6 MR. SHEALY: Okay. I have no further
7 questions for Mr. Gavigan. Mr. Gavigan, please
8 answer any questions that Mr. Raynor may have
9 for you.

10 MR. RAYNOR: Bear with me just a
11 minute, guys. I'm pulling up a document I'm
12 going to use. I'll be right back.

13 EXAMINATION BY MR. RAYNOR

14 Q. Just a follow-up, Mr. Gavigan, I'm going to be
15 skipping around a little bit just because I'm
16 following back up with some questions Mr. Shealy asked
17 you.

18 One toward the end as you all were circulating
19 documents to try to memorialize the agreement, there
20 was an exhibit attached that had a summary of the
21 disbursements of the money from a refinance loan that
22 was part of what you all were discussing; is that
23 correct?

24 A. Correct.

25 Q. And as part of that summary of funds, it reflected the

1 fact that at the end of the resolution of this dispute
2 about the purchase of the co-tenancy interest that
3 each party would own like their respective interest,
4 they would be entitled to certain funds that came from
5 this refinance loan that The Best for Last had
6 originated with -- I think it was C-III commercial
7 lending; is that correct?

8 A. Correct.

9 Q. And so as part of the documents you-all were
10 circulating and waiting for approval from your clients
11 was the approval of those funds that were listed as to
12 be disbursed; correct?

13 A. Correct.

14 Q. And one of those items was payment of legal fees; is
15 that correct?

16 A. Correct.

17 Q. And, initially, that flow of funds table showed the
18 legal fees to be paid basically either to Best for
19 Last attorneys or to reimburse Best for Last for what
20 they had paid; is that correct?

21 A. That's my recollection.

22 Q. And Mr. White objected to that, and that's really what
23 kind of broke down the resolution of that dispute; is
24 that correct?

25 A. Correct.

1 Q. And so he made a proposal. And, in fact, if we go
2 back and look at the -- if we go back and look at the
3 e-mail that is dated -- this is Exhibit 16, the -- and
4 17, the -- originally -- if you look at Exhibit 17 --
5 you don't have the exhibit. Do you have the
6 Exhibit 17, Kirby, you can put on the screen for us.

7 MR. SHEALY: Is that -- tell me the
8 Bates label.

9 MR. RAYNOR: That's 862.

10 MR. SHEALY: Yeah, I'll put that up.

11 Q. If you look at -- go to the -- bring up the first page
12 of that, Kirby. Yes. You see the -- on October 1
13 you're communicating Mr. White's position where it
14 says Lynn's position is -- this is his position;
15 correct?

16 A. Correct.

17 Q. And this is the request he had made earlier and that
18 is that the -- as part of this resolution of the
19 dispute, I'm going to go back to the dispute, is that
20 he being reimbursed for his attorney's fees or some
21 portion of those; is that correct?

22 A. Correct.

23 Q. And, in fact, the The Best for Last rejected that
24 request initially; correct?

25 A. Correct.

1 Q. Now, before this date of October 1 and before, you
2 know, the rejection by The Best for Last of that
3 request, had Mr. White ever authorized you to deliver
4 any signed documents to the other side that related to
5 this transaction?

6 A. No.

7 Q. So even though he had signed them, he had authored you
8 to deliver them to the other side; is that correct?

9 A. That's correct.

10 Q. And let's go back a little bit to talk about the fee
11 dispute. Is it fair to characterize that the initial
12 dispute, the reason this whole purchase or exercise of
13 the option fell apart initially is that the -- when
14 Spring Valley gave notice -- or I should say White
15 Interests gave notice of the exercise of the option to
16 purchase a 74.425 percent co-tenancy interest in the
17 real property, The Best for Last demanded that instead
18 he end up being a member of the LLC; is that a fair
19 description of the initial dispute?

20 MR. SHEALY: Object to the form.

21 A. Yes.

22 Q. And if you go back to the option to purchase and the
23 loan agreement, was there ever anything in that
24 document that said that the exercise of the option
25 would somehow be tied to eventually being converted to

1 a membership interest as opposed to a co-tenancy
2 interest?

3 A. No.

4 Q. Did you ever understand from The Best for Last,
5 including their attorney, Mr. Bethea, why they were
6 demanding that the interest that was being conveyed be
7 in the form of -- or be converted to a membership
8 interest in the LLC? Why were they making that
9 demand?

10 MR. SHEALY: Object to the form.

11 A. Do I answer?

12 Q. Yes, sir. If he objects, you can answer unless your
13 attorney instructs you not to answer.

14 A. Okay. Can you ask the question again? I'm sorry. I
15 got thrown off by the objection.

16 Q. My -- here's my point. The loan documents don't say
17 anything about the conveyance ending up in the form of
18 membership interest in The Best for Last?

19 A. Correct.

20 Q. But as I understand it, that's why The Best for Last
21 was demanding, that is, we don't want to convey you
22 the co-tenancy interest. We want it to be in the form
23 of the membership in the LLC?

24 A. Right.

25 Q. My question is: Why did they explain they were making

1 that demand?

2 MR. SHEALY: Objection to form.

3 MR. RACINE: Objection.

4 A. Rob, I guess, you know, we had the discussion, quote,
5 between us lawyers because we all know that's how we
6 set these things up, that they're eventually to be
7 folded into an ultimate LLC.

8 Q. And that was the extent of the explanation?

9 A. That's it.

10 Q. Now, did Mr. Bethea say there was any document that
11 supported that?

12 A. No. He just told me that the economics would be
13 ridiculous if that wasn't done.

14 Q. Did he say economics to whom, like to his client or
15 your client?

16 A. Well, both. Windfall on one side and a detriment to
17 the other.

18 Q. And the detriment party would be whom?

19 A. Best for Last.

20 Q. And, certainly, Mr. Gavigan, if the intention was to
21 have -- if The Best for Last's intention was to have
22 this interest conveyed in the form of a membership
23 interest, you could have drafted documents to reflect
24 that; correct?

25 A. I could have.

1 Q. But you did not; is that correct?

2 A. Correct.

3 Q. And so your initial documents that you forwarded which
4 were in that e-mail, which was Bates stamped 423
5 through 460, those initial documents, for example, the
6 general warranty deed called for a conveyance of
7 74.425 percent interest which reflects the option to
8 purchase language in the loan agreement; correct?

9 A. Correct.

10 Q. Eventually, you-all end up trying to talk about a
11 reduction in the interest from 74.425, the co-tenancy
12 interest to 70 percent. Was that an effort to try to
13 resolve that dispute about The Best for Last wanting a
14 membership interest and Mr. White wanting co-tenancy
15 agreement or interest?

16 A. Yes.

17 MR. SHEALY: Objection to form.

18 A. It was offered by White and accepted by Heyward.

19 Q. And even when you had the meeting with Mr. McKnight
20 and outlined the general terms of a resolution, that
21 was the general terms, right, there were still
22 specifics to work out?

23 A. Correct.

24 Q. And those specifics included, I think, like a
25 spread -- a math spreadsheet that included all those

1 items, such as who's going to get what money from that
2 refinance loan; is that correct?

3 A. Correct.

4 Q. And that included the breakout of who's going to pay
5 whose attorney's fees and who's going to get
6 reimbursed for that; correct?

7 A. Correct.

8 Q. So while you-all may have had a general outline of the
9 -- what you're trying to do to resolve that dispute,
10 you never got complete agreement on the fine details
11 which included, ultimately, who was going to be paying
12 whose attorney's fees and how much?

13 A. Correct.

14 MR. SHEALY: Objection to form.

15 MR. RAYNOR: Kirby, if you could put
16 the loan agreement up on the screen, please.

17 MR. SHEALY: Just give me a second.

18 Q. If you would -- again, this is the loan agreement,
19 which I think we marked as Exhibit 1. If you go to
20 paragraph 2 of the -- it contains the purchase option
21 language. And I'm going to go back to that language
22 that Mr. Kirby asked you about where it says, quote,
23 lender shall take -- I'm sorry, "shall hold take title
24 to the co-tenancy subject to," and the first one is
25 "no mortgage other than the borrower's then

1 outstanding first lien mortgage." Do you see that?

2 A. I do.

3 Q. That language doesn't require that the borrower have a
4 mortgage as a condition to the lender exercising the
5 purchase option, does it?

6 A. No.

7 Q. It just means that if when the lender exercises the
8 purchase option and takes title, that's one of the
9 acceptable exceptions to title; is that a fair
10 statement?

11 A. Yes.

12 Q. Similarly, with number 2 where it says, "and a
13 mutually accepted co-tenancy agreement," that doesn't
14 require that there be a co-tenancy agreement for the
15 exercise of the option, does it?

16 MR. SHEALY: Object to form.

17 A. No.

18 Q. It means that that is an acceptable exception to
19 title; is that correct?

20 MR. SHEALY: Object to form.

21 A. Correct.

22 Q. Mr. Gavigan, as a drafter of this document, if there
23 was an intent to make the exercise of the option be
24 condition -- as a condition precedent a mutually
25 accepted co-tenancy agreement, you could have drafted

1 that language, could you not?

2 MR. SHEALY: Objection.

3 A. Yes, I could.

4 Q. Is there any language in this agreement that you know
5 of where it requires that a -- there be a mutually
6 acceptable co-tenancy agreement in place as a
7 condition precedent to the exercise of the option by
8 the lender?

9 MR. SHEALY: Object to form.

10 A. No.

11 Q. When you were first approached about this -- I'm
12 changing gears on you a little bit. Going back, when
13 you were first approached by Mr. Heyward about this
14 loan and he wanted you to close the loan with C-III
15 commercial, did you, in fact -- we were looking at an
16 exhibit yesterday from a deposition. This, you know,
17 was an e-mail where you sent -- you were communicating
18 with Mr. Heyward back in early August 18, 2019, and
19 you said, "Please note that CMBS loans, this one
20 included, require a single borrower meaning you'll
21 need to resolve your bill with Lynn before you can
22 move forward with this loan." Do you recall making
23 those comments to him?

24 A. Yes.

25 Q. And why -- was it the issue there? What were you

1 talking to him about in that e-mail?

2 A. The concept of this co-tenancy arising before the loan
3 closed.

4 Q. And how was that going to interfere with or be a
5 problem for him getting -- or The Best for Last
6 getting that loan?

7 A. Well, it turns out it wasn't. It was just my belief
8 in doing other CMBS loans that Wall Street money
9 doesn't particularly favor loaning to co-tenancy
10 ownership, but this one had no problem with it.

11 Q. Just so we understand -- now I'm skipping back again,
12 sorry -- you had documents executed by Mr. White, but
13 you had not delivered them to the other side. Do you
14 remember?

15 A. Yes.

16 Q. The anticipation is, I guess, if you had worked out
17 all the problems and all the conflicts, including
18 broke the ultimate one that broke the camel's back,
19 the attorney's fees, once that was resolved, you could
20 then be authorized to deliver the documents; is that
21 correct?

22 MR. SHEALY: Object.

23 A. Correct.

24 Q. But until you were authorized, you don't deliver those
25 documents; correct?

1 A. Yes.

2 Q. Until you're authorized to deliver them, you don't
3 deliver -- you don't consider them effective to bind
4 your client, do you?

5 MR. SHEALY: Object to form.

6 A. I don't.

7 Q. And, obviously, that's part of the step or the process
8 is not just getting them signed, but actually deliver
9 them to the other side to make them effective; is that
10 a fair statement?

11 MR. SHEALY: Objection.

12 A. Yes.

13 MR. RAYNOR: I don't have any further
14 questions.

15 FURTHER EXAMINATION BY MR. SHEALY

16 Q. Just a couple of follow-ups, Mr. Gavigan. You
17 mentioned earlier that Mr. Bethea had indicated to you
18 that the economics of this deal would result in a
19 windfall to Spring Valley Interests and to the great
20 detriment of The Best for Last; do you recall that?

21 A. I do.

22 Q. Did you agree with his assessment?

23 A. No.

24 Q. Why not?

25 A. I didn't agree with his assessment -- well, he

1 proffered the assessment in support of that's what
2 they had -- they obviously meant this deal to be, and
3 I didn't agree with that.

4 Q. Okay. And did you express that disagreement with --
5 to him?

6 A. Of course.

7 Q. And in other transactions that you have been involved
8 in for the principals in this transaction -- when I
9 say the principals, I'm talking about Albert Heyward,
10 Lynn White -- has there been -- has Mr. White ever
11 used a 1031 exchange to convert a loan into an equity
12 position?

13 A. Not to my knowledge.

14 Q. In other deals with -- that you've been involved in
15 involving Albert Heyward and Lynn White that involved
16 a loan convertible to a co-tenancy, were the terms of
17 the co-tenancy reflective of the same fee structure
18 that the other investors were subject to?

19 A. I don't recall there being another deal where they had
20 a loan convertible into a co-tenancy interest.

21 Q. Well, this being unique in that regard, did you have
22 any communication with The Best for Last about how
23 this purchase option would work?

24 A. Yes.

25 Q. Okay. And what -- and with whom did you communicate?

1 A. Albert.

2 Q. Okay. And that was at the time or before the loan
3 transaction was closed?

4 A. Yes. Before.

5 Q. And was that communication in writing or oral?

6 A. It was probably a combination of both. We had some
7 e-mail back and forth with myself and Albert and Ben
8 Pearman.

9 Q. And Ben Pearman was who?

10 A. The CPA. He's Albert's CPA.

11 Q. And your file with respect to that transaction would
12 reflect whatever e-mail correspondence there was?

13 A. It should. It was on our prior case management
14 system. We've switched case management systems since
15 then.

16 Q. All right. I don't believe I have any further
17 questions. Thank you, Mr. Gavigan.

18 A. You're welcome.

19 MR. RACINE: Ken, you got anything
20 else?

21 MR. RAYNOR: Yeah, just real quickly.

22 FURTHER EXAMINATION BY MR. RAYNOR

23 Q. Did you ever receive an opinion letter that was
24 Mr. Bethea to The Best for Last that you shared with
25 anybody, including Mr. White?

1 A. An opinion about what?

2 Q. Apparently, the option to purchase.

3 A. An opinion about the option to purchase?

4 Q. I'm just asking. I'm not saying you did. I'm just
5 asking if you did?

6 A. I mean, I received several opinions from Rob in
7 writing about this option. It's ridiculousness and
8 what Lynn is proposing it to be. And, yeah, I think
9 he touched upon a concept that Kirby Shealy brought up
10 that he doesn't think it's enforceable anyway.

11 Q. I'm talking about before the White Interests gave
12 notice of the exercise of the option, apparently there
13 was an opinion letter written about a year or two
14 before that by Mr. Bethea to --

15 A. No, but I do -- I recall when I got fired by Albert,
16 he did tell me that while he went and saw Rob about a
17 year ago and got his opinion on that transaction, yes,
18 I do recall that.

19 Q. You weren't given a copy of that opinion letter?

20 A. No, I wasn't privy to any of that.

21 Q. Okay. And then -- no further questions.

22 MR. SHEALY: Thank you very much.

23 MR. RACINE: He'll read and sign.

24 (Whereupon, the foregoing deposition was concluded
25 at 2:32 p.m. Signature was reserved.)

STATE OF NORTH CAROLINA

COUNTY OF UNION

CERTIFICATE OF REPORTER

According to the emergency video notarization requirements contained in NCGS 10B-25, I, CHRISTINE A. TAYLOR, RPR, Notary Public, do hereby certify that the identity of TIMOTHY B. GAVIGAN was confirmed by me over Zoom, that the witness was located in Mecklenburg County, that the witness was remotely sworn by me prior to the taking of the foregoing deposition, that said deposition was taken and transcribed under my supervision and direction; that the parties were present as stated; and that I am not of counsel for or in the employment of any of the parties to this action, nor am I financially or otherwise interested in the outcome of this action.

Additionally, I certify that the foregoing 70 pages constitute a true and accurate transcript of the testimony, and that the witness reserved signature.

This the 6th day of January, 2021.

CHRISTINE A. TAYLOR, RPR

Notary Public #19960530077

WITNESS CERTIFICATION

I, TIMOTHY B. GAVIGAN, hereby certify:

That I have read and examined the contents of the foregoing testimony as given by me on December 22, 2020, and that to the best of my knowledge and belief the foregoing pages are a complete and accurate record of the testimony given by me, except as noted on the attached Addendum A hereto.

I have ___ have not ___ made changes/corrections.

TIMOTHY B. GAVIGAN

I, _____, Notary Public for the
County of _____, State of
_____, hereby certify that the herein
above-named appeared before me this the _____ day of
_____, ____; and that I personally witnessed
the execution of this document for the intents and
purposes as herein above described.

Notary Public

(SEAL)

My Notary Seal Expires: _____

ADDENDUM A

Upon reading and examining my testimony as herein transcribed, I make the following additions, changes, and/or corrections with the accompanying and corresponding reason(s) for the same:

Page	Line	Is Amended to Read
_____	_____	_____
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TIMOTHY B. GAVIGAN



STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
2019-CP-4006914

Spring Valley Interests, LLC,)

)

Plaintiff,)

)

v.)

)

The Best for Last, LLC,)

)

Defendant.)

VIDEOCONFERENCE 30(b)(6) DEPOSITION OF
The Best for Last, LLC
(Albert R. Heyward, III)

Taken at:

Via Remote Videoconference for All Parties

On Monday, December 21, 2020

REPORTER: Darlene Pastel, CVR-CM

Notary Public

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EXHIBITS

Plaintiff's Exhibit No. 1, Spring Valley NOD 3
 Plaintiff's Exhibit No. 2, Loan Agreement 7
 Plaintiff's Exhibit No. 3, Notice of Exercise of Option 16
 Plaintiff's Exhibit No. 4, Email Chain Re Loan Closing 31
 Plaintiff's Exhibit No. 5, Email 8.21.19 Albert & White 37
 Plaintiff's Exhibit No. 6, Co-Tenancy Agreement 52
 Plaintiff's Exhibit No. 7, First Amendment to Loan 58

1 Pursuant to Notice in the aforementioned matter
2 and in accordance with the South Carolina Rules of Civil
3 Procedure, this videoconference 30(b)(6) deposition of
4 The Best for Last, LLC was taken by the Plaintiff
5 beginning at 10:12 a.m. on December 21, 2020, before
6 Darlene Pastel, CVR-CM, Notary Public.

7 MR. RAYNOR: I do have some preliminary
8 matters to put on the record before we get started.
9 I'm going to mark for identification purposes the
10 document that is Spring Valley NOD 30(b)(6) BFL as
11 Exhibit 1.

12 We have two witnesses -- or I should say
13 The Best for Last has two witnesses responding to this
14 30(b)(6) notice. And, Kirby, help me, make sure I get
15 it right. Mr. Heywood is going to address Topics 1
16 through 4, Number 5 to the extent he has any
17 knowledge, Number 6. Number 10 both Mr. Heywood and
18 Mr. Betheau have -- will be responsive witnesses.
19 14, Mr. Heywood. 17, Mr. Heywood. Number 18, both
20 Mr. Heywood and Mr. Betheau. Number 19, Mr. Heywood
21 and Mr. Betheau. And then the remaining ones
22 Mr. Betheau will address; is that correct?

23 MR. SHEALY: I think that's correct. And just
24 for your purposes, Ken, Albert's last name is
25 "Heyward."

1 MR. RAYNOR: Oh, Heyward. I'm sorry. What
2 did I say?

3 MR. SHEALY: Heywood.

4 MR. RAYNOR: I'm sorry, Mr. Heyward.

5 MR. SHEALY: And Rob's last name is Bethea.

6 MR. RAYNOR: Bethea. I'm sorry, gentlemen.
7 Goodness, I got them both wrong.

8 MR. SHEALY: I figured I'd just clear the air
9 at the beginning.

10 MR. RAYNOR: All right. And then we also
11 have -- we are in the process of circulating a waiver
12 that you sent me the other day about any incidental
13 disclosure of attorney-client communication is not
14 meant to waive any privilege.

15 MR. SHEALY: Yes, we have a written limited
16 waiver agreement that we have -- both sides have
17 agreed to that -- and it's being executed now -- that
18 to the extent that any incidental disclosure of
19 attorney-client privileged information is made during
20 these depositions -- that is not to be construed as a
21 waiver of all attorney-client communications as
22 between the various lawyers involved and their
23 respective clients.

24 MR. RAYNOR: And I think with that we're
25 probably ready to get started.

1 MR. SHEALY: I think so.

2 Albert R. Heyward, III, called as a witness and
3 upon first being duly sworn, testified as follows:

4 EXAMINATION BY MR. RAYNOR

5 Q. Good morning. State your name for the record, please.

6 A. Albert Heyward.

7 Q. Mr. Heyward, as I understand it, you have been
8 designated as a 30(b)(6) witness to respond in part at
9 least to the notice of deposition; is that correct?

10 A. I assume so, yes.

11 Q. Have you reviewed the Notice of Deposition of The Best
12 for Last, which was marked Exhibit 1 prior to today?

13 A. Yes.

14 Q. Tell me generally what you've done to prepare to
15 testify here today as the 30(b)(6) witness for
16 The Best for Last.

17 A. I don't quite understand your question.

18 Q. I'm just asking you generally what have you done to
19 prepare to testify as The Best for Last 30(b)(6)
20 witness here today.

21 A. I just reviewed some of the documents and stuff like
22 that.

23 Q. Okay. All right. First of all, if you would, just
24 tell me a little bit about yourself. Where do you
25 live?

1 A. I live at Edisto Island, South Carolina.

2 Q. And where do you work?

3 A. I work out of my house now.

4 Q. Who do you work for, I should say?

5 A. More or less myself.

6 Q. And how long have you been self-employed?

7 A. 40 years.

8 Q. How many years?

9 A. 40.

10 Q. And what is the nature of your work? What do you do
11 for a living?

12 A. I'm a developer and manager of self-storage projects.

13 Q. Okay. Have you been involved in self-storage projects
14 that Mr. Lynn White was also involved in?

15 A. Yes.

16 Q. How many times have you and he been involved in
17 projects?

18 A. Gosh, many times. But I've been involved with Lynn
19 since 1995.

20 Q. So, Mr. Heyward, I may be jumping around a little bit
21 just because of the fact that we've got two 30(b)(6)
22 witnesses, and I apologize for that. But if you -- I
23 start to confuse you during this deposition, let me
24 know.

25 MR. RAYNOR: I'm going to mark as Exhibit 2

1 the document that we provided, Darlene, that's
2 entitled Loan Agreement.

3 Q. (MR. RAYNOR) Mr. Heyward, do you recognize this
4 document that's entitled Loan Agreement?

5 A. Not specifically. This loan agreement was the --
6 anyway. I think I know what you're talking about.

7 Q. I'm sorry. Do you recognize it, though? Have you
8 seen it before?

9 A. I'm trying to find it right here in my paperwork.

10 MR. SHEALY: Ken, do you want me to put it up
11 on the screen?

12 MR. RAYNOR: If that helps him, that will
13 work.

14 MR. SHEALY: Albert, can you see it?

15 THE DEPONENT: Yeah.

16 Q. (MR. RAYNOR) So do you recognize this as an
17 agreement between The Best for Last, LLC and
18 White Interests Limited Partnership that's dated
19 May 3, 2017?

20 A. Yes.

21 Q. And this also -- if you look at Paragraph 2 of this
22 document, there is a reference to a purchase option.
23 Do you see that?

24 Maybe, Kirby, can you scroll down to the -- do
25 you see that, sir?

1 A. Yes.

2 Q. And I'm going to be talking throughout this deposition
3 about the purchase agreement option. That's the
4 purchase option. That's what I'm referring to in
5 Paragraph 2. And if I talk about the loan agreement,
6 I'm referring to the entire document. Do you see
7 that?

8 A. Yes.

9 Q. Tell me how this agreement between White Interests
10 Limited Partnership and The Best for Last came into
11 being. In other words, what started it? Who started
12 talking about it? And that kind of thing.

13 A. That was a decision that was made by Lynn and his --
14 and the counsel for Best for Last at the time. And I
15 was not aware of the actual agreement until the night
16 before we -- or the day before we closed. I got
17 actually a copy of this paperwork at like
18 approximately 8:30 at night. I didn't get it. I
19 didn't see it until the next day, on the 3rd -- or the
20 4th rather, and we closed the loans supposedly or
21 closed the deal on the 5th.

22 Q. I'm sorry. You closed when?

23 A. We closed approximately May 5.

24 Q. So, basically, you had not seen this document until
25 almost two days before you signed it; is that correct?

1 A. Yeah, a day before. Yeah.

2 Q. Okay. Before you saw this document, what discussions
3 did you have with anyone about their being a loan
4 between White Interests Limited Partnership and The
5 Best for Last in connection with The Best for Last's
6 purchase of the property on Rabon Road?

7 MR. SHEALY: I'll just object to the extent
8 that that question calls for the witness to reveal any
9 attorney-client privileged information.

10 But subject to that objection, you may answer.

11 A. I had -- when we first -- when I first started putting
12 the deal together, I had talked with Lynn about it,
13 and he was interested in it. But he had another issue
14 on another piece of property that he was working on,
15 and it dealt with a piece of real estate in Myrtle
16 Beach that he thought he had sold.

17 And, anyway, he wanted to do something
18 different than what we had done in the past, per se,
19 and that was to take a co-tenancy position with this
20 loan for Best for Last. It's also noted that the --
21 (cell phone ringing) -- it's Lynn. He had
22 requested -- or at least I had instructed Tim when I
23 talked to Tim about when he was structuring the deal
24 for Lynn -- to go ahead and do whatever he felt was
25 necessary to allow Lynn to transfer the profits coming

1 from the property in Myrtle Beach in some capacity to
2 Best for Last.

3 And, anyway, that's how we ended up with a
4 co-tenancy agreement.

5 Q. (MR. RAYNOR) So first of all, let me -- I didn't
6 mean to interrupt you. Go ahead, sir.

7 A. I didn't know the specifics of it until, like I say,
8 the day before we closed.

9 Q. So just to kind of unpack a little bit what you said.
10 First of all, what was the deal you were trying to put
11 together?

12 A. What's that?

13 Q. What was the deal you were trying to put together?

14 A. Oh, it was to purchase the storage property in
15 Columbia.

16 Q. That's located on Rabon Road?

17 A. Yeah. Well, Rabon is one of them. There are two
18 sites.

19 Q. Okay.

20 A. And one's on Rabon Road, and the other one is on
21 Two Notch.

22 Q. Correct. Thank you. Throughout this I'll refer to
23 that as the property. Is that fair enough?

24 A. Okay.

25 Q. Now, you said this was going to be different than the

1 way you've done the deals before. How had you done
2 deals before versus what was different about this one?

3 A. This was the first time I think that we ever did a --
4 or it was structured as a loan. In the past, they had
5 all been equity deals.

6 In fact, we just finished an equity deal that
7 was a participation by the investors as an equity
8 deal. This came out to be this, and this was because
9 of the complication of the property in Myrtle Beach
10 that Lynn thought he had sold.

11 Q. When you say equity deal, what property was that
12 involving or project?

13 A. It was -- well, the most previous one before we did
14 this was the Clements Ferry Self-Storage, LLC.

15 Q. And in that LLC, did it involve a co-tenancy
16 agreement?

17 A. No. It was a pure equity participation.

18 Q. And when you say equity, does that mean that
19 everybody --

20 A. By the investors, yes.

21 Q. Every investor including Mr. White contributed money
22 to an LLC and became a member of the LLC?

23 A. That's correct.

24 Q. Okay. Had you ever been involved in a project with
25 Mr. White where you did a co-tenancy agreement?

1 A. No, not until this time.

2 Q. Had you ever been involved with anyone where you did a
3 co-tenancy agreement in a project such as The Best for
4 Last?

