

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master in Equity

Case No. 2013-CP-23-03075

Appellate Case No. 2014-000086

RECEIVED

AUG 19 2014

S.C. Supreme Court

Sherman Financial Group, LLC Petitioner,

v.

FM FRI Greenville, LLC Respondent.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master in Equity

Case No. 2013-CP-23-03075

Sherman Financial Group, LLC.....Appellant,

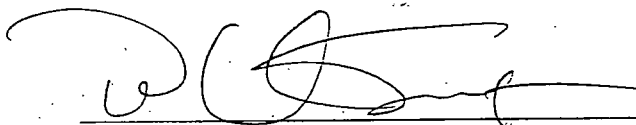
vs.

FM FRI Greenville, LLC.....Respondent.

NOTICE OF APPEAL

Sherman Financial Group, LLC respectfully appeals the order of the Honorable Charles B. Simmons, Jr. dated November 13, 2013, as modified and amended by order filed December 23, 2013 denying Appellant's Motion to Reconsider filed November 15, 2013. Appellant received written notice of entry of the order denying its Motion to Reconsider on December 27, 2013.

January 8, 2014



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master in Equity

Case No. 2013-CP-23-03075

Sherman Financial Group, LLC.....Appellant,

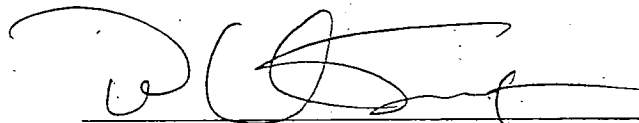
vs.

FM FRI Greenville, LLC.....Respondent.

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RECEIVED

JAN 13 2014

SC Court of Appeals

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master in Equity

Case No. 2013-CP-23-03075

Sherman Financial Group, LLC Appellant,

v.

FM FRI Greenville, LLC Respondent.

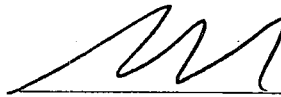
RESPONDENT'S MOTION TO DISMISS APPEAL

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FM FRI Greenville, LLC

Pursuant to Rule 240, SCACR, FM FRI Greenville, LLC, Respondent/Landlord, hereby moves that the above-captioned appeal of Sherman Financial Group, LLC, the Appellant/Tenant, be dismissed for lack of jurisdiction. The Circuit Court's Orders of November 13, 2013 and December 23, 2013, which are the subject of this appeal, are interlocutory orders and are not subject to immediate appeal. The Respondent/Landlord respectfully requests that this Court dismiss this appeal and remand so that the Circuit Court can proceed with the proper administration of this lawsuit. The Respondent/Landlord relies on the authority cited in the accompanying Memorandum of Law filed in support of this motion.

Respectfully Submitted,



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February 4, 2014
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master in Equity

Case No. 2013-CP-23-03075

Sherman Financial Group, LLC Appellant,

v.

FM FRI Greenville, LLC Respondent.

RESPONDENT'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO DISMISS APPEAL

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FACTUAL BACKGROUND

The Notice of Appeal filed in this matter concerns two orders arising out of a lawsuit filed in the Court of Common Pleas for Greenville County by Appellant/Tenant for breach of contract, breach of implied covenant of quiet enjoyment, *quantum meruit*, conversion, violation of the South Carolina Unfair Trade Practices Act, and a claim for injunctive relief. At issue is the interpretation of a certain lease (the "Lease"¹), Respondent/Landlord's right to rent and damages, and Appellant/Tenant's right to a certain unapplied tenant allowance² under the Lease. The Lease requires, among other things, that monthly rent payments be made by Appellant/Tenant to Respondent/Landlord during its term, which is now expired. Specifically, Appellant/Tenant agreed to pay, without any notice, demand, offset or reduction whatsoever, the rent to Respondent/Landlord in equal monthly installments, in advance on the first day of each calendar month, during the term of the Lease. The Lease explicitly mandates that the Appellant/Tenant's duty to pay rent is not subject to offset. See pertinent sections of

¹ The Lease at issue is a May 15, 2003 lease agreement, as amended from time to time, between Appellant/Tenant and Respondent/Landlord's predecessor, DD Greenville, LLC. Respondent/Landlord subsequently acquired the building and assumed the rights of DD Greenville, LLC and its successors under the Lease, as provided in certain agreements pertaining to such transactions.

² Appellant/Tenant never complied with the Lease's condition(s) precedent for recovery of said allowance, and its alleged rights thereto, never exercised, have long expired.

Lease, attached hereto as **Exhibit 1**, § 4.1, p. 12, p. 17 hereto. Failure to pay rent is an event of default. See Exhibit 1, § 9.1(1), p. 54, p. 18 hereto.

On June 11, 2013, Appellant/Tenant filed a motion in the Circuit Court for leave to deposit certain rents with the Circuit Court. Appellant/Tenant's motion indicated that Appellant/Tenant sought leave to deposit with the Circuit Court the amount of its monthly rent obligation until the disputes at issue in the litigation could be resolved. See Motion³, attached hereto as **Exhibit 3**. As this Court will note, Appellant/Tenant contended as part of said motion that it had offset rights, which it had expressly relinquished in the Lease. See Exhibit 3, p. 2, p. 36 hereto ("[c]ontinuing to pay Landlord rent at the same time Landlord owes Tenant over one million dollars [presumably a reference to Appellant/Tenant's unapplied tenant allowance claim], and may be unable to pay Tenant the amounts owed, would prejudice Tenant and is not in the interest of justice.").

At the hearing related to such motion, Appellant/Tenant's counsel conceded that certain rents were due under the Lease from the Appellant/Tenant to the Respondent/Landlord but argued that the Circuit Court had the discretion to direct that such rents be paid into Circuit Court, given the issues presented in the lawsuit. Appellant/Tenant asserted that, among other things, its alleged right to the unapplied tenant allowance, which is one of several ultimate questions to be resolved at trial or summary judgment, somehow deprived Respondent/Landlord of its bargained-for right to rents, immune from offset, during the pendency of this suit. Such position was, and continues to be, in explicit contravention of the Lease. See Exhibit 1, § 4.1, p. 12, p. 17

³ As of June 11, 2013, Appellant/Tenant was in default under the Lease for, *inter alia*, failure to timely pay rent. As such, its May 31, 2013 Verified Complaint was no longer accurate. See Verified Complaint, attached hereto as **Exhibit 2**, ¶ 12, p. 24 hereto ("Tenant is not, and has never been, in default.").

hereto. Respondent/Landlord argued that the rents should be paid directly to Respondent/Landlord during the pendency of this suit, based on, *inter alia*, the Lease, the common law, and S.C. Code Ann. § 27-37-155.

On July 31, 2013, the Circuit Court entered an Order agreeing with Respondent/Landlord and directing Appellant/Tenant to “bring the rent current by making the full payment of both June and July [2013] rent to the Defendant in accordance with the terms of the lease.” See July 31, 2013 Order, attached hereto as **Exhibit 4**⁴, p. 39 hereto. The Order found that “the specific terms of the lease require payment.” The June and July 2013 rent represented the rent due as of July 31, 2013. Appellant/Tenant filed a motion to reconsider. The Circuit Court denied such motion by way of Order dated August 23, 2013. In said Order, the Circuit Court remarked that “[t]he arguments advanced in [Appellant/Tenant’s] Motion to Reconsider suggest that the [Appellant/Tenant] has convoluted and confused the meaning of the Court’s previous Order... The [Appellant/Tenant’s] Motion for Reconsideration is thereby DENIED.” See August 23, 2013 Order, attached hereto as **Exhibit 5**, p. 42 hereto. The Circuit Court indicated that it “made no rulings with respect to the merits of the case” and that the “Order is without prejudice to any party with respect to allocations of an unpaid allowance or a breach under the contract.” See **Exhibit 5**, p. 42 hereto.

On or about September 4, 2013, Respondent/Landlord filed a Motion for Contempt and Sanctions. See Motion, attached hereto as **Exhibit 6**. As a result of said motion, the Circuit Court entered that certain Order dated November 13, 2013, which is one of the orders currently under appeal. A copy of said Order is attached hereto as

⁴ Respondent/Landlord publishes said Order to this Court for review exclusively for purposes of the instant motion and reserves all rights with regard to Appellant/Tenant’s failure to appeal said Order.

Exhibit 7. As this Court will note, the Circuit Court utilized the law of the case doctrine and simply enforced a prior order. The Circuit Court ruled that Appellant/Tenant was required to make payment of June and July rent to Respondent/Landlord in the amount of \$313,757.86 on or before November 15, 2013. See Exhibit 7, p. 3, p. 53 hereto. The Circuit Court expressly held that “[a]ll other issues related to [Respondent/Landlord’s] motion for contempt and sanctions, including [Respondent/Landlord’s] alleged right to additional months’ rent, are held in abeyance and preserved.” See Exhibit 7, p. 3, p. 53 hereto.

On or about November 15, 2013, Appellant/Tenant filed a motion to reconsider the November 13, 2013 Order, which motion was denied by order dated December 23, 2013. The December 23, 2013 Order affirmed the November 13, 2013 Order based on, *inter alia*, the law of the case doctrine and S.C. Code Ann. § 27-37-155. As the Circuit Court expressly noted, “...there is no contempt issue before the Court at this time nor has there been a finding of contempt by the Court relative to [Appellant/Tenant’s] continued nonpayment of rent as directed by Judge Stilwell in his Order filed July 31, 2013. Rather, [Appellant/Tenant] argues the Court exceeded its authority by stating that it could be held in contempt for failure to comply with orders of the Court. Such is simply not the law.” Order, attached hereto as **Exhibit 8**, p. 3, p. 58 hereto.

Appellant/Tenant asks this Court to ignore established precedent and allow an immediate appeal of the Circuit Court’s interlocutory orders, which by their express terms made no rulings with respect to the merits of the case and made no findings whatsoever as to contempt. Such appeal is impermissible and this matter should be immediately remanded to the Circuit Court.

ARGUMENT AND CITATION OF AUTHORITY

I. The Subject Orders Are Interlocutory and Not Immediately Appealable.

The right of appeal arises from and is controlled by statutory law. Hagood v. Sommerville, 362 S.C. 191, 194-95, 607 S.E.2d 707, 708 (2005). An appeal ordinarily may be pursued only after a party has obtained a final judgment. Id. The determination of whether a party may immediately appeal an order issued before or during trial is governed by S.C. Code Ann. § 14-3-330, and an order generally must fall into one of several categories set forth in that statute in order to be immediately appealable. Id. S.C. Code Ann. § 14-3-330 indicates in pertinent part that appellate jurisdiction for correction of errors of law exists for (1) final judgments, (2) intermediate judgments involving the merits, and (3) orders affecting a substantial right. The Orders under appeal fall into none of such categories and this appeal should be immediately remanded.

A. The Orders appealed are not final.

South Carolina adheres to the final judgment rule. Accordingly, with certain exceptions, an appeal lies only from a final judgment. Brunson v. Am. Koyo Bearings, 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct. App. 2005). The Orders appealed are not final, by their express terms. The Orders appealed simply made an award of rent for several months, based on, *inter alia*, the law of the case doctrine, and arose out of prior orders that simply applied the express terms of the Lease. Appeal may only be taken, as provided by law, from any final judgment, appealable order or decision. Rule 201(a), SCACR; see also Rule 72, SCRCR.

B. The Orders do not involve the merits.

“To involve the merits,” pursuant to S.C. Code Ann. § 14-3-330(1), the order must finally determine some substantial matter forming the whole or part of some cause of action or defense. Tatnall v. Gardner, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002), internal citations omitted. An order which does not put a final end to the case, nor establish any principle which will finally affect the merits of the case, nor deprive the party of any benefit which he may have at a final hearing, ought to be considered an interlocutory order, from which no appeal ought to be allowed. Id., internal citations omitted. The Orders at issue, by their explicit terms, do not finally determine some substantial matter, do not end the case and will not affect the Appellant/Tenant’s ability to put on its case as to the unapplied tenant allowance or any other issues in dispute. The Orders are without prejudice as to all claims, counterclaims, and defenses. Accordingly, the Orders do not involve the merits and should be dismissed.

C. The Orders do not involve a substantial right.

An order affects a substantial right and is immediately appealable when it (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action. S.C. Code Ann. § 14-3-330(2). Pursuant to S.C. Code Ann. § 14-3-330(2), this Court may not review an order that does not prevent a judgment from being rendered in the action, and from which an appellant can seek review in any appeal from the final judgment. An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed.

Hagood v. Sommerville, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005). The Orders under appeal do not end the case, do not prevent a final judgment, and could in any event be appealed after such time as an appealable order is entered by the Circuit Court. Accordingly, the Orders under appeal do not involve a substantial right and are subject to dismissal.

D. Dismissal and remand will prevent a piecemeal appeal by Appellant/Tenant.

Further, in this case, dismissal of the Appellant/Tenant's instant appeal would also prevent and discourage the Appellant/Tenant from appealing the orders of the Circuit Court in a piecemeal fashion. For example, if this Court were to immediately substantively review the interlocutory Orders under appeal, affirm them, and remand the matter for disposition, the Appellant/Tenant may, and Respondent/Landlord submits will, still refuse to comply with the November 13, 2013 order requiring the payment of certain rent. The Circuit Court would then presumably enter an order imposing contempt sanctions. The Appellant/Tenant could foreseeably then file a second appeal, complaining that the Circuit Court erred in some manner in imposing the sanctions. This Court would then have to hear the second appeal. Such piecemeal litigation and appeals would not promote judicial economy.

II. Appellant/Tenant Has an Adequate Remedy to Appeal the Order After the Circuit Court Enters a Final, Appealable Order

The South Carolina Supreme Court has recognized that a party compelled to engage in certain actions in an order may preserve its claim of error by refusing to comply with the order, and appealing the contempt order that results from its failure to comply. On January 9, 2014, Respondent/Landlord filed a motion in the Circuit Court

seeking a contempt order based on the November 13, 2013 and December 23, 2013 Orders. See Motion, attached hereto as **Exhibit 9**. As of this writing, the Circuit Court has held such matter in abeyance, based on the Appellant/Tenant's filing of the instant Notice of Appeal, so that this Court can determine whether it will hear the instant appeal, i.e., whether the Orders under appeal are final. The future order that the Circuit Court has stated it will likely enter in this case based on Respondent/Landlord's January 9, 2014 Motion will be a civil contempt order, which will likely result in an appeal. See Appellant/Tenant's counsel's January 28, 2014 letter to Circuit Court memorializing certain of the Circuit Court's present inclinations about future rulings, attached hereto as **Exhibit 10**, p. 84 hereto ("...we understand that ... you are also presently inclined to find Sherman in contempt...").

Instead of appealing an order immediately, a party has two alternatives. It may either comply with the order, or refuse to comply with the order and appeal after it is held in contempt for its failure to comply. This is the same rule applied by the federal courts. See Ex parte Whetstone, 289 S.C. 580, 580, 347 S.E.2d 881, 881-82 (1986) (appeal of order directing a party to participate in discovery deemed interlocutory). Since an order actually holding a party in contempt is final in nature, it is appealable. Tucker v. Honda of S.C. Mfg., Inc., 354 S.C. 574, 577, 582 S.E.2d 405, 406-07 (2003) (citing Ex parte Whetstone).

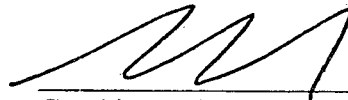
The Supreme Court has established that the Appellant/Tenant will, in fact, have an adequate remedy of appeal when and if Appellant/Tenant is actually held in contempt by the Circuit Court for failure to comply with prior orders, but the current appeal is

premature. Respondent/Landlord respectfully requests that the Court dismiss the appeal and allow this case to proceed in the ordinary course.

CONCLUSION

It is beyond dispute that the Circuit Court's November 13, 2013 and December 23, 2013 Orders are interlocutory and not immediately appealable. Though the Appellant/Tenant disagrees with the Circuit Court's holdings, the Supreme Court has clearly established the choices available to the Appellant/Tenant under these circumstances. It may choose to comply with the order to pay certain rent, or it may continue its non-compliance and appeal a final order making explicit findings as to Appellant/Tenant's contempt of court that will likely be forthcoming from the Circuit Court. The Respondent/Landlord respectfully requests that this Court dismiss the appeal, and allow the Circuit Court to proceed with the proper administration of this case.

Respectfully Submitted,



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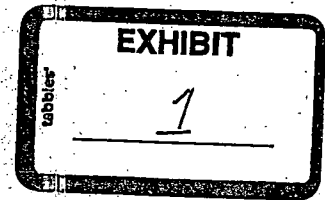
February 4, 2014
Greenville, South Carolina

EXHIBIT 1

Wachovia Plc
Resurgent Capital

LEASE

between



DD GREENVILLE LLC
LANDLORD

and
SHERMAN FINANCIAL GROUP, LLC
TENANT

DATED: May 15, 2003

THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT
TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT SECTION 15-48, ET
SEQ., OF THE CODE OF LAWS OF SOUTH CAROLINA (1976), AS AMENDED.

	commonly known as Wachovia Place.
BUILDING ADDRESS	15 South Main Street, Greenville, SC 29602
NAME & ADDRESS FOR RENTAL REMITTANCE	c/o Insignia/ESG, Inc. 15 South Main Street Suite 900 P.O. Box 1807 Greenville, SC 29602 Attn: Christie Couch
TENANT	Sherman Financial Group, LLC a Delaware limited liability company
TENANT'S ADDRESS	15 South Main Street, Suite 700, Greenville SC 29602
TENANT'S REPRESENTATIVE	Scott Kester
RENTABLE FLOOR AREA OF TENANT'S SPACE	45,527 square feet
TOTAL RENTABLE FLOOR AREA OF THE BUILDING	151,386 square feet
TENANT'S PROPORTIONATE SHARE	Thirty and 07/100 percent (30.07%). Tenant's Proportionate share shall be adjusted, if Tenant leases any additional space in the Building, to equal the ratio of the rentable area of Tenant's Space to the rentable area of the Building.
COMMENCEMENT DATE	December 1, 2003
SCHEDULED EXPIRATION DATE	November 30, 2013
RENT	<u>Base Rent:</u> Sixteen Dollars (\$16.00) per rentable square foot per annum for the 44,065 square feet of Office Space, plus Twelve Dollars (\$12.00) per rentable square foot per annum for the 1,462 square feet of File Storage Space, for a total of Seven Hundred Twenty Two Thousand Five Hundred Eighty Four Dollars (\$722,584) per year, or \$60,215.33

includes
1462 sq ft

	per month. <u>Adjustments to Base Rent:</u> As set forth in Section 4.1, the Base Rent shall be subject to (i) abatement during the one year period from December 1, 2003 to November 30, 2004, and (ii) annual adjustment from and after December 1, 2004. <u>Additional Rent:</u> Operating Cost Escalation pursuant to Section 4.2 and other amounts designated in this Lease as Additional Rent
BASE YEAR	The calendar year 2004, subject to the special provisions of Section 4.2.2(b) regarding real estate taxes.
SECURITY DEPOSIT	NONE
PERMITTED USES	<u>General Office Use</u>
TENANT'S PUBLIC LIABILITY INSURANCE	Commercial General Liability insurance policies or Comprehensive General Liability insurance policies with a Broad Form Comprehensive Liability Endorsement including Contractual Insurance and with a combined single limit of at least \$3,000,000.00 per occurrence on a per location basis, covering death, personal injury and property damage.

3.4 Landlord's Lien Waiver. Landlord hereby expressly waives its statutory lien with respect to Tenant's personal property and trade fixtures with respect to any financing thereof in favor of a lender. Landlord agrees, upon Tenant's request from time to time, to execute and deliver to Tenant's lender, or to the agent representing Tenant's lenders (the "Agent"), in commercially reasonable form and substance a landlord waiver, whereby, among other customary provisions, Landlord acknowledges and consents to the lender's or Agent's liens against Tenant's personalty and fixtures installed by Tenant in the Premises and the priority of the lender's or Agent's interest therein ranking higher than any interest claimed by Landlord therein.

3.5 Representatives. Each party authorizes the other to rely in connection with their respective rights and obligations under this Article III upon approval and other actions on the party's behalf by Landlord's Representative in the case of Landlord or Tenant's Representative in the case of Tenant or by any person designated in substitution thereof or addition thereto by notice to the party so relying.

ARTICLE IV - RENT

4.1 Rent. Tenant agrees to pay, without any notice, demand, offset or reduction whatsoever, to Landlord, the Rent in equal monthly installments as set out in Section 1.1, subject to the adjustments hereinafter set forth, in advance on the first day of each calendar month included in the Term; and for any portion of a calendar month at the beginning or end of the Term, at the rate payable for such portion, in advance. Rent shall consist of: (a) Base Rent, and (b) any Additional Rent identified in this Lease, including but not limited to Operating Cost Escalation as set forth in Section 4.2 and charges for additional services under Section 5.1.

4.1.1 Annual Adjustment. For all periods to and including November 30, 2004, the Base Rent shall be computed at the annual and monthly amounts set forth in Section 1.1. For each succeeding twelve (12) month period during the Term (i.e., commencing December 1, 2004 and continuing until November 30, 2005, after which time the next succeeding annual adjustment shall apply), the annual Base Rent (as the

foreclosure proceedings, if necessary to effect such cure), in which event this Lease shall not be terminated while such remedies are being so diligently pursued.

ARTICLE IX -DEFAULT

9.1 Events of Default. The occurrence of any of the following events if not remedied within the allotted time period, if any, hereinafter provided shall constitute an Event of Default by Tenant under this Lease: (1) Failure of Tenant to pay any regularly recurrent component of Rent on the due date for payment, and the continuation of such failure for more than ten (10) days after notice (provided, however, such notice and such grace period shall be required to be provided by Landlord and shall be accorded Tenant, if necessary, only two (2) times during any twelve (12) consecutive month period of the Term, and an Event of Default shall be deemed to have immediately occurred upon the third (3rd) failure by Tenant to make a timely payment as aforesaid within any twelve (12) consecutive month period of the Term, it being intended by the parties hereto that such notice and such grace period shall protect against infrequent unforeseen clerical errors beyond the control of Tenant, and shall not protect against Tenant's lack of diligence or planning in connection with its obligations to make timely payment of regularly recurrent components of Rent); (2) Failure of Tenant to pay any other component of Rent on the due date for payment or any other charge or sum to be paid to Landlord by Tenant when invoiced therefor, and the continuation of such failure for more than thirty (30) days after notice for any other monetary failure; (3) Failure by Tenant to comply with any of the rules, regulations, agreements, covenants, terms and conditions contained or referred to herein (other than the failure to pay Rent and other sums of money), if not remedied for a period of thirty (30) days following receipt of notice thereof; provided, that in the event a default or breach is not reasonably susceptible of being remedied within such thirty (30) day period, the time permitted Tenant to remedy the default or breach shall be extended for as long as shall be reasonably necessary to remedy same if Tenant commences promptly and proceeds diligently until successful to remedy such default or breach, except that the period for remedying a default or breach shall not be so extended if the extension in Landlord's reasonable judgment may jeopardize the value of the Lot or Building or the interest of

EXHIBIT 2

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Sherman Financial Group, LLC

Plaintiff(s)

vs.

FM FRI Greenville, LLC,

Defendant(s)

Submitted By: Steven E. Farrar

Address: Smith Moore Leatherwood LLP, P.O. Box 87,
Greenville, SC 29602

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2013-CP - 23-03075

SC Bar #: 1960
Telephone #: 864-240-2433
Fax #: 864-240-2498
Other: 864-242-6440
E-mail:

steve.farrar@smithmoorellaw.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

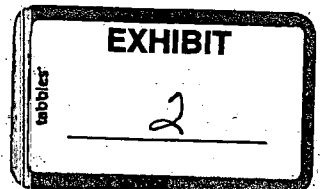
- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|--|---|--|
| Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☒ Breach of Contract (140)
☐ Other (199) | Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20 -CP-
☐ Notice/ File Med Mal (230)
☐ Other (299) | Torts - Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399) | Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) |
| Inmate Petitions
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | Administrative Law/Relief
☐ Reinstate Drv. License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899) | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Confession of Judgment (770)
☐ Petition for Workers Compensation Settlement Approval (780)
☐ Other (799) | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOJ (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Comm. (990)
☐ Employment Security Comm (991)
☐ Other (999) |
| Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in an Out-of-County Action (660)
☐ Sexual Predator (510) | | |

Submitting Party Signature:

Date: 5/31/13



Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq. 024

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

2013 MAY 31 A 9 34

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSHIER

Sherman Financial Group, LLC,)
Plaintiff,)

-vs-

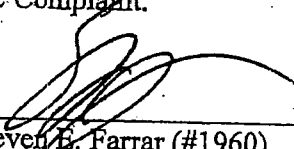
FM FRI Greenville, LLC,)
Defendant.)

