

TABLE OF CONTENTS

Table of Authorities.....iii

Statement of Issues on Appeal..... 1

Statement of the Case..... 2

Statement of the Facts..... 5

Argument

 A. BORROWERS’ CLAIMS FOR RESTITUTION AND MONEY HAD AND RECEIVED ARE INAPPLICABLE; AND BORROWERS FAIL TO PROVE ANY OF THE ELEMENTS REQUIRED FOR RESTITUTION.....9

 1. Brief explanation of Borrowers’ claim for restitution based upon Lease payments made.....9

 2. Brief explanation of Borrowers’ claim for restitution based upon alleged agreement of McCallum to “bring the Note current.”.....10

 3. Borrowers’ claim for restitution grounded upon the doctrine of money had and received.....13

 4. Failure of Borrowers to satisfy any of the essential requirements of restitution.....14

 a. *Any benefit conferred upon McCallum by Borrowers was gratuitous*.....15

 b. *McCallum realized no benefit from Borrowers’ payments under the Lease*.....17

 c. *Borrowers suffer no inequity, whatsoever, from McCallum’s retention of the payments made under and already applied towards those amounts due and owing under the Lease*.....19

 d. *McCallum has not been unjustly enriched*.....20

 5. Borrowers’ restitution claim, if any exists, lies against D’s Wings and/or Hanshaw and Daniels.....20

B. NO RENT WAS EVER “OVERPAID” UNDER THE LEASE AS THE LEASE WAS TERMINATED BASED UPON TENANT’S DEFAULT IN PAYMENT OF RENT; NEVERTHELESS NO LEASE PAYMENTS WOULD HAVE BEEN PROPERLY APPLIED TO OFFSET AMOUNTS DUE UNDER THE NOTE.....	22
C. THE MASTER’S AWARD OF ATTORNEY’S FEES AND COSTS IS SUPPORTED BY AMPLE EVIDENCE IN THE RECORD AND MUST BE UPHELD.....	24
D. MCCALLUM IS ENTITLED TO RECOVER COSTS INCURRED FOR HIS ACCOUNTANT’S SERVICES.....	26
E. THE DEFAULT INTEREST RATE UNDER THE NOTE COMPOUNDS ANNUALLY AND WAS THEREFORE PROPERLY CALCULATED.....	27
Conclusion.....	29

TABLE OF AUTHORITIES

CASES

Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993).....24, 25, 27

Ellis v. Smith Grading & Paving, Inc., 294 S.C. 470, 366 S.E.2d 12 (Ct. App. 1998) 14, 15,19, 20

Farmers & Merchants Bank v. Fagnoli, 274 S.C. 23, 260 S.E.2d 185 (1979).....25

Howard v. Mutz, 315 S.C. 356, 434 S.E.2d 254 (1993).....28

Jasdip Properties SC, LLC v. Richardson, 395 S.C. 633, 720 S.E.2d 485 (Ct. App. 2011).....14, 15, 24,25, 27

Myrtle Beach Hospital, Inc. v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000)..... 13,14, 15, 17, 18

Niggel Assoc., Inc. v. Polo’s of North Myrtle Beach, Inc., 296 S.C. 530, 374 S.E.2d 507 (Ct. App. 1988)..... 16, 18

Okatie River, L.L.C. v. Southeastern Site Prep., L.L.C., 353 S.C. 327, 577 S.E.2d 468 (Ct. App. 2003).....13,15

Rhodus v. Goins, 129 S.C. 40, 123 S.E. 645 (1924).....27

Seabrook Island Property Owners’ Assoc. v. Berger, 365 S.C. 234, 616 S.E.2d 431 (Ct. App. 2005).....25

OTHER AUTHORITIES

BLACK’S LAW DICTIONARY 150 (7th ed. 1999).....17

BLACK’S LAW DICTIONARY 708 (7th ed. 1999).....15

BLACK’S LAW DICTIONARY 817 (7th ed. 1999).....28

RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 24 (2011).....22

RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 30 and Introductory Note (2011).....16

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1505 (3rd ed. 1992);17

STATEMENT OF ISSUES ON APPEAL

1. Whether the Master's Order denying Appellants' claim for restitution should be affirmed when Appellants have failed to satisfy any of the requirements necessary to entitle them to restitution in that the payments for which Appellants seek restitution were gratuitous, did not benefit Respondent, and equity does not justify restitution?
2. Whether the Master's Order should be upheld to the extent it does not grant Appellants an offset against amounts due under the Note for alleged "overpayments" made under the Lease when the Lease is a separate and distinct legal obligation between different parties, and in any event there could not have been any actual "overpayment" under the Lease?
3. Whether the Master's Order granting Respondent's attorney's fees and costs should be affirmed when the Note specifically authorizes a recovery of attorney's fees, the record supports each of the six Blumberg factors and there was no abuse of discretion by the Master?
4. Whether the Master's Order should be affirmed to the extent it awards Respondent the costs of the services of Respondent's accountant when recovery of such costs is specifically authorized in the Note and the accountant's services were necessitated by the erratic and difficult payment history of the borrowers under the Note?
5. Whether the Master's Order should be affirmed to the extent it authorizes default interest under the Note to be compounded annually when the language of the Note clearly provides for interest to be charged on all unpaid interest?

STATEMENT OF THE CASE

This appeal arises from an action for breach of a promissory note and recovery of amounts due thereunder. (R. p. 24). The underlying action was initiated with the filing by Charles L. McCallum d/b/a Smallwood Development Corp., LLC (hereinafter, "McCallum") of his Complaint on November 13, 2008. (R. p. 24). The defendants to the action were all of the makers of the subject note, namely Sherod H. Eadon, Jr., Darryl W. Hanshaw, Russell Howard Daniels, Gary W. Popwell and Christopher G. Isgett. (R. pp. 24-26, 212-213). Darryl W. Hanshaw is in default in the underlying action and Russell Howard Daniels was dismissed after filing a petition for bankruptcy. (R. p. 1). Sherod H. Eadon, Jr., Gary W. Popwell and Christopher G. Isgett are the appellants herein and will hereinafter be referred to collectively as the "Borrowers."

Borrowers filed their original Answer to the Complaint on or about December 16, 2008 wherein Borrowers admitted all of the allegations of the Complaint with the exception only of the debt amount. (R. p. 30-31).

McCallum filed a Motion for Summary Judgment on February 2, 2009. (R. pp. 321-324). After two hearings on the Motion it was denied by Order filed on October 19, 2009. (R. pp. 15-16).