5 MR. SHEALY: And I'm just going to object to
6 scope.

7 But subject to that, you may answer.

8 A. Not that I can remember.

9 Q. (MR. RAYNOR) Okay. So this -- the structure of
10 this deal was different in two ways: One, there
11 was a loan instead of a direct investment into an
12 LLC by Mr. White; and, two, it involved some type
13 of co-tenancy arrangement; correct?

14 A. It involved some co-tenancy what?

15 Q. Arrangement of some kind.

16 A. Yeah.

17 Q. Now, you had not had any conversations with apparently
18 anyone about the loan or co-tenancy agreement -- well,
19 I shouldn't say the purchase option, which is where it
20 talks about a co-tenancy interest. You had not had
21 any conversation with anyone about that until -- I'm
22 sorry. Strike that.

23 You had not had conversations with anyone
24 about Mr. White participating in this investment by
25 making a loan and having an option to purchase a

1 co-tenancy agreement prior to you receiving the
2 document that's called the loan agreement; is that
3 correct?

4 A. I did not know what -- no, I didn't know the
5 difference.

6 Q. You had no idea that was going to be part of the deal?

7 A. No.

8 Q. So when you got the loan agreement and then you had
9 two days before you signed it, what conversations, if
10 any, did you have with anyone about that document?

11 A. I looked at it with my --

12 MR. SHEALY: Hold on a second, Albert.
13 Objection to the extent that the question calls for
14 the witness to reveal attorney-client privileged
15 information. I object. Subject to that objection,
16 the witness may answer.

17 You may proceed, Albert.

18 A. Okay. No, it was -- this happened very quickly.
19 Because I did not even see the document until the
20 3rd -- I mean the 4th. And we closed on the 5th, I
21 think it was.

22 I did look at it. I didn't quite understand
23 it yet. But I did see that in the purchase option
24 there were two items in there that -- that was in the
25 purchase option. One was a -- specifically was an

1 agreeable co-tenancy agreement, and I saw that. And I
2 said, "Well, I guess that we got to agree upon it, if
3 we do it."

4 Q. (MR. RAYNOR) Now, but my question is: Between the
5 time you got it and the time you signed it, did you
6 have conversations with anyone about the terms and
7 conditions of the loan agreement including the
8 purchase option?

9 A. I may have talked --

10 MR. SHEALY: Same objection.

11 A. Okay. I may have talked to somebody. I don't
12 remember. It all happened --

13 Q. (MR. RAYNOR) Sitting here today, you can't
14 identify anybody you talked to?

15 A. No. It happened pretty quick.

16 Q. Now, I'm not asking you for the content of any
17 attorney-client privileged communications. But I do
18 want to make sure that I understand this testimony.
19 Did you talk to an attorney about this agreement
20 before you signed it?

21 A. I don't remember.

22 Q. Now, you talked -- you said there were two --
23 actually, I take that back. You did look at it and
24 see that there were two items in the document under
25 the purchase option, Paragraph 2. One, from looking

1 at it, it says, "Lender shall hold title to the
2 co-tenancy interest subject to (i) no mortgages other
3 than the borrower's then outstanding first lien
4 mortgage." Do you see that?

5 A. Yes.

6 Q. And then (ii), the second thing the title will be
7 subject to, would be "a mutually acceptable co-tenancy
8 agreement." Do you see that?

9 A. Yes.

10 Q. And, again, you don't remember having conversations
11 with anybody about what that provision meant; is that
12 correct?

13 A. I don't remember.

14 Q. Well, what did you assume, if anything, that the
15 language "lender shall hold -- take title to the
16 co-tenancy interest subject to no mortgages other than
17 the borrower's then outstanding first lien mortgage"?
18 What did you understand that to mean?

19 MR. SHEALY: Objection. Calls for legal
20 conclusion.

21 MR. RAYNOR: You can answer the question.

22 A. Just what it says. It was subject to the first
23 mortgage.

24 Q. (MR. RAYNOR) On May 3, 2017 -- strike that.

25 On May 5, 2017, when you signed this document,

1 did Best for Last have a first mortgage on the
2 property?

3 A. No. We placed one. That was an acquisition owed for
4 the property.

5 MR. RAYNOR: I'm going to mark as Exhibit 3
6 the document that is entitled -- Darlene, it's
7 entitled Notice of Exercise of Option to Purchase.

8 THE COURT REPORTER: Thank you.

9 Q. (MR. RAYNOR) Mr. Heyward, do you have a copy of
10 that document?

11 A. What is that?

12 Q. This is the Notice of Exercise of Option to Purchase,
13 dated August 21, 2019.

14 A. I remember it. I don't have actually a copy right
15 now, I don't think.

16 Q. Now, this was addressed to you as well as the company.
17 Do you see that?

18 A. Yes.

19 Q. When you received this, did you make any objection
20 about the form of the exercise of the option?

21 A. Scroll through it. Keep scrolling. Okay. I remember
22 him exercising that option.

23 Q. Right. And my question to you is: When you got this
24 exercise of option, did you give any objection to the
25 form of the exercise of the option?

1 A. I did.

2 Q. And what objection did you make?

3 A. I called my attorney to discuss this.

4 Q. Now, I don't want to know what your discussions were,
5 but who was your attorney?

6 A. Rob Bethea. I believe that's correct.

7 Q. So did you make any objection to the form of the
8 notice?

9 A. Yes, I did.

10 Q. And how did you make that objection?

11 A. By discussions with my attorney about what it meant.

12 Q. Well, sorry. Let me ask you this: Did you make any
13 objections to the form of the exercise of the option
14 to White Interests Limited Partnership?

15 A. I'm sure I did.

16 Q. And what was the objection you made to the form of the
17 exercise of the option?

18 A. Well, you can exercise the option, but they weren't
19 able to -- I mean, there was some hold-ups in that.

20 Q. I'm sorry. Say that again, Mr. Heyward.

21 A. There was something -- he exercised the option, but it
22 also required that it needed -- we needed a mutually
23 agreeable co-tenancy agreement. We did not have that.

24 Q. And did you put that objection in writing, or how did
25 you make that to White Interests Limited Partnership?

1 A. I don't specifically remember. I do remember that I
2 was talking to Mr. Bethea about it and what we do
3 about it. I don't remember specifically what we did.
4 I just did not accept it.

5 Q. So the reason you did not accept the Notice of
6 Exercise of Option to Purchase is that you contend
7 that it -- there had to be a mutually accepted --
8 acceptable co-tenancy agreement before they could
9 exercise this option?

10 MR. SHEALY: Objection. Calls for legal
11 conclusion.

12 MR. RAYNOR: You can answer the question.

13 THE DEPONENT: I didn't get it. My Internet
14 connection was unstable.

15 Q. (MR. RAYNOR) We'll make sure -- I'm clarifying.
16 The reason you did not comply with the Notice of
17 Exercise of Option to Purchase is you contended
18 that it required the parties to enter a mutually
19 acceptable co-tenancy agreement before the option
20 could be exercised; is that correct?

21 MR. SHEALY: Object to the form. And
22 objection, calls for legal conclusion.

23 You may answer.

24 A. I'm assuming yes, that's correct.

25 MR. RAYNOR: Just for the record, Kirby, I'm

1 not asking him to give legal opinion. I'm just asking
2 him for the basis, whether it's based on a legal
3 conclusion or not. Does that make sense?

4 MR. SHEALY: Yes. I still maintain the
5 objection. But I understand where you're going.

6 Q. (MR. RAYNOR) Was there any other reason that you
7 rejected this Notice of Exercise of Option on
8 behalf of Best for Last?

9 A. Well, at that time -- at that time, the -- I had
10 already engaged Rob, because I had heard that Lynn was
11 assuming that he was going to have in perpetuity
12 74 percent interest in the property. And that was not
13 the way the deal was structured in my opinion.

14 Q. So explain to me what you understood about the
15 74 percent interest in perpetuity versus how you
16 understood the deal was structured.

17 A. He was -- well, he was going to -- number one, he was
18 a lender.

19 Q. Pardon?

20 A. He was a pure lender to the property. He did have the
21 option under those two circumstances to exercise it,
22 and it would be a good option. But, let me see, he --
23 as it turned out, I had heard that he was intending to
24 take 74 percent interest of the property and maintain
25 that interest including when he got his money back.

1 And he got could convert that to a 74 percent interest
2 in the property in perpetuity, I guess you could say.
3 But that was not the way the deal was originally
4 structured. It was the first time that we had ever
5 done -- to my knowledge, ever done anything like that.

6 He had a second position in the property,
7 which was far exceeding the position that the other
8 equity holders in the property would have. And then
9 he could convert it into a 74 percent interest with no
10 waterfall difference eventually when he got his money
11 back. And that was not the intent.

12 Q. If you could, maybe just explain a little bit what you
13 understand the deal should have been versus what you
14 understand Mr. White was planning the deal was
15 under -- when he exercised the option to purchase.

16 A. Okay. When he exercised his option to purchase, he'd
17 become a 74 percent equity holder in the property. He
18 would be paid out. He would have his return -- not a
19 guaranteed return, but his stated return of 8 percent
20 on his money, and then he would hold 74 percent of the
21 property converted into an equity position. And then
22 when everybody got their money back, the equity
23 position would be reduced by half, okay, along with
24 the rest of the equity holders.

25 It was a secured position for him since he was

1 a mortgage. Pretty good deal. And, anyway, that was
2 fine, because that's what he was looking at possibly
3 rolling the money into this -- or taking the profits
4 out of the property in Myrtle Beach and putting it
5 into this deal. So that's what I was counting on.

6 Q. But I'm sorry. I still don't understand. Tell me
7 what you understood the deal was supposed to be and
8 then tell me what's different about that versus
9 Mr. White's attempt on behalf of White Interests
10 Limited Partnership to exercise the option.

11 A. Okay. The difference was -- for an example, the one
12 that we had just completed, doing a deal, we raised
13 about 1.32 million to do a project in Charleston,
14 Clements Ferry project. Okay? Everybody came into
15 it -- me included -- came into it as an equity
16 participant. Lynn also. Okay? And we had a
17 waterfall in there that when they got a certain return
18 and got all their money back, based upon returns, that
19 they would take a 50 percent interest in the property
20 with no money in it.

21 And that's exactly the way I had envisioned
22 or -- this was the way this was supposed to be set up.
23 And the only difference was that they wanted to
24 change -- at least what I thought was the only thing
25 they wanted to do was to -- Lynn to be able to 1031

1 exchange into this -- the sale coming out of Myrtle
2 Beach, which never was consummated. That was the
3 difference.

4 Q. So if I look at the document that's Exhibit 2, where
5 in that document is there anything in there that talks
6 about waterfall or equity interest other than the
7 74.425 percent undivided co-tenancy interest?

8 A. There wasn't.

9 Q. Where is there anything in Exhibit 2 that talks about
10 a 1031 sale of a Myrtle Beach property?

11 A. We had some documentation going back and forth, emails
12 and stuff, in reference to it. Even with Lynn.

13 Lynn also assumed a position doing this
14 process that he was not just a lender. He was
15 actually contributing advice, consent, whatever you
16 want to call it. I always considered him an equity
17 participant. And we had emails going back and forth
18 that stated that. That he was always considered to be
19 an equity participant.

20 Q. So did you -- was part of your objections to the
21 exercise of the option based on your efforts to try to
22 enforce what you understood the deal was, and that was
23 for him to be an equity owner in the LLC?

24 A. Uh-huh.

25 MR. SHEALY: Object to the form.

1 Q. (MR. RAYNOR) I'm sorry. I didn't hear you.

2 Yes or no?

3 A. Yes.

4 Q. Mr. Heyward, I forgot to mention to you, in a
5 deposition, it's important that when you're asked a
6 question, if the answer is yes or no -- you know,
7 outside of depositions, we nod our head or shake our
8 head. It's important for the deposition to articulate
9 yes or no. Okay?

10 A. I understand.

11 MR. SHEALY: And, Ken, while we're at kind of
12 a stopping point -- or not a stopping point, but
13 while -- probably need to at this point make sure that
14 I put on the record the objection that I sent to you a
15 couple of weeks ago.

16 You had been asking about Topic Number 2 in
17 the deposition notice, Exhibit 1. And I objected to
18 the premise of the topic on the basis that the
19 defendant has -- contends that it complied with the
20 loan agreement in all respects.

21 I just -- but subject to that objection, I
22 have no problem with the questions you're asking. But
23 I just wanted to make sure that I put that objection
24 on the record.

25 Q. (MR. RAYNOR) Okay. And while we've got this

1 stopping point, Mr. Heyward, it's also important
2 that if anybody asks you a question you don't
3 understand, make sure they -- make sure you ask
4 them to clarify what they ask you. Okay?

5 A. Thanks.

6 Q. And then if Mr. Shealy objects, unless he tells you
7 not to answer the question, he's making an
8 objection -- just like he just did -- for the record,
9 and you can go ahead and answer the question. Unless
10 he tells you "don't answer that question." Okay?

11 A. That's fine.

12 Q. So tell me, under your understanding of the document
13 that's Exhibit 2, and specifically the purchase
14 option, how was the White Interests Limited
15 Partnership to exercise their option? And once they
16 exercised their option, what would be the response by
17 The Best for Last?

18 MR. SHEALY: Object to the form and to the
19 extent that calls for a legal conclusion.

20 But you may answer, Mr. Heyward.

21 A. Okay. The -- in the exercise of the option, it was my
22 opinion when I read it that it had two things to the
23 exercise of that option. First of all, was the first
24 mortgage situation. And the second was the
25 co-tenancy -- agreeable co-tenancy agreement. We did

1 not have one. So I objected to it.

2 Q. (MR. RAYNOR) So your understanding is the exercise
3 of this option required a first mortgage and it
4 also required a mutually accepted co-tenancy
5 agreement?

6 A. That's correct.

7 MR. SHEALY: Object to the form. And
8 objection, calls for legal conclusion.

9 Q. (MR. RAYNOR) And did you ever -- again, I want to
10 make sure. Did you ever put that objection in
11 writing to Spring Valley when they -- when
12 Mr. White -- when they tried to exercise the option
13 as shown in Exhibit 3?

14 A. I can't specifically remember that, but I do remember
15 objecting to it. I talked to my attorneys about it.
16 It was -- that was what it was. I objected to it. I
17 just didn't even regard the option.

18 Q. Did you ever try to compel Spring Valley when they --
19 after they gave notice of exercise to become a member
20 of the LLC to Best for Last instead of a co-tenant?

21 MR. SHEALY: Object to the form.

22 You may answer.

23 A. I don't quite understand what you mean.

24 Q. (MR. RAYNOR) In other words, did you ever in
25 response to that request or the exercise of the

1 option request that the White Interests Limited
2 Partnership, instead of getting a co-tenancy
3 agreement, receive an equity interest in the LLC,
4 The Best for Last?

5 MR. SHEALY: I lost you there. If you could
6 restate that, I would appreciate it.

7 Q. (MR. RAYNOR) Let me back up a little bit.
8 Originally, you talked about you thought the deal,
9 or at least prior deals, were that Mr. White would
10 make his investment and be a member of the LLC like
11 everybody else.

12 A. Eventually.

13 Q. This was different because he was granted the option
14 to purchase and he was participating solely as a
15 lender; is that correct?

16 MR. SHEALY: Object to the form.

17 A. That was what I assumed. And I had a -- I had
18 protection with this mutually agreeable co-tenancy
19 agreement.

20 Q. (MR. RAYNOR) And once the option was exercised,
21 did you ever try to have Mr. White or his company
22 instead of receiving a co-tenancy interest in the
23 real property receive a limited -- I'm sorry -- an
24 equity interest in the limited liability company,
25 The Best for Last?

1 A. I don't know if it was in writing, but there were
2 discussions about that.

3 Q. Did you have those discussions, or was it by your
4 attorney?

5 A. My attorney was involved with it. With me. I know
6 that.

7 Q. Did you have those discussions with anybody for
8 White Interests Limited Partnership or Spring Valley?

9 A. That -- we had -- I said "we had" -- there were
10 discussions between his attorney, who at that time was
11 Tim Gavigan, and my attorneys, the LLC's attorney.
12 And I don't know what the summation of all that was.
13 But there was some discussions about that.

14 Q. I think I know the answer to this, but I want to make
15 sure. Prior to you signing the loan agreement on
16 October 5, 2017, on behalf of The Best for Last, you
17 were not able to identify any conversations you had
18 with anyone about the mutually acceptable co-tenancy
19 agreement as referred to in Paragraph 2 of the loan
20 agreement; is that correct?

21 A. Not with Lynn.

22 Q. Pardon?

23 A. Not with Lynn, I didn't.

24 Q. But earlier -- have you identified anybody you had a
25 conversation with about what was meant when it says in

1 Paragraph 2 of the -- entitled Lender's Purchase
2 Option to the loan agreement where it refers to a
3 mutually acceptable co-tenancy agreement? Did you
4 have conversations with anybody about that before you
5 signed this document?

6 MR. SHEALY: Object to the form to the extent
7 it calls for attorney-client privilege.

8 MR. RAYNOR: You can answer the question.

9 A. I'm sure I did with my attorneys.

10 Q. (MR. RAYNOR) And at that time, who were your
11 attorneys?

12 A. Rob Bethea with Adams and Reese.

13 Q. Anybody else other than your attorneys that you would
14 have talked about with this back in 2017 before you
15 signed it?

16 A. I'm sure I talked to -- with the other equity partners
17 before this whole thing blew up.

18 Q. When you say "equity partners," you mean the other
19 members of The Best for Last, LLC?

20 A. That is correct.

21 Q. So is it your understanding that the lender, White
22 Interests Limited Partnership, could not exercise its
23 option unless The Best for Last mutually -- I mean,
24 agreed to a mutually accepted co-tenancy agreement?
25 Was that your understating?

1 A. Yes.

2 MR. SHEALY: Objection. Calls for legal
3 conclusion.

4 Q. (MR. RAYNOR) And that was your understanding at
5 the time you signed this document; is that correct?

6 A. That's correct.

7 Q. And before you signed this document, you actually had
8 conversations about this agreement and specifically
9 that language with an attorney?

10 A. I don't remember if I had it before or after or -- but
11 I do remember I had discussions with my attorneys
12 about that.

13 Q. I want to make sure -- I'm not asking you about the
14 conversations you had. And I want to make sure you
15 know the time period.

16 I'm asking prior to the date you signed the
17 loan agreement, Exhibit 2, on behalf of The Best for
18 Last on May 5, 2017, you had conversations with any
19 attorney about this document, specifically the
20 language in Paragraph 2, Lender's Purchase Option,
21 that talks about a mutually acceptable co-tenancy
22 agreement?

23 A. I know I had some discussions with somebody. I can't
24 remember exactly who it was. Because all of this took
25 place in like 24 hours.

1 Q. Okay.

2 A. I mean, this is May 2017.

3 Q. And you don't even recall if it was an attorney or not
4 an attorney; is that correct?

5 A. I don't know. I can't honestly tell you.

6 Q. And you can't tell me the subject of the conversations
7 either, can you?

8 A. I'm sure it was part of this.

9 Q. Part of this being?

10 A. The document.

11 Q. Well, as best you can recall, what did you talk about?
12 What did you say, and what did that person say?

13 A. I can't remember.

14 MR. SHEALY: Object to the form to the extent
15 this calls for the witness to reveal attorney-client
16 communication.

17 MR. RAYNOR: Well, I'm asking -- Kirby, I
18 don't want him to talk about what his attorney said.
19 But to the extent it was somebody other than an
20 attorney, that's what I'm asking.

21 THE DEPONENT: I don't remember specifically.

22 Q. (MR. RAYNOR) I'm going to move forward a little
23 bit. At some point, you applied for a refinance
24 loan to refinance the existing loan on the property
25 that The Best for Last owned; is that correct?

1 A. Yes.

2 Q. Was there ever a -- like a loan agreement that you
3 signed in connection with that loan?

4 A. Yes.

5 MR. RAYNOR: Off the record.

6 (Recess taken from 10:59 a.m. until 11:02 a.m.)

7 MR. RAYNOR: I'm going to mark for
8 identification purposes as Number 4 the document
9 that's labeled Email Chain Reloan Closing Status
10 (Combined).

11 Q. (MR. RAYNOR) Mr. Heyward, this is an email I'll
12 represent to you that came from Tim Gavigan. And
13 it starts off a date of August 18, 2019, and it's
14 got a title up here that's The Best for Last,
15 \$3.1 million loan from C-III Commercial Mortgage.
16 Do you see that?

17 A. Yes, I do.

18 Q. Is C-III Commercial Mortgage the company that you were
19 getting the refinance loan for on behalf of The Best
20 for Last?

21 A. Yes.

22 Q. And it's got down, as identified in the body, someone
23 called Neal -- is that Gussis? the broker?

24 A. Yes.

25 Q. Who is he with?

1 A. He's with himself. It's called CCM Commercial
2 Mortgages or something like that.

3 Q. And where is he located?

4 A. He's located in Chicago.

5 Q. Now, if you flip over on the second page of this, at
6 the top of the page, if you will scroll down. You'll
7 see right there -- do you see where it says, "Please
8 note that the CMBS loans, this one included, requires
9 a single borrower, meaning you'll need to resolve your
10 deal with Lynn before you can move forward with this
11 loan." Do you see that?

12 A. Yes, I do.

13 Q. And this is Mr. Gavigan emailing you about the need to
14 resolve this was Lynn. Who did you understand he was
15 referring to when he said "Lynn"?

16 A. I don't understand the question. What did you say?

17 Q. Well, he says in his email, you know, "you'll need to
18 resolve your deal with Lynn." Who did you understand
19 he was talking about when he referenced "resolving the
20 deal with Lynn"?

21 A. Resolving this difference on the -- this co-tenancy
22 crap and all this other stuff.

23 Q. And what did you understand at this point needed to be
24 resolved about the co-tenancy crap?

25 A. We needed to come to a resolution to that.

1 Q. A resolution about what?

2 A. About the relationship between Lynn as a borrower
3 versus Lynn as an equity partner versus the LLC.

4 Q. Okay. Now, had you had any discussions with -- and
5 Lynn being Mr. White on behalf of White Interests
6 Limited Partnership; correct?

7 A. Yes.

8 Q. Had you had any conversations with Mr. White about
9 that issue prior to completing the application for the
10 loan with C-III Commercial Mortgage?

11 A. I'm thinking it probably -- in the application, I
12 remember this about the single borrower and stuff like
13 that. I didn't -- I didn't want Lynn -- Lynn
14 wasn't -- my equity people never guaranteed the loans.
15 Okay? And so it wasn't a -- there were no guarantees
16 involved with that as far as they were concerned. And
17 I'm assuming that's why we came in as a single
18 borrower.

19 Q. But my question is: Before you signed the application
20 and sent it in and paid the fee for the loan, did you
21 have any conversations with Mr. White about resolving
22 the issues you just identified about the co-tenancy
23 crap, as you put it?

24 A. I don't remember exactly. I don't remember. I know
25 that I would never -- I never, never ever would hide

1 anything from him or anything like that, because he's
2 always been pretty open with our discussions mostly.
3 And -- if it impacted him, per se.

4 Q. Now, in this email, Mr. Gavigan goes on to say, "Given
5 that, I recommend you don't return this loan
6 application with the required nonrefundable deposits
7 until you resolve with Lynn."

8 Did you take any efforts to resolve that issue
9 with Mr. White before you sent the application with
10 the nonrefundable deposit?

11 A. I'm not looking at that. What was the date on that
12 email?

13 Q. August 18, 2019.

14 A. That's about the same time this whole thing came up
15 with my attorneys and talking about what we were going
16 to do about this. I don't remember exactly the dates,
17 because it pretty well happened pretty quick.

18 Q. Well, I'm not asking about a specific date. But do
19 you recall whether or not you took any effort to work
20 out the loan -- I'm sorry -- the dispute about the
21 co-tenancy agreement before you returned the loan
22 application and before you paid the required
23 nonrefundable deposits?

24 A. I think that probably took place -- paying the deposit
25 and everything, I think, took place on August 16.

1 And, yeah, I reviewed some documents today, in fact,
2 that -- I think I signed the application or sent the
3 deposit in about the 16th of August.

4 Did not hear anything from anybody until the
5 21st of August when the money had been sent and wired.
6 There was an objection from Lynn. And I did have an
7 email from him at that time. But it was a done deal.

8 Q. So you actually sent the deposit and the application
9 in before you got this email from --

10 A. Tim Gavigan.

11 Q. -- from Tim Gavigan dated August 18; was that correct?

12 A. Yes, I think that's correct.

13 Q. In fact, you sent that in before -- that being the
14 loan application and the nonrefundable deposit --
15 before your email to Mr. Gavigan dated August 18,
16 2019, about doing the closing; is that correct?

17 A. I don't know specifically. I'd have to look at the
18 dates and everything.

19 MR. RAYNOR: Give me just a minute, please.

20 MR. SHEALY: Ken, while we're paused for a
21 second, the four documents that I had sent you in the
22 middle of the deposition is the signed loan
23 application memo, C-III's insurance requirements,
24 C-III's credit forms, and an underwriting checklist.

25 We did previously provide to you an unsigned

1 version of the loan application at Bates range 52 to
2 61, and a loan term summary at Bates 62, and several
3 other documents pertaining to the refinance.

4 MR. RAYNOR: Okay. Thank you.

5 Q. (MR. RAYNOR) Mr. Heyward, I'm looking at the loan
6 application on August 16 -- dated August 16, 2019,
7 which you signed on behalf of The Best for Last.

8 Was part of the purpose of this loan
9 application -- what was the purpose of this loan
10 application? In other words, what was the purpose of
11 the loan that you were applying for?

12 A. What was the purpose of the loan we were applying for?

13 Q. Yes.

14 A. To refinance the property.

15 Q. And what loans were you going to pay off when you say
16 "refinance"?

17 A. We were going to get everybody completely clear,
18 everybody including Lynn. And the appraisal came in
19 pretty good with the exception of one thing. And,
20 anyway, it -- we could afford -- the original loan was
21 for 3.1 million. I had it reduced to 2.6. Okay? And
22 that's the figure that we were dealing with, was 2.6.

23 And it would have gotten all the money back
24 from all the participants including the first
25 mortgage, the second mortgage, equity people, and

1 everything. And nobody would have had any money in
2 the deal, and we would have been down the road.

3 Q. So the purpose of this loan was not just to pay off
4 the existing first mortgage, but it was to return the
5 contributions that the members of the LLC had made
6 toward their ownership in the LLC; is that correct?

7 A. In addition to Lynn.

8 Q. And then also to pay off the lender --

9 A. That's correct.

10 Q. -- the second lender; is that correct? Mr. White's
11 company?

12 A. That's correct.

13 MR. RAYNOR: I'm going to mark for
14 identification purposes an email, Email 8.21.19 Albert
15 and White.

16 Kirby, do you mind showing Mr. Heyward that
17 email?

18 MR. SHEALY: Got it.

19 Q. (MR. RAYNOR) Can you see that, Mr. Heyward?

20 A. Yes, I can.

21 Q. Exhibit 5 is an email dated August 21, 2019, from
22 Mr. White to you; correct?

23 A. That's correct.

24 Q. And it's got Spring Vallet Refinance, but I think he
25 means Spring Valley Refinance; correct?

1 A. (No response.)

2 Q. Do you recall getting this email?

3 A. I do.

4 Q. And do you recall that this was in regards to the --

5 A. What's that?

6 Q. -- loan application you had made with C-III Commercial
7 Mortgage for the refinance loan?

8 A. Say that again, please.

9 Q. Do you recall that this email was in connection with
10 the -- or dealing with the loan application you had
11 made with C-III Commercial Mortgage for the refinance
12 loan?

13 A. That's correct.

14 Q. Now, this email says that the -- if you look at the
15 second sentence, it says, "As I discussed with you at
16 lunch, Tim has advised that in his opinion this
17 proposed loan will not work, and he reportedly advised
18 you of that problem." Do you see that?

