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IN THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

SEP 29 2014

SC Court of Appeals

Honorable Steven H. John, Circuit Court Judge

Civil Action No.: 2011-CP-26-2722

Nichols Holding, LLC and J. Wade Nichols Respondents-Appellants

vs.

Divine Capital Group, LLC, John S. Divine, IV,
Nathan Anderson and Divine Dining Group, Inc. Appellants-Respondents

SUPPLEMENTAL RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Nichols Holding, LLC and
J. Wade Nichols,

Plaintiffs,

vs.

Divine Capital Group, LLC;
John S. Divine, IV; Nathan Anderson;
and Divine Dining Group, Inc.,

Defendants.

C/A NO. 2011-CP-26-2722

ORDER COMPELLING
SETTLEMENT

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CLERK OF COURT

CLERK

I. BACKGROUND FACTS

THIS MATTER IS BEFORE THE COURT based on Defendant's Motion to Compel Settlement, filed June 15, 2013. This case involves John S. Divine, IV, and J. Wade Nichols who were adversaries in three lawsuits commenced in 2010 and 2011, in the Court of Common Pleas for the Fifteenth Judicial Circuit. The lawsuits involved business deals between the parties including loans and restaurant operations.

Pursuant to a Consent Order dated January 23, 2012, Divine agreed to the entry of a judgment in favor of Nichols against Divine in the amount of \$8,642,379.70. After months of negotiations, the parties agreed to execute an agreement to purchase and sell certain real property and restaurants located in Murrells Inlet. (Exhibit 10 in the Court's record).¹

The settlement agreement in essence required Divine to sell certain improved and unimproved real and personal property to Nichols. In exchange, Nichols agreed to assume or pay off certain existing bank loans in the approximate amount of \$5,000,000.00 on the properties. The

¹ The parties also signed a Settlement Agreement contemporaneously. (Exhibit 12).

[Handwritten signature]

real property, including the restaurants known as Bovine's and Divine's, were transferred to Nichols based on the Agreement of Purchase and Sale (See Exhibit 10). The transaction was exceedingly complex, and resulted in a settlement agreement and release in full. (Exhibit 12 in the Court's records).

The case now centers around two central issues: Whether Nichols was required to pay Trade Debt upon assuming control of the restaurants and whether Divine was required to disclose that he had excess water demand charges on the Bovine's and Divine's restaurants with the Georgetown County Water and Sewer Authority. Both of these issues are more fully detailed in the Agreement of Purchase and Sale (Exhibit 10) and will be fully discussed by the Court.

II. STANDARD OF REVIEW

The Defendants have moved to compel settlement, and it is well settled in this State that settlement agreements are viewed as contracts, *Harris-Jenkins vs. Nissan Car Mart, Inc.*, 348 S.C. 171, 177, 557; SE 2d 798, 711 (Cl. App. 2001); see also *Pruitt vs. South Carolina Medical Malpractice Liability Joint Underwriter's Association*, 343 S.C. 335, 339, 540; SE 2d 843, 845 (2001). (enforcement of the terms of a settlement agreement is a matter of contract law); see also *Mattox vs. Cassidy*, 289 S.C. 57, 61, 344; SE 2d 620, 622 (Cl. App. 1986) (applying the general rules of contract construction to a settlement agreement).

At the outset, the Court notes that while this is a contract, both parties have agreed and asked the Court to determine these issues based on its view of the evidence. There is no request for a jury trial and the parties are before the Court with witnesses to offer testimony on their view of the settlement agreement. As a result, this Court heard testimony and reviewed the settlement agreement along with the affidavits submitted by the parties and the exhibits presented during the

hearing. Further, the Court is very familiar with this case having held numerous hearings since it was filed.

III. THE TRADE DEBT ISSUE

Because this is a complex transaction, the Court believes it in the best interests of both parties to address the issues separately. The Defendants argue that they are entitled to \$62,809.08 for back due Trade Debt on the Bovines and Divine's restaurants. Trade Debt is defined in the Agreement of Purchase and Sale on Page 5 as follows:

"Trade Debt" includes all amounts outstanding for and from the operation of the restaurants and bars, which are normal operating expenses of the restaurants and bars and which are reasonably consistent with past operating expenses of the restaurants and bars. The Trade Debt includes the fee for administrative services provided to the restaurants and bars by Divine Dining Group, Inc., (DDG); provided, however, that the administrative services fees of DDG shall not exceed DDG's actual costs and shall not exceed normal rates for fees of this kind in the greater Myrtle Beach and South Carolina market area. The Trade Debt shall not include, but specifically excludes, intercompany debt owed to Divine or companies owed by Divine other than the fees due to DDG for its administrative services for the restaurant and bars.

The Plaintiffs, in response to the Trade Debt provision of the contract, argue that they are only liable for 30 days past due operating expenses of the restaurants. Plaintiffs argue that the definition of Trade Debt and past sales at the restaurants would only support payment of \$45,673.00 for Trade Debt. After hearing the testimony and reviewing the Affidavits, there is no limitation on the Trade Debt of 30 days after the sale of the restaurants. Accordingly, the Court finds as a matter of law that based on all the evidence, testimony, affidavits, and a review of the Agreement of Purchase and Sale that the Trade Debt which Nichols Holding owes Divine is \$62,809.08 and that all vendors shall be paid with one caveat. The Court heard the testimony of the receiver, Arlene Jascott, and reviewed her affidavits (Exhibits 3 and 11). The Affidavits of Arlene Jascott indicate that some of the Trade Debt has been paid by Nichols. The Court finds that Nichols has produced

the following invoices for Trade Debt that he has paid, which shall reduce the Trade Debt owed in the amount of \$9,022.43.

Those include the following:

1. Roper	\$ 1,751.27
2. Santee Cooper	\$ 3,126.58 (Divine's)
3. Santee Cooper	\$ 3,129.66 (Bovines)
4. Horry Telephone	\$ <u>1,014.92</u>
Total	\$9,022.43

As a result of these checks (or paid invoices) being produced to the Court, the Trade Debt to be paid to the vendors is \$53,786.65.

Further, because this is a settlement agreement between the parties of a complex transaction, Plaintiff Nichols is ordered to pay the vendors less the amounts he has already paid within ten (10) days of this Order. Both the settlement agreement and release (Exhibit 12) and the Agreement of Purchase and Sale (Exhibit 10) require that the vendors be paid. Further, the Court has authority to order specific performance of the Agreement of Purchase and Sale. The Court references Section 18 of the Agreement of Purchase and Sale, which provides for specific performance in a court of competent jurisdiction. Accordingly, the Court finds that Nichols shall immediately comply with the terms of the Agreement of Sale and Purchase and pay the vendors as per the Agreement of Purchase and Sale in the Settlement Agreement in the amount of \$53,786.65.

IV. THE DEMAND CHARGE ISSUE

The Court now turns to the Georgetown County Water and Sewer issue between the parties. Apparently, after the closing, the Plaintiffs, through their authorized agent, Ernest Edwards, went to the Georgetown Water and Sewer Authority to change the water and sewer accounts over into Nichols' name. It was at that time that Edwards learned for the first time that the water and sewer accounts for Wahoo's and Bovine's have been operating for years without buying additional water

and sewer capacity, and instead were paying extra demand charges. Exhibits 6 and 7 and the testimony reveal that in order for Nichols Holding, LLC, to obtain water and sewer in their name, it would be required to pay \$53,760.00 for an additional 24 water and sewer impact fees that had not been paid by Divine. Further, according to Exhibit 7, Tommy Kennedy of the Georgetown Water and Sewer District, in a letter to Plaintiff's Counsel dated June 17, 2013, noted, "Before the request to transfer, the Owner (Divine) had received yearly notices that the account had gone over its allocated capacity of water and sewer."

