

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

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**APPEAL FROM HORRY COUNTY  
Court of Common Pleas**

**Paul M. Burch, Circuit Court Judge**

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**Case No. 11-CP-26-5575  
Appellant Case No. 2013-001960**

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**RECEIVED**

JUN 11 2014

**SC Court of Appeals**

**John Sifonios, individually and as agent for William Rempfer  
and Gary Sedlack.....Appellants,**

**v.**

**Town of Surfside Beach.....Respondent.**

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**RECORD ON APPEAL**

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

John Sifonios, individually and as agent for  
William Rempfer and Gary Sedlack,

Plaintiff,

vs.

Town of Surfside Beach,

Defendant.

FOR THE FIFTEENTH JUDICIAL CIRCUIT  
IN THE COURT OF COMMON PLEAS  
CASE NO.: 2011-CP-26-5575

**ORDER GRANTING SUMMARY  
JUDGMENT FOR DEFENDANT  
TOWN OF SURFSIDE BEACH**

FILED  
HORRY COUNTY  
2013 JUL 12 PM 12:10  
MELANIE HUGGINS-WARD  
CLERK OF COURT

**Presiding Judge: The Honorable Paul M. Burch**

**Hearing Date/Time: May 15, 2013 at 2:00 P.M.**

**Motion: Summary Judgment For The Town of Surfside Beach**

This matter comes before the Court upon a hearing on Defendant Town of Surfside Beach's (Town) Motion for Summary Judgment. In the lawsuit, Plaintiffs John Sifonios, individually and as agent for William Rempfer and Gary Sedlack claimed damages in the form of lost profits resulting from the Town's alleged failure to execute and perform a lease agreement with the Plaintiffs. The Town contends the lease had to be executed and delivered by the Town before it became an enforceable agreement and there are no material factual disputes about the fact that the Town did not execute and deliver the lease agreement. The Town contends it is entitled to summary judgment as a matter of law.

A hearing was held on Town's motion for summary judgment at the Horry County Courthouse on May 15, 2013. Present at the hearing were Michael W. Battle Esq., representing the Town and Bob Gwin, Esq. representing Plaintiffs.

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JUL 12, 2013  
WILE & VAUGHT, P.A.

After considering the submittals of the Plaintiffs and the Town, the Court has determined Summary Judgment is appropriate for the Town and hereby grants its motion for summary judgment.

### **Standard of Review**

Summary judgment is appropriate "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*. "[T]he evidence and all reasonable inferences there from must be viewed in the light most favorable to the non-moving party." *Byrd v. City of Hartsville* 365 S.C. 650, 620 S.E.2d 76 (S.C., 2005).

### **Statement of Facts**

The Town of Surfside Beach sought proposals from prospective tenants to operate and maintain a restaurant on the Surfside Beach Pier located at Ocean Boulevard, Surfside Beach, South Carolina 29575. On or about February 14, 2011, the Plaintiff, together with William Rempfer and Gary Sedlack, caused a Letter of Intent to be submitted to the Town. The Letter of Intent was signed by James Cole, Associate Broker of Century 21 Strand Group on behalf of an undisclosed principal (herein "Letter of Intent"). The Letter of Intent contemplated the formation of a corporation for the operation of the restaurant on the Surfside Beach Pier once there was a "meeting of the minds" as to the Lease terms. At a Special Council Meeting held on March 4, 2011, the Town Council considered the terms of the Letter of Intent. The Town Council authorized the Town Administrator to present for Council's approval a proposed lease agreement with Plaintiff for the restaurant at the pier. On April 15, 2011 a Lease was presented to the Town Council at a Special Council Meeting. At that time, the Town Administrator was authorized by the Town Council to enter into the

Lease Agreement presented to the Town by the Plaintiff, conditioned upon the Defendant's receipt and acceptance of evidence of (1) the prospective Tenant's credit worthiness, and (2) satisfactory background check. The Lease Agreement also contemplated the formation of a corporation for the operation of the restaurant on operation of the restaurant on the Surfside Beach Pier upon acceptance of the Plaintiffs' credit worthiness and background check by the Town Council.

The proposed pier restaurant lease agreement contained the following requirements:

**a. 20.8 No Option.**

The submission of this Lease for examination does not constitute a reservation of or option for the Premises and **this Lease shall become effective only upon execution and delivery hereof by both parties.** (emphasis added).

**b. 20.9 No Modification.**

This Lease can be modified only by a writing signed by the party against whom the modification is enforceable.

The lease agreement was not signed by the Town or delivered to the Plaintiffs.

Plaintiffs never occupied the premises. At a Regular Council meeting held on May 10, 2011, the Town rescinded its conditional approval of the lease agreement. Plaintiffs brought the present lawsuit to enforce the unexecuted lease.

### **Discussion**

The law is clear on the enforceability of the pier restaurant lease agreement. Where the parties know that the execution and delivery of a written contract is a condition precedent to their being bound, there can be no binding contract until the written agreement is executed and delivered, even if all the terms have been agreed on. A contract may be signed on condition that it shall not take effect until others have signed it. Or it may be the manifest intent of the parties that the contract is not to be effective until signed by all intended parties; in such a case, in the absence of any of the signatures

so required, the contract, being joint, cannot be enforced. *Dean v. Dean*, 229 S.C. 430, 93 S.E.2d 206 (1956); *Oeland V. Kimbrell's Furniture Co.* 210 S.C. 223, 42 S.E.2d 228 (S.C. 1947) (It is a well-founded rule of law that a contract for sale or lease of real estate may be consummated by letters without the execution of a formal instrument and the fact that it is understood that the contract is to be reduced to a formal instrument does not invalidate such agreement unless there be a positive agreement that it shall not be binding until formally executed); Also see *17A Am. Jur. 2d Contracts § 175*.

It is undisputed that the lease expressly clearly provided that it would become effective only upon execution and delivery hereof by both parties. Plaintiffs now claim that all of the terms were agreed upon and that agreement was noted in the minutes of the Town's minutes. Plaintiff's claim misses the point that one of the express terms agreed upon by both the Town and the Plaintiff were that the lease would not be enforceable against the Town unless it was actually signed by the Town. Plaintiff does not claim that the pier restaurant lease was actually signed by the Town. Even when construing in Plaintiff's favor all of the factual disputes about whether the Town Administrator was satisfied with the Plaintiff's credit worthiness or Plaintiff's background check, the undisputed fact remains that the Town did not execute or deliver the lease agreement to Plaintiff. The pier restaurant lease is not enforceable against the Town and summary judgment is hereby granted to the Town of Surfside Beach.

AND IT IS SO ORDERED!



Hon. Paul M. Burch  
Presiding Judge  
Fifteenth Judicial Circuit

Conway, SC  
this 8th day of July 2013

STATE OF SOUTH CAROLINA  
COUNTY OF HORRY

John Sifonis, individually and as agent for  
William Rempfer and Gary Sedlack,

Plaintiffs,

v.

Town of Surfside Beach,

Defendant.

) IN THE COURT OF COMMON PLEAS  
) OF THE FIFTEENTH JUDICIAL CIRCUIT

) Case Number: 2011-CP-26-5575

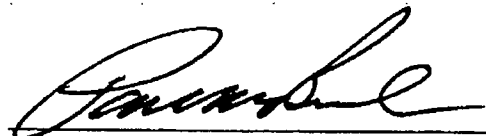
) ORDER DENYING MOTION TO ALTER  
) OR AMEND

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CLERK OF COURT  
WARD

This matter is before the Court on Defendant's Motion to Alter or Amend of this Court's order of July 12, 2013, denying the Defendant's Motion for Summary Judgment. In accordance with Rule 59(f), SCRCP, the Court holds that it is not necessary to hear oral arguments on this matter. After reviewing the memoranda and other documents submitted to the Court, and the applicable authority, the Court hereby denies Defendant's motion.

THEREFORE, Defendant's Motion to Alter or Amend is DENIED.

IT IS SO ORDERED.



The Honorable Paul M. Burch  
Presiding Judge

Pageland, South Carolina  
August 8, 2013

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF HORRY )  
 )  
 John Sifonios, individually and as )  
 agent for William Rempfer and )  
 Gary Sedlack, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 Town of Surfside Beach, )  
 )  
 Defendant. )

IN THE COURT OF COMMON PLEAS  
 FIFTEENTH JUDICIAL CIRCUIT  
 CASE NO.: 2011-CP-26- 5575

**COMPLAINT**  
**(Declaratory Judgment Action)**  
**(Non-Jury)**

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 11

The Plaintiff, John Sifonios, individually and as agent for William Rempfer and Gary Sedlack, respectfully would allege and show unto this Honorable Court as follows:

**JURISDICTION AND BACKGROUND**

1. The Plaintiff, is a citizen and resident of the State of New Jersey. William Rempfer and Gary Sedlack are citizens and residents of Horry County, South Carolina.
2. The Defendant Town of Surfside Beach is, and all times relevant herein has been, a body politic and municipal corporation organized and existing under the laws of the State of South Carolina and located in Horry County, South Carolina.
3. This action is brought under the Uniform Declaratory Judgment Act, Section 15-53-10 et seq. Code of Laws of South Carolina, 1976, and involves a controversy now existing between the Plaintiff and the Defendant arising from a Lease Agreement pertaining to real estate located in Horry County, South Carolina. The Plaintiff needs a declaration of the Plaintiff's rights and the Defendant's obligations under the terms of the Lease Agreement.
4. At all times herein mentioned, the Defendant was and now is the owner of the real estate described on Exhibit "A".

5. The Plaintiff is informed and believes that by Section 2-1 of the Code of Ordinances of the Town of Surfside Beach, South Carolina, the Defendant Town of Surfside Beach has adopted the council form of municipal government as prescribed by S.C. Code Section 5-11-10 (1976, as amended) and all legislative and administrative powers are vested in the Surfside Beach Town Council (herein "Town Council").

6. By Request for Proposal (RFP 10-010-A-PR2), the Defendant Town of Surfside Beach sought proposals from prospective tenants to operate and maintain a restaurant on the Surfside Beach Pier located at 11 Ocean Boulevard, Surfside Beach, South Carolina 29575, which is further described on Exhibit "A", (herein "the Property").

7. On or about February 14, 2011, the Plaintiff, together with William Rempfer and Gary Sedlack, caused a Letter of Intent to be submitted to the Defendant Town of Surfside Beach. The Letter of Intent was signed by James Cole, Associate Broker of Century 21 Strand Group on behalf of an undisclosed principal (herein "Letter of Intent"). The Letter of Intent contemplated the formation of a corporation for the operation of the restaurant on the Surfside Beach Pier once there was a "meeting of the minds" as to the Lease terms.

8. At a Special Council Meeting held on March 4, 2011, the Town Council accepted the terms of the Letter of Intent. The Town Council authorized the Town Administrator to present a proposed Lease Agreement for the Restaurant at the Pier for Council's approval.

9. On April 15, 2011 a Lease which had been executed by the Plaintiff was presented to the Town Council at a Special Council Meeting. At that time, the Town Administrator was authorized by the Town Council to enter into the Lease Agreement presented to the Town by the Plaintiff, conditioned upon the Defendant's receipt and acceptance of evidence of (1) the prospective Tenant's credit worthiness, and (2) satisfactory background check. The Lease Agreement also contemplated the formation of a corporation for the operation of the restaurant on

operation of the restaurant on the Surfside Beach Pier upon acceptance of the Plaintiff's creditworthiness and background check by the Town Council.

10. Thereafter, the Defendant was presented evidence of the credit worthiness of the individuals involved in the planned operation of the restaurant and the Defendant obtained a background check on those individuals. The Plaintiff is informed and believes that the Defendant Town of Surfside Beach approved the credit worthiness and background checks of these individuals.

11. At a Regular Council meeting held on May 10, 2011, the Defendant Town of Surfside Beach wrongfully rescinded the action taken by it at its April 15, 2011 meeting.

12. The Plaintiff has performed all conditions precedent to the execution of the Lease by the Town Administrator.

13. The Defendant, though requested to do so, has refused to recognize Plaintiff's legal rights under the Lease Agreement.

**CLAIMS FOR RELIEF**  
**FOR A FIRST CAUSE OF ACTION**  
**(Declaratory Judgment)**

14. The allegations set forth in Paragraphs 1 through 13 hereinabove are incorporated by reference as if fully set forth.

15. There exists an actual controversy between the Plaintiff and the Defendant relative to the existence of the Lease Agreement for the Surfside Beach Pier restaurant and their respective legal rights and duties under the Lease.

16. The Plaintiff therefore is entitled to a Declaratory Judgment, determining that a valid Lease Agreement exists between the Plaintiff and the Defendant and declaring and adjudicating that the Lease Agreement is valid and binding in all respects against the Defendant.

**FOR A SECOND CAUSE OF ACTION**  
**(Temporary and Mandatory Injunction)**

17. The allegations set forth in Paragraphs 1 through 16 hereinabove are incorporated by reference as if fully set forth.

18. The Plaintiff is informed and believes that without an Order for Temporary Injunctive Relief, the Defendant will undertake action which will cause the Lease Agreement to be lost to the Plaintiff.

19. The real estate which is the subject of this action is unique and specific to the parties and the Plaintiff has no adequate remedy at law.

20. The Plaintiff requests an Order of this Court granting a temporary injunction restraining and enjoining the Defendant from transferring, leasing, encumbering, or hypothecating the Property during the pendency of this action and upon final adjudication directing the Town Council to instruct the Town Administrator to enter into the Lease Agreement as directed by the Town Council at its April 15, 2011 meeting.

**FOR A THIRD CAUSE OF ACTION**  
**(Specific Performance)**

21. The allegations set forth in Paragraphs 1 through 01 hereinabove are incorporated by reference as if fully set forth.

22. Plaintiff has requested the Defendant to execute a Lease of the Property to the Plaintiff according to the terms of the parties' Agreement, but Defendant failed and refused to do so and continues to refuse to execute such a Lease.

23. The Plaintiff has performed all of Plaintiff's obligations under the Agreement for the Lease and, at all times mentioned, has been and now is ready, able and willing to enter into such a Lease for the Property and perform its terms and conditions as required by such Lease and by the parties' Agreement for Lease.