SUMMONS

C.A. No. 2013-CP-23- 03075

TO: THE DEFENDANT NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the undersigned at his office, 300 East McBee Avenue, Suite 500, Greenville, South Carolina, 29601, within thirty (30) days after the service hereof, exclusive of the day of such service. If you fail to answer the Complaint within the time aforesaid, judgment by default will be taken against you for the relief demanded in the Complaint.


Steven E. Farrar (#1960)
William B. Swent (#13519)
Jason D. Maertens (#73583)
Smith Moore Leatherwood LLP
300 East McBee Avenue, Suite 500 (29601)
Post Office Box 87
Greenville, SC 29602
(864) 242-6440
(864) 240-2498 (fax)
steve.farrar@smithmoorelaw.com
william.swent@smithmoorelaw.com
jason.maertens@smithmoorelaw.com
Attorneys for Plaintiff

May 31, 2013

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

Sherman Financial Group, LLC,)

Plaintiff,)

-vs-)

FM FRI Greenville, LLC,)

Defendant.)

VERIFIED COMPLAINT
(Temporary Restraining Order)
(Temporary Injunction)
(Permanent Injunction)
(Damages)

C.A. No. 2013-CP-23-03075

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER

2013 MAY 31 A 9:34

Plaintiff Sherman Financial Group, LLC ("Plaintiff" or "Tenant"), complaining of defendant FM FRI Greenville, LLC ("Defendant" or "Landlord"), respectfully shows as follows:

PARTIES

1. Tenant is a Delaware limited liability company leasing in excess of 80,000 square feet of office space (the "Premises") located within that certain building now known as the Wells Fargo Building, and formerly known as Wachovia Place, and having a building address of 15 South Main Street, Greenville, South Carolina (the "Building").

2. Landlord is a Delaware limited liability company leasing the Premises to Tenant.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this matter.

4. This Court has jurisdiction over these parties.

5. Venue is proper in this jurisdiction in accordance with Section 15-7-30 of the South Carolina Code of Laws and South Carolina law.

FACTUAL ALLEGATIONS

6. Landlord owes Tenant in excess of one million one hundred eighty thousand dollars under the Lease (the "Unpaid Allowance").
7. On May 15, 2013, Tenant demanded Landlord pay the Unpaid Allowance.
8. In response, on May 24, 2013, in an apparent attempt to avoid its Unpaid Allowance obligations, Landlord improperly pronounced Tenant in default, alleging Tenant had "abandoned" the Premises. A copy of the May 24, 2013 letter from Landlord's counsel is attached hereto as Exhibit A.
9. To compound matters, Landlord declared that on or about June 1, 2013, Landlord will enter and demolish the Premises in order to prepare it to be leased to prospective tenants. Landlord also threatened to dispose of Tenant's personal property.
10. Landlord's claim that Tenant is in default because it "abandoned" the Premises has no basis in fact or law.
11. Tenant presently possesses and continues to use the Premises for its legitimate business purposes, and is current in the payment of rent to Landlord.
12. Tenant is not, and has never been, in default and Landlord's notice of "default" is illegitimate and constitutes an unwarranted anticipatory repudiation of the Lease.
13. Further, Tenant has not abandoned and has no intention of abandoning the Premises until the Lease term expires, and has so notified Landlord.
14. By its threats to enter the Premises and commence demolition, Landlord has violated not only the terms and conditions of the Lease but also Tenant's rights under South Carolina statute and law.

Lease Agreement

15. On May 15, 2003, Tenant entered into a lease agreement with Landlord's predecessor, DD Greenville, LLC (as heretofore amended, the "Lease"). Landlord subsequently acquired the Building and assumed the rights and obligations of DD Greenville, LLC under the Lease.

16. In exchange for rent payments, Landlord agreed to allow Tenant to lease the Premises and further agreed that Tenant "shall peacefully and quietly have, hold and enjoy the Premises throughout the Term without any manner of hindrance or molestation from Landlord or anyone claiming under Landlord."

17. As of Landlord's declaration of Tenant's alleged default on May 24, 2013, Tenant had paid all rent due and owing to Landlord.

18. The Lease term does not expire until November 2013.

19. Tenant has not abandoned the Premises, and does not intend to abandon the Premises, but continues to pay rent and occupies the space with fixtures and other equipment.

20. Tenant further has the right and ability to use the space, including but not limited to expanding its operations into the space, if necessary, or subleasing the space pursuant to the terms of the Lease.

Unpaid Allowance

21. Under the Lease, Landlord agreed to provide Tenant an allowance of \$20.00 per square foot of rentable office space that would be paid by Landlord against Tenant's "Qualifying Expenditures."

22. The term "Qualifying Expenditures" is defined in the Lease to mean "(i) Tenant's Architectural and Engineering fees for the Plans, (ii) Tenant's construction management fees,

(iii) Tenant's cost of constructing the Tenant Improvements, including filing and permit fees and fees payable to construction consultants, and (iv) Tenant's cost of acquiring and installing all of Tenant's signage..."

23. Acknowledging that the initial premises included 44,065 rentable square feet of office space, the parties initially stipulated that \$881,300.00 would be payable by Landlord in the name of the "Allowance."

24. Through various amendments, Landlord and Tenant added more rentable square feet of office space such that the Premises now includes in excess of 80,000 square feet.

25. Based on these additions to the Premises, the total allowance Landlord owes Tenant is \$1,187,109.05.

26. Tenant has demanded payment of the Unpaid Allowance.

27. Rather than paying the Unpaid Allowance to Tenant, Landlord fabricated its claim that Tenant "abandoned" the Premises, which is unsupported by the Lease, fact, or law, and done only in an attempt by Landlord to avoid its obligations to Tenant.

FIRST CAUSE OF ACTION
(Breach of Contract)

28. The above paragraphs are incorporated herein by reference.

29. Tenant and Landlord entered into the Lease, which is a valid and binding contract whereby Tenant agreed to pay rent and, in exchange, Landlord promised to lease the Premises to Tenant and further agreed, among other things, that Tenant "shall peacefully and quietly have, hold and enjoy the Premises throughout the Term without any manner of hindrance or molestation from Landlord or anyone claiming under Landlord."

30. Tenant has satisfied all of its obligations under the Lease, and is current in the payment of rent to Landlord.

31. Landlord breached the Lease by, among other things, not paying the Unpaid Allowance and by threatening to enter and demolish the Premises and prepare space for another tenant and dispose of Tenant's personal property.

32. As a direct and proximate result of this breach, Tenant has been damaged and is entitled to the total Unpaid Allowance, plus interest, the injunctive relief sought elsewhere in this Complaint, and any and all other damages arising from Landlord's breach of contract, including attorney's fees and costs.

SECOND CAUSE OF ACTION
(Breach of Implied Covenant of Quiet Enjoyment)

33. The above paragraphs are incorporated herein by reference.

34. Tenant is entitled to the quiet and peaceable possession and enjoyment of the leased Premises.

35. Landlord has breached this covenant by threatening to enter and demolish the Premises and by threatening to dispose of Tenant's personal property.

36. As a direct and proximate result of this breach, Tenant has been damaged and is entitled to the injunctive relief sought elsewhere in this Complaint, as well as any and all damages arising from the breach of covenant.

THIRD CAUSE OF ACTION
(Quantum Meruit/Unjust Enrichment)

37. The above paragraphs are incorporated herein by reference.

38. Landlord has been unjustly enriched in the amount of the Unpaid Allowance.

39. A benefit has been conferred upon Landlord by retaining the Unpaid Allowance owed to Tenant.

40. Landlord has realized that benefit, and the retention of the Unpaid Allowance by Landlord under the conditions make it unjust to retain it without paying its value.

41. Tenant has been damaged by Landlord's retention of the Unpaid Allowance, and is entitled to all damages arising from same, including but not limited to the amount of the Unpaid Allowance, plus interest.

FOURTH CAUSE OF ACTION
(Conversion)

42. The above paragraphs are incorporated herein by reference.

43. Tenant has an interest in the Unpaid Allowance.

44. Tenant has made demand for payment of the Unpaid Allowance.

45. Landlord has converted the Unpaid Allowance to its own use.

46. The use of the Unpaid Allowance is without Tenant's permission or authorization.

47. Tenant has been damaged by Landlord's conversion, and is entitled to all damages arising from the conversion, including but not limited to the amount of the Unpaid Allowance, plus interest, as well as punitive damages for Landlord's intentional, reckless, or indifference to Tenant's rights.

FIFTH CAUSE OF ACTION
(Violation of the South Carolina Unfair Trade Practices Act)

48. The above paragraphs are incorporated herein by reference.

49. By refusing to pay amounts owed under the Lease Agreement, and by threatening this Tenant with interference of the Premises, Landlord has committed a violation of the South Carolina Unfair Trade Practices Act, S.C. Code § 39-5-10, *et seq.* ("UTPA").

50. Landlord's actions are unlawful trade practices.

51. Landlord's actions have an adverse impact on the public interest and are capable of repetition.

52. As a direct and proximate result of Landlord's unlawful actions, Tenant has been damaged and is entitled to any and all damages arising out of Landlord's unlawful action, including but not limited to all actual and consequential damages, as well as attorney's fees and costs, and treble damages.

SIXTH CAUSE OF ACTION
(Injunctive Relief)

53. The above paragraphs are incorporated herein by reference.

54. As a result of the threat by Landlord to enter and demolish the Premises, and to re-lease the Premises to other potential tenants, Tenant will suffer immediate and irreparable harm by virtue of Landlord's intrusion and interruption.

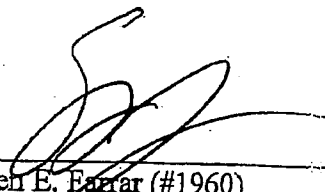
55. Tenant will succeed on the merits in that it is not in default and Landlord unilaterally seeks to evict Tenant without due process and in violation of South Carolina statute and law.

56. Tenant does not have an adequate remedy at law. If Landlord enters the premises on or before June 1, 2013, Tenant will suffer a significant business interruption, will lose the value of its leasehold improvements, will lose the flexibility to use the Premises as needed, and will experience unwanted and unwarranted invasion of its privacy as a result of Landlord's wrongful entry.

57. Therefore, in light of the Landlord's unwarranted and wrongful threat to enter the Premises and demolish the space or dispose of Tenant's personal property prior to the expiration of the lease term, Tenant is entitled to injunctive relief ordering Landlord not to enter the

Premises until the expiration of the lease term, as more fully outlined in Tenant's Motion for Temporary Restraining Order and Temporary Injunction filed concurrently herewith.

WHEREFORE, Tenant prays for all damages that follow as a natural consequence and proximate result of the contract breach, including but not limited to the payment of the Unpaid Allowance, and all actual, special, and consequential damages arising out of any and all of the above causes of action, including attorney's fees and costs, and punitive and treble damages; injunctive relief as more fully set forth in its motion for temporary restraining order and temporary injunction filed concurrently herewith; and such other and further relief that this Court deems just and proper.



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William B. Swent (#13519)
Jason D. Maertens (#73583)
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william.swent@smithmoorelaw.com
jason.maertens@smithmoorelaw.com

Attorneys for Plaintiff

May 31, 2013

EXHIBIT A

(May 24, 2013 Letter)

HAILE SHAW & PFAFFENBERGER

ATTORNEYS AT LAW

North Palm Beach: 660 U.S. Highway One, 3rd Floor, N. Palm Beach, FL 33408
Palm Beach: 249 Royal Palm Way, Suite 301A, Palm Beach, FL 33480
☎ 561.627.8100 ☎ 561.622.7603 ✉ halleshaw.com

May 24, 2013

Via E-mail (william.swent@smithmoorelaw.com)

William Swent, Esquire
Smith Moore Leatherwood LLP
300 East McBee Avenue, Suite 500
Greenville, SC 29601

Re: Sherman Financial Group, LLC ("Tenant") Lease dated May 15, 2003 (as amended, the "Lease") for premises ("Premises") at Wells Fargo Center aka Wachovia Place, Greenville, SC ("Building")

Dear Mr. Swent:

As you know, I represent FM FRI Greenville, LLC. Please be advised that the Tenant is in default under the terms of the Lease for abandoning its Premises prior to the expiration of the Lease term. Pursuant to Section 9.2.1 of the Lease, the Tenant is hereby informed that its possessory right to the Premises shall expire on May 31, 2013. Any personal property of the Tenant remaining at the Premises must be removed by Tenant prior to that date. If the Tenant's personal property is not removed, it will be disposed of at Tenant's cost. Pursuant to Section 9.3.2 of the Lease, the expiration of Tenant's right to possession shall not relieve the Tenant of its liabilities under the Lease including the obligation to pay rent. Accordingly, Tenant must continue to make the required monthly installments of rent.

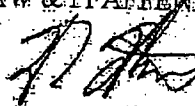
The Landlord specifically reserves all of its rights and remedies available at law and under the Lease including, without limitation, the right to recover certain costs as provided in Section 9.2.2. On or about June 1, 2013, the Landlord intends to commence demolition of the Premises in order to prepare the space for reletting. After completion of the work necessary to ready of Premises for reletting, Landlord shall provide Tenant with an invoice for the cost of such work. Pursuant to Section 9.2.2. of the Lease, the Tenant is responsible for this cost.

The Landlord will be putting together a list of other obligations which have been breached by Tenant (e.g., the disengagement of the FM200 fire suppression system and the failure to remove supplemental HVAC systems and the access control system) and the costs which will likely be incurred by the Landlord to cure such defaults. My client will seek recovery of such costs from the Tenant.

If you have any questions, please do not hesitate to contact me.

Sincerely,

HAILE, SHAW & PFAFFENBERGER, P.A.

By: 

Wilton L. White, Esquire

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
C.A. No. 2013-CP-23- 03075

Sherman Financial Group, LLC,)
Plaintiff,)
-vs-)
FM FRI Greenville, LLC,)
Defendant.)

VERIFICATION

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2013 MAY 31 A 9:34

PERSONALLY APPEARED BEFORE ME this day SCOTT KESTER, who, after being first duly sworn, says that he is the Authorized Representative for Plaintiff Sherman Financial Group, LLC. in the above-entitled action; that he has read the foregoing Complaint and knows the same to be true, except as to those matters and things therein alleged upon information and belief, and as to those matters and things, he believes them to be true.

SHERMAN FINANCIAL GROUP, LLC

By: [Signature]
Scott Kester

Sworn to and subscribed before me this
29th day of May, 2013.

[Signature]
Notary Public for South Carolina
My Commission expires: 8/10/2016

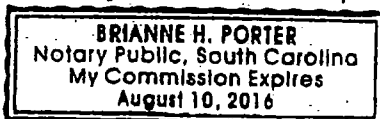
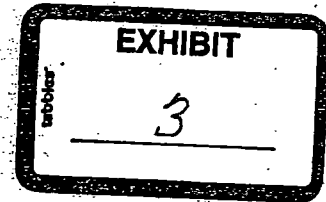


EXHIBIT 3



STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

Sherman Financial Group, LLC,)
Plaintiff,)
-vs-)
FM FRI Greenville, LLC,)
Defendant.)

**MOTION FOR LEAVE TO
DEPOSIT FUNDS WITH COURT**

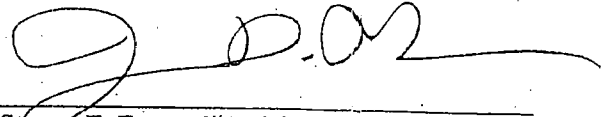
C.A. No. 2013-CP-23-03075

TO: DEFENDANT NAMED ABOVE:

Pursuant to Rule 67 of the South Carolina Rules of Civil Procedure, Plaintiff Sherman Financial Group, LLC ("Plaintiff" or "Tenant") seeks leave to deposit with the Court a sum of money in the amount of Tenant's monthly rent obligation under a lease it has with Defendant FM FRI Greenville, LLC ("Defendant" or "Landlord"). As more fully set forth in Tenant's Verified Complaint and Motion for Temporary Restraining Order and Temporary Injunction, Landlord has wrongfully and unlawfully declared Tenant in default of the Lease, alleging Tenant "abandoned" the Premises. In fact, Tenant is not in default and has not "abandoned" the Premises, but rather continues to use and is in possession of the Premises for its legitimate business purposes. Because Landlord has declared that Tenant is in default, while Tenant believes otherwise, there is a dispute as to whether Tenant is obligated to pay the rent amount to Landlord. Accordingly, Tenant seeks leave to deposit with the Court the amount of Tenant's monthly rent obligation until this dispute can be resolved.

Further, Tenant is seeking to recover from Landlord over one million dollars in an unpaid allowance due to Tenant under the Lease. Landlord has refused to pay the unpaid allowance and

at this stage it is unclear whether Landlord has the ability to pay the unpaid allowance. Continuing to pay Landlord rent at the same time Landlord owes Tenant over one million dollars, and may be unable to pay Tenant the amounts owed, would prejudice Tenant and is not in the interest of justice. Therefore, Tenant also requests leave to deposit with the Court for this reason as well.



Steven E. Farrar (#1960)
William B. Swent (#13519)
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jason.maertens@smithmoorelaw.com

Attorneys for Plaintiff

June 11, 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

Sherman Financial Group, LLC,)
)
Plaintiff,)

-vs-)

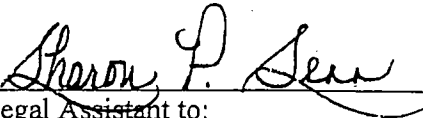
FM FRJ Greenville, LLC,)
)
Defendant.)

CERTIFICATE OF SERVICE

C.A. No. 2013-CP-23-03075

The undersigned certifies that on the 11th day of June, 2013, she caused to be served the **Motion for Leave to Deposit Funds with Court** upon the attorney for Defendant, via email and by depositing in the United States mail, with due and proper postage affixed thereto, copies of the same addressed to:

cbrown@hlblegal.com
Ms. Cynthia Buck Brown
Harper, Lambert & Brown, P.A.
Post Office Box 908
Greenville, SC 29602


Legal Assistant to:
Steven E. Farrar (#1960)
William B. Swent (#13519)
Jason D. Maertens (#73583)
Smith Moore Leatherwood LLP
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steve.farrar@smithmoorelaw.com
william.swent@smithmoorelaw.com
jason.maertens@smithmoorelaw.com

Attorneys for Plaintiff

EXHIBIT 4

FORM 4

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

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP2303075

Sherman Financial Group
LLC

FM FRI Greenville LLC

2013 JUL 31 A 8:24

EXHIBIT

4

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This matter came before the Court pursuant to the Plaintiff's Motion to Deposit Rental Payments into the Court during the pendency of the instant action. Also before the Court were the Defendant's Motions for Ejectment and Modification of the Previously-Issued Restraining Order. The Honorable Gary Hill previously issued a Temporary Restraining Order on May 31, 2013, and subsequently entered a Preliminary Injunction Order on June 24, 2013.

The Plaintiff's Motion to Deposit the Proceeds into the Court is hereby DENIED. This Court recognizes that it is within its discretion to order that funds be deposited into the Court pursuant to Rule 67 of the South Carolina Rules of Civil Procedure and Section 27-37-155 of the South Carolina Code of Laws, 1976, as amended. However, that authority is discretionary, and this Court finds no evidence that either party is insolvent or that there is a likelihood that the monies will be hidden, absconded with or secreted away. The specific terms of the lease require payment, and these parties are obliged to operate under the same until its termination later this year. Having said that, the Plaintiff shall bring the rent current by making the full payment of both June and July rent to the Defendant in accordance with the terms of the lease. The \$152,137.76 shall remain on deposit with the Court as a bond incident to the Temporary Restraining Order.

The Defendant's Motions for Ejectment and Modification of the Court's Previous Order are also DENIED, with the specific qualification as to bond enumerated above. The issue of whether there has been a material breach under the contract is outstanding. That question is appropriately left to a trial on the merits, allowing for a full inspection by the triers of fact.

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

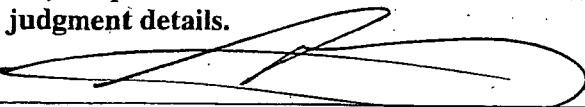
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**



2158

Judge Code

30 JUL 13

Date

Circuit Court Judge

For Clerk of Court Office Use Only

7.31.13

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Steven E. Farrar Smith Moore Leatherwood LLP P.O. Box
87 Greenville, SC 29602

Cynthia Buck Brown Harper, Lambert & Brown, P.A. P.O.
Box 908 Greenville, SC 29602
Calvin Theodore Vick Jr. Harper, Lambert & Brown, P.A.
P.O. Box 908 Greenville, SC 29602
Raymond Patrick Smith Harper, Lambert & Brown, P.A.
P.O. Box 908 Greenville, SC 29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer

Court Reporter

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

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

EXHIBIT 5

(2)

FORM 4

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

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP2303075

Sherman Financial Group
LLC

2013 AUG 23 P 2:40

FM FRI Greenville LLC

EXHIBIT

5

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
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☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

I **ORDERED AND ADJUDGED:** ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This matter comes before the Court pursuant to the Plaintiff's Motion to Reconsider the Court's Order of July 31, 2013. The arguments advanced in the Plaintiff's Motion to Reconsider suggest that the Plaintiff has convoluted and confused the meaning of the Court's previous Order. This Court has made no rulings with respect to the merits of the case and leaves open for a trial on the merits all justiciable issues raised in the parties' pleadings. The Court's Order is without prejudice to any party with respect to allocations of an unpaid allowance or a breach under the contract. Should the Plaintiff need clarification, it should submit a motion asking for specific clarification. The Plaintiff's Motion for Reconsideration is thereby DENIED.

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

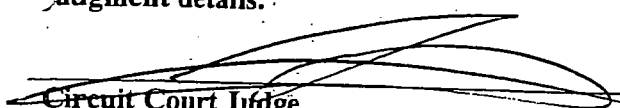
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
If applicable, describe the property, including tax map information and address, referenced in the order:		

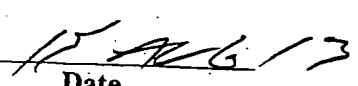
135

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**


Circuit Court Judge

2158

Judge Code


Date

For Clerk of Court Office Use Only

This judgment was entered on 8/23/13, and a copy mailed first class or placed in the appropriate attorney's box on 8/23/13, to attorneys of record or to parties (when appearing pro se) as follows:

Steven E. Farrar Smith Moore Leatherwood LLP P.O. Box
87 Greenville, SC 29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

Cynthia Buck Brown Harper, Lambert & Brown, P.A. P.O.
Box 908 Greenville, SC 29602

~~Calvin Theodore Vick Jr. Harper, Lambert & Brown, P.A.~~
P.O. Box 908 Greenville, SC 29602

~~Raymond Patrick Smith Harper, Lambert & Brown, P.A.~~
P.O. Box 908 Greenville, SC 29602

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

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

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

() This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

EXHIBIT 6

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

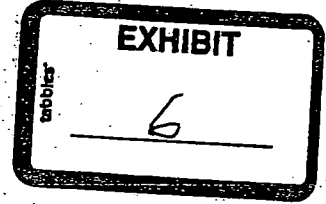
Sherman Financial Group, LLC,)
Plaintiff,)

C.A. No. 2013-CP-23-03075

v.)

FM FRI Greenville, LLC,)
Defendant.)

**NOTICE OF EMERGENCY MOTION AND
EMERGENCY MOTION FOR CONTEMPT
AND SANCTIONS**



FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2013 SEP 4 P 3:55

TO: PLAINTIFF SHERMAN FINANCIAL GROUP, LLC AND ITS COUNSEL:

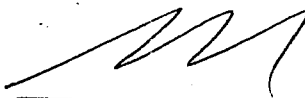
Steven E. Farrar, Esq.
Jason D. Maertens, Esq.
SMITH MOORE LEATHERWOOD LLP
300 East McBee Avenue, Suite 500
Greenville, SC 29601

NOW COMES the Defendant, FM FRI Greenville, LLC ("FM FRI"), at such time as the Court may set but in no event sooner than ten (10) days from the date of filing, by and through its undersigned counsel, which moves the Court pursuant to, *inter alia*, S.C. Code Ann. § 14-5-320, §15-35-180, and SCRCF 70 for an Order holding the Plaintiff, Sherman Financial Group, LLC ("Sherman"), in civil contempt due to its failure to comply with the Court's Order of July 31, 2013 in which Sherman was ordered to "bring the rent current by making the full payment of both June and July rent to the Defendant in accordance with the terms of the lease." Said Order is attached hereto as Exhibit A. As of the date of this filing, Sherman has failed to make payment of June rent, July rent, August rent, and September rent, all of which are past due, while retaining possession of the premises. Sherman was ordered by the Court to "bring the rent current," and has acted and continues to act in contravention of said Order. FM FRI seeks all

remedies available to it under the Court's inherent contempt power, including, without limitation, dismissal of Plaintiff's claims and reply defenses with prejudice, a *per diem* fine for Sherman's non-compliance, and reasonable attorneys' fees and costs.