Additional testimony from Fred Newby, attorney for the Nichols, who was handling this closing, indicates that there were no liens filed in the courthouse and that the Plaintiffs could not have discovered that Divine had been paying additional charges and/or penalties rather than buying additional capacity.

The Court reviewed the Settlement Agreement and turns its attention to the Agreement of Purchase and Sale, (Exhibit 10). Section 15 of Exhibit 10 governs the parties' conduct regarding this issue. It is entitled Representations and Warranties of Sellers' and Divine. The Court's attention was directed to Section 15 (f), which provides in pertinent part:

There are no service, maintenance, property management, leasing or other contracts affecting the property which will be in existence as of the Closing Date, other than the Operating Agreements described on Exhibit C....

Further, Section 15 (h) provides:

Sellers have received no notice of administrative agency action, litigation, condemnation proceedings or proceeding of any kind pending against sellers which relates to or affects the property...

The Court reviewed this matter extensively and finds that Divine had a duty under the terms of the contract to advise the Plaintiffs that he had not purchased additional water and sewer capacity prior to the sale. Further, Exhibit 5 is a letter from Georgetown County Water and Sewer District

dated June 22, 2012, almost a year prior to the closing, in which the Divine Fish House had been advised by John F. Buck, CPA for Georgetown County Water & Sewer Authority, that additional capacity should be purchased by paying the associated impact fees. Further, the Court finds that Divine's suggestion that the water bill be left in his name so that Nichols does not have to pay these additional impact fees is unworkable. The parties have been involved in contentious litigation and the Court believes that to leave the water and sewer bill in Divine's name is a solution which will most likely lead to further involvement by the Court in the future.

The Court also takes note of the testimony of Fred Newby and his affidavit (Exhibit 4) along with the attached Exhibit A to Exhibit 4, which is an owner's affidavit for title insurance. That affidavit says in pertinent part:

That all assessments against the Owner are applicable to the real estate including assessments for street lighting, water and sewer construction, sanitary assessments, and other governmental services have been paid in full, ...

The Court notes that John S. Divine signed Exhibit 4 on May 2, 2013, at the closing.

The Court finds that the failure to disclose that Divine had not purchased additional water and sewer capacity, and instead had been paying additional charges as a penalty, is a violation of the Agreement of Purchase and Sale, specifically Section 15 (f)(h). The Court further finds that John S. Divine, IV and his related companies, Blue Water Food Service, Inc., d/b/a Bovine's Wood Fired Specialties, a/k/a Bovine's, Divine Fish House, Inc, and Abaco Holdings, LLC, and Tortola Holdings, LLC, are liable for these additional impact fees in the amount of \$53,760.00. The Court further finds that the failure to disclose those impact fees is a violation of the Agreement of Purchase and Sale (Exhibit 10) and of the Settlement Agreement (Exhibit 12).

Further, because the Agreement of Purchase and Sale has a specific performance clause (Section 18), the Court exercises its jurisdiction to require Divine and its related companies to pay

Georgetown Water and Sewer Authority \$53,760.00 because the contract between the parties clearly allows for specific performance of this "agreement" in a court of competent jurisdiction (See Agreement of Purchase and Sale, Exhibit 10, Section 18 (B), seeks specific performance of this agreement in a court of competent jurisdiction.)

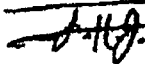
Accordingly, the Court has made two separate and distinct rulings in this case, both of which the Court requires under the doctrine of specific performance that each party perform.

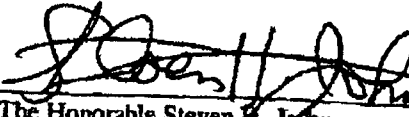
Nichols Holding, LLC, and J. Wade Nichols are required to pay the vendors pursuant to the Settlement Agreement and Release in Full, and the Agreement of Purchase and Sale in the amount of \$53,786.65.

John S. Divine, IV and his related companies are required to pay Georgetown County Water and Sewer Authority \$53,760.00. Further, pursuant to the Settlement Agreement and Release in Full and the Agreement of Purchase and Sale, the Defendants are to immediately forward to Nichols Holding the sum of \$2,795.41, which has been held in trust since the sale and which represents the remaining balances in the accounts for Bovine's and Divine's restaurants on the date of sale, May 2, 2013. Accordingly, Defendants shall immediately forward a check in the amount of \$2,795.41 forthwith to counsel for Nichols holding, Gene M. Connell, Jr.

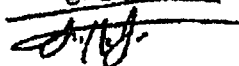
Finally, should either party fail to abide by this Order they shall be subject to contempt of court.

IT IS SO ORDERED.




The Honorable Steven H. John
Resident Circuit Judge
Fifteenth Judicial Circuit

January 6, 2017
Conway, South Carolina.



STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Nichols Holding, LLC and
J. Wade Nichols,

Plaintiffs,

vs.

Divine Capital Group, LLC;
John S. Divine, IV, Nathan Anderson;
and Divine Dining Group, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

C/A No. 2011-CP-26-2722

**MEMORANDUM OF LAW
IN SUPPORT OF MOTION OF
JOHN S. DIVINE, IV TO ENFORCE
SETTLEMENT AGREEMENT**

FILED
Horry County
2013 NOV 26 AM 8:07
CLERK HARRIS-WARD
CLERK CP COURT

INTRODUCTION

John S. Divine, IV ("Divine") submits this memorandum in support of the Motion of John S. Divine, IV to Enforce Settlement Agreement (the "Motion"), filed on June 5, 2013, seeking an order to enforce two agreements, entered into by and between Divine and J. Wade Nichols ("Nichols"),: (i) the Settlement Agreement and Release in Full, dated as of March 2013 (the "Settlement Agreement"), and (ii) the Agreement of Purchase and Sale, dated April 2013 (the "Purchase Agreement," together with the Settlement Agreement, the "Agreements"), which is incorporated by reference in the Settlement Agreement. Specifically, Divine seeks an order compelling Nichols to comply with Nichols' obligations under the Agreements by making prompt payment of the trade debt, which "includes all amounts outstanding for and from the operation of the Restaurants...which are normal operating expenses...and which are reasonably consistent with past operating expenses of the Restaurants"...at the time of the closing of the Purchase Agreement, which sum has since been adjusted to an aggregate total of \$62,809.08.

STATEMENT OF FACTS

Divine and Nichols were adversaries in three Litigations¹ commenced in 2010 and 2011 in the Court of Common Pleas for the Fifteenth Judicial Circuit. *See* Affidavit of Jack S. Divine, IV, dated October 10, 2012 ("Divine Aff."). Pursuant to a Consent Order, dated January 23, 2012, Divine consented to the entry of judgment in Nichols favor against Divine in the amount of \$8,642,379.70 (the "Judgment"). *Id.* At some time thereafter, Nichols concluded that the "Judgment was uncollectible." *Id.*, Ex. A (Settlement Agreement, Whereas Clause). After months of negotiations, the parties agreed to execute the Agreements to resolve the controversies between them. *Id.*

The Settlement Agreement acknowledges the contemporaneous execution of the Purchase Agreement and, generally, discusses the terms of the Purchase Agreement. *Id.*, Ex. A (Settlement Agreement, §8). The Settlement Agreement notes that Divine² agreed to sell "certain improved and unimproved real estate, and certain personal, intangible and intellectual property (collectively, the "Property") to Nichols, and, in exchange, Nichols agreed to assume or pay off certain existing bank loans in the approximate amount of \$5,000,000.00 and "pay[] certain property taxes and **trade debt** of the Sellers, which amounts aggregate to a sum that