19 A. The second paragraph?

20 Q. It's the second sentence in the first paragraph.

21 A. I'm sorry. Excuse me. I don't remember specifically
22 the lunch, but I do remember this email.

23 Q. And then if you look at the second paragraph, first
24 sentence, it says, "We need to determine if this loan
25 proposal can be made to work in an acceptable way."

1 Do you see that?

2 A. Yeah, I see that.

3 Q. What did you understand the issues were that Mr. White
4 was raising here in this email and had discussed with
5 you at lunch?

6 A. I think I could be -- I think it might have been on
7 the single entity issue that C-III made.

8 Q. The same issue that Mr. Gavigan had raised with you?

9 A. Yeah, yeah, that's it. Additionally, too, I think, if
10 you look at this, this is pretty strange getting this
11 from a mortgage holder and not an equity partner.

12 Q. Did you --

13 A. I considered Lynn an equity partner. I'm telling you.
14 And that -- you can very well look at this, that he
15 was -- he was involved. He wasn't just ...

16 Q. And tell me what you understood the single borrower
17 issue to be.

18 MR. SHEALY: Object to the form.

19 But you may answer.

20 A. Okay. In the -- Lynn does not sign or guarantee
21 anything, period, as far as this deal. And I often
22 did, and it wasn't part of my deal. I did what I had
23 to do. And that's when we got involved with the
24 single entity, and then we got involved with the
25 co-tenancies and all this crap that's going back and

1 forth. That's all where it came from.

2 Q. You got the email from Mr. Gavigan that was identified
3 as Exhibit 4. And when you got this email from
4 Mr. White, which is Exhibit 5, did you take any effort
5 to try to stop the payment of the nonrefundable
6 deposit on that loan application?

7 A. No, I did not. The horse was out of the gate.

8 Q. So, really, at that point whether you worked out a
9 deal with Mr. White or not, you already paid that
10 money, that nonrefundable application; correct?

11 A. It went out on the 16th.

12 Q. But my point being, whether you worked out an
13 agreement with him or not, you weren't going to get
14 that money back; correct?

15 A. I don't know that.

16 Q. Well, have you ever tried to get the money back when
17 you weren't able to work out the deal?

18 A. Well, when the deal stalled completely in October, we
19 did get a refund of a thousand bucks on it.

20 Q. How much?

21 A. \$1,000.

22 Q. And how did you get the refund? Did you ask for it,
23 or did they just voluntarily pay it?

24 A. They told me about it. That it was -- you know, they
25 already had the appraisals done and all that stuff,

1 the survey -- a whole bunch of stuff had already been
2 done for the loan.

3 Q. Well, after you made that application and you paid the
4 fee, was there ever a chance or -- that you could
5 identify an opportunity under the loan application
6 process where you could have said, "Hey, let's stop
7 this. And give me my money back"? Or was it like you
8 said "the horse was out of the barn," and you really
9 couldn't get it back?

10 A. Yeah, I didn't even think about that.

11 Q. Do you know of any way between the time you paid it,
12 made the application, and sitting here today -- anyway
13 you could have got that money back from some
14 contractual obligation with that lender?

15 A. I don't think -- well, I say that. I don't know. I
16 didn't check that out.

17 Q. Certainly can't identify it here today?

18 A. I did know the application was rolling constantly and
19 work was being performed. They had surveys they had
20 to come down on, come in and look at the properties,
21 and all that was taking place. Even in the interim
22 while we were trying to work this situation out. I do
23 know that. Property visits, you name it. There was a
24 lot of stuff going on.

25 Q. Now, in November 27, 2019, you or your attorney sent a

1 letter requesting -- strike that. Never mind. Yeah,
2 I take that back. In November 27, 2019, you or your
3 attorney sent a letter requesting a payoff amount to
4 pay off Mr. -- the loan that was held by Spring Valley
5 at that point that's referred to Exhibit 2.

6 A. I remember seeing that.

7 Q. And had you made arrangements at that point to secure
8 a loan to pay off Mr. White's company's loan?

9 A. We had made some -- had some communications with
10 First Palmetto Bank about it.

11 Q. I'm sorry. Do what?

12 A. First Palmetto Bank, local lender about it.

13 Q. And had you made an application for a loan?

14 A. No. We didn't get that far.

15 Q. Well, who did you talk to with the communication?

16 A. With what?

17 Q. Who were you talking to at the bank and had those
18 communications?

19 A. Oh, boy. I think we -- I know Walter Long was one of
20 them and possibly Sammy Small, Jr.

21 (To Mr. Bethea) Rob, you may be able to shed
22 some light on that too. You were involved with that.

23 Q. And as I understand it, you did not make an
24 application for the loan; correct?

25 A. No.

1 Q. Did The Best for Last have money in its account that
2 would be sufficient to pay off Mr. White's loan at
3 the -- or his company's loan if they did not make a
4 loan from a lender?

5 A. No, not at the time.

6 Q. Has The Best for Last ever tendered the money to pay
7 off the loan to Mr. White's company?

8 MR. SHEALY: Object to the form.

9 You may answer.

10 A. We believe that we could have secured the financing if
11 Lynn had been agreeable to that.

12 Q. (MR. RAYNOR) That's a little different question,
13 though. My question is: Have you ever submitted a
14 check and said, "Here, this is to pay off your
15 loan"?

16 A. No. We didn't get that far.

17 Q. Then why would you have to get cooperation from
18 Mr. White to be able to present him a check and say,
19 "Here's the amount we say is owed on the loan, and
20 we're paying it off"?

21 MR. SHEALY: Object to the form.

22 You may answer.

23 A. I believe that I had talked with my counsel about it.
24 And he'd already -- I think. Because they made the
25 offer to buy it out or get the -- actually get a

1 payoff from him. And he refused to give it. So it
2 kind of stalled everything right then.

3 MR. SHEALY: Ken, can we take about a
4 five-minute break?

5 MR. RAYNOR: Yeah, that would be great. It's
6 a good transition point, Kirby.

7 (Recess taken from 11:30 a.m. until 11:37 a.m.)

8 Q. (MR. RAYNOR) Mr. Heyward, I'm looking at the loan
9 application that you made with C-III Commercial
10 Mortgage, and the borrower in that application was
11 The Best for Last, LLC; is that correct?

12 A. Yes.

13 Q. Okay. Now, I'm going to jump around a little bit,
14 just because of the way the responses are to the
15 30(b)(6) notice.

16 In Paragraph 36 of your company's
17 counterclaim, The Best for Last, you alleged that TBFL
18 has been damaged by Plaintiff's refusal to accept a
19 payoff and lacks an adequate remedy at law for
20 Plaintiff's brief.

21 How do you contend that TBFL has been damaged
22 pursuant to that paragraph?

23 A. We have.

24 Q. Tell me how, though, is what I'm asking. How have you
25 been damaged?

1 A. Legal fees, for one. Deposits that were made, for
2 one. Fairly substantial costs.

3 Q. I'm sorry. I didn't mean to cut you off. Were you
4 finished?

5 A. Fairly substantial costs.

6 Q. All right. Well, I heard you say "legal fees";
7 correct?

8 A. Yes.

9 Q. And I heard you say "deposits"; is that correct?

10 A. Yes.

11 Q. Other than legal fees and deposits, what other damages
12 has The Best for Last suffered because of failure to
13 accept the payoff?

14 A. Yeah, it's going to be kind of hard to determine any
15 additional costs other than -- to go back through the
16 refinance again when this thing gets settled.

17 And we could have an increase in interest
18 rates. We could have an increase in amortization. We
19 could have an increase in a lot of different issues
20 that are not being able to be determined at this time.

21 Q. Okay. Now, what deposits were you referring to as
22 part of your damages?

23 A. The deposits that we tendered to C-III.

24 Q. Okay. And the legal fees. Who did you pay the legal
25 fees to?

1 A. To Adams and Reese. To Marcus McKnight. I think that
2 was his name. Fairly substantial legal fees.

3 Q. And Marcus McKnight -- who is he with?

4 A. I can't answer that. Kirby or Rob would know.

5 Q. Were these legal fees tendered before you tried to
6 make a payoff or after?

7 A. They were actually after we tried to make a payoff. I
8 mean before. Excuse me. I'm sorry.

9 Q. He was the counsel for C-III; right?

10 A. A guy named -- well, one of them was Brian something
11 or another. Let me see. Brian Kim. I have an actual
12 breakdown of that too. I don't know exactly what it
13 is.

14 Q. So what is the breakdown?

15 A. I have an actual breakdown that was given to me.

16 Q. Sorry. Did you say you do have an actual breakdown?

17 A. I had an actual breakdown on the deposits.

18 Q. Are those the deposits that total \$35,000?

19 A. That's correct.

20 Q. Okay. And those are listed in the loan application;
21 right? How they're allocated?

22 A. I don't know. I remember seeing the numbers. I don't
23 know exactly where they are. I've got them somewhere
24 here.

25 Q. Were the monies that you paid to attorneys in addition

1 to the portions of the deposits --

2 A. No.

3 Q. -- to make with the application?

4 A. No. That's just the C-III attorneys that were
5 involved.

6 Q. Okay.

7 A. 7-, \$8,000, I think, in legal fees alone to that.

8 Q. So did you pay those attorney's fees in addition to
9 the deposit you made?

10 A. No. They were all part of the deposit.

11 Q. Right. Okay. So other than the deposit being applied
12 to the lender's counsel's -- attorney's fees, did you
13 have any other attorney's fees you're claiming as
14 damages pursuant --

15 A. Yes, we have.

16 Q. And who are those paid to?

17 A. Adams and Reese. We have paid so far approximately --
18 these are approximate figures -- \$38,000 in paid fees
19 so far. There's still owing about \$35,000 to Adams
20 and Reese. And then we paid Marcus Knight
21 approximately 13- or \$14,000.

22 Q. And what did Marcus Knight do for you?

23 A. He came in as recommended from one of the equity
24 partners to go and negotiate with Lynn and Tim Gavigan
25 in trying to get a resolution.

1 Q. And was this -- when did he perform these services?

2 A. I'm thinking sometime in September or October. Well,
3 September mainly.

4 Q. 2019?

5 A. Yes, sir.

6 Q. And then the 38,000 that Adams and Reese, you say, has
7 been paid. When did they perform those services of
8 the 38,000?

9 A. In, I think, maybe -- we had one bill back in '17 or
10 '18, I think, when this first came up. As an opinion
11 that we paid some money for.

12 And then starting in August through today's
13 date. Not counting today.

14 Q. August 2019?

15 A. Yes, sir. Total expenses including the deposits were
16 approximately 121,000 so far.

17 Q. Going back to these legal fees that Adams and Reese --
18 and you said they -- part of the fees covered an
19 opinion back in -- when was -- what was the date of
20 this opinion?

21 A. I can't tell you that. Mr. Bethea can.

22 Q. But it would be before -- was that before you made the
23 loan application to C-III in August 16, 2019?

24 A. Yes, it was.

25 Q. It was? What was the subject matter of the opinion

1 on?

2 A. The interest, 74 percent interest, and its impact on
3 the LLC and the documentation.

4 Q. Well, how is that damages that arise from the failure
5 to accept a payoff as alleged in Paragraph 36 of your
6 counterclaim -- your company's counterclaim?

7 MR. SHEALY: Object to form.

8 A. That is a question that probably should be sent to the
9 LLC's attorneys to answer.

10 Q. (MR. RAYNOR) Well, if you were getting a legal
11 opinion about the co-tenancy agreement and its
12 impact on the LLC -- and that co-tenancy agreement
13 is the one referred to in the loan agreement; is
14 that correct? in the option to purchase?

15 A. Is what?

16 Q. You said you were getting a legal opinion on the
17 74 percent interest -- co-tenancy interest. That
18 would be the co-tenancy interest that would be
19 achieved as a result of the exercise of the option to
20 purchase in Paragraph 2 of the loan agreement;
21 correct?

22 A. Specifically, going into the mutually agreeable
23 co-tenancy agreement and dealing with that.

24 Q. And so you were aware of an issue about the adverse
25 effect of the co-tenancy interest resulting from the

1 exercise of the option before you made the application
2 to C-III Commercial Mortgage in August 2019; is that
3 correct?

4 MR. SHEALY: Object to the form.

5 MR. RAYNOR: I didn't hear your answer,
6 Mr. Heyward.

7 A. The -- we were aware that there might be a problem.
8 That's -- and I just heard a rumor on it. And then I
9 took paperwork and turned it over to Adams and Reese,
10 their opinion on what's going on with this thing, what
11 do we need to do.

12 But it was before the application, yes.

13 Q. (MR. RAYNOR) And what was the rumor you had heard?

14 A. The rumor was that Lynn was trying to take 74 percent
15 interest in the property once the loan was paid out
16 completely.

17 Q. Okay.

18 A. And that's what I got an opinion about.

19 Q. Well, isn't that what the --

20 A. After he had been paid out.

21 Q. Isn't that what Paragraph 2 states? That upon the
22 payment of the purchase price, he will have a -- or
23 his company would have a 74.425 percent interest?

24 MR. SHEALY: Objection. Calls for legal
25 conclusion.

1 A. Subject to the agreeable co-tenancy agreement.

2 I'm looking at an email that -- dated
3 August 29, 2019, from me. I said, "Just got this from
4 Rob B. Lynn's first shot across our bow. It is not
5 agreeable as far as I'm concerned. Let me know your
6 thoughts."

7 Q. (MR. RAYNOR) Sorry. This is an email August 29,
8 '19, from whom?

9 A. From me -- actually, it was -- yeah, it was from me.
10 Let's see.

11 Q. And what had you just gotten, Mr. Heyward?

12 A. It was -- "Albert, I received the attached co-tenancy
13 agreement from Tim this morning. Let's talk about it
14 after you review."

15 And I said, "I just got this from Rob B.
16 Lynn's first shot across our bow. It is not agreeable
17 as far as I'm concerned. Let me know your thoughts."

18 I think that probably -- yeah, probably went
19 to Rhett and Jimmy Cantey, two equity participants.

20 Q. And so what were you forwarding to them? a proposed
21 co-tenancy agreement?

22 A. I just was forwarding Rob's email. Excuse me. Yeah,
23 Rob's email from Tim Gavigan.

24 Q. And what did Tim Gavigan's email say?

25 A. "Rob, attached is a proposed draft co-tenancy

1 agreement. Lynn has not cleared it yet, so it remains
2 subject to his comments as well."

3 Q. Let's look at the document I'm going to mark as
4 Number 6. The document is entitled Co-Tenancy
5 Agreement.

6 Mr. Heyward, do you have access to the
7 attached document? the Co-Tenancy Agreement?

8 A. Not that I can see.

9 Q. Okay.

10 MR. SHEALY: Ken, I think I've got it on the
11 screen.

12 THE DEPONENT: I got it.

13 MR. RAYNOR: Well, if he doesn't have it, I'm
14 not going to ask him -- I was going to ask him to
15 compare it with what he had. But that's okay.

16 Q. (MR. RAYNOR) Well, what did you find
17 objectionable, if anything, to the co-tenancy
18 agreement that Tim had sent Mr. Bethea?

19 A. I can't respond to it because I'm not looking at it.

20 Q. You just don't remember one way or the other?

21 A. Oh, I just had it up here, and somebody took it down
22 off of my screen.

23 Q. I don't know necessarily that that's the one that was
24 attached to the email, Mr. Heyward. I don't want to
25 get you confused.

1 A. I didn't see.

2 Q. Pardon?

3 A. I don't have a copy of that right now. But if you put
4 it back on the screen, I can respond.

5 Q. Well, did the co-tenancy agreement that you saw, that
6 you're referring to, that you sent to your fellow
7 members -- did it refer to a 74.425 percent co-tenancy
8 interest?

9 A. I can't respond to that until you put it back up here
10 and let me look at it.

11 MR. RAYNOR: Okay. Can you put it back up,
12 Kirby?

13 THE DEPONENT: Scroll down.

14 MR. SHEALY: And I'm going to object to the
15 form. I think, Ken, you've sort of outlined what may
16 be a problem. I don't know whether this is what --
17 was in that email are not.

18 MR. RAYNOR: Right, I know. If he can
19 identify it or not -- I mean, if he wants to do it,
20 Kirby.

21 THE DEPONENT: Scroll down. Keep scrolling.

22 Q. (MR. RAYNOR) Mr. Heyward, are you done viewing
23 that document or not?

24 A. Are you talking to me?

25 Q. Yes, sir.

1 A. I screwed up something.

2 Q. We were having you review that document to see if you
3 could identify that as the one attached to the email
4 you were just looking at.

5 A. I remember seeing the document. I do.

6 Q. But it sounds like you didn't accept the document that
7 was attached to the email.

8 This document purports to be signed by you.
9 So that would tell me this is not the document that
10 was attached to the email. Is that a fair statement?

11 A. I don't understand what you said.

12 Q. Well, I guess -- simple question. Is this document --
13 which is Exhibit 6 -- is this the co-tenancy agreement
14 that was attached to that email you were just looking
15 at that you called the "first shot across the bow"?

16 A. Okay. I think that this document was after McKnight
17 visited with Lynn in Charlotte, trying to mediate or
18 work out the problems on this. And at the time, we
19 did agree upon these splits, 70/30 or whatever it was,
20 which you can go back the other and look at it.

21 And these documents -- this co-tenancy
22 agreement was sent to Rob Bethea for our review as a
23 final co-tenancy agreement. And there were also some
24 other issues to be dealt with dealing with the money.
25 And I think we can probably go down to the bottom

1 section -- scroll -- yeah, in there. And these were
2 the numbers that we came up with and were supposedly
3 agreed upon.

4 And there was another hitch to this, and this
5 was approximately about the end of September also.
6 And that we had signed -- and Rob can answer this
7 better than I can -- that we had signed all the
8 documents necessary to effect the change. And at the
9 last moment, Lynn came back and asked for an
10 additional \$6,500 in legal fees, which we did not
11 agree to. And then I thought about it over the
12 weekend, that weekend, and I said, "What the hell.
13 \$6,500 to get this thing done." We agreed to it and
14 signed the documents.

15 And then I left those in trust with Rob
16 Bethea. And he'll have to answer what happened after
17 that. I think that's the way it went.

18 Q. Now, while we're here, this document, Exhibit 6, talks
19 about a 70 percent co-tenancy interest for Spring
20 Valley and a 30 percent for Best for Last?

21 A. That's correct.

22 Q. Why is it 70/30 versus 74.425 --

23 A. Well, we were in the negotiations in Charlotte, and
24 Lynn kind of dug his heels in and said no, he wanted
25 70 percent of it.

1 Q. What were the -- what dispute was being negotiated?

2 A. That he would reduce his 74 percent down to 70.

3 Q. But why was he being asked to reduce his 74 percent
4 down to 70?

5 A. Because we didn't agree with the 74.

6 Q. And why did you not agree to the 74?

7 A. Because I didn't think it was at all reasonable at the
8 time. And then -- "the hell with it all. Let's just
9 go ahead and do it and get it done."

10 Came back -- Rob can pick it up from there
11 what happened.

12 Q. Why don't we go back to -- you said you didn't think
13 the 74.425 percent was reasonable. And I guess that
14 was part of the dispute.

15 Why did you think 74.425 percent wasn't
16 reasonable?

17 A. Because I think it was too much. I even thought about
18 it when I came back after I'd agreed to do it with
19 him, before we got the -- all the changes in writing.
20 And then he came back and wanted to get another
21 \$6,500, which I did agree to over the weekend. And
22 then we agreed to it, and he said, "No. Deal's off
23 the table."

24 Q. Well, if the agreement calls for a -- I'm talking
25 about the first -- the option to purchase in the loan

1 agreement -- called for a 74.425 percent undivided
2 co-tenancy interest, why did it matter if it was
3 unreasonable or not at the time of the exercise of the
4 option?

5 MR. SHEALY: Object to the form.

6 You may answer.

7 A. I think the exercise of the option took place after
8 that. I think. I don't know exactly. But, no, it
9 was -- he just tried to get a little bit more. He got
10 greedy. And I said, "No, I'm not going to do it."
11 And then I agreed to it, and then he came back and
12 said "the deal's off the table."

13 Q. (MR. RAYNOR) Well, you signed this document, which
14 is Exhibit 6 --

15 A. Right.

16 Q. -- September 27, 2019.

17 A. Right.

18 Q. The Notice of Exercise of Option to Purchase was dated
19 August 21, 2019.

20 A. Yeah. That was totally unacceptable at the time.

21 Q. And what was unacceptable was the 74.425 percent
22 co-tenancy interest; is that correct?

23 MR. SHEALY: Object to the form.

24 A. That is correct.

25 Q. (MR. RAYNOR) You have to speak up, sir. I can't

1 hear you.

2 A. Yes, that is correct.

3 Q. And why was that unacceptable?

4 A. It was not mutually agreeable at that time. Still
5 isn't.

6 Q. So your understanding of mutually acceptable
7 co-tenancy agreement would include agreement of the
8 percentage ownership interest?

9 A. Yes, it would --

10 MR. SHEALY: Object to form.

11 A. It would have to be worked out.

12 MR. RAYNOR: Darlene, I'm going to mark the
13 document entitled First Amendment to Loan Agreement
14 497 as Exhibit 7.

15 THE COURT REPORTER: Okay. Thank you.

16 MR. RAYNOR: Kirby, do you mind sharing that
17 with the witness?

18 MR. SHEALY: Got it.

19 MR. RAYNOR: Sir, if you would scroll down and
20 look at this as Kirby goes through it.

21 And I'll represent to you -- you can't see it
22 on the screen -- but this is a draft -- it's got a
23 draft stamp on it.

24 If you would, go back to the top, Kirby.

25 Q. (MR. RAYNOR) Mr. Heyward, have you seen this

1 document before?

2 A. I don't know. What's the date on it?

3 Q. I'm just asking -- I don't -- it's undated.

4 MR. RAYNOR: If you would, Kirby, go to
5 Paragraph 3 of the Recitals.

6 Q. (MR. RAYNOR) Looking at Paragraph 3 of the
7 Recitals -- and actually if you look at Paragraph
8 Number 2, it says, "WILP properly exercised its
9 purchase option." Do you see that?

10 A. I see that.

11 Q. And then Paragraph 3 says, "Prior to this First
12 Amendment, in spite of the plain meaning of the loan
13 agreement, seller challenged the intent of the
14 purchase option, arguing that the intent was to
15 provide an option to purchase a 74.425 percent member
16 interest in the seller rather than a 74.425 percent
17 co-tenancy agreement in the property, to which the
18 buyer disagreed." Do you see that?

19 A. I do see it.

20 Q. And my question to you is: Is that an accurate
21 statement that after WILP exercised it's option that
22 The Best for Last contended that it really wasn't
23 entitled -- WILP was not entitled to a co-tenancy
24 agreement but rather to a membership interest in The
25 Best for Last?

1 MR. SHEALY: Object to form.

2 You may answer.

3 A. I don't -- anyway.

4 Q. (MR. RAYNOR) I'm sorry. I couldn't hear you.

5 A. Who generated this? Do you have any idea?

6 Q. I don't know. But I'm just asking you a question.

7 And the question is simply this: In response to the
8 Exercise of the Notice of Option to Purchase by White
9 Interests Limited Partnership, did The Best for Last
10 respond by saying, "Well, no. You're not entitled to
11 a 74.425 co-tenancy interest. You're really supposed
12 to get a 74.425 percent membership interest in The
13 Best for Last"?

14 MR. SHEALY: Object to the form.

15 A. I think that probably -- well, at least the way I look
16 at it, sounds like he would be taking an equity
17 interest in it.

18 Q. (MR. RAYNOR) I'm sorry. I couldn't hear you, sir.

19 A. He would be taking an equity interest in it of 74.425.

20 Q. In the company, The Best for Last?

21 A. Yes.

22 Q. Okay. So, really, then that is the response. "Would
23 he exercise -- well, would it exercise the option?"

24 Your response was --

25 A. I don't know if this -- was this a signed thing? I

1 don't remember this.

2 Q. I'm just asking you if this was the response. Was the
3 response: "No, you don't get a co-tenancy interest.
4 You get membership interest in The Best for Last"?

5 MR. SHEALY: Object to the form.

6 A. Like I say, I don't know. I don't know. I've never
7 seen this, I don't think.

8 Q. (MR. RAYNOR) Well, regardless of what this piece
9 of paper -- I'm just asking you from your memory.
10 Was that the response that The Best for Last took
11 to the exercise of the option, and that is, "No, it
12 was supposed to be membership interest in the LLC,
13 The Best for Last. Not ownership of the property
14 at 74.425 percent"?

15 MR. SHEALY: Object to the form.

16 A. That would assume -- yeah, I would think so.

17 MR. RAYNOR: Okay.

18 A. But I don't know where this disagreement came from.

19 Q. (MR. RAYNOR) Okay. Kind of jumping around on you.
20 Your answer and counterclaim -- I say "yours" --
21 The Best for Last talks about --

22 A. Can you scroll down on that thing? There's no date on
23 it?

24 Q. No, sir. I don't think so.

25 So your 11th defense and 4th counterclaim was

1 for a breach of contract, Mr. Heyward. And you -- in
2 Paragraph 62 of your counterclaim, you allege that "as
3 a direct consequence of the Plaintiff's breach of the
4 terms of the closing documents, TBFL was forced to
5 forfeit the nonrefundable \$35,000 application fee to
6 the refinance lender."

7 Are you familiar with that allegation?

8 A. Not really. I don't quite understand. My attorney
9 would have to respond to that.

10 Q. Well, let me ask you this: Did you ever attempt to
11 receive an extension of the closing deadline for the
12 closing of that loan with C-III after September 27,
13 2019? When I say "you," the company, Best for Last.

14 A. Can you repeat that question, please, again?

15 Q. After September 27, 2019, did The Best for Last seek
16 to extend the closing date for the closing of the loan
17 with C-III Commercial Mortgage?

18 A. Did we seek an extension after that date?

19 Q. Yes, sir.

20 A. Yes, we did.

21 Q. And who did you ask for that extension to be from?

22 A. It went through Neal Gussis.

23 Q. And for what period did you ask to be extended from
24 to?

25 A. I'm looking at a response he wrote to me -- or to -- a

1 request from me. Offered to close after October 31,
2 2020. "Yes. Communications remain opened with a
3 letter to -- through 12/13 in the hopes of resolution
4 of ownership. On December 13, on instructions from
5 Albert, the lender was told that the ownership would
6 not be able to move forward for some time and a
7 reconciliation cost-to-date was requested. The loan
8 kept the files open through" -- says 6/24/20. I don't
9 know about that date -- "at which time third-party
10 reports were electronically provided, and a refund of
11 deposit of \$1,014.76 upon a signed letter of
12 termination."

13 Q. Sir, what are you reading from?

14 A. This was an email I received from Neal Gussis.

15 Q. And what is the date on the email?

16 A. The date on the email was December 19, 2020.

17 Q. And do I understand from your response that that loan
18 was opened and subject to being closed up until
19 June 24, 2020?

20 A. No. It says, "Communications remained open with the
21 lender through 12/13. Efforts" -- and it was
22 highlighted -- "efforts to close after October 1,
23 2020." And it says, "Yes, communications remained
24 open with the lender through 12/13 in hopes of
25 resolution of ownership."

1 MR. RAYNOR: Kirby, do you think you could
2 have him email you that? Forward that to you?

3 MR. SHEALY: I got this from Mr. Heyward, but
4 after the deposition started. So I can forward it
5 myself to you.

6 THE DEPONENT: Please.

7 MR. SHEALY: And I'm just going to forward
8 it --

9 MR. RAYNOR: Forward it to me. That will
10 work.

11 MR. SHEALY: There's an email from, you know,
12 Albert to me that just I'm going to -- I'm just going
13 to forward the thing. It just says "documents needed
14 for deposition." I don't find that to be
15 attorney-client privileged.

