THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE BEAUFORT COUNTY
Court of Common Pleas

Honorable Eugene Griffith, Jr., Presiding Judge

Case Nos.: 2015-CP-07-00249

Vend Lease Company, Inc., Respondent

v.

The Market Place News, LLC and
Tae Suk Holmes, Appellants.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

I. Procedural History

This is an appeal from an Order issued by the Beaufort County Court of Common Pleas partially recognizing and enforcing foreign judgments rendered in the State of Maryland in favor of the Respondent against the Appellants.

This action was commenced by the filing by the Respondent Vend Lease Company, Inc. ("Vend Lease") of a Petition for Filing Foreign Judgment in the Beaufort County Court of Common Pleas on January 28, 2015. In its Petition, the Respondent Vend Lease asserts that on July 24, 2014 the District Court for the State of Maryland, Baltimore County, entered a judgment in favor of Respondent against Appellants The Market Place News, LLC ("Market Place") and Tae Suk Holmes ("Holmes"), jointly and severally, in the amount of $17,496.29. The Respondent requested that this judgment be registered in the Beaufort County Court of Common Pleas under the authority of the Uniform Enforcement of Foreign Judgments Act, S.C. Code Ann. §15-35-900, et. seq.

On April 6, 2015 the Respondent filed an Amended Petition for Filing Foreign Judgment. In its Amended Petition, the Respondent alleges that on July 2, 2014 the District Court of the State of Maryland, Baltimore County ("Maryland Court") entered a judgment in favor of the Respondent against the Appellant Holmes in the amount of $19,433.18 ("Holmes Judgment") and on July 24, 2014 the Maryland Court, in the same case, entered judgment in favor of the Respondent against the Appellant Market Place in the amount of $16,701.11. In its Amended Petition, the Respondent requests that these foreign judgments be registered in the Beaufort County Court of Common Pleas under the authority of the Uniform Enforcement of Foreign Judgments Act. See Amended Petition for Filing Foreign Judgment, pp. 1-3.

On May 5, 2015 the Appellants filed their Motion for Relief from, and Notice of Defense to, Foreign Judgment pursuant to S.C. Code Ann. §15-35-940 (Supp. 2015). The Appellants moved for relief from, and gave notice of their defense to, the Maryland Judgments on several grounds, to-wit:

a. Neither judgment is entitled to full faith and credit;

b. Said judgments were rendered in violation of the public policy of the State of South Carolina;

c. The Court rendering the alleged judgments lacked personal jurisdiction over these Defendants;

d. Neither Defendant had sufficient contacts with the State of Maryland for that State to exercise personal jurisdiction over either Defendant;

e. The alleged judgments were rendered in violation of these Defendants due process rights under both the United States, South Carolina, and Maryland Constitutions;

f. The maintenance of the suit against these Defendants in the State of Maryland offended traditional notions of fair play and substantial justice;

g. With respect to the alleged judgments neither Defendant purposely availed itself or herself of the privilege of conducting activities within the forum State of Maryland;

h. These judgments were obtained fraudulently;

i. These judgments were obtained in violation of both the substantive and procedural law of the State of Maryland.

Motion for Relief from, and Notice of Defense to, Foreign Judgment, pg. 2. The Appellants requested that the Court declare the Maryland Judgments to be unenforceable and order the Respondent to cease and desist all efforts to seek enforcement of these judgments.

In a separate and previously filed action (2014-CP-07-2102) the Appellants filed a declaratory judgment action against the Respondent, seeking a declaration that the aforesaid foreign judgments entered against them in Maryland were void and unenforceable. See Order Consolidating Cases, pg. 1. In that action, Vend Lease filed a Motion for Summary Judgment on June 16, 2015, asserting that there were no material issues of fact in dispute and the Respondent was entitled to judgment in its favor as a matter of law. See Defendant's Motion for Summary Judgment dated June 16, 2015.

Both cases (2014-CP-07-02102 and 2015-CP-07-00249) were consolidated and tried non-jury before the Honorable Eugene C. Griffith, Jr., Presiding Judge of the Beaufort County Court of Common Pleas. On December 17, 2015, Judge Griffith issued his Order concluding that the Maryland judgments are entitled to full faith and credit in South Carolina, and entering judgment in favor of the Respondent against the Appellants, jointly and severally, in the principal amount of $16,701.11.