Thereafter various discovery motions were filed by both parties. McCallum filed a Motion to Compel on October 19, 2009 in order to require the Borrowers to respond to McCallum's interrogatories and identify the dates and amounts of payments claimed made under the Note. (R. pp. 334-335). On November 24, 2009 Borrowers filed a Motion to Compel asking McCallum to produce his tax returns for certain requested years. (R. pp. 356-357). McCallum, in turn, on December 2, 2009, filed a Motion to

Quash the aforementioned Motion to Compel and in the Alternative for a Protective Order. (R. pp. 359-360). Borrowers subsequently filed, on December 8, 2009, a Motion to Compel Substantial Response to Requests for Admissions. (R. pp. 17-20). This Motion was subsequently withdrawn by Borrowers. Id. McCallum's Motion to Compel was granted by Order filed January 12, 2010. Id. By this same Order, Borrowers' Motion to Compel was granted, but subject to the terms of a protective order which the parties were ordered to enter into with respect thereto. Id. In addition, McCallum's Motion to Quash was granted to the extent that Borrowers demanded production of information and documents not directly related to or relevant to the lawsuit. Id.

Following Borrowers' filing of a Motion to Amend their Answer, Borrowers filed an Amended Answer to the Complaint on January 13, 2010. (R. p. 33). This Amended Answer again admitted all allegations of the Complaint other than the debt amount, and for the first time asserted the affirmative defenses discussed herein relating to restitution. (R. pp. 33-35).

The matter was referred to The Honorable Joseph M. Strickland, as Master-in-Equity for Richland County by Consent Order of Reference filed on January 12, 2010. (R. pp. 21-22). The trial of this matter was held on August 30, 2010 and both parties subsequently submitted Briefs relating to Borrowers' restitution argument. (R. pp. 361-372). After hearing the testimony and reviewing all exhibits from trial, and upon his consideration of the Briefs presented by both parties as to the restitution argument, Judge Strickland issued his Order on February 9, 2011 (the "Order") awarding McCallum recovery of amounts owed under the Note in the amount of \$203,438.81, which includes

an award of the principal amount due, interest thereon, and attorney's fees and costs. (R. pp. 11-12).

Thereafter, Borrowers filed their Motion to Reconsider and Alter or Amend the Judgment on February 17, 2011. (R. pp. 397-400). In response to this Motion, and after the hearing thereon and upon review of various submissions made in connection therewith, the Master issued an Order Denying Defendants' Motion to Alter or Amend Judgment in Part and Granting Motion in Part (the "Order on Motion to Alter or Amend"). (R. p. 13). In his Order on Motion to Alter or Amend the Master amended his previous Order to the extent necessary to correct the interest calculation from being compounded monthly to being compounded annually. (R. pp. 13, 454). Otherwise Borrowers' Motion to Alter or Amend was denied. (R. p. 13). The references herein to the "Order" shall be construed to mean the Order as amended by the Order on Motion to Alter or Amend.

This appeal followed.

STATEMENT OF THE FACTS

The basic facts of this case are simple and undisputed.

Borrowers executed a Promissory Note in favor of McCallum in the original principal amount of Two Hundred Thousand and No/100 (\$200,000.00) Dollars (the "Note").¹ (R. pp. 212-213). The funds disbursed pursuant to the Note were used for the up-fit and build-out of certain restaurant space located in the Village at Blythewood (the "Premises"), which space is owned by Smallwood Development Company, LLC (an entity owned and controlled by McCallum) and was leased to D's Franchise Systems, Inc. d/b/a D's Wings of Blythewood ("D's Wings") pursuant to a Lease entered into between McCallum and D's Wings (the "Lease").² (R. pp. 2-3, p. 49, line 12 - p. 50, line 11, pp. 183-211).

Borrowers are each practicing attorneys with the law firm of Lee, Eadon, Isgett, Popwell and Reardon, P.A. (R. p. 111, line 22 – p. 112, line 1, p. 129, lines 3-5, p. 147, lines 4-7). In addition, Borrowers are each ten percent (10%) shareholders in D's Wings. (R. p. 3, p. 112, line 25 – p. 113, line 3, p. 142, lines 5-7, p. 156, lines 10-12). The other owners of D's Wings are Darryl W. Hanshaw ("Hanshaw") and Russell Howard Daniels ("Daniels"). (R. p. 44, lines 12-18) Although the Borrowers have an ownership interest in D's Wings, and thus a vested interest in the success and continued operation of the D's Wings restaurant, none of the Borrowers signed, personally guaranteed or were

¹ Darryl W. Hanshaw and Russell Howard Daniels were also obligated parties under the Note.

² D's Wings ultimately defaulted in payments due under the Lease and Smallwood Development Company, LLC brought an action against in the Magistrate's Court for Richland County to recover amounts due to it under the Lease which action resulted in the issuance by the Magistrate's Court of a judgment against D's Wings on April 1, 2009 in Civil Case Number 2008CV401092672 in the amount of \$59,388.76 (the "Magistrate's Court Judgment"). (R. p. 410, lines 11-19, p. 411, lines 6-16). McCallum requests that the Court take judicial notice of this Magistrate's Court Judgment in connection with this appeal.

otherwise legally obligated under the D's Wings Lease. (R. p. 3, p. 112, lines 11-14, p. 127, line 19 – p. 128, line 13, p. 129, lines 19-20, p. 142, lines 8-13, p. 150 line 13 – p. 113 line 1).

From its inception, the payments made on the Note were erratic, at best. (R. p. 3, p. 52, line 21). In fact, within 90 days after Note payments began they became 30 to 45 days past due. (R. p. 52, lines 21-23). Thereafter, on two separate occasions the payments on the Note became so far behind that McCallum (through his counsel) gave notice to Borrowers of his election to declare the entire balance of the Note due and payable.³ (R. p. 54, line 8 - p. 55, line 4, p. 114, lines 11-17, p. 132, lines 4-10, p. 148, lines 10-23, p. 155, lines 13-23, p. 272). These notices also advised Borrowers of the default of D's Wings under the Lease. (R. p. 114, lines 11-23, p. 132, lines 18-20, p. 148, lines 10-23, p. 155, lines 13-23, p. 272).