This motion is supported by the attached Order and state law, whether common or statutory, and any such memorandum and affidavits as may be submitted prior to hearing. Pursuant to Rule 11, SCRPC, counsel for movant certifies that he and/or a member of his firm has consulted with opposing counsel in a good faith attempt to resolve the matters addressed by this motion but was unable to resolve them.

Respectfully submitted,



Cynthia Buck Brown, SC Bar No. 66172

Calvin T. Vick, Jr., SC Bar No. 68187

R. Patrick Smith, SC Bar No. 68270

HARPER, LAMBERT & BROWN, P.A.

PO Box 908

Greenville, SC 29602

PH: 864-235-5535

FAX: 864-235-6866

cbrown@hlblegal.com

psmith@hlblegal.com

Attorneys for Defendant, FM FRI Greenville, LLC

September 4, 2013
Greenville, South Carolina

FORM 4

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

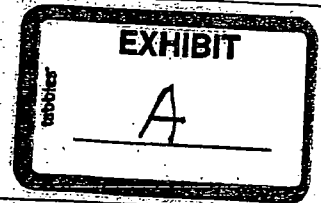
FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP2303075

Sherman Financial Group
LLC

FM FRI Greenville LLC

2013 JUL 31 A 8:24



PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
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☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This matter came before the Court pursuant to the Plaintiff's Motion to Deposit Rental Payments into the Court during the pendency of the instant action. Also before the Court were the Defendant's Motions for Ejectment and Modification of the Previously-Issued Restraining Order. The Honorable Gary Hill previously issued a Temporary Restraining Order on May 31, 2013, and subsequently entered a Preliminary Injunction Order on June 24, 2013.

The Plaintiff's Motion to Deposit the Proceeds into the Court is hereby DENIED. This Court recognizes that it is within its discretion to order that funds be deposited into the Court pursuant to Rule 67 of the South Carolina Rules of Civil Procedure and Section 27-37-155 of the South Carolina Code of Laws, 1976, as amended. However, that authority is discretionary, and this Court finds no evidence that either party is insolvent or that there is a likelihood that the monies will be hidden, absconded with or secreted away. The specific terms of the lease require payment, and these parties are obliged to operate under the same until its termination later this year. Having said that, the Plaintiff shall bring the rent current by making the full payment of both June and July rent to the Defendant in accordance with the terms of the lease. The \$152,137.76 shall remain on deposit with the Court as a bond incident to the Temporary Restraining Order.

The Defendant's Motions for Ejectment and Modification of the Court's Previous Order are also DENIED, with the specific qualification as to bond enumerated above. The issue of whether there has been a material breach under the contract is outstanding. That question is appropriately left to a trial on the merits, allowing for a full inspection by the triers of fact.

his order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

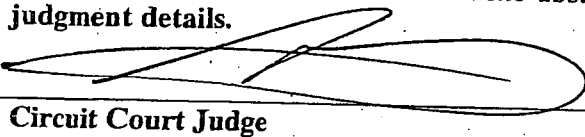
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

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Circuit Court Judge

2158

Judge Code

Date

30 JUL 13

For Clerk of Court Office Use Only

This judgment was entered on 7.31.13, and a copy mailed first class or placed in the appropriate attorney's box on 7.31.13 to attorneys of record or to parties (when appearing pro se) as follows:

Steven E. Farrar Smith Moore Leatherwood LLP P.O. Box 87 Greenville, SC 29602

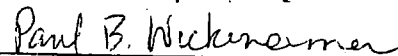
Cynthia Buck Brown Harper, Lambert & Brown, P.A. P.O. Box 908 Greenville, SC 29602

Calvin Theodore Vick Jr. Harper, Lambert & Brown, P.A. P.O. Box 908 Greenville, SC 29602

Raymond Patrick Smith Harper, Lambert & Brown, P.A. P.O. Box 908 Greenville, SC 29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)



Court Reporter

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

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Sherman Financial Group, LLC,

Plaintiff,

v.

FM FRI Greenville, LLC,

Defendant.

IN THE COURT OF COMMON PLEAS

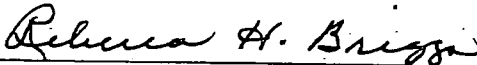
C.A. NO.: 2013-CP-23-0075

CERTIFICATE OF SERVICE

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2013 SEP -4 P 3:55

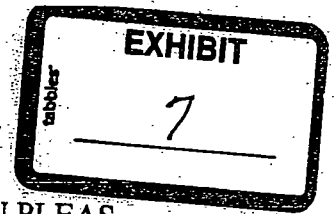
I hereby certify that a copy of Defendant's *Notice of Emergency Motion and Emergency Motion for Contempt and Sanctions with Exhibit A* was served on counsel of record via electronic mail and U.S. mail this 4th day of September, 2013 addressed as follows:

Steven E. Farrar, Esq.
steve.farrar@smithmoorelaw.com
Jason D. Maertens, Esq.
Jason.maertens@smithmoorelaw.com
SMITH MOORE LEATHERWOOD LLP
300 East McBee Avenue, Suite 500
Greenville, SC 29601


Rebecca H. Briggs, Legal Assistant

Greenville, South Carolina

EXHIBIT 7



STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

Sherman Financial Group, LLC,)
Plaintiff,)

C.A. No. 2013-CP-23-03075

v.)

FM FRI Greenville, LLC,)
Defendant.)

ORDER

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2013 NOV 13 PM 4 10

This matter has been referred to the Greenville County Master-In-Equity by Order of the Circuit Court dated September 16, 2013. Before the Court on November 5, 2013 by way of hearing was the Motion of the Defendant, FM FRI Greenville, LLC ("Defendant" or "Landlord") for Contempt and Sanctions. Sherman Financial Group, LLC ("Plaintiff" or "Tenant") opposed such motion. Also before the Court was Tenant's Motion for Withdrawal of the Preliminary Injunction reduced to writing and filed on June 26, 2013 (which injunction incorporated the Temporary Restraining Order of May 31, 2013 where not inconsistent) and return of the \$152,137.76 cash bond incident to the Temporary Restraining Order (the "bond"). Landlord did not oppose the withdrawal of the Preliminary Injunction but opposed the return of the bond.

PROCEDURAL SUMMARY

On or about June 11, 2013, Tenant filed a motion for leave to deposit certain rents with the Court. Tenant asserted in said motion, among other things, its right to a certain alleged tenant allowance. On July 31, 2013, the Circuit Court entered an Order denying such motion and directing Tenant to "bring the rent current by making the full payment of both June and July rent to the Defendant in accordance with the terms of the lease." Said Order found that "the specific

terms of the lease require payment." The Order also provided that the "issue of whether there has been a material breach under the contract is outstanding," and is "appropriately left to a trial on the merits, allowing for a full inspection by the triers of fact." Tenant filed a motion to reconsider. The Court denied such motion by way of Order dated August 23, 2013. In said Order, the Court stated that it "made no rulings with respect to the merits of the case and leaves open for a trial on the merits all justiciable issues raised in the parties' pleadings." The Court also stated that the Order was without prejudice to any party with respect to the alleged tenant allowance or allegations of breach under the lease.

Before the Court is the Affidavit of Brian Schiedemeyer dated November 4, 2013 indicating the Tenant has not paid June, July, August, September, October, or November 2013 rent. Such affidavit has calculated the amounts past due under the lease for June and July 2013 in the amount of \$313,757.86.

Landlord argues that Tenant should be held in contempt for failure to bring the rent current in accordance with the July 31, 2013 Order. Tenant argues that the only remedy available under Section 27-37-155 of the South Carolina Code of Laws for failure to pay rent is ejectment, and the Court does not have the authority to compel Tenant to pay rent under that Section. Accordingly, Tenant argues that it cannot be held in contempt because to interpret the Orders as Landlord suggests would be to follow an order that is unauthorized under Section 27-37-155 and is unconstitutional.

LEGAL ANALYSIS

A. The prior Orders are the law of the case.

The July 31, 2013 Order and the August 23, 2013 Order are the law of the case. See, e.g., ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472

(1997) (unappealed ruling is the law of the case). It is well-settled that a successor judge cannot reverse, overrule, or disregard the rulings of a prior judge. Charleston County Dept. of Social Services v. Father, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995). Notwithstanding the prior Orders of Judge Stilwell, this Court would likewise rule that 27-37-155 does not prohibit Landlord from collecting past due rent under the facts of this case.

The July 31, 2013 Order directs Tenant to bring the rent current by making full payment of June and July rent to Landlord. Such has not been done. This Court will enforce such Order, and directs Tenant to make such past due rent payments for June and July not later than November 15, 2013. Non-payment shall subject Tenant to this Court's contempt powers.

B. The bond must remain in place.

The Court has previously ordered in the Temporary Restraining Order that the \$152,137.76 shall remain on deposit with the Court as a bond incident to the Temporary Restraining Order. The Preliminary Injunction incorporates the Temporary Restraining Order, where not inconsistent. The bond shall stay in place through the conclusion of this case, or until further order of the Court.

CONCLUSION

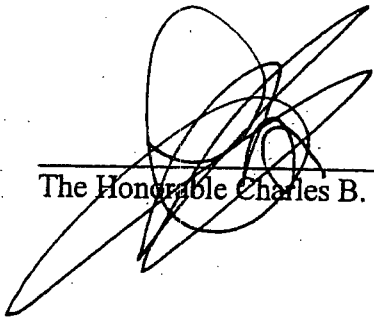
Based on the foregoing, it is

ORDERED, ADJUDGED AND DECREED that Tenant shall make payment of June and July rent to Landlord in the amount of \$313,757.86 on or before November 15, 2013. All other issues related to Landlord's motion for contempt and sanctions, including Landlord's alleged right to additional months' rent, are held in abeyance and preserved.

By consent, the Preliminary Injunction dated June 26, 2013, incorporating the Temporary Restraining Order dated May 31, 2013 where not inconsistent, is withdrawn and dissolved.

The bond in the amount of \$152,137.76 shall remain in place through the conclusion of this case or until further order of the Court.

IT IS SO ORDERED.



The Honorable Charles B. Simmons, Jr.

November 8, 2013
Greenville, South Carolina

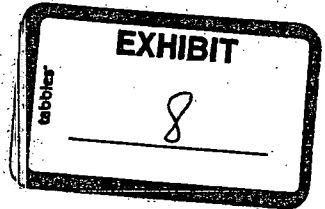
EXHIBIT 8

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

Sherman Financial Group, LLC,)
Plaintiff,)

C.A. No. 2013-CP-23-03075



v.)

FM FRI Greenville, LLC,)
Defendant.)

ORDER

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL W. HIGGINS, CLERK
2013 DEC 23 AM 11:13
Order

This matter was referred by Order of the Circuit Court dated September 16, 2013. On or about November 13, 2013, this Court entered an Order enforcing the prior Order of Judge Stilwell in which he ordered Sherman Financial Group, LLC ("Sherman" or "Tenant") to make payment of June and July 2013 rent to FM FRI Greenville, LLC ("FM FRI" or Landlord). In that the Tenant had still not paid the rent as directed by Judge Stilwell, this Court ordered that it be paid on or before November 15, 2013. Further, and by consent of the parties, the Court dissolved a certain preliminary injunction and the Court ordered the previously established bond in the amount of \$152,137.76 remain in place through the conclusion of the case or further order of the Court. On or about November 15, 2013, Tenant filed a Motion to Reconsider the November 13, 2013 Order. Before the Court on December 17, 2013 by way of hearing was such motion to reconsider. Landlord opposed such motion. The Motion, as noted below, is denied.

LEGAL ANALYSIS

A. The Court had the authority to make the rulings in question in the November 13, 2013 Order.

This is a hotly contested lawsuit between two sophisticated LLC's. There are multiple significant and as of now unlitigated issues between the parties arising out of a long-term commercial lease between the parties.

As relates to the narrow issue presented in Tenant's Motion to Reconsider, it is fairly straight forward. Tenant aggressively questions the Court's inherent authority to invoke its contempt powers in the event that Orders of the Court are not complied with. Initially, it is fundamental that a court with proper jurisdiction has the inherent authority to impose, if necessary and appropriate, contempt sanctions in the event its orders are not complied with. The court may punish by fine or imprisonment, at the discretion of the court, all contempts of its authority in any cause or hearing before the same. See, e.g., S.C. Code Ann. § 14-5-320; 15-35-180; Rule 70, SCRPC. The power to punish for contempt is necessarily inherent in all courts. Miller v. Miller, 375 S.C. 443, 455, 652 S.E.2d 754, 760 (Ct. App. 2007). Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. Id.; Ex parte Cannon, 385 S.C. 643, 660-61, 685 S.E.2d 814, 824 (Ct. App. 2009).

B. The Court properly ruled in accordance with the law of the case doctrine.

The previous orders dated July 31, 2013 and August 23, 2013 (the Order denying Tenant's Motion to Reconsider Judge Stilwell's Order of 7/31/2013) are the law of the case. See, e.g., ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (unappealed ruling is the law of the case). It is well-settled that a successor judge cannot reverse, overrule, or disregard the rulings of a prior judge. Charleston County Dept. of Social Services v. Father, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995). The July 31, 2013 Order signed by Judge Stilwell clearly directs Tenant to bring the rent current by making

full payment of June and July 2013 rent to Landlord. This Court's November 13, 2013 Order enforces the plain language of such prior Order and is both proper and necessary. The fact that the Order of November 13, 2013 states that Tenant may be held in contempt of court simply states the inherent authority noted above. Further, and important to note, is that there is no contempt issue before the Court at this time nor has there been a finding of contempt by the Court relative to Tenants continued nonpayment of rent as directed by Judge Stilwell in his Order filed July 31, 2013. Rather, Tenant argues the Court exceeded its authority by stating that it could be held in contempt for failure to comply with orders of the Court. Such is simply not the law. Despite Tenant's argument, the Court finds that without the ability to enforce its Orders by contempt, the Orders entered thus far become merely advisory with no real enforceability component.

C. The Court acted within the authority granted in S.C. Code Ann. § 27-37-155.

S.C. Code Ann. § 27-37-155(B)(5) declares that "If the court orders that the tenant pay all rent due and accruing as of and during the pendency of the action as provided by Section 27-37-150 and this section, the order may require the payments to be made (a) **directly to the commercial landlord** or to the clerk of court, to be held until final disposition of the case." (Emphasis added). Such is precisely what the Court ordered. S.C. Code Ann. § 27-37-150 indicates that the "**rental for the use and occupancy of the premises involved shall continue to accrue so long as the tenant remains in possession of the premises.**" (Emphasis added). There is no question but that Tenant was in possession of the premises during June and July, 2013. This Court properly applied the statute as written, which evidences the preference of the legislature for direct payment to commercial landlords during the pendency of litigation involving tenancy.

Further, Tenant argues that 27-37-155 provides the sole and exclusive remedy for Landlord and that the Court lacks authority to require payment of rent or enforcement of any such orders by contempt. The Court finds, in light of Judge Stilwell's Order and to the extent he relied upon that Section (as opposed to the clear terms of the lease), such is simply not the case.

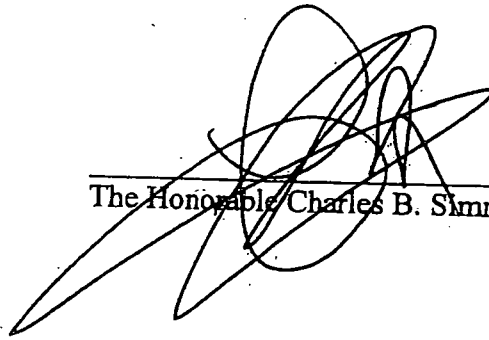
Tenant raises multiple other issues in its Motion to Reconsider. The Court has reviewed them and finds that either they were not raised in front of Judge Stilwell and/or this Court or that they do not change the conclusions set forth herein.

CONCLUSION

Based on the foregoing, it is

ORDERED, ADJUDGED AND DECREED that Tenant's Motion to Reconsider this Court's November 13, 2013 Order is denied.

IT IS SO ORDERED.



The Honorable Charles B. Simmons, Jr.

December 23, 2013
Greenville, South Carolina

EXHIBIT 9

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

Sherman Financial Group, LLC,)
Plaintiff,)

C.A. No. 2013-CP-23-03075

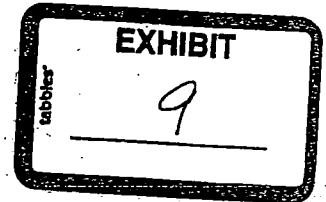
v.)

FM FRI Greenville, LLC,)
Defendant.)

**NOTICE OF MOTION AND MOTION
FOR CONTEMPT, SANCTIONS,
AWARD OF ADDITIONAL MONTHS' RENT,
AND INVOLUNTARY DISMISSAL**

TO: PLAINTIFF SHERMAN FINANCIAL GROUP, LLC AND ITS COUNSEL:

Steven E. Farrar, Esq.
Jason D. Maertens, Esq.
SMITH MOORE LEATHERWOOD LLP
300 East McBee Avenue, Suite 500
Greenville, SC 29601



NOW COMES the Defendant, FM FRI Greenville, LLC ("FM FRI" or "Landlord"), at such time as the Court may set but in no event sooner than ten (10) days from the date of filing, by and through its undersigned counsel, which moves the Court pursuant to, *inter alia*, S.C. Code Ann. § 14-5-320, §15-35-180, and SCRCP 70 for an Order holding the Plaintiff, Sherman Financial Group, LLC ("Sherman" or "Tenant"), in civil contempt due to its failure to comply with the Court's Order of November 13, 2013 in which Sherman was ordered to pay past due rent payments for June and July not later than November 15, 2013, subject to this Court's contempt powers. Said Order is attached hereto as **Exhibit A**. Tenant moved to reconsider such order, and said motion was denied by subsequent order dated December 23, 2013. Said Order is attached hereto as **Exhibit B**. As of the date of this filing, Sherman has failed to make payment of June rent, July rent, August rent, September rent, October rent, and November rent, all of

which are past due. See previously filed Affidavit of Brian Scheidemeyer, a true and correct copy of which is attached hereto as **Exhibit C**. Sherman was ordered by the Court to make payment of June and July rent to Landlord in the amount of \$313,757.86 by November 15, 2013 and has acted and continues to act in contravention of said Order. Landlord seeks all remedies available to it under the Court's inherent contempt power, including, without limitation, all damages due and owing under the Lease, dismissal of Tenant's claims and reply defenses with prejudice, a lump sum fine payable to the Court, a *per diem* fine for Tenant's non-compliance, garnishment of one or more bank accounts of Tenant for purposes of paying the \$313,757.86, incarceration of one or more of Sherman's principals, and reasonable attorneys' fees and costs.

In addition, FM FRI seeks an order awarding FM FRI the additional past due rent for the months of August, September, October, and November 2013, on the basis that this Court has ruled in its Order of November 13, 2013 "that 27-37-155 does not prohibit Landlord from collecting past due rent under the facts of this case." See Exhibit A, p. 3. It is the unappealed law of the case that such past due rent is now due and owing and must be paid from Tenant to Landlord. In addition, FM FRI seeks involuntary dismissal of Tenant's pleadings pursuant to Rule 41(b), SCRCP, which explicitly allows the Court to dismiss an action or any claims against a defendant for failure of a plaintiff to comply with any order of Court.

This motion is supported by the attached Orders, previous Orders in this case, state law, whether common or statutory, and any such memorandum and affidavits as may be submitted prior to hearing. Pursuant to Rule 11, SCRCP, counsel for Movant certifies that a consultation with counsel for Tenant prior to the filing of this motion would serve no useful purpose.

Respectfully submitted,



Cynthia Buck Brown, SC Bar No. 66172

Calvin T. Vick, Jr., SC Bar No. 68187

R. Patrick Smith, SC Bar No. 68270

HARPER, LAMBERT & BROWN, P.A.

PO Box 908

Greenville, SC 29602

PH: 864-235-5535

FAX: 864-235-6866

cbrown@hlblegal.com

psmith@hlblegal.com

Attorneys for Defendant, FM FRI Greenville, LLC

January 7, 2014
Greenville, South Carolina

EXHIBIT A

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

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
JUDGMENT IN A CIVIL CASE
CASE NO. 2013CP2303075

2013 NOV 13 PM 4 10
Sherman Financial Group LLC vs. FM FRI Greenville LLC

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):**
SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Rule 12(b), SCRPC; ☐ Rule 41(a),
☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):**
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☐ See attached order;

☐ Statement of Judgment by the Court:

NOTICE

This is a notice to you that an Order For Tenant To Pay June/July Rent/Motion For Contempt Preserved in this case has been filed in the Clerk of Court's Office. To obtain a certified copy, you may contact our office by phone (864) 467-8551 or email a request to bjeffords@greenvillecounty.org. If you would like a copy via email, please provide a valid email address.

Dated at Greenville, South Carolina, this 13th day of November, 2013.

PRESIDING JUDGE -

Steven E. Farrar, Smith Moore Leatherwood LLP
P.O. Box 87 Greenville, SC 29602
William B. Swent, Smith Moore Leatherwood LLP
P.O. Box 87 Greenville, SC 296020087
Jason Daniel Maertens, Smith Moore Leatherwood
LLP P.O. Box 87 Greenville, SC 29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

Cynthia Buck Brown Harper, Lambert & Brown,
P.A. P.O. Box 908 Greenville, SC 29602
Calvin Theodore Vick Jr., Harper, Lambert &
Brown, P.A. P.O. Box 908 Greenville, SC 29602
Raymond Patrick Smith Harper, Lambert & Brown,
P.A. P.O. Box 908 Greenville, SC 29602

ATTORNEY(S) FOR THE DEFENDANT(S)

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

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

Sherman Financial Group, LLC,)
Plaintiff,)

C.A. No. 2013-CP-23-03075

v.)

FM FRI Greenville, LLC,)
Defendant.)

ORDER

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2013 NOV 13 PM 4 10

This matter has been referred to the Greenville County Master-In-Equity by Order of the Circuit Court dated September 16, 2013. Before the Court on November 5, 2013 by way of hearing was the Motion of the Defendant, FM FRI Greenville, LLC ("Defendant" or "Landlord") for Contempt and Sanctions. Sherman Financial Group, LLC ("Plaintiff" or "Tenant") opposed such motion. Also before the Court was Tenant's Motion for Withdrawal of the Preliminary Injunction reduced to writing and filed on June 26, 2013 (which injunction incorporated the Temporary Restraining Order of May 31, 2013 where not inconsistent) and return of the \$152,137.76 cash bond incident to the Temporary Restraining Order (the "bond"). Landlord did not oppose the withdrawal of the Preliminary Injunction but opposed the return of the bond.

PROCEDURAL SUMMARY

On or about June 11, 2013, Tenant filed a motion for leave to deposit certain rents with the Court. Tenant asserted in said motion, among other things, its right to a certain alleged tenant allowance. On July 31, 2013, the Circuit Court entered an Order denying such motion and directing Tenant to "bring the rent current by making the full payment of both June and July rent to the Defendant in accordance with the terms of the lease." Said Order found that "the specific

ORDER

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PAGE 1

terms of the lease require payment." The Order also provided that the "issue of whether there has been a material breach under the contract is outstanding," and is "appropriately left to a trial on the merits, allowing for a full inspection by the triers of fact." Tenant filed a motion to reconsider. The Court denied such motion by way of Order dated August 23, 2013. In said Order, the Court stated that it "made no rulings with respect to the merits of the case and leaves open for a trial on the merits all justiciable issues raised in the parties' pleadings." The Court also stated that the Order was without prejudice to any party with respect to the alleged tenant allowance or allegations of breach under the lease.

Before the Court is the Affidavit of Brian Schiedemeyer dated November 4, 2013 indicating the Tenant has not paid June, July, August, September, October, or November 2013 rent. Such affidavit has calculated the amounts past due under the lease for June and July 2013 in the amount of \$313,757.86.