24. Plaintiff does not have an adequate remedy at law for Defendant's breach of the Agreement to lease the Property and will be irreparably damaged unless the Defendant is compelled to perform Defendant's obligations under the Agreement for Lease.

**FOR A FOURTH CAUSE OF ACTION**  
**(Breach of Contract)**

25. The allegations set forth in Paragraphs 1 through 24 hereinabove are incorporated by reference as if fully set forth.

26. By reasons of the Defendant's refusal to deliver possession of the Property to the Plaintiff as recited in the Lease Agreement, and the contemplation of the parties that the Plaintiff would use the Property to conduct a restaurant business, the loss of possession of the Property by Plaintiff would cause an interruption of such business.

27. As a direct result of Defendant's breach of the covenant of quiet enjoyment of the leased premises and the business interruption, the Plaintiff has sustained actual, special and consequential damages, including but not limited to, lost profits in an amount not yet determined.

28. Plaintiff is informed and believes that it is entitled to judgment against the Defendant for the actual, special and consequential damages which it has sustained in an amount to be ascertained by the Court.

WHEREFORE, the Plaintiff prays for the following relief:

(A) An Order be entered, directing that the Lease Agreement constitutes a valid and binding Agreement between the Plaintiff and the Town of Surfside Beach;

(B) An Order or Orders be entered granting the Plaintiff appropriate and temporary injunctive relief so as to prevent the Defendant from transferring, leasing, encumbering, or hypothecating the Property during the pendency of this action;

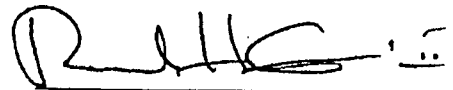
(C) Upon final adjudication, a mandatory injunction be issued directing the Surfside Beach Town Council to direct the Town Administrator to enter into the Lease Agreement as directed by the Town Council at its April 15, 2011 meeting;

(D) Judgment requiring the Defendant to specifically perform the Lease Agreement by executing and delivering to Plaintiff a Lease for the Property subject to the terms and conditions to which the parties agreed and to deliver possession of the Property to Plaintiff as Lessee;

(E) Judgment against the Defendant in favor of the Plaintiff for its actual, special and consequential damages in an amount to be ascertained by the Court;

(F) Costs and disbursements of this action; and

(G) For such other and further relief as this Court may deem just and proper.



Robert H. Gwin, III  
GWIN LAW OFFICE, LLC  
4701-A Oleander Drive  
Myrtle Beach, SC 29577  
(843) 839-2239  
Attorney for Plaintiff

June 30, 2011

Myrtle Beach, South Carolina

EXHIBIT "A"

Restaurant building (formerly Nibils Restaurant) on the Surfside Beach Pier containing approximately 1,800 square feet located at 11 S. Ocean Blvd., Surfside Beach, SC 29575.

The land upon which the Restaurant building is located is more particularly described as follows:

**ALL AND SINGULAR**, all that certain piece, parcel or lot of land, and improvements thereon, including the fishing pier and all structures thereon, situate, lying and being in the Town of Surfside Beach, Socastee Township, Horry County, South Carolina, shown and designated as "Lot A, Block H" (formerly known as Lots 1 & 2, Block H, Floral Section) and "Pier" on a survey prepared by Beasley Land Surveying, Inc., dated July 17, 2008, and recorded in the Office of the Register of Deeds for Horry County in Plat Book 240 at Page 136, reference to which is craved as forming a part and parcel hereof.

# EXHIBIT B

**THIS LEASE AGREEMENT IS SUBJECT TO THE PROVISIONS  
OF THE SOUTH CAROLINA UNIFORM ARBITRATION ACT  
S.C. CODE ANN. 15-48-10 et seq.**

THIS LEASE AGREEMENT ("Lease") is made as of the 1st day of April, 2011 by and between The Town of Surfside Beach, a South Carolina municipal corporation ("Landlord") and [Restaurant Operator], ("Tenant").

WHEREAS, Landlord is the fee simple owner of the Surfside Beach Pier, upon which there are one or more commercial operations that enhance the recreational experiences of residents and tourists; and  
WHEREAS, after receiving offers in response to a public Request for Proposals for a lease of that part of the Surfside Beach Pier suitable for restaurant operation, Landlord has selected Tenant as the most responsive bidder, and determined to enter into this Lease.

NOW THEREFORE, FOR AND IN CONSIDERATION of the mutual covenants and agreements herein contained, the parties hereto do covenant and agree as follows.

## **ARTICLE I - Basic Lease Terms and Definitions**

### **1.1. Basic Lease Terms**

- a. "Landlord's Building": The structure on the Pier Area as it exists on the date hereof and as generally depicted on Schedule "A", as the same may be altered, reduced, expanded or replaced from time to time, as determined mutually by the parties.
- b. "Pier": The Pier Area and any adjacent parcel or parcels of land more particularly described in Schedule "A" and known as "Surfside Beach Pier."
- c. "Pier Area": That certain parcel of land owned or controlled by the Town of Surfside Beach, County of Horry, South Carolina, more particularly described in Schedule "A" and any expansion of the Pier Area.
- d. "Premises": Tenant's portion of Landlord's Building shown on Schedule "A" having a Floor Area of approximately 1,963 square feet.
- e. "Term": The period of approximately five (5) years from the commencement date through the termination date, unless extended as provided herein.
- f. "Commencement Date": April 1, 2011.
- g. "Termination Date": Midnight, March 31, 2016, unless this Lease Agreement is (a) terminated earlier by either party as permitted herein, or (b) extended as provided herein.
- h. "Permitted Use": Operation of a restaurant, including beer, wine, liquor and non-alcoholic beverages for consumption on and off the premises (subject to maintaining a current license for such sales from the South Carolina Department of Revenue & Taxation).
- i. "Annual Basic Rental": Fifty Thousand and NO/100 (\$50,000.00) Dollars payable in twelve (12) equal monthly installments on the first (1<sup>st</sup>) business day of each month. The Annual Base Rent shall increase annually as set forth in the Schedule of Rents set forth in Section 5.1.
- j. "Annual Percentage Rental": From commencement date through March 31, 2014, there shall be no Annual Percentage Rental. From April 1, 2014 through March 31, 2016, a sum equal to one-half (1/2) of one (1%) percent of gross sales shall be paid as additional rent. In the event Tenant exercises its option for the first renewal term (and any of its subsequent renewal terms), an Annual Percentage Rent in a sum equal to one (1%) percent of the annual gross sales shall be paid in

- addition to the Annual Basic Rental.
- k. "Tenant Notice Address": [TBA]
  - l. "Tenant Trade Name": [TBA]  
"[Restaurant Operator]"
  - m. "Retail Radius Restrictions": N/A. See Section 21.1.
  - n. "Landlord's Floor Area": The aggregate amount of square feet of leasable floor area in Landlord's Building, which shall exclude Common Areas, kiosks and temporary vendors, mezzanine areas and areas used for management and promotion offices and storage.
  - o. "Tenant's Floor Area": That portion of Landlord's Floor Area constituting the premises which shall be measured without any deduction for columns or other structural elements within any tenant's premises. Unless otherwise agreed between the parties, the Tenant's Floor Area shall be deemed to be One Thousand Nine Hundred and sixty three (1,963) square feet.
  - p. "Common Areas": Those areas and facilities which may be furnished by Landlord, now or hereafter, in or near the Pier for the non-exclusive general common use of tenants, and other occupants of the Pier, their officers, agents, employees and customers.
  - q. "Default Rate": An annual rate of interest equal to the lesser of (i) the maximum rate of interest for which Landlord may lawfully collect upon default, which shall be the maximum contract rate for the amount in default, or (ii) eighteen percent (18%).
  - r. "Security Deposit": That sum which was paid at the commencement of the Lease.
  - s. "Trade Name": the corporate name of Tenant, or an abbreviation thereof approved in writing by Landlord.

## 1.2 Additional Defined Terms

The following additional terms are defined by the context in which they appear in this Lease below, or otherwise by their normal and customary meaning as terms of art in a commercial lease made in South Carolina:

### TERM

- "Event of Default"
- "Gross Sales"
- "Landlord's Operating Costs"
- "Ready for Occupancy"
- "Rental"
- "Rental Year"
- "Taxes"
- "Tax Year"

## 1.3 Attachments

The following documents are attached hereto, and such documents, as well as all drawings and documents prepared pursuant thereto, shall be deemed to be a part hereof:  
Riders:

Schedule "A" - Drawing of Pier Area and Legal Description of Pier.  
Schedule "B" - Estoppel Certificate.  
Schedule "C" - Tenant's Work.

## ARTICLE II - Premises

### 2.1 Demise

Landlord hereby leases to Tenant, and Tenant hereby rents from Landlord, the Premises, as defined in Section 1.1(d). Notwithstanding anything to the contrary contained herein, Tenant represents that it has fully inspected the Premises and accepts the same as existing as of the date hereof.

### 2.2 Security Deposit

Tenant shall pay to Landlord upon the delivery of this Lease the sum certain amount equivalent to one month's rent for the leased Premises (the "Security Deposit") as security for the full and faithful performance by Tenant of each and every term, provision, covenant and condition of this Lease. If Tenant defaults in any respect of any of the terms, provisions, covenants and conditions of this Lease, including, but not limited to, the payment of rent and/or additional rent or charges, Landlord may, but shall not be required to use, apply or retain the whole or any part of the Security Deposit for the payment of any rent or additional rent or charges in default or for any other sum for which Landlord may expend or be required to expend by reason of Tenant's default, including, but not limited to, any damages or deficiency in the re-letting of the Premises, whether such damages or deficiency accrue before or after summary proceedings or other reentry by Landlord. Whenever and as often as the amount of the Security Deposit held by Landlord shall be diminished by Landlord's application thereof, Tenant shall, within ten (10) days after receipt of Landlord's written request therefore, deposit additional money with Landlord sufficient to restore the Security Deposit to the original amount. Landlord may deposit the Security Deposit into an interest bearing account for the benefit of Landlord, and shall not be obliged to account for or give credit to Tenant for any such interest as may be earned thereon.

## ARTICLE III - Term

### 3.1 Term

The term shall commence on April 1, 2011, and shall be for the number of years set forth in Section 1.1(e), plus the part of the month, if any, from the date of the commencement of the Term through the last day of the month immediately prior to the first full calendar month in the Term, and end on the Termination Date set out in Section 1.1(g) unless extended as provided herein. The Premises shall be deemed "Ready for Occupancy" two hundred seventy (270) days after the Commencement Date, or upon the issuance of a Certificate of Occupancy by the Town of Surfside Beach, whichever first occurs.

### 3.2 Termination

This Lease shall terminate on the stated Termination Date without the necessity of any notice from either Landlord or Tenant, unless extended as provided herein, upon the same terms set forth herein (other than the Rental at the commencement of any extension, which shall be in accordance with the Schedule of Rents as set forth herein) by written notice to Landlord by Tenant not less than one (1) year prior to the expiration of the Term.

### 3.3 Holding Over

If Tenant shall be in possession of the Premises after the Termination Date, in the absence of any written agreement extending the Term hereof, or Landlord's demand to Tenant to sooner vacate the Premises, the tenancy under this Lease shall become one from month to month terminable by either party on thirty (30) days prior written notice, at a monthly rental equal to the sum of (1) one-twelfth installment of the Annual Basic Rental payable during the last year of the Term. Tenant shall also pay all other charges payable under the terms of the Lease, prorated for the period during which Tenant remains in possession. Such tenancy shall also be subject to all other conditions, provisions and obligations of this Lease. Tenant shall not interpose any counterclaim or counterclaims in a summary proceeding or other action based on holdover. The provisions of this Section 3.3 shall be in addition to any liability Tenant may have to Landlord in respect of its holdover.

### 3.4. Option to Renew

Landlord hereby grants the Tenant, its successors and assigns, the option to renew or extend said Lease Agreement for three (3) additional five (5) year terms upon the expiration of this Lease, on the same terms and conditions as set forth herein. Rental for the First Renewal Term, if exercised, shall be in accordance with the Schedule of Rents set forth herein. Rental for the Second and Third Renewal Terms, if exercised, shall be negotiated by the parties. In the event that agreement cannot be reached, Tenant shall give written notice to the Landlord, specifying the name and address of a person designated by it to act as the Arbitrator in its behalf. Within ten (10) days after said notice is given, the Landlord shall give written notice to the Tenant, specifying the name and address of the person designated to act as Arbitrator on its behalf. If the Landlord fails to notify the Tenant of the appointment of its Arbitrator as aforesaid by the time above specified, then the appointment of the second Arbitrator shall be made in the same manner as hereinafter provided for the appointment of a third Arbitrator. The Arbitrators as chosen shall meet within ten (10) days after the second Arbitrator is appointed and within thirty (30) days thereafter, shall decide the dispute. If within said time period they cannot agree upon their decision, the Arbitrators shall appoint a third Arbitrator and if they cannot agree upon said appointment, then a third Arbitrator shall be appointed upon their application or upon the application of either party to the American Arbitration Association. The three Arbitrators shall meet and decide the dispute and a decision in which two of the three Arbitrator concur shall be binding and conclusive upon the parties and designated Arbitrators in deciding the dispute. The Arbitrator shall act in accordance with the rules then in force of the American Arbitration Association, subject, however, to such limitations as may be placed upon them by the provisions of this Lease. The Arbitrators selected or designated under this Paragraph shall be real estate brokers, consultants, or

property managers, and managers shall have at least ten (10) years experience with respect to, and shall then be active in the field of, commercial leasing in Horry County, South Carolina.

**ARTICLE IV - Use**

4.1 **Prompt Occupancy and Use**

Tenant shall occupy the Premises upon commencement of the Term and thereafter will continuously use the Premises for the Permitted Use and for no other purpose whatsoever without prior written consent of Landlord.

4.2 **Deleted**

4.3 **Tenant's Trade Name**

Unless otherwise approved by Landlord, Tenant shall conduct business in the Premises only in Tenant's Trade Name. The approval of any change in the Tenant's Trade Name or the addition of any business operation name shall not be withheld unreasonably by the Landlord).