In response to the default notices from McCallum's counsel, Borrowers made payment of those amounts which were overdue under both the Note and the Lease. (R. p. 4, p. 130, lines 10-21, p. 132, lines 6-17). In exchange for these payments made by Borrowers under the Note, McCallum continued - or reinstated - the Note at its original interest rate (without imposing the significantly higher default interest rate) and no longer treated the Note as being accelerated, thus allowing the Note to continue to be paid according to its original terms. (R. p. 158, line 16 – p. 121, line 5).⁴

³ The first of these instances was in September of 2007 at which time payments for July, August and September of 2007 were unpaid under both the Note and Lease. (R. p. 4, p. 45, line 24 – p. 46, line 5, p. 114, lines 8-17). The second occasion was in August of 2008, at which time payments under the Note and Lease were two months behind. (R. p. 4, p. 46, lines 15-20).

⁴ Borrowers assert an argument that the payments made by Borrower under the Note and Lease were made for the purpose of "bringing the Note current" and that this was not done by McCallum. However, it is admitted by all that after the payments were made by Borrowers under the Note and Lease the Note was reinstated, at its original interest rate, and with payments to be made thereunder in accordance with the original terms of the Note, without all amounts due thereunder being accelerated as provided under the

Reaching an agreement between the parties as to the exact dates and amounts of all payments made under the Note has proved challenging – largely due to the fact that payments under the Note were so erratic, and also in light of the fact that payments were often made under the Note and Lease in lump sums, and payments were at times returned for insufficient funds. (R. p. 4, p. 52, lines 19-23, p. 80, line 22 – p. 81, line 12). The failure of Borrowers to monitor payments or otherwise maintain any records relating to the Note and Lease has also contributed to this confusion. (R. p. 81, lines 13-15, p. 143, lines 9-22, p. 155, line 22 - p. 156, line 20). Nonetheless, after engaging in discovery on these issues the parties seem to have reached an agreement as to the particular dates and amounts of each of the payments made under the Note, as well as those payments made by Borrowers under the Lease. (R. p. 90, line 12 – p. 91, line 2, p. 95, lines 9-15). These dates and payment amounts (which are entirely consistent with all information produced by Borrowers in this action and have not been challenged by Borrowers in this action) were those used by McCallum and his accountant in his calculation of the total debt amount owed from Borrowers to McCallum under the Note. Id.

In short, Borrowers admit their liability under the Note and that the Note is in default. (R. p. 33). Borrowers do not challenge the dates and amounts of those payments that have been made under the Note and those payments made under the Lease by Borrowers. Borrowers instead claim that the payments, or portions of the payments, which Borrowers made under the Lease should also be applied as payments under the

Note in the event of a default. The truth of the matter is that the Borrowers' payments under the Note and Lease were made by Borrower to reinstate the Note and to allow D's Wings to continue operating in the Premises under its Lease. Upon receipt of the Note payments by McCallum the Note was reinstated at its original interest rate to be paid according to its terms. However, none of this changes the actual dates on which the payments under the Note were made, and the manner in which interest should be charged thereunder. These arguments by Defendants are misplaced. This proposition is analyzed in detail below.

Note. It is important to note that in consideration of the payments made by Borrowers under the Lease McCallum allowed D's Wings (of which Borrowers are part owners) to remain in business within the Premises, thus continuing to generate money and earn income to the benefit of the Borrowers. Borrowers now assert that those payments made by Borrowers under the Lease (which operated to continue the Lease and prevent default by D's Wings and the eviction of D's Wings thereunder) should also be treated as payments under the Note. Borrowers further assert that McCallum has somehow been unjustly enriched by these payments. This seems somewhat inconsistent in that what Borrowers are requesting of this Court is the double application of these payments – first to the Lease, to continue D's Wings occupancy and operation within the Premises, and then also to the Note, to reduce Borrowers' obligations thereunder. This double application of payments requested by Borrowers would result in a windfall to Borrowers – at the sole expense of McCallum who has had to endure years of first sporadic and then complete nonpayment of obligations under both the Note and the Lease.

McCallum seeks in this action only to recover those sums justly due and owing to him under the terms of the Note – the Note under which the Borrowers admit liability and which Borrowers admit is in default. McCallum has accepted and based his calculations of the amounts due under the Note on the payment amounts and dates provided by Borrowers. The only question that remains is how much longer McCallum will be delayed in his recovery of those amounts justly due and owing to him under the Note.

ARGUMENT

A. BORROWERS' CLAIMS FOR RESTITUTION AND MONEY HAD AND RECEIVED ARE INAPPLICABLE; AND BORROWERS FAIL TO PROVE ANY OF THE ELEMENTS REQUIRED FOR RESTITUTION

1. Brief explanation of Borrowers' claim for restitution based upon Lease payments made.

Borrowers claim that McCallum has been unjustly enriched by the payments made by Borrowers under the Lease, and that Borrowers are entitled to an offset against the amounts they owe under the Note in the amount of the payments they made under the Lease. However, the Note and the Lease are separate and distinct legal agreements - despite the fact that Borrowers (though not legally obligated under the Lease) had a clear financial interest, as shareholders of D's Wings, in keeping the Lease in effect. (R. p. 3, P. 112, lines 11-14, p. 127, line 19 – p. 128, line 13, p. 129, lines 19-20, p. 142, lines 8-13, p. 150, line 13 – p. 151, line 1). As discussed in detail below, the payments by Borrowers under the Lease were made for the purpose of inducing McCallum to keep the Lease in effect, and in consideration of these Lease payments McCallum did in fact keep the Lease in effect. Borrowers made these payments under the Lease without being legally obligated to do so, but instead because Borrowers had a financial interest in ensuring the Lease was not terminated. Borrowers now seek to apply principles of restitution and money had and received to have the payments made by Borrowers under the Lease applied also as payments under the Note. This contention is unquestionably erroneous. The principles of restitution and money had and received are simply inapplicable to the fact pattern sub judice, and these principles are discussed at length below.

2. Brief explanation of Borrowers' claim for restitution based upon alleged agreement of McCallum to "bring the Note current."

Borrowers also assert that they are entitled to restitution based upon allegations that Borrowers' payments under the Lease were made in consideration of some assurance by McCallum that he would "bring the Note current or treat it as current." It is undisputed that after the requested overdue payments under the Note and Lease were made by Borrowers, McCallum in effect reinstated the Note such that the default interest rate was not applied, the sums due under the Note were not accelerated, and the obligors under the Note were entitled to continue making payments thereunder in accordance with the terms of the Note. (R. p. 158, line 16 – p. 159, line 5). McCallum also allowed the Lease to remain in effect and did not exercise any default remedies thereunder. It is hard to imagine any other way McCallum could have treated the Note as current.⁵ McCallum's accountant even testified that he believed the payments made by Borrowers were applied to bring the Note current, in accordance with his understanding of this concept. (R. p. 92, lines 3-4).