On February 3, 2016 the Defendants filed their Notice of Appeal to the South Carolina Court of Appeals.

II. FACTUAL BACKGROUND

Holmes is a resident of Beaufort County, South Carolina, where she has lived since 1999 with her husband, who retired from the United States Army at that time. She is the sole owner of The Market Place News, LLC. Market Place is a sandwich and ice cream shop located in Beaufort, South Carolina. Tr., pg. 24, lines 12 to pg. 25, line 14.

One day, a gentleman named Steve walked into her store to sell her an ice cream machine. As a result of Steve's representations, Holmes agreed to buy an ice cream machine from him. *Id.*, pg. 25, lines 15 – 20.

Steve gave Holmes a document to "finance" the purchase of the ice cream machine and showed her where to sign. *Id.*, pg. 25, lines 21 – 22 and pg. 26, lines 16 – 22. This document, entitled "Equipment Lease Agreement" calls for 58 monthly payments of $291.21 each, plus a security deposit of $582.42 (the equivalent of two (2) monthly payments). See Exhibit 1-1. Holmes testified that the copy of the Lease which was introduced into evidence as Defendant's Exhibit 1-1 is a "fair, true and accurate copy" of the original that she signed, it is the same size as the original, and that she was not able to read the original. Tr., pg. 26, lines 13 – 15; and pg. 27, lines 4 – 5.

There was no mention about the State of Maryland and Holmes did not know that Maryland had anything to do with the transaction. Tr., pg. 27, lines 9 – 18. The back of the Equipment Lease Agreement, however, recites as follows:

> Law and Jurisdiction: This Agreement will be deemed fully executed and performed in Maryland or the home state of our assignee as it may be assigned from time to time per Paragraph 11. This Agreement shall be governed by and construed in accordance with the laws of Maryland or the laws of the home state of assignee. You expressly and unconditionally consent to the jurisdiction and venue of courts in Baltimore County in the State of Maryland or assignee's home state and waive right to trial by jury for any claim or action arising out of or relating to this Agreement or the Equipment. Furthermore, you waive the defense of inconvenient forum.

Exhibit 1-1, pg. 2 Section 15.

Holmes paid the security deposit by a draft from her bank in Beaufort, and authorized the drafting of her bank account in Beaufort for the monthly payments on the ice cream machine. Tr., pg. 27, line 19 to pg. 28, line 3.

Steve did not have the ice cream machine with him at that time. *Id.*, pg. 26, lines 4 – 9. Sometime later, the ice cream machine was delivered to Holmes' store in Beaufort. *Id.*, pg. 28, lines 11 – 15.

The ice cream machine never worked. *Id.,* pg. 28, line 16 to pg. 29, line 17. Holmes called Steve about the nonfunctioning machine, and he made attempts to fix it, but he was unable to ever get the machine working. *Id.*

In January 2014 Holmes went to see her attorney, H. Fred Kuhn, Jr., Esquire. On January 2, 2014 Attorney Kuhn wrote the Respondent, explaining that the ice cream machine was "nonoperational," despite multiple attempts to make the equipment functional. As a result, Holmes was rescinding the transaction and requested the return of her $582.42 security deposit, as well as a $199.00 "documentation fee." Attorney Kuhn invited the Respondent to make arrangements to retrieve the ice cream machine, if it wished. Exhibit 1-4; Tr., pg. 29, line 22 to pg. 30, line 14.

On January 17, 2014 Vend Lease, through its attorney Ira K. Himmel, Esquire responded to Attorney Kuhn, pointing out the above quoted language of the Lease Agreement which vests Maryland with jurisdiction of any dispute, and noting that Vend Lease "intends to enforce its rights under the lease." Exhibit 1-5; Tr., pg. 30, lines 15 – 17.