4.4 **Deleted**

**ARTICLE V - Rental**

5.1 **Rentals Payable**

Tenant covenants and agrees to pay to Landlord as rental ("Rental") for the Premises, the Annual Basic Rental specified in Section 1.1.(i), commencing two hundred seventy (270) days after the Commencement Date or upon the issuance of a Certificate of Occupancy by the Town of Surfside Beach, whichever first occurs, without any set-off, deduction or prior demand in equal monthly installments in advance on the first business day of each calendar month during the Term. The Schedule of Rents is as follows:

**Initial Term:**

<b><u>Term Year</u></b>	<b><u>Annual Rent</u></b>	<b><u>Percentage of Gross Sales</u></b>
2011	\$50,000.00	0.00%
2012	\$50,000.00	0.00%
2013	\$55,000.00	0.50%
2014	\$60,000.00	0.50%
2015	\$60,000.00	0.50%

First Renewal Term (if exercised):

<u>Term Year</u>	<u>Annual Rent</u>	<u>Percentage of Gross Sales</u>
2016	\$70,000.00	1.00%
2017	\$70,000.00	1.00%
2018	\$70,000.00	1.00%
2019	\$70,000.00	1.00%
2020	\$70,000.00	1.00%

5.2 Payment of Rental

Tenant shall pay all Rental when due and payable, without any setoff, deduction or prior demand therefor whatsoever. If Tenant shall fail to pay any Rental within seven (7) days after the same is due, Tenant shall be obligated to pay a late payment charge equal to the greater of One Hundred and No/100 Dollars (\$100.00) or ten percent (10%) of any Rental payment not paid when due to reimburse Landlord for its additional administrative costs. In addition, any Rental which is not paid within seven (7) days after the same is due shall bear interest at the Default Rate from the first day due until paid. Any payment by Tenant or acceptance by Landlord of a check for a lesser amount shall be due from Tenant to Landlord and shall be treated as a payment on account.

**ARTICLE VI - Taxes**

6.1 Tenant to Pay Proportionate Share of Taxes

If applicable, Tenant shall pay in each Tax Year during the Term a proportionate share (determined by a *pro rata* share of gross floor area) of any and all real estate taxes, ad valorem taxes and assessments, general and special assessments, taxes on real estate rental receipts, taxes on Landlord's gross receipts, or any other tax imposed upon or levied against real estate or upon owners of real estate as such rather than persons generally, including taxes imposed on leasehold improvements which are assessed against Landlord, payable with respect to or allocable to the Pier Area.

6.2 "Tax Year" Defined

The term "Tax Year" means each twelve (12) month period (deemed, for the purpose of this Section, to have 365 days) established as the real estate tax year by the taxing authorities having lawful jurisdiction over the Pier Area.

**ARTICLE VII - Improvements**

7.1 Mechanic's Liens

No work performed by Tenant pursuant to this Lease, whether in the nature of erection, construction, alteration or repair, shall be deemed to be for the immediate use and benefit of Landlord so that no mechanic's or other lien shall be allowed against the estate of Landlord by reason of any consent given by Landlord to Tenant to improve the Premises. Tenant shall pay promptly all persons furnishing labor or materials with respect to any work performed by Tenant or its contractor on or about the Premises.

7.2 Tenant's Trade Fixtures

All trade fixtures and apparatus (as distinguished from leasehold improvements) owned by Tenant and installed in the Premises by Tenant at its expense shall remain the property of Tenant and shall be removable at any time, including upon the expiration of the Term.

ARTICLE VIII - Operations

Deleted in its Entirety

ARTICLE IX - Repairs and Alterations

9.1 Repairs to be Made by Landlord

Landlord, at its expense will make, or cause to be made structural repairs to exterior walls, structural columns and structural floor which collectively enclose the Premises (excluding, however, all doors, door frames, storefronts, windows and glass); provided Tenant shall give Landlord notice of the necessity for such repairs. If the necessity for such repairs shall have arisen from or shall have been caused by the negligence or willful acts of Tenant, its agents, concessionaires, officers, employees, licensees, invitees or contractors, Landlord may make or cause the same to be made, but shall not be obligated to do so, and Landlord may require Tenant to reimburse Landlord.

9.2 Repairs to be Made by Tenant

All repairs to the Premises or any installations, equipment or facilities therein, other than those repairs required to be made by Landlord, shall be made by Tenant at its expense. Tenant shall, at its sole cost, but subject to "force majeure" conditions or other causes beyond its control, prepare the lease premises for its use and occupancy by doing all Tenant's work, including without limitation, installation of trade fixtures, equipment and inventory as set forth in Schedule "C". Without limiting the generality of the foregoing, Tenant will keep the interior of the Premises, together with all electrical, plumbing, heating, ventilating, air-conditioning, and other mechanical installations therein in good order and repair and will make all replacements from time to time required thereto at its expense; and will surrender the Premises at the expiration of the Term or at such other time as it may vacate the Premises in as good condition, excepting depreciation caused by ordinary wear and tear, damage by Casualty (other than such damage by Casualty which is caused by the negligence of Tenant, its agents, concessionaires, officers, employees, contractors, licensees or invitees, and which is not wholly covered by Landlord's hazard insurance policy), unavoidable accident or Act of God. Tenant shall indemnify and hold Landlord harmless from and against all claims, actions, damages and liability in connection therewith, including but not limited to attorney's and other professional fees, and any other cost which Landlord might reasonably incur.

9.3 Damage to Premises

Tenant will repair promptly at its expense any damage to the Premises, and, upon demand, shall reimburse Landlord for the cost of the repair of any damage elsewhere in the Pier, caused by or arising from the installation or removal of property in or from the Premises, regardless of fault or by whom such damage shall be caused (unless caused by Landlord, its agents, employees

or contractors). If Tenant shall fail to commence such repairs within five (5) days after notice to do so from Landlord, Landlord may make or cause to be made and Tenant agrees to pay to Landlord promptly upon Landlord's demand all costs thereof with interest thereon at the Default Rate until paid.

9.4 Alterations by Tenant

Tenant will not make any alterations, renovations, improvements or other installations in, on or to the Premises or any part thereof (including, without limitation, any alterations of the store front or signs, structural alterations, or any cutting or drilling into any part of the Premises or any securing of any fixture, apparatus, or equipment of any kind to any part of the Premises) unless and until Tenant shall have caused plans and specifications therefor to have been prepared, at Tenant's expense, by an architect or other duly qualified person and shall have obtained Landlord's approval thereof (which shall not be unreasonably withheld) and obtained all required Town permits and licenses prior to the commencement of said work.

9.5 Changes and Additions to Pier and Pier Area

Landlord reserves the right at any time and from time to time (a) to make or permit changes or revisions in its plan for the Pier or the Pier Area including Common Areas, (b) to construct other buildings or improvements in the Pier Area and to make alterations thereof or additions thereto and (c) to make or permit changes or revisions in the Pier or the Pier Area. Construction activity by Landlord that materially affects access to the Demised Premises shall entitle Tenant to seek a reasonable abatement of Rental for such period of construction, but such abatement shall be the entire and exclusive remedy of Tenant.

9.6 Roof and Walls

Landlord shall have the nonexclusive right to use all or any part of the roof of the Premises for any purpose; to erect in connection with the construction thereof temporary scaffolds and other aids to construction on the exterior of the Premises, provided that access to the Premises shall not be denied; and to install, maintain, use, repair and replace within the premises pipes, ducts, conduits, wires and all other mechanical equipment serving other parts of the Pier Area, provided that the same shall not unreasonably deny Tenant's use of the Demised Premise or cause Tenant material loss of useable space.

ARTICLE X - Common Areas

10.1 Use of Common Areas

Landlord grants to Tenant and its agents, employees and customers a non-exclusive license for the Term of this Lease (and any extended term) to use the Common Areas in common with others during the Term. Landlord expressly disclaims the availability of the Common Areas to the Tenant at all times, and expressly reserves the right to close off for maintenance, repair or other event promoted or sponsored by Landlord, any part or all of the Common Areas, and in such event, the obligation of Tenant to pay rent shall continue unabated.

10.2 Management and Operation of Common Areas

Landlord will operate and maintain or will cause to be operated and maintained the Common Areas in a manner deemed by Landlord to be reasonable and appropriate and in the best interest of the Pier.

10.3 Employee Parking Areas

Tenant and its employees shall park their cars in such areas designated for the purpose by the Town of Surfside Beach (acting in its capacity as a local government authority and not as Landlord herein) or municipal parking areas in the area, and comply with all regulations related thereto. Tenant shall use two (2) designated car parking spaces only in the immediate Pier parking area, and obtain from the Town of Surfside Beach all necessary identification for approved vehicles. The Town of Surfside Beach shall provide, at a reasonable cost, annual permits for employees of Tenant to park in municipal parking areas, with no daily charge.

ARTICLE XI - Promotion and Advertising

11.1 Promotion and Advertising

Tenant may undertake reasonable commercial advertising at its own expense, and Landlord shall not have any obligation to include Tenant or Tenant's Trade Name in any advertising or promotion of the Pier by Landlord.

ARTICLE XII - Utilities

12.1 Water, Electricity, Telephone and Sanitary Sewer

Landlord will provide at points in or near the Premises the facilities necessary to enable Tenant to obtain water, electricity, telephone and sanitary sewer service.

12.2 Water and Sewer Charge

Tenant shall pay for all water, sanitary sewer service, electrical and telephone service and chilled water for air conditioning required by or used by Tenant in the Premises.

ARTICLE XIII - Indemnity and Insurance

13.1 Indemnity by Tenant

Tenant shall indemnify, hold harmless and defend Landlord from and against any and all claims, actions, damages, liability and expense, including, but not limited to, attorney's and other professional fees, in connection with loss of life, personal injury and/or damage to property arising from or out of the occupancy or use by Tenant of the Premises or any part thereof or any other part of the Pier, occasioned wholly or in part by any act or omission of Tenant, its officers, agents, contractors, licensees, employees or invitees.

### 13.2 Landlord Not Responsible for Acts of Others

Landlord shall not be responsible or liable to Tenant, or to those claiming by, through or under Tenant, for any loss or damage which may be occasioned by or through the acts or omissions of person occupying space adjoining the Premises or any part of the premises adjacent to or connection with the Premises or any other part of the Pier, or otherwise, or for any loss or damage resulting to Tenant, or those claiming by, through or under Tenant, or its or their property, from the breaking, bursting, stoppage or leaking of electrical cable and wires, and water, gas, sewer or steam pipes.

### 13.3 Tenant's Insurance

At all times after the execution of this Lease, Tenant will carry and maintain at its expense, subject to a deductible of not more than Five Thousand and No/100 (\$5,000.00) Dollars:

(a) comprehensive public liability insurance, including, but not limited to, insurance against assumed or contractual liability under this Lease, with respect to the Premises, to afford protection with limits, for each occurrence, of not less than One Million (\$1,000,000.00) Dollars with respect to personal injury or death, and Five Hundred Thousand Dollars (\$500,000.00) with respect to property damage;

(b) all risks property and casualty insurance, written at replacement cost value and with replacement cost endorsement, covering all of Tenant's personal property in the Premises (including, without limitation, inventory, trade fixtures, floor coverings, furniture and other property removable by Tenant under the provision of this Lease) and all leasehold improvements installed in the Premises by or on behalf of Tenant;

(c) if and to the extent required by law, workmen's compensation or similar insurance in form and amount required by law.

### 13.4 Tenant's Contractor's Insurance

Tenant shall require any contractor performing work on the Premises to carry and maintain, at no expense to Landlord, a non-deductible comprehensive general liability insurance, including, but not limited to, contractor's liability coverage, contractual liability coverage, completed operation coverage, broad form property damage endorsement and contractor's protective liability coverage, to afford protection with limits, for each occurrence, of not less than One Million (\$1,000,000.00) Dollars with respect to personal injury or death, and Five Hundred Thousand (\$500,000.00) Dollars with respect to property damage; and workman's compensation or similar insurance in form and amounts required by law.

### 13.5 Policy Requirements

The company or companies writing any insurance with Tenant shall at all times be subject to Landlord's approval and any such company or companies shall be licensed to do business in South Carolina. Public liability and all-risks property and casualty insurance policies evidencing such insurance shall name Landlord or its designee as additional

insured and shall also contain a provision by which the insurer agrees that such policy shall not be canceled except after thirty (30) days written notice to Landlord or its designee. Each such policy, or a certificate thereof, shall be deposited with Landlord by Tenant promptly upon commencement of Tenant's obligation to procure the same. Failure by Tenant to perform any of its obligations under this Article shall be an Act of Default, and in addition Landlord may perform the same and the cost of same and shall be payable by Tenant immediately upon Landlord's demand. Landlord shall be named as an additional named insured party on any and all liability insurance policies of Tenant and Tenant's contractors performing work on or about the Premises.

#### 13.6 Increase in Insurance Premiums

Tenant will not do or suffer to be done, or keep or suffer to be kept, anything in, upon or about the Premises which will violate Landlord's policies of hazard of liability insurance or which will prevent Landlord from procuring such policies in companies acceptable to Landlord.

#### 13.7 Waiver of Right of Recovery

Neither Landlord nor Tenant shall be liable to the other party or to any insurance company (by way of subrogation or otherwise) insuring the other party for any loss of damage to any building, structure or other tangible property or liability for personal injury, or losses under workmen's compensation laws and benefits, even though such loss or damage might have been occasioned by the negligence of such party, its agents or employees.

### ARTICLE XIV - Damage and Destruction

#### 14.1 Landlord's Obligation to Repair and Reconstruct

If the Premises shall be damaged by fire, the elements, including wind and rising water, accident or other casualty (any of such causes being referred to herein as a "Casualty"), but the Premises shall not be thereby rendered wholly or partially untenable, Landlord shall promptly cause such damage to be repaired, subject to collection of sufficient insurance proceeds, and there shall be no abatement of Rental. If, as the result of Casualty, the Premises shall be rendered wholly or partially untenable, then Landlord shall cause such damage to be repaired, provided such damages is not caused by the negligence of Tenant, its agents, concessionaires, officers, employees, contractors, licensees or invitees. All such repairs shall be made at the expense of the Landlord, subject to Tenant's responsibilities set forth herein. Landlord shall not be liable for interruption to Tenant's business or for damage to or replacement or repair of Tenant's personal property (including, without limitation, inventory, trade fixtures, floor coverings, furniture and other property removable by Tenant under the provisions of this Lease) or to and leasehold improvements installed in the Premises, all of which damage, replacement or repair shall be undertaken and completed by Tenant promptly.