Apparently Borrowers' idea of treating the Note as current was that McCallum would have calculated all payments under the Note as having been made on the date that they were due, instead of on the date on which they were actually paid. In particular (and this is the most troubling aspect of Borrowers' argument), Borrowers assert that the Note should be amortized under the fiction that the first payment under the Note was made in March of 2007 when it is undisputed that the payments under the Note did not even begin

⁵ Mr. Isgett testified in this regard that he understood they would be "bringing the rent and note current" such that they would "proceed under the prior monthly rent and note agreement and that [McCallum] would no longer call the full amount of the note due as stated in [his] letter of September 6, 2007." (R. p. 131, lines 14-17). This is exactly what McCallum did and all parties were allowed to proceed under the prior monthly rent and note agreement without the full amount of the note being called due.

until May of 2007 in accordance with the terms of the Note and the agreements of the parties.⁶ (R. p. 51, lines 14-22, p. 76, lines 13-19). This argument is somewhat far-fetched, and there is no evidence in the record of any agreement of McCallum to take such action.

In fact, the only evidence Borrowers rely upon for their assertions of McCallum's agreement to "bring the note current" is the correspondence from Borrowers to McCallum accompanying their payment which states that "It is our understanding that as we are bringing the rent and note current, we will proceed under the prior monthly rent and note agreement and that you will no longer call the full amount of the note due as stated in your letter of September 6, 2007." (R. p. 269). Significantly, McCallum did exactly what the Borrowers requested in this regard – he allowed regular payments to resume in accordance with the original terms of the Note, and he no longer called the full amount of the Note due. (R. p. 158, line 16 – p. 159, line 5). In this respect, McCallum testified that he considered the Note to have been brought current. (R. p. 80, lines 9-11). The idea and claim of Borrowers that McCallum should have for some reason treated the Note as if payments under the Note began in March of 2007, when in fact payments did not begin until several months later, is nonsensical, and something the parties clearly never discussed.

In addition, and despite various assertions of Borrowers to the contrary, McCallum never required or even requested that Borrowers make any payments under the Lease whatsoever. McCallum testified that he never asked the Borrowers to make

⁶ The Note provides that payments should commence "(TBA) March 2007" and the testimony at trial was that "TBA" means "to be adjusted." (R. p. 57, lines 19-20, p. 77, lines 4-6, p. 212). In actuality, Note payments began in May of 2007, after a four-month grace period allowed to D's Wings under the Lease during which no payments under the Lease or Note were due. (R. p. 51, lines 14-22).

any payments of rent under the Lease. (R. p. 77, lines 6-10, p. 79, lines 16-18). Borrowers testified that they never even spoke with McCallum himself, but only with his attorney. (R. p. 117, line 20 – p. 118, line 1). The only evidence presented by Borrowers of any communication with McCallum's attorney in this regard is the correspondence from McCallum's attorney of September 6, 2007 which reads, in full, as follows:

The purpose of this letter is to notify you that D's Franchise Systems, Inc. is in default of rents due for the months of July, August and September totaling \$31,652.07, including interest and penalties. Additionally, payments due under the Promissory Note for the same months have not been paid.

As a consequence of this default, Smallwood Development Company, LLC does hereby elect to declare due and payable the full amount due under the above-referenced Note, of which each of you is a co-signer. As of September 5, 2007, the full amount due is \$190,260.77, which accrues interest, as a result of default, at the rate of 18% per annum.

You are reminded that the Promissory Note contains a provision requiring the maker to pay all costs of collection, including attorney's fees, so I strongly suggest you consult an attorney about making this payment as soon as possible.

(R. p. 272) (emphasis added). This correspondence clearly only advises Borrowers of the default under the Lease, as a courtesy from McCallum who was aware of Borrowers' ownership interest in D's Wings. In fact, by their correspondence of September 7, 2007 Borrowers thanked McCallum's counsel for his communications regarding the arrearages under the Note and the Lease and encouraged McCallum's counsel to contact them directly should any similar problems occur in the future. (R. p. 269). The truth of the matter is that McCallum never required Borrowers to make payment under the Lease in order to reinstate the Note. Borrowers have presented no evidence of this supposed requirement from McCallum. Borrowers admit that they never communicated directly

with McCallum and have pointed to no substantive communications with McCallum's counsel other than the communication referenced above. (R. p. 117, lines 20-24).

Borrowers' idea that portions of the payments made by Borrowers under the Lease should be applied as payments under the Note to the extent necessary to treat the Note as if payments commenced in March instead of May, and as if all subsequent payments were timely made, is without any legal or factual basis whatsoever, and Borrowers' claim in this regard must fail.

3. Borrowers' claim for restitution grounded upon the doctrine of money had and received.

For the first time in their Motion to Alter or Amend Judge Strickland's Order Borrowers attempt to tie their restitution claim to the legal doctrine of money had and received. An action for money had and received exists when one party has money belonging to another party and the money should, in equity, be repaid. See Okatie River, L.L.C. v. Southeastern Site Prep., L.L.C., 353 S.C. 327, 577 S.E.2d 468 (Ct. App. 2003). The essential requirement to application of the money had and received doctrine is that the party asserting the doctrine must show that "he has equity and conscience on his side." Id. at 335, 577 S.E.2d at 472. "Once the requirements of an action for money had and received are proven, the equitable principles of unjust enrichment and restitution provide a remedy." Id. at 335, 577 S.E.2d at 472-73. This Court has recognized that in actuality, an action for money had and received is "subsumed and amalgamated" under the theory of restitution and, therefore, courts analyzing claims for money had and received are bound to "apply with exactitude" the restitution tests and principles set forth in Myrtle Beach Hospital, Inc. v. City of Myrtle Beach, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000), which are discussed more fully below.

As set forth in great detail below, Borrowers have failed to establish any of the elements required under Myrtle Beach Hospital to set forth a claim for restitution. Therefore, Borrowers' claim for money had and received must likewise fail. In addition, Borrowers have failed to satisfy the fundamental element of a claim for money had and received in that Borrowers obviously do not have equity and good conscience on their side, and any payments made by Borrowers under the Lease clearly do not, in equity, need to be repaid to Borrowers. See Okatie River at 335, 577 S.E.2d at 472. These equitable principles are also discussed in detail below.

4. Failure of Borrowers to satisfy any of the essential requirements of restitution.

There is no question that restitution is simply not proper, or called for, in this case.⁷ In fact, Borrowers do not satisfy even one of the elements required to set forth a claim for restitution.