On February 3, 2014 Attorney Kuhn responded to Attorney Himmel, questioning the validity of the Lease's Maryland jurisdiction clause, but offering on behalf of the Appellants to pay for the ice cream machine if it could either be rendered operational, or if a functioning ice cream machine could be substituted for the non-operational one. This letter closes with the following:

> "If you client desires to mitigate its damages by retrieving the equipment, please let me know. The equipment is of no value or use to my client, and she would prefer to return it to your client rather than simply dispose of it."

Exhibit 1-6; Tr., pg. 30, lines 18 – 24.

On March 5, 2014 the Respondent retrieved the ice cream machine from the Appellant's shop in Beaufort. Exhibit 1-7; Tr., pg. 30, line 25 to pg. 31, line 2.

III. MARYLAND LAWSUIT

On February 18, 2014 the Respondent filed suit against the Appellants in the District Court of Maryland for Baltimore County in Towson, Maryland. The Complaint alleges that the Lease Agreement, executed by the Appellant Market Place and guaranteed by the Appellant Holmes, was breached, and the Appellants therefore owed the Respondent 58 payments of $291.21 each, for a total amount due and owing of $16,890.18, together with reasonable attorney's fees of $2,500.00. Exhibit 1-8. On March 20, 2014 the Appellant Holmes was individually served with the foregoing pleadings. Exhibit 1-9.

On April 15, 2014 the Maryland Court, in the same case, issued a Writ of Summons against the Appellant Market Place, based upon the identical Complaint. Exhibit 1-10.

On April 11, 2014 the Maryland Court issued a Notice of Trial as to the Appellant Holmes only, setting the trial for June 19, 2014.

On June 13, 2014 both Appellants filed their response to the Complaint, appearing specially for the purpose of contesting jurisdiction, and alternatively by way of Answer. Exhibit 1-12. The Appellants asserted as a first defense a lack of personal jurisdiction, as a second defense breach of the Lease Agreement by the Respondent by failing to deliver a functioning ice cream machine, and as a third defense the Respondent's duty to mitigate its damages. *Id.* On that same date, in support of its special appearance and answer, the Appellant filed Affidavits of two (2) employees, simply verifying that the ice cream machine never was operational.

On June 16, 2014 the Respondent filed a Motion to Strike the Answer as to the Respondent Holmes on the ground that it was untimely. Exhibit 1-15.

On June 16, 2014 the Maryland Court continued the trial against the Appellant Holmes, which had originally been set for June 19, 2014. Exhibit 1-16.

On July 3, 2014 the Maryland Court granted the Respondent's Motion to Strike the Answer of the Appellant Holmes and held her in default. Exhibit 1-19.

On July 3, 2014 the Maryland Court entered judgment in favor of the Respondent against the Appellant Holmes in the amount of $16,890.18 judgment principal, plus $2,500.00 in attorney's fees and $43.00 in costs, for a total of $19,433.43. Exhibit 1-20 and Exhibit 1-23.

On July 11, 2014 the Appellant Holmes filed a Motion to Alter, Amend or Set Aside the Judgment. Exhibit 1-24. On July 23, 2014, this motion was denied. Exhibit 1-27, 28, 29 and 30.

On July 24, 2014 the Maryland Court entered judgment in favor of the Respondent against the Appellant Market Place in the principal amount of $15,158.11, plus attorney's fees of $1,500.00 and costs of $43.00, for a total of $16,701.11. Amended Petition for Filing Foreign Judgment, pg. 1, ¶2.

The Appellants initially appealed these judgments, but dismissed their appeal on December 1, 2014. Notice of Dismissal of Appeal attached to Amended Petition for Filing of Foreign Judgment.

I. THE COURT OF COMMON PLEAS ERRED IN ENFORCING AND ACCORDING FULL FAITH AND CREDIT TO THE MARYLAND JUDGMENT WHERE THE MARYLAND COURT LACKED PERSONAL JURISIDICTION OVER THE APPELLANTS.