16 MR. RAYNOR: Right. He's just forwarding the
17 document.

18 THE DEPONENT: These dates might not be
19 correct either.

20 MR. SHEALY: And I'm going to copy Shawn too.

21 And Mr. Heyward apparently tried to send this
22 to me over the weekend, but it popped into my email
23 box at about 11:05. I don't know why it was hung up.

24 MR. RAYNOR: Okay. Give me just a minute, and
25 I may be done with Mr. Heyward.

1 MR. SHEALY: Going to take just a couple of
2 minutes?

3 MR. RAYNOR: Well, let me ask you this, guys
4 and Darlene. I'm not a big lunch eater. But, you
5 know, I don't want to impose my appetite on everybody
6 else. What do y'all want to do about breaking for
7 lunch, if anything?

8 THE COURT REPORTER: Either way is fine. I
9 don't need a break other than about five minutes to
10 set up a new file.

11 MR. SHEALY: I'm fine. Whatever Rob wants to
12 do.

13 MR. BETHEA: Yeah, let's roll.

14 MR. RAYNOR: Let's roll.

15 MR. SHEALY: So you're finished with Albert?

16 MR. RAYNOR: Yes, we're done. Let's just take
17 five minutes.

18 THE COURT REPORTER: Okay. And the Zoom will
19 keep rolling.

20 (WHEREUPON, the foregoing deposition was concluded at
21 12:25 p.m. Signature was waived.)

22 * * * * *

23

24

25

STATE OF SOUTH CAROLINA
COUNTY OF YORK

CERTIFICATE OF REPORTER

I, Darlene Pastel, CVR-CM, Notary Public, do hereby certify that Albert R. Heyward, III was duly sworn by me prior to the taking of the foregoing deposition, that said deposition was taken and transcribed under my supervision and direction, that the parties were present as stated, and that I am not of counsel for or in the employment of any of the parties to this action, nor am I interested in the outcome of this action.

I do further certify that the foregoing 65 pages constitute a true and accurate transcript of the testimony and that the witness waived signature.

This the 4th day of January 2021.

DARLENE PASTEL

Notary Public

My commission expires 9/20/27

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Also Present: Albert R. Heyward, III

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Spring Valley Interests, LLC,)
)
Plaintiff,)
)
v.)
)
The Best for Last, LLC,)
)
Defendant.)

VIDEOCONFERENCE 30(b)(6) DEPOSITION OF
The Best for Last, LLC
(Robert Partridge Bethea, Jr.)

Taken at:
Via Remote Videoconference for All Parties
On Monday, December 21, 2020
REPORTER: Darlene Pastel, CVR-CM
Notary Public

1 Pursuant to Notice in the aforementioned matter
2 and in accordance with the South Carolina Rules of Civil
3 Procedure, this videoconference 30(b)(6) deposition of
4 The Best for Last, LLC was taken by the Plaintiff
5 beginning at 12:30 p.m. on December 21, 2020, before
6 Darlene Pastel, CVR-CM, Notary Public.

7 Robert Partridge Bethea, Jr., called as a witness
8 and upon first being duly sworn, testified as follows:

9 EXAMINATION BY MR. RAYNOR

10 Q. State your name for the record, please.

11 A. Robert Bethea.

12 Q. Mr. Bethea, have you ever been deposed before?

13 A. I have.

14 Q. So you pretty much know the ground rules in terms of,
15 you know, if the answer is yes or no, you need to let
16 us know yes or no instead of nodding your head or
17 something; correct?

18 A. Yes.

19 Q. Tell me where you work.

20 A. I'm a partner with Adams and Reese.

21 Q. And what do you do there? What kind of work?

22 A. Mergers and acquisitions work. Finance, tax work.
23 Transaction practice.

24 Q. Just a little background with your involvement with
25 this case. When did you first perform any services in

1 connection with The Best for Last? And, specifically,
2 the loan agreement that is Exhibit 2.

3 A. I was given copies of these documents in -- I think
4 September 2018 by Mr. Heyward and asked to just review
5 them and provide him with an informal assessment of
6 their content and meaning.

7 Q. And then after that, did you have any involvement
8 until the point where The Best for Last made an
9 application for -- or application to C-III Commercial
10 Mortgage for a \$3.1 million loan? And that would have
11 been around August 16, 2019.

12 A. I did not have any involvement up to that point in
13 time. And actually wasn't involved in the C-III loan
14 application process.

15 Q. Now, when did you first become involved after --
16 approximately after the loan application was made to
17 C-III by The Best for Last?

18 A. The last week in August 2019.

19 Q. Was that -- and that would have been after the
20 White Interests Limited Partnership gave notice of its
21 exercise -- of option to purchase?

22 A. I believe so.

23 Q. Okay.

24 A. I mean, that document is dated August 21. And so I
25 don't think I was retained until sometime after that.

1 Q. Under the loan application, the loan was made in the
2 name of The Best for Last; is that correct?

3 A. That's right. That would have been the borrower
4 entity.

5 Q. Yeah. And the loan application required that it
6 provide a first mortgage or deed of trust on the
7 property that was being used as collateral; correct?

8 A. I don't know what the loan application specifically
9 says. Again, I wasn't involved on that document. But
10 we did receive copies of loan documents received from
11 C-III, and that is what they indicate, is a first lien
12 would have been required.

13 Q. And the property that was involved would be the
14 Spring Valley Storage & Office Center that's --

15 A. Correct.

16 Q. Now, if the White business interest had exercised
17 their option and they had been conveyed a
18 74.425 percent interest in that property, then the
19 borrower, The Best for Last, could not give a first
20 mortgage by itself on that property in connection with
21 that \$3.1 million loan; is that correct?

22 MR. SHEALY: Object to the form.

23 You may answer.

24 A. No. There would have been two borrowers under that
25 construction.

1 Q. (MR. RAYNOR) Well, there would -- it would have
2 to be two borrowers for there to be a first
3 mortgage. Both owners would have to be named in a
4 mortgage; is that correct?

5 A. Sure. If there's more than one party on the deed,
6 then both parties would have to consent to the
7 mortgage.

8 Q. Right. So without the consent of White Interests,
9 The Best for Last could not have complied with the
10 loan terms; is that correct?

11 MR. SHEALY: Object to the form.

12 You may answer.

13 A. No, I don't think that's correct.

14 Q. (MR. RAYNOR) Well, if you look at this loan
15 application -- I don't know if you have a copy of
16 it in front of you -- but it requires a first
17 mortgage lien on the property, and the loan
18 application is made by The Best for Last.

19 And so explain to me how after the exercise of
20 the option -- if The Best for Last had conveyed a deed
21 conveying 74.425 percent co-tenancy interest to
22 White Interests, explain to me how --

23 A. They could have satisfied -- they could have paid the
24 note off.

25 Q. Well, I'm asking, if they had conveyed the property,

1 the 74.425 percent, how could they have complied with
2 the loan application which required a first lien on
3 that property?

4 MR. SHEALY: Object to the form.

5 A. If the -- I mean, it's a hypothetical. So if they had
6 conveyed the property so that there were -- we just
7 went over this. If they conveyed the property so
8 there were more than two owners, then both parties
9 would have needed to have been party to the mortgage.

10 Q. (MR. RAYNOR) And make sure you answer my
11 question. The Best for Last could not honor that
12 loan application and provide by itself a first
13 mortgage on the property; correct?

14 MR. SHEALY: Object to the form.

15 You may answer.

16 A. If -- I don't think that's correct. Again, I'm not
17 sure of the fact pattern that you're asking me to
18 respond with respect to.

19 Q. (MR. RAYNOR) Well, let me be clear. White
20 Interests Limited Partnership on August 21, 2019,
21 gave Notice of Exercise of Option to Purchase;
22 correct?

23 A. It's my understanding.

24 Q. And that's Exhibit 3. If The Best for Last had
25 responded to that by conveying the property of

1 74.425 percent undivided co-tenancy interest in the
2 property -- if you assume that -- before the closing
3 of the loan with C-III -- do you understand what the
4 assumption is?

5 A. I do.

6 Q. Now, if you make that assumption, explain to me how
7 The Best for Last could comply with the loan
8 application which required a first lien on the
9 property if it had already conveyed 74.425 percent
10 undivided interest to White Interests Limited
11 Partnership?

12 MR. SHEALY: Object to the form.

13 A. If you assume that, then both -- then it could not
14 alone grant the mortgage. It would need the other
15 owner to grant the mortgage with it, if you assume
16 those facts.

17 Q. (MR. RAYNOR) Now, were you ever asked to provide
18 a written response to the Notice of Exercise of
19 Option to Purchase by The Best for Last?

20 MR. SHEALY: Object to the form. To the
21 extent that calls for attorney-client communications.

22 MR. RAYNOR: Well, let me ask you this -- are
23 you telling him not to answer, Kirby? I don't want to
24 get into -- it's kind of hard when the witness is an
25 attorney not to talk about -- trip into

1 attorney-client communications. So are you telling
2 him not to answer?

3 MR. SHEALY: I'm not. I'm just putting that
4 objection out there. But I'm relying on the witness
5 to exercise judgment about, you know, staying away
6 from attorney-client communications and just talking
7 about what he did.

8 MR. RAYNOR: Well, let me ask it a different
9 way then. Okay? I'll withdraw that question.

10 Q. (MR. RAYNOR) Did you ever on behalf of The Best
11 for Last give any written objection to the Notice
12 of Exercise of Option to Purchase that was given by
13 White Interests Limited Partnership on August 21,
14 2019?

15 A. Upon being retained, I engaged directly with counsel
16 for Mr. White, Tim Gavigan, who was also at the time
17 counsel for The Best for Last. There are a litany of
18 written -- pieces of written correspondence between
19 Tim and myself with respect to the exercise of that
20 option.

21 So I think, yes, I did respond in writing to
22 Tim.

23 Q. Well, my question maybe is a little different, just so
24 we understand. Did you ever give any written
25 objections to the exercise of the option? For

1 example, object to the timing of the notice or the
2 delivery of the notice or the terms that were --

3 A. No.

4 Q. -- demanded in the notice?

5 A. No.

6 Q. Did you ever make any objections to Mr. Gavigan
7 verbally as to objections by The Best for Last to the
8 Notice of Exercise of Option to Purchase?

9 A. Yes.

10 Q. And what were the verbal -- what were the objections
11 you gave to him verbally?

12 A. Again, let me clarify. The emails I referred to --
13 there's significant email correspondence between Tim
14 and me that you have. The objections --

15 Q. And I'm going to come to that in a minute. Right now
16 I'm just asking -- any conversations either on the
17 phone or in person that you --

18 A. Sure.

19 Q. -- said "this is an objection we have to the exercise
20 of the option"?

21 A. Generally speaking, that the transaction is understood
22 by my clients -- was not reflected in the terms of
23 that documentation.

24 Q. Tell me what was understood by your clients versus
25 what was in the documentation. And what was the

1 disconnect, so to speak?

2 A. Mr. Heyward went through some of this earlier. But
3 the original transaction, it appears to me, to have
4 been set up to facilitate a 1031 exchange by Mr. White
5 that would later result in him converting that loan
6 into an ownership percentage of the property followed
7 by a contribution of that into the entity to become an
8 equity owner therein. So that economically his
9 investment was treated no differently than any other
10 cash investment. And the documentation that
11 Mr. Gavigan had provided failed to track that
12 understanding of the transaction.

13 Q. And in what way did it fail to track that
14 understanding?

15 A. It provided -- it failed to -- trying to think how to
16 best describe this to you. The Best for Last
17 operating agreement had a series of fees, transaction
18 expenses, and a financial waterfall that needed to be
19 reflected in the arrangement with Mr. White, and it
20 was not reflected based upon the documents that
21 Mr. Gavigan had showed us.

22 Q. Well, one thing that's different from what I
23 understand that you just described and Mr. Heyward's
24 understanding, under the loan agreement and the option
25 to purchase, it only talks about a transfer of an

1 undivided co-tenancy interest. There is no reference
2 to then that being converted to a membership interest
3 in The Best for Last; correct?

4 A. That's right. I think the documents failed to mention
5 that.

6 Q. But that was what your client understood -- or
7 Mr. Heyward understood was part of the deal?

8 A. The Best for Last and its members understood that to
9 be part of the deal.

10 Q. That in addition to once the exercise of the
11 co-tenancy -- or the option and the transfer of the
12 co-tenancy, then the second part of that would be
13 Mr. White's company would contribute that to the LLC
14 for membership interest of equal amount?

15 A. That's certainly something that I think had been
16 contemplated in the original deal.

17 Q. And that's certainly what Mr. Heyward understood it
18 was -- he was expecting; right?

19 A. It was -- yeah, multistep transaction. I wasn't
20 involved in putting it together. Mr. Gavigan was.
21 And he might be able to provide more detail on how
22 that was going to work.

23 Q. So was there an objection made to proceeding with just
24 the transfer of the co-tenancy interest and not, you
25 know, making a contribution of the property for the

1 membership interest?

2 A. I don't believe so.

3 Q. So are you saying that The Best for Last would have
4 been willing just to convey the 74.425 percent?

5 A. No. It was never willing to convey that amount.

6 Q. And why not?

7 A. My client didn't believe that to be the proper amount.

8 Q. And why did they not believe that to be the proper
9 amount?

10 A. In combination with other demands that Mr. White was
11 making, it changed the economics of the transaction.

12 Q. What were those other combination of demands?

13 A. A failure to participate in the financial waterfall of
14 The Best for Last.

15 Q. And explain that to us who don't know. What does that
16 mean? "Failure to participate in the waterfall."

17 A. The Best for Last had a series of -- I guess the
18 way -- the best way to describe it, you had kind of
19 multiple classes or equity or participation. You had
20 people who had invested cash that were entitled to
21 receive their cash back plus a return. And then after
22 that had been achieved, any remaining cash flow
23 associated with the venture or profit in the event of
24 a sale was to be divided 50 percent to those investor
25 members and 50 percent to the sponsor members, which

1 would be Mr. Heyward and his son Rhett.

2 Q. Are the sponsor members?

3 A. Correct.

4 Q. And who were the investor members?

5 A. Jimmy Cantey and -- I'm drawing a blank on the other
6 gentleman's name at this moment.

7 Q. Did you come up with his name?

8 A. No. I'm sorry. I didn't realize you --

9 Q. Oh, I thought you were looking for it.

10 A. Mr. Heyward may know it.

11 Q. I have Rhett Heyward, Ship, Jimmy. Do those names
12 ring a bell?

13 A. Yeah, Rhett certainly does. The other fellow -- you
14 said Ship?

15 Q. Yeah. Ship apparently -- 4.65 percent.

16 A. Yes, that's right.

17 Q. And Jimmy, 9.3 percent.

18 A. Yeah.

19 Q. Any other objections that you made verbally to
20 Mr. Gavigan in response to the Notice of Exercise of
21 the Option?

22 A. No, I think that covers it.

23 MR. RAYNOR: Madam Reporter, I am going to
24 mark as Exhibit Number 8 the Email 9.13.19 TBG and
25 Bethea 463.

1 Q. (MR. RAYNOR) Do you have a Bates stamped set of
2 these emails, Mr. Bethea?

3 A. Yes, I do. I have the emails you sent this morning.

4 Q. Okay, great. So look at that email, sir, that's Bates
5 stamped 463.

6 A. And I found the name. Ship's real name is Robert L.
7 Jenkins.

8 Q. Who is Jimmy?

9 A. James Cantey.

10 Q. Okay, great. Thank you.

11 So, now, this is an email that you sent to
12 Mr. Gavigan.

13 A. It is.

14 Q. And is this where you raised the issue about the
15 membership in the company versus co-tenancy agreement?

16 A. It's probably one of the occasions.

17 Q. Okay. And then I'm looking at -- you attached a
18 series of emails from 2017. Is that where you got
19 your understanding of what the terms of the deal were
20 supposed to be?

21 A. No. I got my understanding from talking to the
22 clients. Those were additional documents the clients
23 had provided me in support of their explanation.

24 Q. And those clients being Mr. Heyward and who else?

25 A. The members of The Best for Last.

1 Q. So you talked to all the members; is that correct?

2 A. I talked to Rhett Heyward. And Rhett Heyward,
3 Albert Heyward, and Jimmy Cantey.

4 Q. Do you know of another email where you put that
5 position in writing?

6 A. I don't know.

7 MR. RAYNOR: Madam Reporter, I'm going to mark
8 as Exhibit 9 the email that's -- the document is
9 Email 9.12.19 TBG and Bethea 461.

10 THE COURT REPORTER: Okay. Thank you.

11 Q. (MR. RAYNOR) Do you see that email, Mr. Bethea.

12 A. I do.

13 Q. Now, I'll represent to you this is the first email I
14 think I could find where you were talking to
15 Mr. Gavigan about this deal.

16 Do you remember any emails prior to this?

17 A. What's the date of this? September 12?

18 Q. Yes, sir.

19 A. Yeah, I think there would have been. Because Tim had
20 gotten me involved to represent the company in the
21 refinance prior to this. I think he was concerned he
22 was in a conflict and had -- he had started work on
23 the C-III refinance and then handed it off to us in
24 the interim.

25 So I believe that there is likely email

1 correspondence between Tim and myself that predates
2 this.

3 Q. Well, I'm asking -- maybe I should have been more
4 specific. Any that reference or discuss the exercise
5 of the option?

6 A. I'd be willing to bet that there are. But I would
7 have to go and look.

8 Q. Now, this email -- you say Jim and Albert are very
9 concerned about the impact that the exercise of this
10 option could have on their property taxes. Do you see
11 that?

12 A. I do see that.

13 Q. Had -- before this email, had you raised issues about
14 your client's understanding of -- it was supposed to
15 be -- you know, the co-tenancy interest was supposed
16 to be contributed back to the LLC and thus converted
17 into a membership interest? Or was the email that is
18 Exhibit 8 the first time you put that in writing?

19 A. Tim and I certainly would have had conversations about
20 it beginning in late August. I don't know whether or
21 not there's another email that you just haven't either
22 seen or provided to me.

23 Q. But did those conversations or emails -- did you ever
24 take the position that your client was not going to
25 exercise or -- sorry -- not going to respond to the

1 exercise of the option unless the interest was
2 converted into membership interest in the LLC?

3 A. I don't believe I ever took that position
4 specifically.

5 Q. But that was the position your client was stating that
6 they understand; correct?

7 A. Again, I didn't design the transaction. Mr. Gavigan
8 did. And he might be able to shed some light on how
9 those steps were going to occur.

10 But based upon the information provided to me,
11 I do believe that's what the parties intended in 2017
12 when they put this transaction in place.

13 Q. What I'm asking is a little bit different question.
14 The Best for Last's position -- that the transfer was
15 supposed to end up converting back to membership
16 interest; correct?

17 A. I think -- I don't -- I don't know that that was
18 specifically their position. I do believe it's where
19 the parties thought this deal would eventually land.
20 But those things typically -- I mean, I do 1031
21 exchange work. You may not. You typically don't have
22 both the acquisition of an interest in a co-tenancy
23 and the conversion to equity occur very close in time
24 for reasons having to do with taxes.

25 So, again, I'm not sure exactly what the

1 expected timing of that was. But I do believe that
2 was what everyone expected to happen.

3 Q. Well, apparently, there was some dispute about the
4 exercise of the option; correct?

5 A. Yes, clearly.

6 Q. What was the dispute about the exercise of the option
7 from your client's standpoint?

8 A. Was that the manner in which they were attempting to
9 exercise it failed to subject wide interest limited
10 partnership to The Best for Last waterfall.

11 Q. And the waterfall being that --

12 A. It's described in the email we just reviewed together.

13 Q. The one that's Bates stamped 461 or 463?

14 A. The one dated -- 463. No, that's not it. Hold on.
15 Yes, 463.

16 Q. And so, basically, the objection was -- I'm going to
17 put this in layperson's terms, not merger and
18 acquisition attorney's terms. They were making a
19 comparison to the Clements Ferry deal. Do you see
20 that?

21 A. I do.

22 Q. And in the Clements Ferry deal, Mr. White's company or
23 whoever -- entity he invested through was a member of
24 the LLC; correct?

25 A. That's my understanding. I hadn't -- I wasn't

1 involved in the Clements Ferry deal. But as it's been
2 explained to me, that's the case.

3 Q. And then when the waterfall happened, he would have
4 been one of those members that owned 50 percent;
5 correct?

6 A. I don't know how much he owned in Clements Ferry.

7 Q. But he would have -- it would have been something
8 similar. There would be -- the people who had made
9 investments, they would be investors entitled to
10 50 percent. And then the sponsors would be entitled
11 to 50 percent of the --

12 A. I don't know that that deal was identical in all
13 respects. But in theory, yes, that could be the case.
14 I haven't seen the Clements Ferry documents, so I
15 don't know the percentages.

16 Q. Right. But let's -- the percentages may change, but
17 that's basically what happens after the waterfall?

18 A. That's my --

19 Q. The investors get part of it; the sponsors get the
20 other part; correct?

21 A. Correct.

22 Q. And the way this -- if you just did the co-tenancy in
23 this case with the exercise of the option by White
24 Interests, after the waterfall White Interests would
25 own still 74.425 percent; correct?

1 A. Say that one more time. I'm not sure that's right.

2 Q. I'm just trying to make sure everybody understands the
3 objection about the waterfall. If you just had
4 The Best for Last convey the co-tenancy interest --
5 the 74.425 percent interest in the land -- and did not
6 require it to become a member of the LLC, after the
7 waterfall event, the White Interests would still own
8 74.425 percent of the property. And then it would be
9 only the remaining interest that would be subject to
10 that division you just talked about between investors
11 and sponsors; correct?

12 A. That's right.

13 Q. And so that was objectionable to your clients?

14 A. Correct.

15 Q. They wanted it to be so that White Interests'
16 74 percent was kind of thrown into the mix to be
17 divided to let 50 percent investors, 50 percent
18 sponsors; is that correct?

19 A. That's right.

20 Q. And where would Mr. White's company be? Would they
21 be -- would it be an investor or a sponsor under that
22 proposal?

23 A. It would have been an investor, just like the other
24 investor partners that put cash into the transaction.

25 Q. And so that means his 74.425 percent ownership

1 interest in the property would have been converted to
2 what percentage of the membership interest that would
3 reflect his share of a 50 percent -- a divide of the
4 equity in the property between the sponsors and the
5 investors?

6 A. I think it would have been the same percentage.

7 Q. He would still have 74.425 percent?

8 A. I think so. But he would have participated in
9 really -- he would have had 74.425 percent of
10 50 percent. Right? Because of the waterfall.

11 Q. Right, right. Instead of the 74.425 percent of
12 100 percent?

13 A. Correct.

14 Q. Now, there were some efforts to work out this dispute,
15 is that correct, that you were involved in?

16 A. There were.

17 Q. Now, certainly -- let me back up. If you look at the
18 loan agreement, which is Exhibit 2 --

19 A. Okay. I have it open.

20 Q. Now, I appreciate that you were not involved in
21 drafting this. But did you review this in terms of
22 your effort to respond and voice The Best for Last's
23 objection to the exercise of the option? Or did you
24 just rely on the emails that were attached to your --
25 or the documents attached to your email, which is

1 Exhibit 8?

2 A. No, I reviewed it.

3 Q. You reviewed Exhibit 2?

4 A. The loan agreement? Yes.

5 Q. Do you see any language in that agreement which calls
6 for the co-tenancy interest of 74.425 percent to be
7 contributed back to the LLC after it's conveyed to
8 White Interests?

9 A. No.

10 MR. RAYNOR: If you would, Madam Reporter,
11 I'm going to mark for identification purposes
12 Email 9.19.19 TBG and Bethea 490 as Number 10.

13 THE COURT REPORTER: Thank you.

14 Q. (MR. RAYNOR) Mr. Bethea, if you would, look at
15 that email, which is Bates stamped 490.

16 A. I have it.

17 Q. Do you recall getting a copy of this?

18 A. I do.

19 Q. And so this is the effort by Lynn -- that would be
20 Lynn White -- and Albert -- that would be Albert
21 Heyward -- to come up with an agreement about trying
22 to resolve the dispute about the exercise of the
23 option to purchase?

24 A. That's right.

25 Q. And so as to resolve that -- and it says "subject to

1 confirmation, no negative ATI" -- that would be some
2 tax implication?

3 A. That's right.

4 Q. Lynn would purchase a 70 percent co-tenancy agreement
5 and agree to participate in \$125,000 success fee.

6 What was that about? "Participate in \$125,000
7 success fee."

8 A. Again, part of waterfall that was baked into The Best
9 for Last document was this success fee payable to
10 Albert.

11 Q. And that was the operating agreement for The Best for
12 Last you're talking about?

13 A. Correct, that's right.

14 Q. And so if -- when they got refinance closed,
15 Mr. Heyward would get \$125,000 out of the loan
16 proceeds?

17 A. I believe that's right.

18 Q. And no other member would get a portion of that under
19 the operating agreement; is that correct?

20 A. I believe that's correct. I'd have to look at the
21 operating agreement to confirm that.

22 Q. Now, after this email, September 19, 2019, I think you
23 and Mr. Gavigan and also some involvement from
24 Marcus Knight went back and forth on drafting
25 documents; is that correct?

1 A. Correct.

2 Q. When -- do you know when a closing date was actually
3 set for the closing of the refinance loan that
4 The Best for Last had arranged to come from C-III
5 Commercial Mortgage?

6 A. Yeah. It was going to be the first week in October
7 following closing of the transaction described in
8 Bates stamped 490.

9 Q. And when was that closing actually set, if you know?

10 A. I don't remember. I want to -- I think it would have
11 been -- maybe October 3 was the target closing date,
12 which would have been a Wednesday.

13 Q. My question being: It looks like y'all got agreement
14 on September -- or you thought the parties had agreed
15 on September 19, 2019.

16 Was a closing date set before September 19,
17 2019, or after that?

18 A. I don't recall.

19 Q. Okay. So as far as you know, it could have been set
20 even before there was a thought that the parties had
21 resolved their dispute about the ownership; is that
22 correct?

23 A. It could have been. But also -- I think you probably
24 understand a closing of this nature -- there are a lot
25 of moving parts. There was, you know, surveys, title

1 work, title insurance commitments.

2 There were a lot of things going on that were
3 out of the control of the parties themselves that had
4 to come together before probably a definitive closing
5 date could be set in any event.

6 So, I think, if a date was set, it was a
7 target date that everybody was working toward.

8 Q. But, again, that target date was what?

9 A. I believe it was October 3. That's what I have in my
10 notes.

11 Q. It didn't close October 3; is that correct?

12 A. It did not.

13 Q. And, actually, it's 2019; right?

14 A. Correct.

15 Q. Why did it not close October 3, 2019?

16 A. Because the transaction described in Bates stamped 490
17 failed to close properly on Friday, September 27. I
18 mean -- yeah, that's right, September 27.

19 Q. And what was the hold-up on September 27?

20 A. Well, the hold-up occurred over the weekend. We had
21 closed the transaction. Tim Gavigan and I had worked
22 that day to secure signatures on closing documents.
23 You've got copies of our counterparts, I'm certain.

24 Over the weekend, Mr. White continued to
25 negotiate certain elements of that transaction and on

1 October 1 refused to proceed with the closing -- or
2 return signed documents. However you want to -- he
3 withdrew his consent to the transaction. That's why
4 we are where we are.

5 Q. And so you never received signed documents from him --

6 A. Did not.

7 Q. And was one of the documents that was tendered to him
8 for signature the co-tenancy agreement that is marked
9 for identification purposes as Number 6, and was
10 signed by your client on September 27, 2019?

11 A. Yes.

12 Q. What other document did he need to sign other than
13 that?

14 A. I believe there was an amendment to the loan agreement
15 that was part of the closing package. There were --
16 there was a settlement statement. Probably some
17 various affidavits and other title insurance-related
18 documents. It was a typical real estate closing. So
19 it had, you know, any number of transaction documents
20 associated with it.