“Restitution is a remedy designed to prevent unjust enrichment.” Jasdip Properties SC, LLC v. Richardson, 395 S.C. 633, 720 S.E.2d 485, 488 (Ct. App. 2011). Unjust enrichment is an equitable doctrine which permits recovery of the amount by which one party has been unjustly enriched at the expense of the other. Id. (quoting Ellis v. Smith Grading & Paving, Inc., 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct. App. 1998)). Unjust enrichment is a prerequisite to enforcement of the doctrine of restitution; “if there is no basis for unjust enrichment, there is no basis for restitution.”⁸ Jasdip, 720 S.E.2d at 489; Ellis at 473, 366 S.E.2d at 14-15.

⁷ Borrowers' proper claim for restitution likely lies against D's Wings and/or Hanshaw and Daniels, as discussed more fully below.

⁸ The terms “restitution” and “unjust enrichment” are the modern designations for the older doctrine of quasi-contract. Ellis at 473, 366 S.E.2d at 15.

In order to prevail on their restitution claim, the Borrowers must establish and prove *each of* the following well established elements:

1. That Borrowers conferred a non-gratuitous benefit upon McCallum;
2. That McCallum realized the benefit; *and*
3. That it would be inequitable for McCallum to retain the benefit without paying to Borrowers its value.

Myrtle Beach Hosp. at 8-9, 532 S.E.2d at 872 (adopting the aforementioned test as the “sole test for a *quantum meruit*/quasi-contract/implied by law claim”); Jasdip, 720 S.E.2d at 489; Ellis at 474, 366 S.E.2d at 15; see also Okatie River at 336, 577 S.E.2d at 473 (noting that the above-stated test for restitution should be applied “with exactitude” when analyzing a claim for money had and received). As discussed in detail below, Borrowers have failed to establish any of the aforementioned elements required to state a claim for restitution and/or money had and received. Therefore, restitution is not appropriate in this case.

a. *Any benefit conferred upon McCallum by Borrowers was gratuitous.*

The first element to be established when seeking restitution is that the party claiming restitution conferred a “*non-gratuitous*” benefit on the party against whom restitution is sought. Jasdip Properties SC, LLC v. Richardson, 395 S.C. 633, 720 S.E.2d 485, 489 (Ct. App. 2011).

The legal definition of “gratuitous” is “done or performed without obligation to do so.” BLACK’S LAW DICTIONARY 708 (7th ed. 1999). Each of the Borrowers admitted in their Amended Answer and again at trial that the Borrowers had no legal obligation to make payments under the Lease. (R. p. 3, p. 33, p. 112, lines 11-14, p. 129, lines 19-20).

Therefore, any payments made by Borrowers under the Lease were, by definition, “gratuitous.”

The correspondence from McCallum’s counsel to Borrowers (which is set forth verbatim above) made clear the fact that McCallum did not consider (nor did he have any grounds to consider) Borrowers as legally obligated parties under the Lease. (R. p. 272). This letter clearly states that its purpose is to notify Borrowers of a default *by D’s Wings* under the Lease, and also of the default under the Note – with particular reference being made to the fact that Borrowers were obligated under the Note (only). (R. p. 272). McCallum had no right to demand any payment under the Lease from Borrowers, and did not do so.⁹ McCallum simply advised Borrowers of the default by D’s Wings under the Lease as a courtesy to Borrowers, who McCallum was aware were also shareholders in D’s Wings and had a general interest in the success of the restaurant venture. See Niggel Assoc., Inc. v. Polo’s of North Myrtle Beach, Inc., 296 S.C. 530, 533, 374 S.E.2d 507, 509 (Ct. App. 1988) (holding that “it is not enough that the [party against whom restitution is sought] has knowledge of the [party claiming restitution]’s conduct; he must have *induced* the [party claiming restitution] to confer the benefit.”) (emphasis added). There simply was no obligation on the part of Borrowers make payments under the Lease – other than whatever obligation Borrowers may have felt to themselves as shareholders in D’s Wings to see that the business succeeded. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 30 and Introductory Note (2011) (addressing claims of restitution by parties whose intervention is based on their own self-interest and

⁹ As noted above, Borrowers testified that they never communicated with McCallum himself, but only with his attorney, and the only substantive communication with McCallum’s attorney which has been presented by Borrowers is the letter of September 6, 2007 discussed herein (the contents of which is set forth in full above). (R. p. 117, line 20 – p. 118, line 1, p. 272).

recognizing that “restitution for benefits voluntarily conferred is generally denied”). Therefore, the payments made by Borrowers to McCallum under the Lease should be and are deemed “gratuitous.”

b. *McCallum realized no benefit from Borrowers’ payments under the Lease.*

The second prerequisite to application of the doctrine of restitution is that the party against whom restitution is sought must actually realize a benefit as a result of the actions of the party seeking restitution. Myrtle Beach Hosp. at 9, 532 S.E.2d at 872. Not only were the payments made by Borrowers under the Lease “gratuitous” in nature, but these payments did not confer any *benefit* at all upon McCallum, who was already legally entitled to such payments under the Lease. In fact, if this Court were to find that McCallum is not entitled to retain the Lease payments made by Borrowers, these payments would actually have harmed (instead of benefitted) McCallum as McCallum could have sought payment from D’s Wings for these particular payments and/or evicted D’s Wings, but since these amounts were paid by Borrowers (and McCallum relied upon this payment by Borrowers), McCallum did not do so.

To “realize” means “to obtain or achieve, as gain or profit;” likewise, “benefit” means “profit or gain.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1505 (3rd ed. 1992); BLACK’S LAW DICTIONARY 150 (7th ed. 1999). In this case, payments made by Borrowers under the D’s Wings Lease, to which McCallum was already contractually entitled, cannot be construed to constitute a gain or profit to McCallum. McCallum simply received that to which he was legally entitled. The only party who stood to “gain” from Borrowers’ payments under the Lease was D’s Wings (and its shareholders, which included Borrowers), whose legal obligation was being paid

by Borrowers. In fact, if Borrowers had not made the Lease payments on behalf of D's Wings then McCallum would have sought payment of those unpaid amounts directly from D's Wings. Instead, the payments having been made, McCallum did not seek payment from D's Wings and indeed continued the Lease (in reliance on the Lease payments made by Borrowers) and treated it as if in full force and effect. (R. p. 52, line 19 – p. 53, line 14, p. 63, lines 7-10, p. 117, lines 19-21, p. 139, line 23 – p. 140, line 4).¹⁰

In Myrtle Beach Hosp., 341 S.C. 1, 532 S.E.2d 868 (2000), our Supreme Court considered a hospital's claim for restitution against the City to recover for costs of medical care provided to pretrial detainees in the City's custody. The Court denied restitution in this case holding that the party who actually benefitted from the hospital's performance was the third party detainee (D's Wings in our case), not the City. Id. at 9, 532 S.E.2d at 873. Therefore, the Court held that the hospital's claim against the city for restitution was denied since "it is the detainee rather than the City that receives and retains the benefits conferred by the Hospital." Id.