The Respondent's Petition requests that the Maryland judgments be enrolled and enforced in South Carolina pursuant to South Carolina's Uniform Enforcement of Foreign Judgments Act. S.C. Code Ann. 15-35-900, et seq. The Act provides that "[t]he judgment debtor may file a Motion for relief from, or notice of defense to, the foreign judgment on the grounds that the foreign judgment has been appealed from, that enforcement has been stayed by the Court which rendered it, **or on any other ground for which relief from a judgment of this State is allowed."** *Id., §15-35-940(A) (emphasis added).*

Relief from a judgment, even if rendered by a South Carolina Court, is allowed in this State if the Court issuing the judgment lacked personal jurisdiction. "A judgment is void if a Court acts without personal jurisdiction." *BB&T v. Taylor,* 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006). "A judgment of a Court without jurisdiction of the person . . . is not entitled to recognition or enforcement in another State, or to the full faith and credit provided for in the Federal Constitution." *Financial Federal Credit, Inc. v. Brown,* 384 S.C. 555, 563, 683 S.E.2d 486, 490 (2009), quoting 50 C.J.S. *Judgments* § 986 (1997).

"A judgment of a Court of record of another State is entitled to the same presumptions of regularity and jurisdiction as a domestic judgment, and such presumption can be overthrown only by clear and convincing evidence of want of jurisdiction. Where a judgment recovered in a Court of general jurisdiction in another State is relied on, and the record thereof is duly authenticated or certified, and produced in evidence, it will be presumed that the Court had jurisdiction of the subject matter and the parties, in the absence of proof to the contrary or a showing to the contrary by the record itself . . .." *Id. (citations omitted).*

It is respectfully submitted that the evidence in this case is clear and convincing that the Maryland Court lacked personal jurisdiction over the Appellants, and the exercise by the Maryland Court of personal jurisdiction over the Appellants violated their due process rights.

Due process requires that there exist minimum contacts between the Defendant and the forum State such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). Further, the due process requirement mandates the Defendant possess sufficient minimal contacts with the forum State such that she could reasonably anticipate being haled into Court there. *Id.*, 363 S.C. at 491-92, 611 S.E.2d at 508.

In determining whether due process minimum contacts exist between the Defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice, a two-pronged analysis is applied. *S. Plastics Co. v. S. Commerce Bank*, 310 S.C. 256, 260, 423 S.E.2d 128, 131 (1992). The Court must (1) find that the Defendant has the requisite minimum contacts with the forum, without which, the Court does not have the "power" to adjudicate the action and (2) find the exercise of jurisdiction is reasonable or fair. *Id.*, "If either prong fails, the exercise of personal jurisdiction over the Defendant fails to comport with the requirements of due process." *Id.* See also *Power Products and Services Co., Inc. v. Cozma*, 379 S.C. 423, 431-32, 665 S.E.2d 660, 665 (Ct.App. 2008).

The minimum contacts analysis requires a Court to find that the Defendant directed her activities to residents of the forum state and that the cause of action arises out of or relates to those activities. It is essential that there be some act by which the Defendant purposely avails herself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. This "purposeful availment" requirement ensures that a Defendant will not

be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts. *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 331-32, 594 S.E.2d 878, 884-85 (Ct.App. 2004).

Whether the constitutional due process requirement of minimum contacts has been met depends on the facts of each case. In order to determine whether the exercise of jurisdiction over a foreign Defendant meets the fairness prong, the Court must consider the following: (1) The duration of the activity of the non-resident within the State; (2) The character and circumstances of the commission of the non-resident's acts; (3) The inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the non-resident; and (4) The State's interest in exercising jurisdiction. *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 492, 611 S.E.2d 505, 508 (2005). A single act that causes harm to the forum State may create sufficient minimum contacts to confer jurisdiction where the harm arises out of or relates to that act. *S. Plastics Co. v. S. Commercial Bank,* 310 S.C. 256, 260-61, 423 S.E.2d 128, 131 (1992). However, that single act must create a "substantial connection" with the forum State to give rise to jurisdiction. *Moosally v. W.W. Norton & Co.,* 258 S.C. 320, 331, 594 S.E.2d 878, 884 (Ct.App. 2004).