Landlord argues that Tenant should be held in contempt for failure to bring the rent current in accordance with the July 31, 2013 Order. Tenant argues that the only remedy available under Section 27-37-155 of the South Carolina Code of Laws for failure to pay rent is ejectment, and the Court does not have the authority to compel Tenant to pay rent under that Section. Accordingly, Tenant argues that it cannot be held in contempt because to interpret the Orders as Landlord suggests would be to follow an order that is unauthorized under Section 27-37-155 and is unconstitutional.

LEGAL ANALYSIS

A. The prior Orders are the law of the case.

The July 31, 2013 Order and the August 23, 2013 Order are the law of the case. See, e.g., ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472

(1997) (unappealed ruling is the law of the case). It is well-settled that a successor judge cannot reverse, overrule, or disregard the rulings of a prior judge. Charleston County Dept. of Social Services v. Father, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995). Notwithstanding the prior Orders of Judge Stilwell, this Court would likewise rule that 27-37-155 does not prohibit Landlord from collecting past due rent under the facts of this case.

The July 31, 2013 Order directs Tenant to bring the rent current by making full payment of June and July rent to Landlord. Such has not been done. This Court will enforce such Order, and directs Tenant to make such past due rent payments for June and July not later than November 15, 2013. Non-payment shall subject Tenant to this Court's contempt powers.

B. The bond must remain in place.

The Court has previously ordered in the Temporary Restraining Order that the \$152,137.76 shall remain on deposit with the Court as a bond incident to the Temporary Restraining Order. The Preliminary Injunction incorporates the Temporary Restraining Order, where not inconsistent. The bond shall stay in place through the conclusion of this case, or until further order of the Court.

CONCLUSION

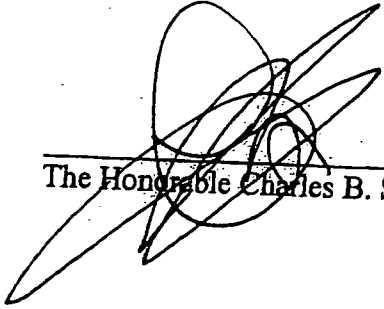
Based on the foregoing, it is

ORDERED, ADJUDGED AND DECREED that Tenant shall make payment of June and July rent to Landlord in the amount of \$313,757.86 on or before November 15, 2013. All other issues related to Landlord's motion for contempt and sanctions, including Landlord's alleged right to additional months' rent, are held in abeyance and preserved.

By consent, the Preliminary Injunction dated June 26, 2013, incorporating the Temporary Restraining Order dated May 31, 2013 where not inconsistent, is withdrawn and dissolved.

The bond in the amount of \$152,137.76 shall remain in place through the conclusion of this case or until further order of the Court.

IT IS SO ORDERED.


The Honorable Charles B. Simmons, Jr.

November 8, 2013
Greenville, South Carolina

EXHIBIT B

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP2303075

THE COURT OF COMMON PLEAS
Sherman Financial Group
LLC

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS
CLERK

FM FRI Greenville LLC

2013 DEC 23 PM 1 40

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

STATE OF SOUTH CAROLINA

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

☐ **DECISION BY THE COURT** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

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

☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

Submitted by:

DEFENDANT(S)

☐ Defendant

☐ Self-Represented Litigant

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

☒ **ORDERED AND ADJUDGED:** ☐ See attached order, (formal order to follow) ☐ Statement of Judgment by the Court.

DECISION BY THE COURT

ORDER INFORMATION

This order ends: ☒ does not end the case.

Additional Information for the Clerk:

☐ Rule 43(k), SCRPC (Settled);

☐ Rule 41(a), SCRPC (Vol. Nonsuit);

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of: (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Submitted by:		
Attorney for:		
Self-Represented Litigant		
Administrative Agency of the		
County of		

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

12/23/2013

Date

For Clerk of Court Office Use Only

This judgment was entered on 23rd day of december, 2013, and a copy mailed first class or placed in the appropriate attorney's box on 23rd day of december, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Steven E. Farrar Smith Moore Leatherwood LLP P.O. Box
87 Greenville, SC 29602

William B. Swent Smith Moore Leatherwood LLP P.O. Box
87 Greenville, SC 29602-0087

Jason Daniel Maertens Smith Moore Leatherwood LLP P.O.
Box 87 Greenville, SC 29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

Cynthia Buck Brown Harper, Lambert & Brown, P.A. P.O.
Box 908 Greenville, SC 29602

Calvin Theodore Vick Jr. Harper, Lambert & Brown, P.A.
P.O. Box 908 Greenville, SC 29602

Raymond Patrick Smith Harper, Lambert & Brown, P.A.
P.O. Box 908 Greenville, SC 29602

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

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

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

Sherman Financial Group, LLC,)
Plaintiff,)

C.A. No. 2013-CP-23-03075

v.)

FM FRI Greenville, LLC,)
Defendant.)

ORDER

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL J. JONES, JR.
2013 DEC 23 AM 11:38

This matter was referred by Order of the Circuit Court dated September 16, 2013. On or about November 13, 2013, this Court entered an Order enforcing the prior Order of Judge Stilwell in which he ordered Sherman Financial Group, LLC ("Sherman" or "Tenant") to make payment of June and July 2013 rent to FM FRI Greenville, LLC ("FM FRI" or Landlord). In that the Tenant had still not paid the rent as directed by Judge Stilwell, this Court ordered that it be paid on or before November 15, 2013. Further, and by consent of the parties, the Court dissolved a certain preliminary injunction and the Court ordered the previously established bond in the amount of \$152,137.76 remain in place through the conclusion of the case or further order of the Court. On or about November 15, 2013, Tenant filed a Motion to Reconsider the November 13, 2013 Order. Before the Court on December 17, 2013 by way of hearing was such motion to reconsider. Landlord opposed such motion. The Motion, as noted below, is denied.

LEGAL ANALYSIS

A. The Court had the authority to make the rulings in question in the November 13, 2013 Order.

This is a hotly contested lawsuit between two sophisticated LLC's. There are multiple significant and as of now unlitigated issues between the parties arising out of a long-term commercial lease between the parties.

As relates to the narrow issue presented in Tenant's Motion to Reconsider, it is fairly straight forward. Tenant aggressively questions the Court's inherent authority to invoke its contempt powers in the event that Orders of the Court are not complied with. Initially, it is fundamental that a court with proper jurisdiction has the inherent authority to impose, if necessary and appropriate, contempt sanctions in the event its orders are not complied with. The court may punish by fine or imprisonment, at the discretion of the court, all contempts of it's authority in any cause or hearing before the same. See, e.g., S.C. Code Ann. § 14-5-320; 15-35-180; Rule 70, SCRPC. The power to punish for contempt is necessarily inherent in all courts. Miller v. Miller, 375 S.C. 443, 455, 652 S.E.2d 754, 760 (Ct. App. 2007). Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. Id.; Ex parte Cannon, 385 S.C. 643, 660-61, 685 S.E.2d 814, 824 (Ct. App. 2009).

B. The Court properly ruled in accordance with the law of the case doctrine.

The previous orders dated July 31, 2013 and August 23, 2013 (the Order denying Tenant's Motion to Reconsider Judge Stilwell's Order of 7/31/2013) are the law of the case. See, e.g., ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (unappealed ruling is the law of the case). It is well-settled that a successor judge cannot reverse, overrule, or disregard the rulings of a prior judge. Charleston County Dept. of Social Services v. Father, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995). The July 31, 2013 Order signed by Judge Stilwell clearly directs Tenant to bring the rent current by making

full payment of June and July 2013 rent to Landlord. This Court's November 13, 2013 Order enforces the plain language of such prior Order and is both proper and necessary. The fact that the Order of November 13, 2013 states that Tenant may be held in contempt of court simply states the inherent authority noted above. Further, and important to note, is that there is no contempt issue before the Court at this time nor has there been a finding of contempt by the Court relative to Tenants continued nonpayment of rent as directed by Judge Stilwell in his Order filed July 31, 2013. Rather, Tenant argues the Court exceeded its authority by stating that it could be held in contempt for failure to comply with orders of the Court. Such is simply not the law. Despite Tenant's argument, the Court finds that without the ability to enforce its Orders by contempt, the Orders entered thus far become merely advisory with no real enforceability component.

C. The Court acted within the authority granted in S.C. Code Ann. § 27-37-155.

S.C. Code Ann. § 27-37-155(B)(5) declares that "If the court orders that the tenant pay all rent due and accruing as of and during the pendency of the action as provided by Section 27-37-150 and this section, the order may require the payments to be made (a) **directly to the commercial landlord** or to the clerk of court, to be held until final disposition of the case." (Emphasis added). Such is precisely what the Court ordered. S.C. Code Ann. § 27-37-150 indicates that the "**rental for the use and occupancy of the premises involved shall continue to accrue so long as the tenant remains in possession of the premises.**" (Emphasis added). There is no question but that Tenant was in possession of the premises during June and July, 2013. This Court properly applied the statute as written, which evidences the preference of the legislature for direct payment to commercial landlords during the pendency of litigation involving tenancy.

Further, Tenant argues that 27-37-155 provides the sole and exclusive remedy for Landlord and that the Court lacks authority to require payment of rent or enforcement of any such orders by contempt. The Court finds, in light of Judge Stilwell's Order and to the extent he relied upon that Section (as opposed to the clear terms of the lease), such is simply not the case.

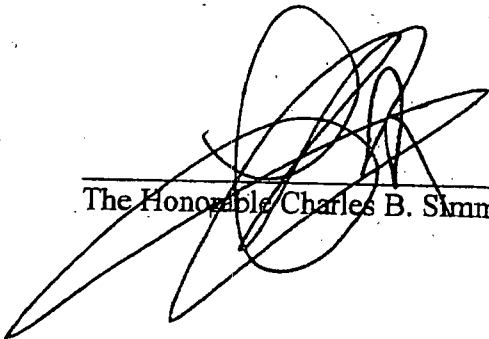
Tenant raises multiple other issues in its Motion to Reconsider. The Court has reviewed them and finds that either they were not raised in front of Judge Stilwell and/or this Court or that they do not change the conclusions set forth herein.

CONCLUSION

Based on the foregoing, it is

ORDERED, ADJUDGED AND DECREED that Tenant's Motion to Reconsider this Court's November 13, 2013 Order is denied.

IT IS SO ORDERED.



The Honorable Charles B. Simmons, Jr.

December 23, 2013
Greenville, South Carolina

EXHIBIT C

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Sherman Financial Group, LLC,

Plaintiff,

v.

FM FRI Greenville, LLC,

Defendant.

IN THE COURT OF COMMON PLEAS

C.A. NO.: 2013-CP-23-03075

**AFFIDAVIT OF BRIAN
SCHIEDEMEYER AS TO CERTAIN
RENTS**

FILED-CLERK OF COURT
GREENVILLE COS.C.
PAUL B. WICKENS
2013 NOV 4 PM 4:46

PERSONALLY APPEARED BEFORE ME, Brian Schiedemeyer, who, being first sworn, states as follows:

1. I am older than 18 years of age, I am competent to testify to the matters addressed herein, and I give this affidavit based on my personal knowledge of the facts described herein.
2. I am Senior Vice President of FRI SC Management, LLC, the property manager for Wells Fargo Center (the "Property Manager"), which is located at 15 South Main Street, Greenville, South Carolina.
3. In May 2003, Sherman Financial Group, LLC ("Sherman") leased certain property in the Wells Fargo Center as set forth in the Lease Agreement with a commencement date of December 1, 2003 and a scheduled expiration date of November 30, 2013.
4. The term of the Lease between FM FRI Greenville, LLC (as successor of FRI Greenville, LLC and Wolf Greenville, LLC, who were successors of DD Greenville, LLC) and Sherman Financial Group, LLC expires on November 30, 2013.

5. Sherman has not paid FM FRI Greenville LLC rent for June, July, August, September, October, or November of 2013. Such amounts are overdue under the terms of the Lease, and Sherman is thereby in default under the terms of the Lease.

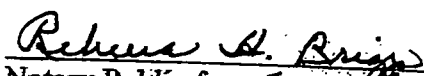
6. I have calculated the amounts past due under the Lease, with late fees and operating expense reimbursement ("CAM") as allowed under the terms of the Lease, and have attached a true and correct copy of such calculation hereto as Exhibit 1. As the Court will note, the total amount due as of this filing is \$979,445.48.

FURTHER AFFIANT SAYETH NOT.



Brian Schiedemeyer

Subscribed and sworn to before me
this 4th day of November, 2013


Notary Public for South Carolina
My commission expires: 3/23/2019

Sherman Late Fee Calculation

	Lease ID Suite ID	Sherma 400	Shef 500	Sherm 600	She 700	She 800 800	She 801 801	She 810 810	She 8300 8300	Total
June	CAM	3,373.00	4,934.00	4,934.00	4,662.00	2,021.00	1,925.83	248.00	2,561.00	24,658.83
	Base Rent	23,035.16	23,035.16	23,035.16	21,766.63	11,030.08	9,542.12	7,593.78	8,722.67	127,760.76
	Total	26,408.16	27,969.16	27,969.16	26,428.63	13,051.08	11,467.95	7,841.78	11,283.67	152,419.59
	Late Fee (2%)	528.16	559.38	559.38	528.57	261.02	229.36	155.84	225.67	3,048.39
	Total	26,936.32	28,528.54	28,528.54	26,957.20	13,312.10	11,697.31	7,998.62	11,509.34	155,467.98
July	Previous Balance	26,936.32	28,528.54	28,528.54	26,957.20	13,312.10	11,697.31	7,998.62	11,509.34	155,467.98
	CAM	3,373.00	4,934.00	4,934.00	4,662.00	2,021.00	1,644.00	248.00	2,561.00	24,377.00
	Base Rent	23,035.16	23,035.16	23,035.16	21,766.63	11,030.08	9,542.12	7,593.78	8,722.67	127,760.76
	Total	53,344.48	56,497.70	56,497.70	53,385.83	26,363.18	22,883.43	15,840.40	22,793.01	307,605.74
	Late Fee (2%)	1,066.89	1,129.95	1,129.95	1,067.72	527.26	457.67	316.81	455.86	6,152.11
	Total	54,411.37	57,627.66	57,627.66	54,453.55	26,890.45	23,341.10	16,157.20	23,248.87	313,757.86
August	Previous Balance	54,411.37	57,627.66	57,627.66	54,453.55	26,890.45	23,341.10	16,157.20	23,248.87	313,757.86
	CAM	3,373.00	4,934.00	4,934.00	4,662.00	2,021.00	1,644.00	248.00	2,561.00	24,377.00
	Base Rent	23,035.16	23,035.16	23,035.16	21,766.63	11,030.08	9,542.12	7,593.78	8,722.67	127,760.76
	Total	80,819.53	85,596.82	85,596.82	80,882.18	39,941.53	34,527.22	23,998.98	34,532.54	465,895.62
	Late Fee (2%)	1,616.39	1,711.94	1,711.94	1,617.64	798.83	690.54	479.98	690.65	9,317.91
	Total	82,435.92	87,308.75	87,308.75	82,499.82	40,740.36	35,217.76	24,478.96	35,223.19	475,213.53
September	Previous Balance	82,435.92	87,308.75	87,308.75	82,499.82	40,740.36	35,217.76	24,478.96	35,223.19	475,213.53
	CAM	3,373.00	4,934.00	4,934.00	4,662.00	2,021.00	1,644.00	248.00	2,561.00	24,377.00
	Base Rent	23,035.16	23,035.16	23,035.16	21,766.63	11,030.08	9,542.12	7,593.78	8,722.67	127,760.76
	Total	108,844.08	115,277.91	115,277.91	108,928.45	53,791.44	46,403.88	32,320.74	46,506.86	627,351.29
	Late Fee (2%)	2,176.88	2,305.56	2,305.56	2,178.57	1,075.83	928.08	646.41	930.14	12,547.03
	Total	111,020.97	117,583.47	117,583.47	111,107.02	54,867.26	47,331.96	32,967.16	47,437.00	639,898.31
October	Previous Balance	111,020.97	117,583.47	117,583.47	111,107.02	54,867.26	47,331.96	32,967.16	47,437.00	639,898.31
	CAM	3,373.00	4,934.00	4,934.00	4,662.00	2,021.00	1,644.00	248.00	2,561.00	24,377.00
	Base Rent	23,035.16	23,035.16	23,035.16	21,766.63	11,030.08	9,542.12	7,593.78	8,722.67	127,760.76
	Total	137,429.13	145,552.63	145,552.63	137,535.65	67,918.34	58,518.08	40,808.94	58,720.67	792,036.07
	Late Fee (2%)	2,748.58	2,911.05	2,911.05	2,750.71	1,358.37	1,170.36	816.18	1,174.41	15,840.72
	Total	140,177.71	148,463.68	148,463.68	140,286.36	69,276.71	59,688.44	41,625.12	59,895.09	807,876.80
November	Previous Balance	140,177.71	148,463.68	148,463.68	140,286.36	69,276.71	59,688.44	41,625.12	59,895.09	807,876.80
	CAM	3,373.00	4,934.00	4,934.00	4,662.00	2,021.00	1,644.00	248.00	2,561.00	24,377.00
	Base Rent	23,035.16	23,035.16	23,035.16	21,766.63	11,030.08	9,542.12	7,819.89	8,722.67	127,986.87
	Total	166,585.87	176,432.84	176,432.84	166,714.99	82,327.79	70,874.56	49,693.01	71,178.76	960,240.67
	Late Fee (2%)	3,331.72	3,528.66	3,528.66	3,334.30	1,646.56	1,417.49	993.86	1,423.58	19,204.81
	Total	169,917.59	179,961.50	179,961.50	170,049.29	83,974.35	72,292.05	50,686.87	72,602.33	979,445.48
Total Late Fees		66,110.98								

Note: For Simplicity reasons and easy of tracking, the entire monthly late charge is only being assessed to one lease ID but relates to all lease IDs

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS
PAUL B. WICKENSIMER

Sherman Financial Group, LLC
2014 JAN 9 PM 4:53

C.A. NO.: 2013-CP-23-03075

Plaintiff,

v.

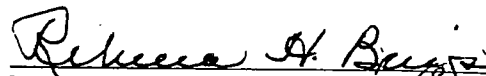
FM FRI Greenville, LLC,

Defendant.

CERTIFICATE OF SERVICE

I hereby certify that a copy of Defendant FM FRI Greenville, LLC's *Notice of Motion and Motion for Contempt, Sanctions, Award of Additional Months' Rent, and Involuntary Dismissal with Exhibits* was served on counsel of record via electronic mail and U.S. mail this 7th day of January, 2014 addressed as follows:

Steven E. Farrar, Esq.
steve.farrar@smithmoorelaw.com
William B. Swent, Esq.
William.swent@smithmoorelaw.com
Jason D. Maertens, Esq.
Jason.maertens@smithmoorelaw.com
SMITH MOORE LEATHERWOOD LLP
300 East McBee Avenue, Suite 500
Greenville, SC 29601


Rebecca H. Briggs, Legal Assistant

Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

FILED-CLERK OF COURT

GREENVILLE 00. CASE NO.: 2013-CP-23-03075

PAUL B. WICKENSIMMER

Sherman Financial Group, LLC

vs.

FM FRI Greenville, LLC

Defendant.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

MOTION AND ORDER INFORMATION
FORM AND COVERSHEET

Plaintiff's Attorney:

Steven E. Farrar, Bar No. _____

Address:

Smith Moore Leatherwood, LLP, 300 E. McBee
Ave., Ste. 500, Greenville, SC 29601

Phone: 864-240-2433 Fax _____

E-mail: steve.farrar@smithmoorelaw.com Other: _____

Defendant's Attorney:

Cynthia Buck Brown, Bar No. 66172

R. Patrick Smith, Bar No. 68270

Address:

Harper, Lambert & Brown, P.A., PO Box 908,
Greenville, SC 29602

Phone: 864-235-5535 Fax 864-235-6866

E-mail: cbrown@hlblegal.com Other: _____

psmith@hlblegal.com

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Contempt and Sanctions

Estimated Time Needed: 15 mins.

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

January 7, 2014

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$ 25.00

☐ EXEMPT:

(check reason)

- ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

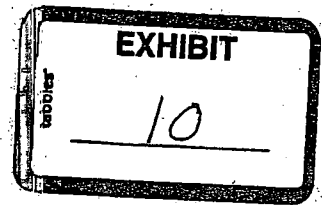
☐ CONTESTED - AMOUNT DUE: \$ _____

086

EXHIBIT 10



SMITH MOORE
LEATHERWOOD



January 28, 2014

Honorable Charles B. Simmons, Jr.
Greenville County Master-in-Equity
305 East North Street, Room 313
Greenville, SC 29601

Re: *Sherman Financial Group, LLC* ("Tenant") v. *FM FRI Greenville, LLC*
("Landlord"), C.A. No. 2013-CP-23-03075

Dear Judge Simmons:

Per your request, this letter is to summarize in-Chambers discussions with counsel in the above-referenced matter. We understand that you are presently inclined toward ruling that Sherman's Notice of Appeal deprives the Court of jurisdiction over the pending Motions for Contempt, Sanctions and any further award of pre-trial money damages. Of course, the Notice of Appeal is only recently filed; therefore, the Court is holding in abeyance any formal ruling to ensure that the Court of Appeals does not refuse the appeal or otherwise remand. In thirty (30) days this Court will revisit the matter, including Landlord's Motion to Cancel Lis Pendens. Should the Court of Appeals refuse the appeal or otherwise remand, within thirty (30) days or at any time thereafter, we understand that, absent some change in circumstances, you are also presently inclined to find Sherman in contempt (for failure to abide by a pre-trial, rent-payment decree).

On a related note, we advised the Court at Chambers that we had not heard anything from the Supreme Court. In this morning's mail we received an acknowledgement letter from the Court of Appeals acknowledging assignment of the case.

We further understand the Court's strong suggestions that the parties use the next thirty (30) days to explore settlement prospects.

I hope I have accurately memorialized our discussions in Chambers, but if not please let me know so that I can clarify it for the record. If you have any other questions or comments, please let me know, and we will schedule a time for all of us to conference with you.

Steven E. Farrar | Direct 864.751.7633 | Fax 864.751.7805 | steve.farrar@smithmoorelaw.com

Smith Moore Leatherwood LLP • Attorneys at Law • www.smithmoorelaw.com

2 West Washington Street Suite 1100 PO Box 87 (29602) Greenville, SC 29601 • 864.751.7600

Atlanta, GA • Charleston, SC • Chadotte, NC • Greensboro, NC • Greenville, SC • Raleigh, NC • Wilmington, NC

January 28, 2014
Page 2

With kind regards, I am

Yours very truly,

A handwritten signature in black ink, appearing to be 'SEF', with a long horizontal flourish extending to the right.

Steven E. Farrar

SEF/sps

cc: Ms. Cynthia Brown (via email: cbrown@hlblegal.com)
Mr. R. Patrick Smith (via email: psmith@hlblegal.com)

2/21/14

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master in Equity

Case No. 2013-CP-23-03075

Appellate Case No. 2014-000086

RECEIVED

FEB 21 2014

Court of Appeals

Sherman Financial Group, LLC.....Appellant,

vs.

FM FRI Greenville, LLC.....Respondent.

RETURN TO RESPONDENT'S MOTION TO DISMISS APPEAL

Through successive, *pre-trial* rulings, the lower court has wrongly ordered Sherman Financial Group, LLC, Appellant/Tenant, to pay rent under the South Carolina Ejectment Statute, S.C. Code Ann. § 27-37-10 (2007), *et seq.* (the "Ejectment Statute"), or else to suffer civil contempt. The first of such rulings, issued by Judge Robin B. Stilwell (entered July 31, 2013 and August 23, 2013), declares simply that Appellant/Tenant must pay pre-trial damages, but these initial rulings specify no consequence for failure or inability to so pay. Presumably, Judge Stilwell was cognizant

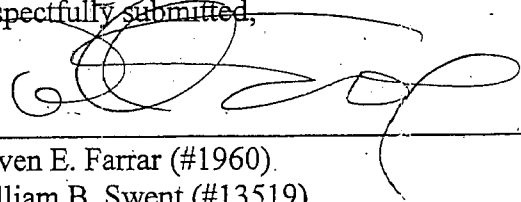
of the plain language of Section 27-37-155(B)(5) of the Ejectment Statute, which requires eviction in the face of a tenant's failure to pay rent during the pendency of an action for recovery of leased realty.