¹ The Litigations are:

- (i) Bank of North Carolina (BNC Bank) as Successor In Interest to Beach First National Bank vs. Abaco Holdings, LLC; John S. Divine, IV, Individually; Lindsay and Evans, LLC and John S. Divine, IV, Co-Trustees of The John S. Divine, III Qualified Personal Residence Trust; The Conway National Bank; J. Wade Nichols and J. Wade Nichols, DMD, P.A. Profit Sharing Plan; and Kings Realty Limited Partnership, initiated in the State of South Carolina, County of Georgetown, in the Court of Common Pleas for the Fifteenth Judicial Circuit, Case No. 2010-CP-22-1542 (the "BNC Action");
- (ii) J. Wade Nichols and J. Wade Nichols DMD, P.A. Profit Sharing Plan v. John S. Divine, IV, initiated in the State Court of South Carolina, County of Horry, in the Court of Common Pleas for the Fifteenth Judicial Circuit, Case No. 2010-CP-26-10474 (the "Nichols Action"); and
- (iii) Nichols Holding, LLC and J. Wade Nichols vs. Divine Capital Group, LLC; John S. Divine, IV; Nathan Anderson and Divine Diving Group, Inc., initiated in the State of South Carolina, County of Horry, in the Court of Common Pleas for the Fifteenth Judicial Circuit, Case No. 2011-CP-26-2722 (the "Nichols Holding Action," together with the Nichols Action and the BNC Action, the "Litigation").

² The Sellers in the Purchase Agreement are: Tortola Holdings, LLC, John S. Divine, IV, Blue Water Foodservice, Inc., d/b/a Bovine's Wood Fire Specialties a/k/a Bovine's, Divine Fish House, Inc. and Abaco Holdings.

either equals or exceeds the current market value of the Property.” Divine Aff., Ex. A (Settlement Agreement, §8) (emphasis added). Nichols obligations to satisfy the Judgment and perform under the Settlement Agreement were made contingent upon Nichols performing his obligation under the Purchase Agreement and transferring the Property in accordance with the terms and conditions of the Purchase Agreement and passage of 100 days after transfer of title to the property without Divine filing or having filed against it any insolvency proceeding. *Id.*

The Purchase Agreement, incorporated by reference into the Settlement Agreement, provides, *inter alia*, that Divine is to “sell and convey all of their right, title and interest in and to the Property to Nichols....” Divine Aff., Ex. B (Purchase Agreement, ¶1). The Property includes, *inter alia*, certain real property, improvements on the real property, including the restaurants, Bovine’s Wood Fired Specialties, a/k/a Bovine’s, and The Divine Fish House (together, the “Restaurants”). *Id.* Ex. B (Purchase Agreement, pg. 2). In exchange, Nichols was required to pay or acquire the loan of CresCom Bank, satisfy the Judgment, cause the termination of the receivership under the Order Appointing Receiver and Allowing Intervention by CresCom Bank (the “Receivership Order”) filed on May 25, 2012, and pay the “outstanding Trade Debt” (the “Trade Debt”) owed by the Restaurants at the time of the transfer of the Restaurants to Nichols. Divine Aff. Ex. A (Settlement Agreement § 8), Ex. B (Purchase Agreement §1.). Trade Debt is defined, in the Purchase Agreement, as including: “all amounts *outstanding* for and from the operation of the Restaurants and Bars which are *normal operating expenses* of the Restaurants and Bars, and which are *reasonably consistent with past operating expenses* of the Restaurants and Bars.” *Id.* (emphasis added).

On May 2-3, 2013, Divine transferred the Restaurants and other assets to Nichols at a closing that took place in the office of Nichols’ attorney, Fred Newby, Esq., in Myrtle Beach,

South Carolina. *See* Divine Aff. Divine fully performed³ his obligations under the Agreements. *Id.* However, Nichols failed to perform his obligations under those same Agreements and is in breach thereof. *Id.* Specifically, Nichols failed and refused pay the Trade Debt, which “includes all amounts outstanding for and from the operation of the Restaurants ... which are normal operating expenses...and which are reasonably consistent with past operating expenses of the Restaurants....” *Id.* Nichols has failed to provide any justifiable reason for refusing to comply with his obligations and seeks to redefine the definition of “Trade Debt” in a manner inconsistent with the Agreements to justify his actions.

To date, Nichols has provided three alleged reasons for failing to pay the Trade Debt, all of which are without support in the Agreements. First, Nichols alleges, in conclusory terms, that the Trade Debt is higher than he expected. Divine Aff. ¶26. Second, Nichols alleges that Georgetown County Water and Sewer District (“GCWSD”) advised Nichols that it will charge him a fee upon opening a new account for the former Divine Fish House Restaurant⁴. *Id.* In correspondence with Divine, through counsel, Nichols has alleged – despite evidence to the contrary – that this fee was “owed” by Divine and that Divine should have disclosed the existence of the fee. *Id.* ¶ 55. As discussed below, Nichols is not required by GCWSD to open a new account but may continue to use the existing account, thereby avoiding such a fee. *Id.* ¶102.

³ Nichols had raised an additional issue with respect to Divine’s performance. Specifically, Nichols alleged that Divine had failed to provide all the monies in the Restaurants accounts to Nichols. Determination of this amount was delayed because Divine, although not contractually bound to do so, agreed to allow Nichols to use Divine’s credit processing equipment the weekend following closing because Nichols had neglected to procure a method to receive payments from customers using credit cards. Nichols has since agreed that pending resolution of this motion that counsel for Divine could hold the sums due to Nichols. Counsel for Divine currently is holding approximately \$2,800.00 pending the outcome of this motion.

⁴ As reflected on the summary of invoices from GCWSD, which was provided by GCWSD, Divine’s Restaurants have paid the balance in full each month and the accounts were current as of the date of the closing. Divine Aff. Exs. O, P. Further, as explained by Tommie Kennedy, Engineering Director of GCSWD, GCWSD’s records reflect only the current monthly balance due at this time. *Id.*, Ex. L. Per Mr. Kennedy, if Divine chose to close his account today, he would only owe the current monthly balance. *Id.* Divine is keeping the account open at this point and allowing Nichols to utilize it only as a gesture of goodwill while this matter is resolved.

Third, that Nichols is only required to pay "Trade Debt" that accrued 30 days prior to closing⁵ as opposed to complying with his obligation to pay the "Trade Debt" in accordance with the specific terms of the contract which provides that "Trade Debt" "includes all amounts outstanding for and from the operation of the Restaurants...which are normal operating expenses...and which are reasonably consistent with past operating expenses of the Restaurants...." See Divine Aff. ¶26, Ex. B.

Each of these arguments is meritless and appear to have been fabricated after the transaction closed. As to Nichols's contention that the Trade Debt is too high, Nichols benefitted from an extended due diligence period during which he was provided with the Trade Debt, but failed to inquire as to the Trade Debt's validity or otherwise question the amount of the Trade Debt. Divine Aff. ¶¶ 22, 29-35, Affidavit of Julio E. Mendoza, Jr., Esq., dated October 11, 2013 ("Mendoza Aff."). Moreover, a conclusory assertion that the Trade Debt is "too high" is insufficient for Nichols to escape his obligation under the clear language of the Purchase Agreement, which provides that Nichols will pay all "outstanding trade debt." Divine Aff., Ex. B (Purchase Agreement). As to Nichols' contention that a GCWSD fee permits him to avoid his obligations, Nichols has mischaracterized a fee that Nichols will incur as a new customer of GCWSD as a penalty owed by Divine. Divine Aff., ¶¶ 55-102. The GCWSD fee is simply a cost of doing business that Nichols is responsible for because he intends to open a new account with GCWSD and that he could have learned of prior to the closing of the transaction by contacting GCWSD. *Id.* ¶¶ 82-85. Moreover, Nichols would be responsible for that fee under the Agreements even if it was a fee owed by Divine prior to closing. *Id.* As to Nichols' contention that he is responsible only for "trade debt" that accrued 30 days prior to closing, Nichols is ignoring the plain and unambiguous terms of the Agreements. Divine Aff., Ex. A

⁵ See Affidavit of Arlene Jaskot, dated August 2013.