Applying the first prong of the above analysis, it is not only clear and convincing, but undisputed, that these Appellants do not have the requisite minimum contacts with the State of Maryland. The salesman, unsolicited, approached the Appellant Holmes inside her sandwich shop in Beaufort. The sale of the ice cream machine took place inside the Appellant's shop in Beaufort. The Lease Agreement was presented to, and executed by, the Appellants in South Carolina. Payment for the machine was arranged in Beaufort. The Respondent drafted the Appellants' bank account in Beaufort. The machine was delivered to the Appellants in Beaufort. Attempts to repair the machine were made in Beaufort. In short, everything about this transaction occurred within

the four walls of the Appellants' sandwich shop in Beaufort. There is not only a lack of minimum contacts with Maryland, there is absolutely no contact with Maryland.

It is clear that the Appellants never "purposefully availed themselves" of the privilege of conducting activity within the State of Maryland. The Appellants never directed any of their activities towards the State of Maryland. The Appellants never attempted to invoke the benefits and protections of the laws of the State of Maryland.

The Maryland judgment likewise fails to satisfy the fairness prong of the due process minimum contacts analysis. The duration of any activity by the Appellants in Maryland is not only brief, but nonexistent. Likewise, the character and circumstances of the commission of the Appellants' acts took place solely and exclusively in Beaufort, South Carolina. The inconvenience resulting to the Appellants by forcing them to travel to Maryland, which they had no idea had any involvement with this transaction until this dispute arose, is high. Conversely, the inconvenience to the Respondent Vend Lease in having to travel to South Carolina is low, inasmuch as Vend Lease apparently maintains agents and sales personnel in South Carolina and reaches out to the citizens of South Carolina and does business in South Carolina. Finally, Maryland has no interest in exercising jurisdiction over a transaction that occurred in, and a dispute that arose out of, South Carolina.

Finally, this dispute arises out of a single act and that single act clearly did not create a "substantial connection" with Maryland as required by *Moosally,* supra, 358 S.C. at 331, 594 S.E.2d at 884. It is, accordingly, respectfully requested that the Beaufort County Court of Common Pleas erred in enrolling and according full faith and credit to the Maryland judgment where the Maryland Court lacked personal jurisdiction over the Appellants.

II. THE BEAUFORT COUNTY COURT OF COMMON PLEAS ERRED IN CONCLUDING THAT *RES JUDICATA* BARRED THE APPELLANTS FROM ARGUING THAT THE MARYLAND COURT LACKED PERSONAL JURISDICTION OVER THEM.

The Beaufort County Court of Common Pleas concluded that the Appellants were precluded by principles of *res judicata* from arguing a lack of personal jurisdiction, because they had raised this issue to the Maryland Court and the Maryland Court had ruled against them. Order, pg. 4. *Res judicata*, however, does not apply where the Court issuing the prior judgment lacked personal jurisdiction.

Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the doctrine of *res judicata*, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit. See, e.g., *Catawba Indian Nation v. State*, 407 S.C. 526, 537, 756 S.E.2d 900, 906-07 (2014).

It is well settled that a judgment issued without proper personal jurisdiction over a party is not entitled to full faith and credit, and therefore has no *res judicata* effect as to that party. See, e.g., *Hospitality Management Assoc., Inc. v. Shell Oil Co.*, 356 S.C. 644, 653, 591 S.E.2d 611, 616 (2004); *Ware v. Ware*, 404 S.C. 1, 12, 743 S.E.2d 817, 823 (2013). This result is not only constitutionally mandated, it only makes sense. If a Court lacks personal jurisdiction over a Defendant, then its judgment against that Defendant is void. A void judgment can have not effect, much less *res judicata* effect. South Carolina cannot enforce a void judgment issued by its own Courts. It makes no sense that it would be obligated by *res judicata* principals to enforce a void judgment issued by a foreign Court. "A State may not grant preclusive effect in its own Courts to a constitutionally infirmed judgment, and other State and Federal Courts are not required to accord

full faith and credit to such a judgment." *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 482, 102 S. Ct. 1883, 1898, 72 L. Ed.2d 262 (1982).