Our Court of Appeals has likewise held that a party who received a benefit incidental to dealings between two other parties in which it did not assert control is not to be construed as having received a benefit for which it should be liable in restitution. Niggel at 533, 374 S.E.2d at 509. In our case the only possible benefit McCallum could be construed as having received from Borrowers' Lease payments (which McCallum was already owed) would necessarily have been "incidental" to the dealings between Borrowers and D's Wings. McCallum certainly did not exert control over this relationship between D's Wings and Borrowers as McCallum (as discussed above) did

¹⁰ Though McCallum has now obtained a judgment against D's Wings relating to its ultimate breach of the Lease, this judgment would not include amounts for the payments that were made under the Lease – including those made by Borrowers.

not require any payment by Borrowers under the Lease. This is not any type of benefit to McCallum that would render him liable to Borrowers for restitution.

c. Borrowers suffer no inequity, whatsoever, from McCallum's retention of the payments made under and already applied towards those amounts due and owing under the Lease.

Despite the contentions of Borrowers, we must keep in perspective the true facts of this case. Borrowers made gratuitous payments under the Lease in order to allow D's Wings to remain in operation. As a result of these Lease payments D's Wings was in fact allowed to remain in operation upon the Premises. (R. p. 52, line 19 – p. 53, line 14, p. 63, lines 7-10, p. 117, lines 19-21, p. 139, line 23 – p. 140, line 4). The Lease payments made by Borrowers were in all respects treated as payments under the Lease and therefore were not recovered, and could not have been recovered, by McCallum in his separate suit against D's Wings to recover amounts owing to him under the Lease.

Borrowers now claim that those Lease payments should also be treated as payments under the Note. Borrowers simply cannot have it both ways. In fact, if this theory of Borrowers were accepted the Borrowers themselves would be unjustly enriched (at the expense of McCallum) as Borrowers would then be receiving the benefit of their payments under the Lease doubly – once as payments made under the Lease (in reliance upon which McCallum allowed D's Wings to remain operating in the Premises, clearly benefitting Borrowers as owners of D's Wings) and then again as payments under the Note. See Ellis at 474, 366 S.E.2d at 15 (denying restitution when it would actually result in the unjust enrichment of a third party). The magnitude of the inequity proposed by Borrowers is astounding. “The law will never impute a promise to pay for a benefit

conferred, where it would be unjust to the party to whom it would be imputed and contrary to equity.” Id.

d. *McCallum has not been unjustly enriched.*

As set forth above, the threshold requirement before even considering a claim for restitution is that the party against whom restitution is sought must have been unjustly enriched. Ellis v. Smith Grading and Paving, Inc., 294 S.C. 470, 366 S.E.2d 12 (Ct. App. 1988). The bottom line is that McCallum has not been *unjustly* enriched. McCallum has not received anything to which he is not contractually entitled. In fact, McCallum has yet to receive all, or even most of that to which he is entitled under the Note *or* under the Lease.

It is impossible for McCallum to be considered to have been unjustly enriched by the payments gratuitously made by Borrowers under the Lease. The payments made by Borrowers under the Lease were applied to the amounts due and owing under the Lease (thus reducing the amount due and owing and later recoverable by McCallum under the Lease) and, as a direct result of such payments by Borrowers, D’s Wings was allowed to remain in operation within the Premises. It is peculiar how McCallum, who has yet to recover those amounts owed to him under the Note and the Lease, could be considered to have been “unjustly enriched” by payments made to him that were legally due and owing to him. McCallum clearly has not been “unjustly enriched” in any way, and any claim for restitution against him is therefore a non-starter.

5. Borrowers’ restitution claim, if any exists, lies against D’s Wings and/or Hanshaw and Daniels.

As mentioned above, the Borrowers’ restitution claim, it appears, would more properly lie against D’s Wings and/or Hanshaw and Daniels. D’s Wings was clearly the

party obligated to McCallum under the Lease which Borrowers made payments on. Therefore, D's Wings (of which Borrowers are part owners) clearly benefitted from Borrowers' payment of its obligations under the Lease. Hanshaw and Daniels, as owners of D's Wings (in addition to Borrowers), likewise benefitted from Borrowers' payments under the Lease. Therefore, if anyone was unjustly enriched as a result of Borrowers' payments made under the Lease it was D's Wings, Hanshaw and Daniels. Borrowers' claim for restitution therefore lies against D's Wings, Hanshaw and Daniels. D's Wings was the only party legally obligated under the Lease and D's Wings, Hanshaw and Daniels are the parties who actually benefitted from Borrowers' payment under the Lease. It is these parties who should be looked to by Borrowers for reimbursement of Lease payments made by Borrowers – not McCallum to whom this money was justly due and owing.

The proper application of the principles of restitution to the case at hand is summarized in the Third Restatement of Restitution as follows:

- (1) If the claimant renders to a third person a performance for which the defendant would have been independently liable to the third person, the claimant is entitled to restitution from the defendant as necessary to prevent unjust enrichment.
- (2) There is unjust enrichment in such a case to the extent that
 - a. The claimant acts in the performance of the claimant's independent obligation to the third person, or otherwise in the reasonable protection of claimant's own interests; and
 - b. As between the claimant and the defendant, the performance in question (or the part thereof for which the claimant seeks restitution) is primarily the obligation of the defendant.

RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 24 (2011) (emphasis added).

Clearly this is a proper application of the restitution doctrine – wherein McCallum is the “third person” to whom an obligation is owed and Borrowers, as claimaints, render performance on behalf of D’s Wings (and/or Daniels and Hanshaw) who take the role of the “defendant.” Nowhere in this scenario is an action shown to lie against the “third person” to whom a performance was owed. Such an application of the doctrine of restitution, as outlined above, would be wholly improper.

B. NO RENT WAS EVER “OVERPAID” UNDER THE LEASE AS THE LEASE WAS TERMINATED BASED UPON TENANT’S DEFAULT IN PAYMENT OF RENT; NEVERTHELESS NO LEASE PAYMENTS WOULD HAVE BEEN PROPERLY APPLIED TO OFFSET AMOUNTS DUE UNDER THE NOTE.