21 Q. And the amendment to the loan agreement -- did it --
22 was it referencing a change from the 74.425 percent
23 undivided interest to a 70 percent interest?

24 A. Have you got a copy of the actual document you're
25 referencing?

1 Q. I thought I did. I can't put my finger on it right
2 now.

3 Well, actually, I've got -- I have the drafted
4 one that is Exhibit 7. Is that the --

5 A. I don't think that's the final version.

6 Q. Do you recall generally what the terms were of that
7 change?

8 A. It incorporated -- it incorporated some of the terms
9 that you saw in Email 490, Bates Number 490, such as
10 participation in the success fee and other aspects of
11 the waterfall.

12 Q. Now, y'all tendered this -- these documents to
13 Mr. White. He refused to sign them.

14 What, if anything, did The Best for Last do to
15 perform the agreement that was contemplated by these
16 documents after he refused to sign them?

17 A. Well, I don't know that he ever refused to sign them.
18 We just never got his signed copies. So, you know, my
19 understanding was he did execute them the same day we
20 did. I believe Tim --

21 Q. But he just never delivered them to you?

22 A. Yeah. I believe Tim was instructed not to deliver
23 them, correct.

24 The Best for Last tendered the deed that would
25 have conveyed him the 70 percent interest. I called

1 Tim Gavigan after we were closed to inform him that
2 everything had been executed on our end and whether or
3 not -- and to determine whether or not he wanted me to
4 FedEx him the deed for the 70 percent interest.

5 And Tim instructed me to just hold on to it
6 here since we were going to be recording the refinance
7 mortgage the following week, that it would make sense
8 for me to handle recording of that deed in connection
9 with the refinance. There was no point sending a deed
10 to Charlotte only to have it sent right back, right,
11 for recording here in Richland County.

12 Q. And so other than tendering a deed, did The Best for
13 Last do anything other than that to perform
14 obligations under the -- what was referred to as
15 the -- under those agreements that you -- or documents
16 you tendered to Tim for signature and didn't get back?

17 A. What obligations are you referring to? I mean, we
18 executed the closing documents and delivered them to
19 Tim.

20 Q. Right. That's what I'm asking. Other than executing
21 the closing documents, did you do anything else --
22 your client do anything else in terms of performance
23 under, say, the co-tenancy agreement, for example?

24 A. What obligation under the co-tenancy agreement -- I
25 guess I'm trying to figure out what obligation would

1 have had to have occurred in connection with the
2 closing. I'm confused by the question.

3 Q. Well, I don't think it would have to necessarily
4 happen in connection with the closing. I'm talking
5 about potentially after the closing. For example,
6 under Paragraph 4 of Exhibit 6, it talks about receipt
7 of rents and income. And it would be divided in
8 accordance with their portions of interest in the
9 property.

10 To your knowledge, did The Best for Last ever
11 allocate any income to Spring Valley Interests, LLC?

12 A. Yeah, I don't know.

13 Q. Has it ever requested that -- obtained an insurance
14 policy that named both co-tenants as co-insureds?

15 A. I don't know.

16 Q. Paragraph 5 of the agreement.

17 A. I know that was certainly something that was in
18 process in connection with the closing. I don't know
19 whether the policy was ever bound or not.

20 Q. Has it ever tendered any expenses to Spring Valley for
21 them to pay their portion of?

22 A. I don't know.

23 And, Ken, I'm not trying to be evasive. Those
24 are just operational details that I wouldn't have any
25 role in.

1 Q. I'm not picking on you. But I understand that you
2 were designated -- I thought you were designated to
3 testify to those issues. That's why I'm asking you --

4 A. Okay. Sorry.

5 Q. -- and Mr. Heyward. But I appreciate your dilemma.

6 A. I'm not trying to evade anything. I just simply -- I
7 simply don't know.

8 Q. Okay. One of the topics -- if I understood you
9 correctly, Mr. Bethea, you -- after you did that
10 initial work in 2018, you basically were unaware that
11 The Best for Last was applying for this loan until
12 after it had applied for the loan; is that correct?

13 A. That's right.

14 Q. Okay. That's what I thought.

15 MR. SHEALY: While we're paused for a moment,
16 I just wanted to put on the record that to the extent
17 that the previous line of questions pertain to
18 Topic 15 in the notice, we had objected in advance of
19 the deposition, saying that the topic was overly
20 broad, because no individual witness would have
21 knowledge of all of the efforts to perform acts
22 required under the closing documents.

23 I just wanted to make sure that was on the
24 record.

25 Q. (MR. RAYNOR) And just to follow up on that,

1 Mr. Bethea, I think other than tendering the
2 closing documents, you can't identify anything that
3 was done after that that would constitute
4 performance of those closing documents? For
5 example, the co-tenancy agreement; is that correct?

6 A. That's right.

7 Q. Okay.

8 A. We executed and delivered them.

9 Q. Now, under those documents, there should have been, if
10 I understood it, a payment of the success fee. That
11 didn't happen; is that correct?

12 A. Yeah, the success fee was predicated upon the
13 refinance closing. So it did not happen.

14 MR. RAYNOR: Give me five minutes, and I may
15 be done.

16 MR. SHEALY: All right. I'm going to go
17 off-line for five minutes.

18 (Recess taken from 1:20 p.m. until 1:23 p.m.)

19 MR. RAYNOR: Gentlemen, I think that's all the
20 questions I have for this witness.

21 MR. SHEALY: All right. Just give me a moment
22 to confer, not with Mr. Bethea, but with -- I probably
23 won't have any questions. But just give me a moment.

24 MR. RAYNOR: Okay, great.

25 MR. SHEALY: All right. I have no questions

1 for Mr. Bethea. So I think that concludes things
2 today.

3 MR. RAYNOR: Is he going to read and sign or
4 waive?

5 MR. SHEALY: Well, Madam Court Reporter, as I
6 asked you last time, did you have any issues with the
7 audio?

8 THE COURT REPORTER: To the best of my
9 knowledge, I did not.

10 MR. SHEALY: I didn't have any that go-round.
11 So, Rob, that is up to you as the witness, but I do
12 not have any issue with your waiving reading and
13 signing.

14 THE DEPONENT: I agree. Waive signing. I'll
15 waive it.

16 (WHEREUPON, the foregoing deposition was concluded at
17 1:24 p.m. Signature was waived.)

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STATE OF SOUTH CAROLINA
COUNTY OF YORK

CERTIFICATE OF REPORTER

I, Darlene Pastel, CVR-CM, Notary Public, do hereby certify that Robert Partridge Bethea, Jr. was duly sworn by me prior to the taking of the foregoing deposition, that said deposition was taken and transcribed under my supervision and direction, that the parties were present as stated, and that I am not of counsel for or in the employment of any of the parties to this action, nor am I interested in the outcome of this action.

I do further certify that the foregoing 33 pages constitute a true and accurate transcript of the testimony and that the witness waived signature.

This the 4th day of January 2021.

DARLENE PASTEL

Notary Public

My commission expires 9/20/27

LOAN AGREEMENT

THIS LOAN AGREEMENT (the "**Agreement**") is made and effective as of the 3rd day of May, 2017 by and between THE BEST FOR LAST, LLC, a South Carolina limited liability company ("**Borrower**"), and WHITE INTERESTS LIMITED PARTNERSHIP, a North Carolina limited partnership ("**Lender**").

WHEREAS, Lender has agreed to loan to Borrower funds in order to assist Borrower to acquire certain real property located in Columbia, South Carolina, to wit: 9500 Two Notch Road, 237 Rabon Road and 241 Rabon Road (collectively, the "**Property**") in the original principal amount of Eight Hundred Thousand and 00/100 Dollars (\$800,000.00) (the "**Loan Amount**"), which is to be evidenced by a promissory note made by Borrower in favor of Lender of even date herewith (the "**Note**") and secured by a second lien Mortgage of even date herewith (the "**Collateral Agreement**"); and

WHEREAS, Borrower and Lender desire to memorialize the terms of the loan herein.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. **Loan to Borrower.** Lender shall loan to Borrower the Loan Amount which shall be repaid as stated in the Note. Borrower shall, on demand of Lender, reimburse Lender for all costs to enter into this Agreement and administer the loan provided for herein.
2. **Lender's Purchase Option.** I consideration for making the Loan, the Borrower hereby grants to Lender the perpetual option to purchase a 74.425% undivided co-tenancy interest in the Property (the "**Purchase Option**") for a purchase price of Eight Hundred Thousand and 00/100 Dollars (the "**Purchase Price**"). The Purchase Option shall be exercised at the Lender's sole option by delivery of written notice no later than thirty (30) days before the intended closing. The Purchase Price shall be paid in cash or immediately available funds at the Closing. The Lender shall hold take title to the co-tenancy interest subject to (i) no mortgages other than the Borrower's then outstanding first lien mortgage, and (ii) a mutually acceptable co-tenancy agreement. The Purchase Option is freely assignable by the Lender.
3. **Remedies.** Upon the breach of this Agreement, the Collateral Agreement and/or the Note, Lender may exercise any one or more of the following rights and remedies:
 - a. Exercise any right that the Lender may have under this Agreement, the Note and/or any of the above-stated agreements.
 - b. Incur reasonable expenses (including attorneys' fees and litigation costs) to exercise any remedy or right and recover such expenses from Borrower.
 - c. Exercise any other right or remedy that a Lender has under law or in equity.
4. **Notices.** All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given (except as may otherwise be specifically provided herein to the contrary) if delivered by hand and receipted for by the

party to whom said notice or other communication shall have been directed or mailed by certified or registered mail with postage prepaid or shipped and receipted by express courier service charges prepaid by shipper addressed as follows (or to such other address as may be designated by notice given pursuant hereto):

To Borrower:

The Best For Last, LLC
PO Box 6926
Columbia, SC 29260

To Lender:

White Interests Limited Partnership
3925 Ayrshire Pl.
Charlotte, NC 28210

5. **Applicable Law.** This Agreement shall be construed and interpreted under the internal laws of the State of South Carolina without giving effect to the conflict of laws rules thereof. Borrowers and Lender hereby submit to the personal and subject matter jurisdiction of the federal and state courts located in Columbia, South Carolina.
6. **Binding Effect.** All of the terms and provisions of this Agreement by or for the benefit of the parties shall be binding upon and inure to the benefit of their successors and permitted assigns. The rights and obligations provided by this Agreement shall not be assignable except by the express written agreement of Borrower and Lender. Except as expressly provided herein, nothing herein is intended to confer upon any person other than the parties and their successors, any rights or remedies or by reason of this Agreement.
7. **Severability.** If any provision of this Agreement or the application of any provision to any party or circumstance is adjudged invalid or unenforceable to any extent, the application of the remainder of the provision to the party or circumstance, the application of the provision to other parties or circumstances and the application of the remainder of this Agreement shall not be affected. Each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.
8. **Counterparts; Electronic Copies.** This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same Agreement. This Agreement may be executed and delivered by facsimile or email/pdf. The parties agree to accept a digital/electronic image of this Agreement as executed, as a true and correct original and admissible as best evidence for the purposes of State law, Federal Rule of Evidence 1002, and the like statutes and regulations.
9. **Further Action.** The parties hereto shall, at any time from time to time, after the date hereof, upon request of any other party hereto, do, execute, acknowledge and deliver or cause to be done, executed, acknowledged and delivered, all such further acts, assignments, transfers, agreements assurances and powers of attorney as may be reasonably required to carry out the transactions herein contemplated.

10. **Agreement Drafted by TIMOTHY B. GAVIGAN, PLLC.** Each party hereby acknowledges that TIMOTHY B. GAVIGAN, PLLC prepared this Agreement on behalf of and in the course of its representation of the Borrower and that each party: (i) has been advised that a conflict may exist between its interest and those of the other parties; (ii) has been advised by TIMOTHY B. GAVIGAN, PLLC of the opportunity to seek the advice of independent counsel; and (iii) has had the opportunity to seek the advice of independent counsel.

[The next page is the signature page.]

IN WITNESS WHEREOF, the parties have executed and delivered this Agreement effective as of date set forth above.

BORROWER:

THE BEST FOR LAST, LLC

By: 

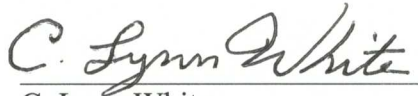
Name: Albert R. Heyward III

Title: Manager

LENDER:

WHITE INTERESTS LIMITED PARTNERSHIP

By: Commercial Real Estate Counsel, LLC,
General Partner

By: 

Name: C. Lynn White

Title: Manager

**SATISFACTION: THE DEBT
EVIDENCED BY THIS NOTE HAS
BEEN SATISFIED IN FULL THIS ____**
day of _____, ____.

Signed: _____

EXHIBIT

Gavigan Exhibit 2

exhibitsticker.com

PROMISSORY NOTE

\$800,000.00

May 3, 2017

FOR VALUE RECEIVED, the undersigned THE BEST FOR LAST, LLC (the "**Maker**"), hereby promises to pay to the order of WHITE INTERESTS LIMITED PARTNERSHIP (the "**Payee**"), the principal sum of Eight Hundred Thousand and 00/100 Dollars (\$800,000.00) pursuant to the terms and conditions set forth herein.

PAYMENT OF PRINCIPAL AND INTEREST. The principal amount of this Promissory Note (the "**Note**") and any accrued but unpaid interest shall be due and payable as follows:

- (a) Interest shall be due and payable in the same manner as set forth in 9.1.1.1. of the Maker's Operating Agreement as if the Maker were an Initial Member (as defined in such Operating Agreement) and the Interest was the Maker's Preferred Return (as defined in such Operating Agreement); and
- (b) The principal shall be paid in full upon the first to occur of the following: (i) at the closing of the exercise of the Purchase Option provided for in the Loan Agreement of even date herewith between the Maker and the Payee, (ii) the refinance of the Company's mortgage debt, and (iii) the sale of the Company's real property.

All payments under this Note shall be applied first to accrued but unpaid interest, and next to outstanding principal.

INTEREST RATE. This Note shall bear interest, at the rate of eight percent (8%) per annum.

PREPAYMENT. The Maker shall have the right at any time or from time to time to prepay this Note in whole or in part. Partial prepayments shall be applied to installments due in reverse order of their maturity.

REMEDIES. No delay or omission on part of the holder of this Note in exercising any right hereunder shall operate as a waiver of any such right or of any other right of such holder, nor shall any delay, omission or waiver on any one occasion be deemed a bar to or waiver of the same or any other right on any future occasion. The rights and remedies of the Payee shall be cumulative and may be pursued singly, successively, or together, in the sole discretion of the Payee.

EVENTS OF ACCELERATION. The occurrence of any of the following shall constitute an "**Event of Acceleration**" by Maker under this Note:

- (a) Maker's failure to pay any part of the principal or interest as and when due under this Note within five (5) days from the due date;
- (b) Maker's default under the terms of any instrument securing this Note; and/or
- (c) Maker's becoming insolvent and not paying its debts as they become due.

ACCELERATION. Upon the occurrence of an Event of Acceleration under this Note, and in addition to any other rights and remedies that Payee may have, Payee shall have the right, at its sole and exclusive option, to declare this Note immediately due and payable.

WAIVERS BY MAKER. All parties to this Note including Maker and any sureties, endorsers, and guarantors hereby waive protest, presentment, notice of dishonor, and notice of acceleration of maturity and agree to continue to remain bound for the payment of principal, interest and all other sums due under this Note notwithstanding any change or changes by way of release, surrender, exchange, modification or substitution of any security for this Note or by way of any extension or extensions of time for the payment of principal and interest; and all such parties waive all and every kind of notice of such change or changes and agree that the same may be made without notice or consent of any of them.

EXPENSES. In the event any payment under this Note is not paid when due, the Maker agrees to pay, in addition to the principal and interest hereunder, reasonable attorneys', plus all other reasonable expenses incurred by Payee in exercising any of its rights and remedies upon default.

SECURITY. The payments under this Note are secured by:

- (a) A second (2nd) lien Mortgage of Real Estate of even date herewith given by Maker, as mortgagor, for the benefit of Payee, as mortgagee.

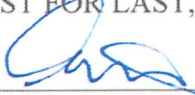
GOVERNING LAW. THIS NOTE SHALL BE GOVERNED BY, AND CONSTRUED AND INTERPRETED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF SOUTH CAROLINA, WITHOUT REGARD TO CONFLICTS OF LAW PRINCIPLES.

SUCCESSORS. All of the foregoing is the promise of Maker and shall bind Maker and Maker's successors, heirs and assigns; provided, however, that Maker may not assign any of its rights or delegate any of its obligations hereunder without the prior written consent of the holder of this Note.

[The next page is the signature page.]

IN WITNESS WHEREOF, Maker has duly authorized and executed this Note under seal as of the day and year first above written.

THE BEST FOR LAST, LLC

By:  (SEAL)

Name: Albert R. Heyward III

Title: Manager

WHITE INTERESTS LIMITED PARTNERSHIP

3925 Ayrshire Place
Charlotte, North Carolina 28210

August 21, 2019

Via Certified Mail, Return Receipt Requested to:

THE BEST FOR LAST, LLC
PO Box 6926
Columbia, South Carolina 29260

Copy via FedEx to:

Albert R. Heyward III
152 Duck Point Lane
Chapin, SC 29036

NOTICE OF EXERCISE OF OPTION TO PURCHASE

Notice is hereby given that WHITE INTERESTS LIMITED PARTNERSHIP ("**Buyer**") is exercising its Purchase Option to purchase a 74.425% undivided co-tenancy interest in the Property for the Purchase Price in accordance with that certain Loan Agreement (the "**Loan Agreement**") dated May 3, 2017 by and between the Buyer and THE BEST FOR LAST, LLC ("**Seller**"). All capitalized terms used herein but not defined herein shall have the meanings ascribed to them in the Loan Agreement. Closing is to occur at the earlier of (i) twenty-nine (29) days from the date of this Notice, or (ii) one (1) day immediately preceding a refinance of the Seller's existing outstanding mortgage indebtedness.

Given that the Loan becomes due and payable in full at the closing of the Purchase Option, the Buyer prefers to pay the Purchase Price at the closing by (i) canceling its remaining outstanding indebtedness due under the Loan Agreement and associated Promissory Note as part payment of the Purchase Price, and (ii) paying the remaining Purchase Price in cash or immediately available funds if the Seller prefers it rather than trading payments at the closing. If the Seller has reason to object to the outstanding indebtedness being applied towards the Purchase Price, the Buyer will pay the Purchase Price in full in cash or immediately available funds at the closing.

[The next page is the signature page.]

WHITE INTERESTS LIMITED PARTNERSHIP

By: Commercial Real Estate Counsel, LLC, its
Manager

By: C. Lynn White
Name: C. Lynn White
Title: Manager

Cc: Albert R. Heyward III via email to albert@ssdevgroup.com and albert@universalstoragegroup.com
Timothy B. Gavigan via email

From: Timothy Gavigan <tgavigan@gaviganlaw.net>
Sent: Thursday, September 12, 2019 5:29 PM
To: Rob Bethea
Cc: White C. Lynn
Subject: Purchase of 74.425% undivided interest in Spring Valley Storage
Attachments: Memorandum of Co-Tenancy Agreement.docx; Incumbency Certificate (The Best for Last).docx; Assignment and Assumption of Lease.docx; Substitute Form 1099-S.docx; Affidavit of Nonforeign Status.docx; Bill of Sale and General Assignment (Real Estate sale).docx; Affidavit of Value.docx; Deed - South Carolina.docx; Consent Resolution (The Best for Last).docx

EXHIBITGavigan Exhibit 4

exhibitsticker.com

Rob:

In order to keep the ball rolling for a closing of this transaction next Thursday, September 19th, I went ahead and drafted the Seller transaction documents and attach them to this email for your review. In the interest of time, I am also sending them to my client, so they remain subject to any comments he may have. We need all the proration detail from Albert re: the lease revenues, etc. in order to draft a Settlement Statement. We also need a copy of the current Management Agreement, the outstanding mortgage loan details re: the First Palmetto loan and any other service contracts that need to be partially assigned as part of this transaction. It is the Buyer's intent to close this transaction next Thursday, September 19th, all in accordance with the timeline set forth in the Notice of Option Exercise.

Thank you.

Tim

Timothy B. Gavigan, CPA, Esq.
TIMOTHY B. GAVIGAN, PLLC
10700 Sikes Pl., Suite 375
Charlotte, NC 28277
Phone: (704) 814-4460
Fax: (704) 814-6017
tgavigan@gaviganlaw.net

Licensed in NC and SC.

NOTICE: This e-mail message and all attachments transmitted with it may contain legally privileged and confidential information intended solely for the use of the addressee. If the reader of this message is not the intended recipient, you are hereby notified that any reading, dissemination, distribution, copying, or other use of this message or its attachments is strictly prohibited. If you have received this message in error, please notify the sender immediately by telephone or by electronic mail, and delete this message and all copies and backups thereof. THE SENDER OF THIS TRANSMISSION DOES NOT INTEND TO BE BOUND BY ANY AGREEMENT THAT MAY ARISE PURSUANT TO THE E-SIGNATURE ACT OR ANY OTHER SIMILAR LEGISLATION.

CIRCULAR 230 NOTICE: To comply with requirements imposed by the United States Treasury Department, any information regarding any U.S. federal tax matters contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, as advice for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

MEMORANDUM OF CO-TENANCY AGREEMENT

Drawn by and mail after recording to:

TIMOTHY B. GAVIGAN, PLLC

10700 Sikes Pl., Ste 375

Charlotte, NC 28277

SPRING VALLEY INTERESTS, LLC, a South Carolina limited liability company and THE BEST FOR LAST, LLC, a South Carolina limited liability company, entered into a certain Co-Tenancy Agreement dated _____, 20____, concerning certain real property lying and being in Richland County, South Carolina and being more particularly described on Exhibit A attached hereto and incorporated herein (the "**Property**"), the terms of which are hereby incorporated by reference in this Memorandum.

SPRING VALLEY INTERESTS, LLC

By: Commercial Real Estate Counsel, LLC, its
Manager

By: _____
Name: C. Lynn White
Title: Manager
Date: _____

THE BEST FOR LAST, LLC

By: _____
Name: Albert R. Heyward III
Title: Manager
Date: _____

STATE OF _____
COUNTY OF _____

I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he or she signed the foregoing document: _____.

Date: _____

Signature of Notary Public

(Official Seal)

_____, Notary Public

Printed or typed name

My commission expires: _____

STATE OF _____
COUNTY OF _____

I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he or she signed the foregoing document: _____.

Date: _____

Signature of Notary Public

(Official Seal)

_____, Notary Public

Printed or typed name

My commission expires: _____

EXHIBIT A
PROPERTY

Parcel 1:

(9005 Two Notch Road, Columbia, SC 29223)

All that certain, piece, parcel or tract of land, with the improvements thereon, situate, lying and being in the County of Richland, State of South Carolina, and being more particularly shown and delineated on plat of survey "Composite Drawing Prepared for Protective Life Insurance Company, Lawyers Title Insurance Corporation and Spring Valley Commons-Columbia LLC," prepared by United Design Services, Inc., dated December 11, 1996 and designated as DWG#: UB-179, having the following courses, measurements, and boundaries, to-wit: BEGINNING at an existing 1/2" iron pipe marking the Southeasterly corner of the property conveyed to Louise Paschal by deed recorded in the Register of Deeds Office for Richland County in Deed Book 778 at Page 285 and lying in the Westerly boundary of the right of way of Two Notch Road (US Hwy. No. 1) and run with the Southerly boundary of the Paschal Property (now or formerly) N 60°30'30" W 224.05' to a point; thence leaving the Southerly boundary of the Paschal Property (now or formerly) and run with a new line then following Twenty (20) courses and distances: (1) S 27°40'50" W 36.60' to a point; (2) N 62°19'10" W 27.00' to a point; (3) N 27°40'50" E 12.50' to a point; (4) N 62°19'10" W 89.90' to a point; (5) S 27°40'50" W 12.50' to a point; (6) N 62°19'10" W 32.80' to a point; (7) S 27°40'50" W 12.50' to a point; (8) N 62°19'10" W 19.50' to a point; (9) S 27°40'50" W 112.70' to a point; (10) S 35°38'47" E 5.60' to a point; (11) S 13°25' 13" W 26.81' to a point; (12) S 62°19'10" E 53.62' to a point; (13) S 27°40'50" W 6.89' to a point; (14) S 62°19'10" E 62.97' to a point; (15) N 27°40'50" E 6.89' to a point; (16) S 62°19' 10" E 30.00' to a point; (17) N 27°40'50" E 61.00' to a point; (18) S 62°19'10" E 36.00' to a point; (19) N 27°40'50" E 103.49' to a point; and (20) S 60°30'30" E 197.68' to a point on the Westerly margin of the right-of-way of Two Notch Road; thence along the Westerly margin of the right-of-way of Two Notch Road N 30°39'35" E 25.01' to the point and place of BEGINNING, containing 0.794 acre, more or less, and being the same parcel shown as "Parcel D" on Plat prepared for Spring Valley Commons - Columbia, LLC, by United Design Services, Inc., dated December 9, 1996, revised September 24, 1997, and recorded in the Office of the Register of Deeds for Richland County, South Carolina in Plat Book 57 at Page 599.

TOGETHER WITH the rights under those easements contained in that certain Declaration of Easements and Restrictive Covenants dated September 9, 1997, and recorded in the Office of the RMC for Richland County, South Carolina in Deed Book D1410, Page 70.

TOGETHER WITH rights contained in that certain Easement Agreement dated December 24, 2013, filed for record March 20, 2014, and recorded in Book R1933, Page 1529.

TMS#: 19903-05-05

Derivation: This being the same property conveyed to Grantor by deed of DWB Richland, LLC dated May 3, 2017 and recorded May 9, 2017 in Deed Book 2209 at Page 1314 and by corrective deed of DWB Richland, LLC dated May 3, 2017 and recorded August 21, 2017 in Deed Book 2237 at Page 2247.

Parcel 2:

(241 Rabon Road, Columbia, SC 29223)

All that certain piece, parcel or lot of land, with improvements thereon, containing One (1) acre, more or less, situate, lying and being on the Southwestern side of Rabon Road, about Nine (9) miles Northeast of the City of Columbia, in the County of Richland, State of South Carolina, being shown and designated as Tract "B" on a plat surveyed for Lila V. Medlin, by Janes C. Covington, C.E., dated September 21, 1951, revised by Joseph Keels, Engineer and Surveyor, December 7, 1960, and recorded in the Office of the Register of Deeds for Richland County in Plat Book 17 at Page 16. This property is also shown on a plat prepared for Deborah H. Holcombe by Benjamin H. Whetstone, R.L.S., dated April 28, 1984, and recorded in Plat Book Z at Page 9051. This conveyance is made subject to all restrictions, easements, and conditions of record.

TMS#: 17115-01-08

Derivation: This being the same property conveyed to Grantor by deed of DWB Richland, LLC dated May 3, 2017 and recorded May 9, 2017 in Deed Book 2209 at Page 1314 and by corrective deed of DWB Richland, LLC dated May 3, 2017 and recorded August 21, 2017 in Deed Book 2237 at Page 2247.

Parcel 3:

(237 Rabon Road, Columbia, SC 29223)

All that certain piece, parcel or tract of land, together with any improvements thereon, known as 237 Rabon Road, situate, lying and being in the County of Richland, State of South Carolina and being shown as containing approximately Two (2) acres on a plat prepared for Mrs. Lillie G. Medlin by James C. Covington, C.E., dated December 4, 1944 and recorded in the Office of the Register of Deeds for Richland County, South Carolina, in Plat Book "J" at Page 104; and being more particularly shown and delineated as a "Vacant Lot", containing One and Ninety Hundredths (1.90) acres on a plat prepared for Interprop, Inc., by Baxter Land Surveying Co., Inc., dated September 7, 2004, a copy of which was attached to the deed to the Grantor and is incorporated herein by reference; and having at the boundaries and measurements as shown on the last-mentioned plat, reference being craved thereto as often as necessary for a more complete and accurate legal description.