(Settlement Agreement), Ex. B (Purchase Agreement).

The Agreements explicitly and unequivocally provide that Nichols is required to pay the “outstanding trade debt,” which “includes all amounts outstanding for and from the operation of the Restaurants...which are normal operating expenses...and which are reasonably consistent with past operating expenses of the Restaurants...” as part of the purchase price of the Restaurants. Divine Aff., Ex. B (Purchase Agreement). By failing to pay the Trade Debt, Nichols has deliberately and unjustifiably failed to pay the full purchase price of the Restaurants. Moreover, Nichols has no valid defense for his breach of the Agreements. Thus, Divine requests, via this motion, that the Court enforce the Settlement Agreement and require Nichols to pay the Trade Debt.

ARGUMENT

“In South Carolina jurisprudence, settlement agreements are viewed as contracts.” *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct.App.2009) (applying general contract principles in construction of settlement agreement); *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) (finding enforcement of the terms of a settlement agreement is a matter of contract law); *Mattox v. Cassidy*, 289 S.C. 57, 61, 344 S.E.2d 620, 622 (Ct.App.1986) (applying the general rules of contract construction to a settlement agreement). Accordingly, Nichols is contractually bound to his obligations under the Agreements. As Divine has performed his obligations under the Agreements, Nichols cannot now disclaim his own obligations. *See Clardy v. Bodolosky*, 383 S.C. 418, 679 S.E.2d 527 (Ct. App. 2009) (noting that the doctrine of substantial performance awards a party whose partial performance has provided another party with a substantial benefit).

I. Nichols is Required to Pay the Trade Debt Under the Terms of the Agreement

Because the Agreements at issue herein, and, specifically, the provisions governing Trade

Debt, are clear and unambiguous, they should be enforced according to their terms. *See C.A.N. Enters., Inc. v. South Carolina Health and Human Servs. Fin. Com'n*, 296 S.C. 373, 377-378, 373 S.E.2d 584, 586 (S.C. 1988) ("When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense. Extrinsic evidence giving the contract a different meaning from that indicated by its plain terms is inadmissible") (internal citations omitted).

Section 1 of the Purchase Agreement specifically provides that the Purchase Price for the Property includes the "outstanding Trade Debt...of the Restaurants and Bars on the Closing Date." *See Divine Aff*, Ex. B, ¶1.

Trade Debt is defined in the Purchase Agreement as follows:

"Trade Debt" includes all amounts outstanding for and from the operation of the Restaurants and Bars which are normal operating expenses of the Restaurants and Bars, and which are reasonably consistent with past operating expenses of the Restaurants and Bars. The Trade Debt includes the fee for administrative services provided to the Restaurants and Bars by Divine Dining Group, Inc. ("DDG"); provided, however, that the administrative service fees of DDG shall not exceed DDG's actual cost and shall not exceed normal rates for fees of this kind in the greater Myrtle Beach, South Carolina market area. The Trade Debt shall not include, but specifically excludes, intercompany debt owed to Divine or companies owned by Divine other than the fees due to DDG for its administrative services for the Restaurants and Bars.

See Ex. B, §1. The Purchase Agreement, which contains no monetary limit or cap on the amount of the Trade Debt, defines as qualifying Trade Debt, expenses that are: (i) normal operating expenses of the Restaurants and (ii) reasonably consistent with past operating expenses. *Id.* Provided that an expense meets these two qualifications, the Purchase Agreement provides only two exclusions from the trade debt: (i) DDG administrative services fees, but only if the fees exceed DDG's actual cost or the normal rate for such fees in the defined market area and (ii) "intercompany debt owed to Divine or companied owned by Divine" other than the

administrative fees owed to Divine Diving Group. *Id.* Nichols has not relied on either of the contractually based exclusions in his attempt to disclaim liability for the Trade Debt.

The expenses presented by Divine to Nichols as Trade Debt – at closing – are both normal operating expenses of the Restaurants and reasonably consistent with past operating expenses. Divine Aff. ¶21, Ex. E. At the closing, in the office of Fred Newby, Esq. (counsel for Nichols), Divine presented the outstanding Trade Debt to Nichols, literally placing the invoices that represented the Trade Debt, in Mr. Newby's hands. Divine Aff. ¶18. Significantly, Nichols neither inquired as to the amount of the Trade Debt nor questioned any of the invoices presented. *Id.* ¶22. The Trade Debt presented to Nichols, in aggregate, totaled \$70,130.37 for the Restaurants. *Id.* ¶19. The Trade Debt for Divine's Fish House and Bovine's Restaurant, respectively, totaled \$42,654.20 and \$27,476.17. *Id.* ¶20. Thus, according to the plain terms of the Purchase Agreement, Nichols is contractually obligated to pay \$70,130.37, which sum represents the aggregate outstanding Trade Debt totaling \$70,130.37.

Notwithstanding the unequivocal provision that the purchase price for the acquired assets includes Nichols' payment of the "outstanding Trade Debt," Nichols has failed and refused to pay the same. Divine Aff. ¶23. Significantly, Nichols has neither alleged that the Trade Debt, either in whole or in part, is not a normal operating expense nor shown that it is inconsistent with past operating expenses.

Instead, Nichols has refused to pay the Trade Debt on the grounds that: (i) the Trade Debt was more than Nichols expected; (ii) Divine allegedly owes GCWSD a "fee;" and (iii) his unilateral determination with no legal or factual support, asserted post-closing that Nichols is only required to be responsible for trade debt incurred during the thirty days prior to closing. Divine Aff. ¶26; Mendoza Aff. ¶32. As discussed below, each of these grounds is meritless and

not a valid reason for Nichols to ignore his obligations under the Agreements.⁶

- A. Nichols is Responsible for Trade Debt as Defined in the Agreements, which “Includes All Amounts Outstanding for and from the Operation of the Restaurants...which are Normal Operating Expenses...and which are Reasonably Consistent with Past Operating Expenses of the Restaurants...” Not Merely What He Unilaterally Determines Is “Trade Debt”**

The Purchase Agreement provides that the Trade Debt must be “*reasonably consistent with past operating expenses of the Restaurants and Bars.*” Divine Aff., Ex. B (Purchase Agreement) (emphasis added). The term “reasonably” modifies the phrase “consistent with past operating expenses.” As previously stated, the expenses submitted by Divine as Trade Debt are “reasonably consistent with past operating expenses,” and Nichols has failed to identify a single expense that is not reasonably consistent with past operating expenses.