#### 14.2 Deleted

#### 14.3 Demolition of Landlord's Building

If Landlord's Building shall be so substantially damaged that it is reasonably necessary, in Landlord's judgment, to demolish such Building for the purpose of reconstruction, Landlord may demolish the same in which event the Rental shall be abated to the same extent as if the Premises were rendered untenable by a Casualty.

#### 14.4 Insurance Proceeds

If Landlord does not elect to terminate this Lease pursuant to Section 142, Landlord shall, subject to the prior rights of any Mortgagee, disburse and apply any insurance proceeds received by Landlord to the restoration and rebuilding of Landlord's Building in accordance with Section 14.1 hereof. All insurance proceeds payable with respect to the Premises (excluding proceeds payable to Tenant pursuant to Section 13.3) shall belong to and shall be payable to Landlord.

### ARTICLE XV - Assignments and Subletting

#### 15.1 Landlord's Consent Required

Tenant will not assign this Lease, in whole or in part, nor sublet or license for occupation or use all or any part of the Premises without first obtaining the written consent of Landlord, which consent shall not be unreasonably withheld. This prohibition includes, without limitation, (i) any subletting or assignment which would otherwise occur by operation of law, merger, consolidation, reorganization, transfer or other change of Tenants corporate or propriety structure; (ii) an assignment or subletting to or by a receiver or trustee; (iii) the sale, assignment or transfer of all or substantially all of the assets of Tenant, with or without specific assignment of Lease; or (iv) the change in control in a partnership.

#### 15.2 Transfer of Corporate Shares

If Tenant is a corporation and if at any time after execution of this Lease any part or all of the corporate shares shall be transferred by sale, assignment, bequest, inheritance, operation of law or other disposition so as to result in a change in the present control of said corporation by the person or persons now owning a majority of said corporate shares, Tenant shall give Landlord notice of such event within fifteen (15) days from the date of such transfer. The change in the control of said corporation by the transfer of a majority of said corporate shares shall be subject to the approval of the Landlord, the approval of which transfer shall not be withheld unreasonably.

#### 15.2 Acceptance of Rent from Transferee

The acceptance by Landlord of the payment of Rental following any assignment or other transfer prohibited by this Article shall not be deemed to be a consent by Landlord to any such assignment or other transfer nor shall the same be deemed to be a waiver of any right or remedy of Landlord hereunder.

## ARTICLE XVI - Default

### 16.1 Event of Default" Defined

Any one or more of the following events shall constitute an "Event of Default":

- (a) The sale of Tenant's interest in the Premises under attachment, execution or similar legal process; or if Tenant is adjudicated a bankrupt or insolvent under any State bankruptcy or insolvency law or an order for relief is entered against Tenant under the Federal Bankruptcy Code and such adjudication or order is not vacated within ten (10) days.
- (b) To the greatest extent allowed by applicable law, the commencement of a case under any chapter of the Federal Bankruptcy Code by or against Tenant or any guarantor of Tenant's obligations hereunder, or the filing of a voluntary or involuntary petition proposing the adjudication of Tenant or any guarantor a bankrupt or insolvent, or the reorganization of Tenant or any such grantor, or an arrangement by Tenant or any such guarantor, or an arrangement by Tenant or any guarantor with its creditors, unless the petition is filed or case commenced by a party other than Tenant or any such guarantor and is withdrawn or dismissed within thirty (30) days after the date of its filing.
- (c) The admission in writing by Tenant or any guarantor of Tenant's obligations hereunder of its inability to pay its debts when due.
- (d) The appointment of a receiver or trustee for the business or property of Tenant or any guarantor of Tenant's obligations hereunder, unless such appointment shall be vacated within ten (10) days of its entry.
- (e) The making by Tenant or any guarantor of Tenant's obligations hereunder of an assignment for the benefit of its creditors, or if in any other manner Tenant's interest in this Lease shall pass to another by operation of law.
- (f) The failure of Tenant to pay any Rental or other sum of money within seven (7) days after the same is due hereunder. Tender of Rentals due after such date against Tenant for non-payment of Rental shall not be a defense to such action.
- (g) Default by Tenant in the performance or observance of any rule, covenant or agreement of this Lease which default is not cured within ten (10) days after the giving of notice thereof by Landlord, unless such default is of such nature that it cannot be cured within such ten (10) day period, in which case no Event of Default shall occur so long as Tenant shall commence the curing of the default within such ten (10) day period and shall thereafter diligently prosecute the curing of same; provided, however, if Tenant shall default in the performance of any such covenant or agreement of this Lease two (2) or more times in any twelve (12) month period, that notwithstanding such defaults have each been cured by Tenant, any further similar default shall be deemed an Event of Default without the ability for cure.
- (h) The vacating or abandonment of the Premises by Tenant at any time during the Term of this Lease or closing the Premises as a restaurant for a period in excess of seven (7) days unless such closing is for the purpose of renovation, repair or permitted alterations and further provided that such renovation, repair or permitted alterations are completed and the store is re-opened within thirty (30) days.
- (i) The occurrence of any other event described as constituting an "Event of Default" elsewhere in this Lease, including the late or incomplete payment of Rentals.

## Remedies

(1) Upon the occurrence and continuance of an Event of Default, Landlord, without notice to Tenant in any instance (except where expressly provided for below) may do any one or more of the following:

With such judicial process as may be required by law, enter the Premises and take possession of any and all goods, inventory, equipment, fixtures and all other personal property of Tenant situated in the Premises without liability for trespass or conversion, and may sell all or any part thereof at public or private sale. Tenant agrees that five (5) days notice of any public sale and (5) days prior notice of the date after which any private sale shall be held shall constitute reasonable notice. The proceeds of any such sale shall be applied, first, to the payment of all costs and expenses of conducting the sale or caring for or storing said property, including all attorneys' fees; second, toward the payment of any indebtedness, including (without limitation) indebtedness for Rental, which maybe or may become due from Tenant to Landlord; and third, to pay the Tenant, on demand in writing, any surplus remaining after all indebtedness of Tenant to Landlord has been fully paid.

- (a) Perform, on behalf and at the expense of Tenant, any obligation of Tenant under this Lease which Tenant has failed to perform and of which Landlord shall have given Tenant notice, the cost of which performance by Landlord, together with interest thereon at the Default Rate from the date of such expenditure, shall be payable by Tenant to Landlord upon demand.
- (b) Elect to terminate Tenant's right of possession of the Premises under this Lease and the tenancy created hereby by giving notice of such election to Tenant, and may reenter the Premises, without the necessity of legal proceedings, if permitted by law, and may remove Tenant and all other persons (if Tenant is still in possession) and property from the Premises, and may store such property in a public warehouse or elsewhere at the cost of and for the account of Tenant without resort to legal process and without Landlord being deemed guilty of trespass or becoming liable for any loss or damage occasioned thereby.
- (d) Exercise any other legal or equitable right or remedy which it may have under this Lease or at law.

(2) Notwithstanding the provisions of clause (b) above and regardless of whether an Event of Default shall have occurred, Landlord may exercise the remedy described in clause (1) (b) without any notice to Tenant if Landlord, in its good faith judgment, believes it would be injured by failure to take rapid action or if the unperformed obligation of Tenant constitutes an emergency. Any costs and expenses incurred by Landlord (including, without limitation, attorneys' fees) in enforcing any of its rights or remedies under this Lease shall be repaid to Landlord by Tenant upon demand.

### 16.3 Damages

If Tenant's right of possession under this Lease is terminated by Landlord pursuant to Section 17.2. Tenant nevertheless shall remain liable for any Rental and damages which may be due or sustained by Landlord and all reasonable costs, fees and expenses including, but not limited to, attorneys' fees, costs and expenses incurred by Landlord in pursuit of its remedies hereunder, or in renting the Premises to others from time to time and additional damages which shall be an amount or amounts equal to the Rental which, but for termination of Tenant's rights of possession under this Lease, would have become due during the remainder of the Term, less the

amount or amounts of rental, if any, which Landlord shall receive during such period from others to whom the Premises may be rented. If this Lease is terminated pursuant to Section 17.2, Landlord may re-let the Premises or any part thereof, alone or together with other premises, for such term or terms (which maybe greater or less than the period which otherwise would have constituted the balance of the Term) and on such terms and conditions (which may include concessions or free rent and alterations of the Premises) as Landlord, in its absolute discretion, may determine, but Landlord shall not be liable for, nor shall Tenant's obligations hereunder be diminished by reason of, any failure by Landlord to re-let the Premises or any failure by Landlord to collect any rent due upon such re-letting.

#### 16.4 Assignment in Bankruptcy

In the event of an assignment by operation of law under the Federal Bankruptcy Code, or any State bankruptcy or insolvency law and Landlord elects not to terminate or is stayed from termination of Tenants rights of possession under this Lease, the assignee shall provided Landlord with adequate assurance of future performance of all of the terms, conditions and covenants of the Lease, which shall include, but which shall not be limited to, assumption of all the terms, covenants and conditions of the Lease by the assignee and the making by the assignee of the following express covenants to Landlord:

- (a) That assignee has sufficient capital to pay the Rental and other charges due under the Lease for the entire Term; and
- (b) That assumption of the Lease by the assignee will not cause Landlord to be in violation or breach of any provision in any other lease, financing agreement or operating agreement relating to the Pier; and
- (c) That such assignment and assumption by the assignee will not substantially disrupt or impair any existing tenant mix in the Pier, or alter the Permitted Use.

### ARTICLE XVII - Subordination and Attornment

#### 17.1 Subordination

Unless a mortgagee from Landlord shall otherwise elect as provided in Section 17.2, Tenant's rights under this Lease are and shall remain subject and subordinate to the operation and effect of:

- (a) any lease of land only or of land and building in a sale-leaseback transaction involving the Premises, or
- (b) any mortgage, deed of trust or other security instrument constituting a mortgage lien upon Landlord's interest in the Premises, and to all modifications, extensions or amendments thereof or advances made thereunder, whether the same shall be in existence at the date hereof or created hereafter, any such lease, mortgage, deed of trust or other security instrument. Tenant's acknowledgment and agreement of subordination provided for in this Section is self-operative and nor further instrument of subordination shall be required; however, Tenant shall execute such further assurances thereof as shall be requisite or as may be requested from time to time by Landlord or a mortgagee from Landlord.

### 17.2 Mortgagee's Unilateral Subordination

If a mortgagee shall so elect by notice to Tenant or by the recording of unilateral declaration of subordination, this Lease and Tenant's rights hereunder shall be superior and prior in right to the mortgage of which such mortgagee has the benefit, with the same force and effect as if this Lease had been executed, delivered and recorded prior to the execution, delivery and recording of such conditions as may be set forth in any such notice or declaration.

### 17.3 Attornment

Tenant hereby agrees that Tenant will recognize as its landlord under this Lease and shall attorn to any person succeeding to the interest of Landlord in respect of the land and the buildings on or in which this apartment is contained upon any foreclosure of any mortgage upon such land or buildings or upon the execution of any deed in lieu of such foreclosure in respect of such mortgage. If requested, Tenant shall execute and deliver an instrument or instruments confirming its attornment as provided for herein; provided, however, that no such mortgagee or successor-in-interest shall be bound by any payment of rent for more than one (1) month in advance, or any amendment or modification of this lease made without the express written consent of such mortgagee.

## ARTICLE XVIII- Notices

### 18.1 Sending of Notices

(1) Any notice, request, demand, approval or consent given or required to be given under this Lease shall

be in writing and shall be deemed to have been given as follows:

- (i) If intended for Landlord, on the third day following the day on which the same shall have been mailed by United States registered or certified mail, return receipt requested, with all postage charges prepaid, addressed to Landlord at 115 U.S. Highway 17 North, Surfside Beach, SC 29575; to which address also Tenant shall timely remit Rental and sales reports.
- (ii) If intended for Tenant, the third day following the day on which the same shall have been mailed by the United States registered or certified mail, return receipt requested, with all postal charges prepaid, addressed to Tenant at the Tenant Notice Address with a copy to the Premises.

(2) Either party may, at any time, change its Notice Address and for the above purposes by sending a

notice to the other party stating the change and setting forth the new address.

### 18.2 Notice to Mortgagees

If any Mortgagee shall notify Tenant that it is the holder of a Mortgage affecting the Premises, no notice, request or demand thereafter sent by Tenant to Landlord shall be effective unless and until a copy of the same shall also be sent to such Mortgagee in the manner prescribed in Section 19.1 and to such address as such Mortgagee shall designate.

## ARTICLE XIX - Quiet Enjoyment

### 19.1 Warranty

Landlord warrants that it has full right and authority to lease the Premises upon the terms and conditions herein set forth; and, subject to the terms hereof, Tenant shall peacefully and quietly hold and enjoy the Premises free of acts or interference of Landlord for the full Term hereof so long as it does not default in the performance of any of its covenants hereunder.

## ARTICLE XX - Miscellaneous

### 20.1 Estoppel Certificates

At any time and from time to time, Tenant will execute, acknowledge and deliver to Landlord and to such mortgagee or other secured party as may be designated by Landlord, a certificate in the form of Schedule "B" (or in such other form and substance satisfactory to Landlord) with respect to the matters required by such party and such other matters relating to this Lease or the status of performance of obligations of the parties hereunder as may be reasonably requested by Landlord. In the event that Tenant fails to provide such certificate within ten (10) days after request therefor by Landlord, Tenant shall be deemed to have approved the contents of any such certificate submitted to Tenant by Landlord and Landlord is hereby authorized to so certify.

### 20.2 Inspections and Access by Landlord

Tenant will permit Landlord, its agents, employees and contractors to enter all parts of the Premises during Tenant's business hours to inspect the same and to enforce or carry out any provisions of this Lease, including any access necessary for the making of any repairs.

### 20.1 Memorandum of Lease

The parties hereby agree that, upon the request of either party, each will execute, acknowledge and deliver a short form or memorandum of this Lease in recordable form. Recording, filing and like charges and any stamp, charge for recording, transfer or other tax shall be paid by the Tenant.