TMS#: 17115-01-09

Derivation: This being the same property conveyed to Grantor by deed of DWB Richland, LLC dated May 3, 2017 and recorded May 9, 2017 in Deed Book 2209 at Page 1314 and by corrective deed of DWB Richland, LLC dated May 3, 2017 and recorded August 21, 2017 in Deed Book 2237 at Page 2247.

INCUMBENCY CERTIFICATE

As of _____, 2019

The undersigned member(s)/manager(s) of THE BEST FOR LAST, LLC, a South Carolina limited liability company (the "**Company**"), hereby certifies as follows:

1. The below-listed individual(s) is/are the duly elected, qualified and acting officer(s) of the Company holding the office set forth opposite his/her/their name(s) as of the date hereof, and the signature(s) set forth opposite the said officer(s) is/are his/her/their true and correct signature(s):

<u>Name</u>	<u>Office</u>	<u>Signature</u>
Albert R. Heyward III	Manager	_____
Albert R. Heyward IV	Manager	_____

2. Attached hereto are the below-listed documents which have not been amended, modified or revoked and are in full force and effect as of the date hereof:
 - A. Attached as **Exhibit A** is a true and correct copy of the Articles of Organization of the Company, certified by the South Carolina Secretary of State's Office;
 - B. Attached as **Exhibit B** is a true and correct copy of the Operating Agreement of the Company;
 - C. Attached as **Exhibit C** is a true and correct copy of the related consent resolution required by the Company's organizational documents for the matter for which this Certificate is being given; and
 - D. Attached as **Exhibit D** is a Certificate of Existence issued by the South Carolina Secretary of State's Office.

IN WITNESS WHEREOF, the undersigned hereby executes this Certificate as of the day and year first above written.

 Albert R. Heyward III, Manager

**EXHIBIT A
ARTICLES OF ORGANIZATION**

[See attached.]

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**EXHIBIT B
OPERATING AGREEMENT**

[See attached.]

DRAFT

**EXHIBIT C
CONSENT RESOLUTION**

[See attached.]

DRAFT

**EXHIBIT D
CERTIFICATE OF EXISTENCE**

[See attached.]

DRAFT

ASSIGNMENT AND ASSUMPTION OF LEASES

THIS ASSIGNMENT AND ASSUMPTION OF LEASES ("Assignment") made effective as of the 19th day of September, 2019 (the "**Effective Date**"), is by THE BEST FOR LAST, LLC, a South Carolina limited liability company ("**Landlord**" and "**Assignor**"), in favor of SPRING VALLEY INTERESTS, LLC, a South Carolina limited liability company ("**Assignee**").

Recitals:

1. Assignor is landlord under those certain Leases set forth on Exhibit A attached hereto and incorporate herein by reference (collectively, the "**Leases**"), for the short-term lease of self-storage spaces located at 9005 Two Notch Road; 241 Rabon Road and 237 Rabon Road, Columbia, South Carolina 29223 and more particularly described in the Lease (the "**Premises**").
2. Effective as of the Effective Date, Assignor wishes to assign to Assignee 74.425% of Assignor's right, title and interest in, to and under the Leases.
3. Assignee has agreed to assume and discharge all of Assignor's obligations and liabilities under the Leases to the extent such obligations and liabilities arise after and are attributable to the period beginning after the Effective Date.

Agreements

NOW, THEREFORE, for and in consideration of the premises contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. **Assignment and Assumption.** Effective as of the Effective Date, Assignor does hereby transfer, assign, convey, set over and deliver unto Assignee a 74.425% undivided interest in, to and under the Leases, and Assignee does hereby assume and agree to perform Assignor's rights, duties, obligations and liabilities, as landlord, in, to and under the Leases to the extent assigned herein and to the extent such rights, duties, obligations and liabilities arise, are to be performed, and are attributable to the period beginning after the Effective Date.
2. **Successors and Assigns.** This Assignment shall be binding on and inure to the benefit of the parties hereto and their respective successors and assigns.
3. **Counterparts / Electronic Copies.** This Assignment may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same Assignment. This Assignment may be executed and delivered by facsimile or email/pdf. The parties agree to accept a digital/electronic image of this Assignment, as executed, as true and correct originals and admissible as best evidence for the purposes of State law, Federal Rule of Evidence 1002, and the like statutes and regulations.
4. **Governing Law.** This Assignment shall be governed by the laws of the State of South Carolina.

[The next page is the signature page]

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IN WITNESS WHEREOF, the parties have duly executed this Assignment as of the dates set forth below, effective as of the Effective Date.

THE BEST FOR LAST, LLC

By: _____
Name: Albert R. Heyward III
Title: Manager
Date: _____

SPRING VALLEY INTERESTS, LLC

By: Commercial Real Estate Counsel, LLC, its
Manager

By: _____
Name: C. Lynn White
Title: Manager
Date: _____

Exhibit A
Leases

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SUBSTITUTE FORM 1099-S

Timothy B. Gavigan, PLLC
10700 Sikes Pl., Ste 375
Charlotte, NC 28277

Seller's Name: The Best For Last, LLC

Seller's Tax Id Number: 82-0861227

Seller's Mailing Address: P.O. Box 6926, Columbia, SC 29260

Date of Closing: September 19, 2019

Sales Price: \$800,000.00

☐ Mark if consideration other than cash was or will be received

Real property tax amounts reimbursed: \$ _____

Property address: A 74.425% undivided interest: 9005 Two Notch Road; 241 Rabon Road and 237 Rabon Road, Columbia, South Carolina 29223

Buyer's Name: Spring Valley Interests, LLC

THIS IS IMPORTANT TAX INFORMATION AND IS BEING FURNISHED TO THE INTERNAL REVENUE SERVICE. IF YOU ARE REQUIRED TO FILE A RETURN, A NEGLIGENCE PENALTY OR OTHER SANCTION WILL BE IMPOSED ON YOU IF THIS ITEM IS REQUIRED TO BE REPORTED AND THE IRS DETERMINES THAT IT HAS NOT BEEN REPORTED.

YOU ARE REQUIRED BY LAW TO PROVIDE TIMOTHY B. GAVIGAN, PLLC WITH YOUR CORRECT TAXPAYER IDENTIFICATION NUMBER. IF YOU DO NOT PROVIDE TIMOTHY B. GAVIGAN, PLLC WITH YOUR CORRECT TAXPAYER IDENTIFICATION NUMBER, YOU MAY BE SUBJECT TO CIVIL OR CRIMINAL PENALTIES IMPOSED BY LAW.

UNDER PENALTIES OF PERJURY, I CERTIFY THAT THE NUMBER SHOWN ABOVE ON THIS STATEMENT IS MY CORRECT TAXPAYER IDENTIFICATION NUMBER.

THE BEST FOR LAST, LLC, a South Carolina
limited liability company (SEAL)

By: _____ (SEAL)

Name: Albert R. Heyward III

Title: Manager

AFFIDAVIT OF NON-FOREIGN STATUS

Section 1445 of the Internal Revenue Code of 1986, as amended (the "**Code**"), as part of the Foreign Investment in Real Property Tax Act, provides that a transferee ("**Buyer**") of a United States real property interest must withhold tax if the transferor ("**Seller**") is a foreign person. To inform the Buyer that withholding of tax is not required upon disposition of a United States real property interest the undersigned Seller, being duly sworn, hereby certifies the following:

1. The United States real property to be transferred from Seller to Buyer is described as a 74.425% undivided interest in Tax Parcel Nos. 19903-05-05; 17115-01-08 and 17115-01-09, containing 3.8 ± acres located at 9005 Two Notch Road; 241 Rabon Road and 237 Rabon Road, Columbia, Richland County, South Carolina (the "**Property**").
2. The name, address and United States taxpayer identification number of the Seller of the Property is as follows:

 The Best For Last, LLC
 P.O. Box 6926
 Columbia, SC 29260
 Tax ID No: 82-0861227
3. There is no other person or entity who has an ownership interest in the Property.
4. Seller is not a nonresident alien or a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Code and accompanying Regulations).
5. Seller is not a disregarded entity as defined in Section 1.1445-2(b)(2)(iii) of the Regulations promulgated under Internal Revenue Code of 1986, as amended.

Seller understands that this certification may be disclosed to the Internal Revenue Service by Buyer and any false statements made herein could be punishable by fine, imprisonment or both.

Under penalties of perjury, the undersigned declares that the undersigned has examined this certification and it is true, correct and complete.

THE BEST FOR LAST, LLC

By: _____
 Name: Albert R. Heyward III
 Title: Manager
 Date: _____

STATE OF _____
COUNTY OF _____

I, _____, Notary Public, certify that _____ personally came before me this day and acknowledged that he is _____ of THE BEST FOR LAST, LLC, a South Carolina limited liability company, and that he as _____, being authorized to do so, executed the foregoing on behalf of the limited liability company.

Witness my hand and official seal, this the _____ day of _____, _____.

Notary Public

My commission expires: _____

[Seal]

BILL OF SALE AND GENERAL ASSIGNMENT

THIS BILL OF SALE AND GENERAL ASSIGNMENT (this "**Bill of Sale**") is made this ____ day of March, 2020, by THE BEST FOR LAST, LLC, a South Carolina limited liability company (the "**Seller**"), in favor of SPRING VALLEY INTERESTS, LLC, a South Carolina limited liability company (the "**Buyer**").

Recitals:

1. By deed dated of even date herewith, the Seller has conveyed certain real property and improvements located on certain real property located in Richland County, South Carolina, being more particularly described on Exhibit A attached hereto and by this reference made a part hereof (the "**Property**"), to the Buyer.
2. The Seller now desires to sell, transfer, assign and convey unto to the Buyer certain of Seller's tangible and intangible personal property located on or about, or used, existing, or required in connection with, the Property.

Agreement:

NOW, THEREFORE, in consideration of the mutual covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which is acknowledged by Seller, Seller agrees as follows:

1. Personal Property. Seller does hereby GRANT, CONVEY, ASSIGN, SELL, TRANSFER, SET-OVER, and DELIVER unto Buyer, a 74.425% undivided interest in and to all personal property located on the Property, all fixtures and all building materials, supplies and equipment now or hereafter placed on the Property, all minerals, crops, timber, trees, shrubs, flowers and landscaping features now or hereafter located on the Property, all architectural renderings, models, drawings, plans, specifications, studies and data now or hereafter relating to the Property, proceeds of insurance and condemnation awards with respect to the personal property and all of Seller's right, title and interest in and to all warranties and guaranties relating to any portion of the personal property (collectively, the "**Tangible Personal Property**").
2. General Assignment. Seller does hereby ASSIGN, TRANSFER, and SET-OVER unto Buyer, to the extent assignable, a 74.425% undivided interest in the following:
 - a. all intangible personal property owned or possessed by Seller and used in connection with the ownership or operation of the Property, including, without limitation, (i) all assignable plans and specifications and other architectural and engineering drawings for the Property, (ii) any licenses, permits and approvals pertaining to the Property, (iii) all warranties and guaranties (if any) related to the ownership or operation of the Property or the Tangible Personal Property, to the extent the same may be assigned, (iv) all transferable consents, authorizations, variances or waivers, licenses, permits and approvals from any governmental or quasi-governmental agency, department, board, commission, bureau or other entity or instrumentality solely in respect of the Property, and (v) all "general intangibles" as that term is defined in the Uniform Commercial Code in effect in the State of South Carolina as of the date of this Bill of Sale, including but not limited to, all present

and future instruments, documents, causes of action, claims, and general intangibles related to the Property (collectively, the **"Intangible Personal Property"**);

- b. all goodwill, if any, and any and all other rights, privileges, and appurtenances owned by or existing for the benefit of Seller or used in connection with the ownership or operation of the Property; and
 - c. all rights and obligations of Seller pursuant to any covenants, conditions, restrictions, declarations, easement agreements, or other similar documents or agreements affecting the Property.
3. No Representations or Warranties. The property and interests transferred pursuant to this Bill of Sale are transferred with a general warranty of title, but are otherwise transferred "AS IS, WHERE IS."
4. Binding Agreement; Governing Law. This Bill of Sale and the provisions herein contained shall be binding upon and inure to the benefit of Seller, Buyer and their respective successors and assigns. This Bill of Sale shall be governed and construed in accordance with the laws of the State of South Carolina.

[The next page is the signature page.]

THE BEST FOR LAST, LLC

By: _____
Name: Albert R. Heyward III
Title: Manager

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EXHIBIT A
Legal Description

Parcel 1:

(9005 Two Notch Road, Columbia, SC 29223)

All that certain, piece, parcel or tract of land, with the improvements thereon, situate, lying and being in the County of Richland, State of South Carolina, and being more particularly shown and delineated on plat of survey "Composite Drawing Prepared for Protective Life Insurance Company, Lawyers Title Insurance Corporation and Spring Valley Commons-Columbia LLC," prepared by United Design Services, Inc., dated December 11, 1996 and designated as DWG#: UB-179, having the following courses, measurements, and boundaries, to-wit: BEGINNING at an existing 1/2" iron pipe marking the Southeasterly corner of the property conveyed to Louise Paschal by deed recorded in the Register of Deeds Office for Richland County in Deed Book 778 at Page 285 and lying in the Westerly boundary of the right of way of Two Notch Road (US Hwy. No. 1) and run with the Southerly boundary of the Paschal Property (now or formerly) N 60°30'30" W 224.05' to a point; thence leaving the Southerly boundary of the Paschal Property (now or formerly) and run with a new line then following Twenty (20) courses and distances: (1) S 27°40'50" W 36.60' to a point; (2) N 62°19'10" W 27.00' to a point; (3) N 27°40'50" E 12.50' to a point; (4) N 62°19'10" W 89.90' to a point; (5) S 27°40'50" W 12.50' to a point; (6) N 62°19'10" W 32.80' to a point; (7) S 27°40'50" W 12.50' to a point; (8) N 62°19'10" W 19.50' to a point; (9) S 27°40'50" W 112.70' to a point; (10) S 35°38'47" E 5.60' to a point; (11) S 13°25' 13" W 26.81' to a point; (12) S 62°19'10" E 53.62' to a point; (13) S 27°40'50" W 6.89' to a point; (14) S 62°19'10" E 62.97' to a point; (15) N 27°40'50" E 6.89' to a point; (16) S 62°19' 10" E 30.00' to a point; (17) N 27°40'50" E 61.00' to a point; (18) S 62°19'10" E 36.00' to a point; (19) N 27°40'50" E 103.49' to a point; and (20) S 60°30'30" E 197.68' to a point on the Westerly margin of the right-of-way of Two Notch Road; thence along the Westerly margin of the right-of-way of Two Notch Road N 30°39'35" E 25.01' to the point and place of BEGINNING, containing 0.794 acre, more or less, and being the same parcel shown as "Parcel D" on Plat prepared for Spring Valley Commons - Columbia, LLC, by United Design Services, Inc., dated December 9, 1996, revised September 24, 1997, and recorded in the Office of the Register of Deeds for Richland County, South Carolina in Plat Book 57 at Page 599.

TOGETHER WITH the rights under those easements contained in that certain Declaration of Easements and Restrictive Covenants dated September 9, 1997, and recorded in the Office of the RMC for Richland County, South Carolina in Deed Book D1410, Page 70.

TOGETHER WITH rights contained in that certain Easement Agreement dated December 24, 2013, filed for record March 20, 2014, and recorded in Book R1933, Page 1529.

TMS#: 19903-05-05

Derivation: This being the same property conveyed to Grantor by deed of DWB Richland, LLC dated May 3, 2017 and recorded May 9, 2017 in Deed Book 2209 at Page 1314 and by corrective deed of DWB Richland, LLC dated May 3, 2017 and recorded August 21, 2017 in Deed Book 2237 at Page 2247.

Parcel 2:

(241 Rabon Road, Columbia, SC 29223)

All that certain piece, parcel or lot of land, with improvements thereon, containing One (1) acre, more or less, situate, lying and being on the Southwestern side of Rabon Road, about Nine (9) miles Northeast of the City of Columbia, in the County of Richland, State of South Carolina, being shown and designated as Tract "B" on a plat surveyed for Lila V. Medlin, by Janes C. Covington, C.E., dated September 21, 1951, revised by Joseph Keels, Engineer and Surveyor, December 7, 1960, and recorded in the Office of the Register of Deeds for Richland County in Plat Book 17 at Page 16. This property is also shown on a plat prepared for Deborah H. Holcombe by Benjamin H. Whetstone, R.L.S., dated April 28, 1984, and recorded in Plat Book Z at Page 9051. This conveyance is made subject to all restrictions, easements, and conditions of record.

TMS#: 17115-01-08

Derivation: This being the same property conveyed to Grantor by deed of DWB Richland, LLC dated May 3, 2017 and recorded May 9, 2017 in Deed Book 2209 at Page 1314 and by corrective deed of DWB Richland, LLC dated May 3, 2017 and recorded August 21, 2017 in Deed Book 2237 at Page 2247.

Parcel 3:

(237 Rabon Road, Columbia, SC 29223)

All that certain piece, parcel or tract of land, together with any improvements thereon, known as 237 Rabon Road, situate, lying and being in the County of Richland, State of South Carolina and being shown as containing approximately Two (2) acres on a plat prepared for Mrs. Lillie G. Medlin by James C. Covington, C.E., dated December 4, 1944 and recorded in the Office of the Register of Deeds for Richland County, South Carolina, in Plat Book "J" at Page 104; and being more particularly shown and delineated as a "Vacant Lot", containing One and Ninety Hundredths (1.90) acres on a plat prepared for Interprop, Inc., by Baxter Land Surveying Co., Inc., dated September 7, 2004, a copy of which was attached to the deed to the Grantor and is incorporated herein by reference; and having at the boundaries and measurements as shown on the last-mentioned plat, reference being craved thereto as often as necessary for a more complete and accurate legal description.

TMS#: 17115-01-09

Derivation: This being the same property conveyed to Grantor by deed of DWB Richland, LLC dated May 3, 2017 and recorded May 9, 2017 in Deed Book 2209 at Page 1314 and by corrective deed of DWB Richland, LLC dated May 3, 2017 and recorded August 21, 2017 in Deed Book 2237 at Page 2247.

STATE OF _____)
)
 COUNTY OF _____)

AFFIDAVIT

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this affidavit and I understand such information.
2. The property being transferred is described as a 74.425% undivided interest in **3.8** acres located at **9005 Two Notch Road; 241 Rabon Road and 237 Rabon Road,** _____ Township, **Richland** County, South Carolina, bearing **Richland** County Tax Map Numbers **19903-05-05; 17115-01-08 and 17115-01-09**, and was transferred by **The Best For Last, LLC**, a **South Carolina limited liability company**, as of **September 19, 2019** to **Spring Valley Interests, LLC**, a **South Carolina limited liability company**.

3. Check one of the following: The deed is

- (a) ☒ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
- (b) ☐ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
- (c) ☐ exempt from the deed recording fee because (See Information Section of affidavit): _____ (If exempt, please skip items 4-7, and go to item 8 of this affidavit.)

If exempt under exemption #14 as described in the Information section of this affidavit, did the agent and principal relationship exist at the time of the original sale and was the purpose of this relationship to purchase the realty? Check Yes ☐ or No ☐

4. Check one of the following if either item 3(a) or item 3(b) above has been checked (See Information section of this affidavit):

- (a) ☒ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of **\$800,000.00**.
- (b) ☐ The fee is computed on the fair market value of the realty which is _____.
- (c) ☐ The fee is computed on the fair market value of the realty as established for property tax purposes which is _____.

5. Check Yes ☒ or No ☐ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "Yes," the amount of the outstanding balance of this lien or encumbrance is:

_____.

6. The deed recording fee is computed as follows:

(a) Place the amount listed in item 4 above here: \$800,000.00

(b) Place the amount listed in item 5 above here: _____
(If no amount is listed, place zero here.)

(c) Subtract Line 6(b) from Line 6(a) and place result here: \$ _____

7. The deed recording fee due is based on the amount listed on Line 6(c) above and the deed recording fee due is: \$ _____.

8. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: closing attorney.

9. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

Responsible Person Connected with the Transaction

SWORN to before me this _____
day of _____, 20 ____.

Timothy B. Gavigan
Print or Type Name Here

Notary Public for _____
My Commission Expires: _____

INFORMATION

Except as provided in this paragraph, the term "value" means "the consideration paid or to be paid in money or money's worth for the realty." Consideration paid or to be paid in money's worth includes, but is not limited to, other realty, personal property, stocks, bonds, partnership interest and other intangible property, the forgiveness or cancellation of a debt, the assumption of a debt, and the surrendering of any right. The fair market value of the consideration must be used in calculating the consideration paid in money's worth. Taxpayers may elect to use the fair market value of the realty being transferred in determining fair market value of the consideration. In the case of realty transferred between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, and in the case of realty transferred to a trust or as a distribution to a trust beneficiary, "value" means the realty's fair market value. A deduction from value is allowed for the amount of any lien or distribution to a trust beneficiary, "value" means the realty's fair market value. A deduction from value is allowed for the amount of any lien or encumbrance existing on the land, tenement, or realty before the transfer and remaining on the land, tenement,

or realty after the transfer. Taxpayers may elect to use the fair market value for property tax purposes in determining fair market value under the provisions of the law.

Exempted from the fee are deeds:

- (1) transferring realty in which the value of the realty, as defined in Code Section 12-24-30, is equal to or less than one hundred dollars;
- (2) transferring realty to the federal government or to a state, its agencies and departments, and its political subdivisions, including school districts;
- (3) that are otherwise exempted under the laws and Constitution of this State or of the United States;
- (4) transferring realty in which no gain or loss is recognized by reason of Section 1041 of the Internal Revenue Code as defined in Section 12-6-40(A);
- (5) transferring realty in order to partition realty as long as no consideration is paid for the transfer other than the interests in the realty that are being exchanged in order to partition the realty;
- (6) transferring an individual grave space at a cemetery owned by a cemetery company licensed under Chapter 55 of Title 39;
- (7) that constitute a contract for the sale of timber to be cut;
- (8) transferring realty to a corporation, a partnership, or a trust in order to become, or as, a stockholder, partner, or trust beneficiary of the entity provided no consideration is paid for the transfer other than stock in the corporation, interest in the partnership, beneficiary interest in the trust, or the increase in value in such stock or interest held by the grantor. However, the transfer of realty from a corporation, a partnership, or a trust to a stockholder, partner, or trust beneficiary of the entity is subject to the fee even if the realty is transferred to another corporation, a partnership, or trust;
- (9) transferring realty from a family partnership to a partner or from a family trust to a beneficiary, provided no consideration is paid for the transfer other than a reduction in the grantee's interest in the partnership or trust. A "family partnership" is a partnership whose partners are all members of the same family. A "family trust" is a trust, in which the beneficiaries are all members of the same family. The beneficiaries of a family trust may also include charitable entities. "Family" means the grantor and the grantor's spouse, parents, grandparents, sisters, brothers, children, stepchildren, grandchildren, and the spouses and lineal descendants of any the above. A "charitable entity" means an entity which may receive deductible contributions under Section 170 of the Internal Revenue Code as defined in Section 12-6-40(A);
- (10) transferring realty in a statutory merger or consolidation from a constituent corporation to the continuing or new corporation;
- (11) transferring realty in a merger or consolidation from a constituent partnership to the continuing or new partnership;
- (12) that constitute a corrective deed or a quitclaim deed used to confirm title already vested in the grantee, provided that no consideration of any kind is paid or is to be paid under the corrective or quitclaim deed; and
- (13) transferring realty subject to a mortgage to the mortgagee whether by a deed in lieu of foreclosure executed by the mortgagor or deed executed pursuant to foreclosure proceedings.
- (14) transferring realty from an agent to the agent's principal in which the realty was purchased with funds of the principal, provided that a notarized document is also filed with the deed that establishes the fact that the agent and

principal relationship existed at the time of the original purchase as well as for the purpose of purchasing the realty;
and

(15) transferring title to facilities for transmitting electricity that is transferred, sold, or exchanged by electrical utilities, municipalities, electric cooperatives, or political subdivisions to a limited liability company which is subject to regulation under the Federal Power Act (16 U.S.C. Section 791(a)) and which is formed to operate or take functional control of electric transmission assets as defined in the Federal Power Act.

DRAFT

Legal Description**Parcel 1:**

(9005 Two Notch Road, Columbia, SC 29223)

All that certain, piece, parcel or tract of land, with the improvements thereon, situate, lying and being in the County of Richland, State of South Carolina, and being more particularly shown and delineated on plat of survey "Composite Drawing Prepared for Protective Life Insurance Company, Lawyers Title Insurance Corporation and Spring Valley Commons-Columbia LLC," prepared by United Design Services, Inc., dated December 11, 1996 and designated as DWG#: UB-179, having the following courses, measurements, and boundaries, to-wit: BEGINNING at an existing 1/2" iron pipe marking the Southeasterly corner of the property conveyed to Louise Paschal by deed recorded in the Register of Deeds Office for Richland County in Deed Book 778 at Page 285 and lying in the Westerly boundary of the right of way of Two Notch Road (US Hwy. No. 1) and run with the Southerly boundary of the Paschal Property (now or formerly) N 60°30'30" W 224.05' to a point; thence leaving the Southerly boundary of the Paschal Property (now or formerly) and run with a new line then following Twenty (20) courses and distances: (1) S 27°40'50" W 36.60' to a point; (2) N 62°19'10" W 27.00' to a point; (3) N 27°40'50" E 12.50' to a point; (4) N 62°19'10" W 89.90' to a point; (5) S 27°40'50" W 12.50' to a point; (6) N 62°19'10" W 32.80' to a point; (7) S 27°40'50" W 12.50' to a point; (8) N 62°19'10" W 19.50' to a point; (9) S 27°40'50" W 112.70' to a point; (10) S 35°38'47" E 5.60' to a point; (11) S 13°25' 13" W 26.81' to a point; (12) S 62°19'10" E 53.62' to a point; (13) S 27°40'50" W 6.89' to a point; (14) S 62°19'10" E 62.97' to a point; (15) N 27°40'50" E 6.89' to a point; (16) S 62°19' 10" E 30.00' to a point; (17) N 27°40'50" E 61.00' to a point; (18) S 62°19'10" E 36.00' to a point; (19) N 27°40'50" E 103.49' to a point; and (20) S 60°30'30" E 197.68' to a point on the Westerly margin of the right-of-way of Two Notch Road; thence along the Westerly margin of the right-of-way of Two Notch Road N 30°39'35" E 25.01' to the point and place of BEGINNING, containing 0.794 acre, more or less, and being the same parcel shown as "Parcel D" on Plat prepared for Spring Valley Commons - Columbia, LLC, by United Design Services, Inc., dated December 9, 1996, revised September 24, 1997, and recorded in the Office of the Register of Deeds for Richland County, South Carolina in Plat Book 57 at Page 599.

TOGETHER WITH the rights under those easements contained in that certain Declaration of Easements and Restrictive Covenants dated September 9, 1997, and recorded in the Office of the RMC for Richland County, South Carolina in Deed Book D1410, Page 70.

TOGETHER WITH rights contained in that certain Easement Agreement dated December 24, 2013, filed for record March 20, 2014, and recorded in Book R1933, Page 1529.

TMS#: 19903-05-05

Derivation: This being the same property conveyed to Grantor by deed of DWB Richland, LLC dated May 3, 2017 and recorded May 9, 2017 in Deed Book 2209 at Page 1314 and by corrective deed of DWB Richland, LLC dated May 3, 2017 and recorded August 21, 2017 in Deed Book 2237 at Page 2247.