Despite the clear and unambiguous language in the Agreements, Nichols attempts to rewrite the relevant sections of the Agreement concerning Trade Debt in an attempt to argue that he is responsible for only “reasonable trade debt.” The term “reasonable trade debt” does *not* appear in the Agreements. *See generally*, Divine Aff. Ex. A (Settlement Agreement), Ex. B (Purchase Agreement). While there is a reasonableness requirement for contracts, it is unreasonable for Nichols to unilaterally rewrite the unambiguous language of the Agreements post-execution to an arbitrary rejection of all trade debt over 30 days old when the Agreements clearly provide for the payment of all “outstanding trade debt.” Nichols’ argument that he is responsible only for a portion of the “outstanding trade debt,” seeks to insert phrases and standards that do not appear in the Agreements and should not be read into the Agreements. Moreover, his unilateral attempt to rewrite the terms of the Agreements is contrary to the well-

⁶ Of note, Nichols recently executed the Consent Order Releasing the Receiver and the Satisfaction of Judgment. If Nichols had a valid argument, based in law and fact that Divine had not substantially complied with the Agreements, pursuant to the Agreements, Nichols could have refused to execute those documents. On August 23, 2013, however, Nichols’ counsel, on behalf of Nichols, executed both Consent Order Releasing the Receiver and the Satisfaction of Judgment. The execution and delivery of those documents tend to belie Nichols’ defenses that appear to sound in breach, for failing to pay the Trade Debt.

established principles of contract law in South Carolina. See *C.A.N. Enters., Inc. v. South Carolina Health and Human Servs. Fin. Com'n*, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (S.C., 1988) (Courts “are without authority to alter a contract by construction or to make new contracts for the parties. Our duty is limited to the interpretation of the contract made by the parties themselves “... regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully”) (internal citations omitted).

Nichols has no contractual or factual basis for his contention that “trade debt” should only include invoices for the past 30 days.⁷ The Agreements contain no such temporal limitation. There is no clause stating that the Trade Debt cannot be past due more than 30 days, rather, the Purchase Agreement provides that Trade Debt includes all amounts “outstanding.” Divine Aff. Ex. B (Purchase Agreement). Had the parties intended to exclude debt that was outstanding past a certain date they certainly could have, as they excluded intercompany debt.⁸

Moreover, it is disingenuous – at best – for Nichols to argue that Trade Debt that is outstanding more than thirty days is “not reasonable.” Nichols is, in large part, the reason that certain expenses remaining outstanding for more than 30 days. Divine Aff. ¶¶47-48. Nichols decided to monitor the Restaurants’ operation utilizing a receiver. *Id.* Due, in part, to the difficulties of managing Restaurants subject to a receivership, the Restaurants did not have sufficient working capital to pay certain expenses as they became due. *Id.*

Nichols has offered no legally valid justification for his failure to pay the Trade Debt that was invoiced within the 30 days prior to closing if he truly believes that 30 days is the relevant

⁷ At no time has Nichols or his counsel provided Divine, or Divine’s counsel, with a list of the invoices that he deems “unreasonable.” For the first time, on August 23, 2013 – well after this motion was made and only three days prior to the scheduled hearing on this matter – Nichols’ counsel sent Divine’s counsel an affidavit from the Receiver that indicates that invoices that were received thirty days prior to the closing should not be considered part of the “reasonable trade debt.” Divine can only assume that this is the argument that Nichols will present to this Court.

⁸ The definition of Trade Debt contains the following exclusion: “The Trade Debt shall not include, but specifically excludes, intercompany debt owed to Divine or companies owned by Divine other than the fees due to DDG for its administrative services for the Restaurants and Bars.” The parties could have excluded debts from the purchase price, as they did, in fact, exclude intercompany debt from the purchase price.

measure of “reasonableness.” The vast majority of the “outstanding Trade Debt” – approximately 71% – was invoiced within 30 days of closing. Divine Aff. ¶50. Moreover, approximately 92% of the “outstanding Trade Debt” was invoiced within the Restaurants’ current billing period. *Id.* ¶51. The normal date for payment of outstanding invoices would have been May 9, 2013. *Id.* ¶ 52. As the Restaurants were transferred to Nichols a week prior to that date, certain expenses that were due to be paid in the ordinary course of business on May 9, 2013 were not paid because the transaction closed a week prior to that date. *Id.*

Despite the clear and unequivocal language of the Agreements – which require Nichols to pay all the outstanding Trade Debt – Divine has adjusted the Trade Debt so as to exclude any outstanding Trade Debt that was invoiced prior to January 1, 2013 and an intercompany debt that was inadvertently included in the Trade Debt. Divine Aff. ¶53. After adjustment the Trade Debt that Nichols remains obligated to pay totals \$62,809.08. *Id.* ¶54. The aggregate adjusted Trade Debt includes \$39,259.65 that is attributable to Divine Fish House and \$23,549.43 that is attributable to Bovine’s. *Id.*

The provision regarding the payment of the outstanding Trade Debt was a bargained for part of the Agreement intended to protect the innocent vendors and service providers of the Restaurants. In the absence of any valid legal or factual basis to fail to pay the Trade Debt, Nichols may not escape his obligations under the Agreements. Nichols’ failure to pay is a breach of the Agreements. Accordingly, the Court should enforce the Agreements and order that Nichols pay the Trade Debt, adjusted as explained *supra* and owed “at the time of the closing of the transaction” in the aggregate amount of \$62,809.08.

B. Because Nichols Had Access to the Amount of Trade Debt Prior to the Closing, He Cannot Reasonably Claim that the Trade Debt was Higher than He Expected

Nichols’ unilateral “expectation” that the Trade Debt would be lower is not relevant to

whether Nichols is required to pay the Trade Debt. The Purchase Agreement requires Nichols to pay the Trade Debt provided the debt is a normal operating expense and is reasonably consistent with past operating expenses. Divine Aff. Ex. B (Purchase Agreement). Despite being in possession of the outstanding Trade Debt for over five months, post-closing, including the individual invoices listing the vendors and amounts to be paid, Nichols has not identified a single expense that he maintains does not qualify as Trade Debt. Divine Aff. ¶41. Notably, Nichols has not contacted Divine to discuss this matter. Divine Aff. ¶24. Instead, Nichols has merely repeatedly argued in conclusory terms, *through counsel*⁹, that the Trade Debt is higher than he expected. *Id.*; Mendoza Aff. ¶5, 24. Generalized dissatisfaction with the aggregate amount of valid invoices, however, is not a proper reason to refuse payment or to ignore one's bargained for obligations.

It is undisputed that Nichols had access to the operating expenses through the court-appointed Receiver for the Restaurants and had the opportunity to review the Trade Debt during the Due Diligence period provided by the Purchase Agreement. Divine Aff. ¶28. Accordingly, Nichols cannot reasonably claim that the "Trade Debt" is "higher" than he expected and, under well-established South Carolina case law, the terms of the Agreements should be enforced.

The Due Diligence section of the Purchase Agreement provided that Divine would deliver: "A complete and accurate list of all outstanding and/or upcoming trade debt relating to the ownership of the Property, stating the creditor's name and address, the nature of the services or goods provided, and the total amount owed." Divine Aff. Ex. B (Purchase Agreement ¶2(k)). Divine delivered the Trade Debt, in the form of outstanding invoices and a general ledger, to Nichols for the first time on or about February 14, 2013. Divine Aff. ¶31.

⁹ A great deal of the discussion regarding the Trade Debt and the GCWSD fee was between the attorneys that negotiated the transaction: (i) Julio E. Mendoza, Jr., Esq. on behalf of Divine and (ii) Gene M. Connell, Jr., Esq. on behalf of Nichols. Accordingly, both Attorney Mendoza and Attorney Connell's testimony will likely be required.