### 20.2 Remedies Cumulative

No reference to any specific right or remedy shall preclude Landlord from exercising any other right or from having any other remedy or from maintaining any action to which it may otherwise be entitled at law or in equity. No failure by Landlord to insist upon the strict performance of any agreement, term, covenant or condition hereof, or to exercise any right or remedy consequent upon a breach thereof and no acceptance of full or partial rent during the continuance of any such breach, shall constitute a waiver of any such breach, agreement, term, covenant or condition.

### 20.3 Successors and Assigns

This Lease and the covenants and conditions herein contained shall inure to the benefit of and be binding upon Landlord, its successors and assigns, and shall be binding upon Tenant, its

successors and assigns and shall inure to the benefit of Tenant and only such assigns of Tenant to whom the assignment of this Lease by Tenant has been consented to by Landlord. Upon any sale or other transfer by Landlord of its interest in the Premises, Landlord shall be relieved of any obligation under this Lease occurring thereafter.

20.4 Compliance with Laws and Regulations

Tenant, at its sole cost and expense, shall comply with and shall cause the Premises to comply with (a) all federal, state, county, municipal and other governmental statutes, laws, rules, orders, regulations, and ordinances affecting the Premises or any part thereof, or the use thereof, and (b) all rules, orders and regulations of the National Board of Fire Underwriters or Landlord's fire insurance rating organization or other bodies exercising similar functions in connection with the prevention of fire or the connection of hazardous conditions which apply to the Premises.

20.5 Captions and Headings

The Article and Section captions and headings are for convenience of reference only and in no way shall be used to construe or modify the provision set forth in this Lease.

20.6 Guarantee of Lease

Tenant shall provide one or more continuing personal guarantors of the performance of Tenant's obligations under this Lease, including all payment obligations. Landlord may approve or disapprove such personal guarantors, and Tenant shall replace any personal guarantor of this Lease who dies, becomes insolvent, or becomes a resident of another State.

20.7 No Joint Venture

Any intention to create a joint venture or partnership relation between the parties hereto is hereby expressly disclaimed. The provisions of this Lease in regard to the payment of Tenant and the acceptance by Landlord of a percentage of Gross Sales of Tenant and others is a reservation for rent for the use of the Premises.

20.8 No Option

The submission of this Lease for examination does not constitute a reservation of or option for the Premises, and this Lease shall become effective only upon execution and delivery hereof by both parties.

20.9 No Modification

This Lease can be modified only by a writing signed by the party against whom the modification is enforceable.

20.10 Severability

If any term or provision, or any portion thereof, of this Lease, or the application thereof to any

person or circumstances shall, to any extent, be invalid or unenforceable, the remainder of this Lease, or the application of such term or provision to persons or circumstances, other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term and provision of this Lease shall be valid and be enforced to the fullest extent permitted by law.

20.11 Third Party Beneficiary

Nothing contained in this Lease shall be construed so as to confer upon any other party the rights of a third party beneficiary except rights contained herein for the benefit of a Mortgagee.

20.12 Corporate Tenants

In the event Tenant is a corporation, Tenant shall submit to Landlord a copy of its corporate resolutions authorizing the execution of the Lease at the time it submits the executed Lease to Landlord.

20.13 Applicable Law

This Lease and the rights and obligations of the parties hereunder shall be construed in accordance with the laws of South Carolina.

20.14 Time of Essence

Time is of the essence of this Lease.

20.15 Performance of Landlord's Obligations by Mortgagee

Tenant shall accept performance of any of Landlord's obligations hereunder by any mortgagee.

20.16 Limitation on Right of Recovery Against Landlord

Tenant acknowledges and agrees that the liability of Landlord under this Lease shall be limited to its interest in the Pier and any judgments rendered against Landlord shall be satisfied solely out of the proceeds of sale of its interest in the Pier. No personal judgment shall lie against Landlord upon extinguishment of its rights in the Pier and any judgments so rendered shall not give rise to any right of execution or levy against Landlord's assets. The provisions hereof shall inure, to Landlord's successors and assigns including any Mortgagee. The foregoing provisions are not intended to relieve Landlord from the performance of any of Landlord's obligations under this Lease, but only to limit the personal liability of Landlord in case of recovery of a judgment against Landlord; nor shall the foregoing be deemed to limit Tenant's rights to obtain injunctive relief or specific performance or to avail itself of any other right or remedy which may be awarded Tenant by law or under this Lease.

20.17 Force Majeure

In the event Landlord or Tenant shall be delayed, hindered or prevented from the performance of any act required hereunder, by reason of governmental restrictions, scarcity of labor or materials, strikes, fire, or any other reasons beyond its control, the performance of such act shall be excused for the period of delay, and the period for the performance of any such act shall be extended for the period necessary to complete performance after the end of the period of such delay. Notwithstanding anything herein contained to the contrary, the provisions of this Section shall not be applicable to Tenant's performance requirements under this Lease, if any, or the obligations of Tenant to pay rent or any other sums, monies, costs, charges or expenses required to be paid by Tenant subsequent to the Commencement Date.

IN WITNESS WHEREOF, the parties hereto, intending to be legally bound hereby, have executed this Lease Agreement in duplicate originals under their respective seals as of the day and year first above written.

LANDLORD:

TOWN OF SURPSIDE BEACH,  
a South Carolina limited municipal corporation

ATTEST/WITNESS:

\_\_\_\_\_  
\_\_\_\_\_

ATTEST/WITNESS:

Jackie Sforios  
Jackie Sforios

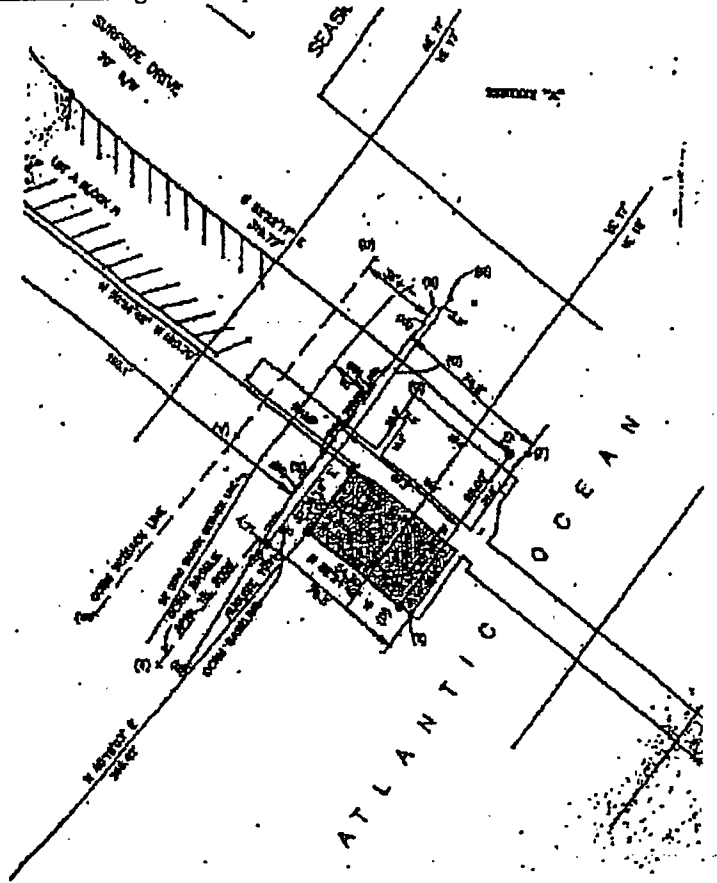
By: Name: Micki Fenner  
Title: Interim Town Administrator

TENANT:  
[Restaurant Operator]

By: J. Sforios  
Its: \_\_\_\_\_

**SCHEDULE "A"**

Drawing of Pier Area and Legal Description



Legal Description of Surfside Beach Pier

ALL AND SINGULAR, that certain piece, parcel, or tract of land situate, lying and being in the Town of Surfside Beach with TMS # 195-04-09-001, 115 HWY 17 N, Lot A Block H, 11 South Ocean Boulevard, Surfside Beach, SC 29575.

SCHEDULE "B"

Tenant's Estoppel Certificate for Surfside Beach Pier

The undersigned, as Tenant under that certain lease (hereinafter called the "Lease") dated \_\_\_\_\_, 20\_\_\_\_, made by and entered into between THE TOWN OF SURFSIDE BEACH, a South Carolina municipal corporation as Landlord/Owner, and \_\_\_\_\_ as Tenant, hereby certifies to \_\_\_\_\_ as of this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ (with the understanding that may rely on such certification) the following:

- (1) That the Lease is in full force and effect and has not been assigned, modified, supplemented or amended in any way subsequent to the Lease execution date, except as indicated on Exhibit A attached hereto and made a part hereof
- That pursuant to the Lease. Tenant has leased approximately \_\_\_\_\_ square feet (the "Premises").
- That the Lease term commenced on \_\_\_\_\_ 20\_\_\_\_ for an initial term of \_\_\_\_\_ years, and is scheduled to expire on \_\_\_\_\_, (subject to the

(2)

(3)

exercise of \_\_\_\_\_ renewal periods of \_\_\_\_\_ years each as set forth in the Lease).

- (4) That the Premises have been completed substantially in accordance with the approved plans and specifications.
- (5) That Tenant has accepted possession of and entered into occupancy of Premises and is in full and complete possession of the Premises.
- (6) That as of the date hereof any improvements or financial contributions required by the terms of the Lease to be made by the Landlord/Owner have been completed to the satisfaction of Tenant.
- (7) That the rent commencement date under the Lease was \_\_\_\_\_, 20\_\_\_\_; and no rent under the Lease has been paid or prepaid more than thirty (30) days in advance of its due date, and all rent payments to be made by Tenant as of the date hereof are current.
- (8) That as of the date hereof, Tenant has no charge, lien or claim of offset under the Lease or otherwise, against rents or other charges due or to become due thereunder.
- (9) That to the knowledge of Tenant, Landlord/Owner is not in any respect in default under The Lease and there are no disputes between Tenant and Landlord/Owner relating to the Lease.
- (10) That there are no actions, voluntary or otherwise, pending against Tenant under the bankruptcy or insolvency laws of the United States or any state thereof
- (11) Tenant security deposits held by Landlord/Owner are \$ \_\_\_\_\_
- (12) That the Lease represents the entire Agreement between the parties as to such leasing.

TENANT:

\_\_\_\_\_

ATTEST:

\_\_\_\_\_

\_\_\_\_\_

By: \_\_\_\_\_

Its: \_\_\_\_\_

## SCHEDULE "C"

### Description of Tenant's Work

The following work is to be done by Tenant at Tenant's expense:

1. Completion of Leased Premises. All work required to complete and place the leased Premises in finished condition for opening for business, except for work specifically described in the Lease as Landlord's work, shall be done by Tenant at Tenant's sole expense.

2. Tenant's Construction. Tenant shall cause

(a) the installation of a new heating and air system at an approximate cost of Fourteen Thousand (\$14,000.00) Dollars,

(b) the installation of new electrical wiring at an approximate cost of Twenty Thousand (\$20,000.00) Dollars,

(c) the installation of new plumbing at an approximate cost of Eleven Thousand (\$11,000.00) Dollars,

(d) installation of a new hood system for the kitchen at an approximate cost of Nineteen Thousand (\$19,000.00) Dollars,

(e) repairs to the roof at approximate cost of Six Thousand (\$6,000.00) Dollars,

(d) installation of new flooring at approximate cost of Five Thousand (\$5,000.00) Dollars,

(e) paint and wall repairs with new sheet rock at approximate cost of Fourteen Thousand (\$14,000.00) Dollars,

(f) a re-do on all kitchen walls at approximate cost of Nine Thousand (\$9,000.00) Dollars,

(g) installation of gas lines at approximate cost of Four Thousand (\$4,000.00) Dollars,

(h) installation of an alarm system at approximate cost of Four Thousand (\$4,000.00) Dollars and

(i) miscellaneous labor at approximate cost of (\$29,000.00) Dollars.

The Tenant shall also install new kitchen equipment, including but not limited to, a walk-in cooler and freezer, all kitchen stainless steel ovens, grills, sinks, dishwashers, kitchen prep tables, décor for dining area, all new plates, silverware, glassware, tables, chairs and other improvements needed to place the leased Premises in finished condition for opening for business. The kitchen equipment, however, shall remain trade fixtures and may be removed upon expiration of the Lease.

**STATE OF SOUTH CAROLINA  
COUNTY OF HORRY  
LEASE GUARANTY**

WHEREAS, THE TOWN OF SURFSIDE BEACH, a South Carolina municipal corporation, hereinafter referred to as "Landlord" and [Restaurant Operator], hereinafter referred to as "Tenant", have simultaneously executed or are about to execute a lease of space within Surfside Beach Pier, hereinafter called the "Lease" wherein Landlord will lease the premises to Tenant; and, WHEREAS, ., hereinafter referred to as "Guarantor" has a financial interest in Tenant, and, WHEREAS, Landlord would not enter into the Lease if Guarantor did not execute and deliver to Landlord this Lease Guaranty,

NOW THEREFORE, for and in consideration of the execution of the foregoing Lease by Landlord and as a material inducement to Landlord to execute said Lease, Guarantor hereby jointly, severally, unconditionally and irrevocably guarantees the prompt payment by Tenant of all rentals and all other sums payable by Tenant under said Lease and the faithful and prompt performance by Tenant of each and every one of the terms, conditions and covenants of said Lease to be kept and performed by Tenant as such are defined in the Lease. It is specifically agreed and understood that the terms of the foregoing Lease may be altered, affected, modified or changed by agreement between Landlord and Tenant, or by a course of conduct, and said Lease may be assigned by Landlord or any assignee of Landlord without consent or notice to Guarantor and that this guaranty shall thereupon and thereafter guarantee the performance of said Lease as so changed, modified, altered or assigned.

This Guaranty shall not be released, modified or affected by failure or delay on the part of Landlord to enforce any of the rights or remedies of the Landlord under said Lease, whether pursuant to the terms thereof or at law or in equity. No notice of default need be given to Guarantor, it being specifically agreed and understood that the guarantee of the undersigned is a continuing guarantee under which Landlord may proceed forthwith and immediately against Tenant or against Guarantor following any breach or default by Tenant or for the enforcement of any rights which Landlord may have as against Tenant pursuant to or under the terms of the within Lease or at law or in equity. Landlord shall have the right to proceed against Guarantor hereunder following any breach or default by Tenant without first proceeding against Tenant and without previous notice to or demand upon either Tenant or Guarantor.

