

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

GO SUPREME COURT

Honorable Mikell R. Scarborough, Master in Equity

Opinion No. 5270 (S.C.Ct.App. Filed September 10, 2014)

56 Leinbach Investors, LLC,..... Respondent,

v.

Magnolia Paradigm, Inc.....Petitioner.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

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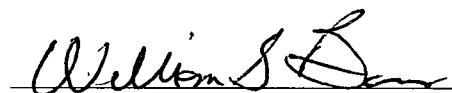
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Respectfully submitted,

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
MASTER-IN-EQUITY

HON. MIKELL SCARBOROUGH, MASTER-IN-EQUITY

APPELLATE CASE NO. 2012-213389

56 LEINBACH INVESTORS, LLC..... APPELLANT/RESPONDENT

v.

MAGNOLIA PARADIGM, INC..... RESPONDENT/APPELLANT

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMONS PLEAS
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2008-CP-10-3590

56 LEINBACH INVESTORS, LLC,)
Plaintiff,)
-versus-)
MAGNOLIA PARADIGM, INC.,)
Defendant.)

CONSENT ORDER OF
REFERENCE

2009 SEP - 1 PM 12:51
JULIE A. BARR, CLERK OF COURT

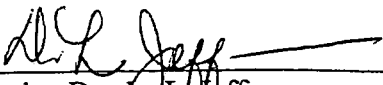
FILED

Pursuant to Rule 53(b) of the South Carolina Rules of Civil Procedure, this matter came before me on motion of William S. Barr, of the law firm Barr, Unger & McIntosh, LLC, Attorneys for the Defendant, by and with the consent of Donald H. Howe, of the law firm Howe & Wyndham, LLP, for an Order of Reference in the above captioned matter.

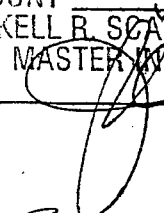
It appearing that pursuant to Rule 53(b) of the South Carolina Rules of Civil Procedure, that this Court may, upon application of any party, direct a reference in this action of all or any of the issues, whether of fact or law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the within action be, and the same is hereby, referred to the Honorable Mikell R. Scarborough, Master-In-Equity for Charleston County pursuant to Rule 53 of the South Carolina Rules of Civil Procedure to take testimony arising under the pleadings and to make his findings of fact and conclusions of law, with authority to enter a final judgment in the cause with any appeal from the said final judgment to be taken directly to the South Carolina Supreme Court.

AND IT IS SO ORDERED.


Judge Deadra L. Jefferson
Circuit Court Chief Administrative Judge

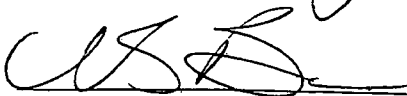
Charleston, South Carolina
August 28, 2009

PAID
DATE 8-24-09
AMOUNT 125.00
MIKELL R. SCARBOROUGH
MASTER IN EQUITY
BY: 

I SO MOVE:


Donald H. Howe
Attorney for the Plaintiff

I CONSENT:


William S. Barr
Attorney for the Defendant



STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

56 LEINBACH INVESTORS, LLC,)
)
Plaintiff,)
)
-versus-)
)
MAGNOLIA PARADIGM, INC.,)
)
Defendant.)

IN THE COURT OF COMMONS PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2008-CP-10-3590

ORDER

This matter came before me on Tuesday, October 11, 2011 for a trial on the merits. Present at the hearing were the Plaintiff's representative Clyde L. Hiers and his attorney, Donald H. Howe, and the Defendant's representative Tommy B. Baker and his attorneys, William S. Barr and Capers G. Barr, IV. Also in attendance were the Plaintiff's (or hereinafter Leinbach) and Defendant's (or hereinafter Magnolia) witnesses, Keith Powell of Optima Towers, Bill Cochran, a former employee of Baker Motor Company of Charleston, Inc. and Corky Carnevale, the Plaintiff's realtor in connection with the matter which is the subject of this case.

1. This action was commenced by the filing of a Summons and Complaint on June 24, 2008. Thereafter, the Plaintiff filed an Amended Complaint to attach the actual lease to the Complaint as alleged therein which had been inadvertently omitted as an attachment. Thereafter, the Defendant filed an Answer and Counterclaim on July 18, 2008. This matter was referred to me by Order of Reference which was filed on September 1, 2009. On August 3, 2010, Plaintiff filed a Motion to amend its Complaint with a proposed unsigned Second Amended Complaint attached thereto. No hearing on the motion was held; however, the Defendant filed an Answer and Counterclaim to the Second Amended Complaint asserting a further additional cause of action on October 18, 2010.



2. After hearing the testimony of the Plaintiff and the Defendant and the witnesses, I make the following findings of fact and conclusions of law.¹

APPLICABLE LAW

3. As stated in McGill v. Moore, 381 S.C. 179, 672 S.E.2d 571, "The cardinal rule of contract is to ascertain and give legal effect to the parties' intentions as determined by the contract language. Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause. Id. It is a question of law for the court whether the language of a contract is ambiguous." 672 S.E.2d 574 (citations omitted). See also McPherson v. J.E. Serrine & Co., 206 S.C. 183, 33 S.E.2d 501: "It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves..." Id. at 510.

FINDINGS OF FACT

4. This action arises out of a lease between the Plaintiff as lessee and the Defendant as lessor dated June 1, 2003 (Exhibit 1) in connection with property located on Leinbach Drive in the City of Charleston known as Parcel H-2 and described on a survey of the property recorded in the RMC Office for Charleston County at Plat Book DB, Page 47 (Exhibit 10). In the lease, the property is referred to as the "demised premises."

5. After entering into the lease with Defendant, the Plaintiff thereafter was approached by and entered into a lease of a portion of the premises to Optima Towers, LLC to erect a cellular telephone tower (Exhibit 3). Despite the fact that the 100' (one hundred foot) tall monopole

¹ First I note that this has been a difficult case to determine due to its unusual and exceptional circumstances. Ultimately, the court spent an inordinate amount of time wrestling with the remedy in this matter.

tower is readily visible from the surrounding area, the Defendant contends it only learned the cell tower was on the demised premises when it discovered the existence of the subsequent lease in 2007 during negotiations between the parties to sell the demised premises to the Defendant. After the parties were unable to reach an agreement to purchase the property, Defendant through counsel, placed Plaintiff on notice that it was in default as a result of the erection of the cell tower and demanded that the Plaintiff remove the tower to cure its default or Defendant would commence abating the rent (Exhibit 7).

6. After the Plaintiff failed to remove the tower, Defendant's counsel notified counsel for the Plaintiff, by letter dated January 31, 2008, (Exhibit 12) that it would commence abating the rent effective February 1, 2008 in the amount of \$800.00 per month; this figure Defendant learned from the failed real estate closing constituted the initial rent provided for in the lease between the Plaintiff and Optima Towers (Ex. 3).

7. As a result of the abatement of the rent by defendant, Plaintiff filed its complaint alleging the Defendant was in default.

8. The Defendant filed an Answer and Counterclaim for breach of contract as a result of Plaintiff's leasing a portion of the property already leased to it and for breach of contract accompanied by a fraudulent act.

9. Thereafter, Plaintiff filed a Motion to amend its Complaint to assert a cause of action for unjust enrichment and equitable estoppel; however, the Motion was never heard and the Amended Complaint never filed. Defendant filed an Answer and Counterclaim to the Second Amended Complaint and in its Answer to the Second Amended Complaint asserted an additional cause of action for unjust enrichment.

10. The case was tried without objection by either party based upon the Plaintiff's Second Amended Complaint and the Defendant's Answer to the Second Amended Complaint. Furthermore, at trial the pleadings were amended by the parties to conform to the proof.

11. At trial, Plaintiff's owner testified under cross-examination that he had made a mistake in that he did not realize that the area leased to Optima Towers was a portion of the property already leased to the Defendant. Mr. Hiers testified he thought the "demised premises" was only the area where the Defendant had improved the premises for parking. In support of that contention, the Plaintiff introduced, over Defendant's objection, a sketch of the proposed parking area (Exhibit 6), and a design plan prepared by LS3P Architects (Exhibit 2). Both of these exhibits were prepared for Defendant but neither of them were attached to the lease or incorporated into the terms of the lease.

12. Based on the Court's review of the lease itself and hearing the testimony of the Plaintiff and Defendant's witnesses and, in particular, Mr. Carnevale, who was Plaintiff's real estate agent at the time, the Court finds that Section 1.01 of the lease entitled "demised premises" describes the premises as the entire 1.21 acre parcel shown on the plat at Plat Book DB, Page 47 (Ex. 10).

13. Plaintiff argues that, even though he leased a portion of the demised premises already leased to the Defendant, he has not breached the lease as the area of the property leased was not being used by the Defendant and only encompasses a small portion of the entire 1.21 acre parcel and therefore does not "substantially interfere" with Defendant's intended use. Plaintiff contends that the Defendant's lease is further defined by the fact that it was to be used for a parking lot. After Defendant constructed its parking lot, it did not utilize the area which is now used by the cellular tower. As Defendant witness Bill Cochran explained, it was not cost effective to build into the "wooded area" of the lot and so the Defendant left that parcel of the

property vacant. Defendant contends that, although it is not now using the area in question, there are still 12 years left on the lease and there is no way he could say that he would never use the area in question. It is apparent that Plaintiff's actions in leasing the area to Optima Towers now prevents the Defendant from using that portion of the demised premises.

14. Article 12 of the lease provides that "there will be no leases... which in any manner would prevent or interfere with tenant... and tenant shall enjoy all the rights herein granted without any let, hindrance, ejection, molestation or interference by any person". The lease term "Demised Premises", when defined, begins "Subject to...the terms, covenants, conditions, and provisions of this Lease, Landlord hereby demises and leases...1.21 acres..." etc.

15. The conditions are addressed both in Section 6.01 and Section 1.02 Use of Space: "the demised premises shall be used by the Tenant as parking for employees of Tenant or Baker Motor Company and for no other purpose without the prior written consent of the Landlord." Thus, since the "wooded area" has no parking area on it, it is not subject to use by Magnolia, because parking is the only purpose for which Magnolia has any right of use pursuant to the lease.

16. Likewise under Title to Premises on page 17 of the lease: "the Demised Premises shall hereafter be subject to no leases...which in any manner interfere with Tenant". Notably, it does not say the Demised Premise is not subject to any lease. It only forbids leases that interfere with use of the parking area.

17. I find the Optima Tower clearly did not interfere with Magnolia's use. The cars are parked in the same spaces with the same ingress and egress. The only difference to the parking area would be the occasional shadow of the tower which is of no consequence. Tommy Baker conceded as much in his testimony before this court.

18. Magnolia argues it is entitled to the quiet enjoyment of the entire parcel. On page 17 of the lease, however, the enjoyment of quiet title and peaceful possession is limited to "all rights herein granted" and those rights, as noted above are limited to the use of parking in the designated area.

19. Even finding that there been a breach of the lease by Leinbach, I find that Magnolia is not entitled to abatement of the rent in the amount of \$886.97 month. First of all, Tommy Baker described the only damage Magnolia sustained as the deprivation of the "opportunity" to expand the existing lot into the "wooded area". Such expansion, however, is entirely speculative because it would be contingent on 1) approval by Hiers; 2) approval by the City of Charleston; and 3) economic feasibility. None of these factors have been shown to be either likely or reasonably probable. Such speculative damages are not recoverable under South Carolina Law. Gray v. Southern Facilities, Inc., 256 S.C. 558, 183 S.e.2d 438 (S.C. Ct. 1971). Yadkin Brick Company Inc. v. Materials Recovery Company, 339 S.C. 640, 529 S.E.2d 764 (S.C. Ct. App. 2000).

20. Thus, the only arguable damage would be to the quiet title, use and enjoyment of the wooded area. Obviously, no use of the wooded area was material to the underlying purpose of the lease (parking). As such a collateral and non-material part of the agreement, damages, even if awarded, would be nominal at most. See Stevens v. Alter, 342 S.C. 47, 536 S.E.2d 633 (S.C. Ct. 2000). Certainly the reasons for abatement of rent in the amount of \$886.97 per month had no reasonable relationship to Magnolia's "limited" resulting use of the property under the original lease. While Magnolia attempts to seek unjust enrichment, that principle requires that the enrichment be "at the expenses" of the other party. Harper v. McCoy, 276 S.C. 170, 276

S.E.2d 782 (S.Ct. 1981). Baker conceded the parking area had not suffered any compromise in its use. Therefore I find Defendant's claim for unjust enrichment would not be a proper result.

21. Plaintiff's leasing of a portion of the demised premises already leased to Defendant constitutes a violation of Article 12 of the lease. While I find that the Plaintiff breached its lease with the Defendant, I further find that Defendant's failure to utilize the area in question amounted to an abandonment of that part of the demised premises which resulted in a mutual mistake of fact -- both parties were unaware that the "wooded area" was contained within the demised premises at the time that either lease was entered into. I further find that this abandonment occurred prior to Plaintiff's breach of the express terms of the lease by again renting part of the demised premises.

22. Plaintiff contends that Defendant breached the lease by reducing its lease payments by the amount of the lease payments received by Plaintiff from Optima Towers. I agree. Article 6.03 of the lease clearly allows for abatement of the rent. The leasing of a portion of the property to another, including fencing off the entire area, prevents Defendant's access to that area; however, I specifically find that the Plaintiff's action does not interfere with the Defendant's normal use of the area of the demised premises. It does however effectively eject Defendant from future use of this part of the original demised premises.

23. While the Defendant did effect a remedy allowed by the Lease, I find that the self-help remedy that Defendant has utilized is excessive and also constitutes a breach in the payment terms of the Lease. I find the abatement of the full amount of rent paid by Optima Towers provides an unjust enrichment to Defendant which abandoned the tower premises and allowed its construction by failure to object when the tower was being erected. To allow the Defendant to benefit from its failure to object to use of its demised premises and then to wait and claim that

Plaintiff has been unjustly enriched from its own efforts smacks this court as both a breach of the parties' agreement and inequitable conduct.

CONCLUSIONS OF LAW

24. I conclude that Section 6.03 of the lease provides Defendant's remedy for Plaintiff's interference with Defendant's use of the demised premises. This Section 6.03 permits the tenant (the Defendant) to abate rent due to the landlord during the time that such interference persists.

25. Plaintiff's argument in regard to its cause of action for equitable estoppel does not lie. Plaintiff contends that, since Defendant did not object during the construction of the cell tower, that they have somehow lost the ability to object and further that the failure to file a memorandum of lease should further estop them. The elements of equitable estoppel are:

- a) Conduct by the party estopped (the defendant here) amounted to a false representation or concealment;
 - b) Intention to be acted upon;
 - c) Knowledge of the true facts;
 - d) Good faith reliance; and
 - e) Detrimental change of position.
- 7 S.C. Juris Estoppel and Waiver.*

26. None of these elements have been established by the facts of this case. The tower lease was entered into by the Plaintiff under the mistaken belief that it had not leased the property to the Defendant. This lease was entered into without any assistance or objection from the Defendant. Plaintiff's argument that Defendant's failure to file a memorandum of lease should give rise to an estoppel is without merit. A memorandum of lease is for the benefit of third parties and not the parties themselves. Both Plaintiff and Defendant should have known the extent of the demised premises and should not have leased a portion of the demised premises to Optima Towers. Their mutual mistake has been the common denominator in this action.

27. The Optima Towers lease was entered into after a mutual mistake of fact was made by the two parties to this action. This provides for an equitable remedy such as rescission of the contract. King v. Oxford, 282 SC 307, 318 SE2d 125 (SC App. 1984). Because the parties do not seek to void the contract, only to determine what is fair to both under the facts of this case, this court concludes that the contract between the parties should be ratified with an adjustment made to the amount of rent payable from Defendant for only that part of the demised premises that Defendant continues to use.

28. Plaintiff's claim for unjust enrichment against the Defendant is granted. Plaintiff asserts that Defendant has been unjustly enriched because they are not paying the full amount of the rent bargained for under the lease. A lease is tantamount to a conveyance of real property for the period of time of the lease. Subject to the terms of the lease, the tenant is entitled to the use and benefits of the leased property. Plaintiff argues that the Defendant would have to obtain permission from the landlord to sublet the property. This is true; however, having allowed the construction of the tower, both parties were mistaken over the boundary of the property which allowed for the construction of the tower. I conclude it would be inequitable for the Defendant to get the full benefit of the amount of the rental payments from Optima Towers after having sat on their rights to stop the tower's construction. The tower is there and the parties will have to live with this fact for the remainder of the term of the lease.

THE REMEDY

29. The Court must now seek to fashion an appropriate remedy for the respective breaches of the lease. Plaintiff has requested the Court to find that the Defendant breached the lease and require Defendant to pay back all monies abated and be denied any right to abate any rent into

the future. Defendant asks the Court to find that the Plaintiff breached the lease and that it be reimbursed for all money received by Plaintiff from Optima Towers, since the inception of the lease and that it be allowed to continue to abate its rent to Plaintiff into the future in an amount equal to the cell tower lease payments to Plaintiff.

Neither of these proposed remedies is acceptable to the court.

30. Plaintiff argues that Defendant has not been damaged, or if it was damaged, only nominally. Defendant claims it seeks to prevent unjust enrichment to Plaintiff. Defendant's witnesses testified it seeks to continue to abate the rent to prevent Plaintiff from continuing to be unjustly enriched and further seeks to recover any payments that Plaintiff has received in excess of what Plaintiff bargained to receive from Defendant.

31. I find that, because the Plaintiff's efforts led to the receipt of additional rent from the cell tower lease without any objection by the Defendant, it would be unjust to allow the Defendant a total offset for these payments as abatement of the rent.

32. The original demised premises were described by deed as consisting of 1.21 acres more or less. The Optima cell tower agreement sought to lease only 5000 square feet of space. In looking at the demised premises used by the Defendant, it appears that the parking area consists of approximately one acre, which is what the Defendant sought in their initial negotiations. (Def. Ex. 18). The premises left vacant and/or used by the cell tower approximates the remaining 0.2 acres of land. Accordingly, the court hereby fashions what it considers an appropriate remedy under the circumstances of this case.

33. The original base rent owed by Defendant will be reduced by one-sixth of its amount which constitutes the loss of use of the 0.2 acres of land from the original 1.21 acre parcel which the court finds to be one-sixth of the original amount of the demised premises. I conclude that the

amount of rent that should be abated is \$300 ($\$1800/6=\$300$) per month and not what Plaintiff receives, and has received, from Optima Towers, LLC. Accordingly, rent shall be owed on the base rent of \$1500 from the time that the cell tower began to pay on its rental term. This figure can then be adjusted, pursuant to the terms of the lease, as calculated for the percentage rental increases over the life of the 20 year lease term provided the Defendant continues to exercise his right to continue with the lease.

34. The testimony from Plaintiff and Defendant was that the rent for the demised premises was calculated based on a rate of return of 8-10% per annum on the fair market value of the entire parcel. (Exhibit 8) This calculation was conceded by the Plaintiff as well as Plaintiff's agent, Corky Carnevale. Furthermore, the parties were in negotiations between \$1600 and \$2000 per month for the property and so \$1500 reflects a reasonable figure for the parties anticipated expectations of rent to be paid for the parking lot. (Plaintiff's Ex. 14).

35. Total rent owed by Magnolia Paradigm to Plaintiff through the month of October 2011 was \$193,352.65 and total rent paid was \$153,561.00. (Exhibit 8). The Optima rent payments schedule (Def. Ex. 9) reveals that Optima paid Plaintiff during the same period \$54,116.65. This amount, when added to the rent paid by Defendant, yields an amount greater than Plaintiff would have received had he not rented the property to Optima (Def. Ex. 15). While I find that Plaintiff received a total of \$207,677.65 through the month of October 2011, it received this amount through its own efforts and not at the unjust expense of the Defendant. I find that the Plaintiff received an enrichment over the contract amount but find this amount was not unjust.

36. Accordingly the Court finds the Defendant has been unjustly enriched in the amount of \$500.00 per month. Defendant has sought its self-help remedy to abate the full amount of \$886.97 per month and will continue to be unjustly enriched unless Defendant is allowed to

abate its rent by the amount of \$300 per month (as originally calculated) until the end of its lease. For the time period from April 1, 2006 until October 1, 2011 (a period of 66 months), this court finds that Defendant therefore owes Plaintiff the sum of \$39,791.65 (\$193,352.65 – \$153,561.00) as base unpaid rent. This figure has not been adjusted for rental increases or additional time since the date of trial and so will need to be adjusted upwards according to the mathematical calculations of time and percentage rent increases in rent.

37. Under the facts of this case, which I find to be quite unusual, I conclude that an award of attorneys' fees is not warranted. While it may be said that one side has prevailed over the other, ample opportunities were afforded these parties to try and resolve this dispute between themselves. Having crafted a remedy from the facts presented here, the court determines no award of attorney's fees shall be made in this case.

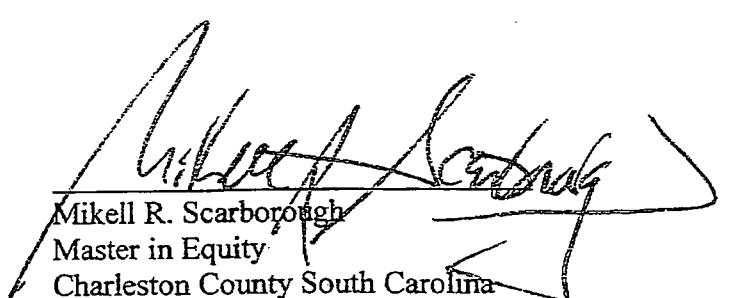
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

1. That Defendant received in excess of that which it bargained for with the Plaintiff by withholding the full amount of the cell tower rental payments (\$866.97 per month) from its monthly rental obligation.
2. That Defendant is hereby authorized to reduce its rent to Plaintiff in an amount of \$300 per month (based upon the base rent figure) for the period of time for which the rent received by Plaintiff from Optima Towers until the termination of Defendant's lease with Plaintiff. Toward that end Plaintiff is ordered to account to Defendant annually for the amount of the rent it receives from Optima Towers as the amount changes from time to time.

3. That Plaintiff be granted judgment on its claim for unjust enrichment.
4. That Defendant shall pay over to Plaintiff the sum of \$39,791.65 being the amount of rent it has not paid to Plaintiff pursuant to its self-help determination of withholding all rental payments against the amount paid Plaintiff under the cell tower lease.
5. No attorney's fees shall be awarded in this matter; and
6. The Defendant shall provide Plaintiff with payment of the aforementioned amounts within 30 days of the date of this order; and

IT IS SO ORDERED!

Charleston, South Carolina
June 11, 2012


Mikell R. Scarborough
Master in Equity
Charleston County South Carolina

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2008 CP-10-3590

56 LEINBACH INVESTORS, LLC

MAGNOLIA PARADIGM, INC.

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.
- ☐ **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 (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 :

THE COURT HAVING CONSIDERED DEFENDANT'S MOTION TO RECONSIDER OR ALTER AND AMEND PURSUANT TO RULE 59(e) IS RESPECTFULLY DENIED.

INFORMATION FOR THE PUBLIC 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

3062

Judge Code

8/31/2012

Date

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

56 LEINBACH INVESTORS, LLC,)
)
Plaintiff,)
)
-versus-)
)
MAGNOLIA PARADIGM, INC.,)
)
Defendant.)

IN THE COURT OF COMMONS PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2008-CP-10-

Amended
COMPLAINT

FILED
2008 JUN 24 AM 11:51
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FOR A FIRST CAUSE OF ACTION

(Breach of Contract)

1. Plaintiff is a duly organized Limited Liability Corporation pursuant to the laws of the State of South Carlina.
2. Defendant is duly organized corporation pursuant to the laws of the State of South Carolina.
3. Plaintiff owns a parcel of land on Leinbach Drive comprising of approximately 1.21 acres as more particularly described as parcel H-2 of TMS#349-01-00-45.
4. Plaintiff and Defendant entered into a Lease Agreement dated June 1, 2003 a copy of which is attached hereto and identified as Exhibit A.
5. Defendant subsequently installed a parking lot on the above described property.
6. In the fall of 2006, Plaintiff allowed, pursuant to a written contract, Optima Towers L.L.C. to erect a communications tower.
7. On January 31, 2008 Defendant began deducting \$800.00 per month from the rent due claiming that the communications tower interfered with Defendant's ability to use the parking area

as contemplated by the lease.

8. Upon information and belief the Defendant's use of the parking area has not been compromised by the erection of the tower.

9. Plaintiff believes that Defendant's deduction of \$800.00 per month from his rent payments are therefor a breach of contract.

FOR A SECOND CAUSE OF ACTION

(Declaratory Judgement)

10. Plaintiff realleges each and every paragraph above as if set forth below verbatim.

11. Plaintiff believes it is entitled to a determination of his rights under the June 1, 2003 Agreement to the Uniform Declaratory Judgement Act, specifically Section 15-53-30 of the S.C. Code of Laws.

WHEREFORE, Plaintiff prays for a judgment of all past due rent up to the time of trial and reasonable attorney's fees and expenses on the first cause of action and, on the second cause of action, a declaration of his rights as to all future rent payments and as to attorney's fees.

Howe & Wyndham, L.L.P.
Post Office Box 598
Charleston, SC 29402
843-853-6121

BY: Donald H. Howe
Donald H. Howe
Attorneys for Plaintiff

Dated: June 24, 08

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMONS PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2008-CP-10-3590

56 LEINBACH INVESTORS, LLC,)
)
Plaintiff,)

-versus-

MAGNOLIA PARADIGM, INC.,)
)
Defendant.)

AMENDED SUMMONS

BY
JULIE J. ARMSTRONG
CLERK OF COURT

2008 JUL -2 AM 9:28

FILED

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the attached Amended 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 subscriber at his offices at 47 State Street, Charleston, South Carolina, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you.

Howe & Wyndham, L.L.P.
Post Office Box 598
Charleston, SC 29402
843-853-6121

BY: Donald H. Howe
Donald H. Howe
Attorneys for Plaintiff

Dated: July 1, 08

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
56 LEINBACH INVESTORS, LLC,)
Plaintiff,)
-versus-)
MAGNOLIA PARADIGM, INC.,)
Defendant.)

IN THE COURT OF COMMONS PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2008-CP-10-3590

AMENDED COMPLAINT

2008 JUL -2 AM 9:28
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

1. Plaintiff is a duly organized Limited Liability Corporation pursuant to the laws of the State of South Carolina.
2. Defendant is duly organized corporation pursuant to the laws of the State of South Carolina.
3. Plaintiff owns a parcel of land on Leinbach Drive comprising of approximately 1.21 acres as more particularly described as parcel H-2 of TMS#349-01-00-45.
4. Plaintiff and Defendant entered into a Lease Agreement dated June 1, 2003 a copy of which is attached hereto and identified as Exhibit A.
5. Defendant subsequently installed a parking lot on the above described property.
6. In the fall of 2006, Plaintiff allowed, pursuant to a written contract, Optima Towers L.L.C. to erect a communications tower.
7. On January 31, 2008 Defendant began deducting \$800.00 per month from the rent due

claiming that the communications tower interfered with Defendant's ability to use the parking area as contemplated by the lease.

8. Upon information and belief the Defendant's use of the parking area has not been compromised by the erection of the tower.

9. Plaintiff believes that Defendant's deduction of \$800.00 per month from his rent payments are therefor a breach of contract.

FOR A SECOND CAUSE OF ACTION

(Declaratory Judgement)

10. Plaintiff realleges each and every paragraph above as if set forth below verbatim.

11. Plaintiff believes it is entitled to a determination of his rights under the June 1, 2003 Agreement to the Uniform Declaratory Judgement Act, specifically Section 15-53-30 of the S.C. Code of Laws.

WHEREFORE, Plaintiff prays for a judgment of all past due rent up to the time of trial and reasonable attorney's fees and expenses on the first cause of action and, on the second cause of action, a declaration of his rights as to all future rent payments and as to attorney's fees.

Howe & Wyndham, L.L.P.
Post Office Box 598
Charleston, SC 29402
843-853-6121

BY: Donald H. Howe

Donald H. Howe
Attorneys for Plaintiff

Dated: July 10, 2008

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
56 LEINBACH INVESTORS, LLC)
)
Plaintiff)
)
vs.)
)
MAGNOLIA PARADIGM, INC.,)
)
Defendant)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2008-CP-10-3590

**ANSWER TO AMENDED COMPLAINT
AND COUNTERCLAIM**

The Defendant answering the Amended Complaint herein would allege and show:

AS TO THE FIRST CAUSE OF ACTION

(BREACH OF CONTRACT)

1. The Defendant admits the allegations of Paragraph 1, 2, 3 and 4.
2. Responding to the allegations of Paragraph 5, the Defendant would admit that it installed a parking lot on the above described property but would further assert that it went into occupancy of the leased property of 1.2 acres described in Exhibit "A" to the Complaint in accordance with the terms of the lease.
3. Responding to the allegations of Paragraph 6, the Defendant denies same and asserts that Plaintiff entered into a long term lease with Optima Towers, LLC and leased a portion of the property leased to Defendant to Optima Towers, LLC in violation of Defendant's written lease with Plaintiff.

4. Responding to the allegations of Paragraph 7, the Defendant admits it began deducting \$800.00 per month from the rent due but would deny the remaining allegations of Paragraph 7.
5. The Defendant denies the allegations of Paragraph 8 and 9.

**AS TO THE SECOND CAUSE OF ACTION
(DECLARATORY JUDGMENT)**

6. Responding to the allegations of Paragraph 10, the Defendant repeats and reiterates responses to the allegations of Paragraph 1 through 9 as if fully repeated herein.
7. The Defendant is without sufficient information to form a belief as to the allegations of Paragraph 11 and therefore would deny same and demand strict proof thereof.

COUNTERCLAIM

Further responding to the complaint and as a counterclaim thereto, the Defendant would assert:

8. The Defendant is a corporation organized and existing under the laws of the State of South Carolina with its principal office in Charleston County, South Carolina.
9. The Defendant is a LLC duly organized and existing under the laws of the State of South Carolina and is the owner of a parcel of property situate on Leinbach Drive comprising of approximately 1.21 acres and more particularly described as Parcel H-2 on a plat of a Hoffman Lester Associates, Inc. dated April 4, 1994 and attached hereto as Exhibit "A".

10. That on or about June 1, 2003 the parties entered into a lease wherein the Defendant leased Parcel H-2 by virtue of the lease attached to the Plaintiff's complaint as Exhibit "A". The parcel is more fully described as Parcel H2 of TMS #: 349-01-00-045 and more fully shown on the attached plat.
11. The lease provides in Article XII that the landlord has full right and power and lawful authority to execute and deliver and perform its obligation under the lease, that the demised premises shall hereafter be subject to no leases, and that the tenants shall, during the demise term, have lawful, quiet and peaceful possession and occupation of the demised premises and shall enjoy all of the rights herein granted without any let, hindrance, ejection, molestation or interference by any person.
12. The lease further provides in Article XII that the landlord shall indemnify and hold tenant harmless from and against any and all claims, actions, demands, losses, costs, expenses, liabilities and judgments arising in connection with a material breach of any of landlords representations, warranties or covenants in this lease.
13. On or about February 23, 2006 the Plaintiff entered into a lease with Optima Towers, LLC, a copy of which is attached hereto as Exhibit "B", and leased a portion of the demised premises without the permission of the Defendant thereby breaching the landlord's covenant of lawful, quiet and peaceful possession and occupation of the demised premises and its

covenant that after the lease with Defendant that thereafter that the property would not be subject to any other leases.

14. Under the terms of the lease at Article XIII, the Defendant was entitled to assign or sublet in whole or in part of the demised premises with the written consent of the landlord. The Defendant is informed and believes that the Plaintiff usurped the Defendant's ability to sublet a portion of the property to Optima Towers, LLC and as a result thereof, the Defendant has been damaged in an amount to be determined by the trier of fact.
15. The lease further provides at Section 14 that in the event that an action is brought in law or in equity then the prevailing party in such action shall be entitled to recover reasonable attorney's fees from the other. The Defendant is informed and believes that in addition to any other relief that it may be entitled, that it is entitled to its reasonable attorney's fees necessitated in the enforcement of its lease against the Plaintiff and the defense of the Plaintiff's suit against it for damages and declaratory relief.
16. The Defendant is informed and believes that as a result of the Plaintiff's breach of the covenant of quiet enjoyment, that it has been damaged in an amount equal to the rental payments received by the Plaintiff from the subtenant, Optima Towers, LLC from the commencement date of that lease until such time as the Defendant commenced offsetting the rental payments to the Plaintiff.

17. The Defendant is informed and believes that it is entitled to interest on the monies that the Plaintiff has received from Optima Towers, LLC in accordance with Paragraph 14.12 of the subject lease.
18. The Defendant is further informed and believes that the Plaintiff has breached the provision of the lease concerning its right of first refusal in that it is not only granted the Defendant a right of first refusal but is now granted the said Optima Towers, LLC a right of first refusal to purchase the subject property.

SECOND CAUSE OF ACTION

BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT

19. The Defendant repeats and reiterates the allegations of Paragraphs above as if fully stated herein.
20. The Defendant is informed and believes that the Plaintiff commenced negotiations with Optima Towers, LLC to sublet a portion of the subject property knowing full and well that it had leased the entire property to the Defendant.
21. The Defendant is informed and believes that the Plaintiff intentionally breached its contract with the Defendant by interfering with its rights of quiet and peaceful enjoyment of the property in that it leased a portion of the property to a third party without the Defendant's approval.
22. The Defendant is informed and believes that the Plaintiff knew at the time that it entered into the contract to lease a portion of the property which it had already leased to the Defendant that the Plaintiff intended to violate its

contractual obligations with the Defendant fraudulently or with dishonest intent.

23. The Defendant is informed and believes that the Plaintiff's acts in breaching the contract in the fashion as pled herein were, in fact, dishonest and designed to breach its obligation to the Defendant.

24. Defendant is informed and believes that the actions of the Plaintiff were done with willful wanton and reckless disregard of the Defendant's rights and is entitled to actual and punitive damages as a result thereof.

FAILURE TO STATE A CAUSE OF ACTION PURSUANT TO RULE 12(b)(6)

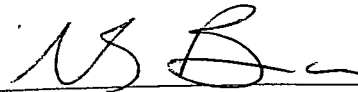
SCRCP

25. The Defendant repeats and reiterates the allegations of Paragraphs 1 through 25 as if fully stated herein.

26. The Defendant moves to dismiss the Plaintiff's complaint on the grounds that it fails to state facts sufficient to constitute a cause of action.

WHEREFORE, the Defendant having replied to the Complaint herein prays that the Court would inquire into the matters here and allege and issue its judgment accordingly, dismissing the Complaint of the Plaintiff and granting the Defendant judgment on its counterclaim as well as reasonable attorney's fees and for such other and further relief as the Court deems just and proper.

BARR, UNGER & McINTOSH, LLC



William S. Barr
11 Broad Street
Charleston, SC 29401
843-577-5083
Attorney for the Defendant

Charleston, South Carolina
July 17, 2008

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMONS PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2008-CP-10-3590

56 LEINBACH INVESTORS, LLC,)
)
Plaintiff,)

-versus-

MAGNOLIA PARADIGM, INC.,)
)
Defendant.)

**PLAINTIFF'S ANSWER TO
DEFENDANT'S COUNTERCLAIM**

The Plaintiff, 56 Leinbach Investors, LLC, in answers the Defendant's Counterclaim filed by the Defendant Magnolia Paradigm Inc. as follows:

1. The Plaintiff denies each and every allegation unless hereinafter specifically admitted.
2. Plaintiff admits the allegations of Paragraph 8.
3. Plaintiff admits the allegations of Paragraph 9.
4. Plaintiff admits so much of Paragraph 10 in which the Defendant leased a certain portion of the property from the Plaintiff but Plaintiff would crave reference to the Lease itself which outlines the exact nature and limits of the property that was leased.
5. Plaintiff admits so much of Paragraph 11 that is consistent with the written lease and denies the other portion thereof.
6. Plaintiff admits so much of Paragraph 12 as is consistent with the lease and denies any other portion thereof.
7. As to Paragraph 13, the Plaintiff admits that it entered into a lease with Optima Towers, LLC but denies this breached the landlord's covenant to lawful quite and peaceful possession and occupation of the premises for any portion of the lease.

8. Plaintiff admits so much of Paragraph 14 that alleges that the Defendant was entitled to assign or sublet and in whole or in part parts of the premises with the written consent of the landlord but denies the remainder of the allegations of Paragraph 14 and demands strict proof thereof.

9. That as to Paragraph 14, the Plaintiff admits that in certain situations, the Defendant, if it prevailed in litigation, would be entitled to attorneys' fees but denied that the facts and circumstances of this action constitutes such an instance.

10. Plaintiff denies the allegations of Paragraph 16.

11. Plaintiff denies the allegations Paragraph 17.

12. Plaintiff denies the allegations of Paragraph 18.

13. Plaintiff denies the allegations of Paragraph 19.

14. Plaintiff denies the allegations of Paragraphs 20, 21, 22, 23, 24 and 25.

15. As to Paragraph 26, Plaintiff believes that it has stated a cause of action and should be granted relief as outlined in its Complaint.

Howe & Wyndham, L.L.P.
Post Office Box 598
Charleston, SC 29402
843-853-6121

BY: Donald H. Howe
Donald H. Howe
Attorneys for Plaintiff

Dated: Aug 17, 08

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

56 LEINBACH INVESTORS, LLC,)
)
Plaintiff,)
)
-versus-)
)
MAGNOLIA PARADIGM, INC.,)
)
Defendant.)
_____)

IN THE COURT OF COMMONS PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2008-CP-10-3590

MOTION TO AMEND COMPLAINT

NOW COMES Plaintiff to move to amend the original Complaint filed on July 2, 2008 to add two additional causes of action (unjust enrichment and equitable estoppel/laches) as outlined in the attached proposed Amended Complaint.

I SO MOVE.

Howe & Wyndham, L.L.P.
Post Office Box 598
Charleston, SC 29402
843-853-6121

BY: _____

Donald H. Howe
Attorneys for Plaintiff

Dated: _____

Aug 31, 10

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMONS PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2008-CP-10-3590

56 LEINBACH INVESTORS, LLC,)
)
Plaintiff,)

-versus-

MAGNOLIA PARADIGM, INC.,)
)
Defendant.)

AMENDED SUMMONS

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the attached Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Amended Complaint on the subscriber at his offices at 47 State Street, Charleston, South Carolina, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Amended Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Amended Complaint and judgment by default will be rendered against you.

Howe & Wyndham, L.L.P.
Post Office Box 598
Charleston, SC 29402
843-853-6121

BY: _____
Donald H. Howe
Attorneys for Plaintiff

Dated: _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMONS PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2008-CP-10-3590

56 LEINBACH INVESTORS, LLC,)

Plaintiff,)

-versus-)

MAGNOLIA PARADIGM, INC.,)

Defendant.)

AMENDED COMPLAINT

FOR A FIRST CAUSE OF ACTION

(Breach of Contract)

1. Plaintiff is a duly organized Limited Liability Corporation pursuant to the laws of the State of South Carolina.

2. Defendant is duly organized corporation pursuant to the laws of the State of South Carolina.

3. Plaintiff owns a parcel of land on Leinbach Drive comprising of approximately 1.21 acres as more particularly described as parcel H-2 of TMS#349-01-00-45.

4. Plaintiff and Defendant entered into a Lease Agreement dated June 1, 2003 a copy of which is attached hereto and identified as Exhibit A.

5. Defendant subsequently installed a parking lot on the above described property.

6. In the fall of 2006, Plaintiff allowed, pursuant to a written contract, Optima Towers L.L.C. to erect a communications tower.

7. On January 31, 2008 Defendant began deducting \$800.00 per month from the rent due

claiming that the communications tower interfered with Defendant's ability to use the parking area as contemplated by the lease.

8. Upon information and belief the Defendant's use of the parking area has not been compromised by the erection of the tower.

9. Plaintiff believes that Defendant's deduction of \$800.00 per month from his rent payments are therefore a breach of contract.

FOR A SECOND CAUSE OF ACTION

(Declaratory Judgement)

10. Plaintiff realleges each and every paragraph above as if set forth below verbatim.

11. Plaintiff believes it is entitled to a determination of his rights under the June 1, 2003 Agreement to the Uniform Declaratory Judgement Act, specifically Section 15-53-30 of the S.C. Code of Laws.

FOR A THIRD CAUSE OF ACTION

(Unjust Enrichment)

12. Plaintiff realleges each and every paragraph above as if set forth below verbatim.

13. That prior to entering into the attached Lease (Exhibit A) on June 1, 2003, Defendant hired local professionals to design a proposed parking area for the property Defendant sought to lease from the Plaintiff.

14. That the proposed parking area had to be approved by the City of Charleston before it could be constructed.

15. That the parking area was ultimately constructed according to the plans that Defendant's agent had designed.

16. That the Defendant has had the full and uninterrupted use of the parking area since it was constructed.

17. That the construction of the communication tower did not invade the parking area that was constructed according to the plans which Defendant had prepared.

18. That at no time during the construction of the communication tower did the Defendant notify Plaintiff of any objection to the installation of the tower.

19. That even after the tower was constructed, Defendant made no objection to the tower until Defendant attempted to by the property several years after the tower was constructed.

20. That Defendant has therefore been unjustly enriched at Plaintiff's defense.

FOR A FOURTH CAUSE OF ACTION

(Equitable Estoppel/Laches)

21. Plaintiff realleges each and every paragraph above as if set forth below verbatim.

22. That Plaintiff believes Defendant should be equitably estopped from raising any objections to the existence of the tower now when Defendant failed to assert any alleged right of any objections to the construction of the tower in a timely manner.

WHEREFORE, Plaintiff prays for a judgment of all due rents along with reasonable attorney's fees and prejudgment interest as set out by Section 34-31-20 of the South Carolina Code of Laws on the First, Third and Fourth Causes of Action, and on the Second Cause of Action a declaration of his rights as to all future payments and as to attorney's fees.

Howe & Wyndham, L.L.P.
Post Office Box 598
Charleston, SC 29402
843-853-6121

BY: _____
Donald H. Howe
Attorneys for Plaintiff

Dated: _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

56 LEINBACH INVESTORS, LLC,)
)
Plaintiff,)
)
-versus-)
)
MAGNOLIA PARADIGM, INC.,)
)
Defendant.)
_____)

IN THE COURT OF COMMONS PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2008-CP-10-3590

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 31 day of August, 2010, I served the **Motion to Amend Complaint** by depositing same in the United States Mail, at Charleston, South Carolina with postage prepaid to the following:

William S. Barr, Esquire
Barr, Unger and McIntosh, LLC
11 Broad Street
Charleston, SC 29401

Howe & Wyndham, L.L.P.
Post Office Box 598
Charleston, SC 29402
843-853-6121

BY: Donald M. Barr

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMONS PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2008-CP-10-3590

56 LEINBACH INVESTORS, LLC,)

Plaintiff,)

-versus-)

MAGNOLIA PARADIGM, INC.,)

Defendant.)

**ANSWER TO SECOND
AMENDED COMPLAINT AND
COUNTERCLAIM**

2018 OCT 18 PM 12:52
FILED J ARMSTRONG
CLERK OF COURT

FILED

The Defendant answering the Amended Complaint herein would allege and show:

**AS TO THE FIRST CAUSE OF ACTION
(BREACH OF CONTRACT)**

1. The Defendant admits the allegations of Paragraph 1, 2, 3 and 4.
2. Responding to the allegations of Paragraph 5, the Defendant would admit that it installed a parking lot on the above described property but would further assert that it went into occupancy of the leased property of 1.2 acres described in Exhibit "A" to the Complaint in accordance with the terms of the lease.
3. Responding to the allegations of Paragraph 6, the Defendant denies same and asserts that Plaintiff entered into a long term lease with Optima Towers, LLC and leased a portion of the property leased to Defendant to Optima Towers, LLC in violation of Defendant's written lease with Plaintiff.

4. Responding to the allegations of Paragraph 7, the Defendant admits it began deducting \$800.00 per month from the rent due but would deny the remaining allegations of Paragraph 7.
5. The Defendant denies the allegations of Paragraph 8 and 9.

**AS TO THE SECOND CAUSE OF ACTION
(DECLARATORY JUDGMENT)**

6. Responding to the allegations of Paragraph 10, the Defendant repeats and reiterates responses to the allegations of Paragraph 1 through 9 as if fully repeated herein.
7. The Defendant is without sufficient information to form a belief as to the allegations of Paragraph 11 and therefore would deny same and demand strict proof thereof.

AS TO THE THIRD CAUSE OF ACTION

8. Responding to the allegations of Paragraph 12, the Defendant repeats and reiterates the responses to the allegations of Paragraph 1 through 11 as if fully stated herein.
9. The Defendants admit the allegations of Paragraph 13, 14 and 15.
10. The Defendants admit the allegations of Paragraph 16.
11. The Defendants deny the allegations of Paragraph 17.
12. The Defendants admit, upon information and belief, the allegations of Paragraph 18 and 19.
13. The Defendants deny the allegations of Paragraph 20.

14. Further responding to the Plaintiff's praying for unjust enrichment, the Defendant would repeat and reiterate the allegations of its Counterclaim as if fully stated herein indicating that the Plaintiff usurped an opportunity of the Defendants in utilizing a portion of the property which it leased to the Defendants to its own gain.

AS TO THE FOURTH CAUSE OF ACTION

15. Responding to the allegations of Paragraph 21, the Defendants repeat and reallege the responses to the allegations of Paragraph 1 through 20 as if fully stated herein verbatim.
16. The Defendant denies the allegations of Paragraph 22.

COUNTERCLAIM

Further responding to the complaint and as a counterclaim thereto, the Defendant would assert:

17. The Defendant is a corporation organized and existing under the laws of the State of South Carolina with its principal office in Charleston County, South Carolina.
18. The Defendant is a LLC duly organized and existing under the laws of the State of South Carolina and is the owner of a parcel of property situate on Leinbach Drive comprising of approximately 1.21 acres and more particularly described as Parcel H-2 on a plat of a Hoffman Lester Associates, Inc. dated April 4, 1994 and attached hereto as Exhibit "A".
19. That on or about June 1, 2003 the parties entered into a lease wherein the Defendant leased Parcel H-2 by virtue of the lease attached to the

Plaintiff's complaint as Exhibit "A". The parcel is more fully described as Parcel H2 of TMS #: 349-01-00-045 and more fully shown on the attached plat.

20. The lease provides in Article XII that the landlord has full right and power and lawful authority to execute and deliver and perform its obligation under the lease, that the demised premises shall hereafter be subject to no leases, and that the tenants shall, during the demise term, have lawful, quiet and peaceful possession and occupation of the demised premises and shall enjoy all of the rights herein granted without any let, hindrance, ejection, molestation or interference by any person.
21. The lease further provides in Article XII that the landlord shall indemnify and hold tenant harmless from and against any and all claims, actions, demands, losses, costs, expenses, liabilities and judgments arising in connection with a material breach of any of landlords representations, warranties or covenants in this lease.
22. On or about February 23, 2006 the Plaintiff entered into a lease with Optima Towers, LLC, a copy of which is attached hereto as Exhibit "B", and leased a portion of the demised premises without the permission of the Defendant thereby breaching the landlord's covenant of lawful, quiet and peaceful possession and occupation of the demised premises and its covenant that after the lease with Defendant that thereafter that the property would not be subject to any other leases.

23. Under the terms of the lease at Article XIII, the Defendant was entitled to assign or sublet in whole or in part of the demised premises with the written consent of the landlord. The Defendant is informed and believes that the Plaintiff usurped the Defendant's ability to sublet a portion of the property to Optima Towers, LLC and as a result thereof, the Defendant has been damaged in an amount to be determined by the trier of fact.
24. The lease further provides at Section 14 that in the event that an action is brought in law or in equity then the prevailing party in such action shall be entitled to recover reasonable attorney's fees from the other. The Defendant is informed and believes that in addition to any other relief that it may be entitled, that it is entitled to its reasonable attorney's fees necessitated in the enforcement of its lease against the Plaintiff and the defense of the Plaintiff's suit against it for damages and declaratory relief.
25. The Defendant is informed and believes that as a result of the Plaintiff's breach of the covenant of quiet enjoyment, that it has been damaged in an amount equal to the rental payments received by the Plaintiff from the subtenant, Optima Towers, LLC from the commencement date of that lease until such time as the Defendant commenced offsetting the rental payments to the Plaintiff.
26. The Defendant is informed and believes that it is entitled to interest on the monies that the Plaintiff has received from Optima Towers, LLC in accordance with Paragraph 14.12 of the subject lease.

27. The Defendant is further informed and believes that the Plaintiff has breached the provision of the lease concerning its right of first refusal in that it is not only granted the Defendant a right of first refusal but is now granted the said Optima Towers, LLC a right of first refusal to purchase the subject property.

FAILURE TO STATE A CAUSE OF ACTION PURSUANT TO RULE 12(b)(6)

SCRCP

28. The Defendant repeats and reiterates the allegations of Paragraphs 1 through 27 as if fully stated herein.
29. The Defendant moves to dismiss the Plaintiff's complaint on the grounds that it fails to state facts sufficient to constitute a cause of action.

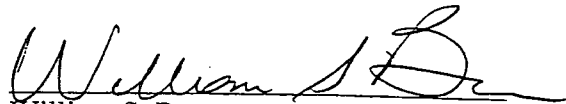
UNJUST ENRICHMENT

30. The Defendant repeats and reiterates the allegations of Paragraphs 1 through 29 as if fully stated herein.
31. The Plaintiffs entered into a lease to lease to Defendant the entire premises as described in the attached lease to the Defendants.
32. Thereafter, in breach of said lease, Plaintiffs leased a portion of the property already leased to the Defendants for additional consideration increasing the consideration it was receiving based on its contract with the Defendant.
33. The Defendant is informed and believes that the Plaintiffs have therefore been unjustly enriched in an amount equal to the additional sums which

they have been receiving from Optima Towers above the stated
consideration received from the Defendant.

WHEREFORE, these Defendants pray that the Court will inquire into the matters
herein and alleged and issue its judgment accordingly, dismissing the Complaint of the
Plaintiff and granting the Defendant judgment on its Counterclaim as well as reasonable
attorney's fees and for such other and further relief as the Court may deem just and
proper.

BARR, UNGER & McINTOSH, LLC



William S. Barr
11 Broad Street
Charleston, SC 29401
843-577-5083
Attorney for the Defendants

Charleston, South Carolina
September 1, 2010

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMONS PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2008-CP-10-3590

56 LEINBACH INVESTORS, LLC,)

Plaintiff,)

-versus-)

MAGNOLIA PARADIGM, INC.,)

Defendant.)

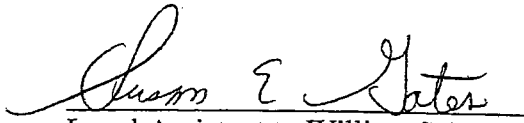
CERTIFICATE OF MAILING

2010 OCT 18 PM 12:52
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

I hereby certify that I have served a copy of the foregoing document on
Plaintiffs by placing a copy of same in the United States mail with sufficient postage
attached thereto and addressed as follows:

Donald H. Howe, Esquire
47 State Street
Charleston, SC 29401


Legal Assistant to William S. Barr

Charleston, South Carolina
September 7 2010

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
IN THE COURT OF COMMONS PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2008-CP-10-3590

56 LEINBACH INVESTORS, LLC,)

Plaintiff,)

-versus-)

MAGNOLIA PARADIGM, INC.,)

Defendant,)

MOTION TO RECONSIDER,
ALTER OR AMEND
PURSUANT TO RULE 59(e)
OF THE SOUTH CAROLINA
RULES OF CIVIL
PROCEDURE

BY JULIE J. ARMSTRONG
CLERK OF COURT

2012 JUL -9 PM 12: 15

FILED

TO: DONALD H. HOWE, ATTORNEY FOR PLAINTIFF
56 LEINBACH INVESTORS, LLC

PLEASE TAKE NOTICE that pursuant to Rule 59(e), South Carolina Rules of Civil Procedure, the Defendant, moves the Honorable Mikell R. Scarborough, Master-in-Equity for Charleston County, to reconsider, alter or amend his Order of June 11, 2012. The said Order being filed in the Clerk of Court for the Ninth Judicial Circuit on June 15, 2012 and notice of entry of the order was received on June 28, 2012 by E--mail from the clerk of court and the mailed copy was received on June 29, 2012. A copy of said Order is attached hereto and specifically incorporated by reference herein.

The grounds for this motion are as follows:

1. The finding of fact page 4 Paragraph 12 fails to establish whether or not the court considers the description of the demised premises to ambiguous or not. Defendant requests the court to determine that the lease unambiguously describes the demised premises as the entire 1.21 acre parcel shown on the plat at Plat Book DB page 47 (ex 10).

2. The finding of fact at Page 5, Paragraph 15, states "The conditions are addressed both in Sections 6.01 and 1.02 Use of Space..." A clear reading of the lease is that the those Sections merely define the use of the demised premises and are covenants in

the lease not conditions. (*See 49 Am jur 2nd Landlord and Tenant* §58) The heading for the sections state “ Section 1.02 Use of Space and Section 6.01 Use.”

The finding “Thus since the “wooded area” has no parking area on it, it is not subject to the use by Magnolia, because parking is the only purpose for which Magnolia has any right of use pursuant to the lease.” is without factual support in that the lease allows the entire demised premises to be used by Magnolia for parking and now that the tower has been built that is impossible.

3. The finding of fact at Page 5, Paragraph 16 which states in pertinent part that “it only forbids leases that interfere with use of the parking area”, the error being “parking area” is not a defined term in the lease and further it conflicts with the clear language of the lease which states “which in any manner prevent or interfere with tenant” not with parking area.

Further the finding “notably, it does not say the Demised Premises is not subject to any lease” this finding is contrary to the clear language in the lease that states “no leases” which defendant submits is the same as “not subject to any leases” as asserted by Plaintiff.

4. The finding of fact at Page 5, Paragraph 17 “that the Optima Tower clearly did not interfere with Magnolia’s use”. This finding is in direct conflict with Page 7, Paragraph 22 that states that “the tower...affectively ejects Defendant from future use of this part of the original demised premises” and page 4 Paragraph 13 which states “it is apparent that Plaintiff’s actions in leasing the area to Optima Towers now prevents the Defendant from using that portion of the demised premises.” This finding should be stricken from the order.

5. The finding of fact at Page 6, Paragraph 18. The finding therein "quiet title and peaceful possession is limited to 'all rights herein granted' and those rights as noted above are limited to the use of parking in the designated area". The error being that the lease contains no designated parking area. Quiet enjoyment refers to the entire demised premises not just a portion of the demised premises. Further the only limitation in Article XII of the lease is that the Tenant discharge its obligations under the lease. This finding should also be stricken from the order.

6. The finding of fact at Page 6, Paragraph 19 is contrary to the relief requested in the Defendant's prayer for relief, Defendant submitted under its theory of unjust enrichment that it was entitled to restitution damages measured by the Plaintiff's windfall and not damages calculated by the size of the area of the demised premises in question. (*Harper v. McCoy*, 276 Se2d 282 , S.Ct. 1981). In the alternative the court should consider the value of the lost area at the rental value of a cell tower not a parking lot since its use was changed by the Plaintiff.

7. The finding of fact at Page 6, Paragraph 20 is contrary to the relief Defendant prayed for, Defendant argued, under its theory of unjust enrichment, that it was entitled to restitution damages measured by the Plaintiff's windfall and not damages calculated by the size of the area of the demised premises in question and further the finding that "while Magnolia attempts to seek unjust enrichment, that principal requires that the enrichment be at the expense of the other party", the grounds are that this finding contradicts the finding at Page 7, Paragraph 22 that reflects that the Defendant was ejected from the area in question. Ejecting Defendant for a portion of the demised premises is at the Defendant's expense. The demised premises is Defendant's property. Plaintiff's gain

was the Defendant's loss and therefore at Defendant's expense. Plaintiff exploited Defendant's property to its gain. Defendant's action was to recover its property right that was exploited and was allowed in the lease by abatement.

8. The finding of fact at Page 7, Paragraph 21, "Defendant's failure to utilize the area in question amounted to an abandonment of that part of the demised premises". The grounds being that the finding is not supported by the evidence or the law. Abandonment is the intentional relinquishment of a known right. (*Holly Hill Lumber Company, Inc. v Grooms*, 16 SE2d 816. 1941). Mere failure to use a portion of the demised premises cannot rise to abandonment without intent to abandon.

The finding that "both parties were unaware that the "wooded area' was contained within the demised premises at the time the lease was entered into" is contrary to the testimony of Mr. Carnevale and Mr. Cochran and paragraph 12 of the order. Both testified at the time that the lease was entered into there was no question that the entire 1.21 acre parcel was the demised premises.

The finding that the "abandonment occurred prior to Plaintiff's breach of the express terms of the lease by again renting a portion of the demised premises", is not supported by the evidence. The only evidence was that Mr. Heirs mistakenly leased the property to Optima Towers long after the lease with the Defendant was entered into.

9. The finding of fact at Page 7, Paragraph 22, The finding, "Plaintiff contends that Defendant breached the lease by reducing its lease payments by the amount of the lease payments received by Plaintiff from Optima Towers. I agree." This finding is inconsistent with the remainder of paragraph 22 and fails to take into consideration the Tenants right to abate. Defendant cannot be in breach of the lease by exercising a right

allowed by the lease. (*See 49 Am jur 2nd Landlord and Tenant §599*)

Further the finding "I specifically find that the Plaintiff's action does not interfere with Defendant's normal use of the are of the demised premises" contradicts the next sentence that states, "It does however effectively eject Defendant from future use of this part of the original demised premises" and page 4 paragraph 13 which states "it is apparent that Plaintiff's actions in leasing the area to Optima Towers now prevents the Defendant from using that portion of the demised premises." This finding should therefore be stricken.

10. The findings of fact at Page 7 Paragraph 23, "I find that abatement of the full amount of the rent paid by Optima Towers provides unjust enrichment to Defendant". This finding fails to consider that any enrichment to Defendant was not at the expense of the Plaintiff. The Plaintiff receives the full amount of the benefit it bargained for under the leases with Defendant and Optima Towers.

The finding " I find that the self help remedy that Defendant utilizes is excessive and also constitutes a breach of the payment terms of the lease", contradicts the Defendant's right to abate in the event of a breach of the lease by the Plaintiff. The lease allows the total abatement of the rent. The total rent at the time of the Plaintiff's breach was \$1,909.00 per month and the Defendant abated the rent by \$800.00 per month which was less than the full amount of the rent that the Plaintiff was receiving from Optima Towers. The lease allows a total abatement. Inasmuch as the Defendant had the right to abate the rent based upon the Plaintiff's breach, then the amount of the abatement goes to the damages only and not to a breach of the lease itself. (*See 49 Am jur 2nd Landlord and Tenant §599*)

A remedy allowed by the lease should not create a default by Defendant.

The finding "that to allow the Defendant to benefit from its failure to object to the use of its demised premises and then wait and claim that the Plaintiff has been unjustly enriched from its own efforts smacks this Court as both a breach of the party's agreement and inequitable conduct." There's no support in the record that there was any inequitable conduct on the part of the Defendant. Further the acts of the Defendant were passive while the acts of the Plaintiff were active, if there was any inequitable conduct it should be cast upon the Plaintiff. Again since the Defendant's acts were not at the expense of the Plaintiff there is no basis for the Plaintiff to recover from the Defendant in unjust enrichment. All Defendant did was to exercise its rights under the lease when it came to its attention that the Plaintiff had breached the terms of the lease. Defendant is entitled to enforce the lease against the Plaintiff.

Plaintiff's "own efforts" were in violation of the terms of the lease and should not be rewarded.

CONCLUSION OF LAW

11. Page 9, Paragraph 26, the conclusion, "Both Plaintiff and Defendant should have known the extent of the demised premises and should not have leased a portion of the demised premises to Optima Towers" is in error. Only the Plaintiff leased to Optima Towers, not both Plaintiff and Defendant.

12. Page 9, Paragraph 27, the conclusion, "that there was a mutual mistake by the two parties in this action." The grounds being that the foregoing is not supported by the evidence. Mr. Heirs testified he made a mistake but there is no evidence to support that Magnolia was mistaken. In order to have been a mutual mistake, the mutual mistake

would have had to occurred at the time that the contract was entered into. Clearly there is no evidence that Defendant was mistaken as to the extent of the demised premises at the time the lease was entered into. See paragraph 12 of the order. The Plaintiff's mistake occurred after the lease was entered into and after he had already authorized the tower to be built, all subsequent to the entry of the contract, the ignorance that the Defendant was constructing the cell tower on a portion of the lease premises does not constitute a mistake on Magnolia's part.

13. Page 9, Paragraph 27, the conclusion that Optima Tower's lease was entered into after a mutual mistake of fact was made by the two parties to this action" is not supported by the evidence. The grounds being that Magnolia was not a party to the Optima lease at the time of execution so therefore there could be no mistake on its part. The evidence was that they did not learn that the Tower was on its leased property until after it was constructed due to Plaintiff unilateral mistake.

The remedy of reformation of the lease between the parties will only lie if there truly is a mutual mistake of fact at the time of the execution of the lease between the parties not related to subsequent mistake of one of the parties and the ignorance of the other party. Again, the court should consider the value of the lost area as a cell tower not as a parking lot and the Plaintiff changed the use of that area.

The conclusion, that "an adjustment made to the amount of rent payable from Defendant for only that part of the demised premises that Defendant continues to use", is contrary to the remedy that Defendant seeks that being restitution for the acts of the Plaintiff to prevent the Plaintiff from benefiting from its unilateral mistake and capitalizing on its mistake.

14. Page 9, Paragraph 28, The conclusion, "Plaintiff's claim for unjust enrichment against the Defendant is granted". The grounds for objecting to this conclusion is that the Plaintiff has failed to establish that the Defendant's unjust enrichment was "at the expense of the Plaintiff". The Plaintiff is entitled to the full benefit of its bargain with the Defendant, Magnolia, which it is receiving through the payments by Magnolia and through Optima Towers. Thus it cannot be said that Magnolia has been unjustly enriched at the expense of Plaintiff since the Plaintiff has not been damaged in any fashion by its unilateral acts in leasing the subject property to Optima.

The conclusion, Plaintiff asserts that "Defendant has been unjustly enriched because they are not paying the full amount of the rent bargained for under the lease." This conclusion fails to consider that the Plaintiff has not been damaged by the Defendant abating the rent in accordance with the lease. Plaintiff seeks to measure its recovery by what is occurring to Defendant, not by its own damages. In essence, Plaintiff seeks restitution measured from Defendant's perspective rather than its own damage perspective. Plaintiff has not been damaged at all.

The conclusion that "it would inequitable for the Defendant to get the full benefit of the amount of the rental payments from Optima after having sat on their rights to stop the Tower's construction" is not supported by the evidence. Plaintiff's conduct was active, it leased the property to another when it knew or should have known that the property was leased to Magnolia. Defendant's conduct was passive and based upon ignorance of the fact that the Plaintiff would have the audacity to lease property to two different people. Plaintiff now seeks forgiveness and a ruling that would allow it to profit from its unilateral mistake. If there was any inequitable conduct it was the conduct of the Plaintiff.

The Defendant passively may have acquiesced in the construction off the tower but it did not waive any of its rights to demand strict compliance with the terms of the lease upon learning of the Plaintiff's breach.

THE REMEDY

15. Page 10 paragraph 31. There is no evidence that would support the position that the Plaintiff's efforts should be rewarded. The fact that the Plaintiff mistakenly leased the property to Optima Towers should not be lauded but condemned.

The finding that it "would be unjust to allow the Defendant a total offset for theses payments as abatement of rent" fails to consider that total abatement of the rent is allowed in accordance with the lease and restitution is the appropriate remedy in this situation. The grounds for this being the Plaintiff's conduct is totally responsible for the error being made. The Plaintiff bargained for \$193,000.00 in rent through October 2011 and has received in excess of \$207,000.00. Plaintiff is receiving it in the form of rent payments from Magnolia and rent payments from Optima and therefore has not been damaged. (*See 49 Am Jur 2nd Landlord and Tenant §599*)

Since the Plaintiff is not damaged it therefore would not be unjust to allow the abatement which is the remedy provided for under the terms of the lease.

From the Defendant's perspective, Plaintiff is the author of its own dilemma to allow it to profit from leasing the property twice is unjust.

16. The Remedy, Page 10, Paragraph 32. The statement "In looking at the demised premises used by the Defendant, it appears that the parking area consists of approximately one acre, which is what the Defendant sought in their initial negotiations." is contrary to paragraph 12 of the order that finds "that Section 1.01 of the lease entitled

demised premises' describes the premises as the entire 1.21 acre parcel shown on the plat at Plat book DB, Page 47 (E. 10)." Based on the forgoing the Defendant leased the entire 1.21 acres not the parking area within the demised premises.

Defendant takes no issue at the Court's calculation of the area in question, however, that is not the measure of damages that Defendant sought. Defendant sought restitution not damages for the lost area. Looking at it another way, if the court is inclined to award damages to the Defendant based on the area lost, it should measure that damages based on the lost area being used as a cell tower and not as a parking lot.

17. Paragraph 33 concerning the calculation of the disputed area, the Defendant does not question the calculation being one-sixth of the total, but again asserts restitution is the appropriate remedy. In the alternative the defendant asserts that since the lost area is now a cell tower the should be calculated, not as a parking lot but as a cell tower.

18. Paragraph 34 page 11, The conclusion is in error and not supported by the facts. The parties expectation was that they were leasing 1.21 acres for the consideration stated in the lease not merely for the parking lot.

19. Paragraph 35, Page 11, the statement "while I find that the Plaintiff received a total of \$207,677.65 through the month of October 2011, it received this amount through its own efforts and not at the unjust expense of the Defendant. I find that the Plaintiff received an enrichment over the contract amount but I find that the amount was not unjust." This finding is not support by the evidence. The fact that the Plaintiff sought and leased property already leased to Defendant through its own efforts is a characterization of the Plaintiff's breach of the lease for which it should not be rewarded. Plaintiff should not have been making any effort to lease property already leased to the Defendant.

Defendant asserts that if the Plaintiff was enriched, it would have to be unjust enrichment given the fact that it had bargained for a specific amount of rent from the Defendant for the full term of the lease and would receive greater than it bargained for and it would be unjust for the Plaintiff to receive greater than the rent it initially bargained for.

The grounds being that restitution allows a recovery from Plaintiff's all of its ill-gotten gain. The Court should not equitably allow Plaintiff to profit from its lease of the same property to two different tenants when the fair remedy is presented in the lease itself. There is no need to explain or justify the benefit the Defendant is receiving since it is the benefit called for in the lease, that is abatement.

Defendant asserts that the lease with Optima was based on the sole illicit efforts of the Plaintiff for which it should not be rewarded.

The finding "not at the unjust expense of the Defendant" fails to consider that Plaintiff exploited a valuable property right of the Defendant and therefore it has to be at the Defendant's expense and it is unjust to allow it to happen. Additionally the correct statement of unjust enrichment requires it to be at the expense of the Defendant, not at the unjust expense.

20. The Remedy, Page 11, Paragraph 36. Although Defendant has received a benefit by virtue of the Optima Lease, it has not been at the Plaintiff's expense. Plaintiff will receive the benefits of its lease with Optima and Defendant for the rest of the term. Since it is not at the expense of the Plaintiff, the Defendant has not been unjustly enriched and Plaintiff has not been damaged. Plaintiff's argument fails for the same reason that the Court found the Defendant's request for unjust enrichment fails, that being the failure to show that the enrichment has been "at the expense of the other party."

The Remedy is restitution to prevent the landlord from capitalizing on its illicit illegotten gain. The property right, the Optima Lease, belongs to the Defendant not the Plaintiff.