Parcel 2:

(241 Rabon Road, Columbia, SC 29223)

All that certain piece, parcel or lot of land, with improvements thereon, containing One (1) acre, more or less, situate, lying and being on the Southwestern side of Rabon Road, about Nine (9) miles Northeast of the City of Columbia, in the County of Richland, State of South Carolina, being shown and designated as Tract "B" on a plat surveyed for Lila V. Medlin, by Janes C. Covington, C.E., dated September 21, 1951, revised by Joseph Keels, Engineer and Surveyor, December 7, 1960, and recorded in the Office of the Register of Deeds for Richland County in Plat Book 17 at Page 16. This property is also shown on a plat prepared for Deborah H. Holcombe by Benjamin H. Whetstone, R.L.S., dated April 28, 1984, and recorded in Plat Book Z at Page 9051. This conveyance is made subject to all restrictions, easements, and conditions of record.

TMS#: 17115-01-08

Derivation: This being the same property conveyed to Grantor by deed of DWB Richland, LLC dated May 3, 2017 and recorded May 9, 2017 in Deed Book 2209 at Page 1314 and by corrective deed of DWB Richland, LLC dated May 3, 2017 and recorded August 21, 2017 in Deed Book 2237 at Page 2247.

Parcel 3:

(237 Rabon Road, Columbia, SC 29223)

All that certain piece, parcel or tract of land, together with any improvements thereon, known as 237 Rabon Road, situate, lying and being in the County of Richland, State of South Carolina and being shown as containing approximately Two (2) acres on a plat prepared for Mrs. Lillie G. Medlin by James C. Covington, C.E., dated December 4, 1944 and recorded in the Office of the Register of Deeds for Richland County, South Carolina, in Plat Book "J" at Page 104; and being more particularly shown and delineated as a "Vacant Lot", containing One and Ninety Hundredths (1.90) acres on a plat prepared for Interprop, Inc., by Baxter Land Surveying Co., Inc., dated September 7, 2004, a copy of which was attached to the deed to the Grantor and is incorporated herein by reference; and having at the boundaries and measurements as shown on the last-mentioned plat, reference being craved thereto as often as necessary for a more complete and accurate legal description.

TMS#: 17115-01-09

Derivation: This being the same property conveyed to Grantor by deed of DWB Richland, LLC dated May 3, 2017 and recorded May 9, 2017 in Deed Book 2209 at Page 1314 and by corrective deed of DWB Richland, LLC dated May 3, 2017 and recorded August 21, 2017 in Deed Book 2237 at Page 2247.

When recorded return to:

Grantee

[Space Above This Line For Recording Data]

SOUTH CAROLINA GENERAL WARRANTY DEEDCOUNTY: **RICHLAND**TAX MAP NUMBERS: **19903-05-05; 17115-01-08 and 17115-01-09**CITY: **COLUMBIA**DATE: **SEPTEMBER 19, 2019****Grantor****Grantee**

**The Best For Last, LLC
P.O. Box 6926
Columbia, SC 29260**

**Spring Valley Interests, LLC
3925 Ayrshire Place
Charlotte, NC 28210**

The designation Grantor and Grantee as used herein shall include the named parties and their heirs, successors and assigns and shall include singular, plural, masculine, feminine or neuter as required by context.

KNOW ALL MEN BY THESE PRESENTS, that Grantor, for and in consideration of the sum of **Eight Hundred Thousand and 00/100 Dollars (\$800,000.00)** paid by Grantee to Grantor, the receipt and sufficiency of which is hereby acknowledged, ***SUBJECT TO*** the matters set forth below, has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto Grantee, a 74.425% undivided interest in the real estate (the "**Premises**") described as follows:

See Exhibit A attached hereto.

A plat of the subject property is recorded in Plat Book _____ at Page _____.

This conveyance is made ***SUBJECT TO***: existing easements and rights of way, whether of record or not, and to restrictions, if any, appearing in the chain of title which said restrictions, if any, are not intended to be reimposed hereby.

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the Premises belonging or in any way incident or appertaining, including, but not limited to, all improvements of any nature located on the Premises and all easements and rights-of-way appurtenant to the Premises.

TO HAVE AND TO HOLD all and singular the Premises unto Grantee and Grantee's heirs successors and assigns forever.

And, ***SUBJECT TO*** the matters set forth above, Grantor does hereby bind Grantor and Grantor's heirs, successors and assigns, executors, administrators and other lawful representatives, to warrant and forever defend all and singular the Premises unto Grantee and Grantee's heirs, successors and assigns against Grantor and Grantor's successors and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

IN WITNESS WHEREOF, Grantor has caused this General Warranty Deed to be executed under seal this _____ day of September, 2019.

Signed, Sealed and Delivered
in the Presence of:

Witness

Notary

The Best For Last, LLC

By: _____ (SEAL)

Name: Albert R. Heyward III

Title: Manager

STATE OF _____)
)
COUNTY OF _____) PROBATE

PERSONALLY APPEARED before me the undersigned witness who, being duly sworn, deposes and says that s/he saw the within-named Albert R. Heyward III, sign, seal and, as their act and deed, deliver the within South Carolina General Warranty Deed, and that s/he with the Notary whose signature appears above, witnessed the execution thereof.

Witness

SWORN to before me this
_____ day of _____, 20____
_____(L.S.)

Notary Public for _____
My Commission Expires: _____

Exhibit A
to
South Carolina General Warranty Deed
from
THE BEST FOR LAST, LLC, Grantor
to
SPRING VALLEY INTERESTS, LLC, Grantee

Parcel 1:

(9005 Two Notch Road, Columbia, SC 29223)

All that certain, piece, parcel or tract of land, with the improvements thereon, situate, lying and being in the County of Richland, State of South Carolina, and being more particularly shown and delineated on plat of survey "Composite Drawing Prepared for Protective Life Insurance Company, Lawyers Title Insurance Corporation and Spring Valley Commons-Columbia LLC," prepared by United Design Services, Inc., dated December 11, 1996 and designated as DWG#: UB-179, having the following courses, measurements, and boundaries, to-wit: BEGINNING at an existing 1/2" iron pipe marking the Southeasterly corner of the property conveyed to Louise Paschal by deed recorded in the Register of Deeds Office for Richland County in Deed Book 778 at Page 285 and lying in the Westerly boundary of the right of way of Two Notch Road (US Hwy. No. 1) and run with the Southerly boundary of the Paschal Property (now or formerly) N 60°30'30" W 224.05' to a point; thence leaving the Southerly boundary of the Paschal Property (now or formerly) and run with a new line then following Twenty (20) courses and distances: (1) S 27°40'50" W 36.60' to a point; (2) N 62°19'10" W 27.00' to a point; (3) N 27°40'50" E 12.50' to a point; (4) N 62°19'10" W 89.90' to a point; (5) S 27°40'50" W 12.50' to a point; (6) N 62°19'10" W 32.80' to a point; (7) S 27°40'50" W 12.50' to a point; (8) N 62°19'10" W 19.50' to a point; (9) S 27°40'50" W 112.70' to a point; (10) S 35°38'47" E 5.60' to a point; (11) S 13°25' 13" W 26.81' to a point; (12) S 62°19'10" E 53.62' to a point; (13) S 27°40'50" W 6.89' to a point; (14) S 62°19'10" E 62.97' to a point; (15) N 27°40'50" E 6.89' to a point; (16) S 62°19' 10" E 30.00' to a point; (17) N 27°40'50" E 61.00' to a point; (18) S 62°19'10" E 36.00' to a point; (19) N 27°40'50" E 103.49' to a point; and (20) S 60°30'30" E 197.68' to a point on the Westerly margin of the right-of-way of Two Notch Road; thence along the Westerly margin of the right-of-way of Two Notch Road N 30°39'35" E 25.01' to the point and place of BEGINNING, containing 0.794 acre, more or less, and being the same parcel shown as "Parcel D" on Plat prepared for Spring Valley Commons - Columbia, LLC, by United Design Services, Inc., dated December 9, 1996, revised September 24, 1997, and recorded in the Office of the Register of Deeds for Richland County, South Carolina in Plat Book 57 at Page 599.

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TMS#: 17115-01-09

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DRAFT

**UNANIMOUS WRITTEN CONSENT
OF
MEMBERS AND MANAGERS
OF
THE BEST FOR LAST, LLC**

(Consent to Action Without Meeting)
As of March _____, 2020

The undersigned, being all of the Members and Managers of The Best For Last, LLC (the "**Company**"), a business organization formed under the provisions of the South Carolina _____ Act (the "**Applicable Law**"), do hereby adopt, consent to and approve in writing the following actions in lieu of holding a meeting:

Approval of Sale of Property

WHEREAS, SPRING VALLEY INTERESTS, LLC (the "**Buyer**") has offered to purchase from the Company a 74.425% undivided interest in certain property containing approximately 3.8± acres in the aggregate and the improvements and fixtures thereon located in the County of Richland, State of South Carolina (the "**Property**"); and

WHEREAS, the Company has obligated itself to sell a 74.425% undivided interest in the Property to the Buyer pursuant to a certain purchase option (the "**Purchase Option**") granted in that certain Loan Agreement by and between White Interests Limited Partnership, as lender, and the Seller dated May 3, 2017; and

WHEREAS, the Members and Managers of the Company (collectively, the "**Undersigned**") have reviewed and discussed copies of the documents to be executed in connection with the Purchase Option (collectively, the "**Transaction Documents**"); and

WHEREAS, the Undersigned deem it to be in the best interest of the Company to enter into the Transaction Documents and the transactions contemplated thereby; **IT IS THEREFORE**,

RESOLVED, that the Undersigned, for and on behalf of the Company, hereby approve the terms and conditions of the Transaction Documents and authorize the Company to enter into, and perform the transactions and agreements contemplated thereby;

RESOLVED, FURTHER, that Albert R. Heyward III (the "**Authorized Officer**") be, and hereby is, authorized and empowered to execute, deliver and perform the obligations of the Company set forth in the Transaction Documents on the Company's behalf, with such changes, additions and modifications thereto as such Authorized Officer executing the same shall approve, such approval to be conclusively evidenced by such Authorized Officer's execution and delivery thereof;

RESOLVED, FURTHER, that the Authorized Officer be, and hereby is, authorized and empowered to do or cause to be done all such acts or things and to sign and deliver, or cause to be signed and delivered, all such documents, agreements, instruments and certificates (including, without limitation, all notices and certificates required or permitted to be given or made by the

Company under the terms of the Transaction Documents), as such Authorized Officer may deem necessary, advisable or appropriate to effectuate or carry out the purposes and intent of the foregoing resolutions and to perform the obligations of the Company under the agreements and instruments referred to therein;

RESOLVED, FURTHER, that any and all action heretofore and hereinafter taken by such Authorized Officer or any other officer of the Company in furtherance of the objectives set forth in any of the preceding resolutions, and all transactions relating thereto, are hereby ratified, confirmed and approved in all respects; and

RESOLVED, FURTHER, that these resolutions shall not be amended, rescinded or revoked and the Buyer and its respective successors and assigns are authorized to rely upon these resolutions.

[The next page is the signature page.]

The undersigned, being all the Members and Managers of the Company, hereby consent that this document be filed with the minutes of the Company, and that the actions set forth in the foregoing resolutions shall have the same force and effect as if taken at a duly constituted meeting of the Members and Managers of the Company, with an effective date as of the day and year first above written.

JAMES W. CANTEY, JR.

ROBERT L. JENKINS

ALBERT R. HEYWARD IV

ALBERT R. HEYWARD III

ALL THE MEMBERS AND MANAGERS

From: Rob Bethea <Rob.Bethea@arlaw.com>
Sent: Friday, September 13, 2019 11:43 AM
To: Timothy Gavigan
Subject: Emails/Thoughts for resolving conversion dispute
Attachments: 20190913113656631.pdf; ~OTVCOKI001F.PDF



Tim:

I have been talking with both Albert and Jim about this situation and both are combing their files to any find relevant documentation. Albert was able to locate the attached emails. To me, these suggest that their understanding of the "deal" is correct and was intended by the parties to reflect an arrangement similar to the Clements Ferry deal. Had Lynn simply contributed his dollars in exchange for an interest, his pro rata share of the initial contributed capital and resulting interest would have been 74.425% (See Page 7 of the attached PDF), but still subject to the waterfall/sponsor's share reflected in the operating agreement. The loan/co-tenancy arrangement was permitted as an accommodation for WILP's planned exchange (See Page 5) and I am reasonably certain at this point that all parties understood the economics to remain unchanged. That same highlighted language on Page 5 references a communication from you to the bank explaining all of this so that they would approve the WILP convertible loan. Can you try to locate that document as I expect it to further confirm the situation?

Perhaps the best way to proceed is to have WILP contribute the note in exchange for equity in TBFL, LLC rather than go through the co-tenancy process. Doing so would likely be acceptable to Rhett, Jim and Albert and likely avoid the unnecessary and unintended property tax consequences that SC's ATI law is going to create.

To that end, Albert shared with me some documentation regarding the property tax impact and the underwriting problem it is creating for the lender (See the second attachment). The increased taxes are impacting the appraisal and, according to the email from the lender yesterday, underwriting of the C-III loan.

Regards,

Rob

-----Original Message-----

From: CAE-MPC5503-05N@arlaw.com <CAE-MPC5503-05N@arlaw.com>
 Sent: Friday, September 13, 2019 11:37 AM
 To: Rob Bethea <Rob.Bethea@arlaw.com>
 Subject: Message from "CAE-MPC5503-05N"

This E-mail was sent from "CAE-MPC5503-05N" (MP C5503).

Scan Date: 09.13.2019 11:36:56 (-0400)
 Queries to: CAE-MPC5503-05N@arlaw.com

Albert Heyward

From: Neal Gussis <ngussis@ccmfinancing.com>
Sent: Thursday, September 12, 2019 10:15 AM
To: Albert Heyward
Cc: Steve Libert
Subject: FW: Spring Valley Taxes
Attachments: Spring Valley Taxes.pdf

Albert:

The appraisal came back with taxes much higher than current taxes. 135 K vs. 69 K and stating taxes are likely to go up substantially due to SC law. Let's discuss and get back with CIII on this BIG issue.

Thanks - Neal

Neal Gussis

Principal

CCM Commercial Mortgage

C 847.922.3750

D 224-938-9419

8052 N. Monticello Ave., Ste. 106

Skokie, IL 60076

From: Bracco, James <jbracco@c3cp.com>
Sent: Thursday, September 12, 2019 8:49 AM
To: Neal Gussis <ngussis@ccmfinancing.com>
Cc: Schwartz, Ian <ischwartz@c3cp.com>
Subject: Spring Valley Taxes

Hi Neal,

Please see attached. Have been going through the appraisal and right now this is the biggest issue since they are stating the taxes here are likely to increase substantially per the SC law.

Not sure if you have any info on this or if the borrower has a tax consultant or something but this is a significant increase in RET that will have a major impact on the underwriting. Still going through the rest of the reports but will let you know if anything else comes up.

James

CH | C-III Commercial Mortgage

James Bracco

Vice President

C-III Capital Partners LLC

717 Fifth Ave., 12th Floor

New York, NY 10022

t 212-705-5037 | f 212-705-5001

INTRODUCTION

Assessment of real property is established by an assessor that is an appointed or elected official charged with determining the value of each property. The assessment is used to determine the necessary rate of taxation required to support the municipal budget. A property tax is a levy on the value of property that the owner is required to pay to the municipality in which it is situated. Multiple jurisdictions may tax the same property.

The subject property is located within Richland County. The assessed value and property tax for the current year are summarized in the following table.

ASSESSMENT & TAXES						
Tax Year	2018				Millage Rate	595.30%
Tax District	2ER				Taxes Current	Yes
APN	LAND	IMPV	TOTAL	EXEMPTIONS	TAXABLE	BASE TAX
R17115-01-08	\$57,500	\$491,200	\$548,900	\$0	\$32,930	\$19,603
R17115-01-09	\$61,800	\$212,700	\$274,500	\$0	\$16,470	\$9,805
R19903-05-05	\$154,900	\$771,800	\$926,700	\$0	\$55,602	\$33,100
Totals	\$274,200	\$1,475,700	\$1,750,100	\$0	\$105,002	\$62,508
Total/SF (NRA)	\$6.23	\$33.52	\$39.75	\$0.00	\$2.38	\$1.42
TAX CREDITS						
Parcel R17115-01-08						
County Sales Credit						(\$788)
Parcel R17115-01-09						
County Sales Credit						(\$394)
Parcel R19903-05-05						
County Sales Credit						(\$1,330)
Total Tax Credits						(\$2,511)
ADDITIONAL TAX CHARGES						
Parcel R17115-01-08						
Solid Waste						\$249
Total Additional Tax Charges						\$249
Total Base Tax, Tax Credits & Additional Tax Charges						\$60,245
Total Base Tax, Tax Credits & Additional Tax Charges Per SF (NRA)						\$1.37
Source: Richland County Assessment & Taxation						

Source: Richland County Assessment & Taxation

SUBJECT PROPERTY ANALYSIS

The total taxable value for the subject property is \$105,000 or \$1.66/SF. There are no exemptions in place. Total taxes for the property are \$60,244 or \$0.95/SF.

As part of the scope of work, we researched assessment and tax information related to the subject property. The following are key factors related to local assessment and taxation policy. Real property in Richland County is assessed at 6% of market value. Real property is reassessed every five years. The next scheduled reassessment date is January 1, 2024. In addition to scheduled reassessments, properties in Richland County are reassessed upon sale, conversion, renovation or demolition.

According to the staff representative at the Richland County collector's office, real estate taxes for the subject property are current as of the date of this report.

ASSESSABLE TRANSFER OF INTEREST

In 2006, the State of South Carolina passed a new real estate tax law, which changes the way real estate taxes are assessed. Under the old law, property tax values only changed during countywide reassessments. Under the 2006 law, property tax values are reassessed when there is an "Assessable Transfer of Interest", or

ATI, which is usually a change in ownership due to a sale. Once the property is sold, the new appraised value is used for the following tax year. For example, if a property is on the tax rolls based on a value of \$500,000, and the property sold for \$1,000,000, the new appraised value on the tax rolls would increase to \$1,000,000 for the following year. Also, as part of the new law, any new leases that have a term, including renewals, of 20 years or more will also be re-appraised. The law also "caps" all properties at the previous reassessment value, plus no more than 15% increase on subsequent reassessment.

In 2011, the SC General Assembly changed the rules to create a discount for commercial properties, including rental properties and second homes. Under the changes, the property is still reassessed if there is a transfer of interest, but the new value is discounted by 25% if the owner applies for a "commercial exemption". The discounted assessment cannot be lower than the assessment prior to the sale or transfer. Therefore, a property's value would have to increase 33% to trigger a tax increase related to a sale.

Even if a property being appraised is not under contract of sale, the SCAB interprets market value as if a sale has/or will occur. Therefore, each valuation assumes a transfer.

APPLICABILITY OF CURRENT TAX LIABILITY

As-Is Market Value	\$5,040,000
x ATI Adjustment	75%
= Projected Assessed Value	\$3,780,000
x Taxable Ratio	6%
= Projected Taxable Value	\$226,800
x Current Millage Rate	59.5300%
= Stabilized Tax Estimate	\$135,014
Stabilized Taxes/SF of NRA	\$3.07

CONCLUSION

The subject property's taxes are projected to increase based on the South Carolina ATI law. We have assumed taxes will increase 3% per annum over the projected period.

Albert Heyward

From: Albert Heyward III <albert@universalstoragegroup.com>
Sent: Tuesday, March 7, 2017 7:31 AM
To: 'Ben Pearman'
Cc: 'Timothy Gavigan'
Subject: RE: The Best For Last

- 1) Net Cash Flow after Equity partners including myself get back their equity, then split 50/50.
- 2) We may over subscribe the amount.

From: Ben Pearman [mailto:BenPearman@mcdowellpearmancpa.com]
Sent: Monday, March 06, 2017 4:30 PM
To: 'albert@universalstoragegroup.com'
Subject: The Best For Last

Albert

Please review the attached before I send it to Tim.

Thanks

Ben

Business Phone – 803-256-8800
 Business Fax – 803-256-8801
 Mobile Phone – 803-413-9492
 PO Box 2088
 Columbia, SC 29202
 Physical Address – 2700 Middleburg Drive, Suite 201, Columbia, SC 29204

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Albert Heyward

From: Timothy Gavigan <tgavigan@gaviganlaw.net>
Sent: Tuesday, April 18, 2017 10:52 AM
To: Mr. Albert R. Heyward III
Subject: Re: Spring Valley Storage & Business Centre - purchase

Albert:

I looked at the time and costs advanced to date on both the real estate purchase and the LLC formation files and, factoring in Lynn's additional loan piece and the review and closing requirements of your main lender, I anticipate the time and costs incurred by my firm to close this transaction will be approximately \$22,000 - \$25,000.

Thank you.

Tim

Timothy B. Gavigan, CPA, Esq.
TIMOTHY B. GAVIGAN, PLLC
10700 Sikes Pl., Suite 375
Charlotte, NC 28277
Phone: (704) 814-4460
Fax: (704) 814-6017
tgavigan@gaviganlaw.net

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Albert Heyward

From: Timothy Gavigan <tgavigan@gaviganlaw.net>
Sent: Thursday, April 27, 2017 10:32 AM
To: Jessamie Vincent
Cc: 'Stuart Lee'; Sandra Carter; Mr. Albert R. Heyward III
Subject: RE: RE: Spring Valley Storage
Attachments: Engagement Letter - 4.27.17.pdf

Thanks Jessamie. Attached is the engagement letter with a few correcting edits:

1. Borrower is The Best For Last, LLC, a South Carolina limited liability company
2. Guarantor is Albert R. Heyward III
3. This deal does anticipate secondary financing from a private lender in the amount of \$800,000.

I cannot accurately generate a Settlement Statement until the loan document drafts have been reviewed and finalized, the other purchase and sale transaction documents have been reviewed and finalized, and all other closing tasks have been completed. Can you please send draft loan documents for review prior to generating the final closing package? Our purchase agreement calls for a closing by May 1st (Monday). Can you please give me some guidance as to the bank's realistic timetable so I can begin discussions with the seller regarding a realistic closing date?

Thanks again and I look forward to working with you and Stuart on this transaction.

-----Original Message-----

From: Jessamie Vincent
Sent: Thursday, April 27, 2017 10:07 AM
To: Timothy Gavigan; Sandra Carter
Cc: 'Stuart Lee'

Mr. Gavigan,

Please see the attached Engagement Letter for this borrower. Review the closing instructions and let Stuart Lee, or myself, know if you have any questions or concerns. We have received the title commitment and it is in review with our attorney. Please send a Settlement Statement at your earliest convenience. A closing date will need to be discussed and confirmed with us 2 business days in advance. If the customer has a date in mind please let us know.

Thank you and I look forward to working with you!

Jessamie N. Vincent
 Commercial Credit Administrator

First Palmetto Bank
 1111 Broad Street | Camden SC 29020
 Tel: 803.424.5036 | Fax: 803.432.0193

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Albert Heyward

From: Rhett Heyward <rhett@universalstoragegroup.com>
Sent: Sunday, April 30, 2017 5:24 PM
To: albert@universalstoragegroup.com
Subject: Follow up to SVC documents

Dad,

I had a chance to finally review the documents and still have some questions/concerns. Perhaps this is best for Tim Gavigan but I'm sending to you first.

1. I saw where it mentioned owner/member units and had Jimmy, Skip, and myself listed, but I didn't see what % ownership that meant. Each membership unit equals what percent of ownership? Can that be clarified?
2. I also didn't notice Lynn anywhere in the document. How is it being completed/structured with Lynn?
3. Again, I read that the management committee is only going to have one member which is you. And then there are several pages talking about the Mgmt Committee duties and decision process. That seems a little odd if only one member is on the committee. I feel at least two more people should be represented on the Mgmt Committee- myself and Jimmy are the logical candidates. You of course would remain the managing member of that committee but again a committee by definition is more than one person. Please address.
4. Julie and I have to move some stuff around and really need to know how much money we need at closing? Today was the first time I had heard the closing was this week so we were caught off guard. And question #1 might change what we can afford. I have yet to see the ownership break down of this deal or a (next question.)
5. Is there a recent proforma or financials showing ROI with the current proposed ownership? I'd like to see what we can expect given the LLC structure.

----Rhett



Rhett Heyward IV | Vice President of Insurance, Area Manager

3905 W. Beltline Blvd | Columbia, SC 29204

803.988.8493 | Direct Fax 803.988.7052

✉ rhett@universalstoragegroup.com



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Albert Heyward

From: Albert Heyward III <albert@universalstoragegroup.com>
Sent: Monday, May 1, 2017 1:36 PM
To: 'Rhett Heyward'
Subject: RE: Follow up to SVC documents

Thanks for sending V7. There are some actual changes to that version. The amount of \$ raised is \$ 1,075,000, not \$ 1,100,000. The following is how it breaks down:

Sources and Usage of funds-First;

Equity Raised \$ 1,075,000
 Debt 1,750,000
 Total \$ 2,825,000

Purchase Price \$ 2,500,000
 Excess Escrow 250,000*
 Est. Closing Cost 50,000
 Est. Bank account 25,000
 Total \$ 2,825,000

*Excess Escrow (Released upon obtaining 1:25 to 1 Debt Coverage Ratio- Up to \$ 50,000 may be used for improvements- reminder released) \$ 250,000. We are already there.

Question 1&2

Lynn is not shown in these Op Agreement due to his "loaning" \$ 800,000 to do the deal. When he sells Restaurant Row Waterway Asso., he will 1031 exchange into The Best For Last, LLC. In essence "swapping out" his loan for the interest. Gavigan has done this before and passes the smell test from the IRS.

I'll send you a document from him to the bank explaining this. They, in their closing docs, had stated "no secondary financing allowed" until Tim explained it had to be this way. They, the bank, said OK because it will be temporary, for all intensive purposes, he follow suite like all the rest of the equity partners. Call Tim, if you have any questions.

Question 3. Tim had put in this originally and We'd never had it in before, I questioned him about it and he just said leave it in case there was a need to have a committee. We never had one before and didn't see a need to have a committee because I have always consulted my partners prior to making any decisions, especially major ones, selling, buying, refinancing, etc. The agreement is set up to change managers in case of my inability to manage or death. I don't really have a problem with it but in view of your relationship with USG, I would prefer Jimmy. He knows how I work and he knows that if USG doesn't perform, they'll be gone. It eliminates any conflict of Interest on your part. As you know, I have always had the interest of the property first and foremost, could care less about who owns it.

Question 4.

You have it- Version 7. In it you were behind the times with your projections (not a bad thing though), Jim has been averaging over \$ 40K per month (projected now the be at close to \$550k), up from your \$463K. If we hit it and honestly I think we will, Our Debt Coverage ratio is now projected to be $490,000 \div 303,638 = \$186,362 / \$137,463$ or 1:356 to 1. The impact to you and Julie is that when Lent releases the \$ 220k+, you will get back approx. 11.7% or \$23,400. So your true investment will actually be a little over \$ 100K. The numbers really hum when that takes place.

My ultimate goal is to refinance, allowing the equity partners to take out their cash, thereby having no investment with them maintaining a 50% interest with you and I owning then 50%,. Not to sell it for now.

Let me know ASAP because we are set to close Wednesday at 2:00 at Spring Valley and I do have another investor "teed up".

/From: Rhett Heyward [mailto:rhett@universalstoragegroup.com]

Sent: Sunday, April 30, 2017 5:24 PM

To: albert@universalstoragegroup.com

Subject: Follow up to SVC documents

Dad,

I had a chance to finally review the documents and still have some questions/concerns. Perhaps this is best for Tim Gavigan but I'm sending to you first.