Guarantor hereby waives (a) notice of acceptance of this Guaranty, (b) demand of payment, presentation and protest, (c) all right to assert or plead any statute of limitations as to or relating to this Guaranty and the Lease, (d) any right to require the Landlord to proceed against the Tenant or any other Guarantor or any other person or entity liable to Landlord, (e) any right to require Landlord to apply to any default any security deposit or other security it may hold under this Lease, (1) any right to require Landlord to proceed under any other remedy Landlord may have before

proceeding against Guarantor, (g) any right of subrogation.

Guarantor does hereby subrogate all existing or future indebtedness of Tenant to Guarantor to the obligations owed to Landlord under the Lease and this Guaranty.


The obligations of Tenant under the Lease to execute and deliver estoppel statements and financial statements, as therein provided, shall be deemed to also require the Guarantor to do and provide the same relative to Guarantor.

The term "Landlord" whenever hereinabove used refers to and means the Landlord in the foregoing Lease specifically named and also any assignee of said Landlord, whether by outright assignment or by assignment for security, and also any successor to the interest of said Landlord or of any assignee in such lease or any part thereof, whether by assignment or otherwise. So long as the Landlord's interest in or to the leased premises or the rents, issues and profits therefrom, or in, to or under said lease, are subject to any mortgage or deed of trust or assignment for security, no acquisition by Guarantor of the Landlord's interest in the leased premises or under said Lease shall affect the continuing obligation of Guarantor under this Guaranty, which shall nevertheless continue in full force and effect for the benefit of the mortgagee, beneficiary, trustee or assignee under such mortgage, deed of trust or assignment, of any purchase or sale by judicial foreclosure or under private power of sale, and of the successors and assigns of any such mortgagee, beneficiary, trustee, assignee or purchaser.

The term "Tenant" whenever hereinabove used refers to and means the Tenant in the foregoing Lease specifically named and also any assignee or sublessee of said Lease and also any successor to the interests of said Tenant, assignee or sublessee of such Lease or any part thereof, whether by assignment, sublease or otherwise.

The obligations of the Guarantor hereunder shall include payment to Landlord of all reasonable costs of any successful legal action by Landlord against Guarantor, including reasonable attorney fees.

IN WITNESS WHEREOF, the Guarantor has hereunto caused these presents to be executed this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

  
\_\_\_\_\_  
(SEAL)

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
CIVIL ACTION No. 2011-CP-26-5575

John SIFONIOS, individually and as agent for )  
William REMPFER and Gary SEDLACK, )

Plaintiffs, )

-vs.- )

TOWN OF SURFSIDE BEACH, )

Defendant. )

ANSWER TO COMPLAINT

FILED  
HARRIS COUNTY  
2011 JUL 25 AM 8:07  
MELANIE HUGGINS-WARD  
CLERK OF COURTS

Now comes the Defendant Town of Surfside Beach ("Town"), answering the Complaint of the Plaintiffs as follows:

RULE 12(b)(6) SCRPC

1. The allegations of the Complaint fail to state facts sufficient to constitute a cause of action and the Complaint must accordingly be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure ("SCRPC").

S.C. CODE § 15-78-10 et seq. (SOVEREIGN IMMUNITY)

2. Pursuant to the laws and constitution of the State of South Carolina, the Defendant is immune from suit by the Plaintiffs for the causes of action alleged in the Complaint, and does not waive immunity by responding to this Complaint, and accordingly the Complaint must be dismissed with prejudice.

LACK OF STANDING

3. The first-named Plaintiff lacks standing to bring a Complaint on behalf of the second and third-named Plaintiffs, and accordingly the Complaint must be dismissed with prejudice.

### DECLARATORY JUDGMENT REFUSED

4. Pursuant to S.C. Code § 15-53-70 (Supp. 2010), the Court must refuse to hear the present Complaint or render or enter a declaratory judgment or decree because such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to this proceeding. Accordingly, declaratory relief would not be appropriate in this action.

### GENERAL ANSWER TO ALLEGATIONS OF COMPLAINT

5. Without waiving any prior defense that the Plaintiff's Complaint fails to state a cause of action cognizable at law in South Carolina, that the Plaintiff lacks standing, and that the Defendant is immune from suit, the Defendant answers the Complaint by denying any and all allegations made therein except as may be specifically admitted herein without qualification.

6. The Defendant lacks sufficient knowledge as to the allegations made in ¶1 of the Complaint and accordingly denies the same and demands strict proof thereof.

7. The allegations of ¶2 of the Complaint are admitted.

8. The allegations of ¶3 of the Complaint appear to be a conclusion of law to which no response is required, but to the extent that such allegations also include or may be deemed to require an answer, the same are denied and strict proof demanded thereof.

9. The allegations of ¶4 of the Complaint are admitted.

10. The allegations of ¶5 of the Complaint appear to be a conclusion of law to which no response is required, and accordingly are neither admitted nor denied, but reference is craved to the public records of the laws of the State of South Carolina and the Town of Surfside Beach.

11. The allegations of ¶6 of the Complaint are admitted.

12. The Defendant lacks sufficient knowledge as to the allegations as plead of ¶7 of the Complaint, and accordingly denies the same and demands strict proof thereof.

13. The allegations of ¶8 of the Complaint are denied, and reference is craved to the approved Minutes of the Defendant's Town Council Meeting held on March 04, 2011 as providing the only authentic public document recording the proceedings at such meeting.

14. The allegations of ¶9 of the Complaint are denied, and reference is craved to the approved Minutes of the Defendant's Town Council Meeting held on April 15, 2011 as providing the only authentic public document recording the proceedings at such meeting.

15. The allegations of ¶10 of the Complaint are denied and strict proof demanded thereof.
16. The allegations of ¶11 of the Complaint are denied, and reference is craved to the approved Minutes of the Defendant's Town Council Meeting held on May 10, 2011 as providing the only authentic public document recording the proceedings at such meeting.
17. The allegations of ¶12 of the Complaint are denied and strict proof demanded thereof.
18. The allegations of fact in ¶13 of the Complaint are denied and strict proof demanded thereof, but to the extent that the allegations of ¶13 of the Complaint contain conclusions of law, the same require no responsive pleading, but to the extent that such allegations also include or may be deemed to require an answer, the same are denied and strict proof demanded thereof.
19. The allegations of ¶14 of the Complaint are denied and strict proof demanded thereof.
20. The allegations of ¶15 of the Complaint are denied, as there is no lease agreement between the parties.
21. The allegations of ¶16 of the Complaint are denied, as there is no lease agreement between the parties.
22. The allegations of ¶17 of the Complaint are denied and strict proof demanded thereof.
23. The allegations of ¶18 of the Complaint are denied and strict proof demanded thereof.
24. With respect to the allegations contained in ¶19 of the Complaint, it is admitted that the real estate that is the subject of this action is unique, but denied that the real estate is specific to the Plaintiffs, as the parties have no lease agreement, and further denied that the Plaintiffs are entitled to any relief, be it legal or equitable.
25. The allegations of ¶20 of the Complaint appear to be a conclusion of law to which no response is required, and accordingly are neither admitted nor denied, but reference is craved to the public records of the laws of the State of South Carolina and the Town of Surfside Beach.
26. The allegations of ¶21 of the Complaint are denied and strict proof demanded thereof.
27. The allegations of ¶22 of the Complaint are denied and strict proof demanded thereof.
28. The allegations of ¶23 of the Complaint are denied and strict proof demanded thereof.
29. The allegations of ¶24 of the Complaint are denied and strict proof demanded thereof.
30. The allegations of ¶25 of the Complaint are denied and strict proof demanded thereof.
31. The allegations of ¶26 of the Complaint are denied and strict proof demanded thereof.
32. The allegations of ¶27 of the Complaint are denied and strict proof demanded thereof.

33. The allegations of ¶28 of the Complaint are denied and strict proof demanded thereof.

**FOR SECOND GENERAL DEFENSES**

34. Without waiving any prior defense, the Defendant denies that any contract between the parties came into existence upon which the Plaintiffs may rely to bring this lawsuit.

35. In the alternative, the Defendant denies that the Plaintiffs have suffered any damage cognizable at law, and that all alleged losses to the Plaintiffs are speculative and not subject to redress as a matter of law.

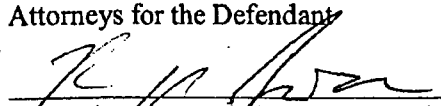
36. All other allegations of the Complaint whether stated or implied are denied and strict proof demanded thereof.

**WHEREFORE**, having fully answered the Complaint of the Plaintiffs, the Defendant prays that the Court dismiss the Complaint with prejudice and award to the Defendant such costs and expenses as may lawfully be awarded against the Plaintiffs for commencing this action.

**Respectfully submitted.**

July 21, 2011

Wright, Worley, Pope, Ekster & Moss, PLLC  
Attorneys for the Defendant

  
Kenneth R. Moss, S.C. Bar No. 15520  
1180 Highway 17 North, Suite 2  
P.O. Box 250  
Little River, South Carolina 29566  
Tel: 843/ 281-9901  
Fax: 843/ 281-9903

Wright, Worley, Pope, Ekster & Moss, PLLC  
File No. SC 4178-009  
Civil Action No. 2011-CP-26-5575

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Paul M. Burch, Presiding Judge

Case No. 11-CP-26-5575

HORRY COUNTY  
13 SEP 17 PM 1:55  
RELAINE PROBERTS-WARD  
CLERK OF COURT

John Sifonios, individually and as agent for William Rempfer  
and Gary Sedlack.....Appellants,

v.

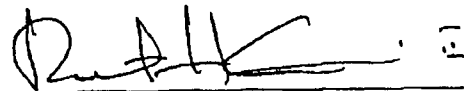
Town of Surfside Beach.....Respondent.

NOTICE OF APPEAL

John Sifonios, individually and as agent for William Rempfer and Gary Sedlack  
appeals the Order Granting Summary Judgment entered July 12, 2013 and the  
Order Denying Appellant Sifonios' Motion to Alter and/or Amend the Order  
Granting Summary Judgment entered August 12, 2013. Both Orders have been  
executed by the Honorable Paul M. Burch, Presiding Judge for Horry County.

Undersigned counsel received written notice of entry of the August 12, 2013  
Order on August 19, 2013. Copies of the Orders and Judgment are attached  
hereto.

September 13, 2013



Robert H. Gwin, III  
4701-A Oleander Drive  
Myrtle Beach, South Carolina 29577  
(843) 839-2239  
Attorney for Appellant

Other Counsel of Record:

Michael W. Battle, Esquire  
P.O. Box 530  
Conway, SC 29528  
(843) 248-4321  
Attorney for Respondent

1 MR. BATTLE: May it please the court. My name is  
2 Michael Battle. And I am the attorney for the Town of  
3 Surfside Beach. we are moving for summary judgment in this  
4 case. The lawsuit is a lawsuit to enforce a contract that  
5 was never signed by the town of Surfside Beach. It  
6 expressly states in the contract that it is not effective  
7 until it is signed by both parties. What I've handed you  
8 is one paragraph from Amdur cite of South Carolina  
9 together with a case it cites that simply says it is not  
10 enforceable unless it is signed, if the parties express  
11 their intent in the contract then it has to be signed  
12 before it is enforceable.

13 And in addition in this particular case there was  
14 nothing done in reliance. The only damages he is seeking  
15 is prospective profits. This is a case where his client  
16 was seeking to enter into an agreement to lease a pier for  
17 several years and there was a letter of intent. The  
18 administrator was authorized to sign the agreement if he  
19 had satisfactory credit references and if he was satisfied  
20 with the credit. The administrator went there and looked  
21 at them, according to the dispute in facts, if there was a  
22 dispute in facts, was they say the administrator was  
23 satisfied and should have signed the lease. The  
24 administrator, and we have got an affidavit that says, no,  
25 it wasn't. And went back to counsel on it and the lease

1 was never signed. The point of this motion for summary  
2 judgment and which there is not dispute is that it was  
3 never signed by the town. Even in his affidavits he  
4 admits it was not signed by the Town or anybody on behalf  
5 of the Town. And based on that law that contract is not  
6 enforceable and he is not entitled to the damages he  
7 seeks, which would be specific performance.

8 THE COURT: Okay. Counsel.

9 MR. GWIN: Your Honor, may I approach?

10 THE COURT: Yes, sir.

11 MR. GWIN: May it please The Court, Robert Gwin  
12 appearing on behalf of the plaintiffs. It is true that  
13 the actual lease was not signed. However I presented to  
14 The Court the affidavits of William Rempfer and Gary  
15 Sedlack. And in the Mr. Rempfer affidavit in the  
16 paragraph five he states that the lease that is the  
17 subject of this litigation was consider at the April 15  
18 meeting of the town counsel. And the minutes -- and in it  
19 was in that meeting which the town council authorized the  
20 administrator to sign the lease subject to the two  
21 conditions precedent. And If I may also approach I've got  
22 copies of the minutes from the town council meeting. The  
23 court will note that those minutes have been signed by all  
24 but one of members of the town council. Under the  
25 Surfside Beach ordinances it is a council form of

1 government. And pursuant to section 5-11-30 of the South  
2 Carolina Code of Laws all legislative administrative  
3 powers of the municipality are vested in the town council.  
4 It is our position that the minutes from the April 15  
5 meeting adequately reference the lease and it specifically  
6 says that is authorized to sign the lease presented by Mr.  
7 John Colleous (ph). We would argue that that is  
8 sufficient signing for the purposes of the lease  
9 agreement. And that the law is that memorandum doesn't  
10 have to be contained in one fully integrated agreement and  
11 that the agreement can be through several instruments.