Ignoring statutory language, FM FRI Greenville, LLC, Respondent/Landlord, filed an Emergency Motion for Contempt and Sanctions on September 4, 2013. Judge Charles B. Simmons, Jr. heard Respondent/Landlord's Emergency Motion and ruled that Judge Stilwell's initial orders establish the law of this case. Judge Simmons then declared that Appellant/Tenant must pay pre-trial, monetary damages to Respondent/Landlord or be held in contempt.

The aggregated rulings of Judges Stilwell and Simmons are contrary to law and deprive Appellant/Tenant of its due process rights under the United States and South Carolina Constitutions. The lower court has not afforded a hearing to resolve ultimate legal and countless factual disputes, yet it has awarded monetary damages and declared such award to be beyond challenge. Further, Judge Simmons would impose the ultimate civil consequence, contempt, without first affording Appellant/Tenant its day in court. The appealed orders are final in that they declare (albeit erroneously) that Appellant/Tenant owes Respondent/Landlord some \$152,137.76, and that such debt is the irreversible law of this case. Further, these rulings constitute a final and appealable contempt decree. Further still, even if they were not final, the aggregated rulings of Judges Stilwell and Simmons are founded on a patent absence of due process, thereby affecting a substantial right. Accordingly, appellate jurisdiction is proper under Section 14-3-330 of the South Carolina Code of Laws, and Respondent/Landlord's Motion to

Dismiss should be denied. Appellant/Tenant submits an accompanying Memorandum in support of its position.

Respectfully submitted,



Steven E. Farrar (#1960)
William B. Swent (#13519)
Jason D. Maertens (#73583)
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Attorneys for Appellant

February 19, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master in Equity

Case No. 2013-CP-23-03075

Appellate Case No. 2014-000086

Sherman Financial Group, LLC.....Appellant,

vs.

FM FRI Greenville, LLC.....Respondent.

APPELLANT'S MEMORANDUM OF LAW IN OPPOSITION
TO RESPONDENT'S MOTION TO DISMISS APPEAL

Steven E. Farrar (#1960)
William B. Swent (#13519)
Jason D. Maertens (#73583)
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Attorneys for Appellant

February 19, 2014

I. INTRODUCTION/STATEMENT OF ISSUES:

Through successive, *pre-trial* rulings, the lower court has wrongly ordered Sherman Financial Group, LLC, Appellant/Tenant, to pay over \$150,000.00 in alleged rental damages to the Respondent/Landlord on authority of the South Carolina Ejectment Statute, S.C. Code Ann. § 27-37-10 (2007), *et seq.* (the “Ejectment Statute”), or else to suffer civil contempt. Furthermore, the lower court has declared Appellant/Tenant’s payment obligation to be the law of this case. These rulings constitute a *de facto*, *pre-trial* judgment against Appellant/Tenant and have been issued without a hearing to resolve the ultimate legal and factual disputes. The appealed orders are final in that they declare (albeit erroneously) that Appellant/Tenant owes a liquidated debt of \$152,137.76 to Respondent/Landlord and that such debt is the irreversible law of this case. Further, the lower court rulings constitute a final and appealable contempt decree. Further still, even if they were not final, the aggregated rulings of the lower court are grounded in an extreme absence of due process, thereby affecting a substantial right. Accordingly, appellate jurisdiction is proper under Section 14-3-330 of the South Carolina Code of Laws, and Respondent/Landlord’s Motion to Dismiss should be denied.

II. FACTUAL BACKGROUND:

At the outset, Appellant/Tenant informs the Court that very little discovery has taken place in the subject action—written discovery is incomplete, no depositions have been taken, and no witnesses have testified before the lower court. As a result, ultimate factual disputes persist. The following relevant details, however, are supported by recent, third-party subpoena responses, or are a matter of record documentation.

In May 2003, Appellant/Tenant and Respondent/Landlord's predecessor-in-interest entered into a commercial lease (the "Lease"), which provided for a 10-year tenancy. The Lease incorporates a "Work Letter," attached hereto as Exhibit A (the "Work Letter"). Such Work Letter calls for Respondent/Landlord to reimburse Appellant/Tenant's up-fitting costs at a rate of \$20.00 per square foot of leased premises. Based upon the final premises area, Respondent/Landlord's obligation of reimbursement (the "Unpaid Allowance") totaled in excess of \$1.2 Million. The amount of the Unpaid Allowance owed to Appellant/Tenant has been acknowledged by Respondent/Landlord in the context of mortgage-loan documentation. In particular, the Loan Agreement signed by Respondent/Landlord's principal, Michael McCloskey, memorializes and quantifies the debt owed to Appellant/Tenant. Relevant excerpts of such Loan Agreement are attached hereto as Exhibit B.

Based on such loan documents (which were not available to the lower court at the time the appealed rulings were issued), the following additional facts are revealed:

- (1) Respondent/Landlord, at the insistence of its mortgage lender, deposited \$1,272,400.00 in a cash reserve account to cover the Unpaid Allowance (See Schedule IV of Exhibit B);
- (2) Respondent/Landlord sought to deprive Appellant/Tenant of the Unpaid Allowance on the hope that Appellant/Tenant would simply overlook the debt (See Exhibit C); and
- (3) Respondent/Landlord eventually converted the Unpaid Allowance cash reserve to its use—as purchase-money to acquire the building in which the premises are situated (See Exhibit D).

In sum, Respondent/Landlord has consistently acknowledged Appellant/Tenant's entitlement to the Unpaid Allowance, and Respondent/Landlord has absconded with cash set aside to cover this obligation in hopes that Appellant/Tenant would "overlook" the debt owed.

Appellant/Tenant did not overlook this sizeable sum, and with approximately six months remaining on the Lease, Appellant/Tenant sent a demand letter to Respondent/Landlord (See Exhibit E). Appellant/Tenant's demand for payment was met with a letter from Respondent/Landlord's Florida attorney conjuring a non-existent default allegation and threatening self-help eviction and seizure of Appellant/Tenant's property (See Exhibit F).

III. PROCEDURAL POSTURE:

Confronting unlicensed counsel's threats, Appellant/Tenant moved for a temporary restraining order and sought permission to pay rent into court as a means of preserving contested possessory rights to the premises. Appellant/Tenant has consistently argued to both Respondent/Landlord and the lower court that there is no self-help eviction privilege in South Carolina, asserting instead that the due process requirements of the Ejectment Statute must be followed. Eventually, on July 16, 2013 (forty-six days after Appellant/Tenant filed suit seeking the Unpaid Allowance), Respondent/Landlord proffered a Rule to Show Cause as required under the Ejectment Statute. See S.C. Code Ann. § 27-37-10 (2007). Such Rule has never been issued or served. Yet, at the hearing on Appellant/Tenant's Motion to Deposit Funds into Court, the lower court ordered payment of the June and July rent according to Section 27-37-155 of the Ejectment Statute. (See Order of Judge Stilwell dated July 31, 2013, Exhibit G). Questioning how

the lower court might recourse to the Ejectment Statute without adherence to statutory notice requirements, Appellant/Tenant moved for reconsideration. Judge Stilwell denied Appellant/Tenant's Motion for Reconsideration, but reassured the parties that the Order awarding pre-trial rent was not a merits-based decision and was without prejudice. (See Order of Judge Stilwell dated August 23, 2013, Exhibit H).

On September 4, 2013, Respondent/Landlord filed an Emergency Motion for Contempt on the basis of Appellant/Tenant's refusal to pay rent. The matter was referred to Judge Simmons by Order dated September 16, 2013. Upon hearing the Respondent/Landlord's Emergency Motion, Judge Simmons declared that the prior Orders of Judge Stilwell—which explicitly declare themselves to be non-prejudicial and not merits-based—establish the law of the case. Judge Simmons consequently ordered Appellant/Tenant to pay pre-trial damages in excess of \$300,000.00 at peril of contempt. (See Orders of Judge Simmons dated November 13, 2013 and December 23, 2013, Exhibit I). Appellant/Tenant has appealed Judge Simmons' Orders, and inherently the non-final Orders of Judge Stilwell, which were founded on *pendente lite* provisions of the Ejectment Statute.

IV. ARGUMENT:

A. The Lower Court's Erroneous Ruling that Non-Final, Prior Orders Constitute Law of the Case is Appealable.

The lower court has declared that a pre-trial, damages award establishes the law of this case. Such an erroneous ruling is immediately appealable because it deprives Appellant/Tenant of the right to a trial on the merits. E.g., Lester v. Dawson, 327 S.C. 263, 491 S.E.2d 240 (1997); C&S Real Estate Services, Inc., v. Massengale, 290 S.C. 299, 350 S.E.2d 191 (1986); Creed v. Stokes, 285 S.C. 542, 331 S.E.2d 351 (1985); First

Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998); Preferred Sav. Bank, Inc. v. Elkholy, 303 S.C. 495, 399 S.E.2d 195 (Ct. App. 1990). The foregoing line of cases establishes that an order depriving a party of a mode of trial to which it is entitled is immediately appealable. In the present case, the lower court's orders would preclude not only the mode of trial, but any trial at all—including presentation of witnesses and determinations by a finder of fact—as to more than \$300,000.00 of contested contract damages. The rulings of Judge Simmons, based on blind obedience to a prior decree, must be appealed; otherwise, Appellant/Tenant would be deemed to forego any contest of these damages—which is the ultimate matter in dispute!

In amplification of the foregoing, Appellant/Tenant is compelled to expound on the lower court's law-of-the-case ruling. The law-of-the-case doctrine allows that “an appealable order from which no appeal is taken becomes the law of the case in all subsequent proceedings involving the same parties and the same subject matter.” Prof'l Bankers Corp. v. Floyd, 285 S.C. 607, 613, 331 S.E.2d 362, 365 (Ct. App. 1985). The doctrine applies to both findings of fact and principles of law. See, e.g., Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 598 S.E.2d 712 (2004); McCullough v. Urquhart, 248 S.C. 348, 149 S.E.2d 909 (1966). Moreover, the law-of-the-case doctrine applies regardless of any patent error in the unappealed ruling. McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004). Given the grave and imposing consequences of the doctrine, it is not surprising that appellate courts have confined its effect to matters *actually determined* in a ruling that was *in fact appealable*. E.g., Prof'l Bankers Corp., 285 S.C. at 613, 331 S.E.2d at 365.

In the present action, Appellant/Tenant has consistently pointed out that the lower court's rent-payment decree is founded on the Ejectment Statute. The pretrial rent-payment remedy of the Ejectment Statute is not intended as a means to a final and appealable damages decree upon which contempt might stand. Indeed, Judge Stillwell cites to Section 27-37-155 of the Ejectment Statute which provides as follows:

If the court orders that the tenant pay all rent due and accruing as of and during the pendency of the action as provided by Section 27-37-150 and this section, the order may require the payments to be made (a) directly to the commercial landlord or to the clerk of court, to be held until final disposition of the case, or (b) through the magistrate's office.... *If the tenant fails to make a payment as provided in Section 27-37-150 and this section, the tenant's failure to comply entitles the landlord to execution of the judgment for possession* and, upon application of the landlord, the magistrate shall issue a warrant of ejectment and the landlord must be placed in full possession of the premises by the sheriff, deputy, or constable.

S.C. Code Ann. § 27-37-155(B)(5)(2007) (emphasis added).¹ In its Motion for Reconsideration submitted to Judge Stilwell, Appellant-Tenant urged that "the Court's Order should be amended to declare that the consequence of a failure to pay rent is dispossession from the Premises (not contempt)...."² (See Appellant/Tenant's Motion to Reconsider dated Aug. 9, 2013, pg. 3). In response, Judge Stilwell advised that Appellant/Tenant:

has convoluted and confused the meaning of the Court's previous Order. This Court has made no rulings with respect to the merits of the case and leaves open for a trial

¹ Notably, the Ejectment Statute abrogates from common law and must be strictly construed. Wallace v. Wannamaker, 231 S.C. 158, 97 S.E.2d 502 (1957).

² Appellant/Tenant's concern over contempt arose from Respondent/Landlord's communicated intent to move for such relief.

on the merits all justiciable issues raised in the parties' pleadings. The Court's Order is without prejudice to any party with respect to allocations of an unpaid allowance or a breach under the contract.

(See Order of Judge Stilwell dated August 23, 2013, Exhibit H). Having thus received equal parts admonishment and reassurance, Appellant-Tenant contented itself with the prospects of either payment or eviction. In summary, Judge Stilwell's Orders declare no consequence; they beg further action, and are, therefore, not final-appealable rulings. Judge Stilwell's rulings are explicitly non-prejudicial and cannot be the basis for establishing the law of this case. The Respondent/Landlord's Motion to Dismiss Appeal should be denied so that trial on the merits can proceed.

B. The Lower Court Rulings are Final and Appealable Because They Declare Appellant/Tenant's Failure to Pay Pre-Trial Damages is Contemptuous Conduct.

The orders issued by Judge Simmons declare that Appellant/Tenant's failure to pay pre-trial damages is contemptuous conduct; therefore, Judge Simmons' rulings are immediately appealable. E.g., Tucker v. Honda of S.C. Mfg., Inc., 354 S.C. 574, 582 S.E.2d 405 (2003); Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986); Ex parte Cannon, 385, S.C. 643, 685 S.E.2d 814 (Ct. App. 2009). The foregoing cases adopt the nearly universal position that contempt citations are final and immediately appealable. The non-prejudicial/non-merits rulings of Judge Stilwell, by themselves, do not constitute final judgments as contemplated by Section 14-3-330(1) of the South Carolina Code of Laws. After all, Judge Stilwell's rulings merely provided for interim statutory relief. By contrast, Judge Simmons' subsequent rulings ascribing contempt to Appellant/Tenant's refused payment are final and are thus immediately appealable.

C. Even if not Final, the Rulings of the Lower Court are Grounded in an Absence of Due Process, and Are Therefore Appealable as Affecting a Substantial Right.

Respondent/Landlord's Motion to Dismiss should further be denied on the basis that the appealed orders affect a substantial right and prevent Appellant/Tenant from achieving a judgment from which appeal might be taken. S.C. Code Ann. § 14-3-330(2) (1976), See also Graham Law Firm, P.A. v. Makawi, 396 S.C. 290, 721 S.E.2d 430 (2012); Ex parte S.C. Farm Bureau Mut. Ins. Co., 314 S.C. 487, 431 S.E.2d 252 (1993). In Graham, appellant argued that the lower court's refusal to allow a factual inquiry deprived it of due process and would likely have the effect of defeating appellant's underlying claims. Graham, 396 S.C. at 300, 721 S.E.2d at 436. The same is true in the present case. Here, the lower court has ruled that Appellant/Tenant is obligated to pay some \$315,000.00 to Respondent/Landlord. Moreover, Judge Simmons has proclaimed this pre-trial payment obligation to be law of the case. Judge Simmons' rulings constitute a de facto judgment which cannot be undone without the present appeal, and worse, such judgment was rendered without due process. Appellant/Tenant was given no opportunity to present its case before a trier-of-fact; Appellant/Tenant was given no opportunity to conduct meaningful discovery; and Appellant/Tenant was given no opportunity to depose Respondent/Landlord's witnesses.

The lower court's failure to afford due process is even more patent upon review of statutory provisions relied upon by Judge Stilwell. The plain language of the Ejectment Statute allows that a landlord may pursue eviction on grounds of an alleged rental default. S.C. Code Ann. § 27-37-10(A)(2007). Unequivocally, an action for ejectment is commenced by issuance and service of a written Rule to Show Cause. S.C. Code Ann. § 27-37-20(2007). Section 27-37-40 requires that a warrant of ejectment shall issue in the

instance of a non-appearing tenant; however, recognizing that landlords do not have a monopoly on the truthful default allegations, Section 27-37-60 mandates that a tenant appearing in contest of ejectment shall be entitled to a trial on the merits over the opposing claims just "as in any other civil case." Depriving Sherman of its right to due process, the lower court's ruling disregards the prerequisite Rule to Show Cause—which is not perfunctory, but is instead a hallmark to the tenant that an ejectment action has been properly engaged. Though proffered to the lower court by Respondent/Landlord, no Rule to Show Cause was ever issued or served in this matter. Judge Stilwell's payment decree cites to—and fundamentally depends upon—Section 27-37-155 of the Ejectment Statute as grounds for commanding Appellant/Tenant's pre-trial payment. Without the issuance of a Rule to Show Cause, however, Sherman cannot have been prepared to make arguments in contest of such payment. Because Appellant/Tenant has been deprived of due process in a manner that would preclude judgment, the lower court rulings are immediately appealable.

V. CONCLUSION:

For the reasons above, Respondent-Landlord's Motion to Dismiss must be denied.

Respectfully submitted,



Steven E. Farrar (#1960)
William B. Swent (#13519)
Jason D. Maertens (#73583)
Smith Moore Leatherwood LLP
2 West Washington Street, Suite 1100 (29601)
Post Office Box 87
Greenville, SC 29602
(864) 751-7600 / (864) 751-7800 (fax)
steve.farrar@smithmoorelaw.com
william.swent@smithmoorelaw.com

jason.maertens@smithmoorelaw.com

Attorneys for Plaintiff

February 19, 2014

Exhibit A

EXHIBIT C

2

Work Letter

Tenant shall construct its improvements to the Premises (collectively, "Tenant Improvements") in accordance with the Plans (as that term is hereinafter defined). Tenant Improvements shall be at Tenant's sole cost and expense except that Landlord shall provide Tenant with an allowance (the "Allowance") of \$881,300 (being \$20.00 per square foot of Rentable Floor Area of Tenant's Office Space, it being understood that no allowance shall apply to the File Storage Space). "Qualifying Expenditures" shall mean (i) Tenant's architectural and engineering fees for the Plans, (ii) Tenant's construction management fees, (iii) Tenant's cost of constructing the Tenant Improvements, including filling and permit fees and fees payable to construction consultants, and (iv) Tenant's cost of acquiring and installing all of Tenant's signage; provided that Qualifying Expenditures shall not include payments for any furnishings, furniture (including systems furniture), personal property, trade fixtures (excluding signage), or equipment not incorporated into the Premises, nor to any telephone, computer or teledata wiring or installations. The "Unapplied Allowance" shall mean the amount, if any, by which, as of the Commencement Date, (x) the Allowance exceeds (y) the total amount of Qualifying Expenditures which Tenant is entitled to apply against the Allowance (including prior advances of the Allowance and any undisbursed retainage or other payments which remain to be paid to Tenant on account of Qualifying Expenditures). Except for the reimbursement from the Allowance provided for herein, Tenant shall be solely responsible for all costs and expenses of Tenant Improvements or other work by Tenant to the Premises, if any.

The Allowance shall be subject to the following further understanding: (a) As set forth in this Lease, in the event that Tenant's Qualifying Expenditures are less than Ten Dollars (\$10.00) multiplied by the rentable area of the Office Space, then the cost of elevator lobby renovations shall be chargeable to the Allowance and shall reduce the

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Allowance otherwise payable to Tenant. However, in the event that Tenant's Qualifying Expenditures are more than Ten Dollars (\$10.00) multiplied by the rentable area of the Office Space, then the cost of such lobby renovations shall be paid by Landlord, at Landlord's sole expense; (b) The cost of bathroom renovations for the 5th, 6th and 7th floors of the Building, consistent with Landlord's current Building renovation specifications, shall be chargeable to and shall reduce the Allowance, (c) In the event Tenant exercises any expansion option under Article XIII, and Tenant leases at least fifty percent (50%) of the rentable area on such floor pursuant to such expansion, then Landlord shall make similar elevator lobby ^{and bathroom} renovations at Landlord's sole expense (if not theretofore performed) and Tenant shall pay for a proportionate share of the cost of similar bathroom renovations for such floor (if not theretofore performed), such share being equal to the ratio that Tenant's rentable area on such floor bears to the rentable area of the full floor, provided that if Tenant expands into the Gallagher A Space (as defined in Article XIII), then notwithstanding that the Gallagher A Space is less than half of a full floor, the preceding provisions of this subparagraph (c) shall nonetheless apply.

As part of the Tenant Improvements, Tenant shall, subject to obtaining all necessary licenses and permits, have the right to place two exterior signs on the Building, (a) one on the Main Street elevation no higher than between the top of the third floor and the bottom of the fourth floor, and (b) one on the Washington Street elevation no higher than between the top of the third floor and the bottom of the fourth floor. Each such sign shall (i) not be internally or back lit (but may be externally lit), (ii) be no larger than 2 feet high and 10 feet long, (iii) be constructed of individual pin mounted letters made of painted aluminum, and (iv) in all respects (including without limitation the manner of exterior lighting, if any) be subject to Landlord's reasonable approval in accordance with the plan approval process set forth below. The Premises includes without limitation the right of Tenant to access the signs for installation, maintenance, operation (including but not limited to electrical and data connections between the Premises and the signs), and removal. The costs of electricity for lighting the sign shall be included in Operating Costs.

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During the process of Tenant's construction activities, Tenant shall have the temporary license and right, with Landlord's approval (not to be unreasonably withheld) to utilize appropriate portions of the Lot for construction staging areas, such as trailers and dumpsters, as well as available minor interior portions of the Building (to the extent available) for supervisory construction personnel; provided that (i) all such use shall be at Tenant's sole cost and risk, including without limitation any costs required to properly and safely secure, establish or separate such areas, and (ii) Tenant's indemnification and insurance requirements as set forth in this Lease shall apply to such areas as if such areas were part of the Premises.

Tenant's plans and specifications shall include the following:

a. *Space Plans*: The "Space Plans" shall be a schematic plan of the Premises indicating the location of all partitions and doors, and shall include the locations and structural, mechanical, electrical or plumbing requirements of any equipment or usage which may affect the structural components and service systems of the Building.

b. *Final Plans*: The "Final Plans" shall consist of all plans and specifications necessary to construct the Tenant Improvements, including mechanical and electrical working drawings.

The Space Plans and the Final Plans (collectively, the "Plans") shall be prepared by a licensed architect hired and paid by Tenant and shall be submitted to Landlord for review and approval prior to the performance of any work. If available at the time of the execution of this Lease, the Plans shall be attached hereto as Schedule C-1. The Final Plans shall be in a form in which building permits can be readily obtained and shall comply with all applicable local, state and federal laws, ordinances, codes and regulations. Tenant's architect shall certify to Landlord and Tenant in the form attached

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hereto as Exhibit G that the Plans comply with the ADA and all other pertinent City and County, State and Federal rules, laws and regulations.

Landlord agrees to diligently review each plan submission and notify in writing Tenant whether such plan submission is approved (and if not approved, including in reasonable detail the reasons therefor) within fifteen (15) days after receipt of Tenant's plan submission or, if later, within five (5) business days after receipt of such additional information or documentation reasonably requested by Landlord within ten (10) days after receipt of Tenant's plan submission. Landlord shall be deemed to have approved if Landlord fails to so notify Tenant within such time period. Landlord agrees not to unreasonably withhold its approval.

Progress payments on account of Qualifying Expenditures, shall be paid to Tenant, provided that this Lease is in full force and effect and Tenant is not in default hereunder beyond any period of grace, and provided that Tenant shall have delivered to Landlord a Qualifying Application for Payment (as hereinafter defined). A Qualifying Application for Payment shall contain (A) a breakdown of Qualifying Expenditures to date and those covered by the current application, (B) a joint certification of Tenant and Tenant's Architect to the effect that the sum for which reimbursement is requested is then justly due to Tenant's contractor(s) and that the work in question has been properly and validly performed to Tenant's satisfaction in accordance with the Final Plans and all applicable laws, codes and regulations, (C) Tenant's certification that there has not been filed any vendor's, mechanic's or other liens with respect to the work, and (D) partial lien waivers, paid receipts or other proof of payment as Landlord may reasonably require for work done and materials supplied prior to the current requisition. Prior to completion of the Tenant Improvements, all progress payments by Landlord of the Allowance shall be subject to a 10 % retainage. Upon the completion of the work for which the Allowance is to be applied, and in order to qualify for disbursement of the 10% retainage, Tenant shall further provide to Landlord, in addition to the foregoing items, (i) the certificate of Tenant's Architect that the Tenant Improvements been

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substantially completed in accordance with the Final Plans and in accordance with all codes, rules, laws and regulations, (ii) a final release of liens from Tenant's contractor(s), and (iii) final "as built" plans of the Premises in CAD format showing the Tenant improvements, as well as a certificate of occupancy (temporary or permanent, to the extent required by law) for the Premises (provided that Tenant shall not be required to obtain a certificate of occupancy if the failure to qualify for same is the result of a condition for which Landlord, and not Tenant, has responsibility). The various submission items required for disbursement of a progress payment (including final payment) on account of Qualifying Expenditures, are collectively referred to as the "Required Submissions."