It is respectfully submitted that the Court's reliance upon *Colonial Pacific Leasing Corp. v. Taylor*, 326 S.C. 529, 484 S.E.2d 595 (Ct.App. 1997) was misplaced. See Order, pg. 4. In that case, Colonial Pacific obtained a judgment against Taylor in Oregon, and then sought to enforce the Oregon judgment in South Carolina. The Richland County Circuit Court issued an Order enforcing the Oregon judgment and on appeal Taylor complained that the trial Court erred in giving full faith and credit to the Oregon judgment without allowing inquiry into the underlying basis for personal jurisdiction. "The trial Court determined that since (Taylor) made a **general appearance** in the Oregon suit, personal jurisdiction could have been litigated by (Taylor) in that proceeding. Therefore, under principles of *res judicata*, (Taylor) was precluded from further litigating personal jurisdiction." *Id.*, 326 S.C. at 532, 44 S.E.2d at 596 (emphasis added). The Court of Appeals agreed. *Id.*

The significant distinction between the *Colonial Pacific* case and the case *sub judice* is that the Appellants in this case appeared specially[1] in Maryland for the purpose of contesting personal jurisdiction. Exhibit 1-12. When Taylor entered a **general appearance** in the Oregon suit, he consented to both personal and subject matter jurisdiction.

The *Colonial Pacific* Court expressly recognized that the full faith and credit clause does not prevent the litigation of personal jurisdiction in an action to enforce a foreign judgment. *Id.*, 326 S.C. at 532, 44 S.E.2d at 596-97, citing *Peoples National Bank of Greenville v. Manos Brothers, Inc.*, 226 S.C. 257, 275, 84 S.E.2d 857, 866 (1954) ("It is well settled that want of jurisdiction over either the person or subject matter is open to inquiry where a judgment rendered

[1] More accurately, Appellant Market Place appeared specially. Appellant Holmes attempted to appear specially, but her pleadings were stricken and she was held in default.

in one State is challenged in another." and *Aladdin Plastics, Inc. v. Wintenna, Inc.*, 301 S.C. 90, 92, 390 S.E.2d 370, 371 (Ct.App. 1990) ("A Court called upon to enforce a judgment of a Court in another State may inquire into whether that Court had jurisdiction."). The *Colonial Pacific Court* expressly emphasized the distinction between a general and a special appearance, noting that "A Defendant who appears to litigate the merits without properly preserving an objection to personal jurisdiction waives the right to raise the objection in the initial proceeding and is bound by the resulting judgment." *Id.,* 326 S.C. at 533, 484 S.E.2d at 597.

In affirming the trial Court, the *Colonial Pacific* Court emphasized that *Taylor* "filed an Answer in the Oregon Court and made a general appearance." *Id.,* 326 S.C. at 534, 484 S.E.2d at 597.

Finally, although it is not perfectly clear, it appears that the jurisdictional defect at issue in the *Colonial Pacific* case was not personal jurisdiction, but rather, was subject matter jurisdiction. In affirming the trial Court, the Court of Appeals cited cases dealing with subject matter jurisdiction. *Id.*, 326 S.C. at 533, 484 S.E.2d at 597, citing *Underwriters National Assurance Co. v. North Carolina Life & Accident*, 455 U.S. 691, 102 S.Ct. 1357, 71 L. Ed.2d 558 (1982) and *Insurance Corp. of Ireland, Ltd v. Compagnie Des Bauxites De Guinney,* 456 U.S. 694, 702, 102 S.Ct. 2099, 2104 72 L. Ed.2d 492 (1982).

III. THE BEAUFORT COUNTY COURT OF COMMON PLEAS ERRED IN FINDING THAT MARYLAND HAD PERSONAL JURISDICTION OVER THE APPELLANTS BASED ON A VALID AND ENFORCEABLE FORUM SELECTION CLAUSE.

In ordering that the Maryland judgment was entitled to full faith and credit in South Carolina the Beaufort County Court of Common Pleas concluded that the forum selection clause contained in the Lease Agreement, conferring jurisdiction and venue in Maryland, was valid and enforceable. As previously noted, the Lease Agreement contains a clause pursuant to which the Appellants "expressly and unconditionally consent to the jurisdiction and venue of Courts in Baltimore County in the State of Maryland **or** assignee's home state." Exhibit 1-1, pg. 2, ¶ 15 (emphasis added). It is respectfully submitted that the trial Court erred in concluding that this clause is valid and enforceable.