12 As to the delivery, the law is that manual delivery  
13 is not necessarily necessary. and I would cite 30 South  
14 Carolina jurisprudence under contracts article section 21  
15 and I also reference 17 A Amdur Second contracts section  
16 190. Additionally Lex law dictionary sixth edition  
17 defines delivery as the act by which the rate or substance  
18 there of is placed in the actual constructive possession  
19 or control of another. Black's Law Dictionary also goes  
20 further and says that it is not necessary that the  
21 delivery should be a manual transfer. 17 Amdur Second  
22 Contract says delivery may be by acts without words, words  
23 without acts or both words and acts. And then it says  
24 delivery is a many mixed question of law and in fact  
25 determined by a jury. And that is in 49 Amdur Second

1 landlord and tenant section 31. Basically it's our  
2 position as to the signing of the lease once the minutes  
3 from that April 15th meeting were signed by the council  
4 members, and they are charged by state law as the ones ha  
5 having the state powers, that is a sufficient signing of  
6 the lease agreement. Mr. Rempfer's affidavit also goes on  
7 further to say the minutes were posted on the Town of  
8 Surfside Beach's web site, [www.Surfsidebeach.org](http://www.Surfsidebeach.org). We're  
9 going to argue, one, that once those minutes were posted  
10 in which the town council was -- authorized the  
11 administrator to sign the lease subject to the occurrence  
12 of those two conditions precedent, that was sufficient  
13 delivery.

14 Also in paragraph 7 and 8 in Mr. Rempfer's affidavit  
15 and paragraph 6 and 7 of Mr. Sedlack's affidavit they  
16 attribute statements made to the authoritarian  
17 administrator Mr. Ducket, who was the administrator at the  
18 time of these events, where it says this is everything I  
19 need, everything looks good in one. The second incident  
20 -- conversation they say everything is good to go, give  
21 them whatever they want. We're going to say these words  
22 after the April 15th meeting evidence delivery and the  
23 intent of the parties to be bound by the lease agreement.  
24 Therefore we do believe that's genuine issue as to  
25 material fact as to the signing of the lease agreement and

1 as to the delivery there of.

2 THE COURT: Anything further?.

3 MR. BATTLE: Yes, sir if may. Let me -- if I may,  
4 approach the bench again. The purpose in these provisions  
5 is to prevent exactly the kind of dispute that we have  
6 right now as to whether or not it becomes enforceable.  
7 That's the language we're talking about. And I would like  
8 to read from you the minutes -- a quote from the, Mr.  
9 Sample says I presume we will reconvene at least be  
10 apprized of the out come of the credit check and the  
11 criminal background check so we are assured that the  
12 tenant is someone who would be a good ambassador to the  
13 town of Surfside Beach. Obviously that language was put  
14 in there so that we're not going to be bound by them  
15 saying we have done something or this and that.

16 The Courts unanimously, that I have found, across the  
17 country say when you have that language in a contract it  
18 is not enforceable until it is signed by both parties.  
19 That is what was -- shows the intent of the parties. You  
20 even have the case in there from Judge Littlejohn where  
21 the people actually performed in reliance, but it wasn't  
22 signed by one of parties. And the Supreme Court held that  
23 case -- that contract was not enforceable because it was  
24 not signed by all parties. And it was the intent of the  
25 parties that it be signed before it becomes enforceable

1 because not all of the terms were agreed to and were not  
2 -- that is one of the main terms

3 THE COURT: Anything else?

4 MR. GWIN: Yes, Your Honor, I would just argue that  
5 the comment was dicta. Also the town administrator was  
6 the power to determine whether or not the conditions  
7 precedent were met were delegated to the town  
8 administrator. And the town just determined to bring the  
9 report back. And his statements that everything looks  
10 good, it wasn't -- he didn't make the statements I have to  
11 take this back to counsel. He indicated his consent to  
12 their qualification in those conversations and therefore  
13 there is questions of fact.

14 THE COURT: All right. Can I ask for proposed orders  
15 within fifteen days and give us a chance to look this  
16 over.

17 MR. BATTLE: Yes, Your Honor.

18 MR. GWIN: Thank you, Your Honor.

19

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STATE OF SOUTH CAROLINA  
COUNTY OF HORRY

John Sifonios, individually and as agent for  
William Rempfer and Gary Sedlack,

Plaintiff,

vs.

Town of Surfside Beach,

Defendants.

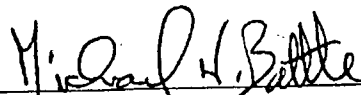
FOR THE FIFTEENTH JUDICIAL CIRCUIT  
IN THE COURT OF COMMON PLEAS  
CASE NO.: 2011-CP-26-5575

**MOTION FOR SUMMARY  
JUDGMENT**

FILED  
HARRIS COUNTY  
2013 FEB 15 AM 11:00  
CLERK OF COURT  
CLARE HARRIS-WARD

**TO: PLAINTIFFS AND THEIR ATTORNEY ROBERT H. GWIN, III**

**PLEASE TAKE NOTICE** that Defendant Town of Surfside Beach, by and through its undersigned attorneys, moves and will move, not sooner than ten (10) days after service hereof, at such time and place as the Court may schedule, for summary judgment pursuant to Rule 56, SCRPC, against Plaintiff on the grounds that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. This Motion is based on the Pleadings, Affidavits, prior Court rulings, discovery responses, and such other and further matter as the Court deems just and proper.

  
MICHAEL W. BATTLE  
BATTLE & VAUGHT, P.A.  
PO Box 530  
Conway, SC 29528  
(843)248-4321  
Attorney for Defendants

February 15, 2013  
Conway, SC

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

John Sifonios, individually and as )  
agent for William Rempfer and )  
Gary Sedlack, )

Plaintiffs, )

vs. )

Town of Surfside Beach, )

Defendant. )

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
CASE NO.: 2011-CP-26-5575

FILED

**PLAINTIFFS RULE 59 MOTION  
TO ALTER AND/OR AMEND JUDGMENT**

HORRY COUNTY  
13 JUL 25 PM 12 11  
CLERK OF COURT

**INTRODUCTION**

Pursuant to Rule 59 S.C.R.C.P. , the Plaintiff John Sifonios, individually and as agent for William Rempfer and Gary Sedlack, moves for an Order of the Court to Alter or Amend the Order granting Summary Judgment for Defendant Town of Surfside Beach (the "Summary Judgment Order"). The Summary Judgment Order was served by mail on the undersigned on July 12, 2013 and received by the undersigned on July 15, 2013.

In the Summary Judgment Order, the Court ruled

"Even when construing in Plaintiff's favor all of the factual disputes about whether the Town Administrator was satisfied with the Plaintiff's credit worthiness or Plaintiff's background check, the undisputed fact remains that the Town did not execute or deliver the lease agreement to Plaintiff. The pier restaurant lease is not enforceable against the Town and summary judgment hereby is granted to the Town of Surfside Beach".

This Motion is made pursuant to Rule 59 of the S.C.R.C.P. and the Plaintiff requests the Court to make express rulings as to the following:

1. The Court failed to address whether the signing of the April 15, 2011 minutes by the members of the Surfside Beach Town Council in approving the lease constituted sufficient signing;
2. The Court failed to address whether the memoranda of the lease is not required to be contained in one document, but permits the essential contractual terms including the signatures to

be gathered from several writings which are connected either expressly or through internal evidence of the subject matter in question;

3. The Court failed to address whether manual delivery of the executed lease was required under the terms of the lease agreement;

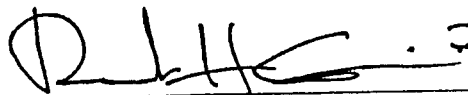
4. The Court failed to address whether the posting of the April 15, 2011 minutes on the website maintained by the Town of Surfside Beach constituted delivery of the Lease Agreement.

Pursuant to Rule 11(a) of the S.C.R.C.P., the undersigned certifies that any consultation with opposing the opposing party to resolve the matter contained in the Motion is not required.

AND WE SO MOVE.

July 25, 2013

Myrtle Beach, SC 29577



Robert H. Gwin, III  
GWIN LAW OFFICE, LLC  
4701-A Oleander Drive  
Myrtle Beach, SC 29577  
(843) 839-2239

Attorney for Plaintiff John Sifonios,  
individually and as agent for William Rempfer  
and Gary Sedlack

STATE OF SOUTH CAROLINA  
COUNTY OF HORRY

John Sifonios, individually and as agent for  
William Rempfer and Gary Sedlack,

Plaintiffs,

vs.

Town of Surfside Beach,

Defendants.

FOR THE FIFTEENTH JUDICIAL CIRCUIT  
IN THE COURT OF COMMON PLEAS  
CASE NO.: 2011-CP-26-5575

**AFFIDAVIT OF JIM DUCKETT**

FILED  
HORRY COUNTY  
2011 FEB 15 AM 11:00  
HILANIE HUGGINS-WARD  
CLERK OF COURT

Personally appeared before me, Jim Duckett, who being duly sworn states:

1. He has personal knowledge of the matters stated herein.
2. At all times relevant to the allegations in the above captioned lawsuit he was the Town Administrator for the Town of Surfside Beach.
3. The lease agreement which the Plaintiff seeks to have enforced in the lawsuit is attached hereto as Exhibit "A."
4. Said lease agreement contains the followings requirements:

a. 20.8 No Option.

The submission of this Lease for examination does not constitute a reservation of or option for the Premises, and this Lease shall become effective only upon execution and delivery hereof by both parties.


b. 20.9 No Modification.

This Lease can be modified only by a writing signed by the party against whom the modification is enforceable.

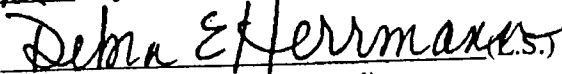
5. Said lease agreement was not signed or delivered by him to the Plaintiff.

*[Handwritten signature]*  
*[Handwritten initials]*

6. He was not authorized by the Town Council to sign and deliver said lease agreement to the Plaintiff.
7. Said lease agreement never became effective according to its own terms and provisions.

  
Jim Duckett, Former Town Administrator  
Town of Surfside Beach

SWORN to before me this  
12 day of February, 2013

  
Notary Public for South Carolina  
My Commission Expires: 03-30-2014

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
CASE NO.: 2011-CP-26-5575

John Sifonios, individually and as )  
agent for William Rempfer and )  
Gary Sedlack, )

Plaintiff, )

**AFFIDAVIT IN OPPOSITION TO DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT**

vs. )

Town of Surfside Beach, )  
 )  
Defendant. )

FILED  
HARRIS COUNTY  
2013 MAY 15 PM 1:00  
MELANIE HUGHES-AYERS  
CLERK OF COURT

I, THE UNDERSIGNED WILLIAM REMPFER, AFTER BEING DULY SWORN,  
DEPOSES AND STATES AS FOLLOWS:

1. I am the William Rempfer referenced in the caption to this action and am familiar with the lease negotiations referenced in the Complaint.

2. I initiated the lease negotiations for the restaurant located on the Surfside Beach Pier and directed James Cole, a local real estate agent, to enter into those negotiations on my behalf. Mr. Cole thereupon contacted John Draughn who was the real estate agent representing the Town of Surfside Beach in attempting to locate a tenant for the Surfside Beach Pier Restaurant. During the initial lease negotiations, I had multiple conversations with several members of the Surfside Beach Town Council concerning the Surfside Beach Pier Restaurant and my involvement in the lease negotiations and ultimately, ownership of the restaurant. For example, our initial offer sought a fifteen (15) year term for the lease. One of these Council Members contacted me and advised me that the fifteen (15) year term was obstructing the completion of the lease negotiations. I therefore directed James Cole to revise our offer as set forth in the

Letter of Intent referenced in the March 4, 2011 Minutes of the Town Council Special Council Meeting (herein "Letter of Intent").

3. The Letter of Intent sets forth that:

The Lessee is comprised of individuals residing in the Town of Surfside Beach, South Carolina, with credit scores of 750+ and a minimum of \$100,000 Dollars of operation capital with bank references. At such time upon a meeting of the minds, the individuals plan to form a corporation for the operation of a restaurant at the space. Although the individuals did not wish their identities to be made public at this moment, they will, at the Owner's request, pending an execution of an agreement of confidentiality.

Although the Town of Surfside Beach never made the request for disclosure of the owners identity, it was common knowledge in the Town of Surfside Beach that I, William Rempfer, was involved as part of the proposed Tenant.

4. After the Surfside Beach Town Council accepted the Letter of Intent, negotiations commenced toward the preparation of a Lease Agreement. Eventually, the undersigned, together with Gary Sedlack, and the Town of Surfside Beach reached an acceptable Lease Agreement which was to be submitted to the Town Council at its April 15, 2011 meeting. John Draughn, on behalf of the Town of Surfside Beach, directed that the Lease Agreement must be signed at the time it was submitted to the Town Council. I still did not want my identity to be disclosed publicly and voiced my concern. I was told that the restaurant operator needed to sign the Lease Agreement prior to its submission to Town Council. Because the plan from the beginning of the negotiations was for John Sifonios to operate the restaurant and for me (William Rempfer) and Gary Sedlack to be the financial backers of the restaurant venture, John Sifonios signed the Lease Agreement as requested by the Town of Surfside Beach.

5. The Town Council, on April 15, 2011, approved the Lease, conditioned upon the Town Administrator approving the prospective tenants credit worthiness and a satisfactory background check. The Town Council, at that meeting, delivered the Lease to the Town Administrator, subject to the satisfaction of the referenced conditions. Thereafter, the Town

posted the Minutes of its April 15, 2013 meeting, signed by the town council members, on its website, [www.surfsidebeach.org](http://www.surfsidebeach.org).

6. When the public became aware that John Sifonios had filed bankruptcy in the state of New Jersey, Gary Sedlack and I met with James Duckett, the Town Administrator, the attorneys for the Town of Surfside Beach, John Draughn, James Cole, and our attorney on April 19, 2011. At that time, I reiterated my intent to financially guarantee the obligations under the lease and the plan to form a corporation for the purpose of operating the restaurant. I previously provided the Town of Surfside Beach a credit reference from Crescent Bank. At that meeting, I was questioned as to the timing of the formation of the corporation and was urged to form that corporation as quickly as possible. At that time, I agreed to meet with James Duckett the following morning and provide him my credit report.