Significantly, not only did the Purchase Agreement provide a mechanism by which Nichols could notify Divine that Nichols had not received information requested, it specifically required that “within Five (5) business days of the full execution of this Agreement, [Nichols] shall notify [Divine] in writing which of [the Due Diligence] items ... it still needs.” Divine Aff., Ex. B (Purchase Agreement, ¶3). Nichols provided no such writing. Mendoza Aff. ¶28. Pursuant to the clear contractual terms, Nichols had an affirmative obligation to raise any questions about the Trade Debt amount during the due diligence period or within five (5) days of execution of the Agreement, which occurred on May 2-3, 2013. Nichols neither raised any questions about the Trade Debt nor requested additional information relating to the Trade Debt. Divine Aff. ¶¶22, 35; Mendoza Aff. ¶¶28, 30.

Moreover, Nichols had the benefit of an extended due diligence period as the transaction was originally expected to close in March 2013, but did not close until May 2-3, 2013. Divine Aff. ¶32. As Nichols had ample time to investigate the Trade Debt prior to closing, he cannot now complain that it was higher than he expected, especially since he has not complied with the terms of the Agreements. Indeed, if Nichols was dissatisfied by the amount of the Trade Debt during the due diligence period, he could have refused to consummate the transaction pursuant to the contract terms. Divine Aff. Ex. B (Purchase Agreement ¶3 (“If [Nichols] during the Inspection Period, determines in its sole discretion not to acquire the Property for any reason ... it may terminate this Agreement.”) Nichols did not, however, terminate the Purchase Agreement. Divine Aff. ¶36.

In addition to receiving the then outstanding Trade Debt in February 2013, and again at closing, for a year prior to the closing of the transaction, Nichols also retained the right to verify the propriety of the uses of the Restaurant income by review and inspection through the court-appointed receiver. Divine Aff. ¶¶ 39, 48, 96. During the year prior to the transaction, the court-

appointed receiver received documentation related to the Restaurants' expenses, which of course, included the Trade Debt. Nichols, accordingly, had inquiry notice, in addition to actual notice, of the amount of the outstanding Trade Debt.

Moreover, Divine and Nichols fully expected a certain amount of outstanding Trade Debt, as the insufficiency of the Restaurants income to cover operating expenses was expected. Divine Aff. ¶ 42. Indeed, because it was expected that the Restaurants would not generate enough income to cover operating expenses, Nichols agreed to fund operating expenses prior to closing. Divine Aff. ¶43; Mendoza Aff. ¶¶14-23. Due to careful management by Divine, however, Nichols did not have to advance funding. Divine Aff. ¶44. In essence, the trade creditors¹⁰ funded the operations, rather than Nichols. *Id.* Nichols has received the benefit of the bargain – but unjustifiably refuses to honor his obligations to pay the Trade Debt, which is part of the Purchase Price. It should be noted that, despite being under no legal obligation to do so, Divine left in place equipment that permitted Nichols to accept payment by credit card to allow Nichols to conduct business operations based upon credit purchases because Nichols had failed to procure the same. Divine Aff. fn. 5. Nichols should not be permitted to shift liability to Divine based on Nichols' own unilateral expectations, which have no contractual basis. Accordingly, as Nichols has unjustifiably, and without legal basis, refused to pay the Trade Debt, the Court should enforce the Agreements.

C. Because Divine is Not Responsible for the Impact Fee that Georgetown County Water and Sewer District Charged to Wahoo's Fish House, Nichols' Attempt to Avoid Payment of The Trade Debt by Citing this Fee is Without Legal Basis and a Breach of Contract

As discussed in Section II, *infra*, Nichols' argument that Divine owes GCWSD a "fee" that should have been disclosed prior to closing is meritless and a complete misrepresentation of

¹⁰ Because Nichols agreed to fund the Trade Debt, and Divine was released from liability stemming from the transaction, Trade Creditor claims for payment of the Trade Debt would be against Nichols and/or the Restaurants. Nichols has no recourse to Divine.

the facts and misreading of the Agreements. The fee that Nichols will be required to pay GCWSD was triggered due to the change in ownership and Nichols' request to open a new account. At all times, however, GCWSD has agreed that the current account (which is owned by Divine) may remain open, with Divine's consent, and service Wahoo's Fish House. Indeed, as of this date, the GCWSD account servicing Wahoo's Fish House remains in the Restaurants' names. Divine has kept the Restaurants' GCWSD account open--despite no legal obligation to do so -- and has repeatedly offered to keep the account open so that Nichols will not incur any fee. Divine Aff., fn. 6. Because the account remains in the Restaurants' names, Nichols has not incurred any fee to date. Yet, Nichols continues to attempt to justify his refusal to pay the Trade Debt on this unassessed "fee," which "fee" he has in a sense "created" because Divine has offered to keep the account open and GCWSD has agreed to allow the account to continue. Accordingly, Nichols may not eschew his obligation to pay the Trade Debt based upon a fee that he owes to GCWSD and which he has incurred in apparent bad faith.

II. The GCWSD Impact Fee is a Not A Valid Reason to Fail to Pay the Trade Debt Because It Is a Cost of Doing Business that Nichols Incurred When He Took Ownership of the Restaurants

Nichols has also refused to pay the Trade Debt on that basis that the Restaurants allegedly owed a "fee" to GCWSD and that the "fee" should have been disclosed to him during the transaction. Nichols is either misinformed with respect to the nature of the "fee" that he is responsible for or is obfuscating the nature of the charge in an attempt to avoid his own obligations. Divine, and his Restaurants, do not owe any "fee" to GCWSD.

A. Pursuant to the Options Presented by GCWSD, The Restaurants Paid a Monthly Demand Charge to GCWSD

Prior the closing of the transaction, the Restaurants paid a monthly "Demand Charge" to GCWSD. A "water demand charge" "applies to existing commercial accounts whose monthly

usage exceeds their water capacity, purchased as impact fees, and decline the opportunity to purchase additional impact fees to compensate for the excess usage.” See Mendoza Aff., Ex. O, Georgetown County Water and Sewer District Water/Sewer Utility Rate Schedule, Resolution Prescribing the Rates and Regulations for the Water Works and Sewer System of Georgetown County Water and Sewer District, in Georgetown County, South Carolina, Resolved at a Meeting duly assembled on June 7, 2012 and effective as of July 1, 2012 (“GCWSD Rate Resolution”), Schedule No.: W-15 (emphasis in the original).

The GCWSD procedure for charging an impact fee is as follows:

When a commercial applicant request water service, an impact fee equal to the prorata residential equivalent capital costs associated with all treatment, transmission, and storage facilities is paid. Thereafter, when the monthly water usage is in excess of the purchased capacity for any quarter ... by more than 1 residential equivalency unit, the District will provide the customer with notification that such excess usage has occurred, and will provide an opportunity to reduce the usage to conform to the previously purchased capacity. Where such usage cannot be achieved, the customer will:

1. Incur a monthly demand charge beginning in August of each year; or
2. Be required to purchase the needed capacity by paying the additional impact fees.

Id. Thus, by the terms of the relevant GCWSD schedule, an existing commercial user has the option of paying a monthly demand charge or purchasing additional impact fees. *Id.* GCWSD’s process to determine whether a demand charge will be paid is as follows:

1. Each commercial customer with the highest rolling peak quarter usage, above their allocated capacity by more than one residential equivalent unit, is provided written notification of their peak usage and the number of Residential Equivalency Units above those previously purchased and being used.
2. Affected commercial customers will be given the opportunity to ... offer justification for or methods to reduce the number of Residential Equivalency Units to be assessed as outlined above.