Borrowers assert that there was some “overpayment” of amounts due from D’s Wings under the Lease. This proposition is strange in light of the fact that the Lease was terminated by McCallum and D’s Wings was evicted based on a non-payment of rent. (R. p. 410, lines 11-19, p. 411, lines 6-16). In light of the fact that a Magistrate’s Court Judgment (referenced above) was issued against D’s Wings on April 1, 2009 in the amount of \$59,388.76 for amounts due and owing under the Lease, it is difficult to imagine how one could earnestly assert that the Lease was “overpaid.” Id.

In addition, Borrowers calculate the claimed “overpayment” based on the assertion that – for certain particular time periods - a greater amount was paid under the Lease than the total amount of the Monthly Base Rent and the common area charges set forth in the Lease.¹¹ However, more is due from D’s Wings under the Lease than simply

¹¹ Borrowers’ claim regarding purported Lease overpayments is grounded upon the fact that for certain periods during 2007 and 2008 more was paid under the Lease than simply the Monthly Base Rent

Monthly Base Rent and common area charges. For example, monthly payments of taxes are also due under the Lease. (R. pp. 207-209 and 291-294). In addition, late fees are imposed for all late payments under the Lease, as well as interest on all amounts not timely paid. Id. Clearly the snapshot picture Borrowers paint relating to these purported Lease overpayments must fail. These additional amounts were likely attributed to tax payments, late fees, interest, or any other number of charges due under the Lease. In any event, it is literally impossible for there to have been an overpayment under the Lease when the amounts due and owing under the Lease remain to this date unpaid in an amount of over fifty thousand dollars. All payments made under the Lease have been accounted for and already the subject of a lawsuit to recover the same, and the amounts owed have been reduced to judgment.

Notwithstanding the foregoing, however, the underlying proposition which Borrowers assert is absolutely without merit. The Lease and the Note are two separate and distinct agreements. If there had been (which there clearly was not) some form of “overpayment” under the Lease, naturally those amounts would not have been applied towards the Note – which was a separate obligation between distinct entities. In fact, an application of payments made on the Lease to sums owed pursuant to a wholly independent obligation would likely itself have been considered a wrongful application of funds. Clearly this contention is without merit.

(\$8,491.50) and common area charges (\$1,415.25). (R. p. 64, line 1 – p. 65, line 1, pp. 208-210 and 290-292).

C. THE MASTER'S AWARD OF ATTORNEY'S FEES AND COSTS IS SUPPORTED BY AMPLE EVIDENCE IN THE RECORD AND MUST BE UPHELD.

Borrowers contend the Master's award of attorney's fees and costs is not supported by adequate findings in the Master's Order, and therefore should be reversed.¹² In this respect Borrowers rely on the case of Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993), which does state that a court "should" make findings of fact as to each of the factors to be considered in an award of attorney's fees. Id. at 494, 427 S.E.2d at 661. Notably, however, the Blumberg case analyzed a situation where no evidence whatsoever was presented by the party seeking attorney's fees as to whether any attorney's fees were actually incurred.

What Borrowers fail to mention in their argument is the well-established rule that "[t]he award of attorney's fees under a contract is left to the discretion of the trial court and will not be disturbed unless the court abused that discretion." Jasdip Properties SC, LLC v. Richardson, 395 S.C. 633, 720 S.E.2d 485, 489 (Ct. App. 2011). In fact, "[w]here an attorney's services and their value are determined by the trier of fact, an appeal will not prevail if the findings of fact are supported by *any* competent evidence." Blumberg at 494, 427 S.E.2d at 660 (emphasis in original).

Moreover, and of particular import to the case at hand, our appellate courts have consistently upheld awards of attorney's fees even without evidence being taken and

¹² Borrowers do not challenge McCallum's right to recover his attorney's fees in this action. The provision of the Note specifically authorizing recovery of these fees reads as follows: "In the event of default in the payment of this note, and if it is placed in the hands of an attorney at law for collection, the undersigned hereby agree(s) to pay all costs of collection, including reasonably attorney's fees." (R. pp. 212-213). In addition, Borrowers mention in their Brief that the Master agreed to a subsequent hearing on the issue of attorney's fees. What Borrowers fail to mention in this respect is that the Master agreed to hold a subsequent hearing if the Borrowers, after their review of the attorney's fee affidavits presented, specifically requested one. (R. p. 421, lines 6-11). The Borrowers, however, failed to request any such subsequent hearing. Yet now Borrowers want to challenge this award on appeal. These actions cannot be sustained and the Master's award must be upheld.

findings being made as to each particular factor to be considered “so long as *the record* supports each of the six factors.” Seabrook Island Property Owners’ Assoc. v. Berger, 365 S.C. 234, 616 S.E.2d 431 (Ct. App. 2005) (emphasis added) (also citing Farmers & Merchants Bank v. Fagnoli, 274 S.C. 23, 260 S.E.2d 185 (1979), wherein “the court affirmed an award of attorney’s fees, even though the trial judge did not ‘receive evidence as to the value of the services rendered.’”).

The six Blumberg factors to be considered in awarding attorney’s fees are:

- 1) nature, extent, and difficulty of the legal services rendered;
- 2) time and labor devoted to the case;
- 3) professional standing of counsel;
- 4) contingency of compensation;
- 5) fee customarily charged in the locality for similar services; and
- 6) beneficial results obtained.

Blumberg at 494, 427 S.E.2d at 660.

Clearly in this case the record provides ample evidence of each of these factors. The Affidavits of Attorney’s Fees and Costs submitted by counsel for McCallum dated December 9, 2010 and March 15, 2011 and filed with the lower court set forth and specifically discuss and establish each of the six Blumberg factors. (R. pp. 373-374 and 432-433). In addition, Borrowers and McCallum have each pointed out in their Briefs the procedural posture of this case and the time necessarily devoted by counsel to the handling of this case. Certainly there is sufficient support in the record as to each of the six factors, and these factors were undoubtedly considered by the Master in reaching the conclusions set forth in his Order.

This decision of the Master must not be disturbed absent an abuse of discretion, and thus the Master’s Order in this respect must be upheld. Blumberg at 494, 427 S.E.2d at 660; Jasdip, 720 S.E.2d at 489.