Defendant takes issue with the Court's math. the Court found the difference in rent paid by Magnolia, \$153,561.00 and in rent owed of \$193,352.65, is \$39,791.00 and found that was what the Defendant owed the Plaintiff. The alleged amount due is incorrect. This fails to take into consideration the \$300.00 abatement from the inception of the Tower lease of \$300.00 per month previously stated in the Order, page 11 paragraph 33. . Sixty-six months at \$300.00 per month would result in a reduction of \$19,800.00 to the \$39,291.65 to \$19,999.65. This is consistent with the finding on page 11 paragraph 33 "Accordingly, rent shall be owed on the base rent of \$1500 from the time that the cell tower began to pay on its rental term."

21. Remedy, Page 12, Paragraph 37, Attorney's Fees. Assuming the court agrees with Defendants motions to amend the Defendant request the Court to reconsider it's decision regarding attorney's fees. The lease provides for the prevailing party to attorney's fees. At the trial of the case, the Defendant presented evidence of attorney's fees and an affidavit in support of the Defendant's attorney's fees. The Plaintiff did not submit any evidence which would support its intent to seek attorney's fees and therefore should be considered to have abandoned its claim for attorney's fees.

In its counterclaim the Defendant sought abatement of rent which is what the Court found was appropriate. Although the Court found that the amount of abatement was somewhat less than what the Defendant sought, it still was a beneficial and prevailing result as it defeated at least a portion of the Plaintiff's claim for a breach of contract.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

EXCERPT

56 LEINBACH,

Plaintiff,

vs.

CASE NO. 2008-CP-10-3590

MAGNOLIA PARADIGM,

Defendant.

HEARING BEFORE: HONORABLE MIKELL R. SCARBOROUGH
DATE: October 11, 2011
TIME: 9:50 AM
LOCATION: Charleston County Courthouse
100 Broad Street
Charleston, SC
TAKEN BY: Counsel for the Plaintiff
REPORTED BY: LORA L. McDANIEL,
Registered Professional Reporter

A. WILLIAM ROBERTS, JR. & ASSOCIATES
Fast, Accurate & Friendly

Charleston, SC (843) 722-8414	Hilton Head, SC (843) 785-3263	Myrtle Beach, SC (843) 839-3376
Columbia, SC (803) 731-5224	Greenville, SC (864) 234-7030	Charlotte, NC (704) 573-3919

1 APPEARANCES:
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3 56 LEINBACH:

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20 (INDEX AT REAR OF TRANSCRIPT)
21
22
23
24
25

1 (PLF. EXH. 1, Lease, was marked for
2 identification.)

3 (PLF. EXH. 2, Design plans, was marked for
4 identification.)

5 (PLF. EXH. 3, Optima lease, was marked for
6 identification.)

7 (PLF. EXH. 4, Topographical drawing, was
8 marked for identification.)

9 (PLF. EXH. 5, Photographs, was marked for
10 identification.)

11 (PLF. EXH. 6, Diagram, was marked for
12 identification.)

13 (PLF. EXH. 7, Letter dated 12-18-07 from
14 William Barr to Donald Howe, was marked for
15 identification.)

16 (PLF. EXH. 8, Rental summary, was marked
17 for identification.)

18 (PLF. EXH. 9, Optima Towers Transaction
19 Detail, was marked for identification.)

20 (PLF. EXH. 10, Plat, was marked for
21 identification.)

22 (PLF. EXH. 11, Title, affidavit dated
23 8-25-99, recording receipt, was marked for
24 identification.)

25 (PLF. EXH. 12, Letter dated 1-31-08 from

1 William Barr to Donald Howe, was marked for
2 identification.)

3 THE COURT: We have 56 Leinbach versus
4 Magnolia Paradigm, Inc., case number 2008-CP-10-3590.
5 This case was commenced in 2008, arising out of a
6 lease agreement between these parties that was
7 entered into in 2003. The matter was referred to me
8 by Judge Jefferson September 2009.

9 I've had several hearings with attorneys.
10 Ultimately, The Court denied motions, defense motions
11 for summary judgement. That was entered in December
12 of last year, and we set this case for trial couple
13 times. That's why we're here today.

14 Mr. Donald Howe for the Plaintiff. Mr.
15 William Barr for the Defendants, along with
16 Mr. Capers Barr. Good morning, gentlemen.

17 I previously asked if there were any
18 matters to come up before we started today. I was
19 told no. Anything else you want to present?

20 MR. HOWE: Just to let you know, we have
21 marked as Plaintiff's Exhibits, they're really joint
22 exhibits, Your Honor, to a certain extent, exhibits 1
23 through 12. And I believe that number 2 and number 5
24 are going to be objected to, but the others are okay.

25 MR. WILLIAM BARR: And 6.

1 (PLF. EXH. 1 was received into evidence.)
 2 (PLF. EXH. 3 was received into evidence.)
 3 (PLF. EXH. 4 was received into evidence.)
 4 (PLF. EXH. 7 was received into evidence.)
 5 (PLF. EXH. 8 was received into evidence.)
 6 (PLF. EXH. 9 was received into evidence.)
 7 (PLF. EXH. 10 was received into evidence.)
 8 (PLF. EXH. 11 was received into evidence.)
 9 (PLF. EXH. 12 was received into evidence.)

10 MR. HOWE: I'm assuming since we had
 11 enough, we don't really need opening statements. You
 12 know more about this than you need to know already.

13 THE COURT: It's an interesting case, I'll
 14 give you that. We're ready

15 MR. HOWE: Yes, sir. The Plaintiff will
 16 call Mr. Keith Powell.

17 THE COURT: Mr. Powell, come on up.

18 STEVEN KEITH POWELL
 19 being first duly sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY MR. HOWE:

22 Q. Mr. Powell, what is your full name,
 23 please, sir?

24 A. Steven Keith Powell.

25 Q. How old are you?

1 A. Forty-one.

2 Q. What is your occupation?

3 A. I'm self-employed.

4 Q. Self-employed as what?

5 A. Telecommunications.

6 Q. Does part of that involve communication
7 towers?

8 A. Yes, sir, I build, construct for a group
9 of partners telecommunications towers and also
10 commercial real estate for those companies involved
11 in that industry.

12 Q. And one of the companies I think you
13 worked with is called Optima?

14 A. I'm a member of that LLC, yes, sir.

15 Q. And in connection with your work in
16 telecommunications and work with Optima, you entered
17 into a lease with Mr. Hiers; is that correct?

18 A. Optima Towers did, yes, sir.

19 Q. And that had to do with a tower that's at
20 the end of Leinbach Drive, I guess -- I forget
21 whether it's Drive or Street -- down by the
22 Charleston Montessori School?

23 A. Yes, sir.

24 Q. How did all this get started? How did you
25 happen to come into contact or choose this site, or

1 how did that become an idea or an option?

2 A. Can you be more specific.

3 Q. Did you choose this -- first of all, who
4 approached who? Did you approach Mr. Hiers, or did
5 he approach you?

6 A. I approached Mr. Hiers.

7 Q. How did you decide to approach Mr. Hiers
8 as even being a possibility?

9 A. We had determined that one of his
10 properties at Leinbach Road fit into our need for a
11 communication center.

12 Q. In what way did it fit in? How do you
13 determine it? What was it about it that fit in?

14 A. His property was in our area, what we call
15 a search ring. We contacted him based on that.

16 Q. How do you actually go about finding a
17 site?

18 A. There's so many variables. We'll be here
19 for the next four days if I explain it to you like
20 that.

21 Q. Tell me about the ones in this particular
22 case, how you came up with it.

23 A. There was a need. From my industry
24 expertise and knowledge, we determined there's a need
25 there.

1 Q. How did you decide to contact Mr. Hiers?

2 A. His property was in that area of need.

3 Q. How did you decide or find out it was his
4 property?

5 A. Went to the tax records.

6 Q. Tell me, are you familiar --

7 MR. WILLIAM BARR: Your Honor, I'm going
8 to interpose an objection. This is an action that
9 really construed -- declaratory judgement construed
10 the lease between the parties. Incident to the
11 parties' lease, Optima Towers has a part because it
12 leased a portion of the property that my client had
13 already leased. Incident to the background and how
14 he got it and where he went to and what he looked
15 for, et cetera, I don't find to be relevant to the
16 determination of the issue between these two parties.

17 THE COURT: Where are we going, Mr. Howe?

18 MR. HOWE: The next question, there was a
19 memorandum of lease that they used to put the public
20 on notice. No memorandum of lease was filed by the
21 Defendant to put the public on notice of its claim
22 that it now asserts against my client.

23 MR. WILLIAM BARR: Relevance still.

24 THE COURT: I'll allow it.

25 MR. WILLIAM BARR: On the point of

1 memorandum of lease, memorandum of lease is to put
2 third parties on notice of the existence of the
3 lease, not the parties themselves. As far as him
4 having notice, he's not party to this action. His
5 lease is not in jeopardy.

6 The memorandum of lease, whether we filed
7 one or not, is irrelevant to the determination of the
8 case.

9 THE COURT: Go ahead.

10 BY MR. HOWE:

11 Q. In what's already been agreed as part of
12 exhibit number 3, tell me what that is.

13 A. That is a memorandum of lease that we use,
14 and that looks like it's signed between 56 Leinbach
15 and Optima Towers.

16 Q. What do you do with a memorandum of lease?

17 A. We record it in the local courthouse. In
18 fact, it would be here in this building.

19 Q. What is the purpose of the memorandum?

20 MR. WILLIAM BARR: Objection, Your Honor.
21 I don't think this witness is qualified to make these
22 determinations.

23 MR. HOWE: What he does for a living.

24 THE COURT: I'll allow it. Go ahead.

25 THE WITNESS: We do it to fill title

1 insurance requirement, to verify and make notice of
2 our interest in the property.

3 BY MR. HOWE:

4 Q. That's so, if somebody checks --

5 A. If somebody like myself walks in a
6 courthouse, they can make a record that we have an
7 interest in the property.

8 Q. Through the lease?

9 A. Yes, sir.

10 Q. Was there a memorandum of lease -- did you
11 looked to see if there was any memorandum of lease in
12 regards to this particular --

13 MR. WILLIAM BARR: Objection; hearsay.

14 MR. HOWE: Whether he looked for
15 something?

16 THE COURT: Confine it to his knowledge.

17 THE WITNESS: From my experience, we pay a
18 title abstractor to do that search for us because
19 they're very specific, and they're knowledgeable,
20 much so than ourselves. And the report came back
21 with nothing of any record that I'm aware of.

22 BY MR. HOWE:

23 Q. When you say nothing, no memorandum of
24 lease by Mr. Baker's company about this particular?

25 A. About this incident, yes, sir.

1 Q. How long did it take to build this tower?

2 A. 45, 60 days once we start construction.

3 Q. How big is it?

4 A. It's 160 feet tall.

5 Q. Did anyone from Mr. Baker's, Mr. Baker or
6 anyone on his behalf, ever approach you during the
7 construction phase and object or say anything to you
8 about it?

9 A. I don't recall them approaching us. I do
10 know we had contacted them because we had to flag off
11 part of their lot where he parked their cars there to
12 set a crane up and, obviously, to take care of the
13 area, make sure no damage would happen to the area.

14 Q. And so, I guess -- I'm trying to
15 visualize. The crane was actually in the lot a
16 little bit?

17 A. The specifics, that's five years ago. I
18 can't recall. I do know we had contacted him.
19 Mr. Hiers had asked us to contact Mr. Baker's group
20 up there, and we did.

21 MR. HOWE: That's all the questions I
22 have. Thank you very much.

23 THE COURT: Any questions?

24 CROSS-EXAMINATION

25 BY MR. WILLIAM BARR:

1 Q. Mr. Powell, just a couple. We've marked
2 as exhibit 9, and I'm going to ask you if you can
3 identify that for me.

4 A. This is a -- this is basically a Quick
5 Books file we pulled up of all the rent we paid 56
6 Leinbach partners since inception.

7 Q. The total amount of rent you paid during
8 December is how much?

9 A. What does it say? It says 54,116. That's
10 based on annual years from January 2006 to the
11 present.

12 Q. That has 3 percent increases per year?

13 A. You would have to look at the lease. I
14 can't recall.

15 Q. You said that you contacted Mr. -- you
16 contacted Mr. Hiers in regard to this lease to do
17 this project?

18 A. Yes, sir, I did.

19 Q. And did you visit the site?

20 A. Yes, sir.

21 Q. And did Mr. Hiers visit the site with you?

22 A. I think originally -- I just don't truly
23 recall that much. I assume so. We generally do it
24 with most owners.

25 Q. When you went to the site, were you

1 targeting a specific area of the site, or did you
2 want to put the tower over in the middle?

3 A. I don't recall. I mean, there's clearly
4 an area where there was parking lot and where there
5 wasn't. We were looking where there wasn't.

6 Q. And you knew that the parking lot was used
7 by Baker?

8 A. At that time, no, sir.

9 Q. There's not a sign out front --

10 A. No, sir.

11 Q. -- that says Baker?

12 A. No, sir, at that time there was just cars.

13 Q. Just cars parked there?

14 A. I guess. There were cars and there was, I
15 think, an employee lot, to be honest with you.

16 That's the only thing I recall.

17 Q. You don't recall the sign on front saying
18 Baker parking, employees only?

19 A. No, sir.

20 Q. Mr. Hiers told you that Baker's people had
21 an interest in the parking lot, though?

22 A. He told us when we wanted to know what it
23 was, Baker's parking was in the gravel area.

24 Q. That's what Mr. Hiers told you?

25 A. Yes, sir.

1 Q. You didn't investigate that any further?

2 A. Nothing came up in our title. We didn't
3 know whose it was. We knew it was obviously a
4 parking lot.

5 Q. You didn't report that fact to your
6 lawyer?

7 A. Yeah, I'm sure we did. It's a parking
8 lot.

9 Q. You notified your lawyer that Baker's had
10 some interest in the parking lot. You weren't sure
11 of the extent?

12 A. That's five years ago. I don't know. I
13 mean, we basically, standard, look at our title
14 policy and our work from our abstractors and
15 exceptions. There's nothing there that showed any
16 interest of Baker or Magnolia or anything like that.

17 Q. Do you recall who did -- you said that
18 someone from your company contacted Baker?

19 A. Yes, sir.

20 Q. Was that you?

21 A. No, sir, it was not.

22 Q. Do you know who it was?

23 A. It was probably one of my other two
24 partners.

25 Q. And they say they contacted Baker?

1 A. Well, they did. We had somebody from
2 Baker's, whether it's general manager or somebody,
3 came out and flagged off the lot where the employees
4 could park or couldn't park.

5 Q. Do you remember the Baker representative
6 who you spoke to?

7 A. No, sir, they flagged it off. I do not
8 recall.

9 MR. WILLIAM BARR: No further questions.

10 REDIRECT EXAMINATION

11 BY MR. HOWE:

12 Q. How big a crane is this that has to put
13 this tower up?

14 A. It's 160-foot tall tower, so something
15 bigger than that.

16 Q. You can see it from 17, can't you?

17 A. Yes, sir.

18 MR. HOWE: That's all the questions I
19 have.

20 THE COURT: Mr. Powell, just so I'm clear,
21 you said somebody from Baker came out and flagged the
22 lot so you would know where to put your towers. Is
23 that what I heard?

24 THE WITNESS: We were setting our crane up
25 in the area, and Mr. Hiers told us to contact

1 Mr. Baker's lot or the car dealership, let them know
2 that we would be setting a crane up a certain day,
3 certain time and that needed to be flagged off so
4 employees wouldn't park there.

5 THE COURT: Were you there for that aspect
6 of it?

7 THE WITNESS: No, sir, I was not.

8 THE COURT: That's y'all's usual,
9 customary practice to do that?

10 THE WITNESS: If we have to set a crane
11 up, yes, in a certain area, we do.

12 THE COURT: This would've been in what?
13 2006 time frame?

14 THE WITNESS: We paid rent, yes, sir

15 THE COURT: Very good. Any follow-up,
16 gentlemen?

17 MR. WILLIAM BARR: Follow-up.

18 THE COURT: Yes, sir.

19 RECROSS-EXAMINATION

20 BY MR. WILLIAM BARR:

21 Q. Did your people flag off where you were
22 going to put the crane?

23 A. Yes, sir.

24 Q. Baker didn't come off and flag where you
25 were going to put the crane?

1 A. Not that I'm aware of, no, sir. We
2 flagged where we would put the crane, and then they
3 marked where they could and could not park.

4 Q. Basically, you flagged where the crane was
5 going to go and asked them not to park in that area
6 so you could put your crane there?

7 A. From my recollection, yes, sir.

8 MR. HOWE: Always another follow-up.

9 FURTHER REDIRECT EXAMINATION

10 BY MR. HOWE:

11 Q. And they came in and marked their own
12 parking?

13 A. I guess so, yes. They clearly were not
14 parking in the area where we needed the crane to sit.

15 MR. HOWE: That's all I have.

16 THE COURT: Mr. Powell, thank you, sir.

17 You may step down.

18 You want to release him?

19 MR. HOWE: Yes, please. He has a 10:30.

20 I think he might be able to make it.

21 Call my client.

22 (The witness exited the stand.)

23 CLYDE LARRY HIERS

24 being first duly sworn, testified as follows:

25 DIRECT EXAMINATION

1 BY MR. HOWE:

2 Q. Could you state your full name for me,
3 please, sir.

4 A. Clyde Larry Hiers. Last name is spelled
5 H-I-E-R-S.

6 Q. How old are you?

7 A. Sixty next Wednesday.

8 Q. What do you do for a living?

9 A. I'm a CPA.

10 Q. And you are also, I guess, the principal
11 of 56 Leinbach Investors, which is the Plaintiff in
12 this matter?

13 A. That is correct.

14 Q. And 56 Leinbach, as I understand it, owns
15 some property at the end of Leinbach Drive?

16 A. That is correct. Originally we owned two
17 parcels; one parcel has since been sold.

18 Q. And what is on the parcel that was sold?

19 A. The parcel that was sold contained
20 approximately 8,000 square -- no, I'm sorry -- about
21 15,000 square feet.

22 Q. Charleston Montessori School?

23 A. Charles Towne Montessori School, yes, sir.

24 Q. This piece of property that's subject to
25 the lawsuit today, as I understand it, you go kind of

1 to the end -- I think we're all on the same page.
2 You go to the end of the cul-de-sac. This is
3 obviously not to scale. There's a cul-de-sac and
4 there's a property line. And sort of on this side is
5 Charles Towne Montessori School, and on this side,
6 what is now where the parking lot is?

7 A. That is correct. The line that you sort
8 of drew in the middle of the key is actually a
9 drainage easement created by the City of Charleston.
10 Everything to the left was Charles Towne Montessori
11 School. Everything to the right was what was
12 commonly referred to as the soccer field.

13 Q. This was a soccer field that was an empty
14 lot?

15 A. Correct.

16 Q. At some point you entered into a lease
17 with Magnolia Paradigm, which is Mr. Baker, about the
18 use of that soccer field lot; is that correct?

19 A. That's correct.

20 Q. And that lease is exhibit number 1 in the
21 exhibits we have submitted to The Court; is that
22 correct?

23 A. Yes, sir.

24 Q. Prior to entering into that lease, what
25 documents, if any, have been supplied by Baker to you

1 to discuss what would and would not be done with the
2 lease?

3 A. When it was determined that Mr. Baker
4 wished to lease the soccer field for use as an
5 employee parking lot, we first went to Barry Whalen,
6 who was a landscape architect. He represents the
7 Leinbach family. Also, he was an owner-tenant of one
8 of the nearby buildings.

9 The covenants and restrictions for that
10 particular neighborhood require approval before any
11 construction can occur. We told Mr. Whalen what
12 Mr. Baker proposed. We asked him for approximate
13 number of parking spaces that we could get. He did
14 not create a detailed drawing. He gave us an
15 approximate number.

16 We went back to Mr. Cochran, Mr. Baker's
17 representative, and said, Barry Whalen has given
18 preliminary approval on behalf of the Leinbach
19 family, and he thinks you can achieve approximately
20 75 parking spaces.

21 At that point, Mr. Cochran then submitted
22 to us a more detailed drawing showing, approximately,
23 90 parking spaces.

24 Q. Let me hand you a copy of a document.

25 MR. HOWE: This is one he has objection

1 to.

2 MR. WILLIAM BARR: One of the objections I
3 have. Your Honor, a key component of this particular
4 case and really what is at issue, what is the demised
5 premises.

6 THE COURT: I agree.

7 MR. WILLIAM BARR: And the document
8 Mr. Hiers is about to testify to is a document that
9 was prepared sometime prior to the entering of the
10 lease during the time that the parties were
11 negotiating the terms of the lease, et cetera.

12 And there's a provision in the lease
13 itself, and I believe in the law, these are referred
14 to as integration clauses. And the integration
15 clause in this particular lease is on page 22. And
16 it's section 14.13.

17 And essentially it says: This lease
18 embodies the entire agreement between landlord and
19 tenant with respect to the subject matter hereof and
20 supersedes all prior agreements and understandings
21 whether written or oral. Landlord and tenant have
22 neither made nor relied upon any promises,
23 representations or warranties in connection with this
24 lease that are not expressly set forth in this lease.

25 In entering into this lease, Landlord and

1 tenant have relied on the representations of
2 warranties contained in this lease.

3 And I believe that the document that
4 Mr. Hiers has in his hand is a document, which is not
5 part and parcel of the lease. The lease refers to
6 parcel H2 of TMS such and such. And that particular
7 plat has been marked as exhibit 10.

8 And essentially what that document
9 constitutes is just a sketch of what the proposed
10 parking area was to be to satisfy the requirements
11 that the landlord had previously approved. It is not
12 part of the lease, not incorporated by a reference in
13 the lease; therefore, I object to the introduction of
14 this particular document into the record for that
15 purpose, as well as the design plans which have been
16 previously marked as exhibit 2. Again, it's all
17 because of the integration clause of the lease
18 itself.

19 THE COURT: Mr. Howe.

20 MR. HOWE: The lease in section one says
21 subject to. And the subject to, with the benefit of
22 the terms, subject to other conditions in the lease.
23 This is the lease.

24 And the first -- the next one is parking,
25 and it refers to the parking area. It says they

1 shall have exclusive use of the parking area.

2 And the evidence -- we haven't got this
3 far yet -- will show that plans were drawn up showing
4 the parking area, that the plans had to be approved
5 by the city before any construction could be done.
6 That the plans that were approved by the city were
7 the plans that went there. And that the parking area
8 is the parking area reflected on those documents.

9 It's explaining a term within there. It's
10 not integrated. It certainly shows -- there's
11 nothing in the lease that says the parking area shall
12 be the metes and bounds of this, you know, these
13 measurements or anything like that. So it's offered
14 to show what is the parking area and explain that
15 term within the lease. I think that's proper.

16 THE COURT: You're under section 102 on
17 use of space? Is that where you're referring to?

18 MR. HOWE: Section 1.02 on the very first
19 page: Throughout the demise term, tenant and its
20 employee shall have exclusive right to use any
21 parking area within the demise.

22 The question is: What are the parking
23 areas? Well, those were -- there's nothing in the
24 lease that says parking area shall mean this piece of
25 property or that piece of property. And so it's

1 being offered to show what the parking area was.

2 And also, if you look up at section 1.01
3 when it says demise, it says: Subject to the
4 conditions. Well, the conditions have to do with the
5 parking area. So it's being offered to show the
6 nature and extent of the parking area was.

7 MR. WILLIAM BARR: I don't want to be
8 Clinton-essing here, Judge, I think the use of the
9 term the parking area is critical. Basically, this
10 is a general statement in the lease. Any parking
11 areas within the demised premises, period. Okay.

12 It's not intended to be a limitation. It
13 just basically refers to it as exclusive versus
14 nonexclusive. And essentially under this -- so as a
15 result of that, to the extent that this document only
16 describes and fulfills an obligation of the lease and
17 that is that the landlord give prior approval to the
18 plans of the parking area. And that is the limit of
19 that particular document.

20 THE COURT: Is the diagram -- what diagram
21 is attached then to the lease?

22 MR. WILLIAM BARR: No diagram is attached
23 to the lease. The only thing -- that's my key
24 consideration is that the description of the demised
25 premise is parcel H2. And parcel H2 is reflected on

1 exhibit 10, which we've marked at least for
2 identification. But there is no document in the
3 lease that would -- that describes it.

4 Again, we're dealing with the issue of the
5 demised premises, period. All this is, is a sketch
6 to fulfill the requirement in the lease that he
7 approve or have knowledge of it. And also we had to
8 have it to get approval from the city.

9 MR. HOWE: And the city approved it; can't
10 build it until you get approval. The question is:
11 Was the parking area approved by the city?

12 THE COURT: I'm going to allow it on the
13 basis I've got some inconsistency going on here. Let
14 me figure out where we're going. I will allow it.

15 This is exhibit what?

16 MR. HOWE: 6.

17 BY MR. HOWE:

18 Q. Do you recognize that document?

19 A. Yes, sir.

20 Q. Tell me what it is.

21 A. It is a rough drawing of a parking plan
22 dated December 12, 2002. And it's labeled Plus-Minus
23 100 Total Parking Spaces. It says: Baker's Motors
24 Gravel Parking Lot. It was drawn by Lucas and
25 Stubbs, who eventually drew the very detailed plan.

1 Q. Did you hire Lucas and Stubbs?

2 A. No, sir.

3 Q. Who hired Lucas and Stubbs?

4 A. Baker Motors.

5 Q. Basically, once those detailed plans are
6 drawn, they have to be approved by the city; correct?

7 A. Yes, sir.

8 Q. Was that approval of the project prior to
9 or after the signing of the lease?

10 A. Prior.

11 Q. There had been plans approved by the city;
12 correct?

13 A. Correct.

14 Q. After those plans were approved by the
15 city, you entered into the lease?

16 A. Well, this preliminary drawing is dated
17 December 16, 2002. The lease was dated -- I believe
18 June 1, 2003.

19 Q. Now, there were some additional plans.

20 MR. HOWE: These are subject to objection
21 as well. These are numbered exhibit number 2.

22 MR. WILLIAM BARR: Same objection.

23 BY MR. HOWE:

24 Q. If you'll look at exhibit number 2. I
25 believe there is three pages in there. Check and see

1 if I have everything.

2 A. Yes, sir.

3 Q. Tell me what those three pages are.

4 A. The first page is a topographic survey.
5 It shows the cul-de-sac, and it shows parcel H2
6 without any drawings for parking spaces.

7 The second drawing is labeled Grading
8 Plan. It's the same parcel of land with detailed
9 parking spaces.

10 The third is called a Landscape Plan,
11 which has taken the Grading Plan along with the
12 outlined parking spaces, and they have added the
13 designated landscaping as required by the city.

14 Q. Were these, in fact, the plans that the
15 city okayed for this work?

16 A. Yes, sir.

17 Q. Now you just heard Mr. Powell, who was on
18 the stand; is that correct?

19 A. Yes, sir.

20 Q. How did you happen to come in contact with
21 him?

22 A. Mr. Powell telephoned me, made a general
23 inquiry, wanted to verify that I was the correct
24 person, the member of 56 Leinbach Investors, and
25 wanted to know if he could come in and discuss a cell

1 tower with me.

2 He came to my office within 45 minutes to
3 an hour later. And he told me what he wanted to do.
4 And I told him then -- he actually wanted to put the
5 cell tower in the middle of the soccer field.

6 I said, no, that is leased on a long-term
7 basis to Baker Motor. And I apologize. I guess all
8 day long we're going to interchange Baker with
9 Magnolia Paradigm.

10 And I said: But there is a finger of land
11 that contains a drainage easement. And if you think
12 you can get the city to approve a cell tower for that
13 site, have at it.

14 Q. What happened after that?

15 A. He went and did his homework. And very
16 surprised when he came back, said they had received
17 preliminary approval to proceed with detailed
18 drawings.

19 Q. I think if you'll look at number four in
20 that package, that's sort of a drawing of where the
21 tower ultimately ended up; is that correct?

22 A. Yes, sir.

23 Q. Again, that was something that had to be
24 approved by the city as well?

25 A. Correct.

1 Q. Did anyone from either Mr. Baker or anyone
2 on his behalf contact you during the construction of
3 this?

4 A. No, sir.

5 Q. The construction of this particular tower
6 had other, I guess, public notoriety as well, didn't
7 it?

8 A. Yes, it did.

9 Q. Very briefly, tell me what that was.

10 A. We were on all three of the television
11 stations. We were in the News and Courier, and we
12 were on the front page of several of the smaller
13 local newspapers. The parents of the students at the
14 Montessori School protested the erection of the cell
15 tower, claiming that we were going to inflict bodily
16 harm upon their children.

17 Q. From the waves of the communications?

18 A. I'm going to say electromagnetic field. I
19 may be overruled by someone with more scientific
20 knowledge.

21 Q. To say lightly, quite a controversy about
22 that tower even going up?

23 A. There was controversy. We were in
24 television, we were in the newspapers. There were
25 editorials. I received threatening phone calls.

1 There was also several hearings held at the
2 Montessori School, which involved not only the
3 parents of the school but interested parties within
4 the neighborhood.

5 Q. I want to turn your attention now to some
6 pictures that are in exhibit number 5. I understand
7 there might be some objections to these as well.

8 MR. WILLIAM BARR: Objection; relevance,
9 Your Honor. What does a photograph of the tower have
10 to do with the interpretation of the lease?

11 THE COURT: As to exhibit 6, I checked it
12 off as entered. Exhibit 2, did you want to enter
13 those as well?

14 MR. HOWE: Yes, I would move to enter.

15 MR. WILLIAM BARR: Same objection I made
16 before.

17 THE COURT: I'll note it. I'm going to
18 allow it on the same basis.

19 (PLF. EXH. 6 was entered into evidence.)

20 (PLF. EXH. 2 was entered into evidence.)

21 THE COURT: Where are we now? Exhibit 5?

22 MR. HOWE: Yes.

23 THE COURT: These are photographs?

24 MR. HOWE: These are photographs of the
25 tower. You can also see the lot.

1 THE COURT: Same objection?

2 MR. WILLIAM BARR: Same objection.

3 THE COURT: I'm going to allow those as
4 well.

5 (PLF. EXH. 5 was entered into evidence.)

6 BY MR. HOWE:

7 Q. If you'll turn to the third page of
8 pictures.

9 A. Yes, sir.

10 MR. HOWE: Do you have those up there? It
11 should be in the packet.

12 THE COURT: I may have it. Hold on a
13 second.

14 MR. HOWE: It should be number 5.

15 THE COURT: That I don't have.

16 BY MR. HOWE:

17 Q. It's just a quick question.

18 Just to orient The Court, if you will look
19 at the top picture with me.

20 A. Yes, sir.

21 Q. There's a driveway, there's asphalt,
22 correct, in the foreground?

23 A. Yes, sir.

24 Q. What is that the driveway to?

25 A. That is both the ingress and the egress

1 into the Baker Motor Company parking lot.

2 Q. So the Baker Motor parking lot is over
3 here on the right?

4 A. That's correct.

5 Q. And over on the left, kind of behind the
6 tree there, is the tower?

7 A. Is the tower, yes, sir.

8 Q. When you look down at the next picture, a
9 little bit further back on Leinbach, you can see the
10 top of the tower a little bit better?

11 A. Yes, sir.

12 Q. And also the Baker cars over on the right?

13 A. That's correct.

14 Q. Can you see the tower from Savannah
15 Highway?

16 A. Yes, you can.

17 Q. When did the existence of the tower first
18 become an issue between you and Mr. Baker or the
19 Magnolia Paradigm group?

20 A. The existence of the tower -- let me start
21 over, please. Mr. Baker had always expressed an
22 interest to buy the soccer field. He approached us
23 once again about purchasing the soccer field. We
24 agreed to enter into a contract. We had an executed
25 contract. He had a period of due diligence.

1 And his realtor brought to his attention,
2 approximately one or two days before the expiration
3 of the due diligence period, that the cell tower, in
4 his opinion, was sitting on the property that
5 Mr. Baker had leased. At that point, Mr. Baker
6 withdrew his contract to purchase.

7 Q. Had you had any negative feedback from
8 Baker or anybody on his behalf prior to that?

9 A. No, sir, none whatsoever.

10 Q. Thereafter, you received, I believe, a
11 letter from Mr. Barr, which is exhibit number 7?

12 A. Yes, I did.

13 Q. If you'll look at the fourth paragraph.
14 Read that for me, please; the erection of the cell
15 tower.

16 THE COURT: What exhibit are we on now?

17 MR. HOWE: This is exhibit 7.

18 THE WITNESS: Fourth paragraph says: The
19 erection of the cell tower on a portion of the leased
20 premises substantially interferes with my client's
21 operation of the demised premise; in particular, the
22 area encompassed by the cell tower prevents them from
23 utilizing the area for the intended purposes of the
24 lease; that is a parking lot.

25 BY MR. HOWE:

1 Q. Had anyone complained to you prior to this
2 letter that it was interfering with the parking lot?

3 A. No, sir.

4 Q. Were you present at Mr. Baker's
5 deposition?

6 A. Yes, I was.

7 Q. What did he say when asked about whether
8 or not it interfered with the parking lot?

9 MR. WILLIAM BARR: I'm going to object. I
10 think Mr. Baker is going to testify instead of him
11 sitting there reading Mr. Baker's deposition.

12 THE COURT: I'll sustain that objection.

13 MR. HOWE: I just want it for the record,
14 an important part of my case, Your Honor, under the
15 Rules, a deposition can be used for any purpose; an
16 out-of-court statement by a party is not hearsay and
17 comes in.

18 He's sitting in the room while he's under
19 oath, and Mr. Baker takes the position totally
20 different from his lawyer in the letter, that goes to
21 the breach of the contract. That shows the breach.
22 That's the essence of the breach.

23 THE COURT: Do you want to be heard on
24 that?

25 MR. WILLIAM BARR: Your Honor, Mr. Baker

1 was in the room in his deposition. Mr. Baker is
2 present. If he wants to bring Mr. Baker on, put him
3 on in his case in chief, he can question him on that
4 issue.

5 MR. HOWE: Rules say I don't have to; I
6 can use the deposition for any purpose. It is
7 out-of-court statement.

8 THE COURT: What do you recall him saying?
9 Do you recall what he said?

10 THE WITNESS: Without reading the
11 deposition, I recall him saying that it did not
12 interfere with his intended purpose.

13 THE COURT: That's good enough. I'll
14 allow that.

15 BY MR. HOWE:

16 Q. What did he, as best you recall, say that
17 it did interfere with?

18 A. The possibility that he could have
19 expanded into what we always call the finger of
20 wooded land.

21 Q. The place where the tower is?

22 A. Yes, sir.

23 Q. And expanded parking area?

24 A. Correct.

25 Q. I want to direct your attention to section

1 5.01 of the lease and ask you did Mr. Baker have the
2 absolute right to expand the parking area?

3 A. No, sir.

4 Q. What has to happen before that happens?

5 A. Section 5.01 says: Tenant's plans and
6 specification for the improvements must first receive
7 written approval by landlord.

8 Q. Look at 5.04 for me as well. I think it's
9 the next page.

10 A. It says, midway through the sentence:
11 Landlord's prior written consent shall be required
12 for any structural or exterior alterations or
13 additions.

14 MR. HOWE: There's also a letter that
15 we've agreed to, number 12, Your Honor.

16 BY MR. HOWE:

17 Q. What's the date of that letter?

18 A. January 31, 2008.

19 Q. What does that letter inform you?

20 A. It tells me they are escrowing \$800 per
21 month of Mr. Baker's rent.

22 Q. Is that basically what the situation is
23 now? Kind of tell The Court a little bit about --
24 what kind of rent checks do you get from Mr. Baker,
25 and what is your understanding of their position?

1 A. The rent, according to my calculation --

2 MR. HOWE: I have these exhibits.

3 THE WITNESS: I was looking for my copy.

4 Mr. Barr has prepared a schedule, and I have no
5 reason to contest the arithmetic accuracy of the
6 schedule. He has stated the rent in terms of annual
7 amount. That would be the only difference between
8 the way I look at it on a monthly basis.

9 If I'm not mistaken, we can verify this,
10 the rent right now should be approximately \$2,200 per
11 month. And the check that I receive is approximately
12 \$1,200 per month. And that differs from the 800
13 original offset due to inflationary increases that
14 have not been honored.

15 BY MR. HOWE:

16 Q. What about after the lease? After the
17 parking area is prepared and established, before the
18 tower goes up, are you with me so far?

19 A. Yes, sir.

20 Q. What was on this finger of land where the
21 tower ultimately ends up? Was there anything out
22 there?

23 A. From the very first day that I became
24 aware of the Montessori School, long before I
25 purchased the property, there had always been a very

1 large ocean-going container, which the school used
2 for storage. There were also two small aluminum
3 buildings near the container.

4 Q. Did Mr. Baker or anyone on his behalf ever
5 ask you to move that?

6 A. No, sir.

7 Q. Ever complain about it being there?

8 A. Not that I'm aware of.

9 Q. So your lease with Baker is that you get
10 approximately \$2,200 a month, whatever is on the
11 schedule from Mr. Barr?

12 A. Yes, sir.

13 Q. What are they paying you?

14 A. Approximately \$1,200 per month.

15 Q. They're doing it based on the idea they're
16 going to keep this rent from the tower?

17 A. Correct.

18 Q. You believe that's a breach of contract?

19 A. Yes, I do.

20 Q. You've reviewed the lease itself since all
21 this litigation; correct?

22 A. Yes, I have.

23 Q. And do you believe that you have breached
24 it?

25 A. No, sir.

1 Q. Explain to The Court why you do not
2 believe you have breached the contract.

3 A. When we look at the very first page of the
4 lease --

5 MR. WILLIAM BARR: Your Honor, I'm going
6 to object to this. This is parole evidence,
7 attempting to vary the terms, simple and plain.
8 Parole evidence attempting to vary the written terms
9 of the lease, period.

10 THE COURT: You've asked him what his
11 understanding of the terms of the lease are?

12 MR. HOWE: Yes.

13 THE COURT: I'm going to allow it.

14 THE WITNESS: Page 1 of the lease states
15 that it is a lease agreement. And it contains
16 general statement of what the lease involves. And
17 then it gets into very specific paragraphs. And
18 section 101 addresses demised premises. And it says:
19 Subject to the other items in this lease. And it
20 talks about the terms and covenants, the conditions
21 and the provisions of this lease.

22 And then more specifically in 102, it
23 talks about exclusive right to use the parking area.
24 The parking area was always a soccer field. There
25 was never any discussion of any other area being used

1 other than the soccer field.

2 BY MR. HOWE:

3 Q. Have you used this parking area in any
4 way?

5 A. No, sir.

6 Q. Has Mr. Baker and his people had exclusive
7 use of the parking area?

8 A. Yes, they have.

9 Q. There's a section a little further down,
10 if I can find it, that talks about whether you can
11 lease the property. I'm looking for my note.

12 Do you have it in front of you?

13 A. I believe you might be referring to page
14 18.

15 Q. Yeah, just about to get there. 17 and 18,
16 I think. On 17, when it says title to premises --

17 A. Yes, sir.

18 Q. It says, about halfway down that the
19 demised premises -- what does it say there?

20 A. It says: Demised premises shall hereafter
21 be subject to no leases, easements, covenants,
22 restrictions or the like which in any manner would
23 prevent or interfere with tenant.

24 There have been no leases that I executed
25 that interfered with his exclusive use of the parking

1 lot.

2 MR. WILLIAM BARR: Same objection.

3 THE COURT: Noted.

4 THE WITNESS: Farther down, third sentence
5 from the bottom, it says: Shall enjoy all the rights
6 herein granted.

7 The only rights I granted him were the
8 right to use the soccer field as a parking lot
9 subject to those drawings.

10 BY MR. HOWE:

11 Q. If you'll look at 6.03. What is that
12 provision entitled?

13 A. Landlord interference: Landlord shall use
14 its best efforts to not interfere with tenant's
15 operations.

16 Q. When Mr. Powell came to see you -- we're
17 talking about this tower going up.

18 A. Yes, sir.

19 Q. I guess, what was your intent in terms of
20 Mr. Baker? Were you trying to pull anything on him?
21 Do anything?

22 A. No, sir, no, sir. At that time, the
23 Montessori School was having severe difficulty paying
24 their rent. Some months we received a rent payment,
25 some months we did not. Regardless, we still had to

1 make our mortgage payment. When this opportunity
2 came along, we considered it a godsend.

3 Q. We being you and your wife, I guess?

4 A. Yes, sir.

5 Q. What are you asking The Court to do today?

6 A. To ask Mr. Baker to release the escrowed
7 funds and to pay rent according to the schedule
8 agreed upon.

9 MR. HOWE: That's all the questions I
10 have. Thank you.

11 THE COURT: Mr. Barr.

12 CROSS-EXAMINATION

13 BY MR. WILLIAM BARR:

14 Q. I'd like to first just set a few matters
15 on the record, if I could. I want to show you a copy
16 of a deed that was from the directors of the Charles
17 Towne Montessori School to 56 Leinbach Investors.
18 And it includes parcel H2, reflected on the Plat Book
19 D47. Can you identify that for me.

20 A. My understanding is this is a title to the
21 real estate, the sale. I believe it's August 25,
22 1999.

23 Q. That property described in that legal
24 description is the parcel of property that you
25 referred to it as the soccer field, parcel H2?

1 A. No, sir.

2 Q. Go ahead.

3 A. I may be mistaken. But it's my
4 understanding that the Montessori School owned the
5 property on which it occupied, and Charles and
6 Celeste Patrick owned the soccer field.

7 When my original partner and I approached
8 the school about bailing them out of their financial
9 debacle, our purchase of the school itself was
10 contingent upon Mr. Patrick also agreeing to sell us
11 the soccer field. We just felt that it was an
12 extremely bifurcated transaction not to have complete
13 control of that cul-de-sac. There was always the
14 possibility that the school would not have use of the
15 soccer field unless there was a purchase of both
16 parcels.

17 Your records may indicate that the
18 Patricks sold the soccer field to the school and then
19 the school simultaneously sold the soccer field to 56
20 Leinbach. I do not recall if it was a two-step
21 transaction or a one step.

22 Q. I'm showing you the deed. This is a deed
23 from the Montessori School to 56 Leinbach. You agree
24 with that?

25 A. Yes, sir.

1 Q. Do you agree, in the legal description, it
2 refers to parcel H2 as reflected on plat book D, page
3 47; the second parcel, not the first one?

4 A. Yes, sir.

5 Q. I'm going to show you a copy which we
6 previously marked as Plaintiff's Exhibit 10. And
7 it's plat book D, page 47. Is that a picture of
8 parcel H2?

9 A. Yes, it is.

10 Mr. Howe, would you be so kind as to give
11 me a refill.

12 MR. HOWE: Yes, sir.

13 BY MR. WILLIAM BARR:

14 Q. During the course of the negotiations with
15 Mr. Baker, or Mr. Baker's company to lease this
16 property, wasn't Corky Carnevale your agent during
17 those periods of time?

18 A. Yes, he was.

19 Q. I'm going to show you a letter dated 9/11
20 of '02 from Mr. Carnevale to Bill Cochran and ask you
21 if you've ever seen that.

22 A. Yes, sir.

23 MR. WILLIAM BARR: I'd like to mark that
24 as 13.

25 (PLF. EXH. 13, Letter dated 9-11-02 from

1 Carnevale to Cochran, was marked for identification.)

2 BY MR. WILLIAM BARR:

3 Q. And this letter basically says that the
4 parcel size that you're going to lease is 1.2 acres.
5 That they could lease all or part of it. And the
6 value of the property, of the parcel is \$250,000 per
7 acre. And you were looking for 8 to 10 percent
8 return on your investment, depending on who pays
9 taxes.

10 Mr. Baker or Baker's company would
11 actually perform all of the required work to get the
12 parcel ready.

13 MR. HOWE: Your Honor, I don't mind it
14 coming in for the limited purposes of negotiation. I
15 have the same; obviously it doesn't redefine the
16 lease. Lease is the lease.

17 MR. WILLIAM BARR: It doesn't redefine.

18 THE COURT: Exhibit 13 in evidence.

19 All right. Got it.

20 (PLF. EXH. 13, was entered into evidence.)

21 BY MR. WILLIAM BARR:

22 Q. Mr. Carnevale, I presume, did some further
23 negotiations with Mr. Cochran and wrote Mr. Cochran a
24 letter on 10/24/02, and ask you if you've seen that
25 letter.

1 A. Yes, sir.

2 (PLF. EXH. 14, Letter dated 10-24-02 from
3 Carnevale to Cochran, was marked for identification.)
4 BY MR. WILLIAM BARR:

5 Q. Basically, this letter says: I wanted to
6 reply in writing. And essentially, the only point
7 that y'all had any difference on was the amount of
8 the rent. And they had offered you 1,600 a month,
9 and you wanted 2,000 a month. And y'all finally
10 agreed on 1,800 a month.

11 A. Yes, sir.

12 Q. And the letter further says that the site
13 contains 1.2 acres, with a value of \$250,000 an acre,
14 would equate to value of 300,000 on 1.2 acres?

15 A. Yes, sir, that's what it says.

16 Q. That letter goes on to say: Corky would
17 undertake the responsibility of getting a lease
18 prepared?

19 A. That's correct.

20 Q. Ultimately, a lease was prepared?

21 A. That's correct.

22 Q. Ultimately the lease, which has now been
23 marked as exhibit 3 was prepared and signed and
24 approved in June '03, I guess it was.

25 A. That's correct.

1 Q. Do you agree that the lease pretty well
2 tracks the 10/24 letter?

3 A. Yes, sir.

4 Q. It refers to the parcel, the demised
5 premises as 1.21 acres. And the rental term is for
6 \$1,800 a month with the first three years -- with no
7 increases until after the first three years?

8 A. Yes, sir.

9 Q. It tracks the 10/24 letter?

10 A. That's correct.

11 Q. That lease was drawn up by your attorney;
12 is that not correct?

13 A. The lease was drawn by my attorneys Mary
14 Murray and David Pagliarini. It was then given to
15 Mr. Cochran. Mr. Cochran gave it to Mr. Baker.
16 Mr. Baker gave it to you.

17 Q. Moving on to 2006, basically you then
18 entered into negotiations with Optima Towers to build
19 a tower on the parcel down there at the end of the
20 cul-de-sac?

21 A. Correct.

22 Q. And we've previously marked as exhibit 10
23 this survey.

24 A. Yes, sir.

25 Q. And do you agree that parcel H2 on that

1 survey containing 1.21 acres is the same property
2 described in the lease at paragraph 1.01?

3 A. Yes, sir.

4 Q. And the other exhibit, the Optima lease,
5 which is exhibit 5 in the record, refers to -- has a
6 sketch attached to it. And you agree that the sketch
7 of the Optima tower lease falls squarely within
8 parcel H2?

9 A. Yes, the sketch of the Optima tower site
10 is on what we call the wooded finger of land, which
11 also contained the storage container and the metal
12 buildings.

13 Q. It's on parcel H2?

14 A. Yes, it is.

15 Q. And at the time that you executed this
16 lease with Mr. Baker's company, in this lease -- I'm
17 going to go from 2003. What happens in 2006, you
18 know, is different than what occurred in 2003.

19 In 2003, you leased parcel H2 as reflected
20 on this plat in plat book D47. There's nowhere in
21 this lease where you reserve the right to utilize any
22 portion of parcel H2 in the future, is there?

23 A. I recall that, other than the soccer
24 field, the cleared area that I had first refusal of
25 any additions or alterations that Mr. Baker proposed.

1 Q. I think Mr. Howe pointed that out to you,
2 I believe, in paragraph six that you could approve
3 that.

4 What I'm asking you, in the lease itself,
5 is there a reservation that you could utilize unused
6 portions of parcel H2 for your future development?

7 A. I do not believe so.

8 Q. When it was pointed out to you in 2007
9 that the Optima tower was on parcel H2, did that come
10 as a surprise to you?

11 A. Yes, sir, it did.

12 Q. My next question is: Did you make a
13 mistake here, or did you intentionally do what you
14 did?

15 A. Mr. Barr, there was no intention on my
16 part to attempt to make a mistake or defraud
17 Mr. Baker. As I stated earlier, we had a situation
18 where the Montessori School was struggling to pay
19 rent and pay taxes. And we saw an opportunity to
20 minimize the deficit. There was no profit on our
21 part.

22 Q. I understand that part. I understand
23 that. What I'm saying is, I'm asking you, when you
24 leased the entire parcel H2 to Mr. Baker's company
25 and then you lease a portion of the property to

1 Optima Towers, you did not do that intentionally?

2 A. No, sir. In my mind, Mr. Baker had leased
3 the soccer field. He had leased the soccer field
4 generally. And then he specifically leased the
5 soccer field according to his very detailed drawing
6 whereby he got 94 parking spaces.

7 Q. Paragraph 1.01, demised premises, clearly
8 defines the demise premises as parcel H2?

9 A. Yes, sir.

10 Q. Again, you keep going back to subject to
11 the benefit of the terms and conditions of the lease,
12 which is some boilerplate in there. Again, you
13 leased them the whole parcel 1 and 2, not just a
14 little bit of it?

15 A. Yes, sir.

16 Q. It's fair to state then that you made this
17 unilateral mistake and leased --

18 MR. HOWE: Objection; legal conclusion,
19 which he's not going to admit.

20 THE COURT: I'm going to allow. Go ahead.

21 BY MR. WILLIAM BARR:

22 Q. You made the unilateral mistake and leased
23 out a portion of the property that you had previously
24 leased to Mr. Baker to Optima Towers?

25 A. Clearly that's why we are in court today.

1 Q. Essentially, I guess what you're doing
2 now, you're asking forgiveness for making that
3 mistake?

4 A. Had Mr. Baker wanted to use the wooded
5 finger, his original drawing and his detailed drawing
6 would've included additional parking spaces. But
7 with the additional use of that land would have come
8 substantial additional cost on the part of Mr. Baker.
9 Mr. Cochran testified in his deposition they didn't
10 want to incur that additional cost.

11 Mr. Cochran further stated, yes, we got
12 everything we bargained for.

13 Q. Is it not fair to state that what
14 Mr. Baker bargained for was 1.21 acres described in
15 paragraph 1.01?

16 A. Once again, I think you're asking me a
17 legal question, which is what the judge is going
18 to --

19 Q. You just said it as a statement of fact by
20 Mr. Baker. Let me ask you this.

21 Based upon these letters from
22 Mr. Carnevale to Mr. Cochran, in one of these
23 letters, the October 24, '02 letter, Mr. Carnevale
24 asked Mr. Cochran to sign it and return it,
25 evidencing his agreement to the terms.

1 Mr. Cochran signed that and sent it back.

2 And I put a notation on the bottom, the lessee will
3 be Magnolia Paradigm. And the lease will be based
4 upon receiving approval from City of Charleston.

5 A. Yes, sir.

6 Q. The rent was calculated at that time as
7 somewhere between 8 and 10 percent calculation on the
8 value of 1.2 acres?

9 A. Yes, sir.

10 Q. That's what you bargained for, for the
11 next 20 years because Mr. Baker's lease has a
12 five-year term and three 5-year options; right?

13 A. Yes, sir.

14 Q. For the next 20 years, you bargained for
15 the -- with 3 percent increases after the first three
16 years. You bargained for a roughly 8 to 10 percent
17 return on the value of that property for the next 20
18 years?

19 A. Yes, sir.

20 Q. Mr. Scott Powell testified that, it looks
21 like, including it looks like deposits, since
22 February '06 through October of 2011, you've received
23 \$54,116.65 from Optima Towers?

24 A. Yes, sir.

25 Q. During that same period of time, based

1 upon exhibit 8, you have also received \$153,500.61
2 from Mr. Baker's company?

3 A. That's correct.

4 Q. This is math, Mr. Hiers. I just want to
5 see if you agree with the math. You being CPA,
6 you're a little bit better than I am at this. I want
7 you to take a look at that.

8 Based on the exhibits I have here, rent
9 paid by Magnolia, you received 153,561; rent paid by
10 Optima, 54,116.65. During this period of time,
11 you've received \$207,477.65 in total rent from this
12 property.

13 A. I will accept that as being correct.

14 Q. Based upon exhibit A, the total rent that
15 you were due from the property, the whole parcel H2,
16 was \$193,352.65?

17 A. Yes, sir.

18 Q. Right now you've been overpaid from the,
19 property \$14,125?

20 A. And obviously I disagree with that
21 conclusion.

22 Q. Why do you disagree with that conclusion?

23 MR. WILLIAM BARR: Mark this as an
24 exhibit.

25 (DFT. EXH. 15, Summary of Rents, was

1 marked for identification.)

2 THE WITNESS: In Mr. Baker's deposition,
3 he said I did not interfere with his lease. He said
4 the only interference may have been the possibility
5 of expanding into that finger of wooded land.

6 Mr. Cochran said: We never wanted to go there. We
7 did not want to incur the additional cost for the
8 limited number of parking spaces we would've gotten.

9 BY MR. WILLIAM BARR:

10 Q. Back to the lease. The demised property
11 is 1.21 acres?

12 A. Yes, sir.

13 Q. You made a mistake and leased a portion of
14 the property to Optima Towers?

15 A. I clearly have leased the property to
16 Optima and to Baker.

17 Q. And if this was a single-family home, you
18 leased the house to me, and I just so happen not to
19 be using one room, could you lease out the other room
20 to somebody else and not breach the lease with me?

21 A. No, sir, I appreciate the analogy, but
22 it's inappropriate.

23 Q. Under the terms of the lease, the term
24 demised premises is used in other areas of the lease
25 more than just in paragraph 1.01; isn't that correct?

1 A. I believe so.

2 Q. For instance, section 2.04: Holding over;
3 if tenant remains in possession of the demise
4 premises, then they would be holding over. It
5 doesn't say the parking area within the demised
6 premises?

7 A. That's correct.

8 Q. Section 3.04: Tax assessments on the
9 demised premises shall be the responsibility of the
10 tenant.

11 Basically right now Mr. Baker's company is
12 paying the taxes on the whole parcel, including the
13 taxes on the cell phone tower.

14 A. And in the Optima lease, they are
15 responsible for any taxes incurred as a result of the
16 increase in the value as a result of their tower.

17 Q. Have you received any tax payments from
18 Optima Towers?

19 A. No, sir, I would not be looking to Optima
20 for a tax reimbursement unless Mr. Baker brought to
21 my attention that his taxes had increased because of
22 the tower.

23 Q. Article five, maintenance and equipment
24 refers to the tenant's responsibilities on the
25 demised premises. No limitation to maintenance and

1 equipment in the parking areas. Article six uses --

2 A. At the time that the lease was created,
3 there was no maintenance to be done to that finger of
4 wooded land. It would've only encompassed the
5 parking lot.

6 Q. At the time the lease was signed, there
7 wasn't even a parking lot there. It wasn't
8 constructed until sometime after the lease was
9 executed?

10 A. I agree.

11 Q. Section 6.01: Demised premises shall be
12 used by the tenant and Baker Motor Company as parking
13 for employees. The demised premises, not the parking
14 area within the demised premises.

15 6.02, maintenance: Tenant shall maintain
16 his business at the demised premises in the same
17 fashion that it operates Baker Motor Company.

18 6.03: If a landlord creates a condition
19 that interferes with the normal use of the demised
20 premises or pertinent parking, et cetera. Then
21 again, the term demised premises doesn't refer to
22 parking area within demised premises; it talks about
23 demised premises.

24 A. That's correct. It also refers to
25 interference with his normal use. There has been no

1 interference with his normal use.

2 Q. It also refers to pertinent parking. More
3 than likely, if you review this lease that your
4 lawyers prepared, it was something they pulled off
5 the shelf for a building, and the building would've
6 possibly had a parking lot. And the tenants of the
7 building would've had the use of the pertinent
8 parking to the building. That's the only reason that
9 could've been in there; isn't that correct?

10 A. I think you're asking me a legal question.

11 Q. Article seven, utilities: Tenant shall be
12 responsible in the operation of his business on the
13 demised premises.

14 Taxes and liability insurance: All of
15 these sections require the tenant to maintain those
16 on the demised premises.

17 Article 11 -- excuse me. If tenant
18 defaults, landlord may take possession of the demised,
19 premises. Damages to the demised premises, article
20 ten.

21 Article 11, imminent domain: Notice of
22 intention to take a portion of the demised premises.

23 Article 12, title. You only read a
24 portion of paragraph 12 into the record, Mr. Hiers.
25 And what I'd like to do is read the rest of it.

1 The demised premises shall hereafter be
2 subject to no leases, easements, covenants,
3 restrictions or the like which in any manner would
4 prevent or interfere with the tenant, and to defend
5 the demised premises against the claim of all persons
6 claiming by or through or under the landlord.

7 And tenant shall discharge its obligations
8 set forth herein to be formed by tenant, tenant
9 during the demised term shall have lawful, quiet and
10 peaceful possession and occupation of the demised
11 premises and shall enjoy all the rights herein
12 granted without any let, hindrance, ejection,
13 molestation or interference by any person; right?

14 A. Yes, sir.

15 Q. Having constructed this tower in the
16 corner of this property, have you not basically
17 ejected Mr. Baker's company from that portion of this
18 property?

19 He can't sure get in there now and park
20 cars, could he, even if he wanted to?

21 A. Not in my opinion, no.

22 Q. You ejected him from that portion of the
23 property?

24 A. No, sir, not in my opinion.

25 Q. Article 14.13, entire agreement: The

1 lease embodies the entire agreement between landlord
2 and tenant with respect to the subject matter hereof
3 and supersedes all prior agreements or
4 understandings, whether written or oral. The tenant
5 have neither conveyed nor relied upon any promises,
6 representations or warranties in connection with this
7 lease that are not expressly set forth therein.

8 You agree with that statement?

9 A. Yes, sir, that's what it says.

10 Q. Mr. Howe introduced, as exhibit 2 -- I
11 think you've testified -- these are the plans that
12 were prepared by LS3P. I believe you characterized
13 the first sketch as a topo?

14 A. Yes, sir.

15 Q. Tell me something. Does that topo reveal
16 the existence of any buildings, containers or any
17 storage facilities on that portion which you
18 described them being on it?

19 A. With the naked eye, I do not see an
20 outline of the storage container; however, the
21 drawing for the Optima lease clearly shows an outline
22 of the storage container.

23 Q. The drawing for the Optima lease?

24 A. Yes, sir, the drawing attached to the
25 Optima lease.

1 Q. Is this the drawing you're referring to?

2 A. Yes, sir, you may need a magnifying glass.

3 I can outline those little dotted lines, if that will

4 help you. And then there's an arrow going to it,

5 telling you what it is.

6 Q. I see it now. This was in 2006?

7 A. I'll have to look at the date.

8 Q. This was dated 3/29 of '06?

9 A. Yes, sir.

10 Q. And the topo was done in what? 2003?

11 A. I don't know the engineering requirements

12 of a topographic survey.

13 Q. It's clear in 2003 the topo does not
14 reflect a storage container or other buildings as
15 you've described in your testimony?

16 A. The drawing does not contain those
17 buildings. Those buildings have been there since
18 1999 or perhaps earlier. As I was about to say, I
19 don't know on a topographic survey what they are
20 required to show. I always thought a topo, as it is
21 commonly referred to, is nothing but trees; trees and
22 elevations.

23 Q. I think even on the sketch it says to be
24 removed?

25 A. Yes, sir.

1 Q. If it was a mobile storage, it could've
2 been moved at any point in time should Mr. Baker have
3 decided that he wanted to utilize that portion of the
4 property in the future, just like you got -- like
5 Optima had it removed?

6 A. The simple removal of that container would
7 not have given him additional use of that property.
8 The trees would've had to have been removed. And he,
9 of course, would've needed permission from both the
10 city and from me to create those additional parking
11 spaces.

12 Q. Essentially, I want to summarize this. I
13 just want to make sure we've got it straight. You
14 leased all of parcel H2 to Mr. Baker's company?

15 A. Yes, sir.

16 Q. You subsequently made a mistake and you
17 leased a portion of that property to Optima Towers?

18 A. It clearly was an inadvertent mistake.

19 Q. Essentially, when you entered into
20 negotiations with Mr. Baker concerning the return you
21 wanted on the value of the property, the entire
22 parcel H2, based upon this letter from Mr. Carnevale,
23 that was done at 8 to 10 percent return per annum?

24 A. Yes, sir.

25 Q. Then based upon the calculations of the

1 rent you have received from all sources, from Optima
2 Towers and from Baker, you've actually received more
3 rent over the last -- what is that, '03 -- nine years
4 than you originally bargained ever to get from
5 Mr. Baker?

6 A. Mr. Baker has reduced his rent by,
7 approximately, 55 percent. Even a strict
8 interpretation would show that the portion that the
9 tower sits on is less than 9 percent of total
10 property.

11 Q. Why, just practically and equitably, does
12 that belong to you?

13 A. It is my property. I have assumed the
14 risk and the rewards of property ownership, which in
15 this economy is skeptical.

16 The tower company took a finger of land
17 that required substantial alteration. They invested
18 large amount of capital. In exchange for being able
19 to invest their capital on my property, they have
20 agreed to pay me rent. Mr. Baker did not want to
21 invest additional capital to have the use of that
22 parcel if, in fact, he even knew it was available.

23 Q. Your rights as a property owner, okay, are
24 subject to Mr. Baker's lease?

25 A. Yes, sir.

1 Q. So you don't have the unilateral right to
2 utilize this property without first insuring that
3 you're in compliance with the terms of your lease
4 with Mr. Baker?

5 A. And, again, I had no reason to believe I
6 was not in compliance. I was not interfering with
7 his right to use it as a parking lot.

8 Q. At no time when this started, negotiations
9 with Optima, did you ever call up Mr. Baker and say:
10 Hey, Mr. Baker, hey Tommy, I have an opportunity here
11 to put a tower up here. We could split it or
12 something like that. You never did that, did you?

13 A. No, sir, I did not see a need in as much
14 as -- let's go back to my deposition. I told you --

15 Q. Let's go to your testimony now, not your
16 deposition.

17 A. Well, then I will restate what I said in
18 my deposition. At the time Mr. Powell came to me, I
19 had just had esophageal surgery. I had just had
20 heart surgery. And I had just had a partner killed
21 in a plane crash in Canada. That partner lived in
22 Denver.

23 I told him my plate was full at the time.
24 And if he wanted to pursue this opportunity, he was
25 going to need to contact the city, Mr. Baker, and

1 everyone else, and he was responsible for getting
2 this done if, in fact, that's what he wanted to do.

3 I also had a severely injured shoulder,
4 which later in 2006 had to be completely
5 reconstructed. As you said to me in my deposition:
6 Were you falling apart? Yes, sir, I was.

7 Q. Mr. Hiers, those are all excuses for your
8 not basically paying attention to business because of
9 your multiple problems, are those not?

10 A. I don't consider it an excuse. I consider
11 it an explanation of why I shifted the burden back to
12 Mr. Powell in that he had to get approval from all
13 interested parties if he wanted to put up that tower.

14 Q. You still made a mistake; right?

15 A. I made an inadvertent mistake.

16 Q. Now, you basically, you know, want to be
17 compensated for your mistake?

18 A. Mr. Baker has not been deprived of
19 anything.

20 Q. Mr. Baker is the tenant on parcel H2;
21 correct?

22 A. Yes, sir.

23 Q. He has been deprived of that portion of
24 parcel H2 where you put the cell tower by mistake;
25 right?

1 A. I think that's why we're here.

2 Q. And the value of that corner is based upon
3 what's there now. We sure as the Dickens can't move
4 it, take it down. And the value of that cell tower
5 is 800 bucks or \$9,600 a year with 3-and-a-half
6 percent escalation over the next 20 years, if they
7 continue to renew; right?

8 A. It can clearly be taken down and the
9 tenant has an obligation to remove the tower at
10 termination of the lease.

11 Q. If he takes it down and the property is
12 restored, then Mr. Baker could move over in that
13 corner if he wanted to; correct?

14 A. Possibly.

15 Q. You're telling me, if the tower was down
16 and he wanted to put parking over there, you would
17 deny that?

18 A. We would certainly need the approval of
19 the city. I don't know what conditions.

20 Q. I'm -- not asking about approval. Subject
21 to approvals from all governmental authority, you're
22 telling me, as a landlord, you would deny him that?

23 A. There are additional trees that did not
24 interfere with the tower site. If Mr. Baker wanted
25 to pursue that finger of land as parking, those

1 additional trees would need to come down.

2 Q. Subject to all governmental approvals, you
3 would then allow him to do that then; right?

4 A. It would be based on facts and
5 circumstances at the time.

6 MR. WILLIAM BARR: No further questions,
7 Your Honor.

8 THE COURT: Any follow-up?

9 MR. HOWE: Yes.

10 REDIRECT EXAMINATION

11 BY MR. HOWE:

12 Q. Mr. Barr mentioned this 10/24/02 letter to
13 Mr. Cochran. Do you have that in front of you,
14 exhibit 14?

15 A. No, sir, I believe it's in that stack
16 right there.

17 Q. I'm going to look over your shoulder.
18 This is a letter to Mr. Bill Cochran from
19 Mr. Carnevale; correct?

20 A. Yes, sir.

21 Q. It sets out what Mr. Carnevale is doing in
22 the negotiations at that time; is that correct?

23 A. That's correct.

24 Q. October of '02, this is approximately
25 eight months before the signing of the lease?

1 A. Yes, sir.

2 Q. It's signed, looks like, for Baker Motors,
3 by Mr. Cochran?

4 A. Yes, sir.

5 Q. Someone has written in there -- it looks
6 like Mr. Cochran because it's not typed. What does
7 it say?

8 A. That's Mr. Cochran's handwriting. He has
9 very good handwriting. And it says: Lessee will be
10 Magnolia Paradigm, Incorporated. Lease based on
11 receiving approval for a parking lot from the city
12 and Mrs. Leinbach.

13 Q. The whole deal was conditioned on getting
14 a parking area approved by the city.

15 MR. WILLIAM BARR: Object to the form.

16 THE WITNESS: Based on the drawings I have
17 seen.

18 MR. WILLIAM BARR: Objection.

19 THE COURT: Just one second.

20 MR. WILLIAM BARR: He's actually leading
21 him. Parking area.

22 BY MR. HOWE:

23 Q. For a parking lot from the city and Mrs.
24 Leinbach?

25 A. That's what it says.

1 Q. And the parking lot that was approved by
2 the city ended up being what?

3 A. I believe it's 94 parking spaces.

4 Q. Is that the same parking lot that's in the
5 drawings?

6 A. Yes, sir.

7 Q. You mentioned there was a little arrow
8 that you didn't actually read the words. I want to
9 make sure this is in the record. On exhibit number
10 4, which was the Optima drawing, what do those words
11 say? What do they point to?

12 A. Existing storage container to be removed.

13 Q. This is the Optima drawing of what's out
14 there?

15 A. Yes, sir.

16 Q. It's got an arrow to an existing storage
17 container to be removed?

18 A. Yes, sir.

19 Q. How long has that container been there?

20 A. At least since 1999.

21 Q. I believe you testified this lease that
22 came out, kind of made the rounds, didn't it, before
23 it was signed?

24 A. Yes, sir.

25 Q. What rounds did it make?

1 A. It went from Hinchey, Murray & Pagliarini,
2 simultaneously to me and Mr. Carnevale.
3 Mr. Carnevale gave it to Mr. Bailey. Mr. Bailey gave
4 it to Mr. Cochran. Mr. Cochran gave it to Mr. Baker.
5 It then went to Mr. Barr.

6 Mr. Barr came back with some correction,
7 amendment, whatever. The correction was made by
8 Hinchey, Murray & Pagliarini. Everyone signed it.

9 Q. Mr. Barr talked about the various places
10 that the word demised premises were used; correct?

11 A. Yes, sir.

12 Q. The very first one is the definition of
13 what demised premises means, isn't it?

14 A. Yes, sir, it says subject to.

15 Q. Subject to conditions?

16 A. Conditions, provisions.

17 Q. Although it's not part of the lease,
18 Mr. Barr was making the point about, did you expect 8,
19 to 10 percent return. And that's on the value of the
20 property?