Notwithstanding the foregoing to the contrary, that portion of the Allowance equal to the Unapplied Allowance shall be utilized as a credit against Base Rent as set forth in Section 4.1.3 of this Lease. If Landlord fails to pay or provide credit for the Allowance or any portion of the Allowance, such failure shall constitute a default under the Lease by Landlord, and if Tenant shall obtain a final and unappealable judgment against Landlord for failure to pay same, in addition to all remedies available to Tenant, Tenant shall have the right to offset the Allowance due but unpaid (together with interest thereon at the rate equal to four percent (4%) in excess of the Prime Rate set forth in the Money Rates column of *The Wall Street Journal*, or if such rate exceeds the maximum interest rate allowed by law, then the maximum interest rate allowed by law, from the date upon which such Allowance was due and payable hereunder) against rent then due and thereafter coming due.

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Exhibit B

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COURT OF APPEALS

LOAN AGREEMENT

THIS LOAN AGREEMENT, dated as of July 27, 2005 (as amended, restated, replaced, supplemented or otherwise modified from time to time, this "Agreement"), between LEHMAN BROTHERS HOLDINGS INC., doing business as Lehman Capital, a division of Lehman Brothers Holdings Inc., having an address at 399 Park Avenue, New York, New York 10022 ("Lender"), and WOLF GREENVILLE, LLC, a Delaware limited liability company ("Wolf"), and FRI GREENVILLE, LLC, a Delaware limited liability company ("FRI"), each having an address at 2090 Palm Beach Lakes Blvd., Suite 700, West Palm Beach, Florida 33409 (collectively, "Borrower").

WITNESSETH:

WHEREAS, Borrower desires to obtain the Loan (as hereinafter defined) from Lender; and

WHEREAS, Lender is willing to make the Loan to Borrower, subject to and in accordance with the terms of this Agreement and the other Loan Documents (as hereinafter defined);

NOW, THEREFORE, in consideration of the making of the Loan by Lender and the covenants, agreements, representations and warranties set forth in this Agreement, the parties hereto hereby covenant, agree, represent and warrant as follows:

I. DEFINITIONS; PRINCIPLES OF CONSTRUCTION

Section 1.1 Definitions.

For all purposes of this Agreement, except as otherwise expressly required or unless the context clearly indicates a contrary intent:

"Acceptable Appraisal" shall mean, with respect to a Property, an appraisal (a) executed and delivered to Lender by a qualified MAI appraiser having no direct or indirect interest in the applicable Property or any loan secured in whole or in part thereby and whose compensation is not affected by the approval or disapproval of such appraisal by Lender; (b) addressed to Lender and its successors and assigns; (c) satisfying the requirements of the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation and Title XI of the Federal Institutions Reform, Recovery and Enforcement Act of 1989 and the regulations promulgated thereunder, all as in effect on the date of such calculation, with respect to such appraisal and the appraiser making such appraisal; and (d) otherwise satisfactory to Lender in all respects in Lender's sole discretion.

"Additional Insolvency Opinion" shall mean an opinion of Moyle Flanigan Katz Raymond & Sheehan P.A. or other competent counsel selected by Borrower in form and substance reasonably satisfactory to Lender and, after a Securitization, the Rating Agencies stating that, in the event a case were to be instituted in respect of certain holder(s) of direct or

7.3.6 Indemnification. Borrower shall indemnify Lender and hold Lender harmless from and against any and all actions, suits, claims, demands, liabilities, losses, damages, obligations and costs and expenses (including litigation costs and reasonable attorneys fees and expenses) arising from or in any way connected with the performance of the Replacements. Borrower shall assign to Lender all rights and claims Borrower may have against all persons or entities supplying labor or materials in connection with the Replacements; provided, however, that Lender may not pursue any such right or claim unless an Event of Default has occurred and remains uncured.

Section 7.4 Intentionally Omitted.

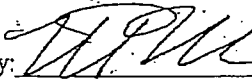
Section 7.5 Unfunded Tenant Allowance Account. On the Closing Date Borrower shall deliver to Lender the sum of \$1,321,548.00 to be held by Lender in an Account (the "Unfunded Tenant Allowance Account") to pay the amount of tenant allowances required to be paid by Borrower or "free rent" credits due pursuant to Leases with certain tenants at the Property. Lender shall maintain the Unfunded Tenant Allowance Account in an Eligible Account with the Servicer pursuant to the Cash Management Agreement. Lender shall instruct Servicer to advance to Borrower portions of the Unfunded Tenant Allowance Account upon ten (10) Business Days written request therefor by Borrower (a) by check payable to the tenant entitled thereto or (b) by check payable to Borrower provided that if said portion is disbursed as described in this clause (b) upon the next succeeding request by Borrower for an advance of a portion of the Unfunded Tenant Allowance Account Borrower shall deliver to Lender an acknowledgement from the tenant(s) which received the prior advance of a portion of the Unfunded Tenant Allowance Account that said tenant received said portion of the Unfunded Tenant Allowance Account and that Borrower has fully satisfied its obligations for payment of tenant allowances required pursuant to the applicable Lease. The tenants entitled to portions of the Unfunded Tenant Allowance Account and the respective amounts of such payments are set forth on Schedule IV. Any funds remaining in the Unfunded Tenant Allowance Account after Borrower has satisfied the obligations to the tenants identified on Schedule IV as evidenced by evidence reasonably satisfactory to Lender shall be remitted to Borrower.

Section 7.6 Reserve Funds, Generally. Borrower grants to Lender a first priority perfected security interest in each of the Reserve Funds and any and all monies now or hereafter deposited in each Reserve Fund as additional security for payment of the Debt. Until expended or applied in accordance herewith, the Reserve Funds shall constitute additional security for the Debt. Upon the occurrence of an Event of Default, Lender may, in addition to any and all other rights and remedies available to Lender, apply any sums then present in any or all of the Reserve Funds to the payment of the Debt in any order in its sole discretion. The Reserve Funds shall not constitute trust funds and may be commingled with other monies held by Lender. The Reserve Funds shall be held in interest bearing accounts and all earnings or interest on a Reserve Fund shall be added to and become a part of such Reserve Fund and shall be disbursed in the same manner as other monies deposited in such Reserve Fund. Borrower shall not, without obtaining the prior written consent of Lender, further pledge, assign or grant any security interest in any Reserve Fund or the monies deposited therein or permit any lien or encumbrance to attach thereto, or any levy to be made thereon, or any UCC 1 Financing Statements, except those naming Lender as the secured party, to be filed with respect thereto. Lender shall not be liable for any loss sustained on the investment of any funds constituting the

IN WITNESS WHEREOF, the parties hereto have caused this Loan Agreement to be duly executed by their duly authorized representatives, all as of the day and year first above written.

BORROWER:

FRI GREENVILLE, LLC, a Delaware limited liability company

By: 

Name: Michael P. McCloskey

Title: President

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SCHEDULE IV
UNFUNDED TENANT ALLOWANCES

Schedule IV
Wachovia Place
Greenville, South Carolina
List of Unfunded Leasing Costs

Office Towers

Pink Azalea, LLC	None
Satyam LLC/Quiznos	None
Wachovia Bank	None
Sherman Financial Group	Expansion TI Allowance \$1,272,400 (Due upon proper notice and request; Per Lease See Exhibit C)
Verizon Wireless	Leasing Commission \$6,000 (Payable on commencement date in September)
Arthur J. Gallagher	None

Retail Buildings

Sticky Fingers	None
Port City Java	None
Charles Schwab	None
Weich Law Firm	New Deal TI Allowance \$43,148 (Due upon Tenant providing a CO.)

Total	\$1,321,548
-------	-------------

CONFIDENTIAL-KTS000308

Exhibit C



RE: Wachovia Place
Jonathan Cameron-Hayes to: david.harrison@midlandis.com

03/04/2011 09:50 AM

History: This message has been replied to.

David: Thanks for your mail and comments:

- TI Allowance - the TI allowance on account was originally funded in the amount of \$1,212,400 at closing. We have been applying certain costs against that amount - HVAC work etc, which reduces the balance owed to Sherman by at least \$200,000. As you know Sherman is entitled to this amount in any event. We believe that they will need \$10 psf for a future renewal and this would be cash funds. Our goal is still to try and utilize the current reserve for the lease renewal TI cost and see if they overlook it (as they have for the last 5 years). To answer your question the TI to be funded is not \$30 but \$10 for the lease renewal.
- Commission - the 4% is to the outside broker (Studley), although we have not seen their agreement yet.
- I had encouraging discussions/meetings yesterday that the City has offered a \$45 per month parking rate (down from \$69). Studley broker also believes that they will consider short circuiting the BIS option if our lease structure is economically compelling. I would like to get your approval on the lease renewal proposal by Monday if possible as I have a follow up call with Studley set up for Monday pm.
- Can meet week of March 14
- Let's try and have a quick call today if possible.

Thanks for your response.

Jonathan Cameron-Hayes
President
FRI Investors
561-615-3903 H Office
561-310-5411 Cell
864-232-1998 SC Office

www.friinv.com

From: David.harrison@midlandis.com [mailto:david.harrison@midlandis.com]
Sent: Thursday, March 03, 2011 5:12 PM
To: Jonathan Cameron-Hayes
Subject: RE: Wachovia Place

I may have time in the late afternoon, but I have a really tight day since I have been on vacation all week. A few questions I have regarding your proposal:

- Regarding the lease terms for Sherman, what is the exact amount currently being held in the reserve for their build-out? I seem to recall it being in the 1.6 million range. Do you think this deal will require almost 2.5 million (30 psf) in TIs in order to get done? That seems really high to me.
- Will you have to pay the tenant broker in addition to the 4% you show in your proposal, or is that for the tenant broker?
- The management fee section is going to be very difficult to get through. I think the best case will

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be a full reinstatement of management fees upon a successful exit from the forbearance agreement. All excess cash flow will be swept to pay down the balance, and we would likely maintain some operational reserve in addition, for rainy day needs.
I will have to get our counsel to review the Guaranty language, and will reserve comments accordingly.

I have a meeting with my boss to discuss on Friday, and will follow up with you as soon as I can. If you can let me know the TI number, I would appreciate it.

Thanks, and I do appreciate you taking the time to put this together. I would also like to plan some time to come out to the building next month, and think we should look at our collective schedules soon to lock something down.

Best

David A. Harrison
Midland Loan Services, Inc.
A PNC Real Estate Company
10851 Mastin, Suite 700
Overland Park, KS 66210
913-253-9346 phone
913-253-9723 fax
david.harrison@midlands.com

From: Jonathan Cameron Hayes <jch@frmv.com>
To: "david.harrison@midlands.com" <david.harrison@midlands.com>
Date: 03/03/2011 02:01 PM
Subject: Wachovia Plaza

Do you have time to talk tomorrow?

The contents of this email are the property of PNC. If it was not addressed to you, you have no legal right to read it. If you think you received it in error, please notify the sender. Do not forward or copy without permission of the sender. This message may contain an advertisement of a product or service and thus may constitute a commercial electronic mail message under US Law. The postal address for PNC is 249 Fifth Avenue, Pittsburgh, PA 15222. If you do not wish to receive any additional advertising or promotional messages from PNC at this e-mail address, click here to unsubscribe, <https://pnc.p.delivery.net/m/u/pnc/uni/p.asp>. By unsubscribing to this message, you will be unsubscribed from all advertising or promotional messages from PNC. Removing your e-mail address from this mailing list will not affect your subscription to alerts, e-newsletters or account servicing e-mails.

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FEB 21 2014

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Exhibit D

From: Michael McCloskey <mpm@frinv.com>
Sent: Friday, November 11, 2011 3:20 PM
To: Jain, Rakshiet; Reynolds, David
Cc: Brian Schiedemeyer <bschiedemeyer@frinv.com>; Jonathan Cameron-Hayes
<jch@frinv.com>
Subject: RE: WP FRI IM v3 2.xlsx

Good point. That is being used to reduce the our purchase basis. Wed
are paying Midland \$17m. The \$1m comes with the asset.

From: Jain, Rakshiet [mailto:rjain@FiveMileCapital.com]
Sent: Friday, November 11, 2011 10:20 AM
To: Michael McCloskey; Reynolds, David
Cc: Brian Schiedemeyer; Jonathan Cameron-Hayes
Subject: RE: WP FRI IM v3 2.xlsx

Michael,

Also, you had mentioned that there was \$1 million or so in some
reserves, would that money be used for the TI/LC's?

Thanks,

rj

From: Michael McCloskey [mailto:mpm@frinv.com]
Sent: Friday, November 11, 2011 10:15 AM
To: Jain, Rakshiet; Reynolds, David
Cc: Brian Schiedemeyer; Jonathan Cameron-Hayes
Subject: WP FRI IM v3 2.xlsx

This is what I sent you in the zip file last week (11/4). It assumes
the following for Resurgent/Sherman renewal:

Term	12 years
Square Feet	81,757 sf
Commencing	11/1/2011
Rate	\$17.50

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Exhibit E



SMITH MOORE LEATHERWOOD

May 15, 2013

U.S. Mail and Email
bschiedemeyer@friniv.com

COPY

FM FRI Greenville, LLC
2090 Palm Beach Lakes Blvd. #700
West Palm Beach, FL 33409

Re: *Lease to Sherman Financial Group, LLC dated May 15, 2003, (as heretofore amended, the "Lease"); Improvement Allowance Accounting and Payment Demand.*

Mr. Schiedemeyer:

As you know, my firm represents Sherman Financial Group, LLC (the "Tenant" under the above-referenced Lease, and hereinafter "Sherman"). In this capacity, I am tasked to communicate a demand to you, as agent for FM FRI Greenville LLC (the "Landlord") for sums due and payable to Sherman in the amount of One Million, One Hundred Eighty-Seven Thousand, One Hundred Nine and 05/100^{ths} Dollars (\$1,187,109.05).

By way of explanation, I direct your attention to Exhibit C of the Lease, entitled "Work Letter." The Work Letter stipulates that an allowance of \$20.00 per square foot of rentable office space shall be paid by Landlord against Tenant's "Qualifying Expenditures." The term Qualifying Expenditures is defined in the Lease to mean "(i) Tenant's Architectural and Engineering fees for the Plans, (ii) Tenant's construction management fees, (iii) Tenant's cost of constructing the Tenant Improvements, including filing and permit fees and fees payable to construction consultants, and (iv) Tenant's cost of acquiring and installing all of Tenant's signage..." Acknowledging that the initial premises included 44,065 rentable square feet of office space, the parties further stipulated that \$881,300.00 would be payable by Landlord in the name of the "Allowance."

William B. Swent | Direct 864.240.2405 | Fax 864.240.2478 | William.Swent@smithmoorelaw.com

Smith Moore Leatherwood LLP • Attorneys at Law

The Leatherwood Plaza 300 East McBee Avenue Suite 500 Greenville, SC 29601 • 864.242.6440 • www.smithmoorelaw.com

May 15, 2013
Page 2

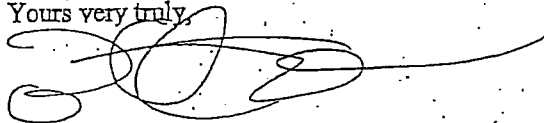
The Lease was subsequently amended in January of 2004 (the "Fourth Amendment"), adding 14,963 rentable square feet of office space. Likewise, later in the spring of 2004, the Lease was further amended (the "Fifth Amendment"), adding 6,129 rentable square feet of office space. The expansion of the Premises affected by the Fourth and Fifth Amendments to the Lease explicitly obligated Landlord to reimburse Sherman for further Tenant Improvements. Specifically, a conservative tally puts the Allowance obligation of the Fourth Amendment at \$277,480.52, and the Allowance obligation of the Fifth Amendment at \$28,328.53. In total, the Allowance specifications of the Lease come to \$1,187,109.05 (the "Total Unpaid Allowance").

I have enclosed herewith a breakdown of qualifying expenditures incurred by Sherman. I am happy to supply lien waivers and supporting invoicing upon request, but of course, the statutory time period for filing mechanic's liens has lapsed. Additionally, it should be plain that Sherman's Qualifying Expenditures well exceeded the Total Unpaid Allowance. As such, the Total Unpaid Allowance is presently due, subject to any deductions for prior payments or bathroom upfits performed by Landlord in accordance with the Lease.

In summary, this letter requests immediate payment to Sherman, delivered to my attention in the amount of \$1,187,109.05. To the extent Landlord takes the position that a deduction from this sum is due, please supply documentary detail sufficient to enable assessment of the deduction claimed. Finally, I am compelled to add that Landlord's failure to reconcile its Allowance obligations against funds allocated and reserved in connection with conveyance of the subject property smacks of conversion and deceptive practices. Under the circumstances, I trust you will work with me expeditiously to finalize a reconciliation and facilitate payment so that we may avoid additional claims for set-off of rent, interest accrual as set forth in the Lease, and recovery of attorney's fees incurred by Sherman in connection with this pursuit.

I will look forward to hearing from you, and remain,

Yours very truly,



William B. Swent

WBS/cc
GREENVILLE 1344499.1

May 15, 2013
Page 3

cc: Resurgent Capital Services, LP
Attn: Scott Kester
15 South Main St., Ste. 700
Greenville, SC 29601

Five Mile Capital Partners
Attn: David Reynolds
Three Stamford Plaza, 12th Floor
Stamford, Connecticut 06901

**HAILE SHAW &
PFAFFENBERGER**

ATTORNEYS AT LAW

North Palm Beach: 660 U.S. Highway One, 3rd Floor N. Palm Beach, FL 33408
Palm Beach: 249 Royal Palm Way, Suite 301A Palm Beach, FL 33480
☎ 561.627.8700 ☎ 561.622.7603 ✉ haileshaw.com

May 24, 2013

Via Email (william.swent@smithmoorelaw.com)

William Swent, Esquire
Smith Moore Leatherwood LLP
300 East McBee Avenue, Suite 500
Greenville, SC 29601

Re: Sherman Financial Group, LLC ("Tenant") Lease dated May 15, 2009 (as amended, the "Lease")
for premises ("Premises") at Wells Fargo Center for Wachovia Place, Greenville, SC
("Building").

Dear Mr. Swent:

As you know, I represent FM PRI Greenville, LLC. Please be advised that the Tenant is in default under the terms of the Lease for abandoning its Premises prior to the expiration of the Lease term. Pursuant to Section 9.2.1 of the Lease, the Tenant is hereby informed that its possessory right in the Premises shall expire on May 31, 2013. Any personal property of the Tenant remaining at the Premises must be removed by Tenant prior to that date. If the Tenant's personal property is not removed, it will be disposed of at Tenant's cost. Pursuant to Section 9.2.2 of the Lease, the expiration of Tenant's right to possession shall not relieve the Tenant of its liabilities under the Lease including the obligation to pay rent. Accordingly, Tenant must continue to make the required monthly installments of rent.

The Landlord specifically reserves all of its rights and remedies available at law and under the Lease including, without limitation, the right to recover certain costs as provided in Section 9.2.2. Prior about June 1, 2013, the Landlord intends to commence demolition of the Premises in order to prepare the space for reletting. After completion of the work necessary to ready of Premises for reletting, Landlord shall provide Tenant with an invoice for the cost of such work. Pursuant to Section 9.2.2 of the Lease, the Tenant is responsible for this cost.

The Landlord will be putting together a list of other obligations which have been breached by Tenant (e.g., the disengagement of the FM200 fire suppression system and the failure to remove supplemental HVAC systems and the access control system) and the costs which will likely be incurred by the Landlord to cure such defaults. My client will seek recovery of such costs from the Tenant.

If you have any questions, please do not hesitate to contact me.

Sincerely,

HAILE SHAW & PFAFFENBERGER, P.A.

By:

William L. White, Esquire

Exhibit G

7/31/13

FORM 4

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

FILED CLERK OF COURT
GREENVILLE CO. S.C.
PAUL E. WICKENS, JR.

JUDGMENT IN A CIVIL CASE
CASE NUMBER: 2013CP2303075

Sherman Financial Group
LLC

FM FRI Greenville LLC

2013 JUL 31 A 3:24

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This matter came before the Court pursuant to the Plaintiff's Motion to Deposit Rental Payments into the Court during the pendency of the instant action. Also before the Court were the Defendant's Motions for Ejectment and Modification of the Previously-Issued Restraining Order. The Honorable Gary Hill previously issued a Temporary Restraining Order on May 31, 2013, and subsequently entered a Preliminary Injunction Order on June 24, 2013.

The Plaintiff's Motion to Deposit the Proceeds into the Court is hereby DENIED. This Court recognizes that it is within its discretion to order that funds be deposited into the Court pursuant to Rule 67 of the South Carolina Rules of Civil Procedure and Section 27-37-155 of the South Carolina Code of Laws, 1976, as amended. However, that authority is discretionary, and this Court finds no evidence that either party is insolvent or that there is a likelihood that the monies will be hidden, absconded with or secreted away. The specific terms of the lease require payment, and these parties are obliged to operate under the same until its termination later this year. Having said that, the Plaintiff shall bring the rent current by making the full payment of both June and July rent to the Defendant in accordance with the terms of the lease. The \$152,137.76 shall remain on deposit with the Court as a bond incident to the Temporary Restraining Order.

The Defendant's Motions for Ejectment and Modification of the Court's Previous Order are also DENIED, with the specific qualification as to bond enumerated above. The issue of whether there has been a material breach under the contract is outstanding. That question is appropriately left to a trial on the merits, allowing for a full inspection by the triers of fact.

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

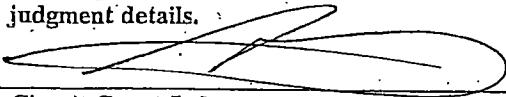
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order: .

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.



Circuit Court Judge

2158

Judge Code

30 JUL 13

Date

For Clerk of Court Office Use Only

This judgment was entered on 7/31/13, and a copy mailed first class or placed in the appropriate attorney's box on 7/31/13, to attorneys of record or to parties (when appearing pro se) as follows:

Steven E. Farrar Smith Moore Leatherwood LLP P.O. Box
87 Greenville, SC 29602

Cynthia Buck Brown Harper, Lambert & Brown, P.A. P.O.
Box 908 Greenville, SC 29602
Calvin Theodore Vick Jr. Harper, Lambert & Brown, P.A.
P.O. Box 908 Greenville, SC 29602
Raymond Patrick Smith Harper, Lambert & Brown, P.A.
P.O. Box 908 Greenville, SC 29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer

Court Reporter

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

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

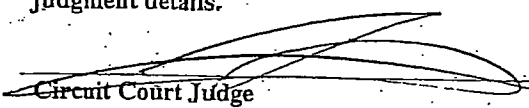
Exhibit H

RECEIVED

FEB 21 2014

Court of Appeals

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge

2158

Judge Code


Date

For Clerk of Court Office Use Only

8/23/13 This judgment was entered on, and a copy mailed first class or placed in the appropriate attorney's box on, 8/23/13 to attorneys of record or to parties (when appearing pro se) as follows:

Steven E. Farrar Smith Moore Leatherwood LLP P.O. Box
87 Greenville, SC 29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

Cynthia Buck Brown Harper, Lambert & Brown, P.A. P.O.
Box 908 Greenville, SC 29602
~~Calvin Theodore Vick Jr. Harper, Lambert & Brown, P.A.~~
~~P.O. Box 908 Greenville, SC 29602~~
~~Raymond Patrick Smith Harper, Lambert & Brown, P.A.~~
~~P.O. Box 908 Greenville, SC 29602~~

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

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

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

8/23/13
(2)

FORM 4

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

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
J. P. WICKENS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP2303075

Sherman Financial Group
LLC

2013 AUG 23 P 2:40

FM FRI Greenville LLC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This matter comes before the Court pursuant to the Plaintiff's Motion to Reconsider the Court's Order of July 31, 2013. The arguments advanced in the Plaintiff's Motion to Reconsider suggest that the Plaintiff has convoluted and confused the meaning of the Court's previous Order. This Court has made no rulings with respect to the merits of the case and leaves open for a trial on the merits all justiciable issues raised in the parties' pleadings. The Court's Order is without prejudice to any party with respect to allocations of an unpaid allowance or a breach under the contract. Should the Plaintiff need clarification, it should submit a motion asking for specific clarification. The Plaintiff's Motion for Reconsideration is thereby DENIED.