7. On the morning of April 20, 2011, I met with Mr. Duckett, James Cole and Gary Sedlack at DeFalco's Towing and Automotive Service. At that time, I provided Mr. Duckett my credit report and the credit report of Gary Sedlack. Mr. Duckett at that time said "This is everything I need" and "Everything looks good". At that time, he indicated his satisfaction with the financial data and would be in touch with me. Previously, I had provided the information necessary to conduct a background check and Mr. Duckett advised me that the background check also was acceptable.

8. The next day, Gary Sedlack and I met with Jackie Donovan in her office. At that time, Jackie Donovan was acting as the Building Director for the Town of Surfside Beach. We were discussing the proposed remodeling of the restaurant premises. During the course of that meeting, James Duckett entered the room and told Jackie Donovan to "give them anything that they want; they are good to go".

9. The conditions for the acceptance of the Lease Agreement by the Town of Surfside Beach as expressed at its April 15, 2011 meeting were completed prior to the action undertaken by the Town Council at its May 10, 2011 meeting. There now exists a valid Lease between the Town of Surfside Beach as Landlord and John Sifonios, Gary Sedlack, and myself, as Tenant. The conditions established in the April 15, 2011 meeting of the Town Council for Surfside Beach have been met and the statements made by James Duckett on April 20, 2011 and April 21, 2011 evidenced delivery of the Lease and the intention of the Town of Surfside Beach to be bound by the Lease.

FURTHER, THE AFFIANT SAYETH NOT.

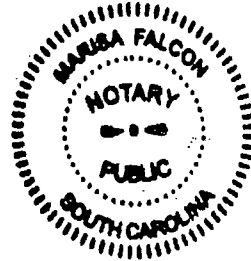


William Rempfer

SWORN TO BEFORE ME this 9<sup>th</sup>  
day of May, 2013.

Marisa Falcon  
Notary Public for South Carolina

My Commission Expires: 1-7-18



STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF HORRY )  
 )  
 John Sifonios, individually and as )  
 agent for William Rempfer and )  
 Gary Sedlack, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 Town of Surfside Beach, )  
 )  
 Defendant. )

IN THE COURT OF COMMON PLEAS  
 FIFTEENTH JUDICIAL CIRCUIT  
 CASE NO.: 2011-CP-26-5575

**AFFIDAVIT IN OPPOSITION TO DEFENDANT'S  
 MOTION FOR SUMMARY JUDGMENT**

FILED  
 Horry County  
 2013 MAY 15 PM 1:01  
 MELANIE AUGGHS WARD  
 CLERK OF COURT

I, THE UNDERSIGNED GARY SEDLACK, AFTER BEING DULY SWORN,  
 DEPOSES AND STATES AS FOLLOWS:

1. I am the Gary Sedlack referenced in the caption to this action and am familiar with the lease negotiations referenced in the Complaint.

2. The Letter of Intent sets forth that:

The Lessee is comprised of individuals residing in the Town of Surfside Beach, South Carolina, with credit scores of 750+ and a minimum of \$100,000 Dollars of operation capital with bank references. At such time upon a meeting of the minds, the individuals plan to form a corporation for the operation of a restaurant at the space. Although the individuals did not wish their identities to be made public at this moment, they will, at the Owner's request, pending an execution of an agreement of confidentiality.

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3. After the Surfside Beach Town Council accepted the Letter of Intent, negotiations commenced toward the preparation of a Lease Agreement. Eventually, the undersigned, together with William Rempfer, and the Town of Surfside Beach reached an acceptable Lease Agreement which was to be submitted to the Town Council at its April 15, 2011 meeting. John Draughn, on

7  
behalf of the Town of Surfside Beach, directed that the Lease Agreement must be signed at the time it was submitted to the Town Council. I still did not want my identity to be disclosed publicly and voiced my concern. I, as well as William Rempfer, was told that the restaurant operator needed to sign the Lease Agreement prior to its submission to Town Council. Because the plan from the beginning of the negotiations was for John Sifonios to operate the restaurant and for me (Gary Sedlack) and William Rempfer to be the financial backers of the restaurant venture, John Sifonios signed the Lease Agreement as requested by the Town of Surfside Beach.

4. The Town Council, on April 15, 2011, approved the Lease, conditioned upon the Town Administrator approving the prospective tenants credit worthiness and a satisfactory background check. The Town Council, at that meeting, delivered the Lease to the Town Administrator, subject to the satisfaction of the referenced conditions.

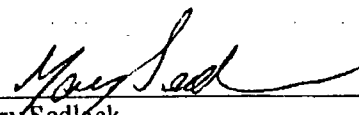
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6. On the morning of April 20, 2011, I met with Mr. Duckett, James Cole and William Rempfer at DeFalco's Towing And Automotive Service. At that time, I provided Mr. Duckett my credit report and the credit report of William Rempfer. Mr. Duckett at that time said "This is everything I need" and "Everything looks good". At that time, he indicated his satisfaction with the financial data and would be in touch with me. Previously, I had provided the information necessary to conduct a background check and Mr. Duckett advised me that the background check also was acceptable.

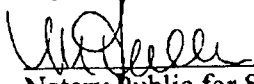
7. On or about April 21, 2011, William Rempfer and I met with Jackie Donovan in her office. At that time, Jackie Donovan was acting as the Building Director for the Town of Surfside Beach. We were discussing the proposed remodeling of the restaurant premises. During the course of that meeting, James Duckett entered the room and told Jackie Donovan to "give them anything that they want; they are good to go".

8. The conditions for the acceptance of the Lease Agreement by the Town of Surfside Beach as expressed at its April 15, 2011 meeting were completed prior to the action undertaken by the Town Council at its May 10, 2011 meeting. There now exists a valid Lease between the Town of Surfside Beach as Landlord and John Sifonios, William Rempfer, and myself, as Tenant. The conditions established in the April 15, 2011 meeting of the Town Council for Surfside Beach have been met and the statements made by James Duckett on April 20, 2011 and April 21, 2011 evidenced delivery of the Lease and the intention of the Town of Surfside Beach to be bound by the Lease.

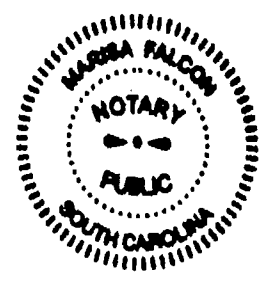
FURTHER, THE AFFIANT SAYETH NOT.

  
\_\_\_\_\_  
Gary Sedjack

SWORN TO BEFORE ME this 9<sup>th</sup>  
day of May, 2013.

  
\_\_\_\_\_  
Marisa Falcon  
Notary Public for South Carolina

My Commission Expires: 1-7-18





TOWN OF SURFSIDE BEACH  
115 US Highway 17 North, Surfside Beach, SC 29575  
Web: [www.surfsidebeach.org](http://www.surfsidebeach.org)  
☎ (843) 913-6111 ☎ (843) 238-5432

**TOWN COUNCIL  
SPECIAL MEETING  
COUNCIL CHAMBERS  
April 15, 2011 8:00 a.m.**

**AGENDA**

1. **CALL TO ORDER**: Mayor Déaton
2. **EXECUTIVE SESSION** - FOIA 30-4-70 (a) (2) Contractual Matter regarding Pier Restaurant
3. **ADJOURNMENT**

Certified true copy of the official minutes of the April 15, 2011 Town Council Special Meeting consisting of the agenda and two pages of minutes.



Debra E. Herrmann, CMC  
Town Clerk



TOWN COUNCIL  
SPECIAL COUNCIL MEETING

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1. **CALL TO ORDER**

Mayor Deaton called the meeting to order at 8:00 AM. Mayor Deaton, Mayor Pro Tem Childs and councilmembers Blair, Smith, Dodge, Samples and Johnson were present. There was a quorum. Staff present: Administrator Duckett; Deputy Administrator, Fellner and Clerk, Pinnell. Attorney Mr. Smith was also present.

Mr. Childs made a motion to go into executive session. Mr. Smith seconded the motion. Mr. Samples asked "are we prepared to discuss coming out of this meeting who the principals are?" Mayor Deaton responded that he assumed that would be taken care of Council comes out with a motion. **All voted in favor. MOTION CARRIED.**

2. **EXECUTIVE SESSION- FOIA 30-4-70 (a) (2) Discuss contractual matter regarding the pier restaurant.**

Mr. Smith made a motion to go back into General Session. Mr. Childs seconded the motion. **All voted in favor. MOTION CARRIED.**

Mayor Deaton stated that Council met in executive session to discuss a contractual matter with the pier restaurant space. Mr. Smith made a motion to authorize the Administrator to enter into the lease agreement tended to the Town by Mr. John Sifonios contingent upon the Town's receipt and acceptance of evidence of one, the prospective tenants credit worthiness, and two, satisfactory background check. Mr. Childs seconded the motion. Mr. Samples asked if he was correct in that "there can be no assignment of this lease without Town Council's prior approval?" Mayor Deaton asked if he wanted confirmation from the Administrator or the attorney. Attorney Mr. Smith stated that this was correct, the lease states "for this lease to be assigned to anybody whether it be an LLC or another individual you would have to have the approval of Council." Mr. Samples "so, Council would have to reconvene and actually take a proactive action." Mr. Smith, "That's right." "There would be a request from the tenant through the Administrator and it would be placed as an agenda item for Council to consider."

*Mr. Childs:* "I believe that this vote will be one of the most important votes that we will cast in this Council. I believe that if we defeat this motion the majority of the people and businesses in this Town will see this as an anti-business vote. This restaurant space is not the only thing at stake. I truly believe if we don't put a restaurant on the pier, the Pier Outfitters and the ice cream shop will suffer because of lack of customers who would frequent the restaurant. The walk-ons on the pier and the use of the parking meters would be minimized. We cannot afford to wait any length of time to fill this space. With the current number of foreclosures and gas prices going up daily we cannot let the pier become a white elephant and receive no income for the Town. After the bidding process failed we are lucky to find a business

52 that is interested. Please look at the big picture of our Town and support this lease for  
53 a restaurant at the pier.”

54  
55 *Mr. Samples:* “It has been a long arduous process, and again, this body bears  
56 responsibility and should be held accountable for the situation that we find ourselves  
57 in. I agree with Councilman Childs that we need to move forward but in my own  
58 mind we created a mess and now we’re trying to fix it. Pending the successful  
59 background checks which are described in the motion; I presume that we will  
60 reconvene or at least be apprised of the outcomes of that credit check and criminal  
61 background checks so that we are assured that the prospective tenant is somebody  
62 who would be a good ambassador for the Town of Surfside Beach.”

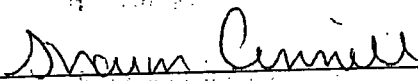
63  
64 *Mr. Johnson:* “I agree with Mr. Samples and I would like to ask our Town  
65 Administrator to at least keep Council apprised of the results of those inquiries,  
66 please.”

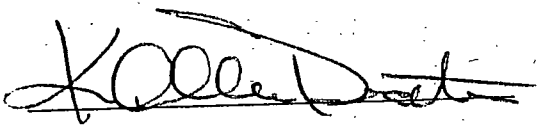
67 All voted in favor. MOTION CARRIED.

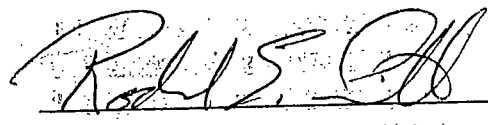
68  
69  
70 **3. ADJOURNMENT**

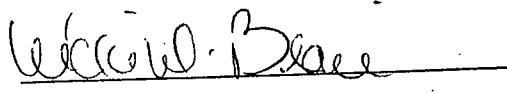
71 Mr. Smith made a motion to adjourn. Mr. Childs seconded the motion. All present  
72 voted in favor. MOTION CARRIED. The meeting was adjourned at 8:46 AM.

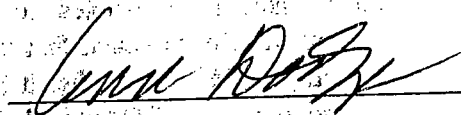
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74 Approved: April 26, 2011

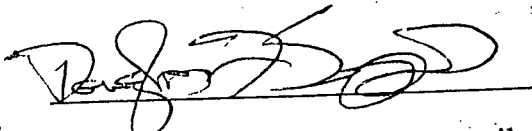
75   
76 Sharon Pinnell, Town Clerk


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81 K. Allen Deaton, Mayor


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83 Roderick E. Smith, Town Council

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87 Vicki W. Blair, Town Council

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89 Ann Dodge, Town Council

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92 Douglas F. Samples, Town Council

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Mark L Johnson, Town Council

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107 Robert F. Childs, III, Mayor Pro Tempore

108 Clerk's Note: This document constitutes minutes of the meeting, which was audio taped. This meeting was transcribed by Clerk Pinnell.  
109 In accordance with FOIA, meeting notice and the agenda were faxed and/or emailed to local media and interested parties. A complete  
110 list is on file in the clerk's office. The agenda was posted on bulletin boards outside Council chambers and in the Town hall reception  
111 area. Meeting notice was also posted on the Town marquee. When (\*\*\*) is used a section of the transcription is inaudible.

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

RECEIVED

JUN 11 2014

Case No. 11-CP-26-5575  
Appellant Case No. 2013-001960

SC Court of Appeals


John Sifonios, individually and as agent for William Rempfer  
and Gary Sedlack.....Appellants,

v.

Town of Surfside Beach.....Respondent.

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.



Robert H. Gwin, III (SC Bar #02367)  
Gwin Law Office, LLC  
5001 N. Kings Highway  
Rainbow Harbor, Suite 210  
Myrtle Beach, South Carolina 29577  
(843) 839-2239  
Attorney for Appellants

June 6, 2014

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 11-CP-26-5575

John Sifonios, individually and as agent for William Rempfer  
and Gary Sedlack.....Appellants,

v.

Town of Surfside Beach.....Respondent.

PROOF OF SERVICE

I hereby certify that I have served the Record on Appeal by depositing  
a copy of it in the United States Mail, postage prepaid, on June 9, 2014, on the  
following Attorney for the Respondent:

Michael W. Battle, Esquire  
P.O. Box 530  
Conway, South Carolina 29528



Robert H. Gwin, III (SC Bar #02367)  
Gwin Law Office, LLC  
5001 N. Kings Hwy.  
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Myrtle Beach, South Carolina 29577  
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June 9, 2014

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