1. I saw where it mentioned owner/member units and had Jimmy, Skip, and myself listed, but I didn't see what % ownership that meant. Each membership unit equals what percent of ownership? Can that be clarified?
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3. Again, I read that the management committee is only going to have one member which is you. And then there are several pages talking about the Mgmt Committee duties and decision process. That seems a little odd if only one member is on the committee. I feel at least two more people should be represented on the Mgmt Committee- myself and Jimmy are the logical candidates. You of course would remain the managing member of that committee but again a committee by definition is more than one person. Please address.
4. Julie and I have to move some stuff around and really need to know how much money we need at closing? Today was the first time I had heard the closing was this week so we were caught off guard. And question #1 might change what we can afford. I have yet to see the ownership break down of this deal or a (next question.)
5. Is there a recent proforma or financials showing ROI with the current proposed ownership? I'd like to see what we can expect given the LLC structure.

—Rhett



**UNIVERSAL
STORAGE GROUP**

Rhett Heyward IV | Vice President of Insurance, Area Manager

3905 W. Beltline Blvd | Columbia, SC 29204

803.988.8493 | Direct Fax 803.988.7052

rhett@universalstoragegroup.com



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Albert Heyward

From: Rhett Heyward <rhett@universalstoragegroup.com>
Sent: Monday, May 1, 2017 4:53 PM
To: 'Albert Heyward III'
Cc: 'Timothy Gavigan'
Subject: RE: Follow up to SVC documents

Thanks. Tim and I spoke and he clarified a bunch of things. I'm going to review a few things tonight with Julie and get back to Tim with hopefully some wired money tomorrow. I understand how deals have been done before but with family it's more complicated and better to get things in writing where all parties are comfortable in order to avoid any future issues. No need for percentages but today was the first day all of this was explained in greater detail and I understand. This represents a considerable plunge for Julie and I and I have to be thorough. I'll be back in touch.



**UNIVERSAL
STORAGE GROUP**

Rhett Heyward IV | Vice President of Insurance, Area Manager

3905 W. Beltline Blvd | Columbia, SC 29204

803.988.8493 | Direct Fax 803.988.7052

rhett@universalstoragegroup.com



From: Albert Heyward III [mailto:albert@universalstoragegroup.com]

Sent: Monday, May 01, 2017 4:16 PM

To: 'Rhett Heyward'

Cc: 'Timothy Gavigan'

Subject: RE: Follow up to SVC documents

If you took your 125 and divided it by total \$ raised, your share is 11.625% of the total, Ship's is 50/1075 or 4.65%, jimmy's 110/1075 is 9.3 % and Lynn's is 800/1075 or 74.425%. You can verify with Gavigan. As far as the Mgt.

Committee issue, the issue is covered in the agreement. I am not going to be involved

In a voting by % issue. It's too unwieldy. In all the deals Jimmy, Lynn and I have been in we have NEVER had one issue come up. Ever. I don't mind putting your name in the hat for my successor and in writing with an amendment which will be approved but this is late in the game and this must be closed by Wednesday. I promise you, you will have an equal say in all major decisions, just like every partner, it's your responsibility AM to handle the day to day stuff with Jim, not mine, jims or lynn's. check with Tim to see if he can put these % numbers in the document.

From: Rhett Heyward [mailto:rhett@universalstoragegroup.com]

Sent: Monday, May 01, 2017 2:03 PM

To: 'Albert Heyward III'

Subject: RE: Follow up to SVC documents

Albert Heyward

From: Timothy Gavigan <tgavigan@gaviganlaw.net>
Sent: Monday, May 1, 2017 8:55 PM
To: Mr. Albert R. Heyward III; Mr. C. Lynn White
Subject: Re: Spring Valley Storage & Business Centre - purchase
Attachments: LOAN AGREEMENT(WILP).docx; MORTGAGE OF REAL ESTATE-WILP.docx; PROMISSORY NOTE-WILP.docx

Albert / Lynn:

Attached for your review and approval are the draft loan documents for the WILP loan.

Thank you.

Tim

Timothy B. Gavigan, CPA, Esq.
TIMOTHY B. GAVIGAN, PLLC
10700 Sikes Pl., Suite 375
Charlotte, NC 28277
Phone: (704) 814-4460
Fax: (704) 814-6017
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*You have
the documents
in the email*

From: Knight, G. Marcus <MKnight@nexsenpruet.com>
Sent: Thursday, September 19, 2019 12:22 PM
To: Rob Bethea
Subject: Re: Purchase of 74.425% undivided interest in Spring Valley Storage

EXHIBITGavigan Exhibit 7

exhibiticker.com

I raised it. Lynn was not a fan. But ATI could put it back in the table.

Sent from my iPhone

On Sep 19, 2019, at 12:16 PM, Rob Bethea <Rob.Bethea@arlaw.com> wrote:

{EXTERNAL EMAIL}

Tim:

That is good news. Was there any consideration of rolling these same terms/economics into the LLC structure? It would eliminate the second borrower and simplify the pending refinance.

Rob

Rob Bethea

Partner

Admitted in South Carolina and Georgia

ADAMS AND REESE LLP



1501 Main Street, 5th Floor | Columbia, SC 29201

main 803.254.4190 | **direct** 803.212.4978 | **mobile** 803.261.1818

efax 803.343.1250 | **fax** 803.779.4749

rob.bethea@arlaw.com

[website](#) [bio](#) [vCard](#) [map](#)



From: Timothy Gavigan <tgavigan@gaviganlaw.net>
Sent: Thursday, September 19, 2019 12:13 PM
To: Rob Bethea <Rob.Bethea@arlaw.com>
Cc: Knight G. Marcus <mknight@nexsenpruet.com>
Subject: Purchase of 74.425% undivided interest in Spring Valley Storage

Rob:

I'm pleased to advise that we were able to get Lynn and Albert to come to agreement on moving forward. Subject to confirmation that no negative ATI effect would occur, Lynn will purchase a 70% co-tenancy interest, agree to participate in the \$125,000 success fee to Albert

@ the closing of the refi loan, and otherwise agree to the attached refi math sheet which essentially makes certain listed expenses and items shared between the co-tenants. Also attached is a Closing Extension executed by The Best for Last, LLC moving the closing to next Friday. In the meantime, I'll draft and circulate an amendment to the Loan Agreement providing for the decreased co-tenancy purchase (70%) and otherwise incorporating the additional agreed upon economics pertaining to the refi proceeds.

Thank you.

Tim

Timothy B. Gavigan, CPA, Esq.
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From: Timothy Gavigan <tgavigan@gaviganlaw.net>
Sent: Thursday, September 19, 2019 12:24 PM
To: Rob Bethea
Cc: Knight G. Marcus
Subject: RE: Purchase of 74.425% undivided interest in Spring Valley Storage

We discussed that concept and Lynn is dug into the co-tenancy unless there is a real risk that doing so will have a negative result from a property tax assessment perspective. Both Albert and Marcus are going to run the question by their respective experts.

From: Rob Bethea <Rob.Bethea@arlaw.com>
Sent: Thursday, September 19, 2019 12:16 PM
To: Timothy Gavigan <tgavigan@gaviganlaw.net>
Cc: Knight G. Marcus <mknight@nexsenpruet.com>
Subject: RE: Purchase of 74.425% undivided interest in Spring Valley Storage

Tim:

That is good news. Was there any consideration of rolling these same terms/economics into the LLC structure? It would eliminate the second borrower and simplify the pending refinance.

Rob

Rob Bethea

Partner
Admitted in South Carolina and Georgia



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From: Timothy Gavigan <tgavigan@gaviganlaw.net>
Sent: Thursday, September 19, 2019 12:13 PM
To: Rob Bethea <Rob.Bethea@arlaw.com>
Cc: Knight G. Marcus <mknight@nexsenpruet.com>
Subject: Purchase of 74.425% undivided interest in Spring Valley Storage

Rob:

I'm pleased to advise that we were able to get Lynn and Albert to come to agreement on moving forward. Subject to confirmation that no negative ATI effect would occur, Lynn will purchase a 70% co-tenancy interest, agree to participate in the \$125,000 success fee to Albert @ the closing of the refi loan, and otherwise agree

to the attached refi math sheet which essentially makes certain listed expenses and items shared between the co-tenants. Also attached is a Closing Extension executed by The Best for Last, LLC moving the closing to next Friday. In the meantime, I'll draft and circulate an amendment to the Loan Agreement providing for the decreased co-tenancy purchase (70%) and otherwise incorporating the additional agreed upon economics pertaining to the refi proceeds.

Thank you.

Tim

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From: Knight, G. Marcus <MKnight@nexsenpruet.com>
Sent: Friday, September 20, 2019 9:35 AM
To: Timothy Gavigan
Cc: Rob Bethea
Subject: RE: Purchase of 74.425% undivided interest in Spring Valley Storage [IWOV-NPCOL1.FID351206]

Thanks for the report. I'll let Albert know. He'll be disappointed. He was confident Lynn had and would agree.

Mark

From: Timothy Gavigan <tgavigan@gaviganlaw.net>
Sent: Friday, September 20, 2019 6:27 AM
To: Knight, G. Marcus <MKnight@nexsenpruet.com>
Cc: Bethea Jr., Robert P. <robert.bethea@arlaw.com>
Subject: RE: Purchase of 74.425% undivided interest in Spring Valley Storage [IWOV-NPCOL1.FID351206]

{EXTERNAL EMAIL}

Marcus: I didn't come away with that same understanding so I took your email to Lynn last night for response. Lynn responded that he only offered the 2 concessions stated at our meeting: reduce his % ownership to 70% and share in Albert's success fee. Lynn further reiterated that he strongly prefers not to be a member of the LLC (provided there is no negative property tax effect from his co-tenancy purchase) due, inter alia, the various "junk fees" being paid to Albert. Lynn recognizes that Albert put the deal together (hence the Success Fee) but he does not share in the belief that Albert's entitled to the other fees set forth in the Operating Agreement, especially the monthly management fee given that the project is being managed by a third party management company pursuant to a separate Agreement. I'll get a draft Amendment circulated shortly.

From: Knight, G. Marcus <MKnight@nexsenpruet.com>
Sent: Thursday, September 19, 2019 3:12 PM
To: Timothy Gavigan <tgavigan@gaviganlaw.net>
Cc: Bethea Jr., Robert P. <robert.bethea@arlaw.com>
Subject: RE: Purchase of 74.425% undivided interest in Spring Valley Storage [IWOV-NPCOL1.FID351206]

Thanks, Tim. I think Lynn also agreed that he would bear his 70% share of Albert's monthly management fee, which we could do by simply burdening the cash-flow distribution provisions with this obligation before the 70/30 split. Because this issue does not impact on the funds flow of the refi loan, we didn't nail this one down in the funds flow I sketched out. Tim, assuming I am right that Lynn has agreed (as a co-tenant, he will benefit from Albert's management that generates the cash-flow), do you think it would be better to include the agreement about Albert's monthly management fee in the Amendment to the Loan Agreement (option) or in the Co-Tenancy Agreement? Section 4a of the draft Co-Tenancy Agreement might be interpreted to say this already, but I think we need to be a bit more specific, especially since Albert's management fee is embedded in the Operating Agreement. I'd think section 4a might be the best place to put this. Just to be clear, if the co-tenants don't share this fee, then Rhett, Jimmy, and Skip carry a disproportionate burden for this fee for management services that are for both co-tenant's benefit.

Rob and I will discuss division of labor for document response at our first chance, and let you know.

Mark

From: Timothy Gavigan <tgavigan@gaviganlaw.net>
Sent: Thursday, September 19, 2019 12:13 PM
To: Bethea Jr., Robert P. <robert.bethea@arlaw.com>
Cc: Knight, G. Marcus <MKnight@nexsenpruet.com>
Subject: Purchase of 74.425% undivided interest in Spring Valley Storage

{EXTERNAL EMAIL}

Rob:

I'm pleased to advise that we were able to get Lynn and Albert to come to agreement on moving forward. Subject to confirmation that no negative ATI effect would occur, Lynn will purchase a 70% co-tenancy interest, agree to participate in the \$125,000 success fee to Albert @ the closing of the refi loan, and otherwise agree to the attached refi math sheet which essentially makes certain listed expenses and items shared between the co-tenants. Also attached is a Closing Extension executed by The Best for Last, LLC moving the closing to next Friday. In the meantime, I'll draft and circulate an amendment to the Loan Agreement providing for the decreased co-tenancy purchase (70%) and otherwise incorporating the additional agreed upon economics pertaining to the refi proceeds.

Thank you.

Tim

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attachments) is not intended or written to be used, and cannot be used, as advice for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

From: Rob Bethea <Rob.Bethea@arlaw.com>
Sent: Wednesday, September 25, 2019 10:47 AM
To: Timothy Gavigan
Subject: RE: Purchase of 74.425% undivided interest in Spring Valley Storage

EXHIBITGavigan Exhibit 10

exhibitsticker.com

Tim:

The conveyance documents you prepared for the option exercise are acceptable once corrected for the agreed 70% interest. If you can get those cleaned up and remove the watermarks, I will get Albert and friends scheduled for execution on Thursday or Friday. Albert owes us a list of leases for the Assignment and Assumption of Leases. I will follow up with him on that item.

Regards,

Rob

From: Timothy Gavigan <tgavigan@gaviganlaw.net>
Sent: Thursday, September 12, 2019 5:29 PM
To: Rob Bethea <Rob.Bethea@arlaw.com>
Cc: White C. Lynn <clwhite1@bellsouth.net>
Subject: Purchase of 74.425% undivided interest in Spring Valley Storage

Rob:

In order to keep the ball rolling for a closing of this transaction next Thursday, September 19th, I went ahead and drafted the Seller transaction documents and attach them to this email for your review. In the interest of time, I am also sending them to my client, so they remain subject to any comments he may have. We need all the proration detail from Albert re: the lease revenues, etc. in order to draft a Settlement Statement. We also need a copy of the current Management Agreement, the outstanding mortgage loan details re: the First Palmetto loan and any other service contracts that need to be partially assigned as part of this transaction. It is the Buyer's intent to close this transaction next Thursday, September 19th, all in accordance with the timeline set forth in the Notice of Option Exercise.

Thank you.

Tim

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Charlotte, NC 28277
Phone: (704) 814-4460
Fax: (704) 814-6017
tgavigan@gaviganlaw.net

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From: Timothy Gavigan <tgavigan@gaviganlaw.net>
Sent: Thursday, September 26, 2019 6:17 PM
To: Rob Bethea; Heyward III Albert R.
Cc: White C. Lynn
Subject: Purchase of 70% undivided interest in Spring Valley Storage
Attachments: Settlement Statement.xlsx



Rob / Albert:

Attached is the draft Settlement Statement for the 70% co-tenancy purchase. You'll see that there are some items that we still need to get TBFL's input on. I'm still calculating the WILP loan payoff but am first awaiting Lynn to confirm the payments made (Ben Pearman and Andy Shobert provided me with difference payment details).

As for my fee for this Matter, it increased by \$6,500 to deal with, settle and document the challenge to the Option put forth by TBFL. The Loan Agreement contains a provision for the Borrower to pay the Lender's fees incurred to enforce the Loan Agreement and Lynn feels that it is only fair that TBFL reimburse him for those fees as provided for in the Loan Agreement and given that (i) the deal ended up right where the Loan Agreement provided, and (ii) Lynn made 2 material concessions (gave up 4.425% ownership in the project and agreed to bear \$87,500 of Albert's success fee). Please advise.

Thank you.

Tim Gavigan
(704) 942-0377
tgavigan@gaviganlaw.net

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From: Timothy Gavigan <tgavigan@gaviganlaw.net>
Sent: Friday, September 27, 2019 12:01 PM
To: Rob Bethea
Subject: RE: Fees for closing statement

EXHIBITGavigan Exhibit 13

exhibitsticker.com

Got it. Thanks. Did Albert respond to Lynn's claim that his fees should be picked up by TBFL?

From: Rob Bethea <Rob.Bethea@arlaw.com>
Sent: Friday, September 27, 2019 11:54 AM
To: Timothy Gavigan <tgavigan@gaviganlaw.net>
Subject: Fees for closing statement

Tim:

When you update the closing statement, please include fee of \$6885 for Adams and Reese LLP. Thank you. Albert is coming at 1:00 to execute everything.

Rob

Rob Bethea

Partner
Admitted in South Carolina and Georgia



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efax 803.343.1250 | **fax** 803.779.4749

rob.bethea@arlaw.com

[website](#) [bio](#) [vCard](#) [map](#)



From: Timothy Gavigan <tgavigan@gaviganlaw.net>
Sent: Friday, September 27, 2019 1:16 PM
To: Rob Bethea
Subject: RE: Purchase of 70% undivided interest in Spring Valley Storage

EXHIBIT**Gavigan Exhibit 14**

exhibitster.com

Thanks. We're on standby over here...

From: Rob Bethea <Rob.Bethea@arlaw.com>
Sent: Friday, September 27, 2019 1:15 PM
To: Timothy Gavigan <tgavigan@gaviganlaw.net>
Subject: RE: Purchase of 70% undivided interest in Spring Valley Storage

Thank you Tim. I'll review with Albert when he gets here. I've asked (you were copied) for the Management Agreement and Insurance information. I don't have anything for you on the other items but will go through this with Albert momentarily.

Rob Bethea

Partner
 Admitted in South Carolina and Georgia



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efax 803.343.1250 | **fax** 803.779.4749

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From: Timothy Gavigan <tgavigan@gaviganlaw.net>
Sent: Friday, September 27, 2019 1:07 PM
To: Rob Bethea <Rob.Bethea@arlaw.com>
Cc: White C. Lynn <clwhite1@bellsouth.net>
Subject: Purchase of 70% undivided interest in Spring Valley Storage

Rob:

Attached is an updated Settlement Statement including the WILP loan payoff and a spreadsheet calculating the WILP payoff. We still need reply on the blank highlighted items in the Settlement Statement, the reply to the ask that TBFL pay Lynn's additional legal fees incurred to defend Albert's challenge of the option, as well as the outstanding copy of the Management Agreement and the proof of adding SVI as an additional insured

Lynn: Please check the payoff calculation and confirm the payment dates and amounts set forth therein.

Thank you.

Tim Gavigan

From: Rob Bethea <Rob.Bethea@arlaw.com>
Sent: Friday, September 27, 2019 4:26 PM
To: Timothy Gavigan
Cc: Albert Heyward (albert@universalstoragegroup.com)
Subject: Executed documents
Attachments: Gap Indemnity Agreement.PDF; Affidavit of Non-Foreign Status.PDF; Deed-GW.PDF; Seller_s Affidavit.PDF; Memo of Co-Tenancy Agreement (partially executed).PDF; Settlement Statement (partially executed).PDF; Incumbency Certificate.PDF; Bill of Sale and General Assignment.PDF; Co-Tenancy Agreement (partially executed).PDF; Assignment and Assumption of Leases (partially executed).PDF; Form 1099-S.PDF; Consent of Members and Managers.PDF

Tim:

I have everything executed here and will hold the deed until we record the C-III mortgage next week. Copies are attached.

Regards,

Rob

From: Timothy Gavigan <tgavigan@gaviganlaw.net>
Sent: Monday, September 30, 2019 10:19 AM
To: Rob Bethea
Cc: Albert Heyward (albert@universalstoragegroup.com); White, C. Lynn
Subject: Re: Executed documents

Thanks for the clarification. I'll discuss this with my client and respond afterwards.

Tim Gavigan
 (704) 942-0377
 tgavigan@gaviganlaw.net

From: Rob Bethea <Rob.Bethea@arlaw.com>
Sent: Monday, September 30, 2019 9:30:52 AM
To: Timothy Gavigan <tgavigan@gaviganlaw.net>
Cc: Albert Heyward (albert@universalstoragegroup.com) <albert@universalstoragegroup.com>
Subject: RE: Executed documents

Tim:

TBFL's position is that (a) each party is responsible for its own fees related to the conversion and (b) fees incurred pursuing the refinance will be pooled and split in accordance with ownership 70/30.

When do you plan to disburse in accordance with the closing statement?

Regards,

Rob

From: Timothy Gavigan <tgavigan@gaviganlaw.net>
Sent: Saturday, September 28, 2019 3:21 PM
To: Rob Bethea <Rob.Bethea@arlaw.com>
Cc: Albert Heyward (albert@universalstoragegroup.com) <albert@universalstoragegroup.com>; White C. Lynn <clwhite1@bellsouth.net>
Subject: Re: Executed documents

Is TBFL rejecting all offers re the legal fee ask?

Tim Gavigan
 (704) 942-0377
 tgavigan@gaviganlaw.net

From: Rob Bethea <Rob.Bethea@arlaw.com>
Sent: Saturday, September 28, 2019 10:23:34 AM
To: Timothy Gavigan <tgavigan@gaviganlaw.net>
Cc: Albert Heyward (albert@universalstoragegroup.com) <albert@universalstoragegroup.com>; White C. Lynn

<clwhite1@bellsouth.net>

Subject: Re: Executed documents

1. TBFL is not paying these fees.
2. Albert will provide.
3. Albert will provide.
4. My paralegal ordered the TCC as we previously discussed.

Robert P. Bethea, Jr.
Adams and Reese LLP

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Rob Bethea

Partner

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On Sep 28, 2019, at 7:53 AM, Timothy Gavigan <tgavigan@gaviganlaw.net> wrote:

Thanks Rob. What about the following:

1. The legal fee ask?
2. Evidence of adding SVI as a co-insured on all insurance policies?
3. Copy of the Universal Management Agreement?
4. Can you please confirm that you ordered the Cert of Tax Compliance?

I'll send you SVI's signature pages on Mondsy.

From: Rob Bethea <Rob.Bethea@arlaw.com>

Sent: Friday, September 27, 2019 4:26 PM

To: Timothy Gavigan <tgavigan@gaviganlaw.net>

Cc: Albert Heyward (albert@universalstoragegroup.com) <albert@universalstoragegroup.com>

Subject: Executed documents

Tim:

I have everything executed here and will hold the deed until we record the C-III mortgage next week. Copies are attached.

Regards,

Rob

Rob Bethea

Partner

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[<image001.jpg>](#)

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map [<image002.jpg><image002.jpg><image002.jpg>](#)

From: Rob Bethea <Rob.Bethea@arlaw.com>
Sent: Tuesday, October 1, 2019 9:14 AM
To: Timothy Gavigan
Subject: RE: NP Fees and Expenses



Tim:

Which specific provision is Lynn relying on for his demanded fee reimbursement?

Rob

From: Timothy Gavigan <tgavigan@gaviganlaw.net>
Sent: Tuesday, October 01, 2019 8:14 AM
To: Knight, G. Marcus <MKnight@nexsenpruet.com>; Rob Bethea <Rob.Bethea@arlaw.com>
Subject: RE: NP Fees and Expenses [IWOV-NPCOL1.FID2164216]

Thanks Marcus. I made the change.

Rob: Lynn's position re: the legal fee reimbursement is as follows: the parties agreed to 2 changes to the Loan Agreement, to wit: decrease option % to 70%, and make Albert's success fee an expense of the co-tenancy rather than an expense of TBFL. The Loan Agreement already contains a provision for the Borrower to bear the Lender's legal fees in administering and enforcing the Loan Agreement. No amendment to that provision was proposed, agreed to, or made. The attached revised Settlement Statement includes a line item for the reimbursement of the Lender's legal fees incurred to deal with TBFL's failed challenge to the Loan Agreement (a challenge that was put forth by Albert, Jimmy and Rhett on behalf of TBFL). Consequently, TBFL's current position that it's not reimbursing those fees is puzzling to Lynn and he sees that position as an invitation to retrade what was agreed to by the parties. Consequently, if TBFL continues to maintain that it's not going to reimburse the Lender as provided for in the Loan Agreement, then Lynn is taking Albert's success fee off the table and further takes the position that each party be responsible for its separate legal fees incurred with respect to the refinance loan. Lynn disagrees with the argument that your actions to date re: the loan benefit both parties as a basis for sharing those fees as you were engaged to close the loan at a time when TBFL believed that it alone would be the borrower, thus forcing SVI to engage separate counsel for the loan transaction.

It is Lynn's hope that the attached revised Settlement Statement will be accepted by TBFL and the parties can get on with their business.

From: Knight, G. Marcus <MKnight@nexsenpruet.com>
Sent: Monday, September 30, 2019 7:13 PM
To: Rob Bethea <Rob.Bethea@arlaw.com>; Timothy Gavigan <tgavigan@gaviganlaw.net>
Subject: Re: NP Fees and Expenses [IWOV-NPCOL1.FID2164216]

After adjustments requested and approved by Albert, our revised fees and expenses total \$12,715.89 for the closing. The invoice number, etc. remains the same. Thanks.

Mark

Sent from my iPhone

On Sep 27, 2019, at 11:12 AM, Knight, G. Marcus <MKnight@nexsenpruet.com> wrote:

Our total Fees and Exps through today for the closing settlement statement are \$13,927.14. I'll send Albert the invoice a little later today. Wire transfer instructions are attached. Or mail a check. Thanks.

G. Marcus Knight

Member

Nexsen Pruet, LLC

1230 Main Street, Suite 700

Columbia, SC 29201

PO Drawer 2426 (29202)

T: 803.253.8245, F: 803.727.1428

MKnight@nexsenpruet.com

www.nexsenpruet.com

<image001.png>

<BOA OPERATING WIRE INSTRUCTIONS (COLUMBIA).DOCX>

From: Timothy Gavigan <tgavigan@gaviganlaw.net>
Sent: Tuesday, October 1, 2019 12:50 PM
To: Rob Bethea
Cc: Albert Heyward (albert@universalstoragegroup.com)
Subject: RE: Settlement Statement TBFL-SVI Co-tenancy 10-1-19 Revised

Thanks Rob. I relayed your message to Lynn and, unfortunately, he believes that the initial rejection of the reimbursement opened the deal up for a retrade and is steadfast in his position that (i) the reimbursement offer is too late, (ii) SVI no longer consents to sharing in Albert's Success Fee, and (iii) each of SVI and TBFL should pay for their respective counsel fees in the loan refi rather than share in the aggregate fees in proportion to their % interests. I'll circulate revised versions of the Settlement Statement, Co-Tenancy Agreement and Loan Agreement Amendment a little later this afternoon.

Please advise when the next call with lender's counsel is so that I can participate on SVI's behalf.

From: Rob Bethea <Rob.Bethea@arlaw.com>
Sent: Tuesday, October 1, 2019 11:19 AM
To: Timothy Gavigan <tgavigan@gaviganlaw.net>
Cc: Albert Heyward (albert@universalstoragegroup.com) <albert@universalstoragegroup.com>
Subject: Settlement Statement TBFL-SVI Co-tenancy 10-1-19 Revised

Tim:

TBFL has agreed the reimbursement of \$6500 of your fees. The executed revised settlement statement is attached.

Bill and I just concluded a call with lender's counsel. He seemed skeptical about the refinance closing tomorrow and was securing an alternate closing date from his client. I will advise as soon as we hear back from him. Once I have that date confirmed, I plan on sending you TBFL original, executed counterparts of the conveyance and co-tenancy documents so that you can attach SVI counterparts and complete recording of the same. If the C-II loan closing is delayed, I see no reason to not proceed with the recording of the TBFL-SVI documents.

Regards,

Rob

Rob Bethea

Partner

Admitted in South Carolina and Georgia



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rob.bethea@arlaw.com

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Dated: *1-9-2023*

RECEIVED

Jan 09 2023

SC Court of Appeals

RAYNOR LAW FIRM, PLLC

/s/ Kenneth R. Raynor

Kenneth R. Raynor

Attorney for Spring Valley Interests, LLC

1822 Cleveland Avenue

Charlotte, NC 28203

Phone 704.413.3400; Fax 704.731.0774

ken@raynorlawfirm.com

N.C. Bar No.: 10488

S.C. Bar No.: 11654

S.C. Fed. ID No.: 6769