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
If applicable, describe the property, including tax map information and address, referenced in the order:		

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

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
CASE NO: 2013CP2303075
2013 NOV 13 PM 4 10

JUDGMENT IN A CIVIL CASE
Sherman Financial Group LLC vs. FM FRI Greenville LLC

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a),
SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy:
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR
ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court;

NOTICE

This is a notice to you that an Order For Tenant To Pay June/July Rent/Motion For Contempt Preserved in this case has been filed in the Clerk of Court's Office. To obtain a certified copy, you may contact our office by phone (864) 467-8551 or email a request to bjeffords@greenvillecounty.org. If you would like a copy via email, please provide a valid email address.

Dated at Greenville, South Carolina, this 13th day of November, 2013.

PRESIDING JUDGE -

Steven E. Farrar Smith Moore Leatherwood LLP
P.O. Box 87 Greenville, SC 29602
William B. Swent Smith Moore Leatherwood LLP
P.O. Box 87 Greenville, SC 296020087
Jason Daniel Maertens Smith Moore Leatherwood
LLP P.O. Box 87 Greenville, SC 29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

Cynthia Buck Brown Harper, Lambert & Brown,
P.A. P.O. Box 908 Greenville, SC 29602
Calvin Theodore Vick Jr. Harper, Lambert &
Brown, P.A. P.O. Box 908 Greenville, SC 29602
Raymond Patrick Smith Harper, Lambert & Brown,
P.A. P.O. Box 908 Greenville, SC 29602

ATTORNEY(S) FOR THE DEFENDANT(S)

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

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

Sherman Financial Group, LLC

Plaintiff

C.A. No. 2013-CP-23-03975

ORDER

FM FRI Greenville, LLC,

Defendant

FILED CLERK OF COURT
GREENVILLE CO. S.C.
PAUL D. WICKENS
2013 NOV 13 PM 4:10

This matter has been referred to the Greenville County Master-In-Equity by Order of the Circuit Court dated September 16, 2013. Before the Court on November 5, 2013 by way of hearing was the Motion of the Defendant, FM FRI Greenville, LLC ("Defendant" or "Landlord") for Contempt and Sanctions. Sherman Financial Group, LLC ("Plaintiff" or "Tenant") opposed such motion. Also before the Court was Tenant's Motion for Withdrawal of the Preliminary Injunction reduced to writing and filed on June 26, 2013 (which injunction incorporated the Temporary Restraining Order of May 31, 2013 where not inconsistent) and return of the \$152,137.76 cash bond incident to the Temporary Restraining Order (the "bond"). Landlord did not oppose the withdrawal of the Preliminary Injunction but opposed the return of the bond.

PROCEDURAL SUMMARY

On or about June 11, 2013, Tenant filed a motion for leave to deposit certain rents with the Court. Tenant asserted in said motion, among other things, its right to a certain alleged tenant allowance. On July 31, 2013, the Circuit Court entered an Order denying such motion and directing Tenant to "bring the rent current by making the full payment of both June and July rent to the Defendant in accordance with the terms of the lease." Said Order found that "the specific

ORDER

ENTERED COMPUTER

PAGE 1

terms of the lease require payment." The Order also provided that the "issue of whether there has been a material breach under the contract is outstanding" and is "appropriately left to a trial on the merits, allowing for a full inspection by the triers of fact." Tenant filed a motion to reconsider. The Court denied such motion by way of Order dated August 23, 2013. In said Order, the Court stated that it "made no rulings with respect to the merits of the case and leaves open for a trial on the merits all justiciable issues raised in the parties' pleadings." The Court also stated that the Order was without prejudice to any party with respect to the alleged tenant allowance or allegations of breach under the lease.

Before the Court is the Affidavit of Brian Schiedemeyer dated November 4, 2013 indicating the Tenant has not paid June, July, August, September, October, or November 2013 rent. Such affidavit has calculated the amounts past due under the lease for June and July 2013 in the amount of \$313,757.86.

Landlord argues that Tenant should be held in contempt for failure to bring the rent current in accordance with the July 31, 2013 Order. Tenant argues that the only remedy available under Section 27-37-155 of the South Carolina Code of Laws for failure to pay rent is ejectment, and the Court does not have the authority to compel Tenant to pay rent under that Section. Accordingly, Tenant argues that it cannot be held in contempt because to interpret the Orders as Landlord suggests would be to follow an order that is unauthorized under Section 27-37-155 and is unconstitutional.

LEGAL ANALYSIS

A. The prior Orders are the law of the case.

The July 31, 2013 Order and the August 23, 2013 Order are the law of the case. See, e.g., ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472

(1997) (unappealed ruling is the law of the case). It is well-settled that a successor judge cannot reverse, overrule, or disregard the rulings of a prior judge. Charleston County Dept. of Social Services v. Father, 317 S.C. 281, 288, 454 S.E.2d 307, 310 (1995). Notwithstanding the prior Orders of Judge Stilwell, this Court would likewise rule that 27-37-155 does not prohibit Landlord from collecting past due rent under the facts of this case.

The July 31, 2013 Order directs Tenant to bring the rent current by making full payment of June and July rent to Landlord. Such has not been done. This Court will enforce such Order, and directs Tenant to make such past due rent payments for June and July not later than November 15, 2013. Non-payment shall subject Tenant to this Court's contempt powers.

H. The bond must remain in place.

The Court has previously ordered in the Temporary Restraining Order that the \$152,137.86 shall remain on deposit with the Court as a bond incident to the Temporary Restraining Order. The Preliminary Injunction incorporates the Temporary Restraining Order, where not inconsistent. The bond shall stay in place through the conclusion of this case, or until further order of the Court.

CONCLUSION

Based on the foregoing, it is

ORDERED, ADJUDGED AND DECREED that Tenant shall make payment of June and July rent to Landlord in the amount of \$313,757.86 on or before November 15, 2013. All other issues related to Landlord's motion for contempt and sanctions, including Landlord's alleged right to additional months' rent, are held in abeyance and preserved.

By consent, the Preliminary Injunction dated June 26, 2013, incorporating the Temporary Restraining Order dated May 31, 2013 where not inconsistent, is withdrawn and dissolved.

The bond in the amount of \$152,137.76 shall remain in place through the conclusion of this case or until further order of the Court.

IT IS SO ORDERED.



The Honorable Charles B. Simmons, Jr.

November 14, 2013
Greenville, South Carolina

ORDER

Page 4

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP2303075

Sherman Financial Group
LLC

FM FRI Greenville LLC

2013 DEC 23 PM 1:40

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

STATE OF SOUTH CAROLINA

A CIVIL CASE

☒ **JURY VERDICT** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
☐ **DECISION BY THE COURT** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☒ **ACTION DISMISSED (CHECK REASON):**

☐ Rule 12(b), SCRCP;

☐ Rule 41(a), SCRCP (Vol. Nonsuit);

☐ Rule 43(k), SCRCP (Settled);

☐ Other:

☐ **ACTION STRICKEN (CHECK REASON):**

☐ Rule 40(j) SCRCP;

☐ Bankruptcy;

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

☐ Other:

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

DEFENDANT(S)

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

☐ Defendant

Submitted by:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE

CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court.

☐ **ORDER INFORMATION**

This order ends: ☒ Does not end the case.

Additional information for the Clerk:

☐ Rule 41(a), SCRCP

INFORMATION FOR THE JUDGMENT INDEX

☐ **ACTION STRICKEN**
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To Be Enrolled (List amount(s) below)
Submitted by:		
State of South Carolina		
County of Greenville		
Case No. 2013CP2303075		
Case Name: Sherman Financial Group LLC		
Case Name: FM FRI Greenville LLC		

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

12/23/2013

Date

CPFORM4Cm

SCCA SCRCP Form 4C (Revised 9/2013)

For Clerk of Court Office Use Only

This judgment was entered on 23rd day of december, 2013, and a copy mailed first class or placed in the appropriate attorney's box on 23rd day of december, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Steven E. Farrar Smith Moore Leatherwood LLP P.O. Box
87 Greenville, SC 29602
William B. Swent Smith Moore Leatherwood LLP P.O. Box
87 Greenville, SC 29602-0087
Jason Daniel Maertens Smith Moore Leatherwood LLP P.O.
Box 87 Greenville, SC 29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

Cynthia Buck Brown Harper, Lambert & Brown, P.A. P.O.
Box 908 Greenville, SC 29602
Calvin Theodore Vick Jr. Harper, Lambert & Brown, P.A.
P.O. Box 908 Greenville, SC 29602
Raymond Patrick Smith Harper, Lambert & Brown, P.A.
P.O. Box 908 Greenville, SC 29602

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

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

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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

Sherman Financial Group, LLC,)
Plaintiff,) C.A. No. 2013-CP-23-03075
v.)
FM FRI Greenville, LLC,)
Defendant.)

ORDER

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL A. COOPER-SHERMAN
2013 DEC 23 AM 11:55

This matter was referred by Order of the Circuit Court dated September 16, 2013. On or about November 13, 2013, this Court entered an Order enforcing the prior Order of Judge Stilwell in which he ordered Sherman Financial Group, LLC ("Sherman" or "Tenant") to make payment of June and July 2013 rent to FM FRI Greenville, LLC ("FM FRI" or Landlord). In that the Tenant had still not paid the rent as directed by Judge Stilwell, this Court ordered that it be paid on or before November 15, 2013. Further, and by consent of the parties, the Court dissolved a certain preliminary injunction and the Court ordered the previously established bond in the amount of \$152,137.76 remain in place through the conclusion of the case or further order of the Court. On or about November 15, 2013, Tenant filed a Motion to Reconsider the November 13, 2013 Order. Before the Court on December 17, 2013 by way of hearing was such motion to reconsider. Landlord opposed such motion. The Motion, as noted below, is denied.

LEGAL ANALYSIS

- A. The Court had the authority to make the rulings in question in the November 13, 2013 Order.

ORDER



RECEIVED
PAGE 1

FEB 21 2014

Court of Appeals

This is a hotly contested lawsuit between two sophisticated LLC's. There are multiple significant and as of now unlitigated issues between the parties arising out of a long-term commercial lease between the parties.

As relates to the narrow issue presented in Tenant's Motion to Reconsider, it is fairly straight forward. Tenant aggressively questions the Court's inherent authority to invoke its contempt powers in the event that Orders of the Court are not complied with. Initially, it is fundamental that a court with proper jurisdiction has the inherent authority to impose, if necessary and appropriate, contempt sanctions in the event its orders are not complied with. The court may punish by fine or imprisonment, at the discretion of the court, all contempts of its authority in any cause or hearing before the same. See, e.g., S.C. Code Ann. § 14-5-320; 15-35-180; Rule 70, SCRPC. The power to punish for contempt is necessarily inherent in all courts. Miller v. Miller, 375 S.C. 443, 455, 652 S.E.2d 754, 760 (Ct. App. 2007). Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. Id.; Ex parte Cannon, 385 S.C. 643, 660-61, 685 S.E.2d 814, 824 (Ct. App. 2009).

B. The Court properly ruled in accordance with the law of the case doctrine.

The previous orders dated July 31, 2013 and August 23, 2013 (the Order denying Tenant's Motion to Reconsider Judge Stilwell's Order of 7/31/2013) are the law of the case. See, e.g., ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (unappealed ruling is the law of the case). It is well-settled that a successor judge cannot reverse, overrule, or disregard the rulings of a prior judge. Charleston County Dept. of Social Services v. Father, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995). The July 31, 2013 Order signed by Judge Stilwell clearly directs Tenant to bring the rent current by making



fail payment of June and July 2013 rent to Landlord.. This Court's November 13, 2013 Order enforces the plain language of such prior Order and is both proper and necessary. The fact that the Order of November 13, 2013 states that Tenant may be held in contempt of court simply states the inherent authority noted above. Further, and important to note, is that there is no contempt issue before the Court at this time nor has there been a finding of contempt by the Court relative to Tenants continued nonpayment of rent as directed by Judge Stilwell in his Order filed July 31, 2013. Rather, Tenant argues the Court exceeded its authority by stating that it could be held in contempt for failure to comply with orders of the Court. Such is simply not the law. Despite Tenant's argument, the Court finds that without the ability to enforce its Orders by contempt, the Orders entered thus far become merely advisory with no real enforceability component.

C. The Court acted within the authority granted in S.C. Code Ann. § 27-37-155.

S.C. Code Ann. § 27-37-155(B)(5) declares that "If the court orders that the tenant pay all rent due and accruing as of and during the pendency of the action as provided by Section 27-37-150 and this section, the order may require the payments to be made (a) directly to the commercial landlord or to the clerk of court, to be held until final disposition of the case." (Emphasis added). Such is precisely what the Court ordered. S.C. Code Ann. § 27-37-150 indicates that the "rental for the use and occupancy of the premises involved shall continue to accrue so long as the tenant remains in possession of the premises." (Emphasis added). There is no question but that Tenant was in possession of the premises during June and July, 2013. This Court properly applied the statute as written, which evidences the preference of the legislature for direct payment to commercial landlords during the pendency of litigation involving tenancy.

Further, Tenant argues that 27-37-155 provides the sole and exclusive remedy for Landlord and that the Court lacks authority to require payment of rent or enforcement of any such orders by contempt. The Court finds, in light of Judge Stilwell's Order and to the extent he relied upon that Section (as opposed to the clear terms of the lease), such is simply not the case.

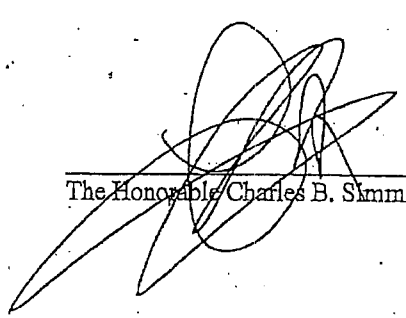
Tenant raises multiple other issues in its Motion to Reconsider. The Court has reviewed them and finds that either they were not raised in front of Judge Stilwell and/or this Court or that they do not change the conclusions set forth herein.

CONCLUSION

Based on the foregoing, it is

ORDERED, ADJUDGED AND DECREED that Tenant's Motion to Reconsider this Court's November 13, 2013 Order is denied.

IT IS SO ORDERED.



The Honorable Charles B. Simmons, Jr.

December 23, 2013
Greenville, South Carolina

2/28/14

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master in Equity

Case No. 2013-CP-23-03075

Sherman Financial Group, LLC Appellant,

v.

FM FRI Greenville, LLC Respondent.

RESPONDENT'S REPLY IN SUPPORT OF
MOTION TO DISMISS APPEAL

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Calvin T. Vick, Jr., SCB 68187
R. Patrick Smith, SCB 68270
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Attorneys for Respondent,
FM FRI Greenville, LLC

Pursuant to Rule 240, SCACR, FM FRI Greenville, LLC, Respondent/Landlord, hereby replies to the Return of Appellant/Tenant and re-asserts that the above-captioned appeal of Sherman Financial Group, LLC, the Appellant/Tenant, be dismissed for lack of jurisdiction. The Circuit Court's Orders of November 13, 2013 and December 23, 2013 (the "Orders"), which are the subject of this appeal, are interlocutory orders and are not subject to immediate appeal. As such, this Court lacks jurisdiction. This Court should dismiss this appeal as premature and remand so that the Circuit Court can proceed with the proper administration of this lawsuit.

FACTUAL BACKGROUND

Appellant/Tenant includes several misstatements in its Factual Background and attaches various exhibits not properly before the Court.¹ Subparagraph 1 at page 6 of the Return indicates that Respondent/Landlord deposited certain funds into a cash reserve account to fund the unapplied tenant allowance. Such is inaccurate. The deposit was made by DD Greenville, LLC, Respondent/Landlord's predecessor. Respondent/Landlord subsequently acquired the building and assumed the rights of DD Greenville, LLC and its successors under the Lease, as provided in certain agreements pertaining to such transactions. Appellant/Tenant also suggests that Respondent/Landlord "converted" the unapplied tenant allowance to its use at Subparagraph 3 on page 6, and "absconded" with cash on page 7. Such is likewise inaccurate, and assumes that Appellant/Tenant had some cognizable interest

¹ Only those documents in the record should be introduced before this Court. Matters raised outside the record may not form the basis for a reversal. Ravan v. Greenville Cnty., 315 S.C. 447, 460, 434 S.E.2d 296, 304 (Ct. App. 1993). An issue may not be raised for the first time on appeal. Id., citing Talley v. S. Carolina Higher Educ. Tuition Grants Comm., 289 S.C. 483, 487, 347 S.E.2d 99, 101 (1986). Based on the foregoing authority, this Court should disregard Appellant/Tenant's Exhibits B, C, and D to its Return. Appellant/Tenant admits that it is attaching documents not available to the Circuit Court at the time the appealed rulings were issued. See Return, p. 6.

in said funds, which it does not. Appellant/Tenant never complied with those conditions precedent² in the Lease to even apply for such funds (which will be clear at trial), and now misconstrues and haphazardly mischaracterizes the “facts” outside of the record in an attempt to try its case in the Court of Appeals. Such a brazen gambit does not affect the dispositive legal issue related to the appellate jurisdiction over the Orders in dispute, however. Respondent/Landlord has in any event never disavowed knowledge of the existence of the allowance or of any cash reserve account, but has asserted, *inter alia*, that Appellant/Tenant failed to timely make a valid claim, with backup, for the allowance, and thus has no legal right, contractual or otherwise, to same.

Additionally, in its Procedural Posture, Appellant/Tenant makes the misleading statement that “Appellant/Tenant moved for a temporary restraining order and sought permission to pay rent into court as a means of preserving contested possessory rights to the premises.” See Return, p. 7. In actuality, the Appellant/Tenant obtained an *ex parte* temporary restraining order (TRO) on May 31, 2013, and held the premises hostage without paying rent from such date through the end of the Lease and subsequent dissolution of the preliminary injunction by Order dated November 13, 2013. See Exhibit 7 to Motion to Dismiss, p. 53. Appellant/Tenant did not file its motion in the Circuit Court for leave to deposit certain rents with the Circuit Court until June 11, 2013, at which time Appellant/Tenant was already in default under the Lease for failure to pay June rent. Appellant/Tenant’s motion indicated that Appellant/Tenant sought leave to deposit with the Circuit Court the amount of its monthly rent obligation until the disputes at issue in the litigation could be resolved. See Exhibit 3 to Motion to Dismiss, pp. 35-36. Finally,

² When Appellant/Tenant finally made a demand for the unapplied tenant allowance, it did so through counsel, who appears to have thereby unwisely interjected himself as a fact witness at trial upon remand. See Exhibit E to the Appellant/Tenant’s Return, p. 33. Said demand does not comply with the Lease’s requirements.

Appellant/Tenant continues in its mischaracterization of Respondent/Landlord's co-counsel, licensed in Florida, as "unlicensed counsel," which, like the foregoing, is pointlessly incendiary and utterly irrelevant to the legal issue presented: Appellant/Tenant's premature appeal of interlocutory orders.

ARGUMENT AND CITATION OF AUTHORITY

I. The Orders appealed do not affect "mode of trial," and do not represent a "pre-trial damages award."

Appellant/Tenant suggests that the Circuit Court's declaration that a "pre-trial damages award" is the law of the case is immediately appealable because it deprives Appellant/Tenant of a mode of trial. See Return, p. 8. The cases cited for this proposition have to do with the right to jury trial, which is not implicated in the instant case, in which no party has requested same and the matter has been referred to the Master-in-Equity. See Exhibit 7 to Motion to Dismiss, p. 51. Further, the Orders related to two months' rent are not a "pre-trial damages award:" they are orders to pay rent per the Lease for two months, June and July 2013, during which Appellant/Tenant held forcible possession of the premises, rent-free, and during which Appellant/Tenant admitted (as of the hearing based on its motion for leave to deposit funds) that rent was due.³ As an aside, during said months, Respondent/Landlord likely could not have effected a Rule to Show Cause⁴, as same could have been adjudged to run afoul of the Court's edict in its TRO that Respondent/Landlord

³ The Orders, while they incorporate and comply with S.C. Code Ann. § 27-37-155, also speak to the exact facts presented herein, in which § 27-37-155(B)(5) provides a conjunctive remedy of ejectment to that entered by the Court: the scenario in which a tenant obtains *ex parte* relief that prevents the issuance of a Rule to Show Cause, prevents possession by a landlord, and attempts to prevent the payment of rent to a landlord. Appellant/Tenant's position that ejectment is Respondent/Landlord's sole remedy ignores the reality that ejectment isn't retroactive – a tenant should pay rent for that period in which it has had the use of its leasehold, as the Court properly determined in its July 31, 2013 Order.

⁴ The purpose of a Rule to Show Cause is to accomplish notice. Appellant/Tenant already had notice of the issues in dispute, as is made clear in its Motion for Leave to Deposit Funds with Court. See Exhibit 3 to Motion to Dismiss, pp. 35-36, enumerating issues of abandonment, obligation to pay rent, unapplied tenant allowance, and alleged right of offset.

not “[take] any other action to hinder, harass, and/or interfere with [Appellant/Tenant’s] possession or quiet enjoyment of the premises.” See May 31, 2013 Order Granting Motion for Temporary Restraining Order and Setting Hearing on Temporary Injunction, attached hereto as **Exhibit 1**. The Preliminary Injunction Order of June 26, 2013 retained the above-quoted language “in full force and effect.” See June 26, 2013 Preliminary Injunction Order, attached hereto as **Exhibit 2**. Having obtained the very *ex parte* relief that prevented Respondent/Landlord from issuing a Rule to Show Cause for, *inter alia*, ejectment, and having placed the issues of rent, offset, and ability to satisfy a judgment in dispute, Tenant may not now manufacture an appeal of the results obtained in its prior motions and complain of a lack of issuance of a rule to show cause because it finds such results disagreeable. If any due process rights have been violated, they belong to the Respondent/Landlord, which was deprived of possession of the premises and rent⁵ from June 2013 through November 2013.

II. The Orders properly apply a prior order, which in turn properly applied terms of the Lease based on Appellant/Tenant’s own motion.

Appellant/Tenant takes the unsupportable position that only matters determined in appealable orders may determine the law of the case. While Respondent/Landlord does not concede the point, it is likewise well-settled that one judge of the same court cannot overrule another. Charleston Cnty. Dep’t of Soc. Servs. v. Father, Stepmother, & Mother, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995). A circuit court judge cannot set aside prior rulings of another circuit judge⁶, even when the subsequent judge disagrees and proper mode of trial is the concern. Cook v. Taylor, 272 S.C. 536, 538, 252 S.E.2d 923, 924 (1979). The

⁵ It is axiomatic in South Carolina that possession of a leasehold means that rent is due. This is the result that obtains statutorily (S.C. Code Ann. § 27-35-140 and § 27-37-155), under the common law, and under the Lease (see Exhibit 1 to Motion to Dismiss, § 4.1, p. 17).

⁶ Appellant/Tenant mystifyingly characterizes the Circuit Court’s proper and mandatory acknowledgement of prior orders as “blind adherence to a prior decree.” See Return, p. 9.

“subsequent judge” rule applies regardless of whether prior orders are appealable, and is grounded in principles of *stare decisis*. Further, Appellant/Tenant’s law of the case argument concerns itself with alleged legal error, whereas the procedural issues presented by Respondent/Landlord’s motion concern themselves with appellate jurisdiction, which is the sole issue before this Court. Were the Court to substantively review the Orders, which Respondent/Landlord submits would be premature and improper until an appealable Circuit Court order is entered, it could in any event affirm pursuant to Rule 220(c)⁷, insofar as the Circuit Court relied on the law of the case doctrine as well as the “subsequent judge” doctrine in enforcing the prior July 31, 2013 Order.

III. The Orders do not involve a substantial right.

An order affects a substantial right and is immediately appealable when it (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action. S.C. Code Ann. § 14-3-330(2). Pursuant to S.C. Code Ann. § 14-3-330(2), this Court may not review an order that does not prevent a judgment from being rendered in the action, and from which an appellant can seek review in any appeal from the final judgment. An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed. Hagood v. Sommerville, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005).

⁷ At such time as a proper appeal is perfected, this court is authorized to consider any sustaining ground pursuant to Rule 220(c), SCACR. The appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal. Jamison v. Ford Motor Co., 373 S.C. 248, 267-68, 644 S.E.2d 755, 765 (Ct. App. 2007); see also I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (“The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment.”).

The Orders appealed, by their explicit terms, do not finally determine some substantial matter, do not end the case and will not affect the Appellant/Tenant's ability to put on its case as to the unapplied tenant allowance or any other issues in dispute. The Orders are without prejudice as to all claims, counterclaims, and defenses. The Orders appealed made an award of rent for June and July 2013 based on Appellant/Tenant's possession of the premises during said period, and arose out of the July 31, 2013 Order that applied the express terms of the Lease disallowing offset against rent. The Orders under appeal do not end the case, do not prevent a final judgment, are not tantamount to the striking of a pleading and could in any event be appealed after such time as an appealable order is entered by the Circuit Court.