21 A. Yes, sir.

22 Q. Has the value of the property increased
23 with the tower on it?

24 A. Not that I'm aware of.

25 Q. Would the rent from the tower make the

1 property in terms of sales go up?

2 A. I'm sorry, the entire parcel, yes.

3 Q. 8 to 10 percent return on the value of the
4 property now would be much greater than what you're
5 getting, wouldn't it?

6 A. Yes, sir, it was recently reassessed by
7 Charleston County.

8 Q. What was that reassessment?

9 A. Approximately 375,000.

10 MR. HOWE: That's all the questions I
11 have. Thank you.

12 THE COURT: Mr. Barr.

13 MR. WILLIAM BARR: Your Honor, I want to
14 make sure that we did move and they were entered into
15 evidence exhibits 14 and 15.

16 THE COURT: I have 15 over here.

17 MR. WILLIAM BARR: 14 is the letter of
18 October 24th.

19 THE WITNESS: I don't have any exhibits.

20 MR. WILLIAM BARR: 13 is the letter of
21 September 11th.

22 THE COURT: 13, 14, 15, without objection?

23 MR. HOWE: Yes, no objection.

24 THE COURT: Okay.

25 (PLF. EXH. 14 was received into evidence.)

1 (PLF. EXH. 15 was received into evidence.)

2 RECROSS-EXAMINATION

3 BY MR. WILLIAM BARR:

4 Q. In connection with the questions Mr. Howe
5 was just asking you about the value of your lease,
6 your lease with Mr. Baker's company has an inflation
7 guard in it, does it not?

8 A. Yes, sir.

9 Q. After the first three years, your rent
10 goes up 3 percent per annum?

11 A. Correct.

12 Q. That guards you against increases in value
13 over the term of the lease?

14 A. I believe you're asking a fairly technical
15 question. The lease guards me against inflationary
16 increases. There are a number of reasons, most of
17 which I'm not qualified to testify to, as to why that
18 property would go up in value. Clearly, the lease
19 protects me from inflationary increases.

20 Q. Had you wanted to protect yourself against
21 increases in value such as Mr. Howe has discussed,
22 then essentially you could've put that in the lease
23 as increases in rents based upon other circumstances?

24 A. Subject to Mr. Baker agreeing to what was
25 in the lease.

1 Q. The bottom line here, Mr. Hiers, you made
2 a mistake, and you leased out a single piece of
3 property to two people?

4 A. We have never denied that the parcel has
5 been inadvertently leased to two people. Again, I
6 contend that Mr. Baker was not interfered with. He
7 got exactly what he bargained for. He saved over
8 \$100,000 by not trying to develop that finger of land
9 for a few additional parking spaces.

10 Q. And you bargained for \$21,600 per year in
11 the first three years and then 3 percent increases on
12 parcel H2 for the next 20 years. And now you're
13 getting, based over the same period of time, now
14 you're getting \$207,000 or \$14,000 more year-to-date
15 than what you originally bargained for?

16 A. I agree with the calculation.

17 MR. WILLIAM BARR: Thank you.

18 FURTHER REDIRECT EXAMINATION

19 BY MR. HOWE:

20 Q. You are not getting that money because he
21 isn't paying it to you, is he?

22 A. No, sir, I'm not.

23 Q. That's what you consider the breach?

24 A. Yes, sir.

25 THE COURT: That's what got us here. This

1 is new information, sitting on this case for about a
2 year.

3 At the time that the lease with Magnolia
4 Paradigm was entered into, this property which now
5 contains the tower was wooded?

6 THE WITNESS: It was very wooded and
7 contained a 40-foot storage container. The city
8 had --

9 THE COURT: Let me stop you right there.
10 I want to make sure what we're talking about.

11 THE WITNESS: Yes, sir.

12 THE COURT: And those storage containers
13 are what's shown in the diagram to Optima Tower's
14 lease; is that right?

15 THE WITNESS: Yes, sir. Even if you'll
16 look at the Optima Tower original drawing, they still
17 see the trees within the circle of where they
18 proposed to put their tower.

19 THE COURT: Right. I'm assuming the
20 square shaped lot is where they put the tower?

21 THE WITNESS: Yes, sir.

22 THE COURT: It's contained within that
23 tree area?

24 THE WITNESS: Yes, sir.

25 THE COURT: That's why, when the parking

1 lot was built, it didn't extend that far?

2 THE WITNESS: Had you seen the parcel, we
3 always called it the soccer field. It was not laid
4 out in exact dimensions. There were white lines.
5 There were goal posts, things like that. It was
6 really just a practice soccer field, let's call it
7 that. There was a natural tree line right there that
8 basically said: You're not going left of this.

9 THE COURT: Within that tree area is where
10 the drainage easement divided these two lots?

11 THE WITNESS: Yes, sir.

12 THE COURT: And these containers were
13 contained?

14 THE WITNESS: Yes, sir.

15 THE COURT: When you're talking, you're
16 talking in terms of the soccer field, you're thinking
17 whatever the non-tree area was?

18 THE WITNESS: Yes, sir.

19 THE COURT: And whatever else was tree-ed,
20 that is where this ended up going?

21 THE WITNESS: That's correct.

22 THE COURT: That's not necessarily where
23 the property line was.

24 THE WITNESS: That's correct.

25 THE COURT: You've sold the property since

1 1999?

2 THE WITNESS: Yes, sir.

3 THE COURT: That's all I have.

4 MR. WILLIAM BARR: One clarification.

5 I've got a large version of the topo that was done,
6 which I'll be glad to substitute, if you want it.

7 THE COURT: Does it provide us with new
8 information?

9 MR. WILLIAM BARR: This is topo of the
10 property in 2003 when Baker was getting ready to
11 build the property. This right now is design plans,
12 exhibit 2.

13 MR. HOWE: It's two; four is Optima.

14 MR. WILLIAM BARR: It's hard to see. This
15 is exhibit 2. It's hard to see this, if you look at
16 the full-size version, in the area where the tower
17 was ultimately constructed, the topo shows one
18 17-inch pine, one 23-inch pine, one 36-inch pine. As'
19 far as the area being, quote unquote, heavily wooded,
20 it was not heavily wooded. There were three trees in
21 there that could've been taken down.

22 The concrete spillway, which is an
23 easement as described on the survey, chunks over
24 here, some railroad tracks over here on the left.
25 For the record, it was not heavily wooded at the

1 time. If The Court would like, I can substitute or
2 mark this as exhibit also.

3 THE COURT: You want to do that? Any
4 objection to that?

5 MR. HOWE: No objection.

6 (DFT. EXH. 16, Large Topo Survey, dated
7 2003, was marked for identification.)

8 THE COURT: Defendant's 16 is the same as
9 Plaintiff's 2 in the package in evidence by Mr. Howe.

10 (DFT. EXH. 16, was received into
11 evidence.)

12 THE COURT: Anything further of Mr. Hiers?

13 MR. HOWE: Nothing, Your Honor.

14 THE COURT: Mr. Hiers, you may step down,
15 sir.

16 (The witness exited the stand.)

17 THE COURT: Let me ask Mr. Howe. You have
18 two witnesses.

19 MR. HOWE: Yeah, the only other thing I
20 have, pictures are worth 1,000 words. I would like
21 to move that The Court at sometime, don't have to do
22 it today, ride-by, look at the site. I think it's
23 something. Pictures help. The scale of it is hard
24 to get in the pictures. I think sort of the overall,
25 just looking at the site. I'll be happy for you to

1 go without any of us. At some point, I think you
2 ought to look at.

3 THE COURT: Any objection to that?

4 MR. WILLIAM BARR: No, the only objection
5 is that we're here to construe the terms of the
6 lease. And the photographs and the testimony thus
7 far is, basically, Mr. Hiers made a mistake..

8 Whatever the topography is, how tall the
9 tower is, what it looks like as you come around the
10 curb, that's all in the eye of the beholder. Has
11 nothing to do with what I believe The Court's job is,
12 to ascertain or construe the terms of the lease.

13 MR. HOWE: It could be -- it's up to The
14 Court -- it could go back to principals in equity as
15 well. And those are pled. If it ever gets into
16 equity, some of those things become a little fuzzier,
17 taking a look at what was seen, what was done.

18 THE COURT: This property backs up to the
19 greenway?

20 MR. WILLIAM BARR: Big fence along the
21 back. You can't get to it. It is along the
22 greenway. Leinbach is clearly accessible.

23 MR. HOWE: The entrance is on Markfield by
24 the I-Hop.

25 THE COURT: By the Kmart?

1 MR. HOWE: Yes.

2 THE COURT: Behind where Baker Motors is.
3 Hard to miss.

4 Motions from the Defendants.

5 MR. WILLIAM BARR: I do have a motion for
6 directed verdict, Your Honor. This action was
7 brought by the Plaintiff against the Defendant for
8 declaratory judgment to construe the rights of the
9 parties under the lease and for breach of contract.
10 And The Court's job, of course, is to determine if
11 there are any ambiguities in the lease. And then if
12 there are any ambiguities in the lease, then parole
13 evidence may be admissible to explain the
14 ambiguities.

15 Essentially, Your Honor, we have an
16 unambiguous document in front of us. And we have the
17 unambiguous testimony of the Plaintiff. And I think
18 the key factor in this case is that this entire
19 matter could've been handled a lot differently by the
20 Plaintiff from the get-go had he just came to someone
21 and said: Hey, I made a mistake.

22 What has happened here, during the course
23 of this litigation is that they've tried to give The
24 Court his version of what he thought he was doing and
25 then trying to interpret the lease to justify his

1 contorted version of the lease, which I don't really
2 believe is allowable parole evidence.

3 You know, all it is, Mr. Hiers thought
4 that he did not lease that portion of the property
5 out to Mr. Baker's company. He made a mistake.
6 People make mistakes. We're not infallible. He
7 didn't do it intentionally; however, a unilateral
8 mistake is not grounds for rescission nor is a
9 unilateral mistake grounds for reformation of the
10 contract.

11 When you get right down to it, he's
12 testified to it, I believe he testified to it
13 truthfully, the demised premises is 1.21 acres as
14 reflected in his deed and is reflected in that
15 survey, which is plat book D, page 47; therefore, the
16 declaratory judgement aspect of the case should be
17 decided, we would submit, against the Plaintiff and
18 in favor of the Defendant. That is, that the
19 construction of the lease of the demised premises is
20 1.21 acres.

21 Then we come to whether or not Mr. Baker
22 has breached his contract with Mr. Hiers. The lease,
23 again, introduced into evidence, has a provision in
24 it, and the letters which Mr. Howe introduced and I
25 introduced into evidence indicate that, if the

1 landlord, paragraph 6.03 -- in my letter to Mr. Howe
2 of January 31st of '08, I reference paragraph 6.03.
3 Paragraph 6.03 gives the tenant the right to abate
4 the rent during the time of the interference of the
5 premises.

6 I think Mr. Hiers has truthfully testified
7 that, by the erection of the tower -- although I
8 think he disagreed with my terminology -- Mr. Baker's
9 company has been effectively denied the use of that
10 particular corner there. No matter what he wanted to
11 do, whether he wanted to do it 15 years from now. He
12 can't do it. And the 6.03 says that the rent and
13 other charges shall be abated during the time such
14 interference persists.

15 This interference persists today and this
16 interference is going to persist for at least five
17 years after Mr. Baker's lease is over so, therefore,
18 under the breach of contract cause of action, since
19 we have the right to abate the rent during these
20 periods, then we have not breached our contract. All
21 we have done is strictly complied with the terms of
22 the lease. We put him on notice 30-days hence; if
23 you don't cure your interference, then we're going to
24 abate the rent.

25 Then the question becomes: What is the

1 value of that? And I submit to you the only way you
2 can value the abatement is by looking at it from the
3 standpoint of the rent, the additional rent which is
4 being paid to Mr. Hiers.

5 Mr. Hiers has testified that he has
6 received \$153,561 from Mr. Baker. And he's paid
7 \$54,116.65 from Optima, total of 207,477. How in the
8 world could he have been damaged under those
9 circumstances?

10 His source of income is the property. If
11 this property was sitting over on the Montessori
12 School, and he was receiving \$800 rent from it and
13 receiving \$21,600 in rent initially from Mr. Baker,
14 then Mr. Hiers -- and we tried to do something in
15 regard to that, Mr. Hiers would be right.

16 This 1.21 acres has a definitive
17 production of income. And the definitive production
18 of income from this 1.21 acres is defined by the
19 lease with Mr. Baker. And over the term of this
20 lease, as reflected in exhibit number 8, and to date
21 at least, Mr. Baker should have paid \$193,352.65.

22 There's no way that Mr. Hiers has been
23 damaged as a result of Mr. Baker's exercise of his
24 rights to abate the rent under the terms of the
25 lease.

1 Based upon that, I don't think that the
2 Plaintiff has presented any other evidence than: I
3 made a unilateral mistake, and I want you to get me
4 out of it. I don't think that meets the bar. Thank
5 you.

6 THE COURT: Mr. Howe.

7 MR. HOWE: Couple things; number one, when
8 you look at the terms of the lease, yes, you have to
9 look at them carefully because what Mr. Barr wants to
10 do is paint a broad brush and say it's just demised
11 premises, and that's the motion he lost at summary
12 judgment, okay.

13 So, essentially, I think that's the same
14 motion that he made before. Demised premises is this
15 property when, in fact, the definition in the lease
16 is this property subject to these other conditions.
17 That's the definition. They're stuck with that
18 definition in the lease.

19 Number two, when you look carefully at the
20 language -- and I have to back up one second. As you
21 heard from Mr. Hiers, this wasn't like a consumer
22 transaction where someone goes to Mr. Baker for a car
23 and they say, here's the document, sign them if you
24 want this car. This was a lease that made the
25 rounds. Mr. Barr made some changes to the lease.

1 This was not your ordinary thing.

2 What the lease does say, it specifically
3 says: Mr. Hiers shall not make any other leases that
4 interfere. It doesn't say Hiers cannot make any
5 subleases or any other leases without Baker's prior
6 permission. Doesn't say that.

7 It has, again, a condition. It says Hiers
8 can't do anything to interfere with Baker's use of
9 the property. Then they say, well, we might have
10 parked some cars there. We might have done this.

11 Number one, they can't do it without his
12 permission. Number two, the city would have to give
13 it. It's entirely speculative that those things
14 would happen. You can't get damages for something
15 that's entirely speculative.

16 And, in fact, as Mr. Hiers testified at
17 his deposition, Mr. Baker said: You know, my only
18 damages, I might have tried to go back to the city
19 and get permission to put more parking spaces in.
20 That's just speculation. He hadn't tried it. He
21 hadn't entered into evidence that it's economically
22 feasible, that he couldn't get permission. He had to
23 go to Mr. Hiers permission, which he said: I don't
24 know that I'm going to give it or not.

25 The basis upon which they look for the

1 damage, boy, we could have gone out there and used
2 this, is entirely speculative by their own admission,
3 even though it's in my case.

4 The last thing that happens where Mr. Barr
5 is a good lawyer, but I won't call his bluff on it.
6 He says: Clyde, you made a mistake, didn't you?

7 Clyde said: Yeah, I made a mistake. In
8 his world, he probably wouldn't have done this had he
9 been aware, okay. That mistake that Mr. Barr wants
10 to say, well, mistake means mistake legally in
11 contract law. Those things don't necessarily equate.

12 He's taking the word, gee, I wouldn't have
13 done that, hindsight being 20-20, I would have
14 differed. He's saying mistake; Clyde has admitted he
15 breached the contract. We don't admit we breached
16 the contract. He would have handled things
17 differently in a business manner had he been aware.

18 That doesn't mean he's breached the
19 contract. The contract is defined by the terms, and
20 the terms are very specific, and they had the chance
21 to redefine them anyway they wanted. They let them
22 go through with those terms.

23 Yes, it's fine print. These are business
24 people where these leases matter, and they both
25 signed off on what's in their contract. If you look,

1 it gives them the right to do other things because it
2 doesn't deny him the right to do other things.

3 Lastly, we go to the damages real quickly.
4 There's, basically, three ways to look at damages.
5 Even if you were to decide that there was a breach,
6 if you say he wasn't really damaged, he might reason:
7 Well, gosh, they say Mr. Hiers is getting windfall.
8 Mr. Baker is getting a windfall. He's getting all
9 the spaces he wanted. It never even occurred to
10 him -- he can't say I was losing my peaceful use of
11 this property.

12 He's a businessman. He would've been
13 knocking on the door if it was interfering with
14 anything. He didn't even know it until he tried to
15 buy it. So he can't say: Boy, they're keeping me
16 from doing something, they interfered. There's just
17 no damage there.

18 Court may find that the law says there's
19 nominal damages for that. They're limited to that.

20 The next thing you could look at and say:
21 Well, as Mr. Hiers pointed out, as you can see from
22 the plat, 10 percent. It at most interferes with 10
23 percent of the property. The 10 percent that it
24 interferes with still gives him 100 percent of the
25 use that was the essential part of his bargain. You

1 might have to put a value on that 10 percent.

2 To say he gets all of the rent, that
3 theory only comes in under a restitution theory when
4 they can show that Mr. Hiers intentionally tried to
5 basically defraud and flimflam somebody.

6 The only evidence -- and Mr. Barr
7 submitted a restatement thing in summary judgement.
8 The only evidence at this point is that that's not
9 even on the radar. That amount of damage would not
10 comport with anything.

11 Bottom line is we have a contract with
12 Mr. Baker, with Magnolia. He's had 100 percent of
13 all the uses. The only thing he can show that could
14 be damage is so speculative it doesn't rise to the
15 level of being any damage. For that reason we think
16 we should win.

17 THE COURT: Anything in reply?

18 MR. WILLIAM BARR: Yes, sir, keep in mind,
19 this is a motion for directed verdict at the close of
20 Plaintiff's case; does not involve Mr. Baker's
21 damages. He sued for breach of contract and damages.
22 And the damages, he takes the position that the
23 damages are based upon what Mr. Baker has paid him
24 and what he was entitled to. That's his damages.

25 In arriving at his damages, you cannot

1 ignore the income he's receiving from the tower. The
2 property generates the income. We don't have a side
3 deal going on where somebody has a hotdog stand down
4 there generating income. The property in and of
5 itself generates income.

6 Interfere; he can not make any leases that
7 interfere. This is the most common sense case I have
8 ever been involved in. Interfere. You can't tell me
9 that if you take this corner of the property you are
10 already leased to me, you put a fence around it, you
11 have not interfered with some use of parcel H2
12 reflected on that survey.

13 There's 12 more years left on Mr. Baker's
14 lease. We've got -- our lease term is from, with
15 options from 2003 to 2023. We got about, if my math
16 is right, 12 more years, 11 more years to go that we
17 have to do this. This is not insignificant to us.
18 You can't define whether we would have done something
19 or not done something.

20 We're dealing with interference with the
21 total terms of the lease, which is five years, plus
22 three five-year options to renew. And we've already
23 renewed one, and the next one comes up in '13. We
24 will renew that one also.

25 The lease does not give Mr. Hiers, as

1 stated by Mr. Howe, the unilateral right to do other
2 things with the property. Mr. Howe uses the term,
3 peaceful use of the property. I think that's a sort
4 of a contortion of the covenant of quiet enjoyment.
5 The covenant of quiet enjoyment is a legal principal,
6 not just peaceful enjoyment practically speaking.

7 In the covenant of quiet enjoyment, he
8 warranted and he bound himself that, during the
9 demised term, that the tenant, article 12: Will have
10 lawful, quiet and peaceful possession and occupation,
11 occupation of the demised premises, 1.21 acres, and
12 enjoy all rights herein granted without any let or
13 lease, hindrance, ejection, molestation or
14 interference by any person; in particular, the
15 landlord himself.

16 I think based upon all these arguments,
17 the Plaintiff has just not proved his case and would
18 ask that The Court direct a verdict in favor of the
19 Defendant.

20 MR. HOWE: Lastly, their equitable
21 principal might have estopped them from asserting
22 that. They didn't file a memorandum of lease, which
23 is the standard thing that's done. The evidence from
24 Mr. Powell, there was no memorandum of lease to put
25 the public on notice of their interest.

1 When it went up, they were advised it was
2 going up. And they sat there and let it go up. And
3 they actually marked off pieces of the property and
4 let it go up.

5 Now they're coming back, oh, my goodness,
6 you pulled this over on us and breached this contact.
7 You can't just stand there and let somebody paint
8 your house and then say: Gosh, you just painted the
9 wrong house.

10 THE COURT: Without getting something for
11 it.

12 MR. HOWE: Without getting something.
13 That goes to all those of things. That's why it's
14 not a directed verdict at this juncture.

15 THE COURT: Well, I'm going to probably
16 regret this. I'm going to deny the motion at this
17 time. Looking at the matter in the light most
18 favorable to the nonmoving party, which is the
19 Plaintiffs, the Plaintiffs bring a cause of action
20 for declaratory judgment. What I will tell you, I'm
21 not sure that there is any ambiguity as to what the
22 demised premises are.

23 What I find there to be ambiguity about is
24 with the use of those demised premises has been put
25 to. That runs throughout this entire lease. I'm

1 specifically looking at article 12, the title of the
2 premises. It talks in terms of it should not be
3 leased in any manner which would prevent or
4 interferes with the tenant. The tenant has not put
5 forth any evidence at this point in time. It's on
6 that basis I'm going to deny the motion as to the
7 declaratory judgment.

8 On the issue of damages, that's frankly
9 what's bothered me throughout this whole case. I'm
10 not sure exactly what the damages are, if any, and so
11 how to reconcile them. I'm going to deny the motion
12 on those bases alone and allow the Defendant to put
13 forth any testimony that they'd like to put forth.

14 Let me just ask you. It's now noon. You
15 indicated two witnesses.

16 MR. WILLIAM BARR: I have three. I've
17 subpoenaed Corky Carnevale.

18 THE COURT: Do you want to break now?

19 MR. WILLIAM BARR: If I could ask you,
20 Mr. Baker teaches at the College of Charleston, among
21 his other -- and he's got a class at 12:15 that he
22 would like to make.

23 MR. HOWE: That's fine. I don't have any
24 problem.

25 MR. WILLIAM BARR: He could be back here,

1 he says 1:45. We might be able to push him.

2 MR. BAKER: 2:00.

3 THE COURT: Two o'clock.

4 MR. HOWE: I don't want him cutting class
5 on my account.

6 THE COURT: Mr. Baker, I'll be happy to
7 cut you loose. Let's just come back at 2:00.

8 (A luncheon recess transpired from 11:53
9 a.m. until 2:25 p.m.)

10 THE COURT: We had concluded the
11 Plaintiff's case. I had denied motion for directed
12 verdict or nonsuit. We should be at the Defendant's
13 case. Mr. Barr.

14 MR. WILLIAM BARR: I'd like to call Corky
15 Carnevale. He has an appointment at 4:00, told him
16 we would get him out of here.

17 ROBERT CARNEVALE
18 being first duly sworn, testified as follows:

19 DIRECT EXAMINATION

20 BY MR. WILLIAM BARR:

21 Q. Mr. Carnevale, state your full name for
22 the record.

23 A. Robert Bernard Carnevale.

24 Q. A/k/a Corky?

25 A. Correct.

1 Q. Mr. Carnevale, you're aware that the case
2 we're in trial today is the case of 56 Leinbach
3 versus Magnolia Paradigm, involving the property at
4 the end of Leinbach Drive where Baker Motor Company
5 has or Magnolia Paradigm has its parking back there?

6 A. Correct.

7 Q. In that particular lease, what was your
8 role?

9 A. I was working as Mr. Hiers' real estate
10 agent.

11 Q. You were his agent during the course of
12 that?

13 A. Correct.

14 Q. During that process, did you work with
15 Bill Cochran representing Magnolia Paradigm?

16 A. Yes.

17 Q. Did Mr. Bailey have anything to do with it
18 back then?

19 A. No.

20 Q. Nothing at all. I'm going to show you a
21 couple of letters, Mr. Carnevale. This is a letter
22 from Bill Cochran to you dated November 11, 2002 and
23 ask if you can identify that.

24 A. I'm familiar with this.

25 Q. Was that letter a result of some meeting

1 you had with Mr. Cochran where he wanted you to put
2 in writing a proposal for the lease of the property?

3 A. That's correct.

4 Q. And that particular proposal offered to
5 lease him either the whole parcel or a part of it?

6 A. I think we only had one parcel there.

7 Q. I think the letter says parcel 1.2 acres,
8 you can lease all or a part of it?

9 A. Correct, right.

10 Q. The value per acre was 250,000?

11 A. That's correct.

12 Q. The lease calculation was based upon
13 return on investment?

14 A. That's right.

15 Q. It was for the entire 1.2 acre parcel that
16 the lease was calculated?

17 A. Right.

18 Q. Now I'm going to show you a letter dated ,
19 10/24/02 and see if you can identify that.

20 A. Yes.

21 Q. Based upon that letter, that was basically
22 some understanding that you had with Bill Cochran
23 that Mr. Hiers or 56 Leinbach would lease him the
24 entire 1.2 acres. What you did was split the baby on
25 the rent from his 1,600 to your 2,000?

1 A. Correct.

2 Q. Ultimately, was there a lease drawn?

3 A. Yes, there was.

4 Q. Please don't read this.

5 A. I'm not.

6 Q. This was the lease that was signed in June
7 2002. In Section 1.01, it describes the devised
8 premises as 1.21 acres.

9 A. Okay.

10 Q. I believe if you wanted to read it, you
11 would find that the rental in there was 1,800 a month
12 with 3 percent increases after the first year. Is
13 that consistent with the October 24th letter?

14 A. Correct, we prepared the lease.

15 Q. Y'all prepared the lease, okay.

16 At the time of the preparation of the
17 proposal to lease and the execution of the lease, was
18 there any question that Mr. Baker's company was going
19 to acquire the entire 1.2 acre parcel?

20 A. No question in my mind.

21 Q. Were they restricted? Could they use the
22 entire parcel for parking, or were they restricted to
23 just use a part of the parcel for parking?

24 A. Didn't make any difference to us.

25 Q. Didn't may any difference?

1 A. They were leasing it. Whatever they could
2 do with it was fine as long as it was legal.

3 Q. As long as they paid the rent?

4 A. Right.

5 MR. WILLIAM BARR: I have no further
6 questions.

7 CROSS-EXAMINATION

8 BY MR. HOWE:

9 Q. For it to be legal, it had to get
10 authorized by the city, didn't it?

11 A. Correct.

12 Q. In fact, Mr. Cochran's letter to you
13 specifically, he writes in hand saying: We're not
14 signing any lease unless there's a parking lot
15 approved by the city; correct?

16 A. That's correct. It says: Lease based on
17 receiving approval for a parking lot from the city
18 and Mrs. Leinbach.

19 Q. I'm going to hand you two pages real
20 quick. RB Corky Carnevale. That's you?

21 A. Yes.

22 Q. That's a letter or writing from
23 Mr. Cochran who was representing Mr. Baker?

24 A. Correct.

25 Q. It had attached to it a drawing?

1 A. Yes.

2 MR. HOWE: And this will be exhibit 17.

3 (PLF. EXH. 17, Memo dated 12-18-02, was
4 marked for identification.)

5 BY MR. HOWE:

6 Q. Would you read for The Court -- first of
7 all, what is the date on this document?

8 A. December 18, 2002.

9 Q. As I understand it, it's sent from
10 Mr. Cochran to you; is that correct?

11 A. That's correct.

12 Q. What is the subject of the document?

13 A. Can I read it?

14 Q. Yeah. What does it say it's about?

15 A. As per our phone conversation today, I'm
16 sending the parking lot layout drawn by LS3P. We
17 have to apply to the city for a variance because lot
18 will be grout -- because the lot will be gravel.

19 LS3P will meet with the city staff on
20 12/19/02 for layout approval. The next meeting for
21 the variance is February 6, 2003. I have not heard
22 from our attorney on the lease but will call you as
23 soon as he completes his review.

24 Q. As of that time, they were already
25 reviewing leases? Some lease documents?

1 A. Yes, apparently so.

2 Q. And the subject of this?

3 A. Parking lot.

4 Q. You're not a lawyer?

5 A. No.

6 Q. Didn't draw the lease?

7 A. No.

8 Q. Didn't consult on the terms of the lease
9 or how they were defined or any of that stuff?

10 A. No, other than to tell them what we had
11 agreed upon.

12 MR. HOWE: That's all I have. Thank you.

13 MR. WILLIAM BARR: One quick question.

14 REDIRECT EXAMINATION

15 BY MR. WILLIAM BARR:

16 Q. The exhibit that Mr. Howe has just shown
17 you, did you consider this parking lot layout a
18 restriction on the area of the parking or the area ,
19 that they could use?

20 MR. HOWE: Objection; relevance.

21 THE COURT: I'm going to allow it. Go
22 ahead.

23 THE WITNESS: I looked at it, and it
24 really didn't concern us. Didn't concern me. If
25 they were happy with what they got, that was fine

1 with us, you know. We were just glad that they were
2 able to get approval so that they would lease it.

3 BY MR. WILLIAM BARR:

4 Q. Did that sketch ever become a part and
5 parcel of the written lease?

6 A. If not, it should have been. I honestly
7 don't know.

8 MR. WILLIAM BARR: No further questions.

9 THE COURT: All your purposes had to do
10 with finding parking spaces for, in this case,
11 Magnolia Paradigm, the company that took it. That
12 was all your negotiations concerned?

13 THE WITNESS: Not really. We were just
14 interested in leasing the property. And I think at
15 one point Mr. Hiers and I went to Barry Whalen, I
16 can't remember the name of his company, but he's been
17 around for a good while, and sat down with him and
18 made sure that we could get enough parking on there
19 that it would be worthwhile to even talk to them
20 about leasing it as a parking lot.

21 We thought that if we could go in there
22 with some sort of sketch plan saying we know we could
23 get 80 -- I don't know how many numbers we were
24 talking about at that time, but enough places that it
25 would interest them in leasing it, which we did.

1 And then we took the piece of land to them
2 and said: Would you be interested in leasing this.

3 As far as my recollection, we weren't
4 concerned how many parking places they could get out
5 of there. They either got enough in there they were
6 interested in leasing it or they couldn't.

7 THE COURT: Would you have anticipated
8 that diagram to be made part of a lease agreement?

9 THE WITNESS: I would have anticipated it,
10 yes, but I wouldn't have been involved in that.

11 THE COURT: Are you the Corky Carnevale
12 that used to play for the Gamecocks?

13 THE WITNESS: Long time ago.

14 MR. HOWE: Just as fast as he ever was.

15 CONTINUED REDIRECT EXAMINATION

16 BY MR. WILLIAM BARR:

17 Q. That sketch didn't limit them from going
18 over into an area that's not where it's not sketched,
19 out?

20 A. Did not. Not to my knowledge. You
21 could've double deck. We didn't really -- it wasn't
22 my concern.

23 MR. WILLIAM BARR: I have no further
24 questions.

25 THE COURT: Mr. Carnevale. You are free.

1 (The witness exited the stand.)

2 (Off-the-record discussion.)

3 MR. WILLIAM BARR: Plaintiff calls Bill
4 Cochran.

5 WILLIAM G. COCHRAN, JR.

6 being first duly sworn, testified as follows:

7 DIRECT EXAMINATION

8 BY MR. WILLIAM BARR:

9 Q. Mr. Cochran, will you state your full name
10 for the record, please.

11 A. William G. Cochran, Jr.

12 Q. Where do you presently reside?

13 A. One Brigadoon Place, Charleston.

14 Q. Are you familiar with the Defendant in
15 this case, Magnolia Paradigm?

16 A. Yes.

17 Q. What was your relationship with that
18 company in the time frame that we're here on, which
19 was about 2002?

20 A. That was a holding company that Mr. Baker
21 had. I was employed by Baker Motor Company.

22 Q. How long had you been employed by Baker
23 Motor Company?

24 A. I started in August of '93 and retired in
25 February of 2004.

1 Q. Where were you prior to that?

2 A. I was with GMAC.

3 Q. For how many years?

4 A. Thirty.

5 Q. At Baker, what was your position at Baker?

6 A. I was the operations manager.

7 Q. What did that entail?

8 A. Entailed a lot of things. I reviewed
9 financial statements, took care of insurance for the
10 company, personnel, expense control, approval of
11 purchases, machinery and equipment. I also
12 coordinated expansions with architects and builders.

13 Q. Incident to those roles, did you have
14 anything to do with sales?

15 A. No, sir, not at all.

16 Q. Incident to your duties at Baker, did you
17 have anything to do with the leasing of the property
18 from Mr. Hiers' company, 56 Leinbach?

19 A. I did.

20 Q. I'm going to show you some notes which are
21 dated February 7, 2000 and ask if you can identify
22 those.

23 A. Yes, sir, I can. Those are my notes.

24 MR. WILLIAM BARR: If we could mark them.

25 (DFT. EXH. 18, Handwritten notes, was

1 marked for identification.)

2 BY MR. WILLIAM BARR:

3 Q. Again, the date of this is February 7,
4 2000. What is the gist of this particular -- of
5 these particular notes?

6 A. I believe that's the time that
7 Mr. Carnevale came to us with a proposal about
8 leasing that property back there. And as stated in
9 here, they said they could lease that property and
10 could get about 70 spaces for car placement and rent
11 them out, 1,800 a month. That would give them about
12 10 percent return.

13 And we would improve the property, do all
14 the work, paving, stripping. And Mr. Carnevale at
15 the time said probably take about \$75,000, \$80,000 to
16 do that.

17 Q. What happened to the February 7, 2000
18 proposal?

19 A. I had a note down here, on February 16,
20 2000, I had advised Corky that we would not be
21 interested in the property at that time.

22 Q. I'm going to show you a note of September
23 5, '02 and ask if you can identify that.

24 A. Yes, sir, that is my handwriting.

25 Q. What is the gist of that particular note?

1 A. Just a notation that I met with Mr. Hiers
2 and Mr. Carnevale for leasing Leinbach Drive for
3 employee parking, and that they would put the other
4 proposal and get back with us.

5 (DFT. EXH. 19, Handwritten notes, was
6 marked for identification.)

7 MR. WILLIAM BARR: Your Honor, I would
8 like to introduce into evidence Defendant's 18,
9 February 7, 2000 and his note of Defendant's Exhibit
10 19.

11 THE COURT: Any objection?

12 MR. HOWE: No objection.

13 THE COURT: Very good.

14 (DFT. EXH. 18 was received into evidence.)

15 (DFT. EXH. 19 was received into evidence.)

16 BY MR. WILLIAM BARR:

17 Q. After September 5th, did you, in fact,
18 receive a letter from Corky Carnevale?

19 A. We did. We received a letter.

20 Q. I'm going to show you what has already
21 been marked as Plaintiff's Exhibit 13 and ask you if
22 that's the letter.

23 A. It is.

24 Q. What was the nature of that? What was
25 their offer to lease?

1 A. Well, in essence, stating they would like
2 to make satisfactory arrangements with Baker Motor
3 Company for the partial size. They put 1.2 acres.
4 You can lease all or part of this 1.2 acres, valued
5 at 250,000 an acre. They wanted 8 to 10 percent
6 return on the value, depending on who paid the tax.
7 We would do all the planning and approval process.
8 We would do the improvements, insurance, maintenance.
9 And the lease would expire in ten years with
10 renewals.

11 Q. When was the next communication that you
12 had?

13 I'm going to show you a letter dated 10/24
14 and ask if you can identify that.

15 A. That's a letter to me from Mr. Carnevale,
16 yes.

17 Q. What was their proposal -- do you have any
18 idea what happened between September 11th and October
19 24th?

20 A. It's been nine, ten years ago. I really
21 don't. I'm sure we had discussions back and forth;
22 must have because of the way he wrote the letter and
23 started out to discuss and propose what they're
24 offering us. I'm sure we had some discussion. I
25 don't remember specifically.

1 Q. Was the proposal for all or part of 1.2
2 acres?

3 A. Well, the proposal is, as I read it,
4 because the valuation of the property was at
5 \$300,000, it was for the entire amount, 1.2 acres.
6 And that's how they got their return, based on that
7 1.2 acres.

8 And the 8 percent return would've been
9 \$2,000 a month. We had originally said we would
10 consider \$1,600 a month. And they came to terms,
11 leased it for \$1,800 a month. It was still the 1.2
12 acres.

13 Q. That actually constituted a compromise.
14 You're reading from Plaintiff's Exhibit 14?

15 A. Right.

16 Q. The next thing that happened, you then, in
17 fact, entered into a lease. And I want to show you
18 what's already been marked as Plaintiff's Exhibit 1
19 and ask you if that's the lease that you ultimately
20 entered into?

21 A. Yes, that's the lease, as far as I know.

22 Q. Was the lease consistent with the October
23 24th proposal?

24 A. Yes, in as much they offered us -- it took
25 care of the 1.2 acres at \$1,800 a month. I would say

1 it was consistent, yes.

2 Q. Other than the 2000 discussions, based on
3 your notes of February 2000, was there any further
4 discussion of leasing just a portion of the property
5 at that time?

6 A. No, there wasn't.

7 Q. Mr. Howe just questioned Mr. Carnevale in
8 regards to a fax that you sent to Mr. Carnevale
9 12/18/02 and ask you if you recall that.

10 A. I do, that was fax that I sent to him.

11 Q. And what was the purpose of that?

12 A. Confirming our telephone conversation.
13 Sent him a parking lot layout drawn by LS3P and let
14 him know we had applied to the city for variance.
15 There's going to be gravel and not paved. Told him
16 when the meeting would be, have not heard from our
17 attorney on the lease. You were reviewing it, I
18 assume at that point.

19 Q. Do you recall why, if you look at the
20 sketch there, why you didn't put any parking over in
21 the corner, off the cul-de-sac?

22 A. Yes, in my position, I was responsible for
23 expense control. When this opportunity came and we
24 decided to go with it, I wanted to get as many
25 parking places as we could at the least amount

1 expense of turning dirt. As they referred to it,
2 that was a soccer field. It was compacted, that
3 whole area. That was the easiest place to put it. I
4 don't recall exactly, that's why that area was used,
5 and that's why this parking lot design was drawn.

6 Over in the corner was an area that
7 would've cost much more at the time to do. We had
8 some trees to take down. We would have to fell and
9 do that. We didn't need that at that time. And so
10 the least expensive way I could turn this piece into
11 a parking lot for us was what we did right there.

12 Q. Did you feel that precluded you from
13 putting parking over there or something over there in
14 the future?

15 A. I didn't think that it would preclude for
16 anything because we had leased the entire parcel.

17 Q. Of course, that would've been subject to
18 Mr. Hiers' approval or governmental authorities'
19 approval?

20 A. Sure, just like this was.

21 Q. To your knowledge, did Mr. Hiers, during
22 the period of time -- did you really have any contact
23 with Mr. Hiers, or was all of your contact with
24 Mr. Carnevale?

25 A. I think most of it with Mr. Carnevale. I

1 may have had some with Mr. Hiers. I don't
2 specifically -- most of the negotiation was with
3 Mr. Carnevale. One of the memos I said I met with
4 Clyde and Mr. Carnevale -- excuse me -- Mr. Hiers and
5 Mr. Carnevale at one meeting. Most of it was with
6 Corky. He was handling everything, yes, sir.

7 Q. When did you leave Baker Motor Company's
8 employ?

9 A. End of February 2004.

10 Q. Fair to state you were not around when
11 they built the cell tower?

12 A. No, sir.

13 Q. When you were doing the negotiations with
14 Mr. Carnevale in connection with the property, the
15 1.2 acres, were there any discussions that Mr. Hiers
16 might want to withhold a portion of the property for
17 future development?

18 A. No, sir.

19 Q. Do you recall, based upon the notes that
20 you've seen and the letters from Mr. Carnevale, how
21 was the lease payment calculated, to the best of your
22 knowledge, by Mr. Hiers?

23 A. Well, I mean, it was calculated on an 8
24 percent return on \$300,000 valuation of property,
25 which would be \$2,000 a month. We would get that

1 return. That's where their figure came from.

2 Q. When you were there -- withdraw that.

3 MR. WILLIAM BARR: I have no further
4 questions at this time.

5 MR. HOWE: Just a couple things.

6 CROSS-EXAMINATION

7 BY MR. HOWE:

8 Q. Do you have exhibit number 19 in front of
9 you? That's September 5, '02 note that you wrote.

10 A. I don't have exhibit 19.

11 Q. We put it back on the table. Tell me if
12 I'm reading this right. This is September 5, '02:
13 Met this a.m. with Clyde Hiers and Corky Carnevale,
14 re: lot on Leinbach Drive to be used for employee
15 parking only; is that correct?

16 A. Yes.

17 Q. The next one says February 7, 2002, that's
18 exhibit 18. Do you have that one?

19 A. Uh-huh. That's February 7, 2000.

20 Q. This is way back.

21 A. That's almost two years before this other
22 note came into play.

23 Q. At the end of the first paragraph, though,
24 again, employee parking lot is what it was about?

25 A. Right.

1 Q. And rent for 70 car spaces around one
2 acre. That was the first note?

3 A. That's what they brought to us.

4 Q. Right. You were the operations guy at
5 Baker; correct?

6 A. Yes, sir.

7 Q. And you, more or less, became the
8 operations guy for this project about this piece of
9 property?

10 A. Just included in my duties, yes, sir.

11 Q. And your goal was to get as many parking
12 spaces as possible, economically feasible on that
13 piece of property, wasn't it?

14 A. My goal was to create a parking area for
15 employees and put it on the area that was already
16 compacted, yes.

17 Q. And to get as many spaces as you possibly
18 could?

19 A. Yes.

20 Q. And you did that, didn't you, in
21 connection with architects, didn't you?

22 A. What they drew out, yes, I got that.

23 Q. And you knew and y'all had it arranged and
24 you have it in the correspondence with Mr. Carnevale,
25 had those plans of LS3P not been approved by the

1 city, this would've never gone through, would it?

2 A. Well, had the plans not been approved for
3 us to put a parking lot there, it probably would not
4 have gone through.

5 Q. Y'all were looking for parking spaces?

6 A. That's correct.

7 Q. According to your note in December of '02,
8 I think it was, the one you wrote to Mr. Carnevale?

9 A. I have it here.

10 Q. There were some versions of this lease
11 already going around?

12 A. I don't understand what you mean, versions
13 of the lease going around.

14 Q. You know what a lease is, right?

15 A. I do.

16 Q. You know what the lease was in this;
17 right?

18 A. I've read that, yes.

19 Q. You talk about the lease and something
20 about the attorney and the lease. What does it say?

21 The last sentence: I have not heard from
22 our attorney on the lease but will call you as soon
23 as he completes his review.

24 A. Which exhibit are you referring to?

25 Q. I'm looking at the note.

1 A. I didn't know what exhibit you had. I had
2 the wrong one.

3 Q. Last sentence.

4 A. Yes.

5 Q. You were aware that your attorney had some
6 version of the lease at that point?

7 A. He had the -- he had the lease that was
8 sent to us by Corky Carnevale.

9 Q. This was in December 18th of 2002;
10 correct?

11 A. Yes.

12 Q. Six-and-a-half months before the lease was
13 signed?

14 A. I don't know the date the lease was
15 signed.

16 Q. June 1, '03, okay. After the plans that
17 LS3P had drawn up, were approved by the city?

18 A. I don't have the date that the city
19 approved it.

20 Q. But you remember that the leases weren't
21 signed until after?

22 A. That's correct.

23 Q. On the lease itself, which is exhibit 1,
24 are you with me? It talks about parking area. Do
25 you see that?

1 A. I see 1.02, yes, sir.

2 Q. That parking area is the same parking area
3 that was in the plans prepared by LS3P and approved
4 by the city, wasn't it? It wasn't some other parking
5 area, was it?

6 A. I don't know that's true, sir.

7 Q. What else would it be? Was there another
8 parking area there?

9 A. There was land that would not be used.

10 Q. Right. If it couldn't be used because it
11 wasn't approved for parking area, you wouldn't call
12 it a parking area, would you?

13 A. Well, I'm just reading: Throughout the
14 demised term, tenant and its employees shall have the
15 exclusive right to use any parking areas within the
16 demised premises. It didn't say to the plat. I
17 mean, I don't know the question, sir.

18 Q. The parking area that was the subject of ,
19 this lease, are you saying it was something different
20 than what you got approved by the city?

21 A. No, sir.

22 Q. That's all I wanted to know.

23 MR. HOWE: That's all I have.

24 REDIRECT EXAMINATION

25 BY MR. WILLIAM BARR:

1 Q. Mr. Cochran, just to follow up on this
2 parking area with the lease. Do you recall when you
3 first got the lease from Mr. Carnevale? Must have
4 been prior to December of '02; is that correct?

5 A. Yes, it must have been. I don't know
6 when.

7 Q. We've already marked --

8 A. Mr. Barr, may I say, we had it awhile, the
9 lease, the first one we had typed in January 2003,
10 beginning. It was struck to June.

11 Q. It may have been as early as June that it
12 was contemplated as being written?

13 A. I can't answer.

14 Q. You don't remember?

15 A. I don't remember.

16 Q. This is what we refer to as Defendant's
17 Exhibit 16. These are the large versions of the LS3P
18 plans. And I believe the date -- tell me what date
19 down here on bottom right corner is.

20 A. April 21, '03.

21 Q. This particular topographic survey, I
22 guess these were the plans that were ultimately
23 approved by the city?

24 A. I'm sure they were, yes.

25 Q. Is it fair to say these plans came into

1 existence after the lease?

2 A. I would say yes.

3 Q. And so in regard to Mr. Howe's question
4 about paragraph 1.02, did section 1.02 really relate
5 to these plans?

6 A. Not that I know of.

7 MR. WILLIAM BARR: No further questions.

8 RECROSS-EXAMINATION

9 BY MR. HOWE:

10 Q. Lease wasn't signed until after those
11 plans were approved by the city and said, this is the
12 plans and this is the project, wasn't it?

13 A. The lease wasn't what, sir?

14 Q. The lease was not signed. There was no
15 lease. There was no legal document. There was no
16 deal until after the city had approved those plans;
17 isn't that correct?

18 A. Well, the lease was signed what? June
19 1st.

20 Q. That's right. And the city had been
21 approved. You said in your own letter, Mr. Cochran,
22 no deal if the city doesn't approve it?

23 A. That would probably be correct then, yes,
24 sir.

25 Q. Had Mr. Baker wanted to change the parking

1 area, you know by the terms of that lease he would
2 need to have Mr. Hiers' approval, wouldn't he?

3 A. That's what the original small plat was
4 for when it was sent to Corky, yes.

5 Q. And you also know that it would need city
6 approval, 'cause you can't build something like that
7 without approval, can you?

8 A. I think that's been established. We had
9 to get approval for the gravel lot, yes.

10 Q. It would also, from a business standpoint,
11 need to make economic sense, wouldn't it?

12 A. It would.

13 Q. You had already made a determination that
14 it didn't make economic sense at that time?

15 A. Originally that's what I determined, yes.

16 Q. Has anybody asked you to re-evaluate that,
17 see if it makes any economic sense?

18 A. I think you need to rephrase it when you
19 say make economic sense. I did it for the least cost
20 to Baker Motor Company to give us the parking there.

21 Q. To get as many spaces as you could?

22 A. To get as many spaces I could without
23 moving any dirt because it was an economical value to
24 me.

25 Q. Your job is to make --

1 A. Hold down expenses.

2 Q. Keep down expenses and make a profit that
3 is logical, for lack of a better reason; right? Get
4 your best return; correct?

5 A. Yes.

6 MR. HOWE: That's all I have.

7 MR. WILLIAM BARR: Nothing further, Your
8 Honor.

9 THE COURT: I don't have any questions
10 Mr. Cochran, thank you very much. You may step down.

11 (The witness exited the stand.)

12 MR. WILLIAM BARR: Call Mr. Baker.

13 TOMMY B. BAKER

14 being first duly sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MR. WILLIAM BARR:

17 Q. Would you state your full name for the
18 record, please.

19 A. Tommy B. Baker.

20 Q. And what is your position with the
21 Defendant Magnolia Paradigm in this case?

22 A. My position?

23 Q. What is your position? Do you own it?

24 A. I own it, yes.

25 Q. Is it a single member LLC that's in your

1 name?

2 A. Yes.

3 Q. Did you have anything to do with the
4 negotiations of a particular lease between Mr. Hiers
5 and the company?

6 A. No.

7 Q. Who did you leave that up to?

8 A. Mr. Cochran.

9 Q. Were you personally aware that, in 2006,
10 that there was a cell tower going up adjacent or on
11 the property?

12 A. No.

13 Q. Were you, as a representative of Magnolia
14 Paradigm, ever contacted or notified concerning the
15 use of that or putting that cell tower up?

16 A. No.

17 Q. We've already introduced, Mr. Baker, as
18 Plaintiff's Exhibit 8, a schedule of payments and ask
19 if you're familiar with that.

20 A. Yes. Yes, I am.

21 Q. That schedule of payments, what does that
22 reflect the total amount of payments that your
23 company has paid to Mr. Hiers' company?

24 A. That is correct, 153,561.

25 Q. Earlier today, Mr. Keith Powell was here.

1 And he prepared -- we introduced exhibit 9. And this
2 is the total payments that Optima Towers has paid
3 Mr. Hiers. And I believe that number is
4 54,000-and-some change?

5 A. 54,116.66, yes.

6 Q. There's an additional column on the
7 Plaintiff's Exhibit 8 called Due From The Property.
8 Is that something that your people calculated for
9 you?

10 A. Yes.

11 Q. What is that total amount there?

12 A. 193,352.05.

13 Q. And that's the total amount that should've
14 been paid to Mr. Hiers over the term of the lease?

15 A. Right.

16 Q. Sometime back in '08, I think you've heard
17 the testimony, y'all started withholding an amount of
18 money from the lease because of the tower?

19 A. Right.

20 Q. We will show you something that's called
21 Defendant's Exhibit 15. Tell me what that states.

22 A. Well, the total overpayment was from the
23 numbers; the rent paid Magnolia 153-and-some change;
24 rent by Optima Towers, 54-and-some change. Total
25 rent 207,477.65, less owed by Magnolia Paradigm,

1 193,352.65 for a total overpayment of \$14,125.

2 Q. Is that an amount of money that you think
3 that you are entitled to be reimbursed by Mr. Hiers
4 because he was overpaid --

5 A. Yes.

6 Q. -- from the property during the course of
7 your tenancy?

8 A. Yes.

9 Q. Are you also asking The Court to allow you
10 to continue to abate the rent based upon the Optima
11 Tower payments?

12 A. Yes.

13 Q. How many more years do you have on this
14 lease?

15 A. I think 12.

16 Q. There's an area over in the corner, I
17 believe that you've seen and heard testify, where the
18 tower went up?

19 A. Right.

20 Q. Is that an area that, at the time that it
21 went up, impacted upon your parking at the time?

22 A. At the time, no.

23 Q. Does it impact upon your ability to use
24 the property in the future?

25 The tower being there now, does it impact

1 your ability to use that corner of the property in
2 the future?

3 A. Yes, absolutely.

4 Q. How would it impact you?

5 A. Well, you never know what you're going to
6 use property for. I'm in a situation right now where
7 we have a ditch to fill in for another franchise that
8 we're acquiring. And I didn't use that property for
9 15 years. Based on that, I would've never known
10 that, if I filled it in, that I could use it and put
11 a service department on it. At some point, you don't
12 know. The only thing you know is you own it; you
13 don't know what the use is. Thank God we had it.

14 Q. Mr. Baker, are you also asking The Court
15 to award you attorney's fees in connection with
16 this --

17 A. Yes.

18 Q. -- action?

19 A. Yes.

20 MR. WILLIAM BARR: Your Honor, for The
21 Court's edification, section 14.11 of the lease
22 provides that the central parties entitled to receive
23 attorney's fees in this matter. I've prepared an
24 attorney's fees affidavit that I would like to mark.

25 (DFT. EXH. 20, Affidavit, was marked for

1 identification.)

2 BY MR. WILLIAM BARR:

3 Q. I believe also, Mr. Baker, that this
4 affidavit also reflects that there's some costs
5 you've incurred. Basically, you're asking The Court
6 to reimburse -- have Mr. Hiers reimburse you for the
7 defense of this action?

8 A. Yes.

9 Q. What is your financial arrangement with me
10 as your attorney?

11 A. Well, Bill, you want the world to know
12 this?

13 Q. We have to put it on the record.

14 A. On the record, you charge \$200 an hour for
15 your services.

16 Q. That's what the statement that is attached
17 to the attorney's fees affidavit requests?

18 A. Yes.

19 Q. We have introduced various exhibits into
20 the record. This is Plaintiff's Exhibit 6 which is
21 an initial sketch of the area that was going to be
22 used for parking. And then later on, there was an
23 LS3P plan. And I'm going to show you the reduced
24 version that showed the area that was going to be
25 used for parking. Did you consider that sketch or

1 the LS3P plans as limiting your ability to utilize
2 the entire property for parking?

3 A. Yes.

4 Q. It did limit or it did not?

5 A. Did not.

6 MR. WILLIAM BARR: I have no further
7 questions.

8 CROSS-EXAMINATION

9 BY MR. HOWE:

10 Q. As I understand it, what happened was, as
11 Baker Motors was growing, your need for parking grew;
12 correct?

13 A. Yes.

14 Q. And the way that you needed to accommodate
15 that parking for Baker Motors was through the parking
16 lot at this site; is that correct?

17 A. Yes.

18 Q. And that is, in fact, what you've done?

19 A. Yes.

20 Q. And the tower that's there has not
21 interfered at all with any of the parking on any of
22 the sites?

23 A. For the time being, yes.

24 Q. Your testimony is, basically, you just
25 really don't know what the future brings?

1 A. I don't think anybody does.

2 Q. That's right. Neither do you today, do
3 you?

4 A. No, sir.

5 Q. It would be speculation to try to say what
6 it is?

7 A. Right.

8 Q. And you did agree to that? You said
9 right?

10 A. I did.

11 Q. I guess you at a point met with
12 Mr. Cochran, and he did the negotiations. We have
13 been through that; correct?

14 A. That's correct.

15 Q. You agree his goal and your goal was to
16 get as many spaces as you could, economically
17 feasible, on that piece of property?

18 A. That was part of the goal. The other part
19 was to secure the total property, 1.2 acres.

20 Q. The only damage that you contend, at some
21 point in the future, you might be able to expand into
22 that other little piece; is that correct?

23 A. I don't know that it's the only. For the
24 moment, I think that is, yes.

25 Q. To do that, you would need Mr. Hiers'

1 approval, wouldn't you?

2 A. Yes.

3 Q. You don't know if you can get that or not,
4 do you?

5 A. I think it's part of the process, thank
6 you.

7 Q. You don't know that you can get that, do
8 you?

9 A. I don't know that it's not going to rain
10 today either.

11 Q. You don't know that the city would approve
12 it either, do you?

13 A. Don't know that.

14 Q. You don't know that it would make any
15 economic sense?

16 A. That would be for a future determination.

17 Q. You haven't run any numbers to see if it
18 would make any economic sense?

19 A. There's no need for the moment.

20 Q. When the tower went up, no one on your
21 behalf ever voiced any opposition to Mr. Hiers or
22 anybody to say, yikes, what's that 160-foot tower
23 doing going up, did they?

24 A. I had no idea.

25 Q. You didn't even know it was there until

1 Mr. Bailey told you some year-and-a-half or two years
2 after it was up?

3 A. Don't know that I recall that.

4 Q. The first time you found out was when
5 Mr. Bailey told you; correct?

6 A. I think that's right, yes.

7 Q. He found it out in connection with doing
8 some work about y'all were buying the property?

9 A. Right.

10 Q. The tower being there hadn't interfered
11 with anything in your daily life at all up to that
12 point, had it?

13 A. I don't know that's the point. I think
14 the point --

15 Q. That's the question, Mr. Baker.

16 A. All right.

17 Q. The question is: The tower hadn't
18 interfered with anything in your life up to that
19 point. You didn't even know it was there. Wasn't
20 even on your radar, was it?

21 A. No.

22 Q. You can see it from Baker Motors, can't
23 you? You can see it from Highway 17, can't you?

24 A. I've never looked back there to see
25 whether it was there or not.

1 Q. You certainly can't miss it if you go down
2 to the parking lot, can you?

3 A. If you go down the parking lot, you're
4 right.

5 Q. I think this is clear. I want to make
6 sure. Your company went and got the design from
7 LS3P; correct?

8 A. Yes.

9 Q. You paid for that design?

10 A. Yes.

11 Q. That was the design that was approved by
12 the city?

13 A. Yes.

14 Q. And that approval by the city was prior to
15 the signing of the lease?

16 A. Yes.

17 Q. No memorandum of lease was filed by
18 Magnolia Paradigm in connection with your lease?

19 A. I don't know that.

20 Q. Do you have any evidence that it was
21 filed?

22 A. No.

23 MR. HOWE: That's all the questions I
24 have?

25

REDIRECT EXAMINATION

1 BY MR. WILLIAM BARR:

2 Q. Mr. Baker, you were getting ready to
3 answer a question for Mr. Howe whether or not the
4 tower interfered in your daily activities. You
5 indicated, I think you said that's not the point.
6 Mr. Howe interrupted and said: That's the question.

7 What is the point, Mr. Baker?

8 A. I think the point is we leased 1.2 acres,
9 and we have adhered to everything that we agreed
10 upon. And the point is we would -- there's a
11 possibility that we have future use of that property.
12 We're denied that because of the cell tower.

13 MR. WILLIAM BARR: Thank you, sir. No
14 questions.

15 MR. HOWE: Nothing else.

16 THE COURT: Mr. Baker, what do y'all use
17 this for? Employee parking?

18 THE WITNESS: Yes, sir.

19 THE COURT: Strictly employee parking?

20 THE WITNESS: Yes, sir.

21 THE COURT: Some note in there about not
22 for storage.

23 THE WITNESS: No.

24 THE COURT: When new cars come in, they're
25 not going back there.

1 THE WITNESS: We have another lot for that
2 down the street.

3 THE COURT: When your employees go to work
4 is when they would park down there and walk up to
5 wherever they're going on the site?

6 THE WITNESS: Yes, sir.

7 THE COURT: I guess what I'm quizzical
8 about, the cell tower itself was not brought to your
9 attention --

10 THE WITNESS: No, sir.

11 THE COURT: -- until a potential purchase
12 of the property?

13 THE WITNESS: Yes, sir.

14 THE COURT: At that point in time is when
15 all this --

16 THE WITNESS: Yes, sir.

17 THE COURT: -- generated. But it had been
18 for -- I'm still not sure on the timing. Was it a
19 number of years, number of months, do you know?

20 THE WITNESS: I really don't.

21 THE COURT: The numbers that we've got in
22 the record are numbers that y'all have run based on
23 your experience and what they provided to you, I
24 assume, in discovery. That's how we come up with the
25 number that you have.

1 THE WITNESS: Yes, sir.

2 THE COURT: Is it your intention -- I'm
3 going to ask this of both parties. So long as I got
4 you here, may as well ask you. Is it your intention
5 to fulfill the terms of the lease agreement as you
6 understand it to be today and into the future for
7 whatever the period of time is?

8 THE WITNESS: Yes, sir.

9 THE COURT: Thank you, Mr. Baker. You may
10 step down.

11 Anything further? Do you have a question
12 for him?

13 FURTHER REDIRECT EXAMINATION

14 BY MR. WILLIAM BARR:

15 Q. You intend to honor the lease in the
16 future. Would you like The Court to allow you to
17 continue to abate the rent on account of the cell
18 tower?

19 A. Absolutely.

20 THE COURT: That was my question; continue
21 as you've done?

22 THE WITNESS: Yes, sir.

23 THE COURT: I'm with you.

24 Mr. Barr.

25 MR. WILLIAM BARR: If I could, Your Honor,

1 I would like to renew my motion for directed verdict.
2 Previously stated the ground. I'll try to do it
3 again, if you want me to. If not, I'll go on.

4 * * * * *

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CERTIFICATE OF REPORTER

I, Lora McDaniel, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to, nor counsel for, any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 7th day of January, 2013 at Charleston, Charleston County, South Carolina.

Lora L. McDaniel,
My Commission expires:
September 18, 2016

LEASE AGREEMENT

4/1/03 (w/ps) Hct
This LEASE AGREEMENT ("Lease"), made this 1st day of JUNE 2003, by and between 56 Leinbach Investors (hereinafter referred to as "Lessor" or "Landlord") and Magnolia Paradigm, Inc. (hereinafter referred to as "Lessee" or "Tenant").

WITNESSETH:

In consideration of the premises, the mutual covenants herein contained, the conditions and agreement to be kept and performed hereunder by the parties, Tenant hereby Leases and hires from Landlord certain space, hereinafter called "demised premises" located at Leinbach Drive City of Charleston, County of Charleston, South Carolina, which is approximately 1.2 acres of land, more particularly described as parcel H-2 of TMS# 349-01-00-045

ARTICLE 1

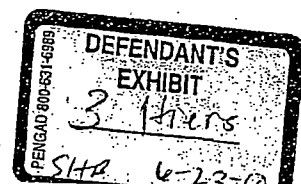
PREMISES

Section 1.01. Demised Premises. Subject to and with the benefit of the terms, covenants, conditions and provisions of this Lease, Landlord hereby demises and leases to Tenant, and Tenant hereby takes and leases from Landlord, certain premises (herein called the "Demised Premises") consisting of the real estate and any improvements located or to be located thereon described 1.21 acres of real estate located at Leinbach Dr. City of Charleston, State of South Carolina and as more particularly described as parcel H-2 of TMS# 349-01-00-045 to have and to hold during the Demised Term (as defined in Section 2.03).

Section 1.02. Parking. Throughout the Demised Term, Tenant and its employees shall have the exclusive right to use any parking areas within the Demised Premises.

Section 1.02. Use of Space. The demised premises shall be used by Tenant as parking for employees of Tenant or Baker Motor Company and for no other purposes without the prior written consent of Landlord. Tenant will not use the demised premises for the purpose of parking inventory or conducting sales. Tenant shall not do or permit to be done in or about the demised premises or bring or keep or permit to be brought or kept herein, anything which is prohibited by or will in any way conflict with any law, statute, ordinance or government rule or

"Exhibit A"



regulation now in force or which may hereafter be enacted or promulgated or which in any way increased the existing rate of or affect of any insurance.

ARTICLE II

TERMS AND RENEWALS

Section 2.01. Original Term. The "Original Term" of this Lease is for a period of 60 months, commencing on the ^{1st day of JUNE, 2003} 15th day of December, 2002 (the "Commencement Date") and ending at midnight on the 14th day of ^{JUNE} December 2008 or at such earlier date as this Lease may terminate as hereinafter provided.

Section 2.02. Renewals. So long as Tenant is not in default hereunder beyond any Applicable Grace Period, Landlord grants to Tenant options ("Option(s)") to extend the Original Term for three (3) additional renewal terms on the same terms and conditions as herein set forth except that there shall be no further Option to extend beyond the last Renewal Term. Should Tenant elect to exercise any Option, it shall do it so by written notice to Landlord at least on hundred eighty (180) days before the expiration of the Original Term or Renewal Term that is in effect at the time of such notice.

Section 2.03. Demised Term. The Original Term and any Renewal Terms for which an Option is exercised by Tenant are collectively referred to in this Lease as the "Demised Term."

Section 2.04. Holding Over. If Tenant remains in possession of the Demised Premises after the expiration of the Demised Term, it shall be deemed to be occupying the Demised Premises as a tenant from month to month at the Rent herein specified (prorated and paid on a monthly basis), subject to all conditions, provisions and obligations of this Lease insofar as the same are applicable to a month-to-month tenancy.

ARTICLE III

RENT

Section 3.01. Rent. Tenant shall pay to Landlord, without any prior demand therefore, the amount \$21,600.00 per annum (hereinafter referred to as the "Rent"), for the first three (3) years of the initial term, payable in advance in equal monthly installments on the first day of each

full month of the Demised Term after the Rent Commencement Date (as defined in Article V hereof), Three (3) years following the Lease Commencement Date, the \$1800 monthly rent shall increase at the rate of 3% annum. If the Rent Commencement Date is not the first day of a calendar month, Tenant shall, on the Rent Commencement Date, pay Landlord the pro rate portion of the Rent for the number of days from the Rent Commencement Date to the end of such fractional month. The Rent for any fractional month at the end of the Demised Term shall also be prorated. Prorations for any fractional month shall be made on the basis of a 365-day year regardless of the actual number of days in such fractional month.

Section 3.02. Payments. Rent checks shall be made payable to Landlord and mailed 56 Leinbach LLC, P.O. Box 31324 Charleston, SC 29417, or elsewhere as designated by Landlord from time to time in a written notice delivered to Tenant at least thirty (30) days prior to the effective date of such address change.

Section 3.03. Lease Year and Fractional Lease Year. The term "Lease Year" shall mean a period of twelve (12) consecutive calendar months, the first Lease Year commencing on the First January 1st following the commencement Date and each succeeding Lease Year commencing on the anniversary of the first Lease Year. The term "Fractional Lease Year" shall mean (i) the period from the Commencement Date through the first December 31st following the Commencement Date, or (ii) the period of the Demised Term subsequent to the last December 31st of the Demised Term, whether this Lease expires by its terms or otherwise.

Section 3.04. Net Lease. The Rent reserve herein shall be absolutely net to the Landlord so that this Lease shall yield net to the Landlord the Rent specified, and all costs, expense and obligations of every kind and nature whatsoever, whether now existing or hereafter arising, even if beyond the current contemplation of, the parties, shall be the obligation of and paid by the Tenant, except only for (i) any mortgage payments or related mortgage expenses of Landlord, (ii) taxes based on income assessed against Landlord, and (iii) taxes which are not specifically the obligation of the Tenant and which shall hereafter be imposed upon the Landlord by law, if any;

provided, however, that any tax assessment charge or imposition in lieu of any real estate tax or assessment on the Demised Premises shall be the obligation of Tenant.

ARTICLE IV

COMMENCEMENT DATE 2BB

The Demised Term of this Lease shall commence on JUNE 1, 2003

ARTICLE V

MAINTENANCE AND EQUIPMENT

Section 5.01. Construction of the Demised Premises. Any improvements on the Demised Premises will be constructed by Tenant, at Tenant's sole cost and expense. Tenant's plans and specifications for the improvements must first receive written approval by Landlord. Such approval shall not be unreasonably withheld.

Section 5.02. Tenant's Fixtures and Equipment. Any and all movable or removable fixtures, equipment and personally purchased by, belonging to or leased from third parties by Tenant and installed on the Demised Premises (whether or not affixed), are herein called "Tenant's Fixtures and Equipment." Tenant shall own all Tenant's Fixtures and Equipment to the exclusion of Landlord. So long as Tenant is not in monetary default under this Lease, Tenant shall have the right to remove all of Tenant's Fixtures and Equipment from the Demised Premises within thirty (30) day period, repair any damage Tenant caused to the Demised Premises by such removal.

Section 5.03. Demised Premises Maintenance. Tenant, at its sole cost and expense, shall keep the Demised Premises, including all portions of any building, equipment and landscaping, in good condition and repair throughout the Demised Term, reasonable wear and tear and the effects of time excepted. Tenant's obligation to keep the Demised Premises in good condition and repair shall include all necessary repairs, replacements and maintenance, whether ordinary or extraordinary and whether or not structural. All such work shall be done in a good and

workmanlike manner, and when completed, be free and clear of all claims for liens by mechanics or materialmen for and on account of labor and material furnished in connection therewith.

Section 5.04. Alterations by Tenant. Except as otherwise provided in this Lease, any alterations and additions to the Demised Premises that Tenant may deem necessary during the Demised Term may be made by Tenant, at Tenant's sole cost and expense, but Landlord's prior written consent shall be required for any structural or exterior alterations or additions. Landlord shall promptly sign and execute such documents or otherwise evidence its approval, consent or grant of authority, as required by any public authorities having jurisdiction thereover, to facilitate issuance to Tenant of necessary licenses or permits to make or perform any permissible alteration or addition.