The trial Court, citing Maryland law, found that a forum selection clause such as the one before it is presumptively valid and enforceable and the party resisting it has the burden of demonstrating that it is unreasonable. A Court may deny enforcement of such a clause upon a clear showing that, under the particular circumstances of the case before it, enforcement would be unreasonable. A clause may be found to be unreasonable if, among other things, it contravenes a strong State public policy. Order, pg. 5, citing *Gilman v. Wheat, First Sec., Inc.*, 345 Md. 361, 378, 692 A.2d 454, 462-63 (1997).

In evaluating the enforceability of the forum selection clause in this case, the Appellants believe that the decision by the South Carolina Court of Appeals in *Pitts v. Fink*, 389 S.C. 156, 698, S.E.2d 626 (Ct.App. 2010) provides guidance. In that case, Pitts obtained a default judgment against Fink in Alabama, and then brought an action in South Carolina to enforce the Alabama judgment against Fink. The Circuit Court concluded that the Alabama judgment was entitled to full faith and credit in South Carolina and Fink appealed, arguing that the Circuit Court erred in

denying his motion for relief from the judgment, arguing that the Alabama judgment was void for lack of personal jurisdiction. The Court of Appeals affirmed.

In affirming the trial Court, the Court of Appeals initially noted that under the Uniform Enforcement of Foreign Judgments Act, a judgment debtor may seek relief from a judgment due to a lack of personal jurisdiction. *Id.*, 389 S.C. at 163, 698 S.E.2d at 629, and that a judgment of a Court without jurisdiction of the person is not entitled to recognition or enforcement in another State, or the full faith and credit provided for in the Federal Constitution. *Id.*, 389 S.C. at 162, 698 S.E.2d at 629. Fink's liability to Pitts was based upon a loan agreement which, like the Lease Agreement now before this Court, contained a choice of law provision stating that the contract would be governed by Alabama law. With reference to this choice of law provision, the South Carolina Supreme Court stated:

> "While we recognize that a choice of law provision standing alone would be insufficient to confer jurisdiction, it is certainly relevant under the facts of this case."

Id., 389 S.C. at 166, 698 S.E.2d at 631, citing *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 482, 105 S.Ct. 2174, 85 L. Ed.2d 528 (1985) (stating that a choice of law provision is relevant but "such a provision standing alone would be insufficient to confer jurisdiction").

Accordingly, in *Pitts v. Fink*, the Court of Appeals concluded that the Alabama Court had personal jurisdiction over *Fink* because, in addition to the choice of law provision, Fink had sufficient contacts with Alabama to satisfy the minimum contacts requirements of due process (e.g., the loan agreement is captioned Alabama, the loan agreement was executed by Fink as a part owner of an Alabama LLC, the loan agreement recites that the proceeds are to be used to construct a golf course and subdivision in Alabama, loan payments were made out of Fink's operations in Alabama, and in the course of constructing the golf course Fink travelled to Alabama periodically

to oversee its operation and monitor the use of the loan proceeds). In short, the Court of Appeals found that Fink "direct connection to the Alabama business resonates throughout the agreement."

In sharp contrast to the facts in *Pitts v. Fink*, the Appellants in this case have absolutely no contacts with Maryland except for the forum selection clause buried in the fine print of the Lease Agreement.

In addition to violating public policy, the forum selection clause in the Lease Agreement is unreasonable and unconscionable.

If a Court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the Court may refuse to enforce the unconscionable clause, or so limit its application as to avoid any unconscionable result. S.C. Code Ann. §36-2-302(1) (Supp. 2014).

As an initial matter, the Lease Agreement is clearly an adhesion contract. "A contract of adhesion is generally thought of as standard form contract offered on a "take-it-or-leave-it" basis. The terms of the contract of adhesion are not negotiable. An offeree faced with such a contract has two choices: complete adherence or outright rejection." *Lackey v. Green Tree Financial Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct.App. 1988). A simple review of the Lease Agreement in this case shows that it is a standard form contract, the relevant terms of which were not negotiable and were offered on a "take-it-or-leave-it" basis. Exhibit 1-1, pg. 2.