3. During June of each year, a final additional total Residential Equivalent Unit demand determination will be made.
4. During July of each year the affected commercial accounts, as defined herein, will be updated to reflect the number of Residential Equivalent Units needed to support the peak quarterly usage.
5. Beginning with the August billing each year and continuing for a one year period, those commercial accounts so affected by this policy shall be billed as normal plus the two additional charges defined below:
 - a. An availability fee for each additional Residential Equivalent Unit determined from the quarterly peak average, and
 - b. A demand charge for each additional residential equivalent unit required to compensate for the additional demand created.
6. Commercial accounts will have the option of purchasing additional Residential Equivalent Units at the prevailing impact fee rate or be charged the monthly demand charge hereafter defined.
7. At any point during the year, commercial accounts will have the option of purchasing the applicable additional capacity by paying the associated impact fee and eliminating the monthly demand charge ...
9. The user demand analysis shall be performed each year providing the customer the opportunity to reduce consumption and/or to lower or eliminate the demand charge for the following year. ...

Id.

In accordance with this GCWSD procedure, GCWSD sent a letter, annually, to existing commercial customers, including the Divine Fish House that exceed the “water and sewer district capacity assigned to them.” See Divine Aff, Ex. M and N (Letters from John F. Buck, CPA, Finance/Administration Services Director of GCWSD, dated June 22, 2012 and June 14, 2013, respectively, to Divine Fish House.) In the letter, GCWSD explains that each year GCWSD assigns a “Demand Charge” to “those commercial customers that consistently exceed the water

and sewer district capacity assigned to them.” Per GCWSD, the purpose of the Demand Charge is to encourage water/sewer conservation and “more equitably distribute costs associated with providing water and sewer service to commercial customers.” *Id.*

GCWSD provides its customers the opportunity to explain the high usage before making a final determination as to the amount of the Demand Charge. *Id.* Once a final determination is made, “commercial accounts with Demand Charges shall be billed as normal plus two additional charges defined below”: “a base charge (availability charge) for each additional impact fee determined from the quarterly peak average, and a “Demand Charge” for each additional impact fee. *Id.* Each existing commercial customer “assessed a Demand Charge has the *option of purchasing additional capacity* by paying the associated impact fees and eliminating or reducing the monthly Demand Charge(s).” *Id.* (emphasis added). A user demand analysis is performed annually to provide the customer the opportunity to reduce consumption and/or to lower or eliminate the Demand Charge for the following year. *Id.* The GCWSD letters do not even quote a purchase price for additional capacity. *Id.*

Thus, an existing commercial customer has the option of paying the Demand Charges and attempting to reduce their consumption or purchasing additional capacity. *Id.* Accordingly, existing commercial customers, such as the Restaurants, generally, are not required to purchase additional capacity. Significantly, neither the relevant regulation nor the letters sent by GCWSD to commercial customers reference a “lien” or “assessment.” Indeed, GCWSD has never placed a lien or assessment on the Restaurants, the property that they are located on or the GCWSD accounts associated with the Restaurants and property. *See* Divine Aff. ¶58, Ex. L, Letter from Tommie Kennedy, GCWSD Engineering Director, to Jack Divine, dated September 16, 2013. Moreover, the regulations and letters sent by GCWSD to its commercial customers do not reference a penalty. *See* Divine Aff, Ex. M, N. In sum, the term penalty is not applicable to a

demand charge. In sum, the demand charge and optional additional capacity that may be purchased by existing commercial customers are not properly termed a “lien,” “assessment” or “penalty.”

As opposed to purchasing optional additional capacity, the Restaurants made a business decision to pay the Demand Charge, which is akin to a surcharge. Divine Aff. ¶70. As the GCWSD Schedule No.: W-15 and the letters to Divine Fish House notes, customers can successfully reduce their consumption and the amount paid as a Demand Charge. Divine Fish House did in fact successfully reduce its usage. Divine Aff. ¶¶ 63-66. In June of 2012, Divine Fish House was assessed a peak usage of 66 residential equivalency units and a corresponding monthly demand charge of \$606.06 and an additional availability charge of \$301.56. Divine Aff. Ex. C (GCWSD Letter dated June 22, 2012). In June of 2013, Divine Fish House was assessed a peak usage of 57 residential equivalency units and a corresponding monthly demand charge of \$476.19 and an additional availability charge of \$236.94. Divine Aff. Ex. N. (GCWSD Letter, dated June 14, 2013). Thus, Divine Fish House successfully reduced its consumption and the corresponding monthly demand charged was reduced \$129.87 without purchasing additional capacity. Divine Aff. ¶¶63-66.

The demand charge was a cost of operating the Restaurants. Divine Aff. ¶71. Significantly, the Restaurants’ account with GCWSD were current at the time of the closing. Divine Aff, Ex. O, P (Customer Reports from GCSWD for the Restaurants). Thus, the GCWSD customer reports for the Restaurants do not contain an outstanding amount due or reference an impact fee that must be paid because there was no outstanding amount due or impact fee required to be paid. *Id.* In sum, the Restaurants did not owe any “fee” to GCWSD because the Restaurants properly paid Demand Charges.

B. Nichols Has Presented No Evidence that Divine is Responsible for a GCWSD “Fee”

As explained in Point II, A, *supra*, Divine’s accounts with GCWSD were paid in full at the time of closing. Notwithstanding the fact that the accounts were paid in full, Nichols now claims that Divine owes an “impact fee” and that Nichols may refuse to pay the Trade Debt because of this “impact fee.” Despite refusing to comply with his obligations because of this “impact fee,” Nichols has failed to provide any evidence that it is owed by Divine. Nichols has not provided a copy of an invoice, a judgment, a lien or any supporting document evidencing any type of payment owed by Divine. In the absence of such evidence, Divine can only speculate as to what the fee might be. Moreover, Nichols has failed to communicate directly with Divine and, instead, has relied upon his counsel to notify Divine, through Divine’s counsel, that Divine allegedly owes this fee.¹¹ The amount of the “fee,” as alleged by Nichols, has been a moving target since its existence was first disclosed. Initially, Nichols claimed the fee was \$100,000.00. Mendoza Aff. ¶45. In June 2013, Nichols alleged the fee totaled \$79,920.00. *Id.* As of August 2013, Nichols alleges that the fee owed is \$53,760.00. *Id.* Beside the amount of the fee, the fee has been described variously as “impact fee,” “upcharge” and “assessment.” Despite the lack of evidence as to the basis of the fee, the amount of the fee or even whether the fee is in fact currently due and payable, Divine does not owe any amount to GCWSD and Divine is not responsible for the “fee” that Nichols has incurred or will incur.

C. Divine is Not Responsible for Any Assessment Made By GCWSD to the Restaurants as A Result of the Transfer of Ownership

As no coherent explanation was forthcoming from Nichols or his counsel, Divine engaged in a thorough investigation to determine the basis of the fee. After much investigation, Divine learned that the fee that Nichols is attributing to him is, in fact, a fee that Nichols is solely responsible for because of change in ownership of the restaurant and account with GCSWD.

¹¹ See Footnote 8, *supra*.

Divine Aff. ¶¶ 82-85. "According to District policy, change in ownership triggers a review of the account and requires that all additional capacity needed for the commercial business be purchased as if it were a new business opening up for the first time." Divine Aff, Ex. E, Letter from Tommie Kennedy, Engineering Director of GCWSD, dated August 15, 2013.

During this review, staff uses historical data from the account to calculate the capacity required for the business. However, staff has the ability in the policy to consider this a new account and review it according to the South Carolina Department of Health and Environmental Control's unit contributory loadings as defined in regulation 61-67 instead of using the historical data.