Section 5.05. Entry by Landlord. Landlord may enter the Demised Premises upon reasonable notice to inspect same and, beginning six (6) months before the end of the Demised Term, to exhibit same to prospective tenants, so long as such entry does not interfere with Tenant's business activities. Landlord may enter the Demised Premises at any time in the event of an emergency. Landlord shall not display "For Rent," "For Sale" or other similar signs or notices on or about the Demised Premises.

Section 5.06. Improvements Become Landlord's Property. Subject to section 5.02, any and all buildings and improvements placed on the Demised Premises shall become the sole property of the Landlord upon the expiration or earlier termination for this Lease.

ARTICLE VI

USE

Section 6.01. Use: The demised premises shall be used by Tenant and Baker Motor Company as parking for employees of Tenant and for no other purposes without the prior written consent of Landlord. Tenant will not use the demised premises for the purpose of parking inventory or conducting sales. Tenant shall be responsible for (i) obtaining any required licenses and permits issuable by applicable governmental authorities for Tenant's operations in the Demised Premises, and (ii) complying with all laws concerning the cleanliness, safety and

operation of the Demised Premises. Tenant may in good faith, after notifying Landlord, contest the validity or application of any law and delay compliance therewith pending the outcome of such contest, provided no civil or criminal penalty would be incurred by Landlord and no lien or charge would be imposed upon or satisfied out of the Demised Premises due to such delay.

Section 6.02. Maintenance. Tenant shall maintain its business at the Demised Premises in accordance with the same standards of operation and in the same quality as Baker Motor Company operates its dealerships. Tenant shall not cause injury or waste to the Demised Premises, reasonable wear and tear excepted. Tenant shall keep the Demised Premises clean and free from rubbish, trash and garbage, and, at its own expense, arrange for removal of same. Tenant shall store all such rubbish, trash and garbage within the Demised Premises.

7 Section 6.03. Landlord Interference. Landlord shall use its best efforts to not interfere with Tenant's operations. If Landlord creates a condition that substantially interferes with the normal use of the Demised Premises or appurtenant parking or service areas as allowed herein, the Rent and other charges due hereunder shall be abated during the time such interference persists, but such abatement shall not continue beyond the time at which such interference persists regardless of any delay by Tenant in resuming normal operations after that time. This Section 6.03 shall be subject to Section 16.09 hereof, and Landlord shall be excused to the extent that Landlord's compliance with this Section 6.03 is prevented by any of the causes specified in Section 16.09.

ARTICLE VII

UTILITY SERVICES

Tenant shall be responsible, at Tenant's expense, for obtaining utilities in the amounts, sizes and pressures as needed by Tenant in the operation of its business on the Demised Premises. Tenant shall pay for all utility usage by Tenant in the Demised Premises during the Demised Term.

ARTICLE VIII

INSURANCE, TAXES AND LIABILITY

Section 8.01. Insurance.

A. Liability Insurance. Tenant shall maintain comprehensive Commercial General Liability insurance on the Demised Premises and all buildings and improvements located thereon, with limits of at least \$1,000,000.00 for each occurrence, bodily injury and property damage combined, protecting Landlord and Tenant against loss, cost or expense by reason of injury to or death of persons or damage to or destruction of property by reason of the use and occupancy of the Demised Premises by Tenant and its invitees.

B. Fire Insurance - Improvements. Tenant shall maintain Special Form Insurance (previously known as "all-risk" fire and extended coverage insurance) on all improvements constructed by Tenant on the Demised Premises (excluding footings, foundations, paved areas and Tenant's Fixtures and Equipment) in amounts equal to one hundred percent (100%) of their full replacement cost, including Builder's Risk Insurance.

C. General Policy Requirements. The insurance provided by Tenant pursuant to this Section 8.01 shall (i) be carried with reputable companies licensed to do business in the State in which the Demised Premises is located, (ii) name Landlord as an additional insured and (iii) not be subject to change, cancellation or termination without at least ten (10) days' prior written notice to Landlord.

D. Blanket Policies. The insurance required to be carried pursuant to this Section 8.01 may be carried under policies of a blanket insurance that may cover other liabilities and locations; provide, however, in all other respects each of such policies shall comply with the provisions of this Section 8.01 without any diminution or dilution of coverage.

Section 8.02. Taxes.

A. Tenant's Obligation. Tenant shall pay all real estate, personal property and use taxes and assessments that accrue during the Demised Term on the Demised Premises, any

improvements thereon and any personal property therein (and all taxes and assessments that are imposed in lieu of the foregoing).

B. Payment of Taxes. Tenant agrees to pay all Real Estate Taxes prior to their due date, provided that statements for such taxes and copies of the actual tax bills are received by Tenant so as to permit timely payment. If the Demised Premises is separately assessed and local practice permits, Landlord shall cause the taxing authority to send the bill for the Real Estate Taxes on the Demised Premises to Tenant, and Tenant shall pay directly to the taxing authority the Real Estate Taxes on the Demised Premises. If the taxing authority requires that payment be made by Landlord, Tenant shall pay to Landlord the amount of Tenant's tax obligation prior to the date on which such taxes are due. If the tax statement for the Real Estate Taxes on the Demised Premises is sent to Landlord, Landlord shall forward the statement to Tenant promptly. Tenant shall not be liable for any penalties, surcharges or interest that may be incurred by Landlord or result from Landlord's failure to forward any tax bill to Tenant at least twenty (20) days before date due. Landlord or Tenant shall, within thirty (30) days after written request from the other, provide satisfactory evidence of such payment. Landlord and Tenant may take the benefit of any law allowing taxes or assessments to be paid in installment payment.

C. Landlord's Obligation. Nothing contained in this Section 8.02 shall be construed so as to require Tenant to pay or be liable for any gift, inheritance, estate, franchise, succession, transfer, income, profits, capital or similar tax, or any tax in lieu of any of the foregoing, imposed upon Landlord or the successors or assigns of Landlord.

D. Timing. Payment of taxes, assessments and the like as required hereunder shall be deemed to be timely if made within the period in which payment is permitted without penalty (whether or not interest accrues on the unpaid balance). Landlord or Tenant shall, within thirty (30) days after written request from the other provide satisfactory evidence of such payment. Landlord and Tenant may take the benefit of any law allowing taxes or assessments to be paid in installments.

E. Proration. Real Estate taxes and assessments for which tenant is responsible shall be prorated between Landlord and Tenant as of the end of the Demised Term. For the Lease Year or Fractional Lease Year in which the Demised Term ends, taxes shall be prorated on the basis of one hundred percent (100%) of the previous Lease Year's taxes. Upon final assessment of taxes for the year of termination, the tax proration will be adjusted to reflect the tax obligation of Tenant. If an assessment that is payable in periodic installments is levied on the Demised Premises, Tenant shall pay only those installments that are attributable to the Demised Term.

F. Right to Contest. Tenant may in good faith, by appropriate proceedings and at Tenant's expense, contest any taxes, assessments or similar items, provided that Tenant shall provide Landlord with security reasonably satisfactory to Landlord; or at Tenant's election, where such procedure is provided for by law, Tenant may pay such items under protest or make proper deposit in court. When any such contested items shall have been paid or canceled, any security so deposited to cover them shall be repaid to Tenant. Any documents required to enable Tenant to effect the foregoing shall be executed and delivered by Landlord on reasonable demand and in default thereof Tenant may execute the same as attorney-in-fact of Landlord.

Section 8.03. Mutual Waiver of Subrogation. Landlord and Tenant and their successors in interest hereby waive any legal rights each may later acquire against the other party during the Demised Term for the loss of or damage to their respective property or to property in which they may have an interest, which loss or damage is caused by an insured hazard arising out of or in connection with the Demised Premises.

Section 8.04. Indemnification of Landlord. Tenant covenants to defend and save the Landlord harmless from any and all claims, demands, caused of action, suits, judgments, damages, losses and expenses, including reasonable attorney's fees and costs of court, including, without limitation, loss or damage which may occur with respect to any person or persons, corporation, property or chattels on the Demised Premises, or to the property itself, resulting from Tenant's acts or omissions and the acts and omissions of others, except (i) when such loss results from a default by Landlord under this Lease or the willful conduct or negligent act or omission of

Landlord, its agents, employees, independent contractors or invites, or (ii) to the extent of any insurance proceeds received (or receivable) by Landlord or payable under Landlord's insurance as a result of Landlord's contributory culpability. With respect to any loss from which Landlord claims Tenant is required to hold Landlord harmless, Landlord shall notify Tenant of (a) any acts or omissions causing such loss, such notification to be made within ten (10) days after Landlord becomes aware of the occurrence of such acts or omissions, and (b) any proceedings initiated in connection with such acts or omissions such acts or omissions, such notification to be made no later than ten (10) days after Landlord becomes aware of the initiation of such proceedings or twenty (20) days prior to the date by which any initial response must be made in such proceedings, whichever comes first. Tenant shall have the right to select and direct the attorneys handling such proceedings. Tenant's obligations under this Section 9.04 shall be released to the extent that Tenant is prejudiced by Landlord's failure to give timely notice.

Section 8.05. Liens. Tenant shall use its best efforts to prevent the creation of any lien against the Demised Premises on account of labor or material furnished in connection with any construction, maintenance, repairs or alterations each shall undertake. If any such lien is filed against the Demised Premises, Tenant shall cause such lien to be released within ninety (90) days after actual notice of the filing thereof or shall furnish to Landlord a bond or other security reasonably satisfactory to Landlord, conditioned to indemnify Landlord against the foreclosure of such lien. Tenant shall have the right, after notice to Landlord, to contest in good faith and with all due diligence any such lien and shall not be required to pay any claim secured by such lien; provided that (i) such lien would not impair the rights or be satisfied out of the interest of Landlord in the Demised Premises by reason of such delay and (ii) Tenant will at its expense defend Landlord and pay all costs reasonably incurred by Landlord relating to the contest if Landlord is joined in any suit pertaining thereto or if any lien is placed upon the other's interest in the Demised Premises.

ARTICLE IX

DEFAULT AND REMEDIES

Section 9.01. Rights of Tenant's Default. If Tenant fails to perform any of its obligations as required by this Lease, and if Tenant fails to cure such failure within the Applicable Grace Period (as defined in Section 9.03), Landlord, in addition to all other rights and remedies available to Landlord under applicable law, may, at Landlord's option, elect the following remedies:

- (i) Landlord shall have the right to take possession of the Demised Premises (without such action being deemed an acceptance of a surrender of this Lease or termination of Tenant's liability hereunder) and, upon taking possession, Landlord shall make reasonable efforts to relet the same on reasonable terms, with Tenant remaining liable to pay Rent, real estate taxes and other leasehold charges or obligations for the remainder of the Demised Term less the net amount realized from such reletting, if any; or
- (ii) Landlord shall have the right to terminate this Lease, thereby releasing Tenant from any further liabilities hereunder.

In the event that Tenant:

- (a) is adjudicated as bankrupt;
- (b) has a receiver in equity appointed for its property and the appointment of such trustee is not set aside within one hundred twenty (120) days;
- (c) has a trustee in reorganization appointed for its property and the appointment of such trustee is not set aside within one hundred twenty (120) days;
- (d) files a voluntary petition for reorganization or arrangement under any state or federal bankruptcy or insolvency laws; or
- (e) files a voluntary petition in bankruptcy or a petition to take advantage of any insolvency laws;

then, in any of such events, the Landlord may terminate this Lease and immediately take possession of the Demised Premises, using such force as may be necessary without being deemed guilty of trespass or forcible entry. The grace periods specified in subparts (b) and (c) above shall not apply unless all payments by Tenant under this Lease are current. Should the sum realized from any reletting hereunder be less than the Rent, Tenant shall pay such deficiency each month upon demand therefore. No act of Landlord shall be deemed an act terminating this Lease or declaring the Demised Term ended unless notice is served upon Tenant by Landlord expressly setting forth therein that Landlord elects to terminate this Lease or declare the term ended.

Section 9.02. Default by Landlord. If Landlord shall fail to perform any of its obligations as required by the Lease, and if Landlord shall fail to cure such failure within the Applicable Grace Period, then Tenant shall have its rights and remedies at law or in equity.

Section 9.03. Applicable Grace Period. Except as may be provided elsewhere in this Lease, the grace period for curing a party's failure to perform its obligations under this Lease (the "Applicable Grace Period") shall be one of the following time periods:

- (i) for failure to perform any covenant to pay money or for any breach that adversely affects the normal operation of Tenant's business at the Demised Premises ten business (10) days after the non-performing or breaching party's receipt of notice from the other party specifying such non-performance or breach; and
- (ii) for failure to perform any other obligation under this Lease, thirty (30) day period, institutes efforts to cure said non-performance and diligently prosecutes said efforts to completion.

Section 9.04. DEFICIENCY. Notwithstanding anything hereinabove to the contrary, in any case where Landlord has recovered possession of the Premises by reason of Tenant's default, Landlord may, at Landlord's option, occupy the Premises or cause the Premises to be

redecorated, altered, divided, consolidated with other adjoining premises, or otherwise changed or prepared for reletting, and may relet the Premises or any part thereof as agent of tenant or otherwise, for a term or terms to expire prior to, at the same time as, or subsequent to, the original expiration date of this Lease, at Landlord's option and receive the rent therefore. Rent so received shall be applied first to the payment of such reasonable expenses a Landlord may have incurred in connection with the recovery of possession, redecorating, altering, dividing, consolidating with other adjoining premises, or otherwise changing or preparing for reletting, and the reletting, including brokerage and reasonable attorney's fees, and then to the payment of damages in amounts equal to the rent hereunder and to the costs and expenses of performance of the other covenants of Tenant as herein provided. Tenant agrees, in any such case, whether or not Landlord has relet, to pay to the Landlord damages equal to the base and additional rent and other sums herein agreed to be paid by Tenant, less the net proceeds of the reletting, if any, as ascertained from time to time, and the same shall be payable by Tenant on the several rent days above specified. Tenant shall not be entitled to any surplus accruing as a result of any such reletting. In reletting the Premises as aforesaid, Landlord may grant rent concessions, and Tenant shall not be credited therewith. No such reletting shall constitute a surrender and acceptance or be deemed evidence thereof. If Landlord elects, pursuant hereto, actually to occupy and use the Premises or any part thereof during any part thereof during any part of the balance of the term as originally fixed or since extended, there shall be allowed against Tenant's obligation for rent or damages as herein defined, during the period of Landlord's occupancy, the reasonable value of such occupancy, not to exceed in any event the basic and additional rent herein reserved and such occupancy shall not be construed as a release of Tenant's liability hereunder.

Landlord's remedies hereunder are in addition to any remedy allowed by law. Landlord reserves the right of re-entry in the event of any breach of Tenant of any provisions of the Lease.

Section 9.05. Additional Landlord's Remedies. If Tenant defaults in the payment of rent, or additional rent, or defaults in the performance of any of the other covenants or conditions

hereof, Landlord shall give Tenant notice of such default, and if Tenant does not cure any rent, or additional rent or other default within ten (10) days, after the giving of such notice (or if such other default is of such nature that it cannot be completely cured within such period, if Tenant does not commence such curing within such ten (10) days and thereafter proceed with reasonable diligence and in good faith to cure such default), then Landlord may terminate this Lease on not less than twenty (20) days notice to Tenant, and on the date specified in said notice, Tenant's

right to possession of the premises shall cease, and Tenant shall then quit and surrender the Premises to Landlord, but Tenant shall remain liable as hereinafter provided. Non-payment of rent as used herein includes non-payment of additional rent items. If this Lease shall have been so terminated by Landlord, Landlord may, at any time thereafter, resume possession of the Premises by any lawful means, including but not limited to summary dispossession actions and remove Tenant or other occupants and their effects.

ARTICLE X

DAMAGE TO DEMISED PREMISES

Section 10.01. Restoration of the Demised Premises. If the improvements on the Demised Premises are damaged or destroyed during the Demised Term, then, except as otherwise provided in Section 10.02 hereof, Tenant, at its sole cost and expense, shall repair, restore or rebuild the improvements constructed by Tenant on the Demised Premises to substantially the condition they were in immediately prior to such damage or destruction, repair, restoration or rebuilding shall be performed with due diligence in a good and workmanlike manner and in accordance with applicable law and plans and specifications for such work reasonably approved by Landlord and Tenant.

Section 10.02. Option Not to Restore. Notwithstanding Section 10.01 hereof, if during the last two years of the Original Term or during the last two (2) years of any of any Renewal Term the Demised Premises is damaged in an amount equal to fifty percent (50%) or more of the replacement cost of the improvements constructed by Tenant on the Demised Premises (exclusive of footings, foundations and paved areas), Tenant may terminate this Lease by giving Landlord

written notice of termination within sixty (60) days after the occurrence of such damage or destruction. Upon termination of this Lease by Tenant, any unearned rent or other charges paid in advance by Tenant shall be refunded to Tenant, Landlord shall be entitled to receive any and all property insurance proceeds paid with respect to any fire and extended coverage insurance required under Section 8.01(B) hereof and the parties shall be released hereunder, each to the other, from all liability and obligations thereafter arising.

Section 10.03 Property Insurance Proceeds. All proceeds of fire and extended coverage insurance collected as a result of any casualty to the improvements on the Demised Premises shall be held by the insurance carrier or, at Tenant's election exercised by notice to such insurance carrier and Landlord, by an independent escrow agent, as the case may be, in progress payments to Tenant for the purpose of reimbursing Tenant for its cost of restoring the Demised Premises. Notwithstanding the foregoing, any such proceeds in an amount less than Fifty Thousand Dollars (\$50,000.00) shall be disbursed to Tenant for the purpose of making necessary repairs.

ARTICLE XI

EMINENT DOMAIN

Section 11.01. The Taking. If Landlord receives notice of the intention of any authority to appropriate, take or condemn any portion of the Demised Premises for public or quasi-public use under any right of eminent domain, condemnation or other law (collectively, a "Taking"), Landlord shall promptly notify Tenant thereof. In the event of such Taking or like proceeding, the parties shall represent their own interests and shall present and prosecute their own claims for damages insofar as possible. ~~If the parties are not permitted to proceed as separate parties, they shall jointly select counsel to present and prosecute their claim, and all costs thereof shall be paid by the parties in proportion to the amount of the award, settlement or sale proceeds that each receives.~~

Section 11.02. Settlement. Any apportionment of the final award or settlement of damages entered into by Landlord and Tenant with the authority over a Taking shall be binding

upon the parties. If no such apportionment is made, then the parties shall agree on the value of their respective interests and distribution shall be made in accordance with such agreement. If the parties are unable to agree on the value of their respective interests, the parties agree to proceed forthwith to arbitrate the issue in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The decision of the arbiter shall be binding unless within thirty (30) days after such decision is made either Landlord or Tenant files suit in a court of competent jurisdiction to litigate the value of the parties' interests. In such event the arbitration shall be of no force or effect and the cost of the arbitration, as well as the cost of the litigation (including reasonable attorney's fees), shall be paid by the non-prevailing party in the litigation.

Section 11.03. Tenant's Option. Tenant shall have the right to receive an award or settlement of damages as aforesaid and the option to terminate this Lease upon sixty (60) days notice to Landlord if such Taking or sale results in (i) a limitation of access to the Demised Premises preventing or materially affecting the operation of Tenant's business at the Demised Premises, unless Landlord provides alternate access that is reasonably acceptable to Tenant; (ii) the loss of all or a portion of the parking area of the Demised Premises, which loss prevents or substantially affects the operation of Tenant's business in the Demised Premises, unless Landlord provides substitute parking spaces that are located on land contiguous to the Demised Premises and reasonably acceptable to Tenant; or (iii) the remaining portion of the Demised Premises being in, Tenant's reasonable judgment, unusable by Tenant in the operation of its business.

Section 11.04. Allocation of Award. In any allocation of awards, Landlord shall be entitled to receipt of the fair market value of the Land and a proportionate amount of the fair market value of all improvements based upon the proportionality obtained by dividing the number of years remaining in the term of the Lease by the Lease Term. As for an example of the foregoing, say the fair market value of the improvements at the time of taking is \$1,000,000.00 and there are fifteen (15) year remaining in the thirty (30) year term. In that event, Landlord would be entitled to \$500,000.00 of the award respecting the improvements in addition to the fair market value for the Land.

Section 11.05. Partial Taking. If any such Taking is less than described in Section 11.03 hereof or if Tenant elects not to terminate this Lease in accordance with Section 11.03 hereof, this Lease shall continue and Tenant shall proceed diligently to restore the Demised Premises. All proceeds from the award, settlement or sale (including any proceeds payable to the Landlord) shall first be applied to restoration of the Demised Premises and thereafter as described in Section 11.01. If, for any reason, such proceeds are not made available to Tenant for such restoration, Tenant shall have the right to terminate this Lease without further obligation.

Section 11.06. Temporary Taking. If a Taking shall be for a period of less than six (6) months, this Lease shall continue in full force and effect, the Rent and other charges shall not abate, and any award or settlement shall belong solely to Tenant.

Section 11.07. More than One Taking. If more than one Taking occurs during the Demised Term, the rights of the parties shall be determined as if all such Takings had all occurred at the time of the last Taking, and the effect of all such Takings shall be considered cumulatively.

ARTICLE XII

TITLE TO PREMISES

Landlord represents and warrants that Landlord has full right, power and lawful authority to execute, deliver and perform its obligations under this Lease, in the manner and upon the terms contained herein, and to grant the estate herein demised, with no other person needing to join in the execution hereof in order for this Lease to be binding on all parties having an interest in the Demised Premises; that the Demised Premises shall hereafter be subject to no leases, easements, covenants, restrictions or the like which in any manner would prevent or interfere with Tenant and defend the Demised Premises against the claim of all persons claiming by, through or under Landlord, and if Tenant shall discharge the obligations herein set forth to be performed by Tenant, Tenant shall, during the Demised Term, have lawful, quiet and peaceful possession and occupation of the Demised Premises and shall enjoy all the rights herein granted without any let, hindrance, ejection, molestation or interference by any person. The person(s) required to execute this Lease in order to bind Landlord. Landlord shall indemnify and hold Tenant harmless from and

against any and all claims, actions, demands, losses, costs, expenses, liabilities and judgments arising in connection with a material breach of any of Landlord's representation, warranties or covenants in this Lease. If Tenant is made a party to any litigation in connection with any such representation, warranty or covenant of Landlord, Landlord shall defend and hold Tenant harmless from all damages, losses, costs, expenses and reasonable attorneys' fees paid or incurred in connection therewith.

ARTICLE XIII

ASSIGNMENT AND SUBLETTING

A. Tenant covenants and agrees not to assign this Lease or to sublease the whole or any part of the Demised Premises or to permit any other persons to occupy same without the prior written consent of Landlord, references elsewhere herein to assignees or subleases notwithstanding. Tenant shall provide Landlord with notice of any such assignment, with a written assumption of the obligations of the Tenant hereunder by a permitted assignee. Tenant shall not be released from any further liability or obligation under this Lease. Landlord's consent to any assignment or subletting shall not constitute a waiver of the necessity for such consent to any subsequent assignment or subletting. The acceptance of rent from any other person shall not be deemed to be a waiver of any of the provisions of this Lease or to be a consent to the assignment of this Lease or subletting of the Demised Premises. Any transfer of ownership interest in Tenant by merger, consolidation, or sale of stock or transfer of a partnership or limited partnership or limited liability company membership interest shall constitute an assignment for the purpose of this Lease and shall require the prior written consent of the Landlord.

B. In the event of any assignment expressly approved by the Landlord, Tenant shall nevertheless remain liable for all of its obligations under the Lease.

C. In the event of the transfer and assignment by Landlord of its interest in this Lease and in the building containing the Demised Premises to a person or other entity expressly assuming Landlord's obligations under this Lease, Landlord shall thereby be released from any

subsequent responsibility hereunder and Tenant agrees to look solely to such successor-in-interest of Landlord for performance of such obligations.

D. Notwithstanding anything hereinabove to the contrary, and so long as Tenant is not in default hereunder, Tenant, on notice to the Landlord, shall have the right to assign this Lease to a Corporation or Limited Liability Company or similar entity in which Tenant is a principal, provided, however, Tenant shall remain liable for performance of the terms, provisions and obligations hereunder.

ARTICLE XIV

MISCELLANEOUS

Section 14.01. Waivers. No waiver of any condition or covenant in this Lease by either party shall be deemed to imply or constitute a future waiver of the same or any other condition of this Lease.

Section 14.02. Notices. Unless otherwise provided in this Lease, all notices required under this Lease to Landlord or Tenant shall be in writing and shall be addressed to the addresses indicated in Section 3.02 of this Lease hereof or to any subsequent address which Landlord or Tenant may designate in writing delivered at least thirty (30) days in advance to the other party for such purpose. Invoices, bills and the like from Landlord to Tenant shall be sent to the attention of the Treasurer of Tenant and all other notices from Landlord to Tenant shall be sent to the attention of the Treasurer of Tenant and all other notices from Landlord to Tenant shall be sent to the attention of Tenant's General Counsel. All notices shall be deemed to be properly served if delivered to the appropriate address by hand delivery, registered or certified mail (with postage prepaid and return receipt requested), or courier, telegram, electronic transmission or similar methods of communication (provided that there is independent verification of delivery). Date of service of a notice served by mail shall be the date of posting; otherwise the date of refusal of receipt.

Section 14.03 Relationship of Parties. Nothing contained herein shall be deemed or construed by the parties hereto, nor by any third party, as creating the relationship of principal and

agent, partnership, joint venture, or any relationship between the parties hereto other than that of the landlord and tenant.

Section 14.04. Construction. Whenever a word appears herein in its singular form, such word shall include the plural; and the masculine gender shall include the feminine and neuter genders. This Lease shall be construed without reference to titles of Articles, Sections or Clauses, which titles are inserted for convenient reference only. References to specific Articles, Sections or Exhibits shall, unless otherwise expressly stated, refer to the Articles, Sections or Exhibits of this Lease. This Lease shall be construed without regard to any presumption or other rule permitting construction against the party causing this Lease to be drafted and shall not be construed more strictly in favor of or against either of the parties hereto.

Section 14.05. Certificate of Performance. At any time, either party shall, within twenty (20) days after receipt of a written request from the other, execute, acknowledge and deliver a statement in writing certifying whether this Lease is unmodified and in full force and effect (or if modified, whether the same is in full force and effect as so modified), whether any conditions to the full enforceability of this Lease remain unsatisfied, the dates to which rent, charges or other performances have been paid or completed, and such other facts, including the nature any claim of default on the part of the other, as either party may reasonably request.

Section 14.06. Governing Law. This Lease shall be construed and enforced in accordance with the laws of the State of South Carolina in which the Demised Premises is located.

Section 14.07. Invalidity or Inapplicability of Clause. If any term or provision of this Lease or the application thereof to any person or circumstances shall, to any extent, be invalid or unenforceable, the remainder of this Lease, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term and provision of this Lease shall be valid and enforceable to the fullest extent permitted by law.

Section 14.08. Excuse for Nonperformance. If either party hereto shall be delayed or prevented from the performance of any act required hereunder by reason of acts of God, strikes, lockouts, labor troubles, plan approval delay, inability to procure materials, restrictive governmental laws or regulations, adverse weather, unusual delay in transportation, delay by the other party hereto or other cause without fault and beyond the control of the party obligated to perform (financial inability excepted), then upon notice to the other party, the performance of such act shall be excused for the period of the delay and the period for the performance of such act shall be extended for a period equal to the period of such delay; provided, however, the party so delayed or prevented from performing shall exercise good faith efforts to remedy any such cause of delay or cause preventing performance, and nothing in this Section shall excuse Tenant from the prompt payment of any rental or other charges required of Tenant except as may be expressly provided elsewhere in this Lease.

Section 14.9. Successors or Assigns. Except as otherwise specified in this Lease, the provisions contained in this Lease shall run with the land and bind and inure to the benefit of Landlord and Tenant and their respective heirs, successors and assigns.

Section 14.10. Disputes. If at any time a dispute shall arise as to any amount or sum of money to be paid by one party to the other or any work to be performed by either of them under the provisions hereof, the party against whom the obligation to pay or to perform is asserted shall have the right to make payment or perform such work and pay the cost thereof "under protest," and such payment or performance shall not be regarded as a voluntary payment or performance and the right of said party to institute suit to recover the amount paid "under protest" or so much thereof as it was not legally required to pay under the provisions of this Lease, plus interest thereon at the Interest Rate specified in Section 16.13 hereof, from the date on which such payment was made until the date on which reimbursement is received.

Section 14.11. Attorney's Fees. If Landlord or Tenant brings an action at law or equity against the other in order to enforce the provision of this Lease or as a result of an alleged default

under this Lease, the prevailing party in such action shall be entitled to recover reasonable attorney's fees from the other.

Section 14.12. Interest Rate. Except where a different rate of interest is expressly provided for elsewhere in this Lease, whenever any interest is payable by Tenant to Landlord or Landlord to Tenant under this Lease, such interest shall be paid at an annual rate (the "Interest Rate") equal to the lesser of (i) the prime interest rate plus two percent (2%), or (ii) the highest interest rate permitted by law.

Section 14.13. Entire Agreement Representations. This Lease embodies the entire agreement between Landlord and Tenant with respect to the subject matter hereof and supersedes all prior agreements and understandings, whether written or oral. Landlord and Tenant have neither made nor relied upon any promises, representations or warranties in connection with this Lease that are not expressly set forth in this Lease. In entering into this Lease, Landlord and Tenant have relied on the representation and warranties contained in this Lease.

Section 14.14. Modification. This Lease may not be modified except by a written agreement signed by the party against whom such modification is sought to be enforced.

Section 14.15. Broker Representations. Except as otherwise set forth herein, Landlord and Tenant represent and warrant that they have not dealt with any real estate agent or broker in connection with this transaction, and each agrees to indemnify and save the other harmless from and against all liability, damage, loss, cost and expense incurred by reason of the indemnitor's breach of said representation and warranty. Landlord does hereby agree to pay by separate agreement Carnevale Associates, LLC and Joe Griffith, Inc. Realtors, a commission in connection with this transaction and further agrees to indemnify and hold harmless Tenant from and against all liability, damage, loss, cost and expenses incurred by reason of Landlord's breach of said separate agreement.

Section 14.16. Name and Plans and Specifications. Landlord acknowledges that any plans, specifications and proprietary material provided by Tenant and Tenant's trademarks and service marks are the sole property of Tenant and Landlord shall have no rights thereto.

Section 14.17. Right of First Refusal. So long as Tenant is not in default under this Lease beyond any Applicable Grace Period, Landlord hereby grants to Tenant while they are under this Lease but not thereafter, a right of first refusal with respect to any sale by Landlord of all or a portion of the Demised Premises to other than an affiliated or related entity of Landlord. An affiliated or related entity shall include any members of Landlord's family or any family-controlled entities. Landlord shall give Tenant at least thirty (30) days' prior written notice of the proposed terms of any such sale, together with a copy of the proposed purchase and sale documents, and Tenant shall, if it elects to do so, exercise its first right of refusal by notifying Landlord in writing, within thirty (30) days of Tenant's receipt of such purchase and sale documents, of Tenant's election to exercise its right of first refusal. Tenant shall have the right to record notice of its right of first refusal with the RMC Office for Charleston County and Landlord will cooperate in executing any documents necessary to accomplish that.

Section 14.18. Hazardous Substances. "Hazardous Substance" is any petroleum product, asbestos product or any other material, substance or waste that is recognized as being hazardous or dangerous to health or the environment by any federal, state or local agency having environmental protection jurisdiction over the Demised Premises. Tenant agrees not to generate, store, handle or dispose of any Hazardous Substance in or upon the Demised Premises during the Demised Term of the Lease. In the event, however, that any substance used in Tenant's business shall, during the Demised Term, become designated as a Hazardous Substance, then Tenant shall discontinue the use of substance in or upon the Demised Premises. Tenant shall indemnify and hold Landlord harmless from and against any and all demands, claims, enforcement actions, costs and expenses, including reasonable attorneys fees, including the cost of all clean-up plans, if any, arising out of the breach of this Section 14.18 by Tenant, and/or the violation of any rules, regulations, statutes or ordinances promulgated by any federal,

state or local governing body or agency and relating to the environmental condition of the Demised Premises.

Tenant shall not (either with or without negligence) cause or permit the escape, disposal or release of any biologically or chemically active or other hazardous substances, or materials. Tenant shall not allow the storage or use of such substances or materials in any manner not sanctioned by law or by the highest standards prevailing in the industry for the storage and use of such substances or materials, nor allow to be brought into the Premises any such materials or substances except to use in the ordinary course of Tenant's business. Without limitation, hazardous substances and materials shall include those described in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. Section 9601 et seq., the Resource Conservation and Recovery Act, as amended, 42 U.S.C. Section 9601 et seq., any applicable state or local laws and the regulations adopted under these Acts. If any lender or governmental agency shall ever reasonably require testing to ascertain whether or not there has been release of hazardous materials, then the reasonable costs thereof shall be reimbursed by Tenant to Landlord upon demand as additional charges if such requirement applies to the Premises, provided that any such required testing is in connection with a spill, discharge or release by the Tenant or its agents, employees, invitees and licensees. In addition, Tenant shall execute affidavits, representations and the like from time to time at Landlord's request concerning Tenant's best knowledge and belief regarding the presence of hazardous substances or materials on the Premises. In all events, Tenant shall indemnify Landlord in the manner elsewhere provided in this Lease from any release of hazardous materials on the Premises occurring while Tenant is in possession or elsewhere if caused by Tenant or other persons acting under Tenant. The within covenants shall survive the expiration or earlier termination of the Lease term.

Section 14.19. Date of Lease. All references to the "date of this Lease," The "date hereof," the "date upon which this Lease is fully executed" and the like shall be deemed to be the last date on which this lease shall be executed by Landlord and by Tenant.

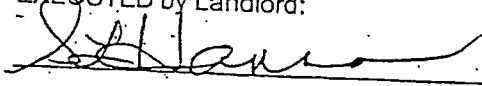
ARTICLE XV

SECURITY DEPOSIT

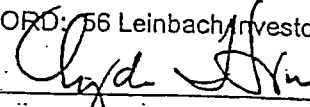
Tenant, concurrently with the execution of this Lease has deposited with Landlord the sum of \$1800.00 the receipt of which is hereby acknowledged, which sum shall be retained by Landlord as a security deposit. The security deposit shall be held by Landlord without liability for interest and as security for the performance by Tenant of Tenant's covenants and obligations under this Lease, it being expressly understood that such deposit shall not be considered an advance payment of Rent, Additional Rent or a measure of Landlord's damage in case of default by Tenant.

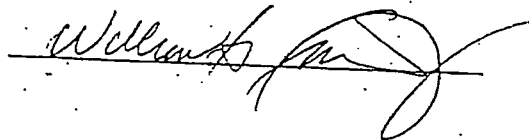
IN WITNESS WHEREOF, the parties have set forth their hands and seals on the 5th day of June, 2003.

EXECUTED by Landlord:

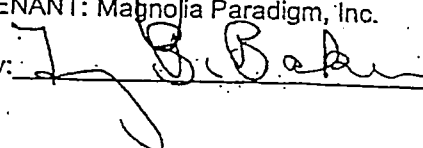


LANDLORD: 56 Leinbach Investors LLC

By: 



TENANT: Magnolia Paradigm, Inc.

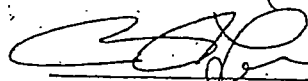
By: 

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Before me, the undersigned, a Notary Public in and for said County and State, on this date personally appeared Tommy B. Baker, to me personally known, who, being by me duly sworn, did say that he is the Tenant under the foregoing Lease and that the foregoing instrument was signed by him as his free act and deed.

Given under my hand and seal of this office 30 day of May, 2003.



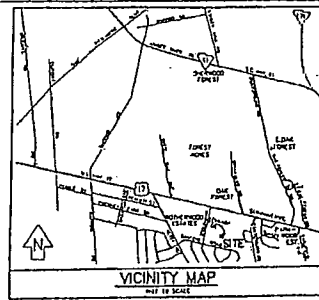
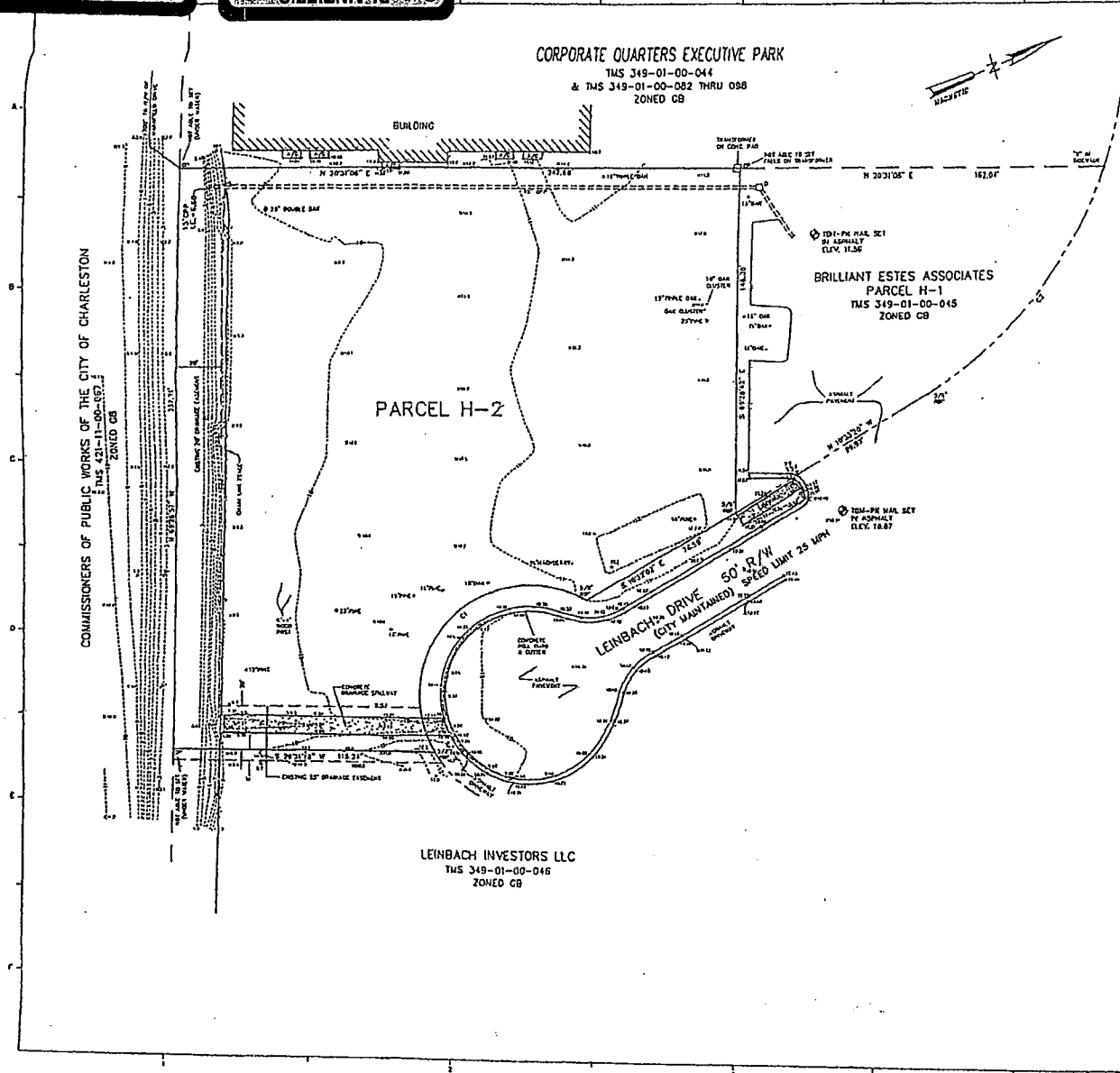
JOSEPH J. MCKEY

Notary Public of South Carolina

My Commission expires: 1-31-2005

0-28-10 7/11/10
 DEFENDANT'S
 EXHIBIT
 11
 7/11/10
 PENALTY 800-631-6886

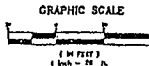
0-28-10 7/11/10
 PLAINTIFF'S
 EXHIBIT
 11
 7/11/10
 PENALTY 800-631-6886



STATION	BEARING	DISTANCE	STATION	BEARING	DISTANCE
1	N 20°10' E	161.01'	2	N 20°10' E	161.01'
2	N 20°10' E	161.01'	3	N 20°10' E	161.01'
3	N 20°10' E	161.01'	4	N 20°10' E	161.01'
4	N 20°10' E	161.01'	5	N 20°10' E	161.01'
5	N 20°10' E	161.01'	6	N 20°10' E	161.01'
6	N 20°10' E	161.01'	7	N 20°10' E	161.01'
7	N 20°10' E	161.01'	8	N 20°10' E	161.01'
8	N 20°10' E	161.01'	9	N 20°10' E	161.01'
9	N 20°10' E	161.01'	10	N 20°10' E	161.01'

LEGEND
 CIP - CONCRETE IN PLACE
 CUP - CONCRETE UNDER PAVEMENT
 TBM - TEMPORARY EMBANKMENT
 E 8.7 - SPOT ELEVATION (COLORADO)
 E 8.75 - SPOT ELEVATION (PAVEMENT, COLORADO)
 --- - CONTOUR LINE
 A/C - AIR CONDITIONER
 CWP - COMMERCIAL PLASTIC PIPE
 IS - GROUP ISLET

NOTES
 1) THE PROPERTY IS OWNED BY LEINBACH INVESTORS LLC.
 2) TMS NO. 349-01-00-155.
 3) REFERENCE PLAT BY JOHN S. LESTER DATED 6/9/91 AND RECORDED IN THE CHARLESTON COUNTY REG. OFFICE IN PLAT BOOK 84 PAGE 45.
 4) THE TOTAL AREA = 1.218 ACRES (52,857 SQ. FT.)
 5) THIS SURVEY DOES NOT REFLECT THE EXISTENCE OR NON-EXISTENCE OF U.S. ARMY CORPS OF ENGINEERS/JAGGREGATIONAL "WELLINGS".
 6) ACCORDING TO FLOOD INSURANCE RATE MAP 455412 0030 D DATED NOVEMBER 3, 1984, THIS PROPERTY LIES IN ZONE C AND SOME AS HIGH A BASIC FLOOD ELEVATION OF 11' HIGHER.
 7) UTILITIES ARE NOT SHOWN ON THIS SURVEY.
 8) THE VERTICAL DATUM IS NAVD83 (NATIONAL GEODETIC DATUM 1983).
 9) THE PROPERTY IS ZONED GENERAL BUSINESS. HEIGHT RESTRICTION 35'.



BAKER MOTORS
 EMPLOYEE
 PARKING LOT

FORSEBERG ENGINEERING
 AND SURVEYING, INC.
 1047 BAYVIEW BLVD. SUITE 1
 FIVE HILLS, MISSISSIPPI 39208
 (601) 725-1111 FAX (601) 725-1112
 WWW.FORSEBERG-ENGINEERING.COM

LS
 CHARLESTON - CHARLOTTE

LS3P ASSOCIATES LTD.
 31 NORTH BLAINE STREET SUITE 300
 CHARLESTON, SOUTH CAROLINA 29405
 TEL: 843.737.1111 FAX: 843.737.1118
 WWW.LS3P.COM



NOTES OF THE MECHANICAL ENGINEER PROJECT
 LOST/REMOVED 2009 ALL RIGHTS RESERVED
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 OR REPRODUCTION MAY NOT BE REPRODUCED
 IN ANY FORM WITHOUT WRITTEN PERMISSION
 FROM LS3P ASSOCIATES LTD.

REVISIONS:
 PROJECT: 1003-07033-43
 DATE: 6/17/10
 DRAWN BY: EML
 CHECKED BY: EML

TOPOGRAPHIC
 SURVEY
 C101

COMMISSIONERS OF PUBLIC WORKS OF THE CITY OF CHARLESTON
TMS 421-11-00-067
ZONED CB

CORPORATE QUARTERS EXECUTIVE PARK
TMS 349-01-00-044
& TMS 349-01-00-082 THRU 088
ZONED CB

BRILLIANT ESTES ASSOCIATES
PARCEL H-1
TMS 349-01-00-045
ZONED CB

LEINBACH INVESTORS LLC
TMS 349-01-00-046
ZONED CB

SEQUENCE OF CONSTRUCTION

1. PLACE SILT FENCING AND TREE PROTECTION AND INSTALL CONSTRUCTION ENTRANCE. CALL BRENDA MITRELL (CITY OF CHARLESTON 724-3782) AND ERIC SCHWARTZ (724-3780) FOR INSPECTION AND APPROVAL.
2. STRIP GRASS AND TOP SOIL.
3. PREPARE SUBGRADE.
4. PLACE GRAVEL, BASE AND ASPHALT PAVING.
5. INSTALL LANDSCAPING AND VEGETATIVE STABILIZATION.
6. REMOVE TEMPORARY EROSION CONTROL AFTER STABILIZATION.

DATE	BY	APP'D	REVISION	DESCRIPTION
12/11/11	WJS	WJS	1	ISSUED FOR PERMIT
12/11/11	WJS	WJS	2	REVISED TO SHOW 5' WIDE CONCRETE SIDEWALK

LEGEND - EROSION

- RM - ALUMINUM ROLLER MAT
- CP - COMBINED POINT
- TM - TEMPORARY SLOPE PROTECTION
- 3.67 - SPOT ELEVATION (GROUND)
- 3.67 - SPOT ELEVATION (PAVEMENT, CONCRETE)
- - CONTIGUOUS LINE
- A/C - AIR CONCRETE
- CPW - CORRUGATED PLASTIC PIPE
- CD - CRIP WELT

LEGEND - MW

- - FINISHED GRADE SPOT ELEVATION
- - FINISHED GRADE CONTOUR
- - DRAINAGE FLOW ARROW
- - SILT FENCE

DETAIL/SECTION INDICATOR

- - DETAIL/SECTION NUMBER
- - SHEET ON WHICH DETAIL/SECTION IS DETICATED

NOTES

1. THE PROPERTY IS OWNED BY LEINBACH INVESTORS LLC.
2. TMS NO. 349-01-00-100.
3. REFERENCE PLAT BY JOHN S. LEITCH DATED 8/9/84 AND RECORDED IN THE CHARLESTON COUNTY PUBLIC OFFICE IN PLAT BOOK 4 PAGE 18.
4. THE TOTAL AREA IS 1.216 ACRES (52,337 SQ. FT.).
5. THIS SURVEY DOES NOT REFLECT THE EXISTENCE OR NON-EXISTENCE OF U.S. ARMY CORPS OF ENGINEERS' JURISDICTIONAL WETLANDS.
6. ACCORDING TO FLOOD INSURANCE RATE MAP 45422-0010 D DATED NOVEMBER 9, 1994, THIS PROPERTY LIES IN ZONE C AND ZONE AD WITH A BASIC FLOOD ELEVATION OF 11' MGDAL.
7. UTILITIES ARE NOT SHOWN ON THIS SURVEY.
8. THE VERTICAL DATUM IS MONDRIAN (NATIONAL GEODETIC VERTICAL DATUM 1929).
9. THE PROPERTY IS ZONED GENERAL BUSINESS 1 (GB1) DISTRICT 3A.

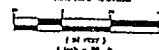
EROSION CONTROL NOTES

1. ALL EROSION CONTROL DEVICES SHALL BE IN PLACE PRIOR TO START OF CONSTRUCTION.
2. CONSTRUCTION SHALL BE INSTALLED AND MAINTAINED TO PREVENT ANY EROSION OR EXPOSURE OF SOIL TO ANY TEMPORARY EROSION CONTROL DEVICES UNTIL PERMANENT EROSION CONTROL IS IN PLACE.
3. EROSION CONTROL DEVICES SHALL BE MAINTAINED TO PREVENT ANY EROSION OR EXPOSURE OF SOIL TO ANY TEMPORARY EROSION CONTROL DEVICES UNTIL PERMANENT EROSION CONTROL IS IN PLACE.
4. THE EROSION CONTROL DEVICES SHALL BE MAINTAINED TO PREVENT ANY EROSION OR EXPOSURE OF SOIL TO ANY TEMPORARY EROSION CONTROL DEVICES UNTIL PERMANENT EROSION CONTROL IS IN PLACE.
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7. ALL EROSION CONTROL DEVICES SHALL BE MAINTAINED TO PREVENT ANY EROSION OR EXPOSURE OF SOIL TO ANY TEMPORARY EROSION CONTROL DEVICES UNTIL PERMANENT EROSION CONTROL IS IN PLACE.

NOTE

ALL DISTANCE MEASUREMENTS AS SHOWN ON THIS SURVEY SHALL BE BASED ON THE MONDRIAN DATUM (NATIONAL GEODETIC VERTICAL DATUM 1929).

GRAPHIC SCALE



BAKER
MOTORS
EMPLOYEE
PARKING LOT

FORSBERG ENGINEERING
AND SURVEYING, INC.
1000 BROADWAY, SUITE 9
CHARLESTON, SOUTH CAROLINA 29401
(843) 799-1111 FAX (843) 799-1112
WWW.FORSBERG-ENGINEERING.COM

LS

CHARLESTON • CHARLOTTE

LS3P ASSOCIATES LTD.
21 NORTH MARKET STREET, SUITE 300
CHARLESTON, SOUTH CAROLINA 29401
TEL: 843/771-1111 FAX: 843/771-1112
WWW.LS3P.COM



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FROM LS3P ASSOCIATES LTD.

REVISED:

PROJECT: 1000-00000000
DATE: 01/11/11
DRAWN BY: JMS
CHECKED BY: CH

GRADING
PLAN

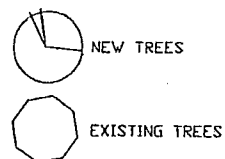
C102

SOLUTIONS THROUGH LISTENING

SERVICE BY DESIGN

LS2P ASSOCIATES LTD.
24 NORTH MARKET STREET SUITE 200
CHARLESTON SOUTH CAROLINA 29401
TEL 843.722.4444 FAX 843.722.4722
HTTP://WWW.LS2P.COM

216



DATE	ANALYST	ORGANISM/CONTAINER	DOOR	TEMPERATURE	END	CA/CF/PC/NC	NOTES
BASIC 95							
TRIAL							
10	CDP	Curie standard Extrude Redox	12-12	8-8	14h	1 1/3"	Not detected
8	LEP	Leprosy Institute "Palmar" Organics	12"	3"	10 Ed		Not clear
14	UCJ	Geometric standard Standard Oil	12-12	8-8	14h	2 1/3"	Good trace
TRIAL							
4	LEV	Iron standard Standard Iron	3-4"	12"	8 Ed	5' x 4"	1/4 show
10	UCJ	Urethane standard Standard Iron	3-4"	12"	7 Ed	5' x 4"	1/4 show

RECEIVED AFD 2 20 1952

LANDSCAPE
PLAN.

L201

29

SOLUTIONS THROUGH LISTENING

SERVICE NY LESIGN

PCS SITE AGREEMENT

Site Name West Ashley

January 2001

Site ID SC-1006

1. Premises and Use. Owner leases and demises to Optima Towers, LLC (OT), a South Carolina Corporation, the site described below: [Check appropriate box (es)]

☒ Land consisting of approximately 5,000 square feet upon which OT will construct its equipment base station and antenna structure;

☐ Building interior space consisting of approximately _____ square feet;

☐ Building exterior space for attachment of antennas;

☐ Building exterior space for placement of base station equipment;

☐ Tower antenna space between the _____ foot and _____ foot level on the Tower.

☐ Space required for cable runs to connect PCS equipment and antennas, in location(s) ("Site") shown on Exhibit A, together with a non-exclusive easement for reasonable access thereto and to the appropriate, in the discretion of OT, source of electric and telephone facilities. The Site will be used by OT for the purpose of installing, removing, replacing, modifying, maintaining and operating, at its expense, a personal communications service system facility ("PCS"), including, without limitation, antenna equipment, cable wiring, related fixtures and if applicable to the Site, and antenna structure. OT will use the Site in a manner which will not unreasonably disturb the occupancy of the Owner's other tenants. OT will have access to the Site 24 hours per day, 7 days per week.

2. Term. The term of this Agreement (the "Initial Term") is 5 years commencing on the date ("Commencement Date") both OT and Owner have executed this Agreement. This Agreement will be automatically renewed for four additional terms (each a "Renewal Term") of 5 years each, unless OT provides Owner notice of intention not to renew not less than 90 days prior to the expiration of the Initial Term or any Renewal Term.

3. Rent. Until the first day of the month following the commencement of the physical preparation of the Site, the rent will be a one-time aggregate payment of \$ 100.00, the receipt of which Owner acknowledges. Thereafter, rent will be paid in equal annual installments of \$9,600.00 (paid monthly) (until increased as set forth herein), partial months to be prorated, in advance. Rent for each year will be the annual rent in effect for the previous year of the initial year or prior year, as the case may be, increased by three and one-half (3.5) percent (%) annually.

4. Title and Quiet Possession. Owner represents and agrees (a) that it is the Owner of the Site; (b) that it has the right to enter into this Agreement; (c) that the person signing this Agreement has the authority to sign; (d) that OT its successors, affiliates, and related parties and its authorized contractors are entitled to access to the Site at all times and to the quiet possession of the Site throughout the Initial Term and each Renewal Term so long as OT is not in default beyond the

expiration of any cure period; and (e) that Owner shall not have unsupervised access to the Site or to the PCS equipment.

5. Assignment/Subletting. Tenant shall have the right to sublease or assign its rights under this Agreement without notice or consent of Owner.

6. Notices. All notices must be in writing and are effective only when deposited in the U.S. mail, certified and postage prepaid, or when sent via overnight delivery. Notices to OT are to be sent to:

Optima Towers, LLC
845 Lowcountry Blvd
Mt Pleasant, SC 29464
Attn: Property Manager

Notices to Owner must be sent to the address shown underneath Owner's signature.

7. Improvements. OT may, at its expense, make such improvements on the Site, as it deems necessary from time to time for the operation of the PCS system. Owner agrees to cooperate with OT with respect to obtaining any required zoning approvals for the Site and such improvements. Upon termination or expiration of this Agreement, OT may remove its equipment and improvements and will restore the Site to substantially the condition existing on the Commencement Date, except for ordinary wear and tear and casualty loss.

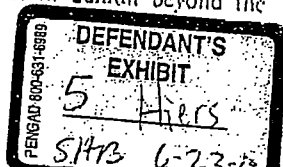
8. Compliance with Laws. Owner does not warrant or guarantee Owner's property, and all improvements located thereon, are in compliance with building, life/safety, disability and other laws, codes and regulations of applicable governmental authorities. OT will comply with all applicable laws relating to its possession and use of the Site.

9. Interference. OT will resolve technical interference problems with other equipment located at the Site on Commencement Date or any equipment that becomes attached to the Site at any future date when OT desires to add additional equipment to the Site. Likewise, Owner will not permit or suffer the installation of any future equipment, which (a) results in technical interference problems with OT then existing equipment or (b) encroaches onto the Site.

10. Utilities. OT will pay for all utilities used by it at the Site. Owner will cooperate with OT in OT's efforts to obtain utilities from any location provided by Owner or the servicing utility, including signing any easement or other instrument reasonably required by the utility company.

11. Termination. OT may terminate this Agreement at any time by notice to Owner without further liability if OT does not obtain all permits or other approvals (collectively,

Initial(s) AK



PCS SITE AGREEMENT

Site Name West Ashley

January 2000

Site ID SC-1006

"approval") required from any governmental authority or any easements required from any third party to operate the PCS system, or if any such approval is cancelled, expires or is withdrawn or terminated, or if Owner fails to have proper ownership of the Site or authority to enter into this Agreement, or if OT, for any reason, in its sole discretion, determines that it will be unable to use the Site. Upon termination, all prepaid rent will be retained by Owner unless such termination is due to Owner's failure of proper ownership or authority, or such termination is a result of Owner's default.

12. Default. If either party is in default under this Agreement for a period of (a) 10 days following receipt of notice from the non-defaulting party with respect to a default which may be cured solely by the payment of money, or (b) 30 days following the receipt of notice from the non-defaulting party with respect to a default which may not be cured solely by the payment of money, then, in either event, the non-defaulting party may pursue any remedies available to it against the defaulting party under applicable law, including, but not limited to, the right to terminate this Agreement. If the non-monetary default may not reasonably be cured within a 30-day period, this Agreement may not be terminated if the defaulting party commences action to cure the default with such 30-day period and proceeds with due diligence to fully cure the default.

13. Indemnity. Owner and OT each indemnifies the other against and holds the other harmless from any and all costs (including reasonable attorneys' fees) and claims of liability or loss which arise out of the ownership, use and/or occupancy of the Site by the indemnifying party. This indemnity does not apply to any claims arising from the sole negligence or intentional misconduct of the indemnified party. The indemnity obligations under this Paragraph will survive termination of this Agreement.

14. Hazardous Substances. Owner represents that it has no knowledge of any substance, chemical waste (collectively "substance") on the Site that is identified as hazardous, toxic or dangerous in any applicable federal, state or local law or regulation. OT will not introduce or use any such substance on the Site in violation of any applicable law.

15. Subordination and Non-Disturbance. This Agreement is subordinate to any mortgage or deed of trust now of record against the Site. However, promptly after Agreement is fully executed, Owner will use diligent efforts to obtain a non-disturbance agreement reasonably acceptable to OT from the holder of any such mortgage or deed of trust.

16. Taxes. OT will be responsible for payment of all personal property taxes assessed directly upon and arising solely from its use of the communications facility on the Site. OT will pay to Owner any increase in real property taxes attributable solely to any improvements to the Site made by

OT within 60 days after receipt of satisfactory documentation indicating calculation of OT's share of such real estate taxes and payment of the real estate taxes by Owner. Owner will pay when due all other real estate taxes and assessments attributable to the property of the Owner of which the Site is a part.

17. Insurance. OT will produce and maintain commercial liability insurance, with limits of not less than \$1,000,000 combined single limit per occurrence for bodily injury and property damage liability, with a certificate of insurance to be furnished to Owner within 30 days of written request. Such policy will provide that cancellation will not occur without at least 15 days prior written notice to Owner. Each party hereby waives its right of recovery against the other for any loss or damage covered by any insurance policies maintained by the waiving party. Each party will cause each insurance policy obtained by it to provide that the insurance company waives all rights of recovery against the other party in connection with any damage covered by such policy.

18. Maintenance. OT will be responsible for repairing and maintaining the PCS system and any other improvements installed by OT at the Site in a proper operating and reasonably safe condition; provided, however if any such repair or maintenance is required due to the acts of Owner, its agents or employees, Owner shall reimburse OT for the reasonable costs incurred by OT to restore the damaged areas to the condition which existed immediately prior thereto. Owner will maintain and repair all other portions of the property of which the Site is a part in a proper operating and reasonably safe condition.

19. FAA Compliance. OT accepts sole responsibility for the Site's compliance with all tower or building marking and lighting regulations promulgated by the Federal Aviation Administration ("FAA") or the Federal Communications Commission ("FCC"), as applicable. OT represents and warrants that the Site complies with all applicable tower or building marking or lighting regulations promulgated by the FAA or the FCC.

Owner agrees that OT may install, at OT's sole cost and expense and as required for OT's PCS, a (i) backup generator to provide backup AC power in the event of an AC power outage at the Site, and/or (ii) tower lighting alarm monitoring system (including, but not limited to, commercial power and a dedicated surveillance telephone line) to monitor the status of the tower/building lighting.

20. Waiver of Owner's Lien. (a) Owner waives any lien rights it may have concerning OT's PCS which are deemed OT's personal property and not fixtures, and OT has the right to remove the same at any time without Owner's consent. (b) Owner acknowledges that OT has entered into a financing arrangement and may enter into additional financing

Initial(s) CR QMC

PCS SITE AGREEMENT

Site Name: West Ashley

January 2000

Site ID: SC-1006

arrangements in the future including promissory notes and a financial and security agreement ("Financing Agreement") for the financing of OT's PCS ("Collateral") with a third party or parties (the "Financing Entity"). In connection therewith, Owner (i) consents to the installation of the Collateral; (ii) agrees that the Collateral shall be exempt from execution, foreclosure, sale, levy, attachment, or distress for any rent due or to become due and that such Collateral may be removed at any time without recourse to legal processing.

21. Miscellaneous. (a) This Agreement applies to and binds the heirs, successors, executors, administrators and assigns of the parties to this Agreement; (b) this Agreement is governed by the laws of the state in which the Site is located; (c) If requested by OT, Owner agrees promptly to execute and deliver to OT a recordable Memorandum of this Agreement in the form of Exhibit B; (d) this Agreement (including the Exhibits) constitutes the entire agreement between the parties and supercedes all prior written and verbal agreements, representations, promises or understandings between parties. Any amendments to this Agreement must be in writing and executed by both parties; (e) if any provision of this Agreement is invalid or unenforceable with respect to any party, the remainder of this Agreement or the application of such provision to persons other than those as to whom it is held invalid or unenforceable, will not be affected and each provision of this Agreement will be valid and enforceable to the fullest extent permitted by law; and (f) the prevailing party in any action or proceeding in court or mutually agreed upon arbitration proceeding to enforce the terms of this Agreement is entitled to receive its reasonable attorneys' fees and other reasonable enforcement costs and expenses from the non-prevailing party.

22. Non-Binding until Fully Executed. This Agreement is for discussion purposes only and does not constitute a formal offer by either party. This Agreement is not and shall not be binding on either party until and unless it is fully executed by both parties.

23. Right of First Refusal. If, during the term of the Agreement, Owner receives and desires to accept an offer to purchase, exchange, assign, transfer, convey or otherwise alienate all or any portion of the Site, then Owner shall provide OT written notice of such offer, which notice shall include a complete and legible copy of such offer ("Owner's Notice"). OT shall have a right of first refusal to purchase, at its election and on the terms and conditions as in Owner's Notice, the Site (or such lesser portion thereof as is described in Owner's Notice), all on the same terms and conditions as in the offer accompanying Owner's Notice. If OT does not exercise its right of first refusal by written notice to Landlord given within ninety (90) days after receipt of Owner's Notice, Owner may sell the property described in the Owner's Notice to such third person in accordance with the terms and conditions of the offer. If OT fails or declines to exercise its

right of first refusal, then this Agreement shall continue in full force and effect and Tenant's right of first refusal shall survive any such sale and conveyance and shall remain effective with respect to any subsequent offers to purchase the Site.

The following Exhibits are attached to and made a part of this Agreement: Exhibits A, B and _____

OWNER: 56 Lienbach Investors, LLC

By: _____

Printed Name: Clyde Hiers

Its: _____

S.S./Tax No.: 57-1089398

Address: 1634 Ashley River Road
Charleston, SC 29407-5902

WITNESS: _____

(Signature Witness #1)

(Signature Witness #2)

Date: 2/23/06

Optima Towers, LLC., a South Carolina Limited Liability Company

By: _____

Printed Name: Johnny Crawford

Its: Member

Address: 845 Lowcountry Blvd., Suite J
Mount Pleasant, SC 29464

WITNESS: _____

(Signature Witness #1)

(Signature Witness #2)

Date: 2/23/06

Attach Exhibit A - Site Description

Exhibit B - Memorandum of Lease

Initial(s) CH : JC

Acknowledgement by Owner
(Corporation, Partnership or L.L.C.)

STATE OF South Carolina

COUNTY OF Charleston

Janene K. Schmidt a notary public, do hereby certify that Clyde Hiers
(Name of Official) (Name)
As the Managing Member of the above signed 56 Lienbach Investors LLC
(Title) (Name of Entity)

personally appeared before me this day and acknowledged the due execution of the foregoing instrument on behalf of said entity.

Witness my hand and official seal this 23rd day of February 2006

(SEAL)

(OFFICIAL NOTARY SIGNATURE)

NOTARY PUBLIC - STATE OF South Carolina

My commission expires: Aug 12, 2008

Janene K. Schmidt
(PRINTED, TYPED OR STAMPED NAME OF NOTARY)
COMMISSION NUMBER: _____

Acknowledgement by Optima Towers, LLC.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

I, Jason P. Shanker, a notary public, do hereby certify that Johnny R. Crawford as Member of Optima Towers, LLC. personally appeared before me this day and acknowledged the due execution of the foregoing instrument on behalf of Optima Towers, LLC.

Witness my hand and official seal this 23rd day of February, 2016.

(SEAL)

Jason P. Shanker
(OFFICIAL NOTARY SIGNATURE)
NOTARY PUBLIC—STATE OF SOUTH CAROLINA

My commission expires: 9-29-13

Jason P. Shanker
(PRINTED, TYPED OR STAMPED NAME OF NOTARY)
COMMISSION NUMBER: _____

EXHIBIT A
Site Description

Site situated in City of Charleston, County of Charleston, State of South Carolina commonly described as follows:

Legal Description:

A 5,000 square foot leased parcel, with easements for access and utilities, located in City of Charleston, County of Charleston, State of South Carolina, as a portion of parcel more commonly known as parcel #349-01-00-105 and more specifically described in deed book E333-page 031 in the Charleston County, South Carolina, RMC office. Owner expressly acknowledges and agrees that, if and when a survey of the Site and access right-of-way thereto is obtained by Optima Towers, LLC, this Exhibit A will be replaced with a substitute Exhibit A containing such legal description, and Owner will, at the request of Optima Towers, LLC and without delay, initial such substitute Exhibit A.

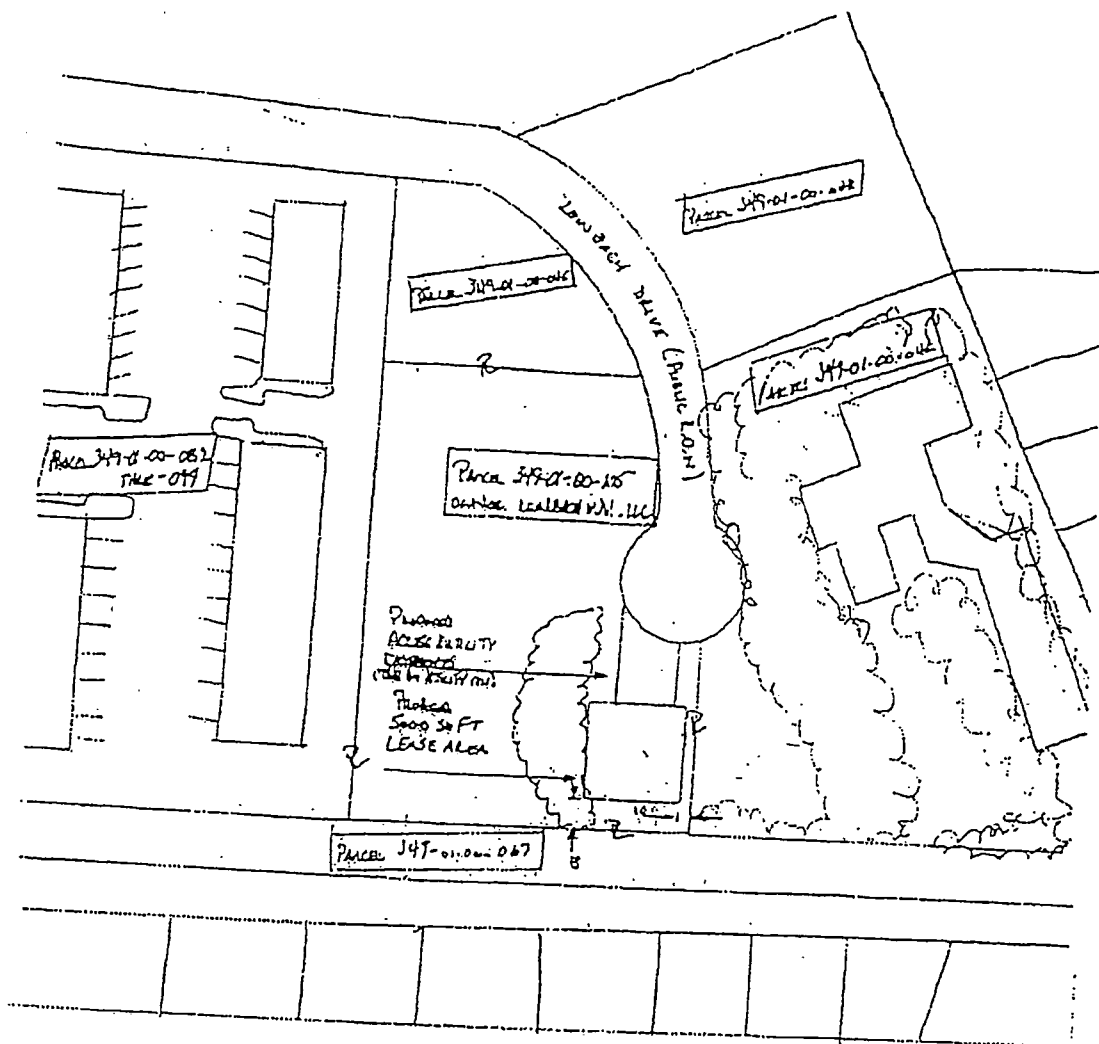
Sketch of Site:

See attached sketch on following page

Note: Optima Towers, LLC may, at Optima Towers, LLC option, replace this Exhibit with an exhibit setting forth the legal description of the property on which the Site is located and/or an as-built drawing depicting the Site.