D. MCCALLUM IS ENTITLED TO RECOVER COSTS INCURRED FOR HIS ACCOUNTANT'S SERVICES

Borrowers assert that McCallum should not be entitled to recover the costs of the services of his accountant. This proposition is interesting, particularly in light of the fact that the accountant's services in this regard clearly would not have been necessary had the Note been paid in accordance with its terms.

Borrowers' argument is that these costs should not be recoverable due to instances on which the calculated debt amount changed. The changes in these calculations were due to additional information being revealed through discovery as to particular payments made. (R. p. 102, lines 8-19). Indeed this is the purpose of our discovery system and to be encouraged. In fact, it was the erratic nature of the payments made on the Note which caused such difficulty in the final determination of the debt amount, as well as the fact that payments on the Note and Lease were often made in lump sums and returned for insufficient funds. (R. p. 52, lines 19-23, p. 80, line 22 - p. 81, line 12, p. 102, lines 8-19). McCallum's accountant testified to this fact at trial as follows: "[the payments received and posted were so erratic in timing and amounts we had some fair amount of difficulty until we received some corrections in getting the actual correct payments in." (R. p. 102, lines 9-13).

The bottom line is that through submissions made by the defendants to the action during the discovery process the true debt amount was discerned, after a few fluctuations based on various information received. This is surely typical in actions of this nature, and the purpose of seeking an accountant's involvement. Certainly this is the purpose of the discovery process, and the parties now have no dispute as to which payments were made, in what amounts, and when. To contend that McCallum is not entitled to recover

the fees for his accountant's services in this regard is illogical. The services of this accountant were used by both parties to ascertain the true debt amount owed and pursuant to the terms of the Note, McCallum is entitled to recover these costs. (R. pp. 212-213).

Furthermore, Borrowers are in no position to cast stones relating to record-keeping as Borrowers, who were jointly and severally liable under the Note, did *nothing* to monitor whether payments were being made under the Note, and when. (R. p. 143, lines 20-23, p. 155, line 24 – p. 156, line 20). Even after the first default under the Note Borrowers took no action whatsoever to keep any records of any payments made under the Note moving forward, or to monitor any payments moving forward. *Id.* Surely Borrowers as obligors under the Note, and practicing attorneys, had some obligation to monitor or at least keep or have available adequate records relating to payments made under the Note.

This Court is bound to uphold the Master's award of costs for McCallum's accountant's services absent an abuse of discretion, and therefore this award must be affirmed. Blumberg at 494, 427 S.E.2d at 660; Jasdip, 720 S.E.2d at 489.

E. THE DEFAULT INTEREST RATE UNDER THE NOTE COMPOUNDS ANNUALLY AND WAS THEREFORE PROPERLY CALCULATED

The Master's Order on Motion to Alter or Amend modifies the original Order to provide that the amounts due on the Note shall bear interest at the rate of eighteen (18%) percent, to be compounded annually (as opposed to monthly, as provided in the original Order). Borrowers assert that the interest on the Note should not be compounded at all and should instead be calculated as simple interest. Borrowers rely upon the 1924 case of Rhodus v. Goins, 129 S.C. 40, 123 S.E. 645 (1924), for this proposition.

Interestingly, Borrowers fail to make any mention of the much more recent 1993 case of Howard v. Mutz, 315 S.C. 356, 434 S.E.2d 254 (1993), wherein our Supreme Court analyzed language contained in a note identical to the language in the Note under consideration and held that such language calls for compound interest. The note in Howard provided for “all *interest* not paid when due to bear interest at the rate of twelve and one-half per cent.” Id at 363, 434 S.E.2d at 258 (emphasis added). The Note under consideration in the case sub judice also provides that interest shall accrue on all unpaid interest. The relevant language in the Note from Borrowers to McCallum reads as follows: “All principal *and interest* not paid when due shall bear interest at a rate of 18% per annum.” (R. pp. 212-213). Thus, the Note clearly states that interest is to be charged on all unpaid interest – in other words, that the interest is to be compounded.¹³ The language of the Note sub judice is entirely consistent with the language of the note analyzed by our Supreme Court in Howard.

Borrowers’ claim that the language of the Note from Borrowers to McCallum provides for simple interest as opposed to compound interest in the event of a default is not only completely without merit according to the plain language of the Note, but is also in direct contravention of the clear precedent established by our Supreme Court in Howard.

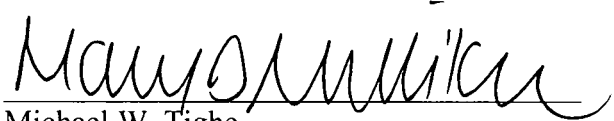
¹³ The legal definition of “compound interest” is “interest paid on both the principal and the previously accumulated interest.” BLACK’S LAW DICTIONARY 817 (7th ed. 1999).

CONCLUSION

In accordance with the foregoing, this Court should find that the Master's Order and his subsequent Order on Motion to Alter or Amend should be affirmed.

Respectfully submitted,

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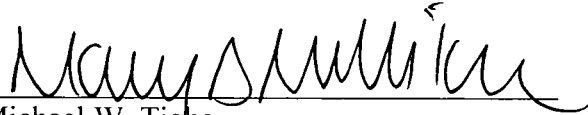
ATTORNEYS FOR RESPONDENT
MCCALLUM

May 30, 2012

CERTIFICATE OF COUNSEL

I hereby certify that this Final Brief complies with Rule 211(b), SCACR.

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May 30, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master-In-Equity for Richland County

Case No. 08-CP-40-8164

Charles L. McCallum, d/b/a Smallwood Development Corp., LLC.....Respondent,

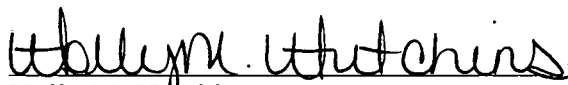
v.

Sherod Eadon, Jr., Darrell W. Hanshaw, Russell Howard, Gary W. Popwell and Christopher G. Isgett, of whom, Sherod Eadon, Jr., Gary W. Popwell, and Christopher G. Isgett are the.....Appellants.

CERTIFICATE OF SERVICE

I, Holly M. Hutchins, an employee of Callison Tighe & Robinson LLC, Attorneys for the Respondent, do hereby certify that, on this date, I caused to be served a copy of the foregoing **Final Brief of Respondent Charles L. McCallum, d/b/a Smallwood Development Corp., LLC** upon Appellants' counsel, by depositing a copy of the same in the United States mail, with proper first-class postage affixed thereon, addressed as follows:

Gary W. Popwell, Jr.
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Holly M. Hutchins

May 30, 2012