The fact that a contract is one of adhesion, however, does not necessarily make it unconscionable. Determining whether a contract is one of adhesion is merely the beginning point in the analysis. Unconscionability requires a greater showing. Unconscionability is characterized by the "absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Id.*, 330 S.C. at 395, 498 S.E.2d at 901-02. Quoting in

part *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 402, 472 S.E.2d 242, 245 (1996).

The forum selection clause in this case is unconscionable, on many levels. First, the Appellant Holmes is a Korean national with a middle school education. Tr., pg. 32, lines 2 – 5. She was unable to read the contract, and simply signed where they told her to sign. Tr., pg. 27, line 5 and pg. 26, lines 16 – 22.

Additionally, the forum selection clause is the epitome of what is often meant when a reference is made to a clause "buried in the fine print." The type is extremely tiny. Additionally, the original contract has apparently been either faxed or copied so many times that the type, in addition to its miniscule size, is blurred and fuzzy. Exhibit 1-1, pg. 2.

Finally, its express terms, the forum selection clause vests jurisdiction and venue not only with Maryland, but in **any State** to where the contract may be assigned. In other words, this forum selection clause vest with the Lessor carte blanche authority to arbitrarily assign this contract anywhere and thereby vest jurisdiction and venue in **any** Court in **any** location. This is clearly an extreme example of overreaching and a clause to which no reasonable party would knowingly agree.

This forum selection clause violates the public policies of both the States of Maryland and South Carolina, and furthermore, is unreasonable and unconscionable under the facts of this case.

CONCLUSION

It is respectfully submitted that the trial Court erred in enrolling the Maryland judgment and in according the Maryland judgment full faith and credit, where the Maryland Court lacked personal jurisdiction over the Appellants. The Maryland Court's determination that it had personal jurisdiction over the Appellants is not entitled to *res judicata* effect, inasmuch as the judgment is void for lack of personal jurisdiction. Enforcement of the forum selection clause vesting jurisdiction with conceivably any Court in any State is, under the circumstances of this case, unenforceable inasmuch as it violates the public policies of both the State of South Carolina and the State of Maryland, and is unreasonable and unconscionable.

It is, accordingly, respectfully requested that the Order and Judgment of the Beaufort County Court of Common Pleas be reversed.

Respectfully submitted,

MOSS, KUHN, FLEMING & SMITH, P.A.

By: _____

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Attorneys for the Appellants

Beaufort, South Carolina

July 21, 2016

CERTIFICATE OF SERVICE

Undersigned certifies that the Initial Brief of Appellant to which this certificate is affixed, was served upon the party (s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record:

Paul H. Hoefer, Esquire
Robinson, McFadden & Moore, PC
Post Office Box 944
Columbia, SC 29202

in a post office or official depository under the exclusive care and custody of the United States Postal Service, on July 21, 2016.

MOSS, KUHN & FLEMING, P.A.

By: _____
Sue Radford

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SC Court of Appeals

July 21, 2016

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Vend Lease Company, Inc. v. The Market Place News, LLC and Tae Suk Holmes
Case Nos.: 2014-CP-07-02102 and 2015-CP-07-00249
Appellate Case No.: 2016-000218

Dear Mrs. Kitchings:

Enclosed please find the original and one (1) copy of the Initial Brief of Appellant and Designation of Matter to be Included in Record on Appeal. Please return a filed copy to me in the enclosed self-addressed stamped envelope.

By copy of this letter and the enclosures, I am serving a copy of the same upon Paul H. Hoefer, Esquire, attorney for the Respondent.

With kindest regards, I am

Very truly yours,

MOSS, KUHN & FLEMING, P.A.

H. Fred Kuhn, Jr.

HFKjr:sr

cc: Paul H. Hoefer, Esquire

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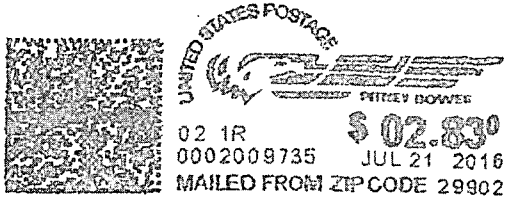

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To:

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