Initial(s) CS me

Site Sketch

Initial(s) CB, JPL

PCS Site Agreement

January 2006

Site ID: SC-1006

Version 1.2 - QY

Site Name West Ashley

EXHIBIT B

Initial(s) ant, Jme

State of South Carolina
County of Charleston

Memorandum of Lease

This memorandum evidences that a lease was made and entered into by written PCS Site Agreement dated _____, 20____, between 56 Lienbach Investors, LLC ("Owner") and Optima Towers, LLC, (OT). Therefore, Owner leases and demises to OT the Site described in Exhibit A attached hereto in accordance with the terms of the aforesaid Agreement.

Such an Agreement provides in part that 56 Lienbach Investors, LLC, Owner, lease and demises to OT a certain ("Site") located at land lying between US Highway 17, Markfield Drive, and Lienbach Drive, City of Charleston, County of Charleston, State of South Carolina, within the property of Owner which is described in Exhibit A attached hereto, with grant of easement for unrestricted rights of access thereto and to electric and telephone facilities for a term of five (5) years commencing on this _____ day of _____, 20____, which term is subject to four (4) additional five (5) year extension periods..

IN WITNESS WHEREOF, the parties have executed this Memorandum under seal as of the day and year first above written.

OWNER: 56 Lienbach Investors, LLC

By: _____

Printed Name: Clyde Hiers

Its: _____

S.S./Tax No.: 57-1089398

Address: 1634 Ashley River Road
Charleston, SC 29407-5902

Optima Towers, LLC, a South Carolina LLC

By: _____

Printed Name: Johnny Crawford

Its: Member

Address: 845 Low County Boulevard
Suite J
Mount Pleasant, SC 29464

WITNESS: _____

(Signature Witness #1)

(Signature Witness #2)

Date: _____

WITNESS: _____

(Signature Witness #1)

(Signature Witness #2)

Date: _____

Attach Exhibit A to Memorandum of Lease

Acknowledgement by Owner
(Corporation, Partnership or L.L.C.)

STATE OF South Carolina
COUNTY OF Charleston

I Janene K. Schmidt a notary public, do hereby certify that Clyde Hiers
(Name of Official) (Name)
As the Member of the above signed 5k Liebbeck Investors LLC
(Title) (Name of Entity)

personally appeared before me this day and acknowledged the due execution of the foregoing instrument on behalf of said entity.

Witness my hand and official seal this 23rd day of February, 2006

(SEAL)

(OFFICIAL NOTARY SIGNATURE)
NOTARY PUBLIC—STATE OF South Carolina

My commission expires: Aug 12, 2006

Janene K. Schmidt
(PRINTED, TYPED OR STAMPED NAME OF NOTARY)
COMMISSION NUMBER: _____

Acknowledgement by Optima Towers, LLC.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

I, JASON P. SPRINKS, a notary public, do hereby certify that Johnny R. Crawford as Member of Optima Towers, LLC. personally appeared before me this day and acknowledged the due execution of the foregoing instrument on behalf of Optima Towers, LLC.

Witness my hand and official seal this 23rd day of FEBRUARY, 2006.

(SEAL)

J. P. Sprinks
(OFFICIAL NOTARY SIGNATURE)
NOTARY PUBLIC—STATE OF SOUTH CAROLINA

My commission expires: 9-29-13

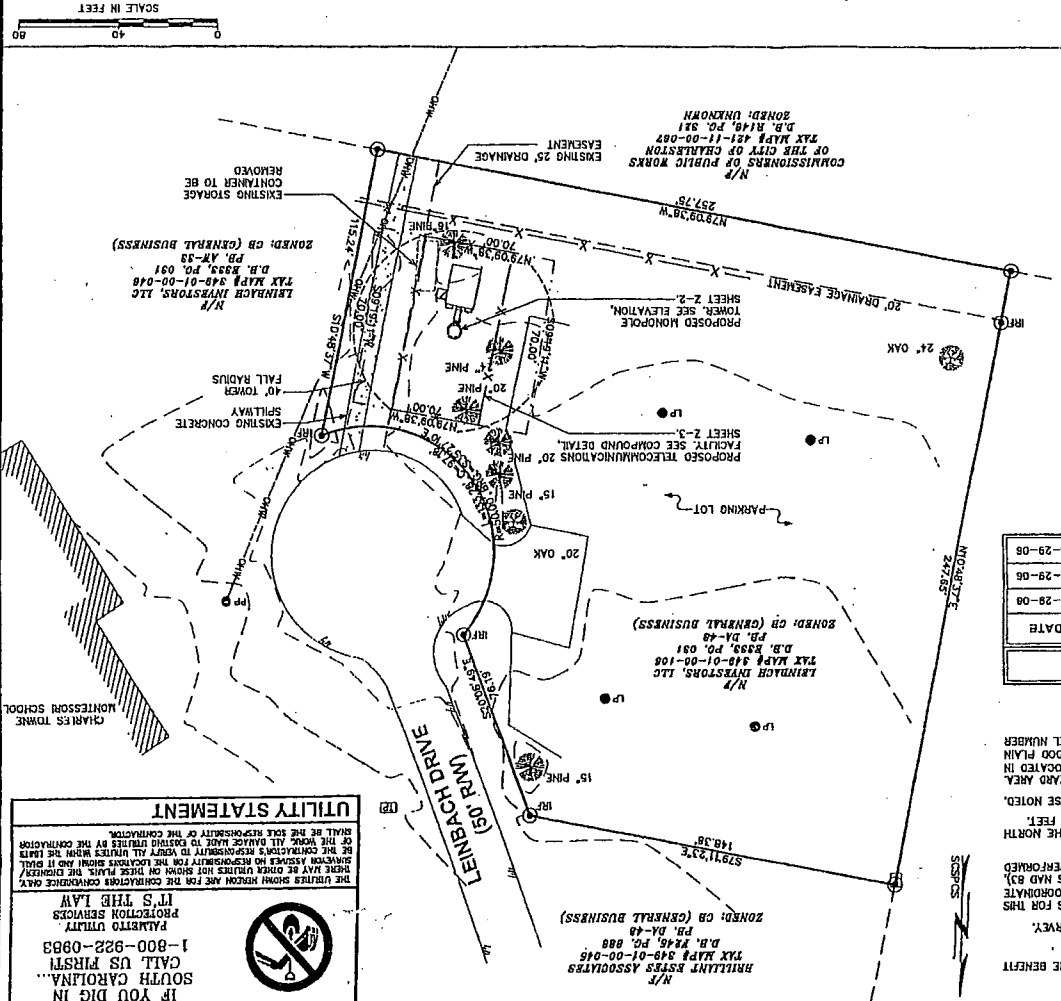
JASON P. SPRINKS
(PRINTED, TYPED OR STAMPED NAME OF NOTARY)
COMMISSION NUMBER: _____

SITE PLAN
SCALE: 1" = 40'

LEGEND	
---	EXIST. PROPERTY LINE
---	EXIST. UTILITY POLE
---	EXIST. TELECO PEDESTAL
---	PROPERTY CORNER
---	EXIST. CONTOUR LINE
---	EDGE OF PAYEMENT
---	OVERHEAD WIRE
---	RIGHT-OF-WAY
---	CHAIN LINK FENCE
---	EXISTING TREE LINE
---	PROPOSED TREE LINE

INDEX OF SHEETS			
NO.	SHEET TITLE	REV	DATE
C-1	SITE PLAN	0	03-29-06
C-2	TOWER ELEVATION	0	03-29-06
C-3	COMPOUND DETAIL	0	03-29-06

- NOTES:**
1. THIS PLAN HAS BEEN PREPARED WITHOUT THE BENEFIT OF A REPORT OF TITLE.
 2. THIS PLAN DOES NOT REPRESENT A TITLE SURVEY.
 3. THE BASIS OF THE HORIZONTALS AND COORDINATES FOR THIS PLAN IS THE SOUTH CAROLINA STATE PLANE COORDINATE SYSTEM, NORTH AMERICAN DATUM 1983 (NAD 83) (GSPCS NAD 83), BASED ON DIFFERENTIAL GPS OBSERVATIONS PERFORMED ON MARCH 15, 2006.
 4. VERTICAL INFORMATION SHOWN, BASED ON THE NORTH AMERICAN VERTICAL DATUM OF MARCH 1988 IN FEET.
 5. ALL DISTANCES ARE GROUND UNLESS OTHERWISE NOTED.
 6. THIS PROPERTY IS NOT LOCATED IN A FLOOD HAZARD AREA, FLOOD ZONE "X", OUTSIDE THE 500-YEAR FLOOD PLAIN (FEMA/FIRM COMMUNITY NUMBER 450190, PANEL NUMBER 04924, DATED NOVEMBER 17, 2004).



UTILITY STATEMENT

THE UTILITIES SHOWN HEREON ARE FOR THE CONVEYANCE OF THE PROPERTY ONLY. THE CONTRACTOR SHALL BE RESPONSIBLE FOR VERIFYING THE LOCATION AND DEPTH OF ALL UTILITIES PRIOR TO CONSTRUCTION. THE CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY PERMITS FROM THE APPROPRIATE AGENCIES. THE CONTRACTOR SHALL BE RESPONSIBLE FOR PROTECTING ALL UTILITIES REMAINING ON THE SITE. THE CONTRACTOR SHALL BE RESPONSIBLE FOR RESTORING THE SITE TO ITS ORIGINAL CONDITION OR BETTER. THE CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY PERMITS FROM THE APPROPRIATE AGENCIES. THE CONTRACTOR SHALL BE RESPONSIBLE FOR PROTECTING ALL UTILITIES REMAINING ON THE SITE. THE CONTRACTOR SHALL BE RESPONSIBLE FOR RESTORING THE SITE TO ITS ORIGINAL CONDITION OR BETTER.

**IF YOU DIG IN
CALL US FIRST
1-800-922-0983
PALMETTO UTILITY
PROTECTION SERVICES
IT'S THE LAW**

OP/IMA
PLANS PREPARED FOR

**WEST ASHLEY
MONTROSS
SITE # SC-1006**
LEACH INVE
CHARLESTON, SC 29407
(CHARLESTON COUNTY)

PLANS PREPARED BY:
TOWER ENGINEERING PROFESSIONALS
3705 JUNCTION BOULEVARD
RALEIGH, NC 27603-5283
OFFICE: (919) 661-0351

PROJECT INFORMATION:
645 LOW COUNTRY BLVD, SUITE J
MOUNT PLEASANT, SC 29504
OFFICE: (843) 773-1011

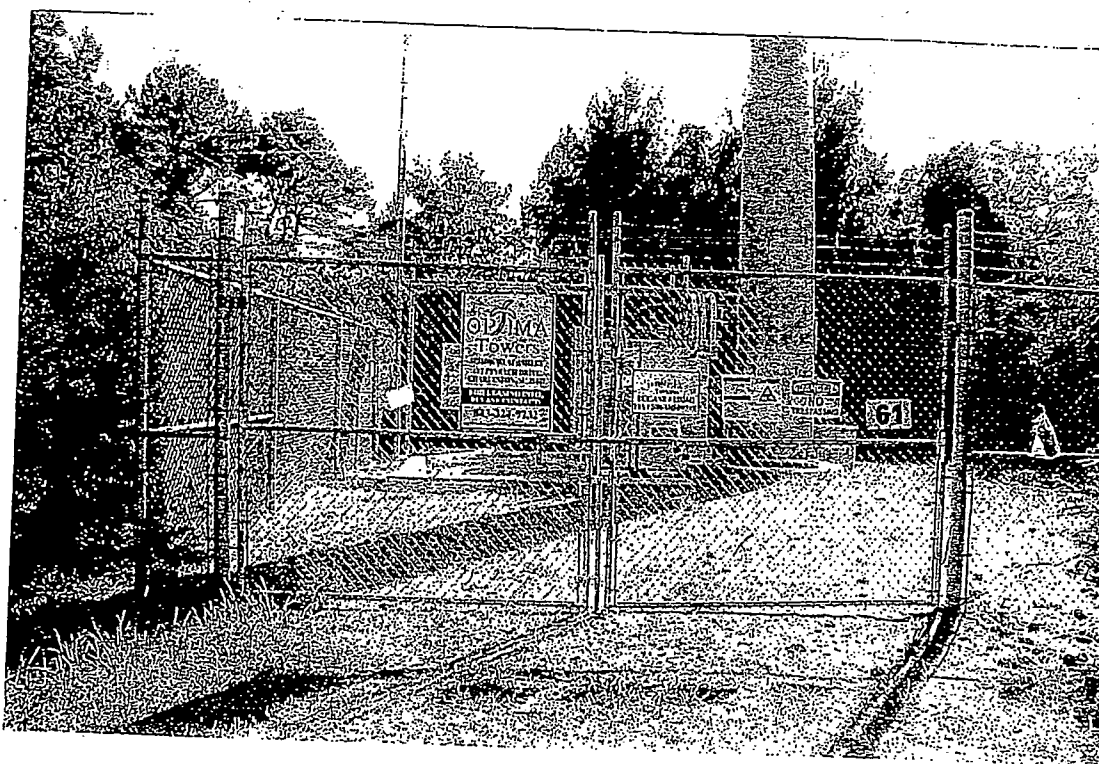
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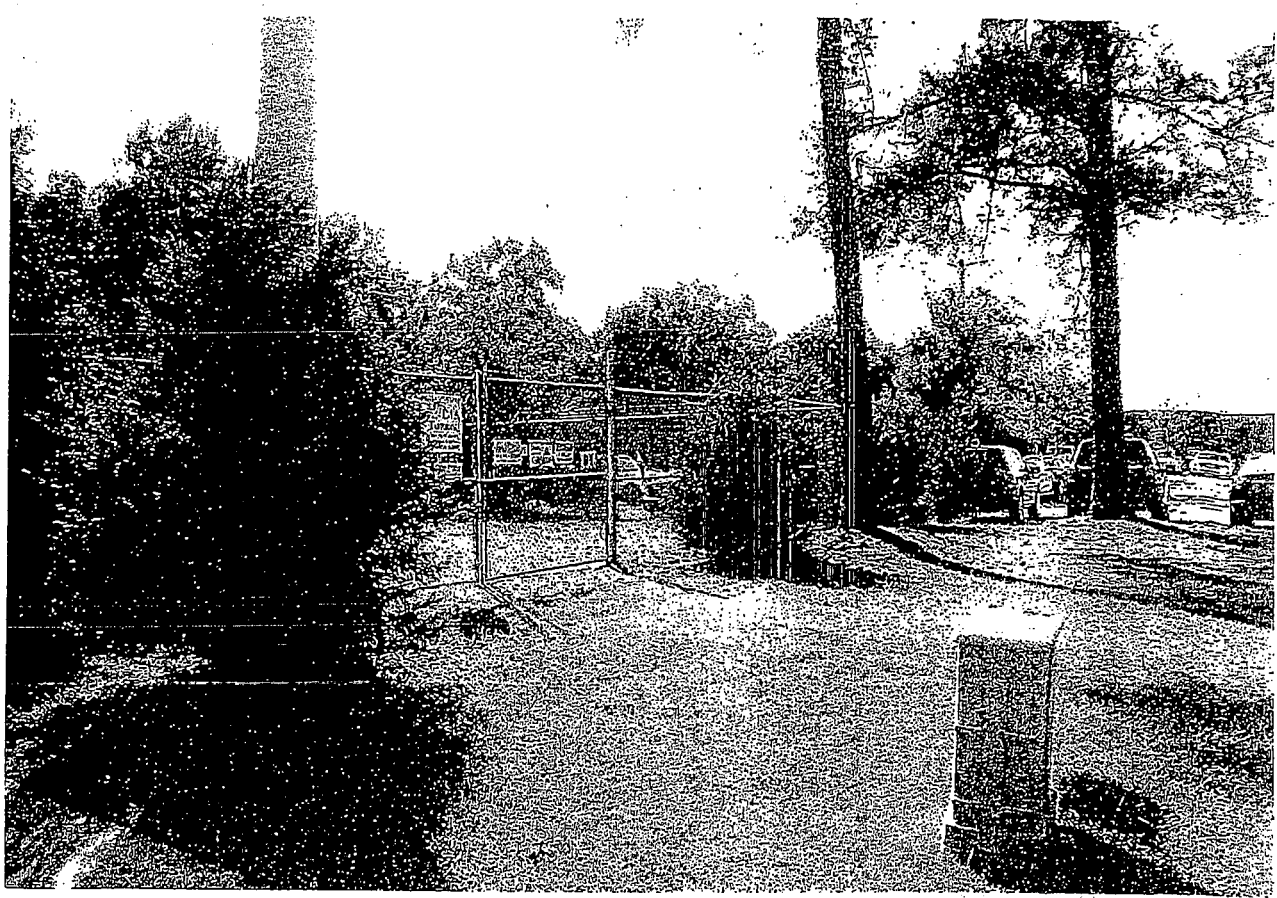
PRELIMINARY
DO NOT USE FOR
CONSTRUCTION

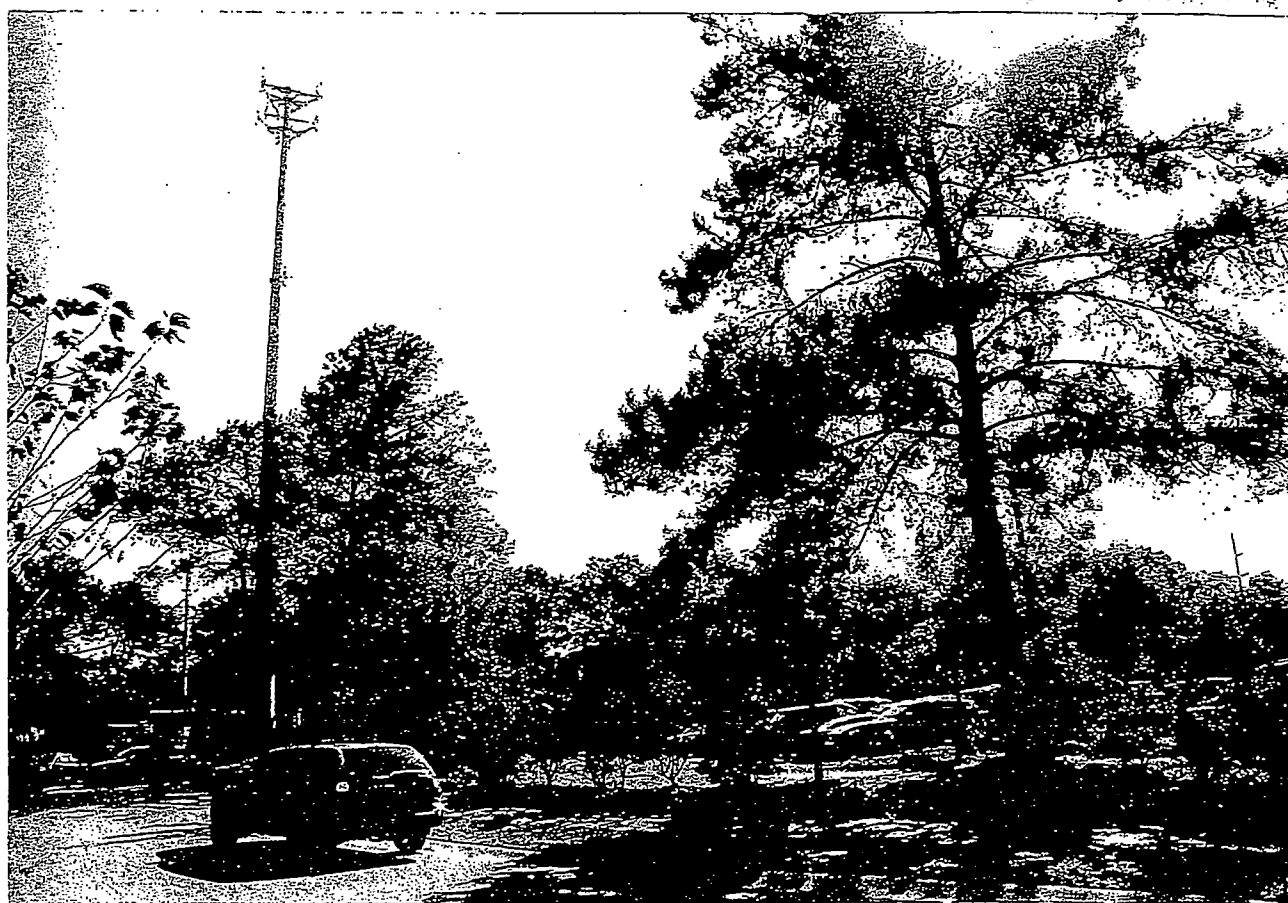
SITE PLAN

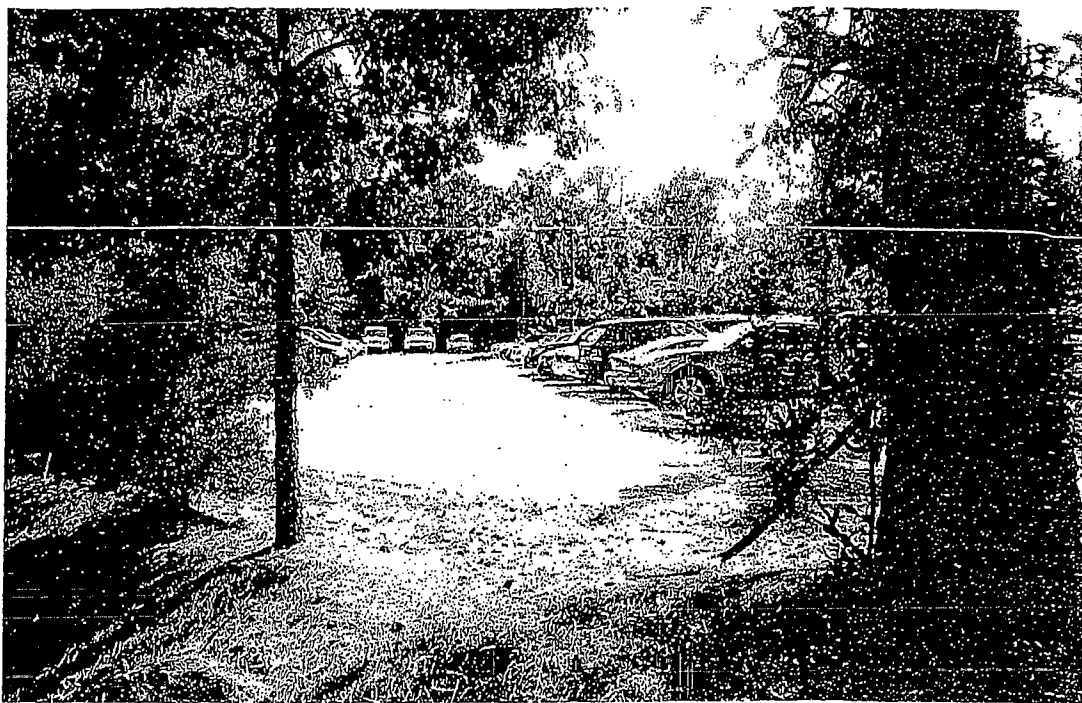
SHEET NUMBER: Z-1
REVISION: 0
TEP # 060226

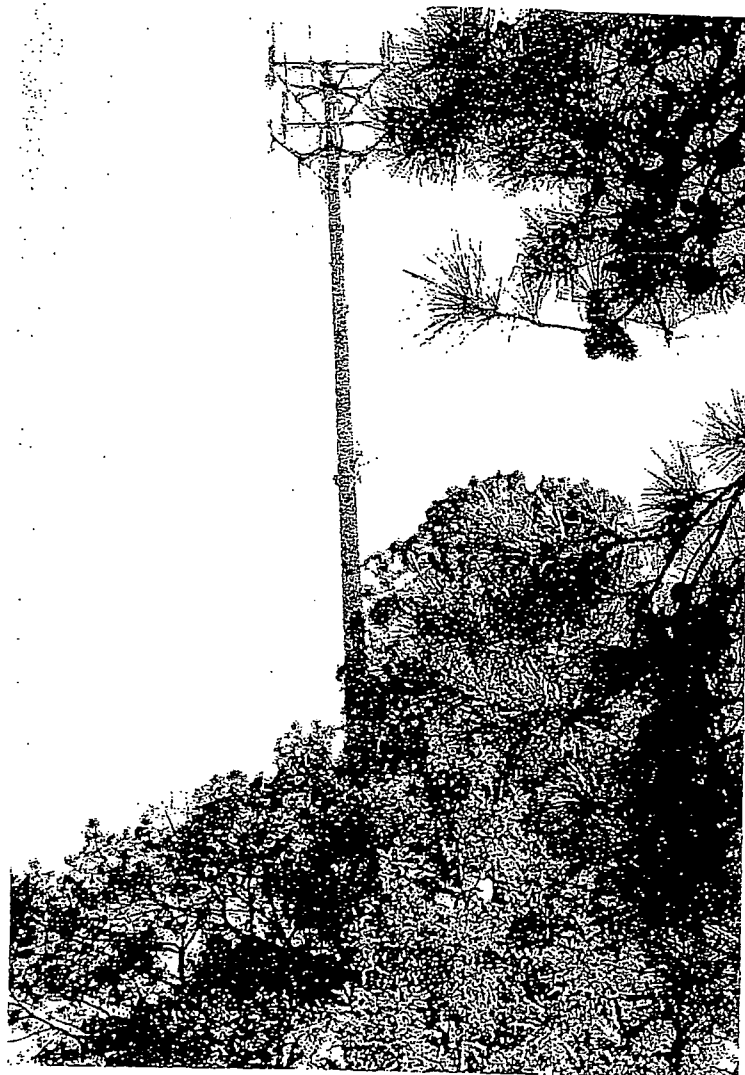
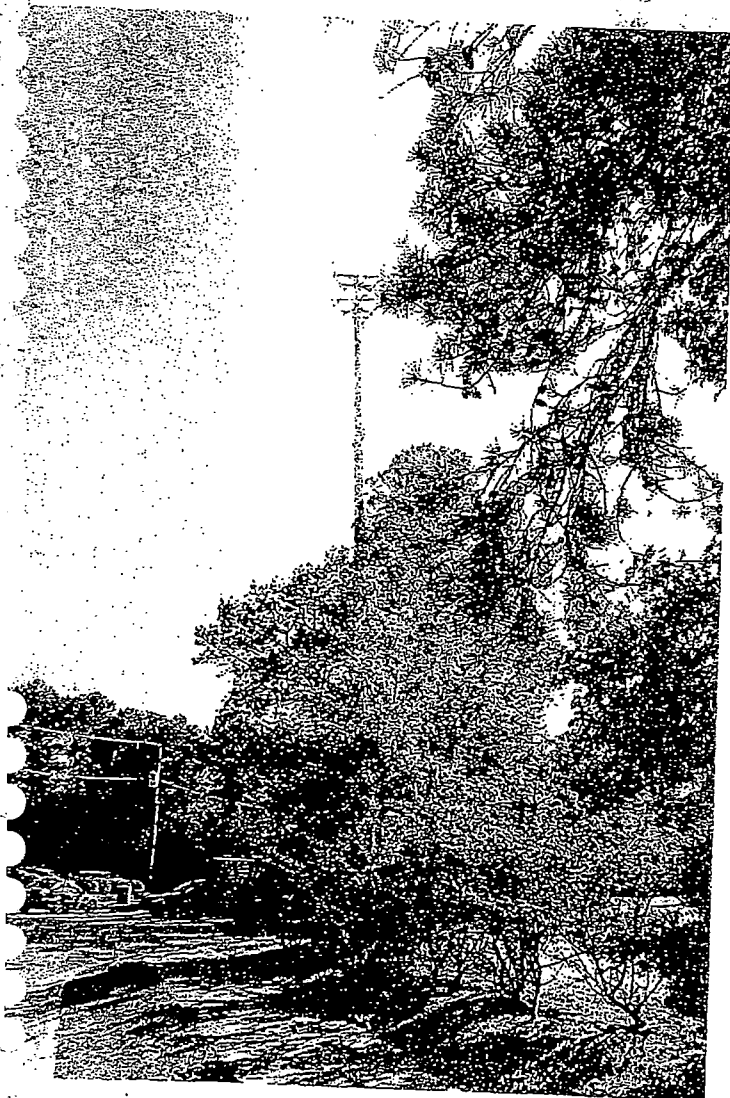
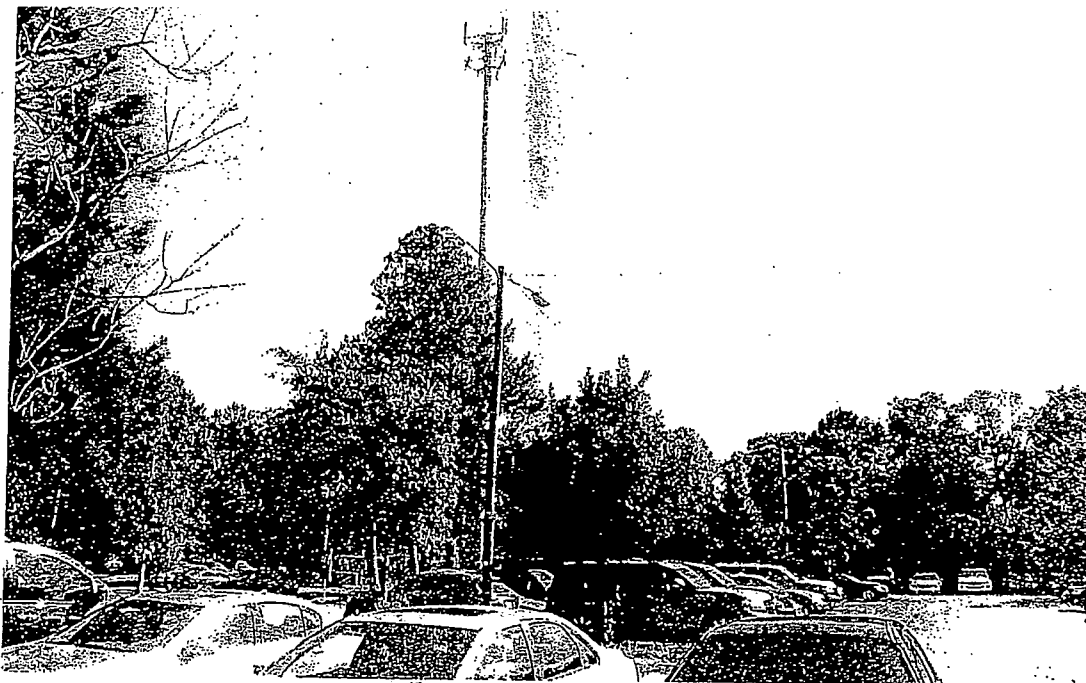
PLAINTIFF'S EXHIBIT

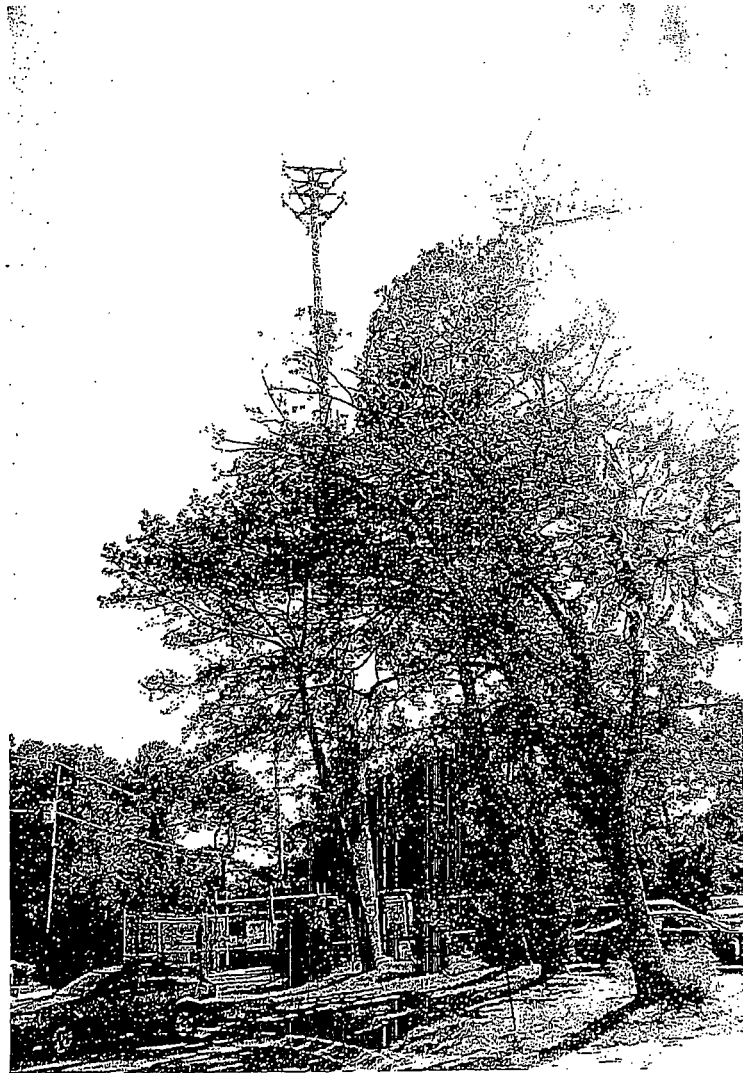
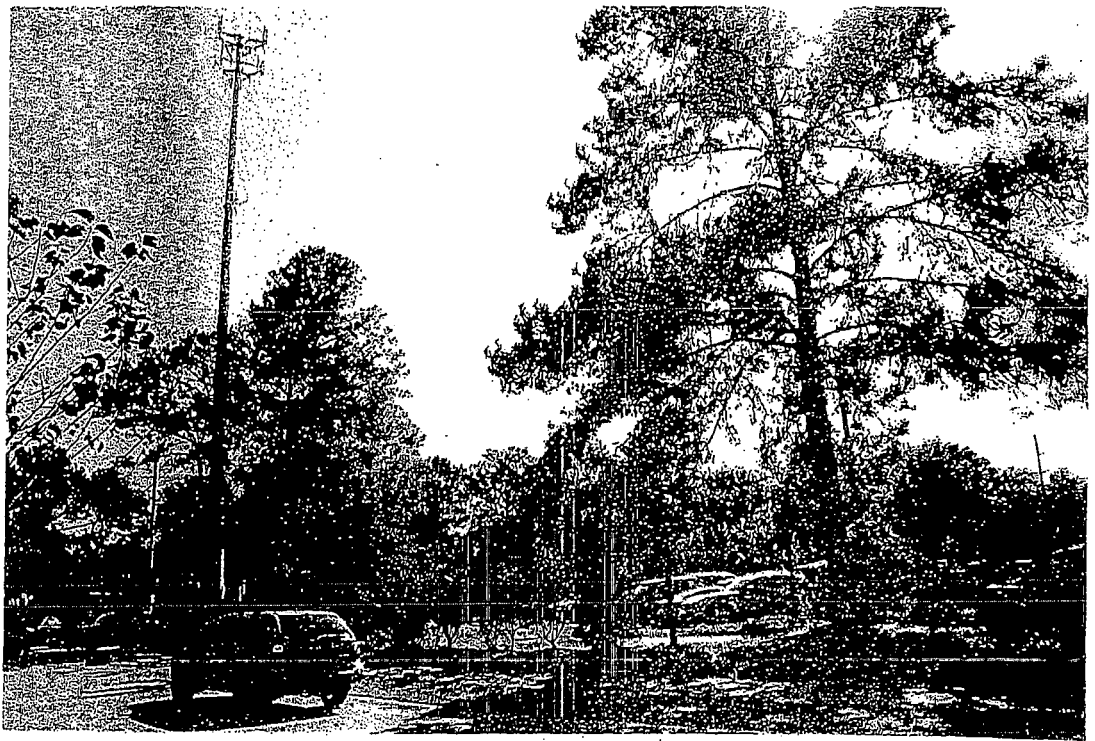




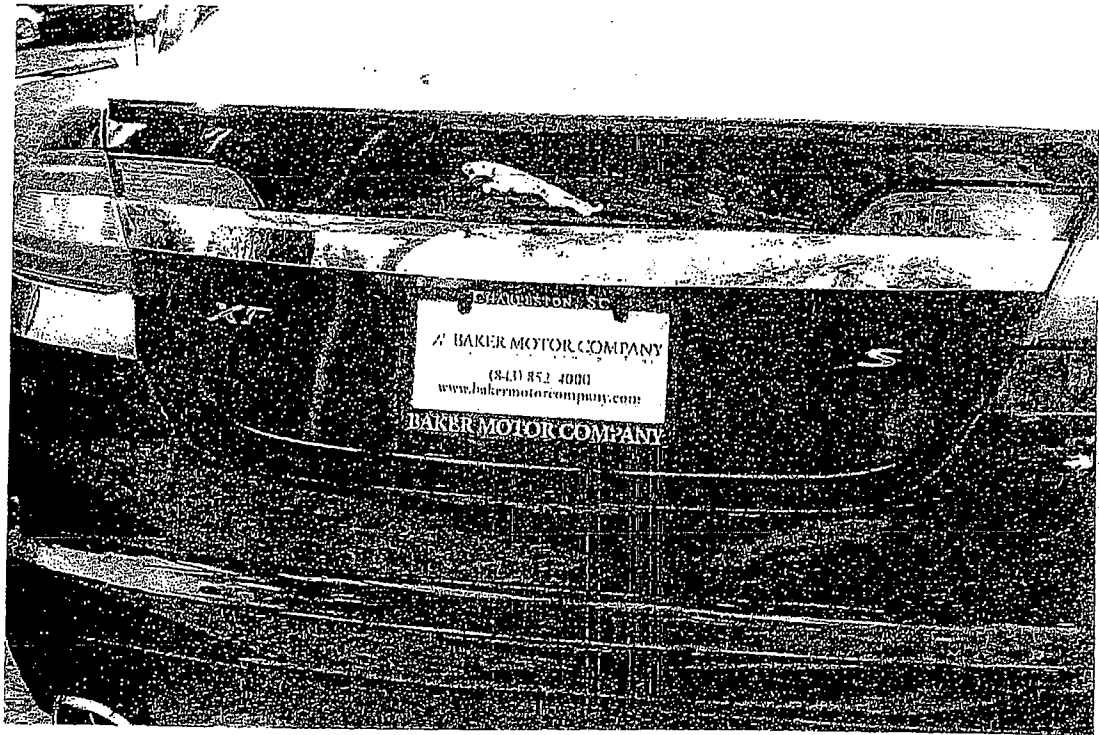
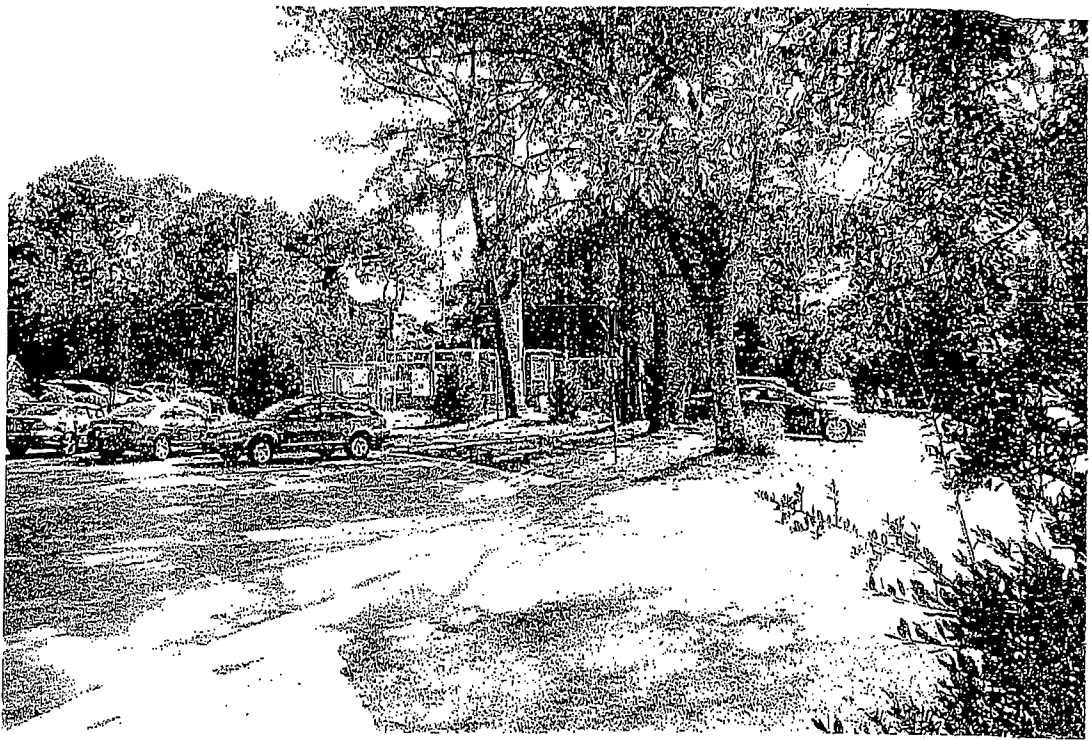












BARR, UNGER AND McINTOSH, L.L.C.

ATTORNEYS AT LAW

11 BROAD STREET

P. O. Box 1037

CHARLESTON, SOUTH CAROLINA 29402-1037

TELEPHONE 843-577-5083

FAX 843-723-9039

CAPERS G. BARR, III
H. WAYNE UNGER, JR.
WILLIAM S. BARR
H. THOMAS McINTOSH, JR.
ADAM E. BARR
B. KIM MILLER

OF COUNSEL
CAPERS G. BARR, IV

December 18, 2007

WALTERBORO OFFICE
1114 EAST WASHINGTON ST.
WALTERBORO, SC 29488-3915
TELEPHONE 843-549-9406
FAX 843-549-1058

EDISTO ISLAND OFFICE
806 OYSTER PARK
EDISTO ISLAND, SC 29438
TELEPHONE 843-869-2389

Donald H. Howe, Esquire
PO Box 598
Charleston, SC 29402

RE: 56 Leinbach Investors/Clyde Hiers

Dear Dingle:

Thank you for your letter. In your letter you asked whether or not you were missing something, quite frankly I think you are.

To begin with, the lease provides that the demised premise consists of 1.21 acre parcel, being parcel H-2, which is shown on the attached survey.

The next section, 1.02 Parking, states we have the exclusive right to use any parking areas within the demised premises, ie the entire 1.21 acres. The next section, also 1.02 provides we can use the property only for parking. Neither of these sections impliedly give the landlord concurrent use of the demised premises.

The erection of the cell tower on a portion of the lease premises substantially interferes with my client's operation of the demised premise. In particular, the area encompassed by the cell tower prevents them from utilizing the area for the intended purposes of the lease, that is, the parking lot.

Section 6.03 simply indicates that if the landlord creates a condition that substantially interferes with the normal use of the demised premises, or appurtenant parking, the rent and other charges due under the lease should be abated during such time as such interference persists. So, therefore, if there's a temporary interference by the landlord of the use and possession of the tenants use of the demised premises, then we have the right to abate the rent until such time as the interference is removed. We therefore have the right to abate the rent until the interference is removed.



In regard to your estoppel argument, Baker was not aware at the time that the tower was being erected, that it was on property that they had leased. It would be natural for a tenant to assume that it would take some gaul on the part of the landlord to rent away a portion of the property that he had already rented to another person.

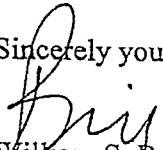
I have obtained a copy of the site plan of the proposed parking area for this property which was submitted to the City of Charleston for approval and to Mr. Hiers. Although as originally constructed the area encompassed by the tower lease may not have totally interfered with our parking, it surely does at the present time and will continue to do so in the future. The fact that we were not parking in that area at the time does not preclude us from parking in that area in the future nor give the landlord the right to lease it to a third party.

Section 9.03 of the lease allows either party to cure any non-performance under the lease if either party is in default. That section gives either party thirty (30) days to cure any defaults. Please let this letter act as notice for Mr. Hiers to cure his defaults under the lease. Should he not cure his defaults then we intend to abate the rent until such time as he does.

Please also be advised that your clients acts in allowing the erection of the cell tower constitutes a violation of the provision of Section 6.12 in that the use by the cell tower company violates my client's lawful, quiet and peaceful possession and occupation of the demised premise. Also please be advised that the leasing of the subject premises to the cell tower company constitutes a violation of Section 14.17 which is my client's right of first refusal.

At the present time, it is my client's position that it is suffering damages equal to the amount of the rent which 56 Lienbach Investors receive from the cell tower company. To date, that amount to date is in excess of \$17,000.00. This amount will continue to accrue until such time as Mr. Hiers figures out a way to cure his default under the lease.

Sincerely yours,


William S. Barr

Enclosure (as stated)
cc: Tommy B. Baker
WSB:seg

Cabinet : BAK_A (72 items)						
	Refer	Document Description	Amount paid	Date	Due	Notes
	55894	55894 29MAY03 56 LEINBACH INVESTORS	1800	2003/05/29		
	56017	56017 09JUN03 56 LEINBACH INVESTORS LLC	Void	2003/06/09		Security deposit
1	56018	56018 09JUN03 56 LEINBACH INVESTORS LLC	1800	2003/06/09		
2	56309	56309 01JUL03 56 LEINBACH INVESTORS LLC	1800	2003/07/01		
3	56716	56716 01AUG03 56 LEINBACH INVESTORS LLC	1800	2003/08/01		
4	57082	57082 31AUG03 56 LEINBACH INVESTORS LLC	1800	2003/09/02		
5	57445	57445 01OCT03 56 LEINBACH INVESTORS LLC	1800	2003/10/01		
6	57879	57879 04NOV03 56 LEINBACH INVESTORS LLC	1800	2003/11/04		
7	58149	58149 01DEC03 56 LEINBACH INVESTORS LLC	1800	2003/12/01		
	Refer	Document Description	Amount Paid	Date		
8	58519	58519 02JAN04 56 LEINBACH INVESTORS LLC	1800	2004/01/02		
9	58858	58858 02FEB04 56 LEINBACH INVESTORS LLC	1800	2004/02/02		
10	59168	59168 01MAR04 56 LEINBACH INVESTORS LLC	1800	2004/03/01		
11	59599	59599 01APR04 56 LEINBACH INVESTORS LLC	1800	2004/04/01		
12	59981	59981 03MAY04 56 LEINBACH INVESTORS LLC	1800	2004/05/03		
			21600			
13	60372	60372 01JUN04 56 LEINBACH INVESTORS LLC	1800	2004/06/01		
14	60750	60750 01JUL04 56 LEINBACH INVESTORS LLC	1800	2004/07/01		
15	61168	61168 02AUG04 56 LEINBACH INVESTORS LLC	1800	2004/08/02		
16	61549	61549 02SEP04 56 LEINBACH INVESTORS LLC	1800	2004/09/02		
17	61868	61868 04OCT04 56 LEINBACH INVESTORS LLC	1800	2004/10/04		

18	62250	62250 01NOV04 56 LEINBACH INVESTORS LLC	1800	2004/11/01		
19	62608	62608 01DEC04 56 LEINBACH INVESTORS LLC	1800	2004/12/01		
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20	62951	62951 03JAN05 56 LEINBACH INVESTORS LLC	1800	2005/01/03		
	62954	62954 03JAN05 56 LEINBACH INVESTORS LLC	Void	2005/01/03		
21	63337	63337 01FEB05 56 LEINBACH INVESTORS LLC	1800	2005/01/31		
22	63678	63678 01MAR05 56 LEINBACH INVESTORS LLC	1800	2005/03/01		
23	64092	64092 01APR05 56 LEINBACH INVESTORS LLC duplex	1800	2005/04/01		
24	64389	64389 02MAY05 56 LEINBACH INVESTORS LLC duplex	1800	2005/05/02		
			21600			
25	64814	64814 01JUN05 56 LEINBACH INVESTORS LLC duplex	1800	2005/06/01		
26	65186	65186 01JUL05 56 LEINBACH INVESTORS LLC duplex	1800	2005/07/01		
27	65526	65526 01AUG05 56 LEINBACH INVESTORS LLC duplex	1800	2005/08/01		
28	66071	66071 01SEP05 56 LEINBACH INVESTORS LLC duplex	1800	2005/09/01		
29	66453	66453 03OCT05 56 LEINBACH INVESTORS LLC duplex	1800	2005/10/03		
30	66858	66858 01NOV05 56 LEINBACH INVESTORS LLC duplex	1800	2005/11/01		
31	67245	67245 01DEC05 56 LEINBACH INVESTORS LLC duplex	1800	2005/12/01		
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32	67609	67609 03JAN06 56 LEINBACH INVESTORS LLC duplex	1800	2006/01/03		
33	68162	68162 02FEB06 56 LEINBACH INVESTORS LLC	1800	2006/02/06		
34	68503	68503 01MAR06 56 LEINBACH INVESTORS LLC	1800	2006/03/01		
35	69104	69104 01APR06 56 LEINBACH INVESTORS LLC	1800	2006/04/03		
36	69475	69475 01MAY06 56 LEINBACH INVESTORS LLC	1800	2006/05/01		
			21600			

37	69931	69931 01JUN06 56 LEINBACH INVESTORS LLC	1800	2006/06/01		
38	70324	70324 01JUL06 56 LEINBACH INVESTORS LLC	1800	2006/07/03		
39	70697	70697 01AUG06 56 LEINBACH INVESTORS LLC	1800	2006/07/31		
40	71191	71191 01SEP06 56 LEINBACH INVESTORS LLC	1800	2006/09/01		
41	71565	71565 02OCT06 56 LEINBACH INVESTORS LLC	1800	2006/09/29		
42	71987	71987 01NOV06 56 LEINBACH INVESTORS LLC	2124	2006/10/31		
	72385	72385 01DEC06 56 LEINBACH INVESTORS LLC	1854	2006/12/01		
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45	73603	73603 01MAR07 56 LEINBACH INVESTORS LLC	1854	2007/02/28		
46	74002	74002 02APR07 56 LEINBACH INVESTORS LLC	1854	2007/03/30		
47	74395	74395 01MAY07 56 LEINBACH INVESTORS LLC	1854	2007/04/30		
			22248			
48	74900	74900 01JUN07 56 LEINBACH INVESTORS LLC	1854	2007/06/01		
49	75326	75326 02JUL07 56 LEINBACH INVESTORS LLC	1854	2007/07/02		
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51	76128	76128 01SEP07 56 LEINBACH INVESTORS LLC	1854	2007/08/31		
52	76441	76441 01OCT07 56 LEINBACH INVESTORS LLC	1854	2007/10/01		
53	76866	76866 01NOV07 56 LEINBACH INVESTORS LLC	1854	2007/10/31		
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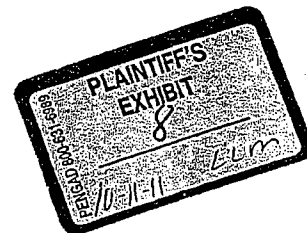
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56	77899	77899 31JAN08 56 LEINBACH INVESTORS LLC	1054	2008/01/31		
57	78297	78297 01MAR08 56 LEINBACH INVESTORS LLC	1054	2008/03/01		
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59	79007	79007 01MAY08 56 LEINBACH INVESTORS LLC	1054	2008/05/01		
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60	79364	79364 02JUN08 56 LEINBACH INVESTORS LLC	1054	2008/06/02		
61	79717	79717 01JUL08 56 LEINBACH INVESTORS LLC	1054	2008/07/01		
62	80094	80094 01AUG08 56 LEINBACH INVESTORS LLC	1054	2008/08/01		
63	80426	80426 02SEP08 56 LEINBACH INVESTORS LLC	1054	2008/09/02		
64	80787	80787 02OCT08 56 LEINBACH INVESTORS LLC	1054	2008/10/02		
65	81153	81153 04NOV08 56 LEINBACH INVESTORS LLC	1054	2008/11/04		
66	81426	81426 01DEC08 56 LEINBACH INVESTORS LLC	1054	2008/12/01		
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	81782	81782 02JAN09 56 LEINBACH INVESTORS LLC	Void	2009/01/02		
	81894	81894 12JAN09 56 LEINBACH INVESTORS LLC	1576	2009/01/12		
67	82110	82110 02FEB09 56 LEINBACH INVESTORS LLC	1167	2009/02/02		
68	82361	82361 02MAR09 56 LEINBACH INVESTORS LLC	1167	2009/03/02		
69	82685	82685 02APR09 56 LEINBACH INVESTORS LLC	1167	2009/04/02		
70	82980	82980 01MAY09 56 LEINBACH INVESTORS LLC	1167	2009/05/01		
71	83255	83255 02JUN09 56 LEINBACH INVESTORS LLC	Void	2009/06/02		
			13622			

72	83438	83438 22JUN09 56 LEINBACH INVESTORS LLC	1167	2009/06/22		
73	83549	83549 01JUL09 56 LEINBACH INVESTORS LLC	1167	2009/07/01		
74	83812	83812 04AUG09 56 LEINBACH INVESTORS LLC	1167	2009/08/04		
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76	84475	84475 02OCT09 56 LEINBACH INVESTORS LLC	1167	2009/10/02		
77	84827	84827 03NOV09 56 LEINBACH INVESTORS LLC	1167	2009/11/03		
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83	86690	86690 03MAY10 56 LEINBACH INVESTORS LLC	1167	2010/05/03		
			14004			
84	86994	86994 02JUN10 56 LEINBACH INVESTORS LLC	1167	2010/06/02		
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86	87627	87627 02AUG10 56 LEINBACH INVESTORS LLC	1167	2010/08/04		
87	87884	87884 02SEP10 56 LEINBACH INVESTORS LLC	1167	2010/09/02		
88	88172	88172 01OCT10 56 LEINBACH INVESTORS LLC	1167	2010/10/01		
89	88485	88485 02NOV10 56 LEINBACH INVESTORS LLC	1167	2010/11/02		
90	88732	88732 02DEC10 56 LEINBACH INVESTORS LLC	1167	2010/12/02		

	Refer	Document Description	Amount	Date		
91	89006	89006.04JAN11:56 LEINBACH INVESTORS LLC	1167	2011/01/04		
92	89824	89824.02FEB11:56 LEINBACH INVESTORS LLC	1167	2011/02/02		
93	89550	89550.01MAR11:56 LEINBACH INVESTORS LLC	1167	2011/03/01		
94	89870	89870.01APR11:56 LEINBACH INVESTORS LLC	1167	2011/04/01		
95	90164	90164.03MAY11:56 LEINBACH INVESTORS LLC	1167	2011/05/03		
			14004			
96	90451	90451.02JUN11:56 LEINBACH INVESTORS LLC	1167	2011/06/02		
97	90717	90717.02JUL11:56 LEINBACH INVESTORS LLC	1167	2011/07/02		
98	91147	91147.02AUG11:56 LEINBACH INVESTORS LLC	1167	2011/08/02		
99	91482	91482.02SEP11:56 LEINBACH INVESTORS LLC	1167	2011/09/02		
100	91709	91709.02OCT.56 LEINBACH INVESTORS LLC	1167	2011/09/02		
			5835			

RENTAL PAYMENT SUMMARY
6/1/2003 - 10/1/2011
FROM MAGNOLIA PARADIGM
to
56 LEINBACH

	Rent from Magnolia	Due From Property
6/1/2003-6/1/2004	\$ 21,600.00	\$ 21,600.00
6/1/2004-6/1/2005	\$ 21,600.00	\$ 21,600.00
6/1/2005-6/1/2006	\$ 21,600.00	\$ 21,600.00
6/1/2006-6/1/2007	\$ 22,248.00	\$ 22,248.00
6/1/2007-6/1/2008	\$ 19,048.00	\$ 22,915.44
6/1/2008-6/1/2009	\$ 13,622.00	\$ 23,602.90
6/1/2009-6/1/2010	\$ 14,004.00	\$ 24,310.99
6/1/2010-6/1/2011	\$ 14,004.00	\$ 25,040.32
6/1/2011-10/1/2011	\$ 5,835.00	\$ 10,435.00
Totals	\$ 153,561.00	\$ 193,352.65



1:35 PM

10/5/11

Cash Basis

Optima Towers, LLC

Transaction Detail By Account

January 1, 2006 through October 5, 2011

Type	Date	Num	Name	Paid Amount	Balance
Jan - Dec 06					
Check	2/22/2006	1013	56 Leinbach Inv., LLC	100.00	100.00
Check	10/8/2006	1065	56 Leinbach Inv., LLC	800.00	900.00
Check	11/6/2006	1076	56 Leinbach Inv., LLC	1,600.00	2,500.00
Jan - Dec 06				2,500.00	2,500.00
Jan - Dec 07					
Check	1/3/2007	1101	56 Leinbach Inv., LLC	1,600.00	1,600.00
Check	2/25/2007	1115	56 Leinbach Inv., LLC	1,656.00	3,256.00
Check	5/26/2007	1134	56 Leinbach Inv., LLC	1,656.00	4,912.00
Check	5/29/2007	1129	56 Leinbach Inv., LLC	1,656.00	6,568.00
Check	8/21/2007	1140	56 Leinbach Inv., LLC	1,656.00	8,224.00
Check	9/28/2007	1151	56 Leinbach Inv., LLC	3,312.00	11,536.00
Check	12/28/2007	1168	56 Leinbach Inv., LLC	828.00	12,364.00
Jan - Dec 07				12,364.00	12,364.00
Jan - Dec 08					
Check	2/1/2008	1003	56 Leinbach Inv., LLC	828.00	828.00
Check	2/28/2008	1009	56 Leinbach Inv., LLC	828.00	1,656.00
Check	3/31/2008	1016	56 Leinbach Inv., LLC	828.00	2,484.00
Check	4/23/2008	1027	56 Leinbach Inv., LLC	828.00	3,312.00
Check	5/29/2008	1036	56 Leinbach Inv., LLC	828.00	4,140.00
Check	6/30/2008	1042	56 Leinbach Inv., LLC	828.00	4,968.00
Check	7/29/2008	1062	56 Leinbach Inv., LLC	828.00	5,796.00
Check	7/30/2008	1047	56 Leinbach Inv., LLC	828.00	6,624.00
Check	9/20/2008	1068	56 Leinbach Inv., LLC	828.00	7,452.00
Check	11/4/2008	1078	56 Leinbach Inv., LLC	828.00	8,280.00
Check	11/23/2008	1082	56 Leinbach Inv., LLC	1,126.00	9,406.00
Check	12/23/2008	1091	56 Leinbach Inv., LLC	857.00	10,263.00
Jan - Dec 08				10,263.00	10,263.00
Jan - Dec 09					
Check	2/4/2009	1104	56 Leinbach Inv., LLC	857.00	857.00
Check	3/1/2009	1107	56 Leinbach Inv., LLC	857.00	1,714.00
Check	3/31/2009	1111	56 Leinbach Inv., LLC	857.00	2,571.00
Check	4/30/2009	1116	56 Leinbach Inv., LLC	857.00	3,428.00
Check	5/30/2009	1121	56 Leinbach Inv., LLC	857.00	4,285.00
Check	6/29/2009	1125	56 Leinbach Inv., LLC	857.00	5,142.00
Check	7/30/2009	1129	56 Leinbach Inv., LLC	857.00	5,999.00
Check	9/25/2009	1135	56 Leinbach Inv., LLC	857.00	6,856.00
Check	10/6/2009	1139	56 Leinbach Inv., LLC	857.00	7,713.00
Check	11/9/2009	1143	56 Leinbach Inv., LLC	857.00	8,570.00
Check	11/18/2009	1148	56 Leinbach Inv., LLC	20.06	8,590.06
Check	12/10/2009	1145	56 Leinbach Inv., LLC	886.97	9,477.03
Check	12/27/2009	1149	56 Leinbach Inv., LLC	886.97	10,364.00
Jan - Dec 09				10,364.00	10,364.00
Jan - Dec 10					
Check	1/27/2010	1155	56 Leinbach Inv., LLC	886.97	886.97
Check	2/24/2010	1161	56 Leinbach Inv., LLC	886.97	1,773.94
Check	3/30/2010	1170	56 Leinbach Inv., LLC	886.97	2,660.91
Check	5/1/2010	1176	56 Leinbach Inv., LLC	886.97	3,547.88
Check	5/19/2010	1180	56 Leinbach Inv., LLC	886.97	4,434.85
Check	6/23/2010	1185	56 Leinbach Inv., LLC	886.97	5,321.82
Check	7/28/2010	1193	56 Leinbach Inv., LLC	886.97	6,208.79
Check	9/1/2010	1198	56 Leinbach Inv., LLC	886.97	7,095.76
Check	9/22/2010	1205	56 Leinbach Inv., LLC	886.97	7,982.73
Check	10/20/2010	1208	56 Leinbach Inv., LLC	886.97	8,869.70
Check	12/1/2010	1212	56 Leinbach Inv., LLC	886.79	9,756.49
Check	12/29/2010	1219	56 Leinbach Inv., LLC	886.79	10,643.28
Jan - Dec 10				10,643.28	10,643.28
Jan 1 - Oct 5, 11					
Check	2/7/2011	1228	56 Leinbach Inv., LLC	886.79	886.79
Check	3/2/2011	1233	56 Leinbach Inv., LLC	886.79	1,773.58
Check	3/25/2011	1239	56 Leinbach Inv., LLC	886.97	2,660.55
Check	4/22/2011	1245	56 Leinbach Inv., LLC	886.97	3,547.52
Check	5/20/2011	1251	56 Leinbach Inv., LLC	886.97	4,434.49
Check	7/1/2011	1256	56 Leinbach Inv., LLC	886.97	5,321.46
Check	7/22/2011	1262	56 Leinbach Inv., LLC	886.97	6,208.43
Check	8/24/2011	1272	56 Leinbach Inv., LLC	886.97	7,095.40



1:55 PM
10/05/11
Cash Basis

Optima Towers, LLC
Transaction Detail By Account
January 1, 2006 through October 5, 2011

Type	Date	Num	Name	Paid Amount	Balance
Check	9/21/2011	1276	56 Leinbach Inv., LLC	886.97	7,982.37
Jan 1 - Oct 5, 11				7,982.37	7,982.37
TOTAL				54,116.65	54,116.65

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

TITLE TO REAL ESTATE

BKE 333PG031

WHEREAS, at a meeting of the Board of Directors of Charles Towne Montessori School, duly called and held, it was unanimously resolved pursuant to the by-laws of said institution that the below described premises be conveyed to the Grantee below for the consideration hereinafter expressed and that Ingrid Tugwell, President was authorized and directed to deliver the deed conveying said property; NOW THEREFOR

KNOW ALL MEN BY THESE PRESENTS that CHARLES TOWNE MONTESSORI SCHOOL sometimes hereinafter called "Grantor"), in consideration of the sum of SEVEN HUNDRED TWENTY-FIVE THOUSAND AND NO 00/100THS (\$725,000.00) DOLLARS in hand paid at and before the sealing of these presents by 56 LEINBACH INVESTORS, LLC (sometimes hereinafter called "Grantee"), the receipt whereof is hereby acknowledged, has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto 56 LEINBACH INVESTORS, LLC its successors and assigns forever, the following described premises to-wit:

SEE EXHIBIT "A" HERETO AND MADE A PART HEREOF BY REFERENCE

TOGETHER with all and singular the Rights, Members, Hereditaments, and Appurtenances to the said premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the said Premises before mentioned unto the Grantee hereinabove named and its successors and



ALL those certain pieces, parcels, or lots of land, situate, lying and being in the City and County of Charleston, South Carolina, and shown and designated as Parcel "F" and Parcel "G" on a plat dated April, 1981 made by W. L. Stevens, Jr., R.L.S., entitled, Harrison Executive Park, City of Charleston, County of Charleston, South Carolina", and recorded in the RMC Office for Charleston County in Plat Book AW, at page 33 on September 30, 1982; measuring and containing, butting and boundings as will appear by reference to said plat.

BEING a property of the property conveyed to the Grantor herein by deed of Kathryn B. Leinbach, dated July 27, 1984 and recorded in the RMC Office for Charleston County in Book A139 at page 644.

TMS# 349-01-00-046 and ~~349-01-00-047~~

ALSO

ALL that lot, piece or parcel of land with the buildings and improvements thereon, situate, lying and being in the City of Charleston, Charleston County, South Carolina being known as Parcel H-2 as shown on a plat made by Hoffman Lester Associates, Inc., entitled, "HARRISON EXECUTIVE PARK PLAT SHOWING THE SUBDIVISION OF PARCEL 11 (TMS# 349-01-00-045) INTO PARCELS H-1 AND H-2 OWNED BY CHARLES W. PATRICK, JR. AND STEPHEN ZIFF", dated April 4, 1994 and revised June 2, 1994 and recorded in the RMC Office for Charleston County in Plat Book DA, page 48. Said lot having such size, shape, metes, bounds and dimensions as shown on said plat.

Under and subject to a private drainage easement fifteen feet in width along the western property line as set forth in deed from Charles W. Patrick, Jr. and Stephen Ziff to Brilliant Estes Associates dated June 21, 1994 and recorded in Book F251 at page 224, in the RMC Office for Charleston County.

THIS CONVEYANCE IS MADE subject to restrictive covenants, or modifications thereto, easements and/or rights-of-way heretofore granted affecting the above-described property and recorded in the RMC Office for Charleston County, South Carolina.

Being the same property conveyed to the Grantor herein by deed of Charles W. Patrick, Jr., dated August 25, 1999 and recorded in the RMC Office for Charleston County simultaneously herewith.

TMS# 349-01-00-105

GRANTEE'S ADDRESS: Post Office 935
Charleston, SC 29402

333PG034

252

Sandra Lempesis

MTL
sol

BKE 333PG035

FILED

E 333-031

1999 AUG 26 PM 3:16

CHARLIE LYBRAND
REGISTER
CHARLESTON COUNTY SC

Recording
Fee

10.00

State
Fee

1885.00

County
Fee

797.50

Postage

TOTAL

2692.50

A

Recorded this 26 day of AUG Year 99
On Property Record Card

Reggie A. Mosley
Auditor Charleston County

TMS VERIFIED	
BAC	<i>MTL</i>
DATE	<u>8/30/99</u>

BARR, UNGER AND McINTOSH, L.L.C.