Appeal may only be taken, as provided by law, from any final judgment, appealable order or decision. See Rule 201(a), SCACR; see also Rule 72, SCRCRCP. Appellant/Tenant asserts that the Circuit Court's refusal to allow a "factual inquiry" has deprived it of due process and speculates that the Orders will likely have the effect of defeating Appellant/Tenant's underlying claims, although it does not specify how such a result would occur. See Return, p. 12. Appellant/Tenant suggests that findings about two months' rent, based on the unassailable fact that Appellant/Tenant was in possession of the premises per the TRO rent-free, have the potential to foreclose future findings of fact with regard to the unapplied tenant allowance, when the Orders at issue explicitly say otherwise. Appellant/Tenant argues that it "was given no opportunity to present its case before a trier-of-fact." See Return, p. 10. The Orders arising out of the July 31, 2013 Order only exist due to the Appellant/Tenant's motion to deposit rents into court, during which it had the opportunity to present those facts it deemed appropriate. Appellant/Tenant put all of the

issues in dispute itself; it may not now reverse course and complain to this Court of an ill-defined failure of due process.

IV. The Orders make no findings as to contempt.

Appellant/Tenant makes the unsupportable argument that the Orders “ascrib[e] contempt to Appellant/Tenant’s refused payment” and are therefore immediately appealable contempt orders. The Orders themselves resolve such issue, and demonstrate that Appellant/Tenant has taken a position that completely mischaracterizes the Orders.

The Circuit Court ruled that Appellant/Tenant was required to make payment of June and July rent to Respondent/Landlord in the amount of \$313,757.86 on or before November 15, 2013. See Exhibit 7 to Motion to Dismiss, p. 53. The Circuit Court expressly held that **“[a]ll other issues related to [Respondent/Landlord’s] motion for contempt and sanctions, including [Respondent/Landlord’s] alleged right to additional months’ rent, are held in abeyance and preserved.”** *Id.*, emphasis added. As the Circuit Court expressly noted in its December 23, 2013 Order, **“...there is no contempt issue before the Court at this time nor has there been a finding of contempt by the Court relative to [Appellant/Tenant’s] continued nonpayment of rent as directed by Judge Stilwell in his Order filed July 31, 2013. Rather, [Appellant/Tenant] argues the Court exceeded its authority by stating that it could be held in contempt for failure to comply with orders of the Court. Such is simply not the law.”** See Exhibit 8 to Motion to Dismiss, p. 58, emphasis added. An appellant must actually have been held in contempt before he has the right to appeal. Ex parte Whetstone, 289 S.C. 580, 581, 347 S.E.2d 881, 882 (1986)(dismissing appeal). Appellant/Tenant has not yet been held in contempt. The black-letter language of the Orders makes clear that the instant appeal is premature.

V. Dismissal and remand will prevent a piecemeal and inefficient appeal by Appellant/Tenant.

Appellant/Tenant's Return does not even attempt to address the grievous judicial economy concerns presented by its premature appeal. The future order that the Circuit Court has stated it will likely enter in this case based on Respondent/Landlord's January 9, 2014 Motion will be a civil contempt order, which will likely result in an appeal. See Exhibit 10 to Motion to Dismiss ("...we understand that ... you are also presently inclined to find Sherman in contempt...").

Appellant/Tenant appears to have appealed to protect itself against a waiver argument. See Return, p. 9 ("The rulings...must be appealed; otherwise, Appellant/Tenant would be deemed to forego any contest of these damages...") Appellant/Tenant may rest easy on such point, as our Supreme Court has established that the Appellant/Tenant will, in fact, have an adequate remedy of appeal when and if Appellant/Tenant is actually held in contempt by the Circuit Court for failure to comply with prior orders. A party may comply with an order of the Circuit Court, or refuse to comply with the order and appeal after the party is held in contempt for its failure to comply. See Ex parte Whetstone, 289 S.C. 580, 580, 347 S.E.2d 881, 881-82 (1986). Since an order actually holding a party in contempt is final in nature, it is appealable. Tucker v. Honda of S.C. Mfg., Inc., 354 S.C. 574, 577, 582 S.E.2d 405, 406-07 (2003) (citing Ex parte Whetstone). Respondent/Landlord respectfully requests that the Court dismiss the appeal and remand so as to allow this case to proceed in the ordinary course.

CONCLUSION

The Circuit Court's November 13, 2013 and December 23, 2013 Orders arise out of Appellant/Tenant's own prior motions and are not immediately appealable. The Respondent/Landlord respectfully requests that this Court dismiss the appeal and remand so that the Circuit Court may proceed with the proper administration of this case.

Respectfully Submitted,

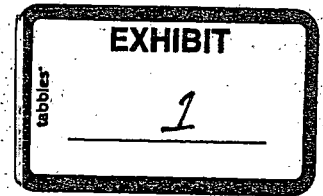


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Attorneys for Respondent,
FM FRI Greenville, LLC

February 28, 2014
Greenville, South Carolina

EXHIBIT 1



STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

Sherman Financial Group, LLC,)
Plaintiff,)

-vs-

FM FRI Greenville, LLC,)
Defendant.)

**ORDER GRANTING MOTION
FOR TEMPORARY RESTRAINING ORDER
AND SETTING HEARING
ON TEMPORARY INJUNCTION**

C.A. No. 2013-CP-23-03075

2013 MAY 31 A 11:53

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER

This matter came before the Court by motion of Plaintiff Sherman Financial Group, LLC ("Plaintiff" or "Tenant") requesting that this Court issue a Temporary Restraining Order against Defendant FM FRI Greenville, LLC ("Defendant" or "Landlord"), to be followed by a hearing on its request for a Temporary Injunction, pursuant to Rule 65, SCRPC. This Court conducted a hearing on the Motion on Friday, May 31, 2013, without notice to Defendant pursuant to Rule 65(b), SCRPC.

For the following reasons, based upon the allegations in the Verified Complaint and the argument of counsel, the request for the Temporary Restraining Order is hereby granted.

Background and Factual Showings

Tenant entered into a lease agreement with Landlord whereby Tenant agreed to pay Landlord rent and, in exchange, Landlord agreed to lease to Tenant premises located within part of the building now known as the Wells Fargo Building, and formerly known as Wachovia Place, and having a building address of 15 South Main Street, Greenville, South Carolina ("Premises"). The lease term does not end until November 2013, and Tenant is current on rent payments to Landlord.

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On May 15, 2013, Tenant notified Landlord that Tenant is entitled to over one million dollars in an unpaid allowance under the lease. In response, on May 24, 2013, Landlord pronounced Tenant in default, alleging Tenant had "abandoned" the Premises. Landlord further informed Tenant that on or about June 1, 2013, Landlord would enter the Premises and commence demolition in order to prepare it to be leased to prospective tenants. Landlord also threatened to dispose of Tenant's personal property. Tenant claims it is not in default, as it has not abandoned the Premises, but rather continues to use and possess the Premises for legitimate business purposes. Tenant seeks to enjoin Landlord from entering the Premises to demolish Tenant's space or to dispose of Tenant's personal property.

Standard for Injunctive Relief

For a preliminary injunction to be granted, Plaintiff must establish that it: 1) will suffer irreparable harm if the injunction is not granted; 2) will likely succeed on the merits of the litigation; and 3) has no adequate remedy at law. Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc., 361 S.C. 117, 603 S.E.2d 905 (2004); Rule 65, SCRPC. A temporary injunction is "an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per curiam).

This standard is heightened when a party seeks relief ex parte, for then the rule expressly provides that "[n]o temporary restraining order shall be granted without notice ... unless it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon." Rule 65(b), SCRPC (emphasis added).

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ORDER

I find that Plaintiff satisfies all the elements for a temporary restraining order based upon the facts shown by Verified Complaint. Plaintiff is likely to succeed on the merits, has no adequate remedy at law, and the pending demolition of its property satisfies the element of irreparable harm.

Furthermore, it is appropriate under Rule 65, SCRPC, that this Order issue without notice to Defendant. For the foregoing reasons, it is hereby adjudged, ordered, and decreed that a Temporary Restraining Order shall issue, as of May 31, 2013, at 10:45 AM, enjoining Defendant, its officers, employees, agents, as well as anyone acting for or on its behalf from:

- a. **Entering the Premises to commence demolition of the Premises;**
- b. **Entering the Premises to remove, dispose, and/or handle any of Tenant's property, including but not limited to Tenant's personal property and/or fixtures; and**
- c. **Entering the Premises or taking any other action to hinder, harass, and/or interfere with Tenant's possession or quiet enjoyment of the Premises.**

This Temporary Restraining Order will remain in full force and effect for ten (10) days unless extended or modified by this Court. Plaintiff is instructed to serve this Order, which hereby provides notice of the hearing for a temporary injunction scheduled for **June 6, 2013, at 9:30 A.M. before Judge D. Garrison Hill at the Greenville County Court of Common Pleas, located at 305 East North Street Greenville, South Carolina, 29601.**

As bond for this order Plaintiff will pay a cash bond in the amount of One Hundred Fifty-Two Thousand One Hundred Thirty-Seven and 76/100 (\$152,137.76) Dollars (such amount specifically being the rental payment which becomes due from Plaintiff to Defendant on June 1, 2013) within three business days of the date of this Order, pursuant to Rule 65(c). This amount shall be returned to Plaintiff upon the conclusion of this case absent a showing that Defendant

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was wrongfully enjoined or restrained or is otherwise entitled to the amount in light of Plaintiff's allegations relating to the Unpaid Allowance.

AND IT IS SO ORDERED.

Dated: 5.31.13

Man / i
Judge, Thirteenth Judicial Circuit

A Certified Copy
Paul B. Williams
Clerk of Court C.P. & G.S.
Greenville County, SC
Dated 5/31/13

EXHIBIT 2

EXHIBIT

2

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER

IN THE COURT OF COMMON PLEAS

2013 JUN 26 P 2:32

Sherman Financial Group, LLC,

Plaintiff,

-vs-

FM FRI Greenville, LLC,

Defendant.

PRELIMINARY INJUNCTION ORDER

C.A. No. 2013-CP-23-03075

The TRO is modified to allow Defendants access to the premises to the extent authorized by the lease;

The TRO is otherwise in full force and effect, and this Court adopts and incorporates the TRO language (where not inconsistent with this Order) into this Preliminary Injunction Order;

This Order shall stay in effect until the mediation is completed. If the mediation proves unsuccessful either party may move to modify the injunction or the bond.

IT IS SO ORDERED!

June 24, 2013
Greenville, SC

D. Garrison Hill

D. Garrison Hill
Circuit Judge

The South Carolina Court of Appeals

Sherman Financial Group, LLC, Appellant,

v.

FM FRI Greenville, LLC, Respondent.

Appellate Case No. 2014-000086

ORDER

Respondent moves to dismiss this appeal of the circuit court's November 8, 2013 order, as modified by its December 23, 2013 denial of Appellant's motion to reconsider. The appealed orders held that (1) prior orders of the circuit court, which required Appellant to pay overdue rent directly to Respondent, were the law of the case; (2) Appellants could be held in contempt for failing to obey the prior orders; and (3) a bond incident to a prior temporary restraining order would remain on deposit with the circuit court until the case concluded or the circuit court ordered otherwise.

Appellant asserts its appeal is proper under section 14-3-330 of the South Carolina Code (1976 & Supp. 2013) for the following reasons: (1) the circuit court's ruling that its prior orders are the law of the case is appealable because it deprives Appellant of its right to a trial on the merits; (2) the appealed orders constitute a final contempt decree; and (3) the appealed orders violate due process and thus affect a substantial right under section 14-3-330(2).

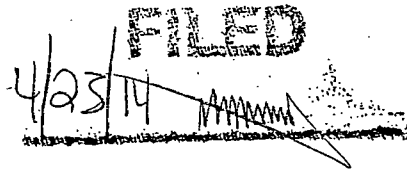
We find the circuit court's orders are not appealable under section 14-3-330 and we grant Respondent's motion to dismiss. *See Edwards v. SunCom*, 369 S.C. 91, 95, 631 S.E.2d 529, 531 (2006) ("Under § 14-3-330 . . . an order must affect a substantial right and prevent a judgment from which an appeal may later be taken in order to be immediately appealed." (emphasis in original)).

AND IT IS SO ORDERED.


FOR THE COURT

Columbia, South Carolina

cc: Steven E. Farrar, Esquire
William B. Swent, Esquire
Jason Daniel Maertens, Esquire
Cynthia Buck Brown, Esquire
Calvin Theodore Vick, Jr., Esquire
Raymond Patrick Smith, Esquire


4/23/14

5/8/14

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master in Equity

Case No. 2013-CP-23-03075

Appellate Case No. 2014-000086

RECEIVED
MAY 08 2014
SC Court of Appeals

Sherman Financial Group, LLC.....Appellant,

vs.

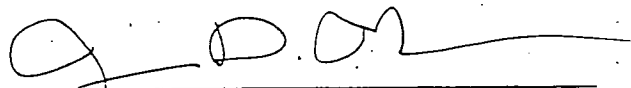
FM FRI Greenville, LLC.....Respondent.

PETITION FOR REHEARING

In accordance with Rule 221(a), SCACR, Appellant Sherman Financial Group, LLC submits this Petition for Rehearing and respectfully requests the Court reconsider or clarify its April 23, 2014 Order dismissing the present Appeal (the "Order of Dismissal"). In the Order of Dismissal, the Court recounts Appellant's three primary reasons why it believes appeal is proper: "(1) the circuit court's ruling—that its prior orders are law of the case—is appealable because it deprives Appellant of its right to trial on the merits; (2) the appealed orders constitute a final contempt decree; and (3) the appealed orders violate due process and thus affect a substantial right under Section 14-3-330 of the South Carolina Code (1976 & Supp. 2013)." The Order of Dismissal then proceeds only to address and declare, without explanation, that no substantial right is affected.

Appellant must, of course, accept the Court's decision to dismiss its Appeal. The Court's rationale for dismissal, however, may have a lasting impact on the matter below. For instance, Judge Stilwell's Order dated August 23, 2013 explicitly states that "[the lower court] has made no rulings with respect to the merits of the case and leaves open for a trial on the merits all justiciable issues raised in the parties pleadings." (A copy of Judge Stilwell's August 23, 2013 Order is attached hereto as Exhibit A for ease of reference). It is this Order and its immediate predecessor (also attached) that Respondent FM FRI Greenville, LLC asserts is law of the case.¹ If this Court remains of the opinion that no final or appealable interlocutory ruling has been rendered, then Appellant requests clarification that its right of appeal would be preserved as to all aspects of Judge Stilwell's rulings. After all, it seems implausible that an order explicitly devoid of any merits decision and expressly leaving open all justiciable controversies would be forever binding. Likewise, Appellant seeks clarification as to why the orders below charging Appellant with contempt are not immediately appealable.

Respectfully submitted,



Steven E. Farrar (#1960)
William B. Swent (#13519)
Jason D. Maertens (#73583)
Smith Moore Leatherwood LLP
2 West Washington Street, Suite 1100 (29601)
Post Office Box 87
Greenville, SC 29602

¹ The law-of-the-case doctrine allows that "an appealable order from which no appeal is taken becomes the law of the case in all subsequent proceedings involving the same parties and the same subject matter." Profl Bankers Corp. v. Floyd, 285 S.C. 607, 613, 331 S.E.2d 362, 365 (Ct. App. 1985). The law-of-the-case doctrine does not apply to statements of the court that do not constitute a binding adjudication on the merits. Weil v. Weil, 382 S.E.2d 471, 299 S.C. 84 (Ct. App. 1989).

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Attorneys for Appellant

May 6, 2014

Exhibit A

FORM 4

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

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
WICKRENSMEE

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP2303075

Sherman Financial Group
LLC

FM FRI Greenville LLC

2013 AUG 23 P 2:40

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This matter comes before the Court pursuant to the Plaintiff's Motion to Reconsider the Court's Order of July 31, 2013. The arguments advanced in the Plaintiff's Motion to Reconsider suggest that the Plaintiff has convoluted and confused the meaning of the Court's previous Order. This Court has made no rulings with respect to the merits of the case and leaves open for a trial on the merits all justiciable issues raised in the parties' pleadings. The Court's Order is without prejudice to any party with respect to allocations of an unpaid allowance or a breach under the contract. Should the Plaintiff need clarification, it should submit a motion asking for specific clarification. The Plaintiff's Motion for Reconsideration is thereby DENIED.

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

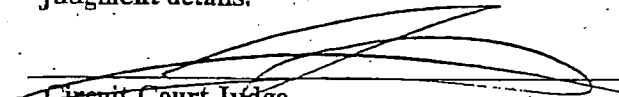
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order: _____

Handwritten signature/initials

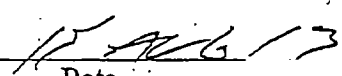
27)

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**


Circuit Court Judge

2158

Judge Code


Date

For Clerk of Court Office Use Only

8/23/13

This judgment was entered on 8/23/13, and a copy mailed first class or placed in the appropriate attorney's box on 8/23/13, to attorneys of record or to parties (when appearing pro se) as follows:

Steven E. Farrar Smith Moore Leatherwood LLP P.O. Box
87 Greenville, SC 29602

Cynthia Buck Brown Harper, Lambert & Brown, P.A. P.O.
Box 908 Greenville, SC 29602
~~Calvin Theodore Vick Jr. Harper, Lambert & Brown, P.A.~~
~~P.O. Box 908 Greenville, SC 29602~~
~~Raymond Patrick Smith Harper, Lambert & Brown, P.A.~~
~~P.O. Box 908 Greenville, SC 29602~~

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

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

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

7/31/13

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP2303075

Sherman Financial Group
LLC

FM FRI Greenville LLC

2013 JUL 31 A 3:24

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
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☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court;

ORDER INFORMATION

This matter came before the Court pursuant to the Plaintiff's Motion to Deposit Rental Payments into the Court during the pendency of the instant action. Also before the Court were the Defendant's Motions for Ejectment and Modification of the Previously-Issued Restraining Order. The Honorable Gary Hill previously issued a Temporary Restraining Order on May 31, 2013, and subsequently entered a Preliminary Injunction Order on June 24, 2013.

The Plaintiff's Motion to Deposit the Proceeds into the Court is hereby DENIED. This Court recognizes that it is within its discretion to order that funds be deposited into the Court pursuant to Rule 67 of the South Carolina Rules of Civil Procedure and Section 27-37-155 of the South Carolina Code of Laws, 1976, as amended. However, that authority is discretionary, and this Court finds no evidence that either party is insolvent or that there is a likelihood that the monies will be hidden, absconded with or secreted away. The specific terms of the lease require payment, and these parties are obliged to operate under the same until its termination later this year. Having said that, the Plaintiff shall bring the rent current by making the full payment of both June and July rent to the Defendant in accordance with the terms of the lease. The \$152,137.76 shall remain on deposit with the Court as a bond incident to the Temporary Restraining Order.

The Defendant's Motions for Ejectment and Modification of the Court's Previous Order are also DENIED, with the specific qualification as to bond enumerated above. The issue of whether there has been a material breach under the contract is outstanding. That question is appropriately left to a trial on the merits, allowing for a full inspection by the triers of fact.

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

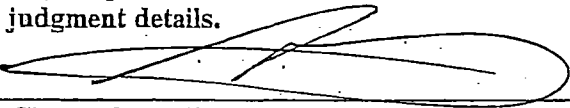
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**



2158

30 JUL 13

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on 7/31/13, and a copy mailed first class or placed in the appropriate attorney's box on 7/31/13, to attorneys of record or to parties (when appearing pro se) as follows:

Steven E. Farrar Smith Moore Leatherwood LLP P.O. Box
87 Greenville, SC 29602

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Raymond Patrick Smith Harper, Lambert & Brown, P.A.
P.O. Box 908 Greenville, SC 29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer

Court Reporter

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

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master in Equity

Case No. 2013-CP-23-03075

Appellate Case No. 2014-000086

Sherman Financial Group, LLC.....Appellant,

vs.

FM FRI Greenville, LLC.....Respondent.

MEMORANDUM OF LAW IN SUPPORT OF
APPELLANT'S PETITION FOR REHEARING

Appellant Sherman Financial Group, LLC ("Appellant/Tenant") submits this Petition for Rehearing, and respectfully requests this Court clarify its April 23, 2014 Order granting Respondent FM FRI Greenville, LLC's motion to dismiss. Rule 221(a), SCACR.

This appeal arises out of underlying *pre-trial* rulings ordering Appellant/Tenant to pay rent under the South Carolina Ejectment Statute, S.C. Code Ann. § 27-37-10, *et seq.*, or else suffer civil contempt. Appellant/Tenant appealed these rulings as final contempt decrees and, if not, an abuse of due process affecting a substantial right. Respondent FM FRI Greenville, LLC ("Respondent/Landlord") moved to dismiss this appeal on the grounds that the underlying rulings are not subject to immediate appeal. On April 23,

2014, this Court granted Respondent/Landlord's motion to dismiss (the "Order of Dismissal").

In the Order of Dismissal, this Court outlined Appellant/Tenant's arguments that appeal is proper as follows:

Appellant asserts its appeal is proper under section 14-3-330 of the South Carolina Code (1976 & Supp. 2013) for the following reasons: (1) the circuit court's ruling that its prior orders are the law of the case is appealable because it deprives Appellant of its right to a trial on the merits; (2) the appealed orders constitute a final contempt decree; and (3) the appealed orders violate due process and thus affect a substantial right under section 14-3-330(2).

This Court, however, did not address (1) whether the circuit court's rulings are law of the case depriving Appellant/Tenant of the right to trial on the merits, and (2) whether the appealable orders constitute a final contempt decree. This Court also do not specifically address why the appealed rulings do not affect a substantial right under Section 14-3-330(2) of the South Carolina Code of Laws.

Appellant/Tenant *believes* the Court ruled as follows: (1) that the circuit court orders are not law of the case and, therefore, Appellant/Tenant is not deprived of its right to trial on the merits; (2) that the appealed ordered *do not* constitute a final contempt decree and, therefore, Appellant/Tenant's appeal is not ripe (i.e., Appellant/Tenant must wait until the circuit court holds Appellant/Tenant in contempt before an appeal can be taken); and (3) that the appealed orders do not yet affect a substantial right because an appeal can later be taken (i.e., an appeal of a final contempt decree). If this is indeed the decision of this Court, Appellant/Tenant simply asks for an acknowledgment of the above. If not, Appellant/Tenant respectfully requests this Court clarify the grounds upon which the motion to dismiss was granted.

Respectfully submitted,



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Attorneys for Appellant

May 6, 2014

7/18/14

The South Carolina Court of Appeals

Sherman Financial Group, LLC, Appellant,

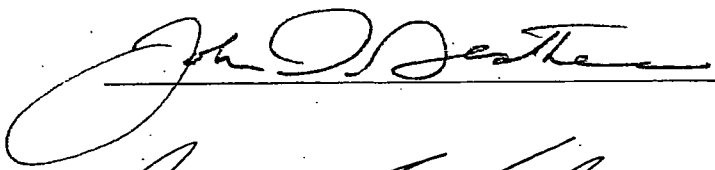
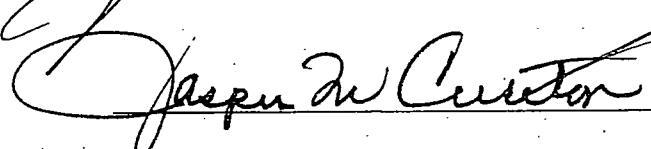
v.

FM FRI Greenville, LLC, Respondent.

Appellate Case No. 2014-000086

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.¹

 J.
 J.
 A. J.

Columbia, South Carolina

FILED
7/18/14

¹ Petitioner has requested clarification of this court's April 23, 2014 order granting Respondent's motion to dismiss. We find the orders from which appeal was taken did not make any findings of contempt or prevent a judgment from which an appeal could later be taken. Accordingly, the orders are not appealable. See *Edwards v. SunCom*, 369 S.C. 91, 95, 631 S.E.2d 529, 531 (2006) ("Under § 14-3-330 . . . an order must . . . prevent a judgment from which an appeal may later be taken in order to be immediately appealed.").

cc: Steven E. Farrar, Esquire
William B. Swent, Esquire
Jason Daniel Maertens, Esquire
Cynthia Buck Brown, Esquire
Calvin Theodore Vick, Jr., Esquire
Raymond Patrick Smith, Esquire