Id. Presumably, what Nichols has characterized, through counsel, as an "impact fee," "assessment," or "upcharge" owed by Divine is, in actuality, an "impact fee" required to be paid by Nichols because of the change in ownership. This is simply a cost of doing business that is attributable solely to Nichols. Whereas Divine as an existing customer, and absent any other applicable trigger, had no obligation to purchase additional capacity, as a new customer, Nichols is required to purchase that additional capacity.

A "water impact fee" ... "applies to anyone requesting new water service or reserving capacity within the service area of the District as well as to existing customers who require additional capacity from the system." GCWSD Rate Resolution, Schedule No.: W-1. The procedure for payment of the impact fee is as follows:

When reservation of capacity was not previously made and the applicant is requesting water service or a building permit, an impact fee equal to the prorata residential equivalent capital costs associated with all treatment, transmission, and storage is paid. For all developed properties or building for which an impact fee has not been paid, payment shall be required at the time of application for service.

Id. Thus, as a new customer of GCWSD, Nichols is required to pay a water impact fee at the time of the application for service. *Id.*

Nichols' argument that Divine had a duty to inform Nichols of the GCWSD fee as a matter of disclosure under the Purchase Agreement is without merit. First, Divine was not aware that GCWSD would impose an "impact fee" upon the opening of a new account for the former Divine Fish House restaurant. Divine Aff. ¶91. GCWSD had for years imposed a Demand Charge on the restaurant, which was annually assessed and incorporated into the Divine Fish House monthly billings. *Id.* ¶92. The Demand Charge was consistent with demand charges charged to other area restaurants. A similar charge had been assessed against Bovine's, but Divine and his management team were able to reduce the volume of water usage at Bovine's and, thus, eliminate the demand charge. Divine Aff. ¶93. Divine had not experienced a lump sum impact fee, as GCWSD proposes to impose on Nichols, and there was no reason for Divine to know that one would arise upon the transfer of the Restaurants to Nichols. *Id.* ¶ 94. Simply put, Divine cannot be deemed to have failed to disclose what he did not know or, as discussed *infra*, what Nichols, as a new owner, should have investigated.

Second, no provision of the Agreements require Divine to advise Nichols of: (i) options presented to Divine as an existing commercial customer of GCWSD – to pay a "demand charge" or purchase to additional capacity or (ii) the impact fee that would be imposed upon Nichols. Nichols, upon information and belief, now argues that the "demand charge" should have been disclosed in the Owner's Affidavits that Divine executed in connection with the transaction. Affidavit of Fred Newby, dated August 23, 2013 ("Newby Aff."). Specifically, Nichols argues that the demand charge should have been listed in the following section of the Owner's Affidavit:

(9) That all assessments against the Owner or applicable to the real estate including assessments for street lighting, water and sewer construction, sanitary assessments and other governmental services have been paid in full, except [affidavit has a blank space to list the requested information].

Id., Ex. A, B. With respect to Divine's duty to disclose "assessments", the demand charge and the option to purchase additional capacity are simply not assessments. The GCWSD Rate Resolution does not utilize the term "assessment" to describe either the demand charge or the purchase of additional capacity and does not otherwise treat the demand charge or option to purchase additional capacity as an assessment. *See generally* GCWSD Rate Resolution. Thus, because the "demand charge" and the option to purchase additional capacity are not "assessments," Divine had no duty to disclose their existence on the Owner's Affidavit. In addition, the "express purpose" of the statements contained in the Owner's Affidavit are to induce the title insurance company "to insure title to said property to be free from adverse claims of *liens* not herein stated..." Newby Aff. Ex. A, B (emphasis added). The demand charge and option to purchase additional capacity are also not liens. *See generally* GCWSD Rate Resolution. Accordingly, Divine had no duty to list the demand charge or option to purchase additional capacity on the Owner's Affidavits.

Third, Nichols had an extended period of due diligence review prior to the closing of the transfer of the Restaurants, during which he could investigate the likely costs of operation. Divine Aff. Certainly, the water and sewer service is an expected operating cost. With respect to the "impact fee," Nichols could have – and should have - contacted GCWSD to inquire whether there would be any charge or fee for the opening of a new account. Moreover, for one year prior to the closing of the transaction, Nichols had the benefit of having the operations and finances of the Restaurants reviewed by the court-appointed receiver, who summarized and reported the information to Nichols. Divine Aff. ¶96. Prior to the closing, Nichols (through the Receiver) had access to approximately one year's worth water billings, and, therefore, had actual or constructive knowledge of the water and sewer charges. *Id.* ¶97. Moreover, a GCWSD invoice

for each of the Restaurants was provided during the due diligence period as part of the "Trade Debt." Divine Aff. ¶100.

Despite this knowledge, Nichols apparently maintains that the monthly billings from GCWSD for the Divine Fish House restaurant are higher than they should be, and that Divine should have pointed out the Demand Charge to Nichols. Significantly, no provision in the Agreements place that onus on Divine, rather, the Agreements puts the onus on Nichols in the due diligence period to review the information provided, request additional information and ask questions – such as what is the basis of the monthly demand charge. At no time did Mr. Nichols or his attorneys ever inquire as to the amount of water capacity the Restaurants had purchased or water and sewer service for the Restaurants. Divine Aff. ¶100.

Fourth, any assertion that Divine would have knowingly withheld information on the GCWSD charges is illogical and without any factual basis. It was in Divine's best interest to make sure that all expenses and trade debts were known by Nichols, as Nichols is obligated to pay them.

Finally, Divine is informed and believes that the impact fee would not be imposed on Nichols if Nichols were to continue using the existing water/sewer account of the Restaurants, which Divine offered to allow Nichols to do and remains willing to do. *Id.* ¶102. Without any logical basis, Nichols has refused this offer, thereby creating, by his own actions, the additional fees without any rational basis.

Accordingly, GCWSD's imposition of an impact fee as a result of Nichols application for service is not a breach of Divine's obligations to Nichols, or justification for Nichols to fail to perform his obligations under the Agreements. This Court should order Nichols to comply with his obligations under the Agreements as Nichols has failed to enunciate a reason that he should be permitted to eschew his obligations.

III. Because Divine has Performed in Accordance with the Terms of the Agreements, Nichols' Should Be Ordered to Perform His Obligations Under the Agreement

Nichols has provided no justification for his failure and refusal to pay the Trade Debt. Because Divine has performed or substantially performed and Nichols performance is past due, the Court should order that Nichols comply with his obligations under the Agreements.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Court enforce the Settlement Agreement requiring that Nichols should immediately pay the Trade Debt as defined in the Agreement, and which been shown to total \$62,809.08.

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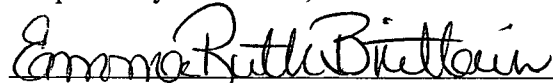
CERTIFICATION

The undersigned hereby certifies that the Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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Respectfully submitted, **SC Court of Appeals**



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IN THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Steven H. John, Circuit Court Judge

Civil Action No.: 2011-CP-26-2722

Nichols Holding, LLC and J. Wade Nichols Respondents-Appellants

vs.

Divine Capital Group, LLC, John S. Divine, IV,
Nathan Anderson and Divine Dining Group, Inc. Appellants-Respondents

PROOF OF SERVICE

I certify that I have served the Supplemental Record on Appeal by depositing a copy of it in the United States mail, postage prepaid, on September 26, 2014, addressed to the following:

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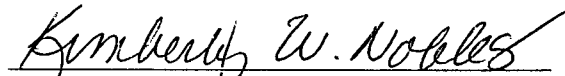
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SC Court of Appeals

Pawleys Island, South Carolina 29585

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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September 26, 2014

A handwritten signature in cursive script, reading "Kimberly W. Nobles", written in black ink over a horizontal line.

Kimberly W. Nobles
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