ATTORNEYS AT LAW

11 BROAD STREET

P. O. Box 1037

CHARLESTON, SOUTH CAROLINA 29402-1037

CAPERS G. BARR, III

H. WAYNE UNGER, JR.

WILLIAM S. BARR

H. THOMAS McINTOSH, JR.

ADAM E. BARR

B. KIM MILLER

OF COUNSEL
CAPERS G. BARR, IV

TELEPHONE 843-577-5083

FAX 843-723-9039

January 31, 2008

WALTERBORO OFFICE

1114 EAST WASHINGTON ST.
WALTERBORO, SC 29488-3915

TELEPHONE 843-549-9406

FAX 843-549-1038

EDISTO ISLAND OFFICE

806 OYSTER PARK

EDISTO ISLAND, SC 29438

TELEPHONE 843-869-2389

Donald H. Howe, Esquire
PO Box 598
Charleston, SC 29402

RE: 56 Leinbach Investors/Clyde Hiers

Dear Dingle:

Please find enclosed the rent payment on the above property which is due on February 1. You will note that this rent payment has been reduced by \$800.00 which is the amount which we understand Mr. Hiers receives for rent from the cell tower company.

On December 18 I wrote you a letter and pursuant to Section 9.03 of the Lease demanded that Mr. Hiers cure his non-performance. Inasmuch as Mr. Hiers non-performance within thirty (30) days of that date, as provided by that section, we are exercising our rights pursuant to Section 6.03 to abate the rent.

By abating the rent at this time, please be advised that the tenant does not waive any rights that it may have for further set-off on account of the landlord's previous interference.

Sincerely yours,



William S. Barr

Enclosure (as stated)
WSB:seg



ISSUED BY: BARBARA

BAKER MOTOR COMPANY
OF CHARLESTON, INC.
CHARLESTON, SOUTH CAROLINA 29407

PAGE 1

INVOICE STOCK NO.	INVOICE DATE	PURCHASE ORDER NO.	COMMENT/IN.	AMOUNT	DISCOUNT/ACCOUNT NO.	NET AMOUNT
	013108	FEB RENT FOR LESS \$800	EMPLOYEE PARKING LOT	77899	20203 8000 8020	1,054.00 -1,054.00 895.9 158.1
TOTAL					20203	1,054.00

DETACH AT PERFORATION BEFORE DEPOSITING CHECK

VERIFY THE AUTHENTICITY OF THIS MULTI-TONE SECURITY DOCUMENT

CHECK BACKGROUND AREA CHANGES COLOR GRADUALLY FROM TOP TO BOTTOM.

REMITTANCE ADVICE

BAKER MOTOR COMPANY
OF CHARLESTON, INC.
1611/1543 SAVANNAH HIGHWAY
CHARLESTON, SOUTH CAROLINA 29407
Telephone: 843-852-4000

B Bank of America

077899

77899

67-44
632DATE
31 JAN 08PAY THIS AMOUNT
*****1,054 DOLLARS 00 CENTSAMOUNT OF CHECK
*****1,054.00

424

BAKER MOTOR COMPANY OF CHARLESTON, Inc.

TO
THE
ORDER
OF56 LEINBACH INVESTORS LLC
225 SEVEN FARMS DRIVE
DANIEL ISLAND SC 29492-8353*Barbara H. Man*

⑈077899⑈ ⑆053904483⑆ 000729026416⑈

THE ORIGINAL DOCUMENT HAS A WHITE REFLECTIVE WATERMARK ON THE BACK. HOLD AT AN ANGLE TO SEE THE MARK WHEN CHECKING THE ENDORSEMENT.

CARNEVALE ASSOCIATES

975 PITT STREET
MOUNT PLEASANT, SOUTH CAROLINA 29464
843-884-0455 FAX 843-856-1492

9-11-02

Mr. Bill Cochran
Baker Motors
1511 Savannah Hwy
Charleston, SC 29407

Dear Bill:

Thank you for the time you spent last week with Clyde Hiers and myself. Your expansion plans at Baker Motors have to be exciting for all of your fine folks.

Before I outline our proposal to you, let me tell you that we would very much like to make a satisfactory arrangement with Baker Motors. Please keep this in mind when you review the following:

PARCEL SIZE 1.2 acres (you can lease all or part)

VALUATION OF PARCEL \$250,000.00 per acre

RETURN TO LESSOR 8% to 10% depending on who pays property tax

PLANNING AND APPROVAL PROCESS by Baker Motors

SURVEY to be supplied by Lessor

IMPROVEMENTS by Baker Motors

INSURANCE by Baker Motors

MAINTENANCE by Baker Motors

LEASE TERM 5 to 10 years with renewals. (we are flexible here and understand you need to recapture your improvements)

RENTAL INCREASES Lessor will hold the lease rate flat for the first three (3) full years of the lease. Thereafter the lease rate will increase three percent (3%) annually.

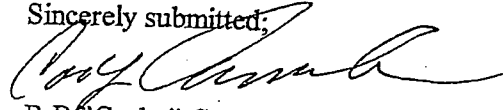


These are the major points that would be included in any potential lease arrangement on this parcel. Frankly, in entering a lease with Baker Motors, we would have to forget about any expansion plans for the Montessori School. This is the main reason we have no problem with a long term lease.

It is our understanding, that you will have to improve the lot to city standards. If you can use it "as is" that is fine with us. We are not interested in improving the lot to your specifications. Further, if in the future, we decide to offer this parcel "For Sale", we will offer Baker Motors the first option to purchase.

After you have had the time to digest the above, please call and we can discuss same and answer any questions you might have. We would be available to meet with you as well.

Sincerely submitted,



R.B. "Corky" Carnevale

CARNEVALE ASSOCIATES

975 PITT STREET
MOUNT PLEASANT, SOUTH CAROLINA 29464
843-884-0455 FAX 843-856-1492

10-24-02

Mr. Bill Cochran
Baker Motors
1511 Savannah Hwy
Charleston, SC 29407

Dear Bill:

I want to reply in writing, to the discussions and proposal, which you suggested at our meeting this week. As I mentioned in my letter to you 9-11-02, Clyde, Gary and I are very interested in making a satisfactory arrangement with Baker Motors.

The only point that we have a difference with you is on the monthly rental rate. You suggested \$1600 per month for the initial 3-year term, which at a 8% return equates to a value on the property of \$250,000. The site contains 1.2 acres, which at a value of \$250,000 per acre would equate to a value on the property of \$300,000. An 8% return on this value would yield a monthly rental of \$2000.

We are prepared to split this difference with Baker Motors and offer an initial rental rate of \$1800 per month. This would be for a 5 year lease with ~~two~~ 5 year options. The agreement would also include the "Right of First Refusal" to purchase the property should it become available for sale.

If the above is satisfactory to Baker Motors, please sign on the line provided, and I will generate a formal lease agreement for your consideration.

I look forward to finalizing this transaction with you.

Sincerely,

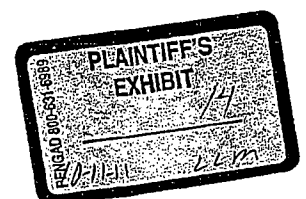
R.B. Carnevale
R.B. "Corky" Carnevale

For Baker Motors:

William J. [Signature]

NOTE: LESSEE WILL BE MAGNOLIA PARADISE, INC

LEASE BASED ON RECEIVING APPROVAL
FOR A PARKING LOT FROM THE CITY
AND MRS. LEINBACH.



SUMMARY OF RENTS RECEIVED BY LANDLORD
JUNE 1, 2003 - OCTOBER 1, 2011

Rent paid by Magnolia Paradigm.	\$153,561.00
Rent paid by Optima Towers	\$ <u>54,116.65</u>
Total Rent received by Landlord	\$ 207,477.65
Less :	
Rent owed by Magnolia Paradigm	\$193,352.65
Total overpaid to Landlord	\$ 14,125.00



COMMISSIONERS OF PUBLIC WORKS OF THE CITY OF CHARLESTON
TMS 349-01-00-061
ZONED GB

CORPORATE QUARTERS EXECUTIVE PARK
TMS 349-01-00-044
& TMS 349-01-00-082 THRU 098
ZONED GB

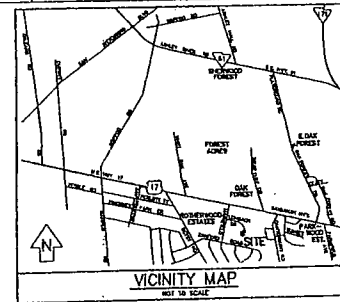
PARCEL H-2

BRILLIANT ESTES ASSOCIATES
PARCEL H-1
TMS 349-01-00-045
ZONED GB

LEINBACH INVESTORS LLC
TMS 349-01-00-046
ZONED GB

TECHNICAL REVIEW COMMITTEE
APPROVED

DATE: 04/21/03
BY: [Signature]
FOR: [Signature]
CHECKED BY: [Signature]



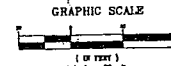
CURVE	LENGTH	RADIUS	TANGENT	CHORD	CH. STATION	CH. STA.
1	135.15	150.00	150.00	150.00	150.00	150.00
2	175.00	175.00	175.00	175.00	175.00	175.00

LEGEND

- REF - REBAR FOUND
- CP - COMPLETED POINT
- TM - TEMPORARY BENCHMARK
- R.L.T. - SPOT ELEVATION (GROUND)
- R.L.T. - SPOT ELEVATION (PAVEMENT, CONCRETE)
- - CENTERLINE
- A/C - AIR CONDITIONER
- CPP - CORRUGATED PLASTIC PIPE
- DI - DROP INLET

NOTES

- 1) THE PROPERTY IS OWNED BY LEINBACH INVESTORS LLC.
- 2) THIS MAP WAS PREPARED BY LEINBACH INVESTORS LLC.
- 3) REFERENCE PLAT BY JOHN B. LESTER DATED 6/8/94 AND RECORDED IN THE CHARLESTON COUNTY REC. OFFICE IN PLAT BOOK DA PAGE 48.
- 4) THE TOTAL AREA IS 1.216 ACRES (52,931 SQ. FT.).
- 5) THIS SURVEY DOES NOT REFLECT THE EXISTENCE OR NON-EXISTENCE OF U.S. ARMY CORPS OF ENGINEERS JURISDICTIONAL WETLANDS.
- 6) ACCORDING TO FLOOD INSURANCE RATE MAP 450412 0002 D DATED NOVEMBER 4, 2004, THIS PROPERTY LIES IN ZONE C AND ZONE AS WITH A BASE FLOOD ELEVATION OF 11' MONDRIE.
- 7) UTILITIES ARE NOT SHOWN ON THIS SURVEY.
- 8) THE VERTICAL DATUM IS NGVD83 (NATIONAL GEODETIC VERTICAL DATUM 1929).
- 9) THE PROPERTY IS ZONED GENERAL BUSINESS, HEIGHT DISTRICT 3A.



BAKER
MOTORS
EMPLOYEE
PARKING LOT

FORSEBERG ENGINEERING
AND SURVEYING, INC.
1847 SAVANNAH HIGHWAY, SUITE B
CHARLESTON, SOUTH CAROLINA 29405
TEL: 843.577.4444 FAX: 843.577.4789
WWW.FORSEBERG-ENGINEERING.COM



CHARLESTON • CHARLOTTE

LS3P ASSOCIATES LTD.
24 NORTH MARKET STREET, SUITE 300
CHARLESTON, SOUTH CAROLINA 29401
TEL: 843.577.4444 FAX: 843.577.4789
HTTP://WWW.LS3P.COM



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FROM LS3P ASSOCIATES LTD.

REVISIONS:

PROJECT: 1103-020130.02
DATE: 04/21/03
DRAWN BY: LHR
CHECKED BY: CHL

TOPOGRAPHIC
SURVEY
C1.01

SOLUTIONS THROUGH LISTENING

SERVICE BY DESIGN



[illegible]

BAKER
MOTORS
EMPLOYEE
PARKING LOT

**FORSBERG ENGINEERING
AND SURVEYING, INC.**
1367 SAVANNAH HIGHWAY SUITE 9
P.O. BOX 30579
DURHAM, NORTH CAROLINA 27617
(919) 271-7471 FAX (919) 271-0192
CIVIL, ELECTRICAL AND SURVEYING
AND LANDSCAPE ARCHITECTURE



CHARLESTON • CHARLOTTE

LS3P ASSOCIATES LTD.
24 NORTH MARKET STREET SUITE 300
CHARLESTON, SOUTH CAROLINA 29401
TEL: 843.577.4444 FAX 843.722.0788
HTTP://WWW.LS3P.COM



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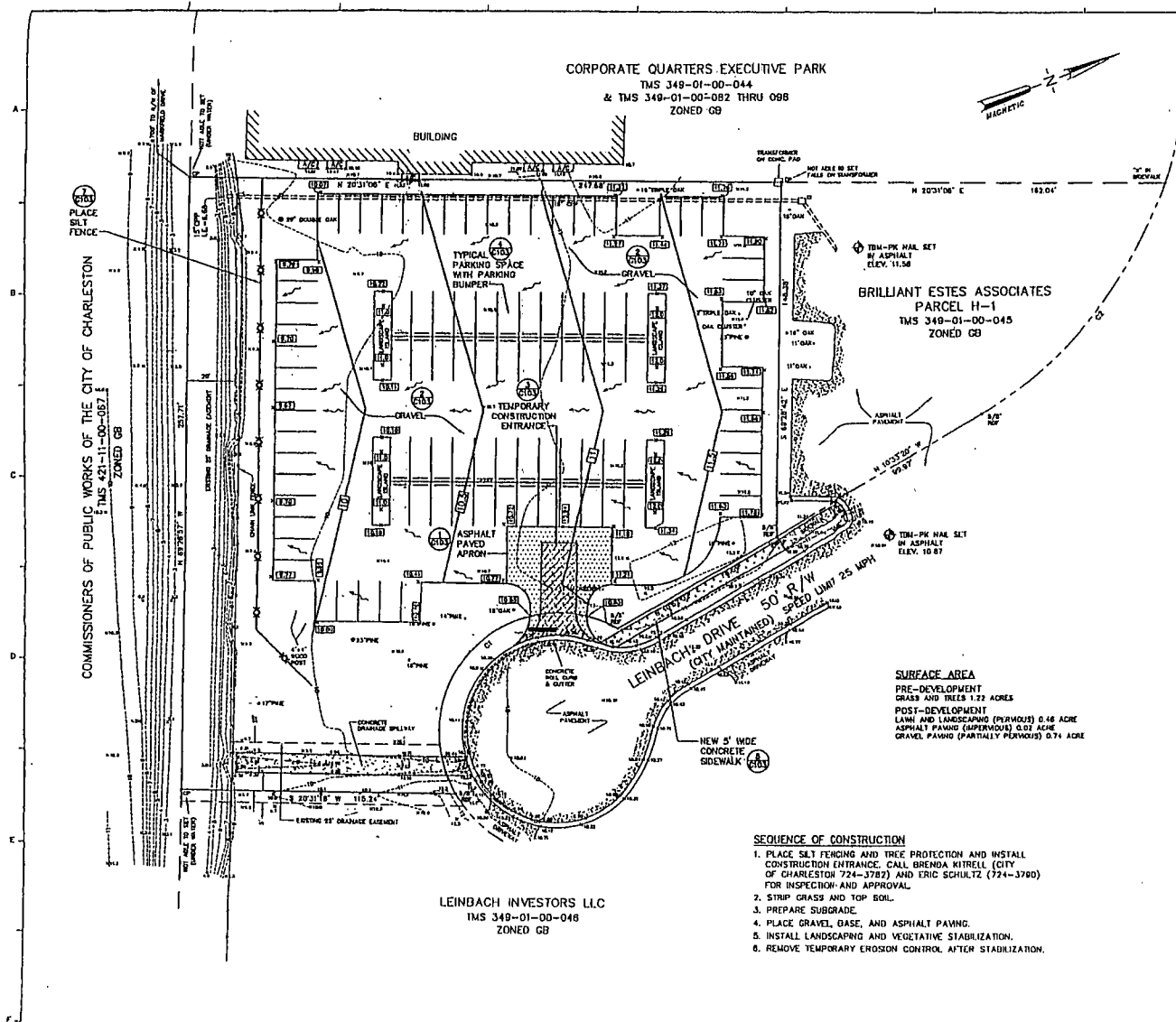
REVISIONS:

PROJECT: 1103-020130.02
DATE: 04/21/03
DRAWN BY: LHR
CHECKED BY: CWL

GRADING
PLAN

11C102

SERVICE BY DESIGN



CURVE	LENGTH	MEASURE	YANGTSE	CH. 1949	DELTA
C1	151.43	86.00	101.00	82.45/82.75	102.45/102.75
C2	124.80	178.00	87.84	122.37	82.37/82.75

LEGEND - EXISTING

- R/F - REBAR FOUND
- CP - COMPLETED POINT
- TEM - TEMPORARY BENCHMARK
- X B.7 - SPOT ELEVATION (GROUND)
- X B.79 - SPOT ELEVATION (PAVEMENT, CONCRETE)
- B--- - CENTER LINE
- A/C - AIR CONDITIONER
- CPP - CORRUGATED PLASTIC PIPE
- DI - DROP INLET

LEGEND - NEW

— 112.49 — FINISHED GRADE SPOT ELEVATION

— 110 — FINISHED GRADE CONTOUR

DETAIL/SECTION INDICATOR
DETAIL/SECTION NUMBER
SHEET ON WHICH DETAIL/SECTION IS DEPICTED

NOTES

- 1) THE PROPERTY IS OWNED BY LEMBACH INDUSTRIES LLC.
- 2) TNS NO. 246-01-00-103.
- 3) REFERENCE PLAT BY JOHN R. LESTER DATED 6/8/94 AND
RECORDED IN HAMILTON COUNTY RECORD OFFICE IN
PLAT BOOK ON PAGE 48.
- 4) THE TOTAL AREA = 1.218 ACRES (82,937 SQ. FT.).
- 5) THIS SURVEY DOES NOT REFLECT THE EXISTENCE OR
NONEXISTENCE OF U.S. ARMY CORPS OF ENGINEERS' SUBSIDIARIZED
WETLANDS.
- 6) ACCORDING TO LOSS INSURANCE RATE MAY-15-11 0020 D
DECEMBER 3, 1998, THIS PROPERTY LIES IN ZONE C
AND ZONE 43 WITH A BASE FLOOD ELEVATION OF 11 HIGHS.
- 7) UTILITIES ARE NOT SHOWN ON THIS SURVEY.
- 8) THE VERTICAL DATUM IS NAVD83 (NATIONAL GEOGRAPHIC VERTICAL
DATUM 1929).
- 9) THE PROPERTY IS ZONED GENERAL BUSINESS. HS0011

EROSION CONTROL NOTES

- 1) ALL EXISTING UTILITIES DEVICES SHALL BE IN PLACE PRIOR TO START OF CONSTRUCTION
- 2) CONTRACTOR SHALL MAINTAIN ALL EXISTING UTILITIES ABOVE OR ON ANY TEMPORARY GUARANTEE SURVEYS OR UTILITIES USED DURING CONSTRUCTION.
- 3) REZEMENT DEPOSITS SHALL BE MAINTAINED WITH THE LEVEL OF DEPOSITION REACHES APPROXIMATELY ONE INCH ABOVE THE LEVEL OF THE EXISTING SURFACE.
- 4) THE CONSTRUCTION SHALL COMPLETE ALL REZEMENT UTILITIES DEVICES AT LEAST ONE EVERY SEVEN CALENDAR DAYS AND AFTER ANY REZEMENT EVENT EXETER THAN ONE OF NUMBER OF PRECIPITATION EXCEEDS THE LEVEL OF THE EXISTING SURFACE.
- 5) CONTRACTOR SHALL DETAIL REZEMENT UTILITIES AS GOOD AS PRACTICABLE AND IN PORTIONS OF THE SITE WHERE CONSTRUCTION ACTIVITIES HAVE TEMPORARILY OR PERMANENTLY CEASED, BUT IN THE CASE WHEN MORE THAN FOURTEEN DAYS AFTER CONSTRUCTION ACTIVITIES HAVE TEMPORARILY CEASED, THE CONTRACTOR SHALL REZEMENT THAT PORTION OF THE SITE.
- 6) ALL EXISTING SHALL BE MAINTAINED AND/OR REPLACED AS PRELIMINARY PERMANENT SURVEYS ARE IN PLACE.
- 7) ALL EXISTING UTILITIES NOT SHOWN AS SUCCEED OR LANDSCAPED SHALL BE REZEMED PER REZEMENT SURVEY.

NOTE

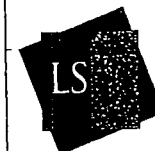
SITE DISTANCE VISIBILITY AT ALL EXITS AND/OR INTERSECTIONS WILL BE MAINTAINED IN ACCORDANCE WITH SCOPES ACCESS AND INGRADE MANAGEMENT STANDARDS MANUAL. ALL TRAFFIC CONTROL DEVICES WILL BE TO STANDARDS IN MANUAL ON UNIFORM TRAFFY CONTROL DEVICES.

GRAPHIC SCALE



2947-

BAKER MOTORS EMPLOYEE PARKING LOT



CHARLOTTE* CHARLOTTE

LS3P ASSOCIATES LTD
24 NORTH MARKET STREET SUITE 300
CHARLOTTE, SOUTH CAROLINA 28201
TEL 843.577.4141 FAX 843.722.1189
HTTP://WWW.LS3P.COM

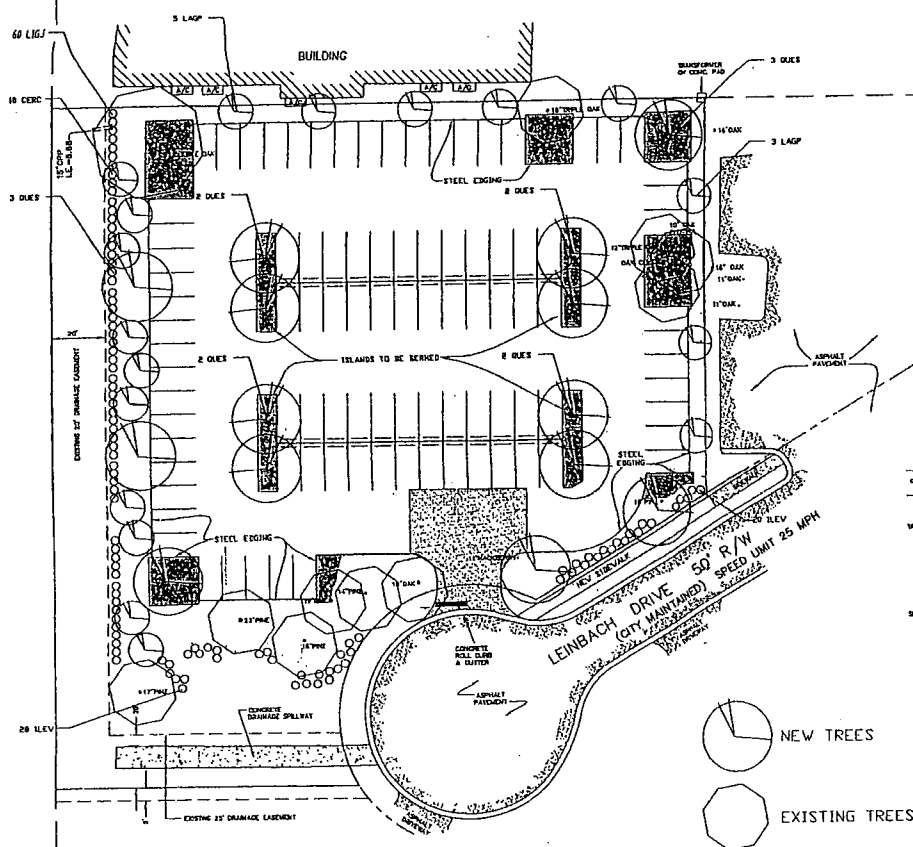
REVISIONS: APRIL 8, 2003

PROJECT: 1103-020130.02
DATE: 04/21/03
DRAWN BY: GOC
CHECKED BY: GOC

LANDSCAPE
PLAN

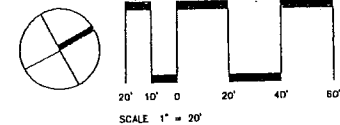
L201

SERVICE BY DESIGN



LEINBACH INVESTORS LLC
TMS 349-01-00-046

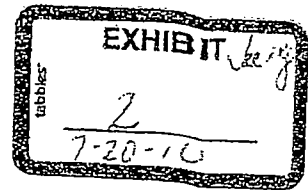
ITEM	AMOUNT	REMARKS/NOTES	MEASUREMENT	SPECIES	DATE	PLANTING	NOTES
PLANTING							
10	100	Circle clematis	10-12"	6-8"	6/8	5 1/2"	Not included
2	2	Large clematis	12"	8"	6/8	5 1/2"	Not included
10	100	Circle clematis	10-12"	6-8"	6/8	5 1/2"	Not included
PLANTING							
10	100	Circle clematis	10-12"	6-8"	6/8	5 1/2"	Not included
2	2	Large clematis	12"	8"	6/8	5 1/2"	Not included
10	100	Circle clematis	10-12"	6-8"	6/8	5 1/2"	Not included



SOLUTIONS THROUGH LISTENING

2017-1

ITEM	AMOUNT	REMARKS/NOTES	MEASUREMENT	SPECIES	DATE	PLANTING	NOTES
10	100	Circle clematis	10-12"	6-8"	6/8	5 1/2"	Not included
2	2	Large clematis	12"	8"	6/8	5 1/2"	Not included
10	100	Circle clematis	10-12"	6-8"	6/8	5 1/2"	Not included
PLANTING							
10	100	Circle clematis	10-12"	6-8"	6/8	5 1/2"	Not included
2	2	Large clematis	12"	8"	6/8	5 1/2"	Not included
10	100	Circle clematis	10-12"	6-8"	6/8	5 1/2"	Not included



BAKER MOTOR COMPANY

1511-1513 SAVANNAH HWY

CHARLESTON, SC 29407

843-852-4000

843-852-4039 FAX

FACSIMILE TRANSMITTAL SHEET

TO: RB "CORKY" CARNEVALE FROM: BILL COCHRAN
COMPANY: CARNAVALE ASSOC., LLC DATE: 12/18/02
FAX NUMBER: 723-6686 TOTAL NO. OF PAGES INCLUDING COVER: 2
PHONE NUMBER: 577-2230
RE: PARKING LOT.

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

AS PER OUR PHONE CONVERSATION TODAY
I AM SENDING THE PARKING LOT LAYOUT
DRAWN BY LS3P. WE HAVE TO APPLY TO
THE CITY FOR A VARIANCE BECAUSE LOT
WILL BE GRAVEL. LS3P WILL MEET WITH
THE CITY STAFF ON 12/19/02 FOR LAYOUT APPROVAL.
THE NEXT MEETING FOR THE VARIANCE IS
FEB 6, 2003. I HAVE NOT HEARD FROM OUR
ATTORNEY ON THE LEASE BUT WILL
CALL YOU AS SOON AS HE COMPLETES
HIS REVIEW



TX/RX No. 5096 @ 10:10AM

February 7, 2000

Met with Corkey Carnevale today. He & his group met with the city, tenants on Leinbach Dr. and owned, Mrs Leinbach. No problem with the concept of using as a employee parking lot.

Carnevale laid out the following proposal. If we are in agreement ~~then~~ they will proceed with permits, approvals, etc.

- Rent for 70 car spaces - Approximately 35,000 sq ft (1 acre)
- Rent will come out to be about \$1800/mo or \$21,600/year

This gives owners a 10% return.

- We improve property: ie pave, stripe, etc - Corkey said cost would be approximately \$75K - \$80K
- Employee parking only
- We provide liability insurance
- They will design.



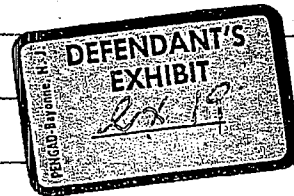
I told Corkey I would get with TBB & review and let them know in a few days.

2/16/00 @ 9:40 - Advised Corkey we would not be interested in his proposal at this time

- Mike LaRoone - son-in-law of Katherine Leinbach

Clyde Allen - 577-1040 (#22)

9/5/02 - Met this AM with Clyde Hiers and
Corey Carnevale re lot on Leebah Rd
to be used for employee parking
only - Not storage -
They will put a proposal
together and get with me
on Wed 9/11/02.



STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMONS PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2008-CP-10-3590

56 LEINBACH INVESTORS, LLC,)

Plaintiff,)

-versus-)

MAGNOLIA PARADIGM, INC.,)

Defendant.)

AFFIDAVIT OF
WILLIAM S. BARR



PERSONALLY appeared before me WILLIAM S. BARR, Attorney at Law, who being duly sworn, deposes and says as follows:

- a) That Affiant is the attorney for Defendant above named.
- b) That Affiant was admitted to the South Carolina Bar in 1974, and, since that time, has been engaged in private practice; and that Affiant is extensively engaged in the practice of all areas of the law particularly in the area of real property.
- c) That Affiant has represented Defendant in the proceedings in this Court, and that such proceedings involved the issues of the parties rights under a lease; and that this Affidavit is filed in support of a motion on behalf of Defendant for attorney's fees, suit money, and costs as provided in their lease.
- d) That Affiant incorporates herein Rule 32, Rules of the South Carolina Supreme Court, which contains the Canons of Ethics concerning the setting of attorney's fees; that Affiant further calls to the attention of the Court the numerous decisions by the Supreme Court of South Carolina and the Court of Appeals concerning the factors and criteria which should be considered in the setting of attorney's fees; that Affiant relies upon the discretion of this Court in the determination of the amount of fees, based, among other things, upon the Court's record

herein and the Court's first hand knowledge of the litigation between the parties, the difficulty of the services rendered, the time necessarily expended, the result accomplished and the other factors and criteria which are set forth in the Canons of Ethics and the decisional law of this State.

e) That the time spent in the representation of Defendant, as set forth more fully hereinafter, was necessary to the protection of the client's interest and the proper representation of the client.

f) That based upon Affiant's time and expense records, which are maintained on a daily basis in the ordinary course of business and is part of the business records of Affiant's firm, Affiant states to the Court that the following time was necessarily expended by Affiant as aforesaid: 109.7 hours from June 27, 2008 to October 10, 2011.

g) That, as of the date of this Affidavit, costs have been incurred, which expenditures include, but not limited to, filing fee, service of process, deposition costs, courier service, postage, and photocopying; it being the information and belief of the undersigned that said expenditures should equitably be added into any fees which this Court may hereafter award.

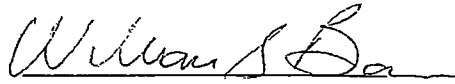
h) That the foregoing time and expenditures are through October 10, 2011 and do not include time and money expended subsequent to October 10, 2011, (the date of the hearing) or any to be incurred thereafter.

i) That Affiant, on behalf of Affiant's client, based not only on the time necessarily devoted to this case, but also upon the other factors and criteria which have been held to be relevant in the setting of attorney's fees, requests that this Court review the record herein and this Affidavit, and take into consideration its relevant first hand knowledge and grant and award to Affiant's client attorney's fees and costs, plus fees incurred thereafter, or an amount determined

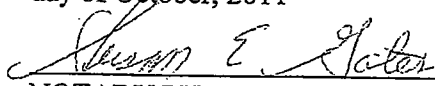
by the Court to be reasonable for attorney's fees, suit money, and costs, and that Plaintiff be required to pay the same within a reasonable time as determined by the Court.

10. Attached hereto and incorporated herein by reference is an itemization of all time spent, including attorney and paralegal time, and costs incurred by his law firm in this case.

FURTHER AFFIANT SAYETH NOT.


WILLIAM S. BARR

SWORN to before me this 10th
day of October, 2011

 (L.S.)
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires : 10-25-16

Detail Transaction File List
Barr, Unger & McIntosh, LLC

Client	Trans Date	Tmkr	H P	Tcode/ Task Code	Rate	Hours Worked	Hours to Bill	Amount	Ref #
Transaction Date 06/27/2008									
20081229.00	06/27/2008	2	A	1	200.00	0.50	0.50	100.00	Review and revise answer and counterclaim. Tel Dingle. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 06/27/2008 Billable 0.50 0.50 100.00									
Transaction Date 07/03/2008									
20081229.00	07/03/2008	2	A	1	200.00	0.70	0.70	140.00	Review and revise answer and counterclaim. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 07/03/2008 Billable 0.70 0.70 140.00									
Transaction Date 07/07/2008									
20081229.00	07/07/2008	2	A	1	200.00	0.90	0.90	180.00	Review and revise answer and counterclaim. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 07/07/2008 Billable 0.90 0.90 180.00									
Transaction Date 07/11/2008									
20081229.00	07/11/2008	2	A	1	200.00	0.40	0.40	80.00	Review and revise complaint. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 07/11/2008 Billable 0.40 0.40 80.00									
Transaction Date 08/19/2008									
20081229.00	08/19/2008	2	A	1	200.00	1.10	1.10	220.00	Prepare discovery and request for admissions. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 08/19/2008 Billable 1.10 1.10 220.00									
Transaction Date 08/22/2008									
20081229.00	08/22/2008	2	A	1	200.00	0.50	0.50	100.00	Clyde Hiers matter. Research tenant's right of quiet enjoyment. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 08/22/2008 Billable 0.50 0.50 100.00									
Transaction Date 10/16/2008									
20081229.00	10/16/2008	2	A	1	200.00	0.45	0.45	90.00	Review Discovery responses, letter to Dingle Howe. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 10/16/2008 Billable 0.45 0.45 90.00									
Transaction Date 11/07/2008									
20081229.00	11/07/2008	2	A	1	200.00	0.30	0.30	60.00	Review letter from Hiers e-mail Barbara a response. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
20081229.00	11/07/2008	2	A	1	200.00	0.30	0.30	60.00	Review letter from Clyde Hiers to TB re rent increase. E-mail Barbara cc of the lease, review Barbara's spread sheet. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 11/07/2008 Billable 0.60 0.60 120.00									
Transaction Date 02/19/2009									
20081229.00	02/19/2009	2	A	1	200.00	0.40	0.40	80.00	Prepare response to discovery and supplemental request to produce for the Optima Tower file. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 02/19/2009 Billable 0.40 0.40 80.00									
Transaction Date 02/20/2009									
20081229.00	02/20/2009	2	A	1	200.00	0.60	0.60	120.00	Review and revise discovery response and supplemental request for production. ARCH

Client	Trans Date	Tmkr	P	Tcode/ Task Code	Rate	Hours Worked	Hours to Bill	Amount		Ref #
Transaction Date 02/20/2009										
Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC										
Total for Transaction Date 02/20/2009 Billable 0:00 0:00 120:00										
Transaction Date 04/15/2009										
20081229.00	04/15/2009	2	A	1	200.00	0.40	0.40	80.00	Tel Hop Iglehart, prepare subpoena to Optima Towers. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 04/15/2009 Billable 0:40 0:40 80:00										
Transaction Date 05/15/2009										
20081229.00	05/15/2009	2	A	1	200.00	0.30	0.30	60.00	Tel Hop re discovery. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 05/15/2009 Billable 0:30 0:30 60:00										
Transaction Date 07/28/2009										
20081229.00	07/28/2009	2	A	1	200.00	0.10	0.10	20.00	Letter to Dingle Howe re discovery. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 07/28/2009 Billable 0:10 0:10 20:00										
Transaction Date 08/05/2009										
20081229.00	08/05/2009	2	A	1	200.00	0.10	0.10	20.00	Review docket, case referred in error, prepare letter to Dingle to see if he would consent to it being referred. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 08/05/2009 Billable 0:10 0:10 20:00										
Transaction Date 10/12/2009										
20081229.00	10/12/2009	2	A	1	200.00	0.10	0.10	20.00	Letter to Dingle for some depositions dates. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 10/12/2009 Billable 0:10 0:10 20:00										
Transaction Date 11/05/2009										
20081229.00	11/05/2009	2	A	1	200.00	0.80	0.80	160.00	Review lease and title docs, tel Bill Cochran. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 11/05/2009 Billable 0:80 0:80 160:00										
Transaction Date 11/06/2009										
20081229.00	11/06/2009	2	A	1	200.00	0.60	0.60	120.00	Review discovery request, review rules of civil procedure re taking TB's deposition. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
20081229.00	11/06/2009	2	A	1	200.00	0.80	0.80	160.00	Review File from Barbara, tel Bill Cochran Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 11/06/2009 Billable 1:40 1:40 280:00										
Transaction Date 11/09/2009										
20081229.00	11/09/2009	2	A	1	200.00	1.20	1.20	240.00	Work on Case Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 11/09/2009 Billable 1:20 1:20 240:00										
Transaction Date 11/11/2009										
20081229.00	11/11/2009	2	A	1	200.00	3.05	3.05	610.00	Meet with Bill Cochran, review records on Cell tower construction, tel Joe Lynch and Eric to see if they recall speaking with anyone in regard to a cell tower. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH

Client	Trans Date	Tmkr	H P	Tcode/ Task Code	Rate	Hours Worked	Hours to Bill	Amount		Ref #
Transaction Date 11/11/2009										
Total for Transaction Date 11/11/2009					Billable	3:05	3:05	610.00		
Transaction Date 11/12/2009										
20081229.00	11/12/2009	2	A	1	200.00	1.70	1.70	340.00	Tel City of Chas, prepare FIFO request to the City to get file. E-mail Hop for same info. E-mail Corky Carnevale. E-mail Jimmy Bailey. Review file before sending it to be copied. Tel Corky Carnevale, prepare subpoena to get his file. letter to Dingle with Subpoena's E-mail to Corky with Subpoena for his file. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 11/12/2009					Billable	1:70	1:70	340.00		
Transaction Date 11/13/2009										
20081229.00	11/13/2009	2	A	1	200.00	0.60	0.60	120.00	Review info from Corky Carnevale Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 11/13/2009					Billable	0:60	0:60	120.00		
Transaction Date 11/16/2009										
20081229.00	11/16/2009	2	A	1	200.00	1.50	1.50	300.00	Review docs from Corky, letter to Dingle. Tel LS3P will pull the file and get back for me to review. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 11/16/2009					Billable	1:50	1:50	300.00		
Transaction Date 11/23/2009										
20081229.00	11/23/2009	2	A	1	200.00	1.50	1.50	300.00	Review article from Jimmy Bailey from the Post Courier. Pull appraisal from Corky's file and e-mail to Jimmy. Review Tower Company file at Hop Iglehart office. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 11/23/2009					Billable	1:50	1:50	300.00		
Transaction Date 12/03/2009										
20081229.00	12/03/2009	2	A	1	200.00	0.30	0.30	60.00	Review info from the City of Chas building Inspectors office. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 12/03/2009					Billable	0:30	0:30	60.00		
Transaction Date 01/19/2010										
20081229.00	01/19/2010	2	A	1	200.00	1.20	1.20	240.00	Review Docs from LS3P Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 01/19/2010					Billable	1:20	1:20	240.00		
Transaction Date 02/18/2010										
20081229.00	02/18/2010	2	A	1	200.00	0.50	0.50	100.00	Prepare deposition notices. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 02/18/2010					Billable	0:50	0:50	100.00		
Transaction Date 02/23/2010										
20081229.00	02/23/2010	2	A	1	200.00	0.10	0.10	20.00	E-mail lawyers re deposition. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 02/23/2010					Billable	0:10	0:10	20.00		
Transaction Date 03/11/2010										
20081229.00	03/11/2010	2	A	1	200.00	0.10	0.10	20.00	E-mail Dingle re depositions. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH

Detail Transaction File List
Barr, Unger & McIntosh, LLC

Page: 4

Client	Trans Date	Tmkr	H P	Tcode/ Task Code	Rate	Hours Worked	Hours to Bill	Amount	Ref #
Transaction Date 03/11/2010									
Total for Transaction Date 03/11/2010					Billable	0:10	0:10	20.00	
Transaction Date 03/15/2010									
20081229.00	03/15/2010	2	A	1	200.00	0.10	0.10	20.00	Prepare depositions, e-mail Hop Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 03/15/2010					Billable	0:10	0:10	20.00	
Transaction Date 03/16/2010									
20081229.00	03/16/2010	2	A	1	200.00	0.10	0.10	20.00	Review and revise subpoena for Keith Powell with Optima Towers Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 03/16/2010					Billable	0:10	0:10	20.00	
Transaction Date 04/20/2010									
20081229.00	04/20/2010	2	A	1	200.00	1.10	1.10	220.00	Review file for deposition Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 04/20/2010					Billable	1:10	1:10	220.00	
Transaction Date 04/21/2010									
20081229.00	04/21/2010	2	A	1	200.00	2.70	2.70	540.00	Attend deposition. Review lease research Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 04/21/2010					Billable	2:70	2:70	540.00	
Transaction Date 06/02/2010									
20081229.00	06/02/2010	2	A	1	200.00	0.10	0.10	20.00	E-mail; Dingle re depositions Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 06/02/2010					Billable	0:10	0:10	20.00	
Transaction Date 06/21/2010									
20081229.00	06/21/2010	2	A	1	200.00	4.05	4.05	810.00	Work on Summary Judgment motion. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 06/21/2010					Billable	4:05	4:05	810.00	
Transaction Date 06/22/2010									
20081229.00	06/22/2010	2	A	1	200.00	3.90	3.90	780.00	Prepare for Deposition. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 06/22/2010					Billable	3:90	3:90	780.00	
Transaction Date 06/23/2010									
20081229.00	06/23/2010	2	A	1	200.00	1.25	1.25	250.00	Tel Dingle take Clyde Hiers deposition. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 06/23/2010					Billable	1:25	1:25	250.00	
Transaction Date 06/24/2010									
20081229.00	06/24/2010	2	A	1	200.00	1.90	1.90	380.00	Research re terms of lease. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 06/24/2010					Billable	1:90	1:90	380.00	
Transaction Date 06/29/2010									
20081229.00	06/29/2010	2	A	1	200.00	0.20	0.20	40.00	Tel Bill Cochran re his deposition. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 06/29/2010					Billable	0:20	0:20	40.00	
Transaction Date 07/01/2010									
20081229.00	07/01/2010	2	A	1	200.00	0.40	0.40	80.00	Work on Summary Judgment motion Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH

NSB

Monday 10/10/2011 4:20 am

Client	Trans Date	Tmkr	H P	Tcode/ Task Code	Rate	Hours Worked	Hours to Bill	Amount	Ref #
Transaction Date 07/01/2010									
Total for Transaction Date 07/01/2010					Billable	0:40	0:40	80:00	
Transaction Date 07/06/2010									
20081229.00	07/06/2010	2	A	1	200.00	2.10	2.10	420.00	Work on motion for Summary Judgment Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 07/06/2010					Billable	2:10	2:10	420:00	
Transaction Date 07/19/2010									
20081229.00	07/19/2010	2	A	1	200.00	1.70	1.70	340.00	Meet with Bill Cochran to prep for his deposition. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 07/19/2010					Billable	1:70	1:70	340:00	
Transaction Date 07/20/2010									
20081229.00	07/20/2010	2	A	1	200.00	2.20	2.20	440.00	Meet with Bill Cochran, attend Bill's deposition. Get memo of lease signed. Prepare acknowledgement for memo of lease Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 07/20/2010					Billable	2:20	2:20	440:00	
Transaction Date 08/02/2010									
20081229.00	08/02/2010	2	A	1	200.00	0.80	0.80	160.00	Staus Conference with J. Scarborough Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 08/02/2010					Billable	0:80	0:80	160:00	
Transaction Date 08/03/2010									
20081229.00	08/03/2010	2	A	1	200.00	0.30	0.30	60.00	E-mail Bachman re mediation dates. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 08/03/2010					Billable	0:30	0:30	60:00	
Transaction Date 09/01/2010									
20081229.00	09/01/2010	2	A	1	200.00	0.50	0.50	100.00	Prepare answer to amended complaint. Revise letter to Dingel, prepare forwarding letter to J. Scarborough. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 09/01/2010					Billable	0:50	0:50	100:00	
Transaction Date 09/02/2010									
20081229.00	09/02/2010	2	A	1	200.00	2.10	2.10	420.00	Prepare for Deposition and deposition Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 09/02/2010					Billable	2:10	2:10	420:00	
Transaction Date 09/14/2010									
20081229.00	09/14/2010	2	A	1	200.00	0.80	0.80	160.00	Work on Summary Judgment / letter to mediator. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 09/14/2010					Billable	0:80	0:80	160:00	
Transaction Date 09/16/2010									
20081229.00	09/16/2010	2	A	1	200.00	1.50	1.50	300.00	Research Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH
Total for Transaction Date 09/16/2010					Billable	1:50	1:50	300:00	
Transaction Date 09/17/2010									
20081229.00	09/17/2010	2	A	1	200.00	2.10	2.10	420.00	Memo to Bachman Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC ARCH

Detail Transaction File List
Barr, Unger & McIntosh, LLC

Client	Trans Date	Tmkr	H P	Tcode/ Task Code	Rate	Hours Worked	Hours to Bill	Amount	Ref #
Transaction Date 09/17/2010									
Total for Transaction Date 09/17/2010: Billable 2:10 2:10 420:00									
Transaction Date 09/22/2010									
20081229.00	09/22/2010	2	A	1	200.00	4.80	4.80	960.00	Mediation, tel Jimmy re his role. ARCH Magnolia Paradgm, Inc. 56 Leinbach Investors, LLC
Total for Transaction Date 09/22/2010: Billable 4:80 4:80 960:00									
Transaction Date 09/27/2010									
20081229.00	09/27/2010	2	A	1	200.00	0.65	0.65	130.00	Tel Jimmy Bailey re meeting today with ARCH Corky. Magnolia Paradgm, Inc. 56 Leinbach Investors, LLC
Total for Transaction Date 09/27/2010: Billable 0:65 0:65 130:00									
Transaction Date 09/28/2010									
20081229.00	09/28/2010	2	A	1	200.00	0.70	0.70	140.00	Work on Summary Judgment motion. ARCH Magnolia Paradgm, Inc. 56 Leinbach Investors, LLC
Total for Transaction Date 09/28/2010: Billable 0:70 0:70 140:00									
Transaction Date 09/29/2010									
20081229.00	09/29/2010	2	A	1	200.00	1.20	1.20	240.00	Research ARCH Magnolia Paradgm, Inc. 56 Leinbach Investors, LLC
Total for Transaction Date 09/29/2010: Billable 1:20 1:20 240:00									
Transaction Date 09/30/2010									
20081229.00	09/30/2010	2	A	1	200.00	2.50	2.50	500.00	E-mail Jimmy for status, prepare ARCH Summary Judgment motion. Tel Jimmy re value. Tel Bachman. Research Magnolia Paradgm, Inc. 56 Leinbach Investors, LLC
Total for Transaction Date 09/30/2010: Billable 2:50 2:50 500:00									
Transaction Date 10/01/2010									
20081229.00	10/01/2010	2	A	1	200.00	1.30	1.30	260.00	Work on Summary Judgment motion. ARCH Magnolia Paradgm, Inc. 56 Leinbach Investors, LLC
Total for Transaction Date 10/01/2010: Billable 1:30 1:30 260:00									
Transaction Date 10/06/2010									
20081229.00	10/06/2010	2	A	1	200.00	1.30	1.30	260.00	Tel Bachman re matter, discussed the ARCH price, he seems to agree that the \$302K is a good price. He has a call into Dingle. Research damages issue Magnolia Paradgm, Inc. 56 Leinbach Investors, LLC
Total for Transaction Date 10/06/2010: Billable 1:30 1:30 260:00									
Transaction Date 10/07/2010									
20081229.00	10/07/2010	2	A	1	200.00	4.00	4.00	800.00	Research damages. Tel Bachman ARCH prepare e-mail to Jimmy. Review Jimmy's response and respond. Tel Aaron. Magnolia Paradgm, Inc. 56 Leinbach Investors, LLC
Total for Transaction Date 10/07/2010: Billable 4:00 4:00 800:00									
Transaction Date 10/13/2010									
20081229.00	10/13/2010	2	A	1	200.00	0.50	0.50	100.00	Tel TB re settlement ARCH Magnolia Paradgm, Inc. 56 Leinbach Investors, LLC
Total for Transaction Date 10/13/2010: Billable 0:50 0:50 100:00									
Transaction Date 10/15/2010									
20081229.00	10/15/2010	2	A	1	200.00	1.20	1.20	240.00	Work on Memo for Summary Judgment ARCH Magnolia Paradgm, Inc. 56 Leinbach Investors, LLC

Client	Trans Date	Tmkr	H P	Tcode/ Task Code	Rate	Hours Worked	Hours to Bill	Amount		Ref #
Transaction Date 10/15/2010										
Total for Transaction Date 10/15/2010					Billable	1:20	1:20	240.00		
Transaction Date 10/18/2010										
20081229.00	10/18/2010	2	A	1	200.00	3.90	3.90	780.00	Work on Summary Judgement memo. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 10/18/2010					Billable	3:90	3:90	780.00		
Transaction Date 10/19/2010										
20081229.00	10/19/2010	2	A	1	200.00	0.90	0.90	180.00	Work on memo. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 10/19/2010					Billable	0:90	0:90	180.00		
Transaction Date 10/21/2010										
20081229.00	10/21/2010	2	A	1	200.00	2.10	2.10	420.00	Work on Summary Judgment. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
20081229.00	10/21/2010	2	A	1	200.00	0.20	0.20	40.00	Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 10/21/2010					Billable	2:30	2:30	460.00		
Transaction Date 10/25/2010										
20081229.00	10/25/2010	2	A	1	200.00	5.60	5.60	1,120.00	Prepare for Summary Judgment motion. Attend hearing. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 10/25/2010					Billable	5:60	5:60	1,120.00		
Transaction Date 10/26/2010										
20081229.00	10/26/2010	2	A	1	200.00	2.10	2.10	420.00	Research, letter to J. Scarborough. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 10/26/2010					Billable	2:10	2:10	420.00		
Transaction Date 11/02/2010										
20081229.00	11/02/2010	2	A	1	200.00	0.30	0.30	60.00	Review letter from Dingle to J. Scarborough. Prepare response. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 11/02/2010					Billable	0:30	0:30	60.00		
Transaction Date 01/05/2011										
20081229.00	01/05/2011	2	A	1	200.00	0.25	0.25	50.00	Review Order from J. Scarborough denying motion for Summary Judgement. E-mail Jeff re pretrial conference Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 01/05/2011					Billable	0:25	0:25	50.00		
Transaction Date 02/21/2011										
20081229.00	02/21/2011	2	A	1	200.00	1.00	1.00	200.00	Trial Prep. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 02/21/2011					Billable	1:00	1:00	200.00		
Transaction Date 02/22/2011										
20081229.00	02/22/2011	2	A	1	200.00	0.70	0.70	140.00	Meet with partner in regard to pre trial. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 02/22/2011					Billable	0:70	0:70	140.00		
Transaction Date 03/14/2011										
20081229.00	03/14/2011	2	A	1	200.00	0.10	0.10	20.00	E-mail Dingle re consent order to continue the trial date. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH

Client	Trans Date	Tmkr	H P	Tcode/ Task Code	Rate	Hours Worked	Hours to Bill	Amount	Ref #
Transaction Date 03/14/2011									
Total for Transaction Date 03/14/2011				Billable		0:10	0:10	20:00	
Transaction Date 04/29/2011									
20081229.00 04/29/2011	2 A	1		200.00	0.10	0.10	20.00	Hearing notice to Dingle Howe, Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 04/29/2011				Billable		0:10	0:10	20:00	
Transaction Date 08/01/2011									
20081229.00 08/01/2011	2 A	1		200.00	1.20	1.20	240.00	Attend Pre trial, set for October 11, 2011 Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 08/01/2011				Billable		1:20	1:20	240:00	
Transaction Date 09/20/2011									
20081229.00 09/20/2011	2 A	1		200.00	3.20	3.20	640.00	Trial Prep Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 09/20/2011				Billable		3:20	3:20	640:00	
Transaction Date 09/21/2011									
20081229.00 09/21/2011	2 A	1		200.00	3.70	3.70	740.00	Trial Prep, tel Barbara re lease payments, review her schedule. Prepare comparison schedule. review Corky's file. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 09/21/2011				Billable		3:70	3:70	740:00	
Transaction Date 09/22/2011									
20081229.00 09/22/2011	2 A	1		200.00	1.00	1.00	200.00	Trial Prep, tel Bill Cochran left message. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 09/22/2011				Billable		1:00	1:00	200:00	
Transaction Date 10/03/2011									
20081229.00 10/03/2011	2 P	1		200.00	0.40	0.40	80.00	Prepare atty fee affidavit Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	118
Total for Transaction Date 10/03/2011				Billable		0:40	0:40	80:00	
Transaction Date 10/05/2011									
20081229.00 10/05/2011	2 P	1		200.00	2.80	2.80	560.00	Meet with Bill Cochran to prepare for Trial. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	121
Total for Transaction Date 10/05/2011				Billable		2:80	2:80	560:00	
Transaction Date 10/06/2011									
20081229.00 10/06/2011	2 P	1		200.00	4.20	4.20	840.00	Trial Prep. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	122
Total for Transaction Date 10/06/2011				Billable		4:20	4:20	840:00	
Transaction Date 10/07/2011									
20081229.00 10/07/2011	2 P	1		200.00	0.30	0.30	60.00	Trial Prep Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	124
Total for Transaction Date 10/07/2011				Billable		0:30	0:30	60:00	
Transaction Date 10/08/2011									
20081229.00 10/08/2011	2 P	1		200.00	2.90	2.90	580.00	Trial Prep. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	125
Total for Transaction Date 10/08/2011				Billable		2:90	2:90	580:00	
Transaction Date 10/10/2011									
20081229.00 10/10/2011	2 P	1		200.00	3.60	3.60	720.00	Review motion for summary judgment in	126

VS8

Monday 10/10/2011 4:20 pm

Client Trans Date Tmkr H P Tcode/ Task Code
Transaction Date 10/10/2011

Rate Hours Worked Hours to Bill Amount

Ref #

preparation for trial. Tel Dingle re sale in
settlement, tel Jimmy Bailey. tel TB.
E-mail Dingle proposal and counter
proposal from August. Calculate the
differenced based on rental owed.
Meet with TB.
Magnolia Paradigm, Inc.
56 Leinbach Investors, LLC

Total for Transaction Date 10/10/2011		Billable	3:60	3:60	7:20:00
GRAND TOTALS					
		Billable	109.70	109.70	21,940.00

Client	Trans Date	Tmkr	H P	Tcode/ Task Code	Rate	Amount	Ref #
Transaction Date 08/20/2009							
20081229.00	08/20/2009	2	A	61		25.00 Filing Fee Charleston County Clerk of Court Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
20081229.00	08/20/2009	2	A	61		125.00 Filing Fee Master in Equity Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 08/20/2009					Billable	150.00	
Transaction Date 11/06/2009							
20081229.00	11/06/2009	2	A	55		80.63 West Law Charges Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 11/06/2009					Billable	80.63	
Transaction Date 11/13/2009							
20081229.00	11/13/2009	2	A	61		193.84 ProCopy, Inc. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 11/13/2009					Billable	193.84	
Transaction Date 04/21/2010							
20081229.00	04/21/2010	2	A	99		219.80 Legal Media Inc. - Transcript Steven Keith Powell Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 04/21/2010					Billable	219.80	
Transaction Date 08/10/2010							
20081229.00	08/10/2010	2	A	99		188.65 A. William Roberts, Jr. & Associates Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 08/10/2010					Billable	188.65	
Transaction Date 08/17/2010							
20081229.00	08/17/2010	2	A	99		67.75 Legal Media Inc. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 08/17/2010					Billable	67.75	
Transaction Date 09/02/2010							
20081229.00	09/02/2010	2	A	99		54.50 Legal Media Inc. Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 09/02/2010					Billable	54.50	
Transaction Date 09/30/2010							
20081229.00	09/30/2010	2	A	99		25.00 Charleston County Clerk of Court Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 09/30/2010					Billable	25.00	
Transaction Date 10/07/2010							
20081229.00	10/07/2010	2	A	55		121.06 West Law Charges Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 10/07/2010					Billable	121.06	
Transaction Date 10/19/2010							
20081229.00	10/19/2010	2	A	55		59.61 West Law Charges Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
Total for Transaction Date 10/19/2010					Billable	59.61	
Transaction Date 03/14/2011							
20081229.00	03/14/2011	2	A	99		25.00 Charleston County Clerk of Court Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH
20081229.00	03/14/2011	2	A	99		35.00 Charleston County Master in Equity Magnolia Paradigm, Inc. 56 Leinbach Investors, LLC	ARCH

Client	Trans Date	H Tcode/ Tmkr P Task Code	Rate	Amount	Ref #
Total for Transaction Date: 03/14/2011					
Billable				1,220.84	
GRAND TOTALS:					
Billable				1,220.84	

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
MASTER-IN-EQUITY

Mikell R. Scarborough, Master-In-Equity for Charleston County

Case No. 2008-CP-10-3590

56 LEINBACH INVESTORS, LLC,

Respondent,

vs.

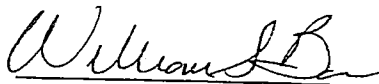
MAGNOLIA PARADIGM, INC.,

Appellant.

NOTICE OF APPEAL

Magnolia Paradigm, Inc. appeals the Order of the Honorable Mikell R. Scarborough dated June 11, 2012 and the Order Denying Plaintiff's Motion Pursuant to Rule 59(e), SCRCP, dated July 9, 2012. Appellant received written notice of entry of the Order on October 15, 2012.

November 12, 2012.



WILLIAM S. BARR
11 Broad Street, P. O. Box 1037
Charleston, SC 29402
(803) 577-5083
ATTORNEY FOR THE APPELLANT

Other Counsel of Record:

Donald H. Howe, Esquire
Howe & Wyndham, LLP
47 State Street
Charleston, SC 29401

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2012 NOV 14 PM 1:25

FILED

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
MASTER-IN-EQUITY

Mikell R. Scarborough, Master-In-Equity, Ninth Judicial Circuit

Case No. 2008-CP-10-3590

56 LEINBACH INVESTORS, LLC,

Respondent,

vs.

MAGNOLIA PARADIGM, INC.,

Appellant.

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2012 NOV 14 PM 1:25

FILED

PROOF OF SERVICE

I certify that I have served a Notice of Appeal on the Respondent, 56 Leinbach Investors, LLC, by hand delivery of same, on November 12, 2012, addressed to his attorney of record, Donald H. Howe, Esquire, Howe & Wyndham, LLP, 47 State Street, Charleston, SC 29402.



WILLIAM S. BARR
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November 12, 2012

ATTORNEY FOR APPELLANT

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
MIKELL R. SCARBOROUGH, MASTER-IN-EQUITY

CASE NUMBER: 2008-CP-10-3590

56 LEINBACH INVESTORS, LLC.....Appellant,

v.

MAGNOLIA PARADIGM, INC.....Respondent.

NOTICE OF APPEAL

56 Leinbach Investors, LLC appeals the Judgment of the Honorable Mikell R. Scarborough dated August 31, 2012 (filed October 8, 2012). Appellant received written notice of entry of this Judgment on October 11, 2012.



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Other Counsel of Record:

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Attorney for Respondent

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
MASTER-IN-EQUITY

HON. MIKELL SCARBOROUGH, MASTER-IN-EQUITY

APPELLATE CASE NO. 2012-213389

56 LEINBACH INVESTORS, LLC.....APPELLANT/RESPONDENT

v.

MAGNOLIA PARADIGM, INC RESPONDENT/APPELLANT

CERTIFICATE OF COUNSEL

Appellant/Respondent, 56 Leinbach Investors, LLC, hereby certifies pursuant to South Carolina Rules of Appellate Procedure 210(g) that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

LAW OFFICES OF DONALD H. HOWE, LLC



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(843)853-6121

Attorney for Appellant/Respondent

August 7, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
MASTER-IN-EQUITY

HON. MIKELL SCARBOROUGH, MASTER-IN-EQUITY

APPELLATE CASE NO. 2012-213389

56 LEINBACH INVESTORS, LLC..... APPELLANT/RESPONDENT

v.

MAGNOLIA PARADIGM, INC..... RESPONDENT/APPELLANT

BRIEF OF APPELLANT/RESPONDENT

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SC Bar#002690
47 State Street
Post Office Box 598
Charleston, SC 29402-0598

Attorney for Appellant/Respondent
56 Leinbach Investors, LLC

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Master-In-Equity err in finding that Appellant/Respondent 56 Leinbach Investors, LLC breached the lease by allowing an Optima communications tower to be built on the area that was not part of the parking lot leased by Respondent/Appellant Magnolia Paradigm?
- II. Assuming 56 Leinbach Investors, LLC breached the lease, did the Master-In-Equity err in awarding more than nominal damages when Magnolia was not able to prove any cognizable damages?
- III. Assuming an award of more than nominal damages was appropriate, did the Master-In-Equity err in allowing a Three Hundred and 00/100 (\$300.00) Dollar per month reduction in rent to Magnolia Paradigm even though Magnolia Paradigm continued to receive 100% of the benefit of its original lease?

STATEMENT OF THE CASE

This matter was commenced by the filing of a Summons and Complaint on June 24, 2008, in the Court of Common Pleas for Charleston County. Appellant/Respondent 56 Leinbach Investors, LLC (hereinafter "Leinbach") alleged breach of contract by Respondent/Appellant Magnolia Paradigm, Inc. (hereinafter "Magnolia"). Leinbach thereafter filed an Amended Complaint to attach the actual lease to the Complaint as alleged therein which had inadvertently been omitted as an attachment. Magnolia filed an Answer and Counterclaim on July 18, 2008. The case was referred to the Honorable Mikell Scarborough, Master-In-Equity for Charleston County, by Order of Reference dated September 1, 2009.

On August 3, 2010, Leinbach filed a Motion to Amend its Complaint with a proposed Second Amended Complaint asserting unjust enrichment and equitable estoppel attached thereto. No hearing on the Motion was held, however, the Defendant, Magnolia, filed an Answer and Counterclaim to the Second Amended Complaint asserting an additional cause of action for unjust enrichment on October 18, 2010.

The case was tried before the Honorable Mikell Scarborough, Master-In-Equity for Charleston County, on October 11, 2011. The issues, without objection by either party, were based on Plaintiff's Second Amended Complaint and Defendant's Answer to Second Amended Complaint and Counterclaim. At trial, all parties moved to amend their respective pleadings to conform to the proof offered and both Motions were granted without objection.

The Master-In-Equity issued an Order dated June 11, 2012. Magnolia filed a Motion to Reconsider on July 9, 2012. Judge Scarborough denied the Motion to Reconsider and both sides filed a Notice of Intent to Appeal: Leinbach on November 8, 2012 and Magnolia on November

12, 2012. The appeals were consolidated by the South Carolina Court of Appeals without objection.

STATEMENT OF FACTS

The facts of this case are relatively undisputed. 56 Leinbach Investors, LLC owns a piece of property in Charleston County at the end of a cul de sac on Leinbach Drive. Leinbach leased the property to Magnolia in a lease dated May 30, 2003. Magnolia Paradigm, Inc. is owned by Tommy Baker who also owns Baker Motors on Savannah Highway not far from the Leinbach property. Baker needed additional parking for the employees of Baker Motors and so leased the property from Leinbach for that purpose.

Leinbach is owned by Clyde Hiers. Hiers also owned the piece of property immediately adjacent to the property which is the focus of this appeal. Negotiations between Leinbach and Magnolia appear to have begun in earnest in September of 2002. (R. p. 266). An initial sketch of the proposed plan for the parking area was prepared in December of 2000. The plans for the project were approved by the City of Charleston sometime in the Spring of 2003 and the lease signed thereafter on May 30, 2003. (R. p. 213, line 10). The lease document appears to have been initially drafted by Leinbach's attorney but was sent for review and approved by Magnolia's attorney who had the draft as early as December of 2002 (nearly seven months before the lease was signed). (R. pp. 167-168, R. pp. 263-264).

After the signing of the lease in May of 2003, Magnolia built the parking lot which had been approved by the City of Charleston. The parking lot covers the vast majority of the area owned by Leinbach. There was a small area, however, into which the parking area did not extend.

This area had trees on it (as well as a shipping container utilized by the school next door) and, according to Baker and his Operations Manager Bill Cochran, it was not economically feasible to extend the parking area that far. (R. p. 166). It is this small "wooded area" that has become the subject of the dispute before this court.

Sometime in 2005 (after the parking lot was built and being used daily), Optima Tower, LLC approached Clyde Hiers (Leinbach's owner) about erecting a communications tower on the property owned by Hiers. Hiers told Optima if they could get approval from the City, he would certainly consider it. Optima obtained that approval for the "wooded area" that was on the same property that Leinbach had leased to Baker. Optima was told by Hiers that the parking area was leased by Baker. (R. p. 67, lines 18-20). Hiers and Optima entered into a lease in February of 2006 and the tower was erected sometime thereafter. The tower is approximately 140 feet tall. It can be seen from Baker's business on Highway 17. It is directly next to the parking area which Baker had for his employees. There is nothing that shields it in any way from any spot in the parking lot. It took thirty to forty-five days to erect and, according to the testimony of Optima employee, Keith Powell, who had to coordinate with people at Baker Motors during the construction phase of the tower. (R. p. 67, line 2).

Sometime in late 2006, Baker apparently decided it was in his best interest to go ahead and buy the property rather than just lease it from Leinbach. A contract of sale was signed and in the process of checking out all of the details prior to closing, Baker (through his commercial real estate agent, Jimmy Bailey) discovered that the Tower had been erected on part of the parcel of land which contained the parking lot. (R. p. 182, lines 1-8) Baker's attorney, Bill Barr, thereafter wrote Hiers' attorney, Donald Howe, a letter on December 18, 2007 in which he stated:

The erection of the cell tower on a portion of the lease premises substantially interferes with my client's operation of the demised premise. In particular, the area encompassed by the cell tower prevents them from utilizing the area for the intended purposes of the lease, that is, the parking lot.

...9.03 of the lease allows either party to cure any non-performance under the lease if either party is in default. That section gives either party thirty days to cure any defaults. Please let this letter act as notice for Mr. Hiers to cure his defaults under the lease. Should he not cure his defaults then we intend to abate the rent until such time as he does.

Please also be advised that your client's acts in allowing the erection of the cell tower constitutes a violation of the provisions of 6.12 in that the use by the cell tower company violates my client's lawful, quiet and peaceful possession and occupation of the demised premises. Also please be advised that the leasing of the subject premises to the cell tower company constitutes a violation of 14.17 which is my client's right of first refusal. (R. p. 238, lines 9-12, R. p. 239, lines 12-22).

Pursuant to this letter, Baker began deducting from his monthly rent the amount of \$886.97. Leinbach alleged a breach of contract for failure to pay the rent due. Defendant admitted it has not been paying the rent but asserted an abatement and counterclaims for the \$886.97 per month which Optima paid Leinbach. Each party sought damages for breach of contract by the other. Neither sought rescission.

ARGUMENT

1. The Master-In-Equity erred in finding that 56 Leinbach breached the lease by allowing the Optima communications tower to be built on the area which was not part of the parking lot leased by Paradigm.

Although the lease generally addresses the entire 1.21 acre parcel of property, the term "Demised Premises", when defined, states "Subject to...the terms, covenants, conditions, and provisions of this Lease, Landlord hereby demises and leases...1.21 acres..." etc. The definition

of "Demised Premises" therefore put Magnolia on notice that specific conditions attached to the lease.

Those conditions are addressed in Section 1.02 Use of Space: "the demised premises shall be used by the Tenant as parking for employees of Tenant or Baker Motor Company and for no other purpose without the prior written consent of the Landlord." This same language is restated in Section 6.01. Thus, since the "wooded area" has no parking area on it (and was specifically designed by Magnolia not to have parking prior to execution of the lease), it is not subject to use by Magnolia, because parking is the only purpose for which Magnolia has any right of use pursuant to the lease.

Likewise under Title to Premises on page 17 of the lease: "the Demised Premises shall hereafter be subject to no leases...which in any manner interfere with Tenant". Notably, it does not say the Demised Premise is not subject to any future lease. It only forbids future leases that interfere with use of the parking area.

Did the Optima Tower interfere with Magnolia's use? Clearly not. The cars are parked in the same spaces with the same ingress and egress. The only difference to the parking area is the occasional shadow of the tower which is of no consequence. Tommy Baker conceded as much in his testimony before the court. He was not even aware the tower was on part of the 1.21 acre parcel until his real estate agent, Jimmy Bailey, tried to negotiate the sale of the property years after the parking lot was built (R. p. 182, lines 1-8).

Magnolia also argues it is entitled to the "quiet enjoyment" of the entire parcel. On page 17 of the lease, however, the enjoyment of quiet title and peaceful possession is limited to "all rights herein granted" and those rights, as noted above are limited to the use of parking in the designated area.

As stated in McGill v. Moore, 381 S.C. 179, 672 S.E.2d 571, "The cardinal rule of contract is to ascertain and give legal effect to the parties' intentions as determined by the contract language. Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause. Id. It is a question of law for the court whether the language of a contract is ambiguous." 672 S.E.2d 574 (citations omitted). See also McPherson v. J.E. Serrine & Co., 206 S.C. 183, 33 S.E.2d 501: "It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves..." 33 S.E.2d 510.

A close but fair reading of the lease allows Leinbach to use portions of the property as long as that use does not interfere with Magnolia's use. Magnolia conceded there was no interference and the Master-In-Equity found that there was no interference.

Appellant/Respondent Leinbach submits that based on the above there was no breach of contract by Leinbach.

II. Assuming Leinbach breached the lease, Magnolia suffered no damages and therefore the Master-In-Equity erred in awarding more than nominal damages.

Judge Scarborough ruled that the presence of the tower did not interfere with Magnolia's use of the parking lot (R. p. 7, line 20). Tommy Baker confirmed this by his own testimony:

*

*

*

Q. There's an area over in the corner, I believe that you've seen and heard testify, where the tower went up.

A. Right.

Q. Is that an area that, at the time it went up, impacted your parking at the time?

A. No.

(R. p. 176, lines 16-22)

*

*

*

Q. And the tower that's there has not interfered at all with any of the parking on any of the sites?

A. For the time being, yes.

Q. Your testimony is, basically, you just really don't know what the future brings.

A. I don't think anybody does.

Q. That's right, neither do you today, do you?

A. No, sir.

Q. It would be speculation to try to say what it is.

A. Right.

(R. p. 179, lines 20-25; p. 180, lines 1-7)

*

*

*

Q. You didn't even know it was there until Mr. Bailey told you some year and a half or two years after it was up.

A. Don't know that I recall that.

Q. The first time you found out was when Mr. Bailey told you, correct?

A. I think that's right, yes.

Q. He found out in connection with doing some work that you all were buying the property.

A. Right.

Q. The tower being there hadn't interfered with anything in your daily life at all up to that point, had it?

A. I don't know that's the point. I think the point-

Q. That's the question Mr. Baker.

A. All right.

Q. The question is: The owner hadn't interfered with anything in your life up until that point? You didn't even know it was there. It wasn't even on your radar was it?

A. No.

(R. p. 181, line 25; p. 182, lines 1-21)

The mere fact that a contract has been breached does not entitle someone to an award. Damages must be proven. If there are no damages, but the Court believes a substantial right has been infringed upon, then nominal damages may be awarded. Save Charleston Foundation v. Murray, 333.S.E.2d 60, 65 (S.C. Ct. App. 1985), Stevens v. Allen, 342 S.C. 47, 530 S.E.2d 633 (S. Ct. 2000).

The \$300.00 per month figure awarded by Judge Scarborough is not consistent with nominal damages. Judge Scarborough himself ruled (as was conceded by the Defendant) that Magnolia received the full benefit of what it bargained for. Thus, even assuming a breach, no more than nominal damages should have been awarded.

III. Even assuming an award of more than nominal damages was appropriate, the award of a one-sixth reduction in the total rent was excessive considering Magnolia enjoyed 100% of the benefit of its original bargain.

The Master-In-Equity specifically found in his Order “that the Plaintiff’s (Leinbach’s) action does not interfere with the Defendant’s normal use of the area of the demised premises.” (R. p. 9, lines 15-16, emphasis in original Order). The Master thereafter further concluded “that Section 6.03 of the lease provides Defendant’s (Magnolia) remedy for Plaintiff’s interference with Defendant’s use of the demised premises. Section 6.03 only applies, however, “if Landlord creates a condition that substantially interferes with the normal use of the Demised Premises.”

Appellant/Respondent would submit that the remedy fashioned by the Master was erroneously based on the proposition that Section 6.03 allowed an equitable remedy under the circumstances. By the wording of the contract and the Master’s own finding, Section 6.03 was simply not triggered by any facts in this case. The Master’s rationale to begin to fashion an equitable remedy was therefore in error.

The Master relied on King v. Oxford, 282 S.C. 307, 318 S.E.2d 125 (S.C. App. 1984) to fashion an equitable remedy. Even assuming an equitable remedy was proper, Landlord submits that the Master’s award of \$300.00 per month was overly generous. The reason is that the Master simply looked at the amount of area the parcel occupied by the tower in proportion to the entire parcel. He did not factor in that Magnolia: 1) had no right to use the parcel where the tower was located; 2) never attempted to use the parcel where the tower was located; 3) was getting the full benefit of its original bargain under the contract before and after the erection of the Optima tower; 4) failed to file a Memorandum of Lease at the R.M.C. Office which would have prevented the entire problem.

Appellant/Respondent would submit that although the “square footage” approach is arguably one part of fashioning an equitable remedy, that the other factors listed above should also be considered to discount the final award further. Appellant/Respondent would submit that a

further reduction of at least an additional 50% (\$150.00 per month) would be appropriate.

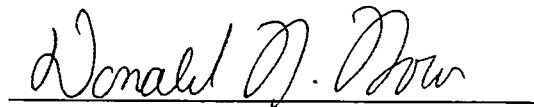
CONCLUSION

Based on the argument set forth in Argument#1 above, Appellant/Respondent would ask this Honorable Court of Appeals to reverse the Judgment of the Master-In-Equity and enter a judgment in favor of the Appellant/Respondent 56 Leinbach Investors, LLC.

In the alternative, as set out in Argument #2 above, Appellant/Respondent would ask that a judgment of no more than nominal damages be awarded to Respondent/Appellant.

As a further alternative, as set out in Argument #3 above, 56 Leinbach would ask that Respondent/Appellant Magnolia Paradigm be awarded a figure of no greater than \$150.00 as an abatement of its monthly rent payment.

Respectfully submitted,

A handwritten signature in cursive script, reading "Donald H. Howe", is written over a horizontal line.

DONALD H. HOWE

ATTORNEY FOR APPELLANT/RESPONDENT

56 LEINBACH INVESTORS, LLC

Date: Aug 12, 2013

Certificate of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

A handwritten signature in cursive script, appearing to read "Donald H. Howe", is written over a horizontal line.

Donald H. Howe

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
MASTER-IN-EQUITY

HON. MIKELL SCARBOROUGH, MASTER-IN-EQUITY

APPELLATE CASE NO. 2012-213389

56 LEINBACH INVESTORS, LLC..... APPELLANT/RESPONDENT

v.

MAGNOLIA PARADIGM, INC..... RESPONDENT/APPELLANT

RESPONDENT'S BRIEF OF APPELLANT/RESPONDENT

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Appellant/Respondent 56 Leinbach Investors, LLC (hereinafter "Leinbach") respectfully submits the following brief in reply to the brief submitted by Respondent/Appellant Magnolia Paradigm, Inc. (hereinafter "Magnolia").

I. THE MASTER DID NOT ERR IN CONSIDERING THE SITE PLANS DESIGNED BY MAGNOLIA (PAROL EVIDENCE) IN HIS INTERPRETATION OF THE LEASE.

Respondent/Appellants Magnolia's first argument is that there was no designated parking area about which there was a common understanding or meeting of the minds at the time the lease was signed. Magnolia urges that the Master erred in considering the parking lot plans drawn up by Magnolia, submitted by Magnolia to the City of Charleston for approval, and ultimately constructed by Magnolia pursuant to the lease. The crux of Magnolia's argument is found on page 8 of its brief: "At the time of the creation of the lease there was nothing but an unimproved lot. There was no designated parking area." (Respondent/Appellant's Brief pg. 8).

There are 2 reasons why Magnolia's argument fails in this regard.

A. The Master in Equity was correct in interpreting the term "parking area" in the lease as being synonymous with the parking lot plans created by Magnolia.

The parol evidence rule generally holds that one should not look outside of the four corners of a contract agreement to interpret the contract if the terms are clear. It is one of the few evidence rules that has as many (or perhaps more) exceptions to it than the rule against hearsay.

One of the exceptions to the parol evidence rule is when a term in the contract is ambiguous or unclear. As stated in American Jurisprudence 2nd (Evidence Section 1140):

The parol evidence rule permits resort to antecedent negotiations to explain the meaning of the word's use in a contract of uncertain meaning. However, previous negotiations cannot be admitted to give an integrated agreement a meaning to which the language of the instrument is not reasonably susceptible.

29A Am. Jur. 2d Evidence § 1140, 596-7 (1994).

The undisputed facts in the case are that prior to the signing of the lease Magnolia had a specific set of plans drawn up and these plans were approved for construction by the City of Charleston shortly before the lease was signed. (R. p. 171, lines 10-24; p. 258). Indeed, the signing of the lease was contingent on the City of Charleston's approval of the site plan. Of note is the following testimony of Bill Cochran who negotiated the lease for Magnolia:

Q. The parking area that was the subject of this lease. Are you saying it was something different than what you got approved by the City?

A. No, Sir.

(R. p. 169, lines 18-21)

The full chronology is that a schematic drawing of the lot dated December 12, 2002 drawn by LS3P (the architectural firm hired by Magnolia) was provided to Leinbach in December of 2002. (R. p. 82, lines 1-18; p. 237). Final plans were created by LS3P in April 2003 (R. pp. 260-262) and approved by the City of Charleston in May 2003. (R. p. 168, lines 7-22; p. 171, lines 10-19). The lease was signed June 5, 2003. (R. p. 189, line 2; p. 213, lines 10-11).

In Soulios v. Mills Novelty Co., 198 S.C. 355, 17 S.E.2d 869 (1941), the South Carolina Supreme Court stated the following in regard to the parol evidence rule:

When the written document is silent as to an important issue thereof, parol testimony is admissible to prove it.

198 S.C. at 362, 17 S.E.2d at 873.

In this case, the lease is silent as to the dimensions of the term "parking area". The dimensions of the intended parking area are clearly an "important issue" and it was proper for the Master in Equity to consider the undisputed evidence as to what those dimensions were intended to be. See also Newton v. Batson, 223 S.C. 545, 77 S.E.2d 212 (1953).

The underlying purpose of the parol evidence rule is to preserve the intent of the parties, not to undermine it. Magnolia's project chief, Bill Cochran, admitted that the "parking area" in the lease was the same "parking area" drawn by LS3P and approved by the City of Charleston. Magnolia's attempt to redefine the term was correctly rejected by the Master in Equity.

B. Even assuming that at the time the lease was signed the term "parking area" comprised the entire 1.21 acre tract, Magnolia's subsequent construction of the actual parking area exempted its subsequent use of the area where the tower was built.

The lease is very explicit that Magnolia has "exclusive" use of any parking area. (Section 1.02/Parking of Exhibit 1) By implication, Magnolia would not have exclusive use of any non-parking area. Magnolia built the existing lot to its own specifications and left a section of the 1.21 acre tract as a "wooded area." This was done intentionally because it was uneconomical to try to convert it to a parking area. (R. p. 172, lines 10-24). Additionally, the City of Charleston never gave approval to use the "wooded area" for parking so it would be illegal for Magnolia to try to use it for parking.

The lease is also explicit that Magnolia's only right to use the property is for parking ("Section 1.02 – Use of Space. The demised premises shall be used by Tenant as parking for employees of Tenant or Baker Motor Company and for no other purpose (emphasis added) without the prior consent of the Landlord.") and since the wooded area could not be used for parking, then Magnolia had no right to use that portion of the premises where the tower was built.

Thus, even assuming that there was the "possibility" at the time the lease was signed that every square inch of the premises would become a parking lot, Magnolia's subsequent actions

(i.e. the building of the lot) created a de facto area which Magnolia had no right to use pursuant to the explicit terms of the lease.

II. THE MASTER ERRED IN REFORMING THE LEASE BETWEEN THE PARTIES.

The Master utilized the legal concept of reformation of the contract, based on mutual breaches of contract. Appellant/Respondent agrees with Respondent/Appellant Magnolia that there was no need to reform the contract. Leinbach, however, believes that Leinbach never breached the contract and Magnolia suffered no damages.

This being said, Leinbach would point out errors in Magnolia's argument should the Court of Appeals disagree with the parties and follow the logic of the Master.

First, just because Leinbach's owner, Clyde Hiers, testified he made a "mistake" does not mean he made a "legal mistake" as that term of art is interpreted. Hiers testified he did not realize the tower was going up on the 1.21 acre tract. To that extent, he was mistaken. On the other hand, that mistake did not constitute a "legal mistake" equivalent with a breach of contract.

As to Magnolia's argument denying there was an "abandonment", Appellant/ Respondent contends that no right to use the wooded area ever even arose. The lease says the only right Magnolia had was for parking and that the sole area that could be used for parking was the parking lot. Thus, Leinbach agrees there was no abandonment because no right to use the wooded portion of the property ever existed to be subsequently abandoned.

To the extent some right to use the "wooded area" for parking ever existed, it was abandoned when Magnolia constructed the existing parking lot which left the "wooded area" unsuitable for parking. To the extent this Court feels that Magnolia had a right of "quiet enjoyment" of the wooded area (independent of the right to use the land for parking), then

nominal damages would be appropriate at the very most because no other breach has been proven.

Lastly, Magnolia argues there is no ambiguity yet there is ambiguity in the lease to some extent. One portion of the lease says that Magnolia can only use the demised premises for parking. Another (argues Magnolia) gives Magnolia the right of quiet enjoyment of the entire parcel which is arguably broader than mere parking. It should be noted that the often cited principle that any ambiguity is construed against the drafter of the document would not apply in this case. The record is clear that Magnolia's attorney had the lease document for review and corrections prior to signing. A December 2002 note of Bill Cochran stated "I have not heard back from our attorney on the lease but will call you as soon as he completes his review (R. p. 167, lines 7-23; p. 263).

III. THE MASTER WAS CORRECT IN FINDING A BREACH OF CONTRACT BY MAGNOLIA BUT ERRED IN NEVERTHELESS ALLOWING AN ABATEMENT OF THE RENT BY MAGNOLIA.

Section 6.03 of the lease allows the tenant to abate the rent "If Landlord creates a condition that substantially interferes with the normal use of the Demised Premises or appurtenant parking or services areas as allowed herein..." (emphasis added).

Magnolia never demonstrated the slightest interference with the normal use of the property much less any "substantial interference." No one at Magnolia ever complained about the tower until after Magnolia tried to buy the property. This was because Magnolia never even noticed the 160-foot tower was on the 1.21 acre parcel. The testimony of Tommy Baker himself confirms this:

Q. When the tower went up, no one on your behalf ever voiced any opposition to Mr. Hiers or anybody to say, yikes, what's that 160 ft tower doing going up, did they?

A. I had no idea.

Q. You didn't even know it was there until Mr. Bailey told you some year and a half or two years after it went up?

A. Don't know that I recall that.

Q. The first time you found out was when Mr. Bailey told you, correct?

A. I think that's right, yes.

Q. He found it out in connection with doing some work about y'all were buying the property?

A. Right.

Q. ...the tower hadn't interfered with anything in your life up to that point. You didn't even know it was there. Wasn't even on your radar, was it?

A. No.

(R. p. 181, line 20-p. 182, line 9; p. 182, lines 17-21)

and,

Q. And the tower that's there and has not interfered at all with any of the parking on any of the sites?

A. For the time being, yes.

Q. Your testimony is, basically, you just really don't know what the future brings.

A. I don't think anybody does.

Q. That's right, neither do you today, do you?

A. No.

Q. It would be speculation to say what it is.

A. Right.

(R. p. 179, line 20-p.180, line7)

In sum, Magnolia, through its owner, Tommy Baker, concedes that there has been no past interference and that any future interference is speculative. The importance of this is that Magnolia's right to any abatement is contingent on "substantial interference." Despite Magnolia's argument to the contrary, the only evidence at trial was that there was no substantial interference. Thus, there is no evidence on which Magnolia would be entitled to any level of abatement under the terms of the lease.

IV. THE MASTER'S REMEDY WAS IN ERROR.

While Leinbach agrees that the Master's remedy was in error, Leinbach asserts that the Respondent/Appellant Magnolia should have received no damages, or nominal damages at most, for any transgression on the part of Leinbach. Leinbach relies on its earlier brief in this regard. In response to specific arguments of Magnolia, however, Leinbach responds as follows:

A. Assuming it was proper to apply principles of equity, the Master correctly ruled that Leinbach was entitled to relief for unjust enrichment.

Magnolia argues that Leinbach was not entitled to recover under a theory of unjust enrichment because the Master wrongly concluded that Leinbach's receiving additional rent was not at the unjust expense of Magnolia. Magnolia states that "Leinbach exploited a valuable property right of Magnolia and that it has to be at Magnolia's expense and that it is unjust to allow it to happen". (Respondent/Appellant's Brief p. 22)

Magnolia's conclusion that the property right is "valuable", as noted above, simply has no evidence to support it. The Master correctly reviewed the evidence in the record and correctly concluded that the right of Magnolia in the wooded area had no value. It is of note that

Magnolia cites no specific evidence in the record that supports the conclusion that the property right had some specific value. Magnolia only offers a bald conclusion.

As noted elsewhere, Leinbach believes that Magnolia breached the lease and should pay its full rent accordingly. The Master (incorrectly we believe) relied on the theory that both parties breached the lease and that equitable principles should apply. Under that theory (assuming it is correct), it would certainly be proper to proceed under a theory of unjust enrichment because Magnolia is, in effect, taking rent money paid by Optima to Leinbach pursuant to a contract to which Magnolia is not even a party.

B. The Master did not err in finding Magnolia was not entitled to recover under the theory of unjust enrichment.

Respondent/Appellant Magnolia correctly states that for a theory of unjust enrichment to apply, the enrichment of one party must be at the expense of the other. As noted above, Magnolia has never established any evidence of loss (i.e. "expense") which it has suffered. As reflected in the testimony of Tommy Baker, Magnolia has always received (and continues to receive) the full benefit of the use of the parking area for which Magnolia bargained. The Master's ruling in this regard was correct.

C. The Master was correct to deny Magnolia full abatement of the rent received from Optima.

First of all, as noted previously, Leinbach believes Magnolia was not entitled to any abatement since no "substantial interference" with Magnolia's ability to use the parking area was ever proven. Assuming some abatement was proper, however, Magnolia asserts that any abatement means full abatement of an amount equal to Optima's rent for the tower.

The term "abatement" simply means reduction, decrease of or diminution. There is nothing in the lease or in the application of common sense that suggests that an abatement would have to be a total abatement or would have to necessarily be equal to an amount that one party receives (as opposed to what the other party loses). Magnolia cites no cases or lease provisions to support its contention. Leinbach believes that the plain meaning of the term could certainly include the idea of a partial abatement.

D. To the extent there is an internal conflict between the working of the Master's Order and the Master's Final Award, the matter should be remanded for clarification.

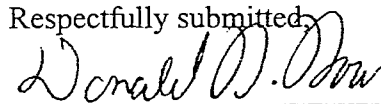
Leinbach agrees there is an apparent conflict between the wording of the Master's Order and his calculations. Leinbach would submit that should this honorable Court of Appeals rule that there be some abatement of the rent, then the matter should be remanded to the Master so that he can resolve the apparent contradiction in accordance with his original intent.

CONCLUSION

Leinbach urges this Court to find that Leinbach is entitled to any and all rent proceeds paid by Optima Tower based on the fact that 1) no breach of contract occurred 2) Magnolia suffered no damages and 3) to the extent that equity is deemed a proper remedy, that equity demands Leinbach receive all of the rent under the circumstances.

Aug 12, 2013

Respectfully submitted,



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Certificate of Counsel

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

A handwritten signature in dark ink, appearing to read "Donald H. Howe", is written over a horizontal line.

Donald H. Howe

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

APPELLATE CASE NO. 2012-213389

56 Leinbach Investors, LLC.....Appellant/Respondent,

vs.

Magnolia Paradigm, Inc..... Respondent/Appellant.

APPELLANT'S BRIEF OF RESPONDENT/APPELLANT

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STATEMENT OF THE CASE

The Appellant/Respondent (Herein "Leinbach:") commenced this action by the filing of a Complaint on June 24, 2008 for breach of contract arising out of a lease entered into by and between the parties dated June 1, 2003, (R.p. 017) Leinbach's Complaint alleges that the Respondent/Appellant (herein "Magnolia") abatement of \$800.00 per month from the rental payments constitute breach of the terms of the lease. A second cause of action requests the Court to declare the parties rights under the lease, pursuant to the Uniform and Declaratory Judgment Act S.C. Code Ann. § 15-53-30 (1976). Thereafter, Leinbach filed an amended complaint attaching the lease which had been inadvertently left off of the lease in the original filing (R.p. 020) This matter was referred to the Master in Equity for Charleston County by Order of Reference filed on September 1, 2009, granting the Master full authority to decide all issues with finality, in accordance with Rule 53(e)(1) SCRCF. (R.p. 001)

On August 3, 2010, Leinbach filed a Motion to amend its Complaint with a proposed unsigned Second Amended Complaint attached and adding causes of action for unjust enrichment and equitable estoppel. (R.p. 031)

On July 18, 2008, the Magnolia filed its answer and counterclaim asserting the Leinbach had breached its lease with the Magnolia by leasing a portion of the property that had been heretofore leased to it. (R.p. 022) On October 18, 2010 Magnolia filed an amended answer and counterclaim to the second amended complaint to assert the additional cause of action of unjust enrichment.(R.p. 037)

On October 11, 2011 the case was tried by the Honorable Michel R. Scarborough, Master in Equity for Charleston County who issued a final order dated June 11, 2012 and

filed on June 15, 2012. (R.p. 003) Receipt of notice of entry of the order was received on June 29, 2012. On July 9, 2012 counsel for the Magnolia filed a motion to reconsider alter or amend. (R.p. 045) A form order denying Magnolia's motion was issued August 31, 2012 but filed not filed until October 8, 2012. (R.p. 016) Receipt of the notice of the Courts order was received on October 15, 2012.

The import of the Courts order was that both parties had breached the terms of the lease, that there had been a mutual mistake that allowed the court to reform the lease , that Magnolia was entitled to abate the rent to Leinbach in a set amount and denied the recovery of attorneys fees.

Leinbach served its notice of appeal on or about November 8, 2012 . (R.p. 283) and Magnolia served its notice of appeal on November 12, 2012 (R.p. 281).

STATEMENT OF FACTS

The lease, (R.p. 189-213) which is the subject matter of this action, was entered into between the parties on June 1, 2003. The lease was prepared by counsel for Leinbach and reviewed and commented on by counsel for Magnolia. An examination of the lease will reveal that it describes the Demised Premises as Parcel H2 of TMS 349-01-00-045 containing 1.21 acres and located on Leinbach Drive in the City of Charleston. A plat entitled "Harrison Executive Park Plat of Parcel H2 owned by Charles W. Patrick, Jr. and Stephen Ziff about to be conveyed to Charles W. Patrick, Jr. (TMS 349-01-00-045) showing the demised premises was introduced into evidence as Plaintiff's Ex. 10, (R.p. 249). Leinbach's, manager, Clyde Hiers, testified that the parcel H-2 is the parcel leased to Magnolia.(R.p. 100, lines 5-9; p.103, line 25; p.104, line 3)

The initial term of the lease was for five years with three options to renew for additional five year periods. The initial rent was \$21,600.00 per year for three years and thereafter three percent increase per year. In all it is a twenty year lease. Magnolia is in first renewal and has exercised its option for the third renewal that commences in June 2013. Exhibit 8 (R.p. 246) is a rental summary as of the date of the trial showing rent paid through October 1, 2011. Total rent paid was \$153,561.00, total rent due under the lease was \$193,352.65. The difference is the amount that Magnolia deducted from its rent payment as a result of the Tower lease described below. Additionally Magnolia was responsible for and paid the taxes on the subject property.

On or about February 23, 2006, after leasing the demised premises to Magnolia, Leinbach entered into a lease with Optima Towers, LLC. (R.p. 217-227) Attached to that lease is a site sketch of the proposed lease area with Optima Towers which was executed by Clyde Hiers, the managing member of the Leinbach. It should be noted in comparing Exhibit "10" (R.p. 249) with the site sketch (R.p. 223) that TMS Parcel 349-01-80-105 is, in fact, Parcel H2 heretofore leased to the Magnolia. Mr. Hiers in his testimony admitted that the sketch is a portion of parcel H-2. (R.p. 104, lines 4-14) See also Plaintiff's Exhibit 4 (R.p. 228) which shows the Cell Tower parcel more clearly.

It is undisputed that the Lease to Optima Towers is a portion of the property already leased to Magnolia.

The Optima lease was for an initial term of five years with four five year options after that. The initial rental was for \$9,600 per month with increase after the first year of 3.5 % per anum. Exhibit 9 is a rent summary of rents paid by Optima from the inception

of the tower lease through September 21, 2011 just before the trial. Total Rent paid was \$54, 116.65. (R.p. 247-248)

Based on the forgoing two exhibits, from the inception of the tower lease to the date of the trial Leinbach received total rent of \$207,477.65 from Optima and Magnolia combined. Exhibit 15 shows these receipts. (R.p. 259) Leinbach was only due from rents from the property \$193, 352.65 over the same period. Therefore, from Exhibit 15, Leinbach was overpaid \$14,125.00 through the date of the trial and continues to be overpaid to date.

Magnolia/ learned that Leinbach had leased a portion of the premises during negotiations for the purchase of the subject property in late 2007. In accordance with the terms of the lease, on December 18, 2007, Magnolia notified Leinbach's counsel of the terms of the lease that had been breach by Leinbach's lease to Optima Towers and to cure Leinbach's breach within 30 days of the letter or Magnolia would commence abating the rent until the Leinbach cured its breach (R.p. 238-239), On January 31 the rent for February was sent to Leinbach's lawyer, Donald H. Howe, abating \$800.00 from the rent. (R.p. 254)

As a result of the forgoing abatement of the rent Leinbach commenced the underlying action leading to this appeal

The Court in its order following the trial, after multiple findings of fact and conclusions, determined that there had been a mutual mistake of fact and since neither party sought rescission, that reformation was the appropriate remedy. (R.p. 011-para 27) Neither party had pled or submitted evidence of mutual mistake or sought reformation of the lease. The only evidence of mistake was the unilateral mistake of Leinbach (R.p.

117, lines 16-18). The reformation of the lease consisted of reducing the size of the demised premises to the area that the tenant (Magnolia) was occupying. Based on the foregoing reformation of the lease the Court then fashioned a remedy that recalculated the lease payment due to its reducing the size of the demised premises and allowed Magnolia to abate the rent since the inception of the tower lease.

The crux of this case is the question, as between Magnolia, the tenant and Leinbach, the landlord, who is entitled to the rent from the Tower lease?

STANDARD OF REVIEW

This action was brought by both parties contending that each had breached the terms of the lease. Lease provisions are construed under rules of contract interpretation. See *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 105-07, 413 S.E.2d 866, 868-69 (Ct.App.1992) (applying the rules of contract construction to interpret the lease of a shopping center). One cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties. *Chan v. Thompson*, 302 S.C. 285, 289, 395 S.E.2d 731, 734 (Ct.App.1990). To determine the intention of the parties, the court "must first look at the language of the contract." *C.A.N. Enters., Inc. v. South Carolina Health and Human Servs. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). The construction of a clear and unambiguous contract presents a question of law for the court. *Ward v. West Oil Co., Inc.*, 379 S.C. 225, 665 S.E.2d 618 (Ct.App.2008); see also *Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001).

Although the action was brought as a case at law the Trial Courts remedy was equitable, that is, it reformed the lease based upon the mutual mistake of the parties and granted Leinbach judgment on its cause of action for unjust enrichment.

In an appeal of an equitable action tried before a master authorized to enter final judgment, this Court must review the entire record and make its own findings of fact according to its view of the preponderance of the evidence.” *Thomas v. Mitchell*, 287 S.C. 35, 37, 336 S.E.2d 154, 155 (Ct.App.1985). “This requirement does not, however, command us to ignore the findings of the trial judge who heard the witnesses.” *Id.* at 38, 336 S.E.2d at 155.

ARGUMENT I

THE MASTER ERRED IN JUDICIALLY CONSTRUING THE LEASE

LAW

“Lease provisions are construed under rules of contract interpretation. See *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 105-07, 413 S.E.2d 866, 868-69 (Ct.App.1992) (applying the rules of contract construction to interpret the lease of a shopping center). One cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties. *Chan v. Thompson*, 302 S.C. 285, 289, 395 S.E.2d 731, 734 (Ct.App.1990). To determine the intention of the parties, the court “must first look at the language of the contract.” *C.A.N. Enters., Inc. v. South Carolina Health and Human Servs. Fin. Comm’n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). The construction of a clear and unambiguous contract presents a question of law for the court. *Ward v. West Oil Co., Inc.*, 379 S.C. 225, 665 S.E.2d 618 (Ct.App.2008); see also *Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass’n*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001).

“Before judicial construction of a lease is appropriate to determine the intent of the parties to the lease, there must be an ambiguity in the lease; and in the absence of an ambiguity in the terms of the lease, no judicial construction is required or permitted. (49 *Amjur 2d Landlord and Tenant Section 44*). The question of whether a lease is ambiguous or clear is a question of law for the Court to determine, not a question of fact.”

THE LEASE IS NOT AMBIGUOUS

The heart of the issue between the parties was the extent of the demised premises. Leinbach took the position that the Demised Premises was limited to the area that Magnolia was using for its parking. The lease clearly limits the demised premises use to parking for its employees and those of Baker Motor Company. (Lease Section 1.02 Parking, Section 1.02 (repeated) Use of Space and Article VI, USE, Section 6.01 Use.(R. p. 189, 193) The language used in each of those sections refers to the Demised Premises and not to the parking area. The only reference in the lease to “parking area” is in the first section 1.02 of the lease:

Section 1.02 . Parking. Throughout the Demised Term Tenant and its employees shall have the exclusive right to use any parking areas within the Demised Premises”

The next section also labeled Section 1.02 and entitled” Use of Space” states that the demised premises shall be used by Tenant as parking for employees.

At the time of the creation of the lease there was nothing but an unimproved lot. There was no designated “parking area”. Since the second Section 1.02 and also Section 6.01 allow the Tenant to use the entire demised Premises for parking the only impact of the first Section 1.02 is that use is exclusive and not by way of limitation of the extent of the demised premises.

In its order the Master failed to rule that the lease was ambiguous or not although he was requested to do so in Magnolia’s Motion to Alter or amend (R.p. 045). The Master did, however find at page 4 paragraph 12 of the order :

“Based on the Court’s review of the lease itself and hearing the testimony of the Plaintiff and Defendant’s witnesses and, in particular, Mr. Carnevale, who was Plaintiff’s real estate agent at the time, the Court finds that Section 1.01 of the lease entitled “demised premises” describes the demised premises as the entire 1.21 acre parcel shown on the plat at Plat Book DB, Page 47” (Exhibit 10) (R.p. 006)

Magnolia asserts that this finding is consistent with Magnolia’s assertion that the lease was unambiguous and not subject to parole or extrinsic evidence that would modify it’s terms.

Over Defendant’s objection, the Plaintiff was allowed introduce sketches and plans of the parking area that were not a part of the lease (R.p. 076) and to testify that he thought the demised premises was limited to the parking area as an explanation as to why

he had made a mistake. (R.p. 76, line 24-p.81, line 14) These plans were submitted to Plaintiff in accordance with the lease that required his approval of the improvements. (Lease page 4, Article V Section 5.01) (R.p. 192)

The Court found in its order at page 6 paragraph 18 “Magnolia argues it is entitled to the quiet enjoyment of the entire parcel, On page 17 of the lease, however, the enjoyment of quiet title and peaceful possession is limited to “all rights herein granted” and those rights, as noted above, are limited of the use of the parking in the designated area.” (emphasis mine). (R.p. 008) There is no designated area for parking in the four corners of the lease. This can only be gleaned by the court taking notice of the plans for the improvements which were not part of the lease. The Court at page 9 Paragraph 28 also found in pertinent part that “A lease is tantamount to a conveyance of real property for the period of time of the lease.” (R.p. 011)

“In absence of ambiguity in description of realty conveyed by deed, grantor’s intent was to be determined from within four corners of deed and he was deemed to have intended to convey land which was accurately and well-described within the deed.” *Bellamy v Bellamy*, 292 S.C. 107,111, 355 SE2d 1,3 (Ct. App. 1987)

The court further made reference to the “parking area” in paragraph 16 of the order at page 5. Referring to Article XII, TITLE TO PREMISES, “The Demised Premises shall hereafter be subject to no leases ... which in any manner interfere with Tenant.” Notably, it does not say the demised Premises is not subject to any lease. It only forbids leases that interfere with the use of the parking area.” (R.p. 007) (emphasis mine) The problem is there is no parking area within the demised Premises. This goes to the issue of the unambiguous description of the Demised Premises. The court found that the Demised Premises consists of the entire 1.21 acre parcel, order page 4 paragraph 12. (R.p. 006) There is no parking area within the Demised Premises. Parking is only a use.

This Section of the lease is an affirmative warranty of title by the landlord, Leinbach, and an affirmative covenant that the property will thereafter not be subject to anything that in any manner would prevent or interfere with Tenant. If the erection of a cell tower on the demised premises does not prevent or interfere in any manner with Tenant, then nothing can.

The court should have excluded and not considered any evidence that tended to reduce the size of the demised premises as being in violation of the parole evidence rule.

“Since the description in the deed of the land conveyed exactly matches the realty conveyed with no discrepancy as to the location of the boundaries, and no question as to the accuracy of the survey as shown within the deed’s description, there is no ambiguity within the deed, either patent or latent, of the location of the property described in the deed; and we so hold. *Bellamy v Bellamy*, 292 S.C. 107, 355 S.E.2d 1, Court of Appeals of South Carolina , 1987.”

“It is fundamental law in this state that if a deed description is unambiguous, extrinsic evidence cannot add to, subtract from, vary or explain its terms, in the absence of fraud, accident or mistake in its procurement. *Kirven v. Bartell*, 266 S.C. 385, 223 S.E.2d 597 (1976) *Bellamy v Bellamy*, 292 S.C. 107, 355 S.E.2d 1, Court of Appeals of South Carolina , 1987”.

In its remedy the court reformed the lease and reduced the size of the “Demised Premises” to the area encompassing Magnolia’s parking lot.

Based on the forgoing the court should find that the lease is unambiguous and not subject to judicial construction and reference to material outside of the lease was not admissible.

ARGUMENT II

THE MASTER ERRED IN REFORMING THE LEASE BETWEEN THE PARTIES

Neither party pled nor submitted evidence in support of the Masters ruling that their lease should be reformed. In its order the Master found that Magnolia had abandoned a portion of the demised premises which led to a mutual mistake of the extent of the demised premises. (Order para 27) (R.p. 011)

A. THERE WAS NO MUTUAL MISTAKE

LAW

“On this issue the burden was upon him to show by clear and convincing evidence that there was not only a mistake but that it was reciprocal and common to both parties. *Gowdy v. Kelley*, 185 S.C. 415, 194 S.E. 156; *Moore v. Jeffords*, 195 S.C. 512, 12 S.E.2d 737. ‘Before a court of equity will reform a solemn instrument, it must be shown by evidence which is the most clear and convincing, not simply it was a mistake on the part of one of the parties, but that it was a mutual mistake; that both parties intended a certain thing; and that by mistake in the drafting of the paper did not get what both parties intended.’ *Sullivan v. Moore*, 92 S.C. 305, 75 S.E. 497. Where only one of the parties is under such mistake, ‘equity will refuse its aid, except under very strong and extraordinary circumstances, showing imbecility or something which would make it a great wrong to enforce the agreement, and this must be made to appear by competent testimony of the clearest kind.’ *Kennerty v. Etiwan Phosphate Co.*, 21 S.C. 226.” *Belin v. Stikeleather*, 232 S.C. 116, 122, 101 SE2d 185, 188, (1957) *Sims v. Tyler*, 276 S.C. 640, 281 SE2d 229, S.Ct. 1981

A mistake by one party coupled with ignorance thereof by the other party does not constitute a mutual mistake within these rules. 76 C.J.S. *Reformation of Instruments* § 40 What Constitutes Mutual Mistake.

In the trial courts order the court found at paragraph 21 at page 7,

“21. Plaintiff’s leasing of a portion of the demised premises already leased to defendant constitutes a violation of Article 12 of the lease. While I find that the Plaintiff breached its lease with the defendant, I further find that Defendant’s failure to utilize the area in question amounted to an abandonment of that part of the demised premises which resulted in a mutual mistake of fact – both parties were unaware that the wooded area was contained within the demised premises at the time that either lease

was entered into. I further find that this abandonment occurred prior to Plaintiff's breach of the express terms of the lease by again renting a part of the demised premises" (Emphasis mine) (R.p. 009)

The statement that, "both parties were unaware that the wooded area was contained within the demised premises at the time that either lease was entered into", is contrary to the evidence. Magnolia's witness, Bill Cochran, testified that Magnolia was leasing the entire 1.21 acre parcel. (R.p. 161, lines 1-7) Robert (Corky) Carnavale, Leinbach's realtor at the time the lease was entered into, testified that Magnolia was leasing the entire 1.21 acre parcel (R.p. 150, line 15-p.151, line 4) . The only testimony in regard to a mistake as to the extent of the demised premises was by Clyde Hiers, Leinbach's manager. (R.p. 105, lines 12-17) In fact Mr. Hiers testified that the lease describes the demised premises as the entire 1.21 acre tract (R.p. 103, lines 4-8). The court found at page 4 paragraph 12 of the order that the demised Premises as the "entire 1.21 acre parcel". (R.p. 006) There is no evidence that the parties were unaware the wooded area was contained within the demised premises at the time the lease was entered into. To the contrary both parties representative testified that the wooded area was a part of the demised premises and the court so found.

At best this was a unilateral mistake on the part of Leinbach. This is confirmed by the conclusion: At page 8 paragraph 26 of the Court's order " The tower lease was entered into by the Plaintiff under the mistaken belief that it had not leased the property to the Defendant. (R.p. 010) This was done without any assistance from the Defendant". There is no evidence in the record that would suggest that at the time the lease was entered into that either party was mistaken as to the extent of the demised premises. The unilateral mistake took place three years later.

B. THERE IS NO EVIDENCE OF ABANDONMENT

LAW

An “abandonment” of leased premises occurs when a tenant leaves the premises vacant with the avowed intention not to be bound by the lease. Under the common-law definition of “abandonment,” a lease may be abandoned when a tenant voluntarily relinquishes or vacates the leased premises with the intention to terminate the contractual rights to possession and control of the premises. For a lessee’s actions to amount to an abandonment, two elements must be proven: (1) that the lessee vacated the premises, and (2) that the lessee had a clear intent not to be bound by the lease.

49 Am. Jur. 2d Landlord and Tenant § 214, Abandonment and re-entry; delivery and acceptance of keys—What constitutes abandonment.

Black’s Law Dictionary, Third Edition, page 5, defines “abandonment” to be: “The relinquishment of a right. It implies some act of relinquishment done by the owner without regard to any future possession by himself, or by any other person, but with an intention to abandon.” *Holly Hill Lumber Co. , Inc. v Grooms*, 198 SC 118, 16 SE2d 816, 821 (1941)

Leinbach did not plead nor argue at the trial of the case that that Magnolia had abandoned a portion of the lease premises. The mere fact that the area in question was not being utilized does not rise to the level of abandonment. The parking lot plan clearly shows that the area in question was landscaped as part of the approval with the city of Charleston approval. (R.p. 262, Plaintiff’s Exhibit 6).

The statement , “I further find that this abandonment occurred prior to Plaintiff’s breach of the express terms of the lease by again renting a part of the demised premises”, (Order p. 7 para 21) (R.p. 009) is also not supported by the testimony for the same reasons stated above that there is no evidence of abandonment of any portion of the demised premises. The only evidence submitted in relation to the use of the demised premises was from Magnolia’s representative Mr. Cochran. He chose not to improve that

area because of the cost involved. (Tr. p. 106-107) (R.p. 162, lines 19-p.163, line 16)

This decision was made at the inception of the lease between Leinbach and Magnolia and not after the erection of the tower.

Mr. Hiers testified that he made the mistake at the time he was approached by Optima Towers in 2006. (R.p. 105, lines 12-17; p.106, lines 16-25) Mr. Cochran and Mr. Carnavale testified that at the inception of the lease in 2003 between these parties it was intended that the entire 1.21 acre parcel be leased. Nothing happened between 2003 and 2006 that would constitute evidence of abandonment as defined above.

The court should thus reverse the Master on this issue and issue its ruling that the courts finding that Magnolia had abandoned a portion the leased premises was in error.

C. REFORMATION OF THE LEASE BETWEEN THE PARTIES WAS IN ERROR

LAW

“Description of land conveyed in deed can be reformed, and boundaries of realty redrawn, only where there is latent or patent ambiguity in description of land conveyed or where there is showing of fraud, coercion, or mutual mistake.” “In absence of ambiguity in description of realty conveyed by deed, grantor’s intent was to be determined from within four corners of deed and he was deemed to have intended to convey land which was accurately and well-described within the deed.” *Bellamy v Bellamy*, 292 S.C. 107, (Ct. App.1987)

“Before a court will reform an instrument, the complaining party must show a mutual mistake by clear and convincing evidence, i.e., that both parties intended a certain thing and did not get what they intended by a mistake in drafting. A contract may be reformed on the ground of mutual mistake when the mistake consists of the omission or insertion of some material element affecting the subject matter or when the terms and stipulations of the contract are inconsistent with those of the parole agreement that preceded it.

George v Empire Fire and Marine Insurance Company 336 S.C. 206, 519 S.E.2d 107, (Ct. App 1999)

A mistake by one party coupled with ignorance thereof by the other party does not constitute a mutual mistake within these rules. *76 C.J.S. Reformation of Instruments* § 40 What Constitutes Mutual Mistake.

Since there is no evidence of mutual mistake or abandonment the court has no power to reform the lease between the parties. Based on the forgoing The Court should reverse the Master on this issue.

ARGUMENT III

THE MASTER ERRED IN FINDING THAT THE MAGNOLIA HAD BREACHED THE PAYMENT TERMS OF THE LEASE WITH LEINBACH.

In its Order, at paragraph 22, the court found that Magnolia had breached the lease, “Plaintiff contends that Defendant breached the lease by reducing its lease payments by the amount of the lease payments received by Plaintiff from Optima Towers. I agree. Article 6.03 of the lease clearly allows for abatement of the rent. The leasing of a portion of the property to another, including fencing off the entire area, completely prevents Defendant’s access to that area; however I specifically find that the Plaintiff’s action does not interfere with the Defendant’s normal use of the area of the demised premises. It does however effectively eject Defendant from future use of this part of the original demised premises.” (emphasis mine). (R.p. 009) The court then went on to state at paragraph 23 of the Order (R.p. 009) , “While the defendant did effect a remedy allowed by the lease , I find that the self –help remedy the Defendant has utilized is excessive and constitutes a breach of the payment terms of the lease.”

Thereafter in the Conclusion of Law at Paragraph 24, the Court concluded “I conclude that Section 6.03 of the lease provides Defendant’s remedy for Plaintiff’s interference with Defendant’s use of the demised premises. This Section 6.03 permits the tenant (Magnolia) to abate rent due to the landlord during the time that such interference persists.” (R.p. 010)

Section 6.03 of the lease provides: “Section 6.03. Landlord’s Interference. Landlord shall use its best efforts to not interfere with Tenant’s operations. If Landlord creates a condition that substantially interferes with the normal use of the Demised

Premises or appurtenant parking or service area as allowed herein, the Rent and other charges due hereunder shall be abated during the time such interference persists, ...”(R.p. 194)

In essence the Court has concluded and found that Magnolia has the right to abate the rent but because the leasing of a portion of the demised premises to another does not interfere with the Defendant’s normal use of the area of the demised premises its abatement is excessive, and constitutes a breach of the payment terms of the lease.

The forgoing paragraphs from the order are inconsistent, the statement “I specifically find that the Plaintiff’s action does not interfere with the Defendant’s normal use of the area of the demised premises.” is completely inconsistent with the next sentence “ It does however effectively eject Defendant from future use of this part of the original demised premises and the sentence “The leasing of a portion of the property to another, including fencing off the entire area, completely prevents Defendant’s access to that area” If the interference ejects the Defendant and prevents the Defendant’s access to the area, it has to interfere. Plain language interpretation demands it.

By exercising a right provided by the lease the defendant cannot be in breach of the lease as stated and concluded above. If the abatement is excessive, if anything, it goes to the issue of damages. It should be noted that Section 6.03 of the lease quoted above allows the total abatement of the rent and other charges. In this case Magnolia reduced its rent payment by \$800.00, the amount of the lease payments that Leinbach was receiving from Optima Towers not the full amount of its rent payments of \$1,854.00 per month.

In interpreting an unambiguous contract the court should give it its ordinary and plain meaning . A remedy allowed by the lease should not create a default by Defendant.

The Court should reverse the Masters finding Magnolia breached the lease.

ARGUMENT IV. THE MASTER'S REMEDY WAS IN ERROR

A. THE MASTER ERRED IN FINDING THAT THE LEINBACH WAS ENTITLED TO RELIEF UNDER ITS CAUSE OF ACTION FOR UNJUST ENRICHMENT

The Court in its order fashioned an equitable remedy that allowed both parties to benefit from the payments from the Tower lease. This was all based on the unpled theories of abandonment, mutual mistake and reformation. The issues of mutual mistake, abandonment and reformation have been previously argued and should control this issue, that is, if this Court determines that there was no abandonment and mutual mistake then reformation was not appropriate and the lease should be enforced as written which includes allowing Magnolia to abate the rent in an amount equal to the Tower lease payments. Without waiving the forgoing Magnolia assets that it was error to grant Leinbach relief for unjust enrichment and further error to deny Magnolia relief for unjust enrichment or grant it full abatement of the rent from Optima Towers.

In its order the Master found, concluded and ordered that Leinbach's claim for unjust enrichment should be granted. In reaching that conclusion the Master concluded: at paragraph 28 page 9, (R.p. 011) "Plaintiff's claim for unjust enrichment against the Defendant is granted. Plaintiff asserts that "Defendant has been unjustly enriched because they are not paying the full amount of the rent bargained for under the lease." The fact that Magnolia is not paying the full amount of the rent bargained for under the lease does not impact Leinbach because it is receiving the full amount of the rent it bargained for under the lease.

LAW

"Unjust enrichment" is an equitable doctrine, akin to restitution, which permits the recovery of that amount the Defendant has been unjustly enriched at the

expense of the Plaintiff. While the two terms are often mentioned in one breath, actually only restitution is a form of remedy, whereas unjust enrichment provides the general theoretical framework for all damages awarded in the context of implied and constructive contracts. *13 S.C. Jur. Implied Contracts* § 6, Unjust enrichment and restitution, and cases cited therein.

“It is not necessary, in order to create an obligation to make restitution, that the party unjustly enriched should have been guilty of any tortious or fraudulent act; the question is: Did he, to the detriment of someone else, obtain something of value to which he was not entitled? In such cases the simple, but comprehensive, question is whether the circumstances are such that equitably defendant should restore to plaintiff what he has received.” 77 C.J.S. Restitution at 322-323. *Harper v McCoy* at 784.

In the case of *Harper v McCoy* 276 S.C. 170, 172 276 S.E.2d 782,783-784

1981, the Court stated

“A cause of action for restitution is a type of the broader cause of action for money had and received, and generally the object to be attained in proceedings for restitution is the prevention of unjust enrichment of the defendant and the securing for plaintiff of that to which he is justly and in good conscience entitled. A person who has been unjustly enriched at the expense of another is required to make restitution to the other, and if one obtains the property or the proceeds of property of another, without a right to do so, restitution in a proper case can be compelled.... at *id* 784

In this matter the question is, has Magnolia obtained the property or the proceeds of property of another (Leinbach), without a right to do so? The underlying question then is whether the property interest, the Tower lease, is the property of Leinbach, the landlord, or property of Magnolia, the tenant. If the property interest is the Tenant's, Magnolia, then it has not obtained the property or the proceeds of property of another, Leinbach, and Leinbach cannot recover.

“The right to use the leased premises during the term specified in the lease is transferred from the landlord to the tenant. Thus, a landlord and tenant have separate estates in the demised premises during the term of the lease, the tenant's being a possessory interest while the landlord has a reversionary interest in the land. In other words, during the existence of the lease, the tenant is the absolute owner of the demised premises for all practical purposes for the term granted,

(emphasis mine) with the landlord's rights being confined to the reversionary interest.” *49 Am. Jur. 2d Landlord and Tenant* § 889, 52 C.J.S. Landlord & Tenant § 337

Leinbach leased the subject property to Magnolia for 20 years inclusive of all options. Magnolia is in its 10th year. Based on the forgoing statement of law Magnolia owns the property interest for twenty years. At the time the lease was negotiated the rent was calculated at capitalization rate of 8 to 10% per anum based on Leinbach’s estimate of value at the time of \$300,000.00. (R.p. 108, lines 6-19) Based on that it anticipated, through the date of the trial, to receive a total of \$193,352.65 from the rent generated from the property. Exhibit 8 (R.p. 246) However, with the inclusion of the cell tower lease payment, \$54,116.65, he received a total of \$207,477.65 over the same period. In essence \$14,125.00 more than he bargained for in 2003, in other words Leinbach has not been damaged by the abatement. (R.p. 259) If Leinbach has not been damaged by Magnolia’s abatement then Magnolia’s abatement can’t be at Leinbach’s expense and Leinbach should not have recovered on its cause of action for unjust enrichment.

Additionally, Leinbach mistakenly created the production of the rent produced by the cell tower. It did so under the mistaken belief that the property was not leased to Magnolia. (R.p. 106, lines 16 – 25; p.117, lines 16-18; p.120, lines 14-15) Had it realized that the property was already leased to Magnolia it would not have entered into the lease with Optima. (R.p. 105, lines 12-17) It cannot, thus, be argued that Leinbach bestowed a benefit upon Magnolia that it would be inequitable for Magnolia to retain.

The court made additional findings which are pertinent to this Argument, it ordered at paragraph 35, Page 11, (R.p. 013) “while I find that the Leinbach received a total of \$207,677.65 through the month of October 2011, it received this amount through

its own efforts and not at the unjust expense of Defendant (Magnolia). I find that the Leinbach received enrichment over the contract amount but I find that the amount was not unjust.” (emphasis mine) This finding is not support by the evidence. The fact that Leinbach sought and leased property already leased to Magnolia through its own efforts is a characterization of Leinbach’s breach of the lease for which it should not be rewarded. Leinbach should not have been making any effort to lease property already leased to Magnolia. Magnolia asserts that if Leinbach was enriched, it would have to be unjust given the fact that it had bargained for a specific amount of rent from the Magnolia for the full term of the lease and would receive greater than it bargained for and it would be unjust for the Leinbach to receive greater than the rent it initially bargained for.

The finding “not at the unjust expense of Magnolia” fails to consider that Leinbach exploited a valuable property right of Magnolia and therefore it has to be at Magnolia’s expense and it is unjust to allow it to happen.

Leinbach further argued and the court found that the money it received is not at the “expense of the tenant”. This is clearly erroneous. Any use of the demised property by the landlord contrary to the Lease with the Magnolia which yields Leinbach additional remuneration is “at the expense of the tenant.” Restitution is not damages but a remedy to prevent unjust enrichment. *Sauner v Public Service Authority of South Carolina*. 581 S.E.2d 161. Restitution is a remedy designed to prevent unjust enrichment.” *Stanley Smith & Sons v. Limestone College*, 283 S.C. 430, 434, 322 S.E.2d 474, 478 (Ct.App.1984) *Moore-Hudson Oldsmobile/GMC, Inc. v. Waterman*, 298 S.C. 107 (1989) 12 S.C. Jur. Equity § 23 Restitution and unjust enrichment

The court made the further finding at page 7, paragraph 22 (R.p. 009) that reflects that Magnolia was ejected from the area in question. Ejecting Magnolia from a portion of the demised premises is at Magnolia's expense. The demised premises is Magnolia's property. Leinbach's gain was Magnolia's loss and therefore at Magnolia's expense. Leinbach exploited Magnolia's valuable property to its gain. Magnolia's action was to recover its property right that was exploited and was allowed in the lease by abatement.

Based on the forgoing authority it cannot be said that Magnolia has been unjustly enriched and that Leinbach is justly and in good conscience entitled to the use of the Tower lease rents during the term of Magnolia's lease.

B. THE MASTER ERRED IN DENYING MAGNOLIA RELIEF UNDER ITS CAUSE OF ACTION FOR UNJUST ENRICHMENT

The thrust of Magnolia's claim against Leinbach has not been a claim for damages, as argued by Leinbach, limited to the square footage lost as a result of the erection of the Tower but a claim for restitution to prevent Leinbach's unjust enrichment. A claim to prevent Leinbach from capitalizing on its unilateral mistake.

Magnolia asserted that it was entitled to abatement under the lease or to recover from Leinbach under its cause of action for unjust enrichment. In order to recover under this cause of action for unjust enrichment it would have to show that Leinbach had obtained the property or the proceeds or property of Magnolia without a right to do so and that it would be inequitable for it to retain it. The case of *Harper v McCoy* cited above is more in keeping with Magnolia's claim than Leinbach's.

A person who has been unjustly enriched at the expense of another is required to make restitution to the other, and if one obtains the property or the proceeds of property of another, without a right to do so, restitution in a proper case can be compelled... *Harper at 784.* (emphasis mine)

The court found Leinbach had been enriched, at page 11 paragraph 35, “While I find that the Plaintiff (Leinbach) received a total of \$207,677.65 through the month of October 2011, it received this amount through its own efforts and not at the unjust expense of the Defendant. I find that the Plaintiff received enrichment over the contract amount but I find that the amount was not unjust.” (emphasis mine) (R.p. 013) This finding satisfies the requirement that one has to be enriched. The next requirement would be whether that enrichment was at the expense of Magnolia.

As previously argued and found by the Master a lease is tantamount to a conveyance of real property for the period of time of the lease. (order page 9 paragraph 28 (R.p. 011)). As argued above the demised premises is the property of the tenant for the lease term. By leasing a portion of the property already leased to Magnolia the court found that it had breached the lease, (order page 7 paragraph 21). (R.p. 009) Since the property right is the property right of the tenant and not the landlord then Leinbach took a valuable property right that he should equitable have to return to Magnolia,

“Did he, to the detriment of someone else, obtain something of value to which he was not entitled? In such cases the simple, but comprehensive, question is whether the circumstances are such that equitably defendant should restore to plaintiff what he has received.” 77 *C.J.S. Restitution* at 322-323. *Harper v McCoy* at 784.

The court further stated that “it was at the expense of Magnolia but it was not unjust” and further “the enrichment to Leinbach was not unjust”. Whether the enrichment and at the expense of Magnolia was just or unjust is not an element of the cause of action. As stated above from *Harper v McCoy*, “Did he, to the detriment of someone else, obtain something of value to which he was not entitled?” Clearly the answer is yes and as result Magnolia should recover on its claim for unjust enrichment.

C. THE MASTER ERRED NOT ALLOWING MAGNOLIA FULL ABATEMENT OF THE RENT BEING RECEIVED FROM OPTIMA TOWERS

In its remedy the court found that Magnolia was entitled to abate the rent but in an amount that was calculated based on the loss of use of the tower area of the demised premises. This is an incorrect calculation of the amount of the abatement. The language at Section 6.03 of the lease provides in pertinent part “the Rent and other charges due hereunder shall be abated during the time such interference persists”. (R.p. 194) The lease thus allows a total abatement of the rent not merely a partial abatement.

The Master stated in his conclusion that “it would inequitable for the Magnolia to get the full benefit of the amount of the rental payments from Optima after having sat on their rights to stop the Tower’s construction” (order page. 9 paragraph 28) (R.p. 011) is not supported by the evidence and contrary to the ruling of the court that Leinbach’s cause of action for equitable estoppel does not lie (order page 8 paragraph 25.) (R.p. 010)

The Master further made a finding at page 7 and 8 “ To allow Defendant (Magnolia) to benefit from its failure to object to use of its demised premises and then to wait and claim that Plaintiff has been unjustly enriched from its own efforts smacks this court as both a breach of the parties agreement and inequitable conduct.” (R.p. 009-010)

There’s no support in the record that there was any inequitable conduct on the part of the Magnolia. Leinbach’s conduct was active, it leased the property to another when it knew or should have known that the property was leased to Magnolia. Magnolia’s conduct was passive and based upon ignorance of the fact that Leinbach would have the audacity to lease property to two different people. Leinbach now seeks forgiveness for its unilateral mistake and a ruling that would allow it to profit from therefrom. If there was any inequitable conduct it was the conduct of Leinbach.

Magnolia may have passively acquiesced in the construction off the tower but it did not waive any of its rights to demand strict compliance with the terms of the lease upon learning of the Leinbach's breach. "A mistake by one party coupled with ignorance thereof by the other party does not constitute a mutual mistake within these rules. 76 *C.J.S. Reformation of Instruments* § 40 What Constitutes Mutual Mistake.

Inasmuch as the lease was not ambiguous and subject to judicial construction the provision for abatement should be enforced as written, however only for the amount of the Tower lease not the full amount as allowed in the lease.

D. THE MASTER ERRED IN HIS CALCULATION OF THE ARREARS IN RENTAL PAYMENTS OWED BY MAGNOLIA TO LEINBACH

In the event that the court rules that the lower court was correct in its assessment Magnolia would request that the court correct a mathematical error in the lower courts order.

In the section of the Court's order entitled "The Remedy" the Court found at page 12 paragraph 36, that the Defendant owed Plaintiff \$39,791.65. This was based on Plaintiff's Exhibit 8 that compared the rents owed under the lease to the actual rent paid. (R.p. 246). ($\$193,352.65 - \$153,561.00 = \$39,791.65$)

Previously in the order at page 11 paragraph 33 (R.p. 012-013) the court found that as a result of the erection of the cell tower the Defendant was deprived of approximately 0.2 of and acre or one sixth (1/6) of the area it contracted to lease. As a result of that calculation he found that the Defendant was entitled to an abatement of the rent in a fixed amount of \$300.00 per month ($1/6 \times \$1,800$) "from the time the cell tower began to pay on its rental term." (order pp 11 R.p. 013), "with that figure to be adjusted

over the life of the lease assuming the defendant continued to exercise its options to renew.”

The forgoing fixed dollar amount of \$39,791.65, however is based upon the original lease and does not reflect the abatement of \$300.00 per month, as adjusted, from the inception of the cell tower lease. The court found that a period of 66 months, from April 1, 2006 through October 1, 2011 (the month of the trial) had elapsed from the inception of the cell tower lease.

Attached to this argument is a table calculating the alleged arrears. Column 1 is the actual rent paid by Magnolia over the period in question. Column 2 is the rent that was is actually due in accordance with the lease with 3 % increases. Column 3 is the amount due with the court awarded offset of 1/6. Based on the forgoing table alleged arrears should thus be \$18,474.21 instead of \$39,791.65.

In Magnolia’s motion to alter or amend it requested the court to correct this mathematical error.

Magnolia would thus request the court to reverse the lower court on this calculation.

RENTAL PAYMENT SUMMARY
6/1/2003 - 10/1/2011
FROM MAGNOLIA PARADIGM
to
56 LEINBACH

	Rent from Magnolia	Due From Property	Due with offset	Balance (1.)
6/1/2003-6/1/2004	\$ 21,600.00	\$ 21,600.00	21,600.00	\$ -
6/1/2004-6/1/2005	\$ 21,600.00	\$ 21,600.00	21,600.00	\$ -
6/1/2005-6/1/2006	\$ 21,600.00	\$ 21,600.00	21,600.00	\$ -
6/1/2006-6/1/2007	\$ 22,248.00	\$ 22,248.00	18,648.00	\$ (3,600.00)
6/1/2007-6/1/2008	\$ 19,048.00	\$ 22,915.44	19,096.20	\$ 48.20
6/1/2008-6/1/2009	\$ 13,622.00	\$ 23,602.90	19,669.09	\$ 6,047.09
6/1/2009-6/1/2010	\$ 14,004.00	\$ 24,310.99	20,259.16	\$ 6,255.16
6/1/2010-6/1/2011	\$ 14,004.00	\$ 25,040.32	20,866.93	\$ 6,862.93
6/1/2011-10/1/2011	\$ 5,835.00	\$ 10,435.00	8,695.83	\$ 2,860.83
Totals	\$ 153,561.00	\$ 193,352.65	172,035.21	\$ 18,474.21

1. Balance = Due from Offset - Rent Paid by Magnolia

ARGUMENT V

THE MASTER ERRED IN NOT AWARDING MAGNOLIA ATTORNEY'S FEES

In the courts order, Remedy, page 12, paragraph 37, Attorney's Fees, the court found that neither party was entitled to an award of attorney fees. (R.p. 014) Assuming this court agrees with Magnolia's position, Magnolia requests the Court to reverse the Master regarding awarding attorney fees to Magnolia.

"As a general rule, attorney fees are not recoverable unless authorized by contract or statute." 2 S.C. *Jur. Attorney Fees* § and cases cited therein.

The lease at page 21 Section 14.11. Attorney's Fees, provides for the prevailing party to recover reasonable attorney's fees. (R.p. 209-210) At the trial of the case, Magnolia presented evidence of attorney's fees and an affidavit in support of Magnolia's attorney's fees. Leinbach did not submit any evidence which would support its intent to seek attorney's fees and therefore should be considered to have abandoned its claim for attorney's fees.

In its counterclaim Magnolia sought abatement of rent which is what the Court found was appropriate. Although the Court found that the amount of abatement was somewhat less than what the Defendant sought, it still was a beneficial and prevailing result as it defeated at least a portion of the Plaintiff's claim for a breach of contract.

The Court found that the Plaintiff breached its lease by leasing it to another (order page 7 paragraph 21). (R.p. 009) The Court also found that the Defendant breached the lease payment terms by excessive abatement. As previously argued, this finding should be in error. Abatement is allowed by the lease and the only issue was the amount of the abatement which only goes to the issue of damages, not to the issue of the breach of the lease. Since the lease was breached by the Leinbach and not by the Magnolia this court

should award reasonable attorney's fees to Magnolia consistent with Magnolia's affidavit in support of attorney's fees.

CONCLUSION

In order to tap the equitable remedies of the court the court found that there had been a mutual mistake of fact warranting reformation of the parties agreement. In doing so he re-wrote the lease between the parties. This was clearly erroneous as argued.

This was an action at law. The court's role was to interpret the contract and determine if there was any ambiguity that allowed the admissibility of parole or extrinsic evidence. The court never ruled that the lease was ambiguous or not. Magnolia asserts that the lease was not ambiguous and the court should not have considered matters outside the four corners of the lease.

What occurred here was Leinbach made a unilateral mistake. After the fact he looked to the lease to see whether or not there were any provisions in the lease that would justify what he had done and seized on interpretations of certain sections to try to accomplish that. To a degree he was successful, however, the court agreed that Magnolia had a right to abate the rent and then fashioned a remedy that split the baby.

This should be considered error on the part of the Master. There was no mutual mistake warranting reformation of the lease. With the court overruling the Master on that point then this court should determine that the lease unambiguously describes the demised premises as the entire 1.21 acre parcel and that Leinbach had no right to lease a portion of the property already leased to Magnolia.

The remedy is provided for in the lease that is abatement. Since Leinbach bargained for the rent provided for in its lease with Magnolia it should receive that amount only from Magnolia and Optima Towers. Thus the abatement is an amount equal

to the amount of the Optima Tower payments makes Leinbach whole and provides Magnolia with the benefit it is entitled to under its lease. The fact that Magnolia received a benefit from the cell tower lease should be of no consequence since Leinbach receives the benefit of its bargain, a 20 year lease with three per cent increases per annum .

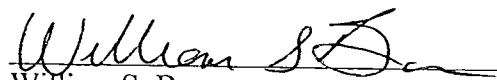
Leinbach sued for breach of contract. He was not damaged by Magnolia abating the rent in an amount equal to the payment it was receiving from Optima Towers. His breach of contract action thus fails.

He also sued for unjust enrichment. There is no unjust enrichment to Magnolia because that has to be at the expense of Leinbach. Although Magnolia is receiving a benefit from the Optima Tower lease payment it is not at the expense of Leinbach. Leinbach would have to suffer some ascertainable loss for it to be at its expense. Having suffered no loss it is not at his expense.

The court should reverse the decision of the Master and enter judgment for Magnolia allowing it full abatement of the rent received by Leinbach since the inception of the tower lease as well as reasonable attorney's fees.

Respectfully submitted,

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Charleston, South Carolina
August 22, 2013

Certificate of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.


William S. Barr

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

APPELLATE CASE NO. 2012-213389

56 Leinbach Investors, LLC.....Appellant/Respondent,

vs..

Magnolia Paradigm, Inc.....Respondent/Appellant.

RESPONDENT'S BRIEF OF RESPONDENT/APPELLANT

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STATEMENT OF THE CASE

The Appellant/Respondent (Herein "Leinbach") commenced this action by the filing of a Complaint on June 24, 2008 for breach of contract arising out of a lease entered into by and between the parties dated June 1, 2003, (R.p. 17) Leinbach's Complaint alleges that the Respondent/Appellant (herein "Magnolia") abatement of \$800.00 per month from the rental payments constitute breach of the terms of the lease. A second cause of action requests the Court to declare the parties rights under the lease, pursuant to the Uniform and Declaratory Judgment Act S.C. Code Ann. § 15-53-30 (1976). Thereafter, Leinbach filed an amended complaint attaching the lease which had been inadvertently left off of the lease in the original filing (R.p. 20) This matter was referred to the Master in Equity for Charleston County by Order of Reference filed on September 1, 2009. (R.p. 001), granting the Master full authority to decide all issues with finality, in accordance with Rule 53(e)(1) SCRCPP.

On August 3, 2010, Leinbach filed a Motion to amend its Complaint with a proposed unsigned Second Amended Complaint attached and adding causes of action for unjust enrichment and equitable estoppel. (R.p. 031)

On July 18, 2008, the Magnolia filed its answer and counterclaim asserting the Leinbach had breached its lease with the Magnolia by leasing a portion of the property that had been heretofore leased to it. (R.p. 022) On October 18, 2010 Magnolia filed an amended answer and counterclaim to the second amended complaint to assert the additional cause of action of unjust enrichment.(R.p. 037)

On October 11, 2011 the case was tried by the Honorable Michel R. Scarborough, Master in Equity for Charleston County who issued a final order dated June 11, 2012 and

filed on June 15, 2012 (R.p. 003) Receipt of notice of entry of the order was received on June 29, 2012. On July 9, 2012 counsel for the Magnolia filed a motion to reconsider alter or amend. (R.p. 045) A form order denying Magnolia's motion was issued August 31, 2012 but was not filed until October 8, 2012. (R.p. 016). Receipt of the notice of the courts order was received on October 15, 2012.

The import of the Courts order was that both parties had breached the terms of the lease, that there had been a mutual mistake that allowed the court to reform the lease , that Magnolia was entitled to abate the rent to Leinbach in a set amount and denied the recovery of attorney's fees.

Leinbach served its notice of appeal on or about November 8, 2012 . (R.p. 283) and Magnolia served its notice of appeal on November 12, 2012 (R.p. 281).

STATEMENT OF FACTS

The lease, (R.p. 189) which is the subject matter of this action, was entered into between the parties on June 1, 2003. The lease was prepared by counsel for Leinbach and reviewed and commented on by counsel for Magnolia. An examination of the lease will reveal that it describes the Demised Premises as Parcel H2 of TMS 349-01-00-045 containing 1.21 acres and located on Leinbach Drive in the City of Charleston. A plat entitled "Harrison Executive Park Plat of Parcel H2 owned by Charles W. Patrick, Jr. and Stephen Ziff about to be conveyed to Charles W. Patrick, Jr. (TMS 349-01-00-045) showing the demised premises was introduced into evidence as Plaintiff's Ex. 10, (R.p. 249). Leinbach's, manager, Clyde Hiers, testified that the parcel H-2 is the parcel leased to Magnolia.(R.p. 103, line 25 - p.104, line 3)

The initial term of the lease was for five years with three options to renew for additional five year periods. The initial rent was \$21,600.00 per year for three years and thereafter three percent increase per year. In all it is a twenty year lease. Magnolia is in first renewal and has exercised its option for the third renewal that commences in June 2013. Exhibit 8 (R.p. 246) is a rental summary as of the date of the trial showing rent paid through October 1, 2011. Total rent paid was \$153,561.00, total rent due under the lease was \$193,352.65. The difference is the amount that Magnolia deducted from its rent payment as a result of the Tower lease described below. Additionally Magnolia was responsible for and paid the taxes on the subject property.

On or about February 23, 2006, after leasing the demised premises to Magnolia, Leinbach entered into a lease with Optima Towers, LLC. (R.p. 217-227) Attached to that lease is a site sketch of the proposed lease area with Optima Towers which was executed by Clyde Hiers, the managing member of the Leinbach. It should be noted in comparing Exhibit "10" (R.p. 249) with the site sketch (R.p. 223) that TMS Parcel 349-01-80-105 is, in fact, Parcel H2 heretofore leased to the Magnolia. Mr. Hiers in his testimony admitted that the sketch is a portion of parcel H-2. (R.p. 104, lines 4-14). See also Plaintiff's Exhibit 4 (R.p. 228) which shows the Cell Tower parcel more clearly. Mr. Hiers testified that he made a mistake at the time this lease was entered. (R.p. 105, lines 12-17; p.106, lines 16-25; p.117, lines 16-18; p.120, lines 14-15) He did not realize that the area being leased to Optima was a part of the Demised premises already leased to Magnolia. (R.p.105, lines 8-11)

It is undisputed that the Lease to Optima Towers is a portion of the property already leased to Magnolia.

The Optima lease was for an initial term of five years with four five year options after that. The initial rental was for \$9,600 per month with increase after the first year of 3.5 % per anum. Exhibit 9 is a rent summary of rents paid by Optima from the inception of the tower lease through September 21, 2011 just before the trial. Total Rent paid was \$54,116.65. (R.p. 247-248)

Based on the forgoing two exhibits, (Exhibits 8 and 9) from the inception of the tower lease to the date of the trial Leinbach received total rent of \$207,477.65 from Optima and Magnolia combined. Exhibit 15 shows a summary of these receipts. (R.p. 259). Leinbach was only due from rents from the property \$193, 352.65 over the same period. Therefore, from Exhibit 15, Leinbach was overpaid \$14,125.00 through the date of the trial and continues to be overpaid to date.

Magnolia learned that Leinbach had leased a portion of the premises during negotiations for the purchase of the subject property in late 2007. In accordance with the terms of the lease, on December 18, 2007, Magnolia notified Leinbach's counsel of the terms of the lease that had been breached by Leinbach's lease to Optima Towers and to cure Leinbach's breach within 30 days of the letter or Magnolia would commence abating the rent until Leinbach cured its breach (R.p. 238-239). On January 31 the rent for February was sent to Leinbach's lawyer, Donald H. Howe, abating \$800.00 from the rent. (R.p. 254)

As a result of the forgoing abatement of the rent Leinbach commenced the underlying action leading to this appeal.

The Court in its order, following the trial, after multiple findings of fact and conclusions, determined that there had been a mutual mistake of fact and since neither

party sought rescission, that reformation was the appropriate remedy (R.p. 011, para 27). Neither party had pled or submitted evidence of mutual mistake or sought reformation of the lease. The only evidence of mistake was the unilateral mistake of Leinbach (R.p. 117, lines 16-18). The reformation of the lease consisted of reducing the size of the demised premises to the area that the tenant (Magnolia) was occupying. Based on the foregoing reformation of the lease the Court then fashioned a remedy that recalculated the lease payment due to its reducing the size of the demised premises and allowed Magnolia to abate the rent since the inception of the tower lease?

The crux of this case is the question, as between Magnolia, the tenant and Leinbach, the landlord, who is entitled to the rent from the Tower lease.

STANDARD OF REVIEW

This action was brought by both parties contending that each had breached the terms of the lease. Lease provisions are construed under rules of contract interpretation. See *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 105-07, 413 S.E.2d 866, 868-69 (Ct.App.1992) (applying the rules of contract construction to interpret the lease of a shopping center). One cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties. *Chan v. Thompson*, 302 S.C. 285, 289, 395 S.E.2d 731, 734 (Ct.App.1990). To determine the intention of the parties, the court “must first look at the language of the contract.” *C.A.N. Enters., Inc. v. South Carolina Health and Human Servs. Fin. Comm’n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). The construction of a clear and unambiguous contract presents a question of law for the court. *Ward v. West Oil Co., Inc.*, 379 S.C. 225, 665 S.E.2d 618

(Ct.App.2008); see also *Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001).

Although the action was brought as a case at law the Trial Courts remedy was equitable, that is, it reformed the lease based upon the mutual mistake of the parties and granted Leinbach judgment on its cause of action for unjust enrichment.

In an appeal of an equitable action tried before a master authorized to enter final judgment, this Court must review the entire record and make its own findings of fact according to its view of the preponderance of the evidence.” *Thomas v. Mitchell*, 287 S.C. 35, 37, 336 S.E.2d 154, 155 (Ct.App.1985). “This requirement does not, however, command us to ignore the findings of the trial judge who heard the witnesses.” *Id.* at 38, 336 S.E.2d at 155

ARGUMENT I

THE MASTER-IN-EQUITY CORRECTLY FOUND THAT 56 LEINBACH HAD BREACHED THE LEASE BY ALLOWING THE OPTIMA COMMUNICATIONS TOWER TO BE BUILT ON THE AREA WHICH WAS ON THE DEMISED PREMISES.

Leinbach's Argument I states, "The Master-In-Equity erred in finding that 56 Leinbach breached the lease by allowing the Optima communications tower to be built on the area which was not part of the parking lot leased by Paradigm." (Emphasis mine)

The lease provides, "Section 1.01. Demised Premises (R.p. 189). Subject to and with the benefit of the terms, covenants, conditions and provisions of this Lease, Landlord hereby demises and leases to Tenant, and Tenant hereby takes and leases from Landlord, certain premises (herein called the "Demised Premises") consisting of the real estate and any improvements located or to be located thereon described 1.21 acres of real estate located at Leinbach Dr. City of Charleston, State of South Carolina and as more particularly described as parcel H-2 of TMS# 349-01-00-045 to have and to hold during the Demised Term (as defined in Section 2.03)."

The Master found by reference to the testimony of Leinbach's agent, Carnevale, and Magnolia's agent, Cochran, that the demised premises is the entire 1.21 acre parcel. (Order, Page 4, Paragraph 12) (R.p. 006). The Master further found at paragraph 13 page 5 of its order "It is apparent that Plaintiff's (Leinbach's) action in leasing the area to Optima Towers now prevents the Defendant (Magnolia) from using that portion of the demised premises (R.p. 007). (emphasis mine) And further at paragraph 22 page 7 "It

does however effectively eject Defendant from future use of this part of the original demised premises". (emphasis mine) (R.p. 009) Leinbach has not appealed this finding.

Leinbach argues that the Demised Premises is limited to the parking area or parking lot within the Demised Premises. There is no parking area or parking lot within the demised premises. Section 1.01 of the lease repeated above states, " consisting of the real estate and any improvements located or to be located thereon described 1.21 acres of real estate (R.p. 189) This language contemplated the construction of a parking lot on the Demised Premises and clearly indicates that the Demised Premises consists of the entire 1.21 acre parcel and any improvements then existing or to be constructed.

The thrust of Leinbach's argument is the boiler plate language of the lease, Section 1.01, "Subject to and with the benefit of the terms, covenants, conditions and provisions of this Lease, Landlord hereby demises and leases to Tenant," allows the landlord, Leinbach, to utilize an area of the Demised Premises that the tenant, Magnolia was not using. (R.p. 189) (Appellant brief page 9) To support this contention Leinbach refers to section 1.02 of the lease which states, "Parking. Throughout the Demised Term, Tenant and its employees shall have the exclusive right to use any parking areas within the Demised Premises." This is the only place that the term "parking area" exists in the lease. This section just speaks to the exclusive use of any parking areas as opposed to non-exclusive use of any parking areas. At the inception of the lease the property was an open field. A parking lot was ultimately constructed on the site after the lease was entered into as contemplated by section 1.02 and Article VII of the lease. There is no designated parking area or lot within the four corners of the lease.

In his Order, the Master found that Leinbach had breached Article 12 of the lease. (R.p. 009, para 21) Article 12 of the lease is the quiet enjoyment paragraph. In pertinent part it provides that “the demised premises shall hereinafter be subject to no leases... which in any manner would prevent or interfere with tenant.” Notably it does not say the parking lot or parking area or parking. It says the demised premises. In that same paragraph the lease goes on to state, “and if Tenant shall discharge the obligations herein set forth to be performed, (terms, covenants and conditions) by Tenant, Tenant shall, during the Demised Term, have lawful, quiet and peaceful possession and occupation of the Demised Premises and shall enjoy all the rights herein granted without any let, hindrance, ejection, molestation or interference by any person.” (R.p. 205)

The erection of the cell tower on the demised premises as a matter of common sense clearly in some manner prevents or interferes with tenant use of the area of the tower and therefore violates Article 12 of the lease as found by the Master.

Leinbach misconstrues the effect of the language in the lease that it is “subject to the terms, covenants, conditions and provisions of this lease”. Leinbach’s construction is that that language allows the landlord (Leinbach) to reduce the size of the demised premises to what tenant is occupying. Leinbach takes this argument to the extreme when it states “since the wooded area” has no parking on it, it is not subject to use by Magnolia.” This argument defies logic. In essence, Leinbach is stating, since Magnolia is not using the area for parking, then Leinbach can use it for any other purposes and since Magnolia did not use it initially for parking they now cannot use it at all.

Clearly a covenant of this lease is that it be used for parking during the demised term. Section 1.02 Parking, Section 1.02 (Use of Space) (R.p. 189) and Section 6.01

(Use) (R.p. 193) makes this abundantly clear. All of these sections refer to the “Demised Premises”. Only the first section, 1.02 Parking, refers to the term “any parking areas” within the Demised Premises. At the time of the execution of the lease, there were no parking areas. There was only a parking plan submitted in accordance with Leinbach’s rights to approve the plans in accordance with Section 5.01 of the subject lease (R.p. 192).

Leinbach further refers to Article 12 of the lease, which is the quiet title paragraph. The statement at Page 8 of its Brief “it only forbids future leases that interfere with the use of the parking area” is again clearly erroneous. As previously stated and as stated in Magnolia’s Appellants Brief, there is no parking area within the demised premises. Parking is merely a use. Article 12 forbids any leases on the Demised Premises that interfere.

Leinbach further asserts that the Optima Tower did not interfere with Magnolia’s use. Article 12 states that “the demised premises shall hereafter be subject to no leases,... which in any manner would prevent or interfere with tenant. There is no language in Article 12 that could be reasonably construed to follow Leinbach’s argument as contained in its Appellants Brief. What Leinbach argues is that the Tower does not interfere with the improved parking area constructed by Magnolia. This argument is misplaced. The question is, does the Tower interfere with Magnolia’s use of the area that the Tower is constructed? Clearly it does. As found by the Master, at paragraph 13 page 5 of its order “It is apparent that Plaintiff’s (Leinbach’s) action in leasing the area to Optima Towers now prevents the Defendant (Magnolia) from using that portion of the demised premises. (emphasis mine) (R.p. 007) And further at paragraph 22 page 7 “It

does however effectively eject Defendant from future use of this part of the original demised premises". (emphasis mine) (R.p. 009).

Leinbach further asserts at Page 8 of its Brief that the "enjoyment of quiet title and peaceful possession is limited to "all rights herein granted" and those rights as noted above are limited to the use of parking in the designated area". Again there is no parking in any designated area. Leinbach's attempted interpretation of the lease in this fashion goes far beyond reasonableness and common sense.

Leinbach's final statement that "a close and fair reading of the lease allows Leinbach to use a portion of the property as long as it does not interfere with Magnolia's use" is clearly erroneous. The lease prohibits any leases "which in any manner prevent or interfere with tenant." (R.p. 205) (Article 12) Leinbach has allowed the construction of a cell tower on a portion of the premise which clearly interferes with the tenant's use and quiet enjoyment of the subject property and in violation of Article XII of the lease.

Based on the foregoing, this Court should reach no other conclusion that the Master correctly found that Leinbach breached Article 12 of the lease when it leased a portion of the property to Optima Towers which "prevented or interfered" with the tenant.

ARGUMENT II APPELLANTS, LEINBACH'S ARGUMENT II FAILS TO TAKE INTO CONSIDERATION MAGNOLIA'S CLAIM FOR UNJUST ENRICHMENT AND ABATEMENT AS PROVIDED BY THE LEASE AND LEINBACHS CHANGE OF USE OF THE TOWER PARCEL

In its Argument II Leinbach asserts that Magnolia has not been damaged, or if Magnolia was damaged it was only nominal. This argument fails to consider the relief that Magnolia sought and the way that the Master fashioned his remedy.

Magnolia asserted a claim for unjust enrichment against Leinbach. Its claim was based on the fact that Leinbach had leased the property to Magnolia for 20 years and all the rights and benefits of the property for that period belonged to the Tenant, Magnolia.

“The right to use the leased premises during the term specified in the lease is transferred from the landlord to the tenant. Thus, a landlord and tenant have separate estates in the demised premises during the term of the lease, the tenant's being a possessory interest while the landlord has a reversionary interest in the land. In other words, during the existence of the lease, the tenant is the absolute owner of the demised premises for all practical purposes for the term granted, with the landlord's rights being confined to the reversionary interest. 9 Am. Jur. 2d Landlord and Tenant § 889, 52 C.J.S. Landlord & Tenant § 337

Magnolia sought restitution from Leinbach to prevent it from collecting a windfall.

”Restitution is a remedy designed to prevent unjust enrichment.” *13 S.C. Jur. Implied Contracts § 6*, citing *Moore-Hudson Oldsmobile/GMC, Inc. v. Waterman*, 298 S. C. 107, 110, 378 S. E. 2d 279, 280 (Ct. App. 1989). In the case of *Harper v McCoy* 276 S.C. 170, 172 276 S.E.2d 782,783-784 1981, the Court stated

“A cause of action for restitution is a type of the broader cause of action for money had and received, and generally the object to be attained in proceedings for restitution is the prevention of unjust enrichment of the defendant and the securing for plaintiff of that to which he is justly and in good conscience entitled. A person who has been unjustly enriched at the expense of another is required to make restitution to the other, and if one obtains the property or the proceeds of property of another, without a right to do so, restitution in a proper case can be compelled.... at *id* 784

The lease also provides a remedy akin to restitution for unjust enrichment that is, abatement. Section 6.03 provides: “Landlord shall use its best efforts to not interfere with Tenant’s operations. If Landlord creates a condition that substantially interferes with the normal use of the Demised Premises or appurtenant parking or service areas as allowed herein, the Rent and other charges due hereunder shall be abated during the time

such interference persists...”. (R.p. 194) This section allows the total abatement of the rent during the period that the interference persists. Total rent at the time was \$1,909.58 per month. Magnolia commenced abating \$800.00 per month which was the initial amount of the Optima Tower lease payment.

Leinbach changed the character of the use of the area now occupied by Optima Towers from parking to cell tower. This is irrevocable. As a result the rental value of that area is greater than the rental value area for parking. Having changed the character of the use any loss to Magnolia should be based on the existing use as a cell tower instead of the original use contemplated by Magnolia. This would, therefore, be that amount that Optima Towers is now paying.

Leinbach did substantially interfere with Magnolia’s use of the Demised Premises, The Master found, at paragraph 13 page 5 of its order “It is apparent that Plaintiff’s (Leinbach’s) action in leasing the area to Optima Towers now prevents the Defendant (Magnolia) from using that portion of the demised premises.” (emphasis mine)(R.p. 007) and further at paragraph 22 page 7 “It does however effectively eject Defendant from future use of this part of the original demised premises”. (emphasis mine) (R.p. 009) These findings are consistent with proposition that there was a substantial interference to that portion of the Demised Premises that the Tower was occupying.

In its Appellant’s brief at page 11 & 12 Leinbach asserts that the Master ruled and Magnolia conceded that it had received the full benefit of what it bargained for. The court did not rule specifically as alleged by Leinbach and further Magnolia did not concede it received the full benefit of its bargain. In fact in Mr. Baker’s testimony on redirect he

testified that he bargained for the full 1.21 acres and was deprived a portion of that by Leinbach's lease of the a portion of the property to Optima Towers. (R.p. 184, lines 8-12)

The Master correctly found that Leinbach had breached the lease and fashioned a remedy that recognized Magnolia's right to abate the rent but not in the full amount of the Optima Tower lease as Magnolia sought. The amount of the abatement was appealed by Magnolia and is fully addressed in Magnolia's Appellants brief.

ARGUMENT III. LEINBACH'S ARGUMENT III FAILS TO TAKE INTO CONSIDERATION THAT MAGNOLIA WAS DEPRIVED OF A PORTION OF THE DEMISED PREMISE AND THEREFORE DID NOT RECEIVE 100% BENEFIT OF THE ORIGINAL LEASE

In its brief Leinbach argues that the Master fashioned an equitable remedy based on Section 6.03 of the lease. This is erroneous. The master fashioned an equitable remedy by finding that there was a mutual mistake that allowed reformation of the lease. In Magnolia's Appellant's brief it asserted that this was in error and fully briefed.

Leinbach argues that Magnolia enjoyed 100% of the benefit of the original bargain. This is clearly erroneous. The original bargain was for 1.21 acres. (Testimony Baker, Carnavale and Cochran) (R.p. 184, lines 8-12; p.150, lines 16-20) The lease to Optima Tower took away 5,000 square feet of that area. The Master found that the entire 1.21 acres was the demised Premises. Therefore Magnolia did not receive 100% of the original bargain.

Leinbach asserts that Magnolia "had no right to use the parcel where the tower was located." I am not sure what support Leinbach gives for that proposition, but if the Master found that the Demised Premises was the entire 1.21 acre parcel and that finding

was not appealed then Magnolia had the right to use the entire 1.21 acre parcel which includes the area of the Optima Tower.

Leinbach argues that these further issues should discount the amount of the abatement from \$300.00 to maybe \$150.00. What the court should consider, as argued in Magnolia's Appellant's brief, is that the parcel that the tower sits on belongs to Magnolia for the term of the lease and that Leinbach is receiving 100% of what it bargained for at the time that it leased the property to Magnolia. It is receiving that agreed upon amount collectively from Magnolia and from Optima Towers. Ex 15 (R.p. 259) shows the rent received from Magnolia and the rent received from Optima through the date of the trial. Leinbach has received \$14, 125.00 more than it would have received had it not allowed the erection of the Tower. In other words Leinbach will receive the full benefit of its bargain with Magnolia by allowing a full abatement of the rent received from Optima. Leinbach has not been damaged by Magnolia's abatement of the rent.

Leinbach comments, but has not appealed, that this matter could have been avoided by the filing of a memorandum of the lease. The Master correctly ruled on this issue at page 8 paragraph 26 of his order. (R.p. 010) and concluded as a matter of law that "A memorandum of lease is for the benefit of third parties and not the parties themselves."

CONCLUSION

Magnolia has fully briefed its position in its Appellant's brief which touches on the issues raised in Leinbach's appeal and urges the court to grant it the relief requested in its appeal.

Leinbach's appeal fails to recognize that it made a unilateral mistake that led to the leasing of the property to two tenants. Leinbach's owner testified that he was not aware that the area was already leased to Magnolia at the time it leased the property to Optima Towers. (R.p. 105, line 22- p.106, line 6; p.110, lines 3-16; p.117, lines 16-18; p.120, lines 14-15) After the fact, Leinbach reviewed the lease and tried to find provisions in the lease that would excuse its unilateral mistake and breach.

Using the boiler plate language of the lease that states "Subject to and with the benefit of the terms, covenants, conditions and provisions of this Lease, Landlord hereby demises and leases to Tenant," Leinbach tries to pull in provisions of the lease that were not intended to accomplish what it seeks, that is justification for leasing the same property to two different people.

The lease unambiguously describes the demised premises as the entire 1.21 acre parcel and the Master so found. There is was no parking area or parking lot on the demised premises at the time the lease was executed. The demised premise is the entire 1.21 acres.

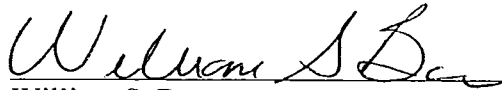
Leinbach was entitled to the lease payments from the entire 1.21 acre parcel for the term of Magnolia's lease, not the full amount of the lease payments for the entire 1.21 acres from Magnolia and the lease payment from Optima Towers for 5,000 square feet of the same 1.21 acres. That is double dipping. As shown on ex 15 (R p. 259) Leinbach received a windfall of \$14,125.00 through the date of the trial at Magnolia's expense.

Only the full abatement of the Optima Tower lease will prevent Leinbach from achieving a windfall at Magnolia's expense.

The court should reverse the decision of the Master and enter judgment for Magnolia allowing it full abatement of the rent received by Leinbach from Optima Towers since the inception of the tower lease as well as the rent in the future well as reasonable attorney's fees.

Respectfully submitted,

BARR UNGER & McINTOSH

A handwritten signature in cursive script, appearing to read "William S. Barr".

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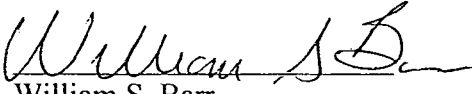
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Charleston, South Carolina
August 22, 2013

Certificate of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.


William S. Barr

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

APPELLATE CASE NO. 2012-213389

56 Leinbach Investors, LLC.....Appellant/Respondent,

vs.

Magnolia Paradigm, Inc..... Respondent/Appellant.

REPLY BRIEF OF RESPONDENT/APPELLANT

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Respondent/Appellant Magnolia Paradigm, Inc. (hereinafter "Magnolia") respectfully submits the following Brief in Reply to Leinbach's Initial Respondents Brief.

ARGUMENT I

THE MASTER ERRED IN CONSIDERING THE SITE PLANS IN HIS INTERPRETATION OF THE LEASE

The Master correctly found at Page 4, Paragraph 12 of the Order "based on the Court's review of the Lease itself and hearing the testimony of the Plaintiff and Defendant's witnesses and, in particular, Mr. Carnevale, who is Plaintiff's real estate agent at the time, the Court finds that Section 1.01 of the Lease entitles "demised premises" describes the demised premises as the entire 1.21 acre parcel shown on the plat at Plat Book DB, Page 47" (Exhibit 10) (R.p. 006).

Having made this finding, Magnolia asserts that description unambiguously describes the demised premises as the entire 1.21 acre parcel. To allow evidence that would reduce the size of the "demised premises" based on matters outside of the four corners of the lease, is clearly erroneous.

In addition to the foregoing, the Lease contains an integration clause. Section 14.13. Entire Agreement Representations. States "This Lease embodies the entire agreement between the Landlord and Tenant with respect to the subject matter hereof and supersedes all prior agreements and understandings, whether written or oral. Landlord and Tenant have neither made or relied upon any promises, representations or warranties in connection with this Lease that are not expressly set forth in this Lease. In entering into this Lease, Landlord and Tenant have relied on the representations and warranties contained in this Lease" (R.p. 210).

This integration clause should have been a further basis for the Court's not considering the plans for the proposed parking lot on the subject premises.

A. THE DEMISED PREMISES IS THE ENTIRE 1.21 ACRE PARCEL, THERE IS NO "PARKING AREA" WITHIN THE DEMISED PREMISES

The plans for the use of the subject property were given to Leinbach in accordance with Section 5.01 Construction of the Demised Premises. Which states "any improvements on the demised premises will be constructed by Tenant, at Tenant's sole cost and expense. Tenant's plans and specifications for the improvements must first receive written approval by the Landlord" (R.p. 192). Thus the plans which were given to the Landlord were given in accordance with Section 5.01 of the Lease.

Had Leinbach wished to reduce the size of the demised premises or considered the demised premises to be the site plan prepared by LS3P, it clearly could have done so. In Mr. Carnevale's testimony, he testified:

Q. Y'all prepared the lease, okay.

At the time of the preparation of the proposal to lease and the execution of the lease, was there any question that Mr. Baker's company was going to acquire the entire 1.2 acre parcel?

A. No question in my mind.

Q. Were they restricted? Could they use the entire parcel for parking, or were they restricted to just use a part of the parcel for parking?

A. Didn't make any difference to us.

Q. Didn't make any difference?

A. They were leasing it. Whatever they could do with it was fine as long as it was legal.

Q. As long as they paid the rent?

A. Right (R.p. 150, line 15, p151, line 4).

BY MR. WILLIAM BARR:

Q. The exhibit that Mr. Howe has just shown you, did you consider this parking lot layout a restriction on the area of the parking or the area that they could use?

MR. HOWE: Objection; relevance.

THE COURT: I'm going to allow it. Go ahead.

THE WITNESS: I looked at it, and it really didn't concern us. Didn't concern me. If they were happy with what they got, that was fine with us, you know. We were just glad that they were able to get approval so that they would lease it (R.p. 153, line 16, p154, line 2).

Based on the foregoing and the fact that the Lease unambiguously describes the parcel as the entire 1.2 acre parcel and the fact that the plan for construction of the parking on the subject site was prepared prior to the execution of the Lease but never incorporated into the Lease, it was error for the Court to consider it and to make references to the "parking area within the demised premises".

Parking is merely the "use" that the property is utilized for.

B. THE CONSTRUCTION OF THE PARKING LOT ON THE DEMISED PREMISES DID NOT "EXEMPT" ITS SUBSEQUENT USE BY MAGNOLIA IN THE AREA WHERE THE TOWER WAS BUILT. This argument is tantamount to

stating that Magnolia had abandoned the area upon which the cell tower was built. This was clearly erroneous and was argued in the Magnolia's Appellant's Brief.

Clearly Magnolia did not construct parking in the area which was ultimately leased to the tower company, however, there was never any indication that it "exempted" it from its use nor abandoned it to the Landlord.

Regardless of the fact that Magnolia was or was not using the area upon which the cell tower was built, it still was, nonetheless, part of the demised premises. Unless Leinbach can show that Magnolia abandoned that property in favor of the Landlord and explicitly or implicitly granted to the Landlord the ability to re-let that portion to another tenant, then Leinbach's argument must fail.

Mr. Hiers testified:

Q. What I'm asking you, in the Lease itself, is there a reservation that you could utilize unused portions of parcel H2 for your future development?

A. I do not believe so.

Q. When it was pointed out to you in 2007 that the Optima Tower was on parcel H2 did that come as a surprise to you?

A. Yes sir it did.

Q. My next question is: did you make a mistake here, or did you intentionally do what you did?

A. Mr. Barr, there was no intention on my part to attempt to make a mistake or to defraud Mr. Baker... (R.p. 105, lines 4-17)

This argument goes to the root of the problem as argued in Magnolia's Appellant's Brief. That is, the rights to the subject property, the entire 1.2 acres belongs

to Magnolia for the period of the Lease. Unless the Landlord can show some explicit or implicit right to re-let the property to another tenant, then for the entire demised term, the property belongs to Magnolia as well as all rights and incidents of ownership for the entire demised term.

ARGUMENT II

THE MASTER ERRED IN REFORMING THE LEASE BETWEEN THE PARTIES

It appears that Leinbach agrees with the proposition that the Master erred in reforming the Lease between the parties, however, he argues that Leinbach never breached the Lease with Magnolia.

Common sense and logic will tell you that if Leinbach leases 1.21 acres to Magnolia for a period of years and then leases a portion of that same property to another tenant, then Leinbach has breached the Lease, and the Master so found. (R.p. 009, para 21)

This is not a case where Leinbach intentionally took a portion of the property that was not being used by Magnolia and leased it to a third party. This is a matter where Leinbach did this inadvertently and has come back and tried to excuse its default through a contorted interpretation of the Lease. Leinbach argues that he did not make a "legal mistake". There are mistakes of law and mistakes of fact. Leinbach made a unilateral mistake of fact and unilateral mistake of fact does not allow the reformation of the Lease. The breach of the Lease need not have been intentional. It could have been inadvertent which is the case here. Nonetheless, it still is a breach of the Lease to lease a property to two different people.

Mr. Hiers testified at several places that he had made a mistake.

Q. My next question is: did you make a mistake here, or did you intentionally do what you did?

A. Mr. Barr, there was no intention on my part to make a mistake to defraud Mr. Baker.... (R.p. 105, lines 12-17)

Q. It's fair to state then that you made this unilateral mistake and leased out a portion of the property that you had previously leased to Mr. Baker to Optima Towers?

A. Clearly that is why we're in Court today. (R.p.106, lines 16-25)

Q. You subsequently made a mistake and you leased a portion of that property to Optima Towers?

A. It clearly was an inadvertent mistake. (R.p. 117, lines 16-18)

Q. You still made a mistake right?

A. I made an inadvertent mistake. (R.p. 120, lines 14-15)

Q. The bottom line here, Mr. Hiers, you made a mistake, and you leased out a single piece of property to two people?

A. We have never denied that the parcel has been inadvertently leased to two people.... (R.p. 128, lines 1-5)

Leinbach, in this same argument, argues that Magnolia was only nominally damaged. This is not the position that Magnolia has taken in its Appellant's Brief. Magnolia asserts that it is the "owner of the subject property for the full term of the Lease". Inasmuch as it is the owner of the subject property for the term of the Lease, then it is entitled to all rights and incidents of ownership thereto as argued in its Appellant's Brief, including the right to receive lease payments from what in actuality is a sub-tenant, Optima Towers. Magnolia's retention of the lease payments from Optima

does not damage Leinbach. Leinbach still receives the full benefit of the lease payments it bargained for from the terms of the lease, part from Magnolia and part from Optima Towers.

Mr. Hiers testified:

Q. And you bargained for \$21,600.00 per year in the first three years and then 3 percent increases on parcel H2 for the next 20 years. And now you're getting, based over the same period of time, now you're getting \$207,000.00 or \$14,000.00 more year-to-date than what you originally bargained for?

A. I agree with the calculation. (R.p. 128, lines 10-16)

ARGUMENT III

THE MASTER ERRED IN FINDING A BREACH OF THE CONTRACT BY MAGNOLIA.

As argued in its Appellant's Brief, Magnolia asserts that to exercise a remedy that was clearly allowed under the terms of the Lease should not have been considered a breach. The Master found that the abatement was excessive and therefore Magnolia breached the Lease. Magnolia asserts that the excessiveness of its abatement, if any, which it denies, would go to the issue of damages and not to the breach of the Lease.

Leinbach further argues that it did not substantially interfere with the normal use of the demised premises or appurtenant parking or services. Clearly the language of this particular sentence contemplated two different areas, the demised premises or parking appurtenant to the demised premises. In this case there is no "appurtenant parking" because the demised premises sole use is for parking. Constructing a tower on a portion of the demised premises completely ejects Magnolia from that area of the subject

property and the Master so found. (Para 22, p. 7) (R.p. 009) Clearly that is a substantial interference with the normal use of the demised premises.

Again, the issue is, as between the Landlord and the Tenant, Leinbach and Magnolia, who is entitled to the rent payments from Optima Towers. As previously argued, clearly those property rights belong to Magnolia.

ARGUMENT IV

THE MASTER'S REMEDY WAS IN ERROR.

A. IT WAS ERROR FOR THE COURT TO ALLOW LEINBACH RECOVERY UNDER ITS THEORY OF UNJUST ENRICHMENT.

Responding to some specific points in the Respondent's Brief of Leinbach, Leinbach asserts that the Court correctly reviewed the evidence in the record and "concluded that the right of Magnolia in the wooded area had no value". Clearly the value of that particular portion of the property does have value and that value is the income stream being derived from that site from Optima Towers. If that particular area had no value, this action would not be pending. Magnolia asserted that a leasehold interest is a valuable property right, not as a matter of fact but as a matter of law. Therefore, there are no references to the record to be made. Clearly, however, as a matter of fact, the area does have value as evidenced by the erection of the cell tower on that area and the income stream being derived therefrom.

In order for Leinbach to recover under its theory of unjust enrichment, the alleged enrichment to Magnolia would have had to have been at the expense of Leinbach. In order to establish this key element of the cause of action, Leinbach would have to establish that it has been damaged by Magnolia's abatement of the rent. As argued in its Appellant's Brief and is argued in this Reply Brief, Leinbach has not been damaged.

Leinbach continues to receive the full value from the demised premises for the full term albeit from two sources, that is, Magnolia and Optima Towers.

Leinbach asserts that it is entitled to the income stream from Optima due to a contract that Magnolia is not even a party. This argument avoids the issue that Optima Towers is nothing more than a sub-tenant of Magnolia and not a direct tenant of Leinbach. The only thing that could be created on the area in question was a sub-tenancy and that sub-tenancy belongs to Magnolia, not to Leinbach. At the end of Magnolia's lease term, then the relationship of Landlord and Tenant between Leinbach and Optima will be restored, however, in the meantime, Optima is nothing more than a sub-tenant of Magnolia and as a result, the revenue from Optima properly belongs to Magnolia.

B. THE MASTER ERRED IN FINDING THAT MAGNOLIA WAS NOT ENTITLED TO RECOVER UNDER ITS THEORY OF UNJUST ENRICHMENT.

In this argument, Leinbach argues that receipt by Leinbach of rents from Optima was not at the expense of Magnolia. Clearly the loss of the rental revenue from Optima Towers has to be at Magnolia's expense. Further, inasmuch as Leinbach agreed to lease the subject premises for 20 years at \$20,000.00 a year plus increases, it is receiving more rent over the 20 year term than it originally bargained for. As a result, it is being unjustly enriched in an amount equal to the amount of the rental payments from Optima Towers and at Magnolia's expense.

C. THE MASTER ERRED IN NOT ALLOWING MAGNOLIA FULL ABATEMENT OF THE RENT RECEIVED FROM OPTIMA.

Leinbach argues that "nothing in the Lease or the application of common sense that suggests that abatement would have to be total abatement." The problem with this argument is that the Lease itself provides at Section 6.03 "the rent and other charges due

hereunder shall be abated during the time such interference persists". This is the clear language of the Lease which allows total abatement because that particular section does not refer to a partial abatement based upon a partial interference. Therefore, the only remedy to Magnolia would have been the total abatement of the rent.

D. THE COURT SHOULD CORRECT THE MATHEMATICAL ERROR OF THE MASTER AND NOT REMAND IT FOR CLARIFICATION.

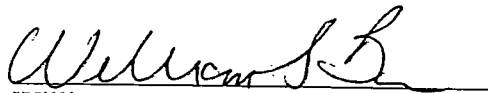
In the interest of judicial economy, the Appellate Court can clearly recalculate and correct mathematically the calculation if that becomes an issue and issue a correct Order resolving that matter without the necessity of remanding the case to the Master-In-Equity.

CONCLUSION

Based on the foregoing, Magnolia urges the Court to grant it the relief in its Appellant's Brief.

Respectfully submitted:

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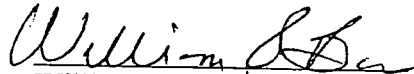
APPELLANT, MAGNOLIA

PARADIGM, INC.

Charleston, South Carolina
August 27, 2013

Certificate of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.


William S. Barr



The South Carolina Court of Appeals

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September 10, 2014

Mr. Donald Higgins Howe, Sr., Esquire
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Mr. William S. Barr, Esquire
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Charleston SC 29401

Re: 56 Leinbach Investors v. Magnolia Paradigm
Appellate Case No. 2012-213389

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

A handwritten signature in black ink, which appears to read "Jenny Abbott Kitchings". The signature is stylized with a large, sweeping flourish at the end.

CLERK

cc: The Honorable Mikell R. Scarborough

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

56 Leinbach Investors, LLC, Appellant/Respondent,

v.

Magnolia Paradigm, Inc, Respondent/Appellant.

Appellate Case No. 2012-213389

Appeal From Charleston County
Mikell R. Scarborough, Master-in-Equity

Opinion No. 5270
Heard June 11, 2014 – Filed September 10, 2014

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Donald H. Howe, of the Law Office of Donald H. Howe,
LLC, of Charleston, for Appellant/Respondent.

William S. Barr, of Barr, Unger & McIntosh, LLC, of
Charleston, for Respondent/Appellant.

KONDUROS, J.: In this cross-appeal, 56 Leinbach Investors, LLC (Leinbach) appeals the master-in-equity's determination it breached a lease agreement with Magnolia Paradigm, Inc. (Magnolia) when Leinbach leased a portion of the subject property to a third party. Leinbach further appeals the master's award of a \$300 per month rent abatement as damages, arguing Magnolia suffered only nominal damages. Magnolia appeals the master's admission of parol evidence regarding the scope of the subject property and the damages award, contending the master erred

in reforming the lease and that rent abatement should be equivalent to the amount Leinbach is receiving under the third-party lease. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL BACKGROUND

Leinbach and Magnolia entered into a lease agreement in 2003 whereby Magnolia leased from Leinbach a 1.21-acre undeveloped parcel of land for Baker Motors to use as employee parking. The parcel is located in Charleston County and adjoined another parcel owned by Leinbach and occupied by the Charleston Montessori School. Prior to signing the lease, the parties negotiated the terms including Magnolia submitting a planned design for construction of the parking area, which covered most of the 1.21 acres with the exception of a small wooded area. Leinbach sought \$2,000 per month in rent, and after negotiations, the parties agreed upon \$1,800 per month.¹

In 2005, Optima Towers (Optima) approached Leinbach's sole member, Clyde Hiers, about leasing space to erect a communications tower on the property. Baker Motors was aware of the tower's erection because Optima coordinated with it regarding construction equipment at the site and the tower is immediately adjacent to the employee parking lot.

In late 2006, Magnolia decided to buy the leased property and discovered the tower had been erected within the wooded area of the 1.21 acres. In late 2007, Magnolia notified Leinbach it considered the erection of the tower to be a violation of the lease and began deducting \$886.97, the amount Leinbach was receiving from Optima, from its monthly lease payments. Leinbach filed suit against Magnolia, alleging Magnolia breached the lease by failing to pay the full amount of rent due under the lease. Magnolia asserted the defense of abatement under the lease and counterclaimed for the \$886.97 Optima was paying Leinbach under the tower lease. Both parties also asserted unjust enrichment claims. Neither party sought to terminate the lease.

The case was referred to the master, and a trial was conducted. The master concluded the leased property constituted the entire 1.21 acres and Leinbach breached the lease by permitting the erection of the tower. However, it further concluded Magnolia had abandoned the wooded area and also breached the lease.

¹ The lease also provides for incremental increases in rent at certain intervals.

by withholding the \$886.97 in payments each month. The master further determined the parties made a mutual mistake that allowed for reformation of the lease because neither Leinbach nor Magnolia understood the wooded area was covered by the lease agreement. The master then reformed the lease to reflect Magnolia's inability to use the wooded area. He determined Magnolia could not use one sixth of the leased property and reduced Magnolia's the monthly rent by that amount, \$300 per month. These cross-appeals followed.

STANDARD OF REVIEW

"When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." *Corley v. Ott*, 326 S.C. 89, 92 n.1, 485 S.E.2d 97, 99 n.1 (1997). The reviewing court should "view the actions separately for the purpose of determining the appropriate standard of review." *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005).

"An action for breach of contract seeking money damages is an action at law." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 89, 594 S.E.2d 485, 491 (Ct. App. 2004) (internal quotation marks omitted). On appeal of an action at law, this court will affirm the master's factual findings if there is any evidence in the record which reasonably supports them. *Query v. Burgess*, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (Ct. App. 2006).

"Actions involving reformation of instruments are equitable in nature." *Crewe v. Blackmon*, 289 S.C. 229, 233, 345 S.E.2d 754, 756 (Ct. App. 1986). In an action in equity, tried by the master, the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence. *Fox v. Moultrie*, 379 S.C. 609, 613, 666 S.E.2d 915, 917 (2008).

LAW/ANALYSIS

I. Leinbach's Breach of the Lease

Leinbach contends the master erred in finding it breached the lease agreement because "demised premises" included the entire 1.21 acres of property described in the lease. We disagree.

"When [a] contract's language is unambiguous it must be given its plain and ordinary meaning and the court may not look to extrinsic evidence to interpret its provisions." *Stevens Aviation, Inc. v. DynCorp Int'l, LLC*, 394 S.C. 300, 307, 715 S.E.2d 655, 659 (Ct. App. 2011, *rev'd on other grounds*, 407 S.C. 407, 756 S.E.2d 148 (2014)). "[E]xtrinsic evidence may only be considered if the contract is ambiguous." *Preserv. Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 320, 751 S.E.2d 256, 261 (2013).

Article I, Section 1.01 of the lease, entitled "Demised Premises," indicates "Landlord hereby demises and leases to Tenant, and Tenant hereby takes and leases from Landlord, certain premises (herein called the "Demised Premises") consisting of the real estate and any improvements located or to be located thereon described 1.21 acres of real estate located at Leinbach Dr.[,] City of Charleston, State of South Carolina and more particularly described as parcel H-2 of TMS# 349-01-00-045"

Although other sections of the lease discuss the permissible use of the demised premises, the contract unambiguously indicates the entire 1.21 acres constitutes the demised premises.² Article XII entitled "Title to Premises" states, "the Demised Premises shall hereafter be subject to no leases, easements, covenant, restriction or the like which in any manner would prevent or interfere with Tenant."

Additionally, Tenant is "entitled to lawful, quiet and peaceful possession and occupation of the Demised Premises and shall enjoy all the rights, herein granted without any let, hindrance, ejection, molestation or interference by any person."

The tower's presence within the demised premises deprives Magnolia of full, quiet, peaceful possession, and the Optima lease interferes with Magnolia's use of the property in some manner, although not to the extent Magnolia argues.

Consequently, we affirm the master's ruling that Leinbach breached the lease.

² With respect to Magnolia's argument the master erred in admitting parol evidence to determine the meaning of the contract, we agree the lease was not ambiguous and did not required extrinsic evidence to ascertain the extent of demised premises. However, extrinsic evidence regarding the plans for Magnolia's parking area and use of the demised premises was relevant to the question of damages because the plans demonstrate the speculative nature of any future use of the wooded area in dispute.

II. Reformation of the Lease

Magnolia contends the master erred in reforming the lease based on mutual mistake. We agree.

"A contract may be reformed on the ground of mistake when the mistake is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with those of the parol agreement which necessarily preceded it." *George v. Empire Fire & Marine Ins., Co.*, 344 S.C. 582, 590, 545 S.E.2d 500, 504 (2001). "A mistake is mutual where both parties intended a certain thing and by mistake in the drafting did not obtain what was intended. Before equity will reform a contract, the *existence of a mutual mistake must be shown by clear and convincing evidence.*" *Id.* (emphasis added); *see also* 66 Am. Jur. 2d *Reformation of Instruments* § 1 (2011) ("Reformation of a contract is an extraordinary equitable remedy and should be granted with great caution and only in clear cases of fraud or mistake.").

The master concluded:

While I find [Leinbach] breached its lease with [Magnolia], I further find that [Magnolia's] failure to utilize the area in question amounted to an abandonment of that part of the demised premises which resulted in a mutual mistake of fact - both parties were unaware that the "wooded area" was contained within the demised premises at the time that either lease was entered into. I further find that this abandonment occurred prior to [Leinbach]'s breach of the express terms of the lease by again renting part of the demised premises."

Initially, we note that neither party, at trial or on appeal, contends they made a mutual mistake. Furthermore, we find the preponderance of evidence in the record does not support a finding of mutual mistake at the time the contract was formed with respect to whether the wooded area was included in the 1.21 acres constituting the demised premises.

William Cochran, Jr. was operations manager for Baker Motors from 1993 until 2004 and negotiated the lease with Leinbach. He indicated the lease included the wooded area for a total of 1.21 acres even though it was not feasible to develop the area for parking at that time and testified as follows:

Q. Do you recall why, if you look at the sketch there, why you didn't put any parking over in the corner, off the cul-de-sac?

A. I was responsible for expense control. When this opportunity came and we decided to go with it, I wanted to get as many parking places as we could at the least amount expense of turning dirt. As they referred to it, that was a soccer field. It was compacted, that whole area. That was the easiest place to put it. I don't recall exactly, that's why that area was used and that's why this parking lot design was drawn. Over in the corner was an area that would've cost much more at the time to do. We had some trees to take down. We would have to fell and do that. We didn't need that at that time. And so the least expensive way I could turn this piece into a parking lot for us was what we did right there.

Q. Did you ever feel that precluded you from putting parking over there or something over there in the future?

A. I didn't think that it would preclude for anything because we had leased the entire parcel.

Additionally, Cochran testified he understood the rent proposed by Leinbach to be based upon its desire to make an 8 to 10% profit on its investment in the property, which would include the entire 1.21 acres. Corky Carnevale, Leinbach's real estate agent for securing the lease, testified the lease was for the entire 1.21 acres and corroborated Cochran's testimony regarding the rent calculation. Tommy B. Baker, sole member of Magnolia, testified his goal in signing the lease was to get as many parking spaces as he economically could and to secure the total property, 1.21 acres.

At trial, Hiers, took the position that because the lease said Baker Motors could use the property for approved parking, he could erect the tower on the wooded area as Baker Motors was not using it for parking. He stated, "*[w]e have never denied that the parcel has been inadvertently leased to two people.* Again, I contend that Mr. Baker was not interfered with. He got exactly what he bargained for. He saved over \$100,000 by not trying to develop that finger of land for a few

additional parking spaces." Additionally, Hiers acknowledged the demised premises is 1.21 acres and that he leased all of parcel H-2 to Magnolia. Furthermore, Hiers testified that while Magnolia did not have the absolute right to expand the parking area, it could have done so with his permission and the approval of the City of Charleston.

Hiers testified he was not heavily involved in the placement of the cell tower. "I told [Optima's representative] my plate was full at the time. And if he wanted to pursue this opportunity, he was going to need to contact the city, Mr. Baker, and everyone else, and he was responsible for getting this done if, in fact, that's what he wanted to do." This testimony indicates Hiers believed Baker had some interest in the property or there would be no need to contact him regarding the tower's construction. Hiers testified:

Q. You made the unilateral mistake and leased out a portion of the property that you had previously leased to Mr. Baker to Optima Towers?

A. Clearly that's why we are in court today.

We recognize Magnolia did not immediately object to the erection of the tower on the wooded area. However, that fact alone does not demonstrate by clear and convincing evidence that *at the formation of the lease* Magnolia did not intend to lease the entire 1.21 acre parcel. Baker testified he was not aware that a cell tower was going up "adjacent or on the property" and he was not contacted about the construction of the tower. The record does not reveal how often Baker was at the premises or whether he parks in the employee lot. Furthermore, Cochran, the Baker employee most familiar with the terms of the lease, was not employed by Baker Motors at the time of the erection of the cell tower. Leinbach also owned the adjacent parcel of land and simple inattentiveness to the precise location of the tower could have resulted in its being built on the wooded area. This falls short of establishing clear and convincing evidence of an intent to have abandoned that portion of the property in 2003. Furthermore, the drawings relied upon by the master to create a mutual mistake through Magnolia's abandonment all depict the wooded area. Although parking spaces are not delineated in the wooded area, the land itself is included in the drawings and is in no way excluded from the terms of the lease. Additionally, Magnolia did not attempt to negotiate a lower rent based on the decision not to use the wooded area for parking.

Leinbach's mistake was unilateral and occurred three years after the signing of the Leinbach/Magnolia lease. While Magnolia did not object to the construction of the tower, that was a mistake that occurred *after* the inception of the lease and does not offer a basis for reformation.

Although reformation corrects a mistake between the written document and the actual intent of the contracting parties, it will not rewrite a contract simply because it has become less favorable to one party. Under the remedy of reformation, the law will not make a better contract than that which the parties themselves have seen fit to enter into, or will not alter it for the benefit of one party to the detriment of another.

Reformation is not available for the purpose of making a new and different contract for the parties but is confined to establishment of the actual agreement; thus, a court of equity cannot, and should not, undertake to make a new contract between the parties by reformation. Thus, a court may not substitute by reformation an agreement that it thinks is proper but to which the parties had never assented.

66 Am. Jur. 2d *Reformation of Instruments* § 1 (2011) (footnotes omitted).

While reformation of the lease allowed the master to fashion an equitable remedy that is very appealing, the preponderance of the evidence does not demonstrate clearly and convincingly the parties made a mutual mistake of fact at the time of the formation of the lease regarding whether the wooded area was included in the demised premises. Consequently, we reverse the master's ruling as to mutual mistake and reformation.

III. Damages and Magnolia's Breach of the Lease

Because we conclude the master erred in reforming the contract, we look to the damages provision in the lease to determine the result of Leinbach's breach and whether Magnolia breached the lease by abating rent. Section 6.03 discusses abatement of rent and provides:

If Landlord creates a condition that *substantially interferes with the normal use* of the Demised Premises or appurtenant parking or service areas as allowed herein, the Rent and other charges due hereunder shall be abated during the time such interference persists, but such abatement persists (emphasis added).

The master concluded the tower was not a substantial interference with the normal use of the demised premises, and evidence in the record supports that finding. Consequently, Magnolia breached the lease by failing to pay the agreed upon rent, and Leinbach is entitled to payment of those funds.

Additionally, although we conclude Leinbach breached the lease, Magnolia's proof as to damages was only speculative and does not support an award of actual damages. Baker testified as follows:

Q. And the tower that's there has not interfered at all with any of the parking on any of the sites?

A. For the time being, yes.

Q. Your testimony is, basically, you just really don't know what the future brings?

A. I don't think anybody does.

.....

Q. You don't know that it would make any economic sense [to expand parking into the wooded area]?

A. That would be for a future determination.

Q. You haven't run any numbers to see if it would make any economic sense?

A. There's no need for the moment.

While we do not condone the "double-leasing" of property, it appears the construction of the cell tower was based on a unilateral mistake by Leinbach further exacerbated by Magnolia's apparent failure to file a notice of lease or recognize at the time of the tower's construction it was being built within the

demised premises. The basic law of damages in our jurisprudence requires proof of damages, and we can find no case law that suggests double-leasing, particularly in a commercial transaction, gives rise to damages per se.

Speculative damages are damages that depend upon future developments which are contingent, conjectural, or improbable. As a general rule, courts will find that all damages must be susceptible of ascertainment with a reasonable degree of certainty, and that uncertain, contingent, or speculative damages cannot be recovered in any action ex contractu or ex delicto.

The inability to measure damages with definite exactness does not make them speculative and does not bar recovery. The general rule is the same, whether the plaintiff seeks lost profits in a contract case or future medical expenses in a tort case: damages must be proved with reasonable, not mathematical, certainty, and no award can be made for speculative or conjectural damages.

Thus, where future injury is only merely possible, rather than probable, or where the amount is speculative rather than reasonably certain, the plaintiff cannot recover.

11 S.C. Jur. *Damages* § 5 (1992) (footnotes and quotation marks omitted).

As previously discussed, although the use of the demised premises was not completely limited to parking, any other use was subject to Leinbach's approval and any expansion of the parking area was subject to approval from Leinbach and the City of Charleston.

Because Magnolia's normal use of the property was not substantially interfered with, it was not entitled to abate rent under section 6.03 of the lease. Therefore, it must pay Leinbach the rent that was previously abated, but Magnolia is entitled to nominal damages for Leinbach's breach.

IV. Unjust Enrichment

Magnolia further appeals the master's denial of its unjust enrichment claim contending the master erred in finding Leinbach's enrichment was not "unjust." We disagree.

"A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another." *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009). "To recover restitution in the context of unjust enrichment, the plaintiff must show: (1) he conferred a non-gratuitous benefit on the defendant; (2) the defendant realized some value from the benefit; and (3) it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value." *Inglese v. Beal*, 403 S.C. 290, 297, 742 S.E.2d 687, 691 (Ct. App. 2013).

In the instant case, an express contract exists covering the issue of abatement of rent — the relief sought by Magnolia. However, because of the unusual circumstances of this case, in which the express contract arguably does not address the type of breach at issue, we address Magnolia's unjust enrichment argument. *See Boldt Co. v. Thomason Elec. & Am. Contractors Indem. Co.*, 820 F. Supp. 2d 703, 707 (D.S.C. 2007) ("While parties are permitted under South Carolina law to pursue quasi-contractual claims when there is no valid contract between parties, or there is some question as to whether contract is enforceable or applies to dispute, when parties agree that valid and enforceable contract exists that covers dispute between them, such claim is superfluous.").

Magnolia claims Leinbach is being unjustly enriched by Optima's monthly rent payment. However, Magnolia failed to demonstrate it is entitled to that money. While Magnolia may have had the opportunity to sublease the wooded area to a tenant, any sublease was subject to Leinbach's approval and did not exist as a matter of right. In fact, the record demonstrates Hiers's consent to a sublease for the tower construction would have been questionable at best. Hiers testified the Optima lease was incredibly beneficial to him because it could offset the failure of the Charleston Montessori School to timely pay its rent. Additionally, the construction of the cell tower was a matter of public concern and debate because of its proximity to the school. Therefore, the record suggests Leinbach's agreement to the tower, in the face of public controversy, was because of the benefit *Leinbach* would receive from the Optima lease and was not given simply as a matter of course. Accordingly, Magnolia was not entitled to the lease payments, and it is not unjust or inequitable for Leinbach to retain them.

V. Remaining Issues

Finally, Magnolia contends the master erred in calculating the arrearages it owed Leinbach under the reformed lease and in not granting Magnolia attorney's fees. Because of our ruling as to damages and reformation, these issues need not be addressed. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address any remaining issues if the determination of a prior issue is dispositive).

CONCLUSION

In conclusion, we hold the master erred in reforming the lease between Leinbach and Magnolia based on mutual mistake. Furthermore, we find that although Leinbach breached the lease agreement by permitting erection of the tower within the demised premises, Magnolia failed to prove it was entitled to rent abatement under the lease or restitution based on its unjust enrichment claim. We remand this case to the master to determine the amount of damages due to Leinbach and for the entry of nominal damages to Magnolia in light of our decision.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

WILLIAMS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No.: 2008-CP-10-3590

56 Leinbach Investors, LLC.....Appellant/Respondent,

vs.

Magnolia Paradigm, Inc..... Respondent/Appellant.

PETITION FOR REHEARING
AND
SUGGESTION FOR REHEARING *EN BANC*

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Respondent/Appellant Magnolia Paradigm, Inc. petitions for re-hearing, and suggests a hearing *en banc*, pursuant to SCAR Rule 221(a) and 219(b).

Introduction. In its opinion filed on September 10, 2014, this Court affirmed the Trial Court's judgment that the Appellant/Respondent 56 Leinbach Investors, LLC (Leinbach) had breached the lease between the parties. The Court of Appeals reversed the Trial Court on the issue of reformation of the lease based upon mutual mistake. The Court found that Respondent/Appellant Magnolia Paradigm, Inc. (Magnolia) breached the lease, by abating rent payments and the Court found that Magnolia was only entitled to nominal damages and not entitled to abatement, attorney's fees or recovery for unjust enrichment.

This Court's ruling overlooks the broad perspective and its effect on decades of landlord tenant law that Leinbach undisputedly leased the entire parcel to Magnolia; that Leinbach undisputedly usurped Magnolia's quiet enjoyment of the lease parcel by leasing a portion of it to the tower company; and that Leinbach's breach and trespass diminished Magnolia's opportunity to use the entirety of its leased property for the balance of the lease until June 2023. Because Leinbach derives substantial profit from the tower lease, its breach of the Magnolia lease and Magnolia's damages can hardly be said to be nominal or speculative or insubstantial.

1. Magnolia's Breach and Abatement.

Introduction: In its opinion filed on September 10, 2014, this Court stated "The Master concluded the tower was not a substantial interference with the normal use of the demised premises, and evidence in the record supports that finding. Consequently, Magnolia breached the lease by failing to pay the agreed upon rent, and Leinbach is

entitled to payment of those funds”. The Court further stated “Because Magnolia’s normal use of the property was not substantially interfered with, it is not entitled to abate rent under section 6.03 of the lease.”

Statement of the Issue for Reconsideration:

This Court did not address the Master’s finding that the “leasing of the property in dispute effectively ejected Magnolia and that leasing of a portion of the property to another, including fencing off the entire area, prevents Defendant's access to that area and from future use of this part of the original demised premises.” Magnolia seeks reconsideration by this Court in accordance with Rule 221(a), SCACR

Argument:

The Master found at paragraph 22 of his order, (Tr pp 009) “Plaintiff contends that Defendant breached the lease by reducing its lease payments by the amount of the lease payments received by Plaintiff from Optima Towers. I agree. Article 6.03 of the lease clearly allows for abatement of the rent. The leasing of a portion of the property to another, including fencing off the entire area, prevents Defendant's access to that area; however, I specifically find that the Plaintiffs action does not interfere with the Defendant's normal use of the area of the demised premises. **It does however effectively eject Defendant from future use of this part of the original demised premises.**” (emphasis added)

The demised premises is the entire 1.21 acre parcel not just the area the tenant is now occupying for parking. Although the cell tower may not interfere with the portion of the demised premises presently used for parking, it completely and permanently ejects and prevents tenant from entering or using the area now occupied by the cell tower for

any purpose, as found by the Master. The effect of this Court's holding is a defacto reformation of the lease sanctioning the ejectment of the tenant, Magnolia. Since this Court found that reformation was not appropriate, and since the area in question cannot be separated from the whole, this Court should consider the fact that Magnolia has been ejected from that area of the demised premises for the remainder of the lease, until June 2023, and that ejectment constitutes substantial if not total interference with Magnolia's use of the area.

Magnolia should have been allowed to abate the rent proportionately and should not have been deemed in default for non-payment of the total rent.

2. Magnolia's Damages.

Introduction: This Court also stated "Additionally, although we conclude Leinbach breached the lease, Magnolia's proof as to damages was only speculative and does not support an award of actual damages".

Statement of the Issue for Reconsideration:

Magnolia did not submit a claim for actual damages, as found by this Court, but asserted in its counter claim and in its arguments that it was entitled to the rent payments from the cell tower as a result of its position as a tenant, Magnolia seeks reconsideration by this Court in accordance with Rule 221(a), SCACR.

Argument:

This Court, in the finding quoted above did not address Magnolia's argument that in this landlord/tenant situation as in all landlord/tenant situations, the rights in the subject property belong to the tenant for the entire 20 year term. "The right to use the leased premises during the term specified in the lease was transferred from the landlord to

the tenant. Thus the landlord and tenant have separate estates in the demised premises during the term of the lease, the tenant's being a possessory interest, while the landlord has reversionary interest in the land. In other words during the existence of the lease, the tenant is the absolute owner of the demised premises for all practical purposes for the term granted, with the landlord's right being confined to the reversionary interest." 9 Am Jur 2nd Landlord/Tenant § 889, 52 CJS Landlord and Tenant §337. (emphasis added)

Here, the Landlord's has unlawfully seized the property of Tenant and is putting it to profitable use for only the Landlord's benefit. Having leased the entire parcel to Magnolia for use as parking, Leinbach has carved out a section of Magnolia's leasehold and has leased it to a third-party for the "parking" of a cell tower. How could this not be a substantial and material breach, measured by the additional compensation received by Leinbach for "parking" the cell tower?

Magnolia further asserts that this Courts reference to its failure to file a "notice of lease or recognize at the time of the tower's construction it was being built within the demised premises" was not at issue. The Master found that Leinbach's cause of action for estoppel did not lie and this finding was not appealed by Leinbach. (Tr. pp 010)

Magnolia respectfully submits that given the forgoing statement of law that the rights to the rents from the cell tower properly belong to the tenant.

Additionally the Court failed to consider or address Magnolia's argument that the landlord, having changed the nature of the use of the area in question, that the value of the area in question should be determined by its present use, a cell tower, and not by its use as a parking area as originally contemplated. The value of the area as a cell tower

would be the income stream derived from the cell tower rent. Restatement, Property, Landlord and Tenant § 11.1 Abatement comment *e* (1977).

3. Unjust Enrichment

Introduction: In its opinion filed on September 10, 2014, this Court stated: “Magnolia claims Leinbach is being unjustly enriched by Optima's monthly rent payment. However, Magnolia failed to demonstrate it is entitled to that money. While Magnolia may have had the opportunity to sublease the wooded area to a tenant, any sublease was subject to Leinbach's approval and did not exist as a matter of right. In fact, the record demonstrates Hiers consent to a sublease for the tower construction would have been questionable at best. Hiers testified the Optima lease was incredibly beneficial to him because it could offset the failure of the Charleston Montessori School to timely pay its rent. Additionally, the construction of the cell tower was a matter of public concern and debate because of its proximity to the school. Therefore, the record suggests Leinbach's agreement to the tower, in the face of public controversy, was because of the benefit *Leinbach* would receive from the Optima lease and was not given simply as a matter of course. Accordingly, Magnolia was not entitled to the lease payments, and it is not unjust or inequitable for Leinbach to retain them. ”

Statement of Issue for Reconsideration:

The foregoing fails to take into consideration the rights that Magnolia had and has as a tenant as stated in the previous citation of authority. Magnolia seeks reconsideration by this Court in accordance with Rule 221(a), SCACR.

Argument:

The statement “Magnolia failed to demonstrate it is entitled to that money” is contrary to Magnolia’s rights as a tenant. “The right to use the leased premises during the term specified in the lease was transferred from the landlord to the tenant. ... During the existence of the lease, the tenant is the absolute owner of the demised premises for all practical purposes for the term granted, with the landlord’s right being confined to the reversionary interest.” 9 Am Jur 2nd Landlord/Tenant § 889, 52 CJS Landlord and Tenant §337. Thus Magnolia is entitled to the rental money from the cell tower lease as a result of its position as the tenant. Further Leinbach has not shown it is entitled to the money from the cell tower lease.

This Court stated: “While Magnolia may have had the opportunity to sublease the wooded area to a tenant, any sublease was subject to Leinbach's approval and did not exist as a matter of right. In fact, the record demonstrates Heirs’ consent to a sublease for the tower construction would have been questionable at best.” This statement is belied by the fact that Leinbach approved the construction of the tower under the unilateral mistaken belief that it was not part of the property leased to Magnolia. Having approved use of the property for cell tower use for its own profit, any suggestion that Leinbach would have denied that use if requested by the Magnolia is clear evidence that a denial by Leinbach of any such request by Magnolia would have been arbitrary and capricious, and contrary to the letter of the lease and a violation of the unwritten covenant of good faith and fair dealing. The issue of whether Magnolia would have received permission is moot; it is already done and Leinbach should be estopped to now argue that approval would not have been given.

In its opinion this Court stated: “Therefore, the record suggests Leinbach's agreement to the tower, in the face of public controversy, was because of the benefit *Leinbach* would receive from the Optima lease and was not given simply as a matter of course.” The fact that Leinbach’s motives to lease the property to cover payments on another adjacent property may have been well intentioned they are not relevant to a determination of Leinbach’s unjust enrichment. What is relevant is that Leinbach now collects double rent from a single piece of property, Magnolia’s property, and at Magnolia’s expense. This Court stated “we do not condone the “double leasing” of property” yet this Court permits Leinbach to do just that and to reap the benefits of its unilateral mistake.

Magnolia respectfully submits that this Court should reverse itself on this issue and grant Magnolia judgment on its claim for unjust enrichment.

4. Leinbach has not been damaged.

Introduction. In its complaint Leinbach sued Magnolia for breach of the lease and damages. In its opinion this Court found that Leinbach had breached the lease and further stated that it did not condone “double leasing” but found that Magnolia had only suffered nominal damages. This Court then concluded that the case be remanded to the Master to determine the amount of damages due Leinbach.

Statement of Issue for Reconsideration:

The foregoing fails to take into consideration that Leinbach was not damaged by Magnolia abating the rent. Magnolia seeks reconsideration by this Court in accordance with Rule 221(a), SCACR.

Argument:

In its lease with Magnolia, Leinbach bargained for a set rental from the property for twenty years. Through the date of the trial in October 2011 Leinbach was due from the property and in accordance with its lease with Magnolia, \$193,352.65 (Tr pp 246). Magnolia paid Leinbach from the inception of its lease in June 2003 through October 1, 2011, the date of the trial, the sum of \$153,561.00. Having rented a portion of the property to Optima Towers, Leinbach also received from Optima from the inception of the tower lease until October 1, 2011, \$54,116.65. The total received by Leinbach from Magnolia and Optima was \$207,477.65. (Tr pp259)

Since Leinbach breached the lease and was only contractually entitled to receive in rental payments \$193,352.65 and it received \$207,477.65, it has not been damaged. If anything, it has been overpaid \$14,125.00.

As between Leinbach and Magnolia, who should be entitled to the rent payments from Optima Towers? As a matter of law Magnolia, should be entitled to the rent derived from its leasehold due to its legal status as tenant. Magnolia respectfully submits that this Court should reconsider this issue and issue its opinion that Magnolia is entitled to the rent payments from Optima.

5. Attorney's Fees

Magnolia respectfully request that the court reconsider awarding it attorney's fees in the event this Court decides to reverse itself as requested.

Conclusion

For the foregoing reasons, Appellant respectfully urges that this Court reconsider its order and opinion on the foregoing issues and issue its order and opinion consistent with this Petition or remanding the case to the Master for further findings or for a new trial.

Respectfully Submitted,

Barr, Unger & McIntosh, LLC

A handwritten signature in cursive script, appearing to read "William S. Barr", is written over a horizontal line.

William S. Barr

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September 23, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2008-CP-10-3590

56 Leinbach Investors, LLC. Appellant/Respondent,

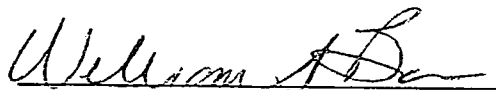
v.

Magnolia Paradigm, Inc. Respondent/Appellant.

PROOF OF SERVICE

I certify that I have served a copy of the Respondent/Appellant's Petition for Rehearing and Suggestion for Rehearing *en banc* on 56 Leinbach Investors, LLC, by depositing a copy of same in the United States Mail, postage prepaid, on September 23, 2014, addressed to its attorney of record Donald H. Howe, Esquire, 818 Wappoo Road, Charleston, South Carolina, 29407.

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Charleston, South Carolina
September 23, 2014

The South Carolina Court of Appeals

56 Leinbach Investors, LLC, Appellant/Respondent,

v.

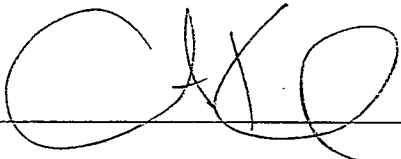
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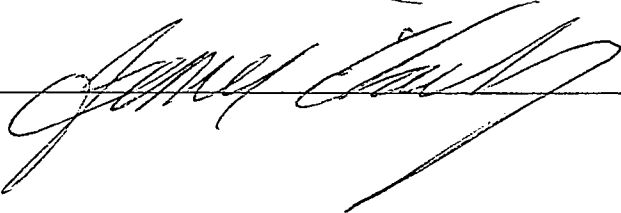
Appellate Case No. 2012-213389

ORDER

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



J.


J.


J.

Columbia, South Carolina

cc:

Donald Higgins Howe, Sr., Esquire

William S. Barr, Esquire

Rev'd - 3/20/15

FILED
3/19/15 